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Brett Kavanaugh Binder [3]

Brett Kavanaugh – Florida School Vouchers

Allegation: Brett Kavanaugh demonstrated his hostility both to the separation of church and state and to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools. *Bush v. Holmes*, 767 So. 2d 668 (2000).

Facts:

- **While an attorney in private practice, Mr. Kavanaugh was part of a large team of lawyers representing Florida state officials in defending Florida's opportunity scholarship program, which provided children in failing public schools with access to a high-quality education and has improved the quality of Florida's public schools.**
  - ✓ The opportunity scholarship program is **a limited program** that allows **students at failing public schools to** transfer to a better public school or a private school at public expense.
  - ✓ The **opportunity scholarship program is carefully tailored** to give choice to those parents who need it and to spur public school improvement through competition.
  - ✓ **Religious and non-religious private schools** are allowed to participate in the program on an equal basis and all public funds **are directed by the private and independent choices of parents**.
  - ✓ In two separate evaluations, researchers have found that **Florida's opportunity scholarship program has raised student achievement in Florida's worst public schools**. A 2003 study specifically found that "**voucher competition in Florida is leading to significant improvement in public schools**" and that "Florida's low-performing schools are improving in direct proportion to the challenge they face from voucher competition."
- **A three-judge panel of Florida's Court of Appeal for the First District unanimously agreed with the position taken by Florida officials. All three of these judges were appointees of Lawton Chiles, the former Democratic Governor of Florida.** The Florida Supreme Court refused to review the Court of Appeal's decision. *See Bush v. Holmes*, 767 So. 2d 668 (2000).
- **The Florida officials were not arguing for an extension in the law. For decades Florida's K-12 system made use of contracts with private schools to educate tens of thousands of students in private schools.**
- **During Mr. Kavanaugh's involvement in this litigation, the main issue was whether the Florida Constitution prohibited the use of state funds to pay for the K-12 education of students attending private schools, regardless of whether they were religious or nonsectarian.**

- ✓ The team of lawyers representing Florida officials, including Mr. Kavanaugh, argued that the Florida Constitution's affirmative mandate for the State to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools" did not preclude the use of public funds for private school education, particularly where the Legislature found such use was necessary.

- ✓ The Florida program has specific safeguards to protect against discrimination and coerced religious activity. Participating private schools must agree to comply with Federal anti-discrimination laws and not compel any opportunity scholarship student to profess a specific ideological belief, to pray, or to worship.

➢ **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population. The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.**

➢ **The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).**

- ✓ The U.S. Supreme Court held in 2002 that Cleveland's school voucher program was consistent with the First Amendment's Establishment Clause because it treated religious and non-religious private schools equally and all funds were guided by the private and independent choices of parents.

- ✓ The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his client.

➢ **In this litigation Mr. Kavanaugh was defending the constitutionality of the opportunity scholarship program on behalf of his clients. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

District Court of Appeal of Florida,
First District.

John Ellis "Jeb" BUSH, in his official capacity as Governor of the State of Florida and Chairman of the State Board of Education; Attorney General Robert A. Butterworth, Secretary of Education Tom Gallagher, Secretary of State Katherine Harris, Comptroller Robert Milligan, Commissioner of Insurance and State Treasurer Bill Nelson, Commissioner of Agriculture Bob Crawford, in their official capacities and as members of the State Board of Education; and Florida Department of Education,
Appellants,
v.
Ruth D. HOLMES; Gregory and Susan Watson on behalf of themselves and their minor children Sarah, Seth, and Sybil Watson; Rebecca Hale, on behalf of herself and her minor child, Jessica Dennis; John Rigsby, on behalf of himself and his minor children, Thaddeus and Porsche Rigsby; Queen E. Nelson, on behalf of herself and her minor grandchild, Ashley Wilson; Samuel Watts on behalf of himself and his minor children, Rondale, Reynard, and Rebecca Watts; Linda Lerner; Betsy H. Kaplan; Florida State Conference of Branches of NAACP; Citizens' Coalition for Public Schools; The Florida Congress of Parents and Teachers (a/k/a "Florida PTA"); Florida Education Association/United, AFT AFL-CIO, a labor organization and Florida taxpayer; and Pat Tornillo, Jr., Andy Ford, Rita Moody, Mary Lopez, and Robert F. Lee, as Florida taxpayers,
Appellees.

Brenda McShane, in her own behalf as natural guardian of her child, Brenisha McShane; Dermita Merkman, in her own behalf and as natural guardian of her child, Jessica Merkman; Tracy Richardson, in her own behalf and as natural guardian of her child, Khaliah Clanton; Sharon Mallety, in her own behalf and as natural guardian of her child, Jermall Bell; Barbara Landrum, in her own behalf and as natural guardian of her children, Laquila and Stacy Marie Wheeler; and Urban League Of Greater Miami, Inc.,
Appellants,
v.
Ruth D. Holmes; Gregory And Susan Watson on behalf of themselves and their minor children Sarah, Seth, and Sybil Watson; Rebecca Hale, on behalf of herself and her minor child, Jessica Dennis; John Rigsby, on behalf of himself and his minor children, Thaddeus and Porsche Rigsby; Queen E. Nelson, on behalf of herself and her minor grandchild, Ashley Wilson; Samuel Watts on behalf of himself and his minor children, Rondale, Reynard, and Rebecca Watts; Linda Lerner; Betsy H. Kaplan; Florida State Conference of Branches of NAACP; Citizens' Coalition for Public Schools; Florida Congress of Parents and Teachers (a/k/a "Florida PTA"); Florida Education Association/United, AFT AFL-CIO, a labor organization and Florida taxpayer; and Pat Tornillo, Jr., Andy Ford, Rita Moody, Mary Lopez, and Robert F. Lee, as Florida taxpayers,
Appellees.

Nos. 1D00-1121 and 1D00-1150.

Oct. 3, 2000.

Individuals filed separate complaints alleging that opportunity scholarship program (OSP) statute violated state and federal constitutions. The Circuit Court, Leon County, L. Ralph Smith, J., granted motion to consolidate and found that OSP, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is unconstitutional on its face under constitutional section providing for public education. State defendants and parents of students receiving opportunity scholarships appealed. The District Court of Appeal, Kahn, J., held that: (1) entering judgment holding OSP statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings constituted harmless error, and (2) OSP statute, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is not unconstitutional on its face under constitutional section providing for public education.

Reversed and remanded.

West Headnotes

[1] Judgment ⚿183
228k183

[1] Pleading ⚿343
302k343

Entering judgment holding opportunity scholarship program (OSP) statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings was erroneous. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. § 229.0537.

[2] Appeal and Error ⚿1073(1)
30k1073(1)

Entering judgment holding opportunity scholarship program (OSP) statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings constituted harmless error, where prejudice was not demonstrated and parties had adequate notice, time to respond, and opportunity to be heard. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. §§ 59.041, 229.0537.

[3] Schools ⚿3
345k3

Opportunity scholarship program (OSP) statute, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is not unconstitutional on its face under constitutional section providing for public education; although constitution directs that public education be accomplished through system of free public schools, nothing clearly prohibits legislature from allowing well delineated use of public funds for private school education. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. § 229.0537.

[4] Constitutional Law ⚿26
92k26

The Florida Constitution is a limitation upon, rather than a grant of, power.

[5] Constitutional Law ⚿48(1)
92k48(1)

Although implied constitutional prohibitions are recognized, a reviewing court must not be overly anxious to strike an enactment that merely is not specifically provided for in the organic document.

[6] Constitutional Law ⚿48(1)
92k48(1)

[6] Constitutional Law ⚿48(3)
92k48(3)

When a legislative enactment is challenged, the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt.

[7] Constitutional Law ⚿14
92k14

The principle of "expressio unius est exclusio alterius," which holds that to express or include one thing implies the exclusion of the other or of the alternative, should be used sparingly with respect to the constitution.

[8] Constitutional Law ⚿12
92k12

[8] Constitutional Law ⚿13
92k13

Courts must be mindful that the constitution is what the people intended it to be; its dominant note is the general welfare, and it was not intended to bind like a strait-jacket, but contemplated experimentation for the common good.

[9] Appeal and Error ⚿170(2)
30k170(2)

District Court of Appeal would decline to consider constitutional arguments challenging statute, where trial court determined that such arguments contained mixed questions of law and fact and did not address arguments, but only addressed alternative claim of facial constitutionality that could be decided without presentation of evidence.

***670** Frank R. Jimenez, Acting General Counsel, and Reginald J. Brown, Deputy General Counsel, Tallahassee; Charles T. Canady, Washington, D.C.; Carol A. Licko, Thomson, Muraro, Razook & Hart, P.A., Miami; and Jay P. Lefkowitz and Brett M. Kavanaugh of Kirkland & Ellis, Washington, D.C.,

for Appellants John Ellis" Jeb" Bush, et al.

Thomas E. Warner, Solicitor General of Florida, Louis F. Hubener, Assistant Attorney General, James A. Peters, Special Counsel, and Richard A. Hixson, Deputy Solicitor General, Tallahassee, for Robert A. Butterworth, Attorney General of Florida.

Harry L. Hooper, General Counsel, Comptroller's Office, Tallahassee, for Robert Milligan, Florida Comptroller.

Michael Olenick, General Counsel, Tallahassee, for Florida Department of Education.

Kenneth W. Sukhia of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tallahassee; and Clint Bolick and Matthew Berry, Institute for Justice, Washington, D.C., for Appellants Brenda McShane, et al.

Frank A. Shepherd of Pacific Legal Foundation, Miami, for Amici Curiae Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, Robert N. Wright, and Pacific Legal Foundation; and Paul D. Clement, Jeffrey M. Telep, and Jeffrey S. Bucholtz of King & Spalding, Washington, D.C., for Amici Curiae The Center for Education Reform, American Education Reform Foundation, American Legislative Exchange Council, Children First CEO America, Education Leaders Council, Floridians for School Choice, " I Have a Dream" Foundation of Washington, D.C., and Mayor Bret Schundler, Republican Mayor of Jersey City, New Jersey, and founder of Empower the People on behalf of Appellants Brenda McShane, et al.

Ronald G. Meyer of Meyer and Brooks, P.A., Tallahassee; Robert H. Chanin, John M. West, and Alice O'Brien of Bredhoff & Kaiser, P.L.L.C., Washington, D.C.; Andrew H. Kayton, American Civil Liberties Union Foundation of Florida, Inc., Miami; Michael A. Sussman of National Association for Advancement of Colored People, New York; Julie Underwood, General Counsel of National School Boards Association, Virginia; Elliot M. Mincberg and Judith E. Schaeffer, of People for the American Way Foundation, Washington, D.C.; Marc D. Stern of American Jewish Congress, New York; Steven K. Green and Ayesha N. Khan, Americans United for Separation of Church and State, Washington, D.C.; Steven R. Shapiro of American Civil Liberties Union Foundation, New York; Jeffrey P. Sinensky and Kara H. Stein of the American Jewish Committee, New York; Joan Peppard, Anti-Defamation League, Miami; and Elizabeth J. Coleman and Steven M. Freeman of Anti-Defamation League, New York, for Appellees Ruth D. Holmes, et al.

W. Dexter Douglass and Thomas P. Crapps of Douglass Law Firm, Tallahassee; Marvin E. Frankel and Justine A. Harris of Kramer Levin Naftalis & Frankel LLP, New York; David Strom of the American Federation of Teachers, Washington, D.C.; Pamela L. Cooper, General Counsel, Florida Teaching Profession-NEA, Tallahassee, for Appellees Florida Education Association/United, AFT AFL-CIO, et al.

KAHN, J.

This is a consolidated appeal from a final judgment declaring section 229.0537, Florida Statutes (1999), "insofar as it establishes a program through which the State pays for certain students to attend private schools," facially unconstitutional under article IX, section 1 of the Florida Constitution. [FN1] Section 229.0537 contains the provisions ***671** of Florida's Opportunity Scholarship Program (OSP) and is part of a larger comprehensive legislative program addressing Florida's public schools. *See* Ch. 99-398, Laws of Fla. For the reasons explained below, we reverse and remand this case for further proceedings. In so doing, we emphasize that our holding addresses only the narrow issue of the facial constitutionality of the OSP under article IX, section 1 of the Florida Constitution.

> FN1. Article IX, section 1 provides:
> Public education.--The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

I. BACKGROUND

Section 229.0537 became law on June 21, 1999. *See* Ch. 99-398, § 78, at 4368, Laws of Fla. The next day, the appellees in this consolidated appeal, a group of parents, Florida citizens, and interest groups, filed a

complaint alleging that section 229.0537 violated certain constitutional provisions: (1) article I, section 3 of the Florida Constitution [FN2]; (2) article IX, section 1 of the Florida Constitution; (3) article IX, section 6 of the Florida Constitution [FN3]; and (4) the Establishment Clause of the First Amendment to the U.S. Constitution. On July 29, 1999, the Florida Education Association and others (FEA), filed a complaint challenging the constitutionality of section 229.0537 on the same four grounds raised by the appellees. [FN4] The complaints named as defendants Governor John Ellis "Jeb" Bush and cabinet members, in their official capacities and as members of the State Board of Education, in addition to the Florida Department of Education ("State defendants").

FN2. Article 1, section 3 provides:
Religious freedom.--There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

FN3. Article IX, section 6 provides:
State school fund.--The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.

FN4. The record on appeal does not contain the complaint(s) filed by the FEA.

The FEA filed a motion to consolidate the two cases and the trial court granted this motion. A group of parents and guardians of students receiving opportunity scholarships ("the parents"), moved to intervene in both cases, and the trial court also granted these motions. The parents thereafter moved to dismiss the article IX, section 1 claims for lack of standing, justiciability, and failure to state a claim. Following a hearing, the trial court denied these motions.

The trial court held a case management conference on December 2, 1999. The court explained that the purpose of the conference was for the parties to identify "the issues that would require the presentation of evidence to resolve those issues and those issues that dealt with the challenge of the constitutionality of the statute on its face." After hearing arguments from the parties, the court deferred consideration of whether the statute was unconstitutional under the religion clauses in the Florida and U.S. constitutions. The court did decide, however, that it could consider the argument that section 229.0537 violated article IX, section 1 on its face because, in the trial court's view, this challenge did not require an evidentiary basis. Accordingly, on December 8, 1999, the trial court entered an order setting ***672** a final hearing for February 24, 2000, and directing the parties to file briefs on "the issue of the facial constitutionality of the Opportunity Scholarship Program, Fla. Stat., Section 229.0537, under Article IX, Section 1 of the Florida Constitution...."

On December 30, 1999, the plaintiffs filed separate briefs and attachments. On January 28, 2000, the State defendants filed Objections to Final Hearing Procedure or, in the Alternative, Motion to Strike Plaintiffs' Briefs. The State defendants argued for the first time that the trial court's summary resolution of the facial constitutionality of the statute "is on the brink of an abyss." The State defendants also argued that the plaintiffs "present myriad factual arguments masked as legal arguments."

On February 4, 2000, the plaintiffs filed responses challenging the timeliness of the defendants' objections, and on February 7, 2000, the trial court conducted a hearing on the objections. The court stated that "[t]his is the final hearing on the facial constitutionality of this statute" and ruled that it was "exercising its inherent power to limit the issues that are going to be tried, and these issues are going to be strictly matters of law." The trial court denied the State's motion to strike the initial briefs and confirmed the final hearing date of February 24, 2000. On February 17, the court rendered an order in accordance with these rulings and denying defendants' objections to the final hearing procedure.

On February 24, the court heard oral argument from the parties and amici curiae. On March 14, 2000, the trial court entered a final judgment holding that "[s]ection 229.0537, Fla. Stat., insofar as it establishes a program through which the State pays tuition for certain students to attend private schools, is declared to be unconstitutional on its face under Article IX, § 1 of the Florida Constitution."

The State defendants filed a timely notice of appeal, assigned case number 1D00-1121 in this court. The parents filed a separate notice of appeal, assigned

case number 1D00-1150. This court granted appellees' motion to consolidate the cases.

Appellants raise essentially two points in this consolidated appeal. First, appellants assert that the trial court denied them due process and a fair trial by ignoring the Florida Rules of Civil Procedure and entering final judgment without trial or evidence, upon disputed facts, and without a motion for summary judgment or judgment on the pleadings. Second, appellants assert that the trial court erred in holding the OSP facially unconstitutional under article IX, section 1 of the Florida Constitution.

II. WHETHER THE PROCEDURE EMPLOYED BY THE TRIAL COURT WARRANTS REVERSAL

[1][2] Regarding the first point, the trial court did err in the procedure it employed because nothing in the Florida Rules of Civil Procedure authorizes this procedure. We find this constituted harmless error, however, because the parties had adequate notice, time to respond, and an opportunity to be heard, and appellants have not demonstrated any prejudice much less "a miscarriage of justice." *See* § 59.041, Fla. Stat. (1999) ("No judgment shall be set aside or reversed ... for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice."). The cases relied upon by appellants involve situations where a trial court failed to set a matter for trial pursuant to Rule 1.440. *See Orange Lake Country Club, Inc. v. Levin,* 645 So.2d 60, 62 (Fla. 5th DCA 1994) (finding trial court erred in entering judgment where, among other things, trial court failed to set matter for trial pursuant to Rule 1.440); *Ramos v. Menks,* 509 So.2d 1123, 1124 (Fla. 1st DCA 1986) (reversing final judgment and remanding for further proceedings where trial court failed to follow ***673** Rule 1.440); *Bennett v. Continental Chems. Inc.,* 492 So.2d 724, 727 (Fla. 1st DCA 1986) (en banc) (holding that "strict compliance with rule 1.440 is mandatory"). That is not the situation here. Moreover, appellants appear to have acquiesced in the procedure adopted by the trial court, objecting only to the plaintiffs' fact-intensive assertions. *See Bennett v. Ward,* 667 So.2d 378, 380 (Fla. 1st DCA 1995) (explaining that appellant "may have waived objection not only to notice of trial but, more fundamentally, to the apparent omission altogether of any bench trial or evidentiary hearing" where, although no motion for summary judgment was ever filed, trial court held hearing and entered final judgment of foreclosure); *Frank v. Pioneer Metals, Inc.,* 121 So.2d 685, 688 (Fla. 3d DCA 1960) (rejecting appellant's argument that the trial court erred by transferring the case to the equity side of the court: "[W]e are constrained to point out that by the appellant's failure to timely object to that procedure which she now contends to be irregular, she will be deemed to have waived the objection by acquiescence. Procedural matters not objected to in the trial court cannot be raised upon appeal."). We thus conclude that the procedure employed by the trial court, although erroneous, does not warrant reversal.

III. WHETHER THE OSP IS FACIALLY UNCONSTITUTIONAL UNDER ARTICLE IX, SECTION I OF THE FLORIDA CONSTITUTION

[3] As a substantive matter, appellants argue that the trial court erred in finding the OSP facially unconstitutional under article IX, section 1. In particular, appellants assert that the trial court should not have relied on the principle of expressio unius est exclusio alterius in finding that the Florida Constitution does not permit the Legislature to enact the OSP. We agree with appellants and, for the reasons set forth below, we reverse on this point and remand this case for further proceedings.

A.

In striking the OSP as facially unconstitutional, the trial court stated:

> By providing state funds for some students to obtain a K-12 education through private schools, as an alternative to the high quality education available through the system of free public schools, the legislature has violated the mandate of the Florida Constitution, adopted by the electorate of this state. Tax dollars may not be used to send the children of this state to private schools as provided by the Opportunity Scholarship Program.

Recognizing that nothing in the constitution directly limits the authority of the Legislature to establish the OSP, the trial court nonetheless concluded, "[T]he negative implication is evident."

[4][5][6] The Florida Constitution is a limitation upon, rather than a grant of, power. *See Board of Public Instruction for County of Sumter v. Wright,* 76 So.2d 863, 864 (Fla.1955) ("This court has consistently adhered to the fundamental principle that our state constitution is a limitation upon, rather than a grant of, power."); *Taylor v. Dorsey,* 155 Fla. 305, 19 So.2d 876, 881 (1944) (" 'Our state constitution is

a limitation upon power, and, unless legislation duly passed be clearly contrary to some express or implied prohibition contained therein, the courts have no authority to pronounce it invalid.' ") (quoting *Chapman v. Reddick,* 41 Fla. 120, 25 So. 673, 677 (1899)). Although implied constitutional prohibitions are recognized, a reviewing court must not be overly anxious to strike an enactment that merely is not specifically provided for in the organic document. Indeed, "[w]hen a legislative enactment is challenged the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt." *Taylor,* 19 So.2d at 882. Recognizing these principles, appellants argue that the trial court ***674** erred in relying on another maxim, expressio unius est exclusio alterius, in finding section 229.0537 facially unconstitutional.

[7] This argument has merit. The principle of expressio unius est exclusio alterius is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." *Black's Law Dictionary* 602 (7th ed.1999). This principle should be used sparingly with respect to the constitution. *See Taylor,* 19 So.2d at 881 (explaining that the expressio unius maxim "should be sparingly used in construing the constitution"). As appellants explain, and appellees acknowledge, the trial court did not find that article IX, section 1, by its terms, expressly prohibits state-funded scholarships for children to attend a private school; instead, the trial court found an implied prohibition. Specifically, the trial court found that "[b]ecause Article IX, section 1 directs that public education, K-12, be accomplished through a 'system of free public schools,' that is, in effect, a prohibition on the Legislature to provide a K-12 public education in any other way." Despite the fact that the constitution does not, by its terms, expressly direct that the State may only fulfill its obligation to provide education "through" the public school system, the trial court arrived at the "evident" negative implication.

In applying the expressio unius principle to this case, the trial court quoted a portion of the Florida Supreme Court's opinion in *Weinberger v. Board of Public Instruction of St. Johns County* :

> The principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.

93 Fla. 470, 112 So. 253, 256 (1927) (citations omitted). In *Weinberger* and the other cases relied upon by the trial court, however, the expressio unius principle found its way into the analysis only because the constitution forbade any action other than that specified in the constitution, and the action taken by the Legislature defeated the purpose of the constitutional provision. *See id.* at 254-56 (finding bonds proposed to be issued by Board of Public Instruction void ab initio because their maturity dates did not conform to article 12, section 17 of the Florida Constitution, which specified that "[a]ny bonds issued hereunder shall become payable within thirty years from the date of issuance in annual installments which shall commence not more than three years after the date of issue"); *State ex rel. Murphy v. Barnes,* 24 Fla. 29, 3 So. 433, 433-34 (1888) (finding that statute providing for compensation of county solicitors by the State violated Florida Constitution provision that "[t]he compensation of all county school officers shall be paid from the school fund of their respective counties, and all other county officers receiving stated salaries shall be paid from the general funds of their respective counties" and explaining that "[w]hen a constitution directs how a thing shall be done, that is in effect a prohibition to its being done in any other way"). *See also Sullivan v. Askew,* 348 So.2d 312, 315-16 (Fla.1977) (quoting *In re Advisory Opinion of the Governor Civil Rights,* 306 So.2d 520, 522-23 (Fla.1975) (quoting *Weinberger*), and holding that Governor had sole, unrestricted, and unlimited discretion to exercise pardon power and procedures adopted by Governor for exercise of that exclusive power were consistent with constitutional grant of authority); *In re Advisory Opinion of the Governor Civil Rights,* 306 So.2d 520, 522-23 ***675** (Fla.1975) (quoting *Weinberger* and advising that provisions for suspension and automatic reinstatement of civil rights contained in Correctional Reform Act of 1974 infringed on Governor's constitutional duties and responsibilities relating to executive clemency); *In re Investigation of a Circuit Judge,* 93 So.2d 601, 606-08 (Fla.1957) (citing *Weinberger* and finding

that where constitution creates office, fixes its term, and provides under what conditions officer may be removed before expiration of term, neither Legislature nor any other authority has power to remove or suspend such officer in any manner other than that provided in constitution); *State ex rel. Ellars v. Board of County Comm'rs of Orange County,* 147 Fla. 278, 3 So.2d 360, 362-63 (1941) (quoting *Weinberger* and finding statute, which fixed compensation of county solicitors of criminal courts of record in counties having population between 70,000 and 100,000, was valid general law applicable to office of county solicitor of criminal court of Orange County and was not subject to constitutional prohibition against enactment of special or local laws regulating fees of county officers); *State ex rel. Church v. Yeats,* 74 Fla. 509, 77 So. 262, 264 (1917) ("Article 19 leaves the determination of its enforcement to the registered voters of the counties and election districts, irrespective of race or color, to be determined by a majority of the aggregate; the statute requires two majorities, one of the white and the other the colored registered voters, and in this it clearly defeats the purpose of the Constitution in local option article, which this court has said was to remit to the registered voters of each county the settlement of the issue whether the sale of intoxicating wines or beer should be prohibited within the county.").

In contrast, in this case, nothing in article IX, section 1 clearly prohibits the Legislature from allowing the well-delineated use [FN5] of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary. We therefore reject the trial court's finding that the constitution not only mandates that the State "make adequate provision for the education of all children" in Florida, but that it also prescribes the sole means for implementation of that mandate. Contrary to the conclusion of the trial court, and the argument advanced by appellees, article IX, section 1 does not unalterably hitch the requirement to make adequate provision for education to a single, specified engine, that being the public school system.

> FN5. *See* § 229.0537(2)(a), Fla. Stat. (1999) (explaining that to receive an opportunity scholarship to attend a participating private school, a student must have "spent the prior school year in attendance at a public school that has been designated pursuant to s. 229.57 as performance grade category 'F,' failing to make adequate progress, and that has had two school years in a 4-year period of such low performance, and the student's attendance occurred during a school year in which such designation was in effect" or the student has been assigned to such a school for the next school year).

[8] In passing section 229.0537, the Legislature made specific findings indicating it sought to advance, not defeat, the purpose of article IX, section 1:

> The purpose of this section is to provide enhanced opportunity for students in this state to gain the knowledge and skills necessary for postsecondary education, a technical education, or the world of work. The Legislature recognizes that the voters of the State of Florida, in the November 1998 general election, amended s. 1, Art. IX of the Florida Constitution so as to make education a paramount duty of the state. *The Legislature finds that the State Constitution requires the state to provide the opportunity to obtain a high-quality education. The Legislature further finds that a student should not be compelled, against the wishes of the student's parent or guardian, to remain in a school found by the state to be failing for 2 years in a 4-year period.* The Legislature shall make available opportunity ***676** scholarships in order to give parents and guardians the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent or guardian chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school as provided in paragraph (6)(a). Eligibility of a private school shall include the control and accountability requirements that, coupled with the exercise of parental choice, are reasonably necessary to secure the educational public purpose, as delineated in subsection (4).

§ 229.0537(1), Fla. Stat. (1999) (emphasis added). Although, in establishing the OSP, the Legislature recognized that some public schools may not perform at an acceptable level, the Legislature attempted to improve those schools by raising expectations for and creating competition among schools, while at the same time not penalizing the students attending failing schools. *See* Ch. 99-398, at 4273, Laws of Fla. ("WHEREAS, children will have the best opportunity to obtain a high-quality education in the public education system of this state and that system can best be enhanced when positive parental influences are present, when we allocate resources efficiently and concentrate resources to enhance a safe, secure, and disciplined classroom learning environment, when we support teachers, when we reinforce shared high academic expectations, and when we promptly reward success and promptly identify failure, as well as

promptly appraise the public of both successes and failures ..."). We must be mindful that "[t]he Constitution is what the people intended it to be; its dominant note is the general welfare; it was not intended to bind like a strait-jacket but contemplated experimentation for the common good." *State v. State Bd. of Admin.,* 157 Fla. 360, 25 So.2d 880, 884 (1946).

B.

We note that the Legislature has, in the past, established a program providing public funds for certain students to attend private schools. *See Scavella v. School Bd. of Dade County,* 363 So.2d 1095 (Fla.1978). In *Scavella* the Florida Supreme Court indicated that "the state is responsible for providing adequate educational opportunities for all children" and "all Florida residents have the right to attend this public school system for free." *Id.* at 1098. The court explained that "[r]ealizing that the public schools may not have the special facilities or instructional personnel to provide an adequate educational opportunity for the exceptional students, the legislature has allowed the school boards to make contractual arrangements with private schools." *Id.; see* § 230.23(4)(m)2., Fla. Stat. (1977).

Scavella involved a challenge to a statute that allowed school boards to cap the amount of money paid to a private school in these contractual arrangements. *See Scavella,* 363 So.2d at 1098; § 230.23(4)(m)7., Fla. Stat. (1977). The supreme court interpreted this statute to mean that school boards could not impose a cap that would deprive "any student of a right to a free education" and found the statute, as interpreted, constitutional. *See Scavella,* 363 So.2d at 1099. As pointed out by appellees and the trial court, however, *Scavella* did not involve a challenge under article IX, section 1.

Nevertheless, in *Scavella,* the supreme court upheld a legislative program authorizing the payment of private school tuition for students whose needs could not be met in the public schools and specified that, in implementing this program, students could not be deprived of "a right to a free education." By analogy, the OSP statute does not deprive students of "a right to a free education" and requires participating private schools to "[a]ccept as full tuition and fees the amount provided by the state for each student." § 229.0537(4)(i), Fla. Stat. (1999).

***677** C.

Based on the foregoing, we hold that the trial court erred in finding the OSP facially unconstitutional under article IX, section 1. Nothing in that constitutional provision prohibits the action taken by the Legislature. The trial court erred by employing the exclusio unius principle to find an implied prohibition.

IV. OTHER CONSTITUTIONAL ISSUES

[9] Appellees have asserted that, even if the trial court erred in its application of article IX, section 1, the order on appeal should be affirmed on alternative constitutional grounds. Specifically, appellees assert that the OSP violates (1) article IX, section 6 of the Florida Constitution; (2) article I, section 3 of the Florida Constitution; and (3) the Establishment Clause of the United States Constitution.

Following the case management conference, the trial court determined that only the facial constitutionality of the OSP under article IX, section 1, could be decided without the presentation of evidence. In the court's view, the remaining issues appeared to constitute mixed questions of fact and law. This court has explained that such issues are inappropriate for initial determination on appeal:

> The rule followed by the Florida courts, as we interpret prior decisions, is that the question of the constitutionality of a statute is an issue of law, or of mixed fact and law, depending upon the nature of the statute brought into question and the scope of its threatened operation as against the party attacking the statute. While there are circumstances in which trial courts are permitted to adjudicate the merits of constitutional issues in ruling on a motion to dismiss, ... the circumstances of the particular case determine whether this is appropriate. The preferable rule, properly applied here, appears to be that if the complaint's well-pleaded allegations entitle the plaintiff to a declaration of rights, the motion to dismiss should be denied and the plaintiff allowed to adduce evidence in behalf of his pleading.
>
> The wisdom of this rule is particularly evident in this case where we have been asked to rule for the first time on constitutional questions of considerable magnitude, without the benefit of any record except the various complaints and motions directed to the complaints, including appellees' motion to dismiss, the granting of which sparked this appeal. It is a familiar canon of appellate review that appellate courts are loath to rule upon

issues not directly ruled upon by the trial court. Courts prefer that the constitutionality of a statute be considered first by a trial court. This rule is relaxed if the constitutional issues are fully briefed and relate to matters of law exclusively, ... and the full record is before the court.

Glendale Fed. Sav. & Loan Ass'n v. State, Dep't of Ins., 485 So.2d 1321, 1324-25 (Fla. 1st DCA 1986) (citations and footnote omitted). Accordingly, we decline to consider the alternative constitutional arguments asserted by appellees.

V. CONCLUSION

In sum, although we find the trial court erred regarding the procedure it employed in considering the facial constitutionality of the OSP under article IX, section 1, we find that error harmless in this case. We further find, however, that the trial court erred in holding the OSP facially unconstitutional under this provision. The trial court must now consider the remaining allegations raised by appellees, as to which we express no opinion.

REVERSED and REMANDED for further proceedings.

WEBSTER and VAN NORTWICK, JJ., CONCUR.

767 So.2d 668, 147 Ed. Law Rep. 1125, 25 Fla. L. Weekly D2385

END OF DOCUMENT

Brett Kavanaugh – Race

Allegation: In a friend of the court brief, Kavanaugh joined Robert Bork in opposing a voting scheme that was intended to assist native Hawaiians by ensuring that only they could vote for board members overseeing a trust for the benefit of native Hawaiians. *Rice v. Cayetano*, 528 U.S. 495 (2000). Before the case was heard, he was quoted as saying that "this case is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of the government." Warren Richey, *New Case May Clarify Court's Stand on Race*, THE CHRISTIAN SCIENCE MONITOR (Oct. 6, 1999).

Facts:

- **The Supreme Court agreed with the position taken by Mr. Kavanaugh's client, that limiting voting for candidates to a statewide office that disbursed state and federal funds based on racial ancestry violated the Constitution. The Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any other State on account of race, color, or previous condition of servitude." U.S. CONST. Amend. XV § 1.**
  - ✓ **In a 7 to 2 decision, with the majority including Justices Breyer, Souter, and O'Connor**, the Court reaffirmed the basic premise upon which the brief was based: that "[t]he 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." *Rice*, 120 S. Ct. at 1054.
  - ✓ The Court explained, "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. That reasoning attacks the central meaning of the Fifteenth Amendment." *Id.* at 523.
  - ✓ The Court added, "Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others." *Id.*
- The brief submitted by Mr. Kavanaugh on behalf of his clients sought to enforce the Fifteenth Amendment against a state law that prohibited citizens from voting in a statewide election based on their race.
  - ✓ When Hawaii was admitted as the 50th State of the Union in 1959, the state adopted the Hawaiian Homes Commission Act, passed by Congress, as part of its Constitution. The Act set aside 200,000 acres of public lands and granted the state over 1.2 million additional acres of land to be held "as a public trust."

- The proceeds and income from the lands were to be used for one or more of five purposes: (1) support of public schools and other public educational institutions, (2) betterment of native Hawaiians, (3) development of farm and home ownership, (4) public improvements, and (5) provisions of land for public use.

✓ In 1978, Hawaii established the Office of Hawaiian Affairs (OHA) to administer special trust revenues "for the betterment of the conditions of native Hawaiians," and any appropriations that were made for the benefit of "native Hawaiians" and/or "Hawaiians."

- The term "native Hawaiian" and "Hawaiian" are defined as descendants of aboriginal peoples or races inhabiting the Hawaiian Islands previous to 1778.

✓ The Hawaii Constitution limited membership on the OHA board of trustees to "Hawaiians," and explicitly provided that the trustees shall be "elected by … Hawaiians."

✓ Although petitioner was a citizen of Hawaii, and his ancestors were residents of the Hawaiian Islands prior to U.S. annexation in 1959, he did not meet the statutory definitions and was thus precluded from voting.

➢ The racial qualification in the Hawaiian law categorically excluded members of certain racial minorities, such as African-Americans and Japanese-Americans, who were members of groups historically discriminated against in the U.S.

➢ One of Mr. Kavanaugh's clients on the brief was the New York Civil Rights Coalition, a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste or discrimination.

➢ Mr. Kavanaugh's statement regarding the Rice case was consistent with statements made by Justice O'Connor in *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), where the Supreme Court upheld the University of Michigan Law School's race-conscious admissions policy. Justice O'Connor stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

For opinion see 120 S.Ct. 1044, 120 S.Ct. 31, 119 S.Ct. 1248

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
Harold F. RICE, Petitioner,
v.
Benjamin J. CAYETANO, Governor of the State of Hawaii, Respondent.
No. 98-818.
October Term, 1998.
May 27, 1999.
On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE CENTER FOR EQUAL OPPORTUNITY, NEW YORK CIVIL RIGHTS COALITION, CARL COHEN, AND ABIGAIL THERNSTROM IN SUPPORT OF PETITIONER

ROBERT H. BORK 1150 Seventeenth St., N.W. Washington, D.C. 20036 (202) 862-5851

ROGER CLEGG CENTER FOR EQUAL OPPORTUNITY 815 Fifteenth St., N.W. Washington, D.C. 20005

BRETT M. KAVANAUGH Counsel of Record THEODORE W. ULLYOT KIRKLAND & ELLIS 655 Fifteenth Street, N.W. Suite 1200 Washington, D.C. 20005 (202) 879-5000

*i QUESTION PRESENTED

Whether the court of appeals erred in holding that the Fourteenth and Fifteenth Amendments to the United States Constitution permit the adoption of an explicit racial classification that restricts the right to vote in statewide elections for state officials.

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*iv TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, AND RULES

*1 INTEREST OF AMICI CURIAE [FN1]

FN1. The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. See S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. See S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. See id.

The Center for Equal Opportunity is a non-profit organization dedicated to the idea that America should be one nation and that citizens of all races, colors, and ethnicities *2 should be treated equally. The New York Civil Rights Coalition is a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste, or discrimination. Carl Cohen is a Professor of Philosophy at the University of Michigan, has served for many years in the leadership of the American Civil

Liberties Union, and is the author of Naked Racial Preference (1995). Abigail Thernstrom is the co-author of America in Black and White: One Nation, Indivisible (1997) and the author of Whose Votes Count? Affirmative Action and Minority Voting Rights (1987). Amici submit that the Fourteenth and Fifteenth Amendments prohibit Hawaii's racial voting qualification.

SUMMARY OF ARGUMENT

The Fifteenth Amendment to the United States Constitution provides: "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." The Amendment, by its language and history, applies to all state elections.

Notwithstanding the clear language of the Fifteenth Amendment, Hawaii determines a citizen's qualifications to vote in elections for the Office of Hawaiian Affairs solely on the basis of the citizen's race. Hawaii's racial voting qualification is a clear violation of the Fifteenth Amendment, and that violation alone requires reversal of the decision of the court of appeals.

The racial voting qualification also violates the Equal Protection Clause of the Fourteenth Amendment. This Court's cases establish that the Equal Protection Clause prohibits racial classifications except when such classifications are necessary and narrowly tailored to serve a compelling government interest.

***3** Outside of an immediate threat to life or limb, as in a prison race riot, a compelling government interest exists only when the government has imposed the racial classification as a remedy for past, identified discrimination in that jurisdiction and field (such as discrimination in the schools in a particular jurisdiction). Hawaii has not shown or attempted to show that its racial voting qualification in elections for the Office of Hawaiian Affairs is designed to remedy past discrimination in voting against """Hawaiians" in Hawaii.

In any event, even assuming such past discrimination, a racial qualification to vote has never been held necessary and narrowly tailored to remedy past discrimination. Moreover, this racial voting qualification is not narrowly tailored in scope: It is a strict racial qualification that categorically excludes members of certain racial groups (all but "Hawaiians") from the ballot in elections for the Office of Hawaiian Affairs -- including members of racial groups historically discriminated against in the United States and in Hawaii. Nor is the racial qualification narrowly tailored in duration: Hawaii established the racial classification in 1978, and it has no termination date.

Hawaii has explained that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But a state has no right to engage in racial classifications on the right to vote in a state election simply to preserve a particular culture. This Court has forbidden analogous "cultural" justifications for racial classifications in cases ranging from Brown v. Board of Education to Loving v. Virginia.

Finally, Hawaii's attempt to end-run the Equal Protection Clause by analogizing "Hawaiians" to American Indian tribes is entirely unavailing. As this Court repeatedly has held, differential treatment of Indian tribes as tribes is justified by the Constitution's specific reference to Indian tribes as separate sovereigns. The Constitution does not contain a Hawaiian ***4** Commerce Clause, and Hawaiians do not and could not qualify as an American Indian tribe.

ARGUMENT

INTRODUCTION

Hawaii determines a citizen's qualifications to vote in state elections for the Office of Hawaiian Affairs on the basis of the citizen's race. As is clear from that introductory sentence alone, Hawaii's racial restriction on voting is a patent violation of the United States Constitution. See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Loving v. Virginia, 388 U.S. 1 (1967); Anderson v. Martin, 375 U.S. 399 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Guinn v. United States, 238 U.S. 347 (1915). [FN2]

FN2. We will use the terms "race" and "racial" throughout this brief to encompass the overlapping concepts of race, ethnicity, ancestry, and national origin, as government distinctions based on such characteristics are subject to the same stringent constitutional scrutiny. See Oyama v. California, 332 U.S. 633, 646 (1948); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). We will adopt the convention of state law and use the term " " "Hawaiian" to refer to those whose ancestors were Hawaiian. For purposes of our brief, there is no need to further distinguish by blood amount between " "Hawaiians" and "native Hawaiians," although state law does so.

Two provisions of law provide the backdrop for this controversy: the federal Admission Act of 1959 and the Hawaii Constitution, as amended in 1978. The Admission Act, enacted by Congress at the time of Hawaii's admission to the Union, ceded to the State approximately 1,800,000 acres of land that the United States had owned since 1898. The Admission Act restricted the State's use of land to five purposes: (1) support of public schools; (2) betterment of the conditions of native Hawaiians; (3) development of farm and home ownership on as widespread a basis as possible; (4) making of public improvements; and (5) provision of lands for public use. Admission Act of March 18, 1959, 73 Stat. 4, § 5(f).

*5 The Admission Act further provided that "[s]uch lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide." Id. The Act thereby permitted the State to use those lands in a race-neutral way and/or for the benefit of all citizens of Hawaii. Indeed, that is precisely how the State administered the lands from 1959 to 1978 when the State used money from the lands on a race-neutral basis primarily for state educational purposes. Pet. App. 5a. [FN3]

FN3. A discrete block of 200,000 acres is administered by the State's Department of Hawaiian Home Lands pursuant to a separate statutory regime. A 1920 federal statute (the Hawaii Homes Commission Act, 42 Stat. 108) dealt with those lands by means of an express racial classification, albeit one that was not applied in the decades that followed. In any event, the HHCA program is not at issue here, although it also has serious constitutional problems to the extent that it relies on racial classifications.

In 1978, however, Hawaii dramatically changed course. The State enacted a constitutional amendment, see Haw. Const. art. xii, which along with a statute enacted shortly thereafter accomplished three things. First, the State required that 20% of the proceeds from the Admission Act lands be used solely to benefit certain native Hawaiians. Id.; Haw. Rev. Stat. § § 10-3(1); 10- 13.5. Second, the State created the Office of Hawaiian Affairs (OHA) to administer that 20% portion of the proceeds and to administer solely for the benefit of Hawaiians other monies

received from general state funds. The OHA's officers must be Hawaiians. Haw. Const. art. xii. Third, the State imposed still another racial qualification, allowing only Hawaiians to vote in the OHA elections. Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register as a voter for the election of board members unless the person meets the following qualifications: (1) The person is Hawaiian ....").

*6 The entire scheme is infused with explicit racial quotas, exclusions, and classifications to a degree this Court has rarely encountered in the last half-century. See generally Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 730 (1994) (Kennedy, J., concurring in judgment). The scheme benefits one preferred racial class within the State of Hawaii to the exclusion of all others and creates collateral racial classifications that are unnecessary even to serve that (itself unconstitutional) purpose. The scheme is a clearcut and extensive violation of the Constitution: None of its three elements, particularly the voting qualification at issue here, is constitutional.

Under the State's theory, the State of Massachusetts could declare certain state funds in Massachusetts to be distributed for the benefit of Irish- Americans, establish an Office of Irish Affairs composed solely of Irish- Americans to administer the funds, and restrict the vote for that Office to those citizens of Massachusetts with Irish blood. The State of Florida could do the same for Cuban-Americans, the State of Wisconsin for German-Americans, the State of Texas for Mexican-Americans, and so on. As a matter of logic and of constitutional law, affirmance of the court of appeals decision could usher in an extraordinary racial patronage and spoils system.

Hawaii no doubt will label such concerns an exaggeration, suggesting that other states would not adopt such a scheme. But we do not possess so clear a crystal ball as to confidently predict how a state 10 or 25 or 50 years from now might utilize a decision in Hawaii's favor in this case. And ultimately the Court must consider what a ruling in Hawaii's favor would authorize. See Morrison v. Olson, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting). As Justice Jackson stated, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that it sanctions such an order, the Court *7 for all time has validated the principle of racial discrimination .... The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." Korematsu v. United States 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

The aspect of the OHA program specifically at issue here is the racial voting qualification, which violates both the Fifteenth Amendment and the Fourteenth Amendment.

I. THE FIFTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

The Fifteenth Amendment to the Constitution, ratified in the wake of the Civil War on February 3, 1870, speaks clearly and definitively: "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." The Amendment repaired the Constitution's original tolerance of racial restrictions on the right to vote and stands as a legal bulwark against the racial strife and ethnic balkanization that has troubled this country since its founding -- and that to this day plagues this Nation and others around the globe. See generally Holder v. Hall, 512 U.S. 874, 894-95 (1994) (Thomas, J., concurring in judgment); South

Carolina v. Katzenbach, 383 U.S. 301, 309-13 (1966).

Since 1978, however, the State of Hawaii has prohibited citizens of certain races, because of their race, from voting in elections for the Office of Hawaiian Affairs -- a government office that controls and disburses a significant amount of state funds, formulates policy, and administers certain state lands. See Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register as a voter for the election of board members unless the person ... is Hawaiian...."). Hawaii excludes not just *8 Caucasians from voting in elections for the Office of Hawaiian Affairs, it turns away citizens who are African-Americans, Japanese-Americans, Chinese-Americans, and indeed members of all racial and ethnic groups except the preferred Hawaiians.

The primary question presented to this Court is whether Hawaii, by prohibiting individuals from voting in a state election because of their race, has violated the Fifteenth Amendment, which prohibits States from denying individuals the right to vote because of their race. To pose the question is to resolve the case. As this Court has stated, the Fifteenth Amendment is "unequivocal[]" and prohibits race-based voting qualifications (as well as facially race-neutral voting qualifications that are intended to harm members of a particular race). Shaw v. Reno, 509 U.S. 630, 639 (1993); see City of Mobile v. Bolden, 446 U.S. 55, 62 (1980); Gomillion, 364 U.S. at 339; Smith v. Allwright, 321 U.S. 649, 657 (1944); Guinn, 238 U.S. at 347; cf. Chisom v. Roemer, 501 U.S. 380, 392 (1991) ("every election in which registered electors are permitted to vote" is covered under § 2 of Voting Rights Act of 1965, which enforces the Fifteenth Amendment) (quotation omitted; emphasis added).

Hawaii has offered an array of historical and policy considerations in support of its racial voting scheme, primarily based on preserving the culture of Hawaiians. But all such arguments are, for purposes of the Fifteenth Amendment, nothing but diversions. Hawaii restricts the right to vote in a state election based on a citizen's race, and the clear and unequivocal language of the Fifteenth Amendment flatly prohibits such state action.

What is perhaps most telling about the unconstitutionality of Hawaii's racial voting qualification is that in the nearly 130 years since the Fifteenth Amendment was ratified -- troubled though those years have been with respect to racial relations and racially motivated voting devices -- no State so far as we are aware has thought it permissible to enact into law a facial *9 racial qualification on the right to vote in any state election. Indeed, several States, no doubt recognizing that the language of the Fifteenth Amendment was clear and unequivocal, resorted instead to pretext and subterfuge to try to evade what all understood to be the meaning of the Fifteenth Amendment. See Shaw, 509 U.S. at 639-40 (describing various forms of "[o]stensibly race- neutral devices" used "to deprive black voters of the franchise"); see Gomillion, 364 U.S. at 341; Guinn, 238 U.S. at 364-65.

In light of the plain conflict between Hawaii's racial qualification for voting and the clear language of the Fifteenth Amendment, the question that comes to the fore in this case focuses on the court of appeals: How did it go so far astray? The court of appeals recognized, after all, that the voter qualification at issue here was "expressly racial" and "clearly racial on its face." Pet. App. 10a, 15a. The court also acknowledged that the Fifteenth Amendment "squarely prohibits racially-based denials of the right to vote." Pet. App. 15a (quoting Laurence H. Tribe, American Constitutional Law 335 n.2 (2d ed. 1988)).

The court explained, however, that "restricting voter eligibility to Hawaiians cannot be understood without reference to what the vote is for." Pet. App. 11a. The court concluded that a state could allow racial restrictions on the right to vote

when the underlying state office was, in essence, devoted to distributing funds for the benefit of a racially restricted class. Pet. App. 15a. The court held that such a scheme "does not deny non-Hawaiians the right to vote in any meaningful sense." Pet. App. 15a (emphasis added). The court did not explain, however, from what source it derived a "meaningful sense" exception to the Fifteenth Amendment's ban on racial voting qualifications, nor did it say how voting in elections to a state office that, among other things, controls and spends substantial sums of state money is not "meaningful."

***10** The court said that it found guidance in cases in which this Court has held that limited special-purpose elections are consistent with the right to vote that the Court has inferred from the Fourteenth Amendment. See Ball v. James, 451 U.S. 355 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); cf. Reynolds v. Sims, 377 U.S. 533 (1964). But in relying on those cases, the court of appeals overlooked a critical point: Those cases did not deal with racial restrictions on the right to vote. The Fifteenth Amendment places voting qualifications based on race in a constitutionally different class from voting qualifications based on non- suspect characteristics. Thus, the Constitution does not expressly provide that all citizens in a jurisdiction can vote in all elections (a point confirmed by the Salyer case), but it expressly prohibits denial of the right to vote in any state election on account of race. Cf. Powers v. Ohio, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."); Buchanan v. Warley, 245 U.S. 60, 74-75, 82 (1917) (state can limit property rights, but cannot do so on the basis of race).

In sum, this Court's resolution of this case should be quite straightforward. Nearly 130 years after the Fifteenth Amendment's ratification, the State of Hawaii seeks the Court's blessing to strip an American citizen of his right to vote in a state election based on his race. The words of the Fifteenth Amendment mean what they say, however, and the Fifteenth Amendment thus flatly bars Hawaii's denial of the right to vote in a state election on account of race.

II. THE FOURTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

Hawaii's racial restriction on voting also violates the Equal Protection Clause of Section 1 of the Fourteenth Amendment.

***11** A. Racial Classifications Are Presumptively Invalid and Subject to Strict Scrutiny Under the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment, also ratified in the wake of the Civil War on July 9, 1868, provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." While not phrased in the plain and crystalline terms of the Fifteenth Amendment, the """central purpose" of the amendment is "to prevent the States from purposefully discriminating between individuals on the basis of race." Shaw, 509 U.S. at 642 (emphasis added). [FN4]

FN4. See Miller v. Johnson, 515 U.S. 900, 904 (1995) ("central mandate is racial neutrality in governmental decisionmaking"); Powers, 499 U.S. at 415 (Fourteenth Amendment's mandate is that "race discrimination be eliminated from all official acts and proceedings of the State"); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."); Loving, 388 U.S. at 10 ("The clear and central purpose of the Fourteenth

Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) ("historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States"); Strauder v. West Virginia, 100 U.S. 303, 307 (1880) ("What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States ....").

To be sure, the Court has not as yet adopted the most stringent rule for analyzing racial classifications under the Equal Protection Clause--that "only a social emergency rising to the level of imminent danger to life and limb ... can justify an exception to the principle embedded in the Fourteenth Amendment that our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *12Croson, 488 U.S. at 521 (Scalia, J., concurring in judgment) (quotation omitted). [FN5] The Court's decisions have nonetheless established that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979). As a result, "all laws that classify citizens on the basis of race ... are constitutionally suspect and must be strictly scrutinized." Hunt v. Cromartie, No. 98-85, 1999 WL 303677, at *4 (May 17, 1999); see Adarand, 515 U.S. at 235-36; Shaw, 509 U.S. at 642-43; Croson, 488 U.S. at 493-94 (plurality).

FN5. See also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring); Fullilove v. Klutznick, 448 U.S. 448, 522-23 (1980) (Stewart, J., joined by Rehnquist, J., dissenting); Defunis v. Odegaard, 416 U.S. 312, 343-44 (1974) (Douglas, J., dissenting); McLaughlin, 379 U.S. at 198 (Stewart, J., joined by Douglas, J., concurring); Bell v. Maryland, 378 U.S. 226, 287-88 (1964) (Goldberg, J., joined by Warren, C.J., concurring); Hirabayashi v. United States, 320 U.S. 81, 110-11 (1943) (Murphy, J., concurring); Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

The Court has stressed that racial classifications must be strictly scrutinized because classifications of citizens solely on the basis of race """are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81, 100 (1943). They "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." Shaw, 509 U.S. at 657. They "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts -- their very worth as citizens -- according to a criterion barred to the Government by history and the Constitution." Miller, 515 U.S. at 912 (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)). And they reflect "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from *13 those of other citizens." Johnson v. DeGrandy, 512 U.S. 997, 1027 (1994) (Kennedy, J., concurring) (quotation omitted). [FN6]

FN6. Strict scrutiny applies regardless of the race benefited or burdened because a "benign racial classification is a contradiction in terms," Metro Broadcasting, 497 U.S. at 609 (O'Connor, J., dissenting) (quotation omitted), and there is "no principled basis for deciding which groups would merit

heightened judicial solicitude and which would not," Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 296 (1978) (Powell, J.). Strict scrutiny also applies, of course, even when the racial classification burdens or benefits the races equally. Powers, 499 U.S. at 410; Brown v. Board of Education, 347 U.S. 483, 494-95 (1954).

Racial classifications are offensive to the Constitution for a more practical reason as well. There is no way to apply them without formal rules for deciding who is and is not a member of a given race and without some governing body to apply and enforce those rules. Cf. Plessy, 163 U.S. at 552. As Justice Stevens has emphasized, however, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." Fullilove, 448 U.S. at 535 n.5 (Stevens, J., dissenting). Justice Stevens thus stated in Fullilove that a "serious effort" to "define racial classes" must "study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935." Id.; see also Metro Broadcasting, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (comparing racial set-aside to South African Population Registration Act). This case illustrates the point: The State of Hawaii has struggled mightily to define who exactly is a "Hawaiian," an enterprise that has led to a variety of conflicting definitions and generated numerous lawsuits.

Strict scrutiny under the Equal Protection Clause applies with particular force to racial classifications affecting the voting process. See Shaw, 509 U.S. at 644. [FN7] The Court has ***14** stated that "[r]acial classifications with respect to voting carry particular dangers" -- including "balkaniz[ing] us into competing racial factions." Shaw, 509 U.S. at 657 (emphasis added). """When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." Miller, 515 U.S. at 911-12 (quotation omitted); cf. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986). As Judge Wisdom stated over a generation ago, "If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." Anderson v. Martin, 206 F. Supp. 700, 705 (E.D. La. 1962) (Wisdom, J., dissenting) (emphasis added), rev'd, 375 U.S. 399 (1964). [FN8]

FN7. See Gomillion, 364 U.S. at 349 (Whittaker, J., concurring); see also City of Mobile, 446 U.S. at 86 (Stevens, J., concurring in judgment) (Gomillion is "compelled by the Equal Protection Clause").

FN8. The Justices who dissented in Shaw still would consider a "direct and outright deprivation of the right to vote" on account of race (as here) subject to the strictest scrutiny. Shaw, 509 U.S. at 659 (White, J., dissenting); id. at 682 (Souter, J., dissenting).

B. The Equal Protection Clause Prohibits a Racial Classification Unless the Classification Is Necessary and Narrowly Tailored to Serve a Compelling Government Interest.

Hawaii's law facially discriminates on the basis of race in determining which voters are qualified to vote in elections for the Office of Hawaiian Affairs. [FN9] Because the intent, meaning, history, and policy of the Equal Protection Clause all suggest that the Constitution does not allow governmental racial ***15**

classifications -- or, at most, only rarely allows them -- the Court has held that racial classifications such as Hawaii's racial voting qualification are "presumptively invalid" and subject to strict scrutiny under the Fourteenth Amendment, meaning that they can be upheld only if based upon an "extraordinary justification." Feeney, 442 U.S. at 272 (quoted in Shaw, 509 U.S. at 643- 44). Under the strict scrutiny standard, racial classifications thus violate the Equal Protection Clause unless they are both necessary and narrowly tailored to serve a compelling state interest. Shaw, 509 U.S. at 643; Croson, 488 U.S. at 509 (plurality) (Only in the "extreme case" may "some form of narrowly tailored racial preference ... be necessary.") (emphases added). [FN10]

FN9. When, as here, "the racial classification appears on the face of the statute," then "[n]o inquiry into legislative purpose is necessary" to determine whether the law is designed to harm members of a particular race. Shaw, 509 U.S. at 642; see Hunt, 1999 WL 303677; cf. Washington v. Davis, 426 U.S. 229 (1976).

FN10. See also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (plurality); id. at 286 (O'Connor, J., concurring); Palmore, 466 U.S. at 432 (classifications must be "necessary" to accomplishment of " " "compelling governmental interest"); Fullilove, 448 U.S. at 496 (Powell, J., concurring) ("racial classification ... is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest"); Loving, 388 U.S. at 11 (racial classifications, "if they are ever to be upheld, ... must be shown to be necessary to the accomplishment of some permissible state objective"). In some cases, the Court has used the term "necessary"; in some cases, the Court has used the term "narrowly tailored"; and in some cases, the Court has used both terms. The Court's consistent analysis incorporates both ideas. The Court has made it clear, for example, that past discrimination does not justify a racial classification if race-neutral alternatives are available.

These requirements impose a number of important barriers that a government entity must surmount before it may impose a racial classification. The rationale is simple: "If there is no duty to attempt ... to measure the recovery by the wrong ... our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a piece of the action for its members." Croson, 488 U.S. at 510-11 (plurality) (quoting Fullilove, 448 U.S. at 539 (Stevens, J., dissenting)). Taken together, as ***16** Justice Kennedy has pointed out, these stringent requirements explain why the strict scrutiny standard "operate[s] in a manner generally consistent with the imperative of race neutrality." Croson, 488 U.S. at 519 (Kennedy, J., concurring).

First, the government must show a compelling interest that justifies its racial classification. Except in situations where there is an imminent threat to life or limb (as in a prison race riot), racial classifications must be """strictly reserved for remedial settings." Id. at 494 (plurality); Metro Broadcasting, 497 U.S. at 612 (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination."); Wygant, 476 U.S. at 274- 76 (plurality). Furthermore, the bare desire to remedy societal discrimination is too "amorphous" a concept of injury to qualify as a "compelling interest." Croson, 488 U.S. at 497 (plurality) (quoting Bakke, 438 U.S. at 307 (Powell, J.)); see also Wygant, 476 U.S. at 274 (plurality) ("This Court never has held that societal discrimination alone is sufficient to

justify a racial classification."). In order for the government to show that the classification is truly remedial, the classification must be preceded by """judicial, legislative, or administrative findings of constitutional or statutory violations." Croson, 488 U.S. at 497 (plurality) (quoting Bakke, 438 U.S. at 308-09 (Powell, J.)). [FN11] In Croson, for example, the Court explained that there was "nothing approaching ... a constitutional or statutory violation by anyone in the Richmond construction industry." Id. at 500.

FN11. Any legislative or executive findings must be strictly scrutinized, for "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." Croson, 488 U.S. at 501.

Second, the government must show that the classification remedies discrimination that was committed both within that jurisdiction, and within the industry or field in which the ***17** classification is imposed (such as school segregation in a district). Id. at 500, 504-05. The Court explained the point in Croson: "The 'evidence' relied upon by the dissent, the history of school desegregation in Richmond ... does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy." Id. at 505 (emphasis added). The Court added that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry." Id. (emphasis added). The Court has "never approved the extrapolation of discrimination in one jurisdiction from the experience of another." Id.

Third, the government must show that the racial classification is necessary in the sense that race-neutral remedies have been or would be ineffective in remedying the discrimination. Adarand, 515 U.S. at 237-38 (court of appeals """did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was any consideration of the use of race-neutral means") (quotation omitted); Croson, 488 U.S. at 507 ("[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting."); United States v. Paradise, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies."); id. at 201 (O'Connor, J., dissenting) ("strict scrutiny requires ... that the District Court expressly evaluate the available alternative remedies."). The decision in Croson illustrated the importance of this requirement: Only in the "extreme case" may "some form of narrowly tailored racial preference ... be necessary ...." Croson, 488 U.S. at 509 (plurality) (emphases added). In Croson, the Court stated that a racial set- aside was not necessary because a "race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation" and remedy any discrimination that had occurred. Id. at 507.

***18** Fourth, the government must show that it cannot devise an individualized procedure to "tailor remedial relief to those who truly have suffered the effects of prior discrimination" -- in other words, that the racial classification is not simply a product of "administrative convenience." Id. at 508; cf. Korematsu, 323 U.S. at 241 (Murphy, J., dissenting) ("[n] o adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal"). The interest in "avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." Croson, 488 U.S. at 508.

Fifth, the government must show that it has minimized harm to innocent members of other racial groups. For this reason, a specific numerical quota, or outright racial exclusion, rarely (if ever) could satisfy the narrow tailoring requirement. See id. The Court applied this principle in Croson: "Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur ... enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination." Id. (emphasis added); see also id. at 515 (Stevens, J., concurring) ("Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause.").

Sixth, the government must show that the racial classification is tailored in terms of duration: that it "will not last longer than the discriminatory effects it is designed to eliminate." Adarand, 515 U.S. at 238 (quoting Fullilove, 448 U.S. at 513 (Powell, J., concurring)).

***19** C. Hawaii's Racial Voting Qualification Does Not Meet the Requirements of Strict Scrutiny.

Based on the foregoing principles, it is plain that Hawaii's racial voting qualification violates the Equal Protection Clause for any one of a host of alternative and independent reasons.

At the outset, Justice Ginsburg's opinion in Adarand identified the simplest reason for holding this racial voting qualification violative of the Equal Protection Clause. As she explained, while this Court has not as yet held that the strict scrutiny standard is automatically fatal for all racial classifications, at a minimum "the strict scrutiny standard" is "fatal for classifications burdening groups that have suffered discrimination in our society." Adarand, 515 U.S. at 275 (Ginsburg, J., dissenting). The principle identified by Justice Ginsburg applies here. In elections for the Office of Hawaiian Affairs, Hawaii turns away would-be voters who are, for example, African-Americans, Japanese-Americans, Chinese-Americans, Mexican-Americans, and even American Indians -- all of whom belong to racial groups whose members """have suffered discrimination in our society" and some of whom have suffered discrimination in Hawaii. As Justice Ginsburg rightly suggested, therefore, the strict scrutiny analysis is "fatal" to Hawaii's racial voting qualification, and no further equal protection analysis is necessary.

Apart from that threshold point, the racial classification here fails to meet any of the specific requirements (much less all of them) that the government must meet in order to show that a racial classification is necessary and narrowly tailored to serve a compelling governmental interest.

First, Hawaii has not shown that its racial voting qualification remedies prior discrimination. In particular, Hawaii has not identified any competent judicial, legislative, or administrative findings of constitutional or statutory violations by any party to justify its racial voting qualification.

***20** Second, and as a necessary consequence of the first point, Hawaii obviously has not shown that its racial voting qualification remedies a prior denial or infringement of the ability of Hawaiians to vote in Hawaii. Hawaii's racial classification thus fails to meet a critical requirement under this Court's equal protection jurisprudence for a racial classification -- that it serve a compelling governmental interest in remedying prior discrimination in the jurisdiction and field in which the classification is imposed.

Third, even had the State shown prior abridgements on the ability of Hawaiians to vote, it has not shown that a race-based voting scheme is necessary to remedy that discrimination. Indeed, an outright denial of the right to vote on the basis of race can never be sufficiently necessary to remedy past discrimination in voting. To be sure, there is a compelling governmental interest in remedying prior racial restrictions on the right to vote, but the constitutionally authorized remedy is imposition of a race-neutral voting scheme (and, if needed, the elimination of various race-neutral voting devices that can be a pretext for racial discrimination). See, e.g., 42 U.S.C. § 1973; Fullilove, 448 U.S. at 546-47 (Stevens, J., dissenting) (Voting Rights Act, if it required that 10% of elected officials be minorities, "would merely create the kind of inequality that an impartial sovereign cannot tolerate"); cf. Bazemore v. Friday, 478 U.S. 385, 407-09 (1986) (race-neutral admissions policy is constitutionally proper remedy for club's prior discriminatory admissions). In this regard, we cannot improve upon Judge Wisdom: "If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." Anderson, 206 F. Supp. at 705 (Wisdom, J., dissenting).

Fourth, even assuming prior denials of the right to vote, Hawaii has not shown that it is unable to devise an individualized procedure to "tailor relief to those who truly have suffered the effects" of any prior voting discrimination -- ***21** in other words, to show that the racial classification is not simply a product of "administrative convenience" in grouping together all Hawaiians. Cf. Croson, 488 U.S. at 508.

Fifth, Hawaii has imposed a 100% racial voting set-aside in OHA elections that absolutely excludes members of races other than Hawaiian from the ballot. Faced with a 30% set-aside in Croson, the Court found "it obvious that such a program [wa]s not narrowly tailored to remedy the effects of prior discrimination." Id. at 508 (emphasis added). Given Hawaii's 100% exclusion of individuals who are not Hawaiian from the ballot in OHA elections (particularly when combined with the lack of findings of prior discrimination), the same conclusion applies here a fortiori.

Sixth, Hawaii's racial qualification is not limited in time. The State established it in 1978, and it is scheduled to last indefinitely. This qualification is not tailored "such that it will not last longer than the discriminatory effects it is designed to eliminate." Adarand, 515 U.S. at 238 (quotation omitted).

In sum, Hawaii's law satisfies none of the requirements this Court has imposed for holding a racial classification permissible under the Equal Protection Clause.

D. Hawaii's Arguments Based on Preserving the Culture of Hawaiians and on a Trust Relationship With Hawaiians Do Not Justify Hawaii's Racial Voting Qualification.

The State has constructed a tortured defense of its racial voting qualification that links (a) the racial restriction on the beneficiaries of OHA-controlled funds, (b) the racial qualifications to be an OHA officer, and (c) the racial qualifications for voting in elections for OHA officers. To begin with, this defense does not purport to meet the requirements this Court has imposed for racial classifications.

Even addressing the State's argument on its own terms, moreover, the short answer to it is fairly simple: Three blatant ***22** constitutional wrongs do not make a right. A massive unconstitutional scheme of racially restricted distribution of state funds, racial restrictions on serving in the state office that oversees and distributes those funds, and racially restricted elections to that office hardly makes the State's voting restriction more constitutionally palatable. See Stuart M.

Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537, 594 (1996) ("""It seems unlikely that many, if any, of Hawaii's current programs singling out Native Hawaiians could meet [strict scrutiny] standards. The compelling interest requirement alone would pose an enormous hurdle.").

Hawaii has suggested that the racial voting qualification is constitutional because the racial restriction on the use of the OHA-controlled funds is constitutional and is not challenged here. As a matter of logic, that conclusion makes no sense even if the premise is accepted. If a state refused to hire a black teacher for an all-white school in 1952 because of his race, it could not have defended against a claimed equal protection violation by saying that the racial restriction on hiring was constitutional because the racially segregated schools were not challenged and had not yet been declared unconstitutional.

In addition, the racial restriction on the use of funds is itself unnecessary and not narrowly tailored to serve a compelling interest. Even assuming, for example, that the average Hawaiian suffers poverty to a greater extent than the average individual of another race, the State can institute a race-neutral social welfare program. It cannot engage, however, in a racially restricted distribution of funds that is both over-inclusive and under-inclusive.

Even if the State had a justification to pay monies to members of a racial group because of their race, a state does not have a compelling interest in establishing a racially restricted office whose members are elected in racially restricted elections in order to administer the program. In that regard, it ***23** bears emphasis that a racial voting qualification is perhaps the most pernicious of all racial classifications because it implies that "individuals of the same race share a single political interest. The view that they do is based on the demeaning notion that members of the defined racial groups ascribe to certain minority views that must be different from those of other citizens." Miller, 515 U.S. at 914 (quotation omitted). This is the "precise use of race as a proxy the Constitution prohibits." Id.; cf. Powers, 499 U.S. at 410. Here, only by assuming that all Hawaiians think differently and vote differently from all other Hawaiian citizens can the categorical racial voting qualification be explained. Such an offensive assumption is patently unconstitutional under this Court's precedent.

Hawaii has invoked the term "trust" to describe its scheme and the term "trust lands" to describe lands transferred to the State by the 1959 Admission Act. But the terminology is simply camouflage for Hawaii's 1978 decision that certain state funds (derived both from the state lands and from other state funds) will be used to benefit a racially defined group -- even though the State is free to use those funds in a race-neutral way. [FN12] In any event, the existence of trust lands does not justify a racial qualification to vote in state elections for the state office that oversees and administers the lands.

> FN12. Even were the State compelled by federal law to impose a racial classification (which it is not), Adarand establishes that the constitutional analysis would remain the same.

Hawaii also has explained -- correctly -- that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But the State has no right to engage in a racially restricted distribution of state funds, or racial classifications on the right to vote in a ***24** state election, simply to preserve a particular "culture." [FN13] As Justice

Kennedy has explained, "There is more than a fine line, however, between the voluntary association that leads to a political community ... and the forced separation that occurs when the government draws explicit political boundaries ...." Kiryas Joel, 512 U.S. at 730 (Kennedy, J., concurring in judgment).

FN13. As two leading political and social commentators said of Hawaii: "It is one thing to celebrate a cultural heritage and a sometimes tragic history, but it is another, as Canadians have learned, to widen splits and schisms in a state that more than almost any place in the world has proved that diverse people can live amicably and successfully together." Michael Barone & Grant Ujifusa, The Almanac of American Politics 439 (1998).

The dangers of allowing a state's cultural justifications to supersede the limitations of the Equal Protection Clause are quite evident: One need only change the state from Hawaii to Louisiana and the year from 1999 to 1896. See Plessy, 163 U.S. at 550 (legislature is free "to act with reference to the established usages, customs, and traditions of the people"). This Court has forbidden that kind of "cultural" justification for racial classifications in cases ranging from Brown v. Board of Education to Loving v. Virginia. Now is no time to return to an era when "cultural" justifications could trump the dictates of the Equal Protection Clause. Cf. Loving, 388 U.S. at 11 (ban on interracial marriage designed to "maintain White Supremacy").

E. Hawaii's Analogy of Hawaiians to American Indian Tribes Is Historically, Legally, and Factually Flawed.

The lower courts suggested that American Indian tribes are exempt from the Equal Protection Clause (at least, treatment of Indian tribes that facilitates self-government is exempt), and that Hawaiians as a group are sufficiently similar to American Indian tribes that discrimination in favor of Hawaiians can be *25 permitted under the Equal Protection Clause. See, e.g., Pet. App. 13a-14a, 17a.

This argument is flawed at every turn. To begin with, it misconceives the basis for differential treatment of American Indian tribes under the Constitution. And it simultaneously creates from whole cloth a constitutional authorization for members of other racial and ethnic groups (for example, African-Americans, Latino-Americans, and Korean-Americans) to assert ipse dixit that they are "similar to American Indian tribes" for purposes of equal protection analysis.

1. American Indian tribes are a distinctive category in our law. See Cherokee Nation v. Georgia, 30 U.S. 1 (1831). The tribes are separate sovereigns within the United States -- and have been so considered since before the Constitution was ratified. The Commerce Clause thus provides that "[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. i, § 8. In addition, the Treaty Clause, which grants the President "Power, by and with the Advice and Consent of the Senate, to make Treaties," has been a source of authority for the federal government to deal with American Indian tribes as sovereigns. U.S. Const. art. ii, § 2.

As mandated by the Constitution, this Court has drawn a clear constitutional distinction between (a) laws that benefit or burden Indian tribes (or tribal members) with respect to self-governance or activities on or near an Indian reservation and (b) laws that burden or benefit Indians solely because of their race and do not relate to tribal activities (in which case, American Indians are

treated like members of other races).

Equal protection strict scrutiny thus applies to classifications by race of individuals who happen to be American Indian so long as the classification in question does not relate to their tribal membership and their activities on or near the reservation. In both Adarand and Croson, for *26 example, the Court held that a racial preference program that gave preferences to American Indians, as well as members of other racial groups, was subject to strict scrutiny. As the Court stated in Croson, "[t]here is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons." 488 U.S. at 506 (emphasis added). In Adarand as well, the program provided a preference for "Native Americans," but the Court held that all racial classifications are subject to strict scrutiny. (In dissent, Justice Stevens raised the subject of American Indians, 515 U.S. at 244-45 n.3, but the Court did not distinguish American Indians from the other racial groups.) So, too, in both Fullilove and Metro Broadcasting, the laws at issue gave a preference to American Indians, see Metro Broadcasting, 497 U.S. at 553 n.1; Fullilove, 448 U.S. at 454, but no member of this Court suggested that a racial preference for African-Americans is more strictly scrutinized than a preference for American Indians.

2. In holding Hawaii's special treatment of Hawaiians consistent with the Equal Protection Clause, the courts below erroneously relied in part on this Court's decision in Morton v. Mancari, 417 U.S. 535 (1974). In that case, the Court upheld a hiring preference granted to tribal Indians for employment in the Bureau of Indian Affairs.

Three points about Mancari are critical, however, and completely undercut the lower courts' reliance on it. First, the Court in Mancari stated that the justification for differential treatment for Indian tribes stemmed not from some idiosyncratic ordering of different racial groups, but "from the Constitution itself" -- namely, the Indian Commerce Clause and the Treaty Clause. Id. at 552; see also Adarand, 515 U.S. at 244-45 n.3 (Stevens, J., dissenting) (Mancari relied in part on "plenary power of Congress to legislate on behalf of Indian tribes"); United States v. Antelope, 430 U.S. 641, 646 (1977) (Mancari "involved preferences ... directly promoting Indian *27 interests in self-government.... Federal regulation of Indian tribes ... is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of Indians.") (quotation omitted; emphasis added). So, too, the government's brief in Mancari, advocating the position that the Court adopted, cautioned that the Constitution "permits special arrangements [with respect to Indian tribes] that might not be appropriate with respect to other groups." Br. for Appellants, No. 73-362, at 33 (emphasis added). By linking its decision to the Indian Commerce Clause, the Court accepted that argument. The Court did not adopt, by contrast, the suggestion of an amicus curiae who argued that benign racial preferences are not subject to strict scrutiny, and that preferences to """members of a minority group" such as American Indians "are constitutional." Br. for Amicus Curiae Mexican American Legal Defense and Educational Fund, Nos. 73-362, 73- 364, at 22-23.

Second, consistent with its view of the proper scope of the equal protection exception for Indian tribes embodied in the Indian Commerce and Treaty Clauses, the Mancari Court went out of its way to make clear that the BIA preference applied only to Indians who were members of Indian tribes and thus "operate[d] to exclude many individuals who are racially to be classified as Indians." Mancari, 417 U.S. at 554 n.24. In particular, the Court relied on the definition of Indian used in BIA regulations, which expressly conditioned the preference on tribal membership. Id.; see Benjamin, 106 Yale L.J. at 612 n.38 ("One of the most important aspects of the Court's conclusion was left unstated: The Court ignored the statutory

definition of 'Indian' and looked only to the BIA regulation's definition."); see also id. at n.121. The government stressed at oral argument, moreover, that the "preference is limited to Indians who are members of federally recognized [tribes]." Tr. of Oral Arg., Nos. 73-362, 73-364, at 7. The government pointed out that members of terminated tribes or never-recognized tribes were not eligible for the preference and noted *28 that "there are many Indians, many people who racially could be considered an Indian who don't get this preference." Id. at 13.

Third, the Court treated the preference as an aspect of constitutionally authorized Indian self-governance. See 417 U.S. at 553 (preference provision designed to give "Indians a greater control of their own destinies"). Indeed, as the government pointed out at argument, some 11,500 BIA employees out of approximately 14,000 at the time worked on the reservations. Tr. of Oral Arg. at 5-6. Moreover, the preference had actually begun as a substitute for a proposal to provide Indian tribes an absolute veto over any person the BIA proposed to send to work on the reservation. Id. at 12. The Court took all of that into account, noting that an "obviously more difficult question ... would be presented" by a general Indian preference in government employment. 417 U.S. at 554. [FN14]

> FN14. That "question," which was unanswered at the time, was whether the same level of scrutiny afforded racial discrimination against minorities would apply to racial preferences for minorities -- a question before the Court that Term, Defunis v. Odegaard, 416 U.S. 312 (1974), and which was subsequently addressed in cases such as Bakke, Fullilove, Croson, and Adarand.

In reaching its conclusion, the Court stated that the BIA classification was not "in this sense" a "racial" preference. Id. at 553 & n.24. By that, the Court clearly meant that a classification involving Indian tribes (or involving Indian tribal members engaged in activities of self-governance or activities on or near a reservation) must be analyzed differently from purely racial classifications.

Mancari is thus simply another in the line of cases in which the Court has held that "the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that *29 might otherwise be constitutionally offensive." Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 500-01 (1979) (quotation omitted; emphasis added).

3. Hawaii's attempts to analogize Hawaiians to Indian tribes for purposes of this case are unavailing for two main reasons.

First, the Constitution does not contain a Hawaiian Commerce Clause, but only an Indian Commerce Clause. Pet. App. 14a. Under the Constitution, therefore, a state's differential treatment of Hawaiians is no more acceptable than a state's differential treatment of Croatian-Americans or African-Americans or Italian-Americans.

Second, Hawaiians are not a federally recognized Indian tribe such that Hawaiians could receive the same treatment as American Indian tribes under the Constitution. Since the annexation in 1898, the United States has not dealt with Hawaiians as a sovereign nation. To be sure, certain federal statutes refer to Hawaiians, just as certain statutes refer to African-Americans, but Congress has never established that Hawaiians are an Indian tribe. This is not a trivial point. Without such recognition, a group of people united by race or ethnicity is not entitled to the

same treatment as an American Indian tribe. As the BIA puts it, express federal recognition as a tribe is a "prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2; see Rachael Paschal, The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process, 66 Wash. L. Rev. 209, 215-16 (1991).

As a matter of law and tradition, moreover, federal courts do not grant tribal status that neither Congress nor the Executive has granted. United States v. Holliday, 70 U.S. 407, 419 (1865); see *30Cherokee Nation of Okla. v. Babbitt, 117 F.3d 1489, 1496 (D.C. Cir. 1997). Therefore, this Court cannot simply declare that Hawaiians are an American Indian tribe.

Indeed, the constitutional constraints on Congress and the Executive in recognizing tribes, as well as existing BIA regulations, establish that Hawaiians could not possibly qualify as a tribe. See 25 C.F.R. § 83; Price v. Hawaii, 764 F.2d 623, 628 (9th Cir. 1985) (group of Hawaiians not a tribe and thus could not sue under jurisdictional statute granting Indian tribes right to sue); Benjamin, 106 Yale L.J. at 574, 576 ("Native Hawaiians are not organized into any entity that can reasonably be called a tribe" and """there is little reason to suppose that Native Hawaiians would satisfy any definition of 'Indian tribe' ...."). Even the courts below recognized that Hawaiians have not and could not at this time receive formal recognition as an Indian tribe. Pet. App. 14a.

In any event, even were Hawaiians a recognized Indian tribe, the OHA's racial restriction on voting in elections for a state government office dealing with such an "Indian tribe" would still be unconstitutional. The "unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, ... [but] States do not enjoy the same unique relationship with Indians ...." Yakima Nation, 439 U.S. at 500-01 (quotation omitted; emphases added).

For all of these reasons, the State's attempt to analogize Hawaiians to American Indians does not justify its racial voting qualification in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

U.S.Amicus.Brief,1999.
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Briefs and Other Related Documents (Back to top)

- 1999 WL 955376, 68 USLW 3288 (Oral Argument) Oral Argument (Oct. 06, 1999)
- 1999 WL 691999 (Appellate Brief) REPLY BRIEF FOR PETITIONER (Sep. 03, 1999)
- 1999 WL 557073 (Appellate Brief) BRIEF FOR RESPONDENT (Jul. 28, 1999)
- 1999 WL 557268 (Appellate Brief) BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, NEVADA, NEW MEXICO, OKLAHOMA, AND OREGON THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANS AND THE TERRITORY OF GUAM SUPPORTING THE STATE OF HAWAII (Jul. 28, 1999)

• 1999 WL 557271 (Appellate Brief) BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE RESPONDENT (Jul. 28, 1999)

• 1999 WL 557275 (Appellate Brief) BRIEF OF AMICI CURIAE STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, HUI K?AKO'O =BQP:0003='?AINA HO'OPULAPULA, KALAMA'ULA HOMESTEAD ASSOCIATION AND HAWAIIAN HOMES COMMISSION IN SUPPORT OF RESPONDENT=EQP:0003= (Jul. 28, 1999)

• 1999 WL 557279 (Appellate Brief) BRIEF OF THE KAMEHAMEHA SCHOOLS BISHOP ESTATE TRUST AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Jul. 28, 1999)

• 1999 WL 557287 (Appellate Brief) BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS, KA LAHUI, THE ASSOCIATION OF HAWAIIAN CIVIC CLUBS, COUNCIL OF HAWAIIAN ORGANIZATIONS, NATIVE HAWAIIAN CONVENTION, NATIVE HAWAIIAN BAR ASSOCIATION, NATIVE HAWAIIAN LEGAL CORPORATION, NATIVE HAWAIIAN ADVISORY CO UNCIL, HA HAWAII, HUI KALAIAINA, ALU LIKE, INC., AND PAPA OLA LOKAHI AS AMICI CURIAE SUPPORTING RESPONDENT (Jul. 28, 1999)

• 1999 WL 557289 (Appellate Brief) BRIEF FOR THE HAWAI'I CONGRESSIONAL DELEGATION AS AMICUS CURIAE SUPPORTING RESPONDENT (Jul. 28, 1999)

• 1999 WL 631668 (Appellate Brief) BRIEF OF AMICI CURIAE ALASKA FEDERATION OF NATIVES AND COOK INLET REGION, INC. IN SUPPORT OF RESPONDENT (Jul. 28, 1999)

• 1999 WL 569475 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT (Jul. 23, 1999)

• 1999 WL 374574 (Appellate Brief) BRIEF FOR PETITIONER (May. 27, 1999)

• 1999 WL 374578 (Appellate Brief) BRIEF OF AMICI CURIAE, THE HOU HAWAIIANS AND MAUI LOA, NATIVE HAWAIIAN BENEFICIARIES (May. 27, 1999)

• 1999 WL 374577 (Appellate Brief) BRIEF OF AMICI CURIAE CAMPAIGN FOR A COLOR-BLIND AMERICA, AMERICANS AGAINST DISCRIMINATION AND PREFERENCES, AND THE UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETITIONER (May. 26, 1999)

• 1999 WL 332717 (Appellate Brief) BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER (May. 24, 1999)

• 1999 WL 33609269 (Appellate Filing) Reply Brief for Petitioner (Jan. 06, 1999)

• 1998 WL 34081124 (Appellate Filing) Respondent's Brief in Opposition (Dec. 29, 1998)

• 1998 WL 34080883 (Appellate Filing) Petition for a Writ of Certiorari (Nov. 17, 1998)

END OF DOCUMENT

Briefs and Other Related Documents

Supreme Court of the United States

Harold F. RICE, Petitioner,
v.
Benjamin J. CAYETANO, Governor of Hawaii.

No. 98-818.

Argued Oct. 6, 1999.
Decided Feb. 23, 2000.

Citizen of Hawai'i brought § 1983 action against state officials, challenging eligibility requirement for voting for trustees for Office of Hawaiian Affairs (OHA). The United States District Court of the District of Hawai'i, David A. Ezra, J., 963 F.Supp. 1547, upheld voter qualification. Citizen appealed. The Court of Appeals for the Ninth Circuit, Rymer, Circuit Judge, 146 F.3d 1075, affirmed. Certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) limiting voters to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian," as defined by statute, violated Fifteenth Amendment by using ancestry as proxy for race, and thereby enacting a race-based voting qualification; (2) exclusion of non-Hawaiians from voting for OHA trustees was not permissible under cases allowing differential treatment of certain members of Indian tribes; (3) voting qualification was not permissible under cases holding that one-person, one-vote rule did not pertain to certain special purpose districts; and (4) voting qualification was not saved from unconstitutionality on theory that voting restriction merely ensured an alignment of interests between fiduciaries and beneficiaries of a trust.

Reversed.

Justice Breyer filed an opinion concurring in the result, in which Justice Souter joined.

Justice Stevens filed a dissenting opinion, in which Justice Ginsburg joined in part.

Justice Ginsburg filed a dissenting opinion.

West Headnotes

[1] **Constitutional Law 82(8)**
92k82(8) Most Cited Cases

Fifteenth Amendment, which prohibits federal government and the states from denying or abridging the right to vote on account of race, grants protection to all persons, not just members of a particular race. U.S.C.A. Const.Amend. 15.

[2] **Constitutional Law 82(8)**
92k82(8) Most Cited Cases

[2] **States 46**
360k46 Most Cited Cases

Provision of Hawai'i Constitution governing election of trustees for Office of Hawaiian Affairs (OHA), under which voter eligibility was limited to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian" as defined by statute, violated Fifteenth Amendment, since voting structure granted the vote to persons of defined ancestry and to no others, and ancestry was a proxy for race, to extent that object of statutory definitions in question was to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

[3] **States 46**
360k46 Most Cited Cases

Hawai'i's exclusion of non-Hawaiians from voting for trustees for Office of Hawaiian Affairs (OHA) was not permissible under cases allowing the differential treatment of certain members of Indian tribes, since, even assuming there was authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress could not authorize a State to create a voting scheme which excluded whole classes of citizens from decisionmaking in critical state affairs based on their race. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

[4] **Constitutional Law 82(8)**
92k82(8) Most Cited Cases

[4] **Constitutional Law** 215.3
92k215.3 Most Cited Cases

[4] **States** 46
360k46 Most Cited Cases

Hawai'i's exclusion of non-Hawaiians from voting for trustees for Office of Hawaiian Affairs (OHA), which constituted a race-based abridgement of the right to vote, was not permissible under cases holding that the one-person, one-vote rule did not pertain to certain special purpose districts, since compliance with Fourteenth Amendment's one-person, one-vote rule did not excuse noncompliance with the Fifteenth Amendment. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

[5] **Constitutional Law** 82(8)
92k82(8) Most Cited Cases

[5] **States** 46
360k46 Most Cited Cases

Hawai'i's exclusion of non-Hawaiians from voting for trustees for Office of Hawaiian Affairs (OHA) was not saved from being struck down under Fifteenth Amendment on theory that voting restriction merely ensured an alignment of interests between fiduciaries and beneficiaries of a trust, and thus that the restriction was based on beneficiary status rather than race; it was not clear that voting classification was symmetric with beneficiaries of programs administered by OHA, and, in any event, State's argument rested on demeaning premise that citizens of a particular race were somehow more qualified than others to vote on certain matters, a premise inconsistent with the Fifteenth Amendment. U.S.C.A. Const.Amend. 15; Haw.Const. Art. 12, § 5; HRS § 10-2.

****1045** ***495** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282.

The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees compose the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA. The agency administers programs designed for the benefit of two subclasses of Hawaiian citizenry, "Hawaiians" and "native Hawaiians." State law defines "native Hawaiians" as descendants of not less than one-half part of the races inhabiting the islands before 1778, and "Hawaiians"--a larger class that includes "native Hawaiians"--as descendants of the peoples inhabiting the Hawaiian Islands in 1778. The trustees are chosen in a statewide election in which only "Hawaiians" may vote. Petitioner Rice, a Hawaiian citizen without the requisite ancestry to be a "Hawaiian" under state law, applied to vote in OHA trustee elections. When his application was denied, he sued respondent Governor (hereinafter State), claiming, *inter alia,* that the voting exclusion was invalid under the Fourteenth and Fifteenth Amendments. The Federal District Court granted the State summary judgment. Surveying the history of the islands and their people, it determined that Congress and Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which is analogous to the relationship between the United States and Indian tribes. It examined the voting qualifications with the latitude applied to legislation passed pursuant to Congress' power over Indian affairs, see *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290, and found that the electoral scheme was rationally related to the State's responsibility under its Admission Act to utilize a part of the proceeds from certain public lands for the native Hawaiians' benefit. The Ninth Circuit affirmed, finding that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." 146 F.3d 1075, 1079.

Held: Hawaii's denial of Rice's right to vote in OHA trustee elections violates the Fifteenth Amendment. Pp. 1054-1060.

****1046** (a) The Amendment's purpose and command are set forth in explicit and comprehensive language. The National Government and the States may not deny or abridge the right to vote on account of race. The Amendment reaffirms the equality of races at the most basic level ***496** of the democratic process, the exercise of the voting franchise. It protects all persons, not just members of a particular race. Important precedents give instruction in the instant case. The Amendment was quite sufficient to invalidate a grandfather clause that did not mention race but instead used ancestry in an attempt to

confine and restrict the voting franchise, *Guinn v. United States,* 238 U.S. 347, 364-365, 35 S.Ct. 926, 59 L.Ed. 1340; and it sufficed to strike down the white primary systems designed to exclude one racial class (at least) from voting, see, *e.g., Terry v. Adams,* 345 U.S. 461, 469-470, 73 S.Ct. 809, 97 L.Ed. 1152. The voting structure in this case is neither subtle nor indirect; it specifically grants the vote to persons of the defined ancestry and to no others. Ancestry can be a proxy for race. It is that proxy here. For centuries Hawaii was isolated from migration. The inhabitants shared common physical characteristics, and by 1778 they had a common culture. The provisions at issue reflect the State's effort to preserve that commonality to the present day. In interpreting the Reconstruction Era civil rights laws this Court has observed that racial discrimination is that which singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics." *Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582. The very object of the statutory definition here is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The history of the State's definition also demonstrates that the State has used ancestry as a racial definition and for a racial purpose. The drafters of the definitions of "Hawaiian" and "native Hawaiian" emphasized the explicit tie to race. The State's additional argument that the restriction is race neutral because it differentiates even among Polynesian people based on the date of an ancestor's residence in Hawaii is undermined by the classification's express racial purpose and its actual effects. The ancestral inquiry in this case implicates the same grave concerns as a classification specifying a particular race by name, for it demeans a person's dignity and worth to be judged by ancestry instead of by his or her own merit and essential qualities. The State's ancestral inquiry is forbidden by the Fifteenth Amendment for the further reason that using racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not 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. The State's electoral restriction enacts a race-based voting qualification. Pp. 1054-1057.

(b) The State's three principal defenses of its voting law are rejected. It argues first that the exclusion of non-Hawaiians from voting is permitted under this Court's cases allowing the differential treatment of Indian tribes. However, even if Congress had the authority, delegated ***497** to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of the sort created here. Congress may not 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. The elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. *Morton v. Mancari, supra,* distinguished. The State's further contention that the limited voting franchise is sustainable under this Court's cases holding that the one-person, one-vote rule does ****1047** not pertain to certain special purpose districts such as water or irrigation districts also fails, for compliance with the one- person, one-vote rule of the Fourteenth Amendment does not excuse compliance with the Fifteenth Amendment. Hawaii's final argument that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. While the bulk of the funds appears to be earmarked for the benefit of "native Hawaiians," the State permits both "native Hawaiians" and "Hawaiians" to vote for trustees. The argument fails on more essential grounds; it rests on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Pp. 1057- 1060.

146 F.3d 1075, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, AND THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the result, in which SOUTER, J., joined, *post,* p. 1060. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part II, *post,* p. 1062. GINSBURG, J., filed a dissenting opinion, *post,* p. 1073.

Theodore B. Olson, Washington, DC, for petitioner.

John G. Roberts, Jr., Washington, DC, for respondent.

***498** Edwin S. Kneedler, Washington, DC, for

United States, as amicus curiae, by special leave of the Court.

Justice KENNEDY delivered the opinion of the Court.

A citizen of Hawaii comes before us claiming that an explicit, race-based voting qualification has barred him from voting in a statewide election. The Fifteenth Amendment to the Constitution of the United States, binding on the National Government, the States, and their political subdivisions, controls the case.

The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees compose ***499** the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA. Haw. Const., Art. XII, § 5. The agency administers programs designed for the benefit of two subclasses of the Hawaiian citizenry. The smaller class comprises those designated as "native Hawaiians," defined by statute, with certain supplementary language later set out in full, as descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778. Haw.Rev.Stat. § 10-2 (1993). The second, larger class of persons benefited by OHA programs is "Hawaiians," defined to be, with refinements contained in the statute we later quote, those persons who are descendants of people inhabiting the Hawaiian Islands in 1778. *Ibid.* The right to vote for trustees is limited to "Hawaiians," the second, larger class of persons, which of course includes the smaller class of "native Hawaiians." Haw. Const., Art. XII, § 5.

Petitioner Rice, a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term, does not have the requisite ancestry even for the larger class. He is not, then, a "Hawaiian" in terms of the statute; so he may not vote in the trustee election. The issue presented by this case is whether Rice may be so barred. Rejecting the State's arguments that the classification in question is not racial or that, if it is, it is nevertheless valid for other reasons, we hold Hawaii's denial of petitioner's ****1048** right to vote to be a clear violation of the Fifteenth Amendment.

I

When Congress and the State of Hawaii enacted the laws we are about to discuss and review, they made their own assessments of the events which intertwine Hawaii's history with the history of America itself. We will begin with a very brief account of that historical background. Historians and other scholars who write of Hawaii will have a different purpose and more latitude than do we. They may draw judgments either more laudatory or more harsh than the ***500** ones to which we refer. Our more limited role, in the posture of this particular case, is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue. The litigants seem to agree that two works in particular are appropriate for our consideration, and we rely in part on those sources. See L. Fuchs, Hawaii Pono: An Ethnic and Political History (1961) (hereinafter Fuchs); 1-3 R. Kuykendall, The Hawaiian Kingdom (1938); (1953); (1967) (hereinafter Kuykendall).

The origins of the first Hawaiian people and the date they reached the islands are not established with certainty, but the usual assumption is that they were Polynesians who voyaged from Tahiti and began to settle the islands around A.D. 750. Fuchs 4; 1 Kuykendall 3; see also G. Daws, Shoal of Time: A History of the Hawaiian Islands xii-xiii (1968) (Marquesas Islands and Tahiti). When England's Captain Cook made landfall in Hawaii on his expedition in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own. They had well-established traditions and customs and practiced a polytheistic religion. Agriculture and fishing sustained the people, and, though population estimates vary, some modern historians conclude that the population in 1778 was about 200,000-300,000. See Fuchs 4; R. Schmitt, Historical Statistics of Hawaii 7 (1977) (hereinafter Schmitt). The accounts of Hawaiian life often remark upon the people's capacity to find beauty and pleasure in their island existence, but life was not altogether idyllic. In Cook's time the islands were ruled by four different kings, and intra-Hawaiian wars could inflict great loss and suffering. Kings or principal chieftains, as well as high priests, could order the death or sacrifice of any subject. The society was one, however, with its own identity, its own cohesive forces, its own history.

In the years after Cook's voyage many expeditions would follow. A few members of the ships' companies remained on ***501** the islands, some as

authorized advisers, others as deserters. Their intermarriage with the inhabitants of Hawaii was not infrequent.

In 1810, the islands were united as one kingdom under the leadership of an admired figure in Hawaiian history, Kamehameha I. It is difficult to say how many settlers from Europe and America were in Hawaii when the King consolidated his power. One historian estimates there were no more than 60 or so settlers at that time. 1 Kuykendall 27. An influx was soon to follow. Beginning about 1820, missionaries arrived, of whom Congregationalists from New England were dominant in the early years. They sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices.

The 1800's are a story of increasing involvement of westerners in the economic and political affairs of the Kingdom. Rights to land became a principal concern, and there was unremitting pressure to allow non-Hawaiians to use and to own land and to be secure in their title. Westerners were not the only ones with pressing concerns, however, for the disposition and ownership of land came to be an unsettled matter among the Hawaiians themselves.

****1049** The status of Hawaiian lands has presented issues of complexity and controversy from at least the rule of Kamehameha I to the present day. We do not attempt to interpret that history, lest our comments be thought to bear upon issues not before us. It suffices to refer to various of the historical conclusions that appear to have been persuasive to Congress and to the State when they enacted the laws soon to be discussed.

When Kamehameha I came to power, he reasserted suzerainty over all lands and provided for control of parts of them by a system described in our own cases as "feudal." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 232, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 166, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). A well-known description of the King's early decrees is contained ***502** in an 1864 opinion of the Supreme Court of the Kingdom of Hawaii. The court, in turn, drew extensively upon an earlier report which recited, in part, as follows:

> " 'When the islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his own hands to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again after (often) passing through the hands of four, five or six persons from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them, the proportions of which rights were not clearly defined, although universally acknowledged.... The same rights which the King possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land, the King really owning the allodium, and the person in whose hands he placed the land, holding it in trust.' " *In re Estate of Kamehameha IV*, 2 Haw. 715, 718-719 (quoting Principles Adopted by the Board of Commissioners to Quiet Land Titles, 2 Stat. Laws 81-82 (Haw. Kingdom 1847)).

Beginning in 1839 and through the next decade, a successive ruler, Kamehameha III, approved a series of decrees and laws designed to accommodate demands for ownership and security of title. In the words of the Hawaiian Supreme Court, "[t]he subject of rights in land was one of daily increasing importance to the newly formed Government, for it was obvious that the internal resources of the country could not be developed until the system of undivided and undefined ownership in land should be abolished." 2 Haw., at 721. ***503** Arrangements were made to confer freehold title in some lands to certain chiefs and other individuals. The King retained vast lands for himself, and directed that other extensive lands be held by the government, which by 1840 had adopted the first Constitution of the islands. Thus was effected a fundamental and historic division, known as the Great Mahele. In 1850, foreigners, in turn, were given the right of land ownership.

The new policies did not result in wide dispersal of ownership. Though some provisions had been attempted by which tenants could claim lands, these proved ineffective in many instances, and ownership became concentrated. In 1920, the Congress of the United States, in a Report on the bill establishing the Hawaiian Homes Commission, made an assessment of Hawaiian land policy in the following terms:

> "Your committee thus finds that since the institution of private ownership of lands in Hawaii the native Hawaiians, outside of the King and the

chiefs, were granted and have held but a very small portion of the lands of the Islands. Under the homestead laws somewhat more ****1050** than a majority of the lands were homesteaded to Hawaiians, but a great many of these lands have been lost through improvidence and inability to finance farming operations. Most frequently, however, the native Hawaiian, with no thought of the future, has obtained the land for a nominal sum, only to turn about and sell it to wealthy interests for a sum more nearly approaching its real value. The Hawaiians are not business men and have shown themselves unable to meet competitive conditions unaided. In the end the speculators are the real beneficiaries of the homestead laws. Thus the tax returns for 1919 show that only 6.23 per centum of the property of the Islands is held by native Hawaiians and this for the most part is lands in the possession of approximately a thousand wealthy Hawaiians, the ***504** descendents of the chiefs." H.R.Rep. No. 839, 66th Cong., 2d Sess., 6 (1920).

While these developments were unfolding, the United States and European powers made constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general. The first "articles of arrangement" between the United States and the Kingdom of Hawaii were signed in 1826, 8 Department of State, Treaties and Other International Agreements of the United States of America 1776-1949, p. 861 (C. Bevans comp.1968), and additional treaties and conventions between the two countries were signed in 1849, 1875, and 1887, see Treaty with the Hawaiian Islands, 9 Stat. 977 (1849) (friendship, commerce, and navigation); Convention between the United States of America and His Majesty the King of the Hawaiian Islands, 19 Stat. 625 (1875) (commercial reciprocity); Supplementary Convention between the United States of America and His Majesty the King of the Hawaiian Islands, 25 Stat. 1399 (1887) (same). The United States was not the only country interested in Hawaii and its affairs, but by the later part of the century the reality of American dominance in trade, settlement, economic expansion, and political influence became apparent.

Tensions intensified between an anti-Western, pro-native bloc in the government on the one hand and western business interests and property owners on the other. The conflicts came to the fore in 1887. Westerners forced the resignation of the Prime Minister of the Kingdom of Hawaii and the adoption of a new Constitution, which, among other things, reduced the power of the monarchy and extended the right to vote to non-Hawaiians. 3 Kuykendall 344-372.

Tensions continued through 1893, when they again peaked, this time in response to an attempt by the then-Hawaiian monarch, Queen Liliuokalani, to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects. A so-called ***505** Committee of Safety, a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with United States Armed Forces, replaced the monarchy with a provisional government. That government sought annexation by the United States. On December 18 of the same year, President Cleveland, unimpressed and indeed offended by the actions of the American Minister, denounced the role of the American forces and called for restoration of the Hawaiian monarchy. Message of the President to the Senate and House of Representatives, reprinted in H.R.Rep. No. 243, 53d Cong., 2d Sess., 3-15 (1893). The Queen could not resume her former place, however, and, in 1894, the provisional government established the Republic of Hawaii. The Queen abdicated her throne a year later.

In 1898, President McKinley signed a Joint Resolution, sometimes called the Newlands Resolution, to annex the Hawaiian Islands as territory of the United States. 30 Stat. 750. According to the Joint Resolution, the Republic of Hawaii ****1051** ceded all former Crown, government, and public lands to the United States. *Ibid.* The resolution further provided that revenues from the public lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Ibid.* Two years later the Hawaiian Organic Act established the Territory of Hawaii, asserted United States control over the ceded lands, and put those lands "in the possession, use, and control of the government of the Territory of Hawaii ... until otherwise provided for by Congress." Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159.

In 1993, a century after the intervention by the Committee of Safety, the Congress of the United States reviewed this history, and in particular the role of Minister Stevens. Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the native Hawaiian people. 107 Stat. 1510.

***506** Before we turn to the relevant provisions two other important matters, which affected the demographics of Hawaii, must be recounted. The first is the tragedy inflicted on the early Hawaiian people by the introduction of western diseases and infectious agents. As early as the establishment of the rule of Kamehameha I, it was becoming apparent that the native population had serious vulnerability to diseases borne to the islands by settlers. High mortality figures were experienced in infancy and adulthood, even from common illnesses such as diarrhea, colds, and measles. Fuchs 13; see Schmitt 58. More serious diseases took even greater tolls. In the smallpox epidemic of 1853, thousands of lives were lost. *Ibid.* By 1878, 100 years after Cook's arrival, the native population had been reduced to about 47,500 people. *Id.*, at 25. These mortal illnesses no doubt were an initial cause of the despair, disenchantment, and despondency some commentators later noted in descendents of the early Hawaiian people. See Fuchs 13.

The other important feature of Hawaiian demographics to be noted is the immigration to the islands by people of many different races and cultures. Mostly in response to the demand of the sugar industry for arduous labor in the cane fields, successive immigration waves brought Chinese, Portuguese, Japanese, and Filipinos to Hawaii. Beginning with the immigration of 293 Chinese in 1852, the plantations alone drew to Hawaii, in one estimate, something over 400,000 men, women, and children over the next century. *Id.*, at 24; A. Lind, Hawaii's People 6-7 (4th ed.1980). Each of these ethnic and national groups has had its own history in Hawaii, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present society of the islands. See E. Nordyke, The Peopling of Hawai'i 28-98 (2d ed.1989). The 1990 census figures show the resulting ethnic diversity of the Hawaiian population. U.S. Dept. of Commerce, Bureau of Census, 1990 Census of Population, ***507** Supplementary Reports, Detailed Ancestry Groups for States (Oct. 1992).

With this background we turn to the legislative enactments of direct relevance to the case before us.

II

Not long after the creation of the new Territory, Congress became concerned with the condition of the native Hawaiian people. See H.R.Rep. No. 839, at 2-6; Hearings on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii before the House Committee on the Territories, 66th Cong., 2d Sess. (1920). Reciting its purpose to rehabilitate the native Hawaiian population, see H.R.Rep. No. 839, at 1-2, Congress enacted the Hawaiian Homes Commission Act, which set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians. Act of ****1052** July 9, 1921, ch. 42, 42 Stat. 108. The Act defined "native Hawaiian [s]" to include "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Ibid.*

Hawaii was admitted as the 50th State of the Union in 1959. With admission, the new State agreed to adopt the Hawaiian Homes Commission Act as part of its own Constitution. Pub.L. 86-3, § § 4, 7, 73 Stat. 5, 7 (Admission Act); see Haw. Const., Art. XII, § § 1-3. In addition, the United States granted Hawaii title to all public lands and public property within the boundaries of the State, save those which the Federal Government retained for its own use. Admission Act § § 5(b)-(d), 73 Stat. 5. This grant included the 200,000 acres set aside under the Hawaiian Homes Commission Act and almost 1.2 million additional acres of land. Brief for United States as *Amicus Curiae* 4.

The legislation authorizing the grant recited that these lands, and the proceeds and income they generated, were to ***508** be held "as a public trust" to be "managed and disposed of for one or more of" five purposes:

> "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible [,][4] for the making of public improvements, and [5] for the provision of lands for public use." Admission Act § 5(f), 73 Stat. 6.

In the first decades following admission, the State apparently continued to administer the lands that had been set aside under the Hawaiian Homes Commission Act for the benefit of native Hawaiians. The income from the balance of the public lands is said to have "by and large flowed to the department of education." Hawaii Senate Journal, Standing Committee Rep. No. 784, pp. 1350, 1351 (1979).

In 1978 Hawaii amended its Constitution to establish the Office of Hawaiian Affairs, Haw. Const., Art. XII, § 5, which has as its mission "[t]he betterment of conditions of native Hawaiians ... [and] Hawaiians," Haw.Rev.Stat. § 10-3 (1993). Members of the 1978 constitutional convention, at which the new amendments were drafted and proposed, set forth the purpose of the proposed agency:

> "Members [of the Committee of the Whole] were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it will unite Hawaiians as a people." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13, p. 1018 (1980).

***509** Implementing statutes and their later amendments vested OHA with broad authority to administer two categories of funds: a 20 percent share of the revenue from the 1.2 million acres of lands granted to the State pursuant to § 5(b) of the Admission Act, which OHA is to administer "for the betterment of the conditions of native Hawaiians," Haw.Rev.Stat. § 10-13.5 (1993), and any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" and/or "Hawaiians," Haw. Const., Art. XII, § 6. See generally Haw.Rev.Stat. § § 10-1 to 10-16. (The 200,000 acres set aside under the Hawaiian Homes Commission Act are administered by a separate agency. See Haw.Rev.Stat. § 26-17 (1993).) The Hawaiian Legislature has charged OHA with the mission of "[s]erving as the principal public agency ... responsible for the performance, development, and coordination of programs and activities relating ****1053** to native Hawaiians and Hawaiians," "[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians," "conducting advocacy efforts for native Hawaiians and Hawaiians," "[a]pplying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services," and "[s]erving as a receptacle for reparations." § 10-3.

OHA is overseen by a nine-member board of trustees, the members of which "shall be Hawaiians" and--presenting the precise issue in this case-- shall be "elected by qualified voters who are Hawaiians, as provided by law." Haw. Const., Art. XII, § 5; see Haw.Rev.Stat. § § 13D-1, 13D- 3(b)(1) (1993). The term "Hawaiian" is defined by statute:

> " '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." § 10-2.

The statute defines "native Hawaiian" as follows:

> ***510** " '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." *Ibid.*

Petitioner Harold Rice is a citizen of Hawaii and a descendant of preannexation residents of the islands. He is not, as we have noted, a descendant of pre-1778 natives, and so he is neither "native Hawaiian" nor "Hawaiian" as defined by the statute. Rice applied in March 1996 to vote in the elections for OHA trustees. To register to vote for the office of trustee he was required to attest: "I am also Hawaiian and desire to register to vote in OHA elections." Affidavit on Application for Voter Registration, Lodging by Petitioner, Tab 2. Rice marked through the words "am also Hawaiian and," then checked the form "yes." The State denied his application.

Rice sued Benjamin Cayetano, the Governor of Hawaii, in the United States District Court for the District of Hawaii. (The Governor was sued in his official capacity, and the Attorney General of Hawaii defends the challenged enactments. We refer to the respondent as "the State.") Rice contested his exclusion from voting in elections for OHA trustees and from voting in a special election relating to native Hawaiian sovereignty which was held in August 1996. After the District Court rejected the latter challenge, see *Rice v. Cayetano*, 941 F.Supp. 1529 (1996) (a decision not before us), the parties moved for summary judgment on the claim that the Fourteenth and Fifteenth Amendments to the United States Constitution invalidate the law excluding Rice from the OHA trustee elections.

***511** The District Court granted summary judgment to the State. 963 F.Supp. 1547 (D.Haw.1997). Surveying the history of the islands and their people, the District Court determined that Congress and the State of Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which the court found analogous to the relationship between the United States and the Indian tribes. *Id.*, at 1551-1554. On this premise, the court examined the voting qualification with the latitude that we have applied to legislation passed pursuant to Congress' power over Indian affairs. *Id.*, at 1554-1555 (citing *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)). Finding that the electoral scheme was "rationally related to the State's responsibility under the Admission Act to utilize a portion of the proceeds from the § 5(b) lands for the betterment of ****1054** Native Hawaiians," the District Court held that the voting restriction did not violate the Constitution's ban on racial classifications. 963 F.Supp., at 1554- 1555.

The Court of Appeals affirmed. 146 F.3d 1075 (C.A.9 1998). The court noted that Rice had not challenged the constitutionality of the underlying programs or of OHA itself. *Id.*, at 1079. Considering itself bound to "accept the trusts and their administrative structure as [it found] them, and assume that both are lawful," the court held that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." *Ibid.* The court so held notwithstanding its clear holding that the Hawaii Constitution and implementing statutes "contain a racial classification on their face." *Ibid.*

We granted certiorari, 526 U.S. 1016, 119 S.Ct. 1248, 143 L.Ed.2d 346 (1999), and now reverse.

III

The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. ***512** 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. Color and previous condition of servitude, too, are forbidden criteria or classifications, though it is unnecessary to consider them in the present case.

[1] Enacted in the wake of the Civil War, the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote, lest they be denied the civil and political capacity to protect their new freedom. Vital as its objective remains, the Amendment goes beyond it. Consistent with the design of the Constitution, the Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment. The Amendment grants protection to all persons, not just members of a particular race.

The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. A resolve so absolute required language as simple in command as it was comprehensive in reach. Fundamental in purpose and effect and self-executing in operation, the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race. "[B]y the inherent power of the Amendment the word white disappeared" from our voting laws, bringing those who had been excluded by reason of race within "the generic grant of suffrage made by the State." *Guinn v. United States*, 238 U.S. 347, 363, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); see also *Neal v. Delaware*, 103 U.S. 370, 389, 26 L.Ed. 567 (1881). The Court has acknowledged the Amendment's mandate of neutrality in straightforward terms: "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is." *United States v. Reese*, 92 U.S. 214, 218, 23 L.Ed. 563 (1876).

***513** Though the commitment was clear, the reality remained far from the promise. Manipulative devices and practices were soon employed to deny the vote to blacks. We have cataloged before the "variety and persistence" of these techniques. *South Carolina v. Katzenbach*, 383 U.S. 301, 311-312, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (citing, *e.g.*, *Guinn, supra* (grandfather clause); *Myers v. Anderson*, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349 (1915) (same); *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) ("procedural hurdles"); *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (white primary); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (same); ****1055** *United States v. Thomas*, 362 U.S. 58, 80 S.Ct. 612, 4 L.Ed.2d 535 (1960) *(per curiam)* (registration

challenges); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (racial gerrymandering); *Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965) ("interpretation tests")). Progress was slow, particularly when litigation had to proceed case by case, district by district, sometimes voter by voter. See 383 U.S., at 313-315, 86 S.Ct. 803.

Important precedents did emerge, however, which give instruction in the case now before us. The Fifteenth Amendment was quite sufficient to invalidate a scheme which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise. In 1910, the State of Oklahoma enacted a literacy requirement for voting eligibility, but exempted from that requirement the " 'lineal descendant[s]' " of persons who were " 'on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation.' " *Guinn, supra*, at 357, 35 S.Ct. 926. Those persons whose ancestors were entitled to vote under the State's previous, discriminatory voting laws were thus exempted from the eligibility test. Recognizing that the test served only to perpetuate those old laws and to effect a transparent racial exclusion, the Court invalidated it. 238 U.S., at 364-365, 35 S.Ct. 926.

More subtle, perhaps, than the grandfather device in *Guinn* were the evasions attempted in the white primary cases; but the Fifteenth Amendment, again by its own terms, sufficed to strike down these voting systems, systems designed ***514** to exclude one racial class (at least) from voting. See *Terry, supra*, at 469-470, 73 S.Ct. 809; *Allwright, supra*, at 663-666, 64 S.Ct. 757 (overruling *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935)). The Fifteenth Amendment, the Court held, could not be so circumvented: "The Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy ... not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local." *Terry, supra*, at 467, 73 S.Ct. 809.

[2] Unlike the cited cases, the voting structure now before us is neither subtle nor indirect. It is specific in granting the vote to persons of defined ancestry and to no others. The State maintains this is not a racial category at all but instead a classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race. Brief for Respondent 38-40. The State points to theories of certain scholars concluding that some inhabitants of Hawaii as of 1778 may have migrated from the Marquesas Islands and the Pacific Northwest, as well as from Tahiti. *Id.*, at 38-39, and n. 15. Furthermore, the State argues, the restriction in its operation excludes a person whose traceable ancestors were exclusively Polynesian if none of those ancestors resided in Hawaii in 1778; and, on the other hand, the vote would be granted to a person who could trace, say, one sixty-fourth of his or her ancestry to a Hawaiian inhabitant on the pivotal date. *Ibid.* These factors, it is said, mean the restriction is not a racial classification. We reject this line of argument.

Ancestry can be a proxy for race. It is that proxy here. Even if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification. But that is not this case. For centuries Hawaii was isolated from migration. 1 Kuykendall 3. The inhabitants shared common physical characteristics, ***515** and by 1778 they had a common culture. Indeed, the drafters of the statutory definition in question emphasized the "unique culture of the ancient Hawaiians" in explaining their work. Hawaii Senate ****1056** Journal, Standing Committee Rep. No. 784, at 1354; see *ibid.* ("Modern scholarship also identified such race of people as culturally distinguishable from other Polynesian peoples"). The provisions before us reflect the State's effort to preserve that commonality of people to the present day. In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics." *Saint Francis College v. Al--Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987). The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.

The history of the State's definition demonstrates the point. As we have noted, the statute defines "Hawaiian" as

> "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands

> in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw.Rev.Stat. § 10-2 (1993).

A different definition of "Hawaiian" was first promulgated in 1978 as one of the proposed amendments to the State Constitution. As proposed, "Hawaiian" was defined as "any descendant of the races inhabiting the Hawaiian Islands, previous to 1778." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13, at 1018. Rejected as not ratified in a valid manner, see *Kahalekai v. Doi*, 60 Haw. 324, 342, 590 P.2d 543, 555 (1979), ***516** the definition was modified and in the end promulgated in statutory form as quoted above. See Hawaii Senate Journal, Standing Committee Rep. No. 784, at 1350, 1353-1354; *id.*, Conf. Comm. Rep. No. 77, at 998. By the drafters' own admission, however, any changes to the language were at most cosmetic. Noting that "[t]he definitions of 'native Hawaiian' and 'Hawaiian' are changed to substitute 'peoples' for 'races,' " the drafters of the revised definition "stress[ed] that this change is non-substantive, and that 'peoples' does mean 'races.' " *Ibid.*; see also *id.*, at 999 ("[T]he word 'peoples' has been substituted for 'races' in the definition of 'Hawaiian'. Again, your Committee wishes to emphasize that this substitution is merely technical, and that 'peoples' does mean 'races' ").

The next definition in Hawaii's compilation of statutes incorporates the new definition of "Hawaiian" and preserves the explicit tie to race:

> " '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." Haw.Rev.Stat. § 10-2 (1993).

This provision makes it clear: "[T]he descendants ... of [the] aboriginal peoples" means "the descendants ... of the races." *Ibid.*

As for the further argument that the restriction differentiates even among Polynesian people and is based simply on the date of an ancestor's residence in Hawaii, this too is insufficient to prove the classification is nonracial in purpose and operation. Simply because a class defined by ancestry does not include all members of the race does not suffice to ***517** make the classification race neutral. Here, the State's argument is undermined by its express ****1057** racial purpose and by its actual effects.

The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. 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. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not 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. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943). Ancestral tracing of this sort achieves its purpose by creating a legal category 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.

IV

The State offers three principal defenses of its voting law, any of which, it contends, allows it to prevail even if the classification is a racial one under the Fifteenth Amendment. We examine, and reject, each of these arguments.

***518** A

[3] The most far reaching of the State's arguments is that exclusion of non-Hawaiians from voting is permitted under our cases allowing the differential treatment of certain members of Indian tribes. The decisions of this Court, interpreting the effect of treaties and congressional enactments on the subject, have held that various tribes retained some elements of quasi- sovereign authority, even after cession of

their lands to the United States. See *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 425, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (plurality opinion); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 208, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). The retained tribal authority relates to self-governance. *Brendale, supra*, at 425, 109 S.Ct. 2994 (plurality opinion). In reliance on that theory the Court has sustained a federal provision giving employment preferences to persons of tribal ancestry. *Mancari*, 417 U.S., at 553-555, 94 S.Ct. 2474. The *Mancari* case, and the theory upon which it rests, are invoked by the State to defend its decision to restrict voting for the OHA trustees, who are charged so directly with protecting the interests of native Hawaiians.

If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State--and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993--has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. Compare Van Dyke, The Political Status of the ****1058**Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998), with Benjamin, ***519**Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996). We can stay far off that difficult terrain, however.

The State's argument fails for a more basic reason. 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.

Of course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 673, n. 20, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (treaties securing preferential fishing rights); *United States v. Antelope*, 430 U.S. 641, 645-647, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (exclusive federal jurisdiction over crimes committed by Indians in Indian country); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84-85, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977) (distribution of tribal property); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-480, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (Indian immunity from state taxes); *Fisher v. District Court of Sixteenth Judicial Dist. of Montana*, 424 U.S. 382, 390-391, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) *(per curiam)* (exclusive tribal court jurisdiction over tribal adoptions). As we have observed, "every piece of legislation dealing with Indian tribes and reservations ... single[s] out for special treatment a constituency of tribal Indians." *Mancari, supra*, at 552, 94 S.Ct. 2474.

Mancari, upon which many of the above cases rely, presented the somewhat different issue of a preference in hiring and promoting at the federal Bureau of Indian Affairs (BIA), a preference which favored individuals who were " 'one-fourth or more degree Indian blood and ... member[s] of a Federally-recognized tribe.' " 417 U.S., at 553, n. 24, 94 S.Ct. 2474 (quoting 44 BIAM 335, 3.1 (1972)). Although the classification had a racial component, the Court found it important that the preference was "not directed towards a 'racial' group consisting of 'Indians,' " but rather "only to members of 'federally ***520** recognized' tribes." 417 U.S., at 553, n. 24, 94 S.Ct. 2474. "In this sense," the Court held, "the preference [was] political rather than racial in nature." *Ibid.*; see also *id.*, at 554, 94 S.Ct. 2474 ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"). Because the BIA preference could be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," and was "reasonable and rationally designed to further Indian self-government," the Court held that it did not offend the Constitution. *Id.*, at 555, 94 S.Ct. 2474. The opinion was careful to note, however, that the case was confined to the authority of the BIA, an agency described as "*sui generis*." *Id.*, at 554, 94 S.Ct. 2474.

Hawaii would extend the limited exception of *Mancari* to a new and larger dimension. The State contends that "one of the very purposes of OHA--and the challenged voting provision--is to afford Hawaiians a measure of self- governance," and so it

fits the model of *Mancari*. Brief for Respondent 34. It does not follow from *Mancari*, however, 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.

The tribal elections established by the federal statutes the State cites illuminate its error. See Brief for Respondent 22 (citing, *e.g.*, the Menominee Restoration Act, 25 U.S.C. § 903b, and the Indian Reorganization Act, 25 U.S.C. § 476). If a ****1059** 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. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations. See Haw. Const., Art. XII, § § 5-6. The Hawaiian Legislature has declared that OHA exists to serve "as the principal public agency in th[e] ***521** State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." Haw.Rev.Stat. § 10-3(3) (1993); see also Lodging by Petitioner, Tab 6, OHA Annual Report 1993-1994, p. 5 (May 27, 1994) (admitting that "OHA is technically a part of the Hawaii state government," while asserting that "it operates as a semi-autonomous entity"). Foremost among the obligations entrusted to this agency is the administration of a share of the revenues and proceeds from public lands, granted to Hawaii to "be held by said State as a public trust." Admission Act § § 5(b), (f), 73 Stat. 5, 6; see Haw. Const., Art. XII, § 4.

The delegates to the 1978 constitutional convention explained the position of OHA in the state structure:

> "The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency. The chairman may be an ex officio member of the governor's cabinet. The status of the Office of Hawaiian Affairs is to be unique and special .... The committee developed this office based on the model of the University of Hawaii. In particular, the committee desired to use this model so that the office could have maximum control over its budget, assets and personnel. The committee felt that it was important to arrange a method whereby the assets of Hawaiians could be kept separate from the rest of the state treasury." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, at 645.

Although it is apparent that OHA has a unique position under state law, it is just as apparent that it remains an arm of the State.

The validity of the voting restriction is the only question before us. As the Court of Appeals did, we assume the validity ***522** of the underlying administrative structure and trusts, without intimating any opinion on that point. Nonetheless, the elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs. The Fifteenth Amendment forbids this result.

B

[4] Hawaii further contends that the limited voting franchise is sustainable under a series of cases holding that the rule of one person, one vote does not pertain to certain special purpose districts such as water or irrigation districts. See *Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973). Just as the *Mancari* argument would have involved a significant extension or new application of that case, so too it is far from clear that the *Salyer* line of cases would be at all applicable to statewide elections for an agency with the powers and responsibilities of OHA.

We would not find those cases dispositive in any event, however. The question before us is not the one-person, one-vote requirement of the Fourteenth Amendment, but the race neutrality command of the Fifteenth Amendment. Our special purpose district cases have not suggested that compliance with the one-person, one-****1060** vote rule of the Fourteenth Amendment somehow excuses compliance with the Fifteenth Amendment. We reject that argument here. We held four decades ago that state authority over the boundaries of political subdivisions, "extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution." *Gomillion*, 364 U.S., at 345, 81 S.Ct. 125. 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.

***523** C

[5] Hawaii's final argument is that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust. Thus, the contention goes, the restriction is based on beneficiary status rather than race.

As an initial matter, the contention founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. 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.

Hawaii's argument fails on more essential grounds. 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. That reasoning attacks the central meaning of the Fifteenth Amendment. The Amendment applies to "any election in which public issues are decided or public officials selected." *Terry*, 345 U.S., at 468, 73 S.Ct. 809. There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others. Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry. Hawaii may not assume, based on race, that petitioner or any other of its citizens will not cast a principled vote. To accept the position advanced by the State would give rise to the same indignities, and the same resulting tensions and animosities, ***524** the Amendment was designed to eliminate. The voting restriction under review is prohibited by the Fifteenth Amendment.

* * *

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

In this case the Fifteenth Amendment invalidates the electoral qualification based on ancestry. The judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

Justice BREYER, with whom Justice SOUTER joins, concurring in the result.

I agree with much of what the Court says and with its result, but I do not agree with the critical rationale that underlies that result. Hawaii seeks to justify its voting scheme by drawing an analogy between ****1061** its Office of Hawaiian Affairs (OHA) and a trust for the benefit of an Indian tribe. The majority does not directly deny the analogy. It instead at one point assumes, at least for argument's sake, that the "revenues and proceeds" at issue are from a " 'public trust.' " *Ante,* at 1059. It also assumes without deciding that the State could "treat Hawaiians or native Hawaiians as tribes." *Ante,* at 1058. Leaving these issues undecided, it holds that the Fifteenth Amendment forbids Hawaii's voting scheme, because the "OHA is a state agency," and thus ***525** election to the OHA board is not "the internal affair of a quasi sovereign," such as an Indian tribe. *Ante,* at 1059.

I see no need, however, to decide this case on the basis of so vague a concept as "quasi sovereign," and I do not subscribe to the Court's consequently sweeping prohibition. Rather, in my view, we should reject Hawaii's effort to justify its rules through analogy to a trust for an Indian tribe because the record makes clear that (1) there is no "trust" for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe.

The majority seems to agree, though it does not decide, that the OHA bears little resemblance to a trust for native Hawaiians. It notes that the Hawaii

Constitution uses the word "trust" when referring to the 1.2 million acres of land granted in the Admission Act. *Ante,* at 1052, 1053-1054. But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii. The Act specifies that the land is to be used for the education of, the developments of homes and farms for, the making of public improvements for, and public use by, *all* of Hawaii's citizens, as well as for the betterment of those who are "native." Admission Act § 5(f).

Moreover, OHA funding comes from several different sources. See, *e.g.,* OHA Fiscal 1998 Annual Report 38 (hereinafter Annual Report) ($15 million from the 1.2 million acres of public lands; $11 million from "[d]ividend and interest income"; $3 million from legislative appropriations; $400,000 from federal and other grants). All of OHA's funding is authorized by ordinary state statutes. See, *e.g.,* Haw.Rev.Stat. § § 10-4, 10-6, 10-13.5 (1993); see also Annual Report 11 ("OHA's fiscal 1998-99 legislative budget was passed as Acts 240 and 115 by the 1997 legislature"). The amounts of funding and funding sources are thus subject to change by ordinary legislation. OHA spends most, but not all, of its money to benefit native Hawaiians in many different ways. See Annual Report (OHA projects support education, housing,***526** health, culture, economic development, and nonprofit organizations). As the majority makes clear, OHA is simply a special purpose department of Hawaii's state government. *Ante,* at 1058-1059.

As importantly, the statute defines the electorate in a way that is not analogous to membership in an Indian tribe. Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans. But the statute does not limit the electorate to native Hawaiians. Rather it adds to approximately 80,000 native Hawaiians about 130,000 additional "Hawaiians," defined as including anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian (assuming nine generations between 1778 and the present). See Native Hawaiian Data Book 39 (1998). Approximately 10% to 15% of OHA's funds are spent specifically to benefit this latter group, see Annual Report 38, which now constitutes about 60% of the OHA electorate.

I have been unable to find any Native American tribal definition that is so broad. The Alaska Native Claims Settlement Act, for example, defines a "Native" as "a person of one-fourth degree or more Alaska Indian" or one "who is regarded as an Alaska Native by the Native village or ****1062** Native group of which he claims to be a member and whose father or mother is ... regarded as Native by any village or group" (a classification perhaps more likely to reflect real group membership than any blood quantum requirement). 43 U.S.C. § 1602(b). Many tribal constitutions define membership in terms of having had an ancestor whose name appeared on a tribal roll--but in the far less distant past. See, *e.g.,* Constitution of the Choctaw Nation of Oklahoma, Art. II (membership consists of persons on final rolls approved in 1906 and their lineal descendants); Constitution of the Sac and Fox Tribe of Indians of Oklahoma, Art. II (membership consists of persons on official roll of 1937, children since born to two members of the Tribe, and children born to one member ***527** and a nonmember if admitted by the council); Revised Constitution of the Jicarilla Apache Tribe, Art. III (membership consists of persons on official roll of 1968 and children of one member of the Tribe who are at least three-eighths Jicarilla Apache Indian blood); Revised Constitution Mescalero Apache Tribe, Art. IV (membership consists of persons on the official roll of 1936 and children born to at least one enrolled member who are at least one-fourth degree Mescalero Apache blood).

Of course, a Native American tribe has broad authority to define its membership. See *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72, n. 32, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). There must, however, be some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members--leaving some combination of luck and interest to determine which potential members become actual voters--goes well beyond any reasonable limit. It was not a tribe, but rather the State of Hawaii, that created this definition; and, as I have pointed out, it is not like any actual membership classification created by any actual tribe.

These circumstances are sufficient, in my view, to destroy the analogy on which Hawaii's justification must depend. This is not to say that Hawaii's definitions themselves independently violate the Constitution, cf. *post,* at 1066-1068, n. 11 (Justice STEVENS, dissenting); it is only to say that the analogies they here offer are too distant to save a

race-based voting definition that in their absence would clearly violate the Fifteenth Amendment. For that reason I agree with the majority's ultimate conclusion.

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 ***528** 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 ****1063** 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." [FN1]

FN1. App. E to Brief for Hawaii 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 Hawaii 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 for the *Aloha* spirit." *Id.*, at E-5.

***529** 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 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 [FN2] and the fiduciary character of the special ***530** federal relationship with descendants of those once sovereign peoples. [FN3] 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.

FN2. See, *e.g.*, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 531, n. 6, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998); *United States v. Wheeler*, 435 U.S. 313, 319, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977); *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-565, 23 S.Ct. 216, 47 L.Ed. 299 (1903); *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886).

FN3. See, *e.g.*, *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); *Kagama*, 118 U.S., at 384-385, 6 S.Ct. 1109; *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831).

"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, ****1064** so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises 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, 6 S.Ct. 1109, 30 L.Ed. 228 (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.' " [FN4] 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, 39- 40, 34 S.Ct. 1, 58 L.Ed. 107 (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 ***531** 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.*

FN4. *Sandoval*, 231 U.S., at 45, 34 S.Ct. 1; *Kagama*, 118 U.S., at 384-385, 6 S.Ct. 1109.

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, [FN5] the coherence or existence of tribal self-government, [FN6] or the varying definitions of "Indian" Congress has chosen to adopt. [FN7] 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 ***532** towards the Indians, such legislative judgments will not be disturbed." *Morton v. Mancari*, 417 U.S. 535, 554-555, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

FN5. See, *e.g.*, *United States v. Celestine*, 215 U.S. 278, 286-287, 30 S.Ct. 93, 54 L.Ed. 195 (1909).

FN6. See *United States v. John*, 437 U.S. 634, 653, 98 S.Ct. 2541, 57 L.Ed.2d 489 (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 federal power to deal with them"); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 82, n. 14, 84-85, 97 S.Ct. 911, 51 L.Ed.2d 173 (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, 94 S.Ct. 2474)).

FN7. See generally F. Cohen, 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").

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 ****1065** 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 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 1051. 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. [FN8] Hawaii was required to adopt this Act as a condition ***533** 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 Admissions 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 1049-1050.

FN8. 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.

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 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. [FN9] 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 ***534** 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 ****1066** the United States includes the authority to legislate in matters affecting the native peoples of ... Hawaii").

FN9. See Brief for Hawaii 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.*

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 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. 417 U.S., at 555, 94 S.Ct. 2474.

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 1057-1059. Second, the elections are "elections 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 1058- 1059. 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 ***535** 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 1058. 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 nontribal member Indians, it also required for eligibility that ethnic Native Americans possess a certain quantum of Indian blood. [FN10] 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. [FN11]

FN10. 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, 94 S.Ct. 2474.

FN11. 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 1062 (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, 98 S.Ct. 1670, 56 L.Ed.2d 106 (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 1064-1066, 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 CFR, 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 1061, 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 moneys to be distributed to "enrolled natives," § § 1604-1605); see also *supra,* at 1066, and n. 10. In the end, what matters is that the determination of indigenous status or "real group membership," *ante,* at 1062 (BREYER, J., concurring in result), is one to be made by Congress--not by this Court.

****1067 *536** 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 1058-1060. 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 ***537** 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 the federal 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, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979), in which we upheld against a Fourteenth Amendment challenge a state law 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, 99 S.Ct. 740 (quoting *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (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 Admissions 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 ****1068** 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.

***538** 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 responsive to the needs of its constituent groups." *Mancari*, 417 U.S., at 554, 94 S.Ct. 2474. 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, 94 S.Ct. 2474. 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. [FN12]

> FN12. 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 1053-1054, that the majority is able to hold that the OHA qualification denies non-"Hawaiians" the right to vote "on account of race."

***539** Section 1 of the Fifteenth Amendment provides:

> "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 1055-1056, 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 thereafter continued to reside in Hawaii." Haw.Rev.Stat. § 10-2 (1993). 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 ****1069** 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 1055. That is, of course, true, but it by no means ***540** 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, 35 S.Ct. 926, 59 L.Ed. 1340 (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 1055. 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, 73 S.Ct. 809, 97 L.Ed. 1152 (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, 73 S.Ct. 809. Similarly, in *Smith v. Allwright,* 321 U.S. 649, 664, 64 S.Ct. 757, 88 L.Ed. 987 (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 1055, 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 ***541** 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." [FN13] 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.

FN13. 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, p. 644.

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 ****1070** "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 1060. 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.

***542** While that may or may not be true depending upon the 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 1051--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. [FN14]

FN14. 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 constitute 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 1048. Prior to 1778, although there "was no private ownership of land," *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 232, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the native Hawaiians "lived in a highly organized, self-sufficient, subsistence social system based on communal land tenure with a sophisticated language, culture, and religion," 42 U.S.C. § 11701(4). According to Senator Akaka, their society "was steeped in science [and they] honored their *'aina* (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.

543** Even if one refuses to recognize the beneficiary status of OHA trustee voters entirely, [FN15] it cannot be said that the ancestry-*1071** based voting qualification here simply stands in the ***544** 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.

FN15. Justice BREYER's even broader contention that "there is no 'trust' for native Hawaiians here," *ante,* at 1061, appears to make the greater mistake of conflating the public trust established by Hawaii's Constitution and laws, see *supra,* at 1067-1068, 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 1062, 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 moneys, 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 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 1064-1066, the OHA scheme surely satisfies the established standard for testing an exercise of that power.

At pains then to identify at work here a singularly "racial purpose," *ante,* at 1056, 1057--whatever that might mean, although one might assume the phrase a "proxy" for "racial discrimination"--the majority next posits that "[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 1057. 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 ***545** 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. [FN16]

> FN16. 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, 107 S.Ct. 2076, 95 L.Ed.2d 668 (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.

****1072** In this light, it is easy to understand why the classification here is not "demeaning" at all, *ante,* at 1060, 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 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 ***546** is disclosed by their ethnic characteristics and cultural traditions." *Ante,* at 1057. 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 1060--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. [FN17] As Judge Rymer explained:

> FN17. 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. 44a.

***547** "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 ****1073** 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. " 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 between the board member, as trustee, and the native Hawaiian, as beneficiary.' *Id."*
146 F.3d 1075, 1081-1082 (C.A.9 1998).

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

Accordingly, I respectfully dissent.

Justice GINSBURG, dissenting.

I dissent essentially for the reasons stated by Justice STEVENS in Part II of his dissenting opinion. *Ante,* at 1063-1068 (relying on established federal authority over Native ***548** Americans). Congress' prerogative to enter into special trust relationships with indigenous peoples, *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), as Justice STEVENS cogently explains, is not confined to tribal Indians. In particular, it encompasses native Hawaiians, whom Congress has in numerous statutes reasonably treated as qualifying for the special status long recognized for other once-sovereign indigenous peoples. See *ante,* at 1065-1066 and n. 9 (STEVENS, J., dissenting). That federal trust responsibility, both the Court and Justice STEVENS recognize, has been delegated by Congress to the

State of Hawaii. Both the Office of Hawaiian Affairs and the voting scheme here at issue are "tied rationally to the fulfillment" of that obligation. See *Mancari*, 417 U.S., at 555, 94 S.Ct. 2474. No more is needed to demonstrate the validity of the Office and the voting provision under the Fourteenth and Fifteenth Amendments.

120 S.Ct. 1044, 528 U.S. 495, 145 L.Ed.2d 1007, 68 USLW 4138, 00 Cal. Daily Op. Serv. 1341, 2000 Daily Journal D.A.R. 1881, 2000 CJ C.A.R. 898, 13 Fla. L. Weekly Fed. S 105

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The Wall Street Journal

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Rule of Law

Are Hawaiians Indians? The Justice Department Thinks So

By Brett M. **Kavanaugh**

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.

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 governing 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 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 Croatian-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-run the constitutional restrictions on racial classifications that the Supreme Court has reinforced 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.

(See related letter: "Letters to the Editor: Righting the Wrongs Perpetrated in Hawaii" -- WSJ Oct. 18, 1999)

---- INDEX REFERENCES ----

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VI. Product Liability Cases

Brett Kavanaugh – Product Liability

Allegation: Mr. Kavanaugh took the side of big business by filing an amicus brief before the Supreme Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1998), in an attempt to deny recovery to a family who lost its daughter when she fell off a boat and was killed by the propeller.

Facts:

- **The amicus brief filed by Mr. Kavanaugh's client, General Motors Corporation, was consistent with the unanimous opinion of the court below – the Eleventh Circuit – and with the decisions of many other courts across the country.**
  - ✓ The Eleventh Circuit held that the Georgia law was impliedly preempted because the Coast Guard – which had exclusive authority in boat and equipment safety standards – determined that propeller guards should not be required because their use could actually increase the danger to boaters.
- **Numerous courts, both state and federal, already had adopted the position taken by Mr. Kavanaugh in the amicus brief – that state common law claims for negligence or product liability were either expressly or impliedly preempted by the Federal Boat Safety Act.**
  - ✓ At the time the amicus brief was submitted, courts in California, Georgia, Connecticut, Ohio, Illinois, and Michigan had come to the conclusion argued in the brief filed by Mr. Kavanaugh.
  - ✓ The district court judge in *Lewis v. Brunswick*, Carter appointee Judge Dudley Bowen, also came to the conclusion that the plaintiff's negligence and strict liability claims based on the lack of a propeller guard were preempted by the Boat Safety Act.
  - ✓ The U.S. Supreme Court did not decide the case because the parties settled the claims before a decision was issued.
- Mr. Kavanaugh's client was interested in the case only because it manufactured vehicles subject to the Motor Vehicle Safety Act, which included language identical to the Boat Safety Act preemption language at issue in *Lewis v. Brunswick*.
  - ✓ Congress, in the legislative history of the Boat Safety Act, explained that the preemption provision "also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements." *Id.* at 1503 (citing S.Rep. No. 92-248).
- Although nearly four years later the Supreme Court did effectively overrule this Eleventh Circuit decision in another case, *Sprietsma v. Mercury Marine*, 537 U.S. 52 (2002), the Court did state that the arguments made by Mr. Kavanaugh's clients in the *Lewis* case - that such claims are implicitly preempted by the statute and by the Coast Guard decision not to regulate propeller guards - "[b]oth are viable pre-emption theories." *Id.* at 64.

No. 97-288

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

VICKI LEWIS, ET VIR, ETC.,

Petitioners,

v.

BRUNSWICK CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

David M. Heilbron
Leslie G. Landau
MCCUTCHEN, DOYLE,
BROWN & ENERSEN, LLP
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000

Thomas A. Ziolkowski
GENERAL MOTORS CORPORATION
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48202

Kenneth W. Starr
Counsel of Record
Paul T. Cappuccio
Richard A. Cordray
Brett M. Kavanaugh
KIRKLAND & ELLIS
655 Fifteenth Street N.W.
Washington, D.C. 20005
(202) 879-5000

Attorneys for Amicus Curiae General Motors Corporation

QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety?

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INTEREST OF *AMICUS CURIAE*

General Motors Corporation ("General Motors") is the world's largest manufacturer of automobiles.[1]

The National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966), 49 U.S.C. §§ 30101-30169 (1994) (the "Motor Vehicle Safety Act") is similar in certain respects to the Federal Boat Safety Act of 1971 ("the Boat Safety Act"), under review here. The Motor Vehicle Safety Act contains a preemption clause, which states

[1] Petitioners and respondent have consented to the filing of this brief, in letters on file in the Clerk's office. The undersigned counsel for General Motors Corporation alone have authored this brief, and no other person or entity has made a monetary contribution to its preparation or submission.

that when a federal standard is in effect, no State may "establish, or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 49 U.S.C. § 30103(b)(1). Moreover, like the Boat Safety Act, the Motor Vehicle Safety Act states: "Compliance with any [federal standard] does not exempt a person from liability under common law." 49 U.S.C. § 30103(e).

For that reason, the resolution of certain issues under the Boat Safety Act is potentially relevant to issues that arise under the Motor Vehicle Safety Act. General Motors thus has an interest in the Court's disposition of this case.

INTRODUCTION

The Boat Safety Act, 46 U.S.C. §§ 4301-4311 (1994), contains two provisions relevant to the preemption issues presented in this case.

Section 4306, entitled "Federal preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Section 4311, entitled "Penalties and injunctions," provides in subsection (g):

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

The preemption issues presented in this case require the Court to reach a sensible and harmonious construction of these two provisions. *Amicus curiae* General Motors respectfully submits that the positions taken by petitioners and the Solicitor General fail in this task. This brief is being submitted to respond to the points discussed not only in petitioners' brief, but also in the Solicitor General's brief.

SUMMARY OF ARGUMENT

1. The Boat Safety Act delegates implementing authority to regulate the design and performance of boats and associated equipment, which the Coast Guard exercised by adopting extensive and detailed regulations. As the Solicitor General notes, section 4306 of the statute expressly preempts the field of state laws and regulations imposing standards or requirements with respect to the design and performance of boats and associated equipment, with only three exceptions: the States may enforce laws that are identical to federal regulations; they may apply for authorization to enforce differing laws; and they may regulate the carrying or use of marine safety articles to meet uniquely hazardous local conditions, unless this authority is specifically disapproved.

If none of these exceptions applies, the Boat Safety Act explicitly preempts state law governing boat design and performance -- regardless of whether a federal regulation governs that same aspect of boat design or performance. Here, the Coast Guard has not required propeller guards on outboard motors. The State of Georgia has not obtained authorization to require propeller guards and does not claim that they would address any uniquely hazardous local

conditions. Therefore, petitioners' tort claim based on respondent's failure to install propeller guards is expressly preempted.

2. Petitioners and the Solicitor General counter that state common law damages actions enjoy a blanket immunity from this straightforward preemption analysis because state common law is not a state "law or regulation" and does not impose any legal "standard" or "requirement" within the meaning of this clause. That is wrong. The Court has rejected their argument at least thrice, by holding that broad terms in a preemption clause such as "standard[s]" and "requirement[s]" encompass state common law. *See, e.g., Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring in part and concurring in judgment); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). Petitioners and the Solicitor General offer no justification for the Court to overrule this line of decisions, which forecloses their position.

Even putting aside this controlling precedent, the position taken by petitioners and the Solicitor General ignores the fact that state common law is an integral part of the corpus of state law, and it sets "standards" and "requirements" that govern private conduct quite as much as state positive law does. Their argument also rests on the bizarre assumption that Congress intended a single state jury -- an *ad hoc* collection of citizens assembled to hear one case -- to have more power to regulate private conduct in a manner different from the federal government than do their duly elected and appointed state officials. Finally, their suggested misreading of the statutory language, if accepted, would undermine the settled holding of cases as basic as *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

3. Petitioners and the Solicitor General further contend that the so-called "savings" clause in the Boat Safety Act negates its explicit preemption of common law tort suits. That, too, is incorrect. The preemption clause contains its own savings provisions, which operate to save state law from preemption where it is identical to federal law, where authority is granted to enforce differing state laws, and in limited circumstances to address uniquely hazardous local conditions. What petitioners and the Solicitor General call a "savings" clause -- section 4311(g) -- is more appropriately viewed as an "anti-affirmative-defense" clause. It says nothing about the kinds of state laws that are preempted. Instead, it simply disclaims any federal immunity from liability at state law, which thus frees each State to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) will be recognized as an affirmative defense in an otherwise permissible state-law cause of action. The claim that this provision should be read instead as a broad "anti-preemption" clause is untenable and cannot be squared with the plain language of the statute.

In any event, the Court has repeatedly held that the general language of a so-called "savings" clause cannot negate the plain terms of an explicit preemption clause. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). More generally, the Court has routinely given these general clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987).

4. Moreover, petitioners' claims also fail under an implied-conflict preemption analysis. As the Court has consistently held in several recent decisions, the mere existence of a clause directed at preemption in the Boat Safety Act does not eliminate the need for such analysis. *See Medtronic*, 116 S. Ct. at 2259 (plurality opinion) (implied-

conflict preemption inquiry is proper); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-88 (1995) (conducting such an inquiry); *CSX*, 507 U.S. at 673 n.12 (same). In addition, the so-called "savings" clause does not preclude implied-conflict preemption analysis, as the Court has long held. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987); *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). Unlike petitioners, the Solicitor General accepts this established approach, and there is no reason for the Court to strike out in a different direction in this case.

Here, accepting the Court of Appeals' view that the Coast Guard made a considered decision not to regulate propeller guards on recreational vessels, in furtherance of its mission to promote boat safety, the necessary result is that any such requirement imposed by state law is impliedly preempted. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). Indeed, as a practical matter it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the federal agency's explicit determination that requiring them to be equipped with propeller guards would undermine the public safety.

ARGUMENT

I. THE BOAT SAFETY ACT PREEMPTS THE FIELD OF STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT.

The Solicitor General points out that the plain language of the Boat Safety Act, its legislative history, and its subsequent administrative history all support the view that the statute is intended to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to certain

exceptions that are specified in the statute itself. Strangely, however, the Solicitor General does not draw the conclusion that the Boat Safety Act actually *has* this effect, for reasons that will be discussed in more detail in Sections II and III, *infra*.

As the Solicitor General explains, the text of the Boat Safety Act appears expressly to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to three exceptions that are set forth in the preemption clause itself. *See* U.S. Br. 14; 46 U.S.C. § 4306. First, Congress has authorized the States to enforce laws that are "identical" to regulations adopted by the Secretary. Second, the States may apply to the Secretary for authorization to enforce differing laws. Third, the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State, unless the Secretary specifically disapproves. *See id.*

If none of these exceptions applies, the Boat Safety Act, by its terms, preempts state law governing the design and performance of recreational vessels and their associated equipment -- regardless of whether a federal regulation governs that same aspect of boat design or performance. It thus differs from the Motor Vehicle Safety Act at issue in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287-88 (1995), which preempts state law only where a federal regulation concerning the same aspect of performance is in effect. *Myrick* is thus irrelevant to the express preemption issue raised in this case.

As the Solicitor General further notes, this reading of the broad preemption clause contained in the Act is confirmed by its legislative history. *See* U.S. Br. 14. The Senate Report on the proposed legislation stated that it was intended to have broad preemptive effect, explaining the preemption clause as follows:

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. . . . The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S. Rep. No. 92-248, at 20 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1341. The Report emphasized that the "need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level." *Id.* at 14 (emphasis added). While the language of the Act phrased the Secretary's obligation to issue regulations in permissive rather than mandatory terms, "the Committee expect[ed] that initial standards will be promulgated as soon as practicable." *Id.* at 17. "It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards, and the possibility for continuous review and updating of the standards, that the Committee opted for a system of administrative rather than statutory standards." *Id.*

The Solicitor General also explains that this construction of the preemption clause accords with the administrative history implementing the Boat Safety Act. *See* U.S. Br. 14-15. The day after the Act was signed into law, the Secretary issued a statement exempting all existing state "laws and regulations" from preemption under the express language of the new statute. 36 Fed. Reg. 15,764-65 (Aug. 11, 1971). The Secretary noted that he was acting under the authority

conferred by Congress, which provided that the Secretary "may, if he considers that boat safety will not be adversely affected, issue exemptions from any provision of this Act or regulations and standards established thereunder, on terms and conditions as he considers appropriate." *Id.* (quoting 46 U.S.C. § 4305). Because "[b]oating safety will not be adversely affected by continuing in effect those existing laws and regulations," the Secretary exempted each State from the operation of the express preemption clause, which "prohibit[s] any of those jurisdictions from continuing in effect or enforcing any provision of law or regulation that is not identical to a Federal regulation." 36 Fed. Reg. at 15,765. The exemption was to remain in effect "until expressly superseded, revoked, or otherwise terminated." *Id.*

About a year later, the Coast Guard exercised the authority delegated by the Secretary to issue voluminous regulations governing boat safety pursuant to 46 U.S.C. § 4302. *See* 37 Fed. Reg. 15,777-85 (Aug. 4, 1972). These regulations cover a broad spectrum of safety matters, such as design standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, requirements for safety equipment to be carried on boats, and measures to correct especially hazardous conditions. *See, e.g.*, 33 C.F.R. Pts. 175, 177, 181, 183 (1997). Thereafter, the Coast Guard proposed to replace the previous blanket exemption from preemption with a more limited provision, noting that "[t]he issuance of these regulations removes the necessity for an exemption to the prohibitions of [the Act's preemption clause] concerning performance or other safety standards for boats." *See* 38 Fed. Reg. 71 (Dec. 27, 1972). The blanket exemption from preemption for state laws concerning boat performance or safety standards was eventually eliminated. *See* 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

Both the legislative history and subsequent administrative history implementing the Boat Safety Act thus reinforce the plain language of the preemption clause. That provision

operates to preempt all state laws that are not "identical" to federal regulations, unless they concern certain uniquely hazardous local conditions or unless the Secretary specifically confers additional authority to act.[2]

Here, the Court's application of the statute's preemption analysis is relatively uncomplicated. The Coast Guard has not required manufacturers to install propeller guards on outboard motors. The State of Georgia has not obtained authorization from the Secretary to require manufacturers to install propeller guards, and no claim has been made that they would address any uniquely hazardous local conditions. Petitioners' tort claim based on respondent's failure to install propeller guards thus is expressly preempted by the Boat Safety Act.

The Solicitor General tries to avoid this straightforward conclusion by arguing that: (1) the preemption clause contained in section 4306 of the Boat Safety Act does not encompass "standards" and "requirements" imposed by state common law; and (2) in any event, section 4311(g) of the Boat Safety Act should be read to override the preemption clause and to preserve all state common law. *See* U.S. Br. 13-25. These arguments are incorrect, as shown in Sections II and III, *infra*.

II. THE PREEMPTION CLAUSE APPLIES TO REQUIREMENTS IMPOSED BY STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE.

[2] Contrary to the assertions made by the Solicitor General, *see* U.S. Br. 14-15, nothing in the administrative history implementing the Act suggests that the exemptions to preemption granted first by the Secretary and later by the Coast Guard do not apply to state common law. Indeed, the Coast Guard explained its later, more limited, exemption by noting that it "will *principally* [but not solely] affect State statutes and regulations." 38 Fed. Reg. at 6914 (emphasis and bracketed material added). *See also infra* Sections II & III.

The preemption clause in the Boat Safety Act states that no State may "establish, continue in effect, or enforce a law or regulation" establishing a "performance or other safety standard" or imposing such a "requirement" for recreational vessels and their associated equipment, which is "not identical to" a regulation prescribed by the Coast Guard under the Act. 46 U.S.C. § 4306. Petitioners and the Solicitor General contend that this provision encompasses only "state legislative and administrative enactments," but not common law. Petrs. Br. 13; U.S. Br. 11-12. They thus argue that *all* common law damages actions -- regardless of whether they set requirements or standards that differ from a federal requirement that is directly applicable -- are immune from a claim-by-claim determination of whether they are preempted under the Act. This extreme position is wrong, for a number of reasons.

First, the Court has rejected this very argument in three cases, holding that the use of terms such as "law," "standard," and "requirement" in a preemption provision plainly covers standards and requirements set by common law damages actions. *See Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). The sound reasons for the Court's repeated holding on this interpretive point compel adherence to *stare decisis* as the Court addresses it once again in this case.[3]

[3] The Solicitor General directly disagrees with the holdings of these cases, *see* U.S. Br. 17-18 & n.9, yet never offers any plausible basis for overruling them. For their part, petitioners essentially ignore the Court's holdings in *Medtronic*, *CSX*, and *Cipollone* when discussing this point. *See* Petrs. Br. 24-28.

In *Cipollone*, the Court was obliged to construe the express preemption provisions contained in two successive federal statutes -- the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), and the Public Health Cigarette Smoking Act of 1969, 84 Stat. 87. The Court determined that in the preemption clause in the 1965 Act, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes.'" *Cipollone*, 505 U.S. at 518 (quoting section 5(b) of the 1965 Act). The Court noted that this language was consistent with "the continued vitality of state common law damage actions," and was "best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." *Id.* at 518-19.

The Court held, however, that Congress changed the situation dramatically by enacting the "much broader" preemption clause contained in the 1969 Act. 505 U.S. at 520. That provision introduced new constraints upon all manner of requirements, duties, and standards imposed under state law by stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are labeled as required under federal law. 15 U.S.C. § 1334(b). Based on this language -- particularly the reference to "requirement[s] or prohibition[s] . . . imposed under State law" -- the Court held that common law actions were within the coverage of the preemption clause in the 1969 Act. 505 U.S. at 520-24.[4]

In *Cipollone*, therefore, the Court specifically rejected the linguistic argument urged by petitioners here in an attempt to limit the scope of terms such as "standard" and "requirement"

[4] The plurality opinion on this point actually speaks for the majority, for it is reinforced by the express agreement of Justices Scalia and Thomas. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part).

to exclude the effects of damage actions brought under state common law. The Court explicitly found this argument to be "at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions." 505 U.S. at 521. In a key passage that squarely resolves this issue, the Court stated: "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Id.* Even though there was some evidence in the legislative history suggesting that Congress "was primarily concerned with positive enactments by States and localities," the Court was emphatic that "the language of the Act *plainly* reaches beyond such enactments." *Id.* (emphasis added).[5]

The Court dispatched the same argument more briefly in the *CSX* case, where it considered the preemptive effect of the Federal Railroad Safety Act of 1970, 84 Stat. 971. The preemption clause contained in that statute provided that applicable federal regulations would preempt any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434.[6] In a single sentence, the Court treated the

[5] Justice Scalia's separate opinion, joined by Justice Thomas, expressly agreed that the broader language of the 1969 Act "plainly reaches beyond [positive] enactments," and "general tort-law duties" can impose requirements or prohibitions within the meaning of the 1969 Act. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part) (brackets in original).

[6] The Railroad Safety Act's preemption clause provided that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement," but included an exception for "an additional or more stringent [state] law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety

(continued...)

issue as settled, flatly stating that "[l]egal duties imposed on railroads by the common law fall within the scope of these broad phrases." 507 U.S. at 664 (citing *Cipollone* plurality and concurrence). No member of the Court dissented from this proposition.

In *Medtronic*, the Court addressed the Medical Device Amendments of 1976, 90 Stat. 539, which contained a preemption clause barring any State from "establish[ing] or continu[ing] in effect" any "requirement" relating to the safety or effectiveness of a medical device that differed from any applicable Federal requirement. 21 U.S.C. § 360k(a). Plaintiffs argued that "common-law duties are never 'requirements'" within the meaning of the statute, and that the statute "therefore never pre-empts common-law actions." 116 S. Ct. at 2258 (Stevens, J., plurality opinion).

A majority of the Court directly rejected this argument. Justice Breyer, in a separate concurrence, stated that "[o]ne can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law." 116 S. Ct. at 2259 (Breyer, J., concurring). After setting forth the Court's holdings to the same effect in *Cipollone* and *CSX*, Justice Breyer observed that the same rationale "would seem applicable to the quite similar circumstances at issue here." *Id.* at 2259. He also agreed on this point with Justice O'Connor's separate opinion for four Justices, which held that state common law actions impose "requirements" because they "operate to require manufacturers to comply with common-law duties." *Id.* at 2262 (O'Connor, J., concurring and dissenting in part) (citing *Cipollone*). The other Justices found it unnecessary to address the issue, since none of plaintiffs' claims was preempted in any event. *Id.* at 2259

[6](...continued)
hazard," when "not incompatible" with Federal law. 45 U.S.C. § 434; *see* 507 U.S. at 662 n.2.

(Stevens, J., plurality opinion). The conclusion reached by the five Justices who addressed the question thus constitutes yet another holding that common law claims impose state law "requirements" within the meaning of such an explicit preemption clause. *See generally Marks v. United States*, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court").[7]

It bears mention that the Government's position in this case is flatly inconsistent with the position in *Medtronic*, where the Solicitor General stated: "[W]e do not agree with respondents' broad submission that the act's preemption provision does not speak at all to common law tort claims. In our view, the word 'requirement' in section 521(a) of the act encompasses duties imposed by State common law, as well as duties imposed by State statutory or regulatory law." Transcript of Oral Argument, *Medtronic* (No. 95-754), at 45. There the Solicitor General added that "*Cipollone* and the use of the requirement there, and just the nature of State law . . . would also encompass duties imposed by the . . . law from whatever source." *Id.* at 46. The Government offers no explanation for this abrupt about-face from its position in *Medtronic*.

Second, even if petitioners' argument were not squarely foreclosed by these prior decisions, it is still plainly wrong because it ignores the ordinary interrelations between the substantive principles of the common law and statutory law in regulating the health, safety, and welfare of citizens in

[7] In addition, the Court has frequently held that the term "standards" refers to state common law as well as state positive law. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California products liability law); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) (referring to "common law standards"); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959) (referring to "standard of care" imposed by common law).

each state. Again, the Court discussed this point in *Cipollone*, and pointed out that "common law damages actions of the sort raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such actions do not impose 'requirements or prohibitions,'" for "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." 505 U.S. at 522; *see also Medtronic*, 116 S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) (state common law actions constitute "requirements" where they "operate to require manufacturers to comply with common-law duties").

In this regard, it simply does not matter whether the *remedy* used to enforce the substantive component of the state law is the payment of damages to private parties rather than the payment of fines to the government or some other enforcement mechanism. "Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959). The Court recently reaffirmed this position. *See BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

The intricate relationship between state common law and state statutory and administrative law in regulating private conduct, and the extent to which they are inherently interwoven, is widely understood and readily demonstrated. Earlier in this century, the courts typically led the way on health and safety issues by applying and developing common law principles to regulate the private sector. The requirements, obligations, and standards imposed in accordance with these principles, in turn, were eventually

codified and at times modified by state legislatures when they took the initiative to address particular concerns. On occasion, legislatures have enacted regulatory statutes conferring administrative authority on government agencies to regulate private conduct directly, while still retaining the common law to fill the remaining gaps between these positive enactments. The further interaction of state legislation and state common law adjudication often is even more complex, as legislative or regulatory enactments may be used to supply the duty of care underlying private damage actions. *See generally* Melvin Eisenberg, *The Nature of the Common Law*, (1988); Guido Calabresi, *A Common Law for the Age of Statutes* (1982).[8]

At the state level, therefore, it is undeniable that the common law forms an integral part of the law's comprehensive regulation of private conduct. Taken in combination with statutory and regulatory enactments, the common law imposes a continual procession of legal "requirements," obligations, prohibitions, and "standards" that are designed to influence and regulate the actions of businesses and individual citizens. *See, e.g.*, *Medtronic*, 116

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[8] The Solicitor General offers a strained construction of the statutory phrase "State or political subdivision" that would appear to read the courts entirely out of the framework of state governments. *See* U.S. Br. 18-19. This approach overlooks the fact that the statute in *Medtronic* contained the same phrase ("State or a political subdivision"), and a majority of the Court held that its preemption clause reached common law claims. In the same passage, the Solicitor General suggests that if state courts wished to apply state common law standards or requirements to the design or manufacture of recreational vessels and associated equipment, it would be absurd to expect state judges to apply for federal authorization to do so. *Id.* We agree that the suggestion is absurd; it also is *irrelevant*. As with the state legislatures, the state courts have authority to act only where state law is not preempted; any application for an exemption from preemption to the governing federal agency -- here, the Coast Guard -- would be made by state executive officials. Neither state legislators nor state judges would be expected to make this application.

S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) ("state common-law damages actions operate to require manufacturers to comply with common-law duties"). Any reading of these terms that would pose a putative distinction between common law and positive law in this respect would be fundamentally misguided. *See id.* at 2259 (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical.").

Third, the argument presented by petitioners and their *amici* rests on the odd assumption that Congress intended an *ad hoc* collection of state citizens assembled to hear one civil case -- a jury -- to have greater power to set standards that differ from Federal law than do sovereign state officials acting through the careful, deliberative processes established in the legislative and administrative spheres. Such a result would be a perverse undermining of the democratic process, and the Court should not assume that Congress intended "this anomalous result" unless it clearly so provided. *See Medtronic*, 116 S. Ct. at 2260 (Breyer, J., concurring). Certainly nothing in the language of the Boat Safety Act requires this upside-down worldview. Indeed, for the reasons stated above, section 4306 plainly contemplates that state juries, just like state administrative and legislative officials, set "standard[s]" and "requirement[s]" that may therefore be preempted by federal regulatory action. *Cf. New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Indeed, petitioners' argument on this point is so plainly wrong that, if accepted here, its logic would partially overrule *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The very same argument that petitioners and their *amici* put forward with respect to the text of section 4306 would apply equally well to the term "laws" in the Rules of Decision Act, 28 U.S.C. § 1652. The Rules of Decision Act requires a federal court to apply "[t]he laws of the several states" as the rules of

decisions in civil actions not arising under federal law. Applying the logic of petitioners' argument, because the Supremacy Clause refers also to "the *Laws* of the United States," U.S. Const. art. VI, cl. 2 (emphasis added), and because there is no general common law of the United States, then the phrase "the laws of the several states" should be limited to the *positive* law of the several states, thereby excluding state common law as the governing rules of decision in federal courts. Adoption of petitioners' argument thus would have the pernicious consequence of upsetting the entire interpretive basis for the longstanding and important *Erie* doctrine.

It is therefore not surprising that, in *Cipollone*, the Court rejected the parallel argument that the phrase "State law" included *only* state statutes and regulations, but not state common law. *See* 505 U.S. at 522-23; *see also id.* at 549 (Scalia, J., concurring and dissenting in part) (agreeing that the phrase "State law" used in the 1969 Act "embraces state common law"). The Court recognized that this argument was flatly irreconcilable with its longstanding construction of the same basic language in the Rules of Decision Act. *See Erie*, 304 U.S. at 77-78. Indeed, the Court indicated no desire to revisit the controversial battles fought over many decades that led up to the Court's historic decision in *Erie* to overrule the contrary interpretation of the Rules of Decision Act that had been adopted in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Instead, the Court simply noted that "we have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 522. For all the same reasons, the efforts made by petitioners and the Solicitor General to limit the terms "requirement[s]" and "standard[s]" to state positive law must fail.

III. SECTION 4311(g) SIMPLY CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT LIMIT THE SCOPE OF THE PREEMPTION CLAUSE.

The Boat Safety Act contains what some have called a "savings" clause, which states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Petitioners and the Solicitor General contend that this provision establishes that the common law is beyond the reach of the preemption clause. *See* Petrs. Br. 28-31; U.S. Br. 21-24. But that does not square with the relation between the preemption clause and this provision, with the text of this provision, or with the clear purpose of this provision, as explained by Congress.

Section 4311(g) does not serve the purpose of "saving" state law or state common law from preemption at all. Indeed, the preemption clause contains its own savings provisions, which are explicitly designed to specify when state law is preserved in the face of the broader general language of the preemption clause. Those provisions operate to save state law from preemption in three distinct circumstances.

First, the States may apply their own law where it is "identical to a regulation prescribed" under federal law. 46 U.S.C. § 4306. This provision is similar to one at issue in *Medtronic*, where the Court unanimously held that the preemption clause permitted state laws and state requirements to be enforced where they are identical to federal law. *See* 116 S. Ct. at 2255; *id.* at 2264 (O'Connor, J., concurring and dissenting in part).

Second, the States may apply to the Secretary for permission to apply their own law even where it differs from federal law. *See* 46 U.S.C. § 4306. This provision

establishes an avenue for each State to seek approval, on a state-by-state basis, for exemption from the statutory prohibition on enforcing inconsistent state laws if a particular matter is thought to warrant an exemption.

Third, the States are explicitly permitted to apply their own law to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State," unless the Secretary specifically disapproves of their doing so. 46 U.S.C. § 4306. This one narrow area of explicit state authority is clearly circumscribed, thus reinforcing the otherwise restrictive impact of the broad preemption clause.

Moreover, section 4311(g) says nothing about the kinds of state laws that are preempted or saved from preemption. Rather, it simply disclaims any possibility that a manufacturer will be able to assert a federal immunity from liability at state law based on its mere compliance with the requirements imposed by federal law. This provision thus works in tandem with the preemption clause by ensuring that the boundaries of federal preemption are not improperly expanded by a broad "government standards" defense, which might be asserted to impede the enforcement of otherwise valid state law. Thus, it would be much more appropriate to refer to this provision as an "anti-affirmative-defense" clause, which operates to preserve state authority on how to treat the issue of a manufacturer's compliance with pertinent federal standards and requirements. For example, where state common law addresses "uniquely hazardous" local conditions, as expressly permitted by the statute, this clause would ensure that federal law is understood to place no limits on how state courts treat the issue of compliance with any federal requirements.

Section 4311(g) thus should not be misread as an "anti-preemption" clause. To the contrary, Congress declared in this provision that where a state-law cause of action is not preempted by federal law, it is impermissible for a party or

a court to accomplish the same end by citing the party's compliance with all pertinent federal requirements as the basis for an affirmative defense or immunity asserted to defeat the same state-law cause of action. In this manner, Congress specified that unless state common law is actually *preempted*, it cannot be circumscribed by legal inferences that might otherwise be drawn about a party's *conduct* in exercising due care by complying with the federal regulatory scheme. *See, e.g.*, *Restatement (Third) of Torts: Products Liability* § 4, cmt. e (proposed final draft Apr. 1, 1997) (explaining the "important distinction" between "the matter of federal preemption of state products liability law" and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness").

The Senate Report accompanying the Act confirms this interpretation. Congress intended, with respect to section 4311(g), that "mere compliance . . . with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary use." S. Rep. No. 92-248, at 32 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1352. The references to "not . . . a complete defense" and "evidentiary value" further establish that this provision simply ensures that the States will have the flexibility to determine whether a party's compliance with pertinent federal requirements can serve as the basis for an affirmative defense or immunity asserted to defeat an otherwise permissible state-law cause of action. In practice, the States differ in their views of such an affirmative defense,

and on the admissibility of evidence of compliance with federal standards on the issues of defectiveness and due care.[9]

The contrary reading of this provision proposed by petitioners would, in addition, flout Congress' intention that "[t]he need for *uniformity* in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level" and that "manufacture for the domestic trade will *not* involve compliance with widely varying local requirements." S. Rep. No. 92-248, at 14, 20 (emphases added).

The erroneous construction of section 4311(g) urged upon the Court by petitioners and the Solicitor General is further underscored by their failure to come to grips with the actual language of the clause, which states that "[c]ompliance with . . . this chapter does not relieve a person from liability *at common law or under State law*." 46 U.S.C. § 4311(g) (emphasis added). Although they make much of the fact that Congress used the term "common law" in this provision, they completely ignore the fact that Congress also referred to all of "state law" in the same passage. If petitioners' reading of this provision were to be adopted, then it would become a

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[9] Each State thus remains free to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) is a relevant factor or an affirmative defense under state law in adjudicating an otherwise permissible state-law cause of action. There are diverse views on this issue under state law. Some States recognize a rebuttable presumption that a product which complies with federal standards is not defective. *E.g.*, Mich. Comp. L. Ann. § 600.2946(4) (West 1997); Kan. Stat. Ann. § 60-3304(a) (1996). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive or presumptive evidence. *E.g.*, *Wagner v. Clark Equip. Co.*, 700 A.2d 38, 49-50 (Conn. 1997); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 63 (N.M. 1995). A few States may hold that compliance conclusively negates any defect, *see, e.g.*, *Beatty v. Trailmaster Prods.*, 625 A.2d 1005, 1013-14 (Md. 1993), while others may treat compliance as irrelevant and inadmissible, *see, e.g.*, *Sheehan v. Cincinnati Shaper Co.*, 555 A.2d 1352, 1355 (Pa. Super. 1989).

complete "anti-preemption" clause, and *all* state law -- whether statutory, administrative, or judge-made -- would remain in effect as a basis for imposing liability, thus completely nullifying the plain import of the preemption clause. Thus, petitioners' strained attempt to find deeper meaning in the omission of the term "common law" from the preemption clause and its inclusion in the so-called "savings" clause, *see* Petrs. Br. 30, rests on a clear distortion of the statutory text.

In addition, as Justice Breyer explained in *Medtronic*, the position urged by petitioners and their *amici* "would have anomalous consequences." 116 S. Ct. at 2259 (Breyer, J., concurring). It would permit "the liability-creating premises of the plaintiffs' state law tort suit" to operate in direct conflict with federal law, whereas state agency regulations could not. *Id.* at 2261. Yet the practical "effects of the state agency regulation and the state tort suit are identical." *Id.* at 2259; *see also supra* Section II.

Finally, the Court's prior cases have consistently held that the general language of a so-called "savings" clause cannot negate the terms of an explicit preemption clause. The Court has frequently been faced with potentially competing preemption and general savings clauses, and has given the latter provisions limited effect in the context of the statutory scheme as a whole. For example, in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the Court held that a "general 'remedies' saving clause cannot be allowed to supersede the specific substantive preemption provision." *Id.* at 385. Indeed, the Solicitor General had urged this reading upon the Court:

> [The savings clause] is properly construed only to preserve those remedies not inconsistent with other provisions of the statute, including [the] express preemption provision. That is the interpretation that this Court has long placed on a comparable savings clause in the Interstate Commerce Act. *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915).

Brief for the United States as *Amicus Curiae* Supporting Respondents, *Morales* (No. 90-1604), at 16.

More generally, the Court has routinely given so-called "savings" clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., American Airlines v. Wolens*, 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding savings clause providing that statute does not "abridge or alter the remedies now existing at common law or by statute"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987) (savings clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy"). Indeed, just two days ago, the Court held again "'it is a commonplace of statutory construction that the specific'" language concerning such matters as preemption "'governs the general' terms of the saving clause." *South Dakota v. Yankton Sioux Tribe*, No. 96-1581, slip op. at 17 (U.S. Jan. 26, 1998) (quoting *Morales,* 504 U.S. at 384)).[10]

Therefore, section 4311(g) of the Boat Safety Act cannot properly be read to nullify or abridge the explicit terms of the preemption clause.

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[10] The Solicitor General's suggestion that the federal safety standards should be understood as mere "minimum" standards, *see* U.S. Br. 20-21, proves too much, for it would exempt all state law from the reach of the preemption clause. Indeed, the only limit that the Solicitor General appears to place on this approach is supposedly premised on the language of section 4311(g), though once again he fails to recognize that the phrase "at common law" is followed by the phrase "or under State law." *See id.* at 21; *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978) (rejecting argument that because statute referred to "minimum standards," it "requires recognition of state authority to impose higher standards").

IV. PETITIONERS' CLAIMS ALSO ARE SUBJECT TO IMPLIED-CONFLICT PREEMPTION ANALYSIS AND ARE IMPLIEDLY PREEMPTED.

Even if not expressly preempted, petitioners' claims would fail under an implied-conflict preemption analysis.

Petitioners briefly assert that the Court should not conduct any implied preemption analysis in this case because the Boat Safety Act contains a preemption clause. *See* Petrs. Br. 31-32. Notably, the Solicitor General appears to disagree with this assertion, for his brief devotes considerable space to the customary inquiry into implied-conflict preemption in an effort to explain its view that petitioners' claims are not impliedly preempted in this case. *See* U.S. Br. 25-30.

In fact, this Court's precedents have already established that the judicial inquiry into implied-conflict preemption, which is dictated by the Supremacy Clause, is proper when courts are applying the federal regulatory safety laws. At one time, a passage from the plurality opinion in *Cipollone*, *see* 505 U.S. at 517, had been misinterpreted so as to create confusion on this point. The Court seemed to settle the issue in *CSX*, when it conducted an implied-conflict preemption analysis even though the federal railway safety statutes included a preemption clause. *See* 507 U.S. at 673 n.12.

Nevertheless, some lower courts continued to dispute the issue. When the Court granted review in *Myrick*, therefore, the parties addressed it and the Court squarely resolved it:

> According to respondents and the Court of Appeals, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), held that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute. *This argument is without merit.*

514 U.S. at 287 (emphasis added). The Court specifically noted that it had in fact "engaged in a conflict pre-emption analysis" in *Cipollone* itself, *id.* at 289, and had done so again in *CSX*, notwithstanding the existence of a preemption clause in the statutes at issue in both of those cases, *see id.* After thus conclusively deciding the issue, the Court went on to conduct an implied-conflict preemption inquiry under the motor vehicle safety statutes, which include both a preemption clause and a clause addressing the effect of compliance with federal standards and requirements. *See id.* at 287-88.

Finally, in *Medtronic*, the posture of the case decided by the Court was such that it concerned only an issue of express preemption, without any briefing on the issue of implied preemption. *See, e.g.*, 116 S. Ct. at 2251 (plurality opinion). Nonetheless, even the four Justices who gave the preemption clause its narrowest reading pointed out that in considering further questions about express preemption under that statute in the future, "the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis." *Id.* at 2259 (citing *Myrick*, 514 U.S. at 289). The statute at issue in *Medtronic*, once again, contained both a preemption clause and a clause addressing the effect of federal compliance.

The Court's repeated endorsements of implied-conflict preemption analysis in the context of federal safety statutes that contain a preemption clause, and often a general savings clause, defeats the argument that such analysis is foreclosed in this case. This approach also accords with the natural effect of the Supremacy Clause. Federal law is unequivocally stated to be "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and thus any state law which conflicts with federal law is "pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501

(1984). The mere inclusion of a preemption clause in a statute cannot uproot the necessary constitutional inquiry.[11]

Moreover, the mere inclusion of a general savings clause in a federal statute cannot nullify the traditional judicial inquiry into implied-conflict preemption.[12] For almost a century, the Court has made clear that even when an Act has no preemption clause at all, a savings clause cannot be read to permit claims that actually conflict with the Act. The principle was first stated in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). There, a federal act contained a broad savings clause that purported to save "the remedies now existing at common law or by statute." *Id.* at 446. In spite of that savings clause, the Court held that an existing but conflicting common law claim was preempted because a savings clause "cannot in reason be construed as continuing . . . a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Id.*; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 485-505 (1987) (state common law claims were impliedly preempted

[11] Petitioners refer to a supposed "presumption against preemption." Petrs. Br. 24. Where state and federal law collide, the Supremacy Clause settles the matter and there is no place for presumptions, no matter how much the matter may traditionally be in the state domain: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962); *see also Cipollone*, 505 U.S. at 516 ("state law that conflicts with federal law is without effect"); *id.* at 544 (Scalia, J., concurring and dissenting in part) (same).

[12] The Solicitor General also appears to accept this proposition, for he states that "[u]nder our reading of the savings clause," a common law claim would be preempted by a pertinent federal regulation if it "propounded a standard of conduct directly contrary to the federal rule." U.S. Br. 28.

because they conflicted with the method chosen by federal law to implement the statutory goals, despite broad savings clause); *Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981) (same). Whatever else may be the effect of section 4311(g), it most assuredly cannot, consistent with the Court's decisions, be interpreted to bar implied-conflict preemption.

For purposes of the merits of the inquiry into implied-conflict preemption in this case, *amicus curiae* General Motors accepts the position taken by the Court of Appeals, *see* Pet. App. A15-A21, and presented in more detail by respondents here -- that in the circumstances of this case the Coast Guard made a considered decision not to mandate propeller guards on recreational vessels, because it determined that to do so would disserve the core safety objectives of the Boat Safety Act.[13] On this record, the agency's decision "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).[14]

As a practical matter, moreover, it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the governing federal agency's explicit determination that

[13] The Solicitor General similarly frames the issue as whether the "Coast Guard's *decision* not to regulate propeller guards" results in implied preemption, U.S. Br. 25 (emphasis added), though his explanation of the underlying basis for the agency's decision is somewhat different.

[14] The Solicitor General's efforts to distinguish *Ray*, *see* U.S. Br. 28-29 & n.19, are unpersuasive. First, it cannot matter whether the federal agency is required to act or permitted to act; what matters is simply whether it is *authorized* to act. Second, the regulations imposed under the Boat Safety Act are quite comprehensive. *See, e.g.*, 33 C.F.R. Pts. 175, 177, 181, 183.

requiring them to be equipped with propeller guards would undermine the public safety. The conflicting signals of state and federal policy pose an obvious potential to whipsaw citizens who wish only to abide by the law and policies of their respective governments. There can be little doubt that if any manufacturer had ignored these safety concerns and installed propeller guards, these considerations would have featured prominently in any lawsuit arising from a blunt trauma injury or fatality of the sort described by the agency as the basis for its determination not to mandate propeller guards on recreational vessels.

In sum, the Coast Guard's decision not to require propeller guards because to do so would disserve the core safety objectives of the Boat Safety Act necessarily leads to the conclusion that such a standard or requirement imposed by state positive law or common law is impliedly preempted. *See, e.g.*, *Ray*, 435 U.S. at 178.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent's brief, the decision below should be affirmed.

Respectfully submitted,

DAVID M. HEILBRON
LESLIE G. LANDAU
MCCUTCHEN, DOYLE,
BROWN & ENERSEN, LLP
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000

THOMAS A. ZIOLKOWSKI
GENERAL MOTORS CORPORATION
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

KENNETH W. STARR
Counsel of Record
PAUL T. CAPPUCCIO
RICHARD A. CORDRAY
BRETT M. KAVANAUGH
KIRKLAND & ELLIS
655 Fifteenth St., N.W.
Washington, D.C. 20005
(202) 879-5000

Attorneys for Amicus Curiae General Motors Corporation

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Briefs and Other Related Documents

United States Court of Appeals,
Eleventh Circuit.

Vicky LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Gary Lewis, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Plaintiffs-Appellants,
v.
BRUNSWICK CORPORATION, Defendant-Appellee.

No. 96-8130.

March 21, 1997.

Parents of recreational boat passenger who died after she fell or was thrown from boat and was struck by the boat's propeller brought suit in state court against manufacturer of boat's outboard engine, asserting negligence and strict liability claims based on absence of propeller guard. Parents also asserted fraudulent misrepresentation claims, based on contention that manufacturer misrepresented performance differences between guarded engines and unguarded engines to discourage government agencies from adopting safety standard requiring propeller guards. After removal, the United States District Court for the Southern District of Georgia, No. CV 195-096, Dudley H. Bowen, Jr., J., 922 F.Supp. 613, granted summary judgment in favor of manufacturer on ground that claims were preempted by the Federal Boat Safety Act (FBSA), and plaintiffs appealed. The Court of Appeals, Carnes, Circuit Judge, held that: (1) text of the FBSA does not provide clear manifestation of intent to preempt claims, and thus they were not expressly preempted; (2) position of Coast Guard rejecting propeller guard requirement is tantamount to a ruling that no such requirement may be imposed, and that position impliedly preempts state law requirements of propeller guards, even in the form of common-law state tort claims; and (3) Coast Guard position on propeller guards also preempted fraudulent misrepresentation claim.

Affirmed.

West Headnotes

[1] **Federal Courts** 776
170Bk776 Most Cited Cases

Decision of district court granting summary judgment on ground of preemption was subject to de novo review.

[2] **States** 18.5
360k18.5 Most Cited Cases

Any state law that conflicts with federal law is preempted by the federal law and is without effect under the supremacy clause of the Constitution. U.S.C.A. Const. Art. 6, cl. 2.

[3] **States** 18.11
360k18.11 Most Cited Cases

[3] **States** 18.13
360k18.13 Most Cited Cases

State regulation established under historic police powers of the states is not superseded by federal law unless preemption is the clear and manifest purpose of Congress; thus, intent of Congress is the touchstone of preemption analysis.

[4] **States** 18.3
360k18.3 Most Cited Cases

Congressional intent to preempt state law may be revealed in several ways: "express preemption," in which Congress defines explicitly extent to which its enactments preempt state law; "field preemption," in which state law is preempted because Congress has regulated a field so pervasively, or federal law touches on a field implicating such dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred; and "conflict preemption," in which state law is preempted by implication because state and federal law actually conflict, so that it is impossible to comply with both, or state law stands as an obstacle to the accomplishment and execution of the full purposes

and objectives of Congress.

[5] **States** 18.13
360k18.13 Most Cited Cases

In areas traditionally regulated by the states through their police powers, Court of Appeals applies presumption in favor of narrow interpretation of an express preemption clause.

[6] **Shipping** 11
354k11 Most Cited Cases

[6] **States** 18.65
360k18.65 Most Cited Cases

Because the Federal Boat Safety Act preempts area of safety that historically has been regulated by the states through their police powers, Court of Appeals must construe the Act's preemption clause narrowly. 46 U.S.C.A. § 4306.

[7] **Products Liability** 62
313Ak62 Most Cited Cases

[7] **States** 18.65
360k18.65 Most Cited Cases

Express preemption clause of the Federal Boat Safety Act does not cover common- law state tort claims; although preemption clause could be read to cover such claims, savings clause indicates that at least some common-law claims survive express preemption, and resulting doubt must be resolved in favor of narrower interpretation; however, conflict between express preemption clause and savings clause precludes any conclusion that such claims are expressly saved. 46 U.S.C.A. § 4306.

[8] **Products Liability** 62
313Ak62 Most Cited Cases

[8] **States** 18.65
360k18.65 Most Cited Cases

State tort claims are impliedly preempted under the Federal Boat Safety Act (FBSA) if they prevent or hinder the FBSA from operating the way Congress intended it to operate; in deciding whether claims conflict with purposes of the FBSA, Court of Appeals does not apply presumption against preemption, even though common-law tort claims are mechanism of police powers of the state, as relative importance to the state of its own law is not material when there is a conflict with a valid federal law. 46 U.S.C.A. § 4301 et seq.

[9] **States** 18.3
360k18.3 Most Cited Cases

Federal decision to forego regulation in given area may imply an authoritative federal determination that area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate.

[10] **States** 18.3
360k18.3 Most Cited Cases

Although federal decision not to regulate does not always have preemptive effect, it does have such where failure of federal officials affirmatively to exercise their full authority takes on character of a ruling that no such regulation is appropriate or approved pursuant to policy of statute.

[11] **Products Liability** 62
313Ak62 Most Cited Cases

[11] **States** 18.65
360k18.65 Most Cited Cases

State common-law negligence and product liability claims against manufacturer of boat engine, based on theory that engine was defective because it lacked a propeller guard, were impliedly preempted by the Federal Boat Safety Act; because Congress has made the Coast Guard the exclusive authority in the area of boat and equipment safety standards, its position rejecting propeller guard requirement is tantamount to ruling that no such requirement may be imposed, and that position impliedly preempts state law requirements of propeller guards, even in form of common-law tort claims. 46 U.S.C.A. § 4301 et seq.

[12] **Products Liability** 62
313Ak62 Most Cited Cases

[12] **States** 18.65
360k18.65 Most Cited Cases

Product liability claims based on defective design or installation of products that are already installed, as opposed to claims based on failure to install a certain device, are not impliedly preempted under the Federal Boat Safety Act (FBSA); permitting such

claims against manufacturers for negligent or defective design of products required by the Coast Guard, or product provided voluntarily by manufacturers, simply requires manufacturers to comply with FBSA regulations, and is consistent with the FBSA scheme; however, claims based on failure to install product that Coast Guard has decided should not be required would conflict with purpose of the FBSA to insure regulatory uniformity. 46 U.S.C.A. § 4301 et seq.

[13] **Products Liability** 62
313Ak62 Most Cited Cases

[13] **States** 18.65
360k18.65 Most Cited Cases

State law fraudulent misrepresentation claim against manufacturer of boat engine, seeking to impose liability upon manufacturer for attempting to persuade the Coast Guard and others that propeller guards are unsafe, was impliedly preempted by Coast Guard's position that propeller guards should not be required under the Federal Boat Safety Act; necessary element of causation in claim was that but for wrongful conduct of manufacturer, propeller guards would have been required by Coast Guard; however, such judgment conflicted with Coast Guard's position that propeller guards should not be required. 46 U.S.C.A. § 4301 et seq.

***1496** David E. Hudson, William James Keogh, III, Hull, Towill, Norman & Barrett, Augusta, GA, for plaintiffs-appellants.

***1497** Ronald L. Reid, James W. Hagan, Alston & Bird, Atlanta, GA, Daniel J. Connolly, Faegre & Benson, Minneapolis, MN, for defendant- appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before BIRCH, BLACK and CARNES, Circuit Judges.

CARNES, Circuit Judge:

Gary and Vicky Lewis appeal the district court's grant of summary judgment in favor of Brunswick Corporation ("Brunswick") on the Lewises' state common law negligence, product liability, and fraudulent misrepresentation claims. The Lewises sued Brunswick to recover damages for the death of their daughter, who died after she fell or was thrown from a boat and then struck by a Brunswick engine propeller. According to the Lewises, the Brunswick engine involved in their daughter's death was defective because it lacked a propeller guard. Upon Brunswick's motion for summary judgment, the district court held that the Lewises' claims were preempted by the Federal Boat Safety Act, 46 U.S.C. § § 4301-4311 ("the FBSA" or "the Act"). We affirm.

In Part I of this opinion, we describe the facts and the procedural history of this case. We describe the standard of review in Part II, and we outline the Act and its regulatory scheme in Part III. In Part IV, we recount the actions taken by the Coast Guard regarding propeller guards. We then summarize the positions of the parties in Part V of the opinion. In Part VI, we describe in general terms how state law may be preempted. We then proceed to consider, in Parts VII and VIII of the opinion, whether the Lewises' claims are preempted by the Act.

As we will explain in Part VII, the preemption clause and the savings clause in the Act provide contradictory indications of congressional intent relating to whether the Lewises' claims are expressly preempted. Because the text of the FBSA does not provide a clear manifestation of intent to preempt the claims, we cannot hold that they are expressly preempted. On the other hand, due to the conflict between the preemption clause and the savings clause, we cannot hold that those claims are expressly saved from preemption either. Consequently, our resolution of the question of preemption in this case turns on whether the Lewises' claims are impliedly preempted by the Act. We hold that they are, because those claims conflict with the Coast Guard's position that propeller guards should not be required.

I. FACTS AND PROCEDURAL HISTORY

On June 6, 1993, Kathryn Lewis was spending the day with her boyfriend's family in a boat on Strom Thurmond Lake in Georgia. While the boat was pulling Kathryn's boyfriend on an inner tube, the driver made a right-hand turn. Kathryn fell or was thrown from the left side of the boat. Once in the water, Kathryn was struck repeatedly in the head and body by the propeller of an engine designed and manufactured by Brunswick. The engine did not have a propeller guard. Kathryn died instantly.

The Lewises filed suit against Brunswick in Georgia state court, alleging that the lack of a propeller guard made the Brunswick engine a defective product. They also claim that Brunswick committed negligence by failing to install a propeller guard on the engine. The Lewises' third claim avers that Brunswick attempted to suppress the production of propeller guards by third persons and exaggerated the performance differences between guarded engines and unguarded engines to discourage government agencies from adopting a safety standard requiring propeller guards.

Brunswick removed this case to federal district court on diversity grounds and moved for summary judgment. In its summary judgment motion, Brunswick contended that all of the Lewises' claims were preempted by the FBSA. The district court agreed ***1498** and granted summary judgment in favor of Brunswick. The Lewises appeal.

II. STANDARD OF REVIEW

[1] We apply the same legal standards in our preemption analysis that the district court was required to apply in its order granting summary judgment; therefore, we review the district court's decision *de novo*. *E.g.*, Southern Solvents, Inc. v. New Hampshire Ins. Co., 91 F.3d 102, 104 (11th Cir.1996).

III. THE FEDERAL BOAT SAFETY ACT

The FBSA was enacted in 1971 in part "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating--presently the Secretary of Transportation." *P.L. 92-75, Federal Boat Safety Act of 1971*, S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. 1333. To implement that goal, the Act grants authority to the Secretary of Transportation to prescribe regulations establishing minimum safety standards for recreational boats. *See* 46 U.S.C. § 4302 (West Supp.1995). The Secretary of Transportation has delegated rulemaking authority under the FBSA to the United States Coast Guard. *See* 49 C.F.R. § 1.46(n)(1) (1996).

The FBSA requires the Coast Guard to follow certain guidelines and procedures when promulgating a regulation under 46 U.S.C. § 4302. For instance, the Coast Guard must consider certain available data and "the extent to which the regulations will contribute to recreational vessel safety." 46 U.S.C.A. § § 4302(c)(1)-(2) (West Supp.1995). The Coast Guard may not establish regulations compelling substantial alterations of existing boats and associated equipment unless compliance would "avoid a substantial risk of personal injury to the public." 46 U.S.C.A. § 4302(c)(3) (West Supp.1995). Before promulgating a regulation, the Coast Guard is required to consult with the National Boating Safety Advisory Council ("the Advisory Council") on the need for regulation. 46 U.S.C. § 4302(c)(4).

IV. COAST GUARD CONSIDERATION OF A PROPELLER GUARD REGULATION

In 1988, the Coast Guard directed the Advisory Council to examine the feasibility and potential safety advantages and safety disadvantages of propeller guards. In response, the Advisory Council appointed a Propeller Guard Subcommittee "to consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers." National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee 1 (1989). The Advisory Council also asked the Subcommittee to consider whether "the Coast Guard [should] move towards a federal requirement for some form of propeller guard." *Id.* at Appendix A.

The Advisory Council Subcommittee held hearings on three occasions and received information from a variety of individuals and groups interested in the topic of propeller guards. *See id.* at 2-4. One of the matters on which the Subcommittee received information was propeller guard litigation, and the Subcommittee devoted a section of its report to the topic. *Id.* at 4. That section states that, at the time of the hearings, propeller guard advocates were petitioning federal and state legislators to mandate propeller guards. According to the Subcommittee Report, a legislative or administrative mandate "would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them"; therefore, feasibility was an important question before the Subcommittee. *Id.* at 5. The report also discusses the theories of liability that were being asserted by propeller guard victims and the defenses used by manufacturers. *Id.* at 4-5. Immediately ***1499**

following that discussion, the report notes that "[m]anufacturers are opposed to mandatory propeller guards." *Id.* at 5.

The Subcommittee also considered the technical issues posed by propeller guards. After reviewing the available scientific data and testimony, the Subcommittee found that propeller guards affect boat operation adversely at speeds greater than 10 miles per hour. *Id.* at 21. Further, the Subcommittee found that propeller guards would not increase overall safety, because they increase the chances of contact between a blunt object and a person in the water. *Id.* at 20-21. The Subcommittee Report states:

> Injuries/fatalities caused by underwater impacts result from a person coming into contact with the propeller or any part of the propulsion unit (i.e., lower unit, skeg, torpedo, anti-ventilation plate, etc.) and even the boat itself. Currently reported accidents make it obvious that all such components are involved in the total picture, and that the propeller itself is the sole factor in only a minority of impacts. The development and use of devices such as "propeller guards" can, therefore, be counter-productive and can create new hazards of equal or greater consequence.... Although the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

Id. at 23-24. The report also states that:

> boats and motors should be designed to incorporate technologically feasible safety features to avoid or minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard, (b) materially interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk.
>
> Proponents assert that propeller guard technology and/or availability meets the foregoing criteria and that guards should not be mandated. The Subcommittee does not agree....

Id. at 20. In its conclusion, the Advisory Council Subcommittee Report recommends that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* at 24.

The Subcommittee presented its report to the entire Advisory Council, which accepted the report and adopted the recommendations of the Subcommittee. Minutes of the 44th Meeting of the National Boating Safety Advisory Council 19 (Nov. 6-7, 1989). The Advisory Council then forwarded the report and recommendations to the Coast Guard. The Coast Guard adopted each of the Advisory Council's recommendations, giving explanations of the Coast Guard's position on each matter. *See* Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation, Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990). The Coast Guard's position on propeller guards, which is set out in that letter, is as follows:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.
>
> The Coast Guard will continue to collect and analyze data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guard devices or other information on the state of the art.

Id. at 1.

V. POSITIONS OF THE PARTIES

The Lewises contend that the FBSA does not expressly or impliedly preempt state law ***1500** tort claims based on the absence of a propeller guard on a boat engine. According to the Lewises, common law claims are expressly saved from preemption by the Act's savings clause. Furthermore, the Lewises argue, the Act does not preempt any state law, regulation, or claims until the Coast Guard issues a formal regulation on the matter. There being no regulation on propeller guards, the Lewises assert they may proceed with their case.

In response, Brunswick argues that the FBSA expressly preempts any state regulation, including regulation through common law claims, that conflicts

with a Coast Guard regulation or regulatory position. Brunswick contends that the Coast Guard has made a regulatory decision that propeller guards cannot be required. For that reason, Brunswick says, the Lewises' claims are expressly preempted by the Act. Furthermore, even if the Lewises' claims are not expressly preempted, Brunswick argues that the claims conflict with the Coast Guard's position that propeller guards should not be required. For that reason, Brunswick contends, the claims are preempted by implication.

VI. AN OVERVIEW OF PREEMPTION DOCTRINE

[2][3] Any state law that conflicts with federal law is preempted by the federal law and is without effect under the Supremacy Clause of the Constitution. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). State regulation established under the historic police powers of the states is not superseded by federal law unless preemption is the clear and manifest purpose of Congress. *Id.* Accordingly, the intent of Congress is the touchstone of preemption analysis. *See id.*

[4] Congressional intent to preempt state law may be revealed in several ways: (1) "express preemption," in which Congress defines explicitly the extent to which its enactments preempt state law; (2) "field preemption," in which state law is preempted because Congress has regulated a field so pervasively, or federal law touches on a field implicating such a dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred; and (3) "conflict preemption," in which state law is preempted by implication because state and federal law actually conflict, so that it is impossible to comply with both, or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir.1996) (citations omitted).

[5] By including an express preemption clause in the FBSA, Congress has demonstrated its intent that the Act preempt at least some state law. *See* 46 U.S.C. § 4306. Therefore, the issue in this case is not whether Congress intended for the FBSA to have any preemptive effect, but the intended scope of preemption--the extent to which the FBSA preempts state law. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, ----, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700 (1996). In areas traditionally regulated by the states through their police powers, we apply a presumption in favor of a narrow interpretation of an express preemption clause. *Id.* at ----, 116 S.Ct. at 2250.

VII. EXPRESS PREEMPTION

Brunswick contends that the Lewises' claims fall within the scope of the FBSA's express preemption clause, which provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or a political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or ***1501** circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C.A. § 4306 (West Supp.1995). According to Brunswick, the Lewises' claims, if successful, would result in a regulation imposing a propeller guard requirement. That regulation would not be identical to--in fact, it would be in conflict with--the Coast Guard's position that propeller guards should not be required. In Brunswick's view, the Coast Guard's position is equivalent to a "regulation prescribed under section 4302," which preempts state law. Following this reasoning, Brunswick argues that the Lewises' claims are preempted by the express terms of the FBSA preemption clause.

In response, the Lewises contend that the phrase "law or regulation" does not reach common law claims, because Congress did not mention "common law" specifically in the preemption clause. According to the Lewises, Congress' decision not to specify "common law" in the preemption clause demonstrates congressional intent to save common law claims. As Brunswick points out, however, the omission of the phrase "common law" in the preemption clause is not determinative, because "law" and "regulation" may be read to include state tort actions. *See Cipollone*, 505 U.S. at 520-30, 112 S.Ct. at 2619-25 (1992) (plurality opinion) (holding that the phrase "State law" in the Federal Cigarette Labeling and Advertising Act was intended to include common law claims); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993) (common law claims

fall within the scope of the phrases "law, rule, regulation, order, or standard"). In fact, the overwhelming majority of courts have held that common law claims fall within the scope of "law[s]" and "regulation[s]" expressly preempted by the FBSA. *See* Moss v. Outboard Marine Corp., 915 F.Supp. 183, 186 (E.D.Cal.1996); *Davis v. Brunswick Corp.*, 854 F.Supp. 1574, 1580 (N.D.Ga.1993); *Shield v. Bayliner Marine Corp.*, 822 F.Supp. 81, 84 (D.Conn.1993); *Shields v. Outboard Marine Corp.*, 776 F.Supp. 1579, 1581 (M.D.Ga.1991); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D.Ohio 1991); *Farner v. Brunswick Corp.*, 239 Ill.App.3d 885, 180 Ill.Dec. 493, 497-98, 607 N.E.2d 562, 566-67 (1992); *Ryan v. Brunswick Corp.*, 454 Mich. 20, 557 N.W.2d 541, 548-49 (1997). *Contra* Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246, 250 (Tex.), *cert. denied*, 513 U.S. 1057, 115 S.Ct. 664, 130 L.Ed.2d 599 (1994).

We agree that the terms "law" and "regulation" evidence an intent to include common law claims. However, we stop short of concluding that common law claims are expressly preempted by the FBSA, because another provision in the Act pulls us away from that conclusion. As the Lewises point out, Congress included a savings clause in the Act, which seems to save common law claims from preemption. That clause, which is found within the section of the Act entitled "Penalties and Injunctions," provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C.A. § 4311(g) (West Supp.1995).

[6][7] Because the FBSA preempts an area (safety) that historically has been regulated by the states through their police powers, we must construe the Act's preemption clause narrowly. *See Medtronic*, 518 U.S. at ----, 116 S.Ct. at 2250. The preemption clause easily could be read to cover common law claims, but because the savings clause indicates that at least some common law claims survive express preemption, we cannot give the preemption clause that broad reading. Instead, we must resolve doubts in favor of the narrower interpretation of the preemption clause and conclude that the express preemption clause does not cover common law claims. We hold that those claims are not expressly preempted.

The Lewises urge us to go further and hold that the savings clause demonstrates clear congressional intent to save common law claims from preemption. We find congressional ***1502** intent to be less than clear, given the conflicting language in the preemption and savings clauses. Just as the conflict between those provisions prevents us from concluding that the Lewises' claims are expressly preempted, so also does that conflict prevent us from concluding that those claims are expressly saved. *See* Taylor v. General Motors Corp., 875 F.2d 816, 825 (11th Cir.1989) (interpreting the National Traffic and Motor Vehicle Safety Act). The express terms of the FBSA simply fail to answer the question of whether Congress intended to preempt common law claims. As a result, our decision about preemption depends on whether the Lewises' claims are impliedly preempted by federal law. *See id.* at 827-28.

VIII. IMPLIED CONFLICT PREEMPTION

[8] The Lewises' claims are preempted impliedly by the FBSA to the extent that those claims conflict with the "accomplishment and execution of the full purposes and objectives of Congress." *See* Freightliner Corp. v. Myrick, 514 U.S. 280, ----, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995). In other words, the Lewises' claims are preempted if they prevent or hinder the FBSA from operating the way Congress intended it to operate. In deciding whether the Lewises' claims conflict with the purposes of the FBSA, we do not apply a presumption against preemption, even though common law tort claims are a mechanism of the police powers of the state. *Taylor*, 875 F.2d at 826. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 2307, 101 L.Ed.2d 123 (1988) (citations omitted).

According to Brunswick, the Lewises' claims are preempted by implication because those claims would interfere with the regulatory scheme enacted by Congress in the FBSA. Brunswick argues that the Coast Guard has the last say on whether a safety feature on boats or associated equipment should be required. Where the Coast Guard believes that a safety feature should not be required, Brunswick argues that states may not require the feature, even through common law claims.

[9][10] "[A] federal decision to forgo regulation in a

given area may imply an authoritative federal determination that the area is best left *un* regulated, and in that event would have as much preemptive force as a decision *to* regulate." *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384, 103 S.Ct. 1905, 1912, 76 L.Ed.2d 1 (1983) (emphasis in original). Though a decision not to regulate does not always have preemptive effect, *see Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503, 108 S.Ct. 1350, 1355, 99 L.Ed.2d 582 (1988), it does "where [the] failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 1004, 55 L.Ed.2d 179 (1978) (citations omitted).

[11] The Lewises argue that the rule of *Atlantic Richfield* does not apply here, because Congress did not intend for a mere decision not to regulate to have preemptive effect under the FBSA. In the Lewises' view, any state regulation on boat and equipment safety standards is permissible, unless the Coast Guard promulgates a regulation that conflicts with the state regulation. As the Lewises understand the FBSA regulatory scheme, a Coast Guard position not to impose a safety standard on a matter leaves room for states to impose safety standards on that matter. There being no regulation on propeller guards, the Lewises argue that their claims are not affected by the Coast Guard's position. For support, they point to ***1503** *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), a case in which the Supreme Court concluded that an absence of regulation on a safety matter did not preempt state common law claims imposing such standards.

In *Freightliner*, the Supreme Court considered whether common law claims based on the failure to install antilock brakes were expressly or impliedly preempted by the Vehicle Safety Act. *See id.* at ----, 115 S.Ct. at 1485. The preemption clause in the Vehicle Safety Act provided:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C.A. § 1392(d) (West 1982) (repealed 1994). The defendants in *Freightliner* argued that the failure-to-install claims were preempted, because the relevant agency had indicated its intent to regulate braking systems by promulgating a regulation on that matter. That regulation was struck down by an appellate court, but the defendants in *Freightliner* believed it still had preemptive effect, because it demonstrated the agency's intent to forbid state regulation on braking systems. *Id.* at ----, 115 S.Ct. at 1487.

The Supreme Court rejected that argument. First, the Court explained, there was no evidence that the Vehicle Safety Act gave the relevant federal agency exclusive authority to issue safety standards. *Id.* In fact, the preemption clause in that act clearly implied that states could impose safety standards on auto manufacturers, until the federal government came forward with a different standard. Therefore, under the Vehicle Safety Act regulatory scheme, the absence of regulation failed to have preemptive effect under the *Atlantic Richfield* doctrine; instead, the agency's failure to put into effect a valid regulation left the state common law intact. *Id.* Furthermore, the Court reasoned, *Atlantic Richfield* was inapposite because:

> the lack of federal regulation [on antilock brakes] did not result from an affirmative decision of agency officials to refrain from regulating air brakes. [The agency] did not decide that the minimum, objective safety standard required by 15 U.S.C. § 1392(a) should be the absence of all standards, both federal and state.

Id. (footnote omitted).

In contrast to the Vehicle Safety Act, the FBSA was intended to give its regulatory agency--the Coast Guard--exclusive authority to issue safety standards:

> This section [containing the preemption clause] provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. At the same time, it was recognized that there may be serious hazards which are unique to a particular locale and which would justify variances at least with regard to the carriage or use of marine safety articles on boats. Therefore, the section does permit individual States to impose requirements with respect to carrying or using

> marine safety articles which go beyond the federal requirements when necessary to meet uniquely hazardous local conditions or circumstances. A right of disapproval, however, is reserved to the Secretary to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity.
>
> The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1341. *See* ***1504**Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1508 (11th Cir.1990) ("[T]he [FBSA] gives the Coast Guard the exclusive responsibility for establishing safety regulations.") (dicta); *Williams v. U.S. Dept. of Transportation*, 781 F.2d 1573, 1577 & n. 4 (11th Cir.1986) (with the FBSA Congress expressly preempted state regulation regarding performance and safety standards for boats and associated equipment) (dicta). While an absence of regulation under the Vehicle Safety Act does not prevent states from regulating motor vehicle safety standards, an absence of federal regulation under the FBSA means that no regulation, state or federal, is appropriate. *Freightliner* is distinguishable for that reason.

Also in contrast to *Freightliner*, the relevant agency here, the Coast Guard, *did* make an affirmative decision to refrain from regulating propeller guards. Unlike the agency in *Freightliner*, the Coast Guard did not try to promulgate a regulation, and then fail, under a statutory scheme that would leave state law intact in the absence of federal regulatory action. Instead, under a statutory scheme that forbids any state standard or regulation "not identical to" a federal regulation, the Coast Guard decided not to issue a regulation. After consulting with the Advisory Council and reviewing the available data, the Coast Guard reached a carefully considered decision that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats."

The Coast Guard decided not only that a federal regulation would be inappropriate, but that the scientific data counseled against any regulation requiring propeller guards. Given that Congress intended for the FBSA to create a uniform system of regulation, and that the Coast Guard has determined that propeller guards should not be required, the Coast Guard's position mandates an absence of both federal and state propeller guard requirements. *See Ryan v. Brunswick Corp.*, 454 Mich. 20, 557 N.W.2d 541, 549-50 (1997). *See also Puerto Rico*, 485 U.S. at 503, 108 S.Ct. at 1355 ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn--not from federal inaction alone, but from inaction joined with action.") (emphasis in original). *Freightliner* does not require that we hold otherwise.

But the Lewises contend that even if *Freightliner* is not controlling here, we cannot find an implied conflict between their claims and the Act, because we know from the savings clause that Congress expected some common law claims to be brought in this area. About the savings clause, the Senate report says:

> This section is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1352.

[12] From the savings clause, we know that Congress understood at least some product liability claims to be consistent with the FBSA regulatory scheme. In order to decide which claims, we must determine when product liability claims can be brought without upsetting the overall scheme Congress intended. Addressing that question, several courts have held that the only claims which do not present a conflict with the FBSA regulatory scheme are product liability claims based on the defective design or installation of products that are already installed, as opposed to claims based on the failure to install a certain safety device. *See Carstensen v. Brunswick Corp.*, 49 F.3d 430, 432 (8th Cir.), *cert. denied*, 516 U.S. 866, 116 S.Ct. 182, 133 L.Ed.2d 120 (1995); ***1505***Moss v. Outboard Marine Corp.*, 915 F.Supp. 183, 187 (E.D.Cal.1996); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D.Ohio 1991); *Rubin v. Brutus Corp.*, 487 So.2d 360, 363 (Fla.Dist.Ct.App.1986); *Farner v. Brunswick Corp.*, 239 Ill.App.3d 885, 180 Ill.Dec. 493, 498, 607 N.E.2d 562, 567 (1992); *Ryan v. Brunswick Corp.*, 209 Mich.App. 519, 531 N.W.2d 793, 796 n. 1

(1995), *aff'd,* 454 Mich. 20, 557 N.W.2d 541 (1997); *Mulhern v. Outboard Marine Corp.,* 146 Wis.2d 604, 432 N.W.2d 130, 134-35 (1988). Permitting product liability claims against manufacturers for negligent or defective design of products required by the Coast Guard, or for products provided voluntarily by manufacturers, simply requires manufacturers to comply with FBSA regulations, and to do any additional manufacturing, in a non-negligent and non-defective manner. Permitting such claims is consistent with the FBSA scheme, which is designed to ensure that boats and associated equipment are safe.

By contrast, claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the FBSA. Without doubt, the Lewises' product liability claims seek to impose a propeller guard requirement. *See Carstensen,* 49 F.3d at 432. That requirement conflicts with the FBSA's grant of exclusive regulatory authority to the Coast Guard, and for that reason those claims are in conflict with and are therefore preempted by the Act.

[13] The Lewises argue that their fraud claim should be treated differently from their other claims, because it would not create a propeller guard requirement beyond FBSA requirements. We disagree. If the Lewises succeeded with their fraud claim, a jury could impose liability upon Brunswick for attempting to persuade the Coast Guard and others that propeller guards are unsafe. The necessary element of causation in any such claim would be that but for the wrongful conduct of Brunswick, propeller guards would have been required by the Coast Guard. Such a judgment would conflict with the Coast Guard's position that propeller guards should not be required. Thus, the fraud claim is impliedly preempted by the Coast Guard's position and the preemptive effect given that position by the FBSA.

Regulatory fraud claims of this nature are impliedly preempted for fundamental, systemic reasons. Permitting such claims would allow juries to second-guess federal agency regulators through the guise of punishing those whose actions are deemed to have interfered with the proper functioning of the regulatory process. If that were permitted, federal regulatory decisions that Congress intended to be dispositive would merely be the first round of decision making, with later more important rounds to be played out in the various state courts. Virtually any federal agency decision that stood in the way of a lawsuit could be challenged indirectly by a claim that the industry involved had misrepresented the relevant data or had otherwise managed to skew the regulatory result. Ironically, such circumvention of the regulatory scheme likely would be more pronounced where, as here, Congress mandated more extensive industry input into the regulatory process. *See* 46 U.S.C. § 4302(c). Congress could not have intended for the process it so carefully put in place to be so easily and thoroughly undermined. [FN1]

FN1. The Lewises' claim may be read to address alleged fraudulent misrepresentations by Brunswick to individuals and groups outside the federal government. To the extent that the Lewises intend to hold Brunswick liable for allegedly dissuading other manufacturers from installing propeller guards, their claim fails on causation grounds, because their daughter was struck by a propeller on a Brunswick motor. To the extent that the Lewises seek to hold Brunswick liable for alleged fraud upon state regulators, their fraud claim is preempted because state regulatory decisions of the propeller guard issue are themselves preempted.

In sum, we conclude that because Congress has made the Coast Guard the exclusive authority in the area of boat and equipment safety standards, its position rejecting a propeller guard requirement takes on the character of a ruling that no such requirement may be imposed. That position impliedly ***1506** preempts state law requirements of propeller guards, even in the form of common law claims. It also prevents plaintiffs from bringing fraud claims intended to demonstrate that the Coast Guard would have reached a different conclusion on the matter of propeller guards but for alleged industry manipulation or subversion of the federal regulatory process. We hold that each of the Lewises' claims is preempted by implication because it conflicts with the Coast Guard's position on propeller guards and would interfere with the FBSA regulatory process designed by Congress.

IX. CONCLUSION

The district court's grant of summary judgment to Brunswick is AFFIRMED.

Briefs and Other Related Documents (Back to top)

• 1996 WL 33469334 (Appellate Brief) Reply Brief of Appellants/Plaintiffs (Jun. 04, 1996)

• 1996 WL 33469335 (Appellate Brief) Brief of Defendant/Appellee Brunswick Corporation (May. 20, 1996)

• 1996 WL 33469333 (Appellate Brief) Brief of Appellants (Apr. 10, 1996)

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H
Briefs and Other Related Documents

Supreme Court of the United States

Vicky LEWIS, et vir., etc.,
v.
BRUNSWICK CORPORATION.

No. 97-288.

May 15, 1998.

Case below, 11 Cir., 107 F.3d 1494.

The writ of certiorari in the above entitled case was dismissed today pursuant to Rule 46.1 of this Court.

118 S.Ct. 1793 (Mem), 523 U.S. 1113, 140 L.Ed.2d 933

Briefs and Other Related Documents (Back to top)

• 1998 WL 106133, 66 USLW 3618 (Oral Argument) Oral Argument (Mar. 02, 1998)

• 1998 WL 66036 (Appellate Brief) REPLY BRIEF OF PETITIONERS (Feb. 18, 1998)

• 1998 WL 32506 (Appellate Brief) BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENT (Jan. 28, 1998)

• 1998 WL 35183 (Appellate Brief) BRIEF FOR THE RESPONDENT (Jan. 28, 1998)

• 1998 WL 35188 (Appellate Brief) BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT (Jan. 28, 1998)

• 1998 WL 35189 (Appellate Brief) BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT (Jan. 28, 1998)

• 1997 WL 793078 (Appellate Brief) BRIEF OF PETITIONERS (Dec. 29, 1997)

• 1997 WL 799992 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS (Dec. 29, 1997)

• 1997 WL 800060 (Appellate Brief) AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS (Dec. 29, 1997)

• 1997 WL 800064 (Appellate Brief) BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE. P.C., IN SUPPORT OF PETITIONERS (Dec. 29, 1997)

• 1997 WL 800068 (Appellate Brief) BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND US. CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPO RT OF PETITIONERS (Dec. 24, 1997)

• 1997 WL 33557248 (Appellate Filing) Brief for the Respondent in Opposition (Oct. 15, 1997)

• 1997 WL 33549141 (Appellate Filing) Petition for Writ of Certiorari (Aug. 13, 1997)

END OF DOCUMENT

Brett Kavanaugh – Products Liability

Allegation: In *Geier v. American Honda Motor Company*, Mr. Kavanaugh filed an amicus brief on behalf of the Alliance of Automobile Manufacturers to preclude a woman who received serious injuries in a car accident from recovering damages from the car manufacturer. The car manufacturer had not installed airbags in the car even though Washington, D.C. law required such airbags. 529 U.S. 861 (2000).

Facts:

- **In an opinion written by Justice Breyer, the U.S. Supreme Court agreed with a position taken by Mr. Kavanaugh's client in its brief.**
  - ✓ The Supreme Court held that safety standards promulgated by the Department of Transportation, pursuant to an Act of Congress, preempted the D.C. law requiring airbags, and that therefore the plaintiff could not bring an action under the D.C. law. *Geier v. American Honda Motor Company*, 529 U.S. 861, 875 (2000).
  - ✓ Federal Motor Vehicle Safety Standard (FMVSS) 208 required that auto manufacturers equip some but not all of their 1987 vehicles with passive restraints.
  - ✓ Because a universal airbag requirement like that in place in D.C. would directly conflict with the safety purposes behind enactment of FMVSS 208, the long-standing principle of preemption applied and the D.C. requirement could not be enforced.
  - ✓ The plaintiff's car in this case contained a restraint system explicitly authorized by Standard 208, and thus was in full compliance with the Federal regulation.
- **All of the circuit courts to consider the issue, including the 9th Circuit, agreed with either the implied or express preemption arguments set forth in the brief Mr. Kavanaugh filed on behalf of his client.**
  - ✓ District Judge William Bryant, appointed by President Johnson, granted American Honda summary judgment in this case based on the express preemption argument later set forth in the brief.
  - ✓ The D.C. Court of Appeals affirmed the lower court decision on implied preemption grounds in a unanimous opinion written by Clinton appointee Judge Judith Rogers.
  - ✓ Four other circuits came to the same conclusion as the D.C. Circuit.

- ✓ The 9th Circuit adopted the express preemption argument set forth in the brief submitted by Mr. Kavanaugh, that the Motor Vehicle Safety Act expressly preempted state tort suits brought on the basis of a lack of an airbag.

- ➢ **The Clinton Administration, through the office of Solicitor General, also argued in its brief that the state law claims were impliedly preempted by the federal standards promulgated by the Department of Transportation.**

For opinion see 120 S.Ct. 1913,120 S.Ct. 519,120 S.Ct. 33

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
Alexis GEIER, et al., Petitioners,
v.
AMERICAN HONDA MOTOR COMPANY, INC., et al.
No. 98-1811.
November 8, 1999.
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

Nancy E. McFadden General Counsel Paul M. Geier Assistant General Counsel for Litigation Frank Seales, Jr. Chief Counsel National Highway Traffic Safety Administration Department of Transportation Washington, D.C. 20590

Seth P. Waxman Solicitor General Counsel of Record David W. Ogden Acting Assistant Attorney General Lawrence G. Wallace Deputy Solicitor General Matthew D. Roberts Assistant to the Solicitor General Douglas N. Letter Kathleen Moriarty Mueller Attorneys Department of Justice Washington, D.C. 20530-0001 (202) 514-2217

*I QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 et seq. (1988), or Federal Motor Vehicle Safety Standard 208, 49 C.F.R. 571.208 (1987), preempts a state common law tort claim that an automobile manufactured in 1987 was defectively designed because it lacked an airbag.

*III TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and regulations:

Intermodal Surface Transportation Efficiency Act of 1991, 49 U.S.C. 30101 et seq.:

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 et seq. (1988):

***1** INTEREST OF THE UNITED STATES

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 et seq. (1988), requires the Secretary of Transportation to promulgate motor vehicle safety standards. 15 U.S.C. 1392(a). [FN1] This case concerns the preemptive effect of the Act and one of those standards, Federal Motor Vehicle Safety Standard 208, 49 C.F.R. 571.208 (1987), which governs occupant crash protection. The Court's decision may affect the manner in which the Secretary exercises his regulatory authority under the Act.

FN1. The Act was recodified, along with other Acts governing transportation, on July 5, 1994, "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745; see § 1(e), 108 Stat. 941-973 (codifying new 49 U.S.C. 30101 et seq.). Like the court of appeals and petitioners, we generally refer to the earlier version of the Act.

*2 STATEMENT

1. Congress enacted the National Traffic and Motor Safety Vehicle Act of 1966 (Safety Act or Act) to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381. The Act directs the Secretary of Transportation to "establish by order motor vehicle safety standards," 15 U.S.C. 1392(a), which are defined as "minimum standard[s] for motor vehicle performance or motor vehicle equipment performance," 15 U.S.C. 1391(2). Each standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. 1392(a).

The Safety Act contains a preemption provision, which provides in relevant part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. 1392(d). [FN2] The Act also contains a provision, which petitioners refer to as a savings clause, that describes *3 the effect of compliance with federal standards on common law liability. That clause provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. 1397(k). [FN3]

FN2. As we explain in note 1, supra, the Safety Act was amended and recodified in 1994 without substantive change. Section 1392(d) is now codified at 49 U.S.C. 30103(b)(1) and states in relevant part:

> When a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

FN3. Section 1397(k) is now codified at 49 U.S.C. 30103(e), which states: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."

2. Federal Motor Vehicle Safety Standard 208 regulates occupant crash protection. 49 C.F.R. 571.208. The Secretary promulgated the version of Standard 208 at issue in this case in 1984, after nearly 15 years of analysis, rulemaking, and litigation. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34-38 (1983); State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 477-478 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987).

Beginning with the 1987 model year (in which petitioners' car was manufactured), Standard 208 phased in a requirement that all new passenger cars have some type of passive restraint system, i.e., a device that works automatically, without any action by the occupants, to help protect occupants from injury during a collision. Standard 208 required manufacturers to install some type of passive restraint in at least 10% of their 1987 model year cars. 49 C.F.R. 571.208.S4.1.3.1. [FN4] ***4** The rule did not, however, require installation of any particular type of passive restraint. Instead, it gave manufacturers the option to install automatic seatbelts, airbags, or any other suitable technology that they might develop, provided they met the performance requirements specified in the rule.

> FN4. The percentages increased each year until the 1990 model year. Beginning in that model year, all new cars were required to have a passive restraint system. 49 C.F.R. 571.208.S4.1.3.2, 571.208.S4.1.3.3, 571.208.S4.1.4. In response to the Intermodal Surface Transportation Efficiency Act of 1991, 49 U.S.C. 30127, the Secretary has amended Standard 208 to require that, beginning in the 1998 model year, all new cars have an airbag at the driver's and right front passenger's position. 49 C.F.R. 571.208.S4.1.5.3. Section 30127(f)(2) provides that "[t]his section and the amendments to Standard 208 made under this section may not be construed as indicating an intention by Congress to affect any liability of a motor vehicle manufacturer under applicable law related to vehicles with or without [airbags]."

In adopting that standard, the Secretary expressly considered, and rejected, a proposal to require airbags in all cars. See 49 Fed. Reg. 29,000-29,002 (1984). The Secretary reasoned that some people had serious concerns about airbags, and, if airbags were required in all cars, there could be a public backlash in which some people disabled the airbags, thus eliminating their safety benefit. Id. at 29,001. The Secretary also concluded that, although airbags and seatbelts together may provide greater safety benefits than automatic seatbelts alone, the effectiveness of an airbag system is "substantially diminished" if, as then often occurred, the occupant does not wear the seatbelt. Id. at 28,996. Further, airbags were found "unlikely to be as cost effective" as automatic seatbelts, and, because of the high replacement cost of airbags, some people might not replace them after deployment, leaving no automatic protection for front seat occupants. Id. at 29,001. Finally, little developmental work had been done to install airbags in smaller cars, and the Secretary found that unrestrained occupants, particularly children, could be injured by the deployment of airbags in those cars. Ibid.

In light of those concerns, the Secretary determined that manufacturers should have a choice of ways to ***5** comply with the passive restraint requirement. 49 Fed. Reg. at 28,997. The Secretary anticipated that manufacturers would respond to that choice by using a variety of passive restraints, including airbags and automatic seatbelts. Although airbags were more expensive than automatic seatbelts, the Secretary expected manufacturers to install airbags in some cars because one manufacturer had already begun to offer airbags, others had indicated plans to do so, and the rule provided an incentive to use airbags and other non-belt

technologies. Ibid. [FN5]

FN5. In determining whether a manufacturer installed passive restraints in the requisite percentage of its fleet during the phase-in period, Standard 208 counted each car with an airbag or other non-belt passive restraint as the equivalent of 1.5 cars with automatic seatbelts. 49 C.F.R. 571.208.S4.1.3.4; 49 Fed. Reg. at 29,000.

The Secretary concluded that installation of a variety of passive restraint systems would have several safety advantages. The latitude provided the industry would enable manufacturers to "develop the most effective systems" and would "not discourag[e] the development of other technologies." 49 Fed. Reg. at 28,997. In addition, the availability of alternative devices would enable the industry to "overcome any concerns about public acceptability by permitting some public choice." Ibid. Customers who did not like airbags could buy a car with automatic seatbelts, and those who did not want the automatic belts could select a car with airbags. Ibid. Finally, widespread use of both airbags and automatic seatbelts was "the only way to develop definitive data" about which alternative is more effective. Ibid. [FN6]

FN6. The Secretary also concluded that a gradual phase-in of the passive restraint requirement would better serve the Act's safety purpose than a uniform implementation on a single future date. One purpose of the phase-in was to achieve the installation of passive restraints in some cars earlier than if a single effective date had been established, since it would have taken longer for all cars to be redesigned to include a passive restraint. The phase-in also increased the likelihood that manufacturers would use airbags, which required a longer lead time for redesign. Finally, the phase-in gave consumers and the agency time to develop more information about the benefits of passive restraints, thus enhancing the opportunity to overcome public resistance. 49 Fed. Reg. at 28,999-29,000.

*6 3. In January 1992, while driving a 1987 Honda Accord, petitioner Alexis Geier collided with a tree in the District of Columbia. Although she was wearing her seatbelt, she sustained "serious and grievous injuries." J.A. 2-5. Ms. Geier and her parents (also petitioners) sued respondent American Honda Motor Company, Inc., in the United States District Court for the District of Columbia. Pet. App. 2 n.1. Alleging that their car was negligently and defectively designed because it lacked a driver's-side airbag in addition to a manual seatbelt, they sought damages under the common law of the District of Columbia. Pet. Br. 12.

The district court granted respondent's motion for summary judgment. Pet. App. 17-20. The court held that petitioners' tort claims were expressly preempted by the Safety Act because recovery on the claims would be "equivalent to a safety standard promulgated by the state legislature or a state regulatory body." Id. at 19.

4. The court of appeals affirmed, but it employed a different preemption analysis. Pet. App. 1-16. The court acknowledged that the term "standard" in the Safety Act's preemption provision could be read in isolation to encompass requirements imposed by common law tort verdicts, but the court recognized that the preemption clause must be interpreted in light of the entire Safety Act, including the savings clause. Id. at 9-*7 11. The court ultimately found it unnecessary to resolve the express preemption question, because it concluded that a verdict in petitioners'

favor "would stand as an obstacle to the federal government's chosen method of achieving the Act's safety objectives, and consequently, the Act impliedly preempts [the] lawsuit." Id. at 12.

The court of appeals rejected petitioners' claim that this Court's decision in Cipollone v. Liggett Group, 505 U.S. 504 (1992), prevents courts from conducting implied preemption analysis when a statute has an express preemption provision and a savings clause. Pet. App. 12-13. The court of appeals noted that this Court rejected a similar argument in Freightliner Corp. v. Myrick, 514 U.S. 280 (1995), in which the Court engaged in implied preemption analysis after concluding that the Safety Act did not expressly preempt the state tort claim at issue.

Applying implied preemption analysis, the court of appeals determined that "allowing liability for the absence of airbags would 'interfer[e] with the method by which Congress intended to meet its goal of increasing automobile safety.' " Pet. App. 14 (citation omitted). The court explained:

A successful no-airbag claim would mean that an automobile without an airbag was defectively designed. Congress, however, delegated authority to prescribe specific motor vehicle safety standards to the Secretary of Transportation, who in turn explicitly rejected requiring airbags in all cars on the ground that a more flexible approach would better serve public safety.

Ibid. (citation omitted). The Secretary had decided that a choice among passive restraint systems would advance public safety by "allowing consumers to adjust to *8 the new technology and by permitting experimentation with designs for even safer systems." Id. at 15. The court therefore concluded that "allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department's policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." Ibid.

SUMMARY OF ARGUMENT

Petitioners' tort claims are not expressly preempted by the Safety Act, but they are impliedly preempted because they conflict with Standard 208. The Safety Act's preemption clause, 15 U.S.C. 1392(d), does not bar the claims, because, particularly when read in conjunction with the Act's savings clause, 15 U.S.C. 1397(k), it expressly preempts only prescriptive rules affirmatively promulgated by a state legislature or administrative agency. Although the reference in the preemption provision to a state "standard" could, in isolation, be understood to encompass common law tort rules, that reading is not consistent with the remainder of the Act, including the express reference to "common law" in Section 1397(k). Moreover, if Section 1392(d) preempted all common law actions involving the same aspect of performance as a federal safety standard, there would be no meaningful role for Section 1397(k), which provides that compliance with a federal safety standard does not "exempt" a person from common law liability.

The Secretary of Transportation has therefore long taken the view that, although state legislatures and administrative agencies may not adopt a safety standard that differs from a federal standard governing the same aspect of performance, state courts are not necessarily precluded from entering tort judgments that a *9 vehicle was defectively designed with respect to that aspect of performance. That interpretation could create some tension within the Safety Act, but any tension reflects a congressional compromise between the interests in uniformity and in permitting States to compensate accident victims.

There is no danger that tort liability will undermine the Act, because common law claims still must yield if they conflict with federal safety standards. Section 1397(k) does not preserve those claims because it neither refers to preemption nor

states that common law liability is preserved even if it conflicts with a federal standard. Congress legislates against the background of the Supremacy Clause, which provides that state law yields if it conflicts with federal law. Thus, absent a solid basis to believe that Congress intended to alter traditional preemption analysis, a statute should not be interpreted to permit state laws to operate in a manner that conflicts with federal law.

Petitioners' claims conflict with Federal Motor Vehicle Safety Standard 208, because a judgment for petitioners would stand as an obstacle to the accomplishment of the full purposes and objectives of the Standard. In promulgating the version of Standard 208 that was in effect when petitioners' car was manufactured, the Secretary rejected a proposal to require airbags in all cars, because she determined that safety would best be served if manufacturers were permitted at that time to install a variety of passive restraints. Petitioners' attempt to hold a manufacturer liable for failing to install a particular type of passive restraint--an airbag--would conflict with that policy of encouraging a diversity of passive restraints. Petitioners' claims are therefore preempted.

***10** ARGUMENT

In cases addressing whether the Safety Act or Standard 208 preempts tort claims that an automobile is defectively or negligently designed because it does not contain an airbag, the parties, and some courts, have tended to take an all-or-nothing view of preemption. Manufacturers have argued, and some courts have held, that Section 1392(d) preempts any common law ruling imposing a standard of care greater than the standard set by federal law. See, e.g., Harris v. Ford Motor Co., 110 F.3d 1410, 1413-1415 (9th Cir. 1997); Wood v. General Motors Corp., 865 F.2d 395, 412-413 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990). In contrast, plaintiffs have argued (as do petitioners in this case) that a federal safety standard can never preempt a tort claim because Section 1397(k) preserves all common law actions.

We agree with neither approach. As this Court has explained, when a federal regulatory scheme preserves a role for state law, "conflict-pre-emption analysis must be applied sensitively *** to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 515 (1989).

The Secretary's longstanding view is that, read in the full statutory context, Section 1392(d) prohibits state legislative or administrative bodies from prescribing safety standards different from those prescribed by the Secretary but does not expressly preempt state tort ***11** claims. At the same time, the Secretary's view has been that Section 1397(k) does not preserve tort claims that actually conflict with a federal standard but rather provides that compliance with federal standards does not, in itself, immunize manufacturers from liability. See U.S. Amicus Br. at 16 & n.10, 28-29, Freightliner Corp. v. Myrick, 514 U.S. 280 (1995); U.S. Amicus Br. at 7-16, Wood v. General Motors Corp., 494 U.S 1065 (1990) (No. 89-46). That view is entitled to "substantial weight." Medtronic, Inc., v. Lohr, 518 U.S. 470, 496 (1996); id. at 505-506 (Breyer, J., concurring).

Petitioners' tort claims that their vehicle was defectively and negligently designed because it lacked an airbag are thus not expressly preempted by the Safety Act. Their claims are, however, preempted by implication, because a judgment for petitioners would frustrate Standard 208's policy of encouraging a variety of passive restraints.

A. The Safety Act Does Not Expressly Preempt Petitioners' Tort Claims.

In 1987, when petitioners' automobile was manufactured, the Safety Act's preemption clause stated:

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

***12** 15 U.S.C. 1392(d). [FN7] It is our view that, read in its statutory context, this provision expressly preempts only prescriptive rules affirmatively promulgated by a state legislature or administrative agency.

FN7. As explained at notes 1-2, supra, that provision has been amended and recodified at 49 U.S.C. 30103(b)(1), but the amendments were not intended to be substantive.

The term "standard," construed in isolation, could be read to encompass duties imposed by tort law. The common law of torts is sometimes described in general terms as articulating "standards of care" to be applied on a case-by-case basis to assess a defendant's conduct and fault. See S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966); cf. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) (legal duties imposed by common law fall within scope of "law, rule, regulation, order, or standard relating to railroad safety"); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246-247 (1959). However, "standard" may also connote a prescriptive criterion, adopted in advance by responsible authorities, such as legislative or administrative bodies. [FN8] Consideration of the Safety Act as a whole confirms that this is the meaning of "standard" as used in the express preemption provision of Section 1392(d).

FN8. See Webster's Third New International Dictionary 2223 (1993) (def. 3a "something that is established by authority, custom, or general consent as a model or example to be followed: CRITERION, TEST;" def. 4 "something that is set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality").

Unlike the statute in CSX, which preempted any relevant "law, rule, regulation, order or standard" (507 U.S. at 664), and thus reached every method by which a State can impose legal obligations, or the statutes in Cipollone v. Liggett Group, 505 U.S. 504 (1992), and Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), ***13**Section 1392(d) preempts only "safety standard[s]," which is also the term used to describe the administrative requirements promulgated by the Secretary. See 15 U.S.C. 1392(a). Moreover, Section 1392(d) uses the verb "establish" to describe the enactment of the state standards it preempts, just as the Safety Act uses that verb to describe the promulgation of standards by the Secretary. See 15 U.S.C. 1392. [FN9] It is a "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995) (internal quotation marks omitted). Further, Section 1392(d) preempts standards established by a "State or political subdivision of a State," a phrase not normally used to describe a court in a common law damages action. Finally, the Act defines standards as providing "objective criteria," 15 U.S.C. 1391(2); see also 15 U.S.C. 1392(a) ("objective terms"), a description that would appear to exclude tort judgments, which are case-specific

determinations of liability and damages.

FN9. The recodification uses "prescribe" to describe the enactment of both state and federal standards. See 49 U.S.C. 30103(b)(1); note 2, supra. The use of "prescribe," which was not intended as a substantive change from the use of "establish" in the former 15 U.S.C. 1392(d) (see note 1, supra), confirms that "standards" are limited to positive enactments.

Our interpretation of Section 1392(d) is further buttressed by the specific reference to common law in Section 1397(k), which states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." [FN10] The reference to common law liability in that Section suggests that Congress ***14** would have referred to common law expressly in Section 1392(d) if it had wanted to preempt all common law actions involving the same aspect of performance as a federal safety standard. See, e.g., City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 338 (1994).

FN10. As we have explained in notes 1 & 3, supra, this Section is now codified as amended at 49 U.S.C. 30103(e), but the changes were not intended to alter the substance of the provision.

Finally, if Section 1392(d) preempted all common law tort actions involving the same aspect of performance as a federal safety standard, there would be no meaningful role for Section 1397(k). That Section provides that compliance with a federal safety standard does not "exempt" a person from, i.e., provide a defense to, common law liability. See 15 U.S.C. 1397(k); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) ("compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law"). There is, however, no need to negate a defense to claims that have already been preempted. And the only claims that would not be preempted under the broad reading of Section 1392(d) are those that involve an aspect of performance not addressed by any federal standard. Yet no court would otherwise have held that compliance with a federal standard provided a defense to such a suit. Congress could not have intended the preemption provision to sweep so broadly that it renders superfluous another provision in the Act. See, e.g., Gustafson, 513 U.S. at 574. [FN11]

FN11. The only remaining role for Section 1397(k) would be to disavow congressional intent to occupy the field and thereby displace all tort actions involving motor vehicle safety. But even that role is unnecessary because the preemption provision itself makes the lack of field preemption clear by permitting States to establish standards identical to the federal standards and standards covering aspects of performance not addressed by the federal standards. See 15 U.S.C. 1892(d).

For those reasons, the Safety Act prohibits state legislatures and administrative agencies from adopting ***15** prescriptive safety standards that differ from a federal standard governing the same aspect of performance. It does not, however, necessarily preclude state courts from entering tort judgments that a vehicle was defectively designed with respect to that aspect of performance.

That interpretation could create some tension within the Safety Act, because

allowing manufacturers to be held liable for design defects in vehicles that comply with federal standards could run counter to Congress's interest in uniform performance standards. But any tension reflects a congressional compromise between the interests in uniformity and in permitting States to compensate accident victims, embodied both in the savings clause (15 U.S.C. 1397(k)) and in the definition of a federal standard as a "minimum standard" (15 U.S.C. 1391(2)). See Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984). Moreover, tort suits can sometimes complement federal regulations and the Act's safety purpose by supplying manufacturers with an additional incentive to design a safe product. See Medtronic, 518 U.S. at 495. Finally, there is no danger that tort liability will impair the purpose of the Act, because, as we explain below, common law claims still must yield if they conflict with federal standards. Cf. Silkwood, 464 U.S. at 256 (conflict preemption analysis still applies despite congressional intent generally to preserve state tort actions).

B. Standard 208 Impliedly Preempts Petitioners' Tort Claims.

State law is impliedly preempted if it is "impossible for a private party to comply with both state and federal requirements *** or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [federal law].' " ***16** English v. General Elec. Co., 496 U.S. 72, 79 (1990) (citations omitted). Petitioners' tort claims are preempted under that analysis. Holding respondent liable for not installing airbags in petitioners' car would frustrate Standard 208's policy of encouraging a variety of passive restraints.

1. Contrary to petitioners' contention (Br. 25-41), the Safety Act's savings clause, 15 U.S.C. 1397(k), does not foreclose implied preemption analysis.

a. As an initial matter, any suggestion (see Pet. Br. 37-38) that the presence of a savings clause automatically precludes implied preemption analysis is incorrect. Savings clauses vary significantly in both phraseology and context, and, as with any other statutory provision, a court must ascertain the meaning of the specific clause. Cf. Freightliner, 514 U.S. at 289. [FN12] Thus, this Court frequently conducts implied preemption analysis even though a statute contains a savings clause. Indeed, the Court hesitates to read a savings clause to authorize claims that conflict with federal law. See, e.g., American Telephone & Telegraph Co. (AT&T) v. Central Office Telephone, 524 U.S. 214, 227-228 (1998); International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987); ***17**Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 328 (1981); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907).

FN12. Petitioners' reliance (Br. 38) on Malone v. White Motor Corp., 435 U.S. 497 (1978), and California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987), is unpersuasive. In Malone, the issue was essentially field preemption, and the Court held that two savings provisions (more broadly worded than the one at issue here) indicated that the federal labor statutes did not foreclose all state regulation of pension plans. 435 U.S. at 504-505. In Guerra, the plurality examined the savings provisions in the Civil Rights Act of 1964 and found that "Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law" (479 U.S. at 281); see also id. at 295-296 (Scalia, J., concurring).

There is good reason for that approach. Conflict preemption arises directly from the operation of the Supremacy Clause (U.S. Const. Art. VI, Cl. 2), rather than from a specific intent to displace state law. Thus, "[a] holding of federal

exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963). Similarly, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" may be impliedly preempted by a federal statute, even in the absence of any expression of intent to supersede state law-making authority. See Jones v. Rath Packing Co., 430 U.S. 519, 540-543 (1977). Those implied preemption principles are equally applicable to conflicts between state laws and federal regulations. Whether or not Congress has addressed preemption, "[t]he statutorily authorized regulations of an agency will pre- empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." City of New York v. FCC, 486 U.S. 57, 64 (1988).

Because Congress enacts laws against the background of the Supremacy Clause, a court should assume that Congress believes that federal law (whether enacted directly by Congress or promulgated by a federal agency pursuant to statutory authorization) will prevail in any collision with state law. Of course, Congress is free to change the general rule and to allow state laws to operate in the place of conflicting federal law. But absent a "solid basis" for believing that Congress "intended fundamentally to alter traditional preemption analysis," ***18**John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 99 (1993), a statute should not be interpreted to permit state laws to operate in conflict with federal law. [FN13]

FN13. Petitioners therefore err in suggesting (Br. 38-39) that the presumption that cautions against unduly broad construction of preemption provisions favors their reading of the savings clause. The presumption against preemption of state laws that can coexist harmoniously with federal law is quite different from a presumption in favor of preservation of state laws that conflict with federal law.

The presumption that Congress does not intend to alter traditional principles of conflict preemption is particularly appropriate when Congress enacts a statute such as the Safety Act that takes effect through administrative action. Congress did not itself prescribe motor vehicle safety standards in the Safety Act. Instead, it delegated their promulgation (and revision in light of experience) to the Secretary of Transportation. Thus, Congress could not know what federal standards would be promulgated, and it could not predict whether or how States might adopt conflicting measures.

b. The Act's savings clause, Section 1397(k), provides no sound basis to conclude that Congress intended to alter the general rule that federal law preempts conflicting state law. Nothing in the text of the clause suggests that common law liability is saved from preemption even if it conflicts with a federal safety standard. Indeed, the language of the clause does not directly address preemption at all. It states that "[c]ompliance with any Federal motor vehicle safety standard issued under [the Safety Act] does not exempt any person from any liability under common law." 15 U.S.C. 1397(k). [FN14] As we have explained, the ***19** clause thus preserves common law liability in the sense that a manufacturer cannot invoke its compliance with federal law as an automatic defense against a claim that a car was defectively designed. See p. 14, supra. The clause does not, however, preserve common law liability that conflicts with federal law.

FN14. The recodification substituted the modifier "a" for "any," note 3,

supra, without intending substantive change, note 1, supra. The fact that Congress perceived no distinction between the use of the words "a" and "any" refutes the suggestion (see Pet. Br. 25) that the use of "any" was intended to signal a broad construction of the clause.

The legislative history supports that interpretation. The provision originated in the House of Representatives, and the House Report expressly states that the clause "establishes[] that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law." See H.R. Rep. No. 1776, supra, at 24 (emphasis added). Other references in the legislative history are consistent with the understanding that Section 1397(k) negates a substantive defense to liability and does not directly address preemption. [FN15] Petitioners have not identified, ***20** and we have not found, any statement in the legislative history that describes Section 1397(k) as preserving from preemption common law claims that conflict with federal law. [FN16]

FN15. See, e.g., S. Rep. No. 1301, supra, at 12 (explaining that federal standards "need not be interpreted as restricting State common law standards of care" so that compliance with federal standards "would thus not necessarily shield any person from product liability at common law") (emphasis added); 112 Cong. Rec. 14,230 (1966) (Sen. Magnuson) (also using qualifier "not necessarily"); id. at 21,487 (Sen. Magnuson) (stating that Senate conferees adopted the House provision, which "makes explicit, in the bill, a principle developed in the Senate report"); ibid. (explaining that the provision does not prevent use of compliance or noncompliance as "evidence"); id. at 21,490 (Sen. Cotton) ("proof of compliance" may be offered "for such relevance and weight as courts and juries may give it"). Petitioners also rely (Br. 29) on the comments of a witness at House hearings who expressed the concern that manufacturers would respond to lawsuits with a claim that "Our product meets Government standards." Comments by members of the public reveal little about congressional intent. In any event, the witness's concern was precisely that manufacturers would use compliance with federal standards as a substantive defense to liability.

FN16. As noted in the text, the House Report states that "compliance with federal standards is not to be a defense or otherwise to affect the rights of parties under common law." H.R. Rep. No. 1776, supra, at 24 (emphasis added). The context suggests that the italicized language refers to substantive changes to common law rules rather than the possibility of preemption. Petitioners also note (Br. 29) that Senator Magnuson stated that "[t]he common law on product liability still remains as it was." That statement too is properly understood as explaining that the Act made no change to the substance of product liability law. Finally, petitioners rely (Br. 30-31) on a statement by Representative Dingell that "we have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser." 112 Cong. Rec. at 19,663. Mr. Dingell made that statement to explain why he opposed an amendment that would have criminalized willful violations of federal standards. Thus, the statement indicates only that common law actions based on the violation of federal standards are preserved; it does not indicate that actions that would conflict with federal standards are similarly preserved. See Wood, 865 F.2d at 407 n.14.

That interpretation of Section 1397(k) is reinforced by the fact that Congress did

not include the savings clause in the Section of the Safety Act that addresses preemption (Section 103(d) (codified at 15 U.S.C. 1392(d))) but inserted it five sections later (Section 108(c) (codified at 15 U.S.C. 1397(k))). Thus, the structure of the Act confirms that the savings clause was not intended directly to address preemption. [FN17]

FN17. The recodification included both provisions in 49 U.S.C. 30103 (entitled "Relationship to other laws") but in separate subsections, one entitled "Preemption" (49 U.S.C. 30103(b)) and the other entitled "Common law liability" (49 U.S.C. 30103(e)).

*21 Our interpretation does not render the savings clause meaningless, as petitioners contend (Br. 26-27). Petitioners' argument would have force only if the preemption clause applied to common law claims, a reading that we reject. See ibid.; pp. 11-15, supra. Instead, our interpretation preserves an important role for Section 1397(k): In cases in which tort liability does not conflict with a federal standard, Section 1397(k) makes clear that compliance with the standard does not immunize a manufacturer from liability. Those cases can arise frequently, since state tort law does not conflict with a federal "minimum standard" (15 U.S.C. 1391(2)) merely because state law imposes a more stringent requirement. [FN18] For example, Federal Motor Vehicle Safety Standard 105, 49 C.F.R. 571.105, which establishes requirements for brake performance, does not require anti-lock brakes in addition to airbrakes in all vehicles, but the Secretary has not determined that requiring anti-lock brakes would disserve safety. Section 1397(k) makes clear that compliance with Standard 105 is not a defense to a common law tort claim that a vehicle is defectively designed because it lacks anti-lock brakes. Federal Motor Vehicle Safety Standard 125, *2249 C.F.R. 571.125, provides multiple options for the design of reflective devices to warn approaching traffic of the presence of a stopped vehicle, but the Secretary did not determine that the availability of options was necessary to promote safety. Section 1397(k) makes clear that compliance with Standard 125 is not a defense to a common law tort claim that the reflective device is defectively designed unless it uses one rather than another of those options. Thus, under our reading, Section 1397(k) has a sensible and important role. [FN19]

FN18. We therefore agree with petitioners (Br. 46-47) that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose. We disagree, however, with the contention (Br. 44, 46) that the Secretary provided options because she had no statutory authorization to do otherwise. The Secretary could have imposed performance requirements that effectively required an airbag design. See Wood, 865 F.2d at 416-417; 112 Cong. Rec. at 21,487 (Sen. Magnuson) (performance standards expected to affect design). As we explain at pages 23-26, infra, the Secretary chose not to do so in order to encourage the provision of a variety of passive restraints, because she determined that would best promote safety. Petitioners' claims are preempted because they would frustrate that policy judgment.

FN19. Petitioners contend (Br. 27 n.11) that there was no need for Congress to specify that compliance with federal standards is not a defense to common law liability because every State already provided that compliance with a federal regulation is not a defense to a design defect claim. But even if Congress understood that to be the common law rule, it could not be certain

that rule would not change. It therefore had ample reason to assure that the Safety Act would not be construed to create a new, automatic federal defense.

c. It is petitioners' reading of the clause as preserving tort claims even if they conflict with federal safety standards that would have anomalous results. The Safety Act's purpose "is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. 1381, and Congress chose to carry out that purpose by empowering the Secretary to issue safety standards, 15 U.S.C. 1392, 1397. In some instances, such as the present case, holding a manufacturer liable for what a jury might find to be a design defect would significantly impair the Secretary's efforts to promote safety. Reading the savings clause to preserve that liability from preemption would impermissibly allow courts to second-guess the Secretary's judgment on matters "entrusted to [his] informed discretion" (Kalo Brick & Tile Co., 450 U.S. at 330) and ***23** lead the Act "to destroy itself" (AT&T, 524 U.S. at 228).

For example, the Secretary has established windshield retention requirements in Federal Motor Vehicle Safety Standard 212, 49 C.F.R. 571.212, in order to prevent occupants from being thrown from their cars in crashes. If manufacturers could be held liable under state tort law on a theory that it is a design defect for windshields in those vehicles to be retained in a crash because passengers could be injured if they struck the windshields, it would be impossible for manufacturers to comply with both the federal standard and the duties imposed by state tort law. Thus, if the tort claims were not preempted, the Secretary would have to rescind the federal standard, or manufacturers would have to continue to produce windshields that do not eject in order to comply with Standard 212, while paying tort judgments based on the theory that the federally mandated failure of the windshields to release in a crash rendered their cars defectively designed. There is no indication that Congress intended that startling result.

2. a. This case does not pose that type of conflict, but it poses a closely related one. In issuing the version of Standard 208 in effect when petitioners' car was manufactured, the Secretary rejected a rule requiring airbags in all cars in favor of a rule encouraging manufacturers to offer a variety of passive restraints. The Secretary determined--based on the history of consumer (and congressional) responses to passive restraint requirements--that diversity would best promote safety by helping to ensure public acceptance of passive protection systems, [FN20] encouraging the development ***24** of new and improved technologies, [FN21] and enabling the agency to acquire more data to make regulatory decisions. See 49 Fed. Reg. at 28,987-28,997, 29,000-29,001. The Secretary also determined that the high replacement costs of airbags could cause some consumers to decline to replace them after they were deployed, which would leave occupants without passive protection. Id. at 29,000-29,001. At the same time, the Secretary took steps that she reasonably determined would prompt manufacturers to install airbags in some ***25** of their cars. See p. 5 & n. 5, supra. Standard 208 thus embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car.

FN20. In 1972, the Secretary adopted a rule requiring an interlock mechanism preventing engine ignition unless manual seatbelts were fastened. That rule provoked a strong public reaction, prompting Congress to ban the interlock requirement and impose procedural limitations on the agency's future efforts to require restraints other than seatbelts. Motor Vehicle and School Bus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482

(codified at 15 U.S.C. 1401(b) (1988)). Given the public's adverse reaction to the interlock system, one factor the Secretary properly considered was the public's willingness to accept various passive restraint technologies. 49 Fed. Reg. at 28,987. See Pacific Legal Found. v. DOT, 593 F.2d 1338, 1345-1346 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979). "Airbags engendered the largest quantity of, and most vociferously worded, comments" during the rulemaking. 49 Fed. Reg. at 29,001. Commenters expressed concerns that the chemical used to inflate airbags would be hazardous, that airbags would deploy inadvertently and thereby cause injury, and that airbags would not deploy during an accident. Ibid. Given those widespread concerns, the Secretary concluded that "[i]f airbags were required in all cars, these fears, albeit unfounded, could lead to a backlash affecting the acceptability of airbags. This could lead to their being disarmed, or, perhaps, to a repeat of the interlock reaction." Ibid.

FN21. The Secretary determined that experience could show that automatic seatbelts would be used more frequently than anticipated, and that manufacturers might develop better and more acceptable automatic seatbelt systems. That development could result in automatic seatbelts that were as effective as airbags but cost less. The Secretary also concluded that requiring airbags in all cars would unnecessarily stifle further innovation in occupant protection systems. 49 Fed. Reg. at 29,001.

That policy of affirmatively encouraging diversity would be frustrated if manufacturers could be held liable for not installing airbags. If, when the Secretary promulgated the rule in 1984, respondent and other manufacturers had known that they could later be held liable for failure to install airbags, the prospect of sizable compensatory and punitive damage awards, combined with the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, supra, at 12, would likely have led them to install airbags in all cars. That outcome would have eliminated the diversity that the Secretary found necessary at that time to promote motor vehicle safety. At the very least, holding manufacturers liable for not installing airbags would have "interfere[d] with the methods by which [Standard 208] was designed to reach [its] goal." Ouellette, 479 U.S. at 494. [FN22] Therefore, tort claims like *26 petitioners', which are based on the theory that a car (subject to the version of Standard 208 in effect in 1987) was defectively designed because it lacked an airbag, "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [Standard 208]." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

FN22. Petitioners mistakenly argue (Br. 16, 44) that their tort claims would not interfere with the Secretary's chosen methods because, they assert (Br. 2, 10-11), the Secretary intended tort liability to provide an incentive for manufacturers to install airbags. In support of that assertion, petitioners cite the Secretary's statement that "potential liability for any deficient systems" would discourage manufacturers from "us[ing] the cheapest system to comply with an automatic restraint requirement." 49 Fed. Reg. at 29,000. Petitioners misunderstand the Secretary's statement, which meant that manufacturers could face tort liability if they installed defective passive restraints. The Secretary did not mean that manufacturers could be held liable for choosing one type of passive restraint rather than another. Petitioners' amici (Missouri Br. 6; Ass'n of Trial Lawyers Br. 29) also mistakenly rely on a public comment that the Secretary summarized in the

description of comments in the preamble. 49 Fed. Reg. at 28,972. An agency does not endorse a comment merely by describing it.

For those reasons, the Secretary has long taken the view that Standard 208 preempts such claims. [FN23] See U.S. Amicus Br. at 28-29, Freightliner Corp. v. Myrick, supra; U.S. Amicus Br. at 11-15, Wood v. General Motors Corp., supra. That view is consistent with this Court's decisions holding that when Congress or an agency determines that certain activity must be permitted in order to further the purposes of federal law, state law that would forbid that behavior is preempted. See, e.g., Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996); Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 154-155 (1982); Kalo Brick & Tile Co., 450 U.S. at 326.

FN23. Not all tort claims involving airbags would be preempted. A claim that a manufacturer installed an airbag that deployed improperly would not be preempted because it would not frustrate the purposes of Standard 208. Even a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car because of other design features particular to that car (see Nat'l Conf. of State Leg. Br. 12) would not necessarily frustrate Standard 208's purposes.

The Secretary's view is entitled to substantial weight. "Because the [Department of Transportation] is the federal agency to which Congress has delegated its authority to implement the [Safety] Act, the [Secretary] is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to *27 the accomplishment and execution of the full purposes and objectives of Congress.' " Medtronic, 518 U.S. at 496; id. at 506 (Breyer, J., concurring) (administering agency has "special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives"). [FN24]

FN24. Petitioners and their amici contend (Pet Br. 40-41, 49-50; Nat'l Conf. of State Leg. Br. 24-25; Leflar Br. 21-22) that there can be no implied conflict preemption here because, when the Secretary adopted Standard 208, she neither plainly stated her intent to preempt tort liability nor provided notice and comment on the question. That contention rests on a misunderstanding of the basis for conflict preemption. Unlike field preemption, which arises when agencies "intend for their regulations to be exclusive," Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 718 (1985), conflict preemption arises not from a specific intent to preempt but from the direct operation of the Supremacy Clause, which mandates that state law yield to federal law when they conflict. See p. 17, supra. Here, because conflict preemption is at issue, neither a statement of preemptive intent nor notice and comment on preemption was required. For the same reasons, the argument that the Secretary lacks authority to give any particular federal standard preemptive force (Nat'l Conf. of State Leg. Br. 24) is wide of the mark. We do not contend that petitioners' claims in this case are preempted because the Secretary decided that Standard 208 should preempt common law liability. We contend that the claims are preempted because they conflict with, and would frustrate implementation of, the policy judgment embodied in the Standard that a choice of passive restraints would best promote safety.

b. Petitioners mistakenly contend (Br. 16, 47-48) that their claims do not conflict with the Secretary's goal of allowing consumers to adjust to new airbag technology because tort liability would not lead manufacturers to change their conduct. To the contrary, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct." ***28** Garmon, 359 U.S. at 247. Indeed, petitioners' amici acknowledge that tort law "has a deterrence function." Nat'l Conf. of State Leg. Br. 14; see Ass'n of Trial Lawyers Br. 10-12; Leflar Br. 12-13, 17; Missouri Br. 6, 13. [FN25]

FN25. That tort law also has other purposes (such as compensation) does not mean tort rules cannot conflict with federal law (Nat'l Conf. of State Leg. Br. 14-15; Leflar Br. 17-19). Conflict preemption flows from the effects of the state law, not its purposes. See Gade v. National Solid Waste Mgmt. Ass'n, 505 U.S. 88, 105-106 (1992).

Petitioners also argue (Br. 16, 47-48) that, if manufacturers had changed their conduct and installed airbags, they would have promoted public acceptance of those devices. That may be true, but the Secretary reasonably determined at that time that experience with a variety of passive restraints would best promote public acceptance. In any event, speculation of the sort advanced by petitioners cannot displace the Secretary's reasonable conclusion that claims such as petitioners' would thwart the purposes behind Standard 208. [FN26]

FN26. Petitioners suggest (Br. 16, 44) that a tort rule requiring airbags is consistent with Standard 208 because the Secretary determined that airbags were technologically the most effective passive restraint and provided an incentive to encourage manufacturers to install them (see note 5, supra). That contention overlooks the Secretary's conclusion that airbags would not be effective in practice if they were installed in all cars because of the likely public reaction and potential safety dangers in small cars. It also overlooks the Secretary's determination that further research and development could lead to more cost-effective restraints. And it overlooks the Secretary's reason for providing the incentive to install airbags--to ensure a variety of passive restraints, not to maximize the number of cars with airbags.

Petitioners further err in contending (Br. 48-49) that their claims do not conflict with the goal of encouraging innovation and development of more effective restraint ***29** systems. Contrary to petitioners' suggestion, the question is not whether tort liability in general stifles innovation but whether liability for failure to install airbags would have done so. The Secretary determined that it would, because of the potential for large damage awards and the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, supra, at 12. This Court should decline petitioners' invitation to second-guess that reasonable determination.

Finally, petitioners argue (Br. 44-45) that their claims do not conflict with Standard 208 because their car was manufactured during the phase-in period (when Standard 208 required the installation of some type of passive restraint system in some, but not all, cars) and their car did not have any passive restraint. Those facts do not, however, alter the preemption analysis, because petitioners do not claim that their car was defectively designed because it lacked any type of passive

restraint. Rather, they claim that the car was defectively designed because it lacked one particular type of passive restraint--an airbag. See Pet. i; Pet. Br. i. Thus, petitioners cannot prevail without a ruling that a car manufactured in 1987 was defectively designed unless it had an airbag. For the reasons we have described, that ruling would conflict with the Secretary's determination that no particular type of passive restraint should be required in any car because the use of a variety of passive restraints would best promote safety. [FN27]

FN27. This Court therefore need not decide whether Standard 208 would preempt a claim that a car manufactured during the phase-in is defective if it lacks any passive restraint. The Secretary believes that it would preempt such a claim, because the claim would frustrate the safety purposes for which the Secretary adopted the phase-in. See note 6, supra. A tort rule that effectively required passive restraints in all cars during the phase-in would likely have resulted in the nearly exclusive use of automatic seatbelts rather than airbags and impeded the development of data about the benefits of passive restraints that could help prevent a public backlash against them. See 49 Fed. Reg. at 28,999-29,000. Contrary to petitioners' contention (Br. 45), the fact that the claim involved a car manufactured in 1987 or a crash that occurred after the phase-in would not save the claim from preemption. The relevant question is not what manufacturers would do after the jury verdict in question but what they would have done when the relevant version of Standard 208 was promulgated if they had anticipated that they could later be held liable.

*30 CONCLUSION

The judgment of the court of appeals should be affirmed.

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