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Senate Joint Resolution 12: Sanctioning Racial Discrimination in Hawaii

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> 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.[1]

Senators Brian Schatz (D–HI) and Mazie Hirono (D–HI) recently introduced a resolution, Senate Joint Resolution 12, that would provide congressional approval of amendments to the Hawaiian Homes Commission Act of 1920.

While this resolution seems innocuous enough on its face, these amendments would institutionalize the racial and ethnic discrimination practiced by the Hawaiian Homes Commission (HHC) by allowing those who benefit unfairly from that discrimination to pass on the benefits to their family members.

Hawaiian Homes Commission. In accordance with the Hawaii Statehood Admissions Act of 1959, Congress must consent to any amendments to the Hawaiian Homes Commission Act of 1920.[2] The HHC provides "special" loans and homesteading leases for "residential, agricultural, or pastoral purposes" for "Native Hawaiians"—who are defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[3]

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In other words, the HHC engages in blatant discrimination against many of the residents of Hawaii to provide financial benefits to certain other residents based on their ancestry and "blood quantum" in direct violation of the protections of the Equal Protection Clause and the Privileges or Immunities Clause of the Fourteenth Amendment.

This post–Civil War amendment was adopted precisely to prevent a state (such as Hawaii in this instance) from treating its citizens in an unequal manner by excluding certain of its residents from the "privileges or immunities" of citizenship, especially on the basis of race or ethnicity. The many special benefits provided by the HHC include 99-year homestead leases at an annual rental rate of only $1.

S.J. Res. 12. S.J. Res. 12 provides congressional consent to state legislative changes that would allow a lessee of the HHC who received a lease "through succession or transfer, to transfer his or her leasehold to a brother or sister who is at least one-quarter Native Hawaiian" or to designate that same brother or sister to "succeed to the leasehold interest upon the death of the lessee."

In other words, S.J. Res. 12 would allow those residents of Hawaii who meet the ethnic definition of the law and have received racially preferential treatment and special benefits to bequeath or pass on those benefits to family members, thereby perpetuating the discriminatory conduct. Moreover, the resolution adds another racial classification: "at least one-quarter Native Hawaiian."

Sanctioning Official Discrimination. As the U.S. Commission on Civil Rights (CCR) recognized in 2005, in a critical report on the proposed Native Hawaiian Government Reorganization Act of 2005,

Hawaii "is in a league by itself" when it comes to officially sanctioned discriminatory conduct.[4] It administers a huge public trust worth billions of dollars that "provides benefits exclusively for ethnic Hawaiians." The CCR recommended against congressional passage of the 2005 act because it "would discriminate on the basis of race or national origin and further subdivide the American people."[5]

For the same reason, S.J. Res. 12 is also highly problematic as a matter of public policy and fundamental fairness. Not only does it implicitly approve of the naked discrimination practiced by the HHC, but it would approve new rules allowing the beneficiaries of such discriminatory conduct to pass on those unfair and unjustified benefits to family members.

Worse, the resolution would explicitly approve a legal definition of "Native Hawaiian" that, in the words of Peter Kirsanow (who serves on the CCR), "implicates the odious 'one drop rule' contained in the racial-segregation codes of the 19th and early 20th centuries."[6] S.J. Res. 12 applies the special financial and other benefits given out as racial spoils by the HHC to those whose blood makes them at least "one quarter Hawaiian," or a "quadroon" under the abhorrent and hateful definitions that were similarly used in Jim Crow laws throughout the segregated South to discriminate against Americans.

The Supreme Court Has Already Spoken. As U.S. Supreme Court Justice John Paul Stevens ironically pointed out in his dissent in *Fullilove v. Klutznick*,[7] if a government "is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935," which similarly defined Jews based on their ancestry.

The constitutionality of Hawaii's entire racial spoils system was called into question by the Supreme Court in *Rice v. Cayetano*,[8] in which the Court held that Hawaii's election system for the trustees of the Office of Hawaiian Affairs that only allowed "Native Hawaiians" to vote violated the Fifteenth Amendment. The Court lectured the state, saying that Hawaii should "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."[9]

In an earlier landmark decision, *Shelley v. Kraemer*, the Supreme Court also held that that the power of a state to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment and that courts cannot enforce racially restrictive covenants on real estate.[10] Yet S.J. Res. 12 would approve Hawaiian legislation making the eligibility to lease property from the state government dependent on racial classifications in violation of that holding.

As CCR commissioner Gail Heriot points out, "[I]f the State of Hawaii were operating its special benefits programs for Whites only or for Asians only, no one would dream the United States could assist them in this scheme."[11] Yet S.J. Res. 12 would do exactly that—have Congress assist Hawaii in operating a discriminatory special benefits program, eligibility for which is determined by ancestry, familial relationships, and blood.

1. *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943).
2. *Hawaiian Homes Commission*, Senate Report 113-76 (July 15, 2013).
3. See Hawaii Department of Hawaiian Home Land, "Hawaiian Homes Commission Act," http://dhhl.hawaii.gov/hhc/laws-and-rules/ (accessed November 22, 2013).
4. U.S. Commission on Civil Rights, *The Native Hawaiian Government Reorganization Act of 2005*, January 20, 2006, p. 17.
5. Ibid., p. 15.
6. Peter Kirsanow, "A Pandora's Box of Ethnic Sovereignty," National Review Online, June 6, 2006, http://www.nationalreview.com/articles/217832/pandoras-box-ethnic-sovereignty/peter-kirsanow# (accessed November 22, 2013).
7. 448 U.S. 448, 534 (1980), footnote 5. ("Indeed, the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals.")
8. 528 U.S. 495 (2000). See also *Doe v. Kamehameha Schools*, 416 F.3d 1025 (9th Cir. 2005).
9. *Rice* at 524.
10. *Shelley v. Kraemer*, 334 U.S. 1 (1948).
11. U.S. Commission on Civil Rights, *The Native Hawaiian Government Reorganization Act of 2005*, p. 18.

Sanctioning Racial Discrimination. A vast majority of Hawaiians—94.3 percent—voted for statehood in 1959, and they clearly did not want "separatist enclaves" in their future state.[12] At the time, many pointed to Hawaii as an example for America. As a delegate to Congress testified in 1957: "Hawaii is living proof that people of all races, cultures and creeds can live together in harmony and well-being and that democracy as advocated by the United States has in fact afforded a solution to some of the problems constantly plaguing the world."[13]

Hawaii is America in a microcosm—a melting pot of citizens of many different racial, ethnic, and national origins. A Senate resolution that sanctions further discriminatory conduct and provides preferential treatment and benefits for a certain portion of the residents of Hawaii is misguided, to say the least. *All* Hawaiians are citizens who are entitled to equal protection under the law.

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12. Erica Little and Todd F. Gaziano, "Abusing Hawaiian History: Hawaiians Knew Their History in 1959," Heritage Foundation *WebMemo* No. 1117, June 8, 2006, http://www.heritage.org/research/reports/2006/06/abusing-hawaiian-history-hawaiians-knew-their-history-in-1959.
13. Testimony of John A. Burns, delegate to Congress from the territory of Hawaii, Senate Committee on the Interior and Insular Affairs, April 1, 1957.