

No. 07-1372

In the  
**Supreme Court of the United States**

HAWAII, et al.,

*Petitioners,*

v.

OFFICE OF HAWAIIAN AFFAIRS, et al.,

*Respondents.*

On Writ of Certiorari  
to the Supreme Court of Hawaii

**BRIEF AMICUS CURIAE  
OF CENTER FOR  
CONSTITUTIONAL JURISPRUDENCE  
IN SUPPORT OF PETITIONERS**

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**QUESTION PRESENTED**

In the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. The question here is whether this symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—29% of the total land area of the State and almost all the land owned by the State—unless and until it reaches a political settlement with native Hawaiians about the status of that land.

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**IDENTITY AND  
INTEREST OF AMICUS CURIAE**

Amicus, Center for Constitutional Jurisprudence<sup>1</sup> is dedicated to upholding the principles of the American Founding, including the important issue raised in this case of state sovereignty. The Center is led by John Eastman, Dean of the Chapman University School of Law, and the Honorable Edwin Meese III serves as the honorary chair. The Board of Advisors for the Center includes a number of distinguished academics such as Hadley Arkes, Henry Jaffa, Douglas Kmiec, and John Yoo—just to name a few.

The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps*

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<sup>1</sup> Pursuant to this Court’s Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae’s intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

*of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes the issue before this Court is one of special importance to the plan of the Constitution. The decision to divide powers between the original states and the new federal government was a product of compromise meant to address fears that too much power would be concentrated in the new federal government. By refusing to permit power to be centralized in one branch or even one level of government, the Founders decided that preserving liberty was more important to the success of the nation than efficient exercise of power. Those limits on the concentration of power are tested in this case.

This case raises the question of whether Congress can impose limits on the sovereign powers of states—long after the states have been admitted into the union. As interpreted by the Hawaii Supreme Court, the resolution adopted by Congress achieved that limit on state power. The state court acted in what it saw as the best interest of the descendants of native Hawaiians who still protest a century-old injustice.

Congress may well have the power to resolve injustices from the distant past by opening up the federal treasury or issuing apologies. It does not, however, have the power to alter the frame of government set down in the Constitution. The federal government remains one of few and defined powers, and those powers do not include the authority to prohibit states from alienating state-owned property.



## SUMMARY OF ARGUMENT

In the Act of Admission, Congress granted to the state of Hawaii lands to be used for a variety of public purposes including support of the public school system. With this grant, Congress continued a tradition that began with the Northwest ordinance of providing land to the new states to support public education and other purposes.

In addition to support of public education, the Hawaii Act of Admission specified that profits from the sale of these lands would be used to support native Hawaiians, home ownership, and public lands. The Hawaii Supreme Court, however, believes that a 1993 congressional resolution altered the terms of this grant. In its ruling below the Hawaii Supreme Court enjoined the state from selling any of the granted lands for any purpose until the state had achieved some unspecified reconciliation with descendents of native Hawaiians.

Amicus leaves to the parties to argue whether the Hawaii Supreme Court correctly interpreted the 1993 congressional apology resolution. Instead, this brief argues that if Congress intended to take the action ascribed to it by the Hawaii Supreme Court, that Congress exceeded its authority under the Constitution.

Hawaii was admitted to the union on an equal footing with other states. That means that the act of admission recognizes in the state the same sovereignty retained by the original 13 states after formation of the union. While Congress might have the power to take property upon the payment of just compensation, the Hawaii Supreme Court did not

interpret the apology resolution as an act of eminent domain. Instead, the state court believed that Congress altered the terms of the grant of lands to the state as originally outlined in Section 5 of the Act of Admission.

According to the state supreme court, lands that had passed to the sovereign state of Hawaii at its admission have now been burdened by new, federally imposed restrictions on alienation. Under the Equal Footing Doctrine, however, Congress does not retain the power to dictate new restrictions on the alienation of property that was granted to the state. As a full and equal member of the union, Hawaii must have the same rights to alienate granted property as enjoyed by every other state. For more than 200 years, this Court has consistently held that Congress has no power to “reserve or convey . . . lands that ‘ha[ve] already been bestowed’ upon a State.” *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001).

## ARGUMENT

### I

#### THE ACT OF ADMISSION GRANTED THE LAND IN QUESTION TO THE STATE OF HAWAII

No party questions the proposition that the lands in question were granted to the State of Hawaii. Section 5 of the Act of Admission provides that in addition to succeeding to the title of lands held by the Territory of Hawaii, the state was granted “title to all the public lands and other public property . . . title to which is held by the United States immediately prior to its admission into the

Union.” Hawaii Admission Act, Pub. L. 86-3, § 5(b), 73 Stat. 4 (1959). This grant encompassed nearly 1.2 million acres, and was in addition to a separate grant of 200,000 acres provided for in the Hawaiian Homes Commission Act. *Rice v. Cayetano*, 528 U.S. 495, 507 (2000).

This grant of land (including proceeds from the sale of the land by the state) was for the benefit of public schools, promotion of farm and home ownership, lands for public use, and “the betterment of the conditions of native Hawaiians.” Pub. L. 86-3, § 5(f). In this, the grant of land to the new state followed a pattern set in the Land Ordinance of 1785 of setting aside land for public schools. *Papasan v. Allain*, 478 U.S. 265, 268-71 (1986) (for extended treatment of the history of the school land grants see *Andrus v. Utah*, 446 U.S. 500, 522-26 (1980) (Powell, J., dissenting)).

In the Act of Admission, Congress emphasized the terms of the grant. Although the Act provided for a five year period in which the federal government could reclaim some of the granted lands (Pub. L. 86-3, § 5(d)), the Act also expressly provided that “[a]ll laws of the United States reserving to the United States the free use or enjoyment of property which vests in or is conveyed to the State of Hawaii . . . shall cease to be effective upon the admission of the State of Hawaii into the Union,” Pub. L. 86-3, § 5(h).

Hawaii was the last state admitted to the union, achieving statehood in 1959. Nonetheless, once admitted, the State of Hawaii was possessed of the same sovereignty over state lands (including lands granted to the state in the Act of Admission) as the

original 13 states exercised over their lands after ratification of the United State Constitution. Hawaii was admitted to the union “on an equal footing with the other States in all respects whatever.” Pub. L. 86-3, § 1.

## II

### **ONCE LAND IS GRANTED, CONGRESS MAY NOT IMPOSE NEW RESTRICTIONS ON ALIENATION**

Although there may have been some debate at the founding whether new states could be admitted to the union as “junior partners” to the original 13 states, the rule is now firmly established that new states enter the Union on an “equal footing.” This Court in *Coyle v. Smith* ruled that the equal footing doctrine flowed not simply from the acts of admission, but was inherent in the definition of “a state.” Examining the constitutional authority of Congress to admit new states, this Court noted that the power “is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a ‘power to admit states.’” *Coyle v. Smith*, 221 U.S. 559, 566 (1911). The Court ruled that a state was defined in terms of its political power and sovereignty rather than geographic area.

In *Coyle*, the Court considered a provision of the Oklahoma Admission Act that prohibited the state from moving the state capitol for a specified number of years after admission. The act also prohibited the expenditure of state funds during that period to prepare for a move of the capitol. *Id.* at 564-65.

Distinguishing these provisions from the specification in the Act of the location of the initial state capitol, this Court noted that there is a difference between conditions that are fulfilled at admission and those that operate in the future. *Id.* at 568. With regard to the latter, conditions are permissible only to the extent that they are supported by an affirmative grant of power to the federal government.

The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

*Id.* at 573.

Each new state comes to the Union with the same “rights of dominion and sovereignty which belonged to the original states.”. *Id.* at 577 (quoting *Bolln v. Nebraska*, 176 U.S. 83, 88 (1900)). The Federalist design of the Union required the original states to cede a portion of their sovereignty to the new national government. As expressed in the Tenth Amendment, however, this new national government was one of few and defined powers. See *The Federalist No. 45* (James Madison) (Clinton Rossiter ed., 1961); *United States v. Lopez*, 514 U.S. 549, 552

(1995); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The states retained sovereignty on other issues. States were not “relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.” *Alden v. Maine*, 527 U.S. 706, 715 (1999). Quoting from The Federalist No. 39 (James Madison), this Court in *Alden* noted that the States “retain ‘a residuary and inviolable sovereignty.’” *Id.* Under the Equal Footing Doctrine, this “residuary and inviolable sovereignty” is held by new states to the same extent as the original 13. *Coyle*, 221 U.S. at 573.

As a consequence of this retained sovereignty, “[t]he Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution.” *Summa Corp. v. California ex rel. State Lands Comm’n*, 466 U.S. 198, 205 (1984). In making this statement in *Summa*, this Court relied on its earlier decision in *Pollard v. Hagan*, 44 U.S. 212 (1845). In that case, there was a dispute over submerged lands in Alabama. The issue was whether the United States controlled the lands and thus had power to sell them to private parties. This Court ruled that Alabama had the sole power to decide the disposition of the lands in question. “When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty . . . . Nothing remained to the United States, according to the terms of the agreement, but the public lands.” *Id.* at 223.

This Court has consistently recognized this principle, noting it most recently in 2005 in *Alaska v.*

*United States*, 545 U.S. 75, 78-79 (2005). Lands granted to the state in the Act of Admission are thereafter vested in the state, subject only to federal enactments based on an enumerated power. As an aspect of retained sovereignty, the state has the power to alienate lands granted as part of the Act of Admission. *Pollard*, 44 U.S. at 223. Once a state has been admitted into the union, Congress loses the power convey lands that were transferred to the state. *Idaho*, 533 U.S. at 280 n.9; *Shively v. Bowlby*, 152 U.S. 1, 28 (1894); *Pollard*, 44 U.S. at 223.

In this case, the Hawaii Supreme Court did not interpret the Apology Resolution as “a law depriving [the] State of land vested in it by the Constitution.” Such a law, without provision for payment of compensation, “would constitute a taking of the state’s property without just compensation, in violation of the Fifth Amendment.” *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 291 (1983).

Nor did the state court interpret the Apology Resolution as effecting a transfer of state property to other private parties (as had happened in *Pollard*). Instead, the state court ruled that the Apology Resolution<sup>2</sup> altered the public trust purposes of the land grant and revoked the power of the state to alienate the land until it met further conditions.

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<sup>2</sup> The state court also purported to rely on state enactments for this change in the public trust. The power of the state legislature to alter the terms of the public trust outlining the purposes for which the land was granted is not before the Court in this case.

Any such changes mandated by the Apology Resolution would run afoul of the Equal-Footing Doctrine.

### III

#### **AS INTERPRETED BY THE HAWAII SUPREME COURT, THE APOLOGY RESOLUTION CONSTITUTES A NEW RESTRICTION ON ALIENATION OF LAND GRANTED AT STATEHOOD**

This case arose when the state proposed to sell some of the granted lands pursuant to the public trust purpose in the Act of Admission of increasing home ownership. *See Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i*, 177 P.3d 884, 890-91 (Haw. 2008) (*OHA*); Pub. L. 86-3, § 5(b). The state court enjoined the sale “until the claims of the native Hawaiians to the ceded lands has been resolved.” *OHA*, 177 P.3d at 891. The court interpreted the Apology Resolution to impose a “fiduciary duty” on the state to retain the lands granted to the state in the Act of Admission until the “unrelinquished claims of the native Hawaiians have been resolved”. *Id.* at 927.

As noted above, this interpretation of the Apology Resolution sees the Congressional action as neither a taking of the property nor an actual transfer of the property to a third party. Instead, the state court interpreted the Apology Resolution as a *new* restriction on state power. Forty-four years after the lands were granted to the state in the Act of Admission, the Apology Resolution—according the Hawaii Supreme Court—revoked the power of the state to sell the granted lands. No longer could the



lands in question be used to support public education or promote home ownership. Instead, the lands must now be devoted to resolution of “unrelinquished claims” of the descendants of native Hawaiians alive at the time of the Hawaiian monarchy.

This restriction on state power is no more permissible under the Equal-Footing Doctrine than an attempt by Congress to deed state properties to third parties. *See Pollard*, 44 U.S. at 223.

The issue here is not simply ownership and control of the property. Instead it is sovereign power of the state. Once the United States has granted property to a state as part of the Act of Admission, the federal government may not alter the terms of the grant. To do so would treat the state as a “mere province.” *See Alden*, 527 U.S. at 715. Just as Congress could not dictate to Oklahoma where the state capitol could be located after admission (*Coyle*, 221 U.S. at 566-67), Congress cannot dictate new restrictions on use and alienation of state property to Hawaii.

The Founders took the concept of “equal footing” quite seriously. In the debate over the Enabling Act of 1802 that set the terms for the admission of Ohio, the issue of Congressional power vis-à-vis new states was presented. The proposal required Ohio to convene a constitutional convention and specified how delegates to that convention were to be apportioned. Congressman Nicholson objected to the provision—contending that it was a matter solely for the determination of Territory. 11 *Annals of the Congress of the United States, 1789-1824* (1834-56),

March 1802, H.R. 7 Cong., 1 Sess., at 1112-14.<sup>3</sup> Ultimately, the debate was won by those who contended that Congress could set the *initial* conditions for statehood, yet the matter was one of significant contention. Both sides of the debate seemed intent on ensuring that once admitted, Ohio would hold the same sovereign powers as the current states.

That debate stands in stark contrast to the state court's interpretation of the Apology Resolution. There is no discussion in that resolution of the sovereign powers of the State of Hawaii. Nor is there reference to any enumerated power in the Constitution that would authorize Congress to impose new restrictions on the state's power to sell the property.

Among the sovereign power of the state is certainly the power to dispose of state lands. *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. 57, 65-66 (1873). In this case, the granted lands were impressed with a public trust. Like every other state admitted to the union since the ratification of the constitution, Congress provided a grant of lands to support public education in the new state. Christopher J. Walker, *The History of School Trust Lands in Nevada: The No Child Left Behind Act of 1864*, 7 Nev. L.J. 110, 112-19 (2006). Yet, while the federal government intended to help finance public education with these grants, it recognized that the provision of public education was a state government function. *Id.* at 114. The granted land was provided as a resource

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<sup>3</sup> Available at <http://memory.loc.gov/ammem/amlaw/lwaclink.html> (last visited Dec. 7, 2008).

for states to use as a means of financing that state function.

While Congress might impose a public trust on the granted lands, it lost power to impose further restrictions once the lands were transferred to the state. *See Summa*, 466 U.S. at 205; *Pollard*, 44 U.S. at 223. Yet that is precisely what the Hawaii court ruled occurred when Congress adopted the Apology Resolution. The state court ruled that the resolution displaced state sovereign power to alienate (in accord with a public trust) lands granted to the state. Instead, according the Hawaii Supreme Court, the Apology Resolution requires the state to preserve the lands granted in the Act of Admission for use in satisfying unstated claims of the native Hawaiians—a purpose not mentioned in the Act of Admission.

If that is what Congress intended, then Congress exceeded its authority. Because Hawaii was admitted on an equal footing with the other 49 states, Congress had no power to revisit its grant of lands to the state 44 years after the fact, and impose new restrictions on the state power to alienate that land. Disposition of state lands granted in the Act of Admission is clearly a power reserved to states under our dual system of government. While Congress is free to act under a specific delegated power, it cannot interfere with state sovereign powers.

Congress remains free, acting under its delegated powers, to address any claims of native Hawaiians. The claim here revolves around loss of land—something this Court has consistently ruled can be remedied by the payment of monetary compensation. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244-45 (1984).

## CONCLUSION

The meaning and effect of the 1993 Apology Resolution adopted by Congress and signed by President Clinton is subject to dispute as outlined in the briefs of the parties. If, however, the resolution is interpreted to mean that Congress intended to restrict Hawaii's power to alienate lands granted to the state in the Act of Admission, the action clearly exceeded Congress' authority. States retain sovereign power and are not mere functionaries of the federal government. Thus, the exercise of federal power must be predicated on a power enumerated in the Constitution. No such power would support the authority of Congress to restrict the power of the state to dispose of state owned lands. There is no question that the state proposed to use the lands for the public trust purposes specified in the Act of Admission. The Hawaii Supreme Court erred in holding that Congress could add new conditions restricting the power of states to alienate state-

owned property. The decision of the Hawaii Supreme Court should be reversed and the injunction dissolved.

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Respectfully submitted,

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