CONCURRING OPINION OF ACOBA, J.

I concur in the majority's conclusion that a quo warranto suit is the appropriate proceeding for fashioning an orderly transition in the board of trustees of the Office of Hawaiian Affairs (OHA) and that the official status of the Trustees is no longer open to question, for the reasons set forth herein.

I.

Rice v. Cayetano, ___ U.S. ___, 120 S.Ct. 1044 (2000), has altered in a very profound way, the course chosen and ratified by the people of Hawaiʻi to remedy and redress past wrongs to persons of Hawaiian ancestry. By invalidating the Hawaiʻi Constitution's mandate under Article XII, Section 5, that the "board of trustees for the [OHA be] elected by qualified voters who are Hawaiians, as provided by law" and related statutes, Hawaiʻi Revised Statutes §§ 13D-1 and -3(b)(1) (1993), a majority of the United States Supreme Court (the Rice majority) has recast the legal framework within which the objectives embodied in Article XII may be implemented. Rice, ___ U.S. at ___, 120 S.Ct. at 1052.

Although Justice John Paul Stevens, in his dissent,[1] lamented that the Rice majority "ignores the overwhelming differences between the Fifteenth Amendment case law on which it relies and the unique history of the State of Hawaii[,]" id. at ___, 120 S.Ct. at 1072, the Rice majority left no doubt under its construction of the Fifteenth Amendment that a voting method based on race or ancestry in a state election is prohibited. Id. at ___, 120 S.Ct. at 1060. Distinguishing Indian "tribal elections established by the federal statutes" in which non-Indians are not permitted to vote because "such elections are the internal affair of a quasi-sovereign[,]" id. at ___, 120 S.Ct. at 1058-59, the Rice majority observed that non-Hawaiians cannot be excluded from OHA elections since in contrast to federal tribal elections, "OHA elections . . . are the affair of the State," OHA being "a state agency, established by the State Constitution, responsible for the administration of state laws[.]" Id. at ___, 120 S.Ct. at 1059. Positing that "[e]ven were [it] to take the substantial step of finding authority in Congress, delegated to the State [of Hawai‘i], to treat Hawaiians or native Hawaiians [like Indian] tribes," id. at ___, 120 S.Ct. at 1058, the Rice

[1] Justice John Paul Stevens was joined in part by Justice Ruth Bader Ginsberg.

majority would rule that even the United States "Congress may not authorize a State [such as Hawaiʻi] to create a voting scheme of this sort." Id. at ___, 120 S.Ct. at 1058.

In arriving at its decision, the Rice majority asserted that "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." Id. at ___, 120 S.Ct. at 1057. On the other hand, Justice Stevens contended that "the [voting] classification [for "Hawaiians" as statutorily defined] is not demeaning at all, . . . 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." Id. at ___, 120 S.Ct. at 1072 (internal quotation marks and citations omitted). Justice Stevens maintained that "[t]he political and cultural concerns that motivated the nonnative majority of Hawaii[] voters to establish OHA reflected an interest in preserving through the self-determination of a particular people ancient traditions that they value." Id. at ___, 120 S.Ct. at 1072. The Rice majority, nevertheless, rejected this view of the OHA elections and concluded that permitting "a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs[,]" is "forbid[den]" by the Fifteenth

Amendment. Id. at ___, 120 S.Ct. at 1059.

II.

Article VI of the United States Constitution directs that the "Constitution [of the United States] . . . shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Hence, by virtue of Article VI, we as State supreme court justices are bound to uphold and to apply the Fifteenth Amendment as construed by the Rice majority in the context of this case.[2]

---

[2] Although we are bound by Article VI to follow the rationale in Rice, we need not, in my view, concur in matters not material to that rationale. In concluding its decision, the Rice majority reminded the State of Hawaiʻi that "it must, as always, seek . . . political consensus . . . [and o]ne of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaiʻi." Rice, ___ U.S. at ___, 120 S.Ct. at 1060. I do not understand the State's position to have ever disavowed our constitutional heritage and find nothing in the decisions of Judge David Ezra of the Hawaiʻi Federal District Court, or in the opinions of the Ninth Circuit Court of Appeals, or of the dissenting United States Supreme Court justices espousing that view of the State's arguments.

The history of Hawaiʻi and its peoples demonstrates nothing, if not the wholesale embracement of democratic principles. Few places in the United States have brought democracy's promise closer to reality, see id. at ___, 120 S.Ct. at 1054, and a more successful marriage between constitution and culture, as that exemplified in our State, can hardly be found. Hawaiʻi has affirmed our constitutional heritage, Hawaiʻi has upheld that heritage, and Hawaiʻi's own have many times been in the forefront of defending it.

III.

While at one point in time the status of the Trustees was a matter of dispute, their standing is no longer a matter for serious argument. The Rice majority focused on "[t]he validity of the voting restriction" in OHA elections as "the only question before" it. Id. at ___, 120 S.Ct. at 1059. Reasoning that "[t]he elections for OHA trustee are elections of the State, not of a separate quasi-sovereign, and [that] they are elections to which the Fifteenth Amendment applies[,]" id. at ___, 120 S.Ct. at 1046 (emphasis added), the Rice majority held that "the

Fifteenth Amendment invalidates the electoral qualification based on [Hawaiian] ancestry." Id. at ___, 120 S.Ct. at 1060.

Thus, it is plain that if the Rice holding means anything at all, it is as Respondent contends, "that the elections of the eight elected OHA Trustees were invalid." See Agreed Statement of Facts at 6, ¶26. The Trustees correctly maintain that "there has been no express judicial determination that the elections were invalid . . . or that the results . . . are void." Agreed Statement of Facts at 6, ¶27 (emphasis added). But since the present Trustees were chosen in "elections to which the Fifteenth Amendment applies[,]" Rice, ___ U.S. at ___, 120 S.Ct. at 1046, the irrefutable conclusion left for this court, which I believe we cannot avoid, is that the Trustees' elections were indeed invalid.

IV.

As presented to us, the parties' agreed question, if taken literally, poses no controversy since Respondent and the Trustees agree and it is uncontroverted that the United States Supreme Court did not expressly rule on the status of the individual trustees. Majority opinion at 10. Rather, the "controversy" lies in whether the legal status of the Trustees

has been affected by the Rice majority's condemnation of a process by which the Trustees hold office. Consequently, what the parties have requested us to decide, and what we must consider in the process of arriving at the answer (as assumably we engaged to do in accepting the question for review) is the effect of the Rice decision on the status of the Trustees. The effect of that decision, which seems to me now to be beyond dispute, is that the individual trustees are no longer de jure officials. For it is well established that a law which is unconstitutional is a nullity; thus, however one may sympathize with the Trustees because of the dilemma which Rice creates for them, their selection under an unconstitutional law must now be viewed as permanently impaired.

V.

In sum, I believe we are obligated to formalize what should be a self-evident proposition. A pronouncement by this court that the Trustees are no longer of de jure status at this juncture would enable them to assess what institutional gain is to be obtained from fending off what may be inevitable and inescapable, and, accordingly, to chart their course of action; a course which need not necessarily be limited to defending

subsequent quo warranto proceedings. We cannot discount the possibility that the parties may be able to agree to an orderly and timely transition of the OHA board in the interest of the State and of OHA, without further court intervention, if aided by this court's unambiguous determination as to the current status of the Trustees. In any event, nothing is to be gained by postponing that determination to quo warranto proceedings in the circuit court since it is purely one of law, which we are as capable as the circuit court of making and, further, one that we are compelled to render by the holding in Rice.