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A Misuse of Equal Protection:
The *Doe v. Kamehameha Schools* Case

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Ku i ka pono, Ku‘e, Ku‘e! Ku ha‘aheo, Ku‘e! Ku‘e! Ku‘e! Ku‘e! Ku‘e!
Ku i ka pono, Ku ha‘aheo, Ku‘e! Ku‘e i ka hewa, Ku‘e! Ku‘e, Ku!
Stand for what is right, Resist! Resist! Stand proudly, Resist! Resist!
Oppose what is wrong, Resist! Resist!
Stand for what is right, Stand proudly, Oppose what is wrong, Resist, Stand up!

On July 8, 2005, 10,000 supporters of the Kamehameha Schools, Hawaiian and non-Hawaiian, united their voices in demands for justice for the Hawaiian people only four days after the release by the U.S. Ninth Circuit Court of Appeals of their decision on the case of Doe v. Kamehameha Schools. Forming a sea of red shirts across the grounds of ‘Iolani Palace, the last home of the ali‘i (royalty) of the sovereign Kingdom of Hawai‘i, these supporters of diverse backgrounds banded together in opposition to a ruling which called for the termination of an admissions policy used by the Kamehameha Schools to provide preference for applicants of part or whole Native Hawaiian ancestry. These supporters, who were students, parents, alumni, teachers, staff, administrators, and members of the community of Hawai‘i who otherwise had been touched by the Kamehameha Schools, banded together to support the continued mission of an educational institution that has been dedicated to the service of the Native Hawaiian community since its establishment in 1887 by one of Hawai‘i’s last ali‘i, Princess Bernice Pauahi Bishop. In solidarity, these 10,000 supporters, who spanned multiple generations and ethnic backgrounds, listened to the impassioned addresses of speakers ranging from the schools’ Chief Executive Officer to the Governor of the State of Hawai‘i, from the President of the Kamehameha School’s Kapalama Heights main campus to the Director of the Department of Hawaiian Studies at the University of Hawai‘i campus at Manoa. They united to enliven mele (songs) of hope, ‘oli (chants) of strength, and hula (dance) of tradition and reverence. Angered, saddened, and confused, 10,000 supporters marched from ‘Iolani Palace to Mauna‘ala, the sacred grounds
of Hawai‘i’s royal mausoleum, to make a promise to a beloved princess that they would do all in their power to honor her last wish to serve her people.

As apparent by the immense and emotional response of the supporters at the August 8th ‘Iolani Palace Unity Rally, the case of Doe v. Kamehameha Schools has struck a chord in the hearts of many in Hawai‘i. This case, in which a non-Hawaiian student seeking enrollment at the Schools challenged the constitutionality of its admissions policy under Civil Rights Law, carries along with it many consequences. In this paper, I contend that the ruling of Doe v. Kamehameha Schools, although purported by the case’s appellant and the judges of the U.S. Ninth Circuit Court of Appeals to defeat the discriminatory admissions policy of the Kamehameha Schools and to protect the equal rights of all citizens, in many ways causes more harm than good for both Native Hawaiians and non-Hawaiians. The case twists legislation which was originally intended to fight against discrimination that upholds one group as dominant above others, limiting the ability of the Kamehameha Schools to serve the disenfranchised Native Hawaiian community and, therefore, society in Hawai‘i as a whole.

In the ways that the ruling challenges the efforts of the Kamehameha Schools, Doe v. Kamehameha Schools not only affects the future of this specific institution but also brings into question implications on the future of other programs designed to serve Native Hawaiians and other disadvantaged groups. I will develop this argument through the layout of four main sections: the first, “Opening the door to further challenge,” provides background of the political climate surrounding this case; the second, “A gift to her people: Why a school of Native Hawaiians?,” explores some of the discordance that exists between the context of the cases used in the argument of the appellant against the Kamehameha Schools and the purpose behind the Kamehameha Schools’ mission specifically to serve
Native Hawaiians in education; the third, “Playing on an un-level field,” displays some of the disadvantages faced by Native Hawaiians in order to challenge the appellant’s implicit assumption that Native Hawaiians have advantages over other groups in Hawai‘i; and the fourth, “‘Trammeling’ upon the rights of non-Hawaiians?,” denies the statement that the Kamehameha Schools admission policy “trammels” the rights of non-Hawaiians, illustrates how the Kamehameha Schools can positively affect the Native Hawaiian community and, therefore, the larger community in Hawai‘i, and poses the idea that the Doe v. Kamehameha Schools decision, in another sense, neglects some of the rights of Native Hawaiians.

OPENING THE DOOR TO FURTHER CHALLENGE

Doe v. Kamehameha Schools was not an isolated case in which a non-Hawaiian has accused organizations and institutions that offer support programming and resources to persons of Native Hawaiian ancestry to be racially discriminatory but rather a most recent case within a political context where such accusations have been reoccurring. While only a few organizations and institutions that have been initiated in order to restore to the indigenous people of Hawai‘i some of what was wrongfully taken from them through the illegal overthrow of their sovereign nation and to ensure their continued survival and well-being have been able to offer their efforts directly to Native Hawaiians, they have been brought to the courts several times over recent years as unfairly barring the participation of non-Hawaiians on a racially discriminatory basis. These recent court cases, including Rice v. Cayetano (2000) and Mohica-Cummings v. Kamehameha Schools (2003), whether through their ruling or their settlement, have created a volatile and somewhat hostile political climate for both public and private institutions intended to serve Native Hawaiians. The Native
Hawaiian Government Reorganization Act, through establishing for Native Hawaiians a formal political relationship with the U.S. federal government similar to those of federally recognized Native American tribes, has been presented by some as legislation which could provide protection from further attacks against Native Hawaiians programming. However, having met great opposition especially by conservative members of the Senate, the bill remains stalled from even entering the Senate floor for debate. This political activity through recent years, naming Native Hawaiian programming as race-based, has left the Kamehameha Schools vulnerable to the challenges argued by the appellant in the case of Doe v. Kamehameha Schools.

In the first case that recently has challenged Native Hawaiian programming, Rice v. Cayetano (2000), the appellant maintained that he had been denied his Fifteenth Amendment right to vote as a result of racial discrimination. The appellant, Harold Rice, a non-Hawaiian who had been born and raised on the Island of Hawai‘i, claimed that, regardless of his racial background, he should have the right to vote in elections for the Office of Hawaiian Affairs (OHA), “the official representative agency for ‘ōiwi Hawai‘i (indigenous Hawaiians), established by the State of Hawai‘i in 1978” (Office of Hawaiian Affairs¹, 2005, online) whose mission is “to malama (protect) Hawai‘i's people and environmental resources and OHA’s assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally (Office of Hawaiian Affairs², 2005, online)”. At that time, OHA only allowed “Hawaiians,” a “class that includes ‘native Hawaiians’-as descendants of the peoples inhabiting the Hawaiian Islands in 1778” (Rice v. Cayetano, 2000, online abstract), the intended
beneficiaries of the agency, to vote in statewide elections for its trustees. Despite the fact that Rice did not have the requisite ancestry to be considered “Hawaiian” under the laws of the State of Hawai‘i, the justices of the U.S. Supreme Court in 2000 ruled in a 7-2 decision that his denial to vote by Hawai‘i state law in the elections of OHA was a violation of the Fifteenth Amendment as it created a race-based voting qualification. Although OHA contended that voting qualifications depended on Hawaiian ancestry, the ruling presented ancestry as a proxy for race. In this manner, OHA became unable to provide exclusive voting rights to those it was designed to serve.

In *Mohica-Cummings v. Kamehameha Schools* (2003), the appellant charged that he had been denied his rights, according to federal civil rights statute Section 1981, to sign contracts. Brayden Mohica-Cummings, through the efforts of his mother Kalena Santos, claimed in suit that he should have all rights, regardless of racial background, to attend the Kamehameha Schools, a private institution whose current mission is “to create educational opportunities in perpetuity to improve the capability and well-being of people of Hawaiian ancestry” according to the will of their founder, Princess Bernice Pauahi Bishop (Kamehameha Schools, 2005, 19). The Kamehameha Schools, which have operated since their inception with an admissions policy that provides preference for applicants of part or whole Hawaiian ancestry as long as they meet all other admissions requisites, initially accepted Mohica-Cummings partly based on his certification of Hawaiian ancestry produced by his mother. However, upon discovering this documentation to be false, the Schools withdrew the appellant’s admission, spurring legal action by the appellant and his mother. In this case, however, U.S. District Court Judge David Ezra did not make a decision as to whether or not the School’s admissions policy indeed violated civil rights code. Instead, on
November 28, 2003, the Kamehameha Schools’ Board of Trustees offered a settlement according to which, if Mohica-Cummings dropped his case, he would be allowed to attend the Schools until his graduation (Pacific Islanders in Communication, 2005). Unfortunately, although this action by the Kamehameha Schools prevented further challenge to its admissions policy in this particular case, it did not close the door to future legal questioning.

Facing opposition similar to that which struck the voting policy of OHA and the admissions policy of the Kamehameha Schools, the Native Hawaiian Government Reorganization Act (S.147), known widely as the Akaka Bill for its prime sponsor Senator Daniel Akaka (D-Hawai‘i), has been purported by some to encourage unlawful racial discrimination against non-Hawaiians. Originally brought to the political table five years ago, the Akaka Bill was designed to establish federal recognition for Native Hawaiians as a political entity of indigenous peoples. On his official website, Sen. Akaka outlines his vision for the most current version of S.147:

“The Native Hawaiian Government Reorganization Act of 2005 does three things. It establishes the Office of Native Hawaiian Relations in the Department of the Interior to serve as a liaison between Native Hawaiians and the United States. It establishes the Native Hawaiian Interagency Coordinating Group to be composed of federal officials from agencies which administer Native Hawaiian programs. Both of these provisions are intended to increase coordination between the Native Hawaiians and the federal government. And third, the bill provides a process of reorganization of the Native Hawaiian governing entity. I am very proud of the fact that while the bill provides structure to the process, it also provides the Native Hawaiian community with the flexibility to truly reorganize its governing entity” (Akaka, 2005).

Although Akaka and other supporters of S.147, including the Office of Hawaiian Affairs and the Kamehameha Schools, had hoped that the Akaka Bill would enter onto the Senate floor for debate as early as July 2005, the bill has yet to reach this stage of legislation as several Republican senators have used procedural holds in order to stop such progress. Senator Jon
Kyl (R-Arizona), the strongest opponent in the Senate to the bill, has claimed both that the Akaka Bill would “create a race-based government for Native Hawaiians” and that it “is being promoted in Hawai‘i as a vehicle for the Native Hawaiian nation to secede from the U.S.” (Wong, Aug. 2005, 1). While the debate surrounding the Akaka Bill is quite complicated, with opposition from some who contend that it limits Native Hawaiians’ full rights to sovereignty and from others who contend that it unfairly gives too much support to Native Hawaiians on a racial basis, many of its supporters strongly advocate the Akaka Bill as “the best way to prevent legal attacks on Hawaiian programs” (Ferrar and Wong, Sept. 2005, 1).

Whether or not the Akaka Bill would indeed provide the best option for protection of Native Hawaiian programs, there currently exists no shield for Native Hawaiian programs against legal attack. The court ruling against OHA’s voting policy in *Rice v. Cayetano* and the settlement which led to no ultimate decision over the legality of the Kamehameha Schools’ admissions policy in *Mohica-Cummings v. Kamehameha Schools* have opened the door for further legal challenge to the efforts of organizations and institutions with the specific intention of supporting Native Hawaiians. With the Akaka Bill held from debate by opponents who believe it to be legislation which could allow Native Hawaiians to form their own race-based government, Native Hawaiian programs have remained in a position of vulnerability against cries of reverse racial discrimination.

A GIFT TO HER PEOPLE: WHY A SCHOOL FOR NATIVE HAWAIIANS?

Making his case while the political climate seemed favorable, an anonymous appellant known only as John Doe picked up a case against the Kamehameha Schools where
Mohica-Cummings left it. As Mohica-Cummings had done, John Doe, in *Doe v. Kamehameha Schools*, claimed that he, an individual not of Hawaiian ancestry, should be allowed the right to attend the Kamehameha Schools whereas the schools’ admissions policy, as it gave preference to applicants of Hawaiian ancestry, barred him from this right on account of his race. Doe filed suit against the Kamehameha Schools after twice participating in the schools’ admissions process, twice meeting the schools’ academic requirements for admission, and twice being denied admission when acknowledging no Hawaiian ancestry on the schools’ Ethnic Ancestry Survey (*Doe v. Kamehameha Schools*, 2005, 8929). In the argument of his case, the appellant used past legislation which had ruled for the equal rights of all people, regardless of race or color, to participate in civil actions, including the equal right to make and to enforce contracts. The cited legislation, however, was originally intended to work against systems designed to maintain one group to be dominant above all others. When considering the intent behind the Kamehameha Schools’ admissions policy, which itself has been in place to help the schools alter a social structure in which Native Hawaiians are found at a disadvantage, the appellant’s argument seems misguided.

Again mirroring the action taken by Mohica-Cummings, the appellant in *Doe v. Kamehameha Schools* cited at the center of his case federal civil rights statute Section 1981. Originally, this statute was ratified as part of the Civil Rights Act of 1866 pursuant to section two of the Thirteenth Amendment and provided the following:

> “That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and
proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding” (in Doe v. Kamehameha Schools, 2005, 8932).

The appellant claimed that as the Kamehameha Schools denied his admission upon his admittance of no Hawaiian ancestry, they violated his rights as a citizen specifically “to make and enforce contracts.” The Kamehameha Schools, according to Doe’s argument, refused the appellant’s right to make and enforce contracts due to racial discrimination.

However, while Section 1981 does order that citizens, “of every race and color,” should “have the same right, in every State and Territory in the United States, to make and enforce contracts,” it is important to examine other points of Section 1981 and to recall the context in which this statute of civil rights law was written. Although the appellant focused on the idea in Section 1981 that citizens, of every race and color, should have the same right to make and to enforce contracts, Section 1981 continues to state that each citizen should have the right “to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens [emphasis added].” This statement seems to expose a given understanding that white citizens had previously enjoyed the “full and equal benefit of all laws and proceedings for the security of person and property” whereas some others had not. With this in mind, the reference of Section 1981 to the equal rights for all citizens “of every race and color” seems to address the assumption that many non-whites had previously been denied equality under the law. In fact, consideration of the context in which Section 1981 was written reveals that “the principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen” (Gen. Bldg. Contractors Ass’n v. Pennsylvania, 2005, 386 in Doe v. Kamehameha Schools, 2005, 8932). Section 1981 was instated as a means to bring an end a
social and political structure in which non-white citizens had been categorically and systematically denied their civil rights.

Posing Section 1981 in opposition to the actions of the Kamehameha Schools, when comparing the intent behind the enactment of this federal civil rights statute and that behind the establishment of this educational institution, does not seem convincing. One important question to ask is: Why did Princess Bernice Pauahi Bishop first feel a need to establish schools, through her own private resources, which would give preference of its services to persons of the indigenous heritage of Hawai‘i? While the Kamehameha Schools do intend to serve Native Hawaiians specifically, they do not do so in order to maintain a dominance of Native Hawaiians over others. Princess Pauahi devised resources towards the founding of said schools through the words of her last will and testament:

“I give, devise and bequeath all of the rest, residue and remainder of my estate real and personal, wherever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools…I direct my trustees to invest the remainder of my estate in such manner as they may think best…and to devote a portion of each year’s income to the support and education of orphans, and others in indigent circumstances, giving preference to Hawaiians of pure or part aboriginal blood” (Bishop, B.P, 1884, thirteenth section).

According to the will of Princess Pauahi, the establishment of the Kamehameha Schools appears more as a gift, provided for through her own personal estate and trust, of support and education especially to Hawaiians of pure or part aboriginal blood.

The words of Princess Pauahi’s husband, Charles Reed Bishop, help to develop this idea more fully. In an address at the first Founder’s Day ceremony for the Kamehameha Schools in December of 1889, Charles Reed Bishop illuminated further the intentions of his wife:
“Bernice Pauahi Bishop, by founding the Kamehameha Schools, intended to establish institutions which should be of lasting benefit to her country...The founder of these schools was a true Hawaiian. She knew the advantages of education and well directed industry. Industrious and skillful herself, she respected those qualities in others. Her heart was heavy, when she saw the rapid diminution of the Hawaiian people going on decade after decade...And so, in order that her own people might have the opportunity for fitting themselves for such competition, and be able to hold their own in a manly and friendly way, without asking any favors which they were not likely to receive, these schools were provided for, in which Hawaiians have the preference, and which she hoped they would value and take the advantages of as fully as possible” (Bishop, C.R., 1889, 1).

Rather than to maintain a social structure in which Native Hawaiians could remain dominant above others, Princess Bernice Pauahi Bishop founded the Kamehameha Schools in order to provide opportunity for greater social mobility to an indigenous people who had suffered “rapid diminution.” The Kamehameha Schools were intended to help rectify unjust social inequalities faced by Native Hawaiians, not to push others into positions of disadvantage.

Judge Alan Kay, who had ruled in favor of the Kamehameha Schools during the first hearing of Doe v. Kamehameha Schools, acknowledged the Kamehameha Schools admissions policy as one that operated within the special social and historical context of Hawai‘i. Rather than consider a superficial reading of Section 1981 and understanding of the admissions policy of the Kamehameha Schools, Judge Kay took also into account the words of both Princess Bernice Pauahi Bishop and her husband, Charles Reed Bishop. In his written opinion of the Doe v. Kamehameha Schools case, he states:

“Thus it is evident that the intent of Princess Pauahi, as explained through her husband Charles Bishop, was that preference be given to Native Hawaiians for admittance to the Kamehameha Schools in order that through proper education they might be competitive with new comers in maintaining their socioeconomic status, culture, and participate in the governance of their communities. It is further evident that this preference was not perpetual nor an absolute bar to admittance of other races to the Kamehameha Schools, but only for so long as it took the schools to fulfill its responsibility in attaining
the goal of educating Native Hawaiians to overcome the manifest imbalance in socioeconomic and educational disadvantages, and non-Native Hawaiians would be admitted when the goal was attained or at such earlier date when the schools has the capacity to also admit non-Native Hawaiians. In sum, it was the vision of Princess Pauahi to save her people through education” (Doe v. Kamehameha Schools, 2003, online).

Judge Alan Kay, in his ruling of this case, recognizes the Kamehameha Schools as an institution which takes as its mission a goal of educating Native Hawaiians in order to help break down many of the socio-economic structural inequalities that they face. According to his ruling, the schools did not absolutely bar non-Hawaiians from attendance nor did it violate civil rights code through racial discrimination. As opposed to the stance taken by the appellant in his case, the Kamehameha Schools aim to contribute to social structure in which a disenfranchised people are allowed greater opportunities rather than to disenfranchise non-Hawaiians from their civil rights as citizens. However, rather than accept a decision by Kay that recognized the Kamehameha Schools as providing Native Hawaiians with needed opportunities, Doe appealed for his case to be heard again.

PLAYING ON AN UN-LEVEL FIELD

Aside from pursuing his case on the basis that the Kamehameha Schools have committed a violation of federal civil rights statute Section 1981, the appellant demanded the judges of the U.S. Ninth Circuit Court of appeals to apply the high standard of strict scrutiny, “such as that used to analyze challenges brought under the Fourteenth Amendment’s Equal Protection Clause” (Doe v. Kamehameha Schools, 2005, 8931), to the Doe v. Kamehameha Schools case. By his use of Section 1981 against the schools, the appellant already implicitly asserted an idea that Native Hawaiians had enjoyed the “full and equal benefit of all laws and proceedings for the security of person and property” whereas they had prevented others from
obtaining and utilizing this same right. A claim for equal protection as well seems to indicate belief of the appellant that the Kamehameha Schools, through their policy of admissions, have hindered his and other non-Hawaiians’ rights to civil participation. When looking at this claim through a broader scope, it seems questionable, however, that a preference for applicants of Hawaiians ancestry at one private institution, dedicated to the service of the Native Hawaiian community, affects the equal access to civil participation of non-Hawaiians. Such logic seems to assume that Native Hawaiians and non-Hawaiians, apart from the Kamehameha Schools, lie on a level playing field when it comes to access to civil resources. Unfortunately, as previously indicated through the words of Princess Pauahi, Charles Reed Bishop, and Judge Kay, the socio-economic playing field between Hawaiians and non-Hawaiians is far from even.

Native Hawaiians, still affected by compounded inequalities which cycle from generation to generation as a result of extreme loss, now compose one of the most socio-economically disadvantaged groups in what is now known as the State of Hawai‘i. Since the time of Western contact in 1778, Native Hawaiians have faced an overwhelming history of disease, depopulation, and disenfranchisement. Prior to Western contact, na kanaka maoli (the Native Hawaiian people) lived within a highly developed society that operated under sophisticated and organized systems of politics, subsistence, language, culture, and religion (Abad, 2001). According to the estimates of David Stannard, a professor of American Studies at the University of Hawai‘i at Manoa, the Native Hawaiian population among Hawai‘i’s eight major islands at the time of Western contact by Captain James Cooke had flourished to between 800,000 and 1,000,000 people (Stannard, 1989). However, largely due to Hawaiians’ lack of immunity to communicable diseases carried by Western visitors, the
Native Hawaiian population plummeted to around 50,000 in a matter of only 100 years (Abad, 2001). Still, despite this extreme drop in population, Native Hawaiians created for themselves a vibrant society. In 1810, Kamehameha I first established a unified monarchical government among the eight major islands of Hawai‘i so that, between 1826 until 1893, the Kingdom of Hawai‘i had achieved recognition as a fully independent government among other nations of the world (Apology Bill, 1993). The Kingdom of Hawai‘i maintained full sovereignty up until its illegal overthrow on January 14, 1893 by group of non-Hawaiian residents who sought the economic and political benefits of a Hawaiian government under the jurisdiction of the United States (Apology Bill, 1993). As outsiders, motivated by their own political and monetary gain, took control of the Hawaiian government, Hawai‘i society became inculcated by colonial ideals. The fate of Hawai‘i and of Hawaiians became decided by powers outside of Hawai‘i. In short overview, these events led to the great socio-political disenfranchisement of the indigenous people of Hawai‘i.

Unfortunately, this series of events have pushed Native Hawaiians into a cycle in which initial losses have been compounded from generation to generation. The results from studies measuring indicators of well-being reveal a number of disadvantages faced by Native Hawaiians that persist from colonial occupation to present. In Ka Huaka‘i: 2005 Native Hawaiian Educational Assessment, the Kamehameha Schools’ division of Policy Analysis and System Evaluation (PASE) uses a multidisciplinary perspective to examine five primary components of well-being—social, physical, economic, educational, and emotional—in order to provide context to the understanding of Native Hawaiian education. Although this study has located a number of strengths within the Native Hawaiian community, it has also provided evidence of social disadvantage among Native Hawaiians. An overview of the key
findings of *Ka Huaka‘i*, reveals Native Hawaiians to have disproportionately high rates of arrest and incarceration within the area of social and cultural well-being (PASE, 2005, 33), low mean income and underrepresentation in professional and managerial work positions when compared to other ethnic groups in Hawai‘i within the area of material and economic well-being (PASE, 2005, 35), as well as high vulnerability to serious health risk factors, especially to obesity and diabetes, and prevalence of uninsured health care within the area of physical well-being (PASE, 2005, 37). These drawbacks both contribute to and exacerbate limitations to educational opportunities faced by Native Hawaiians.

Studies, unfortunately, also reveal Native Hawaiians to be greatly underserved specifically in the area of educational well-being, especially within Hawai‘i’s public school system. In “Left Behind?: The status of Hawaiian students in Hawai‘i public schools,” Shawn Malia Kana‘iaupuni and Koren Ishibashi of PASE produce an in depth view of Native Hawaiians in Hawaiʻi’s public schools, showing Hawaiians to be among the state’s most underprivileged groups in education. Already largely economically disadvantaged, many Hawaiian youth are also enrolled in some of the lowest quality schools within the Hawaiʻi State Department of Education (DOE). Among the 33 schools of the DOE where Hawaiians comprise 50% or more of the student body, 26 (78.8%) are classified as in need of “corrective action,” signifying a school’s need to develop a plan for comprehensive school reform after failing to achieve adequate yearly progress (AYP) according to the service testing standards of the DOE for three consecutive years (Kana‘iaupuni and Ishibashi, 2003, 7). After controlling for poverty, limited English proficiency, special education, and disadvantaged school funding, Kana‘iaupuni and Ishibashi also found evidence of a statistically significant inverse relationship between the proportion of Hawaiian students in a
school and teacher experience as well as teacher tenure within schools (Kanaʻiaupuni and Ishibashi, 2003, 11). Such school conditions have been related in studies to both poor overall performance and low levels of school engagement for students. In the case of Native Hawaiians within the DOE, they have been found to be the lowest scoring on standardized tests among all major ethnic groups in Hawaiʻi, lagging behind total DOE averages by 9 percentiles on a consistent basis (Kanaʻiaupuni and Ishibashi, 2003, 3). Whereas Native Hawaiians comprise roughly 25% of all students enrolled in the DOE, they comprise over 35% of all students retained in grade so that one of five Hawaiian students are held back and comprise one-third of all students found missing from the school system (Kanaʻiaupuni and Ishibashi, 2003, 30). In short, Native Hawaiians, who already are of the most socio-economically disadvantaged in Hawaiʻi, continue to be greatly underserved in education. The public education system compounds socio-economic barriers for Native Hawaiian by failing to provide them with the resources and skills they need to gain greater social mobility. Over and over again, Native Hawaiians find themselves at unfair disadvantage among other ethnic groups in Hawaiʻi.

“TRAMMELING” UPON THE RIGHTS OF NON-HAWAIIANS?

Continuing to manipulate federal civil rights statute Section 1981 and the Equal Protection Clause of the Fourteenth Amendment, the appellant, in his argument against the Kamehameha Schools’ policy to give preference to applicants of persons of Hawaiian ancestry in their admissions process, goes so far as to state explicitly that “Kamehameha’s unconditional refusal to admit non-Hawaiians so long as there are native Hawaiian applicants categorically ‘trammels’ the rights of non-Hawaiians” (Doe v. Kamehameha Schools, 2005,
Through the word “trammel,” Doe conveys a notion that the Kamehameha Schools, through their admissions policy, intend to instill and to maintain an antagonistic relationship between Native Hawaiians and non-Hawaiians, a relationship in which Native Hawaiians hope to take from the experience of non-Hawaiians. Such a notion completely ignores the intention of Princess Bernice Pauahi Bishop to found an educational space in which Native Hawaiians could develop the skills to become positive contributors to society, an intention which continues to shape the mission of the Kamehameha Schools today. Such a notion mistakes the efforts of the Kamehameha Schools to be maliciously exclusionary towards non-Hawaiians. By viewing this situation through another lens, however, the actions of the Kamehameha Schools, through a mission to work towards breaking social inequalities by providing educational opportunities and resources to a historically disenfranchised people, can be seen as helpful to both Native Hawaiians and non-Hawaiians. From this view, a ruling which dismantles the Kamehameha Schools’ admissions policy may hinder Native Hawaiians from contributing to Hawai‘i’s larger society in the most effective ways and, at another level, may itself even “trammel” upon the rights of Native Hawaiians as indigenous peoples.

In her address to supporters of the Kamehameha Schools, both Native Hawaiian and non-Hawaiian, at a unity rally held in San Francisco on August 20, 2005, Dee Jay Mailer, the Chief Executive Officer of the Kamehameha Schools, laid out an idea that the Kamehameha Schools work to create opportunities for Native Hawaiians to fortify themselves within their own community as well as within the broader community in Hawai‘i. Mailer contended that while serving Native Hawaiians according to Princess Pauahi’s vision of providing hope for salvation through education to her dying people, the Kamehameha Schools also serve the
interests of Hawai‘i society as a whole. To help illustrate this point, Mailer quoted the non-Hawaiian head of the Hawai‘i Association of Independent Schools, Robert Witt, as he wrote:

“‘Private schools are at their best when their missions address issues of equity and justice in our society. That is, when a school with a unique purpose serves a population of students that are not otherwise well served, everyone benefits. Kamehameha is such a school. It stands alone, as a private school dedicated to providing urgently needed educational remedies for Native Hawaiians, a disadvantaged people struggling to achieve social and economic parity’” (Witt in Mailer address, 8/20/05).

In this light, the Kamehameha Schools, instead of “trammeling” on the right of non-Hawaiians, seem to help to create an overall positive social environment in Hawai‘i as it serves Native Hawaiians directly. Through dedication to a socio-economically disadvantaged group, the Kamehameha Schools promote values of justice and quality within the larger Hawai‘i society. They also provide opportunities not always otherwise afforded to Native Hawaiians to gain skills needed in leadership formation, helping Native Hawaiians to build a healthy community with the resources to support themselves and to make their own unique contributions to the broader society in Hawai‘i.

To augment this idea, Robbie Alm, a non-Hawaiian member of the Communications division of the Kamehameha Schools, in his speech at the Kamehameha Schools’ Unity Rally on August 6, 2005 held at ‘Iolani Palace in Honolulu, spoke not only of how the positive effects of the Schools extend beyond the Hawaiian community but also of how the harm done by the Doe v. Kamehameha Schools ruling affects non-Hawaiians along with Native Hawaiians. Addressing the decision put forth by the Ninth Circuit Court of Appeals against the Kamehameha Schools admissions policy, Alm testified:

“That Court somehow believes that it has vindicated my rights as a non-Hawaiian. I say to the Court, I need no vindication as I have no ‘right’ involved here that needs to be addressed by you…And I do not feel ‘trammelled’ by the Kamehameha Schools admissions policy; but I do feel
Nicole Alia Salis

As did Witt in his commentary on the Kamehameha Schools, Alm recognized the Kamehameha Schools as an institution which, as it serves Native Hawaiians, serves all in Hawai‘i. Although the Kamehameha Schools do offer a “gift” of education to Native Hawaiians, they do not at all maliciously stomp on the rights of non-Hawaiians. Alm clearly alters the logic of who “trammels” upon who as he explains that the Court, by impinging on the Kamehameha Schools’ capacity to work towards its mission to improve the well-being of the Native Hawaiian community, also imposes limitations on the ways in which the schools augment Hawaiʻi’s “social fabric.” Rather than affirm the rights of non-Hawaiians, the Court itself hinders these rights.

At the center of these arguments lies the idea that the Kamehameha Schools, by providing key educational resources and opportunities to Native Hawaiian youth who are otherwise highly disadvantaged within the socio-economic and socio-political systems in Hawai‘i, help to make right some of the inequalities in society. A quick comparison between the educational outcomes of Native Hawaiian students within the DOE system and those of students at the Kamehameha Schools helps to highlight this idea. According to Destinations Unlimited: KS Senior Survey, Class of 2003 and 2004, 96% and 97% of 2003 and 2004 Kamehameha Schools graduates, respectively, planned to enroll in post-secondary institutions of learning in the year immediately following high school graduation (PASE, 2004, 4). Of the graduates of 2003, 35% and 46% aspired to complete their education by obtaining a bachelor’s degree and a graduate degree, respectively. Of the graduates of 2004,
47% aspired to obtaining a bachelor’s degree and 41% a graduate degree (PASE, 2004, 7). These statistics differ starkly from the educational outcomes of Native Hawaiians in the DOE, in which, in 2003, only 68.4% of Native Hawaiian students were found either to meet graduation requirements or to transfer to different school systems (Kana‘iaupuni and Ishibashi, 2003, 31). While the Kamehameha Schools do help to produce remarkably improved educational outcomes for its graduates, though, this private institution should not be seen as the only solution to systemic inequalities and achievement gaps for Native Hawaiians within the Hawai‘i public school system. Instead, as the public school system should make reform efforts to improve equal opportunities for all of its students, the Kamehameha Schools may operate as an institution working to the best of its capacity to create greater educational opportunities to its students and through other outreach efforts during this process. By offering such opportunities, it can help to break a cycle where Native Hawaiians otherwise remain disadvantaged and disenfranchised and to empower Native Hawaiians to become leaders for their community with the necessary educational and experiential skills and credentials. The schools can help to achieve parity for Native Hawaiians in mainstream education and society so that, as mentioned by Judge Alan Kay in his original decision of *Doe v. Kamehameha Schools*, preference for applicants of Native Hawaiians ancestry may no longer be necessary.

From yet another vantage point, although the appellant in *Doe v. Kamehameha Schools* claimed that the Kamehameha Schools “trammeled” upon the rights of non-Hawaiians by giving preference to Hawaiian applicants in admissions, the case’s ruling may be viewed itself as “trammeled” upon the rights of self-determination afforded to Native Hawaiians as an indigenous people that holds a special relationship with the U.S. federal
government. In recognition of this special relationship, the U.S. Congress in Public Law 103-150, known as the Apology Bill, expressed “its commitment to acknowledge the ramifications of the overthrow on the Kingdom of Hawai‘i, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and” urged “the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawai‘i and to support reconciliation efforts between the United States and the Native Hawaiian people” (Apology Bill, 1993, Section 1). Even within the written opinion of Doe v. Kamehameha Schools itself, the judges of the U.S. Ninth Circuit Court of Appeals acknowledged that “Congress has asserted that the United States has a political relationship with, and a special trust obligation to, native Hawaiians as the indigenous people of Hawai‘i” (Doe v. Kamehameha Schools, 2005, 8960). The Kamehameha Schools have exercised the rights of Native Hawaiians to self-determination through their efforts to develop and to implement internal and community outreach programs based on culturally appropriate research that has aimed to find more effective ways to serve and to extend Native Hawaiian thought in education. By incorporating Native Hawaiian thought into their services, the schools have tried to part from dominant pedagogical approaches which impose Western values in education without paying heed to the particular needs or strengths of those who may not predominantly follow a Western value structure. As an example, I, along with Shawn Malia Kana‘iaupuni, Koren Ishibashi, and Daniel Naho‘opi‘i of the Kamehameha Schools’ division of the Kamehameha Schools, emphasize in current research the importance of developing a Native Hawaiian-determined model for understanding and assessing Native Hawaiian strengths and challenges to be used as a tool for constructing more effective support programs for the Native Hawaiian community. By
developing a strengths-based rather than deficits-based model of Native Hawaiian well-being, we advocate the development of support programs which will build upon Native Hawaiian strengths and promote Native Hawaiian well-being beyond mere survival (Kana‘i aupuni, Ishibashi, Naho‘opi‘i, and Salis, in progress). The ruling of Doe v. Kamehameha Schools, in striking down the Kamehameha Schools’ admissions policy, hinders an institution which seeks to serve Native Hawaiians from doing so in the way it deems most effective. As the ruling takes away from Native Hawaiians’ ability to decide for themselves what works best for their community, it “trammels” upon Native Hawaiians’ rights to self-determination.

CONCLUSION

Revisiting the scene of the August 8th ‘Iolani Palace Unity Rally, it is clear why the announcement of the ruling of Doe v. Kamehameha Schools incited such a powerful and emotional response from so many people, both Hawaiian and non-Hawaiian. Although perhaps not surprised by such a legal argument in the midst of a political climate hostile to the protection of Native Hawaiian programming and entitlements, many were none-the-less disheartened by a court opinion which, through the manipulation of legislation that was originally intended to break down systemic social inequalities, labeled the efforts of an educational institution that seeks to provide for a historically disenfranchised group, the Native Hawaiian people, as racially discriminatory. Many felt harmed by a ruling which would limit the well-meaning approaches of an educational institution to prepare youth to become leaders for their disadvantaged, yet vibrant community as well as for the broader society in Hawai‘i.
Aside from determining the fate of the Kamehameha Schools, the Doe v. Kamehameha Schools case also has deep implications for the Native Hawaiian community as a whole. Most obviously, this ruling may possibly limit the support and services that a Native Hawaiian educational institution can provide for the Native Hawaiian community. This case, however, affects more than just the educational opportunities afforded to Native Hawaiians. It calls into question issues of Native Hawaiian identity and whether the term “Native Hawaiian” refers to a racial or political body of people. It brings to the fore questions regarding the political nature of the relationship that exists between the United States and the Native Hawaiian people, questions strongly tied to issues of Native Hawaiian sovereignty. If the U.S. federal government does indeed respect Native Hawaiians through a special relationship as an indigenous people with political rights, then, why were they treated only as a racial group in Doe v. Kamehameha Schools? What needs to happen in order to insure a more consistent acknowledgement by the federal government and others of Native Hawaiians as also forming a political body?

On an even larger scale, the Doe v. Kamehameha Schools case conveys messages as to how the United States government views its responsibility to minority and indigenous populations. It pushes us to question if the United States will take into fair account the intergenerational cycles of disenfranchisement and disadvantage that many minority and indigenous communities face or if it will treat policies and programs which take race into account for the purpose of righting socio-economic and socio-political inequalities the same way that it treats legislation and policy designed to subjugate minority groups under the power of a dominant group, calling the former reverse-discrimination.
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