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HAWAIIAN ETH(N)ICS: RACE AND RELIGION IN KAMEHAMEHA SCHOOLS

Kamehameha Secondary and Elementary Schools in Honolulu were established by Princess Bernice Pauahi Bishop upon her death in 1884. Pauahi's estate, consisting of the "ancestral lands of the royal Kamehameha family,"¹ the bulk of which Pauahi had inherited from her cousin Ruth Ke'elikolani, formed the corpus of a charitable trust to found and maintain the Kamehameha Schools. To establish the Schools, Pauahi's will stated:

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 expend such amount as they may deem best, not to exceed however one-half of the fund which may come into their hands, in the purchase of suitable premises, the erection of school buildings, and in furnishing same with the necessary and appropriate fixtures furniture and apparatus. I direct my trustees to invest the remainder of my estate in such manner as they may think best, and to expend the annual income in the maintenance of said schools; meaning thereby the salaries of teachers, the repairing of buildings and other incidental expenses; *and to devote a portion of each years income to the support and education of orphans, and others in indigent circumstances, giving preference to Hawaiians of pure or aboriginal blood. . . .*²

The clause specifically providing for the admission of Hawaiians to Kamehameha Schools relates only to the "support and education of orphans and others in indigent circumstances," to which a portion of the annual income is to be devoted. Yet the interpretation of this section of the will has not been that Kamehameha Schools are open to all nationalities with some consideration given to Hawaiian orphans and indigents, but

¹ KAMEHAMEHA SCHOOLS/BERNICE PAUABI BISHOP ESTATE, THE LAND OF KAMEHAMEHA SCHOOLS/BERNICE PAUABI BISHOP ESTATE 1 (1989) [hereinafter THE LAND OF KAMEHAMEHA SCHOOLS].

² *In re Estate of Bishop*, 499 P.2d 670, 674 (Haw. 1972) (Abe, C.J., concurring) (emphasis added). The majority opinion first addresses whether the trustees of the Bishop Estate may earn commissions on those amounts received by the Estate and paid to the State for commercial property taxes. The opinion then focuses on whether the trial court's award of a \$6,000 Master's fee was an abuse of discretion. After holding that amounts paid by the lessees as rents are revenue and/or income for the purpose of calculating commissions, the majority concludes that the trial court did not abuse its discretion by awarding the Master's fee. *Id.* at 671-73.

Justice Abe's concurrence questions whether Kamehameha Schools may continue the policy of race-determined exclusion of all persons who lack Hawaiian ancestry, given that Kamehameha Schools are privately owned by the Bishop Estate and, therefore, exempt from the equal protection clause requirements. Justice Abe concludes that Bishop did not intend to create a school system that would exclude all persons lacking Hawaiian ancestry. Further, Justice Abe reasons that the equal protection clause, applicable under the public function doctrine, is violated by the discriminatory policy. *Id.* at 673-77.

that Hawaiian ancestry is a requirement for admission.³ Pauahi's husband, Charles Reed Bishop, one of the first trustees of the estate, wrote in a letter dated February 11, 1897:

There is nothing in the will of Mrs. Bishop excluding white boys and girls from the Schools, but it is understood by the Trustees that only those having native blood are to be admitted at present, that they are to have preference so long as they avail themselves of the privileges open to them to a reasonable extent.⁴

The only exception to the requirement of Hawaiian heritage was for the children of teachers, who could enroll despite their non-Hawaiian ethnicity. This privilege was discontinued by 1970.⁵

The will also stipulates that trustees must be selected from "persons of the Protestant religion"⁶ and that "teachers of said school shall forever be persons of the Protestant religion . . . [not] restricted to persons of any particular sect of the Protestants."⁷ The students, however, can be of any or no religion as long as they are, at least, part-Hawaiian.

This paper examines the involvement of the State of Hawaii in the establishment and maintenance of the Kamehameha Schools and the constitutionality of the Schools' policies and practices regarding race and religion. First, the paper discusses the establishment of the Schools in 1884 and the maintenance of them today. Second, it examines state action in the Schools to determine whether the Equal Protection Clause of the Fourteenth Amendment applies. Third, it analyzes possible compliance with the Equal Protection Clause by discussion of such factors as the remedial nature of the program and the maintenance of Hawaiian culture rather than race. Finally, the paper discusses the establishment of the Protestant religion by the State through the selection of teachers and trustees of the Schools.

I. ESTABLISHMENT AND MAINTENANCE OF THE SCHOOLS

At the time Pauahi wrote her will, Hawaiians had suffered both cultural and economic devastation.⁸ "Hawaiians had long lost control of their economy, partly through the loss or sale of their lands and through being driven out of certain traditional occupational fields like farming. . . . Hawaiians were forced to compete with Japanese and Chinese . . . in the race for the spoils left by the *haole* oligopoly."⁹ In Pauahi's lifetime, the native population had been reduced from 400,000 at the time of the European discovery of Hawaii to 45,000 in 1878.¹⁰

In 1884, Pauahi's lands amounted to slightly more than 11% of all of the land in the Hawaiian Islands;¹¹ today her estate consists of approximately 339,197 acres,¹²

³ *Id.* at 674.

⁴ GEORGE KANAHELE, PAUABI: THE KAMEHAMEHA LEGACY 177 (1986).

⁵ GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII 428 (1985).

⁶ KAMEHAMEHA SCHOOLS/BERNICE PAUABI BISHOP ESTATE, THE WILL OF BERNICE PAUABI BISHOP AND ITS CODICILS 8 (1989) [hereinafter WILL OF BISHOP AND ITS CODICILS].

⁷ *Id.* at 6.

⁸ KANAHELE, *supra* note 4, at 171.

⁹ *Id.* at 171-72.

¹⁰ WILL OF BISHOP AND ITS CODICILS, *supra* note 6, at 2.

¹¹ GAVAN DAWS, SHOAL OF TIME 299 (1968).

¹² THE LAND OF KAMEHAMEHA SCHOOLS, *supra* note 1, at 2.

or 8% of the State's total land area.¹³ The land is designated as commercial, residential, agricultural, or conservation according to governmental land-use classification,¹⁴ and the rents derived from the land which support Kamehameha Schools depend primarily on this classification and on market forces.¹⁵ In fiscal year 1988-89, as Hawaii's largest private landowner, the Bishop Estate earned \$29 million in lease rents.¹⁶ The Kamehameha Schools are the sole beneficiary of this income. The trustees, who are appointed by the Hawaii Supreme Court,¹⁷ are paid commissions from the estate "on all moneys received in the nature of revenue or income of the estate, such as rents, interests, and general profits."¹⁸ The formula used to compute the trustees' commissions is determined by the Hawaii legislature.¹⁹ The Attorney General of Hawaii is *parens patriae* of the Bishop Estate and all charitable trusts,²⁰ and is "to oversee the activities of the trust to the end that the trust is performed and maintained in accordance with the provisions of the trust document, and to bring any abuse or deviation on the part of the trustees to the attention of the court for correction."²¹

Approximately 3,200 full-time and 21,000 part-time students enrolled in Kamehameha Elementary and Secondary Schools, Center for Development of Early Education, and Extension Education Division in 1989.²² The Elementary School "enrolls about 700 students of Hawaiian ancestry"²³ through a "random selection process."²⁴ The secondary school enrolls 2500 students with "preference . . . given to students of Hawaiian ancestry."²⁵ The Center for Development of Early Education has developed extensive programs in pre-kindergarten education, including a language arts model to teach Hawaiian children to read, now used "in nine public schools on three islands, affecting some 2,750 students."²⁶ Federal funds underwrite some of the costs.²⁷ The Extension Education Division offers, among other activities, summer programs, continuing education programs, and alternative education programs that serve both Kamehameha and non-Kamehameha students.²⁸ Many of these programs are operated in collaboration with the State Department of Education.²⁹ Approximately 40,000 students participate in Kamehameha programs each year, making Kamehameha the second largest private school in the nation.³⁰ With the size and educational importance of the Schools in mind, it is necessary to examine state involvement in the Schools to determine whether the Equal Protection Clause of the Fourteenth Amendment applies to this institution.

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *In re Estate of Bishop*, 499 P.2d 670, 675 (Haw. 1972).

¹⁸ HAW. REV. STAT. § 607-20 (1985).

¹⁹ *In re Estate of Bishop*, 499 P.2d at 672; HAW. REV. STAT. § 607-20.

²⁰ *Midkiff v. Kobayashi*, 507 P.2d 724, 745 (Haw. 1973).

²¹ *Id.*

²² THE LAND OF KAMEHAMEHA SCHOOLS, *supra* note 1, at 8.

²³ KAMEHAMEHA SCHOOLS/BERNICE PAUHI BISHOP ESTATE, EDUCATIONAL PROGRAMS 6 (1989).

²⁴ *Id.*

²⁵ *Id.* at 1.

²⁶ *Id.* at 5.

²⁷ *Id.*

²⁸ *Id.* at 8-10.

²⁹ *Id.* at 8.

³⁰ *Id.* at 4.

II. STATE ACTION

Kamehameha Schools are privately operated and ostensibly not subject to the restraints of the Fourteenth Amendment. Hawaii Supreme Court Justice Kazuhisa Abe notes, however, in his concurring opinion in *In re Estate of Bishop*³¹ that "[m]erely labeling an institution 'private' or 'public' may not be a sufficiently sensitive constitutional analysis."³² The following section examines the characteristics of Kamehameha Schools/Bishop Estate that render them subject to the provisions of the Fourteenth Amendment.

A. Instances of State Action

Although formulating an adequate definition of "state action" is difficult, at least three significant characteristics of the operation of Kamehameha Schools manifest substantial state involvement: (1) the size, curriculum, and secular nature of Kamehameha as indistinguishable from that of a public school;³³ (2) the selection, appointment, and confirmation of the trustees by the justices of the Hawaii Supreme Court,³⁴ who are themselves chosen by the Governor of Hawaii and confirmed by the State Senate;³⁵ and (3) the nature of a charitable trust and supervisory position of the State Attorney General.³⁶ This section discusses each of these three characteristics of the Schools as indicative of state action.

1. The Character of the Schools

In his concurring opinion in *In re Estate of Bishop*, Justice Abe finds Kamehameha Schools equivalent to the Hawaiian public schools:

[I]n virtually every meaningful respect, Kamehameha Schools is indistinguishable from any public school in the State of Hawaii. The institution is as large if not larger than the average State school. Its curriculum is substantially identical to the curriculum of any public school. Students are not required to be of any particular religious affiliation for admission, and the school is not run by any religious sect. A student may enter Kamehameha Schools, study there for several years, and graduate, and no meaningful distinction would exist between the nature of his relationship to Kamehameha Schools and the relationship of another student to a public school.³⁷

³¹ 499 P.2d 670 (Haw. 1972).

³² *Id.* at 676 (Abe, C.J., concurring).

³³ *Id.* at 675-76.

³⁴ *Id.* at 675.

³⁵ HAW. CONST. art. VI, § 3.

³⁶ *Midkiff v. Kobayashi*, 507 P.2d 724, 745 (Haw. 1973).

³⁷ *Bishop*, 499 P.2d at 676 (Abe, C.J., concurring).

2. *The Appointment of Trustees*

Although mere similarity in function to a public school would not charge a private school with the restraints required of a governmental entity,³⁸ fundamental administrative practices of the Kamehameha Schools are fully entangled with the state. The Governor of Hawaii and State Senate nominate and confirm Hawaii Supreme Court Justices,³⁹ and the Hawaii Supreme Court Justices appoint the Bishop Estate trustees.⁴⁰ Although Pauahi's will conferred the appointment power upon the Justices "as individuals, and not as a court,"⁴¹ this process does not escape state action. The Governor and the State Senate can consider the Supreme Court nominee's views on selecting a trustee candidate despite the fact that the Justice as an "individual" chooses and confirms the trustee.

In his commentary on state involvement in private institutions, Choper describes a continuum of state action: "Several qualitative gradations of state action affect private individuals, some of which plainly satisfy the state intent requirement under current doctrine and some of which do not. At one end of the spectrum is state action that *compels* private persons to discriminate."⁴² The Hawaii Attorney General compels adherence to the terms of Pauahi's will, including the provision calling for the State Supreme Court Justices (as individuals) to appoint the trustees who will then enforce the racially discriminatory interpretation of the will. The imprimatur of the state is found not only in this obligation of the State Attorney General to enforce the appointment of the trustees, but also in the action of the Governor and State Senate in nominating and confirming the Supreme Court justices. Choper further articulates this point:

If a state were to award benefits (such as money or jobs) on the explicit condition that the recipients engage in a certain kind of discrimination, then the state, although not compelling the discrimination, nonetheless would be encouraging it through an articulated collective policy choice that plainly manifests the state's motivation.⁴³

Although the state does not engage in the discrimination directly, it is clearly awarding employment to the trustees on the explicit condition that the trustees engage in racial discrimination.

Abernathy takes a similar approach in discussing *In re Estate of Stephen Girard*,⁴⁴ in which Stephen Girard created a testamentary trust for the education of "poor white male orphans."⁴⁵ The City of Philadelphia, through the Board of Directors of City Trusts, was to administer the trust.⁴⁶ Black orphans denied admission to the school established by the trust challenged it as state action furthering discrimination. The

³⁸ *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

³⁹ HAW. CONST. art. VI, § 3.

⁴⁰ *Bishop*, 499 P.2d at 675 (Abe, C.J., concurring).

⁴¹ *Kekoa v. Supreme Court of Hawaii*, 516 P.2d 1239, 1248 (Haw. 1973).

⁴² Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U.L.Q. 757, 771 (1979) (emphasis added).

⁴³ *Id.* at 772.

⁴⁴ 24 U.S.L.W. 2068 (1955), *rev'd sub nom.* *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957).

⁴⁵ Glenn Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 385 (1958) (discussing *Girard*).

⁴⁶ *Id.*

Supreme Court found in favor of the plaintiffs on the authority of *Brown v. Board of Education*⁴⁷ with "no reference to the distinction between governmental and fiduciary functions."⁴⁸ As applied to Kamehameha Schools, this decision calls for no distinction between the Supreme Court Justices as justices (the governmental function) and the "justices as individuals" (the fiduciary function). Abernathy takes this decision one step further:

[I]t may be assumed that when state agents act and act by virtue of their public position, then the requirement of state action is met even though the function performed is that of administering a private testamentary trust, or other normally private functions. The obvious next question is whether it would be unconstitutional for the . . . [c]ourt to appoint, as it suggested, a private trustee for the estate and demand of that trustee that the terms of the will be met. . . . There would appear to be no important constitutional distinction between enforcement of the terms by a city board and similar enforcement by a court.⁴⁹

In the case of Kamehameha Schools, the appointment of the private trustee by the State does not remove state action. Since the will dictates that the trustees must be appointed by the Supreme Court justices, the *cy pres* doctrine should be used to modify this provision. One obvious remedy is to allow current trustees to choose new trustees.

3. The Nature of Charitable Trusts

Charitable trusts are "trusts designed for the benefit of a class or the public generally. . . . [They are] different from private trusts in that the beneficiaries are uncertain."⁵⁰ In his article on restricted charitable trusts, Parker finds "extensive state involvement inherent in any charitable trust" for several reasons.⁵¹ First, state law grants the power to establish a charitable trust, and the trust is "subject to close regulation by the legislative, executive, and judicial bodies of the state."⁵² Second, state law grants special privileges to the charitable trust, such as perpetual existence and immunity from tort liability.⁵³ Finally, the state courts provide administrative oversight in nominating and confirming trustees, in advising trustees as to their duties, and in assuring compliance with or authorizing deviation from the terms of the will.⁵⁴

The Bishop Estate Trust is fully entangled with the state under these criteria. The legislative, executive, and judicial branches of the Hawaii State government regulate the trust:⁵⁵ the legislature sets the salaries of the trustees,⁵⁶ the Governor appoints the

⁴⁷ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁴⁸ Abernathy, *supra* note 45, at 386.

⁴⁹ *Id.*

⁵⁰ BLACK'S LAW DICTIONARY 1510 (6th ed. 1990).

⁵¹ Frank R. Parker, *Evans v. Newton and the Racially Restricted Charitable Trust*, 13 HOW. L.J. 223, 238 (1967).

⁵² *Id.* at 240.

⁵³ *Id.* at 241.

⁵⁴ *Id.* at 242.

⁵⁵ *In re Estate of Bishop*, 499 P.2d 670, 675 (Haw. 1972).

⁵⁶ HAW. REV. STAT. § 607-20 (1985).

Supreme Court Justices,⁵⁷ the Attorney General is *parens patriae* of the trust,⁵⁸ and the judiciary nominates and confirms the trustees.⁵⁹

In addition to extensive state involvement on an administrative level, Kamehameha Schools carry on a most essential governmental function, as *Brown* has described education as "perhaps the most important function of state and local governments."⁶⁰ Parker sees this governmental function as tantamount to state action. "[N]early all charitable institutions and bodies carry on governmental functions. . . . [T]he concerns and activities of charitable trusts in the fields of general welfare — education, health, care of the indigent and aged — are virtually indistinguishable from those services performed by government at all levels."⁶¹ Parker notes that the state awards charities a tax exemption in exchange for performing state-like functions and allows "tax credits to individuals making contributions to discriminatory charitable enterprises, . . . plac[ing] the power and prestige of the state behind them."⁶² Parker centers his arguments on *Evans v. Newton*,⁶³ a case in which a Confederate veteran devised one hundred acres of land to be used as a park exclusively for whites.⁶⁴ The United States Supreme Court held that "regardless of the Georgia court's substitution of private trustees for the municipality, the park must be desegregated."⁶⁵

The secular nature of Kamehameha Schools, the selection and appointment of the trustees, and the characteristics of the charitable trust indicate the presence of state action in the administration of the Schools. Thus, Kamehameha Schools must be examined for compliance with the equal protection clause.

III. EQUAL PROTECTION

Once state action in the administration and maintenance of the Schools has been established, the restraints of the Fourteenth Amendment apply to the now-governmental entity. The second sentence of the Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."⁶⁶ Kamehameha Schools ostensibly and proudly confer a special benefit on Hawaiians and part-Hawaiians while denying this educational benefit to non-Hawaiians. This section discusses the violation of the Equal Protection Clause of the Fourteenth Amendment and suggests several characteristics of the Schools that may allow continuation of racial discrimination in admissions despite the defined limitations of the Fourteenth Amendment.

A. Violation of Equal Protection

A violation of the Equal Protection Clause requires that a state act with a purpose to discriminate.⁶⁷ As Choper states, "the Court has unqualifiedly developed a doctrinal

⁵⁷ *Midkiff v. Kobayashi*, 507 P.2d 724, 745 (Haw. 1973).

⁵⁸ HAW. CONST. art. VI, § 3.

⁵⁹ *Bishop*, 499 P.2d at 675.

⁶⁰ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

⁶¹ *Parker*, *supra* note 51, at 244.

⁶² *Id.* at 248.

⁶³ 382 U.S. 296 (1966).

⁶⁴ *Id.*

⁶⁵ *Parker*, *supra* note 51, at 227-28.

⁶⁶ U.S. CONST. amend. XIV, § 2.

⁶⁷ *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), *cert. denied*, 434 U.S. 1025 (1978); *Washington v. Davis*, 426 U.S. 229 (1976).

approach to the equal protection clause in a series of recent decisions that requires the state to act with a 'purpose to discriminate.'⁶⁸ Intentional discrimination in admission to Kamehameha Schools is evident in its avowed "mission . . . to provide educational opportunities for Hawaiian children."⁶⁹ Neither the Schools nor the state through its executive, legislative, or judicial branches denies that the Schools are presently operated for Hawaiians only.

1. *Brown and Bakke*

Although the Supreme Court in *Regents of University of California v. Bakke*⁷⁰ found that race may be one of many factors taken into account in school admissions, the Court also observed the problems inherent in an exclusively preference-based system.⁷¹ The Court noted that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."⁷² By reserving 100% of class places for Hawaiians or part-Hawaiians, the Kamehameha Schools reinforce the stereotype of Hawaiians as unable to compete academically with people of other races. In Daws' history of the Hawaiian Islands, he notes:

After the Kamehameha Schools had been in existence for more than a generation[,] some members of the Alumni Association made a comment on their education. A good many of them had managed to go on to high school and to college, and what they saw there brought them to the unhappy conclusion that Princess Bernice's endowment was being misused. Despite all the money spent, the public schools of the territory offered a better education than Kamehameha Schools. . . . "The assumption is made by the school authorities that the mind of the Hawaiian boy is capable of developing up to a certain stage only and no further," the alumni wrote in 1916.⁷³

The Court came to a similar conclusion regarding stereotype and inferiority in *Brown v. Board of Education*.

To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: ". . . A sense of inferiority affects the motivation of a child to learn."⁷⁴

⁶⁸ Choper, *supra* note 42, at 767 (quoting *Washington*, 426 U.S. at 239).

⁶⁹ KAMEHAMEHA SCHOOLS/BERNICE PAUHI BISHOP ESTATE, EDUCATIONAL PROGRAMS 4 (1989).

⁷⁰ 438 U.S. 265 (1978).

⁷¹ *Id.* at 320.

⁷² *Id.* at 298.

⁷³ DAWS, *supra* note 11, at 301.

⁷⁴ *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (quoting *Brown v. Board of Educ.*, 98 F. Supp. 797, 799 (D. Kan. 1951)).

Unlike matriculation of the black students in *Brown*, matriculation at Kamehameha Schools is voluntary, and non-Hawaiians have available over two-hundred public and more than ninety private non-discriminatory schools in the state.⁷⁵ Still, the United States Supreme Court has found generally that "[s]eparate educational facilities are inherently unequal."⁷⁶

A second problem inherent in a racially discriminatory system of admission noted by the Court in *Bakke* is the "inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."⁷⁷ The non-Hawaiian elementary or secondary school student seeking admission to Kamehameha Schools is hardly responsible for the cultural and economic problems of the Hawaiian race, but is asked to remedy them by foregoing admission. The Court would likely find this kind of practice inequitable.

B. Possible Compliance with Equal Protection Standards

Several characteristics of the Schools, the State, and Hawaiian history may, however, rescue the institution from non-compliance with equal protection standards. This section discusses (1) the remedial nature of the admissions process, (2) the history of the State regarding its admission to the Union, (3) the importance of the preservation of Hawaiian culture, and (4) the non-segregative nature of the Schools.

1. Remedial Nature of the Schools

Despite the problems noted by the Supreme Court in *Bakke* and the existence of these problems in the Kamehameha preference-based system of admissions, the fundamental purpose of the Schools in remedying the past discrimination against Hawaiians may be a compelling reason for allowing such an admissions restriction. Several guidelines noted by the Court in *City of Richmond v. J.A. Croson Co.*⁷⁸ are applicable to the Kamehameha admissions process. *Croson* involved a race-based program adopted by the City of Richmond in which prime contractors to whom the City had awarded construction contracts were required to subcontract a minimum of thirty percent of the dollar amount of the contract to a minority business enterprise.⁷⁹ A "minority business enterprise" was defined as a business at least fifty-one percent owned or controlled by a black, Spanish-speaker, Oriental, Indian, Eskimo, or Aleut.⁸⁰

First, the Court in *Croson* determined that the state must prove historical discrimination against the specified race in the particular industry;⁸¹ a showing of general societal discrimination is inadequate. Applying this requirement to the Kamehameha admissions process suggests that the State must show discrimination against Hawaiians in education specifically in order to justify the Hawaiian race requirement at Kamehameha Schools. Because the State Department of Education has never maintained segregated public schools, discrimination against Hawaiians in education is not apparent. Hawaiians have been admitted to public schools with whites, Asians, and people of other races since

⁷⁵ DEP'T OF GEOGRAPHY, UNIV. OF HAW., ATLAS OF HAWAII 180 (1973).

⁷⁶ *Brown*, 347 U.S. at 495.

⁷⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978).

⁷⁸ 488 U.S. 469 (1989).

⁷⁹ *Id.* at 477.

⁸⁰ *Id.* at 478.

⁸¹ *Id.* at 499.

the establishment of public schools in Hawaii in 1840.⁸² Rather than attempting to prove discrimination against Hawaiians in education to comply with this guideline of *Croson*, the State can distinguish education from the construction industry and, therefore, distance the Schools' racial policy from the *Croson* requirement. Education itself is not a right granted by the Constitution; however, unlike employment in building construction, education is, according to the Supreme Court, fundamental to the maintenance of a democratic society.⁸³ In addition, a showing of general societal discrimination is not sufficient to justify the narrowly-tailored contracting affirmative action plan because the narrowly-tailored plan is enacted to remedy industry-specific discrimination. An affirmative action plan in elementary and secondary school education, however, is instituted to remedy general societal discrimination, and a showing of such general discrimination should be sufficient to justify the plan's existence.

Second, the Court in *Croson* found Richmond's definition of a minority business enterprise overinclusive, since it provided set-asides for races who were randomly included in the plan.⁸⁴ The Kamehameha Schools' plan in providing for the underprivileged of the State is, in contrast, severely underinclusive — so narrowly-tailored as to exclude other races in need of similar remedial help. *Croson* suggests that a program to remedy past discrimination must include only those groups shown to have been its victims. Where the plan in *Croson* should have excluded races not proven worthy of remedial help, the Kamehameha program should include other underprivileged peoples.

The remedial nature of the Schools' plan will not clearly save the Kamehameha Schools from non-compliance with equal protection, but additional characteristics of the situation are more indicative of the constitutionality of the race requirement.

2. Admission as a State

Unlike any other state, Hawaii existed as an independent kingdom for more than one thousand years, from the eighth century⁸⁵ to the overthrow of Queen Liliuokalani in 1873.⁸⁶ Much of the structure of Hawaii's social and economic systems, most importantly the land tenure system, can be attributed to the policy of its monarchs.⁸⁷ Although territories must forfeit policies and practices inconsistent with constitutional jurisprudence upon admission to statehood,⁸⁸ the Act providing for the admission of Hawaii to the Union does not disallow the racially restricted Kamehameha Schools.⁸⁹ In fact, the State was judged "in conformity with the Constitution of the United States . . ." upon its admission in 1959.⁹⁰ Congress did not find Kamehameha Schools' practices inconsistent with constitutional standards when it reviewed State policies and drafted and approved the Admission Act.

⁸² ROBERT C. SCHMITT, HISTORICAL STATISTICS OF HAWAII 207 (1977).

⁸³ Plyler v. Doe, 457 U.S. 202 (1982).

⁸⁴ *Croson*, 488 U.S. at 506.

⁸⁵ DAWES, *supra* note 11, at xiii (1968).

⁸⁶ LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 376 (1964).

⁸⁷ Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

⁸⁸ See *Reynolds v. United States*, 98 U.S. 145 (1879) (regarding the application of federal law making polygamy illegal to Mormons under religious duty to practice polygamy). Incidentally, Utah was not admitted as a state until 1896.

⁸⁹ Hawaiian Statehood Admissions Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

⁹⁰ *Id.*

3. *Hawaiian Culture*

A third characteristic that may render the Kamehameha Schools in compliance with the Equal Protection Clause is the view of the Schools' purpose as promoting and maintaining the Hawaiian culture rather than the Hawaiian race. Three factors support this view.

First, the Preamble of the Constitution of the State of Hawaii demonstrates the importance of preserving Hawaiian culture; it begins "We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, '*Ua mau ke ea o ka aina i ka pono*' (the life of the land is perpetuated in righteousness)."⁹¹ The State here is seeking to uphold traditional values of culture rather than to promote a specific race. Pauahi's will and Kamehameha Schools' policies should be interpreted in the light of the language of the State Constitution, which suggests that the promotion of Hawaiian culture is a specified goal of the state. The culturally discriminatory policy of the Schools, therefore, is supported by the State Constitution.

Second, recent cases involving Native Americans have shown the importance to the courts of maintaining the culture of indigenous peoples.⁹² Although circumstances of the Hawaiian culture are, in fact, distinguishable from those of Native American life, the cultural similarities warrant comparable attention to the maintenance of Hawaiian culture. Both indigenous peoples suffered usurpation of native lands followed by economic devastation. Hawaiian culture is deserving of safeguards similar to those that now seek to preserve the Native American culture.

Third, the racially restrictive admissions process of Kamehameha Schools can be interpreted as a proxy for admission of those students who identify with and will likely assist in preserving Hawaiian culture. The Schools can claim that, with a purpose to promote Hawaiian culture, they admit those individuals with the most reliable indicator (race) of identification with the culture. Under this scenario, a non-Hawaiian claiming identification with Hawaiian culture would be eligible for admission. This interpretation of the racial restriction as a proxy for cultural identity has not been the policy of the Schools in the past, but may serve as a solution to the equal protection problem. Hawaiian culture may be preserved by the admission of students (a large percentage of whom undoubtedly will be Hawaiian or part-Hawaiian) of any race who identify with that culture.

4. *Integrated Schools*

Finally, Kamehameha Schools are racially discriminatory in admissions only; they are not racially segregated. Integration is achieved under the present system through the admission of a substantial number of mixed-race students. The Schools are not integrated only in the sense that there are no pure-race (other than Hawaiian) or mixed-race (other than part-Hawaiian) students admitted. On the other hand, while Kamehameha Schools may be fully integrated despite the racial restriction, a court reviewing the trust and the Schools should also consider the drain of Hawaiian students from Hawaii's public and private schools to Kamehameha, rendering these schools less than "fully" integrated.

The characteristics of Kamehameha Schools discussed above indicate that compliance with equal protection standards is possible: even if the Schools do not remedy

⁹¹ HAW. CONST. pmbi. (translation added).

⁹² See, e.g., *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986); *In re Adoption of D.M.J.*, 741 P.2d 1386 (Okla. 1985).

the underinclusive nature of the program as dictated by *Croson*, they may claim that Congressional review of State practices and policies upon admission to statehood revealed no problem with the Kamehameha admissions process, that the schools are promoting culture rather than race, and that they are fully integrated.

IV. RELIGION IN KAMEHAMEHA SCHOOLS

Once a court finds sufficient state action in the operation of the Kamehameha Schools, it must examine religious practices in the Schools to determine any violation of the First Amendment's prohibition against the governmental establishment of religion. Parker notes that the establishment of religion must be evaluated separately from any equal protection violation, as "it need not follow that state support which satisfies a Fourteenth Amendment equal protection standard would also be prohibited . . . for the purposes of the First Amendment establishment prohibition. . . ."⁹³ Parker is referring specifically to charitable trusts created for the benefit of religious institutions as both inextricably involved with the state and free of state establishment of religion.⁹⁴

Pauahi's will provided that both the trustees of the Bishop Estate and the teachers of Kamehameha Schools shall be of the Protestant religion.⁹⁵ In addition, the auditorium of the Kamehameha Schools must be used for the religious services of the Bishop Memorial Church, which is a member of the Hawaii Conference of the United Church of Christ (Congregational), as well as non-denominational and non-sectarian.⁹⁶ The Bishop Estate trustees employ a chaplain of the Bishop Memorial Church who is a faculty member of Kamehameha Schools and who is paid with money from the trust.⁹⁷ All boarding students are required to attend Bishop Memorial Church Sunday morning services.⁹⁸

The religious program of Kamehameha Schools presents both free exercise and establishment considerations. Regarding free exercise, although a religious organization can limit its hiring to individuals of a particular religion, the work performed by these employees must be associated with the religious activity of the organization in order to withstand a claim of religious discrimination under Section 703 of the Civil Rights Act of 1964.⁹⁹ Justice Abe challenges the work of the Protestant teachers, claiming that "it is surely of no relevance to the students of Kamehameha Schools, many of whom are Buddhists, Catholics, atheists, or whatever, that they be taught English, mathematics, and science only from Protestant teachers."¹⁰⁰ He implies that Protestantism of the teachers is not connected with the activities of the non-denominational, non-sectarian Bishop Memorial Church.

Although Kamehameha Schools function with significant state action, the hiring of only Protestant teachers is not a violation of the Establishment Clause of the First Amendment when the charitable nature of the Schools is considered. Parker has concluded that "Religious charities[,] . . . though they parallel government agencies, should be classed as non-public undertakings free to exclude members of other religious groups. . . .

⁹³ Parker, *supra* note 51, at 248.

⁹⁴ See *supra* notes 50-54, 61-62, and 65 and accompanying text.

⁹⁵ WILL OF BISHOP AND ITS CODICILS, *supra* note 6, at 6-8.

⁹⁶ Murray v. Kobayashi, 431 P.2d 940, 942 (1967).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987).

¹⁰⁰ *In re Estate of Bishop*, 499 P.2d 670, 677 (1972) (Abe, C.J., concurring).

Such institutions should not be free, however, to exclude Negro members of their faith, since such discrimination would usually not be a protected form of religious liberty."¹⁰¹ Here, to protect religious liberty, Kamehameha Schools should be classified as non-public, thus removing the establishment of religion problem. As non-public entities, the Schools would be free to exclude non-Protestants both as teachers and students, but could not extend this religious liberty to exclude non-Hawaiians.

The appointment of the Protestant (only) trustees by the Hawaii State Supreme Court poses a more complex Establishment Clause problem. The importance of the trusteeship cannot be underestimated; for example, Justice William S. Richardson, now vice-president of the Board of Trustees, gave up his lifetime appointment as Chief Justice of the Hawaii Supreme Court to accept a position as trustee.¹⁰² Cooper and Daws also observed the privilege and prestige of the trusteeship:

Even before the 1980's, the old party of the "have-nots" was producing a fairly large group of politicians who lost strong interest and motivation for land reform, in part once their own financial future was provided for. From within the party a smaller and yet more privileged group emerged to be appointed to run the Bishop Estate, for the benefit of disadvantaged Hawaiian children, receiving in reward nearly a quarter of a million dollars a year each, and defending their right to this level of income.¹⁰³

The message sent each time Protestants are considered exclusively for the significant and powerful appointment as Bishop Estate trustee is that the State, through the Supreme Court Justices, places a premium on Protestantism and awards employment based upon it. The hiring of Protestant teachers may be necessary to ensure the proper religious teaching of the multi-faith student body; yet the appointment of Protestant trustees, a select, powerful, and well-known group of men, is clearly perceived as State preference for one religion at the expense of others. Queen Liliuokalani, Hawaii's last monarch, saw Pauahi's religious restriction as detrimental to the Hawaiian nation, as well:

Another provision of the will of Mrs. Bishop may be noticed here. It was found that she had made ample provision for the education of the people of her race; and an educational and industrial institute was to be erected, specially limited in its mission to young Hawaiians. The privileges of this commendable charity were likewise restricted by the benefactor to those of the Protestant faith. The Presbyterian churches in Hawaii may profit by this devise; but those of English Catholic or Roman Catholic Missions are excluded because of their religion, which scarcely makes the institution a national benefit.¹⁰⁴

Because the establishment of religion by the state is evaluated separately from the violation of equal protection, the Schools appear to be classed as non-public for religious purposes yet public for equal protection purposes. This apparent inconsistency can be rectified only by modifying the provisions of the will containing the religious requirements to open, at least, the trustee positions to members of all faiths.

¹⁰¹ Parker, *supra* note 51, at 267.

¹⁰² Wallace Turner, *Hawaii Trust Wields Unusual Power*, N.Y. Times, July 17, 1983, § 1, at 30.

¹⁰³ COOPER & DAWS, *supra* note 5, at 445.

¹⁰⁴ LILIUOKALANI, *supra* note 86, at 111.

V. CONCLUSION

Although Kamehameha Schools are privately endowed, the State is undeniably involved in the administration and operation of the Schools. Each branch of the Hawaii State Government is included in the management of the trust or the Schools on an ongoing basis. Such state involvement requires that the Schools comply with the Equal Protection Clause of the Fourteenth Amendment. The affirmed mission of the Schools, however, is to educate Hawaiians, and, in order to accomplish this mission, the Schools enforce a racial restriction admitting only Hawaiians or part-Hawaiians.

The promotion of Hawaiian culture rather than race and the fully integrated nature of the Schools may remove the violation of the Equal Protection Clause; however, these circumstances provide no relief to the non-Hawaiian seeking admission. An obvious solution is to open the admissions process to the underprivileged of all races, but such action is likely to be resisted by both Hawaiians and non-Hawaiians, who see the Schools as preservers and conduits of Hawaiian identity. Legal challenge to such action is inevitable.

Although the exclusive hiring of Protestants to teach in Kamehameha Schools is constitutionally valid, the appointment of "Protestant-only" trustees is a violation of the Establishment Clause of the First Amendment in view of the prestige and tremendous financial reward involved. The imprimatur of the State is evident each time a vacancy in the trusteeship is filled by the Supreme Court's consideration of a religiously-restricted schedule of candidates.

The racial and religious practices of Kamehameha Schools are as yet unchallenged in the courts. Although at least one Hawaii Supreme Court Justice has criticized the restrictions, popular support appears to remain with the present policies.

Leigh Caroline Case