# Civil Rights and Wrongs: Understanding *Doe v. Kamehameha Schools*

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The importance of *Doe v. Kamehameha Schools* is obvious to Hawaiians, yet this suit affects all minorities. For centuries, minority groups have suffered from educational discrimination. After the American Civil War, laws created to end slavery provided minorities a mechanism to sue schools with discriminatory policies. Ironically, White students bringing suits against affirmative action programs have been the most successful in using these laws. *Doe* falls in a series of suits attempting to dismantle educational programs redressing historical discrimination. In defending its preference to admit Hawaiian students, Kamehameha Schools has an opportunity to argue for a new legal standard: one where courts meaningfully consider the oppression of the group benefiting from the program and in turn place the burden on claimants to show membership within a historically oppressed class of people.

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Racial discrimination has a long and turbulent history in the United States. Nowhere has this history been more visible and destructive than in our educational institutions. Despite the fact that civil rights legislation was first enacted in the late 19th century (Civil Rights Act of 1871), the courts and the legislature did not effectively recognize the problem of racial discrimination in education until the mid-20th century.[1] The educational institutions in Hawai'i witnessed violent discrimination for decades against Native Hawaiian children who sought to obtain an education and speak their native language (Silva, 2004). The result has been an institutional discrimination against Native Hawaiian educational and cultural practices that has left in its wake generations of Hawaiian children mired by economic difficulties.

Hawaiians have been left largely to their own accord to attempt to improve the education available to their children. The struggle has been constant and difficult. This article is about the most recent episode of this struggle, the *Doe v. Kamehameha Schools* lawsuit. The lawsuit refers to a non-Hawaiian applicant who was denied admission to Kamehameha Schools in part because of his lack of Hawaiian ancestry.

The first section of this article briefly reviews the history of the various laws used in educational discrimination suits. It illustrates how the *Doe* suit undermines the spirit and histories of these laws. Then the article examines the history of § 1981, the specific statute being used by the plaintiff in the *Doe* case. Specifically, it argues that although § 1981 was enacted to protect ethnic minorities from discrimination against private actors or entities, various legal decisions and the high cost of litigation made it very difficult for ethnic minorities to use this law successfully to fight discrimination against minorities in private schools. Instead, Caucasian students would lead the charge, using this law to launch numerous legal attacks against affirmative action programs attempting to redress historical discrimination.

Next, the article looks at the *Doe v. Kamehameha Schools* decision as the latest in this line of cases brought by claimants attacking programs aimed at redressing educational discrimination. This section examines how the first 9th Circuit decision continues the trend within American courts that apply the rule of law without considering the spirit of the law. The article then analyzes the problems with the Kamehameha Schools' defense, which leans heavily on justifications used to protect affirmative action programs. This leads to the final section, which argues that Kamehameha Schools must stand up for the spirit of civil rights laws, which were created to protect groups like Native Hawaiians and not individuals like the claimants. Kamehameha Schools is fitting its defense to existing

standards established by affirmative action programs; it should instead call for a new standard—one that demands that the courts look at the unique legal position of Native Hawaiians, the indigenous people of these islands, and in turn requires the plaintiff to show membership within a historically oppressed class of people. If the plaintiff cannot show how he is a member of a group that has historically suffered from educational discrimination, his claim should be dismissed.

Civil rights laws should be reserved for those they were intended to protect. Further, Kamehameha Schools should encourage courts to look at the specific history of groups benefiting from educational programs and policies. The legal status and history of Native Hawaiians is not comparable with that of other groups. By using legal arguments put forth by other minority groups, Kamehameha Schools continues to allow American courts to see Native Hawaiians and other minority groups as one amorphous mass. Until defendants demand that the courts see individual groups within their specific and unique historical circumstances, the rights of the privileged will always supersede the rights of the oppressed.

The recent *Doe v. Kamehameha Schools* litigation emphasizes that the promising language of civil rights laws differs tremendously from the reality of civil rights laws. Civil rights legislation promised to remedy a violent history of discrimination against ethnic minorities, particularly in educational institutions. Yet that remedy continues to elude minorities and indigenous people, for the 9th Circuit's existing interpretation of law in this case shows that civil rights legislation is poised to attack the very groups it was enacted to protect. The outcome of *Doe v. Kamehameha Schools*, therefore, will affect not only Native Hawaiians but also all minority groups whose children are denied a quality education in the United States.

## A Brief History of Educational Rights

Historically, educational discrimination litigation has been a fairly inactive area of the law. It was not until the latter half of the 20th century that courts began to deal with racial discrimination in education. Since that time, there has been a fair amount of litigation combating racial discrimination in higher education, although none of it was particularly successful in helping minorities gain access to

better education. Nevertheless, these cases reveal laws that have been traditionally used in the effort to create educational equality for minorities. The most important laws in battling discrimination in educational institutions have been the Equal Protection Clause of the 14th Amendment, § 1983 and § 1981.[2,3]

While the complaint Doe filed against Kamehameha Schools did not use all of these laws, the laws are all still important, because they provide a history of how the courts have treated educational discrimination cases. What is perhaps most important to understand is the context in which these laws were created. Understanding the context of why these laws were created sheds light on the appalling ways these laws are currently being used. Many of the statutes used in the *Doe v. Kamehameha Schools* litigation were enacted in the post–Civil War era in an effort to realize the ending of legal slavery in the United States. It is blasphemous that statutes created to end human slavery are currently being used against minorities.

The 13th Amendment was a bold amendment, for, unlike amendments that applied only to state action, the 13th Amendment regulated the actions of private parties and entities; this was to ensure that private slave owners be forced to free their human slaves. The 13th Amendment states:

> *Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> *Section 2.* Congress shall have power to enforce this article by appropriate legislation.

The 13th Amendment not only banned private persons from owning slaves[4] but also granted Congress the authority to enact legislation to enforce this ban. It is under this premise and authority that § 1981 was created.

Another post–Civil War statute (Civil Rights Act of 1866),[5] § 1981 is a statute in the U.S. Code. There are two statutes applicable to this discussion: § 1981 and § 1983; § 1981 is distinct from § 1983 in that it, like the 13th Amendment, applies to private parties, whereas § 1983 applies only to state agencies. Section 1981 reads:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Therefore, § 1981 has the capacity to reach parties and entities that would be protected from 14th Amendment or § 1983 action, as both the 14th Amendment and § 1983 apply only to state actors. Private parties do not like being governed by federal law, yet the Supreme Court has consistently supported the constitutionality of § 1981, finding that § 2 of the 13th Amendment granted Congress the authority to enact laws that enforced the 13th Amendment.[6]

Section 1981 has been used primarily in employment discrimination cases, a fact that becomes important when looking at the *Doe* case, because the courts would find it appropriate to apply standards of employment law in their decision. Therefore, actions related to § 1981 in employment cases would influence § 1981 education cases. The Supreme Court affirmed the use of § 1981 against both private and public employers (*Johnson v. Railway Express Agency*, 1975; *Runyon v. McCrary*, 1976). Section 1981's potency against employers was bolstered in 1991, when Congress amended the Civil Rights Act to include subsections that allowed employees to bring suits against employers who engaged in discriminatory conduct.[7,8]

The 14th Amendment of the United States Constitution is probably the most famous source of "civil rights" protection. The 14th Amendment reads:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Yet, the 14th Amendment is limited in its application in that it applies only to state action. The power of the 14th Amendment was bolstered by the enactment of § 1983, which, like the 14th Amendment, protects individuals from discriminatory state action.[9]

Section 1983 has been an important weapon in combating racial discrimination. Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Derived from the rights guaranteed under the 14th Amendment, § 1983 "ensure[s] that an individual has a cause of action for violations of the Constitution.... Section 1983 by itself does not protect anyone against anything."[10] Therefore, § 1983 is a device for individuals to bring claims for constitutional violations. While these statutes were not used in *Doe*, they are nonetheless part of a larger body of law that provides guidance for the courts in educational suits, like *Doe v. Kamehameha Schools*.

The history of § 1981 claims against schools is most applicable because it is the statute specifically used in the *Doe* complaint. An analysis of § 1981's history in the courts reveals the irony of the plaintiff's success in *Doe v. Kamehameha Schools*, because the statute has been largely unsuccessful in creating educational opportunities for minorities. Like *Rice v. Cayetano* (2000),[11] in which civil rights laws once enacted to combat violent racial discrimination throughout the United States were used against Native Hawaiians, a displaced indigenous group, the *Doe* decision illustrates how civil rights laws can be manipulated to keep dominant groups in power. Section 1981 suits have done little for minorities but have been tremendously successful in attacking affirmative action programs. Unlike suits against employers, which have the potential for substantial monetary recovery,

the limitations placed on the ability of plaintiffs to recover substantial monetary damages under § 1981 claims against schools have contributed to the minimal number of § 1981 suits brought against educational institutions.

Whenever monetary damages are limited, the costs of litigation fall often on the claimants. Most minorities or groups representing minorities lack the financial power to engage in costly litigation. Therefore, the attack on Kamehameha Schools speaks not only to the effort of non-Hawaiian groups to keep Hawaiians dispossessed and disempowered through stripping them of the minimal resources still available to Hawaiians—much of which is controlled through Kamehameha Schools—but it also reveals much about how "justice" has been too expensive for those who need it most.

For generations, we have witnessed the intellectual and cultural deprivation of meaningful educational opportunities for Hawaiian children. This deprivation of educational excellence differs starkly from our traditional system in which Hawaiians thrived intellectually. (For a more in-depth discussion of traditional Hawaiian educational systems, see Meyer, 2003.) Yet, recent legal events threaten to make the sad state of Native Hawaiian education even worse. This case is therefore not simply about a policy for admission to a private school but about the future of Native Hawaiian education.

Native Hawaiians, like many minority groups throughout the United States, have seen no educational justice, despite the fact that the U.S. Constitution and civil rights statutes provide ample ammunition for individuals to battle racial discrimination in the United States. It is important to emphasize that the groups in most need of the rights afforded in civil rights laws have not been able to successfully access them. Understanding the effectiveness and ineffectiveness of education litigation serves to illustrate the uniqueness and disturbing nature of the 9th Circuit decision in *Doe v. Kamehameha Schools*.

In his complaint, Doe claims Kamehameha Schools' admission policy violates his rights under § 1981. A number of the "landmark" § 1981 cases have been claims involving discrimination in educational institutions. From these decisions, it is clear that § 1981 had the potential to be a formidable weapon to combat racial discrimination within a system that has traditionally contributed to the racial segregation and inequality that persists in America today. Ironically, it instead became a weapon used against historically oppressed groups, like Native Hawaiians.

In 1976, two African American students sued a private school that had a policy that categorically denied African American students admission. In the decision in *Runyon v. McCrary* (1976), the Supreme Court held that "§ 1981 does reach private acts of racial discrimination," which, as applied in *Runyon*, included private schools. This was a powerful decision and remains precedent. But, strangely, the *Runyon* decision did not open a floodgate of litigation over racial discrimination in private schools, as might have been expected. It was certainly the optimal time to bring such a suit, for subsequent decisions would limit the broad applicability of § 1981.

Section 1981 was at its strongest after the *Runyon* decision. At the time, it was believed that "it was clear from prior decisions that suits against private parties under § 1981 could be based on a remedy implied from § 1981 itself" (Jeffries, Karlan, Low, & Rutherglen, 2000, § 1.5(C)). The Supreme Court continuously eroded the power of § 1981 suits thereafter.[12]

## The Use of § 1981 Against Racial Discrimination in Education: A Brief History and Recent Cases

Despite its potential, § 1981 remained arguably underutilized. One study found § 1981 to be "the third most important civil rights statute" (Eisenberg & Schwab, 1988, p. 596). Only § 1983 and Title VII actions were brought more often.[13]

Section 1981 actions against educational institutions have rarely been brought in comparison with employment claims. Even in 1980–1981, prior to decisions that made bringing § 1981 suits more difficult, Eisenberg and Schwab (1988) found that only 10 Title VI actions were brought, compared with 433 Title VII actions. Among the 252 claims brought under § 1981 only 2 were against schools, compared with the 195 brought against employers (Eisenberg & Schwab, 1988). Here we begin to see how rare and important the *Doe* decision becomes.

Ironically, despite the minimal number of claims brought under these statutes, claims against educational institutions have become highly successful, when brought by White students challenging affirmative action programs. Most notably, in *Hopwood v. Texas* (1996), four White law student applicants sued the University of Texas School of Law, claiming that its admissions program, which gives preference

to minority applicants (i.e., African Americans and Mexican Americans), violated the plaintiffs' civil rights under the 14th Amendment, Title VI, § 1983 and § 1981. The *Hopwood* decision led to a change in application procedures and policies at the law school.

In *Texas v. Lesage* (1999), the Supreme Court protected an individual's right to challenge affirmative action programs that use race as a factor in their decision-making process. Lesage was an African immigrant of Caucasian descent who was denied admission to the University of Texas's counseling psychology program.[14] The district court ruled for the defendant on a summary judgment motion after finding that the university would not have admitted Lesage, even under a constitutional program (*Texas v. Lesage*, 1999, at 18–19). The 5th Circuit reversed and the Supreme Court affirmed the 5th Circuit's decision (*Texas v. Lesage*, 1999). One commentator notes: "*Lesage* indicates that the Court takes very seriously its traditional preference for equitable relief in constitutional cases" (Whitman, 2000, p. 635).[15] This means that when a constitutional violation case comes before the court, as in *Rice* or *Doe*, the court will require a change in policy rather than award monetary damages. These cases are not about people winning monetary awards—they are about dismantling programs.

Therefore, the "success" of suits brought against universities and colleges has resulted primarily in injunctive relief and/or nominal damages (see also *Smith v. University of Washington*, 2000). It is this fact that possibly explains why the number of civil rights claims brought in the educational setting has been minimal compared with those brought against employers. This reality only emphasizes the *Doe* suit as an attack on Native Hawaiians and any program that aims to remedy the current subjugated state of Hawaiians.

Again, as recent cases show, § 1981 suits can do little but change policy; these suits are not about money. In *Hopwood v. Texas* (1994), despite finding that the law school's admission program violated the plaintiffs' civil rights, the district court substantially limited the monetary relief available to the plaintiffs.[16] In its initial decision, the district court found only that the plaintiffs were allowed to reapply to the law school without paying application fees and entitled to nominal damages of $1 per plaintiff (*Hopwood v. Texas*, 1994, at 582–585). This award resulted from the plaintiffs' failure to show that they would have been admitted under a constitutional admission program (*Hopwood v. Texas*, 1994, at 579–583).

The 5th Circuit disagreed with this test and relieved the plaintiffs of some of the evidentiary burden placed on them by the district court's finding. Instead, the 5th Circuit held that the defendant had the burden of proving that the plaintiffs would not have been admitted under a constitutional admission program. If the defendant could not meet this burden, the plaintiffs would be entitled to greater monetary damages (*Hopwood*, 1994, at 963).

On remand, the defendant proved that the plaintiffs would have still been denied admission under a constitutional program. Thus, the plaintiffs were able to show no injury (*Hopwood v. Texas*, 1998). The award of $1 per plaintiff was reinstated (*Hopwood v. Texas*, 1998, at 923).

In its latest incantation, the 5th Circuit affirmed the district court's finding regarding monetary damages. The court agreed that the defendant met its burden of proof when showing that the plaintiffs would not have been admitted under a constitutional admission program and were therefore not entitled to compensatory damages (*Hopwood v. Texas*, 2000).[17]

The Supreme Court in *Lesage* approved similar limitations to remedies in civil rights litigation. In *Lesage*, the Court stated that "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration" (*Texas v. Lesage*, 1999, at 20–21, citing *Mt. Healthy City Board of Education v. Doyle*, 1977).[18] This decision is consistent with prior findings that held that absent proof that a plaintiff suffered actual injury—a violation of one's constitutional rights—is insufficient in itself to justify a substantial damages award.[19]

Perhaps *Bivens v. Six Unnamed Federal Narcotics Agents* (1971), which "provides a damages remedy for individuals deprived of constitutionally protected rights" (Helfand, 2000–2001, citing *Bivens*, at 397), limited the potential of § 1981 claims before *Hopwood* and *Lesage* were ever decided. *Bivens* greatly limits remedies available under § 1981:

> Section 1981 is inapplicable to remedy many types of constitutional deprivations engaged in by federal officials. While Section 1981 provides all persons the right to make and enforce contracts, to sue, to be parties, and to give evidence on equal footing, it does not provide a remedy for tortuous conduct typically associated with a violation of the Fourth, Fifth, and Eighth Amendments. Indeed, the overwhelming majority of Section 1981 actions brought today are employment discrimination suits. In *Bivens*, the Supreme Court recognized that Section 1981 would not provide a remedy for the types of unconstitutional conduct that Mr. Bivens experienced. (*Bivens*, at 108–109, citing 42 U.S.C. § 1981(a) (1994))

So again, remedies available under § 1981 are limited. This emphasizes the action against Kamehameha Schools as an effort to change policy and social sentiment against Hawaiians.

The lack of litigation against private institutions brought by marginalized groups is certainly suspicious. Civil rights laws were not created for the White majority, yet it seems that only members of the White majority have been able to successfully use civil rights statutes.

Despite the potential to initiate systemic change to prevent racial discrimination in educational institutions, it seems that limits on the amount of monetary damages available and traditionally awarded under § 1981 have discouraged minorities from bringing suits under this statute. Unlike employment cases, which yield a greater potential for compensatory relief, the victories of suits won against schools are largely symbolic (i.e., they result in injunctive or declaratory relief).

While the ability to recover is clearly an important consideration in bringing a suit, the reality is that it inhibits defendants (often members of ethnic minority groups) from bringing suits. Without the potential for monetary damages, defendants are left to fund their actions themselves. Judicial decisions that limit litigation, especially in civil rights actions, run the risk of curbing the mechanisms by which individuals initiate social change and participate in the protection of their civil rights. The importance of § 1981 is not limited to the employment relationship; protection of the freedom to participate in an educational process free from discrimination is also key to sustaining a meaningful democratic society. *Doe* proves that judicial relief often makes itself available only to the wealthy majority and not to the oppressed minorities.

## The Case of *Doe v. Kamehameha Schools*

In June 2003, John Doe, a child of *haole* (non-Hawaiian) ancestry, filed a complaint in federal court after being denied admission to Kamehameha Schools. In his complaint, the plaintiff sought

> a declaratory judgment that the challenged policy is illegal and unenforceable; a permanent injunction against any further implementation of the challenged policy of any other admissions policy at Kamehameha Schools that grants a preference on the basis of 'Hawaiian ancestry'; and a permanent injunction admitting Plaintiff to a Kamehameha Schools campus. (*Doe v. Kamehameha Schools*, 2003)

The plaintiff sought only to change Kamehameha's admission policy.

Doe is being represented by John W. Goemans and Eric Grant. Grant is with the Center for Equal Opportunity, a conservative organization committed to ending affirmative action programs in the United States. Their Web site features articles such as "Hispanic Immigrants Becoming Americans," which expresses concerns such as the following:

> Though most opponents of immigration are loath to admit it, at least publicly, they're worried that the huge influx of Hispanics will somehow change America for the worse. And who can blame them for wondering whether the tremendous demographic shift that has taken place over the last few years won't have unintended consequences? In 1970, there were fewer than 10 million Hispanics in the United States; today, there are more than 40 million, thanks largely to the ever-increasing influx of Latin American immigrants. And some estimates predict that by mid-century one out of every three Americans will be of Hispanic heritage. (Chavez, 2006)

This is shameless racist rhetoric of the Center for Equal Opportunity—the same organization that supports the plaintiff's lawsuit against Kamehameha Schools. The plaintiff's brazen request, that the court use a civil rights law that had only until this action "prevented all-white private schools from refusing to admit black students" ("Ninth Circuit," 2005) against Native Hawaiians, illustrates the vitality of prejudice against minorities in the United States.

Kamehameha Schools serves as one of the few remedies provided to Native Hawaiians for a history of discrimination that extends back to the 19th century. Among a history of empty promises by the state and federal government, it was Princess Pauahi and her private trust that gave Native Hawaiians land and resources. In their Reply Memorandum in Support of Defendants' Motion for Summary Judgment, Kamehameha Schools explained: "Kamehameha...is an educational institution that operates to redress the effects of historical wrongs done to the Native Hawaiian people by preparing students for society at large, and as a consequence, its mission has an external focus" (*Doe v. Kamehameha Schools*, 2004, at p. 16). This is the crux of their affirmative action argument—that their purpose, to remedy a specific historical wrong committed against the Native Hawaiian people, justifies policies that otherwise violate American law. The Reply Memorandum further noted:

> Kamehameha is not remedying generalized social discrimination, but rather is remedying a very specific harm in which government was plainly implicated: the actions of the State of Hawai'i and the United States in bringing about the overthrow of the Hawaiian Monarchy and the

> dispossession of the Native Hawaiian people. The Schools are addressing, through their educational programs, the continuing effects of these past wrongs. (*Doe v. Kamehameha Schools*, 2004, at 21)

Therefore, Kamehameha Schools argues not only that its program is an affirmative action program but also that the program appropriately meets all the legal standards set forth within American jurisprudence.

The District Court agreed. Because no case like this had ever been decided in the United States, the action afforded Judge Alan Kay the opportunity to determine which standard of law should apply. In his decision, Judge Kay found:

> In this case, Kamehameha Schools is a private institution that does not receive federal funding.... Logic thus dictates that although not entirely analogous to a private school's race-conscious remedial admission policy, the Title VII/§ 1981 private employment framework provided the most appropriate guidance. (*Doe v. Kamehameha Schools*, 2003, at 1164)

This means the Court applied standards from employment law to this education case.

Although Judge Kay agreed with Kamehameha Schools, the argument failed on appeal to the 9th Circuit for a number of reasons, both legal and social. The argument failed because although the 9th Circuit did not apply the strict scrutiny test (*Doe v. Kamehameha Schools*, 2005), the court nonetheless found Kamehameha's policy to be a civil rights violation. The 9th Circuit determined:

> [T]he issue becomes whether the Schools can articulate a legitimate nondiscriminatory reason justifying this racial preference. Toward this end, the Schools urge that its policy constitutes a valid affirmative action plan rationally related to redressing present imbalances in the socioeconomic and educational achievement of native Hawaiians, producing native Hawaiian leadership for community involvement, and revitalizing native Hawaiian culture. (*Doe v. Kamehameha Schools*, 2005, at 8947–8948)

Although this certainly adopts a framework endorsed by Kamehameha Schools in the Reply Memorandum, ultimately the court determined that the schools' policy failed to meet the standards adopted by the 9th Circuit.

In rejecting Kamehameha Schools' plan, the court applied a three-part test from a Title VII (employment) case. Comparing this case with *United Steelworkers of America, AFL-CIO-CLC v. Weber* (1979), the court noted: "At issue in *Weber* was an affirmative action plan collectively bargained by a union and an employer that reserved for African-American employees fifty percent of the openings in an in-plant craft training program" (*Doe v. Kamehameha Schools*, 2005, at 8949). The Court then outlined its three-part test from Weber:

> We recently distilled the Court's analysis in Weber into three distinct requirements: affirmative action plans must (1) respond to a manifest imbalance in its work force; (2) not 'create [ ] an absolute to the [ ] advancement' of the non-preferred race or 'unnecessarily trammel [ ]' their rights; and (3) do no more than is necessary to achieve a balance. (*Doe v. Kamehameha Schools*, 2005, at 8950)

The Court then found that the affirmative action policy was a civil rights violation because it failed to meet the second requirement of the *Weber* test. The Court stated:

> We do not address the appellant's claims because we find the second of Weber's guiding principles fatal to the program in place at the Kamehameha Schools. The school's admissions policy operates as an absolute bar to admission for non-Hawaiians. Kamehameha's 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, at 8951)

By this standard, no remedial policy that protects a specific group would survive.

This standard fails to place its decision within the context of Hawai'i's colonial history. The court immediately followed the preceding statement with this: "The [Supreme] Court in *Runyon* made clear that an admission to all members of the non-preferred race on account of their race is a 'classic violation of § 1981'" (*Doe v. Kamehameha Schools*, 2005, at 8951, citations omitted). This is a flat-out insult to what *Runyon* stood for and an illustration of how applicability of law depends on the color of one's skin. In *Runyon v. McCrary* (1976), the Supreme Court held that "§ 1981 does reach private acts of racial discrimination," which, as applied in *Runyon*, included private schools. Yet, in *Runyon*, two African American students were denied admission to a private school that had a policy of systematically denying admission to African American applicants. *Runyon was about letting Black students into an all-White school*—a vital decision the 9th Circuit conveniently ignored in the Kamehameha decision, as if the circumstances of this case have no bearing on the case at hand.

## The Problem with Affirmative Action as a Remedy

This brings us back to the problem of using the affirmative action paradigm. Contract remedies fall into three categories: restitution, reliance, and expectation damages. Tort remedies include three categories as well: general, special, and punitive damages. Civil rights violations can require remedies that demand an individual or group to perform or provide a certain service. This last category is generally what is used in affirmative action cases: Courts can either demand a change in policy or require the school to admit a student who would not otherwise be admitted. Affirmative action cases focus primarily on the student denied admission. The history of the beneficiaries is secondary. This framework allows the court in *Doe* to place the rights of one haole student above the rights of all Hawaiian children.

Affirmative action has become a "catch all" solution that often replaces solutions more appropriate for indigenous people who have native rights to lands and resources that other subjugated persons do not. Instead, perhaps we need to work within the framework of antisubordination theory, discussed later in this article, which gives greater deference to the individualized plight of historically oppressed people.

Kamehameha Schools' admissions policy is not an affirmative action program—it is an exercise of beneficiaries' rights and cultural rights. Native Hawaiians have legal rights that are unique to Native Hawaiians (Lucas, 2004). Take, for example, the issue of access rights. In the *Native Hawaiian Rights Handbook*, Lucas (1991) explained:

> Access along the shore, between *ahupua'a* or districts, to the mountains and sea, and to small areas of land cultivated or harvested by native tenants, was a necessary part of early Hawaiian life. With Western contact and the consequent changes in land tenure and lifestyle, gaining access to landlocked *kuleana* parcels, and to the mountains and sea, have become important rights which Native Hawaiians must assert if they are to retain their lands and their traditional cultural practices. (p. 211)

Access rights, customary rights, fishing rights—these are all things that distinguish Native Hawaiians from other nonindigenous subjugated groups. We must therefore be careful when aligning our claims with other oppressed groups, because a remedy appropriate to one may not necessarily be appropriate to another. Therefore, while using an affirmative action argument makes legal sense within the progeny of cases used by Kamehameha, one must wonder if it did not fail because Kamehameha failed to distinguish itself enough from other oppressed groups within the United States. By "falling into line" with the affirmative action argument, Kamehameha Schools essentially caves to *Rice v. Cayetano* (2000) and its hegemonic ideology by likening the Native Hawaiian people to other ethnic minorities instead of being steadfast in its position that we are subjugated indigenous people with land rights and customary rights that entitle us to special consideration in American courts.

While there are a number of similarities between subordinated groups, such as African Americans and Hawaiians, we cannot allow American jurisprudence to treat us as one amorphous subjugated mass. The bases of the claims by Hawaiians are not the bases of the claims of African Americans. The nature of dispossession of Native Hawaiians comes from specific and distinct acts by the United States that involve the illegal overthrow of a sovereign kingdom. This is a far cry from the atrocities committed against African Americans. When Kamehameha Schools fit itself into the framework created by the plaintiff, it essentially allowed itself to

be "lumped" into a marginalized mass created and controlled by American jurisprudence. Kamehameha Schools allowed itself to be indistinguishable. By saying, "sure we're like everyone else, but..." we fell right into a rhetorical hegemonic trap that doomed us from the start. Such is the very nature of the hegemonic ideologies that control American law. Critical race theory possibly holds an answer.

## Antisubordination Theory: A New Framework for Defending Educational Programs

Antisubordination theory comes out of the critical race theory (CRT) legal scholarship, which

> embraces a movement of left scholars, most of them scholars of color, situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in American legal culture, and more generally, in American society as a whole. (Crenshaw, Gotanda, Peller, & Thomas, 1995, p. xviii)

Crenshaw et al. (1995) identified two common interests within this collection of otherwise diverse scholarship:

> The first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and, in particular, to examine the relationship between that social structure and professed ideals such as "the rule of law" and "equal protection." The second is a desire not merely to understand the vexed bond between law and racial power but to *change* it. [The scholarship] thus share[s] an ethical commitment to human liberation—even if we reject conventional notions of what such a conception means, and though we often disagree, even over its specific direction. (p. xviii)

The ways in which these legal theorists set out to change the use of law as a weapon against the subordinated have undergone many evolutions in the years since the first inception of CRT (Valdes, McCristal Culp, & Harris, 2002). No collection of scholars identifying themselves as "critical" should be without a willingness to be self-critical. The most interesting and perhaps applicable to the legal developments in Hawai'i is antisubordination theory, a subdiscourse within CRT that moves toward a more dynamic approach that allows for greater consideration of the history of the group benefiting from the program being challenged.

Antisubordination theory refocuses on the original vision of affirmative action that demands redress for the wrongs committed against subordinated people. Lawrence (2001) explained:

> The original vision of affirmative action proceeded from the perspective of the subordinated. The students and community activists who fought for affirmative action in the 1960s and '70s understood that racism operated not primarily through the acts of prejudiced individuals against individuals of color but through the oppression of their communities. It was not enough to remove the "White" and "Colored" signs from lunch counters, buses, and beaches. Institutionalized racism operated by denying economic resources, education, political power, and self-determination to communities of people defined by race. When they demanded affirmative action—when they sat-in and sued and took over buildings and went on hunger strikes and closed down universities—they sought redress for their communities. They demanded the admission of students and the hiring of faculty who identified with the excluded—not just people who shared their skin color or language, but individuals who would represent and give voice to those persons who were ignored, misrepresented, or objectified in traditional scholarship. (p. 928)

Legal analysis of the 9th Circuit in *Doe v. Kamehameha Schools* clearly did not operate within this framework. Instead of considering the program "from the perspective of the subordinated," the decision conversely turned on the rights of the non-Hawaiian student. Antisubordination theory therefore would be jurisprudence within the spirit of the law (protection for the oppressed) as opposed to the current practice of using color-blind approaches in keeping marginalized people subordinated.

The *Doe v. Kamehameha Schools* decision errs fundamentally in its perpetuation of a "color-blind" approach of civil rights. It is the position of who Brown et al. (2003) identified as "racial realists." In *White-Washing Race: The Myth of a Color-Blind Society*, Brown et al. explained:

> Although racial realists do not claim that racism has ended completely, they want race to disappear. For them, color-blindness is not simply a legal standard; it is a particular kind of social order, one where racial identity is irrelevant. They believe a color-blind society can uncouple individual behavior from group identification, allowing genuine inclusion of all people. In their view, were this allowed to happen, individuals who refused to follow common moral standards would be stigmatized as individuals, not as members of a particular group. (pp. 7–8)

Color-blindness is simply that: blind. It refuses to acknowledge and engage the continuing discriminations and disparities that hamper any true advancement of justice or equality in the United States. Color-blindness—once the blessed vision of Martin Luther King Jr.—has been distorted by the progeny of his adversaries to hinder the very dream King once held so dear.

The perversion of civil rights law by the White plaintiff and his attorneys in *Doe* is best seen in their reply brief to the 9th Circuit Court of Appeals. The brief opens by citing *Brown v. Board of Education*, the celebrated civil rights decision that ended racial segregation in public schools in the United States in 1954. The plaintiff's heretic effort in *Doe* to turn law enacted to protect ethnic minorities and other oppressed groups against the native people of Hawai'i illustrates the very sort of racial hatred that haole have perpetuated in these islands for hundreds of

years. The plaintiff asks the courts to effectively ignore the history of educational discrimination in Hawai'i and throughout the United States against indigenous and minority groups.

Education, for the majority of the history of the United States, has been used as an effective tool in the oppression and marginalization of Native Americans, Hawaiians, and African Americans, among other marginalized groups, such as Latinos, women, and the disabled (Spring, 2001). Whether through the provision of inadequate education or the denial of education altogether, the White American majority considered it beneficial for hundreds of years to keep races, classes, and genders uneducated. Often, this effort was a calculated and intentional one (Spring, 2001). The White, male majority regularly promulgated laws banning the education of subjugated peoples, like African Americans, women, and Hawaiians. The lasting effects of these efforts are still identifiable today. The plaintiff in *Doe* makes no mention of them.

The more disturbing aspect of color-blind rhetoric is its adoption by the courts. The refusal by judges to see that civil rights laws are contextually situated within the racial discrimination from which they developed is truly what keeps racial discrimination alive and well in the United States. White people should not be allowed to bring race discrimination claims. These laws were not meant to protect them. These laws were enacted to be shields for the oppressed, not swords for the oppressor. Yet such laws have been defiled by people like the plaintiff and attorneys in *Doe* who disregard what is *pono*, or what is right.

## Conclusion

An analysis of the civil rights statutes being used in *Doe v. Kamehameha Schools* reveals a perversion of justice. *Doe* has used laws created to end human slavery in an effort to dismantle a school created to provide a quality education to dispossessed Native Hawaiian children. A look at recent cases brought under these same laws shows how the Center for Equal Opportunity's work in the *Doe* case is actually part of a larger campaign that systematically attacks programs throughout the United States that work to remedy hundreds of years of education discrimination.

*Doe v. Kamehameha Schools* affords Hawaiians the unique opportunity to make our history heard. It is our opportunity to change jurisprudence for the betterment of disenfranchised groups throughout the country. Instead of defending its policies, Kamehameha Schools should ask the court to shift the burden from defendants justifying their affirmative action policies to plaintiffs bringing civil rights suits. Place the burden on those from nonminority groups bringing civil rights suits to show how they belong to a marginalized class as to afford them protection under these laws.

The United States has never afforded all its residents equality under the law. The greatest insult of *Doe v. Kamehameha Schools* is that the 9th Circuit pretends it does. When Native Hawaiians continue to suffer immeasurably from colonization, the demand by a non-Hawaiian that we justify ownership and protection over the few resources that remain available to us is the greatest insult many of us have ever known. We can only hope that the rehearing before the 9th Circuit (*Doe v. Kamehameha Schools*, 2006) results in a decision that better appreciates the continuing struggles of the Native Hawaiian people.

There are many reasons to cringe when reading the *Doe v. Kamehameha Schools* decision. For a nation of marginalized students, it is horrifying to know that the justice that has eluded those who have needed it most continues to elude them, while the courts threaten to take opportunities for minority children and give them to the dominant majority. Yet, there is a more insidious danger in *Doe v. Kamehameha Schools* than the obvious threat it poses to Kamehameha Schools and its programs. This decision codifies within American ideology the notion of a color-blind America, one that refuses to see the ways in which racism still exists in this society. bell hooks (1995) wrote:

> After all if we all pretend racism does not exist, that we do not know what it is or how to change it—it never has to go away. Overt racist discrimination is not as fashionable as it once was and that is why everyone can pretend racism does not exist, so we need to talk about the vernacular discourse of neo-colonial white supremacy—similar to racism but not the same thing. Everyone in the society, women and men, boys and girls, who want to see an end to racism, an end to white supremacy, must begin to engage in a counter hegemonic "race talk" that is fiercely and passionately calling for change. (pp. 4–5)

And this is what we must do now. We must continue to demand a discussion around *Doe v. Kamehameha Schools* framed not in the judicial terms of "affirmative action" or "remedial programs" but fierce discussions about the racism that still plagues Hawai'i. *Doe* should not be only about defending Kamehameha's programs but also about advocating for an end to the continued racial attacks against the Hawaiian people. We have allowed this discussion to be about the rights of non-Hawaiian children. *What about the rights of Hawaiian children?*

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## Notes

1 See *Sweatt v. Painter* (1950), in which the Supreme Court ordered the University of Texas Law School to admit an African American student who had been forced to attend a segregated law school in the state because the law school did not admit African American students. See also *McLaurin v. Oklahoma State Regents* (1950); *Brown v. Board of Education* (1954).

2 Yet, generally, these devices are not used with equal frequency in civil rights cases. Even among cases brought against schools, there is a disparity between the number of cases brought against public institutions (where relief is available under § 1983) and cases brought against private institutions (where relief would not be available under § 1983). When § 1983 relief is not available (§ 1983 actions can only be brought against state actors), remedy would be available under Title VI or § 1981.

3 Title VI is also an important device in educational discrimination suits against private schools. Yet, Title VI only prohibits discrimination in any program or activity that receives funding or financial assistance from the federal government. ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance"; 42 U.S.C. § 2000d.) Because Kamehameha Schools does not receive federal funding, it is not applicable to this case. Title VI is nonetheless important in civil rights claims because it, like § 1981, can reach entities that may not necessary fall into the jurisdiction of § 1983 claims because it has been established that federal funding does not necessarily mean that the entity or program is acting "under color of law" (618 PLI/Lit 611, 630, citing *Morse v. North Coast Opportunities*, 1997).

Further, Title VI can reach private schools that would be protected from § 1983 action. The standard is clear: "Private schools of higher education receiving federal funds, chartered by state, regulated by state, generally not state actors" (*Morse*, p. 637, citing *Cohen v. President and Fellows of Harvard College*, 1984; *Fischer v. Discoll*, 1982; *Krohn v. Harvard Law School*, 1977; *Martin v. Delaware Law School of Widener University*, 1985; *Smith v. Duquesne University*, 1985). This general rule applies even to secondary institutions, despite the opportunity to show standing under § 1983 under "public function" theory ("Since education, fire, and police protection were clear 'public functions' and there was 'a greater degree of exclusivity,' state action could be found when challenges were made to the conduct of those entities"; *Morse*, p. 635): "Where state law mandates that private schools established disciplinary rules for disruptive student activity and student suspended for violating those rules, still no state action..." (*Morse*, p. 637, citing *Albert v. Carovano*, 1988 [en banc]). It has been argued that the only way a school could escape the regulations of Title VI would be to refuse federal funding.

4 While the 13th Amendment's initial effect was the banning of slavery, the Supreme Court would later find that it also prohibited all "badges of slavery":

> 'By its own unaided force and effect,' the Thirteenth Amendment 'abolished slavery, and established universal freedom.' Whether or not the Amendment itself did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.' (*Jones v. Alfred H. Mayer Co.*, 1968, citing *Civil Rights Cases*, 1883)

5 "Section 1981 stems from § 1 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27. It was reenacted in part of § 16 of the Enforcement Act of 1870, ch. 114, 16 Stat. 140, and in full by § 18 of the same act. The rights protected by § 1 of the 1866 Act and by § 16 of the 1870 Act became §§ 1977–1978 of the Revised Statutes" (Eisenberg & Schwab, 1988, note 1).

6 "It has never been doubted…'that the power vested in Congress to enforce [the 13th Amendment] by appropriate legislation'…includes the power to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not'" (*Runyon v. McCrary*, 1976, citing *Jones v. Alfred H. Mayer Co.*, 1968).

7 42 U.S.C. § 1981(b)–(c): (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship. (c) The rights protected by this section are protected against the impairment by nongovernmental discrimination and impairment under color of state law.

This amendment rejected the Supreme Court decision in *Patterson v. McLean Credit Union* (1989), which found that a § 1981 action could not be brought to remedy discriminatory conduct in the employment setting.

8 Yet, in *General Building Contractors Association, Inc. v. Pennsylvania* (1982), the Supreme Court held that a § 1981 claim requires a showing of intentional discrimination. This made Title VI a more powerful tool in combating racial discrimination in schools. For, until the recent *Alexander v. Sandoval* (2001) decision, Title VI could reach cases of disparate impact whereas § 1981 could not.

9 To qualify for relief under § 1983, the plaintiff must prove there was "state action" or that the person or entity who committed the violation acted "under color of law" (see 618 PLI/Lit 611, 628 [1999]).

10 618 PLI/Lit 611, 615 (1999), citing *Chapman v. Houston Welfare Rights Organization* (1979; "§ 1983 does not create any substantive rights at all").

11 *Rice v. Cayetano* was the lawsuit filed by a *haole* (non-Hawaiian) Hawai'i resident over a state law that allowed only those with Native Hawaiian ancestry to vote for candidates for the Office of Hawaiian Affairs. The case went to the United States Supreme Court. The Supreme Court found that Native Hawaiians were a racial group and not a political group under the law. Therefore, allowing only Hawaiians, as a racial group, to vote in a state election was a violation of the Constitution. This decision allowed all state residents, regardless of ancestry, to vote for Office of Hawaiian Affairs candidates.

12 In *Jett v. Dallas Independent School District* (1989), the Supreme Court found that § 1981 itself, contrary to popular belief, did not supply a remedy when the § 1981 action was being brought against a state actor. The court found that remedy for a § 1981 violation in such instances derived from § 1983. The court stated, "We think the history of the 1866 Act and the 1871 Act...indicates that Congress intended the explicit remedial provisions of § 1983 be controlling in the context of damages and actions brought against state actors alleging violation of the rights declared in § 1981."

The court continued to articulate:

> That we have read § 1 of the 1866 Act to reach private action and have implied a damages remedy to effectuate the declaration of rights contained in that provision does not authorize us to do so in the context of the "state action" portion of § 1981, where Congress has established its own remedial scheme. In the context of the application of § 1981 and § 1982 to private actors, we "had little choice but to hold that aggrieved individuals could enforce this prohibition, for there existed no other remedy to address such violations of the statute." (*Jett v. Dallas Independent School District*, 1989, citing *Cannon v. University of Chicago*, 1978; Judge White, dissenting)

*Jett* made bringing a § 1981 action against state actors more difficult in that it required plaintiffs to establish a § 1983 violation as well. ("The plaintiff can recover against a unit of local government, therefore, only if the conditions established for § 1983 can be satisfied"; Jeffries et al., 2000, § 4.2.) Such a showing is not required for actions brought against private actors. ("In cases where *private* actors are sued under § 1981, by contrast, the remedy appears to be implied from § 1981 itself. Section 1983 would in any event be irrelevant because of its explicit limitation to actions taken under color of state law"; Jeffries et al., 2000, § 4.2.)

13 Eisenberg and Schwab (1988) analyzed the civil rights cases brought in three districts between 1980 and 1981. They found that 506 cases were brought under § 1983, 433 were brought under Title VII, and 252 were brought under § 1981. In their analysis, cases could be brought under more than one statute.

14 Lesage brought his claim under the 14th Amendment, Title VI, § 1981 and § 1983 (*Texas v. Lesage*, 1999).

15 Whitman (2000) further commented: "The Supreme Court's opinion in *Lesage* is consistent with prior case law in recognizing that prospective relief should not be foreclosed by a defendant's same-decision showing, whether the case is a First Amendment retaliation case or an equal protection challenge to a government's motion" (p. 634).

16 In their complaint, the plaintiffs had "sought injunctive and declaratory relief, as well as compensatory and punitive damages" (Seamon, 1998, citing *Hopwood*, 1994, at 938).

17 "The district court was correct...in holding on remand that Texas had borne its burden of proving by a preponderance of the evidence that the Plaintiffs would have had no reasonable chance of being offered admission to the Law School in 1992 under a constitutionally valid, race-blind admissions system. In affirming that ruling we avoid the need to address the district court's alternative findings of fact and conclusions of law regarding compensable damages incurred by the Plaintiffs" (*Hopwood v. Texas*, 2000, at 256, 281–282).

18 The court concluded in its decision that "where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983" (*Texas v. Lesage*, 1999, at 21).

19 Whitman (2000) explained that in *Carey v. Piphus*: "[The Supreme Court] rejected plaintiffs' argument that they should be able to recover substantial damages without proof of actual injury simply because their constitutional rights had been violated" (p. 633, citing *Carey v. Piphus*, 1978).