Legal Times
WEEK OF JUNE 19, 2006 • VOL. XXIX, NO. 25
ALM

Aloha, Section 1981

Kamehameha Schools suit brings new battle over remedial preferences.

BY JOHN TEHRANIAN

It is the second-richest educational institution in the United States, yet few people know its name. And years after *Brown v. Board of Education* (1954) ostensibly ended segregation, it continues to deny admission to anyone who fails to meet its strict racial requirements.

It is the Kamehameha Schools, a charitable educational trust founded in 1884 by Princess Bernice Pauahi Bishop, the last direct descendent of the founder of the Kingdom of Hawaii, King Kamehameha I. Owner of 10 percent of the Hawaiian Islands and an investment empire stretching from Beijing to Wall Street, the Kamehameha Schools now faces a legal challenge to its long-standing admissions policy, which has effectively limited its student body to individuals possessing Native Hawaiian ancestry.

On June 20 an *en banc* panel of the U.S. Court of Appeals for the 9th Circuit will hear oral arguments in the suit *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*. The results of the case will affect not only the future of this powerful Hawaiian institution but also the viability of remedial race-based policies in private institutions throughout the country.

HAWAIIANS FIRST

Plaintiff John Doe, a non-Hawaiian, twice applied for admission to Kamehameha Schools and, despite meeting the threshold academic requirements, was rejected on both occasions. Kamehameha Schools denied Doe admission under its Hawaiians-first policy, which dictates that academically qualified students with some Native Hawaiian blood will be admitted before even the most qualified individual without Hawaiian blood.

Doe sued, alleging violations of his civil rights under 42 U.S.C. §1981, which proscribes racial discrimination in the making and enforcing of contracts. In 2003 the District Court entered summary judgment for Kamehameha Schools. It held that the defendant's admissions policy was a permissible race-conscious remedial affirmative action program that served a legitimate, nondiscriminatory purpose by "addressing the socioeconomic and educational disadvantages facing Native Hawaiians, producing Native Hawaiian leadership for community involvement, and revitalizing Native Hawaiian culture, thereby remedying current manifest imbalances resulting from the influx of western civilization."

In 2005 the 9th Circuit disagreed. An opinion written by Judge Jay Bybee and joined by Judge Robert Beezer found that the Hawaiians-first admissions policy lacked a legitimate, nondiscriminatory purpose. In dissent, Judge Susan Graber argued that, absent explicit Supreme Court guidance, the 9th Circuit should defer to the schools, especially in light of apparent congressional support for remedial programs for Native Hawaiians. The case now goes before an *en banc* panel.

The appeal involves an issue of first impression. A long line of Supreme Court decisions, including the 2003 Bollinger cases involving the University of Michigan and the 1978 Bakke case involving the University of California, have scrutinized the remedial admissions policies of public educational institutions—situations that necessarily implicate the equal protection clause.

But Kamehameha Schools is a private institution that accepts no funding from the federal government, and thus the equal protection jurisprudence of *Bakke* and its progeny is inapposite.

Instead, 42 U.S.C. §1981, a statute originally enacted as part of the Civil Rights Act of 1866, governs. Revived after a century of desuetude by the Supreme Court's decision in *Runyon v. McCrary* (1976), Section 1981 proscribes public and private discrimination under powers granted to Congress under the 13th Amendment. *Runyon* applied Section 1981 to strike any categorical exclusion of African-Americans from a private educational institution. By evaluating whether *Runyon* extends to affirmative action programs, this case represents the first appellate foray

into the permissibility under Section 1981 of remedial policies by private schools.

WHAT STANDARDS?

Two specific questions face the *en banc* panel. First, what standards should courts use to assess a Section 1981 challenge of this kind? Second, based on these standards, has the defendant proffered sufficient justifications for its policies?

With respect to the first issue of standards, it is axiomatic that Section 1981 cases involving state actors invoke the equal protection clause. Courts, therefore, use the strict scrutiny typically applied to race-based policies under 14th Amendment jurisprudence.

But for Section 1981 suits involving wholly private actors, equal protection jurisprudence, which requires state action, appears ill-suited. As a consequence, both the District Court and the earlier 9th Circuit panel drew upon the more deferential burden-shifting scheme from *McDonnell Douglas v. Green* (1973)—a standard applied in cases of race-based disparate workplace treatment proscribed under Title VII of the Civil Rights Act of 1964.

The use of the *McDonnell Douglas* standard makes sense in light of the public/private divide that has historically informed our constitutional jurisprudence and limited the reach of the government into civil society. Relaxed scrutiny of private, rather than public, forms of discrimination also reflects a tacit recognition of the free-association rights secured under the First Amendment.

After determining the appropriate standard for review, the *en banc* panel will then scrutinize Kamehameha's proffered justification for its Hawaiians-first policy. Under *McDonnell Douglas*, after a plaintiff makes out a prima facie case of discriminatory intent and effect, a defendant may rebut the inference of unlawful discrimination by offering a legitimate, nondiscriminatory purpose for its actions.

The Supreme Court's decision in *United Steelworkers of America v. Weber* (1979), which scrutinizes affirmative action by private institutions under the *McDonnell Douglas* framework, appears binding. In *Weber*, the Court upheld, under Title VII, a private employer's quota program reserving for African-American employees 50 percent of the openings for a training program. In so doing, the Court issued guidance for future cases by suggesting that remedial race-based policies must not create an absolute bar to the "advancement" of nonpreferred races. The original 9th Circuit panel that heard the Kamehameha Schools case found this language from *Weber* fatal to the Hawaiians-first admissions policy.

But several factors could undermine the conclusion that *Weber* inextricably dooms the Kamehameha admissions policy. First, the Hawaiians-first policy does not technically present an absolute bar to the acceptance of individuals without Hawaiian blood. In practice, however, it does make it all but impossible for the foreseeable future, since Kamehameha currently has space for only 7 percent of eligible Native Hawaiian students.

More significantly, one could reasonably argue that the facts of *Weber* are inapposite. *Weber* involved the workplace, not the schoolhouse, and Title VII, not Section 1981. It is far from clear whether one can conflate employment advancement with educational opportunities, as the original 9th Circuit panel in *Kamehameha Schools* did without explanation.

Indeed, as the District Court recognized, the unique educational mission of the Kamehameha Schools, the history of Hawaii and the Native Hawaiian people, and the recent congressional actions, including the formal apology issued in 1993 for the wrongful overthrow of the Hawaiian monarchy by the United States, distinguish the Hawaiians-first admissions policy from the remedial employment programs discussed in *Weber*.

At the same time, *Weber* expressed reluctance to strike remedial policies that could ultimately advance racial equality—something that the Kamehameha Schools admissions policy seeks to accomplish by improving the lot of Native Hawaiians. As the *Weber* Court noted: "It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."

Similarly, *Weber* appeared to eschew any fixed formula or bright-line test to determine whether remedial policies in the private sector survive legal scrutiny. "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans," noted the *Weber* Court.

Freed from the apparent strictures of *Weber*, the *en banc* panel might therefore side with the District Court and find that the schools' mission to rectify the socioeconomic and educational disadvantages facing the Native Hawaiian population constitutes a legitimate, nondiscriminatory purpose for its admissions policy.

MOVING FORWARD

While the Kamehameha Schools case is likely to provide critical guidance on standards governing Section 1981 suits involving private actors and remedial race-based policies, it is also significant for what outstanding issues it will not address—issues that will likely form the locus of future litigation.

First, a recent line of Supreme Court jurisprudence has shielded private expressive associations from state public accommodations laws meant to fight discrimination. This body of case law has strengthened recognition of the First Amendment rights of private organizations. Kamehameha Schools could have asserted the fundamental role of its admissions policy in its expressive activities and mission as an institution of Hawaiian education, but it did not. Consequently, the case will not implicate countervailing associational rights that permit organizations such as the Boy Scouts to restrict membership on the basis of sexual orientation.

Second, Kamehameha Schools concedes that its admissions policy, which considers Native Hawaiian ancestry, is based upon a racial, rather than political, classification. As a result, the policy cannot claim the protection of *Morton v. Mancari* (1974), which shields exclusive programs for Native Americans from heightened constitutional scrutiny on the grounds that these programs deal with Native Americans in tribal units and, therefore, as a political, rather than a racial, group. *Rice v. Cayetano* (2000)

declined to consider an extension of the *Mancari* doctrine to immunize a race-based voting restriction for Native Hawaiians, so whether Native Hawaiians enjoy a similar legal status as Native Americans will remain uncertain until Congress resolves the matter. (An attempt by Sen. Daniel Akaka [D-Hawaii] to do so failed earlier this month.)

Third, Kamehameha Schools concedes that Section 1981, despite literal language to the contrary, protects both whites and nonwhites from private discrimination equally. It also concedes that the legislation does not exceed congressional authority under the 13th Amendment by targeting more than just the direct vestiges of involuntary servitude. The latter issue appears especially ripe for consideration in future litigation before a judiciary increasingly favoring strict construction of congressional powers.

Finally, a largely unnoticed but looming issue could reawaken after the resolution of this suit: the schools' tax-exempt status. The Internal Revenue Service refuses to grant tax exemption to any private school with a discriminatory admissions policy. And in *Bob Jones University v. United States* (1983), the Supreme Court vindicated the IRS's position, holding that such exemptions would violate the equal protection clause. Thus, the Hawaiians-first admissions policy arguably threatens the Kamehameha Schools' tax-exempt status. The issue was investigated by the IRS but tabled only a few years ago pending legislative or judicial guidance. Even if Kamehameha Schools survives the Section 1981 challenge, its tax-exempt status might not survive stricter equal-protection scrutiny.

In light of the Kamehameha Schools' multibillion-dollar endowment, its legal battles may only be beginning. Meanwhile, the 9th Circuit *en banc* hearing on June 20 represents a significant step in the controversy over remedial race-based policies in the private sector—an issue that will eventually make its way to the Supreme Court.

John Tehranian is an associate professor at the S.J. Quinney College of Law at the University of Utah and of counsel at Turner Green Afrasiabi & Arledge in Costa Mesa, Calif.