

CIVIL RIGHTS — SECTION 1981 — NINTH CIRCUIT HOLDS THAT PRIVATE SCHOOL'S REMEDIAL ADMISSIONS POLICY VIOLATES § 1981. — *Doe v. Kamehameha Schools*, 416 F.3d 1025 (9th Cir. 2005).

For a century, 42 U.S.C. § 1981 lay dormant, a forgotten remnant of the Civil Rights Act of 1866¹ that guaranteed to “[a]ll persons” the “same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”² Then, in the 1970s, the Supreme Court resurrected § 1981, holding that it reached purely private discrimination,³ protected all races,⁴ and prevented all-white private schools from refusing to admit black students.⁵ But thirty years later, no federal court had considered whether § 1981 allows a private school to turn away nonminority students under an affirmative action or other remedial admissions policy. Recently, in *Doe v. Kamehameha Schools*,⁶ the Ninth Circuit held that a private educational institution violated § 1981 by admitting all qualified Native Hawaiians before any non-native applicant.⁷ The court bridged the gap in precedent by importing from Title VII jurisprudence a test for analyzing “reverse discrimination” claims brought against private employers. The court’s application of this test was flawed, however, reflecting the court’s assumption that no exclusive remedial policy — no policy that exclusively targets members of a harmed group — could ever pass muster. A better approach would have replaced the employment test with an evaluation of the exclusive remedial policy in light of history, current need, and unique circumstances.

The first Westerner reached Hawaii in 1778; after a century of Western immigration, American business leaders overthrew the Hawaiian monarchy in 1893 with the assistance of the U.S. military.⁸ In

¹ Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

² 42 U.S.C. § 1981(a) (2000). See generally George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 307–37 (describing the legislative and interpretive history of § 1981).

³ See *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459–60 (1975) (confirming that “§ 1981 affords a federal remedy against discrimination in private employment on the basis of race”). In 1991, Congress amended § 1981 to make explicit its application to private parties. See Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 101(2), § 1981(c), 105 Stat. 1071, 1071–72 (codified at 42 U.S.C. § 1981(c) (2000)).

⁴ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286–87 (1976) (holding that § 1981 bars private employers from discriminating against white employees).

⁵ See *Runyon v. McCrary*, 427 U.S. 160, 172 (1976).

⁶ 416 F.3d 1025 (9th Cir. 2005).

⁷ *Id.* at 1027.

⁸ See, e.g., Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1510. The United States annexed Hawaii in 1898. *Id.* The history of U.S. involvement in Hawaii is still contested, but Congress in its 1993 joint resolution “apologized] to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii,” 107 Stat. at 1510, and acknowledged “the inherent sovereignty of the Native Hawaiian people,” § 1(1), 107 Stat. at 1513.

1884, while Hawaii was still sovereign, Princess Bernice Pauahi Bishop left her estate — consisting of approximately one-tenth of all land in Hawaii⁹ — in trust “for a school dedicated to the education and upbringing of Native Hawaiians.”¹⁰ That gift enables Kamehameha Schools to be entirely private, receiving no federal funding.¹¹ Today there are three Kamehameha campuses, enrolling 4856 students¹² under a “Hawaiians first” admissions policy: as long as any academically qualified student can claim Native Hawaiian ancestry, he or she will be admitted before any qualified non-native applicant.¹³ Given the roughly 70,000 Native Hawaiian school-aged children in Hawaii, this policy effectively excludes non-natives from admission.¹⁴ John Doe, a non-Native Hawaiian, twice applied to Kamehameha Schools and twice qualified as a “competitive applicant,” but both times he was denied admission after completing an Ethnic Ancestry Survey.¹⁵ Doe filed suit in 2003, alleging that the Kamehameha admissions policy violated § 1981 and seeking an injunction admitting him to the school.¹⁶

The United States District Court for the District of Hawaii granted summary judgment for Kamehameha Schools.¹⁷ Because Kamehameha Schools is a private institution, the court declined to apply strict scrutiny to the admissions policy under an equal protection analysis, instead turning to Title VII’s more deferential framework.¹⁸ Recognizing that this framework was designed for an employment context, however, the court applied the test generously to accommodate Kamehameha Schools’s unique history and mission¹⁹ and to align with congressional efforts to remedy past wrongs against Native Hawaiians.²⁰ The court found that the Kamehameha admissions policy had a legitimate remedial purpose, given the “exclusion and marginalization” of Native Hawaiians,²¹ and that the policy furthered this purpose

⁹ *Kamehameha Sch.*, 416 F.3d at 1028.

¹⁰ *Doe v. Kamehameha Sch.*, 295 F. Supp. 2d 1141, 1154 (D. Haw. 2003) (quoting *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000)) (internal quotation mark omitted).

¹¹ *See id.* at 1147.

¹² *Id.* at 1157.

¹³ *Kamehameha Sch.*, 416 F.3d at 1029. To qualify as Native Hawaiian, a student must be able to trace his or her ancestry to a pre-1778 inhabitant of the islands, but no minimum degree of ancestry is required. *Kamehameha Sch.*, 295 F. Supp. 2d at 1156–57.

¹⁴ Appellees’ Answering Brief at 10, *Kamehameha Sch.*, 416 F.3d 1025 (9th Cir. 2005) (No. 04-15044), 2004 WL 1394616.

¹⁵ *Kamehameha Sch.*, 416 F.3d at 1029.

¹⁶ *Kamehameha Sch.*, 295 F. Supp. 2d at 1158.

¹⁷ *Id.* at 1147.

¹⁸ *See id.* at 1164.

¹⁹ *See id.* at 1165–67.

²⁰ *See id.* at 1172–74.

²¹ *Id.* at 1167.

by improving Native Hawaiian test scores, increasing Native Hawaiian college enrollment, and producing Native Hawaiian leaders in both the public and private sectors.²²

The Ninth Circuit reversed. The panel, in an opinion by Judge Bybee,²³ agreed with the district court that Title VII's more deferential framework, not strict scrutiny, applied.²⁴ Unlike the district court, however, the panel closely adhered to the Title VII employment case of *United Steelworkers of America v. Weber*,²⁵ from which it distilled three factors for evaluating the legitimacy of a private employer's affirmative action policy: whether it addresses a manifest imbalance in the employer's workforce, whether it "unnecessarily trammel[s]" the rights of the nonpreferred group or "create[s] an absolute bar" to group members' advancement, and whether it does no more than is necessary to correct the imbalance.²⁶ The court found the Kamehameha admissions policy to violate the second factor because it "operates as an absolute bar to admission for non-Hawaiians" and "categorically 'trammels' the rights of non-Hawaiians."²⁷ The Kamehameha remedial policy by its very nature "exceeds any reasonable application of *Weber*,"²⁸ for any policy that bars all members of a given race is unfair to applicants of that race and "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."²⁹ Finally, the court refused to evaluate the admissions policy in light of congressional legislation indicating a special trust relationship between the United States and Native Hawaiians;³⁰ the court under-

²² See *id.* at 1169–70, 1172.

²³ Judge Bybee was joined by Judge Beezer.

²⁴ See *Kamehameha Sch.*, 416 F.3d at 1038 (concluding that § 1981 "was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments" (quoting *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206 n.6 (1979)) (internal quotation marks omitted)). The court relied on the Supreme Court's indication that Title VII jurisprudence provides the appropriate framework for analyzing § 1981 claims. See *id.* at 1035–36 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 186–87 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 101(2), § 1981(b), 105 Stat. 1071, 1071–72). Although neither Title VII nor § 1981 explicitly allows for race-conscious remedial policies, the Supreme Court concluded in *Weber* that reading Title VII literally to prohibit voluntary affirmative action policies would "bring about an end completely at variance with the purpose of the statute." *Weber*, 443 U.S. at 201–02 (quoting *United States v. Pub. Utils. Comm'n*, 345 U.S. 295, 315 (1953)) (internal quotation marks omitted). A similar analysis would read an exception for race-conscious remedial policies into § 1981 as well. See, e.g., *Setser v. Novack Inv. Co.*, 657 F.2d 962, 966–67 (8th Cir. 1981) (en banc).

²⁵ 443 U.S. 193.

²⁶ *Kamehameha Sch.*, 416 F.3d at 1041 (quoting *Rudebusch v. Hughes*, 313 F.3d 506, 520–21 (9th Cir. 2002)) (internal quotation marks omitted).

²⁷ *Id.*

²⁸ *Id.* at 1042.

²⁹ *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 643 (1993)) (internal quotation mark omitted).

³⁰ See *id.* at 1046–47. For an example of such legislation, see 20 U.S.C.A. § 7512(12)(B) (West 2003), which states that "Congress does not extend services to Native Hawaiians because of their

stood Kamehameha's policy to be racially based and concluded that the institution was thus precluded from seeking more deferential review.³¹

Judge Graber concurred in the use of the deferential Title VII standard but dissented from the majority's conclusions.³² Without clearer Supreme Court guidance, she argued, the court should adhere closely to congressional intent, which demonstrated support for Native Hawaiian preferences in remedial programs.³³ She also disagreed with the dichotomous treatment of the racial and political aspects of Kamehameha's policy.³⁴

In *Kamehameha Schools*, the Ninth Circuit inadequately analyzed the second *Weber* factor by failing to specify any relevant interests that were "trammeled" and by assuming that advancement is coextensive with admission in the educational context. By implying that it was strictly bound by *Weber*³⁵ and by applying *Weber* in a superficial manner, the Ninth Circuit presented its more significant holding — that no exclusive remedial policy could pass muster — as a foregone conclusion. But it was not a foregone conclusion;³⁶ it was very much a question of first impression, a question that required consideration of the

race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship."

³¹ See *Kamehameha Sch.*, 416 F.3d at 1047. In *Rice v. Cayetano*, 528 U.S. 495 (2000), the Supreme Court held that Hawaiian ancestry could be a proxy for race, *id.* at 514, and distinguished the case of Native Hawaiians from *Morton v. Mancari*, 417 U.S. 535 (1974), in which the Court upheld hiring preferences for American Indians due to Indian tribes' political status, see *Rice*, 528 U.S. at 520. But the propriety of such a binary racial-political distinction is debatable. For example, the tribal classification upheld in *Mancari* as "political" also included a blood quantum requirement. See Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1762 (1997); see also *Rice*, 528 U.S. at 535 (Stevens, J., dissenting). As Professor Chris Iijima has argued, both race and politics shape the Native Hawaiian experience with the United States. See Chris K. Iijima, *Race over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 RUTGERS L. REV. 91, 122 (2000). By sharply distinguishing the two instead, judges "contain debates and move politics, choice, and power off stage," pushing aside historical complexity. See MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 74 (1997). In the case of Native Hawaiians, this distinction between race and politics means overlooking the unique situation of the Hawaiian people vis-à-vis the United States. See *Rice*, 528 U.S. at 535 (Stevens, J., dissenting) ("[I]t is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government — a possibility of which history and the actions of this Nation have deprived them.").

³² *Kamehameha Sch.*, 416 F.3d at 1048, 1051 (Graber, J., concurring in part and dissenting in part).

³³ See *id.* at 1050–51.

³⁴ See *id.* at 1050.

³⁵ See *id.* at 1042 (majority opinion).

³⁶ See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979) (clarifying that the Court was not attempting to "define in detail the line of demarcation between permissible and impermissible affirmative action plans").

role of educational institutions in an unequal society, of the appropriateness of private voluntary efforts in furthering congressional intent, of whose “fairness” takes priority, and of which form of racial stigmatization society can most tolerate.

In concluding that the Kamehameha policy failed *Weber*'s second prong, the Ninth Circuit confused the distinct stages of the *McDonnell Douglas Corp. v. Green*³⁷ Title VII burden-shifting framework. The court took as given that the first stage of *McDonnell Douglas* — whether Kamehameha's policy disparately treated native and non-native students — was met. The relevant question was whether, under the second stage of *McDonnell Douglas*, the policy's remedial purpose provided a legitimate nondiscriminatory rationale for the disparate treatment,³⁸ with *Weber* providing a framework for evaluating the policy's legitimacy. In determining that Kamehameha's policy failed the second prong of *Weber*, the Ninth Circuit relied on *Runyon v. McCrary*³⁹ to imply that Doe's interests were trammled because he was denied admission based on his ancestry.⁴⁰ But *Runyon* involved no remedial policy: it was a straightforward case of discrimination. The right to nondiscrimination protected in *Runyon* helps establish only the first stage of *McDonnell Douglas* (that facial discrimination occurred); to allow *Runyon* alone to render Kamehameha's policy illegitimate is to call into question all remedial policies, which must facially distinguish between members of different groups. If instead the court thought that *Runyon* implied a protected interest in having *some* chance of admission, then it should have explicitly considered whether a student has a right in admission to any given school.

Further, in considering whether the Kamehameha policy operated as “an absolute bar to the advancement” of non-Native Hawaiians, the Ninth Circuit equated advancement with admission without further explanation.⁴¹ The two are not synonymous. In an educational context, even when considering elite schools like Kamehameha, the ultimate value of admission is not advancement within the institution itself as much as enabling advancement socially and economically upon graduation. An alternative approach to this *Weber* prong might conclude that absent a showing that no comparable educational opportunity exists in Hawaii, Doe failed to demonstrate that his advancement through education was absolutely barred by the Kamehameha policy.

³⁷ 411 U.S. 792 (1973).

³⁸ See *Johnson v. Transp. Agency*, 480 U.S. 616, 626 (1987) (stating that an affirmative action policy can constitute a legitimate nondiscriminatory rationale under *McDonnell Douglas*).

³⁹ 427 U.S. 160 (1976).

⁴⁰ See *Kamehameha Sch.*, 416 F.3d at 1041.

⁴¹ See *id.* at 1041–42.

At the very least, the Ninth Circuit should have articulated its reasons for treating admission and advancement interchangeably.

Not only did the Ninth Circuit misapply the *Weber* test, it also failed to justify adequately its use of the test in a context so different from that in which it was announced. The Kamehameha admissions policy reflects a broad remedial mission to right historical wrongs that have left the Native Hawaiian community lagging behind other Hawaiian citizens academically, professionally, and financially.⁴² Its focus on general societal inequalities would perhaps be prohibited under Supreme Court precedent if undertaken by a public educational institution or a private employer, but the spirit behind these two lines of precedent might produce a different result in the private educational context. In its Title VII reverse discrimination cases, the Court has emphasized that statutes prohibiting discrimination should be interpreted to permit private, voluntary efforts to fulfill congressional intent to an extent greater than Congress itself can accomplish.⁴³ Further, the Court in *Grutter v. Bollinger*⁴⁴ suggested that educational institutions should be permitted to consider broad social goals in fashioning affirmative action programs because schools “represent the training ground for . . . our Nation’s leaders.”⁴⁵ That is, noncolorblind admissions make possible colorblind professions by correcting the racial imbalance within the skilled labor pool. But instead of considering whether an institution that is both private *and* educational could thus be given greater leeway to correct social disparities, the Ninth Circuit made only a weak attempt to justify the prohibition of all exclusive remedial policies that it extrapolated from *Weber*.

The Ninth Circuit’s first justification — that remedial policies must be limited by concern for “fairness to applicants of the non-preferred race”⁴⁶ — glosses over the weighing of interests necessary to determine whose “fairness” is most at risk. Focusing on fairness to members of

⁴² Statewide, 14.7% of Native Hawaiian households receive public assistance, versus 5.9% of non-native households. Appellees’ Answering Brief, *supra* note 14, at 11. “In 1990, only 9.1% of Native Hawaiians 25 or older in Hawai‘i had obtained a bachelor’s degree, in contrast with 30.3% of persons of Chinese descent, 25.2% of persons of Japanese descent, and 30.2% of Caucasians.” *Id.* at 12. Further, Native Hawaiians are underrepresented in professional and managerial positions and overrepresented among low-paid laborers. *Id.*

⁴³ “[V]oluntary employer action can play a crucial role in furthering Title VII’s purpose of eliminating the effects of discrimination in the workplace, and . . . Title VII should not be read to thwart such efforts.” *Johnson*, 480 U.S. at 630; *see also* *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 214 (1979) (Blackmun, J., concurring) (“Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not. . . . [W]here Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief.”).

⁴⁴ 123 S. Ct. 2325 (2003).

⁴⁵ *Id.* at 2341.

⁴⁶ *Kamehameha Sch.*, 416 F.3d at 1042.

the nonpreferred group suggests that remedial policies should be limited to addressing past wrongs perpetrated by specific bad actors against specific victims:⁴⁷ in the words of the Ninth Circuit, “race conscious programs must be designed to minimize — if not avoid — burdens upon nonculpable third parties.”⁴⁸ But this perspective ignores that “[a]s long as segregation and discrimination persist, there will be innocent victims suffering unjust burdens. The only question is whether these burdens should be borne exclusively by disadvantaged racial groups, or shared by all Americans.”⁴⁹ Further, forcing Kamehameha Schools to accept non-native applicants could exacerbate existing unfairness to Native Hawaiians by perpetuating the status quo: if Native Hawaiian students are lagging in test scores and educational attainment, requiring a “meritocratic” admissions policy would result in higher admission rates for groups already surpassing Native Hawaiian achievement. In implying that Doe was maltreated in being denied admission, the court suggested that this unfairness outweighed both past and continuing unfairness to Native Hawaiians — a conclusion that warranted explicit defense.

The Ninth Circuit also justified its prohibition of all exclusive remedial policies on the grounds that racial identification inherently leads to stigmatization and racial hostility. Segregated institutions might be inherently damaging to racial equality and democracy.⁵⁰ But Kamehameha’s policy employs segregation as a means of desegregating the larger society by producing Native Hawaiians equipped to enter the professional and political sectors. More fundamentally, rejecting an affirmative action policy for fear of racial stigmatization and hostility implies a judgment that existing types of stigmatization and hostility in society are more tolerable.⁵¹ Native Hawaiians could argue that they are already stigmatized by the collective group’s high rate of poverty and unemployment and low level of educational and professional attainment, or by their position as an occupied people deprived of their sovereignty and denied popular recognition of their unique

⁴⁷ See Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 93–94 (1986).

⁴⁸ *Kamehameha Sch.*, 416 F.3d at 1042 (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 917 (9th Cir. 1991)) (internal quotation marks omitted).

⁴⁹ Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1268 (2002).

⁵⁰ See, e.g., *id.* at 1197–1207.

⁵¹ See *id.* at 1269 (“The mere fact that efforts to undo injustice arouse hostility toward the victims of that injustice cannot justify giving up on the attempt. In any event, the divisive effects of undoing the injustice must be weighed against the divisive effects of leaving it intact.”).

status.⁵² The Ninth Circuit should have more thoroughly defended the judgment it made.

A better approach would instead allow private institutions to implement exclusive remedial policies but would constrain their use. In place of the *Weber* test, such a framework might require, first, clear congressional recognition of a historic wrong that severely disadvantaged a discrete group; second, factual findings that the group remains significantly disadvantaged; and third, a specific, legitimate need requiring an exclusionary policy. These considerations would respectively narrow which groups could implement such policies, place a time limit on any fully remedial policy, and ensure that exclusionary policies are tailored to meet specific needs. In *Kamehameha Schools*, the first factor would be satisfied by Congress's joint apology resolution acknowledging the harm to Native Hawaiians caused by the overthrow of the Hawaiian monarchy.⁵³ Statistical evidence demonstrates continuing significant disparities between Native Hawaiians and the rest of the state's population,⁵⁴ findings echoed in congressional legislation.⁵⁵ Finally, a court could find that Kamehameha's limited capacity justifies temporarily excluding non-natives in order to focus resources on Native Hawaiian students.⁵⁶ Alternatively, a court could consider the need to preserve Native Hawaiian culture and identity: Kamehameha Schools itself is now an integral part of Hawaiian identity, and the all-Native Hawaiian student body might provide an environment uniquely conducive to reconnecting students with their cultural heritage.

John Doe is sympathetic: in a society that strives for colorblindness, Kamehameha Schools's ancestry-conscious policy might at first jar one's belief in equal (meaning same) treatment. Yet the very real challenges facing the Native Hawaiian community, legacies at least in part of the U.S. occupation of Hawaii, should also jar the American faith in justice. Instead of quickly finding Doe's predicament to be the greater wrong, the Ninth Circuit should have factored in the historical context, real need, and practical limitations facing Native Hawaiians and Kamehameha Schools to reach a more considered and equitable conclusion.

⁵² See Iijima, *supra* note 31, at 114–15 (describing mainland media misrepresentation of the identity issues at stake in *Rice v. Cayetano*).

⁵³ See Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510.

⁵⁴ See *supra* note 42.

⁵⁵ See, e.g., 20 U.S.C.A. § 7512 (West 2003).

⁵⁶ Kamehameha's campus programs currently have space for only seven percent of Native Hawaiian school-age children. *Doe v. Kamehameha Sch.*, 295 F. Supp. 2d 1141, 1170 (D. Haw. 2003). One might distinguish, however, between Kamehameha Schools' current limited physical capacity to enroll students and the trust's substantial wealth, estimated at six billion dollars, *Kamehameha Sch.*, 416 F.3d at 1028 n.1.