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*BROWN V. KAMEHAMEHA SCHOOLS: AN  
INSTRUMENTAL CRITIQUE OF  
REMEDIAL SELF-SEGREGATION IN  
PRIVATE EDUCATION*

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*“The law contemplates not only that all shall be taught, but that all shall be taught together. . . . The school is the little world where the child is trained for the larger world of life.”*

– CHARLES SUMNER<sup>1</sup>

I. INTRODUCTION

The Kamehameha Schools are a series of private, nonprofit, nonsectarian campuses interspersed throughout the Hawaiian Islands.<sup>2</sup> Founded in the late nineteenth century,<sup>3</sup> they have operated continuously ever since, fulfilling their mission to provide a “good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and

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\* Class of 2008, University of Southern California Gould School of Law; B.A. 2004, Yale University. I thank Professor Scott Bice for his wisdom, the members of the *Southern California Law Review* for their diligence, and especially my parents, Andrew and Alice Thompson, for their love and support. This Note is dedicated to Laura Susan Maile Kuhlemann, whose inspiration made it possible.

1. CHARLES SUMNER, *Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts*, in 2 THE WORKS OF CHARLES SUMNER 327, 371 (1870) (emphasis removed).

2. *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 829 (9th Cir. 2006) (en banc), *cert. dismissed*, 127 S. Ct. 2160 (2007); *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 416 F.3d 1025, 1027 (9th Cir. 2005), *rev'd en banc*, 470 F.3d 827 (9th Cir. 2006). Today, the Kamehameha Schools operate three K–12 campuses, one each on Oahu, Maui, and the Big Island. *Kamehameha Schools*, 470 F.3d at 832.

3. A school for boys opened in 1887 and one for girls in 1894. The two were consolidated during the 1965–66 school year. *Kamehameha Schools*, 470 F.3d at 831 n.3.

women.”<sup>4</sup> With over five thousand students enrolled in kindergarten through grade twelve, the Kamehameha Schools are collectively among the largest independent primary and secondary educational institutions in the United States.<sup>5</sup> Otherwise—apart from their strong academic reputation<sup>6</sup> and champion athletic teams<sup>7</sup>—they might be perceived as fairly typical schools. This perception is deceiving. To the contrary, they are anything but.

Administered by the Bishop Trust, a charitable testamentary trust established by Princess Bernice Pauahi Bishop, the last direct descendant of King Kamehameha I,<sup>8</sup> the Kamehameha Schools are exceptional in at least three ways. First, the schools subscribe to a “Leadership Model” of education that intends to “restore self-identity” to Native Hawaiian students, to “integrate Native Hawaiian culture, heritage, language, and traditions into the educational process,” and to “provide a first-rate educational experience for Native Hawaiians.”<sup>9</sup> By offering a curriculum that intends to respond to the particular educational disadvantages of Native Hawaiians, the schools aspire to raise the scores of Native Hawaiians on standardized tests, to increase their attendance at institutions of higher education, and to improve their representation in professional, academic, and managerial positions.<sup>10</sup> In addition, the schools strive to “cultivate, nurture, and perpetuate Hawaiian culture, values, history, and language,”<sup>11</sup> as well as to develop a community of future leaders to the Native Hawaiian people.<sup>12</sup>

Second, consistent with longstanding policy,<sup>13</sup> the Kamehameha

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4. Will of Bernice Pauahi Bishop (Oct. 31, 1883), in *WILLS AND DEEDS OF TRUST* 15, 18 (3d ed. 1957) [hereinafter *Pauahi Bishop Will*].

5. Jean Christensen, *Private Schools Gaining in Isles*, HONOLULU STAR-BULLETIN, Aug. 26, 2001, available at <http://starbulletin.com/2001/08/26/news/story1.html>. Kamehameha Schools—Facts About KS, at <http://www.ksbe.edu/about/facts.php> (last visited April 14, 2008). When students at separate preschool campuses are included, the total number of students enrolled is over 6500. *Id.*

6. For example, all 437 of the graduates of the Oahu campus in 2004 were accepted to two- and four-year colleges. Petition for Writ of Certiorari, *Kamehameha Schools*, 470 F.3d 827 (No. 06-1202). See also *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d 1141, 1170 (D. Haw. 2003) (“Seniors attending Kamehameha Schools outperform ‘both national norms and state averages on the SAT I verbal and math tests.’”), *aff’d*, 470 F.3d 827 (9th Cir. 2006) (en banc).

7. See, e.g., *Kamehameha Cheerleaders Capture National Title*, HONOLULU ADVERTISER, Feb. 12, 2007, available at <http://the.honoluluadvertiser.com/article/2007/Feb/12/sp/FP702120351.html>.

8. *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). King Kamehameha I unified the Hawaiian Islands under his rule. 20 U.S.C. § 7512(3) (Supp. V 2001–06).

9. *Kamehameha Schools*, 470 F.3d at 844.

10. *Id.* at 843–44.

11. *Id.* at 843.

12. *Id.* at 844.

13. Pauahi Bishop’s will vested administrative authority in a board of trustees, including “full

Schools offer preference to applicants of Native Hawaiian ancestry.<sup>14</sup> Specifically, no student without Native Hawaiian ancestry is admitted until all qualified students with such ancestry have been.<sup>15</sup> Given that the number of qualified candidates with Native Hawaiian ancestry significantly exceeds the number of places at the schools,<sup>16</sup> such instances are exceedingly rare. In fact, beginning in 1962,<sup>17</sup> not a single applicant lacking Native Hawaiian ancestry was admitted for forty years.<sup>18</sup> When a non-Native Hawaiian candidate was finally admitted in 2002, a “firestorm of protests”<sup>19</sup> erupted, compelling at least one trustee to acknowledge having “screwed up major.”<sup>20</sup> To remedy “the situation,” the schools adopted a number of reforms.<sup>21</sup> These included establishing a registry to verify the ancestry of all candidates, temporarily waiving application fees to attract greater numbers of Native Hawaiian applicants, and suspending use of a minimum admissions test threshold.<sup>22</sup> Accordingly, because the new policy provided “no objective guidance whatsoever,” it left the Kamehameha Schools “free to restrict admission solely to Native Hawaiian children.”<sup>23</sup>

Third, the Kamehameha Schools have an endowment valued at approximately nine billion dollars,<sup>24</sup> an enormous sum for a private K–12

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power . . . to regulate the admission of pupils.” *Pauahi Bishop Will*, *supra* note 4, at 18. In 1910, when the question was first presented, the schools determined that they could justifiably deny admission to students on the basis of ancestry. *Kamehameha Schools*, 470 F.3d at 832. *See also* Kamehameha Schools, Questions and Answers About KS Admissions Policies, at <http://www.ksbe.edu/admissions/policy.html> (last visited April 14, 2008). Notably, some have argued that the exclusionary admissions policy is contrary to the terms of the will and the intent of its testator. *See* John Tehranian, *A New Segregation? Race, Rice v. Cayetano, and the Constitutionality of Hawaiian-Only Education and the Kamehameha Schools*, 23 U. HAW. L. REV. 109, 141–42 (2000).

14. *Kamehameha Schools*, 470 F.3d at 831–32. The policy defines Native Hawaiians as those descended from the indigenous people who were sovereign over the Hawaiian archipelago before 1778. *Id.*

15. *Id.*

16. *Id.* The Schools enroll around 5000 students, but there are approximately fourteen times as many school-aged children in Hawaii who qualify as Native Hawaiians. *Id.*

17. In this year, the schools ended a policy that had permitted non-Native Hawaiian children of faculty to enroll. *Id.* at 870 (Bybee, J., dissenting).

18. *Id.*

19. *Id.*

20. *See* Rick Daysog, *Angry Ohana Grills Trustees*, HONOLULU STAR-BULLETIN, July 16, 2002, available at <http://starbulletin.com/2002/07/16/news/story1.html>.

21. Douglas Ing et al., *Kamehameha’s Policy Will Remain*, HONOLULU ADVERTISER, July 27, 2002, available at <http://www.moolelo.com/ks-remain.html>.

22. *Kamehameha Schools*, 470 F.3d at 870–71 (Bybee, J., dissenting).

23. *Id.* at 871.

24. Geraldine Fabrikant, *At Elite Prep Schools, College-Size Endowments*, N.Y. TIMES, Jan. 26, 2008, available at <http://www.nytimes.com/2008/01/26/business/26prep.html?scp=1&sq=endowment+private&st=nyt> (see attached graphic, “Educational Wealth”).

institution. Even among private colleges and universities, only Harvard, Yale, Stanford, Princeton, and the Massachusetts Institute of Technology have greater financial resources.<sup>25</sup> A byproduct of the schools' formidable wealth is that they generously subsidize the tuition of each student. Though the cost of educating a pupil is approximately \$20,000 per year, and the schools receive no federal funding, annual tuition recently reached only \$1,784.<sup>26</sup> Sixty-five percent of students receive even further financial assistance.<sup>27</sup>

On June 25, 2003 an anonymous plaintiff filed suit against the Kamehameha Schools in federal court for the District of Hawaii.<sup>28</sup> The plaintiff, a non-Native Hawaiian who had been repeatedly denied admission,<sup>29</sup> alleged invidious discrimination on the basis of race<sup>30</sup> in violation of 42 U.S.C. § 1981.<sup>31</sup> In *Doe v. Kamehameha Schools*, the district court granted the Kamehameha Schools' motion for summary judgment, dismissing the suit.<sup>32</sup> A federal appeals panel reversed,<sup>33</sup> prompting a throng of approximately fifteen thousand to protest the decision in downtown Honolulu.<sup>34</sup> Upon rehearing the case en banc, a sharply divided Ninth Circuit<sup>35</sup> upheld the Kamehameha Schools' policy as

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25. See 2007 NACUBO Endowment Study, at [http://www.nacubo.org/Images/All%20Institutions%20Listed%20by%20FY%202007%20Market%20Value%20of%20Endowment%20Assets\\_2007%20NES.pdf](http://www.nacubo.org/Images/All%20Institutions%20Listed%20by%20FY%202007%20Market%20Value%20of%20Endowment%20Assets_2007%20NES.pdf) (last visited April 24, 2008).

26. *Kamehameha Schools*, 470 F.3d at 829, 832. The figure represents tuition for day students. The schools also enroll boarding students, who pay a somewhat augmented fee. Kamehameha Schools Admissions Department, at <http://www.ksbe.edu/admissions/mainpage.html> (last visited April 14, 2008).

27. *Kamehameha Schools*, 470 F.3d at 832.

28. *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d 1141, 1158 (D. Haw. 2003), *aff'd*, 470 F.3d 827 (9th Cir. 2006) (en banc).

29. Although the Schools acknowledged that the plaintiff was a "competitive candidate" and placed him on the waiting list, they did not offer him a place in either of the two years that he applied. *Id.* at 1157. The Schools conceded that if the plaintiff were of Native Hawaiian ancestry, he would likely have been admitted. *Id.*

30. Native Hawaiian ancestry, the Supreme Court has held, is a "racial classification." See *Rice v. Cayetano*, 528 U.S. 495, 514–15 (2000).

31. *Kamehameha Schools*, 295 F. Supp. 2d at 1158. Because the Kamehameha Schools likely is not a state actor, a claim under the Equal Protection Clause of the Fourteenth Amendment probably would have been unavailable. See *Tehrani*, *supra* note 13, at 116–18.

32. *Kamehameha Schools*, 295 F. Supp. 2d at 1175.

33. *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 416 F.3d 1025 (9th Cir. 2005), *rev'd en banc*, 470 F.3d 827 (9th Cir. 2006).

34. Mark Niese, *Hawaiian School Admissions Questioned*, WASH. POST, June 20, 2006, available at <http://www.washingtonpost.com/wpdyn/content/article/2006/06/20/AR2006062000187.html>.

35. Eight judges voted with the majority, and seven judges dissented. Judge Robert R. Beezer, who sat on the original panel and ruled with the plaintiff, however, did not participate in the subsequent en banc rehearing. See *Kamehameha Schools*, 416 F.3d at 1025; *Kamehameha Schools*, 470 F.3d at

a permissible remedial measure.<sup>36</sup>

Doe filed a petition for certiorari to the Supreme Court.<sup>37</sup> Four times the Court considered whether to hear the case, and four times it deferred a decision.<sup>38</sup> Then, on May 14, 2007, the parties announced a settlement.<sup>39</sup> Though its exact terms remain undisclosed, the settlement involved a payout to Doe of seven million dollars, an amount far greater than his actual damages.<sup>40</sup> Why would the schools, having emerged victorious from the Ninth Circuit with a favorable en banc decision, then reverse course and settle? There is only one plausible explanation: they perceived a significant risk that the Supreme Court would hear the dispute<sup>41</sup> and strike down the policy at issue. By settling with Doe, the Kamehameha Schools left the en banc Ninth Circuit opinion intact. They bought time—but they did not buy peace. One day after the parties announced their settlement, David B. Rosen, a Honolulu attorney, sent an email to two associates that later became broadly circulated. It began: “I am attempting to put together a group of plaintiffs to bring an action challenging Kamehameha Schools’ race-based admissions policy. The lawsuit will be identical to the John Doe lawsuit that was recently settled.”<sup>42</sup> Indeed, a future *Doe v. Kamehameha Schools II*, in one form or another, appears nearly inevitable.<sup>43</sup>

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827. Hence, the total number of appellate judges who have heard the case is sixteen, and they are evenly split.

36. See *Kamehameha Schools*, 470 F.3d at 849.

37. See Petition for Writ of Certiorari, *supra* note 6.

38. See Docket for 06-1202, Supreme Court of the United States, at <http://www.supremecourt.us/gov/docket/06-1202.htm> (last visited April 14, 2008).

39. Adam Liptak, *Prestigious Private Schools Settle Rights Suit by a Non-Hawaiian*, N.Y. TIMES, May 15, 2007, at A16, available at <http://www.nytimes.com/2007/05/15/us/15hawaii.html>.

40. See Jim Dooley, *Kamehameha Schools Settled Lawsuit for \$7M*, HONOLULU ADVERTISER, Feb. 8, 2008, available at <http://the.honoluluadvertiser.com/article/2008/Feb/08/In/hawaii802080371.html>.

41. See *Kamehameha Schools*, 470 F.3d at 889 (Kozinski, J., dissenting) (“[T]he question is close and ours may not be the last word.”).

42. Email from David B. Rosen to H. William Burgess and Richard O. Rowland (May 15, 2007, 09:59 HST), available at <http://www.khnl.com/Global/story.asp?S=6572282&nav=0bov>. See also Alexandre Da Silva, *Lawyer’s Search for Clients to Sue Kamehameha Raises Questions*, HONOLULU STAR-BULLETIN, May 23, 2007, available at <http://starbulletin.com/2007/05/23/news/story05.html>. Rosen has publicly stated that he seeks to eliminate the Kamehameha Schools’ “discriminatory admissions policy,” not merely to “create a case that the school can settle by just throwing a bunch of money at people.” Helen Altonn, *Kamehameha Schools Critic Licks His Chops Over Opinion*, HONOLULU STAR-BULLETIN, June 29, 2007, available at <http://starbulletin.com/2007/06/29/news/story11.html>; Da Silva, *supra* note 42.

43. See Dooley, *supra* note 40.

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This Note identifies and expounds on a tension between *Doe v. Kamehameha Schools* and “the single most honored opinion in the Supreme Court’s corpus,”<sup>44</sup> with which *Kamehameha Schools* shares the themes of race and education: *Brown v. Board of Education*.<sup>45</sup> Part II profiles the successes and failures of school desegregation in America, observing that contemporary inequalities cause many to be dissatisfied with the legacy of *Brown* and some to reject its once-sacrosanct ruling. Part III proffers a defense of the integrative ideal, particularly as applied to primary and secondary education, arguing—with reference to modern jurisprudence, social commentary, and social science research—that integration has great significance in contemporary multicultural, multiracial America. Part IV turns to § 1981 and *Kamehameha Schools* specifically, criticizing the latter’s interpretation of the former to sanction an “absolute racial bar”<sup>46</sup> as a rejection of the integrative ideal. Part V concludes by observing that the character of the Kamehameha Schools might be salvaged, even if the rule of *Kamehameha Schools* is not.

## II. BROWN AND ITS AFTERMATH: IMPLICATIONS FOR THE INTEGRATIVE IDEAL

“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>47</sup> With these words, *Brown* heralded the end to an era of judicially sanctioned apartheid.<sup>48</sup> Though judging the Reconstruction framers’ intent regarding desegregation to be “inconclusive,”<sup>49</sup> *Brown* rejected the half-hearted and hard-headed mandate of *Plessy v. Ferguson*,<sup>50</sup> bringing the dawn of a new era of race relations. In one fell swoop, it

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44. Jack M. Balkin, *Brown v. Board of Education: A Critical Introduction*, in *WHAT BROWN VS. BOARD OF EDUCATION SHOULD HAVE SAID* 1, 4 (Jack M. Balkin ed., 2001). See also MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 15 (1998) (presenting *Brown v. Board of Education* as “perhaps the most important judgment ever handed down by an American Supreme Court”).

45. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

46. *Kamehameha Schools*, 470 F.3d at 857 (Bybee, J., dissenting).

47. *Brown*, 347 U.S. at 495.

48. See *id.* at 494–95; *United States v. Fordice*, 505 U.S. 717, 754 (1992) (Scalia, J., concurring in part and dissenting in part) (“The constitutional evil . . . in *Brown I* was that blacks were told to go to one set of schools, whites to another. What made this ‘even-handed’ racial partitioning offensive to equal protection was its implicit stigmatization of minority students . . .”) (internal citation omitted).

49. *Brown*, 347 U.S. at 489.

50. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483.

eliminated the “most flagrant remaining insignia of slavery.”<sup>51</sup> For this, *Brown* has been lauded as “the foundation of our quest for equal justice in the United States,”<sup>52</sup> not to mention “the most important political, social, and legal event in America’s twentieth-century history.”<sup>53</sup> Though its practical impact toward achieving desegregation has been questioned,<sup>54</sup> *Brown*’s significance as a harbinger of hope is undisputed.

*Brown* proclaimed desegregation as the vehicle of equalization. First, desegregation would signal the end of judicially sanctioned racial stigma. Relying on studies of the psychological effects of segregation, *Brown* reasoned that “[t]o separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority.”<sup>55</sup> By declaring separate educational facilities to be “inherently unequal,”<sup>56</sup> *Brown* proclaimed that blacks could no longer be branded as “official pariah[s].”<sup>57</sup> Second, desegregation would produce equity in the realm of public education. For many years the attorneys of the National Association for the Advancement of Colored People had worked within the framework of *Plessy*, arguing that separate educational facilities were not unequal by necessity, but were unequal in practice.<sup>58</sup> Despite their substantial successes, disparities remained. As of 1954, for every dollar spent on schools for blacks, \$1.50 was spent on schools for whites.<sup>59</sup> Through desegregation, *Brown* foresaw equitable distribution of not only resources, but also educational opportunity.<sup>60</sup> If blacks were to attend the same schools as whites, it was assumed that they would benefit from the

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51. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 754 (rev. and expanded ed. 2004).

52. Howard A. Glickstein, *The Impact of Brown v. Board of Education and Its Progeny*, 23 *HOW. L.J.* 51, 55 (1980).

53. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 363 (2004) (quoting J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978*, at 6 (1979)).

54. *See, e.g., id.*

55. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

56. *Id.* at 495.

57. *See* KLUGER, *supra* note 51, at 754.

58. *See* CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 7–8 (2004).

59. Anthony Lewis, *What Has Brown Wrought?*, in *BROWN AT 50: THE UNFINISHED LEGACY* 104, 108 (Deborah L. Rhode & Charles J. Ogletree, Jr. eds., 2004).

60. As members of the Civil Rights Project at Harvard University have written, “[T]here was a strong belief that predominantly white schools offered better opportunities on many levels—more competition, higher graduation and college going rates, more demanding courses, better facilities and equipment, etc.” GARY ORFIELD & CHUNGMEI LEE, *CIV. RTS. PROJECT AT HARV. U., RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION* 29 (2006), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Racial\\_Transformation.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf).

same education. Third, desegregation was a prerequisite to cross-racial empathy, which could deconstruct the attendant stigmas of segregation.<sup>61</sup> If blacks and whites were to share the same classrooms, they would have to come to live and learn together.

The idealism of *Brown* has been tempered by the reality of a post-*Brown* world. Shortly before the case was decided, Justice Black predicted that some counties would not have “negroes and whites in the same school this generation”—and he was right.<sup>62</sup> *Brown II*<sup>63</sup> substantially delayed the remedy of desegregation, and “massive resistance”<sup>64</sup> inhibited it further. By 1964, only 2 percent of black children in the South attended integrated schools.<sup>65</sup> Even where educational desegregation was swift, residential segregation remained a stubborn barrier to integrated schools.<sup>66</sup> At least one critic in the years following *Brown* dismissed desegregation of urban schools as “a mockery.”<sup>67</sup> While the pace of change accelerated eventually, contemporary America is far from what the original proponents of *Brown* would have anticipated.

Today, changes in immigration and demographics have dramatically altered the landscape of American education. Asian and Latino students have grown exponentially as a percentage of the total school population, while the number of black students has increased more modestly.<sup>68</sup> Notwithstanding these changes, and regardless of *Brown*, racial isolation remains the rule, rather than the exception, in American public education. “White flight”—the exodus of white families from metropolitan centers to the suburbs<sup>69</sup>—has left a pattern of de facto segregation in the wake of *Plessy*’s de jure segregation.<sup>70</sup> As a result, segregation of neighborhoods

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61. See Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 945 (2004) (“[*Brown*] implicitly endorsed the idea that integration through racial assimilation would eventually cure racial bigotry.”).

62. KLARMAN, *supra* note 53, at 348.

63. *Brown v. Bd. of Educ.*, 347 U.S. 294 (1955).

64. OGLETREE, *supra* note 58, at 126 (explaining that Senator Harry Flood Byrd of Virginia coined the phrase “massive resistance” to refer to the effort to reverse *Brown*).

65. *Id.* at 128.

66. See KLARMAN, *supra* note 53, at 348.

67. *Id.*

68. See ORFIELD & LEE, *supra* note 60, at 6–7.

69. See CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 75–99 (2004). Whites continue to comprise the most isolated racial group, both in neighborhoods and in schools. See ORFIELD & LEE, *supra* note 60, at 8.

70. See CLOTFELTER, *supra* note 69, at 76–81. See also *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 29 (1st Cir. 2005) (Boudin, C.J., concurring) (“The problem is that in Lynn, as in many other cities, minorities and whites often live in different neighborhoods.”).

and schools in some areas is as complete today as it was when legislatively mandated.<sup>71</sup> Further, many previously desegregated areas evidence an ominous trend toward resegregation.<sup>72</sup>

De facto segregation remains a formidable obstacle to the educational equality that many believed to be secured by *Brown*. Isolation of minority students correlates strongly with concentrated poverty,<sup>73</sup> and concentrated poverty is “shorthand for a constellation of inequalities,” including underqualified and inexperienced teachers, below-average peer-level competition, insufficient resources, limited curricula, high failure and dropout rates, and inadequate access to higher education.<sup>74</sup> The situation is sufficiently dire that Robert Carter, who litigated *Brown* alongside Thurgood Marshall, writes that, for most black children, *Brown*’s guarantee is “an arid abstraction, having no effect whatever on the educational offerings . . . [they] are given or the deteriorating schools they attend.”<sup>75</sup>

The hope that “racial prejudice would fade with propinquity[,] and that generations which shared the same classrooms, sports teams, and residential neighborhoods would abandon the misconceptions of their forebears,”<sup>76</sup> has been realized<sup>77</sup>—but only in part.<sup>78</sup> In truth, no one ever expected the decision to end racial stigma immediately. As Richard Kluger elaborates, “[e]very colored American knew that *Brown* did not mean he

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71. See Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1410–12 (1993).

72. See ORFIELD & LEE, *supra* note 60, at 4. For example, the percentage of blacks attending majority white schools in the South steadily grew from 2 percent in 1964 to 43 percent in 1986, but has since declined. The percentage was 39 percent in 1991 and 30 percent in 1998. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 29, 29 (John Charles Boger & Gary Orfield eds., 2005).

73. See ORFIELD & LEE, *supra* note 60, at 29. Over 75 percent of intensely segregated minority schools have a majority of students whose families live below the poverty line. *Id.* at 30–31.

74. *Id.* at 29. See also Gary Orfield & Erica Frankenberg, *Reviving Brown v. Board of Education: How Courts and Enforcement Agencies Can Produce More Integrated Schools*, in BROWN AT 50: THE UNFINISHED LEGACY 184, 192 (Deborah L. Rhode & Charles J. Ogletree, Jr. eds., 2004).

75. James T. Patterson, *Legacies and Lessons*, in BLACK, WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT 297, 301 (Clare Cushman & Melvin I. Urofsky eds., 2004).

76. J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 994 (1995).

77. ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS* 15 (1997) (“[T]he achievements of the American people over the past half century in reducing racial prejudice and discrimination and in improving the socioeconomic and political condition of Afro-Americans are nothing short of astonishing.”).

78. *Id.* at x (“[T]here is still no room for complacency: because our starting point half a century ago was so deplorably backward, we still have some way to go before approaching anything like a resolution.”).

would be invited to lunch with the Rotary the following week.”<sup>79</sup> Fifty years hence, “conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”<sup>80</sup> This unfortunate reality is documented in survey research, psychological experiments, and media analyses.<sup>81</sup> Consequently, racial stigma underlies many forms of subtle, often unconscious discrimination, such as in daily interactions, consumer markets, and employment decisions.<sup>82</sup> Racial bias has both psychological and material repercussions, and extends far into the sphere of public discourse and political decisionmaking.<sup>83</sup>

Frustration with the legacy of *Brown* and the contemporary status of race relations in America has led to an outcome unthinkable just a generation ago. Increasing numbers of black scholars are vocally criticizing the once-sacrosanct *Brown*. Derrick Bell speculates that the Court in 1954 might have realized “a major educational victory” by reaffirming the doctrine of “separate but equal” and mandating that it be rigorously enforced.<sup>84</sup> Alex M. Johnson, Jr. forthrightly submits that *Brown* was “a mistake.”<sup>85</sup> He favors allowing minorities to choose “whether and when to integrate into mainstream society and culture.”<sup>86</sup> Roy L. Brooks argues not only that the promise of *Brown* “remains unfulfilled,” but also that integrated elementary and secondary schools may be “doing more harm than good.”<sup>87</sup> Accusing the Warren Court of “inflated expectations,”<sup>88</sup> he advocates a strategy of voluntary limited separation, involving both integrated and racially separate schools.<sup>89</sup>

What these critics share is that each champions not *Brown*, but its inverse. Whereas *Brown* heralded integration as the vehicle of equalization,<sup>90</sup> its critics reject integration to promote equalization.

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79. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 749 (1976).

80. *Gutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring).

81. Elizabeth S. Anderson, *Racial Integration as a Compelling Interest*, 21 *CONST. COMMENT.* 15, 17 (2004).

82. *Id.* at 18.

83. *See id.*

84. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 20–28 (2004).

85. Johnson, *supra* note 71, at 1409.

86. *Id.* at 1404.

87. ROY L. BROOKS, *INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY* 5 (1996).

88. *Id.* at 2.

89. *Id.* at 214.

90. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2800 (2007)

*Kamehameha Schools*, Part IV proposes, does likewise.

### III. A DEFENSE OF THE INTEGRATIVE IDEAL

In 1881, a black resident of Kansas, Leslie Tinnon, brought a writ of mandamus to compel his admission to a public school previously reserved for whites.<sup>91</sup> The issue in *Board of Education v. Tinnon* was whether, under the Fourteenth Amendment, a board of education, absent explicit legislative authorization, could maintain racially segregated public schools.<sup>92</sup> Holding that it could not, the Supreme Court of Kansas eloquently reasoned:

At the common schools, where both sexes and all kinds of children mingle together, we have the great world in miniature; there they may learn human nature in all its phases, with all its emotions, passions and feelings, its loves and hates, its hopes and fears, its impulses and sensibilities; there they may learn the secret springs of human actions, and the attractions and repulsions, which lead with irresistible force to particular lines of conduct. But on the other hand, persons by isolation may become strangers even in their own country; and by being strangers, will be of but little benefit either to themselves or to society. As a rule, people cannot afford to be ignorant of the society [that] surrounds them; and as all kinds of people must live together in the same society, it would seem to be better that all should be taught in the same schools.<sup>93</sup>

Nearly a century later, Justice Marshall, dissenting in *Milliken v. Bradley*, echoed the sentiment. “[U]nless our children begin to learn together,” he wrote, “there is little hope that our people will ever learn to live together.”<sup>94</sup> Together these statements, one predating and the other postdating *Brown*, articulate the integrative ideal that undergirds that decision itself. This section proffers a defense of the integrative ideal, staging a criticism of *Kamehameha Schools* as a retreat from it.

Racial separation is the close cousin of racial stigmatization, yielding a cycle of prejudice that feeds on itself.<sup>95</sup> A society without cross-racial

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(Breyer, J., dissenting) (referring to “*Brown*’s promise of integrated primary and secondary education”).

91. Bd. of Educ. v. Tinnon, 26 Kan. 1, 15–16 (1881).

92. *Id.* at 16–17.

93. *Id.* at 19. Twenty-six years earlier, an abolitionist had founded the integrated Berea College in nearby Kentucky. Berea College, John Gregg Fee, at <http://www.berea.edu/150/timeline/fee.html> (last visited April 14, 2008). In 1867, a black minister proclaimed to its students, “[L]et there be Bereas planted throughout the nation, institutions in which the youth of the land white and colored shall study together, play together, sing together, worship together, and there will be no war of races.” RICHARD SEARS, A UTOPIAN EXPERIMENT IN KENTUCKY: INTEGRATION AND SOCIAL EQUALITY AT BEREA, 1866–1904, at 56–57 (1996).

94. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

95. See Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L.

interaction is one that has abandoned a search for common ground and denied the possibility of cross-racial empathy.<sup>96</sup> Separation “both expresses and reinforces myriad racial antipathies—from hatred, contempt, resentment, and distrust, to discomfort born of unfamiliarity—that interfere with interaction when such opportunities arise.”<sup>97</sup> It is not only a symptom of discrimination, but also a cause of it.<sup>98</sup> *Brown* itself recognized that racial separation is harmful, even when not imposed by law.<sup>99</sup> Ultimately, separation calls the very legitimacy of democratic institutions into question.<sup>100</sup> If race is the organizing principle of social and political life, we are left with a society “where leaders are substantially spared the need for interracial communication, where groups are encouraged to regard public resources as matters of racial entitlement, and where every minority . . . [can assert] a special racial experience [that] others have not had and thus cannot question.”<sup>101</sup>

Just as racial separation is self-reinforcing, so too is racial integration.<sup>102</sup> In contradistinction to segregation, integration seeks to “sow racial unity, not to breed racial fissures[,] . . . to eradicate the stigma of racial inferiority, not to spawn it[,] . . . to break down racial stereotypes, not to build them[,] . . . to celebrate our nation’s racial diversity, not to condemn it.”<sup>103</sup> Integration is the enemy of prejudice, challenging stereotypes and encouraging cross-racial understanding.<sup>104</sup> Its advocates, supported by a formidable body of social science evidence,<sup>105</sup> recognize that “racial identity . . . [can] trigger stereotypes, biases, and divisions, and

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REV. 60, 71 (2004).

96. See Wilkinson, *supra* note 76, at 1004–07.

97. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1205 (2002).

98. See Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. 1385, 1385, 1394 (2003).

99. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (quoting a finding in the earlier Kansas case: “Segregation of white and colored children in public schools has a detrimental effect . . . . *The impact is greater* when it has the sanction of the law . . . .”) (emphasis added).

100. See Anderson, *supra* note 81, at 21–22.

101. Wilkinson, *supra* note 76, at 1005.

102. Karst, *supra* note 95, at 71.

103. Brief of National School Boards Ass’n et al. as Amici Curiae in Support of Respondents at 18, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915).

104. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); Dora W. Klein, *Beyond Brown v. Board of Education: The Need to Remedy the Achievement Gap*, 31 J.L. & EDUC. 431, 451–52 (2002). Notably, gentiles who had Jews as schoolmates and childhood friends were among those more likely to be rescuers during the Holocaust. DAVID P. GUSHEE, *THE RIGHTEOUS GENTILES OF THE HOLOCAUST: A CHRISTIAN INTERPRETATION* 105–06 (1994).

105. See *infra* text accompanying notes 149–154.

that intergroup cooperation can help to overcome those social ills.”<sup>106</sup> Cooperation is central to integration, which in its truest form, is not premised upon interaction per se, but upon the mutual assistance of social equals.<sup>107</sup> As such, it requires the joint efforts of diverse individuals toward achieving a common goal, “induc[ing] favoritism toward those in the cooperative group.”<sup>108</sup>

The value of integration takes root in modern social, political, and legal history. Integration was an objective of many framers of the Fourteenth Amendment.<sup>109</sup> It was a driving force behind the civil rights movement in general<sup>110</sup> and the Civil Rights Act of 1964 in particular.<sup>111</sup> It was the original justification for affirmative action,<sup>112</sup> and it informed the Court’s decision in *Brown* itself.<sup>113</sup> True—*Brown* did not mandate integration per se, though it condemned segregation and demanded its demise. Yet by calling for an end to “separate but equal” rather than rigid adherence to it, *Brown* clearly foresaw a future of greatly increased interracial interaction.<sup>114</sup> *Brown* not only propounded the principle that segregation is antithetical to equal protection, but also symbolized the ideal that integration is a prerequisite to the dream of “one Nation, indivisible.”<sup>115</sup>

More recently, the Court has assumed the mantle of integration in both

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106. CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 148 (2003).

107. See GORDON W. ALLPORT, THE NATURE OF PREJUDICE 267 (Anchor Books ed., Doubleday Anchor Books 1958) (1954).

108. Anderson, *supra* note 81, at 21.

109. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1140 (1995).

110. See, e.g., Martin Luther King, Jr., Keynote Address at the March on Washington, D.C. for Civil Rights: I Have a Dream (Aug. 28, 1963), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217, 219 (James Melvin Washington ed., 1986) (“I have a dream that one day . . . little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers.”).

111. See 42 U.S.C. § 2000a–h (2000). See also John F. Kennedy, Report to Congress Outlining a Civil Rights Bill (June 19, 1963), in THE CIVIL RIGHTS READER: BASIC DOCUMENTS OF THE CIVIL RIGHTS MOVEMENT 245, 247 (Leon Friedman ed., 1967) (decrying segregation of public accommodations as “a daily insult which has no place in a country proud of its heritage—the heritage of the melting-pot, of equal rights, of one nation and one people”).

112. Samuel Issacharoff, *Law and Misdirection in the Debate Over Affirmative Action*, 2002 U. CHI. LEGAL F. 11, 23.

113. See Wilkinson, *supra* note 76, at 994.

114. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954).

115. See Edwards, *supra* note 61, at 945 (“*Brown* addressed segregation in public education, but the case was symbolically about so much more. The decision implicitly endorsed the idea that integration through racial assimilation would eventually cure racial bigotry.”).

its desegregation and other equal protection jurisprudence. In *Parents Involved in Community Schools v. Seattle School District No. 1*, a majority of the Justices held last term that “avoiding racial isolation” in public primary and secondary schools is a compelling state interest, as is “achieving a diverse student population.”<sup>116</sup> Numerous cases similarly recognize the right of public school administrators to achieve integration through school assignments that consider race.<sup>117</sup> While the Court’s public education jurisprudence presents integration, absent a constitutional violation, as a permissive objective subject to strict scrutiny, not a mandatory one<sup>118</sup>—consistent with the tradition of local control over primary and secondary public education<sup>119</sup>—cases in other contexts more pointedly espouse the constitutional virtues of integration. For example, *Johnson v. California*, which held that a policy of the California Department of Corrections to temporarily isolate new inmates by race was subject to strict scrutiny,<sup>120</sup> observes that segregated cells may “reinforce racial and ethnic divisions.”<sup>121</sup> A segregative policy, *Johnson* emphasizes, threatens to “perpetuat[e] the notion that race matters most,” potentially exacerbating interracial violence, rather than preventing it.<sup>122</sup>

Probably the Court’s most enthusiastic adoption of the integrative ideal derives from *Grutter v. Bollinger*, which upheld against an equal

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116. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2835 (2007) (Breyer, J., dissenting); *id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

117. See, e.g., *id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment) (“[A] district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”); *Bustop, Inc. v. Bd. of Educ.*, 439 U.S. 1380, 1383 (1978) (Rehnquist, Cir. J.) (affirming the constitutionality of a plan to integrate schools beyond the extent mandated by the Constitution); *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) (“[A]s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.”).

118. See *Parents Involved*, 127 S. Ct. at 2752 (plurality opinion) (“In order to satisfy . . . [strict scrutiny], the school districts must demonstrate that the use of individual racial classifications . . . is ‘narrowly tailored’ to achieve a ‘compelling’ government interest.”); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982) (“[I]n the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process.”); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (“To . . . [integrate schools] as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.”).

119. See *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) (“[O]ur cases have . . . firmly recognized that local autonomy of school districts is a vital national tradition.”); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) (“No single tradition in public education is more deeply rooted than local control . . .”).

120. *Johnson v. California*, 543 U.S. 499, 502, 515 (2005).

121. *Id.* at 507.

122. *Id.*

protection challenge the affirmative action policy of the University of Michigan Law School.<sup>123</sup> Reinvigorating and reinventing Justice Powell's concurrence in *Regents of the University of California v. Bakke*,<sup>124</sup> *Grutter* champions educational diversity as a means toward societal integration, reasoning that diversity in higher education promotes "cross-racial understanding,"<sup>125</sup> prepares individuals to work in "an increasingly diverse workforce and society," and trains "leaders with legitimacy in the eyes of the citizenry."<sup>126</sup> As one commentator observes, "the most important function of affirmative action recognized in *Grutter* is forward-looking: to make possible the effective functioning of leading American institutions that have been historically segregated (or stratified) by integrating them at all levels."<sup>127</sup> Recounts another: "'diversity' is another way of talking about integration."<sup>128</sup> Many likewise recognize both the extent to which *Grutter* embraces an integrative ideal, and the means whereby its reasoning can be extended to other contexts, notably employment.<sup>129</sup>

*Grutter* underscores that the integrative ideal, while valuable throughout society, is particularly salient in our nation's schools.<sup>130</sup> Like the concurrence of Justice Powell in *Bakke*, which "builds squarely on the rock of *Brown*,"<sup>131</sup> *Grutter* "expands upon the full-blooded integrationist ideal developed by *Brown* and its successors."<sup>132</sup> Note that *Brown* did not overrule "separate but equal" altogether, but declared only that "in the field of public education," it had "no place."<sup>133</sup> Education, as *Brown* emphasizes,

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123. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

124. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 272–320 (1978) (Powell, J., concurring).

125. *Grutter*, 539 U.S. at 330.

126. *Id.* at 330–32 (quoting Brief of the American Educational Research Ass'n et al. as Amicus Curiae in Support of Respondents at 3, *Grutter*, 539 U.S. at 306 (No. 02-241)).

127. Karst, *supra* note 95, at 71.

128. Anderson, *supra* note 81, at 26.

129. See, e.g., Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 23–26 (2005); Eric A. Tilles, Casenote, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451, 461–63 (2004); Jessica Bulman-Pozen, Note, *Grutter at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1437 (2006).

130. On a similar note, Frederick Douglass believed that education itself "means emancipation[,] . . . light and liberty[,] . . . the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring) (quoting Frederick Douglass, *The Blessings of Liberty and Education*, Address Delivered in Manassas, Virginia (Sept. 3, 1894), in 5 THE FREDERICK DOUGLASS PAPERS 623 (J. Blassingame & J. McKivigan eds., 1992)).

131. Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 U.C.L.A. L. REV. 1745, 1775 (1996).

132. Anderson, *supra* note 81, at 29.

133. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

is a “principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”<sup>134</sup> The value of integrated schools is self-evident. Even the plaintiffs in *Gratz v. Bollinger*, the companion case to *Grutter*, conceded arguendo that diversity in education is “good, important, and valuable.”<sup>135</sup> Schools not only serve to prepare students to “lead economically productive lives to the benefit of us all,”<sup>136</sup> but also to act as melting pots where members of diverse cultures, ethnicities, and nationalities can realize their collective humanity.<sup>137</sup> Kenneth Karst declares integration of public life to be “the best long-term remedy for the private beliefs and behavior that perpetuate the effects of racial caste.”<sup>138</sup> Given that schools provide both a cultural and academic education, they appear among the most suitable spaces for integration.<sup>139</sup>

If integration is a virtue in society generally and in schools specifically, then it is uniquely so in primary and secondary schools for two reasons.<sup>140</sup> First, whereas selective higher education is reserved to relatively few,<sup>141</sup> almost all adolescents in the United States receive a basic

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134. *Id.* at 493. See also *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 437 (1993) (Blackmun, J., concurring) (“Our cases have consistently recognized the importance of education to the professional and personal development of the individual.”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (observing that public schools prepare “students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members”); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (acknowledging the fundamental role of education in maintaining “the fabric of our society” as well as “our political and cultural heritage”).

135. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 823 (E.D. Mich. 2000), *rev'd in part*, 539 U.S. 244 (2003).

136. *Plyler*, 457 U.S. at 221.

137. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) (“[O]ne of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous ‘melting pot’ do not identify essential differences among the human beings that inhabit our land.”).

138. Kenneth L. Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 SUP. CT. REV. 1, 36.

139. *Cf. Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.”).

140. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2822 (2007) (Breyer, J., dissenting) (“And it was *Brown*, after all, focusing upon primary and secondary schools, not *Sweatt v. Painter*, focusing on law schools, or *McLaurin v. Oklahoma State Regents*, focusing on graduate schools, that affected so deeply not only Americans but the world.”) (internal citations omitted).

141. Fewer than 48 percent of eighteen to twenty-four year-olds in the United States are enrolled in a postsecondary institution or have received a postsecondary degree. U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2003, at 1, 4 (2003), available at <http://www.census.gov/population/socdemo/education/cps2003/tab03-01.pdf>. Among postsecondary first-year students, about 20 percent attend a selective four-year institution, whereas 80 percent attend a

education in either public or private schools.<sup>142</sup> By implication, a broad swath of society that will never experience an integrated college or university may benefit from an integrated primary or secondary school. Second, individuals are exposed to primary and secondary education at a formative stage, when they are coming to internalize prevalent racial stereotypes.<sup>143</sup> Correspondingly, an effective means to combat such stereotypes is to expose students to integrated environments, particularly those that promote positive cross-racial interaction.<sup>144</sup> As one commentator has noted, the youngest psyches are also the most pliable: “[a]t the earliest stages of education, the shadow of racism has had less time to hover.”<sup>145</sup> The executive<sup>146</sup> and legislative<sup>147</sup> branches, echoed by the judiciary,<sup>148</sup>

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marginally selective or nonselective two- or four-year institution. ANDREA VENEZIA, MICHAEL W. KIRST, & ANTHONY L. ANTONIO, STANFORD U. BRIDGE PROJECT, BETRAYING THE COLLEGE DREAM: HOW DISCONNECTED K-12 AND POSTSECONDARY EDUCATION SYSTEMS UNDERMINE STUDENT ASPIRATIONS 14 (2004), available at <http://www.stanford.edu/group/bridgeproject/betrayingthecollege-dream.pdf>.

142. See Tamara Henry, *Report: Greater Percentage of Americans Educated*, USA TODAY, June 5, 2002, at D12, available at <http://www.usatoday.com/news/education/2002-06-05-education-census.htm>. But see *Wisconsin v. Yoder*, 406 U.S. 205, 214, 218–19 (1972) (recognizing that the Free Exercise Clause of the First Amendment creates an exception to state compulsory school attendance laws).

143. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005) (en banc) (Kozinski, J., concurring), *rev'd*, 127 S. Ct. 2738 (2007) (“It is difficult to deny the importance of teaching children, during their formative years, how to deal respectfully and collegially with peers of different races. . . . The reality is that attitudes and patterns of interaction are developed early in life and, in a multicultural and diverse society such as ours, there is great value in developing the ability to interact successfully with individuals who are very different from oneself.”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 894 (1982) (Powell, J., dissenting) (noting the responsibility of school boards to supervise “the education of the youth of our country during their most formative and impressionable years”).

144. See Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 6, app. at 4–5, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908, 05-915) [hereinafter Brief of 553 Social Scientists]; Willis D. Hawley, *Designing Schools That Use Student Diversity to Enhance Learning of All Students*, in *LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS* 31, 33–34, 41 (Erica Frankenberg & Gary Orfield eds., 2007). See also *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 16 (1st Cir. 2005) (stating that it “is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking”) (quoting *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 356 (D. Mass. 2003)).

145. Lia B. Epperson, *True Integration: Advancing Brown’s Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 216 (2005).

146. See Richard Nixon, Special Message to the Congress Proposing the Emergency School Aid Act of 1970 (May 21, 1970), in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 1970*, at 448, 449 (1971) (“This Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education—not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today’s world.”).

have all recognized the value of integrated primary and secondary schools.

Social science evidence further reinforces the value of integrated schools. Black students who have graduated from integrated schools, relative to their counterparts who have not, are less likely to view whites negatively, more likely to live in integrated residential areas, and more likely to interact with whites in various facets of life, including the workplace.<sup>149</sup> Conversely, interracial contact can serve to deconstruct stereotypes of whites toward blacks.<sup>150</sup> These patterns hold true across racial groups, as studies generally show that interracial contact in desegregated schools fosters tolerance and ameliorates cross-racial sociability and friendship. The impact is greatest at schools that encourage collaborative activities, including cooperative learning.<sup>151</sup> By contrast, understanding of—and empathy toward—members of other races is neither easily learned nor readily retained in racially homogenous schools.<sup>152</sup> Integrated schools thus prepare youth to participate in an integrated workforce and to serve in an integrated military. As *Grutter* reasons, “the skills needed in today’s increasingly global marketplace can . . . be developed [only] through exposure to widely diverse people, cultures, ideas, and viewpoints,”<sup>153</sup> and, as U.S. military high-ranking retired officers and civilian leaders assert, a “highly qualified, racially diverse officer corps . . . is essential to . . . national security.”<sup>154</sup>

These benefits of integration do not inure solely to members of minority or majority groups. Rather, they are reciprocal. Attending integrated schools helps both minorities and members of the majority to

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147. See 20 U.S.C. § 7201(5)(A) (2000) (“[I]t is in the best interest of the Federal Government to . . . support . . . school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of . . . education.”).

148. See *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment) (“This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.”).

149. JACK GREENBERG, *CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT* (Anniversary ed. 2004), reprinted in *BROWN AT 50: THE UNFINISHED LEGACY* 148, 161 (Deborah L. Rhode & Charles J. Ogletree, Jr. eds., 2004).

150. *Id.* See also Brief of 553 Social Scientists, *supra* note 144, at 6–7, app. at 6.

151. Hawley, *supra* note 144, at 32–33. For a critique of this finding, see *Parents Involved*, 127 S. Ct. at 2780–81 (Thomas, J., concurring) (noting that “it is unclear whether increased interracial contact improves racial attitudes and relations”).

152. See Brief of 553 Social Scientists, *supra* note 144, app. at 4–5; Hawley, *supra* note 144, at 33.

153. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

154. *Id.* at 331.

prepare for “citizenship in our pluralistic society,”<sup>155</sup> and to live with others “in harmony and mutual respect.”<sup>156</sup> “An African American from rural Georgia . . . can learn from a white suburbanite from Phoenix, and the suburbanite can learn from the Georgian.”<sup>157</sup> As one district court observes, it is “well documented and widely recognized by educational authorities that the elimination of racial isolation . . . is beneficial to all students, both black and white.”<sup>158</sup> Integration, by definition, is not a one-way street.

Integrated schools also expand the interpersonal networks of both white and minority students. Students are consequently exposed to professional and educational opportunities to which members of their race might not otherwise be exposed.<sup>159</sup> The trend helps to explain why minorities who attend desegregated schools are more likely, relative to their counterparts who do not, to have high-paying white-collar jobs.<sup>160</sup> Furthermore, by expanding the interpersonal networks of minority students, integrated schools can create a positive-feedback loop. As noted by one study, “improving economic and educational opportunities for one generation of minority individuals raises the socioeconomic status of the next generation, so that those who follow are more apt to begin school at the same starting point as their nonminority classmates.”<sup>161</sup>

Research suggests that the benefits of integrated classrooms may be not only social, but also academic. Desegregation following *Brown* realized modest improvement in the achievement of black students,<sup>162</sup> particularly as measured on reading tests.<sup>163</sup> The greatest improvement occurred after *Alexander v. Holmes County Board of Education*,<sup>164</sup> which disclaimed

155. *Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., dissenting).

156. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 485 n.5 (1979) (Powell, J., dissenting).

157. *Amar & Katyal*, *supra* note 131, at 1778.

158. *Lee v. Nyquist*, 318 F. Supp. 710, 714 (W.D.N.Y. 1970), *aff'd sub nom. Chropowiki v. Lee*, 402 U.S. 935 (1971).

159. See Brief of 553 Social Scientists, *supra* note 144, at 8, app. at 21; SUSAN E. EATON, *THE OTHER BOSTON BUSING STORY: WHAT'S WON AND LOST ACROSS THE BOUNDARY LINE* 138–43 (2001); Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 99, 100 (Gary Orfield & Michal Kurlaender eds., 2001); Walter G. Stephan, *School Desegregation: Short-Term and Long-Term Effects*, in *OPENING DOORS: PERSPECTIVES ON RACE RELATIONS IN CONTEMPORARY AMERICA* 100, 109–10 (Harry J. Knopke, Robert J. Norrell, Ronald W. Rogers eds., 1991).

160. Brief of 553 Social Scientists, *supra* note 144, app. at 21–23.

161. William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. NEGRO EDUC. 255, 257 (1997).

162. Brief of 553 Social Scientists, *supra* note 144, 7, app. at 13–14.

163. *Id.* app. at 13–14; Hawley, *supra* note 144, at 34.

164. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

*Brown II* and accelerated the pace of desegregation.<sup>165</sup> At the Charlotte-Mecklenburg Schools in particular, desegregation pursuant to a court order<sup>166</sup> facilitated marked improvement in the academic performance of black and white students, but especially the former.<sup>167</sup> Contemporary studies generally confirm this trend.<sup>168</sup> Minority students at integrated schools are more likely than their counterparts at racially homogenous schools to complete high school and receive high grades.<sup>169</sup> The benefits are most significant among those exposed to integrated learning at a young age.<sup>170</sup>

Some, including Malcolm X and Justice Thomas, have understandably chafed at the proposal that minorities learn better in integrated schools than in racially homogenous schools.<sup>171</sup> To be sure, the existence of a causal relationship is far from clear.<sup>172</sup> This much is known: motivation to succeed in school derives significantly from social relationships, skills, and competence.<sup>173</sup> Thus, factors such as peer encouragement *can* promote improved academic performance. On the other hand, as noted in Part II, predominantly minority schools are underfunded and generally inferior to others.<sup>174</sup> Hence, integrated schools may yield academic benefits simply

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165. GREENBERG, *supra* note 149, at 161.

166. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971). See also DAVISON M. DOUGLAS, *READING, WRITING & RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS* 204 (1995) (observing that the Charlotte-Mecklenburg Schools became “the most fully desegregated urban school system in the nation’s history”).

167. Brief of the Swann Fellowship et al. as Amici Curiae in Support of Respondents at 11, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915).

168. See Brief of the American Educational Research Ass’n as Amicus Curiae in Support of Respondents at 10, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908, 05-915) (“[B]oth early desegregation research and recent statistical and econometric analyses that isolate the effects of racial composition on student achievement indicate that there are positive effects on minority student achievement scores arising from diverse school settings.”). For an alternate interpretation of the relevant literature, see *Parents Involved*, 127 S. Ct. at 2776–79 (Thomas, J., concurring) (characterizing the impact of integration upon minority student achievement as inconclusive).

169. Stephan, *supra* note 159, at 109.

170. See Brief of 553 Social Scientists, *supra* note 144, app. at 14; Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 741–42 (1998).

171. See *Missouri v. Jenkins*, 515 U.S. 70, 121–22 (1995) (Thomas, J., concurring) (“[T]here is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment.”); Malcolm X, *Answers to Questions at the Militant Labor Forum* (Apr. 8, 1964), in *BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS, AND A LETTER BY MALCOLM X* 14, 17 (George Breitman ed., 1970) (“So, what the integrationists, in my opinion, are saying, when they say that whites and blacks must go to school together, is that the whites are so much superior that just their presence in a black classroom balances it out. I can’t go along with that.”).

172. See Brief of 553 Social Scientists, *supra* note 144, app. at 15; Klein, *supra* note 104, at 455.

173. Brief of 553 Social Scientists, *supra* note 144, app. at 15.

174. See *infra* text accompanying notes 73–75.

because they are better schools.<sup>175</sup> In either case, integrated classrooms encourage dialogue among students with manifold social perspectives and diverse cultural knowledge, thereby enhancing the critical thought of all<sup>176</sup>—a fact that the Ninth Circuit itself has noted.<sup>177</sup>

A final benefit of integration is its popularity. The resistance that succeeded *Brown* is a far cry from the tenor of contemporary America.<sup>178</sup> For many of the reasons mentioned above, “there has been a massive and continuing movement of the American public from overwhelming acceptance of the principle of segregated schooling . . . toward acceptance of the principle of integrated schooling.”<sup>179</sup> One recent poll revealed that an “overwhelming majority of public school teachers and students” believe racially integrated schooling to be important.<sup>180</sup> In another, 57 percent of adult respondents expressed that integrated schools are desirable for students, whereas only 7 percent expressed the opposite.<sup>181</sup> Increasingly, democratically elected local boards have approved voluntary integration plans, as in Seattle and Louisville.<sup>182</sup> Even when integration has compelled significant controversy, many continue to perceive it as a worthwhile goal.<sup>183</sup>

The value of the integrative ideal is no less significant in the context of private education than public education. The arguments for integration in public education are entirely transferable to the private sphere. Critics may argue that private schools have a measure of independence under the Constitution—which is true—but their independence does not imply a license to discriminate on the basis of race. Parents have long enjoyed a

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175. See Brief of 553 Social Scientists, *supra* note 144, app. at 15; Jaekyung Lee, *Can Reducing School Segregation Close the Achievement Gap?*, in LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS 74, 88–89 (Erica Frankenberg & Gary Orfield eds., 2007).

176. Brief of 553 Social Scientists, *supra* note 144, app. at 12.

177. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1174–75 (9th Cir. 2005) (en banc), *rev'd*, 127 S. Ct. 2738 (2007).

178. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2836–37 n.21 (2007) (Breyer, J., dissenting) (“Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it.”).

179. HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 103 (1997) (emphasis removed).

180. Karla Scoon Reid, *Survey Probes Views on Race*, EDUC. WEEK, May 12, 2004, at 1.

181. ORFIELD & LEE, *supra* note 60, at 5.

182. See *Parents Involved*, 127 S. Ct. at 2809–11 (Breyer, J., dissenting).

183. See, e.g., JOSEPHINE LOUIE, CIV. RTS. PROJECT AT HARV. U., WE DON’T FEEL WELCOME HERE: AFRICAN AMERICANS AND HISPANICS IN METRO BOSTON 37–38 (2005), available at <http://www.civilrightsproject.ucla.edu/research/metro/pollpaper.pdf>.

due process right to send their children to private schools,<sup>184</sup> and private schools have long held limited protection from state regulation.<sup>185</sup> *Runyon v. McCrary* confirmed, however, that private schools are not immune from compliance with civil rights laws.<sup>186</sup> Indeed, § 1981, the statutory basis for both *Runyon* and *Kamehameha Schools*, makes no distinction between the racially discriminatory practices of public and private entities.<sup>187</sup> As *Bob Jones University v. United States* further clarifies, racial discrimination in education—whether performed by a public or private actor—is “contrary to public policy.”<sup>188</sup>

A related criticism argues that some integration of education is wrong because it is antithetical to cultural pluralism, and that some integration of private education is doubly wrong because private education has provided a historical bastion for cultural pluralism.<sup>189</sup> At its essence, this argument derives from the concern that integrated schools can be instruments of cultural assimilation. The concern warrants merit, particularly given the historical use of education to “Americanize” both recent immigrants<sup>190</sup> and indigenous peoples.<sup>191</sup> Case in point: recall that a stated purpose of the Kamehameha Schools is to “cultivate, nurture, and perpetuate Hawaiian culture, values, history, and language.”<sup>192</sup> The need for such a purpose derives from historical emasculation of indigenous culture, values, history, and language through the spread of Christian missions in Hawaii and the consolidation of American economic and political control.<sup>193</sup> Throughout, education was the primary means of deculturalization.<sup>194</sup> While Native

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184. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

185. See *Farrington v. Tokushige*, 273 U.S. 284, 298–99 (1927) (striking down a Hawaiian statute that unreasonably restricted foreign language schools); *Meyer v. Nebraska*, 262 U.S. 390, 400–04 (1923) (invalidating a state law that prohibited instruction of foreign languages to elementary students).

186. See *Runyon v. McCrary*, 427 U.S. 160, 178–79 (1976).

187. See 42 U.S.C. § 1981(c) (2000) (“The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.”).

188. *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983) (denying federal tax exemptions to private schools with racially discriminatory admissions policies).

189. See David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74, 75 (1968).

190. See DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION 180–81* (1974).

191. See JOEL SPRING, *DECULTURALIZATION AND THE STRUGGLE FOR EQUALITY: A BRIEF HISTORY OF THE EDUCATION OF DOMINATED CULTURES IN THE UNITED STATES 18–34* (2d ed. 1997).

192. *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 843 (9th Cir. 2006) (en banc), cert. dismissed, 127 S. Ct. 2160 (2007).

193. See ELIZABETH BUCK, *PARADISE REMADE: THE POLITICS OF CULTURE AND HISTORY IN HAWAI’I 126–27* (1993).

194. See *id.* at 126–33 (“It was primarily through the printed word and the mind that the missionaries sought to gain access to the Hawaiian soul. . . . [Hawaiians] reportedly were so keen to

Hawaiian assimilation predominantly transpired in segregated schools,<sup>195</sup> *Brown* itself has inspired criticism, both from black nationalists in the past<sup>196</sup> and others in the present,<sup>197</sup> for failing to give voice to the distinctive cultural contributions of minority heritage in desegregated schools. Racial integration, the critics lament, is something that minorities are doomed to experience “on terms set by whites.”<sup>198</sup>

Racial separation, however, is neither prerequisite to nor concomitant with cultural pluralism. First, race and culture are distinct, as well as “overlapping and divergent”;<sup>199</sup> they ought to be appreciated as such. “Culture crosses racial boundaries. People of any ‘race’ may become acculturated to cultural traits of other groups.”<sup>200</sup> Second, the curricula of integrated schools can—and often do—embrace manifold cultural traditions. As Judge Harry T. Edwards explains, “[i]ntegration and assimilation are no longer synonymous. . . . In an undergraduate English class on twentieth-century American literature, a student is as likely to read Zora Neale Hurston or Toni Morrison as Thomas Pynchon or Philip Roth.”<sup>201</sup> Charles J. Ogletree, Jr. strikes a similar chord:

The challenge of *Brown* was not only to achieve integration but also to recognize that once integrated, all of us are diverse: we have all given up

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learn to read and write that even those reluctant to be Christianized were willing to put up with religious meetings and some of the rules of the missionaries . . . . The shift from orality to writing was accompanied by the social diminishment of Hawaiian and the ascending use and practice of English. . . . The metaphors, tropes, and logic embedded in English carried new interpretations and representations of reality. With English came new orders of knowledge and new values, and old relations of power dissolved as new ones were constructed. . . . After the overthrow of the monarchy, the Americanization of the heterogeneous population became a political as well as a cultural goal of the American political leaders as they consolidated their control over the islands.”)

195. See MICHAEL HAAS, *INSTITUTIONAL RACISM: THE CASE OF HAWAI’I* 167 (1992).

196. See, e.g., Malcolm X, *supra* note 171, at 16–17 (“[I]f we can get an all-black school, that we can control, staff it ourselves with the type of teachers that have our good at heart, with the type of books that have in them many of the missing ingredients that have produced this inferiority complex in our people, then we don’t feel that an all-black school is necessarily a segregated school. It’s only segregated when . . . controlled by someone from outside.”).

197. See, e.g., BELL, *supra* note 84, at 165–66 (“Many advocates of nonpublic schools serving urban black children maintain that *Brown*’s integrative mandate is essentially assimilative. Black students are sent to white schools where teaching, curricula, and conceptions of merit express the homogeneity of their history. Because little attention is given to multiracial, multicultural, or multi-class issues, black students often feel their school environment is alien to their experience.”); Johnson, *supra* note 71, at 1431 (“*Brown*’s failure . . . [lies] in its acceptance of a monolithic, color-blind society premised on the continued supremacy of white cultural norms, without regard to the role to be played by African-American cultural norms.”).

198. Wilkinson, *supra* note 76, at 1004.

199. Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & L. 33, 34 (2001).

200. *Id.* at 34–35 (internal footnote omitted).

201. Edwards, *supra* note 61, at 960 (emphasis removed).

something to gain something more. Integration does not simply place people side by side in various institutional settings; rather, it remakes America, creating a new community founded on a new form of respect and tolerance. Implicit in that challenge was the recognition that white society had to change to acknowledge in substantive ways the achievements of African-American society. It was not enough simply to admit African-Americans to the table, or even to let them dine, but to partake of the food they brought with them.<sup>202</sup>

Third, schools can embrace a set of cultural traditions other than those associated with the majority race. Historically black institutions are an example. Justice Thomas, concurring in *United States v. Fordice*, endorsed the pedagogical value of “operat[ing] a diverse assortment of institutions . . . open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another.”<sup>203</sup> Note that such institutions need not, generally do not—and, when publicly funded, cannot<sup>204</sup>—rely on racially exclusionary policies. To the contrary, most welcome students of all races.<sup>205</sup> For example, there is a historically black primary school in New York named “Mrs. Black’s School for All Children,”<sup>206</sup> and the first students to attend Howard University, perhaps the most storied historically black institution of all, were white women.<sup>207</sup>

Of course, most historically black institutions and analogous entities are not meaningfully integrated. This Note agrees with Justice Thomas and others<sup>208</sup> that legally they should not need to be. Hence, a brief caveat is in

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202. OGLETREE, *supra* note 58, at 295. *See also* Karst, *supra* note 95, at 72 (“The integration that matters is one founded on equal citizenship, that is, full participation of all groups at all levels of the polity and the economy. In this perspective, minority cultural forms are not to be ‘assimilated’ out of existence, but themselves to have causative roles in reshaping the national polity and the culture of a nation.”).

203. *United States v. Fordice*, 505 U.S. 717, 749 (1992) (Thomas, J., concurring).

204. *Id.* at 743.

205. BELL, *supra* note 84, at 168. *See also* JOHN A. CARPENTER, SWORD AND OLIVE BRANCH: OLIVER OTIS HOWARD 170 (1964) (observing that the original charter of Howard University made no mention of race).

206. BELL, *supra* note 84, at 168.

207. CARPENTER, *supra* note 205, at 171.

208. *See, e.g., Fordice*, 505 U.S. at 749 (Thomas, J. concurring) (“Although I agree that a State is not constitutionally *required* to maintain its historically black institutions as such, I do not understand our opinion to hold that a State is *forbidden* to do so.” (emphasis in original) (internal citation omitted)); ALBERT L. SAMUELS, IS SEPARATE UNEQUAL?: BLACK COLLEGES AND THE CHALLENGE TO DESEGREGATION 182 (2004) (“‘Equality’ need not be defined as *requiring* that all Americans *must* sit in the same classrooms at the same institutions in order for equal educational opportunity to exist. Such thinking causes many Americans to fail to see that African Americans can insist on greater access to white educational institutions and at the same time favor policies that strengthen and enhance

order. This Note does not argue that the law should compel school integration. Setting aside this difficult issue—which can pit school integration against individual choice<sup>209</sup>—this Note takes a tack that is consistent with both: regardless of whether the law should compel school integration, certainly it should never defend school segregation. A policy does not deserve the shield of law when it denies admission to students—on the basis of their race—who belong to racial groups that are underrepresented at the school. A purportedly remedial policy is no exception.

For better or worse, some voluntary racial separation may be inevitable—not only across schools,<sup>210</sup> but also within schools that are racially diverse. Consider, for example, the following observation by a middle school teacher in Georgia: “Even in the lunchroom you’ll see it. You’ll have a table of African-American students over here and a table of white students over there. It’s not something you do to them; it’s something they do to themselves.”<sup>211</sup> This Note does not argue—to invoke the school lunchroom as a metaphor for the education system in sum—that the law should compel students of all races to sit together. But if a student from any other table crosses the lunchroom to be with the Asians or the Latinos—or the Native Hawaiians for that matter—should the law affirm an edict that she cannot sit down? Clearly the answer is no. Yet *Kamehameha Schools*, perilously, suggests otherwise.

#### IV. HOW *KAMEHAMEHA SCHOOLS* INTERPRETS § 1981 TO REJECT THE INTEGRATIVE IDEAL

Commentators have identified three perspectives regarding the legitimacy of race-based decisionmaking.<sup>212</sup> First is the anticlassification

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historically black universities without being inconsistent.”) (emphasis added and original emphasis removed).

209. The conflict arises because integration plans can assign students—against their wishes—to schools where members of their racial group are underrepresented. *See, e.g.,* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007).

210. *See infra* text accompanying notes 314–317.

211. CLOTFELTER, *supra* note 69, at 126. *See also* *Parents Involved*, 127 S. Ct. at 2780 (Thomas, J., concurring) (“In addition to classroom separation, students of different races within the same school may separate themselves socially.”); Wilkinson, *supra* note 76, at 1002–03 (“When the school bell rings for lunch, students fall into ethnic formation. Asians may cluster in one favorite corner, blacks in another, Latinos somewhere else. Many school yards can be mapped by ethnicity alone.”) (quoting Nanette Asimov, *Students Say Racism Is on the Rise*, S.F. CHRON., May 15, 1992, at A1).

212. *See, e.g.,* CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 124 (1996).

principle. Adopted by Justice Harlan's *Plessy* dissent,<sup>213</sup> it views race-conscious decisionmaking as "inherently unfair, whether the supposed purpose is benign or invidious."<sup>214</sup> Second is the antisubordination principle. Realized in many affirmative action plans, it views race-conscious decisionmaking as "justified to remedy discrimination," including, "in at least some limited circumstances, support for targeted efforts against 'societal discrimination.'"<sup>215</sup> The antisubordination principle cautions that "interests of bystanders cannot be ignored": "[r]ace-conscious decision making is not flatly impermissible but neither is it morally costless."<sup>216</sup> Third is the instrumental principle, which undergirds *Grutter*.<sup>217</sup> It views race-conscious decisionmaking as "justified . . . in contexts where there are substantial benefits to an institution or to society at large from inclusion or diversity."<sup>218</sup>

The anticlassification principle provides the primary theoretical thrust for the claim of the plaintiff in *Kamehameha Schools*,<sup>219</sup> whereas the antisubordination principle guides the reasoning of the majority.<sup>220</sup> The third principle, by contrast, informs this Note, which proffers an instrumental critique of the antisubordination principle as realized in *Kamehameha Schools*. Part III recounts many of the advantages to integrated schools. Drawing upon that discussion, this Part criticizes *Kamehameha Schools* as a well-intentioned—but ultimately misguided—departure from the integrative ideal.

#### A. SECTION 1981 AND ITS INTERPRETATION IN *KAMEHAMEHA SCHOOLS*

Section 1981 is "one of our oldest civil rights statutes."<sup>221</sup> By its terms, it provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."<sup>222</sup> The enactment traces its origins to the Civil Rights Act of 1866<sup>223</sup> and to the

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213. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

214. EDLEY, *supra* note 212, at 86.

215. *Id.* at 107.

216. *Id.*

217. *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *supra* text accompanying notes 123–129.

218. EDLEY, *supra* note 212, at 124.

219. *See* Petition for Writ of Certiorari, *supra* note 6, at 23–25.

220. *See Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 849 (9th Cir. 2006) (en banc), *cert. dismissed*, 127 S. Ct. 2160 (2007).

221. *Patterson v. McLean Credit Union*, 491 U.S. 164, 168 (1989).

222. 42 U.S.C. § 1981(a) (2000).

223. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

Enforcement Act of 1870.<sup>224</sup> The former was both an exercise of Congress's Thirteenth Amendment power to abolish the "badges and incidents of slavery"<sup>225</sup> and a precursor to the Fourteenth Amendment.<sup>226</sup> The latter was a slightly modified version of the 1866 Act<sup>227</sup> intended as a means to enforce the recently ratified Fourteenth Amendment.<sup>228</sup> Given the firm "roots" of § 1981 in both the Thirteenth and Fourteenth Amendments,<sup>229</sup> at least one commentator has lauded its "near-constitutional status."<sup>230</sup>

Despite auspicious beginnings, § 1981 remained more-or-less latent for its first century.<sup>231</sup> *Runyon*, decided in 1976—and unanimously reaffirmed thirteen years later<sup>232</sup>—was among the first Supreme Court cases to interpret the statute.<sup>233</sup> The issue was whether a nonsectarian private school violated § 1981 when it denied admission to prospective students because they were black.<sup>234</sup> Reasoning that Congress could prohibit private race discrimination pursuant to the Thirteenth Amendment, *Runyon* held the practice at issue to be a "classic violation" of § 1981.<sup>235</sup> Decided on the same day, *McDonald v. Santa Fe Trail Transportation Co.* held that § 1981 prevents discrimination not only against minorities, but also against nonminorities.<sup>236</sup> In the words of the Court, § 1981 "was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race."<sup>237</sup>

In *Kamehameha Schools*, the Ninth Circuit upheld the Kamehameha

224. Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. 1971 (2000)); *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982).

225. *United States v. Stanley*, 109 U.S. 3, 20 (1883). *See* U.S. CONST. amend. XIII.

226. *See Hurd v. Hodge*, 334 U.S. 24, 32 (1948) (noting that "one of the primary purposes of . . . the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land").

227. *Runyon v. McCrary*, 427 U.S. 160, 169 n.8 (1976).

228. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 389.

229. *Id.* at 389–90.

230. Karst, *supra* note 138, at 14 (referring to the 1866 Act).

231. A pair of cases preceding *Runyon* had held that § 1981 proscribed racial discrimination by certain private entities. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459–60 (1975); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439–40 (1973).

232. *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989).

233. *See Runyon v. McCrary*, 427 U.S. 160, 192 (1976) (White, J., dissenting) (commenting that § 1981 "has been on the books since 1870," and that this was the "first time" the Court interpreted § 1981 to reach private individuals and institutions).

234. *Id.* at 167–68.

235. *Id.* at 172–73, 179.

236. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295–96 (1976).

237. *Id.* at 295.

Schools' policy as a permissible remedial measure,<sup>238</sup> and distinguished *Runyon* as "a straightforward case of discrimination."<sup>239</sup> Analogizing to a line of cases that interpret Title VII of the 1964 Civil Rights Act, *Kamehameha Schools* held that, in prescribed circumstances, § 1981 permits private schools to exercise remedial race-based admissions preferences.<sup>240</sup> Further, it appropriated the Title VII standard, which applies to private employers, and modified it on the basis that "schools perform a significantly broader function."<sup>241</sup> Specifically, the Title VII cases permit private employers to exercise a remedial racial preference when it (1) is "justified by the existence of a manifest imbalance in the employer's workforce that is reflective of traditionally segregated job categories"; (2) does not "unnecessarily trammel[] the rights of [other] employees or create[] an absolute bar to their advancement"; and (3) is "designed to do [no] more than attain a balance."<sup>242</sup> By contrast, *Kamehameha Schools* permits private schools to exercise a remedial racial preference when (1) "significant imbalances in educational achievement presently affect the target population"; (2) "within the community as a whole," the policy does not "unnecessarily trammel the rights of students in the non-preferred class or create an absolute bar to their advancement"; and (3) the policy does "no more than is necessary to remedy the imbalance in the community as a whole."<sup>243</sup>

Applying this standard, the Ninth Circuit upheld the policy of the Kamehameha Schools. The majority reasoned that the policy satisfied the first prong because evidence revealed systemic educational disadvantage among Native Hawaiians.<sup>244</sup> It satisfied the second prong because students denied admission had "ample and adequate alternative educational options"; Congress itself had acknowledged the challenges faced by Native Hawaiians and the need to "address present, severe inequalities in educational achievement"; and non-Native Hawaiians had no "legitimate, firmly rooted expectation" of admission to the Schools because the preference was longstanding and predated Hawaii's entrance into the

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238. *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 849 (9th Cir. 2006) (en banc), *cert. dismissed*, 127 S. Ct. 2160 (2007).

239. *Id.* at 837.

240. *See id.* at 842.

241. *Id.* at 841.

242. *Id.* at 859 (Bybee, J., dissenting) (quoting *Rudebusch v. Hughes*, 313 F.3d 506, 520 (9th Cir.2002)) (alterations in original) (internal quotation marks omitted).

243. *Id.* at 842 (majority opinion) (internal quotation marks omitted).

244. *Id.* at 843. Native Hawaiians are historically overrepresented in special education classes and underrepresented in higher education. *Id.* Also, high school graduation rates among Native Hawaiians are below average, as are average standardized test scores. *Id.*

Union.<sup>245</sup> It satisfied the third prong because if fewer eligible Native Hawaiians applied than there were spaces available in a given year, any qualified candidate could be admitted and the preference was limited in time—that is, it would exist only for so long as necessary to “remedy the current educational effects of past, private and government-sponsored discrimination and of social and economic deprivation.”<sup>246</sup>

As an alternative basis for its holding, the majority, joined to some extent by the concurrence,<sup>247</sup> reasoned that Congress intended to exempt the admissions policy of the Kamehameha Schools from the scope of § 1981. Specifically, it observed that (1) when Congress first passed § 1981 in 1870, Hawaii was a sovereign kingdom not subject to U.S. law; and (2) when Congress reenacted § 1981 in 1991, it had recently approved statutes providing for the welfare of Native Hawaiians in various contexts, including statutes that both recognized a need for special efforts to educate Native Hawaiians, and directed the Secretary of Education to make grants to the Kamehameha Schools to provide financial assistance to Native Hawaiian students.<sup>248</sup> Hence, the majority interpreted Congress’s actions as “clear support for the Kamehameha Schools and for the validity of the Schools’ admissions policy” and reasoned that it would be incongruous to interpret § 1981 to foreclose the Kamehameha Schools’ preferential policy.<sup>249</sup> The concurrence added that “Native Hawaiian” is not only a racial classification, but also a political one, and submitted that the United States has a “special trust relationship” with Native Hawaiians analogous to its relationship with formally recognized Native American tribes.<sup>250</sup> The concurrence further posited that because Congress has conferred special benefits upon Native Hawaiians, it must not have intended to prohibit private parties, such as the Kamehameha Schools, from doing the same.<sup>251</sup>

The primary dissent criticized not only the majority’s “sweeping modification of the Title VII standard,” but also its application of that standard “to sanction an absolute racial bar.”<sup>252</sup> Arguing that § 1981 should apply no differently in the educational context than in the employment context, the dissent proceeded to enumerate the various departures of the majority standard from that of Title VII. For example, the Title VII

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245. *Id.* at 844–45.

246. *Id.* at 845–46.

247. *Id.* at 849 (Fletcher, J., concurring).

248. *Id.* at 847–48 (majority opinion).

249. *Id.* at 849.

250. *Id.* at 850 (Fletcher, J., concurring).

251. *See id.* at 856.

252. *Id.* at 857 (Bybee, J., dissenting).

standard permits only racial preferences that address imbalances in an employer's own work force which derive from *historical* segregation.<sup>253</sup> The *Kamehameha Schools* standard is not similarly limited. It permits even racial preferences that homogenize a student population and that do not result from historical segregation.<sup>254</sup> Likewise, whereas the Title VII standard examines a plaintiff's rights at a *defendant institution* to determine whether they have been unnecessarily trammled, the *Kamehameha Schools* standard looks to the plaintiff's rights in the larger context of the plaintiff's relevant community.<sup>255</sup> Also, unlike the Title VII standard, which considers whether an *individual* has been denied an opportunity, the *Kamehameha Schools* standard considers whether the *individual's racial group*, in the aggregate, has been so denied.<sup>256</sup> The list goes on. Furthermore, the dissent criticized the majority's application of its rule, notably observing that the Kamehameha Schools offer an education unparalleled in Hawaii, but denies this education to students lacking Native Hawaiian ancestry.<sup>257</sup>

The dissent was equally dismissive of the majority and concurrence's respective theories that (1) Congress intended to exempt the Kamehameha Schools' admissions policy from the scope of § 1981; and (2) a "special trust relationship" between the United States and Native Hawaiians authorizes the Kamehameha Schools to provide exclusive benefits to Native Hawaiians. Regarding the former theory, the dissent observed that (1) Hawaii has been subject to § 1981 since becoming a territory—and later a state—consistent with the terms of § 1981 itself, the Supremacy Clause, the Hawaiian Statehood Act, and the doctrine that Hawaii entered the Union on equal footing with all other states; (2) § 1981 was not reenacted in 1991, but merely amended by adding text; (3) none of the various Hawaiian benefit statutes mention § 1981 or exempt Native Hawaiians from its scope; and (4) Congress's provision of funds to the Kamehameha Schools to assist Native Hawaiians neither (a) created an "exemption from generally applicable civil rights laws," nor (b) promoted a "racially exclusive admissions policy."<sup>258</sup> "The fact that Congress . . . passed some measures promoting Native Hawaiian education," the dissent concluded, "says nothing about whether Congress intended to exempt Native Hawaiian

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253. *Id.* at 862.

254. *See id.* at 863 (comparing the standard adopted by the majority to the Title VII standard).

255. *Id.* at 864.

256. *Id.* at 866–65.

257. *Id.* at 869.

258. *Id.* at 872–77.

schools from § 1981; there is no legislative conflict to reconcile.”<sup>259</sup> The dissent similarly disposed of the latter theory, noting that (1) the United States has only a “special trust relationship” with Native American tribes whose sovereignty it has formally recognized, which does not include Native Hawaiians; (2) the “special trust relationship” doctrine does not apply to political classifications that are also racial classifications; (3) the judiciary cannot appropriately usurp the prerogative of Congress to accord tribal status to Native Hawaiians; and (4) the existence of a “special trust relationship” between the United States and Native Hawaiians would not enable discrimination by a private party, such as the Kamehameha Schools.<sup>260</sup>

#### B. KAMEHAMEHA SCHOOLS AND THE INTEGRATIVE IDEAL

*Brown* decried segregation of public schools as harmful and stigmatic, heralding desegregation, indeed integration, as the vehicle of equalization. Decided nearly a half-century later, *Grutter* reverberates with *Brown*, applauding “diversity-as-integration”<sup>261</sup> as a means to address the problems of racial division.<sup>262</sup> Social science evidence and Supreme Court jurisprudence generally confirm that integration of our schools yields manifold benefits.<sup>263</sup> It deconstructs racial stereotypes and promotes cross-racial empathy; it prepares students for work in a global marketplace and for service in a diverse military; it expands the interpersonal networks of white and minority students alike; and it enhances their capacity for critical thought. Yet *Kamehameha Schools* rejects the integrative ideal by affording legal shelter to schools that exclude students based purely on their race. As such, *Kamehameha Schools* stands in stark contrast to *Brown*, *Grutter*, and our accumulated understanding of the value of integration.

*Kamehameha Schools*, to some extent, can be appreciated as the inverse of *Brown*. *Brown* is mandatory—it imposes an obligation; *Kamehameha Schools* is permissive—it creates a right. *Brown* applies in the sphere of public education; *Kamehameha Schools* in that of private education. *Brown* confronts segregation imposed upon a minority by law; *Kamehameha Schools* confronts segregation imposed by a minority by choice. *Brown* interprets the Constitution, specifically the Equal Protection

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259. *Id.* at 878.

260. *Id.* at 879–84.

261. Bulman-Pozen, *supra* note 129, at 1411.

262. *See supra* text accompanying notes 123–129.

263. *See supra* Part III.

Clause of the Fourteenth Amendment; *Kamehameha Schools* interprets a statute, specifically § 1981. In each of these regards, *Kamehameha Schools* deviates from *Brown*.

These features of *Kamehameha Schools* make it relatively innocuous in the grand scheme of primary and secondary education. Because it creates a right, *Kamehameha Schools* does not ordain that all private schools will be segregated by race. Because it applies exclusively to private education, it does not question the integrative ideal in the public sphere. Because it confronts segregation imposed by a minority by choice, it does not carry the invidious undertones of Jim Crow. And because it interprets a statute, it can be superseded by legislation. This Note does not take issue with any of these features of *Kamehameha Schools*, but with another: *Brown* perceives separation of the races as harmful, whereas *Kamehameha Schools* perceives separation of the races as a remedy for past harm. Like the critics of *Brown* who dismiss integration as a vehicle of equalization,<sup>264</sup> so too does *Kamehameha Schools*.

Specifically, *Kamehameha Schools* held that the racial preference of a private school—though it operated as an “absolute racial bar” to admission of nonpreferred applicants<sup>265</sup>—was a remedial measure.<sup>266</sup> The outcome is particularly confounding in view of *Parents Involved*, in which a majority of the Supreme Court agreed—only seven weeks after the *Kamehameha Schools* settlement—that “avoiding racial isolation” in public education is a compelling government interest.<sup>267</sup> A comparison of *Kamehameha Schools* to *Parents Involved* raises the question: how can racial isolation in private education be remedial if *avoiding racial isolation* in public education is a *compelling government interest*? It seems logically absurd. Private and public education are insufficiently distinct to enable such diametric results.

Even before *Parents Involved*, one would have expected *Kamehameha Schools* to include a detailed explanation of how a segregative admissions policy becomes a remedial measure. It does not. Instead, it observes that the Kamehameha Schools “advance a curriculum specially tailored to students of Native Hawaiian descent”—that is, a “Leadership Model of education, meant to restore self-identity, integrate Native Hawaiian culture, heritage, language, and traditions into the educational process, and provide

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264. See *supra* text accompanying notes 84–89.

265. *Kamehameha Schools*, 470 F.3d at 857 (Bybee, J., dissenting).

266. *Id.* at 849 (majority opinion).

267. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2835 (Breyer, J., dissenting); *id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

a first-rate educational experience for Native Hawaiians.”<sup>268</sup> While this observation may explain why the schools have realized success in ameliorating the educational plight of Native Hawaiians, it does not explain the need for a racially discriminatory admissions policy. The trouble is twofold.

First, the Leadership Model may benefit students of Native Hawaiian descent, for whom it is “specially tailored,” without excluding all others. Non-Native Hawaiians certainly can benefit from the education that the Kamehameha Schools provide. If they could not, why would the plaintiff John Doe—and countless others similarly situated—even apply? The Leadership Model is not premised upon some racially insular theory of education; it does not assume that only students with Native Hawaiian blood can learn in an environment that embraces Native Hawaiian culture. Nor does the Leadership Model appear to presume that Native Hawaiians learn better when members of other races are absent.<sup>269</sup> Indeed, to admit students lacking Native Hawaiian ancestry to the Kamehameha Schools would seem to complement their secondary mission: “to cultivate, nurture, and perpetuate Hawaiian culture, values, history, and language.”<sup>270</sup> What better way to do so than by educating a segment of the population that otherwise would be ignorant, perhaps dismissive, of Native Hawaiian culture?

Second, *Kamehameha Schools* participates in a tradition of remedial affirmative action whereby scarce resources are allocated to benefit a disadvantaged group.<sup>271</sup> Yet the Leadership Model of education is not a scarce resource. In the Title VII cases, the forebears of *Kamehameha Schools*, the scarce resources were jobs for which there were more qualified candidates than available positions. Other scarce resources that have been the subject of challenges to affirmative action plans include government contracts and subcontracts,<sup>272</sup> radio and television broadcast licenses,<sup>273</sup> and scholarships to institutions of higher education.<sup>274</sup> If a

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268. *Kamehameha Schools*, 470 F.3d at 843–44 (internal quotation marks omitted).

269. *See id.* at 832 (“This curriculum is meant to foster the self-esteem and self-identity of students as individuals of Native Hawaiian descent by teaching Native Hawaiian culture, heritage, language, and tradition, in addition to general college-preparatory courses.”).

270. *Id.* at 843.

271. *See* GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* 3 (2000).

272. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

273. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), *overruled on other grounds by Adarand*, 515 U.S. 200.

274. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

resource is not scarce, a racial preference is not necessary: all parties can be satisfied by universal access to the common good. The Leadership Model is not scarce because with little difficulty it could likely be reproduced outside the Kamehameha Schools<sup>275</sup> and it is indiscriminately available to all who attend those schools. The scarce resource, therefore, is not access to the Leadership Model, but placement in the Kamehameha Schools themselves. The preferential policy is remedial not because it permits access to the Leadership Model of education specifically, but because it restricts access to the Kamehameha Schools generally. Hence, because *Kamehameha Schools* focuses on the former rather than the latter, it fails to explain adequately why the admissions policy is remedial.

*Kamehameha Schools* contravenes the integrative ideal not only by applying § 1981 to sanction an “absolute racial bar,”<sup>276</sup> but also by the reasoning that arrives at this result. Again, the trouble is twofold. First, noting that the Kamehameha Schools’ policy does not “unnecessarily trammel” the rights of nonpreferred candidates within the community of Hawaii, the majority observes, “students denied admission by Kamehameha Schools have ample and adequate alternative educational options.”<sup>277</sup> Sound familiar? *Plessy* may have surrendered to “separate,” but at least it commanded “equal.” *Kamehameha Schools* mirrors the logic of *Plessy*, but falls short. As Doe’s petition for certiorari quipped, “One can imagine the majority asking whether black children in Topeka, Kansas had ‘adequate alternative educational options’ given the public school admission policies that excluded them because of their race.”<sup>278</sup> Of course, *Kamehameha Schools* offends the integrative ideal not because it demands only “adequate” educational opportunities for non-Native Hawaiians, but because it permits racially separate schools at all. Comparing the adequacy of schools for a minority group with that of schools for others resonates with the era of equalization that preceded *Brown*, not the era of desegregation that succeeded it.

Second, *Kamehameha Schools* compromises the integrative ideal by asking whether a racial preference unsettles a “legitimate, firmly rooted expectation” of nonpreferred candidates.<sup>279</sup> Specifically, it reasons that

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275. Pedagogical practices generally are not subject to intellectual property protection and can be readily replicated in new settings. Consider every law student’s favorite: the Socratic method, originated in Ancient Greece, but now a hallmark of American legal education.

276. *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 857 (9th Cir. 2006) (en banc) (Bybee, J., dissenting), *cert. dismissed*, 127 S. Ct. 2160 (2007).

277. *Id.* at 844 (majority opinion).

278. Petition for Writ of Certiorari, *supra* note 6, at 20.

279. *Kamehameha Schools*, 470 F.3d at 845.

rejection by the Kamehameha Schools unsettles no “legitimate, firmly rooted expectation” of nonpreferred candidates because, in part, the schools have always preferred Native Hawaiian candidates at the expense of others.<sup>280</sup> Such logic reasons that “because non-Native Hawaiians have been discriminated against . . . for a long time, they have no cause of action under § 1981.”<sup>281</sup> Implying that deference to expectations precludes social progress, the dissent observes that “the schools in *Runyon* would have found no defense by arguing that their exclusionary policies were open and notorious and that African-American students had ‘no expectation of admission.’”<sup>282</sup> *Brown* likewise serves to advance the dissent’s critique. More than any decision before or since, *Brown* unsettled the expectations of a generation. Until *Brown*, an unbroken line of precedents dating to the 1860s upheld segregation as constitutional.<sup>283</sup> Indeed, “the same Congress that wrote the Fourteenth Amendment . . . had segregated schools in the District of Columbia for nearly one hundred years.”<sup>284</sup> *Brown* punctuated a tradition of deference to state and local governments in matters of primary and secondary education,<sup>285</sup> “transform[ing] . . . school systems in nearly a score of States.”<sup>286</sup> Furthermore, it did so though desegregation was not clearly proscribed by traditional warrants of constitutional interpretation, such as custom, the text of the Constitution, and its original understanding.<sup>287</sup> As the Justices were well aware, *Brown* threatened to incite fervent, indeed violent, opposition in the South<sup>288</sup>—and it did.<sup>289</sup> Yet today—in contradistinction to the logic of *Kamehameha Schools*—*Brown* is celebrated for upending firmly rooted expectations rather than submitting to them. *Kamehameha Schools* might be reconciled with *Brown* by observing that the latter upended *illegitimate*, albeit firmly rooted, expectations. This Note rejects such a defense, arguing that a similarly illegitimate expectation informs *Kamehameha Schools*: the expectation that a segregative measure can be remedial.

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280. *Id.*

281. *Id.* at 869 (Bybee, J., dissenting).

282. *Id.* (quoting *id.* at 845 (majority opinion)).

283. See KLARMAN, *supra* note 53, at 294, 307.

284. *Id.* at 294.

285. See *id.* at 294, 314; H.C. HUDGINS, JR. & RICHARD S. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 16, 59–67 (Matthew Bender & Co., 5th ed. 1999) (1979).

286. KLARMAN, *supra* note 53, at 311 (quoting Memorandum from Felix Frankfurter, Supreme Court Justice, to Supreme Court Justices 2 (Jan. 15, 1954), at [http://tarlton.law.utexas.edu/clark/view\\_doc.php?id=a27-04-09&page=1](http://tarlton.law.utexas.edu/clark/view_doc.php?id=a27-04-09&page=1) (last visited April 14, 2008)).

287. See *id.* at 303, 307.

288. See *id.* at 294, 314.

289. See OGLETREE, *supra* note 58, at 126–31.

Comparing *Kamehameha Schools* with other remedial jurisprudence clarifies its abandonment of the integrative ideal. Consider, for example, preferences in private employment, subject to Title VII, and in public education, subject to the Equal Protection Clause—both of which complement, not contravene, the integrative ideal. The remedial measures of private employers may address a “manifest imbalance” in the makeup of an employer’s workforce relative to the area labor market,<sup>290</sup> but must not unnecessarily trammel the rights of nonpreferred groups or sanction an “absolute bar” to their advancement.<sup>291</sup> Once the percentage of minorities in the employer’s workforce matches that in the area labor market, the preference loses its legal sanction.<sup>292</sup> The remedial exception does not swallow the nondiscriminatory rule. By implication, all Title VII-approved preferences of private employers are integrative: (1) they cause private workforces to mirror (or at least approach) area labor markets, and (2) they do no more. Affirmative action policies at public colleges and universities are likewise integrative because they must be narrowly tailored to attain a diverse student body.<sup>293</sup> A narrowly tailored policy is one that does “not unduly harm members of any racial group”;<sup>294</sup> a diverse student body is an integrated one, racially and otherwise.<sup>295</sup> Contrast the remedial preferences of private schools under the rule of *Kamehameha Schools*. Such preferences need neither respond to a “manifest imbalance” in the racial makeup of a population, nor increase its diversity. *Kamehameha Schools*, expanding the scope of inquiry relative to the Title VII cases from which it draws, asks not whether a remedial preference unnecessarily trammels the rights of nonpreferred individuals at a particular institution, but whether it

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290. See *Johnson v. Transp. Agency*, 480 U.S. 616, 631–32 (1987) (“[I]n determining whether an imbalance exists that would justify taking . . . race into account, a comparison of the percentage of minorities . . . in the employer’s work force with the percentage in the area labor market . . . is appropriate. . . .”) (internal citations omitted). *Accord* *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 204–06 (1979).

291. *Johnson*, 480 U.S. at 637–38.

292. See *id.* at 632 (“The requirement that the ‘manifest imbalance’ relate to a ‘traditionally segregated job category’ provides assurance both that sex or race will be taken into account in a manner consistent with Title VII’s purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed.”); *Weber*, 443 U.S. at 208–09 (“[T]he plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force.”).

293. *Gutter v. Bollinger*, 539 U.S. 306, 328 (2003).

294. *Id.* at 341.

295. See *id.* at 330 (“[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”).

does so in “the community as a whole.”<sup>296</sup> The discriminatory practice of an individual institution, plainly put, is immaterial. *Kamehameha Schools* thereby accords judicial imprimatur to private practices that separate students by race.

In sum, Title VII-approved preferences of private employers necessarily integrate workforces. Equal protection-approved preferences of public schools necessarily integrate classrooms. Yet § 1981-approved preferences of private schools, under the rule of *Kamehameha Schools*, can *segregate* classrooms. Strange, no?

To be sure, not all remedial measures are necessarily integrative. Consider contractual set-asides and preferential allocations of broadcast licenses, both of which benefit minority-owned businesses, but do not integrate them. The crucial observation is not that remediation and integration must always be complementary—though they often are—but that they should never be contradictory, particularly in the realm of primary and secondary education.<sup>297</sup> The law not only permits preferential allocations of government contracts and broadcast licenses to minority owned businesses,<sup>298</sup> but also forbids such employers to discriminate against nonminority prospective employees on the basis of race.<sup>299</sup> Hence, it authorizes remediation without compromising integration. Correspondingly, as § 1981 permits preferential admission of disadvantaged minorities to certain private schools, so too should it preclude an absolute bar to the admission of all others.

The segregative license that *Kamehameha Schools* bestows is all the more troubling because of its expansive scope. The only limitations with teeth are that (1) only private schools, not public schools, can exercise a remedial preference,<sup>300</sup> and (2) the preference must benefit a group that evidences “specific, significant imbalances in educational achievement.”<sup>301</sup> A remedial preference need not (1) address an imbalance within a particular school,<sup>302</sup> (2) permit admission to *any* nonpreferred

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296. *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 842 (9th Cir. 2006) (en banc), *cert. dismissed*, 127 S. Ct. 2160 (2007).

297. *See supra* text accompanying notes 140–148.

298. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 566–79 (1990), *overruled on other grounds by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

299. *See, e.g., Craig v. Ala. State Univ.*, 451 F. Supp. 1207, 1208 (M.D. Ala. 1978), *aff'd*, 614 F.2d 1295 (5th Cir. 1980).

300. *See Kamehameha Schools*, 470 F.3d at 842.

301. *Id.*

302. *See id.* at 862–63 (Bybee, J., dissenting).

candidates;<sup>303</sup> (3) retain access of nonpreferred applicants to equal alternative educational opportunities (only access to “adequate” alternative educational opportunities is required);<sup>304</sup> (4) respond to historical discrimination by the institution exercising the preference;<sup>305</sup> or even (5) respond to any historical discrimination against members of the preferred group at all.<sup>306</sup> Also, because a remedial preference can remain for as long the educational disadvantages do,<sup>307</sup> and given that “few, if any, private parties will be able to correct ‘significant imbalances in educational achievement’” on their own, a remedial preference can—and may—exist in perpetuity.<sup>308</sup>

Imagine a potential application of *Kamehameha Schools*: throughout the Ninth Circuit, leaders of educationally disadvantaged groups, including blacks, Latinos, and Native Americans, form schools for members of their respective groups. The schools do not have multibillion dollar endowments. Nor do they offer superior curricula—just curricula “specially tailored”<sup>309</sup> to students of [insert disadvantaged group] ancestry. The Latino schools, for example, institute a model of education meant to integrate Latino “culture, heritage, language, and traditions into the educational process.”<sup>310</sup> Or perhaps not. Since Latinos do not all share a culture, heritage, set of traditions, or even necessarily a language, they may need to isolate themselves still further. So then there are schools for Mexican Americans, Cuban Americans, Colombian Americans, Uruguayan Americans, and onwards. Members of each group begin—slowly at first, but then en masse—to enroll in their respective educational enclaves. Each school exercises a “remedial” policy such that members of the preferred group are admitted first. Nonpreferred candidates, while not categorically excluded, are never admitted in practice. Black students cannot attend the school for Mexican Americans, of course, nor vice versa—just as neither can attend the *Kamehameha Schools* now. Demand is too great. If only there were enough spaces for everyone! One year, the Cuban American school

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303. *See id.* at 857.

304. *See id.* at 844 (majority opinion).

305. *See id.* at 886 (Rymer, J., dissenting).

306. *See id.* at 862–63 (Bybee, J., dissenting).

307. *See id.* at 846 (majority opinion).

308. *Id.* at 867 (Bybee, J., dissenting). *Cf.* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2773 (2007) (Thomas, J., concurring) (“[A] school cannot ‘remedy’ racial imbalance in the same way that it can remedy segregation. . . . [R]acial balancing will have to take place on an indefinite basis—a continuous process with no identifiable culpable party and no discernable end point.”).

309. *Kamehameha Schools*, 470 F.3d at 843 (majority opinion).

310. *Id.* at 844.

receives too few applications from Cuban American candidates—so it shrinks enrollment. The next, the Mexican American school discovers that one of its students had been adopted and was genetically Uruguayan American. It expels the deceiver (a typical Uruguayan), and creates a Mexican American registry so that no one else will slip through. And what of the so-called public schools? Following the exodus, they are really just schools for whites and Asians, who daydream in class about why they—and they alone—are condemned to associate with the Other.

Doubtless these segregated schools would realize part of their mission: “developing community leaders”—perhaps in the model of Huey Newton and Louis Farrakhan—“who are committed to improving the lives of [members of their own ethnic group].”<sup>311</sup> Yet one might question whether they would achieve another part: “increasing scores [of formerly disadvantaged minorities] on standardized tests, increasing the[ir] number . . . at[] colleges and graduate schools, [and] improving [their] . . . representation in professional, academic, and managerial positions.”<sup>312</sup> Students might even have a disincentive to achieve, knowing that equalization would bring desegregation. Suppose, perhaps against logic, that cross-racial educational equality was realized in the above scenario. The “remedial” preferences would lose their legal sanction—but would desegregation be swift? The post-*Brown* era paints a bleak analogue. If and when desegregation was finally realized, to what kind of world would the students return? What kind of attitudes would they have toward each other?

How likely is this scenario? Perhaps not very<sup>313</sup>—but it is not a possibility the law should even tolerate. Yet the scenario may not be so far-fetched at all. In fact, patterns of human cognition encourage its realization. The American Psychological Association explains:

[S]tereotypes operate automatically, often independent of conscious attitudes, beliefs and perceptions. . . .

. . . [P]rejudice, like stereotypical thinking, [also] operates implicitly. . . . [E]ven those who firmly maintain and articulate explicit attitudes of racial equality and acceptance nevertheless implicitly harbor a variety of negative feelings about members of other racial and ethnic

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311. *Id.*

312. *Id.*

313. Kathleen Sullivan, attorney for the Kamehameha Schools and former Dean of Stanford Law School, predicted that *Kamehameha Schools* will have “no precedential impact on any other school in the nation.” Adam Liptak, *Hawaii Schools’ Racial Enrollment Upheld*, N.Y. TIMES, Dec. 6, 2006, at A25, available at <http://www.nytimes.com/2006/12/06/us/06hawaii.html> (internal quotations omitted).

groups. . . . [S]ubconscious prejudices can . . . trigger avoidance: that is, people who harbor prejudice—even implicit prejudice—will often shy away from contact with persons of other races.

Some researchers emphasize that people often experience anxiety about interacting with members of other groups. . . .

Perhaps unsurprisingly, the “dominant response” to intergroup anxiety is avoidance. . . . [T]he easiest way to reduce anxiety is simply to avoid its source.<sup>314</sup>

These observations help explain the behavior of schoolchildren in Georgia<sup>315</sup> and elsewhere. Can they also help explain patterns of racial separation in public schools? The American Psychological Association continues:

Research on the cognitive and emotional processes associated with intergroup interaction predicts that, given the choice between two schools of equal quality, parents may not *perceive* the schools as equal. They are therefore likely to choose the school whose student body appears more familiar to them, and likely to decide against the school where their children will encounter significant numbers of children of other races.

School choice patterns appear to bear out that prediction.<sup>316</sup>

In effect, birds of a feather stick together. The phenomenon is just as applicable to the selection of private schools as public schools, an unfortunate fact evidenced by the growth of segregation academies in the South following desegregation, as well as by contemporary patterns of private school choice.<sup>317</sup>

Perhaps the greatest obstacles to the above nightmare scenario would be (1) concerns regarding the quality of ethnically identifiable private schools and (2) their cost. The first obstacle arises because academic considerations are foremost in the minds of parents when choosing a school for their child.<sup>318</sup> The second obstacle arises for the simple reason that

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314. Brief for Amici Curiae the American Psychological Ass’n and the Washington State Psychological Ass’n in Support of Respondents at 23–25, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915) [hereinafter Brief for Amici Curiae the American Psychological Ass’n] (internal citations omitted).

315. See *supra* text accompanying note 211.

316. Brief for Amici Curiae the American Psychological Ass’n, *supra* note 314, at 25–26 (emphasis in original) (internal citations omitted).

317. See CLOTFELTER, *supra* note 69, at 109 (“[O]ne aspect of private school demand that is inseparable from the issue of interracial contact is the degree to which private enrollments may be motivated by the desire to avoid racially mixed public schools.”).

318. TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* 165 (2001).

public schools are free, and private schools are expensive. Neither obstacle is insurmountable. In fact, the first may be no obstacle at all. Rather, “the appeal of private schools is especially strong among parents who are low in income, minority, and live in low-performing districts—precisely the parents who are the most disadvantaged under the current system.”<sup>319</sup> Furthermore, private schools generally outperform public schools,<sup>320</sup> and most parents hold the former in much higher esteem.<sup>321</sup> Indeed, many private schools that specifically cater to minority populations already exist and have experienced marked success. Gail Foster describes a network of over four hundred historically black independent schools nationwide that educate about fifty-two thousand students at primary and secondary levels.<sup>322</sup> The schools, which “promote themselves as alternatives for children who are not being adequately served in public schools,”<sup>323</sup> offer pedagogical advantages such as affirming black culture and encouraging positive peer pressure.<sup>324</sup> The second obstacle, which is financial, may be more significant. The average historically black independent school, however—with a slight endowment<sup>325</sup> and many students from disadvantaged families<sup>326</sup>—manages to finance over 90 percent of its costs through tuition.<sup>327</sup> Furthermore, school choice voucher programs, such as those proposed by Milton Friedman one year after *Brown*,<sup>328</sup> and upheld against constitutional challenge in *Zelman v. Simmons-Harris*,<sup>329</sup> promise to make private education increasingly affordable to low-income minority families in the future.<sup>330</sup> Several states, including Arizona, Ohio, Utah, and Wisconsin, as well as the District of Columbia, offer some form of program that encourages public financing of private education,<sup>331</sup> and the school

319. *Id.* at 164.

320. See JAMES S. COLEMAN, THOMAS HOFFER, & SALLY KILGORE, *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* 120–21 (1982).

321. See MOE, *supra* note 318, at 57–58.

322. Gail Foster, *Historically Black Independent Schools*, in *CITY SCHOOLS: LESSONS FROM NEW YORK* 291, 291 (Diane Ravitch & Joseph P. Viteritti eds., 2000).

323. Gail Foster, *New York City's Wealth of Historically Black Independent Schools*, 61 *J. NEGRO EDUC.* 186, 192 (1992).

324. See *id.* at 198; Foster, *supra* note 322, at 301.

325. See Foster, *supra* note 323, at 199.

326. See Foster, *supra* note 322, at 295.

327. See Foster, *supra* note 323, at 199.

328. See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123, 129–44 (Robert A. Solo ed., 1955).

329. *Zelman v. Simmons-Harris*, 536 U.S. 639, 661–63 (2002).

330. See Joseph P. Viteritti, *School Choice: How an Abstract Idea Became a Political Reality*, in *BROOKINGS PAPERS ON EDUCATION POLICY* 137, 142–43, 146 (Diane Ravitch ed., 2005).

331. Alliance for School Choice, *State School Choice Programs*, at [http://www.allianceforschoolchoice.org/school\\_choice\\_programs.aspx](http://www.allianceforschoolchoice.org/school_choice_programs.aspx) (last visited April 14, 2008).

choice movement may be poised for even greater political acceptance.

V. *KAMEHAMEHA SCHOOLS* AND THE *KAMEHAMEHA SCHOOLS*:  
A CONCLUDING RECONSIDERATION

A history of modern Hawaii and an account of the legacy of its unifying King serve to bookend the majority opinion in *Kamehameha Schools*. The history is a story of growing Western economic, political, and cultural domination over the Hawaiian Islands. It begins with the landing of Captain James Cook in 1778 on the Island of Kauai, where he found “a highly organized, self-sufficient subsistence social system based on a communal land tenure system with a sophisticated language, culture, and religion.”<sup>332</sup> Unified under the rule of King Kamehameha I, Hawaii became recognized as a sovereign nation by such powers as the United States, Britain, France, and Japan.<sup>333</sup> A flourishing trade emerged—primarily in fur, sandalwood, and whale stock—then waned with overharvesting.<sup>334</sup> Westerners began investing in sugar plantations, creating the desire for a system of privatized ownership to which the government of Hawaii relented.<sup>335</sup> As a result, Westerners “[w]ith a permanent population of fewer than two thousand” gained control “over most of Hawaii’s land in the next half-century and manipulated the economy for their own profit.”<sup>336</sup> Their power became formalized in 1893, when a small group of non-Hawaiians, including many Americans, overthrew the indigenous sovereign government.<sup>337</sup> The insurgents were assisted by a U.S. Minister, a U.S. naval representative, and armed naval forces of the United States,<sup>338</sup> and the United States formally annexed Hawaii not long thereafter,<sup>339</sup> tragically proceeding to suppress Hawaiian culture and language.<sup>340</sup> That is the history. The legacy is the Kamehameha Schools themselves.

King Kamehameha I, from his deathbed, reportedly declared, “[t]ell my people I have planted in the soil of our land the roots of a plan for their

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332. 20 U.S.C. § 7512(2) (Supp. V 2001–06).

333. *Id.* § 7512(1), (4).

334. OFFICE OF HAWAIIAN AFFAIRS, *NATIVE HAWAIIAN RIGHTS HANDBOOK* 5 (Melody K. MacKenzie ed., 1991).

335. *See id.* at 5–6; *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 830 (9th Cir. 2006) (en banc), *cert. dismissed*, 127 S. Ct. 2160 (2007).

336. Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 858 (1975) (internal footnote omitted).

337. § 7512(5).

338. *Id.*

339. *Id.* § 7512(6).

340. *See id.* § 7512(19).

happiness.”<sup>341</sup> His great granddaughter, Princess Bernice Pauahi Bishop, furthered that goal when she established the Kamehameha Schools through her will.<sup>342</sup> Many years after King Kamehameha I and Princess Pauahi Bishop made their respective pre- and postmortem declarations, the Kamehameha Schools live on. They bestow a first-rate education upon disadvantaged Native Hawaiian students at a steeply discounted cost. Also, by denying the same subsidized education to others, the schools maximize the resources devoted to their intended beneficent purpose. The dissenting judges in *Kamehameha Schools* are not insensitive to the great public service that the schools provide. Judge Bybee “applaud[s]” the Kamehameha Schools for “seek[ing] to remedy a significant problem in a community that is in great need.”<sup>343</sup> Judge Rymer writes, “because education is the greatest inheritance of all, I have difficulty understanding what business it is of the federal government to tell a Native Hawaiian that she can’t choose to help other Native Hawaiians whom she believes particularly need it.”<sup>344</sup> Finally, Judge Kleinfeld expresses regret that the court could not deny jurisdiction over the case.<sup>345</sup> He also writes, “[t]he Kamehameha Schools are admirable in many ways . . . [b]ut we are not free to make a social judgment about what is best for Hawaiians. . . . [W]e have to follow the law.”<sup>346</sup>

For present purposes, a yet unmentioned feature of the Kamehameha Schools carries great import: though their preferential policy operates as an “absolute racial bar” to the admission of students without Native Hawaiian ancestry,<sup>347</sup> the schools are, in fact, diverse. Their policy prefers any student who has at least one Native Hawaiian ancestor, no matter how remote.<sup>348</sup> Most students at the Kamehameha Schools have mixed ancestry.<sup>349</sup> As early as 1957, while 100 percent of students had some Native Hawaiian ancestry, 79 percent also had white ancestry, 58 percent Chinese ancestry, 11 percent Japanese ancestry, and 5 percent Filipino ancestry.<sup>350</sup> Across the history of the schools, students have included

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341. *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 849 (9th Cir. 2006) (en banc), cert. dismissed, 127 S. Ct. 2160 (2007) (quoting COBEY BLACK & KATHLEEN MELLEN, *PRINCESS PAUAAHI BISHOP AND HER LEGACY* 122 (1965)).

342. *Id.*

343. *Id.* at 858, 885 (Bybee, J., dissenting).

344. *Id.* at 886 (Rymer, J., dissenting).

345. *Id.* at 888 (Kleinfeld, J., dissenting).

346. *Id.*

347. *Id.* at 857 (Bybee, J., dissenting).

348. *Id.* at 832 (majority opinion).

349. *Id.*

350. HAAS, *supra* note 195, at 175 tbl. 6.5.

members of over sixty different racial and ethnic groups,<sup>351</sup> and during the 2000–01 academic year alone, students belonged to thirty-nine different racial and ethnic groups.<sup>352</sup> Accordingly, the Kamehameha Schools cannot fairly be accused of compromising the integrative ideal. To the contrary, “an observer visiting the Schools would see visible diversity notwithstanding the students’ commonality of having at least one Native Hawaiian ancestor.”<sup>353</sup>

The history of modern Hawaii is tragic; the remedial efforts of the Kamehameha Schools are great; and these efforts do not, in fact, realize a racially segregated student body. For all these reasons, this Note takes aim not at the holding of *Kamehameha Schools*—that the admissions policy of the Kamehameha Schools complies with § 1981—but at the rule that it creates. As applied to other contexts, this rule could offer legal shelter to invidious and deleterious conduct—though as applied to the Kamehameha Schools themselves, it does not meaningfully compromise the integrative ideal. In sum, this Note views *Kamehameha Schools* as a classic application of an old aphorism: hard cases make bad law.

The question remains: is it possible for the character of the Kamehameha Schools to be retained if the rule of *Kamehameha Schools* is reversed? The answer is yes. Several possibilities present themselves. First, recall that the majority provides an alternative basis for its holding—that Congress intended to exempt the admissions policy of the Kamehameha Schools from § 1981.<sup>354</sup> At the very least, Congress *could* exempt it from § 1981, whether or not it has already done so. Second, the concurrence provides a still-narrower basis for the holding: (1) Native Hawaiian is not only a racial classification, but also a political one;<sup>355</sup> (2) pursuant to the “special relationship” between the United States and Native Hawaiians Congress can provide benefits to Native Hawaiians and enable private parties, such as the Kamehameha Schools, to do the same;<sup>356</sup> and (3) the preferential policy of the Kamehameha Schools is therefore immune from challenge.<sup>357</sup> Though the “special relationship” doctrine generally applies only to Native American tribes whose sovereignty Congress has formally recognized, and though Native Hawaiians are not among this group,<sup>358</sup> the

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351. See *Kamehameha Schools*, 470 F.3d at 832.

352. *Id.*

353. *Id.*

354. See *id.* at 847–49.

355. *Id.* at 850 (Fletcher, J., concurring).

356. See *id.* at 850–53.

357. See *id.* at 853–56.

358. *Id.* at 881–82 (Bybee, J., dissenting).

latter could soon change. Just six weeks after the en banc Ninth Circuit decided *Kamehameha Schools*, Daniel Akaka, Senator from Hawaii, introduced a bill—now pending in the Senate—formally to recognize Native Hawaiian sovereignty,<sup>359</sup> which could legitimate the policy of the Kamehameha Schools as a special benefit for Native Hawaiians.<sup>360</sup> Third, § 1981, as Judge Kozinski remarks in dissent, applies only to the “making and enforcing of *contracts*.”<sup>361</sup> If the Kamehameha Schools were to cease charging tuition—a less-than-ideal, albeit not impossible, scenario—there would likely be no contract. Hence, § 1981 would cease to apply altogether.<sup>362</sup>

Or perhaps a still more elegant solution is available—one that would deploy the proceeds of the Bishop Trust to the benefit of Native Hawaiians while enabling further integration by students who choose to undertake it. The key would be for the Kamehameha Schools to bifurcate their admissions and financial aid policies, which are now effectively coupled. Just as some universities have a merit-based admissions policy and a merit-blind (need-based) financial aid policy,<sup>363</sup> the Kamehameha Schools could introduce a race-blind admissions policy and a race-based financial aid policy. Specifically, they could adopt a model like that of existing minority assistance programs:<sup>364</sup> raising tuition to levels commensurate with operating costs, and offering scholarships specifically to Native Hawaiian students. The Kamehameha Schools might even see fit to offer scholarships to Native Hawaiian students to attend other private schools in Hawaii, thereby more completely realizing the integrative ideal in the state. Such an approach would be loyal to the terms and the spirit of the Bishop Will<sup>365</sup> and would not require the Kamehameha Schools to alter their pedagogical method or otherwise amend their Leadership Model of education. Of course, other approaches could yet be devised. Ultimately, which is adopted, if any, is a matter to be left for the Court, the Congress, and the

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359. Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. § 4 (2007).

360. However, the Kamehameha Schools might still be considered to be a private party whose preferences would not be immune from challenge under § 1981. *See Kamehameha Schools*, 470 F.3d at 882–84 (Bybee, J., dissenting).

361. *Id.* at 888 (Kozinski, J., dissenting) (emphasis in original).

362. *See id.* at 888–89.

363. *See, e.g.*, Yale College Office of Undergraduate Admissions, Yale & Socioeconomic Diversity, at <http://www.yale.edu/admit/news/socioeconomic.html> (last visited April 14, 2008).

364. *See, e.g.*, Prep for Prep, at <http://www.prepforprep.org> (last visited April 14, 2008); A Better Chance, at <http://www.abetterchance.org> (last visited April 14, 2008); The Gates Millennium Scholars, at <http://www.gmsp.org> (last visited April 14, 2008).

365. *See Kamehameha Schools, Questions and Answers About KS Admissions Policies*, at <http://www.ksbe.edu/admissions/policy.html> (last visited April 14, 2008).

Kamehameha Schools.

Little more than a decade after *Brown*, the Supreme Court of New Jersey declared: "children must learn to respect and live with one another in multiracial and multi-cultural communities," adding, "the earlier they do so the better."<sup>366</sup> As our society becomes increasingly more pluralistic, this objective becomes exponentially more important. Children in general, and disadvantaged minority children in particular, are in great need of improved education. Whether this need is fulfilled through segregated or integrated schools is a matter of tremendous moment. *Kamehameha Schools*, because it offers legal sanction to self-segregation in private education, can only do more harm than good.

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366. *Booker v. Bd. of Educ.*, 212 A.2d 1, 6 (N.J. 1965).