

# Language and culture restrictions in K-12 non-public schools in the United States: Exploring the reach of federal non-discrimination law and implications for South Africa

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## OPSOMMING

### **Taal- en Kulturbepenkings in K-12 Nie-openbare Skole in die Verenigde State: 'n Verkenning van die Reikwydte van Federale Nie-diskriminasie Wetgewing en Implikasies vir Suid-Afrika**

In hierdie artikel ondersoek en vergelyk ons aspekte van die beperking sowel as die beskerming van taal- en kultuurregte in skoolverband (onafhanklike skole in die Verenigde State en openbare skole in Suid-Afrika). Ons doen dit deur grondwetlike en ander bepalings te bespreek en geselekteerde regspraak in die twee lande onder die vergrootglas te plaas. Ons ondersoek ook die samehang of gebrek aan samehang tussen die konsepte taal en kultuur in wetgewing en in regspraak. Ten slotte dui ons enkele besluitnemings- en bestuursimplikasies vir rolspelers in die onderwys aan en oorweeg ons ook die rol wat wetgewing en regspraak sou kon speel in die voortbestaan of ondergang van minderheidstale en -kulture.

## 1 Introduction

The purpose of this article is to examine two recent private school cases in the United States (US) addressing language and culture issues in schools and reflect on their application to similar issues in South African public and independent (private) schools. In the two US cases, *Silva v St Anne Catholic School*<sup>1</sup> (*Silva*) involving a private school's creation of an English-only policy and *Doe v Kamehameha Schools*<sup>2</sup> (*Kamehameha*) involving a private school's admission policy limiting admission only to those students who are related by blood as Native Hawaiians, two federal courts examined the legality of the policies in light of federal statutory and constitutional law. In South Africa, the Constitutional Court, in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*<sup>3</sup> (*Ermelo*), addressed the extent to which, under the Constitution of the Republic of South Africa, 1996 (the SA Constitution), a public school was

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1 *Silva v St Anne Catholic School* 595 F Supp 2d 1171.

2 *Doe v Kamehameha Schools* 596 F3d 1036.

entitled to continue operating as a single medium Afrikaans school where its space was underutilised and nearby English speaking students were attending severely overcrowded schools. The common factor in *Silva*, *Kamehameha*, and *Ermelo* is the extent to which school governing bodies (South Africa) or school boards (US) should be able to select and promote a particular language and/or culture.

This article is divided into five parts: (1) presenting brief discussions of selected South African cases; (2) presenting the facts and court opinion for *Silva*; (2) presenting the facts and court opinions for *Kamehameha*; (3) analysing the US cases and their implications for schools under the following headings: culture and school policies in *Silva* and *Doe*; *Runyon v McCrary* and § 1981; the reception of federal aid and Title VI; equal protection and burden shifting standards; free expression issues and culture, and, judicial deference to school decisions; and (4) discussing what implications the US cases might have for *Ermelo*-type decisions in South Africa.

## 2 South African Cases

The cases of *Matukane*,<sup>4</sup> *Gauteng School Education Bill*,<sup>5</sup> *Laerskool Middelburg*,<sup>6</sup> *Mikro*,<sup>7</sup> *Seodin*<sup>8</sup> and *Ermelo*<sup>9</sup> can all be said to deal strictly with legal issues regarding language in schools, such as who may make the language policy of a public school, what are the powers of school governing bodies (SGBs) in this regard and what are the powers of a provincial education department *vis-à-vis* those of an SGB.<sup>10</sup> On the other hand they also deal implicitly and sometimes explicitly with matters of a socio-economic nature namely what does a child's right to a basic education as captured in section 29 of the SA Constitution entail and what are the responsibilities and powers of the state to ensure access

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3 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC). It is the most recent in a sextet of cases dealing with the issue of language in schools.

4 *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T)

5 *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC)

6 *Die Laerskool Middelburg v Die Departementshoof: Mpumalanga se Departement van Onderwys* 2002 JOL 10351 (T).

7 *Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 3 SA 504 (C).

8 *Seodin Primary School v MEC of Education Northern Cape (2)* 2006 4 BCLR 542 (NC).

9 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC).

10 All of these cases should be read in light of two provisions of the Constitution of the Republic of South Africa, 1996 (SA Constitution) namely s 29(2) in terms of which everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable and s 30 in terms of which everyone has the right to use the language and to participate in the cultural life of their choice.

to this right while complying with all other relevant provisions of the SA Constitution. In a sense the *Ermelo* case takes the issues to a logical and inevitable conclusion enjoining the Department of Education of Mpumalanga (representing the state) and the SGB of *Hoërskool Ermelo* to reconsider the language policy of the school in light of the issues of socio-economic justice which co-influenced the court's decision.

## 2 1 *Matukane*

*Matukane* was the first education case which captured national and international attention after the changeover to democracy in 1994. At the beginning of 1996 three black parents charged a dual medium primary school (with largely Afrikaans-speaking students but with some English-speaking ones), Potgietersrus *Laerskool*, with discrimination on the basis of race, ethnic or social origin, culture or language. The school argued that the school had an exclusively Christian Afrikaans culture and ethos which the school was entitled to protect "by refusing to admit pupils from a different or foreign language".<sup>11</sup> In granting the parents an order for admission to the school, Justice Spoelstra rejected the school's claim that a culture should be allowed to have its own schools where children can be educated in the mother-tongue according to their own religion and culture.

## 2 2 *Gauteng School Education Bill*

This case was heard under the interim Constitution of the Republic of South Africa, 1993.<sup>12</sup> In this judgment in the Constitutional Court Mahomed DP pointed out that the Speaker of the Gauteng Provincial Legislature had been petitioned by members of the Legislature to request the Constitutional Court to settle a dispute that had arisen regarding the constitutionality of certain provisions of the Gauteng School Education Bill (the Bill).

Among the disputed provisions was section 19(1) of the Bill which provided that language competence testing shall not be used as an admission requirement to a public school. The petitioners as well as the South African Foundation for Education and Training (SAFET) (which had been admitted to the proceedings as an *amicus curiae*) disputed section 19(1) arguing that it invaded the right of persons to attend schools where language competence testing is permitted as an admission requirement. They further argued that in terms of section 32(c) of the interim Constitution every person could demand from the state the right to have established [public]<sup>13</sup> schools based on a common culture, language or religion provided that there shall be no discrimination on the ground of race. Mahomed DP found that Section 32(c) of the interim Constitution did not confer on the state an obligation to establish such [public]

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11 *Matukane* 231.

12 We believe that, if the case were heard under the 1996 Constitution, the outcome would probably have been the same.

13 Our insertion.

educational institutions. The Section merely created a defensive right to a person who sought to establish such [independent or private] educational institutions and it protected that right from invasion by the state.<sup>14</sup>

Mahomed DP therefore declared that section 19(1) of the Gauteng School Education Bill of 1995 was not inconsistent with the Constitution on any of the grounds advanced by the petitioners and SAFET.<sup>15</sup>

### **2 3 *Laerskool Middelburg***

Justice Bertelsmann heard this case in which the *Laerskool* (Primary School) Middelburg approached the court to set aside a decision by the Head of Department of the Mpumalanga Department of Education and his officials to change the school from a single medium Afrikaans school to a parallel medium school.

Justice Bertelsmann noted with concern that the school had to join two classes for learners with special educational needs to make provision for an English stream. Because it had become clear (commonplace) that the Department's aim was to transform the school and to do away with Afrikaans medium schools in Mpumalanga despite the provisions of Section 29(2) of the SA Constitution and because the documentation before the court hardly seemed to give consideration to the interests of the learners to be enrolled at the school, the Justice Bertelsmann appointed a *curatrix ad litem* for all the children involved.<sup>16</sup>

From the report of the *curatrix* it was clear that the Department could have placed the children at other schools. It also became clear that the children had adapted well to the school but formed a somewhat isolated group. The children received good education and their parents wanted to keep them at the school. It would not be in the interests of the children to transfer them to other schools.<sup>17</sup>

Because of the best interests of the children and because the school had let a considerable time elapse before it approached the court, the court did not set aside the decisions by the authorities and *de facto* created a parallel medium school as the children would continue to other grades. If the school had litigated earlier the judgment might well have been different.

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14 Our insertions.

15 S 29(3) SA Constitution puts the intention of the Constitution beyond doubt: "Everyone has the right to establish and maintain, their own expense, independent educational institutions ...". Such independent schools may be based on a common language or religion and the state may subsidise such schools.

16 8, 9.

17 9.

## 2 4 *Mikro*

The case was heard by Justice Thring and he had to judge an application brought by Mikro Primary School (a single medium Afrikaans school since 1993) and its SGB against the Western Cape Member of the Executive Council for Education (MEC) and the Head of the Department of Education (HoD).<sup>18</sup> The school is just one kilometre from a parallel medium primary school.<sup>19</sup> In November 2004 the HoD had instructed the principal under threat of disciplinary action of the school to admit 40 learners who wanted to be taught through the medium of English to the school's grade 1 class in 2005.<sup>20</sup> The school refused and appealed to the MEC who dismissed their appeal on 19 January 2005 and on the same day "... two senior departmental officers came to the school and participated in the process by which 21 ... children ... came ... to attend the school".<sup>21</sup>

On 20 January 2005 the school and its SGB applied to the court among others to set aside the decisions and actions by the MEC and the HoD and the officials of the Education Department.<sup>22</sup> Justice Thring found that the SGB was not an organ of state obliged to carry out the instructions of the HoD.<sup>23</sup> He also found that "a future repetition of similar conduct on the part of the first and second respondents is not unlikely" and also considered the best interests of the children who had been "enrolled".<sup>24</sup> Justice Thring ordered that the decisions of the MEC and the actions of the HOD and his officials be set aside and the children be relocated to another school as soon as practical but that they should be relocated before the beginning of the 2006 school year.<sup>25</sup>

## 2 5 *Seodin*

On 31 August 2004 the MEC for Education of the Northern Cape decided all single-medium Afrikaans schools in the Kuruman District, as well as Northern Cape Agricultural High School should from January 2005 convert to and function as double-medium Afrikaans-and-English schools. On 1 September the HoD in question decided to implement the MEC's decision.<sup>26</sup> Four Afrikaans medium schools affected by the decision of the MEC approached a full bench of the Northern Cape Division of the High Court for leave to appeal against the judgment in an interlocutory application reported *sub nom* as *Seodin Primary School v*

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18 2.

19 38-39.

20 3.

21 4.

22 5-7.

23 16 *et seq.*

24 47.

25 59-61.

26 3-4.

*MEC of Education, Northern Cape*.<sup>27</sup> The application was dismissed.<sup>28</sup> Leave to appeal was not granted.

## 2.6 *Ermelo*

*Ermelo* tested section 29(2) of the SA Constitution providing that “[e]veryone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable”.<sup>29</sup> Unlike *Matukane* that involved a school that was largely Afrikaans-speaking (with an English minority), *Ermelo* addressed the authority of a school governing body (SGB) to create an Afrikaans-only school, and then, to deny admission to English-speaking students who did not speak Afrikaans and were not willing to learn and be taught in Afrikaans. *Matukane* presented vexing questions, such as whether there is a right to mother tongue medium instruction, what the state’s responsibility, if any, is to effect protection of that right, and whether an SGB has a right to create a single medium school. The Head of Department of Education of Mpumalanga had taken the extraordinary action of revoking the SGB’s authority to determine the language policy at *Ermelo* and had ordered the school to admit English-speaking students from a nearby school. The Constitutional Court determined that the HoD had no authority to replace the SGB, but in so doing, the Court took note of the unused space at *Ermelo* and the crowded conditions at neighbouring township schools and directed the SGB to revisit its language policy in light of the needs of the community.

Whether *Ermelo* represents the eventual end of Afrikaans speaking single medium schools is open to debate.<sup>30</sup> *Ermelo* addressed the limitation on SGBs in requiring a single medium for instruction but did not address the larger question whether language would be a more defensible issue if considered in the broader context of culture. Post-World War II comments referring to Afrikaans in South Africa “as an effective instrument for social engineering” leave unclear whether Afrikaans was one aspect (albeit an important one) of a larger Afrikaans culture or whether language stood by itself as a way of assuring that the Afrikaans speaking population not be swamped by the English speaking one.<sup>31</sup>

In an unusual order the court instructed the SGB of *Hoërskool Ermelo* to:

27 [2006] 1 All SA 54 (NC).

28 10.

29 S 29(2) SA Constitution.

30 More than 50% of the schools that used Afrikaans as the medium of instruction have been dismantled since 1994; [http://www.unpo.org/images/member-\\_profile/afrikaner0ct2009.pdf](http://www.unpo.org/images/member-_profile/afrikaner0ct2009.pdf) (accessed 2011-11-16).

31 See generally, Mawdsley & De Waal “Symbolism in Education: Its Role, Importance and Unique Application in US and South African Schools” 2007 *Ed Law Rep* 587 (arguing that the Afrikaans language is a valid and viable symbolism of a culture, without, however, being able to identify any other aspects besides language as the distinctive aspect of an Afrikaans culture).

- (a) review and determine a language policy in terms of section 6(2) of the Schools Act and the Constitution;
- (b) by not later than Monday 16 November 2009 lodge with this Court an affidavit setting out the process that was followed to review its language policy and a copy of the language policy.

This order can be seen as a creative attempt to reconcile the “legal and lawfulness” issues and the deeper socio-economic issues of access to education.<sup>32</sup>

### 3 Schools and Culture in the US: Statutory, Constitutional and Case Law

#### 3.1 Statutory and Constitutional Law

Of the approximately 5,000,000 students in the US attending non-public schools, 80 percent of these students attend sectarian schools.<sup>33</sup> Because of the manner in which federal non-discrimination statutes are written or are interpreted, students or employees in some of these schools may find themselves excluded from protection under certain federal non-discrimination statutes. For example, some statutes expressly provide specific exemptions for religious institutions.<sup>34</sup> In other cases, the application of certain federal non-discrimination statutes will depend on whether a private school receives federal financial assistance. Thus, a private school’s acceptance of such assistance will make the school subject to the Rehabilitation Act of 1973 (section 504)<sup>35</sup> which prohibits discrimination on the basis of disabilities, Title IX of the Educational Amendments of 1972<sup>36</sup> which prohibits gender discrimination, the Equal Pay Act of 1963 which prohibits gender-based wage discrimination,<sup>37</sup> and Title VI of the Civil Rights Act of 1964<sup>38</sup> which

<sup>32</sup> It appears that the SGB has complied with this order and that a new language policy has been developed that addresses both legal (power) issues and social issues and the need for more school places.

<sup>33</sup> See US Department of Education, National Center for Education Statistics *Characteristics of Private Schools in the United States: Results From the 2007-08 Private School University Survey* (2009) 6 Tab 1.

<sup>34</sup> See eg 28 C FR § 36.102(e) (under Title III of the Americans with Disability Act, a public accommodation is prohibited from discriminating on the basis of disability; however, a “religious entity”, defined as “a religious organisation, including a place of worship”, is exempted from this definition). See also Title VII 42 USC § 2000e-2 *et seq* that contains three exemptions for religious organisations: where religion is a “*bona fide* occupational qualification”; 42 USC § 2000e-2(e)(1), where an employee is part of an educational institution “directed towards the propagation of a particular religion”; 42 USC 2000-§ 3(e)(2), and where individuals of a particular religion “perform work connected with carrying on the activities of such ... educational institution”; 42 USC §2000e-1 (a).

<sup>35</sup> 29 USC § 794.

<sup>36</sup> 20 USC § 1681 *et seq*.

<sup>37</sup> 29 USC § 206(d)(1).

<sup>38</sup> 42 USC § 2000d.

prohibits discrimination on the basis of race, colour or national origin. Even if private schools do not receive federal assistance they are still subject to § 1981 of the Civil Rights Act of 1866 that accords all persons the same rights to make contracts, sue, and present evidence as “are enjoyed by white citizens”.<sup>39</sup>

In certain exceptional situations, the Free Exercise Clause of the First Amendment permits a complete ministerial exemption from school liability for alleged liability under federal non-discrimination statutes.<sup>40</sup> However, such exclusion is very limited.<sup>41</sup> This portion of the paper addresses the liability of private K-12 educational institutions where their language or cultural admissions restrictions are alleged to constitute discrimination. In particular, this paper considers the extent to which a private school’s enforcing its English-only policy against students during the school day and a private school’s limiting student admission only to those students with a particular cultural background violates Title VI and § 1981. The challenge, in part, is that neither language restrictions nor cultural requirements are expressly addressed in Title VI or § 1981.

### 3.2 *Silva*: Facts and Court Decision

In *Silva*, near the beginning of the 2007-2008 school year, a private Catholic diocesan elementary and middle school (St Anne) in Wichita, Kansas adopted an English-only rule requiring that English be the only language spoken at school. The rule had been adopted in response to alleged offensive comments by Spanish-speaking students in their native language towards non-Spanish speaking students. The comments were considered by school officials, none of whom seemed to speak Spanish,<sup>42</sup> to constitute bullying. To explain the new English-only policy, the school principal sent home to all parents the following letter:

We are experiencing some challenges in behaviour that are inappropriate for St. Anne School. Some of these include: name calling, not including others, put-downs, and in general-Bullying! Sometimes it appears to me that some

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<sup>39</sup> *Idem* § 1981(a).

<sup>40</sup> Courts have created a ministerial exemption under the Free Exercise Clause that exempts religious employers from discriminatory claims. See eg *EEOC v Catholic University of America* 83 F3d 455 (dismissing a nun’s Title VII gender discrimination claim after she was denied tenure in the Canon Law Department, the court of appeals finding that, because the department played a significant role in training priests and, thus, was important to the spiritual mission of the Catholic Church, teaching in the department qualified for a ministerial exemption).

<sup>41</sup> See eg *Welter v Seton Hall University* 608 A2d 206 (upholding damages awarded for breach of contract to two nuns and refusing to apply the ministerial exemption where the nuns played no role in performing ministerial functions for the university).

<sup>42</sup> The facts in *Silva* are not clear as to who alerted non-Spanish-speaking school personnel to the content of the Hispanic students’ comments in the lunchroom and on the playground, but a reasonable inference from the facts of the case seems to suggest that the source may have been bilingual students in the school. See *Silva* 595 F Supp 2d 1175.



students feel that they don't have to abide by our policies. This will not be tolerated. This causes disruption in teaching and learning. If this continues, individual parents/students will be obliged to attend a conference!

...

We require English be spoken during school at all times! We are requesting that no native language other than English be spoken. Since all subjects are taught in English then they need strengthening in that area. The more students are immersed in English language the better the chance for improvement/success.<sup>43</sup>

Three days after this letter was sent, the school's principal met with three families of Spanish-speaking parents, including the Silvas,<sup>44</sup> to discuss the language rule, explaining that the English-only rule was enacted "to combat bullying, name-calling, and putdowns".<sup>45</sup> Although three Spanish-speaking parents were plaintiffs in *Silva*, the discriminatory claims discussed in the cases focused on the Silvas's son, Adam and, for purposes of the discussion of the facts, the Silvas' claims will be considered representative of all plaintiffs. The Silvas were strongly opposed to the new rule and in a subsequent meeting with the principal told the principal not to embarrass their son (Adam) in front of his classmates. Two weeks later, the Silva's sixth-grade son was transferred to another diocesan school for refusing to sign in his class an acknowledgement of school rules, including adherence to the English-only rule. While school officials treated this transfer to another diocesan as a disciplinary measure in response to Adam's refusal to sign the acknowledgement, the Silva parents treated it as punishment for Adam's and the parents' exercise of their expressive rights in objecting to the school's authority to ban their native language (Spanish) from the school. An additional parent claim centred on a school seating arrangement whereby Spanish-speaking students were prohibited from sitting together. Even though the school abolished the seating arrangement, the plaintiff parents claimed that their children continued to be targeted and were watched more closely than other children. In addition to the school's allegation that some Spanish-speaking students had bullied other students with derogatory and uncomplimentary comments, two other incidents of non-Spanish speaking students taunting the minor plaintiffs with ethnic comments allegedly had occurred, thus further complicating the legal issues.<sup>46</sup>

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43 *Ibid.*

44 *Idem* 1179. The three student plaintiffs in this case represented three families.

45 *Ibid.*

46 *Idem* 1179 (in one incident, a student sent an email referencing the United States as "our country, not yours", and in the second incident, a non-Spanish speaking student criticised a Spanish-speaking student's incorrect folding of the US flag with the comment, "we aren't in Mexico").

The *Silva* plaintiffs<sup>47</sup> presented three legal claims: (1) intentional discrimination under § 1981 and Title VI; (2) hostile environment under § 1981 and Title VI; and, (3) retaliation under § 1981 and Title VI. Essentially the plaintiffs' primary claim was that the blanket English-only policy constituted a *prima facie* case of discrimination. The school, in defence, denied the plaintiffs' claims, alleging that the English-only rule neither was discriminatory nor the cause of the alleged hostile educational environment.

The threshold question for the federal district court in *Silva* was whether § 1981 and Title VI applied to the private, religious school in this case. While the US Supreme Court in an earlier decision, *Runyon v McCrary*,<sup>48</sup> had determined that § 1981 applied to private schools whose written policies denied admission based on race, the defendants in *Silva* argued that the plaintiffs had failed to demonstrate race discrimination by the school in the making and enforcement of any contract. However, in denying the school's motion for summary judgment, the district court noted that statements in the school's handbook regarding race and diversity were sufficient to "give rise to enough of a contractual relationship to allow the case to proceed under § 1981".<sup>49</sup>

Federal court jurisdiction under Title VI requires that a school receive federal funds, a jurisdictional issue that was not a problem in *Silva* since St Ann received National School Lunch Program (NSLP)<sup>50</sup> federal funds administered by the United States Department of Agriculture.<sup>51</sup> In response to the defendants' claim that Title VI is program specific and, thus, applies only to discrimination in the program through which the school receives federal funds, the district court held that the interpretation of Title VI follows that of Title IX. The *Silva* court noted that Congress had acted to amend Title IX following the US Supreme Court's decision in *Grove City College v Bell*<sup>52</sup> where the court had held the prohibition of gender discrimination was program-specific. Subsequent to the Court's *Grove City* decision, Congress enacted the Civil Rights Restoration Act of 1987<sup>53</sup> that expressly applied Title IX institution-wide to any educational institution receiving federal funds. As a result, the

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47 The three student plaintiffs represented three families of Spanish-speaking parents. *Idem* 1179.

48 427 US 160.

49 *Idem* 1180.

50 42 USC § 1756 (The NSLP provides that, where private schools have families that satisfy the family income eligibility requirements of the statute, "The State revenues provided by any State to meet the requirement of subsection (a) of this section shall, to the extent the State deems practicable, be disbursed to schools participating in the school lunch program under this chapter"). *Idem* § 1756 (a), (b).

51 *Silva* 595 F Supp2d 1174 ("Under the program, the government gave St Anne's \$2.47 in cash for every free lunch, \$2.07 for every reduced price lunch, and \$0.23 for every paid lunch the school served during the 2007-2008 school year").

52 465 US 555.

53 42 USC § 2000d-4a(3)(A)(i).

federal district court in *Silva* held that Title VI applied as well on an institution-wide basis to St Anne, observing that it is well established that Title VI is interpreted as “parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs”.<sup>54</sup>

However, even though Title VI applied institution-wide in *Silva*, the district court found that the plaintiffs had failed to produce evidence that the English-only policy was discriminatory under either Title VI, or § 1981, because they had experienced no adverse action. The court likened the defendant’s English-only policy as “akin to the almost universal decision by private schools to mandate the use of uniforms”,<sup>55</sup> reasoning that just as parents “do not have a fundamental right to control the clothing their children wear to school”, so also parents have “[no] right to control the language their children can or cannot speak at school”.<sup>56</sup>

While the English-only policy, on its face, did not constitute discrimination under Title VI or § 1981, the plaintiffs in *Silva* alleged that interpretation of the policy should be subject to the burden shifting test in Title VII where the Equal Employment Opportunity Commission (EEOC) in its regulations has indicated that an English-only policy applicable at all times to all employees regardless of occupation or activity can be evidence of a hostile work environment.<sup>57</sup> However, the *Silva* federal district court found that the school’s policy, even though it required the speaking of English during the entire school day, did not invoke discrimination comparable to that for employment settings under the EEOC Title VII regulation. Nonetheless, even though the English-only policy was not discriminatory, the *Silva* district court agreed that a school-wide policy did, under the facts of this case, present a genuine issue of material fact as to whether the plaintiffs had implemented the policy in such a way as to create a hostile environment. To support its conclusion, the *Silva* court identified four allegations in the plaintiffs’ complaint, in terms of the school’s enforcement of its English-only policy, that one could argue pointed to a hostile environment: the Hispanic students were watched more closely than other students; the Hispanic students were worried about being expelled if they spoke Spanish; the Hispanic students were worried that other students would report them for speaking Spanish; and the Spanish-speaking students were unable to concentrate on their academics.<sup>58</sup>

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54 *Silva* 595 F Supp2d 1181, citing *Gebser v Lago Vista Independent School District* 524 US 274.

55 *Silva* 595 F Supp 2d 1184.

56 *Idem* 1184-1185.

57 42 USC § 2000e-2(a) (prohibiting employment discrimination on the basis of race, colour, religion, sex, or national origin). See 29 C FR §1601.7 (“A rule requiring employees to speak only English all times in the workplace is a burdensome term and condition of employment”).

58 *Silva* 595 F Supp 2d 1186.

The court observed, though, that, while these factors did not establish that a hostile environment existed at the school, the plaintiffs were entitled to an evidentiary trial to determine if such an environment had, in fact, existed at the time the lawsuit was filed. Under the *McDonnell Douglas Corporation v Green*<sup>59</sup> burden shifting test, the plaintiffs in *Silva* would have the initial burden of establishing a *prima facie* case that the policy created a hostile environment, after which the burden will shift to the defendant school to demonstrate a legitimate non-discriminatory reason for creation of the policy. If the school meets that burden, the plaintiffs must demonstrate that the proffered reason is pretextual.<sup>60</sup>

### 3.3 *Doe v Kamehameha Schools: Facts and Court Decisions*

In *Kamehameha*, the Ninth Circuit addressed the admissions policy of the Kamehameha Schools in Hawaii that limits enrolment in the schools only to native Hawaiians. The Kamehameha Schools were first established in 1884 by the last descendant of the Hawaiian monarchy, Princess Bernice Pauahi Bishop, who was a member of the Hawaiian royal family and at the time of her death in 1884 the largest landowner in Hawaii, owning approximately one tenth of the land.<sup>61</sup> Kamehameha Schools have expanded over the years to three K-12 schools and now have an endowment of \$9.1 billion.<sup>62</sup>

The Bishop Estate trust agreement provided that trustees were “to expend the annual income in the maintenance of said schools – and to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood before admitting other

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59 *McDonnell Douglas Corporation v Green* 411 US 792.

60 See *Silva* 595 F Supp 2d 1182.

61 *Doe v Kamehameha Schools* 416 F3d 1025.

62 This significant endowment resulted from the Supreme Court's upholding an Hawaiian 1967 state statute allowing eminent domain to force the sale of privately held land, including land owned by the Bishop estate, the money from this sale was paid into the Bishop Trust and was the funding source of the Kamehameha Schools. At the time of the statute, the Hawaii Legislature discovered that significant amounts of real property were in the hands of only a few landowners, resulting in an inflated price for non-privately held land. The legislature found that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners, including the Bishop Estate. The legislature further found that 18 landholders, with tracts of 21,000 acres or more, owned more than 40% of this land and that on Oahu, the most urbanised of the islands, 22 landowners owned 72.5% of the fee simple titles. As a result of the eminent domain sale of Bishop Estate property, the endowment ballooned to \$6 billion, a sum that has since increased to \$9.1 billion at the time of the current lawsuit. See *Hawaii Housing Authority v Midkiff* 467 US 229 232; Brief for the Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, as *amici curiae* 32. For a discussion of the Hawaiian statute and the eminent domain challenge, see Mawdsley “Section 1981 and Private Schools: The Ninth Circuit Revisits Race-Conscious Admissions Policies” 2006 *Ed Law Rep* 23.

applicants”.<sup>65</sup> Organised to preserve Hawaiian culture and identity by providing classes on Hawaiian culture and the Hawaiian language, the schools currently enrol approximately 5,000 students<sup>64</sup> and have, with very few exceptions, admitted only students “with any amount of Native Hawaiian blood”.<sup>65</sup>

Native Hawaiians have received special attention from Congress, in some cases being included with legislation protecting Native Americans, such as the American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act.<sup>66</sup> However, in the absence of language connecting Native Americans and Native Hawaiians, statutes protecting Native Americans do not always apply to Native Hawaiians. In its 2005 *Kamehameha* decision, the Ninth Circuit (in interpreting *Morton v Mancari*<sup>67</sup> where the Supreme Court had found Native American hiring preferences not to constitute a Title VII violation) had refused to accord Native Hawaiians the same unique trust relationship that existed between the US government and Native American tribes. The special status granted Native Americans under the Bureau of Indian Affairs (BIA) in a hiring preference for Native Americans did not apply to Native Hawaiians because the preference applied not “towards a ‘racial’ group consisting of ‘Indians’” but instead “to members of ‘federally recognised tribes’”.<sup>68</sup> In essence “the [BIA] preference [was] political rather than racial in nature”<sup>69</sup> and, thus, without a Native Hawaiian political entity corresponding to an Indian tribe, the Kamehameha Schools’ admission policy could be considered to be a violation of § 1981. However, under the No Child Left Behind (NCLB), a Native American school for purposes of compliance with the statute extends to:

Native American (including Alaska Native) children and youth, an Indian tribe, a tribally sanctioned educational authority, a Native Hawaiian or Native American Pacific Islander native language education organisation, or an elementary school or secondary school that is operated or funded by the Bureau of Indian Affairs.<sup>70</sup>

Nonetheless, the NCLB distinguishes between Native American and Native Hawaiian in terms of the amount of funding<sup>71</sup> and the NCLB

<sup>65</sup> *Doe v Kamehameha Schools* 990 F2d 458.

<sup>64</sup> *Doe v Kamehameha Schools* 295 FSupp 2d 1141.

<sup>65</sup> *Kamehameha* 596 F3d 1039.

<sup>66</sup> See 20 USC § 4401 *et seq.* (Congress observed in the American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act that “it is appropriate and necessary for the Federal Government to support research and scholarship in Indian art and culture and Native Hawaiian art and culture and to complement programs for the advancement of such art and culture by tribal, private, and public agencies and organisations”).

<sup>67</sup> 417 US 535 (upholding hiring preferences by the BIA under the Indian Reorganization Act of 1934 for Native Americans as not being discriminatory under Title VII).

<sup>68</sup> *Idem* 553.

<sup>69</sup> *Kamehameha* 596 F3d 1044.

<sup>70</sup> 20 USC § 3203.

<sup>71</sup> *CF* 20 USC § 4111(a)(1) with § 4117.

distinguishes between Native American and Native Hawaiian schools in terms of designing, implementing and enforcing programs funded under the statute.<sup>72</sup> The effect of the federal legislation appears to be that, while Native Hawaiians enjoy inclusion in funding under the NCLB, they do not do appear to do so at the same degree as Native Americans.

Since 1966, the Kamehameha Schools have admitted only two non-Hawaiian students, (one student in 2002 and the second in 2003), under its admissions policy that allows for such admissions if no qualified Native Hawaiian candidates are available. However, the Bishop Estate Board of Trustees has since amended the admission policy by waiving the application fee and minimum test score requirements so as to “effectively ensure that there would never again be an insufficient number of qualified Native-Hawaiian applicants”.<sup>73</sup> In the 1960s, the Kamehameha Schools’ trustees also closed another admissions loophole by reversing an earlier policy allowing children of faculty to attend the schools.<sup>74</sup>

The *Kamehameha* lawsuit has had a complex legal history. The student referenced in the preceding paragraph (hereafter referred to as Doe I) was admitted in 2003 pursuant to a temporary injunction ordering the schools to readmit him after the trustees had rescinded his admission on the grounds that the student’s mother, who had been adopted by a Native Hawaiian, did not qualify the student as a Native Hawaiian for purposes of admission. This injunction led eventually to a settlement agreement permitting the student to continue enrolment at the Kamehameha Schools.<sup>75</sup> The most recent lawsuit involved a different student (hereafter referred to as Doe II) who, however, was unsuccessful in his § 1981 claim to gain admission, also in 2003. Doe II, rather than negotiate a settlement agreement as had Doe I, chose instead to challenge the admissions policy as discriminatory on its face under § 1981.

A federal district court found, regarding Doe II’s claim, that the schools’ admissions policy granting preference to children of Native Hawaiian ancestry constituted a valid race-conscious remedial affirmative action program and, thus, did not violate § 1981.<sup>76</sup> On appeal to the Ninth Circuit, a three-judge panel held that the schools’ race-based admissions policy did not constitute a valid affirmative action plan, and, thus, because the schools had failed to supply a legitimate non-discriminatory reason for its admission policy, the policy was in violation of § 1981.<sup>77</sup> However, the Ninth Circuit Court of Appeals, sitting *en banc*, reversed the three-judge panel. The *en banc* Court of Appeals found that the Kamehameha School’s policy of giving preference in admission to

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72 *CF* 20 USC §§ 7101-7152 (Native Americans) with §§ 7201-7207 (Native Hawaiians).

73 *Kamehameha* 596 US 1039.

74 *Idem* n 1.

75 *Ibid.*

76 *Kamehameha* 295 F Supp 2d 1166-67.

77 *Kamehameha* 416 F3d 1042.

students of Native Hawaiian ancestry did not violate § 1981 inasmuch as a manifest imbalance in educational achievement existed between Native Hawaiians and other ethnic groups in the State of Hawaii and the schools' purpose was to remedy such imbalance.<sup>78</sup> The *en banc* Ninth Circuit also found that educational opportunities were not deficient for non-Native Hawaiians. In addition, the policy which had been constant for 118 years (the number of years at the time of the *en banc* decision) allowed for admission to non-Hawaiians if Native Hawaiians did not apply in sufficient numbers and would be in place only so long as necessary to remedy past discrimination.<sup>79</sup>

The US Supreme Court denied certiorari<sup>80</sup> but that has not stopped the procedural litigation. While the admissions policy was still waiting for a Supreme Court decision on the writ of certiorari, the Doe II plaintiff filed a motion to proceed anonymously because of his fear of physical injury if his identity were revealed. The plaintiff and his parents referenced three incidents that caused them fear: (1) a general sense of anger and rage over the federal district court settlement agreement permitting the plaintiff in 2003 to attend the school; (2) an affidavit from plaintiff's mother where unnamed persons demanded that the plaintiff's name be revealed, threatening physical violence; and, (3) a series of anonymous emails calling the student and parent plaintiffs derogatory names relating to their skin colour, especially the use of the term "haoles".<sup>81</sup> The Ninth Circuit upheld the federal district court's denial of plaintiffs' motion to proceed anonymously, agreeing that the plaintiffs had failed to prove that they "reasonably feared such harm".<sup>82</sup> Balancing the "common law rights of access to the courts and judicial records"<sup>83</sup> with the plaintiffs' "claims of widespread discrimination",<sup>84</sup> the Ninth Circuit supported "the default presumption that the plaintiffs will use their true names"<sup>85</sup> because most of the negative comments contained statements supporting non-violence<sup>86</sup> and because "the US attorney had issued a strongly worded warning, reminding the public that threats based on race are a federal felony".<sup>87</sup>

This procedural venture by the plaintiff Doe II was only a sideshow distraction for the substantive question as to whether the Kamehameha Schools' admission policy is discriminatory under § 1981. Assuming that

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78 *Doe v Kamehameha* 470 F3d 827.

79 *Ibid.*

80 *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 550 US 931.

81 *Kamehameha* 596 F3d 1040 n 3. "Haole" is a term in the Native Hawaiian language denoting a foreigner, especially a White or Caucasian person. "Kill haole day" is an unofficial tradition in Hawaiian public schools when some Native Hawaiian children "beatup Caucasian students on the last day of school" (citations omitted).

82 *Idem* 1044.

83 *Idem* 1042.

84 *Idem* 1043.

85 *Idem* 1046.

86 *Idem* 1045.

87 *Ibid.*

the plaintiffs will proceed now under their true names in a federal district court to challenge the admissions policy, both the district court and the Ninth Circuit will have another opportunity to consider the discriminatory nature of a school policy that furthers a particular culture by excluding all persons not of that culture.

### 3 4 Analysis and Implications

As between language and culture, culture is clearly the more expansive term. While language is generally part of one's culture, culture can include a wide range of other defining concepts such as religion, important historical events and activities. Unfortunately in the US, case law has not provided direction as to whether culture is a protected area under federal law, nor, if culture is protected, have the courts furnished clear guidelines as whether a private school's limitation of language will be permissible as long as it does not restrict all aspects of culture.

#### 3 4 1 Culture and School Policies in *Silva* and *Doe*

The two US cases selected for discussion, *Silva* and *Kamehameha*, present important differences concerning language and culture policies in schools. While both cases addressed factors important to an understanding of culture, they accomplish their purposes in quite different ways. Contrary to *Kamehameha* which represents a coordinated and comprehensive effort to preserve the Hawaiian culture by excluding non-Native Hawaiians, the English-only policy in *Silva*, one can argue, was initiated by the private religious school not to further a culture, but simply to address alleged bullying by Spanish-speaking students. In effect, the exclusion of a language from school could be viewed as excluding, at best, only one part of Hispanic culture (language) from a school.

The problem, of course, is determining the definition of culture and its impact on students. In *Abbott v Abbott*,<sup>88</sup> the US Supreme Court held, following a divorced, custodial mother's taking her son from his birth country (Chile) to the US without the father's consent, that the Chilean father's *ne exeat*<sup>89</sup> right granted by a Chilean family court constituted a "right of custody" under the Hague Convention.<sup>90</sup> In upholding the veto rights of the Chilean father concerning the mother's removing the child from Chile, the Court observed that "[f]ew decisions are as significant as the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb".<sup>91</sup> However, worth noting is the

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88 130 S Ct 1983 (2010).

89 *Ne exeat* is a writ to restrain a person from leaving the country, or the jurisdiction of the court. *Black's Law Dictionary* (1951) 1180.

90 The Hague Convention on the Civil Aspects of International Child Abduction (Convention) 1980-10-24, TIAS No 11670 S Treaty Doc No 99-11, implemented in the US as the International Child Abduction Remedies Act 42 USC § 11601 *et seq.*

91 *Abbott* 130 S Ct 1991.



three-justice dissent in *Abbott* which was critical of the majority and noted that even returning the child to Chile would not permit the father's veto to determine "any number of decisions that are vital to AJA's physical, psychological, and cultural development",<sup>92</sup> such as the kind of school he attends, the religion he chooses to follow, the foods he chooses to eat, the sports he chooses to participate in, or the language he chooses to speak.<sup>93</sup> Although arising out of a child custody setting, *Abbott*, nonetheless, recognises that culture is a multi-faceted concept that includes, but is not necessarily limited to, language. *Abbott* suggests that, in addressing the issue of culture, much depends on the perspective. From the perspective of the child in *Abbott*, the language and culture in Chile that the child had experienced from birth will probably undergo a substantial reorientation when the child is placed in a US school. If the mother prevails, the child's immersion in US education will require the acquisition and use of the English language as well as knowledge of and participation in new historical, social, and educational events, activities, and experiences that represent culture in US schools. At the same time, though, such a transition from Chile to the US will likely result in the diminution (or disappearance) of the Chilean culture through lack of the child's opportunity to participate in Chilean activities and events that would have been part of the Chilean educational experience. This conflict is mirrored in the positions of the Chilean father and the US mother who have used the authority of Chilean, US, and international law regarding custody to determine what the post-divorce culture of their child should be.

In *Silva* the contest is not between parents, but rather between parents and their child's school. While the English-only policy was limited only to the language spoken at school, the court's decision is silent as to how the school might be expected to address parent-requested celebrations at school of Hispanic activities or events that may require the use of costumes, music, and non-English languages. The religious private school in *Silva* was able to avoid a Title VI discrimination claim because its English-only policy was limited only to a fairly narrow disciplinary issue involving inappropriate student comments in a language understood by some students but not by any of the school teachers.<sup>94</sup> However, the fact that the federal district court in *Silva* refused to grant the school summary judgment on plaintiffs' hostile environment claim reflects how fragile may be the school's Title VI and § 1981 defence.<sup>95</sup> The district court found nothing discriminatory in the school's transferring Adam Silva to another school after he had refused to sign St Anne's English-only policy in class.

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92 *Idem* 2000. (Stephens J, Thomas J, and Breyer J dissenting).

93 *Ibid.*

94 *Silva* 595 F Supp 2d 1185; (The federal district court found non-pretextual St Anne's claim that it required "that English be spoken so that students and teachers can understand what is being said, and so that a foreign language could not be used to make fun of or exclude others").

95 *Idem* 1188-1189.

However, *Silva* presents more challenging issues that were not before the district court but may become issues in future litigation. The court did not have to determine how Title VI and § 1981 might be applied were St Anne to expand its English-only policy to prohibit other aspects of culture, such as wearing foreign country-specific symbols, displaying a non-US flag on clothes or school bags, singing songs at school in Spanish (or another language) rather than English, honouring non-US historical personages, or celebrating another country's important historical or social events.<sup>96</sup>

On its face, *Silva* clearly does not involve exclusion from school of a student because he speaks Spanish, nor had the school indicated any intention to expand its English-only policy to other areas. Worth noting is that the religious school in *Silva* did not advance its English-only policy as a means of advancing an "English-only" or "American" culture, but rather as a means of curbing alleged verbal bullying by students who spoke a language understood by none of the school teachers.

Such is not the case, though, in *Kamehameha* where the Kamehameha Schools exist not only to protect a single culture, but to prohibit the enrolment of any students not part of that culture. The Ninth Circuit in a prior *Kamehameha* decision upholding the restrictive enrolment policy observed that:

Native Hawaiians are over-represented in negative socioeconomic statistics such as poverty, homelessness, child abuse and neglect, and criminal activity; they are more likely to live in economically disadvantaged neighbourhoods and attend low-quality schools; and, because of low levels of educational attainment, they are severely under-represented in professional and managerial positions, and over-represented in low-paying service and labour occupations.<sup>97</sup>

To address "the imbalances, disadvantages and marginalisation facing Native Hawaiians",<sup>98</sup> the Ninth Circuit observed that the Kamehameha Schools had created a learning community that "embrace[d] Native Hawaiian culture, reconnect[ed] the children with the values or respect and sharing that guided their ancestors and builds their pride and senses of dignity",<sup>99</sup> claims not dissimilar to those that have been made on behalf of historically black colleges and universities and single-sex

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96 See *Idem* 1188. The district court suggests two different discrimination interpretations of the student plaintiff's (Adam's) refusal to sign the English-only letter. The first, and one adopted by the court, was that speaking a foreign language is not a protected activity. The second, and one not adopted by the court, is that the student's refusal to sign the policy constituted activity protected under Title VI or § 1981 as opposing discrimination.

97 *Kamehameha* 416 F3d 1041.

98 *Kamehameha* 295 F Supp 2d 1168.

99 *Idem* 1169.

schools.<sup>100</sup> In addition, the mission of Kamehameha Schools included a comprehensive remedial plan to increase both “the achievement scores of Native Hawaiian students” and “the number of Native Hawaiian students receiving college and advanced degrees,”<sup>101</sup> a plan that appeared to be working with seniors outperforming both national and state norms on the SAT I verbal and math tests and with virtually the entire graduating class of 2002 planning to enrol in some form of post-secondary education.<sup>102</sup>

However, even though the educational achievement of native Hawaiians at the Kamehameha Schools was improving, the general condition of Native Hawaiian students was not. Congress in 2002 had extended the Native Hawaiians Education Act (NHEA),<sup>103</sup> first enacted in 1994,<sup>104</sup> authorising a variety of preferential educational programs for Native Hawaiians. The NHEA, reauthorised again in 2010,<sup>105</sup> recognised that “Native Hawaiian students continue to begin their school experience lagging behind other students in terms of readiness factors such as vocabulary test scores”,<sup>106</sup> “continue to score below national norms on standardised education achievement tests at all grade levels”,<sup>107</sup> “continue [in both public and private schools] to show a pattern of lower percentages of Native Hawaiian students in the uppermost achievement levels and in gifted and talented programs”,<sup>108</sup> “continue to be over-represented among students qualifying for special education programs provided to students with learning disabilities, mild intellectual disabilities, emotional impairment, and other such disabilities”,<sup>109</sup> “continue to be under-represented in institutions of higher education and among adults who have completed four or more years of college”,<sup>110</sup> and “are more likely to be retained in grade level and to be excessively absent in secondary school”.<sup>111</sup> In other words, although graduates from the Kamehameha Schools were achieving success in education, the overall picture for Native Hawaiians continued to be bleak compared to non-Native Hawaiians.<sup>112</sup> Worth noting is that the deficiencies referenced

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100 See generally Flowers & Pascarella “Cognitive Effects of College Racial Composition After 3 Years of College” 1999 *J of College Student Dev* 669; Allen “The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities” 1992 *Harv Ed Rev* 26.

101 *Kamehameha* 295 F Supp 2d 1169.

102 *Idem* 1170.

103 20 USC § 7511 *et seq.*

104 The NHEA was first codified 20 USC § 7901 *et seq.*

105 20 USC § 7511 *et seq.*

106 *Idem* § 7511(16) (B).

107 *Idem* § 7511(16) (C).

108 *Idem* § 7511(16) (D).

109 *Idem* § 7511(16) (E).

110 *Idem* § 7511(16) (F).

111 20 USC § 7512 (16)(G)(i).

112 Native Hawaiian students score the lowest among major ethnic groups on state-wide standardised tests, approximately 11% below the State Department of Education (“DOE”) average on reading and roughly 14% below the DOE average in math. Native Hawaiian children are also less

above from the 2010 reauthorisation of the NHEA are exactly the same as those from the 2002 reauthorisation. Ironically, despite the deplorable condition of Native Hawaiian achievement in education in general that has prompted federal government assistance, the Kamehameha Schools have not taken advantage of the aid provided under the NHEA and have remained separate from the government, a fact perhaps reflecting its huge endowment.

In its appellee's brief to the Ninth Circuit, Kamehameha Schools had argued that reversing the district court decision and upholding plaintiff's claim "would effectively nullify the mission of a universally applauded educational institution that has helped to reverse the near-destruction of a dispossessed indigenous people".<sup>113</sup> If the schools could no longer provide preferential enrolment to Native Hawaiians, their numbers could very well decline and, as the schools argued in its brief:

[i]f Kamehameha's population [were to become] only 25% Native Hawaiian, ... mirroring the general population in Hawai'i, its mission of improving the capability of Native Hawaiians and helping to preserve Native Hawaiians as an indigenous people would be greatly impaired.<sup>114</sup>

If one follows the reasoning of the Ninth Circuit that the schools had failed to state a compelling reason to justify its discriminatory admissions policy, the Ninth Circuit's decision could very well have the effect of diminishing (or terminating) the schools' purpose of assisting the Native Hawaiian population they had been created to help.<sup>115</sup> Much will depend, of course, on how many non-Native Hawaiians, should admission be opened to all applicants, would seek and secure admission to the Kamehameha Schools.

No statistics are available as to how many non-Native Hawaiians might want to attend Kamehameha Schools, in large part, presumably, because the preference for Native Hawaiians is sufficiently well-known to

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112 likely to graduate from high school on time and are more likely to drop out of school than their non-Native Hawaiian counterparts; only 68.4% of Native Hawaiians in the public school system satisfy graduation requirements compared with 76.6% system-wide. Native Hawaiians are less likely to go on to higher education and well-paying jobs. In 1990, only 9.1% of Native Hawaiians 25 or older in Hawaii had obtained a bachelor's degree, in contrast with 30.3% of persons of Chinese descent, 25.2% of persons of Japanese descent, and 30.2% of Caucasians. Only 22.8% of Native Hawaiians are professionals or managers, compared with 34.2% of non-Native Hawaiians, while 12.1% of Native Hawaiians are low-paid labourers, compared with 8.2% of non-Native Hawaiians. *Appellee's Answering Brief* 11, 12 (No 03-00316-ack). *Kamehameha* 416 F3d 1046-1047.

113 *Appellee's Answering Brief* 1.

114 *Idem* 37.

115 From the 70,000 school-aged Native Hawaiians state-wide, Kamehameha Schools currently are able to admit only about 738 students annually. *Kamehameha* 295 F Supp 2d 1157.

discourage admission applications.<sup>116</sup> The extent then to which non-Native Hawaiians would seek admission remains to be seen, but if the schools are as effective in preparing students for post-secondary institutions as their current success record appears to suggest, one can reasonably expect that many students currently denied access to the schools may want to seek admission and, thus, the plaintiff in this case will be the first of many non-Native Hawaiian applicants.

### 3 4 2 *Runyon v McCrary and § 1981*

The limitation placed on private school discrimination under § 1981 was addressed in 1976 by the US Supreme Court in *Runyon v McCrary*.<sup>117</sup> The *Runyon* court held that the right of contract accorded to “all persons” under § 1981 had been enacted by Congress pursuant to the Thirteenth Amendment’s prohibition of slavery and involuntary servitude which, as applied to schools, prohibited them from refusing to admit black students on the basis of their race.<sup>118</sup> The Supreme Court in *Runyon* put to rest lingering uncertainty as to whether Congress’ authority to prohibit discrimination in private schools pursuant to the Thirteenth Amendment required a finding of state action by a school, as expressly mandated in the Fourteenth Amendment.<sup>119</sup>

The *Runyon* Court effectively brought private schools within § 1981 despite the absence of state action required under the Fourteenth Amendment.<sup>120</sup> The Supreme Court, in upholding Congress’ prohibition under § 1981 of “racial discrimination that interferes with the making

116 One non-Native Hawaiian student was admitted for the 2002-2003 academic year because space remained after all qualified native Hawaiians were admitted, but this admission apparently prompted an investigation that resulted in a promise by school administrators to ensure that admission remained only for native Hawaiians. See *Kamehameha* 416 F3d 1039 n 8.

117 427 US 160.

118 US ConSt Amend XIII. The Thirteenth Amendment prohibits slavery and involuntary servitude and has been interpreted as not requiring state action like the Fourteenth Amendment. See *Runyon* 427 US 189 (Powell J concurring) (“§ 1981, as interpreted by our prior decisions, does reach certain acts of racial discrimination that are ‘private’ in the sense that they involve no *state* action”). Contrast the view of two dissenting justices in *Runyon*, Justice White, joined by (then) Justice Rehnquist, who would have restricted application of § 1981, in essence prohibiting its application to the private schools in *Runyon*, because it was like the “Fourteenth Amendment statute under which the Congress may and did reach only state action”. *Runyon* 427 US 213 (White J joined by Rehnquist J dissenting). For a discussion of private schools and state action under the Fourteenth Amendment, see *Rendell-Baker v Kohn*, 457 US 830.

119 *Runyon* had been preceded eight years earlier by a non-education case, *Jones v Alfred H Mayer* 392 US 409, upholding 42 USC § 1982 that had been enacted pursuant to the Thirteenth Amendment and that prohibited race discrimination in the rental and sale of property. Worth noting is Justice Stevens’ concurring opinion in *Runyon* stating that *Jones* had been wrongly decided but refusing to disturb the decision once it had been made. *Runyon* 427 US 189-190 (Stevens J concurring).

120 A finding of state action requires that least one of the tests in *Blum v Yaretsky* 457 US 991 1004, must be met: (1) the extent to which the private

and enforcement of contracts for private educational services”,<sup>121</sup> found the private schools' and parental liberty clause arguments not applicable. In essence, the court found that Congress, in prohibiting discrimination in making contracts, had not interfered with parental rights under the liberty clause to make educational choices and child-rearing decisions for their children,<sup>122</sup> and § 1981 as a “reasonable government regulation”<sup>123</sup> did not interfere with any decisions the schools may make to “inculcate whatever values and standards they deem desirable”.<sup>124</sup>

In *Silva*, the federal district court applied *Runyon*'s § 1981 prohibition of discriminatory policies in the creation of contracts to “racial discrimination that impairs an existing contractual relationship”.<sup>125</sup> The district court in *Silva* determined that “the school handbook’s statements regarding race and diversity gave rise to enough of a contractual relationship to allow the case to proceed under § 1981”.<sup>126</sup>

### **3 4 3 Title VI and the Reception of Federal Aid**

The *Silva* and *Doe* cases are exemplars for understanding the jurisdictional requirement of federal aid for purposes of applying Title VI to private schools. Because the Kamehameha Schools do not accept federal aid, they are not subject to Title VI. However, St Anne in *Silva* participates in the federally funded lunch program and, for that reason, is scrutinised regarding the race discrimination and retaliation remedies under Title VI.

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entity is subject to state or federal regulations; (2) sufficiency of close nexus between the state and private entity so that action of the latter is treated as action of the former; and, (3) presence of such coercive power or significant encouragement of the state that private decisions are essentially those of the state.

<sup>121</sup> *Runyon* 427 US 179.

<sup>122</sup> See *Meyer v Nebraska* 262 US 390 (reversing criminal conviction of teacher for teaching course content in German in violation of state law, finding that the state prohibition on instruction except in English violated parents' liberty clause right to make education choices for their children); *Pierce v Society of Sisters* 268 US 510 (invalidating state statute requiring attendance at public Schools finding the statute a violation of parents' liberty clause right to make educational choices for their children); *Wisconsin v Yoder* 406 US 205 (invalidating state compulsory statute as applied to Amish children where requiring students to attend public high school would interfere with parents' liberty clause right to make educational choices for their children and their free exercise of religion).

<sup>123</sup> See *Pierce* 268 US 534. The partial quote is from a larger statement by the Court:

No question is raised concerning the power of the state reasonably to regulate all Schools to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some School that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

<sup>124</sup> *Runyon* 427 US 177.

<sup>125</sup> *Silva* 595 F Supp 2d 1180, citing *Domino's Pizza v McDonald* 546 US 470 476.

<sup>126</sup> *Silva* 595 F Supp 2d 1180.

Before a court can consider an alleged discriminatory policy under Title VI, a plaintiff must satisfy a three-part *prima facie* test: (1) the plaintiffs are a member of a protected class; (2) the plaintiffs suffered an adverse action; and (3) the plaintiffs were treated less favourably than similarly situated students.<sup>127</sup> In *Silva*, the plaintiffs' identification as Hispanic met the first requirement.<sup>128</sup> However, the plaintiffs failed to establish that the school's creation of an English-only policy and its application to Hispanic-speaking represented an adverse action, the federal district court observing that a language policy is no different than a school's dress code which private schools are free to dictate to students and their parents.<sup>129</sup> Because the plaintiffs could not satisfy the second *prima facie* requirement, their Title VI discrimination claim failed.

However, the defendant school in *Silva* was not successful in opposing the plaintiffs' Title VI hostile environment claim. In examining the Hispanic plaintiffs' claims of racially insensitive statements by non-Hispanic students and the school's English-only policy, the district court found sufficient evidence of deliberately indifferent response by school personnel to the statements, as well as the severe, pervasive, and objectionably offensive nature of the statements, so as to state a Title VI claim.<sup>130</sup> While the district court notes that the plaintiffs have only stated sufficient facts to go to trial "to determine if [a hostile] environment exists",<sup>131</sup> St. Anne will still have to expend funds to defend against the Title VI claim at trial.

One wonders though, when this lawsuit is resolved, whether officials at St Anne will examine how the cost of defending the lawsuit compares to the financial benefits it received from the federal school lunch program.<sup>132</sup> For many private schools that choose to participate in federal funded programs, such data would be useful in comparing the value of federal aid received with the cost of defending a discrimination lawsuit where jurisdiction depends on the reception of federal funds.

### **3 4 4 Equal Protection and Burden Shifting Standards**

Unlike *Silva* where the religious school faces both Title VI and § 1981 claims, only a § 1981 discrimination claim can be advanced against the Kamehameha Schools. The Ninth Circuit's three-justice panel, in a decision subsequently reversed by a Ninth Circuit *en banc* decision, found the admissions policy discriminatory, but struggled to find a legal

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<sup>127</sup> *Idem* 1182.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Idem* 1184-1185.

<sup>130</sup> *Idem* 1186-1187.

<sup>131</sup> *Idem* 1187.

<sup>132</sup> While the facts in *Silva* are silent as to the number of students who participated in the National School Lunch Program, the facts do reveal that "the government gave St Anne's \$2.47 in cash for every free lunch, \$2.07 for every reduced price lunch, and \$0.25 for every paid lunch the school served during the 2007-2008 school year". *Idem* 1184.

standard to use in analysing the legality of a race-conscious admissions policy.

The three-justice panel rejected the strict scrutiny standard under the Equal Protection Clause of the Fourteenth Amendment that had been applied in *Gratz v Bollinger*<sup>133</sup> and *Grutter v Bollinger*,<sup>134</sup> finding the standard inappropriate. Since liability under the Fourteenth Amendment requires state action and, since the Kamehameha Schools did not receive federal funds, the schools had no government connections to make them subject to the Equal Protection Clause.<sup>135</sup>

However, the panel found more fruitful ground in its effort to apply the *McDonnell Douglas Corporation v Green*<sup>136</sup> Title VII burden shifting test.<sup>137</sup> In so doing, the panel found that “Kamehameha’s unconditional refusal to admit non-Hawaiian applicants so long as there are native Hawaiian applicants categorically trammelled the rights of non-Hawaiians”.<sup>138</sup> The Ninth Circuit, in its *en banc* decision, rejected this conclusion, finding that Kamehameha Schools’ Native Hawaiians-only policy, even though it operated as a complete bar to non-Hawaiians, had legitimate purposes.<sup>139</sup> Thus, even under the three-justice panel’s use of the *McDonnell* Title VII burden shifting test, the policy:

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133 *Gratz v Bollinger* 539 US 244 (invalidating undergraduate admissions policy distributing 20 points or one-fifth of the total to all under-represented minorities as not being a race-conscious policy narrowly tailored to achieve diversity).

134 *Grutter v Bollinger* 539 US 306 (upholding law school’s use of race as a factor in admission because law school had a compelling interest in a narrowly tailored admission policy to assure that the law school had a diverse student body).

135 US ConSt Amend XIV § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

136 411 US 792 (court remanding for trial so that the plaintiff black employee who had been discharged by McDonnell and had engaged in unlawful conduct in response toward the corporation would have an opportunity to produce evidence that corporation’s legitimate non-discriminatory reason for refusing to hire him for a different position was pretextual).

137 *Idem* 802. Under this test, complainants are required as part of a *prima facie* case to produce evidence that an employer’s adverse employment action was intentionally discriminatory, after which the employer can rebut the complainant’s presumption of racial discriminatory treatment by introducing evidence of a legitimate, non-discriminatory reason for its action. Once the employer had produced such evidence, the burden shifts to the complainant to produce evidence of pretext.

138 See *Kamehameha* 416 F3d 1041.

139 See *United Steelworkers of America v Weber* 443 US 193 208 (upholding collective bargaining agreement reserving fifty per cent of new openings in an in-plant craft training program to black applicants, finding that the agreement had not “unnecessarily trammelled the interests of the white employees” where the agreement did not require discharge of white employees and did not act as “an absolute bar to the advancement of white employees”).



[had] a legitimate justification and serve[d] a legitimate remedial purpose by addressing the socioeconomic and educational disadvantages facing Native Hawaiians, producing Native Hawaiian leadership for community involvement, and revitalising Native Hawaiian culture, thereby remedying current manifest imbalances resulting from the influx of western civilisation.<sup>140</sup>

On remand, the plaintiff in *Kamehameha* will have the burden under *McDonnell* of producing evidence that these reasons are pretextual.

A similar *McDonnell* burden shifting analysis was applied to both Title VI and § 1981 claims in *Silva*. However, the court in *Silva* refused to apply the EEOC Title VII employment guidelines concerning “tailored English-only policies in the workplace”<sup>141</sup> to the school context, recognising that “courts have long held that school officials must be able to prescribe and control conduct in the schools, so long as it is consistent with fundamental constitutional safeguards”.<sup>142</sup>

### **3 4 5 Free Expression Issues and Culture**

Somewhat worrisome is the *Silva* federal district court’s discussion of student public school free speech rights under *Tinker v Des Moines Independent School District*,<sup>143</sup> and *Bethel School District v Fraser*,<sup>144</sup> in the context of a private school. Private school students have virtually no constitutional rights with regard to their activities at school to the extent that private schools lack sufficient government contacts to invoke state action under the Fourteenth Amendment.<sup>145</sup> To discuss the *McDonnell* burden shifting under Title VI and § 1981 in the context of student constitutional rights is to mix apples and oranges. Whether a private school’s English-only or exclusionary admission policies violate Title VI and § 1981 is a matter of adverse discriminatory action, but such a determination cannot involve the denial of constitutional rights. Students in private schools cannot experience adverse action as to rights that they do not have. To state, as the court in *Silva* does, that “private schools have even broader power [than public schools] to regulate free speech”,<sup>146</sup> suggests, incorrectly, that a First Amendment limitation may exist at some point for private schools, albeit a less restrictive limitation than for public schools.

In the public educational sector, claims touching on student culture frequently are enveloped in constitutional free speech analysis. The

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140 See *Kamehameha* 295 F Supp 2d 1166.

141 *Idem* 1184. See 29 C FR § 1606.7.

142 *Kamehameha* 295 F Supp 2d 1184.

143 393 US 503 (reversing suspension of students for passive speech in wearing black armbands where the school provided no evidence of disruption).

144 478 US 675 (upholding suspension of student who delivered lewd and vulgar speech at school assembly).

145 For a comprehensive discussion of state action and private schools see Mawdsley *Legal Problems of Religious and Private Schools* (2005) 8-15.

146 *Silva* 595 F Supp 2d 1185.

advantage of constitutional analysis is that a First Amendment free speech approach furnishes a method for addressing controversial cultural claims without, necessarily, having to refer directly to culture. Thus, in cases involving controversial symbols, such as student displays of the Confederate flag, the *Tinker* disruption or *Fraser* lewd and vulgar tests furnish readily convenient mechanisms for prohibiting, as disruptive or potentially disruptive, expression without having to weigh the merits of cultural issues.<sup>147</sup> The difficulty of such a judicial weighing process is suggested in *Scott v School Board of Alachua County*.<sup>148</sup> In *Scott*, the Eleventh Circuit upheld a school district ban on Confederate symbols on *Tinker* disruption grounds without directly having to address the cultural arguments of the plaintiffs challenging the district policy. In upholding a federal district court summary judgment for the school district, the Eleventh Circuit noted that, had the case gone to trial, the plaintiffs' experts planned to testify that:

[t]he Confederate battle flag is not a symbol of racism, but rather a historical symbol embodying the philosophical and political principles of a decentralised form of government in which states and local government retain all powers not expressly ceded to the centralised federal government under the constitution

and that thus the flag is merely “a symbol of southern heritage”.<sup>149</sup> Noting that the school district was prepared to produce evidence that the Confederate symbol had come to represent “slavery” and “white supremacy”,<sup>150</sup> the Eleventh Circuit declared that “[t]he problem, of course, is that both [plaintiff and defendant] are correct”.<sup>151</sup> Rather than try to weigh the merits of the competing cultural viewpoints, the court of appeals bowed out of making a judicial interpretation of a preferred cultural position, asserting instead that, where evidence existed of racial tensions at the high school, the court should defer to the “public school's essential mission to teach students of differing races, creeds and colours to engage each other in civil terms rather than in terms of debate highly offensive or highly threatening to others”.<sup>152</sup> In effect, the plaintiffs' culture arguments, framed as free speech viewpoint discrimination, were trumped by the defendant school's legitimate interest in prohibiting student expression that could be disruptive.

### **3 4 6 Judicial Deference to School Decisions**

Without the constitutional overlay, *Scott* is similar to *Silva* in that both courts resolved the cases on school authority and discipline grounds rather than weigh the impact that the denial of a cultural symbol may

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147 See *Defoe v Spiva* 625 F3d 324 (upholding suspension of student for wearing the Confederate flag on clothing that violated a school dress code and upholding the constitutionality of the school code).

148 *Scott v School Board of Alachua County* 324 F3d 1246.

149 *Idem* 1248-1249.

150 *Idem* 1249.

151 *Ibid.*

152 *Ibid.*

have on those students for whom the symbol is important. The evidence necessary to prevail in a Title VI or § 1981 claim in *Silva* was similar to the plaintiff's free speech challenge in *Scott*, with testimony in both cases finding support that the school's disciplinary action was necessary to prevent a disruptive impact on the schools.

However, the total ban on non-Native Hawaiians in *Kamehameha* is, arguably, more difficult to rationalise. When one considers that the Kamehameha Schools have been in existence for well over a century, one wonders when, if ever, the depressed condition of Native Hawaiians will be transformed to the point where non-Native Hawaiians can enrol and participate in the Kamehameha Schools. One can argue that permitting continued discrimination in admissions at the schools runs contrary to the notions of diversity and inclusion so prevalent in the rest of US education. Kamehameha Schools' huge endowment virtually assures that, in the absence of legal pressure, the schools have little if any incentive to change their admissions policy. Certainly, one can suggest that permitting the Kamehameha Schools' admission policy to continue for an indefinite period of time into the future runs counter to Supreme Court precedents in *Runyon* and *Bob Jones University v US*<sup>153</sup> that have used federal law to reject discrimination by private educational institutions. Even in *Grutter* where the Supreme Court upheld a public law school's consideration of race and ethnicity in its admissions decisions, the court observed that, in light of the twenty-five years that had intervened since the court addressed racial diversity in university admissions in *Regents of University of California v Bakke*,<sup>154</sup> "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today".<sup>155</sup> No such specific forecast appears to have been made for the Kamehameha Schools. The best that the federal courts could do is reflected in the Ninth Circuit's *en banc* decision where it asserted quite broadly that:

[p]reference will be given to students with Native Hawaiian ancestry only for so long as is necessary to remedy the current educational effects of past, private and government-sponsored discrimination and of social and economic deprivation.<sup>156</sup>

### **3 4 7 Application of *Silva* and *Kamehameha* to South African cases**

All rights in the SA Constitution are prefaced with three core values of

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<sup>153</sup> *Bob Jones University v US* 461 US 574 (upholding denial of tax exempt status for a religious university that had policies forbidding inter-racial marriage and dating).

<sup>154</sup> 438 US 265 (finding a violation of the Equal Protection Clause as to a special admissions program under which 16 of 100 new admitted students were required to be disadvantaged minority students, but also noting that race could be a factor in determining students admitted).

<sup>155</sup> *Grutter* 539 US 343.

<sup>156</sup> *Kamehameha* 470 F3d 846.

“human dignity, equality and freedom”.<sup>157</sup> Of these three, human dignity, codified as recognition of everyone’s “inherent dignity and the right to have their dignity respected and protected”,<sup>158</sup> appears to be pivotal<sup>159</sup> and is the only one of the three core values that has no counterpart at all in the US Constitution. The right to equality under the SA Constitution, providing that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”,<sup>160</sup> is reminiscent of the US Constitution’s Fourteenth Amendment guarantee of “equal protection”. The South African constitutional guarantee of equality though is much broader, prohibiting unfair discrimination:

[o]n one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth,<sup>161</sup>

areas addressed to a more limited extent in the US under a variety of federal and state laws.<sup>162</sup> The constitutional right to freedom protects

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157 S 7(1) SA Constitution.

158 S 10 SA Constitution.

159 See *S v Makwanyane* 1995 (6) BCLR 665 (CC) par 144. (In a case challenging the administration of capital punishment, the Court observed that “[t]he rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3 of the Constitution. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others”.)

160 S 9(1) SA Constitution.

161 S 9(3) SA Constitution.

162 See eg US Constitution: *Brown v Board of Education* 347 US 483 (prohibiting race discrimination in education under Equal Protection Clause, using a strict scrutiny test); *US v Virginia* 516 US 910 (finding refusal to admit women to state supported military academy a violation of Equal Protection Clause under a heightened scrutiny test); *Plyler v Doe* 457 US 202 (invalidating, under Equal Protection Clause, Texas statute withholding funds from school districts providing education to undocumented children, using a rational purpose test); Federal Statutes: 42 USC §§ 2000 *et seq* (prohibiting employment discrimination on the bases of race, colour, religion, sex, and national origin); 29 USC §§ 621 *et seq* (prohibiting employment discrimination on the basis of age); 42 USC §§ 12101 *et seq* (prohibiting discrimination on basis of disability in employment Title I, in state and local agencies Title II, and in public accommodations Title III); 42 USC § 2000e(k) (prohibiting employment discrimination on the basis of pregnancy); State Statutes/Constitutions: Ohio Rev Code § 4112.02 (prohibiting employment discrimination on the grounds of race, colour, religion, sex, national origin, disability, age, or ancestry); Ohio Rev Code § 4112.021 (prohibiting discrimination in credit applications on the bases of race, colour, religion, age, sex, marital status, national origin, disability, or ancestry); NJ Stat Ann § 10:5-4 (prohibiting employment discrimination on the bases of “race, creed, colour, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex or source of lawful income”.) See also, Colo ConSt Art 2 § 30b (constitutional provision enacted by popular initiative to prohibit protected status on the basis of “homosexual, lesbian or bisexual orientation” invalidated in *Romer v Evans* 517 US 620 109, on grounds that the state constitutional amendment lacked a rational relationship to legitimate state interests under the Equal Protection Clause).

“the right to freedom and security of the person”<sup>163</sup> and “the right to bodily and psychological integrity”<sup>164</sup> (including everyone’s right “to make decisions concerning reproduction” and to exercise “control over their bodies”),<sup>165</sup> areas protected as derivative rights in the US Constitution under the liberty clause of the Fourteenth Amendment.<sup>166</sup> “Human dignity” has no specific counterpart in the US Constitution and the Supreme Court has incorporated this concept only in a very limited way into decisions concerning capital punishment.<sup>167</sup> In addition to the three core rights of human dignity, freedom and equality, the SA Constitution protects a broad range of rights that, while they have similarities to the US Bill of Rights, are far more explicit and expansive. Thus, while the SA Constitution protects rights of expression,<sup>168</sup>

163 S 12(1) SA Constitution.

164 S 12(2) SA Constitution.

165 S 12(2)(a), (b) SA Constitution.

166 See *Roe v Wade* 410 US 113 (state statute criminalising performance of an abortion any time during pregnancy except for health of woman violated right of privacy under the Fourteenth Amendment; “the right of personal privacy includes the abortion decision”).

167 See eg *Chavez v Martinez* 538 US 760 (in remanding for trial plaintiff’s substantive due process claim concerning his detention and questioning, Justice Souter writing for a divided Court noted that “convictions based on evidence obtained by methods that are ‘so brutal and so offensive to human dignity’ that they ‘shock the conscience’ violate the Due Process Clause of the Fourteenth Amendment”); *Hope v Pelzer* 536 US 730 (upholding prisoner’s Eighth Amendment claim for “cruel and unusual punishment” where handcuffing plaintiff to a fixed object in the prison after he had been subdued “treated him in a way antithetical to human dignity”); *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 916 (in upholding the legitimacy of *Roe v Wade*, Justice Stevens, concurring in part and dissenting in part, observed that “the woman’s constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature ... The authority to make such traumatic and yet empowering decisions is an element of basic human dignity”); *Cruzan v Director Missouri Department of Health* 497 US 261 (in upholding Missouri Supreme Court’s clear and convincing evidence standard as to whether a vegetative patient’s artificial hydration and nutrition could be terminated, the Supreme Court recognised that states could set high standards in protecting the interests of incompetent persons without necessarily endorsing the “reasoning that an incompetent person retains the same rights as a competent individual ‘because the value of human dignity extends to both ...’”) See also *Roper v Simmons* 543 US 551 (in invalidating execution of juveniles as a violation of the Eighth Amendment of the US Constitution, Justice Kennedy writing for a 5-4 Court, relied on “our society’s evolving standards of decency”, as reflected in his observations that most states no longer executed juveniles, the nations that share our Anglo-American judicial have abolished capital punishment for juveniles, and the United States is the last country in the world still executing juveniles).

168 S 16 SA Constitution. However, the South African constitutional approach to expression contains much detail that has developed by interpretation in the United States. For example, South Africa includes as expression “freedom of the press and other media” and “freedom to receive or impart information or ideas” while excluding “propaganda for war”, “incitement of imminent violence”, or “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”. S 16(1)(a), (b), (2) SA Constitution. See eg *Board of Education Island Trees Union Free School*

religion,<sup>169</sup> property,<sup>170</sup> assembly and presenting petitions<sup>171</sup> that have their far less broadly stated counterparts in the US Constitution, the SA Constitution also enumerates rights, such as association<sup>172</sup> and privacy,<sup>173</sup> that are protected only, at best, as derivative rights under the US Constitution.<sup>174</sup> Of singular moment for purposes of this article is the SA Constitution's protection of persons' rights "to enjoy their culture, practice their religion and use their language", a right not found at all in the US Constitution.<sup>175</sup>

The SA Constitution provides that, in interpreting its Bill of Rights, courts "may consider foreign law".<sup>176</sup> One can query what legal principles in *Silva* or *Kamehameha* might have useful application to South Africa.

Both *Silva* and *Kamehameha* recognise that, while language is part of culture, language can be addressed separate from culture when a rational basis exists for doing so (*Silva*) and culture can be the basis for preserving language where the two concepts cannot be readily separated (*Kamehameha*). Since the SA Constitution protects both "language" and

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*District v Pico* 457 US 853 (invalidating school board removal of books from library based on political or personal views of board members where such removal deprived students of free speech right of access to ideas).

169 S 15 SA Constitution. While the Constitution protects "the right to freedom of conscience, religion, thought, belief and opinion", it also permits "religious observances" at state or state-aided institutions provided that "those observances follow rules made by the appropriate public authorities; they are conducted on an equitable basis; and attendance thereon is free and voluntary". S 15(1), (2) SA Constitution. In effect, South Africa's Constitution does not contain an Establishment Clause that has generated considerable litigation in the United States. See generally Mawdsley "Access to Public School Facilities for Religious Expression by Students, Student Groups and Community Organizations: Extending the Reach of the Free Speech Clause" 2004 *BYU Ed and Law J* 269.

170 S 25 SA Constitution. Of the 39 provisions in the Bill of Rights, this provision regarding property rights other than s 35 addressing the rights of those accused, detained or imprisoned is the longest. While the section protects both private right to property and government's right of eminent domain, it also addresses the equitable process for determining the value of property and the role of government in correcting past discriminatory actions through land reform.

171 S 17 SA Constitution. This section also includes the rights "to demonstrate and to picket".

172 S 18 SA Constitution.

173 S 14 SA Constitution. Specifically enumerated are the rights of persons not to have "their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed".

174 See *Boy Scouts of America v Dale* 530 US 640 (Boy Scouts' dismissal of homosexual scout leader not in violation of state non-discrimination statute prohibiting employment discrimination on basis of sexual orientation because organisation had First Amendment association expressive rights to shared values). See generally Mawdsley & Russo "Student Privacy and Classroom Pedagogies: An American Perspective" 2002 *ANZJ of Law and Ed* 65.

175 S 31(1) SA Constitution.

176 S 39(1)(c) SA Constitution.

“culture”, one can ask whether the Constitutional Court in *Ermelo* fully considered the interplay between language and culture in its decision. Unlike the Chilean student in *Abbott* for whom the loss of language would not decimate his culture that also included music, costumes, events, and activities, one might argue that language is the last identifiable aspect of Afrikaans culture. The Constitutional Court’s rational basis argument in *Ermelo* that the need for available classroom space in an Afrikaans-medium school can trump the preservation of the Afrikaans language as the medium of instruction suggests, as would occur in interpreting the US Constitution, that the amount of protection under constitutional rights depends on the right being asserted.<sup>177</sup>

The Constitutional Court in *Ermelo* did not assert that the admission of English-speaking students to an Afrikaans medium school would, in itself, eliminate the authority of SGBs to choose the medium of instruction nor eliminate the prominence of the Afrikaans language in the schools. However, one could argue that, should the number of Afrikaans-speaking students decrease over time, the influence of the language as a means of instruction would also diminish. Such diminution would seem to parallel the policy argument of the Hawaiian students in *Kamehameha* that the percentage of students falling below 25% in their schools would effectively eliminate the distinctiveness of the Hawaiian culture in the Kamehameha Schools.<sup>178</sup>

One can only wonder if an Afrikaans medium school would be permitted to address a bullying problem in the same manner as *Silva*. In *Silva*, the school’s prohibition against students speaking Spanish applied to all school activities during the school day; however, nothing in the SA Constitution suggests that an SGB’s authority to select the medium of instruction also extends to the prohibition of students using languages other than those language(s) chosen as the medium for instruction. Would the same constitutional interpretation of language and culture in *Ermelo* that permits modification of an SGB’s choice of medium of instruction be invoked in a *Silva*-type set of facts so as to prohibit a school from enforcing a ban on speaking a language that has been used in an inappropriate manner? One might argue that the outcome of interpreting

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177 In the interpretation of the US Constitution’s Equal Protection Clause, the Supreme Court has created three standards of protection each with its own burden of proof: “strict scrutiny” and “compelling interest”; “heightened scrutiny” and “exceeding persuasive justification;” and, “not suspect” and “rational basis”. For an example of “strict scrutiny”, see *Board of Education v Brown* 347 US 483 (race); for an example of “heightened scrutiny”, see *Virginia Military Institute v US* 508 US 946 (gender); for an example of no suspect class, see *City of Cleburne v Cleburne Living Center* 473 US 432 (disability).

178 *Kamehameha Appellee’s Answering Brief* 1.

constitutional rights should not have to depend on “whose ox is being gored”.<sup>179</sup>

## 4 Conclusion

Both *Silva* and *Kamehameha* involve issues relating to students and culture although the culture issues are far more pronounced in *Kamehameha*. Without the allegations of bullying and inappropriate comments in *Silva*, the English-only policy, one can speculate, would probably not have come into existence. Certainly, nothing suggests, in addition to language, that other aspects of Hispanic culture, such as historical or social events or celebrations, would be excluded from the school. In short, the religious school in *Silva* appeared to have no intention of creating either, from one perspective, a broad based English-only or American culture in the school, or from a different perspective, a non-Hispanic culture.

The Kamehameha Schools, however, function quite differently. The Bishop Estate trustee policies serve quite clearly to further only one culture, featuring the language, activities and events relevant to Native Hawaiians. However, in the process, they totally exclude non-Native Hawaiians from being part of that cultural environment. Presumably, the plaintiffs in *Kamehameha* will choose to proceed against the schools under their own names to challenge the schools’ exclusionary policy on the merits, with the eventual possibility that the case may yet reach the Supreme Court.

The public policy arguments in *Kamehameha* are not easy ones to resolve, mainly because, while federal non-discrimination statutes and the US Constitution protect the right of religious schools to preserve their religious integrity by limiting admission only to students of a particular faith, no such express protection exists for culture. The difference can be critical. If the issue in *Silva*, rather than the relationship to language, had involved refusal to admit students who were not Roman Catholic, the resolution would have been much simpler. A religious school, like St Anne in *Silva* that is controlled by a religious entity (in this case, a diocesan church), is not required to demonstrate why admitting only students of a particular religious faith is important for the preservation of the school’s religious system because, as a matter of constitutional law, protection of the integrity of a religious school based on its religious beliefs is considered to be a valued public policy in itself.<sup>180</sup> No such blanket exemption seems to exist for culture, which explains why the

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<sup>179</sup> *Regents of Univ of California v Bakke* 438 US 265 295 n 35 (the Supreme Court noted that “it is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others”).

<sup>180</sup> See generally *Mawdsley* 15-35 for a discussion of broad judicial protection of constitutional and contractual authority to set religious requirements for sectarian schools.



Kamehameha Schools can prevail only if they can present persuasive evidence that the Native Hawaiian culture is so threatened that, were the schools not entitled to maintain their exclusionary admissions policy, the very preservation of that culture would be at risk. This difference exposes the fragility of the Kamehameha Schools' admission policy where the schools will be subject to an ongoing burden of proof concerning admissions that a religious school, such as the one in *Silva*, would never confront.<sup>181</sup>

*Silva* does not indicate how widespread English-only school policies are in terms both of the number of religious schools and the variety of languages. *Silva* suggests that such policies present a stronger non-discrimination case where, in the absence of school awareness of bullying words in a language other than English, only those students speaking English would most likely be the ones punished. Whether, in the absence of bullying language, private schools could dismiss students merely because they persist in speaking a language other than English is an open question after *Silva*. If Title VI and § 1981 apply to culture, private schools with an English-only policy might be encouraged to incorporate one or more international days into the school curriculum to permit student emphasis of language, events, and activities important to their culture and, thus, to diminish a claim of cultural discrimination. In addition, private schools receiving federal financial assistance may want to reconsider whether the costs associated with defending a Title VI claim are greater than the amount of financial aid received.

The South African experience in *Matukane*, *Gauteng School Education Bill*, *Laerskool Middelburg*, *Mikro*, *Seodin* and *Ermelo* suggests that the *Kamehameha* approach to language and culture will not prevail in South Africa. The future for South African education in the wake of these cases is difficult to assess because any language or culture policy is certain to involve the constitutional core values of "freedom", "equality", and "human dignity". What seems to be missing in South Africa is the assertion by different indigenous cultures for recognition of their languages as a medium of instruction. Perhaps, even if other cultures were to advocate for their language as a means of instruction, the Constitutional Court would still reach the same conclusion as in *Ermelo* and the cases that preceded it to restrict single medium schools using a rational basis test. The absence of other language claims, however, should not in itself throttle the effort of the Afrikaans-speaking population to have single medium schools. What one could argue is tragic about the impending end of single-medium Afrikaans school is that the loss of

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<sup>181</sup> Worth noting is that the Kamehameha Schools trust agreement provides "that the teachers of said schools shall forever be persons of the Protestant religion". *Kamehameha* 990 F2d 459 n 1. However, the Ninth Circuit rejected the schools' claim to a Title VII religious exemption when the schools refused to hire a non-Protestant, the court of appeals reasoning that the schools were not affiliated with any denomination of Protestants, and, in any case, the schools (unlike St Anne in *Silva* that is controlled by the Catholic Diocese) were not controlled by a religious entity. *Idem* 461.

language may be viewed as the last remaining distinctive of the Afrikaans culture that, at one time, may have included gatherings, activities, religious services, and special events that celebrated or honoured the history of the Afrikaners, but which today have been altered or eliminated. Unfortunately, the conscientious effort in the US to preserve, by the majority, the rights of the Hawaiian minority in the Kamehameha Schools does not seem to have its counterpart in South African schools.

It is noteworthy that the most of the South African cases emerged from events that took place towards the end of the school year or at the beginning of a new school year. There are opinions that this phenomenon suggests a lack of planning on the parts of the authorities and that they start making crisis decisions and resorting to unlawful practices to save themselves from embarrassment and to cover their lack of planning to provide enough school places for all the learners in the various provinces.

In the *Middelburg* case the court referred to efforts to do away with Afrikaans single language medium schools. Two articles by Malherbe<sup>182</sup> that discussed this issue were quoted in *Mikro* and *Middelburg*. In one of the articles Malherbe refers to the “indiscriminate targeting of Afrikaans-medium schools” to become parallel or dual medium schools and maintains that this denies the multilingual reality of South Africa.<sup>183</sup> He states very clearly that section 29(2) of the SA Constitution requires the option of single medium schools to be considered.<sup>184</sup> He does not see a guarantee to single medium mother tongue schools in section 29(2). In 2001, according to Woolman and Fleisch, he apparently held a different view that linguistic communities “can create and maintain publicly funded single-medium institutions”.<sup>185</sup> They come to the conclusion that the Constitution neither guarantees a right to single medium public schools nor does it prohibit the existence of such institutions.<sup>186</sup> We fully agree with their conclusion but the possibility of further litigation in this regard after *Ermelo* is not excluded.<sup>187</sup>

The courts have been engaged in both the issues of legal powers of various role players and deeper-lying issues like the best interests of children. It would be pure speculation whether or not there will be more cases but it seems that single medium schools that are not “full” will be hard pressed to retain such status and the right to education in the

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182 Malherbe “Reflections on the Background and Context of the Education Clause in the South African Bill of Rights” 1997 *TSAR* 85. Malherbe “The constitutional framework for pursuing equal opportunities in education” *Perspectives in Ed* 9.

183 *Perspectives in Ed* 22.

184 *Ibid.*

185 Woolman & Fleisch *The Constitution in the classroom: law and education in South Africa 1994 - 2008* (2009) 63. His article in *Perspectives in Ed supra* does not support Woolman & Fleish’s comment. Also see Currie & De Waal *The Bill of Rights Handbook* (2010) 621-640.

186 80.

187 See the discussion of *Mikro* and *Middelburg supra*.

language of one's choice will increasingly be exercised in dual or parallel medium public schools. The courts have also laid down the rule that legal issues alone will not determine future decisions but that issues of (social) justice and fairness will also be considered.

There is a real danger that the approach outlined in the previous paragraph may lead to the total demise of Afrikaans single medium schools or even to the demise of Afrikaans as a language of education.<sup>188</sup> Perhaps, the future will bear out that public policy has been better served by the *Ermelo* decision, but one must at least acknowledge that a culture and a language, once gone, are not likely to reassert themselves.

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<sup>188</sup> The number of Afrikaans medium single medium schools has indeed dwindled significantly since 1994 and some parallel medium schools have since discontinued the use of Afrikaans as medium of instruction. See *supra*.