Closing Geographical Distances: The Value of a New Zealand Perspective on the Admission Policy of a Native Hawaiian School

By Dr Keakaokawai Varner Hemi*

I. Introduction

Many years ago, I had the privilege of being one of Matiu Dickson's undergraduate students. He was my first teacher of tikanga Māori and jurisprudence, a subject I now teach. As a person of Native Hawaiian and Cherokee ancestry growing up on the Mainland of the United States, I had never been taught like *that* in a classroom or lecture hall before. The tone of his voice, the patience, the almost sacred yet humorous way he shared knowledge, evoked home and the ways of my parents, grandparents, aunties and uncles. As he discussed familiar principles – things like tapu and whanaungatanga that we Hawaiians live too – his kindness and generosity helped me to close the geographical distance between studying law and my own identity. Years later, as a doctoral student, that distance would close again whenever he pulled me into his office for a kōrero about how it was all going.

Matiu's lectures were often dramatic, a weaving of law and stories into something like a living thing through word and waiata. Accounts of atua, of whakapapa and tīpuna flowed timelessly into his experience in courtrooms and cases. Centuries of history, legal principles and facts settled into one's mind with a characteristic raising of his eyebrows and patient "nē?" Beyond the printed word of course materials and textbooks, Matiu's lectures created vaulted spaces of memory, where we students could access an exquisite repository of law, history and culture. More than lecturer, Matiu was librarian, gatekeeper and master narrator of the law – and I will always be grateful.

In honour of Matiu as narrator and in the interest of closing geographical distances, this article examines the legal narratives evident in the American federal court decision in *Doe v Kamehameha Schools* (*Kamehameha*).[1] The article first describes the historical development of *everyone/no-one*, *someone* and Indigenous equality narratives and their particular impact on the narration of Indigenous peoples in the law. It then examines how the opinions of the United States Ninth Circuit Court of Appeals in this case exhibit significant narrative confusion and distrust about the relationship between Indigenous identity and equality, with the Ninth Circuit interpreting the Native

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1 *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 295 F Supp 2d 1141 (D Haw 2003); aff'd in part, rev'd in part 416 F 3d 1025 (9th Cir 2005); reh'g en banc granted 441 F 3d 1029, 470 F 3d 827 (9th Cir 2006) (en banc) [*Kamehameha*].

Hawaiian schools' preference for Native Hawaiian students as either reverse racial discrimination or an exception to the general rule of homogeneity and anonymity. For comparison, the article then examines similar equality narratives in New Zealand law, which reveal few legal challenges to admission policies which, either explicitly or implicitly, prefer Māori and demonstrate a narrative complementarity between equality and Indigenous identity. The article recognises that, while complementarity could clarify the narrative issues in *Kamehameha* for future American federal courts, it also provides the opportunity for New Zealand to pause and reflect. Ultimately, the article advocates a weaving of equality narratives across geographical distances.

II. The Power of the Narrative

The idea that law is narrative in character, that it tells and retells stories and that sometimes these stories conflict, is not novel. The language of law itself can affect individual and group outcomes, due to its "centrality in the production, exercise, and subversion of legal power".[2] Beyond "rules and policies", the law also inherently relates "stories, explanations, performances, [and] linguistic exchanges – as narratives and rhetoric".[3] Such narratives "do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results".[4] From a law and literature perspective, legal narratives may also "invent rather than reflect our lives, ourselves, and our worlds".[5]

Via outcomes, precedents, catchphrases and doctrine, the law is laced with stories which gain power and momentum with each telling – whether or not the narrative is accurate or fair. Narratives of both discrimination and equality have been historically utilised to discriminate against Indigenous peoples and violate our rights. In recent decades, highly formalised equality guarantees and reverse discrimination prohibitions have similarly demonstrated tremendous discursive power and momentum.

A. Everyone, No-one and Someone

Overtly discriminatory legal narratives have invented and manipulated Indigenous identity for a long time. Post-conquest, the doctrine of discovery identified the Indigenous nations of the Americas and other places as non-Christians whose land was *terra nullius* and free for the taking.[6] Later, the 19th century Marshall Trilogy[7] established the fundamental doctrines of American federal Indian

2 John Conley and William M O'Barr *Just Words: Law, Language, and Power* (2nd ed, University of Chicago Press, Chicago, 2005) at xi.

3 Paul Gewirtz "Narrative and Rhetoric in the Law" in Peter Brooks and Paul Gewirtz (eds) *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, Cambridge, Massachusetts, 1996) 2 at 2.

4 Peter Brooks "Narrative in and of the Law" in James Phelan and Peter J Rabinowitz (eds) *A Companion to Narrative Theory* (Blackwell, Malden, Massachusetts, 2005) 415 at 419.

5 Maria Aristodemou quoted in Kathleen Birrell *Indigeneity: Before and Beyond the Law* (Routledge, London, 2016) at 1.

6 See discussion in Robert J Miller, Lisa LeSage and Sebastian Lopez Escarcena "The International Law of Discovery, Indigenous Peoples, and Chile" (2011) 89 Nebraska L Rev 819.

7 Three Supreme Court cases, namely: *Johnson v M'Intosh* 21 US 543 (1823); *Cherokee Nation v Georgia* 30 US 1 (1831); and *Worcester v Georgia* 31 US 515 (1832). Each majority opinion was delivered and significantly influenced by Chief Justice John Marshall. These decisions established the three governing principles of federal Indian law: retention of occupation and land usage rights, inherent tribal sovereignty and the federal trust responsibility.

law and depicted its Indigenous peoples as dependent nations, somewhere between foreign nations and states. Within the Trilogy, Native Americans are described as fierce, warlike and incapable of civilisation, but also as child-like – the "ward", "pupil" or "dependent".[8] The "irrationality"[9] of such children justified "exercise of a guardianship 'to protect them and their property and personal rights'".[10] In New Zealand, Prendergast CJ similarly dismissed the Treaty-based claims of Ngāti Toa in the infamous *Wi Parata v Bishop of Wellington*[11] decision on the grounds that Māori were "primitive barbarians" incapable of making a Treaty with the Crown. According to Native American scholar Robert Williams, such narratives reflect a "legal consciousness that at its core regards tribal peoples as normatively deficient and culturally, politically and morally inferior to Europeans".[12]

Notions of equality have also rationalised discrimination against Indigenous people in the United States. Carole Goldberg has described how:[13]

> ... in its earliest incantations, the talk of equal rights focused on restrictions that allegedly disadvantaged the Indians. For example, allotment of Indian lands in the late nineteenth century was justified as a means of affording Indians equality with other property holders. In the middle of the twentieth century, proponents of the disastrous policy of [treaty] termination employed the rhetoric of the budding civil rights movement, characterizing property owned by the United States in trust for tribes and exempted from taxation as demeaning for Indian men who had returned from fighting in World War II.

These discourses owe much of their power to a larger historically specific and identity-blind narrative. Since 1868, the 14th Amendment to the Constitution of the United States' Equal Protection Clause (EPC) has formally prohibited "any State" from "denying to any person within its jurisdiction the equal protection of the laws".[14] The 13th and 15th Amendments to the Constitution likewise prohibit slavery and the denial of the right to vote "on account of race, color, or previous condition of servitude",[15] respectively. A string of post-Civil War Supreme Court

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8 These and similar terms are used frequently throughout the Trilogy (the three Marshall cases – see above n 7). According to Native American scholar Ward Churchill, such terms originated in conquest, colonialism and the "duality" of international law at the time – the reality of "one code applying to colonizers, another to the colonized": Ward Churchill *Perversions of Justice: Indigenous Peoples and Anglo-American Law* (City Lights, San Francisco, 2003) at 39.

9 Robert Williams "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence" (1986) Wis L Rev 219 at 260–265.

10 At 260–265.

11 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

12 Williams, above n 9.

13 Carole Goldberg "American Indians and 'Preferential Treatment'" (2002) 49 UCLA L Rev 943 at 944–945. For instance, "[e]qual rights and antipaternalism rhetoric also permeated ... the 1971 Alaska Native Claims Settlement Act, which substituted Native corporations for the Bureau of Indian Affairs as the recipients of lands obtained in settlement" and the 1978 Native American Equal Opportunity Act Bill, which "sought to nullify all treaties entered into by the United States with Indian nations, to terminate all separate or special legal protections of Indians, and to end federal supervision over the property and members of Indian tribes.": See Goldberg, at 945.

14 Constitution of the United States, amendment XIV, § 1.

15 Amendment XV § 1.

decisions including *The Slaughterhouse Cases* (1872),[16] *The Civil Rights Cases* (1883)[17] and *Plessy v Ferguson* (1986)[18] interpreted equality in a highly formalised form, which condoned de facto and de jure discrimination, including separate-but-equal facilities.[19]

Decades and generations later, the Supreme Court held that separate-but-equal schools for African-American children violated the EPC in the landmark *Brown v Board of Education of Topeka, Kansas* (1954).[20] Equality required homogeneity. African-American children were entitled to go to the *same* schools, access the *same* facilities and resources and have the *same* teachers as Anglo-American children. Its sequel, *Brown v Board of Education II* (1955)[21] mandated race-aware positive measures to ensure equality. Into the 1970s, federal courts judged that the 14th Amendment imposed an "affirmative duty" and ordered local authorities to take concrete steps, including "compulsory integration",[22] redrawing school zones and bussing,[23] in order to integrate African-American learners into Anglo-American schools. Through its bussing decisions, "[t]he Supreme Court established strong precedent for race-based remedial measures".[24] Affirmative action was bolstered by President Lyndon Johnson's signing of Executive Order 11246,[25] which required the Labor Department to ensure that all federal government contractors were non-discriminatory in their employment practices. Goals of diversity led to the targeted recruitment of minority workers. Eventually, private and public educational institutions and businesses nationwide adopted similar policies to be consistent with the government, as failure to do so could result in loss of federal contracts or funds.[26]

Equality had been interpreted in substantive *everyone* and *no-one* terms – that is, everyone was guaranteed the right to equal protection while denial of that right to anyone or the negatively identified *no-one* was prohibited. Equality had, however, also been interpreted in *someone* terms. Specific identities – the former slave and segregated African-American learner – were recognised in law as members of a particular group within society, which had historically been, and continued

16 *Slaughterhouse Cases* 83 US 36 (1872).

17 *Civil Rights Cases* 109 US 3 (1883).

18 *Plessy v Ferguson* 163 US 537 (1896).

19 At 538, per majority.

20 *Brown v Board of Education of Topeka, Kansas* 347 US 483 (1954) [*Brown I*].

21 *Brown v Board of Education of Topeka, Kansas* 349 US 294 (1955) [*Brown II*].

22 *Green v County School Board of New Kent County* 391 US 430 (1968) at 437–438 and 441–442.

23 *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1 (1971) at 27–31. This was based on the fact that a white student, for instance, was likely to meet only other white students when she attended the school closest to her, regardless of the admissions policy.

24 Carl Livingston "Affirmative Action on Trial: The Retraction of Affirmative Action and the Case for Its Retention" (1996) 40 How LJ 145.

25 Also see President John F Kennedy's Executive Order 10925, signed in 1961, which created the President's Committee on Equal Employment Opportunity.

26 Lee Epstein and Thomas G Walker *Constitutional Law: Rights, Liberties, and Justice (Constitutional Law for a Changing America)* (8th ed, SAGE, Thousand Oaks, California, 2013) at 690.

to be, discriminated against. Positive measures demonstrated an awareness that group identity attracts de facto disparities in real-time.[27]

B. Reverse Discrimination and Indigenous Narratives

Reverse discrimination cases in the 1970s invoked the Equal Protection Clause or legislation descending from it and dramatically altered the tone of *everyone/no-one* and *someone* narratives. In *McDonald v Santa Fe Trail Transportation Co* (1976),[28] Anglo-American employees, dismissed for misbehaviour, successfully sued their employer when an African-American employee guilty of the same misbehaviour was not similarly dismissed. The Supreme Court held that § 1981 of Title 42 of the United States Code – a descendant of both the 13th and 14th Amendments – "prohibits racial discrimination … against white persons as well as non-white persons".[29] In *Regents of University of California v Bakke* (1978),[30] where the 14th Amendment was invoked directly, the Supreme Court outlawed the use of both racial quotas and separate tracks for such admissions. While public educational institutions could continue to use race as a factor in admissions, such policies would trigger the highest level of judicial review – strict scrutiny – and had to be "tailored" to a "compelling governmental interest" and be "necessary".[31] Later decisions would require that the policy be "narrowly tailored",[32] a standard usually "fatal" to any policy.[33]

The success of reverse discrimination arguments in federal courts demonstrated the persuasive power of a more *adamant everyone/no-one* narrative, which presumed that identity-awareness in admissions or employment amounted to racial discrimination. *Brown*'s historico-legal context[34] appeared forgotten and, paradoxically, the measure of equality and non-discrimination had shifted from parity with the privileged majority to parity with the historically disadvantaged minority. Judicial concern had similarly shifted from actual and intentional discrimination targeting certain racial groups to inadvertent, potential disadvantage to non-minority individuals.

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27 The equality narratives introduced throughout this article are discussed in greater detail in my doctoral thesis: Keakaokawai Varner Hemi "Everyone, no-one, someone and the Native Hawaiian learner: How expanded equality narratives might account for guarantee/reality gaps, historico-legal context and an admission policy which is actually levelling the playing field" (Doctor of Philosophy (PhD) Dissertation, University of Waikato, 2016).

28 *McDonald v Santa Fe Trail Transportation Co* 427 US 273 (1976).

29 At 278–279.

30 *Regents of the University of California v Bakke* 438 US 265 (1978).

31 Ironically, the *Bakke* majority relied on the Japanese-American internment cases of *Hirabayashi v United States* 320 US 81 (1943) and *Korematsu v United States* 323 US 214 (1944), which established that "[r]acial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny". Strict scrutiny required any policy to meet two criteria: compelling government interest in the policy and that the policy be tailored to further that interest. "Compelling" required that the court weigh the value of policies on a case-by-case basis against the "burden" which the individual who is disadvantaged by the policy is being asked to bear or "suffer". The policy also had to be "necessary" to achieve the compelling government interest.

32 See *City of Richmond v JA Croson Co* 488 US 469 (1989).

33 Or "strict in theory but fatal in fact": Eric Yamamoto quoted in Avis Poai and Susan Serrano "Alii Trusts" in Melody MacKenzie, Susan Serrano and Kapua'ala Sproat (eds) *Native Hawaiian Law: A Treatise* (Native Hawaiian Legal Corporation, Ka Huli Ao Center for Excellence in Native Hawaiian Law at the William S Richardson School of Law and University of Hawai'i at Mānoa, Honolulu, 2015) 1168 at 1229. Yamamoto explained, "Over time, the U.S. Supreme Court transformed the strict scrutiny analysis from one that protects minorities to one that invalidates all racial classifications".

34 See Part IIA above: *Brown v Board of Education of Topeka, Kansas* 347 US 483 (1954) and *Brown v Board of Education of Topeka, Kansas* 349 US 294 (1955).

In this narrative climate, Indigenous rights were once more assailed in the name of equality. In *Morton v Mancari* (1974),[35] the Bureau of Indian Affair's hiring preference for Native Americans was upheld by the Supreme Court against a reverse discrimination challenge via the 14th Amendment from a non-Indigenous and unsuccessful applicant. A tribe's right to determine membership internally was also protected in *Santa Clara Pueblo v Martinez*[36] against a former tribe member's EPC challenge. In both cases, tribal sovereignty and narratives of self-determination won out. *Mancari* delineated a clear exception to *adamant everyone/no-one* narratives for government bodies which serve Native Americans, based in the political relationship between tribes and the federal government rather than any racial identity. The Court also applied a rational basis of judicial review "with a wide latitude",[37] a standard only requiring that the policy be rationally related to a legitimate government interest.[38] *Mancari*, however, has continued to be challenged. In recent cases such as *Williams v Babbitt*[39] – where legislation limiting traditional reindeer herding rights to Alaskan Natives was challenged under the EPC – federal courts have shown that they are eager to apply strict scrutiny tests to Indigenous rights, despite *Mancari*, in the name of identity-blind equality.[40] *Morton v Mancari* continues to be "unrelenting[ly] assault[ed]" via *everyone/no-one* narratives.[41]

A similar narrative featured in *Rice v Cayetano*[42] where the voting scheme of the Office of Hawaiian Affairs (OHA) – a state government agency specifically established to oversee the use of funds and land set aside for Native Hawaiians in trust – was successfully challenged under the 15th Amendment by a wealthy non-Hawaiian rancher on the Big Island. This state body resembles both the federal Bureau of Indian Affairs and a tribal entity, given its mission and fiduciary role and as a vehicle of self-determination for Native Hawaiians – or something that looks a lot like a *Mancari* body. As such, only Native Hawaiians have been allowed to vote in elections which determine the make-up of the OHA's Board of Trustees. In *Rice*, however, the Supreme Court ruled that Native Hawaiian "[a]ncestry can be a proxy for race."[43] Despite its consistency with *Mancari* policies and

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35 *Morton v Mancari* 417 US 535 (1974).

36 *Santa Clara Pueblo v Martinez* 436 US 49 (1978). In *Martinez*, the plaintiff challenged the constitutionality of a Pueblo ordinance, which denied membership to children of female members who married outside the tribe on the basis of non-discrimination on the grounds of § 1302(8) of Title I of the Indian Civil Rights Act of 1968 25 USC §§ 1301–1304, which states that: "No Indian tribe in exercising powers of self-government shall ... deny to any person within its jurisdiction the equal protection of its laws". The drafting history revealed that the section's central purpose was to "secur[e] for the American Indian the broad constitutional rights afford[ed] to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments".

37 *City of Cleburne v Cleburne Living Center* 473 US 432 (1985) at 440.

38 See *United States v Carolene Products Co* 304 US 144 (1938) at 152, n 4, traditionally known as Famous Footnote Four.

39 *Williams v Babbitt* 115 F 3d 657 (9th Cir 1997).

40 At 665. Kozinski J of the US Ninth Court of Appeals – who was also in the dissent in *Kamehameha Schools* (see below at Part III) – delivered the majority judgment. His Honour took the time to go through the seemingly not so hypothetical steps of applying strict scrutiny tests for equal protection to the reindeer herding legislation.

41 Gregory Smith and Caroline Mayhew "Apocalypse now: The unrelenting assault on *Morton v. Mancari*" (2013) 60 *The Federal Lawyer* 47.

42 *Rice v Cayetano* 528 US 495 (2000).

43 At 514.

voting schemes limited to persons with special interests,[44] the Court applied strict scrutiny to the scheme and equated it with deliberately discriminative measures against African-Americans in the wake of slavery, including poll taxes and grandfather clauses.[45] The decision gave non-Native Hawaiians the right to vote in OHA elections and opened a flood of reverse discrimination cases against similar policies.[46]

The narratives and outcome in Rice are consistent with the near demise of race-based affirmative action measures in recent federal cases including *Hopwood v Texas*,[47] *Gratz v Bollinger*,[48] *Grutter v Bollinger*,[49] *Schuette v Coalition to Defend Affirmative Action*[50] and *Fisher v University of Texas at Austin*.[51] Both the assaults on Indigenous rights and race-based special measures reveal an extremely homogenous and anonymous version of equality – an *adamant everyone/no-one* narrative – which is historically abstract and highly formalised. Conversely, group identity has been reduced to a minimum diversity factor amidst the matrix of admissions,[52] indicating an extremely *weak* or *slim someone* narrative, something even less than a token gesture towards substantive equality. Both the *adamant* and *weak* narratives would be evident in *Kamehameha*.

III. The Schools and the case

While Indigenous peoples are frequently depicted as mere victims of colonisation, our counter-response to such narratives has often been one of agency and action,[53] particularly in terms of education. The Kamehameha Schools (the Schools), a private, Indigenous education system, was first established in 1883 by the *ali'i* Princess Bernice Pauahi Bishop (Pauahi), specifically to help "indigent"[54] Native Hawaiian children overcome socio-economic disparities which were, even then, alarming. In her lifetime, Pauahi had witnessed disease, population decimation, landlessness,

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44 See, for instance, *Salyer Land Co v Tulare Lake Basin Water Storage Dist* 410 US 719 (1973) and *Hill v Stone* 421 US 289 (1975).

45 *Rice*, above n 42, at 506, per majority.

46 See Lahela Hiapola'ela'e Farrington Hite "Maka'ala Ke Kanaka Kahea Manu: Examining a Potential Adjustment of Kamehameha Schools' Tuition Policy" (2009) 32 U Haw L Rev 237 at 244. Cases include *Arakaki v Cayetano* 324 F 3d 1078 (9th Cir 2003); *Carroll v Nakatani* 342 F 3d 934 (9th Cir 2003); and *Arakaki v Lingle* 477 F 3d 1048 (9th Cir 2007).

47 *Hopwood v State of Texas* 78 F 3d 932 (5th Cir 1996).

48 *Gratz v Bollinger* 539 US 244 (2003).

49 *Grutter v Bollinger* 539 US 306 (2003).

50 Schuette v Coalition to Defend Affirmative Action 572 US ___ (2014), 134 S Ct 1623 (2014).

51 *Fisher v University of Texas at Austin* 570 US ___ (2013), 133 S Ct 2411 (2013) (*Fisher I*). Following *Fisher I*, the Supreme Court upheld the University of Texas' admission scheme after a second challenge by the plaintiff, Abigail Fisher: see *Fisher v University of Texas* 579 US ___ (2016) (*Fisher II*). The Court considered wider social implications in their decision but did submerge race in a matrix of admissions factors and relied on the scrutiny tests applied in *Grutter v Bollinger*, above n 49.

52 *Grutter*, above n 49.

53 See B Kamanamaikalani Beamer "Na Wai Ka Mana? 'Ōiwi Agency and European Imperialism in the Hawaiian Kingdom" (PhD Dissertation, University of Hawai'i, 2008); Noelani Goodyear Ka'ōpua "Rebuilding the 'Auwai: Connecting Ecology, Economy and Education in Hawaiian Schools" (2009) 5AlterNative 46 at 57–59; and Donovan C Preza "The Empirical Writes Back: Re-Examining Hawaiian Dispossession Resulting from the Māhele of 1848" (PhD Dissertation, University of Hawai'i, 2010).

54 Thirteenth point, Last Will and Testament of Princess Bernice Pauahi Bishop, dated 31 October 1883.

poverty and other ills arising from Westernisation impact her people. She would have witnessed how the management of education in Hawai'i was assumed by Westerners who considered Native Hawaiians to be "ignorant", "filthy" and "lazy", educated them for subservience, benignly neglected Hawaiian-medium schools and advocated English-only education.[55] In response, Pauahi established a school that would allow Native Hawaiian learners to "compete" with other groups on an equal footing.[56] That school has grown into an Indigenous educational system which serves "more than 47,400 learners" from preschool to high school "on its campus[es] and community-based education programs and services statewide".[57]

Unsurprisingly given its purpose, the private school system has prioritised Native Hawaiians in admission for generations. There are approximately 70,000 Native Hawaiian children in Hawai'i of relevant age but only 5,400 spots in its K-12 programmes.[58] Consequently, non-Native Hawaiians are rarely admitted, though lack of a blood-quantum requirement means that the student body is actually quite diverse.[59] In practice, this preference has produced measurable, substantive equality. Without government funding, the Schools produce students who defy the negative numbers frequently associated with Native Hawaiians in virtually every area of human well-being.[60] Too often, we are identified in various studies and reports by disparities vis-à-vis all other groups in the State of Hawai'i, our own country. We often appear to be the extreme: the *most* likely to be absent, in special education and below average in all subjects; the *least* likely to attend school, graduate and continue to higher education.[61] At the Kamehameha Schools, however, 99 per cent graduate and 92.6 per cent go on to higher education.[62]

Despite this apparent levelling of the proverbial playing field, a non-Native Hawaiian teenager sued the Schools in 2002 under name suppression when he was not admitted under the policy. He was not the first Doe[63] nor the last[64] but represented by the same lawyers whose avowed mission was to eradicate affirmative action. In *adamant everyone/no-one* language, they alleged the admissions

55 Gary Y Okihiro *Island World: A History of Hawai'i and the United States* (University of California Press, Oakland, 2008) at 98–133.

56 Charles Bishop "Founder's Day Speech" (19 August 2015) Kamehameha Schools/Bernice Pauahi Bishop Estate <http://kapalama.ksbe.edu>.

57 Poai and Serrano, above n 33, at 1194.

58 See Kamehameha Schools/Bernice Pauahi Bishop Estate "Financial Aid and Scholarships Services" <http://apps.ksbe.edu/financialaid/>.

59 To qualify as "Native Hawaiian", applicants are only required to show that they had at least one Native Hawaiian ancestor prior to 31 December 1959: see Kamehameha Schools/Bernice Pauahi Bishop Estate "Hawaiian Ancestry Verification Documentation Information" <www.ksbe.edu>. Since Kamehameha students may qualify with *any* amount of Native Hawaiian blood under the policy, the Schools' student population is actually quite diverse, representing some 60 ethnic groups: *Kamehameha*, above n 1, at 832, per majority.

60 See discussion in Hemi, above n 27, at 93–96.

61 See Kamehameha Schools/Bernice Pauahi Bishop Estate *Native Hawaiian Educational Assessment Update 2009: A Supplement to Ka Huaka'i 2005* (Kamehameha Schools Research & Evaluation Division, Honolulu, 2009).

62 Linda Serra Hagedorn and others "The Academic and Occupational Outcomes of Private Residential High School Student Instruction" (2005) 13 Pac Ed Res J 21 at 33–34.

63 See *Rice v Cayetano* 528 US 495 (2000); *Mohica-Cummings v Kamehameha Schools* No CV0300441 (D Haw dismissed December 8, 2003) and *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 295 F Supp 2d 1141 (D Haw 2003). See Poai and Serrano, above n 33, for an in-depth discussion on these cases.

64 See *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 625 F 3d 1182 (9th Cir 2010) brought by a similar group of plaintiffs who were also represented by Eric Grant.

policy violated § 1981 of Title 42 (Equal Rights Under the Law 42 USC § 1981 (§ 1981)). Three panels of judges struggled to decide if the admissions policy *was* discriminatory or a measure of equality.

A. Equality and the Native Hawaiian Learner

In 2003, Judge Kay, in the United States District Court for the District of Hawai'i,[65] applied an adapted or "flexible"[66] version of the test established in *Johnson v Transportation Agency*,[67] where the Supreme Court applied a Title VII standard to an affirmative action policy in private employment,[68] though such tests were "not entirely analogous" to the circumstances of Kamehameha Schools.[69] Prior to *Johnson*, *United Steelworkers of America v Weber*[70] had protected a private employment affirmative action plan and held that intermediary Title VII standards, rather than strict scrutiny, were appropriate for § 1981 claims.[71] Together, the *Weber-Johnson* criteria were three-fold: the admission policy must respond to a "manifest imbalance" between Native Hawaiian children and others in education, must not unnecessarily trammel the rights of members of non-preferred groups and must do no more than necessary to achieve "parity" between groups.[72] Judge Kay held that a "manifest imbalance" in education between Native Hawaiians and other children justified the policy as a legitimate remedial measure. Judge Kay opined that "context matters" and emphasised the "exceptionally unique historical circumstances" of the policy, including the overthrow of the Kingdom of Hawai'i by American agents, later annexation of the Islands by the United States and resulting disparities in various areas of well-being including education which resulted from those acts.[73]

Addressing the same facts on appeal in 2005, a three-judge panel of the Ninth Circuit recognised that the admission policy was purposefully[74] conscious of Native Hawaiian ancestry and that, as *Rice*[75] established, ancestry could be a proxy for race. This admission of "racial" preference triggered a rebuttable but inferred presumption of unlawful racial discrimination. Following *Patterson v McLean Credit Union* (1989), the Schools now bore the burden of proving that it had

65 *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 295 F Supp 2d 1141 (D Haw 2003).

66 At 1166.

67 *Johnson v Transportation Agency* 480 US 616 (1987).

68 Title VII "Equal Employment Opportunity" of the Civil Rights Act of 1964; see 42 USC § 2000e-2(a) – Unlawful employment practices: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin".

69 *Doe v Kamehameha Schools*, above n 64, at 1164.

70 *United Steelworkers of America v Weber* 443 US 193 (1979).

71 Discussed *Doe v Kamehameha Schools*, above n 64, at 1164.

72 At 1172.

73 At 1145 and 1148.

74 Following *General Building Contractors Assoc v Pennsylvania* 458 US 375 (1982) a violation of § 1981 must be purposeful (Equal Rights Under the Law 42 USC § 1981).

75 *Rice*, above n 42.

"legitimate non-discriminatory reasons for its conduct".[76] Had the Schools received any federal funding, strict scrutiny would have applied.[77] As it was, the majority equated the identity-awareness of the policy with racial discrimination and "rigidly applied a formerly flexible contextual analysis, which had been developed to assess private employment affirmative action programs".[78] In a 2–1 decision, the majority applied the *Weber-Johnson* criteria rigorously. In their opinion, the majority de-emphasised the manifest imbalance or purpose of the policy, finding that "[e]ven if we assumed that some, limited racial preferences might be appropriate in order for the Schools to advance its mission" the policy operated as "an absolute bar on the basis of race" to the admission of non-Native Hawaiian students, since such students are rarely admitted.[79] The policy which had helped so many was somehow unconstitutional.

In 2006, a slim 8–7 majority of a full sitting of the Ninth Circuit overturned that decision holding that the policy constituted a legitimate affirmative action policy aimed at racial parity – but only after modifying the *Weber-Johnson* test to judge the manifest imbalance in the external setting of the state of Hawai'i and not merely the Schools. Five members of the majority were also persuaded that the policy was justified by the exception recognised in *Mancari*.[80] Under imminent threat of appeal[81] to the same Supreme Court bench which had decided *Rice*, the Schools settled with Doe for a sizeable sum in 2007.[82]

When the Schools petitioned for a rehearing en banc, they had been joined by 45 amici curiae representing state and local government, civil rights organisations, Indigenous nations and minority groups farther afield,[83] who argued that the policy was a measure of Indigenous self-determination by, and restorative justice for, a historically unique Indigenous people to whom § 1981 tests were misapplied.[84] The Ninth Circuit's reasoning, however, entertained only three possible versions of the admissions policy. It was either an affront to *everyone/no-one* equality guarantees, consistent with affirmative action via an ever slimmer *someone* narrative or another Indigenous exception to the general rule of identity-blindness under *Mancari*. Failing to recognise the policy as a measure of equality itself, however, contradicted the actual success of the Schools in overcoming real disparities in education for the very vulnerable Native Hawaiian learner. Narrated as an exception to *everyone/no-one* narratives, even *Mancari* fails to account fully for Indigenous

76 *Patterson v McLean Credit Union* 491 US 164 (1989).

77 Per *Grutter*, above n 49, and *Gratz*, above n 48.

78 Poai and Serrano, above n 33, at 1189.

79 *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 416 F 3d 1025 (9th Cir 2005) at 1042.

80 *Morton v Mancari* 417 US 535 (1974).

81 Eric Grant, lead counsel for Doe, describes how settlement occurred the Friday before the Supreme Court was set to hear the petition on Monday: Eric Grant "*Doe v. Kamehameha Schools*: The Undiscovered Opinion" 30 U Haw L Rev 355 at 355.

82 See Jim Dooley "Kamehameha Schools settled lawsuit for $7M" *Honolulu Advertiser* (online ed, Honolulu, 2 August 2008).

83 The Schools were joined by amici curiae representing the highest levels of state and local government, including the Attorney-General of the State of Hawai'i, the City and County of Honolulu, and the Hawai'i Civil Rights Commission. They were also joined by other Indigenous and minority bodies farther afield, including the Native American Rights Fund, Alaskan Federation of Natives, Japanese American Citizens League and Centro Legal de la Raza, a Latino-American organisation.

84 See Susan Serrano and others "Restorative Justice for Hawai'i's First People: Selected Amicus Curiae Briefs in *Doe v. Kamehameha Schools*" (2007) 14 Asian Am LJ 205.

self-determination rights which precede liberal notions of equality. Such inconsistencies suggest that none of these narratives actually fit the policy.

IV. Everyone, No one and Someone in a Sister Settler Jurisdiction

Aotearoa New Zealand is another former settler jurisdiction which continues to struggle with a history of colonisation, assimilation, discrimination and present disparities between its Indigenous peoples and other groups resulting from that history. For much of its post-Treaty of Waitangi history, education law and policy in New Zealand was characterised by inherently prejudicial civilisation, assimilation, forced integration and outright discrimination which targeted Indigenous identity.[85] This de jure and de facto discrimination had "long-term and intergenerational" effects.[86] Māori are also often depicted in education statistics in terms of dramatic disparities and discrimination.[87] Here, too, Indigenous peoples have responded to denigrating narratives in education and law by acting to re-establish their own educational systems where education is provided by Māori for Māori in a way that is Māori. As real-time expressions of self-determination, kōhanga reo, kura kaupapa Māori and other grassroots initiatives[88] have resulted in measurable de facto equality and are now recognised in legislation and are publicly funded. Other public educational institutions have also implemented special measures aimed at creating parity between Māori learners and other groups. As in Hawaii, Indigenous schools which prefer Māori in admissions produce students who defy the terrible numbers often associated with Māori learners and evidence a real-time equality.[89]

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85 Linda Tuhiwai Smith has written that "the major agency for imposing … positional superiority over knowledge, language and culture was colonial education … . Numerous accounts across nations now attest to the critical role played by schools in assimilating colonized peoples, and in the systematic, frequently brutal, forms of denial of indigenous languages, knowledges and cultures.": Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Zed Books, London, 2012) at 126–127. Also see Huia Tomlins-Jahnke and Te Rina Warren "Full, exclusive and undisturbed possession: Māori education and the Treaty" in Veronica MH Tawhai and Katarina Gray-Sharp (eds) *'Always Speaking': The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011) 21 at 22; Judith A Simon and Linda Tuhiwai Smith *The Native Schools System 1867-1969: Ngā Kura Māori* (Auckland University Press, Auckland, 1998) at 259; JM Barrington *Separate but Equal? Māori Schools and the Crown 1867-1969* (Victoria University Press, Wellington, 2008) at 15 and 20–21; and Peter Caccioppoli and Rhys Cullen *Māori Education* (Kotahi Media Ltd, Auckland, 2006) at 60.

86 Tomlins-Jahnke and Warren, above n 85, at 23. Human Rights Commission *A fair go for all? Rite tahi tātou katoa? Addressing structural discrimination in public services* (July 2012) at 2.

87 Human Rights Commission, above n 86, at 50, 53 and 54. Māori learners aged 15–19 illustrate this. In terms of participation in education, Māori youth have a 96.3 per cent rate at age 15, 73.7 per cent rate at age 16, a 50.6 per cent rate at age 17 and a 10.6 per cent rate at age 19 compared with non-Māori figures of 98.5 per cent, 91.8 per cent, 75.4 per cent and 17.9 per cent for the same ages. In regards to qualifications, Māori learners "lag behind" in Level 3 NCEA achievement, only 20 per cent of Māori School leavers achieve University Entrance compared with more than two-fifths of non-Māori, and Māori have a higher rate of learners leaving with no qualification at all (13 per cent) compared with non-Māori (5 per cent): Te Puni Kōkiri "Ko Ngā Rangatahi Māori i te Rāngai Mātauranga me te Whiwhi Mahi: Māori Youth in Education and Employment" (2012) Te Puni Kōkiri/Ministry of Māori Development <www.tpk.govt.nz> at 6–8. In other words, Māori tend to stay in mainstream education for a shorter time than their non-Māori counterparts and achieve fewer qualifications.

88 Graham Hingangaroa Smith "Indigenous Struggle for the Transformation of Education and Schooling" (keynote address to the Alaskan Federation of Natives (AFN) Convention, Anchorage, Alaska, October 2003) at first paragraph.

89 See forthcoming article, Keakaokawai Varner Hemi "Māori Education as Justice and Reckoning" in the Yearbook of New Zealand Jurisprudence.

In contrast to the current persuasiveness of *adamant everyone/no-one* narratives in the United States, however, there are few legal challenges to admission policies which either explicitly or implicitly prefer Māori. New Zealand's unwritten constitution prioritises a homogenous and anonymous rightsholder identity in terms of equality, but there is almost no jurisprudence on reverse discrimination. Instead, three alternative equality narratives are readily apparent: the *substantive everyone/no-one, strong* or *complex someone* and *multi-narrative Indigenous learner.*

A. A Substantive Everyone/No one

New Zealand law initially appears to display an almost American *everyone/no-one* narrative. While not guaranteeing equal protection per se, the New Zealand Bill of Rights Act 1990 (BoRA) usually references the anonymous "no one" and the homogenous "everyone", "every person", or "every New Zealand citizen".[90] As Paul Rishworth and others describe, such language conveys the idea that "individuals have rights because each individual matters, and matters equally".[91] Section 19(1) of the BoRA also affirms "[f]reedom from discrimination".[92] The Human Rights Act 1993 (HRA), as in antebellum American constitutional amendments, speaks in *no-one* terms, recognising various group identities as prohibited grounds for unlawful discrimination including: "colour", "race" and "ethnic or national origins".[93]

New Zealand courts and tribunals have, like American federal courts, interpreted equality in terms of identical treatment. In the Court of Appeal, plaintiffs in *Quilter v Attorney-General*[94] argued that a failure to treat same-sex couples the same as heterosexual couples in terms of marriage constituted discrimination on the grounds of sexual orientation. The plaintiffs were unsuccessful but later courts approved Thomas J's dissenting interpretation of equality as same treatment.[95] In *Jian v Residence Review Board*, the High Court of New Zealand recognised "unjustifiably different treatment ... assessed by reference to an appropriate comparator group" as discrimination.[96]

Education is also initially expressed in *everyone/no-one* terms in legislation. Section 3 of the Education Act 1989 affirms the "Right to free primary and secondary education":[97]

> ... every person who is not an international student is entitled to free enrolment and free education at any State school or partnership school kura hourua during the period beginning on the person's fifth birthday and ending on 1 January after the person's 19th birthday.

As in *Brown*, these learners have the right to be treated the same. Sections 8 and 9 of that Act, for instance, recognise that learners with disabilities have the "same right" to education at public

90 The exception is s 20 which recognises the "[r]ights of minorities" and the individual – that is "[a] person who belongs to an ethnic, religious, or linguistic minority in New Zealand".

91 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 368.

92 New Zealand Bill of Rights Act 1990, s 19.

93 See Human Rights Act 1993, s 21 "Prohibited grounds of discrimination".

94 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

95 Thomas J's reasoning was also persuasive with parliamentarians in 2013 when the Marriage (Definition of Marriage) Amendment Act 2013 (making same-sex marriage legal in New Zealand) passed on 19 August 2013, based largely on arguments which interpreted equality as same treatment.

96 *Jian v Residence Review Board* HC Wellington CIV-2005-485-1600, 3 August 2006.

97 Education Act 1989, s 3.

schools "as people who do not".[98] As in American *no-one* narratives, education is expressed elsewhere in terms of non-discrimination. Under the HRA, the right to non-discrimination applies to "[v]ocational training bodies",[99] "educational establishments",[100] and, like the American § 1981, contractual relationships and the "[p]rovision of goods and services".[101]

New Zealand's *everyone/no-one* narratives, however, are much more substantively aware than their American version. Section 65 of the HRA recognises:[102]

> Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part *has the effect* of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

Similarly, the High Court has recognised[103] that discrimination can be indirect or "neutral on its face but ha[s] ... a disproportionate effect on" an identifiable group because of a particular characteristic of that group.[104] The Court has suggested that the effect of differential treatment on an appropriate comparator person or group will reveal the discrimination.[105] The Human Rights Commission (HRC), established to receive complaints of discrimination, has similarly stated:[106]

> Formal equality is equal treatment before the law. It reflects the Aristotelian notion that, to ensure consistent treatment, like should be treated alike. However, equal treatment does not always ensure equal outcomes, because past or ongoing discrimination can mean that equal treatment simply reinforces existing inequalities. To achieve substantive equality—that is, equality of outcomes—some groups will need to be treated differently. It follows that not all different treatment will be considered discriminatory...

Schools whose admissions policies are designed to effect substantive equality are consistent with an *everyone/no-one* narrative. Where the purpose of the policy has been gravely minimised in American federal jurisprudence, New Zealand law has long recognised that educational institutions

98 Education Act 1989, ss 8 and 9.

99 Human Rights Act 1993, s 40.

100 Human Rights Act 1993, s 57.

101 Human Rights Act 1993, s 44.

102 Human Rights Act 1993, s 65 (emphasis added). The Human Rights Commission Act 1977 had previously made "discrimination by subterfuge" unlawful: Human Rights Commission Act, s 27. Also see *Proceedings Commissioner v Air New Zealand* (1988) 7 NZAR 462 (EOT).

103 *Jian*, above n 96, and *Talley's Fisheries Ltd v Lewis* HC Wellington CIV-2005-485-1750, 14 June 2007.

104 See commentary in Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 73–74. Also compare Jian, above n 96, at [24].

105 *Claymore Management Ltd v Anderson* [2003] 2 NZLR 537 (HC). In Quilter, Tipping J in the majority had asked – not unlike the intermediate scrutiny test in *Kamehameha* – whether the "distinction or differentiation has the effect of imposing burdens, obligations or disadvantages on some individual or group not imposed on others": *Quilter*, above n 94, at 575. Justice Thomas, in dissent, considered the Marriage Act 1955 discriminatory at the outset because it treated homosexual couples differently: *Quilter*, above n 94, at 540.

106 Human Rights Commission *Human Rights in New Zealand 2010: Ngā Tika Tangata O Aotearoa* (December 2010) at 27.

which prefer a certain "sex, race, colour, or religious belief"[107] in admissions do not necessarily breach the legislation where there is inequality between groups and where it is done to remedy those disparities.[108] This more substantive version of equality anticipates a privately or publicly funded school which prefers certain minority identities in admission, when such preference would certainly constitute trammelling under United States federal law and be fatal to the policy.

B. *A More Complex Someone*

New Zealand equality narratives are comfortable with group identity where recognising such is necessary to achieve substantive equality. Section 58 of the HRA recognises in unambiguous terms certain "[e]xceptions in relation to establishments for particular groups":[109]

> An educational establishment maintained *wholly* or *principally* for students of one sex, *race*, or religious belief, or for students with a particular disability, or for students in a particular age group, or the authority responsible for the control of any such establishment, does not commit a breach of section 57 by refusing to admit students of a different sex, race, or religious belief, or students not having that disability or not being in that age group.

The BoRA also recognises a more complex version of what constitutes a minority. Where American federal law often appears preoccupied with a racialised, black–white dichotomy, the BoRA recognises the ***human*** rights of individual members of "ethnic, religious and linguistic minorities" who have the right "in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority".[110] The Ministry of Justice has previously approved a definition of "minority",[111] which distinguishes Pacific Island communities[112] from Māori as tangata whenua, a distinction which further distances Indigenous identity from a racial categorisation.

The HRA provides an unambiguous list of groups to which such exceptions apply. While at least 20 sections of the HRA identify prohibited grounds, 31 recognise exceptions. Other provisions justify different treatment in terms of identity relative to religion, privacy, age, politics, family status or where certain employment[113] is concerned. Rather than a weakened standard, these exceptions were drafted to be explicit.[114]

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107 Human Rights Commission Act 1977, s 26(2).

108 Human Rights Commission Act 1977, s 28. Ironically, during an era when the substantial equality reasoning of *Brown* (*Brown I* and *Brown II*, above nn 20 and 21) was already beginning to be forgotten, New Zealand drew a clear line between outright discrimination and special measures meant to overcome discrimination.

109 Human Rights Act 1993, s 58(1) (emphasis added).

110 Bill of Rights Act 1990, s 20. Section 19's non-discrimination clause in that Act is immediately followed by a recognition of minority rights in s 20.

111 The Ministry of Justice recognizes international definitions of minorities: see "International and domestic law on minorities" (Ministry of Justice, 23 October 2016) at [5.2].

112 "There appears to be little doubt that Pacific people in New Zealand have the status of 'minority' groups at international law, to whom rights flow under Article 27 of the [International Covenant on Civil and Political Rights 1966], as members of their national groups. In light of their sense of shared identity, it is also probable that Pacific people collectively constitute a minority group at international law": see Ministry of Justice, above n 111, at [5.2].

113 See respectively, Human Rights Act 1993, ss 27, 28, 30, 32 and 31.

114 Such sections are intended "[f]or the avoidance of doubt": see Human Rights Act 1993, s 74.

The HRA also provides a straightforward three-step test which prioritises the purpose of the policy and a more substantive version of equality. Section 73 of the HRA recognises:[115]

> Measures to ensure equality
>
> (1) Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part shall not constitute such a breach if—
>
> (a) it is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part; and
>
> (b) those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.

Section 19(2) of the BoRA reiterates:[116]

> Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

When examining a complaint, the Human Rights Review Tribunal (HRRT)[117] can similarly approve a prima facie discriminatory practice – in effect, a practice where some identification takes place – if there is a "genuine occupational qualification" or "genuine justification".[118] Such emphasis on purpose allows previously conflicting *someone* and *everyone/no-one* narratives to sit comfortably together given their consistency with a more substantive version of equality and non-discrimination.

V. New Zealand Courts, *Bakke*-like Quotas and Total Reservation

The complementarity of *substantive everyone/no-one* and *strong someone* narratives is illustrated in *Amaltal Fishing Co v Nelson Polytechnic.*[119] The facts resemble *Bakke*'s quotas,[120] while the Complaints Review Tribunal's reasoning recalls the dissent in *Kamehameha*. Crucial differences, however, are worth noting.

115 Human Rights Act 1993, s 73(1).

116 Bill of Rights Act 1990, s 19(2).

117 As well as the Privacy Commissioner (Privacy Act 1993) and the Health and Disability Commissioner (Health and Disability Commissioner Act 1994); see "Human Rights Review Tribunal", Ministry of Justice website, found at <www.justice.govt.nz/tribunals/human-rights-review-tribunal>, dated 14 March 2017.

118 See the Human Rights Act 1993, s 97 and *Avis Rent-A-Car Ltd v Proceedings Commissioner* (1998) 5 HRNZ 501 (CRT).

119 *Amaltal Fishing Co Ltd v Nelson Polytechnic (No 2)* (1996) 2 HRNZ 225 (CRT) [*Amaltal II*]. Historically, the case spans a period of transition during which the first generation of New Zealand human rights legislation, namely the Race Relations Act 1971 and the Human Rights Commission Act 1977, which had been frequently amended over the years, was repealed by the enactment of the Human Rights Act 1993. The case was pre-Human Rights Review Tribunal. The human rights complaint in question was brought before its forerunner, the Complaints Review Tribunal.

120 *Bakke*, above n 30.

A. *New Zealand's* Kamehameha*?*

A fishing training course was offered at Nelson Polytechnic only twice a year with numbers limited to 14 places in each intake. The Polytechnic reserved a certain number of places in the course for Māori and Pacific Islanders. Fees for "target group" members were government subsidised while fees for others were not. Consistent with the agreement, three spaces in the first round of 1994 were reserved for target group members while all fourteen spots in the second round were reserved for the target group. The plaintiff, a fishing company which frequently sponsored individuals for the course,[121] alleged discrimination under the Race Relations Act 1971 (RRA), the Human Rights Commission Act 1977[122] and HRA[123] when one of its intended sponsored employees failed to secure a spot in either intake. When its complaint was not upheld by the Race Relations Conciliator, Amaltal appealed to the Complaints Review Tribunal (CRT).

Giving judgment on substantive issues in 1996,[124] the Tribunal recognised a prima facie[125] but rebuttable presumption of unlawful racial discrimination once the Polytechnic's status as a provider of services to the public,[126] vocational training institution[127] or educational establishment[128] had been established and the use of race was shown to be the factor which determined rejection or admission.[129] Thus, the Polytechnic had discriminated against Amaltal's employee by failing to consider him for the eight spots in the first round and for any spots in the second round because he was not a member of the target group.[130] Regarding the first round, the Tribunal, found that:[131]

> In relation to each one of those nine unsuccessful applicants [outside the target group] the reason for refusing or failing to admit the applicant to one of these three reserve places was race: race was the criterion on which some were admitted and others were rejected ...
>
> The object of the Act[s] is to secure equality of treatment by rendering [race] irrelevant, and when that characteristic has in fact governed the decision it seems to us to be beside the point that the same decision might or might not have been arrived at had other, relevant, factors been considered.

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121 As a procedural issue, the Tribunal found that the company fulfilled the criteria for an "aggrieved person" under the Race Relations Act 1971, s 17; Human Rights Commission Act 1977, s 38; and the Human Rights Act 1993, s 83: *Amaltal II*, above n 119, at 236.

122 See discussion in Gordon Anderson and others *Mazengarb's Employment Law (NZ)* (online looseleaf ed, LexisNexis) at [4000.1].

123 Specifically, s 4 of the Race Relations Act 1971, s 22 of the Human Rights Commission Act 1977 and s 26 of the Human Rights Act 1993, which were all active during the period of January to February 1994 when the advertising for the courses in question and decisions of acceptance were made.

124 Prior to substantive issues, the Complaints Review Tribunal determined it had jurisdiction to review the Polytechnic in terms of human rights legislation: *Amaltal Fishing Co Ltd v Nelson Polytechnic* (1994) 1 HRNZ 369 (CRT) [*Amaltal I*] at 373.

125 *Amaltal II*, above n 119, at 241 and 244.

126 Human Rights Act 1993, ss 44 and 67; Human Rights Commission Act 1977, s 24; and Race Relations Act 1971, s 4.

127 Human Rights Act 1993, s 40 and Human Rights Commission Act 1977, s 22.

128 Human Rights Act 1993, s 57 and Human Rights Commission Act 1977, s 26.

129 Depending on a United Kingdom case, *James v Eastleigh Borough Council* [1990] 2 All ER 607 (HL) at 618.

130 It had also breached the almost identical provisions of s 7 of the Race Relations Act 1971, s 32(1) of the Human Rights Commission Act 1977 and s 67(1) of the Human Rights Act 1993 when it advertised the same course knowing that it intended to discriminate on the basis of race.

131 *Amaltal II*, above n 119, at 237–238.

However, the Tribunal eagerly referred to the very similar provisions in s 9 of the RRA, s 29 of the HRCA and s 73(1) of the HRA, which contained three elements that would justify the policy if proven by the defendant on the balance of probabilities: the discrimination was done "in good faith"; for the purpose of assisting or advancing persons or groups; and the persons or groups in question actually did need or might "reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community".[132]

Ultimately, the agreement with the government and the unlawful discrimination itself, aimed at a specific target group, proved the first two elements. The Tribunal, however, decided in favour of the plaintiff based on the curious refusal of the defendant to produce any evidence to prove the third element because they insisted that the Polytechnic was not subject to the human rights legislation. While ordering that the defendant be "[r]estrain[ed] from repeating the conduct which" constituted breaches of the Acts in question – namely, the reservation of places for members of the target group and the advertisement of such – the Tribunal:[133]

> ...[left] it open for the defendant to reserve places for members of the target group in any courses which it runs in the future providing that it complies with the requirements of s 73 of the Human Rights Act 1993.

That is, the Polytechnic would need to prove all three elements of the s 73 defence.

The case was precedent-setting, given that it was "the only decision on the interpretation of the affirmative provisions in the Human Rights Act 1993".[134] In its wake, respected legal scholars suggested applying an American strict scrutiny to future policies.[135] Despite its human rights focus, the CRT's reasoning seems dichotomous, even American. As in *Kamehameha* and *Rice*,[136] the CRT equated Indigenous identity with *race*.[137] A preference in admissions for the Indigenous learner automatically triggered a presumption of unlawful racial discrimination where both rounds involved *Bakke*-like quotas.[138] The need query recalled the "manifest imbalance" step of *Kamehameha*'s intermediate scrutiny test and ignored any *Mancari*-like[139] exception or prior sovereignty.

The CRT also equated educational and employment contexts[140] as the Ninth Circuit had in *Kamehameha*. The third element itself raised *Kamehameha*-like issues in terms of identifying the

132 Human Rights Act 1993, s 73(1)(b). See current Human Rights Act 1993, s 73(1) containing all three elements.

133 *Amaltal II*, above n 119, at 248.

134 Mai Chen and Geoffrey Palmer *Affirmative Action: A Discussion Paper* (Ministry of Justice, Discussion Paper 12, 1998) at [12.1]. Following the case, Chen and Palmer noted: "To date *Amaltal* is the only decision on the interpretation of the affirmative action provisions of the HRA. This has led to the decision being given disproportionate weight and a corresponding lack of confidence in ss 73 and 74 as a means of justifying affirmative action programmes".

135 At [12.8.3].

136 *Kamehameha*, above n 1, and *Rice*, above n 42.

137 The actual application for the fishing courses identified the target group of the scheme as persons "of Māori or Pacific Island descent", but throughout the decision, the Tribunal refers only to race.

138 The second round is analogous to the practical effect of the Kamehameha Schools policy, which rarely results in the admissions of non-Native Hawaiian students owing to the large numbers of Native Hawaiians who apply.

139 *Mancari*, above n 35.

140 The three main institutional categories which the Polytechnic fall into are provider of services to the public, vocational training establishment and, lastly, educational institution. The description of the first in s 4 of the Race Relations Act 1971 is comparable to the contractual relationship described in the American § 1981 (Equal Rights Under the Law 42 USC § 1981), while the second is directed towards preparation for employment.

appropriate comparator group. It also raised questions of *which* purposes would qualify, a query which would trigger at least intermediate scrutiny in American federal courts.[141] Finally, under s 73 of the HRA, the policy could only be temporary.[142] Thus, the only case we have in New Zealand on reverse discrimination, may not approve the *Kamehameha* admission policy.

B. *The Loneliness of Reverse Discrimination*

The current persuasiveness of reverse discrimination reasoning in American federal courts contrasts with the scarcity of similar cases in New Zealand. Actually, *Amaltal*[143] is most famous for its loneliness and looks less American upon closer examination.

In retrospect, the purpose of the policy mattered to the CRT. Contrary to *Bakke*,[144] the CRT differentiated between policies which actually discriminate against groups and individuals and those designed to help disadvantaged groups overcome discrimination. In contrast to the wholesale denunciation of any identity-specific policy as reverse discrimination, the possibility that purpose-designed policies may promote equality is left open. In contrast to the precedent in *Bakke*, the decision appears to allow quotas, and even total reservation may be defensible under New Zealand law. While *any* reservation of places at a public school would be a *Bakke*-like quota and certainly constitute discrimination in American federal courts, the CRT allows the possibility that quotas might be justified where the policy in question meets all elements of s 73. Even the sympathetic and flexible majority in *Kamehameha* would have been unable to justify an outright total reservation of places in the second round at a public institution. The CRT did note that "[t]he legislation provides for special treatment for disadvantaged groups" and that "evidence could have been called to establish that one or both of the racial groups within the target group were in need of such special treatment."[145]

Both s 19(2) of the BoRA and s 73 of the HRA legislate relatively straightforward tests for *Kamehameha*-like policies – that is, for public and private bodies – which contextualise the prima facie presumption of discrimination. In New Zealand, impact on others will be taken into account[146] but is not determinative per se of the policy's lawfulness. Paul Rishworth and others have concluded that special measures under s 19(2) of the BoRA will likely be lawful where the "good faith" requirement is met and the policy benefits "persons disadvantaged because of discrimination". Under s 73(1), however, "[i]t is enough that they be persons or groups against whom discrimination is unlawful, who need or may reasonably be supposed to need assistance of

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141 See Chen and Palmer, above n 134, at [12.11]. In American federal courts, narrow tailoring and strict scrutiny have become virtually insurmountable hurdles for admissions policies, especially as both remedial and diversity-based policies have fallen out of favour with the United States Supreme Court and are only acceptable as submerged factors in the larger global matrix of admissions.

142 Chen and Palmer noted that, as in the modified *Weber-Johnson* factors (see Part III, A above), the third element of the s 73 defence only protects the measure in question until equal placement with other groups is achieved; that is, it is temporary. Again, looking for possible overseas guidance on how achievement might be measured, Chen and Palmer found the most helpful authority to be the Rehnquist Court's *Adarand Constructors Inc v Peña* 515 US 200 (1995), where strict scrutiny was applied and the policy in question was ultimately found to be unlawful: see Chen and Palmer, above n 134, at [12.12].

143 *Amaltal II*, above n 119.

144 *Bakke*, above n 30.

145 *Amaltal II*, above n 119, at 247.

146 Human Rights Commission *Guidelines on Measures to Ensure Equality* (February 2010) at [5].

advancement."[147] Meeting all three elements is much more likely given that the level of scrutiny to be applied in s 73 cases is the balance of probabilities, a standard akin to *Mancari*'s rational basis rather than *Bakke*'s strict or *Kamehameha*'s intermediate scrutiny. This relaxed scrutiny itself suggests greater narrative allowance for both quotas and total reservation.

Grant Huscroft has also stated that, while s 19(2) "contemplates the use of affirmative action as a remedial measure", s 73(1) "contemplates the use of affirmative action as a tool of distributive justice rather than simply a remedial measure".[148] Similarly, the Human Rights Commission's *Guidelines on Measures to Ensure Equality* recognised *Kamehameha*-type measures as "part of a tool kit to address inequality" when it stated: "Measures to ensure equality are not only permitted but at times required, to ensure equality for disadvantaged groups."[149] Quotas and total reservation are consistent with the proportional approach to special measures taken by the Human Rights Commission:[150]

> The more entrenched the disadvantage the greater the need for measures to ensure equality. Where a group, for example, has been denied access to education because of their race then that group may need preferential admission to redress the resulting disadvantage.

In the wake of *Amaltal*, reverse discrimination cases are almost non-existent though discrimination cases are plentiful. Tim McBride has discussed 42 cases of note on discrimination decided by the HRRT and the courts between June 1996 and January 2010.[151] Only two involved policies or practices relevant to HRA ss 65, 73 or 74.[152] In *Kerr v Victoria University of Wellington*,[153] the CRT held that a university policy providing women-only space for activities including breastfeeding was justified under s 74 and possibly under s 73 as well. In *Church v Hawkes Bay Regional Council*,[154] the complainant's claim that having to listen to a Māori karakia (prayer) at the end of a public meeting constituted discrimination was not upheld given s 65 of the HRA. His appeal to the High Court was similarly struck out. In contrast, more than half of the remaining cases address gendered discrimination, especially sexual harassment in the context of private employment, with the majority decided in favour of the traditionally disadvantaged group.[155] Only three allege racial or national origin discrimination.[156] In fact, racial quotas are widely used in New Zealand,

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147 Grant Huscroft "Freedom from Discrimination" in Rishworth and others, above n 91, at 390–391.

148 At 390.

149 "Where the disadvantage is not widely entrenched or applicable to the group as a whole, then the measure should be less intrusive. It also follows that if there is a less intrusive way of providing a benefit then that is preferable." Human Rights Commission, above n 146, at [1] and [2].

150 At [7].

151 See Tim McBride *New Zealand Civil Rights Handbook* (Craig Potton Publishing, Nelson, 2010) at 336–344.

152 Section 74 approves special measures related to pregnancy and motherhood.

153 *Kerr v Victoria University of Wellington* CRT28/96, 18 March 1997.

154 *Church v Hawkes Bay Regional Council* CRT04/01, 26 March 2001.

155 The Human Rights Act 1993 appears to have the capacity to protect women in *no-one* terms, while retaining the flexibility to recognise special measures which espouse a more *complex someone* narrative.

156 In terms of ss 44, 61, 62 or 65 of the Human Rights Act 1993, see: *Proceedings Commissioner v Archer* CRT16/96, 25 June 1996; *Proceedings Commissioner v Vallant Hooker & Partners* CRT5/98, 18 December 1998; and *B v Commissioner of Inland Revenue* CRT22/93, 6/99, 10 March 1999.

particularly in university admissions. Although sometimes debated in the media or for political grandstanding,[157] there are few legal challenges to such policies.

Thus, the emphasis of the CRT on human rights in *Amaltal* could unwittingly signal what the result may not have outright. In contrast to American trends of adamance, New Zealand narratives recall human rights obligations and *Brown*-like[158] goals of substantive rather than merely formal equality. The only case on affirmative action in New Zealand generously suggests that special measures are defensible where all elements of s 73 were met. Where diversity submerged in the matrix of admissions may be the only viable ground for affirmative action in public schools left in federal courts, diversity-based policies and programmes might not even be considered special measures in New Zealand.[159]

VI. A Complex Indigenous Learner Multi-Narrative

The *Amaltal* decision raises other questions relative to Māori identity. It was argued purely on the basis of *race* and without reference to the Treaty of Waitangi or its principles (that is, without reference to a specifically Indigenous, *Mancari*-type equality narrative based on self-determination and political rather than racial status, as was the case in *Kamehameha*). New Zealand law, however, further evidences a *complex*, specifically *Indigenous* equality narrative, which seemingly exceeds *Mancari*. Rather than conflict with equality, Māori identity creates a narrative nexus between *substantive everyone/no-one*, *complex someone* and *Indigenous learner* narratives. This equality multi-narrative is apparent in legal responses to the Foreshore and Seabed legislation and Treaty of Waitangi interpretation by the Waitangi Tribunal.

A. *Treaty as Indigenous Multi-narrative*

The text of the Treaty of Waitangi brings two equality narratives together. Article II of the Treaty reserves specifically *Indigenous* rights to Māori which have nothing to do with a racial identity and everything to do with the political relationship between the Crown and Māori as "constituent" parties to the Treaty.[160] Given Article III's guarantee to Māori of "all the Rights and Privileges of British Subjects", the Treaty is also New Zealand's most straightforward legal statement of equality and an *everyone* narrative. Thus, the "foundation"[161] document of New Zealand recognises

157 See, for instance, Martin Johnson "Students Stung by Quota Backlash" *New Zealand Herald* (online edition, Auckland, 1 March 2004).

158 *Brown*, above nn 20 and 21.

159 See discussion in Paul Callister and Belinda Hill *Special Measures to Reduce Ethnic Disadvantage in New Zealand: And Examination of Their Role* (Institute of Policy Studies, Wellington, 2007) at 7–8.

160 The Treaty appears to be an example of Indigenous agency not unlike that in Hawai'i. It was negotiated and debated. The debate focused on the retention of self-government. Rather than a completely one-sided affair, "Māori were autonomous" in that process. The Māori version was "strategically" crafted to meet Māori expectations and concerns: Jessica Orsman "The Treaty of Waitangi as an exercise of Māori constituent power" (2012) 43 VULWR 345 at 356–357. The Treaty can be viewed as a "fundamental political decision by Māori exercising constituent power", that is, acting as one of two legitimate constitutional actors and giving their duly recognised "assent" as the Indigenous people of the country to a new constitution which defined a power-sharing arrangement: Orsman, at 357–358. Of course, only five years earlier, Māori chiefs had tried to protect their "independence" via He Whakaputanga – Declaration of Independence 1835.

161 Orsman, above n 160, at 352–353.

a collective, specifically *Indigenous* right to self-determination and taonga and a right to equal protection.

The same document is increasingly recognised as a *constitutional* document which outlines the ongoing relationship between constituent parties.[162] The late Sir Hugh Kāwharu wrote that this "covenant ('kawenata') for relations between all Māori and the British Crown ... has ever since meant relations between Māori and all non-Māori in New Zealand".[163] The nature of the relationship resembles that between Native American tribes and the federal government but also seems to display an expanded self-determination. It entails fiduciary duties but also active protection and partnership – as opposed to dependent nation status – and preserves Māori rights to self-determination. Importantly, the Crown is viewed as having a duty to remedy past breaches of the Treaty.[164]

Although its decisions are not binding, "the Treaty of Waitangi Act 1975 (ToWA) has also afforded the Waitangi Tribunal the opportunity to play a crucial role in debating our constitutional past and present".[165] The Treaty of Waitangi Act 1975 appears to narrate liberal principles including non-discrimination. First, it interprets Māori identity as both race and ancestry, and recognises the reality and possibility of historical, ongoing and potential prejudice.[166] It binds the Crown outright[167] and is, essentially, meant to address discrimination. Māori, individually or collectively,[168] can bring claims to the Waitangi Tribunal where "he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected."[169] Importantly, its "Treaty principles jurisdiction" cannot be "water[ed] down".[170]

B. *The Treaty versus an Adamant Everyone/No one*

The Treaty's multi-narrative would face-off with an *adamant everyone/no-one* counter-narrative in courts of law, courts of public opinion and the Waitangi Tribunal as the result of the issues raised by the Foreshore and Seabed Bill in 2004.

The narrative drama began in 1997 when a group of South Island iwi sought to have "certain land comprised of the foreshore and seabed" declared Māori customary land by the Māori Land Court.[171] By June 2003, the case of *Ngati Apa v Attorney-General* came before the Court of Appeal

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162 Orsman, above n 160.

163 IH Kāwharu "Foreword" in Michael Belgrave, Merata Kawharu and David V Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) at v.

164 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

165 Jacinta Ruru "The Waitangi Tribunal" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 127 at 127.

166 Treaty of Waitangi Act 1975, s 2.

167 Section 3.

168 Section 6(1)(a–d).

169 Section 6(1).

170 Ruru, above n 165, at 128.

171 This area was defined under s 5 of the Foreshore and Seabed Act 2004 as "(a) ... the marine area that is bounded,— (i) on the landward side by the line of mean high water springs; and (ii) on the seaward side, by the outer limits of the territorial sea; and (b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and (c) includes the bed of Te Whaanga Lagoon in the Chatham Islands; and (d) includes the air space and the water space above the areas described in paragraphs (a) to (c); and (e) includes the subsoil, bedrock, and other matters below the areas described in paragraphs (a) to (c)".

which unanimously held that common law and customary rights to aboriginal title "continued until lawfully extinguished" by specific legislation.[172] In January 2004, Dr Don Brash, National party leader, famously alleged in a race-neutral fashion that "[t]here can be no basis for special privileges for any race, no basis for government funding based on race".[173] In response to such allegations, the usually pro-Māori Labour Government drafted legislation vesting ownership of the foreshore and seabed in the Crown.

The *Report on the Crown's Foreshore and Seabed Policy*,174 issued in March 2004 by the Waitangi Tribunal, found that the proposed legislation breached both Articles II and III of the Treaty of Waitangi, as well as principles of the Treaty, namely reciprocity, partnership, good faith, rule of law, active protection and equity and options.[175] Parliament, however, disregarded the Waitangi Tribunal – and Treaty and common law rights – when it passed the Foreshore and Seabed Act 2004 (FSA) under urgency in November 2004. Section 3 set the narrative tone:[176]

> The object of this Act is to preserve the public foreshore and seabed in perpetuity as the common heritage of *all* New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of *all* the people of New Zealand, including the protection of the association of whānau, hapū, and iwi with areas of the public foreshore and seabed.

The legislation immediately signalled a Māori/non-Māori dichotomy and an *adamant everyone/no-one* standard inherently incompatible with the multi-narrative rights guaranteed by the Treaty. Sections 7(2) and 8(1) of the FSA reiterated that "*Every* natural person has access rights" to the foreshore and seabed and that "*Every* person has rights of navigation within the foreshore and seabed."[177] Māori enjoyed a homogenous "association", not the rangatiratanga of Article II of the Treaty as s 13 of the FSA declared Crown ownership in "absolute" terms.[178] Other sections made any customary title claims contingent on demanding criteria.[179] Section 13 of the FSA also denied "any fiduciary obligation, or any obligation of a similar nature, to any *person* in respect of the public foreshore and seabed."[180]

United Nations Special Rapporteur on Indigenous Peoples, Rodolfo Stavenhagen, concluded that "the Crown, while arguing in favour of the interests of the general public in New Zealand, ha[d] breached the Treaty of Waitangi once again"[181] and heightened "racial tensions".[182] The

172 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at 643.

173 Don Brash "Nationhood" (speech to the Orewa Rotary Club, Orewa, 27 January 2004).

174 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004).

175 At 127–134.

176 Foreshore and Seabed Act 2004, s 3: repealed, on 1 April 2011, by Marine and Coastal Area (Takutai Moana) Act 2011, s 5 (emphasis added).

177 Sections 7–8 (emphasis added).

178 Section 13(1).

179 Including "exclusive" and "uninterrupted" "use and occupation" since 1840.

180 Section 13(4) (emphasis added).

181 Rodolfo Stavenhagen *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Addendum: Mission to New Zealand* E/CN.4/2006/78/Add.3 (2006) at 14.

182 At 14.

debacle undoubtedly raised questions about the strength and "constitutional security"[183] of Indigenous rights,[184] while allegations of privilege and advantage once again seemed to be a case of mistaken identity whereby a dichotomous racial label was applied to Māori. In its wake, Māori again responded with action to have their Treaty rights recognised.[185] When they did, a curious nexus of equality narratives emerged.

The Waitangi Tribunal's *Report on the Crown's Foreshore and Seabed Policy*[186] had found that the legislation:[187]

> ... clearly breaches the principles of the Treaty of Waitangi. But beyond the Treaty, the policy fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state. These include the rule of law, and the principles of fairness and *non-discrimination.*

The Tribunal reasoned that Article III of the Treaty and the rule of law would be violated because only Māori would be disadvantaged by "cutting off their access to the courts and effectively expropriating their property rights" thus "put[ting] them in a class different from and inferior to all other citizens".[188] Essentially, the legislation would only disadvantage Māori *in effect* and was, therefore, discriminatory. This conclusion was consistent with human rights narratives about equality. Bodies monitoring New Zealand's international treaty obligations similarly condemned the legislation. In March 2005, the United Nations Committee on the Elimination of All Forms of

183 The Treaty remains more exposed to the dangers of political discretion than human rights inspired legislation such as the Bill of Rights Act 1990 [BoRA] and the Human Rights Act 1993 [HRA], which though not entrenched, have some safeguards built-in (such as ss 5 and 6 of the BoRA). Former United Nations Special Rapporteur on Indigenous Peoples, James Anaya, has criticised the "[l]ack of constitutional security for Māori rights" in New Zealand, even noting a Bill in 2006 that proposed to delete or remove all legislative references to either "the principles of the Treaty" or the Treaty itself. Anaya recommended that the Treaty be given at least similar safeguards as those in the BoRA and HRA, but that discussion should begin on the subjects of entrenchment and making New Zealand law more consistent with international human rights standards, especially the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61-295 (2007). Also see the Principles of the Treaty of Waitangi Deletion Bill 2006 (66-1). A similar Bill was also put forward in 2005.

184 Janine Hayward came to "the sobering conclusion ... that the wishes of the majority might be the greatest obstacle to achieving greater constitutional protection for Māori rights as a minority ... Parliament is representative of Māori and is able to negotiate compromises and solutions to situations that arise concerning the Treaty and Māori rights. But, as the Foreshore and Seabed Act illustrated, Māori cannot rely on Parliament to protect Māori rights (even as defined by the courts), if these are not seen to be in the interests of the majority": Janine Hayward "The Treaty and the Constitution" in Raymond Miller (ed) *New Zealand Government and Politics* (5th ed, Oxford University Press, Melbourne, 2010) 105 at 111.

185 Valmaine Toki has written: "In May 2004 a hikoi (march) culminated in over 20,000 people gathering at Parliament to protest against the Foreshore and Seabed Bill. This was the largest form of protest by Maori since the Land March of 1975. Tariana Turia, a Labour Member of Parliament who could not support the Foreshore and Seabed Bill, resigned. A Waitangi Tribunal Report was strongly critical of the government policy on the foreshore and seabed. An overwhelming majority of those who made submissions to the Select Committee opposed the Foreshore and Seabed Bill. On 18 November 2004, the Bill passed [its] third reading. Symbolically, on the same day Tim Selwyn, mirroring Hone Heke's action, put an axe through the window of the electorate office of the Prime Minister, Helen [Clark]. Nevertheless, on 24 November 2004, the Foreshore and Seabed Act was enacted, vesting title of the foreshore and seabed in the Crown. In October 2006, Tariana Turia, now co-leader of the Māori Party, introduced a Private Member's Bill designed to repeal the Foreshore and Seabed Act.": Valmaine Toki "Can the Developing Doctrine of Aboriginal Native Title Assist a Claim under the Foreshore and Seabed Act 2004?" (2008) 34 Commonwealth Law Bulletin 21 (footnotes omitted).

186 Waitangi Tribunal *Foreshore and Seabed*, above n 174.

187 At xiv (emphasis added).

188 At xiv–xv.

Racial Discrimination (CERD) issued their own decision on the FSA, which concluded that the Act was discriminatory because it removed legal recourse and means of redress where Treaty rights were violated.[189]

Although the *adamant everyone/no-one* legislation initially appeared to trump Māori rights, the divisive legislation was repealed seven years later by s 5 of the Marine and Coastal Areas (Takutai Moana) Act 2011. As the result of Māori and international pressure, the *multi-narrative* Treaty was reaffirmed but also emerged as a narrative symbol of human rights and non-discrimination. Historical Indigenous rights had been recognised by the courts as common law rights; by the expert Waitangi Tribunal as Treaty rights; and, eventually, by Parliament as both.

C. *Narratives of the Māori Learner*

Not unlike the Kamehameha Schools, the student bodies of many kura are overwhelmingly or completely Māori, the curriculum Māori- and even iwi-centric. A preference for Māori identity in admissions is obvious though not exclusive.[190] As of 1 July 2016, there were some 107 "Māori medium schools" in New Zealand[191] covering a similar age group to Kamehameha. While the foreshore and seabed generated narrative conflict, there is no similar furore over admission policies which prefer Māori learners. Besides uninterrupted everyday practice, there is a growing body of Waitangi Tribunal interpretation interpreting the Crown's Treaty obligations in education in terms of positive obligations which recall *someone* measures and *Indigenous* self-determination. Where such obligations are neglected, Māori are likely to be discriminated against in terms of Articles II *and* III of the Treaty – that is, in terms of *everyone/no-one* equality and specifically Māori rights to self-determination and taonga.

In the *Mokai School Report*,[192] parents of Māori learners brought a Treaty claim when their bilingual primary school was closed by the Ministry of Education. Parents claimed that their Article II rangatiratanga right over taonga including te reo Māori (Māori language) and mātauranga Māori (Māori knowledge) and other Treaty principles had been breached when the school was closed without adequate resource allocation and consultation with parents. Closing the school, they claimed, prevented their children from learning Māori language and knowledge at Mokai, forced

189 United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on the Committee's 65th Session* (20 August 2004). See discussion in Claire Charters and Andrew Erueti "Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004" (2005) 36 VULWR 257.

190 At some schools, a majority of the student body actually identifies with a common iwi or hapū. At Te Rakaumangamanga in Huntly, for instance, 95 per cent of students have whakapapa linking them back to Waikato-Tainui. A preference for prior knowledge of and even fluency in te reo Māori often considered in the admissions process for some kura and even kōhanga would seem to create a de facto preference for the Māori learner, not unlike the preference at issue in the *Kamehameha* case (above n 1). In *Kamehameha* it was the de facto effects of the policy that were the source of contention, rather than the official policy which, like many Indigenous institutions in New Zealand, does not officially exclude non-Indigenous students. Like the Kamehameha Schools, these schools do not require a blood-quantum in terms of who is Māori, and student bodies can be quite diverse. The curriculum and kaupapa itself is Māori-centric and may be iwi-centric as in the case of Waikato-Tainui schools such as Te Rakaumangamanga and Bernard Fergusson (which is located in Ngaruawahia adjacent to Turangawaewae Marae).

191 Ministry of Education "Number of Schools by Highest Level of Immersion and Māori Language Descriptor & Highest Level of Immersion – July 2016" <www.educationcounts.govt.nz>.

192 Waitangi Tribunal *The Mokai School Report* (Wai 789, 2000).

them to travel outside the community and meant losing their "Mokai identity".[193] The Tribunal concluded that the Ministry had prejudicially affected Māori in failing to "actively promote and protect" Indigenous language and knowledge, failing to consult with parents prior to the decision and in not allocating enough resources – human and otherwise – to the school when a quality review raised questions.[194] These actions resulted in a diminishment of the community's Article II rangatiratanga *and* prejudice.[195]

In its *Report on the Aotearoa Institute Claim Concerning Te Wānanga O Aotearoa*,[196] the Tribunal described an Indigenous tertiary institution as "fulfilling both an educative and a social justice function for all Māori, and indeed for all New Zealanders".[197] The institution taught Māori language and tikanga in addition to "literacy, numeracy, and other life and employment skills" and was especially aimed at "second chance" learners "whom the primary and secondary education system has failed".[198] The claim was brought on the basis of a breach of rangatiratanga in regards to Crown policy on who might attend the wānanga – namely whether the wānanga should be allowed to admit non-Māori – that is, who had the right to determine admissions. Again, the Tribunal found that the Crown had "fail[ed] to protect the rangatiratanga of [the institution]" with resulting prejudice to the claimants in not allowing them to make that decision.[199]

The Tribunal's *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* in 2011[200] described Indigenous-specific policies currently in place as praiseworthy, representing a certain amount of partnership and "considerable progress".[201] Regarding Crown control of curriculum, however, the Tribunal noted a failure to consult with Māori on key policy decisions and underfunding as breaches of the Treaty.[202] It recommended greater self-determination and responsibility, increased resource allocation, the development of specific indicators to measure Māori progress and the successful transmission of Indigenous knowledge, as well as actual Māori achievement in mainstream education.[203]

Most recently, *Matua Rautia: The Report on the Kōhanga Reo Claim*[204] provided an expansive analysis of an Indigenous right to education at the preschool level. Central to the claim was the Tribunal's finding that kōhanga reo, or language nests, are vital to the survival and revitalisation of Māori language which is a taonga and Treaty right.[205] While the principle of partnership makes both the Crown and Māori responsible for language survival, the Crown has a duty of active promotion

193 At 137. They also claimed that the Education Act 1989 should include a provision requiring consistency with the Treaty and its principles.

194 At 123.

195 At 125.

196 Waitangi Tribunal *The Report on the Aotearoa Institute Claim Concerning Te Wānanga o Aotearoa* (Wai 1298, 2005).

197 At 2.

198 At 2.

199 At 51.

200 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 2.

201 At 559 and 560.

202 At 542 and 543.

203 At 559 and 561.

204 Waitangi Tribunal *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wai 2336, 2013).

205 Repeatedly mentioned throughout the Report.

and protection, which requires it to "engag[e] in 'especially vigorous action' to protect te reo" via funding, policy, increased resource allocation and other positive, identity-specific measures.[206] Regarding options and equity, the Tribunal recognised that the right to attend a preschool was "a citizenship right" afforded to every child in New Zealand, but Māori children were also entitled to know their options, and to a "policy framework" tailored to protecting te reo. Failing to provide such policy or promote participation, or by imposing a funding regime which did not provide incentives for kōhanga reo teachers specifically, was interpreted as prejudice by the Tribunal.[207]

While *everyone/no-one* and *someone* narratives are woven into the narrative of the *Indigenous learner*, the rights in question accord with Treaty principles and remain self-determination based. In these reports, the Tribunal has recognised: Article II rangatiratanga over taonga including te reo Māori and mātauranga;[208] active promotion and protection of such taonga, consultation and participation;[209] partnership, kāwanatanga, rangatiratanga, kaitiakitanga, options and equity.[210] In terms of admissions, the *Aotearoa Institute* decision[211] reveals a *Santa Clara Pueblo*-like control over membership, even where those being admitted are not Indigenous. In the *Mokai*, *Aotearoa Institute* and *Kōhanga Reo* decisions, the schools in question, rather than a greater Indigenous political entity, were themselves recognised as holders, even trustees,[212] of a collective right to self-determination. Diminishing this internal self-determination constituted breaches of the Treaty resulting in prejudice, which seem to violate Article III of the Treaty as much as Article II. Substantive non-discrimination thus linked homegrown Treaty rights with more *substantive everyone/no-one* and *complex someone* rights.

VII. Stories Told, Lessons Learned

In contrast to the conflict of narratives evident in *Doe v Kamehameha Schools*,[213] New Zealand legislation, jurisprudence and Treaty interpretation recognise a complex and complementary multi-narrative of equality. Its main features include scarcity of reverse discrimination, re-affirmation of a *complex someone* right, Indigenous rights as non-discrimination or non-prejudice, remediation and positive government obligations. Education is narrated according to multiple, complex and complementary rightsholder identities rather than a homogenous and anonymous *everyone/ no-one*. Substantive non-discrimination rather than a formalised equality is prioritised implying a *Brown*-like,[214] real-time sense of equality. These features have blurred the narrative lines between the international and domestic, the constitutional, the human and Indigenous. Despite the Waitangi Tribunal's interpretive and recommendatory jurisdiction in terms of Indigenous rights, this nexus has also blurred the narrative lines between the courts and the Waitangi Tribunal. Subsequently,

206 *Kōhanga Reo Claim*, above n 204, at 235.

207 At 236–240.

208 Indigenous knowledge.

209 See Waitangi Tribunal *Mokai School Report*, above n 192, at 137.

210 See extensive Tribunal's discussion on Treaty principles in terms of education in *Kōhanga Reo Claim*, above n 204, at 55–71.

211 Waitangi Tribunal *The Report on the Aotearoa Institute Claim*, above n 196.

212 See kaitiakitanga principle discussed in *Kōhanga Reo Claim*, above n 204, at 66.

213 *Kamehameha*, above n 1.

214 *Brown*, above nn 20 and 21.

New Zealand narratives are also imbued with a supra-domestic moral force which is consonant with domestic intuitions about equality and the unique historico-legal context of Māori rights to education.

Colleagues in the trenches of Indigenous education wisely caution and various reports demonstrate that there is certainly room in New Zealand for greater municipal importation and implementation of human rights, as well as greater recognition of Treaty rights to education. Disparities continue to negatively identify Māori and Native Hawaiian learners in educational data. Key international human rights instruments, which have adopted similar *multi-narratives* about the Indigenous learner, have not been directly incorporated into New Zealand law. These include the Convention on the Rights of the Child 1989,[215] the Convention on the Rights of Persons with Disabilities 2006[216] and the United Nations Declaration on the Rights of Indigenous People 2007;[217] instruments which also come loaded with international interpretation and supra-domestic moral force. The intentional incorporation of human rights instruments, including the International Covenant on Civil and Political Rights 1966[218] into New Zealand law, at least partially explains the complementarity between *everyone/no-one* guarantees and *someone* measures in New Zealand law. Further incorporation seems a logical next step in moving beyond narrative debates to more earthy discussions on real-time realisation of equality, as does a possible re-evaluation of the jurisdiction of the Waitangi Tribunal, given its interpretive expertise and constitutional role.

The obvious danger remains that future New Zealand governments may once again choose to impose *adamant everyone/no-one* narratives on schools which prefer Māori learners, but, for now, a complex *multi-narrative* of equality is evident. The real question then is not whether a *Kamehameha*-like admission policy is consistent with equality nor whether it might coincide with an Indigenous peoples' rights to self-determination in education. Clearly, it is and it can. Rather, current criticisms revolve around implementation. In the United States, meaningful discussions on implementation, and substantive equality generally, will remain moot points until federal law expands the narratives of equality wrestled with in *Kamehameha*.

VIII. Weaving across distances

Since Matiu's passing, his virtues and accolades, his victories and achievements, his offices and involvement in the lives of so many have been much recounted – and rightly so. As Māori legal luminary, scholar, activist, public servant, cultural expert, composer, husband, father and grandfather, he was truly a Renaissance man. Of all Matiu's identities, however, the one which has stayed in my mind is that of the weaver.

Matiu not only wove words, history and law through his kōrero and waiata, and wove people through aroha and true rangtiratanga, but told stories physically with deft fingers in fibre, colour and texture. In honour of this skill, a beautiful example of Māori weaving now hangs in the building in

215 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

216 Convention on the Rights of Persons with Disabilities A/Res/61/106, Annex I (opened for signature 30 March 2007, entered into force 3 May 2008).

217 *United Nations Declaration on the Rights of Indigenous Peoples*, above n 183.

218 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 13 March 1976).

which I write, against the reverence of a black wall in a quiet room adjacent to the courtyard where Matiu graced us with his final kōrero in this life. Worked with obvious aroha by Christine Hurihia Wirihana, the unexpectedly thin mat *Whaariki Takapau* is full of stories. Each time I see it, yellow strands look like Matiu's laughter, the light in his eyes, his love of Matakana and Matapihi. Dark fibres against the fair are true to the tikanga he taught us and lived, to the history he shared and his excellence. The multi-tonal hues in the golden background give the weaving a three-dimensional quality, a life and breath, as if mimicking a field of ripe wheat in a breeze or shifting sand. In this weaving for a weaver there is character, movement and even a soul, somehow perhaps even something of his. More than this, there are stories woven into the harakeke, kiekie and pingao, including those of tamariki running across the piece.

Narrative issues have become only more pressing in Hawai'i since Kamehameha. Already *adamant everyone/no-one* rhetoric has morphed into the vicious in the Donald Trump era where intolerance and ignorance is "shared" and "liked" in posts, tweets and soundbites. After decades of failed legislative attempts to settle which narrative applies to the Native Hawaiian people and our rights to self-determination,[219] former President Barack Obama's Department of the Interior created the so-called Final Rule or Part 50,[220] which provides for federal recognition and would clarify the application of a *Mancari*[221] or, perhaps, another ground-breaking narrative to Kamehameha's admission policy. James Anaya and Robert Williams, two of the nation's foremost Indigenous law scholars, recommended in 2015 that the exact shape of Native Hawaiian sovereignty – and, thus, the exact narrative – was not settled and could borrow from decolonisation and human rights narratives from international law.[222] Even as the Office of Hawaiian Affairs drafts a constitution for a Native Hawaiian nation, however, threats of a potential rescinding of Part 50 by President Trump loom large in the popular media. The 2016 election of Keli'i Akina to the OHA Board punctuates an alarming division between Native Hawaiian groups on federal recognition. Akina controversially heads a non-profit think-tank which is funded by major business interests and is urging the President to rescind the rule. The think-tank has also taken an *adamant everyone/no-one* stance on *Rice v Cayetano*.[223] Ultimately, the equality narratives we tell about ourselves may be the most important of all.

In education, we Native Hawaiians have looked to Aotearoa before, have modelled language revitalisation and Indigenous-medium education on what we learned from Māori struggles and battles hard-won. As if borrowing flax from our cousins across geographical distances, we have woven those lessons into our own struggles and battles hard-won with significant success. These lessons have created distinctive yet familiar patterns of a particular hue and texture and stories

219 See various incarnations of the Native Hawaiian Reorganization Akaka Bill including The Native Hawaiian Government Reorganization Act of 2011, s 675 – 112th Congress (2011-2012), "A bill to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity". See also: Native Hawaiian Government Reorganization Act of 2009 S1011/HR2314, 111th Congress, nicknamed after Senator Daniel Akaka who introduced its first version in 2000.

220 "Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community" 43 CFR Part 50 ([4310-93] Department of the Interior).

221 *Mancari*, above n 35.

222 S James Anaya and Robert A Williams Jr *Study on the International Law and Policy relating to the Situation of the Native Hawaiian People* (University of Arizona, June 2015).

223 *Rice v Cayetano*, above n 42. See Vicki Viotti "Developments in Native Hawaiian affairs could spur ripples of change" *Honolulu Star-Advertiser* (Hawai'i, 11 December 2016).

within stories in our weavings of law. As American federal courts, the executive branch and we ourselves wrestle with which narrative should be applied to the admission policy next, we may do well to remember the lessons we have already learned from Aotearoa. Now may be as good a time as any to close the distance between American equality narratives and those of a sister settler jurisdiction, to tell a more substantive story in the harakeke, one based on outcomes and not merely formal guarantees. The beauty of such a weaving will derive from its three-dimensional quality, a specifically Indigenous multi-narrative consistent with the everyday complexities of equality and a historico-legal account which pays heed to the substantive good of schools such as Kamehameha. Only then will it bear the imprint of our tamariki's feet and tell the right story of equality.