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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

A thesis

submitted in fulfilment

of the requirements for the degree

of

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KEAKAOKAWAI VARNER HEMI

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ABSTRACT

This thesis asks how a school which was established to help a group of children consistently identified with disparities in education achieve equality—and which has actually done so—could be sued for discrimination because it prefers those children in admissions.

In search of answers, this thesis critically analyzes the narratives of equality evident in the United States Ninth Circuit Court of Appeal's reasoning in *Doe v Kamehameha Schools*, arguing that the dissent, majority and concurrence opinions suggest three conflicting narratives of equality—what the thesis calls the *adamant everyone/no-one*, *weak someone* and *limited indigenous learner* narratives. It demonstrates how these narratives reflect an identity-specific, racialized history of slavery and segregation but fail to account entirely for either the unique historico-legal history of the Native Hawaiian people or the huge gap between formal constitutional guarantees of equality and everyday realities of complex discrimination and disparities almost unrelentingly attracted to Native Hawaiian identity. It recommends an expansion of these narratives within federal law consistent with liberal theory, international law and the legal experience of a sister settler jurisdiction—Aotearoa New Zealand. More importantly, it demonstrates that such expansion is consistent with substantial equality, non-discrimination and rights of self-determination that may have the greatest capacity for reconciling the guarantee/reality gap. Finally, specific good, better and best recommendations are made including philosophical consistency with the expanded multi-narrative, and the intentional importation of the human right to education and Article 14 of the UN Declaration on the Rights of Indigenous Peoples 2007 into federal law.

DEDICATION

This thesis is dedicated to *those who come before*—my parents, Mark and Valerie Varner, grandparents, William and Dolores Varner and Samuel and Violet Kalama, and the rest of my kupuna—to *those who come after*—my children, Raven, Kui, Wetekia, Kainoa, and Tama—and to my husband, Jamie, *at the center of everything*.

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Aloha pumehana.

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Treaty of Friendship, Commerce, and Navigation and Extradition, United States–Hawaiian Kingdom (20 December 1849).

Treaty of reciprocity between the United States of America and the Hawaiian Kingdom (13 January 1875).

Multilateral

Charter of the United Nations.

Convention against Discrimination in Education (opened for signature 14 December 1960, entered into force 22 May 1962).

Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981) [CEDAW or 'Women's Convention'].

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Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations UN Resolution 2625 (XXV) (1970).

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities GA Res 48/138, A/RES/48/138 (1993) [Minorities Declaration].

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Universal Declaration on Human Rights GA Res 217A (III), A/810 (adopted 10 December 1948).

United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/Res/61/295 (2007).

United Nations General Assembly Resolution 66(I) regarding Transmission of information under Article 73 e of the Charter GA Res 66(1), A/Res/66(1) (1946).

United Nations Millennium Declaration GA Res 55/2, A/Res/55/2 (2000).

UNESCO World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs (Jomtien, 1990).

Vienna Declaration and Programme of Action A/CONF.157/23 (1993).

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Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") A-52 (16 November 1999).

African Charter on Human and Peoples' Rights ("Banjul Charter") CAB/LEG/67/3 rev 5, 21 ILM 58 (opened for 27 June 1981, entered into force 21 October 1986).

African Charter on Rights and Welfare of the Child CAB/LEG/24.9/49 (opened for signature 11 July 1990, entered into force 29 November 1999).

Charter of the Organization of American States (opened for signature 30 April 1948, entered into force 13 December 1951) (amended by the Protocol of Buenos Aires of February 27, 1967; amended by the Protocol of Cartagena de Indias of November 16, 1985 and amended by the Protocol of Managua of October 6, 1993 which entered into force on January 29, 1996).

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Inter-American Commission on Human Rights (IACHR) *American Declaration of the Rights and Duties of Man* (1948).

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NOTE ON USE OF TE REO MĀORI AND ŌLELO HAWAIʻI

Consistent with the Geoff McLay, Christopher Murray and Jonathan Orpin's *New Zealand Law Style Guide*[1], words in te reo Māori (the Māori language) have not been italicized although translations of the words have been provided in the text or footnotes. While the *New Zealand Law Style Guide* would require languages which are foreign to Aotearoa New Zealand to be italicized continuously, I have chosen to italicize words in *ōlelo Hawai'i* (the Hawaiian language) only the first time they are used, at which time I will also provide a translation of the word or phrase in the text or footnotes. Given their historical status as the indigenous languages of their respective countries and historically discriminatory attitudes towards ōlelo Hawaiʻi and te reo Māori, the author is uncomfortable with treating either as a foreign or alien language. To quote the 2010 doctoral thesis of Dr Nālani Wilson-Hokowhitu:

> I have chosen not to italicize Hawaiian words. I understand that for some Indigenous researchers it is important to italicise Indigenous words that appear in English texts, so that the Native language does not become subsumed within English. However, italicization can also serve to de-normalise language. That is, italicization can make Native languages appear as foreign to the normal text. While both arguments have merit, I believe it is more important that Indigenous languages appear standard, not as 'Other'.[2]

[1] Geoff McLay, Christopher Murray and Jonathan Orpin New Zealand Law Style Guide (2d ed, NZ Law Foundation, 2011), at 1.1.1.

[2] Kathryn Louise Nālani Wilson, *Nā Moʻokūʻauhau Holowaʻa: Native Hawaiian Women's Stories of the Voyaging Canoe Hōkūleʻa* (2010), a thesis submitted for the degree of doctor of Philosophy at the University of Otago, Dunedin, New Zealand, footnote 1 at 1.

GLOSSARY OF EQUALITY NARRATIVES

The following equality narratives are my own creation and will be explained and developed further throughout the thesis. They are provided here for ease of reference.

Everyone

A formalized equality narrative which recognizes universal, broadly expressly equal protection guarantees distributed or recognized on the basis of homogeneity. That is, *everyone* and anyone is a rightsholder. The equal protection clause of the Fourteenth Amendment to the US Constitution is expressed in this language.

No-one

Another formalized narrative often characterized by prohibitive anti-discrimination guarantees or rights belonging to the intentionally anonymous, negatively identified individual including *no-one*. The Thirteenth and Fifteenth Amendments to the US Constitution are examples of this narrative.

An *adamant* combination of *everyone/no-one* is characterized by a highly formalized version of equality and non-discrimination which ignores historico-legal context and substantive considerations, even guarantee/reality gaps. Reverse discrimination is one expression of this narrative. However, a *substantive* version of *everyone/no-one* is evident in international law's recognition of rightsholder identity where doing so narrows guarantee/reality gaps in real-time.

Someone

A narrative which is aimed at substantive equality and exemplified by affirmative action and other temporary, positive measures designed to assist members of a semi-identified minority group member whose group identity has attracted discrimination. The goal is to achieve parity with majority group members. The *slim* or *weak* version is evident in the demise of affirmative action in US federal

courts in recent decades. The *strong* or *expanded* version accounts for *complex* minority-, child- and disability-specific education, language and culture rights in international law.

Indigenous learner

A politically-based, *Mancari*-like right to a preference in admission belonging to members of Native American tribes and nations who retain limited self-determination and other rights consistent with the special trust relationship between the tribes and the US federal government. The goal is the fulfilment of fiduciary duties associated with the trust relationship, tribal self-determination and self-governance associated with substantive equality.

The *limited* or *arbitrary* version is treated as an exception to the general rule of equality and is subject to congressional/parliamentary will and judicial activism. This version has been at the heart of the erosion of self-determination in federal courts in recent decades. The fuller or more *rational and remedial* version recognizes specifically indigenous, historically continuous rights to education which precede any trust relationship. Importantly, the expanded narrative recognizes the right of indigenous 'peoples' to a self-determination which is consistent with substantive equality and non-discrimination.

Complex

Combinations of *strong* and *fuller* versions of multiple narratives which are driven by substantive equality and non-discrimination and may create a toolbox of rights options, or a complex *multi-narrative* of equality.

CHAPTER ONE

NARRATIVES OF EQUALITY

1.1 INTRODUCTION

This thesis fundamentally asks how a school established to help a group of children consistently identified with disparities in education achieve equality—one that has actually done so—can be sued for discrimination because it prefers those children in admissions.

The Kamehameha Schools ('the Schools'), a private school system, were established in 1887 by Native Hawaiian Princess Bernice Pauahi Bishop for the express purpose of helping "indigent" Native Hawaiian children overcome socio-economic disparities that were, even then, alarming. The modern Schools are a bastion of Native Hawaiian identity and culture but also of substantial equality as, without public funding, the Native Hawaiian-run Schools produce students who most often defy the terrible numbers frequently associated with Native Hawaiians in education. However, when a non-Hawaiian boy was denied admission to the Schools, his lawyers alleged racial discrimination. Three federal courts wrestled with whether the admissions policy that had produced measurable de facto equality was discriminatory. Ultimately, it was identified as a *racially* justified affirmative action policy, a category seemingly inconsistent with both the unique historico-legal and socio-economic context of the policy.

This thesis critically analyses the narratives of equality evident in that case, *Doe v Kamehameha Schools*.[1] It demonstrates how current federal narratives fail to account for constitutional guarantee/reality gaps or the unique historico-legal context of the policy. It recommends an expansion of these narratives within

[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 F3d 1025 (9th Cir 2005), reh'g en banc granted, 441 F3d 1029 (9th Cir 2006) 470 F3d 827 (9th Cir. 2006) (en banc).

federal law consistent with liberal theory, international law and the legal experience of New Zealand—but, more importantly, with substantial equality, non-discrimination and rights of self-determination which may have the greatest capacity for reconciling complex guarantee/reality gaps. Recommendations include philosophical consistency with, and intentional importation of, the human right to education, including Article 14 of the UN Declaration on the Rights of Indigenous Peoples 2007 into federal law.

1.2 DISBELIEF AND DISCRIMINATION

In 2005, I took my children back to Hawai‘i for a family reunion on the North Shore of O‘ahu. Halfway through the week, I found myself sitting in a wood-panelled room of relations, watching my mother and my aunties weep as a lady from the Native Hawaiian organization Kau Inoa spoke. She had come to gather names for a Hawaiian nation but instead the conversation turned to current events. With one phrase, the ceiling fan seemed to flutter in slow motion. Someone actually uttered "Auwe!" as if it were a funeral. My grandmother, the last of her generation, sat small and silent.

What was the cause of such disbelief? Death? Sickness? No, it was *law*. On that day, my mother and the aunties cried because of *Doe v Kamehameha Schools*,[2] an American federal court decision.

The tragedy began when a non-Native Hawaiian boy was denied admission to the Kamehameha Schools ('the Schools'), a private school system first established in 1883 by Princess Bernice Pauahi Bishop ('Pauahi') specifically to help "indigent" Native Hawaiian children overcome socio-economic disparities which were, even then, alarming. In her lifetime, Pauahi had witnessed disease, population decimation, landlessness, poverty, and other ills coinciding with Westernization, impact her people.[3] She almost seemed to predict the long-term effects of the later overthrow of the Hawaiian Kingdom by Westerners supported by the American

[2] *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 F3d 1025 (9th Cir 2005).
[3] See discussion in Chapter Two 3.2.2.

government—the assimilation, discrimination and resulting socio-economic disparities which would be multiplied over generations. Her hope was that the school would allow Native Hawaiian learners to "compete" with other groups on an equal footing.[4] Unsurprisingly given its purpose, the private school system has prioritized Native Hawaiians in admission for generations. The preference has no blood-quantum requirement and someone with one per cent Native Hawaiian genealogy has as much right to it as someone who is full Native Hawaiian. Consequently, the school's population is actually quite ethnically diverse.[5]

The identity-aware policy seems to be highly successful. The private school has become not only a bastion of Native Hawaiian identity and culture but also of substantial equality as, without government funding, the Native Hawaiian-run Schools produce students who most often defy the terrible numbers frequently associated with Native Hawaiians in virtually every area of human well-being.[6] Generally, Native Hawaiian learners are depicted in various studies and reports as "severely disadvantaged" in education and "significantly lag[ging] behind" 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.[7] At the Kamehameha Schools, however, 99 per cent graduate and 92.6 per cent go on to higher education. [8]

The policy might be too successful, admission being "highly coveted".[9] Financed by colorblindness campaigns devoted to eradicating affirmative action,[10] the slight teenager who had always possessed a name and identity voluntarily became 'John

[4] Charles Bishop, Founder's Day Speech, Kamehameha Schools Bishop Estate archives (19 August 2015) <http://kapalama.ksbe.edu>.
[5] *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 470 F 3d 827 (9th Cir 2006) (en banc) at 832.
[6] See discussion in Chapter 3 at 3.2.2.
[7] Ibid.
[8] Linda Serra Hagedorn and others "The Academic and Occupational Outcomes of Private Residential High School Student Instruction" (2005) 13(1) Pac Ed Res J 21 at 33-34.
[9] Kay Young "Kamehameha's Hawaiians-Only Admissions Policy Under 42 U.S.C §1981: A Permissible Pursuit of Practical Freedom" (2003) 26 U Haw L Rev 309.
[10] See description of the groups, their agenda and membership in Eric K Yamamoto and Catherine Corpus Betts "Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of *Rice v. Cayetano*" in Rachel E. Moran & Devon Wayne Carbado (eds) *Race Law Stories, Foundation Press* (New York, Foundation Press, 2008) 541.

Doe' when he sued the Schools under name suppression. He was not the first Doe[11] nor the last[12] but represented by the same lawyers. In dogmatic language, they alleged the admissions policy violated section 1981 of Title 42 of the United States Code[13]—legislation which, like the admissions policy, was designed to overcome de facto discrimination and disparities. Despite the Schools' proven track record in helping an extremely disadvantaged group of learners to overcome discrimination and disparities—to actually level the proverbial playing field of liberal democracy—three panels of judges struggled to decide if the admissions policy *was* discriminatory or a measure of equality.

Noting both the unique historico-legal context of the policy and resulting disparities of the history, Judge Kay in the United States District Court for the District of Hawai'i held that a 'manifest imbalance' in education between Native Hawaiians and other children justified the policy as a legitimate remedial measure also consistent with the special trust relationship between Native Hawaiians and the federal government. Judge Kay also emphasized the "exceptionally unique historical circumstances" of the policy and opined that "context matters".[14] In 2005, on appeal, two of three judges in a partial sitting of the United States Court of Appeals for the Ninth Circuit disregarded the context and trust relationship and "rigidly applied a formerly flexible contextual analysis" usually applied to private employment affirmative action policies.[15] 'Race-conscious' equalled racial discrimination. The policy was not legitimate.

The bastion had become a constitutional blasphemy. And my mother and the aunties wept.

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[11] See *Rice v Cayetano* 528 US 495 (2000); *Mohica-Cummings v Kamehameha Schools* No CV03-00441 (D Haw dismissed 8 December 2003) and *John Doe et al v Kamehameha Schools*, 295 F Suppl 2d 1141; 2003 U.S. Dist. LEXIS 23434. See advance copy of Avis Poai and Susan Serrano "Alii Trusts" in Melody MacKenzie, Susan Serrano and Kapua Sproat (eds) *Native Hawaiian Law: A Treatise* (Honolulu, 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, 2015) (advance copy) for an in-depth discussion on these cases.

[12] See *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 625 F3d 1182 (9th Cir 2010) which was brought by a similar group of plaintiffs, also represented by Eric Grant, hoping to proceed anonymously but who were not granted name suppression.

[13] 42 U.S. Code § 1981 - Equal rights under the law.

[14] *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 295 F Suppl 2d (D Haw 2003), at 1145 and 1148.

[15] Poai and Serrano, above n 11, at 1189.

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 after modifying the intermediate scrutiny tests. However, five members of the majority were also persuaded that the policy was justified by the exception made for institutions serving Native Americans recognized in *Morton v Mancari*.[16] Under imminent threat of appeal,[17] however, the Schools settled with Doe for a sizeable sum in 2007.[18]

The colorblindness campaign behind Doe began advertising for new litigants almost immediately, vowing[19] to force the question to the Supreme Court where their identity-blind arguments had been successful in *Rice v Cayetano*.[20] Against the backdrop of recent cases including *Gratz v Bollinger*,[21] *Grutter v Bollinger*[22] ('the University of Michigan cases") and *Schuette v BAMN*[23]—where the Supreme Court seemed to disavow affirmative action and almost any identification constitutes discrimination—the question of what it might say when the admissions policy finally reaches its doors continues to hover like a ghost.

More than this, the case must undoubtedly leave what the thesis will call the *earnest liberal*—that is, anyone concerned with de facto or substantial equality of outcomes rather than merely the formal guarantee of equality—at least a little unsettled. The wrestle of the Ninth Circuit over which standard of judicial review should apply to the admissions policy of a private school under section 1981—as well as the continuing challenges to the admissions policy—suggest uncertainty in the law, always an uncomfortable notion in a democracy. The dissent's adamant insistence on a stricter scrutiny—despite significant evidence of a unique historico-legal context and the Schools' positive impact on present disparities—suggests that almost one-half of the court interpreted the policy in terms of a highly formalized

[16] *Morton v Mancari* 417 U.S. 535 (1974).
[17] 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 "The Undiscovered Opinion" 30 U Haw L Rev 355, at 355.
[18] One of the plaintiff's attorneys disclosed it was $7 million dollars despite a confidentiality agreement: Jim Dooley "Kamehameha Schools settled lawsuit for $7M" *Honolulu Advertiser* (online ed, Honolulu, 2 August 2008).
[19] Poai and Serrano, above n 11, at 1193.
[20] *Rice v Cayetano* 528 US 495 (2000).
[21] *Gratz v Bollinger* 539 U.S. 244 (2003).
[22] *Grutter v Bollinger* 539 US 306 (2003).
[23] *Schuette v Coalition to Defend Affirmative Action* 572 U.S.___ (2014).

and abstract notion of equality devoid of substantial assessment. The majority's stretching of section 1981 tests seems to demonstrate that slightly more than one-half of the court recognized the admissions policy as a measure of equality but seemed to intuitively sense that affirmative action did not quite fit Native Hawaiian identity. The fact that most of the majority—the concurrence—would have preferred to rely on the special trust relationship—but did not—suggests similar ambiguity.

Given the supposedly homogenous and anonymous coverage of formal constitutional guarantees including the Fourteenth Amendment, these wrestles of equality raise deep concerns. Some commentators have likened indigenous learners to the proverbial canary in the coalmine, their situation reflecting the health of rights generally in the United States.[24] As subsequent chapters describe,[25] the Native Hawaiian learners for whom the admission policy was established are among the most disadvantaged of learners in the State of Hawai'i and the United States—the most vulnerable of the vulnerable in some respects. As also described later, similar real-time inequalities are increasing at an alarming rate within the United States and other developed nations, further heightening one's sense that the case raises doubts about the validity of equality itself within so-called liberal democracies.

These wrestles seemingly indicate that not one of the narratives—neither the dissent's adamant identity-blindness, the majority's temporary exception to identity-blindness, nor the tribal identity ascribed to Native Hawaiians by the concurrence—fits the unique history and current circumstances of Native Hawaiians, further heightening the sense of uncertainty. Ultimately, Native Hawaiians seem to represent a *people* in the sense of international law, even an internationally-recognized nation which never ceded its sovereignty by treaty or any other means—unlike Native American tribes. These facts raise the possibility that any discussion on the admission policy needs to go beyond questions of equality—either formal or substantial—and consider the demands of restorative justice and self-determination, even international law.

[24] By the venerable American legal scholar Felix S Cohen, quoted in Tsianina Lomawaima and Teresa McCarty "When Tribal Sovereignty Challenges Democracy: American Indian Education and the Democratic Ideal" (2002) 39 AERJ 279, at 279-280.
[25] See discussion in Chapter Three, at 3.2.2.

Given the onslaught of identity-blindness campaigns and lingering legal uncertainty, these legal questions need resolution.

1.3 IMMEDIATE RESPONSE TO THE CASE

Various legal scholars have discussed the admissions policy, the intuitions, the wrestle and the gaps in the Ninth Circuit's reasoning. Political theory and primary and secondary sources of law provide the main source of literature in the thesis and will be critically analysed and reviewed throughout the chapters. But the following provide a brief introduction to legal issues and illustrate the range of immediate scholarly responses to the case. This literature is also discussed in greater depth in Chapters Two and Three.

While a few scholars echo the dissent in *Kamehameha* and argue for a stricter scrutiny,[26] some have concluded, like the majority, that the admissions policy is consistent with a constitutionally appropriate affirmative action policy. Echoing the concurrence, others have argued that the policy is justified by the special trust relationship between the federal government and Native Hawaiians which justifies the *Morton v Mancari*[27] exception. The policy has often been discussed largely within the bounds indicated by the dissent, majority and concurrence.

Arguing that the admissions policy was in fact a legitimate affirmative action policy, subsequent legal articles have focused on the proper standard of judicial review which should have been applied to such a policy, especially given the private nature of the Schools and the educational rather than employment context.[28] Writing post-*Kamehameha*, David Ezra[29] has focused on the potential of *United States v*

[26] For instance, Donald Thompson "*Brown* v. *Kamehameha Schools*: An instrumental critique of remedial self-segregation in private education" (2008) 81 S Cal L Rev 831; and Rebecca Faust, "*Doe v Kamehameha Schools*: What is the proper standard for analyzing a §1981 claim?" (2007) 34 N Ky L Rev 703. While admittedly not unbiased, the lead counsel for Doe, Eric Grant drafted a hypothetical opinion allegedly predicting what the Supreme Court might have said if the case had not settled in "*Doe v. Kamehameha Schools*: The undiscovered opinion" (2008) 30 U Haw L Rev 355. He asserts that the highest court in the land would have reversed the en banc Ninth Circuit decision.

[27] *Morton v Mancari* 417 US 535 (1974).

[28] See, for instance, Sharon Hsin-Yi Lee "Justifying Affirmative Action in K-12 Private Schools" (2007) 23 Harv BlackLetter L J 107.

[29] Retired United States District Judge for the District of Hawai'i, Chief Judge Emeritus.

Carolene Products Company (1938) [30] Footnote Four [31] to recognize genuine affirmative action policies according to purpose, to justify a lower standard of scrutiny, and otherwise sway the dissent.[32] Similar articles largely approve the majority's reliance on an affirmative action categorization of the policy and its modification of the intermediate scrutiny tests.[33]

Other commentators, following the concurrence, have argued that the most appropriate category in which to place the admissions policy is the special trust relationship-based exception established in *Morton v Mancari*. Most of these articles lay out the consistency of this exception with basic principles of federal Indian law and its long history, and demonstrate through historico-legal analysis how often Native Hawaiians have been treated like Native American tribes in both federal legislation and jurisprudence.[34] Still others promote Native American-like federal recognition for Native Hawaiians—including the passage of the the Native Hawaiian Government Reorganization Act of 2011[35]—the latest 'Akaka Bill'—as the answer to protecting the policy in future.[36]

However, others seemingly exceed the Ninth Circuit's reasoning and suggest the "logical fallacy of the 'false dilemma'"[37] of current federal narratives. Susan Serrano, Eric Yamamoto, Melody MacKenzie, and David Foreman, for instance,

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[30] *United States v Carolene Products Company* 304 US 144 (1938)
[31] Which first established the principle in federal law that a law or policy which targeted and disadvantaged 'a discrete and insular minority' should be subjected to a higher level of judicial scrutiny: discussed in Chapter 2, at 36.
[32] David Ezra "*Doe v Kamehameha Schools*: 'A Discrete and Insular Minority' in Hawai'i Seventy Years After *Carolene Products*?" (2008) 30 U Haw L Rev 294.
[33] For example, Christopher Schmidt "*Doe v. Kamehameha*: Section 1981 and the Future of Racial Preferences in Private Schools" (2007) 42 Harv CR-CL L Rev. 557.
[34] Including Gavin Clarkson "Not Because They Are Brown, But Because of *Ea*: Why the Good Guys Lost in *Rice v Cayetano*, and Why They Didn't Have to Lose" (2002) 7 Mich J Race & L 317; and Angela Kuo "Let Her Will Be Done: The Role of the Kamehameha Schools' Admissions Policy in Promoting Native Hawaiian Self-Determination" (2008) 13 UCLA Asian Pac Am LJ 72. See also Kathryn Nalani Setsuko Hong "Understanding Native Hawaiian Rights: Mistakes and Consequences of *Rice v. Cayetano*" (2008) 15 Asian Am LJ 9.
[35] The Native Hawaiian Government Reorganization Act 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". Last amended December 17, 2012.
[36] Including Crystal K Glendon "A Political Solution for a Legacy Under Attack: The Akaka Bill's Potential Effect on the Kamehameha Schools" (2003) 26 U Haw L Rev 69. See also Justin Pybas "Native Hawaiians: The Issue of Federal Recognition" (2006) 30(1) Am Indian L Rev 185.
[37] Chris Iijima "Race over *Rice*: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in *Rice v. Cayetano*" (2000) 53 Rutgers L Rev 91, at 93.

drafted amicus curiae briefs submitted during the case [38] which justified the admissions policy as a restorative remedy for historical injustices perpetrated against Native Hawaiians by the United States government and the ongoing "harm"[39] of that injustice. Rather than a "privilege[]" or "handout", these scholars claim the policy represents a Native Hawaiian-generated remedy for "severe and systemic educational disadvantages" causally connected with historic injustices perpetrated by the United States.[40] The amicus briefs universally disagreed with the application of equal protection analysis to the admission policy.

Both Yamamoto—with Ashley Obrey[41]—and the late Chris Iijima[42] have written extensively on the uniqueness of the injustices perpetrated on Native Hawaiians, distinguishing the historico-legal context of Native Hawaiians and legal responses to it from racial minorities.[43] In terms of restorative justice, Yamamoto and Ijima view self-determination as a proportional response to the ongoing "deep harm" of those injustices.[44] While Yamamoto—with Catherine Betts—has described the denial of Native Hawaiian self-determination in similar cases as a "disfiguring" of "civil rights",[45] Iijima has equated denial with "continued overthrow".[46]

These responses are consistent with scholarship on the nature of Native Hawaiian rights generally which emphasizes their unique historico-legal context. MacKenzie,

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[38] See Susan Serrano, Eric Yamamoto, Melody Kapilialoha MacKenzie and David Forman "Restorative Justice for Hawai'i's First People: Selected Amicus Curiae Briefs in *Doe v. Kamehameha Schools*" (2007) 14 Asian Am LJ 205.

[39] Eric K Yamamoto, Susan K Serrano and EA Ho'oipo Kalaena'auao Pa, Amicus Brief of the Japanese American Citizens League of Hawai'i-Honolulu Chapter and the Equal Justice Society and in support of Defendant-Appellee's Petition for Rehearing En Banc, 29 August 2005, in *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 416 F 3d 1025 (9th Cir 2005) (No 04-15044).

[40] Serrano and others, above n 38.

[41] Eric K Yamamoto and Ashley Kaiao Obrey "Reframing Redress: A 'Social Healing Through Justice' Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives" (2009) 16(1) Asian Am LJ 5.

[42] See Chris Iijima "Race over *Rice*: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in *Rice v. Cayetano*" (2000) 53 Rutgers Law Review 91. Iijima and Yamamoto have likened its uniqueness to that of the Japanese-American internment during World War II and the situation of the Ainu in Japan.

[43] See, for instance, Chris Iijima "*Rice v. Cayetano*: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status" (2001) 79 NC L Rev 812. Bradford Morse and Kazi Hamid "American Annexation of Hawai'i: An Example of the Unequal Treaty Doctrine" (1990) 5 Conn J Int'l L 407 actually describes the American Annexation of Hawai'i as a "war of aggression".

[44] Yamamoto and Obrey, above n 41.

[45] Eric K Yamamoto and Catherine Corpus Betts "Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of *Rice v. Cayetano*" in Rachel E. Moran & Devon Wayne Carbado (eds) *Race Law Stories, Foundation Press* (New York, Foundation Press, 2008) 541.

[46] Chris Iijima "New *Rice* Recipes: The Legitimization of Continued Overthrow" (2002) 3 Asian-Pacific L & Pol'y J 385.

for instance, has long argued that Native Hawaiians retain the right to self-determination of a fully sovereign nation which never ceded that sovereignty.[47] Forman has similarly argued that equal protection analysis is inappropriate given the historical continuum of Native Hawaiian customary law recognized by the State of Hawai'i.[48]

Approaching similar issues from the perspective of international law, James Anaya and Julian Aguon have similarly argued that Native Hawaiians retain identity-specific human rights to self-determination akin to that of an internationally recognized people or nation-state. Anaya has written extensively on the remedial capacity of self-determination expressed as an indigenous human right and fundamental principle of international law, as well as the "responsibility" of the United States government to secure such rights for Native Hawaiians.[49] Placing these rights in a decolonization context, Aguon has also proposed that Native Hawaiians adopt a "dual-rights strategy" justified in terms of both domestic mechanisms and international law.[50] Such scholarship seems to exceed traditional liberal projects—since self-determination implies collective peoples' rights rather than the individual guarantees at stake in *Kamehameha*. These are, however, justified at least partially in terms of the disparities which persist for indigenous peoples in the wake of colonization, assimilation and discrimination.

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[47] See, for instance, Melody K MacKenzie "Self-Determination and Self-Governance" in Melody Kapilialoha MacKenzie (ed) *Native Hawaiian Rights Handbook* (Native Hawaiian Legal Corporation and Office of Hawaiian Affairs, Honolulu, 1991) at 77. MacKenzie's position is most recently discussed in her chapters "Historical Context" and "Native Hawaiians and US Law" in Melody MacKenzie, Susan Serrano and Kapua Sproat (eds) *Native Hawaiian Law: A Treatise* (Honolulu, 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, 2015) 2 and 64.

[48] David M Forman "The Hawaiian Usage Exception to the Common Law: An Inoculation against the Effects of Western Influence" (2008) 30 U Haw L Rev 319.

[49] For instance, in James Anaya "The Native Hawaiian People and International Human Rights Law: A Remedy for Past and Continuing Wrongs" (1994) 28 Georgia Law Review 309. Most recently, see S James Anaya and Robert A Williams Jr *Study on the International Law and Policy relating to the Situation of the Native Hawaiian People* (Indigenous Peoples Law and Policy Program, University of Arizona, James E Rogers College of Law, June 2015) in which Anaya and Williams recognize that Native Hawaiians retain rights and remedies for infringement under international law and that the United States federal government has a "responsibility" to "secure" those rights.

[50] Julian Aguon "Other Arms: The Power of a Dual Rights Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts" (2009) 21 U Haw L Rev 113; and Julian Aguon "Native Hawaiians and International Law" in Melody MacKenzie, Susan Serrano and Kapua Sproat (eds) *Native Hawaiian Law: A Treatise* (Honolulu, 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, 2015), at 352.

In fact, several scholars suggest that the admission policy and other preferences for Native Hawaiians are consistent with equality but not necessarily with a racially-justified affirmative action scheme or even the current Native American exception in *Morton v Mancari*.[51] Others recognize the limited nature of current "binary" legal constructions of indigenous identity.[52] As discussed in Chapter Three,[53] such intuitions are also consistent with multi-disciplinary findings demonstrating that Native Hawaiians are the most socioeconomically disadvantaged ethnic group in Hawai'i.[54] This body of literature seems to describe how Native Hawaiian identity inherently attracts disparities and predicts negative outcomes. Moreover, the numbers and statistics appear to describe a significant real-time gap between constitutional guarantees of equality and substantial outcomes for many Native Hawaiian learners.

Ironically, as discussed, a majority of the Ninth Circuit seemed to share similar intuitions and awareness of the guarantee/reality gaps.

1.4 NARRATIVES

Drawing on such scholarship, this thesis approaches these intuitions and gaps from a theoretical perspective, examining the case through its narratives of equality.

It is hardly revolutionary to say that law is narrative in character, that it tells and retells stories and that sometimes these stories conflict. The very language of law has power to affect substantial outcomes for individuals and groups, given its "centrality in the production, exercise, and subversion of legal power".[55] More than "rules and policies", the law also inherently relates "stories, explanations,

[51] See, for example, Kara ML Young "Kamehameha's Hawaiians-Only Admissions Policy Under 42 U.S.C. §1981: A Permissible Pursuit of Practical Freedom" (2004) 26 U Haw L Rev 309. Also see Jennifer L. Arnett "The Quest for Hawaiian Sovereignty: Argument for the Rejection of Federal Acknowledgment" (2005) 14 Kan JL & Pub. Pol'y 169.

[52] Rose Villazor "Blood Quantum Land Law and the Race Versus Political Identity" (2008) 96 Cal L Rev 801, suggesting, in the wake of *Rice v Cayetano*, that current binary racial/political legal constructions of indigeneity be expanded.

[53] Chapter 3 at 16-17.

[54] For example, Shawn Malia Kana'iaupuni, Nolan Malone, and Koren Ishibashi. *Income and Poverty among Native Hawaiians* (Honolulu, Kamehameha Schools, 2005).

[55] John Conley and William M O'Barr *Just Words: Law, Language, and Power* (2nd ed, Chicago and London, University of Chicago Press, 2005), at xi. It can be hegemonic and patriarchal, for instance.

performances, [and] linguistic exchanges—as narratives and rhetoric".[56] In any courtroom, particularly within adversarial settings, judges must weigh competing narratives—for instance, counsel's theory of the case, or conflicting witness statements.[57] Importantly, such narratives "do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results".[58]

Narrative theory fundamentally examines *which* stories and *whose* stories the law is telling and retelling. One common approach to the study of legal narratives is the "juxtapos[ition]" of "personal accounts of marginalized individuals with dominant legal narratives to advocate rights and critique hegemonic legal practices" including minority-specific perspectives.[59] This thesis uses the term *narratives* to describe the underlying stories that are told in the law itself—in jurisprudence, legislation, and international law—about Native Hawaiian identity and legal claims. It employs political theory, domestic and international law to explain and reconcile those narratives. Moreover, the thesis specifically seeks to get underneath the so-called "text of the debate swirling through" [60] the *Kamehameha* case —that is, the racialized, dichotomized, identity-blind rhetoric evident in the reasoning of the Ninth Circuit—to the "intricately woven subtext" [61] of the case that hints at a unique historico-legal context and substantial inequality but is "inhabited with demons from the far and not so distant past" which "subtly roil[] public discourse" [62]—and sometimes the reasoning of federal courts.

This thesis critically analyses the narratives of equality evident in the Ninth Circuit's reasoning in *Kamehameha*, arguing that the dissent, majority and

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[56] Paul Gerwitz "Narrative and Rhetoric in the Law" in Peter Brooks and Paul Gerwitz (eds) *Law's Stories: Narrative and Rhetoric in the Law* (Cambridge, Massachusetts, Yale University Press, 1996) 2, at 2.
[57] Peter Brooks "The Law as Narrative and Rhetoric" in Brooks and Gerwitz, 14-23.
[58] Peter Brooks "Narrative in and of the Law" in James Phelan and Peter J Rabinowitz (eds) *A Companion to Narrative Theory* (Malden, Massachusetts, Blackwell, 2005) 415, at 419.
[59] Two other common approaches to the study of legal narratives are "investigations into legal narration as a contest of narratives" and "examinations of law as narrative literature or as rhetoric". Subject areas include: the stories told in courtroom trials by witness and prosecutors; the crossover between law and literature; and minority-specific perspectives including critical race theory, feminist jurisprudence and intersectional legal analysis: Greta Olson. "Narration and Narrative in Legal Discourse" in Peter Hühn, Jan Christopher Meister, John Pier and Wolf Schmid (eds) *Handbook of Narratology* (Berlin and Boston, Walter de Gruyter, 2014) 371, at 372-373.
[60] The quote borrows the language which Rosemary C Salmone employs in her discussion of similar issues in relation to single-sex schools in *Same, Different, Equal: Rethinking Single-Sex Schooling* (New Haven: Yale University Press, 2003), at 6.
[61] Ibid.
[62] Ibid.

concurrence opinions suggest three conflicting narratives of equality—what this thesis calls the *adamant everyone/no-one*, *weak someone* and *limited indigenous learner* narratives. The thesis seeks to demonstrate how these narratives fail to account entirely for either the unique historico-legal history of the Native Hawaiian people or the huge gap between formal constitutional guarantees of equality and everyday realities of complex discrimination and disparities almost unrelentingly attracted to Native Hawaiian identity. It recommends an expansion of these narratives within federal law consistent with liberal theory, international law and the legal experience of a sister settler jurisdiction—but, more importantly, with substantial equality, non-discrimination and rights of self-determination which may have the greatest capacity for reconciling the guarantee/reality gap. The thesis makes a series of recommendations ranked in terms of good, better and best. These include philosophical consistency with the expanded multi-narrative, the intentional importation of the human right to education and the intentional incorporation of Article 14 of the UN Declaration on the Rights of Indigenous Peoples 2007.

1.5 METHODOLOGY

In terms of methodology, the specific aims of the research were to: critique the case; determine why United States federal courts struggled with the admissions policy; identify obstacles currently preventing federal courts from legally recognizing similar measures of equality, including the narratives of equality which have been relied upon in the case; explore alternative narratives of equality which the preferential admissions policy; identify markers signalling measures of equality; test obstacles, narratives and markers within a sister settler jurisdiction; and make specific recommendations which might make similar determinations more straightforward in future cases.

In terms of specific research questions, the thesis asks *why* the Ninth Circuit seemed to wrestle so much with determining whether the admissions policy was a measure of equality and how a policy which has apparently allowed the most vulnerable of learners to overcome discrimination and disparities in education might have been

confused, even momentarily, for a form of discrimination. It also explores *which* narratives of equality the court weighed in making its determination, *why* these narratives seemingly conflict and *whether* any other narratives were suggested by the facts.

The thesis next explores *how* the same conflict of narratives been resolved in political theory and international law and how the gap between formal, constitutional guarantees of equality and the reality of complex discrimination and disparities has been resolved in theory and law. Again, it asks *which* narratives emerge from such reconciliation but also *what* the relationship is between whether equality is formally or substantially defined and the degree to which rightsholder identity will be specified in the law, and, importantly, which features mark a substantial right to equality and non-discrimination in education in terms of Native Hawaiian and other indigenous learners. Finally, the thesis asks what specific legal recommendations might clarify the conflict of narratives evident in federal jurisprudence in regards to the admissions policy.

To answer the research questions, the thesis examines the historical and socio-economic context of the law in question, federal and Hawai‘i state law, political theory, international human rights law, and the legal experience of a sister settler jurisdiction for comparison. Various liberal theorists have similarly wrestled with conflicting narratives, reconciling guarantee/reality gaps, and/or the unique historico-legal context of indigenous rights.[63] The evolution of the right to education in international law has been triggered by persistent gaps and historical context.[64] Other liberal democracies have struggled with eerily similar histories of colonization, assimilation, discrimination and disparities.[65] Ultimately, given the United States' exceptionalism in terms of human rights,[66] comparison with a similar domestic jurisdiction is vital. One should question the applicability of the theory and international law unless they can translate into domestic law.

The law itself will provide the bulk of 'data' gathered in this process from both *primary*—including domestic legislation and jurisprudence, international

[63] See Chapter Four.
[64] See Chapters Five and Six.
[65] See Chapters Six and Seven.
[66] Discussed extensively in Chapter Two at 2.5.

conventions and common law principles—and *secondary* sources—for instance, guidelines, reports and recommendations of UN bodies, American and New Zealand executives and legislatures. Other secondary sources consulted include commentaries, texts, journals, and websites. Throughout the thesis, the law has been allowed to 'speak for itself', as it were, as much as possible.

The foregrounding of multiple, complementary narratives also fundamentally raises questions of historical and socio-economic context. In particular, this thesis requires that the law be situated within a specific historical and socio-economic context. Thus, Chapters Two, Three, Five, Six and Seven draw on the work of historians, archaeologists, physicians, psychologists, educators, and various other researchers. These sources have been utilized as sources of cross-disciplinary data in the more traditional sense—including statistics—but also expert opinion relevant to historical and socio-economic context and disparities.

As signalled in Chapter Eight, the thesis can only represent a starting point for these issues. It seeks to remove a priori theoretical stumbling blocks in the form of legal narratives that currently influence the reasoning of federal courts when they approach admissions policies like that of the Kamehameha Schools. It makes preliminary recommendations regarding the importation and incorporation of international and New Zealand equality narratives into federal law, but subsequent questions of implementation and practice are beyond the ambit of this thesis.

1.6 CHAPTERS

Ultimately, the data gathered has been critically reviewed, analysed and organized logically into chapters to respond to the research questions.

Chapter Two illustrates how an identity-specific history of slavery, Jim Crow laws and segregation first justified then was lost in the singular prioritization of a racialized, dichotomized *everyone*/*no-one* narrative of equality. Two parallel narratives have emerged from or survived that history—namely, the racial *someone*

of *Brown v Board of Education*[67] and affirmative action, and the Native American-specific *indigenous* preference recognized in *Mancari.* However, a critical analysis of federal jurisprudence reveals the undermining of both *someone* and *indigenous* narratives since *Brown* by the *adamant everyone/no-one* narrative evident in *Regents of the University of California v. Bakke,*[68] the more recent University of Michigan cases,[69] and the dissent in *Kamehameha*—as well as the No Child Left Behind Act 2002.[70] The chapter finally notes the reluctance of federal courts to recognize a standalone constitutional or human right to education despite the significant constitutive commitment attributed to education in cases such as *Brown* and *Plyler v Doe*[71]—and persistent inequalities in education which cluster around minority group identity and defy constitutional guarantees.

Chapter Three discusses the wrestle of federal equality narratives in the *KS* case. It describes the unique historico-legal history of the Native Hawaiian people including nation status, overthrow and annexation by the United States and subsequent denials of rights. The chapter further discusses the overwhelming species of discrimination and disparities resulting from this history which defy constitutional guarantees of equality. The chapter demonstrates how the same history affirms a *Mancari*-like narrative but also indigenous, self-determination based rights which exceed the trust relationship. The courts' wrestles and intuitions in *Kamehameha* will suggest that current federal accounts of equality lack the narrative capacity to account for the unique historico-legal context of the admission policy and the concerning constitutional guarantee/reality gaps it was designed to address. Pre-overthrow, historically continuous Native Hawaiian customary law, indigenous-specific Hawaii State law and recent developments including the passing of Hawai'i Act 195[72] and the most recent version of the 'Akaka Bill' will suggest the need for an alternative indigenous narrative exceeding current federal narratives and possibly framed in human rights terms.

In an attempt to resolve the wrestle, intuitions and gaps, the thesis will then examine political theory and international law where the very same narratives have been

[67] *Brown v Board of Education of Topeka, Kansas* 347 US 483 (1954).
[68] *Regents of the University of California v Bakke* 438 US 265 (1978).
[69] See *Gratz* and *Grutter*.
[70] Public Law 107-110—Jan 8, 2002.
[71] *Plyler v Doe* 457 US 202 (1982).
[72] Hawai'i Act 195, Session Laws of Hawaii 2011.

debated at length and various lessons learned. The admission policy was defended and maligned in liberal terms. Crucially, liberal theory and international law offer an expanded equality multi-narrative which can liberally account for guarantee/reality gaps and the unique historico-legal context of the policy.

Chapter Four weighs the narratives and reasoning in *Kamehameha* in terms of liberal theory. The theorists in question have been chosen both because of their influence but also the close resemblance between their theories and the federal narratives debated in the case. The identity-blindness of the dissent—and its insistence on a rigid intermediate scrutiny with all the practical effects of strict scrutiny—are likened to John Rawls' original position and veil of ignorance but also the adamant cosmopolitanism of Jeremy Waldron and callous utilitarian math of Richard Posner. The modified intermediate approach of the minority is compared with Ronald Dworkin's equality of opportunity which would temporarily approve of racially justified affirmative action. Like the concurrence, Will Kymlicka's liberal multiculturalism will justify group-differentiated indigenous rights including self-determination because they buffer indigenous individuals against majoritarian bias and institutionalized discrimination and provide access to substantial rather than merely formal equality. Kymlicka's reconciliation of Rawls and Dworkins will represent the project of the earnest liberal eager to address the guarantee/reality gap. However, because Kymlicka is less amendable to historical remediation and would let individual *everyone/no-one* rights 'trump' indigenous group rights, his liberal multiculturalism illustrates the limits of a purely liberal defence of the admissions policy. Historical self-determination theory is, therefore, posited as a reconciliation of Kymlicka's limits and, particularly, a liberal account of the deep ongoing harm attracted to Native Hawaiian identity narrated in the amicus curiae briefs.

Chapter Five demonstrates how—as if Kymlicka's buffer-and-access thesis is correct—the international human right to education has evolved from a formalized, universalized, *everyone/no-one* right to a complex, highly identity-aware multi-narrative toolbox of rights options. The human right to education—also considered an economic, social and cultural right (ESCR)—includes homogenous guarantees of a universal right, semi-anonymous racial- and gender-specific prohibitions on discrimination in education, as well as special temporary measures aimed at parity,

but also permanent, quasi-collective minority rights to language, culture and parallel institutions which buffer ethnic minority members against systemic, institutionalized majoritarian bias, rights of availability, access, adaptability and acceptability, and participation, and the rights of children specifically and also their families and communities. In response to cynical *everyone/no-one* critiques, the chapter demonstrates the crucial importance of the right in international law including its organic multiplication and indivisibility capacity, emphasized legality and justiciability, demands positive state parties' obligations and affirmation of the fundamental *no-one* right to non-discrimination—and as it would approve of the admission policy on multiple grounds.

Chapter Six further explores the adoption of the United Nations Declaration on Rights of Indigenous Peoples 2007 (UNDRIP)—including the Article 14(1) right of indigenous peoples to establish and control their own schools—as the earnest culmination of the international human right to education affirming both buffer-and-access and historical self-determination projects. It will discuss how this rational and remedial indigenous learner right remains consistent with *substantial everyone/no-one* and *complex someone* narratives entailing identity-aware formalized guarantees, special measures, minority rights and indigenous rights. Article 14 will represent an organic multiplier of other indigenous and human rights, a legal, justiciable, and enforceable right. Moreover, Article 14 will demonstrate the capacity of specifically indigenous rights to reconcile Kymlicka's theory with itself, and account for collective rights, actual prior sovereignty and a historical continuum of rights.

Finally, the thesis compares current federal narratives of equality with those of a sister settler jurisdiction which has and continues to wrestle with similar narratives of equality—Aotearoa New Zealand. Article 14 appears to operate daily in New Zealand where indigenously established and controlled education systems and schools prefer Māori children in admission on a grand scale. Chapter Seven flips the central question of the thesis around to ask why such schools are *not* being sued for discrimination in New Zealand

Chapter Seven will first discuss eerie similarities between the Native Hawaiian and Māori historico-legal context, including prior sovereignty, ongoing harm and a

historical continuum of rights. A critical analysis of domestic jurisprudence and legislation will then demonstrate how domestic law can narrate equality in multi-narrative terms and, consequently, how human, constitutional and indigenous rights can reinforce and coincide with one another. The expanded domestic multi-narrative will then be tested against familiar *everyone/no-one* criticisms including trumping, ESCR and self-determination denial. Ultimately, the chapter will argue that New Zealand law reveals intentional human rights incorporation and an organic interface between human, constitutional and indigenous rights, and recognizes a remedial, historical self-determination which would approve the admission policy on multiple grounds.

Chapter Eight then summarizes previous discussions including seven markers of equality that have emerged as consistent features of the expanded multi-narrative in regards to the indigenous learner. The expanded multi-narrative and markers underwrite recommendations that might clarify equality narratives in terms of the admissions policy. Good, better and best recommendations include philosophical consistency with the expanded multi-narrative, the intentional importation of the complex human right to education and the intentional incorporation of Article 14 of the UNDRIP.

1.7 DISBELIEF AND HOPE

Ultimately, the thesis will reveal a disjuncture between American federal narratives and liberally valid political theory, the consensus of international law and the legal experience of a domestic jurisdiction with a similar indigenous history and present inequalities. It will demonstrate that the wrestle of the Ninth Circuit, its intuitions regarding the unique historico-legal context of the policy and the guarantee/reality gaps it addresses can be resolved by an expansion of present federal narratives of equality consistent with substantial equality, non-discrimination and remedial self-determination. Particularly where constitutional rights coincide with human rights and indigenous rights, the admission policy can be more accurately interpreted as both a measure of earnest equality and legitimate self-determination, both individual rational revision and collective rational revision projects. The thesis will

demonstrate that the admission policy is consistent with a multi-narrative toolbox of rights options which disadvantaged individuals and groups, lawmakers and federal courts can appeal to in the name of equality and remedial self-determination. Such expansion is seemingly consistent with landmark federal cases such as *Brown* and *Plyler* and possesses a greater narrative capacity to deliver on constitutional guarantees.

CHAPTER TWO

THE BURDENS OF A SINGULAR NARRATIVE

2.1 INTRODUCTION

> *Attorney Goemans conjured [racist former Alabama governor George] Wallace's ghost, then, not to help end or redress the longstanding subordination of Native Hawaiians in America. Instead, he appeared to deploy Wallace's white supremacist image in a twisted present-day attempt to benefit white Americans and others at the expense of Native Hawaiian children—and all in the name of civil rights. How did Kamehameha Schools' opponents distort the very idea and language of civil rights in order to characterize two hundred years of anti-black apartheid in America as the moral and legal equivalent of one private school's attempt to educate indigenous Hawaiian children and repair the continuing damage of twentieth century American colonialism? What lay behind the apparent distortion of history and twisting of the language of equality—the disfiguring of civil rights to deny indigenous Hawaiians' claim to the international human right to self-determination?* [1]

The legal narratives apparent in *Doe v Kamehameha Schools*[2] are the result of the development of law, constitutional principles and legal precedent, over generations to a finite moment in the Ninth Circuit. These narratives retell a particular history, account of the rightsholder and response to discrimination which may or may not be accurately applied to the admission policy. These narratives are apparent in the dissent, majority and concurrence's reasoning in *Kamehameha* and in section 1981 of Title 42 of the United States Code.

This chapter describes how an identity-specific history of slavery, Jim Crow laws and segregation drove the singular prioritization of racialized, dichotomized *everyone*/*no-one* narrative of equality. It describes, nevertheless, how two parallel

[1] Eric K Yamamoto and Catherine Corpus Betts "Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of *Rice v. Cayetano*" in Rachel E. Moran and Devon Wayne Carbado (eds) *Race Law Stories, Foundation Press* (New York, Thomson Reuters/ Foundation Press, 2008) 541 at 541-542, referring to the attorney representing the plaintiffs in *Rice* and *Kamehameha.*

[2] *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 F3d 1025 (9th Cir 2005), reh'g en banc granted, 441 F3d 1029 (9th Cir 2006) 470 F3d 827 (9th Cir. 2006) (en banc).

identity-aware narratives emerged and survived—namely, the temporary, racially-specific *someone* evident in *Brown v Board of Education*[3] and affirmative action, and the time-honored, Native American-specific *indigenous* preference recognized in *Morton v Mancari*[4] based on remedial self-determination. However, a closer examination of federal jurisprudence reveals the undermining of both *someone* and *indigenous* narratives since *Brown* by the *adamant everyone/no-one* narrative evident in cases stretching from *Regents of University of California v Bakke*[5] to the more recent University of Michigan cases,[6] *Fisher v Austin*[7]and dissent in *KS,* as well as legislation such as the No Child Left Behind Act 2002.[8] The chapter finally notes the reluctance of federal courts to recognize a standalone constitutional or human right to education despite the significant constitutive commitment attributed to education in *Brown* and *Plyler v Doe*[9]and despite persistent inequalities in education which cluster around minority group identity.

2.2 EVERYONE, NO-ONE AND THE 'BURDENS OF HISTORY'

> *Slavery, racial segregation, and racism left a large and lasting legacy. They scarred American history, and they continue to frame our country's self-understanding.*[10]

In 1776, the Declaration of Independence[11] famously pronounced that, despite "a long train of abuses and usurpations…these truths" are "self-evident, that all men are created equal". However, equality was not guaranteed plainly until the Thirteenth and Fourteenth Amendments to the Constitution of the United States responded to a burdened, identity-specific history of discrimination. Both Amendments were expressed in everyone and no-one terms, interpreted in both formalized and substantial terms and would underwrite section 1981.

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[3] *Brown v Board of Education of Topeka, Kansas* 347 US 483 (1954) [*Brown I*].
[4] *Morton v Mancari* 417 US 535 (1974).
[5] *Regents of the University of California v Bakke* 438 US 265 (1978).
[6] *Gratz v Bollinger* 539 US 244 (2003); and *Grutter v Bollinger* 539 US 306 (2003).
[7] *Fisher v Univ of TX at Austin* 570 U.S. ___ (2013).
[8] No Child Left Behind Act of 2001, 20 USC § 6319, PL 107-110 (2002).
[9] *Plyler v Doe* 457 US 202 (1982).
[10] John Arthur *Race, Equality and the Burdens of History* (New York, Cambridge University Press, 2007) at 1.
[11] Declaration of Independence (US 1776).

2.2.1 THE THIRTEENTH AND FOURTEENTH AMENDMENTS

Slavery has been called "America's 'original sin'",[12] and the degree to which it impacted the American narrative of equality is evident in both the Declaration of Independence and the Constitution.

Political and economic questions of slavery plagued the drafting of the Declaration of Independence[13], as did moral questions arising from a plain reading of the promise that "all men are created equal"[14]. The "power of the slave-owning class"[15] is also clearly evident in the original Constitution. Article 1, section 2, contains the infamous "Three-Fifths Clause" which counted whites as a "whole Number" and, "excluding Indians not taxed", counted "all other persons"—that is, slaves[16]—as "three fifths". David Waldstreicher has also identified "a meaningful silence" in the original Constitution:

> The Constitution never mentions slavery. The word does not appear. And yet slavery is all over the document. Of its eighty-four clauses, six are directly concerned with slaves and their owners. Five others had implications for slavery that were considered and debated by the delegates to the 1787 Constitutional Convention and the citizens of the states during ratification…all but one of these clauses protects slavery; only one points toward a possible future power by which the institution might be ended. In growing their government, the framers and the constituents created fundamental laws that sustained human bondage.[17]

[12] "The forced migration of Africans to the thirteen original British colonies and the United States during the time of slavery involved an estimated 472,000 people who left the African continent. Of them, more than 83,000 never made it to these shores; almost 18 percent died on the notorious Middle Passage….As a whole, the transatlantic slave trade displaced an estimated 12.5 million people, with about 10,650,000 surviving the Atlantic crossing". By the second half of the nineteenth century, "a fully articulated theory of biological (and therefore permanent) black inferiority" or "racism in its ultimate, intellectualized form [had become] a conspicuous part of the rationale for slavery…and slavery itself had been institutionalized and legalized" in the United States of America: Don Fehrenbacher *The Dred Scott Case: Its Significance in American Law and Politics* (New York, Oxford University Press, 1978 (reprinted 2001)) at 11-13. Quote at 11.

[13] David Waldstreicher *Slavery's Constitution: From Revolution to Ratification* (New York, Hill and Wang, 2012) at 21-56.

[14] Fehrenbacher, above n 12.

[15] Frances Graham Lee *Equal Protection: Rights and Liberties under the Law* (Santa Barbara California, Denver Colorado and Oxford, England, ABC-CLIO, 2003) at 2.

[16] Lee, above n 15, at 3-4.

[17] Waldstreicher, above n 13, at 3.

Prior to the Civil War, the Supreme Court[18] "infamous[ly]"[19] decided *Dred Scott v Sanford* (1857)[20] which reinforced the non-citizenship, chattel status and inferiority of African-Americans—or the inequality of some human beings on a *racial* basis. Post-Civil War, "the constitution was amended so as to repudiate [the *Dred Scott* decision], prohibit slavery, and establish the basic liberties and equality of black persons."[21]

The Thirteenth Amendment,[22] passed in 1865, formally "forbade slavery"[23] and answered initial legal questions left by *Dred Scott* but was popularly viewed as a "controvers[ial]" and "dubious predicate for establishing or securing civil rights" without the legal substantiality or standing to bind States,[24] and "it barely dented the racism of the time".[25] Enacted by states in response to the Thirteenth Amendment, the so-called Black Codes—which mostly prohibited black interactions with whites and real political participation—were primarily aimed at maintaining the social status quo and "putting [legal] distance between whites and blacks".[26] The Codes emphasized racial identity and negatively depicted African-Americans in law in terms of a "dualized", "dichotomized" or "polarized" identity—that is, an untrustworthy, inherently suspect, inferior one in opposition to a superior white identity in need of protection from the newly freed slaves.[27]

[18] In the United States, the District Court is the first level, Federal Courts of Appeal the second, and the United States Supreme Court the final appellate court in the federal system. The Supreme Court is the ultimate interpreter of the US Constitution and thus the supreme interpreter of the supreme laws of the nation.
[19] Lee, above n 15, at 198.
[20] *Dred Scott v Sanford* 60 US 393 (1857).
[21] Donald Lively *The Constitution and Race* (New York, Praeger, 1992) at 39.
[22] US Constitution amend XIV, which reads: "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.". Passed by the Senate on April 8, 1864, by the House on January 31, 1865, and adopted on December 6, 1865.
[23] Carl Cohen "Equality as Moral Ideal" in Carl Cohen and James Sterba *Affirmative Action and Racial Preferences: A Debate* (Cary, NC, USA, Oxford University Press, 2003)7 at 7.
[24] See Lively, at 62, especially his discussion on how the 14th Amendment has strengthened the 13th Amendment through judicial development in segregation cases.
[25] Cohen, above n 23.
[26] Lively, above n 21, at 42-43.
[27] Kimberle Williams Crenshaw, in "Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" in *Critical Race Theory: The Key Writings That Formed the Movement* (New York, New Press, 1995) 103 at 103-122.

The Civil Rights Act of 1866 reflected more genuine attempts at addressing the civil rights of African Americans but retained the black-white polarity and dichotomy of the Black Codes, stating, for instance, that:

> …*all* persons born in the United States…excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every *race and color*, without regard to any *previous condition of slavery or involuntary servitude*…shall have the same right, in every State and Territory in the United States, *to make and enforce contracts*, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to *full and equal benefit* of all laws and proceedings for the security of person and property, *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding. [28]

This right "to make and enforce contracts" and the "full and equal benefit of all laws and proceedings" would eventually become section 1981 of Title 42 of the US Code[29]—the very code relied upon by Doe in *Kamehameha*. References to 'race' and 'color', 'slavery' and 'white citizens' indicate that the proto-section was meant to protect the recently freed slaves now recognized as equal to all other citizen-persons and possessing the same rights. While seemingly insisting that *everyone* was equal, however, the standard was parity with the European American majority.

In 1868, section 1 of the Fourteenth Amendment stated that:

> *All* persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive *any* person of life, liberty, or property, without due process of law; nor deny to *any* person within its jurisdiction the *equal protection of the laws*.[30]

Responding to a history of racial discrimination, its Equal Protection Clause describes its rightsholder in homogenous and anonymous terms, as *everyone* and *anyone*. "[W]ith the cruel history of black slavery fresh in mind"[31], section 1 stipulates that "all"—or everyone—born or naturalized in the United States is a citizen entitled to "equal protection of the laws"—that is, all rights, "privileges and immunities".

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[28] Civil Rights Act of 1866, 14 Stat 27-30, enacted 9 April 1866.
[29] 42 USC §1981.
[30] US Constitution amend XIV §1, adopted 9 July 1868.
[31] Cohen, above n 23, at 7.

In subsequent decades, equality became more specific. The Fifteenth Amendment, passed in 1869, like the 1866 Act, negatively recognized certain identities prone to discrimination during Reconstruction: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of *race, color,* or *previous condition of servitude*".[32] While homogenous, this narrative of equality remained, nonetheless, preoccupied with a certain history—slavery—and identity—the former slave.

Simultaneously, 'race', 'color' and 'previous condition of servitude' negatively reference a certain *group* of individuals with a particular history of discrimination—that is, those who are *not* to be discriminated against. Where the Fourteenth Amendment uses the language of homogenenity—or of *everyone*—and guarantees equality—the Fifteenth Amendment is concerned with the apparent *no-one* of a right to non-discrimination. In other words, *no one* is to be discriminated against because they are a former slave, a certain 'color'or race.

The increasingly specific nature of these civil rights signalled a more *substantive* version of equality. Their development "communicated a swift and powerful message that civil rights would not be self-actuating as a result of the Thirteenth Amendment's ratification"[33]. Similarly, the increasing specificity and explicitness of these guarantees—and particularly the shift from an *everyone* to a *no-one* standard, and from equality to non-discrimination guarantees—demonstrates lawmakers' awareness of residual de facto discrimination in state and local law and everyday life.[34] Such ongoing discrimination required greater specification about who was a rightsholder and what rights were theirs. Importantly, these *everyone* and *no-one* narratives where driven by both the burdens of a history of slavery and the failure of subsequent antebellum constitutional guarantees and legislation to effect de facto equality.

[32] US Constitution amend XV §1.
[33] Lively, above n 21, at 42.
[34] Cohen, above n 23, at 8.

2.2.2 ANTEBELLUM JURISPRUDENCE

Thus, in *The Slaughterhouse Cases*, the Supreme Court held that:

> The most cursory glance at [the Thirteenth, Fourteenth and Fifteenth Amendments] discloses a unity of purpose…the freedom of the slave race, the security and firm establishment of the freedom, and the *protection* of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him…[35]

Despite similar attempts in the Civil Rights Act 1875,[36] however, a very conservative Supreme Court, in *The Civil Rights Cases* (1883), held that equal protection would only be violated where there was evidence of "State action"[37]—that is, *de jure* discrimination resulting from action by law or official government rather than *de facto* discrimination arising from supposedly private, even arbitrary individual choices of, for instance, cab or restaurant owners. "Individual invasion of individual rights [was] not the subject matter of the amendment" but rather "the domain of local jurisprudence".[38] Thus, despite history, substantive equality was to be left to majoritarian-biased social forces.

Foreshadowing modern arguments against identity-aware admissions, the Court also held that:

> When a man has emerged from slavery, and by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favourite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery…Mere discriminations on account of race or color were not regarded as badges of slavery.[39]

Despite the historic and ongoing disadvantages, the Court presumed that former slaves, given the same formal rights as white citizens—'the mere citizen' of the day—would find parity regardless of in-built, real-time social discrimination. In

[35] *Slaughterhouse Cases* 83 US 36 (1872), at 67 (emphasis added).
[36] The Civil Rights Act of 1875, 18 Stat 335–337.
[37] *Civil Rights Cases* 109 US 3 (1883), at 11, per majority.
[38] Such as where they choose to live, what restaurant they choose to frequent, or, conversely, who one will entertain as "guests", "take into [one's] cab or car, or admit to his concert or theatre": ibid.
[39] At 25, per majority. Emphasis added.

contrast to *no-one* narratives, preference which disadvantaged the majority not the minority was unequal and unfair.

Justice Harlan's dissent foreshadows identity-blindness but also current arguments for indigenous education rights which equate them with the realization of fundamental constitutional rights. He wrote:

> It is, I submit, scarcely just to say that the colored race has been a special favourite of the laws. What the nation, through Congress, has sought to accomplish in reference to that race is what had already been done in every state in the Union for the white race, *to secure and protect rights belonging to them as freemen and citizens*; nothing more. The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens…Today it is the colored race which is denied, by corporations and individuals wielding public authority, *rights fundamental in their freedom and citizenship*. At some future time it may be *some other race* that will fall under the ban…there cannot be, in this republic, any class of human beings in *practical subjection* to another class with power in the latter to dole out to the former just such privileges as they may choose to grant…[40]

Justice Harlan's reasoning is consistent with *no-one* racial parity and *everyone* integration. But he also recognized the subtleties of de facto discrimination and the real-time advantages of 'classes' with more social and political clout than African-Americans. Crucially, Justice Harlan differentiated between the formalized guarantee of equality and its realization, as well as the potential diversity of those who would claim the right.[41]

Justice Harlan also dissented in *Plessy v Ferguson* (1896) where both the Thirteenth and Fourteenth Amendments were argued and the 'separate but equal' doctrine was sanctioned.[42] Famously, the appellant, "7/8 white and 1/8 black", sued after being asked to move from the 'whites-only' carriage on a train.[43] Such segregation was widely practiced and mandated by Louisiana law, but the Supreme Court found no violation of equal protection. Instead, it recognised that the facts did not, technically, involve slavery or servitude and that the distinction only corresponded with de facto social distinctions between the races. Incredibly, the majority held that the Fourteenth Amendment was not meant "to abolish *distinctions* based upon

[40] At 61, per Harlan J dissenting. Emphasis added.
[41] Harlan J disagreed with the majority interpretation on the grounds that it "proceed[ed]…upon grounds entirely too narrow and artificial" and resulted in "the substance and spirit of the recent amendments of the Constitution [being] sacrificed by a subtle and ingenious verbal criticism": at 26.
[42] *Plessy v Ferguson* 163 US 537 (1896).
[43] At 538, per majority.

color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[44]

The Court again trusted majoritarian-biased social forces—or "natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals"[45]—to equalize prevalent discrimination. The decision seemingly reinforced the legal and socio-economic space between the races.

Dissenting, Justice Harlan argued that the no-one Thirteenth Amendment "prevents imposition of any burdens or disabilities that constitute badges of slavery or servitude"—that is, distinctions which produce discrimination in fact—when read with the Fourteenth Amendment.[46] Together, he argued, the two amendments "protect all the civil rights that pertain to freedom and citizenship" and have "removed the race line".[47] Segregation was unequal because it was what *whites* not blacks wanted. In what would become constitutional catchphrases generations later, Justice Harlan concluded that:

> …In view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is *color-blind*, and neither knows nor tolerates classes among its citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings, or of his color…[48]

However, Justice Harlan was in the minority and *Plessy* would stand for generations, representing the breaking of America's "first civil rights promise".[49]

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[44] At 551.
[45] At 551. The majority decision condones the most dogmatic, ignorant, and overt species of racial discrimination, explaining why current federal courts treat distinctions based on racial identities with such suspicion. The decision is laced with backwards fears of "the colored race [becoming] the dominant power in the state legislature" where it might "relegate the white race to an inferior position" among other unspoken fears of parity and integration: majority at 551.
[46] At 555, per Harlan J dissenting.
[47] At 555.
[48] At 559.
[49] Language of Yamamoto and Betts, above n 1.

2.2.3 BROWN AND THE 'SECOND CIVIL RIGHTS PROMISE'[50]

With Reconstruction, African Americans finally gained access to education,[51] but, with *Plessy*'s blessing, 'separate-but-unequal' education punctuated other constitutional violations common since the end of Reconstruction in 1877, including poll taxes, literacy tests and other voting fraud—and lynchings.[52] In terms of education, the Jim Crow era, especially in the South was formally equally in law but unequal in practice. While equal funding was often mandated by state law administrative decisions regarding "teacher salaries and qualifications, student-teacher ratios, spending on physical plants and equipment" were left to local, usually, white officials[53] as implied in *Plessy*. Often, funds earmarked for African American schools were used for other schools. Such decisions resulted in huge disparities in educational outcomes between African American learners and others.[54] Despite changes in racial attitudes across the country post-World War II—and constitutional guarantees of equal protection—these practices remained entrenched in the South particularly in elementary schools.[55]

Brown v Board of Education of Topeka, Kansas (1954)[56] ('*Brown I*') and its sequel, *Brown v Board of Education II* (1955)[57] ('*Brown II*') combined lawsuits from four states, all challenging the constitutionality of racially segregated school districts in terms of equal protection. In *Brown*, the Court unanimously held that *Plessy*'s 'separate but equal' doctrine had no place in public education.[58] One year later, the Court ruled on how *Brown I* would be implemented in *Brown II*. Incredibly, the

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[50] Ibid.
[51] Michael J Klarman *Brown v. Board of Education and the Civil Rights Movement: Abridged Edition of "From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality "* (Cary, North Carolina, Oxford University Press, 2007), at 3. However, note Heather Andrea Williams *Self-Taught: African American Education in Slavery and Freedom* (Chapel Hill, North Carolina, University of North Carolina Press, 2005); and Grey Gundaker "Hidden Education among African Americans during Slavery" (2007) 109 Teach Coll Rec 1591. Both describe how African-American resistance to slavery included self and community education in secret.
[52] Ibid, at 3.
[53] Ibid, at 30.
[54] Ibid, 30-31: In 1915 the expenditure per white student was 3 times that spent on African-American students in North Carolina, six times in Alabama, and twelve times in South Carolina. In 1910, only 2.8 per cent of African Americans attended high school and there were only four high schools for colored students in the entire South.
[55] Ibid, at 31.
[56] *Brown I*, above n 3.
[57] *Brown v Board of Education of Topeka, Kansas* 349 US 294 (1955) [*Brown II*].
[58] *Brown I,* at 495.

greater equality narrative was to be redefined on the basis of the minority child's grade school experience, but several other features of *Brown I* are remarkable.

In the spirit of the Fourteenth Amendment, the unanimous bench held that equal protection was not to be judged on "tangible factors" alone but also on the *effect* of segregation itself on public education"[59] and "qualities which are incapable of objective measurement but which make for greatness in a…school"[60] including a student's ability in a particular environment to interact with other students, exchange ideas with them and "learn his profession".[61] Even where physical facilities and teacher's salaries might be comparable,[62] intangibles including the psychological effects of forced segregation made "[s]eparate educational facilities…inherently unequal" violating equal protection.[63]

The Court also seemingly recognized the long-term effects of such discrimination when it held that:

> [t]o separate them from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone…[64]

This outcome measured discrimination had "the tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[65]

Such de facto inequality had wider implications given "the importance of education to our democratic society" as it enabled citizenship, the gaining of a profession and "normal" adjustment. After calling education the "most important function of state and local governments", the Court judged that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an

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[59] At 492.
[60] At 492-493, referring to two contemporary cases *Sweatt v Painter* 339 US 629 (1950) and *McLaurin v Oklahoma State Regents* 339 US 637 (1950). In *Sweatt*, the state tried to argue that by providing a separate law school for African-Americans it was treating them equally but the Court had also recognized the importance of intangibles, for instance, the school's reputation.
[61] At 493, noting the Court's decision in *McLaurin*. Compare the constitutional value of intangible factors with Princess Bernice Pauahi Bishop's hope for the Kamehameha Schools and its modern mission statement and apparent success with a preferential admissions policy.
[62] Again, Klarman describes how these tangibles were also unequal: Klarman, above n 51, at 30.
[63] At 495.
[64] At 495.
[65] At 494.

education."[66] However, the Court went further, concluding: "Where a State has undertaken to provide an opportunity for an education in its public schools, such an opportunity is a *right* which must be made available to all on equal terms."[67]

Ultimately, the Court held that "separate educational facilities [were] inherently unequal" and violated the Constitution's equal protection guarantee. In *Brown II*, the Warren Court flatly stated that "racial discrimination in public education is unconstitutional", requiring that "all provisions of federal, state, or local level requiring or permitting such discrimination must yield to this principle". [68] Moreover, segregation was to be remedied according to principles of "good faith implementation" and "practical flexibility…for adjusting and reconciling public and private needs". Such remedies were to be implemented "as soon as practicable", with defendants making a "prompt and reasonable start toward full compliance".[69] Thus, public authorities were required to take positive steps to remedy inequalities.

The *Brown* decisions were a clear response to a particular history of slavery and segregation. In the wake of forced separation on the basis of racial identity, *Brown* required equality to be homogenous and anonymous. However, it was not just the formal existence of the schools themselves or their identity-aware admission policies alone which violated equal protection but also the tangible and less tangible de facto outcomes in the actual educational experience of students sharing a particular racial identity. Importantly the Court recognized education as a right essential to long-term human outcomes. The positive steps required by the Court in *Brown II* were also tailored to this particular historico-legal context but clearly responded to real-time inequalities.

[66] At 493.
[67] At 493.
[68] At 298.
[69] At 299-300.

2.2.4 SECTION 1981

Meanwhile, the Thirteenth Amendment's promise of non-discrimination was preserved and then resurrected in legislation including section 1981 of Title 42 of the United States Code.

Section 1981[70] has Thirteenth and Fourteenth Amendment "roots"[71] but especially expresses Congress' "power to enforce [section 1 of the Thirteenth] by appropriate legislation",[72] even to "abolish the 'badges and incidents of slavery'".[73] It was first enacted in the Civil Rights Acts of 1866[74] and 1870[75] which targeted "explicit"[76] and "intentional discrimination" against former slaves.[77] The next re-enactment, section 1977 of Title 24 of the Revised Statutes of 1874, was virtually identical to the present section 1981, titled "Equal Rights Before the Law" which reads:

> All persons within the jurisdiction of the United States shall have the *same* right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the *full and equal benefit of all laws and proceedings* for the security of persons and property *as is enjoyed by white citizens*, and shall be subject to *like* punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[78]

All incarnations specifically respond to the history of slavery and segregation, even the "events and passions of the time in which the law was forged".[79]

In *Runyon v McCrary* (1976)[80] the Supreme Court extended section 1981 to the sphere of education. It found that two *private* schools which received no federal financial aid and whose admissions policies formally excluded students of African-American ancestry violated section 1981 because "neither school offered services

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[70] Above n 29.
[71] *Kamehameha*, above 2, at 836, per majority.
[72] US Constitution, amend XIII §§ 1-2. Section 5 of the Fourteenth Amendment gives Congress similar powers to legislate civil rights regarding the Equal Protection Clause.
[73] See *Kamehameha*, at 836.
[74] Above n 28.
[75] The Enforcement Act of 1870 also known as the Civil Rights Act of 1870, Act of May 31, 1870, ch 114, §§16, 18, 16, Stat 141, 144 (1870).
[76] *Gen Bldg Contractors Ass'n v Pennsylvania*, 458 US 375 (1982), at 386-388.
[77] *Kamehameha*, at 835-836, per majority.
[78] 42 USC §1981, as amended by the Civil Rights Act of 1991, Pub L no 102-166, 105 Stat 1071 (emphasis added).
[79] See *Kamehameha*, per majority, at 836, quoting *Gen Bldg Contractors*, above n 76, at 390.
[80] *Runyon v McCrary* 427 US 160 (1976), at 176.

on an equal basis to white and non-white students".[81] *Runyon* showed that the Thirteenth Amendment would not be hampered by the public/private divide. Crucially, the Court applied an intermediate rather than strict level of scrutiny to section 1981, allowing the possibility that positive, identity-aware measures might coincide with equality.

Later section 1981 jurisprudence allowed the same possibility. In *General Building Contractors v Pennsylvania* (1982) the Court judged, "Liability may not be imposed under section 1981 without proof of *intentional* discrimination".[82] In *Patterson v McLean Credit Union* (1989) the Court held that the plaintiff had the initial burden of proving such. In their defence, an employer had only to show they had "a legitimate non-discriminatory reason" where a "plaintiff was rejected, or the other applicant was chosen".[83]

Thus, the Thirteenth Amendment right to non-discrimination entailed a lower level of scrutiny than *Brown*, targeted intentional discrimination and recognized the constitutionality of some identity-aware policies admission and hiring policies.

2.3 ADDITIONAL NARRATIVES

An identity-specific history of slavery and segregation justified a homogenous and anonymous *everyone/no-one* narrative of equality. Nevertheless, two parallel identity-aware equality narratives, respectively, emerged and survived in federal law, namely: the temporary, racially specific *someone* of affirmative action; and the time-honored, Native American-specific *indigenous* preference recognized in *Morton v Mancari*[84] based on remedial self-determination.

[81] At 172-173. The schools tried to argue that their First Amendment rights to association with people who shared their beliefs about segregation would be violated by applying section 1981. The Court made it clear that such rights were not protected by the Constitution. The schools also tried to argue that section 1981 violated parental rights to choose private, "specialized" education for their children consistent with cases such as *Meyer v Nebraska* 262 US 390 (1923), and *Pierce v Society of Sisters* 268 US 510 (1925). The Court again held that such a right was not guaranteed by the Constitution or "unfettered by reasonable government regulation": at 176-179.
[82] At 382-391.
[83] *Paterson v McLean Credit Union* 491 US (1989).
[84] Above n 4.

2.3.1 AFFIRMATIVE ACTION

Brown II required the federal government, states, and local government—including school districts—to take positive, *affirmative* steps to remedy racial discrimination. Several subsequent Supreme Court cases emphasise the substantive nature of this equality narrative which displays greater identity-awareness.

Judicial frustration over the slowness of desegregation throughout the country is evident in *Green v County School Board* (1968) where the Fourteenth Amendment was found to impose an "affirmative duty". A "freedom of choice" plan was not inherently discriminatory but was unacceptable to the Court because it had not produced de facto desegregation and more effective ways to do so existed.[85] Potential remedies included "compulsory integration".[86] In *Swann v Charlotte-Mecklenburg School District* (1971), the Court also recognized that "school authorities [had] fail[ed] in their affirmative obligations"[87] in failing to "eliminate invidious racial distinctions" apparent in less tangible differences in "transportation", staff, "extracurricular activities", building maintenance and equipment, and the "location and capacity [of the school in question] in light of population growth, finances [and] land values".[88] To achieve integration, the court was willing to allow the "remedial altering of attendance zones[]"—or "gerrymandering"—and the transportation of students by bus to school districts some distance away.[89]

In *Keyes v School District No 1, Denver* (1973), "no statutory dual system ha[d] ever existed"[90] and assignment plans initially appeared to be "racially neutral".[91] However, the facts "intentional" and "systematic" de facto evident in "concentrat[ions]" of Hispanic and African American learners at schools[92] where tangible differences in resources, budget allocation and building location were

[85] *Green v County School Board of New Kent County* 391 US 430 (1968), at 441-442 and 439-441.
[86] At 437-438.
[87] *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1 (1971), at 15.
[88] At 19-21.
[89] 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.
[90] *Keyes v Denver School District No 1* 413 US 189 (1973), at 198.
[91] At 212-213.
[92] At 201.

obvious.[93] Justice Powell, concurring, would have dispensed with "identifying "segregative acts" or "segregative intent" as the school district was segregated *in fact.*[94]

There were limits to the facts which would violate the Equal Protection Clause. Regarding racial "balances" or "quotas", the *Swann* court opined:

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with the myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds.[95]

In *San Antonio Independent School District v Rodriguez* (1973),[96] arguments for "wealth discrimination" were also rejected. The plaintiffs from a lower socio-economic area of predominantly Hispanic American ancestry alleged that Texas's school finance system—which distributed school funds on the amount of property taxes paid by the district residents—produced actual inequality and was unconstitutional. The Court refused to apply strict scrutiny because it could not identify a suspect class—that is a *racial* minority group rather than a "class of the disadvantaged poor". It held that the "asserted deprivation" was "relative—rather than absolute—[in] nature".[97] In another case, *Milliken v Bradley* (1974), the Supreme Court overruled a District Court ruling mandating cross-district bussing, holding that school districts were responsible for their own segregation and not for another school district's.[98]

However, through its bussing decisions, "[t]he Supreme Court established strong precedent for race-based remedial measures".[99] Positive, identity-aware measures were amenable with equality and even demanded by it—at least until integration

[93] At 201. For example, the district in question had been, apparently, using mobile classrooms for some lower income areas where most of the students were members of racial minorities while building schools of a more permanent nature and higher standard for other areas. as the school board formed a "state agency" and for instance, amounted to "state action".
[94] At 219-236, per Powell J concurring and dissenting in part.
[95] *Swann*, at 22.
[96] *San Antonio Independent School District v Rodriguez* 411 US 1 (1973).
[97] *Rodriguez*, at 18-28.
[98] *Milliken v Bradley*, 418 U.S. 717 (1974). Desegregation continues to this day: See *Cowan and United States v Bolivar County Board of* Education (Cleveland City School District) (2012), Civil Action No 2:65-CV-00031-GHD, filed in the United States District Court for the Northern District of Mississippi Delta Division.
[99] Carl Livingston "Affirmative Action on Trial: The Retraction of Affirmative Action and the Case for Its Retention" (1996) 40(1) How LJ 147.

was achieved. A host of legislation[100] and federal agencies were created in the wake of these cases to enforce anti-discrimination law including the Equal Employment Opportunity Commission (EEOC), a federal law enforcement agency. [101] Affirmative action was bolstered by President Lyndon Johnson's signing of Executive Order 11246[102] 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.[103]

Applying similar reasoning, the Supreme Court recognized disparate impact or discriminatory effect[104] against an ethno-linguistic minority as discrimination and mandated identity-aware education as a remedy. In *Lau v Nichols* (1974)[105] a group of Chinese American students who spoke little or no English but were only instructed in English[106] brought suit against their school district under section 601 of Title VI of the Civil Rights Act 1964 which still bans discrimination "on the ground of race, color or national origin" in "any program or activity receiving Federal financial assistance"[107], including public schools. While a lower court

[100] Including Titles VI and VII of the Civil Rights Act of 1964, Equal Educational Opportunities Act of 1974, Title IX of the Education Amendments of 1972, as well as the Age Discrimination in Employment Act of 1967 (ADEA), the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA) of 1990, and the ADA Amendments Act of 2008.
[101] Created under Title VII of the Civil Rights Act of 1964.
[102] Also see President John F Kennedy's Executive Order 10925 signed in 1961 which created the forerunner of the EEOC, the President's Committee on Equal Employment Opportunity.
[103] Lee Epstein and Thomas G Walker *Constitutional Law: Rights, Liberties, and Justice (Constitutional Law for a Changing America)* (8th ed, Thousand Oaks, California, SAGE, 2013), at 690. For instance, see Title VI of the Civil Rights Act of 1964 which makes federal funding dependent on an absence of discriminatory practice:
[104] In terms of Title VI specifically but the reasoning is, like *Brown* and its progeny, focused on real-time outcomes.
[105] *Lau v Nichols* 414 US 563 (1974).
[106] Ironically, there were other students of Chinese-American heritage in the school with little or no English who were already being given some English instruction.
[107] Title VI, Civil Rights Act of 1964, 42 USC §2000d, also a progeny of the Thirteenth Amendment states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance". As Rachel E Moran explains in "Undone by Law: The Uncertain Legacy of *Lau v. Nichols*" (2005) 16(1) Berkeley La Raza LJ 1, at 2: "In response to civil rights protests and ongoing unrest, Congress enacted the omnibus bill to target segregation and discrimination in the South." However, the provision ended up protecting the education rights of an ethno-linguistic community.

would have allowed any student to bring "to the starting line of his educational career" arbitrary "advantages and disadvantages"[108], the Supreme Court held that:

> [i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from the respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of discrimination…[109]

Lau exemplifies dichotomous *no-one*-ness—no one is to be discriminated against in the classroom intentionally or not[110]—but revolved on non-racial factors. The narrative is openly diverse, even multicultural. Despite integrative purpose, the discrimination arose *within* a school not necessarily between schools and from the *same* treatment provided to other students. The remedial provision of alternative education is aimed at parity but responds to identity-specific needs—at least temporarily. In de facto rather than de jure terms, the decision recognizes a particular ethnic or linguistic—rather than racial—community,[111] language rather than race being the issue.

This *someone* narrative demanded a more substantive interpretation of equality with the capacity to account for slavery and segregation but also disparate impact and real-time inequalities generally.

2.3.2 THE NATIVE AMERICAN PREFERENCE

Another long and painful identity-specific history preceded slavery, segregation and racial discrimination. European colonization traumatized the indigenous peoples of the Americas before it stole human beings from Africa. Despite the equality guarantees in the Declaration and Constitution, various federal acts and policies of the federal government later resulted in gross injustices including

[108] At 565.
[109] At 568. Compare the result in *Lau* with the Supreme Court's decision in the much earlier case of *Yick Wo v Hopkins* 118 US 356 (1886) involving blatant de jure discrimination against Chinese-Americans.
[110] A lack of intention could not provide a defense for defendant school district. Discriminatory effect rather than intention gave rise to Title VI discrimination.
[111] That is, the plaintiffs were discriminated against as Chinese speakers rather than as Asian-Americans.

population removal,[112] the stealing of land, and other treaty violations, both de jure and de facto discrimination, other violations of fundamental constitutional rights, and genocide.[113] Similar injustices were apparent in education.

As in Hawai'i [114] and Aotearoa New Zealand,[115] education was used to assimilate, integrate and discriminate against the indigenous peoples within the United States—depending on which narrative successive governments adopted towards Native Americans. Traditionally recognized eras of federal Indian policy include "Treaty-making", "Removal", "Assimilation", "Reorganization", "Termination" and "Self-Determination". [116] These eras are reflected in Native American education. For instance, where educational efforts amongst Native Americans from colonial times to the early nineteenth century—during Treaty-Making and Removal—focused on Christianization and civilization,[117] efforts from the 1880s to 1920s reflected an *everyone/no-one* assimilation and were aimed at indoctrinating Native American learners and subduing their communities.[118] This aggressive form of Westernization took place at boarding schools where children were often forcibly abducted or coerced into attending, separated from their families and communities, renamed, given corporal punishment for speaking their own language, and faced other "de-humanizing or de-Indianizing treatment".[119] Rather than focusing on academic subjects, these government-run schools focused on vocational training for subservience. These approaches to education were

[112] For the history of the Cherokee Removal and subsequent Trail of Tears: see John Ehle *Trail of Tears: The Rise and Fall of the Cherokee Nation* (New York, Doubleday, 1989).
[113] As described by Ward Churchill *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco, City Lights, 1997).
[114] See discussion in Chapter 3.
[115] See discussion in Chapter 7.
[116] See, for instance, Steve Pevar *The Rights of Indians and Tribes* (New York, Oxford University Press, 2012), at 1-16.
[117] K Tsianina Lomawaima and Teresa L McCarty *To Remain Indian: Lessons in Democracy from a Century of Native American Education* (New York: Teacher's College Press, 2006).
[118] See Gary Y Okihiro, Island World: A History of Hawaii and the United States (University of California Press, Oakland, 2008), "Schooling for Subservience" at 98-134, on the infamous Carlisle Boarding School where the children of chiefs were literally held hostage to subdue their elders. Other methods included "cajolery", "threats", bribery", and "fraud" and food rations being withheld unless families let their children go: Jana Noel "Education toward Cultural Shame: A Century of Native American Education" (2002) 16(1) Journal of Educational Foundations 19, at 24. Compare the forcible abduction of Native American children from their families with the "Stolen Generations" of Australia discussed in Margaret Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia, 1880-1940* (Lincoln, Nebraska and London, England, University of Nebraska Press, 2010).
[119] Noel, ibid.

inherently discriminatory, racist and based on false science and dying race theories.[120]

Between 1925 and 1985, federal Indian education law and policy fluctuated with political whim between neglect, progress, termination and relocation, assimilation, and self-determination.[121] Significant government reports on Native American education recorded concerns about the qualifications of teaching staff, health conditions, the integrity and suitability of facilities, and the discouragement of community and parental participation at government-run boarding schools which show little improvement between 1926 and 1969.[122] While the Self-Determination Era from 1969 to the present has seen improvements, Native American education for the better part of United States history would seem the antithesis of equality.

However, this burdened, identity-specific history also recognized another exception to identity-blind equality, an alternative legal discourse to slavery, segregation and racial discrimination which justified preference in terms of self-determination not equality or non-discrimination. This discourse does not revolve around the individual *everyone* or *no-one* but recognizes collective groups of specifically *indigenous* rightsholders, the constitutional line being *political* not racial.

James Anaya has written that:

> …federal Indian law doctrine[] treats Indian rights as an exception to the norms of equality and non-discrimination, rather than their embodiment…
>
> …

[120] Okihiro, above n 118.
[121] Thomas Glass "Federal Policy in Native American Education, 1925-1985" (1988) 3(2) Journal of Education Policy 105.
[122] The 1926 Meriam Report noted that "only one in eight…Indian children in school were at the normal level according to age" and further concerns regarding quality of teaching staff at Bureau of Indian Education-run schools, "teaching techniques", "[d]eplorable health conditions" related to the quality of facilities, "discouragement of community and parent participation", and other concerns. In 1969, a US Senate committee report, the Kennedy Report, recognized that most of the recommendations of the Merriam Report had not been met by the federal government: summarized and discussed in Glass, at 109. Compare with deficiencies in segregated schools serving African American learners in the South prior to *Brown*.

> As a result, equal protection discussions within a constitutional framework stay away from Native Americans…[123]

Article 1, clause 3—the infamous Three-Fifths clause—of the Constitution narrates Native Americans as outside the constitutional norm: "Representatives and direct Taxes shall be apportioned among the several States ... excluding Indians not taxed".[124] A similar exception also appears in the Fourteenth Amendment, clause 2.[125] Article 1, clause 8 ('the Commerce Clause') of the Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes*".[126] Given this plenary power, Congress has unique jurisdiction to determine this political relationship.

Native American peoples, however, retain inherent sovereignty, a separate political identity and pre-existing rights. From the Marshall Trilogy,[127] the Supreme Court has recognized that indigenous nations retain occupation rights post-European 'discovery',[128] retain inherent sovereignty which pre-dates discovery,[129] and constitute "distinct political societ[ies], separated from others, capable of managing [their] own affairs and governing [themselves]". Tribes have been considered "states" capable of making treaties and "people[s] capable of maintaining the relations of peace and war".[130] Constitutionally, Native American tribes are political entities somewhere between a federal state and a foreign government.[131]

But they have also been considered "domestic dependent nations" whose relationship with the federal government "resembles that of a ward to his

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[123] S James Anaya "Indigenous Peoples and International Law: Lands, Liberties, and Legacies" (2007) 31 Am Indian L Rev 257, at 258.
[124] US Constitution, art 1, cl 3.
[125] US Constitution, art 1, s 2.
[126] US Constitution, art 1, s 8 (emphasis added).
[127] Three Supreme Court cases, namely: *Johnson v M'Intosh* (1823), 21 US (8 Wheat) 543, 5 L Ed 681; *Cherokee Nation v Georgia* 30 US (5 Peters) 1 (1831); and *Worcester v Georgia* 31 US (6 Pet) 515 (1832). Each decision 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.
[128] See *Johnson v M'Intosh.*
[129] See *Cherokee Nation v Georgia*.
[130] Based on historic treaties, the Marshall Court found that Native American nations "had always been considered as distinct, independent political communities, retaining their natural rights, as the undisputed possessors of the soil, from time immemorial…The very term "nation," so generally applied to them, means "a people distinct from others": *Worcester*, at 519.
[131] See *Cherokee Nation v Georgia*, at 1-2, 16-17; *United States v Antelope* 430 US 641 (1977), at 645; and *Fisher v District Court* 424 US 382 (1976), at 390.

guardian".[132] These "sovereign and independent states" remained "tributary and feudatory" under the "protection" of the federal government.[133] The Supreme Court would later describe this special trust relationship thus:

> These Indian tribes are the wards of the nation. They are communities dependent on the United States,—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.[134]

Later courts[135] attributed a "moral obligation to act in good faith in performing the stipulations entered into" on behalf of Native Americans[136] "of the highest responsibility and trust" to the federal government.[137] In *United States v Mitchell* (1983), the Court held the federal government "accountable for breaches of trust",[138] identifying "[a]ll of the necessary elements of a common-law trust" and resultant fiduciary relationship, including a "trustee", "beneficiary", and "trust corpus".[139]

The narrative implications of the trust relationship were evident in *Morton v Mancari* (1974),[140] an action brought by non-Indian employees of the Bureau of Indian Affairs whose employment policy included a preference in hiring for Native Americans. The plaintiffs claimed the preference was *racially* discriminatory and

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[132] *Cherokee Nation v Georgia*, at 17.
[133] *Worcester v Georgia*, at 560.
[134] *United States v Kagama* 118 US 375 (1886), at 383-384.
[135] In *United States v Sandoval*, 231 U.S. 28 (1913), at 230-231, the Supreme Court found that "an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders…"
[136] *Lone Wolf v Hitchcock* 187 US 558 (1903), at 566.
[137] *Seminole Nation v United States* 316 US 286 (1942), at 297.
[138] Where it mismanaged tribal resources it was meant to manage on behalf of, and for the benefit of, the tribe—and especially where it had "elaborate control" of those resources: *United States v Mitchell* 463 US 206 (1983) [*Mitchell II*], at 224-225.
[139] *Mitchell II*, at 226. William Canby has written: "At its broadest, the relationship includes the mixture of legal duties, moral obligations, understandings and expectancies that have arisen from the entire course of dealing between the federal government and the tribes. In its narrowest and most concrete sense, the relationship approximates that of trustee and beneficiary, with the trustee (the United States) subject in some degree to legally enforceable rights": William Canby *American Indian Law in a Nutshell* (2nd ed, St Paul, Minnesota, West Publishing, 1988), at 32.
[140] *Mancari*, above n 4, at 549-551.

violated the Equal Employment Opportunities Act of 1972 (EEOA).[141] The Supreme Court, however, rejected this notion.

The Court held that the preference was consistent with the plenary authority. Congress had legislated section 472 of the Indian Reorganization Act of 1934[142] which restored local self-government to tribes and was part of Title 25 of the United States Code,[143] a voluminous tome of federal law devoted to federal Indian law and significant evidence of the exception itself. Congress had not either explicitly or impliedly (*sub silentio*) repealed that law when they legislated either the EEOA or the Civil Rights Act of 1964. In fact, Title VII's[144] anti-discrimination provisions treated the Native American preference as a "longstanding" exception to identity-blindness.[145] Given the plenary power, "[c]ourts are not at liberty to pick and choose among congressional enactments".[146]

The preference was also consistent with the special trust relationship. A substantial and consistent body of law had been "explicitly designed to help only Indians". Finding the preference constituted invidious racial discrimination would have "erased" Title 25 "in its entirety" and "jeopardized" the fiduciary relationship.[147] The Court noted that "[l]iterally every piece of legislation dealing with Indian tribes…single [them] out for special treatment". Moreover, "[a]s long as the special treatment of Indians can be tied rationally to the fulfilment of Congress' unique obligations toward Indians, such legislation will not be disturbed."[148]

Ultimately, the preference had nothing to do with race. Neither "racial discrimination" nor "racial preference", it was "an employment criterion designed to further the cause of Indian self-government and to make the BIA more responsive

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[141] Equal Employment Opportunity Act of 1972, Pub L No 92-261, 24 March 1972, 86 Stat 103, another Civil Rights-era law designed to give effect to the Fourteenth Amendment.
[142] Indian Reorganization Act of June 18, 1934, 25 USC §472. The Act was passed during the presidency of Franklin D Roosevelt and also known as the "Howard-Wheeler Act" or the "Indian New Deal".
[143] 25 USC.
[144] See sections 701(b) and 703(i).
[145] At 549. In legislation passed just after the EEOA, the Education Amendments 1972, Congress had again legislated preference for Native Americans in the training of teachers for Native American children.
[146] At 549-551.
[147] At 549-551.
[148] At 554-555.

to the needs of its constituents."[149] That is, to further the purposes of the Indian Reorganization Act of 1934 and give effect to the special relationship between the federal government and Native American tribes.

Later cases would emphasize the political rather than racial nature of the exception, based on the Constitution[150] and tribes' residual sovereignty[151] but also its *genealogical* character. In *United States v John* (1978)[152] the trust relationship appeared to operate regardless of federal recognition or reservation residency since the Indian Reorganization Act of 1934:

> defined "Indians" not only as "all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction," and their descendants who then were residing on any Indian reservation, but also as "all other persons of one-half or more Indian blood."[153]

Ultimately, *Mancari* established that a preference for Native Americans will not constitute invidious racial discrimination where it is the identifiable will of Congress and highlighted significant philosophical differences between the *everyone/no-one*, *someone* and *indigenous* narratives.

In contrast to narratives burdened by slavery and segregation, the purpose of the preference was not *everyone/no-one* racial parity but greater indigenous self-determination. Although the preference was remedial, the BIA's preference was not designed to further equal protection or any constitutional right but "derived from historical relationships and …explicitly designed to help only Indians". Its purpose was not to promote equality per se or to "alleviat[e] minority discrimination". Rather the preference was "designed to deal with an entirely different problem": [154] again, how to further tribal self-determination. [155] Importantly, the preference neither advantaged nor disadvantaged any *race* but recognized the government-to-government relationship between the federal

[149] At 553-554.
[150] *Antelope*, above n 131, at 645.
[151] *Fisher*, above 131, at 390.
[152] *United States v John*, 437 US 634 (1978).
[153] Indian Reorganization Act of 1934, 48 Stat 988, 25 USC § 479 (1976 ed).
[154] *Mancari*, at 549-551.
[155] At 553-554.

government and tribes possessing residual sovereignty, the *political* basis of that relationship and the government's accountability therein.

The Court approved the federal government's fiduciary role as "prepar[ing] the Indians to take their place as *independent*, qualified members of the modern body politic".[156] *Mancari*'s explanatory footnotes, particularly those on the Indian Reorganization Act of 1934, emphasize that the relevant 'independence' was not individualized but that which accrues to tribes and nations who yet retain sovereignty. The footnotes emphasize that the purpose of the Act was to "teach[] Indians to manage their own business and control their own funds and to administer their own property",[157] "to extend to the Indian the fundamental rights of political liberty and local self-government", and to promote tribal "economic and political self-determination".[158] Most tellingly:

> [The Act was] designed not to prevent the absorption of Indians into white communities, but rather to provide for those Indians *unwilling* or unable to compete in the white world some measures of *self-government in their own affairs*.[159]

Given the political rather than racial nature of the special trust relationship, Native Americans are not automatically subject to integration but retain the option of self-determination. For instance, Native Americans belonging to federally-recognized tribes are entitled to self-determination[160] and the preference in almost the same way that someone else bears dual citizenship: as United States citizens[161] but also tribal members and trust relationship beneficiaries.[162] Even during the post-*Brown* period, Native Americans had the right to claim constitutional rights as homogenous or anonymous individuals, but their indigenous identity remained an exception to the same. Ultimately, while Congress retains its plenary power:

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[156] Relying on *Board of Commissioners v Seber* 318 US 705 (1943).
[157] At footnote 9.
[158] At footnote 10.
[159] At footnote 12 (emphasis added).
[160] At footnote 24.
[161] See the Fourteenth Amendment and the General Allotment Act of 1887 as well as the Indian Civil Rights Act of 1968, 25 USC §§1301-1303.
[162] See *Winton v Amos* 255 US 373 (1921); and commentary in Canby, at 237-238.

> …the powers that tribes possess are not delegations of authority from the United States; rather, tribes possess them as a consequence of their historical status as independent nations, and the United States supports the exercise of these powers.[163]

The Supreme Court had earlier held that the tribes' powers of self-government did not "spring[] from the [US] constitution" but instead predated it and were "not operated upon" by its provisions.[164] In fact, the BIA was intended to develop into "an Indian service predominantly in the hands of educated and competent Indians".[165]

Santa Clara Pueblo v Martinez (1978)[166] later illustrated how strong the *Mancari* exception was despite legislation whose avowed purpose was to override it.[167] The Court found that the Indian Civil Rights Act 1968[168] (ICRA) evidenced a struggle between "[t]wo distinct and competing purposes": strengthening the position of individual tribe members in relation to tribal government but also "furthering Indian self-government". But it determined that Congress had "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." [169]

Ultimately, the "goal of tribal self-determination" as expressed in Title I, affirmed Congress' intention "to protect tribal sovereignty from undue interference"[170] and that tribal courts were the proper forum for resolving issues of the ICRA and best to judge matters of "tribal tradition and custom" including membership criteria.[171] The plaintiff was a member of the tribe but invoked her constitutional rights as a citizen of the United States, essentially the *everyone/no-one* standard, but even

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[163] Pevar, above n 116, at 82. Also see Executive Order No 13084 "Consultation and Coordination with Indian Tribal Governments" 65 Fed Reg 67249 (9 Nov 2000).
[164] *Talton v Mayes* 163 US 376 (1896), at 382 and 384-385.
[165] *Mancari*, at footnotes 17 and 18.
[166] *Santa Clara Pueblo v Martinez* 436 US 49 (1978).
[167] In *Martinez*, the plaintiffs 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 section 1302 (8) of Title I of the Indian Civil Rights Act of 1968 (the ICRA) which states that: "No Indian tribe in exercising powers of self-government shall…deny 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".
[168] Indian Civil Rights Act of 1968, 25 USC §§1301-1304.
[169] At 62.
[170] At 63.
[171] At 71-72.

where legislation seemed to allow the exception to be overridden, rights accruing to indigenous group identity and a particular history were successful.

In terms of education, Congress had also previously recognized tribal self-determination in the Indian Self-Determination and Education Assistance Act of 1975,[172] the result of significant American Indian activism and the Civil Rights Movement. Section 450(a)(1) acknowledges that "prolonged Federal domination of Indian service programs" including education had "retarded…the progress of Indian people and their communities" towards self-determination. Crucially, sections 450(b)(1) and (3) recognized that "true self-determination" was dependent on educational progress and that "parental and community control of the educational process is of crucial importance to the Indian people".[173] To give greater control over education to tribes, Part C authorizes several government agencies to enter into self-determination contracts with federally-recognized tribes, make grants to tribes and otherwise transfer control from agency to tribe in areas such as education.[174]

Thus, in the wake of *Brown*, federal legal narratives displayed minority identity-awareness and were consistent with a substantive version of equality which admitted and tried to remedy de facto inequalities attracted to group identity. Since the Marshall Trilogy, a massive body of federal law has recognized the unique

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[172] Indian Self-Determination and Education Assistance Act of 1975, 25 USC §§450-458, also known as PL 93-638.

[173] 25 USC §450, "Congressional statement of findings" reads:

"(a) Findings respecting historical and special legal relationship, and resultant responsibilities

"The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

"(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

"(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

"(b) Further findings

"The Congress further finds that—

"(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

"(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

"(3) parental and community control of the educational process is of crucial importance to the Indian people".

[174] 25 USC §§458-458e, Part C, "Indian Education Assistance".

historico-legal context of certain indigenous identity-aware preferences. Although remedial, the *Mancari* preference is sourced in residual self-determination, seemingly exceeding equal protection analysis.

2.4 THE POWER OF EVERYONE/NO-ONE: LIMITS OF THE EXCEPTIONS

> *Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality.*[175]

Given these features, *someone* and *indigenous* narratives seem to have a significant capacity to account for the unique historico-legal context and real-time disparities evident in *Kamehameha*. In reality, however, a *singular*, *adamant everyone/no-one* narrative, divorced from its historico-legal context, currently dominates federal law at the expense of both *someone* and *indigenous* narratives and has significantly undermined the civil rights promise of *Brown* and centuries of federal Indian law.

2.4.1 SLIM SOMEONE: THE DEMISE OF AFFIRMATIVE ACTION

Whether "put[ing] an end to an existing discriminatory practice", "compensat[ing] for past discrimination and the effects of that discrimination", attempting to increase diversity or representation in the classroom or workplace,[176] or providing "legal relief for the effects of societal bias on groups"[177] affirmative action is meant to remedy de facto disparities. State and federal law, however, increasingly rejects *Brown*'s substantive interpretation of equality and is hostile to positive measures.

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[175] *Bakke*, above n 5, at 290-291, citing *Hirabayashi v United States* 320 US 81 (1943), at 100.
[176] James Sterba "A Definition of Affirmative Action" in Cohen and Sterba, above 23, 199 at 202.
[177] Samuel Leitner and William Leitner *Affirmative action in Antidiscrimination Law and Policy: An Overview and Synthesis* (Albany, New York, State University of New York Press, 2002).

Race-neutrality rhetoric, for instance, has been persuasive among state lawmakers and voters. California has been particularly active. In 1995, the Regents of the University of California (UC) passed resolution SP-1,[178] "a policy eliminating the consideration of race, ethnicity and gender in admissions decisions for schools in the [University of California] system". In 1996, Californian voters passed Proposition 209, a state constitutional amendment "prohibit[ing] state and local agencies from granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in public education…"[179] Two years later, the state of Washington passed a similar measure, Initiative 200.[180] These resulted in the elimination of "affirmative action programs at all public colleges and universities in the two states.[181] Eight other states introduced similar measures; seven have passed.[182] Famously, the Michigan Civil Rights Initiative passed in 2006.[183]

In several states, affirmative action plans have been replaced with non-racial "Percent Plans" which have had mixed results at best.[184] Generally, while minority participation in higher education increased during the 1980s and early 1990s when affirmative action was common, it has dropped in states where bans and "'color-

[178] SP-1: Resolution of the University of California Board of Regents Adopting a Policy "Ensuring Equal Treatment" of Admissions, 20 July 1995. After significant public controversy, SP-1 was rescinded by Regents Policy 4401: Policy on Future Admissions, Employment, and Contracting (Resolution Rescinding SP-1 and SP-2), 16 May 2001, found at http://regents.universityofcalifornia.edu/governance/policies/4401.html. Although intended to increase diversity, the policy was still subject to state law similar to the previous ban.
[179] California Proposition 209, California Civil Rights Initiative, passed 5 November 1996.
[180] The Washington Affirmative Action Ban, Initiative 200, passed 3 November 1998.
[181] See National Conference of State Legislatures "Affirmative Action" found at <<www.ncsl.org>>.
[182] The most recent being State Question 759 passed by the voters of Oklahoma in 2012: see National Conference of State Legislatures website found at: http://www.ncsl.org/issues-research/educ/affirmative-action-state-action.aspx, dated 19/09/2013.
[183] The Michigan Civil Rights Initiative or Proposal 2, ballot initiative in state of Michigan, passed 7 November 2006 and became law 22 December 2006.
[184] Merit-only programs which reserve seats at state universities and colleges for any student within the top certain percentage of the state's graduating high school seniors or their own high school. For in-depth discussion, see Catherine L Horn and Stella M Flores *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (Cambridge, Massachusetts, The Civil Rights Project at Harvard University, 2003). In California, Texas and Florida, for instance, affirmative action has been replaced with, respectively, the "Four Percent Plan", "Ten Percent Plan" and "Talented Twenty".

blind' affirmative action program[s]"[185] have been enacted. In Texas, for instance, studies undertaken at the University of Texas at Austin showed that, of smaller classes, "52 percent had no African Americans and 79 percent had one or none", and in larger classes "65 percent had no African Americans and 90 percent had one or none",[186] numbers well below previous figures. Other studies have shown that the probability and actual incidents of minority students "enrolling at public flagship universities in Texas [has] decreased considerably", as well as "the percentage of minority students taking college admission tests".[187] In 2006 in California, "UCLA located in the county with the second largest African American population in the United States…enrolled the smallest number of entering African American freshmen 'since at least 1973'" owing to racially-neutral admissions policies.[188]

Proposition 209 has had a dramatic effect on Native Americans particularly. According to Fletcher et al:

> American Indian freshman enrolment at UCLA declined by *one-third*. American Indian enrolment in all of the University of California schools declined by *one-half*. Minority law school admissions at Boalt Hall (UC Berkeley law school) fell by *two-thirds*, but American Indian admission at Boalt Hall *declined to zero*. American Indian enrolment for all the University of California law schools declined by a full *one-half*.[189]

IN THE SUPREME COURT

In federal courts, affirmative action policies have been targeted since the 1970s in *reverse discrimination* suits where members of non-minority groups have hijacked

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[185] Mariana Alfonso and Juan Carlos Calcagno *Minority Enrollments at Public Universities of Diverse Selectivity Levels under Different Admission Regimes: The Case of Texas* (Washington, DC, Research Department, Inter-American Development Bank, 2007) at 4.
[186] University of Texas at Austin, "The University of Texas at Austin proposes inclusion of race as a factor in admissions process", posted 24 November 2003, found at http://www.utexas.edu/news/2003/11/24/nr_admission/.
[187] Alfonso and Calcagno, above n 185, at 4-5. Numbers for Hispanic Americans are similarly low and particularly concerning given current trends in the actual demographics of the state of Texas where "whites are no longer in the numerical majority".
[188] Matthew Fletcher, Kathryn Fort and Joy Grow "The Michigan Civil Rights Initiative: How Could It Impact Michigan Indian People" (Michigan State University College of Law, Indigenous Law and Policy Center Working Paper Series 2006-02, 2 October 2006), at 7-8.
[189] Ibid, at 8. Authors' emphasis.

civil rights legislation designed to specifically protect African-Americans in order to "'compete for a share of" the "opportunities" [190] allegedly distributed to minorities. As if resurrecting the *Civil Rights Cases* and *Plessy*, the focus has changed from remedying intentional discrimination against African-Americans to preventing inadvertent, debatable disadvantage against the majority. Various decisions have reduced actual discrimination to differential treatment and ignored the unique historico-legal context of constitutional amendments and legislation and actual disparities which defy constitutional guarantees.

In *DeFunis v Odegaard* (1974),[191] a non-minority student, Marco DeFunis, was unsuccessful in gaining law school admission when minority students with lower scores were under a policy which, at a certain stage, considered minority applicants separately. [192] DeFunis alleged a violation of Fourteenth Amendment equal protection.

In their advisory opinion,[193] the majority of the Court refused to comment on the substantive issues. In dissent, however, Justice Douglas with Justice Brennan argued race neutrality:

> There is no constitutional way for *any* race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites creating arrogance instead of humility and by encouraging the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of the fact; nor is he subject to any *disability*, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its *individual* merits in a *racially neutral manner*.[194]

Ultimately, the dissent equated the separate track with a racial quota system "fraught with dangers" because it implied "favoured treatment" for a particular group and its membership.[195]

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[190] Edward Kellough *Understanding Affirmative Action: Politics, Discrimination and the Search for Justice* (Washington, Georgetown University Press, 2006), at 3.
[191] *DeFunis v Odegard* 416 US 312 (1974).
[192] Specifically, African-Americans, "Chicanos", Filipinos and Native Americans. Compare with arguments of plaintiff in *Fisher*, above n 7.
[193] Because of interim relief from an earlier court, DeFunis was only a semester away from graduation when his case reached the Supreme Court making his admission a moot point.
[194] At 336-337.
[195] At 338. Their honors' dissent is abstracted. Even as positive measures were being ordered by federal courts, the opinion affirmed a highly formalized and historically abstract version of equality.

McDonald v Santa Fe Trail Transportation Co (1976)[196] took place in the context of private employment.[197] The decision affirmed the premise of *DeFunis* in holding that section 1981 "prohibits racial discrimination…against white persons as well as non-white persons".[198] Despite the origins of section 1981 in the post-slavery Civil Rights Act of 1866 and its virtually unaltered text from that time, the Court concluded that:

> [s]ection 1981 prohibits racial discrimination in private employment against white persons as well as nonwhites, and this conclusion is supported both by the statute's language, which explicitly applies to "All persons," and by its legislative history. While the phrase "as is enjoyed by white persons" would seem to lend some support to the argument that the statute is limited to the protection of nonwhite persons against racial discrimination, the legislative history is clear that the addition of the phrase to the statute as finally enacted was not intended to eliminate the prohibition of racial discrimination against whites. [199]

Given section 1981's legislative history, *McDonald* ignored the unique historico-legal context of section 1981 and the identity-specific history of slavery and segregation which it was specifically drafted to respond to. It is difficult to imagine how the plaintiffs could be given "the same right…as is enjoyed by white citizens" when they were already 'white citizens'. Essentially, their argument was not that they had not been treated as another white employee would have been but that they wanted the same immunity, privilege or treatment as their *African-American* co-worker. Equal protection had moved from parity with the white race to parity with the minority.

Two years later, another non-minority student claimed discrimination in similar circumstances to DeFunis when less qualified minority students under a separate

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Having discussed slavery and its burdens, the dissent nonetheless attempted to paint that history as equally detrimental to whites. The dissent also equates a remedial measure for actual disparities which might inadvertently disadvantage an individual with intentional racial discrimination designed to perpetuate inequalities—and, by extension, the blatant injustices of slavery and segregation. The homogenous or anonymous individual has priority over the racial minority member who has been the historical target of identity-attracted discrimination. Finally, the opinion presumes that identity-blindness will create a neutral starting point for equality despite gross historic and ongoing disparities.

[196] *McDonald v Santa Fe Trail Transportation Co* 427 US 273 (1976).

[197] The petitioners in the case were two Anglo American employees who had been caught with another African American employee in wrongdoing. They had been dismissed but he had not.

[198] At 278-279

[199] At 274. See discussion at 285-296. The Ninth Circuit Court of Appeals in *Kamehameha Schools* would later note that the Supreme Court in *McDonald* "avoid[ed] the constitutional questions implicated by its broad reading of the statute" and could not pinpoint the Thirteenth Amendment as "the source of Congress's power to prohibit all private discrimination against whites" under section 1981: *Kamehameha*, at 8937-8938.

admissions process which included apparent quotas. In *Regents of University of California v Bakke* (1978),[200] the Supreme Court outlawed the use of racial quotas and using separate tracks for such admissions. While public educational institutions could continue to use race as a factor in admissions, such policies would be subject to the highest level of judicial review—strict scrutiny.

Ironically, the *Bakke* majority relied on the Japanese-American internment cases of *Hirabayashi v United States* (1943)[201] and *Korematsu v United States* (1944)[202] which established that "[r]acial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny".[203] 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.[204] 'Compelling' required that the Court weigh the value of policies on a case-by-case basis[205] 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. [206]

In *Bakke*, the majority of the court concluded that the policy was compelling because it furthered a government interest in diversity but did not meet the second criteria because it denied Bakke the opportunity to compete for a spot in the medical

[200] *Bakke*, above n 5.
[201] *Hirabayashi,* above n 175.
[202] *Korematsu v United States* 323 US 214 (1944). The argument could have been made that anyone except members of the four minority groups preferred in the UC Davis admissions policy might be disadvantaged by the policy as Bakke had thereby making it impossible to identify a single racial group or suspect classification. In *Hirabayashi* and *Korematsu*, of course, the discrimination was not the unintentional by-product of a remedial policy but explicit de jure discrimination aimed at a specific group highly identified by their *ethnicity* rather than their *race*. Though a few members of other Asian ethnic groups were also interned, Japanese Americans rather than Asian Americans generally were targeted in internment.
[203] Both cases discussed in *Bakke*, at 281-287. Those cases represent the last time that Supreme Court upheld an intentional or de jure measure. *Adarand Constructors Inc v Peña* 515 US 200 (1995) has since established that all governmental racial classifications must be analysed by strict scrutiny.
[204] Ironically, strict scrutiny still approved the internment of Japanese Americans, an act now considered to be a significant act of discrimination and injustice, one for which the federal government has apologized for in much the same way it has to Native Hawaiians for the overthrow and annexation, but also tried to redress through financial reparations: see Eric K Yamamoto and Ashley Kaiao Obrey "Reframing Redress: A 'Social Healing Through Justice' Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives" (2009) 16(1) Asian Am LJ 5, at 5-72.
[205] Allan Ides and Christopher May *Constitutional Law and Individual Rights* (3rd ed New York, Aspen Publishers, 2004), at 210.
[206] *Bakke*, at 287-320.

school, and the goal of diversity might be met another way.[207] Ultimately, the majority also rejected the distinction between "benign" racial classifications and others in *United States v Carolene Products* (1938)[208] Footnote Four which seemed to support a lower, rational basis level of judicial review where policies were meant to protect, or remedy discrimination against, a "discrete, insular minority" rather than aimed at them.[209]

Justice Powell was the deciding vote in the tight 5-4 majority which invalidated the admissions policy and ordered Bakke's admission.[210] That opinion reflects a historically and substantively unaware *everyone/no-one* narrative.

Rejecting remediation wholesale, Justice Powell opined that "benign" discrimination against a white person could not turn "[t]he clock of our liberties…back to 1868".[211] Although noting the particular history of the passage of the Fourteenth Amendment,[212] Justice Powell opined:

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[207] At 287-299. A minority of four judges would have upheld the policy as constitutional because of its remedial purpose and applied an intermediate level of scrutiny which required only that the state demonstrate an "important" purpose for the admissions policy and that it be "substantially" related to that purpose: at 278, per dissent.

[208] *United States v Carolene Products* 304 US 144 (1938), Footnote Four, perhaps the "most famous footnote in US legal history": Felix Gilman "The Famous Footnote Four: A History of the *Carolene Products* Footnote" 46 South Texas Law Review 163, at 165. The footnote actually introduced the concept of two-tiered judicial review in terms of equal protection analysis which gave rise to the current levels of judicial review: rational basis which requires the defendant to prove a legitimate government in the law or policy, intermediate and strict which requires defendants to prove a compelling government interest in the law or policy and the narrow tailoring of the law or policy to furthering that interest: see *Wygant v Jackson Board of Education* 476 US 267 (1986).

[209] In *Carolene Products*, the Supreme Court applied a lower, rational basis review which presumed the constitutionality of the law or policy in question to the economic regulation at issue in the case. However, Footnote Four, part of the majority opinion written by Justice Harlan Stone, recognized that legislation aimed at "discrete and insular minorities" was an exception to rational basis review and would trigger heightened scrutiny. Notably, the footnote says nothing about either outright discrimination aimed at or differential treatment which inadvertently disadvantages a member of the majority. Also see David A Strauss "Is *Carolene Products* Obsolete?" (2010) U Ill L Rev 1251.

[210] A minority of four judges, including Brennan J, would have denied Bakke's admission, upheld the policy as constitutional because of its remedial purpose and applied an intermediate level of scrutiny which required only that the state demonstrate an "important" purpose for the admissions policy and that it be "substantially" related to that purpose: see *Bakke*, at 278, per dissent.

[211] At 294.

[212] At 285: "The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color blindness pronouncements cited in the margin at n.19 generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs. [n20] There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment".

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the *same* protection, then it is not equal.[213]

Justice Powell wrestled semantically with terms such as "minority" and "majority" and rejected what he called the "'two-class theory' of the Fourteenth Amendment" and the notion that the Equal Protection Clause had any "special wards".[214] Also rejecting disparate impact, he equated affirmative action with unfair advantage rather than any levelling of the playing field:[215] "Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups."[216]

The majority opinion in *Bakke* preserved the possibility that diversity in education and in fields such as medicine and law could constitute a compelling government interest. Later, *City of Richmond v JA Croson Co* (1989)[217] would establish that the remedying of past racial discrimination might be another,[218] but educational institutions now had to squeeze any preference for race or ethnicity into a very small box.

A Fifth Circuit Court of Appeals case, *Hopwood v Texas* (1996),[219] increased tensions further, taking *Bakke*'s race-neutrality to its logical conclusion: use of race as a factor in admissions at all violated the Fourteenth Amendment. *Hopwood* affected admissions throughout the Fifth Circuit's jurisdiction covering Texas, Louisiana and Mississippi, a significant chunk of the American South. *Bakke*, a Supreme Court case, was still the authority, but affirmative action was in trouble.

In 2003, two Supreme Court cases—*Gratz v Bollinger*[220] and *Grutter v Bollinger*[221]—abrogated *Hopwood* where racial quotas are not used. The cases again pitted individual Fourteenth Amendment rights against public interest in

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[213] At 289.
[214] At 295.
[215] At 299.
[216] At 298. Again, the implication is that inadvertent discrimination and debatable disadvantage somehow equate with what Yamamoto and Betts have called "centuries of anti-black apartheid": Yamamoto and Betts, above n 1. Also see discussion in *Grutter*, above n 6, at 323-324, in terms of Powell J's rejection of the ground of remediation for past discrimination at 323-324.
[217] *City of Richmond v JA Croson Co* 488 US 469 (1989).
[218] Though the city's affirmative action policy failed to meet the narrow tailoring requirement.
[219] *Hopwood v Texas* 78 F 3d 932 (5th Cir 1996).
[220] Cited above n 6.
[221] Cited above n 6. Together, the so-called 'University of Michigan cases'.

diversity, and petitioners relied on Title VII and s 1981. Delivered the same day, the decisions relied heavily on Justice Powell's reasoning in *Bakke*.

In *Gratz*, the Court found that the University of Michigan's freshman admissions policy which awarded a certain amount of points to an applicant if they were non-white[222] was *not* constitutional. Although the policy's goal to reach "critical mass[223] was a compelling government interest, it was not narrowly tailored enough to that goal as race was given a higher percentage of points making it a "decisive factor".[224] The majority opinion, delivered by Chief Justice Rehnquist, approved Justice Powell's requirement that race could be "a plus" but all of an applicants' other qualities had to be given some weight and worthiness for admission assessed holistically on an *individual* basis.

The petitioner in *Grutter* similarly argued that race was a "' predominant' factor" in the admissions policy of the University of Michigan Law School, but a slim majority (5-4) of the Court found the policy narrowly tailored to the compelling government interest of increasing diversity.

The majority opinion, delivered by Justice O'Connor, followed *Bakke* in holding that a narrowly tailored plan must: not "insulate" minority applicants from the competition of other qualified candidates;[225] must allow for "flexibility" and individualization;[226] must not harm non-minority applicants unduly; and be limited in time—that is, be temporary until another race-neutral policy which will achieve the same results is discovered.[227] The law school's policy considered academics, talents and ability to contribute important, as well as grade point average and LSAT scores, but allowed the school to holistically note other aspects of a student's background including soft variables such as "enthusiasm" for learning. Race or ethnic group membership was a "plus factor" but not the only factor determinative of diversity in a matrix of considerations.[228] Additionally, the law school had in

[222] The policy awarded 20 points to an applicant if they were non-white in addition to points for athletic ability (20 points), essay (5 points), and leadership (up to 5 points).
[223] Or "meaningful representation" of minorities in the student body. Definition from *Grutter*, at 318, but similar reasoning given for freshman admissions policy in *Gratz*.
[224] Actually, race carried the same amount of consideration as athletic ability.
[225] *Grutter*, at 334 and 335.
[226] *Grutter*, at 324-325 and 334.
[227] See Ginsburg and Breyer JJ's concurrence in *Grutter*, at 344.
[228] *Grutter*, at 314-316 and 337-339.

"good faith" sought for a race-neutral alternative to their race-conscious program.[229] Thus, the policy "bears all the hallmarks of a narrowly tailored plan".[230]

Fisher v University of Texas at Austin[231] "did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met",[232] but affirmative action now seemingly hung by the thread of diversity submerged in a matrix of admission factors. As weak as diversity is,[233] however, any use of race may soon be finished. In *Schuette v Coalition to Defend Affirmative Action*, the Supreme Court upheld the constitutionality of the Michigan Civil Rights Initiative 2006.[234]

Despite its fundamental role as the supreme interpreter of equal protection and substantial body of jurisprudence in which it had similarly judged state and local laws, the *Schuette* majority left the fate of affirmative action to the voters, holding:

> …There is no authority in the Federal Constitution or in this Court's precedents for the Judiciary to set aside Michigan laws that commit to the voters the determination whether racial preferences may be considered in governmental decisions, in particular with respect to school admissions.[235]

In doing so, they failed to apply strict scrutiny or any judicial review to the initiative itself[236] and appeared to leave the interpretation of discrimination and equality to majoritarian bias as the *Civil Rights Cases* and *Plessy* courts had earlier.

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[229] *Grutter*, at 339-340.
[230] *Grutter*, at 334.
[231] Cited above n 7.
[232] According to the majority in *Schuette v Coalition to Defend Affirmative Action* 572 US___ (2014), per Kennedy J, at 4.
[233] Major G Coleman "Strategic equality and the failure of affirmative action law", (2012) 12(1) Int J Discr Law 27, has argued that "diversity alone is inadequate because it is non-remedial and leaves in place both white privilege and Black, Latino, Asian, and Native American disadvantage". Coleman describes "strategic equality" as "the amount of substantive equality necessary to avoid a crisis". He argues that the current crisis of disparities will continue to be exacerbated as racial minorities are predicted to outnumber the Anglo-American majority within 60 years: Coleman, at 27-28.
[234] Michigan Civil Rights Initiative, discussed above at n 184.
[235] *Schuette*, at 1. Also see majority, at 18.
[236] "This case is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. Here, the principle that the consideration of race in admissions is permissible when certain conditions are met is not being challenged. Rather the question concerns whether, and in what manner, voters in the States may choose to prohibit the consideration of such racial preference": *Schuette*, at 1-2.

In substantive terms, Justice Sotomayor writing for the dissent with Justice Ginsburg recognized that the *no-one* standard initiative "has a 'racial focus'"[237] and argued that it "changed the rules in the middle of the game" for minorities, preventing their meaningful participation in the political process.[238] As the benefit of affirmative admissions policies accrued to minorities particularly, banning them amounted to imposing burdens on those minorities which other individuals did not have to bear.[239] For Justice Sotomayor, this was another example of the majority doing what it had done throughout the nation's history and a "baffling" denial of the Court's own precedent to the contrary in similar cases.[240] The majority also ignored the "the unfortunate effects of centuries of racial discrimination", the "long history of racial minorities' being denied access to the political process", and current realities of "stark socioeconomic disparities" between races.[241]

Justice Sotomayor concluded that the "decision eviscerates an important strand of our equal protection jurisprudence".[242] It also appears to signal that "the debate over affirmative action in Michigan [is] effectively dead, and efforts to ban it in other states can get started".[243] In a "baffling and ominous"[244] recent development, the Texas admission policy previously subjected to strict scrutiny in *Fisher v University of Texas at Austin* (2013)[245] is set to go before the Supreme Court for a second time later this year, despite also having passed strict scrutiny again in the Fifth Circuit last year.

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[237] At 15.
[238] At 13. In substantially aware terms, Sotomayor J likened the affirmative action ban to a race with two competitors where one competitor was required to run twice as far as or leap obstacles which the other did not.
[239] At 15. Sotomayor J noted, at 20, that "on issues dealing with racial and ethnic matters, studies show that racial and ethnic minorities do end up more on the losing side of the popular vote'). In fact, '[i]t is difficult to find even a single statewide initiative in any State in which voters approved policies that explicitly favour racial and ethnic minority groups'."
[240] The dissent would have depended on two precedents in which the Supreme Court had applied strict scrutiny where voters successfully changed laws to prohibit affirmative action measures taken to desegregate, respectively, housing and a school district: *Hunter v Erickson* 393 US 385 (1969); and *Washington v Seattle School Dist, No 1* 458 US 457 (1978). These cases were distinguished by the majority as having involved intentional discrimination but appear to "mirror[]", according to Sotomayor at 12, the circumstances of the present case. As such they violate the fundamental principle of stare decisis: Sotomayor J at 23-24.
[241] At 45 and 46.
[242] At 58.
[243] David Jesse "As justices ponder Michigan's affirmative action ban, observers will eye Kennedy" *Detroit Free Press* (online ed, Detroit, 13 October 2013).
[244] See Adam Liptak "Supreme Court to Weigh Race in College Admissions" *NY Times* (online ed, New York, 29 June 2015).
[245] *Fisher*, above n 7.

The assault on a very *slim someone* narrative continues, revealing the power of a *singular everyone/no-one* narrative divorced from the burdens of history and its identity-aware purpose. Ironically, this narrative ignores de facto discrimination and disparities in much the same way as earlier Jim Crow laws and *Plessy* did and is philosophically contrary to the Civil Rights era law upon which it is argued. One commentator's description of this series of decisions as "a quiet reversal" of *Brown*[246] may be understated.

Eric Yamamoto and Catherine Betts have described this trend as "a cultural and political backlash against the gains of minorities, women, and immigrants", "'re-segregating' America", and the "second broken civil rights promise".[247] In contrast to the conservative elements who backed the earlier segregation, the "New Federalism":

> …employed the language of "equality," "colorblindness," and "responsibility." By emphasizing "fairness to the individual" and "states' rights," the New Federalists purported to embrace civil rights. Although the New Federalism changed its language, it was and remains today the old conservatism in substance.[248]

Chris Iijima similarly wrote after *Hopgood* that:

> the colorblind myth of racial vision confuses the ideological end to racial hierarchy with what already exists…Indeed, 'denial is a pervasive symptom of contemporary American racism.' And, of course, the denial of reality merely perpetuates the condition of racial subordination.[249]

[246] Gary Orfield quoted in Leitner and Leitner, above n 177, at 121.
[247] The first being segregation post-Reconstruction. Yamamoto and Betts refer to the civil rights gains from *Brown* through the 1960s as the "Second Reconstruction": Yamamoto and Betts, above n 1, at 554.
[248] At 554-555.
[249] "Unfortunately, the colorblind myth of racial vision confuses the ideological end to racial hierarchy with what already exists. That is, the prescriptive ideal of a 'colorblind' society, in which racism and White supremacy are eradicated, has been transformed by judicial fiat into 'a condition of societal denial', creating the illusion that racial hierarchy has been eliminated. Indeed, 'denial is a pervasive symptom of contemporary American racism.' And, of course, the denial of reality merely perpetuates the condition of racial subordination.": Chris Iijima "Swimming from the Island of the Colorblind" (1997) 17 Loy LA Ent L Rev 583, at 591.

2.4.2 ARBITRARINESS

Despite consistent recognition, the Native American exception is also undermined by three historico-legal realities: the double-edged nature of the plenary power, the inherent prejudice in the trust relationship and judicial activism.

The plenary power is significant and two-edged. In *United States v Jicarilla Apache Tribe* (2011),[250] the Supreme Court cautioned that the fiduciary/trust analogy "cannot be taken too far". Despite the inherent nature of tribal sovereignty:

> [t]he United States retains plenary authority to divest tribes of any attributes of sovereignty. Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.[251]

Essentially, Congress can "assist or destroy a tribal government as it sees fit".[252]

On several occasions, it has unilaterally *terminated* its relationships with tribes officially via legislation. During the Termination Era (1953-1968) 109 tribes were terminated[253] and previous terminations coincide with Assimilation Era federal Indian policy which justified boarding school abuses and genocide. Termination is historically linked with an *everyone/no-one* standard, its admitted purpose to make Native Americans subject to the same laws as everyone else. Similarly, it results in the loss of tribes' political status as "sovereign, self-defining peoples",[254] services only available to federally-recognized tribes, their reservation or land base, and the exercise of self-government. Its members become subject to state law[255] and an *everyone/no-one* equality narrative.

The trust relationship is defined by federal treaties which can also be abrogated—that is, unilaterally altered or discarded with little or no notice despite treaty

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[250] *United States v Jicarilla Apache Nation* 564 US ___, 131 S Ct 2313 (2011). In the earlier case of *United States v Alcea Band of Tillamooks* 329 US 40 (1946), at 54, the Supreme Court had held that "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute". It is, nevertheless, substantial.
[251] At 11.
[252] Pevar, above n 116, at 58.
[253] Although some were reinstated later, "[n]othing causes Indian tribes to lose more rights and protections than termination": Pevar, at 67.
[254] Robert Williams "The Algebra of Federal Indian Law: The Hard Trail to Decolonizing and Americanizing the White Man's Indian Jurisprudence" (1986) Wis L Rev 219, at 260.
[255] Pevar, at 67.

terms[256]—and legislation which can be unilaterally repealed under the plenary power. In abrogation, the government may simply fail to keep its "word" or promise,[257] a characteristic inconsistent "with perfect good faith towards the Indians"[258] but entirely consistent with the plenary power. In *Jicarilla*, the Supreme Court opined:

> The Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a "trust," …that trust is defined and governed by statutes rather than the common law. …Congress may style its relations with the Indians a "trust" without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is "limited" or "bare" compared to a trust relationship between private parties at common law.[259]

This is particularly true when the federal government is acting as a "sovereign" in its own interests.[260] Ultimately, the trust relationship is a "self imposed policy" in which the federal government "has charged *itself* with moral obligations"[261] and, consequently, not legally enforceable against Congress.[262]

The federal government may itself discriminate between groups of Native Americans, for instance, by requiring a certain blood quantum for participating in a federal program benefitting Native Americans,[263] in distribution of tribal property at termination,[264] or in determining federal recognition generally, as in *Delaware Business Committee v. Weeks* (1977).[265] Following *Delaware*, an equal protection suit against the government is "justiciable" but, under *Mancari*, only subject to the lowest level of judicial scrutiny—rational basis. The "special treatment" need only

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[256] See, for instance, *Lone Wolf v Hitchcock* 187 US 553 (1903), discussed in Walter Echo Hawk *In the Courts of the Conqueror: The 10 Worst Indian Cases ever decided by the Supreme Court* (Golden, Colorado, Fulcrum Publishing, 2010).
[257] Supreme Court Justice Hugo Black who dissented in *Lone Wolf*, quoted in Pevar, at 50.
[258] Canby, above n 139, at 93.
[259] *Jicarilla*, at 10, citing *United States v Navajo Nation* 537 US 488 (2003), at 506; and *United States v Mitchell* 445 US 535 (1980), at 542.
[260] *Jicarilla*, at 10-13.
[261] *Seminole Nation v United States* 316 US 286 (1942), 296–297. My emphasis.
[262] *Menominee Tribe v United States* 391 US 404 (1968). Federal courts cannot "order Congress to implement a treaty or prevent Congress from abrogating one".
[263] *Delaware Tribal Business Comm v Weeks* 430 US 73 (1977), at 84.
[264] See *Ute Distribution Corp v Ute Indian Tribe* 149 F 3d 1260 (10th Cir 1998).
[265] In *Delaware*, one of three branches of the same tribe lacked the federal recognition, benefits and services afforded the other two.

"be tied rationally to the fulfillment of Congress' unique obligation toward the Indians",[266] again, a much lower standard than a *Bakke*-like remedial measure.

The special trust relationship itself may be inherently prejudicial. Robert Williams has written:

> Numerous late nineteenth and early twentieth century Supreme Court opinions freely extend Marshall's original limited recognition of an overriding sovereignty of the federal government in Indian affairs to entail a *superior* and unquestionable power on the part of Congress unrestrained by normal constitutional limitations…[267]

This jurisprudence has attributed a "free reign" and "broad discretionary powers" to Congress which Williams links to ongoing, fundamentally prejudicial presumptions about Native Americans—that is, a "legal consciousness that at its core regards tribal peoples as normatively deficient and culturally, politically and morally inferior to Europeans". [268]

Such thinking is evident in the Marshall Trilogy, where Native Americans are frequently described as fierce, warlike and incapable of civilization but also child-like—the 'ward', 'pupil' or 'dependent'. Such terms originate in conquest, colonialism and the "duality" of international law at the time. [269] The "irrationality"[270] of such children justifies "exercise of a guardianship 'to protect them and their property and personal rights'". According to Williams:

> After rationalizing this hierarchal and totalizing subjugation of the Indian on the basis of a superior rational capacity exercised by the European, the only matter left to the Court [in the Marshall Trilogy] to determine was which branch of government possessed the power to exercise this subrogating power.[271]

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[266] *Mancari*, at 555, discussed in *Delaware*, at 83-85. Also see discussion in Pevar, at 61. In *Delaware*, such discrimination was allowed despite evidence "that Congress deliberately limited the distribution under the Act to" the other branches of the tribe merely for convenience—that is "to avoid undue delay, administrative difficulty, and potentially unmeritorious claims": *Delaware*, at 87-89.

[267] Williams, above n 254, at 260-265.

[268] In federal-Indian relations and justified "unquestioned abrogation and unilateral determination of tribal treaty and property rights": Williams, ibid.

[269] The language runs through all three decisions and is characterized by "one code applying to colonizers, another to the colonized": Ward Churchill *Perversions of Justice: Indigenous Peoples and Anglo-American Law* (San Francisco, City Lights, 2003), at 39.

[270] Williams, at 260-265.

[271] Williams, at 260-265.

Judicial activism also undermines the indigenous narrative. The current phase of federal-Indian relations has been coined the 'Era of Tribal Self-Determination', and since 1969 the executive and legislative branches of the government seemed to have publically pursued tribal "self-government and economic development"[272]. Despite Congress's "exclusive" and "preemptive" [273] plenary authority, however, the Supreme Court has actively struck down Native American rights in recent decades.[274]

It has often done so via the doctrine of implied repeal[275] by which:

> [T]he Court acts to supersede an existing law, rule, or treaty provision *without* an express congressional directive to do so. The Court, in essence, assumes the power to act in a political arena—Congress's arena of authority over Indian affairs—without a directive from Congress to do so. The Court…assumes that a later law repeals, by implication, an earlier treaty if the two appear to be in conflict.[276]

As in the case of termination and abrogation, implied repeal has resulted in a significant loss of legal rights associated with self-determination.[277] Such decisions appear to reject the Court's own precedent,[278] treaties, time-worn

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[272] Positive developments have included the Indian Self-Determination and Education Assistance Act of 1975 which gave tribes the right to administer federal Indian programs themselves, the Indian Child Welfare Act of 1978 which protects Native American children from being taken from their homes by state agencies and courts, the Indian Gaming Regulatory Act of 1988 which has allowed tribes to produce revenue through gaming, and the Indian Health Care Improvement Act which gives tribes more self-determination over healthcare on reservations: Pevar, at 13.

[273] David Wilkins and Tsianina Lomawaima *Uneven Ground: American Indian Sovereignty and Federal Indian Law* (Norman, Oklahoma, University of Oklahoma Press, 2001), at 98-116.

[274] As Pevar points out, "Since the 1970s, Indian interests have lost more than 80 percent of the cases decided by the Court, a worse success rate than convicted criminals have fared on the merits of their cases": Pevar, at 14.

[275] *The Cherokee Tobacco* (1870) case established that "An act of Congress may supersede a prior treaty" or abrogate it without Congressional approval or even intent: *The Cherokee Tobacco* 78 US 616 (1870), at 78.

[276] Wilkins and Lomawaima, at 144-145.

[277] Including: removal of Indian children by the state (*Decoteau v District Court* 420 US 425 (1975)); shrinking of reservation boundaries (*Rosebud Sioux v Kneip* 430 US 584 (1977)); loss of traditional hunting rights due to diminished reservation (*US v Dion* 106 S Ct 2216 (1986); loss of hunting and fishing rights generally (*Oregon Department of Fish & Wildlife v Klamath Indian Tribe* 473 US 753 (1985); and *South Dakota v Bourland* 113 S Ct 2309 (1993)); becoming subject to state criminal jurisdiction under the implied diminishing of reservation boundaries (*Hagen v Utah* 1145 S Ct 958 (1994)) or just outrightly (*Negonsott v Samuels* 507 US 99 (1993)); and inability to enforce law against non-Indians residing within tribal territory (*Atkinson Trading Company v Shirley* 532 US 645 (2001)). For other examples, see David Getches (2001) "Beyond Indian Law: The Rehnquist Court's Pursuit of State Rights, Color-Blind Justice and Mainstream Values" (2001) 86 Minnesota Law Review 267.

[278] *Shirley*, ibid, is a good example. The issue at hand was whether the Navajo Nation had the right to impose a hotel occupancy tax on non-Indians. The answer to the negative was at conflict with earlier precedent in the case of *Merrion v Jicarilla Apache Tribe* (1982) which recognized that Native American tribes had the right to regulate their land and impose taxation on non-Indians who were taking natural resources from reservation land.

principles of federal Indian law, and congressional intent to the contrary to conclude that such rights are inconsistent with the *dependent* status of tribes.[279]

Implied repeal actually may be part of a larger identity-blindness campaign aimed at undermining "meaningful"[280] tribal self-determination and imposing state law and an *everyone/no-one* standard on Native America:

> The Supreme Court has made radical departures from the established principles of Indian law. The Court ignores precedent, construing statutes, treaties, and the Constitution liberally to reach results that comport a majority of the Justices' attitudes about federalism, minority rights, and protection of mainstream values. In the process, perhaps unintentionally, the Court is remaking Indian law and revising a political relationship between the nation and Indian tribes that was forged by the Framers of the Constitution and perpetuated by every Supreme Court until now[281].

The result of such activism is the deterioration of federal Indian law as a specialized body of law and diminishing of the political relationship between tribes and the federal government.[282] In addition to this "stain on Indian rights",[283] the backlash against affirmative action itself further threatens the Native American exception.

Equal protection has historically threatened the Native American exception despite its extra-constitutionality. Carole Goldberg has described how:

> …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 termination employed the rhetoric of the budding civil rights movement, characterizing property owned by the United States in trust for tribes

[279] *Oliphant and Montana v United States* 480 US 202 (1987), at 208; and *Montana v United States* 450 US 544 (1981), at 584.
[280] Frank Pommersheim "At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty" (2010) 55 S D L Rev 48.
[281] "The Rehnquist Court seems oblivious to the discrete body of Indian law that is based on solid judicial traditions tracing back to the nation's founding….Now, these legal traditions are being almost totally disregarded: Getches, at 267-268.
[282] Getches, at 359-362. William Rehnquist was the Chief Justice of the Supreme Court from 1986 to 2005, a period coinciding with significant deterioration of affirmative action in the Court's jurisprudence and decisions. Of the nine active current Supreme Court justices, five were part of the Rehnquist Court: see "Biographies of Current Justices of the Supreme Court" found at http://www.supremecourt.gov/about/biographies.aspx, dated 6/9/14. Justice Antonin Scalia has been particularly associated with an identity-blind interpretation of equality.
[283] Ronald Steiner "Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America, by Robert A. Williams Jr.", (2006) 16(6) Law and Politics Book Review 438, at 438.

> and exempted from taxation as demeaning for Indian men who had returned from fighting in World War II.[284]

Many of these attacks have come from "[n]on-Indians seeking immediate access to Indians' natural resources" and, over a period similar to the deterioration of affirmative action, "the rhetoric has shifted from concern for equal treatment of Indians to fear of unequal treatment of whites".[285] Two examples illustrate this.

The stated purpose of the Native American Equal Rights Act 2000 (NAERA) bill was "[t]o repeal the Indian racial preference laws of the United States".[286] The term "racial" was used repeatedly in the short document and most often interjected between the words "Indian" and "preference" as if to severe the two. Laws which qualify as "Indian racial preference laws" included those "applicable to the Bureau of Indian Affairs and Indian Health Service",[287] as well as the Indian Self-Determination and Education Assistance Act[288] and the Civil Rights Act 1964.[289] If passed, the bill would have expressly repealed the very preference at issue in *Mancari* but also perhaps fatally undermined the preference fundamental to the core piece of legislation on Native American education[290] while questioning the centrepiece of civil rights legislation. The bill's sponsor appealed to "African-Americans, Asian-Americans and white Americans"—but obviously identity-blindness—when he argued that non-Indians should have the "same rights to compete for jobs at the Bureau of Indian Affairs…as Indians do" and equated the preference with "lawful discriminat[ion]".[291]

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[284] 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 the 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.

[285] Goldberg, at 944-945.

[286] See Native Americans Equal Rights Act, HR 5523, 106th Congress (1999-2000).

[287] Section 3.

[288] Section 4.

[289] Section 5.

[290] The Indian Self-Determination and Education Assistance Act (ISDEAA) is a fundamental component of tribal self-determination. It recognizes the rights of tribes to substantive measures such as funding. The ISDEAA embodies a *Mancari*-like preference for the indigenous rightsholder in education. Without the preference, the Act would seem to be nullified entirely.

[291] See Representative Curt Whedon, sponsor of HR 5523, quoted in Goldberg at 954.

While admitting that applying strict scrutiny to Title 25 "would effectively gut" it, the Ninth Circuit in *Williams v Babbitt*[292] nevertheless took time to go through the hypothetical exercise of applying it to the interpretation of a BIA-like agency of federal legislation recognizing Alaskan Native reindeer herding rights. The Court expressed "constitutional doubts" that the identity-specific preference would pass narrow tailoring, finding it "comparable to the official discrimination against African Americans that was prevalent for most of our history". While ultimately sidestepping the issue by depending on the plain language of the statute, the court's hypothetical strict scrutiny analysis occupies a significant chunk of the decision and led the court to advance the possibility that "*Mancari*'s days are numbered".[293]

2.4.3 STANDARDIZATION: THE NO CHILD LEFT BEHIND ACT 2002

While *someone* and *indigenous* narratives initially appear to have been preserved in the text of the No Child Left Behind Act 2002 (NCLB),[294] the *everyone/no-one* dominated legislation has undermined both in practice.

The NCLB is a reauthorization of the Elementary and Secondary Education Act 1965,[295] more Civil Rights-era legislation. Under Title I, "Improving the Academic Achievement of the Disadvantaged", the stated purpose of the current legislation is to:

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

[293] *Babbitt*, ibid, at 665. Kozinski J, delivering the majority opinion, relied on Stevens J's dissent in *Adarand*.

[294] No Child Left Behind Act 2002, Pub L No 107-110—Jan. 8, 2002 [NCLB]. The NCLB's successor, the S. 1177 — 114th Congress: Every Child Achieves Act of 2015, passed the Senate on 16 July 2015. Both are reauthorizations of the Elementary and Secondary Education Act of 1965, 20 USC §6301 et seq.

[295] Elementary and Secondary Education Act 1965, 20 USC §6301 et seq, which was part of Lyndon B Johnson's "war on poverty" and contemporary of the Headstart Program which provided funding and guidelines for preschools for disadvantaged children, the Bilingual Education Act 1968 which required school districts to provide appropriate programs for children needing help with English (see *Lau*), Title XI of the Education Amendments 1972 aimed at gender discrimination, and the Individuals with Disabilities Education Act 1975 which required schools to provide free and appropriate education to students with disabilities: William Hayes *No Child Left Behind: Past, Present and Future* (Lanham, New York, Toronto and Plymouth, UK, Rowman and Little, 2008), at 5-6.

> …ensure that *all* children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on State academic achievement standards and state academic assessments.[296]

The then Secretary of Education described its purpose as "to see *every* child in America—regardless of ethnicity, income or background—achieve high standards".[297] The legislation proposes to achieve this everyone goal by "align[ing]" assessment, accountability, teacher training, curriculum and resources with "challenging State standards" so that progress is measurable.[298]

In *someone* terms, however, it recognizes that this goal will not be reached until the following are met:

> needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance[299]

Also of concern is that "the achievement gap between high- and low- performing children, especially" that "between minority and nonminority students, and between disadvantaged children and their more advanced peers" is closed.[300] In substantive terms, it is meant to "target[] resources sufficiently to make a difference…where needs are greatest".[301]

Title VII of the NCLB specifically addresses Indians, Native Hawaiians and Alaska Natives. Section 7101 recognizes the special trust relationship between the federal government and Indians as a matter of "policy" and both the substantive needs and unique aspects of indigenous education. It states that:

> the Federal Government will work with…Indian tribes…toward the goal of ensuring that programs that serve Indian children are of the highest quality and provide for not only the basic elementary and secondary educational needs, but

[296] "Section 1001, Statement of Purpose" (emphasis added).
[297] Rod Paige, Secretary of Education from 2001-2005, quoted in Hayes, at 15.
[298] Section 1001.
[299] Section 1001 (2).
[300] Section 1001 (3).
[301] Section 1001 (5). It also proposes to grant "greater decisionmaking authority and flexibility to schools and teachers" to accomplish the goal, and to allow "parents substantial and meaningful opportunities to participate": see §1001 (7) and (12).

> also the unique educational and culturally related academic needs of these children.[302]

Under the Act, "Indian[s]" include members of tribes either federally, state- or self-defined—including terminated tribes—and their "descendants to the first and second degree"[303]—a standard consistent with the *Mancari* preference. Activities which meet Title VII's funding criteria include "culturally-related activities", "activities that promote the incorporation of culturally responsive teaching and learning strategies", "activities that incorporate American Indian and Alaska Native specific curriculum content", and "activities that recognize and support the unique cultural and educational needs of Indian children, and incorporate appropriately qualified tribal elders and seniors",[304] as well as, "bilingual and bicultural programs and projects".[305]

As discussed further in the next chapter, Native Hawaiian provisions incorporate the Native Hawaiian Education Act 2002[306] which recognizes the special political relationship between the federal government and Native Hawaiian people, an identity-specific history of discrimination, and the relationship between culturally appropriate education and the educational achievement of Native Hawaiian people. Beyond these indigenous peoples, no racially or ethnically identified groups are provided for.[307]

Despite these provisions, the NCLB has been heavily criticized and raises several issues in terms of narratives. It has been said that "[m]ore than any other recent event, the passage of the No Child Left Behind law has significantly affected the way we are educating our children",[308] but the NCLB is essentially *everyone/no-one* focused, part of a wider legislative framework which inherently narrates

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[302] 20 USC §7101.
[303] Section 7151(3).
[304] 20 USC §7425, "Section 7115 Authorized Services and Activities", subsections (b)(1), (8), (9) and (11).
[305] 20 USC §7441, "Section 7121. Improvement of Educational Opportunities for Indian Children", subsection (a)(1)(C).
[306] Native Hawaiian Education Act, 20 USC §7512.
[307] The only parts which come close are Title III "Language Instruction for Limited English Proficient and Immigrant Students", Section 301, where no particular nationality or ethnicity is specified, and Title X, Part C "Homeless Education", Sections 1031-1034, which specifically relates to "homeless children and youth".
[308] Hayes, above n 288, at 1.

rightsholder identity in terms of homogeneity, anonymity and parity,[309] and aimed at each student achieving minimum standards in English-medium core subjects.[310]

The NCLB required schools to make "adequate yearly progress" in what have been described as "unrealistic standards" and "unfair expectations"[311] assessed through standard tests. Failure to meet adequate progress markers in core subjects has led to "sanctions" including the withholding of funds to schools already most at risk.[312] Despite Tenth Amendment limitations on the federal government's role in education,[313] schools have been forced to prioritize "high-stakes" core, tested subjects and minimize non-core subjects.[314]

In practice, the NCLB did not deliver the hoped-for substantive impact for either minorities or indigenous people. In 2004, the Harvard Civil Rights Project found that accountability had disproportionately negative impacts on high-poverty schools and resulted in "policy churn" in high-poverty districts.[315] A 2005 study in Indiana, found that demographic factors, namely, "high percentages of minority students, free and reduced lunch, teacher student ratio, teacher experience, being geographically located in urban areas" remained the strongest predictors of schools

[309] The NCLB is one of several pieces of legislation which form the basic framework for US federal education law and policy including the Family Educational Rights and Privacy Act 1974, the Individuals with Disabilities Education Act 1975, Higher Education Opportunity Act 2008, Title II of the Americans with Disabilities Act 1990, Title IX of the Education Amendments 1972, Title VI of the Civil Rights Act 1964, and the American Recovery and Reinvestment Act 2009. Most are anti-discrimination measures based on an everyone/no-one standard and the goal of parity.

[310] See, for instance, Shiri Klima "The Children We Leave Behind: The Effects of High-Stakes Testing on Dropout Rates" (2007) 17(1) S Cal Rev L & Soc Just 3.

[311] Findings of the Harvard Civil Rights Project summarized by Teresa McCarty "American Indian, Alaska Native, and Native Hawaiian Education in the Era of Standardization and NCLB—An Introduction" (2008) 47(1) Journal of American Indian Education 1 ["Standardization and NCLB"], at 1.

[312] See Ronnie Lee Hiller *School Demographic Characteristics that Predict No Child Left Behind Sanctions in the State of Indiana* (PhD Dissertation Indiana State University 107, 2005).

[313] US Constitution, amend X reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". Under the Tenth Amendment, the federal government is only supposed to possess powers afforded it by the states. This constitutional provision is the basis of the fundamental principle of federalism. See "Laws and Guidelines" for the US Department of Education, found at http://www2.ed.gov/policy/landing.jhtml, dated 14/9/14.

[314] Klima, above n 317.

[315] Gail Sunderman and others *Listening to Teachers: Classroom Realities and No Child Left Behind* (Cambridge, MA, The Civil Rights Project at Harvard University, 2004), at 3-4. It also caused teachers to "ignore[] important aspects of the curriculum, de-emphasize[] or neglect[] untested topics, and focus attention on tested subjects". Also, "There is evidence from the survey to support the idea of 'policy churn', that is, schools in high-poverty districts, and particularly low-performing schools, are continually changing their educational programs in response to calls for reforms" to the detriment of student achievement: Sunderman at 3-4.

that were failing or those "flagged by NCLB sanctions".[316] The rigorous standards themselves seemed to have resulted in plunging pass rates which have widened the achievement gap between black and Hispanic students and their fellow Asian and White students in diverse New York City.[317] Similar figures seemingly account for a "surge in ELL [English Language Learners]" prompting criticism that the NCLB has also left *Lau*-type students behind. As these students are subjected to high-stakes testing and schools passing rates homogenously and anonymously include their scores with others, schools have begun placing students with little English proficiency in mainstream classrooms where the emphasis is on high-stakes subjects,[318] effecting what may be a not-so-quiet reversal of *Lau*.[319]

While its impact on disadvantaged minorities is concerning, Tsianina Lomawaima and Teresa McCarty have described standardization as "masquerading as a tool for equal opportunity" as it "marginalize[s] Native peoples".[320] In 2005, the National Indian Education Association (NIEA)[321] raised concerns regarding the NCLB's impact on indigenous education including: its "rigid[ity] and tend[ency] to leave children behind"; lack of resources required to make progress; and that "([a]ny) success has clearly been at the expense and diminishment of Native language and cultures" as teachers were forced to focus on high-stakes English-medium

[316] Hiller, above 319.
[317] Sharon Otterman and Robert Gebeloff "When 81% Passing Suddenly Becomes 18%", NY Times (online ed, New York, 1 August 2010).
[318] See Mary Ann Zehr "English Learners Pose Policy Puzzle" (2009) 28(17) Education Weekly 8, at 8. The NCLB replaced the *Lau*-era Bilingual Education Act 1968 with the English Language Acquisition, Language Enhancement, and Academic Achievement Act 2002 and shifted the emphasis from bilingualism to English language proficiency. As these students are also subject to high-stakes testing and schools passing rates homogenously and anonymously fail to differentiate between these students and others, the practical effect may be a 'quiet reversal' of *Lau* as students with little English proficiency are placed in mainstream classrooms where the emphasis is on high-stakes subjects.
[319] Moran has also discussed what she calls the "ritual dismemberment [of *Lau*] in the courts" in Supreme Court cases including *Guardians Ass'n v Civil Service Commission* 463 US 582 (1983) where intention to discriminate did matter and effect did not; and *Alexander v Sandoval*, 532 US 275 (2001) which limited private rights of action in terms of the disparate impact provisions of Title VI: Moran, above n 107.
[320] Tsianina Lomawaima and Teresa McCarty "When Tribal Sovereignty Challenges Democracy: American Indian Education and the Democratic Ideal" (2002) 39 American Educational Research Journal 279, at 299.
[321] NIEA produced their *Preliminary Report on No Child Left Behind in Indian Country* on the de facto effects of the NCLB on the achievement and experience of American Indian, Alaska Natives and Native Hawaiians after conducting eleven hearings across the nation, including in Hawaii, where participants included "[t]ribal leaders, administrators, school board members, teachers, parents, and students": *Preliminary Report on No Child Left Behind in Indian Country* (National Indian Education Association, 2005), at 1-2.

subjects.[322] While approving accountability, participants noted the NCLB's irrelevance to the needs of indigenous learners and the "incredible mismatch between the programs NCLB supports, and what we know works with Native American children".[323] In practice:

> …The focus on testing and accountability in conjunction with insufficient funding has had unintended consequences. Title VII funding has been diverted to preparing children for standardized tests and to provide remedial education.[324]

McCarty has noted similarly that the:

> NCLB's provisions are, on the surface, reasonable and attractive…In practice, these activities are highly constrained by a rigid and punitive accountability systems that fails to consider improvements over previous performance, is blind to racial discrimination and attendant schools funding inequities, and uses English standardized tests as the sole measure of proficiency.[325]

Overall statistics post-NCLB are concerning. For instance, the narrowing of the gap between Anglo-American and African-American children evident near the end of the twentieth century has stalled.[326] The biggest gap between the highest-performing Anglo-American students and the lowest-performing Native American children is either about the same or has widened.[327] Ironically, despite its identity-specific provisions relating to Native Americans and focus on substantive change, the NCLB overarching everyone/no-one focus appears to undermine both in practice.

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[322] NIEA, 7-8.

[323] They also noted that the standards seemed to have been created "somewhere far away from Indian reservations and where Indian children live" and to show little input from indigenous people: NIEA, 8-9 and 10.

[324] Tanya Lee "No Child Left Behind Act: A Bust in Indian Country" *Indian Country* (online ed, Verona, New York, 7 March 2012).

[325] McCarty, "Standardization and NCLB", above n 318.

[326] See findings of Paul Barton and Richard Coley in *The Black-White Achievement Gap: When Progress Stopped* (Princeton, NJ, The Policy Information Center, 2010). Perhaps not coincidentally, growth continued into the 1990s but stalls about the same time that affirmative action begins to lose favor with the Courts and voters.

[327] See Lee. Earlier state data collected by David Garcia in 2008 suggested that, in Arizona, the NCLB has produced "mixed messages" which appear "positive" but must be tempered: David Garcia "Mixed Messages: American Indian Achievement Before and Since the Implementation of No Child Left Behind" (2008) 47(1) Journal of American Indian Education 136. Garcia has questioned a spike in 2005 test scores which may have skewed the results and remains concerned that while "American Indian students are closing the achievement gap" in some grades, "[i]n other subjects and grades, such as eight-grade mathematics and third-grade reading, American Indian students not only started out behind their White peers but are being left further behind their White peers since NCLB": Garcia, at 149. The 2011 national data suggests that even where Native American students are improving the gap is still about the same or growing: see Lee.

2.4.4 THE CONSTITUTIONAL GUARANTEE/REALITY GAP

These results should be put into further context.

A 2010 study identified African Americans as having the highest rates of poverty, a factor shown to predict educational underachievement.[328] In schools, eligibility for school lunch subsidization, another indicator of poverty, was highest among Hispanics, African Americans and American Indian/Alaska Native learners.[329] Schools with higher percentages of African American students also have much higher rates of teachers lacking qualifications in their taught subjects.[330] African American statistics in education fundamentally translate into higher unemployment rates, fewer bachelor's degrees and significantly lower median incomes than Anglo Americans.[331]

Native American statistics, however, may be more troubling. Other recent sources attribute the highest rates of poverty in the United States to Native Americans.[332] A 2008 Harvard study[333] found that while self-determination policies were having a positive impact on educational outcomes for Native Americans, "Indian schoolchildren are at or near the greatest risks of receiving poor education and underperforming at the elementary and secondary levels."[334]

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[328] Thirty-four percent followed closely by American Indians/Alaska Natives on 33 per cent: Angela Kewal Ramani and others *Status and Trends in Education of Racial and Ethnic Groups* (Washington DC, National Center for Education Statistics and U.S. Department of Education, 2010), at iii.

[329] Seventy-seven per cent for Hispanic, 74 per cent for African American and 68 per cent for American Indian/Alaska Native: Ramani and others, at iv.

[330] Ramani and others, at iv

[331] Ramani and others, at vi-vii. The study also indicated that public schools remain segregated in fact as schools where the enrolment was at least half White enrolled 87 percent of all White students: Ramani and others, at iv.

[332] Over a five-year period, the national poverty rate for "American Indian and Alaska Natives alone" was 27.0 per cent compared with "Blacks or African Americans" at 25.8 per cent: Suzanne Macartney, Alemayehu Bishaw and Kayla Fontenot Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007-2011 (Washington DC, US Census Bureau, 2013), Figure 1 "U.S. Poverty Rates by Race and Hispanic or Latino Origin: 2007-2011", at 1-2. The same figures showed that in some states Native American/Alaska Natives displayed poverty rates of 30 per cent. Some reservations, however, have poverty rates of 43 per cent: see Jens Manuel Krogstad "One-in-Four Native Americans and Alaska Natives Are Living in Poverty" Fact Tank (online ed, Washington DC, 13 June 2014).

[333] The Harvard Project on American Indian Economic Development *The State of Native Nations: Conditions under U.S. Policies of Self-Determination* (New York, Oxford University Press, 2008).

[334] Harvard Project, at 203.

According to the Harvard study, Native Americans still have the highest rates of being placed in "special education and learning disabled programs", second highest dropout rates, highest absenteeism in age group studies, and "lag behind" other groups in reading skills.[335] American Indians were also 12.7 per cent less likely than other Americans to attend university. Various factors affecting these outcomes include the "harrowing psychological, sociological, and physical consequences of persistent poverty"[336] as well as "underfunding", "substandard" physical facilities, less access to computer and telecommunications and other considerations[337] reminiscent of African-American schools during the Jim Crow era but also the concerns of reports on Indian boarding schools throughout the 20th century.[338]

Besides "gaps"[339] between indigenous learners and other ethnic and racial groups in the US, various research indicates that such disparities are "persistent", cumulative and predictive of disparities in other aspects of well-being including unemployment, infant mortality, obesity, suicide, substance abuse, domestic violence.[340] Again, these indicators express extremes—"double", "three times", "high", "higher" "highest rates" which frequently "exceed" those of "all other races" including African-Americans.[341]

In a way which fundamentally defies any assumptions of a level playing field, educational disparities spread across multiple areas of human well-being appear to cluster around minority and indigenous identity. These facts indicate a significant

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[335] Harvard Project, at 204.
[336] Harvard Project, at 203.
[337] Harvard Project, at 204.
[338] See previous discussion on Merriam and Kennedy Reports, in Glass above n 124. Echoing previous administrations, the White House announced last year that "Native American education is in a state of emergency". The House Education and Workforce Committee is currently investigating government-run schools for "shocking" failures regarding such concerns: Catherine Morris, "Committee Investigates Failing State of Native American Education" (14 May 2015), Diverse Issues in Higher Education <www.diverseeducation.com>.
[339] Duane Champagne "Contemporary Education" in Department of Economic and Social Affairs *State of the World's Indigenous Peoples 2009* (New York, United Nations, 2009) 129, at 133.
[340] See consistencies between disparities in education and those in other areas of well-being such as "Violence, Trauma, and Loss" and health in Michelle Sarche and Paul Spicer "Poverty and Health Disparities for American Indian and Alaska Native Children: Current Knowledge and Future Prospects" (2008) 1136 Ann NY Acad Sci 126.
[341] Terms repeated throughout Sarche and Spicer's study. Native Americans, for example, have the "highest per capita rate of violent victimization", are "more likely to be killed in a motor vehicle accident, to be hit by a car, to commit suicide, to drown than either their African American or white peers", with "death due to diabetes, chronic liver disease and cirrhosis, and accidents occurring at least three times the national rate" and the "postneonatal death rate roughly twice that of both the U.S and white rates": Sarche and Spicer, ibid, at 127-129.

real-time gap between constitutional guarantees of equality and educational realities for African American and indigenous learners. Moreover, as if retelling a story, these indicators are predictive, demonstrating over time and geography that group identities seemingly attract disparities and negative outcomes. However, indigenous identity seemingly predicts the most extreme disparities.

2.5 LACK OF A STRONG RIGHT TO EDUCATION

The slimness of the *someone* narrative and arbitrariness of *indigenous* narratives in federal law may be further exaggerated by the lack of a strong, standalone right to education in the United States. That is, federal law does not recognize a constitutional or human right to education.

There is no *constitutional* right to education. In *Rodriguez,*[342] plaintiffs actually argued for a "fundamental personal right" justiciable under the Equal Protection Clause.[343] Earlier cases had recognized "the liberty of parents and guardians to direct the upbringing and education of children…under their control"[344] but the plaintiffs argued for the children's own rights to a certain quality of education.[345]

Facts showed that the predominantly Hispanic American, poorer school district received far fewer funds through Texas' tax-based school funding scheme than its predominantly Anglo American and affluent neighbor. Not unlike *Brown*'s facts, the former had fewer staff, poorer facilities and less resources[346]. While the Court approved *Brown*'s view that education is "the most important function of state and local governments" and vital to a "democratic society",[347] it denied any violation of a "fundamental" right to education because the Constitution did not explicitly or

[342] *San Antonio Independent School District v Rodriguez* 411 US 1 (1973).
[343] At 34.
[344] *Meyer* and *Pierce,* cited above at 81.
[345] In terms of the right to a quality education, see Cass Sunstein's discussion on Franklin D Roosevelt's list of fundamental economic and civil rights taken for granted by the American people, including "the right to a good education": Cass Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever* (New York, Basic Books, 2004), at 9-16, and discussion below on constitutive commitments.
[346] The poorer school had two-thirds the classroom space and about one-third the amount of books per student, a 1:28 teacher/student ratio compared with 1:19, and a 32 per cent dropout rate compared with 8 per cent. Compare with *Brown*'s, *Swann*'s and *Keyes*'s tangible and intangible factors.
[347] At 29-35.

impliedly contain such a right[348] and because it could not identify a suspect class.[349] Despite Brown's consideration of similar, even intangible disparities, the *Rodriguez* Court held that the Equal Protection Clause did not guarantee "absolute equality or precisely equal advantages" or "equal quality of education". Despite recognizing the possibility that "quality of education may be determined by" economic factors and the "clustered" nature of poverty in certain areas, the Court was content that the children were receiving an "adequate" education regardless of quality.[350] The Court approved the state's funding scheme under rational basis instead of strict scrutiny despite tangible, *Brown*-like facts.

In *Plyler v Doe* (1982),[351] children of illegal aliens were recognized as having the right to attend school. The Court opined that education was not "merely some governmental 'benefit' but crucially important in terms of collective goods including institutional integrity, "the lasting impact its deprivation on the life of the child", transmission of societal values, effective political participation, and as a source of "basic tools by which individuals might lead economically productive lives to the benefit of us all".[352] The Court decided that its complete denial violated the Equal Protection Clause:

> In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of *any* disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society".[353]

[348] At 33-34.
[349] At 19-23. Relative "wealth" was not a suspect classification like race.
[350] At 23. "…Lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. That is, the Equal Protection Clause was not violated by relative disparities between the schools as long as the children in question received any education or the policy did not impact all poor children in Texas.": at 23.
[351] *Plyler*, above n 9.
[352] At 221.
[353] At 221-222.

The decision has been described as "analytically muddled but ultimately ethical".[354] It was philosophically consistent with *Brown*'s equal protection reasoning but the Supreme Court applied rational basis or review rather than strict scrutiny. Similarly, the decision suggests education should be considered at least a "constitutive commitment"—a basic constitutional principle whose legal value is greater than mere policy.[355] However, the Court held that "public education [was] not a 'right'" guaranteed by the Constitution.[356]

International law recognizes the fundamental, unalienable right of every human being to education and recognizes both affirmative action and a *Mancari*-like preference as human rights. As I will discuss in more depth in Chapters 5 and 6, the international framework of human rights recognizes *strong someone* and *indigenous learner* narratives and might add needed moral force and legitimacy to a federal right to education. However, federal law also fails to recognize a human right to education which might strengthen both *someone* and *indigenous* narratives.

While the United States played a substantial role in the drafting of many of these standards and claims to be a human rights defender, it has been criticized for its "pick-and-choose" approach.[357] It has "exempt[ed]" itself from international rights standards" in various ways including: refusing to sign international agreements; refusing to ratify agreements it has signed; failing to pass legislation that would give them force in law; refusing to comply with obligations it has agreed to; remaining judicially indifferent to international legal decisions;[358] and being selective about which signed treaties will be "self-executing".[359] While Congress

[354] In Cathy Albisa "Drawing Lines in the Sand: Building Economic and Social Rights Norms in the United States" in Shareen Hertel and Kathryn Libal Kathryn (eds) *Human Rights in the United States: Beyond Exceptionalism* (New York, Cambridge University Press, 2011) 68 at 73.
[355] Albisa, drawing on Cass Sunstein's arguments, ibid. Also see Cass Sunstein and Randy Barnett "Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue" (2005) 53 Drake L Rev 205.
[356] *Plyler*, at 221.
[357] See Harold Koh "Restoring America's Human Rights Reputation" (2007) 40 Cornell Int'l L J 635.
[358] Michael Ignatieff "No Exceptions?: The United States' Pick-and-Choose Approach to Human Rights" (2002) in Pierre Claud and Burns Weston *Human Rights in the World Community: Issues and Action* (3rd ed, Philadelphia, University of Pennsylvania Press, 2006) 474 at 474-475.
[359] *Medellín v Texas* 552 US 491 (2008) which relates to 51 foreign nationals on death row in 10 different states being detained and arrested without being given access to consular notification as required by the US' ratification of Article 36 of the Vienna Convention on Consular Relations. Also see Robert S Hogue "*Medellín v. Texas*: The Roberts Court and New Frontiers for Federalism" (2010) 41(2) U Miami Inter-Am L Rev 255.

has ratified the *everyone/no-one* focused International Covenant on Civil and Political Rights (ICCPR) [360] and the *no-one*-focused, negatively prohibitive International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[361] it has not ratified key Conventions on the right to education which are increasingly *someone*- and *indigenous*-specific.[362] The Supreme Court has also been guilty of "aborted dialogues" with international courts regarding treaty obligations.[363]

The almost universally supported United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) importantly recognizes both affirmative action and *Mancari*-like preference as fundamental rights of indigenous peoples including Native Americans.[364] However, when President Obama finally signed UNDRIP under international pressure, the State Department emphasized that the document is "aspirational" and only affirmed previous rights under federal law and not any new rights.[365]

Explanations for such behavior include a "deep attachment to popular sovereignty"[366] and a fear of the "overlegalizing" of human rights[367] but also the

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[360] International Covenant on Civil and Political Rights 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967) (opened for signature 16 December 1966, entered into force 23 March 1976).

[361] International Convention on the Elimination of all Forms of Racial Discrimination T660 UNTS 195 / [1975] ATS 40 / 5 ILM 32 (1966) (opened for signature 21 December 1965, entered into force 4 January 1969). The US has signed and ratified the instrument, but may be ignoring it: see "Status of Ratification, Reservations and declarations" on UN Treaties found at <http://treaties.un.org>.

[362] Including: the International Covenant of Economic, Social and Cultural Rights, 993 UNTS 3 / [1976] ATS 5 / 6 ILM 360 (1967) (opened for signature 16 December 1966, entered into force 3 January 1976); the Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13/ [1983] ATS 9/ 19 ILM 33 (1980) (opened for signature 18 December 1979, entered into force 3 September 1989); and the United Nations Convention on the Rights of the Child 1577 UNTS 3/ [1991] ATS 4 / 28 ILM 1456 (1989) (opened for signature 20 November 1989, entered into force 2 September 1990)--though it has ratified the two Optional Protocols to the Children's Convention. It did not ratify the ICCPR until 1992.

[363] See Melissa Waters "The U.S. Supreme Court and the International Court of Justice: What Does 'Respectful Consideration' Mean?" in Cesare Romano (ed) *The Sword and the Scales: The United States and International Courts and Tribunals* (New York, Cambridge University Press, 2009) 112 at 114-117.

[364] United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/Res/61-295 (2007) [UNDRIP].

[365] The United States was one of only four UN nations who voted against the Declaration, and Obama did not sign the Declaration until 2009 after international pressure had been put on the US.

[366] Ignatieff, at 475 and 477. Including issues of "contentious jurisdiction": Tara Melish "From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies", in Romano, 210 at 226.

[367] Curtis Doebbler "An American Legend: The Overlegalization of Human Rights," published in American Society of International Law, Proceedings of the 96th Annual Meeting held in Washington, DC from 13-16 March 2002 381-383 (2002).

sanctity of an anachronistic Constitution [368] "unusually resistant to modernization".[369] Despite *Brown*'s legacy of positive measure and substantial outcomes, a right to education may also be seen as antithetical to the individuality of the liberal tradition[370] where interpreted as taxpayers and other individuals bearing the burden of "the 'have-nots'"—or even "a free lunch"[371]. While this apparent "cultural aversion" to positive, group rights may mask other issues,[372] it also seems to prioritize the everyone/no-one narrative.[373]

2.6 CONCLUSION

This chapter has described how an identity-specific history of slavery, Jim Crow laws and segregation first justified than was lost in the *singular* prioritization of racialized, dichotomized *everyone*/*no-one* narrative of equality. Two parallel narratives emerged—or survived—namely, the temporary, racially-specific *someone* evident in *Brown* and affirmative action, and the time-honored, Native American-specific *indigenous* preference recognized in *Mancari* based on remedial self-determination. However, a closer examination of federal jurisprudence revealed the undermining of both *someone* and *indigenous* narratives since *Brown* by the *adamant everyone/no-one narrative* evident in cases stretching from *Bakke* to the more recent University of Michigan cases and dissent in *Kamehameha,* as well as legislation such as the No Child Left Behind Act. The chapter finally noted

[368] Ignatieff, 475 and 477.
[369] Albisa, at 69.
[370] Curtis Bentley "Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution" (2007) 6 BYU L Rev 1721.
[371] Rita Cartwright and Victor Conde *Human Rights in the United States: A Dictionary and Documents, Volume 1* (Santa Barbara, ABC-CLIO, 2000), at 71.
[372] Melish, at 225-226.
[373] Interestingly, the United States was ranked 17th out of 40 countries in 2013. Each country ahead of the U.S. had one "fundamental commitment in common…a constitutional, or statutory guarantee of the right to education" which acted as a centralizing force which "establish[ed] baseline requirements that set the frame for policy and judicial challenges, as well as contribute to what the Pearson report calls a 'culture' of education: where 'the cultural assumptions and values surrounding an education system do more to support or undermine it than the system can do on its own'": Stephen Lurie "Why Doesn't the Constitution Guarantee the Right to Education? *The Atlantic* (online ed, Washington DC, 16 Oct 2013). A 2014 report ranked the14th. All but two of the countries—Germany and the United Kingdom—ahead of it have a *constitutional* guarantee of the right to education: see Constitute Project <www.constituteproject.org>. The unwritten constitution of the United Kingdom recognizes a statutory right to education: see ss 8,13(1) and 14(1)-14(2) Education Act 1996.

the reluctance of federal courts to recognize a standalone constitutional or human right to education despite the significant constitutive commitment attributed to education in cases such as *Brown* and *Plyler*—and persistent disparities in education which cluster around African American and Native American identity.

Despite the availability of formal constitutional guarantees, the official end of segregation and critics use of the rhetoric of equality, the circumstances of both groups ultimately feel like a replay on a loop of historic group experiences of de facto and de jure discrimination in education. In terms of African Americans, one has the sense that current federal equality narratives would leave de facto discrimination at the mercy of majoritarian bias conjuring the *Civil Rights Cases* and *Plessy*. Reverse discrimination would similarly ignore the fact of slavery, segregation and ongoing disparate effect even as it hijacks the language of equality—its duality, dichotomy and polarization—and undermines the *someone* narrative which might address quantifiable disparities and gaps.

The venerated American legal scholar Felix S Cohen once equated Native American rights in education to the "canary in the coalmine".[374] As concerning as African American statistics are, Native Americans may represent the most vulnerable of vulnerable rightsholders. Increasingly historically abstract federal narratives clearly fail to adequately account for either the unique historico-legal context of the *Mancari* preference or the extreme real-time disparities which are insidiously attracted to Native American identity every day. Judicial disregard for the uniquely *indigenous* narrative directly threatens time-honored rights of self-determination and implies a very narrow interpretation of the trust relationship[375] but also speaks volumes about equality since the imposition of *everyone/no-one* narratives on Native Americans in the past has been consistently associated with severe discrimination and disparities.

These troubling developments set the scene for the conflict of narratives apparent in *Doe v Kamehameha Schools*. In Chapter Three, all three narratives will be

[374] "Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith": Felix S Cohen quoted in Lomawaima and McCarty, above n 117, at 279-280.
[375] See Glass, above n 121.

compared and contrasted with the unique historico-legal context of the admission policy and the extreme disparities attracted to Native Hawaiian identity which—while eerily similar to the Native American experience—suggests unique historico-legal context and the existence of an expanded multi-narrative of equality within Hawai‘i state law.

CHAPTER THREE

THE ADMISSION POLICY ON TRIAL

3.1 INTRODUCTION

For us, each step of the way was a struggle with identity.[1]

On 5 December 2006, after a tense legal saga,[2] the United States Court of Appeals for the Ninth Circuit announced its decision in the case of *Doe v Kamehameha Schools*[3] (*Kamehameha*). In a close 8-7 decision, the majority of an *en banc* panel held that the long-standing policy of a private school established for the education and betterment of Native Hawaiian children which prefers those children in admissions did not violate section 1981 of Title VII of the US Code.

More than anything the case revealed a wrestle of narratives. 'John Doe' was an intentionally anonymous [4] seventh-grader unsuccessful in admission to the prestigious K-12 school under the policy. His attorneys alleged segregation, but the indigenous school had been established specifically to educate Native Hawaiian children so that they might overcome significant disparities and compete on a level playing field in education. Preferring these children in admissions has, in fact, resulted in significantly improved real-life outcomes for a group of students historically and continuously associated with alarming negative disparities in

[1] African American Civil Rights activist Harry Belafonte Jr quoted in Kate Pickert "One March" *Time* (online ed, New York, 26 August 2013) 36 at 39.
[2] When the initial success of the Schools in the court of first instance was overturned on appeal to the Ninth Circuit in the summer of 2005, Native Hawaiians were stunned and then angry. The decision sparked multiple protests in Hawai'i and elsewhere: see, for instance, Louise Chu "Kamehameha rally draws 400 to protest in San Francisco" Honolulu Star Bulletin (online ed, Honolulu, 21 August 2005).
[3] *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 F3d 1025 (9th Cir 2005), reh'g en banc granted, 441 F3d 1029 (9th Cir 2006) 470 F3d 827 (9th Cir. 2006) (en banc) [*Kamehameha*].
[4] He was granted name suppression.

education. Yet, the Ninth Circuit still struggled to decide if the policy was a measure of equality or some form of discrimination.

Chapter Three examines the wrestle of federal equality narratives in *Kamehameha*. It begins by describing the unique historico-legal context of the policy including nationhood overthrow and annexation by the United States, as well as the discrimination and disparities resulting from these events. The chapter discusses various narratives responding to this history including a familiar Native American-like preference and trust relationship within federal and state law—but also the imposed *everyone/no-one* narrative evident in *Rice v Cayetano*[5]. The courts' wrestles and intuitions in *Kamehameha* are then discussed in terms of narratives. Ultimately, the chapter argues that current federal accounts fail to account for the unique historico-legal context of the policy and the disparities it was designed to address. Pre-overthrow, historically continuous Native Hawaiian customary law, indigenous-specific Hawaii state law and recent developments including the passing of Act 195[6] suggest an alternative indigenous narrative which exceeds current federal narratives and references human rights.

3.2 MO'OLELO: THE BURDENS OF NATIVE HAWAIIAN HISTORY

> *...In federal Indian law, lawyerly analysis that is devoid of broader historical and theoretical perspectives leads to misleading conclusions about the determinacy and substance of what the law "is" at any given moment. More specifically,... what is popularly called "politics" has a strong explanatory and predictive value in federal Indian law. To assess current questions in Indian affairs as merely matters of abstract, backwardlooking doctrinal analysis is to confuse a counterhistorical ideal of the rule of law with the reality of a complicated politico-legal, historical, and institutional "situation sense". What results is illusory law without life - mere conceptual constructs instead of the complicated calculus of doctrinal and human factors that coalesce to form federal Indian law*[7].

Native Hawaiians and Native Americans share an eerily similar historico-legal context devastatingly marked by colonization. Like federal-Indian history, the

[5] *Rice v Cayetano* 528 US 495 (2000).
[6] Act 195, Sess L Haw 2011.
[7] Philip Frickey "Adjudication and Its Discontents: Coherence and Conciliation on Federal Indian Law" (1997) 11 Harvard L Rev 1754 at 1767-1768.

mo'olelo (history or story)[8] of Western and particularly American involvement in Hawai'i has been "a complicated and difficult one, but when told in broad strokes, a familiar one: a story of an indigenous people and of greed, racism, and imperialism."[9]

This story of "widespread historical wrongs, including broken treaties and acts of oppression, and misguided government policies"[10] against an indigenous people connects Native Hawaiians with American Indians and Alaskan Natives infinitely more than it does with 'racial' minorities such as African Americans but also reflects historico-legal developments peculiar to Hawaiian history. The same history has produced complex discrimination and disparities seemingly attracted to Native Hawaiian identity which defy comparison, categorization and the singular narrative.

3.2.1 'PRIMARY STATE'

The unique Polynesian[11] society which Captain James Cook 'discovered' in the Hawaiian Islands in 1778[12] was one of the world's "primary states", akin to civilizations such as "Mesopotamia, Egypt, the Indus Valley, China, Mesoamerica, and Andean South America".[13] At first contact:

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[8] Borrowing language of Jonathan Kamakawiwo'ole Osorio *Dismembering the Lāhui: A History of the Hawaiian Nation to 1887* (University of Hawai'i Press, Honolulu, 2002) at 3.

[9] Melodi Kapilialoha MacKenzie "Ever Loyal to the Land: The Story of the Native Hawaiian People" (2006) 33(2) Hum Rts 15 at 15.

[10] James Anaya "Report of the Special Rapporteur on the rights of indigenous peoples: Addendum--The situation of indigenous peoples in the United States of America" A/HRC/21/47/Add 1, 30 August 2012, in "Summary".

[11] Hawai'i is believed to have been first settled by people from the Marquesas but has also been linked archaeologically and linguistically with Tahiti and other island groups in East Polynesia: see Patrick Kirch *Feathered Gods and Fishhooks* (University of Hawai'i Press, Honolulu, 1985). There may have been several periods of settlement with the earliest taking place perhaps pre-AD 600: see discussion in Melody Kapilialoha MacKenzie "Historical Background" in Melody Kapilialoha MacKenzie (ed) with Susan Serrano and Kapua Sproat *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) 2 (advance copy) [*Treatise*], part II.

[12] For Cook's interactions with Native Hawaiians see: Anne Salmond *The Trial of the Cannibal Dog: The Remarkable Story of Captain Cook's Encounters in the South Seas* (Viking, New York, 2003).

[13] One of the "primary states [that] emerged endogenously"—or those who "taught themselves how to be states": Robert Hommon *The Ancient Hawaiian State: Origins of a Political Society* (Oxford University Press, New York, 2013) at ix.

> [t]he Hawaiian kingdoms of the eighteenth century were large-scale, politically-centralized societies in which a ruler or co-rulers delegated to a branching bureaucratic hierarchy the responsibility for governmental tasks including tax collection, public works, and waging war. In some respects, these Hawaiian primary states appear more similar to modern nation-states than to the Polynesian societies to which they were bound by history and culture. [14]

This "complex"[15] society was spiritually ordered by a world view including the complementary concepts of *kapu*[16] and *noa*,[17] and the role of expert-priests—*kahuna*.[18] *Akua* and '*aumakua* were a part of everyday life.[19] Knowledge was treasured and passed orally.[20]

Socially, the *'ohana* (family) was the "fundamental unit" of Hawaiian society", made up of those related by "blood, marriage and adoption" and "tied by ancestry, birth and sentiment to a particular locality called the '*aina*"'.[21] Kinship ties ordered

[14] Hommon, at ix. Hommon argues that Tonga may have been another one of these primary states.
[15] Patrick Kirch *The Evolution of the Polynesian Chiefdoms* (Cambridge University Press, Cambridge UK, 1984). Ancient Tonga may have been Hawai'i's only rival for complexity in the Pacific.
[16] "Taboo, prohibition; special privilege or exemption from ordinary taboo; sacredness; prohibited, forbidden; sacred, holy, consecrated…": *Ulukau Hawaiian Electronic Library* <http://wehewehe.org > ('*Ulukau*')
[17]"Freed of taboo, released from restrictions, profane": *Ulukau*.
[18] "Priest, sorcerer, magician, wizard, minister, expert in any profession (whether male or female); in the 1845 laws doctors, surgeons, and dentists were called kahuna": *Ulukau*. Also see Samuel Kamakau *Ka Po'e Kahiko: The People of Old* trans from *Ke Au 'Oko'a* by Mary Kawena Pukui with Dorothy Barrere (ed) (Bishop Museum Press, Honolulu, 1992) at 7-8. Kamakau was a nineteenth-century Native Hawaiian scholar and historian.
[19] Kamakau, at 28-31. Akua might refer to a "god, goddess, spirit, ghost, devil, image, idol" or the "divine, supernatural, godly", while aumakua referred to "family or personal gods, deified ancestors who might assume the shape of sharks (all islands except Kaua'i), owls (as at Mānoa, O'ahu and Ka'ū and Puna, Hawai'i), hawks (Hawai'i), 'elepaio, 'iwi, mudhens, octopuses, eels, mice, rats, dogs, caterpillars, rocks, cowries, clouds, or plants. A symbiotic relationship existed; mortals did not harm or eat 'aumākua (they fed sharks), and 'aumākua warned and reprimanded mortals in dreams, visions, and calls.": *Ulukau*.
[20] See Micheal Kioni Dudley *A Hawaiian Nation I: Man, Gods, and Nature* (Na Kane O Ka Malo Press, Honolulu, 1990) at 5-8.
[21] ES Craighill Handy and Mary Kawena Pukui *The Polynesian Family System in Ka-'u, Hawai'i* (The Polynesian Society, Wellington, 1958) at 2. The term ohana is a literally a combination of the term for offshoots from the taro or kalo plant which was the staple of the ancient Hawaiian diet and the word aina. "As the *'oha* or sprouts from the parent taro (or *makua*) serve to propagate the taro and produce the staple of life, or *'ai*, on the land ('*ai-na*) cultivated through generations by the given family, so the family or *'oha-na* is identified physically and psychically with the homeland (*'ai-na*) whose soil has produced the staple of life (*'ai*, food made from taro) that nourishes the dispersed family ('*oha-na*)": Handy and Pukui, at 3-4.

society.[22] Children were raised and taught collectively by multiple generations of relatives.[23] Education began at home in the family.[24]

Hawaiian society was geographically, politically and economically ordered by several types of land divisions but most commonly the *ahupua'a*, "an economically self-sufficient, pie-shaped unit which ran from the mountain tops down ridges, spreading out at the base along the shore"[25] which provided a range of resources[26] worked and shared collectively. Though ruled by *ali'i*[27] (chiefs) "*maka'āinana* [commoners] also had liberal rights to use ahupua'a resources" and "could freely trade and move within the ahupua'a". There was no "concept of private ownership of land…in early Hawaiian thought". Instead ali'i and other rulers ruled as trustees of the land and people with each stratum of Hawaiian society having reciprocal duties to those above them and below them.[28]

Clearly, later foreign-introduced law "entered a field already rich with legal rules and practices".[29] In this system, law was "[i]nterwoven with the religion of Hawai'i…and with governmental and social organization".[30] *Mana* and kapu were fundamental principles[31] but the legal system also prioritized the human rights-like

[22] One's place in stratified Hawaiian society relied on genealogy: see Kamakau, at 4-5. Despite not having a written language, pre-contact Hawaiians had a wealth of oral histories and genealogies connecting them with their ohana, aina, and aumakua: see Kamakau, above n18.
[23] Kamakau, at 26-27.
[24] Kamanaonāpalikūhonua Souza and K Ka'ano'i Walk "Ōlelo Hawai'i and Native Hawaiian Education" in MacKenzie and others, *Treatise*, above n 11, 1259 at 1261-1262.
[25] MacKenzie, "Historical Background", above n 11, at II.
[26]Including timber and other forest resources; freshwater supplies; agricultural land including *lohi* (taro patches) for growing *kalo* (taro) which provided the staple *poi*; and aquaculture zones and access to other marine resources: MacKenzie, ibid, part III. They could also approach their ali'i directly with grievances relating to the konohiki. Agricultural methods utilized by pre-contact Hawaiians have actually been characterized by a prominent archaeologist as "a model system for human ecodynamics": Patrick Kirch "Hawai'i as a Model System for Human Ecodynamics" (2007) 109 American Anthropologist 8.
[27] "Chief, chiefess, officer, ruler, monarch, peer, headman, noble, aristocrat, king, queen, commander; royal, regal, aristocratic, kingly; to rule or act as a chief, govern, reign; to become a chief": *Ulukau*.
[28] *Ahupua'a* were owned by *ali'i* (high chiefs) who had reciprocal duties of protection and provision for the *maka'āinana* (the people of the land): MacKenzie, "Historical Background" at III. They could also approach their ali'i directly with grievances. Also see David Malo *Mo'olelo Hawai'i: Hawaiian Antiquities* trans by Nathaniel B Emerson (Bishop Museum, Honolulu, 1951) at 87-88. Even, the *mo'i* (supreme ali'i or king) was more of a trustee, subject to divine approval, and not an absolute owner..
[29] Sally Engle Merry *Colonizing Hawai'i: The Cultural Power of Law* (Princeton University Press, Princeton, 2000) at 35.
[30] Ralph Simpson Kuykendall *The Hawaiian Kingdom: Volume I, 1778-1854, Foundation and Transformation* (University of Hawai'i, Honolulu, 1938) at 8.
[31] Hommon, above n 13, at 19. Mana means "supernatural or divine power, mana, miraculous power; a powerful nation, authority; to give mana to, to make powerful; to have mana, power, authority;

principle of rule of law.[32] This system was "sharply different" from Western systems.[33]

Population estimates of the Hawaiian Islands at the time of contact in 1778 continue to be debated.[34] But even conservative estimates admit the population was "dense" and "large",[35] and David Stannard's 1989 figures[36] of 800,000 to 1,000,000 have been described as "plausible" even by his critics.[37] Both Congress and federal courts have cited the 1,000,000 figure.[38]

By 1810, Kamehameha the Great had united all the Islands under his control.[39] As a sovereign nation literally 'on the map',[40] the Hawaiian Kingdom entered into treaties throughout the nineteenth century with the United States[41] and various other

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authorization, privilege; miraculous, divinely powerful, spiritual; possessed of mana, power.": *Ulukau*.

[32] Two examples include the accountability aspects of chieftainship discussed above at n 24 and Kamehameha the Great's formal declaration of the rule of law in 1797 in the *Kānāwai Māmalahoe* (or 'Law of the splintered Paddle) which translated reads, "Respect alike the [rights of] people both great and humble. May everyone, from the old men and women to the children, be free to go forth and lay in the road without fear of harm. Break this law, and die": see Keopulaulani Peelitz "Legal Duty or Kuleana" *Mana Magazine* (online ed, Honolulu, May/June 2013); and Troy JH Andrade "Ke Kānāwai Mamalahoe: Equality in Our Splintered Profession" (2010) 33 U Haw L Rev 249.

[33] MacKenzie, "Historical Background", above n 11, at III.

[34] There has been a wide range of estimates over the years including: 200,000-250,000 (Robert Schmitt *Demographic Statistics of Hawai'i, 1778-1965* (University of Hawai'i, Honolulu, 1968)); 800,000-1,000,000 (David E Stannard *Before the Horror: The Population of Hawai'i on the Eve of Western Contact* (Social Science Research Institute, University of Hawai'i, Honolulu, 1989); 110,000-150,000 (Tom Dye and Eric Komori "A Pre-Censal Population History of Hawai'i" (1992) 14 NZ Journal of Archaeology 113); and 150,000 to 300,000 (Ross Kordy "Reconstructing Hawaiian Population at European Contact: Three Regional Case Studies" in Patrick Kirch and Jean-Louis Rallu (eds) *The Growth and Collapse of Pacific Island Societies: Archaelogical and Demographic Perspectives* (University of Hawai'i, Honolulu, 2007) 108 at 126.

[35] Patrick Kirch "Like Shoals of Fish" ["Shoals"] in Kirch and Rallu, at 52. Also see Kordy at 126.

[36] Stannard, above n 34.

[37] See, for instance, Terry Hunt "Book Review—*Before the Horror: The Population of Hawai'i on the Eve of Western Contact* by David Stannard" (1990) 13 Pacific Studies 255 at 258.

[38] Both Congress and federal courts have cited the 1,000,000 figure: see Native Hawaiian Education Act 20 USC §7512(7) and *Kamehameha* at 19055. Of all the island groups in the Polynesian Triangle, Hawai'i is estimated to have had the biggest population: Kirch, "Shoals" at 52

[39] Melodi, Kapilialoha MacKenzie "*Ke Ala Loa*—The Long Road: Native Hawaiian Sovereignty and the State of Hawai'i" (2011) 47 Tulsa L Rev 621 at 624.

[40] See, for instance, "Reich Kamehameha" in the center of the German map, *Karte von Polonesien und dem Litoral des grossen Oceans, zur Uebersicht der politischen Verhaeltnisse im Jahre 1859*, by Von A Petermann, dating from 1859. Image found at Antiquariat Reinhold Berg <http://www.bergbook.com>. In English, the German noun "reich" translates as "empire", "kingdom", or "realm": see Oxford Dictionaries online <http://www.oxforddictionaries.com>.

[41] Treaties between the Hawaiian Kingdom and the United States include: Treaty of Friendship, Commerce, and Navigation Between the United States and the Sandwich Islands (Hawaii) (23 December 1826); Treaty of Friendship, Commerce, and Navigation and Extradition (20 December 1849); Treaty of reciprocity between the United States of America and the Hawaiian Kingdom (13 January 1875); and Reciprocity Convention (6 December 1884): see US Department of State "A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Hawaii" Office of the Historian <https://history.state.gov>.

nations.[42] Its emissaries were received by monarchs and other heads of government and accorded all the respect of foreign dignitaries.[43] This status among nations later earned the Territory of Hawai‘i a place among the United Nations' (UN) non-self-governing territories from 1946 to 1960.[44]

Early treaties with the United States speak of "perpetual" "peace and friendship" between the two nations, shared benefits in commerce and navigation,[45] "mutual agreement" and "most-favored nation" status[46]—much like modern free-trade agreements. Later, the language of these international agreements cools, the tone becoming a more demanding, even one-sided "reciprocity" which clearly favors American commercial and defense interests of the period[47] and seems to reflect Monroe Doctrine[48] foreign policy in regards to Hawai‘i.[49]

Kamehameha the Great's successors converted to Christianity, were educated by foreigners, took counsel from such men and appointed them to positions of influence within governments patterned after Western, particularly British and American, democracies.[50] For various reasons, the monarchy adopted Western-style constitutions which adopted radical changes including hereditary and

[42] Regarding treaties, the Hawaiian Kingdom concluded with other nations, see Tom Bennion "Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi" (2004) 35 VUWLR 165 at 173-174.
[43] See, for instance, various occasions described Queen Lili‘uokalani in Liliuokalani *Hawaii's Story by Hawaii's Queen* (Charles E Tuttle, Rutland VT, 1964 (sixth printing 1972)).
[44] See David Forman "The Hawaiian Usage Exception to the Common Law: An Inoculation against the Effects of Western Influence" (2008) 30 U Haw L Rev 319 at 329. Non-self-governing territories are countries which are seen as possessing rights to decolonization and self-determination under international law: see "Decolonization" United Nations <www.un.org>. Also see discussion on self-determination in Chapter Six at 6.6.1.
[45] Treaty of Friendship, Commerce, and Navigation between the United States and the Sandwich Islands (Hawaii) (23 December 1826) art I.
[46] See, for instance, Treaty of Friendship, Commerce, and Navigation and Extradition (20 December 1849) arts III and VIII.
[47] For instance, in the Treaty of reciprocity between the United States of America and the Hawaiian Kingdom (13 January 1875), Hawaiian goods which can enter American ports duty-free were limited to approximately 15 types of goods (Art I) while goods which the United States could bring into Hawai‘i fell into approximately 40 classes. In the Reciprocity Convention (6 December 1884), the 1875 treaty's application was limited to seven years and the United States secured the use of Pearl Harbor as a "coaling and repair station" for United States ships until the present day.
[48] In an address to the US Congress on December 2, 1823, President James Monroe announced that the establishment by European powers of any further colonies or settlement within the Americas would be viewed as acts of aggression against the United States.
[49] The Tyler Doctrine of 1842, discussed in Department of the Interior *from Mauka to Makai the River of Justice Must Flow Freely: Report on the Reconciliation Process between the Federal Government and Native Hawaiians* (Washington DC, Department of the Interior and Department of Justice, 2000) at 22-23.
[50] See Sally Engle Merry *Colonizing Hawai‘i: The Cultural Power of Law* (Princeton University, Princeton, 2000).

individual ownership of land, the establishment of a Western-style legislature, judiciary and executive, and private property rights for foreigners. The very structure of the new legal system increasingly favored planter interests[51] to the disadvantage of average Native Hawaiians. Most dramatically, the Māhele[52]—or 'Division'—and subsequent Kuleana Act of 1850 which privatized land ownership have been largely credited with widespread land alienation, destruction of the ahupua'a system, landlessness and non-access to crucial natural resources.[53] Legal changes were endorsed by and reflected the agency of the Hawaiian monarchy,[54] but their hands were also increasingly tied by Westernized law and the substantial economic and political power of Western business interests. The 1852 Constitution gave suffrage rights only to male taxpayers over the age of 25 and limited the powers of the monarchy. [55] Under extreme duress, King David Kalākaua was infamously forced to sign the "Bayonet Constitution" in 1887 which further limited those powers. On the verge of signing a new constitution in 1893, King Kalākaua's

[51] MacKenzie, "Historical Background", above n 11.

[52] By 1839, American interests held great economic power in the Islands. The Māhele—or literally the 'Division' --officially began with the passing of legislation in 1845 which established a Board of Land Commissioners that was made up of as many Americans as Native Hawaiians and had significant powers to issue fee patents for land. In 1848, according to the plan of Justice William Lee, the Board managed the official division of all the lands in Hawai'i into three parts: King's land (his private lands and that of the government); konohiki land; and that of tenant farmers, the former maka'āinana. As a result of the Lee Plan and the subsequent Kuleana Act of 6 August 1850, konohiki and maka'āinana could make claims for former ahupua'a land. However, the konohiki were, for instance, required to "pay a commutation tax of one-third the value of the unimproved land or cede[] one-third of the land to the government"--and their property rights were subject to tenants' rights and boundary determination. Likewise, any claims for the Kuleana Lands set aside for maka'ainana had to be made within four years of the 1850 Act: see MacKenzie, "Historical Background" above n 11, Part V, "Māhele Period".

[53] The long-accepted view is that the Māhele resulted in most Native Hawaiians losing their land. Certainly, by 1890, only about 5,000 residents of Hawai'i out of a total population of 90,000 owned land, three out of four owners were Westerners, and few Native Hawaiians owned land: MacKenzie, "Historical Background", above n 11 at VI "After the Māhele". However, see arguments in Donovan C Preza "The Empirical Writes Back: Re-Examining Hawaiian Dispossession Resulting from the Māhele of 1848" (PhD Thesis, University of Hawai'i, 2010). Preza argues that while the Mahele began the process of dispossession, the "loss of governance" resulting from the overthrow of the Native Hawaiian government in 1893 "was the single most critical dismemberment of Hawaiian society": Preza, at 170.

[54] See arguments in B Kamanamaikalani Beamer "Na Wai Ka Mana? 'Ōiwi Agency and European Imperialism in the Hawaiian Kingdom" (PhD Thesis, University of Hawai'i, 2008).

[55] For instance, in the 1852 Constitution signed by pro-Western Kamehameha III and drafted by Justice Lee, suffrage rights--like those in America at the time--favoured white, male property owners. Because of that constitution's limits on the monarch's powers, his successor, Kamehameha IV--who took the throne in 1855, post-Mahele--was unsuccessful in replacing the 1852 Constitution. The later Bayonet Constitution was a response to Kamehameha V's success in passing a new constitution in 1864 which reinstated some royal power: MacKenzie, "Historical Background", above n 11 at VII "Overthrow of the Hawaiian Monarchy".

sister and successor, Queen Liliuokalani, was deposed and imprisoned by American businessmen with the help of American diplomats and military forces. [56]

There is much current discussion on the United States' subsequent role in events. The overthrow of the internationally-recognized, sovereign nation of Hawai'i was illegal.[57] Two Executive Agreements between President Grover Cleveland and Queen Liliuokalani afterwards recognized that illegality and agreed to a return of power to the queen and Native Hawaiians.[58] More recently, both legislative and executive branchs of the federal government have recognized the illegality of the subsequent annexation in 1898.[59] Hawai'i was later included among the UN's non-self-governing territories from 1946 to 1960, a status legally entitling the indigenous population to seek self-government and, ultimately, full independence. The legitimacy of the plebiscite in 1959 in which Hawai'i 'residents' voted for statehood and were thereafter removed from the UN list is also greatly debated.[60]

Crucially, at no point did the Native Hawaiian people "directly relinquish[] their claims to their inherent sovereignty as a people…either through their monarchy or through a plebiscite or referendum".[61] In a manner which violates fundamental justice, and despite significant evidence of resistance,[62] our country and rights were simply taken from us. The Westernization of the Native Hawaiian legal system pre-

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[56] The Clinton Apology, Joint Resolution of the 103rd United States Congress, Pub L 103−150, 107 Stat 1510, S J Res 19, enacted November 23, 1993. "To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii."

[57] Matthew Craven "Continuity of the Hawaiian Kingdom" (2004) 1 Hawn J L & Politics 508 at 512. Presidential approval had been given by President Benjamin Harrison one year earlier. In 1893, the American Minister to Hawaii ordered United States Marines to land (or invade) in support of the insurrectionists: MacKenzie, "Historical Background", above n 11 at VII "Overthrow of the Hawaiian Monarchy".

[58] HR 107, resolution of the House of Representatives in the Hawai'i State Legislature; MacKenzie, ibid at VII.

[59] The Clinton Apology, above n 55.

[60] The legitimacy of the vote is questionable given both the "substance" and "suffrage" of the vote. There are significant questions about whether a majority of Native Hawaiians—that is, the indigenous population of the Islands at the time of colonization or occupation, depending on how one looks at it—actually voted for statehood as required by international law and because statehood was the only option offered to voters on the ballot. The vote seemed to be timed by the United States to achieve a non-indigenous majority. Under international law, other options should have included complete independence from the United States and free association with the United States and not just complete integration into the United States. Voters were not even informed that the territory was on the UN list: Julian Aguon "Native Hawaiians and International Law" in MacKenzie and others, *Treatise*, at III B.

[61] As recognized in the Clinton Apology, above n 55. Also see discussion on the Blount Report in MacKenzie, "Historical Background", at VII.

[62] See MacKenzie, ibid, on political organization, petitions, armed resistance and other methods.

overthrow seems to have made these later, blatant acts of imperialism easier, but the overthrow and annexation undoubtedly mark a watershed moment after which the pace of colonization, assimilation and discrimination dramatically accelerated. Given the causal connection between these events and subsequent discrimination and disparities attracted to Native Hawaiian identity, these events are increasingly narrated as a source of great "harm".[63]

3.2.2 DISCRIMINATION IN LAW AND FACT

Both acceleration and harm are apparent in education. Prior to the overthrow, profound paradigm shifts were apparent in education and language law and policy. Post-overthrow and –annexation, education and language would be stolen and the long-term effects brutal.

In the mid-nineteenth century, Richard Armstrong, second minister of education and former missionary, established an education system in the Hawaiian Kingdom which included boarding schools designed to teach indigenous children to be "subservient" and Western. Mainland boarding schools which committed later injustices against Native American learners were actually patterned after the Hawaiian schools.[64] Like many contemporaries, Armstrong believed that Native Hawaiians were "filthy", "ignorant", "lazy" heathen who "hardly know how to do anything".[65] Not unlike early efforts with Native American peoples, educating the Native Hawaiian child was about Christianizing and civilizing them,[66] about

[63] See, for instance, Aguon, above n 59; and Eric K Yamamoto, Susan K Serrano and EA Hoʻoipo Kalaenaʻauao Pa, Amicus Brief of the Japanese American Citizens League of Hawaiʻi-Honolulu Chapter and the Equal Justice Society and in support of Defendant-Appellee's Petition for Rehearing En Banc, 29 August 2005, in *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 416 F 3d 1025 (No 04-15044) (9th Cir 2005).

[64] These schools would eventually inspire the creation of the infamous boarding school system which essentially took Native American children hostage and tried to forcibly assimilate them into American culture at locations such as the Carlisle Boarding School. His son Samuel Chapman Armstrong founded the Hampton Normal and Agricultural Institute in Virginia which educated African-American children, including the likes of Booker T Washington, in what Gary H Okihiro describes as "schooling for subservience" or helping African-Americans "adjust…to a subordinate role in the Southern political economy". Later, Hampton received Native American students and served as the model for, first, the Carlisle Boarding School and then the federal government's entire Indian Boarding School program: Gary Y Okihiro *Island World: A History of Hawaii and the United States* (University of California Press, Oakland, 2008) at 98-133.

[65] Quoted in Okihiro at 99.

[66] Compare with assimilationist federal-Indian policy discussed in previous chapter at 2.3.2.

overcoming "not mere ignorance, but deficiency of character" inherent to their *race*. As with African-Americans, Native Hawaiians were often viewed as inherently weak and corruptible, mentally and morally, and, therefore, more in need of 'industry'. Armstrong believed that "[e]specially in the weak tropical races, idleness like ignorance breeds vice".[67] Thus, from the 1820s and 1830s, Armstrong and other missionaries established a school system designed to train young Hawaiian males to become Westernized, Christianized teachers, preachers and missionaries and young Hawaiian females to be their wives—but also to separate Native Hawaiian children from the perceived barbarism of Hawaiian culture.[68]

Despite Westernizing forces, Noelani Goodyear-Ka'opua has described how, until the late nineteenth century, education in Hawai'i remained largely community-based and taught by Native Hawaiians in the Hawaiian language. Community-run schools were "sites of struggle" in terms of governance, curriculum and language.[69] In the midst of attempted colonization and assimilation, Native Hawaiians were not passive objects in terms of education but rather active and resisting agents, as Jonathan Kamakawiwo'ole Osorio,[70] Donovan Preza[71] and Kamanamaikalani Beamer[72] have similarly argued in more general terms.

Such agency also accounts for the voluntary choice of Native Hawaiians to learn English, a language which had become the language of business and politics and constituted "an immediate stepping-stone to success and power in the rapidly changing world that intruded on their own".[73] However, a well-known Hawaiian

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[67] Okihiro, 114.

[68] Okihiro, 107-111. Missionary William Lyman defrayed running costs at the Hilo Boarding school by having the Native Hawaiian students grow their own food and otherwise support themselves while also demanding tuition and fees from their parents. While Armstrong may have genuinely believed that he was helping Native Hawaiian learners (as discussed by Souza and Walk, above n 24, at 1264) this approach was inherently discriminatory.

[69] Noelani Goodyear Ka'ōpua "Rebuilding the 'Auwai: Connecting Ecology, Economy and Education in Hawaiian Schools" (2009) 5(2) AlterNative 46 at 57-59.

[70] Above n 8.

[71] Above n 52.

[72] Above n 53,

[73] "Support for English–medium schools from the Native Hawaiian community was born of a desire to obtain equality with the *haole* (white foreigners). Both Kamehameha III (Kauikeaouli) and Kamehameha IV (Alexander Liholiho) supported English instruction, as they felt it was requisite to 'meeting the foreigners on terms of equality.' Kānaka Maoli were well aware of the influence and power that foreigners possessed in politics and business…" It was "natural" to want to learn English because "Kanaka Maoli understood that Hawaiian 'was not an immediate stepping-stone to success and power in the rapidly changing world that intruded on their own'": Souza and Walk, above n 24, at 1264.

proverb says: "I ka ʻōlelo nō ke ola, I ka ōlelo nō ka make"—"In language there is life and in language there is death".[74] As among other indigenous peoples, language law and policy inflicted significant harm in Hawaiʻi.

Missionaries originally taught Native Hawaiians in the Hawaiian language, creating the first primer in 1822. The response was impressive:

> By 1853, nearly three-fourths of the Native Hawaiian population over the age of sixteen years were literate in their own language. The short time span within which native Hawaiians achieved literacy is remarkable in light of the overall low literacy rates of the United States at the time. Given Hawaiians' rapid and successful transformation from an entirely oral culture to a literal culture, Hawaiʻi had the opportunity to become a bilingual nation comparable to some European countries.[75]

By 1850 English had become the "language of business, diplomacy, and to a considerable extent, of government itself". Legislation enacted in 1846 required all laws to be published in English and Hawaiian. Initially, the Hawaiian version was to be preferred where there was any question of translation. However, "'English-Mainly' advocates" later successfully passed legislation which made the English translation the preferred version. Essentially, "English remained the controlling law in Hawaiʻi".[76]

Armstrong was a significant English advocate. During his administration, the first government-sponsored school opened in 1851, taught the "three Rs" in English and was followed by others which began to compete with private Hawaiian-medium schools for staff and resources. Subsequent administrations "fiscal[ly] neglect[ed]" Hawaiian-medium schools, claiming that there would soon be little need for such instruction as Native Hawaiians were a supposedly dying race.[77]

However, "it was not enough to arm the Hawaiians with English. The next logical step was somehow to disarm them".[78] Following the overthrow, suppression of the

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[74] Mary Kawena Pukui *'Ōlelo No'eau" Hawaiian Proverbs and Poetical Sayings* (Bishop Museum Press, Honolulu, 1983) at 129.
[75] Paul Nahoa Lucas "E Ola Mau Kākou I Ka Ōlelo Makuahine: Hawaiian Language Policy and Courts" (2000) (34) Haw J Hist 1 at 2.
[76] Lucas, at 3-4.
[77] Lucas, at 5-6. Consistent with contemporary American beliefs about Native Americans, cultural practices such as the hula and kahunaism rather than Westernization were blamed: Albert J Schutz *The Voices of Eden: A History of Hawaiian Language Studies* (University of Hawaiʻi Press, Honolulu, 1994) at 347.
[78] Schutz, at 350.

Hawaiian language was aggressive. The Act of June 8, 1896 of the 'Republic of Hawaii' officially mandated that:

> The English language shall be the medium and basis of instruction in all public and private schools, provided that where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the Department, either by its rules, the curriculum of the schools, or by direct order in any particular instance. Any schools that shall not conform to the provisions of this section shall not be recognized by the Department.[79]

This outright prohibition on Hawaiian language constituted blatant, unapologetic discrimination de jure and de facto against Native Hawaiians. The effects were stunning. Paul Nahoa Lucas notes that by 1902 there were *no* Hawaiian-medium schools in Hawai'i.[80] Native Hawaiian children were corporally punished and Native Hawaiian teachers dismissed for speaking Hawaiian in the classroom or even on school grounds. Once numerous, Hawaiian newspapers numbered only one by 1948[81] despite previously high rates of literacy.

Westernization had already had a devastating physical impact on the Native Hawaiian people. By 1853, the Native Hawaiian population of the Islands had been reduced to 71,019. By 1900, that figure was a mere 39,656 including part-Hawaiians.[82] The introduction of Western diseases, such as influenza, tuberculosis, leprosy, smallpox, and venereal diseases which Native Hawaiians lacked natural immunity against, partially account for these tragic figures.[83]

However, other factors included "cultural conflict", "prostitution", "despair", "new social ills", land alienation and the imposition of a propaganda of "Western superiority"[84]—circumstances resulting from the Māhele and other legal and social changes. As Osorio describes, this "mo'olelo"

> is a story of how colonialism worked in Hawai'i not through the naked seizure of lands and governments but through a slow, insinuating invasion of people, ideas and institutions. It is also a story of how our people fought this colonial insinuation

[79] Act of June 8, 1896, ch 7, s 30 (codified 1897 Haw Comp Laws s 123).
[80] Lucas, at 8.
[81] Though Hawaiian language was still spoken at home by older Hawaiians, many younger Hawaiians lost fluency: Lucas, at 9.
[82] Sumner La Croix "Economic History of Hawai'i" Economic History Association <https://eh,net>.
[83] See Native Hawaiians Study Commission *Report on the Culture, Needs and Concerns of Native Hawaiians, Pursuant to Public Law 96-565, Title III, Final Report Volume I* (Washington DC, Department of the Interior, 23 June 1983) at 102-104.
[84] See Native Hawaiian Study Commission, ibid.

> with perplexity and courage. But, ultimately, this is a story of violence, in which that colonialism literally and figuratively dismembered the lāhui (the people) from their traditions, their lands, and ultimately their government. The mutilations were not physical only, but also psychological and spiritual. Death came not only through infection and disease, but through racial and legal discourse that crippled the will, confidence and trust of the Kānaka Maoli [Native Hawaiians] as surely as leprosy and smallpox claimed their lives and limbs.[85]

The history remains dramatically evident in current socio-economic statistics. While numbers have rebounded,[86] "[i]n all areas of interest, the Native Hawaiian population is suffering and at risk".[87]

While Hawai'i has "the highest ethnic minority population in the nation"—or highest diversity[88]—Native Hawaiians are most likely to be arrested, incarcerated and to end up back in prison.[89] Despite association with "a number of resiliency factors", Native Hawaiian children and adolescents have the highest rates of infant mortality, mental health diagnoses, suicide, and obesity.[90] The same children are more likely to attend a school in need of "restructuring", have less experienced and qualified teachers, have a disproportionate rate of excessive absences, and be in special education. Collectively, Native Hawaiians are consistently below the state median in math and reading achievement tests, have the lowest graduation rates, and are most likely to graduate late and require subsidized school lunches.[91]

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[85] Osorio, above n 8 at 3.

[86] The 2010 US Census records a total of 527,077 Native Hawaiians living in the United States with 289,970 living in the state of Hawai'i. The total number is a 31.4 percent increase in just 10 years and represents the largest group of Pacific Islanders in the nation: Lindsay Hixson, Bradford B Hepler and Myoung Ouk Kim The Native Hawaiian and Other Pacific Islander Population: 2010 (Washington DC, US Census Bureau, 2012) at 14 and 19.

[87] Lahela Hiapola'ela'e Farrington Hite "Maka'ala Ke Kanaka Kahea Manu: Examining a Potential Adjustment of Kamehameha Schools' Tuition Policy" (2009) 31 U Haw L Rev 237 at 247-248.

[88] See "Hawai'i's ethnic diversity still tops" *Honolulu Star Bulletin* (online ed, Honolulu, 1 May 2008).

[89] Office of Hawaiian Affairs and others *The Disparate Treatment of Native Hawaiians in the Criminal Justice System* (Honolulu, Office of Hawaiian Affairs, 2010), 26-42. The joint study involved the Justice Policy Institute, Georgetown Law and University of Hawai'i shows that Native Hawaiians are far more likely to be arrested, more likely to receive a sentence of incarceration over probation, receive longer prison sentences, serve longer probation periods, have more women incarcerated, and have lower rates of early parole and higher rates of parole revocation than all other ethnic groups in Hawai'i, despite similar rates of criminal activity.

[90] David Liu and Christian Alameda "Social Determinants of Health for Native Hawaiian Children and Adolescents" (2011) 70 Hawai'i Med J 9.

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

In terms reminiscent of American Indians and Alaska Natives,[92] Native Hawaiians are the most socioeconomically disadvantaged ethnic group in Hawai‘i. [93] Moreover, such disadvantage tends to "accumulate" and be "cyclical", compounding and distorting disproportionate impact further[94] and creating a higher "allostatic load" [95] for Native Hawaiian individuals—as well as a complex, almost overwhelming species of inequality. The link between the history and such inequality is unquestionable and widely accepted[96]—as is the link between ongoing "multigenerational trauma and discrimination…poverty and inequities of housing, education, environment, healthcare access, and social capital" [97] and statistics in specific areas such as health and education. Such disparities are organically interdependent and interrelated to disparities in other areas and inherently linked to Native Hawaiian identity.[98]

These disparities identify Native Hawaiians collectively with extreme discrimination and inequality. Like Native American identity, Native Hawaiian

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[92] See discussion in Chapter 2 at 2.3.2.

[93] Shawn Malia Kana‘iaupuni, Nolan Malone, and Koren Ishibashi. *Income and Poverty among Native Hawaiians: Summary of Ka Huaka‘i Findings* (Honolulu, Kamehameha Schools, 2005).

[94] See, for instance, in regard to this phenomenon in the context of criminal justice: "The disparate impact of [criminal] laws and their enforcement on Native Hawaiians is apparent at every stage of the criminal justice system, starting from arrest and continuing through parole. The impact is cumulative, starting with the relatively small disproportionality at arrest, but revealing itself to be more distinct at sentencing and incarceration…The cycle repeats itself and notably, negative cyclical effects are concentrated on Native Hawaiian communities.": OHA "Disparate Treatment", above n 89 at 27

[95] "[A]llostatic loads" are described as the "the sum total of stresses encountered over the life of an individual" which in turn contribute to "chronic stress": Liu and Alameda, above n 90, at 9.

[96] This connection has been accepted as fact by all branches of government: see, for example, the Clinton Apology, above n 55; Department of the Interior *from Mauka to Makai the River of Justice Must Flow Freely: Report on the Reconciliation Process between the Federal Government and Native Hawaiians* (Washington DC, Department of the Interior and Department of Justice, 2000); and the Ninth Circuit in the *Kamehameha* case. Also see Shawn Malia Kana'iaupuni and Nolan Malone "This Land Is My Land: The Role of Place in Native Hawaiian Identity" 2006 3(1) *Hūlili: Multidisciplinary Research on Hawaiian Well-Being* 281.

[97] Liu and Alameda, above n 90, at 9. "The theory of multigenerational, or historical trauma posits that significant negative life events are transmitted intergenerationally and thus may continue to affect future generations decades or even centuries after the inciting event…It is important to note that a possible explanation for the persistence of historical trauma, in addition to the magnitude of the initiating events constituting the trauma(s), [is] that such events are not simply in the past. They are constant new, or similar events which may contribute to historical trauma. There are constant struggles to [protect native Hawaiian rights]. Some Native Hawaiians may see the largely ethnic differential of political and economic achievement in Hawai‘i as a reminder of a second or third class status, reinforcing historical trauma. So Native Hawaiian children and adolescents may be directly experiencing their own historical trauma, in addition to being recipients of transmitted trauma from their families": at 12. Liu and Alameda further recognize the impact of "limited economic opportunities structured by colonial legacies and the everyday oppression of perceived second-class status in one's own homeland", "marginalization", and "racism and colonialism" as factors which increase allostatic load, chronic stress and multigenerational trauma: at 12.

[98] Or "the perceived and experiential role of being Native Hawaiian": Liu and Alameda, at 6.

identity appears to inherently attract disparities and predict extreme negative outcomes which fundamentally challenge the notion of equality. In doing so, our very identity defies homogeneity, anonymity, the singular narrative itself, and any presumption of a level playing field.

3.3 MULTIPLE NARRATIVES OF EQUALITY

In Hawai‘i state law, the legal narratives available to address this particular history and the disparities are complicated, including a *Mancari*-like exception and a unique indigenous rights discourse—but also an adamant narrative. These narratives recognize a more substantial version of equality but have been fettered by an *everyone/no-one* standard.

3.3.1 THE FEDERAL-NATIVE HAWAIIAN TRUST RELATIONSHIP

Both the Newlands Resolution[99] which annexed Hawai‘i and the Organic Act of 1900[100] which established the subsequent territorial government recognized a "special trust under the federal government's proprietorship"—that is, a Native American-like trust relationship where the US held legal title but "beneficial title rested with the inhabitants of Hawai‘i" and the territorial government became the "conduit of Congress".[101]

As early as 1920, crime and other socio-economic statistics indicated that "the position of the Hawaiian community had deteriorated seriously" and that "the remnants of Hawaiians required assistance to stem their precipitous decline".[102] As

[99] Joint Resolution of Annexation of July 7, 1898, 30 Stat 750. Via the Newlands Resolution, the United States officially annexed the long coveted Islands from the so-called 'Republic of Hawai‘i' in 1898. The Republic ceded sovereignty and absolute title of Hawai‘i's public lands to the United States. Public lands included the formerly designated government land and Crown lands totally approximately 1.75 million acres.

[100] The Organic Act of 1900 established Hawai‘i's territorial government and, under section 91, designated that those lands would remain in the possession and management of the territorial government until Congress determined otherwise.

[101] Sheryl Miyahira "Hawai‘i's Ceded Lands" (1981) 3 U Haw L Rev 101 at 121. Also, see extensive discussion in *Hawai‘i et al v Office of Hawaiian Affairs* 556 US 163, 129 S Ct 1436 (2009).

[102] MacKenzie "Historical Background", above n 11, at X, B. "Hawaiian Homes Commission Act".

if acting in its fiduciary role in relation to Native Americans, Congress passed the Hawaiian Homes Commission Act in 1921 (HHCA)[103] which set aside 188,000 acres of the ceded public lands for 99-year leases at "nominal" fees for Native Hawaiians of at least 50 percent blood quantum and established the Hawaiian Homes Commission (HHC), a government body to administer the leases. While blood quantum and other features were driven by sugar interests, this legislation was consistent with long-established American and Hawaiian legal traditions and lessees returning to "ancestral lands".[104] When Hawai'i became a state in 1959, section 5(f) of the Admission Act mandated that the state hold all public land in trust and administer the income towards five purposes including "support" for public education and "for the betterment of the conditions of native Hawaiians".[105]

The late David Getches and others have concluded that the HHCA recalls the "history of federal Indian policy",[106] and Gavin Clarkson has demonstrated that fluctuations in Amerian foreign and domestic policy regarding Hawai'i's indigenous people reflect federal Indian policy eras.[107] For instance, during Allotment when federal Indian policy was directed at "break[ing] up the tribal mass directly upon the family and the individual", American citizens and agents orchestrated the overthrow and annexation of Hawai'i[108] and then language suppression. The Newlands Resolution and Organic Act then gave the US control

[103] Hawaiian Homes Commission Act, 1920, Act of July 9, 1921, c 42, 42 Stat 108.
[104] Quoted in MacKenzie "Historical Background", above n 11, at X, B "Hawaiian Homes Commission Act". Regarding the passing of the HHCA, David H Getches and others noted: "The House Committee Report on HHCA defended the bill against the charge that it was 'unconstitutional class legislation' by noting that congress has the authority to provide special benefits for unique groups such as 'Indians, soldiers and sailors'...": David H Getches "Hawai'i: Islands of Neglect" in David H Getches and others *Cases and Materials on Federal Indian Law* (5th ed, Eagan MN, West Publishing, 2004) 945 at 949.
[105] The Admission Act, "An Act to Provide for the Admission of the State of Hawaii into the Union", Act of March 18, 1959, Pub L 86-3, 73 Stat 4. Statehood was conditional on this provision: David M Forman "The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence" (2008) 30 U Haw L Rev 319, at 322-323.
[106] Getches above n 104.
[107] Gavin Clarkson "Not Because They Are Brown, but Because of *Ea*: Why the Good Guys Lost in *Rice v. Cayetano*, and Why They Didn't Have to Lose" (2002) 7 Mich J Race & L 317 at 320-325.
[108] Clarkson, ibid, at 320-325. Earlier in the nineteenth century, when "government-to-government" political relationships between the federal government and Native American tribes resulted in lands ceded by treaty in return for the trust relationship and a measure of autonomy, the sovereign, collective political entity of the Hawaiian Kingdom entered into treaties with the United States. Later, Native Hawaiians lost land through the American-influenced Mahele. As Clarkson points out, the United States had entertained the idea of first the voluntary and then forced annexation of Hawai'i—as in the case of many of the tribes of the era—since the mid-nineteenth century: Clarkson, at 326-327.

over ceded lands and established a federal-Native Hawaiian trust relationship in the same manner it had with other Native American peoples.[109]

The subsequent failure within the HHCA to recognize "Native Hawaiians as a separate political entity" was consistent with "the overall [federal] policy of destroying indigenous political sovereignty":[110]

> Significantly, the HHCA defined Native Hawaiians racially" rather than politically, because a collective political identification would have been inconsistent with the anti-tribal policies of the time. The "pulverizing engine" was, in effect, still running".[111]

Thus, despite the mirroring effect, federal Indian policy often "worked to the detriment of Native Hawaiians", the "timing" of Hawaiian history[112] creating "deleterious anachronisms" [113] which, for instance, left Allotment-era, "constitutionally-defective racial categorizations" of Native Hawaiian identity in place[114]—or rights based on an individualized *everyone/no-one* standard rather than the more accurate political classification.

The trust relationship nevertheless continued to be assumed by the federal government. The subsequent Admissions Act showed that "[i]n setting aside Hawaiian home lands, [the] federal government undertook [a] trust obligation benefitting aboriginal people" and that the "[s]tate assumed a fiduciary obligation upon being admitted as a state".[115] Section 4 of the Admissions Act directed that

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[109] Clarkson, at 328: "Just as it had with regard to the Pueblo, Navajo, and California Indians after the war with Mexico and the subsequent Treaty of Guadalupe-Hidalgo, the United States also inherited a trust responsibility with regard to Native Hawaiians at the moment of annexation".

[110] Clarkson, at 328.

[111] Clarkson, at 326: The HHCA "…created a system somewhat similar to allotment; whereby 200,000 acres of the land ceded to the United States at annexation were set aside for the purpose of leasing homesteads for a nominal fee to individual Native Hawaiians. According to Professor Williams, 'The Hawaiian Homes Commission Act was remarkably similar in purpose and effect to the General Allotment Act. Both statutes submerged Congress's good intentions in the ambitions of others who coveted the lands. Both were poorly carried out, often giving their purported beneficiaries parcels of inarable land'".

[112] Clarkson, at 319.

[113] Clarkson, at 331.

[114] Clarkson, 330-331. During Reorganization, for instance, when allotment was "repudiated" with regards to Native Americans and some modicum of tribal self-governance, tribal land and other features of the Indian Reorganization Act of 1934 benefitted tribes, Native Hawaiians were stuck with the HHCA drafted only a decade before, an "allotment-era policy" focused on civilizing, not self-government. During Termination, the federal government "delegated" its trust responsibility for Native Hawaiians to the State of Hawai'i upon statehood but, because it would have been inconsistent with federal policy at the time, left Allotment's HHCA as the governing instrument of the trust relationship.

[115] See *Ahuna v Department of Hawaiian Home Lands* 64 Haw 327, 640 P 2d 1161 (1982).

the HHCA be "adopted as a provision of" Hawai'i's constitution" and section 5(f) directed that the "proceeds" and "income" from the public lands were to be managed and held by the state of Hawai'i "as a public *trust"* whose five purposes included *"the betterment of the conditions of native Hawaiians*". To be clear, "their use for any other object" beyond these purposes "shall constitute a *breach of trust* for which suit may be brought by the United States". Retaining Allotment-era racial categorization, the Admissions Act relies upon the 50 per cent blood-quantum definition of "Native Hawaiian" used in the HHCA.[116]

Section 5(f) was revisited at the landmark 1978 Hawai'i State Constitutional Convention which recognized the Hawaiian language as an official language of Hawai'i[117] and established the Office of Hawaiian Affairs ('OHA') which, like the BIA, acts as both government agency and public trust. OHA manages a portion of the income and proceeds of the ceded public lands as a trust for "native Hawaiians"—50 percent or more blood quantum descendants of inhabitants of Hawaiian Islands at time of Cook—and also for "Hawaiians"—any descendants of those inhabitants.[118] The Office of Hawaiian Affairs almost recalls a tribal governing entity as it allows Native Hawaiians some self-determination in the form of voting and operates independently of the executive branch of the state government. Ultimately, it manages the remaining public portion of Native Hawaiian land.[119]

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[116] Admission Act, s 5(f). Emphasis added. Section 5(f) reads: "(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of *native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920*, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university." Section 201 "Definitions" of the HHCA defines "Native Hawaiians" "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778".

[117] It is the only state in the Union which has two official languages, English and Hawaiian, and is an obvious exception to the homogenizing trends of "English-only" legislation enacted elsewhere.

[118] The Constitution of the State of Hawaii, art XII §5.

[119] Art XII §6.

The HHC also has BIA-like trust responsibilities and can be sued for breach of that trust.[120] That right is protected by federal law[121] and under the Admissions Act[122]—in effect, by the federal trust relationship delegated to the state of Hawai'i upon statehood. Congress' unquestionable plenary power has been similarly expressed in a plethora of identity-specific legislation relating to diverse aspects of Native Hawaiian well-being including healthcare, education, and housing. A plethora[123] of current federal law recognizes specifically identifies Native Hawaiians in the manner of federal-Indian policy, class Native Hawaiians with Native Americans generally for rehabilitative purposes and otherwise acknowledge the federal-Native Hawaiian trust relationship. While the Native Hawaiian Government Reorganization Act of 2011[124]—the 'Akaka Bill' discussed below—was drafted specifically to recognize a Native American-like trust relationship, the Native Hawaiian Education Act of 2002[125] ('NHEA') appears to currently constitute a straightforward recognition of the trust relationship.

The NHEA was the result of significant grassroots efforts on the part of Native Hawaiians, especially Native Hawaiian educators and drafted to recognize the trust relationship between Native Hawaiians and the federal government.[126] It is part of

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[120] *Keaukaha-Panaewa Community Association v Hawaiian Homes Commission* 588 F 2d 1216 (9th Cir 1978) [*Keaukaha I*].

[121] See *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission* 739 F 2d 1467 (9th Cir 1984) at 1472 [*Keaukaha II*].

[122] *Price v Akaka* 915 F 2d 469 (9th Cir 1990).

[123] See *Doe v Kamehameha Schools* 470 F3d 827 (9th Cir 2006), at 847-848. Examples listed in the Native Hawaiian Education Act 20 USC §7512 include: "(A) The Native American Programs Act of 1974 (42 U.S.C. 2991 et seq.); (B) the American Indian Religious Freedom Act (42 U.S.C. 1996); (C) the National Museum of the American Indian Act (20 U.S.C. 80q et seq.); (D) the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.); (E) the National Historic Preservation Act (16 U.S.C. 470 et seq.); (F) the Native American Languages Act (25 U.S.C. 2901 et seq.); (G) the American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act (20 U.S.C. 4401 et seq.); (H) the Workforce Investment Act of 1998 (29 U.S.C. 2801 et seq.); and (I) the Older Americans Act of 1965 (42 U.S.C. 3001et seq.)."

[124] The Native Hawaiian Government Reorganization Act 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. Previous versions not only echoed the name of the Indian Reorganization Act 1934 and were consistent with political classification, but replayed the role played by the federal government in the overthrow of the Kingdom of Hawaii and the discrimination against Native Hawaiians which followed; were premised on the federal government's responsibility for and rehabilitative will towards the Native Hawaiian people; recognizes their political status and residual inherent sovereignty ; and is aimed at the return of a greater degree of self-determination and self-governance .

[125] NHEA, above n 123.

[126] See "History" Native Hawaiian Education Council <www.nhec.org>.

Title VII of the No Child Left Behind Act (NCLB)[127] with sections regarding Native Americans and Alaskan Natives. Virtually reciting the Clinton Apology, it describes the relevant history of Hawai'i, including population decimation[128] and disparities[129] with the "incalculable harm" done by overthrow and annexation[130] and, using the language of federal Indian law, recognizes the ongoing "special relationship between the United States and the Native Hawaiians"—even "the unique status of the Hawaiian people", "the trust relationship between the United States and the Native Hawaiians", "the special relationship", "the political status of Native Hawaiians…comparable to that of American Indians and Alaska Natives", and "Federal trust responsibility"[131] in terms of "wards" and "trustees".[132] The act provides examples of Native American-specific legislation in which the United States has "recognized and reaffirmed" "[t]he political relationship between the United States and the Native Hawaiian people"[133] and grouped Native Hawaiians with Native Americans and Alaskan Natives for trust purposes. The legislation has nothing to do with "race" but results from Native Hawaiians' "unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship."[134]

Like other federal Indian law and policy, the purposes of the NHEA are rehabilitative—for instance, "to authorize and develop innovative educational programs to assist Native Hawaiians".[135] Funding priorities include programs aimed at addressing "at-risk children and youth", underrepresentation in employment fields, "early childhood and preschool programs" and reading and literacy[136]—or almost a someone-based affirmative action-like standard. But the NHEA also implies "a continuing right to autonomy in internal affairs" and "an

[127] No Child Left Behind Act 20 USC § 6319, PL 107-110 (2002).
[128] NHEA, § 7202 (1-7). Compare with Clinton Apology, above n 55. Such apologies have been issued by the federal government and various states to various groups including Japanese Americans, African Americans, and Native Americans for various historical injustices including slavery, segregation, and internment. These are examples of what Yamamoto and Obrey call reconciliation though perhaps not adequate redress: see Eric K Yamamoto and Ashley Kaiao Obrey "Reframing Redress: A 'Social Healing Through Justice' Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives" (2009) 16(1) Asian Am LJ 5.
[129] Section 7202 (14-17).
[130] Section 7202 (18-19).
[131] See s 7202 (8-11) and (12)(C).
[132] NHEA s 7202 (8).
[133] NHEA s 7202 (13).
[134] NHEA s 7202(12)(B).
[135] NHEA s 7203(1).
[136] NHEA s 7202 (a)(2)-(3).

ongoing right to self-determination and self-governance".[137] Another purpose of the Act is to "encourage the maximum participation of Native Hawaiians in planning and management of Native Hawaiian education programs".[138] Other funding priorities include Hawaiian language acquisition and Hawaiian-medium instruction while "reading and literacy in either the Hawaiian or the English language" is targeted.[139]

Similar to the BIA and HHC, the NHEA established the Native Hawaiian Council on Education ('NHEC') and Island Councils, self-governing boards entrusted with coordinating federal education available to Native Hawaiians, assessing needs, data collection, "provid[ing] direction and guidance, through…reports and recommendations, to appropriate Federal, State and local agencies" in order to improve delivery of education services, and distributing federal funds for the NHEA's purposes.[140] Current NHEA requirements prefer Native Hawaiians be represented on the NHEC.[141]

The assumption of a special trust relationship with Native Hawaiians by both federal and state governments and a *Mancari*-like exception in federal and state law would appear to be beyond debate. Importantly, this body of law recognizes the link between the mo'olelo and present disparities and is accordingly based on rehabilitation and greater self-determination for Native Hawaiians. This body of law clearly associates greater self-determination with positive outcomes for Native Hawaiians as a group. The NHEC itself represents both substantiality-based efforts to effect positive outcomes in education—an understanding that a uniform, standardized approach has not worked—but also a quasi-autonomous body making decisions for its indigenous constituents as it were.

[137] NHEA s 7203(1).
[138] NHEA s 7203(4).
[139] NHEA s 7205(3)(C).
[140] NHEA s 7204. The board has been historically made-up of Native Hawaiian educators.
[141] NHEA s 7204(b) and (c). However, see Every Child Achieves Act of 2015, S 1177 — 114th Congress, a reauthorization of the Elementary and Secondary Education Act of 1965, 20 USC §6301 et seq, s 7204 on composition of the NHEC including political officials who may not necessarily be Native Hawaiian or have significant associations with Native Hawaiian education. Also, membership is not determined, for instance, by in an OHA-like vote.

3.3.2 ANOTHER INDIGENOUS NARRATIVE: THE NATIVE HAWAIIAN LEARNER

However, the NHEA also hints at another narrative. In contrast to Native American treaty relationships,[142] the NHEA acknowledges Native Hawaiians' previous "sovereignty and independence" and "international recogni[tion] as a nation"[143] as a people which "never relinquished its claims to sovereignty or its sovereign lands".[144]

Similarly, Melody MacKenzie has argued that:

> The claims of Native Hawaiians have often been analogized to those of other Native American groups. While there certainly are similarities, there also are significant differences. By 1831, the U.S. Supreme Court had held that the Indian nations were "domestic, dependent nations" that possessed some, but not all, aspects of sovereignty. The Kingdom of Hawai'i possessed all of the attributes of sovereignty and was recognized by the world community of nations. Native Hawaiians were citizens of an organized, self-governing nation whose status as an independent sovereign entity was acknowledged by other nations, including the United States.[145]

As a result, Native Hawaiian customary rights are law in their own right and not mere survivors of federal benevolence. Native Hawaiian customary law is currently protected and expressed in the Constitution of the State of Hawai'i and in legislation which recognizes:

> … customs and practices related to each major aspect of Hawaiian lifestyle and livelihood, including family, community life, human well-being and spirituality, natural environment, cultural and ecological resources, rights, and economics.[146]

For example, section 7 of Article XII of Hawai'i's constitution recognizes "Traditional and Customary Rights":

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the

[142] Where Native American tribes ceded some sovereignty and land in exchange for the trust relationship.
[143] NHEA s 7202(1) and (2). See also s 7202(4).
[144] Section 7202(12)(A).
[145] Melody Kapilialoha MacKenzie "Native Hawaiians and U.S. Law" in MacKenzie and others, above n 10, 264 ["NHs and US Law"] at I.
[146] Melody Kapilialoha MacKenzie "Hawaiian Custom in Hawai'i State Law" (2010) 13 Yearbook of New Zealand Jurisprudence 112 ["Native Hawaiian Custom"] at 112.

> Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[147]

Section 7 was specifically drafted to "recognize[] and reaffirm[] native Hawaiian rights".[148]

Rather than a renaissance or reassertion, these rights represent a historical continuum of law which has endured from the pre-contact era, through Kingdom, Republic and territorial law into current state law. Relevant law has been interpreted as protecting the "*continued* existence of…customary rights which *continue*[] to be practiced".[149] Moreover, Hawai'i Revised Statutes, section 1–1, originally passed in 1892, recognizes that customary "Hawaiian usage" can establish law in the State of Hawai'i.[150]

Hawaiian courts have accordingly upheld customary ahupua'a rights against everyone/no-one property rights,[151] found violations of such rights to be justiciable even when breach of trust under the Admissions Act is not,[152] recognized a wide range of rights protected under section 1-1 and held that Native Hawaiians have standing to claim such rights based on genealogy and ancestry rather than a racialized standard.[153]

Far from abstract, this jurisprudence is historically-aware, identity-specific and ancestrally-defined. The weaving of indigenous education and associated language rights into the state constitution and legislation may similarly signal a more

[147] Constitution of the State of Hawaii, art XII §7.
[148] MacKenzie, "Hawaiian Custom", at 113.
[149] *Kalipi v Hawaiian Trust* 656 P 2d 745 (1982) at 752. Emphasis added.
[150] Haw Rev Stat S 1-1 (2004): "Common law of the State; exceptions. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State". "'Hawaiian usage' is usage which predates 25 November 1982": See discussion in MacKenzie, "Hawaiian Custom", at 113. Section 1-1 itself descends from both Kingdom and Territorial period legislation which, in turn, was derived from pre-contact Native Hawaiian customary law, making it pre-federal, indigenous precedent.
[151] *Kalipi*, above n 149.
[152] *Pele Defense Fund v Paty* 837 P 2d 1247 (1992).
[153] *Public Access Shoreline Hawai'i v Hawai'i County Planning Commission* 79 Hawai'i 425, 903 P 2d 1246 (1995); and *State v Hanapi*, 89 Hawai'i 177, 970 P 2d 485 (1998).

substantial narrative of equality at work, one that exceeds both the singular narrative and a *Mancari*-like exception.

Article X, section 4 of Hawai'i's constitution reads:

> The State shall promote the study of Hawaiian culture, history and language.
>
> The State shall provide for a Hawaiian education program consisting of language, culture and history in the public schools. The use of community expertise shall be encouraged as a suitable and essential means in furtherance of the Hawaiian education program.[154]

Instead of a necessary evil, section 4 appears to recognize the greater collective good of Native Hawaiian identity. It not only allows Native Hawaiian identity recognition in private education but mandates it as a constitutional value in public education—a supposedly identity-blind environment.[155] Terms including 'promote', 'provide for' and 'encouraged' denote a proactive, positive obligation rather than the usual negative rights of equal protection. Including identity-specific sections indicates the high constitutional value drafters and voters placed on protecting this particular identity, and the possibility of an alternative model of federalism at work and a more robust narrative where identity complements equality. The use of community expertise—including *kupuna* (senior community members) knowledgeable in language, culture and history—similarly references traditional Native Hawaiian methods of education. Kupuna knowledge is transmitted between generations and constitute community-generated sources of teaching and pedagogy—again, in the private *and* public classroom.

Legislation has been enacted to give effect to Article X, section 4, including Chapter 302H of the Hawai'i Revised Statutes which sets out the provisions for Hawaiian language medium programs[156] and openly prefers the Native Hawaiian speaker:

> **Attendance and eligibility**. All children of compulsory school age choosing to enroll in the Hawaiian language medium program in families of fluent Hawaiian-speaking persons may be given preference for admittance. Other persons may enroll at the discretion of individual school sites under the conditions described above and in compliance with applicable state and federal laws. All students and

[154] Constitution of the State of Hawaii, art X §4.
[155] See Article X § 1: "There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry".
[156] Chapter 302H-1 HRS.

their families shall abide by the special rules of the program with respect to family participation.[157]

The legislation gives Hawaiian language medium providers some discretion in admissions and the ability to prefer Native Hawaiian students—as most "fluent Hawaiian-speaking persons" are likely to be—for such identity-specific programs. Current bills also relate to appropriations to "develop annual assessments in the Hawaiian language" in language arts, mathematics and science,[158] "to establish and maintain a kupuna in schools program"[159] and the establishment of an "instructional office in Hawaiians studies" within the state Department of Education.[160]

These rights resemble the specifically-indigenous human rights described in the UN Declaration on the Rights of Indigenous Peoples 2007[161] (UNDRIP) which reserves the rights of indigenous peoples to transmit culture, language and history to "future generations",[162] to determine the appropriateness of teaching methods[163] and to establish, maintain and control autonomous educational institutions and systems.[164] As discussed in Chapter 6, these human rights are pre-existing regardless of federal or any other domestic law, being simultaneously universal[165] but also rooted in the inherent right to self-determination of indigenous *peoples*.[166] State Native Hawaiian customary and indigenous-specific rights are likewise sourced in the indigenous people of Hawai'i.

In fact, Hawai'i Act 195, passed in 2011, recognizes Native Hawaiians' human right to self-determination in section 1 which restates article 3 and the core of article 4 of UNDRIP:

[157] Chapter 302H-2 HRS.
[158] HB224 HD3 SD2.
[159] HB1555.
[160] SB481 and HB253. The stated purpose of the proposed legislation is to oversee and coordinate the currently "disjointed" delivery of such programs.
[161] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007) [UNDRIP].
[162] UNDRIP art 13(1).
[163] UNDRIP arts 14(1) & (3).
[164] Article 14(1). The NHEA also echoes indigenous human rights language recognizing that: "Native Hawaiian people are determined to preserve, develop, and transmit to future generations their ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions": NHEA, section 7202(20).
[165] UNDRIP art 1.
[166] Articles 3 and 4.

> Article 3—Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> …
>
> Native Hawaiians have continued to maintain their separate identity as a single, distinctly native political community through cultural, social, and political institutions and have continued to maintain their rights to self-determination, self-governance, and economic self-sufficiency.[167]

In contrast to exceptionalism, Hawai'i state law recognizes a *collective, indigenous, human* right to self-determination not necessarily predicated on a purely liberal project though aimed at facilitating Native American-like federal recognition and self-government.[168] Act 195 also notes that when the United States endorsed UNDRIP in 2010 it also referred to several other pieces of federal legislation which recognize various aspects of self-government and even use the term "self-determination".[169]

While earlier versions were more detailed and prescriptive, the Native Hawaiian Government Reorganization Act of 2011[170]--the latest 'Akaka Bill'—had only eight short sections and was couched in decidedly different language. It would have granted Native Hawaiians federal recognition on the same basis as other indigenous peoples—the original single purpose of the bill—but also affirmed Act 195 and UNDRIP articles 3 and 4 .

The bill is reconciliatory[171] but, unlike the NHEA and previous versions, spends virtually no space on reciting the history of overthrow and disparities.[172] Instead it recognizes that of the three major indigenous groups recognized as having a special trust relationship with the federal government—American Indians, Alaska Natives and Native Hawaiians—only Native Hawaiians lack federal recognition. Far from equality measured against the everyone/no-one individual, the standard is a

[167] Section 1, 11th and 13th paras.
[168] Section 1, 15th para.
[169] Section 1, 12th para.
[170] The Native Hawaiian Government Reorganization Act 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". Last amended December 17, 2012.
[171] Section 2(5) reads: "the United States shall continue to engage in a process of reconciliation and political relations with the Native Hawaiian people".
[172] Compare with Act 195.

collective, identity-specific "parity in policy and treatment among all indigenous groups with which the United States has a special political and legal relationship…"[173]

In addition to Act 195's recognition of Native Hawaiians' right to reorganize a governing entity and to create the Native Hawaiian Roll,[174] the current bill importantly affirms both Articles 3 and 4 of UNDRIP[175]--that is, both internal and external manifestations of self-determination.[176] The Senate Committee on Indian Affairs described this self-determination as "a full-fledged right of all peoples that can be used to claim their inherent sovereignty".[177]

3.4 'GLITTERING GENERALITIES'

Despite the above features, a counter-indigenous discourse is also apparent in Hawai'i state law and the application of federal law to the Islands, one which has overridden the historical federal trust relationship on several occasions and ignores the unique political status of the Native Hawaiian people.

3.4.1 EVERYONE/NO-ONE IN HAWAI'I

Article I of the Hawai'i State Constitution, as if written at the time of the Fourteenth Amendment, proclaims "Rights of *Individuals*" in section 2, that "[a]ll persons are

[173] Section 2(4). For a more in-depth discussion on parity among indigenous peoples see Daniel Akaka *Report of the Committee of Indian Affairs*, December 17, 2012, 112th Congress 2d Session, Senate, Report 112-251, Calendar No 568 written by Senator Daniel Akaka, at 14. The Report explains that parity would "put an end to…discriminatory practices" within the Department of the Interior in distinguishing between indigenous groups: at 14-15

[174] Section 2(8).

[175] While art 3 is quoted above, art 4 reads: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions".

[176] See Chapter 6 discussion on the arts 3 and 4 at 6.3.3.

[177] Akaka, above n 173.

free by nature and are equal in their inherent and inalienable rights",[178] while section 5 declares that:

> *No* person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of *race*, religion, sex or ancestry.[179]

Section 8 also presents a fairly anonymous, colorblind version of the rightsholder: "No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land."[180] Likewise, in education, Article X, section 1 prohibits any "discrimination in *public* educational institutions because of race, religion, sex or ancestry".[181]

Statehood means that the Fourteenth Amendment and the Constitution of the Untied States itself are also the law of Hawai'i as are the Civil Rights Act 1964 and various other pieces of colorblind federal legislation. The Supreme Court has ultimate jurisdiction to interpret the Constitution in regards to Hawai'i residents as it does elsewhere. Consequently, state Native Hawaiian education and language rights have conflicted with federal law.

In *Tagupa v Odo*(1994)[182] a Native Hawaiian lawyer was unsuccessful in a claim brought under both the state constitution's official language provisions and the Native American Language Act (NALA)[183] because the facts were outside the sphere of education.[184] Ironically, in *Office of Hawaiian Affairs v Department of Education* (1996),[185] NALA also failed to protect Native Hawaiian language rights in the educational context. Essentially, OHA argued in substantial terms that a lack

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[178] Constitution of the State of Hawaii, art I §2. Emphasis added.
[179] Constitution of the State of Hawaii, art I §5. Emphasis added.
[180] Constitution of the State of Hawaii, art I §8. Emphasis added.
[181] Constitution of the State of Hawaii, art X §1. Emphasis added..
[182] *Tagupa v Odo* 843 F Supp 630 (D Haw 1994) at 631.
[183] Native American Languages Act 25 USC §2901 (2000).
[184] In *Tagupa*, an attorney of Native Hawaiian descent was unsuccessful in a federal court under the state constitution and the Native American Languages Act ('NALA') when he was denied the right to give a deposition in Hawaiian—a right implied by the official language provisions of Article XV, section 4 of the state constitution. Ironically, while NALA's purpose is described as to "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages ", Tagupa's suit failed because the judge limited the application of NALA to the sphere of education .Despite provisions within the act itself which stipulate its use by "States… to take action on, and give official status to, their Native American languages for the purpose of conducting their own business": see NALA 1990, section 104 (6).
[185] *Office of Hawaiian Affairs v Dept of Educ* 951 F Supp 1484 (D Haw 1996).

of resources and qualified teachers and the general inaccessibility of the state's Hawaiian language immersion program violated NALA. However, the US district court for the District of Hawaii found that there was no enforceable right under NALA to make such claims.[186]

OHA had originally asserted violations of both article X section 4 and HRS 1-1, but the Court was unwilling to examine "state law".[187] Neither was the Court willing to test the alleged failures of the state in terms of the trust relationship. It did entertain a possible cause of action under the Fourteenth Amendment, specifically under the desegregation precedent in *Keyes v School District No. 1* (1973)[188] and *Milliken v Bradley* (1977).[189] However, after apparently approving *Milliken*'s substantial interpretation of present disparities as the continuing effects of past discrimination—almost multigenerational trauma—and violations of equal protection eligible for injunctive relief, the Court fell back on a more conservative test in *Keyes* without being persuaded by the similar facts in the same case.[190]

Other commentators have argued that the No Child Left Behind Act 2001 (NCLB)[191] presents "myriad setbacks" to NALA given its "restrictive teacher requirements" including qualifications and licensing at odds with the state's constitutional provision for "community expertise". The criteria also seem to double the requirements for qualified immersion teachers, particularly in higher grades where they must be "both fluent in an indigenous language and 'highly qualified' to teach math, science, or another content area".[192] Since the NCLB also bases funding on English-medium assessment,[193] immersion students are a priori disadvantaged since instruction in English may not begin for several years in

[186] NALA's failure to protect Native Hawaiian rights is particularly ironic since Hawaiian policy helped to shape the federal legislation: see William Wilson "The Sociopolitical Context of Establishing Hawaiian-Medium Education" 11(3) Language, Culture and Curriculum 325 at 326-327.
[187] The defendants successfully argued that the Eleventh Amendment to the United States Constitution prevented the court from looking at violations of Article X Section 4 and HRS 1-1.
[188] *Keyes v Denver School District No 1* 413 US 189 (1973).
[189] *Milliken v Bradley* 418 U.S. 717 (1974).
[190] Where lack of access to adequate facilities and resources for students in certain neighbourhoods constituted a violation of equal protection: see discussion in previous chapter at 2.3.1.
[191] Discussed in previous chapter at 2.4.3.
[192] Mary Ann Zehr "NCLB Seen Impeding Indigenous-Language Preservation" Education Week (online ed, Bethesda MD, 14 July 2010).
[193] See discussion in Chapter 2 on NCLB's homogenizing effect…

immersion program.[194] Critics allege that the NCLB actually "imped[es] indigenous language preservation",[195] apparently neutralizing both NALA and state Native Hawaiian education and language rights.

The NCLB's overwhelming standardizing, homogenizing and anonymizing effect on education[196] must inevitably impact the NHEA. A quick glance shows that the NCLB is 670 pages long with the NHEA beginning on page 507 after hundreds of pages of standardizing, homogenizing and anonymizing provisions. Despite the NHEA's recognition of the trust relationship, it is literally submerged within an *everyone/no-one* document and largely concerned with creating federally-recognized bodies to manage federal funds rather than recognizing substantial *rights* to indigenous self-government or self-determination in education. Ultimately, the NHEA falls short of state-promised Native Hawaiian education and language rights.[197]

Recent efforts to "eliminate"[198] the NHEA altogether are even more concerning. Last year, United States House of Representatives Resolution 5 (HR 5)—the so-called Student Success Act[199] meant to rectify the failings of the NCLB—proposed to repeal Title VII regarding American Indian, Alaska Native and Native Hawaiian education. While the original bill proposed to remove some and bury other American Indian provisions among the minutiae of Title I,[200] the next version removed *all* provisions relating to Native Hawaiians and Alaska Natives. Ultimately, the bill passed the House with Title VI in place, but the threat to "critical programs" which "remedy educational disparities, support Native Hawaiian language revitalization, and allow innovative community-based programs" to assist "disadvantaged Native Hawaiians from preschool to post-secondary education"[201]

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[194] See Kelsey Klug "Native American Languages Act: Twenty Years Later, Has It Made a Difference?" (19 July 2012) Cultural Survival <wwwculturalsurvival.org>.
[195] Zehr, above n 192.
[196] See my discussion in previous chapter at 2.4.3.
[197] For a more in-depth discussion on the NCLB and NHEA including implementation see Souza and Walk, above n 24, at 1259-1307.
[198] "Effort to eliminate Native Hawaiian Education Act defeated" OHA <www.oha.org>.
[199] See HR 5, introduced by Rep John Kline (R-Minnesota), 6/6/2013, amended 11/7/2013 to reinstate the NHEA but to amend, among other things, membership requirements for the Native Hawaiian Education Council, passed House 19/7/2013, received in Senate 24/7/2013.
[200] Where, incidentally, American Indians and Alaska Natives would have, with other groups such as rural learners, "migratory children", and "English learners", been submerged in Title I which is still standards-based but perhaps even more identity-blind: "Summary: H.R. 5—113th Congress (2013-2014)"
[201] OHA, above n 198.

is clear. Ultimately, in legislatively severing Native Hawaiians from Native Americans, HR 5 would have renounced both the federal-Native Hawaiian trust relationship and the NHEA's indigenous learner narrative, leaving only American Indians identified in the NCLB.[202]

The very recently passed Every Child Succeeds Act 2015[203] has reserved the previous Title VII including American Indian, Alaskan Native and Native Hawaiian provisions under Title VI—at least for now—but remains funding and standardization based.

3.4.2 RICE V CAYETANO

The 2001 case of *Rice v Cayetano*[204] dramatically illustrates the insinuation of the singular narrative into Hawai'i. The case has been a lightning rod for reverse discrimination in Hawai'i and foreshadows *Kamehameha*.

Harold Rice, a wealthy rancher and descendant of American missionaries, sued the State of Hawai'i when he was not allowed to vote in the OHA trustees election. Rice, admittedly, did not qualify as either a native Hawaiian or Hawaiian but alleged a violation of his Fourteenth and Fifteenth Amendment rights on the grounds that voting requirement was a *racial* rather than *political* classification. The state logically argued *Mancari* given the special trust relationship between Native Hawaiians and both federal and state governments. Subsequently, several federal courts arrived at radically different conclusions.

Judge Ezra in the federal district court of first instance,[205] a unanimous three-judge panel in the Ninth Circuit on appeal[206] and a dissenting minority in the Supreme

[202] The bill would have still made allowances for ESOL students until they became English proficient with the emphasis on parity not bilingualism, as well as migrant students and homeless children. But the bill remained largely focused on school accountability and English-based assessment.
[203] Every Child Succeeds Act of 2015, S 1177 — 114th Congress, a reauthorization of the Elementary and Secondary Education Act of 1965, 20 USC §6301 et seq.
[204] *Rice v Cayetano* 528 US 495 (2000).
[205] *Rice v Cayetano* 963 F Supp 1547 (D Haw 1997).
[206] *Rice v Cayetano* 146 F 3d 1075 (9th Cir 1998).

Court[207] of Justices Stevens and Ginsburg (what might collectively be called 'the minority') rationally tied the voting requirement to the special trust relationship and *Mancari.* The minority recognized the political rather than racial nature of native Hawaiian and Hawaiian. Significant evidence supported the application of *Mancari* including: the voter-approved constitutional amendments which established OHA and made it a BIA-like state agency whose 'constituents' were Native Hawaiians;[208] the funding of OHA by the federal government for the purpose of furthering the federal trust relationship;[209] the acknowledgment of previous sovereignty in the Clinton Apology in 1993;[210] and the plethora of federal legislation which classed Native Hawaiians with Native Americans regarding special programs benefitting Native Americans.[211]

The *Rice* minority recognized that Congress' powers to deal with Native Hawaiians did not arise from their "ancient racial origins", a formal allotment of tribal lands, federal recognition or being "Indians". These facts were not enough to overwhelm the evidence of Native Hawaiian history.[212] While the relationship between the state and Native Hawaiians was not identical to that with the federal government, *Mancari*'s rational basis of review still applied.[213]

According to the minority, the voting requirement met *Mancari*'s criteria because it was "reasonably and rationally"[214] tied to the goal of promoting self-government and making OHA "more responsive to the needs of its constituent groups", based on a trust relationship with OHA as a trustee and Native Hawaiians as beneficiaries, and represented the participation of the governed in the governing agency. Accordingly, the goal of the voting requirement was political not racial.[215]

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[207] *Rice v Cayetano* 528 US 495 (2000). However, the dissent of Stevens and Ginsburg JJ in the Supreme Court will be most relied upon.
[208] *Rice v Cayetano* 528 US 495 (2000) at 528 Steven J dissenting.
[209] Discussed by Stevens J at 538.
[210] Per Stevens J at 533.
[211] Per Stevens J at 533.
[212] Per Stevens J at 531, citing *United States v John*, 437 US 634 (1978), at 653, and *Delaware Tribal Committee*, 430 US 73, 82, n 14, 84-85 (1977).
[213] See Stevens J at 537 discussing *Washington v Confederated Bands and Tribes of Yakima Nation* 439 US 463 (1979) at 500-501.
[214] *Rice v Cayetano* 963 F Supp 1547 (D Haw 1997) at 1554-1555.
[215] Per Stevens J at 538.

The similarities between the facts of *Rice* and *Mancari* are persuasive: a government agency given a clear mandate by the state and—via delegated powers and federal legislation—the federal government to administer trust property for an indigenous people with whom it has previously dealt as a foreign nation and for whom it has also clearly and repeatedly expressed its continuing fiduciary responsibility for. However, the majority of the Supreme Court (7-2) was unconvinced of—or wilfully blind to—minority arguments, excluded the *Mancari* exception and applied a historically-abstract, colour-blind standard to the OHA voting requirement.

The majority focused almost solely on misapplied everyone/no-one Fifteenth Amendment precedent in cases such as *United States v Reese* (1876).[216] *Reese* established: "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be".[217] Admittedly, qualifications were "manipulative" and *deliberate* "devices"[218] from the Jim Crow era including so-called "grandfather clauses", poll taxes, literacy tests and gerrymandering which effectually excluded African-Americans from voting[219] rather than a voting structure meant to rehabilitate an indigenous peoples via self-determination.

The majority emphasized the ancestry requirement in grandfather clauses though there was no suggestion of manipulation or deliberateness in the OHA voting requirement. As if arguing otherwise, the majority itself briefly touched on the history which led to the "tragedy" of introduced diseases, "high mortality figures", and later "despair, disenchantment, and despondency" amongst Native Hawaiians and recognized Congress' rehabilitative will towards Native Hawaiians as expressed in various legislation.[220] Crucially, their honours did not at any point use words such as 'discrimination', 'inequalities', or 'injustice' to describe that history.[221] Rather the Court equated Native Hawaiians with African-Americans

[216] *United States v Reese* 92 U S 214 (1876) at 218.
[217] See *Hill v Stone* 421 US 289 (1975) discussed in *Rice v Cayetano* 528 US 495 (2000) at 289 per majority. Thus, if two persons of different race both fulfil age, citizenship and residency requirements they share the 'same qualifications' and should both be able to vote.
[218] *Rice v Cayetano* 528 US 495 (2000) at 513 per majority.
[219] Examples cited include *Guinn & Beal v United States* 238 US 347 (1915) and *Harper v Virginia Board of Elections* 383 US 663 (1966).
[220] *Rice v Cayetano* 528 US 495 (2000) at 506 per majority.
[221] The majority very briefly mentions the Clinton Apology, above n 55.

while failing to recognize the common experiences of these minority groups, namely, the broader phenomenon of identity-driven, de facto and de jure discrimination. Instead, the majority glossed over Native Hawaiian history, citing, for instance, Native Hawaiian population figures in 1878 without putting them into perspective and failing to cite a range of original figures when the number is debated and when higher figures are commonly cited by other branches of government. Ultimately, all figures present a holocaust-level event[222] most analogous to that of other indigenous peoples. The majority, however, spent little time on context, choosing instead to emphasize the influx of other ethnic groups into the islands, their seemingly cosmopolitan contributions to the culture of the island[223] and the fact that, upon statehood, the federal Constitution had become the law and "heritage" of the Islands.[224] In emphasizing the most negative aspects of the history without context or the vocabulary of equality and discrimination, the majority also appeared to be retelling the old dying-race story.

Ultimately, the majority concluded that "[t]he ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular *race* by name"[225] and that

> [t]he voting structure in this case is neither subtle nor indirect, it specifically grants the vote to persons of the defined ancestry and to no others. *Ancestry can be a proxy for race*.[226]

As a result, the court applied strict scrutiny—but without *City of Richmond v JA Croson Co*'s[227] possible exception on the grounds of past discrimination or *Grutter v Bollinger*[228] and *Regents of the University of California v Bakke*'s[229] diversity argument. It also found the OHA requirement to be unlawful racial discrimination.

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[222] See previous discussion at 5-6.
[223] *Rice v Cayetano* 528 US 495 (2000) at 506 per majority.
[224] Per Kennedy J at 524: "When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawai'i attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawai'i".
[225] *Rice v Cayetano*, 528 US 495, 517 (2000).
[226] *Rice*, at 514. Emphasis added.
[227] *City of Richmond v JA Croson Co* 488 US 469 (1989) discussed in previous chapter at 2.4.
[228] *Grutter v Bollinger* 539 US 306 (2003) discussed in the previous chapter at 2.4.
[229] *Regents of the University of California v Bakke* 438 US 265 (1978) discussed in the previous chapter at 2.4.

Interestingly, the *Rice* majority did not engage in any robust discussion on possible Fourteenth Amendment standards. This avoidance is significant since the right to vote is also a measure of equal protection—or "the right to participate in the electoral process equally with other *qualified* voters".[230] The Fourteenth Amendment was part of the petitioner's original suit. Moreover, the Fourteenth Amendment could have provided a more specific test for the voting requirement. In *Hill v Stone* (1975),[231] for instance, the Supreme Court held that:

> As long as the election is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest.[232]

Hill could have afforded a rational basis of review, akin to that in *San Antonio Independent School District v Rodriguez*[233] or *Mancari.*

In terms of the Fifteenth Amendment, the *Rice* majority rejected the special-purpose exception applied in *Salyer Land Co v Tulare Lake Basin Water Storage Dist* (1973)[234] where, in somewhat analogous circumstances, water storage district elections were limited to the landowners who used that water. The stumbling block for the majority was the "race neutrality command of the Fifteenth Amendment":[235]

> The argument fails on more essential grounds. It rests on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated on race.[236]

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[230] See *Harris v McRae* 448 US 297 (1980) at 322 n 25. Emphasis added.
[231] *Hill v Stone* 421 US. 289 (1975). In that case, state action was excused because the election was reasonably restricted to those who have an interest in the outcome—as in the case of a state agency whose whole purpose is to administer a trust and programs for the benefit of a unique and particular ethnic and political community. The State of Hawai'i could have argued a compelling state interest in the identity-specific requirement, given the 1978 state constitution amendments and regardless of a trust relationship.
[232] *Hill* at 289. Emphasis added.
[233] *San Antonio Independent School District v Rodriguez* 411 US 1 (1973).
[234] *Salyer Land Co v Tulare Lake Basin Water Storage Dist* 410 US 719 (1973).
[235] *Rice v Cayetano* 528 US 495 (2000) at 522 per majority.
[236] *Rice v Cayetano* 528 US 495 (2000) at 497 per majority. There is a certain, consistency, however, between the majority's distinguishing of *Salyer*, where economic considerations appear to drive the constitutionality of the exception, and the acceptance of economic discrimination in Rodriguez, discussed in previous chapter at 2.5.

Despite copious evidence of the trust relationship—and some recognition of disparities—the majority apparently refused to see anything but race, prompting Justice Stevens to opine:

> The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawai'i. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear to me that Hawai'i's election scheme should be upheld.[237]

There is a stark contrast between the state law and the Supreme Court's position. In a surprising twist on recent trends,[238] the Court overrode voter-approved state law. Once again, however, it ignored the historical context and centuries of federal Indian law precedent. As a result, OHA's fundamental purpose as a vehicle for Native Hawaiian self-government and self-determination has been undermined. Easily recognized constituents are almost impossible to identify as they are now hypothetically diluted to include everyone and anyone in the state. The trust corpus itself is in jeopardy. Following *Rice*, at least three cases have come before federal courts challenging the use of OHA funds and assets for the betterment of Native Hawaiians alone.[239] And, as a Supreme Court ruling, *Rice* carries no small authority.

In imposing an adamant federal *everyone/no-one* narrative on multi-narrative state law, the majority decision is 'illusory' and devoid of the historico-legal complexity required to clarify the substantive issues. The late Chris Iijima wrote that the *Rice* decision:

> not only…represents a distortion of the condition of Native Hawaiians and their justice claims, but also…it is a stark reminder…of this Supreme Court's inability and unwillingness to distinguish different claims of the Native Hawaiian people and people of color in general…[240]

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[237] *Rice v Cayetano* 528 US 495 (2000) at 527-528 per Stevens J dissenting.
[238] See its hands-off approach in *Schuette v Coalition to Defend Affirmative Action* 572 US___ (2014).
[239] Discussed in Hite, above n 87 at 244. Cases include *Arakaki v Cayetano* 324 F 3d 1078 (9th Cir 2003): *Carroll v Nakatani* 342 F 3d 1078 (9th Cir 2003); and *Arakaki v Lingle* 477 F 3d 1048 (9th Cir 2007).
[240] Chris K Iijima "New Rice Recipes: The Legitimization of Continued Overthrow" (2002) 3 Asian-Pacific L & Pol'y J 385 at 387-392.

Iijima recognized that, while affirmative action is aimed at the inclusion of excluded minorities, Native Hawaiian claims demand "justice" and "redress for loss of sovereignty" in the wake of "the immense harm caused by the dispossession of Hawai'i by the United States". These are not claims of "racial oppression" but of an "indigenous" people in the wake of "the forcible taking of their land and culture".[241] Instead, as Iijima might describe, the Court placed Native Hawaiians in dichotomized, "binary analytical boxes"[242] of race.

Just as the imposition of an identity-blind, historically abstract narrative represents the "resegregating" of America in terms of various minorities,[243] *Rice* seems to "legitimiz[e] continued overthrow"[244] in terms of Native Hawaiians. Despite its distortion, *Rice* would haunt *Doe v Kamehameha Schools*.

3.5 THE CASE: DOE V KAMEHAMEHA SCHOOLS

> *It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long' constituted…the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.*[245]

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[241] Ibid at 386-387. By way of example, Iijima recognizes that affirmative action would be appropriately applied to racial discrimination which took place in the sugar plantation system whereby "Hawaiians, Filipinos, Pacific Islanders, and African Americans, among others," were subjected to "unequal opportunity and treatment". However: "Native Hawaiian harms are not solely rooted in the vestiges of the racially discriminatory plantation social structure. They are rooted in the forcible taking of their land and culture for the plantations themselves, among other reason. In sum, not all people in Hawai'i have an equal claim to the immense harm caused by the dispossession of Hawai'i by the United States—even those harmed by the racially stratified plantation history. The claims for loss of Hawaiian land and culture are a claim of the indigenous Hawaiian people. This fundamental difference the Supreme Court in *Rice* never addressed, could not understand, and refused to even acknowledge.": Iijima, "New Rice Recipes" at 387.

[242] Chris K Iijima "Race over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano" (2000) 53 Rutgers L Rev 91. His boxes refer to the black-white dichotomy described in Chapter 2 at 2.2.1, for instance.

[243] See Eric K Yamamoto and Catherine Corpus Betts "Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of *Rice v. Cayetano*" in Rachel E Moran and Devon Wayne Carbado (eds) *Race Law Stories, Foundation Press* (New York, Thomson Reuters/ Foundation Press, 2008) 541.

[244] Iijima, "New Rice Recipes", above n 240.

[245] *Johnson v Transportation Agency* 480 US 616 (1987) at 630.

In some ways, it is difficult to accurately encapsulate everything that the Kamehameha Schools *are*, but, clearly, it is not your average school.

The Schools are an expression of Native Hawaiian customary law. Princess Bernice Pauahi Bishop ('Pauahi'), great-granddaughter of Kamehameha the Great and his last surviving heir[246] made provisions in her last will and testament for the establishment of a school. Though Western-educated, Pauahi affirmed a traditional ali'i role of trust and protection[247] when she bequeathed the bulk of her substantial estate, representing the residue of the Crown Lands of Hawai'i:[248]

> to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools.[249]

In these arrangements, trustees were to "giv[e] preference to Hawaiians of pure or part aboriginal blood".[250] The Princess passed away in 1884, but a school for boys

[246] As the last direct descendant of Kamehameha I, Pauahi was actually offered the succession to the throne by a dying Lot, Kamehameha V, but refused, thus making way for the Kalākaua family to rule: see Liliuokalani, above n 43, at 36.

[247] Avis Kuuipoleialoha Poai and Susan K Serrano "Ali'i Trusts: Native Hawaiian Charitable Trusts" in MacKenzie and others, *Treatise*, above n 11, also note at 1171: "In fulfilling the traditional role of Hawaiian ali'i (chiefs), certain ali'i established perpetual trusts to benefit the Native Hawaiian people. These ali'i trusts are Kamehameha Schools/Bernie Pauahi Bishop Estate, the Queen Lili'uokalani Trust, the King William Lunalilo Trust, and the Queen Emma Trust. The trusts were established by will or deed of trust and, at least initially, were all supported by an endowment of land. Income from the lease, and in some instances the sale, of trust lands support their programs and services. Each of the ali'i trusts was intended to address a specific social need: Kamehameha Schools/Bernice Pauahi Bishop Estate, education; the Queen Lili'uokalani Trust, care of orphans and indigent children; the King William Lunalilo Trust, care of indigent and elderly Hawaiians; and the Queen Emma Trust, medical care.

"These trusts reflect the reciprocal duties of the ali'i and the maka'āinana (common people). Traditionally, the maka'āinana had the duty to care for the land, and wise management of the people and land enhanced the right of the ali'i to rule. Productive use of the land and mutual cooperation ensured the right of the maka'āinana to live off the land and use its resources. Although the traditional social structure was dramatically altered through the creation of private property rights in the mid-nineteenth century and the transition from a subsistence to a market economy, the creation of these trusts suggests that the ali'i continued to understand and attempted to fulfil their obligation to provide for the needs of their people."

[248] Part of the lands owned by the King post-Māhele, the Bishop Estate currently comprises 9 per cent of the total land in Hawai'i. According to Poai and Serrano, at 1194, the Kamehameha Schools/Bernice Pauahi Bishop Estate's assets were recently valued at $9.2 billion dollars perhaps explaining why non-Hawaiians may want access. However, as originally envisioned, those resources are used to heavily subsidize the education of Kamehameha Schools students but also to assist students of many ethnicities and races in public education.

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

[250] Ibid.

was established in 1887 and another for girls in 1894 just prior to the Hawaiian language ban.

The Schools were a direct response to the mo‘olelo of Westernization, established to help Native Hawaiian children overcome disparities and compete on a level playing field:[251]

> The founder of these schools was a true Hawaiian. She knew the advantages of education… Her heart was heavy when she saw the rapid diminution of the Hawaiian people going on decade after decade and felt that it was largely the result of ignorance…And so, in order that her own people might have the opportunity for fitting themselves for such competition, and be able to hold their own in a manly and friendly way, without asking the favors which they were not likely to receive, these schools were provided for, in which Hawaiians have the preference, and which she hoped they would value and take advantage of as fully as possible.[252]

The modern Kamehameha Schools/Bernice Pauahi Bishop Estate (‘the Schools’) are a private charitable education trust”—even an ali‘i trust[253]—and “Hawai‘i’s largest private landowner” but also 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”. [254] Despite working with the NHEC and other institutions to improve educational standards for Native Hawaiians, the Schools receive no federal funds and most students are heavily or fully subsidized by the Schools.[255]

The Schools’ curriculum is identity-responsive, with Native Hawaiian language, culture and arts instruction required in addition to standard ‘college-prep’ subjects such as English, mathematics and science. Native Hawaiian values inform pedagogic practices and Native Hawaiian identity is affirmed and celebrated.[256] The Schools have instituted “a ‘Leadership Model’ of education, meant to ‘restore self

[251] See Poai and Serrano, at 1171, quoted in footnote 268.
[252] Charles Bishop, Founder’s Day speech 1889, found in Kamehameha Schools Bishop Estate archives < http://kapalama.ksbe.edu>.
[253] See Poai and Serrano, at 1171, quoted in footnote 268.
[254] Poai and Serrano at 1194.
[255] In *Kamehameha*, above n 123, at 832, the Ninth Circuit noted that while the actual cost of tuition was somewhere around $20,000 per student annually, students were only asked to pay $1,784 per year with 65 per cent of those enrolled receiving financial aid with their portion: Kamehameha, above n 3, at 19058
[256] Materials, for instance, celebrate the accomplishments of notable Native Hawaiians in various fields: see Kamehameha Schools Ka Lamakū: Hawaiian Culture resource materials which, for instance, spotlights influential Native Hawaiians, and describes prayers, chants, cosmology and genealogies, astronomy and navigation, and other traditional practices, and uses all these things to describe Hawaiian identity.

identity, integrate Native Hawaiian culture, heritage, language, and traditions into the educational process, and provide a first-rate educational experience for Native Hawaiians.'"[257]

The Schools play a unique levelling role in the Native Hawaiian community. The most complete study of educational and other outcomes for Kamehameha Schools' students in 2003 showed that when the rate of high school graduation across the nation generally was 71 per cent, Hawai'i's general rate 69 percent, and Native Hawaiians generally 72 per cent, Kamehameha Schools had a 99 percent high school graduation rate.[258] At a time when the rate of college enrollment for European-Americans nationwide was 64 percent, 92 percent of Kamehameha Schools students attended college. Of that number, 64 percent complete a bachelor's degree or higher.[259] The Schools appear to achieve the same "favourable outcomes" as other private schools while the student body is socioeconomically comparable to public school students.[260]

Such statistics clearly represent an actual levelling of the playing field, a de facto equality which somehow transcends the mo'olelo of colonization, its residual trauma and discrimination, allostatic load and disparities. Significantly, this has been accomplished without any welfare, subsidization or other privileges from the public, or at any great expense to other individuals since funds, expertise and other resources have come from the disadvantaged class itself—that is, from the Native Hawaiian community. Ironically, because students may qualify for the preference with *any* amount of Native Hawaiian blood, the Schools' student population is

[257] *Kamehameha*, at 832.
[258] Linda Serra Hagedorn and others "The Academic and Occupational Outcomes of Private Residential High School Student Instruction" (2005) 13(1) Pacific Educational Research Journal 21 at 13-14.
[259] Hagedorn and others at 14. The same study found positive correlations between "Hawaiian Culture Exploration and the number of closest friends in college who were Hawaiian". Students' strong sense of these factors predicted college completion.
[260] Hagedorn and others at 16-17. While current data such as Kamehameha Schools/Bishop Estate *Native Hawaiian Educational Assessment Update 2009: A Supplement to Ka Huaka'i 2005* (Honolulu: Kamehameha Schools, Research & Evaluation Division, 2009) and the *Native Hawaiian Data Book 2011* Office of Hawaiian Affairs <www.ohadatabook> show improvements in some of these areas for Native Hawaiians since 2003, Kamehameha Schools' success is still impressive. For instance, the OHA figures show that the number of Native Hawaiians attempting a college education currently is still only 45.7 percent versus 92.6 percent of Kamehameha Schools' students. The Schools' provision of financial aid was also a significant factor.

extremely diverse, representing some 60 ethnic groups.[261] Sourced in both traditional ali'i trust and protection and the will of the Native Hawaiian community, the Schools also appear to evidence the continuous exercise of self-determination by Native Hawaiians.

Given their impressive academic record, many Native Hawaiian and non-Native learners apply for admission. The Schools' policy still prefers the admission of Native Hawaiian children in "indigent" circumstances[262] who academically qualify.[263] Other students are not excluded from admission, but, given the overwhelming number of applicants who qualify and apply as 'Native Hawaiian', non-Native Hawaiian students are rarely accepted.[264]

3.5.1 IN THE FIRST INSTANCE: SOMEONE AND RELAXED SCRUTINY

Counsel for John Doe relied heavily upon the everyone/no-one narrative in *Runyon v McCrary* (1976),[265] *McDonald v Santa Fe Trail Transportation* (1976),[266] and *Rice* in arguing that: section 1981 applied to private schools and also protected Anglo Americans from any racially-based discrimination; 'Native Hawaiian' was a *racial* rather than *political* classification; and that the admission policy was an

[261] 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 "Hawaiian Ancestry Verification Documentation Information" Kamehameha Schools/Bernice Pauahi Bishop Estate <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*, at 832 per majority.

[262] Pauahi's will "devote[s] a portion of each year's income to the support and education of orphan's, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood" and gives her trustees "full power to make all such rules and regulations as they may deem necessary for the government of said schools and to regulate the admission of pupils": see article 13 "Pauahi's Will" Kamehameha Schools/Bernice Pauahi Bishop Estate <www.ksbe.edu>.

[263] All applicants to Kamehameha Schools at various entrance levels undergo substantial academic testing as part of the application process. Applicants for entrance at 7th grade, for instance, undergo standardized testing in "reading comprehension and general mathematics", must "submit their final report cards from the previous year", interview with a Kamehameha teacher or administrator, and complete a "timed writing test" (write an essay on a topic chosen from a list in 20 minutes). The purpose of such testing is to "admit[] children who show potential": "Admissions and Program Enrollment" Kamehameha Schools/Bernice Pauahi Bishop Estate <http://apps.ksbe.edu>.

[264] There are approximately 70,000 students of Native Hawaiian ancestry of elementary, intermediate and high school (K-12) age in the State of Hawai'i, while the Schools' current enrolment capacity is only 5,400 children: see "Financial Aid and Scholarships Services" Kamehameha Schools/Bernice Pauahi Bishop Estate <http://apps.ksbe.edu>.

[265] *Runyon v McCrary* 427 US 160 (1976).

[266] *McDonald v Santa Fe Trail Transportation Co* 427 US 273 (1976).

affirmative action scheme subject to a strict level of judicial scrutiny. As discussed in the previous chapter, strict scrutiny would have required the Schools to prove that the policy served a compelling government interest and was narrowly tailored to meet that purpose.[267] Accordingly, strict scrutiny is usually "fatal" to any identity-conscious policy.[268]

In the district court of first instance Judge Kay acknowledged the "unique" circumstances of the Schools for which there was no precedent to decide:

> whether §1981 permits the remedial use of race by a private school that receives no federal funding, especially one involving an educational preference for descendants of an indigenous people who have been disadvantaged by past history.[269]

The strict judicial scrutiny applied in cases involving publically funded schools, such as *Grutter*[270] and *Gratz,*[271] was quickly rejected by Judge Kay, since the Schools are privately funded. According to Judge Kay, "such a narrow lens forces the inquiry to ignore the unique historical context which surrounds Kamehameha Schools".[272] Because "context matters", Judge Kay recognized the mo'olelo of overthrow and annexation, present disparities and a federal-Native Hawaiian trust relationship akin to the federal-Indian relationship. [273]

In finding for the Schools, however, Judge Kay applied an adapted or "flexible"[274] version of the test established in *Johnson v Transportation Agency,*[275] where the Supreme Court applied a Title VII standard to an affirmative action policy in private employment,[276] while admitting that such tests were "not entirely analogous" to the

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[267] As required by *Adarand Constructors, Inc v Pena* 515 US 200 (1995) at 235.
[268] Or "strict in theory but fatal in fact": Eric Yamamoto quoted in Poai and Serrano, footnote 222, at 1229. "Over time, the U.S. Supreme Court transformed the strict scrutiny analysis from one that protects minorities to one that invalidates all racial classifications…"
[269] *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 295 F Supp 2d 1141 (D Haw 2003) at 1146.
[270] *Grutter v Bollinger* 539 US 306 (2003).
[271] *Gratz v Bollinger* 539 US 244 (2003).
[272] At 1166.
[273] At 1148, quoting Justice O'Connor in *Grutter*.
[274] At 1166.
[275] *Johnson v Transportation Agency* 480 US 616 (1987).
[276] Title VII, 42 USC s 2000e-2(a), previously discussed in Chapter Two, reads: "It shall be lawful employment practices 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

circumstances of Kamehameha Schools.[277] Prior to *Johnson, United Steelworkers of America v Weber*[278] had protected a private employment affirmative action plan and held that intermediary Title VII standards rather than strict scrutiny were appropriate for §1981 claims.[279] 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.[280]

Judge Kay found that the admission policy specifically addressed the manifest imbalance arising from the history of disadvantage and discrimination particular to the Native Hawaiian child and was consistent with congressional recognition of the same.[281] Rather than internally within the workplace or school population, the admission policy's external "goal is to foster the inclusion of people of Native Hawaiian ancestry, as a whole, into society by means of education".[282] In fact, the admission policy was a legitimate remedial measure.

3.5.2 IN THE NINTH CIRCUIT: EVERYONE/NO-ONE & RIGID SCRUTINY

Doe's lawyers appealed.

Addressing the same facts, a three-judge panel of the Ninth Circuit recognized that the Schools had admitted that the admission policy was purposefully[283] conscious of Native Hawaiian ancestry and that, as *Rice* established, ancestry could be a proxy for race. This admission of 'racial' preference triggered a rebuttable but inferred presumption of unlawful racial discrimination. Under *Patterson v McLean Credit*

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adversely affect his status as an employee, because of an individual's race, color, religion, sex, or national origin". The standard applied was intermediate as in *Weber* and *Johnson* rather than the strict scrutiny applied in *Runyon*.

[277] At 1164.

[278] *United Steelworkers of America v Weber* 443 US 193 (1979).

[279] Discussed at 1164.

[280] At 1172.

[281] At 1166.

[282] At 1167.

[283] According to *Gen Bldg Contractors Ass'n v Pennsylvania* 458 US 375 (1982) a violation of §1981 must be purposeful.

Union, the Schools now bore the burden of proving[284] that it had "legitimate non-discriminatory reasons for its conduct".[285]

Counsel for the Schools argued that sometimes "it is necessary…to trammel the interests of non-aboriginal applicants in order to" help Native Hawaiian children overcome actual discrimination. In terms of legitimacy, they raised "abundant evidence" of cumulative levels of discrimination in education, as well as other socio-economic areas such as health and incarceration rates.[286]

However, in a 2-1 decision, the majority equated the admission policy with that in *Runyon* and de-emphasized the first *Weber-Johnson* criterion finding that "[e]ven if we assumed that some, limited racial preferences might be appropriate in order for the Schools to advance its mission", according to the second *Weber-Johnson* criterion, 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.[287] Crucially, the Court found that Congress had not exempted Native Hawaiians from the racialized standards applied to other schools despite the plethora of legislation produced.[288] Importantly, 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".[289]

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[284] *Patterson v McLean Credit Union*, 491 U.S. 164 (1989). Also discussed in Chapter Two, at 2.2.
[285] Discussed in *Doe v Kamehameha Schools*, 416 F3d 1025, 1036 (9th Cir 2005).
[286] In *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 416 F3d 1025 (9th Cir 2005) at 1041, the majority acknowledged "abundant evidence demonstrating that native Hawaiians are over-represented in negative socio-economic statistics such as poverty, homeless, child abuse and neglect, and criminal activity; they are more likely to live in economically disadvantaged neighborhoods and attend low-quality schools; and, because of low levels of educational attainment, they are severely under-represented in professional and management positions, and under-represented in low-paying service and labor occupations".
[287] *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 416 F3d 1025 (9th Cir 2005) at 1042.
[288] *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 416 F3d 1025 (9th Cir 2005) at 1042-1043.
[289] Poai and Serrano, above n 247, at 1189.

3.5.3 THE EN BANC MAJORITY: RACIAL MINORITY AND RELAXED SCRUTINY

When the Schools petitioned for a rehearing en banc they were joined by 45 amici curiae representing state and local government, civil rights organizations, indigenous nations and minority groups farther afield[290] who argued that the policy was a measure of indigenous self-determination by—and restorative justice for—a historically unique indigenous people to whom section 1981 tests were misapplied.[291]

For instance, in their amicus curiae brief for the Japanese American Citizens League of Hawai‘i, Eric Yamamoto, Susan Serrano and Ho‘opio Pa argued that the policy:

> does not violate civil rights; rather it serves to restore to Native Hawaiians that which 19th and 20th Century "western influence" nearly destroyed: Hawaiian education, culture and a measure of self-governance.[292]

Importantly, Yamamoto et al have argued that, in this context, the policy did not "denigrat[e] one group as inferior to justify better treatment of another" but represented "a private self-determining effort of restoration" and displayed "remedial legitimacy". [293]

On 6 December 2006, a full panel of the Ninth Circuit, by a slim majority of 8-7, affirmed the district court decision, recognizing the legitimacy of the admission policy. However, it did so not in terms of a *Mancari* exception or indigenous rights generally but by adopting *Rice*'s racial categorization of 'Native Hawaiian'[294] and applying *Weber-Johnson* criteria to an affirmative action policy.

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[290] 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. Perhaps more telling, they were joined by groups including other indigenous and minority bodies farther afield, such as the Native American Rights Fund, Alaskan Federation of Natives, Japanese American Citizens League, and Centro Legal de la Raza, also joined as amici curiae.

[291] 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.

[292] Eric K Yamamoto, Susan K Serrano and EA Ho‘oipo Kalaena‘auao Pa, Amicus Brief of the Japanese American Citizens League of Hawai‘i-Honolulu Chapter and the Equal Justice Society and in support of Defendant-Appellee's Petition for Rehearing En Banc, 29 August 2005, in Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate 416 F 3d 1025 (9th Cir 2005) (No 04-15044) at 2.

[293] Ibid, at 5.

[294] See *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 441 F3d 1029 (9th Cir 2006) 470 F3d 827 (9th Cir 2006) (en banc) footnote 9, at 837: "...For the purposes of our decision, we accept

The Court demonstrated historico-legal awareness. After reciting the burdens of Native Hawaiian history leading to present-day disparities, the majority set out the legal genealogy of section 1981, its Reconstruction origins and Civil Rights Era re-emergence.[295] Given that history, the majority distinguished both *Runyon* and *McDonald* on their facts and issues:

> In neither case did the Court have occasion to consider whether and under what terms (i.e., under what standard of scrutiny) a private remedial racial preference would be permissible in the educational context under §1981, nor has it since.[296]

The majority later recognized: "By contrast, the very nature of affirmative action plans is that historically disfavored and underachieving minorities may be given preferential treatment in certain narrowly defined, limited programs."[297]

Like the lower court, the majority relied on the *Weber-Johnson* test, recognizing the elephantine manifest imbalance affecting the Native Hawaiian learner but focusing the test on "demonstrable", current and "present" disadvantages rather than historical discrimination and disadvantage.[298] 'Modifying' *Weber* and *Johnson*'s internal employment context, the majority recognized that imbalance in the context of the state of Hawai'i not just the school itself. Regarding trammelling, the majority found that although the policy rarely results in students of non-Native ancestry being admitted it did not trammel their rights since other educational opportunities in the State of Hawai'i are not deficient and all other non-Native Hawaiian groups actually fare well despite the policy.[299] Finally, the majority found that the policy did "no more than necessary to correct the manifest imbalance suffered by students of Native Hawaiian ancestry" because it was temporary, as preference would only be given until "the current educational effects of past, private and government-sponsored discrimination and of social and economic deprivation" are remedied.[300] Moreover, it was "true to the spirit of §1981 by supporting Native

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that 'Native Hawaiian' '—like 'Negro'—is a racial classification. See *Rice v Cayetano*, 528 U.S. 495, 514 (2000) (so holding in the context of a voting rights case)".

[295] See my discussion in Chapter Two, at 2.2.4.

[296] At 837 per majority. Again in *Runyon*, the preference worked to the disadvantage of the disadvantaged racial minority, rather than working as a levelling mechanism for the disadvantaged minority.

[297] At 843 per majority.

[298] At 843.

[299] At 844.

[300] At 845-846.

Hawaiian students so that they may attain parity with their non-Native Hawaiian peers".[301]

Importantly, the majority partially justified their modification of the Title VII employment standard in terms of the fundamental importance of education to civic participation, societal cohesion, the workforce and long-term life outcomes citing *Brown* and *Plyler*.[302] Again, these were cases where a direct appeal to equal protection had favoured groups identified by minority identity and socio-economic disparities not unlike Native Hawaiian learners.[303] For the majority, the policy constituted a legitimate remedial measure.

3.5.4 THE CONCURRENCE: POLITICAL CLASSIFICATION AND MANCARI

However, five members of the majority[304] were persuaded that the federal-Native Hawaiian trust relationship justified the application of a *Mancari*-like exception. The concurrence asked: "can Congress constitutionally provide special benefits, including educational benefits, to descendants of Native Hawaiians because 'Native Hawaiian' is a political classification" and if so, "has Congress done so in §1981?"[305]

The concurrence noted the unique historico-legal context of trust relationship between federal and state governments and the Native Hawaiian people—as well as the plethora legislation in which "Congress has repeatedly 'affirmed,' 'acknowledged,' 'reaffirmed,' and 'recognized,' that relationship".[306] —and answered affirmatively to the first question. Ironically, their honors cited Stevens J's dissent in *Rice* as a source of legislation supporting political classification[307] while otherwise limiting "its analysis to voting rights under the Fifteenth

[301] At 846.
[302] At 841-842.
[303] See discussion in previous chapter at 2.5.
[304] W Fletcher, Pregerson, Reinhardt, Paez and Rawlinson JJ.
[305] At 850.
[306] At 850. Also footnote 2 at 854 for examples of relevant legislation.
[307] At 850. As Judge Kay in the lower court was able to do: *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 295 F Supp 2d 1141 (D Haw 2003) at 1150.

Amendment".[308] Ultimately, the concurrence acknowledged that Congress had "invariably treated 'Native Hawaiian' as a political classification for the purposes of providing exclusive educational and other benefits".[309]

Regarding the second question, the concurrence rejected the idea that Congress's own preference for Native Hawaiians could be "invalidate[d], sub silentio"[310] via section 1981[311] or the host of legislation recognizing the trust relationship[312] as Doe had argued. Furthermore, the minority recognized a congressional preference for the Schools, despite its non-use of federal funds, in various pieces of legislation[313] which acknowledged the unique role that the Schools play in native Hawaiian learner outcomes. Such legislation "specifically directed Kamehameha Schools to do precisely what plaintiffs in this case say is forbidden".[314] Ironically, the Schools' admissions definition of 'Native Hawaiian' was virtually the same as Congress's in the NHEA.[315]

The affirmative answer to both questions was consistent with the federal-Native Hawaiian trust relationship and an interpretation of the policy as a *Mancari*-type preference.

3.5.5 THE DISSENT: ADAMANT EVERYONE/NO-ONE

Most of the dissenting opinions criticize the majority's modification of the *Weber-Johnson* test. All deny the existence of the federal-Native Hawaiian trust relationship and applicability of the *Mancari* exception. Identity-blindness, historical abstraction and an adamant *everyone/no-one* narrative are apparent.

[308] *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 441 F3d 1029, 470 F3d 827 (9th Cir 2006) (en banc) at 852-853 per concurrence.
[309] At 856-857 per concurrence.
[310] At 854-856.
[311] See discussion on implied repeal in terms of Native American rights in Chapter 2 at 2.4.2.
[312] This was very similar to the argument attempted by the plaintiff in *Mancari* that the Equal Employment Opportunities Act of 1972 had invalidated the Indian Reorganization Act of 1934.
[313] At 856.
[314] At 854.
[315] At 856.

Writing the main dissent, Judge Bybee commended Kamehameha Schools for trying to educate Native Hawaiian children but "[could not] turn a blind eye to a classic violation of §1981".[316] At all three steps of the *Weber-Johnson* test, his dissent would exclude "context".[317]

His honor, for instance, insisted that manifest imbalance should be assessed within the highly successful but somewhat anomalous Kamehameha Schools student population where educational opportunities were not lacking and Native Hawaiians could not be underrepresented because every student was Native Hawaiian. [318] Where the majority had intuited that the external assessment would provide a more accurate snapshot of the manifest imbalance, Judge Bybee opined that the majority's external assessment "green-light[ed] discrimination" and gave all schools a "broad and perpetual license" to circumvent the temporary requirement of the *Weber-Johnson* test. [319]

Ignoring the implications of the unique historico-legal context of the policy, Judge Bybee's analysis also clearly prioritized the homogenous, anonymous individual. He judged that section 1981 protected individuals or "*all* persons" not groups of individuals or a "body of persons".[320] Ironically given the multigenerational trauma and discrimination, allostatic load and actual disparities suffered by Native Hawaiians, Judge Bybee also prioritized "the rights of the disfavored *race*" and the "respective rights of the non-preferred *group*" [321] —meaning non-Native applicants—in determining whether trammelling had occurred.

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[316] At 858.

[317] At 864, for instance, Bybee J reasons: "Context alone cannot explain why, under the majority's view, racial discrimination in some communities would be wrong and actionable, but in other communities, it would be acceptable and praiseworthy."

[318] At 862-863. Like "the employer's work force" in previous section 1981 cases.

[319] At 863: "In contrast to *Weber* and *Johnson*, the majority's test merely requires a private school to 'demonstrate that specific, significant imbalances in educational achievement presently affect the target population' in the relevant community…Thus, by completely eliminating any schoolbased analysis and jettisoning any historical inquiry, the majority rejects the constraint developed in the Title VII context that affirmative action programs must be limited in scope and duration. Indeed, the majority effectively green-lights discrimination so long as the identified group currently suffers from "significant imbalances in educational achievement." … Because such a *broad* and *perpetual* license conflicts with the Supreme Court's consistent emphasis on the *limited* and *temporary* nature of permissible affirmative action plans…cannot endorse the majority's new standard." (footnotes omitted).

[320] At 864-866. His emphasis.

[321] At 864-865. The use of 'respective' recalls the wording of section 1981 which was drafted to guarantee African-Americans the same rights as white citizens. However, as in *McDonald v Santa Fe Trail Transportation Co* 427 US 273 (1976) where white employees tried to claim the same rights

Similarly, while all dissents largely ignored the Reconstruction origins of section 1981, all maintained the black-white dichotomy. Judge Bybee, for instance, described the majority's decision to distinguish *Runyon* as "unfortunate and wrong" and judged that the Kamehameha Schools policy was one that also "bars African American…children"[322]—despite the Schools' de facto diversity.[323]

Despite the preponderance of legislative evidence and centuries of federal Indian law principles to the contrary, Judge Bybee also excluded the federal-Native Hawaiian trust relationship because Congress had not expressly stated an exception to section 1981 within the legislation[324] and Native Hawaiians were not a federally-recognized Indian tribe.[325] While they largely echo Judge Bybee, a few notes about the remaining dissenting opinions are necessary.

Judge Rymer with four others did question applying section 1981 to a philanthropic charitable trust and whether the same right *as whites* to make contracts in *employment* could be equated with the same rights *as Native Hawaiians* to make contracts in *education*. However, he considered precedent such as *McDonald* binding on the court[326]—despite the distinguishing facts recognized by the majority. He also dismissed the legislative evidence as merely "Congressional applause" for federal programs benefitting Native Hawaiians and not federal recognition since, based on *Rice*, 'Native Hawaiian' was a *racial* not political classification.[327] Moreover, Judge Rymer dismissed the use of such policies to remedy historical injustice.[328]

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as and African American, the rights at stake were not Doe's but that of the historically disadvantaged minority group, in this case, Native Hawaiian learners.

[322] At 858.

[323] The majority of cases relied upon by the dissents involve either African-Americans being discriminated against or supposedly preferred versus whites Interestingly, Bybee J never addresses the significance of a lack of blood quantum in the Kamehameha Schools admission policy or the fact that the 'Native Hawaiian' students at Kamehameha Schools apparently represent over 60 nationalities or ethnicities.

[324] See discussion at 874-879. In response, see Fletcher J, concurring opinion at 855-856 regarding the harmonious reading of statutes.

[325] At 879-882.

[326] At 885 Rymer J dissenting. See my critique of *McDonald* in previous chapter at 2.4.1.

[327] At 887.

[328] At 886: "…I am not persuaded that precedent allow the Kamehameha Schools to justify its preferential admissions policy on the footing that the policy redresses past societal discrimination against Native Hawaiians".

Judge Kleinfeld with others disagreed on the standard of review, recognizing, perhaps rightly, that Title VII prohibits discrimination in employment. However, his honor would have applied *Runyon*'s strict scrutiny and not Title VII as the proper standard since Title VII specifically prohibits discrimination in employment. Instead, he would have applied *Runyon* because it also involved the admission policy of a private school, and section 1981 "prohibits a private school from denying admission to prospective students because of their race". Following *McDonald*, Judge Kleinfeld concluded that section 1981:

> protects whites as well as non-whites from discrimination. A fortiori it protects all ethnic groups in Hawai'i: blacks, Filipino-Americans, Japanese-Americans, American Samoans, Chinese-Americans, and all others, regardless of their ancestry[329].

Finally, Judge Kozinski, with some regret about applying *Runyon* to the admission policy,[330] kindly suggested that the Schools stopped charging its students the meagre amount of tuition that it does to avoid further claims under section 1981 which had never been applied to a charity.

Ultimately, Judges Kleinfeld, Kozinski and O'Scannlain disagreed with Judge Bybee's application of a Title VII standard but similarly equated present facts with those in *Runyon*—that is, they equated an admission policy meant to address significant socio-economic disparities with a policy designed to perpetuate such disparities.[331]

[329] At 888. Despite the multicultural nature of the student body and the support various minority rights advocates for the Schools: see amicus curiae briefs including Eric K Yamamoto, Susan K Serrano and EA Ho'oipo Kalaena'auao Pa, Amicus Brief of the Japanese American Citizens League of Hawai'i-Honolulu Chapter and the Equal Justice Society and in support of Defendant-Appellee's Petition for Rehearing En Banc, 29 August 2005, in *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 416 F 3d 1025 (9th Cir 2005) (No 04-15044); and Susan Serrano, Eric Yamamoto, Melody Kapilialoha MacKenzie and David Forman "Restorative Justice for Hawai'i's First People: Selected Amicus Curiae Briefs in *Doe v. Kamehameha Schools*" (2007) 14 Asian Am LJ 205.

[330] In addition to Rymer J's comments, Kleinfeld J actually admitted that he would rather not have heard the case, as the result of some "jurisdictional defect": at 888.

[331] At 888-889, the policy which has done so much actual good was equated with the intentionally discriminating policy of a school run by white supremacists. Also see *Runyon*, above n 265.

3.6 SOME OBSERVATIONS

Ultimately, the Court found that "a Hawaiian private, non-profit K-12 school that receives no federal funds" does not "violate[] §1981 by preferring Native Hawaiians in its admissions policies".[332] Several observations are relevant.

First, the substantial value of education was approved and used to justify *Johnson*'s modification. The majority opinion displays aspects of the kind of constitutive commitment to education which swayed the Supreme Court in *Plyler v Doe*. The importance of education to human development and well-being was obviously persuasive in their honors' modification of the *Johnson* factors. In perhaps another "analytically muddled but ultimately just" decision,[333] the Ninth Circuit's modification enabled them to examine the admission policy in its historical context but also in real-time among the demographics of the state of Hawai'i—though not in terms of state-promised indigenous education rights. As in *Brown* and *Plyler*, the decision moves beyond formalized equality and into the realm of substantial equality.

Next, the majority distinguishes the admission policy in *Runyon* from the Schools', practically affirming *United States v Carolene Products* (1938) Footnote Four's distinction in terms of purpose[334] and undermining the identity- and history-blind premise of reverse discrimination itself. In contrast to *Rice*, the majority draws a clear line between policies which deliberately discriminate against a particular group and those which are meant to assist a particular group in overcoming discrimination, finding the latter constitutionally appropriate where they meet the modified *Johnson* criteria. This differentiation is a matter "of consistency": "To open the door for such plans under [T]itle VII and close it under section 1981 would make little sense".[335] The majority remembered that section 1981 was meant to address the "explicit discrimination faced by recently freed slaves".[336] This historical awareness contrasts with decisions such as *Bakke* where that very

[332] At 829.
[333] See discussion in previous chapter on *Plyler v Doe* at 2.5.
[334] *United States v Carolene Products* 304 US 144 (1938) Footnote Four: see discussion in previous chapter at 2.4.1.
[335] At 838.
[336] At 835-836.

argument was attempted without success. *Rice* itself, was barely mentioned in the majority decision, appearing only as a seemingly reluctant footnote.[337]

In trying to justify the admission policy, the Ninth Circuit seemingly stretched precedent towards it. The majority settled on an affirmative action test and racial interpretation of Native Hawaiian identity which substantially engaged with the burdens of Native Hawaiian history and recognized a relationship between Native Hawaiians and the federal government "akin to that of Native Americans". The court recognized the inconsistency of applying law aimed at eradicating discrimination *against* racial minorities to a policy aimed at overcoming such discrimination:

> Even if we were to try to shove a square peg into a round hole by strictly applying the test developed in employment cases to the Kamehameha Schools' admission policy, that policy would still be valid. As the Supreme Court has cautioned, "[i]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers".[338]

Where the *Rice* court refused to bend, the Ninth Circuit was willing to modify precedent to fit the admission policy—for instance, to examine the local context of discrimination and underachievement in education—in order to meet the demands of a more substantial equality.

One-third of a full sitting of the Ninth Circuit, believed that 'Native Hawaiian' was a political classification and endorsed *Mancari*. More importantly, the concurrence believed this to be "an easier and narrower ground for upholding Kamehameha Schools' admission policy".[339] As in federal Indian law, the minority judged the constitutionality of the admission policy within an identity-specific historico-legal context—within the mo'olelo—recognizing Native Hawaiians as "a once sovereign nation" and Congress' preference for Native Hawaiians in education arising from its unique obligation towards them.[340] There is little or no hesitation, bending or

[337] At 837, footnote 9 which reads: "...For the purposes of our decision, we accept that 'Native Hawaiian' '—like 'Negro'—is a racial classification. See *Rice v. Cayetano"*.
[338] At 846, quoting the Supreme Court in *Weber*, at 201.
[339] At 849.
[340] At 850-851.

stretching of precedent to fit the admission policy or its circumstances in the concurrence.

While the above features are significant given the predominance of the *everyone/no-one* narrative, other features remain troubling. Despite modifying the *Weber-Johnson* criteria to fit the unique circumstances of Native Hawaiian history and ethnic composition of the State of Hawai‘i, the majority still classed the preference as an affirmative action policy premised on *Rice*'s concerning racial classification. *Rice* clearly haunts the decision. While the majority generally recognize the unique history of Native Hawaiians and see the discrimination, they fail, once again, to be swayed by compelling arguments for a *Mancari*-like exception and instead apply affirmative action tests based on *race* to the admission policy—despite the copious evidence they themselves expound. The majority's failure to unreservedly recognize such a relationship while not unique is an uncomfortable consistency between the courts in *Kamehameha Schools* and *Rice*. In this light, the stretching of the *Johnson* factors seems a jurisprudential aberration of sorts, another exception to the general rule of identity-blindness.

The decision displays a certain level of historico-legal abstraction in failing to apply federal Indian law principles to the admission policy. Again, the modified *Weber-Johnson* factors utilized by the majority focus on demonstrated, present disadvantages rather than historic discrimination and disparities.[341] *Johnson*'s temporariness requirement ignores the *Mancari* exception and state-recognized Native Hawaiian rights, distinguishing the preference from a true right, as in the case of human rights which are inalienable and the historical continuum of Native Hawaiian customary rights. Temporariness is, in fact, the embodiment of historico-legal abstraction having less regard for historical injustices and more for current numbers without putting those numbers into a proper historical perspective which gives them meaning. Again, parity, temporariness and its dichotomy seemingly recall only the integration-driven anonymity of *Brown* and its progeny but not their original substantial purpose as counters to persistent ongoing inequalities resulting from an identity-specific history.

[341] At 843.

In terms of section 1981, the court distinguished *Runyon* because the policy in that case was deliberately aimed at excluding African-Americans, but it also applied the Title VII test rather than strict scrutiny to the admission policy because the Kamehameha Schools are a "purely private entity that receives no federal funding" adding that "[t]he Supreme Court has never applied strict scrutiny to the actions of a purely private entity".[342] Again, however, *Runyon* did involve a private school, a fact which caused Judge Bybee to accuse the majority of "stand[ing] *Runyon* on its head".[343] The Schools' private status alone may not be able to protect the admission policy or the Schools' larger mission.

If Kamehameha Schools were not private and had received public funds, strict scrutiny and not the more relaxed Title VII standard would have applied; *Bakke*, *Grutter* and *Gratz* would have applied. This would almost certainly have been "fatal"[344] to the policy. The funding question creates the finest of lines between a constitutionally acceptable admissions scheme and one that is not. That line is an economic and arbitrary one which wholly ignores the mo'olelo of colonization and discrimination, all dealings between the federal government and the Native Hawaiian people, and centuries of federal Indian law. Particularly given the seemingly utilitarian calculations which must accompany any economic exercise, that line favors majoritarian interests.

Ultimately, *Mancari* remains susceptible to the liberalizing trends in Supreme Court jurisprudence over the past three decades.[345] The power of the singular narrative to reach the Islands was clear in *Rice.* The modified Title VII standard's protection of affirmative action plans is inconsistent with the Supreme Court's increasingly restrictive approach to affirmative action as evidenced in *Grutter* and *Gratz*[346]--as well as the growing number of state voters and legislators opposed to affirmative action and preference of any kind.[347] Interestingly, though largely approving a Title VII intermediate standard, the dissent in *Kamehameha*, would have made that

[342] At 839. Otherwise, *Grutter* and *Gratz* would have applied.
[343] At 857 per Bybee J dissenting.
[344] Yamamoto, above n 268.
[345] See previous chapter at 2.4.2. And yet, as in the case of Native American rights generally, both state-recognized indigenous rights and the special trust relationship remain vulnerable to the *everyone/no-one* narrative.
[346] See previous chapter at 2.4.1.
[347] See discussion on *Schuette v BAMN* in previous chapter, at 2.4.1.

standard as fatal and unassailable as the strict scrutiny standard applied to public bodies in terms of equal protection since in both cases virtually any identity-awareness alone will invalidate a policy. Without a stronger legal claim than affirmative action—a legal mechanism which is, at best, an exception to the rule and whose demise appears imminent—the admission policy remains incredibly vulnerable to the *everyone/no-one* narrative.

3.7 'TREACHEROUS LANDSCAPE'

> *This was a very difficult decision. From the beginning of this lawsuit, we have been prepared to defend our policy to the very end of the judicial process. However, it has become increasingly clear that this lawsuit is only one piece of a much broader risk to the rights of Native Hawaiians, as the indigenous people of this state, to manage and control our resources.*
>
> *We cannot ignore the treacherous landscape before us…*[348]

Despite the hard-won nature of *Doe v Kamehameha Schools*, the en banc decision feels neither triumphant nor conclusive. Instead, various uncertainties linger.

Faced with subsequent appeal to the Supreme Court, the Schools settled with Doe out-of-court for a substantial amount[349] leaving the conflicted Ninth Circuit decision standing. There was never any question of whether there would be another John Doe and the same lawyers filed a similar lawsuit in 2008.[350]

Notwithstanding colorblind advocates, the Supreme Court may have to decide on the policy given its constitutional importance to the State of Hawai'i.[351] In *Kamehameha*, Judge Kozinski opined, perhaps ominously, that "[g]iven the scores

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[348] J Douglas Ing and others "Trustee Message: Kamehameha Schools and 'John Doe' Settle Admissions Lawsuit" Kamehameha Schools/Bernice Pauahi Bishop Estate <www.ksbe.edu>.
[349] For a reported $7 million: Jim Dooley "Kamehameha Schools settled lawsuit for $7M" *Honolulu Advertiser* (online ed, Honolulu, 2 August 2008).
[350] The Supreme Court declined to review the case anonymously but the case reached its doors as it were: see *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 625 F3d 1182 (9th Cir 2010); and "Trustees Message: US Supreme Court Declines Review; Jacob Doe, et al Lawsuit Pau" Kamehameha Schools/Bernice Pauahi Bishop Estate <www.ksbe.edu>. *Pau* means 'finished' but this seems unlikely. Ironically, future litigants though pushing anonymity may not be able to hide behind it in court.
[351] The late Jon Van Dyke quoted in "Hawai'i schools' policy called discriminatory" USA Today (online ed, Honolulu, 3 August 2005).

of pages we have written on both sides of this issue, it should be clear that the question is close and ours may not be the last word".[352] Predictions of what the current Supreme Court—largely composed of the same justices who decided *Rice*, *Grutter*, *Gratz* and *Schuette*—might say when the substantive issues do breach its doors must be pessimistic. Currently, *Rice* would require the court to treat ancestry as a proxy for race and similarly foreclose an appeal to *Mancari*.

Even within state law, the landmark amendments to the 1978 Hawai'i State Constitutional Convention—perhaps unparalleled in United States history in terms of recognizing indigenous rights—were apparently, an unexpected and rare constitutional moment. In Hawai'i, such so-called "ConCons" are known for producing radical changes to the state constitution. The ConCon put to Hawai'i voters in 2008[353] was backed by conservative elements but opposed by those who feared "[a] ConCon…could erode the rights of Native Hawaiians, which continue to come under attack in the courts".[354] Given those fears, *Schuette*[355] also suggests the danger that the legal fate of unique, time-honored Native Hawaiian rights—and any preference—might be left to unsympathetic non-Native Hawaiian voters, something that has happened before.[356]

Nevertheless, the history one cannot ignore—so eerily like that of Native Americans but also uniquely Hawaiian—remains. This history affirms a nineteenth century Western-style legal system complete with full-fledged nationhood but also its own peculiar developments. The shape of the Hawaiian Kingdom's constitutional arrangements pre-overthrow and -annexation is more accurately described as a fledgling Western democracy than a tribe. Given the Māhele and other "pre-annexation" changes to land title enacted by the Hawaiian monarchy, for instance, R Hōkūlei Lindsey has concluded that "[t]he analogy of Native American tribes provides only a guidepost for the Native Hawaiian claim to ceded lands".

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[352] *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 441 F3d 1029, 470 F3d 827 (9th Cir 2006) (en banc) at 889.

[353] Hawai'i is one of five states which automatically puts the question of constitutional amendment on the statewide voting ballot every 10 years.

[354] See Dan Nakaso "Should Hawai'i Rewrite Its Constitution—Again?" *Time* (US) (online ed, Washington DC, 30 October 2008). Since statehood in 1959, Hawai'i has had two constitutional conventions in 1968 and 1978. The next opportunity for opponents to rewrite Native Hawaiian rights will come in 2018.

[355] See previous chapter at 2.4.1.

[356] See questions about the legitimacy of the 1959 plebiscite on statehood discussed above at 9, footnote 60.

Given these peculiarities, the question is not about "equal protection analysis" or "the allocation of benefits by the government. It is about guaranteeing self-determination".[357]

That self-determination has, according to Danielle Conway-Jones, "[a]bsolutely nothing…in common" with affirmative action "except in the manner that" the federal government responds to "people of color".[358] Given this history, David Forman has similarly concluded that the application of equal protection theory and strict scrutiny to the admission policy is "impractical and anomalous" while "humanitarian principles" which consider local law are better suited to both the former territorial status of Hawai'i[359] and the historical continuum of Native Hawaiian law.[360] Hawai'i's former territorial context, of course, raises questions of decolonization.[361]

A *Mancari*-like narrative certainly has the capacity to speak in terms of self-determination. However, both state and federal recognition have limits. State recognition of Native Hawaiian rights in terms of the policy were ultimately overridden by a misapplied *slim someone* narrative—by federal narratives increasingly hostile to identity. Moreover, as Chapter Two has described in detail, federal recognition is highly reliant on arbitrary congressional will and judicial activism—to political forces generally. For instance, while the latest version of the Akaka Bill, "signaled a change in the overall approach to federal recognition", it was never voted on and "died when the 112th Congress adjourned in January 2013".[362]

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[357] R Hōkūlei Lindsey "Native Hawaiians and the Ceded Lands Trust: Applying Self-Determination as an Alternative to the Equal protection Analysis" (2011) 34(2) Am Indian L Rev 223 at 226-227. Lindsey concludes that "the purpose of the ceded lands trust is not to achieve equality among its citizens. Its purpose remains as King Kamehameha II mandated in 1848: these lands are meant to provide for the Native Hawaiian people through time. The Native Hawaiian people own these lands. The lands are a means for Native Hawaiian self-determination": Lindsey at 228.

[358] Danielle M Conway-Jones "The Perpetuation of Privilege and Anti-Affirmative Action Sentiment in *Rice v. Cayetano*" (2002) 3 Asian-Pacific L & Pol'y J 371 at 371.

[359] Forman, above n 105, at 328-331

[360] Forman at 345-352.

[361] See Chapter 6 at 6.6.1.

[362] Mackenzie, "Native Hawaiians and U.S. Law" 101-102 iBook version. MacKenzie notes that it also lost its two greatest advocates in the Senate when Senator Daniel Inouye (HI-D) unexpectedly died in December 2012 and Senator Daniel Akaka (HI-D) retired in January 2013.

Ultimately, the wrestle in *Doe v Kamehameha Schools* suggests that not one of the Ninth Circuit's narratives has the capacity—at least on its own—to account for the causal connection between the mo'olelo of Native Hawaiian history and ongoing chronic stress, multigenerational trauma, increased allostatic load and complex disparities almost unrelentingly attracted to the Native Hawaiian learner. Rather than entitling Native Hawaiians to some special advantage as identity-blindness advocates contend,[363] these realities represent what Eric Yamamoto and Ashley Obrey have called "deep harms" embedded in the psyche and social experience of Native Hawaiians which are also pervasive, even "'comprehensive', encompassing resources, culture, and governance; 'sustained' over generations; 'systemwide,' implicating national and local governments, businesses, and citizens."[364]

As noted in Chapter One,[365] prominent indigenous and non-indigenous scholars have suggested expanded narratives which would recognize the admission policy as a form of restorative justice appropriate in terms of both historical injustices committed against Native Hawaiians and legitimate claims to an expanded self-determination arising from unique historico-legal context. The simple calculus of justice would seemingly call for a positive and proportional remedy to this overwhelming species of inequality and injustice. According to Yamamoto and Obrey, "The remedies must be tailored to the harm. That is, when the injuries are long-term and systemic, so must be the response."[366]

The majority's intuitions demonstrate some awareness of the harm but not one of the narratives expresses a sense of remedial proportionality. However, scholars have suggested that an expanded version of self-determination like that recognized in international law is not only consistent with the unique historical context of the admission policy but is seemingly proportional to that harm.[367]

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[363] Yamamoto and Obrey, above n 128, at 48.
[364] Yamamoto and Obrey, above n 128, at 36.
[365] At section 1.3.
[366] Yamamoto and Obrey at 39.
[367] 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; and S James Anaya "The Native Hawaiian People and International Human Rights Law: A Remedy for Past and Continuing Wrongs" (1994) 28 Georgia L Rev 309 on remedial self-determination. More recently, see S James Anaya and Robert A Williams Jr *Study on the International Law and Policy relating to the Situation of the Native Hawaiian People* (Indigenous Peoples Law and Policy Program, University of Arizona, James E Rogers College of Law, June 2015) in which Anaya and Williams

3.8 CONCLUSION

These wrestles, gaps and intuitions raise doubts about the appropriateness of prioritizing the singular *everyone/no-one* narrative within federal law and, certainly, about superimposing such a narrative on Hawai‘i state law. They indicate the need to explore alternate or possibly expanded narratives of equality. Such narratives must seemingly possess the capacity to account for complex discrimination and disparities drawn to Native Hawaiian identity and the unique historico-legal context of the admission policy including prior sovereignty, the ongoingness of the harm and the historical continuum of Native Hawaiian law.

The next three chapters discuss theoretical and legal tools used to address similar conflicts of equality narratives. Ultimately, both political theory and international law has become increasingly aware of historico-legal context and especially guarantee/reality gaps. Both the theory and law utilize the language of rights and have become specifically *indigenous* at least in part by admitting an identity-attracted history of discrimination and human rights violations. However, placing indigenous identity within a historical context has given both the theory and law life in respect to indigenous peoples. In order to achieve the homogenous, anonymous universal, this body of theory and law identifies Native Hawaiians as holders of rights shared with other human beings which transcend time and other arbitrary factors. However, it also acknowledges—because the history demands it—identity- and history-specific protections in order to facilitate substantial and not just de jure equality. The theory and law may provide, if nothing else, a language of rights which might explain and reconcile the wrestle and intuitions in the *Kamehameha Schools* case.

recognize that Native Hawaiians retain rights and remedies for infringement under international law and that the United States federal government has a "responsibility" to "secure" those rights.

CHAPTER FOUR

THE ADMISSION POLICY IN THEORY

4.1 INTRODUCTION

Beyond the actual outcome in the *Doe v Kamehameha Schools* case, a lawsuit against a school established to help a group of children consistently identified with disparities in education achieve substantial equality—one that has seemingly done so—raises fundamental questions about what constitutes 'equality', whether it prefers certain rightsholders over others, and whether, as an ideology, it might allow the perpetual inequality of certain groups of individuals. The acute vulnerability of Native Hawaiians to forces such as multigenerational trauma, increased allostatic load, chronic stress, and otherwise complex discrimination and disparities—the way that such forces appear to be unrelentingly attracted to Native Hawaiian identity—would seem to violate the very idea of a level playing field. Given this undermining, these realities require hearty political but also intellectual discussion, even self-assessment.

Substantial intellectual discussion has already taken place in liberal theory. The same narratives of equality which have clashed in the wider American legal landscape and the *Kamehameha* case have been both canonized and demonized in legal and political theory. Various scholars and philosophers have also tried to reconcile formal guarantees of equality with de facto inequalities seemingly attracted to identity. Some have also addressed the position of indigenous peoples. Ultimately, liberal theory is particularly useful because, as Mark Bennett has observed, "it is predominantly liberal citizens and politicians that need to be convinced of the rights of indigenous peoples."[1]

[1] Mark Bennett "'Indigeneity' as Self-Determination" (2005) 4 Indigenous LJ 71 at 87 discussing a previous statement by Will Kymlicka.

This chapter brings those philosophical and theoretic wrestles with the same gaps and intuitions to bear on the narratives and reasoning in *Kamehameha* in terms of liberal theory. The identity-blindness of the dissent—and its insistence on a rigid intermediate scrutiny—are likened to John Rawls' original position and veil of ignorance but also the adamant cosmopolitanism of Jeremy Waldron and utilitarian math of Richard Posner. The modified intermediate approach of the minority is compared with Ronald Dworkin's equality of opportunity that would temporarily approve racially justified affirmative action. Like the concurrence, Will Kymlicka's liberal multiculturalism will justify identity-specific indigenous rights in terms of remedial self-determination but also in liberal terms as they buffer indigenous individuals against in-built majoritarian bias and discrimination and provide access to fundamental goods intrinsic to rational revision and a more level playing field. Kymlicka's reconciliation of Rawls and Dworkin will represent the project of the earnest liberal eager to address the guarantee/reality gap. However, Kymlicka's liberal multiculturalism remains less aware of deep, ongoing harm and ongoing injustice and would let individual *everyone/no-one* rights 'trump' indigenous group-differentiated rights, illustrating the limits of a more traditional liberal defence of the admissions policy. Historical self-determination theory is, therefore, posited as a reconciliation of Kymlicka's limits and, particularly, a liberal awareness of the deep ongoing harm attracted to Native Hawaiian identity consistent with the Native Hawaiian claims embodied in the amicus curiae briefs.

As the works of many of these philosophers have been prolific, discussion focuses on aspects and sources most relevant to the thesis. It also prioritises principles and concepts which are consistent throughout their writings.

4.2 RAWLS, EVERYONE AND NO-ONE

> *To us it seems that we have simply materialized, as it were, from nowhere at this position in this social world with all its advantages and disadvantages, according to our good or bad fortune. I say from nowhere because we have no prior public or non-public identity: we have not come from somewhere else into this social*

> *world. Political society is closed: we come to be within it and we do not, and indeed cannot, enter or leave it voluntarily.*[2]

Robert Nozick[3] once wrote that "[p]olitical philosophers now must either work within Rawls' theory or explain why not".[4] In terms of this thesis, the late John Rawls[5] represents not only the benchmark of liberal equality but also the quintessential proponent of homogeneity and anonymity, the mainstream liberalist[6] and theoretical equivalent of the dissent in *Doe v Kamehameha Schools* generally. As the development of Rawls' liberal theory is extensive—spanning more than three decades—this discussion, drawing on multiple sources,[7] focuses on relevant principles which remain constant throughout his work.

4.2.1 LIBERAL PROJECTS

Liberal theorists presume that "[i]f we are to treat people as equals, we must protect them in their possession of certain rights and liberties".[8] A question which has

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[2] John Raws *Political Liberalism* (New York, Columbia University Press, 1993) at 135-136. Compare with the decision in *Lau v Nichols* where the lower court was happy to allow students with limited English proficiency arrive in the classroom with apparent disadvantage: see discussion in Chapter Two.

[3] Rawls' formal, procedural middle line of mainstream liberalism and Dworkin's leanings to the interventionist left can be contrasted with the position of Robert Nozick on the right. His theory, largely expressed in *Anarchy, State and Utopia* (New York, Basic Books, 1974), is most particularly characterized by an ardent, atomistic individualism and, convexly, his advocacy of the minimal or "night-watchman" state.

[4] Because John Rawls' *A Theory of Justice* (Oxford, Oxford University Press, 1972) was, in Nozick's estimation, "a powerful, deep, subtle, wide-ranging, systematic work in political and moral philosophy which has not seen its like since the writings of John Stuart Mill, if then": Nozick, above n 2, at 183.

[5] 1921-2002.

[6] Despite claims that Rawls' theory is now defunct or disproved in some way, the sometimes scathing attacks upon his reasoning, and the criticism that his later works are inconsistent with his original theory, rare is the journal article or the book on the subject of contemporary political philosophy that does not refer to Rawls in some way. The fact that he is almost inevitably the starting point for so many discussions on liberal rights is evidence of his substantial impact on political philosophy. The fact that the dissent in *Kamehameha* in 2006 appeared to echo his prioritization of homogeneity and anonymity in rights distribution in their reasoning appears to illustrate the continuing relevance of Rawls to contemporary political philosophy and to indigenous rights conversations, regardless of whether one agrees with him or not.

[7] Including: *Theory of Justice*, above n 4; *Political Liberalism* above n 2; Samuel Freeman (ed), *John Rawls: Collected Papers* (Cambridge MA, Harvard University Press, 1999); John Rawls *A Theory of Justice* (rev ed, Cambridge MA, Belknap Press, 1999); John Rawls *The Law of Peoples: With "The Idea of Public Reason Revisited* (Cambridge MA, Harvard University Press, 1999); and John Rawls (Erin Kelly (ed)) *Justice as Fairness: A Restatement* (Cambridge MA, Belknap Press, 2001).

[8] Will Kymlicka *Contemporary Political Philosophy* (Oxford, Oxford University Press, 2002) at 53.

preoccupied such thinkers is *which* rights and liberties[9] should be protected, given the diversity of rights claims in modern liberal democracies. However, that is closely tied to *whose* rights are—or are not—to be recognized. Liberal theorists have traditionally recognized homogenously, anonymously and individually distributed civil and political rights held against the potential tyranny of the government[10] and other individuals which provide a protective constitutional framework of mostly negative rights around the rightsholder.[11] These rights enable participation as a citizen in society and pursuit of one's own "ultimate good" balanced against the rights of other citizens in pursuit of their own ultimate good.[12] Thus, liberals seek the maximization of the individual's inherent freedom to choose their own life's path, "the high value [liberal theorists] place on individual self-determination" being what most unites[13] and defines them.

Rawls' theory of justice equates anonymity with fairness[14] and equality. Before any rights are distributed, he would have us cover each individual's identity behind a "veil of ignorance" preventing identification of any "arbitrary" features of this real person such as their age, gender, socio-economic status, family, ethnicity, or ambitions.[15] This "original position" "conflat[es] all persons into one through the imaginative acts of the impartial spectator".[16] With everyone including ourselves

[9] Ibid, at 53.
[10] Hence the requirement of a neutral state in mainstream liberal thinking: see David Morrice "The Liberal-Communitarian Debate in Contemporary Political Philosophy and Its Significance for International Relations" (2000) 26 Review of International Studies 233, at 236. Such rights include freedom of speech, thought and association, freedom from false imprisonment, and rights to due process and property. Also see Ronald Dworkin "Rights as Trumps" in Jeremy Waldron (ed) *Theories of Rights* (Oxford, Oxford University Press, 1984) 77 rights as freedom from government interference with choice.
[11] See, for example, the theory of John Locke discussed in Eric Mack and John Meadowcraft *John Locke* (New York, Continuum International Publishing, 2009).
[12] For an example of the liberal balancing act, again, see Dworkin, "Rights as Trumps", above n10, at 77-90. For Dworkin, the balancing act is not determined by a utilitarian calculation. Rather, individual rights—for instance, a right to pornography—can trump other rights even where an opposing argument might be made for the greater benefit of restricting such a right. Such a right protects that individual's chosen ends from government interference—though, held against other individuals, also seems to trump the rights of other individuals. The ultimate example of the liberal prioritization of the individually chosen ultimate good is the Declaration of Independence's recognition of every person's "inalienable" right to "life liberty and the pursuit of happiness": Declaration of Independence (US 1776).
[13] Christopher Heath Wellman "Liberalism, Communitarianism, and Group Rights" (1999) 18 Law and Philosophy 13, at 13.
[14] For instance, in "Fairness to Goodness" in Freeman *Collected Papers*, above n 11, at 267-285.
[15] *Theory of Justice*, above n 11, at 16 and 190.
[16] *Ibid*, at 21. "This conflation does not include the conflation of memories and desires into those of one person": at 191, but it does relegate such arbitrary considerations to the private rather than public persona of the individual.

veiled, Rawls theorizes that we can more fairly judge what fundamental rights we would all choose for each and every person.[17] If we are always someone else, then arbitrary "bargaining advantages" such as political position and socio-economic status which might affect our formulation of rights should be minimized.[18] Unimpeded by our own identity and personal history we claim rights in education, *de novo*, free to pursue a rationally-chosen life path unhindered by such influences.

Some have argued that the veil and the original position are only heuristic models of Rawls' theory,[19] or that we must distinguish between the "thick and thin"[20] versions of the theories in question. However, any heuristic model is, in essence, the object lesson of the theory. As described in the previous two chapters, the American legal landscape is profoundly marked by the prioritization of an *everyone/no-one* narrative that similarly affected the narratives in *Kamehameha*. The same narrative is also prioritized throughout Rawls' writings.

4.2.2 HOMOGENEITY AND ANONYMITY AS FAIRNESS

Both homogeneity and anonymity are clearly evident in Rawls' two fundamental principles of justice.[21] The first requires that:

> Each person has an equal claim to a fully adequate scheme of equal *basic* rights and liberties, which scheme is compatible with the *same* scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.[22]

The second addresses disparities:

> Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of

[17] *Collected Papers*, above n 7, at 267-285.
[18] Or advantages arising from the moral luck of birth: *Political Liberalism*, at 22-24.
[19] As a learned political science colleague argued after a conference presentation or only a "device of representation" as Rawls himself claims: for instance, see *Theory of Justice*, at 24.
[20] As Michael Walzer's somewhat schizophrenic response to Rawls and Dworkin attempts to do: see Michael Walzer *Spheres of Justice* (New York, Basic Books, 1983).
[21] Most fully developed in *Political Liberalism*, above n 2, at 4-6. Also see *Theory of Justice*, above n 4, at 60.
[22] *Political Liberalism*, ibid, at 3-4. Emphasis added. I have used the revised forms of the two basic principles rather than those first stated in Theory of Justice in accordance with Rawls' self-admitted "correction" of *Theory* in *Political Liberalism*.

> opportunity; and second; they are to be to the greatest benefit of the least advantaged members of society.[23]

Rawls prioritizes the first principle[24] where words and phrases such as, "each", "adequate", "basic", "same", and "for all" indicate that universality, uniformity, homogeneity, and minimalism—a sameness principle, as it were—are to regulate rights distribution. Similarly, he later explains that the rights "to be guaranteed their fair value" are "primary goods"—or what all "free and equal citizens need and require...as normal and fully cooperating members of society over a complete life".[25]

For Rawls these uniformly distributed goods or rights are discoverable through the virtual phenomenon of public reason[26] in the form of an "overlapping consensus" among anonymous, public individuals who simultaneously agree on the "reasonable (as opposed to unreasonable or irrational) comprehensive doctrines" which will respond to the endless number of competing claims within pluralistic democracies "independently of comprehensive religious, philosophical, and moral doctrines".[27] Like the Greek goddess Athena springing fully grown into being,[28] Rawls assumes that the original position will make us more "objective",[29] because we are able to "fram[e] our references from a shared point of view" which is more likely to result in overall agreement. Freed from our own identity we are also somehow more "autonomous" as we somehow further our own ends without knowing them [30] but also choose "unanimity even when there is full information"[31]—perhaps even where we are aware of significant identity-specific disparities in education.

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[23] Ibid.
[24] *Political Liberalism*, above n 7, at 6.
[25] *Political Liberalism,* above n 2, at 178. This phrase recalls assimilationist policy. On primary goods see "Social Unity and Primary Goods" in Freeman, *Collected Papers*, above n 7, at 359-387.
[26] *Political Liberalism*, ibid, at 178.
[27] The features of overlapping consensus are summarized at *Political Liberalism,* at 144. This is despite, for instance, the very different historico-legal experiences of indigenous communities and the consistently disenfranchised position of other minorities in modern liberal democracies.
[28] As Michael Walzer describes Rawls in *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame IN, University of Notre Dame Press, 1994) at 12. In Greek mythology, the goddess Athena is born from the head of Zeus fully grown and cognizant.
[29] *Theory of Justice,* above n 4, at 417 and 516-517.
[30] Ibid, at 136-142.
[31] Ibid, at 141.

In contrast, Rawls equates difference and identity generally with a mercurial,[32] "arbitrary" and private persona—a sort of closet personality that one cannot trust to be rational.[33] Fundamentally, he presumes that individual self-interest will overwhelm rationality if identity is not disregarded in rights distribution. Thus, the first part of Rawls' second principle—*fair equality of opportunity*[34]—requires "that positions should not only be open to all in the formal sense, but that all should have a fair chance to attain them".[35] In other words, everyone is to be guaranteed equality of treatment rather than equality of outcome.[36] As in the original position, Rawls seeks to "mitigate the influence of social contingencies on distributive shares"[37] by relying on the safeguard of procedural fairness and institutional neutrality, for example, in government's either subsidizing private education or providing a public school system.[38]

For Rawls, anything beyond a uniform distribution of rights governed by the principles of justice amounts to leaving rights to "a natural lottery", "historical accident and social fortune".[39] Thus, even where the second principle initially appears to allow us to recognize difference in the form of disadvantage, the first principle takes precedent over the second. The second is actually a restatement, or "underwriting", of the "egalitarian" first principle[40] mainly concerned with policy and practices that "exclude applicants [for offices and positions] of certain

[32] In the original position, individuals will make decisions from a position of "mutually disinterested rationality" which prevents them from acting out of "affection", "rancor" or "env[y]" or "maximiz[ing] or minimiz[ing] the difference between their successes and those of others": *Theory of Justice*, at 144-145.
[33] For example, the kind of "irrational[]" person who decides principles of justice in terms of hair colour or skin colour or whether one is "born on a sunny day" as racists have done: *Theory of Justice*, at 149.
[34] *Political Liberalism*, above n 23.
[35] "Distributive Justice: Some Addenda" in *Collected Papers*, above n 7, 154 at 161. See also *Theory of Justice*, above n 4, at 301.
[36] Instead, Rawls' seeks to create the "well-ordered society"—that is, a just constitutional framework for social cooperation—rather than calculating the intricacies of each potential outcome for individuals under that system. For Rawls, perfect or "pure" justice is expressed in "a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed": *Theory of Justice*, ibid, at 86. Rawls relies on the presumption that a uniform distribution of fundamental constitutional guarantees will yield fair and equal opportunities and mutual advantage for all individuals in education. Thus, equal institutions, and not individual circumstances, remain Rawls' priority in the second principle.
[37] By "impos[ing] certain basic structural conditions on the social system": "Distributive Justice: Some Addenda" in *Collected Papers*, above n 7, 154 at 161.
[38] Ibid, at 141.
[39] Ibid, at 162.
[40] *Theory of Justice*, above n 4, at 77

designated ethnic and racial groups, or of either sex".[41] The focus of the first subprinciple is negative "regulation"[42] not acknowledging any identity in particular or making hearty assignments of identity-specific rights.

The second subprinciple, known as the *difference principle*, proceeds on the premise that, assuming that there are two people who could possibly benefit from a distribution of rights:

> …unless there is a distribution that makes *both* persons better off…, an equal distribution is to be preferred…No matter how much either person's situation is improved, there is no gain from the standpoint of the difference principle unless the other gains also.[43]

Rawls would allow social inequalities provided that "these improve everyone's situation, including that of the least advantaged" in accordance with "equal liberty and opportunity". Since everyone starts off with equal shares, the least advantaged—those who benefit least from natural distribution of talents, wealth and other arbitrary attributes—supposedly have a kind of "veto". [44]

However, the difference principle will only operate where, for instance, both the indigenous child and John Doe are better off, a requirement which supports Doe's arguments in the case rather than the Schools'. And it is not meant to level the playing field. As Rawls states:

> …the difference principle is not, of course, the principle of redress. It does not require society to try to even out handicaps as if all were expected to compete on a fair basis in the same race. But the difference principle would allocate resources in education, say, so as to improve the long-term expectation of the least favoured.[45]

Rawls presumes that a uniform distribution of rights over time within a procedurally just framework—or "just savings"—will even out inequalities.[46]

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[41] *Political Liberalism*, above n 2, at 363.
[42] *Theory of Justice*, above n 4, at 84; and *Political Liberalism*, ibid, at 364.
[43] *Theory of Justice* at 76. Emphasis added.
[44] "A Kantian Concept of Equality" in *Collected Papers*, above n 7, 254 at 262. Rawls' just savings depends on incremental gains over generations to even out the kind of disparities affecting the indigenous child, who would obviously qualify as 'the least favored'.
[45] *Theory of Justice*, above n 2, at 101.
[46] See ibid at 284-298.

Approximating strict scrutiny tests applied in *Regents of the University of California v Bakke* (1978) and its anti-affirmative action progeny,[47] neither Rawls' first or second principle seem to justify differentiating between policies meant to assist disadvantaged groups and those which deliberately disadvantage a group. Nor might they recognize the historico-legal peculiarities of Hawaiian history—or any history for that matter. Much like the *Kamehameha* dissent's exclusion of history,[48] Rawls' exclusion of context would appear to given an inaccurate picture and minimize the discrimination in question. As a restatement of the identity-blind first principle, the second, presumably, generally makes the identification of 'the least favored' nearly impossible.

4.2.3 THE HARD CASE

Admittedly, Rawls confessed that equality of opportunity might be jeopardized by great inequality.[49] In fact, he published *A Theory of Justice* in 1972 during the post-*Brown* era.[50]

Justice as fairness nevertheless espouses a highly formalized, individualized version of equality which fundamentally presumes an adversarial relationship between rightsholders' claims and identities, hence the need for veiling and interest conflation. While the veil of ignorance is admittedly an anonymizing device, the original position, overlapping consensus and the very exercise of public reason are homogenizing features which conflate individual interests, thereby inherently prioritizing majoritarian even utilitarian interests. Both the veil and the original position require a significant degree of historical abstraction, while interest conflation and public agreement generally can only promise the recognition of a

[47] *Regents of the University of California v Bakke* 438 US 265 (1978) discussed in Chapter Two in terms of the demise of affirmative action at 2.4.1.
[48] See Chapter Three at 3.5.5.
[49] *Collected Papers*, above n 7, at 143.
[50] *Theory of Justice*, above n 2, was published in 1971.

minimum number of common, basic, immediate rights determined by majority interests.[51]

Rawls never wrote on affirmative action[52] but Samuel Freeman, Rawls' colleague and editor, related that:

> So-called "affirmative action," or giving preferential treatment for socially disadvantaged minorities, is not part of FEO [Fair Equality of Opportunity] for Rawls, and is perhaps incompatible with it. This does not mean that Rawls never regarded preferential treatment in hiring and education as appropriate. In lectures he indicated that it may be a proper corrective for remedying the present effects of past discrimination. But this assumes it is temporary. Under the ideal conditions of a "well-ordered society," Rawls did not regard preferential treatment as compatible with fair equality of opportunity. It does not fit with the emphasis on individuals and individual rights, rather than groups or group rights, that is central to liberalism.[53]

At best, Rawls' outer limits would reluctantly approach the *Weber-Johnson* criteria[54] in recognizing a temporary, individualized exception to the general rule of anonymity and homogeneity. The *Weber-Johnson* test was, in fact, only triggered after the Court recognized a rebuttable presumption of discrimination against the Schools' admissions policy. According to the curt test set out in *Patterson v McLean Credit Union*, once the Schools admitted that the policy preferred any students on the basis of 'race'—once it recognized difference or identity, as it were—the policy was presumed to be discriminatory. The burden of proving otherwise then shifted to the Schools. [55]

4.3 RIGID INTERMEDIATE SCRUTINY: POSNER AND WALDRON

The stricter interpretation of the intermediate *Weber-Johnson* test by the *Kamehameha* dissent, but especially the dissent's fallback to *Runyon v McCrary*[56], represents an extreme version of Rawls' *everyone/no-one* narrative but also the

[51] Note the lack of constitutional and human rights to education in federal law: discussed in Chapter Two at 2.5.
[52] See Thomas Nagel "John Rawls and Affirmative Action" (2003) 39 J Blacks High Educ 82 at 82.
[53] Samuel Freeman, quoted in Robert S Taylor "Rawlsian Affirmative Action" (2009) 119 Ethics 476 at 476.
[54] Discussed in Chapter Three at 3.5.1.
[55] *Paterson v McLean Credit Union* 491 US (1989).
[56] *Runyon v McCrary* 427 US 160 (1976).

more adamant *everyone/no-one* theories of Richard Posner and Jeremy Waldron. Their respective arguments for homogeneity and anonymity resound with a dichotomized, racially defined equality narrative and the same species of almost wilful blindness displayed by the dissent, particularly Judge Bybee, towards the historico-legal peculiarities of Hawaii.[57] Posner's utilitarian math—so much like the public/private funding question but also the reasoning in *Plessy*—is dichotomous but seemingly unconscious to historical context and ongoing realities—the essence of anonymity and the original position. Waldron's cosmopolitan and supersession projects actually, to some degree, admit the mo'olelo but disconnect that context—the harm itself—from ongoing discrimination and disparities. At his most adamant, Waldron appears to belittle the history and the harm while conflating all identities into one which masks actual inequalities and majoritarian bias.

4.3.1 TASTES, TRANSACTIONS AND UTILITARIAN MATH

The previous chapter described the private/public funding query as creating an arbitrary line which has little to do with actual disparities but everything to do with the cost to non-preferred individuals.[58] Chapter Two previously described the larger shift in federal reasoning which has transferred concern from actual identity-attracted disparities to preoccupation with the effect of remedial measures on majority individuals largely. Richard Posner's economic analysis of law theory espouses a similar cost-benefit analysis.

The theory of Richard Allen Posner has been highly influential in the fields of law and economics.[59] He is also a veteran judge on the United States Court of Appeals

[57] See discussion in previous chapter at 3.5.5.
[58] See discussion in Chapter Three on Ninth Circuit's decision not to apply strict scrutiny to the admissions policy because the school is privately funded in Chapter Three at 3.6.
[59] Former Harvard law professor and current associate justice of the US Supreme Court, Elena Kagan has stated that "Richard Posner is the most important legal thinker of our time, and for generations to come legal scholars will dissect and analyse, will praise and criticize, his distinctive legal vision"; Elena Kagan "Commentaries: Richard Posner, The Judge" (2005) 120 Harvard L Rev 1121 at 1121. He is generally credited with revolutionizing the field of law and economics: for instance, see Sophie Harnay and Alain Marciano "Posner, Economics and the Law: From 'Law and Politics' to an Economic Analysis of Law" (2009) 31(2) J Hist Econ Thought 215.

for the Seventh Circuit[60] uniquely situated to comment on the algebra of rights distribution in real-time federal courts.[61] His practical, "scientific"[62] liberal approach to the law, introduced in *The Economics of Justice*[63] and expanded in *The Economic Analysis of Law*,[64] rests on a "pragmatic" calculation of the costs of rights versus their benefits for individuals and society as a whole. Posner never claims a moral high ground but rather that his theory explains and predicts the reasoning[65] of judges[66] "trying to maximize economic welfare" in an exercise paralleling "a free market operating without significant externality, monopoly, or information problems.[67]

Regarding distribution, Posner assumes, as economists do, that individuals make choices "in a world in which resources are limited in relation to human wants", and that each individual "is a rational maximizer of the ends in his life, his satisfactions—what we shall call his 'self-interest'".[68] Not unlike Rawls, Posner assumes that "man is a rational utility maximize in all areas of life". Rights distribution approximates *transactions* between individuals within liberal democracies, where individuals pursue individual wealth maximization. As in economics, these transactions involve *costs* and trade-offs, both pecuniary and non-pecuniary, which individuals may or may not be willing to pay in order to profit from the transaction. Such costs are relative to the *value* each individual places on the transaction and not just actual price.[69] As in free-market theory, the most *efficient* distributions are those which are voluntary in a less-regulated

[60] See "Contact Information" United States Court of Appeals Seventh Circuit <www.ca7.uscourts.gov>.
[61] Posner's own theory and practice on the bench is critiqued and explored in countless journal articles. For just a few examples, see Jerry M Santangelo "Changing Configurations of Antitrust Law: Judge Posner's Applications of His Economic Analysis to Antitrust Doctrine" (1983) 32 De Paul L Rev 839; and Lawrence A Cunningham "Traditional versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions" (2010) 62(3) Florida L Rev 667.
[62] Posner quoted in Robert Cooter and Thomas Ulen *Law and Economics* (6th ed, Boston MA, Addison-Wesley, 2012) at 1.
[63] Richard A Posner *The Economics of Justice* (Cambridge MA, Harvard University Press, 1981).
[64] Richard A Posner *Economic Analysis of the Law* (3rd ed, Boston, Little and Brown, 1986).
[65] Richard A Posner *Economic Analysis of the Law* (2d ed, Boston, Little and Brown, 1977) at 10.
[66] Richard A Posner *Economic Analysis of the Law* (4th ed, Boston, Little and Brown, 1992) at 23.
[67] Posner *Economics of Justice*, above n 63, at 4-5.
[68] *Economic Analysis* (1977), above n 65, at 3. Though Posner argues that self-interest does not mean selfishness as self-interest can include the happiness of others: Richard A Posner *Economic Analysis of the Law* (6th ed, New York, Aspen, 2003) at 3-4.
[69] *Economic Analysis* (2003), ibid, at 5-10.

environment.[70] While not supposedly utilitarian,[71] an overall just distribution "exploit[s] …resources in such a way that 'value'—human satisfaction as measured by *aggregate consumer willingness* to pay for goods and services—is maximized".[72]

In somewhat simplistic terms, Posner views discrimination as a series of transactions between ethnic and racial groups[73] where the majority represents an economic superpower while the minority is extremely vulnerable[74] to market forces and where racial identity equates to "information costs". [75]. Despite this, Posner trusts the free-market system to minimize discrimination because he assumes that—despite a history of economic exploitation by majoritarian interests which has disadvantaged indigenous peoples globally—enough majority members will choose economic advantage over prejudice.[76] Posner, for instance, would have

[70] *Economic Analysis* (1977), above n 65, at 10. Emphasis added. Compare with *Civil Rights Cases* 109 US 3 (1883); and *Plessy v Ferguson 163 US 537 (1896)* where de facto equality was left to majoritarian bias: discussed in Chapter Two at 2.2.2.
[71] *Economics of Justice*, above n 63, at 47-56.
[72] *Economic Analysis* (1977), above n 65, at 10. Emphasis added. Also see *Economics of Justice*, ibid, at 61.
[73] Prejudiced members of the majority group forgo advantageous economic and other transactions, such as real estate and employment, with members of the minority in exchange for the non-pecuniary advantages of not having to associate with members of the other group: *Economics of Justice*, ibid, at 351. As there is little difference in Posner's position on discrimination between *Economics of Justice* and more recent versions of the *Economic Analysis of Law*, for instance, the 2003 edition, I have referred to the original authority for his views. For a more recent discussion: see *Economic Analysis of the Law* (2003), above n 69, at 681-692. Crucially, Posner still views discrimination as a kind of consumer choice and tries to explain non-discrimination in terms of transactional costs largely in a present tense. The immediacy and flat math of his economic approach seems to preclude the higher costs inflicted on racial minorities by historic injustice and ongoing harm.
[74] Within the liberal democracy, the majority group is equal to an economic superpower such as the United States in international trade which can afford to be selective in its transactions, while the minority group is as vulnerable to prejudice as Switzerland's much smaller economy is to changes in the tastes or preferences of Americans for chocolate, for instance: *Economics of Justice*, above n 63, at 351-352.
[75] *Economics of Justice* at 362-363. For Posner, discrimination is more than a taste and may be caused by "[s]heer malevolence and irrationality", or might be anticompetitive—as in the internment Japanese-Americans during World War II—or exploitative—as in the case of slavery . The most important explanatory factor in such instances is "information costs": "To the extent that race or some attribute similarly difficult to conceal (sex, accent) is positively correlated with undesired characteristics or negatively correlated with desired characteristics, it is rational for people to use the attribute as a proxy for the underlying characteristic with which it is correlated…[T]he costs in valuable associations forgone may be smaller than the information costs of making a more extensive sampling. Discrimination so motivated is no different in its fundamental economic character (its distributive effects may of course be different) from a decision to stop buying Brand X toothpaste because of an unhappy experience with a previous purchase of it, albeit the next experience with the brand might have been better. It is no different in its fundamental economic character from the use of information about a person's criminal record to infer his likely fitness as an employee, an example of the use of proxies to economize on information costs…": *Economics of Justice*, ibid, at 362-363.
[76] Some members of the majority will be only mildly prejudiced and will transact with minority members anyway because they will not pass up advantageous transactions. Their distribution costs

decided *Brown v Board of Education*[77] on economic reasoning: segregation is wrong, not for moral reasons or its substantial effect on minority children, but because it reduces their transactional power.[78]

Posner's utilitarian balancing of costs and benefits, of competing interests as ends unto themselves, rather than any reference to any overarching principles of justice might explain the public/private line in the strict scrutiny standard, as well as the *Weber-Johnson* trammelling criterion. Specifically addressing preferential admissions policies, Posner questions whether historic injustice can be rectified through preference or it simply amounts to reverse discrimination.[79] He objects to using proxy characteristics—for instance, diversity rather than a particular race or ethnicity itself, or the presumption that diversity automatically counters discrimination, exclusion and poverty, even where that may not be the individual case[80] as this involves a "conclusive presumption…that an individual possesses some attribute" that justifies their admission, a presumption reminiscent of those bigots base their particular prejudice on.[81] "[I]dentity" itself becomes a "proxy".[82] While minimizing the actual disparities of the indigenous learner, Posner, like the dissent, imagines the non-preferred student subject to disparities "for no better reason than that [his] group lacks one of the racial or ethnic characteristics used for administrative convenience to determine entitlement to preferential treatment."[83]

Posner also apparently rejects multigenerational trauma and allostatic load since beneficiaries of preferential policies are unlikely to be direct victims of injustice

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will be lower because of this and they should come to dominate the "market": *Economics of Justice*, ibid, at 352. That is, they have an incentive to not discriminate against minorities.

[77] See discussion in *Economics of Justice*, ibid, at 354.

[78] That is, as it "reduces the opportunities for associations between races, associations that would be especially valuable to blacks because of the dominant economic position of the whites in society": *Economics of Justice*, ibid, at 355. Posner explains that we can distinguish between the freedom of association claims of the majority and legitimate discrimination claims of the minority in such cases in this way: "Because blacks are an economic minority, the costs to them of the whites' prejudice are proportionately greater than the costs to the whites. This is not to say that discrimination is inefficient but that discrimination has systematic redistributive effects that could be used as the premise of a neutral, though not wealth-maximizing, anti-discrimination principle": *Economics of Justice*, ibid, at 355.

[79] Ibid, at 361.

[80] Ibid, at 367. Note that Posner's example represents the last bastion of affirmative action currently approved by the Supreme Court—at least for now: see *Gratz v Bollinger* 539 US 244 (2003); *Grutter v Bollinger* 539 US 306 (2003); *Schuette v Coalition to Defend Affirmative Action* 572 US___ (2014).

[81] *Economics of Justice*, ibid, at 368.

[82] Ibid, at 370.

[83] Ibid, at 371.

and the non-preferred students who pay the costs of preference are not perpetrators of the injustice.[84] Countering diversity arguments, professional underrepresentation is also unacceptable because there is no way of knowing whether the minorities preferred would supply a certain percentage of the nation's lawyers, for instance, if not for discrimination. Neither is there any guarantee that minorities will go on to serve their communities as counsel for Kamehameha Schools argued.[85] And as long as *any* member of that minority group graduates in a certain profession, those that follow should know that way is open.[86]

Ultimately, for Posner, "it is not permissible for the government to distribute benefits and costs on racial and ethnic grounds". A preferential policy might be efficient because of lower proxy costs but may also allow significant discrimination by giving judges the freedom to "pick and choose among discriminatory measures on the basis of personal values, for the weighing of the relevant costs and benefits would largely be subjective" [87] Posner does support anti-discrimination law because "discrimination imposes proportionally greater costs on the minority than on the discriminating majority". But he sees preferential admissions policies and other affirmative action policies as discrimination, too, one indistinguishable from the other.[88]

Posner may just be frankly admitting that this is the way judges decide cases, but his approach should, like the dissent in *Kamehameha Schools*, worry the earnest liberal. Even more than Rawls, Posner's individual is a sort of proto-human, consisting largely of self-interest—of wants, desires, "tastes" and "preferences" lacking even the basic needs and primary goods which Rawls would afford them.[89] Similarly, Posner's comparison of discrimination to, for instance, one's choice of toothpaste cannot account for the multigenerational, cumulative and complex species of discrimination and disparities affecting Native Hawaiians despite formal

[84] Ibid, at 372. Specifically, in regards to the appropriateness of reparations. He does make a possible exception for Native Americans based on treaty arrangements.
[85] Ibid, at 372.
[86] Ibid, at 373. Compare with reasoning in *San Antonio Independent School District v Rodriguez* 411 US 1 (1973) that as long as poor children were receiving education than they were equal protected: see discussion in Chapter Two at 2.5.
[87] *Economics of Justice*, above n 63, at 378.
[88] Ibid, at 407.
[89] See Rawls' primary goods discussed above at 4.2.2.

guarantees of equality[90] nor their unique historico-legal situation. Posner's stance on reverse discrimination[91] similarly appears to neglect Rawls' rational revision project altogether as discrimination simply amounts to a 'taste'.

Posner's simplistic approach to gauging satisfaction, both individual and aggregate, also raises questions of whose satisfactions and costs matter. In terms of individual satisfaction, judging admissions on a case-by-case basis provides an inaccurate gauging of guarantee/disparity gaps and ongoing harm not unlike Judge Bybee's insistence on an internal trammelling context. Alternately, Posner rejects a utilitarian label but also gauges justice on aggregate satisfaction in a liberal democracy, an exercise which seemingly leaves de facto equality to majoritarian interests and even majorititarian bias as the Supreme Court did in *Plessy*.

Like Rawls, Posner fails to address the hard case, leaving much to Herculean[92] judges with few distributive principles to guide them. Like the dissent, Posner fails to look beyond the black/white dichotomy although modern liberal democracies are multicultural with various stakeholders. Posner also presumes that identity-based claims entail a burden on the public at large much like the *Weber-Johnson* test itself in terms at both trammelling and temporariness steps. Like the trammelling question, Posner's is not necessarily *whether* identity-aware rights entail a burden but *how much* of a burden is too much for other individuals to assume.

Ironically, in terms of a stricter scrutiny, the facts in *Kamehameha* show that the Native Hawaiian institution receives no subsidization from the public at large. Rather as described in Chapter Three,[93] the Schools are entirely privately funded, heavily or fully subsidizing the indigenous learner in an apparent exercise of self-determination. As its levels of academic achievement suggest, the Schools also apparently foster ideal conditions for rational revision enhancement—even a level playing field from which its students set out on their chosen life path. From a purely economic point of view, the Schools are a success story, exhibiting the kind of

[90] See Posner' discussion on reverse discrimination at *Economic Analysis of the Law* (2003) at 689, including his equation of discrimination and reverse discrimination. See *Economics of Justice* at 61-63, 64-65 for examples of his justice math.
[91] *Economic Analysis of the Law* (2003), above n 69, at 689.
[92] See Ronald Dworkin's model judge who is able to decide the hard case objectively, or his "judge as Hercules": Ronald Dworkin *Law's Empire* (London, Fontana, 1986); and *Justice in Robes* (Cambridge MA, Belknap Press 2006).
[93] See discussion on the Schools' private nature at 3.5.

individual and aggregate satisfaction which is meant to drive rightsholders. Thus, the Schools should represent a multiplication of a Coase Theorem[94] calculation of happiness and some measure of Posner's satisfaction. Interference with the freely chosen pursuit of those goods with no apparent utilitarian burden for the public at large—albeit by a collective group of individuals—must surely offend a similar Coase analysis.

However, Posner's economic approach might just as easily be used to interpret present disparities as a symptom of significantly higher transactional costs for Native Hawaiians in relation to other individuals, perhaps even wealth or satisfaction minimization or denial. And yet, like the dissent, Posner's homogenous and anonymous utilitarian math is unlikely to approve an identity-aware preference for a minority group whose satisfaction is subsumed in the greater utilitarian equation. Given such tendencies, Posner—and Law and Economics generally—has been criticized, among other things, for "veil[ing] a preference for the maintenance of the status quo" and various biases.[95]

4.3.2 DISNEYLAND AND HISTORICAL SUPERSESSION

> *Are these goods secured when a dwindling band of demoralized individuals continues, against all odds, to meet occasionally to wear their national costumes, recall snatches of their common history, practice their religious and ethnic rituals, and speak what they can remember of what was once a flourishing tongue?*[96]

What may be more concerning to the earnest liberal than the private/public funding line is that Judge Bybee and others were willing to breach it, being adamant that a stricter scrutiny was the proper standard to apply to the admissions policy—regardless of the school's private character. That propensity emphasizes how thin an already arbitrary line is—especially given the precedent in *Runyon* where the

[94] See Posner's formula for wealth maximization/satisfaction/happiness based on the Coase Theorem, a sort of graph tracking opportunity costs for transactions: see *Economic Analysis* (2003), above n 69, at 7. See also Richard A Posner and Francesco Parisi (eds) *The Coase Theorem, Volume I: Origins, Restatements and Extensions* (Cheltenham Glos UK, Edward Elgar Publishing, 2013).
[95] See, for instance, Martha Albertson Fineman and Terence Dougherty (eds) *Feminism Confronts Homoe Economicus: Gender, Law & Society* (Ithaca NY, Cornell University Press, 2005).
[96] Jeremy Waldron "Minority Cultures and the Cosmopolitan Advantage" in Will Kymlicka (ed) *The Rights of Minority Cultures* (Oxford, Oxford University Press, 1995) 93 ["Cosmopolitan Advantage"] at 97.

school in question was private.[97] It also, again, signals the operation of an extreme version of the *everyone/no-one* narrative wilfully blind to present guarantee/reality gaps and the unique historico-legal context of the admission policy.

Jeremy Waldron, an "expatriate New Zealander",[98] is a legal positivist influenced by Ronald Dworkin,[99] as well as John Locke[100] and Joseph Raz.[101] Waldron has also been influential over the last two decades and deliberately addresses indigenous rights claims including questions of historical self-determination and past injustices. However, in doing so, Waldron exhibits a wilful blindness to present inequalities and historical context reminiscent of the dissent in *Kamehameha*.

Under the guise of plurality, Jeremy Waldron idealizes the *cosmopolitan* individual, a proudly homogenous, ''mixed-up", "freewheeling" identity with no deep affiliations publicly or privately[102] devoid of identities, cultural or otherwise, which "he" [103] absolutely *needs* [104] as an apparently continuously recurring *de novo* personality—though he does owe a duty of acknowledgment and Aristotlean "friendship" to the global "community" of which he is a part as a modern, "interdependent" human being. This "hybrid", "mongrel" person glories in being a "mixed-up" individual in a "mixed up world", and in experiencing life and pursuing arbitrary ends as if selecting meals from a Chinese restaurant or travelling as a "frequent flyer".[105]

[97] See discussion in Chapter Three at 3.6.
[98] Mark J Bennett and Nicole Roughan "*Rebus Sic Stantibus* and the Treaty of Waitangi" (2006) 37 VULWR 505 at 505.
[99] Who supervised him at Oxford University: Jeremy Waldron "Remembering Ronald Dworkin" *The Chronicle of Higher Education* (online ed, Washington DC, 19 February 2013). He also, admittedly, had significant disagreements with Dworkin over constitutional protection of hate speech.
[100] See, for instance, Jeremy Waldron *God, Locke and Equality: Christian Foundations in Locke's Political Thought* (Cambridge UK, Cambridge University Press, 2002).
[101] See his discussion on Raz in Jeremy Waldron *Liberal Rights: Collected Papers 1981-1991* (Cambridge UK, University of Cambridge, 1993) [*Liberal Rights*]. Also see an example of his disagreement with Raz (and Rawls) in Jeremy Waldron "Human Rights: A Critique of the Raz/Rawls Approach" (2013) *New York University Public Law and Legal Theory Working Papers* 405.
[102] "Cosmopolitan Advantage", Waldron above n 96, at 110.
[103] In "Cosmopolitan Advantage", Waldron usually refers to the liberal individual in the male sense.
[104] "Cosmopolitan Advantage", above n 102, at 100.
[105] Ibid, at 95.

Waldron contrasts this *everyone/no-one* ideal with the indigenous individual claiming special rights outside the modern order of things, a relic limited by his or her insistence on an "artificial", irrelevant communal identity which rejects modern technology and democratic participation. Like the *Rice* majority,[106] Waldron views cosmopolitanism as progressive:

> Nor are the citizens of the world, the modernist dreamers of cosmopolis, proposing exactly to destroy minority cultures. Their apartments are quite likely decorated with Inuit artifacts or Maori carvings. Still we know that a world in which deracinated cosmopolitanism flourishes is not a safe place for minority communities. Our experience has been that they wither and die in the harsh glare of modern life, and that the custodians of these dying traditions live out their lives in misery and demoralization.[107]

Waldron displays an almost personal distaste for indigenous identity which he depicts as an arbitrary, interchangeable choice not a primary good. In 'dying race' terms, that choice is incompatible with the modern world, tantamount to racism and irrelevant except as an artistic value. [108]

But Waldron goes further:

> Let me state it provocatively. From a cosmopolitan point of view, immersion in the traditions of a particular community in the modern world is like living in Disneyland and thinking that one's surroundings epitomize what it is for a culture really to exist. Worse still, it is demanding the funds to live in Disneyland and the protection of modern society for the boundaries of Disneyland, while still managing to convince oneself that what is happening inside Disneyland is all there is to an adequate and fulfilling life. It is like thinking that what every person most deeply needs is for one of the Magic Kingdoms to provide a framework for her choice and her beliefs, completely neglecting the fact that the framework of Disneyland depends upon our commitments, structures, and infrastructures that far outstrip the character of any particular facade. It is to imagine that one could belong to Disneyland while professing complete indifference towards, or even disdain for, Los Angeles.[109]

Again, Waldron presumes that indigenous rights require complete immersion in a remote, frozen, pre-colonization culture that indigenous people expect others to pay for, or even dishonest, unfair public subsidization. Reducing rights to their bare,

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[106] See discussion on *Rice* majority minimisation of unique historico-legal context of the OHA voting requirement and emphasis on influx of other ethnic groups in Chapter Three at 3.4.2.
[107] "Cosmopolitan Advantage", above n 96, at 99.
[108] Waldron's Disneyland thesis presumes, for instance, that indigenous people reject modern technology.
[109] "Cosmopolitan Advantage", above n 96, at 101.

negative minimum,[110] Waldron argues that indigenous rights lack the "authenticity" of individual civil and political rights because of this subsidization and cannot demand the same respect. Just as meat lovers can learn to subsist on a vegetarian diet, the indigenous child can have a "rich and "fulfilling" life[111] in a liberal democracy without special rights not vital to individual autonomy. A lack of indigenous-specific rights is "like the death of a hobby, not the demise of anything that people really need".[112]

Waldron's basic cosmopolitan theory seems to ignore both the mo'olelo and present discrimination and disparities entirely, but his more recent writings on supersession[113] address the mo'olelo directly. However, supersession often just sounds like a more politically-correct version of his Disneyland thesis. The thrust is that, even if significant injustices were committed historically—injustices which might justify compensation, for instance—transactions between individuals have moved on since then to such an extent that there is no way to correct those injustices. One cannot change the past and often the facts of history can be mistaken anyway.[114] Treaties like those which undergird the *Mancari* exception, the special trust relationship and political status generally may have a limited warranty, in Waldron's estimation, as history moves on.[115] Indigenous peoples should, therefore, accept the current status quo and adapt without special rights or political identity which affect the holdings of non-indigenous individuals who did not personally commit historic injustices or reverse discrimination.[116]

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[110] The most persuasive argument Waldron makes in "Cosmopolitan Advantage" is his likening of the strength of indigenous rights claims to the standing of freedom of religion. Freedom of religion is largely a negative right. Waldron argues that no one would subsidize a dying religion and neither should we subsidize a dying culture: ibid, at 100.
[111] Ibid, at 99-100.
[112] Ibid, at 100.
[113] Jeremy Waldron "Superseding Historic Injustice" (1992) *Ethics* 103 4; "Redressing Historic Injustice" (2002) 52 U Toronto L J 135 "Indigeneity?: First Peoples and Last Occupancy" (2003) 1 NZJPIL 55.
[114] "Superseding Historic Injustice", ibid.
[115] See Jeremy Waldron "The Half-Life of Treaties: Waitangi, *Rebus Sic Stantibus*" (2005) 11 Otago L Rev 161 ["Half-Life"].
[116] For instance, "Superseding Historic Injustice", above n 113, at 25: "Apart from anything else, the changes that have taken place over the past two hundred years mean that the costs of respecting primeval entitlements are much greater now than they were in 1800. Two hundred years ago, a small aboriginal group could have exclusive domination of "a large and fruitful Territory" without much prejudice to the needs and interests of very many other human beings. Today, such exclusive rights would mean many people going hungry who might otherwise be fed and many people living in poverty who might otherwise have an opportunity to make a decent life. Irrespective of the

Waldron's cosmopolitan, historically abstract individual contrasts with both the majority decision and concurrence but resembles the dissent's willingness to breach the public/private line and apply stricter scrutiny. For Waldron, no one community can or does provide the context of our choices[117] because indigenous cultures are not homogenous or "pure" but the result of the input of varied "cultural materials which enter our lives in many different ways".[118] Similarly, the dissent in *KS* focused on non-Hawaiians who are socially and economically disadvantaged[119] and the first panel in the Ninth Circuit held that "race-conscious programs must be designed to minimize—if not avoid—burdens upon nonculpable parties".[120] Waldron would seemingly conclude that no one school, private or public, with specific curriculum content, language of instruction and culturally-appropriate pedagogy will be vital enough to the development of the rational revision of an individual indigenous child to justify reverse discrimination.

Despite the mo'olelo of complex discrimination and disparities common to indigenous peoples globally and particularly within the United States and New Zealand, Waldron fundamentally rejects the notion that indigenous identity or history is of "practical importance"[121] to present liberal claims. Waldron's supersession thesis is, therefore, the height of historical abstraction and a highly formalized but also idealized version of equality unmoved by actual disparities.

Ultimately, Waldron's cosmopolitan and supersession theses resemble a misplaced *Plessy*-like reliance on *everyone/no-one* guarantees masking majoritarian bias to even out inequalities and even echo assimilative federal policy. In contrast to Rawls' at least initially neutral original position and rational revision, Waldron is prescriptive, even paternalistic: in order to be part of the modern world—to be a participant in democracy—the indigenous learner must embrace cosmopolitanism. We must show disdain for our own identity, eat food, listen to music and speak languages not our own[122]—values and ends we might not otherwise choose. In fact,

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occurrence of past injustice, this imbalance would have to be rectified sooner or later. That is the basis for my argument…"

[117] "Cosmopolitan Advantage", above n 96, at 106.

[118] Ibid, at 108.

[119] *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 416 F3d 1025 (9th Cir 2005) at 8952.

[120] Ibid.

[121] "Superseding Historic Injustice", above n 113, at 4.

[122] "Cosmopolitan Advantage", above n 96, at 95. Knowledge of Spanish marks a cosmopolitan gentleman while indigenous languages are relics of a backwards or frozen past.

we must pursue a wide and varied range of ends even if we may rationally choose just our indigenous identity after weighing all options.

In fact, Waldron seems to require that the indigenous learner be much like himself. His cosmopolitan personality is apparently male, a collector of souvenirs and ethnic art, an opera aficionado, and can afford to eat out, fly and otherwise pursue upper middle class luxuries "frequent[ly]" [123] —pursuits in stark contrast to the multigenerational trauma, extreme allostatic load, cumulative, cyclical and otherwise complex discrimination and disparities experienced by many Native Hawaiians. In fact, Waldron's individual is assumed to be an adult with full mental and socio-economic capacity to make such smorgasbord choices rather than a child who may not. To some extent, Rawls and Posner make a similar assumption.

Rather than fairness, Waldron seems to evoke Rawls' worst fears about arbitrariness—the personification of unequal circumstances. Taken literally, his freewheeling cosmopolitan individual has few checks on his choices, legitimate or not, and little disregard for others. Ironically, while passionately arguing that the indigenous individual have the freedom to be anyone they choose, Waldron presupposes a narcissistic, essentially majoritarian identity for the indigenous learner. In doing so, he merely reiterates centuries of integration-justified discriminatory language, law, policy, and practice which have historically disadvantaged the indigenous child in education—or the mo'olelo itself.

In contrast to other legal scholars who fail to grapple with indigenous issues and history, Waldron consciously and wilfully ignores historic injustices that impact present rights distributions and outcomes. A number of scholars have particularly criticized Waldron's historical supersession project because it disregards the continuing legality and relevance of historic rights to self-determination, [124] the causal connection between present rights denials and historic wrongs, and the causal connection between the historic injustices, ongoing harm and future rights denials. These realities justify present not just historic rights claims.

[123] "Cosmopolitan Advantage", above n 96, at 95.
[124] Bennett and Roughan, above n 97.

In some ways, Waldron and Posner represent the extreme version of Rawls, with utilitarian math and majoritarian bias barely disguised in *everyone/no-one* arguments. However, while Rawls' project is directed at the enhancement of the exercise of rational revision, Posner's calculations and Waldron's cosmopolitanism—like the dissent's insistence on stricter scrutiny—prioritize homogeneity and anonymity as measures of equality in and of themselves exaggerating the flat nature of a uniform, one-size-fits-all distribution of rights.

4.4 THE MAJORITY: DWORKIN'S SOMEONE

> *Equality is a popular but mysterious political ideal. People can become equal (or at least more equal) in one way with the consequence that they become unequal (or more unequal) in others. If people have equal income, for example, they will almost certainly differ in the amount of satisfaction they find in their lives, and vice versa. It does not follow, of course, that equality is worthless as an ideal. But it is necessary to state, more exactly than is commonly done, what form of equality is finally important.*[125]

The late Ronald Dworkin's contribution to legal and political theory has also been profound and includes a long-term disagreement with legal positivism,[126] the role of judges in making law,[127] the integrity of the law,[128] the value of specific constitutional rights such as freedom of speech,[129] but also a more moral concept of equality. While his theory of individual "rights as trumps"[130] does prioritize a mainstream *everyone/no-one* narrative, his strong defence of affirmative action[131] nonetheless recalls *someone* jurisprudence and, particularly, the majority decision

[125] Ronald Dworkin "What is Equality: Part I: Equality of Welfare" (1981) 10(3) Philos Public Aff 185, at 185.
[126] Stephen Guest *Ronald Dworkin* (3rd ed, Stanford CA, Stanford University Press, 2013) at 27.
[127] Dworkin *Law's Empire*, above n 92.
[128] Discussed by Stephen Guest *Ronald Dworkin* (2d ed, Edinburgh, Edinburgh University Press, 1997) at 1-18.
[129] As well as freedom of sexual practice, abortion, genetics, and healthcare. For example, see Ronald Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge MA, Harvard University Press, 2000).
[130] See Ronald Dworkin "Rights as Trumps" in Jeremy Waldron (ed) *Theories of Rights* (Oxford, Oxford University Press, 1984).
[131] He devotes at least one chapter in most of his books to the subject, taking apart the leading US cases in the process. See, for instance, chapters 14-16 in Ronald Dworkin *A Matter of Principle* (Cambridge MA, Harvard University Press, 1985) [*Matter of Principle*].

in *Kamehameha*. In fact, Dworkin's[132] starting point is a more identity-aware homogeneity based on equal concern and respect for each individual which is more willing to stretch to address actual disparities.

Responding to Rawls, Dworkin criticizes what he calls the "flat indiscriminate equality" [133] proposed by Rawls, the undesirability of his utilitarian principles of justice[134] and recognizes the danger of external preferences arising from having too little information about the identity of the rights-holder.[135] For Dworkin, equality means the "right to equal concern and respect":

> The government must treat those whom it governs with *concern*, that is, as human beings who are capable of suffering and frustration, and with *respect*, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's. These postulates, taken together, state what might be called the liberal conception of equality; but it is a conception of equality, not of liberty as license, that they state.[136]

He would restrain "any policy that denies any group of citizens, however small or negligible, the equal resources that equal concern would otherwise grant them"[137]. Thus, Dworkin's right to equal concern and respect entails the right to be treated *as an equal* in contrast to the mere right to equal treatment. This is not an "equal distribution of some good or opportunity, but the right to equal concern and respect in the political decision about how these goods and opportunities are to be distributed"[138]—or a form of individual self-determination.

In contrast to Rawls, Dworkin would allow some inequalities—or individual "sacrifices"—for the good of the greater society, or "community", but requires that the benefit include those disadvantaged. Where *passive membership* is best

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[132] Ronald Dworkin *Taking Rights Seriously* (London, Duckworth, 1977) [*Taking Rights Seriously*]; "What is Equality: Part I: Equality of Welfare" (1981) 10(3) Philosophy and Public Affairs 185; *Sovereign Virtue*, above n 129.
[133] *Sovereign Virtue*, ibid, at 1.
[134] *Taking Rights Seriously*, above n132, at 153, particularly describing how the two basic principles of justice are not in everyone's interests.
[135] Ibid, at 152-154.
[136] *Taking Rights Seriously*, above n 132, at 272.
[137] *Matter of Principle*, above n 131, at 211.
[138] *Taking Rights Seriously*, above n 132, at 273.

represented by the inherent expectation of deprivation for the greater good demanded by a totalitarian regime—or even perhaps by the utilitarian math implicit in Rawls' public reason and, more obviously, in Posner's aggregate satisfaction—Dworkin's *active membership* gives individuals a stake in their society and reason to sacrifice and "carry the burden" of some inequality. Speaking of those who bear inequalities, he writes:

> He can take pride in its present attractiveness—in the richness of its culture, the justice of its institutions, the imagination of its education—only if his life is one that in some way draws on and contributes to these public virtues. He can identify himself with the future of the community and accept present deprivation as a sacrifice rather than tyranny, only if he has some power to help determine the shape of that future, and only if the promised prosperity will provide at least equal benefit to the smaller, more immediate communities for which he feels special responsibilities, for example, his family, his descendants, and, if the society is one that has made this important to him, his race.[139]

In contrast to the original position, active membership depends on some *identification,* albeit with the wider community, while onus for identification rests with the government or the majority interests it represents. Democracy should give indigenous peoples a reason to participate in universal equality. This stake is to be based on actual preference determined through choice of resources, as in a desert island auction, where all shipwrecked participants have exactly the same amount of clamshells to bid with.[140] If we all arrive on this island of liberal democracy with no arbitrary baggage, with no resources of any kind, and we are all given the same distribution of rights to utilize in pursuit of our rationally-chosen life goals then we are equal because our opportunities have been the *same*. The key is ensuring that all participants have the same amount of resources or rights to bid with.

For this reason, Dworkin does address the 'hard case'[141]—at least in terms of minorities—and has strongly and frequently defended affirmative action.[142] His reasoning is fairly consistent with the modified *Weber-Johnson* test and with *Brown v Board of Education*.[143] From the outset—like the moral sense of the majority

[139] *Matter of Principle* at 211.
[140] The clamshell auction. See *Sovereign Virtue* Chapter 2 "Equality of Resources".
[141] He surmises that there is always a right answer for every case that comes before a judge discoverable by applying certain principles including equality of concern and respect. See his description of the 'judge as Hercules" in *Matter of Principle* , above n 131, at 119
[142] See various chapters in books...And Ronald Dworkin "Affirmative Action: Is it Fair?" (2000) 28 J Blacks High Educ 79 ["Affirmative Action"].
[143] See Chapter Two discussion on the substantial version of equality in *Brown I* and its progeny discussed at 2.2.3.

that the mo‘olelo was relevant to whether the admissions policy was a measure of equality or a form of discrimination—Dworkin recognizes that wealth, education, race, luck, raw skill, intelligence and other "native capacities" play a more important part in the realization—or lack—of de facto equality than Rawls' original position admits[144] and that a genuine "suspect group" [145] will be one:

> …saddled with…disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process[146]

rather than the mere disadvantage of "fellow citizens" who are not "in any way historically associated with prejudice and antipathy". [147] Thus, for Dworkin—like the *Kamehameha* majority—the equal protection clause was meant to protect groups with a "special vulnerability to prejudice or hostility or stereotype and…consequent diminished standing—…second-class citizenship—in the political community"; the "motive behind the" law or policy in question matters; and affirmative action plans—which merely disadvantage a 'fellow citizen'—should be subject to a relaxed level of scrutiny.[148] Dworkin considers affirmative action to be "one of the most effective weapons…against racism"[149] rather than a form of discrimination. Like the majority's stretching of the *Weber-Johnson* factors, he favors judging "improper motives" on a "more case-by-case basis" rather than assuming on the "threshold" that any disadvantage to the non-favoured class automatically constitutes discrimination and attracts a stricter scrutiny.[150]

Although not writing on indigenous rights per se, he has written—as if describing the parties in *Kamehameha*—that:

> It has become common, indeed, to describe the great social issues of domestic politics, and in particular the racial issue, as presenting a conflict between the demands of liberty and equality. It may be, it is said, that the poor and the black and the uneducated and the unskilled have an abstract right to equality, but the

[144] *Matter of Principle*, above n 131, at 207.
[145] See *Korematsu v United States* 323 US 214 (1944); and *Hirabayashi v United States* 320 US 81 (1943) discussed in Chapter Two at 2.4.1.
[146] "Affirmative Action", above n 142, at 81.
[147] Ibid, at 81.
[148] Ibid, at 80-81. See *San Antonio Independent School District v Rodriguez* 411 US 1 (1973), discussed in Chapter Two at 2.4.1, where the facts resembled the tangible and intangible differences in *Brown v Board of Education of Topeka, Kansas* 347 US 483 (1954) [*Brown I*] but relaxed scrutiny validated what seemed like a violation of equal protection.
[149] "Affirmative Action", above n 142, at 80-81.
[150] Ibid, at 81 and 82.

> prosperous and the whites and the educated and the able have a right to liberty as well and any efforts at social reorganization in aid of the first set of rights must reckon with and respect the second. Everyone except extremists recognizes, therefore, the need to compromise between equality and liberty.[151]

Dworkin recognizes the connection between de facto freedom—or circumstances beyond formalized *everyone/no-one* guarantees—and the realization of actual equality. He also connects a lack of healthcare, education, housing, employment and other background factors with the practical operation of rights.[152]

Dworkin does not, however, sanction clearing a person's "path" of all unnecessary obstacles to equality[153] or necessarily an additional distribution of strong rights to those who suffer from a lack of de facto equality. His focus is on levelling measures like affirmative action[154] whose objective is to grant access to the same advantages which those who enjoy the benefits of actual equality already have.[155]

Similarly, the majority in the case depended on a *someone* narrative which recognized Native Hawaiians as a group—albeit a *racial* group—plagued historically and currently by discrimination and disparities attracted to their identity. Like the majority decision, Dworkin conveys a moral intuition that de facto disparities undermine formal guarantees of equality. However, like the majority, affirmative action based on individual self-determination and responsibility is his apparent limit. Equal concern and respect allow him to temporarily pull back Rawls' veil of ignorance to recognize that not everyone really starts in an equal, original position but not far enough for him to possibly recognize collective self-determination or special political status as justifying the admission policy. Thus, like the *Kamehameha* majority's modification of the *Weber-Johnson* test, Dworkin is willing to admit the manifest imbalance, will weigh it against the rights of

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[151] *Taking Rights Seriously*, above n 132, at 266.
[152] *Matter of Principle*, abov n 131, at 187.
[153] Isaiah Berlin has written: "The sense of freedom, in which I use this term, entails not simply the absence of frustration but the absence of obstacles to possible choices and activities—absence of obstructions on roads along which a man can decide to walk", quoted in Dworkin, *Taking Rights Seriously*, above n 132, at 267. The removal of obstructions begins to move us toward Kymlicka's idea of minority rights as a sort of buffer against external pressures on the choices of the indigenous individual and his community.
[154] He devotes chapters specifically to affirmative action in most of his books.
[155] Overall, he does not appear to hold liberty in high regard. He is unwilling to make it a "strong right" but would relegate it to a complement of equality, limiting it to the "most serious infractions"[155]—or rather where recognizing individual rights to certain liberties is required by the fundamental right to treatment as an equal: *Taking Rights Seriously*, above n 132, at 273.

others—fundamentally, an assessment of equal respect and concern—and approve it but, like the majority, still require it to be temporary until statistics reveal parity.

4.5 MANCARI AND BEYOND: KYMLICKA AND THE INDIGENOUS LEARNER

> *People on the left who agree on 95 per cent of the actual issues confronting our society spend all of our time arguing with each other about the 5 per cent of issues we disagree about, rather than fighting alongside each other for the 95 per cent of issues we have in common.*[156]

Dworkin is decidedly less adamant and displays increased awareness of the effect of real-time, identity-attracted disparities on the context of rational revision but ultimately fails to go beyond a racialized *someone* narrative. He approaches race but not necessarily indigeneity and largely makes moral arguments for someone-specific exceptions which enable realization of universally everyone/no-one constitutional guarantees. Given such limits, Dworkin has been specifically criticized by Canadian political philosopher Will Kymlicka for failing to explore minority cultural structures and language rights as vital contexts of choice,[157] the very focus of Kymlicka's own theory.

Kymlicka has been highly influential since publishing *Liberalism, Community and Culture* in 1989.[158] His theory of liberal multiculturalism takes liberalism beyond the individual and attempts to reconcile mainstream liberalism with the increasingly multicultural and legally pluralistic nature of modern democracies where various minority groups advance diverse rights claims. Like Waldron, Kymlicka explores the implications of equality in former settler nations including the United States but recognizes the relevance of certain histories to present rights claims and denials, particularly the liberal validity of certain group-differentiated rights. He would, for instance, distinguish the unique historical circumstances of African American claims—for instance, their forced rather than voluntary segregation[159]—from the

[156] Will Kymlicka *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (New York: Oxford, 2001).
[157] Will Kymlicka "Dworkin on Freedom and Culture" in Justin Burley (ed) *Dworkin and His Critics with Replies by Dworkin* (Blackwell Publishing, 2004) 114.
[158] Will Kymlicka *Liberalism, Community and Culture* (New York, Clarendon Press, 1991).
[159] Whose rights claims Kymlicka finds incomparable to any other minority group let alone the rights claims of indigenous peoples.

self-determination based claims of indigenous "minority nations", such as Native Hawaiians, who can claim a prior history of self-government, common culture and language, and self-governing indigenous institutions.[160] Indigenous peoples, therefore, possess unique rights that are not only permissible but demanded by liberalism.[161]

The concurrence in *Kamehameha* equated the admission policy with the self-determination based preference in *Morton v Mancari* (1974)[162] and not a measure of equality per se and explained the policy as an expression of the special trust relationship not a remedy for ongoing historical injustices.[163] Kymlicka would also recognize remedial self-determination as the right of indigenous peoples partially based on historic self-determination and special political status. However, he would also defend the same self-determination in liberal terms that recognize the impact of that history on present rights claims and denials.

4.5.1 RECONCILING EVERYONE/NO-ONE WITH INDIGENOUS IDENTITY

Various scholars have responded to mainstream liberal individualism, including the so-called *communitarians*, a diverse group united by their critique of the prioritization of the *everyone/no-one* in rights distribution and insistence that group identity and experience enhance rational revision context. Alasdair MacIntyre[164],

[160] One of the fundamental arguments of *Liberalism, Community and Culture*, above n 158.
[161] Will Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Clarendon Press, 1995).
[162] *Morton v Mancari* 417 US 535 (1974) discussed in Chapter Two at 2.3.2.
[163] Contrast with Eric K Yamamoto, Susan K Serrano and EA Ho'oipo Kalaena'auao Pa, Amicus Brief of the Japanese American Citizens League of Hawai'i-Honolulu Chapter and the Equal Justice Society and in support of Defendant-Appellee's Petition for Rehearing En Banc, 29 August 2005, in *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 416 F 3d 1025 (9th Cir 2005) (No 04-15044).
[164] MacIntyre disagrees with liberal individualism's "schizophrenic" division of the individual into public and private personalities which he describes as "partition[ing] each human life into a variety of segments, each with its own norms and modes of behaviour". Thus, the individual is viewed in terms of false dichotomies such as 'work/leisure' or 'corporate/personal', and her life becomes "nothing but a series of unconnected episodes" when really she is the same person with the same moralities and interests in both spheres of experience. Such thinking, to MacIntyre, also results in an oversimplification of what are really "complex actions and transactions" and the equation of bits and pieces of a human life with a whole person: Alasdair MacIntyre *After Virtue: A Study in Moral Theory* (Notre Dame, University of Notre Dame Press, 1981) at 190. He similarly rebuts the pan-societal moral consensus or Rawls' exercise of public because it is impossible to achieve such consensus even publically: "…We all have too many disparate and rival moral concepts…and…the moral resources of the culture allow us no way of settling the issue between [us] rationally. Moral

for instance, has emphasized the desirable, even virtuous wider social and historical context of a person's individual heroic narrative, their rationally revised and chosen life's path. Michael Sandel[165] recognizes that homogeneity and anonymity preclude civic affiliations with other individuals prerequisite to forming the public consensus necessary for rational revision and democracy while simultaneously entangling individuals in a network of unchosen obligations. Similarly, Charles Taylor[166] has critiqued the "atomized" self of liberal individualism given the reality

philosophy, as it is dominantly understood, reflects the debates and the disagreements of the culture so faithfully that its controversies turn out to be unsettlable in just the way that the political and moral debates themselves are": *After Virtue*, 235.

[165] For Sandel the liberal individual—the "unencumbered self"—is a being beyond the reach of her own experience whose identity is determined not by who she is but by her relationship to the things she has, wants or seeks: Michael J Sandel "The Procedural Republic and the Unencumbered Self" (1984) 12(1) Political Theory 81. Rawls' difference principle represents the unencumbered self since the resources to be redistributed are things that we have and not who we are: "Procedural Republic" at 84. This state of "possession" cannot account for the principles of redistribution—or "sharing"—required by the difference principle and results in "distance" between the individual and her formally promised rights: Michael J Sandel *Liberalism and the Limits of Justice* (Cambridge UK, Cambridge University Press, 1998) at 55.

Likewise, the unencumbered self fails to account for not just accidental or contingent assets but common assets, or goods, since it rules out the possibility of any communal ties, obligations or responsibilities antecedent to the self and its rights: "Procedural Republic" at 84. As such, this distance between the individual and their aims and interests presupposes a certain kind of person: Michael J Sandel *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge MA, Belknap Press, 1998) at 14. This is an identity-less individual —one without any communal ties, obligations or responsibilities—for whom the two basic principles of justice will work and treats the whole of society as a single person by "conflating diverse desires" into "a single system of desires": "Procedural Republic" at 84. In contrast to the benign conception of the neutral state offered by liberal individualists, Sandel argues that the liberal state "offers a powerful promise of individual rights" but "demands a high level of mutual engagement". This results in individuals being "implicated willy-nilly in a formidable array of dependencies and expectations they did not choose and increasingly reject". In other words, "we are more entangled, but less attached, than ever" in a network of obligations which have little to do with will and are unmediated by those common identifications or "expansive self-definitions" that would make this reality "tolerable": *Democracy's Discontent* at 13-14. Thus, the unencumbered self is flawed because "[i]t cannot make sense of our moral experience" or account for valid communal ties, responsibilities and obligations which have claim on the self and are "antecedent to choice": *Democracy's Discontent* at 15.

[166] Like MacIntyre and Sandel, Taylor argues that "primacy-of-rights" theories fail to take account of the "principle of belonging or obligation" which precedes individual rights: Charles Taylor "Atomism" in *Philosophical Papers, Vol 2, Philosophy and the Human Sciences* (Cambridge UK, Cambridge University Press, 1985) 187 at 188. For Taylor, the problem with modern liberalism is that the individual is, as we have seen above, conceived of as necessarily atomistic—that is, defining themselves without reference to others' preferences and ends in order to become a self-sufficient and authentic human being: "Atomism" at 189-190, and 194. Taylor, however, disputes the notion of "inward generation" due to the "dialogical" nature of human life: "We become full human agents, capable of understanding ourselves, and hence of defining our identities, through the acquisition of rich human languages of expression…But we learn these modes of expression through exchanges with others. People do not acquire the languages needed for self-definition on their own. Rather we are introduced to them through interaction with others who matter to us": Charles Taylor "The Politics of Recognition" in Amy Gutmann (ed) *Multiculturalism: Examining the Politics of Recognition* (Pinceton, Princeton university Press, 1992) 25 at 32. The term "language" describes communication of all kinds and not just verbal expression. The "significant others" ("Politics of Recognition" at 32) he refers to take the form of family and community and shape other "characteristically human capacities" of the individual such as her "convictions" and 'intuitions' about fundamental rights and freedoms, and of course, her choice-making capacity: "Atomism" at

of valid antecedent interests in and obligations to one's community crucial to rational revision. Communitarians, as a group, fundamentally challenge the homogenous, anonymous individual as the only rightsholder and rational revision in the original position alone. Rather, communitarians place a high, even crucial value on group input into rational revision and agency.

Attempting to reconcile these positions, Will Kymlicka[167] argues that we should recognize difference, even identity, where rights, like education, buffer the indigenous child against inequality and help her access equality. That is, he argues that we must differentiate the rights of indigenous rights-holders because their group identity inherently attracts disadvantage where others do not, while that same identity constitutes an essential good and rich context of choice where the child's individual rights are realized. Differential minority rights—even identity-specific rights—then act as both buffer against the identity-attracted disadvantage and provide identity-responsive access to liberal autonomy and equality.

Given that the indigenous child already has their fair share of a "difference-blind, egalitarian distribution of resources and liberties",[168] Kymlicka asks why liberals should concern themselves further, apply Rawls 'difference principle' or depend on Dworkin's equal concern and respect. At the outset, Kymlicka accepts that liberalism requires individuals to be responsible for the ends they choose. Responsibility requires us to weigh our chosen ends in terms of the costs placed on the legitimate interests of others. If the costs of a choice are too high, such interests "have no value".[169] Thus, responsibility qualifies autonomy and equality.

Again, this responsibility account is frequently repeated in criticism of indigenous rights—particularly fears of an oppressive internal majority or minority rights running rampant over the civil and political rights of external individuals. Responsibility explains the trammelling inquiry at the second step of the *Weber*-

191-194. In fact, rather than a mere choice of principle or anonymous assertion of right, these convictions have special moral significance to us. For Taylor, these are actually the capacities which allow us to be authentic human beings making uncoerced choices and as such are worthy of respect: "Atomism" at 193-194.

[167] *Liberalism, Community and Culture*, above n 158; *Multicultural Citizenship*, above n 161; *Politics in the Vernacular*, above n 156.

[168] *Liberalism, Community and Culture*, ibid, at 182.

[169] Ibid, at 185.

Johnson test.[170] Similar liberal reasoning assumes that indigenous identity itself is just one possible, arbitrary contingency,[171] that the Native Hawaiian learner has the rational—not to mention socio-economic—freedom to choose alternative educational outcomes or schools and that their indigenous identity is an optional, disposable choice.[172]

However, Kymlicka seems to rightly conclude that Rawls and Dworkin's real concern is enabling and protecting individual autonomy or self-determination—that is the ability of each individual to rationally choose their life's path on an equal basis with others. In terms of this rational revision capacity, Kymlicka reminds us that choice "is only half of the liberal story" because justice as fairness also "presupposes" circumstances which have nothing to do with choice.[173] While differences resulting from individual choice are the responsibility of the individual who has made that choice:

> …differences which arise from people's circumstances—their social environment or natural endowments—are clearly not their own responsibility. No one chooses what class or race they are born into, or which natural talents they are born with, and no one deserves to be disadvantaged by these facts.[174]

Indeed, this is the reasoning underlying Rawls' veil of ignorance: that we neutralize the effect of these unchosen inequalities or "unequal circumstances".[175]

Thus, Kymlicka notes, both Rawls and Dworkin assume an "abstract egalitarian plateau"—the proverbial level playing field of modern liberal democracies—where the interests of each citizen are given equal consideration in both the economic market and in political process, within a society where each citizen has equal opportunity, equal political power and are constrained by the principles of justice.[176] In reality, Kymlicka notes, indigenous people are often "outbid" for important

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[170] That the policy not unnecessarily trammel the rights of others: see discussion in Chapter Three at 3.5.
[171] As Rawls concludes. He relegates such identities to an individual's private rather public or political life.
[172] As Thomas Pogge argues in "Group Rights and Ethnicity" in Will Kymlicka and Ian Shapiro (eds) *Ethnicity and Group Rights NOMOS Vol 39* (New York, New York University Press, 1997) where he finds little difference between indigenous identity and being a member of a car or other social club,
[173] *Liberalism, Community and Culture*, above n 158, at 186.
[174] Ibid, at 186.
[175] Ibid, at 186-187.
[176] Ibid, at 182-183.

resources, such as land, or "outvoted" on crucial policy decisions, such as which language will be used as the medium of instruction[177]—as well as whose curriculum or pedagogy will be subjected to.

Kymlicka revises Dworkin's clamshell auction to illustrate. Instead of one ship wrecked on a desert island he invites us to see two, one very large and one very small. The auction occurs via the ships' computers. Both ships' occupants have prior knowledge of the resources at stake and are fairly even in percentages of those choosing certain occupations or lifestyles. After all resources are bid on, the passengers embark to claim their resources[178] to find that the passengers on one ship share the same nationality and those on the other ship share another. The group from the small ship are now a minority—even an indigenous minority—and "in a very undesirable position as they try to execute their chosen life-styles in an alien culture".[179]

Rerunning the auction is not to the advantage of individual minority members who do not want the actual resources of the majority—for instance, a public school system that has historically perpetrated and perpetuated discrimination and disparities. They have already chosen those best suited to their individually chosen rational revision projects and values. What the minority "env[ies]" is the majority's context of choice, that the distribution of rights now reflects and favors a majority identity. In response, they pool their clamshells and votes to outbid the majority for a block of land and resources on the island that they would not have chosen individually but now need to secure their identity and cultural context.[180]

Thus, in modern democracies, Kymlicka argues, indigenous peoples must pay additional costs that non-indigenous individuals do not. He writes:

> This inequality has nothing to do with the choices of aboriginal people. A two-year old Inuit girl who has no projects faces this inequality. Without special political protection, ...by the time she is eighteen the existence of the cultural community in which she grew up is likely to be undermined by the decisions of people outside her community. This is true no matter what projects she decides to pursue. Conversely, an English Canadian boy will not face this problem, no matter

[177] Ibid, at 183.
[178] Ibid, at 188.
[179] Ibid.
[180] Ibid, at 188-189.

> what choice he makes. The rectification of this inequality is the basis for the liberal defence of aboriginal rights, and minority rights in general.[181]

4.5.2 BUFFER AND ACCESS

Additional costs arguments are particularly persuasive given the phenomenon Kymlicka calls "nation-building"[182]—that is, the inherent tendency of settler nations to systematically discriminate against indigenous minorities in favour of majority culture, language and identity through law, policy and institutions. Given this homogenizing phenomenon there is no such thing as a neutral state or neutral institutions, a level playing field or de novo original position.

Nation-building is well illustrated in the educational experience of Native Americans and Native Hawaiians already described[183] but perhaps more acutely in the so-called "Stolen Generations" in Australia and the abusive experiences of Canadian First Nations people in boarding school systems.[184] In each instance, majoritarian-biased law, policy and institutions within settler states exerted tremendous overt and subtle, de jure and de facto discriminatory pressures on the rational revision context of indigenous individuals and peoples simply because they were indigenous.[185] Consequently, the internal choices of indigenous minority members remain highly vulnerable to external choices that inherently discriminate against them.[186]

Given this *disadvantage* of cultural membership, specifically indigenous education rights are not, therefore, about indigenous people asking for more than a fair share

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[181] Ibid, at 189.
[182] *Politics in the Vernacular*, above n 156, at 32.
[183] See discussions in Chapter Two at 2.3.2 for Native American experience and Chapter Three 3.2.2 for the Native Hawaiian.
[184] For the Australian, see Margaret Jacobs *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia, 1880-1940* (Lincoln, NB and London, England, University of Nebraska Press, 2010). For First Nations, see Marlene Brandt Castellano, Linda Archibald and Mike DeGagné (eds) *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa, Aboriginal Healing Foundation, 2008).
[185] See his discussions on other minorities, including immigrant groups, in Will Kymlicka *Multicultural Citzenship: A Liberal Theory of Minority Rights* (Oxford & New York, Oxford Unviersity Press, 1995).
[186] *Liberalism, Community and Culture*, above n 158, at 187.

of education rights[187] but about the very existence of their context of choice.[188] These rights, Kymlicka argues, may be seen as a type of insurance against the impact of unequal circumstances similar to the insurance that a homeowner takes out against the possibility of hurricanes and other natural disasters, not a subsidy for individual preference or choice.[189] Specifically indigenous rights, therefore, imply that indigenous individuals should only be responsible for the choices they make and not "morally arbitrary and unjust" circumstances they did not. Such disadvantage is inherently unfair because it limits rational revision context and requires rectification.[190] Thus, indigenous rights *buffer* the indigenous individual against discrimination.

Conversely, Kymlicka realizes that indigenous identity is an essential *good* providing access to a rich context of choice.[191] He asserts that liberals like Rawls place a high value on having a range of choices available to the liberated self, which is why basic, anonymous civil liberties are prioritized in mainstream liberalism. But, he states—sounding like a communitarian—the range of options cannot be chosen because we do not start *de novo*:

> The decision about how to lead our lives must ultimately be ours alone, but this decision is always a matter of selecting what we believe to be the most valuable from the various options available, selecting from a "context of choice" …[192]

For Kymlicka, this "range of options is determined by our cultural heritage"—what we learn and choose by "situating ourselves in [our] cultural narratives". Language, for instance, is vital to that process of discovery because it "renders vivid" "the options available to us, and their significance". And "a rich and secure social structure"—including language, history and other cultural heritage—brings awareness of our range of options.[193]

Obviously, cultural membership is not a primary good for Rawls, but Kymlicka argues that it should be given the principle of self-respect. Rawls prioritizes rational

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[187] As Jeremy Waldron argues in "The Cosmopolitan Advantage", above n 96.
[188] *Liberalism, Community and Culture*, above n 158, at 189.
[189] Ibid, at 191-192.
[190] *Politics in the Vernacular*, above n 156, at 330.
[191] *Liberalism, Community and Culture*, above n 158, at 164.
[192] Ibid, at 164.
[193] Ibid, at 165. Which must make language prohibition like the 1897 law in Hawaii which forbade the speaking of Native Hawaiian in schools immediately suspect in terms of rational revision.

revision and especially internal choice on the grounds that every person should have self-respect—or feel as if their goals are worth pursuing.[194] Kymlicka argues that the context of culture provides 'meaningful' options for our choices creating self-respect. Parties in Rawls' original position are likely, therefore, to treat cultural membership as a primary good since they would not want to undermine their own self-respect.[195]

Echoing research regarding Native Hawaiian learners, Kymlicka concludes that the cultural context of our rational revision affects "our very sense of personal identity and capacity", specifically, our sense of "agency" or autonomy. Language, for instance, is not just a way to identify or convey content but is *itself* content. Similarly, "cultural heritage", or the "sense of belonging" associated with cultural membership, provides "emotional security and personal strength" for individual autonomy, one reason why oppressive racist regimes have historically attempted to destroy minorities' sense of cultural heritage and identity.[196] To strip the individual of cultural heritage and community is to stunt their liberal development.[197]

As it empowers and expands rational revision capacity, indigenous identification enables rather than impedes individual autonomy and is a valuable primary good in the liberal sense. It provides access to optimum conditions for rational revision. Indigenous rights promote equality between cultural groups—buffering against a priori disadvantage. Not unlike the dual citizenship implied in the Native American exception,[198] Kymlicka's indigenous group members also simultaneously retain basic everyone/no-one rights ensuring fairness "within majority and minority political communities"[199] whose object is not colour-blind parity but "ethnocultural justice".[200] Such rights include self-determination in the form of self-government or autonomy in internal matters which buffer against majoritarian bias and which are not limited in time but may be needed indefinitely given nation-building

[194] Rawls *Theory of Justice*, above n 4, at 179, for instance.
[195] *Liberalism, Community and Culture*, above n 158, at 166.
[196] Ibid, at 175. Kymlicka's examples: apartheid South Africa and 'pacification' programme aimed at Native Canadians.
[197] *Ibid, at 176.*
[198] See discussion in Chapter Two at 2.3.2.
[199] *Politics in the Vernacular*, above n 156, at 82.
[200] Ibid, at 42.

forces.[201] Self-determination in regards to community institutions "enable national minorities [such as indigenous peoples] to maintain themselves as distinct societies"[202] thus relieving external pressures on individual rational revision.

4.5.3 MULTICULTURALISM AND THE ADMISSION POLICY

Kymlicka's liberal multiculturalism would seemingly justify the admission policy as an identity-specific indigenous rights underwritten by remedial self-determination but also as it buffers indigenous individuals against in-built majoritarian bias and discrimination and provides access to equality through via rational revision, his seems to represent the project of the earnest liberal eager to address the guarantee/reality gap.

The manifest imbalance identified by the majority and concurrence in the case seemingly constitutes a disadvantage of cultural membership. Statistics the Court considered were overwhelming. Again, as discussed previously, Native Hawaiian children, in their own country, appear to be the most vulnerable of vulnerable learners.[203] Various statistics reveal an extreme disadvantage which defies a supposedly fair distribution and an extreme vulnerability to external forces as Kymlicka predicts. Moreover, the majority essentially connected those forces with the phenomenon of nation-building—even the illegitimate overthrow of the Hawaiian monarchy and subsequent events.[204]

However, in contrast to trammelling questions, the indigenous-specific admission policy can be more accurately viewed as a buffer against the effects of unequal,

[201] Kymlicka places no time limits on his group-differentiated rights but rather presumes the continued effect of majoritarian bias and nation-building on the rational revision context of indigenous individuals: see, for instance, his discussion on group-differentiated rights in *Multicultural Citizenship*, above n 185, at 26-33. While recognizing that groups like African Americans might be seeking integration his focus is not everyone/no-one parity but "ethnocultural justice": *Liberalism, Community and Culture*, above n 158.
[202] *Politics in the Vernacular*, above n 156, at 55.
[203] See discussion in Chapter Three at 3.2.2.
[204] See *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 441 F3d 1029, 470 F3d 827 (9th Cir 2006) (en banc) at 19055-19056 and 19060-19061, quoting reports which connect current disparities with historical injustices.

unchosen—even cataclysmic circumstances.[205] Conversely, the academic success of the Kamehameha Schools, as argued, constitutes a proven, real-time levelling of the playing field—or an identifiable good of cultural membership. An educational system established and controlled by Native Hawaiians, its identity-specific admission policy along with its identity-responsive curriculum, pedagogy and other features appear to constitute a rich context for individual rational revision.

Given the extreme vulnerability of Native Hawaiians to external pressures on individual rational revision, Kymlicka would seemingly require buffering of their rights in education with the proviso that such weight should not unnecessarily burden another's individual rights. Kymlicka's distinction between indigenous claims and those of other minority groups overcomes Waldron and Posner's—and the dissent's—confusion about the purpose of remedial policies.[206] That is, the difference between a manipulative, deliberate device meant to negatively affect a certain group and a law or policy meant to remedy the effects of discrimination.

Multiculturalism may better explain the majority's liberal intuitions about the admission policy but also supports the concurrence's reliance on *Mancari*. On one hand, the admission policy is liberally justified as a both buffer against in-built majoritarian bias which limits rational revision context but also access to a richer context. On the other, the admission policy—the preference for the same indigenous identity for which the Schools were established—can also now be narrated as an expression of the group-differentiated, even collective rights of an indigenous, minority nation with a prior history of self-determination and self-governing institutions like Kamehameha Schools. The policy is not aimed at parity or necessarily limited in time consistent with the Native American exception but justified by remedial self-determination which acknowledges the historical reality of nation-building—what we understand as overthrow, annexation, assimilation, and discrimination—as the *Mancari* preference and various federal rehabilitative legislative measures also do in regards to Native Hawaiians.

[205] See arguments in 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.
[206] See *United States v Carolene Products* 304 US 144 (1938) Footnote Four discussed in Chapter Two at 2.4.1.

Kymlicka's narrative of equality is fundamentally consistent with the concurrence's acknowledgment of a special trust relationship between the Native Hawaiian people and the United States—a political status that should trigger rational basis review rather than intermediate or strict scrutiny.[207] In doing so, he also seemingly argues for time-honored principles of federal Indian law including inherent sovereignty of the US' indigenous peoples. Kymlicka's description of nation-building and his safeguards for rational revision context against external pressure better account for the fiduciary nature of state and federal relationships. In terms of the mo'olelo, nation-building requires self-determination based rights over indigenous institutions to buffer Native Hawaiians against majoritarian bias and other nation-building forces.

4.6 THE AMICUS CURIAE BRIEFS: AN ALTERNATIVE LIBERAL-INDIGENOUS NARRATIVE

Ultimately, Kymlicka has a subtle, *Brown*-like appreciation of the pathological way that guarantee/reality gaps are attracted to indigenous identity as the result of nation-building and create a priori disadvantage. The policy is seemingly both buffer against a priori disadvantage attracted to Native Hawaiian identity as the result of the kind of nation-building which resulted in overthrow, annexation, assimilation, and discrimination in Hawai'i, while also providing a means of access to equality through the good of indigenous identity and group membership, even a collective pooling of distributed resources. In terms of buffering, identity and self-determination in internal matters are essential to countering majoritarian bias left in the wake of nation-building that makes seemingly equal distributions of rights inherently unequal. Internal autonomy particularly counters institutionalized discrimination in education. In terms of access, identity specificity is essential to this collective rational revision which Kymlicka argues will translate into individual rational revision.

Thus, Kymlicka's nation-building thesis seemingly predicts the prioritization of an *everyone/no-one* narrative of rights within settler democracies like the United States

[207] See *Morton v Mancari* 417 US 535 (1974).

and New Zealand. From a liberal standpoint, Kymlicka recognizes that in-built majoritarian bias will result from nation-building activities—for example, overthrow, annexation, assimilation, and discrimination—and will have a negative effect on present rights outcomes for Native Hawaiians and other indigenous peoples not due to any choices they make but as the result of ancestry. Fundamentally, he predicts that law will be narrated in terms of the settler majority. Given these realities, what the thesis has called his buffer-and-access argument is particularly compelling from the perspective of an earnest liberal trying to reconcile substantial constitutional guarantee/reality gaps in terms of Native Hawaiian learners as such reconciliation will be seemingly impossible without somehow accounting for majoritarian bias and other nation-building forces.

However, Kymlicka's multicultural theory may also indicate the limits of traditional liberal arguments for a *Mancari*-like narration of the admission policy.

4.6.1 TRUMPING AND HISTORICAL DISTANCE

Although he recognizes group-differentiated rights, Kymlicka's theory may fall short of the truly collective self-determination rights of a once-and-future Hawaiian nation and people, a historical continuum of customary law and the reality of identity-attracted, complex discrimination and disparities symptomatic of ongoing deep harm.

True to Rawlsian liberalism, Kymlicka remains attached to the individual as primary rightsholder and would prioritize the individual's *everyone/no-one* civil and political rights over specifically indigenous group rights. For Kymlicka, like Rawls and Dworkin, individual capacity for rational revisability is of greatest importance. Kymlicka wrote in *Liberalism, Culture and Community* that a social group is not an individual who can be discriminated against or necessarily bear rights,[208] collective or otherwise, suggesting that he fails to comprehend the way

[208] *Liberalism, Community and Culture*, above n 158, at 241. In contrast to statistics showing that education which affirms Native Hawaiian identity produces positive educational outcomes, Kymlicka has also flatly rejected the contention the indigenous child is only a product of her community, who merely "inherit[s] a way of life that defines their good for them": *Politics in the Vernacular*, above n156, at 19.

that ongoing harm—that is, complex discrimination and disparities which pervade all areas of human well-being—are almost unrelentingly attracted to indigenous identity. As discussed in Chapter 3, inequality clusters around that group rather than individual identity, to the extent that indigenous identity is predictive of inequalities in education, for instance.

Kymlicka recognizes group-differentiated rights in an attempt to maximize individual rational revision. As at the trammelling step of *Weber-Johnson*, his specifically indigenous rights must still be weighed in terms of costs to others. He wrote that "nothing in my account...justifies" internal oppression of individual members by the majority of the minority group.[209] So-called indigenous rights that restrict fundamental civil and political rights within the indigenous community are illegitimate while those that supplement[210] and provide external protections for individual rights are valid. To protect individual rights, Kymlicka recognizes internal mechanisms including tribal constitutions and courts but also allows for external judicial review,[211] a principle inconsistent with the right to self-determination recognized in *Mancari* and *Santa Clara Pueblo v Martinez.*[212] Essentially, not unlike Dworkin, he would allow equal protection to 'trump' the self-determination of the indigenous learner despite his seeming equation of collective rational revision with individual rational revision and his assumption of in-built majoritarian bias within the same legal order that prioritizes an everyone/no-one narrative.

Kymlicka's buffer-and-access rights are practically remedial and historically aware as they respond to majoritarian bias and nation-building—as they reference the kind of internal self-determination recognized by federal Indian law. For this reason, the thesis has described Kymlicka as consistent with the concurrence. However, while Kymlicka broadly recognizes the effect of historical events on present rights outcomes, even a causal connection, he does not seem to describe the deep harm discussed in Chapter Three—that is, the illegality of overthrow and annexation of an internationally recognized nation, or the depth of the resulting harm including

[209] *Liberalism, Community and Culture*, above n 158, at 197-198.
[210] Ibid, 193-197.
[211] *Politics in the Vernacular*, above n 156, at 22.
[212] See discussion in Chapter Two regarding the indigenous rights trumping an everyone/no-one narrative of equality in the case of *Santa Clara Pueblo v Martinez* 436 US 49 (1978) at 2.3.2.

multi-generational trauma, higher allostatic load, chronic stress, cumulative and cyclical discrimination and disparities. Given its potential trumping by individual *everyone/no-one* rights, the limited self-determination he recognizes cannot be a proportionate, remedial response to deep harm generated by historic injustice. Rather, Kymlicka's self-determination really buffers against present majority bias—at least until a *Martinez* scenario arises and *everyone/no-one* rights clash with group interests or choices leaving indigenous peoples once again at the mercy of external choices and values.

Multiculturalism seemingly lacks an account of the historical continuum of Native Hawaiian law that pre-dates historical wrongs and has survived in Hawaii state law[213]—including rights to self-determination—as a source of law on its own. Not unlike Rawls' second principle of justice, Kymlicka's buffer-and-access model almost responds de novo to actual discrimination and disparities because it fails to completely account for the ongoing-ness of present disparities that, by their very nature, are inseparable from historic injustice, particularly given the multi-generational, cyclical and cumulative nature of discrimination and disparities. While essentially earnest, Kymlicka's project thus still keeps relevant historical context at a distance—though less than other liberals perhaps. Such distance creates an uncomfortable congruency between Kymlicka and Waldron.

Other scholars have criticized Kymlicka's reconciliation project more generally. For instance, while Joseph Carens[214] has accused Kymlicka of losing his "way in theoretical constructs" which oversimplify the actually complex, individually experienced, even multicultural context of an indigenous group member's choices,[215] Chandran Kukathas[216] has accused Kymlicka of imposing Rawlsian liberalism on cultural communities. Dwight Newman[217] has similarly criticized Kymlicka's dependence on a liberal basis alone for indigenous rights, as well as his prioritization of the individual rather than the group as a legitimate rightsholder in

[213] See discussion in Chapter Three at 3.3.2.
[214] See Carens' critique of Kymlicka in Joseph H Carens *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford, Oxford University Press, 2000) at 52-87.
[215] Carens, ibid, at 3 and 52-87.
[216] Chandran Kukathas "Multiculturalism as Fairness: Will Kymlicka's Multicultural Citizenship" (1997) 5(4) J Polit Philos 406 at 426-427.
[217] Dwight G Newman "You Still Know Nothin' Bout Me: Toward Cross-cultural Theorizing of Aboriginal Rights" (2007) 52 McGill L J 725.

light of Canadian law's willingness to recognize indigenous rights as collective, "existing rights".[218]

Regarding liberal narratives, James Youngblood Henderson, the Canadian First Nations scholar, might be describing Kymlicka's theory when he talks about "Eurocentric cognitive scripts" within the law which reinforce "superior intellect' mythology and undermine the legitimacy of pre-existing indigenous rights.[219] Similarly, Patrick Macklem has recognized that there is a seeming contradiction in using the legitimizing philosophy of the same legal orders which have historically perpetrated and perpetuated significant "wrongs" against indigenous peoples to justify specifically indigenous rights.[220] Instead, Macklem rejects the liberal project and focuses on the injustices alone, an exercise that seemingly requires external determination of indigenous group membership[221] and prompts Macklem to make similar arguments for non-indigenous minorities as well.[222]

However, others suggest an alternative liberal basis for specifically indigenous rights that, not unlike Kymlicka's, seeks to reconcile present discrimination and disparities but would more fully examine history to counteract "enduring injustice"[223] and prevent future injustice. While Chapter Six provides a more in-depth discussion of self-determination, the following section discusses scholars attempting to proportionally remedy historical injustice by considering self-determination as a liberal principle itself.

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[218] For instance, in section 35 of the Canadian Constitution Act, 1982.

[219] James (Sákéj) Youngblood Henderson "Postcolonial Ledger Drawing: Legal Reform" in Marie Battiste (ed) *Reclaiming Indigenous Voice and Vision* (Vancouver, University of British Columbia Press, 2000) at 161-171. In "Sui Generis and Treaty Citizenship" (2010) 6(4) Citizenship Studies at 417, Henderson contrasts everyone/no-one equal citizenship to the dual citizenship engendered by the co-existence of liberal rights and indigenous rights which are truly indigenous, as "a narrative carefully plotted from the colonial 'insiders' perspective". In contrast, he recognizes section 35 of the Constitution Act, 1982 as an indigenous rejection of individual everyone/no-one rights and a triumph for truly indigenous rights in Canada.

[220] See Patrick Macklem "Minority Rights in International Law" (2008) 6 Int J Constitutional Law 531.

[221] A requirement fundamentally at odds with Native Hawaiian claims, *Martinez*, *Mancari*, Hawaii Act 195, articles 3, 4 and 33 of UNDRIP, and the most basic understandings of what self-determination means.

[222] See Macklem "Minority Rights", above n 220; and "Indigenous Recognition in International Law: Theoretical Observations" 30 Michigan J Int'l Law 177.

[223] Jeff Tully, quoted in Mark Bennett "Indigeneity as Self-Determination" (2005) 4 Indigenous LJ 71 at 88.

4.6.2 HISTORICAL SELF-DETERMINATION

As described previously, amicus curiae briefs submitted during the *Kamehameha* case [224] justified the admissions policy as a remedy for historical injustices perpetrated against Native Hawaiians by the United States government and also the ongoing "harm"[225] of that injustice. Rather than a "privilege[]" or "handout", the briefs claimed that the policy represented a Native Hawaiian-generated remedy for "severe and systemic educational disadvantages" causally connected with historic injustices perpetrated by the United States.[226]

Certain scholars—mostly responding to Waldron—recognize that the reconciliation of present disparities requires deeper awareness of historical wrongs. In the multi-generational trauma and otherwise complex discrimination and disparities associated with Native Hawaiians,[227] Jeff Spinner-Halev, for instance, would seemingly see "enduring injustices" or "injustices that have roots in the past, and continue to the present day". Such injustices require examination rather than ignorance of history "to understand why some injustices endure".[228] These ongoing injustices may reveal the lasting effect of significant breaks in the "collective memory" of "intergenerational groups"—that is, indigenous peoples' own legal and cultural narratives about who they are—that must be addressed if present ongoing disparities are to be remedied. [229] Unremedied breaks may explain why *everyone/no-one* rights distributions have not remedied historic injustices over time [230] and, perhaps, the greater significance of indigenous identity in rights distribution.

Historical self-determination scholars also recognize that past denial of self-determination and subsequent assimilation, discrimination and other practices constitute actual rather than abstract wrongs and even deep, multi-generational

[224] 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.
[225] See Yamamoto, Serrano and Pa, above n 163.
[226] Ibid.
[227] See discussion in Chapter Three at 3.2.2.
[228] Jeff Spinner-Halev "From Historical to Enduring Injustice" (2005) 35 Political Theory 547 at 574.
[229] Ibid, at 579-580 and 583. Spinner-Halev recognizes the power of the narratives to story-telling peoples.
[230] Ibid, at 578-579 and 592. As predicted by Rawls' just savings principle.

harm. Douglas Sanderson has argued that rather than "abstract wrongs committed against abstracted persons", the history reveals how "settler people committed actual wrongs against actual persons" and how such injustices are ongoing and even deliberate. Importantly, "even where those wrongs occurred a long time ago, they continue to affect—that is they continue as wrongs against—present-day persons".[231] Thus, Mark Bennett argues not for "special" rights for indigenous peoples but for the operation of a simpler justice responding to a straightforward wrong.[232]

A common factor in such wrongs includes the "failure" of settler governments "to create just political association" between the government and indigenous peoples,[233] a charge implying a clamshell-like inequality of groups and obviously the political rather than racial nature of inequalities. Thus, Allen Buchanan has similarly argued that justice requires the return of "some form of self-government to indigenous peoples who were forcibly incorporated into a polity controlled by another group" despite having their own "governance institutions". This includes those who were "unjustly annexed"[234] and where self-government will "prevent[] human rights violations and…combat[] the continuing effects of past human rights violations."[235]

Ongoing harm is particularly associated with educational institutions. Non-indigenous institutions including schools are residual sites of ongoing harm. For Sanderson, the "single greatest wrong committed against indigenous peoples" has been the "historical and ongoing suppression of institutions"—such as educational systems—"in indigenous communities that positively affirm indigenous values, cultures and identities"—a seeming description of both the Native American and

[231] Douglas Sanderson "Redressing the Right Wrong: The Argument for Corrective Justice" (2012) 62 Univ Tor LJ 93 at 102-103.
[232] Bennett "'Indigeneity' as Self-Determination", above n 223.
[233] Sanderson, above n 231, at 103.
[234] That is, where the "destruction of indigenous self-government by colonial incursions is both relatively recent and well-documented. Here the case for intrastate autonomy is in basic principle no more problematic than the case for restoring sovereignty to states that have been unjustly annexed": Allen Buchanan *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford, Oxford University Press, 2004) at 416.
[235] Ibid, at 418-419.

Native Hawaiian mo‘olelo. Logically and proportionately, the situation can only be remedied by a restoration of "identity-affirming Indigenous institutions".[236]

For Sanderson, the ideal indigenous institution should look as it might have if it had developed freely under the prior self-determination of the indigenous community without external interference,[237] a model that does not preclude pedagogic or technological progress, a Native Hawaiian school that teaches both identity-affirming and college-prep subjects or, potentially, an indigenous school that does not prefer the indigenous learner. Rather than mandating the archaic, frozen community Waldron has equated indigenous identity with, this historically-responsive justice reorients the site of self-determination with the indigenous people who originally possessed and exercised—but were unjustly denied—the right. Thus, this dynamic conception of self-determination seems to more accurately portray the everyday operation of indigenous institutions including the Kamehameha Schools—or some degree of real-time indigenous self-determination in education that has seemingly overcome majoritarian bias.

As a liberal principle, self-determination offers a mediatory language between *everyone/no-one* guarantees and indigenous claims. Bennett has described historical self-determination as representing an "intercultural dialogue" mediating liberal and indigenous legal traditions that rests on the assumption that "individual freedom…is advanced by collective self-determination" but would also justify it in terms of "prior sovereignty"—or both the exercise and collective "memory" of inherent self-determination".[238]

Historical self-determination may also represent a more proportionate buffer-and-access mechanism less vulnerable to everyone/no-one trumping. Buchanan recognizes that self-determination can:

> …provide a non-paternalistic mechanism for protecting indigenous individuals from violations of their individual human rights and for counteracting the ongoing

[236] Sanderson, above n 231, at 124.
[237] Ibid. Or what a Native Hawaiian education system established by an ali‘i exercising a traditional ali‘i role might look like if the overthrow and annexation had not taken place and the Hawaiian nation had been free to develop under Native Hawaiian self-determination.
[238] Bennett "'Indigeneity as Self-Determination", above n 223, at 102-103.

> detrimental effects of past violations of their individual human rights or those of their ancestors.[239]

Crucially, echoing Yamamoto and Iijima,[240] historical self-determination proportionately responds to the "severity of the problem of discrimination and its ongoing effects and the demonstrated deficiencies of nonindigenous governments to respond adequately to it."[241]

In earnest terms, Buchanan recognizes that the strongest case for indigenous self-determination is the protection of basic *everyone/no-one* rights and that states have "obligations" to remedy institutionalized discrimination.[242] Like Kymlicka, Buchanan would also impose limits on *Mancari*-like indigenous self-determination, but those limits would be human[243] rather than domestic constitutional rights—a proposition implying the substantive, complex and specifically indigenous rights to education and non-discrimination detailed in Chapters Five and Six.[244]

In the light of historical self-determination, the admission policy is not only consistent with equality but demanded by it. It not only buffers against residual in-built majoritarian bias that interferes with present enjoyment of rights but against ongoing historic injustices that have actually interfered with rights enjoyment consistently over generations. Such injustice does not merely dwell in collective memory at the level of national overthrow and forcible annexation but within non-indigenous institutions where wrongs continue to be perpetrated in real-time. Thus, historic injustice is inseparable from present disparities, ongoing, enduring and seemingly pervasive, cumulative, cyclical and otherwise complex discrimination and disparities.

The Schools' admission policy should be viewed, therefore, as a liberally consistent remedy for actual and ongoing wrongs, as is the self-determination that underwrites it. As a logical and proportionate response to such wrongs—but also given its historical fact—Native Hawaiian self-determination can also be liberally

[239] Buchanan, above n 234, at 415.
[240] See Chapter Three at 3.4.2 in terms of Chris Ijima discussing *Rice v Cayetano* and Yamamoto (and Obrey) at 3.7.
[241] Buchanan, above n 234, at 419.
[242] Ibid, at 422 and 427.
[243] Ibid, at 421-422.
[244] In the case of forcible annexation, he also recognizes that secession may be one possible remedy for historic injustice: ibid, at 404.

interpreted as a historically continuous principle despite its frequent denial by settler states.

4.7 CONCLUSION

This chapter initially brought some of the most influential liberal theorists of the past four decades to bear on the intuitions, gaps and wrestles apparent in the *KS* case. Like the dissent in the case, John Rawls prioritized *everyone* and *no-one*—the original position and veil of ignorance—as the measure of a just or equal rights distribution. In more *adamant* terms, Richard Posner's economic analysis of law and Jeremy Waldron's positivist cosmopolitanism and historical supersession respectively displayed a callous utilitarianism and willful blindness to ongoing injustices and guarantee/reality gaps. While much more aware of minority-attracted discrimination and disparities, Ronald Dworkin's equal concern and respect nonetheless relied on temporary measures like affirmative action. However, Will Kymlicka's multiculturalism and historical self-determination scholars appear to represent earnest attempts at reconciling both the significant guarantee/reality gaps attracted to Native Hawaiians in education and the unique historico-legal context of the admission policy. Together, their approaches liberally validate the admission policy without ignoring either present disparities or deeper injustices.

The reality of significant and troubling guarantee/reality gaps almost unrelentingly attracted to Native Hawaiian identity in education demand buffer-and-access rights. As discussed in Chapter Three, imposed public education systems, curricula and pedagogy exhibiting majoritarian bias constitute nation-building, majoritarian bias and clear disadvantage requiring buffering. However, community and 'ohana relationships, cultural resilience, and identity-specific and indigenous-established educational approaches have been associated with goods in education. These clearly provide a richer context of choice for rational revision. Besides buffer-and-access, multiculturalism also implies a range of identity-responsive rights. Kymlicka has written that "liberal multiculturalism… repudiate[es]…older models of" homogenenity and "is not a single principle or policy, but an umbrella of highly

group-differentiated approaches"[245] to equality—or what resembles a theoretical toolbox of identity-specific rights options tailored to counter pervasive and ongoing harm.

However, the unique historico-legal context of the admission policy requires more than buffer-and-access mechanisms which counter present majoritarian bias and disparities. In Hawai'i, the causal connection between historic wrongs and present disparities in education is well-established. The identity-attracted nature of such disparities—the way they have consistently clustered around Native Hawaiian identity over generations—as well as their pervasiveness in every area of human well-being obviously makes them predictive of future discrimination and disparities. Such predictability particularly advances the idea that *everyone/no-one* guarantees alone have not produced and may not in future be able to produce fairness or equality for indigenous peoples.[246] In fact, the once-and-future nature of such injustices indicates the deeper liberal relevance of the policy's historico-legal context. The earnest liberal will want to remedy historic injustices not just because they explain present rights denials but because they predict future denials.

As the next two chapters describe, liberal multiculturalism and historical self-determination seemingly account for an expansion of equality narratives within international law. As if Kymlicka's buffer-and-access thesis is right, Chapter Five describes how the international human right to education has become increasingly identity-specific, evolving from an *everyone/no-one* guarantee to a *complex someone* narrative of equality which approves a toolbox of rights options in education. Chapter Six explores the culmination of this evolution in a specifically indigenous right to education to control educational systems like Kamehameha Schools which responds to present disparities and deep harm, particularly historic injustices committed against indigenous peoples in education.

[245] Will Kymlicka *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford, Oxford University Press, 2007) at 83.
[246] Courtney Jung, for instance, describes indigenous claims to self-determination as the response of marginalized groups with no other option of finding equality within former settler states such as the United States: Courtney Jung "Why Liberals Should Value 'Identity Politics'?" (2006) 135(4) *Daedalus* 32 at 37.

CHAPTER FIVE

THE HUMAN RIGHT TO EDUCATION

5.1 INTRODUCTION

> *Visions of human rights…are not only complex, they are also profound and disturbing. The reason for this is that they tend to strike at our very core and make us confront difficult and discomforting issues. They force us to examine critically the nature of men and women, consider what it means to be human, view both the best and worst of human behavior, wrestle with how we ought to relate to one another…and especially examine our own values and deed in response to those who suffer.*[1]

The same basic narratives of equality considered in terms of theory in the previous chapter—*everyone/no-one*, *someone* and the *indigenous learner*—are present in international law. These narratives seem to be closely intertwined with both the idea and actual law of human rights. The right to education is particularly illustrative and relevant to the admission policy as it reveals an evolution and expansion of equality narratives in terms of rightsholder identity. This evolution provides an expansive discussion on equality and various lessons learned in terms of narratives.

On the understanding that Kymlicka's buffer-and-access thesis is correct, Chapter Five demonstrates how the international human right to education has evolved from universalized, *everyone/no-one* guarantees to a complex, highly identity-aware, multi-narrative toolbox of rights options in order to reconcile guarantee/reality gaps. The chapter first discusses education as a more substantive *everyone/no-one* guarantee which nonetheless entails *slim someone* measures aimed at parity. Exceeding current federal narratives, *complex someone* narratives approve permanent, quasi-collective minority rights to language, culture and parallel

[1] Paul Gordon Lauren "My Brother's and Sister's Keeper: Visions and the Birth of Human Rights", in Paul Gordon Lauren *The Evolution of Human Rights: Visions Seen* (2nd ed, Philadelphia, University of Pennsylvania Press, 2003) 4 at 4.

institutions but also rights of availability, access, adaptability and acceptability, and participation, and the rights of children specifically and also their families and communities. The right has been challenged in *adamant everyone/no-one* terms. However, the chapter shows how, far from a formalized guarantee alone, the right displays organic multiplication and indivisibility, emphasized legality and justiciability, demands positive state parties' obligations and is buttressed by the fundamental *no-one* right to non-discrimination to counter actual discrimination. Importantly, the chapter demonstrates that this evolution has been driven by an awareness of the de facto rights denials attracted to certain identities.

5.2 THE HUMAN RIGHT TO EDUCATION

Human rights are often described as natural, inherent and otherwise "unalienable"[2] legal claims attached to each person which prioritize ideals such as equality and non-discrimination. In *The History of Human Rights*, Michelle Ishay writes:

> Human rights are rights held by individuals simply because they are part of the human species. They are rights shared equally by everyone regardless of sex, race, nationality, and economic background. They are universal in content.[3]

By this definition, rights such as education are universal in two senses. First, the right is universal because it applies to *all* human beings without distinction or exception. Second, the right applies to human beings *everywhere*. It crosses "boundaries" and "borders",[4] and cannot be refuted or taken away by domestic law because it is inherently attached to the human being. Such definitions imply that "every human being is sacred" and that "certain things ought *not to be done* to any human being" while "certain things ought *to be done* for every human being".

[2] Compare with "inalienable rights" in Declaration of Independence (US 1776).
[3] Micheline Ishay *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley, University of California Press, 2004) at 3.
[4] Terms used to describe the effect of ICERD in Hadar Harris "Race Across Borders: The U.S. and ICERD" (2008) 24 Harv Blackletter LJ 61 at 61.

Given individual sacredness, "the good of every human being is worth pursuing in its own right".[5] Similar definitions are commonplace in human rights literature.[6]

The liberal flavor of human rights is no coincidence. While the sacredness of every human being can be traced back to religious sources linking humankind with the divine,[7] the inherent, inalienable nature of human rights themselves may be traced to ancient Greek philosophers, later Christian thinkers including Thomas Aquinas but also the natural rights theory of the Enlightenment period which strongly influenced the drafting of the American Declaration of Independence and Constitution.[8] John Locke,[9] Jean-Jacques Rousseau,[10] Thomas Paine[11] and other thinkers considered rights to be both the natural state of human beings and a "social contract" between them.[12] Such theories recognize core rights that define what it is to be human[13] and also the idea that these human rights "trump" "countervailing utilitarian calculations"[14] similar to Dworkin's "equal concern and respect".[15] Modern natural rights thinkers such as John Finnis[16] and Martha Nussbaum[17] have attempted to itemize a list of core rights in terms of human goods.[18]

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[5] Michael J Perry "Are Human Rights Universal? The Relativist Challenge and Related Matters" 19(3) Hum Rts Q 461 at 462 and 466.

[6] "Human rights—*droits de l'homme*, *derechos humanos*, *Menschenrechte*, "the rights of man"—are literally the rights one has because one is human.": Jack Donnelly *Universal Human Rights in Theory and Practice* (3rd ed, Ithaca NY, Cornell University Press, 2013) at 7. "What is meant by human rights? To speak of human rights requires a conception of what rights one possesses by virtue of being human. That does not mean human rights in the self-evident sense that those who have them are human, but rather, the right that human beings have simply because they are human beings and independent of their varying social circumstance and degrees of merit.": Jerome Shestack "The Philosophic Foundations of Human Rights" in Robert McCorquodale *Human Rights* (Hants Eng UK, Dartmouth Publishing, 2003) 3 at 5. However, Shestack questions the meaning of terms such as "inalienable": at 5-7.

[7] Shestack, above n 6, at 7-8.

[8] Ibid, at 8-10.

[9] See John Locke *Two Treatises of Government* (e-book, McMaster University Archive of the History of Economic Thought, 2000).

[10] For instance, Jean-Jacques Rousseau *The Social Contract* (Penguin Classics, 1968).

[11] Thomas Paine *The Rights of Man* (London, J Dent, 1915).

[12] Shestack, above n 6, at 8-10.

[13] Ibid, at 15-17. See Andrew Fagan "Philosophical Foundations of Human Rights" in Thomas Cushman *Handbook of Human Rights* (London, Routledge, 2014) at 9-10, regarding implications of "*who* is entitled to possess human rights" and "*which* rights should be considered as such".

[14] Shestack, ibid, at 15.

[15] Ibid, at 28-29. Also see Jack Donnelly *Universal Human Rights in Theory and Practice* (2nd ed, Ithaca NY, Cornell University Press, 2003) at 38-53.

[16] John Finnis *Natural Law and Natural Rights* (2nd ed, Oxford, Clarendon, 2011).

[17] Martha Nussbaum *Women and Human Development: The Capabilities Approach* (Cambridge UK, Cambridge University Press, 2002).

[18] Not unlike John Rawls selection of goods behind the veil of ignorance. In contrast, see Patrick Macklem's critique of universally shared humanity as the basis of minority rights legitimacy: Patrick Macklem "Minority Rights in International Law" (2008) 6 Int J Constitutional Law 531.

Human rights have also been approached as a question of justice. Following Immanuel Kant,[19] Rawls has applied 'justice as fairness' to human rights[20] and also been used to explain the focus of human rights on advancing rationality, basic liberties and equal, same rights, even "fair equality of opportunity" regardless of socio-economic background and other 'arbitrary features—or critiqued for doing so. Core rights become, similar to Rawls' first principle of justice, a basic set of liberties guaranteed to each human being and, akin to his second principle, about making both the most and least advantaged human being better off.[21] The idea of human rights as the normative product of overlapping consensus also approximates Rawlsian public reason—or reflexive equilibrium—as well as a stabilizing factor in society.[22] Ultimately, human rights, like Rawls and Dworkin's projects, prize rational revision—or "individual autonomy"—that capacity of individuals "to 'govern' their lives, to make important life choices for themselves".[23]

Thus, liberal theory is heavily intertwined with the origins and idea of human rights. However, while modern human rights instruments initially espoused a very Rawlsian *everyone/no-one* narrative driven by global human wrongs, international law has evolved to recognize a complex multi-narrative of equality as if Kymlicka is right. The human right to education not only encompasses a *Kamehameha*-like right to preference in admission but is a relevant example of this evolution.

5.2.1 EVERYONE: THE CHARTER AND INTERNATIONAL BILL OF RIGHTS

As in antebellum America, early post-World War II narratives of human rights were driven by human wrongs and prioritized a universal *everyone*. In their resolve[24] to

[19] For example, Immanuel Kant *The Principles of Political Right and Perpetual Peace* (translated by W Hastie) (e-book, Digireads.com Publishing, 2010).
[20] John Rawls *The Law of Peoples: With "The Idea of Public Reason Revisited* (Cambridge MA, Harvard University Press, 1999).
[21] In the field of human rights, Rawls' theory is influential: Shestack at 18-20.
[22] Donnelly, above n 15, at 40.
[23] Ibid, at 47.
[24] "It often takes a truly horrific event for humans to make a leap toward progress. World War II was such an event: its senseless slaughter and destruction sent humanity into an existential crisis and led our species to rethink our fundamental values. The outcome of this re-examination was an establishment of a new benchmark for the modern world order: the human being. The war-scarred nations, in an unprecedented show of solidarity, came to an agreement that blind adherence to the cause of the nation-state would only bring disaster. If world peace is ever to be secured, every living

avoid another Holocaust and the "horrors" of World War II, the united "Peoples" of the world adopted the Charter of the United Nations[25] ('the Charter') in 1945 that established the United Nations (UN).[26] The UN was established to prevent and punish atrocities through recognition and protection of individual human rights.[27] The Charter itself assumes the inherent dignity and worth of every human being, who individually possesses "equal"[28] and "fundamental human rights".[29] It presumes that protecting and guaranteeing an individual's rights will "promote social progress and better standards of life in larger freedom" and "maintain international peace and security"[30]—that is, a global collective good—but also prevent future human wrongs.[31] To promote these goals, the Charter established the General Assembly[32] and the Economic and Social Council (ECOSOC)[33].

human being must be afforded a minimum level of respect": Evgeny Krasnov "Freedom from Food: On the Need to Restore FDR's Vision of Economic Rights in America, and How it Might Be Done" (2013) 41(3) Hofstra L Rev 735 at 736.

[25] Charter of the United Nations, preamble.

[26] Charter of the United Nations, preamble. The Charter created a legal framework for subsequent human rights treaties and bodies including "subsidiary organs": art 7(2). "Subsidiary organs" may be created under bodies such as ECOSOC in order to fulfill their various mandates. It also provides for "specialized agencies" like the International Labor Organization (ILO) and the eventual United Nations Educational and Scientific Organization (UNESCO): art 57(1).

[27] Antonio Cassese *International Law* (Oxford, Oxford University Press, 2001) at 351. For instance, Henry J Steiner and Philip Alston comment that: "The Charter builds on the precedents to which the Nuremberg Judgment...refers": Henry J Steiner and Philip Alston *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford, University Press, 2000) at 137.

[28] Preamble and arts 1(2) and (2(1).

[29] Preamble and art 1(3).

[30] Preamble.

[31] Words such as "tolerance", "peace", "security", and "harmonizing" are used generously as counters to "force" and "aggression": preamble and art 1. Also see art 2 on the steps Member states are to take to avoid and resolve conflict. The dread of war is apparent. Under the stated purposes of the United Nations found in art 1, international peace and security are to be maintained through "effective collective measures" for conflict prevention, "suppression" and resolution, "the principle of equal rights and self-determination of peoples", and "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character", and the promotion of respect for human rights "without distinction as to race, sex, language, or religion…": art 1(1-3).

[32] The United Nations General Assembly [UNGA] consists of representatives of all Member states, discusses "any questions or matters within the scope of the Charter" or related to the organs of the UN, and it makes recommendations to Members and the Security Council on such matters: art 10. It can also "initiate studies and make recommendations in order to "promot[e] international co-operation" on "economic, social, cultural [and] educational" concerns: art 13. Members vote on important questions of human rights and "adopt" declarations and treaties: art 18. Subsidiary bodies may also be established under such bodies: Under art 1.

[33] The Economic and Social Council [ECOSOC] includes 54 Members elected by the General Assembly: art 61. Its mandate includes "initiat[ing] studies and reports on "economic, social, cultural [and] educational" matters in order to "promot[e] respect for, and observance of, human rights and fundamental freedoms for all". It may also make recommendations on matters within its jurisdiction and obtain reports from specialized agencies of the UN on such matters: art 62(1-2).

The subsequent Universal Declaration of Human Rights 1948 [34] (UDHR) recognized the human right to education. Like the Charter, the UDHR represents "moral outrage"[35] and functions "as an authoritative interpretation of the Charter"[36] especially cementing the Charter's principles of universality, equality and non-discrimination.[37] That equality is quite Rawlsian, recognizing in Article 1, for instance, that "[a]ll human beings are born free and equal in dignity and rights" and "endowed with reason and conscience".[38] The UDHR's rightsholder is part of "the human family", their dignity "inherent" and rights "inalienable".[39] Homogenous "rule of law", same capacity for "reason and conscience", and equal protection[40] are presumed. Most UDHR rights literally begin with a homogenous "Everyone" or "All".[41]

Including its right to education. Article 26 reads:

> (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory…
>
> (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms…
>
> (3) Parents have a prior right to choose the kind of education that shall be given to their children.[42]

This human rights statement recalls *Brown v Board of Education* [43] and *Plyler v Doe*'s[44] substantively aware, fundamental right to education. However, Article 26 is a supra-domestic human right listed alongside fundamental civil and political—

[34] *Universal Declaration on Human Rights* GA Res 217A (III), A/810 (adopted 10 December 1948) [UDHR].
[35] Johannes Morsink *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, University of Pennsylvania Press, 1999) at 37.
[36] Javaid Reihman *International Human Rights Law: A Practical Approach* (London, Longman, 2003) at 57.
[37] See preamble, arts 1 and 2 respectively.
[38] UDHR, art 1. Compare with the original position and Rawlsian reason and rationality.
[39] UDHR, Preamble.
[40] See UDHR, preamble and arts 1, 6 and 7
[41] See UDHR, arts 2-3,6-8, 10, 11.1, 12-14, 15.1, 17.1, 18-19, 20.1, and 21-29 (emphasis added).
[42] UDHR, art 26. The rest of Art 26(1) reads: "Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit".
[43] *Brown v Board of Education of Topeka, Kansas* 347 US 483 (1954) [*Brown I*]; and *Brown v Board of Education of Topeka, Kansas* 349 US 294 (1955) [*Brown II*].
[44] *Plyler v Doe* 457 US 202 (1982).

and constitutional—rights.[45] It is underscored by universality, equality and non-discrimination though, like a constitutive commitment,[46] justified on the full development of individuals as human beings and the collective good of peace and security.[47] The right to human personality development has been interpreted by the Committee on the Rights of the Child as adding "a qualitative dimension which reflects the rights and inherent dignity of the" rightsholder but also an education "designed to provide…life skills" and "strengthen the child's capacity to enjoy the full range of human rights", as well as human rights education and tolerance.[48]

Article 26 and other UDHR rights echo Rawls' fair distribution of rights—or rights which anyone behind the veil of ignorance might agree on if ignorant of their own identity through the phenomenon of public reason.[49] The UDHR was a resolution adopted by the General Assembly rather than a treaty[50] per se and is sometimes described as "aspirational", "exert[ing] a moral and political influence on states rather than constitut[ing] a legally binding instrument".[51] However, even as supposed "soft law",[52] the UDHR is the most cited human rights document in the world.[53] Javaid Reihman submits that its use and acceptance (*opinio juris*) in general practice demonstrate it has become international custom and founded general principles of international law which are legally binding on all States.[54]

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[45] Such as "life, liberty and security of person", freedom from slavery and torture, and rights to a fair trial and freedom of thought, conscience, religion, opinion, and expression: see UDHR, arts 3, 4 & 5, 10, 18 and 19 respectively.
[46] See discussion on *Plyler* in Chapter Two at 2.5.
[47] See art 26(2).
[48] Committee on the Rights of the Child *General Comment No. 1 (2001), Article 29 (1), The aims of education* CRC/GC/2001/1 (2001) paras 1-4. CESCR endorsed a similar interpretation of Article 13(1) in *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* E/C.12/1999/10 (1999) paras 4 and 5 which state that "education shall be directed to the human personality's "sense of dignity", shall "enable all persons to participate effectively in a free society", and shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups.
[49] See discussion in Chapter Four at 4.2.2.
[50] A treaty has been defined as: "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation": Vienna Convention on the Law of Treaties, 1154 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) (1969) [VCLT] art 2.
[51] Steiner and Alston, above n 27, at 358. Beyond the technicalities, there has been some debate about the status of the UDHR as either customary international law or general principles of international law. See discussion in Reihman, above n 36, at 207.
[52] Where "the instrument or provision in question is not of itself 'law', but its importance within the general framework of international legal development is such that particular attention [must] be paid to it": Malcolm Shaw *International Law* (5th ed, New York, Cambridge University Press, 2003) at 110-111.
[53] "The Universal Declaration of Human Rights is the Most Universal Document in the World" United Nations Office of the High Commissioner on Human Rights <www.ohchr.org>.
[54] See discussion Reihman, above n 36, at 207-208.

Like Rawlsian public reason and goods, the UDHR's everyone narrative also, arguably, represents "the lowest common denominator" in human rights. According to Antonio Cassese, it has "formulated a unitary and universally valid concept of what values all States would cherish within their own domestic orders".[55] Thus, these *everyone* guarantees are also seemingly *everywhere*.

Ultimately, the UDHR's "vision"[56] of human rights was codified[57] in the twin International Covenants on Economic, Social and Cultural Rights (ICESCR)[58] and Civil and Political Rights (ICCPR)[59] (together 'the Covenants'), 1966. Both Covenants stand on universality, equality and non-discrimination[60] but recognize that "freedom from fear and want can only be achieved" where economic, social and cultural rights—including education—and fundamental civil and political rights approximating constitutional guarantees are enjoyed.[61] Each Covenant's rights are meant to operate in tandem and to be interdependent with the other's.[62] Thus, the ICESCR's right to education complements the civil and political rights listed in the ICCPR.

Article 13 of the ICESCR recognizes "everyone" and, its goals are the "full development of human personality", human dignity, and respect for human rights, as well as peace. But it is also aimed at enabling a human being to "participate effectively in a free society" and promoting "understanding, tolerance and friendship" between "racial" and "ethnic…groups".[63] According to Article 13(2), "full realization" in education will be achieved through free, compulsory primary education but also generally "available" and "accessible" secondary education,

[55] Cassese, above n 27, at 358.
[56] Lauren, above n 1, at 227.
[57] The drafters of the UDHR intended to draft a single binding convention expressing its rights immediately following it, but the Cold War caused ideological schisms which resulted in two International Covenants adopted 10 years later and which did not enter into force for another 10 years: Steiner and Alston, above n 27, at 139.
[58] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) [ICESCR].
[59] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 13 March 1976).
[60] ICESCR, preamble and arts 2(2) and 3.
[61] ICESCR, preamble. See discussion on Franklin Delano Roosevelt's Second Bill of Rights below at 5.4.1.
[62] See drafting history and comments in Steiner and Alston, above n 27, at 243 and 47. See Reihman, above n 36, at 6-7 on principles of international law.
[63] See ICESCR, art 13(1).

higher education and fundamental education.[64] This right to education roughly covers the age range of Kamehameha Schools students, envisions school *systems*, considers intangibles such as teacher development,[65] and protects private schools[66] as well as "the liberty of individuals and bodies to establish and direct educational institutions".[67]

Immediately, this universal right to education recalls the moral intuition of the federal courts who decided *Brown*, *Plyler* and *Kamehameha*. Human personality development, particularly, approximates the high constitutional value placed on education by those courts, while minimum educational provisions for all children make that right universal. In both *Brown* and *Plyler* education rights were equated with equal protection.[68] These *everyone* instruments also prize a more substantial version of equality.

The UDHR recognizes both the age and family of the rightsholder to some extent.[69] Additionally, Article 3 of the ICESCR—its equality guarantee—entails "equal enjoyment of" the right to education "in practice", is "understood comprehensively", means "both de facto and de jure equality" as "interconnected

[64] ICESCR, art 13(2)(b) recognizes the right to"[s]econdary education in its different forms, including technical and vocational secondary education…generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education": Subsections 13(2)(c) reads: "Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;" it also provides: "(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved".

[65] For example, teacher training and professional development. ICESCR, art 13(2)(e) provides: "The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved".

[66] "…Which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions": ICESCR, art 13. Compare with parental choice rights recognized in American cases *Pierce v Society of Sisters* 268 US 510 (1925); and *Meyer v Nebraska* 262 US 390 (1923) discussed in Chapter Two at 2.5.

[67] "…Subject always to the observance of the principles set forth in paragraph I of this Article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State": ICESCR, art 13.

[68] See discussion in Chapter Two at 2.2.3 and 2.5.

[69] Recognizing that "childhood [is] entitled to special care and "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State": UDHR, arts 16(3) and 25(2).

concepts" and not merely "neutral" treatment[70] but "the effects of laws, policies and practices and…ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience."[71]

While, the ICCPR's initial equality clause, Article 3, is brief and falls after its more comprehensive non-discrimination clause, Article 2, both hark back to the UDHR and the Charter.[72] Article 26 of the ICCPR requires States parties to "guarantee to all persons equal and *effective* protection against discrimination".[73] The UDHR also describes itself as providing a "common standard of achievement" for "universal and *effective* recognition and *observance*".[74]

More recently, the Committee on Economic, Social and Cultural Rights (CESCR)[75] has interpreted Article 13 as establishing four norms for the right to education, the so-called '4-A Scheme' including: *availability* or "functioning educational institutions and programmes…available in sufficient quantity within the jurisdiction of the State Party"; [76] the *accessibility* of those institutions and programmes "to everyone" on the basis of non-discrimination, both physically and economically; [77] the *acceptability* of "the form and substance of education, including the curricula and teaching methods…to students and…parents";[78] and

[70] CESCR *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)* E/C.12/2005/4 (2005).
[71] ECOSOC General Comment No 16, para 7.
[72] "The non-discrimination clause of paragraph 1 follows that of art 2 of the Universal Declaration of Human Rights": Commission on Human Rights, 5th Session (1949), 6th Session (1950), 8th Session (1952), A/2929, Chap. V, § cited and quoted in Marc J Bossuyt *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights 1966* (Dordrecht, M Niljoff, 1987) at 52. Article 3 was drafted to emphasize and make unequivocal the non-prejudicial nature of the enjoyment of rights protected by art 2 and to "reaffirm" the fundamental principle of equality…enshrined in [art 1(3) of] the Charter of the United Nations…especially as there were still many prejudices preventing its full application": see drafting history in Bossuyt, *Travaux Preparatoires* at 75-79. Quote at 78.
[73] ICCPR, art 26 (emphasis added). For the greater implications, see discussion on justiciability below at 5.4.2.
[74] UDHR, preamble.
[75] "The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established under *ECOSOC Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights Resolution* 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant": Office of the United Nations High Commissioner for Human Rights <www2.ohchr.org>.
[76] CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* E/C.12/1999/10 (1999) at para 6.
[77] Ibid, para 6.
[78] Ibid.

adaptability, or the flexibility of education in response "to the needs of changing societies and communities and…to the needs of students within their diverse social and cultural settings".[79]

The 4-A Scheme addresses many of the same issues which persuaded the US Supreme Court in *Brown*[80] and its progeny to espouse a more substantial narrative of equality and reject 'separate but equal' arguments. Availability entails the straightforward provision of physical facilities, teaching staff, libraries, "safe drinking water" and many other practical considerations, potentially resource-dependent measures.[81] Accessibility, however, requires state obligations in less tangible aspects of education. Not only are facilities to be physically accessible[82] but they must be genuinely "accessible to all, especially the most vulnerable groups, in law and in fact, without discrimination on any of the prohibited grounds". Education must also be economically accessible—or affordable—for all.[83] Furthermore, under acceptability, "the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality)".[84] Finally, under adaptability, education must be socially and culturally responsive to the needs of the students.[85]

This right is significant. The ICESCR is legally binding, requiring State Parties to "guarantee the rights" it contains.[86] Ratifying States commit to "undertake[] steps…to the maximum of [their] available resources" and by "all appropriate means" to achieve the "full realization" of those rights.[87] States Parties are to report

[79] CESCR, *General Comment No 13*, above n 76, para 6. For more on 4-A Scheme, see Katarina Tomasevski *Human Rights Obligations in Education: The 4-A Scheme* (Nijmegen, The Netherlands: Wolf Legal Publishers, 2006).
[80] See discussion in Chapter Two on intangibles at 2.2.3.
[81] CESCR, *General Comment No 13*, above n 76, para 6(a).
[82] Here I realize that for the disabled, for instance, physical accessibility may not be such a mundane consideration but a very real rights concern and possible ground for discrimination. Likewise, for indigenous and other children in remote or rural situations physical accessibility will be crucial to realization of their right to education.
[83] CESCR, *General Comment No 13*, above n 76, para 6(b).
[84] Ibid, para 6(c).
[85] Ibid, para 6(d).
[86] ICESCR, art 2(2).
[87] ICESCR, art 2(1-2).

to ECOSOC, via the Committee on Economic, Social and Cultural Rights (CESCR),[88] on a bi-annual basis.[89]

Article 14 makes States Parties accountable to substantially realize the right to free and compulsory education.[90] Similarly, in 2000, CESCR similarly affirmed that general principles of international law are to be applied when interpreting party obligations under the ICESCR or any treaty addressing economic, social or cultural rights.[91] Guided by the Limburg Principles,[92] parties to the ICESCR must "at all times act in good faith to fulfill the obligations they have accepted under the Covenant".[93] Post-ratification, they are "to begin immediately to take steps towards full realization" and to "use all appropriate means" to accomplish realization.[94] Under the Maastricht Guidelines,[95] failure to "comply with a treaty obligation"

[88] As summarized in "Committee on Economic, Social and Cultural Rights" Office of the United Nations High Commissioner for Human Rights <www2.ohchr.org>: "The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established under ECOSOC Resolution 1985/17 (1985) to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant".

[89] The CESCR makes recommendations regarding the ICESCR to the Human Rights Council and the General Assembly, drafts conventions on ICESCR matters (ICESCR, arts 16(2)(a), 17, 19, 21 and 23) and has recently been empowered by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights GA Res 63/117, A/RES/63/117 (2008) [OP-ICESCR] to hear individual complaints against States Parties regarding ICESCR rights arts 1 and 2.

[90] Article 14 makes States Parties to the ICESCR accountable to at least develop a plan for free and compulsory primary education for all within two years: "Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all". Article 14 is an extension of States obligations under art 2(1) to "take steps, individually" and with other States "to the maximum of available resources, with a view to achieving progressively the full realization" of the ICESCR's rights: See ICESCR, art 2(1).

[91] Also see *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* E/C.12/2000/13 (2000).

[92] *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* E/C.12/2000/13 (2000). The Limburg Principles are considered "soft law" but demonstrate the increasing explicitness and concreteness of state parties obligations in terms of ESCRs including education.

[93] CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights* E/C.12/2000/13 (2000) general observation 7 (emphasis added). Also see general observation 4: "The International Covenant on Economic, Social and Cultural Rights...should, in accordance with the Vienna Convention on the Law of Treaties (Vienna 1969), be interpreted in good faith, taking into account the object and purpose, the ordinary meaning, the preparatory work and the relevant practice".

[94] Comment E/C.12/2000/13. 2 October 2000, English, general observations, 16-17, at 5 (emphasis added).

[95] The Maastricht Guidelines are also considered "soft law" but frequently referred to by especially the CESCR to interpret States obligations in terms of ESCRs.

concerning education "is a violation of" the ICESCR.[96] States Parties are to "respect, protect and fulfill" those rights. In each case they must conduct themselves in a manner consistent with—and "achieve specific targets" which will lead to—full realization of the right.[97]

Given these standards, ECOSOC has stated that: "Article 13, the longest provision in the Covenant, is the most wide-ranging and comprehensive article on the right to education in international human rights law.[98]

5.2.2 NO-ONE AND A SLIMMER SOMEONE: CADE, THE RACE CONVENTION AND CEDAW

Post-war, the UDHR's drafters also chose to employ the phrase "no one" extensively and often as the companion of everyone or all.[99] Under Article 2, the list of identifying characteristics which may *not* be used to deny a human being UDHR rights includes "race, colour, sex, language, religion, political or other opinion, national or social origin, property, [and] birth".[100] The ICCPR's equality clause actually follows the UDHR's non-discrimination provision.[101] While the ICESCR does not specifically address 'no one', it also contains a general non-discrimination clause.[102]

Similar *no-one* narratives are dramatically illustrated in three subsequent instruments prioritizing non-discrimination. Like the *singular* American narrative

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[96] Maastricht Guidelines, para 5, at 17, referring to economic, social and cultural rights or ESCRs. Controversies regarding ESCRs discussed further below at 5.3.1.
[97] Comment E/C.12/2000/13. 2 October 2000, English, paras 6-7. For more on State obligations to respect, protect and fulfil, see discussion below at 5.4.2.
[98] CESCR, General Comment 13, above n 76, para 2.
[99] No less than 8 times: see arts 4, 5, 9, 11(2), 12, 15(2), 17(2) and 20(2).
[100] UDHR, art 2.
[101] "The non-discrimination clause of paragraph 1 follows that of art 2 of the Universal Declaration of Human Rights": Commission on Human Rights, 5th Session (1949), 6th Session (1950), 8th Session (1952), A/2929, Chap. V, § cited and quoted in Bossuyt, *Travaux Preparatoires*, above n 72, at 52. Article 3 was drafted to emphasize and make unequivocal the non-prejudicial nature of the enjoyment of rights protected by art 2 and to "reaffirm" the fundamental principle of equality…enshrined in [art 1(3) of] the Charter of the United Nations…especially as there were still many prejudices preventing its full application": see drafting history in Bossuyt, *Travaux Preparatoires* above n 72, at 75-79. Quoted text found at 78.
[102] ICESCR, art 2(2).

evident in recent 14th Amendment jurisprudence—such as the University of Michigan cases[103]—and Rawls' veil of ignorance, these instruments reluctantly negatively recognize dichotomized certain group identities—or what the thesis has called the 'no-one'—only enough to prohibit them as the basis of unlawful discrimination. However, they also approve a *slim someone* narrative which approves affirmative action, consistent with Dworkin's equal concern and respect limits. Ultimately, dichotomy dominates these conventions.

These instruments recognize that "[t]he principle of non-discrimination is the corollary of the principle of equality"[104] and a fundamental principle of the International Bill of Rights. Accordingly, the Convention against Discrimination in Education 1960 (CADE)[105] is directed at "equality of educational opportunity".[106] Under Art 1, *discrimination*:

> …includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education[107]

which affects access to education "of *any* type or at *any* level" and quality of education, as well as "separate educational systems or institutions", and conditions incompatible with human dignity.[108]

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[103] Where affirmative action hung by the slim thread of diversity submerged within the wider matrix of various admission factors: see discussion in Chapter Two at 2.4.1.
[104] CESCR, *General Comment No. 16*, above n 70, para 10.
[105] UN Educational, Scientific and Cultural Organisation (UNESCO), Convention against Discrimination in Education (opened for signature 14 December 1960, entered into force 22 May 1962). Actually drafted and adopted before the International Covenants by the United Nations Educational and Scientific Organization (UNESCO), one of two UN bodies specifically mandated to advance and monitor the international right to education. The other is the CESCR, as discussed in section 5.1.1.
[106] CADE, preamble.
[107] CADE, art 1.
[108] Likewise, '[e]ducation' includes "all types and levels"[108] of primary, secondary, tertiary and vocational education: Yves Daudet and Pierre Michel Eisemann "Commentary on the Convention against Discrimination in Education (Adopted on 14 December 1960 by the General Conference of UNESCO)" UNESCO <http://unesdoc.unesco.org> at 11. Compare language with that of antebellum law in the United States, discussed at 2.2.1.

Articles 4 and 5 resemble the ICESCR's Article 13.[109] Separate institutions and systems do not constitute discrimination where they offer "equivalent access", support parental choice, are private,[110] and participation is voluntary.[111]

The CADE's right to education is seemingly aware of symptoms of real-time disparities. While Article 1 condemns inferior separate institutions, Article 4 addresses high dropout rates and lack of qualified teachers requiring States to "encourage and intensify" efforts to address such discrimination.[112] State Parties must not only change domestic law where necessary to address discrimination in education but end it in "administrative practice.[113] Such provisions entail "precise obligations to counter discrimination".[114]

Another *no-one* instrument, the International Convention on the Elimination of all forms of Racial Discrimination 1965 ('the Race Convention' or ICERD) [115] specifically condemns "colonialism and all practices of segregation and discrimination", as well as "any doctrine of superiority based on racial differentiation" including "apartheid, segregation or separation" arising in the era of decolonization[116]—a category which must also include assimilative education

[109] Given their reference to free and compulsory primary education, availability and accessibility at other levels, standards requirement, the personality principle, and parental freedom of choice: See art 3 (a-b) and art 4 (a-b) respectively.
[110] CADE, art 2 (a-b).
[111] Article 2. UNESCO, *UNESCO Convention against Discrimination in Education (1960) and Articles 13 and 14 (Right to Education) of the International Covenant on Economic, Social and Cultural Rights: A Comparative Analysis* (Paris, UNESCO, 2006) at 13.
[112] Article 4 (c) and (d), respectively, require States to "encourage and intensify" efforts to assist those who have not completed a primary education to do so and to prohibit discrimination in the training of teachers. For examples of this type of discrimination, see discussion on various peoples in Tove Skutnabb-Kangas and Robert Dunbar "Indigenous Children's Education as Linguistic Genocide and a Crime against Humanity? A Global View" (2010) (1) *Gáldu Čála:* Journal of Indigenous Peoples Rights 53. Other ethnic minorities such as the Roma have been subjected to the indignity of separate and inferior schools: see cases of Roma segregation including *Oršuš and Others v Croatia* (15766/03) Grand Chamber, ECHR 16 March 2010; and *DH and Others v the Czech Republic* (57325/00) Grand Chamber, ECHR 13 November 2007.
[113] CADE, art 3. A phrase which might include the kind of complex discrimination and disparities arising from a majority-biased educational and legal system. Also see *Minority Schools in Albania (Advisory Opinion)* (1935) PCIJ (series A/B) No 64 discussed below at 5.2.4.
[114] UNESCO, *Comparative Analysis*, above n 111, at 14.
[115] International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signatures 21 December 1965, entered into force 4 January 1969) ['the Race Convention' or ICERD], one of the nine core human rights treaties in the UN system: see "International Human Rights Law" United Nations Office of the High Commissioner on Human Rights <www.ohchr.org>.
[116] ICERD, preamble. Also see ICERD's condemnation of segregation in art 3.

policy and other intentionally discriminatory practices. States parties are, particularly, to ensure the right to education.[117]

The Race Convention defines discrimination much like CADE[118] but targets racial discrimination. Generally, any differential treatment based on genealogical identity which interferes with an individual's realization of human rights constitutes *racial* discrimination. However, State Parties must not discriminate themselves by "sponsor[ing]…or support[ing]" private discrimination or effecting de facto discrimination through otherwise innocuous law and policy.[119] Racially discriminatory propaganda and public institutions are particularly repugnant.[120] In contrast, "special measures" may be enacted for "the sole purpose" of assisting "certain racial and ethnic groups or individuals" to realize human rights on an equal basis[121] where they are "concrete"[122] and are distinguishable from "unjustifiable preferences" which unfairly advantage a group.[123] Under Article 7, "States Parties [are] to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information" to "combat[] prejudices which lead to racial discrimination".[124]

Similarly, the Convention on the Elimination of all forms of Discrimination against Women 1979 (CEDAW or 'Women's Convention')[125] negatively recognizes that women have been discriminated against as a group and that such discrimination

[117] ICERD, art 5(e)(v). It is categorized as "(e) Economic, social and cultural rights" as opposed to "(c) Political rights" and "(d) Other civil rights" under art 5.
[118] "…Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life: ICERD, art 1.1.
[119] ICERD, art 2(1)(a-d). Accountability, as with the ICESCR and the CADE, depends upon a system of reporting, in this case, to the Committee on the Elimination of Racial Discrimination (CERD) established by the ICERD: ICERD, arts 8 and 9. Under art 4, racially discriminatory propaganda and organizations, including public institutions, are particularly repugnant.
[120] Article 4. This would seem to provide a legal basis for condemnation of some of the more insidious forms of historic nation-building such as the misrepresentation of indigenous people in textbooks and other curriculum in schools.
[121] Article 1(4).
[122] And taken in "social, economic, cultural and other fields": ICERD, arts 1(4) and 2(2).
[123] Committee on the Elimination of Racial Discrimination (CERD) *General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination* CERD/C/GC/32 (2009) at para 7.
[124] ICERD, art 7. They must adopt a policy of non-discrimination "without delay": ICERD, art 2(1)(a-d).
[125] Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981) [CEDAW of Women's Convention].

violates the inherent dignity and equality they possess as individual human beings.[126] The Women's Convention was precipitated by the "equal right of men and women" stated in Article 3 of the ICESCR[127] and is ideologically related to the Race Convention, its definition of discrimination *gender*-aware rather than *race*-aware.[128] The Preamble of the UDHR and Article 3 of the ICCPR, provisions drafted to reiterate the non-prejudicial nature of equality, also exhibit gender dichotomy.[129] Like ICERD, States parties' obligations under CEDAW entail immediate changes to discriminatory policies, prohibit State parties, including "public authorities and institutions", from "engaging in any act or practice of discrimination", and changing law to effectively protect women, and to "eliminate [private] discrimination" against women.[130]

This right to education, however, is also more substantive and approves Dworkinian special measures. The Women's Convention groups education with civil and political rights[131] consistent with the UDHR. It is also comprehensive in its scope, covering nine paragraphs in Article 10 which insist on equality for women in areas including "career and vocational guidance", "pre-school" through "professional" education, "curricula", "examinations" and credentials of teaching staff, "the elimination of" gendered stereotypes, scholarship opportunities, continuing education and "functional literacy", "sports and physical education", and health and family planning education. State Party obligations, likewise, include a commitment to reduce "female drop-out rates".[132]

Unlike previous *everyone/no-one* instruments, CEDAW recognizes a more complex discrimination. For instance, the Preamble recognizes that, although gender attracts the discrimination, forces such as poverty and racism particularly affect women, while, conversely, the realization of rights for women is directly

[126] CEDAW, preamble.
[127] See authoritative explanation of art 3 in CESCR *General Comment No 16*, above n 70. Also see ICESCR, art 7(a)(i) on equality of women with men in employment.
[128] CEDAW, art 1.
[129] Article 3 of the ICCPR was drafted to emphasize and make unequivocal the non-prejudicial nature of the enjoyment of rights protected by art 2 and to "reaffirm" the fundamental principle of equality…enshrined in [Article 1(3) of] the Charter of the United Nations…especially as there were still many prejudices preventing its full application" in regard to women: see drafting history in Bossuyt, *Travaux Preparatoires*, above n 72, at 75-79. Quoted text found at 78.
[130] CEDAW, art 2.
[131] Such as voting and political participation, right to nationality and equality before the law, CEDAW, arts 7(a), 9 and 15.
[132] CEDAW, art 10.

linked to "the welfare…and the development of the family".[133] The Committee on the Elimination of all forms of Discrimination Against Women has interpreted CEDAW as "emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women", recognized the need to "effectively address[]" and "consider[] in a contextual way" "the underlying causes of discrimination against" them, and attributed the need for special measures for particularly vulnerable groups of women to "multiple forms of discrimination…and its compounded negative impact on them".[134] Importantly, temporary, equalizing, special measures are acceptable for the advancement of women.[135]

However, CEDAW nonetheless interprets equality and non-discrimination as *sameness*. In fact, within the nine paragraphs of Article 10, the word "same" is used at least eight times.[136] Like the Race Convention, the aim of CEDAW is integration. Rather than parity with the majority racial group as in the *Weber-Johnson* test, equality means comparable dichotomous parity with the dominant *gender*.[137] Similarly, CEDAW's text expresses a Rawlsian or Waldronian distrust of community, for instance, where it assumes "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women"[138] and requires States Parties to "take all appropriate measures…[t]o modify social and cultural patterns" to eliminate discrimination.[139]

The education rights in CADE, the Race Convention and CEDAW expand on previous law such as Article 26 of the UDHR and Article 3 of the ICESCR, in identity-specific, dichotomous terms, spelling out who will *not* be discriminated

[133] CEDAW, Preamble.
[134] Committee on the Elimination of Discrimination Against Women (CEDAW) *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures* (2004) paras 5, 10 and 12 respectively. Paragraph 12 explains: "Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them".
[135] CEDAW, arts 3-4(1).
[136] CEDAW, art 10. See arts 15 and 16 for similar repeated emphasis of the word "same".
[137] For similar gender dichotomy see CESCR, *General Comment No 16*, above n 70.
[138] CEDAW, preamble.
[139] CEDAW, preamble.

against, rather than who *is* a rights-holder in education. In Rawlsian fashion, possible aspects of the rights-holder's identity are revealed only so that they can be excluded as the basis of the right. While temporary special measures aimed at parity approximate Dworkin's equal concern and respect and represent a *slim someone*, a dichotomous *no-one* is clearly prioritized.

5.2.3 EXPANDED SOMEONE: MINORITY RIGHTS

While Rawlsian theory has often been applied to such treaties, Kymlicka himself has argued that the international human rights framework actually reflects his theory of liberal multiculturalism.[140] This conclusion certainly seems to be true in terms of the right to education.

Beyond current American federal narratives, international law recognizes group-differentiated minority rights which retain substantial awareness reminiscent of *Brown* and *Plyler* and recall Kymlickan buffer-and-access. Minority rights in education include special measures but also the minority-specific right to establish, maintain and control parallel schools where admission is preferential. Unlike *everyone* and *no-one* instruments, minority rights recognize both the disadvantage and good of ethnic, linguistic, cultural, religious and even indigenous minority identity. They represent an expanded someone narrative but also serve a buffer-and-access function in liberal terms.

5.2.3.1 PERMANENT COURT OF JUSTICE ADVISORY OPINIONS

Ethnic minority education rights were recognized in international law prior to World War II. As the Austro-Hungarian, Ottoman and Romanov Empires disintegrated and nation-states were redrawn on maps post-World War I,[141] the

[140] See premise of Will Kymlicka *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007).
[141] See facts set out in *Rights of Minorities in Upper Silesia (Minority Schools) (Advisory Opinion)* (1928) PCIJ (series A) No 15 [*Upper Silesia I*] at 8-9. The Polish majority voted to be part of Poland. The treaty provided for rejoinder to League of Nations for German minority.

1919 Minorities Treaty between the Principal Allied and Associated Powers and Poland, for instance, guaranteed:

> [m]embers of racial, religious or linguistic minorities …'the same treatment and security in law *and in fact*' as other…nationals, and the right to establish and control at their expense their own religious, social and educational institutions.[142]

Such provisions[143] were guaranteed by the young League of Nations ('the League'), (1919-1938).[144] Minorities within member states could make claims directly to the Council of the League when these rights were violated. The Permanent Court of International Justice (PCIJ), "the first international court",[145] could then issue an advisory opinion on the matter. Between the two World Wars the issue of minority education rights came before the PCIJ on at least three occasions. Each time, the right of private schools to prefer students identified with a certain linguistic and cultural minority group were at issue.

The first two cases concerned German-medium and -curriculum schools in Poland. The first, *Rights of Minorities in Upper Silesia* ('*Upper Silesia I*')[146], came before the Court when the Polish government dramatically interfered with admissions to private German minority schools.[147] The PCIJ affirmed that members of the German minority had the right to self-identify themselves as either a member of a "racial, linguistic or religious minority" or not and also to choose the "language of instruction and the corresponding school" of a child for which he or she was "legally responsible".[148] The majority opinion interpreted equality as "the equal right of [of minority members] to establish, maintain and control" German-medium and –curriculum schools and "the right to use their own language".[149] Such rights were

[142] Related in Steiner and Alston, above n 27, at 95 (emphasis added).
[143] Related in Steiner and Alston, above n 27, at 95.
[144] The League of Nations was created in 1919 under the Treaty of Versailles in the wake of WWI. At its height, the League had 57 member states. During the 1930s a number of significant members pulled out of the League because of its apparent ineffectualness. It basically ceased functioning in 1938 when it became clear that it had failed to prevent WWII. Its last official act, however, took place in 1946 when all of its assets were transferred to the nascent UN: see "UN Documentation: International Court of Justice" United Nations Dag Hammarskjöld Library Research Guides <http://research.un.org>.
[145] Steiner and Alston, above n 27, at 97.
[146] *Upper Silesia I.*
[147] It struck-off the names of over 7000 students accepted to German minority schools on the grounds that they were not German speakers or that declarations declaring them so were invalid: *Upper Silesia I* at 79.
[148] Articles 69, 74, 106 and 131 of the German-Polish Convention of May 15th, 1922.
[149] *Upper Silesia I,* at 42.

necessary to avoid the greater "disadvantages" associated with state interference.[150] The second case, *Access to German Minority Schools in Upper Silesia ('Upper Silesia II')*[151], was, largely, a replay of the first case in the very next school year. The court again gave judgment in favor of the German minority.[152]

While the PCIJ did not give judgment in the *Minority Schools* case on what constituted equal treatment or constituted discrimination in those facts,[153] it did, in the case of *Minority Schools in Albania*.[154] The case concerned ethnic Greeks living within Albania. Upon joining the League of Nations in 1922, Albania signed a declaration that guaranteed Greek minority members "the same treatment and security in law and in fact as other Albanian nationals" and that:

> …they shall have an equal right to *maintain, manage and control at their own expense* or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.[155]

The matter came before the PCIJ when the Albanian government made changes to its constitution which abolished all private schools.[156]

The dissenting opinion in the case has a familiar ring to it. Three members of the Court insisted that "[t]he word 'equal' implies that the right so enjoyed must be equal in *measure* to the right enjoyed by somebody else".[157] By this standard of formal sameness, the Greek children receiving an Albanian-based state education were already equal to children of the majority as none of them were allowed a private education.[158]

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[150] See *Upper Silesia I*, at 35.
[151] *Access to German Minority Schools in Upper Silesia (Advisory Opinion)* (1931) PCIJ (series A/B) No 40 [*Upper Silesia II*]. This time the issue was whether, based on language tests which had been applied in response to the first case, the children identified by their parents or guardians as German but who could not speak German could now attend German minority schools. The answer was affirmative.
[152] *Upper Silesia II* at 20.
[153] Because, technically, the Polish government did not rebut the German government's contention that Poland's "hostile" interference with not just the admissions but the maintenance of those schools constituted discrimination and a violation of equal treatment. See *Upper Silesia II*, at 43-44.
[154] *Albania*, above n 113.
[155] Ibid,, at 8 (emphasis added).
[156] And the Greek minority within Albania alleged that their rights to establish and maintain Greek-medium and Greek-curriculum schools had been violated. For constitutional changes, see discussion *in ibid at 13.*
[157] Ibid, at 101 (emphasis added).
[158] See arguments of the Albanian government, ibid, at 14-15.

However, the majority of the PCIJ recognized that the purpose of differential treatment was to help minorities integrate into national life—an *everyone* consideration directed at sameness—"while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs"—a *someone* matter. Echoing Pauahi's hope, minority members were to be placed "on a footing of perfect equality" with other nationals and possess "suitable means" for the preservation of their cultural identity or "racial peculiarities".[159]

The majority concluded:

> Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations…
>
> The equality of members of the majority and the minority must be effective, genuine equality…
>
> [The Greek minority] institutions…are indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact. The abolition of these institutions, which alone can satisfy the special requirements of the minority groups, and their replacement by government institutions, would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied by the institutions created by the State.[160]

The Court also concluded that rather than "creating a privilege in favour of the minority", this type of equality ensures that the *majority* does not have an unfair advantage in education.[161]

This early opinion recognizes a *substantive* rather than formalized equality but also, importantly, the reality of institutionalized majoritarian bias. Neutral treatment does not then automatically create equality, and different treatment recognizes both the disadvantage and the good of cultural membership in order to achieve real equality. The minority schools themselves seemingly fulfill buffer-and-access functions.

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[159] Ibid, at 17. See discussion on Pauahi's reasons for establishing the Kamehameha Schools in Chapter Three at 3.5.
[160] Ibid, at 19-20.
[161] Ibid, at 20.

Interestingly, the case was brought by a collective group,[162] and the rights accrued to a communal identity. Also, minority language emerges as both a contentious issue and tangible measure of equality in the majority opinion in all three cases.[163]

The League's minorities regime suffered from its overall ineffectiveness and eventual demise. As discussed above, the right to education largely focused on universality and non-discrimination after World War II. However, one of CADE's provisions does address "national minorities" in terms similar to the *Albania* case. Like the League declarations, Article 5(1)(c) requires States Parties to:

> …recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language…[164]

Article 5's drafting history reveals that the drafters were conscious of "non-dominant" groups within states who:

> …while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.[165]

This seems to have included indigenous populations.[166] During drafting, it appeared to be understood that failure to protect minority learners from actual discrimination in education was "tantamount to denying 'equal educational treatment'".[167]

5.2.3.2 ARTICLE 27 OF THE ICCPR 1966

As discussed above, the ICCPR primarily focuses on avowed civil and political rights and does not recognize a right to education per se. Its rights, in general, are

[162] Though there is still some debate about whether the rights to differentiated education recognized by the PCIJ could be claimed by that group as a whole or only by individual members: Steiner and Alston, above n 27, at 102-103.
[163] References from cases
[164] CADE, art 5(c).
[165] Charles Ammoun, former Director-General of UNESCO, quoted in Daudet and Eisemann, above n 108, at 28-29.
[166] Ibid, at 29.
[167] Ibid.

universal in nature and prioritize non-discrimination. However, the ICCPR does include the right of "peoples" to self-determination. "By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[168] It also provides some protection for minorities. Article 27 states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[169]

The wording of Article 27 is reminiscent of the League Declarations and Article 5(1) of CADE. Importantly, it is to be exercised collectively. Logically, the right of minorities to enjoy their culture and use their language, in particular, would include indigenous education rights. Indigenous communities constitute cultural, linguistic and even religious minorities. Indigenous institutions such as Kamehameha Schools enable and protect the enjoyment of those rights.

In fact, the *travaux préparatoires* of the ICCPR on Article 27 show that drafters included the provision because:

> …while…the draft Covenant on Civil and Political Rights contained a general prohibition of discrimination, differential treatment might be granted to minorities in order to ensure them real equality of status with the other elements of the population.[170]

Drafters considered the right so important that early versions of the article actually required public funding of such rights.[171] With similar urgency, the Human Rights Committee (HRC)—mandated to monitor and make recommendations on ICCPR rights implementation[172]—has described Article 27 as "directed towards ensuring the survival and continued development of the cultural, religious and social identity

[168] ICCPR, art 1(10).
[169] ICCPR, art 27.
[170] Bossuyt, *Travaux Preparatoires*, above n 72, at 493.
[171] Ibid.
[172] Under ICCPR, art 28.

of the minorities concerned".[173] Thus, some commentators have summarized minority rights as rights to identity.[174]

Moreover, a violation of Article 27 can trigger the Optional Protocol to the ICCPR[175] which gives the HRC:

> …the competence to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.[176]

While the Optional Protocol is accessible to individuals, members of indigenous communities have collectively submitted communications to the HRC under Article 27.[177] Indigenous rights enjoyed collectively, associated with preserving indigenous identity have been recognized in the decisions of the HRC in those cases. At least one of these complaints also claimed that the right of the indigenous parties to self-determination had been violated.[178]

In terms not unlike Kymlicka's liberal multiculturalism, the Human Rights Committee has commented that: "Although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to

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[173] Human Rights Committee [HRC] *CCPR General Comment No. 23: Article 27 (Rights of Minorities)* CCPR/C/21/Rev.1/Add.5 (1994) at para 9.

[174] Patrick Thornberry "The UN Declaration in the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update" in Alan Philips and Alan Rosas (eds) Unviersal Minority Rights (Turku/Åbo, Insititute for Human Rights, 1995). Also see Kristin Henrard *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority rights and the Right to Self-Determination* (The Hague, Kluwer Law, 2000) at 12.

[175] Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [OP1-ICCPR], preamble and art 1

[176] OP-ICCPR, art 1.

[177] See, for instance, *Kitok v. Sweden*, Communication No 197/1985 (1985); *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* Communication No 167/1984 (1984); and *Lansman et al v Finland*, Communication No 511/1992 (1992). The rights at issue in each were, respectively, right to reintegrate into Saami community and herd reindeer, Cree hunting and trapping rights and Saami herding rights as essential part of minority culture. While the Human Rights Committee has made it clear that rights claimed under Article 27 are *individual* rights, both the *Lubicon Lake Band* and *Lansman et al* communications seem to represent a blurring of the lines between individual and group rights. The complainants were actually groups in fact if not exactly in law, though, in *Lubicon Lake Band*, the Committee described them as "a group of individuals, who claim to be similarly affected". In *Lubicon Lake Band*, the Committee sidestepped the related issue of self-determination under Article 1 by pointing out that the Optional Protocol to the ICCPR provides only an *individual* complaints mechanism: see HRC *CCPR General Comment No. 23*, at para 3.1 and 9; and *Lubicon Lake Band*, at 122, para 32.1.

[178] *Lubicon Lake Band*, ibid. This claim was not addressed on a technicality.

maintain its culture, language or religion".[179] The nature of this provision has led some commentators to conclude that: "as the rights protected under Article 27 apply to members of a minority, they may be equally thought of in part as collective rights, exercisable individually".[180]

Thus, while the majority of the provisions of the ICCPR are framed in terms of universality and non-discrimination, Article 27 echoes both the purpose and wording of earlier Minorities Declarations and PCIJ jurisprudence. Under the ICCPR, minority group members have inalienable and common *everyone* and *no-one* rights and freedoms which are to operate free of discrimination, and be distributed according to a standard of sameness but also cultural, religious and linguistic *someone*—even *indigenous*—rights designed to protect group identity.

5.2.3.3 THE MINORITIES DECLARATION 1992

Article 27 of the ICCPR "inspired" the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992 ('Minorities Declaration').[181]

Beginning with a standard statement of non-discrimination,[182] the Minorities Declaration nonetheless espouses differential equality. Under Article 1, States Parties are to "protect the *existence* and the national or ethnic, cultural, religious and linguistic *identity* of minorities within their respective territories" and must even encourage "the promotion of that identity".[183] Article 2 expands on Article 27 of the ICCPR confirming the right to separate institutions where culture and language are taught. Article 2 remains consistent with the *everyone* personality development principle in the ICESCR's Article 13, as it elaborates on effective participation in public life, effective participation in the political process, rights of

[179] HRC, *CCPR General Comment 23*, at para 6.2.
[180] Sara Joseph, Jenny Schults and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed, Oxford, Oxford University Press, 2004) at 753.
[181] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities A/RES/48/138 (1993) [Minorities Declaration].
[182] Minorities Declaration, preamble, para 1.
[183] Minorities Declaration, art 1(1) (emphasis added).

association with fellow minority members as well as with other minorities, even across international borders.[184] Significantly, Article 3 recognizes that minorities, such as indigenous peoples, "may exercise their rights…individually *as well as in community with* other members of their group".[185]

The Minorities Declaration also recognizes the rights of minority members to be taught in their own language. Under Article 4(3), States are to take positive, "appropriate measures" to provide "adequate opportunities" for minority members to 'learn", or be taught in, their "mother tongue". Similar to the Hawai'i state constitution, [186] Article 4(4) requires that state-wide education incorporate "knowledge of the history, traditions, language and culture of the minorities existing within the[] territory" in question.[187]

Many of these provisions seemed aimed at countering the effects of nation-building and supporting *Albania*-like differential equality. Consistent with Kymlicka, Article 8 prioritizes individual "human rights and fundamental freedoms" but also provides that "[m]easures taken by States to ensure the effective enjoyment of the rights" in the Minorities Declaration "shall not prima facie be considered contrary to the principle of equality" found in the UDHR. It also requires States Parties to act in "good faith" to similar obligations made in other treaties.[188]

Within the Minorities Declaration, individualized universality and non-discrimination coexist with a group-differentiated right to education. The measure of equality is substantive, effective realization. And the rights accrue to members of communities in common, almost blurring the line between individual and collective rights.

[184] See Minorities Declaration, art 2. Compare with ICESCR, art 13.
[185] Minorities Declaration, art 3(1)(emphasis added).
[186] See Constitution of the State of Hawai'i, Article X, s 4, discussed in Chapter Three at 3.3.2.
[187] Minorities Declaration, art 4.
[188] Minorities Declaration, art 8(1-3).

5.2.4 COMPLEX SOMEONE: THE RIGHTS OF CHILDREN AND PERSONS WITH DISABILITIES

Most recently, education rights relating to children and persons with disabilities apparently incorporate all previous narratives but also expand on those narratives in recognizing a complex and highly identified human being as a rightsholder in education. The complexity of this multi-narrative exceeds any comparison in American federal jurisprudence but is best explained, again, by a Kymlickan buffer-and-access function consistent with equality of outcomes rather than merely formalized equality. However, the right remains consistent with an expanded *Plyler*-like right to human personality development, Rawls' rational revision project, as well as fundamental *everyone/no-one* principles of equality and non-discrimination.

The Convention on the Rights of the Children 1989 [189] starts by reciting fundamental principles of "dignity", "equality", universality and non-discrimination.[190] As a descendant of the UDHR, it also affirms that childhood and the family are entitled to special care and protection.[191] The basic, universal right to education under the Convention is stated in ICESCR-like terms in Articles 28 and 29. "States Parties recognize the right of the child to education…on the basis of equal opportunity".[192] The right again includes free and compulsory education, available and accessible secondary education, personality development, and participation.[193] Like the constitutive commitment in *Plyler*, the right presumably prepares the child for a "responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples".[194]

The Children's Convention also depends on the principle of non-discrimination. Article 2 recites a familiar list of identifying characteristics which the universal right to education will *not* be based on as if by rote: "race, colour, sex, language,

[189] Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC].
[190] UNCROC, preamble.
[191] See above at section 5.2.1.1.
[192] UNCROC, art 28.
[193] UNCROC, art 28(1)(a) and (b).
[194] UNCROC, art 29(1)(d) (emphasis added).

religion" et cetera. According to the same article, States Parties are to protect the child "against all forms of discrimination or punishments on the basis of status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."[195]

Article 29(2) recognizes the right to parallel educational institutions acknowledged in CADE: "No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals to establish and direct educational institutions…"[196] Article 30 also reiterates Article 27 of the ICCPR and associated provisions of the Minorities Declaration in respect to minority children.[197]

However, the Children's Convention's right to education goes further. Contrary to a veil of ignorance, rights under the Children's Convention are *age*-specific. Article 1 states that "a child means every human being below the age of eighteen years".[198] The Preamble explains that children require special protection "by reason of [their] physical and mental immaturity"[199] and "[r]ecogniz[es] that, in all countries in the world, there are children living in exceptionally difficult conditions".[200]

The Children's Convention is *outcomes*-focused. Despite its legal genealogy, one of five guiding principles in the Children's Convention is not universality, equality or non-discrimination but "the best interests of the child",[201] a standard subject to the individual needs and situation of a particular child rather than same treatment. Similarly, Article 5 depends on the "evolving capacities" of the child in question.[202] Significantly, the child is viewed as a child. An adult-like access to and grasp of rights is not taken for granted. Instead of uniformity, there is flexibility and even adaptability.

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[195] UNCROC, art 2(2).
[196] UNCROC, art 29(2).
[197] UNCROC, art 30.
[198] UNCROC, art 1. "...unless under the law…majority is attained earlier ". The Preamble suggests that this includes children in the womb.
[199] UNCROC, preamble.
[200] UNCROC, preamble.
[201] UNCROC, art 3, para 1. Also see Committee on the Rights of the Child [CRC] *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)** CRC/C/GC/14 (2013).
[202] UNCROC, art 5.

The Children's Convention is also family-aware. In a twist on suspicion of ancestry—and consistent with the good of cultural membership—the treaty almost sentimentally concludes that a family "atmosphere" characterized by "happiness, love and understanding" is necessary for the "full and harmonious development" of a child's human personality.[203] Consistent with Native Hawaiian culture, "family" indicates 'parents' but also "members of the extended family or community as provided for by local custom".[204] This family relationship becomes almost sacred in Article 5 which recognizes the "right of the child to preserve his or her identity, including nationality, name and family relations".[205]

The Children's Convention seems to recognize family and community as both buffering the child against inequality and helping them access rational revision space and context. However, the treaty recognizes the child's individual rights, too. Article 12 recognizes rights of the child to form and express her own opinions separately from the universal rights to expression affirmed in Article 13 and to "thought, conscience and religion" found in Article 14.[206] This principle of "participation" is another guiding principle or "general requirement[] for all rights" in the Children's Convention.[207]

Importantly, the Children's Convention connects minority identity with *indigenous* identity and indigenous identity with fundamental human rights principles. Article 29(1)(a) requires that State parties agree that education shall be directed to "[t]he development of respect for the child's parents, his or her own cultural *identity*, language and values," as well as those of the majority culture and other "civilizations different from his or her own".[208] Unlike CEDAW, the Children's Convention recognizes "the importance of the traditions and cultural values of each people for the protection and harmonious development of the child".[209] Under Article 29(1)(d), education prepares the child for "tolerance" and "friendship

[203] UNCROC, Preamble.
[204] UNCROC, art 5. Also see wording in art 2.
[205] As well as "the right to know and be cared for by his or her parents and the right to "not be separated from his or her parents against their will, except" where "necessary for the best interests of the child": See UNCROC, arts 7(1), 8(1) and 9(1) respectively.
[206] UNCROC, art 12-14.
[207] UNICEF "The Convention on the Rights of the Child, Guiding Principles: General Requirements for All Rights" UNICEF <www.unicef.org>.
[208] UNCROC, art 29(1)(a).
[209] UNCROC, preamble.

among all peoples, ethnic, national and religious groups and *persons of indigenous origin*".[210] Article 30 specifically refers to the indigenous child, guaranteeing the ICCPR and Minorities Declaration right "to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language" with other members of their community.[211]

The "first human rights convention of the twentieth-first century", [212] the Convention on the Rights of Persons with Disabilities 2006 (CRPD)[213] is also characterized by a multi-narrative. The CRPD is largely aimed at *everyone/no-one* inclusion and is driven by fundamental principles of equality and non-discrimination, but its goal is the "full and *effective* participation in society" and "full enjoyment of all human rights" by a specific group of human beings particularly identified by disparities and discrimination attracted to *disability.*[214] Like the Children's Convention, Art 3 also requires "respect for difference" and "…respect for the evolving capacity of children with disabilities and respect for the right of children with disabilities to preserve their identities."[215]

Article 5 begins like a standard statement of equality and non-discrimination, even using words like "all", but requires States parties to provide "*effective* legal protection" and take "all appropriate steps to ensure…reasonable accommodation" of their disabilities. Special measures which are necessary to accelerate or achieve de facto equality" are not discriminatory.[216] Article 4's States' obligations include an ICESCR-like commitment to positive action to prevent and remedy discrimination both administrative and de facto, [217] having particular regard for

[210] UNCROC, art 29(1)(c) (emphasis added).
[211] See UNCROC, art 30. Article 17(d) "[e]ncourages the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous".
[212] "Convention on the Rights of Persons with Disabilities" United Nations <www.un.org>.
[213] 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) [CRPD].
[214] Article 2, "Discrimination on basis of disability".
[215] Article 3(d), (g) and (h). See also arts 22 and 23 with regard to rights relating to respect for the family.
[216] CRPD, art 5(4). Also see art 12(3) on "appropriate measures".
[217] CRPD, art 4(1).

ESCRs.[218] Incorporating several narratives, the CRPD specifically recognizes "women with disabilities" and "children with disabilities".[219]

Article 24's right to education is similarly aimed at "equal opportunity", non-discrimination and effective participation and inclusion in the "education system at all levels", as well as human personality development, but allows for different treatment including "appropriate measures" , "environments that maximize academic and social development", "facilitating" the use and teaching of "augmentative and alternative modes, means and formats of communication", increasing disability awareness, and otherwise adapting educations to ensure the realization of this right".[220] A 4-A Scheme-like "access" to all CRPD rights, including Article 24, is crucial.[221]

Given its current status as "the most rapidly and widely ratified international human rights treaty in history",[222] the Children's Convention apparently represents a significant consensus among States on the rights it contains. The availability of complaints mechanisms for both the Children's Convention and the CRPD emphasizes the legality and justiciability of the rights they guarantee[223]—including a highly-identity aware, multi-narrative right to education.

[218] CRPD, art 4(2): "With regard to economic, social and cultural rights, each States Party undertakes to take measures to the maximum of its available resources and where needed, within the framework of international cooperation, with the view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present convention that are immediately applicable according to international law".
[219] See CRPD, arts 6 and 7. Not coincidentally, these groups are often targets of intersectional or multiple discrimination: see discussion below at section 5.3.
[220] Article 24(4).
[221] Article 9 expands on 'access' which seems to incorporate all 4-A principles: availability, accessibility, acceptability, and adaptability. Article 24's disability-aware right to education similarly includes considerations relating to physical facilities, disability awareness or a kind of human rights education, teaching methods, conduciveness of learning environment to learning by persons with disabilities, et cetera.
[222] See "A World of Difference: 25 CRC /Achievements" UNICEF <www.unicef.org>.
[223] See further discussion on the emphasized legality transcendence of such rights below at 5.3.

5.2.5 MULTI-NARRATIVE: THE INTERNATIONAL RIGHT TO EDUCATION TODAY

Basic education is more than an end in itself.[224]

The evolution of the international human right to education shows that it has evolved from an anonymous, flatly universal right to an identity-responsive bundle of rights through three main strands of development since World War II. To summarize, the right to education which appears in the Charter, the UDHR and International Covenants is universal and purposively non-discriminatory—even anonymous—reflecting the determination of the international community to maintain global peace and security through the affirmation of fundamental human rights. The foundational right guarantees free and compulsory primary education directed towards the development of the human personality and including the prior right of parents to choose the kind of education their children receive. In everyone terms, it is informed by the principles of universality, equality and non-discrimination.

By the Children's Convention and CRPD, the 'right' to education has become a highly identity-aware bundle of rights options. In addition to *everyone/on-one* standards, this rights toolbox now includes: available and accessible secondary education; specific standards and quality; gender-, minority- and child-specific provisions; parallel institutions; familial and community rights; and specific reference to the indigenous child. In addition to equality and non-discrimination, the UNCROC's right to education is premised on substantial and differential equality, accessibility, availability, acceptability and adaptability, the best interests of the child, and participation.

While a homogenous or anonymous conception remains the ideal, an adamant prioritization or insistence on homogeneity or anonymity in distribution is not consistent with the international human rights framework today. Examining the right to education over decades, it is clear that while principles such as equality and non-discrimination remain constant, their substantial interpretation—including an awareness of complex discrimination and disparities drawn to specific identities—

[224] UNESCO, *World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs (Jomtien Declaration)* (1990), art 1(4).

have led to an expansion of equality narratives, even a multi-narrative of equality. Those foundational principles have driven and created consistency in the subsequent evolution, but the universal right to education no longer presumes that all people have the same access to or enjoyment of the right. Rather, it is assumed that the right must speak to the vulnerable so that the right can be *realized* universally. The right now emphasizes substantial equality because circumstances of inequality such as poverty and language barriers are real-time obstacles to the enjoyment of the right on an equal basis with other human beings. Likewise, non-discrimination, once wilfully blind to difference, requires greater identification of the rights-holder in order to buffer and protect them. The fundamental principles themselves have demanded this. In response, international law has been innovative but also consistent, recognizing a bundle of rights *in the plural* which can be utilized to both create a buffer and access for all children in education.

Ultimately, there is far more discussion on the realities[225] of health, security, education and other circumstances in these instruments than there is of traditional civil and political rights—though the principles of the Charter, the Universal Declaration and other core human rights instruments ground these instruments. This recent law reflects a repugnance for the horrors of poverty, disease, civil war, child trafficking and other human rights violations as emphatic as that in the Charter and UDHR for world war and genocide. Within such law, the right to education has become, likewise, urgently important.[226]

5.3 REVENGE OF THE SINGULAR NARRATIVE?

Despite the consistency of the evolution of the human right to education in international law, the threads of equality and non-discrimination which flow through it, and its seemingly innocuous[227] nature, it has engendered no small amount of debate and continues to face significant challenges. The most prominent opposition dispute the nature, legality, justiciability, and enforceability of the right.

[225] See *United Nations Millennium Declaration* A/RES/55/2 (2000), art 11.
[226] The Vienna Declaration and Programme of Action A/CONF.157/23 (1993) is another example of the urgency of the realization of rights and substantial equality.
[227] Tomasevski, *4-A Scheme*, above n 79.

Relevant to this thesis, these concerns appear to reveal the continuing intrusion of an outdated, American-like singular narrative of equality into the human rights discourse.

5.3.1 REAL RIGHTS?

> *…The fate of the right to education, as an economic, social and cultural right, hinges on that of economic, social and cultural rights as a category.*[228]

A certain amount of skepticism has been directed at all human rights. For instance, from its inception, the UDHR has been criticized as "a product of Western ethnocentricism", or expression of Western liberal democratic values and philosophy.[229] Such criticism has led to ongoing debates on the validity and legitimacy of any supposedly 'human' rights, including that between so-called universalists and relativists.[230] Above all, such claims reveal a distrust and rejection of the fundamental conception of the universal everyone as the fundamental rights-holder and even the concept of 'human' rights.

Rights such as education face further skepticism among those who *do* accept the universality of human rights. In fact, the Western liberal approach to human rights "has tended to emphasise the basic civil and political rights of individuals, that is those rights that take the form of claims limiting the power of government over the governed."[231] Consistent with Rawls' first principle of justice, civil and political rights (CPRs) have been viewed by countries such as the United States as rights

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[228] Klaus Dieter Beiter *The protection of the right to education by international law: including a systematic analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Leiden, Martinus Niljoff Publishers, 2006) at 47

[229] Morsink, above n 35, at ix-xi. See Cassese, above n 28, at 358. Victorious Western Allies were instrumental in the drafting and creation of the post-World War II international framework of human rights and the International Covenants were deliberately modelled after Western constitutions.

[230] One of the more vehement debates associated with the Western accusation akin to the liberal-communitarian debate based on the idea that human rights are not universally applicable or at least that there may be local variations and exceptions to supposedly universal human rights standards. See, for instance, R Pannikar "Is the Notion of Human Rights a Western Concept?" in Steiner and Alston, above n 27, 383 at 385; and Shelley Wright *International Human Rights, Decolonisation and Globalisation: Becoming Human* (Routledge: New York, 2001) at 12.

[231] Shaw, above n 52, at 249-250. The Western approach has everything to do with liberal democratic ideals.

necessary "to guarantee the free development of the individual..."[232] The rights contained in the ICCPR, including rights to life, liberty, equality before the law, fair hearing and appeal,[233] freedom of thought, conscience and religion,[234] and freedoms from torture and slavery[235] are typical of accepted CPRs. Such rights emphasize restrictions on state behaviour in relation to the individual and are meant to protect and facilitate their autonomy as rights-holders.

The opposite approach, espoused most famously by the Soviet Union during the drafting of the International Covenants,[236] has been to emphasize "the importance of basic rights and freedoms for international peace and security"—rights relating to the socio-economic well-being and advancement of states as a whole—and to emphasize the role of the state—rather than the individual—in the provision and protection of human rights.[237]

During drafting, such categorization split UN Members along the ideological, political borders of the 'Cold War'.[238] Where economic, social and cultural rights (ESCRs) clashed with the capitalist ideals of liberal democracy, civil and political rights (CPRs) were at odds with socialist visions of a state-dominated society.[239] At issue then was whether ESCRs were *legal* rights which could be upheld against the state and immediately implemented or merely "programme" rights States were to take progressive positive action on.[240] Since the Cold War, ICESCR rights have

[232] Beiter, above 228, at 51. This kind of rights distribution prioritizes individual autonomy as liberal theorists such as Rawls and Dworkin would. In fact, the inclusion of prior parental choice in art 13 of the ICESCR follows liberal traditions going back to the 19th Century. According to Sital Kalantry, Jocelyn E Getgen and Steven A Koh "Enhancing Enforcement of Economic, Social and Cultural Rights Using indicators: A Focus on the Right to Education in the ICESCR" (2010) 32(2) Hum Rts Q 253 at 262, parental choice and minimal standards in the 19th century reflected liberal "fear of excessive state involvement in the educational system".
[233] ICCPR, arts 6, 9 and 14 respectively.
[234] ICCPR, art 18.
[235] ICCPR, art 7 and 8, respectively
[236] See Steiner and Alston, above n 27, at 249.
[237] Shaw, above n 51, at 250-251. As Beiter, above n 228, describes at 51, the Soviets "perceived the realisation of human rights to be an essentially domestic affair..." and pushed for an all-inclusive instrument with limited implementation standards. Ironically, as Katarina Tomasevski points out in "Has the Right to Education a Future within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998–2004" (2005) 5(2) Hum Rts L Rev 205 at 216, what passed for the right to education within the Soviet Union during that time was hardly consistent with the right in the International Bill of Rights.
[238] Katarina Tomasevski *Education Denied: Costs and Remedies* (London, Zed Books, 2003) at 52-53.
[239] Discussed in Beiter, above n 228, at 50-51.
[240] See Steiner and Alston, above n 27, 245.

commonly been referred to as "new"[241] or "second-generation"[242] human rights, suggesting that such rights are innovations or novelties rather than inalienable or indispensable legal protections. In contrast, ICCPR rights are considered "natural", "classical"[243] rights akin to those emerging from the Enlightenment and the American and French Revolutions.[244]

Such distinction, and even "hierarchy", lingers in textual differences between them. As oft-noted, while ICCPR rights, for instance, are generally stated within the text as *rights*, the ICESCR most often speaks in indirect terms of State party obligations regarding rights.[245] In such critiques, there seems to be "little doubt that the ICCPR is the stronger of the two".[246]

Ultimately, the ICESCR—the authoritative statement of the human right to education in international law[247]—does not apparently entail immediate guarantees of the right to education. Under Article 2(1):

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[248]

Critics have observed:

> The progressive realization benchmark assumes that valid expectations and concomitant obligations of State parties under the Covenant are not uniform or universal, but are relative to levels of development and available resources.[249]

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[241] "Despite its widespread acceptance and fundamental importance, the right to education was not directly nor specifically declared an international human right until the post-World War II era," Kalantry, Getgen and Koh, above n 232, at 263.
[242] Kalantry, Getgen, and Koh, ibid, at 255. Kalantry, Getgen and Koh argue that ESCRs are no longer viewed this way and that there is a consensus on the necessity of linking ESCRs with CPRs within the international community.
[243] Joseph, Schultz and Castan, above n 180, at 7.
[244] See Declaration of Independence (US 1776), discussed in Chapter Two at 2.2.
[245] See, for instance, Steiner and Alston, above n 27, at 246.
[246] Joseph, Schultz and Castan, above n 180, at 7.
[247] CESCR, *General Comment No. 13*, above n 76, para 2.
[248] ICESCR, art 2(1).
[249] Audrey Chapman and Sage Russell "Introduction" in Audrey Chapman and Sage Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cutlural Rights* (Antwerp, Intersentia, 2002) at 4.

Prima facie, terms such as "take steps" and "maximum of available resources", are undefined in the ICESCR and raise questions about how progressive realization is to be measured. Thus, critics claim the ICESCR leaves a "loophole" allowing states to use insufficient resources as an excuse for non-realization. [250]

These differences feed skepticism about the conceptual and legal nature of ESCRs like education. Conceptually, some critics have argued that ESCRs lack the "moral significance", "paramount importance" and urgency of CPRs.[251] They claim that ESCRs are not genuinely universal but merely positive law, the stuff of legislation and policy, while CPRs are the natural, inherent rights of all human beings—which is why, some claim, they do not vary much between domestic jurisdictions.[252] Other critics admit that ESCRs are morally compelling but argue that they have limited legality—or justiciability—and enforceability. Such critics claim that ESCRs require state interference or welfare and are dependent on available resources where CPRs only require negative protections against state interference. As such, ESCRs may be viewed as having variable and unfair applicability, being only afforded to certain individuals or groups of individuals in need of those resources.[253] Others claim that ESCRs can only be legal rights where they are made enforceable through competent judicial and legal terms.[254]

The presumption underlying such claims is that ESCRs—if they are human rights at all—are lesser, or even optional, rights. This is a conception which, if justified, must undermine the first premise of human rights—universality—as well as the legality of such rights and thus the legitimacy of the right to education as a human right.

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[250] Ibid, at 4.
[251] Maurice Cranston *What Are Human Rights?* (London, Bodley Head, 1973). Compare with the constitutive commitment discussed in *Plyler*: see Chapter Two at 2.5.
[252] Marc Bossuyt "La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels" [The legal distinction between civil and political rights and economic, social and cultural rights] (1975) 8 Revue des Droits de l'Homme 783.
[253] See description of this line of criticism and a defence of ESCRs in David Beetham "What Future for Economic and Social Rights?" in McCorquodale, above n 6, 215.
[254] EW Vierdag "The legal nature of rights granted by the International Covenant on Economic, Social and Cultural Rights" (1978) 9 Netherlands Yearbook of International Law 69.

5.3.2 JUSTICIABILITY

As Martin Scheinin notes, the more contentious issue raised in regards to ESCRs is not their validity but their "applicability". Even if the right to education has the moral importance and urgency of CPRs, is it "capable of being invoked in courts of law and applied by judges"?[255]

Rights under the ICCPR have historically been viewed as largely negative in nature, "actively recognized and accepted" but requiring "little more…than legislation and a decision not to engage in certain illegal practices…"[256] In contrast, ICESCR rights are popularly viewed as requiring substantial effort from States for implementation as "they cannot be fully ensured without economic and technical resources, education and planning, the gradual reordering of societal priorities and, in many cases, international cooperation."[257] Some have likened ICESCR rights to "welfare",[258] or simply as being too "onerous"—too practically impossible—to actually implement.[259]

Because of the persistence of such views, Tomasevski once called the right to education "an Orphan of the Cold War"[260] and wrote that one of the greatest challenges in her UN role over six years was to convince states and individuals that the right to education was a legally enforceable human right.[261] Such experiences led her to the conclusion that the universal right to education was "uncertain" and "fragile" [262] and its future endangered. Domestic developments support Tomasevski's concern. As recently as 2003, the United States openly opposed

[255] Martin Scheinin "Economic and Social Rights as Legal Rights" in Asbjørn Eide "Economic, Social and Cultural Rights as Human Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (ed) *Economic, Social and Cultural Rights: A Textbook* (2nd rev ed, Dordrecht, Martinus Nijhoff Publishers, 2001) 41 at 41.
[256] Thomas Buergenthal, Dinah Shelton and David P Stewart *International Human Rights in a Nut Shell* (3rd ed, St Paul MN, West Publishing, 2003) at 66. Also see discussion in Reihman, above n 37, at 106.
[257] Kalantry Getgen and Koh, above n 232, at 255. And Buergenthal, Shelton and Stewart, at 66-67.
[258] Discussion in Steiner and Alston, above n 27, 251.
[259] See art 2(1) discussed in Steiner and Alston, above n 27, at 246.
[260] Tomasevski, "Has the Right...?", above n 237, at 215.
[261] Ibid, at 226.
[262] Ibid, at 207 and 208. Tomasevski argues that education is transcends the categories of economic, social and cultural rights and civil and political rights being really something of both.

ESCRs in the UN, categorized such rights as "goals" rather than "guarantees" and flatly denied that education is a human right.[263]

Generational or other categorization of ESCRs presumes an *everyone/no-one* narrative of equality. Like Rawls' fair distribution and first principle of justice, CPRs represent a minimum number of basic rights judged as rights from a formalized, individualized, intellectual distance. Described so often in unequivocal terms of *everyone* and *no-one*, these rights must also represent both the original position and veil of ignorance. Echoing Waldron's projects, CPRs lacking further explanation inherently presume a level playing field and imply a seemingly cosmopolitan homogeneity which lumps all human beings into a common melting pot of rights capacities and rational revision contexts and pays little heed to socio-economic realities affecting exercise and enjoyment of the right. Like Posner, the line between perceived human rights and unfair subsidizations or welfare is a fundamentally economic, even utilitarian one. Special measures in *no-one* instruments such as CADE, the Race Convention and CEDAW which recall Dworkin's limits, *Weber-Johnson* criteria and a *someone* narrative are a possible exception. However, consistent with Dworkin's equal concern and respect, such measures are seeming exceptions to the general rule of homogeneity and anonymity valid only until parity.

5.4 THE MULTI-NARRATIVE AS EQUALITY

Cynicism about education and ESCRs' status, however, is inconsistent with the actual evolution of the right to education in international law. Importantly, it is inconsistent with the organic value placed on education, its emphasized legality, the increasingly concrete states parties' obligations which it entails, its justiciability and enforceability but also the complex nature of the discrimination it targets.

[263] Ibid, at 217 and 230, referring to report submitted by Katarina Tomasevski, Special Rapporteur on the right to education: "Mission to the United States of America, 24 September-10 October 2001", 17 January 2002, E/CN.4/2002/60/Add.1, cited at 226.

5.4.1 INDIVISIBILITY, MULTIPLICATION AND OTHER ORGANIC PHENOMENA

Any differentiation between the right to education and other rights because it is an ESCR appears misguided. ESCRs have been consistently associated with CPRs on equal terms from the origins of the modern framework—even by the United States—and are largely considered interdependent on—and indivisible from—one another.

For instance, American President Franklin D. Roosevelt included "freedom from fear and want" among a list of basic human rights in his 1941 State of the Union Address which noted:

> We have come to the clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men'. People who are hungry and out of a job are the stuff which dictatorships are made of.[264]

Where *fear* conjures CPR violations—or restrictions on and protection from the state and other individuals—*want* is clearly an economic and social concern. Eleanor Roosevelt was integral to the formation of the UN and President Roosevelt suggested many of the economic, social and cultural rights which were to become part of the UDHR and ICESCR.[265] Several domestic ESCRs formed what he called a "Second Bill of Rights". This list of rights included "[t]he right to a good education" he believed Americans had come to accept as a constitutional right.[266]

As described earlier, ESCRs were included with CPRs as explicit concerns of both the Charter and the Universal Declaration and are currently linked UN goals in terms of peace and security.[267] Education was also included in the UDHR's list of basic human rights.[268] While education in the ICESCR is textually separated from the civil rights contained in the ICCPR, their preambles make it clear that the rights

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[264] See Cass Sunstein "We Need to Reclaim the Second Bill of Rights" (2004) 50(4) Chronicle of Higher Education B9.
[265] See Asbjørn Eide "Economic, Social and Cultural Rights as Human Rights" in Eide, Krause and Rosas above n 255, at 15. Also see Krasnov, above n 24, at 743.
[266] See Cass Sunstein "The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever (New York, Basic Books, 2004). Compare with the fundamental right to education recognized in *Brown*, *Plyler* and *Kamehameha*.
[267] See Claire M Breen "The edges of extraterritorial jurisdiction: The integration of economic, social and cultural rights into peace support operations" (2012) 16(2) J Int'l Peacekeeping 47.
[268] Article 26, UDHR

contained in both are rights belonging to all human beings universally, without discrimination and on equal terms.[269] Borrowing President Roosevelt's very words, both preambles importantly recognize that "freedom from want can only be achieved" where ESCRs *and* CPRs are realized. Article 18(4) of the ICCPR actually contains a parental educational right[270] which virtually echoes the parental right to choose the type of education a child receives recognized in Article 13 of the ICESCR[271] while connecting it with the freedom of thought, conscience and religion guaranteed by Article 18.

Matthew Craven, while acknowledging the prevalence of separatist opinion, calls generational categorization "monolithic",[272] and blames it on Cold War politics rather than any true legal status. Evgeny Krasnov has similarly described how the US' failure to ratify the ICESCR has been linked to inaccurate conceptions of ESCRs as positive rights requiring significant public expenditure and the creation of a welfare state which would interfere with liberalistic individual rights to liberty and freedom.[273] Similarly, various commentators have noted that the right to education appears to have features of all three so-called generations of rights, making any division unreasonable.[274]

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[269] See preambles of ICCPR and ICESCR.

[270] It recognizes the prior right of parents "to ensure the religious and moral education of their children in conformity with their own convictions": ICCPR, art 18(4).

[271] See discussion on ICESCR in section 2.1.2. Also see US Supreme Court cases including *Meyers* and *Pearce*, discussed in Chapter 2 at 2.5.

[272] Matthew CR Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on it Development* (Oxford, Clarendon Press, 1995) at 9.

[273] Krasnov, above n 24, at 746-747. So-called CPRs also require significant public expenditure. The costs of maintaining court systems is just one example. Equal protection, due process and any other CPRs would, of course, be meaningless without judicial avenues of recourse but courts require significant public expenditure of money, staffing, construction, maintenance, education and other considerations.

[274] See Manfred Nowak "The Right to Education" in Eide, Krause and Rosas, above n 255, 245 at 252-255. The right to education is certainly a second-generation economic, social and cultural right with "specific duties assigned to States to ensure it to everybody without discrimination and to combat existing inequalities in the access to and enjoyment of education by legislative and other means" but it is also clearly aimed at equality of opportunity, a first-generation perception of rights, as education provides institutions, for instance, which act as vehicles for freedom of thought vis a vis "interference by the States and the Church" and also rest on non-discrimination—no one is to be denied the right to education under the Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 9 (opened for signature 20 March 1952, entered into force 18 May 1954) art 2, for instance, while protecting equal access and parental rights, self-government and participatory rights. Finally, education can also be considered a third-generation "solidarity" right in terms of a global collective good given education's role in scientific development, and educated citizenry, et cetera.

Strict categories bear little resemblance to current international law. Both the UN General Assembly—representing a consensus of nations—and CESCR have interpreted ESCRs as being interdependent and indivisible from CPRs. The Vienna Declaration and Programme of Action 1993[275] ('the Vienna Declaration'), a UN General Assembly recommendation, affirms that "[a]ll human rights are universal, indivisible and interdependent and interrelated." Likewise, both the Limburg Principles and Maastricht Guidelines flatly state that "human rights and fundamental freedoms are indivisible and interdependent".[276]

Under General Comment 13, the CESCR has affirmed that education is "a human right in itself and an indispensable means of realizing other rights".[277] Craig Scott has similarly argued that CPRs and ESCRs are interdependent because of the intimate relationship between specific rights.[278] For example, it seems obvious that a child's right to life will be severely threatened without a corresponding right to food and clean water. In such a scenario it is difficult to differentiate between the prospective rights: one is so *intrinsic* to the other that they are as one. In other instances, one right may be of such *benefit* to another that they must be viewed as interdependent—because of the support the former gives to the latter. This is what he calls "related" or "organic" interdependence.[279]

Both forms of organic interdependence apply to the right to education. Katarina Tomasevski, former UN Special Rapporteur on the Right to Education (1998-2004), described the right as:

> …a bridge to all human rights: education is indispensable for effective political participation and for enabling individuals to sustain themselves; it is the key to preserving languages and religions; it is the foundation for eliminating discrimination. It is the key to unlocking other human rights...[280]

Beiter has similarly argued that:

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[275] UNGA, *Vienna Declaration and Programme of Action* A/CONF.157/23 (1993) para 6.
[276] See general observation 3 at 3 regarding *Limburg Principles*, above n 92; and point 4 at 17 in terms of *Maastricht Guidelines*, above n 91.
[277] CESCR, *General Comment No. 13*, above n 48, para 1.
[278] Craig Scott "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" 27(4) Osgoode Hall Law Journal 769.
[279] Ibid, at 779-786.
[280] Tomasevski *Education Denied*, above n 238, at 172. Tomasevski was pivotal in the development of 4-A Scheme: see CESCR *General Comment No. 13*, above n 76.

> ...where a person is denied the right to education [as an ESCR], freedom of information, expression, assembly and association or the right to vote [CPRs] amount to nothing as they all depend on a minimum level of education.[281]

As such, UNESCO has said that education "enhances individual freedom" and "occupies a central place in Human Rights".[282]

Contrary to homogeneity or anonymity, education is crucial not least because it is "ground[ed] in social experiences".[283] UNESCO, for instance, almost echoing the Supreme Court in *Brown*, has stated:

> Some benefits of education are less tangible and harder to quantify than others. Schools are not just institutions for imparting information. They are a place where children can acquire social skills and self-confidence, where they learn about their countries, their cultures and the world they live in, and where they gain the tools they need to broaden their horizons and ask questions. People denied an opportunity for achieving literacy and wider education skills are less equipped to participate in societies and influence decisions that affect their lives.[284]

In fact, while many CPRs protect an individual's participation and decision-making rights, such rights may be virtually useless without the ability to read or write—things a child learns in primary school.[285] Given such causal relationships, "all human rights in some way or another mutually reinforce each other".[286]

However, CESCR has concluded:

> Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the

[281] Beiter, above n 228, at 67.
[282] "Mission" UNESCO <http:portal.unesco.org>.
[283] Beiter, above n 228, at 66.
[284] *Education for All Global Monitoring Report 2009* UNESCO <http://unesdoc.unesco.org>, at 24-25.
[285] Obviously, knowing how to read and write, knowing how one's government makes decisions, how to register to vote, how to balance a checking account, how to obtain a driver's license or resource consent, or file your taxes—even how to read the money in your hand at the cash register—is crucial to surviving and thriving in any society, but particularly in a liberal democracy. Ignorance of such matters must result in some degree of marginalization, disenfranchisement, and non-citizenship particularly given the current emphasis on information technology in Western liberal democracies.
[286] This sounds like what Scott calls the "permeability" of human rights, or the legal force of CPRs imbuing ESCRs with legal force due to the phenomenon of interdependence.

> best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.[287]

Similarly, Tomasevski stated, "The right to education operates as a multiplier. It enhances all other human rights when guaranteed and forecloses the enjoyment of most, if not all, when denied."[288]

The multiplying and empowering nature of the right to education was seemingly recognized by the United States Supreme Court in *Brown* where it opined that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education".[289] Ultimately, it is clear that any earnest narrative of equality will realize that education is crucial to the realization of most or all other human rights including liberally cherished CPRs.

5.4.2 NOT IF BUT HOW AND WHEN

Objections to the right to education based on supposed non-legality or non-justiciability are also inconsistent with the current international legal commitment to the right—including the United States' own treaty commitments.

While ICESCR rights initially appear to require only progressive implementation under Article 2(1), CESCR has defined "taking steps":

> …while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete, targeted as clearly as possible towards meeting the obligations recognized in the Covenant.[290]

The Committee on Economic, Social and Cultural Rights has also interpreted "appropriate measures" to include not only legislation but also "administrative, financial, educational and social measures".[291] States parties must also "strive to

[287] CESCR, *General Comment No. 13*, above n 76, at para 1.
[288] Tomasevski, *Education Denied*, above n 238, 1.
[289] *Brown v Board of Education* 347 US 483 (1954) (*Brown I*), at 493.
[290] CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* E/1991/23 (1990) para 2.
[291] Ibid, paras 3-4, 7.

ensure the widest possible enjoyment of the relevant rights" where their "available resources are demonstrably inadequate".[292] Accordingly, States have a "minimum core obligation" to realize ESCRs, at the very least, at "minimum essential levels".[293]

Mentioned previously, the Limburg Principles[294] and Maastricht Guidelines[295]—incorporating CESCR's General Comment No. 3—are authoritative statements on state obligations regarding all ESCRs in international law. Where the Limburg Principles require States to act "in good faith", in accordance with the Vienna Convention on the Law of Treaties (1969),[296] the Maastricht Guidelines take a violations approach to State obligations and interpret State obligations in regard to ESCRs as responsibilities *to respect, to protect and to fulfill*:

> Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights…the obligation to protect requires State to prevent violations of such rights by third parties…The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights…[297]

In turn these obligations imply further duties of both conduct and result by which States are bound "to achieve specific targets to satisfy a detailed substantive standard".[298]

While States may wish otherwise, these increasingly detailed and unambiguous standards leave little room for an optional or loophole view of ESCRs. They also obliterate the CPR/ESCR categorization since, as Philip Alston submitted in 1984, most human rights show two or more aspects of the respect, protect and fulfill model.[299] Given this commonality the question becomes not *if* a State party will

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[292] Ibid, para 11.
[293] Ibid, para 10. This has been summarized as the minimal level at which the right still contains its fundamental and essential components, the level at which it is still the right in question. For education this may be the level at which most children in a State enjoy free and compulsory primary education. Also see,
[294] *Limburg Principles*, above n 92.
[295] *Maastricht Guidelines*, above n 91.
[296] Limburg Principles, paras 4 and 7.
[297] Maastricht Guidelines, para 6.
[298] Maastricht Guidelines, para 7.
[299] Philip Alston "International Law and the Human Right to Food" in Philip Alston and Katarina Tomasevski (eds) *The Right to Food* (The Hague, Martinus Niljoff Publishers, 1984) 9.

fulfill its obligations but *how* and *when* it will fulfill its obligations.[300] This violations approach has become "even more salient"[301] since the adoption of the Optional Protocol to the ICESCR in 2008 whose operation would seem to require even greater clarification in the form of a set of indicators that can be used as benchmarks for realization and to "clearly identify[] violations".[302]

Similar obligations are recognized in various regional human rights treaties[303] including the Charter of the Organization of American States (OAS) signed and ratified by the United States.[304] The Charter recognizes the human right to

[300] Chapman and Russell, above n 249, at 9.
[301] Kalantry, Getgen and Koh, above n 232, at 254.
[302] Ibid. Also see Michael J Dennis and David P Stewart "Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?" (2004) 98(3) American J Int'l Law 462 at 464: "It is often difficult to discern the real—world relevance of this discussion. The immediate and consequential challenge for all proponents of economic, social, and cultural rights is how to improve the lives of the vast majority of people on this planet, who suffer daily from ruinous privations. According to the UN Development Programme, half the human race—3 billion people—live on less than two dollars a day, and 20 percent of the world's population—more than 1.2 billion people—live on less than one dollar per day.
"Many go without adequate food, water, clothing, shelter, or health care. For all human rights advocates and activists, the critically important question must be whether (and how) economic, social, and cultural rights can be given meaningful content and application in individual circumstances…The debate over the need for an individual--complaints mechanism for economic, social, and cultural rights has not yet seemed to contribute to the resolution of this fundamental problem. The current situation results in no small part, we believe, from the fact that such discussions typically focus on the abstract "nature, status, and characteristics" of economic, social, and cultural rights. The issue that needs to be confronted, instead, is that these rights present genuinely different and, in many respects, far more difficult challenges than do civil and political rights. However arduous it may be to determine in practice when certain rights—for example, freedom of expression, or freedom of thought, conscience, and religion—are sufficiently protected, it is a much more complex undertaking to ascertain what constitutes an adequate standard of living, or whether a state fully respects and implements its population's right to education or right to work.
"Vexing questions of content, criteria, and measurement lie at the heart of the debate over 'justiciability', yet are seldom raised or addressed with any degree of precision".
[303] Including the Protocol No 1 to the ECHR, above n 274; European Social Charter (Revised) ETS 163 (opened for signature 3 May 1996, entered into force 1 July 1999); Charter of the Organization of American States (opened for signature 30 April 1948, entered into force 13 December 1951) (amended by the Protocol of Buenos Aires of February 27, 1967; amended by the Protocol of Cartagena de Indias of November 16, 1985 and amended by the Protocol of Managua of October 6, 1993 which entered into force on January 29, 1996); the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") A-52 (16 November 1999); African Charter on Human and Peoples' Rights ("Banjul Charter") CAB/LEG/67/3 rev 5, 21 ILM 58 (opened for 27 June 1981, entered into force 21 October 1986); and African Charter on Rights and Welfare of the Child CAB/LEG/24.9/49 (opened for signature 11 July 1990, entered into force 29 November 1999).
[304] The United States signed the Charter 30 April 1948 and ratified 29 June 1951. The only reservation from the United States was that the Charter did not expand on any powers of federal or state governments contrary to the Constitution: see reservation 2. Also see the Inter-American Commission on Human Rights (IACHR) *American Declaration of the Rights and Duties of Man* (1948) art XIII which recognizes the right to education. There is no separation between ESCRs and CPRs in the Declaration which like the Charter recognizes many ESCRs and lists CPRs and ESCRs together.

education and speaks in ICESCR-like language of State obligations to "devote their utmost efforts to …achiev[ing]…goals"[305] including "rapid eradication of illiteracy and expansion of educational opportunities for all",[306] as well as "to *ensure* the *effective* exercise of the *right* to education" which like Article 13 of the ICESCR includes free, compulsory elementary education, "progressively" available "middle-level education" and available higher education.[307]

Given the sheer volume of international law addressing the right to education and other ESCRs—reiterating, expounding and emphasizing them—ESCRs almost seem to be *more* legal than CPRs. Thus, the more "[v]exing question[]" may be not whether the right to education is a legal right but how to address the "genuinely different" and "far more difficult challenges"[308] that ESCR realization presents.

5.4.3 RECOURSE

Despite widespread international commitment to the right to education, the current Special Rapporteur on the Right to Education, Kishore Singh ('the Special Rapporteur'), has recognized that the right to education would fail the justiciability test without legal recourse in the case of violation.[309]

Admittedly, the United States seems to have displayed a 'pick-and-choose' attitude in its own proverbial backyard. While the United States has signed both the Charter of the OAS and the Declaration on the Rights and Duties of Man 1948[310] where it freely commits to protect and realize ESCRs including education, it has not signed

[305] Art 34, OAS Charter. Art 45 similarly commits OAS states to "dedicate every effort to the application of…principles and mechanisms including: rights to "material well-being", "work", "health" and other ICESCR rights.
[306] Art 34(h), OAS Charter.
[307] Art 49, OAS Charter. Also see art 45(a) on "right to material well-being and "economic security" and arts 30, 31, 33, 34, and 45 on economic, social and cultural rights generally and including rights to development, social justice, work, fair wages and working conditions, food, housing, and health among other ESCRs. Also see the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (San Salvador Protocol, 1999) which has not been signed or ratified by the United States yet despite their earlier endorsement of similar rights in the OAS Charter.
[308] Dennis and Stewart, above n 302, 464.
[309] HRC, *Report of the United Nations Special Rapporteur on the right to education: Justiciability and the right to education* A/HRC/23/35 (2012) para 27.
[310] Cited above at n 304. See Art XIII which recognizes the right to education.

the San Salvador Protocol which provides a complaints mechanism for violations of ESCRs protected by the Declaration.[311] It has, nevertheless, signed and ratified the ICCPR. Under Article 2(1), the rights contained in the ICCPR are immediately binding[312] and justiciable through the first Optional Protocol to the ICCPR which provides a complaints mechanism for individuals and recommendatory response from the HRC.[313] The ICCPR, as mentioned previously, protects educational rights in both Article 18(4) and Article 27 which recognizes minority rights in education. Given this recourse to a third party judicial body, these education rights are immediately legal and justiciable. The adoption of the Optional Protocol to the ICESCR means that Articles 13 and 14 are similarly buttressed by an individual complaints mechanism[314]—and justiciable.

As mentioned previously, Article 2(2) of the ICESCR also commits "States Parties to the present Covenant [to] undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination".[315] Unlike the education rights in Article 13 and 14, Article 2(2) is not qualified by progressive realization but must be guaranteed immediately and applies to Article 13 and 14 as it does to all the rights contained in the ICESCR—as does the right to equality embodied in Article 3.[316] Thus, "elements"[317] of the right—which transcend the ICESCR and apply to all other instruments which trace their legal genealogy back to the UDHR—are also immediately justiciable. Ultimately, the increasing availability of complaints mechanisms in various conventions guaranteeing education demonstrates a transcendent nature and emphasized legality.[318]

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[311] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), cited above n 303.
[312] ICCPR, Art 2(1).
[313] OP1-ICCPR, above n 175.
[314]Discussed in Joseph, Schultz and Castan, above 180, at 8-9. The General Assembly adopted the OP-IESCR, above n 89, in 2008. The ICCPR has had an Optional Protocol individual complaints mechanism since 1966: see OP1-ICCPR, above n 175.
[315] ICESCR, art 2(2) (emphasis added).
[316] ICESCR, art 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".
[317] As noted by Audrey Chapman and Sage Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cutlural Rights* (Antwerp, Intersentia, 2002), at 5.
[318] While the complaints mechanisms for the ICESCR and ICCPR represent the singular everyone/no-one narrative, the recently signed and increasingly ratified Optional Protocol to the Convention on the Rights of Persons with Disabilities (13 Dec 2006) and Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (19 Dec 2011), as argued, represent the complex someone multi-narrative. Optional Protocols make such rights transcendent

Article 26 of the ICCPR is also immediately binding and justiciable through its Optional Protocol. While Article 2(1) prohibits discrimination and Article 3 specifically prohibits sex discrimination,[319] "Article 26 extends" the right to non-discrimination "considerably further than Articles 2(1) and 3".[320] In *Broeks v the Netherlands* (172/84),[321] the HRC determined that there is "a considerable overlapping of the provisions of Article 26 with the provisions of Article 2 of the [ICESCR]"[322] and that Article 26 "entails obligations with regard to" virtually any "legislation in the economic, social and cultural field".[323] Thus, like Article 2(2) of the ICESCR, the scope of Article 26 transcends its convention, "apply[ing] even if a particular subject-matter is referred to or covered in other international instruments"[324] such as the ICESCR. In the wake of *Broeks* and other cases[325], Article 2's non-discrimination provision "is not limited to those rights which are provided for in the" ICCPR[326] and appears to be "'a principle above the law', circumscribing the legitimacy of laws themselves".[327]

Commentators have said that the greatest challenge to the justiciability of ESCRs may be their dependence on the "interplay" between international and domestic orders.[328] While ESCRs may be subject to "detailed jurisprudential scrutiny at the international level", for instance, such examination may be unlikely at the domestic level. As illustrated by American exceptionalism,[329] justiciability at the domestic level is "dependent on the constitutional framework into which the treaty provisions

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by reiterating, reemphasizing the legality of such rights across various conventions and various narratives and by providing legal recourse for violations of such rights. The increasing number of them argues for a growing consensus on the nature and justiciability of ESCRs.

[319] See earlier discussion at 5.2.1.

[320] Joseph, Schults and Castan, above n 180, at 764, para 23.13.

[321] HRC, *SWM Broeks v The Netherlands* Communication No 172/1984, CCPR/C/OP/2 (1990) at 196, a complaint regarding discrimination on the basis of marital status in terms of unemployment benefits.

[322] Ibid, at para 8.3. The complainant brought the complaint after being denied social security benefits by the government on the basis of gendered criteria—that is, because she was not a 'breadwinner'. She was not, therefore, on "an equal footing with men". The HRC delivered its merits decision in her favor.

[323] Ibid, at para 12.1.

[324] Ibid, at para 12.1.

[325] For instance, *Carl Henrik Blom v Sweden*, Communication No191/85, UN Doc CCPR/C/32/D/191/1985, 4 April 1988, on education subsidies.

[326] CESCR *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)* E/C.12/GC/18 (2006) at para 12 discussed in Joseph, Schultz and Castan, above n 180, at 768, para 23.15

[327] Ibid, at para 23.16.

[328] Scheinin, above n 255, at 30.

[329] See discussion in Chapter Two at 2.5.

are incorporated".[330] And yet, the importation of education may not be as legally challenging as one might think.

The Limburg Principles recognize that some rights are immediately justiciable.[331] According to the CESCR, the rights to education contained in Articles 13(2)(a) (on free and compulsory education) and (3)—prior parental choice of schools—and (4)—right to parallel institutions—"would seem to be capable of immediate application by judicial and other organs in many national legal systems".[332]

Equal protection itself may act as a vehicle for the right to education and other ESCRs. Non-discrimination and equality are protected in the European Charter of Human Rights,[333] and a number of cases before the European Court of Human Rights have shown that ESCRs such as rights to housing, government benefits, family life and legal aid[334] are justiciable through civil rights acting as procedural safeguards. For instance, the European Court of Human Rights (ECHR) in *Airey v Ireland*[335] found that the plaintiff's right to a fair trial was compromised by a denial of legal aid—an essentially economic consideration. Dispelling the myth that civil and political rights do not entail positive action, the Court opined:

> ...fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive…"there is ... no room to distinguish between acts and omissions"...The obligation to secure an effective right of access to the courts falls into this category of duty.[336]

Having not provided "effective accessibility"[337] to a fair trial, the Irish government had discriminated against the plaintiff and failed to "safeguard the individual in a

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[330] See Martin Scheinin "Domestic Implementation of International Human Rights Treaties: Nordic and Baltic Experiences" in Philip Alston and James Crawford (eds) *The Future of UN Human Rights Monitoring* (Cambridge UK, New York and Melbourne, Cambridge University Press, 2000) 229, at 237.
[331] Limburg Principles, above n 92, para 8.
[332] CESCR *General Comment No. 3*, above n 290, at para 5. Compare with education rights in Constitution of the State of Hawai'i despite lack of federal acknowledgment of right to education: See Chapter Three at 3.3.2. The United States ranks behind other countries which do recognize a right to education. "Every country that outperforms the U.S. has constitutional or statutory commitment to this right.": Stephen Lurie "Why Doesn't the Constitution Guarantee the Right to Education?" *The Atlantic* (online ed, Washington DC, 16 October 2013).
[333] ECHR, above n 274.
[334] Described and discussed in Scheinin, above n 255.
[335] *Airey v Ireland* [1979] 2 EHRR 305 (ECHR).
[336] Ibid, para 25.
[337] Ibid, para 33.

real and practical way". Thus, the ECHR also held that "there is no water-tight division separating" ESCRs and CPRs.[338]

The United States Supreme Court has adopted *Airey*-like reasoning on several occasions to protect apparent ESCRs.[339] Ironically, *Brown* itself is often cited by international sources as an authority for domestic adjudication of education rights.[340] Legal claims easily understood as human rights at the international level including human personality development and more substantial considerations comparable to availability, acceptability and adaptability were ultimately justified under the Fourteenth Amendment's equal protection clause.[341] The *Brown* Court actually called education a "right".[342] The majority also appeared to approve a positive state obligation to provide education not unlike that in Article 13 of the ICESCR when it stated that "[p]roviding public schools ranks at the very apex of the function of a State" and that "education is perhaps the most important function of State and local governments".[343] A similar duty is recognized in various state constitutions incorporating the right to education.[344]

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[338] Ibid, para 26.

[339] Krasnov, above n 24, has identified several cases where the Supreme Court has apparently read economic and social rights into the US Constitution including *Griffin v Illinois* 351 US 12 (1956) where trials transcripts had to be provided to poor people at no cost, *Boddie v Connecticut* 401 US 371 (1971) at 374 where the poorer party was entitled to legal aid in a divorce case, and *Memorial Hospital v Maricopa County* 415 US 250 (1974) where "the Court struck down an Arizona law that required one-year residency to receive emergency medical treatment": Krasnov, at 752-753. The halt to this trend was due more apparently to changes in the composition of the Supreme Court, particularly the appointment by Richard Nixon of more conservative elements and retirement of others, rather than any overruling of principles in those cases: Krasnov, at 753. "It should be noted, however, that none of the core principles in the Supreme Court's decisions dealing with economic entitlements have been expressly overruled. Thus, '[a]s the law now stands, it would be much too simple to say that the American Constitution does not recognize social and economic rights.' It is possible that one day this line of decisions will experience a revival; the U.S. Constitution is, after all, a 'flexible instrument, one that allows for a great deal of change over time.' With perceived economic injustices becoming widespread, perhaps another wave of change is not too far off"": Krasnov, at 753-754, footnotes excluded.

[340] For instance, HRC, *Report of the United Nations Special Rapporteur on the right to education: Justiciability and the right to education*, above n 309. Also see CESCR, *General Comment No. 13*, above n 76.

[341] See discussion in Chapter Two on *Brown* and its progeny at 2.3.1.

[342] *Brown v Board of Education of Topeka, Kansas* 347 US 483 (1954) [*Brown I*], at 493.

[343] Ibid. Discussed in HRC, *Report of the United Nations Special Rapporteur on the right to education: Justiciability and the right to education*, para 17

[344] Roger Levesque "The Right to Education in the United States: Beyond the Limits of the Lore and Lure of the Law" (1997) 4 Annual Survey of International and Comparative Law 205 at 217-218. As Krasnov points out, "Many state constitutions recognize economic rights, and state courts are frequently called on to enforce them": Krasnov, above n 24, at 749.

Domestic courts might also protect the right to education in the process of ensuring other ESCRs. In 1993, the Supreme Court of India actually held that a constitutionally recognized right to life implied a right to education—particularly in light of the constitution's commitment to provide free, compulsory primary education.[345]

5.4.4 THE COMMITMENT/REALITY GAP

Increasingly at the international level, the real question is not the legitimacy of the right to education, nor its justiciability but the gap between a clear legal commitment to and current denial of the right, particularly among the most vulnerable of rightsholders inevitably identified by gender, ethnicity, poverty, disability and other socioeconomic factors, often simultaneously. Like the complex discrimination and disparities which caused the Ninth Circuit to wrestle with the appropriate narrative of equality in the *Kamehameha* case, this identity-specific gap is increasingly seen as inconsistent with *everyone/no-one* guarantees in international law.

The current Special Rapporteur on the right to education has addressed several pressing concerns in relation to the right to education since taking up his post in 2010. These include the promotion of equal opportunity in education,[346] normative action for quality education,[347] justiciability of the right to education,[348] and "the need to preserve education as a public good".[349] In each one of these areas the Special Rapporteur has identified gaps between the guarantee of the right to education and universal realization, and *Brown*- and *Kamehameha*-like disparities affecting certain socioeconomic groups. The gap is marked by: "physical",

[345] *Unni Krishnan v State of Andhra Pradesh* 1993 AIR 217, 1993 SCR (1) 594, 1993 SCC (1) 645, JT 1993 (1) 474, 1993 SCALE (1)290.
[346] HRC, *Report of the Special Rapporteur on the right to education, Kishore Singh, "The promotion of equality of opportunity in education* A/HRC/17/29 (2011).
[347] HRC, *Report of the Special Rapporteur on the right to education, Kishore Singh, "Normative action for quality education* A/HRC/20/21 (2012).
[348] HRC *Report of the Special Rapporteur on the right to education, Kishore Singh, "Justiciability of the right to education"* A.HRC/23/25 (2013).
[349] Ironically, the Special Rapporteur's 2014 report focused on the need for States parties to monitor the quality and accessibility of private education given the collective value of education and the state's fundamental duties to provide public education: see HRC, Report of the Special Rapporteur on the right to education, "Privatization and the right to education" A/69/402 (2014).

"financial", and "linguistic and cultural barriers" to equal opportunity;[350] "physical environment", "class-size and pupil-teacher ratio", and teacher qualifications affecting the overall quality of education; [351] and "legal" and "procedural barriers".[352] The "phenomenon of marginalization and exclusion" is assumed to disproportionately affect certain groups, namely the poor,[353] "members of certain target groups, such as indigenous peoples, cultural and linguistic minorities…those who suffer from disabilities",[354] and girls.[355] Moreover, such disparities "mutually reinforce[e] layers of disadvantage" and "create extreme and persistent deprivation that undermine equal opportunities in education".[356]

Given the organic relationship between education and other human rights and its potential to multiply either realization or inequalities, education disparities inevitably impact the enjoyment of most if not all other human rights. Statistics discussed in Chapter Three reveal that discrimination and disparities cluster around Native Hawaiian identity not just in education but also in health, housing, social services, employment, and more extreme statistics on, for instance, incarceration rates and trends. [357] Similarly, global statistics show that a denial of education will result in denials of other basic human rights. Maternal and newborn health directly correlates to the level of education a mother receives.[358] Educational attainment is predictive of health outcomes, income earning, political participation and other indicators of well-being. [359] Lack of education leads to social and political exclusion. The world's most excluded children are also usually the least educated.[360] In contrast, education "safeguard[s] children from exploitative and hazardous labour and sexual exploitation". [361] Poverty reduction and development strategies considered crucial to international peace and security depend on

[350] HRC, above n 346, paras 45-64.
[351] HRC, above n 347, paras 51-67.
[352] HRC above n 348, paras 76 and 78.
[353] HRC, above n 346, para 14.
[354] HRC, ibid, para 17.
[355] HRC, ibid, para 24.
[356] HRC, ibid, para 16.
[357] Discussion at 3.2.2.
[358] See UNICEF *The State of the World's Children 2009 (Executive Summary): Maternal and Newborn Health* (New York, UNICEF, 2009) at 6-9.
[359] OECD *Education at a Glance 2014: OECD Indicators* (OECD, 2014) at 14-15.
[360] UNICEF *The State of the World's Children 2006: Excluded and Invisible* (New York, UNICEF, 2006) at 12-14.
[361] Including CESCR *General Comment No. 13*, above n 76.

education.[362] On a global scale, education denial is, again, predictive of not just future education denials but pervasive rights denial across multiple areas of human well-being.

Ultimately, the gap is obvious both within nations, between nations and between genders. This gap is widely recognized[363] and getting wider particularly in developed countries, marking "educational 'haves' and 'have-nots'" and creating wider social "risks" and "penalities".[364]

Education denial is also clearly linked with a highly complex species of discrimination which fundamentally exceeds the capacity of a singular *everyone/no-one* narrative, the Rawlsian original position, level playing fields, and the most basic liberal sensibilities. In terms reminiscent of Kymlicka's nation-building thesis, international law clearly differentiates between *direct* and *indirect* discrimination. CESCR has commented that direct discrimination occurs when a person "is treated "less favourably than another person in a similar situation for a reason related to a prohibited ground", for instance, race or gender. According to CESCR, indirect discrimination is subtler. It:

> …refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination…[365]

As the PCIJ described in the *Albania* case, CESCR also recognizes *systemic* discrimination. This form of indirect discrimination is "pervasive and persistent and deeply entrenched in social behavior and organization" and "often…unchallenged". It manifests itself in "legal rules, policies, practices or

[362] See "Education and the Millennium Development Goals" UNESCO <www.unesco.org>.
[363] For example, in UNICEF's *The State of the World's Children* annual reports on the most pressing human rights issues in terms of children: UNICEF *The State of the World's Children 2004 Girls, education and development* (New York, UNICEF, 2004); UNICEF *The State of the World's Children 2006: Excluded and invisible* (New York, UNICEF, 2006); UNICEF *The State of the World's Children 2007: Women and children – the double dividend of gender equality* (New York, UNICEF, 2007); UNICEF *The State of the World's Children 2013: Children with Disabilities* (New York, UNICEF, 2013) found at <www.unicef.org/sowc>.
[364] See OECD *Education at a Glance 2014: OECD Indicators* found at <www.oecd.org> at 13.
[365] CESCR *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/20 (2009).

predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups."[366]

In addition to substantive and indirect discrimination, CESCR has recognized that:

> Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals...[367]

In terms echoing descriptions of Native Hawaiian statistics, CESCR has described this phenomenon as "multiple" [368] and "intersectional discrimination.[369] Prohibited grounds identified by CESCR as potentially combining, compounding or intersecting to create this particularly invidious species of discrimination include "membership of a group", "race and colour", "sex", "language", and "national or social origin". [370] Other statuses which tend to create intersections include "disability", "age", "health status" and "economic and social status". [371] As education's evolution demonstrates, international law recognizes that childhood alone appears to draw this more complex discrimination and require special legal protection. As Tomasevski noted, children are extremely vulnerable to discrimination simply because of age in a way other human. [372] Access and participation rights are vital to their rights realization because they allow vulnerable voices be heard.

And yet, this vulnerable learner might best validate ESCRs including education and define substantial equality. David Beetham has argued that "the language of rights only makes sense at all in a context where basic requirements"—that is, the real-life concerns typically considered within the ambit of ESCRs—"are vulnerable to

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[366] Ibid, para 12.
[367] Ibid, para 17.
[368] Ibid, para 17.
[369] Ibid, footnote 9 at page 6.
[370] Ibid, paras 16, 17, 20-22, and 24 respectively. Their list also included "religion", "political or other opinion", "real property…personal property…or lack of", and "those…born out of wedlock": see paras 22-23, 25-26 respectively.
[371] Ibid, paras 28-30, 32 and 35, respectively. Vulnerability created by disability actually drove the drafting of the CRPD. This "first human rights treaty of the twenty-first century has, in turn, caused a rethink of human rights monitoring generally: Michael Stein, Michael and Janet Lord "Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential" (2010) 32 Hum Rts Q 689 at 690.
[372] Elizabeth Reichert *Understanding Human Rights: An Exercise Book* (London, Sage Publications, 2007) at 82.

standard threats". Speaking on the ICESCR, he has argued that such rights are not just a reference for state behaviour but a "legitimation for the deprived in their struggles to realize their rights".[373] That is, education becomes most relevant when it reflects the situation of the least advantaged and most vulnerable rights-holders.

Similar to the idea of the canary in the mine, Beetham would turn the question of what constitutes a human right into what constitutes a human wrong. Then "infant mortality rates, life expectancy rates, literacy rates, school attendance rates, etc.," are easily identifiable "as evidence of rights denials".[374] Amartya Sen similarly argues that we should look at the "totality of the human predicament" as an "undiscriminating basis for the social analysis of needs" in regards to "miseries and deprivations of various kinds" [375] rather than categorizing and distinguishing between different kinds of human rights.

Where such discrimination clusters around a particular identity, an *everyone/no-one* guarantee alone will be undermined. In contrast, rights which account for such rights deprivations have greater resonance.

5.4.5 SUBSTANTIAL EQUALITY AND SPECIAL MEASURES

Awareness of complex discrimination and vulnerable rightsholders has undoubtedly driven international interpretation of the purposes of special measures even those associated with *everyone/no-one* instruments. CESCR has approved differential treatment where such rights:

> represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionably, however, need to be of a permanent nature….[376]

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[373] Beetham, in Steiner and Alston, above n 253, at 255-256. Also see Upendra Baxi "Voices of Suffering, Fragmented Universality, and the Future of Human Rights" in Robert McCorquedale Robert, *International Library of Essays in Law and Theory, Second Series: Human Rights* (Hants, Eng UK, Ashgate Dartmouth, 2003) 159.
[374] Beetham, in Steiner and Alston, above n 253, at 255-256.
[375] Amartya Sen "Freedoms and Needs" in Steiner and Alston, above n 27, at 269-270.
[376] CESCR, *General Comment No. 20*, above n 366, para 13. Provided that such differentiation: is "reasonable and objective", has "legitimate" aims, is "compatible with the nature of Covenant rights

Although the ICESCR does not provide for special measures, it recognizes that gender attracts discrimination, and its obligation to fulfill has been interpreted to include "design[ing] and implement[ing] policies and programmes to give long-term effect to the economic, social and cultural rights of both men and women". Such action may include "the adoption of special measures to accelerate women's equal enjoyment of their rights…and gender-specific allocation of resources".[377]

Even in dichotomous, *no-one* instruments like CADE, identity-aware special measures are appropriate given the "notion of intersectionality" and easily distinguished from invidious discrimination.[378] They may also be seen as state obligations "required to reduce structural disadvantages…in order to achieve the objectives of full participation and equality within in society" and entail "additional resources".[379] CERD's General Recommendation No. 23 similarly recognizes the context of complex discrimination and that "enjoyment" of ICESCR rights "on an equal footing" is integral to non-discrimination.[380]

However, like Kymlicka, CERD and other bodies differentiate between special temporary measures and the "permanent human rights" of minorities and indigenous peoples:

> Special measures should not be confused with specific rights pertaining to certain categories of rights pertaining to certain categories of person or community, such as, for example the rights of persons belonging to minorities to enjoy their own culture, profess and practice their own religion and use their own language, the *rights of indigenous peoples*…and rights of women to non-identical treatment with men…on account of biological differences from men. Such rights are permanent rights…states parties should carefully observe distinctions between special measures and permanent human rights in their law and practices. The distinction

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and solely for the purpose of promoting the general welfare in a democratic society", and proportional to the degree of indirect discrimination faced. Compare with the trammelling and temporary criteria for the *Johnson* test in *Kamehameha* in Chapter Three at 3.5.1.

[377] CESCR, *General Comment No 16*, above n 70, para 21.

[378] CERD, *General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination* CERD/C/GC/32 (2009) para 7.

[379] CESCR *General Comment No. 5: Persons with Disabilities* E/1995/22 (1994) para 9.

[380] CERD, *General Recommendation No. 32*, above n 378, para 7: "Discrimination under the Convention includes purposive or intentional discrimination and discrimination in effect. Discrimination is constituted not simply by an unjustifiable 'distinction, exclusion or restriction' but by an unjustifiable 'preference', making it especially important that States parties distinguish 'special measures' from unjustifiable preferences".

> between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures".[381]

Special measures are appropriate when "undertaken for the sole purpose of securing adequate advancement of certain racial or ethnic groups" as long as they do not lead to permanent differentiated rights[382] and address:

> …persistent or structural disparities and *de facto* inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality. It is not necessary to prove 'historic' discrimination in order to validate a programme of special measures; the emphasis should be placed on correcting present disparities and on preventing further imbalances from rising.[383]

While these special measures are temporary [384] and aimed at parity, they ideologically contrast with the *Weber-Johnson* test given their goal of substantive equality, the space they leave for permanent minority and indigenous rights and their status as rights in and of themselves.

5.5 CONCLUSION

International law clearly recognizes a strong right to education. Beyond the single, somewhat amorphous constitutive commitment recognized in *Plyler*, education refers to a multi-narrative toolbox of rights options including: fundamental guarantees to primary and secondary education; temporary special measures; minority rights including parallel institutions and commonly held cultural and language rights; and the complex multi-narrative rights of children and persons with disabilities including the above rights and participation and access rights.

Education is considered organically crucial to the realization of most if not all other human rights—including *everyone/no-one* civil and political rights comparable to

[381] Ibid, para 15 (emphasis added). The availability of both temporary special measures aimed at *no-one* and *slim someone* objectives and permanent rights attached to indigenous group membership, for instance, suggests a harmony between narratives which are at odds in American federal jurisprudence where substantive equality is the goal.
[382] Ibid, para 19.
[383] Ibid, para 22.
[384] UN Sub-Commission on the Promotion and Protection of Human Rights, *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination: The Concept and Practice of Affirmative Action* E/CN.4/Sub.2/2000/11/Corr.1 (2000) at 66-83.

those in the American Constitution. It is legal and justiciable, a strong standalone right entailing increasingly identity-specific, positive states parties' obligations, effective implementation and the 4-A Scheme. Contrary to homogenous or anonymous trends in federal jurisprudence in recent decades, the international right is increasingly identity- and content-specific in an apparent attempt to buffer particular groups against complex discrimination and disparities but also to provide a richer rational revision context in the form of organic multiplication.

Rather than wilfully ignoring the way that complex discrimination and disparities are unrelentingly attracted to certain group identities—and de facto inequalities—international equality narratives recognize multiple rightsholders in education because a more substantive, even *Brown*-like equality demands it, as does non-discrimination. Most importantly, the human right to education has the capacity to liberally account for vulnerable rightsholders whose plight would otherwise undermine the narrative legitimacy of *everyone/no-one* guarantees. In fact, prior to an indigenous identity, the Native Hawaiian learner is entitled to special temporary measures in education and also minority rights to attend a parallel educational institution, be taught in Hawaiian and learn with other Native Hawaiians. These are not exceptions to equality but required by it.

Although this multi-narrative toolbox of rights increasingly recognizes the complex nature of discrimination and disparities, the human right to education has not yet accounted for the unique historical context of the admission policy—for the legal fact of prior sovereignty, historical wrongs linked to the illegal overthrow of the Hawaiian Kingdom, deep ongoing harm, or the historical continuum of Native Hawaiian law. These facts raise questions of self-determination and the collective rights of a nation or people rather than an individual. The next chapter explores the further evolution of the right to education in international law to recognize a truly collective, specifically indigenous right to education which displays buffer-and-access features but also affirms historical self-determination.

CHAPTER SIX

AN INDIGENOUS RIGHT TO EDUCATION

6.1 INTRODUCTION

After being hidden, we were seen.[1]

The evolution of the international human right to education described in Chapter Five clearly displays Kymlickan buffer-and-access features. Importantly, the right has intentionally become more identity-specific in an effort to counter or buffer against complex discrimination and disparities and allow disadvantaged groups access to a richer rational revision context, even organic multiplication. Thus, this strong right has evolved from a formalized, universalized, *everyone/no-one* right to a complex, highly identity-aware, multi-narrative toolbox of rights options entailing *everyone/no-one* guarantees, minority and other *complex someone* rights. The Convention on the Rights of the Child and Convention on the Rights of Persons with Disabilities especially illustrated flexibility and complementarity in terms of the same equality narratives which have been wrestled over in American federal courts. Versus *everyone/no-one* critiques, the right further displayed organic multiplication and indivisibility, emphasized legality and justiciability, demanded positive state parties' obligations and was buttressed by non-discrimination.

Chapter Six presents Article 14 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as the earnest culmination of the evolution of the international human right to education displaying buffer-and-access features but also, importantly, remedial self-determination projects. It describes how and why this rational and remedial indigenous learner right remains consistent with the

[1] Wiremu Ratana, a Maori church leader from New Zealand, who was one of the first indigenous persons to petition the young League of Nations to recognize indigenous rights and rights-holders in the early 20th century, quoted in Keith Newman *Ratana Revisited: An Unfinished Legacy* (Auckland, Reed, 2006) at 140.

previous multi-narrative while enshrining specifically indigenous, collective rights in education. In response to the same kind of adamant everyone/no-one critiques advanced by the dissent in *Kamehameha*, Article 14 is presented as an organic multiplier of other indigenous and human rights, a legally emphasized, justiciable, and enforceable right. Moreover, Article 14 demonstrates the capacity of specifically indigenous rights to reconcile Kymlicka's theory with itself, and account for ongoing harm, actual prior sovereignty and a historical continuum of rights. Importantly, rather than being submerged in a racial minority or more *complex someone* narrative, the most vulnerable of vulnerable rightsholders in education are identified as *indigenous learners* in UNDRIP's highly responsive right to education because both an earnest equality and unique historico-legal context demand it.

6.2 THE MOST VULNERABLE

While both States and indigenous peoples resisted a singular definition of the term during the drafting of UNDRIP,[2] James Anaya, former UN Special Rapporteur on the Rights of Indigenous Peoples, has described "indigenous peoples" as:

> …living descendants of pre-invasion inhabitants of lands now dominated by others. They are culturally distinct groups that find themselves engulfed by other settler societies born of forces of empire and conquest.[3]

[2] Consistent with Article 33 in the final draft of UNDRIP which reserves the right of indigenous peoples to determine their own membership, indigenous delegates adopted a common position and rejected the idea of a formal definition. States also did not want such a definition. However, there was significant debate on such a definition: see Albert K Barume "Responding to the Concerns of the African States", in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen, IWGIA, 2009) 170. Benedict Kingsbury has described two broad approaches to the definition of indigenous peoples. The "positivist approach treats 'indigenous peoples' as a legal category requiring precise definition" making the determination of legal status a straightforward exercise. Kingsbury, however argues "that it is impossible…to formulate a single globally viable definition that is workable and not grossly under- or overinclusive. Any strict definition is likely to incorporate justifications and referents that make sense in some societies but not in others.": Benedict Kingsbury "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92(3) Am J Int'l Law 414 at 414.

[3] S James Anaya *Indigenous Peoples in International Law* (2nd ed, Oxford, Oxford University Press, 2004) at 3. Kinsgbury fears that a "global concept is unworkable and dangerously incoherent" but recognizes its "normative power for many relatively powerless groups that have suffered grievous abuses": Kingsbury, at 415. In fact, the most consistent characteristic of indigenous claims seems to be that these groups share eerily similar experiences of 'grievous abuses'.

In fact, the Native Hawaiian moʻolelo echoes one that has been told many times. Colonialism—including colonization[4]—was a global phenomenon which impacted the indigenous peoples of the Americas, Africa, Asia and Australia but also Europe itself, for instance the Saami. At a global level—as in Hawaiʻi—"the doctrine of discovery, the doctrine of domination, 'conquest'":[5]

> …without question…had a detrimental effect on all indigenous peoples. Its implementation was used as an instrument to alienate indigenous peoples from their lands, resources and culture, a process that continues today.[6]

As in Hawaiʻi, indigenous peoples around the world:

> were constructed as "savages", "barbarians", "backward" and "inferior and uncivilized" by the colonizers, who used such constructs to subjugate, dominate and exploit indigenous peoples and their lands, territories and resources.[7]

Historically, these overtly racist narratives justified the denial of "indigenous peoples' human rights".[8] However, the same narratives are manifest today in various areas of human well-being and thriving[9] regarding indigenous peoples and continue to be used to deny even "extinguish" their human rights.[10]

Today, the same peoples historically impacted by colonization appear to share a common identity of complex discrimination and disparities. As John-Andrew McNeish and Robyn Eversole have asked:

> Where is poverty...always more prevalent? In what kinds of situations, in what places, in what roles, are people around the world most likely to be poor? Clearly there are patterns...
>
> This book acknowledges and explores one key pattern of poverty: the fact that around the world, in vastly different cultures and settings, indigenous peoples are nearly always disadvantaged relative to their non-indigenous counterparts. Their material standard of living is lower; their risk of disease and early death is higher.

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[4] "Colonization" is commonly understood as the migration of settlers into an area who maintain ties to mother country but it also often refers to the larger phenomenon whereby those settlers supersede the original inhabitants who become a minority in their own country. The term is closely associated with "empire" whose Latin root *imperium* translates as "domination": Stephen Howe *Empire: A Very Short Introduction* (Oxford, Oxford University Press, 2002) at 9-34.

[5] UN Permanent Forum on Indigenous Issues [UNPFII] *Report of the Eleventh Session of the UN Permanent Forum on Indigenous Issues* E/C.19/2012/13 (2012) para 4; and Valmaine Toki *Study on the decolonisation of the Pacific region* E/C.19/2013/1 (2013) at para 1.

[6] Toki, at para 1.

[7] UNPFII, *Report of the Eleventh Session*, above n 5, para 4.

[8] Ibid, para 4.

[9] Ibid, para 5.

[11] Ibid, para 6.

> Their educational opportunities are more limited, their political participation and voice more constrained, and the lifestyles and livelihoods they would choose are very often out of reach.[11]

Compounding, multiplication and intersectionality appear to be globally attracted to indigenous identity. In fact, the indigenous child has been classified among the most "excluded and invisible"[12] in the world, by the United Nations Children's Fund (UNICEF)[13]:

> Indigenous children can face multiple barriers to full participation in society...
>
> Indigenous children can suffer cultural discrimination and economic and political marginalization. They are often less likely to be registered at birth and more prone to poor health, to low participation in education and to abuse, violence and exploitation...Many of them are still denied their rights under the Convention on the Rights of the Child, especially with regard to birth registration, access to education and health-care services.[14]

Global educational statistics on the indigenous child not only echo those of Native Hawaiians but may be even more concerning[15] and consistently reveal a "critical"[16] "gap" in educational achievement between indigenous children and other students, including other minorities.[17] Despite increasingly identity-aware, complex rights to education, extreme discrimination and disparate impact continue to cluster around the indigenous learner:

> In most countries, indigenous children have low school enrolment rates. Scarce educational facilities, governments' failure to attract qualified teachers prepared to work in the remote areas where many indigenous people live and the perceived

[11] Robin Eversole and John-Andrew McNeish "Introduction: indigenous peoples and poverty", in Robin Eversole, John-Andrew McNeish and Alberto D Cimadore (eds) *Indigenous Peoples & Poverty: An International Perspective* (London, Zed Books, 2005) 1 at 2.
[12] UNICEF, *The State of the World's Children 2006: Excluded and Invisible* (New York, UNICEF, 2006) at 24-28.
[13] UNICEF was established by the UN General Assembly on 11 December 1946 to provide humanitarian relief to children in the wake of World War II, became a permanent part of the UN system in 1953 and operates under the auspices of ECOSOC as part of the United Nations Development Group: see UNICEF "Our History" United Nations Children's Fund at <www.unicef.org.nz>. "All UNICEF-supported activities are guided by and aim at realising the United Nations Convention on the Rights of the Child (UNCROC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)": UNICEF "Our Mission" United Nations Children's Fund at <www.unicef.org.nz>.
[14] UNICEF, *The State of the World's Children 2006: Excluded and Invisible*, above n 12,at 25.
[15] UNICEF, *The State of the World's Children 2009 (Executive Summary): Maternal and Newborn Health* (New York, UNICEF, 2009) at 132.
[16] Ibid.
[17] Ibid.

> irrelevance of much of the school curriculum for the local community—all act as disincentives to school participation.[18]

Likewise, the Permanent Forum on Indigenous Issues (PFII) has stated that educational exclusion takes "the form of poor access, low funding, culturally and linguistically inadequate education and ill-equipped instructors". [19] Despite emphasized legality, 4-A Scheme standards and States obligations, the global indigenous child—like the Native Hawaiian learner—is less likely to be enrolled in school, stay in school and be literate.[20]

As an essential pre-prerequisite of learning, language is a particular area where indigenous children may be "severely disadvantaged" in education. Comparable to historical discrimination experienced by Native Hawaiian learners, "[s]peaking an indigenous or non-official language is a clear marker of disadvantage in terms of schooling"[21] for indigenous children globally:

> When they attend school, indigenous children often begin their formal education at a disadvantage to other children because they are unfamiliar with the language of instruction. Research indicates that it takes until the third grade before their comprehension begins to match that of children who speak the dominant language.[22]

Among other forms of discrimination, indigenous children have been—and continue to be—denied education, abused and indoctrinated for speaking indigenous languages. Because language constitutes an essential element of community identity, well-being and survival, some commentators believe that such attacks on language constitute "genocide".[23]

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[18] UNICEF, *The State of the World's Children 2006: Excluded and Invisible*, above n 12, at 28. Also see UNPFII *State of the World's Indigenous Peoples 2009,* above n 15, at 132.
[19] UNPFII *State of the World's Indigenous Peoples 2009*, ibid.
[20] Ibid, at 133.
[21] Ibid.
[22] UNICEF *The State of the World's Children 2006: Excluded and Invisible*, at 28. Also see UNPFII *State of the World's Indigenous Peoples 2009*, ibid, at 132.
[23] Tove Skutnabb-Kangas and Robert Dunbar "Indigenous Children's Education as Linguistic Genocide and a Crime against Humanity? A Global View" (2010) (1) *Gáldu Čála:* Journal of Indigenous Peoples Rights 53.

Like language, culturally inappropriate curriculum and pedagogy and lack of indigenous control of institutions creates discrimination. The Expert Mechanism on the Rights of Indigenous Peoples (EMPRIP)[24] found that:

> ...deprivation of access to quality education is a major factor contributing to social marginalization, poverty and dispossession of indigenous peoples. The content and objective of education to indigenous peoples in some instances contributes to the assimilation of indigenous peoples into mainstream society and the eradication of their cultures, languages and ways of life.[25]

Again, for many indigenous children, education is not available, accessible, acceptable or adaptable.[26]

At the intersection of gender, age and indigeneity[27], the indigenous girl might be the poster child for complex discrimination. Generally, women are typically more susceptible to exclusion in education than their male counterparts.[28] Indigenous women have been described as "third class citizen[s]" because they frequently exhibit greater disadvantage than both indigenous males and non-indigenous males and females.[29] Generally, "[i]ndigenous girls tend to be more disadvantaged than indigenous boys".[30] For instance, the indigenous girl is less likely to be enrolled in school, to stay in school and be literate than an indigenous boy—who themselves

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[24] "The Expert Mechanism provides the Human Rights Council with thematic advice, in the form of studies and research, on the rights of Indigenous peoples as directed by the Council. The Expert Mechanism may also suggest proposals to the Council for its consideration and approval.": "Expert Mechanism on the Rights of Indigenous Peoples" Office of the High Commissioner on Human Rights <www.ohchr.org>.

[25] UN Human Rights Council, *Human Rights Bodies and Mechanisms: Study on Lessons Learned and challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education, Report of the Expert Mechanism on the Rights of Indigenous Peoples* A/HRC/12/33 (2009) [EMPRIP 2009] at 2.

[26] Ibid, at 16-26.

[27] On gender and discrimination see: UN Millennium Project Task Force on Education and Gender Equality *Taking Action: Achieving Gender Equality and Empowering Women* (London, Earthscan, 2005); Sandra Fredman *Women and the Law* (Oxford, Oxford University Press, 1997); Cass Sunstein "Gender, Caste and Law" in Martha Nussbaum and Jonathan Glover (eds.) *Women, Culture and Development: A Study in Human Capabilities* (New York, Oxford University Press, 1995) at 332; and Katarina Tomasevski *Women and Human Rights* (London, Zed Books, 1993). Also see United Nations Children's Fund *The State of the World's Children 2004: Girls, Education and Development* (New York, UNICEF, 2004); and *The State of the World's Children 2007: Women and Children—the Double Dividend of Gender Equality* (New York, UNICEF, 2007). This thesis has delved deeply into feminist legal theory or anti-discrimination law but the indigenous girl-child well illustrates extreme intersectionality and multiplication.

[28] Sen, at 259.

[29] United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues *Gender and Indigenous People: Briefing Note 1* <www.un.org>.

[30] UNPFII *State of the World's Indigenous Peoples*, at 133.

are already less likely than other sectors of society to achieve in education[31]. Ironically, the indigenous girl's enjoyment of education rights or lack thereof will certainly impact the educational achievement and wider socio-economic development and physical health of her children, family and community.[32] For these reasons, the indigenous girl-child appears to be the personification of complex discrimination and disparities and the quintessential canary in the coalmine.

Generally, statistics on indigenous learners show that disadvantage and inequality chronically cluster around the indigenous child, creating "striking disparities"[33] in educational achievement and realization. In such statistics, it is not merely a racial or minority identity that is repeatedly defined by extreme discrimination and disadvantage but an *indigenous* identity impacted by colonialism. As demonstrated by language denial and the indigenous girl-child, generations will inherit this extreme form of once-and-future discrimination. "[N]otwithstanding progress in legal protection and recognition through national legislation and international norms",[34] indigenous people experience "discrimination in health, employment and education", "persistent marginalization", "stigmatization", "gap[s] in life opportunities and "dual discrimination"[35] on a pandemic scale.

In contrast to John Rawls' just savings[36] principle, this inheritance of a priori disadvantage compounds and distorts disparate impact further despite international borders, geographic distance, and actual diversity of cultures and languages.[37] The global mo'olelo clearly defies Waldron's supersession thesis[38] since the connection between the event of colonialism and present disparities and discrimination is unquestionable. In fact, resulting unchosen, multi-generational disadvantage

[31] UNPFII *State of the World's Indigenous Peoples*, at 133.
[32] *State of the World's Children 2007: Women and Children: The Double Dividend of Gender Equality*, Executive Summary. For instance, at 2: "Healthy, educated and empowered women have healthy, educated and confident daughters and sons".
[33] UNPFII *State of the World's Indigenous Peoples*, 133. Also see: EMPRIP 2009, above n 25.
[34] Human Rights Council (HRC) *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"; Report of the United Nations Commissioner for Human Rights on indigenous issues* A/HRC/4/77 (2006) [*Implementation* report 2006] at 1.
[35] Ibid, paras 8-11.
[36] See Chapter Four at 4.2.2.
[37] Despite Jeremy Waldron's arguments that indigenous identity is liberally irrelevant or can be historically superseded. See Waldron's cosmopolitan thesis equating indigenous rights claims with living in Disneyland and occasionally putting on traditional costumes or using mother tongues to celebrate dying cultures: Chapter Four, at 4.3.2.
[38] See discussion in Chapter Four at 4.2.2. Waldron equates any addressing of that history with placing unfair burdens on present individuals while the opposite appears to play out in the statistics.

apparently represents a neo-colonialism which plays out—as if on a loop—over and over. The existence of such extreme, supra-insidious discrimination and disparities which are consistently and repeatedly attracted to a particular identity must be highly offensive to any earnest liberal.

6.3 CULMINATION: THE EVOLUTION OF AN INDIGENOUS RIGHT TO EDUCATION

In response, the United Nations Declaration on the Rights of Indigenous Peoples 2007 [39] (UNDRIP or 'the Declaration') specifically addresses the complex discrimination and disparities particularly attracted to the indigenous identity. It demonstrates a repugnance for the global human wrong of colonization as urgent as the avoidance of conflict, genocide and other horrors post-WWII. It upholds and reiterates the universal individual human rights of the indigenous learner but also recognizes collective *peoples'* rights based on a more historical right to self-determination held by the learner *and* his community. Among these, Article 14 emphasizes the universal human right to education held by the indigenous learner—their *everyone/no-one* and *someone* rights to equality and non-discrimination—but also recognizes the right of indigenous peoples to establish and control educational institutions and systems which fundamentally prioritize the indigenous learner not only in admissions but in all aspects of education.

The Declaration also represents the agency, resistance and persistence of indigenous peoples in seeking justice for historic and ongoing injustices—even gross human rights violations. Like the admission policy, global efforts can be seen as real-time exercises of self-determination and self-generated remedies for those injustices. Likewise, UNDRIP does not create any new indigenous rights but rather recognizes historic and ongoing denials and protects surviving pre-contact rights which precede liberalism altogether—or a historical continuum of rights.

[39] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007) [UNDRIP].

6.3.1 INDIGENOUS RIGHTS, HUMAN RIGHTS

The Declaration on the Rights of Indigenous Peoples 2007 was long awaited and anticipated.

In the mid-sixteenth century, with the Conquest of the Americas underway and holocaust-level population decimation[40] unfolding across the Western Hemisphere, Spanish theologians argued that the 'New World's' indigenous inhabitants were human beings with associated rights. Francisco de Vitoria, recognized that the "Indian aborigines" were "true owners in public and in private law before" the Conquest and should not be forced to put themselves into "the power" of European sovereigns.[41] More vehemently, Bartolomé de las Casas criticized the violence and genocide of the Conquistadors, arguing that "Indians" were entitled to the same rights as other human beings.[42] Their arguments foreshadow principles of universality, equality and non-discrimination—even the Enlightenment liberalism[43] and Vitoria especially is recognized as a father of international law.[44] Importantly, Vitoria and de las Casas stressed that indigenous people were human beings because they had already been discriminated against as supposed non-humans.

Post-World War II, the International Labour Organization (ILO)[45] drew attention to inequalities afflicting indigenous peoples in reports such as *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries* (1953)[46] which included global educational statistics from various

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[40] Mirroring developments in Hawai'i, a 2011 study indicates that European diseases may have killed as much as 50 percent of the indigenous population of the Americas within a few years of Columbus' arrival: Ker Than "Massive Population Drop Found for Native Americans, DNA Shows" *National Geographic News* (online ed, 5 December 2011).

[41] Francisco DeVitoria *De indis et De jure belli relectiones*, Vol 7 (Buffalo NY, WS Hein, 1995) at 336.

[42] Bartolomé de las Casas *A Short Account of the Destruction of the Indies/Brevísima relación de la destrucción de las Indias.* (London, Penguin Classics, 1992).

[43] DeVitoria is often recognised with the Dutchman Grotius as a father of international law: see S James Anaya "Introduction" in S James Anaya (ed) *International Law and Indigenous Peoples* (Hants Eng, Dartmouth Publishing, 2003) at xi. Also see GC Marks "Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas" 13 Australian Year Book of International Law 1.

[44] See discussion in previous chapter in section 5.2.

[45] A specialized agency of the United Nations.

[46] International Labour Organization [ILO] *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries* (Geneva, ILO, 1953). See Chapter VII, "Illiteracy and Education". Under the heading of the United States only "Indians" are mentioned. Native Hawaiians are not. The study was focused on very general markers of educational achievement such as literacy rates and school attendance.

regions and countries showing significant gaps between indigenous and non-indigenous learners.[47] The ILO later drafted Convention No 107, Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957),[48] "the first attempt to codify international obligations of States in respect indigenous and tribal populations".[49] More recently, No 169, Convention on Indigenous and Tribal Peoples in Independent Countries (1989)[50] attempted to define indigenous peoples,[51] recognizes the need for "measures" and stresses the importance of indigenous peoples participation "on an equal footing"[52] with other citizens, including in education.[53] Article 27(3) "recognise[d] the right of [indigenous] people to establish their own educational institutions and facilities".[54]

Such developments can be viewed against the "nascent international indigenous movement" "growing rapidly" at that time "throughout the Americas, the Caribbean, the Arctic, Australia, New Zealand, the Philippines, Bangladesh and elsewhere"[55] as "talking circle[s]" of educated, indigenous people shared eerily similar mo'olelo and:

> …sought to understand why the Labour Conventions, the Human Rights Covenants or the [Universal] Declaration and Conventions of UNESCO had never

[47] Though Maori fared better than many other indigenous peoples included in the study: see New Zealand section in Chapter VII "Illiteracy and Education" at 195-196.
[48] ILO, Indigenous and Tribal Populations Convention, C107 (opened for signature 26 June 1957, entered into force 2 June 1959).
[49] See ILO, "Convention No 107" International Labour Organization <www.ilo.org>.
[50] ILO Indigenous and Tribal Peoples Convention C169 (opened for signature 27 June 1989, entered into force 5 September 1991) art 1(1) defines indigenous peoples in tribal terms and by "descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions." The Convention makes self-identification the fundamental criterion in determining membership.
[51] In terms of tribes, pre-contact inhabitation of a country and retention of institutions. Convention No 169 has only been ratified by 22 countries. It also lacks any reference to political status or real rights to self-determination merely stating, in the preamble, indigenous peoples have "aspirations …to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live". Importantly, while using the term peoples, the treaty specifically denies "any implications as regards the rights which may attach to the term under international law—that is, the kind of self-determination claimed by native Hawaiians and other indigenous peoples.
[52] Both phrases repeated throughout the Convention. For instance, see arts 26 and 27 on education. Unfortunately, the standard is parity.
[53] See art 26.
[54] "[P]rovided that such institutions meet minimum standards established by the competent authority in consultation with these peoples": art 27(3).
[55] UNPFII *State of the World's Indigenous Peoples 2009,* above n 15, 2.

> been used to protect us. In these international systems we found we were invisible; we were neither minorities nor peoples. We were ghost peoples, hidden, like our languages and cultures, by the concept of the nation-state.[56]

Another commentator traces Native American awareness back to US events including the Pine Ridge Reservation occupation by Native American protesters in 1973 and "disappointing litigation outcomes" in domestic courts.[57]

Such awareness gave rise to diplomatic alliances and strategies aimed at illuminating "what constitutes the Indigenous humanness of human rights".[58] In such strategies, the UDHR was seen as "an important tool" for overcoming discrimination. As predicted by Kymlicka, gaining a voice in international fora was prioritized as were the issues of collective rights and self-determination.[59] International law was to be the vehicle for domestic rights issues, though there was an understanding that international law was currently insufficient to address indigenous rights.[60]

The ground-breaking *Martinez Cobo Study* submitted to the UN Commission on Human Rights in 1981 after almost a decade of study, attempted to define indigenous peoples in order to specify them as rights-holders in regards to discrimination.[61] More importantly, it repeatedly concluded that, while the right

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[56] James (Sákéj) Youngblood Henderson Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition (Saskatoon, Purich Publishing, 2008) at 35. Henderson speaks from the experience of Canadian First Nations people.

[57] Robert Coulter "The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law" (2008-2009) 45 Idaho L Rev 539 at 543.

[58] Henderson at 29. Also see discussion in Chapter Two on the erosion of Native American rights in US federal courts, at 2.4.2.

[59] Henderson, ibid, at 30. Coulter, above n 57, at 543-544.

[60] Coulter, at 544. Communications by indigenous people to the UN Commission on Human Rights (CHR) under the Optional Protocol to the ICCPR represent early attempts at such strategies. Indigenous peoples were unsuccessful in attempts to claim the right to self-determination generally, under Article 1 of the ICCPR, via the complaints mechanism of Optional Protocol I. In *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* Communication No 167/1984 (1984), for instance, the Human Rights Committee found that a claim under Article 1 was inadmissible because the Lubicon Lake Band was not a "people" within the meaning of Article 1 since the band was only one of many Indian bands throughout Canada and only a "smaller portion" of a larger Cree group, and because the Optional Protocol is an individual complaints mechanism while self-determination was a collective right: see *Lubicon Lake Band* at 106 and 109. The following year, in *Ivan Kitok v Sweden* Communication No 197/1985 (1985), the HRC dismissed a similar complaint on individual grounds. However, these cases said little about what the right actually entailed. See description of events from Canadian perspective in Henderson, at 37-40.

[61] José Martínez Cobo *Study of the Problem of Discrimination Against Indigenous Populations, Final report submitted to Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, by the Special Rapporteur, Mr. José Martínez Cobo* E/CN.4/Sub.2/476, E/CN.4/Sub.2/1982/2, E/CN.4/Sub.2/1983/21.

to education was universally guaranteed in countries including the United States, indigenous persons faced many obstacles to actual enjoyment of the right.[62] With other forces, the Study created a "momentum"[63] that led to the establishment of a UN body dedicated to indigenous human rights issues: the UN Working Group on Indigenous Populations (WGIP) established by ECOSOC and, ultimately, the drafting of a document beginning in 1985 which would respond to the mo'olelo.

On an "extraordinary" level, indigenous peoples were allowed to participate in the proceedings of the WGIP. During drafting, over 1,000 representatives participated annually in the WGIP and later UN Permanent Forum on Indigenous Issues (UNPFII).[64] Such participation ranged from "issue setting and agenda creation"—as in the Indigenous Peoples Decade—to "influence on institutional procedures"—to "influence on policy change in 'target actors'".[65] Crucially, "[f]or the first time, the victim population, indigenous peoples, were permitted to actively participate in the drafting and debate".[66] The human rights focus also shifted "from integration to self-determination".[67]

The result of these rightsholder-driven developments—and the persistence of the global mo'olelo itself—has been a "mainstreaming" of indigenous rights within the UN system.[68] During the decades of drafting, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People

[62] See Martinz Cobo Study, Chapter XIII, "Education": E/CN.4 Sub.2 /1983/21/Add.2.
[63] UNPFII *State of the World's Indigenous Peoples*, above n 17, at 2.
[64] See Augusto Willensen Diaz "How Indigenous Peoples' Rights Reached the UN" in charters and Stavenhagen, above n 2, 16 at 27-28.
[65] For instance, the unprecedented openness of the WGIP to indigenous participation. Influence on institutional procedures and policy change in target actors are two evaluative benchmarks discussed by Jeff Corntassel "Partnership in Action? Indigenous Political Mobilization and Co-optation During the First UN Indigenous Peoples Decade (1995-2004)" (2007) 29(1) Hum Rts Q 137 at 137. The other three are "influence on discursive positions of states and international organizations", "influence on state behavior", and what he calls "co-optation". While Corntassel is ultimately pessimistic about the lasting impact of such participation especially given the effect of co-optation—or the "blunting" or "channelling" of such participation for the benefit of a state's legitimacy—he also provides several specific examples, at least prima facie, of unprecedented participation.
[66] "Hundreds of indigenous participants from all over the world began to participate every year at the meetings in Geneva, Switzerland. Many countries bitterly opposed our efforts...Work and negotiations continued, often painfully, for many years as we educated the delegations of countries from all over the world. As we negotiated, we found that many of these countries were indeed implementing some of these rights—bringing these rights into reality...": Coulter above n 60, at 545.
[67] Asbjørn Eide ""The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UIN Declaration on the Rights of Indigenous Peoples" in Charters and Stavenhagen, above n 7, 32.
[68] Corntassel, at 137.

('Special Rapporteur on Indigenous Peoples')[69] was established and two UN International Decades of the World's Indigenous Peoples (1995-2004) and 2005-2015) were proclaimed, developments meant to focus the world's attention on the acute rights-situations of indigenous peoples.[70] Most recently, an Expert Mechanism on the Rights of Indigenous Peoples[71] to provide thematic expertise on indigenous rights issues for the Commission on Human Rights was created.[72]

Most remarkably, however, the United Nations Declaration on the Rights of Indigenous Peoples was endorsed by a significant majority[73] of the UN General Assembly on September 7, 2007 after some 22 years of discussion, debate, negotiation and compromise. International indigenous rights expert and former UN Special Rapporteur on Indigenous Peoples, James Anaya wrote at the time:

> The UN General Assembly's adoption of the UN Declaration on the Rights of Indigenous Peoples ...marked the end of a long journey, a milestone in the long and arduous march of what have come to be known as "indigenous peoples" through the major institution of organized intergovernmental society: the United Nations. It is a day of celebration for indigenous leaders and their rank and file scattered around the globe, united in a common fate of conquest, dispossession, marginalization and neglect, but also in the joy of rising again.[74]

[69] Given their mandate by *Human rights and indigenous peoples: mandate of the Special Rapporteur on the rights of indigenous peoples* HRC Res A/HRC/Res/15/14 (2010). Also see OHCHR "Special Rapporteur on the rights of indigenous peoples" Office of the High Commissioner for the United Nations on Human Rights <www.ohchr.org>.

[70] OHCHR "International Decades of the World's Indigenous People" Office of the High Commissioner for the United Nations on Human Rights <www.ohchr.org>.

[71] *Expert Mechanism on the Rights of Indigenous Peoples* HRC Res A/HRC/Res/ 6/36 (2007). Also see OHCHR "Expert Mechanism on the Rights of Indigenous Peoples" Office of the High Commissioner for the United Nations on Human Rights <www.ohchr.org>.
The development of such machinery is consistent with the aim of instruments such as the Vienna Programme of Action and the Millennium Development Goals discussed at the end of section 2.1

[72] Only two months after the adoption of UNDRIP. For a useful discussion on how all of these bodies and mechanisms work together see S James Anaya *Coordination with United Nations Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples of the Human Rights Council; Analysis of the duty of States to consult with indigenous peoples on matters affecting them: insight into how duty to consult may be addressed by Governments, indigenous peoples, the United Nations system, and other stakeholders* A/HRC/12/34 (2009); and Alexandra Xanthaki "Indigenous Rights in International Law Over the Law 10 Years and Future Developments" (2009) 10 Melbourne J Int'l Law 27.

[73] It was adopted by 143 countries out of approximately 190 UN member states.

[74] S James Anaya and Siegfried Wiessner "The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment" *Jurist* (online ed, 3 October 2007).

6.3.2 INDIGENOUS EVERYONE, NO-ONE AND SOMEONE

The long-awaited, resulting Declaration, consistent with the previous evolution of the right of education, recognizes a substantive *everyone/no-one* and *complex someone* multi-narrative but is even more specific about *who* is a universal rightsholder—while recognizing a more *rational and remedial indigenous learner* than *Mancari* anticipates.

The Declaration continues to display buffer-and-access features. From the outset, UNDRIP's rights are linked to the Charter of the United Nations,[75] the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)[76] and International Covenant on Civil and Political Rights 1966[77] (ICCPR). As those instruments and the Universal Declaration of Human Rights 1948[78] (UDHR) recognized post-WWII, UNDRIP responds to human wrongs, even assimilative and "racist" "doctrines, policies and practices"[79] and other "historic injustices" arising from "colonization"[80] and recognizes the "urgent need to respect and promote" human rights[81] and to "bring an end to all forms of discrimination and oppression wherever they occur".[82]

With greater identity-specificity, the Declaration reaffirms that "indigenous individuals are entitled without discrimination to all human rights recognized in international law".[83] Article 1 formally recognizes that universal guarantee,[84] while Article 2 recognizes that indigenous individuals are "free and equal to all other…individuals and have the right to be free from any kind of discrimination" in the exercise of their rights.[85] Eleven other articles recognize the indigenous

[75] UNDRIP, preamble, first para.
[76] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) [ICESCR].
[77] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 13 March 1976) [ICCPR]. See UNDRIP, Preamble, sixteenth para.
[78] Universal Declaration on Human Rights GA Res 217A (III), A/810 (adopted 10 December 1948) [UDHR].
[79] Preamble, fourth para.
[80] Preamble, sixth para.
[81] Preamble, seventh and eight paras.
[82] Preamble, ninth para.
[83] Preamble, twenty-second para. Emphasis added.
[84] Article 1.
[85] Article 2.

individual as a rightsholder [86] while eight other articles reiterate non-discrimination. [87] Besides general rights to equality and non-discrimination, familiar *everyone* rights protected in UNDRIP include rights to "life", "liberty", integrity of person, "peace and security", [88] name or identity, [89], education, [90] employment, [91] participation, [92] health, [93] and religion. [94] Like previous *no-one* instruments, UNDRIP also recognizes the special vulnerability of indigenous women to discrimination by virtue of being women[95] and re-emphasizes that they are universal rightsholders.[96]

The Declaration is also keenly aware of the *complex someone* narrative evident in instruments such as the Convention on the Rights of the Child 1989 [97] ('the Children's Convention') and the Convention on the Rights of Persons with Disabilities 2006[98] (CRPD). Like those instruments, UNDRIP incorporates the right to be included[99] but also to be different.[100] Indigenous children are specified as rightsholders in at least five articles.[101] Their vulnerability to rights violations because of their age and other factors is recognized in Articles 21(2) and 22. Both require that "particular attention shall be paid to the rights and special needs of indigenous…youth, children and persons with disabilities". [102] Similarly, the Preamble recognizes the special role which families and communities play in the

[86] Including arts 6-9, 14, 17, 21-22, 24, and 33
[87] Including arts, 9, 14(2), 15(2), 16 (1-2), 17(3), 22(2), 24, and 29(1).
[88] Article 7.
[89] Articles 13(1) and 33.
[90] Articles 14, 15 and 17.
[91] Article 17.
[92] Articles 18-19
[93] Articles 23 and 24.
[94] Articles 11, 25, 34, 36(1),
[95] Articles 21(2) and 22 (1) and (2).
[96] Article 44: "All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals". Compare with no-one narrative in CEDAW, discussed in previous chapter at 5.2.2.
[97] Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [CRC].
[98] 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) [CRPD].
[99] Including arts 14(2) and 33. The CRPD is heavily premised on inclusion but requires effective measures aimed at different rights needs of those with disabilities included innovative approaches to access.
[100] Preamble, second para, and arts 5 and 33. Article 5 recognizes "the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."
[101] Articles 7(2), 14(2) and (3), 17(2), 21(2), and 22(1) and (2).
[102] UNDRIP, art 21(2) and 22(1) and (2).

realization of rights for the indigenous child[103] and, again, the child's right to a name and identity.[104] UNDRIP also recognizes the dangerous intersection of age, gender and disability[105] and requires awareness-raising human rights education on the part of States to counter discrimination.[106]

Other provisions are clearly aimed at protecting indigenous individuals as members of racial, ethnic *minorities*. As in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992[107] ('the Minorities Declaration'), States are to prevent, among other forms of discrimination, "[a]ny action which has the aim or effect of depriving" indigenous individuals "of their cultural values or ethnic identities", "[a]ny form of forced assimilation or integration" and "[a]ny form of propaganda designed to promote or incite racial or ethnic discrimination directed against them".[108] Indigenous communities similarly retain rights to "practise and revitalize their cultural traditions and customs",[109] "manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies"[110] and "revitalize, use, develop and transmit to future generations" community "history… languages, oral traditions, philosophies, writing systems and literatures".[111] Participation by indigenous peoples in local and regional decision-making in which they have a stake is also consistent with the Minorities Declaration.[112]

As with the previous multi-narrative, the focus and driver of the Declaration is clearly substantial equality. More than half of UNDRIP's rights either directly or indirectly protect economic, social and cultural rights[113] (ESCRs). There is no formal categorization between UNDRIP's civil and political rights (CPRs) and its

[103] Preamble, thirteenth para.
[104] Articles 13(1) and 33.
[105] UNDRIP, art 21(2) and 22. Compare with CRPD, arts 6 and 7.
[106] UNDRIP, arts 15 and 16. Compare with CRPD, art 8.
[107] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities GA Res 48/138, A/RES/48/138 (1993) [Minorities Declaration].
[108] Article 8(2)(a), (d) and (e). Compare with rights to enjoy culture and preserve identity with Minorities Declaration art 2 (1), discussed in Chapter Five at 5.2.3.
[109] Article 11(1).
[110] Article 12(1).
[111] UNDRIP, art 13(1). In addition to the education rights discussed below at…, other apparent minority-based rights include appropriate reflection of indigenous culture and identity in public information (art 15) and the media (art 6). Compare with art 27, ICCPR.
[112] Compare art 18 of UNDRIP with Article 2(3) of the Minorities Declaration, for instance.
[113] Including arts, 3-5, 10-15, 17, 20-21, 23-28, 31-36, and 39. Compare with similar rights in the ICESCR.

ESCRs, nor any hierarchy prioritizing CPRs. Rather the various rights are intermingled throughout the Declaration. As Article 43 recognizes, UNDRIP's ESCRs and CPRs together constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world".[114]

States are directed to take positive steps in regards to at least twenty UNDRIP rights, with most entailing the familiar "effective measures"[115] found in previous ESCR instruments.[116] The ESCRs recognized in UNDRIP are clearly linked with those documents. The Preamble encourages "States to comply with and effectively implement *all* their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights".[117]

Special measures, once again, are specifically approved under Article 21 in relation to especially vulnerable groups including "indigenous elders, women, youth, children and persons with disabilities".[118] Article 22 similarly requires "[p]articular attention…be paid to" those groups but reemphasizes two groups especially vulnerable to intersectionality, compounding and multiplication, namely women and children.[119]

Thus, from the outset, the Declaration resembles the previous multi-narrative's reconciliation of the guarantee/reality gap, identity-specificity, flexibility and States obligations.

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[114] UNDRIP, art 43.
[115] See arts 8(2), 11(2), 12(2), 13(2), 14(3), 15(2), 16(2), 17(2), 19, 21(2), 22(2), 24(2), 26(3), 27, 29(1-3), 3(2), 31(2), and 32(2-3). The nineteenth paragraph of the preamble "[e]ncourag[es] States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights…"
[116] See arts 8(2), 11(2), 12(2), 13(2), 14(3), 15(2), 16(2), 17(2), 19, 21(2), 22(2), 24(2), 26(3), 27, 29(1-3), 3(2), 31(2), and 32(2-3). The nineteenth paragraph of the preamble "[e]ncourag[es] States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights…": see similar obligations in regards to the ICESCR, Maastricht Guidelines and Limburg Principles, discussed in previous chapter at 5.4.2.
[117] Preamble, nineteenth para. Emphasis added.
[118] Articles 21(2). Also see Article 22.
[119] Article 22.

6.3.3 ANOTHER NARRATIVE: HISTORICAL SELF-DETERMINATION

The specifically indigenous human rights guaranteed by Declaration are the seeming culmination of the evolution of international law. The bigger story of UNDRIP, however, might not be how consistent these specifically indigenous rights are with previous equality- and non-discrimination-driven human rights statements but rather its affirmation of collective, remedial, self-determination-based rights. Crucially, these rights recognize ongoing harm, prior sovereignty and a historical continuum of timeless rights.

In the language of justice and self-determination, UNDRIP directly responds to historic and ongoing human wrongs, even assimilative and "racist" "doctrines, policies and practices" [120] and other "historic injustices" arising from "colonization"[121] and recognizes the "urgent need to respect and promote" human rights [122] and to "bring an end to all forms of discrimination and oppression wherever they occur". [123] Many of its provisions address indigenous-specific human rights violations commonly associated with colonialism including deprivation of identity, "forced assimilation or integration", and "any form of propaganda designed to promote or incite racial or ethnic discrimination directed against" indigenous people, [124] as well as the forcible removal of indigenous children from their families. [125] In contrast to an irrelevant history, UNDRIP recognizes that such wrongs continue to be perpetrated against indigenous peoples.

Thus, UNDRIP displays a keen awareness of both historic and ongoing aspects of the global mo'olelo and the causal connection between colonialism and present rights denials. Rather than an arbitrary circumstance of the indigenous rightsholder's veiled identity to be excluded by historical supersession, addressing and remedying the effects of colonialism is organically connected to the enjoyment of all other human rights.

[120] Preamble, fourth para.
[121] Preamble, sixth para.
[122] Preamble, seventh and eight paras.
[123] Preamble, ninth para.
[124] Article 8(2)(a), (d)-(e).
[125] Article 7(2). Encompasses, for instance, the "Stolen Generations" of Australian.

The Declaration also recognizes the residual political status of indigenous peoples—even their prior sovereignty. In contrast to previous instruments,[126] most of UNDRIP's rights are held, not by indigenous individuals or members of minority groups but by indigenous *peoples*. The prioritization of the indigenous collectivities as UNDRIP's primary rightsholders is unmistakable. The term "peoples" is used at least 98 times in UNDRIP while "individual" or "individuals" are only used eleven times. Out of a total of 46 articles, 30 relate to indigenous peoples alone,[127] while only 2 can be claimed by indigenous individuals alone.[128] Another 12—including Articles 1 and 2 which guarantee equality and non-discrimination—recognize both "peoples" and "individuals" [129] as UNDRIP's rightsholders. These collective and individual rights sit side-by-side without ready categorization or hierarchy. Ultimately, the term 'indigenous' preceding both 'peoples' and 'individuals' itself references a specific collective identity—and history. As described further below,[130] the term 'people' is usually reserved for collectivities possessing an expanded degree of self-determination.

More than liberal equality, self-determination underwrites UNDRIP. Placed immediately after Articles 1 and 2's equality and non-discrimination, UNDRIP's Article 3 changes "*All*" to "*Indigenous*" but otherwise repeats core human rights treaties, including the UN Charter, ICCPR and ICESCR, verbatim: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[131] The Article 3[132] right to self-determination is the "fundamental underlying principle" [133] of the Declaration, and the Preamble "affirm[s] the

[126] For instance, ILO Convention No 169 uses the term "peoples" liberally but limits rights to an everyone/no-one parity, specifically excluding international understandings of 'self-determination': see comments in previous footnotes 51 and 52. The Minorities Declaration 1992 emphasizes ethnic minorities which may or may not have adjacent political rights including self-determination.
[127] UNDRIP, arts 3-5, 10-13,15-16, 18-20, 23, 25-32, 34-39, 41, 43 and 45.
[128] UNDRIP, art 6 on the right to a nationality and Article 44 which reiterates the dichotomized no-one emphasis on women as rightsholders found in the Preamble of the UDHR, Article 3 ICESCR and CEDAW generally: see previous chapter at 5.1.2.
[129] Articles 1-2, 7-9, 14, 17, 21-22, 24, 33, and 40.
[130] At 6.6.1.
[131] Article 3 repeats almost verbatim Article 1 of the ICESCR and ICCPR, as well as para 2 of Part I of the *Vienna Declaration and Programme of Action* A/CONF.157/23 (1993). All three declare: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".
[132] CHR *Report of the working group established in accordance with the Commission on Human rights resolution 1995/32* E /CN.4/2001/85 (2001) [WGIP report 2001], para 58.
[133] As described by the Working Group on Indigenous Populations during drafting: WGIP Report 2001, para 56.

fundamental importance of the right to self-determination of all peoples" consistent with the UN Charter, ICESCR, ICCPR and the Vienna Declaration and Programme of Action 1993 ('the Vienna Declaration'). [134]

Closely related, Article 4 recognizes "the right to autonomy or self-government in matters relating to their internal and local affairs".[135] This *internal* aspect resembles certain features of Kymlicka's liberal multiculturalism and the *Mancari* exception recognized in American federal Indian law. In the spirit of dual citizenship discussed in Chapter Two, this internal self-determination seems to embody the right to 'opt out' as it were. Article 5 recognizes:

> ...the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining the right to participate fully, *if they so choose*, in the political, economic, social and cultural life of the State.[136]

It goes much farther, however, appearing to entail a measure of the "belated nation-building" described by Erica-Irene Daes.[137]

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[134] UNDRIP, sixteenth para. The *Vienna Declaration* was the product of the second global human rights conference held since World War II held in 1993. It was adopted at the conference by consensus by the 171 nations represented at the conference, on 25 June 1993. It was late endorsed by the UN General Assembly as part of Resolution 48/121.

[135] UNDRIP, Articles 3-4. Article 3 repeats almost verbatim Article 1 of the ICESCR and ICCPR, as well as para 2 of Part I of the Vienna Declaration. All three declare: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

[136] Article 5. Emphasis added.

[137] State-building is usually a *post-conflict* process which can be either internally (from within the country) or externally (by other nations) driven. It follows in the wake of "state failure", where weak states fail to provide the basic infrastructure of a state, including "security", a "legal system" and "economic and communication infrastructures": Armin von Bogdandy et al "State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches" in Armin von Bogdandy and R Wolfrum (eds) (2005) 9 Max Planck Yearbook on United Nations Law 579, at 580. State-building means that such structures are created, strengthened or rebuilt in order to sustain long-term development.

"Belated nation-building" is a phrase coined by Erica-Irene Daes in "Some Consideration on the Right of Indigenous Peoples to Self-Determination" (1993) 3 Transnat'l L & Contemp Probs 1, to describe a *post-colonial* process by which "[i]ndigenous peoples [who] were never a part of State-building… have the opportunity to participate in designing the modern constitution of the State in which they live, or share, in any meaningful way, in national decision-making.": Daes, at 9. Belated State-building is a "peaceful" and internal form of self-determination exercised by indigenous peoples "within existing State structures and orders" through which historical injustices are addressed "by imposing obligations on States to accommodate Indigenous Peoples through constitutional means in order to share power democratically": John Buick-Constable "A Contractual Approach to Indigenous Self-Determination in Aotearoa/New Zealand (2002) 20(1) Pacific Basin Law Journal 113, at 113-114. This internal form is similar to the options explored by S James Anaya and Robert A Williams Jr in their *Study on the International Law and Policy relating to the Situation of the Native Hawaiian People* (Indigenous Peoples Law and Policy Program, The Unviersity of Arizona, James E Rogers College of Law, June 2015). Anaya has previously discussed what this internal form of self-determination might require: see S James Anaya "Indian Givers: What

Beyond *Mancari* and the whims of federal recognition, the Declaration also seemingly recognizes a historical continuum of virtually timeless, permanent indigenous rights. In view of numerous articles on the preservation, protection and transmission of indigenous identity and culture, the rights-holder under UNDRIP is part of a once-and-future community of rightsholders. [138] For instance, Article 11 protects "the right to maintain, protect and develop the past, present and future manifestations of culture".[139] Article 45 likewise looks forward to assure us that nothing in the Declaration is meant to diminish or extinguish existing indigenous rights now *or* in the future.[140] Thus, the Declaration recognizes pre-existing rights rather than merely prescribing or imposing liberal rights to address present disparities.

6.3.4 THE RATIONAL AND REMEDIAL INDIGENOUS LEARNER: ARTICLE 14

Article 14 of UNDRIP is consistent with the previous multi-narrative but premised on self-determination. It recognizes that:

> 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous Peoples Have Contributed to International Human Rights Law" (2006) 22 Wash U J L & Pol'y 107, at 116-117. Also see his example of the Miskito Indians in S James Anaya "Indigenous Peoples in International Law (Oxford, Oxford University Press, 2004), at 114.
In terms of the current situation of Native Hawaiians, the internal aspect could recognize what the Kamehameha Schools are already doing—that is, operating as an indigenous educational system which provides financial backing, research know-how, and community access to indigenous resources. Regardless of whether recognized in the law or not, this is already a significant measure of internal self-determination. However, in the spirit of belated state-building or even the notion of nation-building, the Schools' right to perform and participate must be legally recognized as the rights of a people albeit within an existing state. The degree to which this might be possible may depend on the shape of the self-determination which emerges from the current federal-Native Hawaiian dialogue. At some stage, the right to self-determination may be weakened without a recognizable face and form of this nation but also without greater education for Native Hawaiian constituents on the process and what might be at stake.. For example, an attempt to have Kau Inoa roll members vote for candidates to represent them at a hui to discuss these kinds of matters earlier this year failed because of some of these issues with many constituents refusing to vote because they did not know any of the candidates, for instance.

[138] See arts 5-6, 11-13, 15-16, 20, 24-25, 31, and 33-34.

[139] Article 11. Emphasis addded. Obviously, culture itself is a right which only makes sense in collective terms. In terms of future manifestations of the right, Article 25 recognizes both traditional guardianship and caretaker roles over the environment as well as "responsibilities to future generations".

[140] Article 45.

> 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
>
> 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.[141]

Article 14(2) references *everyone*[142] ("all"), *no-one*[143] ("without discrimination") and the *complex someone*[144]—"particularly children". This learner is specifically guaranteed previously promised universal individual rights to a public education but also the *Mancari*-like option[145] to attend a parallel indigenous educational institution such as Kamehameha Schools, as well as rights to an education in their own culture and language where they constitute a minority.[146]

In name[147] and substance, however, all Article 14 rights are owned by the indigenous learner. Under Article 14, the rights-holder is both the indigenous learner *and* their community. Preference for the indigenous learner in admissions is implicit and emphasized by the repeated use of the possessive pronoun 'their'. While all children have a universal right to education and while Article 14 is consistent with the previous *everyone/no-one* instruments, the right to attend and institution like the Kamehameha Schools—and to establish and control it—is owned by collective indigenous learners.[148] Significantly, the right actually precedes Article 14's non-discrimination and minority-like provisions which also belong to indigenous peoples.

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[141] Article 14. Emphasis added.
[142] Terms including 'all' and 'everyone' are used frequently in human rights instruments which primarily recognise the homogenous, universal human being as a rightsholder. Examples include the UDHR, ICCPR and ICESCR: see discussion in previous chapter at 5.2.2.
[143] Although not using the term 'no one', the inclusion of a statement on non-discrimination is consistent with instruments which frequently do including CADE, Race Convention and CEDAW: see discussion in previous chapter at 5.2.2.
[144] As in the Children's Convention and CRPD.
[145] See dual citizenship discussed in Chapter Two at 2.3.2.
[146] See minority education rights discussed in Chapter Five at 5.2.3.
[147] I do not suggest here a homogenous global indigenous community. As frequently emphasized in UNDRIP's drafting and elsewhere, indigenous communities share similar and common histories and ongoing experiences of discrimination and disparities in the wake of colonialism but are actually quite diverse in language, culture, religion, geography and other aspects. The common experience of such diverse peoples speaks to the significance of the impact of colonialism and the inherent unfairness of dismissing it as an irrelevant consideration in terms of equality and non-discrimination. Rather than an "arbitrary" circumstance of the indigenous individual it constitutes a significant obstacle to actual enjoyment of human rights.
[148] Article 14(1).

Article 14 and related rights reveal the positive value UNDRIP places on indigenous cultural membership. Contextually, Article 14 is preceded by rights: to "revitalize...cultural traditions and customs"[149]; to "teach...spiritual and religious traditions, customs and ceremonies"[150]; and "to revitalize, use, develop and transmit to future generations their histories, language, oral traditions, philosophies, writing systems and literatures..."[151] Like the public good of educating all learners in Native Hawaiian history and culture envisioned by the Hawai'i State Constitution,[152] Article 14 is followed by the "right to the dignity and diversity of indigenous cultures, traditions, histories and aspirations which shall be appropriately reflected in *education*".[153] With Article 14, these rights form a list of identity-specific primary goods for the indigenous human being in education—or, again, "the minimum standards for the survival, dignity and well-being of" the indigenous learner specifically.[154]

Other rights also address indigenous-specific human wrongs in education, even the disadvantage of cultural membership. In its specificity, UNDRIP clearly and directly responds to specific injustices historically and currently suffered by indigenous children—including Native Hawaiian children—such as legal prohibitions on the use of indigenous languages,[155] majority-biased texts, curriculum and pedagogy, the abuses associated with the boarding school experience of indigenous peoples globally.[156]

The right to establish and control such schools expresses the more general right of indigenous peoples to self-determination—or the collective right of peoples. During drafting, attempts by States to insert the word "individuals" instead of "peoples" and make the right to establish and control parallel indigenous institutions subject to some degree to "competent authorities of the State, and in accordance with applicable education laws and standards" were rejected. The same

[149] Article 11(1).
[150] Article 12(1).
[151] Article 13(1).
[152] Compare with Hawaii State Constitution, Art X discussed in Chapter Four at 3.2.2.
[153] Article 15(1). Emphasis added. Art 15(2) clearly refers to previous instruments on the purpose of education in its aim of "combat[ting] prejudice and eliminate[ing] discrimination and...promot[ing] tolerance".
[154] Article 43.
[155] Such as that against the use of Native Hawaiian in education from 1897 in the State of Hawai'i .
[156] For global picture of boarding school experiences, see Andrea Smith *Indigenous Peoples and Boarding Schools: A comparative study* E/C.19/2009/CRP.1 (2009).

draft would have made the universal right of indigenous individuals to "all levels and forms of education of the State" the "same" as other individuals and placed it before the collective right.[157] This wording was also rejected.

Ultimately, Article 14 is comprehensive and flexible in narrative. As described in Chapter 5,[158] the international human rights framework has shown itself to be narratively flexible where substantial equality is at stake. Article 14's flexibility of narrative is consistent with complex someone instruments such as the Children's Convention and the CRPD. Where the Children's Convention and CRPD are highly flexible and subjective in approach, Article 14 recognizes the right of the indigenous learner to claim a public education in association with other universal rightsholders but also their identity-specific right to attend a parallel institution tailored to their identity and both the good and disadvantage it draws. The indigenous-specific right to education is considered so important States are to "take effective measures", including special measures, to realize it.[159]

6.4 TENSION

Despite its consistency with the previous evolution of the right to education and with fundamental principles of equality and non-discrimination, UNDRIP's specifically-indigenous rights have raised several concerns relative to equality narratives.

Megan Davis has identified several "key themes emerging from the somewhat discursive multi-disciplinary commentary" on UNDRIP,[160] including "sovereignty, collective rights versus individual rights…and the right to self-determination and

[157] See WGIP report 2001, above n 131, Annex I, "Amendments Proposed by Governments for Future Discussion", at 30.
[158] See discussion at Chapter Five at 5.1.
[159] Article 14(3).
[160] Megan Davis "To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years ON" (2012) A U Int Law Jl 3 at 17.

democracy and participation".[161] Similar concerns plagued drafting where former settler states:[162]

> claimed that the provisions on lands, territories and resources were particularly unworkable and unacceptable, "by appearing to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous (Article 26).19 Such provisions would be both arbitrary and impossible to implement". The three states also claimed that other provisions in the declaration were potentially discriminatory. "The intent of the Working Group was not that collective rights prevail over the human rights of individuals, as could be misinterpreted in Article 34 of the text and elsewhere".[163]

These *everyone/no-one* fears were later apparent in the 'no' votes of Canada, Australia, New Zealand and the United States (together, the 'CANZUS' states) upon the adoption of UNDRIP in 2007.[164] In their respective explanations of vote, each state claimed to be a historical champion of indigenous rights domestically but struggled to reconcile UNDRIP with its present law. Echoing Waldron's supersession,[165] Canada's representative expressed concerns about provisions on land and resources being "broad" and "capable of variety of interpretations" and the requirement of "free, prior and informed consent" being "unduly restrictive". Canada considered this a veto power.[166] New Zealand also considered provisions on lands and resources, redress and "the right to veto" to be "fundamentally incompatible with [its] constitutional and legal arrangements" including the Treaty of Waitangi which was "unique".[167] It also claimed that such rights "implied

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[161] Davis' list includes "lands territories and resources, sovereignty, collective rights versus individual rights, cultural heritage, free prior and informed consent, and the right to self-determination and democracy and participation. Another distinguishing feature of this literature is a curious over-emphasis or authority afforded to the four original dissenters—Canada, Australia, New Zealand and the United States": ibid, at 25. Footnotes excluded.

[162] Asbjørn Eide ""The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples" in Charters and Stavenhagen, above n 7, 32. "Opposition to the declaration came from two quite different quarters: from four countries outside Europe which, at some stage, had been British colonies and which now had an English-speaking majority (Australia, New Zealand, Canada, the United States), along with substantial numbers of indigenous peoples on their territories, and from African countries. The Russian Federation, which has indigenous peoples on its territory, though fewer in number, also opposed the draft declaration.": Eide at 39.

[163] Ibid, at 40.

[164] 143 nations in favour, 4 against and 11 abstentions: see "UN Adopts Declaration on Rights of Indigenous Peoples" (13 September 2007) United Nations <www.un.org>.

[165] For instance, in Jeremy Waldron "Superseding Historic Injustice" (1992) Ethics 103 4.

[166] See General Assembly Adopts Declaration on Rights of Indigenous peoples; 'Major Step Forward' towards Human Rights for ALL, Says President" (13 September 2007) United Nations <www.un.org>.

[167] See General Assembly Adopts Declaration on Rights of Indigenous peoples; 'Major Step Forward' towards Human Rights for ALL, Says President" (13 September 2007) United Nations <www.un.org>. Compare with arguments in Chapter 7 that Treaty of Waitangi is compatible with UNDRIP and part of NZ's constitutional arrangements.

different classes of citizenship" to the unfair advantage of indigenous peoples. While the United States largely criticized the drafting process and product,[168] it also expressed fears of "endless conflicting interpretations and debate about its application" and self-determination.[169]

Australia unequivocally opposed self-determination, officially stating:

> The Australian Government has long expressed dissatisfaction with the references to self-determination in the Declaration, [its representative] said. Self-determination applied to situations of decolonisation and the break-up of States into smaller states with clearly defined population groups. It also applied where a particular group with a defined territory was disenfranchised and was denied political or civil rights. The government supported and encouraged the full engagement of indigenous peoples in the democratic decision-making process, but did not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a State with a system of democratic Government.[170]

The subsequent acceptance of UNDRIP by the CANZUS states remained reluctant. Both New Zealand and the United States, for instance, emphasized that UNDRIP was only "aspirational" and not legally binding. Although affirming indigenous rights, New Zealand Prime Minister John Key claimed the Declaration "will have no impact on New Zealand law and no impact on the constitutional framework".[171] The US State Department sounded terse as it "proudly len[t] its support" to UNDRIP with the proviso that its right to self-determination was not that recognized traditionally but "a new and distinct international concept of self-

[168] Claiming, for instance, that the drafting process and final provisions were not transparent despite the unprecedented inclusion of participants in the drafting process and the lengthy, pedantic process of drafting, and also that, despite such a process and the adoption by a vote of 143 states to 4, that UNDRIP was not a "consensus text".

[169] (USUN) Press Release 204(07) "Explanation of Vote, by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, statement to the UN General Assembly" (13 September 2007) United States Mission to the United Nations <www.usunnewyork.usmission.gov>.

[170] See General Assembly Adopts Declaration on Rights of Indigenous peoples; 'Major Step Forward' towards Human Rights for ALL, Says President" (13 September 2007) United Nations <www.un.org>.

[171] Rt Hon John Key "UN Declaration on the Rights to Indigenous Peoples" (20 April 2010) 662 NZPD 10238. Even while Dr Pita Sharples, Maori Affairs Minister, claimed that the Declaration was "entirely consistent" with the Treaty of Waitangi: Ninth session of the United Nations Permanent Forum on Indigenous Issues, 19 - 30 April 2010 "Statement by Hon Dr Pita Sharples, Minister of Maori Affairs, 19 April 2010" New Zealand Ministry of Foreign Affairs and Trade <www.mfat.govt.nz>.

determination specific to indigenous peoples" which, to be even clearer, "is different from the existing right of self-determination in international law".[172]

All CANZUS states have also downplayed UNDRIP's rights as expressing rights already recognized within domestic law, further minimizing them.

Such tension may be manifest in UNDRIP itself. Article 46 reads:

> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
>
> 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of *all* shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of *others* and for meeting the just and most compelling requirements of a democratic society.[173]

Article 46(1) seems to distinguish *indigenous* self-determination from the unqualified right of peoples recognized in the Charter, ICCPR and ICESCR, casting some doubt on what the right really guarantees. Article 46(1) also seems to presume that indigenous peoples are seeking complete decolonisation-era secession, echoing Waldron's cultural stasis. Conversely, Article 46(1) precludes decolonisation rights consistent with the unique history of a democratic nation which never relinquished its sovereignty and its later status as a non-self-governing territory.[174]

Article 46(2) could seemingly be used to validate the kind of individual trumping of collective rights Kymlicka would use to curb internal majority oppression in a *Santa Clara Pueblo v Martinez*[175] scenario where admissions-like membership rights were at stake. As Chapter Two and Three describe, democratic limits have also most often meant the imposition of a singular everyone/no-one narrative

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[172] "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples." US State Department <www.state.gov>. Though, in the same announcement, it went on to detail all the efforts it was already making within domestic legal frameworks to assist indigenous peoples.
[173] UNDRIP, Article 46. Emphasis added.
[174] See discussion in Chapter Three at 3.2.1.
[175] *Santa Clara Pueblo v Martinez* 436 US 49 (1978), discussed in Chapter Two at 2.3.2.

masking majoritarian bias and justifying assimilation and discrimination on indigenous Americans.

6.5 BEYOND TECHNICALITIES

Despite the tension between individual and collective rights in UNDRIP, many of the above concerns feel, to some extent, like technicalities in the face of the global mo'olelo of multigenerational trauma, chronic stress, extreme allostatic load, cyclical, cumulative and otherwise complex discrimination and disparities unrelentingly attracted to indigenous identity. States' objections seemingly sidestep the real issue: the gap between clear legal commitment to the rights and the ongoing reality of complex discrimination and disparities for indigenous peoples and individuals. Critics, particularly States, appear to cling to technicalities which favor a *singular everyone/no-one* narrative and ignore the substantive content of Article 14 and other indigenous human rights. As Davis' work shows, a significant number of scholars also remain fixated on *everyone/no-one* interpretations of the Declaration.

Consistent with the overall project of this thesis, it is vital to move beyond technicalities to address the substantive content of these rights and the drivers behind them—though the technicalities will be addressed shortly. Article 14, particularly, seemingly defies technicalities in both its innocuousness and potential in terms of the realization of most if not all other human rights and freedoms. It appears to be, like its multi-narrative predecessor, a human rights multiplier and also legal and justiciable. The right to self-determination which underwrites it is itself a multiplier, legal and justiciable. As such Article 14 and associated rights have a significant narrative capacity to reconcile guarantee/reality gaps and unique historico-legal context.

6.5.1 ORGANIC MULTIPLICATION

Article 14(1) appears to be organically crucial to the enjoyment of most if not all other indigenous rights in UNDRIP—but also to the enjoyment of most if not all other human rights, including both CPRs and ESCRs. Self-determination itself complements the project of the earnest liberal given its organic potential. Importantly, a denial of the indigenous right must seemingly foreclose both *indigenous* and *everyone/no-one* human rights.

The Declaration reiterates the Vienna Declaration's unequivocal statement that "All human rights are universal, indivisible and interdependent and interrelated".[176] So-called ESCRs and CPRs are intermingled throughout UNDRIP without categorization or hierarchy. However, many express Article 4's right to economic, social and cultural development. The indivisibility of these indigenous rights is consistent with the previous multi-narrative which prioritized substantial equality and displayed buffer-and-access features. These provisions leave little doubt that the realization of the fundamental human rights of indigenous peoples depends to a great extent on economic, social and cultural development which, in turn, relies on the realization of individual rights such as education.[177] The emphasis on ESCRs speaks to the rights situation of the most vulnerable human beings, even the *indigenous learner* and, particularly, to the cumulative, intersectional and compounding nature of complex discrimination and disparities.

The right to self-determination itself is an organic multiplier and vital buffer-and-access mechanism in terms of indigenous peoples. The Declaration cites the ICESCR, ICCPR and Vienna Declaration as authorities for the right to self-determination.[178] The *everyone/no-one* features and substantive focus of ICESCR and ICCPR rights were discussed at length in the previous chapter,[179] and the

[176] Vienna Declaration, part I, para 5. Again, the Vienna Declaration represents a persuasive international consensus on human rights.
[177] This is supported in the drafting history of UNDRIP, reports of Special Rapporteur...This focus on development of course, is most apparent in the Millennium Declaration and the resulting Millennium Development Goals, as discussed. Also see Birgitte Feiring "Including indigenous peoples in Poverty Reduction Strategies: A Practical Guide Based on experiences from Cambodia, Cameroon and Nepal" (ILO, 2008).
[178] Preamble sixteenth para.
[179] See discussion in Chapter Five at 5.2.1.

Vienna Declaration[180] similarly views the "human person" as the primary subject of human rights.[181] However, each of these important human rights statements also recognizes the right of peoples to self-determination. The Vienna Declaration, representing an overwhelming consensus of the international community, [182] seemingly recognizes the right of peoples like Native Hawaiians to self-determination and considers its denial a human rights "violation":

> Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.[183]

In similar terms, the Human Rights Committee has stated that:

> ...The right to self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all the other rights in the two Covenants.[184]

The norm of self-determination can be seen as promoting a kind of collective rational revision—essentially, the legal space for *peoples* to determine their own destinies without undue interference from other nations.[185] Though traditionally associated with the sovereignty of the nation-state in international law, it is nonetheless justified as a protection for the individual rights within those states.[186] Fundamentally, de facto equality between peoples—even between distinct ethnic

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[180] These were important statements which put the CPR/ESCR division beyond debate and emphasized the need for States to take effective steps to promote and protect human rights and freedoms particularly for some of the most vulnerable groups in society including minorities, women and the girl-child, indigenous peoples, refugees and those in war zones.
[181] Vienna Declaration, preamble.
[182] There were 171 Nations at the Conference. It was later adopted by the UN General Assembly.
[183] Vienna Declaration, Part I, para 2. Thus there is a consistency with decolonisation instruments without the questions of territorial integrity.
[184] HRC, General Comment 12, para 1.
[185] Contrast with Rawls' conditions for individual rational revision, for instance, his exclusion of arbitrary advantages through the first principle of justice, the veil itself and original position all aimed at minimizing interference with an individual's capacity to choose the path of their life: see Chapter Four at 4.2.2.
[186] S James Anaya "The Native Hawaiian People and International Human Rights Law: A Remedy for Past and Continuing Wrongs" (1994) 28 Georgia Law Review 309. Though States may fail to fulfil this role, particularly where indigenous peoples are concerned.

groups—will result in equality between individuals. This reasoning recalls early Permanent Court of International Justice minority rights cases.[187]

The Declaration also affirms the organic relationship between Article 3's right to self-determination and the enjoyment of all other UNDRIP rights—as well as all other human rights and freedoms. The Preamble "affirm[s] the fundamental importance of the right to self-determination of all peoples" to "political status" and "economic, social and cultural development"[188]—or both the external and internal aspects affirmed in Articles 3 and 4. Given the reach of Articles 3 and 4—particularly, the right to economic, social and cultural development—self-determination underwrites almost every article in UNDRIP.[189]

Throughout UNDRIP's drafting, indigenous participants adamantly and consistently opposed any 'watering down' of the Article 3 right as a violation of equality, non-discrimination and other fundamental human rights and freedoms. In collective terms, any distinction between indigenous peoples and other peoples in the scope of the right to self-determination was seen as a violation of those rights and norms. [190] Indeed, the proposition sounds suspiciously like withholding human rights on the basis of indigenous identity or racial characteristics. As discussed in the previous chapter, there is significant precedent in international law for increased identification of rightsholders—where the goal is ensuring the enjoyment of rights[191]—but none for negative discrimination which would withhold rights. To the contrary, the latter is inconsistent with the fundamental homogeneity and anonymity of supposedly universal human rights.

During drafting, self-determination was viewed as a "fundamental condition for the enjoyment of other human rights and fundamental freedoms". More than mere social justice, the very survival of indigenous peoples was seen as dependent on "full control, politically, economically, socially and culturally, over their lives".[192]

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[187] Previous chapter at 4.2.3.
[188] UNDRIP, preamble, sixteenth para citing the Charter, the ICCPR, ICESCR and the Vienna Declaration as authority.
[189] As discussed above, arts 6 and 44 are the only provisions which address individual rights alone, while art 46 addresses democratic and other limits on the right.
[190] See for instance, WGIP Report 2001, above n 131, at 56-84.
[191] So-called positive discrimination like that distinguished in *United States v Carolene Products* 304 US 144 (1938) Footnote Four: see Chapter Two discussion on demise of affirmative action at 2.4.1.
[192] WGIP Report 2001, above n 131, para 56.

Again, self-determination was never a matter of creating special advantages but rather about remedying disadvantage.[193] For example, during the later stages of drafting, the African Commission on Human and Peoples' Rights (ACHPR) responded to the concerns of African nations:

> ...In Africa, the terms 'indigenous peoples or communities' is not aimed at protecting the rights of the 'first inhabitants that were invaded by foreigners'. Nor does the concept aim to create hierarchy among national communities or set aside special rights for certain people. On the contrary, within the African context the term 'indigenous peoples' aims to guarantee equal enjoyment of rights and freedoms to some communities that have been left behind...[194]

The culmination of such organic indivisibility is clear in Article 14 and associated rights. As discussed extensively in the previous chapter, the right to education is fundamentally a multiplier of other rights whose denial must result in the denial of most, if not all, other human rights. The right to self-determination, which underwrites Article 14(1), is a multiplier itself, whose enjoyment enhances the realization of—and whose denial shuts down—most, if not all, other human rights. Article 14(1)'s self-determination-based education rights must represent both multipliers, while an educational system like the Kamehameha Schools is the very incarnation of those organic relationships.

6.5.2 MORE EMPHASIZED LEGALITY

Not unlike the previous evolution of the right to education, the organic nature of Article 14 and associated rights also points to the emphasized nature of these rights.

One of the main criticisms of UNDRIP generally is that it is only an 'aspirational' document which may or may not recognize existing legal arrangements but does not necessarily add any new legally enforceable rights. Such rhetoric apparently reiterates previous *everyone/no-one* justiciability arguments in terms of the broader human right to education and echoes US exceptionalism in terms of ESCRs and a

[193] S James Anaya "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era" in Charters and Stavenhagen, above n 7, at 196.
[194] African Group of Experts "Response Note the Draft Aide Memoire of the African Group on the Declaration on the Rights of Indigenous Peoples" (21 March 2007) Indigenous Working Group for Indigenous Affairs <www.iwgia.org>. Also discussed in Barume, above n 2, at 174.

strong right to education.[195] Certainly, a lack of legal mechanisms which can enforce the right at the domestic level may also make implementation and realization impossible.[196]

Such arguments, however, are based on the presumption that Article 14 and adjacent rights are less legal than homogenous or anonymous *everyone/no-one* guarantees. Article 14 is the seeming epitome of an emphasized rather than diminished legality given its consistency with *everyone/no-one* guarantees. Importantly, it also linked to the legal and normative status of UNDRIP itself and the broader right to education. This emphasized legality once again signals its genealogy as the culmination of the evolution of the previous right to education driven by considerations of substantive equality and non-discrimination.

6.5.2.1 LEGAL AND NORMATIVE STATUS OF THE DECLARATION

The Declaration itself is not, technically, binding and has no current complaints mechanism. However, several human rights conventions have been preceded by "standard-setting" [197] declarations, including the International Covenants, [198] CERD, [199] CEDAW, [200] and the Children's Convention. [201] In each case, the declarations in question were drafted as forerunners of binding treaties. During UNDRIP's drafting, a declaration rather than a convention was ultimately preferred because the rights situation of indigenous peoples was so urgent. Thus, it may only be a matter of time before such a binding treaty is drafted.

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[195] See discussion in Chapter Two, section 2.5.
[196] Katarina Tomsevski Right to Education Project "Justiciability" at <www.right-to-education.org>
[197] Dalee Sambo Dorough and Megan Davis *Study on an optional protocol to the United Nations Declaration on the Rights of Indigenous peoples focusing on a voluntary mechanism* E/C.19/2014/7 (2014) para 27.
[198] The UDHR.
[199] See "International Convention on the Elimination of All Forms of Racial Discrimiation: Introductory Note" Audiovisual Library of International Law < http://legal.un.org>.
[200] See "Convention on the Elimination of All Forms of Discrimination against Women: Short History of CEDAW Convention" found at UN Women <www.un.org>.
[201] See "The Convention on the Rights of the Child: The Beginnings of the Convention" Humanium <www.humanium.org>.

Although described as "soft law",[202] the UDHR has arguably attained the status of common international law and *jus cogens* despite its technical status as a General Assembly resolution.[203] Again, given the consistency of present UNDRIP education rights with the UDHR but especially with its norms of equality and non-discrimination, UNDRIP itself may reinforce such conclusions. Similarly, Anaya has argued that at least some of UNDRIP's 'indigenous' rights—particularly Article 2 equality and Article 3 self-determination which both underwrite Article 14—are, individually, already human rights and peremptory norms of the highest order as customary international law—or *jus cogens*—making them legal and justiciable with or without a treaty that spells out States parties obligations.[204]

Thus, Dalee Sambo Dorough and Megan Davis have noted that, while the Declaration is technically 'non-binding', it has "normative weight" and "reflects legal commitments". The term "declaration" is "usually reserved for standard-setting resolutions of profound significance".[205] In addition to the urgency of indigenous peoples' rights situation and evidence of customary law,[206] Dorough and Davis have recognized UNDRIP's equality and non-discrimination as peremptory norms important enough to justify an optional protocol.[207] A complaints mechanism would allow monitoring of "both the content and the weight of the Declaration" and also help to clarify its perceived "diminished status", as well as any "diminished commitment ot its terms".[208]

At a more fundamental level, UNDRIP and all of its rights also represent an international consensus. As Ken Coates states, "[t]he United Nations, after all, has spoken. Clearly, national governments must respond".[209] In fact, the Declaration has been endorsed by a majority of the world's nations who, presumably, signed

[202] See Mauro Barelli "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples" (2009) 58 ICLQ 957.
[203] As I have noted in section 2.1.1.
[204] S James Anaya "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era" in Claire Charters and Rodolfo Stavenhagen (eds) Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples (Copenhagen, IWGIA, 2009) 184. Also see author's discussion in section 2.3.2.
[205] Dorough and Davis, above n 197, para 27.
[206] That is, rights evidenced by widespread state practice combined with state belief that such standards are legal: ibid, at paras 31-32.
[207] Ibid, paras 31-34.
[208] Ibid, at paras 26-33.
[209] Ken Coates "From aspiration to inspiration: UNDRIP finding deep traction in Indigenous communities" (18 September 2013) The Rise of the Fourth World <www.cigionline.org>.

the Declaration in good faith[210] and not just as "window dressing".[211] Indigenous peoples have cited the Declaration as an authority for their rights since its adoption, and domestic courts in Africa have already begun to use the Declaration.[212] It has also been incorporated into Bolivian law.[213] Despite exceptionalism, "the Declaration is now part of United States domestic and foreign policy", even "an extension of its international human rights commitments".[214]

6.5.2.2 NO NEW RIGHTS

Education, as described in the previous chapter, has been a fundamental human right in international law since the UDHR and retains elements of universality, human personality development, equality and non-discrimination. As described earlier, Article 14(2), in very language, reiterates the universal right to education found in Article 26 of the UDHR later cemented in Articles 13 and 14 of the ICESCR.[215] All three subsections remain true to the spirit of those earlier rights statements—namely, their focus on substantive equality. Similarly, differences in the text of UNDRIP are consistent with the 4-A Scheme's requirement that education be not only available but accessible, acceptable and adaptable,[216] for instance, Article 14(3) which recognizes that an indigenous-aware education may not be available in the community in which an indigenous child lives.

Certainly, "[t]he Declaration...did not create any new rights".[217] As Special Rapporteur, Anaya wrote:

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[210] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) art 26's principle of "Pacta sunt servanda".
[211] *Tavita v Minister of Immigration* (1993) 1 HRNZ 30 (CA) at 40 per Cooke P.
[212] See Willem Van Genugten "Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems" (2010) 104(1) Amer J Int'l Law 29.
[213] Bolivia was the first country in the world to make the Declaration part of its domestic law when it passed Law No 3760 on 7 November 2007.
[214] S James Anaya *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya" Addendum, "The situation of indigenous peoples in the United States of America"* A/HRC/21/47/Add.1 (2012) paras 83 and 83.
[215] See discussion in section 2.2.3.
[216] See CESCR *General Comment No 13: The Right to Education (Art. 13 of the Covenant)* E/C.12/1999/10 (1999).
[217] *Report on the adoption of the Declaration on the Rights of Indigenous Peoples, 107th and 108th Meetings (AM & PM)* GA/10612 (2007).

> [t]he Declaration does not attempt to bestow Indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of Indigenous peoples.[218]

Similarly, one of UNDRIP's purposes is to "encourag[e] States to comply with and effectively implement all their" human rights obligations[219] in the wake of previous failures to protect the universally guaranteed rights of indigenous peoples. Rather than mere aspiration, the close link between UNDRIP and previous ESCRs argues for the same kind of emphasized legality evident in previous identity-specific instruments.[220] In contrast to a diminished legality, the repetition, reiteration and identity specification evident in Article 14 is consistent with the previous evolution of the human right to education in international law. As before, this emphatic punctuation of human rights and who holds them is driven by the demands of substantive equality and non-discrimination.

Article 14's emphasized character is further demonstrated by potential legal recourse. The Optional Protocol to the ICESCR, for instance, provides a complaints mechanism which can be utilized by "individuals or groups" where any of the ICESCR's rights, including education, are violated.[221] Article 14 may also be clarified through other *everyone/no-one* and *someone* instruments. As discussed in the previous chapter, Article 26, a non-discrimination clause in the *everyone/no-one* ICCPR, has allowed individuals to pursue violations of other ESCRs—regardless of whether the right involved is guaranteed in the ICCPR—where such violations also constitute substantively judged non-discrimination.[222] As a result, the reach of Article 26 must be seen as substantial enough to potentially capture Article 14 as well. Other instruments such as the Children's and Disabilities Conventions which reiterate the right to education and other ESCRs in complex

[218] James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* UN Doc A/HRC/9/9 (2008) para 86.
[219] UNDRIP, preamble, 19th para.
[220] See discussion in previous chapter at 5.5.2.
[221] Arts 1 and 2, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights GA Res 63/117, A/RES/63/117 (2008) [OP-ICESCR].
[222] *SWM Broeks v The Netherlands* Communication No 172/1984, CCPR/C/OP/2 (1990), discussed in previous chapter at 5.5.2.

someone terms also have their own complaints mechanisms[223] through which the right might be buttressed where it is narrated as a children's right to education.

Where Article 14 is considered to be consistent with the non-discrimination clauses and substantively interpreted rights to education in these treaties, states would simply be violating straightforward obligations. Very little in terms of the proverbial leap would be required to utilize these complaints mechanisms in terms of an Article 14 violation. Current international equality narratives would seem to demand this type of equation and translation—particularly, where substantive equality and non-discrimination is at stake.

6.5.2.3 POTENTIAL DOMESTIC EMPHASIS

As demonstrated in the previous chapter, legal recourse in terms of the human right to education may already be available in domestic law even where ESCRs are not formally recognized in a national constitution. Given their narrative consistency with the previous complex human right to education in international law, Article 14 and associated rights may be similarly meaningful and potentially enforceable at the domestic level as well.

The federal courts in *Brown*, *Plyler* and *KS* all recognized a fundamental right to education. Various state constitutions and legislation protect education rights[224] and other ESCRs—if only in the name of equality and non-discrimination as in *Brown*.[225] Despite its reliance on a perhaps mistaken narrative, the Ninth Circuit in the *Kamehameha* case nonetheless protected what would be understood in international law as Native Hawaiians' indigenous human right under Article 14(1) to establish and control their own educational system—albeit in the name of affirmative action—just as the Supreme Court had protected apparent *everyone/no-*

[223] See Optional Protocol to the Convention on the Rights of the Child on a communications procedure 2014 A/RES/66/138 (opened for signature 28 February 2012, entered into force 14 April 2014); and Optional Protocol to the Convention on the Rights of Persons with Disabilities GA Res 61/610, A/RES/61/106, Annex II (2006) [OP-CRD].
[224] See discussion in previous chapter at 5.4.3. Hawaii state law, as discussed in Chapter Three recognizes specifically indigenous education rights.
[225] See discussion in Chapter Three at 3.3.2 and Johanna Kalb "The Persistence of Dualism in Human Rights Treaty Implementation" (2011) 30(1) Yale L & Pol'y Rev 71.

one rights to human personality development and substantial equality in education in the *Brown* and *Plyler* decisions in the name of equal protection. And as described, a significant minority of the Ninth Circuit was convinced that a *Mancari*-like, self-determination-based exception should apply to the admissions policy.[226]

As described in Chapter Three at 3.3.2, various UNDRIP rights are already seemingly protected under Hawai'i's constitution and in its legislation, including indigenous education, language, ahupua'a and other Native Hawaiian customary rights. The Office of Hawaiian Affairs is already recognized as a vehicle of self–government under Hawaii state law.[227] A certain amount of internal autonomy and an indigenous education system are also recognized under the federal Native Hawaiian Education Act.[228] As discussed in Chapter Three, Hawai'i Act 195 incorporates Article 3 of UNDRIP. Thus, the most debated right in UNDRIP is already blackletter law in the United States, though case law on this right is still scarce.

6.5.3 NOT IF BUT WHEN: STATES' OBLIGATIONS

Ultimately, the biggest challenge to Article 14 and associated rights may not be their lack of legality or moral force but a lack of earnest compliance with obligations by states. In their recent discussions on an optional protocol to UNDRIP the PFII have noted that there is an "implementation gap" between international commitment and national implementation, often due to "rights ritualism" which "means that Member States accede to treaties and optional protocols, yet, beyond signing, demonstrate very little commitment to implementing obligations'. [229] Besides other monitoring mechanisms not being "sufficiently engaged in analysis of the right to self-determination", closing the gap would seemingly require reform at the domestic level including executive and legislative action, as well as consistency between "judicial decision-making" with UNDRIP.[230] Similarly, the

[226] Chapter Three on concurrence at 3.5.4.
[227] See Chapter Three at 3.3.1.
[228] Part of the No Child Left Behind Act: see discussion in Chapter Three at 2.4.3.
[229] UNPFII *Expert group meeting on the theme "dialogue on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples"* E/C.19/2015/8 (2015) para 20.
[230] Ibid, paras 20 and 54.

UNPFII has also noted the "increasingly important role of national and regional human rights institutions in…achieving the ends of the Declaration".[231]

Nevertheless, the Declaration openly affirms previously recognized States obligations in regards to education. The Preamble "[e]ncourage[s] States to comply with and *effectively implement* all their *obligations* as they apply to indigenous peoples under international instruments, in particular those related to human rights".[232] Thirteen articles[233] echo the requirement of effective implementation with regard to UNDRIP rights while at least eleven[234] otherwise require positive action and four[235] prohibit certain State behaviour.

These provisions further imply Maastricht Guidelines-like obligations to respect, protect and fulfil.[236] Article 14 itself seems to imply all three aspects. Duties of respect ensue from Article 14(1) and Article 14(2)'s non-discrimination requirement—that is, the State must recognize the right of indigenous communities to establish and control institutions such as Kamehameha Schools and must not itself discriminate against the right of the indigenous child to such an education. Protection from third parties is also entailed: through legislation and other effective measures, the state is to protect the indigenous child against third parties who might discriminate against the indigenous child. Hypothetically, it also protects the right of the indigenous child to a Kamehameha Schools education in federal courts. Positive, even special measures meant to ensure and fulfil the right are also approved: the State is to "take effective measures", implying an obligation of not only conduct but result. Where necessary, the State is to provide "financial and technical assistance" to fulfil the rights of the indigenous child.[237] Obligations to respect, protect and fulfil again blur the lines between ESCRs and CPRs, overcome the supposed obstacle of justiciability and focus the debate not on *if* but on *how* and *when*.

[231] Ibid, para 47.
[232] UNDRIP, preamble, nineteenth para.
[233] UNDRIP, Arts 8(2), 11(2), 13(20, 14(3), 15(2), 16(2), 21(2), 29(2-3), 30(2), 31, 32(3), 36 and 38.
[234] UNDRIP, Arts 12(2), 17(2), 19, 24(2), 22, 26-28, 32(2), 39-40.
[235] UNDRIP, Arts 7(2), 8(2), 9-10.
[236] See discussion in previous chapter 5.4.2.
[237] UNDRIP, arts 14(3) and 39.

The language referring to States' obligations in UNDRIP echoes the "minimum core obligations" and "minimum essential levels" terminology of the Maastricht Guidelines. As in the previous evolution of the right to education, Article 43 emphasizes that the rights affirmed in UNDRIP—including Article 1—represent "minimum standards" of human rights.[238] In response to an underwhelming US House of Representatives resolution[239] which urged adoption of UNDRIP by the United Nations with several reservations, a Yaqui Nation representative asked, "What is it that they feel is more minimum than minimum?"[240] Even in a supposedly 'aspirational" declaration, however, minimum standards recall the universal guarantees which UNDRIP reemphasizes and place pressure on would-be human rights defenders.[241]

As indicated in the previous section, Article 14 may also trigger States' obligations via non-discrimination. Though it reluctantly signed UNDRIP, the United States has for decades been a party to the ICCPR[242]—which, as discussed in the previous chapter, recognizes rights to non-discrimination under Articles 2 and 26 which may offer some legal recourse in case of violation. It has also signed and ratified the Race Convention.[243] In interpreting State party obligations under the Race Convention, CERD has unequivocally stated that discrimination against indigenous people constitutes discrimination in international law.[244] Positive steps which States parties are to take in regards to non-discrimination seemingly include recognizing self-determination:

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[238] Emphasis added.
[239] H.R. 1551, introduced 22/7/2010 by Faleomavaenga Eni Hunkin, member of House of Representatives for American Samoa and chairman of the House Committee on Foreign Affairs' subcommittee on Asia, the Pacific and the Global Environment.
[240] Gale Courtney Toensing "House Resolution Falls Short of Unqualified UN Declaration adoption" (30 July 2010) <www.indiancountrytoday.com>.
[241] As demonstrated by UNDRIP's eventual acceptance by all four CANZUS states, modern liberal democracies want to be seen as champions and models of human rights internationally as well as domestically. Representatives of Australia, New Zealand and the United States have all cited their reputation as "leader[s]" in the protection of indigenous rights and peoples: see previous discussion above at 6.5.
[242] The US signed the ICCPR on 5 Oct 1977 and ratified it on 8 Jun 1992. It signed the ICESCR on 5 Oct 1977 also but has not ratified it.
[243] The US signed the ICERD on 28 Sep 1966 and ratified it on 21 Oct 1994.
[244] CERD, *General Comment No. 23: Indigenous Peoples* UN Doc HRI/GEN/1/Rev.6 (2003) para 4.

> (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
>
> (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
>
> (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics...
>
> (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
>
> (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[245]

These measures not only fall into overlapping categories of obligations to respect, protect and fulfil[246] but seem to encompass the right to education found in Article 14, since indigenous-specific education is a means to achieve all steps. Importantly, in paragraph 4(c) "economic and social development" is seen as a measure for achieving non-discrimination for indigenous peoples.

The Committee on the Rights of the Child has similarly concluded that "the obligation of non-discrimination" guaranteed in Article 2 of the Children's Convention requires states to take "positive steps" and employ "effective remedies" to address disparities affecting vulnerable groups of indigenous children.[247] The Committee recognizes that, despite the universal guarantee of primary education recognized in Article 28, indigenous children are likely to face various discrimination and disparities which result in a denial of the right. Thus, the Committee has included the recognition of "the right of indigenous peoples to establish their own educational institutions and facilities"[248] in a list of state obligations in regards to the right including special measures aimed at "indigenous children [enjoying] their right to education on an equal footing with non-indigenous children"[249] as well as the allocation of "targeted financial, material and human

[245] Ibid, para 4.
[246] As discussed in the previous chapter, most ESCRs display all three aspects.
[247] Committee on the Rights of the Child, *General Comment No. 11: Indigenous children and their rights under the Convention* CRC/C/GC/11 (2009) paras 23-29.
[248] Ibid, para 60.
[249] Ibid, para 60.

resources in order to implement policies and programmes which specifically seek to improve access to education for indigenous children."[250]

6.5.4 AN INDIGENOUS TOOLBOX OF RIGHTS OPTIONS

In legal terms, Article 14 and other UNDRIP rights demonstrate how the international human right to education continues to evolve from an anonymous, flatly universal right to a more identity-responsive bundle of rights as demanded by substantial equality. While these rights largely invoke previous principles and rights—especially equality and non-discrimination—and are consistent with expressions of the right to education elsewhere, they form a "universe of human rights"[251] and a "developing constellation of indigenous rights norms"[252] including crucial rights of self-determination to which the world's most vulnerable rightsholders can appeal in the face of complex discrimination and disparities.

As argued thus far in the thesis, this universe is consistent with the project of the earnest liberal. Article 14 and associated UNDRIP rights resemble the buffer-and-access features of Kymlicka's reconciliation of Rawls and Dworkin, are consistent with the previous evolution of the human right to education in international law and also recognize that self-determination itself is not only an organic multiplier and buffer-and-access mechanism but a proportionate remedy for ongoing harm.

6.6 TRUMPING

Article 14 and UNDRIP possess a greater narrative capacity to begin to account for both the guarantee/reality gap and unique historico-legal context which justify the admission policy. This capacity will be diminished, however, if a singular

[250] Ibid, para 60.
[251] HRC *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010)* A/HRC/15/37/Add.1 (2010) para 217.
[252] Anaya "Native Hawaiian People and International Human Rights Law", above n 186.

everyone/no-one narrative has the power to trump Article 14's collective rights or the broader right to self-determination which underwrites them.

While arguments thus far have attempted to avoid being caught up in technicalities, this section examines two more closely—namely, the territorial integrity limit of Article 46(1) and the apparent individual rights check of Article 14(2)—as potential trumping mechanisms, in the context of the current human rights framework. Ultimately, UNDRIP appears to be generally consistent with Kymlicka's buffer-and-access features but emphasizes remedial self-determination held collectively. Instead of Doe-like trumping, both Article 46(1) and (2) appear to have limits of their own imposed by the fundamental principles of equality and non-discrimination. Ironically, these features may also facilitate a kind of reconciliation between Kymlicka's theory and itself.

6.6.1 REMEDY

Article 46(1)'s territorial integrity requirement must be contextualized within the broader framework of international human rights and within the spirit of UNDRIP itself. Rather than secession, UNDRIP's right to self-determination is largely remedial, aimed at rational revision and upholding fundamental human rights and freedoms. However, its external aspects also display a proportional remediation which recalls Hawaii's unique history.

Prior to World War II, the right to self-determination was evident in conceptions of the nation-state.[253] From the end of the war it was associated with the decolonisation agenda of the UN already apparent in Article 73 of the Charter which spells out States obligations in regard to "Non Self-Governing Territories",[254] and applies to States "who have or assume responsibilities for the administration of

[253] The *external* is associated with the traditional nation-state and with newer decolonized states. It encompasses the rights of states to deal with other states in matters of foreign policy: see Malcolm Shaw *International Law* (5th ed, New York, Cambridge University Press, 2003) at 272. It presupposes a state entity recognized as such and the sovereignty of that state: Steiner and Alston at 1257-1260, at 1258.

[254] Resolutions 1514, 1541 and 2625 all stem from state obligations in Charter of the United Nations, art 73.

territories whose peoples have not yet attained a full measure of self-government".[255] It describes the "interests of the inhabitants of these territories" as "paramount" and State obligations as "a sacred trust". Obligations include:

> (A) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatments, and their protection against abuses;
>
> (B) to develop self-government, to take due account of the political aspirations of the peoples, and to assist then in progressive development of their free political institutions, according to the particular circumstance of each territory and its peoples and their varying stages of advancements...[256]

Article 73 recognized the right of colonized 'peoples' and not only 'states' to self-determination and thus decolonisation. Under Article 73(E), States were to report on their progress in relation to such territories.[257]

Subsequent UN resolutions elaborated on Article 73. The Declaration on the granting of Independence to Colonial Countries and Peoples ('Resolution 1514')[258], 1960, recognized "the passionate yearning for freedom in all dependent peoples and the decisive role of such people in the attainment of their independence".[259] Prior to the International Covenants, Resolution 1514 also recognized that the "denial" of fundamental human rights and freedoms common to the experience of the colonized and that colonization was antithetical to "universal peace".[260] It also recognized self-determination as a means for ending "[t]he subjection of peoples to alien subjugation, domination and exploitation" which "constitutes a denial of fundamental human rights" and for achieving "complete freedom" and the "exercise of sovereignty" by colonized peoples.[261]

Admittedly, Resolution 1514's right to self-determination was not to be applied to "[a]ny attempt aimed at the partial or total disruption of the national unity and the

[255] See Charter of the United Nations, art 73.
[256] Article 73 (A)-(B).
[257] Article 73(E).
[258] *Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 1514 (XV) (1960).
[259] Ibid, preamble.
[260] Ibid, preamble.
[261] Ibid, art 2.

territorial integrity of a country".[262] Soon after, UN Resolution 1541, 1960,[263] established the so-called "Saltwater Thesis" by which states only had "an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it."[264] This requirement seemed to preclude most indigenous peoples as such communities were usually minority cultures dominated by another within their own homelands even where they had continuous territorial association. The later UN Resolution 2625, 1970, reiterated the sanctity of "territorial integrity" and "political unity". [265] Like the rhetoric of the African Group and settler nations late in the drafting stages of UNDRIP, the text is replete with fears of conflict arising from secession.[266]

In terms of prior sovereignty, Hawaii was listed on the General Assembly's list of Non-Self-Governing Territories until 1959 when it became a state, at which time the United States stopped sending information. However, as noted by Anaya, statehood did not "remedy the historical injustices suffered by Native Hawaiians" nor provide "the accommodations necessary to exercise and freely develop their culture, including religious practices and traditional governance, or allow[] them to exercise their fair share of political power"[267]—that is, it did not provide the collective rational revision which is the "birthright" of all peoples. [268] Again, the statehood plebiscite may have been yet another illegal act in a series of historical injustices and ongoing harm.[269] Despite these challenges, Native Hawaiians have remained a distinct people.

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[262] Ibid, art 6.

[263] *Declaration on the Granting of Independence to Colonial Countries and Peoples: Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter* GA Res 1541 (XV) (1960). In the case of Hawaii despite its geographic isolation, the United States stopped transmitting such information after statehood. Non-application to indigenous peoples was questioned by states like Belgium who argued that indigenous peoples should be included in decolonisation: see Robert Joseph "The government of themselves: Indigenous peoples' internal self-determination, effective self-governance and authentic representation: Waikato-Tainui, Ngāi Tahu and Nisga'a" (PhD Thesis, University of Waikato, 2005) at 92-94.

[264] Ibid, Principle IV.

[265] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* UN Resolution 2625 (XXV) (1970).

[266] See, for instance, Principle I on refraining from force and Principle II on peaceful settlement of disputes.

[267] Anaya "Native Hawaiian People and International Human Rights Law", above n 186, at 335-336.

[268] *Vienna Declaration and Programme of Action* A/CONF.157/23 (1993), preamble.

[269] See Julian Aguon "Native Hawaiians and International Law" in Melody Kapilialoha MacKenzie (ed) with Susan Serrano and Kapua Sproat *Native Hawaiian Law: A Treatise* (Honolulu, Native

From decolonisation, self-determination has been justified by the inability of a dependent but distinct people to develop within the existing institutional order. Correspondingly, its components include cultural integrity enabling indigenous peoples to maintain their identity, social welfare and the right to development which counter the impact of "progressive plundering" and "patterns of discrimination", and self-government constituting the political aspect of ongoing self-determination justified by both democracy and cultural integrity. [270]

The question posed endlessly during UNDRIP's drafting was whether Article 3 encompassed this *external*, decolonisation version of the right or an *internal* version. This is not dissimilar to questions now being posed in the US regarding the shape of Native Hawaiian self-government.[271]

The internal has been explained by Steiner and Alston as "forms of self-government and separateness within a state rather than separation...from the state" and "autonomy regimes—political systems or subsystems organized within a state for purposes of political participation and self-government by ethnic minorities".[272] These are rights exercised within the universe of the state and directed at "their own peoples".[273] The internal envisions minorities as rights-holders focusing on basic rights to determine their political status and the right to meaningful political participation.[274] In many ways, the right overlaps with Articles 25 and 27 of the ICCPR.[275] As CERD has stated:

> …The right to self-determination of peoples has an internal aspect, i.e., the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect, there exists a link with the right of every citizen to take a part in the conduct of public affairs at any level [under the principle of non-discrimination]. In consequence, governments are to represent the

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, 2015) (advance copy).

[270] Anaya, above n 186, at 342-346 and 350-360.

[271] See discussion in Chapter Three on current federal overtures regarding federal recognition at 3.6.

[272] Steiner and Alston, above n 27, at 1249.

[273] See Shaw's discussion, above n 253, at 272. As the International Court of Justice (ICJ) has emphasized, self-determination is exercised "through the free and genuine expression of the will of the peoples of the Territory": Summary of the Advisory Opinion of 16 October 1975, WESTERN SAHARA Advisory Opinion of 16 October 1975.

[274] Robert McCorquodale "Self-Determination: A Human Rights Approach" (1994) 43 ICLQ 857 at 866.

[275] On rights to political participation and minority rights repsectively: see Sara Joseph, Jenny Schults and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed, Oxford, Oxford University Press, 2004) at 148.

> whole population without distinction as to race, colour, descent, national, or ethnic origins.
>
> …Governments should be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country in which its members are citizens. Also, governments should consider, within their respective constitutional frameworks, vesting persons of ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in such activities which are particularly relevant to the preservation of the identity of such persons or groups.[276]

Clearly, the external exists as a collective right against the world and other recognized nation-states while the internal is also collective but regulates the relation between a state and a minority group within its population.

The Declaration is usually limited to internal self-determination.[277] The majority of UNDRIP's provisions are descriptions of day-to-day incarnations of autonomy and self-government in the five institutional areas—that is, civil, political, economic, social and cultural rights.[278] Similarly, Article 14(1)'s operative terms, "establish" and "control", are fairly plain in meaning. In terms of the former, education is "set up" by and fixed in the community,[279] while, according to the latter, the same community "determine[s] the behaviour" of, "supervise[s] the running of" and "maintain[s] influence or authority over"[280] the educational institutions or systems it has established. Within the community there is no higher authority in terms of the right to education in UNDRIP except for the considerations of "fundamental human rights and freedoms" and the "just and most compelling" democratic arguments which are to act as limits on all of the rights in UNDRIP according to Article 46.[281] The use of indigenous language as the medium of instruction and instruction in a culturally-appropriate manner[282] also seems to be an

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[276] CERD, *General Recommendation No. 21, The right to self-determination*, UN Doc HRI\GEN\1\Rev.6 at 209 (2003) paras 4-5.
[277] See Alexandra Xanthaki "The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What's the Future for Indigenous Women" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford, Hart Publishing, 2011) 413.
[278] Indigenous education rights seem to fall within all five, as they are clearly economic, social and cultural rights but also form the foundation of an individual's basic ability to participate politically —and as education rears lawyers, judges, legislators and other participants in legal institutions from a tender age.
[279] See first and second definitions for the verb "establish" in Catherine Soanes and Angus Stevenson (eds) *Oxford Dictionary of English (2nd ed, revised)* (Oxford, Oxford University Press, 2005), at 593.
[280] See first definition for the verb "control" in Soanes and Stevenson, ibid, at 377.
[281] UNDRIP, art 46. Territorial integrity and political unity are also mentioned in the same article.
[282] UNDRIP, art 14(1).

internally-driven, internally-defined measure of self-determination as the community itself frames the very terms of what will constitute education. Similarly, Article 14(3) echoes previous minority instruments and partially indicates a state/minority relationship.

The internal aspects of self-determination, however, are also buttressed by seemingly *external* protections flowing from an expanded, even historical self-determination. Anaya notes that Article 2 specifies that indigenous peoples are "equal to all other *peoples*"[283] and that Article 3's text mirrors other instruments including General Resolution 1514. While states clearly did not endorse a right to independent statehood, Article 3 has the same decolonisation context as instruments which have[284] while the Declaration is essentially "a self-determination remedial regime".[285] "The Declaration…[is] based effectively on the identification of a longstanding *sui generis* violation of self-determination"[286] which "[p]rojected back in time" has been "massively and systematically denied to groups within the indigenous rubric".[287] Article 14 and other rights may not imply automatic recourse to secession[288] or other specific remedies but are nonetheless aimed at substantive self-determination and "grounded in freedom and equality".[289] Ultimately, consistent with the evolution of the right to education:

> The purpose of the Declaration is to remedy the historic denial of the right to self-determination and related human rights so that indigenous peoples may overcome systemic disadvantage and achieve a position of equality vis-à-vis heretofore dominant sectors.[290]

Given its remedial nature, Article 3's self-determination may have the greatest capacity to address complex discrimination and disparities. As such, it may also constitute the greatest Kymlickan buffer for indigenous peoples and individuals.

Within UNDRIP, indigenous peoples have "the collective right to live in freedom, peace and security as *distinct* peoples".[291] Again, indigenous peoples *as a whole*

[283] Emphasis added.
[284] Anaya in Charters and Stavenhagen, above n 201, 184-198, at 185
[285] Ibid, at 190.
[286] Ibid.
[287] Ibid, at 191.
[288] However, see Anaya's arguments, above n 201.
[289] Anaya, above n 201, at 189.
[290] Anaya, above n 201, at 191.
[291] UNDRIP, art 7.

are not to be subjected to "assimilation", "integration" or the destruction of their culture or cultural identities.[292] In contrast to minority rights which largely accrue to members of ethnic, linguistic and other minorities on an individual basis, indigenous peoples *collectively* have the "right to belong to an indigenous community or *nation*"[293] and not just to a traditional nation-state.[294] Under that right, membership is to be determined internally according to the custom and tradition of the community. [295] Nor can indigenous peoples be "forcibly removed" or relocated from their homes and territories.[296] These provisions sound like the integrity rights of a *people*. Other important externally protective provisions include rights of consultation and free, prior and informed consent in matters which particularly affect the community in question suggesting political behaviour unlike that of, for instance, a racial minority.[297]

Proposed amendments to the predecessor of Article 14 which would have specifically required indigenous institutions to "consult[] with competent authorities in the State…in accordance with applicable education laws and standards" in exercising their rights were rejected,[298] lending substance to *external* arguments. Thus, under the current Article 14(1), internally-determined pedagogy, curriculum and administration clearly function as a Kymlickan buffer against majority interference and bias. However, these factors are also inconsistent with the imposition of national standards such as the No Child Left Behind Act on indigenous peoples within the United States, as if such self-determination is held against all comers, the right of unqualified 'peoples'. Such a wide latitude of self-determination in education resembles the right to "full control"[299] and unqualified self-determination which indigenous participants claimed during drafting. The specifically indigenous nature of the rights—the unequivocal prioritization of and preference for the indigenous learner—underwritten by self-determination—also defies the mere minority status most associated with the internal aspect. Consistent

[292] Article 8.
[293] Article 9. Emphasis added.
[294] Article 6.
[295] Article 9.
[296] Article 10.
[297] Something like the buffering rights predicated by Kymlicka.
[298] See WGIP Report 2001, above n 131, at 30.
[299] WGIP Report 2001, para 56.

with Article 33,[300] Article 14(1) actually resembles citizenship and passport control, an essentially external power.

Prior to overthrow and annexation, the Hawaiian Kingdom constituted what the thesis has called a fledgling democracy and fully-fledged nation which never ceded or otherwise relinquished its sovereignty and was later recognized to fit all the UN criteria for a non-self-governing territory including the right to decolonisation, even secession, until the Statehood vote.[301] In fact, Hawai‘i and other Pacific states buck decolonisation trends apparent in Asia, Africa and the Caribbean. Reasons why Pacific states remain colonized when others do not appear less legal and more practical including "[t]iming, size, remoteness and economic vulnerability" but also "the determination of some colonial powers to remain, irrespective of the wishes of the indigenous peoples".[302]

As Partick Macklem might observe, Native Hawaiians currently appear to "exist themselves in international law—not as States, but as international legal actors in their own right". According to Macklem, "What constitutes indigenous peoples as international legal actors…is the structure and operation of international law itself".[303] Thus, Native Hawaiians seemingly retain a significant claim to at least an expanded self-determination which exhibits both internal and external aspects. We are clearly not a mere minority[304] but have been treated historically and presently as distinct peoples with rights exceeding those of minorities. Ironically, given its concerns about territorial integrity, the United States itself has acknowledged the unique situation of Native Hawaiians, particularly the fact that Native Hawaiians have never ceded the sovereignty once widely recognized by other nation-states. The oft-noted geographic isolation of the Islands is unchanged, making territorial integrity less daunting as do plans of the State of Hawai‘i to turn

[300] Article 33.
[301] Chapter 3. Another seemingly illegal act in a series of illegal acts of conquest and domination.
[302] Toki, above n 7, para 22.
[303] Patrick Macklem "Indigenous Recognition in International Law: Theoretical Observations" 30 Michigan J Int'l Law 177 at 178 and 179.
[304] For an alternative view, see Will Kymlicka "Beyond the Indigenous/Minority Dichotomy" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford, Hart, 2011) at 183-208. Although Kymlicka has previously differentiated between indigenous peoples and "national minorities (see liberal multiculturalism) on the basis of the inconsistency of their right claims—for instance to self-determination rather than integration—he argues that minorities including African-Americans should be able to claim UNDRIP-like rights

over "management and control of the island of Kahoʻolawe and its waters to" a "sovereign" "reorganized Native Hawaiian governing entity" upon federal recognition.[305]

However, territorial integrity concerns miss the proverbial mark in many ways. Most commentators[306] recognize that the majority of indigenous claims to self-determination are not demands for secession, but instead claims for a kind of rational revision and not a particular remedy.[307] Ironically, criticism of Article 14 is scarce, and yet, Article 14 and other substantive rights really define and animate Article 3's self-determination. Plainly, there is little to fear by way of secession from the existence of identity-specific, parallel educational institutions and systems, such as the Kamehameha Schools, which appear to be the epitome of human rights enjoyment, of substantial equality itself. By contrast, as Chris Iijima might contend,[308] a denial of this more external, historical right to self-determination would seemingly constitute "[a]nother ongoing manifestation" of residual racist narratives and violate the peremptory norm of non-discrimination.[309]

Consistent with historical self-determination and restorative justice scholarship, the PFII has concluded that:

> International human rights law, including norms on equality and non-discrimination such as those affirmed in the International Convention on the

[305] See Hawaii Act 195 on the potential return of the Hawaiian island of Kahoʻolawe to the future "sovereign" "reorganized Native Hawaiian governing entity" as a territory for "nation-building".
[306] In terms of sovereignty claims regarding a Native Hawaiian nation: see Noelle M Kahanu and Jon M Van Dyke "Native Hawaiian Entitlement to Sovereignty: An Overview" (1995) 17 U Haw L Rev 427; and Mililani Trask "Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective" (1991) 8(2) Ariz J Int'l & Comp L 77.
[307] A similar remedy may flow from the violation of that right but is not automatically implied and may not be the only possible remedy. Even where complete independence is inevitable, the shape that independence takes can be varied: see Anaya in Charters and Stavenhagen, above n 2; and James Anaya and Robert Williams "International Recognition" (Part of panel discussion at "Kāmau a Ea 5: Keeping the Breath of Life", Hawaiian Governance Symposium, Honolulu, November 2014).
[308] Chris K Iijima "New Rice Recipes: The Legitimization of Continued Overthrow" (2002) 3 Asian-Pacific L & Pol'y J 385.
[309] UNPFII, *Report of the Eleventh Session of the UN Permanent Forum on Indigenous Issues* E/C.19/2012/13, para 6. The PFII has noted, for instance, that "recognition" which distinguishes between indigenous groups who may and may not claim self-determination—as well as court decisions which purport to extinguish indigenous rights to self-determination and "even their identities and existence" are discriminatory because "[n]o other peoples in the world are pressured to have their rights 'extinguished'".

> Elimination of All Forms of Racial Discrimination and [UNDRIP], demand that States rectify past wrongs….[310]

6.6.2 RECONCILIATION

Article 46(2) raises greater concerns in terms of Article 14, particularly in terms of the issues raised in the *Kamehameha* case. It, too, might trump UNDRIP's rights, particularly the collective nature of substantive rights including Article 14, and prioritize a *singular everyone/no-one* narrative. In fact, in the vote on UNDRIP, the United States denied that UNDRIP entailed collective rights.[311] Ultimately, however, Article 46(2) appears to have limits of its own which preserve the capacity of Article 14 to address the global mo'olelo.

As discussed in Chapter Four,[312] Kymlicka's limits and, particularly, his individual trumping of collective self-determination and distance from historical remediation must discomfort the earnest liberal given the global mo'olelo of complex discrimination and disparities as well as the local. Again, trumping is reminiscent of historical and ongoing assimilationist education policy based on the imposition of a *singular everyone/no-one* narrative which has and does result in complex discrimination and disparities for the indigenous learner and their community. It is the historic face of the nation-building which Kymlicka seeks to defend indigenous individuals against. Any singularly homogenous and anonymous narrative is also at odds with the actual evolution of the right to education in international law where greater identification of multiple rightsholder identities, not less, is associated with rights insurance and enjoyment, even substantial equality and de facto non-discrimination. Ultimately, trumping might also represent a familiar but unfortunate mistaking of identity, particularly the equation of Native Hawaiians and

[310] PFII, *Report of the Eleventh Session of the UN Permanent Forum on Indigenous Issues* E/C.19/2012/13, para 6.
[311] Discussed in Mattias Ahrens "The UN Declaration on the Rights of Indigenous peoples—How it was adopted and why it is significant?" in Henry Minde, Asbjørn Eide and Mattias Åhrén "The UN Declaration on the Rights of Indigenous Peoples: What made it possible? The work and process beyond final adoption" (2007) 4 Gáldu Čála, Journal of Indigenous Peoples Rights 84 at 118.
[312] Chapter Four at 4.6.1.

other indigenous peoples with racial minority groups seeking inclusion and same treatment.

Similarly, Kymlicka's flat rejection of historical remediation seems inconsistent with the project of the earnest liberal—or with his own buffer-and-access project—given the unmistakeable link between colonization and ensuing discrimination and present, ongoing inequities. Given the repetition of those facts on global scale—the singular narrative, as intuitively sensed by the Ninth Circuit in the *Kamehameha* case, cannot sufficiently account for or address the plight of the most vulnerable. The current impact of historical events presents the kind of arbitrary disadvantages which Rawls tried to eliminate because it can interfere with an individual's exercise of ration revision. It also undermines Dworkin's equal concern and respect. Fundamentally, it ignores the historic source of discrimination, its complex nature and, particularly, the way it is inherently attracted to collective indigenous groups impacted by colonization.

At first glance, Article 46(2)'s limits must appear similarly disquieting in regards to Article 14(1) and the issues raised in the *Kamehameha Schools* case. The provision is drafted in everyone/no-one language including "all" and dichotomous "others". It makes the exercise of UNDRIP rights subject to an indiscriminate category of "law" which conceivably might be domestic or international or include singular narrative American federal jurisprudence like *Kamehameha* but also *Rice*, *Bakke* and the University of Michigan cases. The provision also fundamentally requires a weighing of presumably conflicting rights—individual versus collective—reminiscent of the *Weber-Johnson* test, particularly its non-trammelling requirement.

Moreover, Article 46(2) and possibly Article 14 itself highlight a seeming tension in UNDRIP between individual *human* rights, quasi-collective *minority* member rights and truly collective *indigenous* rights.[313] The consistency of, for instance, a collective right to education with an individual right to education can undermine the collective where collective rights are seen as reducible to the individual rights

[313] Alexandra Xanthaki "The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What's the Future for Indigenous Women" in Alexandra Xanthaki and Stephen Allen (eds) *Reflections on the Declaration on the Rights of Indigenous Peoples* (Oxford, Hart Publishing, 2011) at 418.

of members or lacking moral standing as opposed to individual rights. Given their collective nature, there is a certain amount of debate about whether Article 14 and other UNDRIP rights really affirm previously recognized human rights and freedoms or whether such rights are *sui generis*.[314] But how uncomfortable should this provision make the earnest liberal?

Individual trumping on the level demanded by the dissent in *Kamehameha* and the majority in *Rice* is fundamentally inconsistent with the norm and right of self-determination which dominates UNDRIP. While UNDRIP places "democratic"[315] limits on its indigenous education rights, the norm of self-determination underwrites those rights. The buffer-and-access features of Article 14 and other UNDRIP rights make little sense without the right to self-determination being held by a rights-bearing *people*. Interpreted as a collective form of Rawlsian rational revision which enables individual autonomy, self-determination is consistent with the project of the earnest liberal and a norm of international law of the highest order.

Importantly, Article 46(2) requires:

> Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

Similarly, Article 46(3) requires that "principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith" guide interpretation of UNDRIP's provisions. Given the mention of uman rights, equality and non-discrimination, these requirements would appear to require any limitations on Article 14 to be consistent with the previous evolution of right to education in international law. This returns the conversation to the multi-narrative which has specifically evolved to addresses complex discrimination and effect substantial equality. As discussed in terms of drafting, any legal or normative distinction in rights because they are 'indigenous' amounts to discrimination itself.[316] Drafting made it clear that:

[314] Described by Xanthaki, ibid, at 416.
[315] Article 46(2).
[316] See discussion above on distinction in regard to right of *indigenous* peoples to the same right to self-determination as any other peoples: WGIP Report 2001, above n 131, para 23.

> …providing indigenous peoples with a system of individual rights would fail to protect them from the main violations of their human rights, because these include violations of a collective nature, towards indigenous communities as a group.[317]

The collective nature of the right to self-determination and other UNDRIP rights can mask individual rights issues. As Peter Jones argues, collective rights are consistent with individual rights where the moral standing of the group reflects the moral standing of individuals as rights-holders:

> ...The idea of collective rights functions with the same fundamental moral units as the idea of human rights: individual persons. An argument for a collective right must appeal to the good of the individuals who make up the collectivity, and individuals will figure in a right-holding collectivity only if they share in the interest that grounds its right. There is, therefore, a continuity and complementarity between individual and collective rights: respect and concern for the individual drive both. The difference between the two sorts of rights simply reflects the fact that they share with others and in relation to which they hold shared, rather than independent claims.[318]

Jones argues that rather than see these rights as group-versus-individual it is correct to view them as individual-versus-individual. The moral standing of the group relies upon the moral standing of the individual rights-holder. The indigenous learner becomes the member of a group with moral standing when the joint interests of that group in the realization of human rights reflect her interest or moral standing as a rights-holder in education, for instance.[319] This is consistent with an understanding that indigenous peoples as a group attract complex discrimination and disparities which result in individual rights denials.

As discussed, self-determination itself is a human right organically connected to the insurance and enjoyment of all other human rights and freedoms, especially given its remedial capacity. As discussed throughout the thesis, the link between the history and presently complex discrimination and disparities is unquestionable and widely accepted —as is the link between such discrimination and wider disparities. These realities appear to demand historical remediation as they flow from historical injustice and evidence ongoing harm.

[317] Xanthaki, ibid, at 417.
[318] Peter Jones "Human Rights, Group Rights, and Peoples' Rights" (1999) 21 Hum Rts Q 80 at 90.
[319] Ibid, at 84-85, 88 and 93-94.

Although the Declaration is able to buffer the indigenous learner against majoritarian bias and oppression, it also retains the capacity to address genuine instances of internal oppression as anticipated by Kymlicka. He was willing to allow individual rights to trump admission-like rights to control membership where *everyone/no-one* civil or political rights were at stake.[320] Instead, UNDRIP reserves that right for indigenous peoples under Article 33. However, Article 46(2) and (3), in concert with Article 22, also require special attention to groups who are particularly vulnerable to internal oppression, including indigenous women and children.

The Declaration does not exhibit the same presumed suspicion as, for instance, CEDAW, in terms of cultural practices,[321] majority bias and other by-products of nation-building. [322] However, Article 46(2) and (3) possess the capacity to distinguish between fairly innocuous education rights consistent with substantial equality and human rights violations perpetrated against indigenous women and children which has no part in the human rights universe. In practice, admittedly, these rights present complex issues of implementation.[323] However, given the consistency of UNDRIP with previous statements on rights of equality and non-discrimination in regards to women and children, the Declaration, once again, appears to argue for their moral force, normative value and legality rather than compete with them.

Ultimately, rather than a "pre-determined triumph of individual rights over collective rights", UNDRIP follows the pattern of previous human rights law in which, besides non-derogable rights, there is no hierarchy of rights.[324] In regards to the nature of UNDRIP rights, Erica-Irene Daes, former Chairperson of the WGIP, has said:

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[320] In terms of a *Santa Clara Pueblo v Martinez* scenario: see discussion in Chapter Four at 4.6.1.
[321] See discussion in previous chapter at 5.2.2.
[322] See Xanthaki, above n 318, at 420-421.
[323] See, for instance, Xanthaki, above n 318; Celeste McKay and Craig Benjamin "A Vision for Fulfilling the Indivisible Rights of Indigenous Women" in Jackie Hartley and Jennifer Preston (eds) *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon, Purich Publishing, 2010) at 156-168; and Mary-Ellen Turpel-Lafond "More than Words: Promoting and Protecting the Rights of Indigenous Children with International Human Rights instruments" in Hartley and Preston, at 169-188.
[324] Xanthaki, above n 318, at 429.

> The Declaration now constitutes a normative instrument of the UN that memorialises, and simultaneously extends, international consensus regarding the individual and collective rights of indigenous peoples as set out in previous instruments.[325]

Thus, UNDRIP is fundamentally concerned with ensuring the human rights of the most vulnerable of rightsholders—those it recognizes as being particularly susceptible to complex discrimination and rights denial. Collective rights to self-determination complement this priority given its organic capacity but also as a significant buffer-and-access mechanism itself.

6.7 CONCLUSION

> *…When Indigenous Peoples WIN, the whole world WINS.*[326]

Earlier in this chapter, the global indigenous learner was described as the ultimate canary in the coalmine. From this perspective, the sweep of the global mo‘olelo, the magnitude of historic injustices and ongoing, deep harm serially attracted to indigenous identity is staggering and almost incomprehensible. Colonization can be viewed as having multiplied the Native Hawaiian—and also Native American—experience exponentially over geography and centuries. The effect of such human rights violations has been logarithmic, with human rights deprivations and ‘penalties’ pervading the enjoyment of all other human rights and being passed down as a cruel inheritance to the next generation of learners, a legacy further distorted and exaggerated over time. This is both the mirroring and magnifying effect which unfortunately connects the Native Hawaiian mo‘olelo with the global.

The global mo‘olelo is recognized as undermining universality, homogeneity, anonymity and the transcendent premise of human rights. Again, the above realities invalidate any Rawlsian assumptions that such inequalities will be evened out over generations by homogenous and anonymous distributions of rights and any lingering assumptions of a level playing field for all. Given its once-and-present

[325] Erica-Irene Daes “The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal”, in Xanthaki and Allen, above n 318, 11 at 39.
[326] Chief Wilton Littlechild “When Indigenous Peoples Win, the Whole World Wins” in Charters and Stavenhagen, above n 2, at 375.

nature, the mo‘olelo disproves historical supersession and defies the temporariness of special measures. As such it must be grotesquely offensive to any earnest liberal. As human rights violations, these indigenous rights violations must offend humanity as a whole.

However, with the unprecedented participation and persistence of indigenous peoples, international law has narratively responded with repugnance and earnestness. Article 14 of the United Nations Declaration on the Rights of Indigenous Peoples appears to be an earnest culmination of the international human right to education providing both buffer-and-access and remedial historical self-determination—applied specifically to indigenous peoples. This rational and remedial indigenous learner right remains consistent with the previous multi-narrative given its reconciliatory nature, organic multiplication, and potential for emphasized legality. But it also enshrines specifically indigenous, collective rights in education underwritten by self-determination, itself an organic multiplier. Such self-determination may be the ultimate buffer-and-access right while also accounting for ongoing harm, prior sovereignty and a historical continuum of rights. In this way, Article 14 demonstrates the capacity of specifically indigenous rights to reconcile Kymlicka’s theory with itself.

In terms of proportionality, Article 14 and UNDRIP provide an enhanced multi-narrative toolbox of rights options which is both consistent with and exceeds previous instruments from the UDHR to the Children’s Convention and CRPD. Instead of less, this toolbox recognizes more: increased, multiple, simultaneous rightsholder identities; collective peoples’ rights; internal and external aspects of self-determination; and once-and-future rights. Beyond federal recognition, Article 14 is more than just an *indigenous* right to indigenous education. It is a supra-domestic human right to historical self-determination with the multi-narrative capacity to account for ongoing harm, prior sovereignty and a historical continuum of rights. Given its consistency with the previous evolution of education and account of the most vulnerable, it also carries significant moral force.

In terms of this evolution, it is clear that the long-standing policy of a private school established to help indigenous children overcome discrimination and disparities which prefers those children in admissions does not violate either equality or

discrimination. Rather, it is consistent with the equality multi-narrative of human rights which is highly aware of complex discrimination and demand substantial rather than merely formal equality. The self-determination-based, specifically indigenous right to education contained within the UN Declaration on the Rights of Indigenous Peoples 2007 is both a culmination and extension of this multi-narrative, under which the admissions policy may be recognized as the expression of a supra-domestic human right.

Unless such rights are capable of narration at the domestic level, however, all may be in vain. Chapter Seven examines the greater narrative capacity of New Zealand law to account for unique historico-legal context and guarantee/reality gaps because of its interface between human, constitutional and indigenous rights and the presence of both buffer-and-access and self-determination projects in regards to education.

CHAPTER SEVEN

THE ADMISSION POLICY IN AOTEAROA NEW ZEALAND

7.1 INTRODUCTION

> *Dignity and self-determination required responsible action and participation from the colonized—from us. We had to comprehend the depth of our oppression, but we also had to imagine the possibilities of transformation by our legal traditions and diplomacy. Once we began to believe in our traditions and our ability, we realized the source of our transformation. Hope and action returned.*[1]

As this chapter will describe, Aotearoa New Zealand is a liberal democracy which has wrestled, like the United States, with a similar history of colonization, assimilation, discrimination and present disparities. Its history and law are marked by aggressive nation-building projects and residual majoritarian bias. While not identical to the American experience of slavery, this history has also created and perpetuated historic injustices, ongoing harm, settler/indigenous dichotomies and often conflicting equality narratives. For much of its modern history, the *everyone/no-one* narrative has been adamantly prioritized and indigenous rights denied in New Zealand as in the *Kamehameha* dissent. Like the United States, its government failed to endorse UNDRIP originally and later adopted an aspirational stance.

Article 14-like indigenously controlled education systems and schools have been widely established in New Zealand specifically to educate Māori children as the result of significant grassroots efforts by Māori. As in Hawai‘i, preferring even prioritizing the Māori learner in admissions has, in fact, resulted in significantly improved real-life outcomes for another group of indigenous learners historically and continuously associated with striking discrimination and disparities. These

[1] Statement made in regards to indigenous achievements in terms of UNDRIP by James (Sákéj) Youngblood Henderson in *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon SK Canada, Purich Publishing, 2008) at 35-36, yet also an appropriate description of the efforts of indigenous peoples within domestic law.

schools are not sued for discrimination nor merely tolerated as private exeptions to equality but publically funded and legally protected as a collective good. While the overall thesis originally has asked why the Kamehameha Schools *were* sued for discrimination, this chapter asks why they would *not* be sued in New Zealand.

It begins by touching on another eerily similar historico-legal context including prior sovereignty, ongoing harm, a historical continuum of rights, nation-building, and in-built bias and discrimination. A critical analysis of domestic jurisprudence and legislation reveals an expanded domestic multi-narrative of equality. Persistent *adamant everyone/no-one* criticisms, including trumping, ESCR and indigenous rights denial, are noted as possibly undermining the idea of the multi-narrative. Ultimately, however, the chapter recognizes crucial differences between the *Kamehameha* and New Zealand equality narratives including: scarce reverse discrimination; interpretation consistent with human rights obligations; legal indivisibility; emphasized legality; the ascendancy of non-discrimination; and positive government obligations in terms of Kamehameha-like schools. Importantly, New Zealand equality narratives demonstrate intentional human rights incorporation, an organic interface between human, constitutional and indigenous rights, and an unapologetically remedial self-determination.

At the outset, it is important to note that this chapter will not portray New Zealand as a utopian example of how the expanded multi-narrative might work in practice at the domestic level. New Zealand remains a nation struggling with the burdens of its own history, even ongoing harm, identity-attracted complex discrimination and disparities. However, this very wrestle allows us to get underneath the so-called 'text of the debate swirling through' [2] the *Kamehameha* case at the domestic level. This history cannot compare with slavery; in fact, no history can. But it does illustrate how, as in *Brown*, group-specific historico-legal context will drive an expansion of equality narratives where substantial equality and non-discrimination are at stake and an earnest reconciliation of guarantee/reality gaps attempted. This is particularly true in the case of indigenous peoples who retain residual political rights to self-determination and a historical continuum of rights. Unfortunately, the history once more illustrates how a less than earnest liberalism

[2] See methodology in Chapter One, at 1.5.

will mask discrimination and inequalities and adopt an adamant everyone/no-one narrative which ignores legitimate indigenous legal claims.

As noted in the Introduction, the chapter postpones questions of implementation and practice and simply asks what the law is saying about rightsholder identity as a possible starting point for similar conversations in the United States.

7.2 KŌRERO PONO[3]: THE BURDENS OF NEW ZEALAND HISTORY

> *One of the mistakes of scholars…looking at this particular area of law [that is, indigenous issues] is to decontextualize it, decouple it from its history. And in this game, in law particularly…in Māori issues in particular, history is everything.*[4]

Aotearoa New Zealand lies some 4,606 miles across the Pacific Ocean from Hawai'i, which together constitute two points of the rough ethno-cultural triangle of Polynesia.[5] New Zealand's indigenous people are homogenously referred to as the Māori—which literally means the "normal, usual, natural, common" [6] inhabitants of the land[7]—but are comprised of various waka, iwi, and hapu.[8] These two points of Polynesia share an eerily similar history of colonization causally linked to ongoing complex discrimination and disparities insidiously attracted to Māori identity. Such disadvantage is particularly evident in education.

[3] Translated as either a verb meaning "to tell the truth, be honest, be truthful, speak the truth" or a noun meaning a "true story, non-fiction writing, factual text": *Te Aka Māori-English, English-Māori Dictionary (Online)* <www.maoridictionary.co.nz>.

[4] Justice Joe Williams "Lex Aotearoa: A heroic attempt at mapping the Māori dimension in modern New Zealand law", 22nd Annual Harkness Henry Lecture, University of Waikato, 7 November 2013. Justice Williams is former President of the Māori Land Court and current Judge of the New Zealand High Court.

[5] Rapa Nui Easter Island being the third.

[6] See *Te Aka Māori-English, English-Māori Dictionary (Online)* <www.maoridictionary.co.nz>.

[7] As in other Pacific indigenous cultures. A similar term *kanaka maoli* is used by Native Hawaiians to refer to ourselves.

[8] Waka refers to a socio-political grouping based on ancestral descent from the same original canoe which brought the Māori to Aotearoa from other parts of Polynesia. An iwi is a tribe also sharing common ancestry. A hapu is a sub-tribe. All refer to socio-political units recognized historically in Māori society but also in current law and society.

7.2.1 'A COMPLEX PEOPLE' AND HISTORICAL CONTINUUM OF RIGHTS

Anthropologically, Māori share common ancestral and historical origins with Native Hawaiians as East Polynesian peoples who developed complex societies including culture, arts, sciences,[9] language, religion, political systems—and law—in remote parts of the Pacific prior to its 'discovery' by Europeans. Māori are "a complex people who [have] lived in New Zealand for more than 1,000 years".[10] Many claim descent from the intrepid navigators who arrived on the 'Great Fleet' of waka or Polynesian voyaging canoes around 1350 AD.[11] Forbearers of the Māori came from multiple island groups but recalled a place called Hawaiki—the legendary Polynesian homeland with which Hawai'i shares its name—in their chants and genealogies.[12] They brought with them a language[13] and world view like Native Hawaiians' including a familiar creation story, cosmology of gods and folklore.[14] The Māori also believed that they were literally descended from these deities who played an ever-present role in their daily lives.[15]

As in ancient Hawai'i, the principle of whanaungatanga, or kinship, ordered Māori society and bound an individual to the descendants of his ancestral waka, iwi and hapu but also to the land and other living things.[16] Whakapapa[17] was a fundamental aspect of who a person was, their standing in the community and the mana or

[9] The ancestors of the Māori and Native Hawaiians were unrivalled in navigation and seamanship at the time and possessed substantial knowledge of astronomy as well as biology and oceanography: see KR Howe *Vaka Moana: Voyages of the Ancestors* Auckland, David Bateman, 2006); and Peter Henry Buck *Vikings of the Sunrise* Philadelphia, Lippincott, 1938). Such navigation is particularly remarkable considering that the Pacific is "995 parts water to five parts land": Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Rev ed, Auckland, Penguin Books, 2004) at 24.
[10] Claudia Orange *The Treaty of Waitangi* (2nd ed, Wellington, Bridget Williams Books, 2011) at 17.
[11] See Walker, at Chapter 2. For a more conservative date of 1250 AD, see Patrick Kirch "Peopling of the Pacific: A Holistic Anthropological Perspective" (2010) 39 Annu Rev Ant 131.
[12] For mythology see Walker, at Chapter 1. For anthropology and archaeology, see Patrick Kirch and RC Green *Hawaiki, Ancestral Polynesia: An Essay in Historical Anthropology* (New York, Cambridge University Press, 2001).
[13] "New Zealand Māori is most closely related to languages such as Cook Islands Māori, Tahitian and Hawaiian, and forms with them a language grouping known by linguists as Eastern Polynesian": Māori Language Commission "Te Reo Māori" <www.tetaurawhiri.govt.nz>.
[14] See Walker, Chapter 1. Compare with Martha Beckwith *Hawaiian Mythology* (Honolulu, University Press of *Hawaii*, 1970) and Martha Beckwith *The Kumulipo: A Hawaiian Creation Chant* (Honolulu, University Of Hawaii Press, 1981). Including the pan-Polynesian ancestor and hero Maui.
[15] Justice Williams, above n 4.
[16] Kinship ties and responsibilities.
[17] Genealogy.

spiritual, social and political authority one possessed.[18] "The basic social unit in Māori society was the whanau, an extended family which included three generations".[19] In terms of education, the whanau was "the cognitive framework whereby things were known and ordered, stored and transmitted".[20] Whakapapa and other knowledge were taonga, or treasures, whose transmission was sometimes guarded[21]

Ancestry determined social and political standing. "Migrants, conquerors and strangers came into the land by marrying into the local people"[22] who possessed mana whenua, an authority to possess the land only accorded to descendants of the locale's original inhabitants. Rather than a thing or an inanimate object, the land "was part of them by direct descent from the earth mother".[23] As in Hawai'i, customary usage entailed reciprocal responsibility for land and mutual benefits under the auspices of the rangatira—or persons of chiefly status.[24]

Despite later claims,[25] Māori possessed an identifiable legal system based on "an established usage which by long continuance has acquired the force of a law or a right", or, rather, "a reasonable rule, followed consistently and continuously by the people from time immemorial".[26] This historical continuum of "indigenous or aboriginal laws and customs" which even today "have met particular legal tests and

[18] "…Prestige, authority, control, power, influence, status, spiritual power, charisma - mana is a supernatural force in a person, place or object. Mana goes hand in hand with tapu, one affecting the other. The more prestigious the event, person or object, the more it is surrounded by tapu and mana. Mana is the enduring, indestructible power of the atua and is inherited at birth, the more senior the descent, the greater the mana. The authority of mana and tapu is inherited and delegated through the senior line from the atua as their human agent to act on revealed will. Since authority is a spiritual gift delegated by the atua, man remains the agent, never the source of mana.": *Te Aka Māori-English, English-Māori Dictionary (Online)* <www.maoridictionary.co.nz>.
[19] Walker, at 63. Emphasis added.
[20] Mere Roberts "Revisiting 'The Natural World of the Māori'" Danny Keenan *Huia Histories of the Māori: Nga Tahuhu Korero* (Wellington, Huia, 2012) at 46.
[21] And usually "intimate[ly] and interdependent[ly]" tied to land: Roberts, at 46.
[22] Eddie Durie "Ancestral Laws of the Māori" in Keenan at 7.
[23] Ibid.
[24] Durie, at 8-9.
[25] Such as the now infamous claims of Chief Justice William Prendergast In *Wi Parata v The Bishop of Wellington* (1877) 3 Jur (NS) 72, 77-78, 79.
[26] See Richard Benton, Alex Frame and Paul Edward Meredith *Te Matapunenga: A Compendium of Refrences to the Concepts and Institutions of Māori Customary Law* (Wellington, Victoria University Press, 2013).

thus are enforceable in courts"[27] is still known as tikanga.[28] Like the Native Hawaiian continuum, tikanga recognizes principles such as tapu/noa[29] and utu, a kind of reciprocal, restorative justice.[30] These principles allowed Māori to connect to their past, "the ancestors, their knowledge base and to their wisdom".[31] Despite its oral nature, this body of law was complex and detailed.[32] Rather than archaic or "primitive"[33] traditions lacking legal substantiality, this system formed a "constitutional order"[34] which was a "dynamic" "complex framework of distinctive customary norms and values",[35] even "the first law of Aotearoa".[36]

The Māori body politic has been described as a "network" of tribes and iwi each having legitimate authority.[37] These political units were "democratic" as the "power and authority" of the rangatira or chiefs to govern their people—or rangatiratanga—was sourced in the authority of the people.[38] As in Hawai'i, a chief

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[27] New Zealand Law Commission, *Study Paper 9: Māori Custom and Values in New Zealand Law* (Wellington, Law Commission, March 2001) at 1.

[28] Tika being the root word meaning to "be correct, true, upright, right, just, fair, accurate, appropriate, lawful, proper.": *Te Aka Māori-English, English-Māori Dictionary (Online)* <www.maoridictionary.co.nz>.

[29] The dualized sacred/profane system of prohibitions on places, activities and roles within the community based on spiritual rightness as in Hawai'i.

[30] Utu was not about punishment as much as it was about restoring spiritual balance between individuals and families since relatives of an offender were collectively responsible for the acts of the offender: Walker, at 68-70.

[31] Professor Hirini Mead quoted in Law Commission, above n 27, at 3.

[32] As evident in early works such as Norman Smith *Native Custom and Law Affecting Native Land* (Wellington, Māori Purposes Fund Board, 1942); and, more recently, the compendium complied by Benton, Frame, and Meredith, above n 26.

[33] Victorian notions which utilized scales of sophistication to identify supposed legal orders discussed in Benton, Frame and Meredith, ibid, at 16.

[34] FM Brookfield *Waitangi & Indigenous Rights: Revolution, Law and Legitimation* (Updated ed, Auckland, Auckland University Press, 2006) at 86. Brookfield identify constitutional features corresponding with Kelsen's grundnorms and Hart's primary obligation in the pre-European Māori legal order: at 86-87.

[35] As former president of the Māori Land Court, Sir Eddie Durie, explains,

"In fact, a complex framework of distinctive customary norms and values exists that collectively constitute the Māori legal order. Further, from the concepts of whanaungatanga or kinship came additional principles that assumed the primacy of kinship bonds in determining personal action, responsibility, mana (or status or self-esteem) and social rights, including the right of individuals to validate their identity within the chosen descent group. From the law of utu came responsibilities for the regular performance of social obligations; and from the principles of manaakitanga came the need to respect and care for others, or conversely not to advantage oneself to others' detriment: Durie, "Ancestral laws", above n 27, at 10.

[36] Ani Mikaere "Tikanga as the First Law of Aotearoa" in Linda Te Aho (ed) "Tikanga Māori me te Mana I Waitangi: Māori Laws and Values, Te Tiriti o Waitangi, and Human Rights" (2007) Yearbook of New Zealand Jurisprudence 24 at 24. For more on tikanga, see Hirini Moko Mead *Tikanga: Māori Living by Māori Values* (Wellington, Huia, 2003); and Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Auckland, Oxford University Press, 1994).

[37] Jessica Orsman "The Treaty of Waitangi as an exercise of Māori constituent power" (2012) 43(2) VULWR 345.

[38] Rangatiratanga was even thought to be non-transferrable as it was not necessarily the rangatira's to transfer. As a central principle of the Māori legal order and governance, "[t]he office and authority

who failed in his duties to the people could be deposed in favour of another. Rangatiratanga often acted like a centralized authority. Thus, "the highly structured classical Māori society of the late eighteenth century" "form[ed] political alliances and confederations" before the British.[39]

7.2.2 PRIOR SOVEREIGNTY AND CONSTITUENT PARTIES

New Zealand, like North America, was colonized by the British.[40] Both settler experiences were marked, initially, by mutual advantage and peaceful cohabitation.[41]

In 1835, James Busby, British Resident in New Zealand, helped draft and then secure the signatures of 35 hereditary chiefs from various parts of Aotearoa on A Declaration of Independence of New Zealand which declared New Zealand "to be an Independent State" under the jurisdiction of the "Confederation of United Tribes".[42] The Declaration reserved "sovereign power and authority" within New Zealand and the exercise of government including legislative capacity to the "hereditary chiefs and heads of tribes in their collective capacity"[43] while asking the British king to "continue to be the parent of their infant state, and…its Protector from all attempts upon its *independence*".[44]

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of a rangatira was obviously of first constitutional importance in Māori legal orders". Thus, Māori society can be viewed as "a democracy, limited by a certain amount of patriarchal influence" where "[i]ndividuals, other than slaves, 'possessed many political freedoms'": Brookfield and Baragwanath, above n 34, at 88-89. Emphasis added.

[39] Caren Fox "Change, Past and Present" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Wellington, Huia Publishers, 2010) 41 at 42.

[40] The United States was colonized by the 'English' from the 16th Century on, while British settlement began in the late 18th century in New Zealand.

[41] In Aotearoa, whalers, traders, sailors, and missionaries lived among the Māori mainly in coastal areas for some seventy years prior to 1840. While some inland tribes were somewhat unaffected by the newcomers, others enjoyed the "mutually advantageous" benefits of trade in resources such as timber". Orange, above n 10, at 17.

[42] See *A Declaration of the Independence of New Zealand* (English text) found in Orange, Appendix I, at 269

[43] Article 1.

[44] Article 4. Emphasis added. From both the British and Māori perspectives, the Declaration was strategic. The chiefs realized from the experience of other Pacific peoples that they needed to form some alliance but were not ceding their sovereignty. "The Confederation [itself] was similar to tactics being used with other indigenous peoples in the Pacific where foreign powers were vying

By 1840, the British had significant economic interests in New Zealand.[45] In this climate, several hundred Māori chiefs signed the Treaty of Waitangi/Te Tiriti o Waitangi 1840. Given translation issues,[46] Jacinta Ruru has summarized the Treaty thus:

> According to the English version, Māori ceded to the Crown absolutely and without reservation all the rights and powers of sovereignty (article 1), but retained full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties (article 2). In contrast, in the Māori version, Māori ceded to the Crown governance only (article 1), and retained tino rangatiratanga (sovereignty) over their taonga (treasures). Article 2 granted the Crown a pre-emptive right to purchase property from the Māori, and article 3 granted Māori the same rights and privileges as British citizens living in Aotearoa/New Zealand.[47]

Although constituting a treaty of cession, the Treaty nonetheless shows that "[t]he Crown recognized the Māori tribes as enjoying juridical status sufficient for the purpose of such cession"[48] and state-like independence[49] prior to signing. Judged

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with each other": Orange, above n 10, 31. However, see Fox, above n 39, at 42, regarding Māori formation of "political alliances and confederations" before the British.

[45] As in Hawai'i, these "interests were advanced [initially] through non-governmental agents of empire—the traders, missionaries, explorers and adventurers"—at least initially. Three statutes passed in 1817, 1823 and 1828 show that the British recognized "the country as independent territory" even as it assumed a hesitant quasi-jurisdiction over it through the governor of New South Wales: Orange, ibid, at 18.

[46] In addition to willfully blind interpretation in courts, translation issues have generally plagued the Treaty historically and must not be overlooked. These issues have largely centred on the fact that the parties signed two versions of the Treaty—one in English and one in Māori—which are in some cases significantly inconsistent in meaning. For example, the difference between the rangatiratanga or sovereignty in the Māori version versus the surrender of all the rights and powers of sovereignty in the English, a seeming mistranslation of the term kawanatanga. However, such issues exceed the limit of this thesis, being the stuff of many a thesis of its own. I have focused on aspects of the Treaty most relevant to this thesis. The debate is well-addressed in various sources including Orange, above n 10; Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland, Oxford University Press, 1991); and Sir Hugh Kawharu's work generally.

[47] Jacinta Ruru *Brookers Māori Legislation Handbook 2012* (Wellington, Brookers, 2012) at 2.

[48] McHugh, *Māori Magna Carta,* above n 46, at 145-146.

[49] As such, the Treaty does not bear all the hallmarks of the series of friendship and free trade treaties between the Hawaiian Kingdom and the United States prior to annexation. However, as in the case of the United States and Hawai'i, other nations of the age noted that Great Britain had itself recognized New Zealand's *independence*—in effect, the rangatira's independence and their legitimate right to govern New Zealand. 'Independence' is itself a word which at that time and in the present has been most often used in international law to refer to nation-states rather than tribal peoples. Again, the previous Declaration used the word "State" rather than people or tribe: see less debated Declaration of Independence…. The British had themselves seriously considered either establishing a Māori governance body over the territory or getting the chiefs to cede some territory and sovereignty but leaving the bulk of Māori governance and sovereignty intact in order to lend legitimacy to their economic enterprises in New Zealand. While it is true that the British may have promoted this view of New Zealand for their own ends, ultimately, economic interests rather than any change in the actual political status of the Māori chiefs drove the decision to favor the Treaty option, essentially, because it made a public show of a legitimate transfer of sovereignty once British economic interests were too threatened: Orange, above n 10, at 35-39 and 40-41.

against events prior to signing[50] and tikanga, it is clear that Māori signed believing that they retained self-determination via rangatiratanga and that tikanga would continue to govern their society and legal system.[51]

Consistent with self-determination and UNDRIP-like rights, 'taonga' would, in generations to come, be interpreted to include Māori language preservation and promotion, legal protection of Māori traditional knowledge systems, as well as other aspects of Māori culture and identity.[52] Interestingly, in the English and Māori texts, these rights accrue to both individuals and Māori collectively[53] on a permanent basis—or "so long as it is their wish and desire to retain the same".[54] However, Article 3 guarantees everyone rights to equal protection, or "all the Rights and Privileges of British subjects"[55]— that is, the same rights as other British citizens.

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[50] The retention of rangatiratanga was also consistent with the historical context of the treaty, in particular, the hui and whaikorero debates which took place prior to the chiefs' signing of the Treaty during the nine months in which it was circulated throughout the country. Interestingly, chiefs were in many cases persuaded to sign only after express verbal or written guarantees by British envoys and by Governor Hobson himself that Māori custom would be protected under British law. Sometimes called "the fourth article" (*Māori Custom and Values in New Zealand Law*, above n 27, at 73-74), this preservation and protection of Māori customary law was to apply in all cases except where they "were opposed to the principles of humanity and morals": See George Clark, Protector of Aborigines, quoted in *Māori Custom Law and Values*, above n 27, at 73. The effect of such guarantees is that: "It cannot then be said, as a matter of fact, that the Treaty introduced the law of England if the corollary is that Māori laws then ceased to be applicable. The Treaty is rather authority for the proposition that the law of the country would have its source in two streams": Sir Eddie Durie, quoted in NZ Law Commission, *Māori Custom and Values in New Zealand Law*, above n 27, at 74. At the time, the common law doctrine of *contra proferendum* required treaties to be read in favour of indigenous peoples where there were translational issues. Compare with Cherokee Cases described in Chapter Two at 2.3.2.

[51] A 2014 Waitangi Tribunal Report which rigorously analyzed the historical, social and legal context of the Treaty—particularly against the signing of the Declaration of Independence—put such conclusions beyond doubt. Among other findings, the Tribunal concluded that Māori did not "cede authority to make and enforce law over their people or territories", "agreed to share power and authority with Britain", and "consented to the treaty on the basis that they and the Governor were to be equals": Waitangi Tribunal, *He Whakaputanga me te Tiriti—The Declaration and the Treaty: the report on stage 1 of the Paparahi o Te Raki Inquiry, no.1040* (Lower Hutt NZ, Legislation Direct, 2014) at 528.

[52] See *New Zealand Maori Council v Attorney General* [1991] 2 NZLR 129 (CA); and *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets case* (PC)]; *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) [Commercial Radio Assets case].

[53] Art I recognizes the right of "Chiefs", Tribes", "families and individuals" to "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession"

[54] See Art II, English version. Though Crown retains ability to extinguish various rights via specific legislation.

[55] The Treaty of Waitangi—the Text in English, included in WT *He Whakaputanga me te Tiriti*, above

Thus, the "foundation"[56] document of New Zealand recognized a collective, specifically indigenous right to self-determination and a seemingly *everyone/no-one* right to equal protection. The same document is increasingly recognized as a *constitutional* document which outlines the ongoing relationship between two "constituent" parties.[57] The late Sir Hugh Kawharu 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".[58] 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.[59]

Immediately following the Treaty, "[p]ragmatism prevailed",[60] and a dual or parallel legal system, incorporating both British and Māori law, accommodated "both races" in New Zealand. However, when "these measures caused a negative backlash among the settlers over the perceived inequalities of law"[61] legislation

[56] According to Orsman, above n 37, at 352-353, the Treaty is constitutional, thought "not the embodiment of a typical written constitution. It does not really set out "central rules and higher procedure" for a newly constituted New Zealand State. Nor does it constitute specific institutions of government. Although art 3 gives New Zealanders the same rights and duties as British citizens, it does not specify how the Crown will protect them, or entrench the rights as supreme law…However, what the Treaty does arguably contain is an agreement on the authority to be held respectively by Māori and the Crown in New Zealand".

[57] 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: Orsman, above n 37, 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 recognized "assent" as the indigenous people of the country to a new constitution which defined a power-sharing arrangement: Orsman, above n 37, at 355-356. Of course, only five years earlier Māori chiefs had tried to protect their "independence" via the Declaration.

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

[59] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 [*Lands Case*].

[60] With the British realizing that temporarily recognizing Māori customary law would expedite justice and ease eventual legal transition: See *Māori Custom and Values in New Zealand Law*, above n 27, at 19.

[61] Ibid.

limited the application of Māori customary law to cases involving only Māori.[62] Subsequent legislation would further limit the parallel court system.[63]

Judicial recognition of the Treaty and tikanga roughly follows a similar pattern. In 1847, the Treaty was upheld in *R v Symonds*.[64] In 1877, Chief Justice Prendergast of the New Zealand Supreme Court infamously declared it "a simple nullity" sgned by "primitive barbarians" in *Wi Parata v Bishop of Wellington*[65], a case involving the donation of Ngāti Toa land to a church for the purpose of establishing a school which never eventuated.[66] The Prendergast Court also denied the existence of Māori customary law in *Rira Peti v Ngaraihi Te Paku* (1888).[67] While the British Privy Council—the highest court of appeal then—consistently recognized the existence of Māori customary law,[68] New Zealand courts limited Treaty recognition to incorporation into municipal law until recently.[69]

Ultimately, this history exhibits a pattern of "express denial…overt suppression", and assimilation through institutions and "re-interpretation". During fluctuations in federal-Indian and federal-Native Hawaiian policy between self-determination and assimilation, the imposed individualization of land and people in New Zealand drove land alienation and the fragmentation of social structures intricately connected with the land.[70] Similar to Native Hawaiians, "Māori customary law

[62] For instance, the Native Exemption Ordinance of 1844 allowed Māori to practice muru or traditional compensation as an alternative to the standard punishment for theft. It was replaced by the Resident Magistrates Courts Ordinance of 1846 which Magistrates courts included two chiefs as "Native Assessors" in a panel of three judges when judging Māori cases. For a regional history of the scheme see Hillary Mitchell and John Mitchell *Te Tau Ihu o te Waka: A History of Māori of Nelson and Marlborough, Volume II: Te Ara Hou—The New Society* (Wellington, Huia and Wakatu Incorporation, 2007) at 363-367.

[63] The Resident Magistrates Act 1867 again recognized Māori customary principles such as muru. In 1893, however, the Magistrates Court Act repealed the Resident Magistrates Act 1867, ended the role of Native Assessors and replaced the Resident Magistrate with a Stipendiary Magistrate who filled a "strictly judicial function[]": *Māori Law and Values in New Zealand Law,* above n 27, at 20.

[64] See *R v Symonds* (1847) NZPCC 387, a New Zealand Supreme Court case.

[65] *Wi Parata v Bishop of Wellington* [1877] 3 NZ Jur (NS) 72.

[66] See discussion on separate requirements on Māori educational Institutions as the result of the Native Schools Act 1876 at 7.1.3.

[67] *Rira Peti v Ngaraihi Te Paku* (1888) 7 NZLR 235.

[68] In *Nireaha Tamakai v Baker* (1900) NZ PCC 1; [1901] AC 561 (PC); and later the validity of funeral customs in *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); and traditional adoptions in *Hineiti Rirerire Arani v Public Trust* (1919) {1840-1932] NZPCC 1 (PC).

[69] In the case of *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308. For change, see *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

[70] *Māori Custom and Values in New Zealand Law*, above n 27, at 22-26. Quote at 26. Compare with land Westernization in Hawai'i resulting from the Mahele discussed in Chapter Three at 3.2.2.

was denied, acknowledged, defined, modified and extinguished according to non-Māori agenda".[71]

7.2.3 AGGRESSIVE NATION-BUILDING AND IN-BUILT MAJORITY BIAS AND DISCRIMINATION

As in Hawaii, the attempted "eclipse of Māori custom law" had moral and racist overtones,[72] particularly in education. Over generations, legal and educational systems displayed nation-building, including in-built majority bias and structural, systemic and institutionalized discrimination.

Prior to the Treaty, Western-style education was largely provided by mission schools with a Christianizing mission. Early observers recognized Māori's "…great thirst for knowledge, intense desire to acquire literacy skills, and quick … intelligence … and the value that Māori placed on books and writing paper."[73] In the tradition of wananga and valuing knowledge, indigenously run schools were also established during this period.[74] The Crown provided the same education to Māori and non-Māori children. Proximity to home and family was considered conducive to positive education outcomes. [75] This Treaty-friendly approach changed once "a settler government ruled New Zealand".[76] Legislation such as the Native Schools Act of 1858, subsidized boarding schools for Māori intended to separate indigenous learners from family and home, "acculturate them in the ways of the Pākehā [European] and hasten the assimilation process".[77]

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[71] Michael Belgrave quoted in *Māori Custom and Values in New Zealand Law*, above n 27, at 22-23, para 98.
[72] *Māori Custom and Values in New Zealand Law*, ibid, at 22, para 97.
[73] Māori children were "very adept" at acquiring English, possessed "great natural intelligence" and "quickness of perception": various sources quoted in Mitchell and Mitchell, above n 62, at 329.
[74] Though usually in conjunction with mission boarding schools Peter Caccioppoli and Rhys Cullen *Māori Education* (Papakura NZ, Kotahi Media, 2006) at 59.
[75] Including: "religious education, industrial training, and instruction in the English language": ibid, at 59.
[76] Ibid, 60.
[77] 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* (Wellington, New Zealand: Huia Publishers, 2011) 21 at 22. Compare with Hawaiian mo'olelo described in Chapter Three at 3.2.2.

The Native Schools Act 1867 (1867 Act) [78] was seen as an assimilative alternative "to marginaliz[ing] "the natives". [79] New Zealand's version of 'separate but equal'[80] was a separate education system for Māori designed to civilize them.[81] Māori children who spoke Māori and practiced tikanga were regarded as the "bad child" versus the "good" Māori child who had been Europeanized.[82] Conceived of as the 'Other', Maori children were to be separated from other children and from their families[83] and bombarded with cultural and identity denigration[84] as structure, curriculum and pedagogy reflected theories of "inherited and immutable biological inferiority and biological superiority.[85]

The 1867 Act provided limited annual funding for these separate schools [86] requiring Māori communities to pay costs and to leap over bureaucratic hurdles which communities in the mainstream system did not.[87] As a result of this "self-help" approach[88], "few new schools" were built during the early years of the Act in

[78] An Act to Regulate and Provide Subsidies for Māori Schools, 10 October 1867. It was cemented in the Native Schools Code 1879.
[79] JM Barrington *Separate but Equal? Māori Schools and the Crown 1867-1969* (Wellington, Victoria University Press, 2008) at 20.
[80] Barrington recognizes that a few non-Māori children attended the Native Schools but notes that that number never rose above 10 per cent and that such children were often, for instance, the children of the teacher: at 15. The system was administered by a central government department rather than either provincial or local authorities as in the non-Māori case.
[81] Authorities sometimes even used blood quantum to decide which school children would attend: Judith A Simon and Linda Tuhiwai Smith *The Native Schools System 1867-1969: Ngā Kura Māori* (Auckland, Auckland University Press, 1998) at 259.
[82] Ibid.
[83] Maxine Stephenson "Closing the Doors on the Maori Schools in New Zealand" (2006) 9(3) Race Ethnicity and Education 307 at 309-310.
[84] For instance, textbooks and other materials bore the urgent message that the Māori's health, happiness and prosperity, if not their very survival, depended on forsaking traditional practices for European ones: Colin McGeorge "James Pope's textbooks for New Zealand native schools" found at: http://faculty.education.illinois.edu/westbury/paradigm/mcgeorge.pdf, dated 6/5/14.
[85] Barrington, above n 79, at 21.
[86] Established "for the education of 'children of the aboriginal race and of half-castes being orphans or being the children of indigent persons'": ibid, at 21. Interestingly, non-Māori children "of indigent persons"—that is, poor children—were included in this group and also needed to be separated from the Pakeha children.
[87] The Act required Māori communities to donate at least one acre of land to the Crown to establish a school as well as donate to the teacher's salary, their accommodation, building and repair costs, books, and other supplies Caccioppoli and Cullen, at 60. In the case of several schools in the Nelson-Marlborough area, the government portion of the funding actually failed to materialize at all causing local Māori communities to have to fund building and running costs over decades from the already meagre and inconsistent South Island Tenths Benefit Fund which was also supposed to pay for crucial medical services, pensioner income and other government costs and church donations: See Mitchell and Mitchell, above n 62, at 457-461.
[88] Barrington, above n 79, at 15.

poorer Māori communities.[89] When they were, they were "underfunded and under-resourced".[90]

Despite such treatment, contemporary Māori valued education and pushed for equality. A petition[91] written by Wi Te Hakiro of Tai Tokerau and 336 others in 1876 expresses a desire that their children be educated but also frustration with discriminatory costs, loss of land, and the one-size-fits-all approach to Māori education. Their pleas to amend the 1867 Act recognize the value of gaining "all the knowledge you Europeans possess" but also an identity-responsive education.[92] At one point, the petitioner laments prophetically, "had our children received a good sound education, it would have been for the benefit of both races".[93]

In the early 1930s observers recognized that there was nothing Māori about the curriculum.[94] The 1880 Native Schools Code had required teachers to discourage "Māori beliefs and practices" among Māori children and to replace them with European "belief systems and manners". The Tohunga Suppression Act 1908 actually made the expression of cultural and spiritual beliefs at school criminal and prohibited the speaking of the indigenous language,[95] a decade after a settler government did the same in Hawai'i.[96] To receive government funding schools had to teach in English.[97]

The Māori curriculum was inherently unequal to the mainstream. When mainstream schools had six standards in their curriculum, Māori had only four until 1890. When mainstream schools provided both primary and secondary education, Native Schools offered only primary.[98] As Stephen May notes:

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[89] Caccioppoli and Cullen, above n 74, at 60.
[90] Barrington, above n 79, at 21.
[91] Petition of Wi Te Hakiro and 336 others (part of) [Translation.] — 7. "Native Schools Act, 1867.", found at http://nzetc.victoria.ac.nz/tm/scholarly/tei-BIM873TeHa-t1-g1-t2.html, dated 6/5/14.
[92] The petitioners recognized that the Māori learner will not retain education unless the approach is changed, unless children that speak only Māori are educated in Māori and young children are taught English early: ibid.
[93] Ibid.
[94] According to an inspector in 1931: quoted in Barrington, above n 79, at 17. See Simon and Smith, above n 81, at 72.
[95] Barrington, above n 79, at 116.
[96] See Chapter Three discussion at 3.2.2.
[97] Caccioppoli and Cullen, above n 74, at 60. Despite some concession for younger children, funding depended on English proficiency until the 1950s: Barrington, above n 79, at 20.
[98] Barrington, ibid, at 21.

> Ironically, in this process, Pākeha were not only to repudiate and replace Māori language and knowledge structures within education but were also to deny Māori full access to European knowledge and learning. [99]

As in Hawai'i, the use of Māori at school or failure to learn English often resulted in corporal punishment.[100] The psychological effects of these policies had "long-term and intergenerational" effects.[101]

Ultimately, as Linda Smith explains:

> [T]he 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 the systematic, frequently brutal, forms of denial of indigenous languages, knowledges and cultures.[102]

Schools symbolized "civilization" and replicated the colonizers' message of Western superiority.[103] Even in 1961, the influential Hunn Report[104] retained a Waldronian depiction of Māori culture and identity as "relics" or backwardness[105] and Pākeha culture as "civilisation" necessarily "brought to bear on" the Māori child.[106] The Native Schools system was incorporated into mainstream education in 1969 but continued to preach racial superiority.[107]

Thus, during the same period that American federal-Indian and federal-Native Hawaiian policy was characterized by fluctuations between assimilation, integration and self-determination, the Crown's Māori educational policy was dominated by some degree of assimilation and contrasting segregation. Practices of this period are at odds with earnest liberal sensibilities and substantial *Brown v*

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[99] Stephen May "Language and Education Rights for Indigenous Peoples" in Stephen May (ed), *Indigenous Community-Based Education* (Clevedon, Multilingual Matters Ltd, 1999) 42 at 54.
[100] "[S]evere disciplinary measures including "cuts", straps and caning occurred for offenses as minor as not being able to pronounce an English word: See Barrington, above n 79, at 118-119.
[101] Tomlins-Jahnke and Warren, above n77, at 23.
[102] "By the nineteenth century colonialism not only meant the imposition of Western authority over indigenous lands, indigenous modes of production and indigenous law and government, but the imposition of Western authority over all aspects of indigenous knowledges, languages and cultures": Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, London, Zed Books, 2012) at 67.
[103] Ibid, at 68.
[104] Sir Jack Hunn served in many government posts including Minister of Maori Affairs. His 1961 report was meant to be a review of the Ministry of Maori Affairs but recommended, among other things, the integration of Maori, particularly the urbanization of rural Maori.
[105] Compare with Waldron's "cosmopolitan advantage" discussed in Chapter Three at 4.3.2.
[106] May, above n 99, at 55.
[107] Simon and Smith, above n 81, at 258.

Board of Education intuitions. This was both de jure and de facto, direct and indirect, straightforward and complex discrimination constituting a "a sad indictment of the Government's responsibility to Māori, and clear breaches of Article III rights of Māori to equal treatment".[108]

7.2.4 ONGOING HARM

As in Hawai'i, nation-building had far-reaching effects on Māori. Language loss, for instance, led to "capability deprivation".[109] In 1930, 96 per cent of Māori children spoke only Māori at home, but only 26 per cent spoke Māori in 1960. The 'death' of the Māori language was predicted in 1979.[110] Rather than substantial integration, loss of language produced "Māori educational underachievement for decades to come"[111] as well as "culture murder" as Māori language remains "the only appropriate means of transmitting Māori cultural knowledge".[112] Cultural loss also led to children "los[ing] touch" with their *turangawaewae*—or ancestral places.[113]

Physically, the "focus was now on surviving".[114] In 1769, Captain James Cook estimated a population of 100,000 Māori in Aotearoa. In 1858—despite previously prolific birth rates—the first official census of Māori recorded a population of only 60,000. By 1896 that number had dropped to 42,000.[115] Dropping fertility rates

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[108] Mitchell and Mitchell, above n 62, at 461.
[109] Tove Skutnabb-Kangas has said that "Linguistic capital is convertible to other types of capital and resources including formal education and life chances. Capability deprivation…leads to poverty": Tove Skutnabb-Kangas "Series Editor's Note" in Vaughan Rapatahana and Pauline Bunce (eds) *English Language as Hydra: Its Impacts on Non-English Cultures* (Bristol, Multilingual Matters, 2012) xv at xv.
[110] May, above n 99, at 55.
[111] Tomlins-Jahnke and Warren, above n 77, at 23.
[112] Despite many initiatives, language loss continues. Interestingly, speakers of Māori language have dropped since the 2006 census in every age group except those over 65. Te reo speakers currently represent only 21.3 per cent of Māori, a figure not much higher than the 20 per cent who could speak it in 1960: Statistics New Zealand 2013 *Census 2013 QuikStats About Culture and Identity* (Statistics NZ, April 2014) at 23. Also see Tove Skutnabb-Kangas and Robert Dunbar "Indigenous Children's Education as Linguistic Genocide and a Crime against Humanity? A Global View" (2010) (1) *Gáldu Čála:* Journal of Indigenous Peoples Rights 53.
[113] Graham Hingangaroa Smith and Vaughn Rapatahana "English language as Nemesis for Māori" in Rapatahana and Bunce, above n 109, 76 at 83 and 86.
[114] Simon and Smith, above n 83, at 165.
[115] "Story: Taupori—Maori population change" Te Ara Encyclopedia of New Zealand <www.teara.govt.nz>.

are directly linked to the introduction of communicable diseases including influenza and smallpox, malnutrition and new sexually transmitted diseases, while the huge influx of European settlers after 1840 had the effect of "swamping Māori" and creating "demographic marginalization".[116] By 1900, Māori had become a minority in their own country.[117]

With resilience, Māori have survived, with 598,605 identifying themselves as of Māori ethnicity and an overall total of 668,724 claiming they are of Māori descent in the 2013 New Zealand Census.[118] Like Pacific Islanders in the United States, Māori are currently the fastest growing ethnic group in New Zealand.[119]

Resiliency and population growth[120] have not been enough alone to overcome complex discrimination and disparities. A Human Rights Commission (HRC) discussion paper published in 2012 recognized the continued existence of "structural discrimination, systemic discrimination or institutional racism"[121] against Māori in education, health and justice systems, and the public service impacting various outcomes. For instance, Māori men and women have a life expectancy of 8.6 years and 7.9 years, respectively, less than their Pākeha counterparts. Unemployment rates for Māori are almost three times that of Pākeha. While only constituting about 15 per cent of the population, Māori account for 49 per cent of prisoners in New Zealand.[122] A 2007 Report by the Department of Corrections[123] and a 2011 Ministry of Justice discussion paper[124] similarly linked

[116] James Belich *Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000* (Auckland, Allen Lane/Penguin, 2001) at 466.
[117] Ibid, at 466.
[118] The more conservative figure represents 14.9 per cent of the population—or one in seven New Zealanders: Statistics New Zealand, infra n 119, at 5.
[119] See Statistics New Zealand "National Ethnic Population Projections: 2006(base)–2026 update" (22 April 2010) <www.stats.govt.nz>.
[120] From a onetime low of 42,000 representing 5 per cent of the population to present figures representing an almost 40 per cent increase in the last 22 years alone.
[121] Human Rights Commission *A fair go for all? Rite tahi tātou katoa? Addressing Structural Discrimination in Public Services* (Human Rights Commission Discussion Paper, July 2012) at 2.
[122] Ibid, at 6. Moana Jackson's ground-breaking 1988 report *The Maori and the Criminal Justice System: A New Perspective—He Whaipaanga Hou* (Wellington, Policy and Research Division, Department of Justice, 1988) famously connected such statistics systemic discrimination. Compare with figures for Native Hawaiians and similar systemic discrimination discussed in Chapter Three at 3.2.2.
[123] Department of Corrections *Over-representation of Māori in the Criminal Justice System: An Exploratory Report* (Wellington, Department of Corrections, 2007).
[124] Kim Workman *Māori Over-representation in the Criminal Justice System—Does Structural Discrimination Have Anything to Do With It?* (Wellington, Ministry of Justice, 2011).

the overrepresentation of Māori in the criminal justice system with structural discrimination.

A 2006 medical study also found that "[i]nequalities in health between different ethnic groups in New Zealand are most pronounced between Māori and Europeans". The same study found that "the [Māori] experience of racial discrimination and deprivation" in various areas of life and not just healthcare had a direct impact on "ethnic inequalities for various health outcomes" such as "low physical functioning", "low mental health" and "cardiovascular disease".[125] Similar to Native Hawaiians, Māori have the lowest life expectancy at birth, highest suicide rates, and second highest infant mortality rates in New Zealand.[126]

In education, the HRC paper recognized significant "gaps in the educational achievement between Māori" and other ethnic groups in mainstream education correlating with socio-economic factors including poverty.[127] Current Ministry of Education figures show that Māori are half as likely to qualify for university entrance, a third less likely to leave school with National Certificate Educational Achievement (NCEA) Level 2 or above,[128] a third less likely to stay for Year 13,[129] and more than three times more likely to be truant.[130] Māori are also three times more likely to be suspended.[131]

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[125] Rici Harris and others "Effects of self-reported racial discrimination and deprivation on Māori health and inequalities in New Zealand: cross-sectional study" (2006) 17 The Lancet 367. A follow-up 2012 study recognized a "dose-response relationship" between racial discrimination and poor health outcomes in almost every area: Rici Harris and others "The pervasive effects of racism: experiences of racial discrimination in New Zealand over time and associations with multiple health domains" (2012) 74(3) Soc Sci Med 408.

[126] Lisa Marriott and Dalice Sim Indicators of Inequality for Māori and Pacific People (Working Paper 09/2014, Working Papers in Public Finance, Victoria University, August 2014) at 8 and 11-12.

[127] HRC, above n 121, at 50.

[128] "NCEA is the main secondary school qualification for students in years 11-13. NCEA stands for the National Certificate of Educational Achievement, and can be gained at three levels – usually level 1 in year 11, level 2 in year 12, and level 3 in year 13" New Zealand Ministry of Education <www.minedu.govt.nz>. It measures progress in high school but also performs an SAT-like function as university entrance usually requires a certain amount of credits at Level 3 or above.

[129] Comparable to twelfth grade/senior year in US high schools and vital for university entrance qualification.

[130] See Ministry of Education "Progress against Māori Education Plan Targets: Ka Hikitia—Managing for Success" Ministry of Education <www.educationcounts.govt.nz>, Tables 2, 4, 5.

[131] HRC, above n 121, 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 10.6per 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

Such statistics appear to reveal not only a "gap" between 'haves' and 'have-nots' but real poverty measured against minimum standards.[132] Once again, pervasive inequalities cluster around an indigenous identity.[133] Defying Rawlsian just savings,[134] the gap has remained, even during times of relative economic prosperity in New Zealand when other ethnic groups have fared well.[135] And it continues to grow.[136]

The nature of this gap is reminiscent of global intersectionality, compounding and multiplication, with Māori experiencing inequalities on the basis of multiple identities including gender, age, family situation, economic status, educational attainment and other supposedly arbitrary characteristics.[137] Over time, such disparities have become "entrenched", "intergenerational"[138] and closely associated

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 Kokiri "Ko Nga Rungatahi Māori i te Rangai Matauranga me te Whiwhi Mahi: Māori Youth in Education and Employment" (2012) Te Puni Kokiri/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. This underachievement tends to spill over into under-participation in and under-qualification for tertiary education.

[132] That is, they seem to reveal a "gap between the better off and those that are not so well off" but also "resources being too low to meet basic needs…'not having enough' when assessed against a benchmark of 'minimum acceptable standards", or the distinction between inequalities and poverty used by Bryan Perry in *Household incomes in New Zealand: Trends in indicators of inequality and hardship 1982 to 2013*, Ministry of Social Development, Wellington, July 2014, at 18.

[133] With Pacific Islanders who also usually rank very low.

[134] Evan Te Ahu Poata-Smith "Inequality and Māori" in Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (Auckland, Bridget Williams Books, 2013) 148 at 149-150.

[135] In the post-World War II "long boom", for instance, there was a shortage of manpower but Māori were unemployed at a higher rate than other ethnic groups: ibid, at 149.

[136] See Marriott and Sim, above n 126, at 27-28.

[137] See Perry, above n 132, for instance. While Perry's study is admittedly focused on one area of inequalities—income—his findings illustrate not only a consistent gap between statistics for European New Zealanders and Māori but the matrix between indigenous identity and complex someone identities. See, for instance, Table B.5, "Distribution of Individuals across income quintiles (BHC) by various households and individual characteristics (per cent)" which shows that 53 per cent of Māori fall into the two quintiles which most correspond with the largest percentages of children and older people, as well as single-parent families, government transfer as main source of income (under 65s), and rented, even government subsidized accommodation: Perry, at 68. Similarly, throughout the study, Māori and children are repeatedly identified as the most susceptible to various inequalities and poverty: see, for instance, para 23 in "Overview and Summary" at 27, Figure D.10 at 99, "Children in low-income households by ethnicity" at 155, and "Children in income-poor households: composition by their ethnicity and by selected household characteristics" and Table H.5 at 159. Other studies show similar correlations in factors including "health", "knowledge and skills", "paid work", "cultural identity" and social connectedness": see Marriott and Sim.

[138] Poata-Smith, above n 134, at 153 and 157.

with socio-economic immobility, "poverty persistence and 'chronic'" disadvantage[139]—much like those attracted to Native Hawaiian identity.

7.3 AN EXPANDED DOMESTIC MULTI-NARRATIVE OF EQUALITY

Similar to international and Hawai'i state law, multiple equality narratives are available to address the Māori mo'olelo. This multi-narrative approves substantial *everyone/no-one*, *complex someone* and specifically *indigenous* rights which have been influenced by both human rights and homegrown indigenous rights.

7.3.1 INTENTIONALLY HUMAN

Prior to the end of World War II, "many of [the UDHR's] provisions were regarded as right, if not 'rights', and some were established in practice.[140] Later, the "rise of constitutionalism" in New Zealand coincided with international human rights.[141] Since then, human rights have often coincided with constitutional rights in New Zealand.[142]

Constitutional expert Phillip Joseph has said that human rights have a "special status" where incorporated into New Zealand law and that "[h]uman rights statutes

[139] Perry, above n 132, at 26-35. "…Income inequality experienced early in life, result[s] in reduced social mobility later in life": Marriott and Sim, above n 126, at 3.
[140] N Taylor "Human Rights in World War II in New Zealand" (1989) 23(2) New Zealand Journal of History 109 at 109. During World War II, women's and workers' rights flourished in New Zealand and others such as freedom of conscience--as in the case of conscientious objectors--would be tested.
[141] Otherwise described as the emergence of a supranational concept of the rule of law: Philip Joseph *Constitutional and Administrative Law in New Zealand* (Wellington, Thomson Brookers, 2007), at 179.
[142] This is unsurprising given the overlap between the content of what are considered fundamental constitutional rights and the legal claims we call human rights, particularly in describing the basic rights an individual is seen to hold against the state: Duncan Webb, Katherine Sanders and Paul Scott *The New Zeland Legal System: Structures and Processes (5th ed)* (Wellington, LexisNexis, 2010) at 53. This is one of the ironies of the resistance of various liberal jurisdictions to human rights integration. This is also unsurprising in view of the common post-Enlightenment and liberal individualist origins shared by human rights and constitutional rights: See discussion in Chapter Five at 5.2.

are *constitutional* statutes" and "no ordinary statute[s]".[143] The Race Relations Act 1971 (RRA)[144] and the Human Rights Commission Act 1977[145] were the first formal protections against discrimination in New Zealand but also intentional efforts to incorporate its human rights treaty obligations.[146] Later, the New Zealand Bill of Rights Act 1990[147] (BoRA) rejected the adoption of an American-style written constitution[148] instead codifying international human rights as part of New Zealand's 'unwritten' constitution.

The BoRA has "acquired special status as a result of the rights it protects" and fills a fundamental constitutional role as it "is principally directed at public-sector activity, including actions of the legislature, the executive and judiciary".[149] In fact, the BoRA was drafted to "affirm New Zealand's commitment to the [ICCPR]" but also "[t]o affirm, protect, and promote human rights and fundamental freedoms in New Zealand" generally.[150] The BoRA appears to affirm the Article 3 human right to equality.[151] Similarly, as noted by the Court of Appeal:

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[143] Joseph, above n 141, at 269. His emphasis. As described in Chapter 1, New Zealand's Westminsterian constitution is characterized as "unwritten", meaning that it is contained in a variety of sources including legislation. Although almost none of these are entrenched and none constitute supreme law comparable to the US Constitution, all legislation enjoys a certain degree of supremacy under the doctrine of parliamentary sovereignty. Parliamentary sovereignty is the apparent counterpart of the plenary power doctrine in the US which governs so much of the federal-Indian and federal-Native Hawaiian relationships. In New Zealand, "What the statute itself enacts cannot be unlawful, because [it] is the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment…is illegal": *Cheney v Conn* [1968] 1 WLR.242 at 247. Thus, without being entrenched in a written constitution, legislature-made law cannot be changed by any other person or body.

[144] Race Relations Act 1971 [RRA].

[145] Human Rights Commission Act 1977. See discussion in Lorraine Skiffington "Human Rights Act" *Mazengarb's Employment Law (NZ)* (online ed) para 4000.1.

[146] For instance, the RRA was specifically enacted to meet New Zealand's obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination. In 1971, the Marshall government wanted to ratify the United Nations Convention on the Elimination of All Forms of Racial Discrimination which required enacting consistent domestic law: Former Race Relations Commissioner Joris de Bres, "Race relations law marks its 40th anniversary" (1 April 2012) Human Rights Commission <www.hrc.co.nz>. As the twin International Covenants were only adopted in 1966, these responses were relatively rapid.

[147] New Zealand Bill of Rights Act 1990 [BoRA].

[148] A document which would have incorporated the Treaty of Waitangi as supreme, entrenched, undoubtedly constitutional law: see Geoffrey Palmer A Bill Rights for New Zealand: A White Paper [1985] 1 AJHR A6.

[149] New Zealand Human Rights Commission *Human Rights in New Zealand 2010—Nga Tika Tangata O Aotearoa 2010* at 29.

[150] BoRA, Title.

[151] ICCPR, Article 3 reads: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

> The long title of the HRA [Human Rights Act 1993] states that the Act is intended "to provide better protection of human rights" in New Zealand "in general accordance with the United Nations *Covenants* or *Conventions* on Human Rights".[152]

The plurality of these terms suggests affirmation of both Covenants'—the CPR-based ICCPR *and* ESCR-protecting ICESCR—and also, potentially, an unspecified group of UN 'Conventions'. New Zealand legislation also directly incorporates several other international treaties.[153] Where the United States has not yet adopted the ICESCR, has demonstrated a 'pick-and-choose' attitude towards its ICCPR commitments and failed to adopt or ratify other key instruments guaranteeing equality in education such as CEDAW and the Children's Convention,[154] New Zealand has adopted and ratified all these instruments with few reservations.[155]

7.3.2 A SUBSTANTIVE EVERYONE/NO-ONE AND COMPLEX SOMEONE

Influenced by human rights, New Zealand law initially suggests a Rawlsian veil of ignorance and American jurisprudence including *Bakke* and *Rice* but displays greater awareness of complex discrimination and is aimed at substantive equality.

While not guaranteeing equal protection per se, the New Zealand Bill of Rights Act 1990 (BoRA) usually references "no one", "everyone", "every person", or "every New Zealand citizen".[156] As Paul Rishworth and others describe, such language conveys the idea that "individuals have rights because each individual matters, and matters equally".[157]

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[152] In the case of Ministry of Health v Atkinson [2012] NZCA 184, para 33. The Court of Appeal is New Zealand's second highest court of appeal. Emphasis added.
[153] Including the Rome Statute for the International Criminal Court, the Paris Convention, the TRIPS Agreement, and Kyoto Protocol.
[154] See discussion in Chapter 2 at 2.5.
[155] Race Convention 1966 signed 25 Oct 1966, ratified 22 Nov 1972; ICESCR 1966 signed 12 Nov 1968, ratified 28 Dec 1978; ICCPR 1966 signed 12 Nov 1968, ratified 28 Dec 1978; CEDAW 1979 signed 17 Jul 1980, ratified 10 Jan 1985 with reservations specific to Niue and Cook Islands; Children's Convention 1989 signed 1 Oct 1990, ratified 6 Apr 1993, with one reservation over provision of benefits for overstayer children.
[156] The exception is s 20 which recognizes, like the Minorities Declaration 1990 and Article 27 of the ICCPR, the "[r]ights of minorities" and while referencing the individual, that is "[a] person who belongs to an ethnic, religious, or linguistic minority in New Zealand".
[157] Paul Rishworth and others *The New Zealand Bill of Rights* (Melbourne, Oxford University Press, 2003).

More importantly, section 19(1) of the BoRA affirms "[f]reedom from discrimination".[158] The Human Rights Act 1993 (HRA)—as in antebellum American constitutional amendments—speaks in no-one terms recognizing various identities as prohibited grounds for unlawful discrimination including: "sex", "marital status", religion, "ethical belief", "disability", "age", "political opinion", "employment status", "family status" and "sexual orientation". "[C]olour", "race" and "ethnic or national origins"[159] are just a few prohibited grounds.

New Zealand courts and tribunals have, like American federal courts, interpreted equality in terms of identical treatment. In the Court of Appeal,[160] plaintiffs in *Quilter v Attorney-General* [1998][161] 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.[162] In *An Jian v Residence Review Board* (2006), the High Court of New Zealand recognized "unjustifiably different treatment… assessed by reference to an appropriate comparator group" as discrimination[163] —a definition not unlike the trammelling step of the *Weber-Johnson* test. In *Claymore Management Ltd v Anderson* [2003], the High Court also suggested that the effect of differential treatment on an appropriate comparator person or group will reveal the discrimination.[164]

In addition to these *everyone* narratives, however, New Zealand law is also fairly comfortable with a *complex someone* narrative which approves both special measures and minority rights.

[158] NZ Bill of Rights Act 1990, s 19.
[159] See HRA 1993, s 21 "Prohibited grounds of discrimination".
[160] At the time, the highest court of appeal within New Zealand itself.
[161] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).
[162] 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 19 August 2013 based largely on arguments which interpreted equality as same treatment.
[163] *An Jian v Residence Review Board* 3/8/06, Glendall J, HC Wellington CIV-2005-485-1600.
[164] *Claymore Management Ltd v. Anderson* [2003] 2 NZLR 537 (HC). In *Quilter*, Justice Tipping in the majority had asked—not unlike the intermediate scrutiny test in Kamehameha—whether the "distinction or differentiation had the effect of imposing burdens, obligations or disadvantages on some individual or group not imposed on others": *Quilter* at 575. Justice Thomas in dissent considered the Marriage Act discriminatory at the outset because it treated homosexual couples differently: *Quilter*, above n 161, at 540.

As discussed in previous chapters, international human rights treaties recognize the difference between de jure and de facto, direct and indirect, formal and systematic or structural discrimination.[165] Section 65 of the HRA recognizes:

> 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.[166]

Similarly, the High Court has recognized[167] that discrimination can be indirect or "neutral on its face but ha[ve] a disproportionate effect on an identifiable group because of a particular characteristic of that group".[168]

The Human Rights Commission (HRC) was established by the HRA and is charged with promoting and protecting human rights in New Zealand. It receives complaints regarding human rights and can make declaratory judgments.[169] Echoing early Permanent Court of Justice minority education cases,[170] the HRC has said:

> 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…[171]

The constitutional/human rights interface in the BoRA and HRA approves several identity-aware exceptions to the *everyone/no-one* narrative. While some twenty

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[165] See Chapters 5 and 6.
[166] HRA, s 65. Emphasis added. The HRCA had previously made "discrimination by subterfuge" unlawful: Human Rights Commission Act 1977, s 27. Also see *Proceedings Commissioner v Air New Zealand* (1989) 2 NZLEC 96, 614; (1988) 7 NZAR 462.
[167] *An Jian* and *Talley's Fisheries Ltd v Lewis* (2007) 14/06/07 Sinion France J, HC Wellington CIV-2005-485-1750
[168] See commentary in Joseph,above n 141, at 73-74. Also compare *An Jian*, para 24, and *Talley's*, para 52.
[169] See Human Rights Act 1993, especially sections 5-6. It does not hear complaints regarding the BoRA which is dealt with by the High Court, Court of Appeals and Supreme Court.
[170] For instance, *Minority Schools in Albania (Advisory Opinion) (1935) PCIJ (series A/B) No 64* discussed in Chapter Five at 5.2.3.
[171] HRC, "Human Rights in New Zealand 2010", at 27.

sections of the HRA identify prohibited grounds, 31 recognize exceptions. Other provisions justify different treatment in terms of identity relative to religion, privacy, age, politics, family status or where certain employment[172] is concerned. Rather than a weakened standard, these exceptions display pragmatic flexibility driven by substantial equality.[173]

Importantly, section 73 of the HRA recognizes:

> 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.[174]

Section 19(2) of the BoRA, referencing the HRA, reiterates:

> 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 II of the Human Rights Act 1993 do not constitute discrimination.[175]

When examining a complaint, the Human Rights Review Tribunal (HRRT)—a quasi-judicial body dealing with claims relating to breaches of the HRA[176]—can similarly approve a prima facie discriminatory practice—in effect, a practice where

[172] See respectively, HRA, ss 27, 28, 30, 32 and 31.
[173] For example, while maternity is a specifically prohibited ground for different treatment under section 21(1)(a), under section 74, "preferential treatment granted by reason of…a woman's pregnancy or childbirth; or a person's responsibility for part-time care or full-time care of children or other dependents does not breach the Act. Interestingly, such sections are intended "[f]or the avoidance of doubt": see HRA 1993, s 74.
[174] Human Rights Act 1993, s 73(1).
[175] New Zealand Bill of Rights Act 1990, s 19(2).
[176] As well as the Privacy Act 1993 and the Health and Disability Commissioner Act 1994 including those regarding discrimination: "Human Rights Review Tribunal", Ministry of Justice website, found at http://www.justice.govt.nz/tribunals/human-rights-review-tribunal, dated 29/8/15. The HRRT is an "expert forum for hearing" claims relating to breaches of human rights in NZ. Complaints regarding the HRA must be made to the Human Rights Commission before a claim is made to the HRRT. It has the power to award compensatory damages and make a range of orders.

some identification takes place—if there is a "genuine occupational qualification" or "genuine justification".[177]

The BoRA also recognizes the complex someone 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".[178] The Ministry of Justice has approved a UNDRIP-like definition of 'minority',[179] which distinguishes Pacific Island communities[180] from Māori,[181] in terms of self-determination. As in UNDRIP Article 14, minority rights in New Zealand sit comfortably with everyone/no-one rights and blur the lines between individual and collective rights.

7.3.3 THE SPECIFICALLY MĀORI LEARNER

Prior to intentional human rights incorporation, there was already a strong indigenous multi-narrative of equality in New Zealand. Rather than being superseded, forgotten or ignored, local narratives are aware of prior sovereignty, ongoing harm and a historical continuum of rights.

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[177] See Human Rights Act 1993, s 97 and *Avis Rent-A-Car Ltd v Proceedings Commissioner* (1998) 5 HRNZ 501. Immediately, this human rights-based legislation clarifies the confusion of the Ninth Circuit in the *Kamehameha* case, where it was unsure of a *Carolene Products* differentiation in outcomes provided allowed us to differentiate between discriminatory policies and those justified in terms of substantial equality. In contrast to the American case law, "qualification" and justification" are not automatically offensive terms associated only with intentionally discriminatory practices such as grandfather clauses but a reasonable exception to the rule of identity-blind equal protection.

[178] Intentionally echoing Article 27 of the ICCPR, NZBoRA, s 20: "Rights of minorities--A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied 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".

[179] The Ministry of Justice recognizes international definitions of minorities: see "International and domestic law on minorities" Ministry of Justice <www.justice.govt.nz> at 5.2.

[180] "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 ICCPR, 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 "International and domestic law on minorities" Ministry of Justice <www.justice.govt.nz> at 5.2.

[181] As discussed in previous chapters, Māori might still be considered a minority fall into cultural, religious and linguistic categories. Both Article 14(3) of UNDRIP and s 20 of the BoRA echo Article 27 of the ICCPR, s 20 repeating it almost verbatim.

As mentioned previously, the Treaty itself guarantees *everyone* equal protection to Māori under Article III, [182] "[t]he clearest statement on equality in New Zealand".[183] Although Article III dichotomously conflates Māori with the settler citizenry, it displays the emphasized legality characteristic of UNDRIP and other human rights instruments by insisting that Māori are equal to other rightsholders. Given Article III's *everyone* guarantee, the Treaty has been viewed as a "human rights document":

> With regard to universal human rights—that is those recognized in the modern international human rights framework including ESC rights—these are guaranteed to all the people of New Zealand and extended to Māori under article 3 of the Treaty as 'all the Rights and Privileges of British subjects'. This can be interpreted to *now* extend to those rights guaranteed by later processes adopted or acceded to by New Zealand, such as the international human rights instruments…[184]

Correspondingly, the HRA requires the Human Rights Commission "to have a better understanding of …the Treaty of Waitangi" to better understand human rights in "domestic and international human rights law". [185]

However, Article III is clearly addressed to Māori as Treaty partners and Article II, as discussed previously, recognizes the right of Māori to self-determination or "tino rangatiratanga"[186]—a term translated as "the unqualified exercise of chieftainship over their lands, villages, and all their property and 'taonga', or treasures". [187] Article II entails a specifically *indigenous* narrative which has little to do with traditional liberal aims and everything to do with a unique historico-legal context and political rather than racial status.

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[182] That is, "all the Rights and Privileges of British Subjects": English version of the Treaty.
[183] "Apart from this, there is no specific reference in New Zealand law to equality": HRC, "Human Rights in New Zealand 2010", at 28. Ironically, this statement of sameness comes from the Treaty, a document which essentially defines the constitutional relationship between the Crown and Māori, between historic settler and an indigenous people into the present. In an ironic twist on narratives, a settler-indigenous treaty of cession guarantees Māori the same rights enjoyed by other New Zealanders but is also the only direct claim that anyone can make to equal protection.
[184] Karen Meikle "Economic, Social and Cultural Rights: Protection in Aotearoa New Zealand—an Overview" in Margaret Bedggood and Chris Gledhill (eds) *Law into Action : Economic, Social and Cultural Rights in Aotearoa New Zealand* (Wellington, Thomson Reuters, 2011) 39 at 45-46.
[185] Sections 5(2)(d) & 11(1)(a)(iii), respectively: establishing the purpose of the Human Rights Commission "to promote by research, education, and discussion a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law"; and criteria for selection of commissioners to include "knowledge of, or experience in…the Treaty of Waitangi and rights of indigenous peoples".
[186] Article II, Treaty of Waitangi.
[187] See Ruru, above n 48, on translation issues.

Much like UNDRIP, Article II preserves at least an internal version of self-determination which "affords Māori greater control over the nature of policies and programmes that are intended to benefit Māori lives"—that is, "tino rangatiratanga".[188] In terms of access to a richer rational revision context, it is collectively exercised and depends on improved access to resources and participation in development and decision-making. At its core, this self-determination[189] implies a right to "control their own destinies" comparable to the human "right to freely determine social, cultural, political, and economic development within the State".[190] In light of modern interpretations of 'taonga', indigenous self-determination includes UNDRIP-like rights to preserve, protect and promote language, culture and education itself.

This indigenous multi-narrative has been evident in crucial constitutional developments relating to the Treaty. Significantly, in 1975, the government passed the Treaty of Waitangi Act (ToWA).[191] After generations of Treaty denial, customary rights suppression and extinguishment—and after an extensive, grassroots struggle by Māori to have their rights recognized[192]—the New Zealand government legislatively affirmed "the principles of the Treaty of Waitangi"[193] and established "a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty."[194]

The ToWA appears to narrate liberal principles including non-discrimination and self-determination. First, it interprets Māori identity both by "race" and ancestry, the "Treaty" as both the English and Māori versions, and recognizes the possibility and reality of historic, ongoing and future Treaty violations.[195] It binds the Crown outright[196] and is meant to address discrimination. Māori, individually or

[188] Veronica Tawhai "Citizenship and Education" in Mulholland and Tawhai, above n 39, at 294.
[189] Ibid, at 295. See UNDRIP, art 23; and ILO 169, art 6.
[190] HRC *The Right to Education: He Tāpapa* Mātauranga—A Discussion Document (Nov 2003) at 12.
[191] Treaty of Waitangi Act 1975.
[192] See, for instance, Walker, above n 9.
[193] See *New Zealand Maori Council v Attorney-General* (*Lands Case*) [1987] 1 NZLR 641 (CA), per Cooke P regarding fiduciary duty, good faith, reciprocity and active protection.
[194] Long title of the Treaty of Waitangi Act 1975.
[195] Section 2.
[196] Section 3.

collectively,[197] can bring claims to the Waitangi Tribunal where "he or she, or any group of Māoris of which he or she is a member is or is likely to be prejudicially affected."[198]

The Waitangi Tribunal has the power to interpret the Treaty, to determine its meaning and effect, to question legislation and other parliamentary acts against the Treaty[199] and, ultimately, recommend to the Crown that certain "action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future."[200] Thus, the ToWA is aware of discrimination in the past, present and future tense. Ultimately, the Tribunal can also consider "Māori custom or usage" to resolve questions of fact.[201]

The ToWA was followed by legislation countering the assimilative discourse of the Native Schools system. Similar to the 1978 amendments to Hawaii's constitution, the Māori Language Act 1987 which declared Māori an official language of New Zealand and established the Māori Language Commission to protect and promote—even "effect"—the use of the language.[202] Various acts including the Local Government Act 2002[203] and the Resource Management Act 1991[204] refer to the principles of the Treaty, recognize Māori tikanga, and specifically identify Māori rights and responsibilities. Similarly, Te Ture Whenua Māori Act 1993[205] recognizes the unique relationship between Māori and the Crown and reaffirms retained rangatiratanga.

As of May 2014, there were at least 138 current legislative acts passed or bills before Parliament[206] which refer to the Treaty and/or incorporate its principles. In addition to those mentioned above, the Supreme Court Act 2003[207] recognizes that the Treaty is consistent with "important legal matters" and "an understanding of

[197] Section 6(1)(a-d).
[198] Section 6(1).
[199] Section 6(1).
[200] Section 6(3).
[201] Or refer such question to the Māori Land Court for clarification: s 6A.
[202] Māori Language Act 1987, ss 3 and 6.
[203] Local Government Act 2002, s 4.
[204] Resource Management Act 1991, s 8.
[205] Te Ture Whenua Māori Act 1993, ss 7, 18, 30H and 339.
[206] A search for "treaty of waitangi" at Parliamentary Counsel Office, New Zealand Legislation <www.legislation.govt.nz> returns 146 results.
[207] Sections 3 and 13.

New Zealand conditions, history, and traditions".[208] Under s 13(3), "a significant issue relating to the Treaty of Waitangi is a matter of general or public importance" and, therefore, appealable "in the interests of justice".[209] Thus, Treaty matters are justiciable not just as questions before the Waitangi Tribunal but via the common courts and, potentially, through other quasi-judicial bodies including the HRRT. The overlap between human rights and indigenous rights is obvious.

There is a similar overlap between the Treaty and constitutional rights because, as in the case of human rights, the Treaty has impacted the constitutional role of the judiciary itself. Matthew Palmer has written that the landmark *NZ Māori Council v A-G (Lands Case)* [1987][210], for instance, "imposed far greater obligations on the Crown than had been previously understood or accepted by Parliament, the executive government and many New Zealanders."[211] Treaty principles bind Parliament regardless of incorporation but legislative incorporation binds Parliament by its own terms, or rather its own sovereignty. As required, the Court of Appeal took a purposive, broad and liberal approach to the Treaty presuming good faith, active protection and other principles[212] consistent with the Crown's duties and Māori self-determination under the Treaty.

Thus, Māori retain both rights to individual equal protection and collective self-determination consistent with Articles II and III of the Treaty. This expanded narrative of self-determination seems to recognize prior sovereignty, ongoing harm and a historical continuum of indigenous rights. It also appears to form a nexus of human, indigenous and constitutional rights.

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[208] Sections 3 and 13.
[209] Supreme Court Act 2003, s 13: "Criteria for leave to appeal--(1) The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal. (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—(a) the appeal involves a matter of general or public importance; or (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or (c) the appeal involves a matter of general commercial significance. (3) For the purposes of subsection (2), a significant issue relating to the Treaty of Waitangi is a matter of general or public importance".
[210] Discussed in Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington, Victoria University Press, 2008), at 241.
[211] Ibid.
[212] Joseph, above n 141, at 221.

7.3.4 AN INDIGENOUS MULTI-NARRATIVE RIGHT TO EDUCATION

The law of Aotearoa New Zealand appears to embrace a complex right to education.

Section 3 of the Education Act 1989 affirms the "Right to free primary and secondary education":

> …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.[213]

In universal terms, "[e]very person" includes citizens, permanent residents and the children of others. Like the early international right, education is compulsory for "New Zealand citizens between 6 and 16",[214] respectful of parental choice,[215] counters child labor,[216] and recognizes the potential value of private schools[217] and gender-specific schools and parallel education systems.[218] Like complex someone instruments it outlines age-specific rights,[219] recognizes the equal right of learners with disabilities to primary and secondary education[220] and is prohibitive of corporal punishment.[221] Other sections of the Education Act 1989 echo the 4-A Scheme of the international right as they address aspects of access,[222] availability,[223] and acceptability[224] at least. Sections 8 and 9, for instance, recognize that learners with disabilities have the "same right" to education at public schools "as people who do not". However, upon consultation with parents, such learners may be

[213] Education Act 1989, s 3.
[214] Education Act 1989, s 20(1).
[215] Education Act 1989, ss 25A and 25AA. See "Parent's right to entry under s 319A. Compare with American cases recognizing traditional parental education rights including *Meyer v Nebraska* 262 US 390 (1923) and *Pierce v Society of Sisters* 268 US 510 (1925).
[216] Education Act 1989, s 30.
[217] Education Act 1989, s 35N provides public funds for private schools. 2013 amendments to the Education Act 1989 have also established Kura Hourua or Partnership Schools intended to bring together business and struggling schools in partnership: Education Act 1989, Part 12A. Note concerns over the lack of accountability of such schools expressed by the UN Special Rapporteur on Education: see Special Rapporteur's report 2014 discussed in Chapter Five at 5.4.3.
[218] Education Act 1989, ss 146A & 155.
[219] See, for instance, in terms of Kohanga Reo and other Early Childhood Education provision.
[220] Section 8.
[221] Education Act 1989, s 139A.
[222] Fees cap set under s 234A.
[223] Section 20(2), for instance, dictates that a child under 7 is not required to be enrolled at a schools which is more than 3 kilometres away from their residence.
[224] For instance, 25A and 25AA on "Release from tuition on religious or cultural grounds"… and various provisions on teacher qualifications. Also see sections on Kura Kaupapa Māori and character school in Part 12.

enrolled at special schools, or in special classes or programs. Under s 98 of the Education Act 1964, the Minister of Education similarly has the flexibility to "[e]stablish any special school…special class, clinic, or service".[225]

Like early *no-one* instruments, the right is expressed elsewhere in terms of non-discrimination. Under the HRA, the right to non-discrimination applies to "[v]ocational training bodies",[226] "educational establishments", and—like the American s 1981—contractual relationships and the "[p]rovision of goods and services".[227] However, where the purpose of the policy has been minimized in United States federal jurisprudence,[228] New Zealand law has long recognized that educational institutions which prefer a certain "sex, race, colour, or religious belief" in admissions do not necessarily breach the legislation where there is inequality between groups and where done to remedy those disparities.[229] Again, this is consistent with various human rights instruments, including UNDRIP.

In contrast to the judicial confusion apparent in *Kamehameha*, section 58 of the HRA currently recognizes "[e]xceptions in relation to establishments for particular groups":

> 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.[230]

Subsection (1) anticipates a privately or publically 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.

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[225] Education Act 1964, s 98.
[226] HRA 1993, s 40.
[227] HRA 1993, s 44. Compare with s 1981 at stake in *Kamehameha* case regarding broad contractual rights often in employment context.
[228] See discussion of *Carolene Products* in the *Kamehameha* case, and relevant discussion in Chapter Three.
[229] Human Rights Commission Act 1977, s 28. Ironically, during an era when the substantial equality reasoning of *Brown* was already beginning to be forgotten, New Zealand drew a clear line between outright discrimination and special measures meant to overcome discrimination. While US jurisprudence has almost completely forgotten *Brown* since, the unwritten constitution of New Zealand continues to reaffirm this *Carolene Products*-like distinction in human rights based legislation.
[230] Human Rights Act 1993, s 58. Emphasis added.

New Zealand law also recognizes the Māori learner specifically. Such a right was only acknowledged after prolonged struggle and sustained activism and pressure on the government by Māori to have their Treaty rights recognized. At the grassroots level, Māori autonomously established kōhanga reo—or preschool 'language nests'—in the midst of the Māori language renaissance of the 1970s as a self-generated remedy to cultural and identity loss.[231] As these learners grew older, Māori re-established a variety of kura kaupapa Māori—or Māori philosophy-driven schools—to grow with them.[232] These "groundswell"[233] developments, consistent with agency and Treaty rights to self-determination, are now publically funded and legally recognized.

The Education Act 1989 requires all school boards "to acknowledge the principles of the Treaty of Waitangi" in carrying out their duties,[234] provides for the funding of kōhanga reo[235] and the establishment of Kura Kaupapa Māori[236] where an identity-specific "approach to teaching and learning", *Te Aho Matua*, governs.[237] Law and curricula allow for various Māori-curriculum settings including bilingual and full-immersion education, Māori curriculum units and classrooms within mainstream schools and state-sponsored Māori curriculum schools, and parallel education systems covering a wide range of age groups from kōhanga reo to tertiary

[231] Chapter 2: "He Kupu Onamata mō te Kōhanga Reo: The History of the Kōhanga Reo Movement", in Waitangi Tribunal Report 2013, *Matua Rautia: The Report on the Kōhanga Reo Claim* (WAI 2336). The Kohanga Reo movement was, of course, part of a wider movement by Maori beginning in the 1970s to reclaim Treaty rights amidst growing awareness of complex discrimination and disparities.

[232] Maori philosophy schools, as described in HRC, "Human Rights and the Treaty of Waitangi" pdf found at <www.hrc.co.nz> at 248.

[233] Above n 231, at 14.

[234] Education Act 1989, s 181.

[235] Literally 'language nests' or Māori-medium preschools. Funding provided for in s 84

[236] Maori philosophy schools, as described in HRC, Human Rights and the Treaty of Waitangi, at 248. Establishment provided for via s 155 of the Education Standards Act 2001. However, also see Education (Early Childhood Centres) Regulations 1998 ss 15 and 36A and Education (Early Childhood Services) Regulations 2008 s 44, where kōhanga reo are set apart in terms of certain standards and governance remains with the National Kōhanga Reo Trust, the grassroots Maori organisation which started the movement.

[237] Section 155A. See ss 11H, 61, 78T, 154A, 155, 155A, 155B, 155C and 155E. This approach has been summarized thus: Presented in the Māori language, Te Aho Matua is the foundation document and driving force for Kura Kaupapa Māori. It lays down the principles by which Kura Kaupapa Māori identify themselves as a unified group committed to a unique schooling system which they regard as being vital to the education of their children… As the founding document for Kura Kaupapa Māori, Te Aho Matua describes a Māori world view …of education, teaching and learning.": "Te Piko o te Māhuri: The key attributes of successful Kura Kaupapa Māori" Ministry of Education <www.educationcounts.govt.nz>.

institutions. The prioritization of Māori identity in such programmes and schools is straightforward.

The Waitangi Tribunal has also interpreted the Treaty in terms of education on several occasions. It has recognized various, specifically Māori, rights in education including: Article II rangatiratanga over taonga including te reo Māori (Māori language) and mātauranga (indigenous knowledge); government duties of active promotion and protection of such taonga, consultation and participation; [238] partnership; kāwanatanga (governance), rangatiratanga (self-determination) and kaitiakitanga (guardianship), options and equity.[239] In various instances, the Crown failed in its positive duties when it closed a bilingual rural school serving Māori learners, failed to provide proper support for such a school,[240] did not provide sufficient funding, strategic policy or targeted measures to address disparities,[241] failed to develop indicators to measure implementation and progress of Māori students, and failed to provide an identity-specific and culturally appropriate policy framework for Māori-curriculum early childhood education.[242]

A more substantial equality in education is also specifically guaranteed in the recent 2013 amendments to the Education Act 1989 regarding Kura Hourua/Partnership Schools legislatively designed to target the needs of Māori and other at-risk learners.[243] Those amendments also require application of the human rights-based BoRA to education,[244] a requirement which presumably entails the operation of s 19's right to non-discrimination and s 20's minority rights among others.

Thus, the right to education in Aotearoa New Zealand clearly exhibits multi-narrative features of the international human right to education and applies to

[238] See Waitangi Tribunal Report 2003 *The Mokai School Report* (Wai 789) at 137.
[239] See extensive recent discussion on Treaty principles in terms of education in Waitangi Tribunal *Kōhanga Reo Claim*, above n 231, at 55-71.
[240] *Mokai School Report*, above n 238.
[241] Waitangi Tribunal *Report on the Aotearoa Institute Claim Concerning Te Wananga o Aotearoa (Wai 1298, 2005).*
[242] *Kohanga Reo claim* above n 242.
[243] These amendments established Kura Hourua or Partnership Schools intended to bring together business and private funding and struggling schools in partnership especially those with Māori and Pacific Island students: see Education Act 1989, Part 12A and Ministry of Education definition of "Kura Hourua" Ministry of Education <www.minedu.govt.nz>.
[244] Section 158W of the Education Act 1989 specifically dictates the application of s 3(b) of the BoRA to Kura Hourua. That is, the sponsors of such schools—like others—are considered to be public bodies to whose actions the BoRA will apply including, presumably s 19's non-discrimination guarantee.

everyone, *no-one*, someone and the *indigenous learner* specifically. However, it also references a homegrown self-determination arising from a unique historico-legal context.

7.4 ADAMANT CRITICISMS

Despite its potential to address the Māori mo'olelo, this multi-narrative may yet be subject to an *adamant everyone/no-one* narrative. Three New Zealand cases exhibit all too familiar reasoning and rhetoric which seemingly ignores complex discrimination and disparities unrelentingly attracted to indigenous identity, as well as the unique historical context of Māori rights. This section examines three critiques challenging the domestic multi-narrative, namely reverse discrimination, ESCR denial, and Treaty minimization as potentially undermining the expanded multi-narrative.

7.4.1 REVERSE DISCRIMINATION

As discussed in Chapters Two and Three, American federal jurisprudence currently prioritizes an *adamant everyone/no-one* narrative of equality which presumes something like Rawls' original position and veil of ignorance at best but also perhaps a Posnerian utilitarian calculation or Waldron's cosmopolitan conflation of interests.[245] This narrative appears to account for the success of reverse discrimination arguments in federal courts in recent decades and apparent confusion of the Ninth Circuit in regards to the *Kamehameha* admissions policy.

Despite its human rights content, the only reverse discrimination case in New Zealand found a policy which prioritized Māori in admissions discriminatory upon application of a *Weber-Johnson*-like test. Arguments in *Amaltal Fishing Co v Nelson Polytechnic* [1996] (*Amaltal II*)[246] recall *Bakke*, the University of Michigan

[245] See Chapter Four.
[246] *Amaltal Fishing Co Ltd v Nelson Polytechnic* [1996] NZAR 97 [*Amaltal II*]. Historically, the case spans a period of transition during which the first generation of New Zealand human rights

cases and *Kamehameha* dissent. Ironically, the case was brought on the basis of human rights.

A fishing training course was offered only twice a year with numbers limited to 14 places in each intake.[247] Following an agreement with a government body,[248] the Polytechnic reserved a certain amount of spots in the course for Māori and Pacific Islanders. Fees for "target group" members were government subsidized while 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,[249] alleged discrimination under the RRA, HRCA and HRA[250] when one of its intended sponsorees 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).[251]

legislation, namely the Race Relations Act 1971('RRA') and the Human Rights Commission Act 1977 ('HRCA') which had been frequently amended over the years, were repealed by the enactment of the Human Rights Act 1993 ('HRA'). The case was pre-Human Rights Tribunal, the human rights complaint in question brought before its forerunner, the Complaints Review Tribunal (CRT).

[247] The course taught fishing, the primary industry of the city in which it was offered—as well as in New Zealand—making acceptance very competitive.

[248] An agreement between the Polytechnic and a legislation- and policy-mandated government body called the Education and Training Support Agency (ETSA).

[249] As a procedural issue, the Tribunal found that the company fulfilled the criteria for an "aggrieved person" under Race Relations Act, s 17, Human Rights Commission Act 1977 s 38, and Human Rights Act 1193, a 38.

[250] Section 4 of the RRA, s 22 of the HRCA and s 26 of the HRA 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.

[251] Which was the forerunner of the current Human Rights Review Tribunal and successor of the previous Equal Opportunities Tribunal.

Giving judgment on substantive issues in 1996,[252] the Tribunal recognized a prima facie[253] but rebuttable presumption of unlawful racial discrimination once the Polytechnic's status as a provider of services to the public[254], vocational training institution[255] or educational establishment[256] had been established and the use of race was shown to be the factor which determined rejection or admission.[257] Thus, the Polytechnic had discriminated against the sponsoree 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.[258] Regarding the first round, the Tribunal, found that:

> In relation to each 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 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 nor have been arrived at had other, relevant, factors been considered.[259]

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[252] Prior to substantive issues, *Amaltal Fishing Co Ltd v Nelson Polytechnic* [1995] (*'Amaltal I'*), established that the CRT had the jurisdiction to review the Polytechnic in terms of human rights legislation. Section 35 of the RRA stated: "Except as expressly provided in this Act, nothing in this Act shall limit or affect in any way the provisions of any other Act: Section 35, Race Relations Act 1971." As also noted in the case, s 92(2) of the HRCA was virtually identical to s 35 and almost identical to s 15(1) of the new HRA. Section 15(1) of the Human Rights Act 1993 states: "Except as expressly provided in this Act, nothing in this Act shall limit or affect the provisions of any other Act or Regulation which is in force in New Zealand". As the result of these privative clauses, counsel for the defendant alleged that as the Polytechnic was not "expressly enumerated in the act" as an exception to the privative clause it was not subject to the human rights legislation: *Amaltal I,* at 4. Counsel later argued similarly that, as a body deriving its powers from the Education Act 1990 and as its policy was an expression of current government policy regarding Māori and resident Pacific Islanders, it was not subject to the human rights legislation: *Amaltal II,* above n 246, at 14. While the Race Relations Conciliator had found this argument persuasive, the Tribunal did not. With a purposive, common-sense approach, the Tribunal found that the Polytechnic was an "institution" in the sense of those "which the section[s] expressly prohibit[] from acting in a discriminatory manner": *Amaltal I*, at 4. Moreover, it opined: "…Such an interpretation is supported by the manifest purpose of the human rights legislation which is to prohibit discrimination on racial (and other) grounds in specified areas, whereas the interpretation for which Mr Nation [counsel for the defendant] argues would defeat that purpose and …lead to absurdity.": *Amaltal I*, at 5.

[253] *Amaltal II*, above n 246, at 38.

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

[255] Human Rights Act 1993, s 40; and Human Rights Commission Act 1977, s 22.

[256] Human Rights Act 1993, s 57; and Human Rights Commission Act, s 26.

[257] Depending on a UK case *James v Eastleigh Borough Council* [1990] 2 All ER 607 at 618.

[258] It had also breached the almost identical provisions of s 7 of the RRA, s 32(1) of the HRCA, and s 67(1) of the HRA when it advertised the same course knowing that it intended to discriminate on the basis of race.

[259] *Amaltal II*, above n 246, at 238.

However, the Tribunal eagerly referred to the very similar provisions in section 9 of the RRA, section 29 of the HRCA, and section 73(1) of the HRA which contained three elements which 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 of a particular "colour, race, or ethnic or national origin"; 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".[260]

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 favor 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 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.[261]

That is, if the Polytechnic could prove all three elements of the section 73 defense.

However, the case was precedent-setting given it was "the only decision on the interpretation of the affirmative provisions in the Human Rights Act 1993".[262] In its wake, respected legal scholars suggested following American law in terms of affirmative action.[263]

Despite its human rights focus, the CRT's reasoning seems dichotomous, even American. As in *Kamehameha* and *Rice*, the CRT equated indigenous identity with

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[260] See current Human Rights Act 1993, s 73(1) containing all three elements.
[261] *Amaltal II*, above n 246, at 248.
[262] Mai Chen and Geoffrey Palmer *Affirmative Action: A Discussion Paper* (Ministry of Justice, Discussion Paper 12, 1998) at 12.1. In the aftermath of the case, Chen and Palmer noted: "…To date *Amaltal* is the only decision on the interpretation of the affirmative action provisions of the Human Rights Act 1993. 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".
[263] Ibid, at 12.8.3.

race.[264] A preference in admissions for the indigenous learner automatically triggered a presumption of unlawful racial discrimination[265] where both rounds involved *Bakke*-like quotas.[266] The need query recalled the 'manifest imbalance' step of the modified *Weber-Johnson* test and was historically abstract, ignoring the Treaty, prior sovereignty, ongoing harm and a continuum of rights. Section 73 itself recognizes special measures and not a politically-based *Mancari* preference.

Ignoring the merits of a fundamental right to education, the CRT equated educational and employment contexts.[267] The third element itself raised *Kamehameha*-like issues in terms of identifying the appropriate comparator group.[268] Additionally, the third element raised questions of *which* purposes would qualify, with respected scholars suggesting following the American "narrow tailoring" standard consistent with strict scrutiny which would surely be fatal.[269] Finally, under section 73, the policy could only be temporary.[270] Thus the only case

[264] 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.
[265] Just as in the *Kamehameha* case: see Chapter Three at 3.5.2.
[266] 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: Chapter Three at 3.5.
[267] The three main institutional categories which the Polytechnic fell 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 RRA is comparable to the contractual relationship described in the American s 1981, while the sacred heart of the definition of the second is preparation for employment. The CRT has not ascribed any extra constitutional value to education as, for instance, in Plyler v Doe where it may have amounted to a constitutive commitment or as in *Kamehameha* where its importance prompted a modification of the *Weber-Johnson* factors.
[268] See Chapter Three regarding internal versus external comparator group: at 3.5.5. Although the CRT did not elaborate on the requirements of the third element, Chen and Palmer predicted that it would give rise to some of the same finely-balanced but crucial issues in the Ninth Circuit's reasoning in relation to the *Weber-Johnson* factors, including the difficulty of identifying the appropriate comparator group against or within which the target group was to be assessed for need. In regards to the issue of how to determine the size of the comparator population, the CRT's suggestion in the *Amaltal* case was that it would have been young people outside the target group with aspirations of becoming fishermen, and Chen and Palmer noted post-*Amaltal* that it was not the circumstances of Māori and Pacific Islanders in the population at large where one might get a more accurate assessment of 'need'. This group of aspiring fishing cadets was not quite as limited as the comparator population suggested by the plaintiff in the Kamehameha Schools case, but reveals a similar localization or reduction of the comparator population to the point of losing the overall picture of discrimination, poverty and exclusion which would otherwise justify the affirmative action policy in question.
[269] See Chen and Palmer, above n 262, at 12.11. As described in Chapter Two in terms of University of Michigan cases, *Grutter* and *Gratz*, narrow tailoring and strict scrutiny have in recent decades become virtually insurmountable hurdles for admissions policies to leap, especially as both remedial and diversity-based policies have fallen out of favour with the US Supreme Court and are only acceptable as submerged factors in the larger global matrix of admissions.
[270] Chen and Palmer noted that, as in the modified *Weber-Johnson* factors, 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

in New Zealand on reverse discrimination may not approve the *Kamehameha* admission policy.

7.4.2 ESCR DENIAL

As discussed in Chapter Two, United States law denies both constitutional and human rights to education, as well as other ESCRs. New Zealand law might also.

Similar to federal jurisprudence, New Zealand courts have sometimes been hesitant to intrude on the executive where resource allocation is involved.[271] *Lawson v Housing New Zealand* [1997][272], for instance, is held up as a "testament to the stance prevailing in New Zealand that ESC rights are not justiciable".[273] A 2003 Court of Appeal decision actually denied the existence of a right to education in New Zealand, seemingly rejecting a *complex someone* narrative of equality.

The case of *Daniels v Attorney-General*[274] was brought by fifteen families of special needs children[275] affected by policy changes[276] which increased funding for aides but resulted in the closing of special education schools, units and classes and the mainstreaming of their children.[277] The case hinged on judicial questions about "the meaning of 'education'" for these students, "the nature of their rights to education", "related issues of human rights and discrimination",[278] and, more importantly, whether the Crown's failure to treat these students *differently* constituted discrimination.

Rehnquist Court's *Adarand Constructors v Pena* where strict scrutiny was applied and the policy in question was ultimately found to be unlawful: see Chen and Palmer, at 12.12. Also see Chapter Two discussion on the case as part of the demise of affirmative action and the judicial activism of of the Rehnquist Court, at 2.4.1.

[271] Claudia Geiringer and Matthew Palmer "Human Rights and Social Policy in New Zealand" (2007) 30 Social Policy Journal of New Zealand 12 at 37.

[272] *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC).

[273] Meikle, above n 184, at 45.

[274] *Daniels v Attorney-General* (HC Auckland, M 1615/SW99, 3 April 2002) and *Attorney-General v Daniels* [2003] 2 NZLR 742.

[275] "…Some with high intellectual potential are grievously handicapped physically, others suffer grossly impaired intellectual capacity; some are able with adequate assistance to achieve independence, others are reliant throughout their lives on continuing help": ibid, para 1.

[276] Namely, Special Education 2000.

[277] *Daniels v Attorney-General* (HC), above n 274, paras 9-38.

[278] Ibid, at para 6, at 4.

Sections 8 and 9 of the Education Act 1989 allowed learners with disabilities the "same right" to education at public schools "as people who do not". Upon consultation with parents, however, section 98 of the Education Act 1964 gave the Minister of Education power to "[e]stablish any special school…special class, clinic, or service". Under the section, the Minister could also disestablish any special school, unit or class if a similar facility is available nearby.[279]

In the High Court, Justice Baragwanath held that, under section 3, special needs children had the "right to an education that is regular and systematic and clearly *not unsuitable*",[280] while under section 8 they had a right to equality with other students. Reading those rights together, he held that:

> the minimum content of the right…requires an individual focus on the learning needs of each child, and provision of extra assistance in proportion to the extent of the child's particular disability. Thus, disabled children of different learning abilities will require *different* treatment.[281]

Based on individualisation, mainstream education would provide equality in some cases while a special school, unit or class would in other cases. Under the BoRA and the HRA "differential treatment to aid the disadvantaged" was not consistent with discrimination but rather a measure of "equality between disabled and other children".[282] Ultimately, these rights gave rise to a corresponding duty on the part of the Minister of Education to determine whether adequate facilities were available for children with disabilities before disestablishing a special school, unit or class regardless of their statutory powers.[283] The facts showed that disestablishment had resulted in poorer educational quality, farther driving distance and other hardships.

Judge Baragwanath found that these hardships constituted both "a failure to meet minimum standards and…unequal treatment".[284] The Court of Appeal, however, rejected the existence of a "minimum content" of a broad right to education beyond specific 'rights' provided for in legislation.

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[279] Education Act 1989, s 98.
[280] *Daniels v Attorney-General* (HC), above n 274, at para 140. Emphasis added.
[281] Ibid, at para 140. Emphasis added.
[282] Ibid, paras 140-141.
[283] Ibid, para 139.
[284] Ibid, para 43.

The court's reasoning is concerning. Despite the removal of what could be seen as accessible, adaptable, appropriate and available education,[285] it found no breach of students' rights to special education. The court interpreted that right only in terms of every other student's section 3 right to enrol in free primary and secondary education:

> …While there are rights under the 1989 Act that can be enforced by Court process, those rights do not include generally, and abstractly, formulated rights of the kind stated by the Judge. Rather, the rights are essentially those established by and under the legislation which, to recall the Judge's formulation, do in themselves provide for regularity and system and are designed to ensure appropriate quality. There is no free-standing general right, held and enforceable by each individual student under [sections] 3 and 8, of the kind stated.[286]

Quite narrowly, the court held that rights under section 8 only belonged to students already in a special school, unit or class who could move into mainstream education. Essentially, their right was only the "same" and "equal" *everyone/no-one* right enjoyed by students without disabilities,[287] and it was not a "free-standing right" to education.[288] Ultimately, the Court of Appeal found no breach of sections 3, 8 or 9 but did uphold Justice Baragwanath judgment in regard to section 98(1).

An *adamant everyone/no-one* narrative dominates the *Daniels* decision ignoring and contradicting the *complex someone* narrative apparent in international human rights instruments including the Children's Convention and the Convention on the Rights of Persons with Disabilities.[289] Ultimately, the Court of Appeal held that while "a failure to treat *differently*" in education may not constitute discrimination under New Zealand law, "a failure to treat the *same*" does.[290]

Ultimately, "[w]ithout incorporation or constitutionalization into New Zealand's domestic law",[291] ESCRs may seemingly be denied. ESCRs have also been rejected by respected New Zealand judges and legal scholars. Dame Susan Glazebrook, Justice of the Supreme Court, seems to have reiterated Cold War categorizations in extra judicial conclusions that ESCRs are neither real rights or

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[285] The four pillars of the 4-A Scheme discussed in Chapter Six.
[286] *Attorney-General v Daniels* [2003] 2 NZLR 742, para 83.
[287] Ibid, para 63.
[288] Ibid para 97.
[289] See discussion in Chapter Five on state obligations to make education available, accessible, adaptable and appropriate.
[290] *Daniels v Attorney-General* (HC), above n 274, para 97.
[291] Meikle, above n 184, at 49.

justiciable.[292] Sir Geoffrey Palmer, drafter of the White Paper, former prime minister of New Zealand and former president of the Law Commission, has similarly categorized education as being a matter of "social policy" and "the stuff of politics in New Zealand" and courts judging educational matters as "judicial encroachment into key government"—that is, executive—"activity".[293] Such arguments echo United States denials of ESCRs on resource allocation grounds,[294] as well as denials of a constitutional right to education. Given the consistency of the Māori learner's specifically indigenous right to education with the human right to education and its categorisation as an ESCR, an Article 14-like right could be undermined by such denial.

7.4.3 INDIGENOUS RIGHTS DENIAL AND HISTORICAL ABSTRACTION

Human and indigenous rights have thrived in New Zealand under the protection of legislative powers not unlike the plenary power exercised by Congress in the US federal-Indian trust relationship. That same constitutional authority can also arbitrarily trump indigenous rights. The 2004 Foreshore and Seabed legislation engendered a vehement public debate on contested narratives, namely, an assimilationist *everyone/no-one* discourse displaying identity-blindness and historical abstraction versus a complex indigenous learner narrative based more accurately on substantive equality, self-determination and historically continuous indigenous rights. In the process, both human rights and indigenous rights were denied.

The *Kamehameha*-like 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.[295] By June 2003, the case of *Attorney-*

[292] In Susan Glazebrook "Human Rights and the Environment" (2008) 40 VULWR 293, at 18-19 and 22-23.
[293] Sir Geoffrey Palmer "The Bill of Rights Fifteen Years On" (Keynote Speech at the Ministry of Justice Symposium: The New Zealand Bill of Rights Act 1990, 10 February 2006) at paras 28-29. Noted by Meikle, above n 184, at 45.
[294] See Chapter Two at 2.5.
[295] This area was defined under section 2 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)

General v Ngati-Apa [2003] came before the Court of Appeal which unanimously held that common-law and customary rights to aboriginal title "continued until lawfully extinguished" by specific legislation.[296] The decision of the Court of Appeal overturned previous Treaty-incompatible jurisprudence including *Re Ninety Mile Beach* (1963)[297] and *Wi Parata*, affirming the common-law doctrine of aboriginal title which recognized such rights as continuous until specifically extinguished in legislation.

In January 2004, Dr Don Brash, National party leader, famously alleged that "[t]here can be no basis for special privileges for any race, no basis for government funding based on race".[298] In response to allegations of Māori advantage and privilege, 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*[299] issued in March 2004 by the Waitangi Tribunal found that the policy breached both Articles II and III but also principles of the Treaty, namely reciprocity, partnership, good faith, rule of law, active protection, and equity and options.[300] 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 tone:

> 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.[301]

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 and human rights provisions. Sections 7

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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)".

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

[297] *Re Ninety-Mile Beach* [1963] NZLR 461 (CA).

[298] Don Brash "Nationhood" (Speech, Orewa Rotary Club, Orewa, 27 January 2004).

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

[300] Ibid, at 127-134.

[301] Section 3, Foreshore and Seabed Act 2004: repealed, on 1 April 2011, by section 5 of the Marine and Coastal Area (Takutai Moana) Act 2011 (2011 No.3). Emphasis added.

and 8 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".[302] Māori enjoyed a homogenous "association", not Article II rangatiratanga as s 13 declared Crown ownership in "absolute" terms.[303] Other sections made any customary title claims contingent on demanding criteria.[304] Section 13 also denied "any fiduciary obligation or any obligation of a similar nature, to any *person* in respect of the public foreshore and seabed.[305]

Not unlike the breach of longstanding Native Hawaiian rights in the *Kamehameha* case, "the Crown, while arguing in favour of the interests of the general public in New Zealand, has breached the Treaty of Waitangi once again"[306] and heightened "racial tensions".[307] The debacle undoubtedly raised questions about the strength and "constitutional security"[308] of indigenous rights,[309] while allegations of privilege and advantage once again seemed to be a case of mistaken identity whereby a racial label was applied to Māori.

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[302] Sections 7-8. Emphasis added.
[303] Section 13(1).
[304] Including "exclusive" and "uninterrupted" "use and occupation" since 1840.
[305] Section 13(4). Emphasis added.
[306] Rodolfo Stavenhagen *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen: Addendum: Mission to New Zealand* E/CN.4/2006/78/Add.3 (2006), at 13-14.
[307] Ibid, at 13.
[308] In many respects, it is clear that the Treaty remains more exposed to the dangers of political discretion than human rights inspired legislation such as the BoRA and the HRA which, though not entrenched have some safeguards—such as sections 5 and 6 of the BoRA, for instance—built-in. Former UN Special Rapporteur on Indigenous Peoples, James Anaya, has criticized the "[l]ack of constitutional security for Māori rights" in New Zealand, even noting a bill in 2006 which proposed to delete or remove all legislative references to either 'the principles of the Treaty' or the Treaty itself—a move which would have, of course, removed any legal status which the Treaty might have had according to the precedent in *Te Heuheu*. Anaya recommended that the Treaty be given at least similar safeguards to 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 UNDRIP: S James Anaya "Report of the Special Rapporteur on the Rights of Iidgenous Peoples on the Situation of Maori People in New Zealand" (2015) 32 Ariz J Int'l & Comp L 1. Also see The Principles of the Treaty of Waitangi Deletion Bill 2006 (Member's Bill—R Doug Woolerton), date of introduction: 29 June 2006, Bill Digest No. 1392. A similar bill had also been put forward in 2005. Compare with attempted proposed amendments to the NCLB last year which would have removed Native Hawaiian Education and Alaskan Natives sections of the legislation: discussed in Chapter Three at 3.7.
[309] One commentator 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: J Hayward "The Treaty and the Constitution" in Raymond Miller *New Zealand Government and Politics* (5th ed, South Melbourne, Oxford University Press, 2010) 105 at 111.

Though not about education per se, the Foreshore and Seabed saga was a constitutional tug-of-war between equality narratives. Its passing revealed the persistence of assimilationist rhetoric, denial of indigenous rights and historical abstraction. The FSA's passage—particularly under urgency—revealed *Kamehameha*-like fears of group oppression of individual rights, Waldronian supersession and a certain amount of Posnerian utilitarianism, given the strong majority flavor of the public debate. The legislative saga was comparable to historic flip flops in federal-Native American and -Native Hawaiian policy, exhibiting all the arbitrariness of plenary power doctrine.[310] In the wake of the legislation, the indigenous narrative appeared to come off second-best.[311]

7.5 CRUCIAL NARRATIVE DIFFERENCES

Despite clear evidence of an expanded domestic multi-narrative of equality in New Zealand, trumping, ESCR and indigenous rights denial, and historical abstraction seemingly represent another *adamant everyone/no-one* narrative. Again, adamance has been historically associated with assimilation, discrimination and dramatic disparities in education for the indigenous learner. Its rhetoric of identity-blindness often masks real-time disparities, old-fashioned, *Plessy*-like discrimination, and even callous utilitarian calculations. Adamance is not consistent with the expanded multi-narrative toolbox of options observed in international law and could undermine the very idea of a domestic multi-narrative.

Crucial differences between United States federal and New Zealand narratives, however, appear to counter adamance. Rather than the *singular* prioritisation of an identity-blind narrative, New Zealand law demonstrates: the loneliness of *Amaltal*; interpretation consistent with human rights obligations; re-affirmation of a *complex someone* right; emphasized legality; indigenous rights as human rights; non-

[310] Given the dominance of parliamentary sovereignty in Westminsterian democracies, the latitude for such arbitrariness would seem to be great. In the US, however, the courts have been as much of a threat to indigenous rights as the legislature and have exceeded their constitutional boundaries in order to do so: see Chapter Two at 2.4.2.

[311] S James Anaya *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of Māori people in New Zealand* A/HRC/18/XX/Add.Y (2011) Part IV, 16-18.

discrimination; and remediation, proportionality and positive government obligations.

7.5.1 THE LONELINESS OF REVERSE DISCRIMINATION

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

In retrospect, the purpose of the policy mattered to the CRT. Where federal courts have rejected *Carolene Products*,[312] 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 strict scrutiny tests and the intermediate *Weber-Johnson* criteria, the decision appears to allow quotas, and even total reservation may be defensible under New Zealand law. While any reservation of spots at a public school would constitute a *Bakke*-like quota and be fatal in federal courts given strict scrutiny, the CRT allows the possibility that quotas might be justified where the policy in question meets all elements of section 73. Even the sympathetic and flexible majority in *Kamehameha* would be seemingly unable to justify an outright total reservation of places in the second round at a public institution. But the CRT noted 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 groups were in need of such special treatment."[313]

This conclusion is consistent with the proportional approach to special measures taken by the Human Rights Commission:

[312] US Supreme Court in *Bakke* and later cases, discussed in Chapter Two at 2.4.1.
[313] *Amaltal II*, above n 246, at 14.

> 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. [314]

Obviously, meeting all three elements is much more likely since the level of scrutiny to be applied in section 73 cases is the balance of probabilities rather than strict scrutiny. The decision itself established a pragmatic approach more consistent with *Plyler* and even *Mancari* where the threshold for constitutionality was so much lower than in *Bakke* and similar cases. This relaxed scrutiny itself suggests the potential consistency of the admissions policy with equality.[315]

Both s 19(2) and section 73, legislate relatively straightforward tests for *Kamehameha*-like policies—that is, for public and private bodies—which contextualize the prima facie presumption of discrimination. In New Zealand, impact on others will be taken into account[316] but is not determinative per se of the policy's lawfulness. Paul Rishworth et al have concluded that special measures under section 19(2) of the BoRA will likely be lawful where the "good faith" requirement is met and the policy benefits "persons who have been disadvantaged by discrimination".[317] Under section 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 advancement."[318]

Rishworth et al have also stated that, while section 19(2) "contemplates the use of affirmative action as a remedial measure", section 73(1) "contemplates the use of affirmative action as a tool of distributive justice rather than simply a remedial measure". [319] Similarly, the Human Rights Commission's *Guidelines on Measures to Ensure Equality* recognize *Kamehameha*-type measures as "part of a tool kit to ensure equality":

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[314] "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 the benefit then that is preferable.": NZ Human Rights Commission "Guidelines on Measures to Ensure Equality" (Auckland, Human Rights Commission, 2010).
[315] See Chapter Two discussion on *Carolene Products* Footnote Four: at 2.4.1.
[316] HRC, above n 314, at 5.
[317] Grant Hushcroft, "Freedom from Discrimination" in Rishworth and others, above n 157, at 390-391.
[318] Ibid, at 390.
[319] Ibid, at 390.

> …Measures to ensure equality are not only permitted but, at times, required to ensure equality for disadvantaged groups.
>
> Treating groups who have been discriminated against in the past the same as those who have not been can perpetuate existing inequalities. As a result, to ensure genuine equality at times it will necessary to treat individuals or groups differently. Special measures should therefore not be seen as discrimination but rather as a way of realising equality for everyone.[320]

In the wake of *Amaltal*, reverse discrimination cases are almost non-existent though discrimination cases are plentiful. Tim McBride notes 42 cases of note on discrimination decided by the HRRT and the Courts between June 1996 and January 2010.[321] Only two involved policies or practices relevant to HRA sections 65, 73, or 74.[322] In *Kerr v Victoria University of Wellington*,[323] the CRT held that a university policy providing women-only space for activities including breastfeeding was justified under section 74 and possibly under section 73 as well. In *Church v Hawkes Bay Regional Council*,[324] the complainant's claim that having to listen to a Māori karakia [325] at the end of a public meeting constituted discrimination was not upheld given section 65. 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 favor of the traditionally disadvantaged group.[326] Only three allege racial or national origin discrimination.[327] In fact, racial quotas are widely used in New Zealand, particularly in university admissions. Although sometimes debated in the media or for political grandstanding,[328] there are few legal challenges to such policies.

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[320] Human Rights Commission, *Measures*, above n 314, at 2 and 3.
[321] See list compiled by Tim McBride *New Civil Rights Handbook* (Nelson NZ, Craig Potton Publishing, 2010) at 336-344.
[322] Section 74 approves special measures related to pregnancy and motherhood.
[323] *Kerr v Victoria University of Wellington* (CRT Decision: 8/97; 18/3/97).
[324] *Church v Hawkes Bay Council* (CRT Decision 01/2001; 26/3/2001).
[325] A customary prayer delivered in the Māori language as a matter of protocol particularly at certain events.
[326] Like UNDRIP, the HRA appears to have the capacity to protect women as a historically disadvantaged group in everyone/no-one terms while retaining the flexibility to recognize special measures which espouse a more complex someone narrative.
[327] In terms of ss 44, 61, 62 or 65 of the HRA, see: *Proceedings Commissioner v Archer* (CRT Decision 16/96; 25/6/96); *Proceedings Commissioner v Vallant Hooker & Partner* (CRT Decision 22/98); and *B v Commissioner of Inland Revenue* (CRT Decision 6/99; 10/3/99). At least two case relate to age discrimination while another three were brought on the grounds of age discrimination.
[328] See, for instance, Martin Johnson "Students Stung by Quota Backlash", New Zealand Herald (online edition, Auckland 1 March 2004).

Paucity is consistent with the human rights content of New Zealand's equality narrative. Again, the CRT in *Amaltal* adjudicated in the spirit of human rights. It was the defendant's disregard for human rights which seemed to most incense the otherwise generous tribunal.[329] Similarly, Chen and Palmer have commented:

> Although the comments by the Tribunal in *Amaltal* present certain difficulties, they should not be taken as the final word on the law in this respect. It is arguable that a wider approach is more appropriate, given the [New Zealand] courts' acceptance that human rights law should be given a broad purposive interpretation as it is fundamental law.[330]

Such broad, purposive interpretation has been approved by the High Court since *Coburn v Human Rights Commission* [1994].[331] 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 and historical abstraction, New Zealand narratives recall human rights obligations and *Brown*-like goals of substantive rather than merely formal equality. During the same era when the Rehnquist Court produced *Adarand Construction v Pena* and *JA Croson,* the only case on affirmative action in New Zealand generously suggests that special measures are defensible where all elements of section 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[332], diversity-based policies and programmes might not even be considered special measures in New Zealand.[333]

The *Amaltal* decision does raise questions about the role of the Treaty of Waitangi where affirmative action policies are aimed at Māori. It was argued purely on the basis of *race* and without reference to the Treaty or its principles.

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[329] "What the defendant set out to do in 1994 was to reserve more than half of those places for members of the target group without giving any consideration to its obligations under the human rights legislation and the principle of equality of treatment for all which that legislation enshrines…It seems to us from the evidence…that the defendant did not consider its obligations under the Human Rights legislation when it entered into the contract with the ETSA…the defendant's view seems to be that it has no independent obligations under the Human Rights legislation. That view is wrong": *Amaltal II*, above n 252, at 14.

[330] Chen and Palmer, above n 262, at 8.

[331] *Coburn v Human Rights Commission* [1994] 3 NZLR 323. Also see earlier *King-Ansell v Police* [1979] 2 NZLR 531, where the court took a pragmatic approach to interpretation of gender discrimination.

[332] University of Michigan cases discussed in Chapter Two at 2.4.1.

[333] Paul Callister *Special Measures to Reduce Ethnic Disadvantage in New Zealand: And Examination of Their Role* (Wellington, Institute of Policy Studies, 2007) at 7-8.

7.5.2 PURPOSIVE INTERPRETATION CONSISTENT WITH HUMAN RIGHTS OBLIGATIONS

Daniels might leave the impression that "the Court of Appeal did its best to quash any notion of students with special educational needs having innate, freestanding, and enforceable rights."[334] Given that students with disabilities are known to attract compounding, intersectionality and other forms of complex discrimination, this conclusion is liberally uncomfortable. However, the outcome in *Daniels* itself is inconsistent with current judicial trends and New Zealand's international treaty obligations.

In terms of interpretation, the doctrine of parliamentary sovereignty fundamentally demands that courts look to the purposes and intents of Parliament at the time of drafting when interpreting legislation.[335] In contrast to the judicial activism increasingly evident in United States federal courts:

> From the outset, the courts settled upon a purposive approach to the interpretation of the Bill of Rights. A parliamentary declaration of human rights was not to be construed narrowly or technically. The Courts must look to 'the purpose of the guarantee' to ascertain the interests it protects, and apply the right 'generously', avoiding technical and arcane arguments that may detract from the parliamentary purpose.[336]

New Zealand courts are to employ "generous interpretation, avoiding what has been called 'the austerity of tabulated legislation'".[337] Similarly, while the HRA did not initially "distinguish between positive and negative outcomes" as the result of a "former emphasis on forced equality" it does "provide[] mechanisms for avoiding inflexible human rights responses".[338]

New Zealand courts regularly consult international law when interpreting human rights legislation. Failing to do so was famously likened to "window dressing".[339]

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[334] Kate Diesfeld and John Hancock "Special Education Law in New Zealand" in C Russo (ed) *The Legal Rights of Students with Disabilities: International Perspectives* (Lanham, MD: Rowman and Littlefield Publishing Group, 2011) Ch7, 157-178, at 164.
[335] See Webb et al, above n 142.
[336] Joseph, above n 141, at 167.
[337] *Ministry of Transport v Noort* [1992] 3 NZLR 260, at 268 per Cooke P (CA).
[338] Joseph, above n 141, at 272.
[339] Per President Cooke (as he was then) of the Court of Appeal in the case of *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA)

Similarly, in *Northern Regional Health Authority v Human Rights Commission* [1998],[340] Justice Cartwright in the Court of Appeal wrote that:

> In interpreting human rights legislation the New Zealand Courts have resisted any attempt to limit their impact, noting that such legislation is to be "accorded a liberal and enabling interpretation"... New Zealand Courts have increasingly been prepared to look to international interpretations and authorities to gain a better understanding of our own rights-based legislation….
>
> Any analysis of policy which may directly or indirectly discriminate must be done in the light of the international principles and experience as stated in the relevant conventions and covenants ...Moreover, when the ancestry of the New Zealand legislation is understood it is inevitable that it must be read as broadly as is necessary to comply with the overarching themes promoting and protecting human rights.[341]

Statutory interpretation may have provided "[b]y far the most commonly used entry point for international law"[342] given the judiciary's increasing tendency to favor interpretations of domestic law consistent with "New Zealand's international obligations". [343] The government cannot ignore those obligations "in its administrative decision making", and courts presume that legislation is to be read consistent with those obligations "so far as its wording allows".[344]

Purposive and consistent interpretation seemingly makes the constitution more *constitutional*. Again, human rights are premised on the idea that human beings universally possess inalienable rights which presuppose national law or even international law. [345] Logically, these rights also presuppose the would-be lawmaker, even Parliament. The modern interface between human rights and constitutional rights in New Zealand caused the late Lord Cooke of Thornton,

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[340] *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218, at 234.
[341] Ibid.
[342] Treasa Dunworth "The Influence of International Law in New Zealand: Some Reflections" Chapter 17 in C Morris *Reconstituting the Constitution* (Springer-Verlag Berlin Heidelberg 2011), 319-335, at 329.
[343] Unless "the words of the statute rule out such an interpretation": see *B V G* [2002] 1 NZLR 233 (CA) at 243 per Glazebrook J. Also see amenability of Gault J (CA) in *Hosking v Runting* [2005] 1 NZLR 1 and endorsement of Supreme Court in *Ye v Minister of Immigration* [2009] NZSC 76 at para 24. All three cases discussed by Dunsworth, ibdi, at 329-330. The Supreme Court is New Zealand's highest court of appeal.
[344] On government's need to refer to treaty law, see *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) and *Puli'uvea v Removal Review Authority* [1996] 3 NZLR 538 (CA), *Elika v Minister of Immigration* [1996] 1 NZLR 741 (HC). On presumption in terms of statutory interpretation, see Rajan v Minster of Immigration [1996] 3 NZLR 543 (CA) at 551. Cases cited and discussed in Meikle, above n 184, at 43-44. Meikle also notes that, based on the same presumption, "the courts may narrow or read down the scope of a statutory discretion in accordance with this presumption of interpretation."
[345] See Chapter 5, section 1.2.

former President of the Court of Appeals, to argue that even without a written constitution some rights are so fundamental that even Parliament cannot override them.[346] The seminal constitutional case, *Moonen v Film and Literature Board of Review* [2000],[347] suggests that statutory limitation on such rights "cannot be demonstrably justified in a free and democratic society".[348]

In terms of non-discrimination the court will adopt an approach consistent with the BoRA when interpreting statute.[349] If the provision cannot be justified it will also be inconsistent with section 5 of the BoRA. Justifiability will be determined purposively—that is, whether it has "a rational relationship with the objective" which the legislature was trying to achieve in its drafting.[350] An unjustified limitation will constitute discrimination.

7.5.3 RE-AFFIRMATION OF A COMPLEX SOMEONE RIGHT TO EDUCATION

Historically, the *Daniels* case was decided before New Zealand had ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD).[351] The Court of Appeal never had to specifically ask if the policy was consistent with the CRPD. Consequently, Kate Diesfield and John Hancock have concluded that "[t]he government's recent ratification of the [CRPD] will have added considerable weight to any post-*Daniels* interpretation of section 8"[352] —that is, any interpretation of what equality means in regards to children with special needs. This is particularly true given Article 24's requirement that State parties ensure "reasonable accommodation of the individual's requirements…provision of support…to support their effective education",[353] a substantive interpretation of education implying 4-A Scheme considerations.

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[346] Robin Cooke "Fundamentals" [1988] NZLJ 158.
[347] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).
[348] Address given by Chief Justice of the Supreme Court of New Zealand, Dame Sian Elias, "Another Spin on the Merry-Go-Round" found at https://www.courtsofnz.govt.nz/speechpapers/Speech19-03-2003.pdf, at 18.
[349] *Moonen*, above n 347, see paragraphs 27-29, at 19.
[350] *Moonen*, paras 18-19, at 16-17.
[351] Discussed in Chapter Six at 5.2.4.
[352] Diesfeld and Hancock, above n 334, at 160.
[353] Convention on the Rights of Persons with Disabilities, art 24.

Curiously, the Court of Appeal in *Daniels* investigated questions of equality relative to section 8 of the Education Act 1989 but failed to test the policy for discrimination under the HRA, despite "extensive submissions made by the Human Rights Commission to that effect".[354] In fact, New Zealand's ratification of the CRPD was followed by an amendment to the HRA in 2008, section 60(1), which makes educational establishments seemingly liable for a failure to provide special services or facilities where they can reasonably be made available.[355] Thus, post-CRPD, the de-establishment of special schools, classes and programs by the Ministry may constitute a violation of the right to non-discrimination where such de-establishment removes:

> services or facilities that are required to enable the person to participate in the educational programme of an establishment referred to in that section or to enable the person to derive substantial benefits from that programme…[356]

Given that section 60(1) is the result of intentional domestic incorporation of an international human rights convention, New Zealand courts will be obliged to have regard to the CRPD itself in future decisions. Such reference inevitably necessitates the importation of other CRPD rights and principles, even the flexible inclusion which characterizes the convention and its 4-A provisions. As argued in Chapter Five, the CRPD also exhibits a complex someone narrative aimed at substantial equality. This might have been influential in *Daniels* given plaintiffs' evidence of significantly poorer educational outcomes since the implementation of the relevant policy. In practice, reference to the CRPD's principles may become as common as

[354] Noted by Diesfield and Hancock, above n 334, at 160.
[355] Section 60(1) seems to exhibit the CRPD's flexible inclusion: "Nothing in section 57 applies to a person whose disability is such that that person requires special services or facilities that in the circumstances cannot reasonably be made available (being services or facilities that are required to enable the person to participate in the educational programme of an establishment referred to in that section or to enable the person to derive substantial benefits from that programme)." Particularly in light of section 57(1) to which it applies which reads: "(1) It shall be unlawful for an educational establishment, or the authority responsible for the control of an educational establishment, or any person concerned in the management of an educational establishment or in teaching at an educational establishment,—(a) to refuse or fail to admit a person as a pupil or student; or (b) to admit a person as a pupil or a student on less favourable terms and conditions than would otherwise be made available; or (c) to deny or restrict access to any benefits or services provided by the establishment; or (d) to exclude a person as a pupil or a student or subject him or her to any other detriment,—by reason of any of the prohibited grounds of discrimination": s 57, HRA. Quote and references… and echoes states' obligations under the Maastrich Guidelines.
[356] Human Rights Act 1993, s 60(1).

the heed the same courts now give to Children's Convention principles such as the best interests of the child.[357]

The issues in *Daniels* are unlikely to go away. The New Zealand Society for the Intellectually Handicapped (IHC), a non-profit organization providing support services to families of children with intellectual disabilities, has filed a complaint with the HRRT alleging structural discrimination which violates their right to education.[358] The organization has, of course, cited international human rights law.

7.5.4 EDUCATION AS AN ESCR IN NEW ZEALAND: DOMESTIC INDIVISIBILITY AND EMPHASIZED LEGALITY

The evolution of the human right to education in international law, discussed in Chapter Five and Six, revealed an increasing awareness of organic multiplication including the indivisibility of ESCRs and CPRs, and emphasized rather than diminished legality. The presence of these factors at the international level signalled a move from an *adamant everyone/no-one* narrative to a complex toolbox of rights options in terms of education, including the specifically indigenous right to education found in UNDRIP's article 14. In contrast to the *adamant everyone/no-one*, *slim someone* and *limited indigenous learner* narratives currently operating in US federal courts, New Zealand law also appears to recognize the indivisibility of ESCRs and CPRs—as well as human and indigenous rights—and provides legal recourse, suggesting emphasized legality.

Economic, social and cultural rights were almost included in the BoRA. A select committee on its draft form, for instance, "recognised that effective exercise of civil and political rights depends on securing adequate standard of living, housing, health care and education" though it found it too difficult to "deal[] with such rights in a judicially enforceable supreme law such as the" proposed legislation.[359] While

[357] See *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); and *Ye v Minister of Immigration* [2010] NZSC 76.
[358] See IHC website, "Campaigns", "Education complaint" New Zealand Society for the Intellectually Handicapped <www.ihc.org.nz>.
[359] New Zealand, "Final Report of the Justice and Law Reform Select Committee on a White Paper on the Bill of Rights for New Zealand" 1988 (Bob Dillion, Chair), at 3, quoted and referenced in

"[ESCRs] currently receive substantially less judicial protection in New Zealand than do [CPRs]",[360] they are, nonetheless, recognized in legislation.

Both the BoRA and HRA recognize ESCRs. Section 20 of the BoRA, as discussed above, recognizes individual and groups rights to language and culture. In addition to education, the HRA specifically addresses discrimination in various economic and social areas including employment generally, [361] "employment-related retirement benefits", [362] "provision of goods and services", [363] housing, [364] and superannuation.[365] The Health and Disabilities Act, using the word "rights", also prohibits discrimination in healthcare. [366] Such legislation taken together—particularly given New Zealand's *no-one* narrative—equate ESCRs with non-discrimination.

The Education Act itself recognizes a range of legal rights specific to education. As discussed, it recognizes a universal *everyone* right to primary and secondary education not unlike the UDHR and ICESCR as well as later documents. It contains *someone* provisions which are age-, minority-, and culturally-specific, needs-based and even *indigenous*.

New Zealand courts also regularly adjudicate on ESCR rights, particularly in terms of non-discrimination. In fact, a closer look at McBride's 42 discrimination cases[367] shows that at least 24 of them took place in the context of employment, while one involves housing, two goods and services, and four education.[368] Notably, the *Child Action Poverty Group*[369] case and *Atkinson*[370]—consistent with international jurisprudence on non-discrimination such as *Broeks v Netherlands*, [371] both

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Joss Opie "Economic, Social and Cultural Rights in New Zealand: Their Current Legal Status and the Need for Change" (LLM Thesis, Faculty of Law, University of Toronto, 2011) at 48.
[360] Geiringer and Palmer, above n 271, at 37.
[361] Human Rights Act 1993, s 22.
[362] Section 30A.
[363] Section 44.
[364] Section 53.
[365] Section 70.
[366] For instance, see s 70A.
[367] See above n 325.
[368] Note that section 1981 at issue in the *Kamehameha* case similarly involved a contract for goods and services.
[369] *Child Poverty Action Group Inc v Attorney-General* (HC Wellington CIV-2009-404-273, 25 October 2009).
[370] *Minister of Health v Atkinson* [2012] NZCA 184.
[371] *SWM Broeks v The Netherlands* Communication No 172/1984, CCPR/C/OP/2 (1990) discussed in Chapter Five at 5.4.3.

challenged the unequal provision of government benefits to families affected by poverty and disability respectively. With regard to the BoRA, Frances Joychild notes:

> What is now evident, 12 years on from Part 1As commencement, is that the right to freedom from discrimination under the [BoRA] is also a gateway for the adjudication of economic, social and cultural rights. Despite the [BoRA] long title indicating a primary intention to implement the civil and political covenant, and there being no positive economic and social rights enforceable in domestic law as there are in other countries, Part 1A has shown itself to be a significant gateway for their adjudication. All Part 1A claims to date have concerned economic and social rights.[372]

Joychild not only argues that "a constitutional obligation" is a "human right" but recognizes that while ESCRs—like CPRs—may face "[a]pparent obstacles to, and difficulties with, justiciability", "[t]here are currently a range of possibilities for justiciability" in New Zealand "including the application of the prohibition of discrimination and the interconnectedness between [CPRs] and [ESCRs]".[373]

Though New Zealand has not yet ratified the Optional Protocol to the ICESCR, it has endorsed the Optional Protocol to the ICCPR which allows New Zealanders to take complaints to the UN Human Rights Council when domestic remedies are exhausted. Lord Cooke of Thornton suggested that the availability of this remedy made the UN Human Rights Council an extension of New Zealand's judiciary.[374] His point about legal recourse is well-taken, particularly given the potential access provided by Article 26's non-discrimination provision.

Ultimately, while Glazebrook and Palmer have rejected the justiciability of ESCRs, the current Chief Justice of the Supreme Court of New Zealand, Dame Sian Elias, has said that "the implementation of economic, social and cultural rights is a primary duty for the legislative and executive branches of government".[375] She has similarly stated:

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[372] Frances Joychild "Discrimination" in Rishworth and others *NZLS CLE Intensive: Using Human Rights in Litigation* (NZLS CLE Ltd Continuing Legal Education New Zealand Law Society, June 2014) 71 at 86.
[373] Ibid.
[374] Quoted in address by Sian Elias, Dame Silvia Cartwright Lecture 2009, Thursday 26 November 2009, found at <https://www.courtsofnz.govt.nz>,para 18.
[375] Ibid, para 33.

> Judges cannot avoid hard cases if they are properly brought before them…Today, claims which invoke human rights such as equality make it impossible to refuse to engage with substantive outcomes….[376]

Ironically, Glazebrook seems to make a strong case for ESCRs in almost the same breath in which she would deny legal recourse to them.[377] Notably, Glazebrook offered her opinion extra judicially.

Such indivisibility and emphasized legality may be most apparent where the education rights of indigenous learners are at stake, given the nexus of human and indigenous rights. As a *human* right, a right to non-discrimination in education may entail legal recourse through the human rights complaints process, that is, via the HRRT. A Treaty right to education is also likely to be a *human* right. The Human Rights Commission which receives human rights complaints regarding the Human Rights Act 1993 has in no uncertain terms equated Treaty rights with their human rights counterparts in international law and has called the Treaty a "human rights document".[378] Where the Treaty itself is invoked, violation including prejudice against a Māori individual or group of Māori may entail recourse through the Waitangi Tribunal. As discussed above, Treaty violations and human rights violations can also be addressed directly through the common courts, as was the case in the *Ngati Apa* case. Such an overlap suggests that an indigenous human right to education in New Zealand is marked by an emphasized rather than diminished legality—that is, multiple narratives potentially emphasizing the same *complex* right to education and providing multiple avenues of legal recourse. This nexus of human and indigenous narratives suggests a *complex* multi-narrative at work.

[376] Ibid, para 18.
[377] Glazebrook, above n 292. Ironically, Justice Glazebrook is supportive of a right to environment which includes considerations of health (10), indigenous culture (10), participation rights of women and children (17). She cites the right to health, an apparent ESCR as a potential vehicle for a right to environment (21) as well as non-discrimination and right to culture under Article 27 of the ICCPR.
[378] NZ Human Rights Commission, *Human Rights in New Zealand 2010*, above n 152, at 38.

The same nexus appeared in the equality narratives which operated in terms of debate on the Foreshore and Seabed legislation. Despite the vehemence of the public debate, the law was condemned and criticized, domestically and internationally, as a violation of indigenous *and* human rights almost from the beginning. In its wake, Māori again struggled to have their Treaty and human rights recognized.[379] When they did, they were backed by the judiciary and the international community.

In addition to the Court of Appeal judgment in *Ngati Apa* which previously recognized common-law rights, the Waitangi Tribunal's *Report on the Crown's Foreshore and Seabed Policy*[380] issued in March 2004 had found that the legislation:

> …clearly breaches the principles of the Treaty of Waitangi. But beyond the Treaty, the policy fails in 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*.[381]

The Tribunal reasoned that Article III 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".[382] Essentially, the legislation would only disadvantage Māori in effect and was discriminatory.

Bodies monitoring New Zealand's international treaty obligations similarly condemned the legislation. In March 2005, the UN Committee on the Elimination

[379] Valmaine Toki wrote: "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 Seabed Bill. On the 18th November, 2004 that Bill passed it's third reading. Metaphorically on the same day Tim Selwyn, akin to Hone Heke's action, put an axe through the electorate office of the Prime Minister, Helen Clarke. Nevertheless, on 24 November 2004 the Foreshore and Seabed Act was enacted vesting title of the foreshore and seabed into the Crown. In October 2006, Tariana Turia, now co leader of the Maori Party, introduced a Private Member's Bill designed to repeal the Foreshore and Seabed Act.: Valmaine Toki "Can the Developing Doctrine of Aboriginal Title Assist a Claim under the Foreshore and Seabed Act 2004?" (2008) 34(1) Commonwelath Law Bulletin 21 (footnotes omitted).
[380] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004).
[381] Ibid, at xiv.
[382] Ibid.

of All Forms of Racial Discrimination (CERD) issued their own decision on the FSA concluding that it was discriminatory because the act removed legal recourse and means of redress where Treaty rights were violated.[383]

After visiting New Zealand soon after, then UN Special Rapporteur on Indigenous Peoples, Rodolfo Stavenhagen, noted that:

> …some New Zealanders appear to approve of the view of "One law for all" (that is, no more special laws on Māori rights, understood as meaning Government should stop the alleged "pampering" of Māori). The political media have taken up these arguments and have reflected the view of those who would like to see an end to the alleged "privileges" accorded by the Government to Māori.[384]

The Special Rapporteur replied that while he had seen plentiful evidence of complex discrimination and disparities, he had seen none of advantage or privilege.[385]

The divisive legislation was repealed seven years later by section 5 of the Marine and Coastal Areas (Takutai Moana) Act 2011. While providing for "the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand", the purpose of the Act, under section 4, is to:

> (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and (c) provide for the exercise of customary interests in the common marine and coastal area; and (d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).[386]

Consequently, the Act repealed the Foreshore and Seabed Act 2004, restored "customary interests extinguished by that Act", recognized "the continuing exercise of" of historically continuous rights—"mana tuku iho[387] in the marine and coastal

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[383] UN Committee on the Elimination of Racial Discrimination "Concluding Observations on the Committee's 65th Session" (20 August 2004) Press Release. See discussion in Claire Charters and Andrew Erueti "Report form the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004" 36 VULWR 257.

[384] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen: Addendum: Mission to New Zealand* E/CN.4/2006/78/Add.3 (2006) para 54.

[385] "The Special Rapporteur was asked several times whether he agreed that Maori had received special privileges. He answered that he had not been presented with any evidence to that effect, but that, on the contrary, he had received plenty of evidence concerning the historical and institutional discrimination suffered by the Maori people, evidence that he is concerned with in the present report.": Ibid.

[386] Marine and Coastal Areas (Takutai Moana) Act 2011, s 4(1).

[387] See definition for "mana whakaheke": "1. (noun) inherited status, mana through descent - mana that originates from the atua and is handed down through the senior male line from the atua. Also

area"—and "[gave] legal expression to customary interests".[388] Thus, the 2011 Act incorporated the Treaty of Waitangi into municipal law, recognized Māori as "tāngata whenua"—a term denoting their unique political status, residual customary rights and the legality of such rights.

While Parliament remains free to change its collective mind, the current legislation has immediate implications for an indigenous right to education in New Zealand. As the result of significant efforts on the part of Māori and international pressure, New Zealand equality was realigned with its unique historico-legal context. The multi-narrative Treaty was reaffirmed but also emerged as a narrative symbol of human rights and non-discrimination. In terms of emphasized legality, the historical continuum of rights was recognized by the courts as common-law rights, by the expert Waitangi Tribunal as Treaty rights and, eventually, by Parliament as both. Where education is interpreted as an Article II taonga it must similarly be justified as an indigenous right, constitutional right and human right.

7.5.6 REMEDIATION, PROPORTIONALITY AND POSITIVE OBLIGATIONS

Finally, Chapter Six discussed how a complex, multi-narrative human right to education had evolved to include temporary and permanent positive obligations and remedial and proportional self-determination. In contrast to the dramatic events surrounding the Foreshore and Seabed legislation, there is a marked absence of a similar furore over a specifically indigenous right to education. Instead, there is a growing body of Waitangi Tribunal interpretation which recognizes Treaty principles resembling features of the international right to education for Māori learners—but also positive obligations and self-generated, remedial and proportional responses to historic and ongoing harm. Where these principles are violated, Māori are likely to be discriminated against in terms of Articles II *and*

called mana tūpuna or mana tuku iho." Found in *Te Aka Māori-English, English-Māori Dictionary* <www.maoridictionary.co.nz>.

[388] Marine and Coastal Areas (Takutai Moana) Act 2011, s 4(2). The Foreshore and Seabed Act 2004 was formally repealed by s 5.

III—that is, in terms of *everyone/no-one* equality and specifically Māori rights to self-determination.

Ironically, while critics express pessimism about ESCRs, the same commentators readily recognize Treaty rights. Palmer, for instance, advocated entrenching the Treaty in a written constitution in the White Paper.[389] Glazebrook has recognized indigenous self-determination as a potential vehicle for the recognition of ESCRs.[390]

As described previously, the Treaty is a constitutional document and a potential check on plenary power.[391] Similar to the heed which the judiciary must give to human rights, Sir David Baragwanath has described how common-law principles of interpretation appear to require Courts "to construe law as conforming with [T]reaty obligations" and to "warn the decision-makers" where it does not conform.[392]

Although its decisions are not binding, "the Treaty of Waitangi Act 1975 has afforded the Waitangi Tribunal the opportunity to play a crucial role in debating our constitutional past and present".[393] It has the jurisdiction to determine the meaning and effect of the Treaty and, ultimately, judge matters of prejudice. Importantly, its "Treaty principles jurisdiction" cannot be "water[ed] down".[394] A deeper look at the claims alluded to earlier illustrate this point and also recall elements of positive States obligations, the 4-A Scheme, buffer-and-access features generally but also remediation and proportionality.

In the *Mokai School Report 2000,*[395] parents of Māori learners brought a Treaty claim when their bilingual primary school was closed[396] by the Ministry of Education. Parents claimed that their Article II rangatiratanga right over taonga

[389] See Geoffrey *Palmer* "A Bill of Rights for *New Zealand:* A *White Paper*" [1984–1985] I AJHR A6 at 29.
[390] Glazebrook, above n 297, footnotes 117 and 188 at 22.
[391] The Treaty has been described as a "constitutional catalyst": Tawhai, above n 39.
[392] Former Judge of the High Court, Justice of the Court of Appeal and President of the New Zealand Law Commission and current president of the United Nations Special Tribunal for Lebanon speaking extra judicially: David Baragwanath "The Evolution of Treaty Jurisprudence" (Harkness Henry Lecture, University of Waikato, 24 September 2007) at 11-12.
[393] Jacinta Ruru "The Waitangi Tribunal" in Mulholland and Tawhai, above n 39, 127 at 127.
[394] Ibid, at 128.
[395] *Mokai School Report* , above n 238.
[396] Compare with similar closure of identity-aware school in *Daniels.*

including *te reo* (indigenous language) and *mātauranga* (indigenous knowledge) and other Treaty principles had been breached when the school was closed without adequate resource allocation and consultation with parents. The result of the closure, they claimed, had meant that their children were no longer able to learn indigenous language and knowledge at Mokai, had to travel outside the community and would lose their "Mokai identity".[397]

In addition to apparent 4-A issues, the Tribunal recognized Crown duties resembling the respect, protect and fulfil obligations associated with the international human right to education. For instance, it was satisfied 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.[398] These actions resulted in a diminishment of the community's Article II rangatiratanga and prejudice.[399]

In its *Report on the Aotearoa Institute Claim Concerning Te Wānanga O Aotearoa 2005*,[400] the Tribunal described an indigenous tertiary institution as "filling both an educative and a social justice function for all Māori, and indeed for all New Zealanders".[401] The institution taught Māori language and tikanga in addition to "literacy, numeracy, and other skills life and employment skills" and was especially aimed at "second chance" learners "whom the primary and secondary education system had failed".[402] 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. 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 it to make that decision.[403]

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[397] *Mokai School Report*, above n 238, 137. They also claimed that the Education Act 1989 should include a provision requiring consistency with the Treaty and its principles.
[398] Ibid, at 123
[399] Ibid, at 125.
[400] *Wananga o Aotearoa*, above n 241.
[401] Ibid, at 2.
[402] Ibid, at 2.
[403] Ibid, at 51.

Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity in 2011[404] similarly determined that indigenous-specific policies currently in place were praiseworthy, representing a certain amount of partnership and "considerable progress".[405] In response to concerns about the 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.[406] 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.[407]

Most recently, *Matua Rautia: The Report on the Kōhanga Reo Claim* 2013 provided an expansive analysis of an indigenous right to education at the preschool level. Central to the claim was the Tribunal's finding that kohanga reo—or language nests—are vital to the survival and revitalization of Māori language which is a taonga and Treaty right.[408] While the principle of partnership makes both the Crown and Māori responsible for language survival, the Crown has a duty of active promotion 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.[409] Regarding options and equity, the Tribunal recognized 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 a "policy framework" tailored to protecting te reo. Failing to provide such policy, promote participation, and imposing a funding regime which did not provide incentives for kōhanga reo teachers specifically was interpreted as prejudice by the Tribunal.[410]

The harmony of the Tribunal's findings with the evolution of the international human right to education is readily apparent. In terms of the liberal project,

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[404] Waitangi Tribunal *Ko Aotearoa Tenei: Te Taumata Tuatahi - A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (Wai 262, 2011) Volume 2.
[405] Ibid, at 559 and 560
[406] Ibid, at 542, 543
[407] Ibid, at 559, 561
[408] Repeatedly mentioned throughout the Report.
[409] *Kōhanga Reo Claim*, above n 231, at 231.
[410] Ibid, at 236-240.

resource allocation and other concrete, positive measures are consistent with a substantial right to education and a complex someone narrative. The *Mokai*, *Ko Aotearoa* and *Kōhanga Reo* decisions seemed to imply 4-A principles including access, availability and acceptability. The emphasis of the Tribunal on measurement and actual progress echo international treaty obligations requiring states to use maximum resources to realize the right to education. However, language like "active" and "vigorous" are strong even in international terms. Like international standards, resource allocation does not undermine these rights as legally valid claims.

The rights remain self-determination based. In terms of admissions, the *Wānanga* decision reveals an UNDRIP-like control over membership[411]—even where those being admitted are not indigenous. In the *Mokai*, *Wānanga* and *Kōhanga Reo* decisions, the schools in question—rather than a greater indigenous political entity—were themselves recognized as holders, even trustees[412] of a collective right to self-determination. Diminishing even this internal self-determination constitutes breaches of the Treaty resulting in prejudice which seem to violate Article III as much as Article II. Predictably, substantive non-discrimination links homegrown Treaty rights and traditional liberal projects.

Ultimately, the Treaty appears to guarantee an UNDRIP-like, specifically indigenous right to education recognizing the rights of Māori to various rights including 4A-like access and availability, non-discrimination, positive measures, and Article 14-like self-determination. In company *with substantive everyone/no-one* and *complex someone* rights, the Treaty represents an expanded multi-narrative of equality.

7.6 CONCLUSION

The chapter initially asked why Kamehameha-like schools and policies are not challenged in New Zealand. While Native Hawaiians never ceded sovereignty and

[411] See discussion in Chapter Six on UNDRIP, arts 14(1) and 33 on ownership of the right and membership criteria.
[412] See kaitiakitanga principle discussed in *Kōhanga Reo Claim*, above n 231, at 66.

Māori ceded some, the mo‘olelo of colonization, assimilation, discrimination and present disparities is nearly identical, as if from a common playbook. Today, *adamant everyone/no-one* narratives continue to challenge indigenous claims and a *strong* right to education. Events such as the Foreshore and Seabed legislation illustrate the power such narratives still hold in law and the popular imagination.

In response to this mo‘olelo, however, New Zealand law and Treaty interpretation recognizes a multi-narrative of equality—a domestic toolbox of rights options—which, crucially, intentionally incorporates human rights, organically connects human, constitutional and indigenous rights, while also recognizing a remedial, historical self-determination. While *adamant* criticisms retain some degree of the conflict of narratives evident in the *Kamehameha* case, there is certainly a greater flexibility and complementarity between narratives. Features of liberal multiculturalism and historical self-determination theory play out in these narratives including buffer-and-access features, awareness of prior sovereignty and ongoing harm. Key aspects of the expanded multi-narrative evident in international law are also present including: scarcity of reverse discrimination; interpretation consistent with human rights obligations; re-affirmation of a complex someone right; domestic legal indivisibility and justiciability; indigenous rights as human rights non-discrimination; and remediation, proportionality and positive government obligations. Education is stated in legislation as a right with multiple, complex rightsholder identities acknowledged. Non-discrimination rather than a formalized equality is prioritized implying a more substantive, *Brown*-like version of equality.

Notably, New Zealand narratives have expanded with and benefitted from intentional human rights incorporation, the organic and legal interface between human, constitutional and indigenous rights, and an unapologetically remedial and historical self-determination. These features have blurred the 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 lines between the courts and the Tribunal. Subsequently, New Zealand narratives are imbued with a supra-domestic moral force which is consonant with domestic intuitions and the unique historico-legal context of Māori rights to education.

My colleagues in the trenches of indigenous education and various reports wisely caution that there is certainly room in New Zealand for greater municipal importation and implementation of human rights, as well as greater recognition of Treaty- and UNDRIP-based indigenous rights to education. Obviously, UNDRIP, the Children's Convention and the CRPD remain unincorporated in New Zealand legislation though this could clarify these matters further. Regardless of the whims of Parliament or, similarly, the limits of the Tribunal's jurisdiction, however, a *complex* multi-narrative of equality—including the specifically indigenous learner—is obviously present and even emphasized in New Zealand. As in international law, the real question then is not really whether a *Kamehameha*-like admission policy is consistent with equality or a right in and of itself nor whether it might represent a peoples' rights to self-determination. Clearly, it is, and it can. Rather, current criticisms revolve around implementation. In the United States, discussions on the implementation will remain moot points until federal law expands the narratives of equality wrestled with in *Kamehameha*.

The thesis has examined the *Kamehameha Schools* case, its legal background, political theory, international law and the equality narratives of a sister settler nation in an attempt to make sense of the wrestle, intuitions and gaps in the reasoning of the Ninth Circuit. The next chapter will summarize previous discussions and make recommendations that might clarify equality narratives in terms of the admissions policy in future.

CHAPTER EIGHT

SUMMARY AND RECOMMENDATIONS

8.1 INTRODUCTION

The thesis has argued that the Ninth Circuit's reasoning in *Doe v Kamehameha Schools*[1] suggests three conflicting narratives of equality reflected in the wider legal landscape of American federal law. It has demonstrated how and why these narratives fail to account entirely for either the unique historico-legal history of the Native Hawaiian people or the huge gap between formal constitutional guarantees of equality and the persistence of actual complex discrimination and disparities almost unrelentingly attracted to Native Hawaiian identity. Those narratives and the admissions policy itself have been weighed in terms of liberal theory, international law—including the United Nations Declaration on the Rights of Indigenous Peoples 2007[2] (UNDRIP)—and the historico-legal experience of a sister settler jurisdiction—New Zealand. Theory and law have revealed that elsewhere an expansion of the three narratives has been driven by substantial equality and non-discrimination but also rights of self-determination with significant narrative capacity for reconciling the guarantee/reality gap—even deep harm—as they exceed liberal projects.

This chapter summarizes previous discussions and introduces seven markers of equality which have emerged as consistent features of the expanded multi-narrative in regards to the indigenous learner. The expanded multi-narrative and seven markers then underwrite recommendations which might facilitate the task of the next federal court confronted with the admissions policy. Good, better and best

[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 F3d 1025 (9th Cir 2005), reh'g en banc granted, 441 F3d 1029 (9th Cir 2006) 470 F3d 827 (9th Cir. 2006) (en banc).

[2] United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/Res/61-295 (2007).

recommendations include philosophical consistency with the expanded multi-narrative, the intentional importation of the human right to education and the intentional incorporation of Article 14 of UNDRIP.

8.2 SUMMARY OF FINDINGS

The thesis initially sought to explain and address apparent intuitions and gaps in *Kamehameha* from a theoretical perspective by exploring legal narratives evident in the reasoning of the dissent, majority and concurrence and evaluating them in terms of political theory, international law and the domestic law of a sister settler nation.

In terms of current narratives, Chapter Two illustrated how *Brown I* and *II* responded to an identity-specific history of slavery and segregation with a substantially and historically aware *everyone*/*no-one* narrative of equality. *Brown II*, however, was also consistent with the temporary, racially-specific *someone* evident in affirmative action. A third specifically indigenous narrative grounded in residual self-determination had survived colonization, assimilation and discrimination to justify the preference in *Mancari*. However, *someone* and *indigenous* narratives have been undermined since *Brown* by the *adamant everyone/no-one* narrative evident in federal decisions including *Bakke* and the University of Michigan cases and legislation as the No Child Left Behind Act 2002. The chapter finally noted the reluctance of federal courts to recognize a constitutional or human—or strong—right to education despite the significant constitutive commitment attributed to education in cases such as *Brown* and *Plyler*—and persistent inequalities in education which cluster around minority group identity forming significant constitutional guarantee/reality gaps. These features left a very *slim someone* narrative and a highly *arbitrary indigenous* narrative at the whim of colorblind rhetoric which ignores actual inequalities and may mask old-fashioned discrimination.

Chapter Three discussed the clash of these federal narratives in *Kamehameha*. It described the history of the Native Hawaiian people as an internationally

recognized nation and subsequent illegal overthrow and annexation by the US. The chapter further described the overwhelming species of inequality which is causally linked to this particular history and fundamentally violates any level playing field or homogenous/anonymous guarantee. The chapter demonstrated how the same history affirms both a special trust relationship with federal and state governments like that with Native American tribes but also residual rights of a nation which never ceded its sovereignty, demanding self-determination- rather than equality-based narratives. The wrestle of federal courts in *Kamehameha* suggested that *adamant everyone/no-one*, *slim someone* and even the *indigenous Mancari* tests available to federal courts lacked the narrative capacity to account for the peculiarities of the Native Hawaiian historico-legal context and concerning constitutional guarantee/reality gaps. In fact, pre-overthrow, historically continuous Native Hawaiian customary law, indigenous-specific Hawai‘i state law and recent developments including the passing of Act 195[3] and the most recent version of the Akaka Bill suggested the need for an alternative *indigenous* narrative which affirmed residual, homegrown indigenous rights to self-determination and one framed in human rights terms.

In search of theoretical and legal tools which have been used to address the same conflict of narratives and possible resolution of the wrestle, intuitions and gaps, the thesis then turned to political theory and international law.

Chapter Four weighed the narratives and reasoning in *Kamehameha* in terms of liberal theory. The identity-blindness of the dissent—and its insistence on a rigid intermediate scrutiny with all the practical effects of strict scrutiny—were likened to John Rawls' original position and veil of ignorance but also the adamant cosmopolitanism of Jeremy Waldron and callous utilitarian math of Richard Posner. The modified intermediate approach of the minority was compared with Ronald Dworkin's equality of opportunity which would temporarily approve of racially justified affirmative action. Like the concurrence, Will Kymlicka's liberal multiculturalism justified identity-specific indigenous rights including self-determination in liberal terms where such *buffer* indigenous individuals against majoritarian bias and discrimination built into institutions and law and provide

[3] Act 195, Sess L Haw 2011.

access to substantial rather than merely formal equality. Kymlicka's reconciliation of Rawls and Dworkin's represented the project of the earnest liberal eager to address the guarantee/reality gap. However, because Kymlicka's liberal multiculturalism was less amendable to historical remediation and would let individual *everyone/no-one* rights 'trump' indigenous group rights, it illustrated the limits of a purely liberal defence of the admissions policy. Ultimately, however, Kymlicka's buffer-and-access features also illustrated the overlap of liberal and self-determination projects where equality is measured substantially rather than merely formally.

Chapter Five demonstrated how—as if Kymlicka's buffer-and-access thesis were correct—the international human right to education has evolved from a formalized, universalized, *everyone/no-one* right to a complex, highly identity-aware toolbox of rights options. Tracing the evolution of the right through various instruments, the chapter described how the dynamic human right now entails homogenous guarantees of a universal right, semi-anonymous race- and gender-specific prohibitions on discrimination in education, as well as special temporary measures aimed at parity—but also permanent, quasi-collective minority rights to language, culture and parallel institutions which buffer ethnic minority members against systemic, institutionalized majoritarian bias, rights of availability, access, adaptability and acceptability, and participation, and the rights of children specifically and also their families and communities. The multi-narrative human right to education is expressed and emphasized as a standalone right, indivisible from—even demanded by—constitutional civil and political rights, justiciable and enforceable. Importantly, this highly identity-aware rights toolbox entails increasingly specific and concrete state parties' obligations driven by non-discrimination itself.

Chapter Six further explored the adoption of UNDRIP—including the Article 14(1) right of indigenous peoples to establish and control their own schools—as the earnest culmination of the international human right to education affirming both liberal and self-determination projects. It described in detail how this more rational indigenous learner right remains consistent with substantive *everyone/no-one* and *complex someone* narratives as it entails identity-aware formalized guarantees, special measures, minority rights and indigenous rights. Because it entails remedial

self-determination *and* liberal projects, Article 14 is an organic multiplier of other indigenous and human rights, justiciable, and enforceable—even demanded by substantial equality—and displays emphasized legality. Moreover, Article 14 represents the narrative capacity of specifically indigenous rights to reconcile Kymlicka's theory with itself, namely to overcome the dangers of historical disconnection and individual trumping.

Finally, the thesis compared current federal narratives of equality with those of a sister settler jurisdiction—Aotearoa New Zealand—grappling with a similar indigenous history of colonization, assimilation, discrimination and present disparities. Chapter Seven discussed the eerily similar historico-legal context of Māori legal claims to the Native Hawaiian, including prior sovereignty, ongoing harm and a historical continuum of rights. A critical analysis of domestic jurisprudence, legsialtion and Waitangi Tribunal interpretations of the Treaty demonstrated how domestic law could narrate equality in *multi-narrative* terms and, consequently, how human, constitutional and indigenous rights could reinforce and coincide with one another, The expanded domestic multi-narrative was then tested against familiar *adamant everyone/no-one* criticisms including trumping, ESCR categorization and self-determination denial. These criticisms appeared to fall away in the face of intentional human rights incorporation, the organic human/constitutional/ indigenous interface, and historical self-determination recognition. Ultimately, New Zealand equality narratives seemed to blur the lines between domestic and international law and displayed emphasized legality and moral force. Not unlike the international human rights framework, the law of Aotearoa would also approve the admission policy on multiple grounds.

Importantly, New Zealand law revealed both homegrown and imported aspects of the international multi-narrative toolbox of rights. The presence of buffer-and-access features and a more historical self-determination demonstrated a domestic jurisdiction's potential narrative capacity to account for unique historico-legal context and identity-attracted de facto disparities.

8.3 THE EXPANDED MULTI-NARRATIVE AND ITS MARKERS

Kymlickan multiculturalism and historical self-determination, the evolution of the human right to education and the human/constitutional-indigenous rights nexus in New Zealand law demonstrate three expanded equality narratives, namely the *substantive everyone/no-one*, *complex someone* and *indigenous learner*. In theory, international and domestic law, narrratives which seem inherently at odds in *Kamehameha* have been transformed into a highly identity-aware, complex, *multi-narrative* of equality recognizing an ever increasing rather than narrowing toolbox of rights options. It is marked by at least seven features identified below which seemingly define equality in regards to indigenous people in education at the beginning of the 21st century and could expand and enhance federal equality narratives.

8.3.1 EARNEST RECONCILIATION OF THE GUARANTEE/REALITY GAP

Where current federal equality narratives prioritize a uniform distribution of rights, the expanded multi-narrative is fundamentally concerned with the reconciliation of *everyone/no-one* guarantees with identity-attracted disparities. Such disparities defy any presumption of the level playing field, original position or a fair distribution of rights and signal the persistence of ongoing discrimination and injustice. They also impede or disable rational revision projects essential to liberal equality. Thus, the *multi-narrative* interprets equality in *substantive* rather than merely formal terms, in terms of effect and long-term life outcomes consistent with *Brown I* and *Plyler*. It also recognizes multiple identities of rightsholders where necessary to ensure substantial equality.

8.3.2 HISTORICAL AWARENESS

Rather than divorcing historical context from equality narratives and from present disparities or racializing narratives, the expanded multi-narrative recognizes the in-built nature of majoritarian bias and discrimination and the ongoing effect of

historical injustices on certain groups within liberal democracies. Awareness implies that identity-specific history matters, that it shapes equality narratives, identifies vulnerable rightsholders and predicts future violations of equality. Historical awareness also distinguishes the rights claims of various minorities from those of indigenous peoples given the unique historico-legal context of their claims, including the historical fact of prior sovereignty, ongoing harm and a historical continuum of rights. The multi-narrative recognizes that such groups retain special political status and self-determination rights which exceed traditional liberal projects.

8.3.3 BUFFER-AND-ACCESS FEATURES

The multi-narrative also recognizes a correlation between identity and rational revision context. Responding to both the gaps and history, the multi-narrative recognizes that certain groups suffer disproportionate disadvantages prior to any chosen path or end. In terms of indigenous peoples, the multi-narrative recognizes that the prioritization of *everyone/no-one* narratives perpetuates historic injustices and deep harm which pervade all aspects of human well-being and explain educational outcomes for indigenous learners. Thus, the multi-narrative specifies the indigenous learner as a rightsholder in no uncertain terms. It recognizes the disadvantage of indigenous identity where doing so may buffer the indigenous individual against indirect, systemic and cumulative discrimination and, conversely, the advantage where doing so provides access to a richer rational revision context and thus equality itself.

8.3.4 EDUCATION AS A STRONG RIGHT

In contrast to exceptionalist federal narratives, the multi-narrative recognizes education as a supra-legislative, supra-domestic guarantee, even an unalienable, universal fundamental human right crucial to the realization of all other human rights, including the civil and political rights most readily identified with the US

Constitution. It is an organic multiplier, foreclosing most or all other human rights when denied but acting as a bridge to most or all other human rights when realized. In New Zealand, education is stated in legislation in human rights-like terms in the Education Act 1989 and protected via the non-discrimination provisions of the Human Rights Act 1993. This right is potentially legal and morally and normatively persuasive at the international and domestic levels, both on its own and via non-discrimination. Its repetitive and increasing explicitness argues for an emphasized rather than diminished legality applicable to every human being—especially the most vulnerable of rightsholders given historic and ongoing rights denial.

8.3.5 POSITIVE MEASURES AND MINORITY RIGHTS

Rather than broad, formalized guarantees of equality, the multi-narrative recognizes that temporary but also permanent positive measures and minority rights may be necessary to reconcile guarantee/reality gaps. These measures are expressed as human rights alongside the right to education. They range from affirmative action to minority rights to language, culture and parallel educational institutions designed to buffer members of certain groups from majoritarian bias and discrimination. They are consistent with the positive duties attributed to governments to effect the right to education, equality and non-discrimination generally. The 4-A Scheme importantly defines those rights in terms of access, availability, adaptability and acceptability—factors similar to the intangibles which helped to persuade the Supreme Court in *Brown*.

8.3.6 PROPORTIONAL, REMEDIAL SELF-DETERMINATION

The multi-narrative is not just historically aware but recognizes the need to remedy the deep harm caused by historic events like overthrow, annexation and discrimination as a matter of justice in a proportional manner. Self-determination is best interpreted not only as the residual right of a nation or people which never ceded its sovereignty but also as a proportionate response to the deep harm evident

in the Native Hawaiian and global indigenous mo‘olelo. In terms of the indigenous learner, historical self-determination specifically responds to the deep harm of colonization, assimilation, discrimination and ongoing disparities. In its identity-specificity, self-determination is a buffer-and-access feature, organic multiplier and collective form of rational revision, a sum of its parts which translates into individual revision.

8.3.7 INDIGENOUS SELF-DETERMINATION IN EDUCATION

The multi-narrative recognizes the identity-explicit right of indigenous peoples to establish and control educational systems and institutions. Article 14 of UNDRIP expresses the multi-narrative and earnest reconciliation, particularly given its expression of remedial self-determination and *substantive everyone/no-one* and *complex someone* education rights. Article 14 apepars to be the culmination of the evolution of the human right to education, an organic multiplier, buffer-and-access mechanism and the everyday incarnation of Articles 3 and 4—that is, both internal and external self-determination. Consistent with the right to self-determination which underwrites it, Article 14 appears to recognise a proportionate remedy to the deep harm experienced by indigenous peoples in education historically and on an ongoing basis, in terms of institutional control. It is also consistent with homegrown, residual and historically continuous indigenous rights which exceed liberal projects. Domestically, the right forms a potential interface or nexus between human rights, constitutional rights and indigenous rights which could enhance the organic multiplication, emphasized legality and moral force of all.

Ultimately, the foregoing markers represent primary goods in education for the indigenous learner, forming a possible checklist for the expansion of federal equality narratives. The following g*ood*, *better* and *best* recommendations correspond to varying degree with the expanded multi-narrative and its markers. The good would seemingly ask for little departure from present narratives—though perhaps a re-examination of previous precedents—while the better and best would certainly require philosophical change and human rights importation. The best, however, are most consistent with the multi-narrative and its markers—and with a

more earnest equality. Consequently, the best may offer the greatest reconciliation of current guarantee/reality gaps affecting Native Hawaiians and be most consistent with the unique historico-legal context of the policy. These recommendations are not an exhaustive list but those most apparent from the thesis. Again, recommendations focus on expansion of the narratives rather than subsequent questions of implementation.

8.4 GOOD: PHILOSOPHICAL CONSISTENCY WITH THE MULTI-NARRATIVE

Federal courts should interpret the admission policy in terms which are philosophically consistent with the multi-narrative and reflect some of its markers. Consistency would largely affirm current federal narratives of equality.

8.4.1 MAINTAIN PHILOSOPHICAL CONSISTENCY WITH BROWN I AND BROWN II

Federal courts should interpret the admission policy in terms of a Brown*-like narrative which is historically and substantially aware. The appropriateness of an everyone/no-one narrative as a universal remedy for all identity-attracted discrimination should not be presumed.*

Brown I is most often cited in American law as the ultimate example of colorblindness, of sameness. What is often underemphasized is that de facto inequalities within the classroom and between schools singling out certain groups of students really drove the Supreme Court's rejection of the separate-but-equal doctrine in 1954.[4] It was not just the formal existence of the schools themselves or their identity-aware admission policies alone but also the differences in funding, facilities, teaching and other resources which created de facto disparities in the actual educational experience of students across the nation who shared a racial identity. For African-Americans—as for Native Hawaiians—group identity attracted de facto discrimination and disparities in education evident in the

[4] See discussion in Chapter Two, at 2.2.3.

classroom, between groups and in terms of long-term life outcomes in various areas of human experience. As discussed in Chapter Two, *Brown I* and later *Lau* assessed discrimination in terms of disparate impact.[5] Both decisions recognized a real-time gap between formalized *everyone/no-one* constitutional guarantees—namely, the Fourteenth Amendment—and the everyday realities of complex discrimination and disparities insidiously drawn to a particularly minority group identity.

The appropriateness of a deliberately formal *everyone/no-one* narrative which attempted to leave no doubt about who was a rightsholder of equality to that particular historico-legal context and the resulting guarantee/reality gap is also not as evident. Particularly, in recent decades, the legislative histories of civil rights statutes provided in cases such as *Rice* and *Kamehameha* are lengthy and detailed but the narrative implications of the context less explored in the jurisprudence. There is little doubt, given the extensive historico-legal analysis in *Brown*, section 1981 cases and *Kamehameha* itself, that *Brown* responds to a particular history, a history which demanded an emphatic statement of homogeneity and anonymity—even inclusion. Again, the schools in question in *Brown* were not chosen by African-American learners but rather imposed on them via de jure and de facto discrimination. In the wake of the failure of formalized *everyone/no-one* guarantees to deliver on the constitutional promise of equal protection, *Brown* emphasized that *everyone* was a rightsholder while *Brown II* also recognized the appropriateness of *someone* positive measures.

In this light, the admission policy need not be immediately suspect as demanded by *Weber*[6] but actually might be demanded by the historical-legal context. That is, where formalized statements of equality in *everyone/no-one* terms fail to account for the guarantee/reality gap in terms of Native Hawaiian learners, courts should consider the appropriateness of an alternative equality narrative, one with the greatest capacity for accounting for a *Brown*-like substantial equality, intentional identity-blindness notwithstanding.

As argued, narrow federal narratives appear to lack the capacity to account for real-time measures of substantial equality including the admission policy. The

[5] See discussion in Chapter Two, at 2.2.3 and 2.3.1.
[6] See discussion in Chapter Three, at 3.5.1.

predominance of a singular, *adamant everyone/no-one* narrative particularly limits this capacity as it undermines an already *slim someone* and *arbitrary indigenous* narrative. Clearly, the earnest liberal can no longer prioritize the adamant *everyone/no-one*. To do so is to be wilfully blind to the a priori disadvantage of indigenous identity and costs of cultural membership, and to condone significant discrimination and disparities suffered by particular groups.

8.4.2 PURPOSE MATTERS

The purpose of the policy should matter. Following Brown II *and* Carolene Products, *courts should attribute positive duties to the government to adopt special measures to eradicate substantial discrimination.*

Philosophical consistency with *Brown I* and *Brown II* demands a closer assessment of affirmative action. While the *Kamehameha* majority was forced to interpret the admission policy within current federal equality narratives and to treat the *someone* narrative as an exception to the rule, the *Brown* decisions together seemingly espouse a more substantive narrative than *Bakke* and subsequent cases. *Brown I* itself recognized the intangibles and subtle disparities as well as more appreciable differences in facilities, staffing and other resources. *Brown II* crucially approves positive measures to achieve de facto equality including busing and redrawing of district lines in order to achieve disparities between minority groups, even attributing positive duties to public authorities to do so. While current trends of reverse discrimination approval in federal courts are contrary to the evolution of the right to education in international law, *Brown II*'s approval of positive measures is completely consistent with the toolbox of rights options currently available to the indigenous learner under international law.

Brown II also attributes positive duties to the government to take such measures to eradicate de facto discrimination. As described in Chapter Five, the Maastricht Guidelines, Limburg Principles and 4-A Scheme make it clear that states are to take increasingly concrete steps to realize the human right to education. Ultimately, greater philosophical consistency with *Brown II* when interpreting the admission

policy will also be more consistent with international multi-narrative of equality in regards to the indigenous learner. Ironically, while *Carolene Products* Footnote Four seemingly permits preference for a 'discrete and insular minority', international law *demands* identity-specific measures where necessary to ensure substantial realization of equality and non-discrimination for such groups. In *Carolene Products* and international law, the purpose of the policy matters.

Ironically, despite the significance of the decision and its watershed effect, the actual reasoning in *Brown* exhibits little wrestle. While deliberated over a period of time among a group of men with varied backgrounds and opinions, the decision was ultimately unanimous.[7] In contrast, the Ninth Circuit was almost evenly split between *adamant everyone/no-one* and *slim someone* narratives.

8.4.3 RECOGNIZE THE CONSTITUTIVE COMMITMENT VALUE OF EDUCATION

Federal courts should recognize at least a constitutive commitment value in regards to the fundamental right to education affirmed in Brown *and* Plyler v Doe. *This standalone right to education should be measured in terms of substantial equality, considered organically crucial to the realization of constitutional rights including the Fourteenth Amendment's equal protection clause.*

As discussed, the courts in *Brown*, *Plyler* and *Kamehameha* all recognized that education is a 'fundamental right'. Federal jurisprudence recognizes a fundamental right to education which is at least a constitutive commitment. It may not be entrenched in the Constitution but is supra-legislative and has been interpreted as crucial to the realization of all other civil and political rights—even Fourteenth Amendment equal protection. This constitutive commitment to education has several implications for future interpretation and judicial standards in terms of the admission policy.

[7] Which is not to say it was an easy decision. Various members of the Court with vastly different backgrounds and ideological leanings—including a former Klansman and white supremacist—were at first deeply conflicted about the decision: Michael J Klarman *Brown v. Board of Education and the Civil Rights Movement: Abridged Edition of "From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality "* (Cary NC, Oxford University Press, 2007) at 71.

Constitutive commitment value implies interpretation in terms of de facto disparities and long-term effect. What violated equal protection in *Plyler* was not a suspect classification or outright racial identification but the violation of a fundamental—albeit not constitutional—right to education which translated into an equal protection violation. Moreover, that violation was not measured in individual terms but, as in *Brown*, in long-term, organic *group* outcomes—that is, the inability of the alien children to adapt and thrive within American society, poverty, and other socio-economic disparities. To ensure that equal protection was actually universal to all within the territory of the United States, the Supreme Court could not allow this group of children identified by their political status—namely, their non-citizen status or that of their parents—to suffer long-term outcomes which were in their opinion akin to punishing those children for their parentage.[8]

Allowing Native Hawaiian children to likewise suffer disparities as groups because their ancestral identity insidiously attracts complex discrimination and disparities which certainly have long-term effects on life outcomes would also seem to be punishing them for their parentage. To deny that this most vulnerable of vulnerable groups in the state of Hawai‘i does not possess this right would be unconscionable and inconsistent with *Plyler*.

Given its supra-legislative status, section 1981—and perhaps any legislative standard—appears to be unsuitable for determining the extent or implication of any such right on its own. The current application of section 1981 to so-called reverse discrimination is misplaced given the specific historico-legal context of the section and its own wording which guarantees the "same right as whites" to enter into contracts. Once education is also recognized as a fundamental right which might be protected directly via equal protection analysis (see below) even civil rights legislation appears inadequate since section 1981 was severed from its historico-legal roots in the Thirteenth Amendment by decisions such as *McDonald v Santa Fe Trail Transportation*. It has been interpretively divorced from the historical African American experience of slavery, Jim Crow laws and segregation and the ongoing everyday reality of discrimination which it was originally purposed to remedy. In becoming so homogenous and anonymous, the tests—whether

[8] See discussion in Chapter Two, at 2.5.

intermediate or strict—are no longer significantly concerned with actual disparities. This is not philosophically consistent with either *Brown* or *Plyler*.

Given its frequent and consistent recognition in the Supreme Court in cases including *Meyer v Nebraska, Pierce v Society of Sisters, Wisconsin v Yoder, Brown, Plyler* and *Kamehameha*, there is little doubt that federal law recognizes a fundamental right to education which demands greater deference than ordinary statute. Given the substantial interpretation inherent to the reasoning of the *Plyler* majority—which is also consistent with *Brown*—the measurable effect of the policy itself on the guarantee/reality gap or on socio-economic disparities with long-term predictability would seem to provide a standard of its own which must be given a greater weight in judicial review than a legislative provision divorced from its constitutional moorings.

8.4.4 APPLY RATIONAL BASIS REVIEW

Following Plyler, *federal courts should equate the admission policy with the fundamental right to education and apply rational basis review rather than a stricter level of scrutiny. Applying the 'insular and discreet minority' rationale in Footnote Four of* Carolene Products, *courts should distinguish between policies which discriminate against a 'discrete and insular minority' and those aimed at addressing disparities attracted to such minorities. Following* Carolene Products' *two-tiered standard of review, the latter should draw a lower, rational basis review which presumes the constitutionality of admission policies designed to overcome discrimination.*

Plyler has been described as an "analytically muddled but ultimately ethical"[9] decision, another seeming wrestle with narrative in a federal court where facts exceeded current judicial tests, namely the suspect classification requirement. Rather than relax intermediate standards meant for an employment context, the Court in *Plyler* recognized the fundamental right to education as vital to equal

[9] Cathy Albisa "Drawing Lines in the Sand: Building Economic and Social Rights Norms in the United States" in Shareen Hertel and Kathryn Libal (eds) *Human Rights in the United States: Beyond Exceptionalism* (New York, Cambridge University Press, 2011) 68 at 73.

protection and applied rational basis of review to Texas' educational policy. That right constituted a legitimate purpose

Rational basis review is also consistent with *San Antonio School District v Rodriguez*[10], as long as Native Hawaiians are not considered a suspect class. Significant evidence was presented in the *Kamehameha* case—and in this thesis—that Native Hawaiian is *not* a racial classification, suspect or otherwise, which would automatically trigger strict or intermediate scrutiny. In fact, given current, measurable and easily predicted long-term socio-economic disparities—even the multi-generational trauma, higher allostatic load, cyclical, accumulative and otherwise complex identity-attracted discrimination—Native Hawaiians more closely resemble the group of children in *Plyler* whom the Supreme Court refused to punish because of their 'parentage'.

Ultimately, *Carolene Products* Footnote Four would require that the level of judicial scrutiny be heightened where the law or policy discriminates against a "discrete and insular minority" but not seemingly where the disadvantage to a majority member is debatable. Where not to the disadvantage of a minority, *Carolene Products* supports the application of a lower, rational basis standard of review which—contrary to current federal narratives and following *Plyler*—would support the constitutionality of the admission policy.

8.4.5 APPLY MANCARI

Federal courts should find that 'Native Hawaiian' constitutes a political classification and apply the Mancari *exception to the admission policy. Within current narratives,* Mancari *should be considered the most consistent with an expanded multi-narrative and the seven markers and therefore preferred.*

Consistency with the facts and reasoning of *Brown* and *Plyer* notwithstanding, the most straightforward recommendation available to federal courts within current

[10] *San Antonio Independent School District v Rodriguez* 411 US 1 (1973). Discussed in Chapter Two at 2.5.

narratives is to apply the *Mancari* exception to the admission policy in future. Almost one-third of the Ninth Circuit was convinced this was appropriate.[11] As the Schools argued and consistent with a plethora of federal legislation describing the trust relationship between the Native Hawaiian people and the federal government in no uncertain terms especially since annexation, 'Native Hawaiian' is not a racial but political classification. The scholarship is plentiful, extremely persuasive on this point and seemingly impossible to dispute. Any further dismissal of the relationship can only be attributed to wilful blindness to the facts and the law.

The thesis has characterized the *Mancari* exception as representing an undermined indigenous narrative subject to arbitrary congressional will and judicial activism. And yet, applying *Mancari* to the admission policy implies some historical awareness and remediation. Given these features, *Mancari* is the current federal narrative closest to the expanded multi-narrative of equality which more fully accounts for the admission policy in political theory, international law and New Zealand law.

Ironically, *Mancari* provides a straightforward exception to equal protection and would also apply the lower, rational basis of review. This might allow federal courts to give objective weight to the measurable and predictable outcomes of the admission policy, even its apparent de facto buffering against in-built discrimination and access to a level playing field including improved education outcomes for learners. In fact, a *Mancari*-like analysis would only require the purposes of the policy to be consistent with remedial self-determination and special trust relationship, findings frequently shown to be consistent with the unique historico-legal context of the admission policy and the guarantee/reality gap affecting the Native Hawaiian learner. Ironically, this level of scrutiny would also be consistent with the equal protection analysis undertaken in *Plyler*.

[11] See discussion in Chapter Three at 2.5.4.

8.4.6 PREFER AN INTERPRETATION CONSISTENT WITH INTERNATIONAL LAW

Federal courts should refer to international law and jurisprudence when interpreting the admission policy. Federal courts should prefer interpretations which are consistent with international law. Consistency should include greater deference for affirmative action and other positive measures.

The constitutive commitment value the *Brown, Plyler* and *Kamehameha* courts attributed to education resembles the human right in international law, enough that both *Plyler* and *Brown* are regularly cited in international recommendations and reports as prime examples of protection of the human right[12] rather than equal protection per se. More than ordinary statute in international law, the human right is also expressed as a constitutional right in various liberal democracies and has been extensively interpreted in various UN recommendations and in both international and national courts.[13] Prior to any further adoption, ratification or legislation this body of law could provide an invaluable interpretive aid when reviewing the admission policy.

In *Roper v Simmons* (2005), Justice Kennedy wrote on behalf of the majority that the opinion of the world community provides "respected and significant confirmation of our own conclusions…It does not lessen our fidelity to the [U. S.] Constitution," he explained, to recognize "the express affirmation of certain fundamental rights by other nations and peoples".[14] Ultimately, in *Roper*, 'the Court acknowledged "the overwhelming weight of international opinion against the juvenile death penalty'"[15] finding the execution of persons under 18 unconstitutional despite the United States' failure to ratify the Children's Convention.

In the wake of *Roper,* Justice Ginsburg held the hope that:

> …the U. S. Supreme Court [would] continue to accord 'a decent Respect to the Opinions of [Human]kind' as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being — combating international terrorism is a prime example — require trust and cooperation of nations the world over. And

[12] See discussion in Chapter Five at 5.4.3.
[13] See discussion in Chapter Five at 5.4.3.
[14] *Roper v Simmons* 543 US 551 (2005), at 25, Stevens J for the majority.
[15] At 25.

> humility because, in Justice O'Connor's words: 'Other legal systems continue to innovate, to experiment, and to find . . . solutions to the new legal problems that arise each day, [solutions] from which we can learn and benefit.'[16]

Even the conservative, late Justice Scalia approved "reasonable consideration" of international treaty interpretation.[17] In this spirit, earlier federal courts had gone so far as to pass judgment on gross human rights violations upon extra-territorial non-citizens and awarded civil remedies in such cases.[18]

In terms of the admission policy, such reference would allow federal courts to take "comparative sideglances" [19] at the legal experience of other jurisdictions attempting to situate a *strong*, supra-legislative right to education within domestic frameworks. In fact, the multi-decade evolution of the international right to education from a formalized *everyone/no-one* narrative to a *complex someone* and *rational indigenous learner* narrative is basically the drawn-out version of the same wrestle undertaken by the Ninth Circuit and is replete with 'lessons learned' globally.

Non-discrimination may offer the perfect opportunity for the United States to embrace comity given existing treaty obligations. It has not ratified the ICESCR but has ratified the ICCPR, including its Article 3 right to non-discrimination. As discussed in Chapters Five and Six, the right to non-discrimination has been used widely to protect various ESCRs and become a powerful driver behind the evolution of the toolbox of rights options known collectively as the right to education. Special measures, permanent minority rights, autonomous indigenous institutions and preferential admission are all consistent with non-discrimination in international law and provide an alternative but still liberal narrative of the

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[16] Ruth Bader Ginsburg "'A Decent Respect to the Opinions of [Human]Kind': The Value of a Comparative Perspective in Constitutional Adjudication" (2011) 26 American University International Law Review 927, at 934.

[17] See *Sanchez-Llamas v Oregon*, 126 S Ct 2669 (2006) at 2700. The term and the case discussed in Melissa Waters "The U.S. Supreme Court and the International Court of Justice: What Does 'Respectful Consideration' Mean?", in Cesar*e Romano (ed)* The Sword and the Scales: The United States and International Courts and Tribunals (New York, Cambridge University Press, 2009) 112 at 118-122. However, Scalia J dissented in *Roper*.

[18] See, for instance, *Filartiga v Pena-Irala* 630 F 2d 876 (2d Circ 1980) discussed in Michael Ratner "Civil Remedies for Gross Human Rights Violations" in Richard Pierre Claude and Burns H Weston (eds) *Human Rights in the World Community: Issues and Action* (3d ed, Philadelphia, University of Pennsylvania Press, 2006) 483.

[19] Ruth Bader Ginsburg and Deborah Jones Merritt "Affirmative Action: An International Human Rights Dialogue" (1999-2000) 21 Cardozo Law Review 253, at 273. The article specifically discusses gender-specific affirmative action.

admission policy. Whether interpreted as an affirmative action policy or minority education right, good faith fulfilment of the United States' treaty obligations[20] would seem to require its courts to interpret the admission policy as a measure of equality.

Ironically, interpreting education as an outcomes-focused constitutive commitment focused on non-discrimination would also seemingly require federal courts to revisit *Rodriguez* where a very similar group of children defined by socio-economic disparities but also by ethnic minority identity—as one would predict given the clustering of socio-economic disparities around minority identity—were held not to be discriminated against when 4A Scheme-like disparities in educational funding were clear. Where the rational level of review applied in *Rodriguez* failed to hold Texas accountable, the 4-A Scheme, state parties' obligations, the Maastricht Guidelines, Limburg Principles and other interpretive aids could qualify the legitimate purpose step and hold public bodies accountable for de facto discrimination against those learners.

8.4.7 THE LIMITS OF PHILOSOPHICAL CONSISTENCY

The above recommendations offer at least philosophical consistency with an expanded multi-narrative of equality which supports a more substantial interpretation of the admission policy and, possibly, the application of a rational basis of review. *Plyler* represents some reconciliation while *Mancari* shows historical awareness and some remediation.

However, the above recommendations cannot entirely account for either the unique historico-legal context of the admission policy itself—that is the unique history of an independent people which never ceded its sovereignty and the deep harm which has ensued in the wake of overthrow and other historic injustices—or the complexity of the current guarantee/reality gap affecting educational outcomes for Native Hawaiian learners. These recommendations would not necessarily imply

[20] As required by the Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

buffer-and-access functions or provide a strong right to education, positive measures and minority rights in education as rights, proportional remedial self-determination or indigenous self-determination in education. *Mancari*, at best, only promises the limited self-determination associated with a domestic dependent nation. Ultimately, any rights recognized in the name of philosophical consistency might still be undermined by the legal prioritization of the *singular everyone/no-one* solely liberal narrative and the two-edged sword of plenary power and judicial activism.

8.5 BETTER: INTENTIONAL IMPORTATION OF THE HUMAN RIGHT TO EDUCATION

Philosophical consistency with a *multi-narrative* of equality is good but intentionally incorporating a *substantial everyone/no-one* and *complex someone* human right to education into United States federal law would be better. Incorporation could clarify the superficial divisions between human rights and constitutional rights and imply organic multiplication, indivisibility and enhanced constitutionality.

8.5.1 EQUATE PLYLER WITH THE HUMAN RIGHT TO EDUCATION

Federal law should equate the human right to education with the fundamental right to education recognized in Plyler.

Prima facie, education is a fairly innocuous right lacking the immediate drama of, for instance, questions about the appropriateness of applying the death penalty to minors. Rather, it is often taken for granted, even expected among Americans.[21]

[21] Franklin Delano Roosevelt included it in his Second Bill of Rights for this reason: see Cass Sunstein *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever* (New York, Basic Books, 2004). Which is not to say that it is not debated. As the NCLB saga shows, a disjuncture between the good intentions in legislation and policy and implementation particularly engenders fierce debate.

In legal terms, it would seemingly require little departure from current law and narratives.

As discussed previously, education has already been recognized as a 'fundamental right' by the Supreme Court in *Brown* and *Plyler*. This same right also partially validated the admission policy in the opinion of the majority in *Kamehameha*. Again, the real question since *Plyler* has not been whether the federal right to education is legal, justiciable and enforceable because it was upheld in these cases. The crucial inquiry is what status and weight this supra-legislative but not quite constitutional right should bear.

As in international law, the *Plyler* right already displays organic multiplication value creating rights options where realized and foreclosing fundamental civil and political rights and long-term life outcomes where denied. In essence, *Brown* and *Plyler* imply that the right can be denied collectively on the basis of group identity, effectively shutting down rational revision options including citizenship and long-term life outcomes. Although the United States has rejected international statements of ESCRs including the ICESCR, the Supreme Court in *Brown* and *Plyler* were persuaded by socio-economic factors, associating de facto disparities with a denial of equal protection itself.

Ultimately, the Supreme Court's reasoning and international statements of the right are fundamentally consistent and certainly philosophically consistent. There seems little question that the Court and international law are describing the self-same right and that the legal value placed on the right should correspond to its international counterpart. Notwithstanding the United States' reputation for exceptionalism, ascribing a similar value to education in federal law offer greater clarity to the wrestle of narratives in the *Kamehameha* case and would seemingly enhance federal law and narratives rather than compete with them.

A federal human right to education would substantially clarify both the status and weight of the *Plyler* right. It would echo a constitutive commitment in terms of organic indivisibility and multiplication but would also constitute a supra-domestic right sourced in the sacredness of each human being. As discussed in Chapter Five, human rights status implies universality as such rights accrue to *all* human beings

without distinction or exception and to human beings *everywhere*, cross boundaries and borders, and cannot be refuted or taken away by domestic law because they are inherently attached to the human being.[22] It would be not just supra-domestic in jurisdiction but in value.

As an ESCR, the *Plyler* right was consistent with a fundamental constitutional civil and political right even equal protection. Given the intuitions of federal courts anyway, human rights status would seemingly most provide a legitimate even recognizable label. This supra-domestic right would, once again, seemingly exceed the capacity of legislative tests such as those applied to section 1981, particularly tests employed in employment or contractual contexts given its supra-domestic value. Rational basis review would again appear more appropriate to this supra-domestic right.

8.5.2 RATIFY INTERNATIONAL EVERYONE/NO-ONE AND SOMEONE INSTRUMENTS WHICH GUARANTEE AND PROTECT THE HUMAN RIGHT TO EDUCATION

The US should ratify core international human rights treaties which guarantee the human right to education including ICESCR, CEDAW, Children's Convention, and CRPD. It should also ratify relevant Optional Protocols to these instruments.[23]

As mentioned in Chapter Seven, there is room for greater importation of, greater institutional support for and a need to maintain progress made in terms of human rights in Aotearoa New Zealand[24] and particularly in regard to ESCRs including

[22] Chapter Five at 1.2.
[23] Including the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 2008, Doc.A/63/435, C.N.869.2009.TREATIES-34 of 11 December 2009 (opened for signature 24 September 2009, entered into force 5 May 2013); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 1999, 2131 UNTS 83 (opened for signature 10 December 1999, entered into force 22 December 2000); Optional Protocol to the Convention on the Rights of the Child on a communications procedure 2014 A/RES/66/138 (opened for signature 28 February 2012, entered into force 14 April 2014); and the Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006, Doc.A/61/611 (opened for signature 30 March 2007, entered into force 3 May 2008).
[24] Judy McGregor, Sylvia Bell and Margaret Wilson *Fault Lines: Human Rights in New Zealand* (New Zealand Law Foundation Research Paper, April 2015).

education.[25] Yet, New Zealand has a clear advantage over the United States because it has intentionally imported human rights narratives into constitutional law, allowing it to begin discussions on implementation and rightsholders who have been 'left behind'. This is a crucial step which is, even at the philosophical level, challenging in the United States given the prioritization of an *adamant everyone/no-one* narrative which asks few questions about rightsholder identity. Conversations about implementing a human right to education will continue to be a moot point in the United States until a human right to education is actually ratified *and* imported.

Given the toolbox nature of the multi-narrative human right to education, not one of these instruments should be disregarded or ignored in incorporation, especially given their individual specificity to the most vulnerable of rightsholders. Importation would include fundamental *everyone/no-one* guarantees covering all levels of education, *complex someone* special measures in education including identity-specific and socio-economically-aware special measures, permanent minority rights, age-specific education rights including participation, and disability-aware rights focused on flexible inclusion. Given the consistency of the right throughout its evolution, any imported right would likewise remain anchored by substantive equality and non-discrimination.

Where the relevant Optional Protocols are also ratified the legality, justiciability and enforceability of the right to education will obviously be enhanced. While Optional Protocols would further enhance the legitimacy and moral force of human rights and constitutional rights where they overlap, they would also indicate a degree of earnestness, even a willingness to be accountable where the right is violated.

[25] Margaret Beddgood and Chris Gledhill (eds) *Law Into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Wellington, Thomson Reuters, 2011).

8.5.3 INTENTIONALLY INCORPORATE THE HUMAN RIGHT INTO FEDERAL LEGISLATION

Federal lawmakers should also intentionally draft legislation which gives effect to its treaty obligations regarding the right to education under ICESCR, CEDAW, UNCROC, and CRPD, as well as relevant Optional Protocols. Lawmakers should also consider intentionally drafting legislation which is consistent with the minority rights expressed in the Minority Rights Declaration.

Intentional incorporation of international human rights into domestic legislation obviously indicates a degree of earnestness. The New Zealand experience also illustrates how intentional incorporation creates an interface between human rights and domestic law which can actually make constitutional rights more constitutional as it were. In the United States, legal scholars have argued that human rights are mostly consistent with the fundamental rights of the Constitution[26] and with other domestic law.[27] The resemblance between *Brown*'s substantial focus, the fundamental *Plyler* right and the international right is particularly persuasive. Intentional incorporation would facilitate recognition of that right as both a constitutional right and a human right, offering greater legitimacy to the right and lessons learned internationally.

Intentional incorporation into federal legislation would clarify interpretation of the admission policy for federal courts consistent with the positive obligations attributed to states in instruments from the ICESCR to UNDRIP and have reference to international jurisprudence as well as recommendations interpreting those instruments. The Maastricht Guidelines, 4-A Scheme and other interpretations of state party obligations in regards to education would seemingly find little philosophical difference between the facts in *Plyler* and those in *Rodriguez*. Moreover, there would also seem to be little difference between the *Kamehameha* admission policy and the facts of *Plyler*, no question of whether a lower level of

[26] See, for example, Natsu T Saito "Returning to First Principles: International Human Rights as US Constitutionalism" (2006) 1 Florida Int'l U L Rev 45.
[27] See, for example, Alice Farmer and Kate Stinson "Failing the Grade: How the Use of Corporal Punishment in U.S. Public Schools Demonstrates the Need for U.S. Ratification of the Children's Rights Convention and the Convention on the Rights of Persons with Disabilities" (2010) 54 NY L Sch L Rev 1035.

scrutiny should apply. Again, international jurisprudence on the right is extensive and might significantly aid interpretation.

Consistent with a 'Second Bill of Rights',[28] a federal right to education would be bolstered by intentional human rights legislation modelled after the New Zealand Bill of Rights Act 1990 (NZBoRA) and Human Rights Act 1993 (HRA). This domestic statement of human rights would lend moral force to education law but would also approve special measures, minority rights and emphasize non-discrimination. Although the NZBoRA does not recognize ESCRs, the HRA, as discussed in Chapter 7 seemingly does in terms of non-discrimination. The American version could recognize both CPRs and ESCRs consistent with the international multi-narrative. The moral force of this supra-domestic but constitutional instrument could be significant.

8.5.4 INCORPORATE THE HUMAN RIGHT TO EDUCATION INTO EXISTING LEGISLATION

Lawmakers should also intentionally incorporate the United States' treaty obligations regarding education into existing legislation. Legislation which is incompatible with the human right should be revisited.

Where exceptionalism may actually undermine the United States' own current domestic educational policy and the constitutional goals it espouses, incorporation might provide the moral force lacking in legislation including the oft-criticized NCLB or its recently passed rewrite—the Every Student Succeeds Act 2015[29] (ESSA). Angela Holland, for instance, has argued that government efforts to "federalize" or centralize education via the NCLB, "to address disparities" and "close the gap" will fail until a human right to education is recognized because only such a right can provide the "legal commitment"—that is, the moral force—

[28] Cass Sunstein *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever* (New York, Basic Books, 2004), discussed at 1.5.
[29] S 1177 — 114th Congress: Every Student Achieves Act of 2015, a reauthorization of the Elementary and Secondary Education Act of 1965, 20 USC §6301 et seq.

required to implement the law.[30] Others similarly have argued that the centralization which drives the legislation will require at least a constitutional right to education.[31]

Intentional incorporation of a specifically indigenous right to education would create a kind of duality of rights[32] based on multiple jurisdictional bases of legality and legitimacy—that is, both domestic and international. Though incorporated into federal law, the human right to education could retain its legality, justiciability, and enforceability as a supra-domestic universal human right originating in the sacredness of the human being and parallel liberal projects—particularly if the United States also ratifies and incorporates the relevant Optional Protocols to the ICESCR, Children's Convention and CRPD. Where directly equated with a *Brown*- or *Plyler*-like equal protection narrative perhaps through a human rights-informed principle of non-discrimination, the former constitutive commitment would become a *constitutional* right with moral force of its own with the attending justiciability, legality and enforceability.

Backed by the laborious evolution of the human right to education in international law, however, the incorporated right would seemingly carry a moral force and legitimacy which transcended the sanctity of the Constitution even as it affirmed it. Again, the international right is not limited by borders or boundaries and represents a consensus of nations. Moreover, rights such as equality and non-discrimination transcend ordinary human rights being considered norms of international law.

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[30] "While congressional policies make clear our political commitment to the education of America's children, the effective implementation of these policies will require exactly the type of legal commitment embodied in international treaties such as the Convention on the Rights of the Child…. "NCLB is intended to address disparities reflected in the academic outcomes of poor, minority, disabled, and limited-English proficiency students. Its primary objective is to close the achievement gap…In reality, however, the goal of leaving no child behind amounts to mere fantasy without an underlying fundamental right to support it": Angela Holland "Resolving the Dissonance of *Rodriguez* and the Right to Education: International Human Rights Instruments as a Source of Repose for the United States" (2008) 41 Vand J Transnat'l L 229 at 264-265 (footnotes excluded). Ironically, while the United States has not ratified more innocuous treaties such as the Children's Convention and the Convention on the Rights of Persons with Disabilities which it is largely consistent with, it has ratified, for example, the Torture Convention (CAT) which it may not be: Johanna Kalb "The Persistence of Dualism in Human Rights Treaty Implementation" (2011) 30(1) Yale L & Pol'y Rev 71.

[31] See Stephen Lurie "Why Doesn't the Constitution Guarantee the Right to Education? *The Atlantic* (online ed, Washington DC, 16 Oct 2013).

[32] Similar to arguments of Julian Aguon in regards to indigenous peoples in the United States: see Julian Aguon "Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts" (2008) 31(1) U Haw L Rev 113.

Their normative force has driven the evolution of the right to education in international law and certainly entails the kind of comity described by Justice Ginsburg.

The effect on legislation would be significant. Admittedly, the ESSA would need some rethinking. This legislation would need to be philosophically realigned to a rights approach. At a basic level, the ire of politicians, the furore of school districts, educators and parents—the rewrite itself—suggest that the adamant everyone/no-one narratives which dominated the NCLB lacked legitimacy and moral force in the eyes of rightsholders. The rewrite remains preoccupied with funding and standardization and will undoubtedly face the same challenges without a change of narratives which attributes added moral force to education. Its moral force could be boosted by a rights narrative.

Special measures but also permanent minority rights—primarily accruing to ethnic, linguistic and religious minorities but also other disadvantaged groups—would need to be legislated for. Where equated with the non-discrimination-focused mandate of *Brown* and *Plyler* in the courts, this toolbox of rights options could supply moral force and clarification for the intuitions of federal courts that positive measures actually constitute measures of equal protection. The incorporation of a human right to education into the ECAA would also seemingly imply constitutional indivisibility and benefit from lessons learned in terms of a burdened history.

8.5.5 A FEDERAL HUMAN RIGHT TO EDUCATION

The supra-domestic right described above need not automatically compete with the jurisdiction of federal courts—and particularly the Supreme Court as supreme arbiter—nor seemingly require radical constitutional amendment. Once ratified by Congress, the human right to education would be federal law—though admittedly federal law giving effect to supra-domestic treaty obligations and not ordinary law. Federal courts would retain the power to interpret incorporated human rights within the United States jurisdiction, although they would be bound by treaty obligations to pay heed to international jurisprudence regarding the

interpretation of the rights incorporated. Where incorporated, both courts and lawmakers would have good faith obligations towards those rights.[33] Where violated, complainants would have the right to appeal to international bodies and procedures once federal avenues were exhausted. Meanwhile, an expanded multi-narrative would be available and domestic jurisprudence on the rights growing, better equipping federal courts to narrate future admission policies.

If nothing else, intentional importation could offer federal narratives of equality needed legitimacy and resonance. This may be most true within the United States where "polls indicate strong American support for international human rights"[34]—including economic, social and cultural rights[35]—but significant communities of rightsholders continue to feel disenfranchised and excluded despite constitutional guarantees. As this thesis has emphasized, those with the most at stake—even the 'canary in the coalmine' in terms of rights realization generally—include Native Hawaiian and other indigenous learners. The thesis has repeatedly described these rightsholders as the most vulnerable of the vulnerable whose historical and ongoing experience in education show a disturbing pattern of vulnerability to majoritarian bias, discrimination and disparities which have changed relatively little over centuries—except where indigenous education rights have been realized. While the 'hard case' might be avoidable in theory, the failure of federal law to account for measurable, predictable and consistent forces which a priori disadvantage members of minority groups on the basis of their ancestry question the legitimacy and moral force of such law—especially where such law is meant to effect constitutional guarantees including equal protection.

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[33] See VCLT, above n 29, which states basic principles of international customary law. Article 12 recognizes that the signing of a treaty indicates "consent to be bound by a treaty". Under art 26, the principle of *pacta sunt servanda* applies—that is "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Under art 27, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The general rule of interpretation recognized in the Vienna Convention is found in art 31(1) which states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The United States signed the convention on 26 June 1987 but has not ratified it.

[34] Sam McFarland and Melissa Mathews "Do Americans Care About Human Rights?" (2005) 4 Journal of Human Rights 305. At least where it does not conflict with national interests or entail a significant commitment of resources.

[35] See, for instance, Shareen Hertel, Lyle Skruggs and C Patrick Heidkamp "Human Rights and Public Opinion" (2009) 3 Political Science Quarterly 443, regarding public opinion regarding the right to a minimum standard of living.

Federal legislation and jurisprudence must derive greater legitimacy from the human rights multi-narrative's capacity to legally account for the guarantee/reality gap in terms of these most vulnerable of rightsholders and phenomena including organic multiplication and denial, indirect, institutionalized and systemic discrimination, as well as the good of identity-specific rights. As Yamamoto and Obrey have described, human rights legitimacy is a vital aspect of reconciling the "deep harm" which is still experienced by Native Hawaiians and other minorities as the result of historical injustices perpetrated by the United States. Vitally, human rights legitimacy seemingly corresponds with democratic legitimacy, just as a commitment to human rights affirms an earnest commitment to civil rights.[36]

This federal human right to education would seemingly exhibit earnest reconciliation, historical awareness, buffer-and-access features, a morally imbued right to education, positive measures and minority rights to education. However, it would still lack proportional remedial self-determination and specifically indigenous self-determination in education. Importation of the *substantial everyone/no-one* and *complex someone* human right to education is consistent with an expanded *multi-narrative* and many of the seven markers but still largely confined to liberal projects. As such, it cannot fully account for the unique historico-legal context of the admission policy nor the complex guarantee/reality gap which it addresses.

8.6 BEST: INTENTIONAL INCORPORATION OF AN INDIGENOUS HUMAN RIGHT TO EDUCATION

To be most consistent with the multi-narrative and its markers, the United States needs to intentionally import UNDRIP and Article 14 into federal law.

[36] Eric K Yamamoto and Ashley Kaiao Obrey "Reframing Redress: A 'Social Healing Through Justice' Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives" (2009) 16(1) Asian Am LJ 5, at 40-42. Yamamoto and Obrey argue: "To reclaim legitimacy, an established democracy like the United States needs to demonstrate fealty to internationally respected precepts of democratic governance. In particular, the United States must heal the continuing wounds of injustice inflicted on its own people.": at 42.

8.6.1 INTENTIONALLY INCORPORATE UNDRIP INTO FEDERAL LEGISLATION

Any importation should be expressed in the language of rights, assign UNDRIP at least a fundamental, supra-legislative value similar to Plyler*'s but exceed traditional liberal projects in recognizing a more historical self-determination.*

Given the lengthy drafting saga of the UN Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP), the CANZUS vote and the 'aspirational' response of the United States when it finally announced its support,[37] this recommendation is not made lightly. Nevertheless, only an expanded equality *multi-narrative*, justifying a more historical *indigenous learner*, will have the philosophical and legal capacity to account for the unique historico-legal context of the policy and its capacity to overcome guarantee/reality gaps specific to the Native Hawaiian learner. Such expansion requires an earnest response from the United States, even intentional incorporation into federal legislation.

Mancari and a long line of time-honored, consistent federal jurisprudence and legislation going back to at least the Marshall Trilogy have recognised the rights of Native American peoples to limited, particularly remedial self-determination. Residual political status and rights to self-determination have justified indigenous-specific legislation and policy. The foundation of the expanded *indigenous learne*r already narrative exists.

However, UNDRIP promises to build on *Mancari*. As a human right consistent with the rights of *peoples*, the expanded self-determination is supra-domestic, being only subject to certain limits under Article 46 which might be justified in a democratic society.[38] This self-determination cannot necessarily be abrogated or legislated away by Congress nor ignored or "disfigured"[39] by activist federal courts and would come with international jurisprudence to aid interpretation. UNDRIP's legitimacy derives from the organic relationship between proportional remedial

[37] See discussion in Chapter Six at 6.4.

[38] UNDRIP, above n 2, Article 46.

[39] Language of Eric K Yamamoto and Catherine Corpus Betts "Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of *Rice v. Cayetano*" in Rachel E Moran and Devon Wayne Carbado (eds) *Race Law Stories, Foundation Press* (New York, Thomson Reuters/ Foundation Press, 2008) 541.

self-determination and the realization of all other human rights but also from the pre-existing, continuous nature of the rights recognized in UNDRIP, especially as it expresses the rights of *peoples*. Consistent with Hawai‘i state law, these rights would actually originate in the Native Hawaiian people rather than being externally imposed thus also countering the harm of overthrow, annexation and other historical injustices and buffering against ongoing majoritarian bias and discrimination.

Given its buffer-and-access and organic features, as in New Zealand, intentional importation of UNDRIP is likely to blur the lines between constitutional rights and human rights but also between indigenous rights, human rights and constitutional rights. As described, this is not only because of importation but because the lines between various expressions of the same right to education are seemingly superficial where equality narratives are more earnest. Ultimately, both *everyone/no-one* constitutional rights and *complex someone* rights seemingly depend on the realization of specifically indigenous rights, and specifically indigenous rights depend on expanded self-determination.

As a peremptory norm of international law akin to equality and non-discrimination,[40] self-determination possesses normative force and represents comity with international law. Given its recognition in sister settler domestic jurisdictions including New Zealand and non-discrimination, the right already translates at a domestic level. UNDRIP represents lessons learned from a global and local indigenous mo‘olelo. Ultimately, it could offer tremendous moral force as it addresses the plight of the most vulnerable and disadvantaged of rightsholders rather than wilfully ignoring us. Again, given the deep harm experienced by Native Hawaiians and other indigenous peoples, self-determination possesses the greatest narrative capacity for a proportionate response to those harms.[41]

[40] See discussion in Chapter Six at 6.5.2.
[41] Yamamoto and Obrey, above n 33, at 38.

8.6.2 MODEL IMPORTATION AFTER ACT 195 AND THE AKAKA BILL

Lawmakers should use Hawai'i's importation of Act 195 and the latest version of the Akaka Bill as prototypes for federal importation of UNDRIP's right to self-determination.

Importation is not without precedent in American law. As described in Chapter Three, Act 195 has already imported Article 3 of UNDRIP into Hawai'i state law and the latest version of the Akaka Bill was set to import the basic wording of Article 3 and 4—that is, internal and external, remedial and historical self-determination—into federal law.

While the Akaka Bill borrowed some language from Articles 3 and 4, Act 195 quoted Article 3's ICCPR-like right to self-determination. The Act draws on UNDRIP's language and other international law when it speaks in terms of *rights* and frequently stresses identity as "indigenous", "aboriginal", "native" and "maoli"—which has a similar meaning in Hawaiian—as well as "people" and "population".[42] In fact, section 1 notes the United States' accountability in terms of their treaty obligations under international law, including treaties recognizing the decolonization rights of the Native Hawaiian people.[43] Ironically, Article 3, the most debated and resisted of UNDRIP's provisions[44]—the provision which caused the most consternation amongst the CANZUS group [45]—has already been incorporated into American law and equated with various pieces of federal legislation identity-specific to Native Hawaiians.

Such importation is consistent with the joint Departments of Interior and Justice report, *Mauka to Makai: The River of Justice Must Flow Freely* [46] which recommended that self-determination for the Native Hawaiian people be a top federal priority. Often citing Act 195, a 2014 Department of the Interior Advance

[42] "Indigenous", "native", "aboriginal" or "maoli" are used at least 24 times with similar frequency for "people" or "population".
[43] Including article 73 of the Charter of the United Nations; and United Nations General Assembly Resolution 66(I) regarding Transmission of information under Article 73 e of the Charter, A/RES/66(1) (1946): see discussion in 6.6.1.
[44] See discussion in Chapter Six at 1.4.
[45] See discussion in Chapter Six at 6.6.1.
[46] Department of the Interior *From Mauka to Makai the River of Justice Must Flow Freely: Report on the Reconciliation Process between the Federal Government and Native Hawaiians* (Washington DC, Department of the Interior and Department of Justice, 2000).

Notice of Procedural Rulemaking (ANPRM)[47] accepted that the "government-to-government relationship" between the federal government and the Native Hawaiian people should be re-established but would seemingly bypass the legislative ordeal of the Akaka Bill via administrative procedure like that used to federally recognize Native American tribes. The ANPRM has been described by respected indigenous legal scholars James Anaya and Robert Williams as "open-ended" as far as the shape that self-determination will take should such an administrative rule eventuate.[48] In fact, the ANPRM sought feedback from Native Hawaiians on how much the federal government should be involved in the reorganization process and whether Native Hawaiians should determine that process autonomously.[49] In a hopefully earnest overture, the ANPRM sought the input of specifically indigenous, politically defined rightsholders regarding a possible expansion of the narratives.

However, while Act 195 is consistent with the intentional importation of UNDRIP and certainly a landmark in Native Hawaiian history, it cannot, on a narrative level, substitute the greater importation of UNDRIP. As discussed in Chapter Six, UNDRIP's mostly economic, social and cultural rights not only animate and define Article 3 self-determination but constitute a minimum list of human rights standards regarding indigenous peoples and individuals[50] which should not, it would seem, be abbreviated given organic multiplication and indivisibility—especially as they form a legal backdrop to the Article 14 right to education. Moreover, UNDRIP in its entirety could be vital in framing any reorganization process which would clarify the political nature of the admission policy in future. The proviso in the ANPRM seems to be that the process be "consistent with Federal law".[51] Currently, that would, at best, mean a *Mancari* narrative not entirely consistent with the unique historico-legal context of the admission policy or the dangers of congressional whim and judicial activism.

[47] Department of the Interior "Procedures for Reestablishing a Government-to-Government Relationship With the Native Hawaiian Community" Advance Notice of Procedural Rulemaking, 43 CFR Part 50 (16 June 2014) [ANPRM].
[48] James Anaya and Robert Williams "International Recognition" (Part of panel discussion at "Kāmau a Ea 5: Keeping the Breath of Life", Hawaiian Governance Symposium, Honolulu, November 2014).
[49] At 4. These are two of "five threshold questions".
[50] See Chapter Six at 6.3.2.
[51] ANPRM, at 4.

Once imported into a standalone piece of legislation, perhaps not unlike the New Zealand Bill of Rights Act 1990 or its Human Rights Act 1993, all federal legislation relating to Native Hawaiians should be consistent with the United States' good faith obligations under UNDRIP. The legislation could impose certain safeguards to address potential internal oppression but these limits should be consistent with UNDRIP's own limits[52] in order to avoid the pitfalls of current narratives. Legislation which is inconsistent with UNDRIP would be revisited. Legislation such as the Akaka Bill which remained focused on federal recognition might have to be revisited in terms of proportionality and given the vulnerability of tribes with federal recognition to arbitrary congressional whim and judicial activism.[53]

Where federal legislation or judicial decisions are not consistent with UNDRIP's rights, Native Hawaiians would then have recourse to international law once all domestic avenues are exhausted.[54] As previously argued in terms of good recommendations, where such rights are equated with *Brown*-like equal protection, more immediate recourse may be available through federal courts. Where *substantial everyone/no-one* and *complex* human rights to education are intentionally imported, many UNDRIP rights including special measures including affirmative action could be immediately legal and justiciable including in terms of the ICCPR's Article 26 right to non-discrimination given its long legal reach.

8.6.3 INTENTIONALLY INCORPORATE ARTICLE 14 INTO FEDERAL LEGISLATION

Lawmakers should intentionally draft legislation which specifically gives effect to Article 14 of UNDRIP. Legislation regarding Native Hawaiians and other

[52] For instance, Article 46's territorial and democratic limits.
[53] As discussed in Chapter 3, the author is well-aware of the marathon-like struggle which passage of the Akaka Bill has already been and does not make this recommendation lightly.
[54] UNDRIP does not have a complaints mechanism yet but this possibility is currently being pursued by the Permanent Forum on Indigenous Issues: see Dalee Sambo Dorough and Megan Davis *Study on an Optional Protocol to the United Nations Declaration on the Rights of Indigenous Peoples focusing on a Voluntary Mechanism* E/C.19/2014/7 (2014).

indigenous peoples which is inconsistent with Article 14's multi-narrative of equality should be reviewed.

Although UNDRIP as a whole promises an expansion of narratives, Article 14's right to education itself should be intentionally incorporated into federal law.

Education is rightly attributed an almost incomparable value in federal jurisprudence such as *Plyler* and *Brown* as well as in the human rights universe. The specifically indigenous right to education would be supra-domestic, remain inalienable, universal and could not be refuted or taken away by domestic law because it was inherently attached to the human being.[55] Its legitimacy would derive from its organic and legal indivisibility from fundamental civil and political rights, and its justiciability and emphasized legality otherwise. As a culmination of the evolution of the international right to education, it would also be consistent with *Brown*-like substantial equality and non-discrimination and a *Plyler*-like fundamental right to education as well as the remedial purpose and political basis of the *Mancari* preference. As in New Zealand, intentional importation could result in an overlap between human, constitutional and indigenous rights displaying further organic indivisibility, justiciability, and emphasized legality.

The importation of Article 14 might also clarify liberal concerns regarding UNDRIP's Article 3 right to self-determination. At the nexus of education and self-determination, Article 14 is buffer and access, organic multiplier and the epitome of remediation, specifically meant to remedy rights denials in education. Again, Article 14 and other specific rights define and illustrate what this expanded self-determination might look like in real-time. Rather than secession and Balkanization—the perceived horrors of a decolonization context—UNDRIP rights mostly reference ESCRs, the stuff of human survival and basic thriving, not civil war. [56]

Regarding survival and thriving, Article 14 constitutes a minimum list of human rights standards for the indigenous learner in education. Certainly, other UNDRIP rights give context to those standards—including self-determination, special

[55] Chapter Five at 1.2.
[56] See Chapter Six at 6.3.2.

measures, language and transmission of knowledge rights—but Article 14 enshrines education and the admission policy itself. Given all these features, Article 14 would carry significant moral force in and of itself. Its intentional importation would have several implications in terms of education legislation including present and future incarnations of the NCLB, ECAA and the NHEA.

The importation of Article 14 and associated rights would import a multi-narrative toolbox of rights options including universal guarantees, special measures, permanent minority rights and autonomous indigenous educational systems and institutions. Consistent with *Brown*'s positive duties, an earnest importation of Article 14 would require that the United States take "effective measures to ensure that" [57] education rights are protected. Federal education legislation would generally need to be consistent with all these rights options in seemingly identity-specific terms, given the buffer-and-access function of specificity. Article 14 would then provide a supra-legislative standard by which to interpret a host of federal legislation dealing with Native Hawaiians in education and to buffer such provisions against adamant everyone/no-one narratives.

Even prior to incorporation, federal legislation should be reviewed for consistency with Article 14 in the name of good faith treaty obligations. As the right is surprisingly consistent with federal precedents—particularly where measured in terms of substantial equality and non-discrimination—such an exercise could result in a certain legitimation of federal legislation. The host of legislation listed by various courts which are specific to Native Hawaiians in education, including the Stafford-Hawkins Act would already be fairly consistent with the effective measures required by Article 14, as will the NHEA. Indigenous education rights expressed through, for example, the Native American Languages Act would also seem to have greater moral force vis a vis *everyone/no-one* legislation, including the ESSA. Such legislation would best be interpreted as a historically specific response to the Native Hawaiian moʻolelo, likened to the application of a deliberately *everyone/no-one* narrative to segregation in post-*Brown* jurisprudence and Civil Rights legislation.

[57] As discussed in Chapter Six at 6.3.2, "effective measures" are stipulated throughout UNDRIP.

8.6.4 ENACT STANDALONE FEDERAL LEGISLATION

The NHEA and the rest of Title VII should be separated from the ESSA and included in a standalone piece of federal legislation which gives effect to Article 14 and related UNDRIP rights.

Beyond mere incorporation, amendment or interpretive aid, earnest incorporation may still require the drafting of a standalone piece of legislation which would replace Title VII of the ESSA. As discussed, the ESSA's capacity to account for the admission policy in terms of an earnest liberalism is undermined by the predominance of a homogenous *everyone/no-one* narrative expressed in terms of standardization. At the very least, the NHEA is literally and philosophically submerged in this singular narrative. Philosophically, it is also not rights based but governance and funding focused. Given the supra-domestic nature of self-determination and the supra-legislative, *Plyler*-like equal protection which also underwrites the expanded *multi-narrative*, the ESSA already feels like a poor fit for the NHEA and must be for Article 14.

In terms of coverage, this federal statement of an indigenous right to education would apply to Native Americans, Alaska Natives as well as Native Hawaiians[58] not unlike Title VII. Like the ESSA and NHEA it could retain provisions specific to federal Indian law and the relationship between respective groups and the federal government, and also for governance and funding. However, group-specific provisions would need to be consistent with Article 14, while governance would need to reflect Articles 3 and 4 of UNDRIP and preserve indigenous peoples' right to collective rational revision in terms of determining processes affecting them, as recognized in Article 18 and as emphasized in the ANPRM. Funding would similarly need to be expressed in UNDRIP terms of both the rights of indigenous Americans to, and state obligations of, effective special measures.

The legislation would need to repeat Article 14's multi-narrative in terms of *everyone* ("all"), *no-one* ("without discrimination") and the *complex someone*

[58] However, it would also seemingly apply to the indigenous peoples of Guam and other territories as there is little distinction in UNDRIP between territorial or decolonization status and federal status. Indigenous peoples like the Chamorro people of Guam have suffered similar human rights abuses as the result of United States occupation and annexation: see Aguon, above n 29.

("particularly children"). Its learner would be specifically guaranteed previously promised universal individual rights to a public education but also the option to attend a parallel, indigenously established and controlled educational institution such as Kamehameha Schools—as well as rights to an education in their own culture and language as a minority.[59]

In name and substance, however, these federal rights—including its *everyone/no-one* provisions—would be, consistent with buffer-and-access and historical self-determination projects specific to the indigenous learner. The legislation would need to recognize the rights-holder as both the indigenous learner *and* their community. Preference for the indigenous learner in admissions would need to be explicit consistent with Article 14(1)'s control right, Article 18's decision-making right and Article 33's right to determine membership.[60] All children would possess a *Plyler*-like universal right to education and other buffer-and-access rights—one which was also specifically attributed to the indigenous child. However, the right to attend a school like the Kamehameha Schools—and for that school to be established and controlled by indigenous communities like Native Hawaiians—would be owned by the indigenous learner.

The inclusion of related UNDRIP rights could recognize the good of indigenous cultural membership. Again, Article 14 is preceded by rights: to "revitalize...cultural traditions and customs"[61]; to "teach...spiritual and religious traditions, customs and ceremonies"[62]; and "to revitalize, use, develop and transmit to future generations their histories, language, oral traditions, philosophies, writing systems and literatures..."[63]—rights essential to indigenous education. Like the public good of educating all learners in Native Hawaiian history and culture envisioned by the Hawai'i State Constitution,[64] federal legislation would benefit from the inclusion of the Article 15(1) "right to the dignity and diversity of indigenous cultures, traditions, histories and aspirations which shall be

[59] See minority education rights discussed in Chapter Five at 5.2.3.
[60] Which would be consistent with *Santa Clara Pueblo v Martinez* 436 US 49 (1978).
[61] Article 11(1).
[62] Article 12(1).
[63] Article 13(1).
[64] Hawai'i Constitution, art X.

appropriately reflected in *education*".[65] With Article 14, these rights could represent a legislative list of identity-specific primary goods for indigenous learners in America—or as Article 43 states, they would "constitute the minimum standards for the survival, dignity and well-being of" the indigenous child.[66]

In terms of deep harm, however, these rights would seemingly address indigenous-specific human wrongs in education, even the disadvantage of cultural membership. In their specificity, the legislation would clearly and directly respond to specific injustices historically and currently suffered by Native Hawaiian and other indigenous learners.[67] However, rather than merely performing a buffer-and-access function in terms of present disparities, this federal indigenous right to education could be narrated as a remedy to ongoing harm which continues to have a profound effect on current rights outcomes.

8.7 CONCLUSION

Given the once-and-future nature of UNDRIP rights, this right would have the liberal narrative capacity to account for the causal chain of historical self-determination. This right could seemingly account for the prior sovereignty of a nation which never relinquished it, the ongoing harm resulting from continued denial of self-determination, and the living continuum of Native Hawaiian rights which is a legal fact—or the unique historico-legal context of the admission policy. Its buffer-and-access features would nevertheless appreciate the Schools' proven track record in overcoming the guarantee/reality gap in real-time.

In contrast to the modified *Weber-Johnson* test, these rights would seemingly ask the 'right questions'. Rather than viewing present manifest imbalance in historically abstract terms, these rights admit the reality of in-built majoritarian bias and discrimination against Native Hawaiians causally linked to the above history and an overwhelming species of discrimination, even multi-generational trauma,

[65] UNDRIP, art 15(1). My emphasis. Article 15(2) clearly refers to previous instruments on the purpose of education in its aim of "combat[ting] prejudice and eliminate[ing] discrimination and...promot[ing] tolerance".
[66] UNDRIP, art 43.
[67] See discussion in Chapter 2 at 2.4.4 and in Chapter 3 at 3.2.2.

chronic stress, higher allostatic load, cumulative, cyclical and otherwise complex factors drawn insidiously to Native Hawaiian identity. In fact, best recommendations acknowledge the deep harm of overthrow, annexation, assimilation and discrimination and recognize historical self-determination and buffer-and-access mechanisms as a proportionate remedy to that harm.

Similarly, the question would not be whether the policy 'trammeled' the rights of others or whether it did 'unnecessarily' but the extent of the right itself. The question would not be whether the right was consistent with liberal projects alone—with earnestly reconciling the guarantee/gap for individuals—but whether it was consistent with the residual self-determination rights of a sovereign people which never ceded that sovereignty. It would be a political, human rights or constitutional question—not an exception to the rule.

Certainly, the goal would not be parity but long-term outcomes, organic multiplication rather than denial. The rights in question would not be temporary exceptions but timeless, once-and-future rights, a supra-domestic affirmation of a historical continuum of Native Hawaiian rights.

Ironically, one of the most significant implications of Article 14(1) is that the identity of those preferred in admissions to the Kamehameha Schools is less important than the identity of those making that decision and the basis of the right to make that decision. Beyond individual considerations, remedial self-determination recognizes that collective rational revision translates into individual rational revision. As Kymlicka realizes, the toolbox of rights options is just that—a toolbox out of which Native Hawaiians may utilize multiple narratives of equality in order to reconcile the disadvantages of cultural membership—including in-built majoritarian bias and discrimination and other effects of deep harm. It is the quintessential expression of a richer rational revision context.

In fact, this toolbox best resembles the *multi-narrative* of Hawai'i state law and the claims of Native Hawaiians themselves. It also most closely affords with the intuitions of lawmakers, courts and the earnest liberal generally that the admission policy is really a measure of equality justified by the reconciliation of formalized *everyone/no-one* constitutional guarantees with gross real-time disparities

unrelentingly attracted to indigenous identity. Moreover, Article 14 and UNDRIP have an increased narrative capacity to account for the disadvantage and good of cultural membership, the mo‘olelo, both global and local, and the liberal appropriateness of an admission policy which appears to be effecting substantial equality on a daily basis.

The author is under no illusion that better and best recommendations would seemingly require what amounts to a major paradigm shift in both legal and political attitudes, that decades of US exceptionalism would have to be discarded and that a ‘Third Reconstruction’,[68] even a human rights revolution akin to the Civil Rights gains of the 1960s, may have to take place. However, that very possibility indicates a tremendous opportunity, even the hope of another *Brown* moment.

The reality is that, regardless of whether human rights are intentionally incorporated into United States federal law, Native Hawaiians retain human rights as human beings and specifically indigenous human rights as an indigenous people under international law. Incorporation or lack thereof, whether intentional or not, cannot change this legal fact or the fact that Native Hawaiians are utilizing human rights frameworks and fora to advance legal claims.[69] However, incorporation would create a greater consistency between domestic and international narratives enhancing the moral force of all. Rejecting aspirational distinctions and displaying a good faith earnestness towards a right which the United States has approved by signature anyway must also lend greater legitimacy to the United States as a human rights defender generally.

[68] Again, borrowing language of Yamamoto and Betts, above n 33.
[69] James Anaya in Anaya and Williams, above n 57.

CHAPTER NINE

EARNESTNESS

9.1 INTRODUCTION

> *Awful as race prejudice, lawlessness and ignorance are, we can fight time if we frankly face them and dare name them and tell the truth; but if we continually dodge and cloud the issue, and say the half truth because the whole stings and shames; if we do this, we invite catastrophe. Let us then in all charity but unflinching firmness set our faces against all statesmanship that looks in such directions.*[1]

At its outset, the thesis asked how a school which was established to help a group of children consistently identified with disparities in education achieve equality—and which has actually done so—could be sued for discrimination because it prefers those children in admissions.

In search of answers, this thesis has critically analyzed the narratives of equality evident in the Ninth Circuit Court of Appeal's reasoning in *Doe v Kamehameha Schools*, arguing that the dissent, majority and concurrence opinions suggest three conflicting narratives of equality—what have been called the adamant everyone/no-one, weak someone and limited indigenous learner narratives. It has demonstrated how these narratives reflect an identity-specific, racialized history of slavery and segregation but fail to account entirely for either the unique historico-legal history of the Native Hawaiian people or the huge gap between formal constitutional guarantees of equality and everyday realities of complex discrimination and disparities almost unrelentingly attracted to Native Hawaiian identity. It has recommended an expansion of these narratives within federal law consistent with liberal theory, international law and the legal experience of a sister settler jurisdiction—Aotearoa New Zealand—but, more importantly, with substantial equality, non-discrimination and rights of self-determination which may have the greatest capacity for reconciling the guarantee/reality gap. Finally, specific good,

[1] African American journalist, educator and civil rights activist WEB Du Bois, quoted in David Levering Lewis *W. E. B. Du Bois, 1868-1919: Biography of a Race* (New York, Owl Books, 1993) at 434.

better and best recommendations have included philosophical consistency with the expanded multi-narrative, the intentional importation of the human right to education and the intentional incorporation of Article 14 of the UN Declaration on the Rights of Indigenous Peoples 2007 into federal law.

As stated at the outset of the thesis, however, these recommendations could only ever be a first step—though necessary. Several issues remain uncertain.

9.2 REMAINING CHALLENGES

First, it is impossible to determine how federal judges and lawmakers might respond to the recommendations, no matter how consistent with substantial equality. The thesis has suggested possible paths, including those which might take very little adjustment in terms of present federal narratives. It has indicated the possible interface between present narratives and the expanded multi-narrative in terms of all other recommendations. However, as the *Kamehameha* case demonstrates, interpretation can differ widely and be dramatically inconsistent given current trends of judicial activism and congressional whim creating arbitrary narratives which produce significant wrestles and vastly different outcomes. Additionally, one would have to be naïve to believe that the intellectual shift from prioritization of the singular narrative to a human rights- and indigenous rights-informed multi-narrative of equality will be easy for judges, lawmakers or the public at large. This would seemingly require a major paradigm shift, a kind of constitutional revolution of the magnitude of Reconstruction and Civil Rights.

This is not, however, the first time the nation has stood on the brink of such a moment, nor the first time it has been faced with the opportunity to adopt new equality narratives. As Chapter Two describes, while Reconstruction-era constitutional amendments were revolutionary in outlawing segregation and recognizing the rights of African-Americans as citizens, *Brown v Board of Education* required that those formal guarantees be substantially interpreted, laying the foundation for another narrative shift which ushered in the Civil Rights era. As

Yamamoto and Betts have aptly described, [2] those landmark constitutional moments ended with two broken civil rights promises, the most recent accounting for the demise of affirmative action and rise of reverse discrimination suits. This one need not follow suit.

As argued, the human right to education and Article 14 itself come loaded with significant moral force and liberal legitimacy which could bolster the moral force and liberal legitimacy of constitutional rights. For millions of its citizens who are practically excluded from the promise of equality according to group identity—including African-Americans and Native Americans—importation would at least demonstrate a certain amount of earnestness. At best, it would provide narratives capable of addressing the historico-legal peculiarities of the rights of other groups and most importantly their own guarantee/reality gaps.

The irony is that, as difficult as it might be to convince American lawmakers and courts to embrace a multi-narrative of equality, the philosophical and legal changes required would only be the first step. While an expansion of narratives must facilitate meaningful discussion and dialogue on indigenous education rights, implementation remains a separate but grave issue. International law's increasingly identity-specific rights to education and explicit state parties' obligations in regard to ESCRs and education—indeed the drafting of article 14 itself—all indicate a drive for implementation. The evolution of the right to education illustrates the importance placed on legal frameworks, processes and structures which enhance and ensure substantive realization of these rights, especially because they are organically indivisible from and crucial to the realization of most or all other human rights and freedoms. This is the proverbial 'million-dollar question' in international law.

Similarly, New Zealand currently draws less criticism for failing to import international human rights than for failing to implement its ratified and imported treaty obligations.[3] In contrast, the United States draws considerable criticism for

[2] Eric K Yamamoto and Catherine Corpus Betts "Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of *Rice v. Cayetano*" in Rachel E Moran and Devon Wayne Carbado (eds) *Race Law Stories, Foundation Press* (New York, Thomson Reuters/ Foundation Press, 2008) 541.

[3] See, for instance, Judy McGregor, Sylvia Bell and Margaret Wilson *Fault Lines: Human Rights in New Zealand* (New Zealand Law Foundation Research Paper, April 2015).

both. While the United States' characteristic exceptionalism creates significant obstacles to even preliminary discussions of human rights, New Zealand has started implementation dialogues. If the standard is substantive equality and non-discrimination, however, the very next inquiry after importation must be to explore what other frameworks, structures and processes will be needed to realize the right to education.

The question of enforcement entails such an assessment. Once it ratified the relevant treaties and imported the human right to education into federal law the United States might still violate them at will as it has others, both domestically and internationally. In fact, it has a track record of doing so, particularly where indigenous peoples are concerned.

However, the thesis has shown that, where liberal projects are earnest, *someone, indigenous* and human narratives become intertwined with constitutional *everyone/no-one* narratives. Thus, the most fundamental and sacred guarantees of the Constitution will be at stake should the United States fail to keep its word in terms of human or specifically indigenous human rights. Such failure might be per the status quo but would certainly appear to be less legitimate, less right and raise a greater level of alert in our liberal sensibilities regardless of rightsholder identity. Similarly, the expansion of narratives would create "discursive space"[4] but also accountability in terms of supra-domesticity, organic indivisibility and emphasized legality where education rights continue to be denied to Native Hawaiians and other indigenous peoples. Again, importation and incorporation would create a domestic toolbox of rights options and legal remedies to which indigenous peoples and other vulnerable rightsholders can appeal.

Given these uncertainties, implementation and enforcement will require a comprehensive review of present legislation for consistency with the imported, incorporated human rights but, perhaps, also the establishment of specialized judicial or quasi-judicial bodies fitted to determine human rights and specifically indigenous human rights questions. In terms of a federal body with special expertise in terms of indigenous education rights, New Zealand's Waitangi Tribunal

[4] James Anaya and Robert Williams "International Recognition" (Panel discussion at "Kāmau a Ea 5: Keeping the Breath of Life", Hawaiian Governance Symposium, Honolulu, November 2014).

offers one possible model. The federal version might source its authority in the incorporated UNDRIP legislation or UNDRIP itself just as the Waitangi Tribunal is sourced in the Treaty of Waitangi Act 1975 which gives effect to the Treaty of Waitangi. This body could hear complaints relating to 'prejudice' against Native Hawaiians and other indigenous individuals and groups both in terms of historic injustices, present discrimination and predictable future prejudice. It might be supported by a commission that receives complaints not unlike the current Equal Employment Opportunities Commission established during the Civil Rights era to enforce civil rights. The Human Rights Commission and Human Rights Review Tribunal in New Zealand provide additional models of recommendatory and judicial fora with special expertise in addressing human rights and specifically indigenous human rights.

Finally, international recognition of Native Hawaiians as a people possessing an expanded right to self-determination does not depend on the reorganization of a Native Hawaiian governing entity. Nor should federal recognition pursuant to any incorporated UNDRIP rights. However, a Native Hawaiian governance entity would provide an easily recognizable face for the exercise of self-determination especially as it administers its own educational systems and schools. Conversely, the degree to which UNDRIP and Article 14 will affect the shape of that governing entity and the reorganization process also remains to be determined.

9.3 LESSONS LEARNED

The impact of such changes on long-term real-time outcomes for Native Hawaiian learners and other vulnerable indigenous rightsholders also remain unquantifiable at this stage. However, philosophical consistency, intentional human rights importation and UNDRIP incorporation—especially article 14—would expand federal narratives of equality giving them a greater capacity to account for both the unique historico-legal context of the policy and the complex socio-economic disparities it was designed to address. As argued throughout the thesis, such narrative capacity could significantly effect positive outcomes for a group of children historically associated with significant disparities in education as it buffers

against in-built discrimination, provides access to a richer rational revision and remedies ongoing harm.

In contrast to the modified *Weber-Johnson* test, the imported and incorporated multi-narrative of equality would seemingly ask the 'right questions'. Rather than viewing present manifest imbalance in a single moment of time, multiple rights admit the reality of in-built majoritarian bias and discrimination against Native Hawaiians causally linked to a particular history and an overwhelming species of discrimination, even multi-generational trauma, chronic stress, higher allostatic load, cumulative, cyclical and otherwise complex factors drawn insidiously to Native Hawaiian identity. Similarly, the question is no longer just whether the policy would trammel the rights of others unnecessarily or otherwise but whether the policy might be protecting the rights of others—whether it might be consistent with substantial equality. In fact, the admission policy is no longer the exception to the rule but a right in and of itself. The next question is not whether this right is consistent with liberal projects alone—with earnestly reconciling the guarantee/gap for individuals—but whether it is consistent with the residual, specifically indigenous self-determination rights of a once-and-future sovereign people which never ceded that sovereignty. Subsequently, the Kamehameha Schools are more accurately portrayed as no ordinary school but an Article 14 system, an innocuous expression of both internal and external self-determination.

Where recommendations are implemented, the admission policy will form a nexus of rights which more appropriately engenders political questions, human rights and constitutional questions rather than questions of justiciability, legality or enforceability. Consistent with international law, the goal is no longer elusive parity with the majority but long-term de facto outcomes, measurable indicators, organic multiplication rather than denial. The rights in question are not temporary but timeless, once-and-future rights. They are a supra-domestic affirmation of a historical continuum of Native Hawaiian rights—which also happen to be the best chance that the earnest liberal has of reconciling the *everyone/no-one* constitutional guarantees with the reality of complex discrimination and disparities drawn to Native Hawaiian identity. Despite implementation and enforcement issues, this *multi-narrative* toolbox of options represents the best possibility for resolving the wrestle and the gaps.

9.4 HOPE

Of course, this thesis has from the outset assumed that anyone speaking in the name of equality or claiming it to champion their cause is talking about the project of the earnest liberal—that is, the reconciliation of real-time, indigenous identity-specific discrimination and disparities which inherently violate liberal projects and formalized, *everyone/no-one* guarantees. The thesis has assumed that no earnest liberal will be comfortable with professed equality narratives which cannot reconcile the guarantee/reality gap and even inherently favor certain groups of individuals while disadvantaging others on the basis of identity. Moreover, the thesis has assumed that no earnest liberal will approve of deep harm or the historic and ongoing denial of education rights to the most vulnerable of our society's members, even a group of children who are overcoming unchosen odds heavily 'stacked against' them.

Given 'lessons learned' at home and abroad, in theory and law, it seems impossible to be anything but an earnest liberal. As the evolution of the right to education illustrates, an *adamant* insistence on homogenous and anonymous rights fundamentally ignores lessons learned not just from slavery but from the Holocaust and World War II and the experience of minority groups the world over. Adamant narratives particularly ignore the catastrophic global indigenous mo'olelo of colonization, assimilationist law and policy, and frank statistics which tell their own story. These historic and present realities undermine all promises of liberal equality and all equality narratives by their very existence, effectively predicting future rights denial and discrimination—just as they retell an unresolved past marred by injustice. The logarithmic nature of this species of global and once-and-future harm must particularly discomfort the earnest liberal.

Accordingly, the earnest liberal will see the necessity of dropping veils of ignorance and disregarding the false premise of an original position or level playing field, of abandoning cosmopolitan arguments which actually mask old-fashioned discrimination and callous utilitarian calculations—when necessary to ensure equality. Instead, the earnest liberal will insist on an equality requiring equal outcomes and not merely equal treatment. Such equality will be historically aware, even remedial—not abstract—and recognize cultural membership and indigenous

identity where doing so may buffer the indigenous individual against indirect, systemic and cumulative discrimination and, conversely, provide access to a richer rational revision context. The earnest liberal will recognize complex someone, strong standalone rights to education and specifically indigenous rights to establish and control autonomous educational systems and institutions as consistent with equality and non-discrimination but also historically continuous indigenous rights which exceed traditional liberal projects. The earnest liberal will recognize his own rational revision aims in the toolbox of rights options which result from this expanded multi-narrative.

Ultimately, in the tears of my mother and the aunties the earnest liberal will weep too. Then, rather than cry 'discrimination', they will see themselves and feel their own offense in the real-time plight of the Native Hawaiian learner, in the wrestle, the intuitions and the gaps. The ongoing, enduring and pervasive harm of historic injustice will sting not just their pride but their humanity. They will come to equate the admission policy's substantial effect on real-time outcomes with the validity of their philosophy and its potential for reconciliation of the guarantee/reality gap with proof of their religion. In the historico-legal context of the admission policy they will see a liberal good, the very tenets of their faith; in collective self-determination, they will recognize the individual rational revision they hold dear. In difference, they will understand sameness. In identity, we will all see hope.

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