The Kamehameha Schools/Bishop Estate and the Constitution

by
Jon M. Van Dyke*

I. Introduction

The Bishop Estate, established in 1884 by the will[1] of Princess Bernice Pauahi Bishop, plays a central role in Hawaii because it owns 336,373 acres of land (almost ten percent of all the land in Hawaii), controls $1.2 billion in assets, and runs the important Kamehameha Schools and other educational programs for children of Hawaiian ancestry.[2] This article examines the constitutional questions that have been raised recently regarding the manner in which the Estate operates and the trustees are selected.

In 1993, the U.S. Court of Appeals for the Ninth Circuit agreed with the U.S. Equal Employment Opportunity Commission (EEOC) that The Kamehameha Schools' policy of hiring only Protestant teachers violated Title VII of the 1964 Civil Rights Act.[3] This decision does not contest the Schools' policy of admitting only students of Hawaiian

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* Professor of Law, William S. Richardson School of Law, University of Hawai'i at Manoa. J.D. 1967, Harvard University. The author would like to thank Professors Paul Finkelman and Eric Yamamoto for their review of an earlier draft of this article, and Karl Espaldon, University of Hawaii Law School Class of 1996, for his assistance with research.

[1] The text of the will is reprinted in In re Bishop Estate, 250 Fed. 145, 145 (9th Cir. 1918).

[2] Shannon Tangonan, *Hawaiians-Only Admission Policy Appears Safe*, Honolulu Advertiser, May 2, 1993, at A3.

[3] Equal Employment Opportunity Commission v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993). The statutory provision violated is found in 42 U.S.C. § 2000(e)-2(a)(1) (1988).

ancestry, but observers sometimes wonder whether that policy is legitimate. Also controversial are the provisions in the Princess's will that require the five trustees to be Protestant and state that the Justices of the Hawaii Supreme Court should select the trustees. This article will address these issues and explain the constitutional principles that govern the Estate's activities and the selection of trustees.

II. The Nature of a Charitable Trust

Under the law of trusts applicable in Hawaii and other states, persons are free to dispose of their property as they wish when they die.[4] The law favors the formation of charitable trusts, and money may be left in trust for any purpose that is charitable, educational, or religious. As long as the trust is private, a deceased person may define the beneficiaries of their bounty in any way they wish. Private trusts for the education of boys only or girls only, for example, are normally upheld despite our public policy against sex-based discrimination. Once the government becomes involved with a private trust, however, or once the trust takes on a public character of some sort, courts place limits on certain types of restrictions. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution generally prohibits direct public involvement in trusts that discriminate on the basis of race and religion.

Because charitable trusts operate indefinitely, the charitable purpose or administrative provisions sometimes become impossible, impractical, or illegal. In that case, courts apply legal theories called the "*cy pres* doctrine" or the "doctrine of equitable deviation" to reform the trust to approximate the general charitable intent of the deceased person.[5] In these instances, the court will normally eliminate the inappropriate provision so that the charitable purpose can be fulfilled.

III. The Preference for Children of Hawaiian Ancestry

It was argued by Justice Kazuhisa Abe in a concurring opinion in *Estate of Bishop*,[6] that The Kamehameha Schools' restriction to Hawaiian

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[4] *See generally* George G. Bogert, The Law of Trusts and Trustees (2d ed. 1991); Restatement (Second) on the Law of Trusts (1987).

[5] *See* Stuart M. Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts*, 56 Georgetown L.J. 272 (1967). *Cf.* Evans v. Abney, 396 U.S. 435 (1970).

[6] 53 Haw. 604, 499 P.2d 670 (1972).

children and Protestant teachers violated the Equal Protection Clause because of the public nature of the schools. Justice Abe was correct that courts generally refuse to participate in any trust with a racially restrictive provision.[7] For example, in *Howard Savings v. Peep*,[8] the New Jersey Supreme Court applied the *cy pres* doctrine to remove the racial restriction from a scholarship trust limited to white students at Amherst College, because the restriction violated the policy and charter of the college. Similarly, in *Evans v. Newton*,[9] the U.S. Supreme Court ruled that the City of Macon, Georgia could not limit a park to only whites even though that was the express wish of the deceased individual who bequeathed the land to the city. Because of the strong national policy against racial discrimination, even if the only public act is to appoint the trustees who are to administer the racially restrictive activity, such an act is viewed as sufficient "state action" to render it unconstitutional, requiring that the racial limitation be removed.[10]

Serious constitutional questions would therefore be raised if the preference in Princess Pauahi's will were designed to favor any racial or ethnic group other than Hawaiians. Preferences for native peoples are, however, treated differently under U.S. law. Such preferences have been upheld repeatedly in recent years by the U.S. Supreme Court, which has stated that they are "political" and not "racial" in nature.[11]

Preferences for native peoples are upheld not for racial reasons, but because of the unique legal and political status that native groups have under the U.S. Constitution and laws. Unlike other ethnic groups in our multicultural community, native peoples have no "mother culture" in another land where their culture is maintained and developed. Unless they are given the opportunity to protect their culture, language, religion, and traditions in their place of origin, their unique heritage will be lost forever. We all benefit by having diverse and strong cultures thriving in our community.[12]

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[7] *Id.* at 611, 499 P.2d at 675.

[8] 170 A.2d 39 (N.J. 1961).

[9] 382 U.S. 296 (1966).

[10] Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968).

[11] The leading case is *Morton v. Mancari*, 417 U.S. 535, 553 n. 24, 554 (1974), which upheld a hiring preference for Indians for positions in the Bureau of Indian Affairs. *See generally* Jon M. Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63, 73-79 (1985).

[12] *See* Van Dyke, *supra* note 11, at 90-92.

Furthermore, native peoples — and particularly persons of Hawaiian ancestry — have strong claims to reparations and lands based on early interactions with, and abuses by, the federal government.[13] Preferences granted to Native Americans are, therefore, sometimes viewed as partial responses to the obligations owed to these peoples. The Hawaii Supreme Court analogized persons of Hawaiian ancestry to other Native Americans in *Ahuna v. Department of Hawaiian Homelands*,[14] and drew upon the rich body of federal cases involving North American natives to determine trust duties owed to Native Hawaiian homesteaders. U.S. District Judge David Ezra has also explicitly ruled that persons of Hawaiian ancestry are entitled to governmental preferences.[15] Charitable trusts limited to beneficiaries of Hawaiian ancestry are thus clearly acceptable under the law.

IV. Is the Estate's Protestant-Only Hiring Policy Legal?

As mentioned above, the policy of The Kamehameha Schools to hire only Protestant teachers was recently struck down by the U.S. Court of Appeals for the Ninth Circuit as a violation of Title VII of the 1964 Civil Rights Act.[16] This decision was based on the court's view that The Kamehameha Schools are not sufficiently religious in character to justify an exemption from the general statutory rule that no discrimination based on religion is allowed in employment situations. This decision is somewhat troubling because the court has assumed the role of determining what is and what is not a bona fide religion.

In the U.S. District Court, Judge Alan Kay had upheld the Protestant-only restriction because of the "religious purpose and character" of The Kamehameha Schools, ruling that requiring teachers to be Protestant was a bona fide occupational qualification.[17] Certainly there

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[13] *See, e.g.*, Karen N. Blondin, *A Case for Reparations for Native Hawaiians*, 16 Haw. B.J. 13 (1981); S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 Ga. L. Rev. 309 (1994); Melody K. MacKenzie, *Historical Background*, in Native Hawaiian Rights Handbook 3 (Melody K. MacKenzie ed. 1991).

[14] 64 Haw. 327, 640 P.2d 1161 (1982).

[15] Naliielua v. State of Hawaii, 795 F. Supp. 1009 (D.Haw. 1990), *aff'd*, 1991 WL 148771 (9th Cir. Aug. 5, 1991).

[16] Equal Employment Opportunity Commission v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993).

[17] Equal Employment Opportunity Commission v. Kamehameha Schools/Bishop Estate, 780 F. Supp 1317, 1323 (D.Haw. 1991), *rev'd*, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 439 (1993).

can be no doubt that Princess Pauahi desired that the schools have a Protestant orientation, although she did not require that the students themselves be Protestant.

Just as we permit religions to operate freely in the United States, U.S. courts generally permit private trusts to maintain a religious preference, reforming the trusts only if the charitable purposes cannot be carried out. In a 1979 case, for example, the Connecticut Supreme Court examined a trust created to benefit white Protestant boys.[18] The court struck down the preference for whites and males, but allowed the religious preference to stand because it was central to the decedent's charitable goals.

Of even more direct relevance to the Ninth Circuit's decision is *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[19] In that case, the Supreme Court upheld the decision of the Mormon Church to fire an employee at a gymnasium it owned and operated because he had failed to qualify as a "temple recommend," that is, as a member of the Church eligible to attend its temples. He had argued that his work had nothing to do with religion and that his firing violated his First Amendment rights. The Court unanimously rejected his claim, stressing that practitioners of many religions feel that the ability to create an exclusive community of believers is an essential component of their religion.

The Bishop Estate/Kamehameha Schools had argued similarly that the Princess wanted to create a school with a religiously-oriented Protestant community for its students and employees. The Ninth Circuit rejected this argument concluding that the Schools are not sufficiently religious to qualify for the exemption. The appellate court stressed that no religious test is required of the teachers (they simply certify that they are Protestants), that students are accepted from all religions, and that no attempt is made to convert the non-Protestant students. According to the Ninth Circuit, the "generic" Protestant religion community at The Kamehameha Schools was not sufficiently religious to qualify for an exemption, even though the more rigorous Mormon religious community does qualify. It is troubling to have a court determine what a "true" religious community is. Once Congress provided a religious exemption in the 1964 Civil Rights Act, however, it was inevitable that courts would have to undertake this assignment,

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[18] Lockwood v. Killian, 425 A.2d 909 (Conn. 1979).

[19] 483 U.S. 327 (1987).

and it is natural for a court to want to interpret this exemption narrowly to ensure that religious nondiscrimination is adhered to as a general norm.

V. Can the Trustees Be Restricted to Protestants Only?

If teachers at the schools cannot be limited to Protestants because the schools do not have a bona fide religious orientation, then it must also be illegitimate to require that the trustees be Protestants. Certainly the trustees are "employees" of the estate, and governed by the same norm of nondiscrimination as the teachers.[20]

In 1993-94, the Hawaii Supreme Court Justices went through an elaborate process to pick a new trustee, and received widespread criticism for their actions.[21] The Court first appointed an 11-member panel of citizens[22] who nominated five candidates.[23] Then the Justices received a ruling from the Commission on Judicial Conduct stating that it does not violate the law or judicial ethics for them to select the Bishop Estate Trustees.[24] The Commission's report also stated, however, that the justices should avoid activities that would create the perception that the process:

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[20] If, on the other hand, the appellate court had agreed with District Judge Kay that the schools were designed to establish a religious foundation for their students based on the Protestant religion, then it would have been legitimate to require the teachers, administrators, and trustees to be Protestants, just as a Catholic school could require that its teachers, administrators, and trustees be Catholic.

[21] The Honolulu Advertiser, for instance, called this selection process a "fiasco." Editorial, *Bishop Trustee: Selection Now a Fiasco*, Honolulu Advertiser, Oct. 16, 1994, at B2. The Honolulu Star Bulletin has repeatedly called for the Supreme Court Justices to end their role in the selection process. *See, e.g.*, Editorial, *Justices Should Sever Ties to the Bishop Estate*, Honolulu Star-Bulletin, April 12, 1994, at A10, col. 1.

[22] The list included University of Hawaii President Kenneth P. Mortimer, Catholic Monsignor Charles A. Kekumano, Robert J. Pfeiffer, then-chair of Alexander & Baldwin, Inc., William S. Richardson and Matsuo Takabuki, both former Bishop Estate Trustees, educator Gladys Ainoa Brandt, business executives Herbert Cornuelle and Henry A. Walker Jr., attorneys Melody K. MacKenzie and Alvin T. Shim, and union leader Gary W. Rodrigues. Editorial, *A Better Way to Choose Bishop Estate Trustees*, Honolulu Star-Bulletin, Jan. 14, 1994, at A12, col. 1.

[23] James Dooley, *Five Finalists on Bishop Trustee List*, Honolulu Advertiser, April 1, 1994, at A1, col. 4.

[24] Ken Kobayashi, *Panel: Court Can Pick Trustees*, Honolulu Advertiser, April 9, 1994, at A1, col. 6; Mary Adamski, *State Justices Get Green Light on Trustee Picks*, Honolulu Star-Bulletin, April 9, 1994, at A3, col. 6.

* Is influenced by political factors or favors.
* Will influence the judicial process when Bishop Estate is involved in the court case.
* Uses judicial resources to the detriment of the judiciary.
* Is influenced in "any way by religious or racial discrimination."
* Lends the prestige of the high court to the estate or its trustees.[25]

After the Justices received this qualified green light, they reopened the process, but this time without the help of the blue-ribbon citizens panel they had previously relied upon,[26] and added ten new names to the list of candidates to make a list of 15.[27]

The Justices never formally announced that non-Protestants would be eligible to be considered for the new position, but they did state that their selection process would follow the guidelines set forth in the advisory opinion of the Commission on Judicial Conduct (which states that the Justices should avoid actions that are "likely to create a perception . . . that the selection process . . . is . . . influenced by . . . religious or racial discrimination."[28] The Justices then offered as an explanation for their reopening of the nominating process that:

> We believe that some eminently qualified individuals may have refrained from applying for the vacancy because of (1) the well-known provision of the Will of Princess Bernice Pauahi Bishop that only Protestants may be appointed as trustees and (2) the mistaken perception that only native Hawaiians or part-Hawaiians may be appointed as trustees.[29]

This statement is included in a paragraph that also refers to the Commission on Judicial Conduct's advisory opinion, so it appears that these statements are to be read in light of the Commission's admonitions. Nonetheless, it is regrettable that the Justices did not make a more direct statement that religion would no longer be a factor in the

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[25] Ken Kobayashi, *Panel: Court Can Pick Trustees*, HONOLULU ADVERTISER, April 9, 1994, at A1.

[26] *See* News Release issued by "Ronald T.Y. Moon, Robert G. Klein, Steven H. Levinson, Paula A. Nakayama, and Mario R. Ramil, Justices of the Supreme Court of the State of Hawaii, In Their Individual Capacities," Aug. 24, 1994 [hereafter cited as News Release]; Ken Kobayashi, *Reopening of Trustee Selection a 'Shock,'* HONOLULU ADVERTISER, Aug. 26, 1994, at A1.

[27] James Dooley, *High Court Adds 10 to Trustee List*, HONOLULU ADVERTISER, Oct. 26, 1994, at A1.

[28] News Release, *supra* note 26.

[29] *Id.*

selection process. It is also regretable that the Justices lumped the religious-discrimination issue together with whether persons of Hawaiian ancestry should be preferred as Trustees. As explained above,[30] preferences for Native Hawaiians are viewed as "political" in nature and thus are not "racial" discrimination in violation of the concerns addressed by the advisory opinion of the Commission on Judicial Conduct.[31]

The list of ten new names added by the Justices did not contain any person who was identified as a Catholic, Jew, Buddhist, Muslim, or Hindu, but one candidate was listed as a Mormon.[32] The person finally selected, Gerard Jervis,[33] listed himself as a Lutheran.[34] He is of Hawaiian ancestry.

VI. Is It Proper for the Hawaii Supreme Court to Appoint the Bishop Estate Trustees?

This question is more difficult and requires a more detailed analysis. The Princess' will provides that "the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion."[35]

Courts have twice upheld the role of Hawaii's Supreme Court Justices. In 1918, the U.S. Court of Appeals for the Ninth Circuit held in *In Re Bishop's Estate*[36] that the Supreme Court Justices were acting in their individual capacities when appointing Bishop Estate

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[30] *See supra* notes 6-15 and accompanying text.

[31] News Release, *supra* note 26; *see also* William Kresnak, *Justices Will Pick Bishop Trustees*, Honolulu Advertiser, Aug. 25, 1994, at A1, col. 6.

[32] The Morman was John Hoag, president of First Hawaiian, Inc. James Dooley, *High Court Adds 10 to Trustee List*, Honolulu Advertiser, Oct. 26, 1994, at A1. Although the Dooley article cited above characterizes Mr. Hoag as a "non-Protestant," *id.* at A2, it is not clear that Mormons should be so characterized. One definition of "Protestant" is "a Christian not of a Catholic or Eastern church." Webster's Seventh New Collegiate Dictionary 686 (7th ed. 1963). Under this definition, a Morman would be viewed as a "Protestant."

[33] Ken Kobayashi, *Jervis Picked as Bishop Trustee*, Honolulu Advertiser, Nov. 11, 1994, at A1, col. 1.

[34] James Dooley, *High Court Adds 10 to Trustee List*, Honolulu Advertiser, Oct. 26, 1994, at A2, col. 3.

[35] In re Bishop's Estate, 250 Fed 145, 145 (9th Cir. 1918).

[36] *Id.*

trustees, because the Justices' normal duties do not include trust administration. In the second case, *Kekoa v. Supreme Court of Hawaii*,[37] the Hawaii Supreme Court (with all five justices replaced by circuit court judges for this decision) held that the selection process did not violate the due process clause of the Fourteenth Amendment, noting that it was well-established that the Justices were acting in their individual capacities when appointing Bishop Estate trustees.

This rationale can no longer be viewed as credible, because the Hawaii Supreme Court Justices select the trustees specifically because of their status as Supreme Court Justices, and not as named individuals or because of anything they have accomplished or attained as individuals outside the court.[38] Judges and justices do have a realm of private life in which they can act as individuals, and it is proper for them to participate in certain nonpartisan community activities.[39] Here, however, they are given the job of selecting the trustees explicitly because of their positions as taxpayer-supported Supreme Court Justices. They meet to discuss trustee appointments during normal working hours and interview prospective trustees at their offices while they are being paid by the taxpayers. They correspond regarding these appointments using their official stationery and make no effort to separate themselves from their official status when reaching these decisions. And as Supreme Court Justices, they must adhere to the principles of the U.S. and Hawaii Constitutions, which include avoiding any action that would indicate a preference for one religion over another. The Hawaii Constitution is explicit in saying that "No person shall 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."[40]

A recent case that addresses a situation similar to the appointment of the Bishop Estate Trustees is the case of *In Re Certain Scholarship*

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[37] 55 Haw. 104, 516 P.2d 1239 (1973), *cert. denied*, 417 U.S. 930 (1974).

[38] *See, e.g.*, Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 111 S. Ct. 2298 (1991), where the U.S. Supreme Court ignored Congress's attempt to insulate a board from separation-of-powers analysis by characterizing the members of Congress on the board as serving in their "individual capacities." The Court cited *Mistretta v. United States*, 488 U.S. 361, 393 (1989), for the proposition that "separation-of-powers analysis does not turn on the labeling of an activity." 501 U.S. at 267.

[39] *See generally* AMERICAN BAR ASSN. CODE OF JUDICIAL CONDUCT, Canon 4, 5 (1990).

[40] HAW. CONST. Art I, § 5 (emphasis added).

Funds,[41] which involved a will that instructed the principal of a high school and the local school board to award a college scholarship to a "worthy protestant boy." The New Hampshire Supreme Court ruled that it would violate both the New Hampshire and U.S. Constitutions for public officials such as the high school principal and the school board members to engage in activity that would discriminate among the students that might be eligible for such a scholarship on the basis of sex or religion. The court noted that it was required to choose between the competing values of protecting the right of individuals to dispose of their property as they wish and the public policy of ending discrimination, and ruled that the state and federal constitutions required it to choose the latter. The New Hampshire Supreme Court further stated that it would not violate these constitutions for a state court or other public body merely to facilitate or permit a "privately administered lawful discriminatory trust" to function.

Applying these principles to the Bishop Estate situation leads to the conclusion that it is a violation of the Hawaii and U.S. Constitutions for public officers such as our Supreme Court Justices to appoint only Protestant trustees to administer the Bishop Estate, because to do so would express a state preference for one religion and discriminate against non-Protestants. If the trustees were selected on a nondiscriminatory basis, however, it would be constitutionally permissible for the justices to appoint the trustees because the Bishop Estate, with its Hawaiian beneficiaries, and even if it still hired only Protestant teachers, would then be a "privately administered lawful discriminatory trust."

VII. The Potential For Conflicts of Interest

Another potential problem with the trustee appointment process is that the appointment of Bishop Estate trustees by Supreme Court Justices creates apparent or real conflicts of interest. Canon 2 of the Hawaii Code of Judicial Conduct says that "A judge should avoid impropriety and the appearance of impropriety in all his activities." According to Canon 5, "A judge should regulate his extrajudicial activities to minimize the risk of conflict with his judicial duties."

Judges, in general, are held to a higher standard of conduct than ordinary citizens. Judges are precluded from serving on non-law-related commissions because to do so would politicize the court and create an

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[41] 575 A.2d 1325 (N.H. 1985).

appearance of partiality. Judges may participate in charitable organizations, but their activities are restricted in several important respects. They must not raise funds and are prohibited from working with organizations that would give the appearance of bias, such as the Legal Aid Society, or organizations that frequently litigate, such as the American Civil Liberties Union. They must refrain from any activity that takes up so much time that it interferes with their judicial duties. In the past, when challenges concerning the Bishop Estate have reached the Hawaii Supreme Court, the justices have all felt obliged to recuse themselves from sitting on the dispute because of their past participation in the selection of trustees. In these cases, the Supreme Court has had to be restaffed with lower court judges,[42] thus inevitably casting doubt on the authority and legitimacy of the decision.

Furthermore, the principles of judicial ethics place restrictions on a judge's personal conduct. Judges may not belong to clubs that discriminate on the basis of race, sex, or religion, and must refrain from appearing at political functions. Judges must meet high standards of speech, avoiding racial slurs and swearing, and must avoid sexual misconduct. All of these restrictions are meant to preserve a high standard of impartiality so that judges may effectively carry out their role. It follows that they must avoid even the appearance that they favor a certain religious group.

VIII. Summary and Conclusions

To summarize:

1. It is legitimate for the Bishop Estate to use its resources for persons of Hawaiian ancestry, without regard to whether one characterizes the Estate as a public or private entity, because U.S. and Hawaii law clearly permit preferential programs for native people. In this instance, the preference is particularly logical because the lands came from the *ali'i* (chiefs) of the Hawaiian monarchy who held these lands in trust for the Hawaiian people. It would also be constitutional to require the Trustees to be persons of Hawaiian ancestry, because such a preference would be viewed as "political" — and related to the propriety of Hawaiians governing their own resources — and not as a "racial" discrimination.

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[42] *See, e.g.*, Kekoa v. Supreme Court of Hawaii, 55 Haw. 104, 516 P.2d 1239 (1973), *cert. denied*, 417 U.S. 930 (1974).

2. The U.S. Court of Appeals for the Ninth Circuit has ruled that The Kamehameha Schools cannot hire only Protestants as teachers, despite the fact that the schools are run by a private charitable trust, because the schools cannot be characterized as a bona fide religious institution.

3. If this decision is correct, then it is similarly unconstitutional to limit the trustees to persons of the Protestant faith, because the trustees are also employees governed by the 1964 Civil Rights Act.

4. It would also be unconstitutional for the members of the Hawaii Supreme Court to appoint the trustees of the Estate if such appointments must be limited to persons of the Protestant faith. It is not credible for the justices to pretend that they are acting in their individual capacity in making these appointments. They are making the appointments solely because they are Supreme Court Justices and thus are acting in an official capacity when they choose the trustees. For them to prefer persons of one religious belief over those of another religious belief would, therefore, be an explicit violation of their oath to adhere to the state and federal constitutions. This question would be more difficult if the appointment were limited to persons of a native religion, because — as explained above — preferences for natives are legitimate. Many Hawaiians, of course, are Protestants, but it cannot realistically be argued that the Protestant faith is the native religion of persons of Hawaiian ancestry. Many Hawaiians are Catholic, and some today still adhere to the traditional Hawaiian religious beliefs.

IX. What Remedies Are Appropriate

If it is inappropriate and unconstitutional for the members of the Hawaii Supreme Court to appoint the members of the Bishop Estate if the trustees must be Protestant, what changes must take place to allow the Estate to continue its important mission?

The justices could continue to appoint the trustees, but could more formally eliminate the requirement that the trustees be Protestants. Or, the trustees could be selected by some other mechanism. Under our constitutional principles, we can modify the goals of Princess Pauahi to conform to our modern notions of religious tolerance and diversity.

The State Legislature is empowered to intervene and introduce a new method of selecting trustees. Probably the best solution would be to have the beneficiaries — persons of Hawaiian ancestry — select the trustees through an election process, because they are the ones who ultimately stand to benefit if the trust is managed well, and to lose if

it is not. In a democracy, this approach seems like the only truly defensible solution.

It has also been suggested that the remaining trustees pick the new trustees, but a self-perpetuating board could eliminate the possibility of new blood being brought into the process, and would eliminate any sense of accountability for this important organization.

The eleven-member screening commission of the Hawaii Supreme Court appointed in January 1994 to evaluate trustee candidates[43] provided some opportunity for community input, but, as explained above, the justices scuttled that process in August 1994 and supplemented the committee's five nominees with ten of their own.

The person finally selected, Gerard Jervis, is a respected member of the community who has the ability to become an outstanding trustee, but some viewed his appointment with skepticism because he had previously served on the Judicial Selection Commission and thus had helped nominate some of the judges who in turn selected him.[44] Such suspicions, however unfounded, will be inevitable as long as the Hawaii Supreme Court continues to select the trustees.[45] It would be fairer both to the trustees and to the justices if a different process were used, and ultimately the Hawaiian beneficiaries should play a central role in this process.

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[43] *See* Pat Omandam, *High Court Panel to Screen for a Trustee*, HONOLULU STAR-BULLETIN, Jan. 13, 1994, at 1; Ken Kobayashi, *A Long List for Trustee Job*, HONOLULU ADVERTISER, March 11, 1994, at A7.

[44] Ken Kobayashi, *Jervis Picked as Bishop Trustee*, HONOLULU ADVERTISER, Nov. 11, 1994, at A1, col. 1.

[45] *See, e.g.*, Richard Borreca, *Bishop Trustee Reform a Wish*, HONOLULU STAR-BULLETIN, Dec. 10, 1993, at A3 (sharply criticizing several recent appointments of trustees as examples of cronyism).