

A Collective Memory of Injustice: Reclaiming Hawai‘i’s Crown Lands Trust in Response to Judge James S. Burns

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I ka ‘ōlelo no ke ola, i ka ‘ōlelo no ka make.¹

Words can heal; words can destroy.

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¹ MARY KAWENA PUKUI, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 129 (1983) (also translating the proverb as: “Life is in speech; death is in speech”). Consistent with Pukui’s interpretation but with a different emphasis, the authors of this article also literally translate this ‘ōlelo no‘eau as: “In the word there is life; in the word there is death.” Pukui’s translation, as well as the authors’ literal translation, will be used throughout this article.

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I. INTRODUCTION

The ‘Ōlelo No‘eau (Hawaiian proverb) above highlights the power of our words: they can heal and give life; or, obfuscate and destroy. Telling a story of a people and their ‘āina (lands) can heal and shed light on a lāhui’s (nation’s) motives and thinking during the most critical junctures in its history that impact all aspects of its culture, identity, and nationhood. Indeed, the very recounting of this history—who tells it, how it is told, which stories are shared, the nuances and complexities, the language used—can enlighten, restore, and inspire healing and reconciliation. Or, incite destruction.

In his recent article on the Crown Lands Trust,² the late Chief Judge James S. Burns (ret’d) took issue with several conclusions reached by the late Professor Jon M. Van Dyke in his book, *Who Owns the Crown Lands of Hawai‘i*?³ Professor Van Dyke, a noted legal scholar and constitutional

² James S. Burns, *The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?*, 38 U. HAW. L. REV. 213 (2016).

³ JON M. VAN DYKE, *WHO OWNS THE CROWN LANDS OF HAWAI‘I?* (2008). In 2009, Professor Van Dyke won the University of Hawai‘i Board of Regents’ Medal for Excellence in Research, in large part, for his work on this tome. See Press Release, Univ. of Haw., Regents’ Medal for Excellence in Research Awarded to Outstanding UH Faculty (Aug. 25, 2009), <http://www.hawaii.edu/news/article.php?aId=3055>; *Regents Medal for Excellence in Research*, UNIV. OF HAW., <https://www.hawaii.edu/about/awards/research07-11.php> (last visited Jan. 29, 2017).

law expert, sought to advance understanding of the Crown Lands Trust and provide a larger context for the Kānaka Maoli (Native Hawaiian)⁴ community's relationship to these important 'āina. Professor Van Dyke concluded that these lands, which Kauikeaouli Kamehameha III (Kamehameha III) had set aside as his personal lands during the 1848 Māhele,⁵ are subject to a trust that benefits the Native Hawaiian community. That carefully grounded assessment—of a vested beneficial Native Hawaiian interest in a significant portion of Hawai'i's lands—forms a key pillar of present-day and future Kānaka Maoli claims to reparative justice. Through his work and words, Professor Van Dyke sought to enlighten and inspire justice and healing.

The Burns article requires detailed responses that draw on the latest research and scholarship in Native Hawaiian law, politics, history, and more. This response interrogates the battle over the collective memory of injustice surrounding important events in Hawai'i's history leading up to the 1893 illegal overthrow of the Hawaiian Kingdom and other wrongs committed against Native Hawaiians, as well as their implications for indigenous rights and justice struggles in Hawai'i and beyond.⁶ In the wake of the 1893 overthrow, non-native historians developed and promoted a narrative that what happened in Hawai'i was not an injustice.⁷ Instead of

⁴ The Hawaiian Dictionary defines “maoli” as native, indigenous, aborigine, genuine, while “kanaka maoli” is defined as a Hawaiian native. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 240 (rev. & enlarged ed. 1986). “Kanaka” is the singular; “kānaka” is the plural. *Id.* at 127. The terms Kānaka Maoli and Native Hawaiian (plural) are used interchangeably in this Article.

⁵ The 1848 Māhele references the division of all of the Kingdom's 'āina between the mō'i or king, the ali'i or chiefs, and the government; each of these divisions reserved the rights of the native tenants. More generally, the Māhele refers to the entire process that resulted in a private property system in Hawai'i. Melody Kapilialoha MacKenzie, *Historical Background*, in NATIVE HAWAIIAN LAW: A TREATISE 2, 12–16 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat eds., 2015) [hereinafter NATIVE HAWAIIAN LAW]; see also KAMANAMAICALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION 142–53 (2014) (discussing the Māhele as a means to secure the land rights of Kānaka Maoli); LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 201–25 (1992) (detailing the Māhele process dividing the 'āina between the King and the Ali'i Nui (high chiefs), kaukau ali'i (lesser chiefs), and konohiki (land stewards)).

⁶ Collective memory is a social construct contextualized for justice struggles by Professors Sharon Hom and Eric Yamamoto. It explains that society's perception of history and past events are actively created by individuals, institutions (such as the media), nations, and other interests. Current understandings of past acts and the way they are related to current conditions inform rights, claims, and power structures. See Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747 (2000). More detail on collective memory is provided in Part II, *infra*.

⁷ See, e.g., RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1778–1854:

acknowledging those actions as a hostile takeover of an indigenous sovereign, myopic historians crafted a narrative around sugar planters, the economy, and land and power in Hawai‘i that prevailed as the collective memory and, thus, “history” for nearly a century.⁸ I ka ‘ōlelo no ke ola, i ka ‘ōlelo no ka make.⁹

For decades, indigenous scholars and their supporters have worked to redress these inaccuracies and reconstruct a more accurate collective memory of injustice.¹⁰ The Native Hawaiian sovereignty movement played a significant role.¹¹ In addition, legal scholars contextualized historical events from a social justice perspective.¹² By doing so, “they expand[ed]

FOUNDATION AND TRANSFORMATION (1938); RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1854–1874: TWENTY CRITICAL YEARS (1953); RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1874–1893: THE KALAKAUA DYNASTY (1967); *see also* Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court’s Narrative of Hawai‘i’s Past*, 39 U. HAW. L. REV. 631, 680–81 (2017) (deconstructing the biased writing of non-native historian Ralph S. Kuykendall who was hired by the Historical Commission of the Territory of Hawai‘i to frame history in a light most favorable to territorial government and noting that some native scholars who were heavily influenced by Christianity and westerners were also subject to such bias).

⁸ *See, e.g.*, Andrade, *supra* note 7, at 679–82 (describing the danger in allowing non-native and western-influenced historians to shape collective memory); *see also* Jonathan K.K. Osorio & Kamanamaikalani Beamer, *Sullyng the Scholar’s Craft: An Essay and Criticism of Judge James S. Burns’ Crown Lands Trust Article*, 39 U. HAW. L. REV. 469 (2017).

⁹ PUKUI, *supra* note 1, at 129 (translated here literally as “in the word there is life; in the word there is death”).

¹⁰ *See, e.g.*, BEAMER, *supra* note 5 (interrogating ali‘i agency through various actions, including the Māhele process); KAME‘ELEIHIWA, *supra* note 5 (deconstructing the Māhele process); DAVIANNA PŌMAIKA‘I MCGREGOR, NĀ KUA‘ĀINA: LIVING HAWAIIAN CULTURE (2007) (overviewing the traditional resource management system); JONATHAN KAY KAMAKAWIWO‘OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002) (detailing the history and politics of the Hawaiian Kingdom through 1887); NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004) (documenting native resistance to colonialism and particularly the overthrow and annexation); HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I (1999) (detailing the impacts of colonialism and injustice in Hawai‘i).

¹¹ *See, e.g.*, TRASK, *supra* note 10, at 1–25, 31–50 (analyzing the events that led to the illegal occupation and overthrow of Hawai‘i, and explaining the moral and political bases for the Hawaiian sovereignty movement). Indeed, because of political and legal advocacy stemming from the sovereignty movement, Hawai‘i’s legal regime now embraces principles of restorative justice for Kānaka Maoli. D. Kapua‘ala Sproat, *An Indigneous People’s Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENVTL. L.J. 157, 162 (2016).

¹² *See, e.g.*, Hom & Yamamoto, *supra* note 6; R. Hōkūlei Lindsey, *Native Hawaiians and the Ceded Lands Trust: Applying Self-Determination as an Alternative to the Equal Protection Analysis*, 34 AM. INDIAN L. REV. 223 (2009–10); MacKenzie, *supra* note 5; Susan

the law's narrow framing of injustice and focus[ed] on historical facts to more fully portray what happened and why it was wrong. In this way, history bec[a]me[] a catalyst for mass mobilization and collective action aimed at policymakers, bureaucrats, and the American conscience."¹³

The significance of these efforts to reclaim Hawai'i's collective memory is paramount, because "framing injustice is about social memory,"¹⁴ and constructing an accurate and compelling collective memory of injustice is a predicate to fashioning just reparative actions in the future. "Who tells the definitive history of group injustice—and how that history is framed—is vital to shaping a group's narrative and public image. And it can 'determine the power of justice claims or opposition to them.'"¹⁵ Importantly, "[s]ocial understandings of historical injustice are largely constructed in the present. Those understandings are rooted less in backward-looking searches for 'what happened' than in the present-day dynamics of collective memory."¹⁶ Indigenous and other scholars, including Professor Van Dyke, reframed significant events in Hawai'i's history to highlight the injustices to Kānaka Maoli and reconstruct society's collective memory of those incidents, such as the Māhele process and illegal nature of the 1893 overthrow.¹⁷ In partial response, the Hawai'i State Legislature and United States (U.S.) Congress apologized for past acts and recognized the need to redress this loss of life, land, and sovereignty.¹⁸ I ka 'ōlelo no ke ola, i ka 'ōlelo no ka make.¹⁹

K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai'i's Plantations to Congress—Puerto Ricans' Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353 (2011); D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 137 (2011); Eric K. Yamamoto & Sara D. Ayabe, *Courts in the "Age of Reconciliation"*: Office of Hawaiian Affairs v. HCDCH, 33 U. HAW. L. REV. 503, 527 (2011); Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311 (2001); Eric K. Yamamoto & Ashley Kaiāo Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5 (2009).

¹³ Hom & Yamamoto, *supra* note 6, at 1757.

¹⁴ *Id.* at 1756.

¹⁵ Serrano, *supra* note 12, at 359 (quoting Eric K. Yamamoto & Catherine Corpus Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of Rice v. Cayetano*, in RACE LAW STORIES 558 (Rachel F. Moran & Devon W. Carbado eds., 2008)).

¹⁶ Hom & Yamamoto, *supra* note 6, at 1757 (emphasis added).

¹⁷ See, e.g., sources cited *supra* notes 10–12.

¹⁸ See, e.g., Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter Apology Resolution] (apologizing to the Native Hawaiian people for the U.S. role in the illegal overthrow of the Hawaiian Kingdom); HAW. REV. STAT. § 10H-1 (2011) (recognizing Native Hawaiians as the only indigenous people of Hawai'i); Act of July 1,

Not surprisingly, a pushback is in full swing and reactionary forces are attempting to resurrect the colonizer's memory of Hawai'i's history and silence the indigenous narrative. The Burns article, intentionally or not, feeds directly into this effort by re-inscribing the old, inaccurate memory.²⁰ There are numerous problems with this approach. For example, the article relies on dubious sources of authority²¹ while ignoring leading experts in the fields of Native Hawaiian history, culture, and politics.²² The essay also takes facts and events out of context to bolster its claims.²³ Most problematic, however, is that the article reinvigorates the colonizer's narrative which, in turn, undermines Kānaka Maoli legal claims. "Individuals, social groups, institutions, and nations filter and twist, recall

1993, 1993 Haw. Sess. Laws 999 (acknowledging that Native Hawaiian sovereignty was denied and contemplating action to restore indigenous rights and dignity); Act of July 1, 1993, § 2, 1993 Haw. Sess. Laws 1009, 1010 (enacted to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing"); Act of June 30, 1997, § 1, 1997 Haw. Sess. Laws 956, 956 (conceding that "the legislature recognizes that the lasting reconciliation so desired by all people of Hawai'i is possible only if it fairly acknowledges the past while moving into Hawai'i's future").

¹⁹ PUKUI, *supra* note 1, at 129 (translated here literally as "in the word there is life; in the word there is death").

²⁰ The Burns article's incorporation of the old memory also threatens to re-traumatize Kānaka Maoli and undo the reparation efforts following the illegal overthrow. See Rachel López, *The (Re)Collection of Memory After Mass Atrocity and the Dilemma for Transitional Justice*, 47 N.Y.U. J. INT'L L. & POL. 799, 804 (2015) ("Efforts to deconstruct collective memory have the potential to undo the healing accomplished through dialogue and community identification.").

²¹ See, e.g., Burns, *supra* note 2, at 217 n.21 (citing the website HawaiiHistory.org), 218 n.22 (citing a 1993 National Park Service historic resource study), 225 n.59 and 226 n.70 (citing HISTORY OF THE HAWAIIAN KINGDOM, a seventh-grade textbook), 236 n.116 (citing the Stanford Encyclopedia of Philosophy, which is an open access website, and the OXFORD HANDBOOK OF THE HISTORY OF POLITICAL PHILOSOPHY, a collection of essays), 236 n.117 (citing the BLACK'S LAW DICTIONARY without giving the correct legal definition of the term), 241 n.139 (citing a collection of essays as fact, and without designating the author or essay title), 242 n.142 (citing a website source for the Kuleana Act rather than the actual Hawaiian Kingdom law).

²² See, e.g., *supra* note 10 and accompanying text; see also Andrade, *supra* note 7; Osorio & Beamer, *supra* note 8; Avis Poai, *Tales from the Dark Side of the Archives: Making History in Hawai'i Without Hawaiians*, 39 U. HAW. L. REV. 537 (2017).

²³ See Burns, *supra* note 2, at 236–38 (breaking down elected offices along racial lines to support his assertion that Hawaiians had lost control of the Kingdom prior to 1893), 245 (arguing that because the mō'i and ali'i received land in the Māhele, it was not inequitable because they were Hawaiian), 246–47 (alleging that the monarchs did not understand the Crown Lands to be a collective resource without any credible support), 247–56 (misconstruing several documents cited by Professor Van Dyke); see also *infra* Section III.A.1 (detailing Burns' misuse of State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977)).

and forget ‘information’ in reframing shameful past acts (thereby lessening responsibility)[.]”²⁴ Given recent challenges to Native Hawaiian rights and benefits at the local level,²⁵ the battle over the collective memory of injustice in Hawai‘i is critically important. After all, “[c]ollective memory not only vivifies a group’s past, it also reconstructs it and thereby situates a group in relation to others in a power hierarchy.”²⁶ Moreover, the “recounting of history shapes the present-day understanding of injustice, the current need for rectification, and the likely courses of action.”²⁷

This response addresses specific inaccuracies in the Burns article, such as Kamehameha III’s intent behind the Māhele, the United States’ pivotal role in the illegal overthrow of the Hawaiian Kingdom, the subsequent transfer of the Kingdom’s national lands to the United States, and the legal definition of Native Hawaiian, and explains how that framing perpetuates a narrative of justice or injustice and, thus, supports or undermines the legal basis for reparative action. Part II explores collective memory and explains its significance for justice struggles in general and for Kānaka Maoli in particular. Part III interrogates three examples from the Burns article and Part IV explains how this conflicting and inaccurate collective memory harms Native Hawaiian people, culture, and claims.

II. COLLECTIVE MEMORY’S VITAL ROLE IN SHAPING THE PUBLIC’S UNDERSTANDING OF HISTORY AND NATIVE HAWAIIAN RIGHTS’ CLAIMS

A. *Understanding Collective Memory*

In the early 1920s, French philosopher Maurice Halbwachs crafted the phrase “collective memory” in his book *Les cadres sociaux de la memoire* (On Collective Memory).²⁸ Halbwachs noted that memories are “linked to

²⁴ Hom & Yamamoto, *supra* note 6, at 1758.

²⁵ See *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007) (alleging that various state programs gave special treatment to Native Hawaiians); *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (en banc) (challenging Kamehameha Schools’ admissions policy as preferential based on race); *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003) (claiming that various provisions of the Hawai‘i Constitution violated the Equal Protection Clause); *Akina v. Hawai‘i*, 141 F. Supp. 3d 1106 (D. Haw. 2015), *aff’d*, 835 F.3d 1003 (9th Cir. 2016) (challenging self-determination efforts by a group of Native Hawaiians); *Corboy v. Louie*, 128 Hawai‘i 89, 283 P.3d 695 (2011) (alleging that tax exemptions for Hawaiian homestead lessees involved racial discrimination and violated the U.S. Constitution).

²⁶ Hom & Yamamoto, *supra* note 6, at 1758.

²⁷ See Serrano, *supra* note 12, at 360.

²⁸ See MAURICE HALBWACHS, *ON COLLECTIVE MEMORY* (Lewis A. Coser ed. & trans., Univ. of Chi. Press 1992) (1925) (addressing how human memory functions within a

ideas we share with many others, to people, groups, places, dates, words and linguistic forms, theories and ideas, that is, with the whole material and moral framework of the society of which we are part."²⁹ Collective memory is about more than simply recalling fixed collections of data "retrieved from a brain storehouse."³⁰ Memories are produced through the release of neurochemicals in the brain as people engage in complex interactions with others and their social environments.³¹ These memories are "constructed and continually reconstructed"³² as individuals "subconsciously choose what to remember in ways that reflect their desires, hopes, and the cultural norms of their social environment."³³ Therefore, as people grow and their opinions of the world shift, memories and past experiences subconsciously change as well, shaping the way that they understand past events and present circumstances.³⁴

The purposeful development of collective memory generates significant narrative structures that shape how society constructs and relates to individual and group identity and claims.³⁵ "Memories of past events,

collective context).

²⁹ Erika Apfelbaum, *Halbwachs and the Social Properties of Memory*, in *MEMORY: HISTORIES, THEORIES, DEBATES* 77, 86 (Susannah Radstone & Bill Schwarz eds., 2010) (quoting MAURICE HALBWACHS, *LES CADRES SOCIAUX DE LA MÉMOIRE* 38–39 (Albin Michel 1994)) (explaining how mental images of the present reconstruct the memories of the past).

³⁰ Hom & Yamamoto, *supra* note 6, at 1760 (describing the general insight of collective memories). Memories of the past are not stored and retained in a "vacuum free from external influence." López, *supra* note 20, at 807.

³¹ See Hom & Yamamoto, *supra* note 6, at 1760 (citing John H. Krystal et al., *Post Traumatic Stress Disorder: Psychobiological Mechanisms of Traumatic Remembrance*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 150, 154–55 (Daniel L. Schacter ed., 1995) [hereinafter *MEMORY DISTORTION*] (finding that the release of neurochemicals in the brain during trauma contributes to the powerful recollections of horrific events). See generally Cathy Treadaway, *Materiality, Memory and Imagination: Using Empathy to Research Creativity*, 42 *LEONARDO* 231, 231 (2009) ("Emotional responses to sensory stimulation have been found to enhance the strength of memories due to the release of neurochemicals in the brain.").

³² Hom & Yamamoto, *supra* note 6, at 1760; see also Lisa J. Laplante, *Memory Battles: Guatemala's Public Debates and the Genocide Trial of José Efraín Ríos Montt*, 32 *QUINNIPIAC L. REV.* 621, 635 (2014) (explaining how external factors such as media can continue to (re)shape a society's collective memory for decades).

³³ Hom & Yamamoto, *supra* note 6, at 1761 (citing Gerald D. Fischbach & Joseph T. Coyle, *Preface to MEMORY DISTORTION*, *supra* note 31, at ix).

³⁴ *Id.* (citing MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 64 (1998) ("People change, and the meanings of their past experiences change as their ways of interpreting the world shift.")).

³⁵ See *id.* (citing Craig R. Barclay, *Autobiographical Remembering: Narrative Constraints on Objectified Selves*, in *REMEMBERING OUR PAST: STUDIES IN AUTOBIOGRAPHICAL MEMORY* 67, 94 (David C. Rubin ed., 1996)).

persons, and interactions are culturally framed because they are subject to socially structured patterns of recall, they are often triggered by social stimuli and they are conveyed through communal language.”³⁶ Importantly, these narratives “frame what is remembered and . . . stories reinforce a group’s identity and compose the frameworks people use to make the past meaningful.”³⁷ In other words, narrative structures provide critical context—the essential language, ideas, and images of the “stories”—necessary to understand past events.³⁸ They also connect the past to the present, shaping “the past in light of how we see (or want to see) ourselves and others” in this moment.³⁹ For example, different historical narratives of the wars between Native Americans and the U.S. government produce conflicting views of Native Americans today.⁴⁰ Some view those wars as a repulsive history of racism while others see them as a necessary foundation for building the United States as a nation.⁴¹

In addition to personal experiences, narratives of historical memory are easily influenced by culture, politics, and economics, adding to the

³⁶ *Id.* (citing Michael Schudson, *Dynamics of Distortion in Collective Memory*, in MEMORY DISTORTION, *supra* note 31, at 346); *see also* López, *supra* note 20, at 807 (reiterating Halbwach’s discussion that common culture and experiences often bind and define people in a group).

³⁷ Hom & Yamamoto, *supra* note 6, at 1761–62 (quoting Barclay, *supra* note 35, at 94).

³⁸ *Id.* at 1762; *see also* López, *supra* note 20, at 809 (citing ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 79 (George Simpson trans., 1933)) (“At other times, collective memory reflects what sociologist Émile Durkheim called the collective conscience, which is a nation’s or society’s collective understanding of its own history.”).

³⁹ Hom & Yamamoto, *supra* note 6, at 1762. Additionally, Maoli professor, scholar, and activist Osorio writes:

This is our history. It is like the ‘āina, to be shared with one another, to be fought over, to be transformed by our own works and ideas, to be utterly destroyed by the flow of change, as Pele does on Hawai‘i, to be reborn alive with the new vegetation of Hi‘iaka. Yet the mo‘olelo does not belong to us as a people either, so much as we belong to it. Our history owns us, shapes and contextualizes us.

OSORIO, *supra* note 10, at ix.

⁴⁰ *See* Hom & Yamamoto, *supra* note 6, at 1762 (citing Schudson, *supra* note 36, at 346).

⁴¹ *See id.* (quoting Schudson, *supra* note 36, at 346). Michael Schudson also provides another example of contrasting views of Native Americans. *Id.* For some, skeletal remains of Native Americans contributed to the “impersonal history” of humans and were viewed as “valuable specimens for scientific research.” *Id.* In contrast, some viewed them as “cherished property[.]” deserving of “reverent treatment and . . . reburial] according to the customs of Native American groups.” *Id.*; *see also* Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986) (describing the history of America’s physical and cultural genocide of native people and how that shaped Indian law’s legal and political climate). *See generally* ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST* (1990).

complexity of how collective memory is socially constructed and subject to manipulation.⁴² As a result of societal influences, historical memory is selective and subjective. Historian Peter Burke explains:

A way of seeing is a way of not seeing, a way of remembering is a way of forgetting, too. If memory were only a kind of registration, a “true” memory might be possible. But memory is a process of encoding information, storing information and strategically retrieving information, and there are social, psychological, and historical influences at each point.⁴³

Therefore, society’s collective memories are continually molded by contemporary values and ideological pressures.

University of Hawai'i Law Professor Eric Yamamoto highlighted collective memory’s significance in a social justice context, noting that the struggle for justice is largely based on how the public and courts view a group’s story and image through its history of injustice.⁴⁴ In this legal context, collective memory informs the way in which historical injustices are “aggravated or salved.”⁴⁵ As Professor Yamamoto observed, “[i]ndividuals, social groups, institutions, and nations filter and twist, recall and forget ‘information’ in reframing shameful past acts (thereby lessening responsibility) as well as in enhancing victim status (thereby increasing power).”⁴⁶ The “recounting of historical events often determines whether, and to what extent, historical injustice occurred and the present-day need for rectification.”⁴⁷

⁴² See Hom & Yamamoto, *supra* note 6, at 1762; MINOW, *supra* note 34, at 118–20 (highlighting how political leaders often alternate between remembering and forgetting memories to change the public’s view surrounding certain societies and events).

⁴³ Peter Burke, *History as Social Memory*, in *MEMORY: HISTORY, CULTURE AND THE MIND* 97, 103 (Thomas Butler ed., 1989).

⁴⁴ Hom & Yamamoto, *supra* note 6, at 1756–57; see also Laplante, *supra* note 32, at 624–25 (describing the “memory battle” surrounding the criminal proceedings against Guatemala’s former leader, General José Efraín Ríos Montt, in obtaining justice).

⁴⁵ Hom & Yamamoto, *supra* note 6, at 1757; see Jody Lyneé Madeira, *When it’s So Hard to Relate: Can Legal Systems Mitigate the Trauma of Victim-Offender Relationships?*, 46 *HOUS. L. REV.* 401, 425 (2009) (“Legal decisions thus become touchstones for the formation of collective memory, as they ‘set the tone for the public’s response at the very moment that they claim to express it’ and ‘prefigure popular sentiment and give it a degree of definition which it would otherwise lack.’” (internal citations omitted)).

⁴⁶ Hom & Yamamoto, *supra* note 6, at 1758; see also MINOW, *supra* note 34, at 119 (“[M]emory becomes a political tool . . . [as t]he double-edged dangers of too much and too little memory lead contemporary figures to make paradoxical calls about remembering the past.”).

⁴⁷ Serrano, *supra* note 12, at 363 (citation omitted). For example, the Native Hawaiians Study Commission, which was commissioned by Congress to assess the federal government’s responsibility to the Native Hawaiian community in the 1980s, drew heavily from Kuykendall’s work. Andrade, *supra* note 7, at 680–81; Native Hawaiians Study

Professor Yamamoto was among the first to consider collective memory's implications for Kānaka Maoli rights and entitlements, centering on the consequences of the 1893 illegal overthrow of the sovereign Hawaiian nation.⁴⁸ The overthrow catalyzed not only the suppression of Native Hawaiian culture and language, but also the development of derogatory characterizations of Kānaka Maoli.⁴⁹ Native Hawaiians seeking justice for the loss of their government and homelands continue to build their “own new understandings of ‘what happened’ and ‘who [they] were’ partly in order to claim ‘what is rightfully [theirs].’”⁵⁰ This underscores the importance of collective memory in Hawai‘i, and how it incorporates ancestral memories⁵¹ to lay a foundation for contemporary Kānaka Maoli legal claims.⁵²

Commission Act, Pub. L. 96-565, tit. 3, 94 Stat. 3324 (1980) (codified at 42 U.S.C. § 2991a note). Ultimately, the Commission decided that the federal government was not responsible for the illegal overthrow. Andrade, *supra* note 7, at 681; NATIVE HAWAIIANS STUDY COMM'N, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS, PURSUANT TO PUBLIC LAW 96-565, TITLE III 320 (1983).

⁴⁸ Hom & Yamamoto, *supra* note 6, at 1759–60; see MacKenzie, *supra* note 5, at 20–21 (discussing the history of Hawai‘i from the founding of the Hawaiian Kingdom to the acquisition of Hawai‘i by the United States); see also *infra* Section III.A and accompanying text (detailing historical background).

⁴⁹ Foreigners continued to subdue practices that did not comply with western cultures. “Those who deposed the queen felt that the suppression of both native Hawaiian culture and ‘ōlelo Hawai‘i was strategically necessary to prevent a counter coup and to secure Hawai‘i a protected status under the United States.” Kamaonāpalikūhōnua Souza & K. Ka‘ano‘i Walk, ‘*Ōlelo Hawai‘i and Native Hawaiian Education*, in NATIVE HAWAIIAN LAW, *supra* note 5, at 1270 (citation omitted). “[Native] Hawaiians were sometimes pejoratively described by white American missionaries (savages and pagans), businessmen (incompetents), and politicians (a dying race), and later by racial immigrant groups (lazy and uneducated).” Hom & Yamamoto, *supra* note 6, at 1760 (citing TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA’S ANNEXATION OF THE NATION OF HAWAII (1998)).

⁵⁰ Hom & Yamamoto, *supra* note 6, at 1760. Indeed, “[t]his linkage of events to identity and then to rights implicates contemporary notions of group and nationhood.” *Id.*

⁵¹ Ancestral memories are oral traditions passed down through generations via various means of communication, including genealogies, place names, and chants. See *id.* at 1759 (defining ancestral as “genealogy preserved orally over generations through chants” (citation omitted)); Kekuewa Kikiloi, *Rebirth of an Archipelago: Sustaining a Hawaiian Cultural Identity for People and Homeland*, in 6 HŪLILI: MULTIDISCIPLINARY RESEARCH ON HAWAIIAN WELL-BEING 73, 78 (2010).

⁵² Hom & Yamamoto, *supra* note 6, at 1759–60. Kānaka Maoli are “still struggling with the ramifications of the U.S. government-aided illegal overthrow. . . . [t]hey lost their government and homelands and had their language and culture suppressed.” *Id.* at 1760.

B. *Collective Memory's Power and Potential*

Collective memory is critically important; it is shaped by and in turn shapes perceptions of justice and injustice, thereby impacting the claims and rights of Native Hawaiians and other historically disadvantaged groups. Collective memory's significant role in justice struggles extends beyond the historical facts and into the mind, spirit, and culture of both the past and present.⁵³ Through this process, memories are constructed in the context of "not only rights norms but also larger societal understandings of injustice and reparation."⁵⁴ The back-and-forth struggles between conflicting collective memories are generally struggles between colliding ideologies and worldviews.⁵⁵ Importantly, collective memory can be used regressively or progressively, depending on who deploys the more compelling narrative.⁵⁶

1. *Collective memory's practical implications for justice struggles in Hawai'i and beyond*

In elucidating collective memory's power and potential for justice struggles, Professor Yamamoto identified five strategic points. First,

⁵³ *Id.* at 1764; see Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 475 (1995) ("Collective memory . . . consists of the stories a society tells about momentous events in its history, the events that most profoundly affect the lives of its members and most arouse their passions for long periods.").

⁵⁴ Hom & Yamamoto, *supra* note 6, at 1764. Collective memories serve as a "healing power" for societies that experience trauma after mass atrocities. See López, *supra* note 20, at 811–12 (citation omitted) ("In the wake of tragic deaths, there is a societal need for an explanation about what occurred and for collective understandings of the root causes of violence.").

⁵⁵ Hom & Yamamoto, *supra* note 6, at 1764. As Edward Said notes:
[Stories are] the method colonized people use to assert their own identity and the existence of their own history. The main battle in imperialism is over land, of course; but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future—these issues were reflected, contested, and even for a time, decided in narrative.

EDWARD SAID, *CULTURE AND IMPERIALISM* xii (1993).

⁵⁶ Hom & Yamamoto, *supra* note 6, at 1764. "The ideological aggression which tends to dehumanize and then deceive the colonized finally corresponds to concrete situations which lead to the same result. To be deceived to some extent already, to endorse the myth and then adapt to it, is to be acted upon by it." ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 91 (1965); see Yamamoto & Betts, *supra* note 15, at 564 (citation omitted) ("Both proponents and opponents of redress select certain events or images to shape their version of the story."); see also *infra* Section II.B.2 (explaining how the U.S. Supreme Court used collective memory regressively in *Rice v. Cayetano*, 528 U.S. 495 (2000)).

“[j]ustice claims of ‘right’ start with struggles over memory.”⁵⁷ Collective memories differ depending on locale, group experiences, and cultural norms, which create conflicting memories within different groups.⁵⁸ Therefore, it is important to understand and “engage the dynamics of group memory of injustice.”⁵⁹

Second, the “[g]roup memory of injustice is characterized by the active, collective construction of the past.”⁶⁰ As noted earlier, memories are not fixed recollections of past experiences. Collective memory is a social construct that continues to be shaped by present-day “interactions among people, institutions, media, and cul[t]ural forms.”⁶¹ Collective memories, therefore, “are not found, but rather are built and continually altered.”⁶²

Third, “[t]he construction of collective memory implicates power and culture.”⁶³ “[J]ustice claims often turn[] on which memories are

⁵⁷ Hom & Yamamoto, *supra* note 6, at 1764; see Yamamoto & Betts, *supra* note 15, at 563 (citing GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE—THE ESSENTIAL GUIDE FOR PROGRESSIVES (2004)) (“Those struggles are a fight over who will tell the dominant story of injustice (or absence thereof) and how that story will be shaped.”).

⁵⁸ Hom & Yamamoto, *supra* note 6, at 1764. (“[I]mages, ideas, and recollections . . . are filtered and interpreted to present particular understandings of the past[,]” creating different versions of collective memories); see Laplante, *supra* note 32, at 623.

⁵⁹ Hom & Yamamoto, *supra* note 6, at 1764. For example, several legal scholars note that constructing and fighting for certain collective memories establish foundations for redress and reconciliation after mass trauma. See MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 6 (1996) (“[T]he best way to prevent recurrence of genocide, and other forms of state-sponsored mass brutality, is to cultivate a shared and enduring memory of its horrors—and to employ the law self-consciously toward this end.”); MARTHA MINOW, BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 16 (2002) (“[S]ome people will always remember what happened, but if there are no collective efforts to remember, a society risks repeating its atrocities by failing to undo the dehumanization that laid the groundwork for them.”).

⁶⁰ Hom & Yamamoto, *supra* note 6, at 1764; see Samuel (Muli) Peleg, *Quintessential Intractability: Attractors and Barriers in the Palestinian-Israeli Conflict*, 16 CARDOZO J. CONFLICT RESOL. 543, 571 (2015) (citation omitted) (“Developing collective memory involves the construction of a selective and encouraging presentation of the past especially with regard to the intractable conflict.”).

⁶¹ Hom & Yamamoto, *supra* note 6, at 1764; see López, *supra* note 20, at 807 (citation omitted) (“Our interactions with the world deeply color what we perceive our past lives to be and how we remember important events.”).

⁶² Hom & Yamamoto, *supra* note 6, at 1764. The construction of collective memory constantly adds and forgoes new pieces of recollections. It is “more like an endless conversation than a simple vote on a proposition.” OSIEL, *supra* note 59, at 47 (quoting John Thelen, *Memory and American History*, 75 J. AM. HIST. 1117, 1127 (1992)).

⁶³ Hom & Yamamoto, *supra* note 6, at 1765. Collective memories most often involve power struggles between political leaders and community members; see Laplante, *supra* note

acknowledged by decisionmakers.”⁶⁴ The struggle over collective memory is thus “hotly contested by those supporting and those opposing justice claims.”⁶⁵ Ultimately, different collective memories are fundamental disagreements on worldviews and ideologies.⁶⁶ When those in power are threatened by groups reconstructing historical injustice, they seek to discredit the developing memory or resurrect the old memory themselves to maintain the status quo.⁶⁷ Another common practice is to “partially transform the old memory . . . into a new memory . . . that justifies continued hierarchy.”⁶⁸

Fourth, “[t]hese contests over historical memory regularly take place on the terrain of culture—of which legal process, and particularly civil rights adjudication, is one, but only one, significant aspect.”⁶⁹ Decisionmakers

32, at 623 (“The positions taken up by memory-makers are often political, especially when the stakes are high and different consequences flow from each interpretation.”).

⁶⁴ Hom & Yamamoto, *supra* note 6, at 1765; see Laplante, *supra* note 32, at 623 (citation omitted) (“[C]ollective understanding of the past can lead to the pursuit, or frustration, of accountability; shape a national political agenda; and dramatically impact a society’s identity both internally and externally.”).

⁶⁵ Hom & Yamamoto, *supra* note 6, at 1765; see Roger Michel, Book Review, 88 MASS. L. REV. 117, 119 (2003) (reviewing MARTHA MINOW, *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* (2002)) (“[R]eparations are a way for an oppressor group to validate the often forcibly suppressed memory of its victims.”).

⁶⁶ Hom & Yamamoto, *supra* note 6, at 1765; see also Peleg, *supra* note 60, at 553 (2015) (describing the negative views Israelis and Palestinians have of each other’s narratives). Compare KUYKENDALL, *supra* note 7 (portraying the colonization of Hawaiian society as welcomed by the Hawaiians), with SILVA, *supra* note 10 (refuting the myth of Kānaka Maoli passivity and nonresistance to political, economic, linguistic, and cultural oppression, beginning with the arrival of Captain Cook to the struggle over annexation), and BEAMER, *supra* note 5, at 197 (disagreeing with “any proposition that the overthrow was causally connected to ali’i acceptance of law as defined by Europeans. . . . It was not Hawaiian acceptance of the law that led to the overthrow; rather, it was the oligarchy’s conspiring against the law.”).

⁶⁷ Hom & Yamamoto, *supra* note 6, at 1765. See generally Eric K. Yamamoto, Susan K. Serrano & Michelle Natividad Rodriguez, *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1316 (2003) (noting the significance of presenting a new collective memory for groups seeking reparations).

⁶⁸ Hom & Yamamoto, *supra* note 6, at 1765. An example includes transforming the old memory, depicting that slavery benefited the slaves, into a new memory, portraying that slaves could not handle freedom, to justify continued segregation. *Id.* (citing Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129–31 (1997)).

⁶⁹ *Id.* For example, political constraints may have affected the “production and preservation of accurate collective memory” regarding the Rwandan genocide. José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 398 (1999) (“It remains to be seen whether that tribunal . . . will be able to engage in the

“determine[] which cultural practices, images, and narrative formally frame the memories. And those memories in turn legitimate future understanding of and action on justice claims.”⁷⁰

Finally, it is vital that participants in justice struggles “conceive of law and legal process as contributors to—rather than as the essence of—larger social justice strategies.”⁷¹ Therefore, rights struggles must aim to both “achieve the specific legal result and . . . contribute to construction of social memory as a political tool.”⁷²

Professor Yamamoto’s five strategic points underscore collective memory’s powerful role in justice struggles in Hawai‘i and beyond. In particular, they highlight the ongoing battle over collective memory as well as the importance of responding to the Burns article due to its implications for Kānaka Maoli culture and claims. Purposefully or not, that piece attempts to inscribe the old, inaccurate memory of Hawai‘i’s history and undermine the legal basis for Native Hawaiian rights.

2. *Rice v. Cayetano: A disturbing example of how collective memory can be deployed to dismantle Native Hawaiian self-determination*

Professor Yamamoto’s analysis of the U.S. Supreme Court decision in *Rice v. Cayetano*⁷³ illustrates how collective memory can be deployed to

kinds of broad-gauged historical inquiries into the Rwandan genocide that are essential to preserving collective memory and to generating public confidence in its accuracy.”). Thus, “[c]ollective memory . . . should be constructed by the collective; it should be a product of local civil-society . . .” *Id.* at 399.

⁷⁰ Hom & Yamamoto, *supra* note 6, at 1765 (citation omitted). Examples of non-legal symbolic processes that also share collective memories include cultural expressions through “books, museums, memorials, murals, commemorative parks, ceremonies, art, and theater[.]” Laplante, *supra* note 32, at 628.

⁷¹ Hom & Yamamoto, *supra* note 6, at 1765. Osorio notes:

All of the most significant transformations in nineteenth-century Hawai‘i came about as legal changes: in rulership, in land tenure, in immigration, and especially in the meaning of identity and belonging. The Hawaiian saying “I ka ‘ōlelo ke ola, i ka ‘ōlelo ka make” reminds us that language is a creator and a destroyer, and law is nothing if not language.

OSORIO, *supra* note 10, at 251; *see also* MINOW, *supra* note 59, at 19 (“[C]ollective memory, carr[ies] the chance . . . of rebuilding societies. . .”).

⁷² Hom & Yamamoto, *supra* note 6, at 1765 (citation omitted) (“[I]t is never enough for societal outsiders only to frame the injustice narrowly to satisfy legal norms.”). For example, a court’s decision on which collective memory prevails achieves both a legal result and contributes to social memory. *See* Serrano, *supra* note 12, at 360 (citation omitted) (“A judge’s recounting of history shapes the present-day understanding of injustice, the current need for rectification, and the likely courses of action.”).

⁷³ 528 U.S. 495 (2000). Some text in this section discussing *Rice* and its players initially appeared in Sproat, *supra* note 12.

undermine Kānaka Maoli rights and advances in self-determination. At bottom, this decision was “a fierce battle over conflicting histories” with significant impacts for Native Hawaiians.⁷⁴ It also illuminates “the political and cultural dynamics and strategic import of collective memory for justice claims processed through the U.S. legal system.”⁷⁵

In 1996, Harold “Freddy” Rice, a descendant of a white missionary family, filed suit against Hawai'i governor Ben Cayetano, seeking to invalidate the Office of Hawaiian Affairs' (OHA's) indigenous Hawaiians-only election for the agency's Board of Trustees.⁷⁶ Rice claimed that the voting restriction violated the Fifteenth and Fourteenth Amendments of the U.S. Constitution and discriminated against non-Hawaiians.⁷⁷ The state

⁷⁴ Hom & Yamamoto, *supra* note 6, at 1771; see Yamamoto & Betts, *supra* note 15, at 563.

⁷⁵ Hom & Yamamoto, *supra* note 6, at 1777. Often, judges strategically set up narratives in such a way to “blot out the collective memory of racism.” See Yamamoto & Betts, *supra* note 15, at 567 (citing David Breshears, *One Step Forward, Two Steps Back: The Meaning of Equality and the Cultural Politics of Memory in Regents of the University of California v. Bakke*, 3 J.L. Soc'y 67, 88 (2002)).

⁷⁶ See *Rice*, 528 U.S. at 509. The Office of Hawaiian Affairs (OHA) is an agency of the State of Hawai'i established as a result of the 1978 Constitutional Convention to combat the lingering effects of colonialism by improving the conditions of Hawai'i's indigenous people. See HAW. CONST. art. XII, § 5; *Legal Basis*, OFFICE OF HAWAIIAN AFFAIRS, <http://www.oha.org/about/history/constitution/> (last visited Jan. 20, 2017). The agency's mission is “[t]o mālama [(protect)] Hawai'i's people and environmental resources, and OHA's assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally.” OFFICE OF HAWAIIAN AFFAIRS, 2010–2018 STRATEGIC PLAN OF THE OFFICE OF HAWAIIAN AFFAIRS 2 (2010), http://www.oha.org/wp-content/uploads/2014/11/oha_stratplanbroch0312web-1.pdf. OHA currently manages almost 30,000 acres of land. OFFICE OF HAWAIIAN AFFAIRS, 2015 OFFICE OF HAWAIIAN AFFAIRS ANNUAL REPORT 7 (2015), <http://www.oha.org/wp-content/uploads/OHA2015AR.pdf>. Because of the U.S. Supreme Court's decision in *Rice*, a board of nine trustees elected by the general public (as opposed to Native Hawaiians), now governs the agency. *Legal Basis*, OFFICE OF HAWAIIAN AFFAIRS, *supra*. “The Board of Trustees is responsible for setting OHA policy and managing the agency's trust.” *Id.*; see Melody Kapilialoha MacKenzie, *Native Hawaiians and U.S. Law*, in NATIVE HAWAIIAN LAW, *supra* note 5, at 273–76, 284–90 (discussing the creation of OHA and the *Rice v. Cayetano* decision).

⁷⁷ See *Rice*, 528 U.S. at 510 (claiming that OHA's voting limitation facilitated racial discrimination). Rice was a:

[W]hite rancher whose ancestors came to Hawai'i in the mid-1800s as Christian missionaries and eventually built a ranching empire on land that had formerly belonged to Native Hawaiians. Despite having benefitted personally (including accumulating land and other resources) as a direct result of his family's role in colonizing Hawai'i, Rice sued the State of Hawai'i for not allowing him to vote in

explained that the Native Hawaiian people, similar to Native Americans, constitute a “political” class as opposed to a “racial” minority, and therefore, the election was legal.⁷⁸

The underlying battle in *Rice* focused on the competing collective memories of the Native Hawaiian experience. The U.S. Supreme Court majority ignored the indigenous narrative and narrowly crafted a story of racial discrimination against whites while conveniently omitting “the deep history of white racism integral to the dismantling of the Hawaiian nation.”⁷⁹ The majority’s collective memory in *Rice* “distort[ed] progressive civil rights and erase[ed] human rights.”⁸⁰ For native groups and Kānaka Maoli in particular, this decision “generated precedent for forthcoming cases that undermine[d] the principle of justice through reparation”⁸¹ and threatened native programs nationwide.⁸² Moreover, the

OHA elections, claiming this restriction contravened the Voting Rights of 1965 as well as the Fourteenth and Fifteenth Amendments. Although each of those laws was specifically crafted to protect historically disadvantaged groups, *Rice* turned the laws on their heads, wielding them against a historically disadvantaged group to challenge the group’s ability to elect trustees for an agency designed to manage Indigenous resources in partial redress for the devastation imposed by American colonialism.

Sproat, *supra* note 12, at 158–59 (citations omitted).

⁷⁸ *Morton v. Mancari*, 417 U.S. 535, 553 n.24, 553–54 (1974). The U.S. District Court for the District of Hawai‘i rejected *Rice*’s claims and upheld the State of Hawai‘i’s treatment of Native Hawaiians as a political entity. *Rice v. Cayetano*, 963 F. Supp. 1547, 1548, 1553–58 (D. Haw. 1997). In doing so, Judge David Alan Ezra both recognized Native Hawaiians as the archipelago’s indigenous people and respected their continuing relationship with the state and federal governments as analogous to other native people throughout the United States. *Id.* at 1548, 1553–54. The Ninth Circuit affirmed. *Rice v. Cayetano*, 146 F.3d 1075, 1076 (9th Cir. 1998). But, the U.S. Supreme Court reversed. *Rice*, 528 U.S. at 498–99.

⁷⁹ Hom & Yamamoto, *supra* note 6, at 1775. See David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 TEMP. POL. & CIV. RTS. L. REV. 1, 40 (2006) (“[T]he narratives work together to erase almost all historical traces of Western race-based usurpation and dispossession of Native Hawaiians.”); see also Yamamoto & Betts, *supra* note 15, at 568 (quoting Breshears, *supra* note 75, at 88) (“Breshears interprets the growing mainstream acceptance of colorblindness in lieu of traditional civil rights racial awareness as a convenient ‘forgetting’ used to ‘assuage the feelings of guilt that plague the collective white conscience.’”).

⁸⁰ Hom & Yamamoto, *supra* note 6, at 1777; see Barnard, *supra* note 79, at 40. Barnard noted:

The Court’s selective and biased historical reporting, despite the initial disavowal of any ideological purpose, perpetuates colonialist condescension toward native peoples; avoids the most uncomfortable facts concerning a near-genocidal population decline; glosses over the cunning manipulation of natives who were unfamiliar with Western constructs of private property; and depicts the agents of the overthrow of the legitimate government of Hawaii as liberators and defenders of democratic rule.

⁸¹ Hom & Yamamoto, *supra* note 6, at 1777 (citation omitted); see Yamamoto & Betts,

legal and practical impacts of the case—twisting the rule of law to enable non-natives to once again attempt to direct the management of Native Hawaiian resources administered by OHA—“extend[ed] far across the social justice landscape.”⁸³

Deliberately or not, the Burns article employs a similar approach to re-inscribe an erroneous memory of Kānaka Maoli by deploying a narrative analogous to the one devised by the *Rice* majority. For example, the article wrongly claims that before the 1893 overthrow, indigenous Hawaiians did not control their government, downplaying, if not justifying, the overthrow of the monarchy.⁸⁴ The essay contends that Native Hawaiians gave up their sovereignty rights to a mix of Hawaiians and Caucasians before the overthrow, and thus Native Hawaiians “did not expressly, implicitly or by operation of law retain ‘inherent sovereignty’ or any rights to self-determination. They unconditionally relinquished sovereignty and all subordinate rights including inherent sovereignty and rights to self-determination[,]” thereby dismissing a significant aspect of the 1993 Apology Resolution in which the United States apologized for its role in the overthrow of the Hawaiian Kingdom.⁸⁵ These and other inaccurate characterizations distort the collective memory of the injustices committed against Kānaka Maoli and discount the legal and other vehicles established to right those wrongs.

supra note 15, at 567 (citing *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 416 F.3d 1025 (9th Cir. 2005)) (highlighting how the non-Hawaiians in *Doe* used *Rice* to challenge Kamehameha Schools’ preference for Hawaiian children on racial discrimination grounds); *see also* Decision & Order Re Motions for Summary Judgment at 15, *Davis v. Guam*, Civ. No. 11-00035, 2017 WL 930825, at *15 (D. Guam Mar. 8, 2017) (political status referendum that limits voting to “native inhabitants of Guam” violates both the Fifteenth and Fourteenth Amendments to the U.S. Constitution); *Davis v. Commonwealth Election Comm’n*, 844 F.3d 1087, 1089 (9th Cir. 2016) (holding that a provision of the Commonwealth of the Northern Mariana Islands constitution restricting voting in certain elections to those of Northern Marianas descent violates Fifteenth Amendment voting rights).

⁸² Hom & Yamamoto, *supra* note 6, at 1776; *see* Kimberly A. Costello, *Rice v. Cayetano: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status*, 79 N.C. L. REV. 812, 852 (2001) (“Native Hawaiians risk losing not only programs that benefit them, but any chance to attain the sovereignty they seek.”).

⁸³ Hom & Yamamoto, *supra* note 6, at 1771; *see* Costello, *supra* note 82, at 852 (noting how the decision in *Rice* leaves any “legislation vulnerable to challenge,” including congressional plenary power over Native Americans).

⁸⁴ Burns, *supra* note 2, at 238.

⁸⁵ *Id.* at 253–54 (disagreeing with the Apology Resolution’s statement that the overthrow “resulted in the suppression of the inherent sovereignty of the Native Hawaiian people” and “deprivation of the rights of Native Hawaiians to self-determination”). *But see* Osorio & Beamer, *supra* note 8, at 472 (noting the three decades of scholarship showing the strategic leadership of Hawaiian ali‘i during the Kingdom period).

III. I KA ‘ŌLELO NO KA MAKE—WORDS CAN DESTROY

Words, like their related constructions—sentences, phrases, and paragraphs are not used simply to communicate. It is the deeper meaning in words, their layered definitions, and even intentional ambiguities, which rivet the attention and evoke the tears, clarify the thought and articulate a position.⁸⁶

The late Kānaka Maoli scholar and Hawaiian Studies professor T. Kanalu Young poetically explained the significance of our words. As noted in the introduction to this response, for Hawai‘i’s indigenous people, words must be selected with care because they possess the power of life and death. Their kaona, or hidden meaning, imparts deep wisdom and levies serious consequences both for those deploying a term and the object (or person) that expression is directed towards.

Three representative examples highlight the need for this response. Judge Burns’ article, intentionally or not, resurrects the colonizer’s narrative while also ignoring nearly forty years of research and scholarship in key historical and legal arenas. Resuscitating this old, erroneous memory is both hurtful to Native Hawaiians and undermines indigenous legal claims by actively constructing the past in a misleading way. Interrogating inaccuracies from the article illuminates the significance of the collective memory of injustice for both Kānaka Maoli and our legal claims, including interests in the Crown Lands Trust.

A. *Dividing the ‘Āina—Kamehameha III’s Goal in the Māhele*

1. *Burns’ claims regarding the Māhele are misleading*

At bottom, most of Judge Burns’ dissatisfaction with Professor Van Dyke’s conclusions in his *Crown Lands* book is rooted in a misinterpretation of history. An excellent case in point is their contradictory understandings of the Māhele and, in particular, Kamehameha III’s goal in replacing the Native Hawaiian approach to land stewardship with a hybridized private property regime.⁸⁷ Kamehameha III’s intent is a critical factor impacting both the collective memory of injustice and current Kānaka Maoli claims to the Crown Lands.

To bolster an overarching narrative, the Burns article framed Kamehameha III’s rationale underlying the Māhele as an act of self-

⁸⁶ Kanalu Young, *An Interdisciplinary Study of the Term “Hawaiian,”* 1 HAW. J. OF L. & POL. 23, 23 (2004).

⁸⁷ Compare Burns, *supra* note 2, at 231–32, 240–43, with VAN DYKE, *supra* note 3, at 30–50.

interest. The article goes so far as to unequivocally declare that Kamehameha III’s “primary goal” throughout the Māhele process was to selfishly secure his personal lands.⁸⁸ Interestingly, Judge Burns gives rather short shrift to developing this argument, which scarcely exceeds one page, most of which is devoted to reproducing the *State ex rel. Kobayashi v. Zimring*⁸⁹ opinion.⁹⁰ He relies heavily on that decision, which was authored by Chief Justice William S. Richardson, for the proposition that Kamehameha III’s intent in instituting the Māhele was to secure his personal lands to ensure that they would not be considered public domain and subject to seizure by a foreign power should Hawai‘i ever be taken over by another nation.⁹¹ The *Zimring* case, however, stands for the proposition that new lava-created ‘āina is public (not private) property; it did not discuss Kamehameha III’s overall goal for the Māhele. *Zimring*, in turn, quotes from *In re Kamehameha IV*,⁹² which dealt specifically with the Crown Lands and Kamehameha III’s reason for establishing his personal ‘āina. Again, that case did not discuss Kamehameha III’s overall goal for the Māhele, but merely his intent with regard to his personal lands.⁹³ Thus, neither case supports the assertion that Kamehameha III’s overall goal in the Māhele was to secure his own lands.⁹⁴

Taken together, none of the cited authorities, what might be termed a “cascade of precedent,” do anything to support the article’s interpretation of Kamehameha III’s goals— “primary” or otherwise. As a result, the three short non-*Zimring* paragraphs in that section, while nicely bookending the block quote, ignore the Kānaka Maoli narrative and are decidedly one-dimensional.⁹⁵

In citing authority to buttress the claim that Kamehameha III was acting out of his own self-interest, the Burns article ignores more recent

⁸⁸ Burns, *supra* note 2, at 232.

⁸⁹ 58 Haw. 106, 566 P.2d 725 (1977).

⁹⁰ Burns, *supra* note 2, at 231–32 (including an excerpt from *State ex rel. Kobayashi v. Zimring*, to bolster the claim that Kamehameha III’s primary goal in the Māhele was to secure his personal lands); *see also id.*, at 219–21 (lengthy excerpt from *State ex rel. Kobayashi v. Zimring* as a means of “explain[ing] the Great Māhele[.]”).

⁹¹ *Id.* at 231–32.

⁹² 2 Haw. 715 (Haw. Kingdom 1864).

⁹³ In *Kamehameha IV*, the Hawai‘i Supreme Court noted the King’s desire to “promote the interest of his Kingdom,” and therefore “he proceeded with an exalted liberality[.]” to set apart the larger portion of his land for government use. *Id.* at 722. *Kamehameha IV* also references Privy Council Records in its extrapolation of the events and circumstances leading to the Māhele. *Id.* at 721–22.

⁹⁴ *See* BEAMER, *supra* note 5, at 142–53 (arguing that the Māhele was meant to secure the rights of Native Hawaiians); KAME‘ELEIHIWA, *supra* note 5, at 169–225 (detailing the process for and many of the events leading to the Māhele of 1848).

⁹⁵ *See infra* Section III.A.3.

scholarship on the Māhele, which includes significant original research in ‘Ōlelo Hawai‘i.⁹⁶ Without legal or other support, these empty claims attempt to resurrect a collective memory of ignorant and greedy chiefs and disregard the native memory of Kamehameha III as a deliberate and thoughtful leader who married Native Hawaiian tradition with western legal precepts to create a private property system to respect and protect the rights of the ho‘ā‘āina, the native people of the land.⁹⁷ By resurrecting derogatory and inaccurate images of ali‘i (chiefs), the article seeks to undermine indigenous claims to the Crown Lands and justifies the appropriation and continued use of that ‘āina by others, including the United States. It is critical to respond to these inexactitudes because “justice claims often turn[] on which memories are acknowledged by decisionmakers.”⁹⁸

⁹⁶ See, e.g., KAME‘ELEIHIWA, *supra* note 5; BEAMER, *supra* note 5. Beamer’s *No Mākou ka Mana* received multiple awards, including the Samuel M. Kamakau Book of the Year Award in 2015 from the Hawai‘i Book Publishers Association. See *Ka Palapala Po‘okela Awards (2015)*, HAWAI‘I BOOK PUBLISHERS ASS’N, www.hawaiiipublishers.org/awards_archives_2015.html (last visited Apr. 25, 2017); Pakalani Bello, “*No Mākou ka Mana*” is Named Hawai‘i Book of the Year, I MUA (Apr. 24, 2015), <http://www.ksbe.edu/imua/article/no-maakou-ka-mana-wins-samuel-m.-kamakau-award/>.

⁹⁷ Compare Burns, *supra* note 2, at 222, 242, 247 (blaming Kamehameha III and the ali‘i for the maka‘āinana’s failure to receive more lands in the Māhele), with Lindsey, *supra* note 12, at 250–51 (describing Kamehameha III’s brilliance in designing and facilitating the Māhele). Lindsey explained the Māhele’s purposeful design and significant benefits for Kānaka Maoli:

[T]he Government lands would provide for his people by strengthening the Kingdom’s independence while the King’s lands guaranteed the continuation of traditional responsibilities, allowing the King to protect his people directly. Through his act the King established two trusts for the Native Hawaiian people, both imbued with traditional precepts and both to be held for the benefit of the Native Hawaiian people. Like the practice of kālai‘āina, the Māhele affirmed Kauikeaouli’s control of ‘āina: he granted the chiefs land, he created the Government lands for the benefit of the chiefs and people, and he retained the King’s land as his own. Moreover, it strengthened his sovereignty—land was privatized, securing Hawai‘i as a civilized nation—and Kauikeaouli would be able to protect his people. His achievement was significant both in a traditional and contemporary context. To create the trusts the King balanced traditional precepts with the modern legal reality that he faced. Privatization of land was not “merely thrust upon [an] unresponsive . . . societ[y].” Indeed, it was the “outcome of an interaction.” In modern terms, it was an act of self-determination intended to enable continued self-determination. It sealed Native Hawaiians’ interests as owners, practitioners, and beneficiaries.

Id. at 250 (internal citations omitted).

⁹⁸ Hom & Yamamoto, *supra* note 6, at 1765.

2. Native Hawaiian insights regarding the Māhele

The politics and history of the Māhele are far more complex than the short analysis presented in the Burns article. And, given the ramifications of specious claims on both collective memory and Native Hawaiians' vested beneficial interest in the Crown Lands, more context is required:

Hawaiians traditionally viewed and treated land as a member of their family and clearly not something that could be owned and bought or sold.

Land and water were the foundations of their survival; 'āina, that which feeds, and wai, the source of all life. Many of Hawai'i's maka'āinana, the commoners who held this traditional view and practiced its resultant principles, found themselves strangers in their own land during the transition from their traditional view, lifestyle and relationship with the land, to this new and foreign commodity driven concept necessitated for the most part by ever increasing and dominating western influences.⁹⁹

The Māhele, meaning to divide or share, was one of the defining events in Hawaiian history.¹⁰⁰ Indeed, more than an event, it was a complex process of dividing out the recognized interests of the ali'i or chiefs, including the King, the government, and the common people or native tenants, in all the land of Hawai'i.¹⁰¹ In the years leading up to the Māhele, Kamehameha III and his chiefs had begun to selectively adapt European and American concepts and integrate them into traditional Kānaka Maoli concepts of governance.¹⁰² This adaptation was articulated in the 1839 Declaration of Rights, which secured protection to "all the people, together with their lands, their building lots, and all their property. . . . [N]othing whatever shall be taken from any individual, except by express provision of the laws."¹⁰³

The following year, Kamehameha III promulgated the Constitution of 1840, which specifically recognized the interests of the chiefs and people in 'āina, in common with the King as head of the government:

Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom

⁹⁹ Moses K.N. Haia III, *Quiet Title Actions Harm Hawaiians*, HONOLULU STAR-ADVERTISER, Jan. 25, 2017, at A12 (the kahakō ('Ōlelo Hawai'i diacritical mark) are added).

¹⁰⁰ MacKenzie, *supra* note 5, at 12–16.

¹⁰¹ *Id.*

¹⁰² BEAMER, *supra* note 5, at 104–53.

¹⁰³ 1839 Declaration of Rights, *reprinted in* TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS ESTABLISHED IN THE REIGN OF KAMEHAMEHA III 10 (1842) [hereinafter TRANSLATION OF THE CONSTITUTION].

Kamehameha I. was the head, and had the management of the landed property.¹⁰⁴

This provision outlined trust concepts that were foundational to Native Hawaiian society. And, for the first time, the interests of the people, the chiefs, and the King in the land were formally acknowledged.¹⁰⁵

There are complex events and reasons that ultimately resulted in a division of the interests of all—the people, the chiefs including Kamehameha III, and the government—in ‘āina or land.¹⁰⁶ Of major concern was that Hawai‘i might be annexed or taken by one of the “Great Powers”—the United States, Great Britain, or France—and that with undivided interests in the land, native property rights would not be respected.¹⁰⁷ Thus, in 1845, a Land Commission was established to investigate and validate or reject land claims.¹⁰⁸ In doing so, the Land Commission based its decisions on the Kingdom’s existing land laws including “native usages in regard to landed tenures[.]”¹⁰⁹ In 1846, the Land Commission adopted seven principles, with a preface explaining that “there are but three classes of persons having vested rights in the lands,— 1st, the government [(the King)], 2nd, the landlord, and 3d, the tenant[.]”¹¹⁰

¹⁰⁴ KINGDOM OF HAW. CONST. of 1840, *reprinted in* TRANSLATION OF THE CONSTITUTION, *supra* note 103, at 11–12 (1842) (emphasis added).

¹⁰⁵ MacKenzie, *supra* note 5, at 12–16.

¹⁰⁶ For various perspectives on the factors leading to the Māhele, see generally KAME‘ELEHIWA, *supra* note 5, at 169–225; ROBERT H. STAUFFER, KAHANA: HOW THE LAND WAS LOST 9–76 (2004); BEAMER, *supra* note 5, at 142–48; Mark ‘Umi Perkins, Kuleana: A Genealogy of Native Tenant Rights 33–47 (May 2013) (unpublished Ph.D. dissertation, University of Hawai‘i at Mānoa) (on file with authors).

¹⁰⁷ In 1843, Lord George Paulet, captain of the British warship *Carysfort*, took control of the Hawaiian government for five months, partially in response to a lease dispute involving the British consul. KAME‘ELEHIWA, *supra* note 5, at 183–85. The Paulet incident had been carried out against the backdrop of Great Britain’s annexation of Aotearoa (New Zealand) in 1840, France’s seizure of the Marquesas in 1842, and France’s establishment of a protectorate over Tahiti in the same year. *Id.* Moreover, in early 1845, the United States annexed Texas, and ultimately gained California, Arizona, Nevada, and Utah, “all at the expense of Spain.” TOM COFFMAN, *supra* note 49, at 56–57. Hawai‘i’s leaders feared incursions by American mercenaries to Hawai‘i given American intervention in the West and Southwest. SYLVESTER STEVENS, AMERICAN EXPANSION IN HAWAII 1842–1898, at 42–44 (1945).

¹⁰⁸ The official title of the Land Commission was the “Board of Commissioners to Quiet Land Titles.” Act of Dec. 10, 1845, pt. I, ch. VII, art. IV, *reprinted in* 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 107 (1845–46) [hereinafter 1 STATUTE LAWS] (“An Act to Organize the Executive Departments of the Hawaiian Islands”).

¹⁰⁹ *Id.* § 7, *reprinted in* 1 STATUTE LAWS, *supra* note 108, at 109.

¹¹⁰ These principles were subsequently passed by the Kingdom’s Legislature and signed into law by Kamehameha III. Act of Oct. 26, 1846, *reprinted in* 2 STATUTE LAWS OF HIS

Significantly, the Land Commission recognized and validated the underlying and foundational concept that all Native Hawaiians had rights in the land.

Although the Commission's goal was to partition these undivided interests, without an initial division of rights between the ali'i and the King, little could be accomplished. Thus, there was an active discussion in the Kingdom's Privy Council among the chiefs, Kamehameha III, and his western advisors before a final plan was adopted.¹¹¹ Under that plan, Kamehameha III would retain his private lands "subject only to the rights of the tenants."¹¹² The Kingdom's remaining 'āina would be divided into thirds: one-third to the Hawaiian government; one-third to the chiefs and konohiki; and the final third to the native tenants, "the actual possessors and cultivators of the soil[.]"¹¹³

The process to separate out the interests of the King from the interests of the chiefs began on January 27, 1848. All transactions were recorded in the *Buke Mahele* (Māhele Book).¹¹⁴ In essence, each division was a quitclaim arrangement between the King and a particular ali'i or chief.¹¹⁵ After the last division between Kamehameha III and the chiefs on March 7, 1848, the chiefs had received approximately 1.6 million acres of the 'āina of Hawai'i,

MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 83 (1847) ("Approving Principles Adopted by the Board of Commissioners to Quiet Land Titles, in Their Adjudication of Claims Presented to Them").

¹¹¹ Privy Council Minutes, December 18, 1847, at 280–308, <http://punawaiola.org/fedora/get/Punawaiola:720021847002/CompositePDF720021847002>.

¹¹² *Id.* at 282.

¹¹³ *Id.*

¹¹⁴ *BUKE KAKAU PAA NO KA MAHELE AINA* (1848) [hereinafter *BUKE MAHELE*].

¹¹⁵ In the *BUKE MAHELE*, pages on the left side of the book identify the lands in which a chief surrendered his or her interests to the King, with a signed statement by the chief relinquishing any rights to the land and acknowledging that such lands belong to the King. *See id.* Similarly, pages on the opposite (right) side of the book list the lands in which the King surrendered his interest to an individual chief or konohiki, with a signed statement by the King agreeing to the division and giving permission for the chief to take the claim to the Land Commission. *See id.*; LOUIS CANNELORA, *THE ORIGIN OF HAWAII LAND TITLES AND OF THE RIGHTS OF NATIVE TENANTS* 12–13 (1974). The division between the King and the chiefs, however, did not convey any title in land to the chiefs. Kamehameha III merely agreed that an individual chief or konohiki could present the claim to the Land Commission. JON J. CHINEN, *THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848*, at 20–21 (1958). Even an award from the Land Commission did not convey fee simple title to a chief or konohiki; the chief or konohiki was required to pay a commutation fee to the government, either in land or money, for the title to the land to be confirmed. CANNELORA, *supra*, at 26–27. The chief or konohiki would then be issued a Royal Patent from the government giving fee simple title. *Id.* at 28. Notably, both the Land Commission Award and Royal Patent issued by the government contained a reservation of the rights of native tenants. CHINEN, *supra*, at 12–16.

while the King held an estimated 2.5 million acres.¹¹⁶ Kamehameha III then set aside the larger portion of this ‘āina, about 1.5 million acres, “forever . . . unto his Chiefs and People.”¹¹⁷ He retained for himself, his heirs and successors, the remaining lands, approximately 984,000 acres.¹¹⁸ These private lands became known as the King’s Lands (eventually the Crown Lands) and were also subject to the rights of native tenants.¹¹⁹ This demonstrates that the rights of native tenants were expressly recognized and validated at every stage of the Māhele process.

Noted Kanaka Maoli scholar and professor Kamanamaikalani Beamer, who has done extensive original research on the Māhele and the motivating factors for early lawmaking by Hawaiian ali‘i, provides additional context for the Māhele. He notes the similarities and differences between the Māhele and kalai‘āina, the traditional division of ‘āina when a new ali‘i or chief gained authority:

The Māhele was . . . a hybrid initiative—similar to a kalai‘āina in its participants and in the way the lands were distributed, but different because the title provided to the recipient was subject to the rights of native tenants. Perhaps the biggest difference is that the Māhele was to be the final kalai‘āina. ‘Āina conveyed through the Māhele allowed a chief to take the award to the Land Commission, where the title would be validated. These awards enabled chiefs to gain allodial or fee-simple title upon payment of a commutation, which extinguished the government’s interest in those lands. Once the government’s interest in ‘āina was removed, chiefs could then receive a Royal Patent that confirmed fee-simple ownership of the ‘āina, which continued to be “subject to the rights of native tenants.” This process meant that even fee-simple allodial title to ‘āina was a hybrid kind of private property, one that continued to have a condition on title that was to provide for maka‘āinana, as was consistent with early Hawaiian custom.¹²⁰

This complex history uncovers a very different story than the one told in the Burns article. Rather than a self-serving and greedy King, this narrative describes a deliberate and thoughtful ali‘i who crafted a hybrid process that

¹¹⁶ Davianna Pōmaika‘i McGregor, *The Cultural and Political History of Hawaiian Native People*, in OUR HISTORY, OUR WAY: AN ETHNIC STUDIES ANTHOLOGY 351 (Gregory Yee Mark, Davianna Pōmaika‘i McGregor & Linda A. Revilla eds., 1995); JEAN HOBBS, HAWAII: A PAGEANT OF THE SOIL 52 (1935).

¹¹⁷ Act of June 7, 1848, 1848 SUPPLEMENT TO THE STATUTE LAWS OF HIS MAJESTY, KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 22 (listing of lands and ratifying division of lands). This second division was also recorded in the Buke Mahele. See BUKÉ MAHELE, *supra* note 114, at 225.

¹¹⁸ See *In re Kamehameha IV*, 2 Haw. 715, 722–23 (Haw. Kingdom 1864); VAN DYKE, *supra* note 3, at 42.

¹¹⁹ Act of June 7, 1848, *supra* note 117, at 25.

¹²⁰ BEAMER, *supra* note 5, at 144.

respected indigenous tradition while always seeking to protect the interests of the *hoā'āina*, the people of the land.¹²¹ This active, collective construction of the past is vital to undergird the group memory of injustice in Hawai'i, including the fact that despite Kamehameha III's specific actions to protect native land from foreign interests, the United States ultimately took both the Government and Crown Lands. The United States later transferred title to those lands to the State of Hawai'i, but the interests of Kānaka Maoli have yet to be fully addressed. Ultimately, this collective memory of injustice highlights "the political and cultural dynamics, and the strategic import of collective memory for justice claims processed through the US legal system[.]"¹²²

3. *Actual evidence of Kamehameha III's intent*

In addition to the invaluable context provided by the indigenous narrative, including the complexity of the Māhele process, primary authority from the nineteenth century imparts additional support for the fact that one of Kamehameha III's principal goals in the Māhele was to protect Native Hawaiian land from foreigners.¹²³ For example, the Privy Council minutes at the root of the article's assertion of the King's self-interest appear to be those taken at a meeting of the Council on December 18, 1847.¹²⁴ That day in Council, the King is recorded as speaking three times.¹²⁵ The Council was in the process of voting to approve the seven general rules and principles to guide the impending land division between the chiefs and Kamehameha III as drafted by Justice William Little Lee.¹²⁶

The seventh and last of these rules appears to have given the King pause.¹²⁷ Rule seven called for Kamehameha III's personal lands to be entered into a separate book entitled "Register of the lands belonging to Kamehameha III King of the Hawaiian Islands."¹²⁸ Before a vote was taken

¹²¹ *Id.*

¹²² Hom & Yamamoto, *supra* note 6, at 1777.

¹²³ VAN DYKE, *supra* note 3, at 43.

¹²⁴ Privy Council Minutes, December 18, 1847, *supra* note 111, at 280–308; *see Kamehameha IV*, 2 Haw. at 722. Justice Robertson's opinion in *Kamehameha IV* does not provide any citation to the specific Privy Council records on which he bases his interpretation, but his mention of the King's desire to protect his land from confiscation by a foreign power provides a potent clue, as that subject did specifically arise in the Privy Council on December 18, 1847. *See id.* at 722; Privy Council Minutes, December 18, 1847, *supra* note 111, at 304, 306.

¹²⁵ Privy Council Minutes, December 18, 1847, *supra* note 111, at 304, 306.

¹²⁶ *Id.* at 280, 304.

¹²⁷ *Id.* at 304.

¹²⁸ *Id.* at 284.

on the Rule, the King broached the question of whether his personal lands would be more susceptible to confiscation by a foreign power if they were recorded separately from those of other ali'i.¹²⁹ Minister of Foreign Relations Robert C. Wyllie opined that the recognition of Hawai'i's independence by the United States, Great Britain, and France would keep other potential aggressors at bay, and Justice Lee added that except in the case of resistance, and conquest by a foreign power, the King's right to his private lands "would be respected."¹³⁰ The King then said that "unless it were so, *he would prefer having no lands whatsoever[.]*"¹³¹ This pronouncement stands in stark contrast to the allegations that Kamehameha III's "primary goal" was the self-serving preservation of his own landed interests. It is instead proof that Kamehameha III had an express goal of "protecting the lands of the Native Hawaiians from foreigners."¹³² Finally, Kamehameha III instructed the Privy Council that he wished his lands to be listed in the same book as the other ali'i, so that in the event of a foreign invasion, all ali'i lands would be considered together as privately owned lands, separate from the Government Lands, and therefore less likely to be appropriated by the invading power.¹³³ This exchange regarded a very specific aspect of the Māhele, namely the format in which the lands of the various ali'i (including the King) would be recorded and thus distinguished from Government Lands.¹³⁴ At no point in the Privy Council minutes addressing land division did the King discuss any personal "goals" for the enactment of the Māhele at large.¹³⁵ Instead, the larger discussion provides important insight regarding the King's ultimate intent to protect Native Hawaiian land from foreigners.

"Zooming out" from the original Privy Council records and the opinion in *In re Kamehameha IV*,¹³⁶ the Burns article's reliance on *State ex rel. Kobayashi v. Zimring*¹³⁷ in this section of his article must next be scrutinized.¹³⁸ To support an allegation of unmitigated royal self-interest,

¹²⁹ *Id.* at 304.

¹³⁰ *Id.* at 304–06.

¹³¹ *Id.* at 306 (emphasis added).

¹³² VAN DYKE, *supra* note 3, at 43; Burns, *supra* note 2, at 231.

¹³³ Privy Council Minutes, December 18, 1847, *supra* note 111, at 308. The language of the rule was amended and passed by the Privy Council. *Id.*

¹³⁴ *Id.*

¹³⁵ *See id.*; Burns, *supra* note 2, at 232; *In re Kamehameha IV*, 2 Haw. 715, 722 (Haw. Kingdom 1864).

¹³⁶ 2 Haw. 715 (Haw. Kingdom 1864); *see supra* note 118 and accompanying text.

¹³⁷ 58 Haw. 106, 566 P.2d 725 (1977).

¹³⁸ The *Zimring* opinion did not address the disposition of the Crown Lands, but included a recitation of basic Māhele history to support the court's conclusion that the State held title to 'āina newly formed by lava on the island of Hawai'i. *See id.* at 111–15, 566 P.2d at

the piece includes the following passage from Chief Justice Richardson's opinion in *Zimring*:

In 1847, the King together with the Privy Council determined that a land māhele, or division, was necessary for the prosperity of the Kingdom. The rules adopted to guide such division were, in part, (1) that the King shall retain all his private lands as individual property . . .¹³⁹

Taken out of context, the casual reader may be inclined to agree that such a rule proves the article's claim regarding the King's intent. The selected language, however, provides only the beginning of an enumerated list. Indeed, in reviewing the case itself, one finds this passage directly following that quoted: “. . . and (2) that of the remaining lands, one-third was to be set aside for the Government, one-third to the chiefs and konohiki, and one-third for the tenants.”¹⁴⁰ Reducing the length of a quoted passage is not in and of itself alarming. Truncating this passage, however, especially when the omitted portion directly contradicts the assertion put forward, leads a reader to draw conclusions based on an incomplete truth. Taken in full, the demonstrable intent of the King and his Council was to protect the landed interests of all Native Hawaiians, including “tenants.”

The “tenants” language is deeply significant. As a result of the Māhele process, all lands of the Kingdom—whether the personal lands of the ali'i, the King's Lands, or the Government Lands included a reservation for the rights of native tenants.¹⁴¹ These tenants were the maka'āinana or hoa'āina who, with their families, had occupied portions of lands, often for generations.¹⁴² Based on that inherent right, maka'āinana during the Māhele era could claim title to parcels of land under the Kuleana Act of

730–32.

¹³⁹ Burns, *supra* note 2, at 231 (citing *Zimring*, 58 Haw. at 112, 566 P.2d at 730). In other parts of the Burns article, the full passage from *Zimring* is given. Burns, *supra* note 2, at 220, 241.

¹⁴⁰ *Zimring*, 58 Haw. at 112, 566 P.2d at 730. To support his own rendition of the historical reasons for the Māhele, Chief Justice Richardson cites the very Privy Council records mentioned above as the likely source of Justice Robertson's version of Māhele history in *Kamehameha IV*. See *id.* (citing *Kamehameha IV*, 2 Haw. 715; Privy Council Minutes, *supra* note 111, at 250–308).

¹⁴¹ CHINEN, *supra* note 115, at 29; *Palama v. Sheehan*, 50 Haw. 298, 300, 440 P.2d 95, 97 (Haw. 1968) (noting that during the Māhele process whole ahupua'a (divisions of land that roughly approximate watersheds) were awarded but the rights of native tenants were expressly reserved, “Koe . . . [ke] Kuleana o [na] Kanaka”); *Harris v. Carter*, 6 Haw. 195, 205 (Haw. Kingdom 1877) (explaining that Māhele and subsequent awards were “subject to the rights of native tenants”).

¹⁴² See OSORIO, *supra* note 10, at 53–56 (discussing the Kuleana Act, the impact on maka'āinana, and the change in traditional political and social relationships between classes).

1850.¹⁴³ Moreover, Royal Patents, which were given to ali'i and others designating their title to lands, and Kuleana claims were affirmed by the courts of the era as direct acts of the King himself.¹⁴⁴

Other clues from case law and the historical record further contextualize Kamehameha III's motives in designing and facilitating the Māhele. Returning to *Kamehameha IV*, Justice Robertson discusses the two instruments "signed and sealed" by Kamehameha III and included in the Buke Mahele.¹⁴⁵ The first instrument reserved the King's personal lands.¹⁴⁶ The second instrument relinquished the King's interest in lands listed on several pages of the Buke, to be "set apart forever to the chiefs and people

¹⁴³ Act of Aug. 6, 1850, reprinted in 1850 PENAL CODE OF THE HAWAIIAN ISLANDS 202–04 (1850) ("Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges"); see MacKenzie, *supra* note 5, at 14–16 (discussing the Kuleana Act). Indeed, in the Privy Council discussions on the law that would become the Kuleana Act, the King was adamant that the native tenants should receive not merely land, but recognition of their traditional rights of access and gathering for "a little bit of land, even with an allodial title, if they [the people] were cut off from all other privileges, would be of very little value." Privy Council Minutes, July 13, 1850, 713 (1850), <http://punawaiola.org/fedora/>

[get/Punawaiola:720021850001/CompositePDF720021850001](http://punawaiola.org/fedora/get/Punawaiola:720021850001/CompositePDF720021850001) (statement of King Kamehameha III). Although some chiefs objected to including such a clause in the law, eventually "the proposition of the King, which he inserted as the seventh clause of the law, as a rule for the claims of common people to go to the mountains, and the seas attached to their own particular lands exclusively" was agreed to by the chiefs. Privy Council Minutes, Aug. 27, 1850, 763 (1850), <http://punawaiola.org/fedora/get/Punawaiola:720021850001/CompositePDF720021850001>. The provision under discussion in the Privy Council became section 7 of the Kuleana Act, currently codified at Section 7-1 of the Hawai'i Revised Statutes. See HAW. REV. STAT. § 7-1 (2016); David M. Forman & Susan K. Serrano, *Traditional and Customary Access and Gathering Rights*, in NATIVE HAWAIIAN LAW, *supra* note 5, at 788–94 (discussing section 7 of the Kuleana Act and cases interpreting the provision).

¹⁴⁴ See *Kekiekie v. Edward Dennis*, 1 Haw. 42, 43 (Haw. Kingdom 1851); *Kukiiahu v. William Gill*, 1 Haw. 54, 55 (Haw. Kingdom 1851). Likewise, when the courts held in favor of Kuleana Act claimants, as against the new owners of a larger surrounding tract, they did so on the premise that the King himself had created the reservation of rights for native tenants. *Kekiekie*, 1 Haw. at 43 ("[I]n the Royal Patent conveying the land to the defendant, the King had made an express reservation of the claims of tenants."); *Kukiiahu*, 1 Haw. at 55 ("[T]he King in his patent has made a special reservation for the benefit of this and all other claimants. The King did not convey Kukiiahu's rights to Gill[.]."). Combined with the full reproduction of C.J. Richardson's summary of the King's reasons for the Māhele in *Zimring*, this judicial recognition of the King's direct hand in reserving the rights of native tenants demonstrates a clear royal interest in the wellbeing of the maka'āinana, and renders ineffectual any attempts to reduce the Māhele to a mere act of kingly self-preservation. See 58 Haw. at 112, 566 P.2d at 730; *supra* text accompanying note 140.

¹⁴⁵ 2 Haw. at 722–23 (drawing from a portion of the case not cited by Burns).

¹⁴⁶ *Id.* at 723.

of my Kingdom.”¹⁴⁷ While the court provides both the original Hawaiian as well as the English translation of the first instrument in *Kamehameha IV*, only the English translation is given for the second instrument.¹⁴⁸ In this second instrument, the first instance of the word “people” appears in Hawaiian as simply “kanaka,” the second instance of “people” is a reduction of the more complex Hawaiian phrase “poe lahui kanaka.”¹⁴⁹ The court in *Kamehameha IV* gives the following translation: “to have and to hold to my chiefs and people forever.”¹⁵⁰ Distinguished Kanaka Maoli scholar and professor Lilikalā Kame‘eleihiwa translates the same phrase as: “in order that my Chiefs and my Hawaiian people may dwell and establish themselves firmly upon the lands forever.”¹⁵¹ Despite these differences in translation, there can be little doubt that the “po‘e lahui kānaka” or the “people” the King refers to are the native people of the Hawaiian Kingdom.

Thus, it was in fact an express goal of Kamehameha III, at the very outset of the Māhele, to preserve a land base for all Hawaiian people, regardless of social or political status. What transpired subsequently, and the reasons for it, will remain a source of study and debate for years to come.¹⁵² The King’s true reasons for enacting the Māhele in the first place, however, were undoubtedly more complex than those proffered in the Burns article, and certainly included as a “primary goal” the protection of the native people’s rights to ‘āina. Indeed, John Papa ‘Ī‘ī, a member of the Privy Council and one of the first appointees of the Land Commission, praised Kamehameha III because the division of lands in the Māhele would be permanent. ‘Ī‘ī explained, “[i]t was said that he was the greatest of the

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 722–23. The original Hawaiian, however, is in the Buke Mahele and is also included in the Privy Council Records. BUKE MAHELE, *supra* note 114, at 225; Privy Council Minutes (“Ōlelo Hawai‘i), March 30, 1848, at 69, <http://punawaiola.org/KDA/browse/Kingdom/LinksKingdomExe.html>.

¹⁴⁹ BUKE MAHELE, *supra* note 114, at 225 (because few diacritical marks were used in 1848, they are not included in the text; however today this phrase would almost certainly be transliterated as “po‘e lahui kanaka” or “po‘e lahui kānaka”).

¹⁵⁰ Indeed, the English translation of the entire last phrase of the second instrument may be viewed as a matter of latent academic dispute. Justice Robertson gives no source for the English translation. *Kamehameha IV*, 2 Haw. at 723.

¹⁵¹ KAME‘ELEHIWA, *supra* note 5, at 207 (citation omitted) (translating “ko‘u poe lahui kanaka” in the Buke Mahele as “my Hawaiian people”).

¹⁵² VAN DYKE, *supra* note 3, at 372–73 (explaining that Maoli community leaders have different perspectives on the claims of ali‘i descendants and noting that this “process of community involvement will require raising questions and promoting dialogue to address not merely the Crown Lands but also other issues related to history, culture, and sovereignty”).

kings, a royal parent who loved his Hawaiian people more than any other chief before him.”¹⁵³

4. *A collective memory of innovation and courage in the face of adversity*

Both the complex history of the institution of private property in Hawai‘i, as well as clues from the Buke Mahele and Privy Council records, especially the original text in ‘Ōlelo Hawai‘i, tell a different story than incomplete block quotes from cases that stand for different propositions. The Burns article’s attempt to reinvigorate a colonizer’s tale of greedy chiefs and lazy Hawaiians fails. By relying on limited and acontextual fragments of selective case law, and ignoring the last forty years of scholarship on Hawaiian history and the Māhele, the Burns piece recounts a parable of Native Hawaiians as ignorant and selfish. Instead, the indigenous narrative imparts a collective memory of a people struggling to retain their lands and sovereignty amidst mass death and political posturing and an ali‘i—Kamehameha III—innovative enough to marry western and Native Hawaiian legal concepts with the hopes of preserving his nation’s heritage for his people.

Similar to the U.S. Supreme Court’s majority in *Rice v. Cayetano*,¹⁵⁴ which described the Māhele as a “fundamental and historic division” necessary for private ownership as westerners flocked to Hawai‘i,¹⁵⁵ Burns’ article glosses over the complexities and unintended consequences of that process. Even the *Rice* majority acknowledged the loss of land by Kānaka Maoli in the Māhele, but used racism to justify it, attributing that loss to “improvidence and inability to finance farming operations” largely because “Hawaiians are not business men and have shown themselves unable to meet competitive conditions unaided.”¹⁵⁶ In much the same way, the Burns essay unsuccessfully mischaracterizes and denigrates Kamehameha III’s motives for the Māhele in an attempt to justify the seizure of the Crown Lands.

Digging into the historical archives, as well as the “archives of [the Kānaka Maoli] mind, spirit, and culture” is vital to both uncover Kamehameha III’s actual intent behind the Māhele and to reconstruct group memories “within a context of not only rights norms but also larger societal

¹⁵³ JOHN PAPA ‘Ī‘Ī, FRAGMENTS OF HAWAIIAN HISTORY 50 (Dorothy B. Barrere ed., Mary Kawena Pukui trans., 1959).

¹⁵⁴ 528 U.S. 495 (2000).

¹⁵⁵ *Id.* at 503.

¹⁵⁶ *Id.* (quoting H.R. REP. NO. 839, at 6 (1920)).

understandings of injustice and reparation.”¹⁵⁷ These memories and societal understandings are shaped by major events such as the Māhele, and our recounting of those critical junctures in Hawai'i's history “have the potential to remake our, and society's, understandings of justice—for good or ill.”¹⁵⁸ It is therefore critical to elevate the indigenous narrative “for constructing collective memories of injustice as a basis for redress” for Native Hawaiians, and for the theft of the Crown Lands in particular.¹⁵⁹ I ka 'ōlelo no ke ola, i ka 'ōlelo no ka make.¹⁶⁰

B. *Separating the Crown Lands from the Native Hawaiian People*

A second example of conflicting histories and worldviews is the Burns article's basic premise that there is no explicit recognition, either in U.S. or Hawai'i law, for any separate Native Hawaiian interest in the Crown Lands.¹⁶¹ To bolster that argument, the article looks to the colonizer's law—including the Joint Resolution of Annexation¹⁶² and the Organic Act¹⁶³—which facilitated the United States' appropriation of Hawai'i's sovereignty and significant land holdings, in attempt to deny Native Hawaiians any interest in the Crown Lands. In doing so, it ignores and twists Native Hawaiian history and traditions, including the practice of mālama (to care for), attempts to downplay the significance of other legal instruments that have already recognized a Native Hawaiian interest in the Crown Lands, and misinterprets key concepts about native sovereignty. This undermines the collective memory of the injustices committed against Native Hawaiians by seeking to discredit the developing memory and resurrect the old, inaccurate memory to undercut Native Hawaiian legal claims to the Crown Lands.

¹⁵⁷ Hom & Yamamoto, *supra* note 6, at 1764.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ PUKUI, *supra* note 1, at 129 (translated here literally as “in the word there is life; in the word there is death”).

¹⁶¹ Burns, *supra* note 2, at 247–51.

¹⁶² Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, July 7, 1898, H.R.J. Res. 55, 55th Cong., 30 Stat. 750 (1898) [hereinafter Joint Resolution of Annexation].

¹⁶³ Act to Provide a Government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900) [hereinafter Organic Act].

1. *The Burns article relies on the colonizer’s laws—promulgated to legitimize the theft of Hawaiian land—to attempt to undercut Native Hawaiian claims to the Crown Lands*

Burns is correct in that neither the 1898 Joint Resolution of Annexation nor the 1900 Organic Act specifically identify Hawai‘i’s native people as beneficiaries of the Crown or Government Lands. Instead, the Joint Resolution declares:

The existing land laws of the United States relative to public lands shall not apply to such land in the Hawaiian Islands . . . [p]rovided, [t]hat all revenue from or proceeds of the same . . . shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.¹⁶⁴

In turn, the 1900 Organic Act, which established the territorial government, directly references the Joint Resolution of Annexation. Section 73 of the Organic Act provides that the proceeds from the sale, lease, or other disposition of the lands ceded by the Joint Resolution should be deposited in the Territory’s treasury for “such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation[.]”¹⁶⁵

Included in the “public lands” were not only the Government Lands of the Hawaiian Kingdom, but also the Crown Lands. Indeed, the United States specifically claimed the Crown Lands in the Organic Act, with language asserting that:

the portion of the public domain heretofore known as Crown land is hereby declared to have been, on the twelfth day of August, eighteen hundred and ninety-eight, and prior thereto, the property of the Hawaiian government, and to be free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof. It shall be subject to alienation and other uses as may be provided by law.¹⁶⁶

¹⁶⁴ Joint Resolution of Annexation, *supra* note 162 (emphasis added).

¹⁶⁵ Organic Act, *supra* note 163, § 73(e), 31 Stat. at 154–55 (emphasis added). Note that the Burns article, in citing provisions of the 1900 Organic Act, mistakenly includes sections referencing the Hawaiian Homes Commission Act, which was enacted in 1921, well after the original Organic Act became law. See Burns, *supra* note 2, at 249–50. Undoubtedly, the quoted language is from an amended version of the Organic Act, not the original version passed in 1900. Compare *id.*, with Organic Act, *supra* note 163.

¹⁶⁶ Organic Act, *supra* note 163, § 99, 31 Stat. at 161. Section 99 mirrored article 95 of the 1894 constitution of the republic claiming the Crown Lands as public lands and disavowing any trust over or claims to those lands. Compare *id.*, with REPUBLIC OF HAW. CONST. of 1894, art. 95, reprinted in FUNDAMENTAL LAW OF HAWAII, 201, 237 (Lorrin Thurston ed., 1904).

This language was nearly identical to article 95 of the 1894 Constitution of the Republic of Hawai'i that originally confiscated the Crown Lands.¹⁶⁷ As one Native Hawaiian scholar has noted, the Republic's constitution "manufactured a legal history for the Crown and Government lands."¹⁶⁸

That manufactured history continued to hold sway as Queen Lili'uokalani advanced her claims to the Crown Lands in the halls of the U.S. Congress¹⁶⁹ and, finally, in the U.S. Court of Claims.¹⁷⁰ None of her attempts were successful and, eventually, the U.S. Court of Claims determined that the Crown Lands belonged to the office of the Crown and not to the individual monarchs.¹⁷¹ The court upheld the confiscation of the Crown Lands and their eventual transfer to the United States by concluding:

The crown lands were the resourceful methods of income to sustain, in part at least, the dignity of the office to which they were inseparably attached. When the office ceased to exist they became as other lands of the Sovereignty and passed to the defendants as part and parcel of the public domain.¹⁷²

It is hardly surprising that neither the Joint Resolution of Annexation nor the Organic Act specifically recognized Hawai'i's native people's interest in the Crown Lands or any of the Kingdom's lands. Without the active support of the U.S. minister to Hawai'i and the landing of U.S. naval forces, a so-called Committee of Safety, representing American business interests, would not have succeeded in supplanting the Queen's government and establishing colonial rule.¹⁷³ U.S. President Cleveland, after receiving a

¹⁶⁷ REPUBLIC OF HAW. CONST. of 1894, art. 95, *supra* note 166.

¹⁶⁸ Lindsey, *supra* note 12, at 251.

¹⁶⁹ In 1903, the U.S. Senate passed an appropriation to settle Queen Lili'uokalani's claim to the Crown Lands, but it failed to pass in the House of Representatives. S. 1553, 58th Cong. (1903). On February 12 and 15, 1904, a similar bill was debated in the Senate and failed passage by a tie vote of 26 to 26. H.R. 7094, 60th Cong. (1904).

¹⁷⁰ *Liliuokalani v. United States*, 45 Ct. Cl. 418 (1910); *see generally* LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN (1898) (providing a native perspective and greater context for pivotal events in Hawaiian history including the overthrow, annexation, and claim to the Crown Lands); NEIL THOMAS PROTO, THE RIGHTS OF MY PEOPLE: LILIUOKALANI'S ENDURING BATTLE WITH THE UNITED STATES 1893–1917 (2009) (detailing the Queen's efforts to gain recognition and compensation from the United States for the taking of the Crown Lands).

¹⁷¹ The court relied extensively on the earlier Hawai'i Supreme Court decision in *In re Kamehameha IV*, 2 Haw. 715 (Haw. Kingdom 1864) and the Act of January 3, 1865. *See Liliuokalani*, 45 Ct. Cl. at 426–28 (citing *Kamehameha IV*, 2 Haw. at 719, 722; Act of Jan. 3, 1865, 1 Haw. Sess. Laws 69 (1851–70)).

¹⁷² *Id.* at 428.

¹⁷³ H.R. EXEC. DOC. NO. 47, 53D CONG., RELATING TO THE HAWAIIAN ISLANDS (GROVER CLEVELAND, DEC. 18, 1893) (2d Sess. 1893), *reprinted in* H.R. EXEC. DOC. NO. 1, 53D CONG., APPENDIX II, FOREIGN RELATIONS OF THE UNITED STATES, 1894, AFFAIRS IN HAWAII 455–62 (3d Sess. 1895).

report from Commissioner James Blount, whom he had sent to Hawai‘i to do a through investigation of the situation, determined that Americans, with the support of the U.S. minister to Hawai‘i and U.S. military troops, were responsible for overthrowing the monarchy. In a forceful and moving message to Congress, Cleveland advocated for the restoration of the monarchy and proclaimed:

[I]f a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation.¹⁷⁴

Although President Cleveland recommended restoration of the Queen, Congress did not take action and the annexationists in Hawai‘i, realizing that annexation would not be achieved while Cleveland was president, formed the Republic of Hawai‘i.¹⁷⁵ The Republic’s ability to take control of the Crown Lands can be traced directly to the actions of the U.S. government.¹⁷⁶ By 1898, and the election of pro-annexationist William McKinley as president, the United States had sufficiently distanced itself from its complicity in overthrowing the Kingdom’s legitimate government and, sheltered by the five years between the overthrow and annexation, was able to claim the Crown and Government Lands as well as sovereignty over Hawai‘i through the Joint Resolution of Annexation.¹⁷⁷ Although U.S. law acknowledged the trust nature of the Crown and Government Lands, it could not acknowledge the actual beneficiaries of that trust—the Native

¹⁷⁴ *Id.* at 457.

¹⁷⁵ MacKenzie, *supra* note 5, at 23–25.

¹⁷⁶ H.R. EXEC. DOC. NO. 47, *supra* note 173, at 455–62; Apology Resolution, *supra* note 18.

¹⁷⁷ MacKenzie, *supra* note 5, at 25–27. In 1897, William McKinley, a Republican sympathetic to the annexation of Hawai‘i, was elected U.S. President and submitted a treaty of annexation to the U.S. Senate. *Id.* Kanaka Maoli professor Noenoe Silva describes the efforts by Kānaka Maoli, including mass meetings, petition drives, and sending representatives to Washington, D.C., opposing annexation. See SILVA, *supra* note 10, at 157–59. The delegation to Washington was originally told that there were fifty-eight votes in the Senate favoring the treaty of annexation, only a few votes shy of the votes needed for passage. *Id.* By the time the delegation left Washington, however, there were only forty-six votes on the pro-annexation side. *Id.* Failing passage of a treaty, in 1898, Congress passed a Joint Resolution of Annexation that allegedly transferred the sovereignty and lands of Hawai‘i to the United States. *Id.* See generally Williamson B.C. Chang, *Darkness Over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL’Y J. 70 (2015) (analyzing the annexation process and concluding that Hawai‘i was not validly annexed via the Joint Resolution of Annexation). See sources cited at note 217, *infra*, for in-depth arguments of the possible legal effect of this Joint Resolution.

Hawaiian people—from whom those lands were taken. Thus, both the Joint Resolution and the Organic Act used the innocuous term “inhabitants.”¹⁷⁸

The trust nature of the lands, and the relationship of Kānaka Maoli to those lands was partially recognized in the Hawaiian Homes Commission Act of 1920 (HHCA),¹⁷⁹ which set aside approximately 203,500 acres for a homesteading program for “native Hawaiians” of not less than fifty-percent indigenous ancestry.¹⁸⁰ Similarly, in the 1959 Hawai'i Admission Act, provisions explicitly protected lands and resources for “native Hawaiian” beneficiaries as defined in the HHCA.¹⁸¹ Section 5(f) of the 1959 Hawai'i Admission Act declares that the “lands, proceeds, and income” from the ceded lands trust “shall be managed and disposed of *for one or more*” of the five trust purposes listed in section 5(f).¹⁸² These trust purposes are:

¹⁷⁸ The Hawaiian Commission, a five-member body established under the Joint Resolution of Annexation to recommend legislation to Congress regarding Hawai'i, reported that the population of Hawai'i in 1898 totaled 110,000 people. HAWAIIAN COMM'N, THE REPORT OF THE HAWAIIAN COMM'N, APPOINTED IN PURSUANCE OF THE “JOINT RESOLUTION TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES,” APPROVED JULY 7, 1898, at 2–3 (1898). This number included 39,000 Hawaiians and part-Hawaiians (approximately thirty-five percent of the population), 25,000 Japanese, 21,500 Chinese, and 15,000 Portuguese. *Id.* The report noted that about 700 Chinese had been naturalized but most Chinese and Japanese were contract laborers who might be expected to return to their home countries after their contracts expired. *Id.* While it appeared that the Chinese were likely to return to their native country, the Report noted that that was not so of the Japanese who “frequently attain a position and standing in business which makes it desirable to them to remain in the islands.” *Id.* Notably, there were only 4,000 Americans in Hawai'i at the time.

¹⁷⁹ Pub. L. No. 67-34, 42 Stat. 108 (1921) [hereinafter HHCA].

¹⁸⁰ *See id.* § 201(a)(7), 42 Stat. at 108 (defining “native Hawaiian”). The HHCA is set out in full as amended as an appendix to the Hawai'i Revised Statutes. 15 MICHIE'S HAW. REV. STAT. ANN. 431–500 (2009). *See* Paul Nāhoa Lucas, Alan T. Murakami & Avis Kuuipoaleialoha Poai, *Hawaiian Homes Commission Act*, in NATIVE HAWAIIAN LAW, *supra* note 5, at 176, 176–227, for an in-depth discussion of the HHCA and the homesteading program. *See* Section III.C.1, *infra*, for discussion on the racist history and divisiveness of the “native Hawaiian” definition in the HHCA.

¹⁸¹ Hawaii Admission Act, Pub. L. No. 86-3, §§ 4–5, 73 Stat. 4, 5–6 (1959) [hereinafter Admission Act].

¹⁸² *Id.* § 5(f), 73 Stat. at 6 (emphasis added). The Burns article suggests that Professor Van Dyke ignored the section 5(f) language requiring trust resources to go to “one or more” of the five trust purposes pointing to language on pages 257–58 of the *Crown Lands* book for this proposition. Burns, *supra* note 2, at 258. On the very next page of the *Crown Lands* book, however, Professor Van Dyke discusses the State of Hawai'i's interpretation of the section 5(f) language, and the State's position that the revenues could be used for any one of the five trust purposes, although the revenues had never been allocated to benefit the Kānaka Maoli community. VAN DYKE, *supra* note 3, at 259. Thus, Professor Van Dyke was keenly aware of the trust language in the Admission Act. *See id.* Moreover, the passage quoted by Judge Burns is only one instance in which Professor Van Dyke analyzed the Admission Act.

[T]he 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.¹⁸³

Although they acknowledge the interest of the Native Hawaiian community in the Crown and Government Lands of the Kingdom, both the HHCA and the Admission Act attempt to limit the trust beneficiaries—to those of not less than fifty-percent Hawaiian blood quantum—and the trust interest to “one or more” of five trust purposes. Like the Joint Resolution of Annexation and the Organic Act, these laws rely on a manufactured history of the lands and a collective memory that glosses over the illegal transfer of the Kingdom’s lands and sovereignty to the United States.¹⁸⁴

In the chapter of his book discussing the *Rice v. Cayetano* case, Professor Van Dyke specifically noted that section 5(f) of the Admission Act contains language providing that the State must use trust resources for “one or more” of the five trust purposes. *Id.* at 303 (discussing *Rice v. Cayetano*, 528 U.S. 495 (2000)). It is apparent from a reading of that chapter that Professor Van Dyke was well versed on the specific language of section 5(f). *See id.*

¹⁸³ Admission Act, *supra* note 181, § 5(f) (emphasis added).

¹⁸⁴ This history would be incomplete without also acknowledging reconciliation efforts by the people of Hawai‘i, who voted to enact constitutional amendments more clearly and specifically setting out the State’s responsibilities to the Native Hawaiian community under the public land trust. Thus, article XII, section 4 of the State Constitution now designates “native Hawaiians” and members of the general public as the two beneficiaries of the majority of the lands in the “public land trust.” HAW. CONST. art. XII, § 4. Other amendments established the Office of Hawaiian Affairs (OHA) and tasked the OHA trustees with managing and administering a pro rata share of the revenue from the public land trust “for native Hawaiians.” HAW. CONST. art. XII, §§ 5–6. The definition of “native Hawaiians” in these amendments is tied to the fifty-percent Hawaiian blood quantum of the HHCA, as required by federal law. Admission Act, *supra* note 181, § 5(f). Thus, the State has acknowledged and is attempting to fulfill its responsibilities to a portion of the Kānaka Maoli community by mandating that a portion of the public land trust funds go toward that purpose.

More recently, the Hawai‘i Supreme Court has held that a Native Hawaiian member of the general public who is less than fifty-percent Hawaiian can bring suit to enforce the provisions of the public land trust. *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp.*, 121 Hawai‘i 324, 326, 219 P.3d 1111, 1113 (2009). In a challenge to the State’s attempt to sell portions of the trust, the court held that the plaintiff, as a Native Hawaiian and a member of the general public, might be injured by the loss of trust lands. *Id.* The Hawai‘i Supreme Court, in a ruling consistent with its understanding of the relationship between the Native Hawaiian people and the ‘āina, believed that the plaintiff could suffer cultural and religious injury if the lands were transferred in violation of the State’s trust responsibility. *Id.* at 335, 219 P.3d at 1121.

Finally, both the federal and state courts have also recognized that funds derived from

The plain language of the colonizer's laws that the Burns article relies on—the Joint Resolution of Annexation and Organic Act—reflects the fact that they were specifically crafted to legitimize the theft of Native Hawaiian land and sovereignty. When one considers the United States' role in the illegal overthrow of the Hawaiian Kingdom and seizure of the Crown Lands—as Professor Van Dyke did in his book—a collective memory of injustice emerges. That memory “implicates power and culture” and becomes “hotly contested by those . . . opposing justice claims.”¹⁸⁵ After all, if Kānaka Maoli claims to the Crown Lands are respected, that would mean fewer resources for competing interests that have currently been benefitting from the wrongful appropriation of indigenous assets. Sadly, when individuals, including Professor Van Dyke “persuasively reconstruct historical injustice they usually face fierce opposition by those in power. That opposition seeks totally to discredit the developing memory. . . . [o]r, alternatively, it seeks to partially transform the old memory . . . into a new memory.”¹⁸⁶ Purposefully or not, the Burns article's hollow claim that the Native Hawaiian people have no separate interest in the Crown Lands falls into that pattern of seeking to transform an old, erroneous memory into a new one, which necessitated this response. I ka 'ōlelo no ke ola, i ka 'ōlelo no ka make.¹⁸⁷

the public land trust and provided to OHA can be utilized for any of the trust purposes set forth in section 5(f) of the Admission Act as long as the “native Hawaiian” beneficiaries are served. The Ninth Circuit Court of Appeals explained that “[a]lthough the [OHA] trustees are obliged to spend only for trust purposes, they have broad discretion to decide how to serve those purposes.” *Day v. Apoliona*, 616 F.3d 918, 926 (9th Cir. 2010). Similarly, the Hawai'i Supreme Court has held that “an expenditure [by the OHA Trustees] that betters the conditions of native Hawaiians [of at least 50 percent Hawaiian ancestry] may also simultaneously benefit the conditions of others.” *Kealoha v. Machado*, 131 Hawai'i 62, 78, 315 P.3d 213, 229 (2013); see Melody Kapilialoha MacKenzie, *The Public Land Trust*, in NATIVE HAWAIIAN LAW, *supra* note 5, at 105–11 (analyzing the State's trust duties in utilizing public land trust revenues).

The Crown Lands are the 'āina of Hawai'i's indigenous people both as descendants and heirs of the Hawaiian Kingdom. The people of Hawai'i, through constitutional amendments and legislative action, have acknowledged that legacy and, to a limited extent, have sought reconciliation to provide some measure of redress to Hawai'i's native people. Even the decisions of the Hawai'i Supreme Court have valued and appreciated the deep connection between Kānaka Maoli and 'āina as well as the impact of the loss of 'āina and sovereignty to Native Hawaiians. See generally Melody Kapilialoha MacKenzie, *Ke Ala Loa: The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions*, 33 U. HAW. L. REV. 447 (2011) (discussing Hawai'i Supreme Court decisions during the tenure of Chief Justice Ronald Moon impacting the Native Hawaiian community).

¹⁸⁵ Hom & Yamamoto, *supra* note 6, at 1765.

¹⁸⁶ *Id.*

¹⁸⁷ PUKUI, *supra* note 1, at 129 (translated here literally as “in the word there is life; in the word there is death”).

2. *Native Hawaiian tradition, including the duty of ali'i to mālama, must inform claims to and management of the Crown Lands*

The indigenous narrative—which the Burns article ignores—also provides vital insight into Kānaka Maoli traditions, including tenets of land stewardship, which provide a foundation for legal claims to the Crown Lands. As one Native Hawaiian scholar explained, “[t]he trust established under Kingdom law was meant to ensure that Native Hawaiians would always have a means to provide for their own self-determination.”¹⁸⁸ Native Hawaiian interests in the Crown Lands, as well as the Government Lands, do not arise merely from the specific language in the Joint Resolution of Annexation, the Organic Act, the HHCA, or the Admission Act. “Native Hawaiian rights in those lands derive from Native tradition and the law of the Kingdom of Hawai‘i.”¹⁸⁹

The concept of a “trust” is deeply rooted in Kānaka Maoli tradition, one that ensures that ali'i cared for the native people, a tradition consistently honored by many ali'i.¹⁹⁰ Indeed, one of Queen Lili'uokalani's first acts after taking the throne was to direct the Crown Lands Commissioner to set aside Crown Lands in ten-acre lots for homesteading, primarily for Native Hawaiians.¹⁹¹ This trust concept, one that calls upon the ali'i to mālama or care for their people, is embodied today by the Ali'i trusts:¹⁹²

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 . . . the creation of these trusts suggests that the ali'i continued to understand and attempted to fulfill their obligation to provide for the needs of their people.¹⁹³

Upon her death in 1884, Ke Ali'i Bernice Pauahi Bishop's lands, approximately 378,000 acres, were placed in trust to establish the

¹⁸⁸ Lindsey, *supra* note 12, at 257.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 250.

¹⁹¹ HELENA G. ALLEN, THE BETRAYAL OF LILIUOKALANI, LAST QUEEN OF HAWAII 1838–1917, at 259 (1982) (citing notes of THOMAS G. THURM, HAWAIIAN ALMANAC AND ANNUAL (1874–1917)).

¹⁹² See generally Avis Kuuipoleialoha Poai & Susan K. Serrano, *Ali'i Trusts: Native Hawaiian Charitable Trusts*, in NATIVE HAWAIIAN LAW, *supra* note 5, at 1171 (discussing the establishment, challenges, and current status of the various Ali'i trusts).

¹⁹³ *Id.* (footnotes omitted).

Kamehameha Schools, giving preference in admission to Native Hawaiian children.¹⁹⁴ King William Charles Lunalilo, who reigned from 1873 to 1874, left his private lands in trust for the care of elderly Native Hawaiians.¹⁹⁵ Queen Emma, wife of Kamehameha IV, placed the bulk of her estate in trust for the benefit of the Queen's Hospital, which offered medical care to Native Hawaiians.¹⁹⁶ Queen Lili'uokalani herself left most of her land in trust for the benefit of orphans and indigent Native Hawaiian children.¹⁹⁷ Similarly, King David Kalākaua and his wife, Queen Kapi'olani, as part of their ho'oulu lāhui effort,¹⁹⁸ founded the Kapi'olani Maternity Home to ensure that Hawaiian women would have help in giving birth and in nurturing their babies.¹⁹⁹ In this way, an important legacy of Native Hawaiian ali'i has been to 'auamo (take on) their kuleana (sacred responsibility and privilege) of caring for Hawai'i's native people and resources and continuing those efforts ā mau loa (forever).

3. *Other legal instruments have recognized that Native Hawaiians have legal claims to the Crown Lands*

The U.S. Congress through the 1993 Apology Resolution,²⁰⁰ as well as the Hawai'i Supreme Court in the landmark *Office of Hawaiian Affairs v. Housing Community and Development Corp.* decision,²⁰¹ have clearly recognized that the Native Hawaiian people, without regard to the fifty-percent blood quantum requirement, have claims to *both* the Crown and the Government Lands of the Hawaiian Kingdom.²⁰² The Burns article sought to downplay and dismiss the language in the Apology Resolution and

¹⁹⁴ *Id.* at 1172–73.

¹⁹⁵ *Id.* at 1203.

¹⁹⁶ *Id.* at 1206.

¹⁹⁷ *Id.* at 1196.

¹⁹⁸ Ho'oulu lāhui was an organization founded by King Kalākaua to minister to sick Native Hawaiians and provide them with support and healthcare. Constitution & By-laws of the Ahahui Hooulu a Hoola Society, February 19, 1874, at 4, 6–8 (1888); LILIUOKALANI, *supra* note 170, at 111–13.

¹⁹⁹ LILIUOKALANI, *supra* note 170, at 111–13. The maternity home became Kapi'olani Maternity Hospital and in 1978, merged with Kauikeolani Children's Hospital to become Kapi'olani Medical Center for Women and Children.

²⁰⁰ Apology Resolution, *supra* note 18.

²⁰¹ 117 Hawai'i 174, 177 P.3d 884 (2008).

²⁰² See Apology Resolution, *supra* note 18, pmb., 107 Stat. at 1512 (“Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government[.]”).

neglected even to address the Hawai‘i Supreme Court’s interpretation of that federal legislation.²⁰³

Although the U.S. Supreme Court in *Hawaii v. Office of Hawaiian Affairs*²⁰⁴ held that the Apology Resolution did not change substantive law,²⁰⁵ the Court did not refute the findings of either the U.S. Congress or the Hawai‘i Supreme Court.²⁰⁶ As the Burns article correctly asserts, the U.S. Supreme Court held that the Apology Resolution was merely conciliatory and had no operative effect and that its findings, which provide the factual basis for the apology, did not substantively alter the State’s obligations.²⁰⁷ Indeed, the Court noted that giving effect to the Resolution’s whereas clauses “would raise grave constitutional concerns.”²⁰⁸

Nevertheless, the declaration by the U.S. Congress and Executive that the overthrow of the Kingdom of Hawai‘i involved the “participation of agents and citizens of the United States” and resulted in the “deprivation of the rights of Native Hawaiians to self-determination” is a powerful admission.²⁰⁹ Moreover, under U.S. law, a joint resolution such as the Apology Resolution that has gone through the full legislative process, including committee consideration and floor debate, has the same force as any other legislation passed by Congress.²¹⁰

The Hawai‘i Supreme Court’s distillation of Native Hawaiians’ trust lands and claims, as set forth in the Apology Resolution, stand in sharp contrast to those of the U.S. Supreme Court. The Hawai‘i Supreme Court, giving full effect to the Apology Resolution’s findings, reasoned that they gave rise to the State’s fiduciary duty to preserve trust lands until Kānaka Maoli claims are resolved. Relying upon earlier cases establishing the

²⁰³ Burns, *supra* note 2, at 251. Burns also briefly discussed two other sources that he asserts do not support Professor Van Dyke’s overarching thesis. These two sources are a June 24, 1982 Letter from State of Hawai‘i Deputy Attorney General William Tam, and a *Wall Street Journal* article. *Id.* at 254–55 (citing Letter from William Tam, Att’y Gen., State of Haw., to Susumu Ono, Chair, Haw. Bd. of Land & Nat. Res. (June 24, 1982) (on file with authors) [hereinafter Tam Letter]; *The Prince’s Plan is Co-Opted*, WALL ST. J., Sept. 9, 1991, at A4). As Burns notes, the *Wall Street Journal* article contained the reporter’s own interpretation of law. *Id.* at 255 (citing *The Prince’s Plan is Co-Opted*, *supra*, at A4)). The Tam Letter, however, does reference the indigenous population, but it is unclear whether Tam used “indigenous” to mean the first peoples of the land or the local population. Tam Letter, *supra*, at 5.

²⁰⁴ 556 U.S. 163 (2009).

²⁰⁵ *Id.* at 173–76.

²⁰⁶ *See id.*

²⁰⁷ Burns, *supra* note 2, at 251–52 (citing *Office of Hawaiian Affairs*, 556 U.S. at 175).

²⁰⁸ *Office of Hawaiian Affairs*, 556 U.S. at 176.

²⁰⁹ Apology Resolution, *supra* note 18, § 1(3), 107 Stat. at 1513.

²¹⁰ *See, e.g.*, *Ann Arbor R. Co. v. United States*, 281 U.S. 658, 666 (1930) (treating a joint resolution just as any other legislation enacted by the U.S. Congress).

State's trust duties,²¹¹ the court opined, "such duty is consistent with the State's 'obligation to use reasonable skill and care' in managing the public lands trust" and the State's conduct should be judged "by the most exacting fiduciary standards."²¹² The Hawai'i Supreme Court examined both the legal and equitable issues involved, seeking to strike a balance. Although it did not rule on Native Hawaiians' ultimate claims, the court sought to protect the trust lands until a political resolution could be achieved.²¹³

The irony here is that the Apology Resolution is a joint resolution of the U.S. Congress, which the Burns article dismisses as "no more than the personal opinions of those who voted for it or approved it."²¹⁴ Should not then the 1898 Joint Resolution of Annexation also be viewed with similar suspicion? Indeed, while the piece assumes the validity of the Joint Resolution of Annexation,²¹⁵ questions about the legitimacy of U.S. acquisition of Hawai'i through such a resolution, instead of a treaty, were raised and actively debated in Congress in 1898.²¹⁶ The ineffectiveness of such a resolution to transfer Hawai'i's sovereignty and lands to the United States is the subject of ongoing comment and criticism and underpins the modern Hawaiian independence movement.²¹⁷

The Burns article also misinterprets the Apology Resolution's use of "inherent sovereignty" as a term solely applied to the sovereignty of native

²¹¹ See *Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 340, 640 P.2d 1161, 1169 (1982); *Pele Def. Fund v. Paty*, 73 Haw. 578, 601, 837 P.2d 1247, 1262 (1992).

²¹² *Office of Hawaiian Affairs v. HCDCH I*, 117 Hawai'i 174, 195, 177 P.3d 884, 905 (2008) (quoting *Ahuna*, 64 Haw. at 339, 640 P.2d at 1169).

²¹³ *Id.* at 192, 177 P.3d at 902; see MacKenzie, *Ke Ala Loa*, *supra* note 184, at 489–502 (examining the Hawai'i Supreme Court's decision related to the Apology Resolution).

²¹⁴ Burns, *supra* note 2, at 251.

²¹⁵ *Id.* at 249–51.

²¹⁶ Professor Chang notes that the best source showing American opposition in 1898 to annexation can be found in the Senate Debates on annexation. Chang, *supra* note 177, at 72 n.5 (citing to 31 CONG. REC. 6141–6710 (1898)). See generally THOMAS J. OSBORNE, ANNEXATION HAWAII: FIGHTING AMERICAN IMPERIALISM (1998) (providing overview and analysis of annexation process).

²¹⁷ See generally, Chang, *supra* note 177 (analyzing the arguments against annexation by a joint resolution and detailing the current Hawaiian sovereignty initiatives based on the illegal annexation doctrine); David Keanu Sai, *A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison Between Hawaiian State Sovereignty and Hawaiian Indigeneity and Its Use and Practice in Hawai'i Today*, 10 J.L. & SOC. CHALLENGES 68, 84–90 (2008) (arguing that an independent nation state such as Hawai'i could not be annexed by a joint resolution but only by treaty); David Keanu Sai, *The American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State* (Dec. 2008) (unpublished Ph.D. dissertation, University of Hawai'i at Mānoa) (on file at Hamilton Library, University of Hawai'i at Mānoa) (analyzing the process of annexation and asserting that Hawai'i is an occupied state).

nations and tribal governments within the United States.²¹⁸ “Inherent sovereignty” has been used most frequently in U.S. law to characterize the relationship between the federal government and Indian tribes—both to support the tribes’ retained “inherent sovereign powers” as well as to validate the United States’ exercise of authority over native peoples, lands, and resources.²¹⁹ There are obvious concerns with the Burns article’s characterization of the complicated history of federal Indian law based on language from one selected case, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*,²²⁰ to describe what he deemed “the relevant history of the relationship between the United States and the Indian Tribes.”²²¹ The histories and relationships between recognized indigenous

²¹⁸ Burns, *supra* note 2, at 252.

²¹⁹ Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 1–15, 29–42 (2002).

²²⁰ 492 U.S. 408 (1989).

²²¹ Burns, *supra* note 2, at 253 (citing *Brendale*, 492 U.S. at 425). The seventy-word “relevant history” reads:

Prior to the European settlement of the New World, Indian tribes were “self-governing sovereign political communities,” and they still retain some “elements of ‘quasi-sovereign’ authority after ceding their lands to the United States and announcing their dependence on the Federal Government.”

Id. (internal citations omitted) (quoting *Brendale*, 492 U.S. at 425). A tribe’s inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe’s dependent status, that is, to the extent it involves a tribe’s “external relations.” *Brendale*, 492 U.S. at 427 (citing *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978) and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978)).

Although *Brendale* is an inappropriate case to cite for the so-called “relevant history,” Judge Burns’ use of *Brendale* does highlight the complexities of federal Indian law. Professor Matthew Fletcher explained that in *Brendale*, “[t]he sharply divided Court did not issue a majority opinion.” MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 369 (2016). While *Brendale* was a 1978 Supreme Court case, it invoked long-out-of-date federal policies from the 1800s that were abandoned by 1934; Indian policies continued to change in the remainder of the twentieth century. *See generally id.* at 51–115. *Brendale* dealt with civil regulatory jurisdiction issues over lands that were geographically within a tribe’s present-day reservation boundaries but had ceased to be tribal lands because of allotment (which emanates from the General Allotment Act, Act of Feb. 8, 1887, 24 Stat. 388) and were no longer owned by tribal members. 492 U.S. at 422. The federal government’s allotment policy turned tribally held reservation lands into individual parcels of privately-owned lands to tribal members while any surplus parcels were sold to non-Indian non-tribal members “on the open market.” FLETCHER, *supra*, at 70.

Just as a summarized “relevant history” involving shifting policies and actions spanning nearly three centuries requires more than the mere seventy words relied upon in the Burns article, so too does a meaningful but general discussion of *Brendale*. The Court relied on a record that acknowledged “open” and “closed” areas within the reservation boundaries. *Brendale*, 492 U.S. at 415–16. An “open” area referred to areas that contained “allotted”

governments and the United States are too complex to rely on a mere seventy words from a single court decision. U.S. Supreme Court Justice Clarence Thomas indicated how complex the histories and relationships are (or at the least how confused he is) when he wrote, "Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases."²²²

Inherent sovereignty also describes the sovereignty of an independent nation, such as the Hawaiian Kingdom prior to its illegal overthrow. Professor Sarah H. Cleveland's article on how this doctrine is utilized by the U.S. Supreme Court details its international law origins:

[A]ll nations possessed certain powers inherent in their existence as nations. These powers were defined, shared, and recognized by all members of the family of nations and were essential to a nation's identity as an independent state. Sovereign powers were not subject to any external or positive constraints, save the rights of other sovereigns under international law, and any effort to limit these powers would undermine the nation's independence and equal status in the inter-national community.²²³

The Apology Resolution does not specify whether "inherent sovereignty" signifies U.S. domestic law or international law. Since, however, the Resolution is an apology to the Native Hawaiian people for the U.S. role in the overthrow of the Hawaiian Kingdom, which was a recognized independent nation and a member of the family of nations in 1893, it stands to reason that the "inherent sovereignty as a people" referenced in the Apology Resolution, especially when coupled with a claim to "national lands" means the inherent sovereignty of the people of a nation state.

parcels while the "closed" area "had been closed to the general public" and the "Bureau of Indian Affairs restricted the use of . . . the [closed] area to" tribal members and the tribe's permittees. *Id.* at 415. In its plurality opinion, the Court recognized the tribal government's authority to "regulate nonmember land use . . . in [closed] areas . . . but [the tribal government] may not enforce zoning ordinances on nonmembers in [open] areas[.]" FLETCHER, *supra*, at 369.

²²² United States v. Lara, 541 U.S. 193, 219 (2004).

²²³ Cleveland, *supra* note 219, at 15 (citing 2 EMER DE Vattel, THE LAW OF NATIONS § 54, at 154 (Joseph Chitty ed., T. & J.W. Johnson & Co. 1876) (1758)). Professor Cleveland also notes that "Nineteenth century publicists who examined the international law nature of sovereignty include HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (James Brown Scott ed., 1866), and HENRY W. HALLECK, INTERNATIONAL LAW; OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR (1861)." *Id.* at 15 n.56.

4. *Native Hawaiian narratives impart invaluable insight into Hawai‘i’s culture, history, and legal claims*

Yet again, the Burns article ignores Kānaka Maoli culture and traditions, especially the practice of mālama, in an attempt to deny claims to the Crown Lands. Instead, the piece relies on the colonizer’s laws—literally, the very instruments used to facilitate the United States’ grab of Native Hawaiian land and sovereignty—as a basis for trying to minimize the claims of Hawai‘i’s indigenous people. In doing so, the essay elevates the colonizer’s narrative and takes issue with the collective memory of injustice that Professor Van Dyke and even the U.S. Congress actively constructed regarding the harms imposed on Kānaka Maoli as a result of colonization. For example, the Burns article refutes the Apology Resolution’s concession that the 1893 overthrow “resulted in the suppression of the inherent sovereignty of the Native Hawaiian people.”²²⁴ Instead, the piece claims that Hawaiian sovereignty was not suppressed because Native Hawaiians lost control of their kingdom prior to the overthrow “[a]s a result of the decision and indecision and actions and inactions of the Hawaiian ali‘i[.]”²²⁵

This narrow-minded refrain is reminiscent of the U.S. Supreme Court’s majority opinion in *Rice v. Cayetano*,²²⁶ which described the 1893 American overthrow as “justified by Queen Lili‘uokalani’s undemocratic actions. Her attempt to restore ‘monarchical control . . . and limit[] the franchise to Hawaiian subjects compelled prodemocracy Americans to seize control.”²²⁷ Like the Burns essay, the *Rice* majority attempted to blame an illegal act of war and the seizure of Native Hawaiian resources on the Queen’s supposed shortcomings.²²⁸ Fortunately, the Kānaka Maoli narrative, especially the legacy of Native Hawaiian ali‘i and their trusts, demonstrates continued kuleana for Hawai‘i’s indigenous people and resources into the present.

Both the Burns article and the *Rice* majority “twist a history of white racial dominance into a justification” for their legal arguments.²²⁹ “[B]y narrowly framing history to legitimate its decision, the Supreme Court generated precedent for forthcoming cases that undermines the principle of

²²⁴ Burns, *supra* note 2, at 253 (quoting the Apology Resolution, *supra* note 18); see also Osorio & Beamer, *supra* note 8, at 472 (dismantling the Burns article’s claims that the overthrow was the fault of Hawaiian ali‘i).

²²⁵ Burns, *supra* note 2, at 253.

²²⁶ 528 U.S. 495 (2000).

²²⁷ Hom & Yamamoto, *supra* note 6, at 1774 (quoting *Rice*, 528 U.S. at 504).

²²⁸ *Rice*, 528 U.S. at 504–05.

²²⁹ Hom & Yamamoto, *supra* note 6, at 1777.

justice through reparation.”²³⁰ This significant threat to Native Hawaiian people and claims underscores both the need to set the record straight with respect to the Crown Lands as well as the “strategic import of collective memory for justice claims processed through the U.S. legal system[.]”²³¹ I ka ‘ōlelo no ke ola, i ka ‘ōlelo no ka make.²³²

C. *Defining and Dividing Kānaka*

The Burns article opens its critique of Professor Van Dyke’s book by devoting several pages to definitions and legal uses of the terms “Hawaiian,” “Native Hawaiian,” and “native Hawaiian.”²³³ The article utilizes the divisive definition set forth in section 10-2 of the Hawai‘i Revised Statutes and criticizes Professor Van Dyke’s use of a term that includes all of Hawai‘i’s native people irrespective of blood quantum.²³⁴ A seemingly trivial point, this issue epitomizes how the piece’s parochial focus ignores both the larger context of Native Hawaiian law and history, while also resurrecting an instrument that has been used to divide Hawai‘i’s indigenous people and limit benefits.

In doing so, the article misses a crucial point—one that Professor Van Dyke deeply understood²³⁵—that legal definitions do not, and indeed cannot, encompass the rich culture, history, or essence of a people; or, most importantly, how a people identify themselves. Preminent Native Hawaiian scholar and Ethnic Studies professor Davianna Pōmaika‘i McGregor has explained the native perspective:

The Hawaiian people are the living descendants of Papa, the earth mother, and Wākea, the sky father. They also trace their origins through Kāne of the living waters found in streams and springs; Lono of the winter rains and the life force for agricultural crops; Kanaloa of the deep foundation of the earth, the ocean and its currents and winds; Kū of the thunder, war, fishing and planting; Pele of the volcano; and thousands of deities of the forest, the ocean, the winds, the rains and the various other elements of nature. . . . This unity of

²³⁰ *Id.*

²³¹ *Id.*

²³² PUKUI, *supra* note 1, at 129 (translated here literally as “in the word there is life; in the word there is death”).

²³³ Burns, *supra* note 2, at 214–17.

²³⁴ *Id.* As detailed in Section III.C.1, *infra*, this definition originated in the Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921).

²³⁵ VAN DYKE, *supra* note 3, at 1; see also Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL’Y REV. 95 (1998).

humans, nature and the gods formed the core of the Hawaiian people's philosophy, world view and spiritual belief system.²³⁶

This interconnected relationship between nature, land, and *Kānaka Maoli* is also captured in an 'ōlelo no'eau, or indigenous proverb, "Hānau ka 'āina, hānau ke ali'i, hānau ke kanaka. Born was the land, born were the chiefs, born were the common people."²³⁷ This adage reflects the indigenous creation story and belief that "[t]he land, the chiefs, and the commoners belong together[.]"²³⁸ which contributes to a collective memory of Native Hawaiians as an inclusive nation united by their familial bond to their sacred lands and to each other.

1. *The history and legal significance of the capital N in "Native Hawaiian"*

For too long, the law has sought to define and divide Native Hawaiians, usually by descent from an ancestor in Hawai'i prior to 1778,²³⁹ and sometimes with a blood quantum requirement, in various ways and for a myriad of purposes. As the Burns article demonstrates, the ways in which the law defines Native Hawaiians impacts how the law is applied and what legal rights to lands and resources flow from those definitions.²⁴⁰ The piece criticizes Professor Van Dyke's use of the broad term Native Hawaiian in his *Crown Lands* book to include all those of Hawaiian ancestry.²⁴¹ Ironically, in making his critique, Burns constricts the legal definitions of, and conflates distinctions among, the terms "Hawaiian," "Native Hawaiian," and "native Hawaiian" as used in law.²⁴²

After pointing out that Queen Lili'uokalani differentiated between "native" and "part native" and that the Hawai'i State Constitution uses both "native Hawaiians" and "Hawaiians," the Burns article reviewed five

²³⁶ McGregor, *The Cultural and Political History of Hawaiian Native People*, *supra* note 116, at 335–36 ('Ōlelo Hawai'i diacritical marks added).

²³⁷ PUKUI, *supra* note 1, at 56.

²³⁸ *Id.*

²³⁹ The year 1778 is the year of documented contact between Native Hawaiians and Europeans. See THE VOYAGES OF CAPTAIN JAMES COOK ROUND THE WORLD: SELECTED FROM HIS JOURNALS 308–10 (Christopher Lloyd ed., 1949). See generally DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT (1989) (arguing that previous estimates of the number of people in Hawai'i prior to 1778 have been severely flawed and underestimate the population by at least fifty percent).

²⁴⁰ Burns, *supra* note 2, at 214–17.

²⁴¹ *Id.* at 214–15, 217.

²⁴² *Id.* at 214–17.

statutes.²⁴³ Of those five, the article states that three define a “native Hawaiian” as “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.”²⁴⁴ Ultimately, it alleges that Professor Van Dyke conflated the two terms in his analysis of the status of the Crown Lands Trust.²⁴⁵ Professor Van Dyke, however, was careful to specifically note those instances when statutes referred to a fifty-percent Hawaiian blood quantum requirement.²⁴⁶ Moreover, Judge Burns himself appears not to have realized that the statutes that use the fifty-percent blood quantum definition use a lower case “n” in native Hawaiian.²⁴⁷ This is an important distinction, because statutes that use the capital “N” Native Hawaiians utilize a definition based on descent from a pre-1778 native of Hawai'i, whereas lower case “n” native Hawaiians are defined in terms of blood quantum.

While it is true that of the five statutes listed in the Burns piece, three define “native Hawaiians” as those of at least fifty-percent Hawaiian ancestry, there are many more statutes that define or recognize “Native Hawaiians” as those whose ancestors were natives of the Hawaiian Islands prior to 1778, without regard to blood quantum. Beginning in 1974 with the passage of the Native American Programs Act, all major federal legislation that defines “Native Hawaiian” does so based on descent from

²⁴³ *Id.* at 215–17.

²⁴⁴ *Id.* at 215 (citations omitted).

²⁴⁵ *Id.* at 217.

²⁴⁶ *See, e.g.,* VAN DYKE, *supra* note 3, at 1 n.1, 237 n.2, 258, 280–81, 381.

²⁴⁷ Ironically, in the statutes cited in the Burns article, only a lower case “native” Hawaiian is defined using the fifty-percent blood quantum standard. This can be confusing. For instance, the plain text of the “native Hawaiian” definition in section 10-2 of the Hawai'i Revised Statutes capitalizes the word “Native.” When referring to the definition of “beneficiary of the public trust entrusted upon the office” earlier in the same statute, however, it is evident that the capitalization of the “N” in that definition of “native Hawaiian” is due to the word being placed at the beginning of the sentence. *See* HAW. REV. STAT. § 10-2 (2016). The definition section in the Hawaiian Homes Commission Act of 1920, as set forth in the Hawai'i Revised Statutes, also places the word “native” at the beginning of a sentence, thus capitalizing it, but where the term occurs elsewhere in that statute, “native” is not capitalized. *Compare* HHCA § 201(a), 15 MICHIE'S HAW. REV. STAT. ANN., *supra* note 180, at 435 (“When used in this title: . . . “Native Hawaiian” means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.”), *with* HHCA §§ 201.5, 204(a)(2), 207(a), 15 MICHIE'S HAW. REV. STAT. ANN., *supra* note 180, at 436, 454–55, 461. But in the corresponding definitions section of the federally promulgated version of the Act, the word “native” does not appear at the beginning of the sentence, and is not capitalized. *See* HHCA, *supra* note 179, § 201(a)(7), 42 Stat. at 108 (“The term “native Hawaiian” means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.”).

pre-1778 peoples.²⁴⁸ Thus, of the more than 150 laws the U.S. Congress has approved that mention or recognize Native Hawaiians, relatively few utilize the fifty-percent blood quantum definition and those statutes utilize the small “n” native Hawaiian that the Burns article employed.²⁴⁹

The fifty-percent blood quantum definition itself was first used in the 1920 Hawaiian Homes Commission Act (HHCA) passed by the U.S. Congress.²⁵⁰ A chapter of the *Crown Lands* book details the HHCA’s background and history.²⁵¹ As Professor Van Dyke and many others have pointed out, the initial proposals advocated by Native Hawaiian leaders contained no minimum indigenous blood quantum.²⁵² Eventually, to gain the support of the sugar and ranching interests that controlled Hawai‘i’s economy and to ensure the passage of a homesteading bill, several compromises were made, including the fifty-percent Hawaiian blood quantum requirement.²⁵³ Van Dyke explained that those who pressed for this high blood quantum “hoped that, with the rapid decline of the Hawaiian population, the program could be phased out and the lands could be

²⁴⁸ See, e.g., Native American Programs Act of 1974, Pub. L. No. 93-644, §§ 802–03, 88 Stat. 2291, 2324–25 (1975) (promoting Native Hawaiian, American Indian, and Alaska Native economic and social self-sufficiency through financial assistance to indigenous-serving programs); Native Hawaiian Health Care Act of 1988, Pub. L. No. 100-579, § 8(3), 102 Stat. 2916, 2920 (1988) (definition codified at 42 U.S.C. § 11711(3)); Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601, § 2(10), 104 Stat. 3048, 3049 (1990) (definition codified at 25 U.S.C. § 3001(10)); Native Hawaiian Education Act of 2001, Pub. L. No. 107-110, § 7207(1), 115 Stat. 1425, 1942 (2002) (definition codified at 20 U.S.C. § 7517(2)). As recently as 2014, Congress passed an Act relating to Historic Preservation and the National Park Service that uses this descent-based pre-1778 definition of “Native Hawaiian.” Act of Dec. 19, 2014, Pub. L. No. 113-287, § 300313, 128 Stat. 3094, 3190 (2014) (definition codified at 54 U.S.C. § 300313).

²⁴⁹ See, e.g., HHCA, *supra* note 179, § 201(7), 42 Stat. at 108; Act of June 20, 1938, Pub. L. No. 75-680, § 3(a), 52 Stat. 781, 784 (1938); Admission Act, *supra* note 181, §§ 4–5, 73 Stat. at 5–6; Hawaiian Home Lands Recovery Act, Pub. L. No. 104-42, § 202(2), 109 Stat. 353, 357 (1995) (defining “beneficiary” as used in the act as having the same definition as “native Hawaiian” under section 201(7) of the HHCA).

²⁵⁰ VAN DYKE, *supra* note 3, at 1 n.1 (noting that the HHCA was the first federal statute establishing a program for Native Hawaiians), 246–47 (explaining the fifty-percent blood quantum restriction in the bill as enacted); see also Lucas, Murakami & Poai, *supra* note 180, at 186.

²⁵¹ VAN DYKE, *supra* note 3, at 237–53; see also Lucas, Murakami & Poai, *supra* note 180, at 176–86.

²⁵² These leaders included Hawai‘i Delegate to Congress, Prince Jonah Kūhiō Kalaniana‘ole, Territorial Senator John H. Wise, and Rev. Akaiko Akana. See generally, Davianna Pōmaika‘i McGregor, *‘Āina Ho‘opulapula: Hawaiian Homesteading*, 24 HAWAIIAN J. OF HIST. 1 (1990).

²⁵³ *Id.* at 14–30; Lucas, Murakami & Poai, *supra* note 180, at 182–87.

released to others in a relatively short period of time.”²⁵⁴ In this way, the small n “native Hawaiian” is a term that has been controversial, in part, because it was crafted and wielded by colonizers to facilitate the further appropriation of indigenous land and other resources.

Hawai'i law, in part because of the incorporation of the HHCA into state law,²⁵⁵ identifies a “native Hawaiian” using the blood quantum definition, but uses the term “Hawaiian” more generally for those of indigenous descent. The Hawai'i State Constitution does not specifically define “Hawaiian” or “native Hawaiian,” although the terms appear together in Article XII, sections 5 and 6.²⁵⁶ Such definitions were entrusted to the legislature, which enacted Act 196 governing the Office of Hawaiian Affairs in 1979, based on the new Constitutional mandate.²⁵⁷ Act 196, which was codified as chapter 10 of the Hawai'i Revised Statutes, included definitions for “Hawaiian” and “native Hawaiian” in substantially the same form as those proposed during the Constitutional Convention,²⁵⁸ with the added requirement that aboriginal descendants show continued residence in Hawai'i.

As demonstrated above, under both Hawai'i state law and U.S. federal law, the term “native Hawaiian”—which the Burns article prefers—carries the not less than fifty-percent Hawaiian blood quantum requirement. The

²⁵⁴ VAN DYKE, *supra* note 3, at 247.

²⁵⁵ Section 4 of the Admission Act requires the State to adopt the HHCA as part of its constitution and also provides that the “qualifications of lessees shall not be changed except with the consent of the United States.” Admission Act, *supra* note 181, § 4, 73 Stat. at 5.

²⁵⁶ HAW. CONST. art. XII, §§ 5–6. During the Constitutional Convention of 1978, delegates proposed adding a definition section to the article on Hawaiian Affairs. Hawaiian Affairs Comm., *Stand. Comm. Rep. No. 59*, 1 PROC. OF THE CONST. CONVENTION OF HAW. OF 1978, at 646–47 (1978). In an early version of the proposal, “native Hawaiian” was given a descent-based definition, while “native Hawaiian of one-half blood” was given the definition reserved to “native Hawaiian” in the HHCA. *Id.* at 646. This was proposed specifically to address divisions and unfairness caused by defining only one-half blood Hawaiians as “native Hawaiian.” *Id.* at 647. Later in Convention proceedings, the proposed definitions section was amended to define “Hawaiian” generally based on descent, and “native Hawaiian” based on one-half part Hawaiian blood. Comm. of the Whole, *Rep. No. 13*, 1 PROC. OF THE CONST. CONVENTION OF HAW. OF 1978, at 1018 (1978). These definitions, however, were invalidated when the Hawai'i Supreme Court held that the amendment had not been presented to the public in a form allowing for informed ratification. *Kahalekai v. Doi*, 60 Haw. 324, 343, 590 P.2d 543, 555 (1979).

²⁵⁷ Act of June 7, 1979, 1979 Haw. Sess. Laws 398 (codified at HAW. REV. STAT ch. 10).

²⁵⁸ The actual definition of Hawaiian and native Hawaiian also includes the language that the aboriginal peoples “exercised sovereignty and subsisted in the Hawaiian Islands.” *Id.* See SEN. STANDING COMM. REP. NO. 773, 10th Leg., Reg. Sess. (Haw. 1979), *reprinted in* 1979 HAW. SEN. J. 1339, 1354–56 (1979), for an explanation of this language. See note 256, *supra*, for further discussion of the reasons for and substance of the definitions proposed at the Constitutional Convention.

term “Hawaiian” as used in state law is analogous to the federal law term “Native Hawaiian”—which Van Dyke utilizes—requiring Hawaiian ancestry but no minimum blood quantum.

The Burns article’s constrained analysis of the terms Hawaiian, Native Hawaiian, and native Hawaiian misses the ultimate point. Although Queen Lili‘uokalani did indeed differentiate between “native” and “part-native,” she referred in the same document to both groups as “my people,” a term that did not include the American-backed parties responsible for the 1893 illegal overthrow of her kingdom.²⁵⁹ For the Native Hawaiian community, blood quantum is an American-imposed concept, whose primary goal in the HHCA was to limit lands for homesteading and eventually secure additional lands for large corporate sugar and ranching interests.²⁶⁰ Thus, Professor Van Dyke, in recognition of the divisive nature of the blood quantum laws, chose to define Native Hawaiians to include all members of our community.

2. *The Burns article’s use of “native Hawaiian” resurrects the colonizer’s narrative to minimize the claims of Hawai‘i’s indigenous people*

Ultimately, the article’s analysis of the terms Hawaiian, Native Hawaiian, and native Hawaiian is emblematic of how this piece—intentionally or not—seeks to revive the colonizer’s collective memory of Hawai‘i. In that outdated and inaccurate version of ‘his-story,’ Hawai‘i’s indigenous people cannot define themselves and neither can the State’s larger multicultural populace define Native Hawaiians. Instead, an almost century-old definition is imported from Washington D.C.; a definition that has been a lightning rod within the native community and continues to divide and serve as a source of heartache and lawsuits.²⁶¹ As a community, many indigenous Hawaiians have sought to move beyond blood quantum and be more inclusive.²⁶² Professor Van Dyke recognized and respected that move towards greater inclusion.²⁶³

²⁵⁹ Protest to William McKinley (June 17, 1897), *reprinted* in LILIUOKALANI, *supra* note 170, at 354–56.

²⁶⁰ VAN DYKE, *supra* note 3, at 280–81; McGregor, *supra* note 252, at 27–30; J. KEHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 10–14, 37–38 (2008).

²⁶¹ *See, e.g., Day v. Apoliona*, 616 F.3d 918 (9th Cir. 2010) (challenge to OHA’s use of trust funds for programs that serve both native Hawaiians and the larger Native Hawaiian community); *Kealoha v. Machado*, 131 Hawai‘i 62, 315 P.3d 213 (2013) (holding that OHA trustees have broad discretion in use of trust funds to serve both native Hawaiians and the broader Native Hawaiian population). *See supra* notes 251–253, and accompanying text discussing the genesis of the blood quantum definition.

²⁶² *See, e.g., Derek H. Kauanoë & Breann Swann Nu‘uhiwa, We Are Who We Thought*

The Burns article's focus on blood quantum demonstrates not only a lack of sensitivity, but also misses a fundamental point, precisely as the U.S. Supreme Court majority did in *Rice v. Cayetano*.²⁶⁴ For Native Hawaiians, this is not about race.²⁶⁵ Certainly, racialization and racism were tools colonizers effectively deployed to overthrow the Hawaiian Kingdom.²⁶⁶ But, at bottom, what was stolen was the political status of all citizens of the Kingdom, not simply Kānaka Maoli.²⁶⁷ The collective memory of Hawai'i's history must consider and grapple with these injustices.

With respect to the Crown Lands, similar to the Office of Hawaiian Affairs' position in *Rice*, Kānaka Maoli have international human rights claims as a sovereign indigenous people, and are not seeking racial preferences or special privileges.²⁶⁸ In 1893, annexationists, backed by U.S. forces under U.S. minister to Hawai'i John Stevens, took control and overthrew the Hawaiian monarchy.²⁶⁹ Hawaiian culture quickly diminished as foreigners continued to impose western culture throughout the archipelago, condemning traditional practices, including medicinal healing, hula, and our native language.²⁷⁰ In 1959, the United States returned most of the ceded lands, which were "held in trust partially to benefit 'native Hawaiians.'"²⁷¹ The State never acted on its obligations to native Hawaiians, and as a result, specifically created OHA in 1978 to address Native Hawaiian needs and serve as a receptacle for reparations.²⁷² Professor Yamamoto highlighted that OHA and its voting limitation were

We Were: Congress' Authority to Recognize a Native Hawaiian Polity United by Common Descent, 13 ASIAN-PAC. L. & POL'Y J. 117 (2012) (providing a critical and contextual inquiry into the question of whether the U.S. Congress may enact legislation recognizing the self-governing authority of a Native Hawaiian people united by common descent, regardless of blood quantum).

²⁶³ VAN DYKE, *supra* note 3, at 1.

²⁶⁴ Compare Burns, *supra* note 2, at 214–17, with *Rice v. Cayetano*, 528 U.S. 495, 512–17 (2000).

²⁶⁵ See Hom & Yamamoto, *supra* note 6, at 1775–76.

²⁶⁶ *Id.* at 1775.

²⁶⁷ Kanalu Young, *Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1780–2001*, 2 HAW. J.L. POL. 1, 9–10 (2006) (noting that post-1795, Hawaiian nationality was not race-based and was inclusive of non-Hawaiians).

²⁶⁸ Hom & Yamamoto, *supra* note 6, at 1775; see also G.A. Res 61/295, Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) (articulating the rights of indigenous peoples as recognized by the U.N. General Assembly).

²⁶⁹ "The asserted reason for landing troops [in Hawai'i] was to protect American lives and property." MacKenzie, *supra* note 5, at 20–21.

²⁷⁰ See Souza & Walk, *'Ōlelo Hawai'i and Native Hawaiian Education*, in NATIVE HAWAIIAN LAW, *supra* note 5, at 1270.

²⁷¹ Hom & Yamamoto, *supra* note 6, at 1767.

²⁷² *Id.*

“created by the overwhelming vote of Hawai‘i’s multiracial populace partly to rectify the legacies of U.S. colonialism by affording Hawai‘i’s indigenous peoples a measure of self-determination.”²⁷³ Therefore, at issue here, as in *Rice*, is:

[N]ot simply the right to be equal but the right to self-determination; not a right to monetary entitlements but to reparation; not a right to special treatment but to reconnect spiritually with land and culture; not a right to fuller participation in the U.S. polity but some form of governmental sovereignty.²⁷⁴

In 1993, Congress passed the Apology Resolution to acknowledge the government’s immoral acts, apologize on behalf of the United States for its role in the illegal overthrow of the Hawaiian Kingdom, and commit to reconciliation with Native Hawaiians.²⁷⁵ Professor Van Dyke’s thoughtful consideration of this collective memory of injustice and selection of the term Native Hawaiian (with a capital N) extends the potential for healing and justice for Kānaka Maoli. I ka ‘ōlelo no ke ola.²⁷⁶

IV. I KA ‘ŌLELO NO KE OLA—WORDS CAN HEAL

Our collective memory of Hawai‘i’s history is critically important because justice struggles for Kānaka Maoli, and the related legal claims, start with smaller disputes over memory, precisely like those presented in Judge Burns’ article and resolved by this response. Who is Native Hawaiian? What were colonialism’s initial and lasting influences and impacts? What actually happened in the Māhele? What were Kamehameha III’s true motives when he instituted a Native Hawaiian hybrid of private property? Who was ultimately responsible for the illegal overthrow of the sovereign Hawaiian Kingdom, and who transferred the Kingdom’s and monarch’s substantial lands to the United States? Our perceptions of those issues and events evolve over time, especially as scholars and academics uncover new information or glean novel insight from original material, particularly resources in ‘Ōlelo Hawai‘i such as the Buke Mahele or Privy Council Records.²⁷⁷ Those perceptions are easily influenced by images or narratives that can, in turn, undermine or undergird

²⁷³ *Id.* at 1773.

²⁷⁴ *Id.* at 1775.

²⁷⁵ See Apology Resolution, *supra* note 18; Hom & Yamamoto, *supra* note 6, at 1772.

²⁷⁶ PUKUI, *supra* note 1, at 129 (translated here literally as “in the word there is life”).

²⁷⁷ See, e.g., BEAMER, *supra* note 5 (interrogating ali‘i agency through the Māhele process in particular).

Native Hawaiian legal claims.²⁷⁸ I ka ‘ōlelo no ke ola, i ka ‘ōlelo no ka make.²⁷⁹

This is why the inaccurate and conflicting “history” that the Burns article proffers is so problematic. As each of the examples detailed in Part III illustrate, Burns’ article ignores the leading experts in the fields of Native Hawaiian history, culture, law, and politics, and instead relies on questionable sources, including materials that were manufactured to justify the American acquisition of the lands of Hawai‘i’s sovereign government and monarchs.²⁸⁰ Fortunately, more recent research, and Native Hawaiian scholarship in particular, provides a compelling counter-narrative and clear legal and moral bases for Kānaka Maoli justice struggles and legal claims to the Crown Lands specifically.²⁸¹

As Professors Jonathan Osorio and Kamanamaikalani Beamer point out, “Burns’ own voice only rarely mak[es] pronouncements while most of the text includes lengthy and digressing quotations from nineteenth century observers[.]”²⁸² Even so, by resurrecting antiquated narratives that have since been discredited by nearly four decades of research and scholarship, the Burns article seeks to transform those old, erroneous memories into new ones.²⁸³ By doing so, Native Hawaiians and our cultural practices and history are framed in an exceedingly narrow way that confuses and constrains the larger community’s understanding of our legal claims.²⁸⁴ After all, “justice struggles through claims of right are, first and foremost, active present-day struggles over collective memory. How a community frames past events and connects them to current conditions often determines the power of justice claims or of opposition to them.”²⁸⁵

In his *Crown Lands* book, Professor Van Dyke incorporated Native Hawaiian scholarship and tenets to frame memories and illuminate a narrative about the injustices committed against Native Hawaiians. He sought to educate the larger community about the real history of Hawai‘i in

²⁷⁸ See *supra* Part II.B.1.

²⁷⁹ PUKUI, *supra* note 1, at 129 (translated here literally as “in the word there is life; in the word there is death”).

²⁸⁰ See *supra* Part III; see also Osorio & Beamer, *supra* note 8; Andrade, *supra* note 7; Poai, *supra* note 22.

²⁸¹ See *supra* Part III.

²⁸² Osorio & Beamer, *supra* note 8, at 471. Professors Osorio and Beamer likened Burns’ essay to memories of reading “the journals of two of the architects of the 1893 overthrow of the Hawaiian Kingdom, Sanford B. Dole and Lorrin Thurston,” which was “honestly a narrative we did not expect to read again after thirty years of steady and responsible scholarship.” *Id.* at 469.

²⁸³ See *supra* Section II.B.1.

²⁸⁴ See *supra* Section II.B.1.

²⁸⁵ Hom & Yamamoto, *supra* note 6, at 1771.

a manner that would uplift both the collective memory of injustice and Kānaka Maoli communities and culture. He also endeavored to inspire both a more informed understanding of Native Hawaiian justice claims and the actions necessary to right those wrongs. In doing so, Professor Van Dyke's words seek to advance healing and reparations for Native Hawaiians and Hawai'i even after he has left us. I ka 'ōlelo no ke ola.²⁸⁶

²⁸⁶ PUKUI, *supra* note 1, at 129 (translated here literally as “in the word there is life”).

