

# Ho‘oku‘ikahi: Reconciling Land Dispossession, Culture, History, and Law in Hawai‘i

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## ABSTRACT

*Hawai‘i’s story is one like many other Indigenous communities across the globe: a colonizing regime actively assisted in the dispossession of land and illegal overthrow of another internationally recognized sovereign government. This Article examines the ongoing struggle for reparative action for the injustices against Native Hawaiians, Hawai‘i’s indigenous peoples, through an exploration of the work of the Native Hawaiians Study Commission. Congress tasked this Commission with investigating the socioeconomic and cultural conditions of Native Hawaiians and examining the legal and moral obligations of the American government to Native Hawaiians in light of historical wrongs, notably the American overthrow and annexation. What transpired was a battle over the collective memory of Hawaiian history, as different stakeholders vied for control of the historical narrative to shape contemporary legal and political responses. The Commission authored a decision in the face of a Reagan Administration clawing back on programs that benefit minorities. The Commission majority, all political appointees of President Reagan, used biased resources and a skewed view of history to deny reparations from the federal government to Native Hawaiians. This Article examines the creation, challenges, and successes of the Commission to interrogate how the framing of Hawaiian history in political spheres determines the power of or opposition to Hawaiian justice claims.*

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## I. INTRODUCTION

Mauna a Wākea is a revered mountain in Hawai‘i that rises nearly 14,000 feet above sea level.<sup>1</sup> Measured from its base at the bottom of the ocean, this dormant volcano is considered the tallest mountain on the planet. It is a place

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<sup>1</sup> *In re* Conservation Dist. Use Application HA-3568 (*Mauna Kea II*), 143 Hawai‘i 379, 384, 431 P.3d 752, 757 (2018) (“Some Native Hawaiians, including some of the appellants, consider Mauna Kea, which rises to an elevation of 13,796 feet above sea level, to be an ancestor, a living family member and progenitor of Hawaiians, born of Wākea (Sky Father) and Papa (Earth Mother).”). “Mauna a Wākea” and “Mauna Kea” are used interchangeably.

of snow and sweltering heat. It is an area of peace. For Kānaka Maoli (Native Hawaiians),<sup>2</sup> Hawai‘i’s indigenous people, the peak of the mountain “connects us to the heavens—it is the first to be touched by the rising sun’s morning rays and the first to receive the highest clouds’ life-giving waters.”<sup>3</sup> It is “an ancestor, a living family member and progenitor of Hawaiians, born of Wākea (Sky Father) and Papa (Earth Mother).”<sup>4</sup> It is the wao akua, home of the pantheon of Hawaiian gods, where only the highest ranking chiefs and priests journeyed.<sup>5</sup> The Supreme Court of Hawai‘i acknowledged Mauna Kea’s spiritual and cultural significance:

The summit of Mauna Kea is thought to touch the sky in an unique and important way, as a piko (navel) by which connections to the ancestors are made known to them, or as the piko ho‘okahi (the single navel), which ensures spiritual and genealogical connections, and the rights to the regenerative powers of all that is Hawai‘i. The large number of shrines on Mauna Kea indicate that there was a pattern of pilgrimage, “a walk upward and backward in time to cosmological origins,” to worship the snow goddess Poli‘ahu and other akua such as Kūkahau, Līlīnoe, and Waiau.<sup>6</sup>

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<sup>2</sup> “Maoli” is defined as native, indigenous, aborigine, genuine. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 240 (rev. ed. 1986) [hereinafter HAWAIIAN DICTIONARY]. “Kanaka maoli” is defined as a Hawaiian native. *See id.* “Kanaka” is the singular; “kānaka” is the plural. *Id.* at 127. In this Article, the terms “Kānaka Maoli,” “Hawaiian,” and “Native Hawaiian” (plural) are used interchangeably. Unlike how residents in California are described as Californians, “Hawaiian” has always been understood to refer to Hawai‘i’s indigenous people. *See* J. KĒHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY xii (2008).

<sup>3</sup> Leon No‘eau Peralto, *Portrait. Mauna a Wākea: Hānau Ka Mauna, The Piko of Our Ea*, in A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 233, 236 (Noelani Goodyear-Ka‘ōpua et al., eds. 2014) [hereinafter A NATION RISING]; *see also Mauna Kea II*, 143 Hawai‘i at 384, 431 P.3d at 757.

<sup>4</sup> *Mauna Kea II*, 143 Hawai‘i at 384, 431 P.3d at 757.

<sup>5</sup> *See* Peralto, *supra* note 3, at 233; *see also Mauna Kea II*, 143 Hawai‘i at 384–85, 431 P.3d at 757–58 (“They [Kānaka Maoli] consider the Mauna Kea summit area, also known as Kūkahau‘ula (cluster of pu‘u or cinder cones), to be a wahi pana (storied place) and wao akua (the place where gods reside), the realm of ancestral akua (gods, goddesses, deities) believed to take earthly form as the pu‘u, the waters of Lake Waiau, and other significant landscape features.”).

<sup>6</sup> *Mauna Kea II*, 143 Hawai‘i at 385, 431 P.3d at 758.

For Native Hawaiians, Mauna Kea is the most sacred of spaces.<sup>7</sup>

Yet numerous observatories now dot the highest points of the mountain.<sup>8</sup> Despite decades of documented mismanagement,<sup>9</sup> in July 2009, a consortium supported by the Hawai‘i state government and the University of Hawai‘i proposed building a \$1.4 billion Thirty Meter Telescope (“TMT”) atop Mauna Kea.<sup>10</sup> Although the new telescope would allow astronomers “to address fundamental questions in astronomy ranging from understanding star and planet formation to unraveling the history of galaxies and the development of large-scale structure in the universe,”<sup>11</sup> the construction of the TMT presents a direct challenge to Hawaiian culture and religion.<sup>12</sup> The *kia‘i*, or protectors, of Mauna Kea pursued legal avenues to protect their traditional and cultural rights, and to ensure that Mauna Kea would no longer be desecrated.<sup>13</sup> Yet despite years of opposition through hearings and litigation, the TMT consortium received approval to begin construction.<sup>14</sup> Having exhausted all legal remedies, the *kia‘i* prepared to make their final stand.

On Monday, July 15, 2019, at the base of the Mauna Kea Access Road that ascends the mountain to the TMT construction site, eight Native Hawaiians bound themselves to a cattle guard.<sup>15</sup> With the tender care of loved ones,

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<sup>7</sup> See MARY KAWENA PUKU‘I, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS 234 [hereinafter ‘ŌLELO NO‘EAU] (Prov. 2147) (“Mauna Kea, kuahiwi kū‘hao I ka mālie. Mauna Kea, standing alone in the calm.”).

<sup>8</sup> *Mauna Kea II*, 143 Hawai‘i at 385, 431 P.3d at 758 (noting the many astronomical observatories within the Mauna Kea Science Reserve).

<sup>9</sup> See OFF. OF THE AUDITOR, STATE OF HAW., REP. NO. 98-6, AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE (1998), <https://dlnr.hawaii.gov/occl/files/2018/01/Audit-Report-98-6.pdf> (“We found that the University of Hawaii’s management of the Mauna Kea Science Reserve is inadequate to ensure the protection of natural resources. . . . We found that the Department of Land and Natural Resources needs to improve its protection of Mauna Kea’s natural resources.”).

<sup>10</sup> *Mauna Kea II*, 143 Hawai‘i at 386–87, 431 P.3d at 759–60 (describing the TMT partners and the processes followed to obtain a permit to construct the telescope).

<sup>11</sup> *About: TMT’s Mission and Values*, TMT INT’L OBSERVATORY, <https://www.tmt.org/page/about> (last visited Mar. 27, 2025).

<sup>12</sup> *Mauna Kea II*, 143 Hawai‘i at 395–400, 431 P.3d at 768–73 (analyzing the claims that granting the application would interfere with Native Hawaiian traditional cultural and religious rights).

<sup>13</sup> *Id.* at 384–85, 431 P.3d at 757–58.

<sup>14</sup> *Id.*

<sup>15</sup> Anita Hofschneider et al., *No Arrests and No Construction Convoy After a Day of Protests*, HONOLULU CIV. BEAT (July 15, 2019), <https://www.civilbeat.org/2019/07/protest-on-mauna-kea-hundreds-block-road-as-trucks-set-to-roll/>.

these nā pu‘uwai haokila—the hearts of steel—stayed resolute against any encroachments of equipment to the construction site through frigid cold and blistering heat.<sup>16</sup> Jon Osorio, dean of the University of Hawai‘i’s Hawai‘inuiākea School of Hawaiian Knowledge, serenaded his child, Dr. Jamaica He‘oli Osorio, one of the eight tied to the cattle guard.<sup>17</sup>

Heavy machinery and law enforcement from the Hawai‘i County Police Department and the State of Hawai‘i’s Division of Conservation and Resources Enforcement arrived.<sup>18</sup> For the first time in over twenty years, the Hawai‘i County mayor requested and received troops from the Hawai‘i National Guard to “support” law enforcement activities.<sup>19</sup> The mayor also called officers from neighboring islands to assist.<sup>20</sup> The potential for violence grew with the numbers of kia‘i assembled. But this was a non-violent resistance movement; it was a moral stand—one that demonstrated the lengths to which people would go to save this space from further desecration. The tension was palpable as kia‘i leaders negotiated with law enforcement for a resolution. Eventually, the conflict was averted after the police announced that no one would be arrested that day.<sup>21</sup>

The next day, July 16, 2019, hundreds came to the mountain to assist in the resistance. The kia‘i set up a campsite near the base and vowed to peacefully block any attempts at constructing the telescope. In an “unprecedented move,” observatory leaders called for the evacuation of staff from the various observatories “due to safety concerns related to the protest at the mountain’s base over plans to build another telescope.”<sup>22</sup> Negotiations between the government and the kia‘i continued and appeared to fray when the government refused to allow a single car with several kupuna (elders) to

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<sup>16</sup> Zachary Alaka‘i Lum, *Nā Pu‘uwai Haokila*, KANAEOKANA, [https://kanaeokana.net/wp-content/uploads/2019/09/Na\\_Puuwai\\_Haokila.pdf](https://kanaeokana.net/wp-content/uploads/2019/09/Na_Puuwai_Haokila.pdf) (last visited Apr. 15, 2025) (using traditional Hawaiian poetic devices, Lum compares the resolve of the kia‘i to the strength of the steel cattle guard while simultaneously weaving in the names of all eight kia‘i into the composition).

<sup>17</sup> Cassie Ordonio, *Kanaka Maoli Views of Maunakea and TMT*, KA LEO: THE VOICE OF HAWAII‘I (July 29, 2019), [https://www.manoanow.org/kaleo/features/kanaka-maoli-views-of-maunakea-and-tmt/article\\_f97a7272-b1a5-11e9-a227-1be3df6b2521.html](https://www.manoanow.org/kaleo/features/kanaka-maoli-views-of-maunakea-and-tmt/article_f97a7272-b1a5-11e9-a227-1be3df6b2521.html).

<sup>18</sup> See Hofschneider et al., *supra* note 15.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Jason Armstrong, *All Observatory Staffers Evacuated as TMT Protest Continues*, HONOLULU CIV. BEAT (July 16, 2019), <https://www.civilbeat.org/2019/07/tmt-protesters-talks-break-down-kupuna-are-going-to-block-the-road/>.

drive to the top of the mountain to offer prayers and healing.<sup>23</sup> But, again, law enforcement arrested no one.<sup>24</sup>

On July 17, 2019, the dark blue and green government uniforms once again descended upon Mauna a Wākea. Once again, an organized and disciplined response met them.<sup>25</sup> A single line of elders was bundled in warmth to protect against the elements.<sup>26</sup> Tears flowed from the eyes of police officers and *kia‘i* alike as the government gave the orders to begin arrests.<sup>27</sup>

Silence descended upon the group as the police arrested, one by one, revered *kupuna*—such as Dr. Pua Kanaka‘ole Kanahale, considered a cultural treasure and keeper of sacred knowledge, who, along with others, revived traditional hula.<sup>28</sup> *Kia‘i* somberly sang the usually cheerful anthem, “Hawai‘i Loa Kū Like Kākou,” through quivering lips and teary eyes.<sup>29</sup> The sound of the conch shell and the cries of “*auē*” pierced the sky like the wailing of a parent losing their beloved child.<sup>30</sup>

There was no struggle. The *kūpuna* moved slowly and honorably, either by walking or being pushed in wheelchairs, to the paddy wagon.<sup>31</sup> They proudly gave their names to the officers. “Let the mountain bring us all together! Unity Hawaiians!” shouted Walter Ritte, a native of the island of Moloka‘i, who for years championed many causes of Native Hawaiians, including protesting the U.S. military bombing on the island of Kaho‘olawe in the 1970s.<sup>32</sup> “We have a right to worship god in the environment of our

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Anita Hofschneider, *Another ‘Truce’ After a Day of Arrests on Mauna Kea*, HONOLULU CIV. BEAT (July 17, 2019), <https://www.civilbeat.org/2019/07/arrests-begin-as-tmt-protesters-block-road/>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Pualani Kanaka‘ole Kanahale is a revered hula practitioner and cultural expert who has dedicated her life to perpetuating the Hawaiian culture. John Berger, *Tradition & Evolution*, HONOLULU STAR-BULL., Jan. 29, 2006, at E1.

<sup>29</sup> See Big Island Video News, *Kupuna Arrested – Mauna Kea Update (July 17 2019)*, YOUTUBE (July 17, 2019), <https://www.youtube.com/watch?v=6KbYJLfsHN4&t=143s>, at 2:13, 12:38 [hereinafter *Kupuna Arrested*]; Liko Martin, *Composer Martin Shares Lyrics of ‘All Hawai‘i Stands Together’*, KA WAIOLA O OHA, Oct. 1988, at 14 (“E hamauloa, ko leo aloha ‘āina. So let us raise our voice in song to save our land.”).

<sup>30</sup> See HAWAIIAN DICTIONARY, *supra* note 2, at 31 (defining “*auē*” as “[t]o groan, moan, grieve, bewail”); *Kupuna Arrested*, *supra* note 29, at 4:10.

<sup>31</sup> *Kupuna Arrested*, *supra* note 29, at 4:10.

<sup>32</sup> See Keith Haugen, *Ritte is Acquitted of Trespassing Charges*, HONOLULU STAR-BULL., Apr. 15, 1976, at A2.

belief. Respect it!” demanded Mililani Trask, a tireless advocate for Kānaka Maoli and other Indigenous peoples across the world.<sup>33</sup> Officers detained Carmen Hulu Lindsey, who had genealogical ties to Hawai‘i Island and was the then-Chairperson of the Office of Hawaiian Affairs. Aunty Hulu stated, “I stand with other kupuna and our mo‘opuna [grandchildren] because we will live in, be fed by, will stand by, and will aloha this ‘āina.”<sup>34</sup>

In other places at other times, law enforcement officers might inflict violence on a protester for disobeying a government order. But on Mauna Kea in 2019, officers greeted kūpuna with respect and apologies—expressing sincere regret for having to do their job and lock them up. In turn, the kūpuna embraced officers with aloha. Nevertheless, given the growing numbers at Mauna Kea and perceived safety issues, Hawai‘i’s Governor David Ige issued an emergency proclamation—the same mechanism used to seek federal support for natural disasters—which allocated broad powers to law enforcement to control access to the mountain.<sup>35</sup>

This conflict between Kānaka Maoli and the State of Hawai‘i is the latest in a litany of struggles that forced Hawai‘i’s Indigenous people to—quite literally—lay their lives down against the devastating effects of American imperialism and colonization.<sup>36</sup> In the past, these conflicts sparked political

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<sup>33</sup> *Kupuna Arrested*, *supra* note 29, at 6:59. Mililani Trask is a respected lawyer and human rights advocate, who served as trustee of the Office of Hawaiian Affairs and Kia ‘āina or governor for Ka Lāhui Hawai‘i, a Hawaiian sovereignty movement. See Noe Noe Wong-Wilson, *A Conversation with Mililani Trask*, 17 THE CONTEMP. PAC. 142–43 (2005).

<sup>34</sup> Carmen “Hulu” Lindsey, *Kapu Aloha Mauna Kea*, KA WAIOLA OOHĀ (Aug. 9, 2019), <https://kawaiola.news/oha/trustees/kapu-aloha-mauna-kea/>.

<sup>35</sup> Governor David Y. Ige, Emergency Proclamation for Mauna Kea, State of Hawai‘i Off. of the Gov. (July 17, 2019), <https://dod.hawaii.gov/hiema/emergency-proclamation-for-mauna-kea/> (proclaiming “a state of emergency for the purpose of implementing emergency management functions as allowed by law in order to protect the health, safety, and welfare of the people; prevent substantial injury or harm to the population or substantial damage to or loss of property; ensure the execution of the law; and suppress or prevent lawless violence, riot, the forcible obstruction of the execution of the laws resulting from the emergency”); see Hofschneider, *supra* note 25. Years later the Hawai‘i Supreme Court chastised the State because the Mauna Kea Access Road—the path upon which the resistance blocked—was illegally seized from native Hawaiian beneficiaries, giving the State no jurisdiction to control the road. *Kanahele v. State*, 154 Hawai‘i 190, 194, 349 P.3d 275, 279 (2024). The land upon which the State arrested kupuna was quite literally their land. *Id.* The arrests typified Kānaka Maoli dispossession of land, the severe mismanagement of Hawaiian land, and the apathy for Kānaka Maoli claims to land. See *id.*

<sup>36</sup> See Melody Kapilialoha MacKenzie, *Historical Background*, in NATIVE HAWAIIAN LAW: A TREATISE 272 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua‘ala Sproat eds., 2015) [hereinafter *Historical Background*].

revolutions for Native Hawaiians and their allies.<sup>37</sup> In the 1960s and 1970s, and given the rediscovery of a rich yet devastating legal history, Kānaka Maoli challenged the popular narrative of Hawai‘i as a progressive haven of racial, cultural, and social harmony.<sup>38</sup> The reemergence of stories about the American overthrow of the Kingdom of Hawai‘i in 1893 and American seizure of the islands in 1898 against the express will of a vast majority of Kānaka Maoli vivified this legal history—a history that all but vanished to time.<sup>39</sup>

This Hawaiian renaissance sparked a renewed interest and understanding of the past. Among the many results of this heightened historical, political, and legal consciousness, was the State of Hawai‘i’s creation—through constitutional amendment—of the Office of Hawaiian Affairs, an autonomous branch of the State government envisioned to serve as a vehicle for reparative action for the injustices against Native Hawaiians.<sup>40</sup> One of the first initiatives of the Office of Hawaiian Affairs was to support a federally-mandated effort to comprehensively study Native Hawaiian reparations claims against the United States for the theft of Hawaiian land.<sup>41</sup> The federal effort, in the waning days of President Jimmy Carter’s administration, involved the creation of a Native Hawaiians Study Commission (“Commission”). The Commission represented a significant step toward healing historical wounds by setting out a process of ho‘oku‘ikahi—reconciliation. However, that achievement was short-lived.

Using the theoretical framework of collective memory—that is, knowledge about the past that is shared, mutually acknowledged, and reinforced<sup>42</sup>—this Article interrogates underexamined conclusions of the Commission and seeks to deploy and uplift Indigenous knowledge in

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<sup>37</sup> Troy J.H. Andrade, *Hawai‘i ‘78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, 24 U. PENN. J.L. & SOC. JUST. 85, 102–17 (2021) [hereinafter *Hawai‘i ‘78*].

<sup>38</sup> *Id.* at 117–39.

<sup>39</sup> See generally Troy J.H. Andrade, *American Overthrow*, 22 HAW. BAR J. 4 (Apr. 2018) (describing the American government’s support of the illegal overthrow of the Kingdom of Hawai‘i, the American government’s subsequent annexation, and the Native Hawaiian resistance to these injustices).

<sup>40</sup> See *Hawai‘i ‘78*, *supra* note 37, at 90.

<sup>41</sup> See Troy J.H. Andrade, *Changing Tides: A Political and Legal History of the Office of Hawaiian Affairs* (May 2016) (Ph.D. dissertation, University of Hawai‘i at Mānoa) (describing the political and legal history of the Office of Hawaiian Affairs).

<sup>42</sup> Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1764 (2000).

political spheres often fraught with volatile power dynamics. Part II of this Article summarizes the literature on collective memory and its relationship with lawmaking to demonstrate that power rests with those strategically framing—some might say weaponizing—history and culture.<sup>43</sup> The heart of this piece, however, lies in Part III, which dives into the depths of the historical and cultural archive to critique the work of the Commission majority, which ultimately recommended absolving America of liability for the dispossession of Hawaiian land.<sup>44</sup> The case study that emerges, thus, illuminates valuable and strategic lessons to reassess collective memory and amplify the use of cultural practices in efforts to seek reparative action for Kānaka Maoli. This forgotten moment in history when the American government “studied” the necessity of reparations for Native Hawaiians provides key insights and serves as a cautionary tale for seeking justice for Indigenous communities.

## II. COLLECTIVE MEMORY, CULTURE, AND THE LAW

History and law are inextricably linked, shaping and influencing one another in powerful ways.<sup>45</sup> Laws are often responses to past injustices, as politicians craft legislation designed to address historical inequities and rectify societal wrongs.<sup>46</sup> This intertwining of history and law is vital to understanding the function of legal systems, as jurists, lawyers, and legal scholars rely on historical analyses to both interpret existing laws and advocate for legal reforms.<sup>47</sup> In particular, history is an essential tool for

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<sup>43</sup> See discussion *infra* Part II.

<sup>44</sup> See discussion *infra* Part III.

<sup>45</sup> Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court’s Narrative of Hawai‘i’s Past*, 39 U. HAW. L. REV. 631, 634 (2017) [hereinafter *(Re)Righting History*] (citing Daniel A. Farber, *Adjudication of Things Past: Reflections on History as Evidence*, 49 HASTINGS L.J. 1009, 1030 (1998) (“The linkage between past and present is especially central in law.”)).

<sup>46</sup> See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (outlawing discrimination on the basis of race, color, religion, sex, and national origin); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (prohibiting racial discrimination in voting); Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) (apologizing for the incarceration of those of Japanese ancestry during World War II); Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (noting congressional and presidential apology for the overthrow of the Kingdom of Hawai‘i).

<sup>47</sup> See Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896–1900*, 78 DENV. L. REV. 921, 940 (2001) (noting that history is important to “better understand the origin of rules” to make “present day arguments as to why these rules should be changed”).

understanding the evolution of legal doctrines and practices.<sup>48</sup> Courts, for example, depend on historical records to guide their interpretation of legal rules and predict the outcomes of future cases, making history a key aspect of legal reasoning and judicial decision-making.<sup>49</sup>

In the American legal system, the principle of stare decisis, the doctrine that courts should follow previous decisions, ensures that history plays a fundamental role in shaping legal outcomes.<sup>50</sup> Courts look back at past rulings to determine how legal issues were resolved and use this knowledge to predict how current cases might be decided.<sup>51</sup> At the same time, history is often employed to help clarify the intent behind legislative acts.<sup>52</sup> When the language of a statute is ambiguous, for example, courts may delve into legislative history, such as committee reports, debates, and early drafts, to

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<sup>48</sup> See *(Re)Righting History*, *supra* note 45, at 634 (“Indeed, history is a methodological tool that is imbedded in the principle of stare decisis; courts use history as a way to document how legal issues were decided in order to predict the outcome of future cases.”).

<sup>49</sup> See Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 484 (2008) (“At bottom, the legal system and the writing of history are both concerned with establishing the facts of past events and with providing interpretations that establish a workable understanding of the truth.”); Harlan Grant Cohen, “Undead” *Wartime Cases: Stare Decisis and the Lessons of History*, 84 TUL. L. REV. 957, 1000 (2010) (“Moreover, the process of parsing precedent looks in many ways like historical analysis; courts do not only look to prior opinions for wisdom, but carefully interrogate the facts of those cases to determine whether current ones are truly analogous.”).

<sup>50</sup> Cohen, *supra* note 49, at 990 (“Stare decisis is the ‘[p]olicy of courts to stand by precedent and not to disturb settled point[s].’ For inferior courts, that policy is a binding rule. Lower courts must follow the rules laid out in the decisions of higher courts. For future panels of the same court, the effect of stare decisis is less clear, but it operates at the very least as a strong presumption. ‘Stare decisis is not an inexorable command,’ the United States Supreme Court has explained, but it is ‘the preferred course,’ and ‘usually the wise policy.’”).

<sup>51</sup> *Id.*

<sup>52</sup> Alan G. Gless, *A Simple Country Judge’s Musings on the Use of History by Trial Lawyers*, 7 GREEN BAG 2D 343 (2004) (“The trial court team engages in historical inquiry whenever it searches for and chooses among precedents and interprets statutes and administrative rules.”); Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 449 (1998) (“Other historical inquiries can produce far more complex problems. Discerning legislative intent, for instance, may be difficult: among other things the researcher must ask whose intent matters (the majority’s? the minority’s? the swing vote’s?). In the case of a constitutional provision, do the intents of those who voted to ratify the constitution or the amendment matter? Should we consider the intent of some group that voted in favor of the provision, but for reasons that diverge sharply from the bulk of the majority?”).

interpret what lawmakers intended when they passed the law.<sup>53</sup> In this way, history provides a means for the judiciary to legitimize its decisions and shape future legal interpretations.

History, however, is not always used merely to reinforce existing legal structures. Lawyers, particularly those advocating for social justice and reform, may use historical arguments to challenge long-standing legal principles.<sup>54</sup> They may argue that a particular ruling was historically unjust and that it should be overturned or modified.<sup>55</sup> Yet, as Professor Eric K. Yamamoto argues, this conventional approach to history often overlooks an essential aspect of how historical injustices are understood and addressed.<sup>56</sup> History, when used solely as a tool for critiquing legal decisions, misses what Yamamoto calls the “archives of mind, spirit, and culture[.]”<sup>57</sup> He suggests

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<sup>53</sup> See Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 589 (2000) (“A look into history will often bring to light information that is relevant to dealing with the present and the future. But when this happens, it is the information itself that should shape our response to current problems, rather than the past as such; the past is just a data source. If the only reason that can be given for deciding one way rather than another is that this is how it was done in the past, it is a feeble reason, though good enough if there is no reason to change. The database conception of history is now fairly well understood in relation to judges’ use of ‘legislative history,’ the background out of which a statute or a constitutional provision emerges. What an influential member or committee of the legislature said about the meaning of a bill that was later enacted, or what were the historical events out of which the bill welled, are data that may be helpful in determining the meaning of the enactment. This history is not normative, but just a convenient body of relevant data.”).

<sup>54</sup> See Gregory Abvlasky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243 (2023) (using history to describe the ways in which Native peoples can claim their role as co-creators of constitutional law in the United States); José Argueta Funes, *The Civilization Canon: Common Law, Legislation, and the Case of Hawaiian Adoption*, 71 UCLA L. REV. 128 (2024) (analyzing nineteenth century Hawaiian adoption and inheritance cases to reimagine the interplay between statutory interpretation with imperialism and colonialism); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 6, 101–02 (1999) (describing the failure of originalists to adhere to the original meaning of “commerce”).

<sup>55</sup> *Hawai‘i* ‘78, *supra* note 37, at 90 (“When deployed to change the law, history is a weapon in a lawyer’s arsenal to critique legal principles; a lawyer can argue that a particular decision was historically wrong and therefore push for its demise.”).

<sup>56</sup> Hom & Yamamoto, *supra* note 42, at 1764 (“The struggle over recognition of competing collective memories is therefore often a struggle over the supremacy of world views, of colliding ideologies.”).

<sup>57</sup> *Id.*

that the social understanding of past injustices is largely shaped in the present, with collective memory playing a central role in this process.<sup>58</sup> In Yamamoto's view, collective memory is a critical tool for promoting reparative justice because it shapes how communities remember and make sense of past wrongs.<sup>59</sup> Understanding the theoretical foundation of collective memory is, therefore, essential for exploring its potential to influence legal reforms, such as those pursued by Native Hawaiians in their quest for justice.

#### A. *Theoretical Foundations of Collective Memory*

The concept of collective memory has deep roots in sociology, psychology, and history. One of the earliest theorists to explore the role of collective memory was Émile Durkheim, a French sociologist who argued that societies create and adopt "collective representations"—symbols and

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<sup>58</sup> *Id.* at 1757 ("Social 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.").

<sup>59</sup> *Id.* at 1764 ("This means that the group members, lawyers, politicians, justice workers, and scholars possess often unacknowledged power at the very foundational stages of every redress movement. The power resides in the potential for constructing collective memories of injustice as a basis for redress. It also resides in the potential for shaking (or salving) the psyche of a people. This also means that collective memory can be put to regressive and well as progressive use."). Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms*, 27 WM. & MARY BILL RTS. J. 501, 522 (2018). Understanding reparative justice is important to address historical wrongs. Reparative justice, as Professor Susan Serrano concludes, "focuses on mending breaches in the polity by healing the persisting wounds of communities harmed." *Id.* at 522. Serrano contends that that the goal of reparative justice is to:

ascertain and respond to groups' self-determined ideas of injury and remedy in order to build new relationships "as focal points for fostering an interest-convergence among the victims of injustice . . . and society itself." As legal scholar Eric Yamamoto asserts, "[b]ecause the wounds are the material and psychological harms of injustice, the prescriptions for healing those wounds must be informed by justice[.]" shaped by both those harmed and the larger society. Similarly, legal scholar Martha Minow contends that reparative justice for victims of mass violence should embody the notion of restorative justice "to repair the harms and to institute future changes to correct the injustice." For Indigenous legal scholar Rebecca Tsosie, "self-determination provides the baseline requirement for an effective theory of reparative justice."

*Id.* (internal footnotes and citations omitted).

meanings shared by members of a group that define their identity.<sup>60</sup> Durkheim believed that these representations were not merely individual recollections, but rather collective creations that helped bind societies together.<sup>61</sup> In his work *Elementary Forms of the Religious Life*, Durkheim emphasized the significance of group memory over individual memory, suggesting that societies pass down collective representations to maintain social cohesion and continuity.<sup>62</sup>

Durkheim’s ideas were further developed by his student Maurice Halbwachs, who coined the term “collective memory” to describe the way in which individual memories are shaped by social contexts.<sup>63</sup> Halbwachs argued that memory is not an individual phenomenon but rather a social process, with memories formed through interactions with families, communities, and social institutions.<sup>64</sup> He observed that memories are tied to shared ideas, linguistic forms, and social structures, creating what he called “collectively shared representations of the past.”<sup>65</sup> Halbwachs emphasized that collective memory is always constructed in the present and influenced by the social and political contexts in which it is remembered.<sup>66</sup> According

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<sup>60</sup> ÉMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 330 (Carol Cosman trans., 2008) (“[C]oncepts are collective representations. If they are common to a whole social group, this is not because they represent a simple average among corresponding individual representations; for then they would be poorer than these (individual representations) in intellectual content, while in reality they are rich with a knowledge that surpasses that of the average individual. They are not abstractions that would have reality only in particular minds but representations every bit as concrete as those that the individual can construct from his personal surroundings: they correspond to the way in which that special entity, society, thinks about the things from its own experience.”).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 329–31.

<sup>63</sup> Maurice Halbwachs, *From the Collective Memory*, in *THEORIES OF MEMORY: A READER* 139, 143 (Michael Rossington et al., eds., 2007) (“History can be represented as the universal memory of the human species. But there is no universal memory. Every collective memory requires the support of a group delimited in space and time.”).

<sup>64</sup> Ariela Gross, *The Constitution of History and Memory*, in *LAW AND THE HUMANITIES: AN INTRODUCTION* 416, 418 (Austin Sara et al., eds., 2010).

<sup>65</sup> See *id.* (citing Wulf Kansteiner, *Finding Meaning in Memory: A Methodological Critique of Collective Memory Studies*, 41 *HIST. & THEORY* 179, 181 (2002)).

<sup>66</sup> Joachim J. Savelsberg & Ryan D. King, *Institutionalizing Collective Memories of Hate: Law and Law Enforcement in Germany and the United States*, 111 *AM. J. SOCIO.* 579, 582 (2005).

to Halbwachs, the past is never purely objective or static; instead, it is shaped by the needs, values, and power dynamics of contemporary society.<sup>67</sup>

The work of Durkheim and Halbwachs laid the foundation for later developments in the study of collective memory. Jeffrey Olick, a sociologist and historian, has identified three core questions that define the field of collective memory research: What do we do with the past? What does the past do for us? What does the past do to us?<sup>68</sup> These questions encapsulate the complex role that memory plays in shaping society. Margit Cohn, an expert in legal studies, expands on Olick's framework, emphasizing the importance of cultural artifacts, museums, and commemorative practices in shaping collective memory.<sup>69</sup> These "carriers of collective memory" help preserve and communicate historical narratives, reinforcing social identities and values.<sup>70</sup>

Olick's framework also underscores the role of collective memory in shaping the future. How societies choose to remember the past, particularly the injustices of history, influences how they address present-day issues and anticipate future outcomes.<sup>71</sup> For marginalized groups, collective memory can be a tool for both healing and resistance.<sup>72</sup> By revisiting past wrongs

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<sup>67</sup> Margit Cohn, *When, and Where, Does History Begin? Collective Memory, Selective Amnesia, and the Treatment of Asylum Seekers in Israel*, 2017 U. ILL. L. REV. 563, 569 (2017) (citation omitted).

<sup>68</sup> Jeffrey K. Olick, *From Usable Pasts to the Return of the Repressed*, 9 HEDGEHOG REV. 19, 20–21 (2007) ("Either way, the past is not just a tool in the arsenal of power, but the very wellspring of identity. In the first view then, the question is what *we* do *with* the past; in the second, it is what the *past* does *for* us. Nevertheless, there is a third view that sees the relationship between past and present as neither under our control nor functional. Rather, with a much darker vision shaped by the violent culture of nineteenth-century Romanticism, as well as by the unprecedented destruction brought on us by industrial warfare, a third understanding has emerged that asks what the past does *to* us."); Cohn, *supra* note 67, at 570.

<sup>69</sup> Cohn, *supra* note 67, at 570 ("[T]he first question, which can be rephrased as 'how is the past used,' has inspired studies of carriers of collective memory, that is, the agents and vehicles that contribute to its evolution. These are concerned with social and cultural constructs that are either culturally or socially emergent (or both), such as commemoration practices, cultural artifacts, museums, and, in Pierre Nora's words, 'realms of memory.'").

<sup>70</sup> *Id.* at 570–71.

<sup>71</sup> See Olick, *supra* note 68, at 20–21; *Hawai'i '78*, *supra* note 37, at 120–30 (describing the successful mobilization of Hawaiian history in constitutional building process).

<sup>72</sup> See, e.g., Miyoko Pettit-Toledo, *Collective Memory and Intersectional Identities: Healing Unique Sexual Violence Harms Against Women of Color Past, Present and Future*, 45 U. HAW. L. REV. 346, 365–69 (2023) (detailing the power of collective memory within the context of truth commissions and the justice struggles of women of color harmed by sexual

through the lens of collective memory, communities can challenge dominant historical narratives and push for legal and social reform.<sup>73</sup> Yamamoto and others have applied this understanding of collective memory to the legal field, analyzing how courts and legal bodies engage with historical memory in adjudicating claims related to social injustice.<sup>74</sup> Yamamoto’s and Sharon Hom’s critique of the U.S. Supreme Court case *Rice v. Cayetano*, which denied reparative measures for Native Hawaiians, highlights how collective memory can shape the interpretation of legal rights and responsibilities.<sup>75</sup>

### B. *The Power of Collective Memory in Framing Injustice*

In the legal context, the process of remembering past injustices is not neutral; it is an active and often contested one.<sup>76</sup> Collective memory is a dynamic process, shaped by cultural, political, and institutional forces.<sup>77</sup> When decision-makers such as judges, policymakers, or scholars interpret historical events, they are not merely recounting facts; they are actively framing a narrative that has significant implications for justice and social change.<sup>78</sup> Yamamoto suggests that the act of remembering or forgetting is

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violence); *Hawai‘i ‘78*, *supra* note 37, at 94 (“For marginalized communities, reparative action occurs when those in power frame the past as a collective memory of injustice—that is, a framing in which the historic injustice against that community is highlighted and centered as the collective memory to be inscribed.”).

<sup>73</sup> See *Hawai‘i ‘78*, *supra* note 37, at 120–30.

<sup>74</sup> See Hom & Yamamoto, *supra* note 42, at 1764; Susan 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, 359 (2011); Melody Kapilialoha MacKenzie & D. Kapua‘ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai‘i’s Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 487–88 (2017); Pettit-Toledo, *supra* note 72, at 365–69.

<sup>75</sup> See Hom & Yamamoto, *supra* note 42, at 1766–77; *Rice v. Cayetano*, 528 U.S. 495 (2000).

<sup>76</sup> See Hom & Yamamoto, *supra* note 42, at 1758 (“Individuals, 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).”).

<sup>77</sup> *Hawai‘i ‘78*, *supra* note 37, at 96–130 (critiquing the historical and political context in which Native Hawaiians received a form of reparative action).

<sup>78</sup> 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 565 (Rachel F. Moran & Devon W. Carbado, eds., 2008) (noting that the history that is told “is determined by a sifting of the relevant from the irrelevant—a process itself affected by the decision maker’s cultural framework”).

equally important in shaping how collective memory functions in society.<sup>79</sup> The process of “selective amnesia”—the deliberate forgetting of uncomfortable or inconvenient aspects of history—can serve to protect the status quo by downplaying or erasing historical injustices.<sup>80</sup> For example, W.E.B. Du Bois wrote extensively about how the history of slavery in the United States was systematically suppressed in the national memory, impeding the nation’s ability to address its lingering racial inequalities.<sup>81</sup>

Legal actors, including judges, lawmakers, and administrative officials, are often tasked with deciding which aspects of history are relevant and should be remembered, and which should be excluded. This process of narrative construction influences how past injustices are understood and, consequently, how they are addressed in the legal realm.<sup>82</sup> A policymaker’s or judge’s decision about what history to highlight and how to interpret it is shaped by their own cultural framework, which includes their social

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<sup>79</sup> Hom & Yamamoto, *supra* note 42, at 1757 (“Social 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.”); *id.* at 1776 (noting how historian Michael Kammen describes the distortion of American memories: “[T]he combination of loyalty and stability under the oldest written national constitution the world has, indeed, been impressive. But stability is achieved at a price: a tendency to depoliticize the civic past by distorting the nation’s memories of it—all in the name of national unity” (citation omitted)).

<sup>80</sup> Cohn, *supra* note 67, at 601 (defining “selective amnesia” as “an episodic, often pragmatic, and elective decision of pseudoforgetting” and noting the distinction with “selective memory,” which Cohn defines as “the simultaneous remembering and forgetting of a collective memory by a single person, group, or society, based on the context at hand”). What some may call selective amnesia, others call disinformation, and studies are clear that disinformation is a primary tool used to reproduce and reinforce certain hierarchies of power at the expense of populations that lack social, cultural, political, or economic power. See Margaret Kuo & Alice Marwick, *Critical Disinformation Studies: History, Power, and Politics*, 2 HARV. KENNEDY SCH. MISINFORMATION REV. 1, 1 (2021) (“Disinformation is a primary media strategy that has been used in the United States to reproduce and reinforce white supremacy and hierarchies of power at the expense of populations that lack social, cultural, political, or economic power.”).

<sup>81</sup> See Lawrie Balfour, *Unreconstructed Democracy: W.E.B. Du Bois and the Case for Reparations*, 97 AM. POL. SCI. REV. 33, 39–40 (2003) (synthesizing Du Bois’ scholarship).

<sup>82</sup> Hom & Yamamoto, *supra* note 42, at 1758, 1760 (“Individuals, 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). Collective 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. . . . Thus, answering ‘what happened and who we were’ is only partially an exercise in factual discovery. It is also an act of historical and political construction.”).

perceptions, values, and beliefs.<sup>83</sup> These frameworks, in turn, influence their understanding of societal problems and their approach to legal reform.

This dynamic process of remembering and forgetting has profound implications for legal redress. In cases involving historical trauma, such as slavery or genocide, a collective memory of *injustice* can provide a framework for reparative action.<sup>84</sup> By reframing the past as a collective memory of injustice, societies can acknowledge the harms done and work toward restitution or reform.<sup>85</sup> This framing process, however, is not without resistance.<sup>86</sup> Martha Minow, for example, notes that while collective memory is shaped by social forces, external factors such as politics and economics often limit the ability of marginalized groups to control the narrative of their history.<sup>87</sup> In the context of Native Hawaiian legal claims, for instance, political and legal systems may resist recognizing the full extent of historical injustice, thereby impeding efforts for reparative justice.<sup>88</sup>

For marginalized communities, the ability to frame their collective memory of injustice is a crucial tool for advocating for reparative action.<sup>89</sup> Yamamoto outlines several strategic points for critiquing past harms and advancing reparative justice through the lens of collective memory. First, he stresses the need for lawmakers and legal decision-makers to “critically

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<sup>83</sup> Yamamoto & Betts, *supra* note 78, at 565; see *(Re)Righting History*, *supra* note 45, at 645–48 (describing the backgrounds of the parties, lawyers, and judges in *Rice v. Cayetano* to further contextualize the Supreme Court’s decision).

<sup>84</sup> Balfour, *supra* note 81, at 33.

<sup>85</sup> *Hawai‘i ‘78*, *supra* note 37, at 117–30.

<sup>86</sup> *Id.* at 131–44 (critiquing the 1979 and 1980 Hawai‘i legislative sessions in which politicians walked back on the promises of reconciliation to Native Hawaiians made a year earlier).

<sup>87</sup> MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 118–20 (1998) (describing how political leaders oscillate between remembering and forgetting memories to change the public’s view of events or societies).

<sup>88</sup> See, e.g., Terina Kamailelauli‘i Fa‘agau, *Reclaiming the Past for Mauna a Wākea’s Future: The Battle Over Collective Memory and Hawai‘i’s Most Sacred Mountain*, 22 ASIAN-PAC. L. & POL’Y J. 1 (2021) (analyzing the Hawai‘i Supreme Court’s decision regarding the building of the TMT telescope on Mauna Kea); Lu‘ukia Nakanelua, *Nā Mo‘o o Ko‘olau: The Water Guardians of Ko‘olau Weaving and Wielding Collective Memory in the War for East Maui Water*, 41 U. HAW. L. REV. 189, 227–39 (2018) (interrogating the battle over collective memory in relation to passage of a bill regarding access to water).

<sup>89</sup> Hom & Yamamoto, *supra* note 42, at 1758.

engage” with the dynamics of group memory.<sup>90</sup> This engagement requires acknowledging how collective memories are constructed, filtered, and interpreted in the present.<sup>91</sup> Second, Yamamoto argues that collective memory is always a process of active, collective construction, shaped by contemporary social interactions and cultural forces.<sup>92</sup> Memory is not a static recounting of the past, but a dynamic, evolving process influenced by current political, cultural, and social realities.<sup>93</sup>

Third, Yamamoto emphasizes that collective memory is inherently contested.<sup>94</sup> Disputes over how historical injustices are remembered often reflect broader struggles for power and justice.<sup>95</sup> Legal decisions related to past injustices, therefore, depend not only on the facts of the case but on which memories are acknowledged and which are excluded.<sup>96</sup> Without sufficient support or advocacy, marginalized communities may struggle to shape the collective memory of their injustice in ways that support their claims for reparative justice.<sup>97</sup> Thus, having allies in key decision-making positions is essential for advancing a new collective memory of injustice.<sup>98</sup>

Yamamoto also points out in his fourth strategic point that contests over historical memory often take place in cultural spaces—such as media, education, and the arts—where images and narratives about the past are

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<sup>90</sup> *Id.* at 1764 (“Justice claims of ‘right’ start with struggles over memory. As a strategic matter, therefore, if we seek justice by claiming civil or human rights, we must at the outset critically engage the dynamics of group memory of injustice.”).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (“Group memory of injustice is characterized by the active, collective construction of the past. It is ‘active’ because it requires present-day activity; it is not about simply recalling past events. That memory is ‘collective,’ because it emerges from interactions among people, institutions, media, and other cultural forms. It involves ‘construction’ because those collective memories are not found, but rather are built and continually altered.”).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1765 (“The construction of collective memory implicates power and culture. Action on justice claims often turns on which memories are acknowledged by decisionmakers. Collective memory thus is always hotly contested by those supporting and those opposing justice claims. Indeed, struggles over memory are often struggles between colliding ideologies, or vastly differing world views. When outsiders begin to persuasively reconstruct historical injustice they usually face fierce opposition by those in power. That opposition seeks totally to discredit the developing memory proffered by outsiders. Or, alternatively, it seeks to partially transform the old memory (slavery benefited the slaves) into a new memory (freed slaves could not handle freedom) that justifies continued hierarchy (segregation).”).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*; *Hawai‘i ‘78*, *supra* note 37, at 131–44.

<sup>98</sup> *Hawai‘i ‘78*, *supra* note 37, at 117–30.

produced and disseminated.<sup>99</sup> Legal processes, such as civil rights litigation or lawmaking, are one aspect of this broader cultural contest.<sup>100</sup> The final strategic point emphasizes that legal claims related to past injustice must be part of a broader political movement to reshape social memory.<sup>101</sup> Legal victories, while important, are insufficient on their own without a cultural and political context that supports the construction of a new collective memory.

In sum, Yamamoto’s theory of collective memory offers a profound insight into the relationship between history, law, and social justice. This theory underscores that collective memory is not a passive reflection of historical events but a dynamic, ongoing process that is actively shaped by cultural narratives, social institutions, and political struggles. In the context of legal reform, particularly in cases involving reparations for historical injustices, collective memory provides a powerful tool for reframing the past and creating a more just future.<sup>102</sup> By acknowledging the contested nature of historical memory and the role of culture and politics in shaping it, Yamamoto’s framework offers a deeper understanding of how the law can be a tool for repairing past wrongs and promoting social justice.

Recent scholarship amplifies Yamamoto’s work and translates these theories into examples of the successes and pitfalls of justice struggles in various political spheres.<sup>103</sup> One recent piece highlights the success and power of framing a collective memory of injustice in the constitution-building process. In *Hawai‘i ‘78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, I examine the 1978

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<sup>99</sup> Hom & Yamamoto, *supra* note 42, at 1765 (“These 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. Also significant are media-driven popular cultural images as well as day-to-day cultural practices (including artistic expressions, neighborhood meetings, and elder ‘talk-story’ sessions). Who decides determines which cultural practices, images, and narratives formally frame the memories. And those memories in turn legitimate future understanding of and action on justice claims.”).

<sup>100</sup> *Id.*; see also *Hawai‘i ‘78*, *supra* note 37, at 131–44.

<sup>101</sup> Hom & Yamamoto, *supra* note 42, at 1765 (“In light of the importance of power and culture, it is never enough for societal outsiders only to frame the injustice narrowly to satisfy legal norms. Conversely, it is always important for those outsiders to conceive of law and legal process as contributors to—rather than as the essence of—larger social justice strategies. This means working with legal process and rights claims with dual goals: to achieve the specific legal result and to contribute to construction of social memory as a political tool.”).

<sup>102</sup> See, e.g., *Hawai‘i ‘78*, *supra* note 37, at 131–45.

<sup>103</sup> See Serrano, *supra* note 74, at 359 (2011); MacKenzie & Sproat, *supra* note 74, at 487–88; Pettit-Toledo, *supra* note 72, at 365–69.

constitutional convention, demonstrating how delegates of that convention capitalized on a cultural and political revival to deploy a telling of Hawai‘i’s past that uplifted Hawaiian voices and situated the struggles for Kānaka Maoli vis a vis others in the community.<sup>104</sup> The convention delegates in 1978, using a collective memory of injustice, then successfully advanced the creation of the Office of Hawaiian Affairs—a herculean feat for a community that had, up until that point, failed to receive a semblance of justice from the government.<sup>105</sup>

Most recently, Professor and award-winning cultural practitioner U‘ilani Tanigawa Lum emphasizes the power of Yamamoto’s fourth strategic point by accounting for the cultural values that undergird analyses of historical injustices.<sup>106</sup> Within the context of the justice struggle for water in Hawai‘i following the devastating 2023 wildfires in Lāhaina, Maui, Tanigawa Lum writes: “situating Kānaka Maoli narratives—and the guiding cultural values upon which they are built—are a crucial part of a quest for justice.”<sup>107</sup> Tanigawa Lum boldly states, “Indigenous values, histories, and stories ground cultural dimensions of collective memory as the primary means of transmitting knowledge across the larger populace, including Indigenous communities.”<sup>108</sup> Using a Hawaiian cultural frame, Tanigawa Lum’s insights are prescient and powerful in crafting a collective memory that acknowledges and rectifies harm. Her piece also amplifies the important work of storytelling as resistance to systems of oppression.<sup>109</sup> The following case study builds upon this cutting-edge scholarship.

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<sup>104</sup> *Hawai‘i ‘78*, *supra* note 37, at 131–44.

<sup>105</sup> *Id.*

<sup>106</sup> A. U‘ilani Tanigawa Lum, *Ola i ka Malu ‘Ulu o Lele: An Emerging Collective Memory of Injustice in Maui Komohana as a Foundation for Recovery from Lahaina’s Wildfires and Restorative Justice for Hawai‘i*, 47 U. HAW. L. REV. 2 (2024).

<sup>107</sup> *Id.* at 34.

<sup>108</sup> *Id.* at 18; see D. Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 128 (2011) (identifying a traditional Hawaiian song that describes the significance of water and specific streams).

<sup>109</sup> See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440–41 (1989) (“Traditional legal writing purports to be neutral and dispassionately analytical, but too often it is not. In part, this is so because legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie behind their quasi-scientific string of deductions. The supposedly objective point of view often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints. Implying that

III. THE NATIVE HAWAIIANS STUDY COMMISSION: A CASE STUDY OF THE  
COLLECTIVE MEMORY OF INJUSTICE

The following case study analyzes the ways in which those in power use history to frame legal or political decisions. It illuminates the significance of recognizing opportunities for employing collective memory and illustrates the significance of those battles to addressing justice claims.

A. *The Context: The Rise of the Right in Reagan's America and the Commission's Work*

Following the 1980 election of President Reagan, and during the final months of the Carter Administration, Congress passed, and President Carter signed into law, Public Law 96-565, which created a Native Hawaiians Study Commission.<sup>110</sup> Borne of the failed efforts of Hawai'i's congressional delegation, and at the insistence of a Hawai'i organization called the A.L.O.H.A. Association to seek federal reparations for the illegal overthrow of the Kingdom of Hawai'i, Congress tasked the Commission with gathering information on the socioeconomic and cultural condition of Native Hawaiians.<sup>111</sup> Congress mandated that the Commission assess the historical relationship between the federal, state, and local governments in regard to Native Hawaiians and determine what duties, if any, were due Native Hawaiians because of America's involvement in the overthrow.<sup>112</sup> President Carter hurriedly appointed nine commissioners on his last full day in

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objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry. Legal storytelling is an engine built to hurl rocks over walls of social complacency that obscure the view out from the citadel. But the rocks all have messages tied to them that the defenders cannot help but read. The messages say, let us knock down the walls, and use the blocks to pave a road we can all walk together.”).

<sup>110</sup> Native Hawaiians Study Commission Act, Pub. L. No. 96-565, Title III, 94 Stat. 3321 (1980).

<sup>111</sup> Melody Kapiliāloha MacKenzie, *Native Hawaiians and U.S. Law*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 36, at 272 (“[T]he ALOHA Association . . . was founded in 1972 by Louisa K. Rice. . . . First there were only a handful of members . . . who joined, because the Hawaiian natives felt that the United States of America is such a powerful Government and they would not listen to the native Hawaiians, who claimed their kingdom was lost over 80 years ago.” (citation omitted)); MICHAEL K. DUDLEY & KEONI K. AGARD, A HAWAIIAN NATION II: A CALL FOR HAWAIIAN SOVEREIGNTY (1990).

<sup>112</sup> See HAW. ADVISORY COMM. TO THE U.S. COMM’N ON C.R., RECONCILIATION AT A CROSSROADS: THE IMPLICATIONS OF THE APOLOGY RESOLUTION AND RICE V. CAYETANO FOR FEDERAL AND STATE PROGRAMS BENEFITING NATIVE HAWAIIANS (2001) [hereinafter CROSSROADS].

office.<sup>113</sup> One of his nine appointees was Auntie Frenchy DeSoto, then-chairperson of the Office of Hawaiian Affairs—a state constitutional entity mandated with bettering the conditions of Hawai‘i’s indigenous people.<sup>114</sup> Thereafter, President Reagan took office and almost immediately sent letters to all of Carter’s appointees, effectively dissolving the Commission.<sup>115</sup> President Reagan, a star in conservative circles, viewed the Commission as “little more than a taxpayer funded ‘junket’” to Hawai‘i.<sup>116</sup> Reagan later remarked, “Government is no longer the strong draft horse of minority progress. I ask you if it is not the time to hitch up a fresh horse to finish the task.”<sup>117</sup> Reagan’s conservative values found their way to the shores of Hawai‘i and to Hawai‘i’s Indigenous people.<sup>118</sup>

Seizing on President Reagan’s initial dismantling of the Commission and on an opportunity to make bold strides to advance the conditions of Hawaiians, the Office of Hawaiian Affairs created an Ad Hoc Committee on Reparations to “focus the Commission’s work on reparations for Hawaiians” and “to maximize full participation of the Hawaiian community in the Commission’s work.”<sup>119</sup> The Office of Hawaiian Affairs set out to apply political pressure on the Reagan Administration by recruiting support for reestablishing the Commission and appointing members. Auntie Frenchy boldly stated: “Whether or not the president wants to address the commission established by Congress, [the Office of Hawaiian Affairs] will pursue the matter and, if need be, we’ll go to court on behalf of the Hawaiian people.”<sup>120</sup>

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<sup>113</sup> *Three Here Named to Panel on Claims*, HONOLULU ADVERTISER, Jan. 21, 1981, at A10.

<sup>114</sup> *Id.*

<sup>115</sup> Jerry Burris, *Reagan Dismisses Members of Hawaiian Commission*, HONOLULU ADVERTISER, Mar. 12, 1981, at A1.

<sup>116</sup> David Shapiro, *Reagan Fires Appointees to Hawaiian Claims Panel*, HONOLULU STAR-BULL., Mar. 11, 1981, at 1.

<sup>117</sup> *An Editorial on Reparations*, KA WAI OLA O OHA, Summer 1981, at 7.

<sup>118</sup> Hawai‘i had an interesting presidential electoral history in the 1960s and 1970s, in which the popular vote for American president vacillated between support of Democratic and Republican candidates. See Richard Wiens, *The Island Effect: Hawaii’s Angle in Every Presidential Election*, HONOLULU CIV. BEAT (Oct. 28, 2024), <https://www.civilbeat.org/2024/10/the-island-effect-hawaiis-angle-in-every-presidential-election/>.

<sup>119</sup> *Committee Reports: Ad Hoc Committee on Reparations*, KA WAI OLA O OHA, Summer 1981, at 5 [hereinafter *Ad Hoc Committee*]; Laurel Loo, *OHA Delegation to Urge Reagan to Keep Commission*, HONOLULU ADVERTISER, Mar. 16, 1981, at 1.

<sup>120</sup> Helen Altonn, *Suit on Claims Panel Study Ouster Stirs Ire*, HONOLULU STAR-BULL., at A2.

Among supporters of the Office of Hawaiian Affairs was Hawai‘i Governor George Ariyoshi, who urged President Reagan to “seriously consider the retention” of the Commission and to appoint new members.<sup>121</sup> Support also poured in from Hawai‘i’s congressional delegation, the State Legislature, Hawai‘i’s four county mayors, the United Japanese Society, the Association of Hawaiian Civic Clubs, the Oahu Canoe Racing Association, the Hawaiian Businessmen’s Association, and the Democratic Party of Hawai‘i.<sup>122</sup> Appealing to the themes of Reagan’s presidential campaign, Ariyoshi wrote:

we have been the beacon of hope for immigrant families who fled from oppressive governments abroad, we have provided unequalled opportunities for those who strove to succeed and, above all, we have sought to rectify the injustice and wrong done to our citizens and fought to maintain a just and free society.<sup>123</sup>

Ariyoshi continued, “[L]et history prove, once and for all, whether our native Hawaiian people indeed suffered at the hands of the federal government.”<sup>124</sup> Hawai‘i State House Republican Leader Kīna‘u Boyd Kamali‘i pleaded with and lobbied President Reagan to keep the Commission.<sup>125</sup> As Kamali‘i was a passionate advocate and as she had served as chairperson of Reagan’s presidential campaign in Hawai‘i, her plea did not fall on deaf ears.<sup>126</sup>

Ultimately, President Reagan decided not to dismantle the Commission.<sup>127</sup> In response, Governor Ariyoshi wrote:

The President’s decision to retain the Study Commission affords us the opportunity to evaluate the circumstances and determine the factual basis of our country’s involvement in the overthrow of the Hawaiian monarchy. This will be the

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<sup>121</sup> Letter from Governor George Ariyoshi to President Ronald Reagan (Mar. 17, 1981) (on file with the Hawai‘i State Archives) [hereinafter Ariyoshi Letter].

<sup>122</sup> *Ad Hoc Committee*, *supra* note 119, at 5.

<sup>123</sup> Ariyoshi Letter, *supra* note 121.

<sup>124</sup> *Id.*

<sup>125</sup> Helen Altonn, *White House to Re-form Native Claims Panel in a Few Weeks*, HONOLULU STAR-BULL., Apr. 2, 1981, at A1 [hereinafter *White House to Re-form Native Claims Panel*].

<sup>126</sup> CROSSROADS, *supra* note 112.

<sup>127</sup> *White House to Re-form Native Claims Panel*, *supra* note 125, at A1.

first opportunity to address the grievances of the native Hawaiians in a positive and constructive manner.<sup>128</sup>

However, and importantly, Reagan used his appointment power to stack the commission with his own slate of commissioners. By legal mandate, only three commissioners could be residents of Hawai'i.<sup>129</sup> Reagan selected three part-Hawaiian commissioners, including: Republican Leader Kamali'i, whom he also appointed as chair of the Commission; Winona Beamer, a cultural expert and educator; and H. Rodger Betts, an attorney who had served on the staff of former Hawai'i Republican Senator Hiram L. Fong and as minority counsel for the Antitrust and Monopoly Subcommittee of the United States Senate Judiciary Committee.<sup>130</sup>

Reagan also selected six commissioners who all served within his administration: Carl A. Anderson, an official with the Department of Health and Human Services;<sup>131</sup> Carol E. Dinkins, an assistant attorney general for land and natural resources within the Department of Justice; James C. Handley, a specialist assistant secretary in the Department of Agriculture; Diane K. Morales, deputy assistant secretary of Territorial and International Affairs within the Department of Interior; Glenn R. Schleede, executive associate director of the Office of Management and Budget; and Stephen P. Shipley, executive assistant to the Secretary of Interior, who was also tapped to serve as vice-chair of the Commission.<sup>132</sup>

The six commissioners from the continental United States knew little to nothing about Hawaiian history, the current status and condition of Hawaiians, and the often tenuous political relationship between the Hawaiian people and the federal government.<sup>133</sup> Senator Dan Inouye observed that the

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<sup>128</sup> Letter from Governor George Ariyoshi to Richard S. Williamson, Assistant to the President for Intergovernmental Affairs (March 19, 1981) (on file with the Hawai'i State Archives).

<sup>129</sup> Native Hawaiians Study Commission Act, Pub. L. No. 96-565, § 302(b), 94 Stat. 3321 (1980) ("The Commission shall be composed of nine members appointed by the President. Not more than three of such members shall be residents of the State of Hawaii.").

<sup>130</sup> A. Frenchy DeSoto, *"We Have Been Waiting Patiently . . ."—88 Years Later: NHSC to Meet in Hawai'i Jan 9–15, 1982*, KA WAIOLA O OHA, Fall 1981, at 1 [hereinafter *88 Years Later*].

<sup>131</sup> Toni Yardley, *Talking Story with the Native Hawaiian Study Commissioners*, KA WAIOLA O OHA, Winter 1982, at 3 [hereinafter *Talking Story*].

<sup>132</sup> Press Release, The White House Office of the Press Secretary (Sept. 11, 1981); see also *88 Years Later*, *supra* note 130, at 1, 4.

<sup>133</sup> John Heckathorn, *The Native Hawaiian Nation: The Hottest Political Issues of the 1990s*, HONOLULU MAG., Dec. 1988, at 91.

mid-level executive branch appointees were selected because they “weren’t going to come up with something their superiors wouldn’t like[.]”<sup>134</sup> With little foundational knowledge from a supermajority of the commissioners, a lack of funding, and an abbreviated time frame of six months to conduct its work of disentangling Hawai‘i’s complex history of injustice, Reagan’s Commission was set up for failure.

Despite such shortcomings, the Office of Hawaiian Affairs took a proactive role in the work of the Commission and provided support where it could. From late-December 1981 through early-January 1982, the Office of Hawaiian Affairs conducted nineteen informational meetings throughout the State to inform the community about the purpose of the Commission, to encourage Hawaiians to participate and testify at the Commission’s hearings, and to gain support of the Office of Hawaiian Affairs’ position that the root cause of all of the problems of the condition of Hawaiians stemmed from the illegal overthrow of the Hawaiian Kingdom.<sup>135</sup>

The Office of Hawaiian Affairs collaborated with other Hawaiian-serving entities, such as Alu Like, the Department of Hawaiian Home Lands, and the Council of Hawaiian Organizations, to create a questionnaire.<sup>136</sup> In this questionnaire, which emphasized and framed the importance of Hawaiians providing a narrative of their experience and history, Hawaiians were asked questions such as: “Do you feel that the United States government should formally acknowledge its role in the overthrow of the Hawaiian monarchy?” and “Do you feel that some form of reparations/restitution is due the Hawaiian people?”<sup>137</sup> The Office of Hawaiian Affairs also contracted with

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<sup>134</sup> *Id.*

<sup>135</sup> *Survey to Aid Native Hawaiian Study Commission*, KA WAIOLA O OHA, Spring 1982, at 1.

<sup>136</sup> The Department of Hawaiian Home Lands is the state entity that administratively supports the work of the Hawaiian Homes Commission to effectuate the mandates of the federal Hawaiian Homes Commission Act. See Troy J.H. Andrade, *Belated Justice: The Failures and Promise of the Hawaiian Homes Commission Act*, 46 AM. INDIAN L. REV. 1 (2022). In the 1970s, community organizers created Alu Like to serve as a Native Hawaiian service agency “to address the social and economic needs to the Hawaiian community.” *History*, ALU LIKE INC., <https://www.alulike.org/about-us/history/> (last visited Mar. 27, 2025). The Council of Hawaiian Organizations was a coalition of Hawaiian advocacy groups that represented upwards of 30,000 Native Hawaiians in the 1970s on issues relating to housing and government benefits. See Leonard Lueras, *At Last, Hawaiians Try the Coalition Path to Power*, HONOLULU ADVERTISER, at 73–74 (Nov. 26, 1975).

<sup>137</sup> *Native Hawaiian Study Commission Survey*, KA WAIOLA O OHA, Spring 1982, at 4.

the Native Hawaiian Legal Corporation<sup>138</sup> (“NHLC”) to provide it with a legal brief examining the factors that led to American involvement in the overthrow and to work with it to develop a position paper that would provide concrete recommendations and strategies to assist Hawaiians in preparing testimony for inclusion in the Commission’s final report to Congress.<sup>139</sup> The Office of Hawaiian Affairs expended considerable funds to commission six research papers on issues of health, religion, claims and reparations, language, psychological impact of the overthrow, and a historical overview.<sup>140</sup> In addition, the Office of Hawaiian Affairs developed a presentation on the facts of the overthrow for use in community meetings and made its staff and trustees available for addressing any organization or group with questions or concerns about the work of the Commission.<sup>141</sup>

In January 1982, the Commission held eight hearings across the State and an information session to acquaint Commissioners with key issues concerning Hawaiians.<sup>142</sup> The community showed up in force to make their case that Hawaiians suffered from a grave injustice that the United States needed to reconcile.<sup>143</sup> A significant portion of those who participated supported the Office of Hawaiian Affairs’ position that the root of Native Hawaiians’ harm was the American-supported illegal overthrow of the Kingdom.<sup>144</sup> The Office of Hawaiian Affairs organized the community for each hearing and, across the State, facilitated passionate testimony to the Commission.<sup>145</sup> On Hawai’i Island, for example, Bill Kalei stated, “I spent 22 years as an American fighting man for Uncle Sam. Now I want to see America uphold the principles of freedom and justice that I fought for.”<sup>146</sup> On Kaua’i, La France Kapaka testified about her grandmother living during the overthrow and how she would like to see the process of redress begin

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<sup>138</sup> *Native Hawaiian Legal Corporation – Our Mission*, NATIVE HAWAIIAN LEGAL CORP., <https://nativehawaiianlegalcorp.org> (last visited Mar. 27, 2025).

<sup>139</sup> *OHA’s Current Activities With the NHSC*, KA WAI OLA O OHA, Spring 1982, at 1.

<sup>140</sup> *Study Commission Split: Two Reports to Go to Congress*, KA WAI OLA O OHA, Spring 1983, at 1.

<sup>141</sup> *OHA’s Current Activities With the NHSC*, KA WAI OLA O OHA, Spring 1982, at 1.

<sup>142</sup> See NATIVE HAWAIIAN STUDY COMM’N, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 5 (June 23, 1983) [hereinafter MAJORITY REPORT].

<sup>143</sup> *Hawai’i Lokahi*, KA WAI OLA O OHA, Winter 1982, at 2.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

before her grandmother passes on.<sup>147</sup> On Maui, over 400 people attended the hearing with individuals speaking in ‘Ōlelo Hawai‘i, the Hawaiian language.<sup>148</sup> At a hearing in the predominantly Hawaiian enclave of Wai‘anae, teary-eyed students spoke eloquently about the condition of the Hawaiian people and the need for reparations.<sup>149</sup> The seven attending commissioners (Commissioners Schleede and Anderson were not present at the public hearings) listened and learned from the testimony. Commissioner Morales stated, “Basically what we’re doing here right now for this study commission is simply to hear and learn everything and all we can. We’re on a fact finding mission.”<sup>150</sup> Commissioner and Vice Chair Shipley said, “I’m purposely keeping my mind open.”<sup>151</sup>

B. *The Harm: Majority’s Rewriting of History*

Despite the Office of Hawaiian Affairs’ expenditure of considerable efforts and resources, a majority of the Commission ignored the historical record and silenced the outpouring of community sentiment supporting reparative action. The six non-resident members of the Commission constituted this majority. Their report reasserted Western tropes of Hawai‘i’s past to justify a narrative of American conquest in the Pacific. Two particularly harmful themes that the Commission majority repurpose to deny reparative action to Kānaka Maoli are: (1) a fundamental misunderstanding of the Hawaiian traditional land tenure system and the new hybridized system in which Indigenous leaders reinscribed basic cultural values and practices to protect Kānaka Maoli interests; and (2) a weaponized view of the past to justify American seizure and possession of Hawaiian land. These deliberate

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<sup>147</sup> *Id.*; Peter Wagner, *Money, Not Land, Study Panel is Told*, HONOLULU STAR-BULL., Jan. 14, 1982, at A11 (noting that Kapaka, who wheeled her grandmother to the hearing, stated, “Finally . . . [j]ustice is on the way”).

<sup>148</sup> Ellen Dyer, *Federal Panel Airs Arguments for Reparations*, HONOLULU STAR-BULL., Jan. 12, 1982, at A3 (noting the testimony of Oliver Dukelow, who told the Commission, “what happened (in 1893) is still happening today and not a thing is being done about it . . . . Our Hawaiian culture is slowly ebbing away. . . . We are fighting for water now . . . the state is really not helping us in this” and “What are you going to do about it? What do you think the big companies are going to let you do about it?”).

<sup>149</sup> Kathy Titchen & Harold Morse, *Waianae People Testify at Hearing*, HONOLULU STAR-BULL., at A1, A3 (Jan. 15, 1982) (noting testimony from several individuals that “[t]he actual overthrow of our queen was an act of destruction,” “in the interests of justice, the Hawaiian kingdom should be restored to the Hawaiian people; and until that is done, none of our problems can be resolved,” and noting that landlessness likens Hawaiians to a “boat without an anchor” leaving them drifting and rootless).

<sup>150</sup> *Talking Story*, *supra* note 131, at 3.

<sup>151</sup> *Id.*

falsehoods and tropes, as described below, plagued and, because it became enshrined in an official government report, continue to plague justice struggles of Native Hawaiians.

1. *Misinterpreting Hawai‘i’s Traditional Land Tenure System*

The work of the Native Hawaiians Study Commission centered around answering several questions. The first core question was whether Native Hawaiians had “aboriginal title to the Crown and Government Lands” to justify land back or compensation.<sup>152</sup> Despite accepting testimony from many celebrated Hawai‘i historians and scholars and even noting parts of the Native Hawaiian perspective, the Commission majority answered in the negative and embraced a narrative where nineteenth-century Native Hawaiian leaders sought to selfishly claim lands for themselves to the detriment of maka‘āinana, the common people.<sup>153</sup> Furthermore, the Commission majority misunderstood the traditional land tenure system in Hawai‘i and, instead, superimposed Western values and forced analogies of what they perceived occurred in the land tenure transition—often called the Māhele.<sup>154</sup>

For the sake of justice struggles in the future, it is vital to respond to these inaccuracies as “justice claims often turn[] on which memories are acknowledged by decisionmakers.”<sup>155</sup> Indeed, understanding and meaningfully recognizing the cultural significance of and connection to ‘āina that Kānaka Maoli share and the intricacies of the shift in land tenure systems help dispel the inaccurate generalities of the Commission majority.

a. *Understanding the Cultural Significance of and Connection to ‘Āina*

0001. O ke au i kahuli wela ka honua	At the time when the earth became hot
0002. O ke au i kahuli lole ka lani	At the time when the heavens turned about
0003. O ke au i kuka‘iaka ka la	

<sup>152</sup> See MAJORITY REPORT, *supra* note 142, at 334; *see also* Kalen Goodluck, *The Land Back Movement Unravels Manifest Destiny*, SIERRA CLUB (Sept. 11, 2023), <https://www.sierraclub.org/sierra/2023-3-fall/feature/land-back-movement-unravels-manifest-destiny> (noting that, in June 2022, the Bois Forte Band of Chippewa “nearly doubled the amount of land owned by the tribe” following a partnership with the Conservation Fund).

<sup>153</sup> MAJORITY REPORT, *supra* note 142, at 334–38.

<sup>154</sup> *Id.* at 333–45.

<sup>155</sup> *See* Hom & Yamamoto, *supra* note 42, at 1765.

0004. E ho‘omalalama i ka malama	At the time when the sun was darkened
0005. O ke au o Makali‘i ka po	To cause the moon to shine The time of the rise of the Pleiades
0006. O ka walewale ho‘okumu honua ia	The slime, this was the source of the earth
0007. O ke kumu o ka lipo, i lipo ai	The source of the darkness that made darkness
0008. O ke kumu o ka Po, i po ai	The source of the night that made night
0009. O ka lipolipo, o ka lipolipo	The intense darkness, the deep darkness
0010. O ka lipo o ka la, o ka lipo o ka po	Darkness of the sun, darkness of the night
0011. Po wale ho--‘i	Nothing but night
0012. Hanau ka po	The night gave birth
0013. Hanau Kumulipo i ka po, he kane	Born was Kumulipo in the night, a male
0014. Hanau Po‘ele i ka po, he wahine	Born was Po‘ele in the night, a female. <sup>156</sup>

The 2,000-line creation chant, the *Kumulipo*, proclaims the inseparable bond between the natural world and people.<sup>157</sup> The chant honored the birth of high chief Kalani-nui-‘iā-mamao, genealogically linking him to the very beginning of the earth and weaving a collective memory that legitimized the societal order.<sup>158</sup> After these excerpted lines, the chant proceeds to then introduce the duality of the world and the creation of all of nature, including people.<sup>159</sup> The cultural significance of this intimate and familial relationship

<sup>156</sup> KUMULIPO: A HAWAIIAN CREATION CHANT I (Martha Warren Beckwith ed. & trans., 1951), <https://blogs.ksbe.edu/adakina/files/2008/02/kumulipo-text.pdf>.

<sup>157</sup> See Brandy Nālani McDougall, *Mo‘okū‘auhau Versus Colonial Entitlement in English Translations of the Kumulipo*, 67 AM. Q. 749, 752 (2015) [hereinafter *Colonial Entitlement*].

<sup>158</sup> *Id.* at 765.

<sup>159</sup> Le‘a Malia Kanehe, *Kū‘ē Mana Māhele: The Hawaiian Movement to Resist Biocolonialism*, in *A NATION RISING*, *supra* note 3, at 347 [hereinafter *Kū‘ē Mana Māhele*].

with the land provides a foundation to understanding the nineteenth century changes in the land tenure system.<sup>160</sup>

Land for Kānaka Maoli was not just a commodity discovered for extraction and planting a flag.<sup>161</sup> Instead, land and its resources were a respected and valued part of the social order.<sup>162</sup> The *Kumulipo* reiterates the reciprocal relationship between people, the gods, and ‘āina.<sup>163</sup> As Professors Kapua‘ala Sproat and MJ Palau-Macdonald write:

In this genealogy, the relationship between ‘āina (land, or literally, that which feeds us) and kānaka (humanity) is defined as one of reciprocity between an elder and younger sibling; the kuleana (responsibility) of the elder sibling is to sustain, love, and protect the younger, who in turn loves, serves, and honors the elder. For Kānaka, our biocultural resources are our ancestors, part of the extended family, and the physical embodiment of different akua (gods or ancestors). Understanding the genealogical connection between people, natural systems, and resources enabled the development of philosophies such as aloha ‘āina, which focused on the relationships humans must maintain to live in balance with the natural world. . . . Dr. Noa Emmett Aluli expands on this pilina (relationship): [i]n our daily activities, we develop a partnership with the land so as to know when to plant, fish, or heal our minds and bodies according to the ever changing weather, seasons and moons. This intimacy is [s]o close . . . that we acknowledge the ‘aumakua and akua, the ancestral spirits and gods of special areas. In this way, [w]e learn the many personalities of the land, their form, character and resources; and we love the land personally[.]<sup>164</sup>

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<sup>160</sup> See *Colonial Entitlement*, *supra* note 157, at 750–75 (explaining that themes of “colonial entitlement” are even present in well-accepted English translations of the *Kumulipo*, which dismiss or diminish traditional ideologies connection kānaka to ‘āina).

<sup>161</sup> See *id.* at 776 (recognizing that the *Kumulipo* evidences an “intimate genealogical relationship” between Native Hawaiians and the Hawaiian Islands).

<sup>162</sup> See *Kū‘ē Mana Māhele*, *supra* note 159, at 347.

<sup>163</sup> See generally *id.*; *Colonial Entitlement*, *supra* note 157.

<sup>164</sup> D. Kapua‘ala Sproat & MJ Palau-McDonald, *The Duty to Aloha ‘Āina: Indigenous Values as a Legal Foundation for Hawai‘i’s Public Trust*, 57 HARV. C.R.-C.L. L. REV. 525, 531 (2022) (citations, quotation marks, and alterations omitted).

In the story of Hāloa, which reiterates this important reciprocal relationship between people, the gods, and ‘āina, the earth mother, Papahānaumoku, and sky father, Wākea, produce a child named Ho‘ohōkūkalani.<sup>165</sup> Wākea and Ho‘ohōkūkalani mate and produce a stillborn child named Hāloa.<sup>166</sup> Hāloa is buried in the land and from his body grows the kalo plant.<sup>167</sup> Ho‘ohōkūkalani conceived and birthed a second child named Hāloanaka, the first man.<sup>168</sup> Hāloanaka cared for his elder brother Hāloa, the kalo plant.<sup>169</sup> Hāloa, the elder brother, reciprocated and provided sustenance for his younger brother.<sup>170</sup> The mo‘olelo of Hāloa enshrines values of reciprocity between the people and the ‘āina.<sup>171</sup> It further demonstrates the interconnected relationships in Hawaiian culture.<sup>172</sup>

The traditional proverb, “he ali‘i ka ‘aina, he kauwa ke kanaka; the land is a chief, humans are its servants,” builds upon the story of Hāloa and reinforces the Hawaiian worldview of the unique relationship between the people and the land.<sup>173</sup> In other words, if the people cared for the land, the land provided for the people.<sup>174</sup> Because of this intimate understanding of the natural environment, Kānaka Maoli established a highly sophisticated agrarian community that sustained upwards of 800,000 people prior to the arrival of Europeans.<sup>175</sup>

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<sup>165</sup> Harley Broyles, *Act 32 and Perpetuating Practices of Hawai‘i Nā Pua o Haumea: How Hawai‘i’s Midwifery Licensure Law Adversely Impacts Traditional Native Hawaiian Birthing Practices*, 23 ASIAN-PAC. L. & POL’Y J. 1, 14 n.81 (2022).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See Sproat & Palau-McDonald, *supra* note 164, at 556–57 (describing the cultural significance of Pōhakuloa and its interconnectedness with Kānaka Maoli); Troy J.H. Andrade, *E Ola Ka ‘Ōlelo Hawai‘i: Protecting the Hawaiian Language and Providing Equality for Kānaka Maoli*, 6 INDIGENOUS PEOPLES’ J.L., CULTURE & RESISTANCE 3, 4–5 (2020) (describing the cultural significance of Haleakalā and its interconnectedness with Kānaka Maoli).

<sup>173</sup> See ‘ŌLELO NO‘EAU, *supra* note 7, at 62 (Prov. 531).

<sup>174</sup> See *id.*

<sup>175</sup> DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT 30–32 (1989). To sustain such an expansive operation of thriving kalo terraces, sweet potato fields, and abundant fisheries, and to reflect the traditional knowledge repositories, the Hawaiians created a unique and ingenious resource management system that balanced culture, religion, and politics. See *id.* at 40–41, 44–45.

Oli like the *Kumulipo*, mo‘olelo like the story of Hāloa, and traditional Hawaiian proverbs captured the patterns of Hawaiian cultural practice that replicate themselves throughout Hawaiian history.<sup>176</sup> In the way that precedent operates in Western law, Kānaka Maoli engrained stability, predictability, values, and power into mo‘olelo, oli, and mele—important and underappreciated repositories of traditional knowledge.<sup>177</sup> What emerges from this salient repository of traditional knowledge is the integral connection between spirituality, culture, identity, and ‘āina, as well as the key patterns that define a Hawaiian worldview.<sup>178</sup>

Building upon the work of scholars Greg Denning and Marshall Sahlins,<sup>179</sup> Professor Lilikalā Kame‘eleihiwa explains the significance of reconstructing the past based upon what can be gleaned from these patterns of Hawaiian cultural practice, which Kame‘eleihiwa describes as *Hawaiian* metaphors:

Metaphors are those things, those phrases, those customs, a kind of language, if you will, that *only* members of a particular group understand. Now, if an outsider comes to modern Hawai‘i and tries to write a history of these islands, but doesn’t know any of the metaphors, then that outsider will write what he or she thinks might have happened—according to his or her understanding. Such a history would be based on a model of outside, non-Native metaphors, and might include an entirely inaccurate description of what the Native meant. . . .<sup>180</sup>

Critically, language is essential to understanding Hawaiian metaphors as it would be difficult to support a historical argument regarding a specific

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<sup>176</sup> See Tanigawa Lum, *supra* note 106, at 5–6 (“Mo‘olelo teach us about the consequences of disrupting pono and manipulating natural resources. As early as the 1800’s, Kānaka Maoli took to nūpepa [newspapers] Hawai‘i to publish their mo‘olelo of the impact of foreign systems on traditional resources.”).

<sup>177</sup> *Id.* at 12.

<sup>178</sup> ‘Āina, thus, necessarily intertwines with identity and self-determination for Kānaka Maoli. Recent studies have shown that Native Hawaiian health and well-being are “rooted in a close and stable connection to the land.” NOA EMMETT ALULI & DAVIANNA PŌMAIKA‘I MCGREGOR, ‘ĀINA: KEOLA NĀ KĀNAKA ‘ŌIWI LAND: THE HEALTH OF NATIVE HAWAIIANS 12 (2007), <https://www.nlm.nih.gov/exhibition/avoyagetohhealth/pdf/LandandHealth.pdf>.

<sup>179</sup> LILIKALĀ KAME‘ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 4–7 (1992) (citations omitted).

<sup>180</sup> *Id.* at 4–5.

community when one fails to address the subtlety and nuance of that community’s particular language.<sup>181</sup>

These Hawaiian metaphors must ground any discussion of the evolution of Hawaiian land tenure.<sup>182</sup> Private ownership of land, a conception in American law that includes various rights, such as the right to exclude others, did not exist in Hawai‘i.<sup>183</sup> Indeed, “Hawaiians traditionally viewed and treated land as a member of their family and clearly not something that could be owned and bought or sold.”<sup>184</sup> Instead, under the political order in Hawai‘i, the chiefly class, the ali‘i, functionally served as trustees of the land and resources.<sup>185</sup> The structure of this chiefly class and the distribution of power evolved over time, but ultimately resulted in the ascension of a mō‘ī, or supreme chief of an island, and an ‘aha ali‘i, or council of chiefs.<sup>186</sup> This system imbued all ali‘i with religious authority.<sup>187</sup> But, the governing system provided checks on the authority of the ali‘i.<sup>188</sup> For example, the notion of reciprocity—gleaned from mo‘olelo—extended between and among the various political strata of Hawaiian society.<sup>189</sup> The maka‘āinana—as younger siblings of the ali‘i—had an obligation to work the land and sea to serve those above them in the political hierarchy, but these maka‘āinana were not serfs in the European sense.<sup>190</sup> Maka‘āinana could freely move to other land with

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<sup>181</sup> MARSHALL SAHLINS, HISTORICAL METAPHORS AND MYTHICAL REALITIES: STRUCTURE IN THE EARLY HISTORY OF THE SANDWICH ISLANDS KINGDOM 9–19 (1981).

<sup>182</sup> See Tanigawa Lum, *supra* note 106, at 5–6 (highlighting the significance of cultural practice to framing a collective memory of injustice by tracing plantation capitalism to foreign businesses that “decimated the intricate balance of pono and radically transformed Hawai‘i’s landscape”).

<sup>183</sup> See *Historical Background*, *supra* note 36, at 15.

<sup>184</sup> See MacKenzie & Sproat, *supra* note 74, at 502 (citing Moses K.N. Haia III, *Quiet Title Actions Harm Hawaiians*, HONOLULU STAR-ADVERTISER, Jan. 25, 2017, at A 12 (citations omitted)).

<sup>185</sup> *Id.* at 519–20.

<sup>186</sup> KAMANAMA KALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION 19, 25 (2014) [hereinafter NO MĀKOU KA MANA].

<sup>187</sup> *Id.* at 19–20.

<sup>188</sup> See ‘OLELO NO‘EAU, *supra* note 7, at 125 (Prov. 1150) (“I ali‘i no ke ali‘i i ke kānaka. A chief is a chief because of the people who serve him,” which expresses that the ali‘i must care for their people in order to maintain their positions and enjoy prosperity in the lands they stewarded).

<sup>189</sup> *Id.* at 125 (Prov. 1149) (“I ‘āina no ka ‘āina i ke ali‘i, a i waiwai no ka ‘āina i ke kānaka. The land remains the land because of the chiefs, and prosperity comes to the land because of the common people.”).

<sup>190</sup> See *Historical Background*, *supra* note 36, at 8–9.

ali‘i that better managed the ‘āina.<sup>191</sup> Ali‘i provided guidance and protection in exchange for the fruits of maka‘āinana labor.<sup>192</sup> As one Hawaiian proverb stated, “I ali‘i no ke ali‘i i ke kānaka. A chief is a chief because of the people who serve him.”<sup>193</sup> Historian David Malo noted how “the chiefs took great care of their people . . . for a chief was called great in proportion to the number of his people.”<sup>194</sup> Yet regardless of “labels” of who managed land, traditional knowledge dictated that *everyone* had an interest in and responsibility for the ‘āina.

Unlike the European feudal system, which many historians have inaccurately analogized to pre-contact Hawai‘i,<sup>195</sup> traditional land resource management practices emphasized keeping balance to ensure the sustainability of resources through these reciprocal connections under which the community’s success depended on the success of the chief’s stewardship of the resources.<sup>196</sup> As an example, taro terraces would be built to ensure that water could be extracted in a controlled manner from a river, but then engineered so that the water would return to its natural flowing state.<sup>197</sup> Such a system ensured ecological sustainability.<sup>198</sup> Accomplishing such ingenious methods of land stewardship required an intimate understanding of the natural environment as well as a political structure to ensure pono, balance.<sup>199</sup> What emerges is a complex traditional Hawaiian land tenure system that reflected Hawaiian values and the goal of achieving pono. Critical to parsing through the complexity of this land management system is understanding the concepts of palena and kalai‘āina.<sup>200</sup> According to Dr. Kamanamaikalani Beamer, “palena created places—spaces of attachment and access to both the

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See ‘ŌLELO NO‘EAU, *supra* note 7, at 125 (Prov. 1150).

<sup>194</sup> DAVIANNA PŌMAIKA‘I MCGREGOR, NĀ KUA‘ĀINA: LIVING HAWAIIAN CULTURE 29 n.30 (2007) [hereinafter NĀ KUA‘ĀINA] (citing DAVID MALO, CAUSES FOR THE DECREASE OF THE POPULATION IN THE ISLANDS 125 (Lorrin Andrews trans., Hawaiian Spectator 2, no. 2 eds., 1839)).

<sup>195</sup> See NO MĀKOU KA MANA, *supra* note 186, at 25–26 (describing the Native Hawaiian governing and class structure as a unique body that was well-developed long before Western contact).

<sup>196</sup> Dr. Davianna McGregor identifies the concept of “lōkahi” or “unity” between all things, including the people, land, and its resources. See NĀ KUA‘ĀINA, *supra* note 194, at 2.

<sup>197</sup> *Id.* at 25.

<sup>198</sup> See D. Kapua‘ala Sproat, *Water*, in THE VALUE OF HAWAI‘I 187, 188 (Craig Howes & Jonathan Kay Kamakawiwo‘ole Osorio eds., 2010).

<sup>199</sup> See, e.g., NĀ KUA‘ĀINA, *supra* note 194; NO MĀKOU KA MANA, *supra* note 186.

<sup>200</sup> See NO MĀKOU KA MANA, *supra* note 186, at 32–49.

metaphysical and physical worlds. They delineated the resource access of maka‘āinana and ali‘i on the ground, literally connecting people to the material and spiritual resources of the places.”<sup>201</sup> The palena, documented and maintained through oral traditions, served as a figurative map that identified place boundaries, which provided the mechanism by which stewardship could be optimized.<sup>202</sup> An example of a palena is an ahupua‘a, which is broadly defined as a subset of land that extends from the top of the mountain out into the ocean within which existed all resources to sustain the community.<sup>203</sup> Such palena, like the ahupua‘a, worked symbiotically with a mō‘ī’s consolidation of power.<sup>204</sup> The mō‘ī could ensure balance on an island by sharing lands among ali‘i to steward.

The mō‘ī’s traditional redistribution process of the ‘āina to ali‘i was called kālai‘āina. In ‘Ōlelo Hawai‘i, “kalai” means “to carve,” and when combined with “‘āina” it means to “carve out or divide the lands.”<sup>205</sup> A kālai‘āina occurred to ensure that land remained prosperous and to maintain a state of pono, which reflected reciprocally on ali‘i. The kālai‘āina recognized differences in land divisions and the resources they produced.<sup>206</sup> Under this process, the reigning mō‘ī would distribute kuleana in ‘āina to kaukau ali‘i, lower ranking chiefs, who then distributed kuleana to konohiki, resource leaders, to manage for the prosperity of the maka‘āinana that lived in and stewarded them.<sup>207</sup> Productivity of the land ensured community sustenance and peace.

The Native Hawaiian metaphors of reciprocity, connection, balance, and sustainability, as articulated in traditional knowledge repositories are embraced in the worldview of Kānaka leaders. Thus, the nineteenth century changes to the land tenure system uniquely reflected the Hawaiian metaphors

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<sup>201</sup> *Id.* at 32.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 41.

<sup>204</sup> *Id.* at 40–41 (breaking down the word “ahupua‘a” to understand the Hawaiian traditional practice of placing a carving of a pig’s head on an altar at the boundaries of the land division for people to give tribute which would then be collected by ali‘i).

<sup>205</sup> *Kalai‘āina*, WEHEWEHE WIKIWIKI, [https://hilo.hawaii.edu/wehe/?q=kalai‘āina](https://hilo.hawaii.edu/wehe/?q=kalai%27%20aina) (last visited Mar. 27, 2025).

<sup>206</sup> *See* NO MĀKOU KA MANA, *supra* note 186, at 45. The process of distributing land was complex and a failure to allocate the proper amount of lands, and, in turn, resources, could result in an unbalanced system. *See id.*

<sup>207</sup> R. Douglas K. Herman, *Kālai‘āina: Carving the Land* 359 (Dec. 1995) (Ph.D. dissertation, University of Hawai‘i) (ProQuest).

and ensured that the ali‘i cared for the maka‘āinana and all cared for the ‘āina in the rapidly changing world.<sup>208</sup>

b. *Māhele: Weaving Traditional and Western Land Tenure*

Ignoring the aforementioned important cultural dimension,<sup>209</sup> the Native Hawaiians Study Commission majority then analyzed the land tenure conversion process to show that Native Hawaiians did not have claims in land that they did not seek in fee simple.<sup>210</sup> The following narrative engages in the difficult archival work of understanding the land transition process—called the Māhele<sup>211</sup>—and the motivations of the key decisionmakers to better understand what interests, if any, Kānaka Maoli obtained in land following this process.

With the rising deaths of Kānaka Maoli, the arrival of American missionaries, and western aggression in Hawai‘i, the ali‘i saw a growing need to protect the maka‘āinana.<sup>212</sup> In 1839, Kūiaki, King Kamehameha III, began the process to formally recognize and protect the interests of the maka‘āinana by instituting the 1839 Bill of Rights, which guaranteed the rights of the people—who at the time only constituted Native Hawaiians.<sup>213</sup> Section 5 of the Bill of Rights recognizes the land interest vested in Native Hawaiians and the consequences for any attempt to displace them:

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<sup>208</sup> See *infra* Part V.

<sup>209</sup> See MAJORITY REPORT, *supra* note 142, at 253 n.\* (noting that discussions regarding Hawaiian perspectives on land tenure were added to their report from comments of the Office of Hawaiian Affairs without recognizing its significance to their ultimate conclusion).

<sup>210</sup> See *id.* at 657.

<sup>211</sup> See JON J. CHINEN, THE GREAT MAHELE: HAWAII’S LAND DIVISION OF 1848 vii (1958) (noting that “[t]he most important event in the reformation of the land system in Hawaii was *The Great Mahele* of 1848”).

<sup>212</sup> See *Historical Background*, *supra* note 36, at 10–12.

<sup>213</sup> KE KUMUKĀNĀWAI O KA MAKĀHIKI 1839 BILL OF RIGHTS § 5 (June 7, 1839). Importantly, at the time of enactment of this law, foreigners were unable to become naturalized citizens. Jon Van Dyke, *Population, Voting, and Citizenship in the Kingdom of Hawai‘i*, 28 U. HAW. L. REV. 81, 89 (2005) (noting the first Kingdom law regarding naturalization was enacted on November 12, 1840).

<p>Ua ho‘omalua ‘ia ke kino o nā kākāka a pau, a me ko lākou ‘āina, a me ko lākou mau pā hale, a me ko lākou waiwai a pau; ‘a‘ole ho‘i e lawe ‘ia kekahi mea, ke ‘ōlelo ‘ole ‘ia kēlā mea ma ke kākāwai. ‘O ke ali‘i e hana i kekahi mea kū‘ē i kēia Kumukākāwai, e pau kona noho ali‘i ‘ana ma kēia pae ‘āina ‘o Hawai‘i nei, ke ho‘omau ‘ia ma laila, pēlā nā kia‘āina, a me nā luna a me nā konohiki a pau.</p>	<p>Protection is hereby secured to the persons of all the [Native Hawaiian] people, <i>together with their lands, their building lots and all their property and nothing whatever shall be taken from any individual</i>, except by express provision of the laws. Whatever chief shall perseveringly act in violation of this Constitution, shall no longer remain a chief of the Sandwich Islands, and the same shall be true of the governors, officers and all land agents.<sup>214</sup></p>
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A year later, Kamehameha III proclaimed the first Constitution, which set out the structure of the Kingdom government.<sup>215</sup> The 1840 Constitution also clarified and reaffirmed that ‘āina was held in common by the people and the chiefs:

<p>‘O Kamehameha I, ‘o ia ke po‘o o kēia aupuni, a nona nō nā ‘āina a pau mai Hawai‘i a Ni‘ihau, ‘a‘ole na‘e nona pono‘ī, no nā kākāka nō, a me nā ali‘i, a ‘o Kamehameha nō ko lākou po‘o nāna e ‘ōlelo i ka ‘āina. No laila, ‘a‘ohe mea pono ma mua, ‘a‘ohe ho‘i mea pono i kēia manawa ke ho‘olilo aku i kekahi lihi iki o kēia mau ‘āina me ka ‘ae ‘ole o ka mea iā ia ka ‘ōlelo o ke aupuni.</p>	<p>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 <i>not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.</i> Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.<sup>216</sup></p>
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<sup>214</sup> *Id.* (emphasis added).

<sup>215</sup> KINGDOM OF HAW. CONST. OF 1840, *translated in* TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III 61–68 (1994).

<sup>216</sup> KINGDOM OF HAW. CONST. OF 1840 § 14 (emphasis added).

Thus, the Kingdom’s Constitution vested rights in the land with the mō‘ī (King), the ali‘i (chiefs), and the maka‘āinana (Native Hawaiian people).<sup>217</sup> Such a legal scheme, articulated in writing, was consistent with traditional Hawaiian practices where private property did not exist.<sup>218</sup> Importantly, this provision articulated the sovereign’s prerogative to prevent the sale of land without his consent.<sup>219</sup> But tensions began brewing with foreigners.<sup>220</sup>

In 1843, property disputes began to cause friction in the islands as the increasing presence of foreign settlers, merchants, and missionaries, who saw land as a commodity to be bought and sold, began staking claims in Hawaiian land.<sup>221</sup> That year, after a tiff in which the king refused to give into the demands of a rogue British naval officer, Kamehameha III, under protest, turned over the Kingdom to British forces.<sup>222</sup> Upon hearing the news, British Admiral Richard Thomas sailed for Hawai‘i and, given Hawai‘i’s diplomatic relationship with Britain, returned sovereignty of the islands back to Kamehameha III in July 1843.<sup>223</sup> At the ceremony restoring sovereignty, Kamehameha III famously remarked: “Ua mau ke ea o ka ‘āina i ka pono. . . . The sovereignty of the land is perpetuated in righteousness.”<sup>224</sup> This was the first, but not the last time that Western imperialist ambition manifested itself in the dispossession of land.<sup>225</sup> The British theft—albeit brief—of Hawaiian land and sovereignty hastened political and legal changes in Hawai‘i.<sup>226</sup>

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<sup>217</sup> *Id.*

<sup>218</sup> See *Historical Background*, *supra* note 36, at 9.

<sup>219</sup> See KINGDOM OF HAW. CONST. OF 1840 § 14 (showcasing that by drafting the constitutional provisions in this way, Kamehameha III maintained his inherent power to control all distribution of ‘āina like in the traditional kālai‘āina process).

<sup>220</sup> Kamehameha III thereafter sought to stave off conflict with foreign powers and allowed the governors of each island to enter into long-term leases with foreigners. In 1839, for example, France declared war against the Kingdom when ali‘i persecuted French catholic priests as a result of heavy influence from American protestant missionaries in Hawai‘i. Kamehameha III averted violence after he outlawed such persecution.

<sup>221</sup> JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI‘I? 27–28 (2008).

<sup>222</sup> *Correspondence Relating to the Provisional Cession of the Sandwich Islands to Great Britain.—February, 1843*, in BRITISH AND FOREIGN STATE PAPERS 1842-1843, at 1023 (1858), <https://books.google.com/books?id=1qADAAAAQAAJ&pg=PA1023#v=onepage&q&f=false>.

<sup>223</sup> See VAN DYKE, *supra* note 221, at 28.

<sup>224</sup> Katrina-Ann R. Kapā‘anaokalāoikeola Nākoa Oliveira, *E Ola Mau ka ‘Ōlelo Hawai‘i: The Hawaiian Language Revitalization Movement*, in A NATION RISING, *supra* note 3, at 79.

<sup>225</sup> See VAN DYKE, *supra* note 221, at 4.

<sup>226</sup> *Id.* at 30.

In the ways of his ancestors, Kamehameha III sought to institute a final *kālai‘āina* that transitioned the traditional Hawaiian land tenure system to a hybrid system that adopted Western notions of private ownership.<sup>227</sup> Thus began what is now called the *Māhele*—a series of events that culminated in a new land tenure system.

In December 1845, the Kingdom established the Board of Commissioners to Quiet Land Titles (“Land Commission”) to address individual claims to land.<sup>228</sup> The law creating the Land Commission also introduced several principles to guide the transition to a private land tenure system.<sup>229</sup> The principles reaffirmed the traditional Hawaiian land tenure system and the rights vested in various constituencies:

<p>O Na pono a pau i pili i ke Alii maluna o Na konohiki nui, a me Na mea malalo o lakou, oia Na pono o Na konohiki nui maluna o Na hoaina o lakou, a me Na lopa a pau i noho i ko lakou aina. Nolaila, me he poe hui la lakou, a ua pili ka aina ia lakou a pau . . .</p> <p>Nolaila, he mea kupono maoli, a he mea pololei no hoi i ka haawi ana o ke Alii i ke kuleana alodio, ke haawi i ke konohiki maluna, oia hoi ka mea i loa mua ka aina Na ke Alii mai, no ka mea, i ka Hana Na pela, aole i Hana ino ia Na konohiki, a me Na hoaina malalo ona; ua hoomaluia lakou e ke kanawai, e like ma ka wa mamua. He mea akaka loa hoi ka hiki ole i ke Alii ka haawi aku i ke kuleana alodio ia hai, no ka mea, ina pela, ua nele ke konohiki mua. Aka, ina loa</p>	<p>The same rights which the King possessed over the superior landlords and all under them the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land; the King really owning the allodium, and the person in whose hands he placed the land, holding it <i>in trust</i> . . .</p> <p>It seems natural then, and obviously just, that the King, in disposing of the allodium, should offer it first to the superior lord, that is to the person who originally received the land in trust from the King; since by doing so, no injury is inflicted on any of the inferior lords or tenants, they being protected by law in their rights as before; and most obviously the King could not dispose of the allodium to any other person</p>
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<sup>227</sup> See NO MĀKOU KA MANA, *supra* note 186, at 144.

<sup>228</sup> See Commission to Quiet Land Titles; Awards, Patents, Etc: An Act to Organize the Executive Department of the Hawaiian Islands, Apr. 27, 1846, L. 1846, at 107, pt. I, ch. VIII (Apr. 27, 1846), art. IV (passed separately on Dec. 10, 1845), also printed in 2 Revised Laws of Hawaii, 2120 (1925).

<sup>229</sup> See *id.*

<p>i ke konohiki mua kona aina ma ke ano alodio, ma ke kuai, a ma ka haawi wale o ke Alii, ua mau no ke kuleana o Na hoaaiana, a me Na lopa, no ka mea aole nele kekahi mea e ae no ka hoolilo ana o ka Moi i kona iho. Nolaila, o ke konohiki i kuai me ke Alii a loa kona aina ma ke ano alodio, ua hiki ole ia ia ke pai i ka poe malalo ona, e like ma ka hiki ole i ke Alii i keia manawa ke pai i ke konohiki.</p>	<p>without infringing on the rights of the superior lord. But even when such lord shall have received an allodial title from the King by purchase or otherwise, <i>the rights of the tenants and sub-tenants must still remain unaffected, for no purchase, even from the sovereign himself, can vitiate the rights of third parties.</i> The lord, therefore, who purchases the allodium, can no more seize upon the rights of the tenants and dispossess them.<sup>230</sup></p>
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The principles specifically set out the three classes of people with layered and vested rights in any parcel of land:

<p>Ua akaka loa hoi, ekolu wale no mea kuleana ma ka aina hookahi. 1. O ke Aupuni. 2. O Na konohiki. 3. O Na hoaaiana, a nolaila he mea nui ka hoakaka i ka nui o ko kekahi kuleana, a me ko kekahi.</p>	<p>It being therefore fully established, that there are but three classes of person sharing vested rights in the land—[first], the government, [second], the landlord, and [third], the tenant, it next becomes necessary to ascertain the proportional rights of each.<sup>231</sup></p>
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Despite initial reservations, Kamehameha III proceeded with the system of dividing land. The first step of the process required disaggregating the layered interests between Kamehameha III and the ali‘i class.<sup>232</sup> The *Buke Māhele*, or Māhele Book, recorded conveyances by ahupua‘a, effectuating a hybrid system that relied on traditional land divisions.<sup>233</sup> Kamehameha III first claimed approximately two-thirds of the Kingdom land (approximately

<sup>230</sup> *Id.* (emphases added).

<sup>231</sup> *Principles of the Board of Commissioners to Quiet Land Titles (In Hawaiian)*, in INDICES OF AWARDS MADE BY THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES IN THE HAWAIIAN ISLANDS 13–14 (Star-Bulletin Press eds., 1929) [hereinafter *Principles of the Board of Commissioners to Quiet Land Titles (In Hawaiian)*].

<sup>232</sup> See VAN DYKE, *supra* note 221, at 41–42.

<sup>233</sup> BUKE KAKAU PAA NO KA MAHELE AINA I HOOHOLOIA IWAENA O KAMEHAMEHA III A ME NA LII A ME NA KONOHIKI ANA HALE ALII HONOLULU (1848), <https://files.hawaii.gov/dags/archives/PDFs/mahelebook.pdf>.

2.5 million acres), subject to the rights of native tenants.<sup>234</sup> The ali‘i received the remaining one-third of the land (approximately 1.6 million acres), similarly subject to the rights of native tenants.<sup>235</sup>

In June 1848, Kamehameha III then set aside 1.5 million acres of land from his allocation “forever to the chiefs and people” as part of the Government lands.<sup>236</sup> Kamehameha III therefore retained 984,000 acres as the King’s lands or Crown Lands for himself, heirs, and successors.<sup>237</sup> Each Land Commission grant—whether to the Crown, Government, or ali‘i—was subject to the rights of the native tenants.<sup>238</sup> Indeed, each grant contained the phrase “koe wale no ke kuleana o Na kanaka e noho ana ma ua mau aina la” or reserved only to the rights of the native tenants.<sup>239</sup>

The next step of the process required a disaggregation of the peoples’ interests.<sup>240</sup> On August 6, 1850, the Kingdom Legislature passed the Kuleana Act, which sought to clarify maka‘āinana land interests and make it easier

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<sup>234</sup> See VAN DYKE, *supra* note 221, at 42.

<sup>235</sup> *Id.* (citing Davianna Pōmaika‘i McGregor, *The Cultural and Political History of Hawaiian Native People*, in OUR WAY: AN ETHNIC STUDIES ANTHOLOGY 351 (Gregory Yee Mark, Davianna Pōmaika‘i McGregor & Linda A. Revilla, eds., 1996)); JEAN HOBBS, HAWAII: A PAGEANT OF THE SOIL 52 (1935); WILLIAM FREMONT BLACKMAN, THE MAKING OF HAWAII: A STUDY IN SOCIAL EVOLUTION 159 (1906, reprinted 1977)).

<sup>236</sup> See MacKenzie & Sproat, *supra* note 74, at 510 (“[T]here can be little doubt that the ‘po‘e lāhui kānaka’ or the ‘people’ the King refers to are the native people of the Hawaiian Kingdom.”).

<sup>237</sup> See VAN DYKE, *supra* note 221, at 42.

<sup>238</sup> *Harris v. Carter*, 6 Haw. 195, 205 (Haw. Kingdom 1877) (reaffirming that awards in Māhele process were “subject to the rights of native tenants”); *Palama v. Sheehan*, 50 Haw. 298, 300, 440 P.2d 95, 97 (1968) (noting that entire ahupua‘a were awarded subject the rights of native tenants: “Koe . . . [ke] Kuleana o [na] Kanaka”); see MacKenzie & Sproat, *supra* note 74, at 510 (“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.”); *Historical Background*, *supra* note 36, at 14 (“All awards, however, were subject to the rights of the native tenants. Consequently, all lands of the king, government, and chiefs were given *subject to the rights of native tenants.*”).

<sup>239</sup> *Principles of the Board of Commissioners to Quiet Land Titles (In Hawaiian)*, *supra* note 231, at 13–14; see NĀ KUA‘ĀINA, *supra* note 194, at 37 (“All of these lands granted by the Board of Commissioners to the Crown, the government, and the chiefs continued to be subject to the rights of the hoa‘āina. The phrase ‘koe wale no ke kuleana o Na kanaka e noho ana ma ua mau aina la,’ which the government translated as ‘subject or reserved only to the rights of the tenants,’ is at the end of the declaration by the board establishing the Crown and government lands and appears on the grants of land issued by the board.”).

<sup>240</sup> See *Historical Background*, *supra* note 36, at 14.

for them to claim fee simple title to land.<sup>241</sup> Under the Kuleana Act, Native Hawaiians could claim small parcels of typically agricultural land as their personal property, provided they met certain conditions, including the requirement to cultivate and improve the land.<sup>242</sup> Although framed as an effort to protect Hawaiian landholders and ensure they could maintain their connection to the land, the process to obtain fee simple title was complicated and fraught with difficulties.

Many *maka‘āinana* did not fully understand the implications of the new system, nor did they have the means or resources to secure title to their lands.<sup>243</sup> Western-style land deeds were unfamiliar and complex, requiring literacy and a knowledge of English.<sup>244</sup> Many Hawaiians were unable to navigate the legal requirements.<sup>245</sup> The Kuleana Act required *Kānaka Maoli* to survey their land and submit an application for title, and it tasked the Land Commission with adjudicating these claims.<sup>246</sup> The bureaucratic processes, however, were often slow, and many Hawaiians faced difficulties proving ownership.<sup>247</sup> Additionally, many of the lands that Hawaiians traditionally

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<sup>241</sup> Act of Aug. 6, 1850, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges, *reprinted in* L. 1850, at 202, in 2 Revised Laws of Hawaii, 2141–42 (1925) [hereinafter *Kuleana Act*]; *see* NO MĀKOUKA MANA, *supra* note 186, at 142. Less than a month before adopting the Kuleana Act, the Kingdom Legislature adopted the Resident Alien Act, which allowed foreigners living in Hawai‘i to acquire fee-simple title to land. Although three of the seven provisions of the Kuleana Act refer explicitly to “natives,” the Resident Alien Act made it possible for foreigners to buy land without restrictions. *See* KAME‘ELEIHIWA, *supra* note 179, at 170. The act did not define “native,” only specifying that *konohiki* and other government land stewards were excluded from obtaining title in this way. *See* VAN DYKE, *supra* note 221, at 422.

<sup>242</sup> *See* Kuleana Act, *supra* note 241, at §§ 1–2; *Historical Background*, *supra* note 36, at 14.

<sup>243</sup> *See* *Historical Background*, *supra* note 36, at 15.

<sup>244</sup> *See* NĀ KUA‘ĀINA, *supra* note 194, at 38 (“Overall, the concept of private ownership of land was a totally foreign notion . . . . Thus, many Hawaiians did not appreciate or understand the importance of filing a land claim within the given two-year period in order to continue living upon their ‘ili. And although the law was published and posted in key locations, it was vaguely worded, using foreign concepts that were not understood by the common people.”).

<sup>245</sup> *Id.*

<sup>246</sup> *See* VAN DYKE, *supra* note 221, at 46.

<sup>247</sup> *See id.*

farmed and lived on were not properly registered, and disputes over land boundaries erupted.<sup>248</sup>

In the end, 14,195 individuals claimed fee simple plots of land, and 8,421 awards were approved. However, and consistent with the traditional land tenure system, many ali‘i continued to allow maka‘āinana to live on their lands regardless of asserting a claim.<sup>249</sup> Some ali‘i formed groups, called land hui, of individuals who cultivated lands in exchange for living on them.<sup>250</sup> Others leased or sold parcels of lands to Native Hawaiians outright.<sup>251</sup> Kamehameha III himself organized leases to Hawaiian tenants and even elected to sell some lands.<sup>252</sup> He used the revenues generated from his property to support the office of the crown, for which the government itself

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<sup>248</sup> From 1850–1893, over 600,000 acres of government lands were sold via royal patent grants. Melody Kapilialoha MacKenzie, *Historical Background*, *supra* note 36, at 18. While more Native Hawaiian individuals received awards, foreigners received a majority of the allotted lands. See Neil M. Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 859 (1975). Many hoa‘āina elected to live on and tend to their ancestral lands without asserting formal claims. In *Dowsett v. Maukeala*, for example, the hoa‘āina defendants argued their right to live on a foreigner’s land in Halawa, O‘ahu, via adverse possession because their family lived on that land long before plaintiff received title. 10 Haw. 166, 168–69 (Haw. Rep. 1895). The Kingdom Supreme Court disagreed, concluding that if hoa‘āina failed to present their claim to receive kuleana lands, their status on the disputed land depended on permissions of each land owner. *Id.* at 169. The Dowsett defendant’s occupancy only became adverse when they refused to pay rent, which did not meet the time requirement to acquire the land. *Id.* at 170. Ultimately, the Kuleana Act resulted in substantial diminishing of Government Lands. Though weakened by vague language, Section 7 of the Kuleana Act would later provide a framework for protecting Native Hawaiian traditional and customary rights. See Kuleana Act, *supra* note 241, at § 7.

<sup>249</sup> Kamanamaikalani Beamer & N. Wahine‘aipohaku Tong, *The Māhele Did What? Native Interests Remains*, 10 HŪLILI 125, 135–36 (2016) (noting Victoria Kamāmalu’s decision to grant kānaka the rights to live for free on her lands).

<sup>250</sup> *Id.* (noting the decision of ali‘i to use “portions of their lands to create land hui with hybrid collective land ownership for their members”).

<sup>251</sup> *Id.* at 137.

<sup>252</sup> See VAN DYKE, *supra* note 221, at 59; *In re Kamehameha IV Estate*, 2 Haw. 715, 724 (Haw. Kingdom 1864) (“It is admitted that from the time when Kamehameha III separated his own property from that of the Government, in 1848, up till his death, he dealt with his reserved lands, as his own private estate, leasing, mortgaging or selling the same at his pleasure. Ever since the division, those lands, except such as have been sold, have always been known as the King’s lands, and have been managed by an agent or land steward appointed by the King.”); An Act relating to the lands of his Majesty the King, and of the Government, June 7, 1848 (Haw. Kingdom 1848) (confirming Crown Lands of Kamehameha III and determining that these lands are: “[t]o be the private lands of his Majesty Kamehameha III, to have and to hold to himself, his heirs and successors forever; and said lands shall be regulated and disposed of according to his royal will and pleasure, subject only to the rights of tenants”).

provided no monetary support.<sup>253</sup> In this way, the Māhele process did not prevent ali'i from providing for their people, but rather physically documented their rights as more Native Hawaiians succumbed to disease and foreign presence increased.<sup>254</sup>

The Māhele was a radical restructuring of the land system in Hawai'i designed to shift land from a communal system to a hybrid private ownership system. This narrative of the transition in the land tenure process makes clear that Kānaka leaders sought to ensure the protection of the native tenants in the ways of their ancestors while effectively allowing fee simple title to begin to take hold. Without an attuned cultural lens, one can, like the Native Hawaiians Study Commission majority, easily misinterpret the Māhele as a land grab by the political elite to the detriment of the common people. While many Native Hawaiians were not able to pursue their individual claims to land, Kamehameha III structured the hybrid land tenure system to ensure that ali'i continued to care for their tenants and to solidify that land, especially the Crown and Government lands, stayed in the hands of Native Hawaiians. The collective memory inscribed by the majority of the Native Hawaiians Study Commission ignores entirely the Hawaiian perspective.

## 2. *Weaponized View of American Control of Hawai'i*

At the same time the Native Hawaiians Study Commission majority ignored the Hawaiian perspective of the land transition process, it also absolved the United States of liability and wrongdoing for the ultimate seizure of Hawaiian Kingdom land.<sup>255</sup> But such a conclusion is not surprising when one considers that the majority had a flawed methodological approach to its findings and conclusions. Indeed, the Commission majority relied heavily upon the work of American scholar Ralph S. Kuykendall.<sup>256</sup> In particular, the majority favorably and liberally cited Kuykendall's three-

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<sup>253</sup> See VAN DYKE, *supra* note 221, at 59.

<sup>254</sup> See Beamer & Tong, *supra* note 249, at 134–35; see also Adam Roversi, *The Hawaiian Land Hui Movement: A Post-Māhele Counter-Revolution in Land Tenure and Community Resource Management*, 34 U. HAW. L. REV. 557, 563–64 (2012) (“A typical land Hui was created by a group of members who joined together to purchase a block of land, often an entire ahupua'a, and held it in common. Although each individual owner might be designated a house lot or small plot as nominally ‘theirs,’ the remainder of the land was held for the benefit of the group as a whole.”).

<sup>255</sup> See MAJORITY REPORT, *supra* note 142.

<sup>256</sup> See *id.* at 290 (citing R.S. KUYKENDALL, THE HAWAIIAN KINGDOM, VOLUME III, THE KALAKAUA DYNASTY, 1874–1893 (1967) [hereinafter THE KALAKAUA DYNASTY]).

volume history of Hawai‘i, *The Hawaiian Kingdom*.<sup>257</sup> While framed as an unbiased source, the Territory of Hawai‘i’s Historical Commission commissioned Kuykendall to produce this textbook for schools in 1922—during the prime years of the project of Americanization in Hawai‘i.<sup>258</sup> Kuykendall’s history did not use Hawaiian language sources and instead relied entirely on missionary and other colonial translations and historical accounts.<sup>259</sup>

Due to the limited resources available to the Commission, the majority chose to rely upon secondary sources and historians within the federal government, such as historians from the United States Navy, rather than review primary sources.<sup>260</sup> In the majority report, the Naval historian described the Commission majority’s parameters for the required work product: “. . . within six to eight weeks we produce a 15 to 20 page, double-spaced report, footnoted, on ‘what forces caused the monarchy to fall and what forces led to the annexation of Hawai‘i to the United States as a Territory in 1898.’” The request also stated that “reliance on secondary sources will be sufficient for our review.”<sup>261</sup> The Naval historian acknowledged the methodological flaws in his report:

Ideally, the scholar would travel to all archival institutions holding pertinent collection to see if any new facts or fresh perspectives could be found. Unfortunately, the six to eight week time limit, the lack of funds for travel, and the fact that this work was assumed for completion in addition to other work normally done by this office precluded any more extensive treatment.<sup>262</sup>

Recognizing a perception of a conflict, the Naval historian wrote: “It is conceded, however, that it would have been more appropriate had the Commission requested this work be undertaken by a non-governmental historian so that there might have been no question about the appearance or substance of objectivity.”<sup>263</sup> Despite these cautions, the Commission majority proceeded to endorse the conclusions of the government historian.

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<sup>257</sup> See THE KALAKAUA DYNASTY, *supra* note 256; MAJORITY REPORT, *supra* note 142.

<sup>258</sup> See *Publisher’s Note*, in THE KALAKAUA DYNASTY, *supra* note 256, at v; (Re)Righting History, *supra* note 45, at 681.

<sup>259</sup> See Charles H. Hunter, *Preface*, in THE KALAKAUA DYNASTY, *supra* note 256, at vii.

<sup>260</sup> DUDLEY & AGARD, *supra* note 111.

<sup>261</sup> See MAJORITY REPORT, *supra* note 142, at 290.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 290–91.

In its report, the Commission majority concluded, in relevant part:

Hawaii has a long and rich history. As a separate sovereign nation, it developed relations with the United States through treaties and other dealings prior to 1893. . . . [T]ensions between the monarch and the legislature also affected Hawaiian politics during these years, as did efforts by the native Hawaiians to regain power from reformers. The culmination of these trends occurred in 1891 when Liliuokalani became queen and attempted to reassert the power of the throne against the legislature and the reformers.<sup>264</sup>

One of the subtle ways the majority intentionally frames the historical record to minimize American involvement and liability in the events surrounding the overthrow and annexation is through selective word choice and the twisting of facts. The majority, for example, framed the American political maneuvering leading up to, during, and after the overthrow as an effort of the “reformers,” as if to suggest that the monarchical governance under Native Hawaiian leadership was corrupt and needed reformation.<sup>265</sup> Using these slights of hand, the majority, thus, crafted a collective memory that, in the end, justified American dispossession of Hawaiian land.

But, this collective memory was not unlike the nearly one-hundred year imperial narrative of Hawai'i that overshadowed any effort to address the justice claims of Native Hawaiians.<sup>266</sup> As demonstrated below, a more robust and contextualized account of the events surrounding the overthrow and annexation dispels the majority's “filter[ing] and twist[ing]” of facts and inaccuracies.<sup>267</sup> The following details help frame a collective memory that more appropriately critiques these pivotal moments in Hawai'i's history.

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<sup>264</sup> MAJORITY REPORT, *supra* note 142, at 25.

<sup>265</sup> *See id.*

<sup>266</sup> *See Hawai'i '78*, *supra* note 37, at 12 (describing “master narrative” of Hawai'i's history); MacKenzie & Sproat, *supra* note 74, at 483–84 (“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. Instead of 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.”).

<sup>267</sup> *See* Hom & Yamamoto, *supra* note 42, at 1758.

a. *Overthrow*

The Commission majority problematically absolves the United States of liability for the overthrow:

In 1893 the monarchy was overthrown. The overthrow, and the lack of resistance by the queen and her cabinet, was encouraged in part by the presence of United States forces, consisting of one company of Marines and two companies of sailors (approximately 100 men), acting without express authority from the United States Government.<sup>268</sup>

The Commission majority’s core conclusion weaves a false and spurious narrative employing “selective amnesia” to downplay American involvement in the overthrow of the Kingdom and erase the Kingdom government’s fervent non-violent resistance to American aggression.<sup>269</sup> As the following account intricately and critically details, the United States government actively orchestrated and executed the overthrow and faced significant resistance from the Queen and her citizens.

The overthrow of the Kingdom of Hawai‘i, a pivotal moment in the history of the islands and a key chapter in the broader narrative of American imperialism, unfolded over the course of several tumultuous days in January 1893.<sup>270</sup> At the center of this crisis was Queen Lili‘uokalani, who, after years of political maneuvering and increasing pressure from both her citizens and foreign interests, sought to restore the monarchical power that had been diminished during her older brother’s reign.<sup>271</sup>

Lili‘uokalani assumed the throne in 1891 following the death of her brother, David La‘amea Kalākaua.<sup>272</sup> Kalākaua, celebrated as the Merrie Monarch, brought significant change to the island Kingdom, including revitalizing cultural practices and modernizing the monarchy.<sup>273</sup> He built ‘Iolani Palace and traveled around the world—becoming the first monarch to circumnavigate the globe and the first guest honored with a formal state

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<sup>268</sup> See MAJORITY REPORT, *supra* note 142, at 25.

<sup>269</sup> Cohn, *supra* note 67, at 571 (defining selective amnesia).

<sup>270</sup> Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

<sup>271</sup> See Draft of Constitution of January 14, 1893, in FOREIGN RELATIONS OF THE UNITED STATES, 1894 APPENDIX 2: AFFAIRS IN HAWAII – PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. EXEC. DOC. NO. 47, 53D CONG., 2D SESS. 443, 1047 (1895) [hereinafter PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS], <https://www.loc.gov/item/2021666777>.

<sup>272</sup> LILI‘UOKALANI, HAWAII’S STORY BY HAWAII’S QUEEN 208–12 (1898).

<sup>273</sup> See VAN DYKE, *supra* note 221, at 98–99.

dinner by an American President.<sup>274</sup> While Kalākaua and others saw these expenditures as necessary to demonstrate Hawai‘i’s adoption of western norms, others saw them as unnecessary opulence.<sup>275</sup> After Kalākaua’s government became mired in political controversy and accusations of bribery, some Kingdom citizens, who organized themselves as a Committee of Thirteen and had the support of a militia, demanded changes of the government.<sup>276</sup> Chief among the demands in 1887 was the adoption—through solely the action of Kalākaua—of a new constitution.<sup>277</sup>

Whereas previous constitutions provided universal suffrage to all regardless of race, this new 1887 Constitution specifically disenfranchised “Asians,” created an income requirement that effectively removed Kānaka Maoli as eligible voters, and enfranchised white foreigners without any requirement that they renounce their former allegiance or naturalize as subjects of the Kingdom.<sup>278</sup> Put simply, the Bayonet Constitution, which received its name because of the threat of violence that the white instigators promised if Kalākaua refused to sign, provided “grossly disproportionate political power” to the Kingdom’s white business interests.<sup>279</sup> The Bayonet Constitution was all a part of the “Anglo-Saxonizing Machine” that the white oligarchs, many of American-missionary descent, viewed as supreme:

We declare to [Kānaka Maoli] that the Anglicized civilization is settled in this country and is inevitably to prevail. Their only good prospect is heartily to fall in line with it, earnestly to study and diligently to practice all that is

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<sup>274</sup> See TIFFANY LANI ING, RECLAIMING KALĀKAUA: NINETEENTH-CENTURY PERSPECTIVES ON A HAWAIIAN SOVEREIGN 61, 69, 75 (2019) (noting that the King’s circumnavigation of the world as “a form of resistance against the slanderous, trivializing, condescending, and judgmental accounts of his rule and his travels produced by Hawai‘i’s white oligarchy and by international commentators who found the very idea of a Pacific Island country ridiculous”).

<sup>275</sup> See JONATHAN KAY KAMAKAWIWO’OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 206, 212 (2002).

<sup>276</sup> The Committee of Thirteen included: Joseph B. Atherton; Jonathan Austin; William H. Bailey; William R. Castle; Benjamin F. Dillingham; Sanford B. Dole; Henry F. Glade; William W. Hall; Peter C. Jones; Thomas May; John H. Paty; Lorrin A. Thurston; and George N. Wilcox. LORRIN THURSTON, MEMOIRS OF THE HAWAIIAN REVOLUTION 129–54 (1936).

<sup>277</sup> See OSORIO, *supra* note 275, at 239–40.

<sup>278</sup> Compare KINGDOM OF HAW. CONST. OF 1852 art. 78 with KINGDOM OF HAW. CONST. OF 1887 art. 59.

<sup>279</sup> See Yamamoto & Betts, *supra* note 78, at 560 (citation omitted).

pure, just, true, lovely, and of good report in these thoughts,  
customs and habits of the haole.<sup>280</sup>

After she assumed the throne in 1891, Lili‘uokalani set out on a tour of the Kingdom to hear her citizens’ concerns.<sup>281</sup> Overwhelmingly, the people pled with the Queen for a new constitution.<sup>282</sup> Lili‘uokalani, who begrudgingly took an oath to affirm the 1887 Constitution when she became sovereign, heard the pleas of the community and sought to promulgate a new constitution.<sup>283</sup>

As Lili‘uokalani considered these changes, those oligarchs who amassed considerable political power—who the Commission majority referred to as “reformers”—found the actions concerning and sought ways to hasten their goal of annexing Hawai‘i to the United States.<sup>284</sup> John L. Stevens, the American envoy to the Kingdom, wrote to American Secretary of State John W. Foster:

[T]he golden hour is near at hand. . . . [S]o long as the islands retain their own independent government there remains the possibility that England or the Canadian Dominion might secure one of the Hawaiian harbors for a coaling station. . . . Annexation excludes all dangers of this kind.<sup>285</sup>

Secretary of State James Blaine, a former business partner of Stevens, who had in 1881 also expressed his clear sympathies for annexing Hawai‘i to the United States,<sup>286</sup> worked in tandem with Stevens and others to accomplish the theft of Hawaiian land and sovereignty. Indeed, in anticipation of

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<sup>280</sup> S.E. Bishop, *Anglo-Saxonizing Machines*, THE FRIEND, August 1887, at 63 (emphasis omitted). Conspirator Lorrin A. Thurston understood the illegality of his actions and attempted to justify their treasonous acts by alluding to images of the American Revolution: “Unquestionably, the [Bayonet] constitution was not in accordance with law; neither was the Declaration of Independence from Great Britain. Both were revolutionary documents, which had to be forcibly effected and forcibly maintained.” See THURSTON, *supra* note 276, at 153.

<sup>281</sup> LILI‘UOKALANI, *supra* note 272, at 226–36.

<sup>282</sup> *Id.* at 230–31.

<sup>283</sup> *Id.* at 210.

<sup>284</sup> See MAJORITY REPORT, *supra* note 142, at 25.

<sup>285</sup> Letter from John L. Stevens to John W. Foster (Nov. 20, 1892), <https://history.state.gov/historicaldocuments/frus1894app2/d186>.

<sup>286</sup> Secretary Blaine concluded that Hawai‘i needed to be a part of the United States, “drawing the ties of intimate relationship between us and the Hawaiian Islands so as to make them practically a part of the American system without derogation of their absolute independence.” Letter from James Blaine to Mr. Comly (Dec. 1, 1881), <https://history.state.gov/historicaldocuments/frus1881/d405>.

American involvement in an overthrow, in 1891, Stevens also requested that an American warship be stationed indefinitely in Honolulu Harbor.<sup>287</sup>

An Annexation Club in Hawai‘i, led by the white oligarchy, was so bold in their moves that in 1892 they sent Lorrin Thurston—another “reformer” with strong annexationist views who participated in forcing the Bayonet Constitution upon Kalākaua—to meet with the President of the United States to discuss annexation of Hawai‘i.<sup>288</sup> Thurston journeyed to Washington, D.C., and with an introduction from Stevens, had a meeting with United States Secretary of State James Blaine.<sup>289</sup> In the meeting, Secretary Blaine asked Thurston to discuss the annexation proposal with United States Secretary of the Navy Benjamin F. Tracy.<sup>290</sup> Naval Secretary Tracy then took Thurston to meet with President Benjamin Harrison.<sup>291</sup> Thurston documented what happened next:

We went to the White House. Mr. Tracy had me wait in an outer room while he spoke with the President. After about a half-hour, the secretary reappeared and beckoned me to accompany him outdoors. Then he spoke: I have explained fully to the President what you have said to me, and have this to say to you: the President does not think he should see you, but he authorizes me to say to you that, if conditions in Hawaii compel you people to act as you have indicated, and you come to Washington with an annexation proposition, you will find an exceedingly sympathetic administration here.<sup>292</sup>

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<sup>287</sup> See Davianna Pōmaika‘i McGregor, *The Cultural and Political History of Hawaiian Native People*, in *OUR HISTORY, OUR WAY: AN ETHNIC STUDIES ANTHOLOGY* 367 (Mark, McGregor, Revella, eds., 1996) (quoting August 1891 Letter from John L. Stevens).

<sup>288</sup> See THURSTON, *supra* note 276, at 229. Members of the Annexation Club also included attorney Henry E. Cooper. *Id.*

<sup>289</sup> *Id.* at 230.

<sup>290</sup> *Id.* at 231.

<sup>291</sup> *Id.* at 231–32.

<sup>292</sup> *Id.*

Thurston emphatically noted the impact of that conversation: “That was all I wanted to know.”<sup>293</sup> As Stevens would write: “The Hawaiian pear is now fully ripe, and this is the golden hour for the United States to pluck it.”<sup>294</sup>

On the morning of Saturday, January 14, 1893, Queen Lili‘uokalani rode by horse-drawn carriage across the street to Ali‘iōlani Hale, the Kingdom Government Building, to address the formal closing of the legislative session.<sup>295</sup> Following the Queen’s speech, her Cabinet met with the foreign diplomatic corps to discuss rumors that the Queen would promulgate a new constitution later that day.<sup>296</sup> At that meeting, the American representative to the Kingdom, John L. Stevens, requested, among other things, that the Cabinet inform him “at once” if the Queen was going to promulgate a new constitution.<sup>297</sup>

Queen Lili‘uokalani, indeed, responding to widespread petitions from Kānaka Maoli who felt disenfranchised by the 1887 Bayonet Constitution, sought to promulgate a new constitution to restore monarchial power.<sup>298</sup> As her predecessors before her—including Kamehameha III in 1840, Kamehameha V in 1864, and Kalākaua in 1887—Lili‘uokalani was prepared to unilaterally promulgate the new constitution.<sup>299</sup> Lili‘u, nevertheless, requested support from her Cabinet. Despite the Queen’s request, and although being “well aware that more than two-thirds of the electors of the country were in favor of the change, and that nearly all the representatives in the Legislature were elected on a platform in which the main plank was a

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<sup>293</sup> *Id.* at 232. Thurston subsequently wrote to Secretary of State Blaine that outlined the plan of the annexationists in the islands, including “securing the appointment of a Cabinet at the Islands, committed to annexation, and educating the people in favor of annexation; then, if sentiment in Washington was favorable when Congress assembled in December, proceeding to bring about annexation by action of the Hawaiian legislature.” See THE KALAKAUA DYNASTY, *supra* note 256, at 536–37 (quotations omitted).

<sup>294</sup> PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 449.

<sup>295</sup> April 15, 1893 Letter from John Colburn to James Blount, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 498 [hereinafter Apr. 15, 1893 Letter from Colburn to Blount]; Statement of Lili‘uokalani, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 863.

<sup>296</sup> The Queen’s Cabinet consisted of Foreign Affairs Minister Samuel Parker, Finance Minister William H. Cornwell, Interior Minister John F. Colburn, and Attorney-General Arthur P. Peterson. Apr. 15, 1893 Letter from Colburn to Blount, *supra* note 295, at 496–97.

<sup>297</sup> *Id.* at 498.

<sup>298</sup> See VAN DYKE, *supra* note 221, at 151 n.3; *Draft of Constitution of January 14, 1893*, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 1047; see also LILI‘UOKALANI, *supra* note 272, at 237.

<sup>299</sup> See VAN DYKE, *supra* note 221, at 152. “Lot (Kamehameha V) had promulgated the new Constitution of 1864 on his own initiative after he assumed the Crown[.]” *Id.* at n.5.

new constitution[.]” none of her ministers were willing to counter-sign the new constitution.<sup>300</sup> They feared such a move would lead to civil unrest, opposition from foreign residents, and potential backlash from pro-annexation factions.<sup>301</sup> Faced with this rejection, Queen Lili‘uokalani made a painful announcement to her supporters, telling them that the hoped-for constitutional changes would not be coming at that time.<sup>302</sup> For those pushing for Hawai‘i’s annexation to the United States, the Queen’s unsuccessful attempt to restore the monarchy’s power provided the pretext they needed to push forward with their plot to overthrow her government.

In the early morning of Sunday, January 15, 1893, Lorrin A. Thurston met Minister Colburn at his home and requested he accompany him to Attorney-General Arthur P. Peterson’s home.<sup>303</sup> Colburn complied. Thurston then informed him that he represented a Committee of Safety that had met at Thurston’s home the previous night and had concocted a plan to depose the Queen by brewing dissension amongst the Cabinet.<sup>304</sup> Thurston told Colburn, who was already aware of the growing conspiracy, that American Minister Stevens had promised military support if the Committee sought assistance in overthrowing the Queen.<sup>305</sup> Thurston called on the Cabinet to join in deposing the Queen after assuring them that the coup would be “perfectly

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<sup>300</sup> April 24, 1893 Letter from William H. Cornwell to James Blount, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 494 [hereinafter Apr. 24, 1893 Letter from Cornwell to Blount].

<sup>301</sup> *See id.*; Apr. 15, 1893 Letter from Colburn to Blount, *supra* note 295, at 498.

<sup>302</sup> Statement of Lili‘uokalani, *supra* note 295, at 864–65.

<sup>303</sup> Apr. 15, 1893 Letter from Colburn to Blount, *supra* note 295, at 499.

<sup>304</sup> *Id.* The Committee of Safety included: Crister Bolte; William Richards Castle; Henry Ernest Cooper; William O. Smith; Lorrin A. Thurston; Henry Waterhouse; William C. Wilder; Andrew Brown; John Emmeluth; Theodore F. Lansing; John A. McCandless; Frederick W. McChesney; and Edward Suhr. *See* THURSTON, *supra* note 276, at 130.

<sup>305</sup> Thurston informed Colburn and Peterson that “Mr. Stevens had given this committee the assurance that if [they] signed a request to him to land troops of the *Boston* he would immediately comply with the request and have them landed to assist in carrying out this work[.]” Apr. 15, 1893 Letter from Colburn to Blount, *supra* note 295, at 500; W.D. ALEXANDER, HISTORY OF LATER YEARS OF THE HAWAIIAN MONARCHY AND THE REVOLUTION OF 1893 38 (1896) (quoting U.S. Minister Stevens as saying, “the United States troops on board of the *Boston* would be ready to land at any moment to prevent the destruction of life or property of American citizens, and that as to the matter of establishing a Provisional Government, he, of course, would recognize the existing government, whatever it might be”).

safe” because Stevens had pledged American support and recognition of a newly formed provisional government.<sup>306</sup>

Tipped off that the Committee of Safety was planning a coup, Kingdom Marshall Charles Wilson proposed arresting the thirteen men for their treasonous acts, but Attorney General Peterson counseled against doing so to avoid escalating the conflict.<sup>307</sup> The ministers subsequently learned that the pro-annexationist Committee of Safety planned to hold a mass meeting at 2:00 p.m. the next day at the Honolulu Rifles Armory.<sup>308</sup> In response to the insurgents’ meeting, the Cabinet organized a counter-mass meeting to be held at Palace Square, at the same time.<sup>309</sup>

The following day, Monday, January 16, 1893, at 11:00 a.m., the Queen issued the proclamation drafted the day prior that explained that she wished to promulgate a new constitution “under stress of Her native subjects[.]”<sup>310</sup> Liliuokalani sought to reassure the community—both domestic and foreign—that she would not promulgate a new constitution outside of the methods provided for in the 1887 Constitution.<sup>311</sup> At 2:00 p.m., an estimated 2,000 people attended the mass meeting in support of the Queen, and adopted

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<sup>306</sup> Thurston stated, “such movement would be perfectly safe, as Minister Stevens had promised them the support of the United States forces and also that he would recognize and support a provisional government as soon as such a step could be taken.” Apr. 24, 1893 Letter from Cornwell to Blount, *supra* note 300, at 494. After meeting with Thurston, Colburn and Peterson told the remaining Cabinet members, Parker and Cornwell, what the Committee of Safety suggested, and the entire Cabinet consulted another group of businessmen who dictated a proclamation to be issued by the Queen the next day. Apr. 15, 1893 Letter from Colburn to Blount, *supra* note 295, at 500.

<sup>307</sup> May 15, 1893 Statement of C.B. Wilson, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 1028–29.

<sup>308</sup> See Apr. 24, 1893 Letter from Cornwell to Blount, *supra* note 300, at 494; Apr. 15, 1893 Letter from Colburn to Blount, *supra* note 295, at 500; April 13, 1893 Interview with John Lot Kaulukou, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 851 [hereinafter Apr. 13, 1893 Interview with Kaulukou].

<sup>309</sup> Apr. 13, 1893 Interview with Kaulukou, *supra* note 308, at 851; *Natives Meet: They Pass a Resolution Defending the Queen*, DAILY PAC. COM. ADVERTISER, Jan. 17, 1893, at 3.

<sup>310</sup> Apr. 24, 1893 Letter from Cornwell to Blount, *supra* note 300, at 494; July 17, 1893 Letter from James Blount to U.S. Secretary of State Walter Gresham, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 582 [hereinafter July 17, 1893 Letter from Blount to Gresham].

<sup>311</sup> July 17, 1893 Letter from Blount to Gresham, *supra* note 310, at 582. Interestingly, the words “Too Late!” were handwritten across a copy of the Queen’s proclamation that was held by conspirator W.O. Smith. *Kingdom of Hawaii – 1893.01.16 – By Authority*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/881> (last visited Apr. 18, 2025).

a resolution showing their support.<sup>312</sup> They accepted her pledge not to promulgate a new constitution.<sup>313</sup>

Blocks away from the Queen's rally, Lorrin Thurston delivered a fiery speech at the Armory condemning the Queen's actions.<sup>314</sup> Another individual emphasized what he saw as the Queen's threat to foreigners in the islands.<sup>315</sup> These inflammatory speeches were carefully crafted to hide the true goal: to seize control of the Kingdom and annex it with the United States.<sup>316</sup> The Armory gathering adopted their own resolution and subsequently sent a letter to American Minister Stevens stating:

[T]he public safety is menaced and lives and property are in peril, and we appeal to you and the United States forces at your command for assistance. The Queen, with the aid of armed force, and accompanied by threats of violence and bloodshed from those with whom she was acting, attempted to proclaim a new constitution; and, while prevented for the time from accomplishing her object, declared publicly that she would only defer her action. . . . We are unable to protect ourselves without aid, and therefore pray for the protection of the United States forces.<sup>317</sup>

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<sup>312</sup> July 17, 1893 Letter from Blount to Gresham, *supra* note 310, at 582.

<sup>313</sup> *Id.*

<sup>314</sup> Thurston argued, “[s]he wants us to sleep on a slumbering volcano, which will one morning spew out blood and destroy us all.” See *Mass Meeting: Citizens Determined to Resist Aggression*, DAILY PAC. COM. ADVERTISER, Jan. 17, 1893, at 4.

<sup>315</sup> May 8, 1893 Statement of Charles T. Gulick, in PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 784. Alexander Young stated, “[W]hile the Queen and her Cabinet continue to trifle with and play fast and loose with the affairs of State there can be no feeling of security for foreign families residing within these domains.” *Id.*

<sup>316</sup> July 17, 1893 Letter from Blount to Gresham, *supra* note 310, at 584. As noted, “[t]he committee on public safety had kept their purposes from the public view at this mass meeting and at their small gatherings for fear of proceedings against them by the government of the Queen.” *Id.*

<sup>317</sup> January 16, 1893 Letter from Committee of Safety to John L. Stevens, in PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 1056; July 17, 1893 Letter from Blount to Gresham, *supra* note 310, at 584. The rally appointed “a committee of Public Safety, of 13, to consider the situation and devise ways and means for the maintenance of the public peace and the protection of life and property.” *Provisional Government – 1893.01.16 – Committee of Safety Report*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/885> (last visited Mar. 27, 2025).

That afternoon, the Committee of Safety met to “discuss[] the necessary steps to be taken in forming a new government.”<sup>318</sup> The Committee—beginning to second guess the plot—decided that they were *not* ready for the American troops to land and sent Thurston and two others to tell American Minister Stevens to hold off.<sup>319</sup> Stevens, however, replied, “Gentlemen, the troops of the *Boston* land this afternoon at 5:00, whether you are ready or not.”<sup>320</sup>

At precisely 5:00 p.m., troops from the *Boston*—each armed with sixty to eighty rounds of ammunition—made landfall, marched inland, and halted between the palace and Ali‘iōlani Hale.<sup>321</sup> The Queen stood watching as 162 well-armed American soldiers marched in front of her with a Gatling gun, 14,000 rounds of ammunition, and a revolving cannon with 174 shells.<sup>322</sup> The Queen’s Chamberlain, James W. Robertson, noted, “Standing on the front veranda of the palace . . . the immediate impression conveyed to my mind was that they had been landed to take possession of these islands.”<sup>323</sup>

Ministers Parker and Colburn rode to the residence of American Minister Stevens and asked if he intended to annex the country to the United States. Stevens replied, “No,” and also that the troops were ashore to preserve the Queen on her throne and offer protection to the community.<sup>324</sup> When told that

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<sup>318</sup> Report from F. W. Wundenberg to James Blount, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 492 [Report from Wundenberg to Blount].

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> Statement of D.W. Coffman Concerning Number of Troops Landed and Returned to the *Boston*, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 741; Apr. 13, 1893 Interview with Kaulukou, *supra* note 308, at 852.

<sup>323</sup> June 23, 1893 Letter from James W. Robertson to James Blount, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 1110.

<sup>324</sup> Apr. 15, 1893 Letter from Colburn to Blount, *supra* note 295, at 500. Although Stevens feigned ignorance of his desire to annex Hawai‘i, the facts state otherwise. On January 16, 1893, Stevens sought use of the Opera House—located across the street from the palace and next to Ali‘iōlani Hale—to stage the American troops. May 6, 1893 Letter from James Blount to U.S. Secretary of State Walter Gresham, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 527 [hereinafter May 6, 1893 Letter from Blount to Gresham]; January 16, 1893 Letter from Samuel Parker to John L. Stevens, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 1057 [hereinafter Jan. 16, 1893 Letter from Parker to Stevens]. When the Opera House manager declined to allow the troops to occupy the property, Minister Stevens secured use of Arion Hall, which was located immediately next to the Opera House. May 6, 1893 Letter from Blount to Gresham, *supra*, at 527. Queen Lili‘uokalani questioned why American troops had landed when there was peace

the Kingdom government could on its own preserve law and order, Stevens replied, "make your protest in writing, and if you make it in a friendly spirit I will answer in the same tone."<sup>325</sup> Minister Parker subsequently sent correspondence to Stevens saying that troops of the *Boston*

were landed in this port at 5 o'clock this evening without the request or knowledge of Her Majesty's Government. As the situation is one which does *not* call for interference on the part of the United States Government, my colleagues and myself would most respectfully request of your excellency the authority upon which this action was taken.<sup>326</sup>

The next day, January 17, 1893, the plan was in motion to depose the Queen and declare a provisional government.<sup>327</sup> The Kingdom security was on high alert, the Police Headquarters was manned, and the Royal Guards were prepared to defend the Queen and her palace.<sup>328</sup> In an attempt to understand Stevens's involvement and interest in the alleged insurrection, the Queen's Cabinet made their way to Stevens' residence. Stevens, however, provided "no definite answer[.]"<sup>329</sup> Instead, he responded:

In whatever the United States diplomatic and naval representatives have done or may do at this critical hour of Hawaiian affairs, we will be guided by the kindest views and feelings for all the parties concerned and by the warmest sentiments for the Hawaiian people and the persons of all nationalities.<sup>330</sup>

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in the Kingdom: "I was told that it was for the safety of American citizens and the protection of their interests. Then why had they not gone to the residences instead of drawing in line in front of the palace gates, with guns pointed at us, and when I was living with my people in the palace?" Statement of Lili'uokalani, *supra* note 295, at 865.

<sup>325</sup> Apr. 15, 1893 Letter from Colburn to Blount, *supra* note 295, at 500.

<sup>326</sup> Jan. 16, 1893 Letter from Parker to Stevens, *supra* note 324, at 1057 (emphasis added).

<sup>327</sup> See Apr. 15, 1893 Letter from Colburn to Blount, *supra* note 295, at 500.

<sup>328</sup> *Id.* Altogether the Kingdom was prepared with 600 men with rifles and 30,000 rounds of ammunition, eight field cannons, and two Gatling guns. *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> January 17, 1893 Letter from John L. Stevens to Samuel Parker, in PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 1058.

Again, despite his outward protestations of neutrality and support of the people, American Minister Stevens also took the opportunity to send a letter marked “Private” on official U.S. Legation letterhead to Justice Sanford B. Dole, in which he wrote: “I would advise not to make known of *my recognition* of the de facto Provisional Government until said Government is in possession of the Police Station.”<sup>331</sup>

At 2:40 p.m., despite Stevens’ instructions, Dole—a Kingdom Supreme Court Associate Justice who resigned his position that morning—and his compatriots, proceeded to proclaim their new government.<sup>332</sup> Fearing for their safety and understanding the severity of their actions, the conspirators split up and took separate paths to the government building.<sup>333</sup> At about this time, a shot rang out through the city when a police officer was shot as he tried to stop a wagon of weapons headed to the Armory.<sup>334</sup> This distraction provided an opportunity for the Committee of Safety to make their move.

At 2:40 p.m., on the back steps of the government building, Henry Cooper, a denizen American lawyer and member of the Committee, read the declaration that unilaterally abolished the Hawaiian monarchy and announced the formation of a Provisional Government.<sup>335</sup> In their proclamation, the new government claimed to represent the will of the people, asserting that “the Hawaiian monarchical system of government is

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<sup>331</sup> *Provisional Government – 1893.01.17 – Letter from United States Minister, John L. Stevens to Sanford B. Dole*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE (emphasis added) <https://hmha.missionhouses.org/items/show/889> (last visited Mar. 27, 2025).

<sup>332</sup> Report from Wundenberg to Blount, *supra* note 318, at 493; *Provisional Government – 1893.01.17 – Events of January 17 1893*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/886> (last visited Mar. 27, 2025).

<sup>333</sup> See, e.g., Apr. 13, 1893 Interview with Kaulukou, *supra* note 308, at 853 (noting that conspirator Cooper read the proclamation declaring that end of the monarchy “with his hand shaking”); Report from Wundenberg to Blount, *supra* note 318, at 493 (“During all the deliberations of the committee, and in fact throughout the whole proceedings connected with plans for the move up to the final issue, the basis of action was the general understanding that Minister Stevens would keep his promise to support the movement with the men from the *Boston*, and the statement is now advisedly made (with a full knowledge of the lack of arms, ammunition, and men, also the utter absence of organization at all adequate to the undertaking), that without the previous assurance of support from the American minister and the actual presence of the United States troops no movement would have been attempted, and if attempted, would have been a dismal failure resulting in the capture or death of the participants in a very short time.”).

<sup>334</sup> May 8, 1893 Statement of Charles T. Gulick, *supra* note 315, at 786–87.

<sup>335</sup> *Id.* at 787; *Provisional Government – 1893.01.17 – Events of January 17 1893*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/886> (last visited Mar. 27, 2025).

hereby abrogated.”<sup>336</sup> The proclamation removed the Queen and her ministers from office, took possession of the government treasury, and declared martial law in Honolulu.<sup>337</sup>

Five minutes after the reading of the proclamation establishing the Provisional Government, the Queen’s Cabinet hand-delivered a letter to Stevens asking if the rumor that he had recognized the Provisional Government was true.<sup>338</sup> The letter was handed to Stevens’ daughter, who was told an answer was required.<sup>339</sup> Ten minutes later, the daughter returned and stated, “My father is too unwell to write an answer now, but if you will go and return in about an hour’s time he will have the answer ready.”<sup>340</sup> After insistence that a response was necessary, Stevens’ daughter went back in and returned with a letter from her father.<sup>341</sup> By 3:10 p.m., Stevens finally responded and stated that he recognized the Provisional Government as the de facto Government of the Hawaiian Islands.<sup>342</sup> Without control of the police station, barracks, and palace, Stevens recognized the insurgent

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<sup>336</sup> May 8, 1893 Statement of Charles T. Gulick, *supra* note 315, at 788; Apr. 13, 1893 Interview with Kaulukou, *supra* note 308, at 853; *Provisional Government – 1893.01.17 – Proclamation*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/896> (last visited Mar. 27, 2025) (“We, citizens and residents of the Hawaiian Islands, organized and acting for the public safety and the common good, hereby proclaim as follows: 1. The Hawaiian monarchial system of Government is hereby abrogated[;] 2. A Provisional Government for the control and management of public affairs and the protection of the public peace is hereby established, to exist until terms of union with the United States of American have been negotiated and agreed upon.”).

<sup>337</sup> *Provisional Government – 1893.01.17 – Proclamation*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/896> (last visited Mar. 27, 2025); May 8, 1893 Statement of Charles T. Gulick, *supra* note 315, at 789–90; *Provisional Government – 1893.01.17 – Order No. 1*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/894> (last visited Mar. 27, 2025); *Provisional Government – 1893.01.17 – Order No. 2*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/895> (last visited Mar. 27, 2025).

<sup>338</sup> May 3, 1893 Affidavit of Charles L. Hopkins, *in* PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 523–24 [hereinafter May 3, 1893 Affidavit of Hopkins].

<sup>339</sup> *Id.* at 524.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*; *see also* May 4, 1893 Affidavit of Charles B. Wilson, *in* PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 525 (testifying under oath that he read a letter from John L. Stevens between 3:30 and 4:00 p.m. in which Stevens stated that he had recognized the Provisional Government as the de facto government).

Provisional Government.<sup>343</sup> After several rounds of meetings, at 5:30 p.m., and because of the American recognition of the Provisional Government and its military involvement, Queen Lili‘uokalani yielded to the superior power of the United States.<sup>344</sup> Her letter of protest provided:

I, Liliuokalani[,] by the grace of God and under the constitution of the Hawaiian Kingdom[,] Queen[,] do hereby solemnly protest against any and all acts done against myself and the constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom. That I yield to the superior force of the United States of America[,] whose minister plenipotentiary[,] His Excellency John L. Stevens[,] has caused United States troops to be landed at Honolulu and declared that he would support the said Provisional Government.

Now, to avoid any collision of armed forces[,] and perhaps the loss of life[,] I do, under this protest and impelled by said forces[,] yield my authority until such time as the Government of the United States shall[,] upon the facts being presented to it[,] undo the action of its representative and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.<sup>345</sup>

The Queen ordered the police station and barracks turned over to the Provisional Government.<sup>346</sup>

Beginning to frame a new collective memory, on January 18, 1893, the Daily Pacific Commercial Advertiser, controlled by the white oligarchs, ran an article titled, “The New Era,” and heralded:

the prerogative inherent in every people to determine the form of their own government, and have done away with the monarchy. . . . Year after year, we have had to patch up, and patch up, the free Constitution which a Monarch has been

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<sup>343</sup> May 3, 1893 Affidavit of Hopkins, *supra* note 338, at 524.

<sup>344</sup> May 3, 1893 Affidavit of John F. Colburn and A. P. Peterson, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 524.

<sup>345</sup> *Kingdom of Hawaii – 1893.01.17 – Statement from Queen Liliuokalani*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/883> (last visited Mar. 27, 2025).

<sup>346</sup> May 6, 1893 Affidavit of Charles B. Wilson, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 642.

busy in tearing down. . . . *The change which has taken place, though carried out by the foreign population, is not in the interest of any class, section, creed or nationality, but will inure to the benefit of all.*<sup>347</sup>

Highlighting the underlying driving force of annexation, the article stated,

The people rule in the United States and they will rule in Hawaii when she is an integral part of the Union. . . . The United States of America is the country of the poor man—the one country in the world which affords everybody an equal chance. Under its broad aegis this weary nation will at length find peace.<sup>348</sup>

The Provisional Government immediately contracted the steamship *Claudine*, and Sanford Dole as President of the Provisional Government granted passport papers to several insurrectionists, including Lorrin Thurston, to travel to Washington, D.C. to seek, among other things, annexation to the United States.<sup>349</sup> Lili‘uokalani wrote to Dole: “I was assured on yesterday that every facility would be given to me to lay the matter concerning myself and your Council before the authorities of the United States in Washington. I hear that you intend to send Commissioners to

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<sup>347</sup> *The New Era*, DAILY PAC. COM. ADVERTISER, Jan. 18, 1893, at 1 (emphasis added).

<sup>348</sup> *Id.*

<sup>349</sup> DEP’T OF THE FOREIGN OFF. AND EXEC., PASSPORTS SERIES 416, VOL. 5, PASSPORTS, MAY 8, 1891–JANUARY 28, 1897, #2575–2579 (on file with the Hawai‘i State Archives); *Provisional Government – 1893.01.18 – Instructions to delegation sent to United States*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, at 1–2, <https://hmha.missionhouses.org/items/show/897> (last visited Mar. 27, 2025) (“You are hereby instructed to proceed forthwith to Washington and there to represent to the Government of the United States of America the facts leading up to and concerning the establishment of the Provisional Government of the Hawaiian Islands and to request from such Government that the acknowledgment and recognition of such Provisional Government by His Excellency John L. Stevens, Envoy Extraordinary and Minister Plenipotentiary of the United States of America at Hawaii, may be confirmed by the Government of the United States of America. You are also instructed and hereby fully authorized and empowered to negotiate a Treaty between the Provisional Government of the Hawaiian Islands and the Government of the United States of America by the terms of which full and complete political union may be secured between the United States of America and the Hawaiian Islands.”). The Provisional Government delegation also sought assumption of the national debt, installation of a trans-Pacific cable, local ownership of land, establishment of Pearl Harbor as a naval station, exemptions for sugar in the American markets, continuation of immigrant labor contracts, and “appropriate financial provision be made for the ex-Queen Liliuokalani and the ex-Heir Presumptive.” *Id.* at 3–4.

Washington on a steam ship chartered for that purpose.”<sup>350</sup> She then requested that she be allowed to send a messenger on the same ship.<sup>351</sup> Passport papers, however, were not issued to Lili‘uokalani’s emissaries until two weeks later on January 31, 1893.<sup>352</sup>

The Provisional Government’s delegation negotiated a treaty with President Benjamin Harrison and, as he promised a year earlier, he signed the treaty annexing Hawai‘i on February 14, 1893.<sup>353</sup> President Harrison sent the treaty to the United States Senate for ratification, noting:

The overthrow of the monarchy was not in any way promoted by this Government, but had its origin in what seems to have been a reactionary and revolutionary policy on the part of Queen Liliuokalani, which put in serious peril not only the large and preponderating interests of the United States in the islands, but all foreign interests, and, indeed, the decent administration of civil affairs and the peace of the islands. It is quite evident that the monarchy had become effete and the Queen’s Government so weak and inadequate as to be the prey of designing and unscrupulous persons. The restoration of Queen Liliuokalani to her throne is undesirable, if not impossible, and unless actively supported by the United States would be accompanied by serious disaster and the disorganization of all business interests. The influence and interest of the United States in the islands must be increased and not diminished.<sup>354</sup>

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<sup>350</sup> *Kingdom of Hawaii – 1893.01.18 – Letter from Queen Liliuokalani to Provisional Government*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/884> (last visited Mar. 27, 2025).

<sup>351</sup> *Id.* (“I request you to allow some person whom I desire to send as my messenger transportation by the same ship.”).

<sup>352</sup> DEP’T OF THE FOREIGN OFF. AND EXEC., PASSPORTS SERIES 416, VOL. 5, PASSPORTS, MAY 8, 1891–JANUARY 28, 1897, #2582–2587 (on file with the Hawai‘i State Archives).

<sup>353</sup> See VAN DYKE, *supra* note 221, at 165 (citations omitted).

<sup>354</sup> Message From the President of the United States Transmitting a Treaty of Annexation Concluded on the 14th Day of February, 1893, Between the United States and the Provisional Government of the Hawaiian Islands, S. EXEC. DOC. NO. 76, in FOREIGN RELATIONS OF THE UNITED STATES, 1894 APPENDIX 2: AFFAIRS IN HAWAII 197–96 (1895); Benjamin Harrison, *Message to the Senate Transmitting a Treaty to Annex the Hawaiian Islands*, THE AM. PRESIDENCY PROJ., <https://www.presidency.ucsb.edu/node/205364> (last visited Apr. 18, 2025).

The Senate debated annexation, but the votes to annex were not obtained, and President Grover Cleveland, who assumed the presidency on March 4, 1893, withdrew the treaty.<sup>355</sup>

At the behest of President Cleveland, former Chairman of the House Foreign Relations Committee James H. Blount traveled to Hawai‘i, took sworn testimony, and received many statements and documents to investigate the overthrow.<sup>356</sup> Blount concluded that American troops landed without the permission of the Kingdom government and were used as a tool to induce the Queen’s surrender.<sup>357</sup> President Cleveland condemned the action of Minister Stevens, calling his conduct “an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress[.]”<sup>358</sup> President Cleveland then stated that a “substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires that we should endeavor to repair.”<sup>359</sup>

The Provisional Government nevertheless persisted and lobbied the Senate Foreign Relations Committee and its Chairman John Tyler Morgan to conduct its own investigation of the overthrow.<sup>360</sup> Morgan, an ardent annexationist, conducted hearings solely in Washington and issued a report—signed only by him—that agreed that Stevens’ actions and the American military presence were the impetus for the success of the overthrow, but concluded that “Hawaii is an American state and is embraced

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<sup>355</sup> See VAN DYKE, *supra* note 221, at 165–66; October 18, 1893 Letter from U.S. Secretary of State Walter Gresham to Albert S. Willis, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 463.

<sup>356</sup> *Historical Background*, *supra* note 36, at 22.

<sup>357</sup> See, e.g., May 6, 1893 Letter from Blount to Gresham, *supra* note 324, at 526 (“[I]t is now established beyond controversy that Mr. Stevens recognized the Provisional Government before the barracks and station house had been surrendered or agreed to be surrendered[.]”). Blount’s report further concluded that the American “diplomatic and military representatives in the islands abused their authority and were responsible for the change in government.” Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

<sup>358</sup> See PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 456.

<sup>359</sup> *Id.* Cleveland, however, deferred action to Congress and offered to “cooperate in any legislative plan which may be devised for the solution of the problem before us which is consistent with American honor, integrity, and morality.” *Id.* at 458.

<sup>360</sup> See VAN DYKE, *supra* note 221, at 168.

in the American commercial and military system.”<sup>361</sup> The overthrow was complete.<sup>362</sup>

This deeper narrative details and contextualizes the events of the overthrow. Unlike the Native Hawaiians Study Commission majority’s enshrined collective memory, this collective memory of injustice captures clear ways in which the United States government—for many years—orchestrated and then successfully executed the overthrow of the Hawaiian Kingdom.<sup>363</sup> From secret meetings at the White House to damning communications of the actions of American agents, it is difficult to ignore the significant flaws that pervade the Commission majority’s failure to rely on the contemporaneous factfinding efforts of James Blount and John Tyler Morgan. Although the two accounts come to opposite conclusions as to what should be done with Hawai‘i, both reports agreed that John L. Stevens had the authority to and did in fact use the American military to effectuate the overthrow.<sup>364</sup> The Commission majority ignored the opportunity to fully and deeply analyze these reports, and instead concluded that the truth of American involvement in the overthrow “lies between the[se] two reports.”<sup>365</sup> The majority failed to recognize that both reports came to the same factual conclusion: America was intimately involved in the overthrow.

It is also disingenuous for the Commission majority to characterize Lili‘uokalani’s actions as a “lack of resistance.”<sup>366</sup> While it is true that the Queen did not respond with violence to American aggression, she pursued peaceful and diplomatic paths toward resolution—even despite egregious

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<sup>361</sup> *Report of the Committee on Foreign Relations*, S. Rep. No. 53-227, 53d Cong., 2d Sess., at 20 (1894).

<sup>362</sup> Unable to push through annexation following the overthrow, the United States House of Representatives concluded in 1894 that neither restoration of the Queen nor annexation to the United States should occur, *see* 26 Cong. Rec. 2001, 2008 (Feb. 7, 1894), and the United States Senate determined that the people in Hawai‘i had a right to “establish and maintain their own form of government and domestic polity; that the United States ought in no wise to interfere therewith; and that any intervention in the political affairs of these islands by any other government will be regarded as an act unfriendly to the United States.” 26 Cong. Rec. 5499-5500 (May 31, 1894).

<sup>363</sup> *See Hawai‘i ‘78*, *supra* note 37, at 94 (“For marginalized communities, reparative action occurs when those in power frame the past as a collective memory of injustice—that is, a framing in which the historic injustice against that community is highlighted and centered as the collective memory to be inscribed.”).

<sup>364</sup> *Compare* S. Rep. No. 53-277, at 6–7, *with* PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 456.

<sup>365</sup> *See* MAJORITY REPORT, *supra* note 142, at 300.

<sup>366</sup> *Id.* at 25.

conduct by the so-called “reformers” and American actors.<sup>367</sup> For example, and despite the Commission majority’s statement that Lili‘uokalani was able to dispatch her own emissary to Washington, D.C. “[a]t the same time” as the Provisional Government’s representatives, the archival record clearly shows the two-week head start afforded to the annexationists.<sup>368</sup> Two archival documents, the passport log and a letter from Lili‘uokalani to Sanford B. Dole, verify the conniving gamesmanship on the part of the Provisional Government.<sup>369</sup>

The Commission majority’s specious conclusion on the American overthrow informed the ultimate result of the Commission and, therefore, the American government, denying Native Hawaiians reparations. Consistent with the theory of collective memory, “[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).”<sup>370</sup>

b. *The Republic and Annexation to the United States*

In regard to the annexation of Hawai‘i to the United States, the Native Hawaiians Study Commission majority provides another sanitized collective story that to the untrained seems “neutral [and] uncontroversial”:<sup>371</sup>

In 1897, Hawaii’s new government and the United States entered into an agreement that Hawaii would be annexed to the United States. The annexation question was submitted for consideration by the Hawaii legislature. In the United States, it was passed by Joint Resolution of both houses of Congress, rather than as a Treaty requiring two-thirds

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<sup>367</sup> *Id.*

<sup>368</sup> DEP’T OF THE FOREIGN OFF. AND EXEC., PASSPORTS SERIES 416, VOL. 5, PASSPORTS, MAY 8, 1891–JANUARY 28, 1897, #2575–2579 (on file with the Hawai‘i State Archives); *Kingdom of Hawaii – 1893.01.18 – Letter from Queen Liliuokalani to Provisional Government*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/884> (last visited Mar. 27, 2025) (requesting Sanford Dole grant Liliuokalani’s emissaries access to travel to Washington, D.C., after being promised).

<sup>369</sup> *Kingdom of Hawaii – 1893.01.18 – Letter from Queen Liliuokalani to Provisional Government*, HAWAIIAN MISSION HOUSES DIGIT. ARCHIVE, <https://hmha.missionhouses.org/items/show/884> (last visited Mar. 27, 2025) (requesting Sanford Dole grant Liliuokalani’s emissaries access to travel to Washington, D.C., after being promised).

<sup>370</sup> Hom & Yamamoto, *supra* note 42, at 1758.

<sup>371</sup> *Id.* at 1772–73.

majority of the Senate. President McKinley’s concern to secure a foothold in the Pacific for the United States in the face of the Spanish-American War prompted use of a Joint Resolution.<sup>372</sup>

Unfortunately, the Commission majority again omits key facts and portrays the annexation as one of necessity and expediency for the United States without recognizing the harm and injustice to Native Hawaiians.<sup>373</sup> A collective memory of injustice, as detailed below, more fully accounts for the Kānaka Maoli resistance to annexation.

With annexation out of reach, on July 4, 1894, the Provisional Government adopted a new constitution and declared itself the Republic of Hawai‘i, with Sanford B. Dole as its president.<sup>374</sup> “The overwhelming majority of Kānaka Maoli” did not participate in the elections for delegates to the constitutional convention because voters needed to swear allegiance to the Republic, which they refused to do.<sup>375</sup> Furthermore, Republic leaders—aligned intimately with the white oligarchs that overthrew the Kingdom—never sought ratification of the 1894 Constitution from the people.<sup>376</sup> They simply declared the constitution after a vote by the convention delegates.<sup>377</sup> This new

<sup>372</sup> See MAJORITY REPORT, *supra* note 142, at 26.

<sup>373</sup> Hom & Yamamoto, *supra* note 42, at 1773–75.

<sup>374</sup> See REP. OF HAW. CONST. OF 1894 art. 23; see VAN DYKE, *supra* note 221, at 173.

<sup>375</sup> Noenoe K. Silva, *Kanaka Maoli Resistance to Annexation*, in KŪ‘E PETITIONS: A MAU LOA AKU NŌ 22 (Nālani Minton et al., eds., 2020) [hereinafter *Kanaka Maoli Resistance*].

<sup>376</sup> Native Hawaiians resisted the Republic’s efforts. Upwards of 7,000 people participated in a gathering near the Palace to express their disagreement with the formation of the Republic. Joseph Nāwahīokalaniopu‘u, a celebrated lawyer, publisher, and artist stated:

<p>No kakou ka hale e like me ka na Kamehameha i kukulu ai. Ua kipaku ia ae kakou e ka poe ia aea hele mai, a komo i loko o ko kakou hale; a ke olelo mai nei ia kakou, e komo aku a e noho i loko o ka hale kaulei a lakou i manao ai e kukulu iho a onou aku ia kakou a pau e komo aku. O ka‘u hoi e olelo aku nei ia oukou e o‘u mau hoa makaainana, mai noho kakou a ae iki.</p>	<p>The house of government belongs to us, as the Kamehamehas built it. We have been ousted by trespassers who entered our house and who are telling us to go and live in a lei stand that they think to build and force us all into. I am telling you, my fellow citizens, we should not agree in the least.</p>
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*Id.* at 31–32.

<sup>377</sup> See A.F. Judd, *The Constitution of the Republic of Hawaii*, 4 YALE L.J. 53, 54 (1894) (“An act was passed by the Legislature of the Provisional Government (the Executive and Advisory Councils) on the 15th March last, calling for an Election by the people, which included native Hawaiians, of Eighteen Delegates to sit in Convention with the members of

constitution implemented strict voting qualifications specifically designed to keep Native Hawaiians out of political power.<sup>378</sup> Some even embraced criticism that the 1894 Constitution kept control in the hands of the white oligarchs that overthrew the Kingdom government: "It may be stigmatized as the perpetuation of an oligarchy by those who, unfamiliar with our circumstances, find no justification for preserving the ultimate power in the hands of those whose character, intelligence and real interests in the country make it reasonably certain that good government will be secured thereby, and that no irremediable injustice will be done to any of the races living in this archipelago."<sup>379</sup>

Despite this effort to form a new government, Republic leaders still had annexation to the United States as their objective.<sup>380</sup> One of the first major initiatives of the Republic was to promulgate the Land Act of 1895 in an attempt to secure land for America and American settlers.<sup>381</sup> The Land Act

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the Councils. The election was held; the Convention was convened on the 30th of May last and concluded its labors on the 4th July when the Constitution was proclaimed. No express power was given to the Convention to *enact* the Constitution when framed, and the interesting question arose as to what authority the Constitution should proceed from. The idea prevailed that since the Proclamation of the 17th January, 1893, continued Hawaiian Laws and its Constitution in force, so far as they were consistent with the abrogation of the Monarchy, *until otherwise ordered by* the Councils, this body as the Legislative body of these islands should *enact* the Constitution as the fundamental law and thus displace the Constitution of 1887. This was accordingly done; and Act was passed which enacted the Constitution as law.").

<sup>378</sup> See Alfred L. Castle, *Advice for Hawaii: The Dole—Burgess Letters*, 15 HAWAIIAN J. HIST. 24, 27 (1981). In a series of letters, Sanford Dole communicated about the best way to draft a constitution that excluded certain individuals from participation with Columbia University political science professor John William Burgess. See *id.* at 27. Burgess was an admirer of America's "Teutonic individualism" and "Aryan" need for activity and work. *Id.* at 25.

<sup>379</sup> See Judd, *supra* note 377, at 60.

<sup>380</sup> Joining Sanford Dole in leadership of the new Republic was Lorrin Thurston (Annexation Commission), William O. Smith (Attorney General), Francis Hatch (Attorney General and Annexation Commission), and William Kinney (Judge Advocate and Annexation Commission). See 1 MEN OF HAWAII: BEING A BIOGRAPHICAL REFERENCE LIBRARY, COMPLETE AND AUTHENTIC, OF THE MEN OF NOTE AND SUBSTANTIAL ACHIEVEMENT IN THE HAWAIIAN ISLANDS 93, 131, 245, 247 (John William Siddall, ed. 1917) (describing the careers of Dole, Hatch, and Smith); THURSTON, *supra* note 276, at 562 (noting Thurston and Kinney as annexation commissioners).

<sup>381</sup> The Land Act of 1895 was the short title for "An Act Relating to the Public Lands, and Amending Sections 36, 39, and 40 of the Civil Code, Relating to the Care of Government Lands; Section 42 of the Civil Code, Chapter 44 of the Laws of 1876, Chapter 5 of the Laws

repealed most of the land laws of the Kingdom and restructured the method of acquiring title and leasing Government and Crown lands.<sup>382</sup> Most insidiously, the Land Act merged the two categories of land into one “public lands” category.<sup>383</sup> Recall that these lands, which were stolen at the time of the overthrow, were still subject to the vested rights of Native Hawaiians.<sup>384</sup> Addressing this massive consolidation of land, Beamer concludes that the Republic “sought to conceal the illegitimacy of its title to the Crown and Government Lands and to erase any notions of genealogical connection and constitutionally vested rights to those lands by Liliuokalani[] and the [Native Hawaiian] population.”<sup>385</sup> A collective memory of injustice, thus, begins to form of a new government entrenched in keeping power and remaking the legal and political landscape to bide time for another push for annexation.

Despite a first failed attempt at annexation immediately following the overthrow, in 1897, the Republic sent a delegation to Washington, D.C., to again negotiate annexation with the United States.<sup>386</sup> The Native Hawaiians Study Commission majority describes the subsequent vote on annexation as follows: “Although it had been introduced in the United States Senate in June 1897, no action was taken until December of that year. After much debate and many delays, the chances of the treaty receiving a two-thirds majority in the Senate appeared slim.”<sup>387</sup> This framing and selective use of information hides the truth that Native Hawaiians organized themselves, strategically gathered petitions in Hawai‘i, and hosted receptions in Washington, D.C. for politicians to oppose annexation.<sup>388</sup> Importantly, the Commission majority’s

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of 1878, and Act 48 of the Laws of the Provisional Government of the Hawaiian Islands, relating to the Disposition of Government Lands; Sections 43 and 44 of the Civil Code, relating to the Conveyances of Government Lands; Section 45 of the Civil Code, relating to Surveys and Maps of Government Lands; Section 46 and 47 of the Civil Code, relating to Land Agents; and Chapter 87 of the Laws of 1892, relating to Homesteads, and Repealing an Act entitled ‘An Act to Create a Sinking Fund,’ approved December 31st 1864, and an Act Entitled ‘An Act to Relieve the Royal Domain from Encumbrances and to render the same Inalienable,’ Approved on January 3d, 1865,” Act 26, 1895 Haw. Spec. Sess. Laws 49-83 (Haw. Rep. 1895).

<sup>382</sup> *Id.* at § 4–5.

<sup>383</sup> *Id.*

<sup>384</sup> See *supra* Section III.B.1b (discussing the Māhele process).

<sup>385</sup> See NO MĀKOU KA MANA, *supra* note 186, at 219.

<sup>386</sup> See VAN DYKE, *supra* note 221, at 206–07.

<sup>387</sup> See MAJORITY REPORT, *supra* note 142, at 300.

<sup>388</sup> See Hom & Yamamoto, *supra* note 42, at 1758 (“Individuals, 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).”); Kanaka Maoli Resistance, *supra* note 375.

narrative conveniently does not account for the failure of the ratification vote in the United States Senate in 1898.<sup>389</sup>

But, the Commission majority gives little attention to the significant and vocal native opposition and resistance in the islands to annexation, which started almost immediately after the illegal overthrow.<sup>390</sup> Indeed, an overwhelming majority of the community stood with the Queen in opposition to annexation to the United States and stayed civically involved in the issue of the overthrow.<sup>391</sup> Days after the overthrow, for example, the Hawaiian newspapers reported the details of a trip by members of the Committee of Safety to secure annexation to the United States.<sup>392</sup> An editor of the *Holomua* stated in November 1893: “the action of President Harrison through his representative Minister Stevens was revolutionary, and was an act of war against a weaker nation towards which it had been on the most friendly terms for fifty years, and one which it had recognized and acknowledged as an Independent Nation.”<sup>393</sup>

In local newspapers, citizens of the Kingdom held out hope that the United States and President Grover Cleveland would make amends for the conduct of their foreign minister.<sup>394</sup> Newspapers reported the statements and analyses made by constitutional lawyers and American congressmen during the

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<sup>389</sup> Instead, the Commission majority simply justifies that the federal government’s use of a joint resolution instead of a treaty by noting the “annexation proceedings” and “a review of world events that affected United States policies at the time.” See MAJORITY REPORT, *supra* note 142, at 301–04.

<sup>390</sup> See, e.g., *id.* at 307 (“Providing further evidence of lack of ‘native’ participation in annexation proceedings was the so-called ‘monster petition’ of 1897 signed by approximately 29,000 native Hawaiians protesting annexation by the United States. This petition was investigated by the United States Congress and the subsequent report indicated that many names on it were fraudulent.”).

<sup>391</sup> See Statements of the Hawaiian Patriotic League, in PRESIDENT’S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, *supra* note 271, at 911–31; VAN DYKE, *supra* note 221, at 209–11; NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 145–59 (2004) (detailing the 1897 petitions protesting annexation).

<sup>392</sup> *What is Their Errand?*, THE LIBERAL, Vol. I, No. 39, Jan. 25, 1893, at 1, <https://www.papakilodatabase.com/pdnupepa/?a=d&d=TL18930125-01.2.3> (“The public is still in the dark as to the specific character of the errand upon which the commission was sent to Washington. We merely know that Messrs. L.A. Thurston, W.C. Wilder, Joseph Marsden, W.R. Castle and C.L. Carter have been send by the [Provisional Government] to Washington to secure—what? Nobody outside the Executive Council seems to know.”).

<sup>393</sup> *The Passing Show*, HAWAII HOLOMUA, Vol. I, No. 54, Nov. 20, 1893, at 2, <https://www.papakilodatabase.com/pdnupepa/?a=d&d=HHA18931120-01.2.3>.

<sup>394</sup> See *It Will Come to Grief!*, HAWAII HOLOMUA, Vol. III, No. 167, Feb. 23, 1893, at 4, <https://www.papakilodatabase.com/pdnupepa/?a=d&d=HHA18930223-01.2.15>.

debates of annexation.<sup>395</sup> The Hawaiian newspapers reprinted articles published across the United States on the issue of annexation.<sup>396</sup>

Native Hawaiian men and women formed advocacy groups to fight back against the overthrow and the effort of annexation. One group, the Hui Aloha ‘Āina, expressed their collective thoughts regarding the actions of the overthrow conspirators:

The natives when left alone have had a most satisfactory, peaceful, and progressive Government, while all the dissensions, riots, and troubles recorded in the annals of these islands have ever been by or through foreigners seeking to wrench the power and wealth from the poor natives, these being ever the peaceful and patient sufferers thereby, not “mised,” but terrorized and oppressed.<sup>397</sup>

Others expressed their support of the Queen and the restoration of the monarchy through songs or poetry. Perhaps the most famous of the protest songs is *Mele ‘Ai Pōhaku* (Stone-Eating Song), also referred to as *Mele Aloha Aina* (Patriot’s Song) or *Kaulana Nā Pua* (Famous are the Flowers). Ellen Wright Prendergast wrote this song after members of the Royal Hawaiian Band who refused to sign a loyalty oath to the Provisional Government visited and begged that she put their feelings to music.<sup>398</sup> Prendergast expresses the sentiments of the band members:

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<sup>395</sup> See *Hawaiian Affairs*, HAWAII HOLOMUA, Vol. I, No. 64, Dec. 2, 1893, at 3, <https://www.papakilodatabase.com/pdnupepa/?a=d&d=HHA18931202-01.2.19>.

<sup>396</sup> See HAWAII HOLOMUA, Vol. I, No. 69, Dec. 8, 1893, at 2, <https://www.papakilodatabase.com/pdnupepa/?a=d&d=HHA18931208-01>. One appeal of the Hawaiian Patriotic League to the American government stated, “We cry to you for justice, and for such help as the honor and fair name of American people command you to extend us.” Aloha Aina League, *An Appeal*, HAWAII HOLOMUA, Vol. II, No. 38, Feb. 20, 1894, at 2, <https://www.papakilodatabase.com/pdnupepa/?a=d&d=HHA18940220-02>.

<sup>397</sup> *Kanaka Maoli Resistance*, *supra* note 375, at 27.

<sup>398</sup> Eleanor C. Nordyke & Martha H. Noyes, “*Kaulana Nā Pua*”: *A Voice for Sovereignty*, 27 HAWAIIAN J. HIST. 27, 27 (1993).

'A'ole a'e kau i ka pūlima Ma luna o ka pepa o ka 'ēnemi Ho'ohui 'āina kū'ai hewa I ka pono sivila a'o ke kanaka	No one will fix a signature To the paper of the enemy With its sin of annexation And sale of native civil rights
'A'ole mākou a'e minamina I ka pu'u kālā o ke aupuni Ua lawa mākou i ka pōhaku I ka 'ai kamaha'o o ka āina	We do not value The government's sums of money We are satisfied with the stones Astonishing food of the land
Ma hope mākou o Lili'ulani A loa'a ē ka pono o ka 'āina (A kau hou 'ia e ke kalaunu) Ha'ina 'ia mai ana ka puana Ka po'e i aloha i ka 'āina	We back Lili'ulani Who has won the rights of the land (She will be crowned again) Tell the story Of the people who love their land <sup>399</sup>

Many Kānaka Maoli refused to donate to their churches when their minister supported the Provisional Government. Others sewed quilts incorporating the Hawaiian flag as signs of resistance.<sup>400</sup>

In January 1895, Robert Wilcox and Samuel Nowlein, the former head of the Queen's guards, led a final armed revolt to reclaim the Queen's government.<sup>401</sup> A battle broke out on Diamond Head at the home of a royalist after tips of weapons being landed reached the Republic.<sup>402</sup> During this first battle, the royalists were successful in repelling the Republic's movements.<sup>403</sup> However, two additional gun battles, in Mō'ili'ili and Mānoa, proved unsuccessful for the royalists.<sup>404</sup> Royalists who fought in the

<sup>399</sup> ELLEN KEHO'OHIWAOKALANI WRIGHT PRENDERGAST, *Kaulana Nā Pua (Famous Are The Flowers)*, HULA PRESERVATION SOC'Y (Jan. 1893), [https://www.huapala.org/Kau/Kaulana\\_Na\\_Pua.html](https://www.huapala.org/Kau/Kaulana_Na_Pua.html).

<sup>400</sup> *Kanaka Maoli Resistance*, *supra* note 375, at 29 ("While Hawaiian Flag quilts of the nineteenth century were used to communicate loyalty and personal service to the Hawaiian nation, political positions, and protests to foreign domination, those of the twentieth century have conveyed messages of resistance to antinative policies.").

<sup>401</sup> *Wilcox in Prison*, THE PAC. COM. ADVERTISER, Jan. 15, 1895, at 1; *see also Kanaka Maoli Resistance*, *supra* note 375, at 32–33.

<sup>402</sup> *See Kanaka Maoli Resistance*, *supra* note 375, at 3.

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

insurrection were arrested and jailed.<sup>405</sup> Republic officials charged Lili‘uokalani with misprision of treason—essentially knowing of the plot to take back her government and failing to report it—and imprisoned her in her own palace for eight months.<sup>406</sup>

Following the unsuccessful January 1895 uprising, Francisco Jose Testa, editor of the Hawaiian language newspaper *Ka Makaainana*, published the *Buke Mele Lāhui* (Book of National Songs), which contained 104 songs that “expressed belief or hope in the eventual restoration of the Monarchy and Kingdom[.]”<sup>407</sup> In the mele, *Hua Kau I Ka Umauma*, composers Joseph Heleluhe and D.K. Koa describe their patriotism and devotion to the ‘āina, and their plea to the United States to return Lili‘uokalani to the throne:

He “aloha aina” kau i ka hano Kaulana i ka waha o ka lehulehu, O ka hua ia la i ka umauma, Puni e ka lono i na mokupuni, Aia Honolulu i ka ehuehu, Ua wela ka luna i Daimana Hila, Kui aku e ka lono ma ka hikina, Hoike mai ana i ka mea hou, Aia i ka luna la i Manoa, O ke kuahiwi noe pii a ka ohu, O ka pii no ia hiki i Palani, Hoeru mai nei a o Pelekane, Pehea o Maleka a e apa nei? Hoihoi i ka pono a o Hawaii, Me ka noho kalaunu o Liliulani. Nee mai e ka ua noe i na pali, Haaheo i ka luna a o Kupanihi, Ilaila makou ane hiki ole, Ninau e ke ala ma ke kuahiwi, E huli a e hoi no ke kaona, E ike i ka nani o ke kapitala,	“Aloha ‘āina” revered Proudly spoken by the mouths of its citizens, Words we wear proudly on our chests, All around the islands, There is Honolulu in fury and storm, Hot is the top of Diamond Head, The news hits from the East, Announcing the news, Above is Mānoa, The mountain where the mist climbs to the clouds, The mist creeps to France, country of mystery, Britain arrives, How is America? Delaying its arrival, Return what is right to Hawaii, With Lili‘ulani as the crown,
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<sup>405</sup> *In re Kalanianaʻole*, 10 Haw. 29 (Haw. Rep. 1895) (detailing the legal challenge to the trials of various royalists to the Republic of Hawaii’s implementation of martial law and trial by military tribunal).

<sup>406</sup> Amy K. Stillman, *History Reinterpreted in Song: The Case of the Hawaiian Counterrevolution*, 23 HAWAIIAN J. HIST. 1, 6 (1989).

<sup>407</sup> *See id.* at 5; FRANCISCO JOSE TESTA, *BUKE MELE LĀHUI* (BOOK OF NATIONAL SONGS) (Hawaiian Hist. Soc’y eds., 2003) (1895) [hereinafter *BUKE MELE LĀHUI*].

<p>Hui malihini au me kuu aloha,  Na paia pohaku o ka Halekoa;  Hainaia mai ana aka puana,  Ke aloha aina i ka puuwai.</p>	<p>The rains near the cliffs,  Proud at the top of Kupanihi  (Pacific Heights),  We almost did not make it,  The path to the mountain asks,  Seek and find the kaona,  Behold the beauty of the capital,  I meet strangers with my love  The rock walls of the army.  Told is the refrain,  Patriotism always in our hearts.<sup>408</sup></p>
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Nevertheless, pro-annexationist William McKinley assumed the American presidency and sought annexation.<sup>409</sup> Although McKinley signed a Treaty of Annexation in June 1897, the Hawaiian organizations mobilized and rallied again to regain their country.<sup>410</sup> They organized a petition drive to express to the United States Senate the Native Hawaiian sentiment against annexation.<sup>411</sup> A delegation of these groups traveled to Washington, D.C., to meet up with Lili'uokalani and lobby senators for their support.<sup>412</sup> Colonel John Richardson, a member of the delegation, met with Massachusetts Senator George Hoar to present the gathered petitions and explain Kānaka Maoli feelings regarding annexation.<sup>413</sup> So powerful was Richardson's pleas that Senator Hoar accepted the people's petitions and took them before the Senate.<sup>414</sup>

The United States Congress debated annexation.<sup>415</sup> Some legislators insisted that Native Hawaiians be given an opportunity to vote on annexation.<sup>416</sup> Others derided the idea because they knew, from the petitions,

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<sup>408</sup> JOSEPH HELELUHE & D.K. KOA, *Hua Kau I Ka Umauma*, in BUKE MELELĀHUI, *supra* note 407, at 7–8.

<sup>409</sup> See VAN DYKE, *supra* note 221, at 208.

<sup>410</sup> *Id.* at 208, 210.

<sup>411</sup> *Id.* at 210.

<sup>412</sup> *Id.*

<sup>413</sup> *Kanaka Maoli Resistance*, *supra* note 375, at 44.

<sup>414</sup> *Id.*

<sup>415</sup> 31 Cong. Rec. 5967–6019 (June 15, 1898); see VANDYKE, *supra* note 221, at 200–12.

<sup>416</sup> See VANDYKE, *supra* note 221, at 211; 31 Cong. Rec. 6014 (June 15, 1898) (debating the need for consent of the people of Hawai'i for annexation).

that Native Hawaiians did not support annexation.<sup>417</sup> Regardless, the Senate did not have the necessary two-thirds vote needed to ratify the proposed treaty.<sup>418</sup>

The organization and civic engagement of the Hawaiian community and the Queen effectively halted two attempts at annexing Hawai‘i through a treaty—the traditional means to annex an independent nation.<sup>419</sup> But the rules changed. The political tide shifted.

Despite admirable efforts of resistance, on July 7, 1898, the United States used a joint resolution to unilaterally annex Hawai‘i.<sup>420</sup> The “Newlands Resolution” provided that the Republic of Hawai‘i ceded absolute and unreserved sovereignty “of whatsoever kind in and over” the Hawaiian Islands to the United States.<sup>421</sup>

The Native Hawaiians Study Commission majority never confronts the legality of acquiring territory of another country via joint resolution.<sup>422</sup> Instead, the majority concludes:

The joint resolution that was finally used to annex Hawaii was not introduced until world events made plain to the President and Congress that annexation was essential. All concerned viewed it as an expedient. The possibility that passage by a majority of the more representative House, as well as by the Senate, may have indicated greater public support than treaty ratification apparently was not discussed by those considering these issues.<sup>423</sup>

Citing a legal opinion of the Ninth Circuit Court of Appeals, the majority stated, “Indeed, it has been held that the Joint Resolution was legal and

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<sup>417</sup> See VAN DYKE, *supra* note 221, at 209–11; *see, e.g.*, 31 Cong. Rec. 6404 (June 28, 1898) (“The people of Hawaii do not want annexation to the United States as either a Territory or as a State. When I speak of the people of Hawaii I speak of the native Hawaiians of the intelligent population of the country, and I have no hesitation in saying that from the evidence before us the people of Hawaii will vote down the proposition to have Hawaii incorporated as part of the territory domain of the United States.”).

<sup>418</sup> See VAN DYKE, *supra* note 221, at 208–09.

<sup>419</sup> U.S. CONST. art. II, § 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]”).

<sup>420</sup> S.J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

<sup>421</sup> *Id.*

<sup>422</sup> See generally Williamson Chang, *Darkness Over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL’Y J. 70 (2015).

<sup>423</sup> See MAJORITY REPORT, *supra* note 142, at 304.

proper.”<sup>424</sup> In other words, America needed Hawai‘i to continue its military campaign across the Pacific, and therefore, the acquisition of another country by any means necessary was justified.<sup>425</sup>

Following annexation, Lili‘uokalani made several unsuccessful trips to the United States capital to protest and argue for her rightful ownership of the Crown Lands.<sup>426</sup> Her protest came to a height in *Liliuokalani v. United States*, where she sought to at least be compensated for the Crown Lands before the United States Court of Claims.<sup>427</sup> The Court of Claims concluded that Lili‘uokalani had no claim to the Crown Lands.<sup>428</sup> Native Hawaiians, despite having a vested interest in the Crown and Government lands, received nothing. Liliu‘okalani fought for her land and her people. The Native Hawaiians Study Commission majority nevertheless carefully crafted a narrative of Hawai‘i’s past that minimized the strong resistance from Kānaka Maoli to every step of annexation.

This repository of historical and cultural evidence helps frame a collective memory of injustice that uplifts and amplifies the Hawaiian voices to promote reparative action. This collective memory of injustice is important to inscribe because “justice claims often turn[] on which memories are acknowledged by decisionmakers.”<sup>429</sup>

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<sup>424</sup> *Id.* at 347 (citing *United States v. Mowat*, 582 F.2d 1194, 1206–07 (9th Cir. 1978)).

<sup>425</sup> Hawai‘i’s Organic Act, signed on April 30, 1900 established the territorial government of Hawai‘i. Act of Apr. 30, 1900, Pub. L. No. 56-331, § 2, 31 Stat. 141, 141 (1900). Section 91 of the Organic Act affirmed United States ownership over all public lands in the “possession, use, and control” of the Territory of Hawai‘i. *Id.* at § 91. Section 99 held the public lands “free and clear from any trusts.” *Id.* at § 99. Section 73 provided that all funds from the sale or lease of public lands would used for the “benefit of the inhabitants of the Territory of Hawai‘i.” *Id.* at § 73.

<sup>426</sup> See LILI‘UOKALANI, *supra* note 272, at 322 (describing the Queen’s visit with President Cleveland).

<sup>427</sup> *Liliuokalani v. United States*, 45 Ct. Cl. 418, 425–46 (1910).

<sup>428</sup> *Id.* Relying on kingdom-era precedent in *In re Kamehameha IV*, the U.S. Court of Claims denied Lili‘uokalani rights to or compensation for the Crown Lands because, according to the court, these were not personal property, but inalienable lands attached to the office of the crown. *Id.* at 427–28 (citing *In re Kamehameha IV*, 2 Haw. 715 (Haw. Kingdom 1864)). According to the American court, since the Hawaiian monarchy ceased to exist after the overthrow, the rights or claims of the former monarch to the Crown Lands ceased as well. *Id.* at 428 (“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.”). According to the court, the land was part of the public domain, possessed and managed by the succeeding government. *Id.* at 428–29.

<sup>429</sup> Hom & Yamamoto, *supra* note 42, at 1765.

C. *The Aftermath: Denying Reconciliation*

The Native Hawaiians Study Commission majority’s findings immediately sparked community displeasure. Native Hawaiian Legal Corporation attorney Melody Kapilialoha MacKenzie stated that the report showed a “startling bias and lack of objectivity,” inasmuch as the report made statements “which lack supporting authority,” and, in many instances, was “argumentative rather than impartial.”<sup>430</sup>

In a letter to the Commission, Hawai‘i Congressman Cecil “Cec” Heftel aptly summarized the sentiment of the community and began to frame a collective memory of injustice: “I do not believe it is the job of the Commission to write history which merely substantiates a point of view held by those who emerged victorious from the events in Hawaii in the 1890s. There is certainly another point of view, that of the native Hawaiians . . .”<sup>431</sup> Congressman Heftel called out the Commission majority for its use of “selective history,” its efforts to frame a new narrative of Hawai‘i’s past that erased its Indigenous people, and its attempt to justify American intervention as necessary for Hawai‘i’s future.<sup>432</sup> Heftel also clarified that “[t]hose who accept the inevitability of the seizure of Hawaii by the United States are those who are prepared to accept injustice as the norm. It is not the standard by which great men or great nations are measured.”<sup>433</sup> Congressman Heftel did not stop with the inaccuracies of the report, he also faulted the majority for perpetuating a litany of lies and evasions: “We must not now add to the problems of the Hawaiian’s situation by continuing with misinformation or falsehoods.”<sup>434</sup> Heftel insisted that the injustice Hawaiians faced were not left behind in history at the overthrow, but were being perpetuated through the inaccuracies of the history that continued to shape the biased and one-sided legal and political landscape of Hawai‘i: “As cruel as the events of the 1890s appear to Hawaiians, they are no more cruel [than] the long history of

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<sup>430</sup> *Hawaiians v. Reagan Administration*, KA WAI OLA O OHA, June 1991, at 13 [hereinafter *Reagan Administration*].

<sup>431</sup> Letter from Representative Cecil “Cec” Heftel to the Native Hawaiians Study Commission, at 1 (Nov. 22, 1982) (on file with the Hawai‘i State Archives).

<sup>432</sup> *Id.* at 1–2.

<sup>433</sup> *Id.* at 2.

<sup>434</sup> *Id.*

deception which followed.”<sup>435</sup> Heftel evoked, in real time, a collective memory of injustice.<sup>436</sup>

The Hawai'i commissioners—Kamali'i, Beamer, and Betts—were not satisfied with the majority report and sought assistance to help correct the majority's inaccuracies.<sup>437</sup> Prior to the issuance of the majority's final report, the Office of Hawaiian Affairs paid for constitutional law professor Jon Van Dyke and attorney MacKenzie to attend Commission hearings in Washington, D.C.<sup>438</sup> The Office of Hawaiian Affairs tasked these lawyers to provide legal advice and support to the minority members of the Commission.<sup>439</sup> Prior to the Office of Hawaiian Affairs' investment, only federal Justice Department attorneys advised the commissioners.<sup>440</sup> At the Capitol hearings, the local attorneys were not allowed to speak until after the meeting.<sup>441</sup> They “returned home bewildered by the procedural gamesmanship with which the mainland commissioners controlled the meetings.”<sup>442</sup> The Hawai'i commissioners traveled across the State to inform the community about the Commission recommendations and the recommendations that the minority members formulated.<sup>443</sup>

In the end, the Commission majority had an agenda and mandate. They concluded that the federal government did not owe any compensation to Native Hawaiians because the United States did not extinguish aboriginal title to land.<sup>444</sup> The majority stated that although Americans had participated in the overthrow, they did not do so as agents of the government, and

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<sup>435</sup> *Id.* at 3; see MacKenzie & Sproat, *supra* note 74, at 486 n.20 (noting how a biased law review article that incorporated as “old memory[] threatens to re-traumatize Kānaka Maoli and undo the reparation efforts following the illegal overthrow”).

<sup>436</sup> Hom & Yamamoto, *supra* note 42, at 1764 (noting that in invoking a collective memory of injustice, “we need to acknowledge that we are not merely retrieving group memories. We are helping construct them as we go, within a context of not only rights norms but also larger societal understandings of injustice and reparation”).

<sup>437</sup> Stu Glauberman, *Islanders to Push for Hawaiian Claims*, HONOLULU STAR-BULL., Mar. 1, 1983, at A1, A3.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *Reagan Administration*, *supra* note 430, at 13.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> See MAJORITY REPORT, *supra* note 142, at 18 (“The analysis determines that the United States did not recognize title of native Hawaiians to these lands. Further, even if there were recognized title, no compensation for loss of that title would be available under present law.”).

therefore, the federal government bore no responsibility for the overthrow of the Hawaiian Kingdom.<sup>445</sup> Again, relying upon a limited telling of Hawai‘i’s history, the majority believed the federal government had neither an ethical, moral, or legal obligation to offer reparations to Hawaiians for the loss of their land and sovereignty, nor an obligation to apologize to Hawaiians for the overthrow.<sup>446</sup>

One journalist at the time characterized the Commission majority as a “group of Washington insiders whose sympathies lay less with the plight of the Hawaiians than with the Reagan administration’s cost-cutting agenda and its notable lack of compassion for minorities.”<sup>447</sup> Indeed, it came as no surprise that one commissioner was associated with a group that opposed Native Americans in court and another represented the federal government in litigation against Alaska Natives.<sup>448</sup> The experience for Commissioner Kamali‘i was so unpleasant that she, the former Republican Leader in the Hawai‘i State House, abandoned the Republican Party as she believed it had abandoned Hawai‘i’s Indigenous people.<sup>449</sup> But, the majority’s decision was a sign of the conservative backlash against Native Hawaiians and the idea that “things should not just be handed over to them on a silver platter.”<sup>450</sup>

The Commission majority ultimately framed a collective memory that defended and justified any sort of American aggression towards Native Hawaiians.<sup>451</sup> They constructed a collective memory that wholly relied upon

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<sup>445</sup> *Id.* at 357 n.71 (“The actions of United States Minister Stevens that contributed to the overthrow of the monarchy were obviously not authorized by any pre-1893 treaty between the United States and Hawaii, nor were they subsequently adopted by Congress. Indeed, the actions of Stevens on January 17, 1893, do not appear to have been sanctioned by the Congress or the President. The United States Government is not liable for the acts of an agent that exceed the scope of the agent’s authority.”).

<sup>446</sup> See MAJORITY REPORT, *supra* note 142, at 28.

<sup>447</sup> See *Reagan Administration*, *supra* note 430, at 13.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> Michael Reese & Martin Kasindorf, *The Comeback for Hawaii*, NEWSWEEK, Sept. 13, 1982, at 43.

<sup>451</sup> However, the Commission’s Minority Report, drafted in substantial part by Office of Hawaiian Affairs staff members, recommended that Congress acknowledge the illegal action of the federal government in the overthrow of the Kingdom, provide compensation to the Hawaiian people, and include Hawaiians in all programs that benefit other Indigenous peoples throughout the United States. See NATIVE HAWAIIAN STUDY COMM’N, CLAIMS OF CONSCIENCE: A DISSIDENTING STUDY OF THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS iv-xi (June 23, 1983). It was clear that the minority commissioners, and by implication the Office of Hawaiian Affairs itself, believed that Native Hawaiians were entitled

the biased interpretations of history, ignoring the true historical injustices Hawaiians faced.<sup>452</sup> With a reliance on non-native accounts of Hawaiian history, the Commission majority crafted conclusions steeped in the memory of those unaffected by the injustice done to Native Hawaiians for the deprivation of their land and the seizure of their Kingdom.<sup>453</sup> The majority carefully selected a version of history that ensured the United States could avoid accountability and prevent any reparations to Native Hawaiians.<sup>454</sup> The majority ultimately constructed a collective memory that erased Kānaka Maoli voices in their own history, dispersing that biased version of history to the public and the annals of history . . . until now.

#### IV. HO‘OKU‘IKAHI: LESSONS FOR RECONCILING INDIGENOUS LAND DISPOSSESSION

Given the efforts of Land Back campaigns throughout Indigenous communities, this case study offers lessons for reconciling land dispossession.<sup>455</sup> The story of the Native Hawaiians Study Commission

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to a comprehensive compensation package—a benefit that Congress bestowed upon Alaska Natives a decade earlier. *Id.* at v.

<sup>452</sup> See *supra* Section III.B.

<sup>453</sup> See *supra* Section III.B.

<sup>454</sup> See Hom & Yamamoto, *supra* note 42, at 1765 (“[S]truggles over memory are often struggles between colliding ideologies, or vastly differing world views. When outsiders begin to persuasively reconstruct historical injustice they usually face fierce opposition by those in power.”).

<sup>455</sup> Debates over returning stolen Indigenous lands are not unique to Hawai‘i. These Indigenous land reclamation efforts have been broadly categorized as “Land Back” initiatives. Some have defined Land Back as a movement that “addresses the root pain of colonization—the theft of Indigenous lands, alienation of lands for resource extraction, the violence and genocide committed against Indigenous peoples for statehood and capitalism, and the hundreds of years of devastating aftereffects.” Nikki A. Pieratos et al., *Land Back: A Meta Narrative to Help Indigenous People Show Up as Movement Leaders*, 17 LEADERSHIP 47, 51, 52, 55–56 (2021). Others have similarly described Land Back as “a return to culture, place, and identity through the sacred responsibility to care for the land and environment for future generations to come. It is also about rematriation, the Indigenous-led efforts to restore sacred relationships between Indigenous people and our ancestral land . . . .” Vanessa Racehorse & Anna Hohag, *Achieving Climate Justice Through Land Back: An Overview of Tribal Dispossession, Land Return Efforts, and Practical Mechanisms for #Landback*, 34 COLO. ENV’T. L.J. 175, 183 (2023) (citation omitted). Land back movements across the world have sought to reconcile often centuries of land dispossession. *Id.* at 178–83. These movements and resistance efforts take many forms and have been occurring for many years. See, e.g., Lucy Mackintosh, *Why Ihumātao Truly is a Piece of New Zealand’s Soul*, THE GUARDIAN (Sept. 24,

exemplifies the power and significance of collective memory in shaping historical narratives and influencing legal outcomes. The process of creating a collective memory impacted the work of the Commission. Additionally, the majority manipulated the framing of Native Hawaiian history, injustices, and legal claims in ways that affected the long-term struggle for reparations and justice for Native Hawaiians.

At its core, the work of the Native Hawaiians Study Commission offers profound insights into the ways in which history, memory, and law intersect in the context of social justice. The struggles surrounding the Commission demonstrate how collective memory can be a tool for marginalized communities seeking redress, and how powerful institutions can use history to minimize or justify harm.<sup>456</sup> As Yamamoto suggests, collective memory is not a neutral process but is shaped by ongoing social, political, and cultural dynamics.<sup>457</sup> Collective memory plays a critical role in how past injustices are understood and addressed in the present.<sup>458</sup> This is evident in the case of the Native Hawaiians Study Commission, where the historical narrative surrounding the overthrow of the Kingdom of Hawai‘i and annexation to the United States became a contested space.<sup>459</sup> The Commission’s work and its ultimate failure to achieve meaningful reparations for Native Hawaiians illustrates how collective memory can be manipulated by dominant forces to obscure or distort the realities of historical injustice.<sup>460</sup>

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2019), <https://www.theguardian.com/commentisfree/2019/sep/24/why-ihumatao-truly-is-a-piece-of-new-zealands-soul> (describing the fight for land back in Ihumātao in Auckland, New Zealand).

<sup>456</sup> See *Hawai‘i ‘78*, *supra* note 37, at 90 (“When deployed to change the law, history is a weapon in a lawyer’s arsenal to critique legal principles[.]”).

<sup>457</sup> See Hom & Yamamoto, *supra* note 42, at 1757 (“Social understandings of historical injustice are . . . rooted less in backward-looking searches for ‘what happened’ than in the present-day dynamics of collective memory.”).

<sup>458</sup> *Id.*

<sup>459</sup> See *supra* Section III.B.

<sup>460</sup> The work of the Native Hawaiians Study Commission is but one instance in which a collective memory has been invoked to deprive a community of long-sought justice. See Tanigawa Lum, *supra* note 106, at 42–51 (describing the plantation narrative to justify control of resources in Maui Komohana); Hom & Yamamoto, *supra* note 42, at 1766–77 (analyzing the *Rice v. Cayetano* case to show the power of collective memory to deny reparative action for Native Hawaiians). But see *Hawai‘i ‘78*, *supra* note 37, at 120–31 (critiquing the successful invocation of a collective memory of injustice to support the constitutional amendments to provide a vehicle for reparations for Native Hawaiians).

In this context, collective memory was used both as a tool for resistance and as a means of maintaining the status quo.<sup>461</sup> Hawai‘i’s leaders recognized that the process of remembering the overthrow and its aftermath was crucial in framing their case for reparations.<sup>462</sup> Their engagement in the Commission was not just a matter of presenting facts, but rather of asserting a narrative of resistance and the need for legal redress.<sup>463</sup> Hawai‘i’s leaders understood that the struggle for reparations was as much about shaping public memory and securing political support as it was about securing financial compensation.<sup>464</sup>

On the other side, the Reagan Administration and the Commission majority sought to shape a memory that minimized or outright ignored the historical wrongs perpetrated against Native Hawaiians.<sup>465</sup> The majority’s framing of history—using selective sources, omitting important testimony, and relying on biased historical narratives—reflects what Yamamoto describes as the “archives of mind, spirit, and culture” that shape legal outcomes.<sup>466</sup> The Commission majority used the historical narrative to justify its refusal to grant reparations, effectively constructing a collective memory that absolved the United States of responsibility for the overthrow and annexation.<sup>467</sup>

The Commission majority not only ignored Hawaiian voices but also sought to rewrite history to justify the continuing marginalization of Native Hawaiians.<sup>468</sup> These acts of “selective amnesia”—for example, ignoring the full scope of the Blount Report, which had concluded that the U.S. government’s actions amounted to an “act of war” against the Kingdom of

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<sup>461</sup> See Hom & Yamamoto, *supra* note 42, at 1764 (“This means that the group members, lawyers, politicians, justice workers, and scholars possess often unacknowledged power at the very foundational stages of every redress movement. The power resides in the potential for constructing collective memories of injustice as a basis for redress. It also resides in the potential for shaking (or salving) the psyche of a people. This also means that collective memory can be put to regressive as well as progressive use.”).

<sup>462</sup> *Id.* at 1760 (“Thus, answering ‘what happened and who we were’ is only partially an exercise in factual discovery. It is also an act of historical and political construction.”).

<sup>463</sup> *Id.*

<sup>464</sup> *Id.* at 1765 (“[I]t is always important for those outsiders to conceive of law and legal process as contributors to—rather than as the essence of—larger social justice strategies. This means working with legal process and rights claims with dual goals: to achieve the specific legal result and to contribute to construction of social memory as a political tool.”).

<sup>465</sup> See Cohn, *supra* note 67, at 601 (discussing selective amnesia in the context of memory creation).

<sup>466</sup> See Hom & Yamamoto, *supra* note 42, at 1764.

<sup>467</sup> *Id.*

<sup>468</sup> See *supra* Section III.B.

Hawai‘i—demonstrate how history is shaped to serve political agendas.<sup>469</sup> By downplaying American involvement in the overthrow, the Commission majority undermined the legal and moral basis for reparations and effectively erased the truth of Hawaiian suffering.

As Martha Minow notes, collective memory is shaped by power dynamics, and in this case, the dominant political forces—embodied by the Reagan administration’s appointees—used their control over the Commission to suppress the memory of Hawaiian injustices.<sup>470</sup> This manipulation of historical memory directly influenced the legal and political processes surrounding Native Hawaiian claims for reparations, making it more difficult for these claims to be taken seriously by Congress and the broader public.<sup>471</sup>

In stark contrast to the Commission majority, this Article presents an alternative narrative of Hawaiian history—one that centers on the experiences of Native Hawaiians and acknowledges the full scope of injustice they faced. This piece constructs a collective memory that reflects the pain and suffering of the Hawaiian people and the need for redress.<sup>472</sup> It emphasizes that the Māhele and the overthrow of the Hawaiian Kingdom

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<sup>469</sup> See MAJORITY REPORT, *supra* note 142, at 26 (downplaying significance of the Blount and Morgan Reports), 290 (describing the methodology of the Commission majority as relying on “leading secondary works[,]” and relying “carefully and sparingly” on the primary sources of the Blount Report).

<sup>470</sup> See MINOW, *supra* note 87, at 118–20.

<sup>471</sup> As of this writing, the United States has not provided reparations for the overthrow of the Hawaiian Kingdom. *But cf.* Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (apologizing and committing the United States to reparations); DEP’T OF THE INTERIOR AND DEP’T OF JUST., FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY: REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS 4 (Oct. 23, 2000) (“As a matter of justice and equity, this Report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of Native Hawaiians as an indigenous people within our Nation through legislation, administrative action, and policy statements. To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians’ political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.”); 43 C.F.R. § 50.1(a) (2016) (setting forth the “administrative procedure and criteria for reestablishing a formal government-to-government relationship between the United States and the Native Hawaiian community that will allow . . . [t]he Native Hawaiian community to more effectively exercise its inherent sovereignty and self-determination”).

<sup>472</sup> See Hom & Yamamoto, *supra* note 42, at 1758 (“Collective 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.”).

were not just historical events but are contemporary issues that have enduring consequences for Native Hawaiians.<sup>473</sup> This effort to challenge the Commission majority's narrative, which is grounded in the belief that acknowledging the historical injustice was not just about historical accuracy but also about securing justice for future generations of Native Hawaiians, highlights the active role that collective memory plays in legal and political struggles.

Furthermore, by framing the issue in terms of reparations and justice, one is not merely recounting a history of trauma, but actively engaging in the process of collective healing and resistance.<sup>474</sup> As Yamamoto argues, collective memory is inherently contested, and in this context, the Native Hawaiian community was involved in a battle to define their history and demand accountability.<sup>475</sup> This Article represents an important attempt to preserve the integrity of Hawaiian memory and to assert the legitimacy of Native Hawaiian claims to land.

Aside from these observations of the reparative power of crafting a collective memory of injustice, there are several practical lessons gleaned from this case study that should animate future efforts for land reclamation for Native Hawaiians and other Indigenous communities.

First, constructing a collective memory of injustice for a marginalized community necessarily involves understanding the nuances of that community's cultural practices. For example, it is not merely that the Commission majority relied upon Kuykendall and government historians for a Native Hawaiian perspective; the majority failed to meaningfully engage in the difficult historical work of understanding and explaining the Hawaiian viewpoint—a viewpoint that can only be accurately captured with a cultural grounding.<sup>476</sup> The misunderstanding of Kānaka perspectives, for example, affected how the majority portrayed the Māhele and Native Hawaiian interests in land. It is, thus, important to ensure that advocates and

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<sup>473</sup> *Id.* at 1764 (“[M]emory is ‘collective,’ because it emerges from interactions among people, institutions, media, and other cultural forms. It involves ‘construction’ because those collective memories are not found, but rather are built and continually altered.”).

<sup>474</sup> *See, e.g.,* Pettit-Toledo, *supra* note 72, at 365–69 (describing the healing for victims of violence from sharing their stories).

<sup>475</sup> *See* Hom & Yamamoto, *supra* note 42, at 1765 (“Collective memory thus is always hotly contested by those supporting and those opposing justice claims.”).

<sup>476</sup> *See* Tanigawa Lum, *supra* note 106, at 5–6.

decisionmakers have the necessary cultural competencies to navigate this difficult terrain.<sup>477</sup>

Second, key to capturing a collective memory of injustice, particularly when seeking reparative action, such as land back for Indigenous communities, is articulating a framework that incorporates and uplifts Indigenous knowledge and ways of knowing into the legal and political discourse.<sup>478</sup> This Article, for example, seeks to uplift repositories of traditional knowledge, such as chants, songs, and stories because they impactfully express the community values. As another example, one important tool that has been employed in other spheres, but is grounded in Indigenous values and knowledge, is storytelling. Professor Richard Delgado writes:

Stories humanize us. They emphasize our differences in ways that can ultimately bring us closer together. They allow us to see how the world looks from behind someone else’s spectacles. They challenge us to wipe off our own lenses and ask, “Could I have been overlooking something all along?”

Telling stories invests text with feeling, gives voice to those who were taught to hide their emotions. Hearing stories invites hearers to participate, challenging their assumptions, jarring their complacency, lifting their spirits, lowering their defenses.<sup>479</sup>

At several points, this Article infuses storytelling to humanize the experiences of Kānaka Maoli and weave a new memory that emphasizes

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<sup>477</sup> HAW. REV. STAT. § 10-42 (2015) (requiring training for certain government officials regarding “native Hawaiian and Hawaiian traditional and customary rights, natural resources and access rights, and the public trust,” to include “[h]istorical information, explanations, and discussions of key state laws, state constitutional provisions, and court rulings that reaffirm and provide for the protection of native Hawaiian and Hawaiian rights; and . . . [a] discussion of the importance of public trust resources and various programs to native Hawaiian and Hawaiian rights”).

<sup>478</sup> See Tanigawa Lum, *supra* note 106, at 5–6; Terrell Carter & Rachel López, *If Lived Experience Could Speak: A Method for Repairing Epistemic Violence in Law and the Legal Academy*, 109 MINN. L. REV. 1, 73 (2024) (“While legal scholars regularly tell the stories of the marginalized in the process of making their own arguments, they rarely engage with the thinking of the communities they study or regard them as thought leaders in their own right.”).

<sup>479</sup> Delgado, *supra* note 109, at 2440.

Hawaiian connection to 'āina and resistance in the face of nearly insurmountable oppression.<sup>480</sup>

Third, the Native Hawaiian experience underscores the importance of controlling the narrative and ensuring that marginalized communities have the opportunity to present their own history and experiences.<sup>481</sup> As Jeffrey Olick argues, collective memory is not just about preserving the past, but also about shaping the future.<sup>482</sup> The struggle for reparations for Native Hawaiians continues to be an ongoing process of remembering, resisting, and seeking justice for past wrongs. Such a process requires significant efforts to educate others about these historic injustices, and then encouraging those individuals to participate in the decision-making processes.

Ultimately, the Native Hawaiian struggle for reparations highlights the importance of collective memory in both recognizing historical injustices and advocating for legal and political reform. The lessons of this struggle are relevant not only to Native Hawaiians but also to other marginalized communities fighting for reparations and justice. By challenging dominant historical narratives and asserting their own collective memory of injustice, these communities can reshape the future and ensure that their histories are acknowledged and their claims for justice are taken seriously.

## V. CONCLUSION

While the Native Hawaiians Study Commission completed its work in 1983 discussing events that took place in the nineteenth century, the effects of land dispossession continue to reverberate in Hawai'i. Glimmers of hope and change have appeared. A cascade of recent decisions regarding the future of Mauna Kea—the sacred mountain on stolen Kingdom lands that is dotted

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<sup>480</sup> *Id.* (“Stories are useful tools for the underdog because they invite the listener to suspend judgment, listen for the story’s point, and test it against his or her own version of reality. This process is essential in a pluralist society like ours, and it is a practical necessity for underdogs: All movements for change must gain the support, or at least understanding, of the dominant group, which is white.”).

<sup>481</sup> See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325–26 (1987) (“This article, then, suggests a new epistemological source for critical scholars: the actual experience, history, culture, and intellectual tradition of people of color in America. Looking to the bottom for ideas about law will tap a valuable source previously overlooked by legal scholarship.”); Carter & López, *supra* note 478, at 73.

<sup>482</sup> See Olick, *supra* note 68, at 20–21 (“Either way, the past is not just a tool in the arsenal of power, but the very wellspring of identity.”).

with telescopes—highlight a potentially new era of justice for Kānaka Maoli.<sup>483</sup>

In April 2024, the United Nations Committee on the Elimination of Racial Discrimination, after receiving petitions calling for the entity to take action, issued an Early Warning and Urgent Action letter to Canada citing concerns that through its support of the large TMT telescope on top of Mauna Kea, Canada is violating the rights of Kānaka Maoli.<sup>484</sup> One month later, the Hawai‘i Supreme Court confronted a legal challenge by some of the respected kupuna arrested along the Mauna Kea Access Road, including Dr. Pua Kanakaole Kanahale. Auntie Pua argued that the State breached its duty to native Hawaiians because the land under the Mauna Kea Access Road was improperly seized without compensation.<sup>485</sup> After a deep historical review, the Hawai‘i Supreme Court concluded that the State “blatantly disregarded unambiguous requirements” and, in doing so, “breached its constitutional and fiduciary obligation. . . .”<sup>486</sup>

In December 2024, the National Science Foundation’s external panel of experts submitted a report emphasizing that the outstanding and necessary funding to build the TMT will significantly impact the NSF budget without additional congressional support.<sup>487</sup> The report also noted that China, a partner in the TMT, had withdrawn from the project.<sup>488</sup> Some saw this report as a victory given the grassroots Kānaka Maoli advocacy work to stop the TMT.

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<sup>483</sup> See *Kanahale v. State*, 154 Hawai‘i 190, 194, 549 P.3d 175, 279 (2024); *In re Conservation Dist. Use Application HA-3568 (Mauna Kea II)*, 143 Hawai‘i 379, 384, 431 P.3d 752, 757 (2018).

<sup>484</sup> Letter from Michal Balcerzak, Committee on the Elimination of Racial Discrimination Chair, United Nations Human Rights Treaty Bodies (Apr. 26, 2024), [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key=yNIDS2XwB4HKA+pbRv/m5BQZ4x9HKwO/MJdv+sCLXC+Jw+xm3G/SsnfAWYheGd9s](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key=yNIDS2XwB4HKA+pbRv/m5BQZ4x9HKwO/MJdv+sCLXC+Jw+xm3G/SsnfAWYheGd9s).

<sup>485</sup> *Kanahale*, 154 Hawai‘i at 194, 549 P.3d at 279.

<sup>486</sup> *Id.*

<sup>487</sup> U.S. NAT’L SCI. FOUND., US ELT EXTERNAL EVALUATION PANEL REPORT 8 (2024), <https://nsf.gov-resources.nsf.gov/files/ELT-Evaluation-Panel-Report.pdf> (“However, the project’s continuation heavily relies on securing the requested \$1.6 billion from NSF. The panel has noted concerns about the political risks and potential impact on the international commitments if NSF funding does not materialize. Even if NSF provides the requested funds in addition to the existing strong commitments of the partners, a \$300 million funding gap remains for project construction. Active discussions with potential collaborators to fill the funding gap are underway.”).

<sup>488</sup> *Id.*

Are the tides finally changing for Native Hawaiian justice claims? If so, how does this momentum hold? Mass demonstrations, social media campaigns, cultural displays, and increased education provide apt opportunities for the continued framing of a new collective memory of injustice. But perhaps the best answer lies in the past:

Ke Aloha Aina; Heaha Ia? <sup>489</sup>	Aloha ‘Āina; What is it? <sup>490</sup>
<p>O ke Aloha Aina, oia ka Ume Mageneti iloko o ka puuwai o ka Lahui, e kaohi ana i ka noho Kuokoa Lanakila ana o kona one hanau ponoī.</p>	<p>That which we call Aloha ‘Āina is the magnetic pull in the heart of the patriot which compels the sovereign existence of the land of his birth.</p>
<p>O ka Ume Mageneti, oia no ka ikaika nana i kaohi i ke kui magen[e]ti o ke Panana, e ho‘opololei ana i kona kuhikuhi i ka welelau Akau o ka Honua nei, a i ka hoku akau hoi.</p>	<p>Magnetism is the power which directs the needle of a compass so that it will always point directly to the North Pole of the Earth, and therefore toward the North Star as well.</p>
<p>He mea pohihihi ka ike ana i kahi i loa ai ia mea he ume iloko o ka hao Mageneti, aka, eia ka mea maopopo loa, aia kela kui Mageneti ke hoomau la i kona kuhikuhi ana i ka hoku akau ma ka welau akau o [ka] honua nei.</p>	<p>It is impossible to see where or how this thing called magnetism is contained in the needle, [and understanding the principles of its pull is a complex thing]. But there is one thing that can be seen clearly: that magnetized needle continues to point, unfailingly, to the North Star and Earth’s North Pole.</p>
<p>Pela ke aloha iloko o ka puuwai o ke kanaka no kona aina hanau ponoī. Aole i ike maka ia ia mea</p>	<p>That is what the heart of a Hawaiian feels for his own native land. His</p>

<sup>489</sup> Joseph Kaho‘oluhi Nāwahīokalani‘ōpu‘u, *Ke Aloha Aina: He Aha Ia?*, KE ALOHA AINA, May 25, 1895, at 7, <https://www.papakilodatabase.com/pdnupepa/?a=d&d=KAA18950525-01>.

<sup>490</sup> J. Nawahī, *Ke Aloha ‘Āina Aha Ia?* (Ka‘iwakilaumoku Pacific Indigenous Institute trans.), KA‘IWAKILAUMOKU PAC. INDIGENOUS INST., <https://kaiwakiloumoku.ksbe.edu/article/essays-ke-aloha-aina-heaha-ia> (last visited Apr. 19, 2025).

<p>he aloha, aole hoi hiki ke          hoopaaia, aole hoi e hiki ke haha          ia; aka, ua laha wale aku oia, a ua          lele wale aku a pili i kona aina          hanau pono iho, me he ume la o          ke kui Mageneti.</p>	<p>aloha cannot be seen, held, or felt;          but it is widespread, and it points          inevitably to the land of his          ancestors, just like the needle of a          compass.</p>
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In 1895, and consistent with traditional Hawaiian metaphors of reciprocity and responsibility, attorney and scholar Joseph Nāwahīokalani‘ōpu‘u penned these words in the first Hawaiian language newspaper, *Ke Aloha Aina*.<sup>491</sup> This indescribable pull—a magnetism—Kānaka Maoli feel for their ancestral homeland has driven the resistance to the influx of changes over the last two and a half centuries of Western presence in the islands. But, aloha ‘āina encompasses more than just a love of the land; it is personal love for “community so strong that it cannot be overcome.”<sup>492</sup> These collective commitments to our land and each other must remain at the core of anchoring a thriving Kānaka Maoli future. Remembering and telling stories of aloha ‘āina—be it in the past or our own—is our act of resistance. As Dr. He‘oli Osorio, who was one of the kia‘i strapped to the cattle guard on Mauna Kea Access Road, aptly stated:

The stories we tell *matter*. But more than that, sometimes, it is the *way we tell* the story that *matters* most. Our constellation of resistance mo‘olelo is essential to understanding our direction. This mo‘olelo is not a timeline. This mo‘olelo is an ‘upena [net] of aloha ‘āina we tie together. This is how we rise. Until the very last aloha ‘āina.<sup>493</sup>

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<sup>491</sup> *Id.*

<sup>492</sup> Jamaica He‘olimeleikalani Osorio, *Becoming Kūpuna: The Story of the Kū‘ē Petitions*, in KŪ‘Ē PETITIONS: A MAU LOA AKU NŌ, *supra* note 375, at 13, 15.

<sup>493</sup> *Id.* at 17.