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INTRODUCTION

ARTICLES

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Introduction

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Sadly, the deaths of Professor Jon Van Dyke and Intermediate Court of Appeals Chief Judge (ret.) James S. Burns serve as bookends to an important discussion of the history, meaning, and implications of the law of the Hawaiian Monarchy in the nineteenth century. A brief setting for the work that follows might be helpful:

Jon Van Dyke was a beloved member of our Law School faculty from shortly after our founding in 1973 until his untimely death in 2011. Jon was a brilliant teacher and scholar who earned the University of Hawai'i's highest awards both for teaching and for research. His range of expertise was extraordinary, reflected not only in his myriad of publications but also in his appearances across the globe as a speaker and legal scholar in constitutional law, indigenous rights, and domestic and international ocean law. With his wife, Attorney Sherry Broder, Jon was also an accomplished lawyer and litigator, often winning seemingly impossible human rights cases.

Jim Burns led the Hawai'i Intermediate Court of Appeals from 1982 until he retired at the age of 70, as required by Hawai'i law, in 2007. He then became a regular presence at the Law School, attending events large and small. He also served as our favorite gardener and took meticulous care of a large courtyard planter, in which he planted and tended ti leaves grown from plants used at the memorial of the Law School's namesake and his close friend, Chief Justice William S. Richardson. Jim and his wife, producer and television personality Emme Tomimbang, seemed to know everyone though Jim was a man of few words. He was also widely respected for wearing lightly his lineage as the son of the late Governor John A. Burns, renowned leader of the "Democratic Revolution" that transformed Hawai'i and led to the successful drive for statehood.

It is a tribute to our Law School that both men felt very much at home here. It also says a great deal that a next generation of scholars demonstrate, through the articles that follow in this issue, that they should further develop the vital issues raised by Professor Van Dyke's book and Judge Burns' critical review. There can be no question that these impressive articles by University of Hawai'i faculty members Jonathan K.K. Osorio & Kamanamaikalani Beamer;[1] Melody Kapilialoha

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[1] Jonathan K.K. Osorio and Kamanamaikalani Beamer, *Sullying the Scholar's Craft: An Essay and Criticism of Judge James S. Burns'* Crown Lands Trust *Article*, 39 U. HAW. L.

MacKenzie & D. Kapua'ala Sproat;[2] Avis Kuuipoleialoha Poai;[3] and Troy Andrade;[4] extend and deepen our understanding of history, collective memory, and other core issues currently facing the United States generally as well as Hawai'i specifically. The students on the *Hawai'i Law Review* should be commended for demonstrating once again that our Law School is willing to examine difficult issues and to learn from starkly different perspectives.

REV. 469 (2017).

[2] 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 (2017).

[3] Avis Kuuipoleialoha Poai, *Tales from the Dark Side of the Archives: Making History in Hawai'i Without Hawaiians*, 39 U. HAW. L. REV. 537 (2017).

[4] Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court's Narrative of Hawai'i's Past*, 39 U. HAW. L. REV. 631 (2017).

Sullying the Scholar's Craft: An Essay and Criticism of Judge James S. Burns' *Crown Lands Trust* Article

Jonathan K.K. Osorio* and Kamanamaikalani Beamer**

History is not a single story, not ever a narrative safe from reinvention. If retired Judge James S. Burns' *University of Hawai'i Law Review* article teaches a historian anything, it is that our own discourses are ephemeral. Despite our best attempts to tell a true story, ideology, political interests, and sadly bad scholarship from a credible source, can undermine, even degrade, decades of historical research and academic debate.

Reading Burns' article, *The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?*,[1] brings back memories of reading through the journals of two of the architects of the 1893 overthrow of the Hawaiian Kingdom, Sanford B. Dole and Lorrin Thurston,[2] and with it a re-experiencing of outrage at their betrayal and their deceptions. Burns' recitations of the same narrative of greedy Ali'i Nui, and an incompetent Kingdom government meeting its rightful demise because of the work of dedicated and freedom-loving haole,[3] is honestly a narrative we did not expect to read again after thirty years of steady and responsible scholarship.[4]

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[1] James S. Burns, *The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?*, 38 U. HAW. L. REV. 213 (2015).

[2] *See* LORRIN ANDREWS THURSTON, SANFORD BALLARD DOLE & ANDREW FARRELL, MEMOIRS OF THE HAWAIIAN REVOLUTION 153 (Advertiser Publishing Co. 1936). Sanford B. Dole and Lorrin A. Thurston were descendants of prominent missionary families. Dole was a lawyer, politician, and justice of the Hawaiian Kingdom's Supreme Court. Thurston was a lawyer, the editor of the English-language newspaper, *The Bulletin*, and a politician. *See* TOM COFFMAN, NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAI'I 69–90, 115–27 (2009) (description of Dole and Thurston's backgrounds and roles in the overthrow of the Kingdom government and their support for annexation).

[3] *See, e.g.*, Burns, *supra* note 1, at 238 (generalizing the overthrow as merely a response by "a small group of qualified voters"), 246–47 (arguing that the Ali'i Nui did not perceive the Crown Lands as a collective resource). The authors define the term haole to mean white person or foreigner. It is as much a reference to class as it is to ethnicity and, therefore, is not capitalized.

[4] *See infra* note 7. Rather than cite to Native scholarship or other reliable scholarship, Burns relies on untrustworthy, and inappropriate, authority, including websites, outdated historical studies, and even a seventh grade textbook on Hawaiian history. *Compare* Burns,

While most of these studies have come from Kānaka Maoli,[5] it is ironic and telling that the work Burns challenges and seeks to undo was the culminating study of haole Law Professor Jon Van Dyke.[6] That there is only one citation of a contemporary work authored by a Native Hawaiian in the Burns article, which, after all, is offering a read of the historical development of law, is worse than an oversight. It is deeply and disturbingly insulting to the numerous Native historians, geographers, anthropologists, political scientists, lawyers, and Hawaiian language experts who have written dissertations, books, and articles on Hawaiian history, the Māhele, and "Ceded Lands" going back to the late 1980s.[7] In fact, nowhere

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supra note 1, at 217 n.21, 218 n.22, 225 n.59, 226 n.70, 242 n.142 *with* Avis Kuuipoleialoha Poai, *Tales from the Dark Side of the Archives: Making History in Hawai'i Without Hawaiians*, 39 U. HAW. L. REV. 537 (2017).

[5] "Maoli" means "native, indigenous, aborigine, genuine," and "kanaka maoli" is defined as "a Hawaiian native." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 240 (rev. & enlarged ed. 1986). "Kanaka" is the singular, while "kānaka" is the plural. *Id.* at 127. "Kānaka Maoli" literally means "true people" and is the term that Native Hawaiians have traditionally used to refer to themselves; in modern times, it is used to refer to all persons of Native Hawaiian ancestry. *See* R.K. Blaisdell, *The Kanaka Maoli World, in* DISCOVERY: THE HAWAIIAN ODYSSEY 47, 48 (Eric Herter ed., 1993).

[6] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2008).

[7] *See, e.g.*, LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? (1992); HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I (1999); JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002); NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004); DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE (2007); KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION (2014); Kanalu Young, *Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1780–2001*, 2 HAW. J.L. & POL. 1 (2006); David Keanu Sai, The American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State (2008) (unpublished Ph.D. dissertation, University of Hawai'i at Mānoa) (on file with authors); Stephen Kūhiō Vogeler, "For Your Freedom and Ours": The Prolonged Occupations of Hawai'i and the Baltic States (2009) (unpublished Ph.D. dissertation, University of Hawai'i at Mānoa) (on file with authors); Mark 'Umi Perkins, Kuleana: A Genealogy of Native Tenant Rights (May, 2013) (unpublished Ph.D. dissertation, University of Hawai'i at Mānoa) (on file with authors); Donovan C. Preza, The Emperical Writes Back: Re-Examining Hawaiian Dispossession Resulting from the Māhele of 1848 (May, 2010) (unpublished M.A. thesis, University of Hawai'i at Mānoa) (on file with authors); R. Hōkūlei Lindsey, *Native Hawaiians and the Ceded Lands Trust: Applying Self-Determination as an Alternative to the Equal Protection Analysis*, 34 AM. INDIAN L. REV. 223 (2009–10); DAVID KEANU SAI, UA MAU KE EA – SOVEREIGNTY ENDURES: AN OVERVIEW OF THE POLITICAL AND LEGAL HISTORY OF THE HAWAIIAN ISLANDS (2011); Melody Kapilialoha MacKenzie, *Public Land Trust, in* NATIVE HAWAIIAN LAW: A TREATISE 76 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat eds., 2015); Williamson Chang, *Darkness Over Hawai'i: The Annexation Myth Is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70 (2015).

in his article does Burns even deign to explain this dismissal of our work. It is as though, for this retired judge, the Native people, outside of Lili'uokalani herself, have no opinion worth considering.[8]

One of the consequences of ignoring an entire generation of scholarship is that Burns' narrative is a truly disjointed one, disconnected from the steady transformation of historical interpretation that has been taking place since about the end of the Second World War.[9] Professor Jon Van Dyke's book *Who Owns the Crown Lands?* owes its understanding of the politics of the Kingdom and its legal analysis to that generation of Kānaka Maoli such as Haunani-Kay Trask and Lilikalā Kame'eleihiwa, and what is more, pays liberal attention to our work, even when the author does not fully agree.[10] That is the way that academic research, discourse, and publication actually works.

But reading Burns' article is like a transport into a timeless warp, a sense that is heightened by Burns' own voice only rarely making pronouncements while most of the text includes lengthy and digressing quotations of nineteenth century observers and sometimes whole pages of Van Dyke's book.[11] His analysis is limited usually to very short, almost verdict-like "responses" in which he assumes the role of someone trying to set a historical record straight. In most cases, he is merely offering a contrary opinion to Van Dyke's, which is certainly his right, but in terms of new research or facts from some heretofore underutilized archive, Burns really offers nothing. For example, early in his article, Burns quotes Van Dyke's insistence that "Native Hawaiians continued to play the dominant role in decision making"[12] with his "response:"

> In 1893, prior to the overthrow, Hawaiians did not have "control of the Kingdom." They did not "play the dominant role in decision making." They did not have sovereignty over Hawai'i. It was not the overthrow that caused Hawaiians to lose their sovereignty. Their loss was caused by their decisions and indecisions and actions and inactions of their ali'i during the period from 1778 to pre-overthrow.[13]

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[8] *See, e.g.*, Burns, *supra* note 1, at 233, 237–38.

[9] *See* PETER BUCK, VIKINGS OF THE SUNRISE (1938); J.W. DAVIDSON, THE DECOLONIZATION OF OCEANIA – A SURVEY 1945–1970 (1971).

[10] *See generally* Kekailoa Perry & Jonathan Kamakawiwoole Osorio, *Honoring the Law and Restoring a Nation: Who Owns the Crown Lands of Hawai'i? by Jon M. Van Dyke*, 31 U. HAW. L. REV. 331 (2008) (book review); *infra* notes 42 and 43 and accompanying text.

[11] *E.g.*, Burns, *supra* note 1, at 227–28 (reciting William D. Alexander's account of a case involving an opium license), 235–36, 239–40.

[12] *Id.* at 213.

[13] *Id.* at 214.

Burns' declaration here flies in the face of a fairly massive body of research, including numerous publications that detail the intelligent and strategic responses of Hawaiian leaders in the Kingdom as the society was rent by de-population, economic and demographic transformations, and mounting political pressures by the United States and other foreign nations.[14] For instance, *No Mākou Ka Mana* has documented the agency and strategic leadership of Hawaiian ali'i during the Kingdom period in ways that make Burns' arguments and conclusions so unfounded in the face of such overwhelming evidence, it is as if he is reminding us that the world is indeed flat.[15] What is clear is that the overthrow was only possible because of illegal intervention by the United States and the breaking of international treaties and "a critical assault on indigenous Hawaiian governance and the beginning of the United States occupation of the Hawaiian islands."[16]

It is impossible to say whether Burns was ignorant of *No Mākou Ka Mana* or the nearly thirty years of Kānaka Maoli scholarship on this issue or merely dismissive of it. His vague and diffuse writing style makes a real analysis of his position almost impossible. If the Hawaiian Kingdom lost its control or authority before 1893, why is that important and when precisely did it occur? Burns quotes endlessly from Van Dyke, Kuykendall, Thurston and other Kingdom-era observers, but he never states the connection between his theory that the government was defunct, and his argument that the Crown and Government lands had become the property of all of the residents of Hawai'i.[17]

In his lengthy Section III, Burns recounts a history of the Kingdom that is straight out of William D. Alexander and Ralph Kuykendall—writers who assumed the demise of the Hawaiian monarchy was pre-ordained either by God or by the forces of history.[18] Yet, the Kingdom government continued

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[14] *See, e.g.*, BEAMER, *supra* note 7, at 153.

[15] For instance, in enacting the first formal body of written laws, Kauikeaouli Kamehameha III used this process to increase the authority of the mō'ī, and define the relationships between Hawaiian classes, seeking to protect hoa'āina from abuses of power, among other things. BEAMER, *supra* note 7, at 116–25. Beamer describes Kalākaua's tour of the world, where he met with the rulers of the most powerful nations of his day, as well as his agenda to heighten the Kingdom's cultural consciousness and push for a new level of Hawaiian independence. *Id.* at 176–90.

[16] *See id.* at 5.

[17] *See generally* Burns, *supra* note 1.

[18] *See id.* at 217–31. William D. Alexander, who was Surveyor-General of the Kingdom and then the Provisional Government, was a descendant of a missionary family. NEIL THOMAS PROTO, THE RIGHTS OF MY PEOPLE: LILIUOKALANI'S ENDURING BATTLE WITH THE UNITED STATES, 1893–1917, at 65, 70–72 (2009) (discussing Alexander's report to Commissioner Blount on the status of the Crown lands of the Kingdom). For a detailed

to hold elections until 1893, upheld the constitution (even one that was considered illegal and iniquitous by the majority of Kānaka Maoli),[19] collected taxes, honored its treaties, built schools and roads, and generally behaved itself. In fact, the conception of Hawai'i as some lesser, not-quite nation was never more than a racist and politically motivated discourse deployed by the very people who wished to see Hawai'i annexed.[20]

That Burns repeats that same verdict here, even without the overt deceptions of a Sereno E. Bishop or the disturbing racism of a Lorrin

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deconstruction of Burns' quotes from W.D. Alexander's book, see Poai, *supra* note 4. *See also* R.S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1854–1874: TWENTY CRITICAL YEARS (Univ. Haw. Press 1953); R.S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1874–1893: THE KALAKAUA DYNASTY (Univ. Haw. Press 1967); Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court's Narrative of Hawai'i's Past*, 39 U. HAW. L. REV. 631, 680–81 (2017) (discussing the writing of historian Ralph S. Kuykendall, hired by the Historical Commission of the Territory of Hawai'i, to frame history in a light most favorable to the territorial government); Poai, *supra* note 4, at 598–624 (describing the power that Kuykendall wielded as the "anointed penultimate Hawai'i historian")); Jonathon K. Osorio, *Living in Archives and Dreams: The Histories of Kuykendall and Daws*, *in* TEXTS AND CONTEXTS: REFLECTIONS IN PACIFIC ISLANDS HISTORIOGRAPHY 196 (Doug Munro & Brig V. Lal eds., 2006); Kanalu Young, *Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1778–2001*, 2 HAW. J. L. & POL. 1, 24 (2006); TRASK, *supra* note 7, at 121 n.2 (explaining that "countless popular works have relied on [Kuykendall (1938) and Gavin Daws' *Shoal of Time: A History on the Hawaiian Islands* (1968)], which, in turn, are themselves based on primary sources written in English by extremely biased, anti-Hawaiian westerners, such as explorers, traders, missionaries [. . .], and sugar planters" and the resulting harm this practice has inflicted on the Maoli view of our own history).

[19] *See generally*, OSORIO, *supra* note 7, (describing the factors that led to the 1887 Bayonet Constitution and its suppression of native voting and other rights); SILVA, *supra* note 7, at 122–29.

[20] *See* OSORIO, *supra* note 7; Tiffany Ing-Sai, Ho'omālamalama 'ana i nā Hō'ailona o ka Mō'ī Kalākaua a me kona Noho Ali'i 'ana: Illuminating the American, International, and Hawai'i Reprepresentations of David Kalākaua and His Reign, 1887–1891 (2015) (unpublished Ph.D. dissertation, University of Hawai'i at Mānoa) (on file with authors). After formal establishment of the Kingdom, Hawai'i was recognized as an independent nation and entered into treaties with many nations, in addition to its treaties with the United States. BEAMER, *supra* note 7 at 165–78; Julian Aguon, *Native Hawaiians and International Law* in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 7, at 356. Aguon identifies the following treaties entered into by the Hawaiian Kingdom: Austria-Hungary (June 18, 1875), Belgium (Oct. 4, 1862), Denmark (Oct. 19, 1846), Japan (Aug. 19, 1870), Portugal (May 5, 1882), Italy (July 22, 1863), The Netherlands (Oct. 14, 1862), Russia (June 19, 1869), Switzerland (July 20, 1864), Spain (Oct. 29, 1863), and Sweden (July 1, 1852). *Id.* at 402 n. 9. *See also* Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1510–11 (1993) (noting that the "United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887").

Thurston, is an indication of not just an ignorance, but a studied ignorance of history.[21] Absent a sense of history that has been informed by ongoing research and discourse, is Judge Burns' understanding of law even credible?[22]

This is a significant consideration because Burns is not just challenging the work of one his colleagues, but several generations of research.[23] He is also ignoring social, cultural, and political movements in which tens of thousands of people, Native and non-Native residents of Hawai'i have been engaged,[24] while also challenging nearly forty years of judicial decisions that have positioned Native rights mostly favorably and which, under the

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[21] *See* Sereno Edwards Bishop, *How Hawaiian People Were Won From Savagery,* PACIFIC COMMERCIAL ADVERTISER (Jan. 3, 1904); Sereno Edwards Bishop, *How Has Hawaii Become Americanized?*, 25 Making of America Journals 150 (June 1895); THURSTON, DOLE & FARRELL, *supra* note 2. Sereno E. Bishop, was born in the Hawaiian Kingdom in 1827, and was the descendant of missionaries. He became a Presbyterian minister, was the principal of Lahainaluna High School, and took over the editorial desk for the missionary newspaper, *The Friend*, in 1887. *See* PROTO, *supra* note 18, at 72–73, 89–90 (describing Bishop's views of the Hawaiian people and their unfitness to vote, as well as Bishop's portrayal of Lili'uokalani as "the debauched Queen of a heathenish monarchy"); *see also* Kamanaonāpalikūhonua Souza & K. Ka'ano'i Walk, *'Ōlelo Hawai'i and Native Hawaiian Education, in* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 7, at 1268 (discussing Bishop's views on Native Hawaiian language and culture); TRASK, *supra* note 7, at 116–17 (critiquing the Western historian's telling of Hawaiian history: "[Western historians] had said that the Americans 'liberated' the Hawaiians from an oppressive 'feudal' system. By inventing a false feudal past, the historians justify – and become complicitous in – massive American theft.").

[22] Haunani-Kay Trask writes:

> Which history do Western historians desire to know? Is it to be a tale of writings by their own countrymen, individuals convinced of their "unique" capacity for analysis, looking at us with Western eyes, thinking about us within Western philosophical contexts, categorizing us by Western indices, judging us by Judeo-Christian morals, exhorting us to capitalist achievements, and finally leaving us an authoritative-because-Western record of their complete misunderstanding?
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> All of this has been done already. Not merely a few times, but many times. And still, every year, there appear new and eager faces to take up the same telling, as if the West must continue, implacably, with the din of its own disbelief. But there is, as there has been always, another possibility. If it is truly our history Western historians desire to know, they must put down their books, and take up our practices: first, of course, the language, but later, the people, the 'āina, the stories. Above all, in the end, the stories. Historians must listen; they must hear the generational connections, the reservoir of sounds and meanings. . . .
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> Our story remains unwritten. It rests within the culture, which is inseparable from the land. To know this is to know our history.

TRASK, *supra* note 7, at 120–21.

[23] *See* sources cited *supra* note 7 (listing just a few of the notable works by prominent Hawaiian scholars).

[24] *See, e.g.,* TRASK, *supra* note 7.

direction of former Chief Justice Richardson, considered Kingdom law to be foundational and essential in the formulation of land law in the Territory and the State of Hawai'i.[25] We certainly think that if anyone wanted to argue against the Richardson court, the forty-year-old Hawaiian sovereignty movement, and the entirety of that Native scholarship, he would want a champion who could competently string an essay together.

If willful ignorance was the writer's only fault, that alone would be grievous enough to question its publication in a university law review. But Burns makes very strange assumptions about the Kingdom of Hawai'i, essentially considering it nothing more than some kind of tribal government, barely alive and scarcely legitimate among the other nation-states in the nineteenth century world. This is not a new interpretation—although when Lorrin Thurston and Sereno E. Bishop were saying exactly the same things in the 1880s, they were facilitating a political subversion and attempting to destabilize the Kingdom's government.[26] A myriad of research and scholarship in the twenty-first century, including a deep knowledge and understanding of Hawaiian political thought, and a wide look at how the rest of the world (not just one political party in America) viewed the Hawaiian Kingdom, shows a respect and admiration for the island nation and its monarchy.[27] And of course, we know how the Kānaka felt about their government because they expressly communicated their feelings in the great petitions against annexation in 1897.[28]

Burns acknowledges none of this, and because he does not, his arguments about the Kingdom's political culture at the time of the takeover make no sense. On page 238, he attempts to show that the electorate and the political parties that inhabited the legislature were helpless—therefore ineffectual—after the Bayonet Constitution was foisted on the Kingdom:[29]

> In 1893, before the overthrow, Hawaiians did not vote as a unified group, did not control the Legislature, did not have the votes in the Legislature to change the 1887 Constitution, did not control the Cabinet, did not control the Hawai'i

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[25] *See, e.g.*, Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982); State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977); Palama v. Sheehan, 50 Haw. 298, 440 P.2d 95 (1968); *see also* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 7 (discussing and analyzing earlier and current cases based on Hawaiian Kingdom law, as well as on Hawaiian tradition, custom, and usage).

[26] *See generally* Bishop, *supra* note 21; THURSTON, DOLE & FARRELL, *supra* note 2.

[27] *See, e.g.*, BEAMER, *supra* note 6; Jonathan Kamakawiwoole Osorio, *Ku'e and Ku'oko'a (Resistence and Independence): History, Law, and Other Faiths*, 1 HAW. J.L. & POL. 92 (2004); SAI, UA MAU KE EA – SOVEREIGNTY ENDURES, *supra* note 7; SILVA, *supra* note 7; Ing-Sai, *supra* note 20.

[28] SILVA, *supra* note 7 (documenting widespread resistance by Kānaka Maoli to political, economic, linguistic, and cultural oppression).

[29] Burns, *supra* note 1, at 238.

> Supreme Court and did not control the economy. The Queen was the nominal Chief Executive. The Legislature controlled the Cabinet and the Cabinet controlled the Queen.[30]

It is certainly true that Native Hawaiians did not have sole control of the legislature, but no political party did in 1892.[31] By the 1880s, the Hawaiian Kingdom was a fully functioning bilingual nation-state that had achieved recognition as an independent and sovereign state in 1843 and welcomed an ethnically diverse citizenry.[32] This was a parliamentary system and a number of political parties, *none of which* were made up of any one race, contested for influence and political power. To imply that Kānaka were the only ones interested in amending or abrogating the Bayonet Constitution is untrue, and was noted by James Blount in 1894 and Ralph Kuykendall more than fifty years ago.[33] It is true that Hawaiians did not vote as a unified group, but neither did haole nor Chinese for that matter. The Kingdom was a liberal constitutional monarchy that, until the Bayonet Constitution, had encouraged all ethnicities to become subjects and to exercise political power.[34]

Even after July 1887, when the new constitution became the governing document, the electorate debated long and hard about whether to sign on as voters or to boycott the special election in September of that same year. The numbers of Kānaka voters plummeted in that first special election, even though every male of European descent was encouraged and allowed to vote whether he was an actual citizen or not. Had the numbers of Hawaiian voters remained low in the elections of 1890 and 1892, it might be possible to argue that the Kānaka Maoli had given up and could no longer exercise political power. But according to Hawai'i State Statistician Robert Schmitt, while only 22% of Hawaiians voted for representative in

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[30] *Id.*

[31] *Id.* at 236–38 (asserting that Hawaiians had lost control of the Kingdom prior to 1893 by looking at elected offices along racial lines). *See* VAN DYKE, *supra* note 6, at 149 (explaining that the February 1892 election "did not break down along racial lines" and that it produced a strange assembly, in which no party had a majority).

[32] BEAMER, *supra* note 7, at 15–16, 176–80 (describing the evolution of the Hawaiian Kingdom as a nation state); Willy Kauai, The Color of Nationality: Continuities and Discontinuities of Citizenship in Hawai'i 103–51 (2014) (unpublished Ph.D. dissertation, University of Hawai'i at Mānoa) (on file with authors) (discussing international recognition of the Hawaiian Kingdom and citizenship laws in the Kingdom prior to the 1887 Bayonet Constitution).

[33] *See* James Blount, Report of the Commissioner to the Hawaiian Islands (Blount Report), Exec. Doc. No. 47, 53d Cong., 2nd Sess. (July 17, 1893); KUYKENDALL, THE HAWAIIAN KINGDOM, 1874–1893: THE KALAKAUA DYNASTY, *supra* note 18.

[34] Kauai, *supra* note 32, at 109–51; COFFMAN, *supra* note 2, at 59–68.

1887, those numbers rose to 64% in 1890.[35] Indeed, while deeply offended by the constitution, Kānaka Maoli demonstrated an immense respect for law itself and participated fully in political organizing before and after the takeover.[36]

David William Earle's 1993 thesis traces the emergence of political parties led by Kānaka Maoli and by haole who were outraged by the content and the way in which the Bayonet Constitution had come into existence.[37] Though not always in agreement with each other, the Hui Kālai'āina and the Mechanics and Workingman's Political Protective Union were able to coalesce by 1890 into a political coalition called the National Reform Party, which quite successfully challenged the wealthy planter-dominated Reform Party in 1890 and 1892.[38]

But Burns thought that this whole story of the overthrow was the failure of one group, the Kānaka Maoli, to properly exercise their political majority and prevent the takeover. Speaking from a pulpit of incredible ignorance while manifesting white privilege, perhaps Burns faulted Kānaka Maoli for their lack of xenophobia or the value of aloha itself. This is a truly disturbing and objectionable analysis and ought to be examined in the wake of certain disturbing political trends in the United States. For if Burns is to be taken seriously, then we would have to assume that no black voter should vote for Donald Trump, no white voter for Barrack Obama.[39] We

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[35] Robert C. Schmitt, *Voter Participation Rates in Hawai'i Before 1900*, 5 HAW. J. HIST. 50, 55–56 (1971).

[36] VAN DYKE, *supra* note 6, at 150 (describing his view that "Native Hawaiians had effectively wrested control of the Kingdom from those who had foisted the Bayonet Constitution on the Kingdom, and efforts were underway during the years that followed to reassert a stronger role for the Monarchy.").

[37] David William Earle, Coalition Politics in Hawai'i—1887–90: Hui Kālai'āina and the Mechanics and Workingmen's Political Protective Union (1993) (unpublished M.A. thesis, University of Hawai'i at Mānoa) (on file with authors).

[38] *Id.* at v. Hui Kālai'āina (the Hawaiian Political Association) and the Mechanics and Workingman's Political Protective united to form the National Reform Party and won the 1890 election. *Id.* at v, 130, 139. The National Reform Party's objective was to "maintain the independence of the islands and improve the situation of Native Hawaiians and the American and European lower and middle classes." *Id.* See *id.* at 132–33 for the National Reform Party's joint platform, or Declaration of Principles. The National Reform Party was able to organize the Legislature, elect its President, and control its committees, effectively forcing members of the "reform" Cabinet, led by Thurston, to resign. VAN DYKE, *supra* note 6, at 149. The Reform Party represented the interests of American and European elite in Hawai'i. Earle, *supra* note 37, at v.

[39] Of course, this assumption would be false. According to initial exit polls, in 2016, 8% of African-American voters voted for Donald Trump with Hilary Clinton earning 88% of their vote. Alec Tyson & Shiva Maniam, *Behind Trump's Victory: Divisions by Race, Gender and Education*, PEW RESEARCH CENTER (Nov. 09, 2016), http://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-

know this is absurd because political society is much more complex than simply a competition between races. More than that, we know that one's ancestry does not make one into an automaton. And, ultimately, this latest American election will test our hope that a government of diverse peoples, with widely divergent ideologies, is capable of stability and able to be regulated by a common respect for law.

But maybe Burns did not know this. Maybe he thought that some people are deserving of political power and that it really does not matter whether it is secured through patient and persistent advocacy or whether it is permissible for certain ones to seize a government when they are dissatisfied. After all, he pointed out, "a small group of qualified voters who were not Hawaiian initiated the overthrow,"[40] and remarkably neglected to state it would have never been accomplished without the backing of the United States Minister and landing of United States troops on Hawaiian soil.[41]

In the end, the publication of *The Crown Lands Trust* article does credit to no one: not to the writer, not to the scholarship he ignores, and certainly not to the journal that thought this article worth publishing. And while we

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gender-education/. In 2008, the first time Barack Obama ran for president, 43% of white voters voted for Obama while 55% voted for John McCain. *How Groups Voted in 2008,* CORNELL UNIV.: ROPER CTR. FOR PUB. OP. RESEARCH, https://ropercenter.cornell.edu/polls/us-elections/how-groups-voted/how-groups-voted-2008/ (last visited Feb. 18, 2017).

[40] Burns, *supra* note 1, at 238.

[41] Burns only grudgingly acknowledges what the United States admitted in its 1993 Joint Resolution, apologizing for the role the United States played in the 1893 overthrow of the Hawaiian Kingdom. Burns, *supra* note 1, at 252. That resolution, passed by Congress and signed by President Clinton, concedes, among other things:

> Whereas, on January 14, 1893, John L. Stevens (hereafter referred to in this Resolution as the "United States Minister"), *the United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii*;
>
> Whereas, in pursuance of the conspiracy to overthrow the Government of Hawaii, *the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893*, and to position themselves near the Hawaiian Government buildings and Iolani Palace to intimidate
> Queen Liliuokalani and her Government;
>
> * * *
>
> Whereas, *without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms.*

Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1510 (1993) (emphases added).

can say that this article does no great harm if it is not taken seriously, that thought is no comfort in the wake of the latest American presidential inauguration.

The history profession is not free from ideology and bias, and we are well-aware that future professionals will find fault with our contemporary methods and assumptions. Indeed, Jon Van Dyke's book on the Crown Lands makes claims that, as historians, we find wanting in logic, in understanding our country's history, and in his read of the implications of Kingdom law.[42] But Van Dyke did not violate the very important rules of scholarly research.[43] He did not ignore scholarship that did not agree with him. He grappled with it, and we have no doubt that some of his own earlier beliefs were changed as a result of his research and his thinking about that research. That is not only what is missing in Burns' essay. Because of its publication, this hallmark of research and writing, this faith in such an important process, is eroded.

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[42] In a review of Van Dyke's *Crown Lands* book, which was co-authored by one of the authors of this article, we recognized Professor Van Dyke's deep, thorough, and insightful research. Nevertheless, we took Van Dyke to task for suggesting "a limited, almost indifferent approach as a solution: an approach that would have Hawaiians celebrate civil rights gains through federal recognition while accepting our continued subordination as a legally recognized political subclass or native ward of the U.S. in our own homeland." Perry & Osorio, *supra* note 10, at 340.

[43] Indeed, one of the authors of this article praised Van Dyke for "relying heavily on good *Kanaka Maoli* scholarship as well as a very thorough review of court and legislative documents." Perry & Osorio, *supra* note 10, at 332 (footnote omitted).

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

Melody Kapilialoha MacKenzie* & D. Kapua'ala Sproat**

I ka 'ōlelo no ke ola, i ka 'ōlelo no ka make.[1]

Words can heal; words can destroy.

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] *Id.* at 1756.

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

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

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

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

Not surprisingly, a pushback is in full swing and reactionary forces are attempting to resurrect the colonizer's memory of Hawai'i's history and silence the indigenous narrative. The Burns article, intentionally or not, feeds directly into this effort by re-inscribing the old, inaccurate memory.[20] There are numerous problems with this approach. For example, the article relies on dubious sources of authority[21] while ignoring leading experts in the fields of Native Hawaiian history, culture, and politics.[22] The essay also takes facts and events out of context to bolster its claims.[23] Most problematic, however, is that the article reinvigorates the colonizer's narrative which, in turn, undermines Kānaka Maoli legal claims. "Individuals, social groups, institutions, and nations filter and twist, recall

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

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

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

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

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

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

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

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

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

A. Understanding Collective Memory

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

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

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

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

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

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

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

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

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collective context).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OSORIO, *supra* note 10, at ix.

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

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

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

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

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

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

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

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

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

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

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

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

Professor Yamamoto was among the first to consider collective memory's implications for Kānaka Maoli rights and entitlements, centering on the consequences of the 1893 illegal overthrow of the sovereign Hawaiian nation.[48] The overthrow catalyzed not only the suppression of Native Hawaiian culture and language, but also the development of derogatory characterizations of Kānaka Maoli.[49] Native Hawaiians seeking justice for the loss of their government and homelands continue to build their "own new understandings of 'what happened' and 'who [they] were' partly in order to claim 'what is rightfully [theirs].'"[50] This underscores the importance of collective memory in Hawai'i, and how it incorporates ancestral memories[51] to lay a foundation for contemporary Kānaka Maoli legal claims.[52]

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

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

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

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

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

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

B. Collective Memory's Power and Potential

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

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

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

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

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

[55] Hom & Yamamoto, *supra* note 6, at 1764. As Edward Said notes:

> [Stories are] the method colonized people use to assert their own identity and the existence of their own history. The main battle in imperialism is over land, of course; but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future—these issues were reflected, contested, and even for a time, decided in narrative.

EDWARD SAID, CULTURE AND IMPERALISM xii (1993).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[84] Burns, *supra* note 2, at 238.

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

III. I KA ʻŌLELO NO KA MAKE—WORDS CAN DESTROY

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

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

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

A. Dividing the ʻĀina—Kamehameha III's Goal in the Māhele

1. Burns' claims regarding the Māhele are misleading

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

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

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

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

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

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

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

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[88] Burns, *supra* note 2, at 232.

[89] 58 Haw. 106, 566 P.2d 725 (1977).

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

[91] *Id.* at 231–32.

[92] 2 Haw. 715 (Haw. Kingdom 1864).

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

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

[95] *See infra* Section III.A.3.

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

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[96] *See, e.g.*, KAMEʻELEIHIWA, *supra* note 5; BEAMER, *supra* note 5. Beamer's *No Mākou ka Mana* received multiple awards, including the Samuel M. Kamakau Book of the Year Award in 2015 from the Hawaiʻi Book Publishers Association. *See Ka Palapala Poʻokela Awards (2015)*, HAWAIʻI BOOK PUBLISHERS ASSʻN, www.hawaiipublishers.org/awards_archives_2015.html (last visited Apr. 25, 2017); Pakalani Bello, *"No Mākou ka Mana" is Named Hawaiʻi Book of the Year*, I MUA (Apr. 24, 2015), http://www.ksbe.edu/imua/article/no-maakou-ka-mana-wins-samuel-m.-kamakau-award/.

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

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

Id. at 250 (internal citations omitted).

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

2. Native Hawaiian insights regarding the Māhele

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

> Hawaiians traditionally viewed and treated land as a member of their family and clearly not something that could be owned and bought or sold.
>
> Land and water were the foundations of their survival; 'āina, that which feeds, and wai, the source of all life. Many of Hawai'i's maka'āinana, the commoners who held this traditional view and practiced its resultant principles, found themselves strangers in their own land during the transition from their traditional view, lifestyle and relationship with the land, to this new and foreign commodity driven concept necessitated for the most part by ever increasing and dominating western influences.[99]

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

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

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

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

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

[101] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[112] *Id.* at 282.

[113] *Id.*

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

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

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

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

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

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

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

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

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

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

[120] BEAMER, *supra* note 5, at 144.

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

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

In addition to the invaluable context provided by the indigenous narrative, including the complexity of the Māhele process, primary authority from the nineteenth century imparts additional support for the fact that one of Kamehameha III's principal goals in the Māhele was to protect Native Hawaiian land from foreigners.[123] For example, the Privy Council minutes at the root of the article's assertion of the King's self-interest appear to be those taken at a meeting of the Council on December 18, 1847.[124] That day in Council, the King is recorded as speaking three times.[125] The Council was in the process of voting to approve the seven general rules and principles to guide the impending land division between the chiefs and Kamehameha III as drafted by Justice William Little Lee.[126]

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

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[121] *Id.*

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

[123] VAN DYKE, *supra* note 3, at 43.

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

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

[126] *Id.* at 280, 304.

[127] *Id.* at 304.

[128] *Id.* at 284.

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

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

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[129] *Id.* at 304.

[130] *Id.* at 304–06.

[131] *Id.* at 306 (emphasis added).

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

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

[134] *Id.*

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

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

[137] 58 Haw. 106, 566 P.2d 725 (1977).

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

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

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

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

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

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730–32.

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

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

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

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

1850.[143] Moreover, Royal Patents, which were given to ali'i and others designating their title to lands, and Kuleana claims were affirmed by the courts of the era as direct acts of the King himself.[144]

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

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[143] Act of Aug. 6, 1850, *reprinted in* 1850 PENAL CODE OF THE HAWAIIAN ISLANDS 202–04 (1850) ("Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges"); *see* MacKenzie, *supra* note 5, at 14–16 (discussing the Kuleana Act). Indeed, in the Privy Council discussions on the law that would become the Kuleana Act, the King was adamant that the native tenants should receive not merely land, but recognition of their traditional rights of access and gathering for "a little bit of land, even with an allodial title, if they [the people] were cut off from all other privileges, would be of very little value." Privy Council Minutes, July 13, 1850, 713 (1850), http://punawaiola.org/fedora/get/Punawaiola:720021850001/CompositePDF720021850001 (statement of King Kamehameha III). Although some chiefs objected to including such a clause in the law, eventually "the proposition of the King, which he inserted as the seventh clause of the law, as a rule for the claims of common people to go to the mountains, and the seas attached to their own particular lands exclusively" was agreed to by the chiefs. Privy Council Minutes, Aug. 27, 1850, 763 (1850), http://punawaiola.org/fedora/get/Punawaiola:720021850001/CompositePDF720021850001. The provision under discussion in the Privy Council became section 7 of the Kuleana Act, currently codified at Section 7-1 of the Hawai'i Revised Statutes. *See* HAW. REV. STAT. § 7-1 (2016); David M. Forman & Susan K. Serrano, *Traditional and Customary Access and Gathering Rights*, *in* NATIVE HAWAIIAN LAW, *supra* note 5, at 788–94 (discussing section 7 of the Kuleana Act and cases interpreting the provision).

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

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

[146] *Id.* at 723.

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

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

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[147] *Id.*

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

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

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

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

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

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

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

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

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

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

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

[154] 528 U.S. 495 (2000).

[155] *Id.* at 503.

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

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

B. Separating the Crown Lands from the Native Hawaiian People

A second example of conflicting histories and worldviews is the Burns article's basic premise that there is no explicit recognition, either in U.S. or Hawai'i law, for any separate Native Hawaiian interest in the Crown Lands.[161] To bolster that argument, the article looks to the colonizer's law—including the Joint Resolution of Annexation[162] and the Organic Act[163]—which facilitated the United States' appropriation of Hawai'i's sovereignty and significant land holdings, in attempt to deny Native Hawaiians any interest in the Crown Lands. In doing so, it ignores and twists Native Hawaiian history and traditions, including the practice of mālama (to care for), attempts to downplay the significance of other legal instruments that have already recognized a Native Hawaiian interest in the Crown Lands, and misinterprets key concepts about native sovereignty. This undermines the collective memory of the injustices committed against Native Hawaiians by seeking to discredit the developing memory and resurrect the old, inaccurate memory to undercut Native Hawaiian legal claims to the Crown Lands.

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

[158] *Id.*

[159] *Id.*

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

[161] Burns, *supra* note 2, at 247–51.

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

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

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

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

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

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

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

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

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

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

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

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

That manufactured history continued to hold sway as Queen Lili'uokalani advanced her claims to the Crown Lands in the halls of the U.S. Congress[169] and, finally, in the U.S. Court of Claims.[170] None of her attempts were successful and, eventually, the U.S. Court of Claims determined that the Crown Lands belonged to the office of the Crown and not to the individual monarchs.[171] The court upheld the confiscation of the Crown Lands and their eventual transfer to the United States by concluding:

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

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

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

[168] Lindsey, *supra* note 12, at 251.

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

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

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

[172] *Id.* at 428.

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

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

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

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

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[174] *Id.* at 457.

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

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

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

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

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

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

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

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

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

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

> [T]he support of the public schools and other public educational institutions, *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended,* for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use.[183]

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

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

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

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

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

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

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

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

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

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

[186] *Id.*

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

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

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

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

> These trusts reflect the reciprocal duties of the ali'i and the maka'āinana (common people). Traditionally, the maka'āinana had the duty to care for the land, and wise management of the people and land enhanced the right of the ali'i to rule. Productive use of the land and mutual cooperation ensured the right of the maka'āinana to live off the land and use its resources. Although the traditional social structure was dramatically altered through the creation of private property rights . . . the creation of these trusts suggests that the ali'i continued to understand and attempted to fulfill their obligation to provide for the needs of their people.[193]

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

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[188] Lindsey, *supra* note 12, at 257.

[189] *Id.*

[190] *Id.* at 250.

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

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

[193] *Id.* (footnotes omitted).

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

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

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

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[194] *Id.* at 1172–73.

[195] *Id.* at 1203.

[196] *Id.* at 1206.

[197] *Id.* at 1196.

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

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

[200] Apology Resolution, *supra* note 18.

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

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

neglected even to address the Hawai'i Supreme Court's interpretation of that federal legislation.[203]

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

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

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

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

[204] 556 U.S. 163 (2009).

[205] *Id.* at 173–76.

[206] *See id.*

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

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

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

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

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

The irony here is that the Apology Resolution is a joint resolution of the U.S. Congress, which the Burns article dismisses as "no more than the personal opinions of those who voted for it or approved it."[214] Should not then the 1898 Joint Resolution of Annexation also be viewed with similar suspicion? Indeed, while the piece assumes the validity of the Joint Resolution of Annexation,[215] questions about the legitimacy of U.S. acquisition of Hawai'i through such a resolution, instead of a treaty, were raised and actively debated in Congress in 1898.[216] The ineffectiveness of such a resolution to transfer Hawai'i's sovereignty and lands to the United States is the subject of ongoing comment and criticism and underpins the modern Hawaiian independence movement.[217]

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

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

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

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

[214] Burns, *supra* note 2, at 251.

[215] *Id.* at 249–51.

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

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

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

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[218] Burns, *supra* note 2, at 252.

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

[220] 492 U.S. 408 (1989).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[225] Burns, *supra* note 2, at 253.

[226] 528 U.S. 495 (2000).

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

[228] *Rice*, 528 U.S. at 504–05.

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

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

C. Defining and Dividing Kānaka

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

In doing so, the article misses a crucial point—one that Professor Van Dyke deeply understood[235]—that legal definitions do not, and indeed cannot, encompass the rich culture, history, or essence of a people; or, most importantly, how a people identify themselves. Preeminent Native Hawaiian scholar and Ethnic Studies professor Davianna Pōmaika'i McGregor has explained the native perspective:

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

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[230] *Id.*

[231] *Id.*

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

[233] Burns, *supra* note 2, at 214–17.

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

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

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

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

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

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

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

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

[237] PUKUI, *supra* note 1, at 56.

[238] *Id.*

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

[240] Burns, *supra* note 2, at 214–17.

[241] *Id.* at 214–15, 217.

[242] *Id.* at 214–17.

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

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

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[243] *Id.* at 215–17.

[244] *Id.* at 215 (citations omitted).

[245] *Id.* at 217.

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

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

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

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

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

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

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

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

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

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

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

Hawai'i law, in part because of the incorporation of the HHCA into state law,[255] identifies a "native Hawaiian" using the blood quantum definition, but uses the term "Hawaiian" more generally for those of indigenous descent. The Hawai'i State Constitution does not specifically define "Hawaiian" or "native Hawaiian," although the terms appear together in Article XII, sections 5 and 6.[256] Such definitions were entrusted to the legislature, which enacted Act 196 governing the Office of Hawaiian Affairs in 1979, based on the new Constitutional mandate.[257] Act 196, which was codified as chapter 10 of the Hawai'i Revised Statutes, included definitions for "Hawaiian" and "native Hawaiian" in substantially the same form as those proposed during the Constitutional Convention,[258] with the added requirement that aboriginal descendants show continued residence in Hawai'i.

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

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[254] VAN DYKE, *supra* note 3, at 247.

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

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

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

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

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

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

2. The Burns article's use of "native Hawaiian" resurrects the colonizer's narrative to minimize the claims of Hawai'i's indigenous people

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

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

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

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

[262] *See, e.g.*, Derek H. Kauanoe & Breann Swann Nu'uhiwa, *We Are Who We Thought*

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

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

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

[263] VAN DYKE, *supra* note 3, at 1.

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

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

[266] *Id.* at 1775.

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

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

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

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

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

[272] *Id.*

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

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

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

IV. I KA ʻŌLELO NO KE OLA—WORDS CAN HEAL

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

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[273] *Id.* at 1773.

[274] *Id.* at 1775.

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

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

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

Native Hawaiian legal claims.[278] I ka ʻōlelo no ke ola, i ka ʻōlelo no ka make.[279]

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

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

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

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[278] *See supra* Part II.B.1.

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

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

[281] *See supra* Part III.

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

[283] *See supra* Section II.B.1.

[284] *See supra* Section II.B.1.

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

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

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

Tales from the Dark Side of the Archives: Making History in Hawai'i Without Hawaiians

Avis Kuuipoleialoha Poai*

[H]e makemake ko'u e pololei ka moolelo o ko'u one hanau, aole na ka malihini e ao mai ia'u i ka mooolelo o ko'u lahui, na'u e ao aku i ka moolelo i ka malihini.

I want the history of my homeland to be correct, it is not the foreigner who will teach me the history of my people, it is I who shall teach the foreigner.

—Samuel M. Kamakau[1]

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I have adopted modern orthography for Hawaiian language ('Ōlelo Hawai'i) terms in this article where applicable, using the 'okina, representing a glottal stop, and the kahakō to denote lengthening of the vowel sound. However, I do not add these markers when quoting original materials from nineteenth-century court records, laws, and newspapers. Any errors in translations, orthography, and spelling are my own.

The title of this article, which was somewhat cheekily inspired by the television series, *Tales from the Darkside*, has a nuanced meaning that I invite readers to reflect upon. The opening sequence of the show began with this rather ominous message:

> Man lives in the sunlit world of what he believes to be reality. But there is, unseen by most, an underworld, a place that is just as real, but not as brightly lit . . . a darkside.

Tales From the Darkside (Laurel Entm't, Inc. & Tribune Entm't 1983).

[1] Samuel M. Kamakau, *Hooheihei ka Nukahalale,* KE AU OKOA, Oct. 16, 1865, at 1.

I. INTRODUCTION

In today's world, the ways in which Native Hawaiian[2] history has been framed drastically departs from the way Hawaiian historian Samuel Kamakau envisioned and advocated to Hawaiian Kingdom citizens in 1865—foreigners should not be teaching Hawaiians about their own history—and yet, that is exactly what has happened. For Native Hawaiians, our continuing struggle for self-determination has often involved questions relating to our history and a critique of how we have been represented or excluded from various accounts. As noted by scholar Linda Tuhiwai Smith, "Under colonialism indigenous peoples have struggled against a Western view of history and yet been complicit with that view. We have often allowed our 'histories' to be told and have become outsiders as we heard them being retold."[3]

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[2] The terms "Native Hawaiian," "Kanaka 'Ōiwi," and "Kanaka Maoli," are used interchangeably in this article. "Kanaka Maoli" is defined as a "[f]ull-blooded Hawaiian person." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127 (rev. & enlarged ed. 1986). In modern times, it refers to all persons of Native Hawaiian ancestry without regard to blood quantum. *See* Melody Kapilialoha MacKenzie, *Introduction*, *in* NATIVE HAWAIIAN LAW: A TREATISE xi, xiv–xv (Melody Kapilialoha MacKenzie et al. eds., 2015). The term "'Ōiwi" is defined as "Native, native son." PUKUI & ELBERT, *supra*, at 280.

[3] LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES 33 (2005).

Chief Judge James S. Burns (retired) is a respected jurist with an illustrious 30-year law career.[4] He is known for his "calm demeanor," and his "common-sense approach to the law and his ability to treat people with dignity and respect."[5] Mindful of his many contributions and the well-deserved public accolades he has garnered, I worried about the potential ramifications for contradicting the history posited by Judge Burns in his article, *The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?*[6] Indeed, Native Hawaiians have been taught to respect their elders: "I pa'a i kona kupuna 'a'ole kākou e puka."[7] This poetical saying, known as an 'Ōlelo No'eau, is said to remind us to respect the senior line because they came first.[8] And while Judge Burns is entitled to our profound gratitude for his many years of service, as a Native Hawaiian, I have an overriding commitment to honor my ancestors, who have for over a century been effectually silenced by outsiders telling the history of our own people.

Judge Burns, like many others, recounts a Westerner's view of Native Hawaiian history where Native Hawaiians existed in a feudal and war-ridden society with ali'i and mō'ī (king) exercising absolute authority.[9] According to this Western narrative, once Europeans arrived, Native Hawaiians had little power or control, were forced to adopt European-American laws, and were ultimately betrayed by their own leaders.[10]

How this oft-repeated story has become so deeply entrenched in our legal system requires us to look critically at the sources upon which many historians rely and the sources they overlook. Quite simply, the available corpus of Hawaiian-language materials, hand-written and published, is the largest of any native language in the Pacific, and the largest of any indigenous language in the United States and perhaps in all of native North America.[11] The corpus exceeds a million pages of printed text[12]—the

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[4] *End of Judge Burns' Career Posits a Lesson*, HONOLULU ADVERTISER, Apr. 20, 2007, http://the.honoluluadvertiser.com/article/2007/Apr/20/op/FP704200332.html.

[5] *Id.*

[6] 38 U. HAW. L. REV. 213 (2016).

[7] MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 136 n.1251 (1983). This 'Ōlelo No'eau is translated as: "Had our ancestress died in bearing our grandparent, we would not have come forth." *Id.*

[8] *Id.*

[9] *See* Burns, *supra* note 6, at 217–23.

[10] *Id.* at 214, 232–38, 253.

[11] *See* discussion *infra* Section III.C.; *see also* M. PUAKEA NOGELMEIER, MAI PA'A I KA LEO: HISTORICAL VOICE IN HAWAIIAN PRIMARY MATERIALS, LOOKING FORWARD AND LISTENING BACK 1 (2010); Noelani Arista, *Ka Waihona Palapala Manaleo: Research in a Time of Plenty, Colonialism and Ignoring the Hawaiian Language Archive*, *in* INDIGENOUS TEXTUAL CULTURES (forthcoming 2017) (manuscript at 1) (on file with author).

remainder, which is hand-written and located in various archives locally, nationally, and internationally, is left largely uncharted. It is estimated that a very tiny fraction, less than one percent of the available corpus, has been translated and used.[13] Entire books of history have been extracted from this tiny fraction of the available corpus[14]—the rest has been left to "obscurity" in the "dark side" of the archives.

The history that has been gleaned from this tiny fraction has become known as the "authoritative canon" and the so-called foundation of Hawaiian knowledge and history.[15] However, the translations upon which these source materials were founded upon are flawed—the original works were simplified, reordered, and decontextualized to fit and reinforce Western intellectual paradigms.[16] Worse still, the authoritative canon comprising the "entirety" of Native Hawaiian history eclipses the larger body of source materials available.

The inherent problem of an ignored Hawaiian language repository "is structural and attitudinal."[17] Scholars today interested in Hawai'i history are not faced with archival destruction, as has occurred in many Native American and other indigenous sites of colonial contest, and is currently occurring in our world today.[18] Instead, these sources have been devalued, ignored by scholars, while colonial processes over time have resulted in what Ngũgĩ wa Thiong'o refers to as a cultural bomb:

> The effect of a cultural bomb is to annihilate a people's belief in their names, in their languages, in their environments, in their heritage of struggle, in their unity, in their capacities and ultimately in themselves. It makes them see their past as one wasteland of nonachievement and it makes them want to distance themselves from that wasteland.[19]

Judge Burns, like so many other historians and jurists before him, whether through honest ignorance or purposeful omission, has relied on research that comprises only a small portion of what is available—the result: deeming this research as "sufficient" to represent the "official" history of the Native Hawaiian people. Unfortunately, however, this is not

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[12] *See* NOGELMEIER, *supra* note 11, at XIII, 2.

[13] *Id.* at 2.

[14] *Id.* at XIII.

[15] *Id.*

[16] *Id.* at 29.

[17] Arista, *supra* note 11, at 2.

[18] *Id.* at 1.

[19] NGŨGĨ WA THIONG'O, DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE 3 (1989).

the biggest problem with the article's selective iteration of Hawai'i's history.

Indeed, as an initial matter, the article relies on inadequate "historical sources" to validate its Western narrative. Citation to such sources as a seventh-grade textbook[20] and HawaiiHistory.org[21] does not meet the requisite academic rigor commensurate with a scholarly legal publication. Nor does his extensive quotation of outdated secondary sources such as a 1993 National Park Service report about three historic sites on Hawai'i island[22] meet the standard of citing relevant authority to support a position being advocated that impacts an entire native population. Worse still is the complete omission of recent relevant authority from leading experts in the fields of Native Hawaiian history, culture, and politics.[23] One can only assume that we are expected to overlook these faults as minor details insofar the article's underlying premise must be true given the author's stature as a well-regarded jurist.

But such a position cannot and should not be supported. For far too long, Native Hawaiians' history has been told by outsiders. It is vital today for Hawaiians to tell their own history—to give life back to the language, history, and knowledge that has been overwritten, hidden, fractured, and destroyed by colonial regimes. As Smith explained:

> Indigenous peoples want to tell our own stories, write our own versions, in our own ways, for our own purposes. It is not simply about giving an oral account or a genealogical naming of the land and the events which raged over

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[20] *See* Burns, *supra* note 6, at 225 n.59, 226 n.70 (referencing *History of the Hawaiian Kingdom*, a seventh-grade textbook); *see also* discussion *infra* Section II.A.1.

[21] *See* Burns, *supra* note 6, at 217 n.21 (relying on the website HawaiiHistory.org to describe "historical facts"); *see also* discussion *infra* Section II.A.1.

[22] *See* Burns, *supra* note 6, at 218 n.22 (referencing and substantially quoting a 1993 National Park Service historic resource study); *see also* discussion *infra* Section II.A.2.

[23] *See, e.g.*, LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? (1992) (deconstructing the Māhele process); SALLY ENGLE MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW (2000) (examining law's colonizing impact as reflected in nineteenth century district court records); JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002) (detailing the history and politics of the Hawaiian Kingdom through 1887); NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004) (documenting native resistance to colonialism in Hawai'i); DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE (2007) (describing the traditional resource management system); KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION (2014) (interrogating ali'i agency through various actions, including the Māhele process); MARIE ALOHALANI BROWN, FACING THE SPEARS OF CHANGE: THE LIFE AND LEGACY OF JOHN PAPA 'Ī'Ī 9 (2016) (providing detailed historical biography of an influential statesman and Hawai'i Supreme Court Justice).

> it, but a very powerful need to give testimony to and restore a spirit, to bring back into existence a world fragmented and dying.[24]

It is believed that when "the truth comes out," we can achieve a small measure of justice and this will enlighten our decisions about the future.[25] For indigenous peoples, however, "history is mostly about power. It is the story of the powerful and how they became powerful, and then how they use their power to keep them in positions in which they can continue to dominate others."[26] And while it is a truism that history is written by the winners, it is misleading because in both history and law "it is the *writer* who determines who wins and who loses by setting the questions to be asked, by including and excluding evidence, by defining and assessing significance, in short, by controlling the narrative version of the past that will stand for the fleeting past events."[27]

In law, whether it is a scholar or jurist, their concept of history, as embodied in legal storytelling and perpetuated by the courts in so-called "neutral decisions," continues to "obfuscate important histories, particularly for oppressed peoples, in a search for finite evidence"[28] insofar as "[f]acts are assembled to tell a story whose conclusion is determined by others."[29] Later, these histories become enshrined as stare decisis and later interpreted, particularly by jurists and legal practitioners, as the "official history" of a people. This article traces the origins of this practice, and the ramifications for subscribing to this hegemonic methodology.

In Part II, I describe at length the varying (but thematically similar) professional research standards that law students, attorneys, scholars, and judges are expected to meet—especially in the context of both "doing" and "using" history. I then demonstrate how the article at issue does not objectively meet these standards when you carefully evaluate the underlying probity of cited sources contained in the article.

In Part III, drawing upon the insights developed by scholars of critical outsider jurisprudence, indigenous studies, critical archival studies, and

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[24] SMITH, *supra* note 3, at 28.

[25] *Id.* at 34.

[26] *Id.* Indeed, "[h]istory, it is often suggested, is written by the winners. Yet losers also write history; they just don't get translated." ROBERT I. FROST, THE NORTHERN WARS: WAR, STATE AND SOCIETY IN NORTHEASTERN EUROPE, 1558–1721, at 14 (2000).

[27] Eric H. Reiter, *Fact, Narrative, and the Judicial Uses of History: Delgamuukw and Beyond*, 8 INDIGENOUS L.J. 55, 56 (2010) (emphasis added).

[28] Jeremiah Chin, *Red Law, White Supremacy: Cherokee Freedmen, Tribal Sovereignty, and the Colonial Feedback Look*, 47 J. MARSHALL L. REV. 1227, 1230 (2014).

[29] Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 646.

historiography, I analyze the histories that have been told about Native Hawaiians by attorneys, judges, and scholars. I start by conceptualizing "Law as an Archive"—a repository of historical knowledge that contains records that must be critically evaluated. To do this, we must unearth the embedded historical record contained in statutes and case law, and challenge the teleological narratives that it produces. In doing so, we see reflected in these records decisions regarding what is "pertinent" and what is "irrelevant." We see how law both develops and declares its own authority while obfuscating and sanctioning its own records. Moreover, we see how law perpetuates the continued institutional support for dominant viewpoints in the endorsement of these one-sided histories, and how law has been used to effectually silence ʻŌiwi voice. Although I briefly critique several popular historical works, including Gavan Daws' *Shoal of Time*, and Ernest Andrade's *Unconquerable Rebel*, I pay particular attention to a source that has long been relied upon by historians and scholars: Ralph S. Kuykendall's *The Hawaiian Kingdom*.

II. "THAT'S ONE FOR THE HISTORY BOOKS": APPLICABLE PROFESSIONAL RESEARCH STANDARDS FOR STUDENTS, ATTORNEYS, SCHOLARS, AND JUDGES

Haʻa hoʻi ka papa; ke kāhuli nei.

Unstable is the foundation; it is turning over.[30]

For purposes of clarification, my article does not focus on the substantive errors contained in Judge Burns' article—indeed, my colleagues tackle those complex issues separately.[31] Instead, my approach is guided by the following ʻŌlelo Noʻeau: "Haʻa hoʻi ka papa; ke kāhuli nei." This means, if the foundation is unstable, it will topple over.[32] In like fashion, at the heart of Judge Burns' article exists a flawed legal history that is largely supported by sources that are not only questionable, but lack credibility. Once these sources are stripped away, many of his arguments crumble.

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[30] PUKUI, *supra* note 7, at 49 n.390.

[31] Melody Kapilialoha MacKenzie & D. Kapuaʻala Sproat, *Conflicting Histories: Reclaiming Hawai'i's Crown Lands Trust in Response to James S. Burns*, 39 U. HAW. L. REV. 481 (2017); Jonathan Kamakawiwoʻole Osorio & B. Kamanamaikalani Beamer, *Sullying the Scholar's Craft: An Essay and Criticism of Judge James S. Burns'* Crown Lands Trust *Article*, 39 U. HAW. L. REV. 469 (2017); Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court's Narrative of Hawai'i's Past*, 39 U. HAW. L. REV. 631 (2017).

[32] *See* PUKUI, *supra* note 7, at 49 n.390.

Denouncing another scholar's work requires careful consideration. Indeed, because of the author's stature as a respected jurist, and because his article was selected for publication in a law review journal[33] sponsored by the only law school in the State of Hawai'i, it is bestowed with the imprimatur of authoritativeness. But it is for this exact reason that it must be confronted head on—this article may subsequently be relied upon by the unwary scholar, student, practitioner, or jurist.

To competently address this article requires us to first examine the research standards applicable to our profession. In this case, it is best to start with the professional standards that are expected from legal scholars in academia since Judge Burns opted to publish this article in a law review. According to Professor Roger C. Cramton, "law school is more than a place that trains men and women to plead causes and to advise clients; it is a place for dialogue, for reflection, for definition and comparison of

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[33] Some might argue that the very publication of this article is systemic of a larger institutional issue. Specifically, the problem lies squarely with legal academia's scholarly journals which are overwhelmingly student-led and edited. Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 LEWIS & CLARK L. REV. 901, 909 (2006) ("[P]retty much everyone in the academy knows that what law professors do can't really be called 'scholarship' because there are no quality standards . . . ."). One of the common criticisms directed toward law review articles is that "[s]tudent editors lack the knowledge and experience to edit articles and often do not understand the articles they are editing." Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 15 (2013); Robert Weisberg, *Some Ways to Think About Law Reviews*, 47 STAN. L. REV. 1147, 1149 (1995) ("How can second-year graduate students with no formal training in research scholarship choose and edit the work that represents the highest accomplishments of their own professors?"); Roger C. Cramton, *"The Most Remarkable Institution": The American Law Review*, 36 J. LEGAL EDUC. 1, 7–8 (1986) ("Law today is too complex and specialized; and legal scholarship is too theoretical and interdisciplinary. The claim that student editors can recognize whether scholarly articles make an original contribution throughout the domain of the law is now viewed by legal scholars as indefensible.").

Another criticism is that the lack of impartiality has led to the selection of articles not based on merit but rather on author prestige. *See* Wise, *supra*, at 21; Leo P. Martinez, *Babies, Bathwater, and Law Reviews*, 47 STAN. L. REV. 1139, 1142 ("[A]rticles are chosen on the basis of the perceived prestige of the author . . . ."). This can result in other related issues insofar the system thus encourages some authors to "be lazy and not produce their best work because they know student editors will correct deficiencies in their articles for them . . . ." Wise, *supra*, at 21 (first citing Jonathan Mermin, *Remaking Law Review*, 56 RUTGERS L. REV. 603, 605–06 (2004); and then citing John P. Zimmer & Jason P. Luther, *Peer Review as an Aid Selection in Student-Edited Legal Journals*, 60 S.C.L. REV. 959, 962–63 (2009)). Regardless of what occurred with Judge Burns' article, the failure to meet professional standards ultimately rests with the author—not students. It is wholly inappropriate to delegate such responsibility or attribute any deficiencies to students.

values."[34] A quality law school cultivates an environment where a community of scholars can be devoted to the inquiry and development of "new ideas and values concerning law, legal institutions, and the never-ending quest for justice."[35] The expression of these ideas and values are reflected in the careful development of scholarship, which is, according to Professor Anthony T. Kronman, "an antidote to the cynical carelessness about truth that advocacy encourages."[36] Advocacy, the "construction of a convincing or persuasive argument" is a skill central to law school teaching.[37] The defining goal of advocacy is "the production of conviction rather than knowledge[,]"[38] insofar as the interest is in persuading an audience of the "truth of the beliefs [the advocate] wants them to accept."[39] "Advocacy is distinctive, not because it is wholly unconcerned with the truth, but because it is concerned with truth only as an aid to persuasion . . . ."[40] For "powerful psychological reasons," the advocate has to persuade himself of the truth of what he wishes others to accept.[41]

Thus, according to Kronman, law teachers have a "moral responsibility . . . to do what they can to prevent the indifference to truth that advocacy entails from hardening into a cynical carelessness about efforts to discover the truth concerning the various aspects of human social life that the law encompasses."[42] Scholarship, the "antidote" to this carelessness, is premised on "inquiry devoted to the discovery of truth."[43] An ethical scholar "seeks knowledge for its own sake, not for some further purpose"[44] because the "goal of scholarship" is to "understand the world as it truly is . . . ."[45] The best and most meaningful scholarship "emerges from a community of scholars that functions in the way that only the best universities can: through an endless process of discovery, reflection, and

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[34] Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 2 (1986) (referencing a speech that Cramton gave in 1985).

[35] *Id.*

[36] Anthony T. Kronman, *Foreward: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 967 (1981).

[37] *Id.* at 961.

[38] *Id.* at 963.

[39] *Id.* at 961.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 965.

[43] Cramton, *supra* note 34, at 3.

[44] Kronman, *supra* note 36, at 967.

[45] *Id.* at 968.

dialogue concerning ideas, facts, and values carried on in an atmosphere of mutual support and understanding."[46]

It is within this community of scholars that I hope to spur a "process of discovery" or perhaps a moment of meaningful reflection for those who have written about the history of Native Hawaiians. While I and others readily acknowledge that "any scholarly achievement is partial, one-sided, transient, and inevitably influenced in its inception and execution by the scholar's habits, preferences, [and] values[,]"[47] it is critical that we also recognize "that every scholarly endeavor, no matter what its subject, aims to state something true . . . ."[48] As Professor Kronman expressed:

> [T]ruth is a common meeting ground . . . . and the affirmation of its value is, in an important sense, an affirmation of the ideal of community . . . . If one values community—and much of human life would be pointless if one did not—it is important to care about the truth, for a commitment to truth is one of the things that most powerfully and effectively express the idea of our common humanity and sustain us in our efforts to achieve it.[49]

What does it mean, however, to devote yourself to the "discovery of truth?"[50] What standards do we employ as scholars in our endeavor to state "something true"? Before we answer this seemingly easy question, however, perhaps it is best to start from the beginning. As legal scholars and practitioners, we all started as law students—as such, what is expected from them?

Attorneys are expected to possess a "specific set of skills and values upon entering the profession of law[,]" and law schools in turn must "teach these skills and values in the legal education process."[51] From the very

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[46] Cramton, *supra* note 34, at 3.

[47] Kronman, *supra* note 36, at 967.

[48] *Id.*

[49] *Id.* at 966–67.

[50] *Id.* at 967 (stating that inquiry should be devoted to the discovery of truth).

[51] Bryan F. Taylor, *Through the Looking Glass: Perceptions on the Law School Learning Experience*, 61 LOY. L. REV. 275, 280 (2015). According to the American Bar Association, there are ten fundamental lawyering skills necessary for competent lawyering: problem solving, legal analysis, legal research, factual investigation, communication, counseling clients, negotiation, advising clients about litigation and alternative dispute-resolution procedures, organization and efficient management of legal work, and recognizing and resolving ethical dilemmas. A.B.A. TASK FORCE ON LAW SCH. & THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT–AN EDUCATIONAL CONTINUUM 135 (1992). Since that time, other reports were published expanding and furthering the findings of the 1992 report. *See, e.g.*, ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

beginning, law students are inculcated to "think like an attorney."[52] For law students across the United States, one of the first places they learn how to apply this skill[53] is in legal research, which is part of the required first year curriculum.[54] In legal research, students are taught about the types of primary and secondary legal authorities and the various methodologies for accessing these materials.[55] Students are not only taught how to locate relevant legal authority, they are also taught how to critically evaluate it. Over time, students are taught to "probe the text" and take a critical attitude toward everything they read—to "ask questions, play devil's advocate, look for contradictions, omissions, mistakes."[56] When students are learning how to assess the value of secondary authorities, they are taught to ask the following types of questions: "Does the writer have a comprehensive grasp on the literature, *i.e.*, does the writer cite germinal and recent sources, as well as other relevant evidence, experiences, and/or information essential to the issue? Is the information accurate and directly relevant to the question at issue?"[57] In sum, students are expected to know: 1) how to find relevant legal authority; and 2) how to critically evaluate legal authority.[58]

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[52] Taylor, *supra* note 51, at 295 (explaining that some law school curricula are designed to teach students "how to think" and not "how to do").

[53] As explained by a former law student, one part of the law school curriculum that taught students how to "think like an attorney," was legal research and writing: "I think research and writing are essential to practicing law . . . . It does as far as you need to reason and logically work out issues, and decide what's relevant in a fact pattern." *Id.* at 296 (quoting interview).

[54] AM. BAR ASS'N, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010, at 15 (Catherine L. Carpenter ed., 2012) (noting that the standard 1L curriculum includes Legal Research and Writing).

[55] Over the years, students have used a wide-range of legal research texts to learn these skills, including: STEVEN M. BARKAN, ROY M. MERSKY & DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH (9th ed. 2009); ROBERT C. BERRING & ELIZABETH A. EDINGER, FINDING THE LAW (12th ed. 2005); MORRIS L. COHEN & KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL (12th ed. 2016); CHRISTINA L. KUNZ ET AL., THE PROCESS OF LEGAL RESEARCH (7th ed. 2008); KENT C. OLSON, PRINCIPLES OF LEGAL RESEARCH (2009); AMY E. SLOAN, BASIC LEGAL RESEARCH (5th ed. 2012).

[56] *See* ELIZABETH FAJANS & MARY R. FALK, SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES AND LAW REVIEW COMPETITION PAPERS 28 (4th ed. 2011).

[57] *Id.* at 29.

[58] There are claims, however, that law schools are graduating students who cannot competently perform legal research. *See, e.g.*, Paul Douglas Callister, *Beyond Training: Law Librarianship's Quest for the Pedagogy of Legal Research Education*, 95 LAW LIBR. J. 7, 9–11 (2003) (using reports, studies, and anecdotal evidence to demonstrate the lack of adequate legal research skills in law students and law graduates); Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BALT. L.

After law school, attorneys learn how to apply these lessons in their practice. And while there is no definitive measure for assessing an attorney's performance of minimally competent research, there are a variety of guiding principles such as: the Model Rules of Professional Conduct,[59] court rules,[60] judicial decisions censuring attorneys for inadequate research,[61] and malpractice and ineffective assistance claims.[62] As summarized by Professor Ellie Margolis:

REV. 173, 181 (2010) ("[L]aw schools are consistently told that they are graduating students who cannot competently perform legal research.").

[59] The Model Rules of Professional Conduct contain a number of provisions that relate to an attorney's ongoing obligation to perform competent research. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT rs. 1.1, 3.1 (AM. BAR ASS'N 2014). For example, Rule 1.1 provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2014). The comments to Rule 1.1 clarify that, "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." *Id.* r. 1.1 cmt.

Scholars often cite to Model Rule 1.1 and its commentary for purposes of establishing that an attorney has an ethical duty to perform adequate legal research. *See, e.g.*, Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 613 (2000) (explaining that the requirement of competency under Rule 1.1 is directly applicable to a lawyer's legal research); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 90 (2000) ("It has long been recognized that the ability to perform adequate legal research is a component of Rule 1.1."); Carol M. Bast & Susan W. Harrell, *Ethical Obligations: Performing Adequate Legal Research and Legal Writing*, 29 NOVA L. REV. 49, 50–51 (2004) (noting that although Rule 1.1 necessitates the performance of legal research for purposes of competent representation, many attorneys provided legal advice without conducting any research).

[60] Federal and State Courts have instituted several rules that address the level of legal research expected from counsel. *See* Marguerite L. Butler, *Rule 11-Sanctions and a Lawyer's Failure to Conduct Competent Legal Research*, 29 CAP. U. L. REV. 681, 681–82 (2002). Rule 11 of the Federal Rules of Civil Procedure, and Rules 28 and 38 of the Federal Rules of Appellate Procedure are most commonly used by the courts to sanction lawyers who fail to meet the standard for competent legal research. *See* Ellie Margolis, *Surfin' Safari-Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 96 (2007). Most times, lawyers are sanctioned because an attorney's sub-par legal research has resulted in poorly crafted, or unsupported pleadings and briefs. *Id.* at 96.

[61] *See, e.g.*, Office of Disciplinary Counsel v. Danmeyer, No. SCAD-13-0000451, 2013 WL 3776234, at *1 (Haw. Sup. Ct. July 17, 2013). In *Danmeyer*, the Hawai'i Supreme Court publicly censured an attorney for her failure "to perform basic legal research." *Id.* By failing to "inquire with the relevant government authorities regarding the veracity of the 'redemption theory' of finance," the attorney "failed to demonstrate the requisite legal knowledge, skill, thoroughness, and preparation reasonably necessary to fulfill her

> The competent lawyer must, first and foremost, provide courts with current, accurate authority to support the result being advocated. If a lawyer does not provide the court with this authority, the court is likely to investigate the lawyer's research process. The investigation will focus on whether the lawyer employed standard research techniques in an attempt to locate relevant, controlling authority. If the lawyer did not engage in standard research techniques, negative consequences ranging from public embarrassment to sanctions will follow.[63]

While there has been much written about how to conduct legal research,[64] it is much more difficult to ascertain how much legal research is sufficient and how much support must be offered for a legal argument to meet minimal competency.[65] While there is no definitive source providing a clear answer, according to Margolis, a review of a variety of court rules and legal claims addressing aspects of competent research reveal two consistent themes: "[A] competent legal researcher must employ research techniques that are standard in the field, and the result of that process must provide the decision-maker with adequate authority to make an informed decision."[66]

Thus, what standard techniques should be employed by attorneys, legal scholars, and judges when delving into the field of "legal history"? As an initial matter, both historians and legal practitioners criticize the use of history by non-historically-trained judges and legal scholars.[67] Specifically,

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professional obligations" in violation of Rule 1.1 of the Hawai'i Rules of Professional Conduct. *Id.* The attorney's behavior "warrant[ed] a period of suspension, in the absence of mitigating factors." *Id.*

[62] *See* Margolis, *supra* note 60, at 102–06 (citing numerous examples of malpractice cases where the courts considered the adequacy of an attorney's research).

[63] *Id.* at 118.

[64] *See, e.g.*, sources cited *supra* note 55.

[65] *See* Margolis, *supra* note 60, at 86.

[66] *Id.* at 87.

[67] Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 483 (2008); *see also* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 553–54 (1995) ("Too often, legal scholars make a fetish of one or two famous primary sources, and consider their historical case made."). *See generally* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S. CT. REV. 119 (critiquing the Court's misuse of history from the perspective of a historian).

Many of the criticisms are leveled at originalists who seek "legal truth" from the intentions of original law-makers, most often being the Framers of the U.S. Constitution. *See, e.g.*, LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 301, 313–21 (1988) (examining the selective use of history to support legal analysis based on original intent); Rebecca Brown, *History for the Non-Originalist*, 26 HARV. J.L. & PUB. POL'Y 69, 74 (2003) ("The accusations of selective use of history, . . . incomplete history, sloppy or strategic methodology, and lack of candor are all devastating critiques of the originalists,

those who misuse history are charged with "disregarding the professional standards by which history ought to be written in order to marshal historical authority for the purpose of persuading the reader in favor of the author's desired result."[68] The concern is that in the context of litigation, attorneys and judges use history to achieve a particular goal, whether it is to win their case, bolster an argument, or to justify a holding in a decision.[69] Indeed, one can "hardly expect detached, unbiased history to appear within the context of such an argument, for though advocates may pay lip service to the truth, their main objective is victory."[70] For this reason, some commentators have argued that the use of history should be curtailed or only permitted with an adherence to (or recognition of) the standards of professional historiography.[71] This is because the failure to "do history" correctly can have a profound, long-term impact with broad-ranging consequences. For example, as discussed more thoroughly in Part III below, the selective use of history has adversely impacted Hawai'i's legal historiography and in turn, this has dramatically shaped the discourse surrounding Native Hawaiian rights.

Debating whether it is advisable to use history in law is a moot point[72] because the fact remains that courts, legal practitioners, and scholars will continue to "do history"—in fact, there is evidence that this is a growing trend.[73] And while it is probably "unrealistic and impractical to expect

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because their justifications for using history depend on a claim of truth and objectivity.").

[68] Festa, *supra* note 67, at 483. The methodologically weak and selective use of history in legal proceedings is derogatorily referred to as "law office history." *Id.*; *see also* Flaherty, *supra* note 67, at 554 ("Here legal scholars, in what in its worst form is dubbed 'law office history,' notoriously pick and choose facts and incidents ripped out of context that serve their purposes.").

[69] Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 382 (1998).

[70] *Id.*

[71] *See, e.g.*, H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 662–94 (1987) (providing a list of rules for "using history responsibly" in law by originalists); Festa, *supra* note 67, at 537 (endorsing ideology that lawyers and judges should strive to approximate the standards of professional historiography as an aspiration).

[72] Powell, *supra* note 71, at 661. According to Powell, a discourse that is free from the "perversions of law and history arguably would be a more rational and more honest discussion." *Id.* But "[w]e do not live . . . in a world where this will happen. No matter how often constitutional scholars deny the relevance of history for interpretation, and no matter how often historians bemoan the distortions of 'law office history,' advocates and judges will continue to invoke the past." *Id.*; *see also* Flaherty, *supra* note 67, at 524 ("Lawyers, judges, and . . . legal academics regularly turn to history when talking about the Constitution, and not merely as a rhetorical trope.").

[73] *See generally* Melton, *supra* note 69, at 384 (acknowledging the "sad truth" of the

lawyers and judges to meet the standards of academic historians and produce professional-quality historiography[,]"[74] some commentators argue they should "strive to approximate these standards as an aspiration."[75] As the Honorable Judge Landau stated, those "who turn to history must commit themselves to doing it right."[76]

What are these standards that we should all aspire to? Scholars have attempted to elicit a workable methodology drawing from a number of different sources and disciplines.[77] For example, Matthew Festa has suggested using evidentiary rules to evaluate how historical claims may be asserted with a "minimum level of reliability," "without doing violence to the professional standards of historians."[78] He also explained that despite the duty of zealous advocacy, "lawyers are constrained by certain ethical

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"increasing mass" of legal history that is appearing in scholarship, legal briefs, and case law with little to no understanding of how to properly conduct sound historical research); Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191, 192 (1999) (noting that recent literature illustrates the marked turn toward history that seems "so conspicuous a feature" of contemporary legal scholarship); Wendie Ellen Schneider, Note, *Past Imperfect*, 110 YALE L.J. 1531, 1535 (2001) ("The 'turn to history' in American jurisprudence has created an increase in the number of prominent cases employing historical arguments."); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 487–88 (2002) (describing the "turn to history" by American constitutional scholars as a hallmark of modern legal scholarship).

[74] Festa, *supra* note 67, at 537.

[75] *Id.*

[76] Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL. U. L. REV. 451, 486 (2004).

[77] The difficulty in producing a single workable methodology for producing sound historical research is because historians themselves "do not conceive of themselves as having a single, common procedure for viewing the past (or even a common goal)." Maxine D. Goodman, *Slipping Through the Gate: Trusting Daubert and Trial Procedures to Reveal the 'Pseudo-Historian' Expert Witness and to Enable the Reliable Historian Expert Witness-Troubling Lessons from Holocaust-Related Trials*, 60 BAYLOR L. REV. 824, 857 (2008). Indeed, the idea that there is any established, fool-proof methodology to which all historians subscribe to is a reductionist fallacy. For example, one respected treatise describing historical methods describes the historian's task as "to choose *reliable* sources, to read them *reliably*, and to put them together in ways that provide *reliable* narratives about the past." MARTHA HOWELL & WALTER PREVENIER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS 2 (2001). Historian Thomas Haskell claims that a professional historian's goal (or ideal) is to achieve an objective historical interpretation—not neutral, but an "undeniably ascetic capacity to achieve some distance" from one's own beliefs. THOMAS L. HASKELL, OBJECTIVITY IS NOT NEUTRALITY 148–49 (1998). In contrast, historian Peter Novick claims that historical objectivity is a myth and is not only "essentially contested, but essentially confused." PETER NOVICK, THAT NOBEL DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 3–5, 6 (1988).

[78] Festa, *supra* note 67, at 485.

standards that require their work product to meet a minimum threshold of truth and reliability."[79] Thus, lawyers cannot "distort the evidentiary record," or "ignore evidence that is damaging to his client's position."[80]

Other scholars have turned to case law for guidance in assessing how to appropriately "do history." Wendie Schneider proffered the use of the "objective historian" standard that was articulated by Justice Gray in the infamous libel case brought by David Irving, a British historian and Holocaust denier.[81] Schneider explained that while Justice Gray did not explicitly formulate a test for an "objective historian," one can nonetheless "distill a code of conduct" from his criticisms of Irving:

(1) She must treat sources with appropriate reservations;

(2) She must not dismiss counterevidence without scholarly consideration;

(3) She must be even-handed in her treatment of evidence and eschew "cherry-picking";

(4) She must clearly indicate any speculation;

(5) She must not mistranslate documents or mislead by omitting parts of documents;

(6) She must weigh the authenticity of all accounts, not merely those that contradict her favored view; and

(7) She must take the motives of historical actors into consideration.[82]

Another viewpoint was expressed by H. Jefferson Powell who set forth fourteen rules as guidelines to make a lawyers' "use of history as intellectually responsible as possible."[83] Powell's list culminates with the powerful reminder that history is above all an interpretive enterprise, not an "unarguable fiat from the past."[84] This is because we cannot assume that by relying on "historical evidence," we are precluding the importation of our own "values, preferences, individual viewpoints, and subjective and societal blindness and prejudice."[85] Failure to recognize this only grants credence to "historicized myths."[86]

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[79] *Id.* at 524.

[80] *Id.* (citing MODEL RULES OF PROF'L CONDUCT rs. 3.1, 3.3 (AM. BAR ASS'N 1998)).

[81] Schneider, *supra* note 73, at 1532, 1534–35.

[82] *Id.* at 1534–35 (citations omitted).

[83] Powell, *supra* note 71, at 661, 662–91.

[84] *Id.* at 691.

[85] *Id.*

[86] *Id.*

Judge Burns writes a legal history that is supported by sources that are not only questionable, but lack credibility. One does not arrive at these conclusions lightly—hence the need to illustrate at length the numerous standards and guidelines that students, legal practitioners, jurists, and scholars can and should employ in the responsible use of history. As described below, it does not matter which standard is employed to evaluate Judge Burns' article (or other articles of a similar ilk) because the result is the same: when you objectively fail to meet these professional standards, some of your credibility is lost, and any position asserted may be undermined.

A. Sweating the Small Stuff: Why Proper Citation to Credible, Verifiable Sources Is Important

As explained above in Part II, students are taught how to find and critically evaluate relevant legal authority. Part of that "critical evaluation" requires a student to assess the credibility of a source. After a source is evaluated, a student will give proper attribution using conventional citation rules. "Citations in all disciplines are critical to the work of scholarship . . . . These issues are especially important in legal scholarship, where law reviews and judicial opinions are known for their exhaustive use of citations."[87]

While there are several functions for a citation, as explained by Daniel Baker, typically an author cites a particular source because: 1) it will offer support for the author's statements, 2) the citation will help the reader locate the same sources that were used by the author, and 3) it establishes the authority of the sources upon which the writer relied.[88] The authoritative quality of sources is particularly important to those in the legal field because we place "heightened significance on the creator or publisher of the resource being cited, regardless of the content."[89] Because legal discourse "is grounded in opinion and interpretation, some sources of particular opinions and interpretations carry more weight and are, therefore, more authoritative than other sources."[90]

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[87] William R. Wilkerson, *The Emergence of Internet Citations in U.S. Supreme Court Opinions*, 27 JUST. SYS. J. 323, 333 (2006).

[88] *See* Daniel J. Baker, *A Jester's Promenade: Citations to Wikipedia in Law Reviews, 2002–2008*, 7 I/S: J.L. & POL'Y FOR INFO. SOC'Y 361, 364–65 (2012).

[89] *Id.* at 365 (citing Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1935 (2008)).

[90] *Id.* at 366.

As such, there is "a crucial connection between legal argument and the grounding upon which it rests."[91] Accordingly, "legal researchers have traditionally looked for information that is more than just informative; they have looked for information that is unquestionably authoritative."[92] Finally, as explained by Frederick Schauer, "[a] citation to a particular source is not only a statement by the citer that this is a good source but also a statement that sources of this type are legitimate."[93] The very act of citing a source "is a practice, and thus an institution, and consequently every citation to a particular source legitimizes the institution of using sources of that type."[94]

The danger of citation, therefore, is the potential legitimization of unreliable or noncredible sources. More troubling, however, is that another layer of authoritativeness is implicitly inhered to the citation because of the author's stature. As discussed below, not only does Judge Burns' article fail to employ the professional standards that are used in the legal community, the article relies on sources that lack probity. By citing them, he cloaks them in a guise of authoritativeness, giving credence and legitimization to otherwise unreliable and noncredible sources.

1. Why a seventh-grade textbook and HawaiiHistory.Org are not credible sources

In the article at issue, there are several citations to sources of a dubious nature. For example, relying on any portion of a seventh-grade textbook[95]—even to cite seemingly "basic" facts—is inappropriate for a legal scholarly publication and does not comport with standard research methods employed by students, attorneys, scholars, jurists, or historians.[96] History contained in a textbook that has been watered down for easy consumption for twelve-year-old children is part of the concern. Another

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[91] Kris Franklin, *". . . See Erie.": Critical Study of Legal Authority*, 31 U. ARK. LITTLE ROCK L. REV. 109, 111 (2008).

[92] Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 419 (2002).

[93] *See* Schauer, *supra* note 89, at 1957.

[94] *Id.* at 1957–58; *see* discussion *infra* Part III.

[95] *See* Burns, *supra* note 6, at 225 nn.59–60, 226 n.70 (citing NORRIS W. POTTER ET AL., HISTORY OF THE HAWAIIAN KINGDOM 122, 127, 129–33 (2003)).

[96] On the publisher's website, Potter's textbook is marketed as follows: "This revised edition of the widely used 7th-grade textbook *History of the Hawaiian Kingdom* is designed to meet [the State of Hawai'i Department of Education] Social Studies Content Standards in a semester-long course." *History of the Hawaiian Kingdom*, BESS PRESS, http://www.besspress.com/studies/history-of-the-hawaiian-kingdom (last visited Apr. 22, 2017).

issue is that history textbooks for children have long been mired in controversy—indeed, textbooks have become a battleground for special-interest groups who pressure publishers to "tell the official truth about the past."[97] As a result, "commerce plays an important part in deciding which historical truths shall be official."[98] Using the "objective historian" standard, which necessitates the treatment of sources with "appropriate reservations," there is little doubt remaining as to the "citability" of this source. Even assuming this seventh-grade textbook could be accepted as a potentially useful secondary source, we are still obliged to assess its value by examining the sources cited in the bibliography. As discussed below in Part III, this source, like so many other Hawai'i history books, largely relies on a flawed historiography based on biased, outdated, English-only sources.

Another example of a problematic citation to a questionable source comes from the section entitled, "The Relevant History" that begins on page 217 of Judge Burns' article.[99] The author begins that section as follows:

> According to HawaiiHistory.org:
>
> > The concept of private property was unknown to ancient Hawaiians, but they did follow a complex system of land division. All land was controlled ultimately by the highest chief or king who held it in trust for the whole population. Who supervised these lands was designated by the king based on rank and standing . . . .[100]

The textual citation to HawaiiHistory.org draws the reader's attention to the source, as it is not buried in a footnote, which is typical for legal scholarship.[101] The placement of this source directly in the text, whether it was intentional or not, is a tacit recognition by Judge Burns that this is a credible secondary source.[102]

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[97] Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 973 (2009) (quoting DAVID TYACK, SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY 40 (2003)).

[98] *Id.* (quoting TYACK, *supra* note 97, at 59-60).

[99] *See* Burns, *supra* note 6, at 217.

[100] *Id.* at 217 n.21 (citing *Ahupua'a*, HAWAIIHISTORY.ORG, http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&CategoryID=299 (last visited Dec. 2, 2015)).

[101] *See id.*

[102] Admittedly, Judge Burns cites to another source in his footnote. *See* Burns, *supra* note 6, at 217 n.21 (citing Melody Kapilialoha MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 2, at 9). As described in Section II.A.1 below, the deliberate choice of citing HawaiiHistory.org within the main body of an article results in the privileging of some sources over other sources, whether it was intentional, or not.

As a preliminary matter, the practice of citing online sources is not at issue here. Ellie Margolis stated, "[t]he time for lamenting the changes wrought by the Internet and resisting the use of electronic materials has passed."[103] Indeed, a basic search for the use of online sources in Westlaw or Lexis demonstrates that judicial opinions, legal briefs, and law review articles are "replete with citations" to various online sources.[104] From Wikipedia to government websites, from blogs to state regulations—the prolific use of online sources has been well documented.[105] That does not mean that this practice is without controversy.[106] Margolis recognized that in a court proceeding, the chief concern of the use of Internet sources is how to determine whether a website is a source "whose accuracy cannot reasonably be questioned."[107] This is because "anyone, for a small amount of money, can create a website and publish information without any oversight . . . ."[108] Thus, while government websites are generally perceived to be reliable, private corporate websites generate more controversy.[109] Wikipedia is an example of an online source that is considered to be highly controversial.[110] This is because "anyone can edit a Wikipedia entry at any time, its content can change rapidly, and the court cannot necessarily ascertain the accuracy of the requested information."[111] It is readily acknowledged that Wikipedia, and by extension, similar types of sources, should not be cited—especially in cases dealing with complex or hotly contested subjects.[112] The history surrounding Native Hawaiians would undoubtedly be described as a "complex" and "hotly contested subject." Thus, sources like Wikipedia should not be cited as an authoritative source.

While HawaiiHistory.org is arguably not Wikipedia, it certainly bears some striking similarities. First, one could easily be fooled by the seemingly nonpartisan website name: HawaiiHistory.org. An Internet user is likely to assume that the use of ".org," means that the domain name

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[103] Ellie Margolis, *It's Time to Embrace the New—Untangling the Uses of Electronic Sources in Legal Writing*, 23 ALB. L.J. SCI. & TECH. 191, 194 (2013).

[104] *See id.* at 192.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 200 (quoting FED. R. EVID. 201(b)).

[108] *Id.* at 203.

[109] *See id.*

[110] *See id.*

[111] *Id.* (citations omitted).

[112] *See id.*; Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1, 28–29 (2009) (explaining why Wikipedia should not be relied upon, *inter alia*, as the basis for a court's holding or taking judicial notice of adjudicative facts).

represents a non-profit organization.[113] In this case, HawaiiHistory.org "is a part of Hukilau Network . . . [and its] sites were conceived and developed by Info Grafik Inc., a Honolulu design and storytelling company."[114] Info Grafik describes itself as "a specialized consulting firm that provides Hawai'i-style brand image development and management for large and small businesses."[115] The company "helps clients shape the perception of their organizations and products by developing comprehensive communications strategies and marketing identity systems."[116] The company serves a "range of corporate clients from the Hawai'i Top 250 to a range of offshore companies working in Hawai'i."[117] Listed under a section called "Community Service," Info Grafik provides the following information: "In 2004, after 5 years of work, Info Grafik published HawaiiHistory.org, the largest and most comprehensive site of its kind on the web. Info Grafik provided 100% of the funding and did the research, design, writing and application development for the site."[118] In short, HawaiiHistory.org was produced by a marketing company that specializes in storytelling for high-profile corporate clients. Arguably, storytelling is appropriate insofar the audience is largely comprised of, as implicitly noted on the website, school-aged students who need easily digestible stories to connect with history.[119]

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[113] Ariane C. Strombom, *Internet Outlaws: Knowingly Placing Ads on Parked Domain Names Invokes Contributory Trademark Liability*, 17 MARQ. INTELL. PROP. L. REV. 319, 324 (2013) ("[A]n Internet user is likely to type in the domain name by making assumptions, like that '.com' means the domain name is for a business, and '.org' means a domain name is for a nonprofit organization."). There is no prohibition, however, for the use of the .org designation by a for-profit business. *See, e.g.*, Ariz. Comm. on the Rules of Prof'l Conduct, Ethics Op. 11-04 (2011), http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=717) (modifying Ethics Opinion 01-05 in light of recent evidence that anyone may register a website address that contains the suffix ".org," without requiring that the website is or will be used by a nonprofit entity).

[114] *About HawaiiHistory.org & the Hukilau Network*, INFO GRAFIK, INC., http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=44 (last visited Apr. 22, 2017).

[115] *History of Info Grafik*, INFO GRAFIK, INC., http://www.infografik.com/about/about.html (last visited Apr. 22, 2017).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *See Village of Kaawaloa, On Kealakekua Bay*, INFO GRAFIK, INC., http://www.hawaiihistory.org/index.cfm?fuseaction=ig.image&FileName=img63.jpg (last visited Apr. 22, 2017) (giving permission to students to use photos for school reports).

But this is not the most troubling aspect of the use of HawaiiHistory.org as the "headlined" source in Judge Burns' article for Hawai'i's "Relevant History." According to HawaiiHistory.org's website, it states that it provides information about 3,000 events from 1778 to 2002, and over 150 articles on various topics, such as the Hawaiian Sovereignty movement, or cosmology.[120] HawaiiHistory.org is touted as a free-content source that is based on a model of collaborative contribution from volunteers—a model similarly employed by Wikipedia.[121] Articles are anonymously written (*i.e.*, no authors are listed on individual articles or submissions), and there are no footnotes, endnotes, or citations in any of the articles—at the end of some of the articles, however, a list is provided directing the reader to "Sites for further information."[122] If one is persistent and sifts through the various links, on occasion, a bibliographic source list for some of the topics can be found.[123] Although the site purportedly states research was "supervised" by experts,[124] it does not state when or how much of the material listed on the website was "supervised." Indeed, none of the pages are dated, and it does not state if a particular volunteer contribution was vetted by an "expert."

A discussion of some of the criticisms leveled at Wikipedia is worth mentioning due to the problematic similarities that are seen in HawaiiHistory.org. Wikipedia is widely criticized by legal scholars and

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[120] *See About HawaiiHistory.org & the Hukilau Network*, *supra* note 114.

[121] *See Wikipedia:About*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:About (last visited Apr. 22, 2017) ("Wikipedia is a multilingual, web-based, free-content encyclopedia . . . written collaboratively by largely anonymous volunteers who write without pay."). On HawaiiHistory.org, some articles appear to be "sponsored by" corporate entities. For example, the editorial feature about "Chinatown" is sponsored by Hawaii National Bank. *See Library*, INFO GRAFIK, INC., http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&CategoryID=294 (last visited Apr. 22, 2017).

[122] *See, e.g.*, *Peopling of the Pacific*, INFO GRAFIK, INC., http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&CategoryID=317 (last visited Apr. 22, 2017).

[123] For example, I could find a source list for the topic on "Voyaging," but I could not find a source list for "Warfare and Weapons." *Compare Voyaging Sources*, INFO GRAFIK, INC., http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=583 (last visited Apr. 22, 2017), *with Warfare and Weapons*, INFO GRAFIK, http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&CategoryID=284 (last visited Apr. 22, 2017).

[124] The homepage, under a section entitled "The Hukilau Network," states that the work was "supervised and checked by Robert C. Schmitt, the former state statistician and Carol Silva, the archivist, writer and teacher." Under a section entitled "Mahalo to:" it acknowledges Carol Silva "for her guidance" and Robert Schmitt "for helping us keep the facts straight." *See* INFO GRAFIK, INC., http://www.hawaiihistory.org/index.cfm? (last visited Apr. 22, 2017).

courts for its lack of "accuracy, credibility, quality, reliability, trustworthiness, veracity, etc."[125] One of the loudest complaints relates to Wikipedia's lack of probity—*i.e.*, its failure to have an "uncompromising adherence to the highest principles and ideals" or "unimpeachable integrity."[126] As explained by Daniel Baker, "[a] source is authoritative not merely because of who produced it, but because that entity, whether an individual or an institution, has taken responsibility for it."[127] What makes a source "authoritative" is "its reputation . . . for strong scholarship, sound judgment, and disciplined editorial review."[128] For HawaiiHistory.org, the lack of probity should be evident to most students: articles are "authorless," volunteer contributions are welcomed from the public but there are no clear editorial guidelines for contributions (if any), there is no clear indication when articles have been "published" or "revised," bibliographic entries are only sporadically available, and finally, the site is produced and supported by a marketing company that specializes in storytelling for high profile corporate clients.

HawaiiHistory.org is a community resource that was likely intended to be used primarily by the casual researcher, or school-aged students—not legal scholars or courts. If a fourth-grade student relies on an entry on HawaiiHistory.org that contains false or incorrect information, the result is at worse, a bad grade. If a party asks the court to take judicial notice of a particular adjudicative fact[129] from HawaiiHistory.org that is false or incorrect, the results could be disastrous.

Some might argue that I am guilty of over-sensationalizing two examples of what were likely the result of an "accidental oversight"—an admittedly embarrassing mistake that resulted in the citation of a seventh-grade textbook and a website that was arguably geared toward seventh-graders. Unfortunately, there were several other "oversights" in this article. For example, a cultural foundation affiliated with the luxury golf-course community Hoakalei was cited as a source for a primary law (the Kuleana Act)—notably, it was not a digitized image from the original print source

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[125] Baker, *supra* note 88, at 374 (citations omitted) (summarizing commentators' concerns regarding Wikipedia's problematic "dimensions of information quality").

[126] *Id.* at 374–75 (quoting definition of "probity" from WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1807 (1986)).

[127] *Id.* at 377 (citations omitted).

[128] *Id.* at 378 (alteration in original) (quoting Stacy Schiff, *Know it All: Can Wikipedia Conquer Expertise?*, NEW YORKER, July 31, 2006, at 42).

[129] *See* Peoples, *supra* note 112, at 12–19, 28–29 (providing examples of the dangers when a court takes judicial notice of information obtained from Wikipedia entries).

which would demonstrate some indicia of reliability.[130] It was a typewritten version of the Kuleana Act which could easily contain errors in transcription, or worse, could be selectively edited or rewritten.[131] The article also repeatedly utilizes questionable secondary sources to advance controversial "facts" and legal theories,[132] it misconstrues sources,[133] or fails to properly attribute sources altogether.[134]

As described more thoroughly below, what may originally be dismissed as a few "accidental oversights" evolves into a pernicious pattern that not only demonstrates inadequate research, but borders on scholarly negligence.

2. *Why extensively quoting outdated and/or facially biased sources is not "relevant history"—it is unsophisticated advocacy*

As discussed in Section II.A.1 above, the article contains some obvious "oversights." Some of these oversights, however, could be misconstrued and lead to some unfortunate results. For example, the article contains a lengthy quoted passage (353 words)[135] from a 1993 National Parks Survey[136] relating to the cultural history of three historical sites on Hawai'i

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[130] *Compare* Burns, *supra* note 6, at 242 n.142 (citing *The Kuleana Act of 1850*, HOAKALEI CULTURAL FOUND., http://www.hoakaleifoundation.org/documents/kuleana-act-1850 (last visited Apr. 22, 2017)), *with* 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* PENAL CODE OF THE HAWAIIAN ISLANDS, PASSED BY THE HOUSE OF NOBLES AND REPRESENTATIVES ON THE 21ST OF JUNE, A.D. 1850, at 202–04 (Honolulu, Henry M. Whitney, Gov't Press 1850). The latter citation provides a citation to the primary source document.

[131] *See supra* notes 103–11 and accompanying text.

[132] For example, Judge Burns relied on non-legal secondary sources for purposes of defining "sovereignty"—a term with obvious legal import. *See, e.g.*, Burns, *supra* note 6, at 236 n.116 (first citing Daniel Philpott, *Sovereignty*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/sovereignty/; and then citing Daniel Philpott, *Sovereignty*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF POLITICAL PHILOSOPHY 561 (George Klosko ed. 2011)).

[133] *See e.g.*, Burns, *supra* note 6, at 236 n.117 (using *Black's Law Dictionary* as a source to define "authority" but quoting language that does not reflect the correct legal definition of the term); *id.* at 236 n.116 (citing the *Stanford Encyclopedia of Philosophy* to selectively define "sovereignty"). The *Stanford Encyclopedia of Philosophy* is cited as defining "sovereignty" as having "supreme authority within a territory." *See* Philpott, *supra* note 132. The website explains that its "meanings have varied across history." *Id.* It also states that scholars have doubted whether a "stable, essential notion of sovereignty exists." *Id.*

[134] *See* Burns, *supra* note 6, at 241 n.139 (citing a collection of essays as fact and without designating the author or essay title); *see also* Section II.A.2 *infra*.

[135] *See id.* at 217–18.

[136] *See id.* at 218 n.22 (citing LINDA WEDEL GREENE, U.S. DEP'T OF INTERIOR, NAT'L

island. This rather outdated survey was relied upon to purportedly describe the history of land tenure, government, and hierarchical structure of Hawaiian society.[137] Within this quoted section, there are several embedded "quoted passages."[138] One such passage characterized the distribution of lands by Native Hawaiian leaders (ali'i) thusly: "Often this re-distribution of lands was 'carried out with great severity.'"[139] Curiously, Judge Burns' article properly gave attribution to the other quoted authors in this section—however, this strongly-worded characterization of land tenure by ali'i lacked a source for attribution. The omitted citation for this particular quoted passage is Sanford B. Dole's, *Evolution of Hawaiian Land Tenures*.[140]

A detail like this could easily be overlooked by most readers. But the potential impact lies directly in its subtlety—this passage could lead a reader to assume that this somewhat negative characterization of Native Hawaiian land tenure was *authored* by a government agency, the National Park Service—not the infamous political figure Sanford Dole. In a popular book authored by controversial historian Lawrence Fuchs, the 1893 overthrow of the Hawaiian monarchy was described as being "dignified through the support of one of the great names in Hawaiian history, Sanford Ballard Dole" who "represented the best of the haole missionary tradition in

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PARK SERV., A CULTURAL HISTORY OF THREE TRADITIONAL HAWAIIAN SITES ON THE WEST COAST OF HAWAI'I ISLAND (1993)).

[137] *See id.* at 217–18. Why this source was so extensively quoted by Judge Burns is baffling. The preface to this report states that the "primary purpose of this study was to ascertain the appearance of Pu'ukoholā Heiau and any structures that rested on its platform during the late eighteenth and early nineteenth centuries." GREENE, *supra* note 136, at v. In terms of the sources relied upon in this report, "[s]pecific emphasis was put on examining journals, logbooks, photographs, drawings, maps, and other material in the Eastern United States that had not been previously researched." *Id.* In addition, "[a] variety of published German, French, and Spanish sources were translated and studied" as part of their report. *Id.* This is ironic given a review of the bibliography demonstrates a reliance on English-only sources and a small smattering of translated Hawaiian texts—a glaring omission from most histories about Native Hawaiians that is discussed below in Part III.

[138] *See* Burns, *supra* note 6, at 217–18 (first citing Stephanie Seto Levin, *The Overthrow of the Kapu System in Hawai'i*, 77 J. POLYNESIAN SOC'Y 402, 420 (1968); and then citing WILLIAM R. BROUGHTON, A VOYAGE OF DISCOVERY TO THE NORTH PACIFIC OCEAN 37 (reprint ed. 1967) (1798)). Ironically, it would appear that the National Park Service report incorrectly attributed a quote to Broughton—indeed, the quoted material comes from a different source. *See* GREENE, *supra* note 135, at 125 n.25 (quoting HIRAM BINGHAM, A RESIDENCE OF TWENTY-ONE YEARS IN THE SANDWICH ISLANDS 49 (2d ed., Hartford, Hezekiah Huntington 1848)).

[139] *See* Burns, *supra* note 6, at 218 (quoting GREENE, *supra* note 136, at 126).

[140] Sanford B. Dole, *Evolution of Hawaiian Land Tenures*, PAPERS OF THE HAWAIIAN HISTORICAL SOCIETY NO. 3, 1–18 (1892).

Hawaii."[141] According to Fuchs, Dole sought a "constitution that would protect haole rights and privileges."[142] As such, Dole's ideas about land tenure and Hawai'i politics would undoubtedly be representative of a particular viewpoint.[143]

Indeed, in that same passage that is quoted in Judge Burns' article, Dole describes land-tenure in Hawai'i as "analogous to that of the barons of European feudalism."[144] Moreover, that the "despotic control over land developed in the direction of greater severity rather than toward any recognition of the subjects' rights, and it finally became an established custom . . . to re-distribute the lands of the realm."[145] Dole characterizes this type of land tenure as "disastrous and destructive to all popular rights in land."[146]

Citations not only establish the authoritativeness of the position that the author is asserting, they also directly relate to an author's credibility. The failure to properly attribute a direct quotation to Dole is misleading—it fails to acknowledge that the article's "Relevant Facts" partly originate from and are supported by a controversial figure in history. This type of omission, while potentially the result of yet another "accidental oversight," is part of what emerges as a repeated pattern of scholarly negligence.

For example, another one-sided source proffered in support of this "Relevant History" is contained on pages 227 through 228, wherein Judge Burns extensively quotes a total of 498 words from W.D. Alexander's book, *History of Later Years of the Hawaiian Monarchy and the Revolution of 1893*.[147] This secondary source is used to describe the "main facts" of a case that came from, *inter alia*, a reported decision of the Hawai'i Supreme Court.[148] It is unclear why the reported decision, and other published court

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[141] LAWRENCE E. FUCHS, HAWAII PONO "HAWAII THE EXCELLENT": AN ETHNIC AND POLITICAL HISTORY 31 (1961); *see, e.g.*, Lawrence V. Cott, *". . . Bad Scholar . . . Poseur . . . Absurd . . . Sloppy Research, Writing . . . "*, 74 PARADISE PAC., Sept. 1, 1962, at 34 (reviewing the debate over Fuch's controversial best-selling history of Hawai'i).

[142] *See* FUCHS, *supra* note 141, at 31.

[143] As 'Ōiwi scholar Noenoe Silva explained, to say that Sanford Dole's written works "are biased would be an understatement." *See* SILVA, *supra* note 23, at 165.

[144] *See* Dole, *supra* note 140, at 5.

[145] *Id.* at 6.

[146] *Id.*

[147] *See* Burns, *supra* note 6, at 227–28 (quoting W.D. ALEXANDER, HISTORY OF LATER YEARS OF THE HAWAIIAN MONARCHY AND THE REVOLUTION OF 1893, at 19–22 (Honolulu, Hawaiian Gazette Co. 1896)).

[148] *See* ALEXANDER, *supra* note 147, at 19 ("The facts of this case were stated in the affidavit of Aki, published May 31st, 1887, and those of Wong Leong, J.S. Walker and Nahora Hipa, published June 28th, 1887, as well as in the decision of Judge Preston in the

documents (read, the primary sources) relating to the underlying case were not relied upon by Judge Burns. Arguably, the lurid language used in Alexander's book makes for easier reading—for example, the quoted passage refers to a witness in the case as a "palace parasite."[149] This style of writing, however, perhaps should have signaled possible underlying issues of probity.

Upon further examination of W.D. Alexander's[150] book, it is clear that this too is a one-sided source. Part I is entitled, "the Decadence of the Hawaiian Monarchy."[151] Chapter 1 commences with a so-called "history" of the Hawaiian Monarchy with the following statement:

> It is true that the germs of many of the evils of Kalakaua's reign may be traced to the reign of Kamehameha V . . . Under him the 'recrudescence' of heathenism commenced, as evinced by the Pagan orgies at the funeral of his sister, Victoria Kamamalu, in June 1866, and by his encouragement of the lascivious hulahula dancers and of the pernicious class of Kahuna or sorcerers. Closely connected with this reaction was a growing jealousy and hatred of foreigners.[152]

Alexander admits in the preface of his book that he does not "profess to be a neutral," but has "honestly striven" to "state the facts as nearly as possible."[153] The preface further explains[154] that this book was published on behalf of the *Hawaiian Gazette*—which, as described further below in Section III.E., was a pro-Annexation oligarchy newspaper. In advertisements announcing the creation and future publication of this book in 1894, it stated that this "accurate" and "impartial" history of the 1893

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case of Loo Ngawk *et al.*, executors of the will of T. Aki *vs.* A. J. Cartwright *et al.*, trustees of the King (Haw. Rep. Vol. vii., p 401).").

[149] *Id.*

[150] William DeWitt Alexander was a prolific writer and historian during the late nineteenth-century. *See, e.g.*, W.D. ALEXANDER & ALATAU T. ATKINSON, AN HISTORICAL SKETCH OF EDUCATION IN THE HAWAIIAN ISLANDS (Honolulu, Daily Bulletin Steam Print 1888); W.D. ALEXANDER, A SHORT SYNOPSIS OF THE MOST ESSENTIAL POINTS IN HAWAIIAN GRAMMAR: FOR THE USE OF THE PUPILS OF OAHU COLLEGE (Honolulu, H.M. Whitney 1864). He was the corresponding secretary for the Hawaiian Historical Society, and was appointed as a member of the commission responsible for creating and establishing the Hawai'i State Archives. *See* HAW. HIST. SOC'Y, FIRST ANNUAL REPORT OF THE HAWAIIAN HISTORICAL SOCIETY 2, 4 (Honolulu, Hawaiian Gazette Co. 1893).

[151] *See Contents, in* ALEXANDER, *supra* note 147.

[152] ALEXANDER, *supra* note 147, at 1.

[153] *Preface, in* ALEXANDER, *supra* note 147.

[154] *Id.*

revolution was "DEDICATED BY SPECIAL PERMISSION TO THE Provisional Government."[155]

As described in Part II above, and bears repeating here: (1) a scholar is urged towards an "inquiry devoted to the discovery of truth"; (2) students and practitioners are expected to know how to locate relevant legal authority, and how to critically evaluate it; (3) practitioners must be mindful to not distort the evidentiary record, or ignore evidence that is damaging to his client's position; (4) an "objective historian" must, *inter alia*, treat sources with appropriate reservations, must weigh the authenticity of accounts, and consider the motives of actors.

In short, it is evident that Judge Burns' article fails to meet any of these professional standards. The article utilizes watered down "histories" that were meant for children, fails to give proper attribution for quoted material, misconstrues cited material, fails to rely on primary legal sources when appropriate, relies on one-sided secondary sources, and misleads the reader with confusing citations. In his zeal to prove his point, he eschewed the very principles that we all abide by and crafted a "history" supported by a bevy of dubious sources. The result is unsophisticated advocacy that is undermined by numerous, and at times, embarrassing mistakes. Some may argue that I am being too formalistic—that such mistakes are symptomatic of being "human" and we should look at the merits of Judge Burns' arguments.

Ironically, Judge Burns criticized Professor Jon Van Dyke's reliance upon five "documents" to support a particular argument in his book—specifically, Judge Burns asserted that "these documents, considered separately or together, do not validate Professor Van Dyke's opinions."[156] The five documents at issue were: the 1898 Newlands Resolution, the 1900 Organic Act, the 1993 Apology Resolution, a Hawai'i Attorney General's

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[155] Finally, Alexander acknowledges that "much assistance has been derived from a paper by the Rev. S.E. Bishop . . . ." *Id.* To understand how this impacted Alexander's work, one must first recognize that the Reverend Sereno Edwards Bishop considered Native Hawaiian culture and language to be sources of "idolatry" and "unspeakable foulness." Rev. S.E. Bishop, Address to Honolulu Social Science Association: Why Are the Hawaiians Dying Out?: Or Elements of Disability for Survival Among the Hawaiian People 14 (Nov. 1888) (transcript available in the University of California Los Angeles Library). He also asserted that Hawaiians were dying as a race because despite sixty-eight years of Christianity, religion had failed to "lift the Hawaiian people out of the mire of impure living." *Id.* at 17. Bishop claimed that hula had "corrupted them with its leprosy" and the "Kahunas [priests] st[ood] by to thrust [Hawaiians] down into earlier graves." Sereno Edwards Bishop, *Decrease of Native Hawaiians*, FRIEND, Apr. 1891, at 25.

[156] *See* Burns, *supra* note 6, at 249.

opinion, and an article published in the Wall Street Journal.[157] Comparatively speaking, Judge Burns' citation of a seventh-grade textbook, HawaiiHistory.org, an outdated National Park Study, and a string of one-sided secondary sources, seem trite in comparison. When one produces a "history" based on such sources, it is not about being formalistic, it is about credibility—or the lack thereof.

Sadly, these are just some of the glaring "oversights" contained in this article. As discussed below, there are many others. Judge Burns, however, is not alone in making these mistakes—many others have faltered as well.

III. PAST IMPERFECT: MAKING HISTORY WITHOUT HAWAIIANS

He loa ka 'imina o ke ala o Hawai'i 'imi loa

Long is the search for the way of Hawai'i's thinkers[158]

Judge Burns' article is representative of a larger systemic problem—many wish to write about Hawai'i's legal history, but few give much thought to the veracity or authoritativeness of the underlying historical sources that they use. In developing my critique of this hegemonic methodology, I have taken a multi-disciplinary approach, drawing upon the insights developed by scholars of critical outsider jurisprudence, indigenous studies, critical archival studies, and historiography, including, *inter alia*: Subaltern Studies,[159] the Archival Turn,[160] Law as Archive and Counter-

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[157] *Id.* at 248–49.

[158] Samuel H. Elbert, *Preface*, *in* MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN-ENGLISH DICTIONARY ix (3d ed. 1965) (explaining the frustrating realization that despite the many years of dedicated work, it is impossible to record Hawaiian completely, with its rich and varied background, its many idioms undescribed, and its sophisticated use of figurative language).

[159] The term "Subaltern Studies" references a form of historiography that emerged in South Asia and is based on "giving voice to those who have been left outside of historical narratives produced by colonial or national writers." Ratna Kapur, *Law and the Sexual Subaltern: A Comparative Perspective*, 48 CLEV. ST. L. REV. 15, 16 (2000) (first citing SUMIT SARKAR, WRITING SOCIAL HISTORY 82–108 (1997); and then citing Ranajit Guha, *On Some Aspects of the Historiography of Colonial India*, *in* SUBALTERN STUDIES I (Ranajit Guha ed., 1982)); *see also* Kenneth M. Casebeer, *Subaltern Voices in the Trail of Tears: Cognition and Resistance of the Cherokee Nation to Removal in Building American Empire*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 1 (2014) (critiquing the "curious" lack of inclusion of Cherokee voice in two recent publications describing the history of removal of Eastern Native nations); Renisa Mawani, *Law's Archive*, 8 ANN. REV. L. & SOC. SCI. 337, 344 (2012) ("[H]istorians and scholars in colonial history and beyond continue their search for marginal, oppressed, and subjugated voices as subversive figures and as transformative agents in and of history.").

Archival Sense,[161] Reading Against the Grain,[162] Kanaka 'Ōiwi Critical Race Theory,[163] Critical Outsider Jurisprudence,[164] Collective Memory and Counter-memory,[165] and Counter-storytelling,[166] to name just a few.

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[160] Anthropologist Ann Stoler, often credited with coining the term, "Archival Turn," advocates the repositioning of the archive as a mere site of knowledge where research commences, but rather as an object of investigation. *See* ANN LAURA STOLER, ALONG THE ARCHIVAL GRAIN: EPISTEMIC ANXIETIES AND COLONIAL COMMON SENSE 20 (2009).

[161] *See* discussion *infra* Section III.A.; Stewart Motha & Honni van Rijswijk, *Introduction: Developing a Counter-Archival Sense*, *in* LAW, MEMORY, VIOLENCE: UNCOVERING THE COUNTER-ARCHIVE 2 (Stewart Motha & Honni van Rijswijk eds., 2016) (urging legal scholars to refuse to take law's archive for granted, to interrogate the teleological narratives that law produces, and to locate the multiple forms, sites, and practices that manifest law's counter-archive).

[162] "Reading against the grain," long used in critical historiography, is often employed as a subversive approach to reading official historical documents. *See* Mawani, *supra* note 159, at 346; STOLER, *supra* note 160, at 46–47. This methodology is used to fill out the silences inherent to the archives to perhaps draw out new insights and understandings from the archival record.

[163] Kanaka 'Ōiwi Critical Race Theory ('ŌiwiCrit) is an emerging analytical framework currently being used in the context of Native Hawaiian higher education. Erin Kahunawaika'ala Wright & Brandi Jean Nālani Balutski, *Ka 'Ikena a ka Hawai'i: Toward a Kanaka 'Ōiwi Critical Race Theory*, *in* KANAKA 'ŌIWI METHODOLOGIES: MO'OLELO AND METAPHOR 87 (Katrina-Ann R. Kapā'anaokalāokeola Nākoa Oliveira & Erin Kahunawaika'ala Wright eds., 2016). Influenced by Critical Race Theory and Tribal Critical Race Theory, 'ŌiwiCrit is a developing methodological tool employed by Native Hawaiians to "name the oppression, whether structural, normative, or overt, while helping [to] reframe the issues and build equitable . . . environments." *Id.*

[164] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations,* 22 HARV. C.R.-C.L. L. REV. 323, 324–25 (1987) (advocating to look "to the bottom" and adopt the perspective of those most oppressed and subjugated to help define the elements of justice); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2322 (1989) (explaining that outsider jurisprudence is "derived from considering stories from the bottom").

[165] Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747 (2000) (drawing upon cultural psychology studies to show how "collective memory" is a present-day struggle among competing groups to defend historical injustice); GEORGE LIPSITZ, TIME PASSAGES: COLLECTIVE MEMORY AND AMERICAN POPULAR CULTURE 213–14, 227 (1990). Lipsitz frames counter-memory as "a way of remembering and forgetting that starts with the local, the immediate, and the personal . . . [looking] to the past for the hidden histories excluded from dominant narratives . . . [to] reframe and refocus dominant narratives purporting to represent universal experience . . . ." LIPSITZ, *supra*, at 213.

Efforts to reclaim Hawai'i's collective memory is "paramount, because 'framing injustice is about social memory,' and constructing an accurate and compelling collective memory of injustice is a predicate to fashioning just reparative actions in the future." MacKenzie & Sproat, *supra* note 31, at 485. For Native Hawaiians, part of this process involves "reframe[ing] significant events in Hawai'i's history to highlight the injustices to

Collectively these concepts have informed my analysis, allowing me to confront the practice of exclusion or marginalization of Native Hawaiian voice in conventional histories—whether told by judges, lawyers, or scholars.

A. Law As Archive

Because much of this article is focused on challenging research methods used by those who seek to write about Native Hawaiians, I start by first deconstructing preconceived notions of what constitutes a "source" and how those sources should be appropriately evaluated. This is because for those who "do history," many (if not most), will eventually find themselves dealing with "archives."

Jacques Derrida famously stated, "Nothing is less reliable, nothing is less clear today than the word 'archive.'"[167] For many, the archive is simply viewed as a repository for historical records and sources—however as noted by some scholars, it is a "dynamic, incomplete, and fiercely disputed site of knowledge production that carries profound implications for how we write history and approach and understand the past."[168] Indeed, in other disciplines, such as history, philosophy, and literary studies, scholars are focused on what constitutes history, how the past is conceived, and "how it might be written through sources, evidentiary rules of the discipline, and their reinvention."[169] As described by scholar Renisa Mawani,

> [M]any have questioned conventional modes of writing history, highlighting the (im)possibility of recuperating historical and archival texts as "truth" and urging the need to employ critical and literary modes of reading . . . [as such], critics have challenged prevailing views of history's archive as an objective, credible, and reliable domain of the past and as evidence of "what really happened." In the wake of the archival turn, history's archive is newly conceived to be a site of epistemic and political struggle, an approach that

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Native Hawaiians and reconstruct society's collective memory of those incidents, such as the Māhele process and illegal nature of the 1893 overthrow." *Id.*

[166] Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989). In Delgado's article, he advocates for "outgroups," those "whose marginality defines the boundaries of the mainstream," to "shatter complacency and challenge the status quo" by "counter-storytelling," *i.e.*, telling stories which directly challenge the majority in-group's "stock stories." *Id.* at 2412, 2414, 2416, 2430, 2434, 2440.

[167] JACQUES DERRIDA, ARCHIVE FEVER: A FREUDIAN IMPRESSION 90 (Eric Prenowitz trans., 1996).

[168] Mawani, *supra* note 159, at 339.

[169] *Id.*

> questions the integrity of historical evidence and the narrations it makes possible.[170]

Despite the rich dialogue unfolding in other disciplines, legal historians and scholars have not explicitly engaged with "law's archive."[171] Admittedly, some legal scholars have reflected on what constitutes a "reliable source," and have sought alternate forms of legal knowledge—but few have openly challenged their historical methods.[172] "Even fewer have asked whether law has an archive, what constitutes it, how it might be conceptualized, and perhaps most importantly, how such formulations might shape what we think of as law."[173]

According to Derrida, however, the archive's connection to law is evident in its etymology: *Arkhe* "names at once the *commencement* and the *commandment*"—it is "where things *commence*" and "where men and gods *command*."[174] "The key to understanding the relation of archive to law and to legal relations, is to acknowledge that the archive is not somewhere over 'there' but rather 'here,' now."[175] Viewed in this light, archives and law are not only interconnected, as asserted by Mawani, the law *is* the archive:

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[170] *Id.* at 340.

[171] *Id.*

[172] *Id.* The obvious inadequacies in our historical methods were aptly critiqued by Professor Steven Wilf:

> Legal historians, in other words, have been left behind by other historians. Legal historians are borrowers from borrowers. As intellectual magpies traveling from nest to nest, they occasionally bring methodologies borrowed from other areas of scholarship to bear upon their own legal historical enquiries. When was the last time someone borrowed from us? We inherit derivative methodologies, and often remain uncritical of our own historiographic preconceptions. How many legal historians simply follow cases one after another like beads on a rosary until they reach a believable conclusion that this is the past? Much legal historical work is of the headnote tradition—cases simply represent holdings—which, in turn, represent the slow accretion of legal doctrines. In some ways, while we claim the mantle of historians—even if our heads are sometimes insufficiently anointed with the dust of archives—the fact is that among historians we are provincials.

Steven Wilf, *Law/Text/Past*, 1 U.C. IRVINE L. REV. 543, 553 (2011).

[173] Mawani, *supra* note 159, at 349.

[174] DERRIDA, *supra* note 167, at 1 (emphasis in original). As further explained by scholars Motha and van Rijswijk:

> The archive traditionally delineates the site from which the law is drawn, and manifests the space of law's authority. From its root in *arkheion*, the residence of *archons* or super magistrates, the archive is also where official documents were deposited. As Derrida reminds us, the *archons* had the power to make, represent, and interpret the law.

Motha & van Rijswijk, *supra* note 161, at 1.

[175] Motha & van Rijswijk, *supra* note 161, at 5.

> Its constitutive relations and self-generating qualities are clearly manifest in law's citational and organizational structure of command. Its mutuality and mutability are evidenced in the ways that law conceives of, appropriates, and assimilates some knowledge as pertinent to legality while dismissing others as extraneous and nonexistent. As a self-referential system mandating recall, reference, and repetition, while also drawing selectively from other domains of knowledge, law generates documents and renders them potentially (ir)relevant. In so doing, it continually produces, expands, and destroys that which comprises its archive and in turn, that which constitutes law.[176]

At a fundamental level, this intimate connection between law and archive is seen in the "paper trails" of our statutes and in precedents that are a part of our common law.[177] As described in a recent hornbook co-authored by respected scholar Bryan Garner and twelve appellate judges, precedent "is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges . . . ."[178] The legal doctrine that commands a deference to precedence is *stare decisis*, which is derived from the maxim *stare decisis et non quieta movere*—"to stand by things decided and not disturb settled points."[179] Precedent includes, then, the power to not only ensconce wise decisions, but to also enshrine wrong decisions—or in this case, inaccurate or patently false histories.[180] In short, by obeying the commands of stare decisis, it can create "abiding injustice as the cost of ensuring consistency and predictability more systemically."[181] Worse, it may result in a sort of "judicial somnambulism,"[182] wherein judges pass judgment without giving careful consideration of the merits of the case at hand.[183]

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[176] Mawani, *supra* note 159, at 340–41.
[177] *Id.* at 341.
[178] BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 9 (2016).
[179] *Id.* at 5 (quoting GARNER'S DICTIONARY OF LEGAL USAGE 841 (3d ed. 2011).
[180] *See id.* at 12.
[181] *Id.* at 13.
[182] *Id.* at 12 (quoting JEROME FRANK, LAW AND THE MODERN MIND 171 (1930)).
[183] *Id.*

In analyzing the ways that historians and legal practitioners approach the past, there are some similarities.[184] For example, they both "take the raw data of past events and fashion from them narratives that stand for the past."[185] But unlike a historian, when a court interprets history, its version becomes "official" and thus legally authoritative. What makes this concerning, however, is that in our legal system, judges are known for often getting it wrong. From *Dred Scott v. Sandford*[186] to *Plessy v. Ferguson*,[187] and from *Hawai'i Housing Authority v. Midkiff*[188] to *Rice v. Cayetano*,[189]

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[184] As Judge Posner stated, "Law is the most historically oriented, or if you like the most backward-looking, the most 'past dependent,' of the professions." Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 573 (2000).

[185] Reiter, *supra* note 27, at 56.

[186] 60 U.S. (19 How.) 393 (1857) (holding that all blacks, enslaved or free, were not and could never become citizens of the United States and for that reason, had no standing in federal court). According to Chief Justice Taney, the framers of the Constitution believed that blacks "had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." *Id.* at 407. Taney asserted that "it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration . . . ." *Id.* at 410. As noted by several legal scholars, "Taney's argument was supported with a patently erroneous historical gloss . . . ." Robert A. Burt, *Dred Scott and Brown v. Board of Education: A Frances Lewis Law Center Colloquium*, 42 WASH. & LEE L. REV. 1, 6 (1985) (citing Kelly, *supra* note 67, at 122).

[187] 163 U.S. 537 (1896) (sustaining constitutionality of state laws compelling racial segregation). Despite recognizing that the Fourteenth Amendment's purpose was "to enforce the absolute equality of the two races," the Court reasoned that the amendment "could not have been intended to abolish distinctions based upon color." *Id.* at 544. According to legal scholar Leonard Levy, *Plessy* "displayed the Court's disastrous use of history." LEVY, *supra* note 67, at 317.

[188] 467 U.S. 229 (1984). As one scholar aptly explained, in *Midkiff*, "the Court unanimously held that the state could do the very thing that Justice William Paterson had said in 1795 that it could not do—take property from one citizen, even at a just compensation, and give it to another at that price." LEVY, *supra* note 67, at 390. To arrive at this result, the Court adopted a misguided understanding of history that characterized Native Hawaiians as developing and adopting a feudal land tenure system. Justice O'Connor, in emphasizing the antifeudal nature of the Hawai'i Land Reform Act of 1967, wrote:

> The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. . . . Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.

Midkiff, 467 U.S. at 241–42 (footnote omitted).

[189] 528 U.S. 495 (2000) (concluding that the Office of Hawaiian Affairs' law limiting the right to vote to qualified Native Hawaiians violated the Fifteenth Amendment because it was based entirely on a race-based voting qualification). Professor Troy Andrade provides

examples abound of the Supreme Court's misuse of history. As explained by Leonard Levy, "Two centuries of Court history should bring us to understand what really is a notorious fact: the Court has flunked history."[190] Levy harshly rebuked the Justices stating, that they "stand censured for abusing historical evidence in a way that reflects adversely on their intellectual rectitude as well as on their historical competence."[191] This criticism was levelled at the Justices because "[t]he Court artfully selects historical facts from one side only, ignoring contrary data, in order to support, rationalize, or give respectability to judgments resting on other grounds."[192] These sentiments were echoed by Alfred H. Kelly, who described the Court's historical scholarship as "simplistic,"[193] and the result of "creative historical imagination."[194] Further, the Court was guilty of not only committing "historical felon[ies],"[195] but also "amateurish historical solecism[s]."[196] When courts commit these "historical felonies," the resulting impact can be far-reaching:

> The court's historical interpretation may become part of the findings of fact, determine the outcome of the case, be entered in the official public records, become available for citation as binding precedent, and even establish a form of "official" public meaning of laws or of the Constitution itself. In other words, lawyers and judges can create an authoritative interpretation of the past that stands as an official government record, which can have real-world effects.[197]

These real-world effects are dramatically seen in the histories that have been told about Native Hawaiians by attorneys, judges, and scholars. By viewing Law as an Archive, it beckons us to critically evaluate the embedded record in statutes and precedent, and to interrogate the teleological narratives it produces. By doing so, we see reflected in these

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extensive analysis in his criticism of the Court's iteration of "history" in *Rice v. Cayetano*. *See* Andrade, *supra* note 31, at 649 ("[S]erious harm came from the Court's biased and selective narrative of Hawaiian history.").

[190] LEVY, *supra* note 67, at 300.

[191] *Id.*

[192] *Id.*

[193] Kelly, *supra* note 67, at 119 (citing Mark DeWolfe Howe, *Split Decisions*, N.Y. REV. OF BOOKS 17 (1965)).

[194] *Id.* at 136.

[195] *Id.* at 135 ("To put the matter bluntly, Mr. Justice Black, in order to prove his point, mangled constitutional history.").

[196] *Id.* at 141 ("They were concerned with the problems of their day and not with those of ours, and to assume that a revelatory reconstruction is possible is to fall into an amateurish historical solecism.").

[197] Festa, *supra* note 67, at 506–07.

records decisions regarding what is "pertinent"[198] and what is "irrelevant."[199] We also see how law develops and asserts its authority while also concealing and sanctioning its own material.[200]

My analysis begins by questioning what comprises law's "archive" in Hawai'i. I start with Hawai'i's most popular source of history, and I describe how it became sanctioned as a credible source—despite its lack of probity.

B. Hawai'i's Historiography Is Flawed

> Ua noa i na kanaka a pau loa ka moolelo, hookahi mea nana i keakea, o ka naaupo o kanaka . . . .
>
> History is freely available to all people, there being only one obstruction—the ignorance of man.
>
> —Samuel M. Kamakau[201]

As legal scholar David Barnard stated, "[t]o narrate the history of the Hawaiian Islands is immediately to take sides in a political debate."[202] Often times, the dominant Western narrative skips "the more than 1000 years of known human settlement in the Hawaiian Islands" opting instead to begin "with the 'discovery' of Hawaii by Captain James Cook in 1778."[203] Take for example, Gavan Daws' *Shoal of Time*—his version of history purportedly begins when "the existence of the Hawaiian Islands became known to Europeans."[204] Daws' *Shoal of Time* is "the #1 bestselling history of the islands,"[205] and has been cited by the U.S.

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[198] *See id.* at 539–40.

[199] *See id.*

[200] *Id.* at 506–07.

[201] Samuel M. Kamakau, *Palpala mai a S.M. Kamakau mai*, KE AU OKOA, Sept. 12, 1865, at 3.

[202] David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 TEMP. POL. & CIV. RTS. L. REV. 1, 5 (2006).

[203] *Id.*

[204] GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS xi (1968).

[205] *Shoal of Time: A History of the Hawaiian Islands*, AMAZON, https://www.amazon.com/Shoal-Time-History-Hawaiian-Islands-ebook/dp/B010RH98FS (last visited Apr. 22, 2017) ("In SHOAL OF TIME, the #1 bestselling history of the islands, Gavan Daws tells the real-life story: how the winds of change, blowing from the big world, gusted through human life in Hawai'i for more than two centuries, at hurricane force."); *see also* Barnard, *supra* note 202, at 5 ("Gavan Daws, whose *Shoal of Time: A History of the Hawaiian Islands* is the most popular and most-often cited modern treatment . . . .").

Supreme Court,[206] the U.S. District Court for the District of Hawai'i,[207] court briefs,[208] and various law journals.[209] Some scholars have questioned the underlying probity of Daws' historical work,[210] but overwhelmingly, *Shoal of Time*, which was published nearly fifty years ago, is cited to support a historical fact.

Native Hawaiian scholar Dr. Jonathon K. Osorio described Daws as a scholar "with a wide range of abilities and a gift for historical writing."[211] And while *Shoal of Time* is acknowledged as the most "widely read history of Hawai'i," Osorio notes that it is also "among the most criticized."[212] According to Osorio, Daws "represents the irony of historiography itself:

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[206] *See* Rice v. Cayetano, 528 U.S. 495, 500 (2000) (citing DAWS, *supra* note 204, at xii–xiii).

[207] Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141, 1148 (D. Haw. 2003) (citing DAWS, *supra* note 204, at xii-xiii), *aff'd in part, rev'd in part* 416 F.3d 1025 (9th Cir. 2005), *and rev'd in part on reconsideration* 470 F.3d 827 (9th Cir. 2006) (en banc)).

[208] *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondent at 2, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 569475, at *2 (citing DAWS, *supra* note 204, at 2).

[209] *See, e.g.*, Patrick W. Hanifin, *Rice is Right*, 3 ASIAN-PAC. L. & POL'Y J. 283, 298 n.76 (2002) (citing DAWS, *supra* note 204, at 214).

[210] *See, e.g.*, Barnard, *supra* note 202, at 5 ("Gavan Daws, whose *Shoal of Time: A History of the Hawaiian Islands* is the most popular and most-often cited modern treatment, reveals its Western bias in the first sentence . . . .").

[211] Jonathan K. Osorio, *Living in Archives and Dreams: The Histories of Kuykendall and Daws*, *in* TEXTS AND CONTEXTS: REFLECTIONS IN PACIFIC ISLANDS HISTORIOGRAPHY 191, 196 (Doug Munro & Brig V. Lal eds., 2006).

[212] *Id.* ("[N]ative scholars in particular find Daws' observations and piquant sense of humor and irony objectionable if not downright offensive."). Osorio summarized some of the criticisms leveled at *Shoal of Time*: "The portrait [Daws] paints of many native individuals is often openly contemptuous, one reason why native readers today find *Shoal of Time* obnoxious and misleading, especially about the intentions and capacities of native Hawaiians." *Id.* at 197. As explained by Osorio, Daws was particularly offensive in his treatment of the Māhele:

> One example is [Daws'] recounting of the division and alienation of lands known as the Mahele, a seminal event in the Kingdom's history when thousands of years of a tradition of land tenure based on mutual obligations between chiefs and people were suddenly replaced by legislation . . . . Writing in the late 1960s, Daws would not have known that within a few years the Mahele would come to be the strongest symbol of Hawaiian loss to several generations of Hawaiian scholars and activists. Nevertheless, his casual dismissal of the outcome of the Mahele as the result of the slowness of the chiefs to divide out their interests and the *maka'ainana* being equally "dilatory" (127) is most unfortunate and strikes contemporary Hawaiians as incredibly insensitive if not downright stupid.

Id. at 198.

he was sympathetic to native culture . . . *but lacking any way of understanding that culture*, he chose to mock the institutions that he believed oppressed the poor and underclasses and spared no one, neither missionary nor native *ali'i*."[213] Daws acknowledged this "lack of understanding" and how this impacted the way he conducted historical research about Native Hawaiians:

> [S]ources on the life of the native community are all but intractable. The Hawaiians were not in the habit of explaining themselves or even exposing themselves in written form . . . . In general they did not initiate social action but were acted upon. I claim no special gift of empathy; wishing to understand the Hawaiians I found I could not, and I ended by merely trying to make sense out of what their white contemporaries said about them.[214]

Daws' bibliography and citations, which are almost entirely comprised of English-language sources (an estimated 97%),[215] reflect his erroneous assumption that "Hawaiians were not in the habit" of "explaining themselves" in the "written form." This assertion, however, is easily refuted by conducting even the most cursory of research in the repositories that Daws purportedly utilized. Not only does this demonstrate a shocking level of scholarly negligence, it directly impacted the way Daws framed and crafted his history about Native Hawaiians.

With sweeping statements about what Hawaiians did or did not write, it is not entirely surprising that so many who choose to write about Hawai'i's history proceed under the false assumption that English sources are the best and offer all that is left to "uncover" the past. The result is a hegemonic historiography that has been sourced almost exclusively from English sources. As 'Ōiwi scholar Noenoe Silva stated:

> By the mid-twentieth century, the idea that English was the language of Hawai'i seemed natural, especially because, except by some persistent Kānaka, Hawai'i was no longer regarded as a separate nation with its own people having their own history and language. When historians and others

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[213] *Id.* at 196.

[214] Gavan Daws, *Writing Local History in Hawaii–A Personal Note*, 2 HAW. HIST. REV. 417, 418 (1968).

[215] This is an approximation based on what was contained in Daws' bibliography—which Daws readily admitted was incomplete: "This list of references does not pretend to comprehensiveness or even formality. Only those sources actually cited in the footnotes are listed, and often their titles appear in the bibliography shortened unceremoniously." DAWS, *supra* note 204, at 400. In arriving at this calculation, I erred on the side of over-inclusiveness. Of the 562 total sources contained in the bibliography, approximately 19 sources cited are in the Hawaiian language, or were written in both English and Hawaiian.

> composed their narratives, they "naturally" conducted their research using only the English-language sources.[216]

In short, the master narrative as incorporated in histories about Hawai'i reflects the normalized belief that full and unbiased histories may be created from an English-only record. These histories were later embraced by courts and legal scholars, thus becoming a part of law's archive.

Because many lack an understanding of what actually exists, or perhaps willfully choose to ignore it, Hawai'i's flawed historiography has resulted in a perpetuating discourse[217] that has become embedded in our legal scholarship and enshrined in case law as stare decisis. In short, the lack of Hawaiian-language fluency coupled with the false assumption of a "wasteland" of missing history has resulted in the silencing of an entire nation of people.

C. The Silencing of Mānaleo[218]: The Effect of Colonialism on the Hawaiian Language Corpus of Archival Materials

Nānā i ke kumu.

Look to the source.[219]

It is undeniable that language is central to a culture's history and identity. Indeed, on February 1, 2017, the Pew Research Center, a "nonpartisan fact tank" that conducts "public opinion polling, demographic research, content analysis and other data-driven social science research[,]"[220] released a study that revealed how national identity is defined across different countries.[221] According to this study, while such factors as religion, place of birth,

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[216] *See* SILVA, *supra* note 23, at 3.

[217] *Id.* at 9.

[218] The term "mānaleo," refers to a "Native speaker, a term invented by Larry Kimura and William H. Wilson in the late 1970s. *Lit.*, inherited language." PUKUI & ELBERT, *supra* note 2, at 236.

[219] The term "nānā" means to "look at, observe, see, notice, inspect; to care for, pay attention to, take care of." *Id.* at 260. The term "kumu," refers to the "beginning, source, origin . . . ." *Id.* at 182.

[220] *About Pew Research Center*, PEW RESEARCH CTR., http://www.pewresearch.org/about/ (last visited Apr. 22, 2017).

[221] BRUCE STOKES, PEW RESEARCH CTR., WHAT IT TAKES TO TRULY BE 'ONE OF US': IN U.S., CANADA, EUROPE, AUSTRALIA AND JAPAN, PUBLICS SAY LANGUAGE MATTERS MORE TO NATIONAL IDENTITY THAN BIRTHPLACE (2017), http://assets.pewresearch.org/wp-content/uploads/sites/2/2017/04/14094140/Pew-Research-Center-National-Identity-Report-FINAL-February-1-2017.pdf.

nationality, and shared customs and traditions were viewed as important for establishing national identity, language was "far and away . . . seen as the most critical to national identity."[222] This sentiment rings particularly true for Kānaka 'Ōiwi as is evident in the following famous 'Ōlelo No'eau: "I ka 'ōlelo no ke ola, i ka 'ōlelo no ka make," which means, "Words can heal; words can destroy."[223] A contemporary translation for this Hawaiian proverb is, "In the Hawaiian language we find the life of our race, without it (the Hawaiian language) we shall perish."[224] Thus, if one truly wants to write about Native Hawaiians, the lifeblood—and thus the history—of our people will only be found in our language.

Unfortunately, for generations, knowledge about the history of Hawai'i has been limited "at every level by scholarship that accepts a fraction of the available sources as being sufficient to represent the huge collection of material that actually exists."[225] According to Dr. Noelani Arista, the written and published corpus in 'Ōlelo Hawai'i (the Hawaiian language) is "the largest in any indigenous language in the United States and possibly the Polynesian Pacific . . . ."[226] It is estimated that "less than one percent of the whole[] has been translated and published"[227] and "[t]he rest, equal to well over a million letter-size pages of text, remains untranslated, difficult to access in the original form, unused, and largely unknown."[228]

The available corpus in 'Ōlelo Hawai'i comprise a "detailed, almost daily accounting of colonial and imperial processes that span the period from colonial settlement to the overthrow of a native nation and its aftermath (1820-1948)."[229] The produced materials—by both foreigner and Native Hawaiian writers—document in the Hawaiian language the transformation of a nation, with sources "supplying innumerable first-hand accounts of native lives in transition."[230]

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[222] *Id.* at 8.

[223] *See* PUKUI, *supra* note 7, at 129 n.1191.

[224] *'Ōlelo No'eau*, 'AHA PŪNANA LEO, http://www.ahapunanaleo.org/index.php?/programs/ohana_info/olelo_noeau/ (last visited Apr. 22, 2017).

[225] *See* NOGELMEIER, *supra* note 11, at 1.

[226] *See* Arista, *supra* note 11, at 1.

[227] *See* NOGELMEIER, *supra* note 11, at XIII.

[228] *See id.* Hawai'i arguably has "the largest literature base of any native language in the Pacific and perhaps all native North America, exceeding a million pages of printed text . . . ." Noelani Arista, *Navigating Uncharted Oceans of Meaning: Kaona as Historical and Interpretive Method*, 125 PROC. MOD. LANGUAGE ASS'N, 663, 665 (2010). For example, "from 1834 to 1948, Hawaiian writers filled 125,000 pages in nearly 100 different newspapers with their writings." NOGELMEIER, *supra* note 11, at XII.

[229] *See* Arista, *supra* note 11, at 1.

[230] *Id.*

Despite the vast wealth of knowledge available, it is still commonly believed that scholars writing about Hawai'i's history must deal with "source scarcity."[231] Scholars today interested in Hawai'i history are not faced with archival destruction, as has occurred in many Native American and other indigenous sites of colonial contest,[232] and is currently occurring in our world today.[233] Instead, scholars are proceeding under the mistaken presumption that the English sources and the small corpus of Hawaiian materials that have been translated offer sufficient insight to write an "unbiased history."

According to Hawaiian language scholar Dr. Puakea Nogelmeier, the few Hawaiian language primary sources[234] that have been incorporated into modern scholarship are problematic at best—worse, they eclipse the larger corpus of original writings that remain unrecognized.[235] The corpus referred to here is comprised of seven books translated from the words of four nineteenth-century Hawaiian authors, Samuel Mānaiakalani Kamakau, John Papa 'Ī'ī, Davida Malo, Kepelino Keauokalani.[236] Nogelmeier is not alone in his critical assessment of these English language translations—prominent and respected scholars of 'Ōlelo Hawai'i, such as Dr. Noelani Arista, Dr. Jeffrey Kapali Lyon, and Dr. Ronald Williams, to name just a few, have also written extensively about the problems relating to English language translations that so many historians rely upon.[237]

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[231] *Id.*

[232] *Id.* at 2.

[233] *See, e.g.*, Louise Arimatsu & Mohbuba Choudhury, *Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq*, 91 INT'L L. STUD. 641, 663 (2015). Arimatsu and Choudhury state:

> Mari (Tell Hariri) is an ancient Mesopotamian city located close to the border with Iraq and dates back to 2900 BC. It is a rich archeological site exemplified by the discovery of an archive containing fifty thousand clay tablets .... Conservation efforts were suspended with the outbreak of war. The looting at the site has worsened over time, and by early 2014, illegal excavations were reportedly being carried out by an 'armed gang.' In June 2014, Mari and the surrounding territory fell under ISIS control.

Id.

[234] *See* NOGELMEIER, *supra* note 11, at XIII. The translated words of these authors have "become an articulated bastion of Hawaiian reference, and have been granted an overwhelming and far-reaching authority about Hawaiian culture and history." *Id.*

[235] *Id.* at 3. It is estimated that the "sum of these works makes up only a fraction of one percent of the available primary material ...." *Id.* at 2.

[236] *Id.* These works are most commonly relied upon for historical information about Native Hawaiians. *Id.*

[237] *See* discussion *infra* at 578–83.

One issue with the translated versions is that the content of the original works was "reduced, re-ordered, and decontextualized."[238] This problematic methodology resulted in what Nogelmeier refers to as "epistemological overlay" or "dominant overwriting" where Hawaiian writings have been clearly reworked to fit and reinforce Western intellectual paradigms.[239] This process of "dominant overwriting" is seen not only in the way the original source materials were presented, but also in the way materials were actually translated. For example, Dr. Lyon analyzed the translations for Davida Malo's *Mo'olelo Hawai'i*, popularly known by its English title *Hawaiian Antiquities*, as translated by Nathaniel Emerson.[240] The table below has been adapted from Dr. Lyon's article and provides insight into this practice of "dominant overwriting":

Table 1: Example of Dominant Overwriting.[241]

Davida Malo (original with modern orthography added)	**N.B. Emerson** (from *Hawaiian Antiquities*)	**Langlas-Lyon** (close translation)
Mokuna XXXI No ke Kilokilo 'Uhane	CHAPTER XXXI. NECROMANCY	Chapter 31. Concerning Kilokilo 'Uhane
1. He mea ho'omana ke kilokilo 'uhane. He hana nui nō ia ma Hawai'i nei, he mea ho'oweliweli nō e ho'opunipuni ai, me ka ho'oiloilo a me ke koho wale aku e make ka mea nona ka 'uhane āna i 'ike ai, he mea nō e kaumaha ai ka na'au o kahi po'e me ka weliweli nui loa.	1. Necromancy, *kilokilo uhane*, was a superstitious ceremony very much practiced in Hawaii nei. It was a system in which barefaced lying and deceit were combined with shrewd conjecture, in which the principal extorted wealth from his victims by a process of terrorizing, averring, for instance, that he had seen the wraith of the victim, and that it was undoubtedly ominous of his impending death. By means of this sort great terror and brooding horror were made to settle on the minds of certain persons.	1. *Kilokilo 'uhane* [soul sighting] was a religious activity. It was greatly practiced here in Hawai'i, a frightening practice used to deceive others by predicting disaster, supposing that the person whose spirit had been seen would die. It was indeed a practice that weighed down the spirit of some people with great terror.

[238] *See* NOGELMEIER, *supra* note 11, at 3.

[239] *Id.* at 29. It is beyond the scope of this article to delve too deeply into this topic.

[240] Jeffrey Lyon, *Malo's* Mo'olelo Hawai'i*: The Lost Translation*, 47 HAWAIIAN J. HIST. 27 (2013).

[241] *Id.* at 42 (alterations in original).

The selected title of the chapter, "Necromancy," reveals how Malo's work has been translated in such a way to reflect Western intellectual paradigms. As Dr. Lyon observed, "19th century translators of Hawaiian usually rendered each Hawaiian term by what they considered the closest English equivalent, even when there really was no suitable equivalent."[242] Emerson's use of the term "necromancy" is "unsuitable since *kilokilo 'ūhane* (soul sighting) here refers to the wandering souls of *living persons*."[243] The term "necromancy," which has a "primary meaning of 'conjuration of the spirits of the dead'" results in "a pejorative rendering of *kilokilo 'ūhane* (soul sighting)."[244] Indeed, Emerson's translation is "far longer and far more literary than Malo's original . . . [and] is also far more censorious."[245]

In sum, the issue of "dominant overwriting" should be a serious concern for any scholar who decides to rely on these translations. A more obvious issue that scholars should be cognizant of, however, are mistranslations. For example, Nogelmeier noted that in an article from *Nupepa Kuokoa* dated November 30, 1867, the original passage stated: "Ke mau nei no hoi ka moe lehulehu, e like me ka wa kahiko."[246] The literal translation should read as follows, "Numerous sexual liaisons are still ongoing, just as in ancient times."[247] However, the translation of that same passage that was published in Kamakau's *Ruling Chiefs* reads: "Today, licentiousness is more common than formerly."[248] The error is small, but incorrectly conveys comparative qualities that Kamakau never intended—indeed, his statement only references a continuation of "numerous sexual liaisons."[249] One might want to believe that such errors are rare, but there is evidence that this is not the case.[250]

Entire histories about Native Hawaiians have been based on the writings of these four men, and while these works are a valuable source of information, their writings are only a fragment of what hundreds of Hawaiian writers generated in the span of more than a century.[251] This reliance on heavily edited and often condensed English-language

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[242] *Id.* at 51.
[243] *Id.* (emphasis added) (italicization of kilokilo ʻūhane in original).
[244] *Id.* (italicization of kilokilo ʻūhane in original).
[245] *Id.*
[246] NOGELMEIER, *supra* note 11, at 130.
[247] *Id.* at 131.
[248] *Id.* (citation omitted).
[249] *Id.*
[250] *See id.*
[251] *See id.* at 3.

translations of a handful of Hawaiian texts has perpetuated a "discourse of sufficiency"—in other words, that such texts are "sufficient" to embody nearly a hundred years of extensive auto-representation, where Hawaiians wrote for and about themselves.[252] The scope of available information is extensive. But to access these materials, or to even know that it exists, requires that the scholar first obtain cultural and linguistic competency in 'Ōlelo Hawai'i.[253] For whatever reason, however, scholars have eschewed this prerequisite and have opted to rely solely on the English translations.[254]

While it was perhaps unconscious at times, the "erasure[] at work in [these] Eurocentric translations . . . [reflects a] long history of Westerners imposing their beliefs, customs, education, and language on the Hawaiian people . . . ."[255] Over time, many scholars have contributed to the perpetuation of this discursive practice by failing to see the necessity of obtaining "linguistic and cultural fluency," instead choosing to base their work about Hawai'i and Native Hawaiians largely on sources that have been translated into English.[256] This "discourse of sufficiency"[257] has informed prevailing scholarship and mindsets, and has resulted in the

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[252] *Id.* at 1–2.

[253] This is not a unique concept. Constitutional law scholar H. Jefferson Powell explained in his article, *Rules for Originalists*, that "[w]hen a modern American student of ancient Near Eastern civilization interprets an Akkadian text from the second millennium B.C.E. . . . she is highly unlikely to forget that she is dealing with the artifact of a culture different from her own." Powell, *supra* note 71, at 672. Because the text is written in a different language, "[t]here is an unmistakably great historical, conceptual, and cultural distance between the student and the ancient writer." *Id.* at 673. Originalists falsely believe that because the founders spoke "recognizably modern English," that the "historical distance" between 1987 and 1787 or 1868 and 2017 "is effectively zero." *Id.* The assumption is that the founders could participate in our contemporary constitutional conversation without the aid of a translator. *Id.* According to Powell, that is a false assumption—an originalist interpreter of the U.S. Constitution needs a translator to bridge the historical gap between our modern presuppositions and cultural concepts and the thoughts of the founders. *Id.* Thus, to properly fashion a history about any society, one should obtain cultural and linguistic competency, or at least work with a competent translator who has those capabilities.

[254] It is often frustrating for many Native Hawaiian scholars because the concept seems quite straightforward: if one sought to write a history about the political and legal history of nineteenth-century France, a careful and thorough researcher would learn French, work with a skilled translator, or at least acknowledge that their work is based solely on English-language sources.

[255] *See* BROWN, *supra* note 23, at 9.

[256] *See* Arista, *supra* note 11, at 665.

[257] BROWN, *supra* note 23, at 4 (quoting NOGELMEIER, *supra* note 11, at 1).

continued institutional support for these flawed perspectives[258]—as is evident in our current system of law and legal process.

Indeed, in the context of legal scholarship, academics, jurists, and practitioners have the ability to create an authoritative, historical interpretation of the past. Through their analysis, they have the power to discredit some sources, and elevate other sources. For example, the historical events surrounding the 1893 overthrow of the Hawaiian monarchy are often a source of controversy and many seek to write about it in the legal community. As noted in a Georgetown Law Journal, there are "numerous factual accounts of what happened during the fateful days of insurrection, though, unfortunately, they tend to be biased and are often contradictory."[259]

According to the author, however, "one of the more balanced accounts" may be found in Ernest Andrade's *Unconquerable Rebel: Robert W. Wilcox and Hawaiian Politics, 1880–1903*.[260] Andrade's book was lauded as a carefully researched biography that presented "historical facts" from a "critical time in Hawaiian history."[261] Andrade's book contains nearly 740 citations—but like Daws, it fails to reference a "single Hawaiian-language citation from any of the dozens of Hawaiian-language newspapers, manuscript collections, or books about the topic that were produced during the period covered by the text."[262] Andrade acknowledges in his book that it "was based on newspaper accounts more than on any other single kind of source."[263] And indeed, his work reflects this insofar the accounts are "nearly a transcription of the English-language presses' view of Wilcox and the political events of the period . . . ."[264] This is highly problematic because a close review of the cited newspapers utilized by Andrade reveals a troubling pattern. The newspapers that Andrade relies upon were wholly comprised of the "establishment-official press," which essentially "spoke for no more than five to six percent of the population" in Hawai'i.[265]

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[258] *See id.* at 4.

[259] Eric Steven O'Malley, *Irreconcilable Rights and the Question of Hawaiian Statehood*, 89 GEO. L.J. 501, 511 (2001).

[260] *Id.* at 511 n.62 (citing ERNEST ANDRADE, JR. UNCONQUERABLE REBEL: ROBERT W. WILCOX AND HAWAIIAN POLITICS, 1880–1903, at 116–28 (1996)).

[261] Ronald Williams Jr., *'Ike Mōakaaka, Seeing a Path Forward: Historiography in Hawai'i*, 7 HŪLILI 67, 73 (2011) (quoting James V. Hall, *Book Review*, 71 PAC. AFF. 143, 143–44 (1998) (reviewing ANDRADE, *supra* note 260)).

[262] *Id.*

[263] ANDRADE, *supra* note 260, at 287.

[264] Williams, *supra* note 261, at 74.

[265] *See infra* Section III.E.

Andrade's work—a purported biography about a Native Hawaiian political figure—was heralded in a respected law journal as "one of the more balanced accounts" of the 1893 overthrow.[266] The term "balance" means, *inter alia*, to "equalize in number, force, or effect; to bring into proportion."[267] As described more carefully below in Sections III.D through E, the problem with using English-only sources to craft a legal history about Native Hawaiians is that it does not result in "balance." It perpetuates a discourse of sufficiency in what has become a pervasive force in legal scholarship, and has resulted in the continued institutional support for these dominant viewpoints. In short, this discourse of sufficiency has effectually silenced native voice.

D. Lost in Translation: The Disappearance of Hawaiian in Hawai'i's Legal History

> "[T]hough the Hawaiian language is the original language of this people and country, the English language is largely in use. Of necessity the English language must be largely employed to record the transactions of the government in its various branches . . . ."
>
> —Chief Justice A.F. Judd (1892)[268]

> "The mere fact that Hawaiian is also an official language of Hawaii does not compel this Court to ignore the practical realities of this dispute.
>
> . . . .
>
> [The use of Hawaiian] would only add needless delays and costs to this dispute . . . ."
>
> —Senior U.S. District Judge Alan Kay (1994)[269]

According to a 2015 U.S. Census Bureau Report analyzing data from a 2009 to 2013 American Community Survey, in Hawai'i, of the over 1.2 million people aged 5 and older, an estimated 326,893 people, or 25% of the population, spoke a language other than English at home.[270] The

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[266] Eric Steven O'Malley, *Irreconcilable Rights and the Question of Hawaiian Statehood*, 89 GEO. L.J. 501, 511 n.62 (2001).

[267] *See Balance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

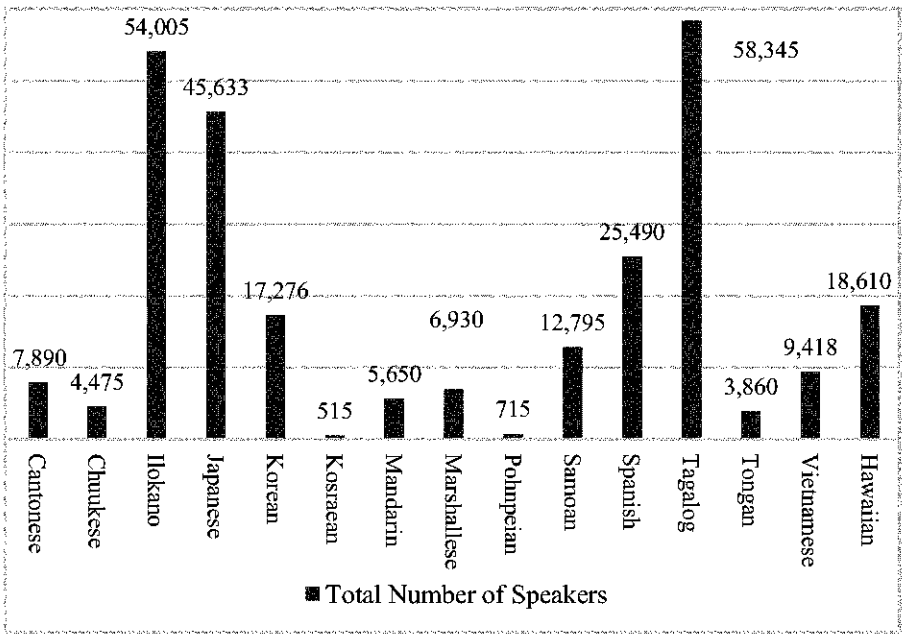
[268] *In re* Ross, 8 Haw. 478, 480 (Haw. Kingdom 1892).

[269] Tagupa v. Odo, 843 F. Supp 630, 631, 634 (D. Haw. 1994).

[270] U.S. CENSUS BUREAU, DETAILED LANGUAGES SPOKEN AT HOME AND ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OVER FOR STATES: 2009–2013 (2013), http://www2.census.gov/library/data/tables/2008/demo/language-use/2009-2013-acs-lang-tables-state.xls (providing tabular multi-year data and listing all languages spoken in the

Hawai'i Judiciary, in recognition of Hawai'i's cultural and linguistic diversity, has made strides to provide access to the courts. The Judiciary website reflects this commitment to diversity in its language access policies which state in pertinent part, "The Hawai'i State Judiciary is committed to providing meaningful access to court process and services to persons with limited English proficiency."[271] The Language Access Services homepage on the Judiciary website is available in the following languages: Cantonese, Chuukese, Ilokano, Japanese, Korean, Kosraean, Mandarin, Marshallese, Pohnpeian, Samoan, Spanish, Tagalog, Tongan, and Vietnamese.[272] The 2015 Census Bureau Report[273] provides the total number of speakers for each of these languages and is graphically produced below in Table 2:

Table 2: Selected Languages Spoken in Hawai'i[274]



United States that were reported during the sample period).

[271] Mark E. Recktenwald, *Judiciary Language Assistance Policy*, HAW. STATE JUDICIARY, http://www.courts.state.hi.us/services/language_assistance_services (last visited Apr. 22, 2017).

[272] *Id.*

[273] U.S. CENSUS BUREAU, *supra* note 270.

[274] *See id.*

Of the languages listed on the Judiciary website, only four languages are more prevalent in Hawai'i than Hawaiian: Tagalog (58,345), Ilokano (54,005), Japanese (45,633), and Spanish (25,490).[275] Sadly, Hawaiian is not currently listed on the Language Access Services homepage,[276] even though Article XV, Section 4 of the Hawai'i State Constitution recognizes the Hawaiian language as a co-official language of the State.[277]

How we arrived at this ironic situation—a situation where Hawaiian has no meaningful place in Hawai'i's legal system—requires us to look critically at how our legal and political system has been used to effectually render Hawaiian a nullity. It certainly was not because Native Hawaiians had little to say. Indeed, the available legal corpus in 'Ōlelo Hawai'i is extensive, comprising a wide range of materials—from international treaties,[278] to a legal form book,[279] from constitutions[280] to a legal digest,[281] from statutes[282] to Privy Council minutes[283]—the list goes on and on. Beyond the estimated thousands of civil and criminal cases from lower courts in 'Ōlelo Hawai'i,[284] there are also three volumes of reported

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[275] *Id.*

[276] HAW. STATE JUDICIARY, *supra* note 271.

[277] HAW. CONST. art. XV, § 4 ("English and Hawaiian shall be the official languages of Hawai'i except that Hawaiian shall be required for public acts and transactions only as provided by law.").

[278] *See, e.g.*, He Olelo Kuikahi, Treaty of Friendship, Commerce and Navigation, Haw.-U.S., Det. 23, 1826 (on file at the Hawai'i State Archives).

[279] J.W.H. KAUWAHI, HE KUHIKUHI O KE KANAKA HAWAII (Honolulu, H.M. Wini. 1857) (providing guide in 'Ōlelo Hawai'i concerning fundamental court documents and procedures, including sample forms for deeds, mortgages, dower, etc.).

[280] *See, e.g.*, *infra* note 291.

[281] *See, e.g.*, 3 KE ALAKAI O KE KANAKA HAWAII (Joseph M. Poepoe trans., Honolulu, Haw. Gazette Co. 1891) (providing a topical guide concerning Hawai'i laws, court rules, and decisions of the supreme court).

[282] *See, e.g.*, *infra* note 300.

[283] *See* KINGDOM OF HAW. PRIVY COUNCIL, MINUTES OF THE PRIVY COUNCIL (1845–1892) (on file at the Hawai'i State Archives) (providing minutes of the council which served to advise the King in all matters relating to the administration of the executive affairs of the government).

[284] The Hawai'i State Archives is the main repository for court records from the nineteenth-century. Approximately 6,527 criminal cases and 6,031 civil cases from the time period of 1847 to 1893 are contained in the archives. *See* HAW. STATE ARCHIVES, FINDING AID: RECORDS OF THE JUDICIARY BRANCH 1839–1970 (2009) (on file at the Hawai'i State Archives). And while I do not have statistical data detailing the exact number of cases in 'Ōlelo Hawai'i due to the lack of an existing index or database, the estimated total provided was based on personal experience and anecdotal evidence from others who regularly use these collections.

decisions in ʻŌlelo Hawaiʻi.[285] Thus, it is impossible to claim that there is a dearth of available material for interested scholars.

By unearthing the embedded record contained in law's archive, we come to recognize how and why the Hawaiian language became a "foreign language" in its own land. By carefully tracing and interrogating law's archival record, we can expose the faulty reasoning that has long supported the "forgone conclusion" that it is perfectly acceptable, and even laudatory, to write a history about Native Hawaiians, without utilizing Hawaiian language sources authored by Native Hawaiians.

To properly describe the emergence, development, and selective appropriation of Euro-American legal and political practices by Native Hawaiians during the nineteenth-century is beyond the scope of this article—other scholars dedicate entire books to this endeavor.[286] It is sufficient to say, however, that from the beginning, Native Hawaiian legal and political practices were largely intended to be conducted and conveyed in ʻŌlelo Hawaiʻi and English.[287]

For example, on June 2, 1825, the first recorded laws appearing in both ʻŌlelo Hawaiʻi and English were published as broadsides.[288] In 1827, King Kauikeaouli promulgated in ʻŌlelo Hawaiʻi one of the first printed examples of a penal code which prohibited murder, theft, adultery, liquor, prostitution, and gambling.[289] In 1839, Kauikeaouli enacted the first formalized codification of laws in ʻŌlelo Hawaiʻi—commonly referred to

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[285] NA OLELO O KA AHA KIEKIE O KO HAWAII PAE AINA, MA KE KANAWAI, KAULIKE A ME HOOKO KAUOHA, 1857–1881 (Henry L. Sheldon trans., Honolulu, Papa Pai o ka Hui P.C. Advertiser 1881); NA OLELO HOOHOLO O KA AHA KIEKIE O KO HAWAII PAE AINA, MA KE KANAWAI, KAULIKE, HOOKO KAUOHA, AME KA AHA MOANA (William P. Ragsdale trans., Honolulu, Keena Paipalapala Aupuni 1867); 1 KE ALAKAI O KE KANAKA HAWAII (Joseph M. Poepoe trans., Honolulu, Haw. Gazette Co. 1891).

[286] *See, e.g.*, BEAMER, *supra* note 23.

[287] This is an important fact that cannot be overstated. All too often, scholars who write about Hawaiʻi's legal history proceed without this most basic understanding, relying solely on the English version to their detriment. The assumption, of course, is that the English version serves as an exact replica of the Hawaiian version. As explained below, however, this is not the case and problems in legal translations are common even in modern times—regardless of the language.

[288] HE MAU KANAWAI NO KE AVA O HONORURU, OAHU—REGULATIONS FOR THE PORT OF HONOLULU (June 2, 1825) (on file at the Hawaiʻi State Archives). Legal proclamations began appearing as early as 1822—however, some of these laws were issued in English only. Some argue this is because these laws were directed mainly toward unruly foreigners, not Native Hawaiians. *See, e.g.*, BEAMER, *supra* note 23, at 106 ("From the examples I have found, it appears that many of these laws regulated the behavior of foreigners and, to a lesser extent, that of the makaʻāinana.").

[289] HE OLELO NO KE KANAWAI (Dek. 8, 1827) (on file at the Hawaiʻi State Archives).

as the "Bill of Rights"—and it was entitled *He Kumu Kanawai a me ke Kanawai Hooponopono Waiwai no ko Hawaii Nei Pae Aina*.[290] One year later, Hawai'i's first detailed Constitution was enacted in 'Ōlelo Hawai'i and was entitled, *Ke Kumukanawai a me na Kanawai o ko Hawaii Pae Aina*.[291] In 1841, an English-language edition was published for both the Constitution of 1840 and the 1839 Bill of Rights.[292] This is significant because as recognized by 'Ōiwi scholar Kamana Beamer, these two documents "were written in Hawaiian and only later translated into English, making the Hawaiian versions the original sources."[293] For this reason,

> [r]eliance on the English texts may undermine analysis and lead scholars to gloss over, or miss entirely, aspects of traditional governance embedded in these early records. The Hawaiian sources provide us with the best insights into what the ali'i were attempting to transform and how they viewed this change in relation to older systems of governance.[294]

This key concept is missed by many scholars, including Judge Burns who cites to the English translations of these two documents[295] to support a version of history that allegedly encapsulates the thoughts and beliefs of the ali'i and the "common people." Not surprisingly, the "thoughts" and "intentions" of Kānaka 'Ōiwi will not be found in these English translations.

Even within these translations, however, the reader is told that certain aspects of traditional 'Ōiwi governance were incorporated in these early laws—thus signaling to a responsible scholar that careful analysis of the underlying primary source is necessary. For example, within the preface to the translation for the 1840 Constitution, the translator acknowledged that while many of Hawai'i's laws were of "quite recent date," there was also "some thing [sic] like a system of common law" that consisted "partly in

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[290] HE KUMU KANAWAI A ME KE KANAWAI HOOPONOPONO WAIWAI NO KO HAWAII NEI PAE AINA (Honolulu, n. pub. 1840) (enacted on June 7, 1839).

[291] KE KUMUKANAWAI A ME NA KANAWAI O KO HAWAII PAE AINA (Honolulu, n. pub. 1841) (enacted on Oct. 8, 1840) [hereinafter 1840 KUMUKANAWAI].

[292] TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III (G.P. Judd trans., Honolulu, n. pub. 1842) [hereinafter TRANSLATION OF 1840 CONSTITUTION].

[293] BEAMER, *supra* note 23, at 127; *see also* MERRY, *supra* note 23, at 78–79 ("Thus the Declaration of Rights, the 1840 Constitution, and the laws of 1841 and 1842, although Anglo-American in some of their inspiration, were joined with Hawaiian systems of law and interpretations of Christian-educated Hawaiians and the Hawaiian-speaking missionary Richards. The result was a system of laws far closer to Hawaiian law than subsequent legislation beginning in 1845.").

[294] BEAMER, *supra* note 23, at 127.

[295] *See, e.g.*, Burns, *supra* note 6, at 218–19,

[the] ancient taboos, and partly in the practices of the celebrated chiefs as the history of them has been handed down by tradition . . . ."[296] As such, because "several of the original laws" were written by 'Ōiwi,[297] native customs and concepts were considered and incorporated in these early laws. Thus, failing to cite a single source in 'Ōlelo Hawai'i, while simultaneously proclaiming to write about the "intentions" and "beliefs" of 'Ōiwi is not just a serious oversight—it is also offensive.

Moreover, with regard to the primacy of the Hawaiian language, the preface to the 1840 Constitution stated:

> The following is a translation of the [C]onstitution of the Hawaiian Government . . . . The translation is not designed to be a perfectly literal one, but where ever there is a variation from the letter of the original it is always made with the design of giving the sense more clearly. . . . *The original [Hawaiian] will of course be the basis of all judicial proceedings.*[298]

Thus, from the beginning, primary legal sources were promulgated in 'Ōlelo Hawai'i—the original language that was intended to be used by the legislature and the judiciary.

With regard to the judiciary, the Constitution of 1840 vested judicial power in the supreme court which consisted of the Mō'ī (King) as chief judge, the Kuhina (Premier), and four persons appointed by the representative body.[299] The supreme court conducted its proceedings in Hawaiian, and the "views, arguments and reasonings adduced" were mandated to be "written or printed in the Hawaiian language."[300] From 1840 to 1852, the Mō'ī was the chief justice of the supreme court and the four associate justices were 'Ōiwi.[301]

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[296] TRANSLATION OF 1840 CONSTITUTION, *supra* note 292, at 3.

[297] *See id.* at 4.

[298] *Id.* at 3 (emphasis added).

[299] *Id.* at 13, 19–20; 1840 KUMUKANAWAI, *supra* note 291, at 5, 12–13.

[300] This was best evidenced in Hawai'i's 1847 Act to Organize the Judiciary Department. *See* 2 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS, ch. III, art. III, §§ X–XI, at 37 (Honolulu, Gov't Press 1847) (enacted Sept. 7, 1847) [hereinafter 1847 STATUTE LAWS] ("And all proceedings of [the supreme] court shall be registered and kept in the Hawaiian language."); 2 KANAWAI I KAUIA E KA MOI, E KAMEHAMEHA III, KE ALII O KO HAWAII PAE AINA, mok. 3, Haa. III, §§ X–XI, at 37–38 (Honolulu, Mea Pai a Na Misionary Amerika 1847) (enacted Sept. 7, 1847) [hereinafter 1847 KANAWAI] ("O na hoopii a pau, na hoopii mua a me na hoopii hope, a kakauia kela hoopii ana ma ka moohoopii e ke Kakauolelo o ua Aha la, a e kakauia na mooolelo a pau no ka Ahahookolokolokiekie ma ka olelo Hawaii.").

[301] King Kamehameha III, Mō'ī, served as chief justice, and Kekāuluohi, Kuhina, served as an associate justice. On May 10, 1842, the representative body appointed four associates justices: Z. Ka'auwai, Abner Paki, Charles Kanaina, and Jonah Kapena. TRANSLATION OF

The Judiciary Act of 1847, however, established a new judicial system that eviscerated the powers of the Mō'ī.[302] The creation of the Superior Court of Law and Equity designated William Lee as chief justice thus rendering the all-Hawaiian supreme court symbolic in significance only.[303] In 1850, under the new Constitution prepared primarily by Judge Lee, the Hawaiian-language supreme court led by the Mō'ī and the Superior Court led by Lee, were both replaced by the Hawai'i Supreme Court, which was composed of a chief justice and two associate justices.[304]

With regard to the use of 'Ōlelo Hawai'i in government, in 1846, the legislature of the Kingdom of Hawai'i decreed that all laws be published in both the Hawaiian and English languages.[305] For over a decade, the Superior Court and later the Hawai'i Supreme Court ruled that in situations involving any statutory interpretation issues, or apparent discrepancies between the English and Hawaiian versions, the Hawaiian version would prevail.

1840 CONSTITUTION, *supra* note 291, at 200. When Kekāuluohi passed away in 1845, Keoni Ana became Kuhina, and the Minister of Interior. 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS, *First Act Kamehameha III* § XXX, at 17 (Honolulu, Gov't Press 1846) (enacted Oct. 29, 1845) [hereinafter 1845 STATUTE LAWS]; 1 KANAWAI I KAUIA E KA MOI, E KAMEHAMEHA III, KE ALII O KO HAWAII PAE AINA, KANAWAI MUA § 30, at 16 (Honolulu, Mea Pai a Na Misionary Amerika 1846) (enacted Oct. 29, 1845) [hereinafter 1845 KANAWAI]. Then in November of 1844, Joshua Kaeo was selected as an associate justice to replace Z. Ka'auwai, who was appointed Land Commissioner. *No ke Aupuni*, POLYNESIAN, Nov. 14, 1846, at 3 ("No ka lilo ana, o L. [sic] Kaauwai, i Luna hoona kumu kuleana Aina, ua hoike mai oia i ka Moi i ke ku pono ole ia ia ke hana i kela hana, a me kela hana a ka Lunakanawai kiekie. Nolaila ua ae aku ke Alii ia ia e haalele i kana hano o ka Lunakanawai, a ua halawai ka poe i kohoia e na Makaainana, a ua hoonohoia Josua Kaeo i Lunakanawai kiekie ma ko Kaauwai hakahaku.").

[302] *See generally* 1847 STATUTE LAWS, *supra* note 300, at 26–38; 1847 KANAWAI, *supra* note 300, at 26–39.

[303] MERRY, *supra* note 23, at 102–03.

[304] From 1852 to 1892, the newly created Hawai'i Supreme Court was comprised almost entirely of foreigners—indeed, of the seventeen men who were justices of the supreme court, fifteen were foreigners, one was Hawaiian (John 'Ī'ī), and one was part-Hawaiian (R.G. Davis). *Id.* at 103 (citation omitted); *see also* WADE WARREN THAYER, A DIGEST OF DECISIONS OF THE SUPREME COURT OF HAWAII vi–ix (1916).

[305] 1845 STATUTE LAWS, *supra* note 300, ch. 1, art. 1, § 5, at 23 (enacted Apr. 27, 1846) ("The director of the government press shall promulgate the laws enacted by the legislative council . . . in the official organ, both in the Hawaiian and English languages.); 1845 KANAWAI, *supra* note 300, mok. 1, haa. 1, § 5, at at 19 (enacted Apr. 27, 1846) ("Pono i ua Puuku Pai palapala nei no ke Aupuni, e hoolaha aku i na Kanawai a ka Poeahaolelo e hooholo ai. . . . Penei oia e hana ai, e pai no ma ka olelo Hawaii, a me ka olelo Enelani . . . .").

For example, in the 1856 case *Metcalf v. Kahai*,[306] an issue arose over a statutory provision relating to the proper assessment of damages to an owner of a trespassing animal.[307] Justice George Robertson concluded that in a dispute involving the English and Hawaiian versions of a law, the Hawaiian version prevailed:

> Ua ikea ka like ole o ka olelo Hawaii a me ka olelo Beritania ma kekahi kanawai, a ua hilinai ka Aha mamuli o ka olelo Hawaii.[308]
>
> Where there appeared a discrepancy between the Hawaiian and English versions of a statute, the Court adhered to the former.[309]

Justice Robertson acknowledged that it had historically been the practice of the court to recognize the Hawaiian version of the law and thus, the court should "conform to it in this instance."[310]

A few months later, Chief Justice Lee reaffirmed this holding in *Hardy v. Ruggles*,[311] which involved conflicting procedural requirements for filing documents with the office of the Registrar of Conveyances.[312] In *Hardy*, the parties all acknowledged that English was "their mother tongue,"[313] but nonetheless argued over the conflicting language contained in the English and Hawaiian versions of laws.[314] In interpreting the Hawaiian version of

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[306] 1 Haw. 225 (Haw. Kingdom 1856).

[307] *Id.* at 226.

[308] Metcalf v. Kahai (1856) *in* NA OLELO HOOHOLO O KA AHA KIEKIE O KO HAWAII PAE AINA, MA KE KANAWAI, KAULIKE, HOOKO KAUOHA, AME KA AHA MOANA, *supra* note 285, at 75 (syllabus). Specifically, the Hawaiian version of the court's decision stated in pertinent part:

> Ua like ole ka olelo Beritani me ka olelo Hawaii, o keia pauku. Ma ka olelo Beritania, ua oleloia e hooukuia ka pa-ha o ka poho i loaa, a poino paha; a ma ka olelo Hawaii, ua oleloia e hooukuia ka mea holoholona e like me ka mea kupono no ka poho a me ka poino i loaa.

Id. at 77.

[309] *Metcalf*, 1 Haw. at 226 (syllabus). The court stated in pertinent part as follows:

> The decision of the case depends, chiefly, upon the construction of certain portions of the statutes relating to estrays .... There is a discrepancy in this section between the English and Hawaiian versions. The former provides that the owner of the animals shall pay, four times the amount of damage done, or of value destroyed; the latter provides that he shall pay, a fair and reasonable amount of compensation for the loss and damage sustained.

Id. (emphases omitted).

[310] *Id.*

[311] 1 Haw. 255 (Haw. Kingdom 1856).

[312] *Id.* at 255–56.

[313] *Id.* at 258–59.

[314] The English version required that all documents be stamped prior to being filed with the Bureau of Conveyances. *Id.* at 257. The Hawaiian version did not contain this

the statute, the court acknowledged the difficulties involved with translation insofar some words are "very broad and indefinite in their meaning, having no corresponding word in the English language, but, on the contrary, as being capable of answering to a hundred different words in the English language . . . ."[315]

To reconcile any conflicts, however, Chief Justice Lee stated, "[W]here there is a radical and irreconcilable difference between the English and Hawaiian, the latter must govern, because it is the language of the legislators of the country. This doctrine was first laid down by the Superior Court in 1848, and has been steadily adhered to ever since."[316] Chief Justice Lee stated that in situations where a meaning is "obscure, or the contradiction slight," Hawaiian and English may be used to "help and explain each other."[317]

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requirement. *Id.* At issue before the court was the definition of the words, "na palapala hoolilo waiwai lewa." *Id.* at 257–58. The court determined that the proper translation of the section referred to "all bills of sales and conveyances of personal property, &c, &c." *Id.* at 258. The court provided a lengthy explanation as to how it arrived at this conclusion. *See id.*

[315] *Id.* at 258.

[316] *Id.* at 259. Chief Justice Lee obliquely references an early Superior Court case as one example—he could be referencing *Shillaber v. Waldo*, 1 Haw. 21 (Haw. Kingdom Super. Ct. 1847), but the dates do not match.

[317] *Hardy*, 1 Haw. at 259 ("The English and Hawaiian may often be used to help and explain each other where the meaning is obscure, or the contradiction slight, but in a case like the present, where the omission in the Hawaiian is clear, it is impossible to reconcile them . . . ."). *But cf.* Haalelea v. Montgomery, 2 Haw. 62, 69 (Haw. Kingdom 1858) (clarifying that in cases where the Hawaiian version is "merely a translation" of an original document, the English will govern).

For example, in *Naone v. Thurston*, 1 Haw. 220 (Haw. Kingdom 1856), the Hawai'i Supreme Court analyzed the meaning of "proportional share" using both the Hawaiian and English versions of the statutes. *Id.* at 221. Defendant argued that "proportional share" should be construed as "a precisely equal share . . . ." *Id.* The court framed the issue as: "Does the language used in the Constitution sustain [Defendant's] argument?" *Id.* In citing the Hawaiian version of the Constitution, the court noted that the translated words for "proportional share," in Hawaiian are "*ke kau wahi hapa kupono.*" *Id.* The court concluded that neither the English nor the Hawaiian version could be construed as "a precisely equal share." *Id.*

According to ʻŌiwi attorney and Hawaiian language scholar Paul Nahoa Lucas, "[t]he Supreme Court's legitimization of Hawaiian as the dominant language . . . was short-lived."[318] "English-mainly" advocates[319] successfully lobbied the Hawaiian legislature[320] and on May 17, 1859 a new law was enacted, reversing over a decade of judicial precedent:

> PAUKU 1493. Ina i ikeia i kekahi manawa, ua kue loa ka olelo Beretania a me ka olelo Hawaii, iloko o keia kanawai, alaila, e paa no ka olelo Beritania.[321]
>
> SECTION 1493. If at any time a radical and irreconcilable difference shall be found to exist between the English and Hawaiian versions of any part of this Code, the English version shall be held binding.[322]

In 1865, section 1493 was reenacted as a new law because the 1859 version applied only to the "Civil Code of 1859." The statutory language was amended to provide as follows:

> PAUKU I. Ina ua ikeia i kekahi manawa, ua kue loa ka olelo Beritania ma ka olelo Hawaii, iloko o na kanawai o keia Aupuni i kauia a e kau ia ana paha ma keia hope aku, alaila, e paa no ka olelo Beritania.[323]
>
> SECTION 1. That whenever shall be found to exist any radical and irreconcilable difference between the English and Hawaiian version of any of the *laws of the Kingdom, which have been, or may hereafter be enacted, the English version shall be held binding.*[324]

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[318] Paul F. Nahoa Lucas, *E Ola Mau Kākou I Ka ʻŌlelo Makuahine: Hawaiian Language Policy and the Courts*, 34 HAWAIIAN J. HIST. 1, 4 (2000).

[319] *Id.* at 2–4 (explaining that by 1850, English had largely become the language of business, diplomacy, and to a large extent, the government—a trend that was welcomed by supporters of the "English-mainly" campaign).

[320] According to scholars Maenette K.P. Benham and Ronald H. Heck, "While the legislature consisted of both Native Hawaiian and White representatives, the majority of Hawaiians were educated by the missionary, thereby swaying government decisions toward dominant colonial activity." MAENETTE K.P. BENHAM & RONALD H. HECK, CULTURE AND EDUCATIONAL POLICY IN HAWAIʻI: THE SILENCING OF NATIVE VOICES 50 (1998).

[321] O NA KANAWAI KIVILA O KO HAWAII PAE AINA, HOOHOLOIA I KA MAKAHIKI 1859, mok. XLI, § 1493, at 268 (Honolulu, n. pub. 1859).

[322] THE CIVIL CODE OF THE HAWAIIAN ISLANDS PASSED IN THE YEAR OF OUR LORD 1859, Ch. XLI, § 1493, at 367 (Honolulu, n. pub. 1859).

[323] Act of Jan. 10, 1865, E Hoomaopopo Ai i ke Ano o na Kanawai Ina ua Kue ka Olelo Beritania me ka Olelo Hawaii, *in* NA KANAWAI O KA MOI KAMEHAMEHA V., KE ALII O KO HAWAII PAE AINA I KAUIA E KA HALE AHAOLELO, ILOKO O KA AHAOLELO O NA MAKAHIKI 1864–65, at 66–67 (Honolulu, n. pub. 1865).

[324] Act of Jan. 10, 1865, Construction of Statutes Where the English and Hawaiian Versions Do Not Agree, *in* LAWS OF HIS MAJESTY, KAMEHAMEHA V., KING OF THE HAWAIIAN ISLANDS, PASSED BY THE LEGISLATIVE ASSEMBLY AT ITS SESSION 1864–1865, at 68

In 1892, a particularly contentious case, *In re Ross*,[325] came before the Hawai'i Supreme Court. The case involved a petition to annul an election of Nobles for the division of O'ahu because the Minister of the Interior allegedly illegally refused to print the "descriptive parts" of the ballots in Hawaiian.[326] The court stated:

> [T]he statute laws of this Kingdom have been and will continue to be passed and promulgated in two versions, English and Hawaiian. But, though this may be the case, the two versions constitute but one act. There is no dual legislation. As a rule one version is the translation of the other. The effort is always made to have them exactly coincide, and the legal presumption is that they do.[327]

This statement seemingly contradicted the court's previous acknowledgment of the complexities involved in interpreting and translating the subtle nuances contained in the Hawaiian language.[328] Indeed, the court's statement in *In re Ross* illustrated a trend toward de-emphasizing the Hawaiian language.[329] In a sense, if both versions were legally intended to correspond exactly,[330] what purpose would it serve to

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(Honolulu, n. pub. 1865) (emphasis added).

[325] 8 Haw. 478 (Haw. Kingdom 1892).

[326] *Id.* at 479. Specifically, the ballots were purportedly illegal because:

> they did not contain any of the words "Koho ana no ka makahiki 1892," nor any Hawaiian words specifying the name of the office, or the name of the division for Nobles, or the term of the office, nor, in the cases of the special elections, any words in the Hawaiian language specifying the unexpired terms of the office, nor the words "Koho Balota Kuikawa," but that all of said Hawaiian words were omitted therefrom, as appears by a specimen of said ballots appended to and made a part of the petition. More succinctly, the ballot is averred to be illegal because its descriptive parts were not printed in Hawaiian.

Id.

[327] *Id.* at 480.

[328] *Cf.* Hardy v. Ruggles, 1 Haw. 255, 258 (Haw. Kingdom 1856) (acknowledging the inherent difficulty in reconciling conflicting statutory provisions between the Hawaiian and English version).

[329] *See Ross*, 8 Haw. at 480.

[330] The concept that "one version is the translation of the other," and that it is even possible to have two versions "exactly coincide" is an overly simplistic view that we continue to see in modern times—indeed, many in the legal community today view legal translation as "merely a simple and straightforward mechanical process, akin to an administrative function . . . ." Stella Szantova Giordano, Note, *It's All Greek to Me: Are Attorneys Who Engage In or Procure Legal Translation for Their Clients at Risk of Committing an Ethical Violation?*, 31 QUINNIPIAC L. REV. 447, 448 (2013). Moreover, the "conventional understanding of interpretation is that it is a mathematical, formulaic process, whereby a word in one language has an 'exact, corresponding word in another.'" Annette Wong, Note, *A Matter of Competence: Lawyers, Courts, and Failing to Translate Linguistic*

have two versions? Eventually, one language would be rendered superfluous in the legislature and the courts. As the Hawai'i Supreme Court noted:

> We are aware that, though the Hawaiian language is the original language of this people and country, the English language is largely in use. Of necessity the English language must be largely employed to record transactions of the government in its various branches, because the very ideas and principles adopted by the government come from countries where the English language is in use.[331]

Shortly thereafter in 1893, Queen Lili'uokalani was deposed and the Kingdom of Hawai'i was illegally overthrown.[332] Supporters of the overthrow believed assimilation,[333] which involved the suppression of both Native Hawaiian culture and the Hawaiian language, was "strategically

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and Cultural Differences, 21 S. CAL. REV. L. & SOC. JUST. 431, 435 (2012) (quoting Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1031 (2007)). As noted by one linguist, however,

> the translation of legal texts remains a myth, a sublime aim never to be truly achieved. . . . linguistically equivalent legal notions will frequently have different contents in different jurisdictions, [and] . . . [a]s a result, the question in legal translation is not which translation is right, but, much more modestly, which one is less wrong.

Giordano, *supra*, at 449 (quoting Uwe Kischel, *Legal Cultures–Legal Languages*, *in* TRANSLATION ISSUES IN LANGUAGE AND LAW 7 (Frances Olsen et al. eds., 2009)).

As just one example, courts in Hawai'i have grappled with problems in legal translations over seemingly straight-forward terms like "father." In *Makila Land Co. v. Kapu*, 114 Haw. 56, 156 P.3d 482 (Haw. Ct. App. 2006), Judge Burns presided over an appeal from summary judgment that involved a complaint to quiet title. *Id.* at 58, 156 P.3d at 484. The parties disputed the translation of a phrase, "kuu makuakane." *See id.* at 60, 156 P.3d at 486.

[331] *Ross*, 8 Haw. at 480.

[332] Aupuni Kuikawa, Aha Hooko a me Komite Kuka, Kuahaua (Ian. 17, 1893) (on file at the Hawaiian Historical Society) (announcing in 'Ōlelo Hawai'i, *inter alia*, that the Hawaiian monarchy is abrogated); Provisional Government, Executive Council and Advisory Council, Proclamation (Jan. 17, 1893) (on file at the Hawaiian Historical Society).

[333] The "assimilation" strategy had previously been explicated by Chief Justice Marshall in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). In *Johnson*, Native Americans were denied the right to own property, in part due to their "failure" to assimilate to Anglo-American culture. *Id.* at 589–90, 604–05. According to Chief Justice Marshall, assimilation of the "objects of the conquest" was necessary insofar "to govern them as a distinct people, was impossible . . . they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence." *Id.* at 589–90. Assimilation of the "objects of conquest" are usually "incorporated with the victorious nation . . . The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people." *Id.*

necessary to prevent a countercoup and to secure Hawai'i a protected status under the United States."[334]

After the overthrow, in the continental United States, debates raged in Congress and in the press over the constitutionality of acquiring overseas territories such as Hawai'i, Puerto Rico, and the Philippines.[335] Much of the controversy centered around the argument "that these territories were different: far off, not contiguous to the continent, densely populated, unamenable to colonization by settlement on the part of Anglo-Americans, and, above all, inhabited by alien peoples untrained in the arts of representative government."[336] Some Americans argued that the annexation of Hawai'i was contrary to their interests describing the inhabitants of Hawai'i as a "variegated agglomeration of the fag-ends of humanity."[337] Specifically, Native Hawaiians were described as an "insouciant, indolent creature" that "lag[ged] superfluous on the scene" both "intellectually and industrially."[338] One bombastic comment asked how Americans could "endure their shame" if a Senator from Hawai'i proceeded to use "pidgin English" to "chop logic" with fellow politicians.[339]

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[334] Kamanaonāpalikūhonua Souza & K. Ka'ano'i Walk, *'Ōlelo Hawai'i and Native Hawaiian Education*, *in* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 2, at 1270; *see also* ALBERT J. SCHÜTZ, THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES 350–51 (1994).

[335] Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REVISTA JURIDICA U.P.R. 225, 237–38 (1996).

[336] *Id.*

[337] 31 CONG. REC. 6189 (daily ed. June 21, 1898) (statement of Sen. Mitchell). Specifically:

> The Hawaiian is an insouciant, indolent creature. With him a longing for repose is a gift of nature. He is more inclined to aesthetics than to ethics. He delights in flowers that grow without cultivation, in listening to music, and in seeing other people dance. Intellectually and industrially he lags superfluous on the scene. After a century's contact with civilization his race has dwindled from 400,000 to 40,000. The white man has stamped out his religion, his traditions. His lands have slipped away from him. He no longer has a voice in the Government. It does not lie in human nature for him to be friendly to the white man, and he would prove a permanent menace to our Government.

Id.

[338] *Id.*

[339] 31 CONG. REC. 5790 (daily ed. June 11, 1898) (statement of Sen. Clark)

Thus, the "English-mainly campaign transformed into an English-only one" and proponents ramped up their effort to further "Americanize" the population.[340] As stated in 1893 by Reverend Charles McEwen Hyde:

> Hawaiian is still the language of the Legislature and the judiciary, and every biennial period the attempt is made to make the Hawaiian, not the English language, the authoritative language of the statute book. The Americanization of the islands will necessitate the use of the English language only as the language of business, of politics, of education, of church service . . . .[341]

To effectuate their goals, English-only advocates focused their attention on education, seeking to instill these principles upon the next generation of native speakers.[342] In 1896, a law was enacted requiring that English be used as the exclusive medium of instruction in all public and private schools.[343] As posited by numerous scholars, the devastating impact of this law nearly resulted in the cultural extermination of Native Hawaiians.[344] Moreover, it had the desired political impact that the English-only proponents sought: annexation could be more swiftly secured.[345]

In 1898, the U.S. Hawaiian Commission, which was appointed after annexation to make recommendations on a territorial government for Hawai'i, concluded that that the laws requiring compulsory attendance at schools, and the law mandating that English be taught exclusively, "[wa]s the most beneficial and far-reaching in unifying the inhabitants which could

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[340] *See* Lucas, *supra* note 318, at 8 (describing it as an effort to accelerate the extermination of the Hawaiian language).

[341] C.M. HYDE, STATEMENT OF APR. 3, 1893, H. EXEC. DOC. NO. 53-47 (1893), *as reprinted in* FOREIGN RELATIONS OF THE UNITED STATES 1894: AFFAIRS IN HAWAII 821, 825 (1895).

[342] *See* Lucas, *supra* note 318, at 8.

[343] Act of June 8, 1896, ch. 57, § 30 (codified in 1897 Haw. Comp. Laws § 123) ("The English language shall be the medium and basis of instruction in all public and private schools . . . Any schools that shall not conform to the provisions of this section shall not be recognized by the Department.").

[344] *See generally* Lucas, *supra* note 318, at 9–10; SCHÜTZ, *supra* note 334, at 352–56 (explaining that due to this 1896 law, the number of Hawaiian medium schools dropped drastically from 150 in 1880 to zero in 1902—the result was that by 1917, no child under the age of 15 could properly speak their mother tongue). Other authors provide a thorough overview of the historic and current legal struggles for those involved in the fight for the revitalization of 'Ōlelo Hawai'i. *See, e.g.*, L. Kaipoleimanu Ka'awaloa, *Translation v. Tradition: Fighting for Equal Standardized Testing ma ka 'Ōlelo Hawai'i*, 36 U. HAW. L. REV. 487, 487–90 (2014); Ka'ano'i Walk, *"Officially" What? The Legal Rights and Implications of 'Ōlelo Hawai'i*, 30 U. HAW. L. REV. 243, 243–48 (2007).

[345] And indeed, annexation came two years later in 1898. *See* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

be adopted.... No system could be adopted which would tend to Americanize the people more thoroughly than this."[346] Two years later, Congress passed an Organic Act establishing Hawai'i's territorial government.[347]

The Organic Act provided in pertinent part that in the Territory of Hawai'i, "[a]ll legislative proceedings shall be conducted in the English language."[348] In 1904, U.S. Representative Jonah Kūhio Kalaniana'ole introduced a bill making both "English and Hawaiian languages official languages in legislative proceedings of the Territory of Hawaii for the period of ten years."[349] The bill, which was heavily criticized by some Native Hawaiians,[350] failed to pass and English became the sole language used in legislative proceedings in Hawai'i.[351] However, the territory continued to promulgate all laws enacted by the legislature in 'Ōlelo Hawai'i and English until 1943.[352] In that year, a Senate committee report explained that it was no longer necessary to publish laws in Hawaiian and English because "the use of English ha[d] been so generally established."[353] The report further claimed that because "many of the terms in modern legislation have no equivalent in the Hawaiian language, a translation is misleading."[354] Implicit within these legislative pronouncements was the

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[346] THE REPORT OF THE HAWAIIAN COMM'N, S. DOC. NO. 16–55, at 10 (1898).

[347] Act of April 30, 1900, ch. 339, 31 Stat. 141 (1900) [hereinafter Hawai'i Organic Act].

[348] *Id.* § 44, 31 Stat. at 148.

[349] H.R. Res. 15226, 58th Cong. (1904). The bill stated in pertinent part:

> Whereas many citizens of Hawaii of the Hawaiian race have been educated in the Hawaiian language and are familiar with the elements of constitutional government, American institutions and history without being able to read, write, and speak the English language understandingly; Whereas nearly all Hawaiians under middle age have been educated in the English language: ... *Be it enacted*... That for the period of ten years ... both the English and Hawaiian languages may be used as official languages in the legislative proceedings of said Territory in so far as the same may be necessary to an intelligent transaction of the business thereof, at the expiration of which time English shall be the sole official language.

Id.

[350] *See, e.g.*, *Republican Meeting: At the Wailuku Skating Rink*, MAUI NEWS, Oct. 22, 1904, at 3. Representative Kalaniana'ole explained as follows: "I introduced a bill to carry the request in effect according to your wishes, but now my enemies are accusing me to trying to abolish the Hawaiian language entirely. I did no such thing." *Id.*

[351] *See* REVISED LAWS OF HAWAII 1905, 1915, 1925, ch. 2 § 2; 1943 Haw. Sess. Laws ch. 218, § 1 (requiring the promulgation of laws in English—Hawaiian was not mentioned).

[352] 1943 HAW. SESS. LAWS ch. 218, § 1.

[353] S. REP. NO. 328, 22d Terr. Sess. (1943) (Standing Comm.), *reprinted in* 1943 HAW. SEN. J. 825, 826.

[354] *Id.*

categorization of the Hawaiian language as a relic—a dead language unable to keep up with the times.

In modern times, questions relating to the utilization of ʻŌlelo Hawaiʻi in our legal system have generally been met with concerns about costs and "judicial economy." Recent legislative attempts, for example, to appropriate funds to establish long-term Hawaiian language resources for the Judiciary have failed.[355] And while some Kānaka ʻŌiwi have successfully used ʻŌlelo Hawaiʻi in court,[356] others have not been so fortunate. For example, in *Tagupa v. Odo*,[357] the court denied a plaintiff's request to provide his deposition testimony in Hawaiian, explaining thusly, "the mere fact that Hawaiian is also an official language of Hawaiʻi" does not mean we can "ignore the practical realities" involved in obtaining a Hawaiian language interpreter as it "is an unnecessary expense that would needlessly complicate and delay" the judicial process.[358]

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[355] In recent times, the Hawaiʻi State Judiciary has made commendable efforts to correct the omission of the Hawaiian language from the judicial system. *See, e.g.*, H.R. Con. Res. 217, 28th Sess. (Haw. 2015) (creating Hawaiian Language Web Feasibility Task Force to determine whether the Judiciary's website could be translated into ʻŌlelo Hawaiʻi); OFFICE OF THE C.J. SUP. CT., REPORT TO THE TWENTY-EIGHTH LEGISLATURE 2016 REGULAR SESSION ON HOUSE CONCURRENT RESOLUTION 217, HOUSE DRAFT 1, SENATE DRAFT 1: REQUESTING THE JUDICIARY TO CONVENE A TASK FORCE TO EXAMINE ESTABLISHING HAWAIIAN LANGUAGE RESOURCES FOR THE STATE OF HAWAIʻI JUDICIARY, H.R. Con. Res. 217, 28th Sess., at 25 (Dec. 2015) (acknowledging that Hawaiʻi has a commitment to the perpetuation of the Hawaiian language but recognized that there could be some potential community opposition due to the use of State resources for a task that arguably serves only a small portion of the population); *see also supra* notes 271–77 and accompanying text. These efforts, however, have largely been stymied due to financial barriers. For example, in 2016, the Judiciary submitted testimony in "strong support" of Senate Bill 2162, which sought to appropriate funds to establish long-term Hawaiian language resources for the Judiciary. *Hearing on S.B. 2162 Before the H. Comm. on Jud.*, 28th Sess. (Haw. 2016) (testimony of Judge Richard Bissen). Senate Bill 2162 was referred to the committee on Finance on March 24, 2016, but was never acted upon.

[356] *See, e.g.*, Jennifer Sinco Kelleher, *Telescope Protestor Found Not Guilty After Trial in Hawaiian*, HAW. TRIBUNE HERALD (Jan. 9, 2016), http://hawaiitribune-herald.com/news/local-news/telescope-protester-found-not-guilty-after-trial-hawaiian; *Even Without Interpreter, Hawaiian Judge Brings a Message*, NPR WEEKEND EDITION SUNDAY (Nov. 29, 2015), http://www.npr.org/2015/11/29/457756725/even-without-interpreter-hawaiian-judge-brings-a-message.

[357] 843 F. Supp. 630 (D. Haw. 1994).

[358] *Id.* at 631.

As it stands then, other than a few "token phrases,"[359] the use of 'Ōlelo Hawai'i is largely symbolic and mostly excluded from the current legislative and judicial system. Similarly, we see this omission reflected in current scholarship and legal histories written about Native Hawaiians. The correlation between law and language is not readily apparent, but by unearthing the records contained in law's archive, we see embedded in its statutes, precedents, and legislative history, a hidden narrative that silently shaped the dominant discourse that we see today—a discourse that glaringly omits Native Hawaiian voice.

Indeed, for those who fail to probe law's archive, it may be difficult to readily ascertain that for a period of time, primary legal sources were in 'Ōlelo Hawai'i—the original language used by the courts and the legislature. Over time, we also see reflected in law's archive the political motivations that led to the direct suppression of 'Ōlelo Hawai'i. Assimilation was necessary so annexation could be secured.

What has also been largely obscured, however, is the correlation between law's historical sanctioning of English as the "official version" in court decisions and legislative enactments, and the hegemonic practice that we see today that relies solely on the "English version" of events. Indeed, law has concealed its role in devaluing Hawaiian language sources as a credible source of knowledge. Only by interrogating law's archive do we recognize the implicit message conveyed: "Why bother looking at the Hawaiian version, when the English version is a direct translation?" Moreover, if there is a conflict, the laws explicitly provide that the English version "trumps" the Hawaiian version. This devaluing of 'Ōlelo Hawai'i, and the sanctioning of the English version as being accurate and representative of Hawaiian thought has led many scholars to believe that there is no need to ascribe to certain professional standards (*i.e.*, learn the language, use primary sources, etc.) that should be so evident when writing about another culture.

Some might question the underlying harm in utilizing English-only sources. How can it really be harmful? A "fact" is a "fact" no matter who says it, right? As described below in Section III.E., this is a dangerous proposition to subscribe to, especially if one proceeds without critically evaluating the source. Moreover, as demonstrated in Judge Burns' article, the problem with this misguided belief is that it produces a one-sided (and

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[359] As noted by Judge Richard Bissen, "To give life and validation to Hawai'i's co-official language, the Task Force urged in its report that the use of 'Ōlelo Hawai'i in State and local government must be broader than token phrases, more accessible in everyday life, and equally valid as the use of English." *Hearing on S.B. 2162 Before the H. Comm. on Jud.*, 28th Sess. 1 (Haw. 2016) (testimony of Judge Richard Bissen).

at times false) version of history that has caused devastating repercussions for Native Hawaiians. Thus, the question isn't, "how bad is it if I rely on English-only sources?" But rather, "what kind of irreparable harm will be perpetuated by employing these one-sided research methods?"

E. A Case in Point: Kuykendall, the Oligarchy Newspapers, and Dole's Assault on the Opposition Media

Mai lilo 'oe i puni wale, o lilo 'oe i kamali'i.

Do not believe all that is told to you lest you be led as a little child.
Do not be gullible; scan, weigh, and think for yourself.[360]

> When memory failed and written records were falsified—when that happened, the claim of the Party to have improved the conditions of human life had got to be accepted, because there did not exist, and never again could exist, any standard against which it could be tested.
>
> —George Orwell[361]

Imagine a future world where historians relied primarily on Fox News[362] and Breitbart News[363] to gather research about societal and political issues

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[360] *See* PUKUI *supra* note 7, at 266 n.2077.

[361] GEORGE ORWELL, 1984, at 93 (1961).

[362] Fox News advertises itself as providing, "Fair and Balanced news"—indeed, Fox News trademarked the phrase "Fair and Balanced" in 1998 to describe its news coverage, and it even went so far as to file a lawsuit to protect the use of the phrase by satirists who allegedly "blur[red] and tarnish[ed] it." Susan Saulny, *In Courtroom, Laughter at Fox and a Victory for Al Franken*, N.Y. TIMES (Aug. 23, 2003), http://www.nytimes.com/2003/08/23/nyregion/in-courtroom-laughter-at-fox-and-a-victory-for-al-franken.html (referring to *Fox News Network v. Penguin Grp. (USA)*, No. 03-CV-06162 (S.D.N.Y. 2003)); *see, e.g.*, *Politics Fair and Balanced*, FOX NEWS, http://video.foxnews.com/playlist/americas-newsroom-politics-fair-and-balanced/ (last visited Apr. 23, 2017).

The Fox News Channel, sometimes dubbed the "Faux News Channel," has been the subject of intense scrutiny by some journalists "because of the fact that at least part of what it foists upon the viewer is not real news but false news." ANTHONY COLLINGS, CAPTURING THE NEWS: THREE DECADES OF REPORTING CRISIS AND CONFLICT 154 (2010). "Fox regularly distorts the elements of news reports, inflating anything that makes Republicans look good and Democrats look bad, and minimizing to the point of near-invisibility anything that makes Republicans look bad and Democrats look good." *Id.*

[363] Breitbart News is a far-right news website whose "influence grew out of a proud and aggressive rejection of the mainstream." Callum Borchers, *How Breitbart Could Lose Its Alt-Right Street Cred*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/25/how-breitbart-could-lose-its-alt-right-street-cred. Since Breitbart chairman Stephen K. Bannon became senior White House advisor for President

occurring in modern times in the United States. In our hypothetical future, anchors and talk show hosts would certainly provide future historians with interesting insights. For example, on January 3, 2013, Fox News television host Bill O'Reilly stated that while he loves Hawai'i as a vacation destination, he has trouble understanding why Hawai'i is so "liberal" despite how many Asians, who "are not liberal by nature, usually more industrious and hardworking," live in that state.[364]

A cursory review of some of the headlines published by Fox and Breitbart suggests they were written by and for a particular segment of American society: *Climate Change: The Hoax that Costs Us $4 Billion a Day*,[365] *The Solution to Online Harassment Is Simple: Women Should Log Off*,[366] *World Health Organization Report: Trannies 49 XS Higher HIV Rate*,[367] *Racist, Pro-Nazi Roots of Planned Parenthood Revealed*.[368]

In October 2014, the Pew Research Center released a study that was part of a year-long effort to shed light on political polarization in America.[369]

Donald Trump, however, it is being described by its own writers as an "influential, now-mainstream publication." *Id.* Breitbart describes the alternative right, also known as the alt-right, as "a movement born out of the youthful, subversive, underground edges of the internet that "delight[] in attention-grabbing juvenile pranks." Allum Bokhari & Milo Yiannopoulos, *An Establishment Conservative's Guide to the Alt-Right*, BREITBART (Mar. 29, 2016), http://www.breitbart.com/tech/2016/03/29/an-establishment-conservatives-guide-to-the-alt-right/.

[364] Media Matter Staff, *O'Reilly: "Asian People Are Not Liberal, You know, By Nature. They're Usually More Industrious and Hard-Working,"* MEDIA MATTERS FOR AM. (Jan. 3, 2013), http://mediamatters.org/video/2013/01/03/oreilly-asian-people-are-not-liberal-you-know-b/192015 (providing transcript and news clip from *The O'Reilly Factor* show that originally aired on January 3, 2013).

[365] Fox News republished this article that originally came from Breitbart's website. *Climate Change: The Hoax that Costs Us $4 Billion a Day*, FOX NEWS (Aug. 10, 2015), http://nation.foxnews.com/2015/08/10/climate-change-hoax-costs-us-4-billion-day (citing James Delingpole, *Climate Change: The Hoax That Coasts Us $4 Billion a Day*, BREITBART (Aug. 8, 2015), http://www.breitbart.com/big-government/2015/08/08/climate-change-the-hoax-that-costs-us-4-billion-a-day/).

[366] Milo Yiannopoulos, *The Solution to Online Harassment Is Simple: Women Should Log Off*, BREITBART (July 5, 2016), http://www.breitbart.com/milo/2016/07/05/solution-online-harassment-simple-women-log-off/.

[367] Austin Ruse, *World Health Organization Report: Trannies 49 Xs Higher HIV Rate*, BREITBART (Dec. 2, 2015), http://www.breitbart.com/big-government/2015/12/02/world-health-organization-report-trannies-49-xs-higher-hiv-rate/.

[368] John Nolte, *Racist, Pro-Nazi Roots of Planned Parenthood Revealed*, BREITBART (July 14, 2015), http://www.breitbart.com/big-government/2015/07/14/racist-pro-nazi-roots-of-planned-parenthood-revealed/.

[369] AMY MITCHELL ET AL., POLITICAL POLARIZATION & MEDIA HABITS: FROM FOX NEWS TO FACEBOOK, HOW LIBERALS AND CONSERVATIVES KEEP UP WITH POLITICS, PEW RESEARCH

The study revealed that "[w]hen it comes to getting news about politics and government, liberals and conservatives inhabit different worlds. There is little overlap in the news sources they turn to and trust. And whether discussing politics online or with friends, they are more likely than others to interact with like-minded individuals . . . ."[370]

The study found that those who expressed as "consistently conservative" were "tightly clustered around a single news source, far more than any other group in the survey, with 47% citing Fox News as their main source for news about government and politics."[371] The study also noted that "consistent conservatives" express "greater distrust" of most sources measured in the survey" however, at the same time, "88% of consistent conservatives trust Fox News."[372] In contrast, those who identified as "consistently liberal" were "less unified in their media loyalty," relying "on a greater range of news outlets . . . ."[373] Notably, 81% of "consistent liberals" distrusted Fox News.[374] In short, for the "consistently conservative" and the "consistently liberal," there are "stark ideological differences" both in the news sources that they use, as well as in their awareness of and trust in those sources.[375] These statistics demonstrate that America's political polarization is reflected in the media that they use and trust.

If issues like these persist in modern times, it should not be difficult to recognize that such political partisanship existed in nineteenth-century Hawai'i. And indeed, it did. Thus, I urge all legal scholars and practitioners who seek to write histories about Native Hawaiians to carefully reflect upon our professional standards and aspire to portray more than the Fox News and Breitbart version of events. To be clear, I do not advocate that these types of sources be omitted—I assert, however, that such viewpoints cannot, and should not be the only viewpoints relied upon if one truly seeks to present a "balanced" history.

As described in Part II above and bears repeating here: (1) a scholar is urged towards an "inquiry devoted to the discovery of truth"; (2) students and practitioners are expected to know how to locate relevant legal authority, and how to critically evaluate it; (3) practitioners must be mindful

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CTR., 8 (2014), http://www.journalism.org/files/2014/10/Political-Polarization-and-Media-Habits-FINAL-REPORT-10-21-2014.pdf.

[370] *Id.* at 1.

[371] *Id.* at 2.

[372] *Id.*

[373] *Id.*

[374] *Id.* at 5, 15–16.

[375] *Id.* at 11.

to not distort the evidentiary record, or ignore evidence that is damaging to his client's position; (4) an "objective historian" must, *inter alia*, treat sources with appropriate reservations, must weigh the authenticity of accounts, and consider the motives of actors.

As it relates to Hawai'i history, it is easy to overlook the necessity of critically examining sources that are a mainstay for scholars. For example, in Judge Burns' article, he extensively quotes (306 words spanning pages 228 through 229) and cites to volumes two and three of Ralph S. Kuykendall's *The Hawaiian Kingdom*[376] in 14 footnotes.[377] Judge Burns is not alone in his use of this source. Indeed, this detailed three-volume history about Hawai'i has been cited by the U.S. Supreme Court,[378] the Hawai'i Supreme Court,[379] the U.S. District Court for the District of Hawai'i,[380] and it can also be found in the Federal Register,[381] various U.S.

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[376] RALPH S. KUYKENDALL, 2 THE HAWAIIAN KINGDOM 1854–1874: TWENTY CRITICAL YEARS (1953) [hereinafter 2 KUYKENDALL]; RALPH S. KUYKENDALL, 3 THE HAWAIIAN KINGDOM 1874–1893: THE KALAKAUA DYNASTY (1967) [hereinafter 3 KUYKENDALL]. Volume one, which was not cited by Judge Burns, is frequently cited by various legal sources. *See, e.g.*, sources cited *infra* notes 378–84 and accompanying text (citing RALPH S. KUYKENDALL, 1 THE HAWAIIAN KINGDOM 1778–1854: FOUNDATION AND TRANSFORMATION (1938) [hereinafter 1 KUYKENDALL]).

[377] Burns, *supra* note 6, at 225 nn.60–62, 226 n.72, 227 nn.74–77, 228 n.83, 229 nn.84–87, 230 nn.89–90.

[378] *See* Rice v. Cayetano, 528 U.S. 495, 500–01, 504 (2000) (first citing FUCHS, *supra* note 141, at 4; then citing 1 KUYKENDALL, *supra* note 376, at 3, 27; and then citing 3 KUYKENDALL, *supra* note 376, at 344–72). The Court stated as follows:

> When Congress and the State of Hawaii enacted the laws we are about to discuss and review, they made their own assessments of the events which intertwine Hawaii's history with the history of America itself. We will begin with a very brief account of that historical background. Historians and other scholars who write of Hawaii will have a different purpose and more latitude than do we. They may draw judgments either more laudatory or more harsh than the ones to which we refer. Our more limited role, in the posture of this particular case, is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue. *The litigants seem to agree that two works in particular are appropriate for our consideration, and we rely in part on those sources.*

Id. at 499–500 (emphasis added). Law's archive continues to perpetuate a one-sided discourse now enshrined as the so-called "history" for Native Hawaiians. *See generally* Andrade, *supra* note 31, at 642–57 (examining *Rice v. Cayetano* and the Court's willingness to ignore, erase, and revise history to ensure the integrity of its decisions).

[379] *See, e.g.*, McBryde Sugar Co. v. Robinson, 55 Haw. 260, 271, 275, 277, 286, 294, 517 P.2d 26, 33, 35, 36, 41, 45 (1973) (citing 1 KUYKENDALL, *supra* note 376, at 288–89; 3 KUYKENDALL, *supra* note 376, at 62–70); Pub. Access Shoreline Haw. v. Haw. Cty. Plan. Comm'n, 79 Haw. 425, 444, 903 P.2d 1246, 1264 (1995) (citing 1 KUYKENDALL, *supra* note 376, at 73, 137–38, 153, 208, 214), *cert. denied*, 517 U.S. 1163 (1996).

[380] *See, e.g.*, Reece v. Island Treasures Art Gallery, Inc., 468 F. Supp. 2d 1197, 1199–

Congressional documents,[382] court briefs,[383] and a plethora of law reviews and journals.[384]

Attorney Paul M. Sullivan, who has penned several law review articles, referred to Kuykendall's work as "[p]erhaps the single most valuable resource"[385] for those involved in examining the history of Hawai'i's government "in the mid-nineteenth century, when Hawai'i was evolving almost overnight from a neolithic culture under a feudal absolute monarchy into a modern constitutional government."[386] Thus, Kuykendall's work has been sanctioned and enshrined by law's archive as *the* preeminent source on Native Hawaiian history.

Because Judge Burns almost exclusively relied on volume 3 of Kuykendall's work, this article critically analyzes and evaluates the sources cited in that particular volume. This was a somewhat daunting task insofar Kuykendall's 764-page tome contained a total of 1,879 endnotes.[387] As

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1200 (D. Haw. 2006) (citing 1 KUYKENDALL, *supra* note 376, at 10–11); Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141, 1148 (D. Haw. 2003) (citing 1 KUYKENDALL, *supra* note 376, at 3), *aff'd in part, rev'd in part* 416 F.3d 1025 (9th Cir. 2005), *and rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006) (en banc)).

[381] *E.g.*, Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71,278, 71,279–80, 71,309 (first citing 1 KUYKENDALL, *supra* note 376; then citing 1 KUYKENDALL, at 258–60; then citing 3 KUYKENDALL, *supra* note 376, at 582–605; then citing 1 KUYKENDALL, *supra* note 376, at 360–62; and then citing 1 KUYKENDALL, *supra* note 376, 227–41).

[382] *See, e.g.*, DEP'T OF INTERIOR, NATIVE HAWAIIANS STUDY COMMISSION: REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 320 (1983) (prepared pursuant to Native Hawaiians Study Commission Act, Pub. L. No. 96-565, 94 Stat. 3324 (1980)) (citing 3 KUYKENDALL, *supra* note 376, at 347, 348, 348 n.*, 348–49, 349 n.*, 351–52, 703 n.9, 704 n.27); *see also* Andrade, *supra* note 31, at 680–81 (explaining how the Commission "drew significantly" from Kuykendall's work).

[383] *See, e.g.*, Amicus Curiae Brief of Abigail Kinoiki Kekaulike Kawananakoa in Support of Respondents at 11, Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) (No. 07-1372), 2009 WL 230935, at *11 (citing 3 KUYKENDALL, *supra* note 376, at 374).

[384] *See, e.g.*, Christopher D. Hu, *Transplanting Servitude: The Strange History of Hawai'i's U.S.-Inspired Contract Labor Law*, 49 STAN. J. INT'L L. 274, 279, 280, 281, 289, 290 (2013) (citing 1 KUYKENDALL, *supra* note 376, at 236, 261, 268, 319–28, 329, 330; 2 KUYKENDALL, *supra* note 370, at 186, 191); *cf.* Alfred L. Brophy, *Aloha Jurisprudence: Equity Rules in Property*, 85 OR. L. REV. 771, 784, 784 n.52 (2006) (citing and discussing 1 KUYKENDALL, *supra* note 376) (recognizing that modern scholarship has taken an "interpretative turn away from praising the process of colonization" embedded in historical works like Kuykendall's *The Hawaiian Kingdom*).

[385] Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 100 n.4 (1998).

[386] *Id.* at 100.

[387] Moreover, some endnotes contained multiple citations, thus raising the total number

Professor Osorio stated, "I don't know a single historian of the Hawaiian Islands who has not depended on the painstaking and detailed study of government documents, foreign exchanges, and letters that Kuykendall collected, organized, and incorporated into his massive three-volume chronicles between 1938 and 1967."[388] Nonetheless, as he further explained, "I also cannot think of a single one of us who would depend on his histories as definitive nor as dependable interpretations of culture, or even believable explanations of change."[389]

As described by Professor Kanalu Young, Kuykendall was "contracted by the civilian occupation authority of the 1930s to write the definitive history of these Islands."[390] Like many other scholars of his generation, Kuykendall believed that "history was properly the objective study of written primary sources meticulously researched in archival and library locations far removed from where the stories are told as palpable, emotion-filled oral accounts."[391] As Young explains, this methodology meshed well with the political agenda advanced by those who hired Kuykendall, insofar the "political objective of US civilian authority" since 1898 was to "sanitize the Hawaiian national past, its precursors, and the oral and written record that did exist."[392] This was largely necessary because it was "damaging to the foundation mythologies of the so-called territorial administration."[393] Moreover:

> Institutional racism of that era set the groundwork to preclude any resurgent nationalism on the part of Hawaiian subjects based on ulterior political motives to maintain hegemony and absolute social control. The recognition of the native Hawaiian intellect rooted in good part in the traditionalism of the ancients had to be recast. The evidence was often reframed and intentionally marginalized.[394]

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of citations to well over 2,000. Spreadsheets tracking individual citations were necessary to categorize sources.

[388] Osorio, *supra* note 211, at 192.

[389] *Id.*; *see also id.* at 195 (criticizing, *inter alia*, Kuykendall's portrayal of the ordinary Hawaiian voter and politician as "dimly perceptive of their weakened position").

[390] Kanalu Young, *Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1778–2001*, 2 HAW. J. L. & POL. 1, 24 (2006); *see* 3 KUYKENDALL, *supra* note 376, at v.

[391] Young, *supra* note 390, at 24.

[392] *Id.*

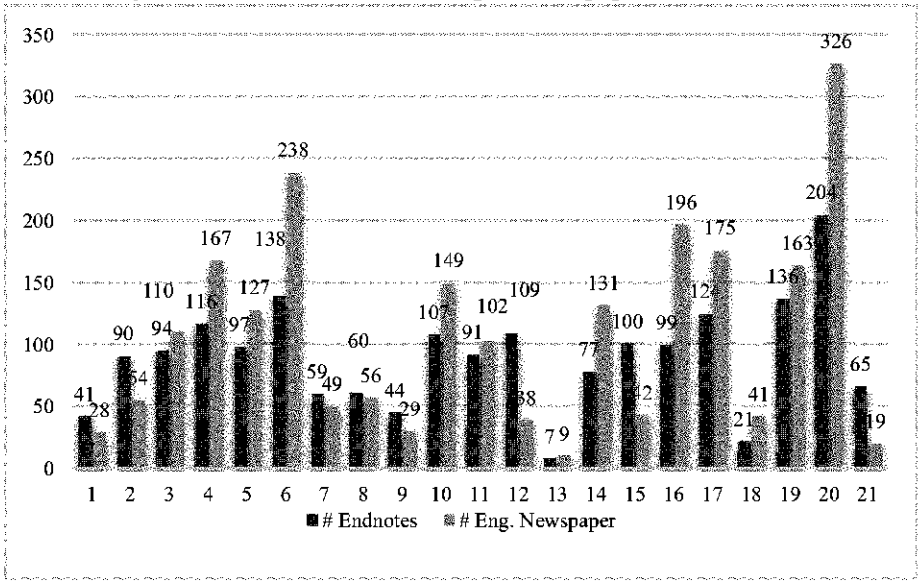
[393] *Id.*

[394] *Id.* at 24–25.

Whether it was intentional or not, Kuykendall selected sources that not only marginalized Native Hawaiian voice, but sharply criticized that voice as "weak" or "thriftless."

In Kuykendall's "References" he stated, "[t]his book is based mainly on manuscript sources and contemporary newspapers."[395] It is Kuykendall's prodigious use and reliance on newspapers that forms the basis of my analysis here. Indeed, Kuykendall's heavy-handed use of newspapers to establish "historical facts" is evident in his endnotes: of the 1,879 endnotes contained in volume three, Kuykendall cited approximately 2,249 times to English language newspapers.[396] Table 3 below displays by chapter, a comparison of the total number of endnotes with the total number of citations to English-only newspapers.

Table 3: Analysis by Chapter: Total Number of Citations Compared to Total Number of Citations to Establishment English Newspapers.



[395] 3 KUYKENDALL, *supra* note 376, at 651.

[396] Kuykendall's endnotes were systematically reviewed to analyze each individual citation to a particular newspaper. *Id.* at 652–747. Some citations contained a single reference to a newspaper, but cited multiple publication dates—for example, "*Hawaiian Gazette*, Aug. 30, Sept. 13, 1876; *Pacific Commercial Advertiser*, Sept. 16, Oct. 14, 1876." Each publication date counted as an individual citation to the particular newspaper—as such, in the provided example, there are two citations to the *Hawaiian Gazette* and two citations to the *Pacific Commercial Advertiser*. Although every effort was made to accurately count each individual citation in Kuykendall's bibliography, some mistakes in computation may have occurred. A spreadsheet was created to track newspaper citations for each chapter.

In contrast, Kuykendall provided only a smattering of references to translated sources that were authored by 'Ōiwi,[397] or translated sources that originally appeared in 'Ōlelo Hawai'i.[398] Using the most generous, over-inclusive measure for calculating the total number of Hawaiian-based sources cited or described in an endnote by Kuykendall still results in a meager 101 citations.[399] This is in stark contrast to the 2,249 citations to English language newspapers—incredibly, newspapers account for only one of the many types of English language sources that Kuykendall referenced in his endnotes. Hundreds of other English language citations were referenced by Kuykendall which include archival materials from a variety of institutions.[400] Table 4 depicts the total number of 'Ōiwi citations per chapter as compared to the total number of citations made to English language newspapers. In most chapters, Kuykendall references 'Ōiwi sources, perhaps once or twice.[401] In six chapters, Kuykendall makes no reference at all.[402]

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[397] Kuykendall references English language translations for some sources. *See, e.g.*, *id.* at 689 n.8 (citing EDWARD K. LILIKALANI, MOVE! EXCEL THE HIGHEST!: THE CELEBRATED LILIKALANI MANIFESTO OF THE ELECTION CAMPAIGN OF FEBRUARY, 1882 (H.L. Sheldon trans., Honolulu, n. pub. 1882)).

[398] Kuykendall referenced either: (1) an English language translation, (2) or an English language article that was published in the following Hawaiian language newspapers *Nuhou*, *Lahui Hawaii*, *Ka Elele Poakolu*, *Ka Leo o ka Lahui*. Ironically, the English language translations for articles that were originally published in Hawaiian were often published in Establishment papers—so the underlying probity of those translations might be at issue.

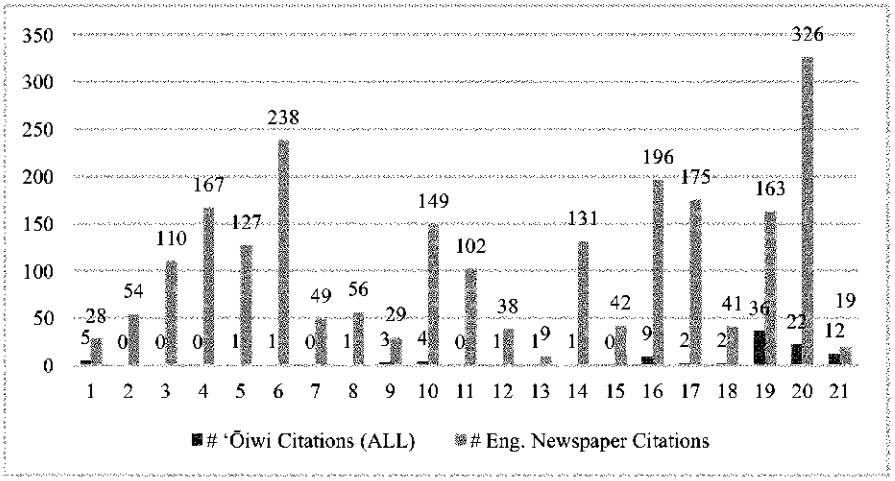
[399] Some might argue that my calculations are too generous. For example, none of Kuykendall's citations actually reference Hawaiian language documents—indeed, he often references translations of articles that were published in English language newspapers. In Chapter 5, Kuykendall references *Lahui Hawaii* in endnote 19: "The *Gazette* of March 29 prints a translation of a very interesting article from the Hawaiian language newspaper *Lahui Hawaii* objecting to further expenditure of public funds for bringing in Chinese laborers." 3 KUYKENDALL, *supra* note 376, at 670 n.19. Similarly, in Chapter 10, endnote 6, Kuykendall references a translation of an article originally published in *Elele Poakolu*. *Id.* at 689 n.6.

[400] *Id.* at 651 (referencing sources from various repositories such as the Hawaiian Historical Society, the Library of Congress, British Public Record Office, U.S. Department of State Archives, etc.).

[401] *See supra* Table 4.

[402] *Id.*

Table 4: Analysis by Chapter: Total Number of 'Ōiwi Citations as Compared to Total Citations Made to Establishment English Language Newspapers



Entirely omitting native voice, while purporting to write histories about Native Hawaiians, is part of the inherent problem with Kuykendall's work. But more importantly, the English language sources that Kuykendall does rely upon are highly contentious as well.

1. The English newspapers that spoke for the oligarchy: how the establishment press shaped history

According to historian Helen Chapin, in Hawai'i, "[b]etween 1834 and 2000, approximately 1,250 separately titled papers have appeared in print."[403] Hawai'i is unique insofar our papers likely "represent[] the most diverse press in the world."[404] Kuykendall's third volume covers the time period from 1873 through 1893.[405] During that era, approximately 79 different newspapers were printed in various languages including 'Ōlelo Hawai'i, English, Chinese, Japanese, and Portuguese.[406] Approximately

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[403] HELEN G. CHAPIN, GUIDE TO NEWSPAPERS OF HAWAI'I: 1834–2000, at 1 (2000).

[404] *Id.*

[405] 3 KUYKENDALL, *supra* note 376, at 3. Although Kuykendall's book title states that it covers the time-period commencing in 1874, Chapter 1 begins in the latter part of 1873.

[406] CHAPIN, *supra* note 403, at 129–32. I created a spreadsheet to calculate this number using Helen Chapin's *Guide to Newspapers of Hawai'i*, which lists published newspapers by date. Again, this number is an approximation due to the range in publishing dates for each newspaper.

48% of the newspapers were in 'Ōlelo Hawai'i, while only 20% of the newspapers were published in English.[407]

Despite the diversity available, Kuykendall relied primarily on three English language newspapers: *The Hawaiian Gazette* (403 citations), *The Daily Bulletin* (767 citations), and *The Pacific Commercial Advertiser* (941 citations).[408] In other words, of the total 2,249 citations to English newspaper articles, 2,111 of those citations (or 94% of the citations), came from these newspapers.[409]

By using Chapin's *Guide to Newspapers of Hawai'i* as a starting point to critically assess the "viewpoints" contained in these English language papers, I ascertained that all of these newspapers—especially toward the latter part of the nineteenth-century—represented the views of what she referred to as the "establishment papers."[410] According to Chapin, the establishment papers exemplified "the controlling interests of a town or city, region or country" but did not always "represent the majority of people."[411] Instead, the establishment papers represented a "part of a power structure that formulate[d] the policies and practices to which everyone [wa]s expected to adhere."[412] In Hawai'i, the establishment press was introduced by the American Protestant Mission, which promoted American culture and values in Hawaiian and English languages.[413] Their ascent to power was described by Chapin:

> Almost immediately after their arrival, members of the tiny [missionary] group from New England became advisors to the Hawaiian monarchy. As the English language gained dominance through the century, so, too, did establishment papers in English gain even greater power. By the end of the century, an alliance of missionary descendants and haole (Caucasian) American business interests, operating as an oligarchy, backed up by the American military, and aided and abetted by the oligarchy's newspapers, overthrew the queen and the Hawaiian government representing the majority population.[414]

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[407] Approximately 38 newspapers were published in 'Ōlelo Hawai'i, and 16 newspapers were published in English. *See id.*

[408] *See supra* note 396.

[409] *Id.*

[410] CHAPIN, *supra* note 403, at 1; HELEN G. CHAPIN, SHAPING HISTORY: THE ROLE OF NEWSPAPERS IN HAWAI'I 2–3 (1996).

[411] CHAPIN, *supra* note 410, at 2.

[412] *Id.* at 3.

[413] *Id.*

[414] *Id.*

During the time period represented in Kuykendall's third volume, population statistics illustrate that the establishment papers had a very small audience. According to census records, the total population in 1872 was 56,897, and Hawaiians and part-Hawaiians comprised just over 90% of the population.[415] Nearly 4% of the population was Chinese and 1% was Portuguese.[416] Thus, the purported audience (U.S. and European) of the "establishment press" was comprised of just less than 4% of the total population.[417] By 1890, the total population in Hawai'i was 88,990.[418] Hawaiians and part-Hawaiians comprised 45% of the population, nearly 33% of population were Asian (Chinese and Japanese), 14% were Portuguese, and a small percentage of the population were designated as "other."[419] Thus, as Chapin confirmed, "the establishment-official press spoke for no more than 5- or 6-percent of the population."[420]

The English language newspapers that Kuykendall relied on most heavily (94% of the total 2,249 citations) were infamous for espousing particularly anti-monarchical and racist sentiments. Helen Chapin and Ronald Williams have carefully analyzed the history of these newspapers, and I summarize the salient points below.[421]

To begin, the three newspapers most frequently cited by Kuykendall were all produced, in whole, or in part, by editor and publisher Henry M. Whitney.[422] It bears noting that Whitney's abhorrence of Hawaiians and native culture was evident in his editorials where he condemned the practice of "pagan" hula[423] and discussed the general inferiority of Hawaiians.[424] Thus, Kuykendall's reliance on such one-sided sources to

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[415] ROBERT C. SCHMITT, DEMOGRAPHIC STATISTICS OF HAWAI'I: 1778–1965, at 10 tbl.1, 74 tbl.16 (1968).

[416] *Id.* at 75 tbl.17.

[417] *Id.*

[418] *Id.* at 74 tbl.16

[419] *Id.* at 75 tbl.17.

[420] CHAPIN, *supra* note 410, at 93.

[421] *See generally* CHAPIN, *supra* note 403; Williams, *supra* note 261.

[422] CHAPIN, *supra* note 403, at 15, 39, 84–85.

[423] Whitney wrote about the "ruinous influence" of hula: "The fairest girls . . . in their wild, denuded state" appeared and danced with "gestures and posturings indicative of licentious acts, accompanied with music and often with the most vulgar and unchaste songs which the tongue is capable of uttering." PAC. COM. ADVERTISER, Apr. 21, 1859, at 2.

[424] With regard to Native Hawaiians, Whitney once wrote, "Though inferior in every respect to their European or American brethren, they are not to be . . . wholly despised . . . . They are destined to be laborers in developing the capital of the country." PAC. COM. ADVERTISER, Mar. 5, 1857, at 2.

describe Native Hawaiian history undercuts any logical assertion that his work is "balanced."

The Pacific Commercial Advertiser (*PCA*), which was cited over 900 times by Kuykendall, was originally published to coincide in 1856 with the U.S. observance of the Fourth of July.[425] It was first founded by Whitney who correctly predicted that the *PCA* was "destined to exert more than an ephemeral influence on our community and nation."[426] As explained by Williams: "After an early existence as both a strong governmental critic and later a publication of the government itself, the influential [*PCA*] came to be controlled and edited by those who were to lead the usurpation of native rule and advocate for the annexation of Hawai'i to the United States."[427] Thus, except for the short period of time when "Walter Murray Gibson ran it and supported King Kalākaua and his policies, the *PCA* was editorially and in its news columns pro-American and pro-annexation."[428]

In 1888, W.R. Castle, Henry Castle, and original *PCA* founder Henry Whitney purchased the *PCA*.[429] By that time, the group already owned another significant English language paper, *The Hawaiian Gazette* (*Gazette*).[430] The *Gazette* was originally run by the Hawaiian government from 1865–1873, however, "[w]hen King Kalākaua's views began to diverge from the oligarchy's after 1873, it became anti-monarchy."[431] Like the *PCA*, it espoused strong, and often rancorous views that even Kuykendall acknowledged were problematic: "In the forefront of the opposition[[432]] newspaper brigade was the long established *Hawaiian Gazette* which sprinkled many paragraphs of biting sarcasm and ridicule here and there in its long columns of small type, and printed some things which, even if true, might better have been left unsaid."[433]

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[425] CHAPIN, *supra* note 403, at 84–85.

[426] *Id.* Indeed, *The Honolulu Advertiser*, a descendant of the *PCA*, ran until 2010, when it was purchased by rival paper *Honolulu Star-Bulletin*. *Id.* at 45, 85; *About Us,* HONOLULU STAR-ADVERTISER, http://www.staradvertiser.com/about/ (last visited Apr. 23, 2017) ("The Honolulu Star-Advertiser published its first edition June 7, 2010, combining the best of the 128-year-old Honolulu Start Bulletin and the 154-year-old Honolulu Advertiser.").

[427] Williams, *supra* note 261, at 75.

[428] CHAPIN, *supra* note 403, at 85.

[429] Williams, *supra* note 261, at 75.

[430] *Id.*

[431] CHAPIN, *supra* note 403, at 39.

[432] Kuykendall refers to them as the opposition newspapers since they opposed King Kalākaua. *See* 3 KUYKENDALL, *supra* note 376, at 274 n.*. For example, some opposition papers Kuykendall references are, "*Daily Bulletin, Hawaiian Gazette, Saturday Press.*" *Id.*

[433] *Id.* at 345 (referencing the increasingly bitter attacks made by opposition newspapers against Walter Murray Gibson and King Kalākaua).

Whitney was also responsible for starting *The Daily Bulletin* (*Bulletin*), ancestor of the *Honolulu Star-Bulletin*, and according to Chapin, the first successful daily newspaper.[434] Like the *PCA* and *Gazette*, the *Bulletin* adopted a pro-American, pro-Annexation stance.[435] It should be noted, however, that not all of its journalists shared the same views as its progenitor, Whitney—after the overthrow, Daniel Logan was jailed for expressing criticism of the Provisional Government.[436] Nonetheless, the *Bulletin* received harsh rebukes from Hawaiian newspapers who criticized it as being untruthful. This is evidenced, for example, by various articles published in 1895 that proclaimed, "*Hoopunipuni loa ka Buletina*," or "The Bulletin Really Lies."[437]

But it was not just Native Hawaiians who viewed these newspapers with a certain level of distrust. Even among those who pledged loyalty to the Provisional Government, and later the Republic of Hawai'i, the oligarchy newspapers were viewed with some disdain. For example, the *PCA*—while it was under the leadership of Whitney during the latter part of the nineteenth-century—was sharply criticized by Hawai'i Supreme Court Chief Justice Albert F. Judd. In an unpublished manuscript, Judd contextualizes the *PCA* as being a newspaper designed to "represent the foreign community of Honolulu."[438] According to Judd, however, the *PCA* often contained "glaring inaccuracies" that were "as common as correct statements."[439] Indeed, in its zeal to beat rival papers like the "Terrafin Express," Judd complained that the *PCA* based its reporting on "merely hearing a whisper of something that is said to have occurred, right or wrong, hit or miss . . . ."[440] According to Judd:

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[434] CHAPIN, *supra* note 403, at 15.

[435] *Id.*

[436] The *Bulletin*, when it was headed by "anti-Kalākaua activist" G. Carson Kenyon, it was undoubtedly anti-monarchical. CHAPIN, *supra* note 403, at 78. Lorrin Thurston, who was a missionary descendant and central figure in the illegal overthrow of the Hawaiian monarchy, was an editorial contributor. *Id.*

[437] *See, e.g.*, KA MAKAAINANA, Sepa. 30, 1895, at 8.

[438] Albert F. Judd, Judd Collection (undated) (unpublished manuscript) (on file at the Bishop Museum Archives, MS Group 70, Box 29.3.24). Various scholars have found the Judd collection to contain a wide-range of fascinating materials. *See* Williams, *supra* note 261, at 77–78 (writing specifically about Judd's complaint about the *PCA*). Although the manuscript relating to the *PCA* is undated, based on the language contained in the text, it "ties the work definitively to the period in which Henry M. Whitney was the proprietor." *Id.* at 88 n.17.

[439] Judd, *supra* note 438.

[440] *Id.*

> If a newspaper cannot give us the truth, unvarnished facts, without blundering and stupidness, then let it not attempt to instruct its readers. And if the information thence obtained cannot be relied on, better be without the newspaper; for while error is dangerous, truth will find for itself other means of publicity, and perfect silence is much preferable to distorted facts & falsehoods.[441]

Given the historical context of the oligarchy newspapers, it is near impossible to assert that these sources present a balanced understanding of Hawai'i history. "If it is a truism that the powerful write history, so too, do they publish papers."[442] And indeed, as Chapin described, the oligarchy's press continued to dominate in Hawai'i's government and politics until the 1950s.[443]

It was not just the newspapers, however, who controlled the historical narrative that we see today. Indeed, it was Kuykendall, the anointed penultimate Hawai'i historian, who ultimately wielded the most power. Under a guise of objectivity, Kuykendall determined who "won" and "lost"—he was the one who framed the questions to be asked, he made the decisions about what evidence to include and exclude, and finally, he assessed the significance or irrelevance of that evidence.[444]

2. The 1893 Overthrow and Sanford Ballard Dole's war with the opposition newspapers

Prior to the the overthrow of the Hawaiian monarchy, freedom of the press was guaranteed. Charles De Varigny, a Frenchman who served as a government official in Hawai'i, characterized the mid-nineteenth century as one of complete freedom of expression:

> No precedent exists in Hawaii for political repression. Indeed, freedom of the press is so completely accepted as a customary part of political life, a kind of national habit, that intemperate language scarcely excites. Restrictive laws are the prime cause of a dangerous public press; when the political writer runs

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[441] *Id.*

[442] CHAPIN, *supra* note 410, at 3.

[443] *Id.* ("Over two centuries, the establishment press has exercised the dominant influence upon the history of Hawai'i.").

[444] *See* Reiter, *supra* note 27, at 56 ("[I]t is the *writer* who determines who wins and who loses by setting the questions to be asked, by including and excluding evidence, by defining and assessing significance, in short, by controlling the narrative version of the past that will stand for the fleeting past events.").

> no risk of official interference his wildest diatribes remain without effect, for then he is obliged to convince his readers by the cogency of his arguments.[445]

In 1852, freedom of speech was guaranteed in Article 3 of the Hawai'i Constitution which provided: "All men may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."[446]

And indeed, the press exercised this right most vigorously. Varigny quoted one article published by the *PCA* as an example of "how far liberty of the press was carried, thanks to the government's policy of toleration . . . ."[447] In that article, Varigny remarked, "The violence of [*PCA*'s] language revealed the[ir] impotence . . . . Persons assured of the righteousness of their actions do not threaten in this style."[448]

Similarly, Kuykendall describes the vitriolic attacks on King Kalākaua and his cabinent waged by the establishment/opposition newspapers in 1884.[449] At that time, the *PCA* was pro-monarchy because it was under the leadership of Walter Murray Gibson, who was a leading target of the establishment/opposition newspapers.[450] The *PCA*, in commenting on the defeat of a resolution in the legislature, acknowledged that "'vigorous, healthy Opposition is necessary to good Government,' but suggested that it was now time to let the fires 'die out from under the political pot.'"[451] As Kuykendall explained, however, the opposition papers refused to let things lie, thus the attacks continued unabated.[452]

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[445] CHARLES DE VARIGNY, FOURTEEN YEARS IN THE SANDWICH ISLANDS 181 (Alfons L. Korn trans., 1981).

[446] HAW. CONST. of 1852, art. III, *in* CONSTITUTION AND LAWS OF HIS MAJESTY KAMEHAMEHA III., KING OF THE HAWAIIAN ISLANDS PASSED BY THE NOBLES AND REPRESENTATIVES AT THEIR SESSION 1852 (Honolulu, n. pub. 1852). In 'Ōlelo Hawai'i, it stated, "E hiki no i na kanaka a pau ke olelo, a ke palapala, a ke hoike wale aku paha, i ko lakou manao no na mea a pau, a na ke Kanawai wale no lakou e hooponopono. Aole loa e kaulia kekahi Kanawai e hoopilikia ana, a e keakea ana paha i ka olelo, a me ka paipalapala." HAW. KUMUKANAWAI O KA MAKAHIKI 1852, pauku III, *in* HE KUMUKANAWAI A ME NA KANAWAI O KA MOI KAMEHAMEHA III., KE ALII O KO HAWAII PAE AINA I KAUIA E NA ALII AHAOLELO, A ME KA POEIKOHOIA ILOKO O KA AHAOLELO O KA MAKAHIKI 1852 (Honolulu, n. pub. 1852).

[447] VARIGNY, *supra* note 445, at 180.

[448] *Id.* at 181.

[449] 3 KUYKENDALL, *supra* note 376, at 274–75.

[450] CHAPIN, *supra* note 403, at 85.

[451] 3 KUYKENDALL, *supra* note 376, at 274 (first quoting PAC. COM. ADVERTISER, June 30, 1884; and then quoting PAC. COM. ADVERTISER, July 12, 1884).

[452] *Id.*

In 1887, the Bayonet Constitution reestablished the right to freedom of the press by adopting the same language contained in the 1852 Constitution.[453] Ironically, while the reigning ali'i might have afforded the press with the unfettered right to freedom of speech—regardless of viewpoints or political affinity—these same rights were severely curtailed under the Provisional Government. As Chapin explained, "[a]n establishment press, protective of itself, however, sometimes betrays the cause of press freedom. In the 1890s, Native Hawaiians, who had fervently adopted the Jeffersonian belief, learned a bitter lesson—the oligarchy's press claimed freedom for itself but strenuously denied it to others."[454]

The overthrow of the Hawaiian monarchy occurred on January 17, 1893[455] and as noted by Chapin, journalists who were political activists chose sides:

> Those who plotted the overthrow of the queen formed the Provisional Government and Republic of Hawai'i until annexation could be secured. In effect, they led a combined establishment-official press, for they controlled the government and the economics of Hawai'i. Those dedicated to preserving Hawai'i as an independent country formed the opposition. It was they who led a Hawaiian nationalist press that challenged the annexationists.[456]

On the same day, the right of the writ of habeas corpus was suspended and martial law was imposed.[457] Within days of the overthrow, the Executive and Advisory Councils of the Provisional Government began summoning certain journalists for questioning. For example, on January 24, 1893, President Sanford B. Dole interrogated John G.M. Sheldon,[458] 'Ōiwi editor

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[453] CONSTITUTION OF THE HAWAIIAN ISLANDS, SIGNED BY HIS MAJESTY KALAKAUA, art. III (Honolulu, Hawaiian Gazette Co. 1887); KUMUKANAWAI O KO HAWAII PAE AINA I KAKAU INOA IA E KA MOI KALAKAUA, pauku III (Honolulu, Hawaiian Gazette Co. 1887).

[454] CHAPIN, *supra* note 410, at 5.

[455] Aupuni Kuikawa, Aha Hooko a me Komite Kuka, Kuahaua (Ian. 17, 1893) (on file at the Hawaiian Historical Society) (announcing in 'Ōlelo Hawai'i, *inter alia*, that the Hawaiian monarchy is abrogated); Provisional Government, Executive Council and Advisory Council, Proclamation (Jan. 17, 1893) (on file at the Hawaiian Historical Society) (proclaiming abrogation of monarchy and establishment of Provisional Government).

[456] CHAPIN, *supra* note 410, at 93.

[457] Provisional Government, Executive Council and Advisory Council, Order No. 2 (Jan. 17, 1893) (on file at the Hawaiian Historical Society); Aupuni Kuloko, Kauoha Helu 2 (Ian. 17, 1893) (on file at the Hawaiian Historical Society).

[458] Sheldon, who was "half native and half white," had worked as an editor and writer for over twenty years. *See Affidavit of John G.M. Sheldon, In re* G. Carson Kenyon (Nov. 2, 1895), *in* CORRESPONDENCE BETWEEN THE GOVERNMENT OF THE REPUBLIC OF HAWAII AND HER BRITANNIC MAJESTY'S GOVERNMENT IN RELATION TO THE CLAIMS OF CERTAIN BRITISH SUBJECTS ARRESTED FOR COMPLICITY IN THE INSURRECTION OF 1895 IN THE HAWAIIAN

of *Hawaii Holomua*, for publishing an article that was purportedly "full of poetical allusions" that tended to "incite the public to disorder" and encouraged "hostility to [the Provisional Government's] plans."[459] Dole, who was purportedly fluent in Hawaiian,[460] correctly surmised that the article had a deeper meaning.[461] Sheldon's article, written in ʻŌlelo Hawaiʻi and titled, "*IMUA O KA LAHUI MAI HAWAII A KAUAI!!*," employed the use of kaona—a highly complex practice of subtext, veiling and layering of meaning.[462] Kaona has been described as the "language of symbols" that Hawaiians used and within which meaning could be concealed.[463] Throughout the nineteenth-century, Hawaiians used kaona as a means to conceal communication among Native Hawaiians to express loyalty to the Hawaiian Kingdom, "while under the surveillance of the colonially imposed government."[464]

ISLANDS 137 (Honolulu, Hawaiian Gazette Co. 1899). He was the son of Henry Sheldon, who was also a journalist and editor. *Id.*

[459] 1893 Executive & Advisory Councils (Sheldon Investigation), at 4 (Jan. 1893) [hereinafter Sheldon Investigation Transcript] (on file at the Hawaiʻi State Archives). Sheldon was questioned due to an article he published in *Hawaii Holomua*. *See id.* (referring to John G.M. Sheldon, *Imua o ka Lahui mai Hawaii a Kauai!!*, HAW. HOLOMUA, Jan. 23, 1893, at 2).

[460] *See* David C. Farmer, *The Legal Legacy of Sanford Ballard Dole*, 6 HAW. B.J. 24, 24 (2002). But, he likely lacked the cultural fluency to definitively understand the underlying message contained in the newspaper article. This is because, even assuming one can read and translate ʻŌlelo Hawaiʻi, a culturally literate interpretation of these types of sources are necessary. *See* Noelani Arista, *I ka Moolelo Nō ke Ola: In History There Is Life*, 14 ANGLISTICA (SPECIAL ISSUE NO. 2) 15, 17 (2010).

[461] By using a "kaona conscious historical method" as an interpretative tool, it allows us to not only properly evaluate latent messages contained in ʻŌiwi texts, it also guides us in questioning the "validity of monoperspectival Euro-American interpretations of contact, colonization, and resistance." Arista, *supra* note 11, at 668 (explaining that a "kaona conscious historical method" is necessary as a means for interpreting sources premised on Hawaiian ways of thinking and speaking).

[462] BRANDY NĀLANI MCDOUGALL, FINDING MEANING: KAONA AND CONTEMPORARY HAWAIIAN LITERATURE 5–6 (2016). The term kaona is defined as "[h]idden meaning, as in Hawaiian poetry; concealed reference, as to a person, thing, or place; words with double meanings that might bring good or bad fortune." PUKUI & ELBERT, *supra* note 2, at 130.

[463] GEORGE HUʻEU SANFORD KANAHELE, KŪ KANAKA: STAND TALL–A SEARCH FOR HAWAIIAN VALUES 47 (1986).

[464] MCDOUGALL, *supra* note 462, at 25; *see also* SILVA, *supra* note 23, at 8. As such, the use of kaona within Hawaiian nationalist texts during the nineteenth-century demonstrates how political claims were embedded and used as a form of coded resistance.

Sheldon, who wisely understood the gravity of the situation he faced, was circumspect in his answers to Dole. Dole first demanded that Sheldon read the article in English.[465] As to be expected, Sheldon gave a summarized version, softening or glossing over some of the language that he read aloud.[466] Sheldon's translation ended with the following line: "We must at all times obey the laws of the Provisional Government, we must obey them without interfering . . . and give them your good opinion as long as it consists and they wait with our prayers, whom God will see who is right."[467]

Dole then asked Sheldon what was "the main purpose" of the article.[468] Sheldon responded, "I wanted that article to go forth to the people to tell them to keep quiet and obey the orders of the new Government and pray to God."[469] Dole responded, "Pray to God for what?"[470] Sheldon started to answer but was interrupted by another question from Dole, "Why all this poetical language?"[471] Sheldon simply stated, "That is newspaper talk."[472] Dole then gave a lengthy speech sharply rebuking Sheldon:

> Well now. Mr. Sheldon, we are not in this Provisional Government for fun . . . . We do not expect everybody to agree with us, but we insist that no one shall act with any hostility to us, because it tends to make trouble, it tends to make breaches of . . . the peace, it tends to make disorder. And we have notified the newspapers that we will not tolerate anything in the way of inciting the people. The Queen has been put off the throne . . . . You and the other newspaper men will run your papers recognizing the Provisional Government . . . . We do not think it is proper for you to instill in the minds of the people that the Queen is a Sovereign in the position to say what she wants . . . . And we expect the newspapers, if they wish to continue, to recognize the situation fully . . . . We are not the censors of the press, but, under the circumstances, we shall not tolerate any incitement to disorder or to support any authority against ourselves. I do not know that you have done so, but it seems to some of us that this article full of poetical allusions is in that direction.[473]

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[465] Sheldon Investigation Transcript, *supra* note 459, at 1.

[466] *Id.* at 1–3. It is beyond the scope of this article to describe the embedded kaona contained in the original article. I encourage readers to look for themselves.

[467] *Id.* at 3.

[468] *Id.*

[469] *Id.*

[470] *Id.*

[471] *Id.*

[472] *Id.*

[473] *Id.* at 3–4.

While Dole claimed that the Provisional Government did not seek to "censor the press," the chilling effect of subsequent actions taken against journalists arguably said otherwise. On January 30, 1893, Act 8 entitled, "An Act Concerning Seditious Offenses," was promulgated by the Executive and Advisory Councils of the Provisional Government.[474] The law made it a misdemeanor to publish, verbally or otherwise, "any words or any document with a seditious intention."[475] A "seditious intention" was defined as,

> an intention to bring into hatred or contempt, or to excite disaffection against the Provisional Government of the Hawaiian Islands, or the laws thereof, or to excite the people to attempt the alteration by force of any matter established by the laws of the Provisional Government, or to raise discontent or disaffection against the Provisional Government, or to promote feelings of ill-will and hostility between different classes of people in the Hawaiian Islands.[476]

The punishment was hard labor for not more than two years or by fine of up to one-thousand dollars.[477] One day later, on January 31, 1893, the historically pro-American, pro-Annexation newspaper *Bulletin* commented on the severity of this law:

> The Bulletin has no policy to be construed into one "to bring into hatred or contempt, or to excite disaffection against the Provisional Government of the Hawaiian Islands . . . ." It does, however, insist on the right to criticize the acts or the policy of the Government, in the interest of liberty equal to that guaranteed under the laws of the United States and Great Britain . . . . The passage and promulgation of severe and stringent laws for purposes already covered by existing legislation . . . in a country with the semblance of freedom, we hold to be an excess of authority. . . and [people are] moved to inquire with bated breath as to what next may be expected in the way of repressive enactments.[478]

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[474] Act of Jan. 30, 1893, *in* LAWS OF THE PROVISIONAL GOVERNMENT OF THE HAWAIIAN ISLANDS PASSED BY THE EXECUTIVE AND ADVISORY COUNCILS: ACTS 1 TO 86 (Honolulu, Robert Grieve Steam Book & Job Printer 1894).

[475] *Id.* at 20.

[476] *Id.* at 20–21.

[477] *Id.* at 21.

[478] DAILY BULL., Jan. 31, 1893, at 2.

The following day, the editor of the *Bulletin*, Daniel Logan, was summoned to appear before the Executive and Advisory Councils.[479] It was evident that under Dole's regime, no one would be spared—any journalist who espoused views that were critical of the Provisional Government could be hauled in for questioning. Logan was interrogated about a number of points made in the *Bulletin*, particularly criticism lobbed at certain measures enacted that curtailed the freedom of the press: "A third aggressive measure establishes a press censorship only surpassed by that of Russia in oppressive possibilities from the fact that an appeal to a jury is still left open to journalists who may be deprived of liberty for exercising the right of legitimate criticism."[480] After reading this passage aloud, Dole, who was formerly a Hawai'i Supreme Court Justice, stated: "I do not understand why an appeal to a jury does not modify this instead of increasing it . . . . To compare a law of that kind with any law of Russia, I think it shows a slight upon your part or a willingness to construe things unfavorably."[481]

Dole continued to question Logan on specific points contained in this article. For example, Dole objected to the following passage: "During the whole of the two years which have elapsed under the Queen's rule never has there been such extravagance, political favoritism or distribution of spoils to the victors as during these fourteen days."[482] Logan was then asked to provide a "definition of spoils."[483] After some exchange, Logan asserted that he should be given some consideration for "weeding out" "everything of a news nature" that was "simply spiteful."[484] Moreover, in defense of the *Bulletin*, Logan carefully maintained:

> The "Bulletin" has always held that whenever the country should be unable to govern itself the United States should have the first claim on it. . . . And we have kept up that policy, and I don't think we ought to be censured very strictly for simply making a party fight, of course we will be just as loyal as anybody.[485]

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[479] 1893 Executive & Advisory Councils (Logan Investigation), at 1 (Feb. 1893) (on file at the Hawai'i State Archives). Logan was questioned about a particular article that was published in the *Bulletin*. *See id.* (referring to *The Course of Events*, DAILY BULL., Jan. 31, 1893, at 2).

[480] *Id.* at 3 (quoting *Bulletin* article).

[481] *Id.* at 3–4.

[482] *Id.* at 6 (quoting *Bulletin* article).

[483] *Id.*

[484] *Id.* at 7.

[485] *Id.*

It is relevant that even within the oligarchy-controlled papers, some editors and journalists like Logan felt compelled to speak out against the oppressive measures that the Provisional Government had enacted.

Sheldon, who refused to cave in to the mounting pressure exerted by Dole, continued to publish various articles in both ʻŌlelo Hawaiʻi and English that showed support for independence. Indeed, a few short days after being interrogated by Dole, an unauthored article (likely penned by Sheldon) appeared in the *Holomua*. The article began poetically with a quote from Sir Walter Scott, "Breathes there a man with soul so dead, Who never to himself hath said, This is my own my native land."[486] The article adamantly insisted that "[n]ot a single Hawaiian . . . desire[d] to see any foreign flag replace his own."[487] No Hawaiian was "willing to barter his whole national life, tradition, . . . the land of his birth, even in exchange for the proud privilege of becoming a citizen of the greatest republic on earth."[488] Other articles authored by Sheldon expressed similar sentiments, but when articulated in ʻŌlelo Hawaiʻi, conveyed a stronger underlying message intended for an ʻŌiwi audience. To accomplish this dangerous task, Sheldon skillfully employed the use of kaona in poems that he composed and published in various newspaper articles. For example, on January 25, 1893, Sheldon published the following poem entitled *Ke Kuokoa Puka La*—his original text appears on the left, and my translation is on the right.[489]

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[486] HAW. HOLOMUA, Jan. 26, 1893, at 4.

[487] *Id.* (emphasis omitted). The article further stated: "Not a single Hawaiian, however, even those few whose signatures to annexation petitions (not 200 in number and mostly convicts) have been bought or forced by necessity from them, desires to see any foreign flag replace his own. And these Hawaiians are 40,000 strong, with 10,000 voters among them."

[488] *Id.*

[489] Kahikina Kelekona, *Ke Kuokoa Puka La*, HAW. HOLOMUA, Ian. 25, 1893, at 2. Sheldon's name in ʻŌlelo Hawaiʻi was Kahikina Kelekona. The name of the poem, *Ke Kuokoa Puka La*, was probably in reference to *Ka Nupepa Puka La Kuokoa me Ko Hawaii Pae Aina i Huiia*. This paper, which listed Whitney as one of its famous editors, began publishing on January 26, 1893. *See* CHAPIN, *supra* note 403, at 82. Sheldon's message in this poem to Native Hawaiians was thus unmistakable.

He malihini, hoi keia,	This is indeed a newcomer,
E auwana hele ae nei,	Wandering hither and thither,
Aihemu manienie,	Devouring and driving everything away,
Ai uhini o ka nahele.	Like a cloud of locusts consuming the forest.
O ke ano iho la no ia,	That is indeed its nature,
Malimali i kinohou,	At first obsequious speech urging reformation,
A ku ae i ka moku,	And then they rule the land,
Ko-we-iu Kanaka.	Go away you Kanaka.
O ko lakou ano iho la ia,	That is their nature,
O hoolilo aina ma,	Those who will transfer the land,
Mai punihei aku,	Do not be deceived,
I ka mali hoohui aina.	By the honey-coated speech of the annexationists.

On February 15, 1893, Sheldon wrote a scathing article criticizing pro-Annexationist Lorrin Thurston.[490] In response to Thurston's bold assertion that foreigners would be forced to leave Hawai'i if the Queen were reinstated, Sheldon countered, "He lies! and he knows it. The laws of Hawaii made by the foreigners themselves are a sufficient protection for life and property of any stranger who makes this fair land his home."[491] According to Sheldon, Thurston's true concern was that if Hawai'i was ruled by the Queen, Hawai'i could not be "used as a milking cow for him and his party to fill their coffers at the expense of the natives . . . ."[492]

That same day, Dole issued a Warrant of Arrest that demanded Sheldon, "to show cause why he should not be punished for contempt."[493] A writ of habeas corpus was issued upon the petition of G.C. Kenyon, editor of *Hawaii Holomua*.[494] Sheldon's counsel, C.W. Ashford, alleged that the warrant was invalid and insufficient because: (1) the Executive and Advisory Councils of the Provisional Government had no power to authorize the issuance of a warrant, (2) the warrant was insufficient because

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[490] HAW. HOLOMUA, Feb. 15, 1893, at 4.

[491] *Id.*

[492] *Id.*

[493] Various newspapers reported on the arrest and subsequent proceedings. *See, e.g.*, *Contempt of Council: Proceedings in the Case of the Holomua Editor*, DAILY BULLETIN, Feb. 16, 1893, at 3; *Frear Sustained—Sheldon Returned to Marshal's Care*, HAWAIIAN GAZETTE, Apr. 4, 1893, at 11.

[494] *In re* Kenyon, 9 Haw. 32, 33 (1893).

although Chairman Dole issued it, the warrant lacked verification that the Councils had authorized it, and (3) the warrant failed to specify the grounds for Sheldon's arrest.[495]

Circuit Court Judge Frear delivered his decision on February 24, ruling that Sheldon was held under a valid warrant of arrest issued by a competent authority.[496] The decision was appealed to the Hawai'i Supreme Court and a hearing was held on March 21.[497] Shortly thereafter, due to the vacancy on the supreme court from Sanford Dole's resignation, Judge Frear joined the Hawai'i Supreme Court, and participated in ruling on the merits of his own decision.[498] Portions of Frear's decision were adopted by the Hawai'i Supreme Court as part of its ruling.[499]

The court first began its analysis by clarifying its role within the Provisional Government. Because the Provisional Government purportedly took possession of all government property and established itself as the government of Hawai'i by abrogating the monarchy, the court determined:

> [I]t is the *de facto* Government. It is the Government and the only Government now existing in the Hawaiian Islands. The Courts of this country are not at liberty to discuss the question of the legal existence of the Government of which they form a part, and the laws of which they are called upon to administer.[500]

Ashford asserted that the warrant was issued not by a court of judicial character, but by a body exercising legislative functions—thus, because legislative bodies have no implied authority to punish generally for contempt, the warrant was invalid. Despite citing U.S. Supreme Court precedent stating that a "legislative body has no inherent power to punish generally for contempts," Ashford failed to convince the Hawai'i Supreme Court of his argument.[501] While acknowledging that it was "doubtful if Congress could enact a law authorizing itself to punish for contempt persons not members of that body,"[502] the supreme court explained that "in this country, the legislative body" passed this law and "not being trammeled by any inhibition of any constitutional provision," proceeded to expressly give itself authority to punish for contempts.[503] The court concluded that

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[495] *Id.* at 34.
[496] *Id.* at 33, 39.
[497] *Id.* at 32.
[498] *Id.* at 33.
[499] *See id.* at 35.
[500] *Id.* at 34–35.
[501] *Id.* at 37 (citing Kilbourn v. Thompson, 103 U.S. 168 (1880)).
[502] *Id.*
[503] *Id.* at 38.

the Councils have the "inherent power also to exercise this authority in so far as the same is essential to the performance of their other functions."[504]

Not surprisingly, Sheldon lost and was remanded to the custody of the Marshal.[505] Sheldon's imprisonment did little to deter other journalists, and when he was released, he and other journalists continued to publish opposition pieces. Dole responded swiftly in his endeavor to quash all opposing viewpoints. Through the enactment of laws and vigorous judicial enforcement, Dole effectively accomplished this goal. Shortly after the Hawai'i Supreme Court rendered its decision, on May 4, 1893, Dole promulgated Act 33 which was entitled, "*An Act to Regulate the Printing and Publishing of Newspapers and Publications.*"[506] This law was ostensibly enacted to protect "the rights of individuals as well as of the public in general,"[507] however, this law actually did the opposite—it limited publication of newspapers and prints that disseminated "news, information, instruction" to only those deemed "responsible individuals or companies."[508] The Minister of the Interior was charged with issuing certificates to permitted individuals or companies.[509] But these initial laws (Act 8 and Act 33), and a supreme court decision affirming the legality of the government's actions were just the start.

As noted by Kuykendall, Dole even targeted journalists who published "libelous" articles in the continental United States. For example, Charles Nordhoff of the New York *Herald* arrived in Honolulu on April 7, 1893.[510] Nordhoff, who was "predisposed to favor the queen," drew the ire of annexationists.[511] When his articles began to return from New York, one pro-annexationist threatened to "tar and feather" Nordhoff.[512] The legal actions taken by Dole against Nordhoff were covered in a report issued by James H. Blount, a special commissioner appointed by President Grover Cleveland to investigate the Provisional Government's request for annexation to join the United States.[513] Blount maintained that Dole's

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[504] *Id.*

[505] *Id.* at 40.

[506] Act of May 4, 1893, To Regulate the Printing and Publishing of Newspapers and Other Publications, *in* LAWS OF THE PROVISIONAL GOVERNMENT OF THE HAWAIIAN ISLANDS PASSED BY THE EXECUTIVE AND ADVISORY COUNCILS: ACTS 1 TO 86, *supra* note 474, at 63–66.

[507] *Id.* at 63.

[508] *Id.*

[509] *Id.* at 63–64.

[510] *See* 3 KUYKENDALL, *supra* note 370, at 624.

[511] *Id.* at 626.

[512] *Id.*

[513] *See* H. EXEC. DOC. NO. 48, 53d Cong., 2d Sess. (1893), *reprinted in* FOREIGN

handling of the entire affair appeared "to have been animated by the spirit of crushing out all opposing opinions by forceful methods."[514]

Dole's tactics for silencing the opposition had thus far been effective. After the successful implementation of various measures and a supreme court decision ruling in his favor, Dole now looked toward securing the interests of the government through the constitution. After nearly fifty years of constitutionally protected freedom of speech in the Kingdom of Hawai'i, on July 4, 1894, Article 3 of the Constitution of the Republic of Hawai'i was changed to permit the Legislature to enact laws that would prohibit "seditious language":[515]

> All men may freely speak, write and publish their sentiments on all subjects; and no law shall be enacted to restrain the liberty of speech or of the press; but all persons shall be responsible for the abuse of such right. Provided however, that the Legislature may enact such laws as may be necessary, to restrain and prevent the publication or public utterance of indecent or seditious language.[516]

Thereafter, the legislature enacted Chapter 96, which related to "Seditious Offenses."[517] While it was similar in form and language to Act 3, the law included new language that allowed a Judge or Magistrate to not only penalize a journalist with steep fines or imprisonment at hard labor, it could also suspend any further publication of the newspaper that published

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RELATIONS OF THE UNITED STATES 1894: AFFAIRS IN HAWAII app. 2, at 422–29 (May 24, 1893).

[514] *Id.* at 427.

[515] HAW. CONST. of 1895, art. III, *in* CONSTITUTION OF THE REPUBLIC OF HAWAII AND LAWS PASSED BY THE EXECUTIVE AND ADVISORY COUNCILS OF THE REPUBLIC (Honolulu, Robert Grieve Steam Book & Job Printer 1895) [hereinafter 1895 CONSTITUTION & LAWS].

[516] The Hawaiian version stated:

> Ua hiki i na kanaka a pau ke kamailio me ke keakea ole ia, e kakau a hoolaha i ko lakou manao ma na mea a pau; a aole e hanaia kekahi kanawai e hoohaiki ai i ke kamailio ana, a i ole ia ka papapai; aka, e kau no maluna o na mea a pau ke kaumaha o ka lawelawe hewa ana o ia pono; eia no nae, ua hiki i ka Ahaolelo e hooholo i na kanawai i kupono e kaohi ai a e pale aku ai i ka hoolahaia ana, a i ole ia ke kamailio akeaia ana o na olelo pelapela a me na olelo hoala kipi.

HAW. KUMUKANAWAI O KA MAKAHIKI 1895, pauku III, *in* KUMUKANAWAI O KA REPUBALIKA O HAWAII A ME NA KANAWAI I HOOHOLOIA E KA AHA HOOKO A ME AHA KUKA O KA REPUBALIKA O HAWAII (Honolulu, Robert Grieve Steam Book & Job Printer 1895).

[517] Act of Mar. 19, 1894, Relating to Persons Having Certain Lawless Intentions, *in* 1895 CONSTITUTION & LAWS, *supra* note 515, at 55; Act of Mar. 19, 1894, ch. 96, §§ 1620–32, *in* THE PENAL LAWS OF THE HAWAIIAN ISLANDS, 1897, at 519–22 (Honolulu, Haw. Gazette Print 1897) [hereinafter 1897 HAW. PENAL LAWS].

the original article.[518] Further, Chapter 96 also included new language that made it a crime to have "lawless intentions":

> If the Marshal or a Deputy Marshal or any Sheriff or Deputy Sheriff knows or has reason to believe that any person has lawless intentions that are hostile to public order, or the established system of Government, he may complain to a Circuit Judge . . . . If it appears to the satisfaction of the Judge that the complainant has reason to believe that the person complained of harbors lawless intentions . . . he shall cause him to be arrested and brought before him by warrant . . . .[519]

If the person was found guilty of "lawless intent," the applicable punishment was banishment from the country for a minimum of two years.[520] With these questionable measures in place, Dole's government wielded enormous power that effectively silenced journalists who dared to speak out against the government. For example, Edmund Norrie, the editor of *Hawaii Holomua*, was jailed for writing "Mr. Dole is President of Hawaii through treason, fraud and might. He will never get there through RIGHT."[521]

After the unsuccessful rebellion in 1895 that sought to restore the queen to her throne, journalists John E. Bush, E.C. Crick, Daniel Logan, Joseph Nāwahī, Edmund Norrie, Thomas Tamaki Spencer, W.J. Kapi, J.K. Kaunamano, G. Carson Kenyon, and F.J. Testa were all arrested for conspiracy and held in prison with excessively high bail.[522] For example, Nāwahī's bail was set for an astounding $10,000.[523] Journalists were the target of the government during this time because, as explained by Edward G. Hitchcock, the Marshal of the Provisional Government and later the Republic of Hawai'i, "[r]evolutions are not started these days without the aid of newspapers . . . ."[524] Even after martial law was instituted, the

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[518] 1897 HAW. PENAL LAWS, *supra* note 517, §§ 1624–25.

[519] *Id.* § 1627.

[520] *Id.* §§ 1627–28

[521] Edmund Norrie, *The Bishop and Dole*, HAW. HOLOMUA, Nov. 21, 1894, at 2.

[522] *See* CHAPIN, *supra* note 410, at 103; *see, e.g.*, Republic v. Bush, No. 2106 (Haw. 1st Cir. Ct. Feb. 25, 1895).

[523] J.G.M. SHELDON, KA PUKE MO'OLELO O HON. IOSEPA K. NĀWAHĪ 141 (J.G.M. Sheldon ed., 1908). In 'Ōlelo Hawai'i it states, "I ka ho'oku'u 'ia 'ana mai o Iosepa Nāwahī mai loko mai o ka hale pa'ahao ma muli o kona hā'awi 'ana i $10,000 pona . . . ." *Id.* My translation: "After Joseph Nāwahī's release from prison following his posting of a $10,000 bond . . . ."

[524] *See Affidavit of Edward G. Hitchcock*, *In re* G. Carson Kenyon (Nov. 2, 1895), *in* CORRESPONDENCE BETWEEN THE GOVERNMENT OF THE REPUBLIC OF HAWAII AND HER BRITANNIC MAJESTY'S GOVERNMENT IN RELATION TO THE CLAIMS OF CERTAIN BRITISH SUBJECTS ARRESTED FOR COMPLICITY IN THE INSURRECTION OF 1895 IN THE HAWAIIAN

government sought to keep the journalists jailed because, as Chapin explained, while they were locked up, the "newspapers stopped printing"—an action that pleased *Gazette* editor Wallace Farrington who stated that the imprisoned journalists were "enjoying a long-needed term of rest" while "passing their vacations in Oahu Prison."[525]

The numerous conspiracy, libel, and "seditious language" cases filed against at least a dozen Hawaiian and Caucasian newsmen during this tumultuous period demonstrate that the government, under Dole's leadership, vigorously sought to silence any opposing viewpoint. Undoubtedly Dole felt these measures were necessary to ease the path toward annexation. And indeed, how they were portrayed in the papers mattered: Would they be presented as illegal usurpers or as a legitimate, rightful governing entity? Once annexation was secured, however, these concerns were abated and the right to free speech was reestablished.[526] Ironically, however, this was a necessary result because under the Organic Act, the U.S. Constitution extended to Hawai'i, and any laws deemed repugnant to the Constitution (*i.e.* laws that curtailed freedom of speech[527]) necessitated abrogation.

Numerous scholars seek to write about this controversial time period. And many, like Judge Burns, rely on the work contained in Kuykendall's massive 764-page tome that depicts the events leading up to annexation. Dole's draconian tactics vividly illustrate the lengths that a government will go to control its own version of truth. And while Kuykendall at times attempted to provide context to this narrative by raising competing ideas, and opposing viewpoints raised by Dole's contemporaries, Kuykendall's bibliography and endnotes demonstrate a one-sided bias that is impossible to overlook.

To be clear, I do not advocate that all historians, legal scholars, attorneys, and judges arrive at the same conclusion, or have the same opinions. I do, however, expect that we adopt certain principles and standards in conducting responsible historical research. Moreoever, I advocate that we shift the paradigm in our current discourse that deems our current methodologies in conducting research about Native Hawaiians "sufficient." Professor Young stated that this approach does not mean we take "a monolithic approach whereby a party line of political resistance

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ISLANDS, *supra* note 451, at 134.

[525] CHAPIN, *supra* note 410, at 103 (quoting HAW. GAZETTE, Jan 18, 1895).

[526] *Id.*

[527] *See id.* ("While annexation was still pending, they were liable to arrest at any time . . . . [but] [a]fter formal annexation, the right to free speech was once again guaranteed, now by the American Constitution.").

doublespeak creates simplistic 'bad guys and good guys' scenarios for public cheerleading purposes."[528] Instead, he urged that history "be written to more accurately reflect what actually took place in the nineteenth-century by giving voice to the people of that time to tell their stories in ours."[529] By taking this approach, there is no demand to "molding of what it would be most useful to report," but rather it would represent "the most comprehensive presentation of evidence from all sides of an issue to let the reader decide the merits or lack thereof for what is being asserted."[530]

IV. CONCLUSION

I ka wā mamua, i ka wā mahope.

The time in front (or the past), the time in back (or the future).[531]

As explained by Dr. Kame'eleihiwa, "the past is referred to as *[k]a wā mamua*, or 'the time in front or before[,]' [w]hereas the future[] . . . is *[k]a wā mahope*, or 'the time which comes after or behind.'"[532] Such an orientation means that a Native Hawaiian "stands firmly in the present, with his back to the future, and his eyes fixed on upon the past, seeking historical answers for present-day dilemmas."[533] Thus, it makes sense that much of the work of present day 'Ōiwi scholars is focused on the past—our interpretations of the past inform our present and direct us toward a more knowledgable future.[534]

By being knowledgeable about our past, it allows us to recognize and spotlight potential threats to our society. As described in Section III.E. above, Sanford B. Dole waged a war on newspaper journalists that published stories for opposing or portraying the Provisional Government, and later the Republic of Hawai'i, and its supporters in a negative light. Hawaiian citizens watched as their Constitution was amended for the first time in over fifty years to include seditious libel. Journalists were jailed, or excessively fined, and dragged into court to defend their stories. Some were faced with the prospect of being forcibly banished from the country. The so-called "winners" and their newspapers told their version of

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[528] Young, *supra* note 390, at 22 (emphasis omitted).

[529] *Id.*

[530] *Id.*

[531] *See* KAME'ELEIHIWA, *supra* note 23, at 22.

[532] *Id.* (italicization in original)

[533] *Id.*

[534] *See* BEAMER, *supra* note 23, at 10.

history—a history that spoke for only five to six percent of the Hawai'i population.

Journalists serve an important function, and part of that function is to hold government officials accountable. When our journalists are silenced, the potential ramifications are far-reaching. Over 100 years later, I find myself writing a law review article, attempting to explain how dangerous it can be to rely on a one-sided account of history. I contend that a history that speaks on behalf of a small minority of the population cannot possibly be presented as "balanced." And yet, that is what Judge Burns, and many others, attempt to do.

What lessons can we draw from this history? United States President Donald J. Trump, on his first full day in office, opted to "wage war on the media."[535] President Trump's chief White House strategist, Stephen K. Bannon, described the media as "the opposition party"[536] and directed the media to just "keep its mouth shut . . . ."[537] White House press secretary, Sean Spicer lambasted the media stating that, "We're going hold the press accountable . . . ."[538] Trump has been openly hostile to the media, including mocking a disabled reporter,[539] encouraging crowds to attack journalists,[540] denying press credentials to outlets like the *Washington Post* when he disliked their coverage,[541] and promising to "open up libel laws"[542] to make it easier for him to sue the *New York Times* and other media outlets.[543]

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[535] Philip Rucker et al., *Trump Wages War Against the Media as Demonstrators Protest His Presidency*, WASH. POST (Jan. 21, 2017), https://www.washingtonpost.com/politics/trump-wages-war-against-the-media-as-demonstrators-protest-his-presidency/2017/01/21/705be9a2-e00c-11e6-ad42-f3375f271c9c_story.html.

[536] Michael M. Grynbaum, *Trump Strategist Stephen Bannon Says Media Should 'Keep Its Mouth Shut,'* N.Y. TIMES (Jan. 26, 2017), https://www.nytimes.com/2017/01/26/business/media/stephen-bannon-trump-news-media.html.

[537] *Id.*

[538] Rucker et al., *supra* note 535.

[539] Glenn Kessler, *Donald Trump's Revisionist History of Mocking a Disabled Reporter*, WASH. POST (Aug. 2, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/08/02/donald-trumps-revisionist-history-of-mocking-a-disabled-reporter.

[540] *See, e.g.*, Alexander Burns & Nick Corasaniti, *Donald Trump's Other Campaign Foe: The 'Lowest Form of Life' News Media*, N.Y. TIMES (Aug. 12, 2016), https://www.nytimes.com/2016/08/13/us/politics/donald-trump-obama-isis.html.

[541] Paul Farhi, *Trump Revokes Post Press Credentials, Calling the Paper 'Dishonest' and 'Phony,'* WASH. POST (June 13, 2016), https://www.washingtonpost.com/lifestyle/style/trump-revokes-post-press-credentials-calling-the-paper-dishonest-and-phony/2016/06/13/f9a61a72-31aa-11e6-95c0-2a6873031302_story.html.

[542] Eugene Volokh, Opinion, *Donald Trump Says He'll 'Open Up Libel Laws,'* WASH. POST (Feb. 26, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/26/donald-trump-says-hell-open-up-libel-laws.

Why does President Trump hate the media so much? Perhaps because they challenge his authority and refuse to allow him to tell his version of "facts." Whether it is his claims that his inauguration crowd size was the "largest audience to ever witness an inauguration,"[544] or his assertion that the science behind climate change is a "Chinese hoax,"[545] or his claims that "there were 3 million to 5 million illegal votes cast in last November's election"[546]—journalists can barely keep up with the diluge of vitriolic hyperbole, mistruths, or outright lies being spewed.

As eloquently stated by historian Shana Bernstein,

> It is deeply disturbing to find ourselves at a historical moment where misguided appeals to hate and fear seem to be regaining traction. Our president boldly disregards factual information, and his spokesperson Kellyanne Conway suggests that "alternative facts" are just as real as actual facts, and in the process dismisses the historical lessons that may be drawn when politicians replace fact with exaggeration—or worse, outright fiction.[547]

She urges us to "relearn the lessons of history and apply its tools of critical thinking to our current moment."[548] Now, more than ever is it crucial for us

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According to prominent First Amendment lawyer Susan Seager, Donald Trump and his affiliated companies have been involved in a "mind-boggling 4,000 lawsuits over the last 30 years and sent countless threatening cease-and-desist letters to journalists and critics." Susan E. Seager, *Donald J. Trump Is a Libel Bully But Also a Libel Loser*, 32 COMM. LAW, Fall 2016, at 1-11.

[543] Volokh, *supra* note 542.

[544] President Trump's press secretary stated, "This was the largest audience to ever witness an inauguration—period—both in person and around the globe . . . ." Nicholas Fandos, *White House Pushes 'Alternative Facts.' Here Are the Real Ones*, N.Y. TIMES (Jan. 22, 2017), https://www.nytimes.com/2017/01/22/us/politics/president-trump-inauguration-crowd-white-house.html.

[545] Edward Wong, *Trump Has Called Climate Change a Chinese Hoax. Beijing Says It Is Anything But*, N.Y. TIMES (Nov. 18, 2016), https://www.nytimes.com/2016/11/19/world/asia/china-trump-climate-change.html.

[546] Danielle Kurtzleben & Jessica Taylor, *This Week in Trump's "Alternative Facts,"* NPR (Jan. 29, 2017), http://www.npr.org/2017/01/29/512068148/this-week-in-trumps-alternative-facts; *see* Glenn Kessler, *Recidivism Watch: Trump's Claim That Millions of People Voted Illegally*, WASH. POST (Jan. 24, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/24/recidivism-watch-trumps-claim-that-3-5-million-people-voted-illegally-in-the-election/.

[547] Shana Bernstein, Opinion, *How to Use the Past to Fight for Your Rights Today*, CNN (Jan. 23, 2017), http://www.cnn.com/2017/01/23/opinions/past-still-matters-bernstein-opinion/index.html.

[548] *Id.*

"to read history with critical and appreciative minds, and to be prepared to fight any attempts to undermine our democracy."[549]

Some day in the future, histories will be written about this tumultuous political period. In these chaotic times, all of us—law students, legal scholars, attorneys, and judges—should be mindful of these past lessons and our professional obligations to continuously seek the truth. As Professor Cramton explained, the best scholarship is premised on an "endless process of discovery, reflection, and dialogue concerning ideas, facts, and values carried on in an atmosphere of mutual support and understanding."[550] If we fail in this endeavor, we needn't look far to see the results—as Native Hawaiians can attest, histories written using one-sided or "alternative facts" can have devastating and long-term impacts on an entire society.

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[549] *Id.*

[550] Cramton, *supra* note 34, at 3 (quoting a speech that Cramton gave in 1985).

(Re)Righting History: Deconstructing the Court's Narrative of Hawai'i's Past

Troy J.H. Andrade*

In a recently published article, Chief Judge James S. Burns (retired) contends that the Hawaiian Crown Lands were owned by all the people of Hawai'i and were not held in trust for Native Hawaiians as Professor Jon Van Dyke argued in his book, Who Owns the Crown Lands. Although this author, as with many others, takes issue with the research and conclusions of that article, this Article focuses upon the larger issue of the reliance on the Supreme Court of the United States' jaded recitation of Hawai'i's complex political and legal history. The article specifically relies upon two Supreme Court opinions, Rice v. Cayetano *and* Hawai'i v. Office of Hawaiian Affairs*—two politically charged cases that dealt large blows to the Native Hawaiian community particularly because of the Court's skewed views of Hawai'i's past. Native Hawaiians, like most indigenous people, are faced with a legal system that rarely recognizes their stories and their histories. Due in large part to the enshrined principle of stare decisis, Native*

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Hawaiians have been left with a less than adequate narrative of their legal and political history that has ramifications for other indigenous and marginalized communities across the United States. The Court's narrative is oftentimes then interpreted, particularly by jurists and legal practitioners, as the "official" history of a people. This Article criticizes the Court's writing of Hawaiian history in its opinions and also the re-writing of history and silencing of Native voices that occurs when jurists and practitioners blindly adhere to "precedent." This Article demands careful use of history when analyzing complex issues involving Native Hawaiians, and provides methods for ensuring an accurate recitation of history.

I. INTRODUCTION

In February 2015, a student attending a conference in Washington, D.C., asked Associate Justice Antonin Scalia whether the United States Congress could annex an independent nation by way of a joint resolution.[1] Justice Scalia—perhaps one of the brightest conservative legal thinkers of his time—responded that there was nothing in the Constitution that precluded such action and that it would likely be upheld because the annexation "went through a process."[2] Scalia apparently proceeded to provide "examples" of this type of "process" through the American acquisition of the Philippines and Puerto Rico following the Spanish-American War.[3] When prodded about the "process" for annexing Hawai'i in 1898, the conservative firebrand implied that Hawai'i was also a spoil of the Spanish-American War and stated that, based on international law, there has been "hundreds of years worth of problems there."[4]

Justice Scalia's response elucidated sharp criticism from Professor Williamson B.C. Chang, a scholar in Hawai'i's legal history and an expert in Hawaiian law.[5] Professor Chang argued that Scalia was "clearly wrong"[6] and, along with the rest of the American public, was "deeply ignorant" of the annexation of Hawai'i.[7] Professor Chang crafted an argument premised

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[1] Jacob Bryan Aki, *Supreme Court Justice Antonin Scalia, Hawaii and Annexation*, HONOLULU CIVIL BEAT (Feb. 24, 2015), http://www.civilbeat.org/2015/02/supreme-court-justice-antonin-scalia-hawaii-and-annexation.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* Williamson Chang, *Darkness Over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70 (2015). This author takes no position on Professor Chang's theory that Congress lacked the constitutional authority to annex Hawai'i.

[6] *See id.* at 77.

[7] *Id.* at 71.

on a review of the legislative debates surrounding the U.S. Senate's failed efforts to ratify a treaty of annexation—the Constitutional means by which annexation is accomplished.[8]

Justice Scalia's remarks, while simply a cursory attempt at appeasing a college student's question, and Professor Chang's scathing response, evince the complexities of Hawaiian legal and political history. This tiff also highlights a recurring problem encountered by Native Hawaiians and other marginalized communities whose concerns are addressed before courts of law: the courts' often skewed use of history in their legal opinions. Indeed, while a Supreme Court justice can state things during a meeting with students that have no legally binding effect, he or she has the power to set harmful precedent that is often times difficult for practitioners to overcome.

As analyzed below, the Supreme Court of the United States has selectively used aspects of Hawaiian history as a means to justify its political ends. As Justice Robert H. Jackson wrote, "Judges often are not thorough or objective historians."[9] This selective use of laws and facts to recreate or reimagine the past is dangerous and is a highly political practice with severe consequences for those communities with little access to courts to vindicate their own history. In Part II of this Article, the Court's use of history and the evolution of the use of history in judicial opinions is briefly reviewed to show the trend of both liberal and conservative justices toward writing historical essays to justify their decisions. Part III of this Article, titled "Righting History," then critiques the conservative narrative of Hawai'i's past through the lens of two cases: *Rice v. Cayetano*[10] and *Hawai'i v. Office of Hawaiian Affairs*.[11] These two cases reveal a Court that is willing to ignore, erase, and revise history to ensure the integrity of its decisions. Finally, Part IV of this Article discusses the consequences of

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[8] *See generally id.* Professor Chang argued specifically that because there was no mutual treaty of annexation, the United States did not receive an "objective metes and bounds description of the islands and waters" that therefore caused a "break in the chain of sovereignty." *Id.* at 90. The Admission Act describes the lands of the newly formed State of Hawai'i as those lands "included in the Territory of Hawaii on the date of the enactment of this Act[.]" Admission Act of 1959, Pub. L. No. 86-3, § 2, 73 Stat. 4, 4. The "Territory of Hawaii" was defined in the Organic Act as "the islands acquired by the United States of America under an Act of Congress entitled 'Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States[.]'" Act of Apr. 30, 1900, Pub. L. No. 56-331, § 2, 31 Stat. 141, 141 [hereinafter Organic Act]. Therefore, according to Professor Chang, "by the combined effect of the two acts there are no lands and waters in the State of Hawaii!" Chang, *supra* note 5, at 97.

[9] Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM L. REV. 1, 6 (1945).

[10] 528 U.S. 495 (2000).

[11] 556 U.S. 163 (2009).

relying upon the Court's biased and flawed narrative and proposes steps for addressing some of these problems for practitioners and judges. This Article concludes that practitioners and, particularly judges, should be cautious when relying upon the Court's recitation of the history of Hawai'i as authoritative.

II. HISTORY'S COMPLEXITIES: THE JUDICIAL INCLUSION OF HISTORICAL ESSAYS

A. The Supreme Court's Use of History

History and law are closely intertwined.[12] 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.[13] The entire premise of litigation itself is to determine what occurred in the past, who was at fault for such conduct, and whose story is more convincing. History is also used to define legislative intent. When the text of a statute is ambiguous, courts will resort to an analysis of legislative materials such as drafts of the legislation, committee reports, speeches from legislators, and testimony received during the committee hearings. These resources provide a toolkit for a court to ascertain what legislators were intending in passing the law. History, thus, serves as a way for a court to legitimize its decision. However, in *Clio and the Court: An Illicit Love Affair*, Professor Alfred H. Kelly provided a theoretical survey of the Supreme Court's misuse of history.[14] Kelly specifically identified two alternative ways in which the court uses history to justify its decision: judicial fiat and the "law-office history."

First, in what he termed "judicial fiat" or "authoritative revelation," Kelly stated that in order to determine the intent of a constitutional provision, the Court would issue "a simple declarative statement of a revelatory kind of what the original intent actually had been."[15] Once written, future courts could, under the doctrine of stare decisis, then rely upon that retelling of history: "by quoting history, the Court made history, since what it declared to be was frequently more important than what the history might actually

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[12] *See* 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.").

[13] Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 121 (1965).

[14] *Id.* at 122.

[15] *Id.* at 122–23.

have been."[16] This practice of "judicial fiat" was perhaps best accomplished in the early years of the nation with Chief Justice John Marshall, who mastered "simple declarative statement[s]" to enshrine legislative intent into the meaning of the laws.[17] For example, in *Marbury v. Madison*, Chief Justice Marshall reviewed three clauses of the Constitution to reach the following revelatory statement: "From these, and many other selections which might be made, it is apparent, that the Framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."[18] Kelly discussed the use of judicial fiat in landmark cases, like *Plessy v. Ferguson*, where the Court, without examining the evidence, stated that the "Fourteenth Amendment in the nature of things could not have been intended to abolish distinction based upon color."[19]

Kelly then identified a second historical technique, the historical essay, which judges use to support their opinions. This technique, according to Kelly is employed "as an instrument of extreme political activism, involving extensive judicial intervention in contemporary political problems."[20] History, in these circumstances, was used as a "precedent-breaking device" so that the Court could "return to the aboriginal meaning of the Constitution."[21] Under this historical essay approach, the Court's opinion was "partisan[,]" "used evidence wrenched from its contemporary

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[16] *Id.* at 123.

[17] *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 190 (1824); McCulloch v. Maryland, 17 U.S. 316, 403 (1819); Sturges v. Crowninshield, 17 U.S. 122, 206 (1819); Fletcher v. Peck, 10 U.S. 87, 138 (1810).

[18] Marbury v. Madison, 5 U.S. 127, 179–80 (1803) (citing U.S. CONST. art. I, § 9, cl. 5; U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. III, § 3, cl. 1).

[19] Kelly, *supra* note 13, at 125 (citing Plessy v. Ferguson, 163 U.S. 537, 544 (1896)). In *Plessy*, the Court upheld racial segregation and the doctrine of separate but equal, which led to the horrors of the Jim Crow South. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 393 (1978) (Marshall, J., concurring and dissenting). Writing separately from the *Bakke* majority, Justice Marshall explained:

> In the wake of *Plessy,* many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts.

Id. at 835–36. In recent times, the Court has resorted to judicial fiat when it reinterpreted the pleading standards to require a recitation of detailed facts. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

[20] Kelly, *supra* note 13, at 125.

[21] *Id.*

historical context[,]" and used "carefully selected . . . materials designed to prove the thesis at hand, suppressing all data that might impeach the desired historical conclusions."[22] Kelly cited *Scott v. Sandford*, as an example of the use of the historical essay.[23] There, Chief Justice Roger B. Taney wrote a historical essay that described the role of "Negros" in early America to justify his assertion that the Constitution was a "white man's document."[24] In this case, the justices "wrote history for political reasons, that is, in an attempt to solve by judicial intervention some major contemporary socio-political problem upon which the case at hand cold be made to bear."[25]

B. Rise of the Historical Essay

Many have analyzed the evolution of the use of the historical essay in the twentieth century.[26] In the early 1900s, the use of the historical essay declined primarily because the justices did not need it:

The Court was dominated by an activist philosophy in these years, as it adjusted the constitutional system to the exigencies of the industrial revolution and the new capitalism, but it has two other major instruments at hand that all but eliminated the need to resort to history for this purpose:

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[22] *Id.* at 126.

[23] *Id.* at 125 (citing Scott v. Sandford, 60 U.S. 393 (1856)).

[24] In *Scott*, the Court noted:

> It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms. In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

60 U.S. at 407.

[25] Kelly, *supra* note 13, at 126.

[26] *See, e.g.*, William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1988); Francis Stites, *Comment on "Clio as Hostage"*, 24 CAL. W.L. REV. 273 (1988); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POLS. 809 (1997); Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008).

substantive due process and a "sovereign prerogative of choice" in state-federal relations.[27]

Substantive due process provided the Court with "immense activist flexibility" in their decision-making.[28] However, when both substantive due process and "sovereign prerogative of choice" waned, the Court reinvigorated its use of the historical essay.[29]

From the late 1940s to the 1960s, the use of the historical essay increased. Kelly examined several opinions from the Warren Court that incorporated the use of the historical essay and concluded that the "'liberal history' of the present Court is not much better than the business-minded vested rights 'history'. . . . [and] fails to stand up under the most superficial scrutiny by a scholar possessing some knowledge of American constitutional development."[30] For example, Kelly argued that the Court committed a "historical felony" when it "mangled constitutional history" to mandate the "one person, one vote" doctrine in *Wesberry v. Sanders*.[31] In *Wesberry*, Justice Hugo Black specifically concluded for a majority that "construed in its historical context, the command of Article 1, Sec[tion] 2, that Representatives be chosen 'by People of the several States' means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's."[32] To reach his conclusion, Justice Black relied upon statements from the debates of the Constitutional Convention.[33] Those statements, however, had "nothing at all to do with the question of representation within the states."[34] Instead, the statements related to the debate between those in favor of state equality in the legislature and those in favor of proportional representation within the states.[35] Justice Black nevertheless included the statements in his recitation of history in his historical essays to rationalize social change.[36]

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[27] Kelly, *supra* note 13, at 128.

[28] *Id.*

[29] *Id.* at 130–32.

[30] *Id.* at 132.

[31] *Id.* at 135 (citing Wesberry v. Sanders, 376 U.S. 1 (1964)).

[32] *Wesberry*, 376 U.S. at 7–8.

[33] *Id.* at 10–13.

[34] Kelly, *supra* note 13, at 135.

[35] *Id.*; *see also Wesberry*, 376 U.S. at 30–42 (Harlan, J., dissenting).

[36] Some have argued that the Court is constrained to bring about social change. *See generally* THE FEDERALIST NO. 78 (Alexander Hamilton) (Cambridge Univ. Press 2003) (noting that the judiciary was envisioned as a branch wholly dependent upon the executive and legislative branches inasmuch as the judiciary: "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever[,]" but "may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"); *see also* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN

With the election of Ronald Reagan as President came a conservative push for a "jurisprudence of original intent."[37] Reagan's Attorney General, Edwin Meese, promised that the Justice Department would "endeavor to resurrect the original meaning of constitutional provisions [based upon the] belief that only 'the sense in which the Constitution was accepted and ratified by the nation' . . . provide[s] a solid foundation for adjudication."[38] Under the theory of originalism, judges would ascertain the "intent" of the Founders by conducting a historical review of that particular measure, which would "supposedly result in interpretations of the Constitution that showed proper deference to the political branches of government, and would limit the degree to which judges decided cases based on their 'ideological predilections' or subjective policy preferences."[39] History would, therefore, be used as a sword to justify a judge's decision.[40]

COURTS BRING ABOUT SOCIAL CHANGE? 10 (2008) (arguing that a court is unable to produce significant social reform because of "the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's inability to develop appropriate policies and its lack of powers of implementation"). For example, in the context of public school desegregation, Rosenberg asserted, "Congressional and executive branch action . . . was virtually non-existent until the passage of the 1964 Civil Rights Act." *Id.* at 46. Similarly, some argued that meaningful desegregation did not occur until Lyndon B. Johnson became President over a decade after *Brown v. Board of Education*, 349 U.S. 294 (1955), and took affirmative action to secure passage of the Civil Rights Act. *See* JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 452 (2006). While there may have been some instances of executive support of *Brown*, there were other factors at play that precluded its wholesale adoption for the purpose of promoting racial equality within schools. For example, at Central High School in Little Rock, Arkansas, President Dwight D. Eisenhower federally deputized the Arkansas National Guard, who escorted black children into a white school. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 151 (2000). However, "[f]rom the perspective of President Eisenhower, the core interests at stake in Little Rock had more to do with federal authority and foreign affairs than with racial equality." *Id.* President Eisenhower's actions were clearly intended to appease the eyes from around the world that were focused in on American society in a time when America was trying to promote democracy overseas and contain the spread of communism.

[37] Several scholars have written about originalism. *See, e.g.*, Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

[38] Wiecek, *supra* note 26, at 266 (citing Attorney General Edwin Meese, III, Address to American Bar Association, July 9, 1985, *reprinted in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 9–10 (1986)).

[39] Festa, *supra* note 26, at 489.

[40] Many scholars have criticized originalism. *See, e.g.*, Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2005); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006); James H. Hutson, *The Creation of the*

Originalism came to the fore with the failed confirmation of Circuit Judge Robert Bork for a seat on the Court.[41]

In response to the originalism movement, judges and scholars began asserting the notion that the Constitution was a "living" document whose meaning was not fixed at the time of its enactment, but was rather defined by the aspirations it signified.[42] At around the same time, legal scholars began putting forth new narratives of historical events. In providing voice to the voiceless, these scholars began to critically examine the role of race in American society, and its role in history.[43]

Accordingly, over the course of the institution's 200-plus-year history, the justices—both conservative and liberal—have not been coy in using history to satisfy their own political agendas.[44] Native Hawaiians, and their story, were not immune from this gamesmanship.

Constitution: The Integrity of the Documentary Record, 65 TEX. L. REV. 1 (1986). The conservative backlash to the Warren Court's decisions was not unique to the *Brown* decision. In his book, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE, William J. Stuntz discusses how the Warren Court's decisions on criminal procedures had a similar unintended backlash from conservatives. Warren Court decisions, such as *Mapp v. Ohio*, 367 U.S. 643 (1961), turned the focus of prosecution of alleged criminals from the merits of the alleged crime to ensuring that proper procedural mechanisms were in place. According to Stuntz, the Warren Court "proceduralized criminal litigation, siphoning the time of attorneys and judges away from the question of the defendant's guilt or innocence and toward the process by which the defendant was arrested, tried, and convicted" and "chose to ramp up the level of constitutional regulation of state and local criminal justice at a time when crime was rising sharply and criminal punishment was falling substantially." WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 228 (2011). This dramatic shift in criminal law, combined with the conservative rallying cry for "law and order," forced liberals toward a more punitive stance on criminality.

[41] *See infra* Part III.A; Jack N. Rakove, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 4–5 (1990) (asserting that "the rejection of Bork's nomination might in part be seen as a repudiation of the theory of interpretation with which he was associated").

[42] *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 19 U.C. DAVIS L. REV. 2, 5 (1985).

[43] *See, e.g.*, Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 4 U. ILL. L. REV. 893, 893–910 (1995); Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1559–77 (1989); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2d ed. 2012).

[44] *See, e.g.*, Aviam Soifer, *Courting Anarchy*, 82 BOSTON L. REV. 699, 700 (2002) (describing the Court's political ruling in Bush v. Gore).

III. RIGHTING HISTORY: ANALYZING THE TWENTY-FIRST CENTURY NARRATIVE OF HAWAI'I'S PAST

A unique narrative of Hawai'i's past has developed from the Court's decisions in two recent cases. These cases epitomize the Court's use of the historical essay to write out Native Hawaiians and their perspectives from the history of Hawai'i. As analyzed below, the Court has ignored, erased, and revised the history of Native Hawaiians and created a uniquely American narrative of the past.

A. Erasing History

"This is a case of ballot-box discrimination plain and simple. . . . There is no question that what Hawai['Ji is attempting to do here is discrimination on the basis of race[,]" decried Theodore Olson.[45] John G. Roberts, Jr. argued, "[The petitioner] was not permitted to vote . . . because he is not a beneficiary of the trust[.]"[46] Justice Anthony Kennedy shot back, "[y]ou begin by saying, now, this is not [about] race, it's [about] a trust . . . [but] [o]f course it has to do with Hawaiian ethnicity."[47] Attorney Edwin S. Kneedler argued that Hawaiians are a "distinct people determined to maintain their culture, their language, and their ties to the land[.]"[48] "There are a lot of groups in this country like that[,]" quipped Justice Antonin Scalia.[49]

On October 6, 1999, inside the ornate courtroom of the United States Supreme Court, the justices peppered lawyers on the constitutionality of the Hawai'i state law that mandated that only those of Hawaiian-descent could vote in the elections for trustees of the Office of Hawaiian Affairs[50]—an

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[45] Transcript of Oral Argument, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 955376, at *3, *5 [hereinafter *Rice* Oral Argument].

[46] *Id.* at *20.

[47] *Id.* at *24.

[48] *Id.* at *36.

[49] *Id.*

[50] The Office of Hawaiian Affairs' mandates is set forth in the Hawai'i Constitution:

> The Board of Trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in Section 4 of this article for native Hawaiians to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who

entity created to better the conditions of Native Hawaiians and serve as a receptacle for reparations between the Hawaiian community and the State and federal governments.[51] Indeed, following a Hawaiian cultural and spiritual renaissance, the people of Hawai'i—through a vote following the State's 1978 Constitutional Convention—approved a constitutional amendment creating the Office of Hawaiian Affairs.[52] The agency would be funded through revenues from the public lands trust that was established at Statehood.[53] Pursuant to the State constitutional amendment, Native Hawaiians would elect other Native Hawaiians to serve as trustees of the entity.[54] The goal of the entity, which Hawai'i's people ratified, was truly reconciliatory: to "unite Hawaiians as a people[,]" to ensure that "Hawaiians have more impact on their future[,]" and to provide it "maximum independence."[55] But, that goal would be put to the test.

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shall be appointed by the board.

HAW. CONST. art XII, § 6.

[51] *Id.*; *see* STATE OF HAWAI'I, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978 1018 (1980).

[52] *See, e.g.*, TOM COFFMAN, THE ISLAND EDGE OF AMERICA: A POLITICAL HISTORY OF HAWAI'I 289–316 (2003); Davianna McGregor-Alegado, *Hawaiians: Organizing in the 1970s*, 7 AMERASIA J. 29, 29–55 (1980).

[53] The federal government required the State of Hawai'i, upon its admission into the Union, to hold public lands and its associated revenue in trust for several purposes, including the betterment of the conditions of native Hawaiians:

> The lands granted to the State of Hawaii . . . shall be held by said State as a public trust for the support of the public schools and other public education institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for the public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959). The State subsequently delegated a portion of the Section 5(f) trust funds from these Public Trust Lands to the Office of Hawaiian Affairs. HAW. CONST. art. XII, § 4 ("The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as 'available lands' by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for *native Hawaiians and the general public*." (emphasis added)); Haw. Rev. Stat. § 10-13.5 (1990) ("Twenty per cent of all funds derived from the public land trust, described in Section 10-3, shall be expended by the [Office of Hawaiian Affairs], as defined in Section 10-2, for the purposes of this chapter.").

[54] HAW. CONST. art . XII, § 5, *invalidated in part by* Rice v. Cayetano, 528 U.S. 495, 522 (2000).

[55] STATE OF HAWAI'I, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978 1018 (1980); H. Journal, 17th Leg., Reg. Sess., 791 (Haw. 1993) (statement of Rep.

In March 1996, Harold "Freddy" Rice sought to register to vote for trustees of the Office of Hawaiian Affairs in the upcoming election.[56] The registration form contained a declaration that required the applicant to attest that: "I am also Hawaiian and desire to register to vote in OHA elections."[57] Rice crossed out the phrase "am also Hawaiian and" and marked "yes" on the application.[58] As Rice was not of Hawaiian ancestry, his application to register to vote in the Office of Hawaiian Affairs' election was denied.[59] Rice, whose great-great grandparents were part of the initial Christian missionary families that came to Hawai'i and struck it rich, and whose great-grandfather helped to orchestrate the institution of the Bayonet Constitution and the overthrow of the Hawaiian Kingdom,[60] filed a lawsuit against then-Governor Ben Cayetano.[61] In his lawsuit, Rice alleged that the Office of Hawaiian Affairs election violated the Fourteenth and Fifteenth Amendments of the United States Constitution because it premised his right to vote on race.[62]

Okamura) ("[t]he injustice perpetrated on the Hawaiian people a century ago has been a cancer that insidiously all too silently has been destroying the fabric of our community"). Delegates of the 1978 Constitutional Convention expressly envisioned the Office of Hawaiian Affairs as a "receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians[.]" *See* STATE OF HAWAI'I, *supra*, at 644. The Committee viewed the creation of the office of Hawaiian Affairs "of utmost importance" because it "provide[d] for accountability, self-determination, [and] methods for self-sufficiency through assets and a land base[.]" *Id.* at 646; *see also infra* Section III.B; Act Relating to the Island of Kaho'olawe, §2, 1993 Haw. Sess. Laws 804–06; Act Relating to Hawaiian Sovereignty, § 1, 1993 Haw. Sess. Laws 999.

[56] Rice v. Cayetano, 963 F. Supp. 1547, 1548 (D. Haw. 1997).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *See* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 120–24, 151–71 (2008).

[61] Paul G. Stader, Rice v. Cayetano: America's Evolving Legal Debate Over Race, and the Consequences of Applying "Color-Blind" Constitutionalism to Law Affecting Indigenous Peoples (May 2013) (unpublished Ph.D. dissertation, University of Hawai'i at Mānoa) (on file with Hamilton Library, University of Hawai'i at Mānoa). Rice believed that by filing the lawsuit he was "helping" Native Hawaiians, whom he saw as "taking advantage of the welfare system by choosing not to work." Eric K. Yamamoto & Catherine C. Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of* Rice v. Cayetano, *in* RACE LAW STORIES 545 (Moran and Carbado, eds., 2007) (citation omitted). The same attitude was reflected in Rice's counsel, John W. Goemans, who moved to Hawai'i prior to statehood in 1959, and who supported the elimination of federal funding for programs benefitting Native Hawaiians because of his "commitment to the civil rights laws of this country and to the Constitution." *Id.*

[62] *Rice*, 963 F. Supp. at 1548–49; *see* U.S. CONST. amend. XIV ("No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. amend. XV ("The right of citizens of the United

Both Rice and Governor Cayetano—who had tense relations with Trustees of the Office of Hawaiian Affairs[63]—moved separately for summary judgment in their respective favors on the claim that the Office of Hawaiian Affairs' voting scheme violated the federal constitution.[64] The Governor argued that "Native Hawaiian" was a political classification that the government could treat as analogous to the status of Indian tribes.[65] Rice argued that Article XII, Section 5 of the Hawai'i State Constitution, which established the Office of Hawaiian Affairs, and Hawai'i Revised Statutes Section 10-13D, which specified that persons entitled to vote must be Native Hawaiian, were unconstitutional because Native Hawaiians "are a racial rather than a political group."[66] Rice expressly rejected the notion that Native Hawaiians were akin to a recognized Indian tribe and, thus, should be afforded special status under federal law.[67] The distinction of whether "Hawaiian" was a racial classification or a political classification was important in establishing which test the court would apply to determine the constitutionality of the law.[68] Naturally, because the Governor argued that "Hawaiian" was a political classification, he asserted that the law should be reviewed under the less strenuous rational basis test.[69]

States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.").

[63] *See, e.g.*, BENJAMIN CAYETANO, BEN: A MEMOIR, FROM STREET KID TO GOVERNOR 443 (2009) (noting the animosity toward some Office of Hawaiian Affairs trustees: "They don't listen to anyone but themselves, they sing only to the choir and that's not going to change.").

[64] *Rice*, 963 F. Supp. at 1548–49.

[65] *Id.* at 1549–50.

[66] *See id.* at 1549.

[67] *Id.*

[68] Under a Fourteenth Amendment equal protections analysis, on one end of the spectrum, a racial classification is reviewed under a strict scrutiny standard, which requires that the government show a "compelling governmental interest" in enacting the law and that the law enacted was "necessary" to further that interest. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 202 (1995). On the other end of the spectrum, a political classification is reviewed under the less stringent "rational basis test," which requires the government to provide a rational connection between enacting the law and the legislative objective. *See* Morton v. Mancari, 417 U.S. 535 (1974). It is generally acknowledged that government action is almost always validated under a rational basis review and almost always invalidated under the strict scrutiny standard. *See* Mathews v. De Castro, 429 U.S. 181, 185 (1976) (citation omitted) (holding that under a rational basis test, laws will be upheld unless the government's action is "clearly wrong, a display of arbitrary power, not an exercise of judgment"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

[69] *Rice*, 963 F. Supp. at 1549.

In his May 6, 1997 decision, federal District Court Judge David A. Ezra—a Reagan appointee[70]—rejected Rice's arguments.[71] Judge Ezra, conjuring the language of Federal Indian Law, concluded that there was a "guardian-ward" relationship between the United States and the Native Hawaiian people, which resembled that of Native Americans throughout the country.[72] He alluded to several federal laws, including the Apology Resolution, the Hawaiian Homes Commission Act, Section 5(b) of the Hawai'i Admission Act, and recognized the "unique obligation" of the federal government to Native Hawaiians.[73] As such, Judge Ezra upheld the Office of Hawaiian Affairs' voting requirement:

> the State of Hawai'i created OHA as a means to fulfill the obligation taken over from the federal government as part of the Admission Act. The State of Hawai'i did not create the trust relationship with Native Hawaiians, nor did it enact the initial legislation singling Native Hawaiians out for special treatment. Rather, the State of Hawai'i merely enacted a reasonable method to satisfy its obligation to utilize a portion of the proceeds from the [Section] 5(b) lands for the betterment of Native Hawaiians. This is clearly consistent with and pursuant to Congress' mandate and intent.[74]

Dissatisfied, Rice appealed Judge Ezra's decision.[75] On appeal, the Ninth Circuit Court of Appeals affirmed Judge Ezra's ruling, holding that Hawai'i "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom [OHA] trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be," even if the Hawai'i Constitution and implementing statutes contain a racial classification on its face.[76]

Rice filed a petition for a writ of certiorari to the Supreme Court of the United States.[77] In a surprise to most observers,[78] the Court granted the writ and, thus, allowed Rice to appeal the Ninth Circuit's decision.[79] Rice, a rancher from Hawai'i,[80] brought his case to the largest legal stage, and was

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[70] Dan Nakaso, *Judging Ezra: Ambition and Ability*, HONOLULU ADVERTISER (May 27, 2001), http://the.honoluluadvertiser.com/article/2001/May/27/ln/ln02a.html.

[71] *Rice*, 963 F. Supp. at 1559.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 1555.

[75] Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998).

[76] *Id.* at 1079.

[77] Rice v. Cayetano, 526 U.S. 1016 (1999).

[78] The Court's acceptance of certiorari surprised many because of the unanimous decision of the district court and Ninth Circuit affirming the election procedures. *See* Rice v. Cayetano, 963 F. Supp. at 1547; Rice v. Cayetano, 146 F.3d at 1076.

[79] *Rice*, 526 U.S. at 1016.

[80] Christine Donnelly, *Rice: It's About Protecting the Constitution, Not 'Racist'*,

not alone in the fight.[81] One of his supporters was conservative attorney Robert Bork.[82] Bork gained national attention in the 1970s when, as acting Attorney General under President Richard Nixon, he fired Watergate Special Prosecutor Archibald Cox for requesting Nixon's cover-up tapes.[83]

HONOLULU STAR BULLETIN (Feb. 23, 2000), http://archives.starbulletin.com/2000/02/23/news/story3.html.

[81] Rice was also joined on appeal by a slew of conservative organizations, including the Campaign for a Color Blind America, Americans Against Discrimination and Preferences, the United States Justice Foundation, and the New York Civil Rights Coalition. *See* Brief for Amici Curiae Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, and Abigail Thernstrom in Support of Petitioner, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 345639; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 332717; Brief of Amici Curiae Campaign for a Color-Blind America, Americans Against Discrimination and Preferences, and the United States Justice Foundation in Support of Petitioner, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 374577. These organizations, which by name suggest pro-civil rights agendas, were vehemently opposed to affirmative action programs and outright belligerent to minority causes and rights. Edward Blum of the Campaign for a Color Blind America ignored the century-long subjugation of Native Hawaiians and instead tried to frame the case as a direct challenge to other minority groups by insisting that he was "appalled that African Americans and Hispanics in Hawai['']i are being turned away from the OHA voting polls because of their skin color." Pat Omandam, *Hawaiians Say Hearing Went Badly*, HONOLULU STAR-BULLETIN, Oct. 6, 1999, at A1, A8. Blum, who has chased and created cases challenging affirmative action programs around the country, saw his role "to facilitate and fund" these various lawsuits challenging affirmative action programs. Catherine Ho, *The Washington Duo Behind Texas Affirmative Action Case*, THE WASHINGTON POST, (March 4, 2012), http://www.washingtonpost.com/business/capitalbusiness/the-washington-duo-behind-texas-affirmative-action-case/2012/02/28/gIQAEfsrqR_story.html. In his comments, and as discussed in detail below, Blum conveniently forgot to mention that Rice was a wealthy white voter whose family assisted in the theft of Hawaiian sovereignty. Blum's ability to bring funds to litigation has since been responsible for two recent decisions by the Court that struck down a portion of the Voting Rights Act in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), and reviewed affirmative action policies in college admissions in *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013). *Id.* Blum's biases were on full display in an amicus brief filed on behalf of his organization, the Campaign for a Color Blind America, and Americans Against Discrimination and Preferences, and the United States Justice Foundation. In that brief, the organizations cited authoritatively to the work of Romanzo C. Adams, the twentieth century historian who created the "melting pot" ideology, which has since been heavily criticized by contemporary scholars. *See* JONATHAN Y. OKAMURA, ETHNICITY AND INEQUALITY IN HAWAII 8 (2008) (criticizing Adams' melting pot ideology because it ignored the subjugation of Native Hawaiians, Filipinos, and Samoans to allow the narratives of Caucasians, Japanese, and Chinese to be elevated as the dominant narrative).

[82] *See* Brief for Amici Curiae Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, and Abigail Thernstrom in Support of Petitioner at 6, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 345639, at *1 [hereinafter Bork Brief].

[83] Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y.

Bork again gained national attention in 1987 when his appointment by President Ronald Reagan to serve on the Court was rejected because of his extremist ideology.[84] United States Senator Edward M. Kennedy characterized Bork's view of America as:

> [A] land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is—and is often the only—protector of the individual rights that are the heart of our democracy.[85]

Consistent with his past criticism of minority views,[86] Bork ignored the history of colonization against Hawaiians and instead trumpeted the conservative rallying cry that affirmative action programs and entities, such as the Office of Hawaiian Affairs, were unconstitutional.[87] Instead of recognizing the unique situation in Hawai'i and the clear reconciliatory purpose that the Office of Hawaiian Affairs was intended to address, Bork implicitly invoked a post-racial society in which everyone was equal: "The entire [Office of Hawaiian Affairs] scheme is infused with explicit racial quotas, exclusions, and classifications to a degree this Court has rarely encountered in the last half-century."[88]

On the other end of the legal battle was a diverse group of supporters of the Office of Hawaiian Affairs' voting procedures, including the National Congress of American Indians, Hawai'i's congressional delegation, and the federal government, which was asked to participate in the oral arguments before the Court.[89] Tasked with defending the State's position was John G. Roberts, Jr., an attorney with the Washington, D.C. law firm of Hogan & Hartson LLP. Roberts' career, which eventually led to his selection as Chief Justice of the Court by George W. Bush, traced the trajectory of the

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TIMES (Dec. 19, 2012), http://www.nytimes.com/2012/12/20/us/robert-h-bork-conservative-jurist-dies-at-85.html.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *See* Bork Brief, *supra* note 82, at *2–4.

[88] *Id.* at *6.

[89] *See* Brief Amicus Curiae of the National Congress of American Indians in Support of the Respondent at 1, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 557271 at *1; Brief for the Hawai'i Congressional Delegation as Amicus Curiae Supporting Respondent at 1, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 557289 at *1; Brief for the United States as Amicus Curiae Supporting Respondent at 1, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 569475 at *1.

conservative movement in America.[90] Yet, although he clerked for conservative justice William H. Rehnquist and worked in the Reagan and George H.W. Bush Justice Departments, Roberts advocated for Native Hawaiians.[91] Constitutional and International Law scholars and long-time duo Jon Van Dyke and Sherry Broder briefed the Court on behalf of the Office of Hawaiian Affairs.[92] Given the legal fire-power brought to the Court, the case was hailed as the "best briefed" case of the term.[93]

The Supreme Court announced its decision on February 23, 2000.[94] The tally was seven in favor of Rice and two in favor of Cayetano.[95] Writing for a five-member majority of the Court,[96] Justice Anthony Kennedy—who Reagan selected after Bork's failed confirmation[97]—overturned the decision of the Ninth Circuit Court.[98] Kennedy was joined by Chief Justice William

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[90] *See* Donnelly, *supra* note 80 (noting that Roberts was a partner and Hogan and Hartson, clerked for Justice Rehnquist and then was appointed to the White House staff); Linda Greenhouse, *A Ceremonial Start to the Session as the Supreme Court Welcomes a New Chief Justice*, N.Y. TIMES (Oct. 4, 2005), http://www.nytimes.com/2005/10/04/politics/politicsspecial1/a-ceremonial-start-to-the-session-as-the-supreme.html.

[91] *See* Donnelly, *supra* note 80; Oral Argument at 26:49, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), https://www.oyez.org/cases/1999/98-818.

[92] Brief of the Office of Hawaiian Affairs, Ka Lahui, Ass'n of Hawaiian Civic Clubs, Council of Hawaiian Organizations, Native Hawaiian Convention, Native Hawaiian Bar Ass'n, Native Hawaiian Legal Corp., Native Hawaiian Advisory Council, Ha Hawai'i, Hui Kali'aina, Alu Like, Inc., and Papa Ola Lokahi as Amici Curiae Supporting Respondent at 1, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 557287 at *1.

[93] Pete Pichaske, *Attorneys Spar in OHA Case*, HONOLULU STAR-BULLETIN, Oct. 6, 1999, at A1, A6.

[94] Rice v. Cayetano, 528 U.S. 495, 495 (2000).

[95] *Id.*

[96] The Rehnquist Court continued the Burger Court's conservative bent, but shifted the legal landscape. In regard to America's indigenous people, the Rehnquist Court has been criticized for its hostility particularly toward Native American interests, which have been a radical departure from Courts of the past:

> In the last ten terms, Indian tribal interests have lost seventy-seven percent of all their cases before the Rehnquist Court; they lost only thirty-six percent of their cases before the Burger Court. Tribal interests have not won a single case before the Supreme Court involving state jurisdiction over non-Indians, and they have lost seventy-three percent of the cases involving tribal jurisdiction over nonmembers. It is difficult to find another class of cases or type of litigant that has fared worse before the Supreme Court.

Jeanette Wolfley, Rice v. Cayetano*: The Supreme Court Declines to Extend Federal Indian Law Principles to Native Hawaiians Sovereign Rights*, 3 ASIAN-PAC. L. & POL'Y J. 359, 359–60 (2002).

[97] *See* Linda Greenhouse, *Reagan Nominates Anthony Kennedy to Supreme Court*, N.Y. TIMES (Nov. 12, 1987), http://www.nytimes.com/1987/11/12/us/reagan-nominates-anthony-kennedy-to-supreme-court.html?pagewanted=all.

[98] Rice, 598 U.S. at 497.

Rehnquist and Associate Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas.[99] Rehnquist, who was initially selected as an associate justice by President Richard Nixon,[100] was elevated to the position of Chief Justice by President Reagan.[101] Reagan's stacking of conservative voices on the Court continued with his appointment of the first female justice, O'Connor,[102] originalist guru, Scalia,[103] and Bork's replacement selection, Kennedy.[104] The fifth member of the conservative majority was Thomas, the former chair of the Equal Employment Opportunity Commission who was appointed by President George H.W. Bush to fill the vacancy left by the retirement of liberal firebrand Thurgood Marshall.[105] Thomas' former position in the EEOC was one of the positions filled by Reagan to ensure an anti-affirmative action regime in federal enforcement.[106] Thomas had adamantly opposed all racial preference programs and saw affirmative action as "social engineering."[107] In this matter, the right-leaning Court concluded that the voting requirement for the Office of Hawaiian Affairs under Hawai'i law violated the Fifteenth Amendment inasmuch as it was based entirely on a racial preference.[108]

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[99] *Id.*

[100] Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES (Sept. 4, 2005), http://www.nytimes.com/2005/09/04/politics/chief-justice-rehnquist-dies-at-80.html.

[101] *Id.*

[102] Linda Greenhouse, *When Sandra Day O'Connor Broke Into the Men's Club*, N.Y. TIMES (Aug. 4, 2016), https://www.nytimes.com/2016/08/04/opinion/when-sandra-day-oconnor-broke-into-the-mens-club.html.

[103] Josh Gerstein, *Supreme Court Justice Antonin Scalia Dead at 79*, POLITICO (Feb. 13, 2016), http://www.politico.com/story/2016/02/breaking-news-supreme-court-justice-antonin-scalia-dead-at-the-age-of-79-219246.

[104] *See supra* note 97.

[105] Adam Liptak, *Reticent on the Bench, But Effusive About It*, N.Y. TIMES, Nov. 1, 2016, at A15.

[106] TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 208 (2004).

[107] *Id.*

[108] Paul Finkelman contends that Court opinions are the product of decisions by individual justices because the justices of the Court are not social actors, but are either "heroes or villains" in that they bring their own perspective, prejudices, and attitudes to the bench. *See* Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 994 (2005). The result in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and other racial cases were, according to Finkelman, a reflection of the personal views of the justices and their decision to support Southern, rather than Northern, notions of race. Finkelman, 118 HARV. L. REV. at 978–94. For instance, Finkelman argues that "[v]irtually all scholars agree that the death of Chief Justice Vinson in 1953 and his replacement with Chief Justice Earl Warren made it possible for the Court to reach a unanimous decision in Brown with a single opinion and a unified voice." *Id.* at 995. Richard Kluger similarly asserts that judges indeed bring their own biases to bear on their decisions. *See* RICHARD

While the outcome was not unexpected given the composition of the Court and their prior decisions, serious harm came from the Court's biased and selective narrative of Hawaiian history. The Court's piece-meal narrative was, in their own words, their way to "recount events" in Hawaiian history relevant to the case.[109]

Ignoring Hawaiians' own creation story, the Court began with a patronizing tale of an island people whose life was "not altogether idyllic" and who simply found "beauty and pleasure in their island existence[.]"[110] Despite noting that the Native Hawaiian people had "well-established traditions and customs[,]" the Court was quick to point out that Native Hawaiians practiced a "polytheistic religion."[111] The Court could have simply stated that Native Hawaiians developed their own religion; instead it chose to highlight the difference between the Native Hawaiians' polytheistic religious belief and the Euro-centric and monotheistic religious view (Christianity) of the majority justices. In what way was noting that Native Hawaiians had a polytheistic religion relevant to deciding the case? It was not. Thus, the reference was a subtle, yet implicit, swipe at the lack of Christianity, and therefore morality, of the Native Hawaiians. Moreover, instead of characterizing the New England missionaries as cultural and religious intruders, the Court found that those missionary families, which included Rice's ancestors, were simply attempting to "teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices."[112]

KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 295–305 (2004). Kluger recounts the story of J. Waties Waring, a white federal district court judge, who was raised by ex-slaves and, after reaching the upper echelon of society in South Carolina, was shocked at the treatment of blacks. *Id.* Judge Waring took small steps toward addressing the inequality against blacks, such as making it easier for a black individual to sit on a jury. *Id.* After several deplorable cases, Judge Waring became "the black man's friend" and set precedence for future cases. *Id.* at 305. Finkelman's and Kluger's positions are in stark contrast to that of Michael Klarman, who described the Court as playing a "vanguard role" in the school desegregation decision, *Brown v. Board of Education*, noting that "[m]any of [the justices] had to overcome serious legal doubts to invalidate segregation, but fundamental changes in the extralegal context of race relations had rendered a contrary result too unpalatable to most of them." MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 343 (2004).

[109] Rice v. Cayetano, 528 U.S. 495, 500 (2000).

[110] *Id.*

[111] *Id.*

[112] *Id.* at 501.

Significantly, the Court's narrative implied Native Hawaiian acquiescence to the significant political changes that occurred in the Kingdom from the institution of the Bayonet Constitution in 1887 through the annexation of Hawai'i. The Court noted "[t]ensions" between the "anti-Western, pro-native bloc" and the "Western business interests and property owners[.]"[113] The Court specifically alluded to tensions in response to "an attempt by the then monarch, Queen Lili'uokalani, to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects."[114] The Court simplified and mischaracterized the efforts of Lili'uokalani and Native Hawaiians. In essence, the Court accused Native Hawaiians of attempting an illegal overthrow of the government and ignored American business interests' involvement in Kingdom governance. While Lili'uokalani did seek to promulgate a new constitution, she did so in response to the calls of the Hawaiian people, who had been effectively written out of society with the foreign-imposed Bayonet Constitution in 1887.[115] Whereas the Kingdom's 1852 Constitution provided universal suffrage to all regardless of race, the Bayonet Constitution effectively disenfranchised Asians because of its literacy requirements, created an income requirement that effectively removed Native Hawaiians as eligible voters, and enfranchised white foreigners without any requirement that they renounce their former allegiance or naturalize as subjects of the Kingdom.[116] Put simply, the Bayonet Constitution, which received its name because of the threat of violence that the white instigators promised if then-monarch Kalākaua refused to sign, provided "grossly disproportionate political power" to white business interests.[117] It was all a part of the "Anglo-Saxonizing Machine" that the missionary descendants viewed as supreme:

> We declare to [Native Hawaiians] 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 pure, just, true, lovely, and of good report in these thoughts, customs and habits of the haole.[118]

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[113] *Id.* at 504.

[114] *Id.*

[115] LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 226–36 (1898).

[116] *See, e.g.*, HAW. KINGDOM CONST. arts. 59, 62 (1887).

[117] Yamamoto and Betts, *supra* note 61, at 560 (citation omitted).

[118] S.E. Bishop, *Anglo-Saxonizing Machines*, THE FRIEND, August 1887, at 63.

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."[119] This "tension" was erased from the *Rice* majority's opinion.

The Court noted that a Committee of Safety with the "active assistance" of an American minister to Hawai'i, John Stevens, and American armed forces "*replaced* the monarchy with a provisional government," and that Queen Lili'uokalani "could not resume her former place," which led to the establishment of the Republic of Hawai'i.[120] Again, the Court simplified history and wholly ignored that "replac[ing]" the monarchy involved direct threats of violence to the Native Hawaiian people.[121] Indeed, the characterization of American involvement in the overthrow as "active assistance" downplayed the landing of American Marines and Lili'uokalani's formal protests to President Grover Cleveland and the American Congress.[122] The Court ignored the American investigation and July 1893 Blount Report that found that the "United States diplomatic and military representatives had abused their authority and were responsible for the change in government."[123] The Court ignored the subsequent effort by members of the Senate Foreign Relation Committee to discredit the findings of the Blount Report by cobbling together pro-annexationist testimony in Hawai'i into another report.[124] That subsequent Morgan Report, made at the request of Foreign Relations Chairman,[125] racial segregationist and Ku Klux Klan leader John Tyler Morgan,[126] attempted to exonerate American involvement in the overthrow.[127] While it may have swayed some uninformed and pro-annexationist leaders at the time, the

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[119] LORRIN THURSTON, MEMOIRS OF THE HAWAIIAN REVOLUTION 153 (1936)

[120] Rice v. Cayetano, 528 U.S. 495, 505 (2000).

[121] *Id.*

[122] LILI'UOKALANI, *supra* note 115, at 335–40.

[123] S.J. Res. 19, 103d Cong. (1993), Pub. L. No. 103-150, § 1, 107 Stat. 1510, 1513 [hereinafter Apology Resolution]; *see also* James Blount, Report of the Commissioner to the Hawaiian Islands, S. EXEC. DOC. NO. 53-47 (1893).

[124] *See* SENATE COMMITTEE ON FOREIGN RELATIONS, REPORT ON HAWAIIAN ISLANDS, S. Rep. No. 227 (1894) [hereinafter Morgan Report].

[125] PETER TRUBOWITZ, DEFINING THE NATIONAL INTEREST: CONFLICT AND CHANGE IN AMERICAN FOREIGN POLICY 267 n. 103 (1998) (noting that Morgan was chairman of the Senate Foreign Affairs Committee "and a champion of imperialism").

[126] SUSAN LAWRENCE DAVIS, AUTHENTIC HISTORY: KU KLUX KLAN, 1865–1877, at 45 (1924).

[127] *See* Morgan Report, *supra* note 124.

Morgan Report has been sternly criticized for its slanted and imperialist agenda.[128] Yet, instead of recounting these American investigations, Justice Kennedy's opinion simply ignored them.

The Court failed to mention the overwhelming resistance to American annexation by Lili'uokalani and Native Hawaiians. Following the overthrow, Lili'uokalani made several trips to the United States to seek assistance in reinstating her government.[129] While the Court mentioned a "Joint Resolution" that annexed Hawai'i to the United States in 1898,[130] it failed to justify how such a "Joint Resolution" could annex another sovereign entity and have binding effect like a treaty. The Court wholly ignored the 21,000 Native Hawaiian signatures, which represented well over half of the adult Hawaiians at the time, obtained on a petition protesting an annexation treaty that was sent to the United States Senate and ultimately led to the proposed-treaty's defeat.[131]

The Court's biases were also on full display through its description and characterization of Plaintiff Freddy Rice. First, in a very different way that a citizen of California is a Californian, the Court characterized Rice as a "citizen of Hawai['']i and thus himself a Hawaiian in a well-accepted sense of the term."[132] The characterization of Rice as "Hawaiian" trivialized what it means to be "Hawaiian" as most Hawai'i citizens recognize that "Hawaiian" refers to a person of Native Hawaiian ancestry. It was, as Professor Chris Iijima noted, "misinformed, biased, and plainly wrong."[133] Second, the Court described Rice as a "descendant of pre-annexation residents of the islands."[134] It failed to account for the role played by the Rice family in the subjugation of Native Hawaiians throughout the nineteenth century. For example, it was Rice's great-great grandparents William Harrison Rice and Mary Sophia Hyde Rice who voyaged to Hawai'i to preach their religious values—values that they believed needed to be taken to the "savage" indigenous people in much the same way that Mary's father brought Christian values to the Seneca Indian tribe.[135] After arriving in Hawai'i, William ended up doing well by amassing land and

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[128] *See* VAN DYKE, *supra* note 60, at 168–69.

[129] LILI'UOKALANI, *supra* note 115, at 313–40.

[130] "Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States," ch. 55, 30 Stat. 750, 751 (1898).

[131] VAN DYKE, *supra* note 60, at 209–11.

[132] Rice v. Cayetano, 528 U.S. 495, 499 (2000).

[133] Chris K. Iijima, *Race Over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in* Rice v. Cayetano, 53 RUTGERS L. REV. 91, 104 (2000).

[134] *Rice*, 528 U.S. at 510.

[135] HAWAII MISSION CHILD. SOC'Y, PORTRAITS OF AMERICAN PROTESTANT MISSIONARIES TO HAWAII 75 (1901).

money from the growing sugar industry on Kaua'i.[136] William, who supervised the creation of the first irrigation ditch in Hawai'i, was also responsible for diverting the natural flow of water from native farmers to ensure the sustainability of the sugar plantation.[137] That diversion, when repeated throughout the Hawaiian Islands, effectively cut-off native farmers from water and all but ensured the demise of their crops, ensured a reliance on a western economic structure, and eviscerated the Hawaiian culture and way of life.[138] When combined with the results of western land tenure in the Māhele,[139] William's diversion of water in favor of plantations closed the door on native control of their land and resources.[140]

William's children immersed themselves in the fabric of western control in Hawai'i. William's daughters, Maria and Anna, married white-missionary descendants that went on to form companies like AMFAC and Castle & Cooke[141]—two of the "Big Five" companies that controlled the Hawaiian economy for decades, in what some have characterized as the most consolidated system of power throughout the United States.[142] William's son (and Freddy Rice's great-grandfather), William Hyde Rice, continued the family business and amassed a large portion of land on Kaua'i (at one point being one of the top ten lands owners on the island).[143] William Hyde eventually entered politics and became a member of the Kingdom's House of Representatives.[144] Despite his role as a politician for the Kingdom, William Hyde was instrumental in drafting the Bayonet Constitution of 1887, which, forced upon Kalākaua, stripped the monarch of substantial power and disenfranchised native voters in favor of white control.[145] Clearly, generations of the Rice Family played key roles implementing and enforcing laws and practices that benefitted white-Americans at the expense of Native Hawaiians. The *Rice* Court, however, conveniently left this context out of its decision.

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[136] *Id.*

[137] CAROL WILCOX, SUGAR WATER: HAWAII'S PLANTATION DITCHES 70 (1996).

[138] *Id.*

[139] See Jonathan K.K. Osorio & Kamanamaikalani Beamer, *Sullying the Scholar's Craft: An Essay and Criticism of Judge James S. Burns' Crown Lands Trust Article*, 39 U. HAW. L. REV. 469, 470 (2017).

[140] *See* WILCOX, *supra* note 137 at 70.

[141] EDWARD T. JONES, NOTABLE AMERICAN WOMEN, 1607–1950: A BIOGRAPHICAL DICTIONARY 377–78 (1971).

[142] *Id.*

[143] GEORGE F. NELLIST, THE STORY OF HAWAII AND ITS BUILDERS 171–73 (1925).

[144] *Id.*

[145] HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 14 (1993).

These glaring omissions are likely the result of a majority on the Court who had clear political and historical biases.[146] Indeed, the Court's bias was epitomized in its description of the historical background, in which the Court noted two "important matters[.]"[147] First, the Court concluded that the introduction of western diseases was "no doubt" a "cause of the despair, disenchantment, and despondency . . . in descendants of the early Hawaiian people."[148] In other words, disregard America's involvement in the overthrow and subjugation of the Hawaiian political body, disregard America's suppression of Hawaiian language, culture, and history, disregard the theft of Hawaiian land and resources, and instead accept that the current socio-economic struggles were the result of a people that could not survive that Darwinian notion of survival of the fittest. Second, the Court concluded its re-telling of Hawaiian history by highlighting the influx of immigrants to the islands.[149] Justice Kennedy highlighted the following immigrant groups that were brought to Hawai'i: "Chinese, Portuguese, Japanese, and Filipinos[.]"[150] At no time did the Court refer to Americans and other Western individuals as "immigrants." In the eyes of the Court, Americans—including Freddy Rice's missionary ancestors—were "settlers" not "immigrants"; Americans were, as Professor Iijma interpreted the Court's specific terminology, the "rightful and natural heirs to the land of Hawai[']i" and not just another ethnic group coming to the islands for work.[151] It is then not surprising that the Court concluded: "Each of these ethnic and national groups has had its own history in Hawai[']i, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present society of the islands."[152] The Court's message was clear: if everyone else could do it, so too could the Native Hawaiians.

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[146] The legitimacy of the Court is in jeopardy with its cherry-picked narratives of the history of oppressed communities. One scholar noted, "[i]t is the judiciary that is the gatekeeper of how history is relevant to the respective case or controversy, the manner in which history in law is applied, and what historical evidence is to be admitted." Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEVELAND STATE L. REV. 23, 37 (2014). That responsibility is severely curtailed when the Court selectively decides what occurred in the past. When the Court (and the judiciary in general) lose legitimacy, the public is less likely to accept its pronouncements as authoritative. The Court is no longer respected as a neutral arbiter, but rather as a political body subject to the fanciful whims of the majority of its members.

[147] Rice v. Cayetano, 528 U.S. 495, 506 (2000).

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] Iijima, *supra* note 133, at 103.

[152] *Rice*, 528 U.S. at 506.

As if the Court's stinging mischaracterization of nineteenth and early twentieth century Hawaiian history were not enough, it then made a decision regarding the Office of Hawaiian Affairs without adequately analyzing the agency's unique history and its role in the Hawaiian community.[153] Surprisingly, the Court failed to mention the reconciliatory purpose for which the Office of Hawaiian Affairs was created and conveniently left out from its opinion the fact that the Office of Hawaiian Affairs (and its constitutional foundation) was voted for and approved by a majority of citizens of the multi-ethnic State of Hawai'i in 1978.[154]

When it pleased the Court, it found certain Congressional and jurisprudential "historical conclusions . . . persuasive[.]"[155] For example, the Court ignored the Congressional mandate in the Admissions Act that the State hold lands in trust for the native Hawaiians.[156] As the dissenting opinion of Justices John Paul Stevens and Ruth Bader Ginsburg noted, "it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government—a possibility of which history and the *actions of this Nation have deprived them.*"[157] In another example of the Court's selective nature, while quick to cite to legislative history from the enactment of the Hawaiian Homes Commission Act that declared Native Hawaiians as "wards,"[158] the Court all but ignored the federal Apology Resolution that set forth Congressional and Presidential apologies for the actions of Americans with the overthrow of the Kingdom and called for reconciliatory efforts between Native Hawaiians and the United States.[159] The Court failed to recognize that an American law clearly stated that Native Hawaiians "never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum[.]"[160] It, therefore, is not surprising that Justice Scalia had the following colloquy with Rice's attorney, Ted Olson, about the significance (or lack thereof) of the Apology Resolution:

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[153] *See* Troy J.H. Andrade, Changing Tides: A Political and Legal History of the Office of Hawaiian Affairs (May 2016) (unpublished Ph.D. dissertation, University of Hawai'i at Mānoa) (on file with author).

[154] *See supra* note 53.

[155] *Rice*, 528 U.S. at 501.

[156] Admission Act of 1959, Pub. L. No. 86-3, § 2, 73 Stat. 4, 4.

[157] *Id.* at 535 (Stevens, J., dissenting) (emphasis added).

[158] *Id.* at 511 (citation omitted).

[159] *See* Apology Resolution, *supra* note 123.

[160] *Id.*

Scalia:	You mean you're contradicting the congressional resolution that said we're guilty? Do we have to accept that . . . resolution as an accurate description of history?
Olson:	Of course, and this Court . . .
Scalia:	Can't Congress make history? [Laughter in the audience]
Olson:	Congress does make history, but Congress, of course, can't change history. I'm . . . not accepting everything that's in the so-called Apology Resolution.[161]

For some, like Scalia and his conservative colleagues, Congress' recitation of Hawaiian history was not binding and the Court could, on its own, write history.

Given its tailored view of Hawai'i political and legal history, it was clear the direction that the Court was headed. It concluded that the voting scheme for the Office of Hawaiian Affairs, although argued as being based on ancestry, was a racial classification: "The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose."[162] The Court then made the bold pronouncement that reflected the conservative mantra of picking oneself up by the bootstraps: "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[163]

Justice Kennedy concluded with a stinging rebuke of Hawaiians and a paternalistic and patriotic message:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawai[']i attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawai[']i.[164]

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[161] *Rice* Oral Argument, *supra* note 45, at *14.

[162] Rice v. Cayetano, 528 U.S. 495, 515 (2000).

[163] *Id.* at 517. The Court added that the State's argument failed because it rested on the "demeaning" premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. *Id.* at 498.

[164] *Id.* at 524.

The harm from the *Rice* decision, much like that of the successive generations of the Rice Family, comes from a legitimization of American superiority over indigenous peoples. The *Rice* Court "turned a blind eye to history."[165] As Justice Stevens, in his scathing dissent, wrote: "The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawai['i]."[166] Another scholar argued that "[i]f there is a textbook case in which majoritarian perspectives and racial norms masquerade as neutral narrative, it is the *Rice* decision."[167]

Following the decision, Rice boldly professed, "I'm proud to be part of Hawai['i]'s history . . . It was good for Hawaiians, and certainly good for the state. Got everybody thinking. Hawaiians took advantage of being able to play the part of victim and get entitlements based on race. They stepped over the line. The *Rice* decision made everyone step back."[168] Rice and the Court's decision indeed made Hawaiians "step back."[169]

B. Revising and Copying History

Nine years later, Native Hawaiians and the Office of Hawaiian Affairs again appeared before the Court.[170] This time, the State of Hawai'i applied and was granted certiorari on a decision by the Hawai'i Supreme Court that enjoined the sale of Ceded Lands until Native Hawaiian claims to the land were settled.[171] While the Hawai'i Supreme Court recounted a Hawaiian past reflecting the effects of colonialism on Hawaiians, the history told by the United States Supreme Court in its opinion downplayed the procedural history of the case and, again, provided a jaded view of Hawai'i's legal and political history.

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[165] Eric K. Yamamoto, *The Colonizer's Story: The Supreme Court Violates Native Hawaiian Sovereignty—Again*, COLORLINES (August 20, 2000), http://www.colorlines.com/articles/colonizers-story-supreme-court-violates-native-hawaiian-sovereignty-again.

[166] *Rice*, 528 U.S. at 527–28 (Stevens, J., dissenting).

[167] Iijima, *supra* note 133, at 98.

[168] Yamamoto & Betts, *supra* note 61, at 546 (citation omitted).

[169] Attorney Roberts saw the decision as a victory: "The good news is that the majority's opinion was very narrowly written and expressly did not call into question the Office of Hawaiian Affairs, the public trust for the benefit of Hawaiians and native Hawaiians, but only the particular voting mechanism by which the trustees are selected." Helen Altonn & Christine Donnelly, *Top Court Backs Rice in OHA Vote Challenge*, HONOLULU STAR-BULLETIN, Feb. 23, 2000, at A1, A8–A9.

[170] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i, 117 Hawai'i 174, 177 P.3d 884 (2008) [hereinafter *HCDCH I*].

[171] *Id.*

In 1987, the Housing Finance and Development Corporation ("HFCD")—an entity created by the State of Hawai'i to remedy the critical housing shortage facing the community—examined parcels around the State and selected two sites for future development of housing projects.[172] The two sites, Leiali'i in West Maui and La'i 'Ōpua in North Kona on Hawai'i Island, were both on Ceded Lands.[173] After obtaining the necessary approvals, the HFDC began a residential housing development project at Leiali'i.[174] Pursuant to State law, specifically Hawai'i Revised Statutes Section 10-13.6, and consistent with the determination of its share of Ceded Land revenues, the Office of Hawaiian Affairs was to be compensated twenty-percent of the fair market value of both parcels.[175] Following passage of the Apology Resolution (acknowledging that "the indigenous Hawaiian people never relinquished their claims . . . over their national lands to the United States"),[176] the Office of Hawaiian Affairs demanded "that a disclaimer be included as part of any acceptance of funds from the sale so as to preserve any native Hawaiian claims to ownership of the ceded lands[.]"[177]

In October 1994, the State balked at putting in such a disclaimer because "to do so would place a cloud on title, rendering title insurance unavailable to buyers in the [Leiali'i] project."[178] The State Department of Land and Natural Resources thereafter transferred the land to HFDC for $1.00, and sent the Office of Hawaiian Affairs a check for $5,573,604.40 as its twenty-percent share of the fair market value of the land.[179] The Office of Hawaiian Affairs refused to accept the check, and, along with several Native Hawaiian individuals, filed suit in State court seeking to halt the sale of all ceded lands because the "alienation of the land to a third-party would erode the ceded lands trust and the entitlements of the native Hawaiian people."[180] As one attorney asserted, "Those lands may be part of some major settlement, so to lease them now or dispose of them will definitely affect what's available for a settlement in the future[.]"[181] Then-Chairman Clayton Hee provided the rationale for filing suit against the State:

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[172] *Id.* at 896.
[173] *Id.* at 897.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 895.
[177] *Id.* at 897.
[178] *Id.*
[179] *Id.* at 897–98.
[180] *Id.* at 898.
[181] Gary Kubota, *On Hold: Land Disposition Issues at the Proposed Site of a Maui Subdivision Leave Potential Buyers Out in the Cold*, HONOLULU STAR-BULLETIN, July 28, 2000, at A1, A8 (quoting Melody K. MacKenzie).

> What is being disputed is whether the state had the legal right to dispose of ceded lands at no compensation to the public land trust. . . . This is the first case where the Office of Hawaiian Affairs has taken a proactive step to prevent the state from reducing the inventory of public lands.[182]

The trial court heard evidence regarding the transfer of the land, the importance of the land to the Hawaiian community, analogies to Native American property rights, and evidence from the State that it was authorized to sell ceded lands from the public land trust.[183] The court issued an opinion concluding that the Office of Hawaiian Affairs' claims were barred by various legal doctrines and that the "State had the express authority to alienate ceded lands from the public lands trust."[184] The Office of Hawaiian Affairs appealed.[185]

Writing for a unanimous court, Chief Justice Ronald T.Y. Moon—the nation's first Korean-American Chief Justice[186]—reversed the trial court's decision by relying upon a reading of State laws and the Apology Resolution. The court first reviewed the language of the Apology Resolution, in which Congress and the President determined:

> Whereas the Republic of Hawai[']i also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawai[']i, *without the consent of or compensation to the Native Hawaiian people of Hawai[']i or their sovereign government*;
>
> * * * *
>
> Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or *over their national lands* to the United States, either through their monarchy or through a plebiscite or referendum;
>
> * * * *
>
> Whereas the Native Hawaiian people are determined *to preserve, develop and transmit to future generations their ancestral territory*, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions.[187]

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[182] *Id.*

[183] *HCDCH I*, 117 Hawai'i at 188, 177 P.3d at 898.

[184] *Id.* at 899.

[185] *Id.*

[186] Nicole Kato, *Ronald Moon*, MIDWEEK (Jan. 1, 2014), http://www.midweek.com/ronald-moon/.

[187] Apology Resolution, *supra* note 123, at §3, 107 Stat. 1512–13.

Although the Apology Resolution contained a statement that "Nothing in [it] is intended to serve as a settlement of any claims against the United States," the political branches (Congress and the President) undoubtedly expressed a "commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai[']i, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people."[188] Thus, under a plain reading, the standard used to interpret legislative intent,[189] the Apology Resolution was, as others have recognized, "more than a policy statement."[190] While it expressly did not constitute a settlement, it evidenced a federal intent to reconcile with the Hawaiian community.

Chief Justice Moon latched onto that concept and held that although the Apology Resolution did not, on its face, constitute a settlement of claims, it did serve as a "foundation (or starting point) for reconciliation," which he then noted included "the future settlement of the plaintiffs' unrelinquished claims."[191] With that one sentence, the Hawai'i Supreme Court took a step where no other court had gone before; it recognized that the words of the Apology Resolution created a direct acknowledgment and acceptance by the United State of a commitment to reconciliation with Native Hawaiians. The Hawai'i Supreme Court, thus, halted the sale or transfer of ceded lands to third parties "until the claims of the native Hawaiians to the ceded lands have been resolved."[192] The pronouncement by a unanimous court was a victory for the Hawaiian community; there was an official stop to the alienation of ceded lands and, more importantly, a judicial recognition that Native Hawaiians had outstanding claims that needed to be dealt with by the State.

But, the brilliance of the decision was that it firmly situated its rationale upon federal law *and on independent State law grounds*. Specifically, the Hawai'i Supreme Court relied upon Acts 354, 359, 329 and 340 to conclude that the State has made commitments to reconcile with Native Hawaiians that need to be adhered to.[193] In Act 354, the State recognized that "many native Hawaiians feel there is a valid claim for reparations[,]" acknowledged that "the actions by the United States were illegal and

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[188] *Id.* § 3, 107 Stat. 1514.

[189] *See* State *ex rel.* Louie v. Hawaii Gov't Emps. Ass'n, 133 Hawai'i 385, 400, 328 P.3d 394, 409 (2014) (citations omitted) ("It is well-established that the 'fundamental starting point for statutory interpretation is the language of the statute itself.").

[190] Eric K. Yamamoto & Sara D. Ayabe, *Courts in the "Age of Reconciliation":* Office of Hawaiian Affairs v. HCDCH, 33 U. HAW. L. REV. 503, 517 (2011).

[191] *HCDCH I*, 117 Hawai'i at 192, 177 P.3d at 902.

[192] *Id.* at 218, 177 P.3d at 928.

[193] *Id.* at 193–94, 177 P.3d at 903–04.

immoral," and "pledge[d] its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians."[194] In Act 359, the State recognized in 1993 that "the indigenous people of Hawai[ʻ]i were denied . . . their lands," and committed to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing."[195] In 1997, the Legislature passed Act 329, in which the State recognized:

> that the lasting reconciliation so desired by all people of Hawai'i is possible only if it fairly acknowledges the past while moving into Hawai[ʻ]i's future. . . . [O]ver the last few decades, the people of Hawai[ʻ]i through amendments to their state constitution, the acts of their legislature, and other means, have moved substantially toward this permanent reconciliation.[196]

The State also recognized its continued commitment "toward a comprehensive, just, and lasting resolution" with the Native Hawaiian community.[197] Finally, upon return of the island of Kahoʻolawe to the State from bombing activities by the federal government, the State committed in Act 340 to "transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawai'i."[198]

For the Moon Court, taking these various State laws together evidenced a commitment by the State to reconciliation with Native Hawaiians; it was a commitment that the court took seriously to enforce. For the Hawai'i Supreme Court, the issue of ceded lands was fundamental to reconciliation between the State and the Native Hawaiian community because of the importance of land to Hawaiians:

> Aina, or land, is of crucial importance to the Native Hawaiian People—to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. Aina is a living and vital part of the Native Hawaiian cosmology, and is irreplaceable. The natural elements—land, air, water, ocean—are interconnected and interdependent. To Native Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The aina is part of their ohana, and they are for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.[199]

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[194] Act Relating to Hawaiian Sovereignty, 1993 Haw. Sess. Laws 999–1000.
[195] *Id.* at 1010.
[196] *Id.* at 956.
[197] *Id.*
[198] Act Relating to the Island of Kahoʻolawe, §2, 1993 Haw. Sess. Laws 806.
[199] *HCDCH I*, 117 Hawai'i at 214, 177 P.3d at 924.

The Moon Court also enshrined in precedent the Hawaiian cultural importance of land to Hawaiians and their identity by quoting testimony of Native Hawaiian cultural practitioner, Olive Kanahele:

> The land itself is the deity, Pele. The land itself was made from fire and it comes from out of the earth. And, you know, I can give you a little genealogy of the Pele family. The Pele family comes from—the mythological genealogy of the Pele family is that the mother is Haumea, she is the Mother Earth, she is the earth and all of these children are born from different parts of her. Pele is born from the natural channel of a female, she comes from the womb. And so her responsibility is to go back into the womb of the mother and—and bring out all of these things that we call land, that we call magma and lava and eventually will become land. One of the—one of the most amazing literary work that we have is the kumulipo. The kumulipo spans generations of people. And the first era of the kumulipo, the very first line of the kumulipo talks about the making of the earth. And why does it have to be earth, you ask me? It has to be earth because as man we need—we need land to live on. That is—that is our foundation. And for the native Hawaiian, more than the family, land is their foundation. Land is their identity.[200]

Given the State and federal governments' commitments to true reconciliation with the Hawaiian community and the clear harm that would come to Native Hawaiians by the sale or transfer of the land, Chief Justice Moon determined that the State could no longer alienate the ceded lands: "we believe, and therefore, hold that the Apology Resolution and related state legislation . . . give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved."[201] The decision was a victory for the Office of Hawaiian Affairs and the Hawaiian community.

Celebration for the watershed decision, however, was quickly quelled when Governor Linda Lingle and her administration appealed the decision to the United States Supreme Court.[202] The Office of Hawaiian Affairs requested that Lingle withdraw the appeal, but the Administration refused.[203] Lingle's attorney general, Mark Bennett, argued that the State should have unfettered discretion to sell or transfer ceded lands.[204]

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[200] *Id.* at 215, 177 P.3d at 925 (ellipses omitted).

[201] *Id.* at 195, 177 P.3d at 905.

[202] Hawai'i v. Office of Hawaiian Affairs, 554 U.S. 944 (2008).

[203] Rowena Akana, State of Hawai'i v. OHA*: Showdown in Washington, D.C.*, KA WAI OLA O OHA (Mar. 2009), http://www.rowenaakana.org/state-of-hawai%e2%80%99i-v-oha-showdown-in-washington-d-c/.

[204] Ken Kobayashi, *Battle Over Ceded Lands*, HONOLULU STAR-BULLETIN, Feb. 22, 2009, at 1, 11.

In an opinion by Associate Justice Samuel Alito, a unanimous Supreme Court struck down the Hawai'i Supreme Court's decision to the extent that it relied upon the Apology Resolution.[205] Justice Alito began his opinion by first citing to the *Rice* decision's discussion of Hawaiian political history[206]—thereby demonstrating the Court's commitment to the principle of stare decisis. Although *Rice* and *HCDCH* dealt with two wholly separate issues—elections and land alienation, respectively—the Court's recitation of history in *Office of Hawaiian Affairs* mirrored the tact taken in *Rice*.[207] As in *Rice*, in *Office of Hawaiian Affairs*, Justice Alito noted how the Committee of Safety—again, the organization of white citizens opposed to the Queen's push for, among other things, the enfranchisement of her people—"replaced" the Hawaiian monarchy with the provisional government.[208] The Court, again, failed to acknowledge that "replac[ing]" the Kingdom government meant the American threat of violence upon a sovereign independent country that was a fully integrated member of the family of nations.[209]

The Court then articulated the chain of title to the lands of Hawai'i, beginning with the Newlands Resolution, the Organic Act, and the Admissions Act.[210] Again, missing from its discussion of the United States' "absolute fee" in Hawai'i was the Hawaiian opposition to annexation.[211] Omitted from the Court's historical recitation was the vehement opposition to the Newlands Resolution as a proper means to annex a sovereign government.[212] Also missing from the Court's history was the Territory of Hawai'i's clear project of Americanization, in which Hawaiian language was banned in schools and a program of patriotism was adopted to indoctrinate the youth.[213]

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[205] *See generally* Hawai'i v. Office of Hawaiian Affairs, 556 U.S. 163 (2009).

[206] *Id.* at 166–67.

[207] *See supra* Section III.C.

[208] *Office of Hawaiian Affairs*, 556 U.S. at 166–67.

[209] *See* Apology Resolution, *supra* note 123, at 1510–11.

[210] *Office of Hawaiian Affairs*, 556 U.S. at 167–68.

[211] *See generally* NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 145–59 (2004) (detailing the 1897 petitions protesting annexation).

[212] *See* Chang, *supra* note 5, at 78–83 (citations omitted).

[213] *See* Act of June 8, 1896, § 30, 1896 Haw. Sess. Laws 189. The Act states:

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

Id.

After its historical diatribe on the political history of Hawai'i, the Court then discussed the "various observations" about Hawaiian history contained in the Apology Resolution.[214] In other words, the Apology Resolution, which was enacted by Congress and signed by President Clinton on November 23, 1993, was not, according to the Court, a valid narrative of historical facts; they were simply "observations."[215] The Court held that these statements did not create any substantive rights.[216] Erased from this narrative of history were the steps that the Clinton Administration took, because of the Apology Resolution, to begin the process of reconciliation with Native Hawaiians, including the publishing of a joint report of the federal Justice and Interior Departments noting that "passage of the Apology Resolution was the first step in the reconciliation process."[217] Nevertheless, based upon its opinion that the Apology Resolution contained only "preambular" clauses and "conciliatory or precatory" language, the Court made it clear that the Apology Resolution did not provide a basis for Native Hawaiian claims to the ceded lands: "the State Supreme Court incorrectly held that Congress, by adopting the Apology Resolution, took away from the citizens of Hawai[']i the authority to resolve an issue that is of great importance to the people of the State."[218]

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[214] *Office of Hawaiian Affairs*, 556 U.S. at 168.

[215] *Id.*

[216] The Office of Hawaiian Affairs, again represented by a slew of attorneys, including Professor Van Dyke, argued that they had "broader moral and political claims for compensation for the wrongs of the past." Brief for the Respondents at 18, 40, Hawai'i v Office of Hawaiian Affairs, 556 U.S. 163 (2009) (No. 07-1372), 2009 WL 181534 (U.S.), at **18, 40. ("There is nothing unusual about such moral and political claims; when Congress established the Indian Claims Commission, it expressly conferred authority on the Commission to consider that type of claims." (citations omitted)). The Court simply rejected the argument, stating, "But we have no authority to decide questions of Hawaiian law or to provide redress for past wrongs except as provided for by federal law." *Office of Hawaiian Affairs*, 556 U.S. at 177.

[217] *See* U.S. DEP'T OF THE INTERIOR AND U.S. DEP'T OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY: REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS i (Oct. 23, 2000). The Report states:

> In 1993, with Public Law 103-150, the Apology Resolution, the United States apologized to the Native Hawaiian people for the overthrow of the Kingdom of Hawai'i in 1893 and expressed its commitment to acknowledge the ramifications of the overthrow in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people. *The passage of the Apology Resolution was the first step in this reconciliation process.*

Id. (emphasis added).

[218] *Office of Hawaiian Affairs*, 556 U.S. at 177.

Interestingly, the Court also concluded that it did not have jurisdiction to rule on the State law bases for the moratorium on the sale of ceded lands, and remanded the case to the Hawai'i Supreme Court.[219] But before the Hawai'i Supreme Court could affirm its holding on solely a State law rationale, the Office of Hawaiian Affairs, the State, and most of the individual Native Hawaiian plaintiffs reached a settlement agreement through passage of Senate Bill 1677, which required the vote of two-thirds of both chambers of the Legislature and the signature of the Governor to alienate ceded lands.[220] In a joint statement, Attorney General Bennett and Office of Hawaiian Affairs Chairwoman Apoliona stated:

> There is no question that OHA and the state had significant differences with regard to this lawsuit. This settlement resolves those differences in a way we believe is beneficial to all citizens of Hawai'i. We can now concentrate on working together on matters we all believe are crucially important to Hawai'i. . . . We look forward to doing so.[221]

One plaintiff, Professor Jonathan K. Osorio, refused to settle the lawsuit because he believed, accurately so, that the Hawai'i Supreme Court could reaffirm its moratorium solely on State law grounds and without reference to the Apology Resolution.[222] However, the Hawai'i Supreme Court's reconsideration of their decision in regards to Osorio was dismissed on procedural grounds because the political branches had reached a settlement in which the Leiali'i parcels would not be sold, and therefore, the claims for a moratorium were no longer ripe for adjudication.[223] It was, thus, clear that the political settlement reached usurped the Hawai'i Supreme Court's opportunity to affirm the moratorium solely under Acts 354, 359, 329 and 340.

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[219] *Id.* The insistence on ruling on only the federal law grounds was likely the result of the liberal bloc's insistence on narrowing the opinion. *See, e.g.*, Transcript of Oral Argument at 6, Hawai'i v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) (No. 07-1372) 2009 WL 462660, at *6 ("JUSTICE GINSBURG: . . . Why isn't it sufficient just to say that this resolution has no substantive effect, period, and then remand to the Hawai[']i Supreme Court?").

[220] *See* Act Relating to Lands Controlled by the State, § 2, 2009 Haw. Sess. Laws 706–07.

[221] Gordon Y.K. Pang, *State, OHA, 3 Plaintiffs Settle Ceded Lands Suit*, HONOLULU ADVERTISER, May 6, 2009, at A2.

[222] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., 121 Hawai'i 324, 328, 219 P.3d 1111, 1115 (2009).

[223] *Id.*

Instead, in regards to the alienation of ceded lands, the Hawaiian community was left to the mercy of State lawmakers. The settlement, which the Office of Hawaiian Affairs agreed to, while politically expedient, harmed the Native Hawaiian interest in ceded lands. The Moon decision represented a paradigm shift in the push for justice and reconciliation for Native Hawaiians as it broadcasted unified support from Hawai'i's highest court that it would hold the State to its reconciliation commitments. The Office of Hawaiian Affairs ignored the Hawai'i Supreme Court's opinion and simply gave up after its fifteen-year legal battle. As Osorio stated, "I hope they understand how much they have betrayed not just the interests of the (Hawaiian) nation but their own interests, because they are not willing to fight."[224] The Office of Hawaiian Affairs unfortunately underestimated the true reconciliatory power that the Hawai'i Supreme Court asserted and would have likely asserted again.

C. Consequences of Flawed History

Rice and *Office of Hawaiian Affairs* illustrate the significant flaws in the Court's recitation of history and its use of history as a tool to reach its desired outcome. The harm from the Court's contorted recitation of history is twofold: first, it enshrines an inaccurate history that is binding, unless overturned, on all other courts within the federal system; and second, it mandates a history that instills fear for future repercussions and, thereby, forces a people to take action that may not be consistent with their interests.

1. Stare Decisis and Lawyering Complications

The harm from decisions like *Rice* and *Office of Hawaiian Affairs* is the binding effect that they have on future decisions of any federal court. As one scholar noted, "The United States Supreme Court is the only institution in human experience that has the power to *declare* history: that is, to articulate some understanding of the past and then compel the rest of society to conform its behavior to that understanding."[225] In addition, "Principles of *stare decisis* operate upon these essays to render them extremely difficult to overrule."[226] For example, as of the writing of this Article, *Rice* has been cited for various propositions in over one hundred cases. While a significant portion of the cases citing *Rice* deal with Native

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[224] David Shapiro, *Ceded Lands: It's Time to Move On*, HONOLULU ADVERTISER, May 27, 2009, at A12.

[225] Wiecek, *supra* note 26, at 227–28.

[226] Richards, *supra* note 26, at 889.

Hawaiian issues,[227] the harms of which were discussed *supra* section III.B of this Article, a large amount deal with non-Hawaiian issues—thereby showing the larger implications of the opinion.[228] As analyzed below, the *Rice* decision with its underlying historical flaws is being used as a tool to oppress other colonized peoples struggling for justice.

In *Davis v. Commonwealth Election Commission*,[229] for example, the Ninth Circuit relied heavily upon *Rice* to justify its conclusion that the voting restrictions for constitutional amendments in the Commonwealth of the Northern Mariana Islands ("Commonwealth" or "CNMI") was unconstitutional.[230] In so doing, the court dismantled a key component of the Covenant between the Commonwealth and the United States.[231] Indeed, a "key aspect of the Covenant negotiations involved land use and ownership."[232] Section 805 of the Covenant specifically mandated that the CNMI government regulate and restrict land ownership to persons of Northern Marianas descent ("NMD") for twenty-five years after termination of the Trusteeship Agreement and then "may" choose to continue the restrictions after the twenty-five year period.[233] An individual of NMD was defined in Article XII, section 4 of the CNMI Constitution as:

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[227] *See, e.g.*, Doe v. Kamehameha Schools, 470 F.3d 827 (9th Cir. 2006) (en banc).

[228] *See* Fisher v. Univ. of Texas, 133 S.Ct. 2411, 2418 (2013) (citing Rice v. Cayetano, 528 U.S. 495, 517 (2000)) ("Distinctions between citizens solely because of their ancestry are by their nature odious to a free people."); Shelby County v. Holder, 133 S.Ct. 2612, 2629 (2013) (citing *Rice*, 528 U.S. at 512) ("Consistent with the design of the Constitution, the [Fifteenth] Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment.").

[229] 844 F.3d 1087 (9th Cir. 2016) [hereinafter *Davis II*].

[230] *See id.* at 1091-95.

[231] *See* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, N. Mar. I.-U.S., Feb. 15, 1975, 90 Stat. 263 (1976) [hereinafter Covenant to Establish the CNMI]. Prior to the Covenant, CNMI was part of a Trusteeship Agreement, in which the United States administered various islands in the Pacific for the purpose of, among other things, promoting independence and self-government among those people. *See* Davis v. Commonwealth Election Comm'n, No. 1-14-CV-00002, 2014 WL 2111065, at *1 (N. Mar. I. May 20, 2014) [hereinafter *Davis I*].

[232] Nicole Manglona Torres, Comment, *Self-Determination Challenges to Voter Classifications in the Marianas After* Rice v. Cayetano*: A Call for a Congressional Declaration of Territorial Principles*, 14 ASIAN-PAC. L. & POL'Y J. 152, 162 (2012); *see also* Jose P. Mafnas, Jr., *Applying the Insular Cases to the Case of* Davis v. Commonwealth Election Commission*: The Power of the Covenant and the Alternative Result*, 22 U.C. DAVIS J. INT'L L. & POL'Y 105 (2016).

[233] Covenant to Establish the CNMI, *supra* note 231, art. VIII, § 805.

> [A] person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.[234]

It is critical to note that the Northern Marianas Chamorro descend primarily from late nineteenth and early twentieth century immigrants from Guam, who "constituted a racially diverse group deriving from centuries of intermarriage, on Guam,. . . . composed of Spanish, Chamorro, Kanaken, Tagalogs, Chinese, Japanese, German and other blood[.]"[235]

To regulate the land alienation provision of Section 805, which the Ninth Circuit upheld,[236] a constitutional provision required that one must be of NMD in order to vote to amend Article XII.[237] Accordingly, the "NMD classification is specifically intended for the political question of whether persons of NMD want to continue land alienation restrictions in the CNMI."[238] In order to effectuate Section 805 of the Covenant, the CNMI government passed legislation that created the Northern Marianas Descent

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[234] N. MAR. I. CONST. article XII, § 4.

[235] Brief Amicus Curiae of Northern Marianas Descent Corporation in Support of Defendants-Appellants and Reversal at 11, 844 F.3d 1087 (9th Cir. 2016) (No. 14-16090), 2014 WL 5510536, at *11 (citing HERMANN H.L.W. COSTENOBLE, THE MARIANAS 46–47 (1905)).

[236] *See* Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1992). In *Wabol*, the court stated the following regarding the Covenant:

> Its bold purpose was to protect minority rights, not to enforce homogeneity. Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders' vision does not precisely coincide with mainland attitudes toward property and our commitment to the ideal of equal opportunity in its acquisition. We cannot say that this particular aspect of equality is fundamental in the international sense. It therefore does not apply ex proprio vigore to the Commonwealth. Accordingly, Congress acted within its power in enacting sections 501(b) and 805 of the Covenant, and Article XII is not subject to equal protection attack.

Id.

[237] N. MAR. I. CONST. art. XVIII(5)(c) ("In the case of a proposed amendment to Article XII of this Constitution, the word 'voters' as used in subsection 5(a) above shall be limited to eligible voters under Article VII who are also persons of Northern Marianas descent as described in Article XII, Section 4, and the term 'votes cast' as used in subsection 5(b) shall mean the votes cast by such voters.").

[238] Torres, *supra* note 232, at 157.

Registry within the Commonwealth Election Commission.[239] That law required that a Northern Marianas Descent Identification verification "that will be issued only to persons who are qualified pursuant to Art. XII, [section] 4" be produced to register for an election that requires only persons of NMD to vote, pursuant to Article XVIII, Section 5.[240]

John H. Davis, Jr., an American citizen and registered CNMI voter, maintained that the NMD classification in Article XVIII of the CNMI Constitution and Public Law 17-40 violated, among other provisions, the Fourteenth and Fifteenth Amendments of the United States Constitution, and requested an injunction to allow him to vote in a 2014 special election to consider changes to the definition of NMD.[241] Relying upon *Rice*, the United States District Court for the District of the Northern Mariana Islands concluded that the Article XVIII used ancestry as a proxy for race, which ran afoul of the Fifteenth Amendment.[242]

The Ninth Circuit reviewed the district court's decision and affirmed the judgment: "The restriction is invalid and may not be enforced. Our analysis is controlled by the Supreme Court's decision in [*Rice*]."[243] The court specifically held: "Just as the definitions of Hawaiian and native Hawaiian in the *Rice* statute referred to specific ethnic or aboriginal groups, the definition of NMD in Article XII, section 4, ties voter eligibility to descent from an ethnic group."[244]

The court then concluded that *Davis* "cannot be distinguished from *Rice*."[245] First, it held that *Rice* was about ancestry, which according to the Court was a "proxy" for race, and so too was *Davis*.[246] Despite the court acknowledging that "some persons who were not of Chamorro or Carolinian ancestry lived on the islands in 1950,"[247] thereby precluding the notion that the NMD definition was based on race, the Ninth Circuit pitted the classification with *Rice*, where the Court rejected the argument that the classification based upon the 1778 date of western contact in Hawai'i was race-neutral.[248]

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[239] *See* Act of March 31, 2010, 2011 N. Mar. I. Pub. L. 40.
[240] *Id.* §§ 2(c)(1)–(4).
[241] *Davis I*, 2014 WL 2111065, at *1.
[242] *Id.* at **11–18 (citing Rice v. Cayetano, 528 U.S. 495, 514–15 (2000)).
[243] *Davis II*, 2016 WL 7438633, at *3.
[244] *Id.* at *4 (citing *Rice*, 528 U.S. at 509–10; *Davis I*, 2014 WL 2111065, at *15).
[245] *Id.* at *5.
[246] *Id.*
[247] *Id.*
[248] *Id.* at *5 (citing *Rice*, 528 U.S. at 516).

Second, and ignoring the clear mandate of Section 805 of the Covenant, the court brazenly stated that persons of NMD are not "quasi-sovereign or *otherwise distinct from the Commonwealth citizenry as a whole* . . . [.]"[249] In much the same way that the Court used "glittering generalities" in *Rice* to conclude that Native Hawaiians did not have a political status,[250] the Ninth Circuit tried to fit the CNMI's own unique history into the box of *Rice*.[251]

Third, the *Davis* court held that the voting classification "would divide the citizenry of the Commonwealth between NMDs and non-NMDs when voting on amendments to a property restriction that affects everyone."[252] Again, the court used *Rice* to foreclose the argument that those of NMD have a "specialized interest" in Article XII's alienation restrictions: "That position . . . rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."[253] Akin to *Rice*, the Ninth Circuit failed to acknowledge that those of NMD should be the only individuals to vote on amendments to the definition of NMD, particularly given the validity of the alienation restrictions.[254]

Clearly, *Rice* was the standard by which the federal court needed to fit the Commonwealth's efforts to preserve their land for their people. However, it was as if the Ninth Circuit was comparing apples and oranges. *Rice*, for example, was decided within the context of a State law that governed a State entity, whereas, *Davis* dealt with an independent sovereign government with a wholly separate and distinct Covenant relationship. In the end, the Ninth Circuit used *Rice* as precedent to dismantle a key component of the CNMI's effort to control the alienation of their limited land.[255] *Davis*, thus, directly demonstrates the harm of *Rice* and its use as a tool to oppress marginalized communities.

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[249] *Id.* at *5 (emphasis added) (quotation marks omitted).

[250] *Rice*, 528 U.S. at 527–28 (Stevens, J., dissenting).

[251] *See supra* text accompanying note 235 (discussing the uniqueness of the CNMI people).

[252] *Davis II*, 2016 WL 7438633, at *6.

[253] *Id.* (citing *Rice*, 528 U.S. at 523).

[254] *See* Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1992).

[255] Even assuming *arguendo* that one adopts *Rice* as precedent, it should only be binding in Hawai'i as that case dealt specifically with the State of Hawai'i's relationship with the indigenous community.

2. Mandating Fear

Another consequence of the Court's slanted narrative of Hawaiian history and its decision is the sense of fear that it instilled.[256] The Hawaiian sovereignty discussion prior to and after *Rice* provides an apt illustration of the consequences of the decision.

Prior to the decision in *Rice*, there appeared to be building momentum toward some form of an independent governing nation of Hawaiians.[257] The State of Hawai'i passed various laws to study the issue of Hawaiian sovereignty,[258] and in 1993 co-sponsored a centennial observation of the overthrow of the Kingdom of Hawai'i.[259]

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[256] In a similar light, some have argued that the Court's decision in *Brown v. Board of Education*, 344 U.S. 1 (1952), actually slowed the progress that was being made in the South on civil rights, particularly stymying the strides in integration that was taking shape in the South. *See* KLARMAN, *supra* note 108, at 389 (arguing that "before *Brown* focused attention on school desegregation, southern politics was generally controlled by moderates, who downplayed race while accommodating gradual racial change. *Brown* turned that political world upside down"). Political rhetoric immediately shifted after *Brown*. For example, Georgia Governor-elect Marvin Griffin announced, "come hell or high water, races will not be mixed in Georgia schools." *Id.* at 390. Mississippi Senator James Eastland stated that the South "will not abide or obey this legislative decision by a political court indoctrinated and brainwashed by Left-wing pressure groups." LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS 38 (2000). Klarman concluded that *Brown* radicalized southern politics: first, because it was harder to ignore than earlier changes; second, it represented federal interference in southern race relations; and third and most important, it commanded that racial change take place in a different order than might otherwise have occurred. *See* KLARMAN, *supra* note 108, at 391. Finkelman, however, challenged Klarman's critique and noted that the desegregation of public elementary schools had nothing to do with the ultimate violence that occurred at the University of Mississippi, the mob violence against the freedom riders, or even the terrorist bombing of the home of Martin Luther King, Jr. *See* Finkelman, *supra* note 108, at 1010–12. These events, Finkelman argued, are not direct results of the *Brown* decision, but are in fact specific responses to other specific events. *See id.*; *see also* POWE, *supra*, at 37 (citing urban Southern press coverage of the decision in two leading newspapers and arguing that in general, the Southern response to *Brown* was "surprisingly mild" and suggesting that ending segregations "was not the end of the world and, more important, not a call for violence").

[257] In the late-1980s, Ka Lāhui Hawai'i was established by and for native Hawaiians, without the interference of State or Federal agencies, to effectuate a multi-step approach toward achieving sovereignty. *See* KA LĀHUI HAWAI'I, MASTER PLAN 1–11 (1995).

[258] *See, e.g.*, Act Relating to the Island of Kaho'olawe, §2, 1993 Haw. Sess. Laws 806.

[259] Act Relating to Hawaiian Sovereignty, 1993 Haw. Sess. Laws 999–1000.

Following *Rice*, however, there was a clear push for federal recognition.[260] United States Senator Daniel K. Akaka and the rest of Hawai'i's congressional delegation formed a Task Force on Native Hawaiian issues because the *Rice* decision had created a "sense of urgency" for Hawaiians.[261] The Task Force's immediate goal was to clarify the relationship between Hawaiians and the federal government.[262] The Task Force's solution was federal legislation—an idea that the Office of Hawaiian Affairs trustees vigorously latched onto in an attempt to save their agency.[263]

On July 20, 2000, following the work of his Task Force, Senator Akaka introduced "A Bill to Express the Policy of the United State Regarding the United States' Relationship with Native Hawaiians, and for Other Purposes[,]" which proposed to recognize Hawaiians as indigenous people that have a right to self-determination under federal Indian law.[264] Specifically in response to *Rice*, Senator Akaka's bill, later referred to as the Native Hawaiian Government Reorganization Act or the Akaka Bill, sought to clarify the political status of Native Hawaiians with the federal government, establish a process to create a Hawaiian governing entity that would be federally recognized, and protect various Hawaiian-serving programs from constitutional challenges.[265] Federal recognition, for some, meant the conveyance of a special status to a Native Hawaiian government that could come with a broad array of federal protections and benefits.[266] Federal recognition implies a level of self-determination for Native Hawaiians. The Akaka Bill, which has gone through various iterations and has been introduced in every Congress for well over a decade, represented an admirable effort by Hawai'i's congressional delegation to facilitate and codify in American law self-governance and self-determination for

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[260] The fears were not unfounded as lawsuits streamed in challenging the political status of Native Hawaiians. *See* Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007) (challenging various State of Hawaii programs that provide preferential treatment to Native Hawaiians); Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003) (alleging that various provisions of the Hawai'i Constitution violated the equal protection clause); Arakaki v. Hawai'i, 314 F.3d 1091 (9th Cir. 2002) (challenging the requirement that Office of Hawaiian Affairs trustees be Native Hawaiian).

[261] Melody K. MacKenzie, *Native Hawaiians and U.S. Law*, *in* NATIVE HAWAIIAN LAW: A TREATISE 264, 312 (MacKenzie et al. eds., 2015).

[262] J. Kēhaulani Kauanui, *The Politics of Blood and Sovereignty in* Rice v. Cayetano, 25 POL. & LEGAL ANTHROPOLOGY REV. 110, 120 (2002).

[263] *See* A Bill to Express the Policy of the United State Regarding the United States' Relationship with Native Hawaiians, S. 2899, 106th Cong. (2000).

[264] *Id.*

[265] *See* MacKenzie, *supra* note 261, at 312–16.

[266] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3] (Nell Jessup Newton et al. eds., 2005).

Hawai'i's indigenous people. Through the Akaka Bill, as then-Office of Hawaiian Affairs Chairperson Haunani Apoliona expressed:

> the Native Hawaiian people seek the restoration of their government, because they know and have witnessed how the Federal policy of self-determination and self-governance has not only had a dramatic impact on the ability of Native communities to take their rightful place in the American family of governments, but also how that policy has enabled Native people to grow and thrive.[267]

For over a decade, from 2000 through 2012, the Office of Hawaiian Affairs championed federal legislation to grant Hawaiians self-determination to enable the establishment of a government-to-government relationship between the federal government and Native Hawaiians.[268] The costly effort mired the agency in conflict with nationalist Hawaiians, who believed that recourse should be obtained on the international stage, and pro-American conservatives, who believed that the entity was wasting funds to benefit a portion of the State's citizenry. With its decision in *Rice*, the Court changed the trajectory of the movement for sovereignty in forcing the hands of the Office of Hawaiian Affairs to scramble for recognition.

IV. (RE)RIGHTING HISTORY

If advocates are going to deal with precedent that contains history (and they have a lot of it to deal with), or urge a court to adopt their positions based on historical arguments, they had better understand the principles of historical scholarship. If legal scholars are going to analyze cases that include history, they had better know something of the history that they propose to explain.[269]

While there is considerable harm from the Court's writing of Hawaiian history, that harm is exponentially increased when the opinions are used to then buttress a scholarly retelling of history. Legal practitioners and scholars, particularly those in Hawai'i, must carefully disaggregate the Court's "truth" with the current historical scholarship.

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[267] *Hearing on S. 1011 Before the S. Committee on Indian Affairs*, 111th Cong. 13 (2009) (statement of S. Haunani Apoliona, Office of Hawaiian Affairs).

[268] *See* MacKenzie, *supra* note 261, at 312–16.

[269] Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 384 (1998).

In a recently published article,[270] James S. Burns,[271] retired and respected Chief Judge of the Hawai'i Intermediate Court of Appeals, takes on constitutional scholar Jon Van Dyke's conclusion that the Crown Lands belong in trust to the Native Hawaiian people.[272] As other authors have alluded, and which will not be elaborated on here, there are errors with the article's recitation of history and conclusion.[273] Relevant here, however, is the article's reliance on both the *Rice* and *Office of Hawaiian Affairs* decisions for various historical points.[274] Relying upon the Court's slanted recitation of Hawai'i's past, as described above, does considerable harm because it legitimizes what the Court stated,[275] and effectively silences a people pursing justice.

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[270] James S. Burns, *The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?*, 38 U. HAW. L. REV. 213, 251, 259 (2016).

[271] Judge Burns passed away on March 9, 2017. Press Release, Hawai'i State Judiciary, Joint Statements on the Passing of Chief Judge James S. Burns (Mar. 9, 2017), http://www.courts.state.hi.us/news_and_reports/featured_news/2017/03/joint-statements-on-the-passing-of-chief-judge-james-s-burns. The author met with Judge Burns prior to his passing to discuss the contents of Burns' article and the author's perspective. Judge Burns was gracious and encouraged further dialogue about the subject matter.

[272] Professor Van Dyke passed away on November 29, 2011. Press Release, University of Hawai'i William S. Richardson School of Law, Obituary: John Markham Van Dyke (Dec. 9, 2011), https://www.law.hawaii.edu/news/2011/12/09-0. Professor Van Dyke was a well-respected scholar and intellectual, who committed a large part of his life's work to understanding and educating about the legal and political struggles of Native Hawaiians. *See id.* As noted above, Professor Van Dyke served as counsel to the Office of Hawaiian Affairs in the *Rice* case. *See supra* note 216.

[273] *See* Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *Conflicting Histories: Reclaiming Hawai'i's Crown Lands Trust in Response to James S. Burns*, 39 U. HAW. L. REV. 481, 482–87 (2017) (discussing collective memory); Avis Kuuipoleialoha Poai, *Tales From the Dark Side of the Archives: Making History in Hawai'i Without Hawaiians*, 39 U. HAW. L. REV. 537, 554–65 (2017) (discussing the reliance on dubious sources); *see* Osorio & Beamer *supra* note 139, at 469 (discussing errors regarding the Māhele and the agency of the sovereigns).

[274] *See* Burns, *supra* note 270, at 251, 259.

[275] Scholars and practitioners of the laws of the State of Hawai'i have a particular responsibility to ensure that Hawai'i's history does not succumb to the American narrative of the past. As shown in Section III.B, the Hawai'i Supreme Court has done a commendable job at recognizing the unique history of Hawai'i. *See* Yamamoto & Ayabe, *supra* note 190, at 517.

A. Silencing Marginalized Voices

When regurgitating the Court's warped narrative of Hawaiian history without correcting the errors or clarifying the shortcomings, judges and practitioners silence the people trying to right historical wrongs that have plagued them for well over a century. Burns' article provides an apt example. There, the article cites to *Rice* for its discussion regarding the Section 5(f) funds and the federal set aside of 200,000 acres under the Hawaiian Homes Commission Act for "native Hawaiians[.]"[276] Although one would expect such a discussion in a piece discussing Hawaiian land issues, there is no recognition in the essay of the considerable harm of the Act and the issue of blood quantum in dividing families and the Hawaiian people from the land.[277]

In 1921, with years of returning lands to Native Americans as precedent and with a strong Native Hawaiian presence in Delegate (Prince) Jonah Kalaniana'ole Kūhiō and Territorial Senator John H. Wise as representatives advocating for rights of the indigenous people, the United States Congress reluctantly decided to gift lands back to native Hawaiians, those individuals of "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[278] Congress defined these people by the then-conventional method of blood quantum.[279] Hearings were held about the conditions of Hawai'i's indigenous peoples and the United States Congress learned that Hawaiians were a "dying race" with the number of "full-blooded Hawaiians" dropping from 142,500 in 1826 to 22,500 in 1919.[280] Territorial Senator Wise noted:

> The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is

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[276] *See* Burns, *supra* note 270, at 259.

[277] There is no question that blood quantum has been an issue that has haunted Hawaiians and other indigenous communities throughout the United States. Indeed, Native Hawaiians have criticized the Act: "The blood quantum issue is intentionally divisive," decried Adelaide "Frenchy" DeSoto. Ron Stanton, *Hawaii's Own: A Look at a Century of Annexation*, HAW. TRIB. HERALD, Aug. 10, 1998, at 1. "It was a devious plot, but it has survived for decades." *Id.*

[278] Hawaiian Homes Commission Act, Pub. L. No. 67-34, § 201(a)(7), 42 Stat. 108, 108 (1921).

[279] *See id.*

[280] *See* H.R. REP. NO. 66-839, at 2 (1920).

> to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.[281]

Following the failed attempt to pass the "Rehabilitation Bill" the first time, Prince Jonah Kalaniana'ole Kūhiō framed the failure on procedural grounds.[282] Kūhiō did little to mention the substantive objections to the bill that echoed through the chambers of the United States Capitol.[283] Nevertheless, Congress subsequently enacted the Hawaiian Homes Commission Act,[284] and Kūhiō and Wise's goal of putting Hawaiians back on the land was achieved. The harsh result of the Act, however, is a system in which the diminution of individuals of "not less the one-half" blood through interracial procreation ultimately leads to a lack of beneficiaries and the subsequent returning of lands to the government,[285] further separating Hawaiians from their lands. Put another way, this Act was established with the intention of rehabilitation, but the reality is that eventually there will be no more native Hawaiians to rehabilitate. As American Studies Professor J. Kēhaulani Kauanui asserted, the Act and the issue of "[b]lood quantum is a manifestation of settler colonialism that works to deracinate—to pull out by the roots—and displace indigenous peoples."[286]

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[281] *Id.* at 4.

[282] Prince Jonah Kalaniana'ole Kūhiō reported:

> Though the Bill itself died with the passing of the last Congress on March 4, I am able to state to you that many of its provisions met no opposition and that the much discussed sections opening the way for the Hawaiians to return to the land were looked upon favorably by the members of both Houses of Congress. . . . Yes, the Bill is dead; but it failed at the last movement in the Senate owing to the congestions of business at the short session of Congress."

J. KĒHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 150 (2008)

[283] The notion of rehabilitating Hawaiians resonated with some federal legislators. *Id.* at 109–13. Others, questioning the constitutionality of a race-based legislation, found comfort in analogizing native Hawaiians with Native Americans of the continent. *Id.* at 113–16. For example, United States Secretary of the Interior Franklin K. Lane analogized native Hawaiians to Native Americans when he articulated, "the natives of the [Hawaiian] islands . . . are our wards . . . and for whom in a sense we are trustees." H.R. Rep. No. 66-839, at 4 (1920).

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

[285] *See id.* § 201(a)(7), 42 Stat. 108.

[286] KAUANUI, *supra* note 282, at 9.

The Act is inherently flawed because it is "rooted in racism and shot through with paternalism."[287] During the debates that surrounded enactment of the Act, various issues of inherent racism and paternalism were raised. First, in order to achieve passage of the bill, the proposed Act was portrayed as an Anti-Asian law that would prevent individuals of Asian decent from acquiring lands in the U.S. and prevent them from being more successful than indigenous Hawaiians.[288] Second, the Act, originally intended for indigenous Hawaiians of 1/32 part Hawaiian blood,[289] was amended to be one-half part.[290] On this issue of part Hawaiians, A.G.M. Robertson pronounced that:

> the part-Hawaiian[s] . . . are a virile, prolific, and enterprising lot of people. They have large families and they raise them - they bring them up. These part Hawaiians have had the advantage, since annexation especially, of the American viewpoint and the advantage of a pretty good public school system, and they are an educated people. They are not in the same class with the pure bloods.[291]

Paternalism is reflected in the Act because native Hawaiians become wards of the government by having to pay rent for the lands, instead of being given lands fee simple.[292] The Dawes Act did the same for Native Americans; it reflected the federal government's efforts at the time to deal with the indigenous communities of the United States.[293]

The racist and paternalistic issue of blood quantum would again resurface in *Rice*. In a concurring opinion in *Rice*, Justices Stephen Breyer and David Souter joined the result of the majority's decisions, but specifically concluded that the Office of Hawaiian Affairs' electorate did not sufficiently resemble an Indian tribe.[294] The usually consistent liberal

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[287] Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 U. HAW. L. REV. 519, 562 (1992).

[288] KAUANUI, *supra* note 282, at 107–08 (noting that Congressional leaders and Judges had unfavorable and racist views of Asians).

[289] *Id.* at 152–53 (noting the proposal for a blood quantum of one-thirty-second degree Hawaiian blood).

[290] *See* Hawaiian Homes Commission Act, Pub. L. No. 67-34, § 201(a)(7), 42 Stat. 108, 108 (1921).

[291] KAUANUI, *supra* note 282, at 127.

[292] Hawaiian Homes Commission Act, Pub. L. No. 67-34, § 207(b), 42 Stat. 108, 111 (1921) ("The title to lands so leased shall remain in the State.").

[293] The Act's blood quantum requirement is considered "more stringent than the membership requirements imposed by most mainland tribes." Friedman, *supra* note 287, at 565.

[294] Rice v. Cayetano, 528 U.S. 495, 525 (2000) (Breyer, J., concurring). For Justice Breyer, the Office of Hawaiian Affairs was nothing more than "a special purpose department of Hawaii's state government." *Id.* at 526.

voices addressed blood quantum and how the State's definition of "Hawaiian" was so "broad" that it went "well beyond any reasonable limit" because it included all individuals of Hawaiian ancestry without regard to blood quantum.[295] For Justices Breyer and Souter, a line *needed* to be drawn to determine who qualified for benefits and those that did not—and that line would be based upon percentage of blood.[296] During oral arguments in *Rice*, Justices Kennedy and Scalia pressed the federal government about the acceptability of someone with 148th, 196th, "195th Hawaiian blood" to participate in the Office of Hawaiian Affairs' elections.[297]

Justice Breyer also suggested the arbitrariness of ancestry: "It seems to me . . . that everyone who has one Hawaiian ancestor at least gets to vote, and more than half of those people are not native Hawaiians. They just have a *distant ancestor*."[298] Justice Breyer then asked "How do we extend that to people [ten] generations later, who had [ten] generations ago one Indian ancestor? I mean that might apply to everybody in the room. We have no idea."[299] In much the same way that opponents of the one thirty-second blood quantum quota argued that such dilution of blood made a Hawaiian individual "to all intents and purposes a white person[,]"[300] Justice Breyer's line of questioning and decision implied that dilution of blood quantum disqualified individuals from being members of a sovereign indigenous body. The Court, with both conservative and liberal support, thus, reaffirmed the early twentieth century doctrine and again tied indigeneity, and thus sovereignty, to blood quantum, which has enabled "white American economic, political, and social domination" to endure.[301]

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[295] *Id.* at 526–27.

[296] The Court, thus, "relied on the logics of dilution to undermine inclusive conceptualizations of Nativeness." Kauanui, *supra* note 262, at 118.

[297] *Rice* Oral Argument, *supra* note 45, at *40.

[298] *Id.* at *29. (emphasis added).

[299] *Id.* at *35; *See Rice*, 528 U.S. at 501 (Breyer, J., concurring). In his concurring opinion, Justice Breyer declared the connection to one Native ancestor as meaningless:

> There must . . . be . . . some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members—leaving some combination of luck and interest to determine which potential members become actual voters—goes well beyond any reasonable limit.

Rice, 528 U.S. at 501 (Breyer, J., concurring).

[300] Kauanui, *supra* note 262, at 118 (citation omitted).

[301] KAUANUI, *supra* note 282, at 183.

Missing from Justice Breyer's recitation of blood logic (as well as Judge Burns' use of *Rice* and the HHCA) was a recognition of the ways in which Hawaiians themselves viewed the issue of blood quantum.[302] For Hawaiians, the connection to a people is not based upon blood quantum, but rather a deep connection to the land.[303] But, clearly, missing from Justice Breyer's concurrence (and Judge Burns' piece) is the true goal of the Hawaiian Homes Commission Act: displace Hawaiians from the land.

The willingness to simply accept the mandates of the Act without criticizing or even simply acknowledging the divisiveness of the issue and its validity is unacceptable and silences the indigenous perspective of these racist laws. This type of omission does a disservice to the advancement of justice for all. Judges and practitioners must keep a sensitivity to the stories of marginalized communities and must be vigilant in ensuring that the little they have is protected.

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[302] The issue of blood quantum has also divided the Hawaiian community and pitted those with one-half part Hawaiian blood against all others. *See* Day v. Apoliona, 616 F.3d 918 (9th Cir. 2010); Kealoha v. Machado, 131 Hawai'i 62, 315 P.3d 213 (2013). While American blood logic emerged in *Rice* through Justice Breyer's concurrence, so too did the argument of native Hawaiians who challenged the agency's expenditure of section 5(f) trust funds for both native Hawaiians and Hawaiians. In an amicus brief to the Court, the Hou Hawaiians (a self-described tribal body of native Hawaiians, as defined by the Hawaiian Homes Commission Act) criticized the Office of Hawaiian Affairs' expenditures and compared Hawaiians to dogs:

> Suppose wolves were an endangered species and Congress had given the state of Virginia 1.4 million acres of land in trust to provide habitat and funding to preserve them. If Virginia installed the American Kennel Club as trustees of this land and they, in turn, proposed that the definition of wolf be changed to include all breeds of domestic dogs, it would be a clear breach of trust. OHA is doing the same thing. OHA wants a person who is one-half Filipino, one-quarter Japanese, one-eighth Caucasian, one-sixteenth Chinese and one-sixteenth Hawaiian to be given the same benefits as a person who is one-half Hawaiian. How can such a person make a claim to participate as an equal beneficiary with a person who is one-half Hawaiian?

Brief of Amici Curiae, The Hou Hawaiians and Maui Loa, Native Hawaiian Beneficiaries at 10, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 374578, at *10. The Hou Hawaiians' analogy conjures images of a pack of ravaging dogs fighting over scraps. The Hou Hawaiians were unfortunately ingratiated with the American blood logic and the notion that they were more worthy of resources than those of less than fifty percent Hawaiian blood.

[303] *See* Friedman, *supra* note 287, at 564–65. Friedman states:

> People in Hawaii were predominantly identified by their relationship to the country or to the society or to the 'aina [land]. Thus people were called by the terms Kama'aina (adopted to the land); Hoa'aina (friend of the land); Kua'aina (backbone of the land); or Maka'ainana (eyes of the land). The person who had no such relationship was a Malihini (stranger, newcomer).

Id. (citation omitted).

B. Vigilance for the Future

It is not reasonable to bifurcate history from the law. Indeed, as Judge Richard A. Posner stated, "Law is the most historically oriented, or if you like the most backward-looking, the most 'past dependent,' of the professions."[304] With no other choice but to use history, a compromise must be made to ensure that the history that is used is accurate. As this Article has shown, Hawaiian history is unique and highly complicated. How is it then that practitioners and judges ensure that their recounting of Hawai'i's unique history is adequate? Are there structural changes that can be made to the legal system to ensure that attorneys and jurists are educated and sensitive to Native Hawaiian issues? How do scholars and lawyers stay vigilant given the uncertain times ahead?[305]

To ensure accuracy of the recitation of Hawaiian history, practitioners and judges should adhere to these guiding principles: first, acknowledge the tremendous wrongs committed against the Native Hawaiian people;[306] second, be open to using non-legal resources;[307] third, consistently update the historical narrative based upon the scholarship available to ensure that the narrative accounts for the stories of all people;[308] and fourth, use both

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[304] Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 573 (2000); *see also* Kelly, *supra* note 13, at 157. Kelly notes:

> [T]he essential nature of the judicial process, as already observed, is too close to that of history-writing for the Court [to] ever abandon entirely either the use of history or the writing of history. But a historian might observe that the historical evidence seems to indicate the Court's history to be [the] most dubious in those instances in which an appeal to the past has been recruited for activist purposes of interventionist political implications. It is on those occasions that the worst kind of law-office history makes its appearance in the Court's opinions.

Kelly, *supra* note 13 at 157.

[305] Indeed, with the election of Donald J. Trump as President of the United States, there is a legitimate concern for the future of Native Hawaiian programs. *See* Troy J.H. Andrade, *Legacy in Paradise: Analyzing the Obama Administration's Efforts of Reconciliation with Native Hawaiians*, 22 MICH. J. RACE & L. (forthcoming 2017).

[306] Legal scholars, jurists, and attorneys have a moral obligation to, at the very least, acknowledge the harms that have come from colonization. *See* HAW. R. SUP. CT. 1.5(c) ("I will faithfully discharge my duties as attorney, counselor, and solicitor in the courts of the state to the best of my ability, *giving due consideration to the legal needs of those without access to justice*." (emphasis added)).

[307] *See* Melton, *supra* note 269, at 435 ("The number of possible sources for historical study, consequently, is staggering; the number of finding aids alone is daunting.").

[308] *See* Joshua Stein, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMAN. 359, 387 (2013) ("[C]ourts who use historical knowledge [or] arguments ought to use history accurately and responsibly, avoiding if possible the 'lawyer's history' . . . . Our job is to provide the Court with the best historical

primary and secondary sources, so long as the biases of these sources are analyzed.[309]

The last point is particularly important given the vast variety of resources available on Hawaiian history. For example, the *Rice* majority relied heavily upon the biased writings of non-native historian Ralph S. Kuykendall.[310] Kuykendall authored a multi-volume book of Hawaiian history.[311] Kuykendall wrote these texts at the request of the Historical Commission of the Territory of Hawai'i,[312] and, by virtue of his methodological approach, writes as if he was the sole authority on the topic. Kuykendall was tasked to write these works as textbooks that would paint the territorial government in a favorable light and the monarchy in a negative light.[313] One of the methodological choices made by Kuykendall was to use little, if any, native sources of information; he also chose not to use any non-English sources.[314] Unsurprisingly, Kuykendall presents a biased view of history and often portrays the dramatic transformation in Hawaiian legal, political, and economic landscape as gradual and welcomed by the Hawaiians. At some points, he improperly rationalized actions of natives. Kuykendall, as an example, writes that the monarchy's resistance to takeover by the United States was, among other things, anti-haole racism,[315] as opposed to simple resistance against a takeover of their

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knowledge available[.]" (citation omitted)); *see also* Robinson v. City of Detroit, 462 Mich. 439, 464, 613 N.W.2d 307, 320 (Mich. 2000) ("We must also recognize that stare decisis is a 'principle of policy' rather than 'an inexorable command,' and that the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned." (citations omitted)). For example, Hawaiian language resources have not been fully mined to provide historians and scholars with a full picture of Hawaiian history. Poai, *supra* note 273, at 575–82.

[309] *See* Melton, *supra* note 269, at 435 ("Once the researcher has begun to locate documents of interest, the next step is that of determining the accuracy of the document's contents, and to understand how the information in those sources relates to other information."); *id.* at 457 (noting that the trend in historical research is to rely on primary sources, but finding that there is also value to using secondary sources).

[310] Rice v. Cayetano, 528 U.S. 495, 500 (2000).

[311] *See* R.S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1778–1854: FOUNDATION AND TRANSFORMATION (1938); R.S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1854–1874: TWENTY CRITICAL YEARS (1953); R.S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1874–1893: THE KALAKAUA DYNASTY (1967) [hereinafter THE KALAKAUA DYNASTY].

[312] *See Publisher's Note*, *in* THE KALAKAUA DYNASTY, *supra* note 311, at v.

[313] *See* MICHAEL K. DUDLEY & KEONI K. AGARD, A HAWAIIAN NATION II: A CALL FOR HAWAIIAN SOVEREIGNTY 110–11 (1990).

[314] *See* Charles H. Hunter, *Preface to* THE KALAKAUA DYNASTY, *supra* note 311, at vii.

[315] For example, Kuykendall writes:

> In the succeeding period, we observe what was apparently a deliberate effort to separate natives and foreigners and to foment race hatred. The cry was raised, "Hawai['i for the Hawaiians"; and this slogan was used to promote the political

homeland. Yet, Kuykendall's books were widely read and cited, including by the federal government. For instance, the Native Hawaiians Study Commission,[316] which was commissioned by Congress to assess the federal government's responsibility and recommend further reparatory action, drew significantly on Kuykendall's work in the early 1980's.[317] A majority of the Native Hawaiians Study Commission—all political appointees in the Reagan Administration—determined that the federal government was not responsible for the illegal overthrow of the monarchy and recommended that Native Hawaiians did not need an apology or reparations.[318] Kuykendall's methodological approach and ultimate product, while helpful to synthesize the entire history of Hawai'i from 1778 to 1893, lends itself to criticism.

Native scholars are not immune from similar criticism. Indeed, renowned historian Samuel Manaiakalani Kamakau's life may have influenced his view of Hawaiian history. Educated at the missionary high school at Lahainaluna, Kamakau offers a unique and sometimes jaded glimpse of life in the eighteenth and nineteenth centuries. Throughout Kamakau's *Ruling Chiefs of Hawai'i*,[319] one can see the major influence of Western religion. Kamakau provides a sermon on sacrifice and the deeds of past rulers to which future generations will be punished.[320] Additionally, when a group of Hawaiian individuals were spared by the volcanoes fire, they claimed their safety was ensured because of the taboo flags that they carried in front and behind them.[321] Kamakau quickly rebuts the individual's story and criticizes them: "They did not think of Jehovah and give credit to him for their escape!"[322] When Kamakau recounts the final acts of Kamehameha to solidify his rule of the island of Hawai'i, specifically the sacrifice of his cousin Keoua Kūahu'ula, he again attributes this unification to a foreign god: "They may not have known that it was the power of Jehovah which united these small dominions into a single

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interests of various persons. That a feeling of racial antagonism existed is clearly apparent. That this feeling was intensified in the reign of Kalakaua is equally clear.

THE KALAKAUA DYNASTY, *supra* note 311, at 187

[316] *See* Native Hawaiians Study Commission Act, Pub. L. No. 96-565, § 302, 94 Stat. 3321, 3324 (1980) (establishing the Native Hawaiians Study Commission).

[317] *See, e.g.*, NATIVE HAWAIIANS STUDY COMM'N, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 320–21 (1983).

[318] *Id.* at 28 ("[T]he Commission concludes that, as an ethical or moral matter, Congress should not provide for native Hawaiians to receive compensation either for loss of land or of sovereignty.").

[319] SAMUEL H. KAMAKAU, RULING CHIEFS OF HAWAI'I (1992).

[320] *Id.* at 140–41.

[321] *Id.* at 152.

[322] *Id.*

kingdom."[323] Thus, although Kamakau offers a Hawaiian perspective, parts of his work are influenced by his teachings in the Western and Christian discipline.

Aside from following the principles articulated above, there are also structural changes that, if made, would likely impact the recitation of Hawaiian history or at least instill competency in and sensitivities to Native Hawaiian issues for all attorneys and judges in Hawai'i.[324] For judges, the Hawai'i Supreme Court could require that all judges attend mandatory sessions on Hawai'i's political and legal history.[325] Much like the State Judiciary's conference on implicit biases for judges,[326] a training on Hawai'i's unique history can be beneficial to ensuring accuracy in the future. For practicing attorneys, the Hawai'i Supreme Court could require a mandatory continuing legal education course on Hawai'i's history.[327] For future attorneys, the Hawai'i Supreme Court, in conjunction with the State's Board of Bar Examiners, should require knowledge of Hawaiian legal issues on future bar examinations.[328] For all, Hawaiian language

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[323] *Id.* at 157–58.

[324] As one scholar noted, "If judges are going to write history, they should strive to do a competent job of it." Melton, *supra* note 269, at 384.

[325] Relatedly, training on Native Hawaiian issues is currently provided to all State Department leaders and members of various boards and commission that have a stake in Hawaiian issues. *See* HAW. REV. STAT. §§ 10-41, 10-42 (2015) (requiring certain state councils, boards and commission to attend a legal training course on Hawaiian customs and rights).

[326] HAW. ACCESS TO JUST. COMM'N, REPORT TO THE ABA RESOURCE CENTER FOR ACCESS TO JUSTICE INITIATIVES 6–7 (2014), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_rept_re_grant_2_27_14.authcheckdam.pdf (last accessed Jan. 6, 2017) (noting that Chief Justice Mark E. Recktenwald approved an all-day training for all State judges to understand how implicit bias may influence a judge's decisions, understand the different scenarios or trial stages that could raise possible bias, and understand the different techniques that may help change stereotypical perceptions).

[327] The Rules of the Hawai'i Supreme Court provide:

> Except as otherwise provided herein, every active member of the Bar shall complete at least 3 credit hours of approved continuing legal education (CLE) during each annual reporting period. "Continuing legal education," or "CLE," is any legal educational activity or program that is designed to maintain or improve the professional competency of lawyers or to expand an appreciation and understanding of the ethical and professional responsibility of lawyers and is approved for credit by the Hawai'i State Bar, including those listed in Rule 22(b) of these Rules.

See HAW. R. SUP. CT. 22(a).

[328] The Hawai'i Supreme Court (Supreme Court) shall appoint a Board of Examiners (Board) to administer the process of admission to the bar of the state. Nothing in this rule, however, shall be construed to alter or limit the ultimate authority of the Supreme Court to oversee and control the privilege of the practice of law in this state.").

See HAW. R. SUP. CT. 1.1. The idea of incorporating the indigenous rights law into the bar

courses should be taken so that Hawaiian words are pronounced and spelled correctly, and to better appreciate the richness of the Hawaiian culture.[329] These structural changes would, again, instill a sensitivity to Native Hawaiian issues and will stand as a firm commitment by the State's judicial branch to truly reconciling with Native Hawaiians for the past injustices. These simple actions could also go a long way in educating the federal court judges and justices of the need for accuracy when addressing Native Hawaiian issues.

V. CONCLUSION

History is complicated. Law is complicated. But, those complications are no excuse for silencing the voice of a community that, by all accounts, have been disadvantaged because of the colonizing efforts of the United States. Attempting to justify legal disputes by resorting to false narratives of Hawai'i's history is a dangerous practice that has repercussions to all people. These "glittering generalities" are then enshrined and used repeatedly thereafter to quash those seeking justice. These voices cannot and will not be silenced. The legal community must no longer stand idle.

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examination or admission process would not be a new concept as New Mexico and Washington require knowledge of federal Indian law as part of their bar admission process. *See* N.M.R.A. 15-107(A)(10) ("An applicant who meets the requirements of Rules 15-103 and 15-104 NMRA and this rule may, upon motion, be admitted to the practice of law in New Mexico if the applicant . . . submits evidence of in-person attendance at, and successful completion of, a course approved by the Supreme Court, which shall include Indian law, New Mexico community property law, and professionalism, before being approved for admission."); WA. A.P.R. 5(b)(1) (noting that "[b]efore an applicant who has passed the bar examination, or who qualifies for admission without passing the bar examination, may be admitted, the applicant must . . . take and pass the Washington Law Component[,]" which includes a section on Indian law). This author firmly believes that the bar examination should not be used as a measure to admit candidates to the practice of law in a jurisdiction. *See* Troy J.H. Andrade, *Ke Kānāwai Māmalahoe: Equality in Our Splintered Profession*, 33 U. HAW. L. REV. 249 (2010).

[329] The Hawaiian language is an official language of the State of Hawai'i. *See* HAW. CONST. art. XV, § 4 ("English and Hawaiian shall be the official languages of Hawaii, except that Hawaiian shall be required for public acts and transactions only as provided by law."); Poai, *supra* note 217, at 582–98.

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- Parallel citations are still required for cases decided by Hawai'i state courts; and
- Words of Hawaiian origin should incorporate diacritical marks ('okina and kahakō) as stated in the most current editions of *Hawaiian Dictionary* (Mary Kawena Pukui & Samuel H. Elbert eds., rev. ed. 1986), or *Place Names of Hawai'i* (Mary Kawena Pukui, Samuel H. Elbert & Esther T. Mookini eds., rev. ed. 1974).