

HAWAII '78: COLLECTIVE MEMORY AND THE UNTOLD LEGAL
HISTORY OF REPARATIVE ACTION FOR KĀNAKA MAOLI

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Abstract. Constructed from years of archival and legal research, and in-depth interviews, this Article unearths the story of Native Hawaiians who, tired of failed promises and hollow apologies, in 1978 capitalized on an indigenous cultural and political revival to change the law and secure reparative action. The Native Hawaiian community subsequently faced immediate backlash from politicians who weaponized sterile and racialized views of Hawai'i's indigenous people to create a memory of the past that upended those reparative initiatives. This Article is thus a legal history that, unlike any other, captures the messiness of politics and race relations in twentieth century Hawai'i. It contributes to the study of collective memory and demonstrates the constant negotiation of history, mobilization, and power that lawmakers wield to either advance or stymie justice for Native Hawaiians. The events recounted in this Article offer both hope and a cautionary tale for those seeking reparative action for historical wrongs.

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INTRODUCTION

Hawaii, despite the popular view that it is a progressive haven of racial harmony, has a rich yet devastating legal history. This history is epitomized by the American overthrow of the Kingdom of Hawaii in 1893 and subsequent annexation of the islands in 1898 against the express will of a vast majority of Kānaka Maoli (Native Hawaiians),¹ Hawaii's indigenous people.² For decades, scholars have argued that those in power often twist narratives of Hawaii's legal history to justify their legal or political decisions.³ As Professor Haunani-Kay Trask aptly observed, the version often told of Hawaii's history is “nothing more than a series of political myths created by foreigners and designed to disparage our people.”⁴ Due to these myths, for well over a century Native Hawaiians have coped with the harsh effects of colonization, and endured the pains of losing their government, the suppression of their culture and language, and the arduous—often frustrating—journey toward justice.⁵

Yet, in 1978, something truly unprecedented happened. Delegates of the State of Hawaii's 1978 constitutional convention proposed and the people of Hawaii ratified a constitutional amendment creating the Office of Hawaiian Affairs (“OHA”), an agency tasked solely with bettering the conditions of Native Hawaiians.⁶ This simple act represented a significant step toward repairing the historical wounds of Kānaka Maoli by providing a means to begin the process of reconciliation and reparations. The victory, however, was short-lived. Lawmakers over the next two years narrowed

¹ “Maoli” is defined as native, indigenous, aborigine, genuine. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 240 (rev. ed. 1986). “Kanaka maoli” is defined as a Hawaiian native. *Id.* “Kanaka” is the singular; “kānaka” is the plural. *Id.* at 127. In this Article, the terms “Kānaka Maoli,” “Hawaiian,” and “Native Hawaiian” (plural) are used interchangeably. Unlike how residents in California are described as Californians, “Hawaiian” has always been understood to refer to Hawaii's indigenous people. *See* J. KĒHAULANI KAUANUI, HAWAIIAN BLOOD COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENITY xii (2008).

² *See* Troy J.H. Andrade, *American Overthrow*, 22 HAW. BAR J. 4 (April 2018) [hereinafter *American Overthrow*] (describing the American government's support of the illegal overthrow of the Kingdom of Hawaii, the American government's subsequent annexation, and the Native Hawaiian resistance to these injustices).

³ *See, e.g.,* Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawaii's Plantations to Congress—Puerto Ricans' Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353, 359–60 (2011) (discussing the impact of collective memory on court decisions and how Hawaiian sugar cane plantation owners furthered a collective memory of racialization of Puerto Ricans); Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1771–72 (2000) (discussing the impact of collective memory on judicial decisions).

⁴ HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII 129 (University of Hawaii Press rev. ed. 1999).

⁵ *See* NATIVE HAWAIIANS STUDY COMM'N, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 28 (1983) (“[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.”).

⁶ While not perfect and not true decolonization, the creation of OHA represented a significant step on behalf of a colonizing government to repair historical wrongs with indigenous people. *See* Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1, 100 (2014) (“True decolonization entails the ability of the formerly colonized to exercise their right to self-determination and, thus, is a process that must be envisioned and implemented from the ground up. Colonial powers may withdraw, or negotiate alternate arrangements with the formerly colonized, but if they presume to dictate the terms of decolonization, the end result is simply a different variant of colonial domination.”).

the constitutional mandate and made it difficult for OHA to live up to its reparatory potential.⁷

How, despite decades of suppression and deception to enshrine “political myths”⁸ of Hawai‘i’s past that outright eliminated native resistance to the illegal changes to their land and government, did this reparative act and subsequent retrenchment happen? What can be gleaned about the impact of past events, particularly as they relate to a group’s memory, on the design and implementation of a constitutional or statutory provision? More broadly, how do those in power strategically “remember” and “forget” narratives to justify their political ends?

This Article interrogates the battle over collective memory—the knowledge about the past that is shared, mutually acknowledged, and reinforced⁹—that ensued between 1978 and 1980 with the creation of OHA. The success in altering the status quo for Native Hawaiians in 1978 rested on the shoulders of those constitutional convention delegates who reframed the sanitized master narrative of Hawai‘i’s past and crafted a new collective memory highlighting the injustices to Hawaiians. As Professor Susan Serrano emphasizes, “[w]ho tells the definitive history of group injustice—and how that history is framed—is vital to shaping a group’s narrative and public image.”¹⁰ More importantly, this reframed history determines “the power of justice claims or opposition to them.”¹¹ The question of how to achieve reparatory justice for Kānaka Maoli is, therefore, really a threshold battle over the collective memory of America’s settler colonial conquest in Hawai‘i. By linking collective memory with policy-making and legislation, this Article contributes to the well-developed, multidisciplinary body of research on the study of collective memory. The story of OHA’s creation offers an important case study to examine the strategic and selective reliance on collective memory in legal contexts. This Article shows how the framing of past events in connection with constitution-building and lawmaking could either support or undermine the legal bases for reparative action for Kānaka Maoli by perpetuating narratives that carried competing (in)justice claims.

Part I of this Article theorizes the relationship between history, law, and collective memory. Part II then demonstrates how the colonizer’s master narrative of Hawai‘i frames a first collective memory whose strategic purpose is to justify American control and power over the land, the government, and the people. Part III recounts a history of collective struggle throughout the 1970s and early 1980s to challenge that master narrative in pursuit of reparative justice for Kānaka Maoli. Section III.A foregrounds this investigation by describing how the shifting cultural and political landscape in 1970s Hawai‘i unsettled the foundations of the master narrative by providing the requisite “terrain of culture”¹² to frame a second collective memory: a “collective memory of

⁷ See discussion *infra* Section III.C.2 (discussing how the legislature ultimately passed legislation that failed to provide sufficient, funding, resources, and independence).

⁸ TRASK, *supra* note 4 (describing such “political myths” fabricated by foreigners to Hawai‘i across time).

⁹ See also Maurice Halbwachs, *From the Collective Memory*, in THEORIES OF MEMORY: A READER 143 (Michael Rossington & Anne Whitehead, eds., 2007) (“History can be represented as the universal memory of the human species. But there is no universal memory. Every collective memory requires the support of a group delimited in space and time.”).

¹⁰ Serrano, *supra* note 3, at 359 (emphasis omitted).

¹¹ 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).

¹² See Hom & Yamamoto, *supra* note 3, at 1765 (“[C]ontests 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.”) (emphasis omitted).

injustice.”¹³ As such, Section III.B weaves together in detail an often untold story of ordinary people—a former janitor and a recent law school graduate—who capitalized on the seismic shift in the cultural and political landscape to reframe the injustices against Kānaka Maoli and eventually succeed in obtaining reparative action. Section III.C then critiques the legislative backlash and politicking that occurred in the minority-led Hawai‘i legislature immediately after the creation of OHA to illuminate how “selective amnesia”¹⁴ worked to reconstruct yet a third framing of Hawai‘i’s collective memory. This third “local” collective memory weaponized the colonizer-colonized dynamic of the master narrative to deflect blame for Hawaiian injustices solely to a white colonizer and away from “local” non-white settler communities. This Article, therefore, shows how collective memory in post-colonial contexts can be contested even between subordinated groups, thereby demonstrating the complex ways collective memory is deployed in struggles for power.

Finally, this Article concludes by drawing upon the experiences of the late-1970s to suggest strategies to reassess collective memory and the potential for reparative action under Hawai‘i’s current socio-political tensions. Indeed, current events in Hawai‘i vivify the continued Native Hawaiian quest for justice for historical harms and have catalyzed resistance reminiscent of the 1970s.¹⁵ This untold story of that era of change provides insight and a cautionary tale for those seeking justice today. As Kānaka Maoli believe, “O ke au i hala ka lamakū, ke ala i ke kupukupu . . . The past is the beacon that will guide us into the future.”¹⁶

I. HISTORY, LAW, AND THE COLLECTIVE MEMORY OF INJUSTICE

History is always inseparable from the law.¹⁷ Not only do legislators and politicians create laws that respond to historical inequities,¹⁸ but for jurists, lawyers, legal scholars, and politicians, history is essential to “better understand the origin of rules” to make “present day arguments as to why these rules should be changed.”¹⁹ In the context of the American judicial system,

¹³ *Id.* at 1764 (describing “group memory of injustice” as “characterized by active, collective conscious construction of the past” that “emerges from interactions among people, institutions, media, and other cultural forms” in recalling past events).

¹⁴ See Margit Cohn, *When, and Where, Does History Begin? Collective Memory, Selective Amnesia, and the Treatment of Asylum Seekers in Israel*, 2017 U. ILL. L. REV. 563, 601 (2017) (referring to selective amnesia as the “simultaneous remembering and forgetting of a collective memory by a single person, group, or society based on the context at hand”).

¹⁵ *Id.*

¹⁶ MARY KAWENA PUKU‘I, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS (1983); see also Kau‘i P. Goodhue, *We Are Who We Were: From Resistance to Affirmation*, 1 ŌIWI: A NATIVE HAWAIIAN J. 36, 36 (1998) (“O ke au i hala ka lamakū, ke ala i ke kupukupu, goes a Hawaiian saying. The past is the beacon that will guide us into the future.”).

¹⁷ See Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court’s Narrative of Hawai‘i’s Past*, 39 U. HAW. L. REV. 631, 634 (2017) [hereinafter *(Re)Righting History*].

¹⁸ See, e.g., Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 904 (1988) (apologizing for the “evacuation, relocation, and internment” of those of Japanese ancestry during World War II and making restitution payments to all internees); Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (apologizing to Native Hawaiians for American involvement in the overthrow of the Kingdom of Hawai‘i and committing the federal government to reconciliation efforts).

¹⁹ Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896-1900*, 78 DENV. U. L. REV. 921, 940 (2001).

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. 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.²⁰

When deployed to change the law, history is a weapon in a lawyer’s arsenal to critique legal principles; a lawyer can argue that a particular decision was historically wrong and therefore push for its demise. This broad use of history, however, misses what Professor Eric K. Yamamoto argues is the central struggle in battles over resolving past societal harms.²¹ The traditional or “pure” historical approach ignores the “archives of mind, spirit, and culture—then and now.”²² As Yamamoto describes, “[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.”²³ In this light, understanding the theoretical origins of collective memory and its potential power as a tool for reparative change sets a foundation to decipher the constitutional and legislative changes that transpired in Hawai‘i from 1978 to 1980.

A. Origins of Collective Memory

Yamamoto’s work on collective memory builds upon sociological, psychoanalytic, and critical historical literatures analyzing the importance of group memory. The sociologist and philosopher Émile Durkheim argued that societies adopt “collective representations.”²⁴ These

²⁰ See *(Re)Righting History*, *supra* note 17, at 634 (footnotes and citations omitted).

²¹ See Hom & Yamamoto, *supra* note 3, at 1764 (“The struggle over recognition of competing collective memories is therefore often a struggle over the supremacy of world views, of colliding ideologies.”).

²² *Id.*

²³ *Id.* at 1757; see also Halbwachs, *supra* note 9, at 139 (“Undoubtedly, history is a collection of the most notable facts in the memory of man. But past events read about in books and taught and learned in schools are selected, combined, and evaluated in accord with necessities and rules not imposed on the groups that had through time guarded them as a living trust.”).

²⁴ ÉMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 330 (Carol Cosman trans., 2008) (“[C]oncepts are collective representations. If they are common to a whole social group, this is not because they represent a simple average among corresponding individual representations; for then they would be poorer than these (individual representations) in intellectual content, while in reality they are rich with a knowledge that surpasses that of the average individual. They are not abstractions that would have reality only in particular minds but representations every bit as concrete as those that the individual can construct from his personal surroundings: they correspond to the way in which that special entity, society, thinks about the things from its own experience.”).

collective representations are meanings or symbols that become associated with a group's identity.²⁵ These symbols, he believed, were collectively conceived by and belonging to the group.²⁶ In his 1912 book, *Elementary Forms of the Religious Life*, Durkheim highlighted the power of group—as opposed to individual—memory.²⁷ Maurice Halbwachs, a student of Durkheim, drew a connection between group memory of the past and that memory's power in the present,²⁸ coining the term “collective memory” to “emphasize the way even individual memories are formed socially, through families, religious communities, and even social classes.”²⁹ He described how memories are “linked to ideas we share with many others, to people, groups, places, dates, words and linguistic forms, theories and ideas with the whole material and moral framework of the society of which we are part.”³⁰ These ideas in turn create “collectively shared representations of the past.”³¹ For Halbwachs, the past we know “is always constructed” and the “present-day interests of social actors profoundly affect our understanding of the past.”³² Halbwachs’ “presentist” claim is, therefore, that “most groups . . . engrave their form in some way upon the soil” and retrieve those collective remembrances at a subsequent point in time.³³

The works of Durkheim and Halbwachs lay the foundation for the multi-disciplinary research on the study of collective memory.³⁴ The sociologist and historian Jeffrey Olick categorized

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 329–31.

²⁸ Peter J. Verovšek, *Collective Memory, Politics, and the Influence of the Past: The Politics of Memory as a Research Paradigm*, 4 *POLITICS, GROUPS, AND IDENTITIES* 529, (2016).

²⁹ Ariela Gross, *The Constitution of History and Memory*, in *LAW AND THE HUMANITIES: AN INTRODUCTION* 418 (Austin Sara, et al, eds., 2010); *see also* Halbwachs, *supra* note 9 (“History can be represented as the universal memory of the human species. But there is no universal memory. Every collective memory requires the support of a group delimited in space and time.”).

³⁰ Melody Kapilialoha MacKenzie & D. Kapua’ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai’i’s Crown Lands Trust in Response to Judge James S. Burns*, 39 *U. HAW. L. REV.* 481, 487–88 (2017) (citation omitted); *see also* Pierre Nora, *Between Memory and History: Les Lieux De Mémoire*, in *THEORIES OF MEMORY: A READER* 145–46 (Michael Rossington & Anne Whitehead, eds., 2007) (“Memory is life, borne by living societies founded in its name. It remains in permanent evolution, open to the dialectic of remembering and forgetting, unconscious of its successive deformations, vulnerable to manipulation and appropriation, susceptible to being long dormant and periodically revived. . . . Memory is a perpetually actual phenomenon, a bond tying us to the eternal present; history is a representation of the past. Memory, insofar as it is affective and magical, only accommodates those facts that suit it; it nourishes recollections that may be out of focus or telescopic, global or detached, particular or symbolic—responsive to each avenue of conveyance or phenomenal screen, to every censorship or projection.”).

³¹ Gross, *supra* note 29, at 418 (quoting Wulf Kansteiner, *Finding Meaning in Memory: A Methodological Critique of Collective Memory Studies*, 41 *HISTORY & THEORY* 179, 181 (2002)).

³² Joachim J. Savelsberg & Ryan D. King, *Institutionalizing Collective Memories of Hate: Law and Law Enforcement in Germany and the United States*, 111 *AM. J. SOC.* 579, 582 (2005).

³³ Cohn, *supra* note 14, at 569 (citation omitted).

³⁴ *See* Gross, *supra* note 29, at 417-19 (noting the burgeoning field and ascension of memory studies in the humanities attributable to the starting point of Halbwachs’ definition of collective memory, work of Pierre Nora, the rise of psychoanalytic theory to the study of the past, nationalist history, public “ferment” stirred trials and debates addressing the aftermath of the Holocaust, and the “important tradition of tracing the relationship between history and memory in Jewish history.”)

the various fields of collective memory research into three distinct areas captured by the following research questions: “what do we do *with* the past; what does the past do *for* us; and what does the past do *to* us.”³⁵ As Professor Margit Cohn describes:

Under this taxonomy, the first question, which can be rephrased as “how is the past used,” has inspired studies of carriers of collective memory, that is, the agents and vehicles that contribute to its evolution. These are concerned with social and cultural constructs that are either culturally or socially emergent (or both), such as commemoration practices, cultural artifacts, museums, and, in Pierre Nora’s words, “realms of memory.” Presentists and those concerned with strategic uses of past memories, offer distinct responses to the second question. The third question, in Olick’s view, is central to those who focus on trauma and its impact on collective identity.³⁶

Collective memory work in the legal field focuses primarily on the role of the courts. Yamamoto, for example, critiques *Rice v. Cayetano* for framing a narrative of Hawaiian history that altered collective memory to deny reparative action for Native Hawaiians.³⁷ Similarly, in the context of the denial of the right to vote in presidential elections for Puerto Ricans, Serrano uses collective memory theory to assess the First Circuit’s decision in *Igartúa de la Rosa v. United States*.³⁸ Some collective memory work has focused on quasi-judicial bodies, such as truth commissions, as carriers of collective memory in response to a particular traumatic event.³⁹ Such legal scholarship centers collective memory within the context of transitional justice—that is, “legal responses to regime change or democratization in formerly unjust societies.”⁴⁰

Other legal scholarship, although not as robust, focuses on collective memory’s impact on the shaping of law and policies.⁴¹ Deliberative bodies, such as constitutional conventions or legislatures, are, like judicial bodies, apt sites for the framing or reframing of a collective memory. Indeed, constitutions and statutes often contain explicit references to the past. More fundamentally,

³⁵ See Cohn, *supra* note 14, at 570 (citing Jeffrey K. Olick, *From Usable Pasts to the Return of the Repressed*, 9 HEDGEHOG REV. 19, 20-21 (2007)).

³⁶ *Id.* at 570–71.

³⁷ See Hom & Yamamoto, *supra* note 3, at 1766-77.

³⁸ See Serrano, *supra* note 3, at 408-28. More recently, Professors Melody Kapilialoha MacKenzie and D. Kapua’ala Sproat used the collective memory framework to critique a historically flawed law review article written by a highly respected jurist about Native Hawaiian claims to lands. See MacKenzie & Sproat, *supra* note 30, at 499-533.

³⁹ See Gross, *supra* note 29, at 431 (analyzing a range of scholar’s arguments for the merits and limits of using truth and reconciliation commissions to promote restorative justice).

⁴⁰ *See id.* at 423.

⁴¹ See Cohn, *supra* note 14, at 565 (“Constitutional-law scholarship can be especially enriched by this body of research: constitutions are affected by the past as much as they are the result of the needs of the present.”); see also Lu’ukia Nakanelua, Comment, *Nā Mō’o o Kō’olan: The Water Guardians of Kō’olan Weaving and Wielding Collective Memory in the War for East Maui Water*, 41 U. HAW. L. REV. 189, 227-39 (2018) (interrogating the battle over collective memory in relation to passage of a bill regarding access to water).

constitutions both “respond to past structures and are impacted by them.”⁴² The creation, nature, and evolving meanings of constitutional and statutory provisions beyond mere text necessarily require a socio-historic analysis.⁴³ For example, it would be disingenuous to assert that interpreting the U.S. Constitution meant divorcing critiques of the framers’ intent or the Federalist Papers, and equally disingenuous to interpret those same provisions without recognizing the context of African slavery and the dispossession and genocide of Native America.⁴⁴ Such decontextualization undermines the robust and multi-layered facets of lawmaking and the law’s impact on justice claims.

B. Power of a Collective Memory of Injustice

In the legal context, to frame these collective memories, “[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).”⁴⁵ A decision by a policymaker or judge to select a particular history to tell “is determined by a sifting of the relevant from the irrelevant—a process itself affected by the decision[]maker’s cultural framework.”⁴⁶ This cultural framework is often dictated by the decisionmaker’s “social perceptions, beliefs, and practices that form the lens through which . . . [they] see[] and evaluate[] both daily happenings and society as a whole.”⁴⁷ Other institutions, such as scholarship and mass media, necessarily mediate this framework before they affect collective memories.

Discussions of remembering or ascertaining a group memory implies an equally active process of forgetting. This concept of forgetting, referred to in the literature as “selective amnesia,” developed in tandem with the study of memory and highlights the central battle over the construction of the past.⁴⁸ Within the context of legal redress concerning slavery, for example, Professor Lawrie Balfour draws upon the writings of W.E.B. Du Bois to suggest that a “willful national amnesia prevented black citizens from enjoying in fact the freedom and equality they were guaranteed by

⁴² See Cohn, *supra* note 14, at 565.

⁴³ *Id.* at 568.

⁴⁴ Similarly, the collective memory of *Brown v. Board of Education* as the harbinger of racial equality in the United States erases the limited effect that decision had on actual equality, which did not truly manifest until passage of the Civil Rights Act of 1964. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN 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”). Within the context of public school desegregation, Rosenberg asserts, “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).

⁴⁵ See Hom & Yamamoto, *supra* note 3, at 1758.

⁴⁶ See Yamamoto & Betts, *supra* note 11, at 565.

⁴⁷ *Id.* at 565; see also Serrano, *supra* note 3, at 364 (describing legislators as “engage[d] dialectically with other dominant political institutions, with [people’s] preexisting cultural assumptions, and [with] other sources of cultural authority”).

⁴⁸ See Cohn, *supra* note 14, at 571.

law.⁴⁹ Balfour claims that the suppression of a critical reflection of slavery in the nation's collective memory impedes legal redress through reparations for the legacy of that slavery.⁵⁰ Thus, decisionmakers have the “narrative power to reframe the past so as to include certain events and people, exclude others, and redefine the meaning of landscape accordingly.”⁵¹

These collective memories are “linked to 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.”⁵² These memories, unlike reciting “pure” history,⁵³ are “constructed and continually reconstructed” as individuals grow and their ideologies and opinions change.⁵⁴ These group memories thereby “shape the way in which racial wounds are aggravated or salved,”⁵⁵ because “[h]ow a community frames past events and connects them to current conditions often determines the power of justice claims or opposition to them.”⁵⁶ Importantly, as Professor Martha Minow recognizes, although collective memory is constructed, external forces such as culture, politics, and economics limit the control over framing that a person or group can have in reconstructing that memory.⁵⁷

For marginalized communities, reparative action occurs when those in power frame the past as a collective memory *of injustice*—that is, a framing in which the historic injustice against that community is highlighted and centered as the collective memory to be inscribed. An analysis of a historical event under the collective memory of injustice framework reconstructs the event, “thereby situat[ing] a group in relation to others in a power hierarchy.”⁵⁸ To this end, Yamamoto articulates five strategic points for critiquing past harms.⁵⁹ First, lawmakers must “at the outset critically engage

⁴⁹ Lawrie Balfour, *Unreconstructed Democracy: W.E.B. Du Bois and the Case for Reparations*, 97 AM. POLIT. SCI. REV. 33, 33 (2003) (synthesizing Du Bois's scholarship, arguing that “the unwillingness to confront the past is connected to the failures of formal equality as an antidote to the poison of racial injustice,” and concluding that the argument for reparations for slavery implicates “a structure of memory and critique” whereby legal redress for slavery via reparations is “centrally a story of memory's suppression”).

⁵⁰ *Id.* at 33.

⁵¹ William Cronon, *A Place for Stories: Nature, History, and Narrative*, 78 J. AM. HIST. 1347, 1364 (1992). Research suggests that memory also serves a unique role as a form of identity creation that is necessary for community and advocacy. *See* Savelsberg & King, *supra* note 32, at 584 (“Collective memory and commemorations do not only affect future commemorations but also events in which decisions are debated and made on laws, enforcement organizations, and control actions.”).

⁵² *See* MacKenzie & Sproat, *supra* note 30, at 488.

⁵³ Michal Shur-Ofry & Guy Pessach, *Robotic Collective Memory*, 97 WASH U. L. REV. 975, 980 (2020) (“Although often relying on historical accounts, collective memory is not synonymous with history. Since it is a product of social construct, it has subjective and normative dimensions, and can more easily encompass a multiplicity of voices and meanings.”).

⁵⁴ *See* Hom & Yamamoto, *supra* note 3, at 1760.

⁵⁵ *Id.* at 1757.

⁵⁶ *See* Yamamoto & Betts, *supra* note 11, at 558.

⁵⁷ *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 118–20 (1998) (describing how political leaders oscillate between remembering and forgetting memories to change the public's view of events or societies).

⁵⁸ *See* Hom & Yamamoto, *supra* note 3, at 1758.

⁵⁹ *Id.* at 1764–65.

the dynamics of group memory of injustice.”⁶⁰ These dynamics, including the ways decisionmakers filter and interpret images, ideas, and recollections “to present particular understandings of the past,” transcend physical boundaries and intragroup affinities.⁶¹ Second, such group memory of injustice is “characterized by the active, collective construction of the past.”⁶² Collective memory is, therefore, not a simple static recounting of the past, but is instead a process altered by present-day conditions, such as interactions among people, institutions, media, scholarship, and other cultural forms.⁶³ Third, collective memory is “always hotly contested” because any action on historical claims of injustice “turn[] on which memories are acknowledged by decision-makers.”⁶⁴ These first three strategic points involve an assessment of the power of legal decisionmakers, such as judges, politicians, or delegates at a constitutional convention, their views of the collective memory as shaped by their own present-day sifting of the relevant and irrelevant, and their willingness to use a collective memory of injustice to make legal change. Without a seat at the table or allies willing to advocate for a new collective memory, marginalized communities face an uphill struggle to correct historical injustices. It is, therefore, important to have the right people strategically placed in decision-making positions to advocate a collective memory of injustice.

Under Yamamoto’s fourth strategic point, “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.”⁶⁵ Those in power interpret popular-cultural images and day to day cultural practices to further frame the collective memory.⁶⁶ Yamamoto’s final point emphasizes the importance of working with “legal process and rights claims” to “achieve the specific legal result *and* to contribute to construction of social memory as a political tool.”⁶⁷ These two points highlight that the critical work of framing a collective memory of injustice must occur within a context conducive to making those changes. Deeply held collective memories cannot be changed within a vacuum; change must be made within the context of mass mobilization of the community to support justice where justice has been readily denied.⁶⁸ There is, therefore, a right time for advocates to push

⁶⁰ *Id.* at 1764.

⁶¹ See MacKenzie & Sproat, *supra* note 30, at 488; see also Shur-Ofry & Pessach, *supra* note 53, at 981 (“Relatedly, multiple sources affect the formation of collective memory. A non-exhaustive list includes historical and documentary materials, formal and informal studies, media coverage, visits to physical sites, as well as community rituals and witness testimonies.”).

⁶² See Hom & Yamamoto, *supra* note 3, at 1764.

⁶³ *Id.* at 1765 (“Indeed, struggles over memory are often struggles between colliding ideologies, or vastly differing world views.”).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* (emphasis added).

⁶⁸ A contemporary example is apt. Despite years of attempts to have Mississippi remove the Confederate flag from its state flag, only in 2020 did the state pass legislation to redesign the flag. Rick Rojas, *Mississippi Lawmakers Vote to Retire State Flag Rooted in the Confederacy*, N.Y. TIMES, (June 28, 2020), <https://www.nytimes.com/2020/06/28/us/mississippi-flag-confederacy.html> [https://perma.cc/WZZ7-M94E]. This legislation came in response to the significant mobilization across the United States that occurred after the murders of George Floyd, Breonna Taylor, and Ahmaud Arbery, and the calls for the removal of memorials and symbols of the Confederacy. See Giacomo Bologna, *Mississippi Voted to Keep its State Flag in 2001. A*

for a collective memory of injustice.

These insights help to tease out and understand particular moments. They also underscore the power of collective memory to advance or undermine claims for historical injustices. Thus, the key to restorative justice and successful inscription of a collective memory of injustice is to have the right people, at the right time, with the right tools.⁶⁹

The following case study analyzes the mobilized resistance and challenges to the master narrative at the 1978 Hawai‘i constitutional convention and subsequent legislative sessions. It illuminates Yamamoto’s theory of the battles over collective memory of injustice and illustrates the significance of those battles to addressing justice claims in lawmaking.

II. THE COLONIZER’S MEMORY: CONSTRUCTING A MASTER NARRATIVE OF HAWAII

To grasp how lawmakers reframed a collective memory of injustice in 1978, it is important first to understand the colonizer’s story of Hawai‘i (referred to here as the master narrative) and its themes. Unsurprisingly, this master narrative—like many master narratives that suppress indigenous communities—is a collective memory that erases native resistance, legitimizes land seizure, and situates power with non-natives.⁷⁰

There are three starting points for the master narrative—all of which center the beginning of Hawai‘i in America or Europe. For some, Hawai‘i’s narrative begins on December 7, 1941, that “day of infamy” when the Japanese empire attacked American military installations at Pearl Harbor and thrust America into World War II.⁷¹ Hawai‘i’s story for others begins on August 21, 1959, the day Hawai‘i became the fiftieth state. But, for most Western historians or social scientists, Hawai‘i begins “[a]t dawn on January 18, 1778,” when English Captain James Cook “discovers” the islands and encounters the “wildness” of the first Kānaka Maoli that greeted him.⁷² Under the master narrative,

Lot has Changed Since Then, CLARION LEDGER, (June 8, 2020), <https://www.clarionledger.com/story/news/politics/2020/06/08/mississippi-flag-confederate-emblem-time-reconsider-protests-george-floyd/5318216002/> [<https://perma.cc/Q85P-Y6TZ>] (noting the activism following the death of George Floyd as a precursor for the renewed conversation about the Mississippi flag).

⁶⁹ See MINOW, *supra* note 57, at 119 (“[M]emory becomes a political tool . . .”).

⁷⁰ LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* 33 (1999) (“Our orientation to the world was already being redefined as we were being excluded systematically from the writing of the history of our own lands.”). These one-sided narratives erase native resistance to assure colonizing powers that they are welcomed as heroes. See *id.* (“We have often allowed our ‘histories’ to be told and have then become outsiders as we heard them being retold.”); NOENOE K. SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM* 2-3 (2004).

⁷¹ TOM COFFMAN, *NATION WITHIN: THE STORY OF AMERICA’S ANNEXATION OF THE NATION OF HAWAII* xiv (1999) (noting that “the effective definition of history had been reduced to a few years” and that December 7, 1941, was “practically the beginning of time, and anything that might have happened before that was prehistory”).

⁷² GAVAN DAWS, *SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS* 1 (1974); LAWRENCE FUCHS, *HAWAII PONO: A SOCIAL HISTORY* 3 (1961) (“In 1778, Hawaii had been discovered by the English explorer Captain James Cook . . .”); JAMES COOK, *THE EXPLORATIONS OF CAPTAIN JAMES COOK IN THE PACIFIC 1776-1780*, 216–17 (A. Greenfell Price, ed. 1967) (“[T]heir eyes were continually flying from object to object, the wildness of [their] looks and actions fully express[ed] their surprise and astonishment. . .”).

and given the “feudal” land system governed by warring and despotic rulers, life for the indigenous people was “not altogether idyllic,” as they simply found “beauty and pleasure in their island existence”⁷³ The master narrative often discusses Kamehameha, a “far from handsome” man who had a “savage” looking face, who, with the assistance of Western weaponry, unified the Hawaiian people under his rule.⁷⁴ Kamehameha’s descendants abolished the alleged old and regressive kapu system, established the Kingdom of Hawai‘i, and adopted a constitutional monarchical system of government.⁷⁵

The colonizer’s story continues in 1820 when New England missionaries arrived in Hawai‘i and “sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices.”⁷⁶ According to Gavan Daws—whose 1968 book, *Shoal of Times: A History of the Hawaiian Islands*, is often credited as the most popular and most-often cited modern treatment of Hawai‘i’s history⁷⁷—“Hawaiians, of course, were savages as well as sinner,” yet “the Gospel would be the civilizing instrument, and Hawaiian civilization would be a Christian civilization.”⁷⁸ Moreover, Hawaiians were portrayed as lazy, lewd, and childish, with an “appearance of destitution, degradation, and barbarism.”⁷⁹ Missionaries began converting the nobility and became involved in politics and lawmaking.⁸⁰ According to the master narrative, the values and priorities of the missionaries and other Europeans heavily influenced Hawaiian chiefs to adopt Western notions of governance and land tenure.⁸¹ In 1850, in a process the master narrative refers to as the “Great” Māhele, Kingdom leaders privatized all lands.⁸² Hawaiian chiefs squandered land and resources and left nothing for the Native Hawaiian people, who were succumbing to foreign disease and famine. Indeed, Western historians’ estimates of the decimation place the population decline from between 300,000 and 400,000 Native Hawaiians in 1778 to approximately 57,000 in 1866.⁸³

⁷³ See *Rice v. Cayetano*, 528 U.S. 495, 500–01 (2000) (describing a feudal land system where, “[i]n Cook’s time the islands were ruled by four different kings, and intra-Hawaiian wars could inflict great loss and suffering. Kings or principal chieftains, as well as high priests, could order the death or sacrifice of any subject”).

⁷⁴ See DAWS, *supra* note 72, at 32.

⁷⁵ See *id.* at 66, 125.

⁷⁶ *Rice*, 528 U.S. at 501.

⁷⁷ See, e.g., *Rice*, 528 U.S. at 500 (citing G. DAWS, *SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS* xii–xiii (1968)); *Doe v. Kamehameha Schools*, 295 F. Supp. 2d 1141, 1148 (D. Haw. 2003) (same).

⁷⁸ See DAWS, *supra* note 72, at 62.

⁷⁹ *Id.* at 64.

⁸⁰ *Id.* at 66–67, 124–28.

⁸¹ See DAWS, *supra* note 72, at 124–28. This view erases agency of Kānaka Maoli leaders, who actively merged Western governance structures with Hawaiian customs and within a Hawaiian worldview. See KAMANAMAİKALANI BEAMER, *NO MĀKOU KA MANA: LIBERATING THE NATION* 12 (2014).

⁸² See DAWS, *supra* note 72, at 124–28.

⁸³ DAVID E. STANNARD, *BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT* xvi, 3–5 (1989); see also 152 Cong. Rec. S. 5,558 (daily ed. June 7, 2006) (statement of Sen. Daniel Kahikina Akaka) (stating during a motion to proceed for the Native Hawaiian Government Reorganization Act of 2005 that “[b]y 1866, only 57,000 Native Hawaiians remained from the basically stable pre-1778 population of at least 300,000”); David E. Stannard, *Disease and Infertility: A New Look at the Demographic Collapse of Native Populations in the Wake of Western Contact*, 24 J. AM. STUDIES 325 (1990) (describing the ideological motivations for Western population estimates).

In 1893, in what many adherents of the master narrative frame as the “Hawaiian Revolution,”⁸⁴ Kingdom citizens closely allied with American business interests “replaced” the Native Hawaiian sovereign and her government with a new Provisional Government that would immediately seek annexation by the United States.⁸⁵ In his memoirs, lead “revolutionist” Lorrin A. Thurston dedicated his recounting of the “Revolution” to “the brave and faithful men who, without expectation of reward, undertook and accomplished a tedious and dangerous task: *the rescue of a community from arbitrary and unjust government and oppression . . .*”⁸⁶ The master narrative frames Queen Lili‘uokalani, the “replaced” sovereign, as lazy, autocratic, inefficient, corrupt, and undependable,⁸⁷ therefore justifying the overthrow of the Kingdom of Hawai‘i as an attempt to replace the tyranny and greed of monarchical control with a democratic form of government representative of and welcomed by “the people.”⁸⁸

With annexation to the United States at the fore of their minds, the revolutionists dubbed themselves the Provisional Government and, after holding a constitutional convention, created the Republic of Hawai‘i in 1894.⁸⁹ Subsequently, in 1898, President William McKinley signed a Joint Resolution that annexed Hawai‘i to the United States.⁹⁰ Hawai‘i then officially became United States

⁸⁴ See LORRIN A. THURSTON, MEMOIRS OF THE HAWAIIAN REVOLUTION 1 (Andrew Farrell, ed. 1936); SANFORD B. DOLE, MEMOIRS OF THE HAWAIIAN REVOLUTION 1 (Andres Farrell, ed. 1936); see also DAWS, *supra* note 72, at 277 (“The Hawaiian revolution had come too soon or too late, and much as Harrison sympathized with its aims there was little he could do for Thurston and his colleagues.”); FUCHS, *supra* note 72, at 31 (“The Committee of Safety, which was to spearhead the revolution, was led by Thurston, advised by Stevens, and dignified through the support of one of the great names in Hawaiian history, Sanford Ballard Dole.”).

⁸⁵ Rice, 528 U.S. at 505. The master narrative often downplays American involvement in the overthrow and the pivotal role played by United States diplomat John L. Stevens and the U.S. Marines. See *American Overthrow*, *supra* note 2, at 8 (“American Minister Stevens also took the opportunity to send a letter marked ‘Private’ on official U.S. Legation letterhead to Justice Sanford B. Dole, in which he wrote: ‘I would advise not to make known of *my recognition* of the de facto Provisional Government until said Government is in possession of the Police Station.’”).

⁸⁶ THURSTON, *supra* note 84, at xi (emphasis added). But see *American Overthrow*, *supra* note 2, at 4-11 (detailing the plotting and preordained American support of the overthrow of the Kingdom).

⁸⁷ See SILVA, *supra* note 70, at 165-67; WILLIAM ADAM RUSS, JR., THE HAWAIIAN REVOLUTION (1893-1894) 29 (1959) (“Lili‘uokalani was not a good Queen. That is certain.”).

⁸⁸ See, e.g., THURSTON TWIGG-SMITH, HAWAIIAN SOVEREIGNTY: DO THE FACTS REALLY MATTER? 86-87 (1998) (“Revolutionists believed the people of Hawai‘i would support them, as popular opinion in America and France had supported those earlier revolutions. . . . Why was there no mass uprising in Hawai‘i against the Revolution? In part, because in the opinions of Native and Caucasian leaders expressed in 1898, the Revolution of 1893 and the subsequent Annexation of Hawai‘i by the United States were the best things that could have happened to the people of these Islands at that point in history.”); THURSTON, *supra* note 84, at 153 (describing the institution of the Bayonet Constitution upon Lili‘uokalani’s brother as “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”).

⁸⁹ Sanford B. Dole, a lead conspirator in the overthrow and leader of the Provisional Government, drafted the 1894 constitution of the Republic of Hawai‘i. See Alfred L. Castle, *Advice for Hawaii: The Dole-Burgess Letters*, 15 HAWAIIAN J. OF HISTORY 24, 29 (1981).

⁹⁰ The Western historians’ narratives erase the considerable resistance to annexation plans and the two failed attempts to annex Hawai‘i by treaty. See Williamson B.C. Chang, *Darkness Over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL’Y J. 70, 71-75 (2015) (questioning the validity of Hawai‘i’s annexation). Importantly, the

Territory in 1900.⁹¹ The master narrative then recognizes that during the territorial period, White plantation owners and businessmen who led the 1893 “Revolution” and the push for annexation, consolidated political and economic control of the territorial government.⁹² The oligarchy that they created thrived because of the subjugated non-White immigrants—Japanese, Chinese, Portuguese, Okinawan, Korean, Puerto Rican, and Filipino—who worked in the bustling plantations under harsh labor conditions.⁹³

Eventually, these “immigrant” communities unite and mobilize politically in resistance to the concentrated power of the White oligarchy, remaking Hawai‘i as a “melting pot.”⁹⁴ As these struggles develop, Hawai‘i entered the global arena after the 1941 Japanese bombing of Pearl Harbor. The government thereafter instituted martial law and, while the federal government incarcerated those of Japanese ancestry – including American citizens, in concentration camps – most Japanese Americans in Hawai‘i did not face a similar fate.⁹⁵ The master narrative instead highlights stories of the heroism and patriotism of Japanese-American soldiers of the famed and highly decorated 100th Infantry Battalion and 442nd Regimental Combat Team, who, despite facing discrimination, returned to Hawai‘i after fighting deadly battles for democracy overseas.⁹⁶ The “triumphant” return of the Nisei soldiers and the unifying force of the labor movement combined to reach a high point in 1954 when the Democratic party seized control of the Territorial Legislature through the ballot box.⁹⁷ In 1959, the multiethnic people of Hawai‘i resoundingly supported statehood, and with America’s permission, Hawai‘i became the fiftieth state.⁹⁸

resistance against annexation was readily available in the Hawaiian language, a resource Western historians did not, and in some cases refused, to consider.

⁹¹ Act of Apr. 30, 1900, Pub. L. No. 56-339, § 2, 3 Stat. 141, 141.

⁹² See, e.g., Castle, *supra* note 89 (describing how under the 1894 constitution, lead conspirator of the 1893 “Revolution,” Sanford B. Dole, implemented substantial property qualifications, voting eligibility tests, and a requirement that all office holders take an oath to the new Republic). Dole further disenfranchised Kānaka Maoli and effectuated a political system that legitimized the theft of Hawaiian sovereignty.

⁹³ See Laura Edles, *Rethinking ‘Race’, ‘Ethnicity’ and ‘Culture’: Is Hawai‘i the ‘Model Minority’ State?*, 27 ETHNIC AND RACIAL STUDIES 37, 51-52 (discussing the ways white plantation and business owners exploited laborers of varying ethnic and racial identities with particularly harsh treatment of Chinese and Japanese laborers as well as Native Hawaiians).

⁹⁴ See *id.* at 40 (explaining how Hawai‘i is often discussed as a “melting pot” while critiquing how this conception glosses over the history of violent American colonialism and “complex workings of racialization”).

⁹⁵ See HARRY N. SCHEIBER & JANE L. SCHEIBER, *BAYONETS IN PARADISE: MARTIAL LAW IN HAWAII DURING WORLD WAR II* (2016).

⁹⁶ See DAWES, *supra* note 72, at 383.

⁹⁷ TOM COFFMAN, *THE ISLAND EDGE OF AMERICA: A POLITICAL HISTORY OF HAWAII 151–54* (2003) [hereinafter *ISLAND EDGE OF AMERICA*]

⁹⁸ Western historians parade the vote in support of statehood as a sign that Native Hawaiians willingly accepted statehood and thereby renounced claim to a restored independent nation. See, e.g., TWIGG-SMITH, *supra* note 88, at 130 (noting that that plebiscite taken during statehood “showed more than 90 percent of Hawaii voters, Native Hawaiians and otherwise, in favor of the [statehood] relationship with America”). The vote for statehood, however, was deficient because: (1) the 1959 plebiscite did not include an option for “independence,” which should have been afforded voters under international law, see G.A. Res. 742 (VIII), at 21–22 (Nov. 27, 1953) (outlining factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government, November 27, 1953, item 33); and (2) the 1959 plebiscite vote improperly included settler populations. See S. James Anaya, *The Native Hawaiian People*

The master narrative of Hawai'i thus describes a progression of political power from an uncivilized society in 1778, to a greedy and inefficient Kingdom, to a series of temporary governments, to the democratic and free fiftieth State in 1959. The arc of this nearly 200-year narrative moves the reader from chaos and violence to stability and peace. In this telling, Hawai'i represents the American Dream, where all people—whether “settler” or “immigrant”⁹⁹—can, through hard work, seize control of their destiny—and the Hawaiian islands.¹⁰⁰ As Lawrence Fuchs wrote in his 1961 book *Hawaii Pono: A Social History*:

Hawaii illustrates the nation's revolutionary message of equality of opportunity for all, regardless of background, color or religion. This is the promise of Hawaii, a promise for the entire nation and, indeed, the world, that peoples of different races and creeds can live together, enriching each other, in harmony *and* democracy.¹⁰¹

In this master narrative, the colonizer racializes Kānaka Maoli as undeserving and unable to govern and make productive their land.¹⁰² Due in significant part to an unwillingness to engage with the rich and voluminous materials published in the Hawaiian language,¹⁰³ the master narrative downplays the story of Americanization and instead portrays Hawaiians as passive and often willing contributors to their own displacement.¹⁰⁴ Fundamentally, the master narrative sidelines grievances

and International Human Rights: Toward a Remedy for Past and Continuing Wrongs, 28 GA. L. REV. 309, 334 (1994) (arguing that the “plebiscite procedures allowed the majority of settler populations to overpower the voice of the Native Hawaiian people who were uniquely interested in a Hawaii reconstituted in accordance with self-determination values”).

⁹⁹ See Saito, *supra* note 6, at 28-29 (describing a triangulated analysis, which eliminates the settler-indigenous binary by distinguishing “migrants who are not intended to become part of the settler class from both settlers and Indigenous peoples”).

¹⁰⁰ See discussion *infra* Section III.C.2 (discussing settler colonialism and the myth of “locals” in Hawai'i).

¹⁰¹ See FUCHS, *supra* note 72, at 449.

¹⁰² See discussion *infra* Section III.C.1 (discussing the racialization of Native Hawaiians); see also ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 69-76 (1965) (describing the colonizer's use of racism); Susan K. Serrano, *Rethinking Race for Strict Scrutiny Purposes, Yniguez and the Racialization of English Only*, 39 U. HAW. L. REV. 221, 225 (1997) (“Racial formation is a sociohistorical process by which social and political forces continually create, shape and transform race, thereby imparting racial meaning to groups, social practices and events. Race is thus changeable rather than fixed, political rather than biological and value-laden rather than neutral.”); Jocelyn Linnekin, *Contending Approaches*, in *THE CAMBRIDGE HISTORY OF THE PACIFIC ISLANDERS*, at 21 (Donald Denoon et al. eds., 1997) (noting that colonial historiography “tends to convey certain key messages about early encounters: that Islanders were naïve and readily responded to crude materialist appeals, that foreign introductions were the primary agents of change, and that first encounters with famous Europeans were the most important events in Island history”).

¹⁰³ Scholars across disciplines are digging through archives and Hawaiian-language source materials and discovering a treasure trove of long-silenced voices—voices that provide vastly different perspectives on historical events and people in Hawai'i's history. See SILVA, *supra* note 70, at 3 (“By the mid-twentieth century, the idea that English was the language of Hawaii seemed natural, especially because . . . Hawaii was no longer regarded as a separate nation with its own people having their own history and language. When historians and others composed their narratives, they ‘naturally’ conducted their research using only the English-language sources.”); Avis Kuuipoleialoha Poai, *Tales from the Dark Side of the Archives: Making History in Hawaii Without Hawaiians*, 39 U. HAW. L. REV. 537, 575-625 (2017).

¹⁰⁴ See SMITH, *supra* note 70, at 33 (“Schooling is directly implicated in this process. Through the curriculum and its underlying theory of knowledge, early schools redefined the world and where indigenous peoples were positioned within the

with the theft of Hawaiian sovereignty. Instead, Kānaka Maoli became the “host culture” where everyone was welcomed with the “aloha spirit.”¹⁰⁵ Hawaiians take center stage, literally and figuratively, in supporting the commodification of their culture and an economic system heavily reliant on those from outside Hawai‘i. For Gavan Daws, the conclusion “that the native was unfit to govern himself” was “inescapable,”¹⁰⁶ and so too was the destiny for Kānaka Maoli inevitable:

The Hawaiians had lost much of their reasons for living long ago, when the kapus were abolished; since then a good many of them had lost their lives through disease; the survivors lost their land; they lost their leaders, because many of the chiefs withdrew from politics in favor of nostalgic self-indulgence; and now at last they lost their independence. Their resistance to all this was feeble. It was almost as if they believed what the white man said about them, that they had only half learned the lessons of civilization.¹⁰⁷

For decades following the illegal overthrow of the Kingdom of Hawai‘i, those in power developed and deployed this master narrative, thereby constructing a collective memory that undermined Kānaka Maoli legal claims and supported American control of the islands.¹⁰⁸

III. HAWAII '78: A CASE STUDY OF THE COLLECTIVE MEMORY OF INJUSTICE

On September 3, 1968, James Bacon, a part-Hawaiian delegate to the State of Hawai‘i’s first constitutional convention, introduced a constitutional amendment requiring the state to “preserve and enhance the heritage and culture of the Hawaiian people and encourage continued support of Hawaiian traditions.”¹⁰⁹ Delegate Bacon’s passionate recitation of the historical injustices against

world. From being direct descendants of sky and earth parents, Christianity positioned some of us as higher-order savages who deserved salvation in order that we could become children of God.”)

¹⁰⁵ Judy Rohrer, *Disrupting the ‘Melting Pot’: Racial Discourse in Hawai‘i and the Naturalization of Haole*, 31 *ETHNIC AND RACIAL STUDIES* 1110, 1113-14 (2008) (critiquing the arguments for Hawai‘i statehood in Hawai‘i in part based on mischaracterization of the welcoming Native Hawaiian “host culture” and “aloha spirit”).

¹⁰⁶ See DAWS, *supra* note 72, at 213.

¹⁰⁷ *Id.* at 291.

¹⁰⁸ See *American Overthrow*, *supra* note 2, at 13 (discussing the annexation of Hawai‘i despite admirable efforts of resistance by Kingdom citizens); J. KEHAULANI KAUANUI, *HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENITY* 183 (2008) (analyzing the deployment of blood quantum for purposes of determining beneficiaries for Hawaiian homesteading land, which enabled “white American economic, political, and social domination”); see also NGŪGĪ WA THIONG’O, *DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* 3 (1986) (describing this process a “cultural bomb” that “annihilate[s] a people’s belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities and ultimately in themselves,” thus “mak[ing] them want to identify with that which is furthest removed from themselves,” and resulting in “serious doubts about the moral rightness of struggle”).

¹⁰⁹ STATE OF HAWAII, *PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, VOLUME II, COMMITTEE OF THE WHOLE DEBATES* 517 (1972) [hereinafter 1968 DEBATES]; STATE OF HAWAII, *PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, VOLUME I, JOURNAL AND DOCUMENTS* 209 (1973) [hereinafter 1968 JOURNAL].

Native Hawaiians, however, proved ineffective.¹¹⁰ Delegates shot his proposal down, but not before they forced him to defend it by saying that it was “not a laughing matter”¹¹¹ But while those in power were not yet ready to make amends with Kānaka Maoli, the resistance outside of the 1968 constitutional convention began to brew.

The period leading to the creation of OHA in 1978, commonly referred to as the Hawaiian Renaissance, saw a reawakening of Hawaiian culture and the emergence of a people impatient for economic, social, and cultural justice.¹¹² It was a time of learning, challenging authority, and unifying the Hawaiian people—a “bottom-up movement” that ushered in significant legal changes.¹¹³ The creation story of OHA is, thus, a potent example of the reparative power of mobilizing a collective memory of injustice. As detailed below, the cultural and political wave that swept over Hawai‘i in the 1970s created the right time for the right people to use the right tool of collective memory. They challenged and reframed the master narrative of Hawai‘i’s past and reversed the elusive path for reparative action for Kānaka Maoli.

A. *The Right Time: The Changed Cultural Terrain in 1978*

Building upon and alongside the resistance movements in the United States and around the world,¹¹⁴ and following the post-Vietnam ethos of challenging authority,¹¹⁵ Kānaka Maoli began to

¹¹⁰ See 1968 DEBATES, *supra* note 109, at 518 (describing the historical decimation of Native Hawaiians, the loss of a Hawaiian identity, and the way in which Hawaiians “are made the butt of jokes in this State”). Delegate Hiroshi Kato, with a settlor mindset, argued that the Hawaiian experience was one of many different experiences that deserve attention: “[I]f we are going to include the Hawaiian culture, why not include the cultures of all of the immigrant peoples of this State because I think they have a right to have a place in the history of this State.” *Id.* at 519.

¹¹¹ *Id.* at 518.

¹¹² GEORGE S. KANAHELE, HAWAIIAN RENAISSANCE 13 (1982).

¹¹³ See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 at 372–73 (1987). Hawai‘i’s 1978 constitutional convention is best known for progressive changes with respect to environmental protection, Hawaiian rights, and judicial independence.

¹¹⁴ See, e.g., *Brown v. Bd. of Educ.* 347 U.S. 483, 495 (1954) (concluding that segregated public schools were “inherently unequal”); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968); JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954-1965, at xi–xiii (1987); Anne F. Boxberger Flaherty, *American Indian Movement*, in POLITICAL GROUPS, PARTIES, AND ORGANIZATIONS THAT SHAPED AMERICA: AN ENCYCLOPEDIA AND DOCUMENT COLLECTION VOL. I 75, 75 (Scott H. Ainsworth & Brian M. Harward, eds. 2019) (describing the American Indian Movement); SARA EVANS, PERSONAL POLITICS: THE ROOTS OF WOMEN’S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT 24–27 (1979); JO FREEMAN, THE POLITICS OF WOMEN’S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS 12–15 (1975); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 1–2 (1987); Ian F. Haney López, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205-09, 243-44 (2001); F. ARTURO ROSALES, CHICANO!: THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT xviii, 180 (2d ed. 1997); JUAN GÓMEZ-QUINONES, CHICANO POLITICS: REALITY AND PROMISE, 1940-1990 141 (1990).

¹¹⁵ See SMITH, *supra* note 70, at 113; LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANGE AND CIRCUMSTANCE: THE DRAFT, THE WAR AND THE VIETNAM GENERATION 62–63 (1978); CHARLES DEBENEDETTI & CHARLES CHATFIELD, AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA 392-93 (1990); MICHAEL FERBER &

contest the master narrative. This move was a critical piece of the success of 1978. As Yamamoto articulates, “[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.”¹¹⁶

The starting point for understanding the context of the landmark changes in 1978 and the shifting collective memory supporting Native Hawaiians is seeing how collective memory exists within the “terrain of culture.”¹¹⁷ This cultural terrain includes media-driven popular cultural images and cultural practices, such as language revitalization, artistic expression, and the institutions and political environment in which decisions are made.¹¹⁸

1. Reviving Hawaiian Culture and Identity

The reclamation of Hawaiian identity and a developing interest in the Hawaiian language, Hawaiian arts, and culture amongst Kānaka Maoli and their allies reframed the cultural terrain in Hawai‘i. Indeed, despite the near collapse of the Native Hawaiian culture following the American theft of sovereignty from the Hawaiian people and the Americanization project,¹¹⁹ glimmers of resistance within Kānaka Maoli remained. Individuals like Mary Kawena Puku‘i, Papa Auwae, and ‘Iolani Luahine held steadfast to their stories and traditions.¹²⁰ They refused to let their identities and those of their ancestors vanish. In 1964, a book by John Dominis Holt spurred a renewed interest in regaining a Hawaiian identity.¹²¹ In *On Being Hawaiian*, Holt demanded justice: “[W]e want to run our own show—at long last—as an ethnic and political conglomerate on our own terms.”¹²² He noted how Hawaiians’ self-respect was “undermined by carping criticism of ‘Hawaiian beliefs’ and stereotypes concerning our being lazy, laughing, lovable children who needed to be looked after by more ‘realistic’ adult oriented caretakers. . . .”¹²³

During this time, Native Hawaiians finally learned about Hawai‘i’s past, which the Territorial government had suppressed during the Americanization project.¹²⁴ Indeed, the University of Hawai‘i

STAUGHTON LYND, THE RESISTANCE 3-4 (1971).

¹¹⁶ See Hom & Yamamoto, *supra* note 3, at 1757.

¹¹⁷ *Id.* at 1765.

¹¹⁸ *Id.*

¹¹⁹ See ‘*Olelo Hawai‘i*, KA PUUHONUA O NA HAWAII, Jan. 26, 1917, at 1 (decrying the state of the Hawaiian language: “Aole keiki o 15 makahiki e hiki ke kamailio pololei i ka olelo makuahine o keia aina,” which translates as “there is no child under 15 years of age who can converse correctly in the mother tongue of this land”). Schools indoctrinated children with a sanitized and western view of Hawaiian political history. See Troy J.H. Andrade, *E Ola Ka ‘Olelo Hawai‘i: Protecting the Hawaiian Language and Providing Equality for Kānaka Maoli*, 6 INDIGENOUS PEOPLES’ J. L., CULTURE, & RESISTANCE 3, 23 (2020) [hereinafter *E Ola Ka ‘Olelo Hawai‘i*].

¹²⁰ See Troy J.H. Andrade, *Changing Tides: A Political and Legal History of the Office of Hawaiian Affairs 16-17* (May 2016) (Ph.D. dissertation, University of Hawai‘i at Mānoa).

¹²¹ See JOHN DOMINIS HOLT, *ON BEING HAWAIIAN* (1995).

¹²² *Id.* at 8; see also ISLAND EDGE OF AMERICA, *supra* note 97, at 294 (noting that Holt’s pride in Hawaiian identity was shared by young people and traditional Hawaiian organizations).

¹²³ See HOLT, *supra* note 121, at 7-8.

¹²⁴ See (Re)Righting History, *supra* note 17, at 681-82 (discussing Kuykendall’s narrative of Hawaiian history written at the

established a Hawaiian Studies Program to assist in preserving, studying, and elaborating on the Hawaiian culture and community.¹²⁵ Importantly, and despite territorial laws and practices that in essence forbade the use of Hawaiian language in schools,¹²⁶ Kānaka Maoli regained use of and appreciation for ‘ōlelo Hawai‘i, the Hawaiian language, which experts considered a “dying” language.¹²⁷ At the University of Hawai‘i, one language teacher increased to more than a dozen.¹²⁸ Private and public high schools began teaching Hawaiian language courses.¹²⁹ In 1972, the ‘Ahahui ‘Ōlelo Hawai‘i conducted a weekly talk show on the radio entirely in ‘ōlelo Hawai‘i.¹³⁰ This reclaiming of language allowed for greater connection to Native Hawaiian culture and identity. As Ngūgī wa Thiong’o describes:

Language carries culture, and culture carries, particularly through orature and literature, the entire body of values by which we come to perceive ourselves and our place in the world. How people perceive themselves affects how they look at their culture, at their politics and at the social production of wealth, at their entire relationship to nature and to other beings. Language is thus inseparable from ourselves as a community of human beings with a specific form and character, a specific history, a specific relationship to the world.¹³¹

With a flourishing language came an interest in other traditional arts, powerful sites of self-representation and indigenous articulation that also resist colonization. Linda Tuhiwai Smith emphasizes how creating art, literature, or ideas “transcend[s] the basic survival mode” and contributes to “the spirit of creating which indigenous communities have exercised over thousands of years.”¹³² In her analysis of indigenous modes of knowing and being, Smith elucidates the politically generative function of cultural production: “Imagination enables people to rise above their own circumstances, to dream new visions and to hold on to old ones.”¹³³ In 1970s Hawai‘i, for example, the traditional form of *hula*, dance, found its revival.¹³⁴ Once described by a Christian bishop as an “unnamable lewdness” and a cause of Native Hawaiians’ rapid decline,¹³⁵ traditional hula was no longer an expression hidden from the public eye. Dissatisfied with the commodification of the hula,

request of the Historical Commission of the Territory of Hawai‘i).

¹²⁵ See Helen Altonn, *UH to Offer Hawaiian Studies*, HONOLULU STAR-BULLETIN, Oct. 3, 1977, at A-18.

¹²⁶ See *E Ola Ka ‘Ōlelo Hawai‘i*, *supra* note 119, at 21.

¹²⁷ See *id.*; see also Richard R. Day, *The Ultimate Inequality: Linguistic Genocide*, in LANGUAGE OF INEQUALITY 163, 170 (Joan Manes & Nessa Wolfson eds., 2012).

¹²⁸ KANAHELE, *supra* note 112, at 18.

¹²⁹ *Id.*

¹³⁰ KANAHELE, *supra* note 112, at 17-18.

¹³¹ See THIONG’O, *supra* note 108, at 16.

¹³² See SMITH, *supra* note 70, at 158.

¹³³ *Id.*

¹³⁴ KANAHELE, *supra* note 112, at 15.

¹³⁵ S.E. BISHOP, WHY ARE THE HAWAIIANS DYING OUT? OR, ELEMENTS OF DISABILITY FOR SURVIVAL AMONG THE HAWAIIAN PEOPLE 14 (1888).

traditional practitioners Joseph K. Ilalaole, Pua Ha'aheo, Lokalia Montgomery, 'Iolani Luahine, Kau Zuttermeister, and Edith Kanaka'ole trained students, who in turn became *kumu hula*, master teachers, training scores of young people.¹³⁶

In 1971, the Hawaiian Music Foundation was established to perpetuate Hawaiian music.¹³⁷ The Foundation sponsored slack key, steel guitar, and falsetto contests.¹³⁸ Talented Kānaka Maoli musicians such as the Cazimero Brothers, Gabby Pahinui, Olomana, and the Sons of Hawai'i singing songs in the Hawaiian language were as familiar to Hawai'i's multicultural populace as nationally recognized musicians.¹³⁹ Eddie Kamae, famous entertainer and member of the Sons of Hawai'i, stated, "Young Hawaiian musicians are coming out of the woodwork in droves."¹⁴⁰ These artists revived old songs and created new ones that reflected the cultural and political changes occurring in Hawai'i at the time.¹⁴¹ The lyrics to the song, *Hawai'i '78*, written by high school student Mickey Ioane, captured the haunting sentiment of the era and became an anthem for Native Hawaiian political resistance:

If just for a day our king and queen
Would visit all these islands and saw everything,
How would they feel about the changes of our land?

Could you just imagine if they were around
And saw highways on their sacred grounds?
How would they feel about this modern city life?

Tears would come from each others' eyes
As they would stop to realize
That our people are in great, great danger now.

How, would they feel, could their smiles be content, then cry?
Cry for the gods, cry for the people
Cry for the land that was taken away
And then yet you'll find, Hawai'i.

Could you just imagine if they came back
And saw traffic lights and railroad tracks?
How would they feel about this modern city life?

¹³⁶ KANAHELE, *supra* note 112, at 14.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 13-14.

¹⁴⁰ *Id.*

¹⁴¹ *Mele*, songs, have always served an important site of resistance for Native Hawaiians. *See, e.g., American Overthrow*, *supra* note 2, at 12-13 (discussing the song Kaulana Nā Pua as a song of resistance to the illegal overthrow of the Kingdom of Hawai'i).

Tears would come from each others' eyes
 As they would stop to realize
 That our land is in great, great danger now.

All the fighting that the king had done
 To conquer all these islands now these condominiums
 How would he feel if he saw Hawai'i nei?
 How, would he feel, would his smile be content, then cry?¹⁴²

The sound of this Hawaiian Renaissance reflected a cultural and spiritual reawakening of, for, and by Native Hawaiians.

But the quintessential symbol of Kānaka Maoli cultural revival in the 1970s was the successful transpacific voyage of the Hōkūle'a, a traditionally designed double hull canoe.¹⁴³ The Polynesian Voyaging Society, under the vigilant eye of master navigators Mau Piailug and Nainoa Thompson, and cultural consultant Herb Kane, revived the all-but-lost ancient navigational arts and skills.¹⁴⁴ Reaching its destination of Tahiti from Hawai'i in 1976 without the use of modern navigational equipment seemed to be an unprecedented feat.¹⁴⁵ According to Kane, “[t]he building of the canoe and its trip are stimulating a cultural revival where Hawaiians are learning what their ancestors were capable of accomplishing. The voyage has confirmed Polynesian intelligence, resourcefulness and self-esteem.”¹⁴⁶ The Hōkūle'a thus symbolized Native Hawaiian pride because it showed their intellectual prowess in the past and the twentieth century.

This was the “Hawaiian Renaissance,” which encompassed “a revival of interest in the past, in the pursuit of knowledge or learning, and in the future. In short, it deal[t] with the revitalization of the human spirit in all aspects of endeavor.”¹⁴⁷

2. Political Mobilization

Alongside the surge in cultural awareness, Kānaka Maoli began to organize and find their political voice. Three community organizations—The Hawaiians, the Aboriginal Lands of Hawaiian

¹⁴² *Hawai'i '78*, MANA MELE, <https://www.manamele.org/hawaii-78> [<https://perma.cc/F4DU-BGC7>] (last visited July 10, 2020); Billy V. & Lacy Deniz, *Power of Palehua: How IZ got his inspiration for 'Hawai'i '78'*, HAWAII NEWS NOW (Nov. 15, 2018), <https://www.hawaiinewsnow.com/2018/11/15/power-palehua-how-iz-got-his-inspiration-behind-hawaii> [<https://perma.cc/6RDE-T3TJ>].

¹⁴³ George S. Kanahale, *Han'n Renaissance Grips, Changes Island History*, HA'ILONO MELE (The Hawaiian Music Foundation, Honolulu, Haw.), July 3, 1979, at 1.

¹⁴⁴ *The Story of Hōkūle'a*, POLYNESIAN VOYAGING SOCIETY, <http://www.hokulea.com/voyages/our-story/> [<https://perma.cc/Q75E-V4DG>] (last visited July 10, 2020). Wright Bowman, Jr. also played a significant role in the history of the Polynesian Voyaging Society as a master carver. See *The Blessing and Launching of Hawai'i Loa*, POLYNESIAN VOYAGING SOCIETY (Fall 1993), <http://archive.hokulea.com/index/newsletters/1993/09.html> [<https://perma.cc/F8WS-765W>].

¹⁴⁵ *Id.*

¹⁴⁶ *Quoted in* Bunky Bakutis, *Bigger Excitement to Come After Return Voyage*, HONOLULU ADVERTISER, June 5, 1976, at A-4.

¹⁴⁷ KANAHELE, *supra* 112, at 2.

Ancestry, and the Protect Kaho‘olawe ‘Ohana—mobilized during the 1970s to bring the struggles of Hawai‘i’s indigenous people to the fore of public consciousness. These mass mobilizations provoked media attention to the injustices facing Native Hawaiians and created opportunities to educate Hawaiians and allies. These efforts also reframed justice struggles for Hawaiians by highlighting the failures of both the state and federal governments.

a. The Hawaiians

“The Hawaiians” were pioneers of this political mobilization.¹⁴⁸ In the predominantly Kānaka Maoli community of Waimānalo, a young Raymond Pae Galdeira drew public attention to the issue of Hawaiian economic justice.¹⁴⁹ Galdeira grew up on leased lands in Waimānalo awarded to his mother pursuant to the 1921 Hawaiian Homes Commission Act.¹⁵⁰ This federal legislation provided land to “any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.”¹⁵¹ Galdeira wanted to give back to his community and founded the Waimānalo Teen Project to keep local teens active and out of trouble after school and on weekends.¹⁵²

One stormy night, a few teenagers asked if Galdeira could give them a ride home.¹⁵³ Galdeira agreed, but, to his shock, the teens directed him to Waimānalo Beach Park, which had grown to become a sort of “tent city” of Kānaka Maoli.¹⁵⁴ With the winds gusting and the spray of ocean water and rain pelting their skin, Galdeira and the teens jumped out of the car and assisted a mother who, while holding and trying to protect her newborn, was struggling to keep the tarp covering her family’s home from blowing away.¹⁵⁵ Galdeira was beside himself when he saw these Native Hawaiian teens and their families struggling to keep their tents from collapsing: “why were Hawaiian families living at the beach and not in a home on Hawaiian homestead land?”¹⁵⁶ He made a phone call to the local paper to shed light on a situation that many were talking about, but about which no one was willing to take any action.¹⁵⁷ Galdeira spoke with his mother-in-law, Elizabeth K. Tuttle, a volunteer with the Legal Aid Society, about the situation.¹⁵⁸ Tuttle told Galdeira that she had been researching the Hawaiian Homes Commission Act and the state and federal governments’

¹⁴⁸ See generally, Davianna McGregor-Alegado, *Hawaiians: Organizing in the 1970s*, 7 AMERASIA J. 29, 29-51 (1980).

¹⁴⁹ Interview with Raymond Pae Galdeira, Founder, The Hawaiians, in Henderson, Nev. (May 7, 2015) [hereinafter Galdeira Interview].

¹⁵⁰ *Id.*

¹⁵¹ Hawaiian Homes Commission Act, Pub. L. No. 34, 42 Stat. 108 (1921) (defining “native Hawaiian” as “any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778”).

¹⁵² See Galdeira Interview, *supra* note 149.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

failures to uphold their obligations to native Hawaiians.¹⁵⁹ Armed with new knowledge of the past, Galdeira reclaimed that history and put out a call that revived Hawaiian consciousness on the historical injustices and the need to correct them. In other words, Galdeira organized.¹⁶⁰

With the support of other Waimānalo residents and his wife, Luana, Galdeira invited Native Hawaiians from all over the state to Waimānalo to meet with the Legal Aid Society and discuss issues concerning the Hawaiian Homes Commission Act and the Department of Hawaiian Home Lands.¹⁶¹ Those at the gathering discussed leasing policies and allegations of nepotism and favoritism in the lease awarding process.¹⁶² They also decided to call themselves, simply, The Hawaiians.¹⁶³ Their goal was to “gain ‘justice’ for the Hawaiians, to improve their social and economic position, and to restore racial pride.”¹⁶⁴ Their first objective was to meet with Governor John A. Burns and list their grievances with the Department of Hawaiian Home Lands.¹⁶⁵

On October 13, 1970, Galdeira sent a letter to Governor Burns advising him that The Hawaiians would hold a rally at the State Capitol rotunda on October 25, 1970, to “demonstrate that we Hawaiians are united in our drive to get more land through the Hawaiian Homes Act and to help encourage our people to participate and strengthen our cause.”¹⁶⁶ After persistent calls to the Governor for a meeting and a promise that The Hawaiians would picket the Governor’s office, Galdeira led a demonstration at the Capitol during one of the busiest tourist events of the year, Aloha Week.¹⁶⁷ Hundreds of demonstrators—Hawaiians and many more non-Hawaiians—showed up from around the state.¹⁶⁸ As promised, they demanded a meeting with Governor Burns.¹⁶⁹ Embarrassed by the demonstration occurring during such a highly publicized tourist event, Governor Burns begrudgingly granted the meeting, but not before a heated exchange with Galdeira.¹⁷⁰

Finally [Governor Burns] came over to me and he said, “What the fock you doing?” So I look at him.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*; Raymond Pae Galdeira, *An Open Letter to the Hawaiian People*, HAWAII FREE PEOPLE’S PRESS, Dec. 1970, at 3 (“We, the people of Hawai‘i, have journeyed a long and dark road together. A road which began a long time ago . . . a road which grew smaller, rougher and painful to us. It was only our spirit and love for our homeland, for our great mother Hawai‘i, that lightened the darkness like a flickering candle. There is great truth in the old proverb that says, ‘It is better to light one candle than to curse the darkness.’ Let us stop cursing the darkness of extinction, disunity and poverty. Let us each light a candle of unity to light our way. Let us each light a candle of love to help our homeland and our people.”).

¹⁶³ Raymond Pae Galdeira, *An Open Letter to the Hawaiian People*, HAWAII FREE PEOPLE’S PRESS, Dec. 1970, at 1.

¹⁶⁴ George S. Kanahale, *The New Hawaiians*, 29 SOCIAL PROCESS IN HAWAII 21, 28 (1982).

¹⁶⁵ See Galdeira Interview, *supra* note 149.

¹⁶⁶ Letter from Raymond Pae Galdeira, Chariman, The Hawaiians, to John A. Burns, Governor of Hawai‘i (Oct. 13, 1970) (on file with author, retrieved from the Hawai‘i State Archives) [hereinafter Letter to Burns].

¹⁶⁷ See Galdeira Interview, *supra* note 149.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

At first I had respect because he was the Governor – but I said, “Hey, fock you man, because we trying to reach you and you were giving us this kind of run around.”

He said, “Bullshit,” you know, and he was going in a rage. Yeah, he was really high. So we went at it for about five minutes, and finally he said, “Okay, I want to meet with you at two o’clock.”¹⁷¹

Governor Burns and his special assistant, Myron Pinky Thompson, fielded questions and provided assurances that the Burns Administration would do everything in their power to address the dilapidating Department of Hawaiian Home Lands.¹⁷² This meeting was the first of numerous open discussions the Governor had with The Hawaiians about their issues with the Department of Hawaiian Home Lands.¹⁷³ It eventually led to Burns requesting that The Hawaiians submit names of candidates to fill the upcoming vacancies on the Commission.¹⁷⁴ Galdeira later remarked: “I see a lot of hope for Hawaiian people in the future, simply because they know what’s happening and they won’t run away from their problems. We have to go political – that’s the only way things can happen.”¹⁷⁵

Galdeira and The Hawaiians assisted other Native Hawaiians in their struggles to keep land. In 1974, The Hawaiians staged an occupation on Hawai‘i Island to assist rancher Sonny Kaniho after the Department of Hawaiian Home Lands denied Kaniho homesteading lands despite thousands of acres being leased to the large privately owned Parker Ranch.¹⁷⁶ The Hawaiians assisted Kānaka Maoli and other farmers in Kalama Valley on O‘ahu, who faced eviction because of proposed

¹⁷¹ TOM COFFMAN, TEN YEARS OF COMMUNITY ACTION 18–19 (1975).

¹⁷² See Galdeira Interview, *supra* note 149; Letter from John A. Burns, Governor of Hawai‘i to Raymond Pae Galdeira, Chairman, The Hawaiians, at 4 (Oct. 25, 1970) (on file with author, retrieved from the Hawai‘i State Archives) (“I would like to see every qualified applicant off the list and on a homestead. I would like to see the Commission and the department actively supporting our Hawaiian people in search for solutions to all their problems, not just housing. I would like to see these programs become a valuable tool in the revitalization of the Hawaiian culture and an increase of appreciation of what it means to be Hawaiian by Hawaiians and non-Hawaiians alike.”).

¹⁷³ Galdeira Interview, *supra* note 149.

¹⁷⁴ *Id.*

¹⁷⁵ James Bassett, *The Hawaiians Make Bid for their Share*, HONOLULU ADVERTISER, Dec. 20, 1971, at C-3. The Hawaiians would tackle several other issues to assist the struggling communities in Hawai‘i, including organizing the People’s Market. See Galdeira Interview, *supra* note 149. The People’s Market was a bold initiative in economic and agricultural self-sufficiency because it assisted farmers in supplying produce directly to consumers, thereby bypassing retail sales. *Id.*; see also McGregor-Alegado, *supra* note 149, at 44. This open market idea allowed farmers to reap more of the profit for their families and pass on lower costs to the consumer. Through his work with the Legal Aid Society, Galdeira was also pivotal in the establishment of the Community Client Counseling Program and the Hawaiian Coalition for Native Claims. See Galdeira Interview, *supra* note 149. The Hawaiian Coalition for Native Claims later became the Native Hawaiian Legal Corporation, a legal advocacy group that actively fights to protect Native Hawaiian traditional and customary rights and interests. *Id.* But, by far, The Hawaiians’ most significant contribution came with demanding reform of the Department of Hawaiian Home Lands.

¹⁷⁶ See Sonny Kaniho, *Sonny Speaks*, 3 ANOTHER VOICE 1 (1974), reprinted in IAN LIND, SONNY KANIHO: HOMESTEADER, LEADER, HAWAIIAN 2 (2009) (describing first-hand account of the protest by The Hawaiians and rancher Sonny Kaniho at Parker Ranch); Helen Altonn, *Squatting Surprises State Aides*, STAR-BULLETIN, May 21, 1974, at 2.

development.¹⁷⁷ The Hawaiians and Kalama Valley farmers were “natural allies” because “The Hawaiians pointed to the failure of the homestead program, while tenants in Kalama were living proof of that failure. It was public knowledge that several families in the Valley had been on the Hawaiian Homes waiting list for decades.”¹⁷⁸

Although the Kalama Valley residents failed to save their homes and way of living, the efforts of The Hawaiians eventually led to the appointment of one of their own, Georgiana Padeken, as director of the Department of Hawaiian Home Lands.¹⁷⁹ This was a turning point in the Department’s history. Through lobbying, advocacy, mass protests, and non-violent civil disobedience, The Hawaiians successfully influenced reforms to the Department of Hawaiian Home Lands, and awakened Kānaka Maoli to the possibilities of a unified voice of resistance.¹⁸⁰

b. Aboriginal Lands of Hawaiian Ancestry

Another entity, the Aboriginal Lands of Hawaiian Ancestry (“ALOHA”), sought reparations from the federal government for the illegal overthrow of the Kingdom of Hawai‘i.¹⁸¹ Louisa K. Rice founded ALOHA in 1972, inspired by Queen Lili‘uokalani’s autobiography, *Hawaii’s Story by Hawaii’s Queen*.¹⁸² In the book, Lili‘uokalani describes her life story and key events during and after the overthrow, including her effort to reclaim the throne.¹⁸³ The 1971 Alaska Native Claims Settlement Act, which provided Alaska Natives with title to approximately forty million acres of land and a nearly one billion dollar cash settlement in exchange for their extinguishment of all claims against the government and the revocation of any existing Native reserves,¹⁸⁴ influenced ALOHA’s push for reparations.¹⁸⁵ Along these lines, ALOHA’s president, Charles Maxwell, articulated the organization’s

¹⁷⁷ See Galdeira Interview, *supra* note 149.

¹⁷⁸ Haunani-Kay Trask, *The Birth of the Modern Hawaiian Movement: Kalama Valley, O‘ahu*, 21 HAWAIIAN J. HIST. 142 (1987).

¹⁷⁹ See *Ex-Hawaiian Homes Chief Padeken Dies*, HONOLULU ADVERTISER, June 11, 1987, at A-3.

¹⁸⁰ See McGregor-Alegado, *supra* note 148, at 29, 48-49 (describing a network of Hawaiian political organizations that coordinated efforts to support each other and bring about necessary reforms).

¹⁸¹ MICHAEL K. DUDLEY & KEONI K. AGARD, *A HAWAIIAN NATION II: A CALL FOR HAWAIIAN SOVEREIGNTY* 109 (1990).

¹⁸² *Id.*; see Hawaiian Native Claims Settlement Act: Hearings on H.R. 1944 Before the Subcomm. on Indian Aff. of the H. Comm. on Interior and Insular Aff., 94th Cong., 28 (1975) (statement of Charles Maxwell, President, ALOHA) (“[T]he ALOHA Association . . . was founded in 1972 by Louisa K. Rice. . . . First there were only a handful of members . . . who joined, because the Hawaiian natives felt that the United States of America is such a powerful Government and they would not listen to the native Hawaiians, who claimed their kingdom was lost over 80 years ago.”).

¹⁸³ QUEEN LILI‘UOKALANI, *HAWAII’S STORY BY HAWAII’S QUEEN* (Univ. of Hawai‘i Press, 2013) (1898).

¹⁸⁴ Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629h. (1971); see also Martha Hirschfield, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331, 1331 (1992) (confirming the calculations of money and land provided in the settlement).

¹⁸⁵ DUDLEY & AGARD, *supra* note 181, at 109; see also Hawaiian Native Claims Settlement Act: Hearings on H.R. 1944 Before the Subcomm. on Indian Aff. of the H. Comm. on Interior and Insular Aff., 94th Cong., 28 (1975) (statement of Charles Maxwell, President, ALOHA) (“The native Hawaiians were made aware of the Alaska Native Claims Bill and that the Alaskan natives were successful in their claims. The membership and interest in the ALOHA Association began to increase and

goals: “The mission of ALOHA is to get legislation to justly and fairly compensate the Hawaiian natives for what the United States of America took from them.”¹⁸⁶

In a sign of its growing presence, in 1973 ALOHA organized a telethon that raised \$150,000.¹⁸⁷ A year later, ALOHA submitted a bill through Hawai‘i’s congressional representatives Patsy T. Mink and Spark M. Matsunaga demanding one billion dollars in settlement for claims stemming from the United States’ involvement in the illegal overthrow of the Kingdom of Hawai‘i.¹⁸⁸ The bill condemned the “lawless, fraudulent and forceful acts of agents of the United States” in the 1893 overthrow¹⁸⁹ and sought to create a “Hawaiian Native Corporation” that would receive and administer the one billion dollar settlement funds.¹⁹⁰ It would also require the Secretary of the Interior to prepare and maintain a roll of Native Hawaiians.¹⁹¹ Public hearings were eventually held on ALOHA’s reparations bill, but passage proved elusive.¹⁹² The resolution died in the House Committee on Interior and Insular Affairs.¹⁹³

c. Protect Kaho‘olawe ‘Ohana

While ALOHA sought to hold the federal government accountable for reparations, other activists demanded de-militarization of the islands. Their first demand was for the United States Navy to halt the aerial and surface bombardment of live and inert ordnances on the forty-five square mile

the native Hawaiians started to investigate the bases of the claim, which they found to be true. . . .”).

¹⁸⁶ Hawaiian Native Claims Settlement Act: Hearings on H.R. 1944 Before the Subcomm. on Indian Aff. of the H. Comm. on Interior and Insular Aff., 94th Cong, 28 (1975) (statement of Charles Maxwell, President, ALOHA).

¹⁸⁷ See McGregor-Alegado, *supra* note 148, at 45; DUDLEY & AGARD, *supra* note 181, at 109.

¹⁸⁸ Hawaiian Native Claims Settlement Act: Hearings on H.R. 1944 Before the Subcomm. on Indian Aff. of the H. Comm. on Interior and Insular Aff., 94th Cong, 19 (1975) (statement of Spark Matsunaga, Representative for the State of Hawai‘i, U.S. Congress) (stating the bill “bears the names of Congresswoman Mink and myself as consponsors of the measure but the bill belongs in a larger sense to the ALOHA Association, whose members worked so hard to develop the legislation in the first place . . .”).

¹⁸⁹ H.R. 15666, 93rd Cong. (1974).

¹⁹⁰ *Id.*; see also Viveca Novak, *Hawai‘i’s Dirty Secret: The Continuing Denial of Native Hawaiian Land Rights*, in ISLANDS IN CAPTIVITY: THE INTERNATIONAL TRIBUNAL ON THE RIGHTS OF INDIGENOUS HAWAIIANS 198 (Ward Churchill & Sharon Venne, eds., 2004) [hereinafter ISLANDS IN CAPTIVITY].

¹⁹¹ H.R. 15666, 93rd Cong. (1974).

¹⁹² Due to the efforts of ALOHA and Hawai‘i’s congressional delegation, particularly United States Senator Daniel K. Inouye, Congress eventually passed a law that established a “Native Hawaiians Study Commission” to make a recommendation as to whether the federal government should provide reparations for the Hawaiian community. Native Hawaiians Study Commission Act, Pub. L. No. 96-565, § 301-302, 94 Stat. 3324 (1980) (codified as 42 U.S.C. 2991a notes). Inouye, a highly decorated war hero, had a fair understanding of the federal government’s involvement in the overthrow of the Kingdom of Hawai‘i, and spearheaded the effort to establish the Commission to address the needs and concerns of the Hawaiian people—a people for whom Inouye had much respect. Indeed, Inouye’s first act as a legislator in the territorial government was to propose vacating the Legislature out of ‘Iolani Palace, the home of the last Hawaiian monarchs, even if it means “going into a tent” because it was “sacrilege” to hold meetings in the Queen’s throne room. See ISLAND EDGE OF AMERICA, *supra* note 97, at 299.

¹⁹³ See Novak, *supra* note 190, at 198; H.R. 15666.

island of Kaho‘olawe.¹⁹⁴ Protests against the bombing ensued after continued safety concerns and an unexploded bomb was found on property owned by Maui Mayor Elmer Carvalho in 1969.¹⁹⁵ Mayor Carvalho, with the organization Life of the Land, filed a lawsuit seeking an injunction against the government for failure to file a legally required environmental impact statement.¹⁹⁶ The district court dismissed the lawsuit after the federal government hurriedly put together the impact statement in 1972, and the United States Army resumed bombarding the sacred island with heavy artillery.¹⁹⁷

Equipped with the phrase “E hō mai i nā lima eia hoi he hana ka kākou” (“allow the hands to come forth for here is work to be done”), members of the Protect Kaho‘olawe Association, later named the Protect Kaho‘olawe ‘Ohana (“PKO”), no longer sat idle as another culturally significant site was demolished at the hands of the American government.¹⁹⁸ Inspired by the 1971 Native American occupation of Alcatraz Island and the occupation at Wounded Knee on the Pine Ridge Indian Reservation in South Dakota, the PKO began a series of landings on and occupations of Kaho‘olawe.¹⁹⁹

On January 4, 1976, nine individuals made the first landing.²⁰⁰ Within hours of landfall, the United States Coast Guard detained seven of the nine members.²⁰¹ Dr. Emmett Aluli, an extern practicing rural medicine on Moloka‘i, and Walter Ritte, Jr., a former high school and college basketball standout, hid in the thickets of a kiawe tree.²⁰² With Marine helicopters zooming overhead,

¹⁹⁴ Kaho‘olawe, also known as Kohe malamalama o Kanaloa, was a place of spiritual and cultural significance to the Kānaka Maoli. It served as the stronghold for the priesthood that worshiped Kanaloa, one of the four principle gods in the Hawaiian cosmology. Ancient people lived there in communities along the coastline. The island served as an important training center for budding navigators. See Noa Emmett Aluli, *The Most Shot-at Island in the Pacific*, in ISLANDS IN CAPTIVITY, *supra* note 190, at 238-39. On February 20, 1953, President Dwight D. Eisenhower signed Executive Order 10436, which seized Kaho‘olawe because it “appear[ed] necessary and in the public interest that the Island . . . be taken and reserved for the use of the United States for naval purposes” Exec. Order No. 10436, 18 Fed. Reg. 1,051 (Feb. 20, 1953). The island was thereafter placed under the Navy’s jurisdiction. *Id.* Bombing of Kaho‘olawe began in 1940, prior to the Japanese attack on Pearl Harbor. See Peter MacDonald, *Fixed in Time: A Brief History of Kahooolawe*, 6 HAWAIIAN J. HIST. 69, 76, 86 (1972).

¹⁹⁵ See MacDonald, *supra* note 194, at 78-79.

¹⁹⁶ See *id.* at 85-86.

¹⁹⁷ *Id.*

¹⁹⁸ WALTER RITTE JR. & RICHARD SAWYER, NA MANAO ALOHA O KAHOOLAWE 4 (1978).

¹⁹⁹ Colleen Uechi, *Stepping on to Kahooolawe, Stepping into History*, THE MAUI NEWS, Jan. 5, 2016, <https://www.mauinews.com/news/local-news/2016/01/stepping-on-to-kahooolawe-stepping-into-history/> [<https://perma.cc/W548-7UQV>]; see also RITTE & SAWYER, *supra* note 198, at 3 (describing PKO’s goals as threefold: “(1) [t]o ensure through Aloha ‘Āina, the proper use of Hawai‘i’s natural resources (her peoples, her lands, her waters, and all which comes so willingly from the ‘āina); (2) [t]o perpetuate the historical, cultural, spiritual and social significance of Kaho‘olawe; and (3) [t]o instill a strong sense of pride in ho‘oHawai‘i (being and acting Hawai‘i) through knowledge and practice”).

²⁰⁰ David Tong, *Two Still on Kahooolawe*, THE HONOLULU ADVERTISER, Jan. 6, 1976, at A-3.

²⁰¹ *Id.* The Coast Guard arrested George Helm, Kimo Aluli, Gail Prejean, Steve Morse, Ellen Miles, Karla Villalba (published in error as Carla), and Ian Lind. *Id.*

²⁰² See PBS Hawai‘i, Long Story Short, Interview: Noa Emmett Aluli (Nov. 5, 2019), https://www.pbshawaii.org/wp-content/uploads/2019/11/LSS_1229_Noa_Emmett_Aluli_Web_Transcript.pdf [<https://perma.cc/WXF9-924B>]; Mark Coleman, *Walter Ritte*, Honolulu Star-Advertiser (April 5, 2013), <https://www.staradvertiser.com/2013/04/05/editorial/name-in-the-news/walter-ritte/> [<https://perma.cc/ZGK9-XJ85>].

both Ritte and Aluli held out for three days before turning themselves over to the federal government.²⁰³ Those three days transformed Ritte and Aluli and motivated them to complete the landings.²⁰⁴

On January 12, 1976, Ritte, his wife Loretta, and his sister Scarlett, joined Dr. Aluli for a second landing.²⁰⁵ The Rittes spent five days on the island before the government detained them.²⁰⁶ Ritte and Aluli also faced federal criminal charges for trespassing on federal military property.²⁰⁷

In a change in strategy, PKO leader George Jarrett Helm, Jr. wrote to the Navy requesting access to Kahoʻolawe to perform religious healing ceremonies to cleanse the island of its “evil” and to symbolically accept responsibility of stewardship.²⁰⁸ To the PKO’s surprise, the Navy allowed the third landing. Although federal authorities denied Ritte permission to land on the island, on February 13, 1976, approximately sixty people, including Ritte, participated in a third occupation.²⁰⁹ Among the participants in this third landing were several kūpuna, elders, including revered cultural practitioners Sam Lono and Emma DeFries, who participated in the ceremonies of *mōhai aloha*, love offering, and *hoʻokupu*, gift-giving.²¹⁰

Helm was the political and spiritual leader of the PKO.²¹¹ He attracted support from Hawaiians long dissociated with the efforts to reconcile historical injustices.²¹² He used his knowledge of political history and his alluring falsetto voice to convince people across the state of the importance of stopping the bombing of Kahoʻolawe.²¹³ The Protect PKO was highly successful in garnering public support, and by January 1977, two-thirds of Hawaiʻi’s population wanted the bombing stopped and the island returned to the people of Hawaiʻi.²¹⁴ The State’s Historic Preservation Office conducted an archaeological survey of the island and uncovered twenty-nine sites deemed eligible for the National Register of Historic Places.²¹⁵ Yet the bombing continued.²¹⁶

²⁰³ See Uechi, *supra* note 199, at 3.

²⁰⁴ *Id.*

²⁰⁵ Edwin Tanji & Karen Horton, *A “Crowd” on Kahoʻolawe?*, THE HONOLULU ADVERTISER, Jan. 14, 1976, at A-3.

²⁰⁶ Terry McMurray, *Ritte Jailed by FBI*, HONOLULU STAR-BULLETIN, Jan. 18, 1976, at A-1, A-4.

²⁰⁷ *Aluli Charged with Trespass After Kahoʻolawe Warning*, HONOLULU STAR-BULLETIN, Feb. 19, 1976, at 34.

²⁰⁸ Bob McCabe, *The Gods are Appeased*, HONOLULU STAR-BULLETIN, Feb. 14, 1976, at A-1, A-7.

²⁰⁹ *Id.*

²¹⁰ *Id.* at A-7 (“The special religious rites, considered an essential step in the struggle to wrest the Island from military control, were performed by kahuna Sam Lono of Honolulu, who invoked the ancient god of old Hawaii to return to the Island. Lono, assisted by Emma Defries, who is also considered an important Hawaiian spiritualist, changed ancient Hawaiian prayers and officiated over the preparation of a ritual drink made from the scared [sic] awa root.”).

²¹¹ See Rodney Morales, *George Helm: The Voice and Soul*, in HOʻIHOʻI HOU: A TRIBUTE TO GEORGE HELM AND KIMO MITCHELL 22–23 (Rodney Morales, ed. 1984) [hereinafter HOʻIHOʻI HOU].

²¹² *Id.* at 22.

²¹³ See *id.* (describing how at times Helm convinced others the importance of PKO’s work through songs and speeches).

²¹⁴ *Id.* at 23.

²¹⁵ *Id.*

²¹⁶ *Id.*

Eleven months after the third landing, on January 30, 1977, members of the PKO proceeded with their fourth landing.²¹⁷ Ritte and PKO-leader Helm joined Richard Sawyer, Charles Warrington, Jr., and Francis Kauhane, a law student who had earlier protested alongside Pae Galdeira and Sonny Kaniho on Hawai'i Island.²¹⁸ Helm reflected on the rationale for the fourth landing: "Call me a radical for I refuse to remain idle. I will not have the foreigner prostitute the soul of my being, and I will not make a whore out of my soul (my culture)."²¹⁹ Helm described the occupation of the military installation as "not so much a defiance as it is a responsibility to express our legitimate concern for the land of the Hawaiian. . . . We are against warfare but more so against imperialism."²²⁰ Helm, Kauhane, and Warrington hiked for a day across the island and then turned themselves over to the Coast Guard.²²¹ Ritte and Sawyer planned to stay on Kaho'olawe indefinitely.

Helm returned to Honolulu and, because the bombing continued, decided to change his strategy and work within the political system.²²² Helm and other members of the PKO met with legislators and used local media to their advantage.²²³ Nevertheless, the Navy still refused to acknowledge Ritte's and Sawyer's presence on the island.²²⁴

On February 10, 1977, Helm led a delegation of the PKO to the State Capitol for a rally.²²⁵ The next day, in an unprecedented move, state Representatives Henry Ha'alilio Peters and Jan Yuen convinced their colleagues to allow Helm to address the Legislature.²²⁶ Helm pleaded to legislators:

We are motivated to pursue the action of protecting whatever is left of our culture and very basically, it is simple. The culture exists only if the life of the land is perpetuated in righteousness; that belongs to my ancestors. You folks are using this to get paid, to build your homes, to give your kids an education, to bring kids over here and listen to you give a political rhetoric. I came here to ask; to help some people's lives. . . . Please *kokua* [help]; do something—some reaction. Every county made a resolution . . . Bills have been passed and when something like this is

²¹⁷ See Keith Haugen, *Kaboolawe Concerns Cited: 5 Men's Trip Described as "Necessary"*, HONOLULU STAR-BULLETIN, Feb. 1, 1977, at 5; Rodney Morales, *George Helm: The Voice and Soul*, in HO'IHO'I HOU, *supra* note 211, at 23.

²¹⁸ Keith Haugen, *Kaboolawe Concerns Cited: 5 Men's Trip Described as "Necessary"*, HONOLULU STAR-BULLETIN, Feb. 1, 1977, at 5.

²¹⁹ George Helm, *Personal Statement: Reasons for Fourth Occupation of Kaboolawe*, in HO'IHO'I HOU, *supra* note 211, at 55.

²²⁰ George Helm, *George's Diary: Fourth Occupation of Kaho'olawe, Jan. 1977*, in HO'IHO'I HOU, *supra* note 211, at 72.

²²¹ Rodney Morales, *George Helm: The Voice and Soul*, in HO'IHO'I HOU, *supra* note 211, at 23–24.

²²² *Id.* at 24.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* Helm also took advantage of the media by joining radio talk shows. *Id.* (calling out politicians on the most popular radio show: "When I walk down to Kohala, and I walk house to house in Hana, and I walk house to house in Molokai, I go down to Waimanalo and Nanakuli, and I see all the Hawaiian people, I get insulted at the easy display of ignorance by politicians. They're using statistics to define the problems and they ain't gonna know the problem until they sit down and look [the people] in the eye. . . . it takes a lot of stripping away").

²²⁶ Greg Kakesako, *House Backed into Support of Kaboolawe*, HONOLULU STAR-BULLETIN, Feb. 12, 1977, at 2 ("After the [House] resolution, which also demanded the Navy to start cleaning up the tiny target Island, was adopted, Helm was allowed to address the legislators.").

happening, nothing is being done. All I'm asking for is a reaction, positive or negative, but please support us if you can, and we are talking about *Aloha 'Aina 'Ohana* and if you cannot understand it, go do your homework.²²⁷

The legislators quickly introduced and passed a resolution to stop the bombing.²²⁸ That same day, federal Judge Samuel W. King denied two temporary restraining orders that sought to halt the bombing.²²⁹ But Helm would not relent.

Helm and Kauhane, along with members of the newly established Council of Hawaiian Organizations, traveled to Washington, D.C., to appeal to President Jimmy Carter and Hawai'i's congressional delegation.²³⁰ Unfortunately, Carter was vacationing in Georgia and most of Hawai'i's congressional delegation had returned to Hawai'i to meet with the Navy and tour Kaho'olawe.²³¹ The Navy conducted the delegation's tour in the worst areas of the island to attempt to illustrate that the soil was useless.²³² The tour also included a demonstration in which "F4 jets dropped 27 Mark 76's—dummy bombs with an explosive device the size of a 12-gauge shotgun shell rather than the usual live 500-pound bombs."²³³ After being handed enlarged photos of the naval commanders, the delegation apparently left satisfied with the Navy's conduct.²³⁴ One reporter characterized the delegation's tour as "Kahoolawe Whitewash."²³⁵

When Helm returned to Hawai'i, signs pointed toward a cataclysmic event: Helm had a dream that Ritte and Sawyer were in danger and needed help; *kahuna* (spiritualist) Mornnah Simeona told Helm that a large wave would wash over Kaho'olawe and that he needed to rescue Ritte and Sawyer; *kahuna* Emma DeFries foretold of an upheaval and warned Helm against going.²³⁶ Helm nevertheless decided to rescue his companions.²³⁷

²²⁷ George Helm, *Speech to the State House, in HO'IHO'I HOU*, *supra* note 211, at 69-70. The concept of "aloha 'āina" embodies a reciprocal and unconditional love for the land and the sovereignty of Hawai'i. It is a concept that evokes patriotism for Hawai'i and its people.

²²⁸ See House Resolution Requesting a Solution to the Problems of Kaho'olawe, H.R. 321, 9th Leg. (Haw. 1977) (requesting the Navy to halt the bombing of Kaho'olawe and restore the island to a safe condition); Observing the Navy's Violation of Executive Order 11593 and Requesting Congress to Halt the Bombing of Kaho'olawe, H.C.R. 80, 9th Leg. (Haw. 1977) (requesting that Congress halt the bombing and conduct an archaeological survey); Senate Resolution Requesting a Solution to the Problems of Kaho'olawe, S.R. 392, 9th Leg. (Haw. 1977) (demanding the Defense Department comply with President Jimmy Carter's request for a feasibility study on using non-explosive ordnances).

²²⁹ Keith Haugen, *Court Denies Request to Halt Kahoolawe Bombing*, HONOLULU STAR-BULLETIN, Feb. 11, 1977, at 2.

²³⁰ See Rodney Morales, *George Helm: The Voice and Soul, in HO'IHO'I HOU*, *supra* note 211, at 25 (discussing the visit of Helm and Kauhane to Washington, D.C.); *Kahoolawe Protestors Meet 3 Carter Aides*, HONOLULU STAR BULLETIN, Feb. 15, 1977 at A-1 (discussing three members of the Council of Hawaiian Organizations to advocate to President Carter and Hawaiian Congressional delegates).

²³¹ Rodney Morales, *George Helm: The Voice and Soul, in HO'IHO'I HOU*, *supra* note 211, at 25.

²³² Pam Smith, *Operation Whitewash*, HAWAII OBSERVER, March 10, 1977, at 6-7 [hereinafter *Operation Whitewash*].

²³³ See Morales, *supra* note 211, at 25 (internal quotation marks omitted).

²³⁴ *Id.*

²³⁵ See *Operation Whitewash, supra* note 232, at 6.

²³⁶ Morales, *supra* note 211, at 29.

²³⁷ *Id.*

Helm, Kimo Mitchell, and Billy Mitchell headed out in a boat to Kaho‘olawe.²³⁸ When a Coast Guard helicopter appeared to be approaching their boat, someone said, “Hit it,” and the three men jumped into the frigid waters on two surfboards and an inner tube and made their way to the island.²³⁹ The trio searched for Ritte and Sawyer, but were unsuccessful.²⁴⁰ Ritte and Sawyer had left their base camp in search of food and water, and a Coast Guard helicopter had picked them up.²⁴¹ After they searched the island without success and after their pickup boat failed to arrive, Helm, Kimo, and Billy headed into the ocean to make a break for Molokini, an island off the coast of Maui.²⁴² Billy turned back and made his way back to Kaho‘olawe.²⁴³ Billy saw Helm and Kimo struggling in the surf near Molokini.²⁴⁴ No one ever saw George Helm and Kimo Mitchell again.²⁴⁵ Their deaths increased the efforts of the PKO and fueled a sense of urgency in the community to stop the bombing.

On September 15, 1977, federal Judge Richard Wong ruled that the federal government failed to properly conduct the environmental impact statement and violated the National Environmental Policy Act and an executive order that mandated the preservation of historic sites.²⁴⁶ Judge Wong ordered the federal government to halt the bombing.²⁴⁷ The ruling was a legal victory for the Hawaiian people that ultimately led to a 1980 consent decree limiting naval training on the island, mandating ordnance cleanup on one-third of the island, and allowing PKO access to the island.²⁴⁸

The momentum, fervor, and media attention created by the acts of The Hawaiians, ALOHA, and the PKO, among others, against the State of Hawai‘i and the federal government catalyzed a fundamental shift in the Native Hawaiian journey for justice. These grassroots organizations infused their advocacy with a reframing of the present-day struggles of Hawaiians as symptoms of historic injustice. In the process, they created the conditions for mass mobilization and collective action “aimed at policymakers, bureaucrats, and the American conscience.”²⁴⁹ The right climate had been set for those in power to know that Native Hawaiians were yearning for resolution

²³⁸ *Id.* at 30.

²³⁹ *Id.*

²⁴⁰ *Id.* at 30-31.

²⁴¹ *Id.* at 30.

²⁴² *Id.* at 31.

²⁴³ *Id.*

²⁴⁴ *Id.*; David Tong, *Relatives to Press Target Island Hunt*, THE HONOLULU ADVERTISER, Mar. 12, 1977, at A-3.

²⁴⁵ See Morales, *supra* note 211, at 31; David Tong, *Kaho‘olawe Searcher is Lost*, THE HONOLULU ADVERTISER, Mar. 10, 1977, at A-1.

²⁴⁶ *Aluli v. Brown*, 437 F. Supp. 602, 606-608 (D. Haw. 1977).

²⁴⁷ *Id.* at 606.

²⁴⁸ See Jordan Kealaikalani Inafuku, *E Kūkulu Ke Ea: Hawai‘i’s Duty to Fund Kaho‘olawe’s Restoration Following the Navy’s Incomplete Cleanup*, 16 ASIAN-PAC. L. & POL’Y J. 22, 38 (2015). Congress eventually passed a law that established the Kaho‘olawe Island Conveyance Commission to recommend the return of the island to the State. *Id.*; S. 3088, 101st Cong. (1990) (enacted). In an unprecedented move, the 1994 Department of Defense Appropriations Act transferred Kaho‘olawe to the State and appropriated \$400 million to clean and restore the island. See Inafuku, *supra*, at 39.

²⁴⁹ See Hom & Yamamoto, *supra* note 3, at 1757 (discussing how social justice advocates redefine historical injustices in the collective consciousness).

and a seat at the decision-making table.

B. The Right People with the Right Tools: The 1978 Constitutional Convention

1978 offered a moment of clarity and a cultural climate ripe for systemic change. Native Hawaiians were rediscovering their identity and mobilizing on a scale not seen since their resistance to American annexation in the late nineteenth century. One woman's work with the PKO would inspire her to push forth a bold alternative for Hawaiian justice. For as she stood on the shores of Maui—gazing through the flames of the fire at the distant island of Kaho'olawe and watching as her comrades prepared for a landing to protest the American military's bombings—Adelaide “Frenchy” DeSoto thought to herself, “there must be a better way to do this.”²⁵⁰

1. Pūwalu: From Protests to Politics

Frenchy DeSoto, affectionately called Aunty Frenchy, worked her way from being a janitor to the sergeant at arms of the state Senate.²⁵¹ She had a “husky, cigarette voice, which she used to great advantage, gliding seamlessly from perfect English to pidgin to a partial but expressive grasp of Hawaiian.”²⁵² DeSoto's endless commitment to the Kānaka Maoli, her grit, and her tenacity reflected her fractured past:

My full-Hawaiian mother never raised me. . . . [M]y German father killed himself when I was 6. The court took us away from our mother. I was raised from foster home to foster home, and I ran away from every single one of them. There must have been 17 or 16 [W]hen I speak of starving people, it's not an intellectual exercise. . . . When I speak of the pain of children, it's not another exercise of brain-wave patterns.”²⁵³

It was, for DeSoto, a closely held reality. She volunteered with her children's schools in her home district of Wai'anae and became involved in community affairs.²⁵⁴ In 1976 on the shores of Makena, Maui, DeSoto, a PKO member, pondered the future of the Kānaka Maoli justice struggles: “I remember going to the island and listening to the kupuna plead through tears for some righteousness to be done to the Hawaiian people, so that we are not on our knees begging to eternity.”²⁵⁵

²⁵⁰ Curt Sanburn, *OHA: The Beginning-Part One*, KA WAI OLA O OHA, April 1991, at 12; see ISLAND EDGE OF AMERICA, *supra* note 97, at 309 (discussing DeSoto's involvement in PKO).

²⁵¹ Michael Tsai, *Tough OHA activist “had a heart of gold”*, STAR ADVERTISER, (Jan. 23, 2011), <https://www.staradvertiser.com/2011/01/23/hawaii-news/tough-oha-activist-had-heart-of-gold/> [<https://perma.cc/92FL-SJNL>].

²⁵² ISLAND EDGE OF AMERICA, *supra* note 97, at 308-09.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Sanburn, *supra* note 250, at 12; see also Edwin Tanji & Bunky Bakutis, *A “Family” Against Bombs Seeks Kahooolawe's Return*, THE HONOLULU ADVERTISER, July 19, 1978, at A-3 (noting DeSoto's statement that “One thing that Kahooolawe has done is to give these people a basis of identity with the idea of protecting Hawaii's lands . . . [a]nd by protecting it, they may get some of it back. They have learned that beginning again with the land that was once theirs is not that far-fetched a concept.

DeSoto returned from the pilgrimage to Kaho‘olawe and represented the PKO at a gathering of Hawaiians in Wai‘anae called the Pūwalu Sessions.²⁵⁶ “Pūwalu” means unity and cooperation, and, as its name suggests, hundreds of invitations were sent to individuals who attended the meetings to unite the Hawaiian people in a spirit of cooperation.²⁵⁷ Many considered the Pūwalu the first post-annexation fora devoted solely to a discussion of Hawaiian issues amongst members of the Native Hawaiian community.²⁵⁸ In the first session, the participants, which included representatives from twenty-eight different organizations, prioritized five goals: (1) begin the journey toward self-determination by establishing political credibility and influence; (2) establish a land base; (3) ensure an educational system relevant to the needs and concerns of the Kānaka Maoli; (4) achieve economic self-sufficiency; and (5) strengthen “the spirit of ‘ohana and puwalu” amongst the Hawaiian people.²⁵⁹

Pūwalu participants discussed options for seeking justice and reconciliation for the historical injustices against the Kānaka Maoli. At the outset of the third Pūwalu Session, Supreme Court of Hawai‘i Chief Justice William S. Richardson,²⁶⁰ the first Kānaka Maoli to hold the state’s highest judicial post, urged the use of the courts to advocate for justice: “Our courts have recognized that Hawaii’s land laws are unique in that they are based, in part, upon ancient Hawaiian tradition, custom and usage. This means that in some cases . . . we can look to the practices of our ancestors as guidance to establish present day law.”²⁶¹ Richardson, former Lieutenant Governor under John A. Burns, led Hawai‘i’s highest court in issuing watershed decisions that recognized Hawaiian practices and understandings,²⁶² defined the shoreline to ensure that the public had access to the ocean and the upper reaches of the waves,²⁶³ and concluded that the waters in streams were held in trust for all of the public.²⁶⁴

Protection of the land has been our culture. Our culture teaches us that the land was given to us to utilize and attain self-sufficiency. That is, to live off the land, not desecrate it”).

²⁵⁶ See ISLAND EDGE OF AMERICA, *supra* note 97, at 308-09.

²⁵⁷ See PUKUI & ELBERT, *supra* note 1, at 360 (defining “pūwalu” as “[a]ll together, in unison, united, cooperative”); see also Sanburn, *supra* note 250, at 12 (noting that individuals invited to the Puwalu Sessions represented 28 different organizations).

²⁵⁸ Alu Like and the Council of Hawaiian Organizations sponsored the Pūwalu Sessions. See Sanburn, *supra* note 250, at 12.

²⁵⁹ *Id.*

²⁶⁰ See generally Williamson Chang, *The Life of the Law is Perpetuated in Righteousness: The Jurisprudence of William S. Richardson*, 33 U. HAW. L. REV. 99 (2010) (discussing the jurisprudence of Chief Justice Richardson).

²⁶¹ Sanburn, *supra* note 250, at 13.

²⁶² See Sheehan v. Palama, 50 Haw. 298, 440 P.2d 95, 97 (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”).

²⁶³ See *In re Application of Ashford*, 50 Haw. 314, 440 P.2d 76, 78 (1968) (determining that the shoreline should be set in accord with ancient custom that allowed for public use).

²⁶⁴ See *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330, 1330 (1973) (affirming the state’s property rights in the Koula stream and Hanapepe river). Richardson and his successors would later pen various rulings that significantly expanded the rights of Hawai‘i’s indigenous peoples. See Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka Nō‘eau*, 33 U. HAW. L. REV. 3, 6 (2010) (“Working closely with the other members of the court, [Chief Justice] Richardson helped to reincorporate

DeSoto recalled, “Justice Richardson and I had a sad conversation It hurt him so much to see the Hawaiian people coming to court with no resources. We weren’t able to sustain the onslaught by those with money who were quiet-titling the land. They were stealing. We had to do something.”²⁶⁵ Fortified by her intimate involvement in the Pūwalu Sessions and the struggles against the federal government on Kaho’olawe, DeSoto set herself on a course to change the political tides of the Kānaka Maoli.

DeSoto developed a keen interest in one of the foremost developments from the Pūwalu Sessions—a legislative package that included a draft bill to reestablish a governing entity for the Kānaka Maoli. In 1977, Hawai‘i State Representative and future Speaker of the House Henry Ha‘alilio Peters introduced that Pūwalu bill as House Bill 1469.²⁶⁶ The bill recognized a private, non-profit entity called Hō‘āla Kānāwai, meaning “awakening of the law,”²⁶⁷ as the recipient of a portion of the Public Lands trust properties—those lands given to the state upon statehood—and funds to be expended to benefit Hawaiians.²⁶⁸ Section 5(f) of the law granting statehood to Hawai‘i specifically provided that the Public Lands and the income derived therefrom be held as a “public trust” to support five different purposes, including “the betterment of the conditions of native Hawaiians”²⁶⁹ Accordingly, its proponents intended Hō‘āla Kānāwai to recognize a private entity that, consistent with the mandate of section 5(f) of the Admissions Act, that could accumulate and channel eighty percent of proceeds from state lands to programs aimed at benefitting native Hawaiians.²⁷⁰ House leadership ultimately referred Hō‘āla Kānāwai to the House Committee on

Native Hawaiian tradition and custom into state law and expanded public rights. His decisions show his successful efforts to balance competing factors: the past and the future; Western law and Hawaiian law and tradition; the rights of the individual and the rights of the collective; and public and private interests.”)

²⁶⁵ Sanburn, *supra* note 250, at 13.

²⁶⁶ H.B. 1469, 9th Leg. (Haw. 1977); *Remedial Bill Outlined for Trust Lands*, THE HONOLULU ADVERTISER, Dec. 7, 1977, at A-12 [hereinafter *Remedial Bill*].

²⁶⁷ *Id.*

²⁶⁸ *Id.*; H.B. 1469. In the act granting the Territory of Hawai‘i’s admission to the United States, Congress set forth specific terms by which the new state could enter, one of which narrowly defined the purposes for which the state could use the Public Lands. An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. 86-3, 73 Stat. 4 (1959). Those lands included the Crown and Government Lands of the Kingdom of Hawai‘i illegally taken by the Provisional Government in the 1893 overthrow and then improperly “ceded” to the United States in 1898. *See* Melody Kapilialoha MacKenzie, *Public Lands Trust*, in NATIVE HAWAIIAN LAW: A TREATISE, at 79-80 (2015). During Hawai‘i’s territorial period, the federal government set aside land from the Ceded Lands for native Hawaiians as part of the Hawaiian Homes Commission Act and kept land for military purposes. *Id.* at 81. The remaining land constitutes the Public Lands trust. *Id.*

²⁶⁹ An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959) (“[The Public Lands] shall be held by said State as a public trust for the support of the public schools and other public institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for other object shall constitute a breach of trust for which suit may be brought by the United States.”).

²⁷⁰ *See* Edwin Tanji, *Hawaii Groups Clash Over Use of Agency’s Funds*, THE HONOLULU ADVERTISER, Dec. 14, 1978, at C-23.

Water, Land Use, Development and Hawaiian Homes, and then to the Committee on Finance.²⁷¹ Hō‘āla Kānāwai died in committee, however, after constitutional scholars raised concerns that the state could not create a private and independent agency using public funds.²⁷² Although Hō‘āla Kānāwai failed to gain traction in the state legislature in 1977, DeSoto and an ambitious crop of delegates resurrected it in the 1978 state constitutional convention.

2. The People’s Convention: Reclaiming and Reframing Hawai‘i’s Past

The 1978 constitutional convention was fundamentally different from that which occurred a decade earlier when delegates literally laughed at a proposal to protect Native Hawaiians.²⁷³ A campaign by the League of Women Voters and Common Cause Hawai‘i, supported by the local media, framed the 1978 convention as a grassroots convention.²⁷⁴ The media successfully discouraged public office holders from running as delegates.²⁷⁵ Compared to the 1968 convention, where one-third of the delegates were legislators and most of the rest were closely associated with the political elite, the 1978 convention aptly represented a body dubbed the “People’s Convention”: only seven of the 102 delegates had held political office; there were thirty women compared with seven women ten years earlier; and almost half of the delegates were under thirty-four years old.²⁷⁶

Native Hawaiian attorney John D. Waihe‘e, III won a seat as a delegate.²⁷⁷ Waihe‘e had grown up on rural Hawai‘i Island and was influenced by his father, a telephone repairperson who was involved in Democratic politics.²⁷⁸ A 1976 graduate of the University of Hawai‘i Law School, Waihe‘e’s first two cases were defending Walter Ritte and Charles Warrington, Jr. for trespassing on Kaho‘olawe.²⁷⁹ Waihe‘e also participated in the Pūwalu Sessions and was impacted by Pae Galdeira, who Waihe‘e heard speak about the struggles of Native Hawaiians.²⁸⁰

Almost immediately, three groups of delegates formed at the convention: (1) those who were in favor of preserving the status quo; (2) those characterized as “independent” for pushing a liberal political agenda, which included initiative, referendum, and recall; and (3) a small group aligned with Waihe‘e.²⁸¹ Waihe‘e’s faction had an agenda of changes to environmental laws and Hawaiian

²⁷¹ Journal of the House of Representatives of the 9th Legislature, State of Hawai‘i, Regular Session of 1977, at 321 (1977).

²⁷² See H.B. 1469.

²⁷³ See 1968 DEBATES, *supra* note 109, at 518 (“Mr. Chairman, this is a matter which I feel is of utmost importance and it is not a laughing matter as many of the other people have criticized me for bringing it up.”).

²⁷⁴ Interview with John D. Waihe‘e, III, Former Governor, State of Hawai‘i, in Honolulu, Hawai‘i (April 16, 2015) [hereinafter Waihe‘e Interview].

²⁷⁵ STATE OF HAWAII, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII 1978, VOLUME I, at vii (1980) [hereinafter 1978 PROCEEDINGS VOLUME I].

²⁷⁶ See *id.*

²⁷⁷ Waihe‘e Interview, *supra* note 274.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* Waihe‘e later became the first Native Hawaiian Governor of the State of Hawai‘i. *Id.*

²⁸¹ *Id.* Waihe‘e’s faction opposed initiative, referendum, and recall because of the potential for the majority to dictate

rights.²⁸² None of the factions, however, held a majority at the convention.²⁸³

The first order of business was to organize and select leadership—particularly a convention president—who would select chairpersons for the various committees. Jeremy Harris, a delegate from Kaua‘i and one of the leaders of the independent group,²⁸⁴ called Waihe‘e and informed him that if he aligned with the independent faction, the delegates would elect Waihe‘e president.²⁸⁵ In part because of the diverse views of the independent faction, Waihe‘e refused Harris’ offer and instead aligned himself and his group with the status quo faction.²⁸⁶ Waihe‘e supported status quo delegate William Paty as the compromise candidate for convention president.²⁸⁷ Paty was a plantation manager of Waiialua Sugar Company and a descendant of individuals who supported Queen Lili‘uokalani’s effort to regain the throne.²⁸⁸ Paty described the convention as,

taking a hundred and two people, most of them with no real legislative background, except the very few that were elected, and say, Hey, we want you to look at the State Constitution, get yourself organized, develop the rules, develop committees, get the hearings going, and come up with recommendations all in terms of sixty actual working days.²⁸⁹

Paty asked Waihe‘e, the power broker, what he wanted.²⁹⁰ The young attorney responded that he did not want anything for himself but wanted to be at the table when Paty doled out committee chairpersonships to the delegates.²⁹¹ With his seat at the table, Waihe‘e shaped the tenor of the convention. Paty granted Waihe‘e’s request for a new Hawaiian Affairs Committee, for which he singled out delegate Frenchy DeSoto to be selected as the chair.²⁹² The creation of this new committee and the entrustment of its success to DeSoto represented a turning point for discussions of justice for Native Hawaiians. Waihe‘e successfully navigated the early stages of the framing of the constitutional debate simply by being at the decision-making and leadership table.²⁹³

the course of the political and legal system to the disadvantage of the poor and disenfranchised. *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* Harris would eventually become Mayor of the City and County of Honolulu. *Id.*

²⁸⁵ See ISLAND EDGE OF AMERICA, *supra* note 97, at 308.

²⁸⁶ Waihe‘e Interview, *supra* note 274.

²⁸⁷ *Id.*

²⁸⁸ 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 10, 502.

²⁸⁹ PBS Hawaii Long Story Short with Leslie Wilcox, *Transcript of Interview of Bill Paty* 5, (July 5, 2011), http://www.pbshawaii.org/ourproductions/longstory_transcripts/LSS%20425%20Transcript%20-%20Bill%20Paty.pdf [<https://perma.cc/JY88-VJDR>].

²⁹⁰ See ISLAND EDGE OF AMERICA, *supra* note 97, at 308.

²⁹¹ *Id.*

²⁹² Waihe‘e Interview, *supra* note 274. Per Waihe‘e’s request, his friends and law school classmates Anthony Chang and Carol Fukunaga got chairpersonships of the Environment, Agriculture, Conservation and Land Committee and the Committee on the Executive, respectively. ISLAND EDGE OF AMERICA, *supra* note 97, at 308.

²⁹³ See Hom & Yamamoto, *supra* note 3, at 1765 (“Indeed, struggles over memory are often struggles between

In a nod to reframing the scope of the the Hawaiian Affairs Committee's work,²⁹⁴ committee members considered proposals related to: (1) the protection and perpetuation of ancient Hawaiian rights, traditions, heritage, and archaeological sites; (2) the implementation of native Hawaiian culture and language; (3) the preservation of native Hawaiian vegetation and crops; (4) the recognition of problem areas common to native Hawaiians; and (5) the Hawaiian Homes Commission Act.²⁹⁵ A dedicated staff provided support for the Committee's bold agenda.²⁹⁶ In addition, DeSoto and Waihe'e had a "deal": Waihe'e would find the votes for and pass out of the convention any item that DeSoto could get out of committee.²⁹⁷

While delegates put forth several proposals dealing with Hawaiian Affairs, three proposals formed the basis for the eventual establishment of an agency that would serve as a vehicle for reparative action for Kānaka Maoli—a bold idea that had only recently received a lukewarm reception from the federal and state governments.²⁹⁸ Delegate Gil Silva introduced Proposal 405 to amend the constitution to establish a "commission on Hawaiian affairs" that would coordinate "all government affairs directly pertaining to the Hawaiian people, their culture, history and lands," and "[e]stablish facilities to protect and preserve the Hawaiian people, their culture, history and lands."²⁹⁹ Chair DeSoto, in Proposals 674 and 676, proposed revisiting the Hō'āla Kānāwai concept and provided a framework whereby Native Hawaiians would elect a board of Native Hawaiian trustees to "manage and administer the proceeds from the sale or disposition of the lands, natural resources, minerals, and income."³⁰⁰

colliding ideologies, or vastly differing world views.”)

²⁹⁴ Although there was a cultural and political renaissance that led up to the Con-Con, Kānaka Maoli affairs were not a hot-button issue for the convention. For example, the Legislative Reference Bureau provided a briefing report for Hawaiian Affairs Committee members about issues facing Hawaiians, but focused primarily on the Hawaiian Homes Commission Act and how nothing much could be done because federal law created it. *See* ISLAND EDGE OF AMERICA, *supra* note 97, at 308-09. The report did not share new ideas of how to advance its declared scope. *Id.*

²⁹⁵ Constitutional Convention of Hawaii of 1978, *Committee on Hawaiian Affairs: Scope*, (1978) (on file with author, retrieved from the Hawai'i State Archives).

²⁹⁶ *See* Waihe'e Interview, *supra* note 274. Waihe'e considered the composition of DeSoto's staff "genius" because "she hired all the young activists into her group . . . and forced them to get off of . . . talking about stuff and actually writing down specific proposals . . . actually working on provisions." *Id.* Committee staffers Steve Kuna and Martin Wilson and attorneys Sherry Broder and Jon Van Dyke supported the committee's work. Interview with Sherry Broder, Esq., in Honolulu, Hawai'i (April 13, 2015). Volunteers Walter Ritte (Kaho'olawe protector), Randy Kalahiki, Francis Kauhane (member of The Hawaiians arrested at Parker Ranch and on Kaho'olawe), Steve Kuna, Mililani Trask, Kali Watson, Alu Like Director Winona Rubin, and Georgiana Padeken also contributed significantly to the Committee's work. *See* ISLAND EDGE OF AMERICA, *supra* note 97, at 308-09.

²⁹⁷ *See* Waihe'e Interview, *supra* note 274.

²⁹⁸ *See supra* Sections III.A.2.b (discussing the ALOHA organization), III.B.1 (discussing Hō'āla Kānāwai).

²⁹⁹ Delegate Proposal No. 405, Constitutional Convention (Haw. 1978) (on file with author, retrieved from the Hawai'i State Archives).

³⁰⁰ Delegate Proposal No. 674, Constitutional Convention (Haw. 1978) (on file with author, retrieved from the Hawai'i State Archives); Delegate Proposal No. 676, Constitutional Convention (Haw. 1978) (on file with author, retrieved from the Hawai'i State Archives).

A public hearing took place on the evening of August 8, 1978, at the Waimānalo Community School Library.³⁰¹ The hearing, which was originally scheduled to be in Honolulu, was instead held in Waimānalo because, according to DeSoto, “that is where native Hawaiians live.”³⁰² The Hawaiian Affairs Committee sought to consider, among other items, Proposals 405, 674, and 676.³⁰³ Among the numerous individuals who testified were PKO members Ritte, Aluli, and Warrington, as well as Department of Hawaiian Home Land protestors Sonny Kaniho, Moanike’ala Akaka, and Joe Tassil.³⁰⁴

Waihe’e recalled the moment when the idea of creating a Native Hawaiian serving entity took form: “Aunty Frenchy called a meeting of the [constitutional convention’s] Hawaiian Affairs Committee, so that all these interest groups could come together and thrash it out. Nobody left the room. There was prayer, there was yelling, and whatever else you needed to have. At the end, a consensus emerged. It was Aunty Frenchy—maybe they were terrified by her, maybe they were persuaded by her; I don’t know.”³⁰⁵ The Hawaiian Affairs Committee consolidated and revised Proposals 405, 674, and 676 into its own Committee Proposal 13, titled “Relating to Hawaiian Affairs.”³⁰⁶ Committee Proposal 13 suggested several substantive revisions,³⁰⁷ including merging ideas from DeSoto’s and Silva’s proposals to create a new entity:

There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are native Hawaiians, in accordance with law. The board members shall be native Hawaiians. There shall be not less than 9 members of the board of trustees; provided that each of the following Islands have at least one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The Board shall select a chairman from its members.³⁰⁸

In its report, the Committee articulated its reparatory goals of providing a “receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians, and to create a body that could formulate policy relating to all native Hawaiians and make decisions on the allocation of those assets belonging to native Hawaiians.”³⁰⁹ The Committee specifically envisioned that OHA would “be

³⁰¹ David Tong, *Native Hawaiians Spell Out Concerns for Con Con Panel*, THE HONOLULU ADVERTISER, Aug. 9, 1978, at D-18.

³⁰² *Id.*

³⁰³ 1978 Constitutional Convention of the State of Hawaii, Public Hearing Notice, Committee on Hawaiian Affairs 2 (Aug. 9, 1978) (on file with author, retrieved from Hawai‘i State Archives).

³⁰⁴ Stand. Comm. Rep. Report No. 59 in 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 643.

³⁰⁵ *Former Gov. Waihee ponders OHA’s 25 Years*, OFFICE OF HAWAIIAN AFFAIRS, undated article (on file with author).

³⁰⁶ 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 812.

³⁰⁷ *Id.*; Stand. Comm. Rep. No. 59 in 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 643.

³⁰⁸ Comm. Proposal No. 13, in 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 813.

³⁰⁹ Stand. Comm. Rep. No. 59 in 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 644.

able to receive and administer any reparations money, which [would] probably be awarded to all native Hawaiians regardless of blood quantum.”³¹⁰ This reframing of historical injustices as requiring reparative relief represented a stark shift from efforts in the previous decade.³¹¹

The Committee was “unanimously and strongly of the opinion that *people to whom assets belong should have control over them*,” and added language to ensure that the board of trustees would be elected “by all native Hawaiians.”³¹² The Committee’s decision to limit voting to native Hawaiians was necessary to avoid the “criticism which has been directed at the Hawaiian homes commission for, among other things, its inability to respond adequately to the needs of native Hawaiians of one-half blood.”³¹³ The Committee, therefore, invoked the decades-long struggle to hold the Department of Hawaiian Home Lands accountable for failing to house native Hawaiians.³¹⁴

Perhaps the most critical line of the Committee’s report was: “The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency.”³¹⁵ The Committee thus indicated it was creating a new entity that would operate as an autonomous branch of the government.³¹⁶ The Hawaiian Affairs Committee sought to return power to Kānaka Maoli by providing a form of self-determination—something the United States stole eight decades earlier. Indeed, the Committee envisioned the trustees of OHA to have the power “to contract, to accept gifts, grants and other types of financial assistance and agree to the terms thereof, to hold or accept legal title to any real or personal property and to qualify under federal statutes for advantageous loans or grants. . . . These powers also include the power to accept the transfer of reparations, moneys and land.”³¹⁷

³¹⁰ *Id.*

³¹¹ *See supra* Section III.B.2.

³¹² Stand. Comm. Rep. No. 59 in 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 644-45 (emphases added).

³¹³ *Id.*

³¹⁴ *See discussion supra* Section III.A.2.a (discussing the efforts of Pae Galdeira and The Hawaiians to challenge the inefficiency of the Department of Hawaiian Home Lands).

³¹⁵ Stand. Comm. Rep. No. 59 in 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 644-45 (emphasis added).

³¹⁶ *Id.* at 645 (“The board shall exercise power in accordance with 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, including all income and proceeds from that pro rata portion of the trust referred to in Section 4 for those native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended or may be amended; formulate policy relating to affairs of native Hawaiians, and exercise control over real and personal property set aside by state, federal, or private sources and transferred to said Board for Native 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 shall be appointed by the board.”).

³¹⁷ Stand. Comm. Rep. No. 59 in 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 645 (emphases added). Importantly, not all Hawaiians were satisfied with the Committee’s proposal. Mililani Trask, a staff member of the Hawaiian Affairs Committee who was recruited by Alu Like, stated: “I opposed the committee’s decision” Noe Noe Wong-Wilson, *A Conversation with Mililani Trask*, 17(1) THE CONTEMPORARY PACIFIC 142, 145 (2005) (describing that Trask contended that DeSoto’s committee concluded: “(1) Hawaiians were not ready for self-governance; (2) the community initiative [Hō’āla Kānāwai] was a substantial threat, a challenge to the state; and (3) Hawaiians needed a two-step approach ,” creating a state agency and then seeking sovereignty). Clearly dissatisfied, Trask left the Committee and the constitutional convention. *Id.* Following her exit from the convention, Trask worked with community members to form the Native Hawaiian Land Trust Task Force to focus on self-determination for Native Hawaiians. *See Mililani Trask, The Politics of Oppression: The United States in*

On Saturday, September 2, 1978, the Committee of the Whole debated Committee Proposal 13.³¹⁸ Hundreds of Hawaiians, traveling from across the state to lend their support, filled the meeting room.³¹⁹ Aunty Frenchy seized the opportunity to frame a collective memory of injustice that used history to push for support from fellow delegates. It was not lost on DeSoto and the Hawaiian Affairs Committee that September 2 was the birthday of Queen Lili'uokalani. DeSoto, at the beginning of the session, made a *ho'okupu*, offering, in memory of Hawai'i's last sovereign.³²⁰ The act of paying tribute to Lili'uokalani in a state proceeding was a symbolic gesture that set the tone and offered a new way of approaching lawmaking as it was an indigenizing effort to demonstrate the importance of Lili'uokalani to the work the delegates were about to tackle.³²¹

DeSoto then advocated for Committee Proposal 13.³²² She stated that she believed the Committee created OHA “to address the modern-day problems of Hawaiians which are rooted in as dark and sad a history as will ever mark the annals of time.”³²³ Armed with an intimate understanding of history, DeSoto “critically engage[d] the dynamics of group memory of injustice”³²⁴ and began her narrative of Hawai'i's history not with the arrival of Captain Cook or the bombing of Pearl Harbor.³²⁵ Her reframed narrative instead began “[b]efore the advent of the foreigner” and emphasized how Hawaiians developed a “truly remarkable” culture, where land and sea provided sustenance.³²⁶ In a play to popular media and the cultural terrain, she referenced the recent extraordinary voyage of the Hōkūle'a to highlight how “the pre-Captain Cook Hawaiians were great sailors, traveling long distances in canoes. They were great navigators, with an almost mystic knowledge of the stars.”³²⁷ DeSoto reclaimed Kānaka Maoli as brilliant farmers, engineers, and healers.³²⁸ She described the relationship between land, religion, and government:

The land system before the coming of the foreigner was inseparably a part of religion and government. To destroy one was to destroy the other. The Hawaiians worshipped nature, which expressed itself in a system of rules—*kapus*—that regulated their daily lives. The islanders were divided into kingdoms, each ruled by

Hawai'i, in ISLANDS IN CAPTIVITY, *supra* note 190, at 28485. This effort led to the creation of Ka Lāhui Hawai'i, a native sovereignty initiative. *Id.* at 285–88.

³¹⁸ STATE OF HAWAII, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, VOLUME II at 456 (1980) [hereinafter 1978 PROCEEDINGS VOLUME II].

³¹⁹ Waihe'e Interview, *supra* note 274.

³²⁰ 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 252.

³²¹ SMITH, *supra* note 70, at 146 (describing indigenizing as a project of decolonization as centering “a politics of indigenus identity and indigenous cultural action” that draws upon the traditions of native peoples).

³²² 1978 PROCEEDINGS VOLUME II, *supra* note 318, at 456.

³²³ *Id.* at 457.

³²⁴ Hom & Yamamoto, *supra* note 3, at 1764.

³²⁵ See discussion *supra* Part II (describing the starting point for the master narrative as the bombing of Pearl Harbor, statehood day, or the arrival of Captain Cook).

³²⁶ 1978 PROCEEDINGS VOLUME II, *supra* note 318, at 457.

³²⁷ *Id.*; see *supra* Section III.A.1 (discussing the significance of the voyage of Hōkūle'a).

³²⁸ 1978 PROCEEDINGS VOLUME II, *supra* note 318, at 457.

a king. In land matters, as in many others, the king's words were supreme. Part of the land the king reserved for himself for his own private use; the rest he portioned out to his subordinates, who in turn portioned it out to their subordinates, all the way down to the *hoa'aina*, who tilled the soil.

....

If you took away his religion, his government, if you took him away from the *'aina* or from the economy that he knew, you destroyed him. And many people did do this.³²⁹

Hawaiians, prior to Western contact, were not the “savages” and “sinners” that typified the collective memory of Native Hawaiians at the time.³³⁰ Instead, DeSoto rearticulated Native Hawaiians before Western contact as a sophisticated and intelligent people with an intimate connection and unparalleled understanding of their land and resources.

DeSoto then described the significant social and political change and the beginning of the injustice that came about with the “influx of foreign invaders,” particularly the rapid transition from a “subsistence economy—and with it the whole cultural structure—to an exchange economy”³³¹ DeSoto’s labeling Anglo-Americans as “invaders” reframed these foreigners’ role in the violence perpetuated against *Kānaka Maoli* and the Kingdom of Hawai‘i.³³² In her plea to her fellow delegates, DeSoto noted the decimation that came about with this foreign presence:

By 1840, native morale had all but been destroyed. The new ways may have been superior, but to Hawaiians this was little compensation for the destruction of the old and the familiar. Thousands of Hawaiians died. From the missionary estimate in 1826 to the official Hawaiian census in 1919, the number of full-blooded Hawaiians had decreased from 142,650 to 22,500, while the Hawaiian death rate had correspondingly increased until it exceeded considerably the death rate of any other race inhabiting the Islands at that time.³³³

Native Hawaiians became “hopelessly land-less.”³³⁴ This tragic history, recounted by DeSoto, led to the “inevitable”: “our *mo’i wahine* Queen Lili‘uokalani was dethroned—a bloodless revolution but a

³²⁹ *Id.*

³³⁰ See discussion *supra* Part II.

³³¹ 1978 PROCEEDINGS VOLUME II, *supra* note 318, at 457.

³³² *Id.*

³³³ *Id.* at 457-58.

³³⁴ *Id.* at 458; *Leaders Mourn Claims Bill Death*, THE HONOLULU ADVERTISER, Sept. 9, 1978, at A-4 (noting the following remarks from DeSoto to the failure of the federal government to pass legislation creating a commission to study reparations for Native Hawaiians: “Queen Liliuokalani unsuccessfully appealed to the conscience of the American government at the time of her overthrow, 85 years ago, and today, it appears that the conscience and morality of that same government holds the same unresponsive view to native Hawaiians”).

queen deposed, a *legitimate* monarchy overthrown.”³³⁵ DeSoto placed the overthrow of “our” Lili‘uokalani at the forefront of the delegates’ minds. Her mention of the Queen was again buttressed by the *ho‘okupu* that she made on behalf of the delegates to Lili‘uokalani earlier that day, negating the master narrative that Lili‘uokalani was lazy, corrupt, and undependable.

DeSoto concluded her remarks by connecting this history with the opportunity the delegates now had to repair the historical wrong it presented:

Many, many injustices have been documented in our history. All these injustices have caused us now to stand in public and bare our souls once more, bare our souls so that someone, someplace will begin to listen. Mr. Chairman, fellow delegates, if there must be a statement of need before Committee Proposal No. 13 is accepted or adopted by this Convention, then surely the following statistics indicate it: according to the 1975 census updates, the present Hawaiian population is a young one: there are roughly 60,000 Hawaiians, or approximately 54 percent of the total Hawaiian population, who are under the age of 20. It is my dream and the dream of my people that the Hawaiian today be given the opportunity to provide for betterment of the condition and well-being of these young Hawaiians, to address the contemporary problems which Hawaiians face—of crime, inadequate housing conditions, welfare rolls, education. Committee Proposal No. 13, Mr. Chairman, I submit, attempts to build the steps for native Hawaiian people so that they may realize . . . self-determination.³³⁶

DeSoto’s advocacy framed the measure not as a handout to a racial group but as a means to repair a litany of historical injustices perpetrated by the United States.³³⁷ She connected this history to present-day problems plaguing the Hawaiian people. DeSoto deployed a new collective memory by highlighting the damage wrought by settler colonialism and reframed that shared history of injustice by telling the story of the Native Hawaiian people.³³⁸

Several delegates echoed DeSoto’s sentiments and expounded on the intent and significance of Proposal 13. Delegate Kekoa D. Ka‘apu, for example, explained that the intent of the Proposal

³³⁵ 1978 PROCEEDINGS VOLUME II, *supra* note 318, at 458 (emphasis added).

³³⁶ *Id.*

³³⁷ See also 1978 PROCEEDINGS VOLUME II, *supra* note 318, at 460 (Statement of Delegate Barr) (“It seems to be clear that it was the intent of the Admission Act that we recognize a special claim, a special interest on the part of an aboriginal people in these Islands. And if that effect sets up a separate county, or a separate trust, or a separate university or whatever, it is well past time that we take that step so that we as people meet the obligation that we have to do justice to that aboriginal people.”).

³³⁸ See Saito, *supra* note 6, at 30-31 (“Narratives of origin, identity, and purpose structure social relations, identifying who belongs, their status with respect to others, and how decisions for the collective will be made and enforced. They tell us who we are, where we have come from and where we are going, what we should fear, what we should want, and how we should try to get it.”); see also SMITH, *supra* note 70, at 144 (“For many indigenous writers stories are ways of passing down the beliefs and values of a culture in the hope that the new generations will treasure them and pass the story down further. The story and storyteller both serve to connect the past with the future, one generation with the other, the land with the people and the people with the story.”).

was to allow duly elected Hawaiian beneficiaries “to set the framework by which resources can be managed and benefits achieved” and to “govern the disposition of these resources and settle on policies among themselves. . . .”³³⁹ Delegate C. Randall Peterson stated, “I think it’s time that native Hawaiians have more impact on their own future, and *the transfer to Hawaiians of the responsibilities of self-government is only right and proper.*”³⁴⁰ Like DeSoto, these lawmakers sifted through the relevant and irrelevant to conclude that historical injustices occurred and Native Hawaiians were entitled to reparative action.³⁴¹

Nevertheless, as collective memory is “always hotly contested,” action that responds to historical claims of injustice “turn[s] on which memories are acknowledged by decisionmakers.”³⁴² Here, not everyone agreed with DeSoto. Delegate Akira Sakima questioned whether it was unconstitutional for a public agency to be elected by and to benefit only one race.³⁴³ For Sakima, Committee Proposal 13 conferred racial privileges that tipped an otherwise equal scale in favor of Native Hawaiians at the expense of the non-Hawaiian community.³⁴⁴ Sakima failed to see how the creation of OHA, as DeSoto articulated, was an effort to repair the negative effects of settler colonialism and the racialization of Native Hawaiians.³⁴⁵ Despite these reservations, the Committee of the Whole voted to approve Committee Proposal 13.³⁴⁶ DeSoto stated:

The convention, if it so desires to adopt these proposals set before it on behalf of the Hawaiian community, can go down in history as being the only elective body truly representative of the people throughout Hawaii, which gave any consideration that had meaningful and lasting impact on the native Hawaiian community.³⁴⁷

In 1978, the constitution-building process provided a fertile site for successfully framing the collective memory of injustice.

The Committee of the Whole, which included all delegates, subsequently issued its report. The report indicated that delegates were “impressed by the concept” of OHA.³⁴⁸ They saw the creation of OHA as a means to effectuate the betterment of the condition and welfare of Native Hawaiians to “unite Hawaiians as a people,” to ensure that “Hawaiians have more impact on their

³³⁹ 1978 PROCEEDINGS VOLUME II, *supra* note 318, at 458.

³⁴⁰ *Id.* at 459 (emphasis added).

³⁴¹ Yamamoto & Betts, *supra* note 11, at 565. Public sentiment began shifting on the issue of Native Hawaiian justice; *see also* Editorial Board, *Reparations Setback*, THE HONOLULU ADVERTISER, Sept. 9, 1978, at A-12 (“It would seem that the best approach remains the idea of getting a study commission [on Native Hawaiian reparations] that will both determine the justice of the Hawaiian cause and have the respect of Congress to the point it will act on its recommendations.”).

³⁴² Hom & Yamamoto, *supra* note 3, at 1765.

³⁴³ 1978 PROCEEDINGS VOLUME II, *supra* note 318, at 459.

³⁴⁴ *See (Re)Righting History*, *supra* note 17, at 640-57 (discussing the Court’s decision in *Rice v. Cayetano*).

³⁴⁵ *See* discussion *infra* Section III.D.1.

³⁴⁶ 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 254.

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 1018.

future,” and to provide OHA with “maximum independence.”³⁴⁹ They respected Native Hawaiians and accepted as true the struggles they endured. The delegates recognized the harm done to Native Hawaiians and therefore sought to help unify them and give them a voice in constructing their own future. The Committee of the Whole lauded OHA’s independent nature: “The most important aspect of this model is *the power to govern itself*.”³⁵⁰ The convention delegates thus showed themselves willing to turn over some of the state’s power.

Finally, and in an apparent effort to answer the question of OHA’s constitutionality, the Committee of the Whole stated:

If one looks to the precedent of other native peoples, one finds that they have traditionally enjoyed self-determination and self-government. They have power to make their own substantive rules in internal matters. Although no longer possessed of the full attributes of sovereignty, they remain a separate people with the power of regulation over their internal and social problems. . . . In conclusion, these provisions are constitutional due to the unique legal status of Hawaiians.³⁵¹

The Committee of the Whole, at the advice of legal counsel, and much like the Hawaiian Homes Commission Act, analogized Native Hawaiians to Native Americans.³⁵² The delegates had the foresight to affirm OHA’s constitutionality. In so doing, those in power used the constitution-drafting process to “achieve the specific legal result and to contribute to construction of social memory as a political tool.”³⁵³ Moreover, by equating the Native Hawaiian situation to that of Native Americans, the convention delegates sought to construct a new memory founded upon accepted legal precedent.

During the convention proceedings, Native Hawaiians amplified historical injustices to pressure delegates to take bold legal action. Specifically, on September 4, 1978, The Hawaiians—the grassroots organization that fought corruption in the state Department of Hawaiian Home Lands—staged a protest at Hilo International Airport.³⁵⁴ Police arrested sixty-five demonstrators after they tried to sit down on the runway to protest inequities against Native Hawaiians.³⁵⁵ The demonstrators

³⁴⁹ *Id.*

³⁵⁰ *Id.* (emphasis added).

³⁵¹ *Id.* at 1019 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Morton v. Mancari*, 417 U.S. 535 (1974)).

³⁵² See Troy J.H. Andrade, *Legacy in Paradise: Analyzing the Obama Administration’s Efforts of Reconciliation with Native Hawaiians*, 22 MICH. J. RACE & L. 273, 279-280 (2017) [hereinafter *Legacy in Paradise*]; *Mancari*, 417 U.S. at 553 n. 24 (“The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”).

³⁵³ Hom & Yamamoto, *supra* note 3, at 1765

³⁵⁴ Waihe’e Interview, *supra* note 274; Hugh Clark, *Scenes from a Protest that Ended in Smiles*, THE HONOLULU ADVERTISER, Sept. 6, 1978, at A-3 (quoting DeSoto as calling the Hilo Airport protest “an honest and genuine expression” of the frustration of Hawaiians and urging her fellow delegates to grant justice: “Our Hawaiian community by-and-large are victims of injustices—past and present. . . . We face many closed doors and as a result, many look ahead to an even more dismal future”).

³⁵⁵ Hugh Clark, *51 Hilo Protesters Arrested; Demonstration Shuts Airport*, THE HONOLULU ADVERTISER, Sept. 5, 1978, at

denounced the years of rent-free use of the state-owned lands that the airport sat upon because those lands were set aside for Hawaiian homesteading.³⁵⁶ They again highlighted this history of broken promises and used it as “a catalyst for mass mobilization and collective action” aimed at lawmakers and the community conscience.³⁵⁷

With this mounting political pressure, on September 7, 1978, Committee Proposal 13, as amended, came up for its final convention approval.³⁵⁸ Delegate DeSoto expressed her gratitude to the Convention for moving forward with this reparative measure:

We have waited years. Our people have struggled. Our people have broken hearts and broken spirits. Many of our *opio* [youth] strike out and strike back at administrative bureaucracies. I want to be able to stand in front of them and tell them that indeed the system works and that they should participate in it.³⁵⁹

With a simple voice vote, DeSoto and her youthful colleagues succeeded.³⁶⁰ The delegates, representing a vote by the people, approved the ideas borne of the Pūwalu Sessions and the cultural and political renaissance of the 1970s.

Committee Proposal 13 joined four other proposed amendments affecting Native Hawaiians on the state ballot before the electorate.³⁶¹ Yet, even with the groundswell in awareness and participation,³⁶² the broader public barely approved the five amendments, together referred to as the “Hawaiian Affairs Package.”³⁶³ To the dismay of many, the package received more “no” votes than any other amendment.³⁶⁴ This was, as one journalist put it, “an unsettling reminder of the reality of

A-1, A-3.

³⁵⁶ Waihe'e Interview, *supra* note 274.

³⁵⁷ See Hom & Yamamoto, *supra* note 3, at 1757.

³⁵⁸ 1978 PROCEEDINGS VOLUME I, *supra* note 275, at 285.

³⁵⁹ *Id.* at 285–86.

³⁶⁰ *Id.* at 285.

³⁶¹ State of Hawai'i, Office of Elections, *Informational Booklet: Amendments to the State Constitution Proposed By the 1978 Constitutional Convention* (Nov. 7, 1978) (on file with author). The four other proposed amendments: provided protections for traditional fishing, hunting, gathering and access rights; prohibited the use of adverse possession to acquire land larger than five acres; recognized the importance of Native Hawaiian culture and included the Hawaiian language as an official language of the State; and strengthened the troubled Department of Hawaiian Home Lands by providing greater flexibility for funding administrative costs. *Id.*

³⁶² *Con Con Hawaiian Affairs Items to Be Discussed, Aired*, HONOLULU STAR-BULLETIN, Oct. 30, 1978, at A-2 (describing the public campaign to ensure the public understood the proposed amendments regarding Hawaiian issues).

³⁶³ Sandra Oshiro, *Con Con Scores a Total Triumph: All 34 Approved*, THE HONOLULU ADVERTISER, Nov. 8, 1978, at A-1, A-4 (concluding that the Hawaiian affairs proposals barely passed with a two percent margin and noting that “[t]he voters’ support for the Hawaiian affairs package was also weaker, judging from initial results. Questions raised about the cost of expanding the Department of Hawaiian Home Lands and requiring that it be funded and a provision to allow only Hawaiians to select the controlling board of directors for a new Office of Hawaiian Affairs were reflected in the vote”); Editorial Board, *Our Position on Con Con Amendments*, THE HONOLULU ADVERTISER, Nov. 6, 1978, at A-16 (recommending that voters vote “no” on the creation of OHA because of “a constitutional question that involves public funds”).

³⁶⁴ Sanburn, *supra* note 250, at 14.

being a minority in your own homeland.”³⁶⁵ Nevertheless, the ratification of the Hawaiian Affairs Package was victorious. It was now the supreme law of Hawai‘i that the amorphous “Office of Hawaiian Affairs” better the conditions of all Hawaiians.

The framing that supported reparative action for Native Hawaiians changed in 1978—at least for a majority of those in Hawai‘i. What was a laughing matter in 1968 was now accepted due in significant part to the willingness of lawmakers to recognize a collective memory of injustice that acknowledged the struggles of Native Hawaiians.³⁶⁶ In particular, the delegates of the constitutional convention framed a collective memory of injustice that emphasized the harms deployed against an empowered and thriving Hawaiian nation and people, the often intentional destruction and subsequent revival of the Hawaiian identity, the series of continued broken promises and trust responsibilities to Native Hawaiians, and the belief that the current socio-economic ills facing Kānaka Maoli were a result of this historical trauma.

The creation of OHA in 1978 demonstrated that the right people—DeSoto, Waihe‘e, the Hawaiian Affairs Committee staff, lawyers, community organizers, and other delegates—using the right tool—the collective memory of injustice—at the right time—in a constitution-building process that occurred during the throes of a cultural and political revolution by and for Kānaka Maoli—could produce reparative action.³⁶⁷

C. Reparative Retrenchment: Memory and Selective Amnesia in the 1979-1980 Legislative Sessions

The framing of a collective memory is fragile, subject to external forces and shifting cultural terrains.³⁶⁸ More importantly, those in power hotly contest collective memory, particularly when the narrative threatens an existing power hierarchy or the power of the state.³⁶⁹ At the 1979 and 1980 legislative sessions, some powerful legislators saw OHA as a threat and, despite the delegates’ intention to make OHA independent, decided that OHA should answer to the state legislature. These lawmakers held that Native Hawaiians were still not ready for self-determination.

1. Legislative Backlash in 1979: Using the Melting Pot Narrative to Blunt Reparative Action

The Legislature had two years to fulfill the constitutional mandate and create the Office before a scheduled 1980 election for trustees of the entity. It acted quickly to implement statutes that upended the initial purpose of OHA, thereby dampening the victory of the Hawaiian Affairs

³⁶⁵ *Id.* at 14.

³⁶⁶ 1978 PROCEEDINGS VOLUME II, *supra* note 318, at 457-59.

³⁶⁷ See Hom & Yamamoto, *supra* note 3, at 1764 (noting that reconstructed group memories occur “within a context of not only rights norms, but also larger societal understandings of injustice and reparations”).

³⁶⁸ See MINOW, *supra* note 57, at 118-20.

³⁶⁹ For some delegates, the ratified constitutional amendment left gaping holes in the organization and structure of OHA. 1978 PROCEEDINGS VOLUME II, *supra* note 318, at 460-61 (detailing Delegates Uyehara’s, Burgess’s, and Goodenow’s concerns with leaving discretion with the Legislature). The response from the Proposal’s proponents was that the State Legislature would have the authority to fill in the gaps of the constitutional mandate. It was a move many delegates, including DeSoto, would regret. DeSoto would later call the delegation of power to the Legislature a “horrendous mistake.” See Sanburn, *supra* note 250, at 14.

Package's ratification.³⁷⁰

In early 1979, weeks after the people ratified the constitutional amendments, Representative Richard A. Kawakami of Kaua'i introduced House Bill 890.³⁷¹ The bill provided the proposed statutory parameters for OHA, including the qualification of the administrator, the administrator's salary, and the funding mechanism for ensuring the agency's success.³⁷² Several individuals submitted testimony in support of the proposed bill, including Frenchy DeSoto.³⁷³ DeSoto sought to clarify the intent of creating OHA: "With an 'umbrella' function, the Office of Hawaiian Affairs . . . could receive and manage the available resources, implement some programs, contract other entities to operate other programs, and be accountable for making maximum use of human and material resources to address the needs of Hawaiians with the expected positive spin-offs for all the people of Hawaii Nei."³⁷⁴ Others who testified at that first hearing foreshadowed major issues that would continue to haunt OHA throughout its existence, including blood quantum requirements, trustee elections, and federal recognition.³⁷⁵

The House Committees amended House Bill 890 to include provisions consistent with the constitutional convention delegates' intent.³⁷⁶ The amendments equated the salary of OHA's

³⁷⁰ See NORA, *supra* note 30, at 146 ("Memory is blind to all but the group it binds—which is to say, as Maurice Halbwachs has said, that there are as many memories as there are groups, that memory is by nature multiple and yet specific; collective, plural, and yet individual.").

³⁷¹ H.B. 890 (Haw. 1979) (on file with author, retrieved from the Hawai'i State Archives).

³⁷² *Id.*

³⁷³ *Hearing on H.B. 890 Before the H. Comm. on Water, Land Use, Development and Hawaiian Affairs*, 10th Leg., Reg. Sess. (Haw. 1979) (Notice of Public Hearing Feb. 22, 1979) (on file with author, retrieved from the Hawai'i State Archives).

³⁷⁴ *Hearing on H.B. 890 Before the H. Comm. on Water, Land Use, Development and Hawaiian Affairs*, 10th Leg., Reg. Sess. (Haw. 1979) (statement of Adelaide "Frenchy" De Soto) (on file with author, retrieved from the Hawai'i State Archives).

³⁷⁵ *Hearing on H.B. 890 Before the H. Comm. on Water, Land Use, Development and Hawaiian Affairs*, 10th Leg., Reg. Sess. (Haw. 1979) (statement of Kamuela Price) (stating as an advisory council member of the group Hou Hawaiians, testified about the need for OHA to protect native Hawaiians at the expense of all other Hawaiians). Price and the Hou Hawaiians, relying upon the paternalistic and racist construct of blood quantum, believed the mandate of the constitutional convention was to use OHA's share of ceded land trust revenues only for those individuals with one-half part Hawaiian blood. *Id.* Attorney Mitsuo Uyehara—an original founder of Hō'āla Kānāwai—took the same position, but added that the concept of OHA was unconstitutional as it provided preferential treatment for one race. See *Hearing on H.B. 890 Before the H. Comm. on Water, Land Use, Development and Hawaiian Affairs*, 10th Leg., Reg. Sess. (Haw. 1979) (statement of Mitsuo Uyehara) (on file with author, retrieved from the Hawai'i State Archives). Georgiana Padeken, the director of the Department of Hawaiian Home Lands, who was recommended by Galdeira and The Hawaiians to Governor Burns, and who assisted the Hawaiian Affairs Committee at the convention, offered comments on specific clarifications that needed to be made. See *Hearing on H.B. 890 Before the H. Comm. on Water, Land Use, Development and Hawaiian Affairs*, 10th Leg., Reg. Sess. (Haw. 1979) (statement of Georgiana Padeken) (on file with author, retrieved from the Hawai'i State Archives). Her largest concern was ensuring that the Legislature clarify how the state would conduct the elections certify the electorate. *Id.* Attorney Nolan Chock of the Native Hawaiian Legal Corporation espoused the need for a political entity for Hawaiians to approach the federal government and obtain political recognition as an indigenous governing body. *Hearing on H.B. 890 Before the H. Comm. on Water, Land Use, Development and Hawaiian Affairs*, 10th Leg., Reg. Sess. (Haw. 1979) (statement of Nolan Chock) (on file with author, retrieved from the Hawai'i State).

³⁷⁶ H.R. Rep. No. 10-672 (Haw. 1979) reprinted in JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE 10TH LEGISLATURE, STATE OF HAWAII, REGULAR SESSION OF 1979, at 1477-80 (1979) [hereinafter 1979 HAWAII HOUSE

administrator with other state cabinet-level directors, thereby ensuring a qualified and strong administrator for the agency, and they protected the agency's independence by proposing that OHA be tied to the governor's office "for administrative purposes only."³⁷⁷ The House also suggested allocating \$150,000 to fund OHA for the first eight months and \$170,000 for the Lieutenant Governor's office to conduct the special election of the first crop of trustees in 1980.³⁷⁸ Convention delegate-turned-state House Representative Carol Fukunaga moved that the bill pass out of the House and cross over to the Senate for consideration.³⁷⁹ Representative Kīna'u Boyd Kamali'i—a Native Hawaiian Republican who represented the district encompassing the tourist hub of Waikīkī—rose in favor of the bill, arguing: "I fully realize this office represents a degree of control and self-determination for native Hawaiians to create their own future."³⁸⁰ Representative Kamali'i noted, however, her reservation that the bill established election procedures without understanding or developing what and how programs will be managed.³⁸¹ Nevertheless, the House voted on the bill.³⁸² With forty-nine "ayes" (with two representatives excused), the bill passed Third Reading, and moved to the Senate.³⁸³

While the House passed the bill with relative ease, it faced an uphill battle in the Senate. The bill needed to pass through three separate committees that each scheduled their own hearings and decided on amendments independently.³⁸⁴ The first hurdle in the Senate was the Committee on Housing and Hawaiian Homes.³⁸⁵ After hearing testimony, and despite noting the convention delegates' intent to make OHA as autonomous as possible, the committee proposed several amendments.³⁸⁶ They felt "very strongly" that the administrator "should not be paid comparable to that of a director" because the administrator would "not have the responsibility, duties and supervision of personnel to warrant such a salary."³⁸⁷ With little explanation, the Committee viewed OHA as a clearinghouse for all Hawaiian issues, but noted it did not warrant staff and personnel commensurate with other state departments holding narrower functions.³⁸⁸ These views made it clear that the Senate would not provide OHA with the resources needed to fulfill its mandate of bettering the conditions of Kānaka Maoli.

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³⁷⁷ *Id.* at 1478-79.

³⁷⁸ *Id.* at 1480.

³⁷⁹ 1979 HAWAII HOUSE JOURNAL, at 587 (providing transcript for the third reading of H.B. 890).

³⁸⁰ *Id.*

³⁸¹ *Id.* at 588.

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ JOURNAL OF THE SENATE OF THE 10TH LEGISLATURE, STATE OF HAWAII, REGULAR SESSION OF 1979, at 443 [hereinafter 1979 HAWAII SENATE JOURNAL].

³⁸⁵ *Id.*

³⁸⁶ S. Rep. No. 10-773 (Haw. 1979) *reprinted in* 1979 Hawaii Senate Journal, at 1339-45.

³⁸⁷ *Id.* at 1343-44.

³⁸⁸ *Id.*

The Senate Judiciary Committee then had its opportunity to determine the legal parameters of OHA.³⁸⁹ This committee, led by Senator Dennis O'Connor, explicitly ignored the convention delegates' intent.³⁹⁰ It reframed the collective memory to re-inscribe the master narrative and constrain reparative action for Native Hawaiians. In its report, the Judiciary Committee first articulated what it believed to be the "legal confines" of OHA.³⁹¹ The Committee began by quoting from the Hawaiian Constitution, which stated that all persons are deemed under the Constitution to be "equal in their inherent and inalienable rights" in "the enjoyment of life, liberty and the pursuit of happiness."³⁹² The Committee further noted, "inherent in our commitment to those rights is our duty to seek with incessant endeavor a society in which race, sex and all other antitheses to merit would disappear."³⁹³ The Committee's invocation of the state constitution's preamble and the ideal of "equality" disclaimed the unequal status of Native Hawaiians and ignored the historical injustices that plagued them. The Committee concluded, "[w]e are therefore committed to the ultimate 'melting pot,' to the interdependence of all peoples, and to social, economic, cultural and educational mobility based on merit."³⁹⁴

With this one sentence, the Judiciary Committee reframed the collective memory by re-inscribing parts of the master narrative that sought to racialize and then erase Kānaka Maoli and their struggles. The "melting pot" theory Hawai'i that the Committee highlighted was first articulated in Romano C. Adams's 1933 book, *The Peoples of Hawaii*.³⁹⁵ Adams observed the high interracial marriage rate and concluded that Hawai'i was a "racial melting pot."³⁹⁶ Noting the "equality" of economic, political, and educational opportunity among the "races," Adams argued that Hawai'i would become a place of one people—a "new Hawaiian race."³⁹⁷ As deployed by both Adams and the Judiciary Committee, the "melting pot" theory provides a legitimizing basis for settler-colonial domination by justifying the marginalization and suppression of Native Hawaiians through the construct of race and the process of racialization.³⁹⁸

Michael Omi and Howard Winant, in their groundbreaking book *Racial Formation in the United States: From the 1960s to the 1990s*, describe "racial formation" as "a sociohistoric process by

³⁸⁹ S. Rep. No. 10-784 (Haw. 1979) *reprinted in* 1979 HAWAII SENATE JOURNAL, at 1350-60.

³⁹⁰ *Id.* at 1352 ("As such, unlike legislative committee reports which reflect the will of the legislators, the committee reports of the Constitutional Convention do not reflect 'the will of the electorate' and cannot be given similar weight. Accordingly, in responding to the mandate of the Constitutional amendments, the legislature is not mandated to implement them in strict compliance with matters that may be discussed in committee reports but are not expressly reflected in the Constitutional text.")

³⁹¹ *Id.* at 1351.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ JONATHAN Y. OKAMURA, ETHNICITY AND INEQUALITY IN HAWAII 8 (2008).

³⁹⁶ *Id.*

³⁹⁷ *Id.* ("The important and distinctive fact about Hawaiian [sic] race relations is, of course, the existence of a code of equalitarian relations which is deeply rooted in and has developed out of customary conduct of a similar nature and the code does then exercise a coercive influence upon all who might be disposed to violate it.")

³⁹⁸ The "melting pot" theory also contributes to the settler colonial suppression of Native Hawaiian voices and justice claims. *See* discussion *infra* Section III.C.1.

which social and political forces continually create, shape and transform race, thereby imparting racial meaning to groups, social practices and events. Race is thus changeable rather than fixed, political rather than biological and value-laden rather than neutral.”³⁹⁹ The process of racialization, which scholar Albert Memmi describes with four discursive strategies,⁴⁰⁰ involves “characterizing people as ‘different,’ less-worthy, or less-human ‘others’ (threatening, uncivilized, inferior) to make political aggression against the entire group for economic or military reasons appear necessary.”⁴⁰¹ Western historians, media, government officials, Hawai‘i’s elite oligarchy, and powerful immigrants deployed racialization throughout the master narrative to characterize Kānaka Maoli as “others.” For example, the master narrative portrays Hawaiians from as far back as Cook’s contact in 1778 as primitive savages that were lazy, lewd, and childish.⁴⁰² The Kingdom government and monarch were “othered” as “an absurd anachronism” that was autocratic, corrupt, inefficient, undependable, and “an impediment to good government.”⁴⁰³ The racialization of Hawaiians was also pivotal to the push for statehood to “reassure a race-anxious continent that ‘the natives’ were not restless but rather docile, happy, and whitening through racial amalgamation.”⁴⁰⁴ The process of othering deployed by the master narrative is thereby used to legitimize the seizure of land and state power. By this rationale, “lazy” Hawaiians cannot make the land productive, their government is “corrupt” and “inefficient,” and “docile” Kānaka Maoli will not challenge American supremacy. The path forged through racialization is a map of America’s colonial conquest of the Hawaiian Islands.

Through its reliance on the “melting pot” theory, the Senate Judiciary Committee thoroughly dismissed the reparatory intent of the 1978 convention delegates with brazen disregard. The Committee’s report concluded that “unlike legislative committee reports which reflect the will of the legislators, the committee reports of the Constitutional Convention do not reflect ‘the will of the electorate’ and cannot be given similar weight.”⁴⁰⁵ Asserting that it was not bound by the delegates’ intent, the Committee further declared that, although the convention committee reports suggested that OHA should be an independent entity, the language of the relevant constitutional provision did not contain language similar to that of Article X, Section 6 of the Hawai‘i Constitution, which granted the University of Hawai‘i Board of Regents power to formulate policy “except that the board shall have exclusive jurisdiction over the internal organization and management of the university.”⁴⁰⁶

³⁹⁹ Serrano, *supra* note 3, at 365-66; *see also id.* at 368-69 (“Because the colonizer portrays itself as civilized and law-abiding, it needs a mechanism for justifying to its people and the world its bald political takeover of another country and its people.”); IAN F. HANEY LÓPEZ, *WHITE BY LAW* 10 (2006) (“Race can be understood as the historically contingent social systems of meaning that attach to elements of morphology and ancestry.”).

⁴⁰⁰ ALBERT MEMMI, *DOMINATED MAN: NOTES TOWARD A PORTRAIT* 186 (1968) (describing four discursive strategies to justify the colonization of non-white races: (1) stressing the real or imaginary differences between the racist and its victims; (2) assigning values to those differences to disadvantage the victim; (3) generalizing from these values and claiming that they are final; and (4) justifying aggression or privilege).

⁴⁰¹ *See* Serrano, *supra* note 3, at 369.

⁴⁰² *See* discussion *supra* Part II.

⁴⁰³ President’s Message Relating to the Hawaiian Islands, H Exec. Doc. No. 47 at vi (2d. Sess. 1893).

⁴⁰⁴ JUDY ROHRER, *STAKING CLAIM: SETTLER COLONIALISM AND RACIALIZATION IN HAWAII* 83-84 (2016) (emphasis omitted).

⁴⁰⁵ S. Rep. No. 10-784 (Haw. 1979) *reprinted in* 1979 HAWAII SENATE JOURNAL at 1352.

⁴⁰⁶ *Id.*

Absent this language, the Judiciary Committee concluded, the Board of Trustees did not have exclusive jurisdiction over its own affairs; instead, the state, specifically the Legislature, retained plenary powers over the Board's activities.⁴⁰⁷

Next, the Committee addressed OHA's organization and trust administration.⁴⁰⁸ It began by amending the proposed requirement that OHA's administrator be Native Hawaiian,⁴⁰⁹ attempting to justify its rejection of such "racial preference" with a paternalist jab.⁴¹⁰ The Committee cited with approval the following language from the United States Supreme Court case *Board of County Commissioners v. Seber*:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.⁴¹¹

For the Senate Judiciary Committee, restricting OHA's administrator to an individual of Hawaiian descent would have eliminated the non-Hawaiian community's ability to protect Hawaiians from the "selfishness of others and their own improvidence."⁴¹² The Committee believed that precluding a non-Hawaiian from becoming OHA's administrator would, in effect, doom the agency to failure. Turning OHA's purpose on its head, the Committee's amendment ignored the convention delegates' intent to provide a means of self-determination for Native Hawaiians—a necessary component of which being the self-control of assets. Moreover, the Committee's rationale harkened to the master narrative's emphasis on the inability of Native Hawaiians to govern themselves and their own affairs.⁴¹³ With sleight of hand, the legislators failed to acknowledge that the law included a "racial preference" because the colonizing process itself deployed race to help justify the overthrow and annexation.⁴¹⁴

⁴⁰⁷ *Id.* at 1352–53.

⁴⁰⁸ *Id.* at 1356.

⁴⁰⁹ *Id.* at 1357.

⁴¹⁰ *Id.*

⁴¹¹ *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).

⁴¹² *Id.*; cf. Judy M. Cornett, *Atticus Finch: Christian or Civic Hero? A Response to Professor McMillian*, 77 TENN. L. REV. 723, 734 (2010) (discussing the fictional attorney Atticus Finch in *To Kill a Mockingbird* as a "white savior" and noting that "[t]he problem with idealizing the white savior is that it simply reinforces white empowerment, the same sort of white empowerment that resulted in the oppression which is now being resisted. The white savior motif deprives African-Americans of agency").

⁴¹³ See discussion *supra* Part II.

⁴¹⁴ Hom & Yamamoto, *supra* note 3, at 1775. The Committee, however, left open the option for OHA to create job opportunities for Hawaiians, but only "to help an isolated Hawaiian community" to "take their place as independent, qualified members of the modern body politic." S. Rep. No. 10-784 (Haw. 1979) reprinted in 1979 HAWAII SENATE JOURNAL at 1357.

The Judiciary Committee then amended the bill to allow for suits against the Board of Trustees for breach of the public trust.⁴¹⁵ Other government agencies received and continue to receive shelter against lawsuits through sovereign immunity.⁴¹⁶ By denying this same privilege to OHA, the Committee rendered the Board vulnerable to a litany of lawsuits brought by any beneficiary for any conceivable “breach” of its mandate to better the conditions of Kānaka Maoli.

Finally, the Committee did not define the “pro rata portion” of the Public Lands revenue. Instead, it concluded that OHA’s funds would be channeled through the normal process of legislative appropriation, effectively vesting control of the purse strings in the state legislature.⁴¹⁷ The Committee believed that annual legislative appropriation was necessary to provide “flexibility as changing circumstances may well dictate the need to adjust to fluctuating need, merit and availability of funds.”⁴¹⁸ Following a familiar pattern, this amendment again denied Hawaiians the ability to control their assets and determine their priorities.⁴¹⁹ The framing of the collective memory of Hawaiians being part of a “melting pot” allowed the Senate Judiciary Committee to advance regressive amendments to undermine the intent of the constitutional delegates and delegitimize OHA’s reparatory integrity.

Following the amendments in the Senate Judiciary Committee, the Senate Ways and Means Committee agreed that OHA should return to the legislature each year to justify its appropriations.⁴²⁰ This committee made several minor amendments to the bill,⁴²¹ which the Senate subsequently approved.⁴²² The Legislature’s leadership team eventually formed a Conference Committee to arrive at a compromise bill reconciling the differences between the House and the Senate versions.⁴²³ After negotiations, the Conference Committee report stated: “The hope of this bill lies in the vehicle it presents to the long neglected Hawaiian people by way of imaginative affirmative action programs to better their condition.”⁴²⁴

⁴¹⁵ *Id.* at 1360.

⁴¹⁶ U.S. Const. amend. XI.

⁴¹⁷ S. Rep. No. 10-784 (Haw. 1979) *reprinted in* 1979 HAWAII SENATE JOURNAL at 1357 at 1358.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* In terms of salary of the administrator, the Judiciary Committee concluded that \$15,000, which was far less than other cabinet-level director’s earnings, was an appropriate amount. *Id.* The Committee also set the compensation for trustees at \$50 per day for each day’s actual attendance at meetings. *Id.*

⁴²⁰ *Id.* at 1439-40.

⁴²¹ S. Rep. No. 10-944 (Haw. 1979) *reprinted in* 1979 HAWAII SENATE JOURNAL, at 1439-40 (adding the following amendments to the bill: clarifying that one member of the board must be from Maui or Lāna‘i and that one member must be from Kaua‘i or Ni‘ihau; increasing the annual salary of the administrator to \$20,000; and providing that a candidate needed only fifteen signatures of registered Hawaiian voters to fulfill the nomination requirement).

⁴²² 1979 HAWAII SENATE JOURNAL, at 559.

⁴²³ *Id.* at 682.

⁴²⁴ H.R. Rep. No. 10-76 (Haw. 1979) *reprinted in* 1979 HAWAII HOUSE JOURNAL, at 1132. Accordingly, the Conference Committee added numerous amendments, including: elevating the annual salary of the administrator from \$20,000 to \$30,000; mandating the board of trustees to submit an annual budget to the Legislature and subjecting OHA to annual government audits; increasing the number of Hawaiians that need to sign nomination papers from fifteen to twenty-five; and increasing the funds provided to OHA to \$125,000 for the first fiscal year. *Id.* at 1133-35.

Political jockeying and backroom agreements permeated passage of OHA’s implementing legislation. For example, the firm House position on the administrator’s salary was that it would match that of State cabinet-level directors.⁴²⁵ Senate conferees initially assented, but they undercut this agreement in the last minute after claiming a “miscommunication.”⁴²⁶ The Senate insisted that the House conferees had agreed to the conference draft, which gave the administrator an annual salary of \$30,000—below the salary level of a cabinet-level director.⁴²⁷ Representative Milton Holt expressed his displeasure with the Senate’s gamesmanship:

[P]laying politics with something as important as this is very disturbing and really bugs the hell out of me. The Senate conferees, I believe, changed their position after the conference because of pressure from fellow colleagues who would not buy the higher salary level. I sincerely feel that the Senate did not act in good faith and purposely claimed miscommunication at the last minute so the House would not have time to confer on this matter before the deadline.⁴²⁸

During the debate following the recommendation to adopt the Conference Committee’s draft, several legislators expressed their frustration with the end result. Representative Kamali’i argued that the draft’s reporting requirements turned OHA’s intended autonomy on its head and that placing liability with the trustees was counter to general trust functions.⁴²⁹ She professed: “This version of the Office of Hawaiian Affairs is an insult, both to the Hawaiians it would pretend to serve and to all of the people of Hawai’i.”⁴³⁰ Kamali’i specifically called out the master narrative and its racialization of Native Hawaiians:

Since American annexation of the islands in 1898, it has been characteristic of all government efforts and eventually programs . . . [to] appeal to the conscience of the power-that-be to acknowledge the Hawaiians as weak and helpless. . . . We cannot continue perceiving and judging Hawaiians like beautiful, simple children whose only handicap is their own culture.⁴³¹

Noting the Conference Committee’s report that envisioned the “ultimate homogeneity” of the community, Kamali’i retorted: “The purpose of [OHA] is not, or should not, be to make or force the Hawaiians into being like everybody else, whatever that may be.”⁴³² By invoking a collective memory of injustice, Kamali’i sought to lay bare the deep historical realities inflected in what the

⁴²⁵ 1979 HAWAII’I HOUSE JOURNAL, at 998.

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 998-99.

⁴²⁸ *Id.* at 999.

⁴²⁹ *Id.* at 996.

⁴³⁰ *Id.*

⁴³¹ *Id.* at 995.

⁴³² *Id.*

Conference Committee, specifically through the Senate, had done to the bill.⁴³³

Other legislators, however, perceived a need to resolve the issue immediately and patch the gaps later. Citing what he believed was a political attempt to delay reconciliatory efforts for Hawaiians, Representative Holt stated:

[W]hen Hawaiians are given the opportunity to move ahead, people oppose any such move because they can't have each and every one of their concerns addressed completely. I would surely hate to see the Hawaiian community come up with nothing, which would happen if we vote down this bill. . . . Let's not be foolish and play politics with Hawaiians anymore. This bill before us is a monumental piece of legislation which will finally provide the Hawaiians with *something to hang their hats on*.⁴³⁴

The “something is better than nothing” approach carried the vote in 1979.⁴³⁵ Yet, in the end, “not a single member of the legislature who had been a delegate at the Constitutional Convention voted for the OHA bill, because it had been sold out.”⁴³⁶ The Legislature “failed” in three ways to pass legislation that kept with the spirit of the convention’s reparative goals: first, the legislation did not provide an adequate independent mechanism for funding; second, it did not provide sufficient resources to support OHA’s mandate of bettering the conditions of all Native Hawaiians; and third, the Legislature failed to provide OHA with a strong executive. Nevertheless, on June 7, 1979, Governor George Ariyoshi signed the conference draft of House Bill 890 into law as Act 196.⁴³⁷

2. Strong-Arming a Compromise in 1980

In 1980, the stage was set again for a battle between the House and Senate over collective memory. This time, lawmakers fought over the definition of the “pro rata portion” of revenue OHA would receive annually from the Public Lands trust. House Bill 1853 set the amount at twenty percent of all Public Lands trust revenue. Because there were five purposes of section 5(f), the House found a one-fifth (or twenty percent) share for OHA sufficient.⁴³⁸

The House debated the adequacy of the twenty percent figure, considering the history of the Public Lands and Kānaka Maoli. Representative Richard “Ike” Sutton, a Pearl Harbor survivor and

⁴³³ Representative Fukunaga echoed Kamali’s argument, and pointed out that the conference draft failed to determine the percentage of funds that would be allocated from the Public Lands to be given to OHA. *Id.* at 997. Fukunaga urged her colleagues to reject the bill and use the interim to further study the issues so that they could draft “more careful legislation . . .” *Id.* at 998.

⁴³⁴ *Id.* (emphasis added).

⁴³⁵ *Id.* at 1002.

⁴³⁶ See Office of Hawaiian Affairs, *Former Gov. Waibee ponders OHA’s 25 Years*, undated article (on file with author).

⁴³⁷ Act Relating to an Office on Hawaiian Affairs, No. 196, 1979 Haw. Sess. L. 398, 408.

⁴³⁸ JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE 11TH LEGISLATURE, STATE OF HAWAII, REGULAR SESSION OF 1980, at 1015 [hereinafter 1980 HAWAII HOUSE JOURNAL].

former federal judge,⁴³⁹ stated: “I feel that making it only [twenty percent] is poor, that it’s a very inadequate amount considering that [Native Hawaiians] really, in truth, are the owners thereof, and that we should have increased it.”⁴⁴⁰ House Republican Leader Kamali‘i expressed her displeasure with the method of getting to the twenty percent figure.⁴⁴¹ She argued for a thirty percent share for native Hawaiians, consistent with the congressional approval of thirty percent of sugarcane leases and water revenue for the Hawaiian Homestead program.⁴⁴² Observing the unwillingness of legislators to give the Hawaiians any more than the minimum amount required, Kamali‘i remarked:

I am not here to argue that native Hawaiians should receive a pro rata share of [one hundred percent]. I am not politically naïve The entire state rejoiced in the renewed pride and identity of Hawaiians, as long as we were talking about music, dance and the arts. When that same pride assumes new dimensions of confidence and political expression, I detect fear.⁴⁴³

Although she supported the bill, Kamali‘i expressed deep misgivings and a feeling of collective insult:

Hawaiians gave freely of their love and trust. All we’re asking is for the same in return, and to set the pro rata at [twenty percent] instead of [thirty percent] is to ask Hawaiians to accept less than what is legally their right. We are, by this bill, only adding another wrong to the too-long list of injustices done against Hawaiians.⁴⁴⁴

Despite her fervent plea, the bill passed the House unanimously and crossed over to the Senate.⁴⁴⁵

Staunch in their position from the 1979 legislative session, however, the Senate Ways and Means Committee would not budge on its demand that OHA come back to the Legislature every year to justify appropriations.⁴⁴⁶ The Senate remained unmoved despite passionate testimony from individuals—including DeSoto, who lambasted the Committee with a recitation of the historical injustices faced by Kānaka Maoli.⁴⁴⁷ At the time, freshman Senator and future Governor Benjamin J. Cayetano held the powerful committee’s chair,⁴⁴⁸ which is often considered the second most powerful

⁴³⁹ *Id.*; Craig Gima, *Isle Politician and Navy Vet Dies at Age 86*, HONOLULU STAR-BULLETIN, July 1, 2001, at A6; Walter Wright, *Politician “Ike” Sutton Dead at 86*, HONOLULU ADVERTISER, July 2, 2001, at B2.

⁴⁴⁰ 1980 HAWAII HOUSE JOURNAL, at 497.

⁴⁴¹ *Id.* at 373.

⁴⁴² *Id.* at 497–98.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* at 1015–1017.

⁴⁴⁶ BENJAMIN J. CAYETANO, BEN: A MEMOIR, FROM STREET KID TO GOVERNOR 183 (2009).

⁴⁴⁷ *Id.* at 185.

⁴⁴⁸ *Id.*

position in the Senate after the Senate presidency.⁴⁴⁹ Cayetano received the prime committee leadership position in exchange for his political alliance with Senate President Richard Wong.⁴⁵⁰ Chair Cayetano's Committee believed that "a dollar amount assignment of proceeds from the public trust is more appropriate at this time in light of the yet unclear role and nature of activities of the Office of Hawaiian Affairs," and amended the bill to provide a one million dollar appropriation to OHA.⁴⁵¹ Cayetano opposed providing OHA with twenty percent of Public Lands trust revenue and expressed his sense of distrust: "My personal view, shared by the majority of my committee and Judiciary chairman O'Connor, was that setting the pro rata share at [twenty] percent was like giving OHA a blank check. There would be little accountability. OHA, after all, was still a State agency."⁴⁵² Cayetano believed that OHA needed to justify its appropriations annually, and that the twenty percent figure was simply derived from a "logic of convenience."⁴⁵³

After listening to DeSoto, whom he characterized as "angry," an "activist," and a "political demagogue," Chair Cayetano's rhetoric betrayed his oblivion to the privileges afforded him by the theft of Hawaiian sovereignty and land less than a century earlier: "Frenchy, take a look at the faces of the members of this committee. None of our ancestors had anything to do with the historic injustice you just talked about."⁴⁵⁴ Cayetano's remarks stand as an apt example of "selective amnesia"—an episodic, often pragmatic, and elective decision of pseudoforgetting.⁴⁵⁵ He specifically noted that with the exception of Senator Neil Abercrombie, the committee members were all "local" Chinese, Filipino, Japanese, or Portuguese, and were therefore not the White settlers that colonized Hawai'i.⁴⁵⁶ Cayetano sought to reframe the discussion as one in which the non-White "local" community had nothing to do with the injustices perpetrated against Kānaka Maoli.⁴⁵⁷ As a rhetorical strategy, his

⁴⁴⁹ *Id.* at 167.

⁴⁵⁰ *Id.* at 169.

⁴⁵¹ Journal of Senate of the 11th Legislature, State of Hawai'i, Regular Session of 1980, at 1479 [hereinafter 1980 Hawai'i Senate Journal].

⁴⁵² See CAYETANO, *supra* note 446, at 183.

⁴⁵³ *Id.* at 184.

⁴⁵⁴ *Id.* at 185.

⁴⁵⁵ Cohn, *supra* note 14, at 601 (citation omitted); see Hom & Yamamoto, *supra* note 3, at 1765 ("When outsiders begin to persuasively reconstruct historical injustice they usually face fierce opposition by those in power. That opposition seeks totally to discredit the developing memory proffered by outsiders."); MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST 348 (Daniel L. Schacter, Joseph T. Coye eds., Harvard University Press 1997) ("A way of seeing is a way of not seeing. A way of remembering is a way of forgetting, too."); EDWIN M. YODER, THE HISTORICAL PRESENT: USES AND ABUSES OF THE PAST 56 (1997) ("It is well to remember all this rather recent history when we are tempted to preen ourselves on the American record of justice, and when we feel an urge to preach on the subject of basic human rights to those elsewhere who still sit in darkness. It is among our great American susceptibilities to cherish our myths of exceptionalism and special virtue. When the history fails to fit the myth, we bend the history."); MICHAEL KAMMEN, IN THE PAST LANE: HISTORICAL PERSPECTIVES ON AMERICAN CULTURE 204 (1997) ("[T]he combination of loyalty and stability under the oldest written national constitution the world has, indeed, been impressive. But stability is achieved at a price: a tendency to depoliticize the civic past by distorting the nation's memories of it—all in the name of national unity. . . .").

⁴⁵⁶ See CAYETANO, *supra* note 446, at 185.

⁴⁵⁷ See MEMMI, *supra* note 102, at 46-47 ("No matter what happens he justifies everything — the system and the officials in it. He obstinately pretends to have seen nothing of the poverty and injustice which are right under his nose; he is

statement is what scholar Judy Rohrer calls “individual disassociation,” which allows “an abdication of responsibility and a simultaneous suggestion . . . that Hawaiians should ‘get over it,’ ‘move on,’ ‘stop dwelling in the past’”⁴⁵⁸ Intentionally or not, Cayetano’s individual disassociation ignored the role that immigrant communities played in the colonization of Hawai‘i and the dispossession of Native Hawaiians from the land.⁴⁵⁹

Over many decades, the government and plantation owners imported laborers from China, Japan, Korea, Okinawa, Portugal, Puerto Rico, and the Philippines to work in sugar and pineapple fields that once belonged to Hawaiians.⁴⁶⁰ Plantation owners and the White oligarchy that supported them created racial divisions within the plantations and instituted coercive labor practices.⁴⁶¹ They racialized each group to justify the discriminatory and stratified sociopolitical structure, in turn reproducing a system of economic relations that was harsh, punitive, and, for the planter class, lucrative.⁴⁶² Struggles, deep tensions, and, eventually, a camaraderie developed among these groups and formed the basis for “local” identity and politics. These “locals” then “use[d] nostalgic plantation narratives and common oppression by the haoles to indigenize themselves” and replace Hawaiians as entitled to controlling Hawai‘i.⁴⁶³ These blinders of “individual disassociation” ignore that a great number of “locals” have “whitened their social status through Americanization, including economic success. . . .”⁴⁶⁴ By denying “local” agency in the settler colonial story of Hawai‘i, Cayetano justified the hierarchy that denies Hawaiians self-determination.⁴⁶⁵ In this vein, the Senate retreated to its position,⁴⁶⁶ but the legislative battle was far from over.

interested only in creating a position for himself, in obtaining his share. . . . Why should [the immigrants] not congratulate themselves for having come to the colony? Should they not be convinced of the excellence of the system which makes them what they are? Henceforth they will defend it aggressively; they will end up believing it to be right. In other words, the immigrant has been transformed into a colonialist.”); MINOW, *supra* note 57, at 119 (“The double-edged dangers of too much and too little memory lead contemporary figures to make paradoxical calls about remembering the past.”).

⁴⁵⁸ See ROHRER, *supra* note 404, at 56.

⁴⁵⁹ See Saito, *supra* note 6, at 25-28 (discussing settler colonialism as “replacing classic colonialism’s hierarchical relationship of center to periphery with a triangulated structure in which the colonizers reject the hegemony of the metropolitan center or colonial ‘motherland,’ and directly assert control over Indigenous peoples as well as those who are neither indigenous to the land nor part of the settler class”).

⁴⁶⁰ See RONALD TAKAKI, PAU HANA: PLANTATION LIFE AND LABOR IN HAWAII 1 (1983).

⁴⁶¹ *Id.* at 66-76.

⁴⁶² See Serrano, *supra* note 3, at 383 (“As Memmi’s framework predicts, race was key in legitimizing the planters’ confiscation of land, destruction of Hawaiian culture and self-governance, and exploitation of labor of color from around the globe. While the planters ‘used race to legitimize conquest, denigrating, in racial terms, those colonized,’ it also sought to civilize those colonial people ‘through the acquisition of [W]estern values and work discipline.’” (citations omitted)).

⁴⁶³ See ROHRER, *supra* note 404, at 63. “Haole” is defined as “any foreigner” but has come to be a universal word to refer to a Caucasian person.

⁴⁶⁴ *Id.* at 62.

⁴⁶⁵ Hom & Yamamoto, *supra* note 3, at 1758 (“[Cayetano] filter[ed] and twist[ed], recall[ed] and forgot ‘information’ in reframing shameful past acts (thereby lessening responsibility) as well as enhancing victim status (thereby increasing power).”); see also *Id.* at 1764 (“The struggle over recognition of competing collective memories is therefore often a struggle over the supremacy of world views, of colliding ideologies.”).

⁴⁶⁶ 1980 HAWAII‘I SENATE JOURNAL, *supra* note 451, at 535.

As there were significant differences between the House and Senate versions, another Conference Committee was created to negotiate a final compromised version of the bill.⁴⁶⁷ During the conference process, now open to the public, House Majority Leader Henry Ha'alilio Peters took the lead on the bigger ticket items on behalf of the House.⁴⁶⁸ Peters saw to it that the House version of the twenty percent pro rata portion of the Public Lands revenues would prevail.⁴⁶⁹ But Peters was, according to Cayetano, not as "well prepared as he should have been to negotiate the budget and related bills."⁴⁷⁰ Peters would constantly turn to his staff for assistance when asked questions by Senate members about the House's position.⁴⁷¹ Consequently, there were no concessions from the senators. About a week prior to the last day of the legislative session, Majority Leader Peters and the House changed their strategy.⁴⁷² Peters withheld House approval of three critical bills—the Supplemental Capital Improvement Bill, the Pensioners' Bonus Bill, and a work-training bill for unemployed individuals—until the Senate agreed to the twenty percent revenue provision in House Bill 1853.⁴⁷³ With these important bills "held hostage" in abeyance, pressure began to mount from Native Hawaiians and retirees demanding that the wrinkles in House Bill 1853 get ironed out.⁴⁷⁴ Senators Anson Chong and Neil Abercrombie reported threats of intimidation, and Chair Cayetano reported a death threat from a hunter claiming he would "nail" Cayetano as he drove home on the freeway.⁴⁷⁵ Cayetano, as lead Senate negotiator, nevertheless held to the Senate's position.⁴⁷⁶

On the last day of the legislative session, there was no movement on House Bill 1853, and, accordingly, no movement on the "hostage" bills either.⁴⁷⁷ In an unusual move, Governor Ariyoshi used his executive authority to grant a one-day extension of the legislative session and, subsequently, five more one-day extensions.⁴⁷⁸ During one of the Conference Committee meetings, Speaker of the House James Wakatsuki called various Senate conferees out of the meeting to discuss the bills.⁴⁷⁹ "Give them [the Hawaiians] the 20 percent, otherwise they'll just come back again and again," Speaker Wakatsuki implored Senator O'Connor, chair of the Senate Judiciary Committee.⁴⁸⁰ With the pleas from Wakatsuki, mounting pressure from labor unions (who began running ads on the Pensioners' Bonus Bill) and calls from legislators to have their pork barrel projects passed during the crucial election year, multiple senators began to rethink their hardline position.⁴⁸¹ Cayetano, the last

⁴⁶⁷ *Id.* at 1019.

⁴⁶⁸ CAYETANO, *supra* note 451, at 184.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 184-85.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at 186-87.

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

and critical holdout, finally capitulated to Peters's demand, and the Conference Committee resolved the issue in House Bill 1853 with the pivotal twenty percent revenue language.⁴⁸²

Given their political strong-arming, the House members ultimately succeeded in getting the Senate to bow out and agree to the twenty percent figure.⁴⁸³ The Conference Committee also agreed to appropriate \$100,000 from general state funds to OHA. Republican Representative Sutton lauded Peters as “truly a representative of the Hawaiian people” who had “done the initial research which started the Constitutional Convention into their significant thing of having this amendment.”⁴⁸⁴ Representative Kamali'i extolled the significance of the legislation and its reparatory reach: “This office is a step towards social justice for Hawaiians, not another welfare or rehabilitation program.”⁴⁸⁵ Representative Holt celebrated the work of the two legislative bodies: “Hawaiians and non-Hawaiians alike will always remember the Tenth State Legislature as one that did not shirk its responsibility to our Hawaiian community.”⁴⁸⁶ In the end, the Conference Committee draft passed unanimously out of the House.⁴⁸⁷

On the other side of the State Capitol building, the Senate—with the exception of Republican Senator Anderson, who applauded the House's tactics—took a far less celebratory tone, and some senators still opposed the bill.⁴⁸⁸ Despite the clear intent of the constitutional convention delegates to make OHA an independent agency, Senator Ajifu believed that legislators were “relinquishing [their] responsibilities” by agreeing to the twenty percent pro rata figure.⁴⁸⁹ Instead, Ajifu expressed a need for state oversight, stating that he believed that the Legislature “should appropriate funds for OHA like any other agency and review the appropriations and programs as we have done with all other agencies”⁴⁹⁰ Thus, the battle over collective memory continued, as the threat of relinquishing political power and control was too much for some legislators.⁴⁹¹ Senator Abercrombie described his concern over the constitutionality of the bill, but he ultimately voted to accept the House's position because the bill was the only vehicle “that we have that can fund this office and maintain the agreements that were arrived at in the course of the negotiations over not only the budget, but the various and sundry bills associated with the ultimate passage of legislation this session.”⁴⁹² Invoking the image of a defeated Greek army, Senator Abercrombie called the passage of OHA's funding mechanism a “Pyrrhic victory . . . a skirmish in a very large battle.”⁴⁹³

⁴⁸² *Id.* at 188-90.

⁴⁸³ 1980 HAWAII SENATE JOURNAL, *supra* note 451, at 1019.

⁴⁸⁴ 1980 HAWAII HOUSE JOURNAL, *supra* note 438, at 1016.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* at 1017.

⁴⁸⁷ *Id.*

⁴⁸⁸ 1980 HAWAII SENATE JOURNAL, *supra* note 451, at 881-84.

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ Reiterating his opposition from the 1979 session, Senator Kawasaki expressed his concerns about the constitutionality of all the bills related to OHA. *See id.* (“Mr. President, consonant with my concern about the constitutionality of these bills and their propositions, I will vote against this bill.”).

⁴⁹² *Id.*

⁴⁹³ CAYETANO, *supra* note 446, at 188.

Abercrombie prophetically cautioned: “I regret to say that I expect that the moment this passes into statute, there will be a suit and that the business of OHA is, as a result, going to be tied up in court for God-knows how many years.”⁴⁹⁴

Over the objections, and despite the political brinkmanship and contentions displayed throughout the process, the State Legislature finalized the parameters for OHA before its election, and on June 16, 1980, Governor Ariyoshi signed the strong-armed compromise bill into law as Act 273.⁴⁹⁵ OHA finally had the statutory framework within which the elected trustees would navigate.⁴⁹⁶ The House’s strong-arming tactics showed that sympathetic advocates can force substantial changes where there is political will.

CONCLUSION

The creation of OHA has been described as the “political apex”⁴⁹⁷ for the Hawaiian Renaissance and the “centerpiece of Hawaiian politics.”⁴⁹⁸ Since its establishment, the State of Hawai‘i and the federal government have stymied OHA and other efforts to reconcile historical injustices with Native Hawaiians.⁴⁹⁹ So, what insights can be gleaned from these battles over collective memory that are relevant today? How can this story of Hawai‘i in 1978 guide the future as Native Hawaiians continue to seek reparative action for the injustices of the past?

This case study buttresses the well-established theory that all memories and histories are subject to manipulation. It adds support to the developing scholarship on legislators’ strategic use of memory and highlights that constitution-building and lawmaking are apt sites for the framing of collective memory.⁵⁰⁰ More specifically, OHA’s history demonstrates how the constant negotiation of

⁴⁹⁴ Office of Hawaiian Affairs v. State, Civ. No. 94-0205-01, at 401 (Haw. 2001) (citations omitted). Lawsuits did indeed ensue. See, e.g., Office of Hawaiian Affairs v. State, 95 Haw. 388, 388 (Haw. 2001); Office of Hawaiian Affairs v. State, 31 P.3d 901, 905 (Haw. 2001); Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai‘i, 219 P.3d 1111, 1111 (Haw. 2009). OHA and the state finally resolved disagreements of the twenty percent revenue in 2012—nearly thirty-five years after the creation of OHA.

⁴⁹⁵ Act 273, 1980 Haw. Sess. L. 525, 525.

⁴⁹⁶ This statutory framework has been and still can be changed by the Legislature. A Legislature sympathetic to the Native Hawaiian cause could increase the percentage of ceded lands revenue afforded to OHA.

⁴⁹⁷ Lee Gomes, *Hawaiian Renaissance Reaching Political Apex*, HONOLULU STAR-BULLETIN, Aug. 11, 1978, at A2.

⁴⁹⁸ McGregor-Alegado, *supra* note 148, at 50. Compare *OHA is Born*, KA WAI OLA O OHA, Summer 1981, at 1 (citing John Dominis Holt, the seminal figure that helped to launch the political and cultural renaissance of the 1970s stating, “Many, many Hawaiians made OHA a reality. It belongs to all Hawaiians. The creation of OHA is a major victory for the majority of Hawaiians. It belongs to all because we are the lo‘i and the kalo in which and upon which OHA grows”) with Mililani Trask, *The Politics of Oppression: The United States in Hawai‘i*, in ISLANDS IN CAPTIVITY, *supra* note 190, at 284 (stating that “The purpose of OHA was to achieve assimilation of the native culture and to guarantee state control of native trust lands in perpetuity”).

⁴⁹⁹ Rice, 528 U.S. at 524 (“As the State of Hawaii 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 Hawaii.”); see also *Legacy in Paradise*, *supra* note 352, at 283–92 (describing the failure of Congress to pass federal legislation providing federal recognition of Native Hawaiians).

⁵⁰⁰ A legislator’s “treatment of the past through remembering and forgetting crucially shapes the present and future for individuals and entire societies.” MINOW, *supra* note 57, at 119. Indeed, because justice claims begin with struggles over

history, mobilization, and power has alternatively perpetuated and stymied justice for Native Hawaiians. In 1978, the cultural terrain—characterized by cultural revitalization, grassroots organizing, and political resistance—fueled support for inscribing a new collective memory—a collective memory of injustice. This memory of injustice, which the media amplified, was built upon the important presence of key individuals in strategically appropriate positions to make changes. Those in power, like Frenchy DeSoto and John Waihe‘e in 1978, equipped with a “cultural framework” that understood and valued historical framing, cast light on the shameful past acts of the government and resultant suffering. These individuals pushed decisionmakers, whether allies or not, to critically engage “the dynamics of group memory of injustice.”⁵⁰¹ These essential elements—leaders deploying a collective memory of injustice during a critical time of activism—animate Native Hawaiians’ political struggles in the present day.

Indeed, following the live-streamed arrests of revered *kupuna*, elders, protecting the most sacred mountain Maunakea from the development of a thirty-meter telescope, thousands took to the streets across all the islands demanding justice.⁵⁰² OHA released a statement following the arrests: “The Native Hawaiian community weeps today. . . . To see some of our most respected kupuna, advocates and ‘ohana get arrested for voicing the same concerns our community has expressed for decades over the state’s mismanagement of Maunakea brings a *kaumaha* (heaviness) to our hearts that is unbearable.”⁵⁰³

Much like the 1970s cultural revival, Hōkūle‘a accomplished another monumental feat in 2017 when it completed its journey circumnavigating the world.⁵⁰⁴ Hawaiian language revitalization also received a major boost recently after widespread backlash following a state court’s bench warrant for the arrest of an individual who, although present in a courtroom, chose to respond in the Hawaiian language.⁵⁰⁵ The Supreme Court of Hawai‘i further amplified the language revitalization movement in 2019 when it required the state’s Department of Education to provide Hawaiian language immersion education on every major island.⁵⁰⁶

A new generation of composers have written *mele*, songs, describing their respect and love

“who will tell the dominant story of injustice and how that story will be shaped,” each lawmaker’s “recounting of historical events often determines whether, and to what extent, historical injustice occurred and the present-day need for rectification.” Yamamoto & Betts, *supra* note 11, at 563 (“The power to shape that story would determine whether, and to what extent, historical injustice occurred, and, concomitantly, the need for rectification.”). Therefore, a decisionmaker’s choice of what story prevails “is determined by a sifting of the relevant from the irrelevant—a process itself affected by the decision maker’s cultural framework” that consists of “social perceptions, beliefs, and practices that form the lens through which . . . [he or she] sees and evaluates both daily happenings and society as a whole.” *Id.* at 565.

⁵⁰¹ Hom & Yamamoto, *supra* note 3, at 1764.

⁵⁰² Anita Hofschneider, *Another ‘Truce’ After a Day of Arrests on Mauna Kea*, HONOLULU CIVIL BEAT, (July 17, 2019), <https://www.civilbeat.org/2019/07/arrests-begin-as-tmt-protesters-block-road/> [<https://perma.cc/WGH3-BQ9Y>].

⁵⁰³ *OHA Statement on Today’s Arrest of Kupuna and Others on Maunakea*, OFFICE OF HAWAIIAN AFFAIRS (July 1, 2019), <https://www.oha.org/news/oha-statement-on-todays-arrest-of-kupuna-others-on-maunakea/> [<https://perma.cc/HP33-8LG4>].

⁵⁰⁴ Marcel Honoré, *Home at Last*, HONOLULU STAR-ADVERTISER (June 18, 2017), http://www.hawaii-newspaper.com/special_sections/hokulea_home_at_last/html5forpc.html [<https://perma.cc/HWB8-VUWK>].

⁵⁰⁵ *See E Ola Ka ‘Ōlelo Hawai‘i*, *supra* note 119, at 6-7.

⁵⁰⁶ *Clarabal v. Dep’t of Educ.*, 446 P.3d 986, 988 (Haw. 2019).

for Hawai'i and its people. The anthem for 2020 is a mele written by Hinaleimoana Wong, entitled *Kū Ha'āheo E Kū'u Hawai'i*.⁵⁰⁷ The lyrics call for action and unity, a definite change in tone from *Hawai'i '78*.⁵⁰⁸

Kaiko'ō ka moana kā i lana nei Hawai'i Nāueue a hālulu ka honua a Haumea Nākulukulu e ka lani ki'eki'e kau mai i luna Auē ke aloha 'ole a ka malihini	The sea of Hawai'i surges in turmoil The earth of Haumea rumbles and shakes The highest heavens shudder up above Alas! Woeful indeed are the heartless foreigners
Kū ha'āheo e kū'u Hawai'i Mamaka kaua o kū'u 'āina 'O ke ehū kakahiaka o nā 'ōiwi o Hawai'i nei No kū'u lahui e hā'awi pau a i ola mau	Stand tall my Hawai'i Band of warriors of my land The new dawn for our people of Hawai'i is upon us For my nation I give my all so that our legacy lives on
Auhea wale 'oukou pū'ali koa o Keawe Me ko Kamalālāwalu la me Kākuhihewa 'Alu mai pualu mai me ko Manokalanipō Ka'i mai ana me nā kama a Kahelelani	Where are you soldiers of Keawe Along with those of Maui and O'ahu Unite, join together with those of Kaua'i Marching alongside the descendants of Ni'ihau
E nāue imua e nā poki'i a e inu wai 'awa'awa E wīwo'ole a ho'okūpa'a 'a'ōhe hope e ho'i mai ai A nā'i wale nō kākou kaukoe mau i ke ala Auē ke aloha 'ole a ka malihini	Move forward young ones and drink of the bitter waters Be fearless, steadfast for there is no turning back Let's press onward straight on the path of victory Alas! Woeful are the heartless foreigners!
E lei mau i lei mau kākou e nā mamo aloha I lei wehi 'a'ali'i wehi nani o kū'u 'āina Hoe a mau hoe a mau no ka pono sivila A ho'ihō'i hou 'ia mai ke kū'oko'a	Be honored always oh beloved descendants of the land Let us wear the honored 'a'ali'i of our beloved land Paddle on in our pursuit of civil justice Until our dignity and independence is restored

The resistance on Maunakea spawned movements across Hawai'i to protect the remaining vestiges of sacred spaces and creatures. OHA, along with others, organized workshops and rallies in response to the arrests.⁵⁰⁹ Community members in Pae Galdeira's home of Waimānalo successfully halted the development of a sporting complex on sacred lands.⁵¹⁰ Although unsuccessful, community members on the North Shore of O'ahu showed up in force to demonstrate against the building of massive wind turbines that would kill indigenous animals.⁵¹¹

⁵⁰⁷ *Kū Ha'āheo E Kū'u Hawai'i*, OFFICE OF HAWAIIAN AFFAIRS, <https://www.oha.org/ku-haaheo> [https://perma.cc/9AJB-C4QT] (last visited Nov. 1, 2020).

⁵⁰⁸ *Id.*

⁵⁰⁹ *Kumu Hinaleimoana Wong*, OFFICE OF HAWAIIAN AFFAIRS, <https://www.oha.org/kumuhina> [https://perma.cc/U47P-ANSU] (last visited Nov. 1, 2020).

⁵¹⁰ Christina Jedra, *Construction Resumes at Waimanalo Park Despite Pandemic and Protest*, HONOLULU CIVIL BEAT (April 6, 2020), <https://www.civilbeat.org/2020/04/construction-resumes-at-waimanalo-park-despite-pandemic-and-protest/> [https://perma.cc/89H6-ZFZQ].

⁵¹¹ Blaze Lovell & Christina Jedra, *Wind Farm Protesters Arrested as they Blockade Road for Construction*, HONOLULU CIVIL BEAT (Oct. 18, 2019), <https://www.civilbeat.org/2019/10/wind-farm-protesters-arrested-as-they-blockade-access-road-for-construction-vehicles/> [https://perma.cc/EM29-773N].

Mass media, particularly social media, provided a powerful and necessary tool for live coverage of events as they unfolded atop Maunakea, and they supported efforts to educate the broader community about Native Hawaiian struggles. A renewed sense of *aloha ʻāina*, which spawned during the resistance to the bombing of Kahoʻolawe, has emerged: “Aloha ʻāina . . . is the natural, undeniable bond between man and environment. Every moment we dedicate to aloha ʻāina is a moment we dedicate to our keiki. Moments like these are the little pebbles that will form a new foundation—he kahua hale hou. It will be a new reality for our keiki, the rebirth of a new lāhui consciousness.”⁵¹² Much like the events leading up to 1978, Kānaka Maoli spawned a cultural and political revival.⁵¹³

But, if the 1979 and 1980 legislative sessions taught us anything, it is that advocates for Native Hawaiian justice must work closely with allies to forge relationships of trust and understanding. The history of OHA highlights the present-day power that remains with Kānaka Maoli to codify their story and dictate their future. Native Hawaiians must find key allies and urge them to consider framing Hawaiʻi’s past to advance reparative action for Native Hawaiians. Communities must use these legislative and constitution-building sites to challenge the master narrative to create transformative change. It is only when the battle over collective memory is won that true reparative action can occur. The state has disappointed Kānaka Maoli time and time again with promises of justice. Something about Hawaiʻi in 2021 is different though. “O ke au i hala ka lamakū o ke ala i ke kupukupu. . . . The past is the beacon that will guide us to the future.”

⁵¹² *Musicians Support Maunakea With One Voice*, BIG ISLAND NOW (Sept. 5, 2019), <https://bigislandnow.com/2019/09/02/musicians-support-maunakea-with-one-voice/> [<https://perma.cc/VF8H-DSCM>].

⁵¹³ Although it already has OHA, the State of Hawaiʻi recently proposed a Blue Ribbon Commission to articulate a path of reconciliation with Kānaka Maoli for past injustices. *See* H.R. Con. Res. 35, 30th Leg., Reg. Sess. (Haw. 2020) (requesting the Governor convene a blue ribbon commission to examine and formulate a reconciliation process relating to issues of past, present, and future importance to Native Hawaiians, the State, and the United States); S. Con. Res. 37, 30th Leg., Reg. Sess. (Haw. 2020) (same). These efforts perhaps indicate a willingness of the state to reengage the Native Hawaiian community.