

Reclaiming the Past for Mauna a Wākea’s Future: The Battle Over Collective Memory and Hawai‘i’s Most Sacred Mountain

*Terina Kamailelauli ‘i Fa ‘agau**

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I. UNDERSTANDING THE RELATIONSHIP BETWEEN PAST, PRESENT, AND FUTURE

The ‘ōlelo no‘eau (proverb) “I ka wā ma mua, ka wā ma hope” illustrates how Kānaka Maoli (Native Hawaiians)¹ orient themselves temporally. “Ka wā ma mua,” literally translated as “the time in front,” describes the time that precedes the present (i.e., the past).² Likewise, “ka wā ma hope” means “the time in back,” the time coming after the present (i.e., the future).³ Kānaka Maoli appreciate that they “stand[] firmly in the present, with [their] back[s] to the future, and [their] eyes fixed upon the past, seeking historical answers for present-day dilemmas.”⁴ Recollections of the past, however, “are largely constructed in the present.”⁵ While looking to history⁶ can provide insight for the present and into the future, understandings of history depend on “who tells it, how it is told, which stories are shared, the nuances and complexities, [and] the language used.”⁷

¹ “Native Hawaiian,” “Kanaka Maoli,” or “Maoli,” as used in this article, refers to individuals that can trace their ancestry back to the peoples inhabiting the Hawaiian Islands prior to the arrival of Captain James Cook in 1778, regardless of blood quantum. “Kanaka” is the singular, while “Kānaka” is the plural. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127 (1986) [hereinafter HAWAIIAN DICTIONARY].

² LILIKALĀ KAME‘ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI? 22 (Bishop Museum Press, 1992) [hereinafter KAME‘ELEIHIWA, NATIVE LAND]; Nālani Wilson-Hokowhitu & Manulani Aluli Meyer, Introduction: *I Ka Wā Mamua, The Past Before Us*, in THE PAST BEFORE US: MO‘OKŪ‘AUHAU AS METHODOLOGY 1 (Nālani Wilson-Hokowhitu ed., 2019).

³ KAME‘ELEIHIWA, NATIVE LAND, *supra* note 2, at 22; Wilson-Hokowhitu & Meyer, *supra* note 2, at 1.

⁴ KAME‘ELEIHIWA, NATIVE LAND, *supra* note 2, at 22.

⁵ Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1757 (2000).

⁶ “History” is traced back to the Greek “histōr,” meaning “wise man” or “judge.” *History*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=history&source=ds_search (last visited Feb. 21, 2021). For the purposes of this article, “history” refers to a story, narrative, or relation of incidents (true or false) of the past. *See id.*

⁷ 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.*

And as those social understandings of the past evolve, so do the solutions for present-day problems.⁸

Traditionally, Kānaka Maoli fixed their eyes on “ka wā ma mua” by looking to their history and ancestral knowledge preserved through mo‘okū‘auhau (genealogies), mele (songs), and mo‘olelo (stories).⁹ But near the end of the 19th century, many Kānaka worried their ancestral knowledge would be erased, leaving future generations lost without the cultural kahua (foundation) Native Hawaiians relied upon since time immemorial.¹⁰ As American businessmen seized control over the archipelago and Hawai‘i’s native population declined due to foreign-introduced disease, “non-native historians developed and promoted [a] narrative” that failed to “acknowledg[e] . . . [Americans’] hostile takeover of an indigenous sovereign” and instead centered “around sugar planters, the economy, and land and power in Hawai‘i.”¹¹ Prevailing for nearly a century after the 1893 illegal overthrow of the Hawaiian Kingdom, colonial narratives developed and promoted by foreign historians centered around shifting economic and political power in Hawai‘i.¹² This “history” crafted by non-natives suppressed Native Hawaiians’ historical accounts, along with their collective memory of the injustice that took place in Hawai‘i.¹³

Burns, 39 U. HAW. L. REV. 481, 482 (Summer 2017).

⁸ *See id.*

⁹ NOENOE K. SILVA, *THE POWER OF THE STEEL-TIPPED PEN: RECONSTRUCTING NATIVE HAWAIIAN INTELLECTUAL HISTORY* 212 (2017) (examining literature by Native Hawaiian intellectuals) [hereinafter SILVA, STEEL-TIPPED PEN]. A mo‘olelo “is a progression of words that not only recounts the story of an individual, but is also woven into the collective fabric or memory of Maoli society.” Lu‘ukia Nakanelua, *Na Mo‘o o Ko‘olau: The Water Guardians of Ko‘olau Weaving and Wielding Collective Memory in the War for East Maui Water*, 41 U. HAW. L. REV. 189, 191 (2018).

¹⁰ SILVA, STEEL-TIPPED PEN, *supra* note 9, at 7–8.

¹¹ MacKenzie & Sproat, *supra* note 7, at 483–84. A century after Westerners’ first contact in Hawai‘i, “the Native Hawaiian population had plunged to a mere 19 percent of the pre-contact population.” Lilinoe Kauahikaua & Seanna Pieper-Jordan, *DATA JUSTICE: ABOUT US, BY US, FOR US* 9 (Feb. 2021), available at https://static1.squarespace.com/static/5ef66d594879125d04f91774/t/601dca4138c3983f4b7d5646/1612565088228/Data+Justice+Report_FINAL.pdf.

¹² MacKenzie & Sproat, *supra* note 7, at 483–84.

¹³ *Id.* The modern Hawaiian sovereignty movement galvanized Kānaka Maoli’s pursuit of redress for the colonization’s injuries. Julian Aguon, *Native Hawaiians and International Law*, in *NATIVE HAWAIIAN LAW: A TREATISE* 352, 360–61 (2015). To get at the heart of the issue, Kānaka Maoli worked to reconstruct history and correct the inaccurate collective memory that was told, and prevailed, for so long. *See* MacKenzie & Sproat, *supra* note 7, at 484–85 (citing HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I* 1–24, 31–50 (2004)); KAME‘ELEHIWA, *NATIVE LAND*, *supra* note 2, at 3 n.7 (describing the shift in Native Hawaiian consciousness and the politicization, identification, and capitalization of “Native” during the Hawaiian sovereignty movement). Native Hawaiians began to “expand the law’s narrow framing of

Which aspects of history are told, and how they are told, determine social understandings of justice and how that “justice” will be accomplished.¹⁴ Collective memory—a powerful tool wielded by colonizers for centuries—can be reclaimed and deployed by Kānaka and other Indigenous People to undergird justice claims.¹⁵ Kānaka Maoli today are deliberately looking to the past—through stories, songs, genealogies, and chants—to understand how they can shape and determine their future.¹⁶ They continue the effort to recover parts of history left out of colonizers’ narratives.¹⁷ And while the courts often tell a different version of “history,” Native Hawaiians have persisted in making these recovered narratives public and changing the way others understand what justice for Native Hawaiians requires.¹⁸

injustice and focus on historical facts to more fully portray what happened and why it was wrong.” Hom & Yamamoto, *supra* note 5, at 1757. History was more than a way for Hawaiians to look to the past and remember the ways of their ancestors. *Id.* It became “a catalyst for mass mobilization and collective action aimed at policymakers, bureaucrats, and the American conscience.” *Id.*

¹⁴ Hom & Yamamoto, *supra* note 5, at 1764.

¹⁵ *Id.* at 1764–65. For instance, the 1993 Apology Resolution’s recognition of the illegal overthrow of the Hawaiian Kingdom bolstered Native Hawaiians’ claims to the Crown and Government Lands of the Hawaiian Kingdom. MacKenzie & Sproat, *supra* note 7, at 520–21. A result of the Great Māhele in 1848, King Kamehameha III held 2.5 million acres, sixty-percent of the kingdom’s lands, with chiefs holding the remainder of the land. *Id.* Kamehameha III then divided his lands into two. *Id.* First, he established the Government lands, about 1.5 million acres, that were “set apart forever to the chiefs and people” of the kingdom. *Id.* Kamehameha III retained the remaining land, subject to the rights of native tenants, “for himself and his heirs and successors[.]” Melody Kapilialoha MacKenzie, *Historical Background*, in NATIVE HAWAIIAN LAW: A TREATISE 2, 12–14 (2015). These lands were “taken by the United States upon annexation of Hawai‘i as a territory following the 1893 overthrow.” Hom & Yamamoto, *supra* note 5, at 1766–67 (citing Melody K. MacKenzie, *Historical Background*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 3, 12 (Melody Kapilialoha MacKenzie ed., 1991)). Upon statehood in 1959, Hawai‘i’s Government and Crown Lands were transferred from U.S. control to the State of Hawai‘i by the 1959 Admission Act. Melody Kapilialoha MacKenzie, *Public Land Trust*, in NATIVE HAWAIIAN LAW: A TREATISE 76, 79 (2015). These former Government and Crown Lands are subject to the Public Land Trust, which imposes on the state specific fiduciary obligations of due diligence and undivided loyalty in ensuring that trust benefits are maximized for Native Hawaiian and public beneficiaries. *See id.*; HAW. CONST. art. XII.

¹⁶ *See* Hom & Yamamoto, *supra* note 5, at 1759–60. For instance, Noenoe K. Silva uses nineteenth and twentieth century texts written by Kānaka in ‘Ōlelo Hawai‘i (Hawaiian language) to examine the gaps left in the historical record authored primarily by non-native outsiders and illuminate the history of Native Hawaiians’ resistance to American imperialism. NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 15 (2004) [hereinafter SILVA, ALOHA BETRAYED].

¹⁷ SILVA, ALOHA BETRAYED *supra* note 16, at 15.

¹⁸ *See id.*; Hom & Yamamoto, *supra* note 5, at 1759–60.

In October 2018, the Hawai‘i Supreme Court published the decision *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Res. (“Mauna Kea II”)* (2018).¹⁹ On the heels of protracted administrative trials (contested case hearings)²⁰ and earlier litigation,²¹ the court’s *Mauna Kea II* decision affirmed the state’s Board of Land and Natural Resources’ (“BLNR’s” or “the Board’s”) grant of a Conservation District Use Permit (“CDUP” or “the Permit”)²² for the development of the Thirty Meter Telescope (“TMT”) on Maunakea.²³ Many assumed that the court’s ruling finally “clear[ed] the way for TMT to begin construction.”²⁴ But when developers sought to break ground on the TMT in July 2019, several hundred Kia‘i (guardians)²⁵ gathered at the base of the Mauna Kea Access

¹⁹ *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Res.*, 143 Haw. 379, 431 P.3d 752 (2018) [hereinafter *Mauna Kea II*].

²⁰ A contested case hearing is a quasi-adjudicative hearing held to determine “the rights, duties, and privileges of specific parties.” HAW. REV. STAT. ANN. § 91-1 (Westlaw through 2019 Reg. Sess.); HAW. CODE R. §§ 13-1-28, 13-1-29 (2009); *Kilakila ‘O Haleakalā v. Univ. of Haw.*, 131 Haw. 193, 200, 317 P.3d 27, 34 (2016) [hereinafter *Kilakila*]. A contested case may be required by agency rule or regulation, statutory law, or constitutional due process. *Kilakila*, 131 Haw. at 200, 317 P.3d at 34.

²¹ *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 363 P.3d 224 (2015) [hereinafter *Mauna Kea I*].

²² BLNR administrative rules require that “[n]o land use(s) shall be conducted in the conservation district unless a permit or approval is first obtained from the department or board.” HAW. CODE R. § 13-5-6(d) (2009).

²³ *Mauna Kea II*, 143 Haw. at 384, 431 P.3d at 757. All names for the same mountain, “Mauna Kea,” “Maunakea,” and “Mauna a Wākea” are used interchangeably throughout this article. “Mauna Kea” (white mountain) describes the mountain’s snow-covered peak. “Maunakea,” as one word, is short for “Mauna a Wākea” (mountain of Wākea). Consistent with Native Hawaiian tradition, “[t]he University of Hawai‘i Hilo School of Hawaiian Language recommends the one-word spelling[.]” *Mauna Kea or Maunakea?*, UNIV. OF HAW. INST. FOR ASTRONOMY, <https://www2.ifa.hawaii.edu/newsletters/article.cfm?a=690&n=55> (last visited Feb. 21, 2021). The ‘Ōiwi (Native) place-name “Maunakea” is used throughout this article “to remember and honor the mana, the spiritual and cultural power, that resides in places and the persons . . . associated with those places.” See *DETOURS: A DECOLONIAL GUIDE TO HAWAII* 16 (Hōkūlani K. Aikau & Vernadette Vicuña Gonzalez eds., 2019); HAWAIIAN DICTIONARY, *supra* note 1, at 280.

²⁴ Alexandra Witze, *Embattled Thirty Meter Telescope Scores Big Win in Hawaii’s Highest Court*, NATURE (Oct. 31, 2018), <https://www.nature.com/articles/d41586-018-04444-2>.

²⁵ MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 146 (rev. & enlarged ed. 1986). Behind the movement to protect Maunakea are “self-described ‘protectors, not protestors’ or Kia‘i Mauna (guardians of the mountain).” Noelani Goodyear-Ka‘ōpua, *Protectors of the Future, Not Protestors of the Past: Indigenous Pacific Activism and Mauna a Wākea*, 116 S. ATL. Q. 184, 188–89 (2017). In this article, “Kia‘i” and “Kia‘i Mauna” are used synonymously to refer to protectors holding space on

Road to halt the contentious project's construction, which they have been successful in doing for nearly two years as of this writing.²⁶

The present conflict engulfing TMT is the culmination of a decades-long battle over the summit of Maunakea.²⁷ This conflict, however, is not simply a battle over a sacred mountain, but a battle over the collective memories of Maunakea and Kānaka Maoli and the injustices committed against them.²⁸ The Hawai'i Supreme Court majority and TMT stakeholders and supporters recall memories altered by their "hopes and desires" to justify their approval and support for the project.²⁹ On the other hand, Kia'i, other Kānaka Maoli, and their allies remember and retell a competing collective memory of injustice, one that "integrates the ancestral with claims of right" to Maunakea.³⁰ These present-day constructions of the past will determine the future of Maunakea and other Kānaka Maoli struggles for justice.³¹ The prevailing collective memory of "ka wā ma mua" will inform what will be done "ka wā ma hope."³²

This article unpacks the incomplete "history" of injustices in Hawai'i and on Maunakea—as depicted by BLNR's approval of TMT's CDUP and reinforced by the *Mauna Kea II* majority—that the Hawai'i Supreme Court and TMT supporters deployed to rationalize and clear the way for the telescope's development.³³ Further, this article explains how the prevailing collective memory of injustice will determine the fate of the TMT on Maunakea and shape narratives of justice for Native Hawaiians "ka wā

the mountain, petitioners challenging the TMT in court, and others fighting in solidarity to protect Mauna a Wākea.

²⁶ HPR News Staff, *Latest Developments as TMT Construction Preparations Begin on Mauna Kea*, HAW. PUB. RADIO (July 15, 2019), <https://www.hawaiipublicradio.org/post/latest-developments-tmt-construction-preparations-begin-Mauna-kea#stream/0>. In March 2020, one of two countries using public funds to finance the TMT, Japan suspended its yearly funding, "citing the stalemate over [the project's] construction on Mauna Kea." Ku'uwehi Hiraishi, *Japan Suspends TMT Funding Citing Mauna Kea Stalemate*, HAW. PUB. RADIO (Mar. 3, 2020), <https://www.hawaiipublicradio.org/post/japan-suspends-tmt-funding-citing-Mauna-kea-stalemate#stream/0>. In response to the suspension, Kia'i delivered a letter to the Consulate General of Japan reaffirming their stance on protecting the mountain from the TMT. *Id.* Kia'i Lanakila Mangauil urged Japan to divest money from the project and instead "reinvest back into their own communities and help their own people." *Id.*

²⁷ *See infra* Parts III, V, VI.

²⁸ *See* Hom & Yamamoto, *supra* note 5, at 1764–65.

²⁹ *Id.* at 1761.

³⁰ *See id.* at 1761–62.

³¹ *Id.*

³² *See infra* Parts II, VII.

³³ *See infra* Part V.

ma hope.”³⁴ Part II explores collective memory and explains its power and potential for justice struggles in Hawai‘i with an example from *Rice v. Cayetano* (2000).³⁵ Part III examines the cultural and historical significance of Maunakea to Hawai‘i and Native Hawaiians as well as the history of Western astronomy on the mountain’s summit. Part IV provides the legal background of this battle over Maunakea and outlines the State of Hawai‘i’s affirmative duty to protect Native Hawaiian traditional and customary rights. Parts V and VI illuminate the recent and ongoing battle over the collective memory of injustice of Maunakea. Part V closely examines the *Mauna Kea II* majority and dissenting opinions and their effects on public perception surrounding Maunakea and justice for Native Hawaiians. Part VI then brings light to Native Hawaiians’ oft-ignored familial, spiritual, and legal claims to Maunakea—with examples from Kia‘i’s testimony before BLNR, the court, and the public—to combat the narrative that has paved the way for the approval of the TMT. Finally, Part VII concludes this article by looking to “ka wā ma hope” and contemplating the future of Maunakea.

II. COLLECTIVE MEMORY’S ESSENTIAL ROLE IN SHAPING NARRATIVES OF JUSTICE FOR KĀNAKA MAOLI

Kānaka Maoli identity and understanding of the present derive from mo‘olelo.³⁶ Native Hawaiian Professor and Scholar Lilikalā Kame‘eleihiwa explained that “every aspect of the Hawaiian conception of the world is related by birth, and as such, all parts of the Hawaiian world are one indivisible lineage . . . Hawaiians patterned their behavior after the ancestral example found in their genealogy.”³⁷ That past informed their future.³⁸ But since Western contact, the “historical portraits” often used to describe Hawai‘i were crafted primarily by non-native voices that reflect Eurocentric views.³⁹

Since “Western views [of history] have [largely] predominated,” those narratives play a significant role in Native Hawaiians’ lives.⁴⁰ Eric K.

³⁴ See *infra* Parts V–VI.

³⁵ *Rice v. Cayetano*, 528 U.S. 495 (2000); Hom & Yamamoto, *supra* note 5, at 1766–76.

³⁶ See KAME‘ELEIHIWA, *supra* note 2, at 1 (describing how “Hawaiian identity is, in fact, derived from” the mo‘olelo and “cosmogonic genealogy” of the Kumulipo); Nakanelua, *supra* note 9, at 198–99 (“[U]nderstanding Mo‘o [and mo‘olelo] as a paradigm, the foundation of Maoli understanding of law, culture, and society, is critical to the way Kānaka create and re-create community identity.”).

³⁷ KAME‘ELEIHIWA, *supra* note 2, at 2.

³⁸ *Id.*

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 4.

Yamamoto, Fred T. Korematsu Professor of Law and Social Justice at the William S. Richardson School of Law, also recognized how historical narratives impacted Kānaka's sense of identity: "'Who we were and what happened' are integrally connected to how Native Hawaiians were sometimes pejoratively described by white American missionaries (savages and pagans), businessmen (incompetents), and politicians (a dying race), and later by racial immigrant groups (lazy and uneducated)."⁴¹ Equally important is the way these predominating narratives or stories determine what justice entails for Native Hawaiians.⁴² As succinctly put by Columbia University Professor Edward Said:

[Stories are] the method colonized people use to assert their own identity and the existence of their own history. The main battle in imperialism is over land, of course; but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future—these issues were reflected, contested, and even for a time, decided in narrative.⁴³

Understanding the inherent power in narratives and how they are framed, Dr. Kame'eleihiwa questioned the flawed accounts peddled by non-native Westerners:

[H]ow can anyone write an honest history? Moreover, how is it possible to write an accurate, or even approximate, replay of life when writing the history of a people from the viewpoint of another completely distinct culture, or from another completely different time?⁴⁴

Professor Yamamoto observed that, akin to Native Hawaiians, other groups also understand how the past informs present and future constructions of justice and redress.⁴⁵ Those groups seeking social justice "tend to define injustice more broadly" than the "progressive lawyers" whose ideas of injustice are framed within the narrow confines of legal doctrine that "narrows public imagination and debate."⁴⁶ To achieve mass mobilization and collective action, social justice groups must "expand the law's narrow framing of injustice and focus on historical facts to more fully portray what

⁴¹ Hom & Yamamoto, *supra* note 5, at 1760.

⁴² See EDWARD W. SAID, *CULTURE AND IMPERIALISM* xv (1993).

⁴³ *Id.*

⁴⁴ KAME'ELEIHIWA, *supra* note 2, at 5–6.

⁴⁵ Hom & Yamamoto, *supra* note 5, at 1757.

⁴⁶ *Id.*

happened and why it was wrong.”⁴⁷ As Professor Yamamoto noted, however, both “progressive lawyers” and social justice groups often fail to address the crux of how collective memory operates.⁴⁸

A. *Understanding Collective Memory*

More than historical facts and events simply “retrieved from a brain storehouse,” memories are “constructed and continually reconstructed.”⁴⁹ Memories are always being reshaped “by complex interactions among people and their social environments.”⁵⁰ Both individuals and social groups “often subconsciously choose what to remember in ways that reflect their desires, hopes, and the cultural norms of their social environment.”⁵¹ Moreover, memories of the past are framed within the context of culture.⁵² These culturally-framed memories are conveyed and perpetuated through narratives.⁵³

Narrative structures derive from purposeful constructions of collective memory and “shape how society constructs and relates to individual and group identity claims.”⁵⁴ “Direct experiences, cultural forms, institutional practices, and political ideology generate the underlying, or structural, narratives.”⁵⁵ These narratives serve as a lens through which groups understand history and frame their relationship of the past to the present.⁵⁶ But “this lens is constructed,” and thus “‘remembering’ the past is neither innocent nor objective.”⁵⁷ Historian Peter Burke’s observation illustrates how “historical memory is selective”:

A way of seeing is a way of not seeing, a way of remembering is a way of forgetting, too. If memory were only a kind of registration, a “true” memory might be possible. But memory is a process of encoding information,

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1760.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1761.

⁵³ *Id.*

⁵⁴ MacKenzie & Sproat, *supra* note 7, at 488; see Hom & Yamamoto, *supra* note 5, at 1761 (citing Craig R. Barclay, *Autobiographical Remembering: Constraints on Objectified Selves*, in REMEMBERING OUR PAST: STUDIES IN AUTOBIOGRAPHICAL MEMORY 67, 94 (David C. Rubin ed., 1996)).

⁵⁵ Hom & Yamamoto, *supra* note 5, at 1762.

⁵⁶ *Id.*

⁵⁷ *Id.*

storing information and strategically retrieving information, and there are social, psychological, and historical influences at each point.⁵⁸

Figuring out “what happened and who we were” goes beyond factual discovery and is “an act of historical and political construction.”⁵⁹ The daughter of Holocaust survivors, writer Eva Hoffman observed that the understanding of any event is “shaped by contemporaneous values and ideological pressures.”⁶⁰ For instance, historian Peter Novick examined how “America’s preoccupation with the Holocaust . . . is motivated as much by political as moral concerns.”⁶¹ The Holocaust “has been treated as a political issue and deliberately used for political ends.”⁶² Therefore, to effectively use collective memory to understand present-day justice struggles, a “lawyerly approach”—digging historically to find out what happened and applying those facts to show a violation of established rights norms—will not suffice.⁶³ Instead, “[t]he digging we must do is not only into the documentary archives, but also into the archives of mind, spirit, and culture—then and now.”⁶⁴

Since “framing justice is about social memory,”⁶⁵ social justice lawyers and activists often aim to refute inaccurate historical narratives and take a more active role in constructing group memories “as we go, within a context of not only rights norms but also larger societal understandings of injustice and reparation.”⁶⁶ Collective memory allows groups demanding justice to dismantle the inaccurate narratives—told and retold by individuals, institutions, and nations—that “refram[e] shameful past acts” and deflect blame and responsibility.⁶⁷

⁵⁸ *Id.* (quoting Peter Burke, *History as Social Memory*, in *MEMORY: HISTORY, CULTURE AND THE MIND* 97, 103 (Thomas Butler ed., 1989)).

⁵⁹ *Id.* at 1760.

⁶⁰ *See id.* at 1762 (citing Eva Hoffman, *The Uses of Hell*, N.Y. R. BOOKS 19 (Mar. 9, 2000)).

⁶¹ *Id.* at 1763.

⁶² Hoffman, *supra* note 60.

⁶³ Hom & Yamamoto, *supra* note 5, at 1764.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1756.

⁶⁶ *Id.* at 1764.

⁶⁷ *Id.* at 1758.

B. *Collective Memory’s Power and Potential for
Justice Struggles in Hawai‘i*

For Kānaka, recounting “what happened” in Hawai‘i’s past remains difficult for several reasons.⁶⁸ Many stories traditionally passed down between generations of Kānaka Maoli were lost when the native population was decimated by foreign-introduced disease.⁶⁹ With America’s increased presence in Hawai‘i, Western narratives and institutions predominated, suppressing Hawaiian language and culture.⁷⁰ And, as Professor Yamamoto explained,

Making the task of recounting even more difficult is the present-day reality that native Hawaiians are building their own new understandings of ‘what happened’ and ‘who we were’ partly in order to claim ‘what is rightfully ours.’ This linkage of events to identity and then to rights implicates contemporary notions of nationhood.⁷¹

Other scholars, including Dr. Kame‘eleihiwa, similarly recognized and emphasized how history is tied to identity, which are tied to rights claims and justice.⁷² Unpacking and examining “history”—especially when inscribed into law—thus becomes a crucial task because of collective memory’s use as a strategic tool that justifies upholding or denying rights to certain groups as well as promoting or thwarting notions of justice.⁷³

Professor Yamamoto outlines five strategic points to translate collective memory into practical strategy that can be deployed to realize the power and potential of collective memory for justice struggles.⁷⁴ First,

⁶⁸ *Id.* at 1759–60.

⁶⁹ SILVA, ALOHA BETRAYED, *supra* note 16, at 3; *see supra* note 11 and accompanying text.

⁷⁰ KAME‘ELEIHIWA, *supra* note 2, at 5–6. “[W]ithin a century of foreign occupation ‘ōlelo Hawai‘i became an endangered language.” Katrina-Ann R. Kapā‘anaokalāokeola Nākoa Oliveira, *E Ola Mau ka ‘Ōlelo Hawai‘i: The Hawaiian Language Revitalization Movement*, in *A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY* 79 (Noelani Goodyear-Ka‘ōpua et al., eds., 2014). The illegal overthrow of the Hawaiian Kingdom marked a “devastating blow[] dealt to the Kanaka people.” *Id.* at 80. By 1896, three years after the overthrow, the Republic of Hawai‘i established English as the medium of instruction in schools and “effectively banned ‘ōlelo Hawai‘i-medium education.” *Id.*

⁷¹ Hom & Yamamoto, *supra* note 5, at 1760.

⁷² *See* KAME‘ELEIHIWA, *supra* note 2, at 7–8; Hom & Yamamoto, *supra* note 5, at 1764–65.

⁷³ *See* Hom & Yamamoto, *supra* note 5, at 1777.

⁷⁴ *Id.* at 1764.

“justice claims of ‘right’ start with struggles over memory.”⁷⁵ “Collective memories differ depending on locale, group experiences, and cultural norms[.]”⁷⁶ Since different groups remember the past differently, they often disagree on what injustice looks like and what justice entails.⁷⁷ Therefore, justice depends upon “critically engag[ing] the dynamics of group memory injustice.”⁷⁸

Second, the “[g]roup memory of injustice is characterized by the active, collective construction of the past.”⁷⁹ Memory is not composed of a recollection of past events.⁸⁰ Instead, it involves present-day constructions that are built and altered, not simply found.⁸¹ Collective memory “emerges from interactions among people, institutions, media, and other cultural norms.”⁸²

Third, “[t]he construction of collective memory implicates power and culture.”⁸³ Decisionmakers have the power to decide which memories ought to be acknowledged, and those prevailing memories shape justice claims.⁸⁴ “[S]truggles over memory are often struggles between colliding ideologies, or vastly differing world views.”⁸⁵ Challenges to the prevailing historical narratives are met with “fierce opposition by those in power” who “seek[] totally to discredit the developing memory proffered by outsiders” or who “seek[] to partially transform [an] old memory . . . into a new memory . . . that justifies continued hierarchy.”⁸⁶

Fourth, “[t]hese contests over historical memory regularly take place on the terrain of culture—of which legal process, and particularly civil rights adjudication, is one, but only one, significant aspect.”⁸⁷ Memories of past events, persons, and interactions are culturally-framed—“they are subject to socially structured patterns of recall, they are often triggered by

⁷⁵ *Id.*

⁷⁶ MacKenzie & Sproat, *supra* note 7, at 493.

⁷⁷ *See id.*; Hom & Yamamoto, *supra* note 5, at 1764.

⁷⁸ Hom & Yamamoto, *supra* note 5, at 1764.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 1765.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

social stimuli and they are conveyed through communal language.”⁸⁸ Legislators, judges, and other decisionmakers “determine[] which cultural practices, images, and narratives formally frame the memories. And those memories in turn legitimate future understanding of and action on justice claims.”⁸⁹

Finally, “it is always important for those outsiders to conceive of law and legal process as contributors to—rather than as the essence of—larger social justice strategies.”⁹⁰ Activists seeking justice have dual goals: “to achieve the specific legal result and to contribute to construction of social memory as a political tool.”⁹¹

Together, these strategic points “underscore collective memory’s powerful role in justice struggles in Hawai‘i and beyond.”⁹² They call attention to the ongoing battle over collective memory of injustice and the strategic import of deploying collective memory to bolster justice claims.⁹³ In courts in particular, judges hold power to shape collective memory, which, when inscribed into case law, legitimizes “socio-legal or cultural narratives, or stories, about groups, institutions, situations and relationships.”⁹⁴ The “prevailing, or master, narrative provides a principle lens[] through which groupings of people in a community see and interpret events and actions.”⁹⁵

Thus, the battle over the memory of Maunakea poses major implications for not only Maunakea but also Native Hawaiians themselves.⁹⁶ The battle over Maunakea—both in and outside of the courtroom—illustrates these five strategic points and collective memory’s significant role in the struggle for justice for Kānaka Maoli.⁹⁷

Professor Yamamoto deployed *Rice v. Cayetano* (2000) as an example to illustrate how collective memory can perpetuate injustice, and the controversial majority opinion authored by Justice Anthony Kennedy is representative of the types of narratives and collective memories told by

⁸⁸ *Id.* at 1761.

⁸⁹ *Id.* at 1765.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² MacKenzie & Sproat, *supra* note 7, at 495.

⁹³ *Id.*

⁹⁴ See Eric K. Yamamoto, Moses Haia, & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians’ Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 24 (1994); Hom & Yamamoto, *supra* note 5, at 1765.

⁹⁵ Yamamoto et al., *supra* note 94 (“Court rulings have reinforced such master narratives, and harsh societal actions have been justified them.”).

⁹⁶ See Hom & Yamamoto, *supra* note 5, at 1766.

⁹⁷ See *id.*

non-natives that Native Hawaiians have sought to correct.⁹⁸ In 1978, a result of the Constitutional Convention, Hawai'i voters established the Office of Hawaiian Affairs ("OHA") and its Board of Trustees comprised of and elected by Native Hawaiians.⁹⁹ Catalyzed by the efforts of Native Hawaiian Convention participants who "saw the convention as an opportunity to further the goal of self-determination,"¹⁰⁰ "Hawai'i's diverse peoples overwhelmingly approved the 1978 state constitutional amendment creating OHA and its indigenous Hawaiians-only voting structure."¹⁰¹ A unique governing entity independent from the state's executive branch, OHA holds broad powers to "acquire, hold, and manage property; to enter into contracts and leases; to manage and invest funds; and to formulate public policy relating to Hawaiian affairs."¹⁰²

In 1996, Harold Rice, a rancher from Hawai'i Island, sued then Hawai'i Governor Ben Cayetano to invalidate OHA's voting process and claimed that it was nothing more than a special privilege for a racial minority in violation of the Fifteenth and Fourteenth Amendments.¹⁰³ The U.S. Supreme Court agreed, in part, with Rice's argument and struck down the voting system.¹⁰⁴ The majority concluded the state's "denial of [Rice's] right to vote to be a clear violation of the Fifteenth Amendment."¹⁰⁵

How was the Court able to reconcile the history of injustice in Hawai'i with its invalidation of a program clearly intended to rectify injustice? As Professor Yamamoto elucidates, "the Court majority generated a remarkable narrative reminiscent of the familiar tale of how Western culture and law, more or less naturally, 'civilized' the native savage

⁹⁸ *See id.*

⁹⁹ Melody Kapilialoha MacKenzie, *Native Hawaiians and U.S. Law, in NATIVE HAWAIIAN LAW: A TREATISE* 264, 273 (2015). OHA "represents [Native Hawaiians] concerning government control over valuable [public trust lands] . . . OHA . . . monitors the state's use of [trust] lands and spends millions annually on programs addressing social, economic, and cultural needs of Kanaka Maoli." Hom & Yamamoto, *supra* note 5, at 1766–67; *see also* HAW. CONST. art. XII, §§ 5–6; 1997 Haw. Sess. Laws 240.

¹⁰⁰ MacKenzie, *supra* note 99, at 273. Convention delegates intended for OHA to bolster Hawaiian self-determination and self-government, similar to the way Native Americans had been able to do in cooperation with the federal government. *Id.* at 274.

¹⁰¹ Hom & Yamamoto, *supra* note 5, at 1767.

¹⁰² MacKenzie, *supra* note 99, at 275 n.83.

¹⁰³ *See Rice v. Cayetano*, 528 U.S. 495, 499 (2000).

¹⁰⁴ *Id.*; MacKenzie, *supra* note 99, at 284. Both the Hawai'i District Court and the 9th Circuit Court of Appeals upheld OHA's voting system limiting registration to Hawaiians. *See generally Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998); *Rice v. Cayetano*, 941 F. Supp. 1529 (D. Haw. 1996).

¹⁰⁵ *Rice*, 528 U.S. at 499.

. . . in Hawai‘i.”¹⁰⁶ Justice Kennedy’s majority opinion contorted history and, in effect, what was required to achieve justice in Hawai‘i.¹⁰⁷ The majority’s narrative euphemized the impacts of Western colonists in nineteenth century Hawai‘i.¹⁰⁸ It framed a narrative that it claimed was only a “neutral” and “uncontroversial” recounting of past events.¹⁰⁹ Characterizing “white American missionaries and businessmen [not] as foreign settlers but rather as natural heirs of Hawai‘i,” the majority intimated that there were no negative effects of U.S. colonization.¹¹⁰ All things considered, there was no injustice for OHA to remedy.¹¹¹

The majority’s inaccurate retelling of Hawai‘i’s history and its “dissonant framing of the ‘injustice’”¹¹² has effectively left other laws and programs intended to benefit Native Hawaiians vulnerable to legal challenges and potential invalidation.¹¹³ A devastating blow to Native Hawaiian self-determination:

¹⁰⁶ Hom & Yamamoto, *supra* note 5, at 1773.

¹⁰⁷ See *Rice*, 528 U.S. at 498–511. Justice Kennedy detailed, and analogized, the histories of the voting structure in Hawai‘i and the events surrounding the Fifteenth Amendment. *Id.* at 511–14. Despite the vast dissimilarities between those histories, Justice Kennedy then likened OHA’s voting scheme to pre-Reconstruction voting restrictions and an Oklahoma voting law that was struck down for its “subtle” attempt to limit voting to white citizens. *Id.* The majority found that OHA’s voting structure “[rested], in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters.” *Id.* at 523. Justices Stephen Breyer and David Souter’s concurrence went further and opined that OHA’s electorate does not resemble that of a federally recognized Indian Tribe and that “there is no ‘trust’ for native Hawaiians here.” *Id.* at 524–37 (Breyer, J., concurring).

¹⁰⁸ Hom & Yamamoto, *supra* note 5, at 1773.

¹⁰⁹ *Id.* at 1772.

¹¹⁰ *Id.* at 1775. For instance, the Court characterized (pre-contact) life in Hawai‘i as:

[N]ot “idyllic” because there was internecine warfare and. . . kings “could order the death or sacrifice of any subject.”. . . [The majority] blandly described often greedy Western encroachment as a “story of increasing involvement of westerners in the economic and political affairs of the Kingdom.”. . . [T]he Court intimated that the overthrow was justified by Queen Lili‘uokalani’s undemocratic actions. . . [T]he majority alluded to the “Chinese, Portuguese, Japanese, and Filipino” migrations to Hawai‘i and how these immigrants faced, and overcame, discrimination.

Id. at 1773–74.

¹¹¹ See *id.* at 1775.

¹¹² *Id.* at 1771.

¹¹³ See *id.* Authored by Justice John Paul Stevens’ and joined by Justice Ruth Bader Ginsburg, the dissenting opinion criticized the majority’s holding for failing to understand the significance of Hawaiian history and “rest[ing] largely on the repetition of glittering generalities that have little, if any, application to [Hawai‘i’s] compelling history.”

Rice and the collective memory it legitimates distort progressive civil rights and erase human rights. They twist a history of white racial dominance into a justification for present-day equality for Freddy Rice . . . [B]y narrowly framing history to legitimate its decision, the Supreme Court generated precedent for forthcoming cases that undermines the principle of justice through reparation.¹¹⁴

This example demonstrates that, more than a tool for “retrieving group histories[,]”¹¹⁵ collective memory of injustice is “construc[ed] as we go, within a context of not only rights norms but also larger societal understandings of injustice and reparation.”¹¹⁶ Professor Yamamoto’s analysis of *Rice* is but one example evincing the power of collective memory for Native Hawaiians seeking to rectify wrongs perpetuated by revisionist histories and colonial narratives.¹¹⁷

III. KA PIKO KAULANA O KA ‘ĀINA: THE FAMOUS SUMMIT OF THE LAND

A. *The Significance of Maunakea to Hawai‘i and Kānaka Maoli*

Mauna a Wākea’s allure is uncontested—people from Hawai‘i and abroad admire the mountain’s beauty. But Kānaka Maoli’s connection to Maunakea is unique from those of other locals, astronomers, or tourists. That connection—Maunakea’s historical and cultural significance to Kānaka—is embedded in their many stories, songs, genealogies and

Rice v. Cayetano, 528 U.S. 495, 527–28 (2000) (Stevens, J., dissenting). Justice Stevens based his dissent on Congress’ analogous treatment of Native Americans and Native Hawaiians and the reality that OHA’s trustee system and electorate “violate[d] neither the letter nor the spirit” of the Fourteenth and Fifteenth Amendments. *Id.* at 538. Native Hawaiians’ legal status and OHA’s technically being an “arm of the state” should not have precluded the state from implementing OHA’s voting scheme, especially given that Native Hawaiians’ lack of “any vestigial native government” was “a possibility which history and the actions of [the United States] deprived them.” *Id.* at 535. The dissenters accosted the majority’s flawed collective memory. *See id.* They understood that, through OHA’s implementation and voting scheme, Kānaka Maoli sought neither “privileges [n]or handouts.” *See Hom & Yamamoto, supra* note 5, at 1775.

¹¹⁴ *See Hom & Yamamoto, supra* note 5, at 1777.

¹¹⁵ Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai‘i’s Plantations to Congress—Puerto Ricans’ Claims to Membership in the Polity*, 20 REV. L. & SOC. JUST. 353, 362 (2011).

¹¹⁶ *Id.*; Hom & Yamamoto, *supra* note 5, at 1764.

¹¹⁷ *See, e.g., Nakanelua, supra* note 9; MacKenzie & Sproat, *supra* note 7.

chants.¹¹⁸ Most notably, the Kumulipo, “an oli of our beginnings”¹¹⁹ and “arguably the most important literary work in the Hawaiian canon[,]”¹²⁰ traces Kānaka Maoli’s lineage directly back to Maunakea.¹²¹

Traditionally passed down through generations orally,¹²² the Kumulipo imparts the story of Papa (earth mother) and Wākea (sky father) from whom the islands were born and all Kānaka Maoli descended.¹²³ Wākea and Papa bore their first human daughter, Ho‘ohōkūkalani.¹²⁴ Hāloanaka—Wākea and Ho‘ohōkūkalani’s first child—was born prematurely, buried in the earth, and grew into the first kalo (taro)¹²⁵ plant.¹²⁶ Wākea and Ho‘ohōkūkalani then delivered a second son, Hāloa, who became the first Kanaka, ali‘i nui (high chief), and the progenitor of all Kānaka Maoli.¹²⁷

¹¹⁸ See generally BRANDY NĀLANI MCDUGALL, FINDING MEANING, KAONA AND CONTEMPORARY LITERATURE (2016).

¹¹⁹ *Id.* at 52.

¹²⁰ *Id.* at 53.

¹²¹ *Id.* As McDougall explains:

A 2,102-line mele ko‘ihonua (creation and genealogical chant), the Kumuplipo provides an evolutionary account of creation and traces the beginnings of the Kanaka Maoli concept of the universe, from degrees of darkness to the births of plants and animals, to the births of the gods from whom came the first Kānaka. Although the Kumulipo is not the only mo‘okū‘auhau, nor is it the only one relating the creation of the universe, the Kumulipo is thought to be most complete and best preserved.

Id.

¹²² The Kumulipo was first transcribed in 1889 for King Kalākaua. *Id.* at 59. Several translations of the Kumulipo were subsequently produced, including one by Queen Lili‘uokalani in 1897. *Id.* The most popularly used translation today was provided by Martha Warren Beckwith in 1951. *Id.* Though often used and cited to, some scholars have criticized Beckwith’s version as being translated through a primarily Western lens. *Id.*

¹²³ KAME‘ELEIHIWA, *supra* note 2, at 23–24.

¹²⁴ *Id.* at 24.

¹²⁵ With over 300 varieties in Hawai‘i, kalo, or taro, has been a staple of Maoli diets “from earliest times to the present.” HAWAIIAN DICTIONARY, *supra* note 1, at 123.

¹²⁶ KAME‘ELEIHIWA, *supra* note 2, at 24.

¹²⁷ *Id.* Because the union of Papa and Wākea resulted not only in Maunakea’s birth but also the birth of the Native Hawaiian people, Native Hawaiian scholar Leon No‘eau Peralto attributes Maunakea as “the birthplace of a Kanaka Maoli consciousness.” Emalani Case, *I ka Piko, To the Summit: Resistance from the Mountain to the Sea*, 54 J. PAC. HIS. 166, 174 (2019) (citing Leon No‘eau Peralto, *Mauna a Wākea: Hānau Ka Mauna, the Piko of Our Ea*, in A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 233, 234 (Noelani Goodyear-Ka‘ōpua, Ikaika Hussey, & Erin Kahunawaika‘ala Wright, eds. 2014)).

Before Ho‘ohökūkālani’s birth, Papa and Wākea bore their first-born mountain son, Mauna a Wākea.¹²⁸ A mele hānau (birth chant) composed for Kauikeaouli (Kamehameha III) recounts Maunakea’s creation and divine origins:

O hanau ka Mauna a Wakea,
 O puu a‘e ka Mauna a Wakea.
 O Wakea ke kane, o Papa, o Walinuu ka wahine.
 Hanau Hoohoku, he wahine,
 Hanau Haloa he ‘lii
 Hanau ka Mauna, he keiki Mauna na Wakea

*Born is the Mauna a Wākea,
 The mountain of Wākea buds forth.
 Wākea is the male, Papa Walinu‘u is the female.
 Born is Ho‘ohökū, a female,
 Born is Hāloa, a chief,
 Born is the Mauna, a mountain-child of Wākea.*¹²⁹

Imbued with “multiple layers of kaona, or veiled meaning,” these genealogical stories shape Native Hawaiians’ connection to ‘āina (land)¹³⁰ and to Maunakea.¹³¹ By “blur[ing] the boundaries and break[ing] down hierarchies between humans and nonhumans,” the Kumulipo, along with accompanying mele and mo‘olelo, teaches that “we are all interconnected and genealogically part of the ‘āina.”¹³²

The Papa and Wākea lineage teaches the fundamental lessons, traditions, and responsibilities of Mālama ‘Āina (caring for the land) and Aloha ‘Āina (loving the land).¹³³ It conveys the Maoli understanding that

¹²⁸ Peralto, *supra* note 127, at 233 (citing *He Kananae No Ka Hanau Ana O Kauikeaouli*, KANA‘I AUPUNI (1906)).

¹²⁹ *Id.*

¹³⁰ “‘Āina,” typically translating to “land,” describes “nature itself” and those “part[s] of the land, and sea, and streams, and water that [] sustain[] life.” Julia Steele, *Episode 2: The Meaning of Aloha ‘Āina with Professor Jon Osorio*, HAW. PUB. RADIO (Feb. 5, 2016), <https://www.hawaiipublicradio.org/post/episode-2-meaning-aloha-ina-professor-jon-osorio>. [hereinafter Steele, *Professor Jon Osorio*]. ‘Āina is what feeds “not just humans, but [] everything.” *Id.*

¹³¹ Peralto, *supra* note 127, at 234.

¹³² See MCDUGALL, *supra* note 118, at 95.

¹³³ See KAME‘ELEIHIWA, *supra* note 2, at 25. A longtime member of the Protect Kaho‘olawe ‘Ohana, Professor Davianna Pōmaika‘i McGregor describes “Aloha ‘Āina” as having:

[T]hese different layers of meaning: It is the practice of caring for the land and the resources of the land. It is the practice of honoring the

“[b]oth the [‘āina] and Kanaka are instilled, at birth, with particular kuleana [privileged responsibilities] to each other.”¹³⁴ Kānaka Maoli’s familial relationship to the land is the foundation of Native Hawaiians’ “desire [not] to conquer his elder female sibling, the ‘Āina, but to take care of her, to cultivate her properly[.]”¹³⁵ This responsibility is reciprocated: “[s]o long as younger Hawaiians love, serve, and honor their elders, the elders will continue to do the same for them, as well as to provide for all their physical needs.”¹³⁶ As described by Native Hawaiian Scholar and Professor Emalani Case, Native Hawaiians understand themselves as “belonging *to*” the ‘āina, including Maunakea, rather than having “possession *of*” it.¹³⁷

More than a genealogical record, these ancestral teachings “firmly establish our history and belonging to the pae ‘āina (archipelago), with all of the kuleana, or privileged responsibilities, associated with this familial belonging.”¹³⁸ With ‘āina as an ancestor, pono (balance, perfect order)¹³⁹

spiritual life force of those natural resources and honoring them through worship or through gifting, but also through a demeanor and manner that is respectful of those resources. And then at certain key political points it has meant that those who are aloha ‘āina are people who are nationalists and have a strong sense of patriotism for Hawai‘i and the land of Hawai‘i and Hawai‘i Pae ‘Āina.

Julia Steele, *Episode 5: The Meaning of Aloha ‘Āina with Professor Davianna Pōmaika‘i McGregor*, HAW. PUB. RADIO (Feb. 5, 2016), <https://www.hawaiipublicradio.org/post/episode-5-meaning-aloha-ina-professor-davianna-p-maika-i-mcgregor>. “Aloha ‘Āina” therefore encompasses “Mālama ‘Āina.” *See id.*

¹³⁴ Peralto, *supra* note 127, at 234. “Kuleana” translates to “right.” It also translates to both “privilege” and “responsibility.” HAWAIIAN DICTIONARY, *supra* note 1, at 179.

¹³⁵ KAME‘ELEIHIWA, *supra* note 2, at 25. “[T]he *kalo* plant, which was the main staple of the people of old, is also the elder brother of the Hawaiian race, and as such deserves great respect.” *Id.*

¹³⁶ *Id.* For “it is the ‘Āina, the *kalo*, and the *Ali‘i Nui* who are to feed, clothe, and shelter their younger brothers and sisters, the Hawaiian people.” *Id.*

¹³⁷ Case, *supra* note 127, at 180.

¹³⁸ MCDUGALL, *supra* note 118, at 94.

¹³⁹ HAWAIIAN DICTIONARY, *supra* note 1, at 340. Dr. Kame‘eleihiwa describes pono as “denot[ing] a universe in perfect harmony.” KAME‘ELEIHIWA, *supra* note 2, at 25. Richard Kekuni Blaisdell further elaborates on this pono relationship between Kānaka Maoli and ‘āina:

[W]e are lōkahi with everything in our cosmos, inherently, because we have the same parents and therefore we are all siblings, and therefore, we must respect, revere, everything in our environment, and that is why we cannot destroy and pollute, contaminate, because to do this is to hurt ourselves. That is the essence of being Kanaka Maoli. In our thinking and action, the greatest virtue is to maintain proper pono, that is proper relationships, harmony within ourselves and others with everything in

exists so long as the land takes care of Kānaka Maoli and Kānaka Maoli take care of the land.¹⁴⁰

While Native Hawaiians understand that all land must be taken care of, Maunakea also has particular significance to Kānaka Maoli because of its divine origin.¹⁴¹ As the piko (naval) of Hawai‘i, the summit of Mauna a Wākea is “where Kanaka Maoli can be closest to Wākea, the ancestor whose domain is the sky”¹⁴² and “where heaven, earth, and stars find union.”¹⁴³

Moreover, the summit of Maunakea, with an elevation of 13,803 feet,¹⁴⁴ is a wahi pana (storied place)¹⁴⁵ that lies within wao akua (space of the gods).¹⁴⁶ Pono required that Kānaka respect the bounds of wao akua and refrain from developing structures within or altering the landscape of the

the cosmos.

MCDUGALL, *supra* note 118, at 95 (quoting *Aloha Quest: Kumulipo/Hawaiian Cosmos* (KFVE television broadcast Dec. 9, 1999)).

¹⁴⁰ See Steele, *Professor Jon Osorio*, *supra* note 130.

¹⁴¹ Case, *supra* note 127, at 168.

¹⁴² *Id.* Piko is also translated to mean the “summit or top of a hill or mountain.” HAWAIIAN DICTIONARY, *supra* note 1, at 328. “Mauna Kea can be considered the *piko ho‘okahi*, the single navel, which ensures spiritual connections, genealogical connections, and the rights to the regenerative powers of all that is Hawai‘i. It is from this ‘world navel’ that the Hawai‘i axis emerges.” KEPĀ MALY & ONAONA MALY, MAUNA KEA, KA PIKO KAULANA O KA ‘ĀINA (MAUNA KEA, THE FAMOUS SUMMIT OF THE LAND) ii (KUMU PONO ASSOCIATES, LLC 2006). For more information on piko, see *id.* at i–ii (describing the significance of piko and explaining how Native Hawaiian understandings of piko provide a better understanding of the importance of Mauna a Wākea as a “piko o ka moku” (navel of the island)).

¹⁴³ MALY & MALY, *supra* note 142, at i (“Not just any heaven, but Wākea, not just any earth, but Papahānaumoku, and not just any constellation . . . but Ho‘ohōkūkalani, whose children descend and return to the stars.”).

¹⁴⁴ Measured from sea level, Maunakea stands as the tallest mountain in the Pacific. See Flores-Case ‘Ohana’s Proposed Findings of Fact, Conclusions of Law, and Decision Order, *A Contested Case Hearing Re Conservation Use Application HA-3568 for the Thirty Meter Telescope at Mauna Kea Science Reserve* 46 ¶ 341 (May 30, 2017) [hereinafter Flores-Case Proposal]. From its base on the ocean floor to its peak, Maunakea is nearly 33,000 feet tall, making it the tallest mountain in the world. See *id.*

¹⁴⁵ Wahi pana are sacred or “legendary” places. HAWAIIAN DICTIONARY, *supra* note 1, at 377.

¹⁴⁶ Case, *supra* note 127, at 168; see Flores-Case Proposal, *supra* note 144, at 23–24. Ku‘ulei Kanahale explains that wao akua might be equated with conservation lands—places that should be left alone by humans. *Mauna Kea LUC: Ku‘ulei Kanahale On Wao Akua* (Oct. 25, 2019), BIG ISLAND VIDEO NEWS (Oct. 28, 2019), <https://www.youtube.com/watch?v=RiDPVS19yCM>. In contrast, Kānaka resided in and subsisted off of wao kanaka and the resources it provided. *Id.* Although typically translated to “god(s),” “akua” can be better understood as elements, and, in accord with that thinking, the elements (e.g., winds, waters, lava) and all other resources (e.g., plants, animals) are physical manifestations of the akua. *Id.*

summit area of Maunakea.¹⁴⁷ Thus, while tradition indicates that people traveled across Maunakea with great frequency,¹⁴⁸ the upper elevations and summit area were kapu (sacred).¹⁴⁹ Kānaka Maoli often prayed or honored akua at the summit and “actively nurture[d] and maintain[ed] our relationship to our ancestors, thereby renewing our sense of responsibility to them” and to the ‘āina.¹⁵⁰ Maunakea’s summit was left untouched by Kānaka Maoli “on purpose because [it was] reserved for honouring the spiritual connection between Kanaka and ‘āina.”¹⁵¹

Sitting atop an aquifer, Maunakea is also integral in “collecting waters that sustain life[.]”¹⁵² Ka‘ohe, the ahupua‘a (district)¹⁵³ in which the summit sits, is aptly named after ‘ohe (bamboo) for the way it collects water.¹⁵⁴ Kānaka Maoli know Ka‘ohe as “the place that we will find water, always.”¹⁵⁵ They understand that Waiau (the lake), Poli‘ahu (the snow),

¹⁴⁷ See *Mauna Kea LUC*, *supra* note 146; Steele, *Professor Jon Osorio*, *supra* note 130. Because Native Hawaiians understood akua to be literal elements, respecting wao akua was also an act of conservation or sustainability of their environment upon which they depend. See *Mauna Kea LUC*, *supra* note 146; Steele, *Professor Jon Osorio*, *supra* note 130.

¹⁴⁸ MALY & MALY, *supra* note 142, at 453, 456.

¹⁴⁹ See Case, *supra* note 127, at 172, 180. What is sacred “is ultimately a conversation of a relationship between humans and all of creation.” *Id.* at 173. Native Hawaiian Scholar and Professor Emalani Case discusses the intricacies and difficulties involved in discussions about Maunakea and sacredness:

To talk about Mauna Kea, therefore, is to talk about spirit. It is to use words like ‘sacred’ and to draw on emotions born of connection and relationship that are too often disregarded in academic discourse. Further, it is to use stories that are frequently categorized as ‘myth’, a category that has not served Indigenous peoples well as myths tend to be read as fantastical or make-believe. The relegation of Indigenous beliefs to the realm of the mythical, or even the spiritual, is further complicated by the fact that conservations of what Indigenous peoples consider ‘sacred’ must sometimes occur in court rooms . . . and in written testimonies. This can be problematic—or as Winona La Duke explains, quite ironic—because, in those spaces, ‘what is sacred to Native Americans [or other Indigenous peoples] will be determined by the government that has been responsible for doing everything in its power to destroy Native American [and other Indigenous] cultures’.

Id. at 172 (quoting WINONA LA DUKE, *RECOVERING THE SACRED: THE POWER OF NAMING AND CLAIMING* 11 (2005)).

¹⁵⁰ *Id.* at 180.

¹⁵¹ *Id.*

¹⁵² Goodyear-Ka‘ōpua, *Protectors of the Future*, *supra* note 25, at 189.

¹⁵³ HAWAIIAN DICTIONARY, *supra* note 1, at 9.

¹⁵⁴ Goodyear-Ka‘ōpua, *Protectors of the Future*, *supra* note 25, at 189.

¹⁵⁵ *Id.*

Kahoupokāne (the springs), and Lilinoe (the mist)—akua and waters of Maunakea—“give continued life through a healthy water supply.”¹⁵⁶ Even today, “their wellbeing is stewarded by kānaka practitioners.”¹⁵⁷ Maunakea is thus not only an elder but also a valuable water resource that must be “safeguard[ed] for future generations[.]”¹⁵⁸

These stories and names of Maunakea elucidate Kānaka Maoli’s connection—physical, spiritual, genealogical, and ecological—to ‘āina, including the mountain itself. They are the bases for, and help to make sense of, Kānaka Maoli’s responsibility to care for and protect the land and its natural resources. And they illuminate Maunakea’s centrality in Native Hawaiians’ understanding of themselves and the universe encompassing them.

B. *Western Astronomy’s Occupation of Maunakea*

Although Native Hawaiians intentionally left Maunakea undisturbed as a space reserved for akua, colonizers “strategically used the appearance of emptiness to justify their claims to land.”¹⁵⁹ These early claims became astronomers’ basis for increased development of observatories on the summit of Maunakea.¹⁶⁰ Western astronomers¹⁶¹ at work on observatories atop Haleakalā, Maui’s tallest peak,¹⁶² admired

¹⁵⁶ See *id.*; KU‘UPUAMAE‘OLE KIYUNA, KA PIKO KAULANA O KA ‘ĀINA: ADDITIONAL CONTEXT FOR UNDERSTANDING THE CULTURAL SIGNIFICANCE OF MAUNA KEA 4 (2019), available at https://figshare.com/articles/Ka_Piko_Kaulana_o_ka_ina_Additional_Context_for_Understanding_the_Cultural_Significance_of_Mauna_Kea/11522274.

¹⁵⁷ KIYUNA, *supra* note 156.

¹⁵⁸ Case, *supra* note 127, at 171; Goodyear-Ka‘ōpua, *Protectors of the Future*, *supra* note 25, at 189.

¹⁵⁹ Case, *supra* note 127, at 180.

¹⁶⁰ See *id.*

¹⁶¹ Dr. Gerald Kuiper was among the first astronomers that sought to build observatories at Maunakea’s summit. STATE OF HAWAI‘I AUDITOR, AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE, REPORT NO. 98-6 2 (Feb. 1998) available at http://www.malamamaunakea.org/uploads/management/Audit_98-6.pdf. [hereinafter 1998 AUDIT]; Walter Steiger, *Origins of Astronomy in Hawai‘i*, UNIV. OF HAW. INST. FOR ASTRONOMY, <https://www.ifa.hawaii.edu/history/steiger/index.shtml> (last visited Feb. 21, 2021).

¹⁶² Similar to Maunakea, the summit of Haleakalā is both a wahi pana (storied place) and a sacred site for Native Hawaiians. The Haleakalā summit falls within those lands “ceded” to the United States upon annexation and later transferred to the State of Hawai‘i upon its 1959 admission into the United States. *Haleakala Crater*, SACRED LAND FILM PROJECT (Sept. 1, 2008), <https://sacredland.org/haleakala-crater-united-states/#:~:text=The%20holy%20site%20or%20wahi,spiritual%20wisdom%20and%20practiced%20meditation.>

Maunakea for its height and sought to use its summit that was unobstructed by cloud cover.¹⁶³ Astronomers have since continued to praise Maunakea’s summit as “the finest [astronomical observing sight] in the world.”¹⁶⁴

In 1953, University of Hawai‘i Professor Walter Steiger made it his “goal to establish a solar observatory on the top of” one of Hawai‘i’s highest peaks.¹⁶⁵ Soon after, Governor John Burns released funds to begin the construction of an access road to Maunakea’s summit, where astronomers housed the first telescope in 1964.¹⁶⁶ The mountain quickly became renowned as “a truly superb site, the finest [many astronomers] had ever seen.”¹⁶⁷

Over the following decade, in Steiger’s words, “the spectacular developments on Mauna Kea began.”¹⁶⁸ These developments were catalyzed, in part, as an effort to attract investors and revitalize Hilo’s economy after the county was devastated by a tsunami.¹⁶⁹ In 1968, the Board of Land and Natural Resources approved a 65-year lease to the University of Hawai‘i for the lands referred to as the Mauna Kea Science Reserve, which included all lands above the 12,000-foot level of the mountain.¹⁷⁰ In the same year, astronomers established the first observatory on Maunakea on Pu‘u Poli‘ahu.¹⁷¹

¹⁶³ Steiger, *supra* note 161.

¹⁶⁴ See MAUNA KEA COMPREHENSIVE MANAGEMENT PLAN 6-1 (2009), available at <http://www.malamaMaunakea.org/management/comprehensive-management-plan> [hereinafter 2009 MANAGEMENT PLAN].

¹⁶⁵ Steiger, *supra* note 161.

¹⁶⁶ *Id.*; Kelly Dickerson, *The Incredible Story of an Astronomer Who Struggles to Support the Instrument That Will Revolutionize His Field But is Tearing His Community Apart*, BUS. INSIDER (Oct. 13, 2015), <https://www.businessinsider.com/thirty-meter-telescope-hawaii-protests-2015-10>. That same year, the Hawai‘i Land Use Commission established a Conservation District encompassing Maunakea’s summit. 1998 AUDIT, *supra* note 161, at 2. With Maunakea as a conservation district, “Mauna Kea’s lands fell under the direct purview of the State Board of Land and Natural Resources.” *Id.*

¹⁶⁷ Steiger, *supra* note 161.

¹⁶⁸ *Id.*

¹⁶⁹ See Dickerson, *supra* note 166. In order to quickly attract astronomers and investors, the University of Hawai‘i rented land on Maunakea for only one dollar per year. See *id.*

¹⁷⁰ 1998 AUDIT, *supra* note 161.

¹⁷¹ Steiger, *supra* note 161. Steiger recalled the development of the first observatory proposed by John Jefferies in 1968: the 88-inch telescope “was a well-conceived plan” that was “a terrible blow to Dr. Kuiper, who felt ‘his mountain’ was ‘stolen’ from him . . . Regardless of the outcome, [Kuiper] must be acknowledged as the discoverer of Mauna Kea as a superb astronomical site.” *Id.*

In 1969, the University established the Institute for Astronomy (“IfA”) to facilitate research and education on astronomy.¹⁷² As more astronomers began work on the mountain, more foreigners began claiming Maunakea as their own.¹⁷³ Failing to turn a profit, the observatories atop Maunakea have also seldom employed Native Hawaiians, with most positions being outsourced to organization and university investors.¹⁷⁴ Moreover, the observatories gave rise to longstanding controversy within the local community because of the University’s mismanagement and its failure to consult with Native Hawaiians.¹⁷⁵

By 1974, three telescopes were in operation after being constructed without the appropriate Conservation District Use Permits, and three more telescopes were planned for development.¹⁷⁶ Local groups, including conservationists, formed a coalition to challenge increased development on Maunakea’s summit.¹⁷⁷ In response to these concerns, Governor George Ariyoshi issued a memorandum directing BLNR Chairman Sunao Kido and the Department of Land and Natural Resources (“DLNR”) to “develop and promulgate . . . a Master Plan for all of Mauna Kea[,]” assemble an advisory group to provide input for the plan,¹⁷⁸ and incorporate the planning under lease to the University.¹⁷⁹

State and federal agencies, individual scientists, representatives from conservation organizations, and community members sought to weigh in on DLNR’s plan for Maunakea.¹⁸⁰ But by 1976, the Department had not

¹⁷² 1998 AUDIT, *supra* note 161, at 8; *see* Steiger, *supra* note 161.

¹⁷³ *See* 1998 AUDIT, *supra* note 161, at 8; Steiger, *supra* note 161.

¹⁷⁴ Dickerson, *supra* note 166.

¹⁷⁵ *See id.*; Alexandra Witze, *How the Fight Over A Hawaii Mega-telescope Could Change Astronomy*, NATURE (Jan. 14, 2020), <https://www.nature.com/articles/d41586-020-00076-7> (last visited Feb. 21, 2021).

¹⁷⁶ WILLIAM S. RICHARDSON SCHOOL OF LAW ENVIRONMENTAL LAW CLINIC, UNDERSTANDING MAUNA KEA: A PRIMER ON CULTURAL AND ENVIRONMENTAL IMPACTS 1 (2020) [hereinafter UNDERSTANDING MAUNA KEA].

¹⁷⁷ 1998 AUDIT, *supra* note 161, at 4.

¹⁷⁸ Governor Ariyoshi specifically requested that the group “should include representation from Hawaii County government, interested and affected citizens, knowledgeable scientists, and person with interest in environmental protection.” Memorandum from Acting-Governor, State of Hawai‘i, to Chairman Sunao Kido, Bd. Land Nat. Res. (Nov. 1, 1974). The Mauna Kea Advisory Committee was assembled in response to Governor Ariyoshi’s memorandum. Royal Order of Kamehameha I & Mauna Kea Anaina Hou, *Mauna Kea—The Temple, Protecting the Sacred Resource*, at Appendix A, <https://dlnr.hawaii.gov/mk/files/2017/01/MKAH-Exhibit-B01q.pdf>.

¹⁷⁹ Memorandum from Acting-Governor, *supra* note 178.

¹⁸⁰ *See* Memorandum from Staff Planner Randal Jackson, Recreation Planning to Bd. Land Nat. Res. (July 20, 1976).

held any public hearings concerning the Mauna Kea Plan.¹⁸¹ Several members of the Mauna Kea Advisory Committee, the group assembled by DLNR to advise the plan, pushed for public hearings and the fencing off of certain areas for preservation.¹⁸² Most notably, the Committee unanimously agreed that the number of observatories on the summit should be limited to the six that were already approved.¹⁸³ Former County of Hawai‘i Mayor Herbert T. Matayoshi also “strongly urge[d] that the number of telescopes be limited to the number presently on Mauna Kea.”¹⁸⁴

Many of the comments in DLNR’s 1976 Report on Community Comments for a Mauna Kea Plan reflect the same concerns echoed today regarding Maunakea’s future.¹⁸⁵ For instance, community members sought to ensure the preservation of the forests and Native Hawaiian ecosystems on Maunakea and did not want to see any more development “scar the mountain.”¹⁸⁶ One comment took issue specifically with astronomers’ argument that the telescopes provided employment opportunities and recalled IfA founding director John Jefferies’ assertion that the telescopes “offered good jobs[.]”¹⁸⁷ In response to Jefferies’ remark, the commenter asked, rhetorically, “*but for whom?*”¹⁸⁸

In 1977, BLNR published its Mauna Kea Plan, “a set of broad guidelines to be reviewed and updated from time to time[.]” which ignored the recommended six-telescope limit on Maunakea.¹⁸⁹ And, while many Hawai‘i Island locals recognized the scientific significance of the observatories, the community remained

[C]oncerned about the natural beauty of the mountain and about its historic and cultural heritage. Sites such as Puu Poliaiu [sic], home of the Hawaiian Goddess of Snow, and Lake Waiau atop the summit, “regarded by Hawaiians as a

¹⁸¹ *See id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Letter from Managing Director John Keppeler, County of Hawai‘i, to Chariman Christopher Cobb, Bd. Land Nat. Res. (Sept. 16, 1976); BIANCA ISAKI, SHELLEY MUNEOKA, & KUULEI HIGASHI KANAHELE, KŪ KIA‘I MAUNA: HISTORICAL AND ONGOING RESISTANCE TO INDUSTRIAL ASTRONOMY DEVELOPMENT ON MAUNA KEA, HAWAI‘I 2–3 (2019).

¹⁸⁵ Memorandum from Staff Planner Randal Jackson, Recreation Planning to Bd. Land Nat. Res. (July 20, 1976).

¹⁸⁶ *See id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ *Plans Drawn for Majestic Mauna Kea*, HAW. TRIB.-HERALD B-2 (Jan. 27, 1980). At the time, no limit on the number of observatories was placed by BLNR. *Id.*

sacred place and a cultural tie with the past,” should not be obliterated by haphazard development. And the rarefied atmosphere on the mountain’s higher slopes and summit surrounding unique Hawaiian ecosystems should not be unreasonably disturbed in the name of progress or scientific development.¹⁹⁰

Members of the Waimea Hawaiian Civic Club¹⁹¹ also worried that the mountain would become overcrowded by “outsiders who do not have good ‘mana’o’ (thoughts) about preserving the valuable history of the mountain.”¹⁹² One member hoped to prevent “irreversible effects such as full-scale erosion of the mountain itself, not to mention the devastating effect it has on the existing historical sites.”¹⁹³

Largely ignoring these concerns, IfA researchers sought to expand “astronomy as an enterprise on Mauna Kea” and aspired “to develop an academic program matching the excellence of our sites[.]”¹⁹⁴ And while BLNR developed subsequent management plans,¹⁹⁵ concerns over Maunakea’s mismanagement were never adequately addressed or resolved.¹⁹⁶

By the late 1990s, Maunakea’s summit housed thirteen telescopes.¹⁹⁷ And in 1998, the State Auditor published a scathing report detailing the state’s failure to adequately manage the natural and cultural

¹⁹⁰ *Id.*

¹⁹¹ The Waimea Civic Club is a part of the Moku o Keawe (Hawai’i Island) Council within the Association of Hawaiian Civic Clubs, a not-for-profit organization that advocates for improved welfare of Native Hawaiians. The oldest Hawaiian community-based advocacy movement and governed by an 18-member volunteer Board of Directors, the Association of Hawaiian Civic Clubs is a federation of individual Hawaiian Civic Clubs located across Hawai’i and the continental United States. *Our Organization | Ka ‘Ahahui, ASS’N HAWAIIAN CIVIC CLUBS*, <https://aohcc.org/our-organization/>.

¹⁹² Faith Bean & Brenda Duquette, *PERSPECTIVE: Reflections of Mauna Kea*, HAW. TRIB.-HERALD B-8 (Jan. 27, 1980).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ For a list and details of these management plans, see 2009 MANAGEMENT PLAN, *supra* note 164, SUB-PLANS—MAUNA KEA CULTURAL RESOURCES MANAGEMENT PLAN (CRMP) & MAUNA KEA NATURAL RESOURCES MANAGEMENT PLAN (NRMP), at 1-16–1-18.

¹⁹⁶ 1998 AUDIT, *supra* note 161, at 23. For instance, while historic preservation was an initial concern upon the signing of the University’s 1968 lease, the issue was only first addressed in 1983 in the state’s complex development master plan. *Id.* The plan, however, “did not adequately address preservation.” *Id.*

¹⁹⁷ *See id.* at 2.

resources on Maunakea.¹⁹⁸ The Auditor found that the University’s sole focus on developing Maunakea for astronomical research “overshadowed” the University’s obligation “to provide reasonable assurance of protection for the summit’s natural resources.”¹⁹⁹ Plans developed by the University that outlined protection controls “were submitted late and were weakly implemented.”²⁰⁰

The State Auditor traced Maunakea’s management problems (e.g., neglecting historic preservation, damage to historic sites) back to the University’s “limited approach to protection[.]”²⁰¹ The cumulative “substantial, significant, and adverse”²⁰² impacts on Maunakea’s natural, historical, and cultural resources spanned back to the building of the first three telescopes without CDUPs starting in 1986—including fluid and fuel spills (1979, 1982, 1995, 1996, 2004), the failure to adequately dispose of trash (1995), damage to historic sites (1991), habitat destruction (1996), and sewage overflows and spills (1998–2004, 2008).²⁰³ As the Auditor concluded in its 1998 report:

[L]ittle was done to protect [Maunakea’s] natural resources. The university, as the leaseholder, should have provided sufficient protection to the natural resources and controlled public access and use . . . The Department of Land and Natural Resources, in its role as landlord, should have overseen the university’s activities and enforced permit conditions and regulations in protecting the State’s interests. Neither state agency has been proactive in maintaining the conservation district.²⁰⁴

In 1999, the University’s Board of Regents held committee meetings on the proposed draft of the 2000 Mauna Kea Master Plan for the

¹⁹⁸ See *Summary*, in 1998 AUDIT, *supra* note 161 (“[M]anagement of the Mauna Kea Science Reserve is inadequate to ensure the protection of natural resources.”); UNDERSTANDING MAUNA KEA, *supra* note 176.

¹⁹⁹ See 1998 AUDIT, *supra* note 161, at 15.

²⁰⁰ See *id.* at 18.

²⁰¹ See *id.* at 21.

²⁰² See *In re Contested Case Hearing Re Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Res., Findings of Fact, Conclusions of Law and Decision and Order*, Case No. BLNR-CC-16-002, 21 (Haw. Bd. of Land and Nat. Res. Sept. 27, 2017) [hereinafter BLNR TMT Decision].

²⁰³ See UNDERSTANDING MAUNA KEA, *supra* note 176 (listing examples of cultural and environmental impacts on Mauna kea between 1968 and 2019).

²⁰⁴ 1998 AUDIT, *supra* note 161, at 34–35.

construction of more telescopes on Maunakea's summit.²⁰⁵ At those meetings, Native Hawaiians "gave impassioned testimony about the sacredness of Mauna Kea, their opposition to further development, and their great distrust of the [U]niversity and the astronomy community."²⁰⁶ After thirty years of astronomy on Maunakea, "it was the first time [the Board of Regents] heard such testimony firsthand."²⁰⁷ In the decades that followed, Native Hawaiians continued to challenge further development of Maunakea's summit.²⁰⁸

Native Hawaiian practitioner and then-Regent Nainoa Thompson brought to light the broader justice issues that the Maunakea controversy reflected, explaining that "[t]his is really about abuse of the native people being subject to racism and disrespect. This is an opportunity for a real turning point, a defining moment."²⁰⁹ The same sentiment has been emphasized in recent years as the controversy over Maunakea has made international headlines.²¹⁰ Protectors of the sacred mountain emphasize that "the movement we are witnessing today is not new . . . It has been at least a century in the making, from the first arrival of colonialism in Hawaiian lands."²¹¹ For Native Hawaiians, the continued development on these lands "is fundamentally indistinguishable from earlier colonization activities."²¹²

IV. THE STATE'S AFFIRMATIVE DUTY TO PROTECT NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY RIGHTS

Shaped by a culture unique to Hawai'i, the state's laws are comprised of special legal protections for Hawai'i's people, land, and natural resources. Both inspired by and affirming Native Hawaiian tradition and custom, the state's laws—in the Constitution, Hawai'i Revised Statutes

²⁰⁵ Susan Kreifels, *Science vs. Spirit is Key Mauna Kea Issue*, HONOLULU STAR-BULL. (June 18, 1999), available at <http://archives.starbulletin.com/1999/06/18/news/story10.html>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See generally ISAKI ET AL., *supra* note 184 (detailing the decades of Native Hawaiian resistance against development on Maunakea).

²⁰⁹ Kreifels, *supra* note 205.

²¹⁰ See *Mauna Kea: Hawaii Protesters Delay Giant Telescope Construction*, BBC (July 18, 2019), <https://www.bbc.com/news/world-us-canada-49035815>.

²¹¹ Keolu Fox & Chanda Prescod-Weinstein, *The Fight for Mauna Kea Is a Fight Against Colonial Science*, NATION (July 24, 2019), <https://www.thenation.com/article/archive/Mauna-kea-tmt-colonial-science/>.

²¹² Leandra Swanner, *Instruments of Science or Conquest? Neocolonialism and Modern American Astronomy*, 47 HIST. STUD. NAT. SCI. 293, 296 (2017); see *infra* Parts V.C–VI.

(“HRS”), and case law handed down from the Hawai‘i Supreme Court—include intentionally-crafted legal protections for Native Hawaiian traditions and customs.²¹³ The State of Hawai‘i has an affirmative duty to protect Native Hawaiians’ traditional and customary rights,²¹⁴ and these rights are a protected public trust purpose under Hawai‘i’s public trust doctrine.²¹⁵

A. *Native Hawaiian Traditional and Customary Rights*

Notwithstanding the onset of drastic changes to Hawai‘i’s cultural and political landscape as a result of American colonization, “[a]ncient Hawaiian usage [] survived the transition from communal land tenure to a Western system of private property rights[.]”²¹⁶

A landmark result of the 1978 Constitutional Convention, the duty to protect traditional and customary rights was codified into the Hawai‘i Constitution as Article XII, section 7, which provides: “[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”²¹⁷ “Against the backdrop of rising consciousness now known as The Hawaiian Renaissance,”²¹⁸ delegates to the Convention intended that the provision “encompass all rights of Native Hawaiians such as access and gathering.”²¹⁹ In an effort to rectify some of the wrongs committed against Native Hawaiians since the 1893 overthrow of the Hawaiian Kingdom, delegates sought to codify these rights that were “an integral part of the ancient Hawaiian civilization and are retained by its descendants.”²²⁰

²¹³ See, e.g., HAW. CONST. art. XII, § 7; HAW. REV. STAT. ANN. §§ 1-1, 7-1 (West 2019).

²¹⁴ HAW. CONST. art. XII, § 7; HAW. REV. STAT. ANN. §§ 1-1, 7-1 (West 2019).

²¹⁵ HAW. CONST. art. XI, § 1; D. KAPUA‘ALA SPROAT, *OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAI‘I* 7 (Dec. 2009) [hereinafter SPROAT, *OLA I KA WAI*].

²¹⁶ See David M. Forman & Susan K. Serrano, *Traditional and Customary Access and Gathering Rights*, in *NATIVE HAWAIIAN LAW: A TREATISE* 775, 786 (2015).

²¹⁷ HAW. CONST. art. XII, § 7.

²¹⁸ A. U‘ilani Tanigawa Lum, *Accessing Traditional Kīpuka: Protecting the Storehouse of Knowledge Through the Rule of Law*, 20 *ASIAN-PAC. L. & POL’Y J.* 69, 77–78 (2019) (internal quotations omitted).

²¹⁹ Hawaiian Affairs Comm., Standing Comm. Rep. No. 57, reprinted in 1 *PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978* at 637, 640 (1980).

²²⁰ *Id.*; Forman & Serrano, *supra* note 216, at 786–87 (“In November 1978, state voters approved [the] amendment to the Hawai‘i Constitution that sought to provide further

HRS section 1-1 provides further protections for Native Hawaiian traditional and customary practices:

The Common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or *established by Hawaiian usage*[.]²²¹

Section 1-1 codifies the doctrine of custom²²² into Hawai‘i’s common law.²²³ Although Native Hawaiian traditional and customary rights are not expressly referenced in the statute, the Hawai‘i Supreme Court has cited that the Hawaiian usage exception in section 1-1 is a basis for protecting those rights.²²⁴ HRS section 7-1 also protects Native Hawaiian traditional and customary gathering rights “on the premise that they ‘were necessary to insure the survival of those who, in 1851, sought to [continue to] live in accordance with the ancient ways.’”²²⁵

The Hawai‘i Supreme Court has protected Native Hawaiians’ traditional and customary rights on the basis of HRS section 1-1, section 7-1, and Article XII, section 7.²²⁶ Authored by the Hawai‘i Supreme Court’s first Native Hawaiian justice, Chief Justice William S. Richardson (“CJ Richardson”), *Kalipi v. Hawaiian Trust Co.* (1982) was the first of his court’s landmark decisions that would uphold protections for Native Hawaiian traditional and customary rights.²²⁷ CJ Richardson’s “opinions

protection for traditional and customary rights.”).

²²¹ HAW. REV. STAT. ANN. § 1-1 (West 2019) (emphasis added).

²²² In English law, the doctrine of custom describes “an ancient rule of law for a particular locality, as opposed to the common law of the country. It has its origin in the Anglo-Saxon period, when local customs formed most laws affecting family rights, ownership and inheritance, contracts, and personal violence.” The Editors of Encyclopedia Britannica, *Custom*, BRITANNICA (Feb. 4, 2018), <https://www.britannica.com/topic/custom-English-law>.

²²³ See HAW. REV. STAT. ANN. § 1-1 (West 2019).

²²⁴ Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm’n, 79 Haw. 425, 437 n.21, 903 P.2d 1246, 1258 n.21 (1995) [hereinafter *PASH*]; Forman & Serrano, *supra* note 216, at 787–88.

²²⁵ Tanigawa Lum, *supra* note 218, at 89 (quoting *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 8, 656 P.2d 745, 750 (1982)).

²²⁶ See *id.* at 89; *Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n*, 94 Haw. 31, 7 P.3d 1068 (2000).

²²⁷ *Kalipi*, 66 Haw. 1, 656 P.2d 745 (affirming that pursuant to Article XII, section 7 of the state constitution that Hawai‘i courts are obligated to preserve and enforce Native Hawaiian traditional and customary rights).

reflect his humble background, his commitment to a more open society with equal opportunity for Hawai‘i’s multi-ethnic population, and his strong belief in looking to Hawai‘i’s rich past as a source of today’s law.”²²⁸ Reflecting on his court’s approach, and exemplifying “i ka wā ma mua, ka wā ma hope,” CJ Richardson explained,

While the [Native Hawaiian] culture had largely been displaced, nevertheless many of the underlying guiding principles remained. We set about returning control of interpreting the law to those with deep roots and profound love for Hawai‘i . . . [W]e made a conscious effort to look to Hawaiian custom and tradition in deciding our cases[.]²²⁹

CJ Richardson “broke new ground” for traditional and customary rights with his 1982 *Kalipi* decision,²³⁰ which held that HRS section 7-1 “assure[s] that lawful occupants of an ahupua[‘]a may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupua[‘]a to gather those items enumerated in the statute[.]”²³¹ By recognizing that gathering rights are also protected by HRS section 1-1 and Article XII, section 7 of the Hawai‘i State Constitution, the Richardson court in *Kalipi* “set the foundation for more recent cases affirming traditional and customary rights[.]” such as *Pele Defense Fund* and *PASH*.²³² In *Pele Defense Fund*, the court broadened the black letter of the law to better reflect native practices by concluding that Native Hawaiians’ exercise of traditional and customary rights was not limited to practitioners’ ahupua‘a of residence.²³³ Native Hawaiians’ traditional and customary rights, the court held, should not be “narrowly construed or ignored by the court.”²³⁴ In *Public Access Shoreline Hawaii v. Hawai‘i County Planning Commission* (“*PASH*”) (1995), the Hawai‘i Supreme Court reaffirmed Native Hawaiians’ traditional and customary rights under Article XII, section 7 and held that the state is “obligated to protect the reasonable

²²⁸ Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No‘eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 3 (2010) [hereinafter MacKenzie, *Ka Lama Kū*].

²²⁹ *Id.* at 6–7 (quoting William S. Richardson, Spirit of Excellence Award Acceptance Speech at the ABA Spirit of Excellence Awards Luncheon (Feb. 10, 2007)).

²³⁰ *Id.* at 9, 11.

²³¹ *Kalipi*, 66 Haw. at 7–8, 656 P.3d at 749.

²³² MacKenzie, *Ka Lama Kū*, *supra* note 228, at 11–12.

²³³ *Pele Def. Fund v. Paty*, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992), *cert denied*, 507 U.S. 918 (1993).

²³⁴ *See id.* at 619–20, 837 P.2d at 1271.

exercise of traditional and customary rights to the extent feasible under” Hawai‘i’s laws.²³⁵

Ka Pa‘akai O Ka ‘Āina v. Land Use Commission (“*Ka Pa‘akai*”) (2000) then introduced the analytical framework state agencies must use to operationalize their fiduciary duty under Article XII, section 7.²³⁶ *Ka Pa‘akai* also clarified that the provision requires that agencies “actively research and consider the cultural, historical, and natural resources of a subject property as they relate to Native Hawaiian rights when determining what restrictions should be placed on land use.”²³⁷ This decision “is monumental for its recognition of the State’s ‘affirmative duty . . . to preserve and protect traditional and customary Native Hawaiian rights’ and for providing the framework for agencies to employ when evaluating competing interests” of these rights against the “ever-growing private property interests[.]”²³⁸

B. *Traditional and Customary Rights as a Protected Public Trust Purpose*

Hawai‘i’s public trust doctrine, codified as Article XI, section 1 of the state constitution, also protects Native Hawaiians’ traditional and customary rights.²³⁹ The public trust doctrine, articulated in Hawai‘i law, is rooted in and is consistent with Native Hawaiian custom and tradition, and the Maoli values upon which the public trust doctrine was founded have been upheld and elevated in Hawai‘i long before Article XI, section 1’s codification into state law.²⁴⁰ “Based on ancient tradition, custom, practice

²³⁵ *PASH*, 79 Haw. 425, 437–51, 903 P.2d 1246, 1258–72 (1995). *PASH* also outlined the “elements of the custom doctrine[.]” *Id.* at 447, 903 P.2d at 1268.

²³⁶ *Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n*, 94 Haw. 31, 7 P.3d 1068 (2000); Forman & Serrano, *supra* note 216, at 799.

²³⁷ Forman & Serrano, *supra* note 216, at 804. The three-part framework requires findings of fact and conclusions regarding:

- (1) the identity and scope of “valued cultural, historical, or natural resources” in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area
- (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 799 (quoting *Ka Pa‘akai*, 94 Haw. at 35, 7 P.3d at 1072).

²³⁸ Tanigawa Lum, *supra* note 218, at 82.

²³⁹ HAW. CONST. art. XI, § 1.

²⁴⁰ SPROAT, *OLA I KA WAI*, *supra* note 215, at 7 (“[C]ases and laws from the Kingdom of Hawai‘i, along with Hawaiian custom and tradition, firmly established the

and usage[.]” Hawai‘i’s public trust doctrine is unique.²⁴¹ That “private ownership of land had no place in early Hawaiian thought”²⁴² directly shaped and continues to inform the development of law and policy in Hawai‘i.²⁴³

For instance, in 1978 the Constitutional Convention amended the state’s constitution “to clarify the policy of the State with regard to resources” and promote the protection of Hawai‘i’s natural resources.²⁴⁴ Since then, the constitution has required that:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.²⁴⁵

principle that natural resources, including water, were not private property, but were held in trust by the government for the benefit of the people.”).

²⁴¹ See *In re Ashford*, 440 P.2d 76, 77 (1968) (citing *Keelikolani v. Robinson*, 2 Haw. 514 (1862)) (“Hawaii’s land laws are unique in that they are based on ancient tradition, custom, practice and usage.”)

²⁴² NATIVE HAWAIIAN LAW: A TREATISE 9 (MELODY KAPILIALOHA MACKENZIE ET AL. EDS., 2015).

²⁴³ See TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III 11–12 (1842) (quoting THE CONSTITUTION OF 1840) (“Exposition of the Principles on Which the Present Dynasty is Founded. The origin of the present government, and system of polity, is as follows. Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.”); THE DECLARATION OF RIGHTS OF 1839 (“Protection is hereby secured to the persons of all the people, together with their lands, their building lots and all their property and nothing whatever shall be taken from any individual”). Accordingly, the Hawai‘i Supreme Court has held that “[t]he public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances.” *In re Waiāhole Combined Contested Case Hearing*, 94 Haw. 97, 135, 9 P.3d 409, 447 (2000) [hereinafter *Waiāhole I*].

²⁴⁴ See *Env’t, Agric., Conservation & Land Comm., Standing Comm. Rep. No. 77*, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 685-86 (1980), available at <https://digitalcollections.hawaii.gov/docs/concon/1978/1978%20Con%20Con%20Journal%20Vol-1%20Journal.pdf>.

²⁴⁵ *Id.* The former constitutional provision that was deleted and replaced by Article XI, section 1 read: “The legislature shall promote the conservation, development and

According to the Convention's Committee on Environment, Agriculture, Conservation and Land, the language "For the benefit of present and future generations" was included because the Committee felt it important to "affirm[] the ethical obligations of this generation toward the next" and ensure that the law is "consistent with the concept that the Constitution should provide for the future."²⁴⁶ Article XI, section 1, as held by the Hawai'i Supreme Court, "adopt[s] the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."²⁴⁷ Thus far, the court has affirmed that public trust purposes were intended to include: environmental protection, traditional and customary Native Hawaiian rights, appurtenant rights, domestic water uses, and reservations for the Department of Hawaiian Homelands.²⁴⁸

Native Hawaiian traditional and customary rights are protected as a public trust purpose under Hawai'i's public trust doctrine, as outlined by the watershed case *In re Waiāhole Combined Contested Case Hearing* ("Waiāhole I") (2000).²⁴⁹ In *Waiāhole I*, the Hawai'i Supreme Court held that the public trust exacts a "dual mandate of: 1) protection and 2) maximum reasonable and beneficial use" of waters, a public trust resource.²⁵⁰ Further, public trust purposes "have priority over private commercial uses, which do not enjoy the same protection."²⁵¹ Since "use consistent with trust purposes [are] the norm or 'default' condition," the state's balancing between public and private purposes "must begin with a presumption in favor of public use, access, and enjoyment."²⁵² Moreover, *Waiāhole I* established the state's "affirmative duty . . . to protect public trust uses whenever feasible."²⁵³ In *Kauai Springs, Inc. v. Planning Comm'n of Kaua'i* ("Kaua'i Springs") (2014), the court further recognized and affirmed the "separate and enduring public rights in trust resources" that remain "superior to any private interest."²⁵⁴

utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources." *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Waiāhole I*, 94 Haw. at 132, 9 P.3d at 444.

²⁴⁸ *Id.* at 137–39, 9 P.3d at 449–51.

²⁴⁹ *Id.*; *In re Wai'ola o Moloka'i, Inc.*, 103 Haw. 401, 430–31, 83 P.3d 664, 693–94 (2004) [hereinafter *Wai'ola*] ("We have consistently recognized the heightened duty of care owed to native Hawaiians."); SPROAT, OLA I KA WAI, *supra* note 215, at 8.

²⁵⁰ *Waiāhole I*, 94 Haw. at 139, 9 P.3d at 451; Sproat, OLA I KA WAI, *supra* note 215, at 7–8.

²⁵¹ SPROAT, OLA I KA WAI, *supra* note 215, at 8.

²⁵² *Waiāhole I*, 94 Haw. at 142, 9 P.3d at 454.

²⁵³ *Id.* at 141, 9 P.3d at 453.

²⁵⁴ *Kauai Springs, Inc. v. Planning Comm'n of Kaua'i*, 133 Haw. 141, 173, 324

Pursuant to the state’s laws and the unique principles underlying them, the state has a duty to “conserve and protect [Maunakea’s] natural beauty and all [its] natural resources[.]”²⁵⁵ Moreover, the state’s public trust doctrine protects Native Hawaiian traditional and customary rights on the summit of Mauna a Wākea.²⁵⁶ The majority’s narrative and holding, however, hold neither BLNR nor the University accountable for their repeated failures to adequately protect Maunakea and its resources, including Kānaka Maoli’s traditional and customary rights.

V. (RE)SHAPING KA WĀ MA MUA: THE BATTLE OVER COLLECTIVE MEMORY OF INJUSTICE SHROUDING MAUNAKEA

The most recent controversy concerning Maunakea, the proposed TMT, threatens to further desecrate Maoli lands and curtail Native Hawaiians’ protected rights. In 2008, the TMT International Observatory, LLC (“TIO”)²⁵⁷ consulted with the University of Hawai‘i to assess the development of the TMT on Maunakea, chosen for its pristine atmospheric conditions.²⁵⁸ Following a 2010 Final Environmental Impact Statement (“EIS”), TIO submitted Conservation District Use Application (“CDUA”) HA-3568 for the TMT in the same year.²⁵⁹

Maunakea, with its thirteen existing telescopes, is already home to more astronomical observatories than any other mountain peak in the world.²⁶⁰ If built, the proposed TMT would tower over Hawai‘i Island as the largest building on the isle.²⁶¹ The structure, planned to be built within the conservation district, would occupy over five acres of land just 600 feet below the summit ridge.²⁶²

P.3d 951, 983 (2014) (reaffirming the public trust doctrine as a fundamental principle of Hawai‘i law and establishing a framework for state and county agencies to appropriately consider the public trust in fulfilling their mandates) [hereinafter *Kaua‘i Springs*].

²⁵⁵ See HAW. CONST. art. XI, § 1.

²⁵⁶ See *id.*

²⁵⁷ In 2003, the TMT Corporation was formed by Caltech and the University of California “for the purpose of fostering astronomy through building a thirty meter telescope. . . . Voting power and telescope observing time [] vary amongst its members proportionate to their respective contributions to the TMT project.” *Mauna Kea II*, 143 Haw. 379, 386, 363 P.3d 752, 759 (2018).

²⁵⁸ *Id.* at 386, 363 P.3d at 759.

²⁵⁹ *Id.*

²⁶⁰ Joseph E. Ciotti, *Historical Views on Mauna Kea: From the Vantage Points of Hawaiian Culture and Astronomical Research*, 45 HAWAIIAN J. HIST. 147, 148, 150 (2011).

²⁶¹ Goodyear-Ka‘ōpua, *Protectors of the Future*, *supra* note 25, at 188.

²⁶² *Mauna Kea II*, 143 Haw. at 387, 431 P.3d at 760.

The contentious project, like other telescopes and observatories before it, was met with resistance by Kānaka Maoli “working to assert and protect their genealogical connections to elements and deities of the mountain against an expanding footprint of astronomical observatories and telescopes[.]”²⁶³ Kia‘i Mauna, protectors of Maunakea, explained that the eighteen-and-a-half story structure would desecrate the sacred summit, which had already suffered substantial, adverse impacts from the existing observatories that occupied the summit area.²⁶⁴ They also argued that BLNR, by approving the TMT’s permit application, violated its constitutional duty to protect Native Hawaiian traditional and customary rights.²⁶⁵ In 2011, the Board approved the TMT’s Conservation District Use Permit (“CDUP” or “permit”), despite strong Maoli-led opposition and without holding an administrative trial or contested case hearing that would determine the rights of Native Hawaiians in the matter.²⁶⁶

In April 2015, thirty-one Kia‘i Mauna were arrested for “trespassing’ on government property and ‘obstructing’” the access road to the summit in an effort to halt the TMT’s construction.²⁶⁷ Meanwhile, in the courts, grassroots community group Mauna Kea Anaina Hou and other Kia‘i²⁶⁸ challenged the permit, contending that BLNR “put the cart before the horse” by prematurely approving the CDUP.²⁶⁹ The Board claimed, on the other hand, that the approval was a preliminary decision and that the construction of the TMT was stayed pending the outcome of a contested case hearing.²⁷⁰ The Hawai‘i Supreme Court ruled in favor of the Kia‘i petitioners, holding that the CDUP was invalid and ordering a new contested case hearing for the CDUA.²⁷¹

The following year, the state legislature passed a statute allowing contested cases regarding conservation districts to be directly appealed to the Hawai‘i Supreme Court.²⁷² In 2016, as ordered by the *Mauna Kea I*

²⁶³ Goodyear-Ka‘ōpua, *Protectors of the Future*, *supra* note 25, at 188.

²⁶⁴ *Mauna Kea II*, 143 Haw. at 384, 431 P.3d at 757; *Mauna Kea I*, 136 Haw. 376, 380, 363 P.3d 224, 228 (2015).

²⁶⁵ *Mauna Kea II*, 143 Haw. at 396, 431 P.3d at 769.

²⁶⁶ *Mauna Kea I*, 136 Haw. at 380, 363 P.3d at 228.

²⁶⁷ Goodyear-Ka‘ōpua, *Protectors of the Future*, *supra* note 25, at 184.

²⁶⁸ In addition to Mauna Kea Anaina Hou, the named plaintiffs to *Mauna Kea I* were: “Clarence Kukauakahi Ching, the Flores-Case ‘Ohana, Deborah J. Ward, Paul K. Neves, and Kahea: The Hawaiian Environmental Alliance.” *Mauna Kea I*, 136 Haw. 376, 363 P.3d 224.

²⁶⁹ *See Mauna Kea I*, 136 Haw. at 381–82, 363 P.3d at 230–31.

²⁷⁰ *Id.* at 381, 363 P.3d at 229.

²⁷¹ *Id.*

²⁷² H.B.1581, 28th Leg., Reg. Sess., 2016 Haw. Sess. Laws § 48. The majority inserted this fact into a footnote: “Act 48 of 2016, effective August 1, 2016, added Hawaii

court, BLNR began its second contested case for the TMT before a new Hearing Officer, former Judge Riki May Amano, who concluded that the permit should be granted.²⁷³ In accord with Hearing Officer Amano’s recommendation, BLNR again approved the TMT’s CDUA and granted its permit.²⁷⁴

In February 2018, Native Hawaiian cultural practitioners appealed to the Hawai‘i Supreme Court, where they argued that the permit approval violated BLNR’s public trust duties and its duty to protect Native Hawaiian traditional and customary rights and practices.²⁷⁵ By October 2018, the court majority published its decision that affirmed that BLNR properly issued the telescope’s CDUP.²⁷⁶

Less than a year later, on July 10, 2019, Hawai‘i State Governor David Ige and TIO announced that the TMT’s construction would begin on July 15, 2019.²⁷⁷ Hundreds of Kia‘i Mauna, anticipating the beginning of construction, convened again on Maunakea to block vehicles carrying construction equipment for the TMT from reaching the summit.²⁷⁸ In an emotional confrontation for Kia‘i and local law enforcement officers, police arrested thirty-three kūpuna (elders) who had placed themselves on the frontline.²⁷⁹ Kia‘i were unshaken and maintained their presence, with thousands of other Kānaka and their allies convening—along the access

Revised Statutes § 183C-9 to make final decisions and orders from contested cases concerning conservation districts directly appealable to this court. 2016 Haw. Sess. Laws Act 48, §§ 2 & 14 at 76, 82.” *Mauna Kea II*, 143 Haw. at 387 n.4, 431 P.3d at 760 n.4.

²⁷³ *Mauna Kea II*, 143 Haw. at 387, 431 P.3d at 760; In re Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Proposed Findings of Fact, Conclusions of Law and Decision and Order 21, Case No. BLNR-CC-16-002 (Haw. Bd. of Land and Nat. Res. July 26, 2017) [hereinafter Hearing Officer Amano Proposal].

²⁷⁴ *Mauna Kea II*, 143 Haw. at 387, 431 P.3d at 760.

²⁷⁵ *See id.* at 395, 431 P.3d at 768.

²⁷⁶ *Id.* at 409, 431 P.3d at 782. In an unprecedented maneuver, first published its decision without Justice Michael D. Wilson’s dissent. *See id.* at 379, 431 P.3d at 752.

²⁷⁷ Press Release, State of Hawai‘i, Governor’s Office—Joint News Release—Thirty Meter Telescope Set to Start Construction (July 15, 2019), *available at* <https://governor.hawaii.gov/newsroom/latest-news/governors-office-joint-news-release-thirty-meter-telescope-set-to-start-construction/>.

²⁷⁸ Tribune Herald Staff, ‘OUR LAST STAND’: Hundreds of TMT Protesters Block Maunakea Access Road, HAW. TRIB.-HERALD (July 16, 2019), <https://www.hawaiitribune-herald.com/2019/07/16/hawaii-news/our-last-stand-hundreds-of-tmt-protesters-block-Maunakea-access-road/>.

²⁷⁹ KITV Web Staff, 33 Kupuna Arrested for Protesting on Mauna Kea, KITV4 ISLAND NEWS (July 17, 2019), <https://www.kitv.com/story/40804841/33-kupuna-arrested-for-protesting-on-Mauna-kea>.

road, at rallies on neighboring islands, and across the world—in support of protecting Maunakea.²⁸⁰

Mauna Kea II reignited a public battle over the story of Maunakea.²⁸¹ The majority opinion, contrasted against Kānaka Maoli's ancestral claims and their kuleana to Maunakea, also highlights an even broader centuries-long battle over the collective memory of Hawai'i that will play an integral role in determining the future of Maunakea and the future of Kānaka Maoli and their struggles for justice.²⁸²

As “outsiders” in a foreign legal system, Native Hawaiians' memories have often been ignored.²⁸³ And, in effect, their justice struggles are inadequately addressed by Hawai'i's courts and by state agencies and their departments.²⁸⁴ Despite protections explicitly guaranteed by the Hawai'i State Constitution, as made apparent by *Mauna Kea II*, the state has yet to “fully embrace[] . . . its trust responsibility” to Native Hawaiians.²⁸⁵ In an uphill battle against a whitewashed, popularized narrative, Kānaka Maoli have fought for decades to reshape collective memory to reflect a more complete story of Mauna a Wākea.²⁸⁶ By bringing typically “forgotten” events back to the forefront, Native Hawaiians deployed collective memory as a tool in a struggle over justice for Maunakea—a struggle to protect against the state-sanctioned desecration of Kānaka Maoli's ancestral land, to prevent further destruction of a sacred ancestor, and to preserve the mountain and its resources for the generations to come. Before BLNR, the state supreme court, and the general public, Kia'i sought to reshape mainstream narratives told about Maunakea, and Kānaka generally, in a valiant effort to protect their sacred mountain and bolster other justice claims.

The majority for *Mauna Kea II*, on the other hand, employed a brief, selective “history” of Maunakea to justify affirming BLNR's approval of the TMT.²⁸⁷ It told a historical narrative that, deliberately or not, removed

²⁸⁰ Kristin Lam, *Why Are Jason Momoa and Other Native Hawaiians Protesting a Telescope on Mauna Kea? What's at Stake?*, USA TODAY (Aug. 21, 2019), <https://www.usatoday.com/story/news/nation/2019/08/21/Mauna-kea-tmt-protests-hawaii-native-rights-telescope/1993037001/>.

²⁸¹ See, e.g., Tribune Herald Staff, *supra* note 279; Lam, *supra* note 280; see generally *Mauna Kea II*, 143 Haw. 379, 363 P.3d 752.

²⁸² See Hom & Yamamoto, *supra* note 5, at 1765.

²⁸³ See *id.*

²⁸⁴ See *id.*

²⁸⁵ See MacKenzie, *Public Land Trust*, *supra* note 15, at 123.

²⁸⁶ See *infra* Parts V–VI.

²⁸⁷ See generally *Mauna Kea II*, 143 Haw. 379, 431 P.3d 752.

Native Hawaiians from the centuries-old story of Maunakea.²⁸⁸ A narrative that relieved the state of its public trust obligations and disemboweled Native Hawaiians’ constitutionally protected traditional and customary rights.²⁸⁹ A narrative that is in lockstep with other colonizers’ accounts of Hawai‘i’s history—one that begins with and revolves around Western contact and its ostensible benefits gifted to Kānaka Maoli.²⁹⁰

A. *The majority’s “history” of Maunakea is almost entirely void of Native Hawaiians and obscures Kānaka Maoli’s deep-seated connections to Mauna a Wākea.*

By integrating ‘ike kūpuna (ancestral insight) with current claims of right,²⁹¹ Kia‘i petitioners told an “ancestral” collective memory—a “genealogy preserved orally over generations through chants.”²⁹² Kia‘i consistently reiterated what Kānaka Maoli have known since time immemorial: Mauna a Wākea is sacred.²⁹³ And through oli and mo‘olelo, they told stories of their familial connection to the ‘āina and to Mauna a Wākea.²⁹⁴ These stories, Kia‘i urged, “are not myths but rather teaching tools[,]” about Native Hawaiians’ kuleana to care for the ‘āina, including Maunakea, for future generations, just as Kānaka Maoli have always done.²⁹⁵

Kia‘i explained that Maoli identity has always been intimately tied to Maunakea and its well-being.²⁹⁶ “It is clear that to many Hawaiians,

²⁸⁸ See *infra* Part V.A.

²⁸⁹ See *infra* Part V.B.

²⁹⁰ See *infra* Parts V.A–V.B.

²⁹¹ Hom & Yamamoto, *supra* note 5, at 1759–60.

²⁹² See *id.* at 1759.

²⁹³ See, e.g., Written Direct Testimony of E. Kalani Flores 20, available at <https://dlnr.hawaii.gov/mk/files/2016/10/B.02a-wdt-EK-Flores.pdf> [hereinafter Flores Testimony]; Witness Direct Testimony of Hāwane Rios 1, available at <https://dlnr.hawaii.gov/mk/files/2016/10/F-5-Witness-Testimony-Hawane-Rios.pdf> [hereinafter Rios Testimony]; *Mauna Kea II*, 143 Haw. 379, 384, 431 P.3d 752, 757 (2018); *Mauna Kea I*, 136 Haw. 376, 380, 363 P.3d 224, 228 (2015).

²⁹⁴ Rios Testimony, *supra* note 293, at 1–2 (“The practice of aloha ‘āina—to love and care for the land, was passed down by these same ancestors through generations all the way to my mother and then to me. It is a practice of our people to know where we come from, to remember our creation story and how our family genealogies connect to it . . . [The genealogy of Papa and Wākea] was taught to me by my elders with the intention to always remember my birthright and responsibility to uphold the tradition of caring for the earth in a good way.”).

²⁹⁵ See Written Direct Testimony of K. Kealoha Pisciotta 5, available at <https://dlnr.hawaii.gov/mk/files/2016/10/B.01a-Kealoha-Pisciotta-WDT-2016-C-1-amend.pdf> [hereinafter Pisciotta Testimony].

²⁹⁶ See *id.* at 2; Rios Testimony, *supra* note 293, at 1–4.

Mauna Kea is more than a mountain; it is the embodiment of the Hawaiian people.”²⁹⁷ Kānaka testified about their genealogy—extending back to Papa and Wākea—that imparts upon them a responsibility as stewards to protect the ‘āina—in this case, Maunakea—consistent with and in furtherance of Native Hawaiian tradition.²⁹⁸

The *Mauna Kea II* majority, however, relegated Kānaka Maoli’s experiences to a short paragraph providing a vague, “objective” overview of what “some Native Hawaiians consider” Maunakea to be.²⁹⁹ The majority opinion opened by appearing to acknowledge Maunakea’s spiritual significance to Native Hawaiians.³⁰⁰ The one-paragraph summary ended as quickly as it began, and it failed to capture the tremendous significance Maunakea holds for Kānaka Maoli, traditionally and to this day.³⁰¹ By failing to convey Native Hawaiians’ deep-rooted, genealogical connection to Maunakea, the majority limited Native Hawaiians’ claims of right to the sacred mountain.³⁰²

Providing no further explanation aside from a simple definition, the majority stated that Maunakea is “wao akua (the place where gods reside)[.]”³⁰³ “Before Western contact[,]” the majority writes, “the summit area was considered kapu (taboo) to all but the highest chiefs and priests, and unavailable to the general public.”³⁰⁴ This account did not attempt to relay the complexities of kapu or wao akua and how they function together.³⁰⁵ Instead, it mirrored Westerners’ descriptions that “few Hawaiians travelled to the summit area of Mauna Kea” making it “largely unknown even to the native populations.”³⁰⁶ The court’s collective memory of injustice, though it does make mention of Native Hawaiians, also simultaneously erases Native Hawaiians from its narrative of Maunakea.³⁰⁷

²⁹⁷ Flores-Case Proposal, *supra* note 144, at 23 FOF 183 (quoting MALY & MALY, *supra* note 142, at 1).

²⁹⁸ Pisciotta Testimony, *supra* note 295, at 2, 5, 7; Flores Testimony, *supra* note 293, at 18; Rios Testimony, *supra* note 293, at 1–2.

²⁹⁹ See *Mauna Kea II*, 143 Haw. 379, 384, 431 P.3d 752, 757 (2018).

³⁰⁰ *Id.*

³⁰¹ *Id.* at 384–85, 431 P.3d at 757–58.

³⁰² See *id.*

³⁰³ *Id.* at 384, 431 P.3d at 757.

³⁰⁴ *Id.* at 385, 431 P.3d at 758.

³⁰⁵ See *id.*

³⁰⁶ DALE P. CRUIKSHANK, MAUNA KEA: A GUIDE TO THE UPPER SLOPES AND OBSERVATORIES 4 (1986).

³⁰⁷ See *Mauna Kea II*, 143 Haw. at 384–85, 431 P.3d at 757–58.

Nowhere in the opinion did the majority clarify that kapu was neither just a set of restrictions nor a prohibitive system.³⁰⁸ It did not include that kapu was a “code of conduct”³⁰⁹ for Kānaka that facilitated this Indigenous society’s creation and implementation of conservation practices;³¹⁰ or, that the kapu marked the sacred and required Kānaka to understand their relationship to those hallowed sites (e.g., areas marked as wao akua) and entities.³¹¹ The Board and, subsequently, the majority ignored testimony that explained the Mauna’s holy status, which:

[W]as known from the remote times of the ancient ones. It is for this reason that amongst the countless ancestors of Kanaka Maoli and numerous ali‘i (chiefly) dynasties that lived in these islands, they never built any large heiau (temples) on the summit in this realm that is considered kapu . . . so as not to create a physical and/or spiritual disturbance, disconnection, or imbalance between man and his akua, and between man and his environment.³¹²

Instead, the majority’s framing of kapu plays into the Western caricature of a punitive system that restricted maka‘āinana (common people)³¹³ from freedoms that only privileged ali‘i (chiefs) could enjoy.³¹⁴ The majority, therefore, completely misunderstood and mischaracterized Native Hawaiians’ relationship to Maunakea.³¹⁵ By the court’s account, Native Hawaiians seem to have benefited from the increased access to the

³⁰⁸ See generally *id.*

³⁰⁹ Lezlie Kī‘aha, *Thinking Outside the Bars: Using Hawaiian Traditions and Culturally-Based Healing to Eliminate Racial Disparities Within Hawai‘i’s Criminal Justice System*, 17 ASIAN-PAC. L. & POL’Y J. 1, 6 (2015).

³¹⁰ See *Mauna Kea LUC*, *supra* note 146; Steele, *Professor Jon Osorio*, *supra* note 130; Charles Kekuewa Pe‘ape‘a Makawalu Burrows, *Hawaiian Conservation Values and Practices*, in CONSERVATION BIOLOGY IN HAWAII 203, 205 (1989) (Kapu was “used as a conservation measure to protect the over-exploitation of natural resources.”).

³¹¹ Interview with Jamaica Heolimeleikalani Osorio, Assistant Professor, University of Hawai‘i Department of Political Science, in Mānoa, Haw. (Feb. 18, 2020).

³¹² Flores Testimony, *supra* note 293, at 18 (emphasis removed).

³¹³ See HAWAIIAN DICTIONARY, *supra* note 1, at 224.

³¹⁴ See *Rice v. Cayetano*, 528 U.S. 495, 500 (2000) (“Kings or principal chieftains, as well as high priests, could order the death or sacrifice of any subject.”). Dr. Jamaica Heolimeleikalani Osorio explained that the state and others local to Hawai‘i are “accustomed to think of kapu as obstructions, as something tell you to keep out,” and it has often been used contemporarily to keep Native Hawaiians out of their homelands. Interview with Jamaica Heolimeleikalani Osorio, Assistant Professor, University of Hawai‘i Department of Political Science, in Mānoa, Haw. (Feb. 18, 2020).

³¹⁵ See *Mauna Kea II*, 143 Haw. 379, 385, 431 P.3d 752, 758 (2018).

summit, which was once “forbidden,” via roads built for the observatories.³¹⁶

Opposite the majority, in order to accurately reflect Native Hawaiians’ history on Maunakea, Kia’i underscored the significance of wao akua and kapu. Within wao akua, Kia’i explained, Maunakea’s summit is an especially sacred landscape.³¹⁷ And while select ceremonial and spiritual practices take place at the summit, Kia’i emphasized that many Native Hawaiians refrain from entering into that sacred space all together as a practice of reverence.³¹⁸ Even more than a cultural practice, Kia’i urged, Kānaka Maoli’s sacred conduct on the summit is a kuleana—a birthright borne from the familial connection between Kānaka and their elder Mauna a Wākea.³¹⁹

The court’s framing obscures Native Hawaiians’ genealogical connection and deep-seated relationship with the mountain. The absence of physical “evidence” of Native Hawaiian practices occurring on the summit was construed by the court as indicative that there were no cultural or spiritual practices that ever took place there.³²⁰ By twisting wao akua and kapu, the majority construed Kānaka Maoli’s physical absence from the summit to intimate that since Native Hawaiians were traditionally restricted from physically accessing the summit, then they could not have a legitimate claim today.³²¹ But, as Kia’i asserted, the court’s “use it or lose it” justification reinforces a colonial lens incompatible with Maoli culture and worldviews.³²² The court’s approach blatantly ignores kapu and wao akua, some of the very Native Hawaiian customs that influenced current state law and that the state is obligated to protect.³²³ Both BLNR and the court failed to recognize that revering wao akua and the sacred mountain—by not building structures or frequenting the areas—is a cultural and spiritual practice in and of itself.³²⁴ The framework advanced by the *Mauna Kea II*

³¹⁶ *See id.*

³¹⁷ Kealoha Pisciotto, Mauna Kea Anaina Hou, Paul Neves and Kaliko Kanahale Proposed Findings of Fact, Conclusions of Law, Decision and Order, *A Contested Case Hearing Re Conservation Use Application HA-3568 for the Thirty Meter Telescope at Mauna Kea Science Reserve* 53 (May 30, 2017) [hereinafter Mauna Kea Anaina Hou Proposal].

³¹⁸ *Id.* at 105–07.

³¹⁹ *Id.*

³²⁰ *See id.*

³²¹ *See id.*

³²² *See id.*

³²³ *See id.*

³²⁴ *See generally id.* (affirming BLNR’s findings of fact and conclusions of law); BLNR TMT Decision, *supra* note 202 (finding no relevant Native Hawaiian traditions and customs warranting state protection).

court threatens any traditions or customs that risk being misinterpreted—or misconstrued, intentionally or not—by the state, and it dangerously reaffirms the colonial-borne court system’s grasp over Native Hawaiians’ fragile rights.³²⁵

The remainder of the majority’s opinion, aside from stating that archaeological research reveals the existence of an adze quarry on the southern slopes of the mountain, treated Native Hawaiians and their interests in the Mauna as peripheral, and Native Hawaiians are mentioned only as an afterthought.³²⁶ After its scant overview of the “history” of Maunakea before Western contact in 1778, the majority skipped forward two-hundred years to post-statehood in 1968, offering a collective memory of Maunakea that barely mentioned Native Hawaiians at all.³²⁷

The majority overviewed the establishment of the Mauna Kea Science Reserve and then listed all twelve observatories built between 1970 and 2002.³²⁸ It details the “direct”³²⁹ and “obvious benefits”³³⁰ of the TMT and the twelve already-existing observatories on the mountain’s summit.³³¹ The majority’s emphasis on the already-existing observatories implies that the next “natural” step is building the TMT, another “advanced world-class telescope.”³³² By the majority’s account, the TMT is just one more telescope that should take its rightful place next to the other thirteen already occupying Maunakea.³³³

The erasure of Native Hawaiians from the majority’s “history” of Maunakea justifies the state’s continuing exclusion of Native Hawaiians from making decisions on matters regarding the summit.³³⁴ The majority, intentionally or not, evoked the same collective memories deployed by Justice Kennedy’s majority opinion in *Rice v. Cayetano* and the late Justice Burns’ “The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?”

³²⁵ See *Mauna Kea II*, 143 Haw. 379, 396–97, 431 P.3d 752, 769–70; BLNR TMT Decision, *supra* note 202.

³²⁶ See *Mauna Kea II*, 143 Haw. at 385, 431 P.3d at 758.

³²⁷ See *id.* at 396–97, 431 P.3d at 769–70.

³²⁸ *Id.*

³²⁹ *Id.* at 402, 431 P.3d at 775.

³³⁰ See Testimony of David Callies, at 6, Contested Case Hearing, Case No. BLNR-CC-16-002 (CDUA HA-3568) (Oct. 11, 2016), *available at* <https://dlnr.hawaii.gov/mk/files/2016/10/TIO-EXH-C-6.pdf>.

³³¹ *Mauna Kea II*, 143 Haw. at 385, 431 P.3d at 758. The twelve observatories on Maunakea house a total of thirteen telescopes. *Id.*

³³² See *id.* at 402, 431 P.3d at 775.

³³³ See *id.*

³³⁴ See *id.*

both of which told narratives also justifying undermining Native Hawaiians' rights and justice claims.³³⁵

The majority actively ignored, and thus rendered insignificant or irrelevant, Maoli testimony and well-established Native Hawaiian traditions and customs.³³⁶ The erasure of Native Hawaiians from the majority's narrative of Maunakea effectively threatens Native Hawaiians' constitutionally protected traditional and customary rights.³³⁷ The brief "history" provided by the majority as a background to *Mauna Kea II* sets up the rest of the court's analysis that, also through skewing "history" and suppressing Native Hawaiians' collective memory of injustice, minimized the state's duty to protect natural and cultural resources on public and conservation district lands and cuts away at Native Hawaiians' protected rights enshrined in Hawai'i's Constitution.³³⁸

B. *The majority ignored decades of the University and DLNR's mismanagement of Maunakea and the significant, substantial and adverse impacts to the summit.*

To justify the majority conclusion that BLNR did not violate its constitutional duty to protect the summit and traditional and customary rights by permitting the TMT, the majority glossed over the decades of UH's mismanagement of the mountain,³³⁹ ignored the long-term substantial, adverse impacts to public trust lands, resources, and purposes that it concedes the observatories have effected;³⁴⁰ and applied a framework that allows the state to ignore the cumulative impacts to conservation and public trust lands.³⁴¹

For the first time, in *Mauna Kea II*, the Hawai'i Supreme Court explicitly held that state-managed conservation district lands "are public resources held in trust for the benefit of the people pursuant to Article XI, Section 1."³⁴² Despite the majority's concession that the telescopes' cumulative effects already caused substantial, adverse impacts, the majority nonetheless held that the "use of the land by TMT is consistent with conservation and in furtherance of the self-sufficiency of the State."³⁴³

³³⁵ See MacKenzie and Sproat, *supra* note 7; James S. Burns, *The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?*, 38 U. HAW. L. REV. 213 (2016).

³³⁶ See *Mauna Kea II*, 143 Haw. at 396–97, 431 P.3d at 769–70.

³³⁷ See discussion *infra* Part V.A.

³³⁸ See *Mauna Kea II*, 143 Haw. at 396–97, 431 P.3d at 769–70.

³³⁹ See *id.* at 386, 431 P.3d at 759.

³⁴⁰ See *id.* at 422, 431 P.3d at 795 (Wilson, J., dissenting).

³⁴¹ See *id.* at 399–402, 431 P.3d at 772–75.

³⁴² *Id.* at 400, 431 P.3d at 773.

³⁴³ *Id.* at 402, 431 P.3d at 775.

Therefore, the court concluded, “the TMT comports with Article XI, Section 1 public trust principles and . . . the BLNR met its duties as trustee under [Article XII, Section 4] public land trust.”³⁴⁴ The majority justified this conclusion by evading details of the state’s mismanagement of Maunakea’s natural and cultural resources and by ignoring its own case precedent regarding public trust lands.³⁴⁵ Using what Justice Wilson’s dissent called “the degradation principle,” the majority concluded that TMT alone would not cause substantial, adverse impacts and thus the board met its Article XI, section 1 trust responsibilities and would instead benefit Hawai‘i and Native Hawaiians.³⁴⁶

Embracing their kuleana to mālama ‘āina, Kia‘i told a collective memory of decades of harm caused by already-existing and poorly-managed observatories on Maunakea. Kia‘i’s testimony and stories, when taken collectively, created an extensive list of the University’s mismanagement and the lasting injuries to Maunakea’s summit. Since the 1960s, the predominating story of Maunakea is one that elevates its potential for stargazing—as the best astronomical site in the world. Kānaka Maoli, however, have sought to uncover the deleterious impacts to Maunakea and Native Hawaiians caused by the astronomical “progress” that the Mauna became renowned for.

Kānaka Maoli detailed a number of egregious mistakes by the University since the first telescope’s establishment on Maunakea: allowing the development telescopes without permits and others “without permit conditions or controls to ensure implementation of management plans[.]”³⁴⁷ refusing to establish a limit to telescopes against the suggestions of the Mauna Kea Advisory Committee, many members of the public, state leaders, and Native Hawaiians;³⁴⁸ and prioritizing astronomical research over its obligation to protect the summit’s resources.³⁴⁹ Unlike the *Mauna Kea II* majority, Kia‘i stressed the scathing 1998 Auditor’s Report and the University’s blatant disregard of the audit’s criticisms and

³⁴⁴ *Id.* (originally stating that “BLNR met its duties as trustee under Article XI, Section 1 *public land trust*”) (emphasis added)). Public land trust duties are codified under Article XII of the state’s constitution. HAW. CONST. art. XII, § 4.

³⁴⁵ *See id.*

³⁴⁶ *Id.* at 422, 431 P.3d at 795 (Wilson, J., dissenting) (“BLNR concludes that the degradation to the summit area has been so substantially adverse that the addition of TMT would have no substantial adverse effect.”).

³⁴⁷ Written Direct Testimony of Deborah J. Ward 10 (Oct. 11, 2016), *available at* <https://dlnr.hawaii.gov/mk/files/2016/10/B-17-a-WDT-Deborah-J-Ward.pdf> [hereinafter Ward Testimony].

³⁴⁸ *See id.* at 2; *Plans Drawn for Majestic Mauna Kea*, HAW. TRIB.-HERALD B-2 (Jan. 27, 1980).

³⁴⁹ Flores-Case Proposal, *supra* note 144, at 120–21.

recommendations intended to safeguard the Mauna's natural, historical, and cultural resources.³⁵⁰

Kia'i told a collective memory of injustice that sought also to hold the Department of Land and Natural Resources and its Board accountable for their complicity in Maunakea's mismanagement.³⁵¹ They drew from several critical reports from the Hawai'i State Auditor to demonstrate that even the state itself recognized the Department and Board's failures as lessor to provide oversight of the University's actions on the mountain.³⁵² Kia'i cited that, according to a 1998 audit, DLNR "failed to define its relationship with the university, allowing the institution to oversee its own activities and not provide a mechanism to ensure compliance with lease and permit requirements."³⁵³ Citing a later audit report from 2005, Kia'i underscored that this matter had "been previously brought to the attention of DLNR and its board for several decades."³⁵⁴ According to the 2005 audit, which Kia'i quoted, "[t]he lack of oversight by the department allow[ed] the university and its sublessees unchecked discretion on the use of Mauna Kea and le[ft] cultural and natural resources at risk for further damage."³⁵⁵

Demonstrating the state's readiness to undermine its public trust duties and protections for Native Hawaiians' rights, Kia'i drew attention to a previous controversy with "issues . . . almost identical" to those in *Mauna Kea II*.³⁵⁶ In 2004, despite the 1998 audit's critical findings, the Department of Land and Natural Resources permitted the development of the NASA/Keck Outrigger Telescopes project near the summit without a comprehensive management plan.³⁵⁷ Native Hawaiians and other

³⁵⁰ Ward Testimony, *supra* note 347; see Flores Testimony, *supra* note 293, at 4; 1998 AUDIT, *supra* note 161, at 15.

³⁵¹ See, e.g., Flores Testimony, *supra* note 293; Ward Testimony, *supra* note 347.

³⁵² Flores Testimony, *supra* note 293, at 4.

³⁵³ Ward Testimony, *supra* note 347 ("The Legislative Auditor addressed the accumulation of impacts that have resulted in the findings of significant, adverse and substantial cumulative impacts to the natural and cultural resources of Mauna Kea in 1998: '(DLNR) has failed to define its relationship with the university, allowing the institution to oversee its own activities and not provide a mechanism to ensure compliance with lease and permit requirements.'").

³⁵⁴ Flores Testimony, *supra* note 293, at 4 (quoting STATE OF HAWAI'I AUDITOR, FOLLOW-UP AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE, REPORT NO. 05-3 30 (Dec. 2005) [hereinafter 2005 AUDIT]).

³⁵⁵ *Id.*

³⁵⁶ See Pisciotta Testimony, *supra* note 295, at 3.

³⁵⁷ Ward Testimony, *supra* note 347; *Timeline of Mauna Kea Legal Actions Since 2011*, KAHEA (Sept. 10, 2016), <http://kahea.org/issues/sacred-summits/timeline-of-events>; see HAW. CODE R. § 13-5-39(b) (2011) ("The department or board may require the preparation of a comprehensive management plan where it finds that further development may lead to significant natural, cultural, or ecological impacts within the conservation

conservation groups, including many of the Kia‘i that challenged the TMT in *Mauna Kea I*, intervened to challenge the permit.³⁵⁸ Petitioners challenging the “Outrigger” project endeavored to hold the state accountable to its responsibility to preserve and protect the summit and to comply with its own administrative rules.³⁵⁹ NASA eventually pulled its funding for the project but only after its federal environmental impact statement, created as a result of the litigation, had acknowledged the adverse and significant impacts of three decades of astronomy on the cultural and natural resources of Maunakea.³⁶⁰

Recent events, pertaining specifically to the TMT’s development, also reveal the state’s evasion of its public trust duties and its duty to affirmatively protect Native Hawaiians’ rights. For instance, prior to BLNR’s consent to sublease to TIO, the Board allowed TIO to take possession of the proposed site to grade, excavate, and bore into Maunakea’s summit.³⁶¹ “Th[ose] activities, between August and October 2013, resulted in irreparable harm and damage to th[e] unique and pristine geological and cultural landscape” of Maunakea.³⁶² Moreover, Kia‘i emphasized the Board’s attempt to evade due process and expedite the TMT project, which came to a head in *Mauna Kea I*.³⁶³ By “putting the cart before

district.”).

³⁵⁸ Pisciotta Testimony, *supra* note 295, at 3. The project “sought to construct four (4) to six (6) smaller ‘outrigger’ telescopes placed around the existing two (2) KECK observatories that sit on Kukahau‘ula (the summit).” *Id.* After the Hearing Officer concluded that the project lacked the required BLNR-approved management plan, BLNR remanded the decision for re-review and the Hearing Officer changed his position. *Id.* On appeal to the state district court, Mauna Kea Anaina Hou and other petitioners were successful, and the court voided the CDUP issued for the KECK project. *Id.* Later, a federal Environmental Impact Assessment case, the Office of Hawaiian Affairs sued NASA on behalf of Mauna Kea Anaina Hou “for failing to complete a full EIS for the Outrigger Telescopes Project . . . After the Third Circuit Court vacated [the project’s] CDUA, NASA eventually pulled their funding for the project.” *Id.*

³⁵⁹ Ward Testimony, *supra* note 347, at 3. Judge Glenn Hara overturned the board’s decision to approve the development and directed the development of a management plan. *Id.* A result of Judge Hara’s decision and order, the University developed a Comprehensive Management Plan which was approved by the board in 2009. *Id.* at 4. Deborah Ward, in testimony to BLNR, criticized the 2009 Comprehensive Management Plan for its reliance on a 2000 Management Plan that “has neither been scrutinized nor approved by the BLNR, yet it is referenced as the determining document for future development.” *Id.* at 4; *see* 2009 MANAGEMENT PLAN, *supra* note 164, at 37, 3-8 (describing the 2000 Mauna Kea Science Reserve Master Plan and its approval by the University Board of Regents).

³⁶⁰ Pisciotta Testimony, *supra* note 295, at 3.

³⁶¹ Flores-Case Proposal, *supra* note 144, at 69.

³⁶² *Id.*

³⁶³ *See id.* at 145 (“BLNR has a pattern of executing actions that are comparable to ‘putting the cart before the horse[.]’”).

the horse,” the Board revealed its willingness to forfeit its statutory and constitutional obligations to further the project.³⁶⁴

Since the first concerns regarding TMT’s permit application arose over a decade ago, Kia’i urged the state to fulfill its statutory and constitutional obligations as outlined by *Ka Pa ‘akai* by rejecting the TMT’s CDUA.³⁶⁵ Kia’i also criticized the University and the TMT’s lack of meaningful consultation with Native Hawaiians regarding the project.³⁶⁶ Rather than “trigger[ing] high levels of cultural conversations, consultation, engagement, [and] decisionmaking” among Native Hawaiians, TMT stakeholders, and the state,³⁶⁷ the TMT’s proposal to build on sacred land was “rubber stamped” by the state.³⁶⁸ As Maoli practitioner and Kia’i Kalani Flores explained, the lack of accountability for state decisionmakers thus leaves the burden on the public, specifically Kānaka Maoli, to adequately protect Maunakea.³⁶⁹ By remaining “engaged in the process,” Flores and his ‘ohana (family) and others seek to fulfill their “civil responsibilities,” or kuleana, to protect Maunakea.³⁷⁰

The majority glossed over the the mismanagement of the MKSR and the irreplaceable natural and cultural resources located within the reserve.³⁷¹ The opinion conceded that:

Construction of these observatories and roads has had significant cumulative adverse impacts on cultural, archaeological, and historic resources in the MKSR. The observatories have also had significant cumulative adverse impacts on geology, soils, and slope stability in the MSKR because they significantly modified the preexisting terrain, the tops of certain pu‘u were flattened to accomodate observatory foundations, and some materials were removed

³⁶⁴ *See id.*

³⁶⁵ *Id.* at 69.

³⁶⁶ *Id.* at 83 (“It was not only the lack of quantitative lack of consultation with Native Hawaiian cultural practitioners, but also the types of questions that were asked and the kinds of information that were provided in the asking of the questions.”).

³⁶⁷ *Id.* at 81.

³⁶⁸ *Id.* at 2 (“There’s an underlying perception that these types of projects are typically ‘rubber stamped’ and pushed through the existing State permitting process due to political pressures and/or business influences despite very apparent noncompliance with State laws.”).

³⁶⁹ *Id.*

³⁷⁰ *See id.*

³⁷¹ *See Mauna Kea II*, 143 Haw. 379, 385, 431 P.3d 752, 758 (2018).

from the pu‘u were pushed over their sides, creating steeper slopes more susceptible to disturbance.³⁷²

The opinion then mentioned the 2000 MKSR Master Plan adopted by the University’s Board of Regents in response to “significant criticism raised” in the 1998 Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve.³⁷³ The majority, however, did not describe the “significant criticism.”³⁷⁴ Nor did it include any of the criticisms outlined in the three audits that followed in 2005, 2014, and 2017.³⁷⁵ Instead, by avoiding all audits’ criticisms, the majority trivialized the already significant, adverse impacts that it admitted the TMT would exacerbate.³⁷⁶

The majority did not include the first audit’s finding that the University’s focus on developing Maunakea to “enhance[] the university’s prestige and that of its astronomy program . . . overshadowed the university’s commitment to provide reasonable assurance of protection for the summit’s natural resources,” or that a subsequent audit found the same.³⁷⁷ The majority did not consider that, even when the University outlined plans for resource management and protection, “many of these plans were submitted late and were weakly implemented” due, in part, to “the university’s lack of commitment and the Department of Land and Natural Resources’ failure to enforce plans.”³⁷⁸ These failures “compounded the problem of inadequate environmental protection.”³⁷⁹ The 1998 Audit repeated that Maunakea’s stellar reputation as “a premier location for astronomical research” came at the expense of the University’s and DLNR’s neglect of the mountain’s natural resources, but the majority failed to include any information about these audits beyond the fact that one was published in 1998.³⁸⁰

³⁷² *Id.* at 385–86, 431 P.3d at 758–59.

³⁷³ *Id.* at 386, 431 P.3d at 759.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *See id.*

³⁷⁷ 1998 AUDIT, *supra* note 161, at 15; *see* 2005 AUDIT, *supra* note 355 (“The University of Hawai‘i has taken some positive steps toward strengthening the protection of Mauna Kea’s natural and cultural resources by implementing the 2000 Mauna Kea Science Reserve Master Plan. However, the university has not dealt with certain significant management issues, such as resolving jurisdictional issues with the Department of Land and Natural Resources and monitoring conservation district use permits. Such issues, if left unaddressed, increase the likelihood of harm to the science reserve’s vulnerable environment.”).

³⁷⁸ 1998 AUDIT, *supra* note 161, at 18.

³⁷⁹ *Id.*

³⁸⁰ *See Mauna Kea II*, 143 Haw. at 386, 431 P.3d at 759.

In its opinion, the majority referred to the 2000 Master Plan's goals and the establishment of the Office of Mauna Kea Management ("OMKM"), which were created to help better effectuate those goals of protecting the right to exercise traditional cultural practices and preserving natural resources and landscapes.³⁸¹ The majority mentioned the Master Plan's goals but not how those goals were effectuated, if at all.³⁸² And it did not provide any updated information regarding the state's implementation of the 20-year old plan or the subsequent 2009 Comprehensive Management Plan.³⁸³

In addition to emphasizing the Master Plan's goals, the majority highlighted DLNR's and TMT's mitigation measures and plans that would "lessen the impacts of the TMT."³⁸⁴ The court determined that, on balance, the TMT would be consistent with conservation and in furtherance of the state's self-sufficiency.³⁸⁵ In the majority's view, "[t]he TMT Project does not involve the irrevocable transfer of public land to a private party" and, as a condition of the TMT's decommissioning plan, "the land [will one day] . . . be restored."³⁸⁶

As a text that constructs collective memory of injustice and inscribes it into law, the majority's opinion perpetuates a narrative that ignores astronomy's cumulative impacts on the summit while exaggerating its benefits, especially as they concern Native Hawaiians. By ignoring the state's decades-long mismanagement of Maunakea, the majority shirked the legal obligation of the state to ensure protection of natural and cultural resources as required by Article XI, section 1 of the constitution.³⁸⁷ Rather than recognizing and taking into consideration the significant adverse impacts the previous observatories already caused, the majority ignored all that history, and instead looked only at the specific impacts the TMT itself would have in one specific area.³⁸⁸ It removed the TMT from the rest of the history of observatories on the summit and viewed the TMT's impacts in isolation.³⁸⁹ Overall, the majority masked the state's numerous

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *See id.*

³⁸⁴ *Id.* at 405, 431 P.3d at 778.

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 401, 431 P.3d at 774 ("The TMT is to be decommissioned at the end of its anticipated 50 year useful life or at the end of the lease, whichever comes first, pursuant to the Decommissioning Plan.").

³⁸⁷ *See id.*

³⁸⁸ *See id.*

³⁸⁹ *See id.*

shortcomings and promoted the TMT as a benefit to the state with few, if any, negative implications.³⁹⁰

1. Justice Wilson challenged the majority’s indefensible use of the “degradation principle.”

The collective memory of injustice that Native Hawaiians sought to recast more closely parallels Justice Wilson’s dissent, which criticized the majority for its use of the “degradation principle.”³⁹¹ Similar to Kia‘i, Justice Wilson recognized the significance of including the entire history of damage to the summit.³⁹² Both Native Hawaiians and Justice Wilson sought to portray the full extent of astronomy’s impacts on Maunakea more accurately.³⁹³ Justice Wilson’s dissent sheds light on the court’s own precedent and past events omitted or obscured by the majority’s analysis.³⁹⁴ Throughout his opinion, Justice Wilson consistently criticized the majority’s reliance on “the degradation principle,” a principle contrary to Hawai‘i law.³⁹⁵ He pointed to the state’s duties to Kaho‘olawe to illuminate the danger of the majority’s incorporation of the degradation principle into its legal analysis.³⁹⁶

Whereas the majority proposed that there was no precedent for BLNR or the court to follow concerning management of public trust resources on Maunakea, Justice Wilson turned to the state’s management of Kaho‘olawe as an example of the state’s obligation toward protecting Hawai‘i’s lands and natural resources.³⁹⁷ By bringing this context forward, Justice Wilson explained that the state’s approval of the TMT is inconsistent with its constitutional duties under Article XII, section 7 and Article XI, section 1.³⁹⁸

Justice Wilson recalled that, like Maunakea, Kaho‘olawe had been “severely degraded.”³⁹⁹ However severe the damage already inflicted upon a public trust resource, the state still maintained the “duty to preserve and rehabilitate in perpetuity.”⁴⁰⁰ The interpretation put forth by the majority—

³⁹⁰ *See id.*

³⁹¹ *See id.* at 421–34, 431 P.3d at 794–807 (Wilson, J., dissenting).

³⁹² *See id.*

³⁹³ *See id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 421–22, 431 P.3d at 794–95.

³⁹⁶ *Id.* at 422 n.2, 431 P.3d at 795 n.2.

³⁹⁷ *Id.*

³⁹⁸ *See id.* at 422, 427–28, 431 P.3d at 795, 800–01.

³⁹⁹ *Id.* at 422 n.2, 431 P.3d at 795 n.2.

⁴⁰⁰ *Id.*

that “the passage of time and the degradation of natural resources can justify unacceptable environmental and cultural damage”—renders null the state’s duty to protect conservation district lands and other public lands and resources.⁴⁰¹ According to Justice Wilson, the state’s duty is “potentially undermined or extinguished under the new degradation principle.”⁴⁰² Letting the degradation principle inform its opinion, the majority:

[R]enders inconsequential the failure of the State to meet its constitutional duty to protect natural and cultural resources for future generations. It renders illusory the public trust duty enshrined in the Constitution of the State of Hawai‘i and heretofore in the decisions of this court to protect such resources. And its policy of condoning continued destruction of natural resources once the resource value has been substantially adversely impacted is contrary to accepted norms of the environmental rule of law.⁴⁰³

The dissent further criticized the majority for its failure to recognize and consider the intent of the existing legal framework concerning public trust lands and resources within conservation districts—“to conserve, protect, and preserve the important natural resources of the state through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare.”⁴⁰⁴ In its analysis and application of the law, the majority also ignored the Constitutional Convention delegates’ intent that the 1978 amendments expressly set forth the state’s obligation to conserve and protect all public lands and natural resources, including Native Hawaiians’ traditional and customary rights.⁴⁰⁵ Based on the foregoing, Justice Wilson warned that as a result of the majority’s flawed analysis, “one of the most sacred resources of the Hawaiian culture loses its protection because it had previously undergone substantial adverse impact from prior development of telescopes.”⁴⁰⁶

⁴⁰¹ *Id.* at 422, 431 P.3d at 795.

⁴⁰² *Id.* at 422 n.2, 431 P.3d at 795 n.2.

⁴⁰³ *Id.* at 423, 431 P.3d at 796.

⁴⁰⁴ *Id.* at 433, 431 P.3d at 806; *see* HAW. CONST. art. XI, §§ 1, 9; HAW. CONST. art. XII, § 7; HAW. REV. STAT. § 183C-1 (1978); HAW. CODE R. § 13-5-30(c)(4) (2011).

⁴⁰⁵ *See Mauna Kea II*, 143 Haw. at 411–12, 413 P.3d at 784–85 (Pollack, J., concurring). Justice Richard W. Pollack, however, in his concurring opinion, did consider the 1978 Constitutional Convention and delegates’ express intent regarding Article XI, section 1. *Id.* (“[T]he principle that public land is a natural resource within the meaning of article XI, section 1 has long been established under our law.”).

⁴⁰⁶ *See id.* at 422, 431 P.3d at 795 (Wilson, J., dissenting).

2. The majority's narrow collective memory relieved the state of its constitutionally mandated duties.

Although Justice Wilson's dissenting opinion did not refute the entire flawed history embraced by the majority, his opinion, focused on the degradation principle, purposefully portrayed a fuller picture of Maunakea's past and criticized the majority for its failure to fully weigh the TMT's implications.⁴⁰⁷ On the other hand, by failing to acknowledge the University's and BLNR's grave failures, thereby neglecting to hold the state accountable, the majority opinion resulted in the curtailment, or dilution, of Native Hawaiians' rights despite their being guaranteed by the constitution and statutes.⁴⁰⁸

By the majority's logic, the cumulative past is irrelevant. Thus, although the astronomical development on Maunakea has "resulted in substantial, significant and adverse impacts," the court concluded TMT was still permissible because even if the TMT would exacerbate the already substantial, significant, and adverse impacts on the summit, the impacts of the TMT alone would only be "incremental" in comparison to the overall damage already done.⁴⁰⁹ Following this logic, the majority held that the TMT would not adversely impact cultural resources.⁴¹⁰ If applied to future cases, the majority's reasoning allows for the state to ignore or dismiss its constitutional duties to Native Hawaiians and the general public if public trust and conservation lands are deemed to have already suffered enough "substantial, significant and adverse impacts[.]"⁴¹¹

In addition to artificially separating the TMT's impacts from the history of all the existing observatories, the majority also failed to acknowledge the significance of the University's history of mismanagement of the Mauna and its resources.⁴¹² In essence, the court ignored the state's entire past of mismanagement mistakes.⁴¹³ Separating the present (TMT) from the past (thirteen existing telescopes and the University's past behavior) effectively deemed the cumulative past irrelevant in determining

⁴⁰⁷ *Id.* at 421–34, 431 P.3d at 794–97.

⁴⁰⁸ *See id.* at 386, 395–98, 400–02, 431 P.3d at 759, 768–71, 773–75.

⁴⁰⁹ The court, citing *Kilakila III*, explains that "BLNR does not have license to endlessly approve permits for construction in conservation districts, based purely on the rationale that every additional facility is purely incremental." *Id.* at 403–04, 431 P.3d at 776–77. But this rationale, which the court appears to refute is exactly the logic it deploys to justify permitting the TMT. *See id.*

⁴¹⁰ *Id.* at 404, 431 P.3d at 777.

⁴¹¹ *See id.* at 403, 431 P.3d at 776.

⁴¹² *See id.* at 386, 395–98, 400–02, 431 P.3d at 759, 768–71, 773–75.

⁴¹³ *See id.*

what justice entails for Native Hawaiians and Maunakea.⁴¹⁴ It concealed the genuine justice concerns shared by Kānaka Maoli and allowed for the majority to cast TMT as purely a benefit to the state and Native Hawaiians.⁴¹⁵

Justice Wilson's critical dissent brought into focus the entire impact of the area and considered the actual and potential implications of the observatories, including TMT, on Maunakea.⁴¹⁶ He began to tell a story more in line with Native Hawaiians' collective memory of injustice by comparing the state's history with and duty to Maunakea to those of Kaho'olawe.⁴¹⁷ Justice Wilson's consideration of the TMT's impacts to the entire summit, as well as his recognition of the University's mismanagement and lack of accountability, revealed, in part, the injustice that Native Hawaiians remember and that the majority's opinion masks.⁴¹⁸ Opposite the majority, the dissent's more complete account of history and its criticism of the "degradation principle" attempted to reinforce and uphold the state's constitutional duties under Hawai'i law.⁴¹⁹

3. The majority ignored traditions and customs exercised everywhere but within the exact footprint of the TMT project.

Chief Justice Richardson's seminal decisions upheld that the state's "resources should be held for the benefit of the public[.]"⁴²⁰ In *Mauna Kea II*, however, the majority abandoned CJ Richardson's legacy of protections for Native Hawaiian traditional and customary rights that were based on his pursuit of "justice for Hawai'i's native people and, indeed, for all people in our homeland."⁴²¹

The court's selective approach to history that undermined Native Hawaiians' claim to Maunakea is captured by a single sentence that contends: "various Native Hawaiian traditional and customary practices are derived from these beliefs, which have also led to related contemporary cultural practices."⁴²² The court's separation of "related contemporary" cultural practices from "traditional and customary" ones created a dichotomy that never existed and does not accurately reflect Native

⁴¹⁴ *See id.*

⁴¹⁵ *See id.*

⁴¹⁶ *Id.* at 422, 431 P.3d at 795 (Wilson, J., dissenting).

⁴¹⁷ *Id.*

⁴¹⁸ *See id.*

⁴¹⁹ *Id.*

⁴²⁰ MacKenzie, *Ka Lama Kū*, *supra* note 228, at 6.

⁴²¹ *See id.* at 15; *Mauna Kea II*, 143 Haw. at 395–98, 431 P.3d at 768–71.

⁴²² *See Mauna Kea II*, 143 Haw. at 385, 431 P.3d at 758.

Hawaiian cultural practices.⁴²³ Moreover, this superficial distinction between traditional and contemporary stands “contrary to legal understandings that Hawaiian cultural practices must evolve in contemporary times to support a living culture.”⁴²⁴

The court’s framing of cultural practices lends to the narrative, “a tired colonial trope, representing Indigenous Peoples as mere vestiges of a quickly fading and increasingly irrelevant past.”⁴²⁵ In essence, the court legitimizes the colonial narratives that cast Native Hawaiian culture as antithetical to progress and modernity.⁴²⁶ Moreover, the court’s mischaracterization of Native Hawaiian culture sets up the framework for the rest of its analysis that, in effect, invalidates Native Hawaiians cultural practices on Maunakea.⁴²⁷

Just as the court majority narrowed the scope of time in its evaluation of “history” and TMT’s potential impacts, it similarly narrowed the scope of physical space evaluated such that the TMT would appear not to affect Native Hawaiian traditional and customary rights on Maunakea. This narrowed scope further justified the majority’s conclusion the state did not violate its obligations under Article XI, section 1, Article XII, section 7, and HRS section 1-1 when it approved the TMT’s CDUP.⁴²⁸ In doing so, the majority’s conclusion ignored the Native Hawaiian principles that are the very foundation of Hawai‘i’s unique legal system that this state boasts.⁴²⁹ Further, *Mauna Kea II* departed from longstanding precedent and curtails the specific protections for Native Hawaiians’ rights incorporated into state law.⁴³⁰

Departing from Chief Justice Richardson’s precedent and legal legacy, the *Mauna Kea II* majority constricted its focus to look only at the

⁴²³ See *id.*; KIYUNA, *supra* note 156, at 7.

⁴²⁴ KIYUNA, *supra* note 156, at 7 (“Although Hawai‘i case law establishes that practitioners must demonstrate that a particular practice existed prior to 1892, this does not mean that traditional and customary rights are frozen in time and cannot take on new forms. Indeed, in the Declaration on the Rights of Indigenous Peoples, the United Nations affirmed that Native peoples retain the right to ‘practice and revitalize their cultural traditions and customs[,] . . . includ[ing] the right to maintain, protect, and develop the past, present, and future manifestations of their cultures.’”).

⁴²⁵ See Goodyear-Ka‘ōpua, *Protectors of the Future*, *supra* note 25, at 184.

⁴²⁶ See generally *Rice v. Cayetano*, 528 U.S. 495 (2000); Burns, *supra* note 335; Avis Kuuipoleialoha Poai, *Tales from the Dark Side of the Archives: Making History in Hawai‘i without Hawaiians*, 39 U. HAW. L. REV. 537 (2017) (analyzing “the histories that have been told about Native Hawaiians by attorneys, judges, and scholars”).

⁴²⁷ See *Mauna Kea II*, 143 Haw. at 385, 431 P.3d at 758.

⁴²⁸ *Id.* at 395–98, 431 P.3d at 768–71.

⁴²⁹ See MacKenzie, *Ka Lama Kū*, *supra* note 228, at 6.

⁴³⁰ See *Mauna Kea II*, 143 Haw. at 395–98, 431 P.3d at 768–71.

specific area that TMT would occupy.⁴³¹ By narrowing its scope and considering the proposed observatory site in isolation, the majority constricted the *Ka Pa‘akai* analysis to conclude that there was no evidence that the site was used to store or bury artifacts, that ahu or lele (sacrificial altars or stands)⁴³² existed, or that mele or hula were performed there.⁴³³ This constricted focus on the specific site proposed for the TMT Observatory conveniently narrowed the scope so much so that it excluded Native Hawaiians—along with their well-documented cultural traditions and customs—from the analysis.⁴³⁴ Doing such contradicted *Kalipi* and subsequent precedents that consistently upheld Native Hawaiians’ rights.⁴³⁵

The majority cited the evidence—testimony, research studies, plans, and impact assessments—provided by BLNR to examine the extent of cultural practices that took place on Maunakea.⁴³⁶ The majority acknowledged the cultural practices of Native Hawaiians on the Mauna’s summit by summarizing some of BLNR’s findings that:

Native Hawaiian cultural practitioners on Mauna Kea conduct their practices at the summit of Mauna Kea (Pu‘u Wēkiu), Lake Waiau, Pu‘u Līlīnoe, or Kūkahau‘ula. Cultural practices at Mauna Kea include solstice and equinox observations on Pu‘u Wēkiu, burial blessings, depositing of piko (umbilical cord) near Lake Waiau as well as collection of its water for use in healing and ritual practices, the giving of offerings and prayers at the ahu lele (sacrificial altar or stand), behind the visitor center adjacent to Hale Pōhaku,

⁴³¹ See Memorandum in Support of Motion, at 9, In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Res. No. SCOT-17-0000777 (Nov. 19, 2017) [hereinafter Native Hawaiian Amici Brief]; *Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n*, 94 Haw. 31, 47–49, 7 P.3d 1068, 1084–86 (2000) (stating that the “petition area” relevant to the court’s analysis comprised 1,009.086 acres of land, the reclassification of which was in dispute); In re ‘Iao Ground Water Management Area High-Level Source Water Use Permit Applications, 128 Haw. 228, 248–49, 287 P.3d 129, 149–50 (2012) [hereinafter *Nā Wai ‘Ehā*]; *Wai‘ola*, 103 Haw. 103 Haw. 401, 401, 424, 426, 83 P.3d 664, 664, 687, 689 (2004).

⁴³² HAWAIIAN DICTIONARY, *supra* note 1, at 8, 201.

⁴³³ *Mauna Kea II*, 143 Haw. at 396, 431 P.3d at 769.

⁴³⁴ *See id.*

⁴³⁵ *See Ka Pa‘akai*, 94 Haw. at 47–49, 7 P.3d at 1084–86; *Nā Wai ‘Ehā*, 128 Haw. at 248–49, 287 P.3d at 149–50; *Wai‘ola*, 103 Haw. at 424, 426, 83 P.3d at 687, 689; *Mauna Kea II*, 143 Haw. at 396, 431 P.3d at 769; *see also* Native Hawaiian Amici Brief, *supra* note 431, at 8–12.

⁴³⁶ *Mauna Kea II*, 143 Haw. at 395–98, 431 P.3d at 768–71.

monitoring or observing the adze quarry, or observing stars, constellations, and the heavens.⁴³⁷

Despite acknowledging the many Native Hawaiian practices that take place atop Maunakea, the majority quickly turned around to conclude that none of those practices were relevant in assessing the TMT’s impact on cultural resources or traditional and customary practices.⁴³⁸

The majority, in accord with BLNR’s assertions, narrowed its analysis to what it called the “relevant area,” which included only the proposed TMT Observatory site area and the Access Way.⁴³⁹ Thus, the court concluded that there were no Native Hawaiian cultural practices, artifacts, or structures found in the “relevant area.”⁴⁴⁰ The majority noted that there were ahu erected in the vicinity of the project but wrote those off as irrelevant because they were not within the narrowly construed “relevant area,” as well.⁴⁴¹

With little explanation, the majority further concluded that the two ahu constructed on the Access Way by Kia‘i in 2015 to protect Maunakea “did not constitute a traditional and customary right or practice.”⁴⁴² The majority did not discuss whether Native Hawaiians were consulted to reach this conclusion, or whether this practice—of building ahu to protect sacred land—was a tradition or custom.⁴⁴³ The majority also did not fully consider or address the cultural practice of refraining from going to Maunakea’s summit in wao akua.⁴⁴⁴ The majority ignored these factors, and instead constructed a narrative that the apparent absence of Kānaka from the “relevant area” justified denying Native Hawaiians’ claims to Maunakea and permitting continued development on Maunakea.⁴⁴⁵

Even where the majority took a broader approach and recognized that Native Hawaiian cultural practices did indeed take place on Maunakea, the court emphasized that those practices have “coexisted” alongside the astronomy facilities at the summit.⁴⁴⁶ The majority did not include that, for decades preceding TMT’s conception, Kānaka and others urged to halt any

⁴³⁷ *Id.* at 396, 431 P.3d at 769.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.* at 395–98, 431 P.3d at 768–71.

⁴⁴⁴ *See id.*

⁴⁴⁵ *See id.*

⁴⁴⁶ *Id.* at 397, 431 P.3d at 770.

further development of telescopes on Maunakea.⁴⁴⁷ Nor did it include Native Hawaiians' early concerns that the mountain would become "overcrowded" by outsiders who do not share the same concerns regarding protection of the natural and cultural resources or "preserv[ation of] the valuable history of the mountain."⁴⁴⁸ The majority also omitted the many state officials' statements admitting the University's and state's failures on Maunakea, including Governor Ige's concession that "[w]hether you see it from a cultural perspective or a natural resource perspective, we [state officials] have not done right by a very special place."⁴⁴⁹

On the contrary, the majority assumed that since previous observatories had "co-existed" alongside "Native Hawaiian uses," the TMT would not "curtail or restrict" any Native Hawaiian practices.⁴⁵⁰ The majority conveniently forgot Native Hawaiians' vehement opposition to development on Maunakea at the turn of the 21st century, or that astronomers had previously resigned from or declined work at observatories on Maunakea in response to the mistreatment of Indigenous resources and issues by other astronomers.⁴⁵¹ These "forgotten" stories refute the majority's flawed memory of Native Hawaiians coexisting with and consenting to the already-existing facilities on the mountain.⁴⁵²

With the majority's inscription of its flawed narrative into law, the court constructed and legitimized a "memory" of Maunakea devoid of Native Hawaiians.⁴⁵³ The opinion adds to the Western-produced historical accounts and narratives that minimize Native Hawaiians' presence in Hawai'i's history.⁴⁵⁴ The erasure of Native Hawaiians and their cultural practices from Maunakea supports the state's and court's presumption that no harm would be done by the TMT.⁴⁵⁵ "Limiting the analysis of Native

⁴⁴⁷ See *id.* at 385, 431 P.3d at 758. In 1976, members of the local community and state and city officials recommended that the BLNR cap the number of telescopes on the mountain to those six already existing facilities. Letter from Managing Director John Keppeler, County of Hawai'i, to Chairman Christopher Cobb, Bd. Land Nat. Res. (Sept. 16, 1976).

⁴⁴⁸ Bean & Duquette, *supra* note 192.

⁴⁴⁹ Governor David Ige, *The Mauna Kea Story* (May 26, 2015), <https://governor.hawaii.gov/main/governor-iges-transcribed-Mauna-kea-story/>.

⁴⁵⁰ *Mauna Kea II*, 143 Haw. at 402, 431 P.3d at 775.

⁴⁵¹ Usha Lee McFarling, *Science, Culture Clash Over Sacred Mountain*, L.A. TIMES (Mar. 18, 2001), <https://www.latimes.com/archives/la-xpm-2001-mar-18-mn-39418-story.html>.

⁴⁵² See Flores Testimony, *supra* note 293; Rios Testimony, *supra* note 293; Pisciotta Testimony, *supra* note 295.

⁴⁵³ See generally *Mauna Kea II*, 143 Haw. 379, 431 P.3d 752.

⁴⁵⁴ See generally *id.*

⁴⁵⁵ Native Hawaiian Amici Brief, *supra* note 431, at 12.

Hawaiian rights only to the TMT site” in the way the majority did “emasculates the law and not only deprives these rights fundamental justice, but essentially erases them from recognition.”⁴⁵⁶

In its narrow analysis of traditional and customary rights on Maunakea, the majority perpetuated the narrative—often proffered by those who take issue with Kānaka Maoli’s “recent” mobilization to protect Maunakea⁴⁵⁷—that traditional and customary practices have “co-existed” on the summit alongside astronomy for decades.⁴⁵⁸ In an act of erasure of Native Hawaiians, the *Mauna Kea II* majority concluded that since previous observatories had been “compatible”⁴⁵⁹ and “co-existed” with Native Hawaiian practices, so would the TMT.⁴⁶⁰

Native Hawaiians, publicly and through formal testimony, have sought to counter these narratives that falsely assume the compatibility of astronomical structures on sacred land and the ability for such developments to co-exist with Native Hawaiian culture.⁴⁶¹ Rather than remembering past observatories as compatible with the land and land-based cultural practices, Kia‘i’s stories reminded us that Kānaka Maoli consented neither to the existing observatories nor the TMT, nor did any of the telescope developers meaningfully consult with Native Hawaiians or involve Kānaka in the processes of developing these projects.⁴⁶²

Native Hawaiians seeking to protect Maunakea criticized that these developments never “co-existed” but have actually threatened cultural practices.⁴⁶³ And petitioners urged that the need for the *Mauna Kea II* case only existed because of the state’s unwillingness to listen to and recognize petitioners’ claims that observatories never co-existed with Native

⁴⁵⁶ *Id.*

⁴⁵⁷ Kealoha Pisciotta testified that the movement to protect Maunakea gained traction in the past decade as a result of “the perfect storm.” Pisciotta Testimony, *supra* note 295, at 4. After decades of legal challenges, public hearings, and heartfelt testimonies, Kia‘i used media to disseminate their message and start reshaping the public consciousness across Hawai‘i. *Id.*

⁴⁵⁸ *Mauna Kea II*, 143 Haw. at 302, 431 P.3d at 775.

⁴⁵⁹ *See id.* (finding that the TMT met the permit requirement under HAR § 13-5-24(c)(5) that “[t]he proposed land use . . . shall be compatible with the locality and surrounding areas”).

⁴⁶⁰ *See id.* at 302–03, 431 P.3d at 775–76.

⁴⁶¹ Written Direct Testimony of B. Pualani Case 1 (Oct. 11, 2016), *available at* <https://dlnr.hawaii.gov/mk/files/2016/10/B.21a-wdt-Case.pdf> [hereinafter Case Testimony]. “Nor did [scientists] ask permission to [build observatories/TMT] from the caretakers of that sacred place, and the mountain does have kahus.” *Id.*

⁴⁶² *Id.*

⁴⁶³ *Id.* at 1–4; Ward Testimony, *supra* note 347, at 14, 17–18.

Hawaiian traditions and customs on Maunakea.⁴⁶⁴ Kealoha Pisciotto lamented, “Native Hawaiians have watched the University repeatedly erect telescopes on Mauna Kea over and against their protests and patient explanations of the site’s sacred importance.”⁴⁶⁵ Others also recall their efforts over the past decades to “remed[y] the habitat loss, the repeated pollution accidents, the introduction of multiple alien predators and weeds, the permanent and irreversible alteration of the geologic terrain.”⁴⁶⁶ Time and again, however, Kia‘i’s pleas have fallen on the state’s deaf ears.⁴⁶⁷

In its unprecedented approach, the majority limited the scope of its analysis to the TMT’s specific footprint and curtailed protections for Native Hawaiian traditional and customary rights.⁴⁶⁸ The court’s narrative not only shapes how we remember history but also influences how history will be evaluated under the law, and how the law will apply to future cases. The court’s formalist approach⁴⁶⁹ ignored the broader context of this issue as well as the real-life impacts the court’s decision would inflict. This formalist approach separates legal rules from their political and social implications and is particularly easy for courts to employ.⁴⁷⁰ By stripping away the surrounding context, courts—and other decisionmakers—can readily replicate unjust laws as well as the stories (i.e., collective memories), flawed or not, that originally justified them.⁴⁷¹ The history transcribed by the court and the majority’s conclusion in *Mauna Kea II* illuminate the importance of collective memory in struggles for justice.⁴⁷² The controversy over Maunakea is a testament to the court’s power and readiness to “filter and twist, recall and forget ‘information’ in reframing shameful past acts (thereby lessening responsibility)” to also define and enact “justice” in a way that does not actually redress Native Hawaiians’ rights claims.⁴⁷³

⁴⁶⁴ See Ward Testimony, *supra* note 347, at 5.

⁴⁶⁵ Mauna Kea Anaina Hou Proposal, *supra* note 317, at 50 ¶ 253.

⁴⁶⁶ Ward Testimony, *supra* note 347, at 5.

⁴⁶⁷ See *id.*

⁴⁶⁸ See *Mauna Kea II*, 143 Haw. 379, 302–03, 431 P.3d 752, 775–76 (2018)..

⁴⁶⁹ Legal formalism is “a theory that legal rules stand separate from other social and political institutions. According to this theory, once lawmakers produce rules, judges apply them to the facts of a case without regard to social interests and public policy. In this respect, legal formalism differs from legal realism.” *Legal Formalism*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/legal_formalism.

⁴⁷⁰ See *id.*

⁴⁷¹ See Yamamoto et al., *supra* note 94, at 21; Hom & Yamamoto, *supra* note 5, at 1764–65.

⁴⁷² See *Mauna Kea II*, 143 Haw. at 302–03, 431 P.3d at 775–76.

⁴⁷³ See Hom & Yamamoto, *supra* note 5, at 1758.

The state’s intentional exclusion of the surrounding area ignored a history of Native Hawaiian customs and traditions involving Maunakea.⁴⁷⁴ Consequently, by looking only at the “application area” and holding that Native Hawaiian practitioners did not meet their burden to show the summit was essential for traditional and customary practices,⁴⁷⁵ the majority subverted the *Ka Pa‘akai* analysis and weakened protections for Native Hawaiians traditional and customary rights.⁴⁷⁶ This approach is contrary to the court’s analysis in *Ka Pa‘akai*, *Na Wai ‘Ehā*, and *Wai‘ola*, all three of which affirmed the state’s affirmative duty to adequately consider and protect Native Hawaiians rights.⁴⁷⁷

The majority’s legal conclusions derived, in large part, from the history the court itself constructed.⁴⁷⁸ Thus, by putting blinders on to avoid the surrounding summit area, the court relieved the state of its public trust duties, including the obligation to protect traditional and customary rights.⁴⁷⁹ The court’s holding that BLNR met its constitutional duties—despite the actual and potential implications of its decision (i.e., ignoring relevant cultural practices; limiting the scope of analysis in a way that favors development; irreversible damage to the summit environment and natural resources)—absolved the state of its duty all together.⁴⁸⁰

The majority abandoned the well-documented intent of Constitutional Convention delegates who sought to protect the “integral part[s] of ancient Hawaiian civilization” that are “retained by its descendants.”⁴⁸¹ And opposite its own precedent, the court “narrowly construed” and “ignored” Native Hawaiians rights enshrined in Article XII, section 7.⁴⁸² The court’s problematic framing of present-day cultural

⁴⁷⁴ See *Mauna Kea II*, 143 Haw. at 302–03, 431 P.3d at 775–76.

⁴⁷⁵ Hearing Officer Amano Proposal, *supra* note 273, at 242 COL 346. Misinterpreting the state’s affirmative duty to protect traditional and customary rights, Hearing Officer Amano incorrectly concluded that “Petitioners and Opposing Intervenors have not established by reliable, probative, substantial and credible evidence that their practices—whether characterized as contemporary, customary or traditional—will be adversely affected by the TMT Project.” *Id.*

⁴⁷⁶ *Mauna Kea II*, 143 Haw. at 322, 431 P.3d at 795 (Wilson, J., dissenting).

⁴⁷⁷ See *Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n*, 94 Haw. 31, 47–49, 7 P.3d 1068, 1084–86 (2000); *Nā Wai ‘Ehā*, 128 Haw. 228, 248–49, 287 P.3d 129, 149–50; *Wai‘ola*, 103 Haw. at 401, 424, 426, 83 P.3d at 664, 687, 689 (2004).

⁴⁷⁸ See generally *Mauna Kea II*, 143 Haw. 379, 431 P.3d 752.

⁴⁷⁹ See *id.* at 395–98, 431 P.3d at 768–71.

⁴⁸⁰ See *id.*

⁴⁸¹ See Hawaiian Affairs Comm., Standing Comm. Rep. No. 57, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 637, 640 (1980).

⁴⁸² See *id.*; see also *Pele Def. Fund v. Paty*, 73 Haw. 578, 619–20, 837 P.2d 1247,

practices as separate from those practiced by earlier Kānaka distorted the way traditions and customs have been perpetuated and passed down between generations of Kānaka Maoli.⁴⁸³ It presumed that traditional practices are frozen in the past, not “retained” in the present and for the future, and that the culture practiced by Native Hawaiians today is not legitimate and does warrant protection.⁴⁸⁴

Further, the court’s analysis drastically departs from principles that have guided it in evaluating these fundamental protections. As Native Hawaiians argue, and as previous cases have upheld, Native Hawaiian traditions and customs that are practiced have adapted, and must continue to adapt, to changing times.⁴⁸⁵ For instance, in *Palama v. Sheehan* (1968), the Richardson court upheld the exercise of rights along an ancient trail by vehicle rather than restricting use to horses and pedestrians as it was used around 1850.⁴⁸⁶ The Hawai’i Supreme Court also held in *PASH* that “notwithstanding arguable abandonment of a particular site, . . . traditional and customary practices remain[] intact[.]”⁴⁸⁷ Therefore, even if there was a gap in time between exercising these rights on Maunakea—as a result of “stresses . . . in the form of dispossession, displacement, legal and moral prohibition and more”⁴⁸⁸—“continuous exercise is not required[.]”⁴⁸⁹ Rather than interpreting these adaptations as traditions and customs that have been “retained”⁴⁹⁰ and “evolved over time[.]”⁴⁹¹ the majority’s construing these adaptations merely as “contemporary Native Hawaiian practices that derive from . . . traditional and customary rights” threatens extinguishing them.⁴⁹² “Affirming the continuation of traditional and

1271 (1992), *cert. denied* 507 U.S. 918 (1993).

⁴⁸³ See Kiyuna, *supra* note 156, at 2–5.

⁴⁸⁴ *Id.*

⁴⁸⁵ See *Palama v. Sheehan*, 50 Haw. 298, 440 P.2d 95 (1968).

⁴⁸⁶ See generally *id.*; see also Forman & Serrano, *supra* note 216, at 817 (discussing *Palama*); Native Hawaiian Amici Brief, *supra* note 431, at 7.

⁴⁸⁷ *PASH*, 79 Haw. 425, 450, 903 P.2d 1246, 1271 (1995). *PASH* qualifies its holding by including that “this right is potentially subject to regulation in the public interest.” *Id.*

⁴⁸⁸ Native Hawaiian Amici Brief, *supra* note 431, at 8.

⁴⁸⁹ *PASH*, 79 Haw. at 450, 903 P.2d at 1271.

⁴⁹⁰ See Hawaiian Affairs Comm., Standing Comm. Rep. No. 57, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 637, 640 (1980).

⁴⁹¹ Native Hawaiian Amici Brief, *supra* note 431, at 8.

⁴⁹² *Id.*; see *Mauna Kea II*, 143 Haw. 379, 385, 431 P.3d 752, 758 (2018).

cultural practice is useless if there are no actual protections provided for practitioners to continue their practices.”⁴⁹³

Taking everything into account, the court, in its analysis of traditional and customary rights exercised on Maunakea’s summit, reinscribed a colonial history into law and deployed those colonial narratives to justify ignoring its own precedent and changing the law itself to promote the development of the TMT on sacred land.⁴⁹⁴

C. *The majority failed to acknowledge the TMT controversy within the context of colonization and its lasting impacts for Kānaka Maoli.*

Kānaka Maoli relate the injustices of Maunakea back to a pattern of colonial “projects” developed in Hawai‘i. In contrast to the court’s extremely limited scope in evaluating “history” and Native Hawaiians’ rights to Maunakea, Kānaka—looking at the broader implications of colonization—understand this controversy as an episode in an ongoing series of injustices against Native Hawaiians. Kānaka Maoli’s collective memory of injustice of astronomy on Maunakea is therefore not just about Maunakea.⁴⁹⁵ The “ongoing violation of Hawaiians’ religious and cultural attachments to Mauna Kea is linked to colonial, systemic deprivation of self-determination that is materially detrimental to Native Hawaiian[s].”⁴⁹⁶

Kia‘i argued that the collective memory of Maunakea cannot be separated from many of the other past harms Native Hawaiians suffered as a result of colonization.⁴⁹⁷ Native Hawaiian musician and scholar Dr. Jonathon Osorio explained the state’s role in perpetuating the legacy of colonization in Hawai‘i:

Since the takeover of our country, we Kānaka Maoli have witnessed the steady and lately, spectacular erosion of our presence on the land that only [four] generations ago was exclusively ours. But of far greater concern, is that neither government nor public interests today effectively regulate the use of our lands in any meaningful way. To put this baldly, the lands of Hawai‘i have been offered up for speculation and to fuel expensive capital projects and neither environmental cautions [nor] community concerns [] have

⁴⁹³ Pisciotta Testimony, *supra* note 295, at 11.

⁴⁹⁴ *See generally Mauna Kea II*, 143 Haw. 379, 431 P.3d 752.

⁴⁹⁵ *See Mauna Kea Anaina Hou Proposal*, *supra* note 317, at 100 COL 1095.

⁴⁹⁶ *Id.*

⁴⁹⁷ *See, e.g., Ward Testimony*, *supra* note 347, at 18; Written Direct Testimony of Jonathan K. Kamakawiwo‘ole Osorio 2 (Oct. 10, 2016), *available at* <https://dlnr.hawaii.gov/mk/files/2016/10/B.07a-Osorio-WDT.pdf> [hereinafter Osorio Testimony]. Dr. Osorio is also the Dean of Hawai‘inuiākea School of Hawaiian Knowledge at the University of Hawai‘i Mānoa.

been able to balance the political trend away from the knee-jerk approvals of development Public resistance to the construction of the [TMT] on Mauna Kea must be understood within all of these historical contexts.⁴⁹⁸

Sharing a sentiment felt by many Kānaka Maoli, hula master and Maoli educator Dr. Pualani Kanaka‘ole Kanahale bemoaned the continued desecration of Maoli lands: “For the economy, we have given up all of our sacred spaces.”⁴⁹⁹

Thus, for Kānaka Maoli, challenging the TMT also means having to challenge that larger narrative concerning colonization, which, as demonstrated by *Mauna Kea II*, is often excluded by decisionmakers in considering present rights claims. Regardless, Native Hawaiians challenged the “racialized images inscribed in and reproduced through law that continue to foster systemic, present-day exclusion” of Kānaka Maoli in matters concerning Maunakea and other Maoli lands.⁵⁰⁰

VI. KŪ KIA‘I MAUNA: KĀNAKA MAOLI’S EFFORT TO PROTECT MAUNAKEA AND RESHAPE PREDOMINATING NARRATIVES

In their effort to bolster their familial, spiritual, and legal claims to Maunakea, Kia‘i testified before BLNR, the court, and the public to reshape the narrative that has paved the way for the approval of the TMT. Set against a backdrop of unresolved issues dating back to the beginnings of colonization, this battle—as well as “future disputes over land and development in Hawai‘i”—is happening “within a context of growing resentment of the state’s failure to protect vulnerable communities and willingness to ignore inconvenient regulations in its rush to approve sizable capital projects,”⁵⁰¹ as well as Native Hawaiians’ “increasing impatience with the state’s management of our [ancestral] lands.”⁵⁰²

With this controversy hinging on which collective memory prevails, *Mauna Kea II* is actually a conflict “between people who see the history and future of Hawai‘i very differently.”⁵⁰³ As Kānaka Maoli see it, the collective memory of Maunakea and Native Hawaiians will determine how Hawai‘i reconciles “a ruptured past, contentious present, and very uncertain

⁴⁹⁸ Osorio Testimony, *supra* note 497, at 2.

⁴⁹⁹ Ward Testimony, *supra* note 347, at 18.

⁵⁰⁰ See Serrano, *supra* note 115, at 425.

⁵⁰¹ Osorio Testimony, *supra* note 498, at 3.

⁵⁰² *Id.*

⁵⁰³ *Id.* at 1.

future.”⁵⁰⁴ Although Kānaka Maoli hoped the court might serve as a site of “cultural transformation” in this battle, the *Mauna Kea II* majority only reaffirmed colonizers’ narratives and the status quo.⁵⁰⁵ By purposefully narrowing the scope of its investigation of history, the court and “the legal process reinforce[d] inequality [and the] power imbalance” between Kānaka Maoli and the private interests that the state favored.⁵⁰⁶ Equally important, the court shared a public message that shapes larger societal understandings and policy actions over time.⁵⁰⁷

The court’s intentional framing of Maunakea’s narrative—justifying increased development on an already significantly, substantially, and adversely impacted sacred space and arbitrary limitations on Native Hawaiians’ traditional and customary rights—poses grave implications. The over-development of the kapu area would result in detrimental changes to the “environmental forms” of akua (i.e., the resources and elements on Maunakea), negatively affecting the landscape and changing the summit’s climate.⁵⁰⁸ With the deep connection Kānaka Maoli have with the mountain and its resources and elements that exist there, the “irreparable harm caused by the TMT Project will include . . . [p]sychological harms caused by the desecration of a [sacred] site[.]”⁵⁰⁹ Such harms, to “the feeling associated with sites and the cultural practices associated . . . cannot be mitigated.”⁵¹⁰

On a spiritual level, because Kānaka Maoli know Maunakea is an ancestor that must be cared for, the TMT would sever “connection[s] . . . between the ancestral and human realm. Information shared between us, and knowledge passed down ancestrally would be lost. Interaction between the mountain and the human would be diminished like a loss of a family member, and the death of a way of life.”⁵¹¹ Further desecration of the summit by the TMT “harm[s Native Hawaiians’] ability to transmit knowledge about who they are in relation to this place to future generations.”⁵¹² Thus, for present and future Kānaka, the TMT is a desecration to Maunakea that would “harm the ability of kānaka to be fully

⁵⁰⁴ *Id.*

⁵⁰⁵ See YAMAMOTO ET AL., RACE, RIGHTS, & REPARATIONS: LAW AND THE JAPANESE AMERICAN INTERNMENT 251 (2001).

⁵⁰⁶ Yamamoto et al., *supra* note 94, at 17–18.

⁵⁰⁷ See *id.* at 33–34 n. 53–54.

⁵⁰⁸ See Case Testimony, *supra* note 462, at 5.

⁵⁰⁹ Flores-Case Proposal, *supra* note 144, at 104–05 FOF 750.

⁵¹⁰ *Id.*

⁵¹¹ Case Testimony, *supra* note 462, at 6; Flores-Case Proposal, *supra* note 144, at 103 FOF 740.

⁵¹² Flores-Case Proposal, *supra* note 144, at 107 FOF 765.

kānaka.”⁵¹³ As explained by Maoli scholar and educator Dr. Noelani Goodyear-Ka‘ōpua,

Aloha ‘āina has been a practice of Kanaka Maoli survivance for generations, and it is based on the undretanding tht lands, incuding Mauna a Wākea, are familial kin . . . Kānaka Maoli are not just related to the land but are indeed part of it. The health of kānaka and their cultural identities is directly tied to the health of the land and is thus harmed when the ‘āina is harmed.⁵¹⁴

The TMT’s “irreparable harms” will extend to and impact future generations of Kānaka by “inhibit[ing] and harm[ing]” the “kuleana relationships between Kānaka Maoli and this Mauna” that Native Hawaiian practitioners and educators have been “trying to preserve and perpetuate[.]”⁵¹⁵

But the battle over Maunakea, and its collective memory, continues. Although their memory did not prevail in the Hawai‘i Supreme Court, the battle over Maunakea—and its collective memory—continued outside the state’s formal adjudicative processes.⁵¹⁶ Native Hawaiians have since looked beyond the court for ways to “publicize counter narratives that challenge dominant understandings, or master narratives” about Native Hawaiians and their justice claims.⁵¹⁷ While the majority opinion might be considered the “prevailing” collective memory, Kānaka Maoli’s most recent stand to protect Maunakea challenges that narrative in the public domain. To support their claims to Maunakea, Kānaka Maoli challenged the TMT at demonstrations across the Hawaiian archipelago and through a media campaign that reached international audiences and challenged mainstream narratives of Native Hawaiians.⁵¹⁸

A movement in the making, over 300 Kānaka Maoli—from Hawai‘i Island and beyond—mobilized in the early hours of July 17, 2019 to block the Mauna Kea Access Road and halt the TMT’s planned start of construction.⁵¹⁹ Some Kānaka Maoli chained themselves across

⁵¹³ *Id.*

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ See Yamamoto et al., *supra* note 94, at 21–25.

⁵¹⁷ See *id.*

⁵¹⁸ See *infra* notes 534–548 and accompanying text.

⁵¹⁹ Michael Brestovansky, *Dozens of Kupuna Arrested on Third Consecutive Day of TMT Protest*, HAW. TRIB.-HERALD (July 18, 2019), <https://www.hawaiitribune-herald.com/2019/07/18/hawaii-news/dozens-of-kupuna-arrested-on-third-consecutive-day-of-tmt-protest/>.

cattleguards, while others stood arm in arm.⁵²⁰ Kūpuna comprised the frontline of the blockade.⁵²¹ These Kia‘i committed to peacefully resist the state-sanctioned desecration while remaining in kapu aloha, a discipline “rooted in dignity and humanity” and a code of conduct that allow Kānaka Maoli, by acting only with love and kindness, to honor the sanctity of Mauna a Wākea.⁵²²

Denouncing Native Hawaiians’ actions as “lawlessness,” law enforcement, equipped with riot gear, confronted Kia‘i and arrested thirty-three Kūpuna, raising tensions among the broader community.⁵²³ That same day, Governor Ige declared a statewide proclamation of emergency “to ensure the execution of law [and] suppress or prevent lawless violence.”⁵²⁴ Highlighting the ongoing battle over collective memory of injustice, Governor Ige intimated that Kia‘i, the Native people of this land, were “illegally occup[ying]” space on the Mauna.⁵²⁵ The court’s decision—based on the selective history it inscribed—is, thus, also a “public message” that TMT supporters, including Governor Ige, can rely on to further deny justice to Native Hawaiians while simultaneously labelling them vagrants for violating the “rule of law.”⁵²⁶

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Kapu Aloha: A Guiding, Transformational, and Liberating Force*, PUUHONUA PUUHULUHULU (Sept. 23, 2019), <https://www.youtube.com/watch?v=AX7kTOHNjYU>. Andre Perez and Pualani Case describe kapu aloha as sacred conduct required of the sacred space they seek to protect. *Id.* Kapu aloha demands and interconnects honor, respect, and reverence not just to other people but to the entire surrounding environment. *Id.* On the mountain, it is used as a philosophy of non-violent direct action. *Id.* With kapu aloha as a guiding principle, Kia‘i “engage in civil resistance [while] demonstrating aloha for the opposition, for each other, and for their land.” *Id.*

⁵²³ Brestovansky, *supra* note 521. “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.” *OHA Statement on Today’s Arrest of Kūpuna and Others on Maunakea*, OFF. OF HAWAIIAN AFFS. (July 17, 2019), <https://www.oha.org/news/oha-statement-on-todays-arrest-of-kupuna-others-on-maunakea/>.

⁵²⁴ Proclamation, Office of the Governor, State of Hawai‘i (July 17, 2019), available at <https://governor.hawaii.gov/wp-content/uploads/2019/07/1907086-Mauna-Kea.pdf>. On July 30, 2019—after the state granted a 2-year extension of the CDUP deadline for initiation of construction—Governor Ige rescinded the emergency proclamation “because there are no immediate plans to move heavy construction equipment” to the proposed TMT site. Withdrawal of Proclamation, Office of the Governor, State of Hawai‘i (July 30, 2019), available at <https://governor.hawaii.gov/wp-content/uploads/2019/07/Withdrawal.pdf>.

⁵²⁵ See Proclamation, Office of the Governor, *supra* note 524.

⁵²⁶ See Yamamoto et al, *supra* note 94, at 21–25; Lorraine R. Inouye, *Inouye to Ige: It’s Time*, HAW. TRIB.-HERALD (Aug. 20, 2019), <https://www.hawaiitribune->

Uncritical of the majority's regressive opinion, TMT supporters, and other bystanders, claim that the rule of law justifies the harassment of Kia'i by law enforcement and the state. Their critiques—that Kia'i are over-emotional and stuck in the past—perpetuate tired “colonial tropes [that] point to the sense of American exceptionalism brought with the U.S. occupation of Hawai'i.”⁵²⁷ They “see irrational people who fail to see the unique opportunity TMT can provide to Hawai[‘i] and the world.”⁵²⁸ Emboldened by *Mauna Kea II*, they ask, “[i]f the legal process is thwarted by a vocal minority, what about the rule of law?”⁵²⁹ But, as Critical Race Theorists and Professors Mari Matsuda and Charles Lawrence III articulated, “settled law can give way when a committed minority heeds the justice call.”⁵³⁰

By taking their stand to protect Maunakea, despite criticisms relying on *Mauna Kea II* and the flawed narratives it impressed, Kia'i actively worked to reshape the collective memory of injustice of Maunakea and Kānaka Maoli. And despite the state's attempt to quash the movement along with Native Hawaiians' justice claims, the organized movement quickly grew.⁵³¹ Kia'i committed to living on the Mauna at Pu'uhonua o Pu'uhuluhulu for as long as necessary.⁵³² While braving the harsh climate

herald.com/2019/08/20/opinion/inouye-to-ige-its-time/ (“We cannot pick and choose. Laws must be followed, all laws, all the time . . . TMT has gone through unprecedented review . . . [B]locking the road, stopping TMT and shutting down astronomy will only impede these [essential human rights issues]—and further divide our community.”); Sherry Menor-McNamara, *Column: Stonewalling TMT Would Undermine the Rule of Law*, HONOLULU STAR ADVERTISER (Aug. 4, 2019) (“From a legal and regulatory process standpoint, the rule of law must stand. Undermining the integrity of our judicial system undermines our democracy . . . From a business and economic standpoint, certainty and fairness are key to doing business in Hawaii. Approved projects such as TMT have gone through the proper process and should not be stopped after the fact.”).

⁵²⁷ See Iokepa Casumbal-Salazar, *A Fictive Kinship: Making “Modernity,” “Ancient Hawaiians,” and the Telescopes on Mauna Kea*, U. OF MINN. PRESS, <https://www.upress.umn.edu/book-division/images/other-images/a-fictive-kinship-making-modernity-ancient-hawaiians-and-the-telescopes-on-mauna-kea>.

⁵²⁸ See Robert Kekuna, *Column: Stopping TMT Won't Help Hawaiians Much*, HONOLULU STAR ADVERTISER (Aug. 18, 2019) (“[W]hen I see [Kānaka Maoli] protesting . . . I see the accumulation of decades of pain, hurt and resentment, passed down through generations.”).

⁵²⁹ Charles Lawrence & Mari Matsuda, *Column: Civil Disobedience Has Changed the Law*, HONOLULU STAR ADVERTISER (Aug. 18, 2019).

⁵³⁰ *Id.* (“As Hawaii confronts a climate apocalypse we are woefully ill-equipped for, we face annihilation if we cannot learn kapu aloha and a new rule of law: one based on caring for the land and for one another. Instead of seeing protectors on the mountain as crazy Hawaiians, we should consider whether they bring a vision of law that will save our lives.”).

⁵³¹ *See id.*

⁵³² *See id.*; PU'UHONUA O PU'UHULUHULU, puuhuluhulu.com. Named after the

at an altitude over 6,000-feet, Kānaka Maoli quickly established a highly-organized community rooted in kapu aloha.⁵³³

With a “Mauna Media” team documenting the events at Pu‘uhonua o Pu‘uhuluhulu, the protectors were able to take control over framing how the public perceived what was happening on Maunakea and what led to Kānaka Maoli taking their stand to protect Maunakea in 2019.⁵³⁴ By posting the initial images and videos of Kia‘i chained to cattle grates and the live coverage of Kūpuna arrests, “[t]he peaceful dignity of these [Kia‘i] established the media frame for the following weeks” of the Kū Kia‘i Mauna movement.⁵³⁵ Soon after, news, information, and personal stories were disseminated directly from Kia‘i to the public through social media (i.e., Facebook, Instagram, and Twitter), YouTube videos, the Pu‘uhuluhulu website, press releases, and video recordings of near-daily announcements made by Kia‘i leaders.⁵³⁶

Not only did the media team “allow[] for rapid mobilization of [protectors,]” but it “spread awareness fast and without cost.”⁵³⁷ In this deliberate endeavor to confront pro-TMT narratives and to reshape the

Pu‘u (hill) on which it was established, the Pu‘uhonua was “established by Kia‘i with the support of the Royal Order of Kamehameha ‘Ekahi for the purpose of protecting sacred Maunakea.” *Id.* “Pu‘uhonua” are established places of refuge, sanctuary, and peace and safety. HAWAIIAN DICTIONARY, *supra* note 1, at 358.

⁵³³ PU‘UHONUA O PU‘UHULUHULU, *supra* note 532. Kia‘i established a code of conduct for the Pu‘uhonua; held protocol three times a day every day; orchestrated a rideshare system to transport people to and from the Mauna; guided visitors on scheduled tours of Pu‘u Huluhulu; offered free Pu‘uhuluhulu University courses taught by Maoli educators, practitioners, and other experts. *Id.* They organized designated hale (houses) for new visitor check-ins, meals that were served three times a day, medical services with medics on hand, and a “Kānaka Costco” stocked with warm clothes, sleeping bags, sunscreen, flashlights, and more. *See id.*; HAWAIIAN DICTIONARY, *supra* note 1, at 52. In addition to requiring “Kapu Aloha Always” and that Kia‘i “BE PONO[,]” this set of rules for the Pu‘uhonua also prohibited smoking, weapons, and alcohol and required consent for any pictures or videos taken. *Code of Conduct*, PU‘UHONUA O PU‘UHULUHULU, *supra* note 532.

⁵³⁴ Sterling Higa, *Sterling Higa: The Social Media Movement Behind the Mauna Kea Protests*, HONOLULU CIVIL BEAT (Aug. 8, 2019), <https://www.civilbeat.org/2019/08/sterling-higa-the-social-media-movement-behind-the-mauna-kea-protests/>.

⁵³⁵ *Id.*

⁵³⁶ *Id.* Sterling Higa describes the “concerted effort to control the narrative on social media probably contributes to the generational divide in public opinion, with older people supporting the telescope and younger people opposing it.” *Id.*

⁵³⁷ *Id.* This rapid mobilization and communication via social media allowed Kia‘i to garner support in ways that the movement might not have seen otherwise. *Id.* Those unable to travel to Maunakea sent on-the-ground Kia‘i money through Venmo or CashApp to help pay for food, water, and other necessary supplies. *Id.* And when Kia‘i, who were shuttling people to and from the Mauna, lacked money for car repairs, donors were quickly notified and just as quickly met those Kia‘i’s needs. *Id.*

enduring collective memory of Mauna Kea and Kānaka Maoli, Kia‘i filled the gap in the collective memory that neither local news outlets, which did “not have the resources to properly cover all of the resistance[,]”⁵³⁸ nor international news outlets, “much of which downplayed . . . Native Hawaiians’ range of concerns,”⁵³⁹ could accurately cover.⁵⁴⁰ Kia‘i and their media team “reveal[ed] . . . the severely misguided understanding of Native Hawaiian perspectives” held by journalists, local and international communities, the State, and the court.⁵⁴¹ Maoli activist Kawena Phillips explained, this movement and the concerted effort to confront and reshape these narratives central to the collective memory of injustice “is about telling the world that [Native] Hawaiians have a right to our own land, a voice in what happens to it, [and] a right to have people listen to and respect our wishes for our land.”⁵⁴²

Early news coverage of the events on Maunakea did not include the “history of litigation that has been ongoing for years around the Mauna, [or] the century-long fight of Native Hawaiians to be recognized, eventually culminating in an apology from the [United States] in 1993 for the forceful and illegal annexation of Hawai‘i.”⁵⁴³ But since then some mainstream news outlets have adopted the narrative that, “[a]s [Native] Hawaiian leaders have been stating for decades, this struggle is about ‘more than just [the TMT.]’”⁵⁴⁴ Articles published in mainstream outlets including *The New York Times*,⁵⁴⁵ *The Guardian*,⁵⁴⁶ and *USA Today*⁵⁴⁷ began to tell a collective memory of decades of Maoli opposition to development on Maunakea that had been ignored; the project’s damage to the ecology, the

⁵³⁸ Marisa Peryer, *Native Hawaiians on Coverage of Mauna Kea Resistance*, COLUM. JOURNALISM REV. (July 29, 2019), <https://www.cjr.org/opinion/mauna-kea-telescope-protest-hawaii.php>.

⁵³⁹ *See id.*

⁵⁴⁰ *See id.*

⁵⁴¹ *See id.*

⁵⁴² *See id.*

⁵⁴³ *Id.*

⁵⁴⁴ *See id.*

⁵⁴⁵ Meghan Miner Murray, *Why Native Hawaiians Are Protesting a Telescope*, N.Y. TIMES A-11 (July 23, 2019) (highlighting “prote[ctors]’ larger goal . . . to bring wider attention to their grievances about the state’s economic interests being given priority over Native Hawaiian cultural and land use rights”).

⁵⁴⁶ Michelle Broder Van Dyke, *‘A New Hawaiian Renaissance’: How a Telescope Protest Became a Movement*, GUARDIAN (Aug. 17, 2019), <https://www.theguardian.com/us-news/2019/aug/16/hawaii-telescope-protest-mauna-kea> (voicing concerns of Kia‘i on the ground at Pu‘uhonua o Pu‘uhuluhulu).

⁵⁴⁷ Lam, *supra* note 280 (describing Native Hawaiians’ claims to Maunakea in the context of the broader history of Hawai‘i’s illegal overthrow).

scenic viewplane, and the aquifer on the mountain; and Native Hawaiians’ enduring mistrust of the University.⁵⁴⁸ This largely unprecedented shift resulted from Kia‘i’s unwavering effort to reshape conversations about—and thus, the memory of—Maunakea and Native Hawaiians.

Kia‘i remained steadfast, and Kānaka Maoli supported the movement from afar. People and rights organizations from around the world rallied in support of the Kia‘i on Maunakea.⁵⁴⁹ High-profile celebrities, many with ties to Hawai‘i, visited the Mauna and shared their experiences and support via their own social media channels.⁵⁵⁰ Thousands gathered on neighbor islands, as well as across the continental U.S. and beyond, at rallies, benefit concerts, community town halls, and workshops.⁵⁵¹ Exasperated with the University’s compliance in the ongoing mismanagement Maunakea, Kia‘i sat in at Bachman Hall outside University of Hawai‘i President David Lassner’s office for more than a hundred days.⁵⁵² Other Kānaka Maoli held their own daily protocol ceremonies outside the Department of Hawaiian Homelands building in Kapolei, and eager communities gathered at trainings and workshops to learn about non-violent direct action and the stories and significance of the Mauna.⁵⁵³

In early 2020, after holding space on the Mauna for over six months, Kia‘i agreed with Hawai‘i County Mayor Harry Kim to vacate the access road, both to remain safe against the risks of COVID-19 and with the understanding that no TMT construction would proceed until at least the end of February 2020.⁵⁵⁴ Kia‘i leader Dr. Noe Noe Wong-Wilson called this

⁵⁴⁸ See, e.g., *id.*; Murray, *supra* note 545; Broder Van Dyke, *supra* note 546.

⁵⁴⁹ PU‘UHONUA O PU‘UHULUHULU, *supra* note 532. This included organizations including Amnesty International, the Council of the Native American and Indigenous Studies Association, the Asian Pacific American Labor Force. *Id.* Many grassroots community groups from abroad also visited Pu‘uhonua o Pu‘uhuluhulu in support of Kia‘i. *Id.*

⁵⁵⁰ See Ellie Nakamoto-White, *TMT Protestors Took to Social Media to Make Their Case—and Build Support Nationally*, HAW. NEWS NOW (Aug. 1, 2019), <https://www.hawaiinewsnow.com/2019/08/01/tmt-protesters-took-social-media-make-their-case-build-support-nationally/>.

⁵⁵¹ See Jenn Boneza, *More Than 10,000 March Through Waikiki to Support Mauna Kea and the Protection of Hawaiian Lands*, KHON2 (Oct. 5, 2019), <https://www.khon2.com/local-news/more-than-10000-march-through-waikiki-to-support-mauna-kea-and-the-protection-of-hawaiian-lands/>; Trisha Kehaulani Watson-Sproat, *Why Native Hawaiians Are Fighting to Protect Maunakea from a Telescope*, VOX (July 24, 2019), <https://www.vox.com/identities/2019/7/24/20706930/mauna-kea-hawaii>.

⁵⁵² Nicole Tam, *UH Manoa Students that Occupied Administration Building on Campus Packs Up*, KITV4 (Dec. 20, 2019), <https://www.kitv.com/story/41483827/uh-manoa-students-that-occupied-administration-building-on-campus-packs-up>.

⁵⁵³ See Pu‘uhonua o Pu‘uhuluhulu, @puuhuluhulu, <http://www.instagram.com/puuhuluhulu/>.

⁵⁵⁴ *Hawaii Telescope Protesters Leave Camp Due to Virus Concerns*, ASSOCIATED

“a victory for the protectors,” though Kia‘i continued to hold space on the sides of Mauna Kea Access Road.⁵⁵⁵ As of this writing, the TMT’s construction is still halted.

In what has become a 21st century “Hawaiian renaissance,” elders said that this type of movement was unprecedented.⁵⁵⁶ This renaissance illustrates that there is no master narrative or prevailing collective memory of the injustice of Maunakea and Native Hawaiians, despite colonizers’ efforts to cement their incomplete narratives as truth.⁵⁵⁷ On the contrary, the battle continues as Native Hawaiians challenge the narratives that have stood as barriers to achieving justice. Although colonizers’ narratives predominated for centuries, Kia‘i have begun reshaping the stories told about Maunakea and Kānaka Maoli in the courts, on social media, through public demonstrations and increased academic scholarship. Through all these efforts, Kānaka Maoli challenge the very narratives that deny them justice.

VII. LOOKING TO KA WĀ MA HOPE: THE FUTURE OF MAUNAKEA AND KĀNAKA MAOLI

Dr. Jonathon Osorio foresaw, as presented in his contested case testimony nearly four years ago, that “the renewal of the protest on the mountain, should the TMT prevail [in court] and try to resume construction, will shake the political foundations of the state.”⁵⁵⁸ Just as Dr. Osorio

PRESS (Mar. 27, 2020), <https://apnews.com/article/a1d2c1993c9df2981d5e192f21037cf1>.

⁵⁵⁵ Michael Brestovansky, *Protestors, Kim Reach Agreement to Reopen Maunakea Access Road*, HAW. TRIB.-HERALD (Dec. 27, 2019), <https://www.hawaii-tribune-herald.com/2019/12/27/hawaii-news/protesters-kim-reach-agreement-to-reopen-maunakea-access-road/>.

⁵⁵⁶ *Kapu Aloha: Remember Your Ancestors*, PU‘UHONUA O PU‘UHULUHULU (Sept. 13, 2019), <https://www.youtube.com/watch?v=adeqsmRgdyI> (“We’ve never experienced anything like this.”). In what became an island-wide movement sparked by this battle over Maunakea, Native Hawaiians across the pae ‘āina (archipelago) were emboldened by Aloha ‘Āina, similar to Kānaka of generations past, and mobilized against developments that threatened the integrity of their communities. Christine Hitt & Aaron K. Yoshino, *How the Conflict Over the Thirty Meter Telescope Has Reawakened a More-Than-Century-Old Battle*, HONOLULU MAG., <http://www.honolulumagazine.com/how-the-conflict-over-the-thirty-meter-telescope-has-reawakened-a-more-than-century-old-battle/> (“No matter where you stand on this issue, there is no question that widespread media coverage surrounding Maunakea has reinvigorated activism in the Hawaiian community and focused attention on other movements and protests across the state. On Sept. 26, 2019, 28 people were arrested while blocking construction equipment headed to a \$32 million proposed sports complex at Waimānalo’s Sherwood Forest. About three weeks later, 22 arrests were made in Kahuku and 33 in Kalaeloa after dozens of protesters tried to stop transportation of turbine equipment to the Nā Pua Makani wind farm project.”).

⁵⁵⁷ See *Kapu Aloha*, PU‘UHONUA O PU‘UHULUHULU, *supra* note 556.

⁵⁵⁸ Osorio Testimony, *supra* note 498, at 3–4.

predicated, Kānaka Maoli have done just that.⁵⁵⁹ Through investigating, criticizing, and correcting the inaccurate historical narratives deployed by the Hawai‘i Supreme Court and others in support of the TMT, Kānaka Maoli have illuminated their collective memory of injustice, one which sets the controversy shrouding Maunakea against a backdrop of colonization’s continued destruction to Maoli land (including Maunakea), Maoli people, and Maoli self-determination.

This battle over Maunakea is, at its heart, a battle over the collective memory of Maunakea and Kānaka Maoli and the injustices committed against them both. As Professor Yamamoto points out, “if we seek justice by claiming civil or human rights, we must at the outset critically engage the dynamics of group memory of injustice.”⁵⁶⁰ These group memories are “not about simply recalling past events” but rather they are constructed in the present—they are “built and continually altered.”⁵⁶¹ The collective memory cast by *Mauna Kea II*, only appearing to take into consideration Maoli voices and perspectives, justified the resulting curtailment of Native Hawaiian traditional and customary rights. By ignoring the purpose and intent behind Native Hawaiian traditions and customs on the Mauna, the court deemed that no “relevant” traditional and customary rights were ever exercised by Kānaka. According to the majority’s selective version of history—void of Native Hawaiians, of the continued resistance to development on Maunakea, and of the University and BLNR’s mismanagement of the summit’s resources, void of any discussion of the illegal overthrow—“justice” requires that the TMT, having gone through the “proper” legal process, ought to be built.⁵⁶²

Although the memories acknowledged by decisionmakers (i.e., BLNR, the *Mauna Kea II* court) typically dictate notions of justice, the legal process “is one, but only one, significant aspect” in shaping both collective memory and justice.⁵⁶³ Despite the court’s use of historical narratives that, in actuality, perpetuate colonization’s harms to Maunakea and Kānaka Maoli, Kia‘i and their allies have illuminated that the battle also “take[s]

⁵⁵⁹ *See id.*

⁵⁶⁰ Hom & Yamamoto, *supra* note 5, at 1764.

⁵⁶¹ *Id.*

⁵⁶² *See Mauna Kea II*, 431 Haw. 379, 431 P.3d 752 (2018). In discussing Native Hawaiians’ potential unjust enrichment claims, Harvard Law Review importantly argues that “choosing how to recount history can dictate the victor of a land dispute. *Aloha ‘Aina: Native Hawaiian Land Restitution*, 133 HARV. L. REV. 2148, 2151 (2020). Courts evaluating land claims by Native Hawaiians should trace earlier than the lease at hand, to the Overthrow of the Hawaiian Kingdom.” *Id.* Although *Mauna Kea II* did not address restitution claims, telling a complete history of Native Hawaiians and Maunakea, including the overthrow, remains nonetheless important in determining Native Hawaiians’ rights claims. *See id.*

⁵⁶³ Hom & Yamamoto, *supra* note 5, at 1765 (emphasis omitted).

place on the terrain of culture.”⁵⁶⁴ Through mass demonstrations, social media, and Maoli scholarship, art, and literature, Kānaka Maoli have increasingly controlled the stories told and retold about Maunakea, Native Hawaiians, and their justice struggles.

By taking control over the narrative, Kānaka Maoli have more fully and accurately portrayed the collective memory of injustice shrouding Maunakea, one that is not separate from the enduring injustices Native Hawaiians face as a result of colonization. Deploying collective memory as a political tool, Native Hawaiians also envision the Kū Kia‘i Mauna movement as a part of a larger movement to rectify colonization’s gravest harms, including global climate change and human rights violations against Indigenous Peoples. Through actively reshaping the collective memory of Hawai‘i’s past (“ka wā ma mua”), as Maoli Political Scholar and Professor Kamanamaikalani Beamer succinctly put, Native Hawaiians have “altered what’s possible in Hawai‘i and what’s possible” for Kānaka Maoli in “ka wā ma hope.”⁵⁶⁵

⁵⁶⁴ *Id.*

⁵⁶⁵ See Lam, *supra* note 280.