
ARTICLES

FRAMING RESTORATIVE ENVIRONMENTAL JUSTICE

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ABSTRACT

Framing is a powerful but unexamined tool in Native Peoples' legal battles for restorative environmental justice. This Article examines framing's potential to help Indigenous groups articulate complex cultural and environmental harms that necessarily challenge the political and economic status quo under U.S. colonization. Framing specific to Native Peoples is essential because decisionmakers often have little experience with restorative environmental justice in theory or practice, and laws and the legal process are often not neutral for Indigenous communities.

Drawing on interdisciplinary research, insights from the new legal realists, and a growing body of restorative environmental justice scholarship, this Article examines the legal advocacy of two groups of Kānaka Maoli (Native Hawaiian) farmers before Hawai'i's Commission on Water Resource Management to glean insights into framing Indigenous claims for biocultural resource restoration. These case studies illustrate the power and potential of framing rooted in Indigenous place-based knowledge, especially in the absence of politically and economically powerful countervailing interests. As discussed herein, restorative environmental justice framing has varied uses, including temporally shifting the narrative back in time to reveal the harms of ongoing resource theft and highlighting the compatibility of restorative environmental justice initiatives with existing laws.

Simultaneously, however, the case studies also demonstrate that framing is just one component of advocacy rooted in community co-powerment. The political landscape, favorable laws and regulations, a mobilized community, and competent, culturally adept decisionmakers are also essential to redress the

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theft of biocultural resources and engender na‘au pono (a deep sense of justice) for Kānaka Maoli and other Indigenous Peoples.

While not all states’ legal regimes are grounded in restorative justice as Hawai‘i’s are, broadening the historical context of an issue to expose the persisting environmental and cultural harms of colonization is widely applicable to Indigenous Pacific Islanders across Moananuiākea (the greater Pacific), Native communities on the North American continent, and allies across the globe fighting for a livable future. As the Fourth National Climate Assessment recognized, Indigenous stewardship practices are some of our best tools for adapting to the new climate reality. Native Peoples also have generational experience with protecting threatened resources in the face of government inaction and opposition, which is especially relevant today given the ongoing retrenchment of environmental protections. This Article aims to help facilitate the actualization of restorative environmental justice initiatives on the ground to step toward more just climate futurities for all.

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INTRODUCTION¹

Kānaka Maoli² cosmologies explain that our people are genealogically related to—and intimately a part of—the Hawaiian archipelago.³ Our creation chants record that, in the beginning, there was Pō, the primordial darkness from which all life and knowledge sprang forth.⁴ After our islands and all the plants and animals residing on and among them were born, Ho‘ohokukalani, the daughter of Papa (Earth Mother) and Wākea (Sky Father), gave birth to a stillborn child, Hāloanakalaukapalili.⁵ His body was buried outside, and a kalo (taro) plant grew from his grave.⁶ Ho‘ohokukalani soon had another child whom she named Hāloa to honor his elder brother.⁷ Hāloa was the first Kanaka Maoli and the progenitor of our Native Hawaiian people.⁸

In this way, our people, kalo, and the Hawaiian archipelago have a shared mo‘okū‘auhau (genealogy) that stretches back to the beginning of time and extends forth to future generations.⁹ This kinship engenders a kuleana (responsibility and privilege) to care for ‘āina (land and literally “that which

¹ In this Introduction, I start with an extended orientation to water stewardship in Hawai‘i, from its Indigenous origins through the state’s water law today, which is rooted in the traditional and customary Native Hawaiian stewardship practices that frame this Introduction. This extended orientation embodies the very framing technique proposed in this Article. Such framing accomplishes two tasks: First, it shifts the narrative back historically to reveal the harms of ongoing resource theft, and second, it highlights the compatibility of restorative environmental justice with existing laws. While not all states’ legal regimes are grounded in restorative justice, broadening the temporal context of an issue to reveal the persisting harms of biocultural resource theft is widely applicable.

² Kānaka Maoli are Native Hawaiians, the Indigenous Peoples of Hawai‘i. This Article uses “Kanaka Maoli,” “Native Hawaiian,” and “Hawaiian” interchangeably with no reference to blood quantum. “Kanaka Maoli” with no kahakō (macron) is singular, whereas “Kānaka Maoli” with a kahakō is plural.

³ See generally THE KUMULIPO: A HAWAIIAN CREATION CHANT (Martha Warren Beckwith ed. & trans., Univ. of Haw. Press 1972) (1951) [hereinafter THE KUMULIPO] (providing English translation of Kumulipo); THE ECHO OF OUR SONG: CHANTS AND POEMS OF THE HAWAIIANS 12-28 (Mary Kawena Pukui & Alfons L. Korn eds. & trans., 1973) (providing another cosmogonic genealogy with accompanying English translation).

⁴ THE KUMULIPO, *supra* note 3, at 42-49.

⁵ *Id.* at 50-120; BRANDY NĀLANI MCDUGALL, FINDING MEANING: KAONA AND CONTEMPORARY HAWAIIAN LITERATURE 87, 91 (2016) [hereinafter MCDUGALL, FINDING MEANING].

⁶ THE KUMULIPO, *supra* note 3, at 118; MCDUGALL, FINDING MEANING, *supra* note 5, at 91.

⁷ THE KUMULIPO, *supra* note 3, at 118.

⁸ *Id.*

⁹ See DOMINIQUE LEU CORDY & LILIA MERRIN, NOHOPAPA HAWAI‘I, I MANO KA WAI‘OLI: SUSTAINING THE JOYOUS WATERS, A CULTURAL IMPACT ASSESSMENT OF THE WAI‘OLI LO‘I KALO IRRIGATION SYSTEM, KAUA‘I MOKUPUNI, HALELE‘A MOKU, WAI‘OLI AHUPUA‘A, HANALEI KALANA 14 (2020) https://ccd45f47-7e22-405f-b6ee-7114a6df7f8c.filesusr.com/ugd/e24150_4de1c86e8d70475aa9d89d8096ae7536.pdf [<https://perma.cc/2CVY-7WW2>].

feeds”) and natural resources, including wai (fresh water), as kin.¹⁰ Aloha ‘āina, a foundational cultural precept, encapsulates the “complex, reciprocal relationship”¹¹ between Kānaka Maoli and our islands’ biocultural resources¹² and forms the foundation of Hawai‘i’s constitutional public trust doctrine today.¹³

In ancient times, Kānaka Maoli expressed aloha ‘āina in part by managing Hawai‘i’s biocultural resources “as a public trust for present and future generations.”¹⁴ To nourish the ‘āina and the lāhui (Hawaiian nation, people), Kānaka of old stewarded intricate lo‘i kalo (wetland taro complexes) that routed fresh, flowing water from streams through irrigated fields before returning that water to the streams of origin.¹⁵ Traditional and customary Native Hawaiian lo‘i kalo cultivation operationalizes the kuleana to care for Hawai‘i’s biocultural resources and embodies the reciprocal relationship with kalo, the elder sibling of all Kānaka Maoli.¹⁶

Though this vital cultural practice continues today,¹⁷ the arrival of Westerners in the late eighteenth century and the subsequent proliferation of plantation

¹⁰ E.g., NOENOE K. SILVA, *THE POWER OF THE STEEL-TIPPED PEN: RECONSTRUCTING NATIVE HAWAIIAN INTELLECTUAL HISTORY* 4 (2017); Kawika B. Winter et al., *Empowering Indigenous Agency Through Community-Driven Collaborative Management to Achieve Effective Conservation: Hawai‘i as an Example*, 27 PAC. CONSERVATION BIOLOGY 337, 340-41 (2021).

¹¹ D. Kapua‘ala Sproat, *An Indigenous People’s Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENV’T L.J. 157, 167-68 (2016) [hereinafter Sproat, *Environmental Self-Determination*].

¹² See Kamanamaikalani Beamer et al., *Reflections on Sustainability Concepts: Aloha ‘Āina and the Circular Economy*, SUSTAINABILITY, 2021, at 1, 2. Biocultural resources are natural resources, such as fresh water, land, or fauna, that are intertwined with Native Peoples’ cultural and physical identities.

¹³ D. Kapua‘ala Sproat & MJ Palau-McDonald, *The Duty to Aloha ‘Āina: Indigenous Values as a Legal Foundation for Hawai‘i’s Public Trust*, 57 HARV. C.R.-C.L. L. REV. 525, 539-45 (2022) (unpacking how Hawai‘i’s public trust doctrine reflects Native Hawaiian precepts).

¹⁴ Sproat, *Environmental Self-Determination*, *supra* note 11, at 168.

¹⁵ D. Kapua‘ala Sproat, *From Wai to Kānāwai: Water Law in Hawai‘i*, in NATIVE HAWAIIAN LAW: A TREATISE 522, 527 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua‘ala Sproat eds., 2015) [hereinafter Sproat, *Water Law*].

¹⁶ Wai‘oli Valley Taro Hui, Aia i Wai‘oli ke Aloha ‘Āina: Perpetuating Aloha ‘Āina in Wai‘oli Valley, Kaua‘i 26 (Apr. 20, 2021) (presentation, Haw. Comm’n on Water Res. Mgmt.), <https://files.hawaii.gov/dlnr/cwrms/submittal/2021/sb20210420C4.pdf> [<https://perma.cc/VZ33-DEDU>] (“[Wai‘oli Valley Taro Hui’s kalo farming] not only operationalizes the farmers’ kuleana to mālama ‘āina [care for the land] as a means of survival, but importantly, it actualizes their familial relationships and kuleana to Kānaka Maoli’s elder sibling: kalo.”).

¹⁷ E.g., D. Kapua‘ala Sproat, *A Question of Wai: Seeking Justice Through Law for Hawai‘i’s Streams and Communities*, in A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 199, 207-08 (Noelani Goodyear-Ka‘ōpua, Ikaika Hussey & Erin Kahunawaika‘ala Wright eds., 2014) [hereinafter Sproat, *A Question of Wai*] (discussing “rejuvenation of cultural practices” like kalo cultivation in Waiāhole on O‘ahu after streamflow restoration).

agriculture upended the traditional Hawaiian social-ecological system.¹⁸ Newly introduced diseases decimated the Native population, which declined from about one million people in 1778 to forty thousand by the end of the 1800s.¹⁹ Streams were diverted to irrigate plantation fields, and entire communities were—and still are—deprived of wai.²⁰ The lack of fresh water flowing ma uka to ma kai (mountain to sea) wreaks havoc on Hawai‘i’s ecosystems and makes traditional lifeways dependent on biocultural resources impossible.²¹

At the 1978 Constitutional Convention (“ConCon”), the people of Hawai‘i committed to healing this injustice by amending the state constitution to protect fresh water and all other natural resources as a public trust for present and future generations,²² just as our ancestors did.²³ Nearly a decade later, Hawai‘i’s Legislature created the Commission on Water Resource Management (“Water Commission”), an agency tasked with administering the newly enacted Water Code.²⁴ Today, the Water Commission, composed of seven Commissioners,²⁵

¹⁸ D. Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 143-45 (2011) [hereinafter Sproat, *Wai Through Kānāwai*] (recounting fresh water’s historical and cultural significance in context of proliferation of sugar plantations). Sugar is just one of a handful of successive industries that have dominated the Hawaiian Islands, though it has arguably had the most devastating effects on traditional lifeways and biocultural resources. See SUMNER LA CROIX, HAWAII: EIGHT HUNDRED YEARS OF POLITICAL AND ECONOMIC CHANGE 9-10 (2019) (examining sandalwood, coal, and sugar industries’ impacts on Hawaiian society and politics). The U.S. military’s annihilation of land and poisoning of freshwater resources has also had devastating impacts. See generally Sproat & Palau-McDonald, *supra* note 13.

¹⁹ LILIKALĀ KAME‘ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 81 (1992) (estimating there were at least 1,000,000 Kānaka Maoli prior to Western contact and explaining there was at least 80% decline in population in first forty-five years after Western contact); DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAII‘I ON THE EVE OF WESTERN CONTACT 78-80 (1989) (estimating Kānaka Maoli population prior to Western contact as well over 800,000).

²⁰ E.g., Sproat, *Wai Through Kānāwai*, *supra* note 18, at 143-44.

²¹ *Id.* at 143-45.

²² See HAW. CONST. art. XI, § 1.

²³ See Sproat, *Environmental Self-Determination*, *supra* note 11, at 168 (“This complex, reciprocal relationship was the foundation of traditional Kānaka Maoli society.”).

²⁴ See HAW. REV. STAT. § 174C-7 (2025). The amended constitution contemplated the establishment of the Water Commission and Water Code, though it was not supposed to take ten years to promulgate the Code and establish the Commission. HAW. CONST. art. XI, § 7. See generally WILLIAMSON B.C. CHANG, WATER CODE DEVELOPMENT IN HAWAII: HISTORY AND ANALYSIS, 1978-1987 (1987) (enumerating obstacles to promulgating Water Code).

²⁵ All Commissioners must have “substantial experience” in water resource management. HAW. REV. STAT. § 174C-7(b). The Chairperson of the Hawai‘i Department of Land and Natural Resources and the Director of the Hawai‘i Department of Health automatically sit on the Water Commission as *ex officio* members. *Id.* The Governor appoints the other five Commissioners from a list curated by a nominating committee. § 174C-7(b), (d). One of the appointed Commissioners must have “substantial experience or expertise in traditional Hawaiian water resource management techniques and in traditional Hawaiian riparian usage,”

and support staff including lawyers from the Hawai‘i Attorney General’s Office, hydrologists, and others, has primary authority over water use and allocation throughout Hawai‘i.²⁶

Justice, however, does not always flow from the Water Commission’s decisions.²⁷ Although traditional and customary Native Hawaiian rights are one of four constitutional public trust purposes,²⁸ the Water Commission and its counsel have historically struggled to fulfill their duties under the Water Code, especially when corporate and political pressures come to bear.²⁹ Although the Water Commission has recently entered a new era of scientifically based decision-making, constitutionally protected Native Hawaiian rights are still viewed by many as “handouts” and secondary to commercial and private interests.³⁰ On the ground, Kānaka Maoli communities partner with public interest firms³¹ and law school clinics³² to wage legal and political campaigns for access to fresh water, as the law prioritizes.³³

including water reservations for the Department of Hawaiian Home Lands, traditional and customary Native Hawaiian rights, and appurtenant rights. § 174C-7(b) (citing § 174C-101).

²⁶ HAW. REV. STAT. § 174C-7(a). The Hawai‘i Department of Health regulates water quality in coordination with the U.S. Environmental Protection Agency. §§ 174C-7(a), 174C-5(12), (13); 33 U.S.C. § 1251(d) (authorizing Environmental Protection Agency as administrator of federal water quality regulation).

²⁷ See Sproat, *Environmental Self-Determination*, *supra* note 11, at 212 (“[T]he Water Commission’s decisions . . . actually disservice the intended accommodation of indigenous interests and values.”).

²⁸ *In re* Water Use Permit Applications (*Waiāhole I*), 9 P.3d 409, 449 (Haw. 2000). The other trust purposes are water resource protection, domestic uses, and Department of Hawaiian Home Lands reservations. *In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Moloka‘i), Inc., 174 P.3d 320, 330 & n.6 (Haw. 2007). These prioritized trust purposes take priority over commercial uses under the Water Code. *Id.* at 330.

²⁹ E.g., Teresa Dawson, *Commission’s Order on Na Wai ‘Eha Baffles Its Most Experienced Member*, ENV’T HAW., July 2010, at 1, 5, 7; Sproat, *Wai Through Kānāwai*, *supra* note 18, at 133-34.

³⁰ See Sproat, *Water Law*, *supra* note 15, at 575-76.

³¹ Earthjustice, a nonprofit environmental law firm, has been instrumental in public trust litigation across Hawai‘i. *Mid-Pacific Office*, EARTHJUSTICE, <https://earthjustice.org/office/mid-pacific> [<https://perma.cc/69L8-3FWL>] (last visited May 28, 2026). Among numerous path-forging cases, Earthjustice attorneys, including Paul Achitoff, D. Kapua‘ala Sproat, and Isaac Moriwake, secured monumental rulings for Kānaka Maoli communities in Waiāhole Valley on O‘ahu, see *Waiāhole I*, 9 P.3d 409, and Nā Wai ‘Ehā in Central Maui, see *In re* ‘Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications (*Nā Wai ‘Ehā I*), 287 P.3d 129 (Haw. 2012).

³² The Native Hawaiian Rights and Environmental Law Clinics at the University of Hawai‘i at Mānoa, William S. Richardson School of Law, have worked alongside Kānaka Maoli communities for countless hours in various administrative proceedings regarding public trust resources, including in Wai‘oli Valley on Kaua‘i’s North Shore and Nā Wai ‘Ehā in Central Maui. See A. U‘ilani Tanigawa Lum, *Aia i Wai‘oli ke Aloha ‘Āina: Re-centering ‘Āina and Indigenous Knowledge for Restorative Environmental Justice*, 41 UCLA J. ENV’T L. & POL’Y 301, 330-31 (2023).

³³ See generally Sproat, *A Question of Wai*, *supra* note 17.

Framing is a powerful and underexamined tool in Native Peoples' legal battles for restorative environmental justice. Frames are "stories and explanations, deeply embedded in our thought patterns, about the way our society and the world work."³⁴ Throughout our lifetimes, our brains subconsciously create frames through tacit teachings from society and the media, as well as from our peers, caregivers, and other authority figures.³⁵ Every word is linked to one or more conceptual frames.³⁶ Because of this linkage, every word activates frames in the minds of readers and listeners.³⁷ Cognitive scientists have shown that, along with other factors, the frames we trigger shape decision-making.³⁸

This Article examines framing's potential to assist Native groups in persuasively articulating complex cultural and environmental harms to decisionmakers who possess little understanding of restorative environmental justice in theory or in practice.³⁹ Situated within a growing body of restorative environmental justice scholarship,⁴⁰ this Article builds on work of critical sociolegal scholars who have long recognized the value of stories, theme, and

³⁴ Bill Kennedy, Emily Fisher & Colin Bailey, *Framing in Race-Conscious, Antipoverty Advocacy: A Science-Based Guide to Delivering Your Most Persuasive Message*, 43 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 408, 411 (2010).

³⁵ *Id.* at 409.

³⁶ *Id.* at 411.

³⁷ GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE, at xv (Collette Leonard et al. eds., 2004).

³⁸ Kennedy et al., *supra* note 34, at 409.

³⁹ See generally *id.* (discussing importance of framing for race-conscious, antipoverty advocacy).

⁴⁰ E.g., Tanigawa Lum, *supra* note 32; Sproat & Palau-McDonald, *supra* note 13; Sproat, *Environmental Self-Determination*, *supra* note 11; Sproat, *Wai Through Kānāwai*, *supra* note 18; Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 355 (2001); MJ Palau-McDonald, *Blockchains and Environmental Self-Determination for the Native Hawaiian People: Toward Restorative Stewardship of Indigenous Lands*, 57 HARV. C.R.-C.L. L. REV. 395, 409 (2022).

narrative theory in all legal spaces—from law practice⁴¹ to law teaching,⁴² to movement building⁴³ and beyond.⁴⁴

In Part I, I first review scholarship from the fields of cognitive psychology and linguistics on framing theory. I then examine the impact of racial and ethnic stereotypes on framing Native Peoples' claims, drawing on Charles R. Lawrence III's foundational critical race scholarship and Albert Memmi's identification of the four discursive strategies central to the process of colonization. Then, through an examination of the district court's decision in *Rice v. Cayetano*,⁴⁵ I demonstrate how racial stereotypes can paradoxically both help and harm Indigenous groups' framing, depending on the content of the racialized frames and the context in which they are deployed.

In Part II, I delve into case studies of two groups of kalo farmers—the Wai'oli Valley Taro Hui and Hui o Nā Wai 'Ehā—before Hawai'i's Water Commission to glean insights into framing Indigenous claims for restorative environmental justice. This often involves the restoration of biocultural resources and traditional practices that are threatened or have been eradicated under the status quo of colonial subordination.⁴⁶ For both groups of farmers, the decision to frame their legal and social advocacy has been a defining factor in their

⁴¹ See generally Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N LEGAL WRITING DIRS. 1 (2010) (discussing double-blind study wherein judges found briefs with narrative elements more persuasive than briefs containing only logical reasoning); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING: J. LEGAL WRITING INST. 3 (2009); Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355 (2013).

⁴² See generally Stefan H. Krieger & Serge A. Martinez, *A Tale of Election Day 2008: Teaching Storytelling Through Repeated Experiences*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 117 (2010); Laurie Shanks, *Whose Story Is It, Anyway?—Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 CLINICAL L. REV. 509 (2008); Robert McPeake, *Fitting Stories into Professional Legal Education—The Missing Ingredient*, 41 L. TCHR.: INT'L J. LEGAL EDUC. 303 (2007).

⁴³ Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2278-91 (1992) (viewing storytelling as vital to liberationist teaching, scholarship, and activism); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2416-18 (1989) (discussing importance of counter-storytelling by outgroups in legal and political movements for social change). See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1992).

⁴⁴ See generally Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM'N & RHETORIC 99 (2012); Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883 (2010); Ruth Anne Robbins, *An Introduction to Applied Legal Storytelling and to This Symposium*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 3 (2008); LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996).

⁴⁵ 528 U.S. 495 (2000).

⁴⁶ For more information on Indigenous struggles for restorative environmental justice in the context of water resources, see OLA IKA WAI, <https://olaikawai.org> [<https://perma.cc/TJR3-CAKB>] (last visited May 28, 2026), and HUI O NĀ WAI 'EHĀ, <https://www.huionawaicha.org> [<https://perma.cc/2J4S-YLGT>] (last visited May 28, 2026).

successes. But, these case studies also demonstrate the limitations of framing, especially when faced with influential countervailing interests and entrenched settler colonial power dynamics.

The first case study recounts the Wai‘oli Valley Taro Hui’s efforts to restore their traditional and customary Native Hawaiian lo‘i kalo (wetland taro) irrigation system, which has been the cornerstone of their Halele‘a community on Kaua‘i’s North Shore since at least the 1500s.⁴⁷ Though the Wai‘oli farmers had always worked cooperatively to manage their water resources, they formally organized into a nonprofit in 2018, after devastating flooding wiped out their ancient irrigation system, which necessitated a coordinated disaster response.⁴⁸ During the rebuild process, however, the farmers learned that portions of their centuries-old system were on state-zoned conservation land,⁴⁹ which triggered a maze of legal requirements under the Water Code. While navigating these requirements, they faced a technicality that, if unchallenged, would impose additional legal requirements and leave their ancient system with less prioritization and protection under the law. To surmount the technicality, they framed their arguments to the Water Commission with ‘ike ku‘una (traditional knowledge), humbly demonstrating that their Indigenous stewardship practices, refined over generations, were the best way to manage Wai‘oli’s biocultural resources—the technicality in the Water Code’s western management framework notwithstanding.⁵⁰

And it *worked*. In an unprecedented decision, the Water Commission integrated the Wai‘oli Valley Taro Hui’s ancient stewardship practices into the agency’s management framework for the stream and lauded the farmers for uplifting their ancestral, place-based expertise. In this proceeding, the Commission fulfilled its constitutional public trust duties and moved closer to restorative environmental justice for the farmers and Wai‘oli’s biocultural resources.⁵¹ The Wai‘oli Valley Taro Hui’s success underscores that contextual framing has the potential to bolster Native claims, especially when restoration

⁴⁷ HAW. COMM’N ON WATER RES. MGMT., STAFF SUBMITTAL: DRAFT AMENDED INTERIM INSTREAM FLOW STANDARDS FOR THE SURFACE WATER HYDROLOGIC UNIT OF WAI‘OLI 3 (2021) (“Mo‘olelo, genealogical scholarship, Māhele documentation, and Native Testimony in support of Land Commission Awards in particular, establishes lo‘i use in Wai‘oli from the 1500s.”). For more information on the Hui and its work, see Tanigawa Lum, *supra* note 32.

⁴⁸ See, e.g., A. U‘ILANI TANIGAWA LUM, TERINA FA‘AGAU, DEVIN KAMEALOA FORREST & GLORIA LEILANI PALMA, WAI‘OLI VALLEY TARO HUI LONG-TERM WATER LEASE FOR TRADITIONAL LO‘I KALO CULTIVATION: FINAL ENVIRONMENTAL ASSESSMENT FINDING OF NO SIGNIFICANT IMPACT 31 (2021) [hereinafter FINAL ENVIRONMENTAL ASSESSMENT].

⁴⁹ *Id.*

⁵⁰ *Id.* In a foundational article on restorative environmental justice for Native Hawaiians and her work with the Wai‘oli Valley Taro Hui in particular, Kanaka Maoli legal scholar U‘ilani Tanigawa Lum notes ‘ike ku‘una “is not only a foundation for Hawai‘i’s laws, but a guiding tool to effectuate justice, as well.” Tanigawa Lum, *supra* note 32, at 314.

⁵¹ Tanigawa Lum, *supra* note 32, at 339-40; FINAL ENVIRONMENTAL ASSESSMENT, *supra* note 48, at 61.

of the resource does not restructure the status quo or impact politically powerful interests.

The second case study centers on Hui o Nā Wai ‘Ehā, a community group of kalo farmers in Central Maui who sought to protect and preserve traditional and customary Native Hawaiian practices for future generations in Nā Wai ‘Ehā—the Four Great Waters of Waihe‘e and Wailuku Rivers and Waiehu and Waikapū Streams, which flow from Mauna Kahālāwai (the West Maui mountains).⁵² Prior to Western contact, these legendary waters supported “the largest continuous area” of lo‘i kalo cultivation in Hawai‘i,⁵³ as well as thriving stream ecosystems and Kānaka Maoli communities.⁵⁴ But Hawaiian Commercial and Sugar Company (“HC&S”)⁵⁵ and its corporate successors have diverted Nā Wai ‘Ehā’s streams for the last 150 years.⁵⁶ While HC&S was in operation, the diversion systems drained the streams “almost completely dry to subsidize plantation agriculture.”⁵⁷ Now, since sugar cultivation has ceased, corporate successors use the same systems to sell water to offstream users including luxury estates built on former plantation land, continuing the obliteration of “natural ecosystems and cultures that relied upon free-flowing streams.”⁵⁸ In 2004, Hui o Nā Wai ‘Ehā and Maui Tomorrow Foundation teamed up with the environmental nonprofit law firm Earthjustice to petition the Water Commission to restore ma uka to ma

⁵² TY P. KĀWIKĀ TENGAN, REPORT ON THE ARCHIVAL, HISTORICAL AND ARCHAEOLOGICAL RESOURCES OF NĀ WAI ‘EHĀ, WAILUKU DISTRICT, ISLAND OF MAUI 1-2 (2007).

⁵³ *Id.* at 1 (quoting E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT 496 (Genevieve A. Highland ed., 1972)).

⁵⁴ *Id.* at 14-15.

⁵⁵ HC&S historically cultivated 35,000 acres of sugarcane, of which 3,950 acres (referred to as the Waihe‘e-Hopoi fields) were cultivated with Nā Wai ‘Ehā stream water. Hui o Nā Wai ‘Ehā, Maui Tomorrow Found., Inc. & Off. of Haw. Affs.’ Joint Opening Brief at 7, *In re* Surface Water Use Permit Applications, 550 P.3d 1167 (Haw. 2024) (No. SCOT-21-0000581) [hereinafter Hui o Nā Wai ‘Ehā, Maui Tomorrow & OHA Joint Opening Brief].

⁵⁶ Sproat, *Wai Through Kānāwai*, *supra* note 18, at 145. There are other powerful economic and political interests that use water from Nā Wai ‘Ehā streams, including MMK Maui, LP, Wailuku Country Estates, and the Maui County Department of Water Supply. MMK Maui, LP’s Reply Brief to Hui o Nā Wai ‘Ehā & Maui Tomorrow Found., Inc.’s Responsive Brief at 2, *In re* Surface Water Use Permit Applications, 550 P.3d 1167 (Haw. 2024) (No. SCOT-21-0000581) (arguing on behalf of MMK Maui, LP, that its request for 1.25 million gallons of water per day accurately reflects its needs); Opening Brief of Wailuku Country Ests. Irrigation Co. & Wailuku Country Ests. Cmty. Ass’n at 1-12, *In re* Surface Water Use Permit Applications, 550 P.3d 1167 (Haw. 2024) (No. SCOT-21-0000581) (explaining company’s various uses of water); Supporting the Petition to Designate Na Wai Eha as a Surface Water Management Area, Res. No. 07-13, Council of the Cnty. of Maui (2007) (noting need for government regulation to preserve water supply due to various companies’ diversions).

⁵⁷ Sproat, *Wai Through Kānāwai*, *supra* note 18, at 128.

⁵⁸ *Id.*

kai (mountain to sea) flow to Nā Wai ‘Ehā streams.⁵⁹ Nearly two decades of protracted litigation has ensued.

Like the Wai‘oli farmers, Hui o Nā Wai ‘Ehā has deployed masterful restorative environmental justice framing, and the community group has repeatedly prevailed before the Hawai‘i Supreme Court.⁶⁰ But they have not enjoyed resounding successes as the Wai‘oli farmers have. For the Nā Wai ‘Ehā streams, full compliance with administrative and judicial orders has remained elusive in the face of entrenched dynamics and powerful political and economic players. Compounding the problem, the Water Commission failed in its most recent decision to discharge its constitutional public trust duties.⁶¹

In Part III, I elucidate insights from these case studies—namely, that the farmers’ decades-long battles for water justice illustrate the power and potential of restorative environmental justice framing rooted in Indigenous place-based knowledge and stewardship. But, as Hui o Nā Wai ‘Ehā’s protracted legal battle demonstrates, even the most skillful framing will not be enough in the face of economically and politically powerful opposition and a status quo under which resource theft has been normalized through years of colonization. For these reasons, I conclude that framing should be characterized as just one fiber in the kaula (rope)⁶² of “lāhui lawyering”—advocacy rooted in community co-powerment.⁶³ The political landscape, favorable laws and regulations, a mobilized community, and competent, culturally grounded decisionmakers who understand the value of ancestral knowledge and have the courage to carry out their legal duties in politically charged situations are also essential to redress the theft of biocultural resources and other persisting wounds of settler colonialism.

⁵⁹ Hui o Nā Wai ‘Ehā & Maui Tomorrow Found., Inc.’s Petition to Amend the Interim Instream Flow Standards for Waihe‘e, N. & S. Waiehu, ‘Āao & Waikapū Streams & Their Tributaries at 1, *In re* Petition to Amend Interim Instream Flow Standards, 174 P.3d 320 (Haw. 2007) (No. 24856) [hereinafter 2004 IIFS Petition], <https://dlnr.hawaii.gov/cwrm/surfacewater/ifs/nawaieha> [<https://perma.cc/F582-7GS9>] (scroll to “Jun. 25, 2004” box; click “Part A: General Information”); Sproat, *Wai Through Kānāwai*, *supra* note 18, at 129-30.

⁶⁰ *In re* ‘Āao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications (*Nā Wai ‘Ehā I*), 287 P.3d 129, 145-64 (Haw. 2012).

⁶¹ *In re* Surface Water Use Permit Applications, Integration of Appurtenant Rts. & Amends. to Interim Instream Flow Standards (*Nā Wai ‘Ehā II*), 550 P.3d 1167, 1182, 1202-09 (Haw. 2024) (rejecting Water Commission’s 2021 decision, cited *infra* note 345).

⁶² This likening of restorative environmental justice work to a rope is a reference to Kanaka Maoli poet, artist, and musician Imaikalani Kalahele’s poem *Make Rope*. See IMAIKALANI KALAHELE, *Make Rope*, in KALAHELE 29, 31 (2002) (“[T]he Kaula of our people / is 2,000 years old / . . . / one by one / strand by strand / we become / the memory of our people / and / we still growing / so be proud / do good / and / make rope / boy / make rope.”).

⁶³ Tanigawa Lum explains that “[i]n contrast to ‘empowering’ communities, where one party holds power or authority to give to another, the idea of ‘co-power’ acknowledges that each party holds power that can support one another and that learning is relational and reciprocal.” Tanigawa Lum, *supra* note 32, at 317.

I. FRAMING

Framing is a communications tool rooted in cognitive psychology and linguistics that can be utilized as part of a cohesive litigation and community mobilization strategy.⁶⁴ Doing so may help Native groups persuasively articulate cultural and environmental harms for decisionmakers with little understanding of how the complicated web of constitutional duties, caselaw, and administrative regulations apply to Indigenous claims in practice.⁶⁵ As this Part demonstrates, understanding framing's role in legal proceedings is crucial because the laws and the legal process are often not neutral for Native communities, and racialized frames can paradoxically both help and hamper the decision-making process.⁶⁶

A. *Insights from Cognitive Psychology*

Framing theory, which arises from the fields of cognitive psychology and linguistics, “builds upon an understanding of the science of cognition that tracks how the brain processes information and prompts certain analytic frames through which facts are sorted.”⁶⁷ Frames, then, “are mental structures that shape the way we see the world.”⁶⁸ They are “networks of unconscious associations” created through tacit information transmitted by society and the media, as well as from our peers, caregivers, and other authority figures.⁶⁹ Every word is “defined relative to conceptual frames,” so “[w]hen you hear a word, its frame (or collection of frames) is activated in your brain.”⁷⁰ “[L]ike subconscious filing boxes,” the activated frames “allow[] us to sift through, sort, and organize the information we hear and come to a value judgment quickly.”⁷¹ They help guide the audience's attention and interpretation.⁷² And they shape decision-making, as cognitive scientists have shown that we unconsciously “reach conclusions

⁶⁴ Kennedy et al., *supra* note 34, at 411.

⁶⁵ See generally *id.* (discussing importance of framing for race-conscious, antipoverty advocacy).

⁶⁶ See Sproat, *Wai Through Kānāwai*, *supra* note 18, at 154-60; Sproat & Palau-McDonald, *supra* note 13, at 551.

⁶⁷ Kennedy et al., *supra* note 34, at 408; see also LAKOFF, *supra* note 37, at xv (introducing think tank convening specialists in cognitive science and linguistics to research progressive framing on social issues).

⁶⁸ LAKOFF, *supra* note 37, at xv. Frames have also been described as “stories and explanations, deeply embedded in our thought patterns, about the way our society and world work.” Kennedy et al., *supra* note 34, at 411.

⁶⁹ See Kennedy et al., *supra* note 34, at 410 (providing examples of “national myths learned in our high school history class” and “implicit messages and false baselines about criminality embedded within the local evening news” as examples of frames shaping our view of how world works).

⁷⁰ LAKOFF, *supra* note 37, at xv.

⁷¹ Kennedy et al., *supra* note 34, at 411.

⁷² *What's in a Frame?*, FRAMEWORKS INST. (July 16, 2020) [hereinafter *What's in a Frame?*], <https://www.frameworksinstitute.org/article/whats-in-a-frame> [<https://perma.cc/4DSA-AJD2>].

based on a whole host of factors, including the order in which that information is presented, who does the presenting, and what values, metaphors, and frames precede the presentation of facts.”⁷³

FrameWorks Institute has spent over two decades conducting interdisciplinary research on framing for social change.⁷⁴ Its researchers identified a dozen elements, or “significant framing decisions,” that affect how any given communication is understood and interpreted.⁷⁵ For example, context “sets the scene” for the communication and “illuminates—or, by omission, obscures—the environmental conditions and social factors that give meaning to people’s actions and experiences.”⁷⁶ The amount of context provided in a communication can broaden or narrow the discussion.⁷⁷ The tone of a communication, as well as its messenger, are also frame elements.⁷⁸ An aspirational tone, as opposed to a judgmental or argumentative one, helps garner widespread support and “convey[] that the message is for ‘everyone,’ not just those who already share the expressed point of view.”⁷⁹ Effective messengers—whether people or institutions—have perspectives that appear unbiased, reliable, and trustworthy.⁸⁰ Other frame elements include explanatory chains,⁸¹

⁷³ Kennedy et al., *supra* note 34, at 409.

⁷⁴ See FRAMEWORKS INST., ANNUAL IMPACT REPORT 2025, at 4 (2025), <https://www.frameworksinstitute.org/impact-stories/frameworks-annual-report-2025> [<https://perma.cc/RL7T-UY8V>].

⁷⁵ *What’s in a Frame?*, *supra* note 72.

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *Id.*

⁷⁹ *Id.*; see also Delgado, *supra* note 43, at 2429-35 (contrasting two examples of counter-storytelling which both respond to institutional narratives but differ, in part, through tone used).

⁸⁰ *What’s in a Frame?*, *supra* note 72.

⁸¹ Explanatory chains “connect the dots” for the audience. *Id.* Each explanatory chain “offers a sequence of ideas, or series of steps in a process,” that links an underlying issue with its visible symptoms. *Id.* They also use causal phrases, such as “which leads to” or “because of,” to prevent the audience from drawing on their own preconceptions when confronted with information gaps. *Id.*

explanatory examples,⁸² explanatory metaphors,⁸³ narrative,⁸⁴ numbers,⁸⁵ order,⁸⁶ solutions,⁸⁷ values,⁸⁸ and visuals.⁸⁹

Because frames subconsciously shape decision-making,⁹⁰ framing is often deployed in marketing to sell products and in politics to generate support.⁹¹ George Lakoff, a cognitive linguist and framing expert, describes the paradigmatic example of the second Bush Administration's strategic framing of

⁸² Explanatory examples “depict particular instances within a general pattern, or specific cases that represent a broader trend,” to “make the possibility of change more relatable and plain to see.” *Id.* For example, communications from advocates for restorative environmental justice who seek the co-management of biocultural resources between a Native group and a state or private entity should use specific, real-world explanatory examples of successful co-management regimes, such as the partnership between the Wai’oli Valley Taro Hui and the Water Commission, discussed *infra* Section II.A.

⁸³ Explanatory metaphors help the audience understand “abstract, unfamiliar, or misunderstood” concepts, systems, or processes by comparing them to something familiar. *What’s in a Frame?*, *supra* note 72.

⁸⁴ Narrative is defined here as a “collection of stories that all follow a similar arc,” with each story in the collection featuring a “beginning, middle, and end, and (whether stated or implied) a recurring set of characters, scenery, and plot.” *Id.* Through repetition, the narrative “can become embedded in culture,” thus “serving as a template for new stories and advancing a world view.” *Id.*

⁸⁵ Numbers “quantify some aspect of an issue. They can help explain the size and scope of a challenge, or the scale of response that is necessary.” *Id.* Numbers, however, are also easy to misinterpret, so they “work best when used to reinforce a message explicitly stated in words, rather than left to stand alone.” *Id.*

⁸⁶ The order of components in a communication is also important because it “taps the power of priming: the way our response to information is shaped by what we encountered just before it.” *Id.*

⁸⁷ Incorporating solutions, defined here as “proven or promising approaches to improving a situation,” is also important because they increase the audience’s feelings of capability and goal attainability. *Id.*; see also *Don’t Feed Fatalism . . . Put Forward Solutions Instead*, FRAMEWORKS INST. (June 6, 2020), <https://www.frameworksinstitute.org/article/dont-feed-fatalism-put-forward-solutions-instead> [<https://perma.cc/JQ4S-GZ5B>].

⁸⁸ Values are widely held “cherished ideals or deep-seated principles.” *What’s in a Frame?*, *supra* note 72. They can “invite civic thinking about social issues—helping us all see why we should care about them, and what’s at stake.” *Id.* Moreover, they are “especially effective tools for introducing a topic because they prime people to adopt a ‘common good’ mindset from the start, and then keep an open mind about the message that follows.” *Id.*

⁸⁹ Visuals are images, like photographs and illustrations, that “work hand-in-hand with other frame elements, such as context and tone,” and reinforce the overall framing strategy. *Id.*

⁹⁰ LAKOFF, *supra* note 37, at xv; see also Delgado, *supra* note 43, at 2416-17 (“Narrative habits, patterns of seeing, shape what we see and that to which we aspire. These patterns of perception become habitual, tempting us to believe that the way things are is inevitable, or the best that can be in an imperfect world. Alternative visions of reality are not explored, or, if they are, rejected as extreme or implausible.” (footnotes omitted)).

⁹¹ Kennedy et al., *supra* note 34, at 408; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1451-52 (1999) (discussing importance of framing in food marketing).

tax cuts for the wealthy as *tax relief*.⁹² Lakoff explains that the word *relief* triggers an image of “an afflicted party, and a reliever who removes the affliction and is therefore a hero. And if people try to stop the hero, those people are villains for trying to prevent relief.”⁹³ In turn, adding *tax* to *relief* creates a metaphor: “Taxation is an affliction. And the person who takes it away is a hero, and anyone who tries to stop him is a bad guy.”⁹⁴ The Bush Administration deployed this frame in press releases and communications, and news outlets across the political spectrum soon began to use the phrase.⁹⁵ The conservative framing of *tax relief* thus ensnared national discourse about any version of a tax plan.⁹⁶

Lakoff explains that progressives “sho[t] themselves in the foot” by reflexively adopting the conservative frame, as there were other metaphorical ways for progressives to talk about taxes.⁹⁷ For example, they could have framed taxes as an *investment in the future*.⁹⁸ America’s infrastructure—including transportation and communications systems, as well as the entire scientific and medical establishments—was financed by prior generations’ taxes.⁹⁹ This metaphor could have been repeatedly deployed through a multipronged communications strategy, and, “[e]ventually, the frame would be established: Taxes are wise investments in the future.”¹⁰⁰

As the dueling frames of *tax relief* versus *taxes are a wise investment* illustrate, framing “is about getting language that fits your worldview,”¹⁰¹ and using the evocative language to carry your ideas to decisionmakers.¹⁰²

B. *Racialized Frames*

Not all frames are so benign as Lakoff’s *tax relief* example, however. Racial stereotypes pose a unique problem for framing Native Peoples’ restorative justice claims because these stereotypes are intertwined with colonial power dynamics¹⁰³ and are therefore deeply ingrained within decisionmakers’ subconscious minds.

⁹² LAKOFF, *supra* note 37, at 3-4.

⁹³ *Id.* at 3.

⁹⁴ *Id.* at 4.

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ *Id.* at 4, 24-25.

⁹⁸ *Id.* at 24-25.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 25.

¹⁰¹ *Id.* at 4.

¹⁰² *Id.*

¹⁰³ *See* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 200 (2001).

The deployment of racial stereotypes is central to colonialism.¹⁰⁴ Palestinian-American scholar Edward Said explained:

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. . . . The power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them.¹⁰⁵

For Indigenous communities, Said's insights are particularly relevant because inaccurate narratives about Native Peoples and their relationship to colonial powers are often fabricated and mutated to justify land dispossession, resource exploitation, cultural containment,¹⁰⁶ and eventual cultural annihilation through assimilation and genocide.¹⁰⁷

¹⁰⁴ E.g., ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 7-9 (Howard Greenfeld trans., Beacon Press 1969) (1967) [hereinafter MEMMI, *COLONIZER AND THE COLONIZED*]; see also CANDACE FUJIKANE, *MAPPING ABUNDANCE FOR A PLANETARY FUTURE: KANAKA MAOLI AND CRITICAL SETTLER CARTOGRAPHIES IN HAWAII* 10-12 (C.M. Kaliko Baker ed., 2021) (surveying scholarship on settler colonialism in Hawai'i context); SASHA DAVIS, *THE EMPIRES' EDGE: MILITARIZATION, RESISTANCE, AND TRANSCENDING HEGEMONY IN THE PACIFIC* 105 (2015) ("Colonialism and militarization are responsible for producing not only the built landscapes of the island but also tourist and conservation-friendly landscapes deemed to be 'natural.'"); Coffey & Tsosie, *supra* note 103, at 200-01.

¹⁰⁵ EDWARD W. SAID, *CULTURE AND IMPERIALISM*, at xii-xiii (1994); see also ALBERT MEMMI, *DOMINATED MAN: NOTES TOWARDS A PORTRAIT 186-94* (1968) [hereinafter MEMMI, *DOMINATED MAN*] (discussing narrative strategies in relation to colonialism); Refaat Alareer, *Gaza Asks: When Shall This Pass?*, in *LIGHT IN GAZA: WRITINGS BORN OF FIRE* 15, 20 (Jehad Abusalim, Jennifer Bing & Michael Merryman Lotze eds., 2022) ("Writing is a testimony, a memory that outlives any human experience, and an obligation to communicate with ourselves and the world. We lived for a reason, to tell the tales of loss, of survival, and of hope."); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1267 (1993) (noting, in relation to critical race scholarship's tendency to focus on "black-white racial paradigm" that functions to erase Asian Americans, "[n]arrative will allow us to speak our oppression into existence, for it must first be represented before it can be erased").

¹⁰⁶ See Tanigawa Lum, *supra* note 32, at 334-38 (discussing inherent problems with decisionmakers "defining and 'authenticating' traditional and customary practices" in adjudication of Indigenous claims for restorative environmental justice).

¹⁰⁷ See, e.g., Coffey & Tsosie, *supra* note 103, at 200-01; see also Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 482 (2017) ("Indeed, the very recounting of this history—who tells it, how it is told, which stories are shared, the nuances and complexities, the language used—can enlighten, restore, and inspire healing and reconciliation. Or, incite destruction."); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 262-77 (1989) (examining narratives of American Indian inferiority and non-assimilability); David Barnard, *Law, Narrative, and*

Racialized framing is especially potent because, as Charles R. Lawrence III explains, U.S. society has cultivated a “common historical and cultural heritage in which racism has played and still plays a dominant role.”¹⁰⁸ This “shared experience” means that “we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites.”¹⁰⁹ In this way, decisionmakers are “unaware” that the “ubiquitous presence of a cultural stereotype has influenced [their] perception” that a certain ethnic or racial group are, for example, violent, unintelligent, or passive.¹¹⁰ In turn, decisionmakers often fail to “recognize the ways in which [their] cultural experience ha[ve] influenced [their] beliefs about race or the occasions on which those beliefs affect [their] actions.”¹¹¹

Albert Memmi, a Tunisian Jew living under French colonial rule and one of the foremost post-colonial scholars,¹¹² examined the centrality of racial stereotypes to the process of colonization and identified four discursive strategies the colonizer deploys to justify his domination of a Native

the Continuing Colonialist Oppression of Native Hawaiians, 16 TEMP. POL. & C.R. L. REV. 1, 26-34 (2006) (analyzing colonial narratives of Native Hawaiians).

¹⁰⁸ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) [hereinafter Lawrence, *Unconscious Racism*]; see also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988) (“[R]acism is a central ideological underpinning of American society.”). I understand that Lawrence’s central focus in *The Id, the Ego, and Equal Protection* was not individual bias, although some incorporating cognitive psychology into legal scholarship have interpreted his seminal piece in that way. See, e.g., Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 938 (2008) (noting scholars “often read and cite the article for its introduction of the theories and science of unconscious motivation to the discussion of equal protection doctrine”). Rather, as Lawrence explains in *Unconscious Racism Revisited*, he was “most concerned with exploring how white supremacy is maintained not only through the intentional deployment of coercive power, but also through the creation, interpretation, and assimilation of racial text.” *Id.* at 939. Though this Article incorporates insights from cognitive psychology, I mean to cite Lawrence for his structural observations and am loath to further “sample[], chop[], and screw[]” his song. See *Critical Race Theory: A Conversation Among Kimberlé Williams Crenshaw, Cheryl Harris, James Forman, Jr., and Camille Nelson*, 44 U. HAW. L. REV. 455, 461 (2022) (interpreting Charles Lawrence III’s work in *Unconscious Racism* as asserting “maintenance of white supremacy depends upon its shape-shifting qualities that are structured through racial text”).

¹⁰⁹ Lawrence, *Unconscious Racism*, *supra* note 108, at 322.

¹¹⁰ See *id.* at 323; see also Justin D. Levinson, Koichi Hioki & Syugo Hotta, *Implicit Bias in Hawai‘i: An Empirical Study*, 37 U. HAW. L. REV. 429, 436-48 (2015); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 402 (2007); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1211-16 (1995).

¹¹¹ Lawrence, *Unconscious Racism*, *supra* note 108, at 322.

¹¹² Williams, *supra* note 107, at 261.

community.¹¹³ Memmi posits that the colonizer knows his privileged position depends on the continued subjugation of the colonized.¹¹⁴ The colonizer understands that he wields illegitimate power because he tore down pre-existing laws and social structures to establish his own.¹¹⁵ The colonizer must then legitimize his privilege by justifying the oppression of the colonized.¹¹⁶ He accomplishes this partly through racist discourse that “portray[s] the colonized as so backward and primitive that they deserve their subordinate position.”¹¹⁷

The process of constructing histories about Pacific Islanders and Kānaka Maoli in particular is evident in the West’s written record.¹¹⁸ Monogenetic Enlightenment thinkers¹¹⁹ viewed Pacific Islanders as the “last major piece” of the “philosophical and scientific jigsaw” of human hierarchy.¹²⁰ These thinkers’ views on race “were deeply shaped by the ideas that had already solidified from other colonial ventures.”¹²¹ In particular, prior to contact with Pacific Islanders, Westerners had mapped a “split between the Indians of the New World and

¹¹³ See MEMMI, DOMINATED MAN, *supra* note 105, at 186; see also MEMMI, COLONIZER AND THE COLONIZED, *supra* note 104, at 7-9.

¹¹⁴ MEMMI, COLONIZER AND THE COLONIZED, *supra* note 104, at 8-9; see also Brief for Japanese Am. Citizens League of Hawai‘i-Honolulu Chapter et al. as Amici Curiae Supporting Defendant-Appellees’ Petition for Rehearing *En Banc*, Doe v. Kamehameha Schs./Bernice Pauahi Bishop Est., 470 F.3d 827 (9th Cir. 2006) [hereinafter Brief for JACL et al.] (applying Memmi’s framework in Hawai‘i context).

¹¹⁵ MEMMI, COLONIZER AND THE COLONIZED, *supra* note 104, at 9.

¹¹⁶ *Id.* at 4, 7-9; MEMMI, DOMINATED MAN, *supra* note 105, at 186 (noting one element is “[j]ustifying any present or possible aggression or privilege”).

¹¹⁷ Barnard, *supra* note 107, at 15 (citing MEMMI, COLONIZER AND THE COLONIZED, *supra* note 104, at 24-25); Brief for JACL et al., *supra* note 114; see also Delgado, *supra* note 43, at 2438 (“The dominant group justifies its privileged position by means of stories, stock explanations that construct reality in ways favorable to it.”).

¹¹⁸ Brief for JACL et al., *supra* note 114; Barnard, *supra* note 107, at 26-34 (examining discursive techniques in Western descriptions of Native Hawaiian society, Māhele process, illegal overthrow of sovereign Hawaiian Kingdom, annexation, and removal of Hawai‘i from United Nations’ list of Non-Self-Governing Territories); see also Coffey & Tsosie, *supra* note 103, at 201 (discussing racist stereotypes of American Indians embedded in U.S. law).

¹¹⁹ Monogenism regards all humanity as descendants of a single species, whereas polygenism views Europeans and non-Europeans as distinct species. Both views presume European superiority over non-Europeans. During the Enlightenment era, proponents of monogenism included Charles de Brosses, Pierre Louis Moreau de Maupertuis, and Comte de Buffon. Voltaire subscribed to the polygenetic view. Tom Ryan, *‘Le Président des Terres Australes’: Charles de Brosses and the French Enlightenment Beginnings of Oceanic Anthropology*, 37 J. PAC. HIST. 157, 166 (2002).

¹²⁰ *Id.* at 167.

¹²¹ MAILE ARVIN, POSSESSING POLYNESIANS: THE SCIENCE OF SETTLER COLONIAL WHITENESS IN HAWAI‘I AND OCEANIA 38 (2019).

Africans.”¹²² Under this split, Indians were seen as “fully human and capable of being civilized, whereas Africans were inferior and appropriately enslaved.”¹²³

As Kanaka Maoli scholar Maile Arvin has demonstrated, Westerners mapped this split onto the Pacific as they began to colonize the region in the 1700s, “reinvigorating the noble Indian and the enslavable African stereotypes.”¹²⁴ This was exemplified by the later carving of the Pacific into four pseudo-scientific regions: Polynesia, Micronesia, Malaysia, and Melanesia.¹²⁵ Polynesian men “replaced Hurons, Mohicans, and Iroquois in Enlightenment philosophy as idealized figures of natural man and warrior chiefs,”¹²⁶ whereas Polynesian women were cast as “sexualized, classical figures such as sirens or nymphs.”¹²⁷ These characterizations simultaneously incorporated “Polynesian” Kānaka Maoli into Europe’s classical lineage, while also subordinating them based on their “primitive” culture.¹²⁸ On the other hand, Melanesians were characterized as “savage, black, and cannibalistic” in line with the African stereotype.¹²⁹

Throughout the 1800s, Western anthropologists increasingly looked for a scientific explanation to fit Polynesians into constructed racial hierarchies.¹³⁰ Their studies “represent[ed] Polynesians as ‘settlers,’” who were “analogous to European settlers” and “argued that Polynesians, in stark contrast to the more tribal, savage Melanesians, were ancestrally related to classical ‘European’ civilizations, including, in different accounts, Egyptians, Greeks, and Aryans.”¹³¹ In other words, Polynesians, and Kānaka Maoli in particular, were viewed as “almost white,” whereas Melanesians were cast as Black.¹³² But this fictitious genealogical connection between “almost white” Polynesians and Europeans “did not mean that Polynesians were seen as identical or equal to Europeans—far from it.”¹³³ Instead, Westerners were “interested in delineating racial distinctions in order to rank Polynesians as inferior to white settlers who

¹²² *Id.* at 38.

¹²³ This split was “epitomized by the Valladolid debates between Bartolomé de las Casas and Juan Ginés de Sepúlveda in 1550-51.” *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 39.

¹²⁶ *Id.* at 38.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 38-40. The representations of “black, savage, tribal, violent, and physical” Pacific Islanders, Dr. Tracey Banivanua-Mar explains, “were intimately related to the colonial project of constructing and containing a colonizable, oppressable, and exploitable object and were more than just a set of haphazardly similar constructions.” TRACEY BANIVANUA-MAR, VIOLENCE AND COLONIAL DIALOGUE: THE AUSTRALIAN-PACIFIC INDENTURED LABOR TRADE 3 (2007).

¹³⁰ ARVIN, *supra* note 121, at 40-41.

¹³¹ *Id.* at 41.

¹³² *Id.* at 39, 44.

¹³³ *Id.* at 44.

saw themselves as more deserving to rule and profit from Polynesian lands.”¹³⁴ In short, coding Kānaka Maoli as Indians made us assimilable into European and American mythology of pre-ordained supremacy.¹³⁵

In 1820, American missionaries arriving on Hawai‘i’s shores sought to impose their ideology on Kānaka Maoli.¹³⁶ They assigned racial meaning to perceived differences between Kānaka Maoli and themselves, ultimately creating generalized stereotypes similar to tropes of the savage, childish Indian.¹³⁷ For example, Gavan Daws’ controversial *Shoal of Time* recounts that, upon arriving in Hawai‘i, missionary Hiram Bingham remarked that the “appearance of destitution, degradation, and barbarism, among the chattering, and almost naked savages, whose heads and feet, and much of their sunburnt swarthy skins, were bare, was appalling.”¹³⁸ Bingham noted that another missionary “with firmer nerve” asked, “Can these be human beings! . . . Can we throw ourselves upon these rude shores, and take up our abode, for life, among such a people, for the purpose of training them for heaven?”¹³⁹ Other missionaries emphasized the “laziness, lewdness, and childishness of the natives they had come to save.”¹⁴⁰ These stereotypes helped the missionaries justify the colonization of Hawai‘i, as well as the banning of ‘ōlelo Hawai‘i (the Hawaiian language) and cultural practices to civilize (i.e., assimilate) Kānaka Maoli.¹⁴¹ As Kanaka Maoli legal scholar Troy J.H. Andrade points out, widely-cited modern

¹³⁴ *Id.*

¹³⁵ *Id.* at 38.

¹³⁶ Barnard, *supra* note 107, at 27-28.

¹³⁷ *Id.* at 26-34. Although much of this Article deals with tacit characterizations, sometimes the racial coding is explicit. For example, James Cook, the first European known to have reached Hawai‘i’s shores, recounted the following after encountering Kānaka Maoli for the first time:

I never saw Indians so much astonished at the entering a ship before, their eyes were continually flying from object to object, the wildness of thier [sic] looks and actions fully express’d their surprise and astonishment at the several new o[b]jects before them and evinced that they never had been on board of a ship before.

3 THE JOURNALS OF CAPTAIN JAMES COOK ON HIS VOYAGES OF DISCOVERY 265 (J.C. Beaglehole ed., Cambridge Univ. Press 1967) (1778).

¹³⁸ GAVAN DAWS, *SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS* 64 (1974).

¹³⁹ *Id.*

¹⁴⁰ Barnard, *supra* note 107, at 27.

¹⁴¹ See Troy J.H. Andrade, *Hawai‘i ‘78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, 24 U. PA. J.L. & SOC. CHANGE 85, 97 (2021); Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1760 (2000) (citing TOM COFFMAN, *NATION WITHIN: THE STORY OF AMERICA’S ANNEXATION OF THE NATION OF HAWAII* (1998)); see also Natsu Taylor Saito, *Tales of Color and Colorism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1, 23-24 (2014) (explaining “civilizing” is “key element of colonial ideology” used to justify culture and history erasure).

scholarship *still* portrays our ancestors as “sinners” for whom “the Gospel would be the civilizing instrument,” or “as lazy, lewd, and childish.”¹⁴²

These stereotypes are not fixed; they transform to fit settler colonial needs. Throughout the eighteenth and early nineteenth centuries, the planter class, comprised of the descendants of the American missionaries,¹⁴³ derided Kānaka Maoli as “incompetents” to justify the theft and exploitation of biocultural resources.¹⁴⁴ The planter generation “had been imbued from birth with a sense of their own superiority to the natives; their parents and grandparents had come to Hawai‘i in order to bring enlightenment and civilization.”¹⁴⁵ These “sons and grandsons had been sent to the United States to be educated in East Coast colleges, where racism, even in the abolitionist north, was the norm.”¹⁴⁶ The planter generation infiltrated political and judicial offices, bent, like their missionary forefathers, on preventing a “regression to a savage culture” and seeking favorable tax treatment from the United States on sugar exports.¹⁴⁷ As politicians, they characterized Kānaka Maoli as a dying race and Queen Lili‘uokalani, the reigning mō‘ī (sovereign), as a “lazy, autocratic, and ineffectual” despot to legitimize the illegal overthrow of an internationally recognized sovereign nation and dismiss claims for restoration.¹⁴⁸ Ultimately, the planters, together with other businessmen and U.S. armed forces, overthrew the Kingdom of Hawai‘i in 1893, after Queen Lili‘uokalani sought to re-establish fair voting practices.¹⁴⁹

Stereotypes about Kānaka Maoli mutated again in the 1970s in reaction to the Hawaiian Renaissance, giving rise to the “radical Hawaiian” trope.¹⁵⁰ Drawing on fears of communism during the Cold War, colonial powers sought to silence Native activists by framing them as terrorists bent on overthrowing U.S. control in Hawai‘i.¹⁵¹ In 2019, the state of Hawai‘i played to this trope when it deployed

¹⁴² Andrade, *supra* note 141, at 85, 96-102; see also Avis Kuuipoleialoha Poai, *Tales from the Dark Side of the Archives: Making History in Hawai‘i Without Hawaiians*, 39 U. HAW. L. REV. 537, 599-636 (2017).

¹⁴³ NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 126 (2004).

¹⁴⁴ See Hom & Yamamoto, *supra* note 141, at 1760; Barnard, *supra* note 107, at 30.

¹⁴⁵ SILVA, *supra* note 143, at 126.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Barnard, *supra* note 107, at 27-29, 31.

¹⁴⁹ Melody Kapilialoha MacKenzie, *Historical Background*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 15, at 2, 18-22.

¹⁵⁰ See Jonathan Kamakawiwo‘ole Osorio, *Hawaiian Souls: The Movement to Stop the U.S. Military Bombing of Kaho‘olawe*, in A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 137, 146-47 (Noelani Goodyear-Ka‘ōpua, Ikaika Hussey & Erin Kahunawaika‘ala Wright eds., 2014).

¹⁵¹ See, e.g., HAUNANI-KAY TRASK, *Racism Against Native Hawaiians at the University of Hawai‘i: A Personal and Political View*, in FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII‘I 151, 151-68 (U. Haw. Press, rev. ed. 1999) (1993); HAUNANI-KAY

the largest armed force since the illegal overthrow to remove Native Hawaiian *kia'i mauna* (guardians of the mountain) peacefully protesting the development of a large telescope on a sacred mountain on Hawai'i Island.¹⁵² The state ultimately arrested thirty-eight *kūpuna* (elders).¹⁵³ In the media, these *kia'i* were simultaneously portrayed as lawless rebel rousers and "relics of the past" who sought to hamper scientific development.¹⁵⁴ More recently, after fires ripped through Lahaina in August 2023, far-right media blamed "pagan Hawaiian culture" and Indigenous "water worshippers" for the devastation.¹⁵⁵ And, completing the full-circle return to the savage Indian trope, a West Maui land developer who sought to divert water from a stream relied upon by Kānaka Maoli families said that the fires happened because "God was angry" that the land was not being used "as God intended."¹⁵⁶

TRASK, *The Politics of Academic Freedom as the Politics of White Racism*, in FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII, *supra*, at 169, 173-79.

¹⁵² PUUHONUA PUUHULUHULU, *Like a Mighty Wave: A Maunakea Film*, at 7:57 (YouTube, Dec. 9, 2019), <https://www.youtube.com/watch?v=4J3ZCzHMMPQ> [<https://perma.cc/G9PR-GDXB>] ("We were looking at the largest law enforcement operation in the history of Hawai'i to come down on Hawaiians short of the U.S. military actually landing Navy and Marine officers to overthrow our government.").

¹⁵³ HNN Staff, *State Won't Re-File Charges Against 38 Kupuna Arrested in TMT Protest*, HAW. NEWS NOW (Jan. 10, 2023, at 11:10 ET), <https://www.hawaiinewsnow.com/2023/01/11/re-prosecution-declined-38-kupuna-arrested-mauna-kea-2019> [<https://perma.cc/5DQM-9MWF>].

¹⁵⁴ Bryan Kamaoli Kuwada, *We Live in the Future. Come Join Us.*, KE KAUPU HEHI ALE (Apr. 3, 2015), <https://hehiale.com/2015/04/03/we-live-in-the-future-come-join-us> [<https://perma.cc/29QN-XFUZ>]. Similar to the dying race trope of the twentieth century, this "is a tired colonial trope, representing Indigenous peoples as mere vestiges of a quickly fading and increasingly irrelevant past." 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, 184 (2017). It is also similar to the age-old portrayal of American Indians as helpless children of nature who are "land-based obstructions that st[an]d in the way of growth and progress—that is, the expansion of global, neoliberal capitalism—and like trees, require[] removal." MICHAEL RAY FITZGERALD, NATIVE AMERICANS ON NETWORK TV: STEREOTYPES, MYTHS, AND THE "GOOD INDIAN," at xiii (2013).

¹⁵⁵ Media Matters Staff, *Charlie Kirk Blames Maui Wildfires on "Pagan Hawaiian Culture"*, MEDIA MATTERS (Aug. 17, 2023, at 14:41 ET), <https://www.mediamatters.org/charlie-kirk/charlie-kirk-blames-maui-wildfires-pagan-hawaiian-culture> [<https://perma.cc/24UK-PRNY>].

¹⁵⁶ Imogen Piper, Joyce Lee, Elahe Izadi & Brianna Sacks, *Maui's Neglected Grasslands Caused Lahaina Fire to Grow with Deadly Speed*, WASH. POST (Sep. 2, 2023, at 06:00 ET), <https://www.washingtonpost.com/investigations/interactive/2023/lahaina-wildfires-invasive-grass-destruction>. Martin later told reporters, "What I just want is the water to be able to be used on the land, which God intended it to." Anita Hofschneider & Jake Bittle, *The Libertarian Developer Looming over West Maui's Water Conflict*, GRIST (Nov. 27, 2023), <https://grist.org/indigenous/developer-peter-martin-west-maui-water-wildfire> [<https://perma.cc/A9PW-4FUZ>]. He also compared Native Hawaiians to Hitler. *Id.* ("When you're around a gang of people, a mob, the commissioners just listen to the mob, they don't listen to reasoned voices, . . . I'm not comparing these people to Hitler; I'm just saying Hitler got people involved by hating, hating the Jews.").

While the examples of the express invocation of racial stereotypes described above are easy to spot, racialized frames often play out in more subtle ways. This is especially so with the pervasive societal emphasis on colorblindness and multiculturalism,¹⁵⁷ which, in Hawai‘i, can sometimes play out as references to a farcical “melting-pot.”¹⁵⁸ For example, at a Hawai‘i Water Commission meeting in October 2021, the owner of Wailuku Water Company¹⁵⁹ used tacit racialized framing of Hui o Nā Wai ‘Ehā to justify his noncompliance with an agency order.¹⁶⁰ At the meeting, a kuleana user¹⁶¹ reliant on Wailuku Water Company’s system testified angrily about the company cutting off water to his property.¹⁶² The kuleana user was not Kanaka Maoli nor a member of the Hui. He charged Wailuku Water Company’s owner with having “no morals, no values, no ethics, no mores, [and being] spiritually void.”¹⁶³ Prior to the hearing, the kuleana user had allegedly tampered with the company’s water system. At the end of his testimony, the kuleana user stated: “the last thing is, if [Wailuku Water Company’s owner] wants to have me arrested, [he should] do it himself. I am tired of this.”¹⁶⁴

When Commissioners later asked Wailuku Water Company’s owner about refusing to collaborate with the Hui, the owner framed his noncompliance as a precaution in light of *the Hui’s* hostility. He stated that he had “express[ed] some concern about having the different parties get together. That was done in a context of not having any protocols or rules of engagement. You heard today the testimony of [the kuleana user]. That is confrontational.”¹⁶⁵ He continued that if “all the parties have a set of rules that we can agree to and a procedure that works

¹⁵⁷ As Delgado observed, most oppression “does not seem like oppression to those perpetrating it.” Delgado, *supra* note 43, at 2437.

¹⁵⁸ See Laura Desfor Edles, *Rethinking ‘Race’, ‘Ethnicity’ and ‘Culture’: Is Hawai‘i the ‘Model Minority’ State?*, 27 ETHNIC & RACIAL STUD. 37, 40 (2004) (“In short, ‘Hawai‘i’ has become our ‘model minority’ state — the state that ‘epitomizes’ what a multiracial, multiethnic, multicultural ‘melting pot’ *should* look like. . . . The two most important (albeit interrelated) problems are (1) that the myth of Hawai‘i as a ‘model minority’ state is grossly, historically, inaccurate; and (2) that the myth of Hawai‘i as a ‘model minority’ state grossly misconstrues the complex workings of racialization.”).

¹⁵⁹ For an explanation of Wailuku Water Company, see *infra* note 306.

¹⁶⁰ HAW. COMM’N ON WATER RES. MGMT., *October 19, 2021 Commission on Water Resource Management Meeting*, at 2:15:41, 3:07:13 (YouTube, Oct. 19, 2021) [hereinafter *Oct. 2021 Water Comm’n Meeting*], https://www.youtube.com/watch?v=q4J-u5n_PVw [http://perma.cc/H3PF-7E2A].

¹⁶¹ A “kuleana user” is someone who possesses land to which appurtenant rights attach because the parcel used water at the time of the Māhele process in the mid-nineteenth century. See Sproat, *Water Law*, *supra* note 15, at 541. For a description of appurtenant rights, see *infra* note 242.

¹⁶² *Oct. 2021 Water Comm’n Meeting*, *supra* note 160, at 2:53:16.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2:55:03.

¹⁶⁵ *Id.* at 3:07:11.

of all of us, we're happy to do it. Absent that, I don't think we can get together. [The kuleana user] showed you that today."¹⁶⁶

Although the kuleana user was *not* a member of Hui o Nā Wai 'Ehā, *not* Kanaka Maoli, *nor* a party to the referenced litigation, Wailuku Water Company's owner imputed the user's "confrontational" actions onto the Hui to justify his noncompliance with the Water Commission's order and impute guilt to Hui members. These types of generalizations can be effective because they play to deeply embedded tropes of the "sketchy," dumb Hawaiian shaped by the historic racialization of Kānaka Maoli described above.¹⁶⁷

As Memmi pointed out, the use of racial stereotypes is meant to justify the settler colonial project by making the subordinated group seem deserving of the colonizer's subjugation.¹⁶⁸ These racialized stereotypes of Kānaka Maoli are ingrained in American mythology and are thus deeply embedded within decisionmakers' subconscious frames, as demonstrated in the foregoing exchange before the Water Commission.¹⁶⁹

Research shows, however, that it is counterproductive to attempt to discredit negative frames because doing so paradoxically reinforces the frame and the audience's pre-existing beliefs.¹⁷⁰ For example, arguments from Hui members at the Water Commission meeting that the kuleana user's behavior was wrongly imputed onto them would likely have been ineffective—the frame had been set, and their arguments to the contrary may have only further cemented the negative

¹⁶⁶ *Id.*

¹⁶⁷ See Susan K. Serrano & Breann Swann Nu'uhiwa, *Federal Indian Law: Implicit Bias Against Native Peoples as Sovereigns*, in IMPLICIT BIAS ACROSS THE LAW 209, 214-25 (Justin D. Levinson & Robert J. Smith eds., 2012). For another example of a developer playing to tropes of "violent" Natives, see Hofschneider & Bittle, *supra* note 156 (reporting on West Maui developer Peter Martin's characterization of Kānaka Maoli as "mob" employing similar tactics to Hitler).

¹⁶⁸ See MEMMI, COLONIZER AND THE COLONIZED, *supra* note 104, at 7-9; MEMMI, DOMINATED MAN, *supra* note 105, at 186. It is also deeply ironic that many negative tropes assigned to Native Hawaiians, such as violence and aggression, are more aptly applied to colonizing forces. See, e.g., IMAIKALANI KALAHELE, *No Was Us*, in KALAHELE, *supra* note 62, at 42-43 ("Ho bra! / I neva say nothing about fighting. / You talk about living in peace. / Bra, no was us. / Us Hawaiians was neva / violent to Americans. / No was us, bra. / We were neva / violent to Haole. / No was us, bra. / We neva go to the haole / and change their language. / No was us, bra. / We neva try change their gods. / No was us, bra. / We neva give them / disease that killed / thousands of friendly people. / No us, bra. / And / as for being American. / No was us, bra. / . . . Something you / got to understand / all the trips / that wen happen / to us Hawaiians, / no was us, bra. / Was you guys.").

¹⁶⁹ See, e.g., Lawrence, *Unconscious Racism*, *supra* note 108, at 323; Crenshaw, *supra* note 108, at 1373-76; Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORN. L. REV. 1258, 1260-81 (1992).

¹⁷⁰ See George P. Lakoff & Gil Duran, *Trump Has Turned Words into Weapons. And He's Winning the Linguistic War*, GUARDIAN (June 13, 2018, at 06:00 ET), <https://www.theguardian.com/commentisfree/2018/jun/13/how-to-report-trump-media-manipulation-language> [<https://perma.cc/N2AY-AFY9>]; LAKOFF, *supra* note 37, at 4.

portrayal. Rather, to confront negative myths, FrameWorks researchers found that communications that “explain why social or scientific phenomena matter, how they work, and what needs to be done to address them” can be effective.¹⁷¹ Native communities should therefore deploy nuanced framing that proactively establishes a narrative and sidesteps racialized tropes—*unless* those racialized tropes are useful, as discussed in the next Section.

C. *Framing in the Legal Process*

Understanding how decision-making actually functions in practice is crucial for effective framing of restorative environmental justice claims. Since the 1800s, legal formalism has been the dominant jurisprudential approach.¹⁷² Formalism rests on a “basic understanding of the law as a formula that produces ‘correct’ or ‘just’ results when mechanically applied to specific cases.”¹⁷³ Formalism views laws and decisionmakers as “objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics.”¹⁷⁴ It foregrounds certainty, stability, and logic as primary values in the legal system and uses methods like originalism and stare decisis to achieve these goals.¹⁷⁵ With neutral laws and objective decisionmakers, “justice” necessarily results from a mechanistic application of legal rules to the facts of any given case, regardless of the actual outcome.¹⁷⁶ Formalism is the only jurisprudential method most attorneys learned in law school.¹⁷⁷

In practice, however, the law does not actually work as formalism posits. Legal Realism, and the empirical work of the New Legal Realists in particular,¹⁷⁸ has “recognized that laws often are not content ‘neutral . . . [and] legal language

¹⁷¹ Nat Kendall-Taylor, *Five Framing Tips: Framing for Social Change*, FRAMEWORKS INST. (June 4, 2019), <https://www.frameworksinstitute.org/article/five-framing-tips-framing-for-social-change> [<https://perma.cc/5RA7-AR9C>].

¹⁷² See Sproat, *Wai Through Kānāwai*, *supra* note 18, at 154-55.

¹⁷³ Isaac Moriwake, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian “Cultural Property” Repatriation*, 20 U. HAW. L. REV. 261, 287 (1998); see BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 2 (2009) (Legal formalism is “theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required”).

¹⁷⁴ Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 731 (2009) (quoting WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 187 (1988)); see Sproat, *Wai Through Kānāwai*, *supra* note 18, at 154.

¹⁷⁵ See Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 91 (1995).

¹⁷⁶ See Sproat, *Wai Through Kānāwai*, *supra* note 18, at 154.

¹⁷⁷ See *id.* at 155.

¹⁷⁸ The New Legal Realism is an emerging sub-branch of legal philosophy that empirically examines how the law and the legal process actually function on the ground. See Eric K. Yamamoto, *Critical Procedure: ADR and the Justices’ “Second Wave” Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765, 782 n.111 (2017).

tends to reflect the interests of those in power at a given time.”¹⁷⁹ This is especially true in “complex cases,” such as Native claims for restorative environmental justice, “with tremendous cultural, environmental, legal, and political ramifications because ‘judges have admitted for decades that personal values can have an influence on their decisions in uncertain or *hard cases*.’”¹⁸⁰

This is not to say that decisionmakers disregard the law; on the contrary, studies show that judges care about reaching the “correct legal result.”¹⁸¹ Personal philosophies, however, impact decisionmakers “when statute or precedent does not point their discretion in one direction or constrain it in another.”¹⁸² While the exact impact of ideological influence is subject to debate, experts have shown that its effects are more pronounced in contexts where judges exercise greater discretion and where issues carry strong ideological or personal valence,¹⁸³ such as cases involving environmental law and other politically charged fields.¹⁸⁴ Legal adjudication thus simultaneously encompasses two “dual realities”: Decisionmakers “do not follow formalist analysis in controversial cases,” but decisionmakers still “feel constrained to try to follow the rules to appear legitimate.”¹⁸⁵

As Kanaka Maoli scholar Kapua‘ala Sproat explains, the New Legal Realists’ “insights are especially important to understanding how the law operates for Kānaka and other Native Peoples.”¹⁸⁶ As detailed in Section I.B *supra*, histories of Indigenous groups “have been constructed and transformed” through the colonial process “to legally justify cultural devastation and the theft of natural resources.”¹⁸⁷ “In turn, laws are often not neutral for Native Peoples, and ‘justice’ rarely results from a mechanistic application of law to facts.”¹⁸⁸

Framing is a tool to broaden formalist analyses of the relevant law with context to achieve a favorable result.¹⁸⁹ Much has been written about the

¹⁷⁹ Sproat & Palau-McDonald, *supra* note 13, at 550 (quoting TAMANAHA, *supra* note 173, at 146).

¹⁸⁰ *Id.* (emphasis added) (quoting TAMANAHA, *supra* note 173, at 146).

¹⁸¹ TAMANAHA, *supra* note 173, at 136.

¹⁸² *Id.* at 143.

¹⁸³ Sproat, *Wai Through Kānāwai*, *supra* note 18, at 169 (quoting TAMANAHA, *supra* note 173, at 141).

¹⁸⁴ TAMANAHA, *supra* note 173, at 136; *see also* Chestek, *supra* note 41, at 5-6 (discussing various circumstances where purely logical arguments fail, including when statutes give courts wide discretion, balancing tests, and “totality of the circumstances” tests).

¹⁸⁵ Sproat, *Wai Through Kānāwai*, *supra* note 18, at 169; *see also supra* note 41 (discussing findings of Chestek’s study on persuasive superiority of story-based reasoning in appellate briefs).

¹⁸⁶ Sproat & Palau-McDonald, *supra* note 13, at 551.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See* Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai‘i’s Plantations to Congress—Puerto Ricans’ Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353, 359 (2011) (“Who tells the definitive history of group injustice—and *how* that history is framed—is vital to shaping a group’s narrative and public

Supreme Court's decision in *Rice v. Cayetano*,¹⁹⁰ and this Article does not endeavor to spill more ink on the subject.¹⁹¹ The preceding District of Hawai'i's decision in *Rice*, however, illustrates the power of purposeful racialized framing to broaden a formalist analysis that is otherwise incapable of reaching any semblance of "justice" for a Native group.¹⁹²

At issue in *Rice* was an ancestry-based qualification for Office of Hawaiian Affairs ("OHA") elections.¹⁹³ OHA is a semiautonomous entity created by a 1978 state constitutional amendment that was meant to facilitate a measure of restorative justice for Native Hawaiians through the "transfer of reparations moneys and land" from the state to Kānaka Maoli. OHA aimed to "provide for accountability, self-determination, [and] methods for self-sufficiency through assets and a land base."¹⁹⁴ In recognition of the importance of self-governance, OHA's original governing board was composed of Native Hawaiian trustees elected by those of Kanaka Maoli ancestry.¹⁹⁵ For twenty years, OHA enabled Kānaka Maoli to "exercise[] a limited form of self-governance" and "gradually became a strong and respected voice for Native Hawaiians at both the state and federal levels."¹⁹⁶

image. And it can 'determine the power of justice claims or opposition to them.'"); Hom & Yamamoto, *supra* note 141, at 1757, 1762 (explaining narrative provides language to comprehend past, as well as frame relationship between past and present); MacKenzie & Sproat, *supra* note 107, at 482 ("Telling a story of a people and their 'āina (lands) can heal and shed light on a lāhui's (nation's) motives and thinking during the most critical junctures in its history that impact all aspects of its culture, identity, and nationhood. Indeed, the very recounting of this history—who tells it, how it is told, which stories are shared, the nuances and complexities, the language used—can enlighten, restore, and inspire healing and reconciliation. Or, incite destruction.").

¹⁹⁰ 528 U.S. 495 (2000).

¹⁹¹ See, e.g., Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2657-59 (2022); Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms*, 27 WM. & MARY BILL RTS. J. 501, 510-14 (2018); Sproat, *Wai Through Kānāwai*, *supra* note 18, at 158-60; Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21, 35-36 (2005); Chris K. Iijima, *Race over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 RUTGERS L. REV. 91, 96-98 (2000); Eric K. Yamamoto, *The Colonizer's Story: The Supreme Court Violates Native Hawaiian Sovereignty—Again*, COLORLINES (Aug. 20, 2000), <https://colorlines.com/articles/colonizers-story-supreme-court-violates-native-hawaiian-sovereignty-again> [<https://perma.cc/U8TQ-49XB>]; Hom & Yamamoto, *supra* note 141, at 1766-77.

¹⁹² *Rice v. Cayetano*, 963 F. Supp. 1547 (D. Haw. 1997).

¹⁹³ *Id.* at 1548.

¹⁹⁴ *Id.*

¹⁹⁵ Palau-McDonald, *supra* note 40, at 409.

¹⁹⁶ Melody Kapilialoha MacKenzie, *Native Hawaiians and U.S. Law*, in NATIVE HAWAIIAN LAW: A TREATISE 265, 284 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat eds., 2015).

OHA's ability to actualize its restorative mission, however, was hamstrung by a lawsuit filed by Freddy Rice, a non-Kanaka Maoli resident of Hawai'i whose application to vote in an OHA Trustee election had been denied because he was not descended from inhabitants of the Hawaiian Islands in 1778.¹⁹⁷ Instead, Rice's ancestors were among the white missionaries who colonized Hawai'i in the 1800s.¹⁹⁸ Rice had previously challenged other Native Hawaiian sovereignty initiatives.¹⁹⁹ In the instant suit, he framed OHA's ancestry classification as an invidious racial restriction that violated the Fourteenth and Fifteenth Amendments.²⁰⁰

Rice came down to whether Native Hawaiians were considered a political or racial group under the law. If the group were deemed political, the U.S. Supreme Court's decision in *Morton v. Mancari*²⁰¹ would control.²⁰² In *Mancari*, the Court upheld the constitutionality of the Bureau of Indian Affairs' ("BIA") hiring preference for "Indians" as an "employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups."²⁰³ The Court reasoned that the preference was given to Indians on the basis of their *political* status "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."²⁰⁴ *Mancari* and its progeny have come to stand for the doctrinal bifurcation of classifications that benefit federally recognized Indian tribes under federal Indian law from racial classifications in constitutional race jurisprudence.²⁰⁵ While political classifications undergo rational basis review, racial classifications must survive strict scrutiny.²⁰⁶

In *Rice*, the state of Hawai'i needed to convince the court that "Native Hawaiian" was a political classification so that *Mancari*'s rational basis review would be applied to OHA's ancestry classification. One immediate obstacle was

¹⁹⁷ *Rice*, 963 F. Supp. at 1548.

¹⁹⁸ Sproat, *Wai Through Kānāwai*, *supra* note 18, at 158.

¹⁹⁹ See *Rice v. Cayetano*, 941 F. Supp. 1529 (D. Haw. 1996) (challenging Rice's exclusion from participation in Native Hawaiian Sovereignty Election).

²⁰⁰ *Rice*, 963 F. Supp. at 1548-49. Sproat notes the irony of Rice's allegations: Although the Fourteenth and Fifteenth Amendments were "specifically crafted to protect historically disadvantaged groups, Rice turned the laws on their heads, wielding them against a historically disadvantaged group to challenge the group's ability to elect trustees for an agency designed to manage Indigenous resources in partial redress for the devastation imposed by American colonialism." Sproat, *Wai Through Kānāwai*, *supra* note 18, at 158-59.

²⁰¹ 417 U.S. 535 (1974).

²⁰² See generally Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011) (discussing complexities of "tribal and racial classifications" present in *Mancari*).

²⁰³ *Mancari*, 417 U.S. at 554-55.

²⁰⁴ *Id.* at 554.

²⁰⁵ Rolnick, *supra* note 190, at 2660.

²⁰⁶ See *id.* at 2670.

that Native Hawaiians were not a federally recognized Indian tribe, which Rice argued precluded the application of rational basis review.²⁰⁷

In response, the state grounded its defense in specific language from federal Indian law that is laced with racialized meaning.²⁰⁸ First, the state argued that Native Hawaiians “have a special relationship to the Federal Government which is similar to the historically unique relationship between mainland American Indian tribes and the Federal Government underlying the [*Mancari*] decision.”²⁰⁹ The state also argued Congress had indicated this special relationship parallels the federal government’s relationship with Native Americans “by grouping Native Hawaiians with Native American groups for various special benefits programs.”²¹⁰ The state pointed out that “the Native Hawaiian community is one marked for rehabilitation and special consideration by Congress” and highlighted the “unique obligation” and “fiduciary duties” owed to Kānaka Maoli by the state, “similar to those owed by the federal government to Native Americans.”²¹¹ The state also emphasized that it has a “special responsibility to protect traditional rights of access to land for subsistence, cultural and religious purposes.”²¹²

The district court rejected Rice’s challenge in a decision steeped in legal and historical context that resisted a narrow, formalist application of constitutional race jurisprudence. The court first reviewed *Mancari*, noting the “unique legal status” of tribes under federal law and the “plenary power of Congress, based on a history of treaties and the assumption of a ‘guardian-ward’ status, to legislate on behalf of federally recognized Indian tribes.”²¹³ The *Mancari* Court’s reasoning was grounded in the “special relationship” between Indian tribes and the federal government, stemming from the colonial process whereby “the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence.”²¹⁴

The court then turned to the history of OHA’s ancestry classification, starting first with the history of U.S. colonization in Hawai‘i, and, citing Congress’s Apology Resolution, the court noted the United States’ role in the illegal overthrow of the internationally recognized Hawaiian Kingdom in 1893.²¹⁵ The

²⁰⁷ *Rice v. Cayetano*, 963 F. Supp. 1547, 1549 (D. Haw. 1997).

²⁰⁸ For a discussion of racialized stereotypes in federal Indian law, see Serrano & Nu‘uhiwa, *supra* note 167, at 214-25.

²⁰⁹ *Rice*, 963 F. Supp. at 1549-50.

²¹⁰ *Id.* at 1550.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

²¹⁴ *Id.* at 1550-51 (quoting *Mancari*, 417 U.S. at 552).

²¹⁵ *Id.* at 1551 (citing Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993)) (resolving then-President Grover Cleveland was correct when he reported to Congress in 1893 that conspirators who overthrew Hawaiian Kingdom did so in violation of U.S. law).

court then systematically reviewed the legal relationship between Native Hawaiians and the federal and state governments. In 1920, Congress passed the Hawaiian Homes Commission Act (“HHCA”) in response to concerns that the Native Hawaiian population was “fast becoming a minority element” in Hawai‘i.²¹⁶ The court noted that the legislative history of the HHCA describes Native Hawaiians as “wards” of the United States and Congress as “trustees.”²¹⁷ The court quoted then-Secretary of the Interior Franklin Lane’s description in the legislative history of Native Hawaiians as:

[A] most lovable people, a kindly people, and a generous people. They have arts of their own which endear them to the people who visit the islands. It is not altogether the beauty of the islands that attracts people there. It is the spirit that they see and the old civilization that they meet. There is a thriftlessness among those people that is characteristic among peoples that are raised under a communist or feudal system. They do not know what the competitive system is and they will get rid of property that is given them. . . . Therefore, they should be given as close identification with their country *as is possible* and yet be protected against their own thriftlessness and against the predatory nature of those who wish to take the land from them, and who have in the past.²¹⁸

The court noted that, because of these concerns, Congress “set aside certain public lands to be considered Hawaiian home lands to be utilized in the rehabilitation of Native Hawaiians.”²¹⁹

The court next reviewed Hawai‘i’s Admission Act, which included a compact with the United States to adopt the HHCA as part of the state constitution.²²⁰ As part of that compact, the federal government returned lands stolen from the Hawaiian Kingdom to the state to be held as a public trust for several enumerated purposes, including the betterment of the conditions of Native Hawaiians.²²¹ In turn, the state of Hawai‘i amended its constitution to comport with the Admission Act, declaring that the lands set aside would be held “as a public trust for native Hawaiians and the general public.”²²² Another constitutional amendment created OHA, which was “to be funded with 20% of the proceeds from the public trust” created under the Admission Act and other legislation.²²³

The court then wove the legal and historical context surrounding *Mancari* and its progeny with the context surrounding the instant case. The court pointed out that “[t]he cases following [*Mancari*] repeatedly focus upon the special

²¹⁶ *Id.* (quoting H.R. REP. NO. 66-839, at 2 (1920)).

²¹⁷ *Id.* (first citing H.R. REP. NO. 66-839, *supra* note 216, at 4; and then citing *Ahuna v. Dep’t of Hawaiian Home Lands*, 640 P.2d 1161, 1167 (Haw. 1982)).

²¹⁸ *Id.* (quoting H.R. REP. NO. 66-839, *supra* note 216, at 4).

²¹⁹ *Id.*

²²⁰ *Id.* at 1551-52 (citing Admission Act of 1959, Pub. L. No. 86-3, § 4, 73 Stat. 4, 5).

²²¹ *Id.* at 1552.

²²² *Id.* (citing HAW. CONST. art. XII, § 4).

²²³ *Id.*

relationship between the Indians and the federal Government, specifically the Government's 'unique obligation' toward Indians."²²⁴ The court explained that *Mancari* rooted the origin of the relationship in the "fact that the Indians were left helpless and dispossessed due to the United States' exercise of its war and treaty powers."²²⁵ The court reasoned that, in crafting the HHCA, Congress used "almost identical expressions" to describe Native Hawaiians because Hawai'i's Admission Act created a federal right enforceable under 42 U.S.C. § 1983²²⁶ and the state legislature is unable to amend the trust obligation embedded within the Admission Act without the consent of the United States.²²⁷ Although Native Hawaiians were not federally recognized as an Indian tribe, the court noted that Congress had not "explicitly terminated its trust relationship" with Native Hawaiians given that the state must receive Congressional approval before making certain HHCA amendments.²²⁸ Moreover, the court reviewed the history of the formal recognition process and concluded that the lack of Native Hawaiian federal recognition was "not controlling for purposes of determining the proper standard of review."²²⁹

For the district court, federal recognition was simply evidence of a continuing guardian-ward relationship rather than a hard-and-fast precondition of the application of *Mancari*'s rational basis review.²³⁰ An extensive review of the historical and legal context convinced the court that:

[T]here is abundant evidence that the guardian-ward relationship existed, and currently exists, between the federal Government and Native Hawaiians and between the State of Hawai'i and Native Hawaiians. As it is the unique guardian-ward relationship that is paramount, not formal recognition, the court finds that [*Mancari*] is equally applicable to Native Hawaiians as to formally recognized Native Americans.²³¹

Accordingly, the court held that "the Fourteenth and Fifteenth Amendments are not violated because [OHA's ancestry qualification] is not based upon race, but upon a recognition of the unique status of Native Hawaiians" which "derives from the trust obligations owed and directed by Congress and the State of Hawaii."²³² Applying rational basis review, the court ultimately upheld OHA's ancestry qualification.²³³

²²⁴ *Id.* (footnote omitted).

²²⁵ *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 552 (1974)).

²²⁶ 42 U.S.C. § 1983 provides a vehicle to assert a federal civil rights claim against public officials, employees, and entities.

²²⁷ *Rice*, 963 F. Supp. at 1552.

²²⁸ *Id.* at 1552-53.

²²⁹ *Id.* at 1553.

²³⁰ *Id.* at 1553-54.

²³¹ *Id.* at 1554.

²³² *Id.*

²³³ *Id.* at 1554-55.

Though tailored to language from *Mancari* and its progeny, the state's arguments and the district court's reasoning in *Rice* are steeped in racist, inaccurate narratives about Kānaka Maoli. The "guardian-ward" relationship between Kānaka Maoli and the state and federal governments and playing to tropes of the primitive, childish Native is an inaccurate recitation of history. Secretary Lane's depiction of our grandparents and great-grandparents as primitive, "thriftless" people is offensive and based on a constructed story about Kānaka Maoli that justified the illegal overthrow.²³⁴ Moreover, there is a bitter irony in the United States' purported duty to protect Kānaka Maoli from the "predatory nature" of those who took land from a sovereign nation,²³⁵ given that the United States itself effectuated that dispossession.

Nevertheless, framing the relationship between Kānaka Maoli and the state and federal governments with racist language from federal Indian law was necessary to achieve the desired application of *Mancari*'s rational basis review to OHA's ancestry classification.²³⁶ The state's reduction of our culture to fictions compatible with a formalist analysis of political Indian classifications enabled the district court to situate OHA's ancestry classification within legislative and historical context, map Kanaka Maoli history onto existing federal law (i.e., *Mancari* and its progeny), and ultimately deem the lack of federal recognition as substantively irrelevant. Without this contextual framing, OHA's ancestry classification would have been perceived as a racial classification that fails under strict scrutiny. Indeed, the Supreme Court later did just that.²³⁷

Framing for Native groups requires "ambidexterity"²³⁸—that is, it must simultaneously identify and combat racialized tropes that activate negative frames in decisionmakers' subconscious minds, while also keying into racialized framing that gives decisionmakers permission to reach a favorable conclusion under the applicable law, like the state did before the district court in *Rice*. As a practical matter, communities might find these racialized frames to be culturally reductive or even offensive—I certainly did. For this reason, engaging in such framing requires attorneys to continually work at establishing long-term relationships with the Indigenous communities they represent, rooted in trust and open communication, to avoid further subordinating communities that shoulder intergenerational trauma.

²³⁴ See discussion *supra* Section I.B.

²³⁵ *Rice*, 963 F. Supp. at 1551 (citing H.R. REP. NO. 66-839, *supra* note 216, at 4).

²³⁶ See Serrano & Nu'uhiwa, *supra* note 167, at 214-25.

²³⁷ See *Rice v. Cayetano*, 528 U.S. 495 (2000).

²³⁸ This term was first used by Mari Matsuda when I was a student in her Critical Race Theory course. She used it in relation to the balancing act that intersectional racial justice advocates engage in: They must combat racist stereotypes of Black men as violent, aggressive, and sexually deviant, while also acknowledging that crimes against Black women are most often perpetrated by Black men and seeking solutions to end the cycle of domestic violence.

II. CASE STUDIES BEFORE HAWAII'S WATER COMMISSION

With this context in mind, I now turn to case studies of the advocacy of the Wai'oli Valley Taro Hui and Hui o Nā Wai 'Ehā before Hawaii's Water Commission to glean insights into the successes and pitfalls of framing Indigenous claims for restorative environmental justice.

A. *Wai'oli Valley Taro Hui*

When the Wai'oli Valley Taro Hui began to restore their traditional and customary Native Hawaiian lo'i kalo irrigation system in 2018, they discovered that portions of their centuries-old system were on state-zoned conservation land.²³⁹ This protective zoning classification triggered a maze of legal requirements, including an amendment to Wai'oli Stream's Interim Instream Flow Standard ("IIFS").²⁴⁰ The IIFS is the bedrock of the Code's surface water management framework, as it represents the minimum amount of flow necessary to protect fishery, wildlife, traditional and customary Native Hawaiian rights, and other beneficial instream uses.²⁴¹

From the outset of the IIFS amendment process, the Wai'oli Valley Taro Hui and its partners at the University of Hawai'i at Mānoa William S. Richardson School of Law's Native Hawaiian Rights and Environmental Law Clinics were faced with a dilemma. Along with other specific water rights,²⁴² traditional lo'i kalo cultivation is supposed to receive the highest prioritization and protection under Hawai'i law as a constitutionally protected traditional and customary Native Hawaiian practice and constitutional public trust purpose.²⁴³ As a traditional and customary practice, lo'i kalo cultivation is considered an

²³⁹ FINAL ENVIRONMENTAL ASSESSMENT, *supra* note 48, at 31.

²⁴⁰ *Id.* at 26.

²⁴¹ See HAW. REV. STAT. § 174C-3.

²⁴² Appurtenant rights also have the strongest protections under both Hawai'i's Constitution and Water Code. HAW. CONST. art. XI, § 7; HAW. REV. STAT. § 174C-63. Appurtenant rights attach to parcels that used water at the time of the Māhele process around 1845 to 1848. See Sproat, *Water Law*, *supra* note 15, at 541. Any attempt to transfer or reserve appurtenant rights extinguishes them. *Reppun v. Bd. of Water Supply*, 656 P.2d 57, 69-70 (Haw. 1982).

²⁴³ HAW. CONST. art. XI, §§ 1, 7 (Public Trust Doctrine); HAW. CONST. art. XII, § 7 (establishing protection of traditional and customary Native Hawaiian rights); HAW. REV. STAT. § 174C-101(c) (establishing protection of right to cultivate kalo on one's own kuleana and Commission's obligation to protect that right); *In re Water Use Permit Applications (Waiāhole I)*, 9 P.3d 409, 449 (Haw. 2000); *Ka Pa'akai O Ka 'Āina v. Land Use Comm'n*, 7 P.3d 1068, 1082 (Haw. 2000).

“instream use” under the Water Code,²⁴⁴ which the Water Commission must account for when setting IIFSs.²⁴⁵

The Water Code instructs the Commission to set IIFSs based on the hydrologic unit in which the stream runs.²⁴⁶ A hydrologic unit is a “surface drainage area or a ground water basin or a combination of the two.”²⁴⁷ The hydrologic units in the Hawai‘i Water Plan more or less conform with Western notions of a watershed,²⁴⁸ which sometimes align with traditional Native Hawaiian water stewardship practices. The Wai‘oli farmers’ traditional lo‘i kalo irrigation system, however, did not entirely conform to the hydrologic unit boundaries within which Wai‘oli Stream runs. Water from the stream flowed back into the Hanalei Stream located in the neighboring Hanalei hydrologic unit just before both streams drained into a bay.²⁴⁹ The lo‘i kalo irrigation system’s partial draining into Hanalei Stream comported with the traditional stewardship of the ahupua‘a of Wai‘oli, Hanalei, Waikoko, and Waipā as a single, integrated land division (a kalana)²⁵⁰ since time immemorial.²⁵¹

The farmers and their legal allies were concerned, however, that the partial drainage of water from Wai‘oli Stream into Hanalei Stream would cause the Water Commission to view their traditional and customary lo‘i kalo cultivation as a “noninstream use,” which incurs less prioritization and protection under Hawai‘i law and imposes additional permitting requirements.²⁵² Thus, the farmers and their legal allies were faced with the task of convincing the Water Commission to adopt an Indigenous stewardship model in the IIFS amendment proceeding.

In that proceeding, the Hui, its attorneys, and the clinicians framed the Hui’s traditional place-based stewardship by deploying widely held values, while simultaneously asserting the farmers’ expertise in managing Wai‘oli’s biocultural resources and emphasizing the restorative justice principles inherent

²⁴⁴ HAW. REV. STAT. § 174C-3. Instream uses are “beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream.” *Id.* Instream uses include the “[m]aintenance of fish and wildlife habitats,” “[t]he protection of traditional and customary [Native] Hawaiian rights,” the “[m]aintenance of water quality,” “[a]esthetic values,” “[o]utdoor recreational activities,” and the “[m]aintenance of ecosystems such as estuaries, wetlands, and stream vegetation.” *Id.*

²⁴⁵ *See id.* § 174C-71(4).

²⁴⁶ *Id.* § 174C-31(c)-(e), (h).

²⁴⁷ *Id.* § 174C-3.

²⁴⁸ *See generally* HAW. COMM’N ON WATER RES. MGMT., PR-2005-01, SURFACE-WATER HYDROLOGIC UNITS: A MANAGEMENT TOOL FOR INSTREAM FLOW STANDARDS 2-3 (2005).

²⁴⁹ FINAL ENVIRONMENTAL ASSESSMENT, *supra* note 48, at 27.

²⁵⁰ *Id.* at 9 (defining “kalana” as “traditional Native Hawaiian land division term associated more with systematic biocultural resource management and community identity rather than governance”).

²⁵¹ *See* Kawika B. Winter et al., *The Moku System: Managing Biocultural Resources for Abundance Within Social-Ecological Regions in Hawai‘i*, SUSTAINABILITY, 2018, at 1, 5.

²⁵² *See* HAW. REV. STAT. § 174C-71.

in Hawai‘i’s constitutional public trust doctrine.²⁵³ Studies establish that effective framing subtly grounds the narrative in shared beliefs.²⁵⁴ Regardless of the specific facts of a case, tacitly invoking a shared value system gives decisionmakers “permission to reach the conclusion we want them to reach.”²⁵⁵ Frames that key into core “American” values—such as ingenuity, innovation, meritocracy, and interdependence, to name a few—have been empirically shown to be effective in signaling shared beliefs and garnering support for race-based and environmental policies in general,²⁵⁶ and farming initiatives in particular.²⁵⁷ There are a variety of free resources on framing for the “American” public available from FrameWorks Institute.²⁵⁸

Similar to the use of racialized tropes from federal Indian law described in Section I.C, deploying “American” values framing may be uncomfortable for Native communities and other historically disadvantaged groups because it requires language that may seem incomplete, inaccurate, or culturally reductive.²⁵⁹ Tapping into American values may be unsettling, if not unacceptable, to Kānaka Maoli and other Native Peoples due to unredressed settler colonial injustices in Hawai‘i and across the globe, such as the loss of ancestral land and other biocultural resources, and the simple fact that many of us do not view ourselves as Americans.²⁶⁰ In these situations, the hard reality is that community members and their legal allies may need to translate Indigenous values and issues in ways that decisionmakers can relate to and that fit within the narrow confines of the law, which will ultimately help the community

²⁵³ See, e.g., Written Testimony of Reid Yoshida, Wai‘oli Valley Taro Hui President, before the Haw. Comm’n on Water Res. Mgmt. (Apr. 20, 2021); Written Testimony of JoAnne Kaona, Wai‘oli Valley Taro Hui Bd. Member & Sec’y, before the Haw. Comm’n on Water Res. Mgmt. (Apr. 20, 2021); Written Testimony of Kaisen Carillo, Wai‘oli Valley Taro Hui Member, before the Haw. Comm’n on Water Res. Mgmt. (Apr. 20, 2021); Written Testimony of Chris Kobayashi, Wai‘oli Valley Taro Hui Member, before the Haw. Comm’n on Water Res. Mgmt. (Apr. 20, 2021). All testimonies available at *IFS: 2018—Wai‘oli, Kaua‘i*, HAW. COMM’N ON WATER RES. MGMT., [hereinafter *IFS Testimonies*] <https://dlnr.hawaii.gov/cwrm/surfacewater/ifs/kauai/2018-waioli> [<https://perma.cc/KQ7D-4MEH>] (last visited May 28, 2026) (scroll to “Information Updates”; click “Testimony” in April 20, 2021 box).

²⁵⁴ Kennedy et al., *supra* note 34, at 414.

²⁵⁵ *Id.*

²⁵⁶ E.g., LYNN DAVEY, FRAMEWORKS INST., TALKING ABOUT DISPARITIES: THE EFFECT OF FRAME CHOICES ON SUPPORT FOR RACE-BASED POLICIES 8 (2009); FRAMEWORKS INST., REFRAMING CLIMATE CHANGE: IMPACT BRIEF 3 (2019).

²⁵⁷ THERESA L. MILLER, DANIEL BUSSO, ANDREW VOLMERT, CATASHA DAVIS & JULIE SWEETLAND, FRAMEWORKS INST., UNDERSTANDING THE CONVERSATION ABOUT FARMING: AN ANALYSIS OF MEDIA AND FIELD COMMUNICATIONS 18 (2020).

²⁵⁸ See FRAMEWORKS INST., <https://www.frameworksinstitute.org> [<https://perma.cc/8D4P-YF6G>] (last visited May 28, 2026).

²⁵⁹ Kennedy et al., *supra* note 34, at 408.

²⁶⁰ E.g., TRASK, *supra* note 151, at 65, 79 (“We are Hawaiians, not Americans.”).

prevail.²⁶¹ Of course, communities and advocates can acknowledge the effectiveness of American values framing and strategically deploy it without acknowledging that it is true or supporting it.²⁶² Humility and deference to the communities' values, priorities, and agency is paramount in navigating this discursive minefield.

The three frames discussed below are examples deployed by the Hui that subtly incorporated American values while also elevating 'ike ku'una, emphasizing the widespread benefits from traditional and customary Native Hawaiian practices, and engaging the foundations of Hawai'i's constitutional public trust in Kānaka Maoli precepts and restorative justice principles.

1. 'Ike Ku'una (Traditional Knowledge)

The Wai'oli farmers emphasized their generational stewardship of the Hanalei Kalana grounded in Indigenous place-based expertise, tacitly tapping into the American values of ingenuity, innovation, and individual responsibility.²⁶³ For example, in his written testimony, Hui President Reid Yoshida explained that the farmers and their "ancestors have stewarded Wai'oli Stream and the greater Hanalei Kalana for four to six generations or more — long before there was a State of Hawai'i, conservation district, or interim instream flow standards."²⁶⁴ All of the farmers submitted testimony about their families' long histories of farming in Wai'oli Valley.²⁶⁵ Aunty Chris Kobayashi,²⁶⁶ a third-generation Wai'oli farmer, also noted the painful irony that the Hui was required to go through these legal processes "just to continue to steward resources our ancestors protected for generations."²⁶⁷

Emphasizing place-based expertise and technical knowledge of their lo'i kalo system enabled the Hui to demonstrate their ingenuity in stewarding such a complex system and innovation in the face of multiple environmental catastrophes. It also helped to elevate local and Native Hawaiian farmers' knowledge within a system that elevates academic expertise over lived experience and intergenerational knowledge, especially from Black, Brown, and Indigenous communities. In empirical studies, ingenuity and innovation framing garnered positive responses to race-based and farming policies. For example, ingenuity framing was effective in cultivating an understanding of "racial disparities in terms of system inequity in access to social resources" and enabled participants to "talk more concretely" about solutions.²⁶⁸ With regard to farming

²⁶¹ Kennedy et al., *supra* note 34, at 408.

²⁶² *Id.*

²⁶³ *Id.* at 412-13 (explaining ingenuity and innovation are American values).

²⁶⁴ Yoshida, *supra* note 253.

²⁶⁵ All testimonies available at *IFS Testimonies*, *supra* note 253.

²⁶⁶ This Article refers to revered elders as "Aunty" or "Uncle," consistent with Native Hawaiian custom and tradition.

²⁶⁷ Kobayashi, *supra* note 253.

²⁶⁸ DAVEY, *supra* note 256, at 7-8.

policies, studies show that stressing innovation—like the Hui’s centuries-long adaptive stewardship—helps to “shift people’s thinking away from farming as hard but simple labor and toward an understanding of farming as a complex, expert practice” rooted in scientific approaches.²⁶⁹

Relatedly, the Wai‘oli farmers also asserted the primacy of their ‘ike ku‘una to help reverse the dominant narrative of who the biocultural resource management “experts” really were. Kaisen Carillo, a fifth-generation Wai‘oli farmer, explained that the Hui’s “stewardship of the stream brings together centuries of Native Hawaiian knowledge that is specific to this ‘āina.”²⁷⁰ He humbly pointed out that the Hui and their “ancestors are the original experts with regard to the needs of Wai‘oli Stream and the Hanalei Kalana.”²⁷¹ At Wai‘oli’s IIFS proceeding before the Water Commission, Devin Kamealoha Forrest, a Kanaka Maoli clinician from Halele‘a who worked for three semesters alongside the Hui,²⁷² grounded the Hui’s presentation in cultural and historical expertise through mele (songs), mo‘olelo (oral histories), and Māhele documents demonstrating the ancestral stewardship of the area as a kalana.²⁷³ JoAnne Kaona, a fourth-generation Wai‘oli farmer and Hui Board member, then took the Commissioners on a virtual huaka‘i (journey) through the complexities of the Hui’s lo‘i kalo irrigation system and technical expertise required to manage it.²⁷⁴ She explained that, for the Hui, “ma ka hana ke ‘ike, the learning is in the doing. We practice and perpetuate kalo farming best practices specific to Wai‘oli We kilo, we observe and adapt. For over a century, we have been managing our resources to support cultural practices and kalo in particular.”²⁷⁵ The Wai‘oli farmers were ultimately successful. In what has been hailed as a “significant and unprecedented action,”²⁷⁶ the Water Commission recognized kalana as the “traditional land and water management system” of Wai‘oli and the larger Hanalei Kalana.²⁷⁷

²⁶⁹ MILLER ET AL., *supra* note 257, at 17-18, 22.

²⁷⁰ Carillo, *supra* note 253.

²⁷¹ *Id.*

²⁷² Forrest is also a lauded traditional and customary Native Hawaiian practitioner who was one of a handful of law students nationally recognized in 2021 for his pro bono service. See Beverly Creamer, *Law Student Named Pro Bono Hero for Assisting Kaua‘i Taro Farmers*, UNIV. OF HAW. NEWS (May 11, 2021), <https://www.hawaii.edu/news/2021/05/11/law-student-pro-bono-hero> [<https://perma.cc/L66Y-UGPA>].

²⁷³ HAW. COMM’N ON WATER RES. MGMT., *April 20, 2021 Commission on Water Resource Management Meeting*, at 5:13:51 (YouTube, Apr. 20, 2021) [hereinafter *Apr. 2021 Water Comm’n Meeting*], <https://www.youtube.com/watch?v=KTBL2LHWg78> [<https://perma.cc/G4VP-2WYM>].

²⁷⁴ *Id.* at 5:20:28.

²⁷⁵ *Id.* at 5:27:09.

²⁷⁶ Tanigawa Lum, *supra* note 32, at 346-47.

²⁷⁷ HAW. COMM’N ON WATER RES. MGMT., AMENDED INTERIM INSTREAM FLOW STANDARDS FOR WAI‘OLI STREAM IN THE SURFACE WATER HYDROLOGIC UNIT OF WAI‘OLI 7 (2021), <https://files.hawaii.gov/dlnr/cwrm/submittal/2021/sb20210518B1.pdf> [<https://perma.cc/M62W-FWPP>].

Emphasizing the Hui's ancestral knowledge helped establish who the experts on Wai'oli Stream really were and elevated their 'ike ku'una. This made it more difficult to discount ancestral knowledge of the kalana-wide stewardship in favor of incomplete Western understandings of resource management on a watershed scale.²⁷⁸ As Kanaka Maoli legal scholar U'ilani Tanigawa Lum explained, the farmers' efforts "empowered decisionmakers with Indigenous place-based knowledge for a more comprehensive and adaptive approach to resource management."²⁷⁹

Though sometimes uncomfortable for community members accustomed to humility, asserting the primacy of traditional Indigenous place-based expertise is vital because Native Peoples' testimonies are often devalued as unscientific opinions, whereas non-Indigenous experts are taken as "unbiased purveyors of truth."²⁸⁰ This is compounded in administrative proceedings where decisionmakers look to hydrologists, geologists, and other "experts" largely unfamiliar with the resource to provide one-size-fits-all guidance on management.

2. Widespread Benefits from Traditional and Customary Practices

The Wai'oli farmers also keyed into American mythology of shared fates and interdependence by emphasizing the many ways in which the greater Halele'a community benefits from the Hui's traditional and customary Native Hawaiian lo'i kalo cultivation. The majority of the kalo grown by the Hui, for example, goes to Waipā Foundation, a nonprofit in the neighboring Waipā Ahupua'a within the Hanalei Kalana that processes the kalo into poi to be distributed below-cost to the local community.²⁸¹ JoAnne explained at Wai'oli's IIFS hearing that the Hui "strive[s] to ho'olako, to have enough and enough to share with others. Our little Hui aims to feed kama'āina to sustain the relationship-based economy and shared values of aloha 'āina: aloha for each other and aloha for our land and water."²⁸² In addition to strengthening local food security, the Hui's kalo cultivation has other widespread environmental and cultural benefits for the greater Hanalei Kalana, including community-wide flood mitigation, preservation of stream habitats for Native biota, groundwater recharge, and cultural and agricultural education.²⁸³

²⁷⁸ See Tanigawa Lum, *supra* note 32, at 305; see also Coffey & Tsosie, *supra* note 103, at 201.

²⁷⁹ Tanigawa Lum, *supra* note 32, at 305.

²⁸⁰ See Coffey & Tsosie, *supra* note 103, at 201.

²⁸¹ See FINAL ENVIRONMENTAL ASSESSMENT, *supra* note 48, at 25-26.

²⁸² *Apr. 2021 Water Comm'n Meeting*, *supra* note 273, at 5:27:31.

²⁸³ FINAL ENVIRONMENTAL ASSESSMENT, *supra* note 48, at 89-90; see also Kobayashi, *supra* note 253; Written Testimony of Clarence "Shorty" Kaona, Wai'oli Valley Taro Hui Member, before the Hawai'i Commission on Water Resource Management (Apr. 20, 2021), <https://files.hawaii.gov/dlnr/cwrn/submittal/2021/sb20210420C3T.pdf> [<https://perma.cc/M62W-FWPP>].

Multi-disciplinary research indicates that this “interdependence” framing has “several promising effects.”²⁸⁴ For race-based policies, interdependence helped study participants understand that reducing racial disparities will have society-wide benefits.²⁸⁵ This is important because traditional and customary Native Hawaiian rights and practices, especially as they relate to stream restoration, are too often framed as a burden on commercial interests and property rights.²⁸⁶

3. Restorative Justice Principles Embedded in Hawai‘i Law

The Wai‘oli Valley Taro Hui also grounded their testimonies in Hawai‘i’s constitutional public trust provisions.²⁸⁷ These laws originate in restorative justice principles and Kānaka Maoli customs, traditions, and precepts, as well as the laws of the Kingdom of Hawai‘i.²⁸⁸

As Sproat and I have previously explained, Hawai‘i’s unique history, including Native Hawaiian custom and tradition, the U.S.-backed illegal overthrow of the sovereign Hawaiian Kingdom, and the ongoing harms of settler colonialism, have “inspired a focus and emphasis on restorative justice principles in addressing issues continuing to face Kānaka Maoli.”²⁸⁹ Through the 1978 ConCon and subsequent statutory and caselaw development, the people of Hawai‘i established a comprehensive constitutional public trust doctrine that is grounded in Indigenous custom, tradition, and values, in part to further restorative justice for Kānaka Maoli, while also benefiting all Hawai‘i residents.²⁹⁰

Article XI, section 1 of Hawai‘i’s Constitution sets forth Hawai‘i’s public trust framework and outlines the state’s and counties’ trust obligations, declaring that the State “shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources,” and promote the development and use of these resources “in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State” for “the benefit of present and future generations.”²⁹¹ In turn, article XI, section 7 refers to water resources and declares that it is the state’s “obligation to protect, control and regulate the use of Hawaii’s water resources for the benefit of its people.”²⁹²

²⁸⁴ DAVEY, *supra* note 256, at 8.

²⁸⁵ *Id.*

²⁸⁶ See, e.g., Chris Hamilton, *Na Wai Eha: HC&S Speaks*, MAUI NEWS (Oct. 9, 2009) (on file with author); Hawaiian Commercial and Sugar Company’s Opening Brief at 1-2, 12-14, *In re ‘Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications & Petition to Amend Interim Instream Flow Standards of Waihe‘e River & Waichu, ‘Iao & Waikapu Streams Contested Case Hearing*, No. CCH-MA-06-01 (Haw. Comm’n on Water Res. Mgmt. Dec. 5, 2008).

²⁸⁷ E.g., Kobayashi, *supra* note 253; Carillo, *supra* note 253.

²⁸⁸ Sproat & Palau-McDonald, *supra* note 13, at 537-50.

²⁸⁹ *Id.* at 537.

²⁹⁰ *Id.* at 538-39.

²⁹¹ HAW. CONST. art. XI, § 1.

²⁹² *Id.* § 7.

In the Hawai‘i Supreme Court’s paradigmatic *Waiāhole I* decision, the court recognized that, together, sections 1 and 7 of article XI “adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i.”²⁹³ In *Waiāhole I*, the court placed the origins of Hawai‘i’s public trust in the Hawaiian Kingdom and the commitment to aloha ‘āina, biocultural resources, and the Hawaiian people reflected in the Kingdom’s constitution and other laws.²⁹⁴ In addition to other path-forging pronouncements, the *Waiāhole I* court expansively interpreted the scope of the constitutional public trust to include “all water resources without exception or distinction.”²⁹⁵

Another section of Hawai‘i’s Constitution, article XII, section 7, articulates specific protections for traditional and customary Native Hawaiian practices.²⁹⁶ The *Waiāhole I* court declared that these practices, including lo‘i kalo cultivation, are protected constitutional public trust purposes.²⁹⁷

In emphasizing the restorative justice principles and Kānaka Maoli values embedded in Hawai‘i law, the farmers keyed into the national myth that Americans “play[] by the rules.”²⁹⁸ For example, the farmers emphasized that they were simply asking the Water Commission to fulfill its trust duties to amend Wai‘oli Stream’s IIFS and afford due weight to the special types of water rights held by some of their members.²⁹⁹ They also explained that their instream use for traditional and customary Native Hawaiian lo‘i kalo cultivation was a protected public trust purpose the Water Commission must prioritize.³⁰⁰ By emphasizing legal principles, the farmers were able to frame Wai‘oli Stream’s IIFS amendment as not only consistent with, but also necessary to uphold, the Water Commission’s constitutional public trust obligations, which are grounded in restorative justice and Native Hawaiian customs and precepts.³⁰¹

²⁹³ *In re Water Use Permit Application (Waiāhole I)*, 9 P.3d 409, 444 (Haw. 2000).

²⁹⁴ *Id.* at 440-41.

²⁹⁵ *Id.* at 445.

²⁹⁶ HAW. CONST. art. XII, § 7 (“The 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 . . .”). See generally *Ka Pa‘akai O Ka‘Āina v. Land Use Comm’n*, 7 P.3d 1068 (Haw. 2000).

²⁹⁷ *Waiāhole I*, 9 P.3d at 448-50, 454.

²⁹⁸ See, e.g., Kennedy et al., *supra* note 34, at 412.

²⁹⁹ Yoshida, *supra* note 253; Kobayashi, *supra* note 253. Some Wai‘oli farmers have appurtenant and riparian rights, for an explanation of appurtenant rights, see *supra* note 242. Riparian rights “protect the interests of people who live along river or stream banks to the reasonable use of water from that river or stream on the riparian land.” Sproat, *Water Law*, *supra* note 15, at 542.

³⁰⁰ See Yoshida, *supra* note 253; Kobayashi, *supra* note 253.

³⁰¹ See Sproat & Palau-McDonald, *supra* note 13, at 537-44; see also *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330, 1339 (Haw. 1973) (finding there was no private ownership of water resources because “right to water was not intended to be, could not be, and was not transferred” through Māhele process and subsequent legislation; rather, “ownership of water in natural watercourses streams and rivers remained in the people of Hawaii for their common

By grounding the narrative in existing laws, the farmers keyed into “rule of law” framing.³⁰² Despite recent events, studies show that the American public believes that following the law is essential for a well-functioning society.³⁰³ Framing that triggers images of rule following or respect for the rule of law can help establish shared values with middle-ground decisionmakers.³⁰⁴ Once a shared value system is established, decisionmakers are more apt to feel as if they can decide in a favorable way.³⁰⁵

B. *Hui o Nā Wai ‘Ehā*

Hui o Nā Wai ‘Ehā, a community group of kalo farmers in Central Maui, have fought for decades to protect and preserve Nā Wai ‘Ehā—the Four Great Waters of Waihe‘e and Wailuku Rivers, and Waiehu and Waikapū Streams—which have been diverted by HC&S and its corporate successors, including Wailuku Water Company³⁰⁶ and Mahi Pono, LLC,³⁰⁷ for the last 150 years.³⁰⁸ The

good”); Robinson v. Ariyoshi, 658 P.2d 287, 310, 312 (Haw. 1982) (“Native Hawaiian practices respecting water, the tradition from which our water law ostensibly springs, have been consistently described as aimed at maximizing benefits for those involved . . . [U]nderlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty.”).

³⁰² See Kennedy et al., *supra* note 34, at 412.

³⁰³ See *id.*

³⁰⁴ See *id.* at 413-14.

³⁰⁵ See *id.*

³⁰⁶ Wailuku Water Company is a corporate successor of Wailuku Sugar Plantation, which historically grew 5,250 acres of sugarcane using forty-five million gallons of water per day from Nā Wai ‘Ehā streams. When sugar cultivation ceased in 1988, the company morphed into Wailuku Agribusiness, which grew pineapple and macadamia nuts. In 2001, Wailuku Agribusiness began to sell the former cane lands, but it retained its plantation ditch system. The company renamed itself Wailuku Water Company and now sells water to the luxury developments built on the former cane lands it sold. Hui o Nā Wai ‘Ehā, Maui Tomorrow & OHA Joint Opening Brief, *supra* note 55, at 6-7.

³⁰⁷ Mahi Pono is an “agricultural venture between Pomona Farming LLC, a California-based agricultural group[,] and the Public Sector Pension Investment Board, one of Canada’s largest pension investment managers.” Decl. of Grant Nakama ¶ 4, Haw. Com. & Sugar Co.’s & Mahi Pono, LLC’s Joint Motion for Withdrawal & Substitution of Parties for SWUPA 2206, Surface Water Use Permit Applications, Integration of Appurtenant Rts. & Amends. to the Interim Instream Flow Standards, Na Wai Eha Surface Water Mgmt. Areas of Waihee, Waiehi, Iao & Waikapu Streams, Maui, CCH-MA 15-01 (Haw. Comm’n on Water Res. Mgmt. May 14, 2019), https://files.hawaii.gov/dlnr/cwrmm/cch/cchma1501/CCHMA1501-20190514-HC&S_MP.pdf. In late 2018, Mahi Pono purchased forty-one thousand acres from Alexander & Baldwin (the parent corporation of HC&S) intending to cultivate diversified agriculture and raise livestock. See *id.* ¶ 5. After the sale, HC&S withdrew as an applicant for a water use permit and substituted Mahi Pono as its predecessor-in-interest in the water use permit application before the Water Commission. *Id.* at 1-2.

³⁰⁸ See Sproat, *Wai Through Kānāwai*, *supra* note 18, at 128-30, 134. There are other powerful economic and political interests that use water diverted from Nā Wai ‘Ehā streams, including MMK Maui, LP and the Maui County Department of Water Supply. See *infra* notes 324-325 (expanding on MMK Maui, LP and Maui County Department of Water Supply’s use

diversion systems diverted the streams' water to use for free for plantation agriculture.³⁰⁹ Now, since sugar cultivation has ceased, Wailuku Water Company uses the same systems to sell water to offstream users, including estates built on former plantation land, even though freshwater is a constitutionally protected public trust resource that legally cannot be owned by anyone.³¹⁰ The enduring stream diversions continue the obliteration of the stream ecosystems and cultural practices dependent upon them.

Since 2004, Hui o Nā Wai 'Ehā, Maui Tomorrow Foundation, and Earthjustice have litigated to restore flow to the Nā Wai 'Ehā streams.³¹¹ At the outset, the Hui's primary goal was amending the Nā Wai 'Ehā streams' IIFSs so that the streams, ecosystems, and communities could "live again" and "to support the myriad public trust uses that the streams once sustained."³¹² In pursuit of this goal, the Hui, in partnership with Maui Tomorrow Foundation, Inc., OHA, and Earthjustice attorneys, pursued a dual strategy: It sought IIFS amendments for the Nā Wai 'Ehā streams³¹³ and also successfully petitioned the Water Commission to designate the region as a surface water management

of Nā Wai 'Ehā streams); Opening Brief of Wailuku Country Ests. Irrigation Co. & Wailuku Country Ests. Cmty. Ass'n at 2-8, Surface Water Use Permit Applications, Integration of Appurtenant Rts. & Amends. to the Interim Instream Flow Standards, Na Wai Eha Surface Water Mgmt. Areas of Waihee, Waiehu, Iao & Waikapu Streams, Maui, CCH-MA 15-01 (Haw. Comm'n on Water Res. Mgmt. Feb. 5, 2015).

³⁰⁹ See Sproat, *Wai Through Kānāwai*, *supra* note 18, at 128.

³¹⁰ *Citizens Challenge Plantation Owner's Water Profiteering Plans*, EARTHJUSTICE (June 21, 2010), <https://earthjustice.org/press/2010/citizens-challenge-plantation-owner-s-water-profiteering-plans> [<https://perma.cc/J54C-NM9K>] (claiming Wailuku Water Company sells Nā Wai 'Ehā water for profit in conflict with Hawai'i's constitutional public trust doctrine).

³¹¹ See Sproat, *Wai Through Kānāwai*, *supra* note 18, at 129-30 (summarizing collective litigation in pursuit of restored water flow to Nā Wai 'Ehā streams). For more information on Hui o Nā Wai 'Ehā and the biocultural resources they seek to protect, see HUI O NĀ WAI 'EHĀ, *supra* note 46.

³¹² See 2004 IIFS Petition, *supra* note 59.

³¹³ Since the litigation began, the Nā Wai 'Ehā streams' IIFSs have been amended twice: once in 2010, and then again in 2014 because of a settlement between the parties. See Findings of Fact, Conclusions of L. & Decision & Order at 162-80, 'Iao Ground Water Mgmt. Area High-Level Source Water-Use Permit Applications & Petition to Amend Interim Instream Flow Standards of Waihe'e, Waiehu, 'Iao & Waikapū Streams, No. CCH-MA-06-01 (Haw. Comm'n on Water Res. Mgmt. June 10, 2010) [hereinafter 2010 FOF, COL & D&O]. See generally Order Adopting (1) Hearing Officer's Recommendation on the Mediated Agreement Between the Parties & (2) Stipulation re Mediator's Report of Joint Proposed Findings of Fact, Conclusions of L., Decision & Order, 'Iao Ground Water Mgmt. Area High-Level Source Water-Use Permit Applications & Petition to Amend Interim Instream Flow Standards of Waihe'e, Waiehu, 'Iao & Waikapū Streams, No. CCH-MA06-01 (Haw. Comm'n on Water Res. Mgmt. Apr. 17, 2014) [hereinafter 2014 Settlement Order]. In 2016, the Hui filed another petition to amend Nā Wai 'Ehā stream's IIFS. See generally Hui o Nā Wai 'Ehā's & Maui Tomorrow Found., Inc.'s Petition to Amend Upward the Interim Instream Flow Standards for Waihe'e River, N. & S. Waiehu Streams, Wailuku River & Waikapū Stream & Their Tributaries, No. CCH-MA 15-01 (Haw. Comm'n on Water Res. Mgmt. Mar. 9, 2016).

area,³¹⁴ which is an administrative process that triggers an extra layer of permitting for any consumptive water use.³¹⁵

After the Water Commission designated Nā Wai ‘Ehā, over one-hundred applicants submitted water permit use applications (“WUPAs”) for new and existing uses.³¹⁶ The proceedings culminated in a Hawai‘i Supreme Court decision in 2012. The court declared that the decision the Water Commission had issued in 2010 failed to discharge its constitutional duty to protect traditional and customary Native Hawaiian rights and public trust resources, among other errors.³¹⁷ On remand in 2014, the parties entered into a settlement agreement that established initial interim flow restoration and accommodated HC&S water needs.³¹⁸ In 2016, however, HC&S announced that it would close by the end of the year, and its extensive land holdings would be transitioned to diversified agriculture.³¹⁹ Recognizing that the closure of Maui’s last sugar plantation “opened a once-in-a-century opportunity to remedy historical injustices and reset Nā Wai ‘Ehā toward a new, pono path under traditional and modern public trust principles enshrined in Hawai‘i law,”³²⁰ the Hui filed a petition to increase the Nā Wai ‘Ehā streams’ IIFSs and requested the consolidation of their IIFS petition with the WUPA contested case hearing.³²¹ At this point in the litigation, the Hui, Maui Tomorrow Foundation, and OHA were set to face off against a group of powerful business interests and political players, including Wailuku Water Company,³²² Mahi Pono (a California company that purchased forty-one

³¹⁴ See *Citizens Seek State Oversight for Central Maui Streams*, EARTHJUSTICE (Dec. 6, 2006), <https://earthjustice.org/press/2006/citizens-seek-state-oversight-for-central-maui-streams> [<https://perma.cc/35E9-EMF7>] (publicizing Earthjustice, on behalf of the Hui and Maui Tomorrow Foundation, filed petition before Commission on Water Resource Management to designate streams’ watersheds as surface water management areas); Press Release, Haw. Comm’n on Water Res. Mgmt., Public Notice to Announce the Designation of the Surface Water Hydrologic Units of Waihee, Waiehu, Iao, and Waikapu Streams (Na Wai Eha) as Surface Water Management Areas (Apr. 10, 2008), <https://files.hawaii.gov/dlnr/cwrm/notice/2008/nt20080410.pdf> [<https://perma.cc/QA2H-GCSS>].

³¹⁵ See HAW. REV. STAT. §§ 174C-41, 174C-48 (2024).

³¹⁶ See Hui o Nā Wai ‘Ehā, Maui Tomorrow & OHA Joint Opening Brief, *supra* note 55, at 9.

³¹⁷ See *In re ‘Īao Ground Water Mgmt. Area High Level Source Water Use Permit Applications (Nā Wai ‘Ehā I)*, 287 P.3d 129, 150 (Haw. 2012).

³¹⁸ See 2014 Settlement Order, *supra* note 313, at HOR 2, Stipulation 24-28.

³¹⁹ See Hui o Nā Wai ‘Ehā, Maui Tomorrow & OHA Joint Opening Brief, *supra* note 55, at 10.

³²⁰ *Id.* at 1.

³²¹ See *id.* at 2, 9-10.

³²² For an explanation of Wailuku Water Company, see *supra* note 306.

thousand acres from HC&S),³²³ MMK Maui (the owner and operator of two golf courses),³²⁴ and the County of Maui's Department of Water Supply.³²⁵

In 2017, the parties filed their proposed Findings of Fact, Conclusions of Law, and Decision and Orders.³²⁶ In its proposal, the Hui asked the Water Commission to restore flow to the streams commensurate with the closure of HC&S with adjustment and sharing provisions during low-flow conditions; they also advocated for the adoption of a "21st-century ahupua'a model" that would integrate Indigenous stewardship practices into the management framework and uphold the agency's public trust duties.³²⁷

The Hui also keyed into the same frames that the Wai'oli farmers had deployed in pursuit of an IIFS amendment for their stream: rule following, widespread benefits, and traditional Indigenous expertise.

The Hui covered all bases with the "rule following" framing. It rooted its proposal not only in the Water Code, but also in Hawai'i's constitutional provisions and caselaw related to the public trust and the exercise of traditional and customary Native Hawaiian rights.³²⁸ It emphasized the Water Commission's "affirmative duty" to account for the public trust "in the planning and allocation of water resources, and to protect public trust uses whenever feasible."³²⁹ And the Hui exhaustively mapped the Water Commission's constitutional public trust obligations and statutory responsibilities onto the agency's duties with respect to IIFS amendments, water rights, water use

³²³ For a description of Mahi Pono, LLC, see *supra* note 307.

³²⁴ MMK Maui, LP owns and operates the King Kamehameha Golf Club and the Kahili Golf Course in Waikapu on Maui, which span around 350 acres. MMK Maui, LP's Opening Brief at 2, *In re Surface Water Use Permit Applications*, No. SCOT-21-0000581 (Haw. Sep. 1, 2022). MMK is one of Wailuku Water Company's customers, paying for the delivery of 2.7 million gallons of water per day. *Id.*

³²⁵ The Maui County Department of Water Supply uses some Nā Wai 'Ehā stream water for municipal water. See Hui o Nā Wai 'Ehā, Maui Tomorrow & OHA Joint Opening Brief, *supra* note 55, at 8 (discussing county water department among players seeking WUPAs for Nā Wai 'Ehā water); see also *Frequently Asked Questions—Where Does Maui Water Come from?*, CNTY. OF MAUI HAWAII, <https://www.mauicounty.gov/m/faq?cat=64#question-112> [<https://perma.cc/7DK6-D7GX>] (last visited May 28, 2026) (explaining which water resources are for different regions of Maui).

³²⁶ See generally Hui o Nā Wai 'Ehā's, Maui Tomorrow Found., Inc.'s & Off. of Hawaiian Affs.' Joint Proposed Findings of Fact, Conclusions of L. & Decision & Order, Surface Water Use Permit Applications, Integration of Appurtenant Rts. & Amends. to the Interim Instream Flow Standards, Nā Wai 'Ehā Surface Water Mgmt. Areas of Waihe'e, Waiehu, 'Iao & Waikapū Streams, Maui, No. CCH-MA15-01 (Haw. Comm'n Water Res. Mgmt. Feb. 17, 2017).

³²⁷ *Id.* at 60-61. Specifically, Hui o Nā Wai 'Ehā and OHA proposed the restoration of 37.7 million gallons per day ("mgd") across Nā Wai 'Ehā streams: 18 mgd for Waihe'e River, 1.5 mgd for North Waiehu Stream, 1.3 mgd for South Waiehu Stream, 13 mgd for Wailuku River, and 3.9 mgd for Waikapū Stream, with adjustment and sharing provisions during low-flow conditions. See *id.* at Decision & Order ("D&O") 1-2.

³²⁸ See *id.* at Conclusions of Law ("COL") ¶¶ 1-349.

³²⁹ *Id.* at COL ¶ 7.

permitting, and the protection of traditional and customary Native Hawaiian practices.³³⁰ In doing so, the Hui framed its proposal as not only consistent with but also required by Hawai‘i’s constitution, statutes, regulations, and caselaw.

As for the “widespread benefits” from its proposal, the Hui explained that restoring stream flow would result in overall ecosystem benefits, including for freshwater stream animals, wetlands, estuaries and nearshore marine ecosystems, Native bird habitats, groundwater recharge, traditional and customary Native Hawaiian practices, and recreational opportunities for local communities and the public at large.³³¹

As for grounding its proposal in traditional Indigenous expertise, the Hui proposed an integrated “‘21st-century ahupua‘a model’ for water resource protection and management consistent with the public trust and Native Hawaiian stewardship principles.”³³² Under this system, the Water Commission would “provide for adjustable IIFSs,” consistent with Native Hawaiian adaptive stewardship, “such that when streamflows drop below a certain low-flow threshold, the IIFS will temporarily decrease to allow diversion of a portion of the total available flow.”³³³ The Hui pointed out that there was “already precedent for such adjustable IIFSs” in the present proceedings, as the Water Commission had previously incorporated adjustments into South Waiehu’s and Wailuku River’s IIFSs for low flow conditions.³³⁴ The Hui also advocated for coordination among water users reliant on the plantation ditch system, “including the sharing of water during different times.”³³⁵ The Hui noted that, in ancient times, Kānaka Maoli would divide water use between day and night to maximize the resource.³³⁶ In the present, for example, the Hui noted that watering “fields crops or a golf course” at night would help conserve water and then sufficient flow could be directed through lo‘i kalo during the day when cold, flowing water is necessary to remove heat from the lo‘i.³³⁷ Overall, the Hui demonstrated that its proposal for adjustable IIFS with sharing provisions would not only maximize the reasonable beneficial use of the resource, but also uphold the Water Commission’s constitutional public trust duties and establish a model for water resource stewardship grounded in Indigenous place-based knowledge.³³⁸

The Water Commission’s final decision, however, fell far short of any envisioned restorative model and once again violated the agency’s public trust

³³⁰ See *id.* at COL ¶¶ 17-101.

³³¹ See *id.* at COL ¶¶ 125-41.

³³² *Id.* at COL ¶ 225.

³³³ *Id.* at COL ¶ 252.

³³⁴ *Id.* at COL ¶ 253.

³³⁵ *Id.* at COL ¶ 282.

³³⁶ *Id.* (citing 2010 FOF, COL & D&O, *supra* note 313, at FOF 273; Horner v. Kumuli‘ili‘i, 10 Haw. 174 (1895)).

³³⁷ *Id.*

³³⁸ See Tanigawa Lum, *supra* note 32, at 305.

duties.³³⁹ It began with a separate fifteen-page executive summary that professed to ground the decision in “ancestral Hawaiian water management” and usher in a “new era” of adaptive resource stewardship in the region, recognizing that “Maui’s future is at stake.”³⁴⁰ Paying lip service to Kanaka Maoli culture, the executive summary acknowledged in large, italicized font in the middle of the first page that “[w]ater holds the key to invigorating the life of our land; catalyzing the transition of fallow plantation acreage to a vibrant new era of sustainable agriculture; and enabling traditional practices that allow our host culture to evolve and perpetuate.”³⁴¹ It prominently displayed two ‘ōlelo no‘eau (Hawaiian proverbs) often quoted by community members in testimony before the Commission.³⁴² It also featured a large block quote from the text of the Hawai‘i Supreme Court’s foundational *Waiāhole I* decision that instructed the Commission to “not relegate itself to the role of a mere umpire passively calling balls and strikes” and instead “take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision process.”³⁴³

But the executive summary had no legal import.³⁴⁴ The cultural references and promised paradigm shift were trappings to frame a decision rife with legal errors that upheld the status quo. Notably, the legally binding part of the decision maintained the existing IIFSs adopted in the 2014 settlement when HC&S was still operating.³⁴⁵ It ignored the Hui’s proposed ahupua‘a model and continued

³³⁹ See Surface Water Use Permit Applications, Integration of Appurtenant Rts. & Amends. to Interim Instream Flow Standards (*Nā Wai ‘Ehā II*), 550 P.3d 1167, 1182, 1202-07 (Haw. 2024).

³⁴⁰ See HAW. COMM’N ON WATER RES. MGMT., NĀ WAI ‘EHĀ CONTESTED CASE EXECUTIVE SUMMARY at 1-2, 15 (June 28, 2021) [hereinafter NĀ WAI ‘EHĀ CONTESTED CASE EXECUTIVE SUMMARY]. The Hawai‘i Department of Land and Natural Resources, the agency of which the Water Commission is a part, also lauded the decision as “the most comprehensive application of the Hawai‘i Water Code to water use and protection in history” that “establish[es] a new paradigm for water resource management and collaboration in Nā Wai ‘Ehā.” Press Release, Haw. Dep’t of Land & Nat. Res., Nā Wai ‘Ehā Decision & Order Ensures Water for Traditional and Customary Practices (June 28, 2021), <https://dlnr.hawaii.gov/blog/2021/06/28/nr21-123> [<https://perma.cc/DZG8-7BUX>].

³⁴¹ NĀ WAI ‘EHĀ CONTESTED CASE EXECUTIVE SUMMARY, *supra* note 340, at 1.

³⁴² *Id.* at 2, 15 (“‘Ola i ka wai’ - ‘In water there is life.’” “‘Hahai no ka ua i ka ululā‘au’ - Rains always follows the forest.”).

³⁴³ *Id.* at 6 (quoting *In re Water Use Permit Applications (Waiāhole I)*, 9 P.3d 409, 455 (Haw. 2000)).

³⁴⁴ See *id.* at 1 (“This Executive Summary does not replace the formal and lengthy Decision and Order . . . which documents the legal record, analysis, and the over 1000 determinations that resulted in 116 recognized appurtenant rights and 176 permits granted. Its purpose is to summarize the Hawai‘i Commission on Water Resource Management’s . . . deliberations and offer insights and context relative to our decision-making process.”).

³⁴⁵ Findings of Fact, Conclusions of L. & Decision & Order at COL ¶¶ 122-44, Surface Water Use Permit Applications, Integration of Appurtenant Rts. & Amends. to the Interim Instream Flow Standards, Nā Wai ‘Ehā Surface Water Mgmt. Areas of Waihe‘e River,

to view community members' Indigenous place-based knowledge as insufficient evidence.³⁴⁶

Two days after releasing its final decision, the Water Commission corrected some blatant errors, including Mahi Pono's irrigation requirements, allowable losses from Mahi Pono's and Wailuku Water Company's systems, and the amount of water that could be drawn from an alternative source instead of the streams.³⁴⁷

Nevertheless, all parties challenged the decision. For Hui o Nā Wai 'Ehā and OHA, the final decision once again illustrated the Water Commission's failure to fulfill its constitutional and statutory duties in the "initial, foundational step" of setting IIFSs "to protect Nā Wai 'Ehā stream flows and instream public trust uses 'to the extent practicable.'"³⁴⁸ In doing so, the Hui and OHA pointed out that the Water Commission "left Nā Wai 'Ehā rivers and streams as 'convenient reservoirs for offstream private use' by Wailuku Water Company," a "former plantation now in the business of diverting and selling Nā Wai 'Ehā water to the public."³⁴⁹

On appeal, the Hawai'i Supreme Court unanimously struck down the Water Commission's decision.³⁵⁰ They held that the agency had "failed to justify its decision to not restore water to the streams in light of the closure of the last Maui sugar plantation and newly incorporated downstream uses."³⁵¹ Among other errors, the court also concluded that the Commission's decision lacked findings on the effects of its decision on constitutionally protected traditional and

Waichu Stream, Wailuku River (previously known as 'Āo Stream) & Waikapū Stream, Maui, CCH-MA 15-01 (Haw. Comm'n on Water Res. Mgmt. June 28, 2021), <https://files.hawaii.gov/dlnr/cwr/cch/cchma1501/CCHMA1501-20210630-D&O.pdf>.

³⁴⁶ In reaction to the decision, Hōkūao Pellegrino, the president of Hui o Nā Wai 'Ehā, thanked the Water Commission "for its work on the decision, as well as to all the Nā Wai 'Ehā community members and supporters for their steadfast commitment, patience, and tireless work" but expressed "concern[] and disappoint[ment] with some key parts of the decision," including "a number of oversights in allocating too much water to several big diverters, while restoring little or no flows to Nā Wai 'Ehā streams even though the closure of Hawaiian Commercial & Sugar Company in 2016 should allow much more water to be returned." *Hawai'i Water Commission Issues Historic Decision on Maui's "Four Great Waters,"* EARTHJUSTICE (June 29, 2021), <https://earthjustice.org/press/2021/hawaii-water-commission-issues-historic-decision-on-maui-s-four-great-waters> [https://perma.cc/BH7P-FKF5].

³⁴⁷ Errata to Findings of Fact, Conclusions of L. & Decision & Order at 1-2, CCH-MA 15-01 (Haw. Comm'n on Water Res. Mgmt. June 30, 2021), <https://dlnr.hawaii.gov/cwr/news-events/cch/cch-ma15-01> [https://perma.cc/LK35-ZTZK] (click on "Errata to Findings of Fact, Conclusions of Law, and Decision and Order").

³⁴⁸ Hui o Nā Wai 'Ehā, Maui Tomorrow & OHA Joint Opening Brief, *supra* note 55, at 1 (citing *Waiāhole I*, 9 P.3d at 467).

³⁴⁹ *Id.* (citing *Waiāhole I*, 9 P.3d at 467, 465).

³⁵⁰ Surface Water Use Permit Applications, Integration of Appurtenant Rts. & Amends. to Interim Instream Flow Standards (*Nā Wai 'Ehā II*), 550 P.3d 1167, 1182 (Haw. 2024).

³⁵¹ *Id.* at 1182, 1201-07.

customary Native Hawaiian rights, as required by longstanding precedent,³⁵² and unlawfully delegated the agency's constitutional public trust duties to private commercial users.³⁵³

III. INSIGHTS FOR RESTORATIVE ENVIRONMENTAL JUSTICE CLAIMS

Both the Wai'oli Valley Taro Hui and Hui o Nā Wai 'Ehā deployed similar framing of their claims before the Water Commission, but the groups of kalo farmers received different results. Their contrasting experiences shed light on the power and limitations of framing Native communities' restorative environmental justice claims.

The Wai'oli Valley Taro Hui's success in convincing the Water Commission to adopt a traditional stewardship model in the Hanalei Kalana demonstrates that framing Indigenous claims for restorative environmental justice with 'ike ku'una is a valuable tool when the law is too narrow to fit Indigenous stewardship practices. Injecting 'ike ku'una into restorative environmental justice framing can help to temporally shift the narrative to include the status quo *before* colonization—in Wai'oli, for example, when place-based stewardship on a kalana-wide scale was the norm before the Water Code's western management schema based on watersheds even existed. The contrast between the status quo *before* (adaptive, place-based stewardship rooted in Indigenous knowledge) and *after* colonization (potential eradication of a centuries-old traditional lo'i kalo cultivation system) reveals the generational harms missed by an acontextual analysis. This contrast is even more stark in the case of Nā Wai 'Ehā, which went from free-flowing streams that nourished abundant ecosystems, including lo'i kalo complexes and muliwai (estuaries), to large-scale diversions for luxury estates and golf courses, nearly eradicating lo'i kalo cultivation and stream ecosystems.

In the Wai'oli farmers' case, the Water Commission could have narrowly interpreted the Water Code's "in-stream use" provision (and arguably violated Hawai'i's Constitution in doing so), but it instead chose to adopt an adaptive stewardship model grounded in Native Hawaiian custom and tradition because the Wai'oli farmers supplied the agency decisionmakers with 'ike ku'una.³⁵⁴

Moreover, the Wai'oli farmers' framing of their practices as consistent with Hawai'i's Constitution, statutes, and caselaw, as well as their emphasis on the widespread benefits of their traditional lo'i kalo system, gave the Water Commission permission to integrate the ancient stewardship framework into the Commission's western management approach. In this context, it helped that the applicable constitutional provisions, statutory and regulatory regime, and relevant caselaw are grounded in restorative justice principles. The three frames the Wai'oli farmers keyed into—rule following, widespread benefits, and

³⁵² *Id.* at 1182, 1207-09 (citing *Ka Pa'akai O Ka 'Āina v. Land Use Comm'n*, 7 P.3d 1068 (Haw. 2000)).

³⁵³ *Id.* at 1182, 1224-26.

³⁵⁴ See Tanigawa Lum, *supra* note 32, at 305.

generational expertise—worked for their Hui, but they may not work for other communities or traditional practices, as Hui o Nā Wai ‘Ehā’s case study illustrates.

Hui o Nā Wai ‘Ehā deployed similar tactics as the Wai‘oli Valley Taro Hui, but it did not achieve the same resounding success in the Water Commission’s decision in 2021. Hui o Nā Wai ‘Ehā grounded its advocacy in its members’ ‘ike ku‘una and has demonstrated over two decades of litigation that restoring stream flow is necessary not only under the Water Code and constitutional protections for public trust resources and traditional and customary Native Hawaiian practices, but also given these laws’ roots in restorative justice principles.³⁵⁵ Full streamflow restoration still remains elusive, however, due to the Water Commission and its attorneys’ apparent hesitation to embrace the full extent of their constitutional public trust duties when faced with politically charged disputes. But it is in precisely these situations where the constitutional public trustee’s willingness to uphold its legal duties is most critical.

Hui o Nā Wai ‘Ehā’s experience before the Water Commission illustrates the limitations of framing for Indigenous claims. These limits are particularly apparent when restorative justice for the community may have political and economic ramifications. As U.S. District Judge Barbara Crabb observed in relation to racialized opposition to a Native American tribe’s bid for a casino, “[i]t is one thing to treat a group well when its members present no economic or personal inconvenience; it is quite another to continue to treat them that way when they have asserted interests in competition with one’s own.”³⁵⁶ The Wai‘oli farmers’ success is due in part to the fact that there were no countervailing political or economic interests opposed to Wai‘oli Stream’s IIFS amendment. On the other hand, Hui o Nā Wai ‘Ehā took on Maui County and successors of the politically and economically powerful sugar plantations, all of which benefit from the status quo of water diversions that have dried Nā Wai ‘Ehā streams for nearly two centuries. Hōkūao Pellegrino, a kalo farmer from Waikapu Valley and president of Hui o Nā Wai ‘Ehā, explained in relation to the Water Commission’s June 2010 decision:

T[he Hui’s case] should have been a no-brainer. We had the better legal case, but at the end of the day, it didn’t matter. The full commission went with what it knew best: politics, power, big money, and the ‘old boy’ mentality. Their final decision was based on nothing that was legally relevant or what justice required.³⁵⁷

At bottom, these case studies demonstrate that framing is a crucial tool for Native communities to deploy—but framing, by itself, is not enough. Other

³⁵⁵ Sproat, *Wai Through Kānāwai*, *supra* note 18, at 131-32.

³⁵⁶ *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 843 F. Supp. 1284, 1294 (W.D. Wis. 1994); *see also* Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 650 (2009) (discussing *Lac du Flambeau Band* and Judge Crabb’s statement).

³⁵⁷ Sproat, *A Question of Wai*, *supra* note 17, at 213.

elements, such as well-informed, proactive decisionmakers with detail-oriented staff and consultants, a favorable political climate, a community mobilized for advocacy, and pro bono legal assistance committed to long-term litigation are also needed to meaningfully step toward restorative environmental justice for Native Peoples.³⁵⁸

But even when all these factors are present, the force of status quo bias may still hamper success. In particular, the impact of structural racism on Native communities' restorative environmental justice claims cannot be discounted. Negative stereotypes are embedded within subconscious frames by virtue of the colonial process, so the playing field is already stacked against Native groups.³⁵⁹

In practice, this can look like Indigenous claims for restorative environmental justice being interpreted by the non-Native public as complaining or as an attempt to get special treatment and handouts from local, state, and federal governments.³⁶⁰ It can also look like giving in to corporate fear mongering about job cuts,³⁶¹ or hand wringing about the length and complexity of legal processes as a pretext to delay systemic change.³⁶² Bias, whether conscious or unconscious, is also at play when 'ike ku'una is portrayed as an opinion, rather than scientific expertise accumulated and handed down over centuries. When Kānaka Maoli are in decision-making positions, we are explicitly and implicitly viewed as biased, especially when biocultural resources or traditional practices are implicated, as if we are genetically incapable of neutrality.³⁶³ Similar

³⁵⁸ See *id.* at 215.

³⁵⁹ See Serrano & Nu'uhiwa, *supra* note 167, at 214-25.

³⁶⁰ For example, see West Maui developer Peter Martin's comment that Native Hawaiian rights are a "crock of shit." Carolyn Kormann, *Why Maui Burned*, NEW YORKER (Oct. 30, 2023), <https://www.newyorker.com/magazine/2023/11/06/maui-wildfire-response-recovery> [<https://perma.cc/G63N-Y3DR>].

³⁶¹ For example, see Hamilton, *supra* note 286 (discussing HC&S's statement that "800 full-time Maui jobs with benefits are at stake if the state Water Resource Management Commission rules against them in the Na Wai Eha streams case").

³⁶² In the Lahaina Aquifer Sector designation proceedings, allies of large development companies that purchased former plantation lands repeatedly cited the complexity of the designation process as a reason not to proceed. See, e.g., Testimony of Heidi Bigelow on behalf of West Maui Land Company, before the Haw. Comm'n on Water Res. Mgmt. (Apr. 25, 2022); Testimony of Margaret Jennesse on behalf of Kaanapali Land Management Corp., before the Haw. Comm'n on Water Res. Mgmt. (Apr. 26, 2022); Testimony of Joshua Guth, before the Haw. Comm'n on Water Res. Mgmt. (Apr. 26, 2022). All testimonies available at *Water Management Area Designation: Lahaina Aquifer Sector Area*, HAW. COMM'N ON WATER RES. MGMT., <https://dlnr.hawaii.gov/cwrw/groundwater/gwma/lahaina> (last visited May 28, 2026) (scroll to "Information Updates"; click "Appendix I: Compilation of Public Hearing Written Testimony" in the June 14, 2022 box). At a designation hearing, West Maui Land Company's attorneys even passed out copies of a complex diagram that appeared to exaggerate the procedural complexity of the designation process in a way that may have been misleading to non-attorney community members.

³⁶³ For example, in the wake of the Lahaina fires in August 2023, Kaleo Manuel, the Deputy Director of the Water Commission, was blamed by a developer for the devastation, who insinuated that he was biased because Manuel is Native Hawaiian and a cultural

accusations are not lobbed when former developers and plantation interests—who held or continue to hold financial and political capital in the outcome—occupy the same positions.³⁶⁴

Framing with “American” values—or even engaging with the legal system at all—can rightfully be critiqued in Indigenous communities as “selling out” to a settler colonial system that many reject the legitimacy of. But, for Kānaka Maoli communities, the legal systems of the state of Hawai‘i and the U.S. federal government dictate the contours of our legal rights at present. In many cases, our willingness to work within these systems will make the difference between steps toward restorative environmental justice and an erosion of our rights and continued theft of biocultural resources.³⁶⁵ Working within these systems does not preclude critiquing them or questioning their legitimacy, nor does it stymie political action and community organizing. Indeed, a central theme of this Article is that a multi-pronged strategy incorporating community-led legal and

practitioner. Members of the media picked up this story. *E.g.*, Stewart Yerton, *A State Official Refused to Release Water for Maui Fires*, HONOLULU CIV. BEAT (Aug. 15, 2023), <https://www.civilbeat.org/2023/08/a-state-official-refused-to-release-water-for-west-maui-fires-until-it-was-too-late> [<https://perma.cc/J7HE-R3K3>]. The state Attorney General’s Office opened an investigation into his actions. *Kaleo Manuel to Depart the Commission on Water Resource Management*, MAUI NOW (Dec. 28, 2023, at 11:05 ET), <https://mauinow.com/2023/12/27/kaleo-manuel-to-depart-the-commission-on-water-resource-management> [<https://perma.cc/J7WF-KKCQ>]. Manuel was put on leave from the Water Commission. After an outpouring of support from largely Native Hawaiian communities, Manuel was reinstated. The Attorney General’s Office later cleared him of all allegations. Nevertheless, Manuel resigned a few months after his reinstatement. *Id.*

³⁶⁴ Given that plantations had a stranglehold on economic and political life in Hawai‘i until recently, it is no surprise that plantation interests have historically dominated the Water Commission. In recent years, current and former Water Commissioners have had ties to plantation and development interests. Former Water Commissioner Paul Meyer, for example, had previously been an executive of Maui Land and Pineapple Company, Inc., a large developer in West Maui. *About Us*, HAW. COMM’N ON WATER RES. MGMT., <https://web.archive.org/web/20240624110104/https://dlnr.hawaii.gov/cwrn/aboutus/commission> (last visited May 28, 2026); *see also* Sproat, *A Question of Wai*, *supra* note 17, at 215 (quoting Hui o Nā Wai ‘Ehā’s attorney Isaac Moriwake’s statement that communities “must appreciate the strategies and costs of engaging in a Western legal framework, where political powers including those from Hawai‘i’s colonial legacy have not hesitated to put a thumb on the scale of justice when necessary to maintain private control of public resources and deny public trust beneficiaries relief”).

³⁶⁵ As many of us know all too well, a knife edge separates subversion and complicity—but that dissonance is beyond the scope of this Article. Nevertheless, Junot Díaz’s comments on the power of Black women writers articulate the grief:

[I]n the work of say, Morrison, or Octavia Butler, we are shown the awful radiant truth of how profoundly constituted we are of our oppressions. Or said differently: how indissolubly our identities are bound to the regimes that imprison us. These sisters not only describe the grim labyrinth of power that we are in as neocolonial subjects, but they also point out that we play both Theseus and the Minotaur in this nightmare drama.

Paula M.L. Moya, *The Search for Decolonial Love: An Interview with Junot Díaz*, BOS. REV. (June 26, 2012), <https://www.bostonreview.net/articles/paula-ml-moya-decolonial-love-interview-junot-diaz>.

political mobilization is necessary to achieve meaningful change on the ground. As Auntie Rose Marie Ho‘oululāhui Lindsey Duey, a kupa (Native) of ‘Īao Valley and founding member of Hui o Nā Wai ‘Ehā explained, “it doesn’t help to be taunted by other Hawaiians who say that we lose more by having faith in the law. By using the law, we got water returned to our streams and we will continue working at it until others get theirs.”³⁶⁶

CONCLUSION

Framing is a vital, but limited tool for Indigenous communities’ pursuit of restorative environmental justice. Evidence shows that frames that uplift core “American” values, such as ingenuity, innovation, and meritocracy, are effective in signaling shared beliefs, which in turn help give decisionmakers permission to rule in our favor. Studies from nonprofit research centers, such as FrameWorks Institute,³⁶⁷ indicate that shared value framing helps to garner support for race-based and environmental policies.³⁶⁸

In this Article, I proffered three examples of frames that helped the Wai‘oli Valley Taro Hui convince Hawai‘i’s Water Commission to take the unprecedented step of adopting an Indigenous stewardship framework as part of its surface water management in the Hanalei Kalana: rule following, widespread benefits, and traditional Indigenous expertise. Such restorative environmental justice framing has varied uses, including temporally shifting the narrative back in time to reveal the harms of ongoing resource theft, and highlighting the compatibility of restorative environmental justice with the laws on the books today. While not all states’ legal regimes are grounded in restorative environmental justice, broadening the historical context of an issue to reveal the persisting environmental and cultural harms of colonization is widely applicable.

Hui o Nā Wai ‘Ehā’s experience before the Water Commission, however, illustrates the limitations of framing when powerful interests seek to hoard biocultural resources for economic gain and oppose any measure of restorative environmental justice for the community. In this way, framing is one of many components necessary for effective advocacy grounded in community co-powerment.

³⁶⁶ Sproat, *A Question of Wai*, *supra* note 17, at 214-15; *see also* Crenshaw, *supra* note 108, at 1382 (“Attempts to harness the power of the state through the appropriate rhetorical/legal incantations should be appreciated as intensely powerful and calculated political acts.”).

³⁶⁷ *See generally* FRAMEWORKS INST., *supra* note 258.

³⁶⁸ *E.g.*, DAVEY, *supra* note 256, at 7.