
CHAPTER FOUR

ALOHA ‘ĀINA¹: NATIVE HAWAIIAN LAND RESTITUTION

When I speak at this time of the Hawaiian people, I refer to the children of the soil — the native inhabitants of the Hawaiian Islands and their descendants.

— Queen Lili‘uokalani²

Mauna Kea, a dormant volcano on the island of Hawai‘i,³ is home to sacred practices of the Native Hawaiian people — including the burial of sacred ancestors⁴ — and, of more recent tenancy, thirteen telescopes.⁵ A permit to construct a new Thirty Meter Telescope (TMT) has been the subject of recent litigation.⁶ In 2015⁷ and again starting in July 2019, kia‘i — protectors — prevented developers from breaking ground in the ‘āina — the land.⁸ While the popular discourse and court opinions fixated on the public trust doctrine’s problematic weighing of cultural preservation against scientific gains, another legal doctrine has lain dormant, like the volcano itself: unjust enrichment.

In 2017, the state Board of Land and Natural Resources (Board) granted the University of Hawai‘i (University) a permit to construct the TMT.⁹ Native Hawaiian plaintiffs appealed the permit on numerous

¹ See Julia Steele, *Episode 5: The Meaning of Aloha ‘Āina with Professor Davianna Pōmaika‘i McGregor*, HAW. PUB. RADIO (Feb. 5, 2016), <https://www.hawaiipublicradio.org/post/episode-5-meaning-aloha-ina-professor-davianna-p-maika-i-mcgregor#stream/o> [https://perma.cc/5HAE-AV6T] (defining “[a]loha ‘āina” as “caring for the land,” “honoring the spiritual life force of . . . natural resources . . . through worship” and, “at certain key political points,” describing “people who are nationalists and have a strong sense of patriotism for Hawai‘i”).

² LILIUOKALANI, HAWAII’S STORY BY HAWAII’S QUEEN 363 (Hui Hānai 2013) (1898).

³ Angela M. Cowan, *Mauna Kea*, NAT’L GEOGRAPHIC (Apr. 8, 2013), <https://www.nationalgeographic.org/media/mauna-kea> [https://perma.cc/HS43-KPZ3].

⁴ Duane W. Hamacher & Tui Britton, *Mauna a Wakea: Hawai‘i’s Sacred Mountain and the Contentious Thirty Meter Telescope*, THE CONVERSATION (Sept. 20, 2015, 4:09 PM), <https://theconversation.com/mauna-a-wakea-hawaiis-sacred-mountain-and-the-contentious-thirty-meter-telescope-46060> [https://perma.cc/Y77Y-4FWZ].

⁵ Jonathan Kay Kamakawiwo‘ole Osorio, *Hawaiian Issues, in THE VALUE OF HAWAI‘I: KNOWING THE PAST, SHAPING THE FUTURE* 15, 20 (Craig Howes & Jonathan Kay Kamakawiwo‘ole Osorio eds., 2010).

⁶ *In re Conservation Dist. Use Application* (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve, 431 P.3d 752, 757 (Haw. 2018) [hereinafter *In re TMT*].

⁷ See Hamacher & Britton, *supra* note 4.

⁸ See Trisha Kehaulani Watson-Sproat, *Why Native Hawaiians Are Fighting to Protect Maunakea from a Telescope*, VOX (July 24, 2019, 12:30 PM), <https://www.vox.com/identities/2019/7/24/20706930/mauna-kea-hawaii> [https://perma.cc/6XVN-EDN7].

⁹ See Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve, Case No. BLNR-CC-16-002, slip op. at 1, 265 (Haw. Bd. of Land &

grounds.¹⁰ Writing for the Hawai‘i Supreme Court, Justice McKenna set the terms of debate, discussing the ancient spiritual beliefs about the summit and the traditional Native Hawaiian practices on it dating back to 1100 A.D. and, leaping 800 years forward, the lease issued to the University to establish the Mauna Kea Science Reserve.¹¹ The court acknowledged that Native Hawaiians had a property interest in Mauna Kea, but it stated that the Board must accommodate “competing private development interests.”¹² The court deferred to the Board’s findings that there were no cultural resources in the designated construction area, and thus the Board did not need to be concerned by the TMT’s impairment of such resources.¹³ Stating that Mauna Kea is “held in trust for the benefit of the people,”¹⁴ the court weighed the development interests against their impact on natural resources, noting that other telescopes would be decommissioned and that the developer of the TMT would be the first sublessee on Mauna Kea to pay rent to the University.¹⁵

Mauna Kea is just one recent case in Hawaiian history that betrays a restitution claim. This Chapter argues that the lands of the Hawaiian Kingdom unjustly enriched the United States when the Kingdom was overthrown, and that the State of Hawai‘i benefited from the same when it was admitted into the Union.¹⁶ The wealth accrued due to the possession of this land has continued to unjustly enrich these governments. Courts should recognize a restitution remedy for Native Hawaiians seeking their rights to these lands.

This Chapter addresses multiple audiences. First, Native Hawaiians, like all indigenous peoples in the United States, should view unjust enrichment as a viable legal claim.¹⁷ Second, courts should not withhold restitution in cases of historical injustices.¹⁸ Once the law of unjust enrichment is unmoored from individual claims between two living parties, other types of historical claims become cognizable. For example, those arguing for reparations for slavery should view

Nat. Res. Sept. 27, 2017), <https://dlnr.hawaii.gov/occl/files/2019/08/3568-TMT-Final-Decision-and-Order.pdf> [<https://perma.cc/EEJ9-TNUU>].

¹⁰ See *In re TMT*, 431 P.3d at 761.

¹¹ *Id.* at 758.

¹² *Id.* at 768 (quoting *Ka Pa‘akai o Ka ‘Āina v. Land Use Comm’n*, 7 P.3d 1068, 1072 (Haw. 2000)).

¹³ See *id.* at 768–70.

¹⁴ *Id.* at 773.

¹⁵ See *id.* at 773–75.

¹⁶ See Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL’Y REV. 95, 108–09 (1998).

¹⁷ Hawai‘i courts do not distinguish between actions under law and equity. See *Ass’n of Apartment Owners of Royal Aloha v. Certified Mgmt., Inc.*, 386 P.3d 866, 872 (Haw. 2016); see also *supra* ch. I, pp. 2093–95.

¹⁸ Boston University School of Law’s symposium on slavery reparations shows the vast array of perspectives on this issue that are beyond the scope of this Chapter. See generally Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135 (2004).

unjust enrichment as a basis for compensation, either through monetary awards based on the gains made on their unpaid labor¹⁹ or through land restitution for displacement from property through coercive transfers.²⁰

An unjust enrichment claim gives rise to two possible remedies. First, monetary compensation is a straightforward gain-based restitution remedy.²¹ Second, an alternative remedy is restitution of the thing unjustly gained — here, land.²² This Chapter uses “land restitution” to specify the second type. Land restitution has primarily been used in the South African context.²³ Early iterations of this distinction used “restitution in kind” as theorizing when pecuniary compensation would be “inadequate” for certain offenses.²⁴ Recently, the term has been used to refer to the return of land expropriated by the communist East German government.²⁵ Most relevant to this Chapter, one scholar used “in kind” restitution in the indigenous context.²⁶ The American Law Institute discusses “specific restitution” as applied to land.²⁷ The shifting classification of restitution is beyond this Chapter’s scope.²⁸

This Chapter makes the case for Native Hawaiian land restitution in three sections. Section A details the origins of the unjust enrichment claim in the history of Hawai‘i and the modern day ebb and flow of Native Hawaiians’ rights to self-determination. Section B lays out the path for a restitution claim under common law. Section C reimagines how the TMT case could have been resolved if restitution applied to historical wrongs.

¹⁹ See Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 700–03 (2003).

²⁰ See Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Land-ownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 521–23, 562–63 (2001).

²¹ See, e.g., David N. Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations*, 76 N.Y.U. L. REV. 626, 660–62 (2001) (discussing the damages remedy for unjust enrichment for indigenous claimants).

²² See *id.* at 660 (noting that a “plaintiff may seek . . . specific restitution of the property”).

²³ See Restitution of Land Rights Act 22 of 1994 (S. Afr.); M. MERCEDES STICKLER, *LAND RESTITUTION IN SOUTH AFRICA* 2 (2012).

²⁴ 2 JEREMY BENTHAM, *BENTHAM’S THEORY OF LEGISLATION* 75, 78 (Charles Milner Atkinson ed. and trans., Oxford Univ. Press 1914) (1840).

²⁵ See Heather M. Stack, *The “Colonization” of East Germany?: A Comparative Analysis of German Privatization*, 46 DUKE L.J. 1211, 1221–23 (1997) (describing the “process of returning land” in Germany as “restitution-in-kind,” *id.* at 1221 n.55).

²⁶ See Scott Morrison, *In Kind or Monetary Restitution? Historic Wrongs and Indigenous Land Claims*, J. POL. & L., June 2014, at 50, 53–54; cf. *id.* at 53, 54, 57 (using the term “land restitution”).

²⁷ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. c (AM. LAW INST. 2011).

²⁸ Cf. Suzan L. Haasdijk, *The Lack of Uniformity in the Terminology of the International Law of Remedies*, 5 LEIDEN J. INT’L L. 245, 250–52 (1992) (historicizing restitution in kind in international law).

A. Native Hawaiian History

Choosing how to recount history can dictate the victor of a land dispute.²⁹ Courts evaluating land claims by Native Hawaiians should trace earlier than the lease at hand, to the Overthrow of the Hawaiian Kingdom. In doing so, they will find a clear path to a restitution claim based on unjust enrichment, as outlined in section B and as applied to Mauna Kea in section C.

i. Tracing the Lands of Hawai‘i. — The Hawaiian people existed on the islands for over a millennium before Western contact. Ancient Hawaiians settled between A.D. 300 and 600, and evolved the ahupua‘a system between A.D. 600 and 1000.³⁰ Ahupua‘a — watershed management units — created boundaries between chiefs that mapped the land use of early Hawaiians;³¹ by A.D. 1000, ahupua‘a had become intricate systems that cultivated both the land and the sea.³² Captain James Cook’s arrival in 1778 started a domino effect that decimated ahupua‘a.³³ The missionaries who came in 1819 sought to inhabit the islands while spreading their religion.³⁴

The Māhele, which means “to divide or share,” was a land division process in the mid-nineteenth century that created the private ownership of land in Hawai‘i through a redistribution plan, while maintaining the notion that the land belonged to the people.³⁵ The King was to retain his private lands subject to the rights of the tenants, and the remainder would be divided into thirds between the government, the chiefs, and the native tenants.³⁶ This process originated the battles over

²⁹ Compare *In re TMT*, 431 P.3d 752, 757–58 (Haw. 2018) (jumping from pre-Western contact to 1968), and *Flores v. Bd. of Land & Nat. Res.*, 424 P.3d 469, 472 (Haw. 2018) (starting with the lease to the University in 1968), with *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 830–31 (9th Cir. 2006) (detailing relations from Western contact through statehood).

³⁰ DAVIANKA PÔMAIKA‘I MCGREGOR & MELODY KAPILALOHA MACKENZIE, OFFICE OF HAWAIIAN AFFAIRS, MO‘OLELO EA O NĀ HAWAII‘I: HISTORY OF NATIVE HAWAIIAN GOVERNANCE IN HAWAII‘I 77–78 (2014).

³¹ See *id.* at 91; see also U.S. DEP’T OF JUSTICE & U.S. DEP’T OF THE INTERIOR, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY 21–26 (2000) [hereinafter FROM MAUKA TO MAKAI].

³² MCGREGOR & MACKENZIE, *supra* note 30, at 78, 81.

³³ See Sumner J. La Croix, *Explaining Divergence in Property Rights, in LAND RIGHTS, ETHNO-NATIONALITY, AND SOVEREIGNTY IN HISTORY* 183, 184–92, 200–02 (Stanley L. Engerman & Jacob Metzer eds., 2004) (analyzing property rights following Cook’s arrival in 1778).

³⁴ See HIRAM BINGHAM, A RESIDENCE OF TWENTY-ONE YEARS IN THE SANDWICH ISLANDS 60–61 (Hartford, Hezekiah Huntington 1849).

³⁵ See JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII‘I? 40–44 (2008); Melody Kapilaloha 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, 502–06 (2017).

³⁶ MCGREGOR & MACKENZIE, *supra* note 30, at 218–19.

the “Crown Lands.”³⁷ The Supreme Court of the Kingdom of Hawai‘i held that the lands retained by the King should pass to the successor Monarch,³⁸ and the legislature passed an act indicating the same.³⁹ The court reaffirmed its holding in 1883.⁴⁰ The Government and Crown Lands reduced from 2.5 million acres to about 1.8 million acres by 1898.⁴¹

The Overthrow of the Hawaiian Kingdom transferred the Crown and Government Lands to the United States in three important steps. First, King Kalākaua signed the Bayonet Constitution of 1887 under duress. When hundreds of white residents gathered to announce a new constitution, backed by a 500-man militia, the King knew he had to surrender and sign the new constitution, or enter combat.⁴² Under the Bayonet Constitution, the King’s powers were reduced immensely, and his cabinet’s powers increased significantly — catering to missionary plantation owners’ interests represented by the “Hawaiian League.”⁴³

Second, after Kalākaua’s death, Queen Lili‘uokalani was overthrown after a failed attempt to adopt a new constitution. Members of her cabinet affiliated with the “Annexation Club” conspired with the U.S. Minister to Hawai‘i to overthrow the government.⁴⁴ On January 16, 1893, the U.S. Minister ordered U.S. Marines to support the insurrectionists, who seized control of the government building and established a provisional government.⁴⁵ The Queen yielded to prevent the loss of life.⁴⁶ Although President Cleveland recommended restoration of the monarchy, the provisional government expropriated the Queen’s private lands without compensation.⁴⁷ In the 1895 Land Act,⁴⁸ the provisional government merged the Crown Lands with the Government

³⁷ In the words of Queen Lili‘uokalani, “even the best-informed citizens of the United States do not understand the difference between [the Crown Lands] and the lands of the Hawaiian Government.” LILIUOKALANI, *supra* note 2, at 393. She argued the Monarch used the Crown Lands to care for the poor and to protect their interests from foreigners. *Id.* at 302, 393–94.

³⁸ *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 725 (Haw. Kingdom 1864).

³⁹ An Act to Relieve the Royal Domain from Encumbrances, and to Render the Same Inalienable, Laws of His Majesty Kamehameha V, at 69 (1865).

⁴⁰ Keelikolani v. Comm'r of Crown Lands, 6 Haw. 446, 451–52 (Haw. Kingdom 1883).

⁴¹ See MCGREGOR & MACKENZIE, *supra* note 30, at 242–44.

⁴² See JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 238–39 (2002); LILIUOKALANI, *supra* note 2, at 212–13; MCGREGOR & MACKENZIE, *supra* note 30, at 297; FROM MAUKA TO MAKAI, *supra* note 31, at 26.

⁴³ See MCGREGOR & MACKENZIE, *supra* note 30, at 297; VAN DYKE, *supra* note 35, at 120–24 (describing the “Hawaiian League,” a society made of mostly Caucasian missionaries who orchestrated the Overthrow).

⁴⁴ MCGREGOR & MACKENZIE, *supra* note 30, at 315–19; Julian Aguon, *Native Hawaiians and International Law*, in NATIVE HAWAIIAN LAW 352, 357–58 (Melody Kapilialoha MacKenzie et al. eds., 2015).

⁴⁵ Melody Kapilialoha MacKenzie, *Historical Background*, in NATIVE HAWAIIAN LAW, *supra* note 44, at 2, 21.

⁴⁶ MCGREGOR & MACKENZIE, *supra* note 30, at 324.

⁴⁷ See MacKenzie, *supra* note 45, at 22–24.

⁴⁸ Act of Aug. 14, 1895, No. 26, § 2, 1895 Rep. Haw. Laws Spec. Sess. 49, 49–51.

Lands and began homesteading those lands to people of all races.⁴⁹ The Queen was arrested after a failed attempt to restore her monarchy.⁵⁰ She was forced to abdicate her throne under the threat that six of her followers would be put to death.⁵¹ She later wrote that her abdication should “have no force nor weight, either at law or in equity,” because it was “obtained under duress.”⁵²

Finally, despite Native Hawaiians’ petitions in opposition,⁵³ President McKinley signed the Newlands Resolution,⁵⁴ which “incorporated the language of the failed 1897 treaty of annexation.”⁵⁵ The provisional government ceded sovereignty of the lands of Hawai‘i to the United States,⁵⁶ transferring title of 1.8 million acres of these so-called Ceded Lands in an act later reaffirmed by Congress in 1900.⁵⁷

2. *Post-Overthrow Developments.* — Since the Overthrow, Native Hawaiians have attempted to restore self-governance and various government actors have had a role in progressing or limiting recognition of Hawaiian sovereignty. First, Queen Lili‘uokalani sued the United States in the Court of Claims, arguing the Crown Lands were her private property, raising equity questions, and demanding that she be remunerated for the taking of the Crown Lands.⁵⁸ The court flatly ignored the equity claim, noting that when the Queen signed an instrument in writing, she abdicated her throne to the provisional government.⁵⁹ Citing the Hawai‘i Supreme Court and the legislative act after the Māhele, the court held that the Crown Lands passed to the provisional government.⁶⁰ The opinion equated the history of the Hawaiian Islands with “the usual story of conquest,” and legitimized the provisional government’s possession of the land.⁶¹

⁴⁹ MacKenzie, *supra* note 45, at 24–25.

⁵⁰ *Id.* at 25.

⁵¹ LILIUOKALANI, *supra* note 2, at 315–16.

⁵² *Id.* at 317.

⁵³ VAN DYKE, *supra* note 35, at 209–12.

⁵⁴ Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898).

⁵⁵ MCGREGOR & MACKENZIE, *supra* note 30, at 41; *see also id.* at 41 & n.81 (questioning the “constitutionality of annexing a territory by way of resolution rather than by treaty”).

⁵⁶ MacKenzie, *supra* note 45, at 27.

⁵⁷ An Act to Provide a Government for the Territory of Hawaii (Hawaiian Organic Act of 1900), Pub. L. No. 56–339, 31 Stat. 141 (1900).

⁵⁸ *See* Liliuokalani v. United States, 45 Ct. Cl. 418, 419–21 (1910).

⁵⁹ *See id.* at 425–26.

⁶⁰ *See id.* at 427–28 (“When the [monarchy] ceased to exist [the Crown Lands] became as other lands of the Sovereignty and passed to the defendants as part and parcel of the public domain.”).

⁶¹ *Id.* at 426; *see also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1722 (1993) (“Only particular forms of possession — those that were characteristic of white settlement — would be recognized and legitimated.”).

A decade after the Queen lost her claim, Congress passed the Hawaiian Homes Commission Act⁶² (HHCA) to rehabilitate Native Hawaiians with 200,000 acres of Ceded Lands for settlement and agriculture.⁶³ The HHCA was limited by agricultural businessmen in Hawai‘i who successfully lobbied Congress to include a “blood quantum” restriction — by which Native Hawaiians needed to possess at least fifty percent Hawaiian ancestry to benefit from homesteading — and to limit the HHCA to third- and fourth-class lands.⁶⁴ When Congress granted Hawai‘i statehood in 1959, the Hawai‘i Admission Act⁶⁵ passed trusteeship of most of the Ceded Lands to the state.⁶⁶ The Act detailed five permissible uses of the trust: public education, the betterment of Native Hawaiians, farm and home developments, public improvements, and public use.⁶⁷ Yet, Hawai‘i allocated all of the revenues to public education.⁶⁸ This frustrated Native Hawaiians, such that the state constitutional convention in 1978 established the Office of Hawaiian Affairs (OHA), a board of trustees to be elected by Native Hawaiian residents,⁶⁹ and required Hawai‘i “to allocate a pro rata share of the revenues from the Public Land Trust to OHA” for the betterment of Native Hawaiians.⁷⁰

Since 1959, Congress has taken some steps to further Native Hawaiian interests. Through a Joint Resolution (“Apology Resolution”), Congress formally apologized for the U.S. participation in the Overthrow, which Congress characterized as illegal.⁷¹ Scholars found some significance in the resolution, even if it carried no legal import.⁷² In the Hawaiian Home Lands Recovery Act⁷³ (HHLRA), Congress required the Department of the Interior (DOI) to identify federal lands that were originally part of the 200,000 acres in the HHCA and to return them to the state’s Home Lands Trust or compensate the Department of Hawaiian Home Lands with either land or remuneration.⁷⁴

⁶² Pub. L. No. 67-34, 42 Stat. 108 (1921).

⁶³ FROM MAUKA TO MAKAI, *supra* note 31, at 2.

⁶⁴ *Id.* at 32–33, 54.

⁶⁵ Pub. L. No. 86-3, 73 Stat. 4 (1959).

⁶⁶ FROM MAUKA TO MAKAI, *supra* note 31, at 37–38.

⁶⁷ Hawai‘i Admission Act § 5(f).

⁶⁸ Van Dyke, *supra* note 16, at 106 n.66.

⁶⁹ HAW. CONST. art. XII, § 5.

⁷⁰ Van Dyke, *supra* note 16, at 109; see also HAW. CONST. art. XII, § 6.

⁷¹ Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai‘i (Apology Resolution), Pub. L. No. 103-150, 107 Stat. 1510, 1510–13 (1993).

⁷² See J. Kēhaulani Kauanui, *Resisting the Akaka Bill*, in A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 312, 326 (Noelani Goodyear-Ka‘ōpua et al. eds., 2014); *infra* notes 81–84 and accompanying text.

⁷³ Pub. L. 104-42, 109 Stat. 357 (1995). The HHLRA was passed in response to a case requesting the return of lands used by the U.S. Navy. See MCGREGOR & MACKENZIE, *supra* note 30, at 524–25.

⁷⁴ See FROM MAUKA TO MAKAI, *supra* note 31, at 43.

The federal courts have limited the force of these legislative acts. In *Rice v. Cayetano*,⁷⁵ the U.S. Supreme Court held that restricting voting in OHA elections to Native Hawaiians violated the Fifteenth Amendment.⁷⁶ *Rice* damaged the “reconciliation efforts” Congress had “urge[d] the [executive] . . . to support.”⁷⁷ In dissent, Justice Stevens noted the “painful irony” in the Court’s denial of a closed election to restore Native Hawaiian self-governance after the United States partook in overthrowing their Kingdom.⁷⁸ In *Kahawaiolaa v. Norton*,⁷⁹ the Ninth Circuit differentiated the histories of the American Indians and Native Hawaiians and upheld the DOI’s decision to exclude Native Hawaiians from federal regulations for American Indians.⁸⁰ Finally, in *Hawaii v. Office of Hawaiians Affairs*,⁸¹ the U.S. Supreme Court rejected a Native Hawaiian land rights claim.⁸² A unanimous Hawai‘i Supreme Court had granted injunctive relief, prohibiting the alienation of Ceded Lands until the claims of the Native Hawaiian people, recognized in the Apology Resolution, could be addressed.⁸³ In an opinion by Justice Alito, the U.S. Supreme Court reversed and accepted the 1900 transfer of sovereignty over Hawaiian land to the United States as fact and indicated concern that the Hawai‘i court’s reading of the Apology Resolution would “cloud” the state of Hawai‘i’s title to its sovereign lands more than thirty years after statehood.⁸⁴

Native Hawaiian rights under U.S. law have continued to evolve in the twenty-first century. Native Hawaiians have continuously fought for rights already recognized for other indigenous peoples. Congress responded to *Rice* by enacting two statutes that entered into the “difficult terrain” that the Court had left to it.⁸⁵ In the Hawaiian Homelands Homeownership Act⁸⁶ (HHHA), enacted the same year as *Rice* as part of both the Omnibus Indian Advancement Act⁸⁷ and the American Homeownership and Economic Opportunity Act,⁸⁸ Congress included

⁷⁵ 528 U.S. 495 (2000).

⁷⁶ *Id.* at 514–17.

⁷⁷ Apology Resolution, Pub. L. No. 103-150, § 1(5), 107 Stat. 1510, 1513 (1993); see also Troy J.H. Andrade, *Legacy in Paradise: Analyzing the Obama Administration’s Efforts of Reconciliation with Native Hawaiians*, 22 MICH. J. RACE & L. 273, 280–82 (2017) (noting the larger historical harm of this opinion).

⁷⁸ *Rice*, 528 U.S. at 535 (Stevens, J., dissenting).

⁷⁹ 386 F.3d 1271 (9th Cir. 2004).

⁸⁰ See *id.* at 1280–83.

⁸¹ 556 U.S. 163 (2009).

⁸² *Id.* at 169–71, 177.

⁸³ *Office of Hawaiian Affairs v. Hous. and Cnty. Dev. Corp.*, 177 P.3d 884, 927–28 (Haw. 2008).

⁸⁴ See *Office of Hawaiian Affairs*, 556 U.S. at 167–68, 176.

⁸⁵ *Rice v. Cayetano*, 528 U.S. 495, 519 (2000).

⁸⁶ Pub. L. No. 106-568, §§ 201–203, 114 Stat. 2872 (codified at 25 U.S.C. 4221 et seq. (2012)).

⁸⁷ Pub. L. No. 106-568, §§ 201–203, 114 Stat. 2868, 2872–76 (2000).

⁸⁸ Pub. L. No. 106-569, §§ 511–513, 114 Stat. 2944, 2966–69 (2000).

Native Hawaiians in its Native American housing assistance scheme.⁸⁹ In the Native Hawaiian Education Act,⁹⁰ Congress reiterated the special trustee relationship between Native Hawaiians and the United States.⁹¹ In *Doe v. Kamehameha Schools*,⁹² the Ninth Circuit, sitting en banc, confirmed that *Rice* was limited to the Fifteenth Amendment.⁹³ A non-Hawaiian plaintiff sued a private school with an admission preference for Native Hawaiians, claiming he was denied entry because of his race.⁹⁴ The district court granted summary judgment in favor of the school, and the Ninth Circuit affirmed,⁹⁵ holding that Congress provided special treatment for the education of Native Hawaiians that could coexist with antidiscrimination laws.⁹⁶ The 950-person march the day before *Doe* was decided showed the people were motivated to protest for their rights to self-determination.⁹⁷ Finally, after *Office of Hawaiian Affairs*, the Hawai‘i legislature passed Act 176,⁹⁸ which requires a two-thirds majority vote by the legislature to approve the sale or gift of Ceded Lands or public lands acquired by the government after 1895.⁹⁹

The DOI recently promulgated procedures to allow Native Hawaiians to establish a government-to-government relationship with the federal government¹⁰⁰ (Procedures), responding to the Apology Resolution’s call for executive support of reconciliation.¹⁰¹ The DOI disagreed with the racial categorization in *Rice*¹⁰² and stated that Native Hawaiians 1) are indigenous people of the United States, 2) retain inherent sovereignty, and 3) are in a special trust relationship with Congress.¹⁰³

⁸⁹ Pub. L. No. 106-568, §§ 202, 114 Stat. at 2873–74.

⁹⁰ 20 U.S.C. § 7511–7517 (2012).

⁹¹ *Id.* § 7512(8).

⁹² 470 F.3d 827 (9th Cir. 2006).

⁹³ *Id.* at 852–53.

⁹⁴ *Id.* at 829.

⁹⁵ *Id.* at 834–35.

⁹⁶ *Id.* at 848–49 (holding 42 U.S.C. § 1981 was not violated).

⁹⁷ See Manu Ka‘iama, *Kū i ka Pono: The Movement Continues, in A NATION RISING*, *supra* note 72, at 98, 108; cf. Paul Babie, *A New Narrative: Native Hawaiian Law*, 39 U. HAW. L. REV. 233, 248 (2016) (book review) (“[I]n Hawai‘i a new narrative is emerging, and . . . popular political protest remains a principle means of expressing its parameters.”).

⁹⁸ 2009 Haw. Sess. Laws 705 (codified at HAW. REV. STAT. § 171-64.7 (2019)).

⁹⁹ *Id.* at 706–07. It does not “apply to the issuance of licenses, permits, easements, and leases.” *Id.*

¹⁰⁰ Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71,278 (Oct. 14, 2016) (codified at 43 C.F.R. pt. 50).

¹⁰¹ *Id.* at 71,281–82 (citing Apology Resolution, Pub. L. No. 103-150, § 1(5), 107 Stat. 1510, 1513 (1993)).

¹⁰² See *id.* at 71,312 (defining “Native Hawaiian” consistent with the special political and trust relationship Congress acknowledged and recognizes” and noting that “[t]he rule is distinguishable from . . . *Rice*”); see also *id.* at 71,294–95 (responding to a comment regarding the constitutionality of the rule and offering a clear statement that Native Hawaiians have a political status comparable to Native Americans and Alaska Natives).

¹⁰³ See *id.* at 71,286.

To trace the land, in summary, ownership over Mauna Kea has followed that of most of the Ceded Lands¹⁰⁴: the lands of Mauna Kea first belonged to the chiefs, then the Monarch held them in common with the people after the Constitution of 1840, then the Māhele deemed them Government Lands,¹⁰⁵ until the provisional government claimed and merged those lands to be jointly held in trust after the Overthrow, then ceded those lands to the United States, which finally ceded most of the land to the State of Hawai‘i in 1959. The University was granted a lease to Mauna Kea in 1968.¹⁰⁶

B. The Law of Restitution

Native Hawaiians seeking reparations should use all possible arguments. This section offers a possibility not yet explored in Hawai‘i courts: land restitution through the legal claim of unjust enrichment.

i. Restatement. — The Restatement (Third) of Restitution and Unjust Enrichment (Restatement) contains principles that support a theory of land restitution, but that are not identical to the land restitution remedy proposed in this Chapter. The basic definition of unjust enrichment is an unequal transfer of value without an adequate legal basis.¹⁰⁷ Though the Restatement disavows rigid formulaic conceptions of unjust enrichment, it provides an example of a three-part test: first, the plaintiff must have conferred a benefit upon the defendant; second, the defendant must have appreciated or known of the benefit; third, the defendant must have accepted or retained the benefit in spite of the inequitable circumstances.¹⁰⁸ Professor Ernest Weinrib formulates the elements even more succinctly: the defendant has been enriched, the enrichment was at the plaintiff’s expense, and the enrichment was unjust.¹⁰⁹ Section C describes Hawai‘i’s slightly different test.¹¹⁰ The Restatement

¹⁰⁴ See Watson-Sproat, *supra* note 8; *Mauna Kea*, OFFICE OF HAWAIIAN AFF., <https://www.oha.org/maunakea> [<https://perma.cc/HHQ2-LC6J>].

¹⁰⁵ An Act Relating to the Lands of His Majesty the King and of the Government, Supplement to the Statute Laws of His Majesty, Kamehameha III, at 22, 25, 31, 41 (1848) (listing Ka‘ohe as an ahupua‘a that would belong to the Hawaiian Government). Mauna Kea was part of the ahupua‘a Ka‘ohe. *Pualani Kanahale on Mauna Kea, Kaohe, and the Elementals*, BIG ISLAND VIDEO NEWS (Apr. 28, 2015, 12:56 AM), <https://www.bigislandvideonews.com/2015/04/28/video-pualani-kanahale-on-mauna-kea-kaohe-and-the-elementals> [<https://perma.cc/HK6M-865B>].

¹⁰⁶ *In re TMT*, 431 P.3d 752, 758 (Haw. 2018).

¹⁰⁷ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. LAW INST. 2011).

¹⁰⁸ *Id.* § 1 cmt. d; see S & M Rotogravure Serv., Inc., v. Baer, 252 N.W.2d 913, 915–16 (Wis. 1977).

¹⁰⁹ ERNEST J. WEINRIB, CORRECTIVE JUSTICE 186–87 (2012).

¹¹⁰ See *infra* pp. 2163–64.

warns that such tests can lead to error.¹¹¹ Unjust enrichment should be a flexible principle, not a rigid cause of action with enumerated elements.¹¹²

Restitution is the remedy based on the legal claim of unjust enrichment.¹¹³ It is not simply an alternative remedy to damages.¹¹⁴ Rather, because defendants should not profit from their wrongs,¹¹⁵ restitution is a gain-based remedy for an action that benefited the defendant.¹¹⁶

This Chapter focuses on two principles of restitution that could be the basis for Native Hawaiian claims. First, duress provides a basis for a claim for restitution or for asserting the invalidity of a written instrument.¹¹⁷ The Restatement sets out three characteristics of the principle of duress. First, “[d]uress is coercion that is wrongful as a matter of law.”¹¹⁸ Second, “[a] transfer induced by duress is subject to . . . restitution” to rectify unjust enrichment.¹¹⁹ Third, if the duress is “tantamount to physical compulsion,” then the transfer is void; other transfers under duress convey voidable title.¹²⁰ Even without notice of void title, a third-party bona fide purchaser gains no title; however, the transfer can be valid if the title was merely voidable, but not void.¹²¹ The Restatement calls the “proverbial transfer ‘at gunpoint’” the obvious example of a void transfer.¹²² It also notes that a common misconception is that duress is a “threat that overcomes a person’s free will.”¹²³ Duress does not turn on whether a transaction was voluntary or coerced, but rather on whether a particular form of coercion was permissible.¹²⁴ The Restatement offers illustrations to differentiate coercive acts, one of

¹¹¹ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (AM. LAW INST. 2011).

¹¹² See P.G. Turner, *Fusion and Theories of Equity in Common Law Systems*, in EQUITY AND LAW: FUSION AND FISSION 1, 24–27 (John C.P. Goldberg et al. eds., 2019).

¹¹³ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. c (AM. LAW INST. 2011).

¹¹⁴ See *id.* § 1 cmt. e(3).

¹¹⁵ *Id.* § 3; see also Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) (“No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.”).

¹¹⁶ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 cmt. a (AM. LAW INST. 2011).

¹¹⁷ *Id.* § 14 cmt. a.

¹¹⁸ *Id.* § 14.

¹¹⁹ *Id.*

¹²⁰ *Id.* This explication is similar to duress in contract law. See D.J. Lanham, *Duress and Void Contracts*, 29 MOD. L. REV. 615, 615, 620 (1966). However, the inquiry relevant to restitution is not about whether there was a contract, but whether a party was enriched.

¹²¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 14 cmt. c (AM. LAW INST. 2011).

¹²² *Id.*

¹²³ *Id.* § 14 cmt. b.

¹²⁴ *Id.*

which addresses a land claim: if *A* conveys land to *B* when induced by *B*'s threats of unlawful harm, *A* is entitled to restitution.¹²⁵

Second, benefits gained in breach of fiduciary duties trigger an entitlement to restitution. If a person gains any benefits in breach of their own fiduciary duty, in breach of an equivalent duty under a relation in trust and confidence, or as a consequence of another person's breach of such a duty, that person is liable for restitution.¹²⁶ Though a fiduciary breach could trigger a tort action, the unjust enrichment claim coexists as a separate claim; the two are not coextensive, and an analysis of a fiduciary's requirements under tort doctrine does not necessarily complete the analysis under unjust enrichment.¹²⁷ The law of unjust enrichment condemns any possibility of further profit from wrongdoing after a breach of fiduciary duty.¹²⁸ This principle is quite expansive given the breadth of a fiduciary's duty of loyalty.¹²⁹ Fiduciaries violate the law of unjust enrichment if they act without faith during a transaction, if they engage in business dealings that are competitive with their beneficiaries, or if they have a self-interested objective.¹³⁰ Relatedly, constructive trust provides an even more flexible remedy that does not require a strict fiduciary relationship.¹³¹

International law should be considered alongside the Restatement's summary of the common law of restitution. The U.N. Declaration on the Rights of Indigenous Peoples¹³² (UNDRIP) does not mandate the return of land for violation of its principles, but it prohibits the forcible removal of indigenous people without a remedy, whether "just and fair compensation" or "the option of return."¹³³ President Obama endorsed UNDRIP in 2010.¹³⁴ Given it is a declaration and not a treaty, in order for it to be effective it needs to be incorporated into U.S. law.¹³⁵ It

¹²⁵ *Id.* § 14 cmt. g, illus. 7.

¹²⁶ *Id.* § 43.

¹²⁷ See James Barr Ames, *Constructive Trusts Based upon the Breach of an Express Oral Trust of Land*, 20 HARV. L. REV. 549, 551–52, 557 (1907); *supra* ch. I, p. 2097.

¹²⁸ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 cmt. b (AM. LAW INST. 2011).

¹²⁹ *Id.* § 43 cmt. d.

¹³⁰ *Id.*

¹³¹ See *id.* § 55.

¹³² G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

¹³³ *Id.* art. 10.

¹³⁴ Lorie M. Graham & Siegfried Wiessner, *Indigenous Sovereignty, Culture, and International Human Rights Law*, 110 S. ATLANTIC Q. 403, 405 (2011).

¹³⁵ See *Developments in the Law — Indian Law*, 129 HARV. L. REV. 1652, 1760–70 (2016). The State Department indicated that UNDRIP has "moral and political force," U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 1 (2011), <https://2009-2017.state.gov/documents/organization/154782.pdf> [<https://perma.cc/TZ9G-CDZQ>], and it could be invoked as a source of

nevertheless can be and has been used as persuasive authority. Though it is a viable legal strategy that has been explored by others,¹³⁶ an UNDRIP claim is not the focus of this Chapter. Instead, this Chapter urges a nontraditional path of common law restitution claims — bolstered by UNDRIP's discussion of restitution and transitional justice, which could shape a court's understanding of equity.¹³⁷

2. *Cases.* — There is at least one manifestation of a fiduciary breach claim resulting in land restitution. In *Choctaw Nation v. Oklahoma*,¹³⁸ the Cherokee Nation sued the State of Oklahoma, which had leased out the rights to resources under the Arkansas River.¹³⁹ The Choctaw and Chickasaw Nations intervened to argue that they owned parts of the river bed.¹⁴⁰ Analyzing treaties that the Indian Nations “entered into nearly a century and a half” prior,¹⁴¹ the Court described a conflict of values between Indian property rights, which the United States was obligated to protect, and the passage of the Indian Removal Act of 1830,¹⁴² which demanded those property rights be relinquished. The Act prevailed.¹⁴³ Under duress — knowing that cohabiting with the colonists would mean losing both their culture and lands — the Choctaws left Mississippi in 1830, relying on the promise by the United States that the new lands to which they moved, which later became Oklahoma, would be conveyed in fee simple.¹⁴⁴ The United States made the same promise

customary international law, *see Aguon, supra* note 44, at 399–401. An international tribunal might rule for Native Hawaiians, *see Jennifer M.L. Chock, One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawaii's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463, 497–506 (1995), but it would likely struggle to seek compliance, *see Developments in the Law — Indian Law, supra*, at 1770–72.

¹³⁶ See, e.g., Thomas M. Antkowiak, *A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples*, 25 DUKE J. COMP. & INT'L L. 1, 11–13 (2014). The National Lawyers Guild cited international law on war crimes in a recent press release on Hawai‘i. *See Press Release, Nat'l Lawyers Guild, NLG Calls upon U.S. to Immediately Comply with International Humanitarian Law in Its Illegal Occupation of the Hawaiian Islands*, (Jan. 13, 2020), <https://www.nlg.org/nlg-calls-upon-us-to-immediately-comply-with-international-humanitarian-law-in-its-illegal-occupation-of-the-hawaiian-islands> [https://perma.cc/H5NU-4B5L].

¹³⁷ UNDRIP, *supra* note 132, arts. 11, 28 (discussing restitution); Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Recognition, Reparation and Reconciliation, para. 44, U.N. Doc. A/HRC/EMRIP/2019/3 (May 2, 2019) [hereinafter Expert Mechanism].

¹³⁸ 397 U.S. 620 (1970).

¹³⁹ *Id.* at 621.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 622. This history is much older than the “three decades” of statehood Justice Alito was worried about troubling. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009).

¹⁴² Ch. 148, 4 Stat. 411 (1830).

¹⁴³ *See Choctaw Nation*, 397 U.S. at 625; cf. Harris, *supra* note 61, at 1723 (“The law provided not only a defense of conquest and colonization, but also a naturalized regime of rights and disabilities, power and disadvantage that flowed from it, so that no further justifications or rationalizations were required.”).

¹⁴⁴ *Choctaw Nation*, 397 U.S. at 625–26.

to the Cherokees in 1835.¹⁴⁵ Yet, when the colonists wanted to settle Oklahoma at the turn of the century, the United States asked the Indian Nations to move once again.¹⁴⁶ The Court held that each Indian Nation had been promised “virtually complete sovereignty over their new lands” and therefore had proper title.¹⁴⁷ On remand, the Tribes were entitled to be paid all lease bonuses, rentals, and royalties that had been collected on the river bed, but not the interest collected on the funds.¹⁴⁸ Analyzing the promise brought the case from treaty construction into the realm of restitution. This Chapter reads *Choctaw* as a case of unjust enrichment, though the case was not brought under this legal theory.

Other land restitution claims have failed in federal courts. One case failed under the fiduciary duty analysis. The Dann sisters of the Western Shoshone Tribe, acting as individuals, lost their defense of aboriginal title to a trespass action,¹⁴⁹ but eventually succeeded in an international tribunal.¹⁵⁰ The Dann sisters argued that because the Western Shoshone did not withdraw \$26 million that the United States deposited into the U.S. Treasury to settle the Tribe’s claims, their Tribe’s aboriginal title was not extinguished.¹⁵¹ The Supreme Court disagreed, finding that the United States upheld its fiduciary duty to use the payment in the best interests of the Tribe.¹⁵² The Court reiterated that when the United States acts as a fiduciary to Native Americans, it must ensure the funds are put to productive use and are not converted or mismanaged.¹⁵³ If all of the principles of restitution had been used by the parties, the case may have been resolved differently; the trustee did not loyally adhere to the best interests of the beneficiary, which were to restore title, not to earn compensation. The Dann sisters and the Western Shoshone people had a strong restitution claim that the Court refused to respect, but the Inter-American Commission on Human Rights later embraced some form of restitution as a possible remedy.¹⁵⁴ By emphasizing the historical significance of the ancestral lands and the

¹⁴⁵ *Id.* at 626.

¹⁴⁶ *See id.* at 627.

¹⁴⁷ *Id.* at 635 (citing *Atl. & Pac. R.R. Co. v. Mingus*, 165 U.S. 413, 435–36 (1897)).

¹⁴⁸ *Choctaw Nation v. Oklahoma*, 490 F.2d 521, 527 (10th Cir. 1974).

¹⁴⁹ *United States v. Dann*, 470 U.S. 39, 48–50 (1985).

¹⁵⁰ *See Dann v. United States*, Case 11-140, Inter-Am. Comm’n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5 ¶ 5 (2002). The Dann sisters’ case took place in the broader context of longstanding litigation between the Western Shoshone tribe and the United States that led to a \$26 million compensation offer. *See Dann*, 470 U.S. at 41–42.

¹⁵¹ *See Dann*, 470 U.S. at 43–44.

¹⁵² *See id.* at 48–50.

¹⁵³ *See id.* at 50 n.13 (citing *United States v. Mitchell*, 463 U.S. 206, 226 (1983)).

¹⁵⁴ *See Dann*, Case 11-140, Inter-Am. Comm’n H.R., ¶¶ 133, 140–45, 171–72 (finding violations of the right to equality before the law, right to a fair trial, and right to property protected by the American Declaration of the Rights and Duties of Man, and instructing U.S. courts to engage with the equality and property rights claims to the Western Shoshone ancestral lands).

injustice of denying the Dann sisters a right to present their claims, the international tribunal conducted the beginnings of an equitable analysis.¹⁵⁵

Equity principles can help and hurt plaintiffs in restitution claims. The Supreme Court used the equitable defenses of laches, acquiescence, and impossibility to deny the Oneida Nation's claim to sovereignty over lands it had ceded to New York and then repurchased in fee simple.¹⁵⁶ Laches considers the lapse of time during which a plaintiff did not seek the equitable relief; if a remedy would be disruptive in light of shifting realities over time, the Court reasoned, it could be precluded.¹⁵⁷ The Court therefore reversed the Second Circuit's holding that the Tribe had retained sovereignty over the land.¹⁵⁸ The Second Circuit fell in line. It invoked laches to hold that the Cayuga Nation's land claim in central New York would be "indisputably disruptive" because it would eject tens of thousands of landowners.¹⁵⁹ Five years later, the court expressed that the Oneida Nation may have a cognizable restitution remedy,¹⁶⁰ but denied the claim due to laches.¹⁶¹ The invocation of laches maps onto the Restatement's principle that remedying unjust enrichment should not leave "an innocent recipient worse off . . . than if the transaction with the claimant had never taken place."¹⁶² The cases show that restitution is subject to equitable defenses, even if courts misuse them.¹⁶³

C. Native Hawaiian Land Restitution

This section brings the bird's eye view of restitution back down into the soil of Hawai'i. By linking Hawai'i with the fate of all indigenous peoples, new paths emerge. The previous cases show the importance of holding on to the history of the land.¹⁶⁴ In the present debates, with the history of the Hawaiian Kingdom as a guide, those wrongfully enriched can finally return their gains — starting with Mauna Kea.

i. *The Missed Opportunity of Mauna Kea.* — The decision upholding the TMT permit missed an opportunity to grapple with unjust enrichment. The court dismissed what was, at heart, an unjust enrichment

¹⁵⁵ See *id.*

¹⁵⁶ See *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203, 214, 221 (2005).

¹⁵⁷ See *id.* at 215–17. See generally Lorie M. Graham, *The Racial Discourse of Federal Indian Law*, 42 TULSA L. REV. 103, 114–17 (2006) (book review) (critiquing the sua sponte laches defense).

¹⁵⁸ See *Sherrill*, 544 U.S. at 212, 221.

¹⁵⁹ *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 275 (2d Cir. 2005); see *id.* at 275–77.

¹⁶⁰ See *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 138–39 (2d Cir. 2010).

¹⁶¹ See *id.* at 127–28.

¹⁶² RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (AM. LAW INST. 2011).

¹⁶³ Scholars have argued that laches was misused in *Sherrill* and its progeny. See Graham, *supra* note 157, at 114–17; Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 611–12 (2006).

¹⁶⁴ Cf. MacKenzie & Sproat, *supra* note 35, at 488–98 (describing the importance of history in legal claims generally and as applied to Hawai'i).

claim: one plaintiff argued that the summit of Mauna Kea was still held by the Hawaiian Kingdom.¹⁶⁵ Justice McKenna held that the Hawai‘i Supreme Court was “bound” by the U.S. Supreme Court’s finding in 1901 that the transfer of ownership of Hawai‘i was lawful, declaring that “[w]hatever may be said regarding the lawfulness’ of its origins, ‘the State of Hawai‘i . . . is now a lawful government.’”¹⁶⁶ In doing so, Justice McKenna did not once reference the Procedures, ignoring the reality that the DOI invited Native Hawaiian self-determination.

The Supreme Court’s declaration of lawful statehood is a strong defense to an unjust enrichment claim, but it is not insurmountable. The Court’s recent discussion of the Overthrow in *Hawaii v. Office of Hawaiian Affairs* was dicta;¹⁶⁷ the Court held only that the Apology Resolution did not create a legal cause of action for the land claim.¹⁶⁸ A Native Hawaiian unjust enrichment claim has not reached the Court, so the Hawai‘i Supreme Court could have ruled on it for the first time.

The other opinions also failed to consider unjust enrichment. The concurrence discussed how the Māhele created a trust for the benefit of the people of Hawai‘i, yet agreed with the Board’s findings that mitigation would lessen any impact on the people’s interests, that the TMT would not seriously impact a tourist’s view, and that scientific gains render the TMT a public use of land.¹⁶⁹ The dissent feared the environmental “degradation” of Mauna Kea, providing no trust analysis.¹⁷⁰

2. Reimagining Restitution for Native Hawaiians. — The doctrine of unjust enrichment can help to reimagine the outcome of the case. The doctrine would ease the quagmire through a historical analysis that charts the path for the right remedy: the land permit should not have been issued because the State of Hawai‘i was unjustly enriched by the Ceded Lands held in trust — including Mauna Kea.

The Hawai‘i Supreme Court has adopted the First Restatement’s test for unjust enrichment¹⁷¹: unjust enrichment permits restitution for “benefits improperly conferred on [a defendant] as a result of a wrongful act,” which the court identifies through an analysis “guided by its objective to prevent injustice.”¹⁷² The “dispositive question” is whether an

¹⁶⁵ *In re TMT*, 431 P.3d 752, 772 (Haw. 2018).

¹⁶⁶ *Id.* at 773 (alterations in original) (quoting *State v. Kaulia*, 291 P.3d 377, 385 (Haw. 2013)). Justice McKenna could have applied laches instead of making such a conclusory ruling. See Ass’n of Apartment Owners of Royal Aloha v. Certified Mgmt., Inc., 386 P.3d 866, 873 (Haw. 2016) (holding that “laches is a defense to legal and equitable claims alike”).

¹⁶⁷ See *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 167–68 (2009).

¹⁶⁸ See *id.* at 176; see also MacKenzie & Sproat, *supra* note 35, at 520–22.

¹⁶⁹ *In re TMT*, 431 P.3d at 783–85, 791–92 (Pollack, J., concurring in part and concurring in the judgment).

¹⁷⁰ *Id.* at 796 (Wilson, J., dissenting).

¹⁷¹ See *Small v. Badenhop*, 701 P.2d 647, 654 (Haw. 1985) (quoting RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. b (AM. LAW INST. 1937)).

¹⁷² Hawaiian Ass’n of Seventh-Day Adventists v. Wong, 305 P.3d 452, 465 (Haw. 2013).

act was unjust.¹⁷³ Running with a formula for argument's sake,¹⁷⁴ Hawai'i's test could be summarized in three steps: Who are the parties? What was the benefit conferred? Was the transaction wrongful or unjust?

(a) *The Parties Framed Historically.* — Defining the parties is one of the trickiest parts of a land restitution claim. In the TMT case, the Hawai'i Supreme Court adopted the narrowest view: the Board as a trustee and the Native Hawaiians who appealed.¹⁷⁵ A restitution claim should frame the plaintiffs as beneficiaries of the trust of Ceded Lands due to their status as descendants of the people of the Hawaiian Kingdom, from whom that land was stolen. The defendants could be any trustees who mismanaged the land during its history of being stolen and given to the State of Hawai'i. The scope of those beneficiaries, and the precise defendants from whom they would seek restitution, would vary based on the claim.

Many parties could bring a land restitution claim in Hawai'i. The most comparable plaintiff in American Indian common law is a federally recognized tribe.¹⁷⁶ This is why the Procedures hold so much promise;¹⁷⁷ if the United States recognized a Native Hawaiian government, that government could be a plaintiff for unjust enrichment claims.¹⁷⁸

A federally recognized Native Hawaiian government is not a necessary party for a successful unjust enrichment claim.¹⁷⁹ Native Hawaiians would not be the first indigenous people to gain self-determination without recognition by the United States.¹⁸⁰ As beneficiaries of the trust, every Native Hawaiian has standing to bring a land claim, regardless of

¹⁷³ *Durette v. Aloha Plastic Recycling, Inc.*, 100 P.3d 60, 73 (Haw. 2004).

¹⁷⁴ Cf. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (AM. LAW INST. 2011) (noting that "formulas . . . can lead to serious errors").

¹⁷⁵ *In re TMT*, 431 P.3d at 757.

¹⁷⁶ Cf., e.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 621 (1970).

¹⁷⁷ See Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 43 C.F.R. § 50.1–44 (2019).

¹⁷⁸ Some Native Hawaiians do not want federal acknowledgment and have resisted it for decades out of concern that the federally recognized Native Hawaiian government would be dependent on the United States and unable to exercise sovereignty. See Jennifer L. Arnett, *The Quest for Hawaiian Sovereignty: An Argument for the Rejection of Federal Acknowledgment*, 14 KAN. J.L. & PUB. POL'Y 169, 186–87 (2004); Kauanui, *supra* note 72, at 313–14. Instead, some activists have urged the usage of international law. See MacKenzie, *supra* note 45, at 42. Though posed as mutually exclusive, federal acknowledgment would neither prevent a claim under international law, nor end Native Hawaiian sovereignty. R. Hōkūlei Lindsey, *Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual*, 24 U. HAW. L. REV. 693, 723–24, 727 (2002).

¹⁷⁹ See Lindsey, *supra* note 178, at 727.

¹⁸⁰ See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1867–68 (2019) (noting that the Kanienkehake Nation, which is based in "an area that the United States considers northern New York State," *id.* at 1868, has exercised sovereignty without official federal recognition since 1974).

the blood quantum of their Hawaiian ancestry.¹⁸¹ One limitation narrows the category: the plaintiff needs to show a customary Native Hawaiian usage of the land that dates back to November 25, 1892.¹⁸²

There are numerous potential defendants for a restitution claim. The defendants in the TMT litigation included the State of Hawai‘i as the trustee, the Board as the arm of the State that granted the permit, the University as the lessee that subleased to various telescope developers, and the TMT corporation as the sublessee.¹⁸³ Because the land was seized by insurrectionists, given to the United States, then given to the State of Hawai‘i with statehood, one could argue that the United States could be named as a defendant for ceding the trust to the State of Hawai‘i — even more of an historical challenge than the one suggested here.

(b) *Land Dispossession Conferred Benefits.* — The lands in dispute, and the wealth accrued from those lands, are the benefits conferred. The disputed lands have been framed differently by both sides. The court discussed the “specific parcel” of land the TMT will be built on,¹⁸⁴ whereas the Native Hawaiian claim viewed Mauna Kea as a whole.¹⁸⁵ The court wrongly diminished the benefits conferred — a parcel of the land held in trust — by comparing them to development interests. The public trust doctrine places the interest of the people into one substep of four within a two-part test.¹⁸⁶ The court weighed a narrow version of the interests of the plaintiffs against the public benefits of scientific knowledge, the mitigation of environmental impact, and the minimal impact on the view of and from the summit.¹⁸⁷ It is unnecessary for the defendant to diminish the property’s value in order for the rightful owner to have a right to consent to how the property would be used.¹⁸⁸ Further, the TMT will put revenues into the pockets of the University.¹⁸⁹ This is a gain resulting from a wrongful act.

(c) *Land Dispossession Was Wrongful and Unjust.* — Unjust enrichment asks whether the transfer was a wrongful or unjust act. Hawai‘i cases applying this test have been limited to contexts of insurance and

¹⁸¹ *Office of Hawaiian Affairs v. Hous. & Cnty. Dev. Corp. of Haw.*, 219 P.3d 1111, 1116, 1121–22 (Haw. 2009); *see also MacKenzie & Sproat, supra* note 35, at 527–33.

¹⁸² *Pub. Access Shoreline Haw. v. Haw. Cty. Planning Comm’n*, 903 P.2d 1246, 1268 (Haw. 1995); *see also In re TMT*, 431 P.3d 752, 769 n.16 (Haw. 2018).

¹⁸³ *In re TMT*, 431 P.3d at 757.

¹⁸⁴ *Id.* at 776.

¹⁸⁵ *Id.* at 757–58.

¹⁸⁶ *See id.* at 789 n.9 (Pollack, J., concurring in part and concurring in the judgment).

¹⁸⁷ *See id.* at 768, 774–75, 779 (majority opinion).

¹⁸⁸ *See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 cmt. b (AM. LAW INST. 2011).*

¹⁸⁹ *See In re TMT*, 431 P.3d at 775.

monetary transactions.¹⁹⁰ However, the federal government has acknowledged that the lands of Hawai‘i were ceded “without the consent of or compensation to the Native Hawaiian people,”¹⁹¹ matching language found in the unjust enrichment doctrine.¹⁹² The wrongful and unjust transfer here satisfies both Hawai‘i’s definition and this Chapter’s definition of unjust enrichment. In reviving a restitution doctrine, the Hawai‘i courts can turn to the Restatement for exemplary principles and applications. The Restatement uses triggering liabilities based on substantive areas of law to define the wrongfulness of a transfer.¹⁹³ In addition to the Apology Resolution’s concession that this transfer was nonconsensual, this Chapter suggests duress and fiduciary duty as two potential triggers for Native Hawaiian land claims.

(i) *Signed Under Duress.* — The Overthrow was sufficiently unjust to attach restitution liability to the benefit of the Ceded Lands. Under the principle of duress, a transaction based on impermissible coercion that is wrongful as a matter of law is subject to restitution.¹⁹⁴ President Cleveland’s directive to restore the monarchy should show the Overthrow was impermissibly coercive.¹⁹⁵ Further, the Queen’s abdication at gunpoint¹⁹⁶ rises to the level of physical compulsion, rendering the transfer void.¹⁹⁷ The Restatement’s illustration¹⁹⁸ of this high standard is derived from *Rubenstein v. Rubenstein*.¹⁹⁹ There, a court found the plaintiff’s free will was destroyed by repeated threats of physical violence.²⁰⁰ Duress invalidates the instruments signed by the Queen under threat of violence to her loyalists and to herself, particularly because her brother, King Kalākaua, was also threatened to sign the Bayonet Constitution.²⁰¹ The abdication of the throne and the transfer of title of the Ceded Lands were therefore void, not just voidable.

(ii) *Fiduciary Duty Breached.* — The state failed its fiduciary obligations in leasing lands on Mauna Kea. Following Hawai‘i’s second constitutional convention, the terms of the lands held in trust by the state shifted from the five-part test of the Admission Act to “a public

¹⁹⁰ See, e.g., *Porter v. Hu*, 169 P.3d 994, 1005–08 (Haw. Ct. App. 2007); see also *In re Cuzco Dev. U.S.A., LLC*, 592 B.R. 352, 367 (Bankr. D. Haw. 2018).

¹⁹¹ Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510, 1512 (1993).

¹⁹² See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmts. b, e(2) (AM. LAW INST. 2011).

¹⁹³ See *id.* § 3 cmt. d.

¹⁹⁴ See *supra* notes 117–20 and accompanying text.

¹⁹⁵ See MacKenzie, *supra* note 45, at 22–23.

¹⁹⁶ See *id.* at 21–22.

¹⁹⁷ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 14 cmt. c (AM. LAW INST. 2011).

¹⁹⁸ *Id.* § 14 cmt. g, illus. 7.

¹⁹⁹ 120 A.2d 11 (N.J. 1956).

²⁰⁰ See *id.* at 15–17.

²⁰¹ See *supra* notes 42–43 and accompanying text.

trust for native Hawaiians and the general public.”²⁰² In the TMT case, the Hawai‘i Supreme Court found that this provision was not at issue.²⁰³

Unjust enrichment also allows courts to recognize constructive trusts whenever “one party has been wrongfully deprived either by mistake, fraud, or some other breach of faith or confidence, of some right, benefit, or title to the property.”²⁰⁴ The constructive trust allows a court to consider remedies regardless of the terms of the actual trust between the state and Native Hawaiians, allowing a thorough examination of any “breach of faith” that occurred.

Each defendant has gained benefits as a result of their own or another’s breach of a fiduciary duty.²⁰⁵ It is settled that there was a special trust relationship between the Monarch and her people, which, Congress and the courts have held, passed on to the state government.²⁰⁶ By gaining a lease, the University also became a trustee to the people. The people spoke, and their fiduciaries did not listen. In a hearing, one advocate stated that Mauna Kea, as a whole, was traditionally part of the ahupua‘a Ka‘ohe.²⁰⁷ Instead of acknowledging cultural uses of the sacred site, the State of Hawai‘i prioritized development interests of foreign parties over the will of their beneficiaries.²⁰⁸

The court’s indication that the rent “will be used for the management of Mauna Kea” on the summit²⁰⁹ sprinkles salt on the wound. The fact that this gain is going into the University that developed the telescopes

²⁰² HAW. CONST. art. XII, § 4.

²⁰³ See *In re TMT*, 431 P.3d 752, 774 n.24 (Haw. 2018).

²⁰⁴ *Constructive [Involuntary] Trust*, BARRON’S LAW DICTIONARY (6th ed. 2010).

²⁰⁵ Cf. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 cmt. b (AM. LAW INST. 2011) (providing remedy for “an advantage improperly gained . . . in violation of fiduciary duty”).

²⁰⁶ *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 167–68 (2009).

²⁰⁷ *Pualani Kanahele on Mauna Kea, Kaohe, and the Elementals*, *supra* note 105.

²⁰⁸ See *In re TMT*, 431 P.3d at 768–75. Some evidence exists suggesting that Hawai‘i residents and Native Hawaiians support the TMT. One poll shows that voters in Hawai‘i support the TMT by a two-to-one ratio, Chad Blair, *Civil Beat Poll: Strong Support for TMT but Little Love for Ige*, HONOLULU CIVIL BEAT (Aug. 7, 2019), <https://www.civilbeat.org/2019/08/civil-beat-poll-strong-support-for-tmt-but-little-love-for-ige> [https://perma.cc/WS47-VWTN], and it appears that support from Native Hawaiians grew from thirty-nine percent in 2016 to seventy-two percent in 2018, see Timothy Hurley, *Support Is Building for TMT — Even Among Hawaiians*, HONOLULU STAR-ADVERTISER (Mar. 25, 2018), <https://www.staradvertiser.com/2018/03/25/hawaii-news/support-is-building-for-tmt-even-among-hawaiians?HSA=ce26884fb64542ae5c92bde8a66b048acf74df6e> [https://perma.cc/9HA7-LW4V]. Direct democracy in the form of civil disobedience is an expression of the beneficiaries’ will that should prompt a more comprehensive survey. Moreover, the fact that OHA Trustees unanimously voted to support the kia‘i, and that at least one trustee joined the kia‘i and was arrested, counteracts the results of the poll quite significantly. *State Subpoenas Hawaiian Affairs Agency’s Protest Support*, U.S. NEWS & WORLD REP. (Sept. 20, 2019), <https://www.usnews.com/news/best-states/hawaii/articles/2019-09-20/state-subpoenas-hawaiian-affairs-agency-s-protest-support> [https://perma.cc/D762-55GA].

²⁰⁹ *In re TMT*, 431 P.3d at 775.

in the first place²¹⁰ is violative of the fiduciary duty. As the Queen argued in 1910, the revenues from the trust, including rent paid for permits or leases, should go into the trust²¹¹ — here, for the benefit of the people.

The fiduciaries acted without loyalty to their beneficiaries.²¹² Fervent kia‘i arose in 2015,²¹³ but the University and the Board pressed on with the permit process.²¹⁴ The University placed research interests over those of Native Hawaiian land rights. The Board prioritized development and tourists’ interests over their beneficiaries’ interests — apparently placing fiduciary duty in competition with self-interest and business dealings²¹⁵ — and restricted the rights of Hawaiians to visible practices, of which the Board found none occurring at the site.²¹⁶ But the valued natural resource in this instance is the land of Mauna Kea itself.²¹⁷ This specific parcel of land had no visible cultural practices because the area was kapu — forbidden — to all except high-ranking chiefs;²¹⁸ thus, the site holds cultural significance to Native Hawaiians precisely because of the minimal human contact. Plaintiffs should not need to show any physical evidence, as exists in other parts of the mountain,²¹⁹ to prove the site holds cultural significance.

The University argued that the state interest is strong because of the millions of dollars that the TMT would bring to local education and the scientific gains to be made.²²⁰ Even if plaintiffs concede this point, they should not lose the doctrinal argument. The legal question is whether Native Hawaiian interests are outweighed by the public interests. Though the court cited the rule of law stating that the state’s fiduciary duties “are not fulfilled simply by providing a level playing field for the parties,”²²¹ the court neglected the Board’s beneficiary: the Native Hawaiian people. Once one recognizes the culturally significant resource is the mountain terrain itself — as a sacred site long limited to

²¹⁰ See *id.* at 758–59.

²¹¹ See *Liliuokalani v. United States*, 45 Ct. Cl. 418, 421–23 (1910).

²¹² See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 cmt. a (AM. LAW INST. 2011).

²¹³ See Hamacher & Britton, *supra* note 4.

²¹⁴ See *In re TMT*, 431 P.3d at 760.

²¹⁵ Cf. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 cmt. d (AM. LAW INST. 2011) (“[D]isloyalty involves the pursuit of self-interested objectives [by a fiduciary].”).

²¹⁶ *In re TMT*, 431 P.3d at 768–71.

²¹⁷ See Leon No‘eau Peralto, *Portrait. Mauna a Wākea, in A NATION RISING*, *supra* note 72, at 232, 233–43.

²¹⁸ Caleb Jones & Jennifer Sinco Kelleher, *Protests Flare over Construction of Telescope in Hawaii*, AP NEWS (July 15, 2019), <https://apnews.com/3459159e3fba48f5a10812b1064db26a> [https://perma.cc/TEW4-TPKR].

²¹⁹ See *In re TMT*, 431 P.3d at 769.

²²⁰ *Id.* at 775.

²²¹ *Id.* at 775 n.28.

high chiefs and priests — the only way to protect it is to not break ground.

(iii) *A Losing Laches Defense.* — A court would likely consider a laches defense before resolving the claim.²²² The traditional laches defense, which exists in Hawai‘i law, requires the court to determine whether there was unreasonable delay in bringing the claim, and if so, whether the delay prejudiced the defendants.²²³

From a historical view, there was no delay to a claim for wrongful transfer of land. Protest began immediately after the Overthrow; the Queen went to the United States to self-advocate as soon as she was able, handing a protest to the annexation treaty to Secretary of State John Sherman in Washington, D.C.,²²⁴ and suing thereafter.²²⁵ Native Hawaiian advocacy led to the HHCA in 1921, the creation of OHA in 1978, the HHLRA in 1995, and the countless legislative and executive acts in the twenty-first century.²²⁶ There have been steady legal battles for land since 1898; Native Hawaiian legal history does not show any delay in Native Hawaiians advocating for self-determination, which is connected almost inextricably with the land.²²⁷

Any delay a court finds would not prejudice the defendants. First, the DOI found that Native Hawaiians retained inherent sovereignty,²²⁸ so their claim to Mauna Kea can be viewed as an exercise of that sovereignty. Second, no one lives on Mauna Kea who would be displaced, differentiating this case from the Cayuga and Oneida land claims.²²⁹ Third, the telescope is not built yet; no present use would be prejudiced by this claim. Fourth and relatedly, the kia‘i are not demanding the thirteen existing telescopes be shut down, though they could.²³⁰ The plaintiffs’ claim should prevail in the prejudice inquiry.

(iv) *The Wrong Remedy?* — There is a grand counterargument to this Chapter’s application of restitution to land claims by indigenous peoples. Scholars have argued that restitution is simply not meant to be

²²² Cf. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 217, 221 (2005).

²²³ See Ass’n of Apartment Owners of Royal Aloha v. Certified Mgmt., Inc., 386 P.3d 866, 871 (Haw. 2016) (quoting *Adair v. Hustace*, 640 P.2d 294, 300 (Haw. 1982)).

²²⁴ LILIUOKALANI, *supra* note 2, at 389–92.

²²⁵ Liliuokalani v. United States, 45 Ct. Cl. 418, 418 (1910).

²²⁶ See *supra* pp. 2154–57.

²²⁷ See Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510, 1512 (1993); see also FROM MAUKA TO MAKAI, *supra* note 31, at 41–44.

²²⁸ See Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71,278, 71,286 (Oct. 14, 2016) (codified at 43 C.F.R. pt. 50).

²²⁹ See *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 126–28 (2d Cir. 2010); *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 274 (2d Cir. 2005).

²³⁰ A laches defense against such a claim would be different and may require a court to weigh the present and future scientific value of the thirteen telescopes against Native Hawaiian rights to the land they were built on. Cf. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 215–17 (2005) (finding restitution would pose “present-day and future disruption,” *id.* at 215 n.9).

a vessel for claims against historical injustices, such as reparations for slavery.²³¹ Such critics may believe that legislatures would first need to explicitly invite such claims.²³²

The values explored by UNDRIP should impact the court's analysis in response to this counterargument. When the analysis is rooted in preventing injustice, the interests of Native Hawaiians are in the spotlight. Such is the call of the international community, which has recognized that all indigenous peoples have the right to legal recognition, respect, and redress — through restitution or compensation — for their traditional lands that were “confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”²³³ These important notions should persuade a court weighing equitable principles to reconsider indigenous claims and to view these important values with respect.²³⁴ Maybe then the long-sought justice for indigenous peoples in the United States, stifled by the pens of judges, will finally flow freely, from the highest mauka to the deepest makai.²³⁵

Conclusion

Land restitution has always been a desirable outcome for Native Hawaiians. This Chapter proclaims this insight in an effort to revive the doctrine of unjust enrichment under twenty-first century equitable values. Accountability for the violent, wrongful land dispossession of U.S. settler colonialism is long overdue. Audre Lorde wrote that “the master’s tools will never dismantle the master’s house,” but “[t]hey may

²³¹ See, e.g., Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443, 1443–44 (2004).

²³² Cf. Andrew Kull, *Restitution in Favor of Former Slaves*, 84 B.U. L. REV. 1277, 1277, 1289–90 (2004) (discussing judges’ emphasis on defendants’ “good-faith expectation” in restitution cases brought by formerly enslaved people, *id.* at 1289, which may make a legislative solution necessary).

²³³ UNDRIP, *supra* note 132, art. 28; see also *id.* art. 26.

²³⁴ Some decisions have referenced UNDRIP favorably, even when the state found responsible did not incorporate it. See, e.g., Maya Leaders All. v. Att’y Gen. of Belize, No. BZCV2014/002, Judgment, paras. 53–56 (Caribbean Ct. of Justice Oct. 30, 2015), <https://ccj.org/wp-content/uploads/2015/10/2015-CCJ-15AJ.pdf> [<https://perma.cc/ZR58-FJUS>] (stating that “[w]hile . . . [UNDRIP] is] not binding, [it is] relevant to the interpretation of the Constitution of Belize which in its preamble explicitly recognizes that state policies must protect the culture and identity of its indigenous peoples,” *id.* at para. 54). The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have also applied UNDRIP or referenced it before it was ratified. See Kaliña & Lokono Peoples v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, paras. 122–25 (Nov. 25, 2015); Mayánya (Sumo) Awas Tingni Cmty. v. Nicaragua, Concurring Opinion of Judge Sergio García Ramírez, Inter-Am. Ct. H.R. (ser. C) No. 79, paras. 8–9 (Aug. 31, 2001); Dann v. United States, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, doc. 5 ¶ 47 (2002).

²³⁵ “Mauka” refers to the mountain area and “makai” to the ocean or coastal area within ahupua‘a. MCGREGOR & MACKENZIE, *supra* note 30, at 206.

allow us temporarily to beat him at his own game.”²³⁶ Plato wrote of the painful “dazzle and glitter of the light” when prisoners facing a cave wall were freed to turn away from it and were “drag[ged]” out of the cave and into the sun.²³⁷ The legal principles described in this Chapter are just some of many employable strategies to convince the masters — enslaved by their ancestors’ wrongdoing to continue facing the cavern wall — to step outside of the cave and see the dazzling light. The principles of restitution are value-neutral and widely applicable. Private law doctrines should not be illogically nullified when broaching political topics such as land rights. It is unjust for equity to be denied from survivors of U.S. conquest with no reasonable explanation besides embracing the status quo,²³⁸ that is as good as a court saying “Ainokea.”²³⁹ Such a dismissal flies in the face of the principles of equity and perpetuates the limited application of equity only to the interests of particular classes of white people, regardless of the fact that indigenous citizens with the same right to these legal principles are making valid claims.

This Chapter has argued for unjust enrichment doctrine to support the restitution of Mauna Kea, but also supports a broader argument for the full return of the trust into the hands of the Native Hawaiian people. Land restitution is of the utmost significance for Native Hawaiians’ cultural, social, and economic welfare.²⁴⁰ Congress even acknowledged that “the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.”²⁴¹

The international community is watching.²⁴² In the prescient words of Hawai‘i’s last monarch: “There is little question but that the United States could become a successful rival of the European nations in the race for conquest, and could create a vast military and naval power, if such is its ambition. But is such an ambition laudable?”²⁴³ Restitution should be a vehicle for the gains from American conquest to be restored.

²³⁶ AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in SISTER OUTSIDER: ESSAYS AND SPEECHES 110, 112 (1984).

²³⁷ PLATO, THE COLLECTED DIALOGUES 748 (Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1961).

²³⁸ Cf. Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 176 (2009).

²³⁹ Hawai‘i slang for “I don’t care.” See *Who We Are*, THE AIKEA MOVEMENT, <https://www.aikeahawaii.org/about-aikea/> [<https://perma.cc/S684-M29V>].

²⁴⁰ See Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 219 P.3d 1111, 1120 (Haw. 2009).

²⁴¹ Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510, 1512 (1993).

²⁴² See Expert Mechanism, *supra* note 137, at para. 59.

²⁴³ LILIUOKALANI, *supra* note 2, at 406.