

likely remained unsettled indefinitely. In addition, Chief Justice Roberts's dissent in this Term's *Caperton v. A.T. Massey Coal Co.*⁷⁹ decision raised the counterintuitive concern that expanding the standards for recusal could decrease the public's confidence in judicial impartiality by increasing the permissible opportunities for alleging judicial bias.⁸⁰ At the least, this concern supports construing any *Beatty*-inspired expansion of Supreme Court recusal standards narrowly — every member of the current Court is a former court of appeals judge⁸¹ and, in that role, is likely to have decided issues of colorable similarity to many, if not all, of those they must consider as Justices.

Supreme Court recusal standards must strike a delicate balance between efficient administration of justice and the preservation of the Court's legitimacy among the public. By declining to participate in cases they decided as judges on lower courts, the Justices foster the appearance of openmindedness on the part of the Court as a whole and avoid the appearance of bias toward the parties. However, when, as in *Beatty*, the danger of partiality with respect to the parties is less severe, recusal may not be justified by reference to openmindedness alone. Otherwise, recusal would arguably follow any time a Justice considered an issue he or she had previously decided, and the administration of justice would be unacceptably hampered. Thus, despite the potential for impropriety, Chief Justice Roberts's participation in *Beatty* was likely proper. Nonetheless, the principles behind the Court's recusal practices require that the Justices be particularly cognizant of threats to openmindedness in future cases like *Beatty*.

C. Hawaii Apology Resolution

Alienation of Hawaiian Land. — In recent years, the United States has apologized for some of the unfortunate aspects of its history. Since 1988, Congress has passed resolutions apologizing for the internment of Japanese-Americans,¹ for the U.S. role in overthrowing the Kingdom of Hawaii,² and for slavery and racial segregation.³ A proposed congressional apology to Native Americans has yet to gather sufficient

⁷⁹ 129 S. Ct. 2252 (2009).

⁸⁰ See *id.* at 2267 (Roberts, C.J., dissenting); see also Stempel, *supra* note 52, at 595–96 (discussing the notion of a “judicial ‘duty to sit’ in close cases to prevent the disqualification law from being abused,” *id.* at 595). But see Bassett, *supra* note 59, at 672–73 (arguing that “Congress eliminated . . . the ‘duty to sit’ doctrine in 1974” by amending 28 U.S.C. § 455, *id.* at 673).

⁸¹ POSNER, *supra* note 69, at 134.

¹ Act of Aug. 10, 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903, 903–04 (codified at 50 U.S.C. app. § 1989a(a) (2006)). The apology also included a payment of \$20,000 to internees who were still alive. *Id.* § 105(a)(1), 102 Stat. at 905–06 (codified at 50 U.S.C. app. § 1989b-4(a)(1)).

² Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1513.

³ S. Con. Res. 26, 111th Cong. (2009) (enacted); H.R. Res. 194, 110th Cong. (2008) (enacted).

support.⁴ In 1997, President Clinton apologized for the syphilis study performed on citizens of Tuskegee.⁵ Just this year, there was speculation that President Obama might apologize for the World War II bombing of Dresden.⁶ For some, these apologies represent important steps toward reconciliation by acknowledging wrongdoing.⁷ For others, these apologies are little more than meaningless political rhetoric.⁸

Last Term, in *Hawaii v. Office of Hawaiian Affairs*,⁹ the Supreme Court was called upon to interpret the 1993 resolution apologizing for the U.S. role in overthrowing the native government of Hawaii. In a relatively brief, unanimous decision reversing the Supreme Court of Hawaii, the Court held that the congressional apology did not alter Hawaii's authority to dispose of lands that once belonged to the Hawaiian crown.¹⁰ While the Court did not appear to consider seriously the possibility that a mere apology could effect substantive change in rights and obligations, in other contexts such words do affect what claims a party can assert. Although the result may be correct, by assuming that the apology could accomplish no real change, the Court furthered the perceived emptiness and impotence of political rhetoric.

On January 14, 1893, after years of increasing American economic and political stranglehold over the Kingdom,¹¹ Hawaiian Queen Liliuokalani proposed reforms that would have limited voting to Hawaiian citizens and removed high property qualifications for voting.¹² With their power threatened, a group of American and European sugar planters, missionaries, and financiers organized an overthrow of the monarchy.¹³ United States Minister to Hawaii John L. Stevens

⁴ See S.J. Res. 14, 111th Cong. (2009) (introduced Apr. 30, 2009).

⁵ Press Release, Office of the Press Sec'y, Remarks by the President in Apology for Study Done in Tuskegee (May 16, 1997), available at <http://www.cdc.gov/tuskegee/clintonp.htm>.

⁶ See, e.g., Daniel Schwammenthal, *Obama and Dresden*, WALL ST. J., June 5, 2009, at A15.

⁷ See, e.g., Jean-Marc Coicaud & Jibecke Jönsson, *Elements of a Road Map for a Politics of Apology*, in THE AGE OF APOLOGY: FACING UP TO THE PAST 77, 82 (Mark Gibney et al. eds., 2008) (arguing that shifts away from regimes "in which basic liberties had been regularly violated" present a host of "ethical, legal and political difficulties" and that apologies have become a method of addressing "abusive and criminal pasts").

⁸ See, e.g., Kelly Brewington, *House of Delegates Passes Resolution Acknowledging State's Part in Slavery*, BALT. SUN, Mar. 27, 2007, at 1A ("I don't think apologies solve anything . . . They're just feel-good superficial measures." (quoting Maryland Delegate Patrick L. McDonough) (internal quotation marks omitted)).

⁹ 129 S. Ct. 1436 (2009).

¹⁰ *Id.* at 1443.

¹¹ See STEPHEN KINZER, OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ 9 (2006) ("A few dozen American and European families effectively controlled both the economy and the government, ruling through a succession of native monarchs who were little more than figureheads.").

¹² *Id.*

¹³ See HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 293 (1980) (noting the overthrow served "the combined missionary and pineapple interests of the Dole family").

was critical to the group, using his position to secure United States naval forces in order to intimidate the Queen into submission.¹⁴ By January 17, the group had proclaimed a new provisional government. Queen Liliuokalani acquiesced: "I yield to the superior force of the United States of America . . . I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall . . . undo the action of its representatives . . .".¹⁵

Although the provisional government promptly proclaimed Hawaii to be a protectorate of the United States and sought annexation, President Cleveland viewed the overthrow as an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress."¹⁶ He refused to consider annexation, working instead to reinstate the Queen. Only in 1898, with President Cleveland out of office and the Hawaiian islands taking on strategic importance for the Spanish-American War, was the Hawaiian government able to obtain President McKinley's support for annexation.¹⁷ Even then, with concerns about illegitimacy lingering, the annexation treaty failed in the Senate. Hawaii was only annexed by means of a joint resolution — the Newlands Resolution¹⁸ — passed July 7, 1898; there was never an annexation treaty.¹⁹

According to the Newlands Resolution, Hawaii "cede[d] and transfer[red] to the United States the absolute fee and ownership of all public, Government, or Crown lands."²⁰ In 1900, the Hawaiian Organic Act²¹ made Hawaii into a territory and established a territorial government.²² The Organic Act affirmed that:

[T]he portion of the public domain heretofore known as Crown land is hereby declared to have been . . . the property of the Hawaiian government, and to be free and clear from . . . all claim of any nature whatsoever . . . upon the rents, issues, and profits thereof. It shall be subject to alienation and other uses as may be provided by law.²³

According to the act admitting Hawaii as the fiftieth state in 1959, Hawaii was granted "the United States' title to all the public lands

¹⁴ See Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1510; see also WILLIAM ADAM RUSS, JR., THE HAWAIIAN REVOLUTION (1893-94) 106 (1959) ("Stevens usually claimed the credit for bringing the marines and bluejackets ashore . . .").

¹⁵ Joint Resolution of Nov. 23, 1993, 107 Stat. at 1511.

¹⁶ *Id.* (internal quotation marks omitted).

¹⁷ *Id.* at 1512.

¹⁸ Joint Resolution of July 7, 1898, 30 Stat. 750.

¹⁹ The legitimacy of the Newlands Resolution is still disputed. See *Larsen v. Hawaiian Kingdom*, Case No. 99001 (Perm. Ct. Arb. 2001), available at <http://www.pca-cpa.org/upload/files/LHKAward.pdf>.

²⁰ Joint Resolution of July 7, 1898, 30 Stat. at 750.

²¹ Hawaiian Organic Act, ch. 339, 31 Stat. 141 (1900).

²² *Id.* §§ 2-3, 31 Stat. at 141.

²³ *Id.* § 99, 31 Stat. at 161.

and other public property within the boundaries of the State of Hawaii.”²⁴ The lands and the proceeds from their sale were to be held by the State of Hawaii as a public trust to promote several public purposes, including bettering the conditions of native Hawaiians.²⁵

In 1993, one hundred years after the overthrow, Congress passed a joint resolution “to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii . . . with Native Hawaiians.”²⁶ In a series of thirty-seven “whereas” clauses, the Apology Resolution describes the history of the 1893 overthrow.²⁷ It then states that Congress:

- (1) . . . acknowledges the historical significance of [the illegal overthrow] which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;
- (2) recognizes and commends efforts of reconciliation . . . ;
- (3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow . . . with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;
- (4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and
- (5) urges the President of the United States to also acknowledge the ramifications of the overthrow²⁸

The final section of the Apology Resolution disclaims, “Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.”²⁹

The “Leiali’i parcel” is a tract of former Crown land on the island of Maui that was among the lands that the Admission Act conveyed to the State of Hawaii to be held in trust.³⁰ Hawaii’s Housing Finance and Development Corporation (HFDC) received permission to remove the Leiali’i parcel from the trust and develop it.³¹ The Office of Hawaiian Affairs (OHA), a semi-autonomous entity created by the Hawaiian Constitution and charged with administering the land held in

²⁴ Hawaii Statehood Admissions Act, Pub. L. No. 86-3, § 5(b), 73 Stat. 4, 5 (1959).

²⁵ *Id.* § 5(f), 73 Stat. at 6.

²⁶ Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1513.

²⁷ *Id.*, 107 Stat. at 1510-13.

²⁸ *Id.* § 1, 107 Stat. at 1513.

²⁹ *Id.* § 3, 107 Stat. at 1514.

³⁰ *Hawaii*, 129 S. Ct. at 1441.

³¹ *Id.*

trust for the benefit of native Hawaiians,³² asked that HFDC include a disclaimer preserving any claims of native Hawaiians.³³ HFDC refused to include the disclaimer because “to do so would place a cloud on title, rendering title insurance unavailable.”³⁴ Relying in part on the Apology Resolution, OHA sued the State, HFDC, and various state officials seeking “to enjoin the defendants from selling or otherwise transferring the Leiali’i parcel to third parties and selling or otherwise transferring to third parties any of the ceded lands in general until a determination of the native Hawaiians’ claims to the ceded lands is made.”³⁵ The trial court denied the injunction, finding “that the State had the express authority to alienate ceded lands from the public lands trust.”³⁶

The Supreme Court of Hawaii vacated and instructed the trial court to issue an injunction preventing the State “from selling or otherwise transferring to third parties [any] ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands have been resolved.”³⁷ The court explained that it “believe[d], based on a plain reading of the Apology Resolution, that Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation.”³⁸ The court concluded that the State had “a fiduciary duty as trustee to protect the ceded lands pending a resolution of native Hawaiian claims.”³⁹ The court rejected arguments that the relief was barred under doctrines of estoppel, sovereign immunity, waiver, ripeness, or political question.⁴⁰

Granting certiorari to address the impact of the Apology Resolution, the Supreme Court unanimously reversed and remanded.⁴¹ In an opinion by Justice Alito, the Court held that the Apology Resolution did not strip Hawaii of its authority to alienate the ceded lands.⁴²

The Court began by addressing jurisdiction. OHA maintained that the Supreme Court of Hawaii’s decision was based on Hawaiian trust law, providing an adequate and independent state ground for the decision. The Court rejected OHA’s argument.⁴³ According to *Michigan*

³² HAW. CONST. art. XII, §§ 4–6.

³³ *Hawaii*, 129 S. Ct. at 1441.

³⁴ *Id.* (quoting Petition for a Writ of Certiorari app. at 207a, *Hawaii*, 129 S. Ct. 1436 (2009) (No. 07-1372)) (internal quotation marks omitted).

³⁵ *Office of Haw. Affairs v. Hous. & Cnty. Dev. Corp. of Haw.*, 177 P.3d 884, 899 (Haw. 2008).

³⁶ *Id.*

³⁷ *Id.* at 928.

³⁸ *Id.* at 922.

³⁹ *Id.* at 923.

⁴⁰ *Id.* at 905–20.

⁴¹ *Hawaii*, 129 S. Ct. at 1439, 1445.

⁴² *Id.* at 1443.

⁴³ *Id.* at 1442–43.

v. *Long*,⁴⁴ federal jurisdiction is absent only where there is a “plain statement”⁴⁵ that the decision rests on state law, but not where “the adequacy and independence of any possible state law ground is not clear from the face of the opinion.”⁴⁶ Noting the Supreme Court of Hawaii’s extensive references to the Apology Resolution⁴⁷ and statements that the Apology Resolution “dictate[s]” and “lies ‘[a]t the heart’” of the claims,⁴⁸ the Court concluded, “we have no doubt that the decision below rested on federal law.”⁴⁹

Turning to the merits, the Court first addressed whether any of the five clauses in the first section of the Apology Resolution could operate to strip Hawaii of the lands that had previously been held in absolute fee by the United States and subsequently conveyed to the State of Hawaii.⁵⁰ The Court firmly rejected the idea that verbs of apology could be used to create substantive rights. “The resolution’s first substantive provision uses six verbs, all of which are conciliatory or precatory. . . . Such terms are not the kind that Congress uses to create substantive rights”⁵¹ With those words, the Court rejected any suggestion that apologizing could alter rights and obligations.

The Court then rejected any suggestion that the Apology Resolution’s disclaimer of claims against the United States could implicitly create any substantive claims against Hawaii: “[W]e know of no justification for turning an express disclaimer of claims against one sovereign into an affirmative recognition of claims against another.”⁵² The Court also rejected the idea that the “whereas” clauses could have any legal effect.⁵³ Even if “whereas” clauses did have legal significance, the Court made two arguments against reading the clauses in the Apology Resolution as “chang[ing] the legal landscape.”⁵⁴ First, the “whereas” clauses could not be read to alter any previous federal legislation because “repeals by implication are not favored.”⁵⁵ Second, if the Apology Resolution did purport to “cloud” Hawaii’s title, it would

⁴⁴ 463 U.S. 1032 (1983).

⁴⁵ *Id.* at 1041.

⁴⁶ *Id.* at 1040–41.

⁴⁷ See *Hawaii*, 129 S. Ct. at 1443 (noting “the State Supreme Court’s 77 references to the Apology Resolution”).

⁴⁸ *Id.* at 1442 (second alteration in original) (quoting *Office of Haw. Affairs v. Hous. & Cnty. Dev. Corp. of Haw.*, 177 P.3d 884, 922, 899 (Haw. 2008)).

⁴⁹ *Id.* at 1443.

⁵⁰ *Id.*

⁵¹ *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17–18 (1981)).

⁵² *Id.* at 1444.

⁵³ *Id.*

⁵⁴ *Id.* at 1445 (quoting *Office of Haw. Affairs v. Hous. & Cnty. Dev. Corp. of Haw.*, 177 P.3d 884, 900 (Haw. 2008)) (internal quotation mark omitted).

⁵⁵ *Id.* (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007)) (internal quotation marks omitted).

raise constitutional concerns because Congress cannot diminish a title that it has already bestowed upon a sovereign state.⁵⁶

The Court's conclusion that words of apology cannot be the bearers of legal change was too hasty. From the plausible claim that the language of apology falls short of explicit rights-creation, the Court mistakenly inferred that apology cannot alter legal claims. This inference ignored the meaning of apology, oversimplified the issue in the case, and acquiesced to the cynical view that political rhetoric is empty.

The *Hawaii* case is remarkable for the apparent consensus that the Apology Resolution was legally insignificant. On appeal, OHA essentially abandoned any argument that the Resolution generated substantive claims, arguing instead that the judgment below was based on state law,⁵⁷ a concession the Supreme Court found noteworthy.⁵⁸ Petitioner HFDC ambitiously sought not merely a reversal of the Hawaii Supreme Court's interpretation of the Apology Resolution, but also a statement that federal law bars any claim of native Hawaiian title.⁵⁹ Several of the amicus briefs even focused on such peripheral issues as the legality of OHA's preference for native Hawaiians⁶⁰ and the extent of Congress's powers over Indian affairs.⁶¹ Sensing the departure from the original question presented, at oral argument Justice Ginsburg was quick to suggest that the Court simply acknowledge that the Apology Resolution has no substantive effect and remand.⁶² With

⁵⁶ *Id.* ("Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State." (quoting *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001) (alteration and internal quotation marks omitted))).

⁵⁷ See Brief for the Respondents at 19–43, *Hawaii*, 129 S. Ct. 1436 (2009) (No. 07-1372), 2009 WL 181534.

⁵⁸ *Hawaii*, 129 S. Ct. at 1445 ("[W]e find it telling that even respondent OHA has now abandoned its argument, made below, that 'Congress . . . enacted the Apology Resolution and thus . . . change[d] the Admission Act.' (alteration and omissions in original) (quoting Joint Appendix at 114a, *Hawaii*, 129 S. Ct. 1436 (2009) (No. 07-1372), 2008 WL 5155273)).

⁵⁹ See Brief for Petitioners at 31, *Hawaii*, 129 S. Ct. 1436 (2009) (No. 07-1372), 2008 WL 5150171; see also Transcript of Oral Argument at 14–15, *Hawaii*, 129 S. Ct. 1436 (2009) (No. 07-1372), 2009 WL 462660. Several amici also pressed for the stronger position. See, e.g., Amicus Brief of the States of Wash. et al. in Support of Petitioner State of Haw. at 11–18, *Hawaii*, 129 S. Ct. 1436 (2009) (No. 07-1372), 2008 WL 5236222.

⁶⁰ See, e.g., Brief for Native Hawaiians, Samuel L. Kealoha, Jr. et al. as Amici Curiae Supporting Respondents at 25–37, *Hawaii*, 129 S. Ct. 1436 (2009) (No. 07-1372), 2009 WL 271046; Brief Amicus Curiae of Pac. Legal Found. et al. in Support of Petitioners at 8–28, *Hawaii*, 129 S. Ct. 1436 (2009) (No. 07-1372), 2008 WL 5249235.

⁶¹ See, e.g., Brief for the Nat'l Cong. of Am. Indians as Amicus Curiae in Support of Respondents at 11–35, *Hawaii*, 129 S. Ct. 1436 (2009) (No. 07-1372), 2009 WL 247669; Amicus Curiae Brief of Mountain States Legal Found. in Support of Petitioners at 5–24, *Hawaii*, 129 S. Ct. 1436 (2009) (No. 07-1372), 2008 WL 5249238.

⁶² Transcript of Oral Argument, *supra* note 59, at 6 ("Why isn't it sufficient just to say that this resolution has no substantive effect, period, and then remand to the Hawaii Supreme Court?").

brevity and unanimity the Court followed this suggestion, apparently not taking seriously the idea that the Apology Resolution might be the source of substantive legal changes. It is, so to speak, mere words.

But this argument is too simplistic. It is an important feature of some speech that the utterance of certain words changes rights and obligations. To use classic examples, when one says “I do” at a wedding, or “I name this ship the *Queen Elizabeth*” while breaking the bottle, this speech is not merely descriptive.⁶³ The changes in rights and obligations need not even be intended — when one says “I promise,” it may not matter whether one intends to create an obligation.⁶⁴ In deciding whether Congress’s apology effects change in this way, Justice Alito incorrectly asserted that, on its own, it does not.

Apology entails more than expression of sympathy. When one offers a true apology, one takes responsibility for past actions and acknowledges wrongdoing.⁶⁵ This feature may be concealed by the fact that people often use the generic “I’m sorry” to express regret or sympathy — as in, “I’m sorry for your loss.” But this is not an apology. Apology, unlike the mere expression of sympathy, involves accepting both the responsibility for and the wrongness of one’s past actions.⁶⁶ The Apology Resolution purported to offer such an apology for the American role in overthrowing the Hawaiian monarchy. In doing so, Congress did more than express regret or sympathy, as it might have done toward victims of the Holocaust, for example. Instead, Congress acknowledged that the United States itself had acted unjustly.

⁶³ J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 5 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975).

⁶⁴ See *id.* at 16 (“Thus, when I say ‘I promise’ and have no intention of keeping it, I have promised but [it is infelicitous].”).

⁶⁵ See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 115 (1998) (“Full acceptance of responsibility by the wrongdoer is the hallmark of an apology.”); NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 17 (1991) (“To apologize is to declare voluntarily that one has *no excuse*, defense, justification, or explanation for an action (or inaction)”); Louis F. Kort, *What Is An Apology?*, in *INJUSTICE AND RECTIFICATION* 105, 110 (Rodney C. Roberts ed., 2002) (“[A]pologizing . . . for something [requires] . . . accepting responsibility for it [and] . . . acknowledging it to constitute an offense to [the] hearer”); Janna Thompson, *The Apology Paradox*, 50 *PHIL. Q.* 470, 471 (2000) (“If we apologize without remorse, then we are being hypocritical.”).

⁶⁶ See NICK SMITH, *I WAS WRONG: THE MEANINGS OF APOLOGIES* 68–69 (2008) (arguing that it is “central to apologetic meaning” that a transgressor “explains that she regrets what she has done because it is wrong, she wishes she had done otherwise, and in accordance with this realization she commits to not making the same mistake again”); Kathleen A. Gill, *The Moral Functions of an Apology*, in *INJUSTICE AND RECTIFICATION*, *supra* note 65, at 111, 112 (describing apology as including “an acknowledgment of responsibility for the act” and an “expression of an intention to refrain from similar acts in the future”).

After acknowledging the illegitimacy of one's claim, one cannot proceed to assert that very claim.⁶⁷ One cannot, for example, plausibly assert, "I apologize for stealing your car, but it's still my car." The apology acts as a moral, if not legal, estoppel. In some ways, however, this self-contradictory reading is precisely the reading that the Court gave to the Apology Resolution: "We apologize for stealing your land, but it's still our land." Six times throughout the opinion, the Court cited the Newlands Resolution, the Organic Act, and the Admission Act for the proposition that the United States owned the ceded lands in "absolute fee," suggesting that the Apology Resolution did not alter this fact.⁶⁸ But if the United States genuinely apologized for the illegal seizure of land — that is, acknowledged the seizure as unjust — this acknowledgment would seem incompatible with asserting a claim of perfect title to that very land.⁶⁹

This understanding of apology is entirely compatible with the Court's suggestion that the language of apology does not *create* any substantive claims. If someone says, "I apologize for stealing your car," the listener would hardly take this to be a gift of the car. The apology does not create a substantive right in the person apologized to, but rather it *extinguishes* a claim of the apologizer. The effect is similar — the right to the car is returned — but transfer is accomplished through the abandonment of a competing claim rather than through any substantive creation. By analogy, even if the Apology Resolution does not create substantive claims to the land, it may still establish the illegitimacy of the United States's prior ownership claims. In other words, even if the significance of the apology is political rather than legal, in order to give effect to this expressive political content there must be a genuine forsaking of certain legal positions.⁷⁰

⁶⁷ Cf. MINOW, *supra* note 65, at 114 ("By retelling the wrong and seeking acceptance, the apologizer assumes a position of vulnerability before not only the victims but also the larger community of literal or figurative witnesses.").

⁶⁸ See *Hawaii*, 129 S. Ct. at 1440, 1441, 1443–45. This may be a subtle victory for the State of Hawaii and the United States, both of which argued for a broad declaration that federal law gives Hawaii complete title to the land.

⁶⁹ The Court wrote, "[N]or does the Apology Resolution reveal any evidence that Congress intended sub silentio to 'cloud' the title that the United States held in 'absolute fee' and transferred to the State in 1959." *Id.* at 1445 (emphasis omitted). But this statement presumes the conclusion. Insofar as apologies acknowledge wrongdoing, it would not be sub silentio any more than saying "I'm sorry I stole your car" would be a sub silentio undermining of one's claim of ownership.

⁷⁰ See Christopher Bennett, *Apology and Reparation in a Multicultural State*, in 10 LAW & PHIL. 272, 277 (Michael Freeman & Ross Harrison eds., 2007) ("Apology works because and insofar as it expresses a remorseful recognition that the initial action was wrong; a repudiation of the attitude expressed in the wrong; and a renewed commitment to the rules and values that structure the relationship. Words are cheap and have no magic power in themselves." (footnote omitted)).

Congress itself appears to view apology as a way of legitimizing the claims of wronged groups.⁷¹ If Congress viewed an apology as an essentially impotent act that merely expresses goodwill, then it would be hard to explain the resistance that proposed apologies consistently face.⁷² In fact, only Japanese internment, the Hawaiian overthrow, and slavery have received congressional apologies.⁷³ Moreover, the Apology Resolution itself was not treated as uncontroversially empty rhetoric by Congress.⁷⁴ Senator Slade Gorton worried that the Resolution was far from impotent, explaining, “[T]he logical consequences of this resolution would be independence.”⁷⁵ With equal dramatic flair, Senator Daniel Akaka described the Resolution as “finally acknowledg[ing] Queen Liliuokalani’s plea for justice.”⁷⁶

All this is not to suggest that the Apology Resolution actually should, or could, be read as stripping Hawaii’s title.⁷⁷ In order for “I do” to have its effect, one must be at one’s lawful wedding;⁷⁸ and saying “I name this ship the *Queen Elizabeth*” will accomplish little if one

⁷¹ Cf. MELISSA NOBLES, THE POLITICS OF OFFICIAL APOLOGIES 71 (2008) (“[S]tate officials will apologize when they ideologically support and seek to advance minority rights.”).

⁷² See *id.* at 72 (“[A]pologies validate reinterpretations of history by formally acknowledging past actions and judging them unjust. . . . [A]pologies may strengthen history-centered explanations of minority disadvantage [and] . . . advance reconsideration of the obligations and boundaries of membership in the national community. . . . [I]t is precisely these qualities and the politics that apologies advance that explain why governments have refused to apologize.”).

⁷³ The current scarcity of congressional apologies weakens, but does not obviate, the concern that giving apologies greater legal effect might create a disincentive to apologizing. Even if congressional apologies were deterred by the prospect that the country would be committed to the acknowledgment of injustice, it would only be a disincentive to disingenuous apology.

⁷⁴ In fact, the Resolution generated thirty-four dissenting votes in the Senate. 139 CONG. REC. 26,428 (1993) (Rollcall Vote No. 332). The House held forty minutes of debate, but passed it by voice vote. *Id.* at 29,102–07.

⁷⁵ *Id.* at 26,425.

⁷⁶ *Id.* at 26,424.

⁷⁷ More nuanced treatment of apology might have reached a similar result. For example, the Court might have questioned whether the apology for the overthrow implied any illegitimacy of the subsequent annexation. See RUSS, *supra* note 14, at 351 (“From the standpoint of American sensibilities, it was fortunate that annexation did not occur in 1893. . . . [T]here would always have been certain unanswerable questions, each with an overtone of guilt. . . . By 1898. . . . no one could say that the United States was receiving stolen goods, for by that time the new Government had secured a good title.”). The Court might have relied on peculiarities of apologizing collectively or by representation to circumscribe the legal significance of the apology. Cf. Thompson, *supra* note 65, at 475 (suggesting that political apologies are better understood not as “apolog[ies] for the deeds of our ancestors,” but as “apolog[ies] concerning deeds of the past”—that is, as regret for the fact that “we owe our existence and other things we enjoy to the injustices of our ancestors”). Or the Court might have acknowledged that the Resolution undermined the “perfect title” that the United States previously held under the Newlands Resolution but recognized that the significance of this clouded title now lies with the State of Hawaii—as the significance of a thief’s admission might lie with the person to whom the stolen property had already been given.

⁷⁸ See AUSTIN, *supra* note 63, at 8 (“[I]t is always necessary that the *circumstances* in which the words are uttered should be in some way, or ways, *appropriate* . . .”); cf. *The Queen v. Allen*, [1872] L.R. 1 C.C.R. 367 (confronting the conceptual impossibility of bigamy).

does not have the appropriate authority.⁷⁹ Similarly, Congress can only accomplish what is within its authority. As the Court rightly points out, saying that Congress could revoke Hawaii's title to land would raise serious constitutional concerns.⁸⁰ But Congress can admit that the United States's prior title was unlawfully initiated — an admission that the Apology Resolution arguably does make. There is nothing implausible in thinking that an admission has the potential to subtly alter the legal landscape. By bluntly declaring the legal insignificance of apology, the Court ignored these subtleties.

We have become accustomed to an overwhelming amount of empty political rhetoric — politicians' words that are neither false nor efficacious.⁸¹ Congressional resolutions are a prime culprit. In its first few months, the 111th Congress passed resolutions “[c]ommemorating 90 years of U.S.-Polish diplomatic relations,”⁸² “[c]ongratulating the University of Florida football team,”⁸³ and “[s]upport[ing] the designation of a ‘National Data Privacy Day.’”⁸⁴ In this context, it is easy to understand a congressional apology as mere “conciliatory and precatory” verbiage with no actual legal effect. By reading the resolution this way, however, the Court accepted and perpetuated an understanding of political rhetoric as meaningless and impotent.⁸⁵ The Court should instead take seriously the possibility that congressional language may be legally significant, even where it is not, strictly speaking, used to create legal rights.

D. Identity Theft

Mens Rea Requirement. — Traditionally, undocumented immigrants have been punished in immigration courts, and punishment has consisted primarily of deportation.¹ More recently, prosecutors have used general criminal statutes creatively to prosecute undocumented

⁷⁹ See AUSTIN, *supra* note 63, at 23 (“One could say that I ‘went through a form of’ naming the vessel but that my ‘action’ was ‘void’ or ‘without effect,’ because I was not a proper person, [or] had not the ‘capacity,’ to perform it . . .”).

⁸⁰ *Hawaii*, 129 S. Ct. at 1445.

⁸¹ For a discussion of language that does not attempt to be truthful, see generally HARRY G. FRANKFURT, ON BULLSHIT (2005).

⁸² S. Res. 9, 111th Cong. (2009) (enacted Apr. 1, 2009).

⁸³ S. Res. 13, 111th Cong. (2009) (enacted Jan. 14, 2009).

⁸⁴ H. Res. 31, 111th Cong. (2009) (enacted Jan. 26, 2009).

⁸⁵ Cf. CHARLES L. GRISWOLD, FORGIVENESS 182 (2007) (arguing that when apology is politically sentimentalized, “the criteria for its practice are obscured” and “it can easily degenerate into lip service and a morally meaningless formality”); MINOW, *supra* note 65, at 117 (“If unaccompanied by direct and immediate action, . . . official apologies risk seeming meaningless.”).

¹ Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 665–66 (2008) (noting that the typical punishment in the immigration system is deportation).