



ARTICLE

Origin Stories in Property Law

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Abstract. Narrating the origins of a property regime affords an opportunity to shape that regime in several important respects. For one thing, an origin story can shape the language that participants in the regime use to make property claims. For another, because every property regime is preceded by some other entitlement distribution, how we account for that distribution—eliminating it, preserving it, or modifying it in some way—can shape the political economy of the resulting property regime. In short, origin stories can shape the kinds of property claims people think are plausible and privilege some forms of economic activity over others.

I develop these two insights—origin stories as tools to shape the language of property and to embed a political economy within the property regime—by reconstructing three resource-use contests in the aftermath of property reform in the Kingdom of Hawai'i in 1848. In these contests, the kingdom's denizens—both Hawaiian and *haole* (foreign)—formed expectations about property that relied on Hawaiian land ways, or the practices and relationships that Hawaiians had used to govern access to and allocation of resources. They articulated property claims that reinterpreted those land ways to navigate a period of intense legal, social, and economic transformation.

As the Hawaiian Supreme Court considered these claims, its justices toggled between two stories about property's origins in the kingdom. On one account, property accomplished a revolution that wiped clean the slate of Hawaiian land relations, such that any reliance on Hawaiian land ways after reform was misplaced. On another, property built atop an existing foundation, and it was the court's job to sort out how Hawaiian land ways

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informed the meaning of property. In shifting between these accounts, the court recognized a hybrid quality in Hawaiian property. The court shaped the kingdom's property language by selectively including Hawaiian land ways, seemingly to privilege modes of land use that judges believed would lead to economic growth. Hybridity in Hawaiian property is therefore hard to disentangle from the demands of extractive capitalism. And yet, after Hawai'i became a state in 1959, its supreme court would revise its property doctrine precisely to challenge the claims of a propertied elite, and it would do so by drawing upon and reinterpreting Hawaiian land ways, which remained part of the islands' property regime.

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Introduction

A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit a prendre as such.

—Justice Oliver Wendell Holmes, Jr.¹

Property law is no stranger to storytelling. For example, property students are likely to come across a cautionary tale by Garrett Hardin about resource depletion in the absence of private entitlements—a story that serves as a foundational justification for private property.² And as Carol Rose has pointed out, Hardin’s was hardly the first story that theorists have deployed to shore up the moral foundations of private property.³ Stories are powerful, Rose argues, because they structure our “experience and imagination.”⁴ As critical legal studies scholars might put it, stories can shape what worlds we think are possible.⁵

This Article further explores the role and power of narrative in property law by focusing on origin stories. I am particularly interested here in stories that arise in the aftermath of regime change—that is, at the point when a society shifts from one property regime to another. At that moment, the society faces an important question: Is this new property regime entirely novel, or is it a permutation of what came before? Put differently, what is the story behind this new regime?

Studying these origin stories matters for two reasons. First, they highlight an important but understudied dynamic in those theories that portray

1. *Damon v. Hawaii*, 194 U.S. 154, 158 (1904).

2. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968); see Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. CHI. L. REV.* 711, 712 & n.7 (1986) (citing Hardin as articulating the “obverse” of the foundational idea in property law that “exclusive private property is thought to foster the well-being of the community”).

3. See Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 *YALE J.L. & HUMANS* 37, 38-39 (1990) (surveying stories about property’s origins in the writings of thinkers like Blackstone and Locke).

4. *Id.* at 55; see also Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 10 (1983) (“Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common ‘script’ renders it ‘sane’—a warrant that we share a *nomos*.”).

5. Cf. Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 109 (1984) (“[T]he power exerted by a legal regime consists . . . [mostly] in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.”).

property as a system of communication.⁶ Such approaches hold that ownership must be claimed “in a language that is understood” by others.⁷ But that language does not emerge out of thin air; participants in the property regime construct it over time from a broader universe of possible signifiers and ideas. Participants may well disagree about how the components fit with each other. Origin stories are one (though not the only) way through which a property regime’s governing institutions can inform or constrain how the components of that language may be used to make property claims.

Second, studying a given regime’s origin stories can help us understand its distributional consequences. Because every property regime arises out of preexisting entitlement distributions, how an origin story accounts for, eliminates, or rearranges these entitlements can reallocate means of creating value. Scholars have previously considered what kinds of incentives would lead a society to shift from one property regime to another and what kinds of costs would keep them from doing so.⁸ But the meaning and consequences of regime change are seldom obvious.⁹ Competing origin stories about property might suggest competing attempts to inscribe a political economy at the very foundations of property.

I develop these insights through a close analysis of the development of private landownership in the Hawaiian Kingdom in the middle of the nineteenth century. I use archival research to reconstruct three contests over resources in the aftermath of reform: one over the right to pasture horses, another over the right to access fisheries, and a third over the right to preclude one’s neighbors from using water from a shared watercourse. In each of these cases, litigants, lawyers, and judges presented different understandings of how private landownership built on or eliminated Hawaiian land ways—the

6. For a discussion of these theories, see Part IV.A below.

7. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 82 (1985).

8. Indeed, Carol Rose sees storytelling as a way to paper over gaps in theoretical accounts that explain why private property exists in the first place. See Rose, *supra* note 3, at 51. And Stuart Banner has observed that transitioning from one property regime to another carries additional costs that might prevent a regime change “that would otherwise be collectively wealth enhancing.” Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359, S365 (2002).

9. Cf. KELLEN R. FUNK, *LAW’S MACHINERY: REFORMING THE CRAFT OF LAWYERING IN AMERICA’S INDUSTRIAL AGE 155-57* (2025) (detailing how the enactment of the Field Code did not immediately transform legal practice, not simply because conservative judges resisted it, but because codifiers and conservative judges alike continued to rely on inherited and embodied forms of knowledge derived from lawyerly practice).

practices and relationships that Hawaiians¹⁰ had used to govern access to and allocation of resources.¹¹

Hawai'i is a fruitful site to explore the telling of property origin stories, given both the richness of the available sources and the political conditions leading to and structuring property reform.¹² The advent of private property came about at a tumultuous period in the kingdom's history, as a recent military unification, demographic collapse, and mounting foreign threats led Hawaiian chiefs to find new mechanisms to address foreign and domestic crises.¹³ Private landownership arose as one of these mechanisms, regarded by many—back in the nineteenth century as well as in the present—as a radical departure from Hawaiian land ways.¹⁴ Thus, by some accounts, the origin story of property in Hawai'i began with a blank slate. At the same time, the mechanics of property reform in the kingdom in fact relied on Hawaiian land

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10. I use “Hawaiian” and “Hawaiians” to refer to the indigenous people of Hawai'i without regard to blood quantum and thus interchangeably with other terms like “*Kānaka Maoli*” and “Native Hawaiian.” On these terms, see Troy J.H. Andrade, *E Ola Ka 'Ōlelo Hawai'i: Protecting the Hawaiian Language and Providing Equality for Kānaka Maoli*, 6 INDIGENOUS PEOPLES' J.L. CULTURE & RESISTANCE 4 n.3 (2020).
 11. I borrow the term “land ways” from Jenny Hale Pulsipher's writing on early New England property relations between settler and Native communities. See Jenny Hale Pulsipher, *Defending and Defrauding the Indians: John Wompas, Legal Hybridity, and the Sale of Indian Land*, in JUSTICE IN A NEW WORLD: NEGOTIATING LEGAL INTELLIGIBILITY IN BRITISH, IBERIAN, AND INDIGENOUS AMERICA 89, 89 (Brian P. Owensby & Richard J. Ross eds., 2018). Despite its rarity in the literature, I prefer this term over “tradition” and “custom.” Because the cases in this Article highlight the malleability of property and the creativity with which people can interpret Hawaiian practices around land, I do not want to present them as a traditional monolith. Moreover, using “custom” in a study that deals with claims rooted in the doctrine of custom could be confusing, so “land ways” may help readers to understand my meaning.
 12. Case studies are a mainstay of property literature. Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 882-83 (2019). This is in part “because land has long been the subject of remote and highly localized control.” *Id.* at 885.
 13. NOELANI ARISTA, *THE KINGDOM AND THE REPUBLIC: SOVEREIGN HAWAII AND THE EARLY UNITED STATES* 8-9 (2019); LILIKALĀ KAME'ELEIHIWA, *NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI?* 140-41 (1992). As Noelani Arista writes, by the 1820s, “Hawaiians were . . . experiencing a series of dramatic social and political upheavals marked most significantly by Kamehameha's unification of the islands.” ARISTA, *supra*, at 8. On the history of property reform, see generally KAME'ELEIHIWA, *above*. Stuart Banner has argued that chiefs' concerns about impending colonization also lent support for property reform. STUART BANNER, *POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA* 150-51 (2007).
 14. See, e.g., KAME'ELEIHIWA, *supra* note 13, at 219-20 (recounting foreign reformers' arguments that private landownership would eliminate the hierarchical relationships that previously governed access to and use of resources in the kingdom); *id.* at 9-10 (“[*Māhele*] was meant to sever the traditional relationship between Hawaiians and their *'Āina* [(land)].”).

ways.¹⁵ In this light, the origins of property in Hawai'i look more like a palimpsest (or crowded slate). These conditions made it possible to tell at least two different property stories—one in which private landownership was something entirely new, another in which landownership built upon prior practices. The kingdom's authoritative institutions never chose one story definitively over the other, making it possible for us to explore narrative choices as attempts to demarcate property's language and privilege some forms of economic activity over others.

Reconstructing these cases can provide new ways to think about property reform in the kingdom, with important consequences for the present. When we explore what happened in the aftermath of reform, it becomes clear that Hawaiian land ways were part of the language of property with which the kingdom's denizens, Hawaiian and *haole* (foreign)¹⁶ alike, made property claims.¹⁷ This fact invites us to look past whether property reform was meant to preserve¹⁸ or eliminate¹⁹ Hawaiian land ways. Embedded in that question is an assumption of a fixed baseline, which can either be preserved or eliminated.²⁰ These cases show us that this baseline was itself contested, and that rather than being preserved or eliminated, it could be reconfigured in new ways. The resulting property regime was a hybrid, not necessarily because it

15. See KAMANAMAICALANI BEAMER, *NO MĀKOU KA MANA: LIBERATING THE NATION* 104 (2014).

16. To aid the reader's comprehension, I have included a glossary of Hawaiian terms that appear frequently in this Article. See *infra* Appendix.

17. See *infra* Parts II-III.

18. See, e.g., BEAMER, *supra* note 15, at 152 ("The Māhele and the Kuleana Act therefore perpetuated and codified many traditional Hawaiian relationships between people and property.").

19. See, e.g., Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 121-22 (1998) ("Only those rights which were enumerated in what is now [Hawai'i Revised Statutes] section 7-1 survived the *Mahele* and the act of 1850.").

20. Both those who argue for preservation and elimination tend to think through the lens of custom, which was either codified by or irreconcilable with the new property regime. Compare BEAMER, *supra* note 15, at 151 ("[T]he Kuleana Act derive[s] from Hawaiian custom and cannot be said to have [its] origin in Anglo-American law."), with Sullivan, *supra* note 19, at 125 ("[T]here was a . . . commitment . . . to restructure traditional and customary rights . . . in accordance with Western legal concepts."). But looking for customs can lead us to underestimate how much contestation there always is in the assertion of community norms and how much communities can adapt to changing circumstances. This builds on E.P. Thompson's observation that, in eighteenth-century England, "custom was the rhetoric of legitimation for almost any usage, practice, or demanded right. Hence uncoded custom—and even codified—was in continual flux." E.P. THOMPSON, *CUSTOMS IN COMMON: STUDIES IN TRADITIONAL POPULAR CULTURE* 6 (1991). All of this is to say that we should use the category of custom with care, particularly in moments of rapid transformation.

preserved preexisting land relations wholesale, but because Hawaiian land ways remained a powerful component of the language in which property claims could be made.

Importantly, this does not mean that the property regime protected the bulk of the Hawaiian population from dispossession. As we will see shortly, Hawaiian claimants reformulated Hawaiian land ways to make property claims that would preserve their access to resources that they enjoyed before property reform.²¹ But the Hawaiian Supreme Court rejected these claims in some cases while preserving the possibility that Hawaiian land ways could inform property claims in others—indeed, the same justice took both seemingly conflicting positions.²² The court’s selective commitment to the hybridity it perceived in Hawaiian property suggests a desire to privilege some forms of economic activity over others. Namely, the goal was to force most Hawaiians to rely on market relations rather than on the obligations of landholders rooted in Hawaiian land ways. But although this hybridity was a tool for the accumulation of wealth among elites in the nineteenth century, it would be repurposed in the twentieth century precisely to challenge the claims of an entrenched planter elite.²³ That historical trajectory makes Hawaiian property’s hybridity, and the competing origin stories that enabled it, all the more vital to understand.

The contestation of property’s origins in Hawai‘i, and particularly the centrality of Hawaiian land ways to how people made and continue to make property claims on the islands, also invites us to think about the development of property in other places. For one thing, Hawai‘i can inform our understanding of how property regimes developed in other sites of colonial and capitalist exploitation. The cases discussed in this Article suggest that capitalism as a historical process did not develop only by eliminating local particularities in favor of a homogenous structure of legal relations.²⁴ It is true

21. See *infra* Part II (discussing Oni’s and the *maka’āinana* of Honouliuli’s attempts to reconfigure Hawaiian land ways to preserve their access to pasturage rights).

22. See *infra* Parts II.A, III.A (discussing *Oni v. Meek*, 2 Haw. 87 (1858) (Haw. Kingdom), and *Haalelea v. Montgomery*, 2 Haw. 62 (1858) (Haw. Kingdom), respectively, in which Justice George Robertson seemed to espouse conflicting interpretations of property reform).

23. See *infra* text accompanying notes 298-305. As Melody Kapilialoha MacKenzie has explained, Chief Justice William S. Richardson “helped to reincorporate Native Hawaiian tradition and custom into state law and expanded public rights” in the twentieth century. Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No’eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 6 (2010). Richardson was the first *Kānaka Maoli* to hold the highest judicial seat in the state. Troy J.H. Andrade, *Hawai‘i ’78: Collective Memory and the Untold Story of Reparative Action for Kānaka Maoli*, 24 U. PA. J.L. & SOC. CHANGE 85, 118 (2021).

24. Dipesh Chakrabarty highlights two kinds of history in Marx’s thinking on capital: one “posited by capital” and another that “do[es] not belong to capital’s life process.” DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL*

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that treating land as a commodity marked an important shift in the islands—one that we also find in other sites of colonial expansion and capitalist extraction.²⁵ But commodification did not eliminate older ways of thinking about the relationship between people and land. Nor is it enough to say that these modes of thinking were relegated to a realm beyond law or persisted only in opposition to a dominant legal regime.²⁶ This matters not because the resulting property relations were somehow more humane or legitimate, but because of the imaginative possibilities they left open. The persistent vitality of Hawaiian land ways could operate as a constant reminder that there were other ways of organizing the world.

And this imaginative potential leads to another implication beyond Hawai'i concerning property's flexibility as a legal category. Scholars have distinguished property from contract particularly by emphasizing the limited range of forms that property may take.²⁷ If, as I have already noted, property claims must be made in a language that others can understand, then property is not infinitely malleable (for otherwise one might make property claims that are completely unintelligible to others, and thus not good against the world).²⁸ But just how much flexibility there is or should be is an open question²⁹—and

DIFFERENCE 50 (2000). We might understand the latter kind of history as local particularity which allows people to imagine “other ways of being in the world—other than, that is, being a bearer of labor power.” *Id.* at 66. This is a kind of history that capital must override, however, if it wishes to “extract from peoples and histories that [are] all different a homogenous and common unit for measuring human activity.” *Id.* at 50. The cases I reconstruct here suggest that we should keep an eye out for moments where the articulation of abstract legal forms that facilitate capitalism nonetheless retain local particularities and thus preserve alternative ways of imagining the world.

25. On a similar shift to an Anglo-American view of the relationship between people and land which centered commodification, see K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 LAW & SOC. INQUIRY 1006, 1024-25 (2016) (arguing that in foreclosing on Indigenous land, seventeenth-century colonists in New England “not only insisted on the English conception of land, ignoring indigenous understandings of belonging to a place, but [also] . . . abandon[ed] age-old English hesitations about treating land in the manner of chattel, thus creating a brand-new American commodity”).
26. Cf. SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* 256 (2000) (arguing that Hawaiian concepts of family and sexuality persisted only as “subjugated knowledge”).
27. See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8 (2000) (comparing the flexibility of contract rights with the more “restricted” nature of property rights).
28. See Rose, *supra* note 7, at 82 (noting that ownership must be claimed “in a language that is understood” by others).
29. Contrast Merrill & Smith, *supra* note 27, at 8 (“The . . . frustration caused by standardizing the building blocks [of property] is far less than would be the case if a specially tailored basic building block were required for every purpose to which property can be put.”), with Brady, *supra* note 12, at 950 (“Customization facilitates
footnote continued on next page”).

an important one to ponder in light of the U.S. Supreme Court's reliance on ill-articulated "background principles" as a constitutional limit on state courts' ability to alter their own property law.³⁰ The questions whether and how Hawaiian land ways should remain a part of and inform the islands' property law thus offer one way to think about both the degree of flexibility property should have and what justifies more or less flexible arrangements.

This Article proceeds in four Parts. Part I offers a sketch of the world of Hawaiian land ways before reform. It then turns to explain how the kingdom initiated and conducted its land reform. Again, the political conditions leading to and structuring reform made it possible to tell at least two stories about property in Hawai'i: one in which property was created on a blank slate, another in which it became a palimpsest.³¹

Parts II and III use archival research to explore how these two stories played out before the kingdom's supreme court, and how the court itself oscillated between them. When it came to the pasturage claims of the *maka'āinana* (the people on the land), the court, with Justice George Robertson writing, adopted a blank-slate story that eliminated any foundations for those property claims.³² Yet just a few months earlier, when adjudicating a new land purchaser's right to access fisheries, Justice Robertson had reasoned as though

compliance with property laws and institutions . . . [S]tandardization and customization may make sense at different stages of development and under different conditions.”).

30. The Court has alluded to “background principles” of property law as a kind of boundary for regulatory takings beyond which the government must compensate property owners. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). In one opinion, Justice Antonin Scalia concluded that state courts could not alter these principles without effecting a taking, thus bringing the development of states’ private law within the scope of the Supreme Court’s takings jurisprudence. *See Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion). Only four Justices joined that portion of the opinion. *Id.* at 706. Writing separately, Justice Stephen Breyer complained that “federal judges would [then] play a major role in shaping a matter of significant state interest—state property law.” *Id.* at 744 (Breyer, J., concurring in part and concurring in the judgment). Just how this shaping is supposed to happen—that is, what these background principles are—remains a difficult question to answer. Recently, the Court seemed to espouse the idea that other states’ property law might constitute a baseline against which to assess the constitutionality of a particular state’s property law. *See Tyler v. Hennepin County*, 143 S. Ct. 1369, 1377-78 (2023) (contrasting Minnesota’s property law with that of “[t]hirty-six states and the Federal Government”); *see also* Timothy M. Mulvaney, *Reconceptualizing “Background Principles” in Takings Law*, 109 MINN. L. REV. 689, 692-94 (2024) (arguing that this comparison could limit flexibility in state property law while reading *Tyler* more narrowly as an invitation to consider other states’ property laws when determining whether a particular property right deserves constitutional protection).

31. *See supra* text accompanying note 15.

32. *See infra* Part II.

property reform did not completely remake land-tenure relations.³³ We see similar reasoning in a case concerning surface-water allocation.³⁴ There, while the court did not recognize the landowner's claim relying on Hawaiian land ways, it remained open to the possibility that those land ways could help define the meaning of landownership.³⁵ Whatever was intended by the reform, it is clear that the kingdom's denizens used Hawaiian land ways to make property claims, and that the court was sometimes willing to entertain these kinds of claims.

Part IV develops the two insights I alluded to earlier with illustrations from these cases. The first insight is theoretical: Rather than assuming property's language, these cases allow us to see the language as the product of contestation. The second insight is historical, focusing on why some claims relying on Hawaiian land ways succeeded and others did not. My own sense is that the court selectively incorporated Hawaiian land ways as part of its privileging modes of economic activity that it believed led to economic growth. This suggests that, somewhat perversely, capitalist extraction of the islands' resources could proceed not only by eliminating Hawaiian relations to land, but by refashioning them and incorporating them into a new market economy. As I have already alluded to, however, the resulting hybridity in Hawaiian property could be, and was, repurposed to buttress a different political economy.

I. Hawaiian Land Reform

Private landownership—more specifically, fee simple absolute—became a legal possibility in the Hawaiian Kingdom after 1848. In an event known as the *Māhele* (division), the kingdom's rulers met in the early months of 1848 to disentangle their common interests in the lands.³⁶ Subsequently, the kingdom's legislature created avenues for foreigners and the *maka'āinana* (the people on the land) to claim land as well.³⁷ Landownership marked a shift from what I call Hawaiian land ways, or the collection of practices and relationships that Hawaiians used to govern access to and allocation of resources across the islands. Just how much of a shift this was, though, is an open question that I explore more thoroughly in subsequent Parts.

33. *See infra* Part III.A.

34. *See infra* Part III.B.

35. *See infra* Part III.B.3.

36. KAME'ELEIHIWA, *supra* note 13, at 227.

37. JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 50 (2002).

This Part explains why the kingdom made the move toward privatization and how it achieved this in part by relying on existing Hawaiian land ways. I highlight the two conditions that made it possible and fruitful to explore the telling of stories in the aftermath of reform. First, landownership challenged both the cultural underpinnings of Hawaiian land ways and the *maka'āinana's* ability to rely on longstanding patterns of production. In this sense, private landownership marked a break, perhaps even a radical one, from the kingdom's previous property regime. Second, however, the mechanics of reform forever tethered this new property regime to Hawaiian land ways, casting doubt on this vision of landownership as a wholly novel institution. These two conditions made it possible to disagree over the relationship between Hawaiian land ways and private landownership. Subsequent Parts will explore how the kingdom's denizens tried to articulate different visions of this relationship to their advantage.

A. Hawaiian Land Ways

How did Hawaiians relate to their lands before reform? Hawaiians did not think about land as something to be owned in fee simple absolute.³⁸ This does not mean that Hawaiians lacked a concept of property; resources across the islands were governed not through a system of private entitlements, but through a web of status relationships.³⁹ I cannot hope to convey the complexity of these relationships here. My goal, instead, is to highlight two features of Hawaiian land ways that became important in the aftermath of reform. The first is the importance of status relationships in structuring resource governance. The second is the way in which Hawaiians connected different parts of the landscape to improve agricultural production. This interconnectedness would be imperiled by privatization, and efforts to recreate it would be particularly important among the *maka'āinana*.⁴⁰

As early as the fourteenth century, rulers on different islands ordered lands surveyed and boundaries drawn to avoid disputes among neighboring chiefs, dividing the islands into a series of nested units.⁴¹ The most important of these units for our purposes was the *ahupua'a*, which was typically wedge-

38. See KAME'ELEIHIWA, *supra* note 13, at 9-10.

39. For instance, different access and use regimes applied to irrigated patches as opposed to shared pastures, suggesting different conceptions of ownership at play. See *infra* notes 50-56 and accompanying text.

40. As part of these efforts, some *maka'āinana* organized *hui*—"unincorporated voluntary associations"—to accumulate landholdings that would allow them to supplement the insufficient resources they received through privatization and to "retain some features of the traditional life ways of the ancestors." CARLOS ANDRADE, *HĀ'ENA: THROUGH THE EYES OF THE ANCESTORS* 103 (2008).

41. KAME'ELEIHIWA, *supra* note 13, at 26-27.

shaped, as illustrated in Figure 1.⁴² Usually, though not always, the boundaries between *ahupua'a* would trace natural features, running from the mountains to the sea and thus encompassing within the *ahupua'a* the various materials needed for sustenance—from coastal fisheries to upland thatch.⁴³ Upon assuming control of an island, each new ruler would reallocate the land among the chiefs, a process that allowed the ruler to consolidate power and ensure orderly governance.⁴⁴ The chiefs could rely on a *konohiki* (steward) to administer the land by organizing agricultural production and collecting taxes.⁴⁵ And while this structure for governing the land could change with the kingdom's politics, the *maka'āinana* remained largely in place, although they were always free to relocate.⁴⁶

Within each *ahupua'a*, beginning from the ocean and running all the way up the mountains, Hawaiians organized the landscape into different regions with distinct productive uses.⁴⁷ Two of these regions or areas are particularly important for our purposes: wet and dry lands. Wet lands were those irrigated by an intricate set of ditches bringing water from mountain streams to level terraces, where Hawaiians cultivated several crops, most important among them *kalo* (taro).⁴⁸ *Kalo* production (as well as the chief's tax on this production) fell on the *'ohana*, the family unit, and irrigated terraces were allocated among these family units.⁴⁹

42. E.S. CRAIGHILL HANDY, ELIZABETH GREEN HANDY & MARY KAWENA PUKUI, *NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT* 48 (1972).

43. KAME'ELEIHIWA, *supra* note 13, at 27; KATRINA-ANN R. KAPĀ'ANAOKALĀOKEOLA NĀKOA OLIVEIRA, *ANCESTRAL PLACES: UNDERSTANDING KANAKA GEOGRAPHIES* 53 (2014).

44. KAME'ELEIHIWA, *supra* note 13, at 51-52.

45. *Id.* at 29.

46. OLIVEIRA, *supra* note 43, at 45; HANDY ET AL., *supra* note 42, at 288; MARSHALL SAHLINS, *HISTORICAL ETHNOGRAPHY* 113-14 (1992).

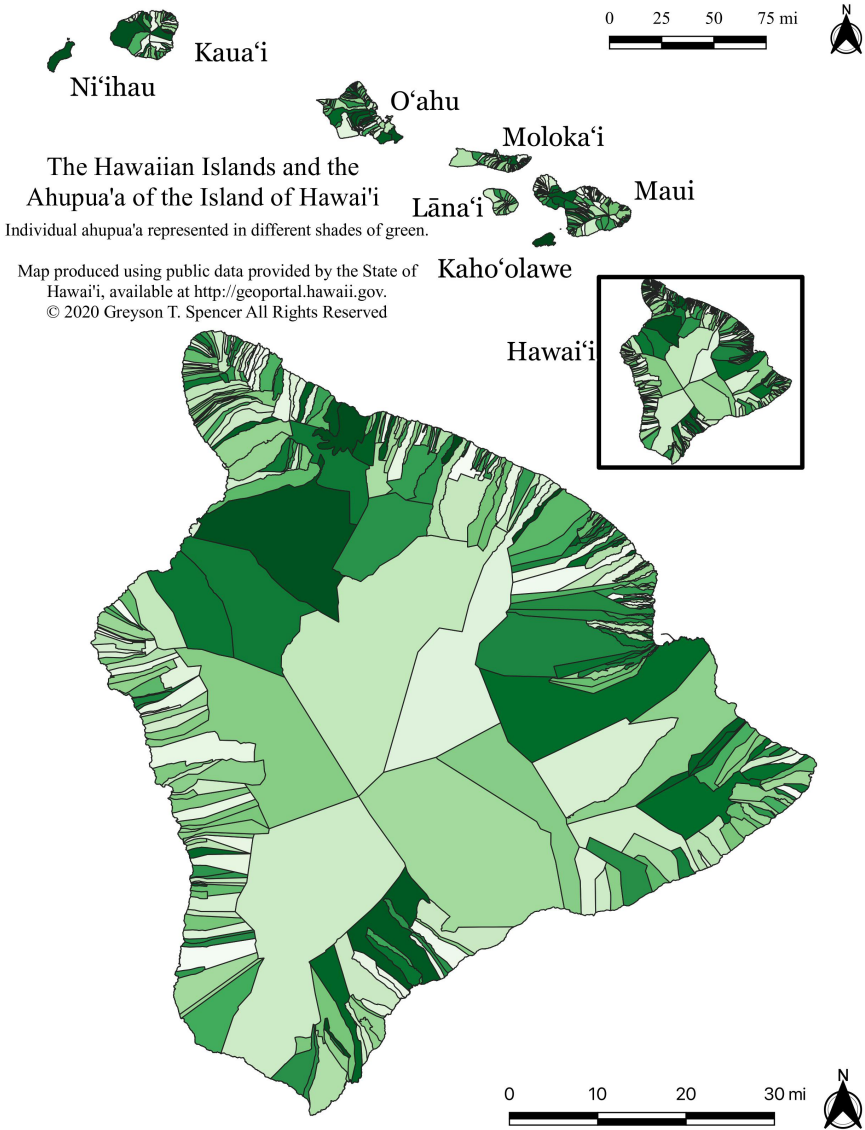
47. HANDY ET AL., *supra* note 42, at 54-57.

48. *Id.* at 55; LAWRENCE H. MIIKE, *WATER AND THE LAW IN HAWAII* 47 (2004). It is difficult to overstate the importance of *kalo* in Hawaiian society and culture. Hawaiians regarded *kalo* as "the elder brother of the Hawaiian race." KAME'ELEIHIWA, *supra* note 13, at 24. And "[t]he Hawaiian political geography was patterned in terms of agricultural districts topographically determined by the stream systems upon which [*kalo*] plantations were dependent for irrigation." HANDY ET AL., *supra* note 42, at 77.

49. Jocelyn Linnekin, *The Hui Lands of Keanae: Hawaiian Land Tenure and the Great Mahele*, 92 J. POLYNESIAN SOC'Y 169, 173-74 (1983); JOHN RYAN FISCHER, *CATTLE COLONIALISM: AN ENVIRONMENTAL HISTORY OF THE CONQUEST OF CALIFORNIA AND HAWAII* 55-56 (2015).

Figure 1

Map of the Hawaiian Islands and the *Ahupua'a* of the Island of Hawai'i



Hawaiians also relied on dry land, or *kula* land, for cultivation.⁵⁰ Hawaiians used *kula* land to grow several crops, including breadfruit, sweet potato, banana, and a dryland variety of *kalo*.⁵¹ Unlike the irrigated terraces, access to *kula* land was communal, and households could use *kula* land to supplement their cultivation in irrigated terraces and access other resources, like grasses or wood, subject to the *konohiki*'s authority.⁵²

This cursory sketch of Hawaiian land ways allows us to better understand two important features. The first is the way status relationships governed access to resources. The central figures here were the *konohiki*. The *konohiki* were not only responsible for collecting tribute for the chiefs; they could also regulate access to common resources and organize labor to maintain critical infrastructure, like ditches.⁵³ This was a particularly important role, because the Hawaiian agricultural landscape, and especially *kalo* cultivation, required considerable labor and coordination.⁵⁴ Importantly, however, the relationship between the *maka'āinana* and the *konohiki* (and the chiefs, for that matter) was not one of control alone. Although the *maka'āinana* might not move frequently, they were not tied to the land and could relocate to escape the demands of an overbearing superior, who might in turn be criticized for losing *aloha* (love) for the people.⁵⁵ In short, reciprocal status relationships among Hawaiians mapped onto the land, governing resource allocation and use.

The second aspect of Hawaiian land ways worth emphasizing is the interconnectedness of the Hawaiian agricultural landscape. Some agricultural practices followed clear spatial delineations—most obviously, the irrigated terraces—but the terraces were not the only sites of resource extraction and production. Again, Hawaiians supplemented them with cultivation in the *kula*

50. FISCHER, *supra* note 49, at 80. *Kula* can have several meanings, but the relevant cluster of definitions here is “[d]ry open land; grass land.” A DICTIONARY OF HAWAIIAN LEGAL LAND-TERMS 60 (Paul F. Nahoia Lucas ed., 1995) [hereinafter DICTIONARY OF LAND-TERMS].

51. Linnekin, *supra* note 49, at 174; FISCHER, *supra* note 49, at 56.

52. Linnekin, *supra* note 49, at 174-76; see ANDRADE, *supra* note 40, at 89.

53. See ANDRADE, *supra* note 40, at 88 (discussing the importance of *konohiki* organization for the maintenance and construction of ditches).

54. This was so in no small part because of the difficulty of constructing ditches to connect terraces to mountain streams. See HANDY ET AL., *supra* note 42, at 58. It also bears emphasizing that wet and dry lands were not fixed categories. For example, dry lands could be transformed into wet lands by extending ditch networks to new regions. See SAHLINS, *supra* note 46, at 52 (concluding that irrigated terraces were expanded into the upper Anahulu Valley in O'ahu around 1804, as Kamehameha I's conquest of that island brought Hawai'i Island warriors to the O'ahu backcountry).

55. See SAHLINS, *supra* note 46, at 113-14.

lands. Moreover, the *maka'āinana* living within a specific *ahupua'a* could also access fishponds or coastal fisheries connected to that *ahupua'a*.⁵⁶

Privatization threw this interconnectedness into disarray. Securing homesteads for the *maka'āinana* may have provided them a place to live and a spot on the ground to cultivate, but it extricated that spot from this interconnected landscape. This would make it harder to cultivate the land, and it would also endanger the *maka'āinana's* access to the broader range of resources available before reform.⁵⁷

B. Crisis and Reform

The Hawaiian Kingdom suffered a catastrophic population decline in the first half of the nineteenth century.⁵⁸ By 1839, the Hawaiian scholar and chiefly advisor Davida Malo feared that the kingdom was “reduced to a skeleton, and [was] near to death; yea, the whole Hawaiian nation [was] near to a close.”⁵⁹ Malo warned in a letter to the chiefs the following year:

The ships of the white man have come, and smart people have arrived from the great countries which you have never seen before, they know our people are few in number and living in a small country; they will eat us up, such has always been the case with large countries, the small ones have been gobbled up.⁶⁰

56. See *infra* text accompanying notes 190-91 (detailing testimony from a man who enforced chiefly protections on fisheries).

57. For instance, it would require securing an easement to access a ditch for upstream repairs. Cf. OSORIO, *supra* note 37, at 53 (“[T]he typical award was somewhere in the neighborhood of three to ten acres, enough to include a good [taro patch] perhaps, but not enough to ensure that the ‘auwai (irrigation system) would be left intact at the point where it joined with the stream.”). And because *kula* land was not “extensively cultivated,” it was “rarely awarded” by the Land Commission, which deprived the *maka'āinana* of materials that “made possible the self-sufficiency of the local community.” Linnekin, *supra* note 49, at 175-76.

58. KAME'ELEIHIWA, *supra* note 13, at 140-41. The decline was driven by diseases brought from abroad and a low fertility rate. SETH ARCHER, SHARKS UPON THE LAND: COLONIALISM, INDIGENOUS HEALTH, AND CULTURE IN HAWAII, 1778-1855, at 170 (2018). One “low to moderate estimate” places the kingdom’s population in 1778 at 800,000 inhabitants. DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT 59 (1989). Kame'eiehiwa estimates that by 1823, the kingdom had lost 83% of this population. KAME'ELEIHIWA, *supra* note 13, at 141.

59. ARCHER, *supra* note 58, at 199 (quoting David Malo, *On the Decrease of Population on the Hawaiian Islands*, 2 HAW. SPECTATOR 121, 130 (L. Andrews trans., 1839)).

60. *Id.* at 200 (quoting RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1778-1854: FOUNDATION AND TRANSFORMATION 153 (1938)). This had long been a fear among the chiefs. In the 1820s, the chief Kuakini worried that England would “give[] us laws [and] . . . send men to see that they are executed. Our harbors will be filled with ships of war and our vessels can not go out or come in without their permission. . . . We shall no more be able to do as we please.” ARISTA, *supra* note 13, at 217 (quoting Levi

footnote continued on next page

In an effort to restore *pono* (righteousness) to the kingdom, the chiefs embarked on a project to remake the kingdom through law. In 1840, Kamehameha III promulgated the kingdom's first written constitution, which created a new judicial system and a new bicameral legislature.⁶¹ The legislature went on to enact reforms touching virtually every aspect of Hawaiian life.⁶² Among the most critical changes that came about in this period, and the focus of this subsection, was the creation of private property in land.

For many of the *haole* advising the chiefs, private landownership held the key to solve the kingdom's population crisis.⁶³ For instance, the Harvard-trained lawyer William Little Lee argued for private landownership by likening the kingdom's situation to that of Prussia.⁶⁴ The Prussian peasantry, he argued, had "no independent rights in the soil they cultivated, industry was checked, agriculture sunk, and the whole kingdom reduced to poverty and want."⁶⁵ These conditions were the "inevitable consequence of such a system of landed tenures No country can long thrive, where the people do not own the lands they cultivate" ⁶⁶ Indeed, Christian missionaries in the kingdom advocated for land reform as a cure for what they diagnosed as Hawaiian "licentious, indolent, improvident and ignorant" tendencies.⁶⁷ They argued that once Hawaiians owned the land they cultivated, free from the "oppressive

Chamberlain, 8 Journal 23-24 (Dec. 8, 1827) (on file with Haw. Mission Houses Digit. Archive, Journal Collection, Chamberlain (Levi) Family Journals)).

61. José Argueta Funes, *The Civilization Canon: Common Law, Legislation, and the Case of Hawaiian Adoption*, 71 UCLA L. REV. 128, 154-55 & 155 n.126 (2024).
62. See generally 1847 Haw. Sess. Laws index (Haw. Kingdom) (listing legislation regarding bastardy, taxation, probate, nuisance, mortgages, guardianship, and so on).
63. It was not a foregone conclusion that the chiefs would listen to these advisors, and the role these advisors—and particularly Christian missionaries—came to play in these reform projects owes much to historical accident. For instance, when the English missionary William Ellis arrived in Hawai'i in 1823, he brought Tahitian converts, who proved much more capable and compelling interlocutors than previous missionaries. KAME'ELEIHIWA, *supra* note 13, at 143; DAVID A. CHANG, *THE WORLD AND ALL THE THINGS UPON IT: NATIVE HAWAIIAN GEOGRAPHIES OF EXPLORATION* 92-97 (2016). And as Noelani Arista has demonstrated, the missionary William Richards became an influential figure in the kingdom's government in part because he demonstrated careful understanding of Hawaiian governance practices in the 1820s. ARISTA, *supra* note 13, at 222.
64. KAME'ELEIHIWA, *supra* note 13, at 219. See generally JON M. VAN DYKE, *WHO OWNS THE CROWN LANDS OF HAWAII?* 36-40 (2008).
65. KAME'ELEIHIWA, *supra* note 13, at 219 (quoting Privy Council Minutes from May 17, 1847, to Aug. 26, 1848 [Handwritten] 302 (Haw. Kingdom) (on file with Haw. Digit. Archives, Records of the Foreign Office & Executive, Series 421, Volume 04)).
66. *Id.* (quoting Privy Council Minutes from May 17, 1847, to Aug. 26, 1848 [Handwritten], *supra* note 65, at 302).
67. *Id.* at 202 (citing T. COAN ET AL., *ANSWERS TO QUESTIONS PROPOSED BY HIS EXCELLENCY, R.C. WYLLIE* 47-50 (Honolulu 1848)).

nature” of the land-tenure system, Hawaiians would be “industrious, moral, and happy.”⁶⁸ These *haole* advisors advocated for landownership as a break from Hawaiian land ways, which, they argued, contributed to the kingdom’s precarious position.⁶⁹

Land reform—known as the *Māhele* (division)—came in 1848. It began with a series of meetings between Kamehameha III and the kingdom’s chiefs to disentangle their interests in the land by allocating *ahupua’a* and other administrative units among themselves.⁷⁰ These preexisting administrative units thus served as the blueprint for landownership in the kingdom, forever tying landownership to the older property regime.⁷¹ This initial division did not, however, create private landownership, because it did not address a third important claim on the land: that of the *maka’āinana*. After the Kuleana Act of 1850 (from *kuleana*, meaning right, privilege, or responsibility⁷²), the *maka’āinana* could claim homesteads consisting of their houses and their cultivation lands.⁷³ Chiefly and *kuleana* claimants were to present their claims to the Board of Commissioners to Quiet Land Titles, or the Land Commission, as it is commonly known.⁷⁴ This was a legislative creation empowered to

68. *Id.* (quoting COAN ET AL., *supra* note 67, at 52).

69. The faith of missionaries and other Anglo-American foreigners in landownership reflected a deeply held conviction in landownership as the natural basis of political organization. On the lineage of this idea, see Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 588-596 (1984). The idea of fee simple ownership of land, particularly by individual farmers, remained a powerful and recurrent theme in American political rhetoric on the American West throughout the nineteenth century. See TAMARA VENIT SHELTON, A SQUATTER’S REPUBLIC: LAND AND THE POLITICS OF MONOPOLY IN CALIFORNIA, 1850-1900, at 7 (2013) (“A large base of independent proprietors would protect the United States from the dependency and degeneracy that many associated with the old-world tenants and peasants of Europe. . . . [T]here was more at stake in the disposal of western land than access to the [West’s] natural resources. . . .”).

70. See OSORIO, *supra* note 37, at 46; KAME’ELEIHIWA, *supra* note 13, at 230, 232 (“On every island but O’ahu most ‘Āina awards were by *ahupua’a*”).

71. The connection between this new property regime and the one it replaced might be even deeper. Lilikalā Kame’eleihiwa has argued that the *Māhele* itself could be understood as a permutation of the well-established Hawaiian practice of the king reallocating land among the chiefs in order to ensure proper governance. KAME’ELEIHIWA, *supra* note 13, at 98.

72. *Kuleana*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/VW9A-5Z4L> (archived Mar. 1, 2026).

73. OSORIO, *supra* note 37, at 53.

74. BANNER, *supra* note 13, at 140, 142-43; see also José Edwin Argueta Funes, Hawaiian Common Law: Adoption, Legal Change, and Cultural Difference, 1840-1940, at 73-77 (Jan. 2024) (Ph.D. dissertation, Princeton University) (on file with author) (describing the process of issuing title to land and the Land Commission’s role in it).

adjudicate claims to land and issue Land Commission Awards, which served as “*prima facie* evidence of title.”⁷⁵

Relatively few *kuleana* claims were made and granted,⁷⁶ although the *maka‘āinana* did find other ways of claiming land.⁷⁷ Beyond the number and size of these claims, though, these claims posed important challenges to the ways in which the *maka‘āinana* had used the land before reform. As their irrigated terraces showed, Hawaiians understood the land they cultivated as interconnected with its surroundings—after all, the proper functioning of an irrigated terrace depended on a network of ditches that brought water down from the mountains.⁷⁸ Moreover, because they cultivated and collected resources from many areas, their land claims were unconsolidated.⁷⁹ When they approached the Land Commission to file their claims, many *maka‘āinana* also claimed scattered patches of various crops or stands of trees for canoe-making.⁸⁰ These claims were less successful than their claims for taro cultivation, which scholars have argued were “more amenable to the Western notion of ‘parcels.’”⁸¹ The end result, as we will see in more detail in the following Parts, was that privatization limited the material base from which the *maka‘āinana* could secure sustenance.⁸²

This brief sketch helps illustrate two important features about the shift toward private landownership in the kingdom. The first is that privatization built upon Hawaiian land ways. This was true in the sense that the chiefs had relied on ancient administrative units as a mechanism to divide the land.⁸³ But it was also true in that, at least initially, the *maka‘āinana* made sense of privatization in light of their prior uses of the land—hence their move to make claims not only to the lands in which they cultivated taro, but also to other lands and resources. This adds some nuance to the claim that privatization was

75. W.D. ALEXANDER, A BRIEF HISTORY OF LAND TITLES IN THE HAWAIIAN KINGDOM 11 (Honolulu, P.C. Advertiser Co. 1882). On the mechanics of the *Māhele*, see generally KAME‘ELEIHIWA, note 13 above, at 208-14; and ALEXANDER, above.

76. KAME‘ELEIHIWA, *supra* note 13, at 295.

77. NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 42 (2004).

78. See *supra* notes 48-49 and accompanying text.

79. Linnekin, *supra* note 49, at 175. Stuart Banner has identified a similar tension between spatial and functional allocations of property rights in New Zealand. Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 LAW & SOC. INQUIRY 807, 810-11 (1999).

80. Linnekin, *supra* note 49, at 175.

81. *Id.*

82. ANDRADE, *supra* note 40, at 97.

83. See KAME‘ELEIHIWA, *supra* note 13, at 230, 232.

incompatible with Hawaiian land ways.⁸⁴ This claim often rests on the idea that privatization violated fundamental tenets of Hawaiian culture, especially the sense that land was an elder that could not be owned, bought, or sold.⁸⁵ Still, Hawaiians' *kuleana* claims suggest that these issues did not preclude Hawaiians from making sense of privatization. Even if the Land Commission rejected such claims, we should not read them as evidencing a failure on the part of the *maka'ainana* to understand private landownership. Rather, we should read them as their own interpretations of landownership rooted in Hawaiian land ways.

At the same time, these *kuleana* claims highlight a second important feature of privatization: Private landownership threatened the interconnectedness that characterized Hawaiian land uses before reform.⁸⁶ More generally, much about the transition to private landownership did imply a shift away from Hawaiian land ways, if not a radical rejection of them. For the *haole* advisors who supported privatization, eliminating Hawaiian land ways was the whole point of property reform.⁸⁷ Moreover, even if we ignore these reformers' intent, for many of the people living in Hawai'i, property reform opened the door to eschewing Hawaiian land ways. A missionary claimed that after reform, some chiefs and *konohiki* were told to "forbid all such [*maka'ainana*] who get their land titles, the privileges they formerly enjoyed from the *kula* of the landlord."⁸⁸ For some, then, property reform was a radical break from the past.

The upshot is that there were at least two ways of telling the story of property reform in the kingdom. One was a story about accretive change in the face of crisis, in which Hawaiian land ways adapted to a new framework of private landownership. The other was a story about a completely novel property regime that eschewed any connection to earlier ways of regulating access to and distribution of resources. In the following Parts, we will see how the kingdom's property regime—and specifically, its supreme court—embraced both stories.

84. *Contra, e.g., id.* at 9-12.

85. *Id.* at 10.

86. This was not the first such threat. The expansion of cattle capitalism in the islands posed challenges to the *maka'ainana's* ability to access *kula* resources even before reform. See *infra* notes 124-28 and accompanying text.

87. See KAME'ELEIHIWA, *supra* note 13, at 201 ("Whether friend or foe, missionary or merchant, American or European, all foreigners were ecstatic that the 'oppressive' system of Hawaiian Land tenure was about to be swept away.").

88. Linnekin, *supra* note 49, at 176 (quoting an 1850 letter between missionaries).

II. Pasturage Rights and the Blank Slate

In the 1858 case *Oni v. Meek*, the Hawaiian Kingdom's Supreme Court held that the *Māhele* had eliminated whatever pasturage rights the *maka'āinana* held before property reform.⁸⁹ The court represented property reform as a revolutionary act that razed preexisting property relations and replaced them with a new understanding of landownership. And yet all parties to the lawsuit had operated under the opposite assumption: that property reform in the kingdom in fact built upon, rather than eliminated, Hawaiian land ways. This conflict helps us understand how property's origin stories shaped the ways in which people made property claims and the distributive consequences that might follow from them.

A. The Court's Story: Property as Revolution

In 1858, a Hawaiian man named Oni sued a white man named John Meek for stealing two of his horses while the horses were grazing in the *ahupua'a* of Honouliuli in O'ahu.⁹⁰ Meek ran a cattle ranch on this *ahupua'a*.⁹¹ He had obtained this land by entering into a series of leases with the chiefs Mikahela Kekau'ōnohi and Levi Ha'alelea between 1846 and 1853.⁹² Meek responded that he had assumed the horses were strays trespassing on his land, which is why he had them impounded and sold.⁹³

Oni asserted that his horses were not trespassing.⁹⁴ Instead, he articulated two bases—one customary, the other statutory—for his right to pasture his horses.⁹⁵ The customary claim was relatively straightforward: In exchange for laboring for the chiefs, the *maka'āinana* were entitled to pasture their horses on the chief's land, Meek's lease notwithstanding.⁹⁶ His statutory claim was a little

89. See *Oni v. Meek*, 2 Haw. 87, 90 (1858) (Haw. Kingdom).

90. *Oni*, 2 Haw. at 87.

91. See Lease Between Keahonui et al. & John Meek Dated Mar. 3, 1846 at 1, *Oni*, 2 Haw. 87 [hereinafter 1846 Lease] (on file with Haw. State Archives, Records of the Judiciary, Series 006, Box 22, Law No. 788) (describing Meek's rights to pasture his cattle).

92. *Oni*, 2 Haw. at 87-88; 1846 Lease, *supra* note 91; Lease Between M. Kekauonohi, J.H.L. Haalelea & John Meek Dated July 15, 1851, *Oni*, 2 Haw. 87 [hereinafter 1851 Lease] (on file with Haw. State Archives, Records of the Judiciary, Series 006, Box 22, Law No. 788); Lease Between John Meek & J.H.L. Haalelea Dated Feb. 16, 1853, *Oni*, 2 Haw. 87 [hereinafter 1853 Lease] (on file with same).

93. Decision of the Police Court at 1, *Oni*, 2 Haw. 87 (on file with Haw. State Archives, Records of the Judiciary, Series 006, Box 22, Law No. 788).

94. *Id.* Before the Honolulu Police Court, which heard the case in the first instance, Oni claimed that he had "vested rights . . . as a kamaaina [(native inhabitant)] of" the land that Meek was leasing. *Id.*

95. *Oni*, 2 Haw. at 89.

96. See *id.* at 89-90.

more convoluted. An 1846 statute—which I will call the Joint Resolutions of 1846—provided that a *maka‘āinana* could “pasture his horse and cow and other animals on the [*kula*] land, but not in such numbers as to prevent the konohiki from pasturing his.”⁹⁷ This statute also articulated other rights belonging to the *maka‘āinana*.⁹⁸ In 1850, with the enactment of the Kuleana Act, the legislature omitted any mention of pasturage rights at the same time it listed other rights belonging to the *maka‘āinana*.⁹⁹ Oni’s lawyer contended that this omission was not an abrogation, that the provisions of the Joint Resolutions were still good law, and that Oni therefore had a statutory right to pasturage.¹⁰⁰ The supreme court concluded, however, that whatever Oni’s pre-reform rights might have been, they had been eliminated by the transition to private property.¹⁰¹

This case fits quite neatly with a particular strand of property theory that sees the right to exclude as central to ownership.¹⁰² When Meek leased the lands from the chiefs, he obtained the right to exclude others from them. When the horses entered this land, they became trespassers who infringed on his right to exclude, and he gained the power to remove them from the land.¹⁰³ From this point of view, the supreme court merely vindicated the core of what landownership meant: the right to exclude others from one’s land.¹⁰⁴

In service of that goal, the court adopted a reading of property reform in the kingdom as a turning point in the history of Hawaiian land relations—a break from the past. The Joint Resolutions, the court reasoned, were enacted

97. Joint Resolutions of Nov. 7, 1846, § 1, 1847 Haw. Sess. Laws 70, 70 (Haw. Kingdom).

98. *Id.* (providing, for example, a right “to take fish in those fishing grounds of the konohiki”).

99. Kuleana Act, § 7, 1850 Haw. Sess. Laws, in PENAL CODE OF THE HAWAIIAN ISLANDS app. at 202, 203-04 (Honolulu, Oahu, Gov’t Press 1850) (Haw. Kingdom) [hereinafter PENAL CODE].

100. *Oni*, 2 Haw. at 91-92. Oni’s lawyer argued before the court that these rights had been “fixed by the statute,” referring to the Joint Resolutions. First Transcript of Hearing, at 16, *Oni*, 2 Haw. 87 (on file with Haw. State Archives, Records of the Judiciary, Series 006, Box 22, Law No. 788). Note that the case file at the Hawai‘i State Archives contains two transcripts of this hearing, the second of which was undated. Second Transcript of Hearing, *Oni*, 2 Haw. 87 (Haw. Kingdom) (on file with same).

101. *Oni*, 2 Haw. at 90 (concluding that the customary right was “so repugnant to the spirit of the present laws, that it ought not to be sustained by judicial authority”); *id.* at 95 (concluding that it was “the intention of the Legislature at the time of the passage of the Act of 1850, that the former right of [pasturage] . . . should cease to exist”).

102. See, e.g., Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012) (arguing that property is the law of things, and that “property defines things using an exclusion strategy of ‘keep off’ or ‘don’t touch’”).

103. Trespass alone did not earn him the right to have the animals impounded and sold, though. That seemed to flow from his claim that the animals were strays.

104. See *infra* Part IV.B (pointing to language in *Oni* suggesting the court’s disbelief at the nature of the claim Oni asserted).

“at a time when the old system as to the tenure of lands was still in existence.”¹⁰⁵ But their provisions had been “entirely superseded by other and more expeditious arrangements.”¹⁰⁶ The Kuleana Act, by contrast, was “passed at a time when the entire change of system, which has taken place since 1846, was in full progress, and had already, to a great extent, been achieved.”¹⁰⁷ This meant that Oni had no statutory right to pasturage, because the Kuleana Act said nothing about such rights. It also meant that Oni had no customary right to pasturage, because such a right would be “so unreasonable, so uncertain, and so repugnant to the spirit of the present laws, that it ought not to be sustained by judicial authority.”¹⁰⁸

In sum, Oni could claim no pasturage rights because the *Māhele*, alongside the Kuleana Act, had “brought about and perfected that entire revolution in the law affecting rights in land, and land titles, which ha[d] taken place since the year 1846.”¹⁰⁹ In other words, the court concluded that property reform had made the world anew. If only that had been true.

B. Oni’s Story: Property as Reform

It is difficult to glean from the opinion alone how many interpretive choices the *Oni* court made in telling the story of property reform in the kingdom. This is because once the court assumed that landownership implied the right to exclude, Oni’s claim could not help but sound implausible. As the court framed it, Oni was claiming for himself—and for others similarly situated—a right *against* exclusion from property arrangements across the kingdom.¹¹⁰ Of course, historically, the right to exclude has not always been absolute.¹¹¹ But framing that right as absolute and Oni’s claim as potentially boundless makes Oni’s claim seem antithetical to the very meaning of property. This, in turn, contributes to the feeling that Oni’s pasturage rights

105. *Oni*, 2 Haw. at 92.

106. *Id.*

107. *Id.* at 94.

108. *Id.* at 90.

109. *Id.* at 92.

110. *See id.* at 87 (“[T]he case . . . involves some questions of great importance, and will determine the rights of many other persons besides the present plaintiff and defendant . . .”); *id.* at 89 (“[T]he claim of a right of pasturage . . . upon . . . broad[] grounds . . . renders this case one of great importance, not only to the large landed proprietors throughout the Kingdom, but to thousands of the common people.”).

111. Hence, for example, the debate over public accommodations. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1295 (1996) (discussing how a previously broad easement to access businesses open to the public was narrowed into a right of businesses to exclude members of the public).

could not have survived property reform. But if we reconstruct the series of events leading up to the lawsuit, it becomes clear that Oni's claim fit quite well within the expectations that the kingdom's denizens formed after property reform. This is because people in the kingdom assumed that private landownership built upon Hawaiian land ways.

We might expect that Oni, being Hawaiian, would rely on Hawaiian land ways, while Meek, being *haole*, would not. Yet they both did. Indeed, Meek tried refashioning these land ways into a means of appropriating the chiefs' ability to call upon Hawaiian labor. It was only once he soured on this economic arrangement that he changed his tune on the relationship between property and Hawaiian land ways and claimed an absolute right to exclude. This background makes Oni's claim much more intelligible. It also allows us to understand the arguments that Oni's lawyer used to bring context into this case—that is, to present a different property story.

1. Hawaiian labor

The bounty that Hawai'i contributed to the Pacific economy in the early nineteenth century depended on the labor of the *maka'ainana*, for it was they, as the chiefly counselor Davida Malo once remarked, "who did all the work on the land."¹¹² It was "relatively easy" for the chiefs to "muster[] the labor" of the *maka'ainana*¹¹³ because the chief who controlled the land could also call upon the labor of the *maka'ainana* living upon it.¹¹⁴ But just because it was easy does not mean it did not take work. Because the *maka'ainana* were not bound to the land, the chiefs needed to be judicious in their demands.

By some accounts, the *Māhele* was supposed to sever this connection between land and labor. In the late 1840s, the legislature had abolished the labor due for certain classes of people, including those *maka'ainana* who had obtained private land claims.¹¹⁵ Some members of the Land Commission instructed these recipients that they should no longer perform this labor.¹¹⁶ But the

112. HANDY ET AL., *supra* note 42, at 323 (quoting DAVID MALO, HAWAIIAN ANTIQUITIES 88 (N.B. Emerson trans., 1903)). The importance of Hawaiian labor remained constant even as the focus of economic activity shifted from harvesting sandalwood for export to provisioning whaling expeditions in the Pacific. ARISTA, *supra* note 13, at 24 (sandalwood); SAHLINS, *supra* note 46, at 111 (whaling).

113. ARISTA, *supra* note 13, at 24.

114. SAHLINS, *supra* note 46, at 90; ANDRADE, *supra* note 40, at 88.

115. Joint Resolutions of Nov. 7, 1846, § 4, 1847 Haw. Sess. Laws 70, 71 (Haw. Kingdom).

116. George Morison Robertson, who had served on the Land Commission, VAN DYKE, *supra* note 64, at 81, explained that the Commissioners "ha[d] the right to grant certificates to those who held allodial titles instructing those people not to work for the Konohikis," Record of the House of Representatives, 1851-1853, at 38 (Haw. Kingdom) (on file with Haw. State Archives, Records of the Legislature, Series 221, footnote continued on next page

transition to private property did not immediately end this practice; instead, people continued to argue over its regulation. Thus, on May 19, 1851, Kapehe, a member of the Kingdom of Hawai'i's House of Representatives, presented a petition from the *maka'ainana* of Waimea, on Kaua'i, which "complain[ed] against the Konohikis for requiring the sick tenants to work as soon as they got well" and asked for various reforms to the *konohiki*'s authority.¹¹⁷ This petition, alongside others like it presented during the 1851-1853 legislative sessions, suggests that traditional labor patterns survived in various parts of the kingdom.¹¹⁸ These petitions also show that Hawaiians had divergent opinions about this kind of labor. Some petitioners thought that labor dues should end.¹¹⁹ Others, like those from Waimea discussed above, asked for regulation of the *konohiki*'s power—perhaps reducing, but not eliminating, the labor due.¹²⁰

Why would some *maka'ainana* want to continue this labor practice? It is not enough to say that they had done so in the past. Indeed, by the middle of the nineteenth century, the *maka'ainana* were experiencing worsening labor conditions as the islands' population declined and extractive activities demanded more resources.¹²¹ Instead, we should understand the persistence of

Volume 7) (statement of Rep. G.M. Robertson). Robertson would go on to turn his reading of reform authoritative by writing the court's opinion in *Oni v. Meek*. 2 Haw. 87, 90 (1858) (Haw. Kingdom).

117. Record of the House of Representatives, *supra* note 116, at 36 (statement of Rep. Kapehe).
118. *See, e.g., id.* (statement of Rep. Kaahalama) (describing a "Petition from . . . Kau, Hawaii, praying . . . that the number of labor days of the Konohikis and Government be reduced from three to two per month"); *id.* at 127 (statement of Rep. Kalauhala) (describing a "Petition from Waialua, praying . . . to abolish the Konohiki working days"); *id.* at 431 (statement of Rep. J.W.E. Maikai) (describing "a Petition from Waikiki . . . praying . . . [t]hat the Konohiki labor days be lessened").
119. *Id.* at 352 (statement of Rep. Koiku) (describing "a Petition from Lanai containing 91 names praying: [t]hat the Konihiki labor days be abolished"); *cf. id.* at 355 ("S.P. Kalama read a Petition from Waioli, Kauai, praying: That those people without fee Simple lands be given a chance to acquire same: That they were being oppressed by the Konohikis, and consequently some people have left with their children.").
120. *Id.* at 36 (statement of Rep. Kapehe); *cf. id.* at 38 ("T.C.B. Rooks moved to prepare a Bill to remove the burdensome taxes [including labor taxes] imposed by the Konohikis on the people . . .").
121. SAHLINS, *supra* note 46, at 90; KAME'ELEIHIWA, *supra* note 13, at 205; ARISTA, *supra* note 13, at 24; *see supra* notes 58-59 and accompanying text (describing the decline in population). Several petitions submitted to the legislature complained that the *konohiki* were oppressing the people. *See, e.g.,* Record of the House of Representatives, *supra* note 116, at 209 (statement of Rep. H.L. Sheldon) (describing a "Petition from Kona, Hawaii, against the Konohikis for being oppressive"); *id.* at 168 (statement of Rep. G.M. Robertson) (describing a "Petition from Laie, Koolauloa, complaining against the Konohikis for being oppressive"); *id.* at 355 (statement of Rep. S.P. Kalama) (describing a
- footnote continued on next page*

traditional labor practices as a response to an important obstacle introduced by privatization: the breaking down of the *ahupua'a* as a collection of common resources. The homesteads the *maka'ainana* could claim after the *Māhele* represented a fraction of the resources they could previously access. They were effectively cut off from areas of *kula* land where they might grow other crops or obtain thatch or timber. Moreover, irrigated patches relied on networks of ditches that might now require an easement to reach and repair.¹²² Traditional labor practices could open negotiations with those holding land after reform to give the *maka'ainana* access to these resources.

With this background on the connection between land and labor, we can return to the *ahupua'a* of Honouliuli and trace a different set of land transactions. Between 1847—that is, before the *Māhele*—and 1853, John Meek obtained from Kekau'ōnohi and Ha'alelea a series of leases for *kula* land on Honouliuli, depicted in Figure 2.¹²³ These instruments make clear that Hawaiian land ways informed how parties understood and made claims about landownership in the aftermath of property reform.

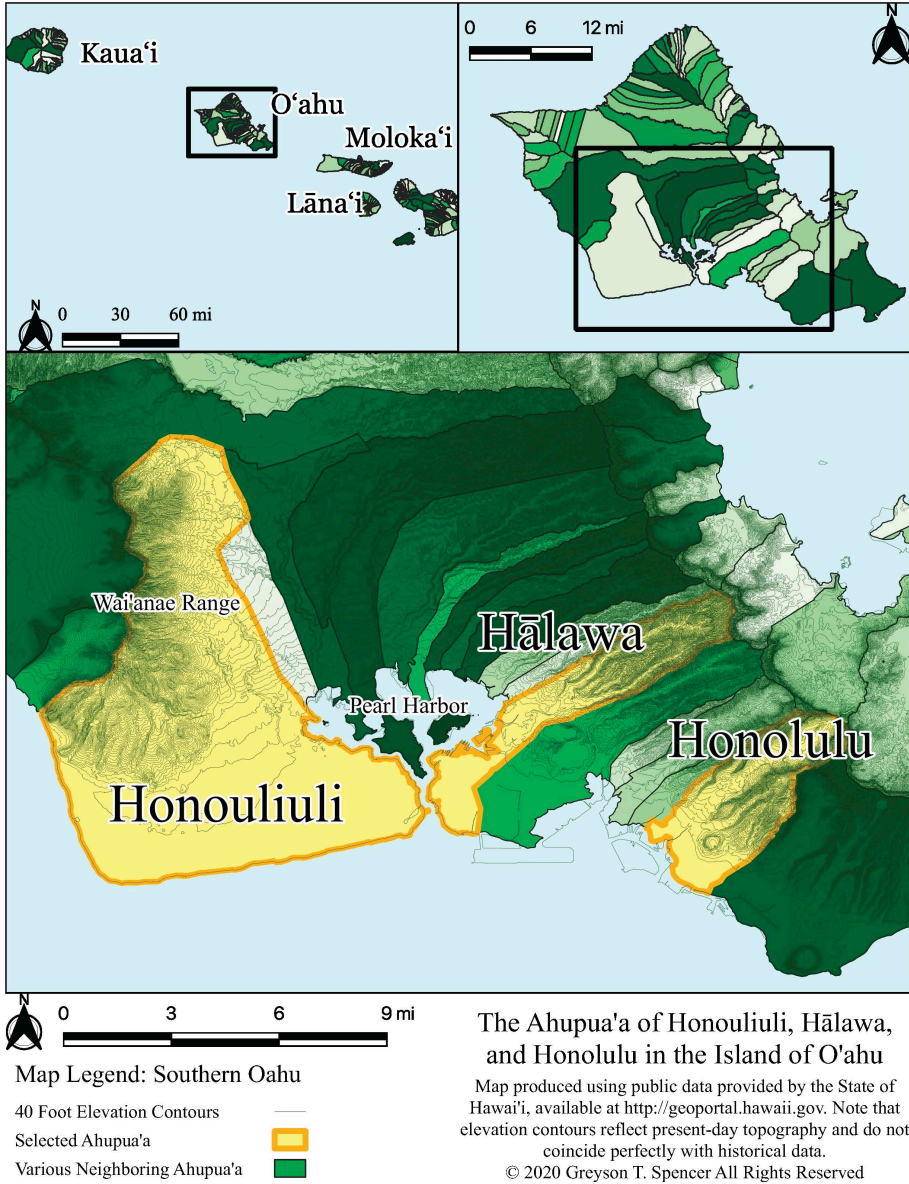
petition claiming that the *maka'ainana* “were being oppressed by the Konohikis, and consequently some people have left with their children”).

122. OSORIO, *supra* note 37, at 53-54.

123. For the leases, see sources cited in notes 91-92 above. Chiefs leased land to foreigners before the *Māhele*, even as private ownership of land was not possible during that time. See KAME'ELEIHIWA, *supra* note 13, at 171. The chiefs conceived of leases as a means of protecting Hawaiian sovereignty. Thus, in 1834, Kamehameha III advised a chief named Kakio'ewa to follow his example and lease land to foreigners rather than ceding that land as repayment for Kakio'ewa's debts. *Id.* Leasing, the king explained, meant that “if we should decide to remove them, then we take back the [land].” KAME'ELEIHIWA, *supra* note 13, at 171 (translating the king's letter).

Figure 2

The Ahupua'a of Honouliuli, Hālawā, and Honolulu on the Island of O'ahu



Although it was the theft of horses that triggered the contest between Oni and John Meek, the case was born out of the troubles arising from the islands' burgeoning cattle economy. Cattle were introduced to Hawai'i in the late eighteenth century as one of many gifts from Euro-American merchants seeking the chiefs' favor.¹²⁴ Cattle disrupted Hawaiian agricultural patterns in part by turning *kula* land—which had previously served as a site for cultivation and collection of various resources—into pastures.¹²⁵ This shift limited the *maka'ainana*'s ability to reproduce patterns of production they had relied upon for generations.¹²⁶ At the same time, the cattle industry needed the labor of the very *maka'ainana* whose lives it was disrupting, for cattle required not only vast pastures to graze, but also laborers capable of managing growing herds.¹²⁷ The *maka'ainana* provided the bulk of this labor by learning how to handle horses, another drain on the islands' resources.¹²⁸

Meek's foray into the cattle industry began sometime in the 1830s.¹²⁹ By the late 1840s he needed more land and labor, which he seemingly thought he

124. FISCHER, *supra* note 49, at 32. After the sandalwood trade declined, cattle rose to prominence in the Hawaiian economy to support the whaling trade. *Id.* at 116. Cattle "hides and tallow were the most valuable trade goods in the eastern Pacific" in the 1830s and 1840s. *Id.* at 87. Indeed, in 1837, cattle hides accounted for a fourth of the kingdom's exports. *Id.* at 122.

125. *Id.* at 60-64.

126. *See id.* at 62. Leases to foreigners made matters more difficult, as these foreigners curtailed access to *kula* resources and could resort to violence in protecting what they regarded as their property. *See id.* at 166; *see also* KUYKENDALL, *supra* note 60, at 128 (describing an episode in which foreigners tied a rope around a Hawaiian man's neck and dragged him through Honolulu after he shot a foreigner's cattle for trespassing on land declared *kapu* (taboo)). Unsurprisingly, several *maka'ainana* legislative petitions asked "[t]hat the Konohiki be required to lease their lands to the natives and not to the foreigners," Record of the House of Representatives, *supra* note 116, at 354 (statement of Rep. S.M. Kamakau), "that the Chiefs be prohibited from leasing their lands to the foreigners," *id.* at 357-58 (statement of Rep. Wm. E. Pii), and "that the leasing of the lands owned by the Konohikis, to foreigners and others be prohibited," *id.* at 376 (statement of Rep. Kailihaona).

127. FISCHER, *supra* note 49, at 143. The development of a skilled laboring class capable of engaging in this work called for very deliberate public investment. Starting in the 1830s, the Hawaiian government imported workers from California who could then train the *maka'ainana* in managing and capturing the growing cattle population. *Id.* at 143-45. While chiefs and *haole* owned the cattle enterprises that developed in Hawai'i in the 1830s and 1840s, it was the *maka'ainana* that provided the bulk of the labor required to make these enterprises profitable. *Id.* at 129.

128. *Id.* at 150. As larger cattle operations acquired more *kula* resources, those Hawaiians who owned horses and cattle would have experienced greater difficulties in grazing their own animals. In the *Oni* litigation, Ha'alelea testified that some of the horses on Honouliuli belonged to the *maka'ainana*. *See* First Transcript of Hearing, *supra* note 100, at 9 ("Some of the horses belonged to the tenants within 10 years after [the first horse came to Honouliuli]. They purchased them.").

129. *See* FISCHER, *supra* note 49, at 84-85.

could obtain by leasing land in Honouliuli from Kekau'ōnohi. Meek believed that acquiring land was also a vehicle for acquiring labor, an expectation that grew out of Hawaiian land ways.¹³⁰ Specifically, in the second of three leases he secured (dated 1851), Meek obtained not only more land for his herd, but also a specific kind of labor due to the chiefs.¹³¹ The 1851 lease gave Meek “the monthly *Poalimas* (labor days)” that the *maka'āinana* owed to Kekau'ōnohi.¹³² *Pō'alima* were among the many labor taxes that the *maka'āinana* owed to their superiors—both to their chiefs and *konohiki* and to the kingdom's government.¹³³ Meek's lease emphasized these distinctions: “This Lease does not include the Konohiki's labor days, only the Poalima days are included.”¹³⁴

As this transaction makes clear, Hawaiian land ways gave content to the meaning of landownership. Meek did not pay the *maka'āinana* who worked for him; instead, he allowed them to pasture their animals on his land as Kekau'ōnohi and Ha'alelea might have done before him.¹³⁵ Testimony from Ha'alelea in the ensuing litigation suggests that the *maka'āinana* labored for Meek precisely to retain some access to the resources he was gobbling up. Ha'alelea recalled that “when the new law was passed,” the *maka'āinana* told him they were worried they “should be the losers by it, and wished to continue the labor.”¹³⁶ Ha'alelea confirmed this understanding, telling them that “if they did not . . . work on labor days they could not enjoy [their traditional] rights.”¹³⁷ Laboring for Meek seemingly preserved a connection to the resources the *maka'āinana* needed.

130. Meek was not the first *haole* to attempt to command Hawaiian labor in this way, though further research is necessary to determine whether this was a systemic practice. The former missionary Richard Armstrong “submitted an application [to the chiefs] to purchase a parcel of land on O'ahu ‘with the old feudal rights of labour from the native’ . . . [which the chiefs] denied, ‘because he want[ed] to buy the labor [sic] of the people.’” BEAMER, *supra* note 15, at 150 (quoting Privy Council Minutes from July 1, 1847, to Sept. 30, 1850 [Handwritten] 484 (Haw. Kingdom) (on file with Haw. Digit. Archives, Records of the Foreign Office & Executive, Series 421, Volume 03)).

131. 1851 Lease, *supra* note 92, at 1.

132. *Id.*

133. See SAHLINS, *supra* note 46, at 111; *Pō'alima*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/YF3N-22NY> (archived Mar. 2, 2026).

134. 1851 Lease, *supra* note 92, at 1.

135. One witness recalled that the *maka'āinana* “did not receive any pay on the working days. They came on their own horses.” First Transcript of Hearing, *supra* note 100, at 15. Another witness similarly recalled that “Meek had an arrangement with some Kanakas to work for him at times, in consideration of pasturing their animals.” Second Transcript of Hearing, *supra* note 100, at 5.

136. First Transcript of Hearing, *supra* note 100, at 11.

137. *Id.*

Cast in this light, we can also understand the transactions for land as efforts by Kekau'ōnohi and Ha'alelea to enable foreigners to access the islands' resources without abdicating their responsibilities to care for those under them.¹³⁸ This strategy became clearest in the third lease, dated 1853, which Meek obtained from Ha'alelea (who had succeeded Kekau'ōnohi as owner of Honouliuli after her death in 1851¹³⁹).¹⁴⁰ Through this lease, Ha'alelea lent Meek "all that remaining part of his (Kula) pasturage Land at Honouliuli."¹⁴¹ This grant was significant for the *maka'āinana*: If they wished to access *kula* resources thereafter, they would have to deal with Meek. Perhaps for this reason, Ha'alelea inserted a provision protecting the rights of the *maka'āinana*: "This Lease is not to be adverse to the rights of the Kanakas (people) living under the (protection) *malu* of the party of the first part [Ha'alelea]."¹⁴² The word *malu* is important, for it suggests Ha'alelea's own attempt at bringing Hawaiian ideas about land to bear on the meaning of landownership. *Malu*, originally meaning "shade," referred to "the manner in which a chief's care for and physical and spiritual protection extended canopy-like over a person or group."¹⁴³ Ha'alelea thus blended Hawaiian ideas around land tenure and governance with private landownership, building protection for the *maka'āinana* into the lease.

We do not know exactly how this merging of Hawaiian land ways and private landownership worked out in the short term. Things certainly took a turn for the worse in the middle of the 1850s, as the Hawaiian cattle industry faced increased competition from Brazil and Argentina.¹⁴⁴ Perhaps Meek felt the sting of this downturn and became overprotective of his margins, turning his attention to the *maka'āinana*'s horses, which he now felt competed with his cattle for precious grass. Meek "repeatedly warned [the *maka'āinana* of Honouliuli] to remove their animals from the land . . . under penalty of having

138. Indeed, around the same time Oni sued Meek, Ha'alelea sued a man named Isaac Montgomery, who also held a lease from Kekau'ōnohi and who Ha'alelea alleged was wrongfully precluding the people of Honouliuli from accessing the *ahupua'a*'s fisheries. See *infra* Part III.A.

139. KAME'ELEIHIWA, *supra* note 13, at 307.

140. 1853 Lease, *supra* note 92, at 1.

141. *Id.*

142. *Id.* at 3. The *Oni* court quoted this provision in Hawaiian and furnished its own translation: "This lease shall not be construed as conflicting (or interfering) with the rights of the people living under the shade of the party of the first part (the *konohiki*)." *Oni v. Meek*, 2 Haw. 87, 88 (1858) (Haw. Kingdom).

143. ARISTA, *supra* note 13, at 194.

144. FISCHER, *supra* note 49, at 195.

to pay pasturage.”¹⁴⁵ A changing economic position seemingly shifted Meek’s understanding of property away from Hawaiian land ways.

We know what happened next. Meek took two horses he found on his land and had them impounded and sold; Oni sued him for the theft of these horses. Preserving his right to appeal, Meek allowed a judgment to be entered for Oni in the Honolulu Police Court in 1858.¹⁴⁶ Oni would lose before the Hawaiian Supreme Court a month later.¹⁴⁷ But it is worth pausing to explore how his lawyer, Charles Coffin Harris, tried to present his own story of property reform to the court.

2. Legal hooks for an alternative property story

The core of Oni’s case against Meek was that Meek was not ignorant of Hawaiian land ways; in fact, these were critical to understanding the obligations between Oni and Meek. Oni’s lawyer made as much clear in his opening statement to the court:

[Oni] is one of the original kamaainas [those born in a particular place] of Honouliuli, under the shade of the chief. Kamaainas always have had the right to pasture their animals on the Ahupuaas. Meek holds the land by a lease from the Konohiki . . . with a saving clause in favor of the rights of the *kanakas* [persons, specifically Hawaiians] living under the *malu* of the Konohiki.¹⁴⁸

This was quite a different history of property in the kingdom. Rather than portraying Oni’s rights as tethered to a bygone property regime, Harris made this regime central to figuring out the meaning of property. The puzzle for him was how to translate this account of property reform into legal arguments. To do this, he relied on the doctrines of custom and trade usage, and on the relationship between statutes and the common law. I examine each in turn.

a. Custom and trade usage

Harris first claimed that the *maka’āinana* enjoyed a right to pasture their horses in exchange for laboring for the *konohiki*. A man named Kaope testified that the *maka’āinana* enjoyed “ordinary privileges . . . in return for their work on the Konohiki’s labor days.”¹⁴⁹ These rights included “the right to wood, to

145. Second Transcript of Hearing, *supra* note 100, at 2.

146. *Oni*, 2 Haw. at 87; Decision of the Police Court, *supra* note 93, at 1.

147. *Oni*, 2 Haw. at 96.

148. Second Transcript of Hearing, *supra* note 100, at 1; *see also* DICTIONARY OF LAND-TERMS, *supra* note 50, at 48 (defining *kama’āina*); *id.* at 49 (defining *kanaka*).

149. Second Transcript of Hearing, *supra* note 100, at 2.

fish, & to depasture [their] horses.”¹⁵⁰ Ha‘alelea also testified extensively on the pasturage custom: “Ever since the land has come to me in 1851 I know that the Tenants of Honouliuli have run their cattle on the land as a right.”¹⁵¹ This right “was allowed to every Hoaina who went on labor days.”¹⁵² Further testimony established that Oni labored as required under this relationship, entitling him to pasture his horses on the *kula* land.¹⁵³ But if pasturage was a customary right, it was not clear why the *maka‘āinana* had been forced to bargain with Ha‘alelea in order to exercise it.¹⁵⁴ During oral argument, Justice John Papa ʻĪi, the only Hawaiian member of the court,¹⁵⁵ observed that *maka‘āinana* with land title “had to make arrangements for their horses, but not so their other rights.”¹⁵⁶

Harris, therefore, switched tracks to root Oni’s right to pasturage in the agreement to perform labor. This path had its own problems because Meek could claim that any such agreement bound Ha‘alelea and the *maka‘āinana*, but not him. Indeed, Meek claimed he never knew of such an agreement.¹⁵⁷ But clearly, Meek could not claim total ignorance. After all, he had bargained for land expecting to get Hawaiian labor, too. This kind of expectation could become legally relevant through the doctrine of trade usage. As Simon Greenleaf explained in his treatise on evidence (which Harris cited at the hearing¹⁵⁸), trade usage allowed courts to reconstruct “the habits, modes, and course of dealing, which are generally observed, either in any particular branch of trade, or in all mercantile transactions.”¹⁵⁹ Hawaiian land ways, including reciprocal obligations and labor dues, informed how parties approached land negotiations in the kingdom. Meek knew this—otherwise, why did the 1851 lease include a grant of the *pō‘alima* labor days? As Harris reminded the court, “We have always done our *poalima labor* for Haalelea. If he has transferred his rights to Meek, very well, let him notify us to labor.”¹⁶⁰

150. First Transcript of Hearing, *supra* note 100, at 5.

151. *Id.* at 7.

152. *Id.* at 11.

153. *Id.* at 12-13.

154. Indeed, the court concluded that Oni’s witnesses admitted that any pasturage right was terminated by “the operation of the new laws affecting the tenure of land” precisely because they had to bargain for this right. *Oni v. Meek*, 2 Haw. 87, 91 (1858) (Haw. Kingdom).

155. *See* 2 HAWAII REPORTS iii (1866).

156. First Transcript of Hearing, *supra* note 100, at 13.

157. Second Transcript of Hearing, *supra* note 100, at 9.

158. *Id.* at 6.

159. 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 248 (Boston, Little & Brown 1866).

160. Second Transcript of Hearing, *supra* note 100, at 6.

Custom and trade usage thus provided mechanisms through which Harris could turn his account of property reform into legal arguments. In Harris's story, the kingdom's transition to private property operated atop an existing property regime characterized by various Hawaiian status relationships. These relationships did not vanish after reform; in fact, they informed how parties engaged in property transactions. In this account of property reform, Oni's claim to pasturage appears less as a challenge to property reform, and more as a remnant of a property language familiar to the kingdom's denizens. They might not all agree on what that language should include—as I have already noted, Hawaiians themselves disagreed on whether labor dues should continue. But it was not inconceivable that labor dues remained part of the Hawaiian property regime, particularly as a mechanism to access resources the *maka'āinana* needed.

b. Common law and statute

Harris's argument thus far assumed Oni had not taken land under the Kuleana Act—a factual question that remained open.¹⁶¹ Recall that if Oni had land under the Act, his rights would be determined by the statute. This raised a question about how one should read the Kuleana Act. Again, the Joint Resolutions of 1846 clearly protected Oni's right to pasturage: "He may also pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the konohiki from pasturing his."¹⁶² But the Kuleana Act of 1850 did not mention pasturage rights, even as it did mention other rights listed in the Joint Resolutions.¹⁶³ Did this mean that the legislature had eliminated the right to pasturage when it enacted the Kuleana Act?

To answer this question, Harris argued that the court should read the Kuleana Act against a backdrop of Hawaiian land ways. This argument reflects a tendency among nineteenth-century lawyers in Hawai'i to sometimes treat Hawaiian customs and practices as common law.¹⁶⁴ This had several implications, but the one that bears emphasizing here concerns the relationship between common law and statute. For nineteenth-century Anglo-American jurists, statutes were written against the background of a preexisting

161. *Oni v. Meek*, 2 Haw. 87, 87-88 (1858) (Haw. Kingdom).

162. Joint Resolutions of Nov. 7, 1846, § 1, 1847 Haw. Sess. Laws 70, 70 (Haw. Kingdom); see *supra* notes 97-101.

163. See Kuleana Act, § 7, 1850 Haw. Sess. Laws, in PENAL CODE, *supra* note 99, app. at 202, 203-04 (Haw. Kingdom).

164. See José Argueta Funes, Ke'elikōlani and the King's Wharf: Hawaiian Sovereignty and the Common Law 1 (July 10, 2025) (unpublished manuscript) (on file with author); see also, e.g., *Keelikolani v. Robinson*, 2 Haw. 514, 516 (1862) (Haw. Kingdom) ("[T]here was no law of inheritance at that time. I am of opinion that there was a common law of inheritance, liable to be modified or defeated, but perfectly good until such an event.").

common law, and judges were not to assume that a statute changed (or, in technical language, derogated) the common law unless the legislature explicitly stated its intention to do so.¹⁶⁵

Harris made this argument in two stages. First, he argued that the Joint Resolutions of 1846 were a declaratory statute.¹⁶⁶ Declaratory statutes, as a contemporary treatise explained, were those which “simply declare[d] or explain[ed] the law or the right as it stood previous to the statute.”¹⁶⁷ This meant that the Joint Resolutions of 1846 amounted to something of a

165. See THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 313 (New York, John S. Voorhies 1857) (“It has been repeatedly declared that statutes which alter common-law remedies or affect common-law rights must be strictly complied with.”). This canon of construction was a much reviled yet persistent feature of American debates around legislation. See *id.* at 317 (“The condition of things has very essentially altered since the time of Lord Coke. . . . [T]he doctrine that statutes in derogation of the common law are to be strictly construed, has now truly no solid foundation in our jurisprudence. . . .”).

166. More precisely, Harris argued that the Joint Resolutions of 1846 were “both enactive and declaratory.” Second Transcript of Hearing, *supra* note 100, at 10 (emphasis omitted). Whereas declaratory statutes declared the law as it existed, enactive ones “introduce[d] new legislative provisions.” SEDGWICK, *supra* note 165, at 36. It is hard to say with certainty why Harris wanted to have it both ways, but we can get some clues by looking at how his opposing counsel, Asher B. Bates, argued about the statute.

Bates seemed to rely on a theory of legal development in which the structure of legal relations reflected a society’s socioeconomic conditions. Cf. Henry Home of Kames, *Preface to SELECT DECISIONS OF THE COURT OF SESSION, FROM THE YEAR 1752 TO THE YEAR 1768*, at iii, iii (Henry Home ed., Edinburgh, Bell & Bradfute 2d ed. 1799) (“The law of a country is in perfection when it corresponds to the manners of the people, their circumstances, their government. And as these are seldom stationary, law ought to accompany them in their changes.”). See generally DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 148-51 (1989) (discussing Kames’s historical jurisprudence); KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790-1900: LEGAL THOUGHT BEFORE MODERNISM 50-57, 65 (2011) (discussing Kames’s jurisprudence and his influence on American legal thought). He argued that pasturage rights in England had only been recognized “upon necessity for the purpose of enabling the tenant to cultivate.” Second Transcript of Hearing, *supra* note 100, at 7. But different socioeconomic conditions would yield different legal relations, making it necessary to understand the state of things in Hawai‘i. Bates contended that by the time the legislature enacted the Joint Resolutions, property relations in Hawai‘i were “in a transition state.” *Id.* at 8. As a “declaratory” statute, the Joint Resolutions were therefore suspect; in fact, Bates took the striking position of “deny[ing] that the legislature had any right to pass” the Joint Resolutions. *Id.* Given this argument, we can understand why Harris would want to contend that the Joint Resolutions of 1846 were both declaratory and enactive: If they were declaratory, then he could rely on the interpretive presumption that preserved the common law unless the legislature explicitly stated otherwise; if they were enactive, then he could protect against the argument that Oni’s rights were out of sync with the times, for the legislature had recently created these rights.

167. SEDGWICK, *supra* note 165, at 36.

declaration of what the kingdom's common law was at the time of its enactment—a list of rights and relationships among landholders at the time. Second, because the Kuleana Act of 1850 had not explicitly repealed the Joint Resolutions of 1846, Harris argued that the court should not assume that merely omitting the right to pasture from the Kuleana Act was enough to abrogate the pasturage provision.¹⁶⁸ In other words, the Kuleana Act's silence on pasturage was not enough to revoke that right.

This legal argument reflected a story of property reform in the kingdom as an accretive or incremental process. In characterizing the Joint Resolutions of 1846 as a declaratory statute, Harris seemingly tried to preserve the connection between the worlds before and after the *Māhele* of 1848. Even if Oni had taken land under the Kuleana Act, his rights would be determined not merely by what the statute provided, but by an understanding of Hawaiian land ways (including those articulated in the Joint Resolutions of 1846). Thus, Oni's claimed right to pasture his horses was not an anachronistic remnant of a bygone legal order; it was embedded in the very foundations of the kingdom's new property regime.

C. What the Court Left Out

Of course, the court ultimately disagreed with this more accretive account of property reform, preferring a story of property reform as a revolution. But we are now in a better position to appreciate what the court omitted in presenting its chosen story; that is, we can discern the court's interpretive or narrative choices. And we can also speculate about why the court made these choices—about what kind of value the court was creating through this property history, and for whom.

The most important omission from the court's opinion was any sustained discussion of the 1851 lease.¹⁶⁹ This omission was important because Meek's lease was the clearest piece of evidence that he understood Hawaiian land ways to inform the meaning of landownership after reform. Why else would he think to ask for labor along with land? This is likely why Harris reminded the court that Oni had always performed his *pō'ālima* labor for Ha'alelea.¹⁷⁰ This was the exact type of labor tax that Meek came to claim through the 1851 lease.¹⁷¹ And yet, the opinion did not mention Meek's own attempts to capitalize on the merging of Hawaiian land ways and private landownership.

168. *Oni v. Meek*, 2 Haw. 87, 91 (1858) (Haw. Kingdom).

169. 1851 Lease, *supra* note 92. The court acknowledged this lease, but only to say that it did not “contain any clause parallel” to the clause in the 1853 lease that explicitly protected the rights of the *maka'āinana*. *Oni*, 2 Haw. at 88.

170. Second Transcript of Hearing, *supra* note 100, at 6.

171. 1851 Lease, *supra* note 92, at 1.

A concern for notice may have informed this omission. The court held that the labor relationship between the *maka'āinana* and the chiefs could not create an obligation for Meek because he did not know of that agreement.¹⁷² If we assume that Meek lacked notice of the ways in which Hawaiians negotiated access to *kula* resources, Oni's demands begin to look unreasonably onerous. Why should Meek have known about Ha'alelea's pasturage arrangements? It would seem unfair to expect landowners in the kingdom to understand these complicated labor practices. Indeed, even though Meek's third lease included a provision protecting the rights of the *maka'āinana*,¹⁷³ how could he have known what those rights were? Omitting Meek's own understanding of Hawaiian land ways, in short, makes those land ways appear more incompatible with private landownership and the outcome of the case all the more obvious.

This interpretive choice also had two important distributive consequences. First, it freed Meek from needing to understand, let alone respect, Hawaiian land ways. Second, it increased the cost that people like Oni would have to pay to protect their rights. For instance, they might need to enter into private agreements for pasturage and figure out ways to bind people like Meek to those agreements. And this all assumed that parties remained willing to enter into these agreements. The court's property history, then, eliminated means of value creation that the *maka'āinana* enjoyed before reform to the benefit of people like Meek, who now faced (to use some technical terms) lower information and transaction costs.

This suggests that *Oni* was an effort to inscribe a particular political economy into the kingdom's new property regime—crucially, a political economy in which the *maka'āinana* lost some of the mechanisms that would have allowed them to negotiate access to resources they previously enjoyed. The court, of course, did not state as much. But we can point to two instances in the opinion that support this reading of *Oni*.

First, the court sensed in the case an opportunity to address not only Oni's rights, but also the rights of “the large landed proprietors throughout the Kingdom” and “thousands of the common people.”¹⁷⁴ The court itself envisioned the broad reach of its conclusion.

Second, the court used *Oni* to selectively broaden its interpretation of the Kuleana Act. Recall the court's holding that, in enacting the Kuleana Act, the

172. *Oni*, 2 Haw. at 91 (“And whatever private agreement as to pasturage rights may have existed between the plaintiff and the konohiki, that, of course, cannot affect the defendant's rights under his leases, unless he had special notice of such agreement, and bound himself to respect its terms.”).

173. *Id.* at 88; 1853 Lease, *supra* note 92, at 3.

174. *Oni*, 2 Haw. at 89.

legislature meant to eliminate whatever rights it did not explicitly include.¹⁷⁵ Because the Kuleana Act did not list pasturage rights, it followed that the statute eliminated those rights. However, the Kuleana Act also omitted any mention of access to fisheries, which had also been listed as rights under the Joint Resolution of 1846.¹⁷⁶ Yet the court in *Oni* was unwilling to conclude that the Kuleana Act abrogated those rights.¹⁷⁷ Indeed, earlier that year, the same court had held that fishing rights survived property reform.¹⁷⁸ Moreover, it had shown itself willing to extend those rights to a new class of people: purchasers of land.¹⁷⁹ This unequal treatment suggests that the reasoning in *Oni* was partly motivated by an effort to limit the *maka'āinana*'s bargaining power by depriving them of rights they enjoyed before reform, and which they had managed to rearticulate after reform. But to see this more clearly, we need to dive into that fishing-rights case and explore the rather different property story on which the court relied there.

III. Fisheries, Water, and the Crowded Slate

In other instances, the court operated under a much more accretive account of property reform. This Part reconstructs two contests over resources—the first over access to fisheries, the second over surface-water allocation—to highlight two observations. First, much as in the lead-up to *Oni*, the parties in these cases formed expectations around landownership rooted in Hawaiian land ways. Indeed, just like Meek, who sought to capture both Hawaiian land and Hawaiian labor, the *haole* litigants in these contests thought they could transform chiefly authority into more expansive property claims for themselves. Second, and in contrast to *Oni*, the court in these cases was open

175. *Id.* at 95.

176. *Contrast* Joint Resolutions of Nov. 7, 1846, § 1, 1847 Haw. Sess. Laws 70, 70 (Haw. Kingdom) (“The *hoaina* [(tenant, caretaker)] has also the right to take fish in those fishing grounds of the *konohiki* and . . . other places . . .”), with Kuleana Act, §§ 6-7, 1850 Haw. Sess. Laws, in PENAL CODE, *supra* note 99, app. at 202, 203-04 (Haw. Kingdom) (granting the *maka'āinana* rights to certain common resources, including water, but not fish).

177. *Oni*, 2 Haw. at 95 (“That it was the intention of the Legislature to declare, in this enactment, *all* the specific rights of the *hoaina* (excepting fishing rights) which should be held to prevail against the fee simple title of the *konohiki*, we have no doubt.”).

178. *See Haalelea v. Montgomery*, 2 Haw. 62, 66 (1858) (Haw. Kingdom) (“Under this [1846] statute . . . the entire fishing ground . . . was the private property of M. Kekauonohi . . . subject to the *piscatorial* rights of the tenants living on that Ahapuaa.” (emphasis added)).

179. *Id.* at 71 (“[W]hen [Isaac Montgomery] received a conveyance of a portion of the Ahupuaa of ‘Honouliuli,’ he acquired along with it a common right of piscary in the fishing ground adjacent.”).

to the possibility that the meaning of landownership could derive from Hawaiian land ways that existed in the time before reform.

A. Fisheries in Honouliuli

Let us return to the *ahupua'a* of Honouliuli. Within a year before the court's decision in *Oni*, Levi Ha'alelea, the *konohiki* of Honouliuli, sued a *haole* man, Daniel Montgomery.¹⁸⁰ Ha'alelea alleged that Montgomery was taking fish that belonged to Ha'alelea and that Montgomery was preventing those under Ha'alelea from accessing the fisheries abutting Honouliuli.¹⁸¹ Ha'alelea's claims and Montgomery's defense both assumed that the meaning of landownership in the kingdom derived in part from pre-reform Hawaiian land ways. And the court would resolve the dispute by fitting those land ways into a new property regime.

1. Governing/owning fisheries

Shortly after the *Māhele*, the chief Mikahela Kekau'ōnohi sold a portion of the *ahupua'a* of Honouliuli to a man named Isaac Montgomery.¹⁸² Kekau'ōnohi died soon thereafter, leaving her vast estate to her husband, Levi Ha'alelea.¹⁸³ Isaac thereafter engaged in some curious land transactions that culminated in a transfer of the property to his brother, Daniel, in 1855.¹⁸⁴ Daniel allegedly started excluding other people in Honouliuli from the fisheries next to the land his brother had purchased.¹⁸⁵ In 1857, Ha'alelea brought suit against Daniel for interfering with both his and his tenants' rights in the fisheries.¹⁸⁶

Ha'alelea's attorney, Asher B. Bates, framed two claims against Daniel: First, Daniel had taken "a large number of fish" that belonged to Ha'alelea

180. Complaint at 1, *Haalelea*, 2 Haw. 62 (on file with Haw. State Archives, Records of the Judiciary, Series 006, Box 12, Law No. 348).

181. *Id.*

182. Transcript of Jan. 16, 1858 Hearing at 1, *Haalelea*, 2 Haw. 62 [hereinafter Jan. 16 Transcript] (on file with Haw. State Archives, Records of the Judiciary, Series 006, Box 12, Law No. 348).

183. KAME'ELEIHIWA, *supra* note 13, at 307.

184. These land transactions became the subjects of their own suit a few years later. Isaac transferred the property to a man named Charles Vincent in 1849, and Vincent was to hold it in trust for Isaac's benefit. *Montgomery v. Montgomery*, 2 Haw. 563, 564 (1862) (Haw. Kingdom). Isaac then paid for his brother, Daniel, who was "in destitute circumstances," to move to Hawai'i. *Id.* at 564-65, 582. At Isaac's behest, Vincent then transferred the property to Daniel, who would then hold it in trust for Isaac's benefit as well. *Id.* at 565, 584, 586.

185. Complaint, *supra* note 180, at 1.

186. *Id.*

under the kingdom's laws.¹⁸⁷ Second, Daniel had prohibited Ha'alelea and those "under him" from accessing the fisheries, also in violation of the kingdom's laws.¹⁸⁸ Understanding this complaint thus requires understanding the laws governing fisheries and the chiefs' use of *kapu* (oral legal pronouncement, taboo) to govern resources.

The chiefs relied on *kapu* to regulate access to and distribution of resources. For example, a chief could declare a *kapu* to prohibit or limit the catch of a specific species of fish from a coastal fishery during a particular season.¹⁸⁹ Access to the fisheries flowed from living in the *ahupua'a*, under the *konohiki*'s jurisdiction. As a man named Keahunui, who had enforced *kapu* on behalf of Kekau'ōnohi, explained at Daniel's trial, "All the people mauka [inland] and makai [seaward] had a right to take" fish that were not under *kapu*.¹⁹⁰ "When other people came from some distance [within the *ahupua'a*] down and fished," he continued, "there was no complaint."¹⁹¹

This mechanism for governing resources was codified in 1840, when the legislature enacted a statute that guaranteed the *maka'āinana* access to the fisheries "from the coral reefs to the sea beach" subject to the *konohiki*'s power to declare *kapu* in regulating these fisheries.¹⁹² A statutory revision in 1846 left this structure in place, declaring the fisheries to be the "private property" of the *konohiki* "for the equal use of themselves and of the tenants on their respective lands."¹⁹³

187. *Id.*

188. *Id.*

189. See ARISTA, *supra* note 13, at 191 ("The suspension of *kapu* and its reinstatement was the normal way that *kapu* functioned. *Kapu* on diverse natural resources, like fish and birds, or on activities like fishing, planting, going to war, or sexual intercourse were proclaimed for different reasons. At times, *kapu* were instituted on a cyclical basis that responded to different periods of the year, changes in climate and environment.").

190. Transcript of Jan. 27, 1858 Hearing at 6-7, *Haalelea v. Montgomery*, 2 Haw. 62 (1858) (Haw. Kingdom) [hereinafter Jan. 27 Transcript] (on file with Haw. State Archives, Records of the Judiciary, Series 006, Box 12, Law No. 348).

191. *Id.*

192. No ka noa ana o ke kai, ch. 3, § 8(1), in KUMU KANAWAI A ME NA KANAWAI O KO HAWAII PAE AINA 22, 22 (Honolulu 1841) ("O ke kai hoi mai kua nalu a hiki i kahakai no na konohiki no ia, a me na makaainana o kona aina iho no, aole ko hai mai."), translated in TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS ESTABLISHED IN THE REIGN OF KAMEHAMEHA III, at 36, 36 (Lahainaluna 1842) ("But the fishing ground from the coral reefs to the sea beach are for the landlords, and for the tenants of their several lands, but not for others."). Note that the Hawaiian statute refers to "*maka'āinana*" and "*konohiki*," following the traditional divisions of Hawaiian society, while the English version renders these concepts as "tenant" and "landlord."

193. 2d Act Kamehameha III, pt. 1, ch. 6, art. 5, §§ 2-3, 1845-1846 Haw. Sess. Laws 19, 90-91 (1846) (Haw. Kingdom).

This statute remained in place after the *Māhele*, giving rise to the question that animated the contest between the parties here: What effect, if any, did the new possibility of owning land have on the regulation of the kingdom's fisheries? In answering this question, neither party turned its back entirely on Hawaiian practices governing fisheries before reform. Rather, they used these practices as starting points to articulate the meaning of landownership.

Let us begin with Ha'alelea's arguments. As we have already seen, Ha'alelea had cause for concern by the 1850s that *haole* landholders in Honouliuli were interfering with the rights of those living "under him"—under his authority as *konoiki*.¹⁹⁴ We might understand this lawsuit, then, as Ha'alelea's attempt to protect those under his authority in a way that would have befitted a *pono* (proper, righteous) ruler. Through his lawyer, Ha'alelea advanced a jurisdictional reading of the effects of property reform. Ha'alelea contended that when Kekau'ōnohi sold land to Isaac, she removed the land and those living on it (including Isaac, and later Daniel) from her jurisdiction.¹⁹⁵ Daniel could not use the fisheries, let alone exclude anyone from them, because that was a right reserved only for those under the *konoiki*'s authority.

This reading of property reform would depart from pre-*Māhele* fishery regulation in an important way. Recall that Keahunui, who enforced *kapu* over the fisheries, testified that any inhabitant of an *ahupua'a* could access that *ahupua'a*'s fisheries, regardless of whether they lived close to the beach or not.¹⁹⁶ But under Ha'alelea's theory, it would matter a great deal where in an *ahupua'a* a potential claimant lived. Indeed, Ha'alelea's view of the effects of selling land on fisheries access would curtail the rights of the *maka'āinana* who lived on the land Daniel owned.¹⁹⁷ But this jurisdictional theory would also put Ha'alelea in a position to negotiate the effects of private property within the *ahupua'a* and address any issues created by troublesome new landowners.¹⁹⁸

194. See *supra* Part II.B.1.

195. See Jan. 27 Transcript, *supra* note 190, at 5.

196. *Id.* at 6-7.

197. At oral argument, Ha'alelea's lawyer objected to the introduction of a witness who lived on that land, contending that "any person living under Montgomery had no right to fish there, & this man living there, was as much interested as Montgomery in the right to fish there." Jan. 27 Transcript, *supra* note 190, at 5.

198. In this sense, Ha'alelea's jurisdictional reading of property reform exemplifies how Hawaiian rulers tried to use law to reconfigure preexisting governance mechanisms and address new resource contests. Before property reform, the chiefs used leases to regulate access to the kingdom's resources by *haole* inhabitants. Thus, an 1847 lease between Kekau'ōnohi and Isaac Montgomery, which gave Isaac control over some salt fields, included a provision that Isaac would "not perform unlawful acts of this Kingdom while he occupies this land." Olelo Hoolimalima [Lease Agreement] (July 16, 1847) (on file with Haw. Bureau of Land Convs., Book 3, Pages 212-13) (as translated by Devin Kamealoha Forrest). And this lease also contemplated that Isaac would exercise not only a property right over this land, but also a form of jurisdictional authority,
footnote continued on next page

One might expect to find Daniel recoiling from any allusion to Hawaiian social relations regulating fisheries before reform. But he did no such thing. Instead, he advanced his own nexus between private property and Hawaiian land ways. Kekau'ōnohi was no ordinary seller of land; she was a *konohiki*. When Isaac bought the land in Honouliuli from her, he “became the possessor of everything that *she* possessed,” including the fisheries, which, after all, the 1846 statute declared to be the private property of the *konohiki*.¹⁹⁹ Daniel owned the fisheries, subject only to Ha'alelea's statutory property right to declare a *kapu* over some fish.²⁰⁰ In short, Daniel tried to use Hawaiian land ways to secure a greater property claim after reform.²⁰¹

2. Purchasing land and reproducing status

The court took neither position. Instead, it downplayed the effects of private ownership's novelty on the regulation of fisheries and held that Daniel was a “tenant” within the meaning of the 1846 statute.²⁰² The court reasoned that when Isaac purchased land in Honouliuli, “he became, for the purposes of the law, governing this subject, a tenant of the Ahupuaa, and as such entitled to

providing that he would “make all decisions for this area, similar to how M. Kekauonohi always did.” *Id.* Placed alongside this lease's grant of jurisdictional authority to Isaac, Ha'alelea's own jurisdictional reading of property reform might reflect the sense that the sale of land severed the relationships that would have existed between lessor and lessee, and thus threatened Ha'alelea's ability to step in and negotiate resource contests between Montgomery and the *maka'āinana* living under Ha'alelea. The different property relations under the lease and the sale required a different jurisdictional reading of property reform. This reading did not imagine jurisdiction over the fisheries as running with the sale of the land; rather, it imagined that the sale of land excised that land and its people from the jurisdiction—and fish—of the *konohiki*.

199. Jan. 27 Transcript, *supra* note 190, at 5; 2d Act Kamehameha III, pt. 1, ch. 6, art. 5, § 2, 1845-1846 Haw. Sess. Laws 19, 90 (1846) (Haw. Kingdom).

200. Jan. 16 Transcript, *supra* note 182, at 5 (“Mr. Montgomery contended that Haalelea had no right to any fish except that which was Tabu'd, as stated in [the statute]. & that Haalelea being the only person, entitled to any thing, had forfeited that right by not having complied with the Law.”). This is also how the court understood his claim. *See Haalelea v. Montgomery*, 2 Haw. 62, 64 (1858) (Haw. Kingdom).

201. Daniel, like his *haole* contemporaries, may have understood Hawaiian governance practices through the lens of feudalism, and therefore interpreted the power of the stewards to govern the fisheries as boundless or authoritarian. *See OSORIO, supra* note 37, at 49. But this framing ignored the context in which the chiefs and *konohiki* exercised their power. As Noelani Arista explains, “The ‘good’ of any ali'i was expressed in Hawaiian by the word pono—the pono of the chief encompassed the nature of his rule, his protection of the people, and his ability to maintain healthy balance in the world through the proper administration of lands and resources, through the veneration of the akua (gods).” ARISTA, *supra* note 13, at 40.

202. *Haalelea*, 2 Haw. at 71.

take fish in the sea adjoining.”²⁰³ Because Daniel’s rights in the fisheries were not exclusive, he could not lawfully prevent Ha’alelea or his tenants from fishing there.²⁰⁴ Still, with “[n]o specific damage having been proved by the plaintiff,” the court awarded Ha’alelea only five dollars in nominal damages, plus costs.²⁰⁵ This conclusion followed from a specific reading of the word “tenant” in the statute: “We understand the word tenant, as used in this connection, to have lost its ancient restricted meaning, and to be almost synonymous, at the present time, with the word occupant . . . and that every person occupying lawfully, any part of ‘Honouliuli,’ is a tenant within the meaning of the law.”²⁰⁶

What warranted this reading of “tenant”? The court’s reading relied in large part on an analogy to the statutory rights of the *maka’āinana* in obtaining a *kuleana* land claim.²⁰⁷ Among those rights was the right to access the fisheries of an *ahupua’a*. The court reasoned that if a *kuleana* holder sold some of their land, the purchaser would also receive a right to access the fisheries, even if that right was not explicitly conferred through the sale.²⁰⁸ It then assumed that the same would be true if the *konohiki* sold land, even though the title of the *konohiki* did not derive from the statutes governing *kuleana* land.²⁰⁹

In effect, the court read into the governing statutes a power in the *konohiki* to create new tenants in the fisheries. More specifically, the court reasoned that the purchase of land in an *ahupua’a* reproduced some of the status relationships that previously existed between the *konohiki* and the *maka’āinana*, such that the new purchaser of land could enjoy the right to access fisheries previously attached to that status relationship.

The litigation around the Honouliuli fisheries thus illustrates how the meaning of landownership in the kingdom could derive, rather than depart, from Hawaiian land ways. Litigants like Ha’alelea and Daniel Montgomery advanced different interpretations of property reform, but each of them reached back to the world before private landownership—and to the status

203. *Id.*

204. *Id.* at 70-72.

205. *Id.* at 72.

206. *Id.* at 71.

207. *Id.* (citing Kuleana Act, 1850 Haw. Sess. Laws, in PENAL CODE, *supra* note 99, app. at 202 (Haw. Kingdom)).

208. *Id.*

209. *Id.* The court noted, however, that unlike a *kuleana* claimant, Kekau’ōnohi could have sold “the whole Ahapuaa, by metes and bounds,” without giving up her rights to the fisheries. *Id.* at 70. “Here, we think, is the great distinction between the rights of the Konohiki, and those of the tenant or occupant, for, while the former holds the fishery as his private property, the latter has only a right of piscary therein, as an incident to his tenancy.” *Id.* at 71.

relationships that governed that world—in order to articulate property claims. And the court in *Haalelea* reasoned that private property did not eliminate all incidences of these status relationships, but rather built upon them.

The outcome in *Haalelea* is striking because it relies on a view of private property that the same court—indeed, the same judge—would abandon just a few months later in *Oni*.²¹⁰ Again, the court in *Oni* had to craft an exception to its reasoning there in order to salvage its ruling in *Haalelea*. Recall that *Oni* assumed that the legislature meant to eliminate any rights it did not explicitly preserve in the Kuleana Act of 1850.²¹¹ This would include *both* pasturage rights *and* fishing rights. But if fishing rights had also been abrogated by the transition to private property, then the *Haalelea* court's central analogy between the sale of land by a *konohiki* and the sale of land by a *kuleana* holder would fall apart. To avoid that, Justice Robertson in *Haalelea* embraced more of the world of Hawaiian land ways that preceded reform than he would in *Oni*.

B. Water in Maui

Haalelea v. Montgomery illustrates a mode of reasoning about property grounded in Hawaiian land ways. We can find a similar approach in later litigation over surface water from the Wailuku River on the island of Maui, depicted in Figure 3. Like the litigation around Honouliuli's fisheries and *kula* land, this contest over surface water highlights how Hawaiian land ways informed landholders' understandings of their property rights. Indeed, reliance on pre-*Māhele* physical infrastructure to carry water to individual plots of land was a powerful reminder of the regime that had preceded private property—a regime that landowners worked to recreate in the aftermath of property reform.

The 1867 litigation I reconstruct here, *Peck v. Bailey*, illustrates an effort by a landowner named Sherman Peck to escape this regime by articulating an expansive property claim.²¹² This claim was rooted in his own reading of Hawaiian land ways, which privileged the power of the *konohiki* over the reciprocity between the *konohiki* and the *maka'āinana*. Peck argued that he had obtained title to his land from the *konohiki*, and he claimed that the *konohiki* had the power to withhold water from subordinates along the watercourse.²¹³

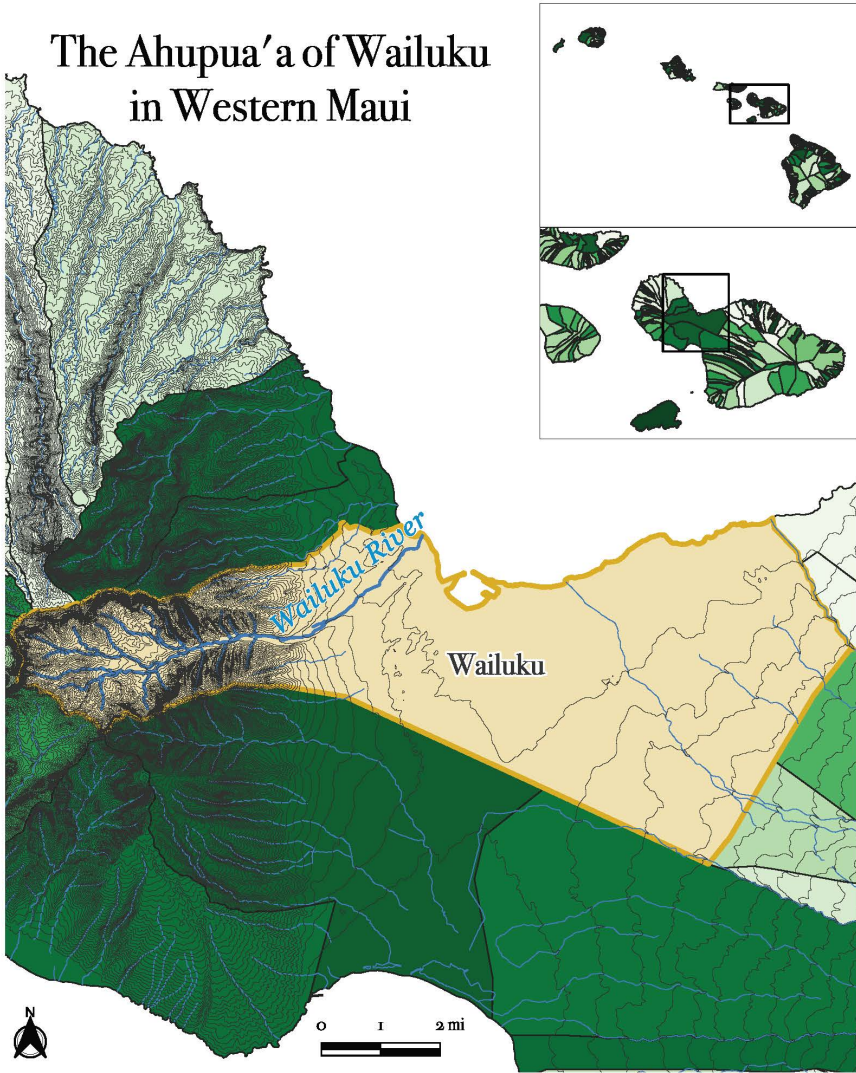
210. See *supra* Part II.C.

211. *Oni v. Meek*, 2 Haw. 87, 95 (1858) (Haw. Kingdom).

212. 8 Haw. 658, 659 (1867) (Haw. Kingdom) (Allen, C.J., in chambers).

213. *Id.*

Figure 3
The Ahupua'a of Wailuku in Western Maui



Map Legend: Western Maui

- 100 Foot Elevation Contours
- Wailuku River and Tributaries
- Other Rivers and Tributaries
- Wailuku Ahupua'a

Map produced using public data provided by the State of
Hawai'i, available at <http://geoportal.hawaii.gov>.
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Peck's attempt to escape this regime for allocating surface water was unsuccessful,²¹⁴ but it nonetheless highlights two important facts about how legal actors made sense of property in the aftermath of reform. First, it affords yet another example of landowners relying on pre-*Māhele* status relationships to make sense of private landownership. Second, it surfaces the political-economic concerns that informed how the court articulated the relationship between the kingdom's property regime and the Hawaiian land ways that had preceded it. This Subpart begins by surveying the mechanisms Hawaiians used to collect and allocate surface water before the *Māhele* and how the people in Wailuku, Maui, worked to rearticulate these mechanisms after property reform. It then examines Sherman Peck's efforts to monopolize water in Wailuku. It closes by unpacking how the kingdom's chancellor rejected Peck's efforts while leaving the door open to the kinds of claims that Peck articulated.

1. Reconstructing ditches and rights

Hawaiians built *auwai* (irrigation ditches) that connected mountain streams to the terraces they used to grow *kalo*. The connection between surface-water rights and *kalo* continued to structure water governance long after the *Māhele*. As one *haole* judge wrote in the early twentieth century, "Generally but little has remained of the customary law except the system of water rights, apportioned according to certain hours and days for use upon the *kalo* lands which required thorough irrigation."²¹⁵ The physical infrastructure necessary to sustain this system of rights remained in place after the *Māhele*, and Hawaiians worked to reconstruct the legal infrastructure needed to keep the system running as well.

The ditches that fed irrigated terraces required coordination and continuous labor to work. Their construction was directed by the *konohiki*, who would call upon those who would benefit from a ditch to build and maintain it.²¹⁶ The amount of labor contributed to these efforts determined the share of water a planter would receive.²¹⁷ The *konohiki*, as "water boss," would allocate water among the planters and inspect the dam with them before each use.²¹⁸ A planter would then repair the ditch as needed before routing the water into his own inlet.²¹⁹ Sometimes, the *konohiki* called on all planters for

214. *See id.* at 674 (dismissing Peck's complaint).

215. Alfred Stedman Hartwell, *Forty Years of Hawaii Nei*, 54 ANN. REP. HAW. HIST. SOC'Y 9, 14 (1947).

216. HANDY ET AL., *supra* note 42, at 58.

217. *Id.*

218. *Id.* at 59.

219. *Id.*

more substantial repairs.²²⁰ Freshets (floods produced by heavy rain) could destroy the ditch and impede the flow of water.²²¹ In short, *kalo* cultivation required coordination among neighbors and continuous labor to maintain the necessary flow of water.

This system for allocating water survived both the *Māhele* and the turn to new agricultural ventures. But its survival turned on concrete efforts by the islands' inhabitants to recreate the coordination that made this system work. We observe one such effort in the *ahupua'a* of Wailuku on the island of Maui, where the Wailuku River flowed into the lands of Maui's central valley.

The *Māhele* disrupted the mechanisms Hawaiians relied upon to distribute the waters of the Wailuku River. When the "kuleana system commenced," explained a Wailuku resident named Kauma in 1866, "the authority of the *konohiki* . . . was over."²²² This brought problems to Wailuku: The people there "were in *pilikia*" (trouble) because the lack of a *konohiki* to direct planters' efforts threatened the flow of water for the region.²²³ To address this problem, Kauma explained that he and his neighbors—both Hawaiian and *haole* landholders—"joined together, that they might unanimously consent to work together to keep the ditch in repair. They made [an] association, there was [sic] certain laws made for the regular distribution of the water for the different lands."²²⁴

The resulting association recreated significant aspects of pre-*Māhele* water governance. Its articles of agreement—a recorded instrument—specified that the members of the association would select one president and three "luna hooko" (executors) empowered to enforce the terms of the agreement.²²⁵ Kauma noted that the first executors of the Wailuku Water Association were three Hawaiians: Pepe, Kalohokula, and Namailo.²²⁶ Kauma also explained that these executors had two main responsibilities: "to distribute water to this land & to that land, & also to call upon the people to come & repair the ditch, or clear it out from obstructions."²²⁷ Much as it had before the *Māhele*, water flow

220. *Id.*

221. For example, Judge Kahale (a witness in Peck's case) recalled that in 1840 "a very heavy freshet . . . washed away the bed of [the local ditch], so that the water could not run down" the entire course of the ditch. Transcript of Hearing at 192, *Peck v. Bailey*, 8 Haw. 658 (1867) (Haw. Kingdom) (on file with Haw. State Archives, Records of the Judiciary, Series 004, Box 27, Eq. No. 305).

222. *Id.* at 169-70.

223. *Id.* at 170.

224. *Id.*

225. Wailuku Water Course Articles of Agreement § 1, *Peck*, 8 Haw. 658 (on file with Haw. State Archives, Records of the Judiciary, Series 004, Box 27, Eq. No. 305).

226. Transcript of Hearing, *supra* note 221, at 172.

227. *Id.*

was conditioned on labor. Under the terms of the agreement, members with parcels under five acres were required to send one person to work on the ditch when repairs were needed; members with more land had to send more workers.²²⁸

This association provided continuity to the allocation of surface water after property reform. Even as privatization was taking place and Hawaiians were claiming *kuleana* parcels, they and their neighbors made sense of property by looking back to the status regime that had connected the *konohiki* and the *maka'ainana* and to the structures and practices that had developed around this relationship. One man named Olelo summarized this conceptual move: “The common people are Konohikis now . . . [E]verybody now that has a Kuleana of his own is a Konohiki . . .”²²⁹

The method of allocating water may have been similar, even identical, before and after property reform, but the uses of the land were changing to the detriment of Hawaiians in the area. An 1866 letter to the editor of a Honolulu newspaper alerts us to the shifts taking place on Maui’s landscape:

A letter arrived at our office from S.D. Hakuole, of Kula, Maui, informing that the land of Wailuku is completely covered with sugarcane plantations. And it further informs us that the irrigated taro fields are being dried out by foreigners, as a place to plant sugarcane. He is fearing that the people in that place will stop eating *poi*, and perhaps eat only the stiff hardtack crackers that hurt the teeth and . . . the light bread by which the Hawaiian people will not be satisfied. Since the people are accustomed to eating *poi*.²³⁰

The turn to sugar in Wailuku repurposed water in the area—not only for sugar cultivation, but also to power the mills needed to process it.²³¹ To satisfy these new needs for the water of Wailuku, Sherman Peck tried to find a way out of the Wailuku Water Association and claim more water for himself.

228. Wailuku Water Course Articles of Agreement, *supra* note 225, § 6.

229. Transcript of Hearing, *supra* note 221, at 79.

230. *Auwe! Pau Wailuku i ka mahiko* [Alas! Wailuku Is All Plantations], KA NUPEPA KUOKOA (Honolulu), Jan. 13, 1866, at 2 (as translated by the Author and Kahanuola Tabor). The original reads as follows:

Ua hiki mai ma ko makou nei keena hana, he palapala na S.D. Hakuole, o Kula, Maui, e hai mai ana i ka pau loa o ka aina o Wailuku i ka mahina i ke ko. A ke hai hou mai nei no ke hoomaloo ia nei na loi kanu kalo e na haole, i wahi e kanu ai i ke ko. A ke makau nei oia e pau ana ka ai ana o na kanaka oia wahi i ka ai ana i ka poi, a e ai wale aku ana no paha i ka balena oolea hoeha niho . . . palaoa mama e maona ole ai na kanaka Hawaii. Oiai ua maa na kanaka i ka ai i ka poi.

Id. *Poi* is steamed, mashed *kalo*. HANDY ET AL., *supra* note 42, at 77.

231. Mills figure prominently in the construction of rights regimes over water. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 47-53 (1977) (discussing the importance of mill acts in transforming legal conceptions of property); Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261 (1990) (discussing the role of mills in shaping water law).

2. Water for the sugar mill

In 1863, Sherman Peck and his associates began planting sugarcane in Wailuku as the Wailuku Sugar Company.²³² The company was part of a boom in Hawaiian sugar production fed by the American Civil War and the collapse of American sugar production, which translated into more and more landowners and tenants in Wailuku repurposing lands to grow sugarcane.²³³ They built their plantation on a site that had housed Kamehameha III's own sugar plantation in the 1840s, but which had since been abandoned.²³⁴ In the process of setting up a new sugar plantation, the Wailuku Sugar Company rebuilt the king's old sugar mill, which had once turned with the help of water from the Wailuku River.²³⁵ By the following year, it seems that the water running from the river to the ditch that fed the mill could no longer power the machinery.²³⁶

Why was there not enough water? At least some of the shortage must have stemmed from the fact that the Wailuku Sugar Company was itself cultivating new lands. As Figure 4 illustrates, the Wailuku Sugar Company diverted water from the Wailuku River at two points along its course—first for its cane fields and second for its mill. But the owners and operators of the company placed the blame for the shortage elsewhere, specifically on their neighbor Edward Bailey.²³⁷ In March 1866, the company's plantation manager sent a letter to

232. *Peck v. Bailey*, 8 Haw. 658, 663 (1867) (Haw. Kingdom) (Allen, C.J., in chambers). This was alternately referred to as the Wailuku Plantation and the Wailuku Sugar Company. *Contrast* Bill of Complaint at 1, *Peck*, 8 Haw. 658 (on file with Haw. State Archives, Records of the Judiciary, Series 004, Box 27, Eq. No. 305) (referring to the partnership as “doing business under the name and style of the Wailuku Plantation”), *with* Transcript of Hearing, *supra* note 221, at 93 (“I know the Wailuku Sugar Comp[an]y. They have property in Wailuku, cane lands, & a mill near Gov. Road south side of Wailuku River.” (capitalization altered)).

233. On the effects of the Civil War on American sugar production, see generally MOON-HO JUNG, *COOLIES AND CANE: RACE, LABOR, AND SUGAR IN THE AGE OF EMANCIPATION* (2006). On the turn to sugarcane in Wailuku, see generally Transcript of Hearing, note 221 above.

234. *See* Transcript of Hearing, *supra* note 221, at 83-84, 86.

235. *See id.* at 83-84 (“[In] the years 1841, 42, 43 [one of the river’s watercourses] was used for a Mill . . . in the name of the King . . . The Mill was located where the present mill stands.”). “[T]he King’s mill stood there 3 years, it was removed in 1843, the water became less after the removal of the mill, because it was not taken such care of.” *Id.* at 86. The new mill “was erected . . . in the early part of 1864.” *Id.* at 87. On Kamehameha III’s sugar venture, see Carol A. MacLennan, *Foundations of Sugar’s Power: Early Maui Plantations, 1840-1860*, 29 HAW. J. HIST. 33, 36-40 (1995); and CAROL A. MACLENNAN, *SOVEREIGN SUGAR: INDUSTRY AND ENVIRONMENT IN HAWAII* 84-85 (2014).

236. *See* Transcript of Hearing, *supra* note 221, at 110.

237. Bill of Complaint, *supra* note 232, at 3-4 (accusing Bailey of altering the flow of the water).

Bailey claiming that Bailey had started plowing some new land in Maui and that he was about to start planting sugarcane on that land.²³⁸ “[T]he owners of the Wailuku Plantation . . . *protest* against your taking water from the Wailuku Stream, to irrigate the said land,” warned the manager, “as any such appropriation of water they regard as a trespass on their vested rights.”²³⁹

Bailey replied with a terse letter. He believed he had “a right to his usual amount of water, and he [did] not expect to be interfered with in the use of it whether he chooses to water with it one part of his own plantation or another part.”²⁴⁰ In June of that year, Peck and his associates brought a bill in equity against Bailey, seeking an injunction to keep him from using any means to dam the river and interrupt the flow of water to the company’s mill.²⁴¹

In this bill, Peck and his associates made a striking claim about the scope of their rights over the waters of the Wailuku River. They argued that they could preclude Bailey from drawing *any* water for his sugarcane venture from the river.²⁴² They asserted that, because they had obtained their land from the *konohiki* of Wailuku, they had acquired by appurtenance his “rights in the Wailuku Stream of Lord Paramount.”²⁴³ Bailey, on the other hand, was not entitled to use water “in any other way than was of ancient times allotted . . . by the Konohiki for the use of certain kalo patches.”²⁴⁴ Because Bailey was now growing sugarcane on this land, Peck and his associates, stepping in the shoes of the former “Lord Paramount” of the river, could force Bailey to use “infinitely less” water from the Wailuku River.²⁴⁵

238. Letter from N.W. Gallant, Manager of the Wailuku Plantation, to E. Bailey & Son Dated Mar. 7, 1866, *Peck v. Bailey*, 8 Haw. 658 (1867) (Haw. Kingdom) (on file with Haw. State Archives, Records of the Judiciary, Series 004, Box 27, Eq. No. 305) (observing that Bailey had “commenced plowing the Kula land, lying west of the gov’t road leading to Waikapu”).

239. *Id.*

240. Letter from Edward Bailey to N.W. Gallant, Manager of the Wailuku Plantation Dated Mar. 7, 1866, *Peck*, 8 Haw. 658 (on file with Haw. State Archives, Records of the Judiciary, Series 004, Box 27, Eq. No. 305).

241. Bill of Complaint, *supra* note 232, at 8-9.

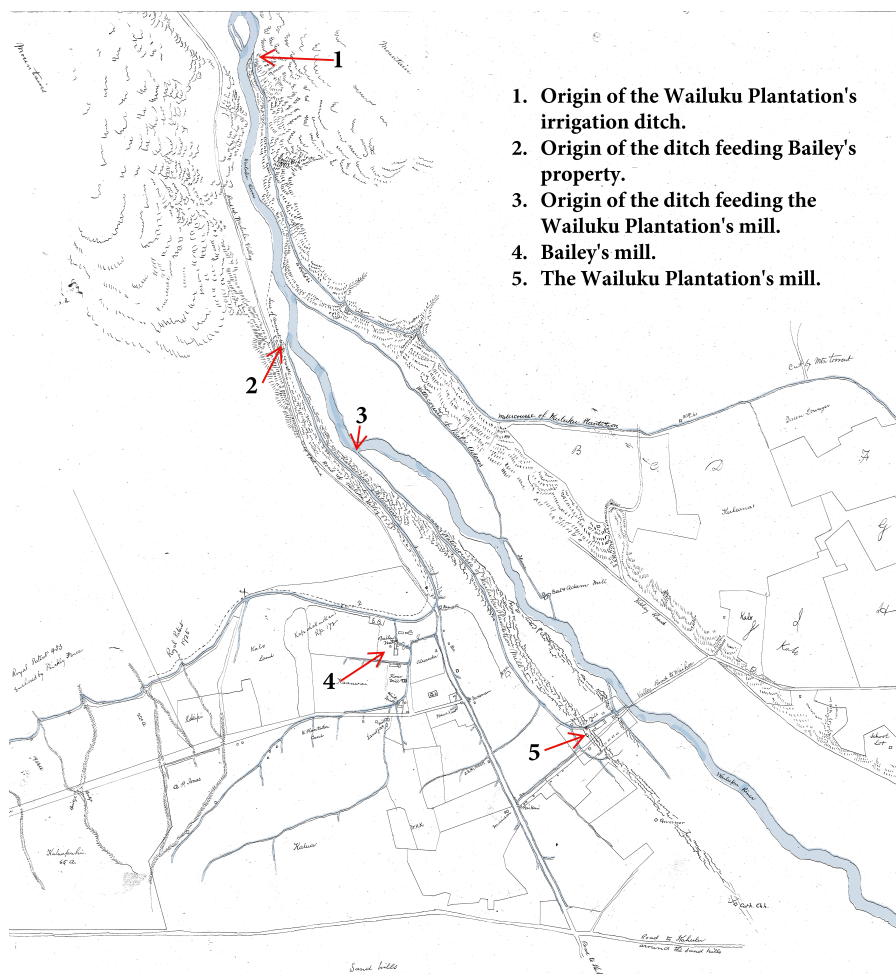
242. Bill of Complaint, *supra* note 232, at 2-3.

243. *Id.* at 2.

244. *Id.* at 2-3. In fact, both Peck and Bailey had obtained their lands from the same *konohiki*. *Peck*, 8 Haw. at 662.

245. Bill of Complaint, *supra* note 232, at 2-3. The court interpreted the claim as follows:
It is contended by the complainants that as the defendant has the right only to use the water of the Kamaauwai ditch for the watering of twelve acres of kalo land, the extension of the ditch on kula land and diversion of the water from the kalo patches to cane was illegal, because it was originally appropriated for this kalo land and always used as such . . .
Peck, 8 Haw. at 665.

Figure 4
Ditches Along the Wailuku River



Note. Portion of a map previously copied from the *Peck v. Bailey* case file, date and author unknown.²⁴⁶ I have added color to identify the Wailuku River and the ditches flowing from it. I have also identified key sites of diversion and water use at issue in the litigation.

246. Tracing of 597, *E. Bailey vs. Wailuku Plantation, Water Case, Wailuku Maui*, Copied from Map in Records of Supreme Court Honolulu (on file with Haw. Dep't Acct. & Gen. Servs., Land Survey, Registered Map No. 0885).

3. The trouble with “illiberal” rights

The Chancellor (and Chief Justice) of the kingdom, Elisha Hunt Allen, traveled to the island of Maui in late July to take testimony on the question of the *konoiki*'s water rights.²⁴⁷ Over two weeks and some two hundred pages of handwritten testimony, it became clear that Peck and his associates had left much out of their account of the water shortage, including their own expanding sugar operation²⁴⁸ and their knowing participation in the Wailuku Water Association.²⁴⁹ Chief Justice Allen therefore declined to enjoin Bailey from diverting any water.²⁵⁰ Chief Justice Allen's opinion is worth entertaining briefly for two reasons. First, it confirms the importance of Hawaiian status relationships for making sense of property. And second, it gives us a glimpse at a political-economic logic used to assess these status relationships.

Allen's disposition of the bill suggests that he was mindful of the importance of pre-*Māhele* status relationships for making sense of landownership in the aftermath of reform. He could not award the injunction, for this kind of remedy was not available for the “infringement of even doubtful rights, until they have been established at law.”²⁵¹ He instead dismissed the application and ordered the parties to pay their own costs.²⁵² This was an equitable result because, to his mind, the parties were earnestly confused about what landownership meant for water allocation. Both parties, he wrote, had “mistaken ideas of their rights, which were very honestly entertained.”²⁵³ This suggests that Peck's claim about the scope of his rights, rooted in the power of the *konoiki*, was not so implausible that he should have known better. The evidence did not support his view, but under different circumstances, a property transfer from a *konoiki* might yield such a result. Chief Justice Allen's opinion suggests, at the very least, an openness to rooting property claims in status relationships.

247. See Transcript of Hearing, *supra* note 221, at 1 (noting that the hearing took place in Wailuku, Maui).

248. See *Peck*, 8 Haw. at 664 (“From the general current of the evidence, it appears to me most manifest that the injury which the complainants have received, from want of the usual flow of water to the mill, has arisen from their own acts. They have diverted a large quantity of water by the Kalaniauwai, which was accustomed to flow in the Wailuku river, and which supplied the Kamaauwai and the mill water course.”).

249. See *id.* at 665-66 (“Various parties interested in the Kamaauwai have hitherto mutually agreed upon the diversion of water, and for a period the complainants participated with them.”).

250. *Id.* at 674 (“I cannot certainly in this case issue an injunction as prayed for.”).

251. *Id.*

252. *Id.*

253. *Id.*

Nonetheless, Chief Justice Allen was skeptical of Peck's account of his rights. Peck's claim that Bailey could only use water to grow *kalo* struck the chief justice as "an illiberal construction of the prescriptive right and one which would do infinite mischief."²⁵⁴ Peck's interpretation was "illiberal" in that it circumscribed the uses to which Bailey could put his water and his land. In casting doubt on this construction, Chief Justice Allen delineated a political-economic vision underlying his understanding of property rights, one favoring innovation and development.²⁵⁵ He looked to the law of England and the United States, where it was "well settled" that once a right to use a certain quantity of water had been acquired, that right could be used however the rightsholder saw fit, provided that the use did not injure other rightsholders.²⁵⁶

Chief Justice Allen quoted New York's Chancellor Kent for an explanation of the policy underlying this rule: Landholders could not be required "to use the water in the precise manner, or to apply it to the same mill, for such a construction of the rule would *stop all improvement in machinery*."²⁵⁷ In this account, property law had a forward momentum toward improvement and economic growth; narrowing property owners' rights also restricted this momentum. Chief Justice Allen was suspicious of Peck's claim because it limited Bailey's latitude to use his property. This helps explain why the chief justice claimed to base his own decision not only on "general principles of law and equity" but also on "the common judgment of the practical planter."²⁵⁸

The arguments made in *Peck v. Bailey* confirm the importance of Hawaiian status relations in making sense of property after reform. Rather than thinking about property reform as abandoning these structures, we should think of it as unsettling a world in which status relationships governed access to the islands'

254. *Id.* at 665.

255. As Morton Horwitz argued in the context of water rights in New England, American courts in the first half of the nineteenth century renounced the view of property as "absolute dominion over land" to facilitate economic growth. See HORWITZ, *supra* note 231, at 31-62. Chief Justice Allen seems to be engaging here in a similar form of reasoning about property. He is concerned that granting such a robust property right to Peck and his associates would hinder their neighbors' ability to use their lands as they saw fit, thus possibly hindering innovation.

256. See *Peck*, 8 Haw. at 666-68 ("In this country' (the United States) . . . 'the doctrine is [sic] well settled, that where a right has been acquired . . . to use a certain quantity of water, a change in the mode and objects of use is justifiable; and here as in England the only restriction is, that the alterations made from time to time shall not be injurious to those whose interests are involved.'" (quoting JOSEPH K. ANGELL, A TREATISE ON THE COMMON LAW OF WATERCOURSES 243 (Boston, Charles C. Little & James Brown 4th ed. 1850))).

257. *Id.* at 668 (emphasis added) (quoting 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 576-77 (Boston, Little, Brown & Co. 9th ed. 1858)).

258. *Id.* at 674.

many resources. But even as property destabilized this world, Hawaiian land ways remained available as hermeneutic devices with which to make sense of private property in land. This was true for both Hawaiians and the kingdom's *haole* denizens.

At the same time, *Peck* suggests some limits to the role that traditional status relationships might play in the definition of property rights. Specifically, where property claims threatened to constrain economic development, courts could be skeptical of reliance on status relations to ascertain the meaning of landownership. This seems to map well on to the reasoning in *Oni*, where the court voiced concern about the implications of pasturage rights for large landholders across the kingdom. In other words, property was not itself an empty concept into which people could read just any meaning. Rather, it was a concept with commitments to a particular course of economic development.

IV. Telling Stories About Property's Origins

Oni v. Meek,²⁵⁹ *Haalelea v. Montgomery*,²⁶⁰ and *Peck v. Bailey*²⁶¹ show that after property reform, it remained possible to tell two origin stories about Hawai'i's property regime. One of these accounts was a blank-slate story: As told in *Oni*, property reform revolutionized land relationships in the kingdom and created a new property regime wholesale.²⁶² The second account looked more like a palimpsest: As suggested in *Haalelea* and *Peck*, property reform built upon preexisting Hawaiian land ways, which claimants could reinterpret in their efforts to make property claims.²⁶³ The Hawaiian Supreme Court never chose one story over the other. This is most striking when we consider *Haalelea* and *Oni*. Both were written months apart by the same justice, who sensed that his blank-slate story in *Oni* was in tension with his palimpsest story in *Haalelea*.²⁶⁴

Read together, these cases offer two insights. The first contributes to a strand of property theory that understands property as a system of communication. Because property rights are good against the world, scholars argue that these rights must be communicated in a language that third parties understand. These cases suggest that the language of property is not a given; rather, it arises as participants in a property regime assemble components of

259. 2 Haw. 87 (1858) (Haw. Kingdom).

260. 2 Haw. 62 (1858) (Haw. Kingdom).

261. 8 Haw. 658.

262. See *supra* Part II.

263. See *supra* Part III.

264. See *supra* text accompanying notes 210-11.

the language into competing interpretations of the meaning of ownership. These cases show litigants using Hawaiian land ways as components of property's language and the Hawaiian Supreme Court picking and choosing among these components as it attempted to articulate an authoritative language of property.²⁶⁵

The second insight is more historical, and it concerns why some attempts to incorporate Hawaiian land ways into property's language succeeded and others failed. The different outcomes reflect the Hawaiian Supreme Court's bias toward uses of the land it thought were useful and thus contributed to economic growth. Hawai'i thus offers an episode of a larger global story in which traditional or communal modes of governing resource access and use were replaced by market relations. At the same time, however, Hawai'i shows that the expansion of market relationships did not always require the elimination of these traditional or communal relationships. Sometimes, these relationships could be repurposed to serve an extractive capitalism.

A. Shaping Property's Language

A vibrant strain of theoretical work argues that a principal function of property law is to manage the information that property conveys to the world. This is an important function because, unlike other private rights, property rights are supposed to be good against the world.²⁶⁶ Whereas contract law presumes that parties know their rights because they agreed to them, property law must enforce the rights of owners against third parties who might not know who the owner is, whether the owner has a claim to the thing owned, what the nature of that claim might be, and so on.²⁶⁷ Therefore, property law must concern itself with how property communicates to the world around it.

Scholars disagree on how property law should go about managing these communications. Some scholars argue that property law should reduce transaction costs that come with the complexities of everyday life. In delineating bundles of things and enforcing the boundaries around these bundles, property law can send a clear message to third parties about how they may or may not engage with these bundles: "keep out" or "come in."²⁶⁸ This

265. This dynamic is akin to the "jurispathic" function that Robert Cover attributed to courts: "Confronting the luxuriant growth of a hundred legal traditions, [judges] assert that *this one* is law and destroy or try to destroy the rest." Cover, *supra* note 4, at 53.

266. Smith, *supra* note 102, at 1706 ("The traditional definition of property is a right to a thing good against the world—it is an in rem right.")

267. See Merrill & Smith, *supra* note 27, at 8 ("When property rights are created, third parties must expend time and resources to determine the attributes of these rights The existence of unusual property rights increases the cost of processing information about all property rights.")

268. Smith, *supra* note 102, at 1693-94.

allows third parties to more easily navigate the world around them without having to undertake extensive investigations into their legal duties.²⁶⁹ Other scholars contend that property law should not only streamline private relationships; it should also constitute them to ensure that they “reflect and shape our deepest values.”²⁷⁰ For example, allowing landlords unfettered power over their tenants would convey an image of the landlord-tenant relationship that is difficult to square with foundational democratic commitments to self-determination.²⁷¹

Despite the substantial differences between these two approaches to how property talks,²⁷² they both assume that there exists a language of property

269. See *id.* at 1693 (“Property is a shortcut over the ‘complete’ property system that would, in limitlessly tailored fashion, specify all the rights, duties, privileges, and so forth, holding between persons with respect to the most fine-grained uses of the most articulated attributes of resources.”).

270. E.g., Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1299 (2014). Jedediah Purdy has advanced a slightly different version of this argument, maintaining that our ideas about property arise “within traditions of principle, argument, and aspiration, which in turn take some of their coherence and force from the larger social and legal imagination in which they are related.” JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* 18 (2010). Purdy’s work traces the rise of the competing and complementing values that American legal academia associates with property to nineteenth-century Scottish Enlightenment thought. *Id.*

271. Singer has analogized a situation in which “a mortgage lender offers onerous terms to someone who is desperate to become a home owner and get a share in the American Dream” to the kinds of relationships—“master/slave” and “lord/vassal”—that are “out of bounds” in a democracy. Joseph William Singer, Essay, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORN. L. REV. 1009, 1048 (2009).

272. These two accounts of property differ on the relationship between property and the social order. Scholars focused on transaction costs tend to work from (and seek to aid) a social order shaped by privately articulated values. This is akin to what Gregory Alexander described as the “commodity theory of property” in the United States, which depicts property as delineating “the legal and political sphere within which individuals are free to pursue their own private agendas and . . . preferences.” GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970*, at 1 (1997). From this standpoint, a central puzzle emerges: How can people build their lives in a world full of other people, similarly engaged in building their own lives? Property has a crucial role to play in solving this puzzle by facilitating people’s interactions with each other. Calls to consider systemic values and to further investigate the character of people’s relationships to each other—as Henry Smith might put it, to “[p]romot[e] the promiscuous employment of contextual information in property”—only make people’s interactions more costly, thus undermining property’s function. Smith, *supra* note 102, at 1717.

By contrast, scholars focusing on the values that property promotes argue that reducing transaction costs itself implicates value judgments. See, e.g., Singer, *supra* note 270, at 1300 (“[Smith] wants to focus on the structures of property that are necessary to enable *any* legitimate values to be promoted. Yet despite these ambitions, Smith does not eschew value choices.” (footnote omitted)). The vision of the social

footnote continued on next page

that can both reduce information costs and convey moral meaning. This is a longstanding assumption in property theory: that, as Carol Rose put it, people must be able to claim ownership “in a language that is understood” by others.²⁷³ The stories told about property’s origins in Hawai’i add nuance to this assumption. Rather than taking property’s language for granted, we can see it as something shaped and contested by participants in a property regime.

What kinds of ideas could a denizen of the Kingdom of Hawai’i rely upon in making property claims following reform? In other words, what were the components of the kingdom’s property language? In Hawai’i, as elsewhere, fences and other boundary markers became important mechanisms with which to communicate a property claim²⁷⁴—physical symbols of the right to exclude. We might say that, in responding to Oni’s lawsuit, Meek accused Oni of not speaking the right language.²⁷⁵ But the cases reconstructed here invite us to second-guess that claim in two ways. First, they make clear that there was much more to the language of property in Hawai’i than fences and that Hawaiian land ways were a component of that language. Second, the cases cast doubt on what the “right language” of property was.

Indeed, one way to interpret the court’s toggling between origin stories is to say that the court was trying to decide whether Hawaiian land ways would be part of the kingdom’s property language. Thus recast, the cases offer a powerful insight into property’s language: Before the language of property can communicate anything, someone must make choices about what that language

order underlying this account of property is one in which people already share commitments to different norms, such that the choices among different property arrangements implicate choices among different values. In other words, this is a vision of private ordering in which private choices are informed by and implicate questions of public good. *Id.* at 1299. On this note, Singer’s account is part of a family of property theories that take a skeptical stance toward the centering of individual self-interest in property law. See Ezra Rosser, Essay, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 110-11 (2013); Carol M. Rose, Essay, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1902-03 (2007); ALEXANDER, *supra*, at 1-2.

273. Rose, *supra* note 7, at 82.

274. See FISCHER, *supra* note 49, at 61 (“[M]any Hawaiians . . . built stone fences and walls to protect their crops [from harassing cattle.]”); cf. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1328 (1993) (“Because private property in land necessitates the policing of boundaries, advances in surveying and fencing techniques may enhance the comparative efficiency of the institution.”).

275. See *supra* Part II. Carol Rose has offered a similar reading of Chief Justice John Marshall’s writings on Native American property in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). See Rose, *supra* note 7, at 85-88 (“[Native Americans] did not play the approved language game and refused to get into the business of publishing or reading the accepted texts about property.”).

will be and what components it will include.²⁷⁶ Some scholars have portrayed property's language as largely a function of its audience. For instance, they have argued that larger and more heterogenous audiences require a simpler language that can cut across distance and difference.²⁷⁷ But note that this involves an antecedent choice to speak to a larger and more diverse audience; not all property regimes follow that path.²⁷⁸ This does not mean that there is no relationship between audience and language. Indeed, an individual actor might only be successful in shaping a property regime's language to the degree they remain within the confines of what the community understands.

We can see these dynamics play out in the cases reconstructed here. *Oni* seemingly rejected claims rooted in the *maka'āinana's* customs as components of property's language, and it did so by portraying property as a complete revolution.²⁷⁹ By the court's own admission, however, the revolution was incomplete, as preexisting fishing practices informed the scope of rights for new landowners. The court could not push a wholesale rejection of Hawaiian land ways because, in its own experience, the kingdom's denizens relied on these land ways to make property claims that the court itself had recognized. It had to pick and choose among these land ways—to select the components of property's language—and it had to do so in a way that was mindful of its audiences' expectations.

This theoretical insight into the language of property carries important consequences for how we think about the meaning of property reform in Hawai'i and how we write its history. Most importantly, it allows us to

276. Cf. Rose, *supra* note 3, at 51 (“At the outset of private property, people have to cooperate to set up the system—they have to get themselves organized, go to the meetings, discuss the options, figure out who gets what and how entitlements will be protected.”).

277. See, e.g., Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1125 (2003) (“The larger and more diverse the target audience, the more courts will intervene to enforce a limit on the intensiveness of information carried by the set of symbols.”); Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 12 (2009) (arguing that the law's reliance on custom places an “informational burden . . . on duty-holders who are farther removed from the community that originated a custom”); Brady, *supra* note 12, at 881 (“[U]nder conditions of land scarcity and growing population size and diversity, standardized information demarcating boundaries became more important because it facilitated transactions and reduced a rising tide of litigation.”).

278. For instance, Brady argues that early New Haven employed a much more customized language around boundaries in part because it had a “smaller and more homogenous” community. Brady, *supra* note 12, at 941. But it was smaller and more homogenous by choice. As Brady explains, “New England settlers, including residents of New Haven, defined themselves against others: new immigrants, other settlers from different colonial powers, and Native Americans. Exclusion was built into the structure of society.” *Id.* at 946 (footnote omitted).

279. See *supra* Part II.A.

characterize the Hawaiian property regime as a hybrid regime, with components of its language derived from different legal traditions. Other scholars have made a similar claim about its hybridity, though they have tended to portray this hybridity as preserving specific pre-*Māhele* legal entitlements. For example, Kamanamaikalani Beamer has argued that the chiefs “codified . . . ancient resource use rights into law” through the Kuleana Act.²⁸⁰ While I think there is some degree of codification at play, the cases I have reconstructed here suggest that this perspective on hybridity underestimates the interpretive creativity of the kingdom’s denizens in the aftermath of reform. Think back to Olelo’s testimony in the *Peck* litigation: “The common people are Konohikis now . . . [E]verybody now that has a Kuleana of his own is a Konohiki”²⁸¹ In transposing the authority and responsibility over the land from the *konohiki* to the common people, Olelo relied on preexisting Hawaiian land ways without claiming that the structures that existed before had been codified into the present. Hawaiian land ways became components of the hybrid language of property, which the kingdom’s denizens could mobilize to give meaning to property reform.

This perspective should also lead us to reject the notion that Hawaiians did not understand the meaning of property. Some scholars have argued that the *maka‘āinana* misunderstood the meaning of property reform and continued to believe—erroneously—that they would be able to continue accessing resources as they did before reform.²⁸² In response, others have highlighted the fact that Hawaiians understood property reform and acquired more land than previous scholarship has acknowledged.²⁸³ But minding the malleability of property’s language suggests another rejoinder to the position that Hawaiians did not understand property reform: The *maka‘āinana* offered their own understanding of what property reform meant in tones that were plausible and intelligible to their neighbors, but which did not win out because (as I address in the next Subpart) their understanding of property seemed to challenge an ascendant political-economic vision.

280. BEAMER, *supra* note 15, at 151.

281. Transcript of Hearing, *supra* note 221, at 79.

282. See, e.g., DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII 3 (2d ed. 2010) (discussing “unfamiliarity with European concepts of landownership” as one of the reasons why Hawaiians lost their lands); Linnekin, *supra* note 49, at 174 (“Clearly, many natives did not comprehend the meaning of private *kuleanas*, and believed that they could continue to live ‘under the *konohiki*’ as they had always done.”).

283. See J. KĒHAULANI KAUANUI, PARADOXES OF HAWAIIAN SOVEREIGNTY: LAND, SEX, AND THE COLONIAL POLITICS OF STATE NATIONALISM 90-97 (2018) (discussing scholarship that challenges the assumption that privatization of land led inexorably to dispossession by focusing on how Hawaiians engaged with landownership).

This view is strengthened by how much *haole* litigants in the cases discussed here relied on Hawaiian land ways to make property claims. Consider Peck and Montgomery—both litigants advanced expansive property claims rooted in the pre-*Māhele* status of the *konohiki*.²⁸⁴ To do so, both flattened the relationship between the *konohiki* and the *makaʻāinana* into one of domination and control, ignoring the bounds on the *konohiki*'s power and the power of the *makaʻāinana* to exit the rule of an overbearing chief. The likes of Peck and Bailey are seldom accused of misunderstanding the meaning of property, despite doing what Oni did: speaking a language of property that incorporated Hawaiian land ways.

B. Stories and Political Economy

If Oni, like Meek, was presenting a plausible interpretation of property reform, why did he lose? Why did some Hawaiian land ways become part of the language of property while others did not? Once we understand property's language as something that can be contested and shaped, we must identify its shape. The cases I have reconstructed here are helpful in this regard, too. They suggest that the Hawaiian Supreme Court was intent on supporting uses of the land that it regarded as productive and that contributed to the kingdom's economic growth.

I gather as much from the concerns the court raised at different times over the possibility of relying on Hawaiian land ways to make property claims. In *Oni*, for instance, the court was explicitly concerned with the economic impact of the claims that Oni was articulating. Oni's claim presented "questions of great importance" that would "determine the rights of many other persons besides the present plaintiff and defendant."²⁸⁵ And these many other persons were differentiated by the asymmetric distribution of resources across the land: The case was "of great importance, not only to the large landed proprietors throughout the Kingdom, but to thousands of the common people."²⁸⁶ This case, in other words, pitted the landed few against the (possibly landless) many. And in that contest, the court made sure to remove an important tool—Hawaiian land ways—with which the common people might counter the asymmetries of that political economy. The property protections the court granted in *Oni* would, of course, also accrue to those among the common people who managed to secure their own land claims. But the right to exclude

284. See the discussion of these cases in Part III above.

285. *Oni v. Meek*, 2 Haw. 87, 87 (1858) (Haw. Kingdom).

286. *Id.* at 89.

would mean something different to these smaller landholders, who would be left to reckon with the resource asymmetries resulting from the *Māhele*.²⁸⁷

The concern with political economy is even more explicit in *Peck*. There, recall, Chief Justice Allen worried that the right that Sherman Peck and his associates claimed—the right to preclude their neighbors from using water for purposes other than *kalo* cultivation²⁸⁸—threatened the islands’ changing agricultural focus. Recognizing such an “illiberal construction” of water rights would freeze land uses or, at the very least, make it very difficult to repurpose water for different uses and “do infinite mischief.”²⁸⁹ What followed this assessment was a collection of British and American cases in which courts warned that prohibiting water rights from being put to new uses would defy “law [and] common sense.”²⁹⁰ Thus, the chief justice rejected Peck’s claim not because it relied on Hawaiian land ways that had been superseded by property reform, but because claims of this nature could make resources unavailable for new uses made possible by technological developments. What these judicial opinions suggest, then, is that a concern for the productive use of the land bent judges’ disposition toward reliance on Hawaiian land ways to give meaning to landownership.

This judicial concern with economic growth situates Hawai‘i squarely within a global story about the development of market economies. E.P. Thompson, for instance, has argued that a mindset of extractive economic progress was exported from England “across the Atlantic, to the Indian sub-continent, and into the South Pacific” in the eighteenth century.²⁹¹ At the core of this mindset was “[t]he concept of exclusive property in land.”²⁹² Law facilitated the spread of this mindset as “the instrument of reorganising (or disorganising) alien agrarian modes of production.”²⁹³ The result was that “[t]he same era that saw the English peasant expropriated from his common lands saw the Bengal peasant made a parasite in his own country.”²⁹⁴ This was done in large part by uprooting traditional and customary relations governing access to resources and replacing them with the categories of English common law, which Thompson conceptualized as mutually exclusive modalities of

287. See *supra* text accompanying notes 76-82 (discussing the inadequacy of small *kuleana* claims in preserving the pre-reform resources of the *maka‘āinana*).

288. *Peck v. Bailey*, 8 Haw. 658, 659 (1867) (Haw. Kingdom) (Allen, C.J., in chambers).

289. *Id.* at 665.

290. *Id.* at 666-68 (quoting ANGELL, *supra* note 256, at 243).

291. THOMPSON, *supra* note 20, at 163-64.

292. *Id.* at 164.

293. *Id.*

294. *Id.* at 170 (quoting EDWARD J. THOMPSON, *THE LIFE OF CHARLES, LORD METCALFE* 268 (1937)).

governing resources.²⁹⁵ Morton Horwitz, meanwhile, has identified a similar transformation in American law in the early nineteenth century. In that period, he argued, judges thought they could spur economic growth by revising “[l]egal relations that had once been conceived of as deriving from natural law or custom” and “subordinat[ing them] to the disproportionate economic power of individuals or corporations that were allowed the right to ‘contract out’ of many existing legal obligations.”²⁹⁶ These scholars thus identify the legal construction of a political economy characterized by the elimination of local, communal, and traditional relations in favor of market relationships.

Something similar happened in Hawai‘i. In telling a blank-slate story about reform, the court eliminated the levers Oni could pull to force Meek to allow his horses onto the lands Meek had leased. Let us imagine what Oni could do thereafter. If Oni wanted to pasture his horses, he would now have to pay Meek for that privilege or enter into a labor contract with Meek including a right to pasturage. Either way, Oni would have needed to enter the market and bargain. And in this bargaining process, he would begin with no legal entitlements on Meek’s land at all—no preexisting obligation that Meek was bound to observe and that Oni could leverage in negotiation. Instead, he would need a voluntary agreement from Meek—the owner of virtually all the remaining *kula* land in Honouliuli—who would be able to set terms accordingly. One way to read *Oni*, then, is to say that the court wanted to channel the *maka‘ainana* into the market by eliminating other avenues they could use to access resources, like claiming that the very act of leasing land from a chief carried with it obligations to the *maka‘ainana*.

At the same time, Hawai‘i offers an important caveat to this global story: The expansion of market economies did not completely eliminate preexisting traditional or communal regimes, and it sometimes explicitly relied upon them. The cases that I have reconstructed here show that both the Hawaiian Supreme Court and *haole* landholders were quite comfortable relying upon and rearticulating Hawaiian land ways in making property claims. These actors, in other words, did not see Hawaiian land ways as inherently opposed to their quest for economic development—particularly, it seems, where it allowed them to recast the power of the chiefs as a means of articulating more expansive property claims.²⁹⁷

295. See *id.* at 171-73 (“There simply was no way of converting the practices and customs of Bengal and Bihar or Orissa into a common specie to be exchanged with English practice and common law.”).

296. HORWITZ, *supra* note 231, at 253.

297. See *supra* Part III.A.2 (discussing the court’s creation of new powers in the *konohiki* to expand a foreigner’s property claim).

Conclusion

In the aftermath of property reform, the Hawaiian Kingdom's denizens formed expectations about property that relied on Hawaiian land ways. They articulated property claims that reinterpreted those land ways to navigate a period of intense legal, social, and economic transformation. As they brought these claims before the Hawaiian Supreme Court, its justices toggled between two stories about property's origins in the kingdom. On one account, property accomplished a revolution that wiped clean the slate of Hawaiian property relations, such that any reliance on Hawaiian land ways after reform was misplaced. On another, property built atop an existing foundation, and it was the court's job to sort out how Hawaiian land ways informed the meaning of property. In shifting between these accounts, the court shaped the kingdom's property language in ways that recognized its hybrid quality. But this was a selective hybridity, one that privileged modes of land use that the court believed would lead to economic growth. As such, the development of hybridity in Hawaiian property is hard to disentangle from the demands of extractive capitalism.

But the story of hybridity in Hawaiian property does not end there. Hawaiian land ways did not disappear; neither the illegal overthrow in 1893, nor American annexation in 1898, nor even statehood in 1959 managed to eliminate them.²⁹⁸ At the same time, the islands experienced a "social upheaval" that both "embraced significant challenges to the property rights of the powerful" and "placed Asian-Americans, Hawaiians, and other disempowered groups in the judiciary."²⁹⁹ A supreme court with quite different political-economic commitments than the nineteenth-century judges who had come to the islands from abroad proceeded to introduce important changes to Hawaiian property law.

Chief Justice William S. Richardson—the first Native Hawaiian to hold that post³⁰⁰—reminisced about these changes in an address to the American Bar Association in 2007.³⁰¹ He explained that the islands' legal system was "originally built on an ancient traditional culture," and that while much of that culture had been displaced, its "underlying guiding principles" remained.³⁰² These had been ignored by the Hawaiian Supreme Court for a long time, as it

298. On the overthrow and annexation, and Hawaiians' resistance to these events, see generally SILVA, note 77 above, at 123-63.

299. Williamson B.C. Chang, *Reversals of Fortune: The Hawaii Supreme Court, the Memorandum Opinion, and the Realignment of Political Power in Post-Statehood Hawai'i*, 14 U.HAW. L. REV. 17, 20 (1992).

300. Andrade, *supra* note 23, at 118.

301. MacKenzie, *supra* note 23, at 6-7, 7 n.5.

302. *Id.* at 6 (quoting remarks by former Chief Justice William S. Richardson).

espoused “a primarily Western orientation . . . that wasn’t a comfortable fit with Hawai‘i’s indigenous people and its immigrant population.”³⁰³ The work of the court after statehood was thus dedicated to “returning control of interpreting the law to those with deep roots in and profound love for Hawai‘i.”³⁰⁴ And this work had important consequences for property law: “[C]onsistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and the shoreline must be provided to the people, and that water resources could not be privately owned.”³⁰⁵

Backlash to the court’s property doctrine in the twentieth century was couched in the language of revolution: The court had upended expectations by supposedly ignoring “notions which, under U.S. constitutional law, have long been regarded as a fundamental element of the right to private property.”³⁰⁶ Even more insidiously, critics claimed the court “inject[ed] a racial or ethnic character into a debate where such considerations can only impede rational solutions.”³⁰⁷ This was so because the court presented—mistakenly, it seemed—an “artificial opposition of ‘Hawaiian’ to ‘western,’ as if both had persisted with equal vitality and in actual conflict from the past to the modern day.”³⁰⁸

This critique downplayed how much the state supreme court engaged in something the Hawaiian Kingdom’s Supreme Court had already accomplished: articulating a language of property that reflected and shaped expectations around landownership by recourse to Hawaiian land ways. The outcomes were different because they reflected legal regimes with different political and economic commitments. To depict this revision as illegitimate, it became necessary to portray the court as veering away from property’s obvious meaning by relying on moribund ideas that could not possibly survive, let alone challenge, that obvious meaning of property.³⁰⁹ But these ideas did more than survive: They continued to shape the expectations people could form about property. Moreover, excavating the past makes clear to us that the meaning of property was not obvious, that people creatively shaped it toward

303. *Id.*

304. *Id.*

305. *Id.* at 6-7.

306. Sullivan, *supra* note 19, at 102. Williamson B.C. Chang has argued that media outlets controlled by plantation interests worked to undermine the legitimacy of judicial decisions by portraying them as products of identity politics rather than legal reasoning. Chang, *supra* note 299, at 20 & n.10, 38-39.

307. Sullivan, *supra* note 19, at 159.

308. *Id.*

309. This critique shares something with a recent turn in U.S. Supreme Court takings jurisprudence; the Justices have recently endorsed an essentialist view of property to limit state courts’ ability to develop their own property law. *See supra* note 30.

their desired goals, and that, sometimes, authoritative institutions were quite open to this flexibility.

Appendix: Glossary of Hawaiian Terms

To aid readers unfamiliar with the Hawaiian language, parenthetical definitions for Hawaiian terms are provided throughout the Article. This Appendix offers more complete definitions adapted primarily from Ulukau's *Nā Puke Wehewehe 'Ōlelo Hawai'i* repository and tailored to the contexts discussed in this Article.³¹⁰

ahupua'a. Land division usually extending from the uplands to the sea.³¹¹

ali'i. Chief.³¹²

aloha. Love, affection, compassion, mercy, sympathy, pity, kindness, sentiment, grace, charity.³¹³

'auwai. Ditch, canal.³¹⁴

haole. White person; American, English; formerly, any foreigner.³¹⁵

hoa'āina. Tenant, caretaker, as on a *kuleana*.³¹⁶

kalo. Taro (*Colocasia esculenta*), a kind of aroid cultivated since ancient times for food.³¹⁷

kama'āina. Native-born; one born in a place; acquainted, familiar.³¹⁸

kanaka. Human being, man, person, individual, party, mankind, population; subject, as of a chief; Hawaiian.³¹⁹

310. For readability and consistency, definitions have been lightly paraphrased and presented without quotation marks.

311. *Ahupua'a*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/XW99-F5K8> (archived Mar. 7, 2026).

312. *Ali'i*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/P9HT-BXKR> (archived Mar. 7, 2026).

313. *Aloha*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/LDW3-66FC> (archived Mar. 7, 2026).

314. *'Auwai*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/Q7QP-EM8G> (archived Mar. 7, 2026).

315. *Haole*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/7Q4B-QGK9> (archived Mar. 7, 2026).

316. *Hoa'āina*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/ETL9-TGJR> (archived Mar. 7, 2026).

317. *Kalo*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/96PC-HSG9> (archived Mar. 7, 2026).

318. *Kama'āina*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/DAX8-DU4M> (archived Mar. 9, 2026).

319. *Kanaka*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/535P-VRG4> (archived Mar. 7, 2026).

- kapu.** Taboo, prohibition; special privilege or exemption from ordinary taboo; sacredness; prohibited, forbidden; sacred, holy, consecrated.³²⁰
- konohiki.** Headman of an *ahupua'a* land division under the chief.³²¹
- kula.** Plain, field, open country, pasture.³²²
- kuleana.** Right, privilege, concern, responsibility, title, business, property, estate, portion, jurisdiction, authority, liability, interest, claim, ownership, tenure, affair, province.³²³
- luna ho'okō.** Executive officer; literally, officer who accomplishes.³²⁴
- māhele.** To divide or apportion; the land division of 1848.³²⁵
- maka'āinana.** Commoner, populace, people in general; citizen, subject.³²⁶
- makai.** Toward the sea.³²⁷
- malu.** Shade, shelter, protection, peace, control, strength; protected by taboo; reserved, held apart.³²⁸
- mauka.** Inland.³²⁹
- 'ohana.** Family, relative, kin group.³³⁰

320. *Kapu*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/WL56-HMP3> (archived Mar. 7, 2026). On the particular oral nature of *kapu* and its coexistence with new written modalities of lawmaking, see ARISTA, note 13 above, at 175-79.

321. *Konohiki*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/CT55-8N2U> (archived Mar. 7, 2026).

322. *Kula*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/SKD6-CURC> (archived Mar. 7, 2026); see also DICTIONARY OF LAND-TERMS, *supra* note 50, at 60 (defining *kula* as “land having no water rights” or “[d]ry open land; grass land”).

323. *Kuleana*, *supra* note 72.

324. *Luna*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/T72Z-5CSR> (archived Mar. 7, 2026); DICTIONARY OF LAND-TERMS, *supra* note 50, at 69.

325. DICTIONARY OF LAND-TERMS, *supra* note 50, at 70.

326. *Maka'āinana*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/GLX4-SWPP> (archived Mar. 7, 2026).

327. DICTIONARY OF LAND-TERMS, *supra* note 50, at 72 (quoting *DeFries v. Scott*, 268 F. 952, 953 (9th Cir. 1920)).

328. *Malu*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/7R9Z-FQGY> (archived Mar. 7, 2026).

329. DICTIONARY OF LAND-TERMS, *supra* note 50, at 75-76.

330. *'Ohana*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/5EQE-SNCD> (archived Mar. 7, 2026).

pilikia. Trouble of any kind, great or small; problem, nuisance, bother, distress, adversity, affliction, accident, difficulty, inconvenience, perturbation, tragedy, lack.³³¹

pō'alima. Work on the chief's plantations, so called because this work was done on Fridays;³³² land farmed by tenants for the chiefs one day in five.³³³

poi. A Hawaiian staple food, made from cooked taro corms, or rarely breadfruit, pounded and thinned with water.³³⁴

pono. Goodness, uprightness, morality, moral quality, correct or proper procedure, excellence, well-being, prosperity, equity.³³⁵

331. *Pilikia*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/5UDV-ZNH9> (archived Mar. 7, 2026).

332. *Pō'alima*, *supra* note 133.

333. DICTIONARY OF LAND-TERMS, *supra* note 50, at 93.

334. *Poi*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/GJ29-VA73> (archived Mar. 7, 2026).

335. *Pono*, ULUKAU: HAWAIIAN DICTIONARIES, <https://perma.cc/7PV2-QF96> (archived Mar. 7, 2026).