KULEANA: A GENEALOGY OF NATIVE TENANT RIGHTS

A DISSERTATION SUBMITTED TO THE GRADUATE DIVISION OF THE UNIVERSITY OF HAWAI‘I AT MĀNOA IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

IN

POLITICAL SCIENCE

MAY 2013

By

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This dissertation is dedicated to my mother, Leialoha Apo Perkins.
ACKNOWLEDGEMENTS

I would first like to mahalo my dissertation chair Noenoe K. Silva for guiding me through the odyssey of the Ph.D., including this dissertation. As a Hawaiian scholar, intellectual and academician, her guidance was invaluable. My mother, Leialoha Apo Perkins, likely put the idea of pursuing a Ph.D. in my head, but certainly modeled the life of a true Kanaka Maoli scholar. My father Roland F. Perkins demonstrated the breadth a scholar can have, and that the pursuit of knowledge is its own reward. My brother Kele Perkins was cut from the same mold, and is a true philosopher. I was extremely fortunate to be able to work with my dissertation committee members, Michael J. Shapiro, J. Noelani Goodyear Kaʻōpua, Ty Kāwika Tengan and Jonathan Kamakawīwoʻole Osorio. They lent insight, guidance as well as gravitas to my work.

The staff of Midkiff Learning Center at Kamehameha Schools – Kapālama, particularly Kāwika Makanani and Gail Fujimoto, truly extended the boundaries of the type of research that can be done at a high school library. I thank the staff of the UH Hamilton Hawai‘i-Pacific Collection, especially Joni Hori, and Stuart Dawrs, for the stack pass I was given in 2009 to work on this and another project. Mahalo to the Liko Aʻe scholarship program for the funding I received in 2009 and 2010. Hōkūlani ‘Aikau of the Political Science department provided key insights at crucial moments, including working with me on the first draft of my dissertation proposal. Sankaran Krishna helped me through gaining an understanding of postcolonial theory in what became a crucial directed reading course. Kanalu Young oversaw the writing of what became the Crown
lands portion of this dissertation, and Kāwika Mahelona created the Land Division figure in Chapter 5.

My colleagues at Kamehameha, who are too numerous to name, have given me a safe and nurturing place to work. I particularly want to thank Social Studies department head Kapua Akiu-Wilcox, who knows what I have gone through in this process. Members of the Kamehameha sabbatical committee were generous in awarding me the 2008-2009 year to devote to academic and educational work. My History Day colleagues at Kamehameha helped me find my niche on campus, as did my friends (too numerous to name), but particularly my intellectual mentors Jan Becket and Richard Hamasaki. Shawn Kanaʻiaupuni and Kēhau Abad provided opportunities to stretch beyond the traditional boundaries of teaching at Kamehameha, and I found comraderie on the editorial boards of Kamehameha Publishing and Halili journal. All of you make KS a wonderful place to teach. My students have sat through practice presentations and provided feedback to my work when it overlapped with the Hawaiian history course. Many have gone on to stellar careers of their own.

Masahide T. Kato provided intellectual companionship in the long and solitary period of my studies, and Laulani Teale always provided invaluable and new ways of looking at my research. My dissertation writing group – Melisa Casumbal, Brianne Gallagher, Mary Lee and Bianca Isaki – gave critical and valuable feedback and comraderie in our weekly meetings, without which I may not have finished. Ikaika Hussey provided opportunities to share my work through The Hawaiʻi Independent. John P. Rosa was a trusted mentor,
colleague and friend before and through the process. David Keanu Sai’s groundbreaking work is foundational to mine, and his generosity in speaking to my classes at Kamehameha seems to know no bounds. Manfred Steger also mentored me over the years with an eye toward my long-term career. Roy Fujimoto gave me my first opportunity to teach at the college level at Windward Community College. Brian Richardson was extremely generous with his time in reading and editing an initial draft of this dissertation. My initial interest in politics was certainly cultivated by my uncle Peter Apo, who taught me how politics in Hawai‘i works in the trenches.

Finally, and perhaps most importantly, I want to most sincerely mahalo my wife, Nichole J. Field, who was part of this process from beginning to end. Our children, Līlīnoe, Mima and Melekahiwa have not known a time when I was not a graduate student, and their presence has filled our days with joy.

Mahalo nui loa ia ‘oukou pākahī apau.
ABSTRACT

During the period of the privatization of land in Hawai‘i (1840 – 1855), kuleana, usually translated as “native tenant rights,” constituted both a right to, and responsibility over, land for Hawaiians. The 1850 Kuleana Act provided a means for maka‘āinana to divide out these rights and gain a fee simple title to the lands under their cultivation. Using a hybrid genealogical method, I argue that these rights were elided by gathering rights in the period since the 1890s. By debating the extent of gathering rights, courts have been able to appear liberal, while obscuring the profound rights of Kānaka Maoli embedded in Hawai‘i’s land tenure system. The 1850 Kuleana Act was a continuation of the process begun with the 1848 Māhele, which I contend was misconstrued by twentieth century scholars. This contributes to the confusion over native tenant rights. I examine both the foundations of the introduced system of land law (the ideas of dominium, eminent domain and property itself), and responses to kuleana rights – the Land Court, 1895 Land Act, and legal cases such as Dowsett v. Maukeala. In examining its foundations, I use a concept I call theoretical encounter, which attempts to apprehend the meeting of ideas. In analyzing the responses to kuleana, I use the framework of legal pluralism, which acknowledges the simultaneous existence of multiple legal regimes. In examining the question of the alienation of Hawaiians from land, I find that a technique called erasure allowed for a radical forgetting of place. Central to the debate over kuleana lands is the notion of a deadline on claims to such lands. I problematize the idea of a deadline on claims, opening questions over the continued existence of kuleana in the present day.
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CHAPTER 1 – ‘ŌLELO MUA: INTRODUCTION

In his 1904 book, Lorrin Thurston presented the following sequence of what he considered *The Fundamental Law of Hawaii:*

1. The first Constitution of Kamehameha III (1840), including the previously issued Bill of Rights [sic – Declaration of Rights]
2. The first laws of Hawaii, enacted under Kamehameha III (1833-1842)…
3. The law creating, and principles guiding, the Land Commission.
4. The second constitution of Kamehameha III, 1852.
7. The proclamation and orders, incident to the establishment of the Provisional Government, 1893.
10. The Resolution of the Hawaiian Senate ratifying the annexation treaty, 1897.
11. The joint resolution of Congress annexing Hawaii, 1898.

This sequence is interesting for several reasons, the most significant being the inclusion of a “Treaty of Annexation” in 1897, which was never ratified by the US Senate and is therefore a legal nullity (see Sai, 2008, Kauanui, 2006). Further, his sequence includes the joint resolution of annexation – a resolution that would not have been
necessary had the treaty passed, and has no authority to annex foreign territory. As Willoughby (1929, 427) noted “it is … unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution.” Thurston’s inscription of Hawai’i’s “fundamental law,” and inclusion of a non-existent treaty constitutes an attempt to legitimize an illegal regime change in Hawai’i that he designed in the 1890s. This sequence also constitutes a teleological view of the “development” of a society from native to “teutonic” control (Coffman, 1998, 89-90).¹ Yet Thurston’s book is far from discredited. On the contrary, it was cited by the Hawai’i Supreme Court in Doe v. Kamehameha Schools (2006).

Foucault and Nietzsche might attempt to undermine a sequential narrative such as Thurston’s with the method they call “genealogy.” As Sydney ‘Iaukea (2012) notes: “for Hawaiians, land, identity, and mo’okū’auhau were all impacted by the illegal overthrow of the Hawaiian Kingdom in 1893 and the subsequent occupation of Hawai’i by the United States.” Genealogy seeks to “cure history of its tendency to be handmaiden to philosophy,” to put “last things first” – to misguidedly impose a teleological development on history. Genealogy seeks to undermine narratives of noble origins and view history in its ignoble reality. It is concerned not with continuity, but with rupture.

I argue in this dissertation that while there is evidence that kuleana (native tenant rights) endure, the legal narrative that the rights were terminated – seen as linear and continuous – is itself fraught with rupture. This dissertation is a genealogy of Hawaiian land in the Foucauldian and Nietszchean sense, but it also employs mo’okū’auhau, a Hawaiian concept of genealogy concerned with sequence, but more importantly, with

¹ While at Columbia University, Lorrin Thurston had come under the influence of Professor John W. Burgess, who “taught Teutonic supremacy in the art of government.” Coffman, 1998, 89-90.
power. This study looks for continuity and rupture in given sequences and narratives regarding Hawaiian land. In doing so, it presents a new view of the current legal status of Hawaiian land, and a more critical, if ignoble, history. I show that while structurally sound at the level of rights, the Māhele process, rather than a formal and rigorous process, was at the same time fraught with problems; fraud, favoritism, interference by chiefs, and duplicate claims (Chinen, 2002). But this is also a history of the present, a narrative of how we got where we are in terms of land tenure.

I focus on kuleana, or native tenant rights – embedded rights to land for hoaʻāina (makaʻāinana or “commoners”) that could be “divided out” in exchange for actual parcels of land. Land would thus be converted from right to object. A major point of contention is the deadline for converting such rights – February 28, 1848. While this date is widely held to have been a “hard” deadline, I problematize this notion. Konohiki (aliʻi or chiefs) had multiple extensions of their own deadline for submitting claims to land until as late as 1909. I question whether the early deadline for hoaʻāina claims was in fact a deadline at all, or if it in fact applied to another group – those who already owned land before the Māhele, or land division, which created private property in Hawaiʻi. The Kuleana Act, which allowed for the dividing out of vested rights in land, did not reference any deadline. On the other hand, actors at the time (such as historian Samuel Kamakau, who was on the Land Commission responsible for confirming title) appear convinced of such a deadline. These inconsistencies in law, and the perception of law, create a situation that can be described as plural.

An additional theoretical tool used in this dissertation is the concept of legal pluralism – the simultaneous existence of multiple legal orders in one locale. This
condition has been extant in Hawai‘i for at least a century, and complicates the subject of this study, which is primarily land law. Legal pluralism simultaneously functions explicatively and *is* the problematic I examine. In the context of land tenure, Meinzen-Dick and Pradhan (2002) note that legal pluralism “introduces a sense of dynamism in property rights, as the different legal frameworks do not exist in isolation, but influence each other, and can change over time.” Concepts that are seen today as legal givens were imposed on a Hawaiian sense of ‘āina (land) as linked to *mana* – status, coercive power, or even spiritual force.

### ‘Āina and Mana

‘Āina – land, has historically been the basis of political power in Hawai‘i. Cooper and Daws (1985, 2) contend that in Hawai‘i “land has always been a political battleground and prize … [and] those who have held land have generally occupied the high ground in politics … This was true in traditional Hawaiian times … It was true in mid-nineteenth century when whites became influential advisors to the Hawaiian monarchs … [and] it was true when *haole* revolutionaries overthrew the Hawaiian monarchy in 1893.” They go on to describe how it was still true in the state of Hawai‘i in the 1960s and 1970s. The Hawaiian term kālai‘āina, translated as “land carving,” bears this relationship out (Pukui & Elbert, 1986, 121). In a Kālai‘āina “one of the first acts of a Hawaiian chief victorious in battle was to seize land and redistribute it to his own advantage” (Cooper and Daws, 1985, 2). This term for a land division came to be used as the Hawaiian word for politics. Politics, then, in Hawaiian thought is concerned with the question “Who gets which land(s)?”
Despite its importance, the structure of Hawai‘i’s land tenure system is poorly understood. The Board of Commissioners to Quiet Land Titles (or “Land Commission”) was established to determine title anterior (prior) to 1845, the year of its creation. There was a deadline of two years for those who already owned land to file claims to this land. This was a way of determining previous ownership before the division of the interests of the various classes in the Māhele. All land titles originating from that process (which constitute the vast majority of all lands in Hawai‘i) contain the stipulation “ua koe ke kuleana o na kanaka.” This phrase was translated on land titles as “reserving the rights of native tenants,” but this translation is at the root of the problematic I examine in this dissertation. Definitions of kuleana and “native tenant” have served to obsfuscate the relationship between Hawaiians (maka‘ainana in particular) and land.

Kuleana, as set forth in the Principles of the Land Commission (1845), were to a fee-simple title to land in which they could claim a hereditary interest. Today, understanding of these legal concepts is distorted in ways that serve to cloud the nature of ownership in land. First, native tenant rights to fee-simple title have been conflated (most notably in the 1995 PASH decision)² with native gathering rights. Gathering rights did exist under kingdom law, but were in addition to, and separate from, native tenant rights. Second, the timeline on claims (February 14, 1848), was only for those claims anterior to 1845. The term anterior has been mistakenly taken to mean after, creating the idea that no further claims were possible after the deadline, which was extended several times, eventually to 1895. It could therefore be argued that native tenant rights continue to exist

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² The 1995 Public Access Shoreline Hawai‘i decision upheld shoreline and upland gathering rights originating in kingdom law.
for Hawaiians today, and the possible consequences of this are numerous and throw land ownership in present-day Hawai‘i into question.

This dissertation is an effort to clarify the political nature of land by re-examining the transition from traditional Hawaiian to Euro-American, capitalist land tenure in the mid-nineteenth century. Twentieth-century scholars contend that the 1848 Māhele and 1850 Kuleana Act – the divisions of lands that form the foundation of Hawai‘i’s present-day land tenure system – alienated Hawaiians from land via the imposition of “Western” legal real estate concepts. It is commonly cited that the final result of this process was the maka‘āinana receiving less than one percent of the land, while chiefs, the king, government and eventually foreigners gained ownership of the vast majority (see Kame‘elehiwa, 1992). An emerging view suggests that, in fact, the Māhele and Kuleana Act processes were beneficial to Hawaiians (see Stauffer, 2003; Beamer, 2006), who, from 1850 until 1874, possessed most of the desirable land in Hawai‘i.

This study will provide a more complex description of the process of conversion of Hawaiian land tenure from traditional to one recognizable to Europe and the United States. Further, it examines the transition from traditional to Western-modeled land tenure from the perspective of the underlying theoretical understandings of the actors involved, particularly Kauikeaouli (King Kamehameha III) and advisor William Richards. Finally, it examines the response of the post-overthrow oligarchy to embedded kuleana, or native tenant rights – the fundamental, but undivided, ownership by Hawaiian maka‘āinana of all land in Hawai‘i.

The Māhele and Kuleana Act were not the travesties that contemporary scholars would have us think, nor an example of unmitigated agency on the part of Hawaiians. By
the standards of the time, they created a broad ownership of land, but did not prevent alienation. Despite aspects of the process that preserved Hawaiian and Indigenous understandings of land, it was the economics of their situation and the processes of erasure and forgetting that led to alienation, rather than the design of the Māhele process itself. A clearer understanding of this design would allow for a reframing of the narrative of Hawaiian land distribution and later alienation.

One contribution that this project will make is a theoretical explication of the transition from a traditional Hawaiian to a “modern” Western-modeled land tenure system. Rather than passively accepting this categorization, I critically examine the term “modern” below. I will show that this transition incorporated aspects of the traditional understandings of the relationships on which Hawaiian society is based, and thus illustrates Hawaiian agency in the transition. This is in contrast to the approach of previous scholars, some of whom cast Hawaiians as passive victims in this process (see Kameʻeleihiwa, 1992, Chinen, 2002). My approach views agency and objectivity as mutual and simultaneous actors on Hawaiians throughout this process.

A second contribution this study will make is a clarification of the question of alienation of Hawaiians from land. Kameʻeleihiwa (1992, 296) states that “the claiming of ʻĀina was a very foreign idea, generally outside the common Hawaiian’s reality.” But Stauffer (2003) found that makaʻāinana (commoners) actually received the majority of land in terms of value (i.e., the most valuable lands) and that they held on to this land for a generation. Stauffer’s findings show that Hawaiians understood “Western” land tenure,

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3 In critiques of the “invention of tradition” including Hobsbawm and Ranger’s (1983), “tradition” is used broadly to include practices “actually invented, constructed and formally instituted and those emerging in a less easily traceable manner.” In the Hawaiian context, such practices could include the term “mōʻī,” from the period of Kamehameha III (Osorio, 2002), or land practices (discussed in chapter 2) of Kamehameha I, which came to appear “traditional.”
and functioned in this system for at least a quarter century. While Hawaiians lost land, it was not the result of the structure of the new land tenure system. I will explore the mechanisms that caused the later alienation of land.

This dissertation asks four major questions:

1. What was the structure of the post-1848 Hawaiian land tenure system?
2. How was the transition from the traditional Hawaiian land tenure to Western-modeled land tenure made, and how did this occur as a theoretical encounter?
3. What were the oligarchy’s responses to embedded native tenant rights?
4. How did Hawaiians lose control of land subsequent to these changes in kuleana – native tenant rights?

To answer the first question on the structure of the land tenure system, I re-examine the laws and debates over their formation, which I contend were largely misinterpreted by twentieth-century scholars. As answering the second question on theoretical encounters is a more interpretive endeavor, I will employ a genealogical approach that seeks to trace the development and intersection of Hawaiian and Euro-American ideas on land. By “theoretical encounter” I refer to the contact between worldviews (Hawaiian and Euro-American) addressed by Salmond (2003, xx), who, in her examination of Captain James Cook’s voyages in the Pacific, shows the ways in which Cook and Polynesians “engaged with [each other] in ways that were defined by their cosmology and culture” and how “in those meetings, perceptions and practices were mutually altered” (Salmond, 2003, 10).

For the third question on the response to native tenant rights, I focus on the effect of law. I examine two legal cases, *Dowsett v. Maukeala* and *Kalipi v. Hawaiian Trust Co.*, and
two legal mechanisms, the Land Court and non-judicial foreclosure. The fourth question on alienation of land will be addressed in four categories; private purchase, adverse possession, “erasure,” and government confiscation, and illustrated using case studies.

A note on the use of the notions of “modern” and “Western.” First, I use “Western-modeled land system” because the system combined aspects of the land tenure systems of several countries, and as I will show, simultaneously incorporated traditional Hawaiian concepts. “Modern” is in quotes so as not to connote a progression from native concepts toward Western concepts, or Marxian teleological development from “feudal” to capitalist economic relations. Second, Chakrabarty (2000) shows the ways in which a European imaginary, or an imaginary Europe is always already a constitutive part of the social sciences. In comparison to this mythical Europe of enlightenment values and reason, real worlds of the South cannot but pale in comparison. Further, this imaginary is em/deployed in the process of the institution of capitalism, the transition to which is always simultaneously a translation, of existing thought-worlds to the “self-understandings of capitalism.” He continues:

The Europe that I seek to decenter is an imaginary figure that remains deeply embedded in clichéd and shorthand forms in some everyday habits of thought that invariably subtend attempts in the social sciences to address questions of political modernity in South Asia. The phenomenon of ‘political modernity’ — namely, the rule by modern institutions of the state, bureaucracy, and capitalist enterprise — is impossible to think of anywhere in the world without invoking certain categories and concepts, the genealogies of which go deep into the intellectual and even theological traditions of Europe. Concepts such as
citizenship, the state, civil society, public sphere, human rights, equality before the law, the individual, distinctions between public and private, the idea of the subject, democracy, popular sovereignty, social justice, scientific rationality, and so on all bear the burden of European thought and history. One simply cannot think of political modernity without these and other related concepts that found a climactic form in the course of the European Enlightenment and the nineteenth century… in fact, the very critique of colonialism itself is unthinkable except as a legacy, partially, of how Enlightenment Europe was appropriated in the [Indian] subcontinent” (Chakrabarty, 2000, 4).

The use of categories from this imagined Europe is a hazard of a project such as this, which seeks to map the transition between “traditional” and “modern” understandings of land. Hobsbawm and Ranger (1983) demonstrate the fluidity of the boundary between these given categories, which influence the context of the transition period in examine here.

Context

In the book Hawaii: A Pictorial History, there are two pictures of Honolulu circa 1850. One is drawn looking mā kai, and shows a bustling town reminiscent of New England with dozens of ships in Honolulu Harbor.
The second is facing māuka, and gives the opposite impression. It shows that the town stops just māuka of what is now Beretania Street and shows open land stretching to the Koʻolau mountains.
This second picture puts into perspective the time period covered (particularly in chapters 3 and 4) in this dissertation – the nineteenth century. The population of Hawai‘i in 1832 was 130,000, which is approximately the current population of Maui. Fewer events occur with a smaller population, and there may be a tendency to overvalue the events of the Kingdom period.

Mark Twain (aka Samuel Langhorn Clemens, in Frear, 1947) made the shrewd, if caustic, observation that “each Hawaiian official dignitary has a gorgeous, varicolored, gold-laced uniform peculiar to his office … all this grandeur in a playhouse kingdom whose population falls absolutely short of sixty thousand souls!” Twain’s remark underscores the fact that despite its importance as a historical period, the kingdom
represented the nadir of both the Hawai‘i and Hawaiian population. I emphasize this period not because it was more significant than the present, but because the events of that period established the infrastructure for what followed.

The period that I examine in this study was one of rapid and sweeping change. I describe these changes at the beginning of each chapter, but briefly, many of the events of this period are the subject of a debate of sorts over what constitutes the most significant turning point in Hawai‘i’s history. While chapter 2 considers pre-contact land tenure, I focus mainly on the period after what some perceive as the most significant change – the end of the ‘aikapu, or basis of Hawaiian religion. Kame‘elehiwa (1992) calls the 1848 Māhele, an event I consider closely here, the most significant event in the disenfranchisement of Hawaiians. Osorio (2002) might argue that the 1887 Bayonet constitution, the “squalid tale” of the stripping of the power of the monarch, was the definitive moment in Hawai‘i’s history. Others might contend that the 1893 overthrow of the monarchy, or annexation in 1898, were the crucial turning points (Sai, 2008, Coffman 1998). Finally, some would argue that socially, in bringing democratic rights and a more representative government, it was the 1954 Democratic Revolution that had the most impact on Hawai‘i’s people (Fuchs, 1961). This study views some of these events, such as the overthrow, from the perspective of its effect on land. It does so through a genealogical method.

Theory and Method

Elements of several types of theory will be applied, such as postcolonial studies and an emerging indigenous theory, the primary theoretical frameworks that will be
employed in this study are genealogy and ethnohistory. The genealogical method constitutes a hybrid approach to politico-historical work. This study employs two types of genealogical methods, which challenge each other in some ways and are symbiotic in others: a Hawaiian genealogical method and a Nietzschean/Foucauldian genealogical method. Hawaiian genealogies emphasize continuity of ancestral or other lineages, while a Nietzschean/Foucauldian genealogy looks for ruptures in such continuity. In other ways, discussed below, these methodologies are complementary. The ethnohistorical approach, will be modified, in ways used by Robert Warrior, to constitute an Indigenous ethnohistorical method.

**Genealogy and Moʻokūʻauhau: Continuity and Rupture**

Mykännen (2003, 118) views what I call theoretical encounters as a partial, cross-cultural translation, noting that “in the province of political knowledge … two cultures … approach each other. Yet the translation [is] not completed, because the comparisons [are] established in two distinct conceptual systems.” Such an encounter can occur between disparate cultural views of the concept of genealogy. I show the ways in which a Kanaka Maoli genealogy, moʻokūʻauhau, challenges, and then comes into conversation with a Nietzschean/Foucauldian genealogy, and apply this hybrid frame to a genealogy of Hawaiian land, specifically, the Crown lands of Hawaiʻi.

**Moʻokūʻauhau**

Malo (1987, 18) takes a nearly Neitszchean approach to the origins of Hawaiʻi’s land:
1. He mea kahaha loa no ka manao i ka lohe ana i na olelo a ke poe kahiko no ke kumu o ka aina ana ma Hawaii nei, he kuee ko lakou mau manao aole he like pu

2. Maloko o na mookuauhau a lakou e ike ai lakou i ka okoa ana o na manao o lakou kekahi me kekahi

Emerson (1897, 3) translates:

1. It is very surprising to hear how contradictory are the accounts given by the ancients of the origin of the land here in Hawaii.

2. It is in their genealogies that we shall see the disagreement in this regard.

This acceptance of the contingent nature of “origin,” is one area of resonance between genealogy/moʻokūʻauhau, but it does not diminish its importance for Kanaka Maoli. Emerson translates “okoa” (ʻokoʻa) as “disagreement,” but it could as easily be rendered “another, evoking a sense of plurality in the multiple versions of moʻokūʻauhau. 4 An alternate way of viewing the plural aspect of moʻokūʻauhau is as competing narratives, each of which is in itself continuous. As Abad (2000) notes, moʻokūʻauhau are internally consistent and reliable as data. Thus, moʻokūʻauhau can have renderings emphasizing both continuity and rupture. As moʻokūʻauhau is central to Hawaiian identity, this has effects on Hawaiian identity politics.

Halualani (2002, xiv) asserts that Hawaiian identity in the twentieth and twenty-first centuries is closely tied to genealogy (moʻokūʻauhau) and land, particularly claims for Hawaiian Home Lands:

As a result of the Hawaiian Homes Commission Act (HHCA), a Native

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4 wehewehe.org provides the following definitions for ʻokoʻa: “Different, separate, unrelated, another; whole; entirety; a whole note in music; entirely, wholly, completely; altogether, fully, independently, exclusively.”
Hawaiian means ‘any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.’ In order to claim Hawaiianess and homestead leases and benefits in the name of Hawaiians, individuals must formally substantiate their 50 percent blood quantum ... Many Hawaiians to this day, however, cannot formally prove their Hawaiianess. Halualani (2002) also documents the perceived connection between Hawaiian ethnicity and residence in Hawai‘i. Land is thus racialized and genealogy is central to Hawaiian identity formation.

Noted genealogist Lilikalā Kame‘eleihiwa (1992, 19-20) holds that “genealogies are perceived by Hawaiians as an unbroken chain that links those today to the primeval forces—to the mana (spiritual power) that first emerged with the beginning of the world. Genealogies anchor Hawaiians to our place in the universe and give us the comforting illusion of continued existence.” She continues, noting in regard to the illusory nature of the connection, that:

This does not mean that every genealogy is without error. It is inevitable that human memory makes for error and when comparing various versions of genealogies, discrepancies do occur. However, such discrepancies are less important than the received mana of the names. It is the function of genealogies in Hawaiian society that is important to Hawaiians, not their absolute accuracy (Kame‘eleihiwa, 1992, 344).

Noelani Goodyear-Ka‘ōpua (2005) asserts that “our mo‘okū‘auhau are certainly powerful truth claims … [o]ur genealogies are not just pronouncements. Uttering them creates space for discussion and debate.” Noting the many consequential events of the
nineteenth century, Kameʻeleihiwa (1992, 20) expands on the function of moʻokūʻauhau, stating that “genealogies also brought Hawaiians comfort in times of acute distress.” She holds that genealogies offered “proof that the race still existed as a great nation” in times when Western practices seemed to render them “irrelevant” (Kameʻeleihiwa, 1992, 20). Finally, citing the significance of genealogies in political power, Kameʻeleihiwa notes that aliʻi are “the totality of their genealogy, which is comprised of the character of their ancestors. [Genealogy] is the sum total of their identity.” Discussing Hawaiian historical figures without examining their genealogies, she posits, would be “unintelligible” (Kameʻeleihiwa, 1992, 21).

Moʻokūʻauhau, then, emphasizes continuity in its provision of an “unbroken chain … link[ing] those today to the primeval forces—to the mana (spiritual power) that first emerged with the beginning of the world” (Kameʻeleihiwa, 1992). In this sense, moʻokūʻauhau appears as the obverse of a Nietzschean/Foucauldian genealogy, which privileges disparity. But this continuity is acknowledged to be an “illusion,” – mana, rather than lineage or continuity, constitutes the actual significance of moʻokūʻauhau. It is in this sense of the term, with its emphasis on power, that the two concepts begin to resonate. Nietzschean/Foucauldian genealogy, with its emphasis on rupture, approximates the narratives of the early moʻolelo, in which time has obscured continuity. In the later moʻolelo (in what archaeologists would call the “proto-historic” period), continuity is more established. Further, by emphasizing “blood” on the one hand and “biopolitics” on the other, both are embodied practices. There is another way in which moʻokūʻauhau and genealogy are compatible, namely that genealogy primarily critiques the scientific.

Henceforth, I will use the term moʻokūʻauhau to denote Hawaiian/Kānaka Maoli
genealogies, and “genealogy” to refer to the Nietzschean/Foucauldian method.

**Genealogy**

To understand the “source” of his genealogical method, it is worth quoting Nietzsche (1989, 18) at length, as he reminisced on his method’s hazy origin:

The first impulse to publish something of my hypotheses concerning the origin of morality was given me by a … little book in which I encountered distinctly for the first time an upside down and perverse species of genealogical hypothesis, the genuinely English type, that attracted me—with that power of attraction which everything contrary, everything antipodal possesses. The title of the book was *The Origin of the Moral Sensations*; its author Dr. Paul Ree … Perhaps I have never read anything to which I would have said to myself No, proposition by proposition, conclusion by conclusion, to the extent that I did to this book: yet quite without ill-humor or impatience … I made opportune and inopportune reference to the propositions of that book, not in order to refute them—what have I to do with refutations!—but as becomes a positive spirit, to replace the improbable with the more probable, possibly one error with another. It was then, as I have said, that I advanced for the first time those genealogical hypotheses to which this treatise is devoted—ineptly … still constrained, still lacking my own language for my own things and with much backsliding and vacillation.

This quote gives several indications of genealogy’s tendencies. It views with derision the “English,” upside-down genealogy with its invocation of ‘heritage.’ It aims to “replace the improbable with the more probable,” recognizing that that which replaces “error”
may be, in fact, more error. This portrays genealogy as uninterested, particularly in grand metanarratives of glorious origin, thus genealogy is “quotidian,” commonplace, or as Nietzsche put it, “gray” – the color of “what is documented, what can actually be confirmed and has actually existed” (Nietzsche, 1989, 21). Finally, this founding document of the genealogical method notes its “constrained” nature, and allows, at least in this early manifestation, for “backsliding and vacillation.”

What was so offensive about Ree’s hypothesis regarding moral sentiments? As Small (2007, 160) shows, Ree offered a Darwinian theory of morality coupled with the notion that “idealism was demonstrable without being intelligible.” He claimed that “the ethical problem has been solved. We know why many actions seem praiseworthy to us, and others blameworthy” – namely because it is evolutionarily beneficial (Ree in Small, 2007, 162). It was the idealist aspect of Ree’s approach that Nietzsche (1997, 47) objected to rather than the Darwinian, for as he states in Daybreak, “Formerly one sought the feeling of grandeur of man by pointing to his divine origin: this has now become a forbidden way, for at its portal stands the ape, together with other gruesome beasts, grinning as if to say: no further in this direction!” As Foucault (1977, 139) noted, “Paul Ree was wrong to follow the English tendency in describing the history of morality in terms of a linear development.”

As Foucault (1977, 156), who viewed genealogy as the proper method of historical inquiry, contends:

Historical sense has more in common with medicine than philosophy; and it should not surprise us that Nietszche occasionally employs the phrase ‘historically and physiologically,’ since among the philosopher’s idiosyncracies is a complete
denial of the body. This includes, as well, ‘the absence of historical sense, a hatred for the idea of development, Egyptianism’ the obstinate ‘placing of conclusions at the beginning,’ of ‘making last things first.’ History has a more important task than to be handmaiden to philosophy, to recount the necessary birth of truth and values; it should become a differential knowledge of energies and failings, heights and degenerations, poisons and antidotes. Its task is to become a curative science.

Genealogy thus rejects any teleological approach, and even the dialectical approach of a Marxian historical materialism, preferring instead to allow history to unfold “warts” and all. As Foucault held, genealogy “rejects the meta-historical deployment of ideal significations and indefinite teleologies.” Foucault (1977, 142) contests the historian’s faith in reason, and [supports] Nietszche’s critique of moral values assumed to be embedded in historical development:

...if the genealogist refuses to extend his faith in metaphysics, if he listens to history, he finds that there is “something altogether different” behind things: not a timeless and essential secret, but the secret that they have no essence or that their essence was fabricated in a piecemeal fashion from alien forms.

In I, Pierre Riviere, Having Slaughtered My Mother, My Sister and My Brother: A Case of Parricide, Foucault drew from multiple sources in a way that illustrates the genealogical method: medical and legal records, police testimony and Riviere’s remarkable memoir of the acts. As Foucault (1973) noted in the forward to the book, it was “an affair, a case, an event that provided the intersection of discourses that differed in form and origin.” Similarly, I draw on legal documents from the Kingdom, Territory
and State, letters of actors in the Māhele process, policy papers, oli and mele, and oral histories, in addition to academic sources, to look at the intersection of disparate narratives and arrive at more profound understandings of processes and events.

Commonalities emerge from a comparison of Hawaiian and Nietzschean/Foucauldian genealogies; both are cognizant of disparity in lineal descent (I would argue both of ancestry and of ideas), and both are concerned with power (mana). Late in his life, Foucault (in Dreyfus and Rabinow, 1982, 237) offered a refined elucidation of genealogy:

Three domains of genealogy are possible. First, an historical ontology of ourselves in relation to truth through which we constitute ourselves as subjects of knowledge; second, an historical ontology of ourselves in relation to a field of power through which we constitute ourselves as acting on others; third, an historical ontology in relation to ethics through which we constitute ourselves as moral agents.

I examine the politics of land in each of these three domains, as a subject of knowledge and as a moral object in chapter 3, and in relation to a field of power (in chapter 6).

Malo exhibits a nearly Nietzschean detached impartiality in origin, as his examinations of early Hawaiian history show. Regarding the early peopling of Hawai‘i, Malo (2006, 4) relates:

A mahope mai o Lailai ma, ua hai hou ia mai, ma ka mookuauhau i kapa ia Ololo, he kania kanaka mua loa, o Kahiko kona inoa, ua olelo ia mai no kona mau kupuna a mau makua, me ka maopopo ole, o ko kakou ano, Kahiko no kai maopopo mai he kanaka ia.
After Laʻilaʻi and others, it was again stated in the genealogy called Lolo that the very first person was a male. Kahiko was his name. It was said that the nature or being of his ancestor was not known. It is known that Kahiko was a human. Malo (trans. Chun, 2006, 5) continues “from Kapawa until today, people have been known to have been born in the Hawaiian Islands. It, however, has not been told if they came from ʻOlolomehani. It has not been told who the first were to arrived [sic] and settle in the Hawaiian Islands. It has not been told if they came on canoes, and it has not been told what time their voyage to the Hawaiian Islands took place.”

Malo’s disclaimer “it has not been told” runs contrary to the Catholic Hawaiian scholar Kepelino’s assertion of a grander origin in the story of Hawaiʻiloa. Addressing the notable disparities between Kepelino’s account and those of other Hawaiian scholars, Arista (1998, 90, citing Beckwith, 1932) notes that some “Hawaiians tried to bridge the gap between the two traditions – Hawaiian and Christian – by attempting confusion. The Hawaiian Roman Catholic Zepherino Kepelino altered Hawaiian traditions so that they would better fit his new Christian paradigms.” There is, then, disparity within and between Hawaiian sources on origin. Rather than viewing this as a weakness, it can be seen as bringing moʻokūʻauhau and genealogy into closer conversation.

Some of the discrepancies that emerge from the attempt to order Hawaiian moʻolelo can be mitigated by considering them over time. Abad (2000) holds that the Hawaiian genealogical record is internally consistent and reliable as data, but she focuses on the twenty-three generations between voyaging chiefs such as Maweke, and Kamehameha I. Earlier than this, genealogies are less consistent, as are creation moʻolelo pertaining to the several relevant questions. These questions include those concerning the
origin of Hawaiians, dates of settlement, first humans (mortals and ākua – gods). If Stannard (1989) is correct, there may have been as few as one hundred settlers in approximately 300 AD – not sufficient for any “glorious” origin, but rather a situation of survival.

As Malo (2006, 133) notes on the consistency of early and late moʻokūʻauhau:

Aole i Akaka ka moolelo o na [a]lii kahiko, o na [a]lii mai a Kealiiwahine mai, a me Lailai kana wahine, a mai a Kahiko mai, a me Kupulanakehau [kehau] kana wahine, a ma ia Wakea mai a me Papa kana wahine, a hiki mai ia Liloa, aole i lohe pono ia ko lakou mau moolelo ua lohe iki ia nae kahi mau olelo o kekahi mau aliʻi kahiko, aole lohe nui ia, a mai ka Liloa a mai, a hiki mai ia Kamehameha akahi, ua akaka iki paha ko lakou moolelo.

The traditions of the ancient aliʻi are not quite clear … The [traditions of the] aliʻi from the time of Kealiʻiwahine and Laʻilaʻi, his wife, and from Kahiko and his wife, Kupulanakehau, and from Wākea and his wife, Papa to Loʻiloa have not been accurately heard. Some statements (ʻōlelo) have been particularly retained [heard] about these ancient aliʻi(s) but not a lot has been actually [retained or] heard of. [However,] the traditions, from the time of Liloa until Kamehameha I, are well known (trans. Chun, 2006, 182).

Further, genealogy and moʻokūʻauhau are compatible in one additional sense. As Foucault (1980) noted, “it is really against the effects of a discourse that is considered to be scientific that the genealogy must struggle.” If “scientific “ is defined as that body of knowledge derived through the use of the scientific method, then Hawaiian genealogies
do not qualify, and gain a measure of exemption from genealogy’s cutting gaze. De Goede (2005, 115) notes that:

In his *Genealogy of Morals* of 1887, Nietzsche objected to Victorian science precisely on the grounds of its apparent rejection of spiritualism. According to Nietzsche, scientific asceticism did not constitute the renunciation of ideals, beliefs, and hopes but was on the contrary the expression of a very specific kind of faith and morality.

She quotes Nietzsche (1996, 125-127):

Science today … constitutes not the opposite of the ascetic ideal but rather *its most recent and refined form* … What *compels* these men to this absolute will to truth … is the *belief in the ascetic ideal itself*—make no mistake on this point—it is the belief in a metaphysical value, the value of *truth in itself* … Strictly speaking, there is absolutely no science “without presuppositions,” the very ideal is inconceivable, paralogical: a philosophy, a “belief,” must always exist first in order for science to derive from it a direction, a meaning, a limit, a method, a *right* to existence.

Hawaiian thought, while rightly described by some as scientific, at the same time contests science. In Hawaiian thought, intuition is considered to be a reliable source of truth, whereas the intellect is considered “a deceiver” (Kaʻimikaua, in Minton, 2000). Hōʻailona, or signs in the environment, used for decision-making, are not considered controversial. For example, Kamehameha decided to go to battle if “the feather god Kūkaʻilimoku encouraged him to fight, for its feathers bristled and stood upright” (Kamakau, 1992, 148). What could be interpreted as the use of subtle, environmental
cues is, in Hawaiian thought, direct communication from gods. That environmental cues
are not a criterion that would be used by modern Western leaders shows the significance
of intuitive experience in Indigenous and Hawaiian thought.

In contrast to such intuitive practices, and to its own professed faith in reason,
modern science and theory practice a systematic, and systemic dismissal of non-
conforming events as often as skepticism and consideration of evidence. Sheldrake
(2003, 3-4) relates a story of one such dismissal in an encounter by villagers in Maine,
France with a meteor, a phenomenon not explicable by the prevailing laws of Newtonian
physics:

Several villagers heard a noise like a thunderclap, followed by a whistling
sound, and saw something falling into a meadow. It turned out to be a stone too
hot to touch. A local priest sent part of it to the Academy of Sciences in Paris
for identification. The chemist Lavoisier ground it up, did some tests, and
claimed he had proved it had not fallen from the sky, but instead was an
ordinary stone that had probably been struck by lightning. He told the academy,
‘There are no stones in the sky. Therefore stones cannot fall from the sky.’

In contrast to a genealogical, and even a scientific approach, such a logic puts theory
before observation. As Ranciere (2004) states, in the field of aesthetics, “the idea of
modernity is a questionable notion that tries to make clear-cut distinctions in the complex
configuration of the aesthetic regime.” Modernity in general, and science in particular,
emerge as belief systems as much as rational practices. Hawaiian practices such as
mo’okū’auhau can confront modernist beliefs systems in concert with genealogy.
One further area of contact between moʻokūʻauhau and genealogy is in the notion of subjectivity. As Michael Clifford (2001, 6) notes:

Following Foucault, the guiding methodological question [of a genealogical approach] is not, ‘What is the political subject?’ but rather, ‘How are political subjects formed?’ The first question is metaphysical; that is, it inquires into the essence of political subjectivity. The second question, on the other hand, is *genealogical*; it inquires into the contingent historical, discursive and non-discursive conditions of the emergence of political subjects.

Summarizing Foucault’s transition from archaeology to genealogy, Clifford (2001, 20) notes that the latter method “sheds light on given historically contingent events, without pretense that they refer to foundational or universal structures that govern the formation of human thought or practice.”

One purpose of genealogy, as Clifford (2001, 21) describes it, is to disclose the constitution, or formation of the subject and then “get rid” of it, in order to re-capture the historical processes leading to its formation:

Foucault is concerned with the limits that circumscribe human beings so as to transform them into *subjects*: medical subjects, sexual subjects, incarcerated subjects, [or sovereign subjects] and so on. ‘My objective,’ says Foucault, ‘has been to create a history of the different modes by which, in our culture, human beings are made subjects.’

Foucault holds one must then abolish the subject as a construction that blocks the full realization of a genealogical history:
One has to dispense with the constituent subject, to get rid of the subject itself, that is to say, to arrive at an analysis which can account for the constitution of the subject within a historical framework. And this is what I call genealogy.

(Foucault, 1980, 117)

This is one of the ways in which genealogy and moʻokūʻauhau can be brought into conversation with one another, and be rendered into two “gazes” through which to perceive the creation of Hawaiian subjects, and developments in Hawaiian land tenure. As Kauanui (2008, 10), whose work focuses on the legal production of Hawaiian identity, notes, the genealogical method “is embedded in indigenous epistemologies whereby peoplehood is rooted in the land.” This notion of the connectedness of “peoplehood” and land was directly confronted by the introduction of Western norms surrounding land. This confrontation constitutes what I call a theoretical encounter – the encounter between ideas – which is one of the central methodological tenets of this study.

**Theoretical Encounter**

My phrase “theoretical encounter” refers to the contact between worldviews (Hawaiian and Euro-American) addressed by Salmond (2003, xx), who shows how Cook and Polynesians “engaged with [each other] in ways that were defined by their cosmology and culture” and how “in those meetings, perceptions and practices were *mutually* altered” (Salmond, 2003, 10). It also is aware of Dening’s (2004, 46) admonition that “cultures don’t come in contact, and ‘contact’ [is] too pretty a word to describe the awfulness of what happened.” Some of the cultural categories that emerge from analyses of such encounters are religion, privilege and, of course, race. I will note
how these categories frame, and are themselves framed and recoded in the encounters I address.

**Early Descriptions**

Anthropology was defined early on as “the study of primitive societies” (Asad, 1973, 11). The definition of ethnohistory has undergone a similar development over the past four decades. According to Axtell (2001, 2), in 1966, ethnohistory was defined as “original research in the documentary history of culture and movements of primitive peoples, and related problems of broader scope,” a definition Axtell finds “restricted, demeaning and hopelessly vague.” In 1971, “primitives” was replaced by “non-industrial peoples” as sensitivity to colonial discourses gained sway (Axtell, 2001, 2). In 1982, it was simply, if problematically, “the cultural history of ethnic peoples throughout the world,” and by 1986, “the past of cultures and societies in all areas of the world, emphasizing the use of documentary and field materials and historiographic and anthropological approaches” (Axtell, 2001, 2). By this time, the idea that ethnohistory was an approach only compatible for “ethnic” peoples had been disproven by research applying it to Euroamerican subjects (Axtell, 2001, 3).

Such definitions presuppose several things: a linear development not yet reached by native objects (who are presumably not yet subjects); the ability of the ethnographer or ethnohistorian to estimate the “phase of development” of the Other, placing them in a narrative structure of the outsider’s own creation, in which “simple people,” often meant “preliterate peoples” (Asad, 1973, 11); and the legitimacy of a conception of the world in
which similarity (to the observer’s culture) is *a priori* superior to difference. Later methods sought to undermine this tendency.

**Later Ethnographic Methods**

Later ethnographic methods – roughly paralleled in ethnohistory – attempted to consider the dual roles of the participants in encounters. By the 1980s these methods seem to have caught on in the work of Marshall Sahlins, Anne Salmond, and Greg Dening. Salmond (1997, 13 - 14) describes her method of writing about theoretical encounters in *Between Worlds* explicitly:

*Between Worlds* echoes the idea of the ‘pae’ in Māori – that edge or horizon between earth and sky, worlds of light or darkness – where people and ancestor gods enter into exchanges that separate and bind them. The pae is a place of action, where history is made … The challenge of writing history across the pae, though, is formidable. Early meetings between Māori and Europeans were shaped by strategic choices. When Europeans arrived, some Māori leaders kept their distance, while others engaged with them. European sailors visited certain harbors often … while avoiding others. On both sides, fighting men frequently initiated encounters, while women, children and elders stayed in the background. Some Europeans recorded their experiences … while others remained silent … Documentary and oral accounts illuminate the past in bits and pieces, and from particular angles. In writing this work, I have gathered these fragments like a magpie, storing them in archive boxes and filing cabinets … While trying to
master the myriad details … I have sought to grasp key patterns in European and Māori forms of life that influenced those early meetings.

I have likewise sought to grasp patterns in encounters between Hawaiians and Euroamericans. One such encounter is in the area of translation.

**The Politics of Translation**

One final aspect of the theoretical encounters I examine in this dissertation is the issue of translation – itself a theoretical encounter. As Vicente Rafael (2001, 23) points out in his examination of the linguistic colonization of the Phillipines:

In 1492, the Spanish humanist Antonio de Nebrija …claimed that ‘language is the perfect instrument of empire.’ Surveying the record of antiquity, Nebrija writes … that ‘one thing I discovered and concluded with certainty is that language was always the companion of empire; therefore it follows that together they begin, grow and flourish, and together they fall.’

While the specifics of Hawaiʻi’s encounter with the West are contested, the ban on Hawaiian language in schools and government at the turn of the twentieth century bears out the relationship between language and political power. Silva (2004, 12) notes that when interpreting Hawaiian texts in English, it is “impossible to convey all of the cultural coding English strips away, and equally impossible to avoid the Western cultural coding that English adds.”

The politics of translation are seen at the very beginning of the project of altering the Hawaiian legal and land tenure systems. In the 1840 Constitution, the Hawaiian reads:
Eia ke ano o ka noho ana o nali‘i a me ka hooponopono ana i ka aina. O Kamehameha I., oia ke poo o keia aupuni, a nona no na aina a pau mai Hawaii a Niihau, aole na e nona ponoi, no na kanaka na, a me nali‘i a o Kamehameha no ko lakou poo nana e olelo i ka aina. Nolaila, aohe mea pono mamua, aohe hoi mea pono i keai manawa ke hoolilo aku kekahī lihi iki o keia mau aina me ka ae ole o ka mea ia ia ke olelo o ke aupuni (Hawaiian Laws, 1841-1842, 3).

The English reads:

The origin of the present government, and system of polity, is as follows.

Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I. was the head, and had the management of the landed property. Wherefore there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.

Phrases in the Hawaiian idiom, such as “mai Hawaii a Niihau” – from Hawai‘i to Ni‘ihau – suggest that the Hawaiian was written first. So where the Hawaiian version reads “nona no na aina” – the land was his [Kamehameha’s] – the English reads “[Kamehameha] had the management of the landed property.” William Richards’s translation constitutes a theoretical encounter, in which, through the politics of translation concepts such as “property” can be inserted into a Hawaiian discourse on land. Grammar and syntax themselves are implicated in this intervention.
Rafael (2001, x) may as well have been referring to Hawai‘i when explicating the hegemony embedded in the grammar and syntax of academic writing:

Ordered by the syntax of colonial discourse, narratives of national histories in the non-Western world cannot but reposition the ‘West’ as the locus of their address: the guarantor, albeit a negative one, of their coherence ... And those who write about these societies within the global imaginary of Western academic institutions ... are constrained to employ these categories, however critically, in order to appear reasonable and thus legitimate within and beyond their own particular contexts.

This work is an intertextual attempt to negotiate the mutual (mis)understandings of all “sides” involved in the narratives of land in Hawai‘i. And it is about narratives of land that I am concerned. As Said (in Silva, 2004, 15) stated:

The main battle in imperialism is over land, of course; but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future – these issues were reflected, contested, and even for a time, decided in narrative.

Kuleana have been rendered, seemingly unproblematically, as “native tenant rights,” as the narrative over these rights, which were simultaneously responsibilities, has elided the fundamental politics of the translation project. The centrality of narrative makes translation a critical aspect in an analysis of theoretical encounter. While I strive for clarity in these pages, the imperfect translations and interpretations add to the complexity of encounters over land.
**Historical Background/Literature Review**

Changes in Hawaiian land tenure occurred as part of broader processes of the emergence and acceleration of Euro-American capitalist practices in the nineteenth century, and their adoption and imposition in non-European countries. In England, the enclosure movement, described by Marx (1973) as a form of “primitive accumulation” and part of a transition from feudal to capitalist relations, forced rural peasants into the industrializing cities. The second enclosure movement consisted of the enforcement of property laws and exclusion of peasants from land through the erection of fences. As Marx (1996, 723) put it, emerging capitalist forces “conquered the field for capitalistic agriculture, made the soil part and parcel of capital, and created for the town industries the necessary supply of a ‘free and outlawed’ proletariat.”

As Lockean notions of rights to property spread from Europe, a concentration of land ownership developed, a consequence of which was the “tragedy of the commons,” in which the subaltern majority began to be excluded from communally held lands. In colonial India a similar process occurred, without the urbanizing effect. As Guha (1983) notes, in early colonial descriptions in India, naturalistic metaphors were used to describe peasant uprisings, thus diminishing subaltern agency by equating their actions with uncontrollable acts of nature. In Australia the doctrine of terra nullius denied the existence of Aborigines, making it unnecessary to employ legal means for abolishing native land tenure (Bartlett, 1999). In Aotearoa/New Zealand, Te Kooti Tango Whenua, “the Land Taking Court” was an apt name for the court that presided over hearings on privatization and “individualisation” of Māori land (Williams, 1999, 1).
Peasant and subaltern studies scholars seek to denaturalize this practice, find the voice of the peasant and re-insert it into academic discourse. Postcolonial theory emerged in opposition to standard legalistic historiographies, were often forwarded by scholars with third-world (or tricontinental) origins, and set about problematizing the prior historical accounts. The postcolonial approach will inform this study as it forms a narrative of changes in land tenure in Hawai‘i.

**Traditional Land Tenure**

Lucas (2004, 199) reviews legal aspects of traditional land tenure citing *Kalipi v. Hawaiian Trust Co.*, 1982, at 6 – 7:

[C]ommoners were permitted to cultivate lands within the ahupua‘a in exchange for services to the King and the ruling chief (if the ahupua‘a were not reserved for the King himself). The well-being of ruler and ruled was thus intertwined and the use of undeveloped lands by commoners for subsistence and culture was to the benefit of all.

The relationship between the social classes was thus based to a large extent on land.

Hawaiian land tenure was uniform throughout the archipelago. Chiefs controlled land and granted usufruct (the right to use) to maka‘ainana (commoners), and even to foreigners. With the increasing concentration of power (culminating in the Kamehameha dynasty) came centralization in land tenure. This led to a situation in which piecemeal land alienation could not occur, as land title was invested in the pre-eminent chief in a domain, mō‘ī, ali‘i ‘ai moku or ali‘i nui. This domain could consist of part of an island, an entire island, or the entire archipelago in the case of the Kamehameha line. Prior to
Kamehameha, land tenure was based on conquest by war, granted by chiefs, or through political alliances, including marriage. But the ali‘i insulated maka‘ainana from the effects of warfare, so that usufruct was maintained, even when leaders changed (Parker, 1989).

Traditionally, land was the basis of sovereignty and all political power stemmed from it. Land could be given to chiefs, but not sold. ‘Āina was *controlled* rather than owned (Kame‘eleihiwa, 1992, 51). Originally the rights to land did not include the right to inheritance, so an Ali‘i’s children did not automatically gain control of their father’s or mother’s land. Land was usually transferred in Kālai‘aina whenever there was a new mōʻī (Kame‘eleihiwa, 1992, 51).

**Changes in Land Tenure**

Traditional Hawaiian understanding that land was controlled and not owned was in direct conflict with Western ideas of land ownership, with its notion of individual title. The British viewed individual title to land as the “very foundation of modern civilization” (Ward, 1999, 112). Hawaiians viewed land differently. Kame‘eleihiwa (1992) emphasizes the difference between ‘āina and land as a commodity. Kauikeaouli (Kamehameha III, who reigned from 1825 until 1854) attempted to create a transition between traditional Hawaiian and Euro-American capitalist understandings of land if Hawai‘i was to remain sovereign and integrate into the international system. His teacher of political economy, William Richards, taught “three paths to foreign mana: Christianity, Western Law and Capitalism” (Kame‘eleihiwa, 1992, 174). Private land ownership came as a virtual prerequisite of a capitalist economy, and Richards promoted it. One way in
which Kauikeaouli attempted to ease the transition to the new land tenure system was to incorporate ownership by the three classes of Hawaiian society — mōʻī (king), konohiki (the aliʻi or chiefs in their capacity of supervisors of ahupuaʻa) and hoaʻāina (makaʻāinana, i.e., commoners, also called “native tenants”) — into the fundamental rights to land under the reformed system.

The constitution of 1840 provided that the King held all land, and that this land was inalienable. Disputes over alleged “title,” such as that resulting in the Paulet affair, in which the British consul claimed land ownership rights and caused the cession of Hawaiian sovereignty to Britain for five months, created concern over this system of land tenure (Kameʻelehiwa, 1992, 183-184). In the mid-1840s, Kauikeaouli agreed to a plan to privatize and finally divide the lands of the Kingdom.

The Board of Commissioners to Quiet Land Titles, or “Land Commission” was originally established to investigate land titles prior to 1845, and to confirm or reject titles. Their function was later expanded to include granting titles to the hoaʻāina (commoners, literally friends of the land) under the Kuleana act process. Article IV of an Act to Organize the Executive Departments stated: “His majesty shall appoint through the minister of the interior ... five commissioners, one of whom shall be the attorney general of this Kingdom, to be a board for the investigation and final ascertainment of or

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5 Hawaiian Kingdom Laws, An Act to Organize the Executive Departments, Article IV – Of the Board of Commissioners to Quiet Land Titles. 107.

6 Kuleana means responsibility. It referred to the transferring of title to those responsible for cultivating the land.
rejection of all claims of private individuals ... to any landed property acquired anterior to
the passage of this act ...”7

One of the first commentators on the Māhele process, a surveyor general of the
Hawaiian Kingdom, William DeWitt Alexander (1891, 109) asserts that as they were
“convinced that the ancient system was incompatible with their further progress in
civilization, the King and chiefs resolved to separate and define the undivided shares
which each individual held in the lands of the Kingdom.” W.D. Alexander was the eldest
son of William Patterson Alexander and the elder brother of Samuel Thomas Alexander,
the co-founder of Alexander & Baldwin, Ltd. (Day, 1984, 3). Alexander was also married
to the daughter of the reverend Dwight Baldwin, making him the brother-in-law of Henry
Perrine Baldwin, the other co-founder of Alexander and Baldwin.8

Alexander produced several important works on Hawaiian history, including a
textbook published by the kingdom Board of Education in 1891, and several treatises on
land history published in Thrum’s Hawaiian Annual and by the government. While his
work for the kingdom exhibits a certain impartiality, his publications after 1893 evince a
complicity with the provisional government, and an outright anti-Hawaiian sentiment.
Short of complete disloyalty to his former employer (Alexander was in Kalākaua’s privy
council) he shifts some of the prevalent criticism by the oligarchy onto Kalākaua’s
predecessor, Lot Kapuaiwa. Alexander (1896, 1) began his book The History of the Later
Years of the Hawaiian Monarchy and Revolution of 1893 with the following passage:

It is true that the germs of many of the evils of Kalakaua’s reign may be

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7 An Act to Organize the Executive Departments, Article IV — of the Board of Commissioners to Quiet
Land Titles, 1845, 107. Contrary to what has become the accepted view, the Land Commission was not
originally involved in the mahele process, and was only reconstituted to assist in the Kuleana Act process.
8 Henry Perrine Baldwin was also directly a brother-in-law of Samuel T. Alexander through his marriage to
Emily Whitney Alexander.
traced to the reign of Kamehameha V. The reactionary policy of that monarch is well known. Under him the ‘recrudescence’ of heathenism commenced, as evinced by the Pagan orgies at the funeral of his sister, Victoria Kamamalu … and by his encouragement of the lascivious hulahula dancers and of the pernicious class of Kahunas or sorcerers. Closely connected with this reaction was a growing jealousy and hatred of foreigners.

This context problematizes Alexander’s position as a commentator on land tenure, as his family stood to gain from Hawaiians’ dispossession from land. Conversely, some allegiance to the Hawaiian monarchy can be inferred by his government appointments.

A contemporary participant-observer of land tenure, John Mortimer Lydgate (1915, 103) supports a more optimistic view of the process of alienation, and contests the view that the Māhele and Kuleana act alienated Hawaiians from land. Lydgate (1915, 107) also puts into question received notions of alienation, positing a process of “forgetting,” which I discuss in chapter 6. Trained as a minister, Lydgate’s background included positions as “first assistant on Government Survey, 1869” and tax assessor for the island of Kaua‘i (Siddal, 1917, 182-183). As with Alexander, Lydgate is implicated by his position as manager of Laupahoehoe and McBryde sugar companies. He was also editor of the Garden Island newspaper. Lydgate’s work is not mentioned in later histories of the Māhele. Later commentators would examine this process with less of a stake in the process, but an increasingly detached position from it.

Jean Hobbs’ Hawaii: a Pageant of the Soil (1935) was the first book-length treatment of Hawaiian land tenure. She relies mainly on government reports, Alexander’s books (but not his history of land tenure in Thrum’s Annual), and Sanford Dole’s very
brief lecture on the “Evolution of Hawaiian Land Tenure” for the Hawaiian Historical Society. Hobbes notes that “no provision had been made by the original plan to care for the expense of carrying on the government,” leading to Kauikeaouli’s “set[ting] apart for this purpose a large portion of his land [for the government, available to be claimed by makaʻāinana]” (1931, 33). This “unselfish act,” in Hobbs’s (1931, 33) view, “showed his deep sympathy and understanding for the needs of his people and set an illustrious example of liberality and public spirit.” Despite this positive appraisal of Kauikeaouli, Kameʻeleihiwa describes Hobbs’s book as “primarily a defense of missionary behavior,” and notes that her primary contribution to Māhele scholarship is an appendix of missionary land transactions (1992, 12).

Marxist scholar and emeritus professor of Ethnic Studies at UH Mānoa, Marion Kelly’s M.A. thesis (UH Mānoa, 1956) made a similar argument to that later made by Kameʻeleihiwa. Kelly’s (1956, 141 – 142) description intimates a view of the māhele as a case of colonial infiltration:

[T]he changes in Hawaiian land tenure with consequent alienation were the result of intrusive forces over which they had little or no power and against which they were inadequately protected. If there were those among the Europeans who were concerned about the welfare of Hawaiians and the ultimate results of land alienation, their voices were too small to be heard above the tumult of acclamation to the contrary … The legislative action of 1850 set up the machinery by which Hawaiians could dispose of their land. Without their farms the commoners were deprived of the intimate relationship with the land which was a fundamental principle of Hawaiian civilization. Thus, in the interest of the
establishment of a free enterprise system the land of the Hawaiian people was alienated and their ancient cultural ties severed.

Kelly (1956, 133) described the first step in the process, responding to the “greatest obstacle to the release of large areas of land for freehold purchase … the several and undivided interests in the land, i.e., those of the tenant [hoa’aina], the landlord (chief), and the king,” that of the Māhele itself. This process was intended, in Kelly’s view, to “make a division whereby the king and the chiefs separated their interests in certain lands and established their interests in other lands” (Kelly, 1956, 133). Later analysis would hinge on the definition of the idea of “mak[ing] a division.” Legalistic descriptions began to contend with cultural and moral views of the “intentions” “behind” such a division.

In 1958, territorial deputy attorney general Jon Chinen wrote The Great Māhele: Hawai‘i’s Land Division of 1848, which described the process in a more legalistic and ostensibly neutral manner. Chinen addresses the idea that one purpose of the Māhele was to eliminate the existence of two landlords over the people, because of the three-part ownership in the dominium of the Kingdom. By dividing all the land between the King and the chiefs, the Māhele resulted in each piece of land having only one landlord. As Chinen (1958, 15) described it, the Māhele was “the separation and identification of the relative rights of the king, the chiefs, and the konohikis, in the lands within the Islands.” It was necessary that this process occur first so that maka‘āinana would have only one

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10 Chinen, in my view, is incorrect in naming the chiefs as separate from konohiki, in fact, ali‘i (chiefs) received lands in their capacity as konohiki.
landlord from whom to claim land in the later Kuleana Act. Chinen (1958, 15) concluded, however, that:

as a suggestion to an equitable distribution of lands within the Islands, the Land Commission had recommended the separation of the lands into three parts: one part to be retained by the king, one part to be set aside to the chiefs and konohikis, and a third part to be distributed to the tenants or common people. However, there was no action taken on the suggestion. Neither King Kamehameha III nor the chiefs were then ready for such a drastic departure from the old system.

Many scholars later cited this lack of action on the alleged intent of the Māhele as a primary cause of land alienation in Hawai‘i (see Kame‘eleihiwa, 1992; Merry, 2000; Chinen, 2002). University of Hawai‘i historian of the Hawaiian Kingdom Ralph S. Kuykendall (1938, 282) critiqued similar contemporary analyses. He quotes the land commission: “a tract of land ... might be divided in three parts, and an allodial title to one then be given to the lord, and the same title be given to the tenants of one third, and the other third would remain in the hands of the King, as his proportional right.” Kuykendall (1938, 281 – 282) goes on: “[t]hese remarks by the land commission gave rise to the statement frequently made, but wholly erroneous, that all the lands of the kingdom were divided in three parts, one third to the king, one third to the chiefs, and one third to the tenants or common people. The division was effected on quite a different basis.” But as Van Dyke (2008) points out, Kuykendall does not explain how the actual division was structured.

As a successor to Haunani-Kay Trask (who at varying points was a Marxist and feminist intellectual) as director of the Center for Hawaiian Studies at the University of
Hawai‘i at Mānoa, Kame‘elehiwa inherited some of Kelly’s aversion to the capitalist structure of the Māhele while applying Hawaiian cultural concepts to her critique. These include four traditional Hawaiian metaphors she gleaned from a prolonged study of Hawaiian history (see Kame‘elehiwa, 1992, 25-49). Kame‘elehiwa (1992, 15) argued that the Māhele was the primary cause of Hawai‘i’s loss of sovereignty, and maka‘āinana’s loss of “‘Āina” – which, as she point out, means “that which feeds.” Kame‘elehiwa (1992, 12) notes that there had previously been “no history of the Māhele from the Hawaiian point of view.” Using Hawaiian language sources, Kame‘elehiwa shows how “traditional patterns of land tenure persist[ed]” from 1819 until 1848, during which time “‘Āina were in a constant state of flux, being given as presents by one Ali‘i Nui to another, as tribute from a lesser Ali‘i to a higher one, or granted by an Ali‘i Nui as a favor to a lesser Ali‘i” rather than being passed down by inheritance in the European model.

Calling the event “a terrible disaster for the Hawaiian people,” Kame‘elehiwa holds that foreigners asserted that privatization of land was the first step toward creating a foreign capitalist class. It was thought that cash-poor, land-rich Hawaiians without a clear sense of Western concepts of land tenure would give up land at a rapid rate. So while their justification for privatization of land was to empower Hawaiians, in Kame‘elehiwa’s view this can be seen as a device to convince the King to facilitate the alienation of Hawaiians from land.

Kauikeaouli, in Kame‘elehiwa’s view, saw that imperialist powers were coveting Hawai‘i, and was advised that in case of a foreign takeover, the occupying power would respect Western-modeled land tenure, and Hawaiians would then be able to retain their
private lands. Banner (2005, 273) calls this process “preparing to be colonized,” and holds that Hawaiian leaders were “trying to maintain their position as elites under what they expected would be a new regime” (Banner, 278). But Banner disregards the simultaneous process of recognition of Hawaiian sovereignty in 1842 and 1843 that had precisely the opposite effect, that of maintaining independence.

International legal scholar Maivân Clech Lâm (1989) asserts that the Kuleana Act created a system of rights parallel to traditional Hawaiian rights to land, and that the new system was “not in derogation” of the prior system (Lâm, 1989, 233). Traditional rights remain in this interpretation. Rights pertaining to land and natural resources include: water rights, fishing rights, shoreline rights, access rights, gathering rights, and burial rights (MacKenzie, 1991). Traditional gathering rights were affirmed by the 1995 PASH (Public Access Shoreline Hawai‘i) decision, in which the Hawai‘i Supreme Court ruled that anyone (not merely Native Hawaiians) gathering for traditional Hawaiian practices may cross private lands for access.

Factors that “combined to deprive commoners of their land and its benefits” included the industry supplying foreign ships with food, water, and sandalwood (Lâm, 1989, 282). This led to the neglect of gardens and waterways (Lâm, 1989, 283). Disease brought by foreigners led to the loss of a large portion of the labor force, which in turn led to the collapse of the traditional economy, and an influx into the towns and entrance into the cash economy. Land was also converged to foreigners’ ownership directly.

In Lâm’s view, the Māhele’s ostensible dual goals of not alienating Hawaiians from their livelihood and conferring one third of Hawai‘i’s land to maka‘āinana, were not compatible with the regulations involved in securing land title. Lâm concludes, however,
that the Hawai‘i Supreme Court has never denied that failure to gain title to land abrogated the rights to use land in an ahupua‘a (traditional land division running from the ocean to the mountains). Fishing rights that have been recognized based on occupancy of an ahupua‘a and by konohiki ownership can be extended to hunting and gathering and to agriculture. Through a present-day interpretation, Lâm emphasizes gathering rights, and possibly conflates them with native tenant rights.

Reframing the Māhele

An emerging view holds that the Māhele of 1848 was an effort to allow a transition in the land tenure system in the Kingdom that would allow for capitalist development. This institutionalist approach (see Sai, 2008, Beamer, 2006, Preza, 2010) attempts to upend twentieth century critiques of the Māhele as capitalist exploitation, and replace it with a positivist and legalist description of the Māhele as merely an institution of an emerging and modernizing nation-state. As Tengan (2008, 40) describes it, “a number of scholars have identified the Māhele and the massive alienation of the commoners thereafter as the primary source of societal breakdown and later colonial marginalization; others have argued for a more nuanced reading of the legislation as having worked to empower Hawaiians.” The latter view holds that the “undivided shares” existed in the dominium of the Kingdom – the government’s ownership of all land based on sovereignty. Preza (2010, 12) for example, shows how most of the commentators on the Māhele cite six authors, cite each other, or do not cite anyone in

support of the claim that the Māhele was the direct cause of the dispossession of Hawaiians’ land. I examine this emerging view of the Māhele in chapter 4.

Relevance and Implications

Cahill (2006, 1) calls attention to the importance of the study of land, pointing out that land ownership is the often-misunderstood basis of the global economic system:

Poverty and wealth are not, as is often thought, opposites. Instead the two words predicate a problem, which is poverty, and indicate its solution, which is wealth.

Land, that upon which we all stand, is the single most common characteristic of wealth worldwide. … And the commonest characteristic of the poor of the planet is the opposite, landlessness.

Cooper and Daws (1985) show the relationship between land and political power in Hawai‘i, and the current homelessness confronting Hawaiians underscores the significance of a re-evaluation of land history, as global capitalist competition drives Hawaiians out of the housing market.

The implications of reinterpreting the history of land tenure are potentially profound. Because of potential misunderstandings of fundamental concepts of land tenure, it is conceivable that individuals, organizations and governments do not own the land they claim to. The system created in the mid-1840s is the basis of all land ownership today irrespective of all changes in government, and all land titles trace back to it, as seen in the process of title search. Because of this, claims of land ownership are grounded in law to a greater extent than claims of “sovereignty” or the right of self-determination. These claims are, then, more verifiable and demonstrable. Land research can undermine
or reinforce ownership claims in ways that claims of sovereignty cannot, and thus offers a link connecting the successive governments in Hawai‘i through “that upon which we all stand.” It connects all residents of Hawai‘i directly to structures of power.

**Conclusion**

While the prevailing view of the Māhele makes a compelling case for the detrimental effects of land privatization, this view is based on an unclear understanding of the process. The revised view, forwarded by Sai (2008), Stauffer (2004) and others, in contrast, creates a clearer picture of the Māhele/Kuleana Act process while minimizing its detrimental effects. Kamakau’s criticisms are particularly damning, although his accounts are mainly simultaneous with the early stages of the process. Kamakau does not describe the broad ownership that Stauffer clearly shows existed, nor the alternative process of purchasing government land pointed to in primary documents by Sai.

In the hybrid form in which I will use it, genealogy (or moʻokūʻauhau) seeks to examine the breaks in narrative in such a way as to produce a history of the present. This “gray” history, with its continuity and rupture, provides a new lens through which to consider Hawai‘i’s land tenure system, and native tenant rights in particular. What remains is the sense that the Māhele and Kuleana Act were not the travesties that contemporary scholars would have us think, nor an example of unmitigated agency on the part of Hawaiians. By the standards of its time, it created a broad ownership of land, but did not prevent alienation. It is most likely that the process, while ostensibly well-conceived, took on a life of its own, leaving some Hawaiians in control of their economic fate, at least for a generation, and some disenfranchised. And despite aspects of the
process that opposed Hawaiian and Indigenous understandings of land, it was the economics of their situation and the processes of erasure and forgetting that led to alienation, rather than the design of the Māhele process itself.

Further, once the ali‘i committed to the capitalist paradigm, no alternate path existed in the nineteenth century to ameliorate the alienation of Hawaiians from land, other than the usage rights represented in the *Oni v. Meek* case of 1858, which defined and limited native gathering rights. The system of vested interests was an attempt to prevent this from becoming a generational problem, as the rights were perpetually renewed to those born after 1848. I describe the structure of the post-Māhele Hawaiian land tenure system and the transition to that structure in chapters 3 through 5 and in chapters 6 and 7, I examine the responses to, and results of the new system. These chapters are interspersed with critique employing a genealogical method. Kuleana – “native tenant rights” were embedded in this system, then concealed, and misconstrued as gathering rights. This entire system was built upon the foundation of traditional Hawaiian land tenure – a foundation that itself has been little-studied, and constitutes the subject of the next chapter.
CHAPTER 2 – MO‘OLELO: TRADITIONAL HAWAIIAN LAND TENURE

I have two convictions in life.

One of these is that I am Hawaiian.

The other conviction is that I am this land, and this land is me.

Pua Kanaka‘ole Kanahele

A Hawaiian farmer related his view of place as an orienting concept:

As a Native Hawaiian, a place tells me who I am and who my extended family is.

A place gives me my history, the history of my clan, the history of my people. I am able to look at a place and tie in human events that affect me and my loved ones. A place gives me a feeling of stability and of belonging to family, those living and dead. A place gives me a sense of well-being and of acceptance of all who have experienced that place … The concept of wahi pana [storied places] merges the importance of place with that of the spiritual. My culture accepts the spiritual as a dominant factor in life; this value links me to my past and to my future, and is physically located at my wahi pana … Where once the entire Native Hawaiian society paid homage to numerous wahi pana, now we may give hardly a cursory glance (James in Kanahele, 1991).

In this chapter, I survey some of the aspects of place, or land, emphasized by James above – notably spiritual connections and familial ties. I trace a mo‘okū‘auhau of traditional Hawaiian land tenure, similar to Sahlins and Kirch’s “integrated history” (1992, 1) in their study of Anahulu valley, drawing on their combined expertise in cultural anthropology and archaeology. It is integrated in the sense that it draws on multiple fields of study – political science, ethnohistory, anthropology and archaeology,
and thus may provide “positive synergistic effects for an historical understanding” (Sahlins and Kirch, 1992, 1). This chapter is a moʻokūʻauhau of traditional Hawaiian land tenure, as it uses Hawaiian sources to show the power relations contained in a Hawaiian ontology of land. As a moʻokūʻauhau, it draws on multiple sources such as oli, mele, oral history and later archival sources, and therefore does not merely describe Hawaiian notions of land from one perspective. It is, to an extent, an “insider” ethnohistory, but because some of its sources are “outsider” sources, it remains, as Krishna (2009, 73) stated of Said’s notion of Orientalism, “indissociable from the fact of Western conquest … [and] its belief in the innate superiority of its own civilization.” It is also a genealogy in Foucault’s and Nietzsche’s sense – a dual approach I argue is compatible, as Hawaiian sources such as David Malo display a surprising affinity for ambiguous accounts of “origin.” I distinguish between a Hawaiian conception of land and a Hawaiian perception of land. Though the two are interrelated, perception of land, being affective, has more currency for Hawaiians than for westerners. Despite this, Hawaiians do still retain a conception of land, but one that also has affective connotations such as embedded nationalistic sentiments. I examine landscape, ahupuaʻa, traditional knowledge of land such as palena (Beamer and Duarte, 2006), and how these shape a Hawaiian politics of land.

I begin with the gods, as land is seen by Hawaiians as belonging to deities, continue into theoretical notions of land and landscape, and conclude with an ethnohistory of the politics of land. While I employ ethnohistoric and anthropological approaches, I also problematize their use as processes serving to construct indigenous subjects as “Others.” Tengan and White (2001, 381 – 416) have described the
development of a native anthropology, which, like Geertz’s thick description, shifts the direction of “the gaze.” It shifts from native as object to native as subject. I attempt in this chapter to approximate this approach in examining traditional Hawaiian land tenure.

Most texts on land devote little more than a paragraph to traditional Hawaiian land tenure. Moffat and Fitzpatrick (1995) suggest the need for a reevaluation of traditional Hawaiian land tenure, which Sahlins and Kirch call an “overly simplistic theory of demographic determinism.” Moffat and Fitzpatrick (1995, 1) note that while much has been written about the land tenure system, recently published research suggests that much remains to be learned through archaeological investigation and reinterpretation of the oral tradition that is an important source of Hawaiian history. It is apparent that the writings of earlier - and very reputable - scholars presented too simplistic a picture of Hawaiian land use. Revelations from field archaeology, careful review of historic documents, intensive study of mahele [sic] records, and even efforts to revive the ancient lo‘i ... all point to a very complex and dynamic system.

Like Anne Salmond (1997), I have sought to “gather fragments” and “grasp key patterns” in traditional land tenure, as a move toward filling these gaps. Ralston (1984, 21) notes that historians have presented “Hawaiian society as a homogeneous, monocultural entity,” focused on Hawaiian and foreign elites, and “it has been too easy to portray the maka'ainana submitting willingly or passively ... to chiefly dictates.” The same is true for studies of Hawaiian land tenure, which, while not completely neglecting maka'a'inana, often homogenize both the land tenure system and class agency (see Kame'eleihiwa, 1992). This chapter synthesizes multiple fields of research in order to
expand what has thus far been a skeletal narrative in an undeveloped field. Much of the current scholarship fails to emphasize a central aspect of Hawaiian land tenure – the relationship between ‘āina and akua.

**Akua**

In *Ka Mooolelo Hawaii*, the first book on Hawaiian history, the Lahainaluna scholars wrote:

> I ka mana o o kekahi poe noonoo, aole paha aina maanei i ka wa kahiko, he moana wale no. Manao lakou, ua hoea mai na aina mai loko mai o ka moana, o na ahi pele ka mea i hoea mai ai.

[In the opinion of some learned people, there was no land here in ancient times, only ocean. In their opinion, the lands arrived out of the ocean and the lava (“ahi pele”) is the thing that made them arrive (my translation)].

The line “ahi pele” suggests the idea of the goddess Pele producing the islands, and contradicts other accounts, including Kumulipo, in which the islands were fished from the sea by the demigod Maui and given birth to by akua, particularly Papa-hānaumoku (Papa from whom lands are born) (Beckwith, 1970, 294). Kānaka Maoli are unconflicted over this ambiguity, as multiple versions of histories are a standard feature of Hawaiian moʻolelo, particularly in the case of “origin” stories, which concern deities.

McGregor (2007, 264) summarizes Hawaiian origins in relation to deities:

> According to the kupuna, Native Hawaiians respect, treasure, praise, and worship the land and all natural elements as deities and the source of universal life ... At a [deep] level ... ancestral chants trace Hawaiian origins to such great gods as Papa Hānaumoku, the earth mother and birth mother of the Hawaiian islands; Wākea,
the sky father; Kāne, the springs and streams; Kanaloa, the ocean; and Pele, the volcano. Hawaiians are genealogical descendants of the earth, sea, sky, and natural life forces.

She reiterates that the Kumulipo “establishes that Native Hawaiians are descended from, and thus inextricably related to, natural life forms and the spiritual life forces personified as deities” (McGregor, 2007, 13). But this descent is neither entirely linear nor unproblematic, but “grey” with genealogical continuities and ruptures.

Malo (1951, 3), in a dual genealogical approach, notes: “In the genealogy of Wakea it is said that Papa gave birth to these islands. Another account has it that this group of islands were not begotten, but really made by the hands of Wakea himself.” Malo’s approach is “dually” genealogical in the sense that in sequential moʻokūʻauhau he shows the rupture created by varying accounts. Another account, recorded by Lahainaluna scholar Kaiʻaiakawaha, (in Kikiloi, 2010, 113-115) appears to begin before the gods’ arrival in Hawai‘i and continue on to the major Hawaiian islands:

Eia na ʻaina i hanau mai ai maloko mai o ke kanaka i puka mai ai. O Papahānaumoku moku ka wahine o ka Hanau—Akea ke kane, moe laua, ko ka laua keiki, a hanau mai ka laua hiapo he pohaku o Kahikiku, oia ka mua, hanau mai kona hope o Kahikimoe…

[Here are the lands that were born from which the people emerged. Papahānaumoku the mother of birthing—Wākea the husband, they mated, and their children were begotten, and born was their first child a rock named Kahikikū, he was the first, born next was Kahikimoe… (trans. Kikiloi)].
The chant continues naming islands not in the Hawaiian archipelago until Hawai‘i is mentioned as the twenty-fifth child of the couple. Maui is the next island after Hawai‘i.\(^\text{12}\) This birthing of the islands suggests a familial relationship between kanaka and ‘āina, as gods are, in the view of John Ka‘īlimikaua (2000), “ancestors from the beginning of time.”

**Land as Kin**

As Hawaiian mo‘okūauhau derive unbroken from these akua, the islands, and the land itself can be understood as kin to Kanaka ‘Ōiwi. Andrade (2008, 25) points out, “the familial relationships established by the Papa and Wākea story place human beings as the younger siblings of the kalo (taro plant) and the ‘āina (islands) in the family of life. These relationships carry with them responsibilities and examples for proper behavior.” This kinship suggests land is seen as a companion, friend or relative, and can be seen even in a modern chant such as Ku‘u Lei Tubarose – Hele au i Honolulu (Kanahele, N.D., 67):

\[
\begin{align*}
\text{Ka lawe ana mai o ke kai loa} \\
\text{Ia ‘oe ho‘i au minomino} \\
\text{A noho i ka hale makamaka‘ole} \\
\text{E ole o kaina muli pok‘i} \\
\text{Ike hou ana ke one hanau} \\
\text{Ke kowa o Moloka‘i me Lana‘i} \\
\text{Ninau e ke hoa pehea au} \\
\text{Pehea ke kai ‘o Pailolo}
\end{align*}
\]

\(^{12}\text{The island named immediately before Hawai‘i is “Polapola” (Borabora).}\)
Hoʻohen ana me Honokohau

The long sea is bringing me
To you, I return miserable
I remain in the friendless house
Denied of my younger siblings
And to see again the homeland
The channel of Molokaʻi and Lanaʻi
It was asked by a friend how am I?
How is the sea of Pailolo
Caressing Honokohau

According to Joseph M. Poepoe (1905) Pailolo was the channel where Kamehameha first boarded Captain Cook’s ship *Discovery*, and thus may have political implications. Hawaiian mythology suggests the intertwined nature of land and people, which is seen in the inquiry of the well-being of the person and place in the chant nearly interchangeably – “how am I?” is immediately followed by “how is the sea of Pailolo.” The image of the land as friend or companion is also seen in the chant. This applied to both chiefs and commoners. According to Beckwith (1970, 304):

the conception of Papa-hanau-moku both as a human being – wife of Wakea and progenitress of the long line of descendents who form the common stock which peopled the group – and as a foundation land out of which islands were formed agrees with the Hawaiian belief that land forms arise as the material body of the

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spirit which informs them and which is in effect a god with power, in some cases, to take human form at will. It is this belief in the animate nature of land which gives poetic integrity to the conception …

The notion that all Hawaiians are descended from Papa and Wākea forms a familial relation between Hawaiians and land, and unifies Hawaiians. Connected to this is the idea that kalo is the elder sibling of kanaka.14

Such genealogical conceptions of the origin of land are situated in a historical context of settlement and development of Hawaiian society. Between 900 and 1100 AD war increased along with a dramatic rise in population. The arrival and introductions of the priest Pa’ao facilitated a transition to a more rigidly structured and hierarchical society, one that was embodied and viewed, metaphorically, as a body.

Land as Body

Hawaiians embodied land. The structure of the increasingly hierarchical society of the classical period was described in a chapter of David Malo’s Ka Mooolelo Hawaii (1951) entitled “No Kalaimoku.”15 In it, he uses an analogy of a body to describe traditional Hawaiian government and society.16 The head in this metaphor represents the Mōʻī or King.17 The shoulders and chest represent the aliʻi (chiefs). The left hand represented the Kālaimoku. Malo uses the Western analogy of the Interior minister or Prime minister to describe this position. This political expert was responsible for war, administration of the royal court, and checking genealogies of potential court members in

14 Wākea had a relationship with his daughter Hoʻohōkūkalani that produced the still-born Hāloanaka, who became the first kalo plant.
15 In Emerson’s translation, “no Kālaimoku” is rendered “Civil Polity.”
17 Osorio (2003) notes that Mōʻī is a modern term, dating to the time of Kamehameha III (1825-1854).
an elaborate ritual in the hale nauā. The right hand in this analogy represented the Kahuna or high priest. The Kahuna advised the King on religious matters, and enforced kapu, encouraging the King to enforce the kapu by “kill[ing] off the ungodly people.” The right foot represented nā koa, the soldiery, and the left foot the mahi‘ai and lawai‘a (farmers and fishermen). According to Leilani Basham (2010, 48), Hawaiian nationhood was itself embodied in land. She notes: “ma nā manaʻo [Hawai‘i] … hō‘ike ‘ia ka pili o Hawai‘i i ka po‘e Hawai‘i, ka Lāhui Hawai‘i, ka ‘Āina Hawai‘i, ke Aupuni Hawai‘i, a me ka ‘Ōlelo Hawai‘i.” [In Hawaiian thought is articulated the relationship among the Hawaiian people, the Lāhui Hawai‘i, Hawaiian land, Hawaiian government, and Hawaiian language. trans. N.K. Silva] This body politic is likely what Osorio (2002) refers to when he describes the “dismembering” of “lāhui” (nation) that occurred in the late nineteenth century.

There is also a notion of land-as-body that can be apprehended in land research, and is connected to memory. As Iaukea (2012, 14) points out:

Land, body and memory all inform one another. The land, extending out and into the ocean, holds the practical and epistemological memories of encounters. The body is the agent, the participant in the environment, and the container of memories. For Hawaiians in the past, vital information was relayed through the environment, and this memory of ka ʻāina (the land; that which feeds) affected close interpersonal relationships and societal structures. Vestiges of that connection to ka ʻāina still exist in place and still hold valuable information about who we are. The dynamics and evolution of land, body and memory can be

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18 Malo 188.
glimpsed in the land tenure documents and in the personal stories that accompanied the exchanges of private property.

These notions – of land as deity, relative, body and companion, developed over a period of centuries of Hawaiian settlement.

The increasingly Hawaiian complex society of the expansion period (1100 – 1650AD) is said to have featured a highly stratified class system, and complex kapu to govern a large population. Developments that allowed for this increase in complexity included increased warfare after 1100 AD and an increase in religious practice: the building of large, elaborate heiau as a means of consolidating power through control of religion, improved technology for fishing, fishponds and fishhooks, improved technology for agriculture – irrigation and lo‘i kalo (Kirch, 1985).

Sahlins and Kirch (1992, 171), however, hold that their “sequence of agricultural change from upland Anahulu reveals the folly of an overly simplistic theory of demographic determinism in accounting for Hawaiian agricultural intensification.” They show that in the case of Anahulu and the Kawaiola district, intensification was a purposeful political strategy of Kamehameha and Ke‘eaumoku during a period of population decline (Sahlins and Kirch, 1992, 171). This political arrangement was later reflected in land claims. As Stauffer (2004, 13) points out, 82 percent of claims in Kahana valley traced to “the time of Kamehameha I.” Politics, then, and not merely demographics, determined the use of land. A Hawaiian conception – and a Hawaiian politics – of land developed within this socio-political context. I further address the idea of a Hawaiian politics of land at the end of this chapter.
While Hawaiian land tenure has historically been considered to be fairly uniform throughout the archipelago, it is possible that regional variation in norms surrounding land affected the later Kuleana claims, as chiefs sought ways to prevent the claiming of “their” lands by makaʻāinana. This is a point I consider in chapters 4 and 5 on kuleana and the Māhele. Chiefs traditionally possessed land and granted what may be called “usufruct” (the right to use) to aliʻi, makaʻāinana, and later to foreigners. Abad (2000, 417) notes Alapaʻi’s approach to land management:

Alapaʻi enacted several measures to ensure his control over Hawaiʻi Island, many of which involved ancestral understandings from the times of Pilikaʻaiʻea, Kanipahu, Kihanuilūmoku, Līloa, and ʻUmi. Perhaps the key to his success was that ‘he did not take lands from the chiefs or the commoners’ but only asserted his right as the aliʻi nui to oversee the management of those lands ... His administration of the island demonstrated that he ‘loved the common people.’

If Alapaʻi’s approach was typical, or ideal, a multi-layered and benevolent land tenure system is suggested. But with the increasing concentration of power (culminating in the Kamehameha dynasty) came centralization in land tenure. This led to a situation in which piecemeal land alienation could not occur, as land title was invested in the pre-eminent chief in a domain, or Mōʻi. This domain could consist of part of an island, an entire island, or the entire archipelago in the case of the Kamehameha line. John Wise (1965, 83) holds that “in the old days, we say that the land belonged to the Alii Nui. It did—just as long as he held the power. When he lost the office, he lost the land.” Prior to Kamehameha, land tenure was based mainly on conquest by war. Although occasionally,

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19 Alapaʻi was mōʻi (ruling chief) of Hawaiʻi Island at the time of Kamehameha’s birth, ca. 1758.
20 Pilikaʻaiʻea was a contemporary of the kahuna Paʻao, ca. 900 – 1100 AD.
21 Līloa and ʻUmi were father and son, who reigned over Hawaiʻi Island ca. 1600.
land passed to the heir of a ruling chief, the land was divided between district chiefs in kālaiʻāina, or land divisions. Aliʻi often insulated the makaʻainana from the effects of warfare, so that usufruct was maintained, even when leaders changed (Parker, 1989).

There was, however, variation in land tenure practices. Kamakau (1992, 230) notes that the people desired to live under chiefs who were successful and dwelt in peace … if a chief was victorious in war and showed seemingly superhuman power, then his men feared him and worshiped him as if he were a god. And because of their dependence upon the chief he would have many kahu, companions (punahele), favorites (aikane), [and other attendants] … Seeing themselves thus surrounded, the chiefs would lay heavy burdens upon the commoners and kill them at the slightest provocation.

Chiefs, however, “did not rule alike on all the islands. It is said that on Oahu and Kauai the chiefs did not oppress the common people. They did not tax them heavily and they gave them land where they could live at peace and in a settled fashion” (Kamakau, 1992, 230). Changes occurred under Kamehameha I, under whom the chiefs “oppressed the commoners and took away their lands” (Kamakau, 1992, 231). The ability to use oppressive practices was likely the unintended result of unification, the loss of the ability to rebel and consolidation of control over land. This system may have prevented the rapid usurpation of power by foreigners, but their arrival slowly began to erode the original Hawaiian conception of land.

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22. Umialiloa divided Hawaiʻi Island between his sons Keawenuiaʻumi and Keliʻiokaloaʻumi, who later fought each other to reunify the island. This pattern is also seen with the sons of Maui chief Piʻilani. See Kamakau, 1992.
Hawaiian Conception of Land

On one hand, a Hawaiian sense of land is exemplified by Pua Kanakaʻole Kanahele’s statement (2005, 23), in the epigraph to this chapter, that “I am this land and this land is me.” On the other hand is the Euroamerican notion that “this land is mine,” to paraphrase Woody Guthrie’s 1944 song or Jean Renoir’s 1943 film. The critical difference lies in the idea of possession. The commonly stated ʻōlelo noʻeau “he aliʻi ka ʻāina, he kauā ke kanaka” [the land is a chief, people are its servants] demonstrates that in the Hawaiian conception, people do not own land – land owns people. Ellis (2004, 430) describes Hawaiian land tenure in 1823, in a passage called “PEOPLE PASS WITH THE LAND:”

The common people are generally considered as attached to the soil, and are transferred with the land from one chief to another … In recently conquered districts, they were formerly obliged to abide on the land which they cultivated, as slaves to the victors; at present, though they frequently remain through life the dependents or tenants of the same chief, such continuance appears on their part to be voluntary.

This passage shows the semi-communal nature of traditional Hawaiian land tenure, and generally supports Kanahele’s claim. Ellis’s emphasis on dependency and tenancy elucidates why Hawaiian land tenure would be called “feudal” for the next century and a half. The very idea that Hawaiian land tenure was feudal shaped the changes made to the system in the nineteenth century, and created perceived parallels with European feudalism, which I examine in the next chapter.
Linnekin (1985, 231), in her study of traditional land practices in Keanae, Maui, describes the social arrangement surrounding land:

The exchange of land for service is a long-established Hawaiian concept and was the basic principle underlying chiefly land redistribution [kālaiʻāina]. The recipient is obligated to repay the giver with assistance and loyalty. This kind of exchange is a frequent theme in Hawaiian legends, as when a son-in-law serves his wife’s father who has provided him with land. In Keanae, control of land certainly helps to make someone koʻikoʻi [influential]; land is desirable not only for its material returns but also — and perhaps more importantly — for its potency as a gift.

Land thus conferred status, which made the later feudal term “landlord” appear suitable. And land was the primary gift given to both Hawaiians and foreigners in appreciation for services rendered. For example, Kamehameha I granted John Parker the land that developed into the 250,000 acre Parker ranch, for his services in ridding Hawaiʻi Island of feral bulls. [SITE] But land also had affective connotations. As Silva (2004, 40) holds, “land tenure was the central feature of this system of political and social relationships based on obligations as well as bonds of affection.” Anonymous editorials were written in the 1890s protesting the overthrow, signed with such names as “Kealohaaina” — figuratively patriots, but also literally “those who love the land” (Silva, 2004, 130). This affective relationship with land is most evident today in Hawaiian music, and is implicitly political. In the song ‘E Aloha Mai E Pele,’ by Harriet Kepilino Fernandez, this relationship is seen in the evoking of Pele:

Haʻina mai ka puana
E ʻō e Pele i kou inoa
Puʻu wai kaumaha o ka lehulehu
Aloha nou e ka ‘āina
[This is the end of the song
Answer O Pele to your name
To the heavy heart of the multitude
Aloha for you, land

In a more militant vein, the song “Wilikoki ke Koa Ola Hawaii” [Wilcox the warrior for the life of Hawaiʻi] composed by D.M. Punini and published in the Buke Mele Lahui (1895, 8) depicts the rebel Robert Wilcox as saying:

Imua kakou a e na hoa
E hopu i ka pu paa i ka lima
E moe a ilalo me ka eleu,
Kapae ka makau me ka hopohopo,
Makia ke aloha o ka aina
[Let us all go forward my friends
Seize the gun firmly in the hand
Sleep below with alertness
Set aside the fear and uncertainty
Focus on the love of the land[23]

This love of land, which was both figurative (patriotism) and literal, was bound with chiefly control. Land was seen as living, and this life was embodied in the chief. As Dudley (1990, 112-113) points out, “so close is [the chief’s] relation with the lands, that when he dies the lands die”:

Ua lele ka hoaka o ka aina
Ka uhane o ka moku eia iluna
Ua ikea na iliili a Palila
Ua hoolei ia i kahi make
Kau ka make, Kau make ia.
Make kau e lakou nei,
Ka newa mai nei ka uhane
Ka uhane kinowailua o ka aina
Ke kinowailua o na kolu,
O Kau, o Puna, o Hilo.

[The spirit of the land has fled;
The soul of the land is flown upward
The pebbles of Palila have appeared,
The glory of the land is thrown into a place of death.
Kaʻu is dead.
Kaʻu is slain by these conquerors
Now the soul staggers

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23 Originally published in 1895 by F.J. Testa, editor of the Hawaiian language newspaper Ka Makaainana, Buke Mele Lahui was reprinted in 2003 by the Hawaiian Historical Society.
The ‘ʻuhane kinowailua (soul) of the three districts:

Kaʻu, Puna and Hilo.]


Kinowailua, which Thrum and Dudley translate as “soul” evokes the Maori term Wairua, a life-force that flows through people, living things and nature. This suggests that a life-force flows in and out of people and land, and presumably into the next ruling chief. McGregor (2007, 13) notes that the Kumulipo “establishes that Native Hawaiians are descended from, and thus inextricably related to, natural life forms and the spiritual life forces personified as deities.” Oliveira (2006, 68) extends this sense of connection to ʻāina:

To truly know the ʻāina is to feel it. It means tilling the soil, planting crops, and diving into the ocean. It means being ‘rooted’ in place because when you are not, you truly lose ‘touch’ with nature and distance yourself from your ancestor. And, to truly ‘know’ the ʻāina is to feel for the ʻāina and interact with the ʻāina. By working on the ʻāina, people are able to understand how the ʻāina feels. Even today, many Kanaka Maoli practitioners are convinced that the ʻāina in is great pain and distress. The runoff that constantly encircles Kahoʻolawe, for example, is like blood squirting out of the veins.

Oliveira (2006, 5) notes that “local knowlege often reveals itself in a performative nature.” This “knowing” is seen in Piʻilani’s (2001)24 The True Story of Kaluaikoolau, an account of the fight of a Hawaiian family to remain together in the face of the “separating disease” – leprosy or Hansen’s disease, and (an illegal) government’s enforcement of

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24 The text was published in 1906.
“resettlement” at Kalawao/Kalaupapa. In the story, narrator Piʻilani illustrates her connection to place:

O ke anu iniki hoeha o na kipona wehekaiao – ua ike au,
O ke anu hui hoomaele ili a ke kehau poli kuahiwi– ua ike au,
O ke anu waianuhea kokololio o na omaka Waikoloa– ua ike au,
O ke anu mea e hoi keia e hoiloli nei I ka houpa– ua ike au la.

(Piilani, 2001, 83)

The pinching of the spreading dawn – I know it.
The cold of the mountain dew that numbs the skin – I know it.
The chill of the rapid flowing waters of Waikoloa – I know it.
The other kind of chill – emotional disturbance – I know it.

(Piilani, 2001, 13)

Through their knowledge of place, Piʻilani, her husband Kaluaikoʻolau and their son defy the contested post-overthrow government’s attempts to confine them. Knowledge of place, inherent in kamaʻāina to places such as Piʻilani and her husband Kaluaikoʻolau, was formalized in the Kingdom period, particularly during the reign of Kamehameha V, in the institution of palena.

**Palena**

Palena was place-based knowledge that was recorded from kamaʻāina of various areas soon after the institution of private property. According to Pukui and Elbert (1986,
palena means “boundary,” and “palena ʻāina” is “land boundary.”

Kamanaokalani Beamer (2008, 100) connects the importance of palena, which he uses to describe traditional Hawaiian boundary understandings recorded by the Kingdom’s Boundary Commission (created in 1862), to kālaiʻāina:

It is highly likely that the establishment of Palena would have aided in the process of a Kālaiʻāina because if there were not pre-established boundaries over the lands that were being redistributed in the Kālaiʻāina, it would be nearly impossible to appease all the aliʻi and each Kālaiʻāina would result in war. The chiefs who entered into the Hale Naua must have understood and accepted that the lands which were being awarded were bounded according to tradition — lest one chief could argue that Puna extended into Hamakua which would destroy the entire Moku of Hilo.

Beamer reminds us not merely to focus on what is contested, but on what is taken for granted by those we wish to understand. Palena were the fundamental geographic understandings that created boundaries agreed upon by contending chiefs, as he states, “according to tradition.” According to Beamer (2008, 159), they thus formed a component of “Hawaiian state-craft.” These traditional understandings were translated into boundaries that could be mapped during the reign of Kamehameha V (1863 – 1872). The physical layout and use of land, documented in palena, had an effect on chiefly structures. As Melinda Allen (2001, 145) points out in regard to dryland field systems in Kona:

Hawaiian dryland farming complexes were pivotal in the development of

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25 The full definition in the Pukui and Elbert dictionary is “Boundary, limit, border, separation, partitioning; terms of a fraction.”
Hawaiian chiefly hierarchies, increasing competition, and the emergence of the Hawaiian polity … Hommon (1986:67) opines that rivalry between windward and leeward polities was seated in economic differences, the former based on long-established stable and productive economies, and the latter on more youthful ones in less productive and often unstable environments.

Kirch (in Allen, 2001, 145) argues that agriculture was the essential feature of Hawaiian political life, and as it became the dominant district militarily, Kona’s dryland systems “must have had a great productive capability, for they provided the economic base for the powerful chiefdoms.” This political power was based on a view of land shared by other indigenous peoples – one that saw the interaction between people and land as a relationship.

**Indigenous Conceptions of Land**

In this chapter I use sources from archaeology and oral history to supplement available narratives on traditional land tenure, but I also use sources from other Indigenous cultures, presupposing that there are similarities in their views of land, and the Hawaiian conception is not entirely autochthonous. Indeed, it is only through their relationship to their traditional lands that the term “Indigenous” has traction.26

M. Scott Momaday (1976, 82) holds that native “attitudes toward the environment” have, as a central feature, the concept of “appropriateness.” When confronted with the prospect of not being able to feed his family with a pregnant wife and no job, a Navajo man was asked why he did not hunt a deer. “No,” he replied, “it is

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26 See Corntassel and Primeau (2006) for a problematization of the conception of Indigenous peoples as a group. I use the convention, after the NGO Cultural Survival, of capitalizing the term Indigenous, as it names an internationally recognized politico-social formation.
inappropriate that I should take life just now when I am expecting the gift of life.” This concept of appropriateness can be likened to the Hawaiian concept of pono.

Other Indigenous peoples, like Hawaiians, have embodied experiences of land. Describing Australian Aboriginal women’s experiences of land, Diane Bell (1998, 269) documents the pain felt when land is altered for development:

Right from when they started to construct the jetty, the women were in a lot of pain, young babies were dying and women were having miscarriages ... There was an agony. There was crying. There was moaning. And the older women were rolling around just like they’d had a stake driven into their side. It continued right till the jetty was built.

Hawaiian activists today assert a similar pain in reaction to development, particularly in relation to the violation of pre-contact Hawaiian burial sites. But Hawaiian reactions vary in this case. At the time of this writing, a dispute exists between Hawaiian activists and Kawaihaʻo church leaders over remains found during the construction of a church building, which shows Hawaiian views on development and the treatment of remains are disparate.

Kameʻelehiwa (1992) and Meyer (2003) forward theoretical components that constitute the beginning of a specifically Hawaiian Indigenous theory, many of which relate to land. Kameʻelehiwa (1992, 25 – 49) asserts that four “metaphors” order Hawaiian society: mālama ʻāina (care for land), nīʻaupiʻo (chiefly incest), ʻimi haku (search for mana or power), and ʻaikapu (separation of genders). Meyer (2003) identifies five “meta epistemological threads” one of which is the role of place, history and
genealogy. It is the study of history, particularly when it includes a geographic component, which facilitates an understanding of the importance of place.

The theorizing of space has rarely taken Indigenous perspectives into account. Shapiro quotes Lefebvre: “space … tends to have an air of neutrality” despite the fact that it “has already been the focus of past processes whose traces are not always evident on the landscape” (Shapiro, 1999, 15). Non-evidence is precisely the mechanism used to project such a neutrality that puts the burden of proof on the “peoples who are not easily coded within the dominant system of sovereignties,” (Shapiro, 1997, 22) i.e., Indigenous peoples.

The map, for Shapiro, is “one of the rhetorical mechanisms for translating a dynamic space of encounter into a fixed space of settlement, extended into the future” (Shapiro, 1997, 26). Intra-state conflicts, which frequently involve states and “indigenous peoples,” are often “invisible” because they concern peoples who are “not even on the map” (emphasis added). Unlike the co-optation of Indigenous knowledge through “researching” Indigenous peoples, it is the refusal to “map” them that constitutes the mechanism of control in this case. Shapiro’s idea of “forgetting” is inherent in settlement and the displacement of indigenous peoples. Leroy Little Bear (Battiste, 2000) contends that Indigenous peoples privilege space over time. These conventions hold when compared with Hawaiian conceptions of land described above, and a Hawaiian perception of land.

27 Manu Meyer’s five “meta epistemological threads” are: 1) the role of place, history and genealogy, 2) culture restores culture, 3) duality of education systems 4) experience, practice and repetition, and 5) the role of morality (pono) (Kaiwi, 2000, p. 27 – 29). Following the meta epistemological threads are seven more specific epistemological themes: 1) spirituality and knowledge 2) “that which feeds” (‘aina); physical place and knowing, 3) cultural nature of the senses; expanding notions of empiricism, 4) relationship and knowledge; notions of self through other, 5) utility and knowledge; ideas of wealth and usefulness, 6) words and knowledge; causality of language, and 7) the body/mind question; the illusion of separation.
Hawaiian Perception of Land

Andrade (2008, 1) begins his book Hā’ena with a passage that evokes a Hawaiian perception of land:

In Hawaiian ways of perceiving the world, Hā’ena is a place situated below the wind, close to the taproot of the earth, where the sun enters the sea at Haleleʻa (House of Pleasure), Kauaʻi o Manokalanipo (Kauaʻi of the legendary Manokalanipo). One translation of the name Hā’ena is ‘Hot breath,’ a reference to the sun and to the volatile, voluptuous Pele, whose amorous adventures are recorded on the land there. Hā’ena is also where the mountain Makana calls, as if it were a sweetheart.

Andrade’s lyrical description focuses on Hawaiian points of reference – orientations of winds, sun, and earth. His invocation of the image of a “sweetheart” illustrates an affective relationship with land that is not exclusive to Kauaʻi. That it is described as “below the wind” suggests Malo’s (1951, 12) description of concentric circles “used to designate space above and below.” His reference to Pele’s “amorous adventures” shows the inscription of histories on the land, what Andrade (2008, 35) calls the “storied landscape.” In the Maui chant ‘Oni ke Kula o Kamaʻomaʻo (Kanahele, n.d., 66), land is described similarly:

He nani Kuahiwi o Haleakalā

Ua laʻa ia wahi kula Honua ula

Kiʻekʻie ka makemake i ka leo o kaʻu ipo
Beautiful is the mountain of Haleakalā

Dedicated is that little plain, Honua‘ula

High in the estimation, in the praise of my lover

History was inscribed in Hawaiian traditions, which “pinpoint places as landing spots of ancestral navigators, as locations where the people emerged into the world, or as arenas in which they lived, fought battles, engaged in love affairs, and buried the dead. These named places were, and still are, considered sacred...” (Andrade, 2008, 2).

Oliveira (2006, 22) posits nine senses through which Hawaiians apprehend land and landscape: besides the traditional five senses, naʻau (intuition), kulaiwi (place), au ‘apa’apa’a (ancestral time), and moʻo (connection to past, present and future). Thus, place itself is a sense. Hawaiians employed methods of apprehending the physical world that transcended the physical. Such methods included hōʻailona – signs in nature, which alternately were considered direct communication from akua. Desha (2000, 35) notes an instance of the war god Kūkāilimoku being “consulted” on matters of war. The kahuna of Kalaniōpu‘u, Holoʻae, said: “i nā wau e kū i ka pule, a i hele auane‘i nā hulu i luna o ko akua a kolili, a i lele auaneʻi a kau ‘ole i luna oʻu, e kuʻu lani aliʻi, e hoʻike mai ana ko akua e hoʻomoe ke kaua a ka lā ‘apōpō, a ‘aʻole hoʻi e neʻe kaua aku i kēia ahiai”28

Frances Frazier (2000) translates: “when I offer a prayer, if the feathers on top of the god flutter and fly and do not alight upon you, my heavenly one, your god is telling you to lay aside battle until tomorrow and not go to battle this evening.”

The use of such hōʻailona – “omens,” signs in nature, or as Jung termed these occurrences, “synchronicities” – suggests a worldview that transcends the materialist,

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28 Desha wrote this article on March 26, 1921 and it was published in He Moʻolelo Kaʻao no Kekāhaʻupiʻo: Ke Koʻa Kaulana O Ke Au O Kamehameha Ka Nui in 1996 (ed. Lōkahi Antonio).
even the Marxist, conception. Vine Deloria (2006) describes an indigenous world in which spiritual forces, or direct communication from deities are not merely taken seriously, but taken for granted. He calls this “the world we [Native Americans] used to live in.” In their description of the “organic relationship of the people to the land,” Handy and Handy (1972, 42) describe Hawaiian sense of connectedness to place using European notions of nationhood:

The German theory of Geopolitik emphasizes the concept of a mystical or spiritual identification of a nation with the homeland - not just the ‘Vaterland’ ideal, but the actual physical land on which they live and from which they draw their sustenance. In these days of transience and displacement, this reality may have become blurred. But the concept has very real relevance to the relationship which existed from very early times between the Hawaiian people, be they chiefs or commoners, and their homeland- perhaps peculiarly so between the commoner (maka‘ainana) who was a planter and his land (‘aina).

This is abundantly exemplified in traditional mele (songs), in pule (prayer chants), and in genealogical records which associate the ancestors, primordial and more recent, with their original homelands, celebrating always the outstanding qualities and features of those lands. But it is equally exemplified by the strong attachments, evident even among the dislocations of today, which the kama‘āina (“child of the [specific] land,” or native) has for her or his place of origin.

Handy and Handy (1972, 43) note that the reasons for kama‘āina pride and identification with places of origin “differed from ‘āina to ‘āina and island to island, but the identification was everywhere an essential reality.” As with Hegelian and Wagnerian
pre-unification “German” notions of patriotism and the Vaterland, Hawaiian
identification was originally with the specific place but evolved in the nineteenth century
to an identification with the nation as a whole. The shift toward a "Hawaiian" national
identification was a response to threats against that nationhood.

Ahupuaʻa and Landscape

Ahupuaʻa were land divisions that generally ran from the ridgeline of a mountain chain to
the shore, and constituted one of the primary features of both the physical landscape, and
the Hawaiian conceptual landscape. But, as Andrade (2008, 29) notes, it “was only one
facet of a sophisticated land classification system developed out of a desire to create
order, encourage peace, and support prosperity.” The ahupuaʻa’s association with peace
is reflected in its association with Lono, the Hawaiian god of peace and agriculture
(Andrade, 2008). Kirch and Sahlins (1992, 19) quote Lyons (1875, 104) regarding
ahupuaʻa: “Mauka [landward] and makai [seaward] are ... central ideas to the native of an
island.” While Malo (1951, 16) notes that ahupuaʻa were one of several types of land
divisions, including moku (district), kalana (sub-district), and “ili-aina” (subdivision
within an ahupuaʻa), ahupuaʻa seem to retain a certain primacy. As Kirch and Sahlins
(1992, 19) put it, “while it did not achieve complete autarchy, the ahupuaʻa ... was able to
synthesize ... kai and uka, ‘sea’ and ‘mountain.’”

I seek to rediscover a Hawaiian sense of place and relationship to land and
landscape in ways that share affinity with Kapulani Landgraf’s photographic projects. On
the distinction between land and landscape, Landgraf (in Bacchilega, 2007, 58) writes:

Landscapes ... [are] environmental portraits of of an altered place. At another time
in Hawai‘i these places had names and significance. The land was cultivated and turned nurtured its people ...Today, subdivisions, golf courses, executive homes, and public projects change the topography without regard for nature’s power ... I am interested in rediscovering the significance of a place.

But the native perspective is not seen by all as unproblematic. Neil Smith cites Cassirer’s description of tribal understandings of land, one he describes as “gifted with an extraordinarily sharp perception of space”:

A native of these tribes has an eye for all the nicest details of his environment … upon closer examination we discover to our surprise that in spite of this facility there seems to be a strange lack in his perception of space … If you wish him to draw you a map of the river and its various turns he seems not even to understand your question. Here we grasp very distinctly the difference between the concrete and the abstract apprehension of space and spatial relations. The native is perfectly acquainted with the course of the river, but this acquaintance is very far from what we may call knowledge in an abstract, a theoretical sense.

Smith concludes: “if our concept of space is the product of continual abstraction, the definition of space as an abstract framework in which all reality exists must at least be questioned. Is space ‘itself’ a framework for reality, or is it the abstract concept of space which is a framework for how we view reality” (Smith, 1990, 72). Notions of space vary and must be translated cross-culturally. Such a theoretical approach risks privileging the abstract over the “concrete,” maps over indigenous perspectives “from the ground.” What may be termed an over-theorizing of concepts of land was part of a process of dissociating Hawaiians from land.
Kauanui (2008, 168) shows how the inextricable relationship between Hawaiians and land was altered during the debates over the Hawaiian Homes Commission Act (HHCA), in the process, recasting Hawaiians' identity:

Those who tightened the definition of 'native Hawaiian' in order to limit the number eligible for homesteading also actively worked to limit the amount of lands to be set aside for allotment. This link between a restrictive definition of an indigenous people and the land base reserved for their use is a rather obvious example of colonial power. Less obviously, the restriction of identity was accomplished through redefining the relationship of the people to the lands in question.

So whereas the original relation of Hawaiians to land was familial, that is, inclusive, the constrained legal definition of native Hawaiians in HHCA was based on blood quantum - a practice that served to fracture those very families as they intermarried with non-Hawaiians and blood quantum was diminished. Some argue that this was the purpose of the blood quantum – to reduce the number of beneficiaries until the lands could be reintegrated into, and likely re-concentrated in, the private market.

Oliveira (2005, 123) distinguishes between "Western" and Hawaiian and Indigenous notions of land:

Western ways of knowing also differ from Indigenous ones in that from a Western tradition, knowledge can only be obtained under empiricism. That is to say, in order for a notion or theory to be considered true and accurate, it must first be measurable and observable. In contrast, Hawaiians feel the land in both a physical and spiritual sense. Cultivating the land is a physical bond; however a
spiritual connection is also important. The land speaks. Hawaiians gain
knowledge through their relationships with their environment, ancestors, akua,
and culture. The environment is the source of life for Hawaiians. It is also the
centre of their life, their piko ... The relationship of Hawaiians to land is not one
that can easily be severed, for Hawaiians so not merely reside on the land; they
embody the land.

An example of the embodiment of Hawaiians in the landscape is in the moʻolelo of
Kahalopuna. Her grandfather ʻAkaʻaka’s body was the Eastern ridge (Waʻahila ridge) of
Manoa valley, where his silhouette can still be seen (Fornander, 1916).

Kahalaopuna, Mānoa Valley, Oʻahu

I discussed the notion earlier in this chapter, but this embodiment was not always and
only an affective one, it could also take a political form.

**A Hawaiian Politics of Land**

Haunani-Kay Trask (in Bacchilega, 2007, 1) describes how land becomes
politicized:
What constitutes ‘tradition’ to a people is ever-changing ... The Hawaiian relationship to land has persisted into the present. What has changed is ownership and use of the land ... Hawaiians assert a ‘traditional’ relationship to the land not for political ends ... but because they continue to believe in the cultural value of caring for the land. That land use is now contested makes such a belief political. Hawaiians had an intimate knowledge of the economic and political value of specific “lands” – the productivity of particular ahupua‘a could be translated into political and military power. The following passage illustrates the concept:


Keoua[kūahu‘ula] … came to the ruling chief, Kīwala‘ō and said ‘Are
Ola’a and Kea’au ours?’ the chief answered ‘They have been given away; they are not ours.’ ‘How about Waiakea and Ponahawai?’ ‘They have been given away; they are not ours.’ ‘Waipi’o and Waimea are ours?’ ‘They are not ours; they have been given away.’ ‘Pololu and Makalapa are ours?’ ‘They have been given away; they are not ours.’ ‘The two Napu‘u and the two Honokahau are ours?’ ‘They have been given away; they are not ours.’ ‘The two Napu‘u and the two Honokahau are ours?’ ‘They have been given away; they are not ours.’ ‘Kahalu‘u then, and the two Keauhou?’ ‘They have been given away; they are not ours.’ ‘Then am I to have nothing in this division?’ ‘You and I are left without land in this division. Our uncle has taken it. Our old lands you will have’ (Kamakau, trans. 1992, 120).

Keōua’s inquiry went on, and the lands he requested were mainly on the windward side of Hawai‘i island, despite the fact that Keōuakūahu‘ula was from Ka‘ū, the Southernmost district, an arid land. What he requested were the fertile areas suitable for raising and supporting a large warrior force. Having received only his ancestral lands – the arid district of Ka‘ū – Keōua was the first of the five major chiefs involved in this kālai‘aina, or land division, to declare war. The recipient of most of the fertile districts (under Kiwala‘o) was Keawema‘uhili, whose “tabu was doubly twisted, twisted in knots, woven in and out, broken from the topmost branch of the ‘Ī family” (Kamakau, 1992, p. 86), attesting to his exalted genealogy and rank. Keōua’s inquiry, which is focused on the ahupua‘a level rather than the moku (district) level, shows the extent of knowledge of land as part of culture, and suggests the importance of water in politics and of agriculture, which allows the supporting of a warrior force – and consequently of the political power of land. This politicized knowledge is, as Goodenough (in Geertz, 1973, 11) described, an inseparable part of culture, if culture
“consists of whatever it is one has to know or believe in order to operate in a manner acceptable to its members.”

This politicized knowledge of land is also seen in the story of ‘Umialiloa, when the kahuna Ka’oleiokū [or Kaleiokū] used agriculture to build an army for the overthrow of ‘Umi’s half-brother Hakau:

Kaleiokū became his trusted attendant and built many long houses (halau), ten times ten of them, for the purpose of feeding men. When people came from Hilo and Hāmākua for salt they were given pork to eat [a mark of great hospitality]. Travelers from Hāmākua, Kohala, and Kona who went to Hilo and Puna for birds’ feathers were received in ‘Umi’s eating places. Before a year had gone, many people had been received, and ‘Umi’s hospitality gained fame. Most of the men busied themselves with farming and in the evenings were trained in warfare [emphasis mine]. (Kamakau, 1992, 12)

This passage shows the importance of a land base in politics under the traditional Hawaiian land tenure system. It also shows that certain moku (districts) and ahupua’a (land divisions) – Waipunalei in this case – were viewed as politically important because of their fertility, and that fertility could be translated into military strength.

Kamakau (2001, 243) relates one technique of transmitting knowledge of proper land stewardship, excerpting a letter from himself to Kauikeaouli (Kamehameha III), he described a discussion with “old people who had lived in the time of Kahekili and Kamehameha I:”

I ka Manawa a ke ali‘i e nīnau mai ai, ‘o wai ke ali‘i hana ‘ino a nā kānaka, a
When the chief asked ‘What chief has done evil to the land and what chief good?’ then the orators alone were able to relate the deeds of the chiefs of old, those who did good deeds and those who did evil deeds, and the king would try to act as the chiefs acted who did good deeds in the past (trans. 1992, 399).

Narrative and precedent thus constitute methods of conveying stewardship practices. That this practice focused on chiefs suggests its nexus to sovereignty.

**Land and Sovereignty**

Land was linked inextricably to “sovereignty.” I put the term sovereignty in quotes because, while the concept existed, no word existed before Western contact. The term “ea” was applied ostensibly when the concept of sovereignty was explained to Hawaiians – the very existence of a nation-state was understood by Hawaiians as its “ea” – its life. The confusion of the Kingdom and later State motto “Ua mau ke ea o ka aina i ka pono,” as “the life of the land is perpetuated in righteousness” both ignores the historical context of the Paulet affair from which it derives and underscores one of the many ironies of given historical narratives in Hawai’i – the motto of the State of Hawai’i is a sovereignty slogan for the Hawaiian Kingdom and, in a sense, denies the State’s existence, asserting that the sovereignty of the land (ea) perpetuates (ua mau).
The connection between land and sovereignty was clearly extant in Hawaiian political thought, but its precise nature was a matter of debate. This is seen in the installation of the young chief Kahahana as the ali‘i nui of O‘ahu through an agreement between the O‘ahu chiefs and Maui ali‘i nui Kahekili. Kahekili demanded pieces of O‘ahu land, including the sacred pu‘uhonua [refuge] Kualoa:

Shortly after his installation, Kahahana called a great council of the O‘ahu chiefs and the high priest Kaʻōpulupulu and laid before them the demands of Kahekili regarding the land of Kualoa and the “palaoa-palae”\(^{29}\) [sic, washed up whale bone and ivory along the O‘ahu coastline]. At first, the council was divided; some thought it was but a fair return for the kindness and protection shown Kahahana from his youth by Kahekili, but the high priest was strongly opposed to such a measure and argued that it was virtual surrender of the sovereignty and the independence of Oahu. Kualoa, being one of the most sacred places on the island, where stood the sacred drums of Kapahuula and Kaahu-ulapunawai, and also the sacred hill of Kauakahi-a-Kahoowaha, and the surrender of the palaoa-palae would be a disrespect to the gods. In fact, if Kaheki’s demands were complied with, the power of war and the sacrifice would rest with the Maui King and not with Kahahana. He represented strongly, moreover, that if Kahahana had obtained the Kingdom by conquest, he might do as he liked, but having been chosen by the Oahu chiefs, it would be wrong in [sic] him to cede to another the national emblems of sovereignty and independence. Kahahana and all the chiefs admitted

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\(^{29}\) May be palaoa pae: ivory washed up, or adrift (see Pukui and Elbert, 1986).
the force of Kaʻōpulupulu’s arguments, and submitted to his advice not to comply with the demands of Kahekili (Fornander, 1969, 218).

This passage could evoke a great deal of analysis, but I will focus on the concepts, mitigated by Fornander of “sovereignty” and “independence.” First, the guidance of Kahuna Nui (high priest) Kaʻōpulupulu shows the influence of religion in Hawaiian politics. Without imposing more Euroamerican concepts on Hawaiian society, I would suggest that it was akin to a theocracy. Second, the passage shows multiple meanings embedded in land. The sacred drums represent a religious layer of meaning for Kualoa, which was a puʻuhonua (refuge), while the palaoa-pae [palaoa-palae in the quote] has an economic meaning. Both constitute, in Fornander’s (1969) conception of the event at least, “national emblems of sovereignty and independence.”

Land was also used to congeal sovereignty. Sahlins and Kirch (1992) show how Kamehameha I used the kālaiʻāina to solidify his control over Oʻahu. Though these grants were inheritable, “this infeudated system of land and loyalty … worked against the kingship, the more so as the new commercial stakes [such as the trade in sandalwood] increased and the great aliʻi attempted to turn their local rights into personal advantage” (Sahlins and Kirch, 1992, 45). Sahlins and Kirch are referring to restricted nature of the “infeudated system,” which allowed district chiefs more autonomy, and potentially more exploitive power as Kamehameha II came to power. His authority was not as extensive as that of his father, was partially usurped by Kaʻahumanu, and thus needed to be reinforced through negotiations such as abolishing the sandalwood monopoly (see Kamakau, 1992, 219-228).

Desha (2000, 98) comments on traditional Hawaiian thought on the political and
aesthetic value of particular lands in the story of Kamehameha’s rise to power:

...the thought of making war in order to snatch lands was entertained by the chiefs of Hilo, Puna and Hamakua. They wanted to seize the two Kona districts for in those days the two Kona districts were thought of as the makaha [sluice gates allowing “fish” or resources in, but not out] which furnished a good living for the rulers, and those districts were also desirable because of their pleasant living conditions - they were lands possessed of everything needful for existence.

Whether a market model effectively replaces the notion of ‘needful existence’ remains an open question. One effect is clear, however - the decoupling of land from water. Prime lands in the pre-plantation era were those with abundant water. The diversion of water, then, marked a break with traditional Hawaiian notions of land value. With the diversion of water, the Leeward sides of islands increased in value, while the windward areas had a relative decline. This effect was exacerbated with the tourism economy in the early twentieth century.

Sometimes settlement was a response to war or imminent war. Sahlins and Kirch (1992, 1) note that settlement and agricultural development in some windward O‘ahu valleys dated to the period of Kamehameha I, much later than expected, as preparations for an expected invasion of Kaua‘i left many Hawai‘i island people in places such as Anahulu, O‘ahu. This fact explains why many of the Land Commission Awards in that area were received through testimony that lands “had been in the possession of their families ‘from the time of Kamehameha I’” (Sahlins and Kirch, 1992).

Traditional Practice
The native testimonies for the Māhele were the site of discussions that established the nature of Hawaiian practice regarding land. The second entry in the Native Testimony – the testimony given to verify the landholdings of a claimant in the Māhele – was by Mataio Kekūanāo‘a regarding the land of a man named Papa, and is instructive in traditional practices concerning tenants and “Landowners,” as well as the King. Kekūanāo‘a was questioned by John Ricord on March 18, 1846:

J.R. How many years has it been since Kauikeaouli awarded [Papa] the land?

M.K. He gave him the land when he was small; perhaps when he was twelve years old.

J.R. How was it in your day, could a twelve year old child give away land?

M.K. No.

J.R. Who could rightfully join forces with the boy in giving away land outright?

M.K. His parents were the proper (people) to join forces with him; Kaahumanu and Kalanimoku …

J.R. What do you think and what do you know about the past history of this land. If a person lived on the land for forty years or eighty years did that land become his?

M.K. No, unless he lived properly on the land, then he could always stay (on the land).

J.R. In olden times which ruler had the right to decide who was at fault?

M.K. The high chief told Kaahumanu who was at fault.

J.R. What about the royal lands (listed) below, in the old days who was to
blame for his land?

M.K. If (it is) my own tenant who is wrong I would end (the tenancy).

J.R. And what about this? If you give me land and then give it to someone else without my knowledge, what then?

M.K. This granting is right. It is up to me. That’s how it was in olden times.

J.R. Do you know anything wrong about Papa that would cause him to lose his land?

M.K. Yes, I heard from Kauikeauai Papa hasn’t been sewing his clothes. He was given that land because of that service.

J.R. What does the king think about this matter?

M.K. He has no grudge (against him). Papa came to get poi and fish and the king gave it to him. However, T. Haalilio was the one who thought of taking the land away in the first place because Papa does not sew the king’s clothes. That is what I heard.

J.R. In these Islands how old must a child be before he can give land away?

M.K. At any time; from the time he can think properly until he dies then the giving away ends. But according to hearsay the parents and perhaps through the guidance of the parent and people like parents who are closely related to this boy (assist).

J.R. What about now, can Kamehameha III give land away?

M.K. Yes, because he is the only remaining (sovereign) of the kingdom.

J.R. In your time, what were the responsibilities of the poor tenant farmer and land overseer?

M.K. Here are (their) responsibilities: to take care of the land, to obey, the friends, the relatives were their responsibilities in olden times.
J.R. If a land owner gave up his land did his tenants leave too?

M.K. No. If a landowner gave up his land he alone left …

J.R. I wonder what the size of the king’s share would be if the land were divided into shares for the king, his headman and his tenants.

M.K. I think it would be about a third. I’m not very sure.

Several features stand out in this passage that are instructive of traditional practices regarding land. One is Kekūanāo’a’s response to Ricord’s question “If a person lived on the land for forty years or eighty years did that land become his?” This question assumes that something akin to ownership of property existed in traditional times and that it could be gained through a period of tenancy. Kekūanāo’a’s response that if a “tenant” “lived properly on the land, then he could always stay (on the land),” undermines Ricord’s assumption, focusing instead on residence, rather than ownership. This notion of residence also brings out the connections between kuleana as right, responsibility and as object. The chief, in Kekūanāo’a’s conception, appears obligated to grant the right of residence to the “tenant” (hoaʻāina) as long as they carried out their responsibility to live “properly on the land.” This right of residence was to be converted to a permanent right of fee-simple ownership in the Māhele process.

Two other features of Kekūanāo’a’s response (ironically) show the similarities to European feudalism – first, that tenancy was premised on labor, as seen in the case of the prospect of Papa’s loss of his land for failure to provide his labor, and second, that there were traditions aimed at protecting tenants from loss of land due to changes in landlord. Kekūanāo’a’s claim supports Ellis’s (2004, 430) contention that makaʻāinana were considered to be “attached to the soil.” Such protections were traditional in European
feudalism, where obligations were to some extent reciprocal between landlords and serfs. There was an internal understanding of the definition of the term “lands,” which were not of equal size or quality.

The traditional view of land was held by kuaʻāina, natives of an area who held specific oral historical information. These kuaʻāina were relied upon for palena, place-based information incorporated into late Kingdom mapping schemes. When Lahainaluna students recorded ahupuaʻa and moku boundary information onto maps, it constituted a type of translation of Hawaiian spatial concepts into Western terms, and onto a Western medium. McGregor (2007, 4 – 5) explains the cultural significance of kuaʻāina in traditional and modern times:

A kuaʻāina came to be looked upon as someone who embodied the backbone of the land. Indeed, kuaʻāina are the Native Hawaiians who remained in the rural communities of our islands, took care of the kāpuna or elders, continued to speak Hawaiian, bent their backs and worked and sweated in the taro patches and sweet potato fields, and held that which is precious and sacred in the culture in their care. The kuaʻāina are those who withdrew from the mainstream of economic, political and social change in the islands. They did not enjoy modern amenities and lived a very simple life … gifted with this stewardship responsibility, the successors held their ancestral lands and knowledge sacred in their memories and passed it on in custom and practice from generation to generation.

Malo's layers that emanate from a person in all directions bear this out. Hawaiians conceive of themselves as connected to the environment, which is in turn connected to the gods.
Land as Power

Oliveira (in Cant, Goodall and Inns, 2005, 119) notes that “political maneuvering was often land-based. Whenever a new ali‘i nui ruled over the land, his first obligation was to kālai‘āina or to redistribute the land among his supporters. Those that demonstrated the most allegiance to the ali‘i nui received the best lands.” Mykkānen (2003, 25) emphasizes the particular importance of the figure of the chief, who, “for Hawaiians, the concrete environment being of divine origin, their arduous duty was to negotiate their mode of being with the divine.” He cites the proverb (from Pukui, 1983, 273) “O luna, o lalo; o uka, o kai; o ka palaoa pae, no ke ali‘i ia” [Above, below; the upland, the lowland; the whale that washes ashore—all belong to the chief] to show the centrality of chiefly authority in land and politics. This importance and divinity pertained directly to the distribution of land:

The new high chief showed his productivity and generosity by redistributing lands to his followers. In this way, he truly was the life on earth and the source of all power. This dividing of lands often bypassed the closest male relatives of the high chief, particularly because they were his main genealogical rivals. It was safer to give land to the lesser ali‘i and thereby keep the potential “gods” without land resources, which simultaneously deprived them of manpower (Mykkanen, 2003, 25).

Lucas (1995, 47) defines kālai‘āina (not literally): "to manage or direct the affairs of the land, that is, the resources," and kālaimoku as "one who is concerned in managing the affairs of an island." These formal definitions depict a society with structured rules
regarding land, and contradict Lyons's (1903, 22) contention that “the change from barbarism to civilization that has taken place on these Islands has in no respect had more material importance than as regards land matters.”

Archaeological evidence can be used in conjunction with ethnography, as Fitzgerald and Moffat suggest, and as Kolb (1997) shows in his study of traditional land tenure in Waiohuli, Maui. Kolb (1997, 265) “demonstrate[s] that Waiohuli's pattern of social organization was not timeless at all, but shifted from a period of regional centralization and control over labor to one of community independence.” This view both complexifies traditional approaches to Hawaiian land tenure, which typically are confined to a few paragraphs, and underscores the emerging view that pre-“contact” Hawaiian society changed considerably over time. Labor and land are intertwined as land formed the relation between the maka‘āinana and ali‘i classes, the former of which provided labor, and the latter, administration of land. This arrangement contradicted emerging notions of private property.

Dekker (2006, 15) notes that private property is a social construction not universally shared by all cultures, most notably Indigenous cultures:

In many indigenous land tenure systems nowadays, as well as in communist doctrine - in particular by the writings of Karl Marx - land is seen as too important for human survival to make it the subject of private individual ownership rights. Land is the key to human existence. It is the source of all material wealth. From it we get everything that we use whether it is food, clothing, fuel or shelter. We need it simply to survive. We live on the land and from the land, and this has been a plain fact for mankind from early times on. Land, and in particular access to
land, is important for human survival. But over time land has increasingly become a source of material wealth and having access to land often resulted in exercising authority. Ownership of rights to land provided humans with power over other people. Numerous wars have been fought to gain such access to land. With the stronger emphasis on the power and authority bringing aspect of rights to land, people started to forget the other responsibilities for land. They forgot about the stewardship that is needed to preserve … life.

**Conclusion**

As Moffat and Fitzpatrick suggest, traditional Hawaiian land tenure was more complex than is usually recognized. This complexity has interwoven political, economic and spiritual dimensions. By unraveling this complexity, an enhanced understanding of the transition from traditional to present-day land tenure can be garnered. The tools of the various disciplines utilized here – ethnohistory, archaeology, anthropology – are only means to revive a Hawaiian perspective on land, as that is the subaltern perspective – unwritten and obscured, but nevertheless present in moʻolelo, mele, oli and moʻomeheu.

What this chapter has uncovered is a land tenure system at once driven by politics, religion, demographics and economic (that is, agricultural) concerns, but one that does not follow the economic logic of “the market.” Hawaiians embodied land, rather than viewing it as a means of production. The transition from this system to the new, then, mainly involved the introduction of a particular market ideology. The next chapter traces this introduction, primarily on a theoretical level. What drove the change in the politics of land was, in fact, a change in *thinking* about land.
CHAPTER 3 – KĀLAI ‘ĀINA: THE MORAL-POLITICAL ECONOMY

Thou didst at first desire a farm; then thou wouldst possess an estate; thou wouldst shut out thy neighbors; having shut them out, thou didst set thy heart on the possessions of other neighbors; and didst extend thy covetous desires till thou hadst reached the shore: arriving at the shore, thou covetest the islands ...

(Augustine in Kirch and Sahlins, 1992, 15).

The word kālai‘aina is comprised of the word kālai, meaning “carve” and ‘āina – land. Kālai‘aina refers, metaphorically, to the act of dividing land at the death of a ruling chief, and came in the nineteenth century to refer to politics in general. In his translation of Francis Wayland’s *Elements of Political Economy*, William Richards used the title *No ke Kalaiaina*, rendering kālai‘aina as “political economy.” His missionary background infused a Christian and moralistic dimension to the concept of kālai‘aina. I argue that this translation constitutes a theoretical encounter between Hawaiian and Euroamerican ideas regarding land. Hawaiians adopted and adapted concepts such as capitalism, while simultaneously interpreting them in terms of their own conceptions of land, value, justice and social obligations. The missionaries, I will show, were attempting to reconstruct Hawai‘i, in the words of Shapiro and Campbell (1995), as a “moral space” in which labor, ownership and obligation ordered social relations.

In this chapter I examine the introduced Euroamerican concepts of property – both as a right and an object between 1830 and 1850. I show that notions of property were evolving, contested, and bound up with moral implications that stemmed from the missionaries’ (and former missionaries’) backgrounds, and church politics in the US. As William Hutchison (1987, 4) put it, missionaries “assumed both a deeply affirming and a
sharply critical stance toward their own culture.” In what was viewed as a kind of vacuum or *tabula rasa*, foreign missionaries, in collaboration with Hawaiian elites, sought to create a new Hawaiian subject partly in relation to property.

I situate foreign influence and actions by examining the biographical backgrounds of certain members of what could be called the “inner circle” of both Hawaiian and non-Hawaiian architects of the new political economy in general, and the Māhele and Kuleana Act specifically with their attendant native tenant rights. In doing this work, culture emerges as a central feature of the interaction between Hawaiians and non-Hawaiians. Hawaiian elites “voluntarily” made changes to the Hawaiian government and economy that proved intractable, and later, momentous to Hawaiian land tenure and ownership. I end with an analysis of Francis Wayland’s *Elements of Political Economy* and William Richards’s translation. In short, I offer here a cross-cultural analysis of the intersection of culture and political economy, with land and law in Hawai‘i as its focus.

Part of this project is a theoretical history of the interaction between Euroamerican ideas regarding land and landscape, and Hawaiian ideas, both from the Kingdom era and traditionally, prior to the codification of laws. I examine the practices of claiming and naming as methods of possessing land and landscape. As the process of claiming began within the settler societies, I begin with a decentering of the current political economy, in order to show its contingent nature. An examination of a process of self-colonization, mainly in England, follows, in which the process was refined before and during its export to areas of colonial expansion. Throughout, I show this process of the emerging political economy of early 19th century Hawai‘i with its attendant tensions, functioning in Hawai‘i.
Roseberry (1989, ix) posits that the intersection of culture and political economy is an area in which too few of [its] implications have been explored, by those authors who dismiss the very possibility of a political economic understanding of culture as well as by many of the political economists themselves. Our ideas about culture and history never seem to confront each other. Within too many understandings of political economy, we may have sophisticated treatments of uneven development and of the formation of centers and peripheries, but when we come to consider culture and politics, we enclose profoundly contradictory social experiences within unproblematic and simplistic class or epochal labels.

Unlike Roseberry, however, who seeks a political economic understanding of culture, I seek a cultural understanding of political economy. Clifford Geertz (1973, 89) defined “culture” as “an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life.” Here the tensions and parallels between genealogy and moʻokūʻauhau will prove useful. While power provides a parallel between the two methods, one of their areas of divergence is a result of the different cultures from which they emerge.

In the Hawaiian case, tensions that lie at this intersection between culture and political economy emerged from attempts to codify, in writing, pre-existing Kanaka Maoli “legal” concepts. The use, and later ownership of land, in particular, created this tension in the period I examine here. Several events and processes shaped this period, during which the new political economy developed. General “Westernization” of
Hawaiian society under Kamehameha III was marked by the Declarations of Rights and Religious Rights in 1839, followed in 1840 by the first Hawaiian constitution, the opening of Lahainaluna seminary in 1831, and the printing of *Ka Lama*, the first Hawaiian language newspaper there in 1834. Stauffer (2008, 19) puts this into global context, noting:

> Of the dozens of internationally recognized nations … that produced written constitutions during the rise of modern constitutionalism, the only indigenous participant was Hawai‘i. And of the hundreds of constitutional documents included in this collection, only the four Hawaiian documents appear in an indigenous or non-European language and predate the multitude of constitutions found outside of Europe and the Americas today.

Stauffer is referring to the constitutions of 1840, 1852, 1864 and 1887. The last of these is a contested document (see Osorio, 2002 and Sai 2008 for discussions of the legality of the so-called “Bayonet Constitution” of 1887). But legally, through the mid- to late-nineteenth century, the trend was toward a representative constitutional monarchy, integrating what was viewed as the best aspects of democratic republics without forfeiting the monarchical form of government.

Politically, gunboat diplomacy influenced the decisions of the Hawaiian government beginning in 1826 with American threats over sandalwood and continuing through 1843 with the Paulet Affair, during which Britain occupied Hawai‘i for five months. A related issue was the continual demand and pressure for private land ownership. Depopulation continued to plague the Hawaiian community, with a rapid decline occurring from 1830, with 130,000 through 1850, when it fell to 71,000 (Schmitt,
The land tenure system that was developed was contingent on these conditions, rather than an idealized system based strictly on ideological goals. The transition that followed was theoretical, but also done in response to foreign influence, and as such, was based on immediate concerns, such as the fear of the loss of sovereignty. Central to resistance against imperialism was the construction of a system of law recognizable to the West, a system that would have its own role in the coming cultural transformations.

**The Cultural Power of Law**

Merry (2000, 8) holds that in Hawai‘i, law was “one of the institutions of colonial control, serving the needs of commerce and capitalism by producing free labor and privatized land.” For Merry (2000, 19), “modern law itself is a creature of colonialism, developed during an era of colonial expansion and shaped by those conditions.” Law was also a battleground for, and between, Hawaiians, and not merely between Hawaiians and foreigners. After the fall of the ‘aikapu in December 1819, the transformation of law continued in the early 1820s with discussions over instituting Christian law, which at first included the astounding possibility of literally adopting the ten commandments.

Mykkänen (2003, 95) recounts the missionary printer Elisha Loomis’s depiction of one meeting in which some chiefs, like O‘ahu governor Boki, opposed missionary influence in the creation of a Christian legal code:

After listening to what the foreigners [ship captains opposing Christian law] had to say, Karaimoku [Prime Minister Kalanimoku?], Kaahumanu and others …expressed their desires to have the laws established. But Boki, whose feelings had by this time got raised to a high pitch, ventured to disclose that if the laws
were established he would not support him. Keriiahonui now rose and commenced a speech in which he was recommending David’s resolution to serve the lord, when Boki interrupted him by inquiring “Who?” “David” was the answer. “Was you there?” asked Boki. “No” replied Keriiahonui and would have continued, but Boki, who was a much higher chief, motioned him to be silent. This conduct of Boki excited feelings little less than of indignation in the breasts of the others and almost the instant he stopped Keriiahonui he was himself by Karaimoku directed to be silent. In this state of affairs the king said he was afraid, and proposed to adjourn, which was accordingly done. The principal chiefs are highly displeased with the part Boki took, and but for the influence of Christian instruction, would at once make an appeal to arms. That this would have been the case at a former period we have the authority of the chiefs to say.

This theoretical encounter illustrates the interactions and conflicts between Hawaiians over introduced religious and legal ideas. It also demonstrates the hierarchy among chiefs at precisely the moment they were considering adopting laws that would eliminate this very hierarchy. The 1839 Declaration of Rights legally, if not actually, accomplished this “flattening” of the Hawaiian polity, providing that “no chief may be able to oppress any subject, but … chiefs and people may enjoy the same protection, under one and the same law …and nothing whatever shall be taken from any individual except by express provision of the laws. What ever chief shall act in violation perseveringly in violation of this constitution, shall no longer remain a chief of the Hawaiian Islands …” (Hawaiian Laws, 1841 – 1842, 9). What the missionaries saw as “oppression” was the tributary nature of Hawaiian taxation – part of a reciprocal relationship between ali‘i and
maka’āinana, albeit one that was already deformed by the time of missionaries’ arrival. The development of a legal system modeled on that of the West, was an encounter that was both carefully undertaken, and encumbered with preconceptions. According to Kamakau (1992, 402), Attorney General John Ricord believed:

the laws of Rome … could not be used for Hawai‘i, nor could those of England, France, or any other country. The Hawaiian people must have laws adapted to their mode of living. But it is right to study the laws of other peoples, and fitting that those who conduct law offices in Hawaii should understand these other laws and compare them to see which are adapted to our way of living and which are not.

In response to an impending crisis in foreign relations, Ricord (Hawai‘i Privy Council, 1845) recommended the following books to Kauikeouli in 1845: Elements of International Law, by Wheaton (1836); The American Diplomatic Code, Vol 2, by Jonathan Elliott (1834); The Principles and Affairs Applied to the conduct of Nations and Sovereigns, by M.D. Vattel (1820); Commentaries on the Laws of England, by William Blackstone (1838); Commentaries on American Law, by Kent (1826); Commentaries on the constitution of the United States, by Story (1833); and Montesquieu’s (1823) The Spirit of Laws. This small selection of books is notable in three respects: first, the books were remarkably up-to-date, particularly considering the standards of the time and the speed with which texts could reach as remote a place as Hawai‘i; second, several authors and texts on the list are still considered “classic” texts in international and British legal theory, including Vattel, Blackstone’s Commentaries on the Laws of England, and Montesquieu’s The Spirit of Laws; third, the book list is distinctly theoretical, rather than
“legalistic” in a technical sense – this is especially true of Montesquieu, who deals with the ethos underlying law, rather than its mere application. Montesquieu (in Fitzpatrick, 1992, 87) also stands out because he noted that “it should be a great chance if [the laws] of one country suit another,” and that a number of factors, such as geography and the “degree of liberty which the constitution will bear,” formed the context within which the “Spirit of the Laws” would operate. This understanding likely shaped the care with which Hawai‘i’s modern legal code took shape, but engrained biases remained. One of these was the “myth … [which is] worked out in the narratives of law and progress” (Fitzpatrick, 1992, 87). One of these myths was the idea that modernity necessitated private property.

The rationale for privatizing land, on the foreigners’ side, was captured by Catholic Bishop Maigrêt (in Blackman, 159 – 160), who wrote to R.C. Wylie:

The natives will have something to eat, and therewith to clothe themselves; they will labor with gladness, because they will be interested in the fruit of their labor, and the fruit of their labor will be insured to them… the natives will be attached to a spot of ground which they know belongs to them … we will no longer see so many vagabonds, who live only at the expense of others … the people will bless the sovereign who governs them.

As the emphasis on the virtue of work is a singularly protestant phenomenon – the so-called protestant work ethic – it is significant that this passage comes from a Catholic clergyman, as it shows the extent of the consensus on the benefits of privatization of land among the foreign population. Sai (2008, 86) cites the State Laws on the rationale behind the institution of property, both real and personal:

The Hawaiian rulers have learned by experience, that regard must be had to the
immutable law of property, in things real, as lands, and in things personal as chattels; that the well being of their country must essentially depend upon the proper development of their internal resources, of which land is the principal; and that in order to its proper cultivation and improvement, the holder must have some stake in it more solid than the bare permission to evolve his daily bread from an article, to which he and his children can lay no intrinsic claim.

But this system of property as a commodity was new to the west as well. Niblack (1903) puts the archaic system in context, noting that “until the last forty years [the 1860s] land was scarcely considered a commercial article or commodity in England, and the comparative infrequency of transferring land helped to maintain this system.” Cahill (2006, 13-14) concurs, underscoring both the comparative novelty of real estate as a commodity and its feudal origins:

Since land was initially hardly transferred from one family to another (the land stayed in the family by inheritance and marriages) there was no land market and also no real concept among the people of land tenure insecurity. Land tenure security as an issue developed, according to most scholars, around the start of the great transformation with the various revolutions of the end of the 18th century in Western Europe. These revolutions signaled the start of the industrial era and the end of the era of manorialism and feudalism in rural areas in Western Europe.

Hawaiian intellectuals, in conjunction with foreigners, would attempt to make two conflicting ideologies – Hawaiian connections to land and Euroamerican control over land – complement each other in a new system. The new system was to be recognizable
to the western powers, but still preserve some “communal” aspects of traditional Hawaiian land tenure. As the Hawai‘i Constitution of 1840 stated, “Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.”

Mykännen (2003, 118) theorizes the tension of contact as a process of translation, holding that “in the province of political knowledge the two cultures did approach each other. Yet the translation was not completed, because the comparisons were established in two distinct conceptual systems.” The consequences of this encounter underlie many of the most contentious issues around land today, notably gathering rights and title to “ceded,” that is, former Hawaiian Kingdom Crown and government lands, which I attend to in chapters 5 and 6. The new political economy, co-created by Hawaiian and foreign elites, was the result of pressure on Hawaiian leaders by foreigners to adopt what they viewed as the [correct] economic system. This system, however, was always already being problematized, even within the West, most notably by Marx. Today its contingencies are even more apparent, and are viewed by some as a contested practice.

**Political Economy as Contested Practice**

De Goede (2005, ix) “discusses how modern finance has acquired the reputation of economic necessity and scientific respectability when less than two centuries ago it stood condemned as irreputable gambling and fraud.” De Goede thus decenters the

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30 I put the word communal in quotes because rather than a system of mutually shared ownership, the Hawaiian system was a system without ownership – land was *controlled*.
current political economy, developed just prior to its adoption in Hawai‘i, showing that it is contingent on the fact that a discourse early in the nineteenth century resulted in its normalization. As Foucault notes, “normalization [became] one of the great instruments of power at the end of the classical age” (Foucault, 1995). All of this raises the question: How was this particular political economy normalized? I hold that what Appleby (1978) describes in her analysis of seventeenth century economic transformation constitutes a self-colonization that was exported to colonies simultaneously with its development in England. This self-colonization worked against what may be termed the “Biblical economy” – a covenant society in which social relations reflected those between “man” and God.

The Biblical Economy

In England in the seventeenth century an economic self-colonization was required in order to decouple an emerging capitalist economy from the mythic, but reified “biblical economy;”

The salient features of the biblical economy were sufficiently congruent to the ordering of labor in the sixteenth century to invite belief: the world could be made fruitful through labor; labor came to man as both a punishment and a gift. As a gift it tied human society to God’s charity. As a punishment it forever harnessed men and women in the common work of sustaining life and doing God’s will. Biblical texts explained this social order, infusing the daily round of tasks with a divine rationale. If the poor tenant found himself ground down by a cruel lord, the pain of privation could be relived by the Proverbial promise: ‘Rob not the
poor, because he is poor: neither oppress the afflicted at the gate: For the Lord will plead their cause, and spoil the soul of those that spoiled them (Appleby, 1978, 52).

It was against this biblical economy that the new, capitalist ideas had to struggle. But by the time of the American missionaries’ arrival in Hawai‘i, this “retreat” of the “moral economy” had already occurred, and an “amoral,” “economic” logic predominated in lessons on political economy, though attempts were made to synthesize religious notions with already-secularized economic principles. Thus, what arrived in Hawai‘i was a hybrid, moral-political economy, driven by the tensions between the rise of capitalism in the Northeastern US, and the “second great awakening,” with its valorization of the “gentleman farmer.” These tensions were at the heart of the second great awakening itself, which was a product of “the splintering effects of the worldly spirit of commerce” (Mykkänen, 2003, 63). As Mykkänen (2003, 64) describes them, “the orthodox evangelicals were set apart from two modernizing forces: first, commercial capitalism and the growing rationalism that was its corollary, and second, the influx of migrants and the resulting diversification of the nation’s religious outlook.”

The image of the gentleman farmer, the result of tensions within American society as churches fought to regain members, was then projected on Hawaiians. The projected image was, in many respects, what Leo Marx (1964, 5) called the “pastoral ideal” – a symbolic landscape “less of thought than of feeling,” and one at variance with the Hawaiian conceptions of land discussed in chapter two. But pastoral ideas were easily projected on Hawaiians. Populated by Ortega y Gasset’s *Naturemench*, the not-as-yet-civilized resident occupied a space that was a “middle ground somewhere ‘between,’ yet
in transcendent relation to, the opposing forces of civilization and nature” (Marx, 1964, 23).

John Locke forwarded many of the ideas that came to be fundamental to the modern notion of private property. An ambiguous stance on liberalism is seen in the protestant missionaries’ view of John Locke. As Mykänn (2003, 155) notes, “Locke … was received with suspicion by the evangelical clergy, and … his status was elevated mostly among those who espoused the rising individualism.” This was likely because of the covenant society, with its attendant social commitments, that missionaries clung to. These commitments included that of labor. The result is visible in statutes against idleness, some of which would cause Hawaiian owners to lose land. Laws were enacted “permit[ing] the extinguishment of tenant rights in limited circumstances,” including the “dispossession of tenants because of idleness, where such idleness is proven at trial” (PASH v. Hawai’i County Planning Commission, 1995). This impacts Hawaiian culture if part of culture is, as Geertz holds “attitudes towards life”; this certainly includes attitudes towards work, which, as is well known, conflicted with the protestant work ethic.

Appleby (1978, 4) describes a similar shift in England from a medieval to early capitalist economy, its effects on land and labor, and the attendant ideational shift that split the laboring/desiring subject from their own understanding of the reciprocal arrangement of feudalism:

To respond positively to the opportunities for further economic development meant to abandon customary ways of holding and working the land. It required the endorsement of new values, the acknowledgement of new occupations and the reassessment of the obligations of the individual to society. Before these
responses could be made, however, people had to perceive the changes and incorporate them into an intelligible account of their meaning. Before there could be new modes of behavior, there had to be new ideas to explain them” (Appleby, 1978, 4).

The motive and trauma involved in this split is accounted for by Weber’s observation that “modernization requires a radical transformation of human habits in the interest of purposes as yet unperceived” (Appleby, 1978, 13). Hawaiians were caught between evolving western notions of morality and commerce, but whether missionaries had clear philosophical intentions is unclear. As Mykkänen (2003, 69) notes, “whether the evangelicals really embraced a political ideology is unclear.” They were more likely products of a changing ideological context formed as far away, and as far back, as Adam Smith’s Europe. Smithian liberal economics came into conversation and conflict with moralist ideas that underpinned the covenant society missionaries sought to construct around Hawaiians. This social project worked against a perceived (and projected) idea that Hawaiian social relations, particularly regarding land, were feudal. The idea that Hawaiian social “evolution” followed a Euroamerican model shaped the course of the development of a hybrid system away from this perceived feudal state, and this necessitates here a discussion of European feudalism.

**Feudalism**

Marc Bloch (1961, xvi) notes that the term feudalism was applied to the medieval period mainly in retrospect, as the French term féodalité dates to the seventeenth century, when feudalism was already in full retreat. Bloch (1961 xvii) notes that “it is a question
of the deepest interest whether there have been other societies, in other times and in other parts of the world, whose social structures … have sufficiently resembled that of our Western feudalism to justify us in applying the term ‘feudal’ to them as well.” It did not occur to the commentators on Hawai‘i during the late eighteenth and early nineteenth centuries to ask this question, and the history of the ownership of land became inextricably bound with feudalism until the late twentieth century. Further, as the still-evolving concepts of Euroamerican land tenure were exported to Hawai‘i, their feudal roots remained embedded. A discussion of feudalism is thus necessary to understand how the shift occurred in Hawai‘i from “traditional” Hawaiian to Euroamerican-modeled land tenure. Holton (1985, 18) provides the following description of feudalism:

The notion of a feudal order (or feodalité) emerged within European thought from the sixteenth century onwards, first within legal and then political discourse. For sixteenth century jurists such as Dumoulin, Cujas and Hotman, the notion of ‘feudal’ referred to a system of law – the ‘jus feudale’ – centered around the medieval notion of the feudum, a term derived from the Frankish term ‘feud’, whose literal meaning is cattle-owned… this legal system was seen as comprising a form of jurisdiction over landed territory and landed dependents. Jurisdiction was exercised by vassals who held land in the form of fiefs, granted on the condition that military service might be provided to some superior power, originally that of the warrior chief. Within his own domain the jurisdiction of the vassal was in most respects sovereign … A fundamental feature of the feudum is that it entailed a divided system of property rights. ‘Ownership’ of the land … was thereby separate, in both legal theory and for a while in fact, from the
property of the chief’s military follower who received rights of tenure over parcels of land. ‘Cattle-ownership’ (from which derives the term chattels) is thereby indicative of the property rights of those who, at least in theory, occupy land on conditional tenure. Property … is thereby deployed over the land rather than the land itself being owned outright, and thereby being freely heritable and alienable.

Sato (1886, 15) holds that Norman invaders introduced English feudal land tenure, and the previous form of tenure was alodial:

As the Norman conquest and Domesday Book made a transition from the Anglo-Saxon alodial land system into the feudal land system, so the abolition of military tenures by Charles II was a transition from the feudal land system to a more liberal land system of a testamental succession and free alienation, but not by any means a return to the ancient Anglo-Saxon land laws in theory or practice. The English land laws may be called Reformed Feudal Land Laws. They retain the essential feature of feudalism, and that is the reason why they are so confusing.

Dekker (2006, 13-14) noted that there is a distinction between the closely related systems of feudalism, which was political and military, and manorialism, which was economic, and reminds us of the relative novelty of the free market in real estate. Holton (1985) brings some clarity to the confusion that arises from the existence of two distinct notions of feudalism— the original from a warrior aristocracy and the second from signeurial relations that developed later – these relations were based on a layered model
of land tenure.\textsuperscript{31}

The use of the latter model leads to conflation of the term “feudal” with an exploitative and “multiform phenomenon of peasant subjugation” (Holton. 1985, 20). The stigma attached to the term “feudal” from Marxist critics and others, is the result of the term’s identification with the revised version of feudalism, and not its original form, which was a military relationship.

Holton (1985, 27) continues: “One of the main problems with the wider definition of feudalism – or the feudal mode of production – as ‘peasant subjection’ is that it prejudices analysis of social change in favour of a unilinear evolutionary theory.” Rodney Hilton adds, “there was a good deal more to feudal society than the exploitation of peasants by landowners” (Hilton, 1985, 167). Andrade (2008, 70) points out that makaainana did not owe military allegiance to konohiki and chiefs, showing variation even from the earlier form of European feudalism. But as I have shown, even within the study of feudalism itself, misconception exists. This misconception is then projected onto comparisons of Hawaiian land tenure with feudalism. Even more fundamental to the transition to Western land tenure was the notion of property itself.

\textbf{Property}

Molokaʻi kupuna and manaleo Earl Kawaʻa holds that for Hawaiians possessions were very few. A typical Hawaiian man would own his malo, a poi pounder and board and implements of his trade (fishing, etc.). But his prized possession would be his name.\textsuperscript{32}

In contrast, Blackstone, in the \textit{Commentaries on the Laws of England} (1765), defined

\textsuperscript{31} The term “signeural” is from the French feudal and semi-feudal system used even in its North American colonies of New France.

\textsuperscript{32} Personal communication, Feb. 18, 2011.
property as "that sole and despotic dominion which one man claims and exercises over
the external things of the world, in the total exclusion of the right of any other individual
in the universe." Such a definition omits the notion of multiple interests in land, an
omission noted by Pufendorf, who pointed out that obligations give rise to rights in
others. But the relationship between persons and their property also reflects the
relationship between the individual and the state. Blackstone’s definition is also archaic
in that it reflects an essentialized concept of property that could be used to avoid the
payment of government taxes. It is also at odds with a Hawaiian conception of dwelling
on land. While there is a possessive tense in Hawaiian, Kameʻeleihiwa (1992, 9) notes
there is no Hawaiian word for the phrase “to own,” but only a transliteration: “ona,”
meaning owner.

John Locke (1952, 30) speculated on the origin of private property:

...it is very clear that God, as King David says (Psalm 115.16), 'has given the earth
to the children of men,' given it to mankind in common. But, this being supposed,
it seems to some a very great difficulty how any one should ever come to have a
property in anything [emphasis mine].

The term “property” originally denoted a right, exercised over an object such as land,
personal belongings, and even one’s life. This definition was almost imperceptibly
modified to refer to the object itself.\(^33\) Noting this dichotomous situation, Grey (1980, in
Epstein, 1985, 20) notes that “the term ‘private property’ has no uniform meaning… In

\(^33\) Sackman and Van Brunt (1950, [vol 2] 4) note that “according to those who follow Bentham’s concept
of property the corporeal object, although the subject of property, is, when coupled with possession, merely
the indicia – the visible manifestation – of invisible rights. Property in a specified object, according to such
concept, is composed of the rights of use, enjoyment and disposition of such object to the exclusion of all others”
some instances refer[ring] to real estate; in other contexts … refer[ing] to rights good against the world.” “Rights good against the world” signifies that the system (of property in this case) is not relative, i.e., it does not depend on an individual’s view, but is held to be absolute and applies to all. In other words, the government guarantees, in essence, that one’s property rights will be enforced against all challengers. Property can also refer to the “set of rights protected against government takeover under the eminent domain clause (Grey, 1980, in Epstein, 1985, 20). Banner (2005, 6-7) distinguishes between “property in land” and “the acquisition of sovereignty over territory” – “property means ownership; sovereignty means the right to govern.” Historically, discourses on property facilitated a transition from the second definition to the first - from right to object.

In England, a Hobbesean relationship of the individual to the state is seen in the land tenure arrangement. In the British Commonwealth, it is the monarch who owns all land – “freeholders” merely possess an inheritable right to use, to hold land at the will of the monarch. The British monarch, therefore, is the single largest landowner in the world. The United States incorporated a Lockean notion of relation of individual to state, a notion that was “dominant at the time when the [US] Constitution was adopted.” In this conception, the power of the government is checked, for example, by limitations on “takings” through eminent domain. The sovereign may only take property upon meeting two conditions; that the taking is in the public good, and that it is compensated (Epstein, 1985). In Hawai‘i an altogether different relationship was posited. Though the influence of American advisors [pulled] the Hawaiian land tenure system toward a Lockean relation, a hybrid system was devised that had as its leviathan the three classes of Hawaiian society – King, chiefs and maka‘āinana.
Hegel, in contrast, holds that there are three relations between “the will” (the individual) and property, only one of which applies to land. The three methods of taking possession of a thing are 1) by “grasping it physically,” 2) by “forming” the thing, and 3) “merely marking it as ours” (Hegel, 1952, 25). Hegel shows that ownership of property is representative only, is founded on convention and constitutes a social relation that is dependent on the recognition of others.

Mainstream economists have posited an “evolutionary” theory of the development of land tenure among developing societies, in which individualization of property rights “spontaneously” emerge as market forces put pressure on the government (Platteau, 1996). This notion is both supported in the Hawai‘i case and susceptible to critique. The Māhele constitutes the moment of this transition, in which a right to land is converted to possession of the object of that right. Further, it represents the creation and constitution of a Hawaiian subject, as individual rights are traditionally (in Western societies) intimately bound with property in land. I do not mean to suggest here that this transition was seamless, but rather to examine the complexities of translation – both linguistic and theoretical – that attended the transition. In the context of Indigenous peoples generally, Johnson (2005, 50) holds that “the objective of most compensation schemes is to convince Indigenous Peoples that title means ownership, not guardianship or spiritual connection.”

This is in direct contrast to the Western concepts, later integrated into Hawaiian

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34 The 1839 Cherokee Constitution, for example, suggests an Indigenous view of property varies from this position, framing the issue in these terms:
The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens respectively who made, or may rightfully be in possession of them.
Kingdom law, of tenements - structures on land, and hereditaments - the inheritable land itself. In these systems, tenements and hereditaments were inseparable. A lessee, for example, does not own the structures on leased land – rather, they belong to the fee-simple owner. But such notions are embedded in larger and more fluid legal concepts of land. The US Supreme Court addressed the issue of the transfer of “title” to land from Native American ownership, or control, to “private individuals” in the case of Johnson v. McIntosh. In this case, the US Supreme Court found itself in the awkward position of reasoning that title, stemming from sovereign control in their view, derived from English control of the colonies and was inherited by the US via the Revolutionary war:

However extravagant the pretension of converting the discovery of an inhabited country may appear; if the principle has been asserted in the first instance, and afterward sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So too, with respect to the concomitant principle, that the Indian inhabitants are to be considered as merely occupants, to be protected … but to be deemed incapable of transferring the absolute title to others (Schekel, 1998, 18).

Scheckel (1998, 19) points out that Supreme Court justice Marshall “seems to admit that the denial of Indians’ full rights to the lands they possessed is a convenient fiction, but one that cannot be rejected by the courts of a nation whose very existence and future expansion depend on it.” The irony in the case of Hawai‘i is that, rather than denying Indigenous title, the state and Federal governments may be currently denying “Western” land title in many cases involving Hawaiians, including, arguably, the “ceded”
lands, which I address in chapter 6.

Hawaiians were able to comprehend the new land tenure system through a combination of bringing traditional concepts of land tenure and synthesizing them with the [emerging] ideas from the west. But, as Chakrabarty (2000) holds, these ideas were actually a chimera – a travesty of the Euroamerican reality. They did not recognize resistance within Europe to such ideas. Such resistance was erased. Further, they did not recognize internal contradictions within the capitalist system. As Bell (1976, 7) holds, “we are witnessing the end of the bourgeois idea—that view of human action and of social relations, particularly of economic exchange—which has molded the modern era for the last 200 years.” This two-century-old system, then at its peak, “argue[d] that the unbounded drive of modern capitalism undermines the moral foundations of the original protestant work ethic that ushered in capitalism itself” (Bell, 1976).

Just as the protestant work ethic itself conflicted with the original Christian doctrine of the meek inheriting the earth, as Weber argued, what capitalism became undermined its own moral, Christian foundation. What Hawai‘i received, then, was a still-changing, always already dynamic, morphing system. This may explain some of Richards’s difficulty in answering the chiefs’ question “pehea la e pono ai?” Richards did not seem to have been aware of the contradictions within the system he was attempting to teach, or impose on the chiefs. For what was being debated in the school of political economy for the chiefs was, in essence the nature of “man.”

In common parlance, the term property is used as a noun. One is said to own “property,” i.e., a piece of property, an object. Locke’s time used property as a right, as in “I have a property in that land.” This shift occurred sometime in the seventeenth century
in Europe, and was present at the founding of the US, but in Hawai‘i, it was more visible, occurring in the time period in question, the 1840s and 1850s (see Appleby, 1978). So in addressing the question of the transition from property as a right to property as an object, some of the associated trauma can be attributed to the fact that the shift was both later and more rapid in Hawai‘i than in Europe.

Locke expounded his notion of property in his *Two Treatises of Government*, *Second Treatise* (1690):

… every Man has a *Property* in his own *Person*. This no Body had any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.

. . . 'Tis *Labour* then which *puts the greatest part of Value upon Land*, without which it would scarcely be worth any thing . . . For 'tis not barely the Ploughman's Pains, the Reaper's and Thresher's Toil, and the Bakers [sic.] Sweat, is to be counted into the *Bread* we eat . . .

… Thus *Labour*, in the Beginning, *gave a Right of Property*, where-ever any one was pleased to imploy it, upon what was common, which remained, a long while,
the far greater part, and is yet more than Mankind makes use of.

The application of Lockean ideals in Hawai‘i was premised on a particular psychology subscribed to by missionaries:

In some ways the missionaries ... were equipped with a full-fledged theory of the human mind and society ... Their psychology started with the empiricist idea of the mind as filled with custom, hence subject to outside influence and change. The follies and whims of the human mind, perpetuated by custom, as Locke and the enlightenment thinkers would say, are a result of insufficient use of the reason due to social circumstances (Mykkänen, 2003, 80).

Distortion of “custom” and cultural practices regarding land complicates attempts to understand previous ideas about land. Indigenous peoples in the Pacific grappled with introduced concepts surrounding land, and sought to adapt to these concepts. In New Zealand, for example, Maori communal ownership was also used as a means to prevent land alienation, but was a mixed blessing. The land tended to remain in Maori ownership, but proved nearly impossible to develop, even at the most basic level, due to the large number of owners who had to agree with each decision. Likewise, in Hawai‘i, the hui described in Stauffer’s (2003) study on Kahana valley also had the effect of slowing land sales, though not ultimately of preventing them.

Responding to Hobbes' more radical notion that "everyman" has a right to everything, Locke held that it was a "ridiculous trifling to call that power a Right, which should we attempt to exercise, all other Men have an equal Right to obstruct or prevent us" (Tully, 1980, 74). This separation of rights represented a building of consensus over rights in property that the state was being encouraged to protect.
The foundation of the debate rested on the notion of natural rights, on the existence of which there was considerable agreement. The debate centered, instead, on the manifestation of natural rights in the actual world of property ownership. The interpretation of these rights rested, in turn, on the idea of the social contract. Pufendorf held, in response to Hobbes, that “rights of property have no higher sanction than the laws which men consent to in entering political society” (Tully, 1980, 75). Implicit in this idea, however, was the notion that it applied only to Europeans, who were further along than non-Europeans in a sequence of teleological development.

Ivison, Patton and Sanders summarize the larger picture of interaction between "Western" political thought and Indigenous societies, values and systems of property:

Western political thought has often embodied a series of culturally specific assumptions and judgments about the relative worth of other cultures, ways of life, value systems, social and political institutions, and ways of organizing property. As a result, egalitarian political theory has often ended up justifying inegalitarian institutions and practices (Ivison, Patton and Sanders, 2). They contend that "finding appropriate political expression for a just relationship with colonised indigenous peoples is one of the most important issues confronting political theory today" (Ivison, Patton and Sanders, 2).

Defining “rights” as that “securing or protecting fundamental human interests, for example, those to do with property or bodily integrity,” they note that recognition of Indigenous rights will entail a fundamental alteration of those rights. Further, the note the failure of western political theory to enter into dialog with Indigenous peoples over the issue of rights in general, and, I would add, property rights in particular. Ivison, Patton
and Sanders also address the issue of indigenous title, and hold that it is "more about the continual definition and redefinition of relationships rather than the simple vindication of a property right." This notion suggests the primacy of communal title and further its contrast with individual title. In fact, New Zealand's Maori Land Court had as its primary task the "individualisation" of Maori title - a practice viewed as facilitating alienation of Maori lands.

Tully (99) notes that, for Locke, "it is never the case that ... property is independent of a social function." He distinguishes between property as a natural right and "political property," which succeeds it and is only then private property. Locke opposes Filmer, Grotius and Pufendorf on this point. He holds that the natural property rights in the state of nature precede "the systems of property that arise later with the introduction of money and the creation of government."

This, of course, is subject to critique, as the notion of a state of nature prior to government was what facilitated the doctrine of terra nullius. Thus the notion of a state of nature itself is contingent on one's ability to see a government - which settlers in Australia claimed not to be able to do. Locke had a similar blind spot when it came to the "new world." Locke worked as an aide to the Lord Proprietor for the Carolina colonies. His work justified slavery in the Carolinas and he was a shareholder in the Royal African Company, which was involved in the African slave trade. Locke clearly believed in property, but his belief in liberty was more constrained. Farr (2008), however, holds that Locke forwarded a just-war model justifying slavery, but one that did not apply in the Americas, but only in Stuart England.
Between Locke's Eurocentric notions of property and government and inconsistent position on slavery, the implementation of a Lockean private property regime in Hawai'i was indeed problematic. The Hawai'i Supreme Court in Makea v. Nalua (1878) summarized historical Hawaiian relations to land: “On account of the comparatively recent period at which regular government and rights of property in land have been established in this country, there is no necessity of inquiring into any ancient laws or customs touching the descent of property” (Ladd, 1992, 21). This unproblematic view obscures the ways in which Hawaiians sought to bridge their own notions of land with western notions.

Euroamerican concepts of property rest, to a large extent, on the ideas of John Locke. Locke holds that it is labor, beginning with gathering, that grants ownership: "it is plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common." This is consistent with Europeans' notions, upon contact with Indigenous peoples, and noted by Banner (2007) that the practice of agriculture gave native peoples a kind of title to their land - an ownership that hunter-gatherers did not possess. Early settlers, then, seemed to be informed by Locke, or at least by a Lockean paradigm. Locke himself speculated on "Indians'" ownership of property, forwarding an inconsistent notion of the value of their labor. Locke held that the catching of a deer makes it the Indian's, whereas previously it was "the common right of everyone." But in agriculture, he speculates that an Indian's agricultural labor, on the same land, producing the same yield, would bring "not one thousandth" of what European-grown produce would (Locke, 1952, 34). This disparity reflects Locke's notion of the obvious superiority of European agricultural methods, and the satisfactory state of
"Indian" hunting - Indians being at a lower level of "development." According to Johnson (2005, 44):

The sovereignty of Indigenous peoples, though initially recognized by many European colonial powers, was quickly wallpapered over. It was a process called domestication, involving a series of legalized illegalities (Martinez, 1999, p30). Indigenous land rights were moved under colonial law. Today, these sordid details are no secret at the United Nations (UN). What remains hushed is the ongoing mission of certain ‘upstanding’ governments to utilize the UN.

At the core of this emerging capitalist paradigm being imposed on Hawaiians was a fundamental contradiction. This contradiction was compounded on the already existing contradiction between Hawaiian land practices and capital itself - the contradiction of the capitalist paradigm is seen in the Adam Smith Problem. Adam Smith’s conception of man as an economic being and man as a moral being are disparate, if not polar opposites. The conception of man as an economic being is that of a rational actor pursuing his or her own self-interest at the expense of others, but unknowingly work for the social good in a system that is arranged around self-interest. His conception of man as a moral being holds that there are times when people will act against their own self-interest purely for the well-being in the individual, although this can be argued as self-interest, it is not economic self-interest. Smith’s conception rests on a fundamentally individualistic idea of humanity, one that opposes collectivist (though not Marxian) Hawaiian notions, in which individuality is not as pronounced – the individual consists of their place in a social, genealogical network.
As an architect of the new political economy, William Richards held a central position in the theoretical encounter between Hawaiian and Euroamerican ideas surrounding land and political economy. Richards was both the teacher of the “inner circle” of Māhele architects and a member of the Land Commission. Hutchison (1987, 88) notes the concern, even within the mission itself, over the undue influence of such advisors. Rufus Anderson, senior secretary of ABCFM, and a man who Francis Wayland called “the wisest man in America,” noted this concern:

What I fear is, that the foreign members of [the Hawaiian] government will imperceptibly be so multiplied, that the young chiefs now in school, will never be able to rise to consideration and influence …. [Foreigners] deem themselves more competent to fill the offices than the natives, and would fain believe that the natives are incompetent to fill them …. [Natives] cannot, indeed, perform the duties as well as foreigners, if the duties must be performed just as they are in foreign courts and governments; but at the same time, it is better for the islanders, and it is essential to the continuance of their institutions as a nation, that the offices should be filled by natives. Better have the duties performed imperfectly, than not done by them.

Richards did not have the perspective of distance to be concerned over such undue influence. He was educated at Williams College, Massachusetts, where he graduated in 1819, trained at Andover Theological Seminary and ordained in 1822 (Hawaiian Mission Children’s Society, 1969, 162). Kamakau (1992, 345) notes that:
Mr. Richards did not translate the whole of such books [as Wayland’s *Elements of Political Economy*]… [but Richards] never ceased teaching the principles of government to the king. By means of these lessons in political economy with the chiefs he was educating them to confer together as leaders of other governments did, to compare the constitutional forms of government with governments which had no constitution, and to see that the constitutional form of government belonged to those governments which were most famous and …most advanced. Such governments excelled in knowledge and wealth and represented progress in the search after wealth and trade. Thus the minds of the chiefs became enlightened. ‘So this is it! [they said] Here is the way to gain wealth and honor.’

Why chiefs could not apprehend the limitations of Euroamerican political economy is unclear, but they did question Richards’s ideas on government. Despite this, a project of mimesis of Western government and economy – a particular *moral* economy – was begun. In Foucault’s *The Order of Things: An Archaeology of the Human Sciences* (1970) he posits four “similitudes,” which govern the practice of producing resemblance. His “archaeology” can be conceived as a nascent form of his later genealogical method. Of these similitudes, *aemulatio*, or emulation most closely describes the process of mimesis. *Aemulatio* is “a sort of ‘convenience’ that has been freed from the law of place and is able to function, without motion, from a distance” (Foucault, 1970, 19). A system of private property was appended to the developing market system in ways that were “freed from the law of place” – i.e., it *emulated* an idealized Western system, but out of the cultural and social context of Hawai‘i.

This project was imperfect from the outset. First, Richards was not regarded as an
authority on political economy, and was only appointed after a failed search for a teacher he himself undertook in the United States. Second, Francis Wayland, whose textbook was translated in order to teach the chiefs, was not an economist but a “moral philosopher.” Francis Wayland was born in New York in 1796 of English parents, and attended Union College, studying medicine. After practicing for a few years, he joined the Baptist church and “devoted himself to the ministry” (Moulton, 1910, 447). Wayland studied theology for a year at Andover, and was pastor at Baptist churches in Boston and Providence, while holding positions at Union College. He was considered “highly distinguished as a pulpit orator” (Moulton, 1910, 447). Wayland held that “the principles of Political Economy are so closely analogous to those of Moral Philosophy, that almost every question in the one, may be argued on grounds belonging to the other.” The Christian morality purposely embedded in the Wayland and Richards texts is apparent.

Incidentally, however, they may have differed on the question of “civilizing” Hawaiians. By the standards of ABCFM, Wayland, along with Rufus Anderson, were viewed as “anticivilizing” forces within the ministerial community (Hutchison, 1987, 90), but this likely had no effect on Richards’s effort. It is ironic that Wayland’s text became a primary vehicle for proselytizing for capitalism, as he wrote “the son of God has left us no directions for civilizing the heathen, and then Christianizing them. We are not commanded to teach schools in order to undermine paganism … If this is our duty, the command must be found in another gospel; it is not found in the gospel of Jesus Christ” (Hutchison, 1987, 84). But neither Wayland nor Anderson came to Hawai‘i, so arriving in Hawai‘i were those missionaries on one side of the debate.

The 1886 edition of Wayland’s textbook notes that his “aim was to put into
simple statement … the doctrines of Adam Smith, Say and Ricardo” (Wayland, 1886, i). Like Smith, Wayland authored a work on moral philosophy, and thus has his own version of the Adam Smith problem. Richards did not translate the entirety of Wayland’s *Elements of Political Economy*. Richards’s translation, *No ke Kalaiaina*, was about two-thirds complete. The section of Wayland’s book that deals with land was not translated. Thus, as Richards must have read the sections on land, the original English can be used to analyse the ways these concepts may have been imparted to the chiefs in Richards’s inner circle of students.

Unfortunately, no record was kept of these lessons with the chiefs. The closest to a record are a few quotes from Richards and others, and the texts themselves. Schweizer (1999, 138) relates Richards’s account of teaching the chiefs:

> The lectures themselves were outlines of general of political economy, which of course could not have been understood except by full illustration drawn principles from Hawaiian custom and Hawaiian circumstances. In these illustrations I endeavored as much as possible to draw their minds to the defects in the Hawaiian government, and Hawaiian practices, and often contrasted them with the government and practices of enlightened nations. The conversation frequently took so wide a range that there was abundant opportunity to refer to any and to every fault of the present system of government. But when the faults of the present system were pointed out & the chiefs felt them & then pressed me with the question, ‘*Pehea la e pono ai*’ [“What is the right thing to do?”], I have often felt that it is much easier to point out the defects of an old system than it is to devise a new one, suitable to take its place.

35 The copies at UH Mānoa and UH Hilo are two-thirds complete.
Thus, Richards was clearer on the problems with the existing government than on its solutions. His suggestions would have been literally textbook solutions, and unlikely to have been adapted to Hawai‘i’s context. Schweizer (1999, 141) also notes that the subtitle of Lilikalā Kame‘elehiwa’s book, “recalls the one question closest to the chiefs’ hearts, namely how to find the proper way of doing things” – pehea lā e pono ai – and that this shows “why this land reform was not in the best interest of the indigenous population.” My project problematizes this widely held notion. Wayland claims to have not “thought it proper, in general, to intermingle [economics and moral philosophy], but … argued economical questions on economical grounds.” Elements of Political Economy was originally a series of lectures to the senior class at Brown University.

Regarding land, Wayland (1837, 354) notes that “property in land is considered more secure than any other property.” He goes on to make the curious statement that “the principle may be considered indestructable.” This notion of the secure nature of real estate is seen in the phrase “safe as houses” (Ferguson, 2008, 230). But Niall Ferguson (2008), writing in the twenty-first century, notes that this is a misconception – that in fact, real estate is safe for lenders, as the property constitutes a more significant form of collateral than exists in other investments such as stocks or bonds. Thus, lenders can retrieve value from defaulted loans on real estate. This collateral, on the contrary, makes these loans risky for borrowers. My findings in the final chapter of this dissertation show that defaulting on loans was a primary mechanism of land alienation for Hawaiians. Wayland’s (1841, 199) interest in land, however, mainly concerns “rent:”

the compensation for the use of capital in the form of land and its appendages, commonly called real estate. Rent implies ownership of land. It belongs not to our
science to discuss the abstract right of property in land, or to determine the basis of that right. It is enough to say that the wealth which God has hidden in the vegetable and mineral resources of the earth cannot be developed without some exclusive possession and control of land itself.

Wayland reiterates that “title to land can be more definitely secured, than that of any other property. The legal instruments, by which it is secured to the individuals, are a matter of public record.” I show in Chapter 6 that this was not seen to be the case in Hawai‘i by the late nineteenth century, and that the land court was developed by the Territory of Hawai‘i to address the clouded nature of title. Richards, then, via Wayland, was imparting a series of ideas that were shown to be misconceptions decades later. And this is the case within the Euroamerican framework of land tenure, and does not address the additional ruptures that resulted from Hawaiian conceptions of land that underlie the new system that was being constructed.

Wayland only notes one instance of what may be termed an affective connection to land, and even this is monetized:

Of two farms equally productive, many men would give a decided preference to that which commanded a view of the richest and most beautiful prospect ... as to give the greatest pleasure to the beholder. For this preference, most men would be willing to pay a considerably additional price. This additional price will increase with the wealth and the improving tastes of the community.

This affective factor in the calculation of land value is among a list of factors such as “mines.” The idea of improvement is based on his notion that land, in its initial, undeveloped state, is worthless, and only emerges with the addition of labor. This
highlights the perceived relationship between economic productivity and moral philosophy.

But Wayland’s most explicit discussion of land, and specifically fee simple title comes in a section called “Distribution of Responsibility:”

*The holding of lands in fee simple*, with no checks on their free transfer, and with unfettered laws of inheritance, tends to equality of condition and to a distribution of land to such as will occupy and improve it for themselves. This, in the long run, ensures the highest productiveness of wealth and promotes the highest happiness of a people ... The chief arguments urged against the private ownership of land, have equal force against private property in every form. If the radical change proposed with respect to land should be made, it would, we believe, inevitably be followed by the speedy subversion of all property rights as now recognized, and bring a reign of anarchy, destructive of existing wealth and paralyzing to all productive industry. The common interests of men in society are best subserved by *a distribution of responsibility*, such as combines the particular care of individual interests into the highest efficiency of action for the general good [emphasis original].

Wayland overlooks productive societies (such as Hawai‘i) without private property, as well as the well-known vicissitudes of the market, and promotes privatization with a nearly religious fervor. William Richards would do the same in his translation.

*No ke Kalaiaina*

Richards described his translation of Wayland’s *Elements of Political Economy* as
“compiling a work on Political Economy of which Wayland’s is the basis” (Mykännen, 2003, 136). While Wayland (1837, 3) begins his introduction, “Political Economy is the Science of Wealth. [emphasis original] It is sometimes defined as the Science of National Wealth,” Richards’s “translation” begins: “ua haawi mai ke akua i mea e waiwai ai na kanaka apau.” [God gave the means to enrich all people] 36 Richards first introduces the concept of resources. He uses the Hawaiian term ‘āina. Richards replaces Wayland’s (1837, 4) examples of objects “having the power of gratifying human desire, which are capable of being appropriated [emphasis mine]” – bituminous coal, money, wood, and iron – with the soil, the ocean, canoe carvers and house builders (Richards, 18). Tokishi translates Richards’s exposition of wealth and resources: “the land where man farms is wealth. The sea, the place where one fishes, is wealth. Bought goods, they are wealth. The ability to carve canoes, it is wealth. The ability to build a house, it is wealth. Each and everything that has value for most men, these things are called, wealth.” Here Richards is introducing the idea of services, in addition to goods, as a category of wealth. Richards can thus be seen as a conceptual or theoretical translator, creating a text that, in his view, is “appropriate” to his Hawaiian audience.

Richards (1839, 18) next discusses the concept of value or wealth – waiwai. 37 In order to distinguish between resources (potential wealth) and actual wealth, Richards enumerates things that are not wealth: “Aole nae he waiwai na mea i waiho wale ia. O ka aina I mahi ole ia, a noho ole ia, aole ia he waiwai. O ke kala e waiho wale ana iloko o na mauna, aole ia he waiwai. O ka laau ala I nalo loa ma kahi e hiki ole i ke kanaka aole ia he waiwai.” [Those things that are merely left in place are not wealth. Land that is not

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36 Unattributed translations are mine.
37 Pukui and Elbert define waiwai as “Goods, property; value, worth; estate; rich, costly; financial.”
farmed but left alone, that is not wealth. Silver that is left inside the mountains, that is not wealth. Sandalwood that is forgotten and not available to people is not wealth.] Implied in this exposition is the notion that resources become wealth when they are expropriated.

Richards then illustrates what does constitute wealth:

Richards adds a point not made in the original (and directed at Hawaiians): “In that way men lived poorly during the period of ignorance. They did not know the places valuables could be gotten” (Tokishi 1). It is interesting that Richards felt the need to translate explicitly what it means to be rich. Where Wayland writes “He who possesses many of these objects in abundance, is termed rich,” Richards translates it to “Ina he nui ke kala o kekahi kanaka, ua oleloia, ua nui kona waiwai” [If a man’s money is plentiful, it is said his wealth is great].

On intrinsic value, Richards renders “money is the measure that can measure the beneficiality and the amount of the valuable” as “O kekahi waiwai, aole nui kona maikai iho, ua nui loa ke kala iloko” [some valuables don’t have a lot of intrinsic value, but there is much money inside the valuables]. Richards thus introduces the notion of intrinsic value by illustrating that objects contain money or perhaps “capital,” though it is difficult to say whether he would have used this word.

Richards (1839, 19-20) writes “He mea maikai ka hao, a ua oi loa aku kama maikai mamua o ke gula. Ua nui loa nae ke kala i loko o ka gula no ka mea, e hiki no ke kuai aku, a nui ka loaa mai” [Iron is a beneficial thing, and it is much greater in its beneficiality than gold. Great is the amount of money inside the gold, because it is possible to sell it, and much is gained]. In her footnotes on the text and translation, Tokishi clarifies the “translation of ‘aina’ as ‘wealth.’” Later in the footnotes, she states
that “at first Richards’ use of ‘waiwai’ seems to be exactly the same as ‘aina’ meaning wealth. However, as the paragraph goes on, and more examples are used, it becomes clear that he is referring to ‘the particular quality in any substance that renders it capable of gratifying human desire’, that is, ‘value.’”

Richards (1839, 30) also introduces a Smithian concept of the division of labor:

“Ina hui pu na kanaka he nui, hiki wawe ia lakou ke hoonui I ke waiwai, aole hiki wawe ke hana pakahi na kanaka.” [If many men join together, they can quickly increase wealth, they cannot do so quickly working individually.] Richards (1839, 31) addresses variations in the value of such labor “Okoa ka uku o kekahi paahana, okoa ka uku o kekahi paahana. No laila he mea nui ke puunaue pono” [Various forms of labor have various values. Therefore, a proper division of labor is an important thing].

Richards promoted the Smithian idea of competitive advantage, comparing American and Hawaiian examples:

If a[n American] man makes a great effort to grow wheat, he obtains perhaps forty barrels of wheat. The money in these barrels is four hundred. In Hawai‘i Nei, if a man makes a great effort to plant sugar cane, he obtains perhaps four tons in one year. In these four tons there are four hundred dollars. But if he makes a great effort to plant wheat, and he is fortunate, he obtains three barrels, and in the barrels there are only thirty dollars. Therefore it is understood what is good for that man of America and that man of Hawai‘i Nei … and then those men barter…

Richards may not have read the entirety of The Wealth of Nations, however, as Smith (782) conceded that the division of labor rendered the worker “incapable of exerting his strength with vigour and perseverance, in any other employment than that which he has

38 This is not a literal translation.
been bred.”

The concept of private property was introduced in Richards’s text simply by explaining the necessity of paying for land, though he never translated Wayland’s section on property. Richards (22) wrote “A ina holo aku kela kanaka, a hai, ‘Ua loaa ia’u ka aina,’ a lohe na kanaka, a holo mai me ka manao e noho ma ia aina, pono ia lakou e uku aku i ua kanaka la…” [And if this person goes and says ‘I have that land’ and people hear, and he comes with the thought of living on that land, they have to pay that person…]. Richards (22) then introduces the notion of the moral value of inputting one’s labor into land: “I ka wa aole i ukuhiia, na ke Akua. I ka wa i ukuhiia, ua lilo mai na ke kanaka, no ka mea, ua hana oia” [In the time when there was no payment, it was God’s. In the time when there was payment, it transferred to people because they worked it]. Richards notes that this “transfer” (lilo) occurred when Hawaiians arrived and began to cultivate the land, but that wealth from the islands can be increased if Hawaiians increase their efforts: “Ina i nui ka hana a ke kanaka i hana’i i kekahi mea, alaila, lilo kela mea i mea ku’ai nui” [If Hawaiians put a lot of work into something, then that thing will turn into something very saleable]. This passage can be read as an encouragement to Hawaiians to sell their lands. Richards proposes four categories which “political economy” is said to be divided into; natural resources, items for sale, the division of labor, and what could be termed “waste products.” The early land laws seemed to reflect this four-part understanding, as they addressed land, exchange, labor for the chiefs, taxes and “waste” lands. Richards seems to have put land into the category of natural resources rather than items for sale, as the latter referred to personal property rather than real property. As he put it in the most explicit passage on land at the beginning of Book One:
The land is a resource, it is the whole resource of all the people who are living on that land. It is not separated between the chiefs and the people. It is undivided. Because of this, if the people are enriched, the chiefs are also enriched. Land is not seen as being wealth for the chiefs, but not for the people].

Here we see the origin of the conception of land that underlay the Māhele process – its status as storehouse of wealth, its ownership in common (undivided) between the makaʻāinana and aliʻi, and its potential to be converted into monetary wealth.

The protestant work ethic was thus bound to conceptions of land from the beginning of the modern land tenure system. It was on this theoretical foundation – one that was utilitarian in its sole focus on the economic dimensions of land – that the system of private property rights was constructed and understood. As Schweizer (1999) concludes:

Employing such examples couched in easily intelligible language, Richards taught his skeptical scholars how land could create wealth and how an efficient trade with the United States could be developed. And in this fashion he laid the foundation for the Great Māhele … which in turn made possible the subsequent rise of the sugar industry.

The Theoretical Encounter
It is difficult to determine what Hawaiian elites were thinking when they proclaimed “This is it! This is the way to gain wealth and honor!” but it seems to be the moment of a shift in perspective. To unravel this shift is the work of the theoretical encounter. Whereas previously Hawaiians viewed land in various ways: as self, as living being, as mother, as livelihood, now they claimed “that the well being of their country must essentially depend upon the proper development of their internal resources, of which land is the principal” (Hawaiian Laws in Sai, 2008, 86).

Traditionally, Hawaiians embodied land. This shift constituted the disembodying of Hawaiians from land – the original alienation. This is why I choose the word alienation rather than dispossession, for the loss of land, or more precisely, the loss of control of land. Just as land cannot be stolen, land cannot ultimately be lost. Control is lost, as is the productive capacity and health of land. On this framework, the concept of kuleana was built – a concept that would empower Hawaiians by embedding rights to land, but the understanding of these rights would later be distorted in ways that would serve to alienate Hawaiians from those same lands. Land was always equated with political power. Originally that power lay in the land’s ability to feed and build up armies. But after the introduction of capitalist principles, the power of land lay in its monetization. This may be why chiefs became severed from makaʻāinana, and became implicated in their disenfranchisement. Aliʻi soon began to undermine Kuleana, or native tenant rights, embedded in Hawaiʻi’s legal system. The extent to which these rights survived the assault by aliʻi and foreign interests is the topic of the next chapter.
CHAPTER 4 – KULEANA: NATIVE TENANT RIGHTS

This story is about what it means to live with and without kuleana.

John Laimana, “Living Without Kuleana”

Lorrin Andrews’s (2003) A Dictionary of the Hawaiian Language provides the following definition of kuleana:

Kuleana, s. [substantive (noun)] A part, portion or right in a thing.

2. A right of property which pertains to an individual.

3. a friend; a portion belonging to a friend.

4. One’s appropriate business … NOTE.—In modern times, kuleana refers to a small land claim inside another’s land, that is, a reserved right in favor of some claimant.

This definition of kuleana as a noun was from an 1865 dictionary roughly contemporaneous to the events of the Māhele and Kuleana Act. The definition sheds light on the act of makaʻāinana “dividing out” their interest from “inside another’s land” through the 1850 Kuleana Act, which shows that all lands were indeed “subject to the rights of the native tenants.” Kuleana is also a right, in addition to being a responsibility as it is in the fourth part of the definition (“one’s appropriate business”). Further, the concept of being a “friend” to the land, as seen in the term “hoaʻāina,” is apparent in this definition.

John Laimana, quoted in the epigraph to this chapter, is describing the kuleana his family had for burial sites on Hawaiʻi island. Laimana describes traditional Hawaiian sensibilities in caring for a place, and distinguishes between them and non-Hawaiian

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39 The original dictionary was published in 1865.
sensibilities in which place has economic, rather than affective dimensions. The kuleana grants beginning in 1850 were explicit recognition that the right to these lands was merely the counterpart of the responsibility makaʻāinana had for these lands. I argue in this chapter that hoaʻāina kuleana rights were the right to fee simple title to land, not merely gathering rights. I have placed this chapter on kuleana before the chapter on the Māhele, despite the fact that the Māhele predated the Kuleana Act, because the notion of embedded rights that kuleana indicate, underlies the rights expressed in the Māhele. While most people know that the Kuleana Act provided rights to fee simple title, those rights have been obscured by present-day debates over gathering rights. This radical forgetting has allowed the State, and its courts to appear liberal in relation to Hawaiian rights, when in fact they have elided over the potentially profound rights of Hawaiians embedded in Hawaiʻi’s real estate system. I problematize, but do not entirely disprove, the existence of a deadline for the exercise of native tenant rights.

In this chapter, I present a genealogy of native tenant rights, with attendant lineages and ruptures, and trace the intersection of the post-1845 land tenure system with the emerging concept of sovereignty. I argue that native tenant rights should be understood not only as gathering and access rights, but include in addition the right of makaʻāinana to divide out their interest in the dominium of the Hawaiian state and convert that interest to a fee simple title to land – to convert their right into an object. The encounter between sovereignty and ea was also significant, because the land tenure system was intimately bound up with sovereignty as its basis lay in the concept of sovereign ownership of land, called dominium. That the Hawaiian term for sovereignty
became ea (life) suggests that Kānaka Maoli viewed sovereignty as “ke ea o ka ʻāina,” to paraphrase the Kingdom motto – the life of the land itself.

Agamben (1995, 15) notes that the paradox of sovereignty is its position, “at the same time, outside and inside the juridical order,” which constitutes a “state of exception” in which the sovereign has the “legal power to suspend the law.” While statements of the architects of the land tenure system contradict this notion, some historical events support the idea that in Hawai‘i, the sovereign exercised a state of exception in regard to land. Adding to this complexity is the change in “sovereigns” at the turn of the 20th century.

Globally, the period in which the changes in the Hawaiian land tenure system occurred was one of significant political shifts. Land was traditionally the basis of sovereignty and all political power stemmed from it. Land could be given to chiefs, but not sold. ʻĀina was controlled rather than owned (Kameʻeleihiwa, 1992, 51). Originally the rights to land did not include the right to inheritance, so an Aliʻi’s children did not automatically gain control of their father’s or mother’s land. Land was usually transferred in redistribution initiatives – kālaiʻāina (to carve the land), whenever there was a new mōʻī.\footnote{Kameʻeleihiwa 51.}

Major changes in land tenure began slowly under Kamehameha I. As the first mōʻī of the archipelago, he found it necessary to divide land and power more widely than his predecessors. Kamehameha gave his four uncles from Kona (who were generals in the wars of unification), his chief, and his potential rivals large tracts of land in
perpetuity, inheritable by their offspring, and also governorships over entire islands.\textsuperscript{41} This set a new precedent, as land had formerly reverted to the mō‘ī upon the death of an Ali‘i Nui (high chief).

Further changes in the traditional land tenure system began when the missionaries’ ties to the American Board of Commissioners of Foreign Missions (ABCFM) in Boston were severed. Kelly (2001) attributes much of the land alienation to the missionary presence in Hawai‘i.\textsuperscript{42} The influence gained during the first generation of missionaries was used in the second generation to gain land and capital seen as necessary to maintaining their status. ABCFM wanted the missionaries to go to the Gilbert Islands (Kiribati), but they refused, as the islands were atolls without the resources that allowed them a comfortable life.\textsuperscript{43}

While there were missionaries who favored exclusive Hawaiian ownership of land, the majority of foreign subjects, including most missionaries, pushed hard for the introduction of fee-simple title. Kamehameha III repeatedly reaffirmed his right to revoke all usufruct of land, but was forced to concede land to a British resident in 1843. In the “Paulet Affair,” a British captain, Lord George Paulet, forced Kamehameha III to cede Hawaiian sovereignty to Britain as a consequence of this land dispute.\textsuperscript{44} Hawaiian representatives were sent to Britain and regained Hawai‘i’s sovereignty on the basis of an

\textsuperscript{41} Kame‘eleihiwa 52. The four Kona uncles of Kamehameha were Ke‘eaumoku, Kamanawa, Kame‘eiamoku, and Keaweheulu.

\textsuperscript{42} Marion Kelly, Personal Interview, May 6, 2001.

\textsuperscript{43} Marion Kelly, Personal Interview, May 6, 2001.

\textsuperscript{44} Parker 101.
1843 treaty signed by the British. It guaranteed Hawaiian independence. Upon the return of sovereignty, Kauikaeouli (Kamehameha III) uttered what became the motto of the Kingdom and later the state – “Ua mau ke ea o ka ‘āina i ka pono” [the sovereignty of the land is perpetuated in righteousness] – which shows that in a Hawaiian conception of land, sovereignty is embedded in land. As Leilani Basham notes in her study of mele Lāhui (national songs), “ma ke mele ‘ana ‘Ea mai Hawaiinuiakea/ Ea mai loko, mai loko mai o ka po’… he hō‘oia no ‘ia i ka puka ‘ana mai o ka mokupuni mai ka moana lipolipo mai.” [When it is sung ‘Rise up great Hawai‘i/Rise up from the darkness’ it is a verification that the islands emerged from the dark sea]. Thus ea is coupled with the very origins of the islands. But one that was to be recognizable to expansionist powers supplanted this notion.

Stauffer (2004, 10) illustrates Hawai‘i’s place in the global political shifts by tracing British and American imperialist activities globally in the “long decade” (for Hawaiians) of the 1840s:

Great Britain was contending with the first of the notorious Opium Wars as she humbled China. Three decades of Maori resistance in New Zealand were commencing. Talk of war was simmering with the Americans over the Oregon Territory. The United States had just included Hawai‘i within her sphere of influence by extending the Monroe Doctrine to the Islands.

The sovereignty of Hawai‘i was contested, but ultimately confirmed during the early- to mid-1840s. The Paulet affair ended with the restoration of Hawai‘i’s sovereignty by Admiral Richard Thomas on July 31, 1843, after verbal recognition from Britain and

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45 Coffman 87.
France but before written recognition, which came on November 28, 1843. Foreigners such as William Richards viewed private property as the next crucial step in westernization and legitimization of the Hawaiian government in the international system. Within this shifting political context, Hawaiian and non-Hawaiian elites began the construction of a liberal capitalist system of private property. The underlying, but often invisible, basis of private property lies in the fundamental ownership of all land by the sovereign known as dominium.

**Dominium**

Derived from Roman law, dominium originally meant “complete ownership” (Morey, 1914, 283), i.e., the fundamental ownership by the state “beneath” fee-simple and other types of ownership. This was later modified into what Grotius (1853, 69) described as original ownership. In Britain and its commonwealth, the sovereign (the monarch) is the sole “owner,” on the level on dominium of all the territory of the state – in the case of Britain, the British Empire. But the legal doctrinal developments occurred within the context of imperial expansion. Williams (1992, 13) points out the medieval origins of the concept of dominium in relation to Indigenous peoples: “[Pope] Innocent … focused on the central legal problem raised by the medieval warfare against non-Christian societies: Under what circumstances might Christians legitimately dispossess pagan peoples of their *dominium*—that is, their lordship and property?” While Innocent conceded that “normatively divergent non-Christian peoples possessed the same natural-law rights as Christians … to exercise *dominium* over property,” they were in a wardship position in relation to the papacy due to the “divinely instituted … mandate [that] the pope
had been entrusted by Christ through St. Peter … with the care of the spiritual well-being of all the souls of Christ’s human flock” (Williams, 1992, 14). Williams (1992, 18) concludes, “the will to empire expressed in this central vision of a universal order established through law and lawgiving is a distinctive feature of the West’s colonizing discourses of conquest.”

According to Keene (2002, 77), “the question about the property rights of indigenous peoples … had already been thoroughly debated [in European legal circles] when Grotius offered this opinion, and [the] main positions had previously been worked out.” The debate, which included European legal and ecclesiastical scholars such as Hostiensis and Fransicus de Vitoria, centered on whether or not non-Christians could own property. The compromise offered by Pope Innocent IV, was that native peoples could retain their property rights, but provided a method for revoking those rights, if the indigenous peoples failed to “observe natural law” (Keene, 2002, 55). By the 1840s, when Hawaiʻi’s land tenure was transitioning, the concept of dominium was established, and incorporated into the kingdom’s legal system.

The concept of dominium, by the time of its implementation in the Hawaiian Kingdom, consisted of a three-tiered system of interest in land: the King, aliʻi (chiefs) in their capacity as konohiki (land supervisors), and the hoaāina (makaʻāinana or “commoners”) in their capacity as “tenants.” Each class held a one-third undivided interest in all the land in the Kingdom. The system of proprietary interests, consisting of fee-simple title, leaseholds and life estates existed “on top” of this dominion of vested rights in land. Life Estates are “any estate in real or personal property which is limited in duration to the life of its owner” (Reilly, 1975, 202). As Sai (2008, 81) notes in regard to
the dividing out of the interests of the chiefs, “the granting of freeholds in fee or for life to the Konohiki class did not diminish the government’s title to the dominium that remained with the state.” Vogeler (2009) goes further, contending, “as a result of the Māhele, only the government (not the monarch or the chiefs) and native tenants continued to possess rights to dominium.” Vogeler holds that within the context of the “prolonged occupation” of Hawai‘i, sovereignty resides in the native tenants, because of native tenants rights (see Sai, 2008, Vogeler, 2009). Sai and Vogeler concur on the idea that since 1898 Hawai‘i has been an occupied state, but differ on this point, and on what route Hawaiians might take to end occupation.

The concept of dominium did not originally denote sovereign ownership, nor did it apply only to land. Birks (1985, 1) holds that it applied to “absolute” and unrestricted private ownership of objects. He soon points out, however, that such an ownership that is “incapable of restriction” is impossible, as “no community could tolerate ownership unrestricted in its content” (Birks, 1985, 1). Such an ownership would be “disengaged … from other superiorities, as for instance sovereignty, jurisdiction and patriarchal authority.”

Burns (1985, 778) points out that according to the scholastic John Mair, “the individual's dominium over his personal possessions differs essentially in degree, not in kind, from the dominium a king has over his kingdom, [but that] in modern English however we are almost obliged to use different terms in the two cases: 'property' in the first, ‘authority’ or perhaps even ‘sovereignty’ in the second.” Burns (1985, 778) also notes that there is no “fully adequate term for dominium in its ‘political’ applications.”
Despite these difficulties, the concept of dominium can be seen in the process of title searches. A title search is designed to verify ownership of land by “start[ing] at the present owner and … search[ing] backwards in chronological order … until reaching when he [the present owner] acquired title … The process continues until the chain [of title] is complete to the sovereign” [sic, emphasis mine] (Beasley, 2000, 129). Thus, the sovereign has dominium – i.e., is the original owner. This seemingly distinct process may be expected to produce a linear genealogy of land ownership, but as I show, in Hawai‘i it has produced the reverse – a Foucaultian/Nietzschean genealogy – chains of title, and of narrative, that are hazy and wrought with rupture. Part of the confusion was due to the failure to distinguish between fee-simple ownership and dominium.

Samuel Puffendorf, in De Jure Naturae et Gentium, distinguished between dominium, “control, in the proprietary sense, as of that which is one’s own,” and imperium, “control, in the governmental of sovereign sense, as of that which belongs to others” (Sackman and Van Brunt, 1950, 6 – 7). This distinction informs the concept of eminent domain, discussed below. Buchanan (1991, 108 - 109, in Metzer and Engerman, 2004, 8) distinguishes between private ownership and territorial sovereignty, or dominium:

...under modern conditions, the relationship between the state and its territory is NOT the same as that between a person and the land which is her private property. It may be true that in earlier periods of history a ruler or ruling family was thought to own the territory of the state, to possess it as a piece of private property. But modern states, whether socialist or capitalistic, are not conceived of in this way. This is perhaps clearest in states where private citizens own land;
they, not the state, are the property holders. But even where there is virtually no private property in land, the official rationale, at least, is that the state holds and administers the land resources it contains, and defends the borders for the people [ital], that is, the citizens collectively. Thus the relationship between the state and "its" territory is that between an agent and the principal that authorizes the agent to perform certain functions on the principal’s behalf ... ‘Territorial sovereignty,’ therefore, signifies not a property right ascribed to the state but, rather, a complex relationship among the state (the agent), the territory, and the people (the principal) ... to talk about the state’s territory in the territorial sovereignty sense ... is to say that the state is authorized to exercise certain limited forms of control over the citizen’s private property (e.g. the power of eminent domain), and to control the borders surrounding it.

The distinction between individual property and sovereign ownership (dominium) is apparent in this quote, as is the source of eminent domain, which I discuss below.

Another dimension of this distinction lies in the question of where sovereignty lies in a state. In Republics such as the United States, sovereignty is said to rest in “the people” — a post-French revolution development. In British Commonwealth countries, sovereignty lies in the monarch — first in the very body of the monarch in an absolutist monarchy, and later in the office of the monarch with the emergence of constitutional monarchy. As a constitutional monarchy, Hawaiʻi vested sovereignty in the office of the monarch, but unlike Britain, vested dominium in the three sites, or "classes:" the king, government, and hoaʻaina (“tenants” or makaʻāinana). The state primarily exercises its power of dominium in cases in which it needs to reclaim or redistribute land for “ends of
public utility,” through the doctrine of eminent domain. Eminent domain is the evidence of the existence of the state’s possession of dominium. While eminent domain was not expressly provided in the US Constitution, the Supreme Court has repeatedly asserted its existence in American jurisprudence.

Eminent Domain

Sackman and Van Brunt (1950, 2) define eminent domain as “the power of the sovereign to take property for public use without the owner’s consent.” While the power itself has been “exercised since the days of the Romans” the term eminent domain, was originally called *dominium eminens*, a term that shows its basis in the concept of dominium. The concept of eminent domain is said to have originated with Grotius, who wrote in 1625, “the property of subjects is under the eminent domain of the state, so that the state … may use and even alienate or destroy such property … for ends of public utility” (Sackman and Van Brunt, 1950, 6).

According to Sackman and Van Brunt (1950, 9):

it was the theory of Grotius that the power of eminent domain was based upon the principle that the state had as original and absolute ownership of the whole property possessed by the individual members of it antecedent to their possession of it, and that their possession and enjoyment of it was derived from a grant by the sovereign and was consequently held subject to an implied reservation that it might be resumed, and that all individual rights to such property might be extinguished by a rightful exertion of this ultimate ownership by the state. Puffendorf nominally concurs with Grotius (Sackman and Van Brunt, 1950, 9).
State Supreme Courts, including those of Connecticut and New York, affirmed the theory of eminent domain. In Connecticut’s *Todd v. Austin* (1869), for example, the court held that “the right to use property for public use, or of eminent domain, is a reserved right attached to every man’s land, and paramount to his right of ownership. He holds his land subject to that right, and cannot complain of injustice when it is lawfully exercised” (Sackman and Van Brunt, 1950, 9–10). Likewise, in the Hawai‘i State constitution (1978), the power of eminent domain is mainly addressed in terms of the *limits* on the State’s ability to use it.

Sackman and Van Brunt (1950, 13) hold that “the principle that the power of eminent domain is an attribute of sovereignty has developed from two schools of thought:” Natural law and the “concept of sovereignty.” The natural law school held that state power superseded private property, but a reciprocal right called for just compensation for state takings. The second school held that eminent domain is a power implicit in the very creation and existence of government. Both schools concur that no constitutional provision is needed to assert eminent domain – rather, only limitations on the inherent power of eminent domain are required. (Sackman and Van Brunt, 1950, 13–14). They hold that “nothing in the nature of the title to land can withdraw the land itself from subjection to eminent domain” (Sackman and Van Brunt, 1950, 98).

In his book on government takings (via eminent domain), Epstein (1985, vii) holds that he originally “considered these relationships strictly a matter of private law,” but came to view it differently:

Public law, and certainly political theory, had no place in my thinking about the organization of the common law system. But working in these areas has
convinced me that the separation between public and private law breaks down, in both theory and in practice … with property. The general rule of acquisition is a rule of first possession. At first glance it seems that only one person and one thing are at issue. But a moment’s reflection shows that this perception is false. The rule of first possession is said to give the first possessor rights against the rest of the world. Although the transaction looks private, a statement of its legal consequences reveals the social conception of ownership at its roots.

The notion of a “forced exchange” becomes necessary in certain situations – this is the origin of the takings doctrine. The doctrine touches upon my contention that real estate is far from a purely private matter. Dominium and eminent domain illustrate that land ownership is based ultimately on the will of the sovereign, which, as the “exception” can allow for the erasure of title to land.

Epstein (1985, 347) justifies such erasure of preceding titles, albeit of an “ancient” standing:

[The] successors [of an ancient land title] cannot always have the right of action. With property titles as with contract claims, some statue of limitations is needed to wipe ancient titles off the books. As [Ballentine’s]… classical article on adverse possession notes, barring old land claims is the price worth paying to protect valid titles against ceaseless attack. The social gains from forcing quick resolution of disputes are so enormous that everyone is better off with the limitation than without it.

A publication by Pae ‘Aina Productions [no author] notes that what is owned in

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46 The likely author of Pae ‘Aina Productions publications is Donald Lewis, former owner of Locations real estate company which was bought by Prudential. Lewis was later involved with Keanu Sai in Perfect Title.
real estate is precisely an estate in land, rather than the land itself. Similarly, Callies (2002, 357) holds that a fee simple interest is “the largest interest in land that can be privately owned in the United States.” In British Commonwealth countries, the term “freehold” emphasizes the fact that the owner is merely holding property actually belonging to the monarch (at least at the level of dominium), albeit indefinitely and inheritable. Freehold is also an umbrella term under which are fee simple (inheritable to the heirs of one's body), fee tail (inheritable to a particular heir) and life estate (which reverts upon the death of the owner to the remainderman - the previous owner). Lucas (1995) translates fee-simple as “alodio” (allodial), but freehold as “ʻāina alodio.”

Callies (2002, 356) notes that Hawai'i's compulsory takings law is typical of the US, granting the power of eminent domain to local government, counties, and to public utilities, such as the Hawai'i Housing Authority and the Airports Division of the Department of Transportation. In the case of Kamehameha Schools, the City and County of Honolulu attempted to condemn certain properties from leasehold to fee-simple, arguing that greater diversity of private ownership was in the public interest. Cowell and Dornbush (1977, 3) define condemnation as

the act of government … and public utility companies invested with the right of eminent domain, to take private property for public use and benefit, upon the payment of just compensation. It is the act of the sovereign in substituting itself in place of the owner, and/or the act of taking all or a part of the rights of an owner. Blackstone (in Allen, 2000, 14) appears to contradict the doctrine of eminent domain:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole
community. If a new road, for instance, were to be made through the grounds of a
private person, it might perhaps be extensively beneficial to the public; but the
law permits no man, or set of men, to do this without consent of the owner of the
land.

But as he was writing in the 18th century, Blackstone’s thought on this is likely obsolete.
By the early- to mid-nineteenth century, the idea of multiple, perhaps \textit{layered}, rights in
land was emerging, which was to some extent compatible with Hawaiian notions of
kuleana in land.

\textbf{Kuleana: Native Tenant Rights}

Preza (2010, 118) explains that native tenant rights were limited to native
Hawaiian maka’āinana: “foreigners, even those naturalized as Hawaiian Nationals, were
not considered Native Tenants and therefore, they were not eligible for a Land
Commission award from the \textit{Kuleana Act}.” This distinction is seen in the Hawaiian
phrase for these rights “ke kulelana o na \textit{kanaka}.” Kanaka refers to native Hawaiians
rather than Hawaiian citizens.\footnote{The term for Hawaiian citizen during the Kingdom period was “Kanaka Hawai‘i.”} I will address here native rights to land in two senses:
legal and theoretical. Native tenant rights are legal rights, and I will argue for the
possibility of their continued existence. But in addition to this legal right is a more
abstract right upon which native tenant rights are based. This abstract right is analogous
to notions of inherent sovereignty in that its existence is \textit{implied} rather than expressly
provided for in law.

The alleged origin of native tenant rights as they came to be conceived in the

\footnote{The term for Hawaiian citizen during the Kingdom period was “Kanaka Hawai‘i.”}
twentieth century, was the 1851 amendment of the Kuleana Act, which, as common law, percolated into Hawai‘i Revised Statutes §7-1:

Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land where they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have the right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple…

The 1995 PASH decision foregrounded the notion of native tenant rights, presuming them to be gathering rights, or as Judge Robert Klein called them, a “cultural link to the land.” PASH arose from a dispute between the Hawai‘i County Planning Commission and Public Access Shoreline Hawai‘i, a community organization that opposed the development by Nansay Corporation of a resort community in Kona. The Hawai‘i Supreme Court in PASH found that the organization did have the status to participate in hearings, and, more fundamentally, asserted [or confirmed] the existence of gathering rights. In the remainder of this chapter I contend that native tenant rights are more than gathering rights, a contention supported by House Resolution 198 (2009), which exempted Kuleana landowners from taxes:

WHEREAS, King Kamehameha III recognized that the aina, or land, did not belong to him, but belonged to the people of Hawaii who had an interest in the land and that he was the trustee; and
WHEREAS, the Kuleana Act of 1850 created Hawaii’s first system of private land ownership; and

WHEREAS, through the Kuleana Act, King Kamehameha III created a process that allowed the people of Hawaii to claim and obtain fee simple title to their family kuleana, or the land where their family homes were built and where they grew their food… [emphasis mine]

The State of Hawai‘i thus recognizes the interest in ‘āina – and interest in this context usually consists of a fractional ownership, not mere usage rights.

As the State-mandated PASH-Kohanaiki Study Group (1998, 20) found in its conclusions, “everyone should accept the idea that the Western concept of exclusivity in landownership does not apply in Hawai‘i.” Among its observations, the PASH-Kohanaiki Study Group also noted: the anger at S.B. No. 8, which limited gathering rights to residents of the ahupua‘a in question; the public’s, and government officials’ poor understanding of the PASH decision; exaggerations of the implications of PASH by both business and Hawaiians; and that there were differences in notions of “ownership” in Hawai‘i compared to the American or English Common Law systems (PASH-Kohanaiki Study Group, 1998, 7). As one of the State’s responses to PASH specifically and to gathering rights in general, the PASH-Kohanaiki Study Group was a political process of interpreting the real-world consequences of a court decision. The Study Group included representatives of several stakeholders, notably native Hawaiians and business interests. The “Landowner/Business Perspective” included such concerns as encumbrances on title, claiming that “local financial institutions are treating PASH exceptions like any other
encumbrance that appears on a title search … [and that because of this] transactions for certain lands [were] being impeded by the PASH exception required by the title companies” (PASH-Kohanaiki Study Group, 1998, 11). The “perspective” continued, claiming that “this encumbrance is foreign to most buyers … [and that] the sluggish real estate market in Hawai‘i is masking the full impact of PASH on real estate transactions” (PASH-Kohanaiki Study Group, 1998, 11). Further, they cited “negative impacts on land development and transactions,” some claiming that buyers were “unwilling to buy property because it was not clear whether gatherers and other practitioners would be allowed on their property” (PASH-Kohanaiki Study Group, 1998, 23).

State government concerns included: the definition of “not fully developed” land; identifying those able to “exercise traditional and customary practices on a particular parcel” of land; a definition of customary practices; balancing the preservation of natural resources with rights to traditional practices; and the resolution of disputes over access to traditional practice sites (PASH-Kohanaiki Study Group 1998, 18). The study group included Hawaiian members Kumu Hula Victoria Holt Takamine, Hannah Springer, Land Manager Neil Hannahs, Professor Davianna McGregor, and judge Walter Heen. This significant presence resulted in a Hawaiian perspective represented in the report, which held that traditional practices could not be strictly defined, as doing so could “limit what is acknowledged and respected as customs and practices to that narrow list [that would be created by such definitions]” (PASH-Kohanaiki Study Group, 1998, 16). The Study Group (apparently because of its strong Hawaiian contingent) declined to define “what may be gathered,” stating that “there is a recognition that Hawaiian culture is a dynamic living culture,” and that it “would have been inappropriate … to list customs,
practices or resources” (PASH-Kohanaiki Study Group, 1998, 30). Some “unreasonable” uses of lands were listed, such as “making a campground, using hallucinogenic drugs, or excluding others from public lands” (PASH-Kohanaiki Study Group, 1998, 3).

While the real estate industry complained of encumbrances on title due to gathering rights, and the State debated definitions of “not fully developed” land, nearly all evidence from Kingdom law points to the idea that native tenant rights are vested rights to a fee simple title to cultivated land. As Chinen (1958, ) notes, “The tenants of the king’s private lands were entitled to a fee simple title to one third of the lands possessed and cultivated by them, which was to be set off for the tenants in fee simple, whenever the king or any of the tenants desired such a division” [italics mine]. The issue of native tenant rights was contentious at the beginning of the process. As the Privy Council records show, for example, in August 1850, Governor Mataio Kekuanaoʻa attempted to sideline the issue of native tenant rights:

Governor Kekuanaoa proposed that the Government accept the division of lands proposed by the chiefs without the question of the rights of natives entering into the calculation for the present.

This created the somewhat counterintuitive situation of foreigners, along with the King, defending native tenant rights from aliʻi. But as Kameʻeleihiwa (1992, 224) notes:

It is difficult to imagine Kekūanāoʻa as an impartial judge, as he was described in the official report, as he rarely behaved that way in Privy Council. Because he so often pressed for Aliʻi rights, it is more likely that he acted as a check on Piʻikoi’s zeal. However, while Kekūanāoʻa was extremely careful about Aliʻi ʻĀina and privileges, especially those of his children, he also had an interest in the Mōʻī
ʻĀina. As Kauikeaouli had no legal issue, his designated heir was his nephew Alexander Liholiho who was also Kekūanāoʻa’s son. Hence the Mōʻi ʻĀina would descend to Alexander Liholiho one day, a fact of which Kekūanāoʻa was well aware.

But even this “advocacy” for Hawaiians on the part of foreigners had, perhaps unintended, drawbacks. Privy Council member William Little Lee’s Dec. 9, 1847 letters to ministers on Hawaiʻi and Kauaʻi problematize the concept of native tenant rights, in that it asserts a deadline for the filing of kuleana claims:

Sir

Being very desirous that the natives of Hawaii should send in their land claims

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48 As a Harvard-trained lawyer, former student of US Supreme Court Joseph Story, William Little Lee was certainly one of the most able lawyers in the Kingdom at this period, and his background deserves some attention. Merry (2000, 3) considers William Little Lee archetypical enough to begin her book with a description of his position as a joint architect (along with several others) of Hawai‘i’s legal system:

In October 1846 William Little Lee arrived in Hawai‘i … Lee was twenty-five years old and a lawyer. Trained at Harvard University under judge Joseph Story and Professor Simon Greenleaf, Lee had practiced law in Troy, New York, for a year and had been admitted to practice before the Supreme Court of the State of New York. Scarce a month after his his ship docked in Honolulu, Kamehameha III, the king of Hawai‘i, had persuaded Lee to stay on in the independent kingdom and become a judge in the Honolulu court. By 1847 he had helped to draft legislation creating a new Superior Court of Law and Equality; he was immediately elected its chief justice. In the same year he was appointed to the Privy Council and appointed president of the Board of Commissioners to Quiet Land Titles … Lee … invested in one of the earliest sugar plantations with his friend [Charles Reed] Bishop … By 1850 Lee had penned a new criminal code for the islands, modeled after a Massachusetts prototype, and by 1852 a new constitution.

Lee’s attitude and approach toward working with Hawaiians is apparent in a letter Lee wrote to a friend in 1851:

Certainly they are a kind and peaceable people, with a superabundance of generous hospitality; but with all their good traits, they lack the elements necessary to perpetuate their existence. Living without exertion, & contented with enough to eat and drink, they give themselves no care for the future, and mope away life without spirit, ambition or hope. Now & then we meet an enterprising native, climbing up in the world, and I feel like crying bravo! my good fellow! bravo! but the mass of the people, where are they? I consider the doom of this nation as sealed, though I will labor on without ceasing, hoping for the blessing of heaven to bring some change (Merry, 2000, 5).

Lee was not alone in his sentiments on the “protestant work ethic.” This idea was so ingrained in the inner circle, that “several laws enacted in 1839 and 1840, and later compiled in the Laws of 1842, permit[ing] the extinguishment of tenant rights in limited circumstances,” including the “dispossession of tenants because of idleness, where such idleness is proven at trial,” public purposes and road building (PASH v. Hawai‘i County Planning Commission, 1995). Forbes (2000, 7) notes that Lee was chosen for a committee of three that would revise the constitution in 1850-51 and produce the Constitution of 1852 under Kauikeaouli.
before the 14th day of February next, the day limited for the reception of claims, I take the liberty of addressing you to request that you will exert yourself in your field, to arouse them to the necessity of sending in their claims immediately. I learn with great pain that there are not a dozen native claims received from the whole Island of Hawaii, while from the smaller islands of Maui and Oahu we have nearly 1200.

There is no particular form for these claims, and all that is necessary is to state from whom the land was derived, and where situate [sic] – they can be made very short indeed – when the bounds are well defined by a fence or otherwise it would be well to give them – Owing to the ignorance of the natives in these matters, we receive almost anything from them as a claim to land.

... would you please give an answer to the following questions –

1. What is the amount of arable land in your district?

2. What portion of this land is cultivated?

This letter was sent to the Reverends Titus Coan, Bond, J.D. Paris, A. Thurston, and M. Lyons, and a nearly identical letter to ministers on Kauaʻi.

Lee’s letter is one of the only commonly cited pieces of evidence of a deadline, or at least a “hard” deadline for the submission of Kuleana claims. Most scholars and commentators on this process cite deadlines that apply to Māhele claims. The Federal Native Hawaiians Study Commission (1983, 260) report, for example, states that “an act of the legislature barred the establishment of any kuleana claims not proved by 1854.” But Chinen (1958, 21) shows that this deadline was for “those who had participated in The Mahele [and] had failed to file their claims for their lands with the Land Commission.
within the time allowed by law [emphasis mine].” Further, this deadline was extended first to 1862, then to 1895 and finally to 1909 (Chinen, 1958, 21 – 23).

In his more recent book, however, Chinen (2002) cites a deadline as being listed in *The Polynesian* newspaper – February 14th 1848. And the participants at the time of the Kuleana Act, including Samuel Kamakau, behaved as if there was a deadline. Chinen (2002) echoes Kamakau’s grievance that the deadline for Kuleana Claims should have been extended for twenty more years. But Nogelmeier (2010, 9) notes that *The Polynesian* was “an English newspaper … to communicate with the growing foreign population,” and the Kuleana Act itself does not refer to any deadline. This discrepancy between the extensions for ali‘i and holding firm (or delaying) on the deadline for makaʻāinana supports Emmet Lee Loy’s contention that we should “blame ali‘i” for land loss as does a statement on April 30, 1847 by Keoni Ana (John Young II) to the legislature enumerating makaʻāinana complaints about the process:

> The Land Commission have (sic) found numerous difficulties arising from the frequent complaints of the tenants against their landlords. These are the main difficulties which they have found. The Commissioners have power to decide who has the just claim to an allodial or to the tenantry, but they have no power to punish the landlord from dispossessing his tenants, although in violation of his right … I recommend that there be a law enacted on that subject, prescribing some other punishment previous to their degradation from rank … so that lands and other property may be thereby [sic] receive proper protection.
According to Kamakau (in Chinen, 2002, 38), the constitution of 1852 included such protections. But ultimately, Kamakau (1992, 404) concluded that, in the matter of land, “there was no powerful chief to stand back of the people.”

William Little Lee’s letter to missionary Nathaniel Emerson on January 8, 1848 also expressed frustration over the dispossession of makaʻāīnana in violation of native tenant rights:

I am pained to learn that an effort has been made by any one to prevent the poor natives sending in their land claims. However, their rights will be preserved, if their Konohikis send in their claims. No chief or Konohiki will have land awarded to him upon the condition of respecting, to the fullest extent, the rights of his tenants. But merely to preserve the rights of the common people is not the whole of our object; for this would be no gain – We seek to define their rights – to separate them from those of the chiefs. We seek to give them what they have as their own – to inspire in them more self respect, more independence of character, and to lead them if possible to work, and labor, and cultivate, and improve their lands. In a word, we seek to make them as industrious enterprising and prosperous people [emphasis original].

But the Kuleana Act appears to have resolved some of the tension over native tenant rights evident in Kekūanāoʻa’s concern. As Linnekin (1990, 195) notes, “the Kuleana Act resolved the question of the ‘rights of native tenants’ in the Māhele and made it possible for commoners to be awarded their lands in fee simple” [emphasis mine]. Despite the fact that the the Land Commission was dissolved in 1854, Sai (2008, 83) offers an explanation for the continuation of native tenant rights beyond its
When the Land Commission statutorily ceased to exist in 1854, the duty of dividing out native tenant rights was resumed by the Government and Konohikis, including the Crown. For those native tenants who were unable to file a claim with the Land Commission, they could divide out their interest on lands held by the government ‘in lots from one to fifty acres, in fee-simple’ by applying to special agents appointed by the Minister of the Interior. The prescribed division was regulated by rule 5. In other words, a native tenant could not divide out their interest within lands already conveyed by the government or Konohikis, whether in fee, for life or for years, unless the lands have reverted to the same by treason, remainder, or want of heirs.

Barrere (1994) shows that “award[s] given after the dissolution of the land commission (March 1855); issued by the Minister of Interior upon survey of the land and payment of commutation to the Government” were called “Mahele Awards.” Konohiki rights were thus given an extended method for being exercised, while native tenant rights were not.

Native tenant rights, then, are vested interests, “a present right, interest or title to realty, which carries with it the existing right to convey, even though use or possession is postponed to some uncertain time in the future,” for example, because the interest is undivided (Reilly, 1975, 360). Attorneys General William Little Lee and John Ricord were explicit that these rights were inalienable. Lee wrote to an ABCFM pastor that “the tenants … will not lose their rights should they fail to send in their claims, for I will see that no Konohiki has a title to lands except on the condition of respecting the rights of tenants” (Osorio, 2002, 265).
The Principles of the Land Commission (1846) state:

But even when such lord shall have received an allodial title from the King by purchase or otherwise, the rights of the tenants and subtenants must still remain unaffected, for no purchase, even from the sovereign himself, can vitiate the rights of third parties. The lord, therefore, who purchases the allodium [fee-simple title], can no more seize upon the rights of the tenants and dispossess them.

This statement was in response to the charge that konohiki were expelling “tenants” from their lands in order to prevent claims, and was affirmed by the Kingdom Supreme Court in the 1851 case *Kekiekie v. Dennis*. In that case the court held that “… the people’s lands were secured to them by the constitution and laws of the kingdom and no power can convey them away, not even that of royalty itself” (Canelora, 1974, 5). The [Albert F.] Judd court of the Republic of Hawai‘i, however, allegedly overturned this ruling in the 1895 case *Dowsett v. Maukeala*, which I discuss in chapter 6.

The principle of native tenant rights, however, was exemplified in the rider “ua koe na kuleana o na kanaka” (reserving the rights of the native tenants), on every Royal Patent. As mentioned earlier, the term “kuleana” has multiple meanings. At root, it was as much responsibility as right, though in this context it is the right that is emphasized. It is most likely the second definition in Andrews’s dictionary, “a right of property which pertains to an individual” that is pertinent here. The term “kanaka,” as opposed to hoa‘aina, distinguished between Native Hawaiians and mere citizen tenants – the term denoted not race in the sense it is conceived today, but actually connoted those with kuleana in lands. It is worthwhile here to consider Anne McClintock’s insights on race (and gender) and how such categories came into being. McClintock (1995, 5) shows how
race, along with class and gender “come[s] into existence in and through relation to each other.” It was the arrival of Euroamericans with their racially attentive projects of law and empire that created the need to distinguish between a native and a non-native.

The PASH decision cites “several laws enacted in 1839 and 1840, and later compiled in the Laws of 1842, permit[ing] the extinguishment of tenant rights in limited circumstances,” including the “dispossession of tenants because of idleness, where such idleness is proven at trial,” public purposes and road building (PASH v. Hawai‘i County Planning Commission, 1995). But these were unusual situations that do not undermine the argument for the general inalienability of native tenant rights. As Sai (2008, 85) contends:

The native tenant class is ever increasing and is comprised of all natives who were not Konohikis. Native tenants who divided out their interests from the dominium did not affect the vested rights of native tenants who did not divide; a priori the right is vested in a class and not a finite number of individuals like the Konohiki class. Therefore, the rights of native tenants exist in perpetuity…

Since at least the 1990s, when gathering rights activism culminated in the PASH decision, native tenant rights have been constrained to gathering rights. What is overlooked is that native tenant rights in this context constitute the right to claim a fee-simple title through the Kuleana act process, not merely gathering rights, which did exist, but were a part of the bundle of rights separate and distinct from native tenant rights. One way this conflation has been perpetuated is through the assumption that there was a deadline on Kuleana Act claims. This alleged deadline, February 14, 1848, was prior to the 1850 Kuleana Act, and may have applied only to claims of ownership of land
“anterior” to 1845, the date of the creation of the Land Commission. Merriam-Webster’s dictionary defines “anterior” as “coming before in time or development” [italics mine]. The possibility that the architects of the Māhele system misunderstood the definition of anterior is precluded by the fact that in 1846, the Privy Council records show the following discussion relating to the creation of the Board of Commissioners to Quiet Land Titles (Land Commission):

9th Feb 1846

Persons present

His Majesty Kamehameha III, His Highness the Premier A Paki, Wm. Leleiohoku, John Ii, J. Kaeo, G. P. Judd, John Ricord, Wm Richards

It was proposed to consider the appointment of five Commissioners, the Attorney General being the fifth one of them - to hear, consider and decide upon confirm or reject all claims of natives or foreigners to lands obtained by them previous to the 10th day of December 1845 [italics mine].

It is a commonly held belief that land sales and transfers began with the Māhele. There is ample evidence that this is not the case, including deeds in the Bishop Museum archives in which Kauikeaouli transferred land to foreigners. On September 19th, 1840, five years before the process creating the Māhele commenced, Kauikeaouli transferred a piece of property in Nuʻuanu to Thomas Phillips (Bishop Museum archives, Map case 3). Even earlier, on December 24th, 1839 Kauikeaouli transferred a property called Halelena in Napoko, Maui to Alexander Birch (Bishop Museum archives, Box 1.4). William Richards was a witness to this transaction, precluding the possibility that it was a
misguided act taken without an understanding of private property.

This problematizes the idea that a deadline existed for Kuleana Act claims, because the deadline may have only applied to those who had acquired land prior to the formation of the Land Commission, and not to any Kuleana Act claimants. If there was no hard deadline, then there was never a ceasing of native tenant rights, and it is possible, the political situation in Hawai‘i notwithstanding, that native tenant rights persevere and constitute a double encumbrance on title, in addition to gathering rights. As I will show in Chapter 5, the Republic court in *Dowsett vs. Maukeala* (1895) attempted to terminate native tenant rights. Whether this court had the authority to do so is problematic, but the fact that it attempted to do so suggests that there had been no deadline in native tenant rights.

Judge Klein’s 1995 opinion in *PASH* includes a discussion of the concept of native tenant rights that reaches the expedient conclusion that native tenant rights are a vague “cultural link to the land,” rather than a legal right to ownership. Footnote 27 of *PASH* (1995) states:

The word ‘hoa‘aina’ [another term for native tenant] is defined as ‘(t)enant, caretaker, as on a kuleana.’ Pukui & Elbert, Hawaiian Dictionary 73 (2nd ed.1986). Meanwhile, the term ‘tenant’ includes ‘one who holds or possesses real estate or sometimes personal property ... by any kind of right(.)’ Webster's Third New Int'l Dictionary 2354 (1967 ed.). Therefore, it is possible to construe the term ‘tenant’ so as to incorporate the traditional native Hawaiian concept of a cultural link to the land.”

But in an earlier footnote, Klein contradicts this dubious interpretation, perhaps
unknowingly, in defining the term “kuleana.” Footnote 24 of *PASH v. Hawai‘i county Planning Commission* (1995) states that “the word ‘kuleana’ is defined as, inter alia, ‘(r)ight, privilege, concern, responsibility, ... (or) small piece of property, as within an ahupua'a’” [italics mine]. This definition is from Puku‘i and Elbert’s dictionary (1957) and differs substantially from Andrews’s definition cited in the beginning of this chapter.

Here is the conflation of native tenant rights with gathering rights. The court appears uncertain about the definition of the terms native tenant and hoa‘aina [hoa‘aeina, sic], and merely speculates that “it is possible” that they are those Hawaiians with the right to gather. It is much more likely that a kuleana was, as Klein himself states, the right to a “small piece of property.” The Land Commission noted the protections for maka‘āinana/hoa‘āina in their view of the practice of dividing first between the King and Konohiki (ali‘i). In the Principles of the Land Commision, it was noted regarding the division of interests:

> It seems only natural then, and obviously just, that the King, in disposing of the Allodium, should offer it first to the superior lord, that is the the person who originally had received the land from the King; since by doing so, no injury is inflicted on any of the inferior lords or tenants, they being protected by law in their rights as before (Pae ‘Āina Productions, 2006, 3).

The Privy Council of May 27, 1850 supported this contention when it resolved, regarding the lands of the deceased W.P. Leleiohoku, that “nothing ... shall be construed as interfering with the rights of native tenants in said lands.”

I argue that the term “kuleana” was used in Kingdom law in the Lockean sense of having a property *in* land – thus, “ua koe ke kuleana o na kanaka” becomes: reserving the
property rights of the kanaka within a given parcel of land. Or as the Andrews (2003) definition holds “a small land claim inside another’s land.” This is consistent with nineteenth century discourses on property as a right rather than as an object. The native tenants’ vested rights to land and gathering rights thus constituted two layers of rights within the kingdom real estate system, and gathering rights existed separately, as I will show below. It is these native tenant rights that I aim to show were erased, beginning with the Dowsett vs. Maukeala ruling in 1895. Their erasure amounted to the undermining of the maka’āinana stake in the very sovereignty of Hawai‘i.

Gathering Rights in the Kingdom

In the kingdom gathering rights were mainly for those who had not divided out their interest and acquired a fee simple parcel. This is seen in guidelines for gathering, which mention “the Lord.” A native tenant who had divided out their interest would have no lord [landlord], hence the use of the term allodial, “free from the tenurial rights of a lord, as opposed to feudal land” (uslegal.com):

the rights of the makaainanas (sic) to firewood, timber for house, grass for thatching, ki leaf, water for household purposes in said land, and the privilege of making salt and taking certain fish from the seas adjoining said lands shall be and is hereby sacredly reserved and confirmed to them for their private use (should they need them) but not for sale ... provided, that before going for firewood, timber for houses and grass for thatching, said makaainanas (sic) shall give notice to the Lord or his luna resident therein.”
Gathering rights existed for those who had divided out their interest, but these were restricted to their own ahupuaʻa, whereas the others were not. Kauikeauoli established these gathering rights for those who had acquired land, because he was concerned that makaʻainana could not subsist on the average parcel without access to mauka and makai resources. As *PASH* (1995) cites:

The King … express[ed] his concern that ‘a little bit of land even with allodial title, if they were cut off from all other privileges, would be of very little value (.).’ Accordingly, the final resolution was passed with the comment that ‘the proposition of the King, which he inserted as the seventh clause of the law, a rule for the claims of the common people to go to the mountains, and the seas attached to their own particular land exclusively, is agreed to(.).’

Gathering rights, then, constituted a separate layer of rights, which the *PASH* court collapsed into one, effectively eliminating native tenant rights. Previously, the Territorial government, aware of the problems associated with native tenant rights, devised a system to counteract encumbrances on title.

*Kekiʻekiʻe v. Dennis* (1851) confirmed native tenant rights, holding a Land Commission award as “good against a Royal Patent of anterior date, which expressly reserved the rights of native tenants.” The same principle was affirmed by *Kukiiahu v. Gill* the same year (Ladd, 1992, 4). However, the courts did not rule unabashedly and unanimously in favor of native tenants. In Piikoi et al v. Kapena (1857) the court ruled that "possession (and use) alone of a tract of land is not enough to maintain ownership" (Ladd, 1992, 6).

In the landmark case Oni vs. Meek in 1858, the court reaffirmed native tenant
rights, but also clarified the rights that ended once a hoa‘āina held land in fee simple, and began to define native use rights (in this case pasturage rights):

It was not in the power of a konohiki ... to alienate a single right secured by law [to the hoaaina - in original] ... Customary rights of pasturage don't hold in this case since the hoaaina holds his property in fee simple. This also frees him 'from the labor formerly due to the Government and to the konohiki ... while the great division of 1848 separated and defined the land of the King and the Government, and that of every hoaaina who succeeded in sustaining a claim before the board ...

(Ladd, 1992, 7).

The Land Commission established in its principles the basis for the separation of the rights of the classes. According to the “Principles adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them” (An Act to organize the Executive departments of the Hawaiian Islands, April 27, 1846, Article IV—Of the Board of Commissioners to Quiet Land Titles):

The [traditional land] tenures were in one sense feudal, but they were not military, for the claims of the superior on the inferior were mainly either for produce of the land or for labor, military service being rarely or never required of the lower orders.

All persons possessing landed property, whether superior landlords, tenants or sub-tenants, owned and paid to the King not only a land tax, which he assessed at pleasure, but also, service which was called for at discretion, on all the grades from the highest down. They also owed and paid some portion of the productions
of the land, in addition to the yearly taxes. They owed obedience at all times. All these were rendered not only by the natives, but also by foreigners who received lands from Kamehameha I. and Kamehameha II., and by multitudes sill alive; of this there are multitudes of living witnesses, and a failure to render any of these has always been considered a just cause for which to forfeit the lands … It is therefore certain that the tenure was far from being alodial, either in principle or practice … the treaty established in 1836, between this government and Lord Edward Russell on behalf of the British government, would show [this] … It is there declared, ‘The land on which the houses are built is the property of the king.’

In the 1848 Māhele, the King, along with the other classes, would gain title to his own private property, ending this traditional practice, which was discursively, if problematically, associated with feudalism.

**Conclusion**

Kuleana, normally translated as “responsibility,” refers in the case of native tenant rights to “right(s).” But the conventional definition – responsibility – is more compatible with the idea of native tenant rights as the right to claim fee-simple title to land held by another. More specifically, the responsibility gave the maka‘ainana the right to claim land. The practical issue of present-day rights of Hawaiians to lands, and their ability to exercise these rights, invites the more political question of sovereignty. The question is not whether Hawaiian have land rights, but *under which sovereign* would Hawaiians be able to activate native tenant rights. The scope of this dissertation, however, is to
enumerate the rights, rather than to describe scenarios in which they could be exercised. While the Hawai‘i Supreme Court verified the existence of gathering rights, legal precedent such as the failure to settle the ceded lands issue with OHA, suggests it is not likely that the State of Hawai‘i would facilitate the actuation of much broader native tenant rights.
CHAPTER 5 – MĀHELE

By any standard, the 1848 Māhele was a revolution.

Lilikālā Kameʻeleiwiwa, *Native Land and Foreign Desires*

According to Pukui and Elbert (1986, 219) the term “māhele” means “portion, division, section, zone, lot, piece quota, installment.” Kameʻeleiwiwa (1992) holds that it means “to share.” I submit that it could also mean “share” as in “one’s share.” Some debate continues over whether or not the 1848 Māhele was a traditional kālaiʻāina on a grander scale. Noted surveyor Curtis Lyons (1903, 30) notes the unique historical significance of the Māhele as the final kālaiʻāina: “The Mahele was a phenomenon in natural history not often repeated. The Mahele was, in one sense, a revolution. In another sense it was eminently a conservative movement.” Lyons does not elaborate on this statement, but it can be inferred that the revolution concerned the integration of the land tenure system into the Euroamerican conception. His use of the term “natural history” implies a privileging of the idea that a progression toward Euroamerican land tenure was inevitable. Kameʻeleiwiwa (1992, 10) partially concurs, holding that “by any standard, the 1848 Māhele was a revolution.” On its conservative nature, Lyons (1903, 30) states that the Māhele was "simply an endeavor on the part of the majority of the Hawaiian chiefs, and especially on the part of Kamehameha III, to secure to all parties what, on the ordinary principles of acquiring property, *seemed to belong to them*” [emphasis mine].

Scholars in the mid- to late-twentieth century portrayed the Māhele as one of the pivotal episodes in the disenfranchisement of Hawaiians. Chinen (1958) first provided a

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49 Lyons’s political leanings can be deduced from the fact that worked with and for the oligarchy before and after annexation. His expertise in surveying and land matters, however, is undeniable, and thus his views on the Māhele are often instructive.
legalistic description of the Māhele, but later (2002) emphasized that makaʻāinana “cried for help” from the results of the Māhele. Kelly (1958) held a Marxist view of the value of private property, and later twentieth-century analyses inherited this tendency to equate Hawaiian land tenure with this vaguely Marxian model. Marx, however, published *The Communist Manifesto* in 1848, the same year as the Māhele itself, presenting an alternative to liberal capitalism too late for consideration in Hawaiʻi. Kameʻeleihiwa (1992, 16) considered it “but a short step from the 1848 adoption of private ownership of ‘Aina to the 1893 overthrow of the Hawaiian government.” Preza (2010) shows that most analyses of the Māhele rely on several primary sources, including the three named above, and that these sources constructed, then reified a discourse that misconstrued a process meant merely to modernize Hawaiʻi’s land tenure system. However, it is more accurate to describe the Māhele/Kuleana Act as a more complex process involving modernization, native and foreign agency, and the competing influences of Western and Hawaiian norms, both of which were in flux.

What is normally called “the Māhele” is actually a multi-step process consisting of the Māhele itself and the Kuleana Act – the two were steps in the same initiative – and the constitution of 1840, in which the principles of the proportional (and potential) ownership of land were first laid out. The 1848 Māhele was a division of all the lands of Hawaiʻi between the King and 252 individuals, mainly chiefs (Kameʻeleihiwa, 1992, 227). Kameʻeleihiwa (1992) notes that not all of these were Hawaiian, as some non-Hawaiians were considered konohiki. This included several Tahitians, including Tau-a and Kahikona, “a Tahitian convert to Christianity, [who] became a teacher of the palapala to the chiefs” (Barrere, 1994, 135). The 1850 Kuleana Act provided for makaʻāinana
claiming the lands they cultivated from the lands previously divided in the Māhele. In this chapter I provide an alternate narrative of the Māhele process. I argue for a more nuanced understanding of the changes in land tenure, one in which the mechanics of the transition did not by itself alienate Hawaiians from land. On the contrary, they embedded makaʻāinana rights to land and provided for unencumbered ownership. This is seen in the Hawaiian phrase attached to each original land title, “ua koe na’e na kuleana o na kanaka ma loko.” Translated as “subject to the rights of native tenants,” the phrase “ma loko” indicates that the rights (kuleana) were inside, or embedded in, the land. These rights in land were expressed in the Constitution of 1840, which provided that land “belonged to the chiefs and people in common, of whom Kamehameha I. was the head, and had the management of the landed property” [emphasis mine]. Misunderstandings over the intent of these laws, whether purposeful or inadvertent, caused Hawaiʻi’s land tenure system to become legally plural. In this chapter I examine the “moment of Māhele,” which Kameʻeleiwiha (1992) notes “was a long moment indeed,” stretching from the establishment of dominium ownership in the Constitution of 1840 through the 1850 Kuleana Act, beyond the dissolution of the Land Commission in 1855, to the final chance for aliʻi to divide out interests in 1909. In subsequent chapters, I examine the response to native tenant rights and the subsequent alienation of land.

The Māhele took place at a time of global social and political upheaval. 1848 has been called the “year of revolutions” with uprisings across Europe, including in France, the German and Italian states, Denmark, and the Hapsburg Austro-Hungarian Empire (Rapport, 2009). In Hawaiʻi, a series of epidemics swept through the islands between 1848 and 1853. As Kuykendall (1938, 386) put it, “during the years 1848-1853 the future
of the [Hawaiian] race looked especially dark, for in those years epidemic diseases, like a gigantic scythe, cut great swathes through the native population.” This may have affected the number of Kuleana claims, as the ostensible deadline was in February of 1848.

The global changes included shifts in the area of land tenure. Montoya (2002, 19) notes that at precisely the time of the Māhele, the US incorporated a large portion of Mexico, causing lasting conflicts over the nature of land tenure in that region:

The property systems of the United States and Mexico have been in conflict with each other ever since the United States incorporated Mexico into its social, legal, and economic regime after the U.S.–Mexican War and the Treaty of Guadalupe Hidalgo in 1848 … the “informal” property system of the Mexican frontier, which was based more on personal connections and patronage, was incorporated into the U.S. property regime of private property and public domain, which has privileged the fee simple absolute, or exclusive, form of holding property.

Thus, the norms surrounding land tenure globally were in flux at the time of the Māhele. Translation of these evolving norms would construct a vocabulary that proved somewhat problematic in the long term, as I shall show in later chapters, but was clear enough in the 1840s and 1850s to allow a transition, however halting, from traditional to Euroamerican modeled land tenure.

**Delineations**

The term “native tenant rights” is at the heart of the confusion over land in Hawai‘i. As I pointed out in the previous chapter, it is imperative to return to the original term “kuleana” in order to unpack the embedded rights in land. Kuleana denotes both
rights and responsibilities\textsuperscript{50}, which is a conception that is at variance with Lockean rights-based liberalism. Kuleana views makaʻāinana as co-owners of land along with konohiki and the government (including the king). In contrast, the term native tenant, as Andrade (2008, 71) notes, “refer[s] to someone paying rent to use or occupy land … or other property belonging to another.”

Three basic types of land tenure existed in the new Hawaiian system created in the Māhele process. Fee-simple land tenure evolved from feudal land tenure and refers to a property right inheritable by multiple heirs. It is essentially synonymous with “allodial” title, the term used at the time of the Māhele. Life Estates were a property right for life, which, upon the death of the owner, reverted (or “escheated”) to the remainderman, or prior owner, which was sometimes the government. In the mid-nineteenth century, this usually meant the konohiki of the ahupua’a or other land division. In Hawaiian, the term “ma lalo o ke ano alodio” – “less than allodial” – was used to denote a life estate (see Crowningburg). While some life estates exist today, they are rare. Because traditional kālaiʻāina were divisions of land essentially for the life of the ruling chief, life estates are more consistent with Hawaiian practice than is fee simple ownership. The final type of land tenure, leaseholds, still exist extensively today and are the right to use a piece of land for a fixed period, usually 30 years, at the end of which period, the lease is either renegotiated or terminated and the property reverts to the fee-simple owner.

One misunderstood aspect of the Māhele process was the role of Konohiki. Aliʻi received land not directly because of their status, but in their capacity as managers of

\textsuperscript{50} In an alternate definition to Andrews’s Kuleana is “Right, privilege, concern, responsibility, title, business, property, estate, portion, jurisdiction, authority, liability, interest, claim, ownership, tenure, affair, province; reason, cause, function, justification; small piece of property, as within an ahupua’a.” (Pukui and Elbert, 1986).
land, i.e., konohiki. Further, they continued to have management rights and responsibilities over fishing grounds, which were not part of kuleana grants, and arguably a right that may be termed (for lack of a native term) seigneury. While this term acts to obsfucate the traditional duties of a konohiki, I use the term to describe the layer of rights, rather than continue the process of speciously using feudal terms to describe aspects of Hawaiian land tenure. Merriam-Webster’s dictionary defines seigneur as “the territory under the government of a feudal lord,” and it stemmed from the continued existence of a layered system of rights, which, upon the death, intestate, of a kuleana landowner or a life estate holder, would allow for reversion of the land to the konohiki. This would prevent the ownership of land from going into “limbo.” There were also “Ali‘i awards” granted in the Māhele process – large awards often of many ahupua‘a conferred on the highest chiefs, such as William Lunalilo, Victoria Kamāmalu, Lot Kapuawai and others. It was expected that maka‘āinana would divide out their cultivated lands from within these large estates, but for various reasons few acted on their rights to do so.

These rights were considered to be “vested.” A vested right was “a right belonging completely and unconditionally to a person as a property interest which cannot be impaired or taken away (as through retroactive legislation) without the consent of the owner” (Reilly, 1975). Upon these definitions and understandings, the Board of Commissioners to Quiet Land Titles, more commonly known as the Land Commission, was created in 1845, and facilitated the great shift in land tenure, the 1848 Māhele. This period I argue has been historically misinterpreted, necessitating a reframing of the Māhele.
Reframing the Māhele

An emerging view holds that the Māhele of 1848 was an effort to allow a transition in the land tenure system in the Kingdom that would allow for capitalist development. As Tengan (2008, 40) describes it, “a number of scholars have identified the Māhele and the massive alienation of the commoners thereafter as the primary source of societal breakdown and later colonial marginalization; others have argued for a more nuanced reading of the legislation as having worked to empower Hawaiians.”

The latter view holds that the “undivided shares” existed in the dominium of the Kingdom, i.e., the government’s ownership of all land based on sovereignty.

This revised conception leads to a different understanding of the Māhele/Kuleana Act process. The mōʻī held vested rights as the head of the government. The King also held land as a konohiki in fee simple. The chiefs, in their capacity as konohiki, held land as vested rights in the dominium and, after dividing out their interests, in fee simple. Makaʻainana held vested rights in the dominium and could divide out their interests and gain fee-simple title, but could not divide out as a class. As previously stated, all original land titles carried the provision “ua koe ke kuleana o na kanaka,” usually translated as “reserving the rights of native tenants” (Garovoy, 2004). Thus, all land held in the system of proprietary rights was subject to the rights of native tenants. Foreigners held land only as proprietary interests, and did not hold vested rights in the dominion of the Kingdom.

In addition to these layers were gathering rights, which were usage rights rather than ownership. Thus, a layered system emerged consisting of the dominium (divided between

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the king, aliʻi and makaʻānana), proprietary interests (fee simple, leasehold and life estates), and gathering rights (usage rights). Figure 5.1 shows the relationship of the layers of interests, with the most fundamental (dominium) at the base:

Figure 5.1: Layers of interests in land in Hawaiʻi

As the control of the dominium does not lie with the three classes, but with the government only, the figure above could include a fourth major layer, that of vested rights. The Māhele was merely the dividing out of the interests in land of the King (in his role as head of government) and the konohiki. They converted their abstract right in the dominium of the Kingdom to a substantive proprietary interest – a life estate convertible to a fee simple title. The Kuleana Act was the same process for makaʻānana.

This more recent view shows that in addition to the claims in Kuleana act process, makaʻānana received approximately 155,000 acres in government land sales through the
minister of interior (Pae ‘Āina Productions, 2006). The population at this period was approximately 88,000. Some evidence suggests that Hawaiians received much of this land. Alexander (1891, 119) states “between the years 1850 and 1860, nearly all the desirable Government land was sold, generally to natives.” According to *Numerical Index of all Grants and Patents Land Sales*, there were 6,526 sales of government land between 1846 (the first sale was to William Paty) and 1916. The actual records of these sales are kept in thirty-two volumes of books, and could constitute an archive for an entire study. Many of the names in the index are Hawaiian, and many are not. By the late nineteenth century it is difficult to know by names who is Hawaiian and who is not. This brings the total nearer to 5% of the land in the Kingdom (178,000 acres), and when combined with Stauffer’s finding on value, suggests that Hawaiians received the vast majority of land value in the Kingdom. These were the loʻi lands – the rich soils near streams and often near the ocean. The king, chiefs and government retained the remaining lands, with an increasing amount sold to foreigners, but always subject to the rights of the native tenants. Today, this is seen in the fact that much of the government lands are “poorer” (in the capitalist sense of being developable) lands: conservation lands in the mountains, such as the Koʻolau and Waianae ranges on Oʻahu and the slopes and Mauna Kea on Hawaiʻi.

There were two procedures for gaining title to land. One involved an exercise of native tenant rights; the other was the direct purchase of lands from the government. The distinction between the two types of Royal patents granting title was explained by Alexander: “the Royal patents issued to purchasers of Government land are styled ‘Grants,’ and are recorded in a distinct series of volumes from the Royal patents in
confirmation of Land Commission Awards ... mistakes are often made by confounding the two series of patents” (Alexander, 1891, 118 – 119). That there were two types of awards was due to the requirement that grants had two stages: the initial award was a life estate, and the second was fee simple title.

Stauffer (2003) adds that an 1874 law allowing for foreclosures on property without judicial oversight was a primary method of alienation. Keanu Sai modifies this view while partially agreeing with it, claiming that Stauffer “fails to distinguish political institutions from the behavior of individuals” (Sai, 2005, 239). Sai concurs with Stauffer on the importance of the 1874 law, while contesting his view that it was an act of “stealth” intended to appropriate Hawaiian land. I examine this further in chapter 7 on alienation.

**Purpose of the Land Commission**

The land commission was originally established to investigate land titles prior to 1845, and to confirm or reject titles. Its function was later expanded to include granting titles to the hoa‘āina (commoners, literally friends of the land) under the Kuleana act process. Article IV of *An Act to Organize the Executive Departments* stated: “His majesty shall appoint through the minister of the interior ... five commissioners, one of whom shall be the attorney general of this Kingdom, to be a board for the investigation and final ascertainment of or rejection of all claims of private individuals ... to any landed

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52 Hawaiian Kingdom Laws, *An Act to Organize the Executive Departments, Article IV – Of the Board of Commissioners to Quiet Land Titles*, 107.

53 Kuleana means responsibility. It referred to the transferring of title to those responsible for cultivating the land.
property acquired _anterior_ [prior] to the passage of this act ...^54 Thus, contrary to what has become the accepted view, the Land Commission was not originally involved in the Māhele process, and was only reconstituted to assist in the Kuleana Act process.

Most consider the Māhele the origin of private property in Hawai‘i, but this is not the case – it merely _codified_ private property early in its existence. Thus the Land Commission was tasked with investigating ownership as of 1845. For example, the land for Punahou School was gifted to the mission in 1829 by O‘ahu Governor Boki and his wife Liliha at the urging of Queen Ka‘ahumanu (www.punahou.edu). Citing _Harris v. Carter_ (1877), Preza (2010, 86) notes that the Land Commission was “authorized to consider possession of land acquired by oral gift of Kamehameha I or one of his high chiefs, as sufficient evidence of title to authorize an award therefore to the claimant,” in other words, property acquired _anterior_ to the passage of the 1845 act. As noted earlier, many Land Commission Awards date to the “time of Kamehameha I.” Preza (2010, 86) goes on to describe how these “oral gifts” were “outside of normal Hawaiian custom” of land tenure and transfer. Kame‘eleihiwa (1992) notes that the Kamehameha awards were among the first inheritable properties in Hawai‘i.

According to Alexander (1891, 109): “convinced that the ancient system was incompatible with their further progress in civilization, the King and chiefs resolved to separate and define the undivided shares which each individual held in the lands of the Kingdom.” Keeping Chakrabarty’s problematization of this mythical Europe toward which the native perpetually moves, one must question whether Kauikeaouli was “convinced” of the need for “further progress in civilization,” or whether he was merely

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^54 _An Act to Organize the Executive Departments_, Article IV —of the Board of Commissioners to Quiet Land Titles, 1845, 107.
willing to move in its direction. On Dec. 14, 1847, Lee drafted the rules of the Māhele for Kauikeaouli (see Appendix 1: Lee’s proposed rules of the Māhele). It begins: “Whereas, it has become necessary to the prosperity of our Kingdom, and the proper physical mental and moral improvement of our People, that the undivided rights, at present existing in the lands of our Kingdom, should be separated and distinctly defined.”

The first rule emphasized the fact that the king would have his own private lands, “to have and to hold to Him, His Heirs and Successors forever.” The second rule divided the remaining lands between the government, chiefs and makaʻāinana. The third rule concerned the timing of the division. It stated that the “tenants” (makaʻāinana) and chiefs could divide out their interests “at a time of their own choosing.” This point contradicts the commonly-held notion of the existence of a deadline on claims, a point I discussed in chapter 4. The fourth rule clarified that these lands would be held in fee-simple title. The fifth point noted that these divisions would not affect lands distributed before 1845. The sixth point addressed commutation – the payment of a fee in land or cash to extinguish the government’s interest in lands received. The seventh and final point concerned the recording of all claims in a book called the Buke Mahele (Māhele Book).

An additional purpose of the Māhele was to eliminate the existence of two landlords over the people, because of the three-part ownership in the dominium of the Kingdom. By dividing all the land between the King and the chiefs, the Māhele resulted in each piece of land having only one landlord – either the king or a chief – rather than two. This partly explains why the division of the rights of the three interest-holders was a multi-step process.
Principles of the Land Commission

McGregor (2007, 35) notes that the principles of the land commission “actually describe how any one section of land in the Hawaiian Islands is vested with multiple layers of responsibilities and rights.” The principles (in McGregor, 2007, 34) state:

“Ua Akaka loa hoi, ekolu wale no mea kuleana ma ka aina hookahi. 1. O ke Aupuni. 2. O Na konohiki. 3. O Na hoaaina, a nolaila he mea nui ka hoakaka i ka nui o ko kekeahi kuleana, a me ko kekahih.” [It being fully established, that there are but three classes of person sharing vested rights in the land, — 1st, the government, 2nd, the landlord, and 3rd, the tenant, it next becomes necessary to ascertain the proportional rights of each.]

In the Principles, originally drafted by William Little Lee (see Appendix I), there is some slippage between the English and Hawaiian versions not only linguistically, but conceptually. It was thus another theoretical encounter, and one that had been seen in other contact situations. In India, for example, Prakash (1990) describes how Indian ranks were equated with English ones, so that: “the malik, instead of being a miniature raja, becomes a mere landlord; and the kamia, rather than being his dependent subject, is portrayed as a mere landless laborer forced by his poverty to become a debt serf.” Lee undertook a similar translational encounter with konohiki being rendered as landlords and hoaʻāina becoming tenants. The final version of his principles, in full, read:

1) Where the land has been obtained from the King or his authorized agent without a written voucher, prior to June 7, 1839, inquiry will be made into the history of the derivation, and if the land has been continuously occupied, built upon or otherwise improved since that time, without molestations, and there is
no contest between private parties, a freehold, less than allodial will be inferred.

2) In the cases above specified where there are counter-claims, inquiry will be made as to which of the claimants has the freehold, less than allodial.

3) Where the land has been obtained from the King or his authorized agent, or from any governor, chief or pretended proprietor, subsequent to June 7, 1839, inquiry will be made into the right of the King, or chief, or landlord, to make such disposition of the land; and will confirm or reject, according to the right of such donor, grantor or lessor, regardless of the consideration, occupancy or after improvements.

4) In all cases, where the land has been legally and validly obtained from the lawful proprietor, by written grant, deed or lease, the claimants’ rights will be construed by the wording of the instrument.

5) Even though a claimant lawfully acquired his claim to land for valid consideration, if the land now claimed were never occupied, or have not been occupied by the claimant since June 7, 1839, an absence of title will be inferred.

6) The commutation to be paid in order to obtain a fee simple title is one-third the value of the land without improvements, provided that the King, in Privy Council, may fix upon a less commutation.

7) Parties who fail to present their claims by February 14, 1848, are forever barred from asserting their claims (Chinen, 2002).
Principle 7 lists the deadline commonly believed to pertain to kuleana grants. But Principle 1, which states that “Where the land has been obtained from the King or his authorized agent without a written voucher, prior to June 7, 1839, inquiry will be made into the history of the derivation,” shows that the principles are addressing those with land rights pre-dating the Māhele process.

The 1845 Principles also draw out the similarities with feudal land tenure:

When the Islands were conquered by Kamehameha 1st, he followed the Example of his predecessors, and divided out the lands among his principle Warrior Chiefs; retaining however a portion in his hands to be cultivated or managed by his own servants or attendants. Each principle Chief divided his lands anew and gave them out to an inferior order of Chief or persons of rank, by whom they were subdivided again and again, often passing through the hands of four, five or six person from the King down to the lowest class of tenants.

In relation to the two stages of European feudalism, the Principles state that “the tenures were in one sense, feudal, but they were not military.” This association of Hawaiian land tenure with the later stage of feudalism, that of labor rather than military service (and the stage that is associated with the exploitation of serfs) is what caused the critique of traditional Hawaiian land tenure with “exploitive” European feudalism.

The Principles continue, noting the existence of native tenant rights: “all these persons were considered to have rights in the lands. The proportions of these rights were not very clearly defined, but were nevertheless universally acknowledged.” The Principles of the land commission held that, traditionally, the King placed land in the hands of chiefs or konohiki in trust, “the King really owning the allodium.” To take a
genealogical approach, the definition of “allodium” is problematic in this context, as the original meaning was “free from the tenurial rights of a lord, as opposed to feudal land” (uslegal.com). Allodial is held to be “absolute … [and] not subject to any rent, service, or acknowledgement to a superior” (uslegal.com). This understanding suited the purposes of at least the missionary segment, as it would free makaʻāinana from what they viewed as bondage to aliʻi, who they viewed as feudal “landlords.” In most common law countries, fee simple ownership is the form that allodial land takes, and as such it is “limited by the four basic government powers of taxation, eminent domain, police power and escheat” (uslegal.com).

In the context of Lee’s proposed rules for the Māhele (in Appendix 1), it most likely meant fee-simple title. The principles argued that it seemed “natural” to divide with the “superior lord” first, “since by doing so, no injury is inflicted on any of the inferiors lords or tenants, they being protected by law in their rights as before.” Makaʻāinana – tenants – would divide out their (protected) interests later under the provisions of the 1850 Kuleana Act. This shows that the two pieces of legislation were parts of the same strategy. That strategy would be carried out in a number of stages or steps.

**Steps in the Māhele/Kuleana Act**

Scholars posit various numbers of “steps” in the Māhele process, as what constitutes a step is often a matter of conjecture. Stauffer (2004) distinguishes between aliʻi and makaʻāinana “tracks” in the process. I suggest there were five steps in the process: 1) determining the various interests in land; 2) filing claims, which occurred between February 14, 1846 and February 14 1848; 3) The Māhele – konohiki and the
King dividing all land between themselves; 4) the issuance of Royal Patent grants (life estates), after which konohiki were to file for fee simple title from life estates; 5) the Kuleana Act itself, in which native tenants divide out their interests in the previously divided (between the King and the chiefs) lands. Not exactly a step in the process, but an additional procedure, was commutation – the settling of the other classes interests in land received from this process. Commutation was later waived for makaʻainana (Chinen, 2002, 82).

**Determining Interests**

Because the control of land in Hawaiʻi was considered to be undivided, the first step in the Māhele process involved determining the underlying owners of Hawaiʻi’s land. The Privy Council minutes of December 11, 1847 record that:

The Legislature resolved that there are the following classes of rights inherent in all lands

1st Government

2nd Konohiki

3rd People or Tenants

The King now claims to be Konohiki of a great portion of the lands. He therefore makes known to the other Konohikis that they are only Holders of Lands under him, but he will only take a part and leave a part.

This action of the legislature, reflected in the Privy Council’s statement, recognized the fundamental ownership of land jointly by the three major classes of Hawaiian society, and marks the transition from control by the King, to control by individuals – “allodial” or fee simple title. It also recognized the vested rights of the three classes in the lands of
Hawai‘i. The mechanics of this division, in which “Konohikis [were] … only Holders of Lands under him, but he will only take a part and leave a part” are seen in the Buke Mahele, in which lands are relinquished by chiefs to the King on the left-hand pages, and returned to the chiefs (but not in their entirety) on the right hand pages. Often lower-ranking chiefs would merely relinquish half and receive half of an ahupua‘a or ‘ili.

Preza (2010) holds that the Māhele was a division of rights, rather than of land. These rights were to be divided first in the Māhele, which separated the interests only of the King and the chiefs in their capacity as konohiki, and again through the Kuleana Act, which allowed maka‘āinana to divide out their interests in lands they lived on and cultivated. As Hawai‘i was by this time a constitutional monarchy, and the King legally an office rather than a person, the term “government” included the office of monarch, and meant, in effect, the executive branch of government. This is why the term “government” is used in the principles, but the King exercised its authority. The Privy Council continued:

> It being therefore fully established, that there are but three classes of persons having vested rights in the land,— 1st, the government, 2nd, the landlord, and 3rd, the tenant, it next becomes necessary to ascertain the proportional rights of each.

If the King be disposed voluntarily to yield to the tenant a portion of what practice has given to himself, he most assuredly has a right to do it; and should the King allow to the landlord one third, to the tenant one third, and retain one third himself, he, according to the uniform opinion of the witnesses would injure no one unless himself; and in giving this opinion, the witnesses uniformly gave it
against their own interests. According to this principle, a tract of land now in the hands of a landlord and occupied by tenants, if all parts of it were equally valuable, might be divided into three equal parts, and an allodial title be given one to the lord, and the same title be given to the tenants of one third, and the other one third would remain in the hands of the king [emphasis mine].

This hypothetical division, of one-third to each class, came to be understood as the desired outcome of the Māhele/Kuleana Act process. It was more likely an example to illustrate the principle of dividing out undivided interests in land. Lyons (1903, 30) claims that “the theory which was adopted, in effect, was this: That the King, the chiefs and the common people held each undivided shares, so to say, in the whole estate.”

Lyons, like earlier legal architects of the revised land tenure system, is noting the embedded rights - notably of makaʻāinana - in the lands of the Kingdom. An alternate interpretation, however, is that "ownership" here is not of land itself, but of an estate in fee in land.

As the exchange, previously noted, between John Ricord and Mataio Kekuanaoʻa shows, the concept of one-third interests was a mere consensus that developed, not a fixed principle of Hawaiian tradition:

J.R. I wonder what the size of the king’s share would be if the land were divided into shares for the king, his headman and his tenants.

M.K. I think it would be about a third. I’m not very sure.

On July 12, 1850, the following Privy Council entry reviewed the Māhele process:

Mr. Armstrong brought forward the subject of the division of lands among the Chiefs. He said that himself & Mr. J. Young were formerly appointed a
committee to consult with the chiefs and see what lands they wished to keep &
what they would relinquish to government.

What followed was a list of the highest ranking aliʻi, such as William Lunalilo, Victoria
Kamāmalu, Lot Kapūiwa (Kamehameha V), Princess Ruth Keʻelikōlani and others, each
given vast tracts of land. A ratio of lands given up (as commutation) and lands kept, of
approximately two “lands” kept for every one given for commutation was proposed.
Lunalilo, for example, after relinquishing 96 ʻāina (“lands”), received 61 ʻāina, including
at least 18 ahupuaʻa, and 10 ʻili (Barrere, 1994, 430-433). But the amounts varied, and
“lands” were commuted on the basis of named areas only – ahupuaʻa, ʻili or smaller
divisions – rather than acreage. The land commission then addressed the subject of what
the entire division would look like:

After many conversations, each of the chiefs had agreed to make their own
statements in writing. Many remarks were made respecting the rights of the
people and chiefs in land, Mr. Ii explaind [sic], the facts in the case. Mr. Wyllie
spoke at length advising the council to accept the proposal of the several chiefs,
but only so far as the rights of the common people could be respected. He
estimated all the lands at 3,897,600 acres
The King one third 1,299,200 do [ditto, i.e., acres],
The Chiefs 1,299,200 do,
Common people entitled to 1,299,200 do.
Gov. Kekuanaoa urged an immediate vote, but it was voted to postpone the
subject...

This entry from the Privy Council minutes shows that the Māhele process was a
process of dividing out the interests of the members of the three classes of Hawaiian society. The chiefs’ giving up of lands constituted the settling of the interests of the other classes in the chiefs’ own lands. This allowed the chiefs to own property “free and clear” – clear of any encumbrances on title, save that of the rights of native tenants. The list of land holdings of the highest chiefs is also a de facto measure of their respective rank. It constitutes a second method of gauging the chiefs’ comparative right to rule apart from discussions of the relative mana embedded in their genealogies (see Kameʻeleihiwa, 1992, 234 - 289).

Filing Claims

Ostensibly, the period to file claims in the Māhele/Kuleana Act process was between February 14, 1846 and February 14, 1848. I problematize the idea that this latter date constituted an ultimate deadline on Kuleana Act claims. During this period, however, claims could be filed with the Land Commission for parcels of land. Claimants were to provide two witnesses to corroborate their claims to land under cultivation. Testimony was recorded in two separate volumes called Native Testimony and Foreign Testimony, based on the language in which testimony was given. William Little Lee wrote a nearly identical letter to the missionaries stationed in the major districts to encourage makaʻāinana to file claims as the “deadline” approached, because on Kauaʻi, for example, very few claims had been made. Hawaiʻi island, by contrast, had over 1200 claims by late 1847. This letter is one of the only pieces of evidence that such a deadline existed. I argue that in pushing for early submission of claims Lee was attempting to legitimize the process, and show that makaʻāinana could indeed file claims, notably
against their own chiefs, which was a concern of Kauikeaouli from the beginning. But Lee’s use of the term “deadline” also shows that the process was legally plural nearly from its outset. While most evidence points away from a “hard” deadline for claims, Lee’s contention, conversely, problematizes my view that there was no deadline.

One step in filing claims that had to be completed before the deadline was the submission of testimonies, usually by neighbors or kamaʻāina of the area, on the possession or residence of the claimant on the land(s) being claimed. My great-great grandfather Henry (Harry) Swinton, for example, made testimony on the land of William Z. Hoʻonaulu for a house lot in Lahaina:

I know the house lot in dispute. The Clt. [claimant] Hoonaulu I always heard desired [sic: derived – Barrere] his title to this lot from Keaweaheulu. He has lived there ever since. I have been in Lahaina now 5 years. I never heard his title disputed until 1847. He has built upon and improved the lot and I gave him a small piece out of my lot so as to give him a passageway in to his lot from H street. I never heard Kauai say this lot belonged to Hoonaulu, but I have heard Keaweaheulu say that the lot was his once and that he had given it to Hoonaulu because he had taken care of him when sick (Barrere, 1994, 63).

Others gave testimony for Kauai, the counter claimant, but Hoonaulu was granted the lot in Royal Patent 1724 (Barrere, 1994, 64). Thus, a discursive practice of claims and counter claims determined the awarding of lands.

In examining the processes of filing claims and of the operation of the Land Commission, a genealogical approach is helpful in that what was viewed as formal proceedings were often informal and chaotic, wrought with fraud, favoritism and

Chinen (2002) notes instances of interference by chiefs Kekauonohi and Charles Kanaina. In the latter case, Kanaina was questioned by land officer (and later Supreme Court justice) G.M. Robertson, and this was recorded in Claim 9539: “Why have you resisted Kaikikio’s claim?” C. Kanaina replied “For the same reason as the others. Kaikikio has all the patches, 16 of them and I have none.” In this case Robertson overruled Kanaina.

Chinen (2002, 40-42) shows that claims were lost or destroyed, and the Land Commission, in 1847 seemed to realize that it should not make any awards until after the “deadline” of February 14, 1848, even though they had already made some awards. Further, there was no standardized form or even format for claims, nor a standard method of sending them to the Commission. Chinen (2002, 50-51) cites a letter from a sub-commissioner on Kaua‘i, G.B. Rowell, to the Land Commission:

They (the documents) came entirely loose, without a particle or wrapper or even a string around them and without any note accompanying. They had passed through several hands having been handed over from one native to another, until they finally reached me.

Some konohiki were given Māhele awards if their claims were lost. Mahele Award 64 was given to Kahoe after the “original” of his claim to half of the ‘ili of Papaloa in

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55 “ho’opilimea’ai” can also be translated as “parasite.” The last part of the quote is not translated, and would read “

56 Kanaina later inherited the lands of his son King William Lunalilo, estimates of which vary, but is said to have consisted of 33 ahupua’a totaling between 70,000 and 400,000 acres.
Kailua, O‘ahu was “not found” (Barrere, 1994, 136). The same occurred with Kalaiopu‘u (Mahele Award 49, Barrere, 1994, 166).

Other irregularities were likely out of the control of the Land Commission. Hanakaipo, recipient of Māhele Award number 10, “was crazy and hanged himself …” had “no children, no relatives,” and his wife received only half of his land after his death (Barrere, 1994, 32). This was a form of alienation, as was death itself. Boaz Mahune, the possible author of the Constitution of 1840, died in 1847, before the actual division, and his lands were granted directly to his heirs (Māhele Award 45 in Barrere, 1994, 438). In some families, both husband and wife filed claims to the same land, and some hoa‘āina sent in multiple claims on the same land due to fear that the claims would not arrive in Honolulu (Chinen, 2002, 50). “Kaaione, a.k.a. William Hughes, a haole,” for example, filed a claim for an ‘ili in Waimalu, but his wife Waiaha filed a claim for the same land. Waiaha was awarded the land in LCA 70 (Barrere, 1994, 89). In this case, the double claim was caught by the Land Commission, but that was not always the case, and according to Chinen (2002), the operation of the Land Commission was likewise informal.

The Māhele

The Māhele itself consisted of 252 chiefs and foreigners filing what were essentially quitclaims to the lands under their control to the King. These lands were listed on the left hand page in the Buke Mahele. The King would then “return” most (but not all) of the listed lands to the chiefs. These returned lands were listed on the right hand pages of the Buke Mahele. According to Barrere’s (1994, 7) compilation The King’s
Mahele: The Awardees and Their Lands, Keoni Ana (John Young II) for example:

Relinquished [his own acquired lands]:

Haleaha, ahp. [ahupua’a], in Kalana of Hilo, Hawaii

Paiwa, ili no Waikele, Kalana of Ewa, Oahu and

Moanui, ahupua’a of Kalana of Lahaina, Maui

Received:

Puunui, ili no Honolulu, Kona, Oahu

Puunoa, ahp., Lahaina, Maui

The “received” lands listed here are the lands returned by the king and constitute the remaining land after commutation.

The minutes of the Privy Council proposed this process, while also revealing its discursive and contingent nature:

Mr. Wyllie thought the King as an individual and as the Head of the Nation should be regarded as one - the King was the government and without him, there could be no government and he thought it would simplify matters and prevent future evil, if all the chiefs and Landlords would surrender their lands to the King as their common sovereign, to receive them back in the above proportions, with fee Simple titles and without any restrictions, but what the law now makes or may hereafter make.

This process recognized their original status as “Tenants in Common,” i.e., their joint undivided interests in the lands with the King having “management” of these lands. It also constituted the division of these previously undivided interests – the “returned” lands
were no longer subject to the interest of the King, but only to those of the makaʻāinana and the government, which could be satisfied through commutation.

Despite what Lee stated above, however, these lands were not immediately granted in fee simple. As Preza (2010, 91) notes, citing the 1872 case *Kanoa v. Meek*, “the Mahele itself [did] not give a title [in fee simple]. It [was] a division, and of great value because, if confirmed by the Board of Land Commission, a complete title [could be] obtained.” In other words, the Māhele granted essentially a life estate that could be converted to a fee simple title through the granting of a Land Commission Award – the technical name for which was a “Royal Patent Grant upon confirmation of the Land Commission” (Chinen, 1958, 14).

As stated above, the Māhele was also a division that included foreigners because the Land Commission was determining, in part, who *already owned land* anterior, or prior, to 1845. Robert Grimes Davis, for example (Barrere, 1994, 15), received a “claim in Palama [Kona, Oahu] called Hawaiki and also Kumuhahani, kalo land, given to father Capt. W.H. [William Heath] Davis by Liholiho about 30-35 years ago.” Other testimony dates “Old Davis” as having received the land from Kamehameha I (Barrere, 1994, 15).

The results of the Māhele/Kuleana Act have been widely reported: Aliʻi (chiefs) and some foreigners received 39.2% of the land, the king 23.8%, and the government 37%. The government’s portion was the result of Kauikeaouli claiming to be not only king but also the highest konohiki. This meant that he claimed to be entitled to 60% of the land in a preliminary division, but from that he immediately gave away about two-thirds to the government, which was his way of commuting his interest in these lands, but also possibly of allocating more land to the government to be later claimed by
makaʻāinana. This suggests a fear of chiefs preventing makaʻāinana from filing or receiving land awards.

Kameʻeleihiwa (1992) notes that the original three owners received less than intended because of the addition of new “classes” such as the government. But the government was always already the owner on the level of dominium, and “owned” this 37% by virtue of there being no fee-simple owners “above” it. In other words, the discrepancy is merely a function of a misapprehending of the system. In fact, Kauikeaouli was claiming more land than he would have been expected to in order to make more land available for makaʻāinana, who may have been intimidated from claiming lands against the rights of their aliʻi and konohiki. In July 1850 a law was passed allowing foreigners to buy land. This law predated by a month the law allowing makaʻāinana to claim lands, and has been one of the causes of criticism of the Māhele process. While the process of claiming land had begun in 1846, the law enabling its actuation did not go into effect until August, 1850.

**Kuleana Act**

On August 6, 1850, the “Enactment of Further Principles,” usually called the Kuleana Act, was passed by the Kingdom legislature. Its formal name suggests the connection between the Act and the prior Māhele, and that the two were parts of the same initiative. According to Malcolm Naea Chun it was Davida Malo who pressured the chiefs and government to actuate makaʻāinana land claims, and for this he received the resentment of many chiefs and member of the legislature. The fact that Malo was the

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57 Personal communication, Oct. 9, 2012.
sole, or one of very few supporters of makaʻāinana land rights may account for the short “deadline” on Kuleana claims, if it was actually a deadline, and the failure to extend it.

This second phase in the land division process gave lands, in fee-simple, to those whose kuleana (responsibility) it was to cultivate lands “owned” by konohiki or the king. After filing claims and giving testimony to the Land Commission, 14,195 makaʻāinana filed claims for land. Of these claims, 8,421 received grants of land (Kameʻeleihiwa, 1992, 295). Like the grants to ali`i, the makaʻāinana received Royal Patent Grants, and were to commute the interests of the other classes in their lands. This provision was later dropped to encourage more makaʻāinana to file claims. Thus the only expense incurred was that of surveying the land. Complicating the analysis of this process is the fact that John Mortimer Lydgate, W.D. Alexander and Curtis Lyons were some of the early surveyors, and have come to be relied on for their descriptions of both the geography of Hawai`i and its land system. While their expertise on the technicalities of surveying make them indispensable resources, their ties to the sugar-planter elite cloud their analysis of the land system itself. And they were not the only ones whose self-interest may have clouded the process. Kameʻeleihiwa (1992), for example, notes that Kekūanāoʻa seemed to self-interestedly advocate that chiefs retain as much land as possible, but that he also had an interest in his children’s future landholdings as the father of Alexander Liholiho and Lot Kapuāiwa, the future Kings Kamehameha IV and V.

Lee enthusiastically promoted the privatization of land, though as cited above, possibly without due consideration. The Privy Council minutes noted:

Mr. Lee said this subject was a momentous one, He hailed with delight the Advent of this subject, believing as he did, that the separation of the undivided
rights at present existing in the Lands of the Kingdom, was a thing of the last importance to the propriety of the Nation, So long as Agriculture was depressed, the Nation could not rise. However it was a subject of vast difficulties, and one which he had not sufficiently considered to be able to give advice. It was a subject he wished to turn over and over in his mind (Privy council minutes, Dec. 11, 1847).

Citing Prussia as an example of the perils of concentrated ownership by elites (Kameʻeleihiwa, 1992, 219), Lee encouraged Kauikeaouli in no uncertain terms that he was making a momentous and sound decision in executing the Māhele:

It is my firm conviction that this silent and bloodless revolution in the landed tenures of Your Kingdom will be the most blessed change that has ever fallen to the lot of Your nation. It will remove the mountain of depression that has hitherto rested upon the productiveness of the of your soil, unbind the fetters of industry and wealth, and give a life and action to the dormant resources of Your Kingdom, which will convery our land with the stream of prosperity and gladness ... I am aware that the division of lands between the Chiefs and Tenants of Your Kingdom will be attended with a multitude of difficulties. I cannot say that the great mass of Your Nation are fully prepared to receive so great an emancipation. They may spurn this proffered freedom. But I do most sincerely believe, that this great measure by raising the Hawaiian nation, from a state of hereditary servitude, will promote industry and agriculture, check population and ultimately prove the Salvation of Your People. I believe it to be a measure which will meet the approval of Your majesty in years to come, and cause your name to be
remembered with veneration and gratitude by generations yet unborn ... if the
lands of Your Kingdom be unlocked it will open the hidden fountains of
prosperity, and prove the dawn of a new and bright era to Your Kingdom.

Lee neglected the earlier accounts of Cook (1967, 501), who describes Hawai‘i as
“fruitful.” Nor was Lee merely currying favor with the King. He wrote on December 23,
1847 to Reverend J.S. Emerson of Waialua more candidly and with overtones of his own
views of the similarities between traditional Hawaiian land tenure and slavery:

The present system of landed Tenures in this Kingdom rests upon the Nation like
a mountain, pressing and crushing them to the very earth. Remove it, and the
fettered resources and depressed energies of the nation will rise, and cover the
land with prosperity and plenty. Unless the people – the real cultivators of the
soil, can have an absolute and independent right in their lands – unless they can be
protected in those rights, and have what they raise as their own, they will
inevitably waste away…

He wrote to Emerson again on January 8, 1848 regarding the Reverend’s concerns
that chiefs were preventing maka‘āinana from submitting claims. Lee asserted that as
long as konohiki sent in their claims, the rights of maka‘āinana would be preserved. This
is why the deadline for konohiki claims was extended for over fifty years into the 1890s –
to protect the maka‘āinana claims within them. Merry (2000, 5) notes that “despite his
prominence in facilitating these changes, it is not clear how much Lee knew of the
Hawaiian language or legal system ... [nevertheless] he was actively involved in changing
the legal system almost as soon as he arrived.” In addition to his ostensible ignorance of
Hawaiian law, his lack of clarity in the dividing of interests is striking, as the institution
of undivided interests was an accepted one by the mid-nineteenth century and the related principles from Hawaiian law do not appear central to the division – only to the proportion given each interest-holder.

The discussion moved to the proportional division between the King and chiefs, noting that “Oahu has been divided on this principle, of an individual who holds 4 lands, heretofore calling himself Konohiki, the King take 3 - if 3 lands, 2...” The discussion continued, noting that “the chiefs do not greatly object to this, but, they ask, has the Government a third interest in the lands left to us? The King replies Yes, and the Government has 1/3 interest in his. There are some who say no. Let us have an Allodial Title to what the King has left us, subject only to the rights of the Tenants.” The minutes offer three questions:

1st Is this division just?

2nd Has the Government claim been extinguished by this division?

3th [sic] Shall foreigners be compelled to be subject to this division?

These questions, undoubtedly representing the concerns of the chiefs, show, on the discursive level, a critical engagement with the construction of a new land tenure system. The first question, as noted earlier, measures the process against pono, and represents a moral examination of Western legal norms. The second suggests an engagement with the abstract notion of Government - as an entity and as a set of institutions, rather than as the will of the strong. The third question asks whether the new system complies with alleged norms of consistency across class and race. This attempt at consistency was either catastrophic (Kame‘elehiwa, 1992) or efficacious (Preza, 2010),
depending on the interpretation of its results. My analysis takes a middle ground that recognizes both the lack of capacity to undertake such a massive global division, its mainly virtuous intent and relative effectiveness.

Results of the Māhele and Kuleana Act

Maka‘āinana received 0.8% (28,600 acres) after the Kuleana Act, which came from the konohiki and government lands (Kame‘eleihiwa, 1992; McGregor, 2007, 37). Maka‘āinana lands totaled 28,658 acres – three acres apiece for 8,421 awardees (Kame‘eleihiwa, 1992, 295) out of a total of 29,221 eligible males (Garovoy, 2004, 527).\(^{58}\) This unequal allocation led to the argument that the Māhele was “a catastrophic event” (Kame‘eleihiwa, 1992, 8). But misconception over the unequal division of lands stemmed from the hypothetical division proposed in the principles, which offered that a section of land, “if all parts were equally valuable, might be divided into three equal parts” [emphasis mine] (McGregor, 2007, 36). Noting the vast differences in the value of land, Stauffer (2003) found that maka‘āinana received the majority of land value (i.e., the most valuable lands) and that they held on to this land for a generation. As Lydgate (1915, 107) states, the “Kuleanas were ordinarily the cream of the land – scattered as plums throughout the pudding.” Further, Stauffer found that Hawaiians lost land after 1874 due to a non-judicial foreclosure law – a law that allowed foreclosures on mortgages without judicial oversight, which I address in chapter 6 on “responses” to native tenant rights (Stauffer, 2003).

\(^{58}\) Female ali‘i received Ali‘i awards in the Māhele, but all commentators agree that only males aged 20 and older were eligible for Kuleana awards.
A contemporary participant-observer of land tenure, John Mortimer Lydgate (1915, 103) supports a more optimistic view of the process of alienation, and contests the view that the Māhele and Kuleana act alienated Hawaiians from land:

ʻKuleanas’ or shares – for such is the significance of the word – aggregated 11,309 actual grants. I question whether any people, ancient or modern, ever constituted so general a body of independent land owners. The population of Hawaii at this time was about 80,000 or say 16,000 families, or a fee-simple holding of two out of every three families. And these Kuleanas were family holdings, since they were the farms on which the families were living and from which they derived their support. France is the classic example, among modern peoples, of peasant proprietorship, yet we find in France, apparently, two million holdings to seven million families, or one holding to three and a half families.

The land records reveal that in Hawai‘i maka‘āinanareceived approximately 155,000 acres in government land sales through the Minister of Interior. This brings the total nearer to five percent of the land in the Kingdom, and when combined with Stauffer’s finding on value suggests that Hawaiians received the vast majority of land value in the Kingdom. Further, there were “layers” of rights to land distinguishing between the dominion of Hawaiian Kingdom and proprietary rights: fee-simple, leasehold, life estates. Dominium is the sovereign’s right of ownership that exists beneath all “private” ownership. Proprietary rights – private property – are actually the right to use for a particular period, and exist “on top” of dominion. The constitution of 1840, prior to the Māhele, established vested rights in land for maka‘āinana, with the King
owning the fee. This was a one-third undivided interest in all the land in Hawai‘i. 5. 2 illustrates this conception.

fig. 5.2 Land Division

The figure above shows both the “layers” of rights in land, as well as the actual division of land (represented by the divided sections). But it mainly shows one of the three layers listed in figure 1 – dominium, and how each section or parcel of land had within it the rights of the three vested classes.

This revised conception leads to a different understanding of the Māhele/Kuleana process. The mōʻī (King) held vested rights as the head of the government. The King also held land as a konohiki (supervisor) in fee simple. The chiefs, in their capacity as
konohiki, held land as vested rights in the dominion and, after dividing out their interests, in fee simple. Maka‘āinana held vested rights in the dominium and could divide out their interests and gain fee-simple title, but could not divide out as a class because they were not a finite group in the way that the King and konohiki were. In addition, foreigners and others could hold land by leasehold, or as life estates, in which ownership would revert to the government upon the owner’s death. Thus, all land held in the system of proprietary rights (the second layer in figure 1) was subject to the rights of native tenants. Foreigners held land only as proprietary interests, and did not hold vested rights in the dominion of the Kingdom.

Kuykendall (1938) affirmed that this was the case. He quotes the land commission: “a tract of land ... might be divided in three parts, and an allodial title to one then be given to the lord, and the same title be given to the tenants of one third, and the other third would remain in the hands of the King, as his proportional right.” Kuykendall goes on: “[t]hese remarks by the land commission gave rise to the statement frequently made, but wholly erroneous, that all the lands of the kingdom were divided in three parts, one third to the king, one third to the chiefs, and one third to the tenants or common people. The division was effected on quite a different basis” (Kuykendall, 1938, 281 – 282).
It is likely that makaʻainana did not file land claims under the Kuleana act in larger numbers because there was an alternative method of acquiring land—purchase through the minister of interior. Land sales were the primary method for the acquisition of land by makaʻainana during the Kingdom period. As stated in An Act ... Granting to the Common People Allodial Titles for their Own Lands and House Lots: “a certain portion of the government lands in each island shall be set apart, and placed in the hands of special agents, to be disposed of in lots of from one to fifty acres, in fee-simple, to such natives as may not be otherwise furnished with sufficient land, at a minimum price of fifty cents per acre.” ⁵⁹ This challenges not merely the notion that Hawaiians received only one percent of the land through the Kuleana Act, but also that native Hawaiians lacked money to pay for surveys.

The government sold a “Grand Total” of 688,292.37 acres by 1893, and an additional 20,980.82 acres were sold after the 1893 overthrow, which suggests that government grants (land sales) were a more significant form of land distribution than the Kuleana act process. ⁶⁰ An increasing amount of evidence also suggests that Hawaiians received much of this land. Alexander states that “between the years 1850 and 1860, nearly all the desirable Government land was sold, generally to natives. The portions sold were surveyed at the expense of the purchaser ... The total number of Grants issued before April 1st, 1890, was 3,475” (Alexander, 1891, 119).

⁵⁹ An Act Confirming certain Resolutions of the King and Privy Council, Passed on the 21st Day, A.D. 1849, Granting to the Common People Allodial Titles for their Own Lands and House Lots, and Certain Other Privileges.

⁶⁰ Hawaiian Annual 1897, 40 – 41.
Parrish (2001, 120), in his analysis of Puna district, Hawai‘i Island, shows that government grants (lands sales) to Hawaiians constituted 16,175 acres or 35% of the total acreage, and 214 grants, or 40% of the total grants in Puna between 1852 and 1915. He also notes “Hawaiians received the majority of grants under the Kingdom of Hawai‘i” (Parrish, 2001, 120). Lydgate (1915, 103), as noted above, supports this more optimistic view of the process. Curtis Lyons (1903), a surveyor, noted one of the problems related to surveys of kuleana parcels with this example:

Surveyor No. 1, a stranger to the country, found the people cultivating on the land say two or three acres of upland kalo. Not taking into account the fact … that it was necessary for the land to lie fallow for two or three years before another crop of kalo could be produced from it, he surveyed merely the amount under actual cultivation. The kuleana were awarded accordingly, the poor people having no one to take their part, and as a consequence in many cases abandoning their newly acquired property as utterly insufficient for their needs.

Lyons gives other examples of surveyors who take fallow lands into account, and with the awarding of lands below the high watermark, such as “Pearl River.” Lyons concludes, defending the inconsistent practices with “the plea … that the Commissioners has such a mountain of business to dispose of that ‘any way to get through’ might well have been their motto.”

A vested right is an interest in land that exist without regard to whether or not the right has become manifest in actual ownership or title. Native tenant rights were, and are, vested rights. All grants issued by the Land Commission contained the provision “koe nae na kuleana o na Kanaka ma loko” – reserving the rights of native tenants.
Conclusion

Nineteenth-century texts on the Māhele tended to oversimplify the process and unquestioningly accept its outcomes. Twentieth century texts tended to over-critique the Māhele process in ways that were out of context and failed to comprehend the legal structure of the system that was being established by viewing it alternately from a Marxian and an American real estate viewpoint. Emerging critiques in the twenty-first century have tended to counter twentieth-century texts and err in the opposite direction, replacing Hawaiian objectivity with unconstrained agency. I attempt in this chapter to temper such critiques with a view that sees Hawaiian and foreign elites as mutual actors in the construction of the “modern” land tenure system.

But some of the criticism appears valid, as the chaotic and informal nature of the proceedings tended to privilege wealth and status. This is seen in the failure to extend the filing deadline for makaʻāinana while that of the konohiki was extended more than sixty years. In the next chapter, I show how the oligarchy immediately after the 1893 overthrow responded to embedded makaʻāinana rights in land – by various methods abridging these rights. By tracing these methods genealogically, I raise questions as to their legitimacy.
CHAPTER 6 – PANE: RESPONSE TO NATIVE TENANT RIGHTS

Modern law … was formed in the very denial of that mythic realm which had so deluded the pre-moderns … In this negation of mythic being, there is a denial of what gives the law coherent existence. Negation through law is the negation of law.

Peter Fitzpatrick, The Mythology of Modern Law

The anxious language of the pamphlet *Land Court Registration (Torrens Titles) and Conveyancing in Hawaii* (1946, 3) shows the fear the oligarchy had of native tenants’ rights and the potential they had to undermine a century of land acquisitions by the plantation oligarchy:

Early surveys with inaccurate instruments have been held partially responsible for complications in the present titles and the large numbers of instruments recorded in the Hawaiian language has been considered anathema. The result is that the titles in this territory have become burdened with those elements which often make it almost impossible to buy safely; out of the murkiness and darkness surrounding them there hardly comes a gleam of light to satisfy those who wish to be safe in their investments. Uncertainties and technical blemishes hang like so many threatening clouds over them and laborious searches of title are necessary to determine their status. Even then doubt may still persist and potential danger remain. We have experienced samples of this potential danger. It springs into vitality at the most unexpected times and strikes from hidden places. Out of the void wherein sits enthroned the heirs of John Doe too frequently strikes a thunderbolt to scatter and destroy.
The anxiety in this passage presages the emergence of a legal pluralism, in which a multi-layered system of legal understandings resulted from the overwriting of one legal system on another. This overwriting is complicated by the fact that the Kingdom legal system was already a hybrid of “traditional” Hawaiian norms and “western” concepts of law. Even western concepts vacillated between what Santos (1987) called Homeric and biblical legal styles (see Merry, 1988).

When the second generation of “missionaries,” the new plantation elite, encountered Hawaiian land law, it was found to be incompatible with consolidating large land holdings, thus it needed to be adjusted, responded to, and ultimately deformed to facilitate industrial agriculture. This was particularly true of kuleana, or native tenant rights, which to them need to be abridged. As these rights were embedded, the only way to abridge them was to create legally plural mechanisms of dispossession. While I consider the processes in this chapter as “responses” to native tenant rights, they were also part of larger processes of capitalist and imperialist expansion, and attempts by Hawaiian elites to incorporate Hawai‘i by degrees into the US sphere. The 1893 overthrow, 1898 annexation and even Statehood in 1959 were responses to American tariff policy on sugar – Hawai‘i became more and more embedded in the American system as lawmakers attempted to treat as the equivalent of a foreign producer in terms of tariffs on sugar.

It is also plausible that these processes were not intentional affronts to native tenant rights, and I do not necessarily ascribe such intention or even agency to the actors involved. But the opening quote shows that native tenant rights were a threat to a regime that sought to modernize and settle Hawai‘i with those of an appropriate “class” – a
euphemism for race as I show below. The result was a legally plural system that used various forms of overwriting to abridge, distort or veil native tenant rights or kuleana.

Merry (1988, 870) defines legal pluralism as “a situation in which two or more legal systems coexist in the same social field.” She refers mainly to state and non-state laws coexisting in a locale, but I refer mainly to two state legal systems co-existing – the result of Hawaiʻi’s unique position as a sovereign state overwritten in a “colonial” or occupation arrangement. As foreshadowed in the epigraph to this chapter, the legal regimes and laws I describe in this chapter at times contradict and even negate each other. The unusual aspect of this arrangement is that the governments overwriting the Hawaiian Kingdom (Republic of Hawaiʻi, Territory, State) tacitly acknowledge Kingdom law, and “traditional” Hawaiian practice as underlying their legal systems.

If native tenant rights – kuleana – were being undermined during the late kingdom and early Territorial period, it was part of the larger context of American capitalist, commercial and imperial expansion. The concept of legal pluralism provides a framework for understanding how law may have worked at cross-purposes with itself, with the plantation elite deliberately or inadvertently pursuing the overriding goal of consolidating their power. Law in Hawaiʻi became plural just as Hawaiians had learned to negotiate the new system. The imposition of Territorial and later State law on Kingdom law made the legal order literally plural, although the systems were layered in a manner that was ostensibly seamless. The introduction of English common law compounded the potential for internal conflicts. As §1 – 1 of the Hawaiʻi Revised Statutes holds:

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61 Other than the so-called “Emmaites” in the 1870s, many of the large-scale political associations such as Hui Kālaiʻāina and Hui Aloha ʻĀina were formed between the time of the overthrow and annexation.
The common law of England, as ascertained by English and American decisions, is declared to be the common law of the state of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage…

The significance for Hawaiians of this sequence of legal regimes is in the alienation of land. While I address the topic in greater detail in chapter 7, Stauffer (2004) suggests that an 1874 law was responsible for the majority of this land loss. The non-judicial foreclosure law of 1874 is held by Stauffer (2004) to have facilitated the foreclosure of Hawaiian owned land by eliminating the requirement of judicial oversight on foreclosures. This law is often used today, and constitutes evidence that Kingdom laws underlie State laws and remain in effect as long as State laws do not expressly “repeal” them.

This chapter examines five responses by the “oligarchy” – the plantation-affiliated elites of the late Kingdom, Republic of Hawai‘i, the early Territory of Hawai‘i, and later the State – to Native tenant rights. These responses are 1) non-judicial foreclosure; 2) the Republic Supreme Court case Dowsett v. Maukeala; 3) the Land Court, also known as the Torrens system of land registration; 4) the 1895 Land Act, a homesteading act; and 5) the 1982 Hawai‘i Supreme Court case Kalipi v. Hawaiian Trust Co. Two of these, Dowsett v. Maukeala and Kalipi are directly aimed at native tenant rights; one, the Torrens system of registration, directly impacts (negatively) native tenant rights; and the others indirectly affect these rights.
The period covered in this chapter is perhaps the most contentious in the history of Hawai‘i. There are several accounts of the political transitions that occurred from 1887 to 1900 (see Budnick, 1992, Dougherty, 1992, Coffman, 1998, Osorio, 2002, Kinzer, 2006), as well as primary source documents (Affairs in Hawaii, 1893, Liliʻuokalani, 1898, Native Hawaiians Study Commission, 1983), and films, both documentary and historical fiction (The Hawaiians, 1970, Act of War, 1994, Princess Kaʻiulani, 2010). But all focus on the governmental changes during this period, and none on the changes in land tenure. In this chapter, I trace the changes in land tenure from the perspective of their effects on native tenant rights. This chapter amounts to a genealogy/moʻokūʻauhau of political thought and action vis a vis rights to land. Because the period covered in this chapter is one of Hawaiʻi’s most contentious, I cover below the political changes of the period before examining their effects on land tenure.

A Brief Political History

After a gradual erosion of the power of the monarch over an 80-year period, the haole oligarchy overthrew the monarchy in 1893. As Queen Liliʻuokalani was about to promulgate a new constitution (to replace the “Bayonet Constitution” forced on her brother King Kalākaua in 1887, which gave foreigners the majority vote), non-Hawaiian business leaders, most connected with the sugar industry, overthrew the Queen with the aid of US Marines. The Marines acted at the request of John Stevens, US Minister to the Kingdom of Hawai‘i, but without the knowledge or authorization of Congress or the President. The oligarchy proclaimed itself a provisional government, elected Sanford B.

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62 Tom Coffman, Nation Within: The Story of America’s Annexation of the Nation of Hawai‘i, (Kaneʻohe, HI: Epicenter, 1998), 126.
Dole President, and proceeded to lobby the US Congress to annex Hawaii. Their aim was to become a territory, thereby avoiding foreign tariffs on sugar.\footnote{Coffman 126.}

President Grover Cleveland opposed the annexation of Hawai‘i and the overthrow. Cleveland sent Senator James Blount to investigate and, in denouncing the overthrow, Blount produced one of the most scathing critiques of US foreign policy in American history. On the basis of this report Cleveland pushed for reinstatement of Queen Liliʻuokalani. Congress was pro-annexation, however, and this led to a standoff until William McKinley was elected president in 1896.\footnote{See Noenoe Silva, Aloha Betrayed, (Durham: Duke University Press, 2004).} Because of the Blount report, the provisional government declared itself the Republic of Hawai‘i during the standoff in 1894 and denounced the interference of the US in its internal affairs.

McKinley was in favor of annexation, but the Congress did not have a two-thirds majority necessary for a treaty of annexation. A joint resolution, the Newlands resolution, was resorted to as a means of annexing Hawai‘i, with the admittance of Texas as a state (not as a territory) used as a precedent. This resolution is still a point of contention that many in the Hawaiian sovereignty movement claim nullifies the annexation of Hawai‘i, because the resolution was an internal law not even binding on the illegal Republic of Hawai‘i, much less the Kingdom.\footnote{Steven T. Newcomb, “Justice Memo Shows US Never Legally Annexed Hawaii,” Honolulu Advertiser 12 Mar. 2000: B3.} Annexation occurred in 1898 despite petitions signed by 38,000 Hawaiians – most of the 40,000 living at the time.\footnote{Silva, 2004.} These petitions were the cause of the decreased support for the proposed treaty in the Senate from over two-thirds to just over half. The Territory of Hawai‘i came into existence after the Spanish-American war in 1900 with the proclamation of the Organic Act. After a brief period of

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Hawaiian control of Territorial politics, the Territorial government was Republican and business dominated, and the power of the sugar-based oligarch reached its zenith during this period from 1902 until 1954, when the Democratic party came to power. During this period from the late nineteenth century until the mid-twentieth, the four “responses” to native tenant rights that I address appeared; non-judicial foreclosure, *Dowsett v. Maukeala*, the Land Court (Torrens system) and the Land Act of 1895.

**Non-judicial Foreclosure**

During Kalakaua’s reign in 1874, the Kingdom legislature passed a law providing for non-judicial foreclosure called *An Act to Provide for the Sale of Mortgaged Property Without Suit and Decree of Sale* (Hawaiian Civil Code, 1884). Non-judicial foreclosure, also called foreclosure by sale, is a foreclosure without court oversight, and is executed under a power of sale written into the mortgage contract. The law reads:  

When a power of sale is contained in a mortgage, the mortgagee, or any person having his estate therein, or authorized by such power to act in the premises, may, upon breach of the condition, give notice of his intention to foreclose such mortgage, by publication of such notice in the Hawaiian and English languages for a period of three consecutive weeks, before advertising the mortgaged

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67 HRS §667-5, the State of Hawai‘i’s version of law, is similar and provides:

Foreclosure under power of sale; notice; affidavit after sale. (a) When a power of sale is contained in a mortgage, and where the mortgagee, the mortgagee’s successor in interest, or any person authorized by the power to act in the premises, desires to foreclose under power of sale upon breach of a condition of the mortgage, the mortgagee, successor, or person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State.
property for sale … and he shall within thirty days after selling the property in
pursuance of the power, file a copy … in the office of the Registrar of
Conveyances, in Honolulu.

Non-judicial foreclosure has stringent notice requirements, ostensibly to prevent abuse. Notice must be given to the borrower, and must be published in three newspapers of “general circulation in the county where the property is located.” Further, notice must be given to the condominium or Co-op association, and the State Tax Office and posted on the premises “not less than twenty-one days before the date of sale” (Beasley, 2000, 94, 95). The property is then auctioned. Title insurance can be acquired on an auctioned property provided the property meet several requirements, including “a release of the first mortgage... definitely needed with Land Court property” (Beasley, 2000, 97), which I address below.

In conjunction with techniques of erasure, which obfuscated Hawaiian understandings of land, or palena (see Beamer, 2007), economic and financial attacks may have in fact been central to the “theft” of Hawaiian land. The notion of land theft, however, is itself problematic. According to Black’s Law Dictionary (1968, 1023), the common law definition of larceny (theft) is “felonious taking and carrying away of personal goods of another.” Real estate or real property is, by definition, not personal property - it is immovable, it cannot be “carr[ied] away.” Despite this, Keanu Sai was convicted, and his conviction was upheld by the Hawai‘i Supreme Court, of “attempted theft of land.”68 Thus, the Hawai‘i Supreme Court is on record asserting that land can be stolen. This definitional paradox is at the heart of questions over both the “theft” and

conversely “ownership” of land in Hawai‘i. Financial, procedural, bureaucratic and even discursive practices were therefore utilized to facilitate the transfer of land from Hawaiian to non-Hawaiian ownership, which, as Stauffer holds, occurred, but not in the ways normally considered. Non-judicial foreclosure was one of these methods. It was likely the ballooning of interest payments, in conjunction with non-judicial foreclosure that led to the seizure of properties.

Stauffer (2004, 145-146) relates an example of the aggressive use of non-judicial foreclosure by the rancher William Castle in Kahana valley:

Castle was most successful in his goals by hunting down various “mortgage” lenders who held unreleased mortgage notes for Kahana kuleana. Castle would then purchase such mortgages, arrange for foreclosure actions, and let his agent Brown front for him. Brown then would transfer the foreclosed lands to Castle. Such legal ruses, rather than outright “theft” were used to alienate Hawaiians from land. Because land cannot be legally stolen, trespass and title disputes constitute the outcomes of disputes over land. By eliminating the mechanism of trespass, the non-judicial foreclosure law did in fact bring the system one step closer to breaking down the barriers to the prevention of foreclosure. As Banner (2007, 284) notes comparatively, if Tonga had sold land to foreigners as was done in Hawai‘i, “it would have been available to be foreclosed upon in payment of … debts” for houses, furniture, clothing and other expenses. Privileging lenders over borrowers, Hawai‘i is considered a “title theory” state, in which mortgagor continues to own the property until the underlying loan, or promissory note is paid in full. In 2010, it was found that while non-judicial foreclosure was legitimate, it was not legal to evict the former owner(s).
A 2010 Hawai‘i law allowing for mediation in the case of non-judicial foreclosures provided that the foreclosures could be voided if lenders “violated any part of the law, no matter how trivial” (Gomes, 2012, A10). Non-judicial foreclosures previously constituted half of all foreclosures, but by 2011 they were a small minority of foreclosures, mainly for failure to pay condominium association fees. In 2012, mortgage lenders pursued legislation to “open the door a little wider for lenders to pursue foreclosures” (Gomes, A1, 2012). Non-judicial foreclosure was also a mechanism of alienation of land, and will be discussed further in chapter 7.

This type of foreclosure may not have been technically legally plural as it was actually a Kingdom law. It could be argued, however, that while the law was fashioned in the Kingdom, and was meant to streamline its procedures, it violated another intent of the crafters of Hawaiian law – to retain the rights and interests in land in the hands of makaʻāinana. That it failed to do so shows that Kingdom law served two purposes; the protection of makaʻāinana rights and the facilitation of capitalist expansion. The courts, as in the Dowsett v. Maukeala case, worked at cross-purposes, erecting a façade of legal positivism and protecting oligarchy privilege.

**Dowsett v. Maukeala**

The 1895 case Dowsett v. Maukeala in the Supreme Court of the Republic of Hawai‘i is held as confirmation of the extinguishment of native tenant rights. The case involved six “tenants,” Maukeala, Naea, Kaumaea, Hina, Elikai and Kaluahilo, who filed for adverse possession of portions of Halawa ahupua‘a.\(^69\) The court found that because

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\(^69\) Adverse possession is a legal procedure for claiming the land of a second party based on use – it is adverse to the property owner. I discuss this in detail in chapter 7.
their tenancy was “permissive,” i.e., with the consent of the fee-simple owner, and no notice had been given of adverse possession – acquiring title by possessing land for a statutory period under conditions – the “tenants” had no valid claim for adverse possession. This legal technique was used by corporations, estates, and churches to acquire land by “maintaining” a parcel of land, often without the owner’s knowledge, and to the owner’s detriment.

Garovoy (2005, 533) wrote in *Harvard Environmental Law Review*, of the complexities of native tenant rights in relation to the *Dowsett* case:

In *Dowsett v. Maukeala*, native tenants argued that by continuing their occupancy of their old tenancy in the *ahupua‘a* after the *Mahele* and after title to the *ahupua‘a* and other *kuleanas* claimed therein had been awarded by the Land Commission, they had adversely possessed their parcel. The [Republic of] Hawaii Supreme Court rejected this theory and ruled that such occupancy of land not properly claimed or awarded, even after the passage of the “extremely liberal” *Kuleana* Act, must be considered unlawful.

This passage, however, should be scrutinized carefully, even genealogically. First, the kuleana right that the native tenants possessed was not one that needed to be claimed or possessed adversely. It was, rather, inherent in the system of land tenure that tenants could claim a division “at a time of their choosing.” Second, the “Hawaii Supreme Court” referred to here is that of the Republic of Hawai‘i, not the Kingdom or even the State, and as a government the United States itself called “self-proclaimed,” questions must be raised over its legitimacy. Third, as Garovoy insinuates with her quotation marks, for this court to call the Kuleana act “extremely liberal” is an interpretation that contradicts what
advisers held at the time, that not even the king could divest native tenants of their embedded rights. It stands to reason that a court formed by a “self-proclaimed” government could not do so.

This is legal pluralism in its most pure form. The Republic of Hawai‘i, successor to a government that owed its existence to the United States, did not have the authority to overwrite Kingdom laws that were so fundamental to Hawai‘i’s real estate system. Its attempt to do so was not merely legally plural, but fictional in that it depended on a logical sequence that did not follow in a linear, logical, or even a legal manner. A genealogical approach can undermine this widely accepted sequence, but here one must be careful not to overprivilege one legal system – the Kingdom in this case – as if it was itself of “pure” origin, and fall prey to what Fitzpatrick (1992, 51) calls the “deification of law,” or to legal positivism, the notion that law consists merely of the commands of the sovereign.

*Dowsett v. Maukeala* is an example of the ways in which expedience trumps law, and does so through law, or as Fitzpatrick puts it, expedience “negates” law. The Judd court of the Republic of Hawai‘i found in the 1895 case *Dowsett v. Maukeala* that “if the hoaaina, so-called, without paper title by kuleana, remains on the land after his permissive occupancy has ceased, either by notice to quit or by his own act of refusing to attorn [“agreeing to become the tenant of a successor landlord” (Reilly, 1975, 26)], he cannot be considered a ‘lawful occupier’ and entitled to the specific rights of the people …” (Cannelora, 1974, 43).

The *Dowsett* court summarized the defendants’ argument [as to] their occupation of lands in Halawa: “the possession of a person living on land by permission of the chief
before he obtained a paper title to the land cannot be considered in law as continuing to have a permissive nature.” In other words, the defendants were claiming to have a right in the land greater than that of “tenant.” The court immediately disagreed with this contention:

The Land Commission was a court and had full jurisdiction to settle all claims to land, whether by claimants of larger divisions of land as divided in ancient times by name, or by the hoaainas or natives living on the lands under the chiefs. If the Land Commission expired and the hoaainas or native tenants neglected to present their claims for the parcels of land which they desired, and for which they would ordinarily be awarded a kuleana title, showing merely their occupation of the same as a foundation for it, we think they must be considered as content with their prior status as tenants by permission of the land owner.

This imposition of a deadline both problematizes the idea that there was a previous deadline of February 18, 1848, and contradicts Ricord’s (1846) statement that “the [native tenant] rights themselves, if vested, cannot be constitutionally disturbed.” Of course, Ricord is referring to the constitutions of the Kingdom, but these ostensibly form “common law” even for the Republic, whose legitimacy at any rate must be questioned. The Court’s proviso that “if the Land Commission expired ... hoaainas … must be considered as content with their prior status as tenants [italics mine]” shows doubt as to the existence of a deadline. Sai (2008) argues that the Land Commission’s responsibilities were transferred to the minister of interior, and I show in the previous chapter that Māhele Awards replaced Land Commission Awards after 1855. The ability

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70 The date of the dissolution of the Land Commission.
of konohiki to divide out their interests was extended for fifty years, right up to the time of Dowsett, so it stands to reason that makaʻāinana, whose rights were to be protected, who were much more numerous, and who had had less time to file claims, would also have their deadline, if in fact there ever was a deadline, extended. The notion of a “hard” deadline was not reified in the way it is today.

The Court here is tacitly acknowledging the legal plurality of land titles in Hawai‘i. Nowhere in Kingdom law is it stated that failure to adhere to an arbitrary deadline constitutes being “content” with their status as tenants. Further, as noted above, the term “tenant” itself is problematic when contrasted with “owner” – hoaʻāina were owners of vested rights in land that could not be constitutionally disturbed, not tenants at will. The Republic Court thus imposed a “flat,” one-dimensional legal conception of land onto a multi-dimensional model, creating two simultaneous and contending legal conceptions of land tenure. One would slowly displace the other, and a legally plural condition would come to appear singular.

The use of Dowsett v. Maukeala as a de facto deadline for the division of native tenant rights, also ignores the details of the case itself. This was an adverse possession case, not a case in which claimants were attempting to divide out their interests in the land in question. Thus the case did not precisely attempt to end native tenant rights, it was used after the fact to abridge these rights. The Dowsett case has thus been misconstrued as ending native tenant rights, when it neither claimed to do so, nor directly involved these rights. As title seemed to become increasingly clouded, Sanford Dole, while Territorial Governor, proposed a system that would, “amend” the compounding imperfections in land titles. This was the Land Court or Torrens system.
Land Court/Torrens System

Chicago Bar member William Niblack (1903, 2-3) wrote that there were three systems of title transfer “in the civilized world... transfer without recording or registering; the ministerial system of recording deeds; and the judicial system of recording.” The second system emerged with the shift to land speculation, when an increased liquidity in real estate was desired. It streamlined the process of title transfer, which previously required a cumbersome transfer of all title documents, replacing it with a “mere memorandum” of the title records. This second system remains the predominant system in the United States. The third system - judicial registration, including the Torrens system, emerged as a way to “grapple with the problem of simplification of title of land” (Niblack, 1903, 6).

Because of the clouded nature of much land title in Hawai‘i, Territorial Governor Sanford Dole introduced the “Torrens System of land registration,” previously used in Australia.71 Wang (1982, 480) describes the ostensible purpose of the land court:

Because land ownership was foreign to the Hawaiians and because of Hawaiians’ extended family relationships, land deeds were either non-existent or cloudy. Some of the surveys were inaccurate; this situation created disputes among landowners.

Part of this system was the Land Court, established in 1903. The land court system holds that encumbrances on title prevent its transfer until such defects are noted on the original certificate of title (Reilly, 1975, 184-185). Encumbrances, or flaws on the

71 Torrens title was introduced in the Phillippines at approximately the same time as in Hawai‘i.
title, were common in Hawai‘i due to the fractional interests and complex transfers that occurred. The court thus became a mechanism for “correcting,” or more accurately, politicizing title defects, privileging those claimants the court favored – usually those connected with large sugar or landed interests. By politicizing land titles, the Land Court essentially created legally plural titles in Hawai‘i – the power to erase claims to, and encumbrances on land was merely asserted politically, rather than constructed legally.

In 1902 Phillip Weaver (in American Law Review 36) agitated for the land court showing its benefits in Massachusetts. The following year, Territory of Hawai‘i governor Sanford Dole recommended the Torrens system to the Territorial Senate. Recorded in the Senate Journal of 1903, Dole stated to the Territorial legislature:

I invite your attention to the Torrens system of registration of instruments, a law to substitute such system for that at present in use, having been prepared for submission to you. With the prospect of the early establishment of county government and the creation of registration offices in each county the time is most opportune for the introduction of this improved and well-tested system of registration.

A bill prepared by PL Weaver, CH Merriam, Walter E Wall, Geo B McClellan and FJ Lowrey “was passed by the legislature in 1903 as Act 56” (3). A summary of benefits “made by Sir Robert Torrens” was presented to the Hawai‘i legislature. These included the following:

1st. It has substituted security for insecurity

2nd. It has reduced the cost of conveyances …

3rd. It has exchanged brevity and clearness for obscurity and verbiage.
Theories of legal pluralism show how “different systems of law intersect within fields of power relationships linked to conceptions of race [and] nationalism” (Merry, 2000, 18). The “insecurity … obscurity and verbiage” mentioned here could feasibly refer native tenant rights.

The benefits of the Torrens system were also said to include protection against fraud, prevention of devaluation and a diminishment of lawsuits over property. Proponents of the law concluded “the present system of indexing is cumbersome, uncertain, unreliable and entirely unsuited to the particular conditions in these islands. The tendency in all progressive communities is to do away with it and adopt some surer method whereby the investor is offered a guarantee for his investment…” (3).

The law creating the land court is now part of Hawai‘i Revised Statutes (HRS) §501-1, which states:

A court is established, called the land court, which shall have exclusive original jurisdiction of all applications for the registration of title to land and easements or rights in land held and possessed in fee simple within the State, with power to hear and determine all questions arising upon such applications, and also have jurisdiction over such other questions as may come before it under this chapter [501], subject to the rights of appeal under this chapter. The proceedings upon the applications shall be proceedings in rem against the land, and the decrees shall operate directly on the land and vest and establish title thereto.

“In rem” in this context refers to proceedings against a property, as opposed to those against a person – “in personam” (Black’s Law Dictionary). The plaintiff in a land court hearing can address notices to those who are known to have, or claim to have, an interest
in the property, or to unknown holders of interest. HRS §501-71 states that “every decree of registration of absolute title shall bind the land, and quiet title thereto, subject only to the exceptions stated in section 501-82.” Section 501-82 pertains mainly to various types of liens against the property, including tax liens. Further sections in the law concern adverse possession. I address these sections in chapter 7.

MacKenzie (1991, 113) notes that the Land Court system of registration is “a somewhat confusing, time-consuming, and expensive registration process.” But even her *Native Hawaiian Rights Handbook* does not problematize Land Court titles, but merely describes them as if they were legally given. I argue that the Torrens system that created the Land Court was devised as, and became, a method of erasing native tenant rights. By transferring the responsibility of recording land titles to a court (appointed by plantation-affiliated leaders during the Territorial period), elites were able to initiate a massive, and self-directed process of claiming land. Incidentally (and problematically to my argument and research), the Land Court keeps no record of their proceedings, only of documents filed.

If, as Reilly contends, “the certificate of title reflects the current status of the title to the property,” and that status becomes the permanent legal status of the property, this system had (and has) the effect of erasing prior historical claims to land. This system was developed over time in order to address the difficulties that arose from the peculiar set of circumstances under which the rules of property transfer developed. Robert Torrens, “a layman” from South Australia, modeled his technique on the system for registering ships, and the “declared object of this system is under governmental authority to establish and certify to the ownership of an absolute and indefeasible title to realty, and to simplify its
transfer.” The emergence of the Torrens system from Australia cannot be extricated from that country’s legal doctrine of terra nullius, which purported to erase any prior claims to land by refusing to recognize the existence of Australian Aborigines. This context makes the Torrens system’s use in other contexts, such as Hawai‘i and even the United States, problematic in that it becomes implicated in a project of erasure.

An 1898 report of the Republic legislature noted the “evils” of the system of the “regular” system of recording land titles, stating that “in instances of conveyances by natives it cannot be ascertained from an examination of the indexes in whom the title is vested, this being due partly to the fact children do not take the names of the parents.”72 Henry Cooper noted at the time the difficulty in tracing through the “labyrinth of Hawaiian relationship for interests in shares in undivided huis [sic]” (Stauffer, 2004). It is worth noting that Cooper was the person who read the proclamation “abrogating” the Hawaiian monarchy on January 17th, 1893. These hui can be viewed as a method of resistance to alienation – by dividing title among many owners, alienation was complicated as acquiring the consent of all parties was difficult.

The anxious language of the passage at the beginning of this chapter concerning Hawai‘i land titles – that the “heirs of John Doe too frequently strike … a thunderbolt to scatter and destroy” – suggests somewhat different motivations on the part of Hawai‘i elites than those in other places in instituting the Torrens system. Europe, Australia, the United States, and Hawai‘i offer different contexts in which the Torrens system was instuted, and the use of the Torrens system across such diverse contexts is highly problematic. In Australia, the Terra Nullius doctrine created a legally simple, if morally

72 This was true particularly of those born before an 1865 law passed by Kamehameha V that required “Christian” names and surnames.
problematic, origin of land titles. Thus a simple registration system could be implemented (if it was to neglect Aboriginal title, as it did). The American context, however, is more complex – there was a system with post-feudal land tenure being applied in a layered fashion over Native American rights, some of which were recognized, some not; others recognized, then violated. In Hawai‘i with native tenant rights and a layered system it was still more complex, and it merely obsfucated a new, and fairly clear system of land tenure. What was complex were family relationships when it came to inheritance. This issue is still in contention today as families with fractional interests in lands are “bought out” by large corporate landowners.\textsuperscript{73}

In cases in which the plaintiff cannot prove valid title, adverse possession is filed. While some protection exists against abuse, the system appears overall as a means of seizing land. HRS §501-11 holds that “the judge [of the land court] may appoint one or more examiners of title in the first judicial circuit, or when necessary in any other judicial circuit, who shall be persons of good moral character, and shall have been declared by the supreme court to be qualified for the office after examination. They shall be subject to removal by the supreme court.” This archaic method of choosing title examiners harkens back to the Territorial period of oligarchic plantation dominance.

The ostensible purpose of this process was to create a court that could perfect encumbered title within the Territory, of which there was likely a considerable amount. What resulted was a two-part, or legally plural system, with the “Regular System,” for “unencumbered” title and the Land Court system, which could politicize and thereby quiet encumbered title. MacKenzie (1991, 113) notes, again unproblematically, that

\textsuperscript{73} I provide an example of this in my conclusion.
“once a land court decree is entered, the property always maintains its land court status.”

As Stauffer (2004, 192 - 193) charges in his critique of current land practices, “apparently no one has ever succeeded in getting a Land Court title overthrown in Hawai‘i” — he interprets the system as a “method to ensure that the Hawaiians, having had their lands taken, would never be able to regain them.” Thus, the title to a certain portion of Hawai‘i’s land lies in a politicized, rather than a strictly legal, process.

Morris (1935, 652) relates the creation of the Torrens system, which led to the Hawai‘i Land Court:

Our land title business in this Territory is too limited in extent, and beset with obstacles to have ever made it worth while for anyone to set up a Title Guarantee Company here. Several efforts in that direction have been costly failures. Then too we have had a successful Torrens system at work here for thirty years, and an efficient land Court to make it function. The Government guarantees the titles registered under the Land Court decrees, and this tends to make unnecessary the establishing of a private Title Guarantee Company."

This was true in 1935, but since then at least twelve title search companies opened in Hawai‘i, including First American Title Company, First Hawaii Title Corp, Hawaii Escrow and Title, and Title Guaranty Escrow and Title, which began in Hawai‘i in 1957. While these companies guarantee private lands in Hawai‘i, the insuring of the ceded lands was discontinued due to the clouded nature of the State of Hawai‘i’s title to the former Crown and Government lands of the Kingdom.

Morris (1935, 652) continues,
Our Land Court Torrens system was inaugurated by an act of 1903. The Act is copied from the statute of Massachusetts. That statute was thoroughly tested for Constitutionality in the case of Tyler vs. Judges ... the total area of land in Territory suitable for registration is not extensive when regard is had to the area of the public lands, and waste lands and large area in small city lots, where the expense of obtaining Land Court Title would not be justified except in cases where the title is dubious.

Morris notes that the land holdings of plantations were beginning to move through the Land Court process as of the time of his article.

Keahi Pelayo, a Honolulu realtor, wrote in his weblog, Realty Views on July 16th, 2008, of land court registered properties:

“Hypothetically” the government provides a guarantee for the title to a home, condo or piece of land. The key word in the last sentence is “hypothetically,” please don’t believe that the government will protect your title. As with all real property purchases, be sure to obtain title insurance (whether or not the property is in land court) … I would like to focus on one aspect of the land Court that could impact parties making loans or obtaining judgments secured by Hawaii property.

In most other parts of the United States, in order to secure a mortgage or other type of lien against a property, one merely needs to go to the county recorder and record the appropriate document at the county seat. Once this is done, the lien becomes a public record and encumbers the property. If a property is registered in the land court and a lien is not properly registered with the court, then the person
who holds the lien will not have a security interest in the property. Since Hawaii has two methods available for recording interests in property (regular system and land Court), theoretically, a party who was unaware of land Court could lend a borrower money, which is supposed to be secured to a piece of property, and at the end of the day not have an ability to get at the property. [emphasis original] (http://honolulurealestateviews.com/2008/07/16/honolulu-land-court/, accessed Sept. 14, 2009)

Thus, even in mainstream real estate circles, the Land Court is seen as somewhat problematic, in that it creates a legally plural system that is confusing for outside investors.

Weaver (1906, 21) countered this argument in American Law Review: “as a rule the seller is much annoyed at this requirement, but experience has shown that the buyer in many cases congratulates himself on the means of compelling the seller to pay for the expense of curing defects in title discovered in the process of registration.”

Counterexamples such as Aotearoa/New Zealand show that much the impetus for transferring land to non-native ownership was that land was not put to its “highest and best” use. This notion that particular lands are not efficiently used by natives was reflected in policies such as the restriction on the claiming of lands left fallow in the Kuleana act. Good stewardship was thus seen as uneconomic and inefficient. In what some term the “mahele liʻiliʻi,” attempts to regulate the commons proved problematic to such an extent that the project had to be repeated - in the “mahele nui” of 1848. The first attempt at a division (the 1839 Māhele liʻiliʻi) addressed topics such as excess
“grasslands,” and other forms of “the Commons,” whereas the 1848 Māhele was more like a Domesday Book in the totality of its reach.

Cameron (1915, 87) quotes Arnold’s critiques of the Torrens system, which contest claims of its simplicity and the "inevitab[ility of] the sweep of the movement:"

the critic may find abundant flaws in each particular statute which attempts to substitute a Torrens system for an ancient and tolerably well-settled one. Without attempting such criticism, or denying the desirability of reform of our land transfer system, it appears obvious that the present applicability of the Australian System can be overcome only by constitutional amendment.

These flaws are seen in the constant revision of the laws - in several Australian provinces six revisions were made to the Torrens laws. Still commentators emphasize the "efficiency" and "desirability," contenting themselves to "speak hopefully of its future rather than with satisfaction at its past" (Niblack, 1904, 15). The system was, in its early manifestations, an agenda, rather than a proven technique of registering land.

Cameron (1915, 89) quotes Torrens himself, whose own view of the transition was that "the first step toward making a registration of titles practicable is to make a clean sweep of our present real property laws." Cameron felt that "the revolutionary aspect of the statement frightened conservatism, tradition, and lawyer," and he could have added, Hawaiian landowner. The "clean sweep" of the land tenure system was likely an outcome desired by Dole and early Territorial leaders, who, in Dowsett v. Maukuela and other cases, were dismantling fundamental structures of the Hawai‘i land tenure system.

Cameron (1915) notes “no legal or economic principle is of greater moment that the system known as the Torrens. It interests every owner of property, without exception,
every lawyer and every financier who may soon see real estate become an asset as liquid as other factors of wealth.” Cameron’s view is that the Torrens system was “assured of adoption … as it has proved its immense value in almost every part of the civilized globe.”

Schneider and Tanoue (1991, 196-197) state that following an examination of the title abstract by a court-appointed "expert," and "if title is deemed clear, the Land Court will decree registration and cause issuance of a Land Court Certificate of Title." The Land Court then erases previous title history: "thereafter all references to the original underlying titles are eliminated in favor of Land Court nomenclature: the application number, the map number, the lot number and the certificate number." And as Stauffer (2004) has stated, no Land Court title has ever been overturned.

However, this title is not permanent. Transfers of title, and "changes in ownership result in cancellation of the Certificate of Title and issuance of a Transfer Certificate of Title ... a ‘TCT.'" Schneider and Tanoue (1991, 197) warn "no one should rely on an owner’s copy of a TCT as an accurate representation of title. These are only duplicates of the State certificate which is controlling." They proceed to enumerate the disadvantages of the Land Court system, which they hold "is burdened by the quantity of paperwork incident to modern titles ... [with] some TCTs [becoming] cumbersome book-length chronologies of title which immediately suggest the wisdom of obtaining a title report." This is due to the practice of recording all transfers on the original or transfer certificate of title.

The authors note in the conclusion that "title [search] companies are held to a duty of reasonable care in compiling a search." Chanin (1991, 10) notes that "no party can
acquire an interest in the land, unless that interest is noted on the certificate of title." With the distortion of native tenant rights, underlying interests in land could be erased through this method of registration.

Gillmore (1991, 11) explains that the Court may rule in favor of a party that shows adverse possession occurred prior to registration in the Land Court, but precludes claims after Land Court registration:

all adverse possession claims are eliminated from and after the date the certificate of title is issued. The reason is that no interest arising after the original issuance of the certificate of title is recognized in the Land Court system, unless it is noted on the certificate of title. This is not to say the that the Land Court does not recognize adverse possession.

**Marketable Title**

One of the purposes of the Land Court is to ensure “title that is free and clear of liens or encumbrances which are incompatible with the full enjoyment of the property” (Gillmore, 1991, 14). The clouded nature of title in Hawai‘i means that “marketability is affected when there is a ‘reasonable doubt’ as to whether the purported owner actually owns all or a sufficient amount of the bundle of rights to constitute marketable title” (Gillmore, 1991, 15).

The Land Court was established allegedly to address flaws in the "regular system" of registration, in which "recordation is not mandatory and there is no guarantee that all transfers have been recorded. Even if recorded, there is no guarantee that a transfer is valid" (Erickson, 1980, 12). The Land Court, described in Hawai‘i Revised Statutes 176-
Section 504, which provides that "every decree of registration of absolute title shall bind the land and quiet the title thereto subject only to the exceptions stated in section 501-82." Section 501-82 deals with liens against property. The Presiding judge of the Land Court is designated by the Chief Justice of the Hawaii Supreme Court and comes from among the judges of the First Circuit Court. Sanford Dole resigned as Governor of the Territory of Hawaii in 1903, when the Torrens System was established and became a judge in the US District Court until 1916.

Chanin (1991, 9-10) explains the significance of title granted by the land court. The "Land Court awards a certificate of title ... to a party who is able to demonstrate fee simple ownership of a parcel of land. The certificate then becomes synonymous with title and no party can acquire an interest in the land, unless that interest is noted on the certificate of title."

The Rules of the Land Court hold that the kinds of documents required to show valid title include mortgages, leases, muniments (evidence) of title, maps, notice of adverse possession or accretion (adding adjoining lands to the applicant’s land). The Rules state that “the application shall set forth all interests or claims affected thereby whether the applicant admits or denies them. If further interests or claims come to the attention of the judge or registrar, additional notices shall be issued, if deemed advisable.” (6) The Rules hold that for examiners of title, appointed by the Land Court, “one month only shall be allowed for the examination of an abstract unless further time shall be allowed by the court on cause shown.”

The land court procedure elides varying means of deriving meaning from land. In contrast to Aotearoa/New Zealand’s Waitangi Tribunal, which attempts to view
transactions over land from various perspectives, and often privileging the Maori perspective, the land court procedures serve to reify existing, often illegitimate, land ownership based on mere assertion. It puts the burden of describing conflicting claims over land on those who would benefit from there not being any existing claims.

Foucult holds that the process of record-keeping is one of control, of creating boundaries that limit discourse, and what is able to be asserted in a particular discourse. The land court system, then, constitutes a record-keeping of the winner, an attempt to permanently marginalize the subaltern, who are often the underlying owners of land. The fact that 83% of property on the island of O‘ahu, whereas only 20% of all land in Hawai‘i is registered in the land court, attests to the value of the land court in high-priced real estate, which is more contested than real estate in rural areas, with larger landholdings.

Dole, Race and Land Settlement

Sanford Dole wrote that if he had not been a Hawaiian, he would be a Bostonian. This ambiguous statement sheds light on the complexity of Dole’s thought regarding race, place and land. One of Dole’s primary concerns in and after his time as governor was settlement of the islands by what he saw as the proper type of colonists. But his views on the ideal race for settlement were complex. In an undated74 article on the subject, Dole lamented:

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74 “1905?” is written on the manuscript at the Archives of Hawai‘i.
As yet little has been done in the way of introducing Americans from the mainland to these islands. Although the preparation of the Act of 1895 was distinctly made with that object in view…

[Some successful] colonists were Americans, were enterprising, persevering and industrious and their great success is, I think, attributable largely to these qualities. Colonists of a different class might have eventually reached a similar success but it would have taken a longer time to do it.

Dole had been thinking of the prospect of American settlement for a long time. Damon (1957, 326) recounts Dole’s views as a man of 28 [1875?] on the settlement of Hawai‘I’s land:

With the present rapid decadence of the population we are in a fair way of learning the very important truth that ‘land without people on it, is really worthless’; that the ‘value of land depends simply on there being someone there to collect its produce, or on the probability that there will be people.’ This clear proposition is universally acted upon every day the world over. The settlement of the new land of the United States is under its principle. Land associations and railroad companies know that they can afford to give away land to settlers for the sake of the rise in value thereby accruing to the adjoining lands.

Upon the premises, therefore, that if our islands are ever to be peopled to their full capacity, it must be brought about through the settlement of their lands; that homesteads, rather than field-gangs, are to be the basis of our future social and
civil progress, a careful study of our land policy becomes necessary to the
formation of any practical plan for effecting this result …

Dole saw the inalienability of Crown Lands as “the greatest obstacle to a
comprehensive homestead system of settlement” (Damon, 1957, 326). But to paint Dole
as purely a “racist,” would underestimate his complexity. Dole was invited at least twice
to join the American Bar Association, the second time in 1914 by William H. Taft of
New Haven, CT. In his response of May 16, 1914, Dole wrote:

there was considerable interest over the admission of a negro lawyer to the
association, and I understood some action was taken with the view of excluding,
thereafter, negroes from membership. Under such circumstances I was unwilling
to become a member, as I could not endorse such a policy, and I feel the same
way now … I should like to be a member and make my protest against a rule of
qualification of membership not founded on legal ability and character but upon
race discrimination.

With this backdrop, the Land Act of 1895 passed, attempting to fill the “empty” lands left
by Hawaiian depopulation. The Act “formally merged the Crown Lands with the
Government lands, [and] declared that these ‘Public lands’ would now be alienable” (Van
Dyke, 2008, 192). It gave various types of title to 800 individuals, 223 of whom were
“Hawaiians” – a “few” were Hawai‘i-born of foreign parents. “Hawaiians” received more
land than any other single group – 8,382 acres – but this was out of a total of 24,749 acres
(Van Dyke, 2008, 196). Other statistics show that 50 of the “Hawaiians” were actually
“non-Hawaiians born in Hawai‘i” (like Dole himself) and only 129 Native Hawaiian
received land under the program (Van Dyke 2003, 197). Further, Native Hawaiians were most likely to receive 999-year leases, not fee-simple title to lands under this program.

Dole ended up disappointed in the program overall, noting that “few Hawaiians” had taken advantage of it. Even fewer Americans – 79 – had taken advantage of the opportunity to make Hawai‘i “productive.” Dole’s views on race are ambiguous because his terminology was varied and inconsistent. Dole was keen to refer to himself as “Hawaiian,” a designation consistent with the late Kingdom, as he was born on the soil. “Kanaka,” or “native” was the most likely term for Hawaiians, and on this he was again ambiguous. In his post-annexation writings and speeches, Dole simultaneously presents a theoretical view of the “progression” of ethnic groups (mainly Hawaiians) up a hierarchical ladder toward Euroamerican status, and mentions how Hawaiian qualities in relation to “lesser” races are “well known” (Dole collection, Mission House Museum Library).

Rather than accepting Dole’s views of Hawaiian uncritically, it should be noted that even critical race theory, in the view of Kēhaulani Kauanui, fails “to consider how the racialization of indigenous peoples … follows what Andrea Smith would call a ‘genocidal logic’ … rather than simply a logic of subordination or discrimination.” Iaukea (2010) shows that educated “Part-Hawaiians” could be an exception to this patronizing and perhaps genocidal view and be taken as legitimate rivals or even collaborators. Race was a primary, though vague, factor in a narrative for which Dole was a more articulate spokesperson. But land was, in his view, to be settled and repopulated by those of a higher class, who would be more industrious in its development. It is important to recall
that these initiatives were responses within the contested legal regimes of the Republic and Territory, and their legitimacy is dubious.

**Kalipi v. Hawaiian Trust Co.**

In 1982, *Kalipi v. Hawaiian Trust Co.* affirmed the existence of native tenant rights, but also abridged them. The case dealt with a native Hawaiian resident of Moloka‘i, William Kalipi, who owned land in the ‘Ōhi‘a and Manawai ahupua‘a, but did not reside there. Kalipi had traditionally praticed and exercised the right to gather in the ahupua‘a, which was used for hunting and ranching, despite the fact that it was owned by Hawaiian Trust Company. The Supreme Court of the State of Hawai‘i, led by Chief Justice William Richardson, opined that while native tenant rights – defined as gathering rights by the Court – continued to exist, they could only be exercised by residents of an ahupua‘a, not by land owners in that ahupua‘a.

The defendants argued that:

Regardless of their purported sources, traditional gathering should not be recognized or enforced as a matter of policy. They characterize the rights as dangerous anachronisms which conflict with and potentially threaten the concept of fee simple ownership in Hawai‘i (*Kalipi v. Hawaiian Trust Co.*, 1982, 4).

The Court disagreed, countering that “any argument for the extinuishing of traditional rights based simply upon the possible inconsistency with our modern system of land tenure must fail” (*Kalipi v. Hawaiian Trust Co.*, 1982, 4). They held that Kingdom law referred to those “living in the ahupua‘a” as possessing such rights, and they found no reason to argue with such “unambiguous language” (*Kalipi v. Hawaiian Trust Co.*, 1982,
The *Kalipi* case is often used to “clarify” the concept of native tenant rights and to show their limits, but is also put forth as an example of Hawai‘i’s liberal legal culture that is sensitive to Hawaiians. But the case elides the distinction between kuleana as gathering rights and as right to fee simple land. By attempting to abridge the former, Hawaiian Trust Company may have secured gathering rights for residents of ahupua‘a, but they succeeded in diverting attention from a more radical, and fundamental interpretation. Still, the case set a precedent for the non-exclusive nature of land ownership in Hawai‘i, which was affirmed by the 1995 PASH case.

**Conclusion**

In this chapter I have detailed five initiatives that impacted, directly or indirectly, native tenant rights. Non-judicial foreclosure was a method of alienation, but it decimated maka‘āinana Kuleana holdings, possibly creating a situation in which Hawaiians had few examples of small landowners to emulate. *Dowsett v. Maukeala* was purported to terminate native tenant rights, but a careful analysis suggests that it did not concern those rights, but involved, rather, adverse possession. The Land Court and Torrens system obscures, and arguably suppresses, native tenant rights by asserting a new title document based on the claimant’s submission of a relatively few and narrow documents. The Waitangi Tribunal provides a counter-example that broadens the types of evidence that may pertain to land claims. The Land Act of 1895 was an attempt to overrun Hawai‘i with settlers, thereby limiting the native presence, which was seen as diminishing anyway. Finally, the *Kalipi* case affirmed, but also abridged native tenant rights in the
1980s. All of these efforts eroded, and ultimately led to a “forgetting” of the meaning of native tenant rights and their recasting as gathering rights. In the next chapter, I show how this legal infrastructure that attempted to erase native tenant rights, led to the actual loss of, or alienation from, land.

These responses to native tenant rights – to kuleana – added to an increasingly plural legal order in ways that seemed intractable. While none appear to actually undermine native tenant rights, they problematized and obfuscated them enough that few recognize their existence. Those who do recognize what they originally stood for hold that the deadline applied, ending the ability to divide out these rights in the mid 1800s.
CHAPTER 7 – LILO: ALIENATION

Much as Americans might couch their accounts of Indian extinction in reassuring metaphors of natural processes, there was no denying that the ‘wave’ that drove Indians from their lands was one of Euro-American westward expansion. Nineteenth-century Americans had to account, in moral terms, for the fact that the nation was built on the graves of Indians.

Susan Schekel, *The Insistence of the Indian*

My own family owned land in Lahaina, Maui, below Lahainaluna School. Nearly all of this land was sold or lost to gambling debts – only a few small parcels remain today in the ownership of relatives. It seems that every Hawaiian family has a story of the loss of land. What this suggests, however, is something contrary to the received wisdom regarding land in Hawai‘i. It suggests that in contrast to Kame‘elehiwa’s contention that land was lost immediately because of the Māhele process, Hawaiians actually owned land in the nineteenth century, and lost it subsequently. As Stauffer (2004, 1) notes:

“The Hawaiians lost their land in the nineteenth century. About that there can be no argument. In the roughly fifty years prior to the 1893 overthrow of the Hawaiian monarchy, 90 percent of all land in the islands passed into the control or ownership of non-Hawaiians … So the land was lost. But exactly how and exactly when? At the turn of the twentieth century, political upheaval masked changes to the land tenure system, which was at the heart of those very upheavals. Confusion, or “huikau”
(Osorio, 2006, 19), exists regarding Hawaiian land alienation. In the Center for Oral History’s (1988) book on Kōloa, Kaua‘i, Abraham Keli‘i Aka (KA), interviewed by ‘Iwalani Hodges (IH), describes his grandfather’s landholdings, and comments on the confusion over land transfers to the Knudsen family:

IH: Do you know how [your grandfather] got these properties?
KA: No, I don’t really know. I guess he was one of the first down here, so [sic]. I don’t know really how he got the property. But then what I’m trying to wonder, how did Knudsen get his property? My grandfather was here before him. So you see, like down at Po‘ipū Beach Park, that area belongs to him … But then how come [Eric] Knudsen got the other part? Where did that Haole come in? [Emphasis original]

Aka is expressing confusion over how his own grandfather acquired land and how a non-native tenant acquired the adjacent land, but also asserting a notion of original occupancy as a means of acquiring title. Osorio (2006, 21) relates a story heard from ‘Imaikalani Kalāhele that also conveys this notion of original occupancy:

On some beach, a houseless Hawaiian is confronted by another Hawaiian who wants to know what he is doing there … The houseless Hawaiian replies that he was always there, from the first settlement to the coming of the great southern chiefs to the invasion by Kamehameha. He, like his ancestors has always been part of the land. It was only huikau, confusion, that caused people to believe they had no right to live and work on the land.

One of the goals of this dissertation is to expand understanding over the nature of land titles and alienation – to address, in Osorio’s words, huikau – confusion. Huikau is
one form that what I call “erasure” of Hawaiian knowledge of land takes. This erasure, in turn, leads to alienation. I also examine Hawaiian notions of control of land that were at odds with ownership, such as original occupancy.

I use the term alienation rather than Preza’s (2010) term dispossession, because while he restricts himself to the legal dimension of ownership and loss thereof, I consider the broader, socio-cultural dimensions associated with such loss. Kameʻeleihiwa (1992, 9) contends that Hawaiian inability to comprehend western land tenure led to a nearly immediate alienation of most Hawaiians from land because land ownership was “not part of the Hawaiian metaphor.” While Hawaiians were imparted vested rights in land, Callies (1984, 2) contends “unfamiliarity with European concepts of land ownership, lack of concern, and lack of understanding resulted in the loss of many of those rights in a few short years.” I challenge this consensus view. As Preza (2010, 52-53) holds in what he calls “the Genealogy of the Misunderstanding,” the Māhele “has been mistakenly identified as a sufficient condition for dispossessing the makaʻāinana of land.” He attributes dispossession (or in my parlance, alienation) to the “loss of governance” following the overthrow. I add mechanisms such as erasure to this process.

Stauffer (2004) [made] a major contribution to this question with his work on the non-judicial foreclosure law of 1874. In the Hawaiʻi context, Stauffer (2004, 1) writes:

By looking in detail at what happened in the land division of Kahana on Oʻahu, we see a picture that challenges and supplants conventional wisdom. One surprising finding is that, although the ahpua’a of the aliʻi were rapidly lost, the people’s kuleana homesteads ... remained largely unalienated for a generation ...
A related finding is ... [t]he 1874 act that played the central role in the loss of the people’s land.

Sai (2005, 239) modifies this view while partially agreeing with it, claiming that Stauffer “fails to distinguish political institutions from the behavior of individuals.” Sai concurs with Stauffer on the importance of the 1874 law, while contesting his view that it was an act of “stealth” intended to appropriate Hawaiian land. The early system, even in the West (discussed in Chapter 3) which usually consisted of a father passing land to his eldest son, allowed for loans to be taken out on land with an “equitable lien,” or mortgage securing the loan, but these loans were "cheap, safe and secret." The secretive aspect of such loans is [reminiscent] of the 1874 non-judicial foreclosure act (Stauffer, 2004), which was a mechanism of the alienation of land I discuss below.

Using archival documents, previous studies and oral histories, I examine methods of alienation in this chapter and arrive at four mechanisms of land loss: private purchase, government confiscation, legal mechanisms such as adverse possession, and other mechanisms including what I term “erasure.” I examine other contexts comparatively and end with case studies of the Crown lands of Hawai‘i, Kaho‘olawe and Mākuʻa valley, which collectively show some of these mechanisms taking effect. The politics of alienation was in some ways analogous to the processes acting in other parts of the world during the imperialist nineteenth century. As James Scott (1976, 7) describes, in Southeast Asia, “control of land increasingly passed out of the hands of villagers; cultivators progressively lost free usufruct rights and became tenants or agrarian wage laborers.”

The British Government's Proclamation of 1763 dealt with the “problem” of
acquiring lands from Native Americans:

whereas great frauds and abuses have been committed in the purchasing lands of
the Indians, to the great prejudice of our interests, and to the great dissatisfaction
of the said Indians; in order, therefore, to prevent such irregularities for the future,
and to the end that the Indians may be convinced our justice and determined
resolution to remove all reasonable cause of discontent, we ... require that no
private person do presume to make any purchase from the said Indians of any
lands reserved to the said Indians within those part of our colonies where we have
thought to settle.

This approach was similar to those employed in Aotearoa/New Zealand in the early
1800s. There settlers bought an amount of land greater than the total area of the
archipelago before the British Crown negated these purchases and established the
principle of Crown pre-emption, which gave the Crown the right of first refusal in the
sale of any Maori land.

In the Native American context, Banner (2005, 6), notes:

In the end, the story of the colonization of the United States is still a story of
power, but it was a more subtle and complex kind of power than we
conventionally recognize. It was the power to establish the legal institutions and
the rules by which land transactions could be enforced. The threat of force would
always be present, but most of the time it could be kept out of view because it was
not needed, Anglo-Americans could sincerely believe, for most of American
history, that they were not conquerors, because they believed they were buying
land from the Indians in the same way they bought from each other. What kind of
conqueror takes such care to draft contracts to keep up the appearance that no conquest is taking place? A conqueror that genuinely does not think of itself as one.

Banner’s quote partially contradicts Scheckel’s in the epigraph for this chapter, and raises questions over American intent and agency both in Hawai‘i and elsewhere.

But in addition to this general trend in alienation globally, processes specific to Hawai‘i were operating. Five factors influenced the first stage of the alteration of the Hawaiian land tenure system: first, the urging of foreign naval officers who threatened to attack Honolulu; second, the interference of foreign diplomats in internal land affairs; third, forced recognition of property rights for foreign subjects; fourth, increasing influence on, and control of, the government by foreigners; and fifth, intensified protests over land tenure by foreign subjects (Parker 104). In the 1830s and 1840s, pressure for private ownership increased (Parker 104). Foreigners thought Hawaiians would become extinct, and wanted to be positioned as landowners when this happened (Kame‘eleihiwa 207).

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75 The early royal court moved frequently back and forth between “capitals.” Kailua-Kona, on Hawai‘i Island and, later, Lahaina, on Maui were the de facto predecessors of Honolulu as a kingdom capital.
76.
The four general mechanisms of land alienation I propose are summarized in Table 7.1 below.

Table 7.1: Categories of alienation of Hawaiian land

<table>
<thead>
<tr>
<th>Method</th>
<th>Case</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Purchase</td>
<td>Land Law of 1850</td>
<td>Concentration of land ownership in plantations</td>
</tr>
<tr>
<td>Government Confiscation</td>
<td>Seizure of government and Crown lands by Republic of Hawai‘i, and transfer to Federal (1898) and State (1959) Governments</td>
<td>1.75 million acres removed from Native Hawaiian control</td>
</tr>
<tr>
<td>Legal Mechanisms</td>
<td>Adverse Possession</td>
<td>Corporate seizures of land</td>
</tr>
<tr>
<td></td>
<td>Foreclosure</td>
<td>Loss of kuleana and government grant lands</td>
</tr>
<tr>
<td>Other Mechanisms</td>
<td>Erasure</td>
<td>Loss of palena - cultural memory of land</td>
</tr>
</tbody>
</table>


Among these four mechanisms, most available cases of land loss can be explained. But rather than propose mechanistic and legalistic explanations for alienation,
I aim to theorize land loss, in order to examine its other, non-legal dimensions – its genealogy. Consideration of the question of land alienation invokes Spivak’s famous question: Can the subaltern speak? Were Hawaiians able to tell their stories of the alienation of land? It seems every family has a story of alienation of their family land, but these do not appear to be recorded in any systematic way. Perhaps this hidden history can be uncovered by some method, either through case histories or read in the records of land transactions. How is it that theft of lands, if it can be called that, could happen without any discernable record? It could be the case that it is precisely the legality of these “thefts” that obscures the deed. Lorrin Thurston bristled at the allegation that, in his words, the “damned missionaries stole all the poor Kanakas’ land. All land transactions in Hawaii appear in the records of land patents, real estate transfers, and probate courts; and they show no large real estate holdings by any missionary” (Thurston, 1936, 4). Thurston (1936, 6) notes that “the charge that the missionaries ‘stole the poor Kanakas’ land’ has been reiterated so often by the uninformed that it is regarded generally as historical fact” He called the accusation a “gross libel” (Thurston, 1936, 4).

Distinguishing between the missionaries themselves and the “mission boys,” Thurston has “no apologies … They need none.”

The question of alienation further invokes Silva’s (2004) extension of Spivak’s question: In what ways does the subaltern speak? It also needs to be asked whether Hawaiians were, in fact, “the subaltern,” and if so, when did they become so. The question of agency is [relevant/invoked] here: to what extent were Hawaiians agents in regard to land, and when did they cease to be so, if indeed they did.

Preza (2010) summarizes the literature on Hawaiian “dispossession” of land, noting
that there are two basic arguments in the literature. One argument claims that Hawaiians never received land through the Māhele/Kuleana Act process; the other claims that Hawaiian received land, but subsequently lost it. Preza (2010, 13) notes that the two arguments are “mutually exclusive ... either the maka'āinana got land via the Māhele or they did not; possession of land is a necessary precursor to dispossession.” He critiques the previous generation of Māhele scholarship, stating that “The existing scholarship has stopped questioning dispossession and instead the focus has been on building a corpus of evidence which supports the presumption of dispossession.” In the main my approach is consistent with Preza’s, but I attempt to contextualize and theorize a somewhat disparate argument. Rather than attempting to “defend” the Māhele process, I look at the complex ways in which land and law interacted to relinquish Hawaiians’ control over land. The first mechanism of alienation I examine is mere private purchase, a surprisingly nuanced process in which Hawaiians participated, but for whom understandings of transactions may have varied from other parties to the exchanges.

**Private Purchase**

Private purchase was a major mechanism of alienation of land in Hawai‘i. Private ownership was presaged when Kamehameha I allowed hereditary holding of land, giving his generals the right to pass their lands to their children. This is why many Māhele and Kuleana grants are claimed to be possessed “since the time of Kamehameha I.” In 1825, the council of chiefs under Kamehameha III legalized the hereditary holding of land (Parker 92). A law of July 10, 1850, allowed foreign ownership of land. This ownership

77 Kauikeaouli (Kamehameha III) was 12 years old in 1825, and Ka‘ahumanu, the Kuhina Nui, was the de facto ruler of Hawai‘i.
was tempered with a provision that requests for intervention by foreign governments would forfeit land to the Hawaiian government (Parker, 1989, 114). This law was promoted by Richard Armstrong, *Kahuna Nui* of the Kingdom (Kameʻelehiwa, 1992, 186), who argued that foreign citizens of Hawaiʻi could already own land, and because there was actually no difference between foreign citizens and foreign non-citizens, the latter should also be able to own land (Kameʻelehiwa, 1992, 300).

Sometimes, private purchase, or private sale of land occurred *between* the time of filing claims and receiving awards. Kaiwi (Buke Mahele, 55-56) relinquished half and received half of the ili of Kapaeli in Ewa, Oʻahu, but the claim was given “no LCA” (Land Commission Award) and “no R.P.G.” (Royal Patent Grant) because he was shown to have sold it to Stephen Reynolds on Feb 28, 1846. After the land law of 1850, chiefs and commoners sold land to foreigners (Parker, 1989, 115). As with Māori, makaʻāinana in Hawaiʻi did not always understand that they forfeited all rights when selling land. Some lost land through mortgages or failure to pay tax, others through death with no heir, in which case land reverted to the ownership of local aliʻi.

A lack of genealogical documentation to prove descendence from the kuleana grant owner further exacerbated alienation (Parker, 1989, 118). Heirship problems led to further alienation. In some cases, land swaps took place in which Native tenants did not realize they were signing an agreement for a lifetime occupation right in exchange for their land. Sugar company officials evicted heirs from the land after the death of the signee (Parker, 1989, 120). Some Hawaiians became embedded in the political system, and simply sold land to their own benefit. Hawaiian Nani Roxburg (Center for Oral

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78 This occurred in the 1920s and 1930s on Kauaʻi with the McBride Sugar Company.
History, 1988, 375-376), interviewed by Warren Nishimura, describes her mother’s land transactions, which show the transfer of Hawaiian-owned land to large estates:

WN: And what happened to the land your old house sat on?

NR: They sold it. Then I heard the ‘Ilikai Hotel came up (chuckles) …

WN: Who did your mother sell the house to?

NR: Oh, that land down there? Dillingham.

WN: Hawaiian Dredging [and Construction Company]?

NR: Hawaiian Dredging. They bought all that property. They [also] built Ala Moana Shopping Center.

Laws aiding speculation led to an enormous concentration of land in a few hands in Hawai‘i. Land Acts passed in 1884 and 1895 were intended to promote homesteading (Parker, 121). The second of these, passed during the dubious Republic of Hawai‘i period, I examined in detail in chapter 6. These 21-year leases on parcels of up to 1200 acres went primarily to speculators, rather than homesteaders, and tended to end up in the hands of the large plantations (Parker 121). Titus Coan (1882, 125-125 in Blackman, 1906, 159) gave an account of large sales of land for miniscule prices:

I have known thousands of acres sold for twenty-five cents, and still others for six and a quarter cents an acre. These lands were, of course at considerable distances from towns and harbors. But even rich lands near Hilo and other ports sold at one, two or three dollars per acres … Those who accepted or bought land now [1881] find its value increased ten, and, in some cases, a hundred fold.

79 It should be noted that the 1884 law was under the Kingdom of Hawai‘i, while the 1895 law was under the Republic of Hawai‘i.
Blackman (1906, 159) also notes that “Professor [W.D.] Alexander says that ‘at least 300,000 acres were disposed of in this way.’”

By World War II, “almost half the total land area of the islands was in the hands of fewer than 80 private owners. Government ownership accounted for most of the rest” (Cooper and Daws, 1985, 3). The state government held thirty-nine percent, and the Federal government ten percent. Seventy-two private owners held title to forty-seven percent of the land in Hawai‘i, and seven of these owners held thirty percent of the land (Parker, 1989, 122). While large landowners such as sugar plantations and ranches began with large landholdings, one reason their landholdings grew so large was that some of it was claimed through adverse possession.

**Adverse Possession**

A major factor contributing to Hawaiian land alienation was plantation expansion through adverse possession – acquiring title by possessing land for a statutory period under certain conditions. Hawai‘i Revised Statutes §669-1 provides that:

(a) Action may be brought by any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim.

(b) Action for the purpose of establishing title to a parcel of real property of five acres or less may be brought by any person who has been in adverse possession of the real property for not less than twenty years.

Corporations, estates, and churches used this legal technique to acquire land. In
such cases, a plantation would “maintain” a piece of land by marking it off with a fence, ditch, sign, or gate, and in a specified number of years, an adverse possession claim could be filed. The period of time required to file and adverse possession claim was originally twenty years, then it was reduced to ten, and later lengthened back to twenty years (Chinen, 2002). Molokaʻi Ranch, for example, comprised one-third of the island of Molokaʻi, much of which was obtained through adverse possession (Parker, 1989, 117). Adverse possession claims were required to be advertised in a major newspaper, but often claimants would publish a notice in a newspaper on a different island from where the land and owners were. Also many owners did not read, understand legal language, or receive newspapers (Parker, 1989, 118). Publishing in specific languages (Hawaiian or English) does not seem to have been part of this requirement. Some Native Hawaiians gained land through this technique, but this was very rare. Native Hawaiian Legal Corporation (1992) notes that:

No one knows how many kuleana parcels are still held by Hawaiian families. An in-depth study of all kuleana awards and their subsequent title histories would be required to provide that information. Similarly, there is no information available as to how many other lands - lands that originally may have been konohiki lands or government lands subsequently sold to Hawaiian families - are currently owned by Native Hawaiians. Although it is undoubtedly true that many Native Hawaiian lands have been lost as a result of adverse possession, there are no hard and fast figures that show the extent of the these losses [sic]. NHLC's experience indicates, however, that virtually every quiet title action contains a claim of

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adverse possession. Similarly, since most land titles in Hawai‘i were originally awarded to Native Hawaiians, most quiet title actions name Hawaiians and their heirs as defendants.

The report supports the “non-adversarial resolution of Native Hawaiian family land titles,” because “most Native Hawaiians do not have the economic means to properly defend their aboriginal claims in a formal court” (HCR No. 145, HD 1, 1991). It goes on to state that most of the quiet title actions filed in the period 1987 to 1991 were by large corporations, including Hamakua Sugar Co., Pioneer Mill Co., Mauna Kea Agribusiness, Wailuku Agribusiness, and Hana Ranch, and the total acreage involved was over 7000 acres. The report cites Levy's (1975) contention that the dilemma faced by Native Hawaiian families is “fractionated interests,” which creates title “so clouded that ownership is perceived as temporary” (NHLC, 1992, 6). This created a collective action problem in the paying of taxes, which, in turn, could lead to tax liens and foreclosure.

There were particular sections in the law that dealt with adverse possession when it came to Land Court registered properties. In these sections, the Court was positioned in virtual opposition to adverse possession, likely because the Land Court was established to prevent Hawaiian claims against land. HRS §501-87 holds that “no title, right, or interest in, to or across registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.” HRS §501-186 provides a process for adverse claims against land court registered property, holding that “whosoever claims any right of interest in registered land adverse to the registered owner arising subsequent to the date of original registration may …make a statement in writing setting forth fully the alleged right or interest, and how or under whom acquired … and a description of the
land in which the right or interest is claimed … This statement is entitle to registration as an adverse claim.” However, “if the claim is adjudged to be invalid … the registration shall be canceled.” Further, the statute gives the court a punitive power, holding that if the court finds the adverse claim to be “frivolous or vexatious, it may tax the adverse claimant double costs.” And as Stauffer (2004) notes, no Land Court title has ever been overturned. Thus, in the case of Land Court registered properties, the burdens are arranged in a manner that is opposite of a normal quiet title action. All of this can be read as a means of facilitating the general and gradual transfer of land from native Hawaiians to landed corporate interests, or in the particular case of the Land Court, to prevent its return. The government also seized land directly.

**Government Confiscation**

Confiscation of the ceded lands by the US Federal government began immediately after annexation. On September 28, 1899, an executive order issued by President McKinley suspended any transactions pertaining to the public lands of Hawai‘i by the still-functioning Republic of Hawai‘i.\(^3\) This was after annexation but before the Organic Act that created the territorial government. It was in response to a report that recommended confiscation because much of the land desired for military purposes was held under leases that would not expire until the 1920s. The report recommended that the current sites of Schofield Barracks and Fort Schafter on the island of Oahu be obtained through condemnation procedures. Five such executive orders were issued between 1898 and 1900 securing land for military purposes, and, according to the dissenting report of

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\(^3\) The Organic Act, which organized the Territorial government, passed in 1900, thus the Republic continued as a de facto government from mid-1898 until 1900.
the Native Hawaiians Study Commission (1983), “the military has made extensive use of Hawai‘i’s public lands ever since.” (US. Native Hawaiians Study Commission 2: 109)\textsuperscript{84}

According to Melody K. MacKenzie (1991, 27), by the time Hawai‘i became a state in 1959, the Federal government had “set aside” 287,078 acres of public lands, of which 60,000 acres were used by the military. In her footnotes, MacKenzie (1991, 40) reveals that these lands were in fact seized through executive orders, and the remainder were in National Parks (1991, 27). An additional 28,000 acres were obtained in fee through purchase or condemnation. And finally, 117,000 acres were held under permits and licenses (US. Native Hawaiians Study Commission. 2: 109). Upon statehood, 87,000 of these acres were retained by the Federal Government, while 30,000 of these acres were retained through leases of $1 for each lease for 65 years (US. Native Hawaiians Study Commission 2: 117). Included in this acreage is Mākua valley, used since World War II as a live fire military training area, and considered in depth in a later section of this chapter. The Hawai‘i state government has withdrawn 13,000 acres from the Hawaiian Homes trust through Governor’s Executive Orders (GEOs), primarily for game reserves, forest conservation, military, airports, and public services (US. Native Hawaiians Study Commission 1: 384).

In addition to these seizures of large parcels of land, the government has for many years evicted Native Hawaiians from land over which title was in dispute. Examples of this include the Pai Ohana in Kona; evicted when the National Park Service bought the land the family was caretakers of (LaDuke, 1999, 168). This is discussed in the section on government land purchase. Another example is the ongoing threat of eviction of the

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Viernes family, a Kanaka Maoli Ohana tending to the sacred sites of Ka Lae, Hawai‘i Island. The Department of Hawaiian Home Lands threatened to evict the family after a caretaking agreement had expired, but organized resistance prevented the eviction temporarily. Another ongoing case of eviction is the Lui family in Kawa'a, Kaʻū, which I discuss in my conclusion.

**Erasure**

As stated earlier, the Māhele was executed without maps. The device for recording land was *names*. Western naming practices, in contrast, were predicated on mapping, and had the effect of overwriting the very device used to conceptualize and divide land. As Shapiro (2004, 114) notes, “historically, the map precedes the landscape of property as national representation in Britain.” A similar form of overwriting facilitated erasure of Hawaiian land claims.

In Hawai‘i, there was resistance to the violence of mapping. Under Kamehameha V, surveying had to take into account the “palena,” or knowledge of kamaʻāina, natives of the place (see Beamer and Duarte, 2006). This was in contrast to the prevalent grid system, which failed to take into account landscape and histories on land. Earlier, the Māhele was executed without maps, relying only on palena, native knowledge of what names of ʻāina, or “lands,” meant. By a simple name, it was understood whether an ahupua’a, ili, or smaller subdivision was being referred to. Later, as some features of landscape were erased for plantations, the markers and eventually, palena, disappeared.

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85 Jashua Viernes, Personal Interview, Jan. 12, 2002.
Lydgate (1915, 107) also puts into question received notions of alienation, positing a process of erasure as in this example:

The meritous attractions of the town … lured away the country people … The Kuleana was deserted, or rented out to other parties … Once having passed into the possession of a plantation, whether by lease or purchase the bounds and identity of the Kuleana were gone. The boundary hedges, or fences, were cut down, the ku-aunas or dykes, were leveled off, the ditches were filled up, the fruit trees sacrificed, and when the middle-aged owner came back from Honolulu to see the place which was dear to him since childhood, he simply couldn’t find it! All he could be sure of was, ‘It was somewhere in that great field of cane or rice!’ Or, when later on, his children came back to find the ancestral estate, there was no longer any one to tell them where it was. … In the early days every man woman and child could have told you where [particular lands were], but now nobody knew.

Trained as a minister, Lydgate’s background included positions as “first assistant on Government Survey, 1869” and tax assessor for the island of Kaua‘i (Siddal, 1917, 182-183). As with Alexander, Lydgate is implicated by his position as manager of Laupahoehoe and McBryde sugar companies. He was also editor of the Garden Island newspaper. Lydgate’s work is not mentioned in later histories of the Māhele. Later commentators would examine this procedure with less of a stake in the process, but an increasingly detached position from it. Thus native agency was surrendered to the encroaching codification of land, as were cultural symbols embedded in the disappearing palena.
While generally I contest, with Preza (2010), the notion that the Māhele itself was a cause of alienation, a type of erasure did sometimes occur in the process. Nehemia Hoʻoliliamanu, who relinquished half and “received” half of the ili of Anana in Waimalu, Oʻahu, is simply listed as having “no award for Waimalu.” It is noted that “no record of any transaction on land named Anana, ili of Waimalu was found in Archives files” (Barrere, 1994, 58). So while Hoʻoliliamanu is listed in the Buke Mahele (89-90), the ʻāina he named was not identified. The process of using names as the sole identifying markers of ʻāina may thus have been problematic, as it seems to have caused many boundary disputes. Naming also constituted a method of possession.

**Naming**

Naming was intimately bound up with mapmaking. The acts of naming and renaming have a multiplicity of meanings and intents, but in the imposition of a “moral” or “amoral” economy, its intents are often to facilitate the possession of places. Dening notes James Cook’s dubious naming practices in Aotearoa/New Zealand and Australia. Cook named places such as “Poverty Bay” or “Murderer’s Bay,” based on his experiences in those areas, or at times in blatant obsequiousness to his patron, the Earl of Sandwich. Basso (1996, 143) theorizes sense of place as an active faculty:

Sense of place, as I have made it out, is neither biological imperative, aid to emotional stability, nor means to group cohesiveness. What it is, as N. Scott Momaday (1976) has suggested, is a kind of imaginative experience, a species of involvement with the natural and social environment, a way of appropriating portions of the earth … Removed from the spectral realm of scholastic
reifications—needs attributes, mechanisms and the like—sense of place can be seen as a commonplace occurrence, as an ordinary way of engaging one’s surroundings and finding them significant. [As] Camus … said it … ‘sense of place … is something people do.’

An example of traditional Hawaiian naming practices was given by Joseph Poepoe in 1906. At the peak of the sandalwood trade (ca. 1820) Hawaiians took on names related to the practice of gathering sandalwood:

Mamuli o keia pii ana o na kanaka i ke kua laau ala, i loaa mai ai kekahi mau inoa e o nei maluna o kekahi poe e ola nei i keia wa a i hala aku paha elike me Kalaau ala (no ke ala o ka laau iliahi) Kekuailiaiahi (no ke kua a no ke koi ana i ka iliahi) Kaleookekoi (No ke kani o ka leo o ke koi i ke oki a kua ana i ka iliahi); Kailiahi (ka inoa nohoi ia o ua laau ala nei) a me na inoa e ae he nui.

[Because of the climbing of the people to cut the fragrant wood, names were obtained by which those people who lived at that time were called who have passed on like: The fragrant wood (because of the smell of the sandalwood), The Sandalwood cutter (for the cutting and the adzing of the sandalwood), The Voice of the adze (for the sound of the voice of the adze when it chopped and felled the sandalwood); The Sandalwood (another name for the fragrant wood). [My translation, emendations: N.K. Silva]

Thus names were historically situated, and, in genealogical fashion, no contradiction was seen in the existence of multiple names or in the overwriting of one name with another.

While consistent with this practice, names such as Barber’s Point (Kalaeloa), named for captain Henry Barber whose ship was grounded in 1796 (Pukui, Elbert and
Moʻokini, 1974, 17), Hawaiʻi Kai (Maunalua), named for the developer Henry Kaiser, Portlock and LaPerouse (Lāhaina, Maui), both named for ship captains in 1786 (Pukui, Elbert and Moʻokini, 1974, 129, 190), still serve to sever the Hawaiian sense of place and meanings attached to the original names. Even the names of surfing breaks have the effect of marking recent, rather than historical, events and structures: Ala Moana Bowls, for example, refers to the lawn bowling facility immediately onshore. In contrast, many of the traditional place names in Kamakau’s *Ruling Chiefs of Hawaiʻi* are unfamiliar and unrecognizable today.

But as Samuel Elbert (1974, x) noted in *Place Names of Hawaiʻi*, these names “are far from static.” In the children’s book *Kohala Kuamoʻo*, (Kawaiʻa, 2010) the Kawaiʻaeʻa family shows how place names in Kohala derived from the chief Naeʻole’s flight to save the infant Kamehameha. This means that previously, there were different names for these areas. While 86 percent of Hawaiʻi place names are in Hawaiian (Elbert, 1974, xi -xii), “place names are in daily use, but their meanings are only known to experts and in many cases not even to them. Furthermore, most of the stories behind the names have been lost, distorted and sentimentalized.”

Erasure can take plural forms. Sydney ʻIaukea’s (2010) story is one in which inherited land does not leave the family, but part of the family is effectively disinherited by another part. Land is these cases can be “hidden” – she documents how Curtis ʻIaukea transferred land to his wife through an intermediary in order to hide its ownership – or sold by one faction of a family to the detriment of another. Land disputes, then, often occur within families, not merely between families and other entities, such as government or corporate interests. Names both identify and obscure a sense of place necessary for the
prevention of the alienation of land. An examination of other contexts sheds some light on the processes of the “transfer” of control of land in Hawai‘i. I focus in the following sections mainly on government controlled lands – the Crown lands, and the military-controlled areas of Kaho‘olawe and Mākua.

**Case Studies**

**The Crown Lands of Hawai‘i**

In the 2009 US Supreme Court (SCOTUS) case *State of Hawai‘i v. Office of Hawaiian Affairs*, Justice Alito summed up the Court’s view of the State of Hawai‘i’s title to “ceded” lands:  

After the overthrow of the Hawaiian monarchy in 1893, Congress annexed the Territory of Hawaii pursuant to the Newlands Resolution, *under which* Hawaii ceded to the United States the ‘absolute fee’ and ownership of all public, government, and crown lands. In 1959, the Admission Act made Hawaii a State, granting it ‘all the public lands...held by the United States,’ §5(b), and requiring these lands, ‘together with the proceeds from [their] sale...[to] be held by [the] State as a public trust,’ §5(f). [Italics mine] (*Hawaii v. Office of Hawaiian Affairs*, 2009).

This sequence, said to comprise part of the chain of title to ceded lands, is logically and legally fallacious, and thus constitutes a rupture in the narrative surrounding these lands.

In real estate law, two basic terms denote the parties on each side of a land transaction: grantor, “the person transferring title to, or an interest in, real property;” and grantee, “the person who receives from the grantor a grant of real property” (Reilly, 150 – 151). It is
noted in the definition of grantee that “a grantor cannot convey title to himself alone” (150). It is self-evident, then, that a grantee cannot transfer a grantor’s title to “him”self. Yet this is what the SCOTUS claimed was done when it stated that “Congress annexed the territory of Hawaii pursuant to the Newlands Resolution, under which Hawaii ceded to the United States the ‘absolute fee’ and ownership of all public, government, and crown lands.” Congress was both grantor and grantee of the ceded lands in this case. Putting aside for the moment that the Newlands Resolution was not a treaty, and that Congress cannot annex territory, this assertion defies the basic logic and law of real estate transactions.

The Republic of Hawai‘i, ostensibly the grantor of these lands, was the successor to a government (the Provisional Government) called “self-proclaimed” and “ow[ing] its existence to the United States” by President Grover Cleveland (Affairs in Hawai‘i, 1893), and was thus an extension of the US government itself. As the duty of foreign affairs lies with the executive branch of the US government (President Cleveland), Congress’s failure to support the restoration of Queen Lili‘uokalani does not constitute a change in US policy, nor legitimate the Republic of Hawai‘i, which remained, as Cleveland put it, “self-proclaimed.” As Public Law 103-150, the 1993 “Apology Resolution,” states, “the Provisional Government was able to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy.” There was therefore no grantor of these lands, and only a grantee “convey[ing] title to himself alone.”

In addition to this larger politico-legal question, within Hawai‘i real estate law there are several factors that could be used by the Hawai‘i Supreme Court, upon remand, to block or restrict the sale of ceded lands. These include: various potential breaks in the
chain of title to the ceded lands; a possible acknowledgement by the US Federal
government of clouded title in the transfer of Kahoʻolawe to the state by quitclaim deed;
and the concept of native tenant rights, which constitute an encumbrance on all land in
Hawaii, including the ceded lands. It is significant that the Crown land portion of the
ceded land trust was private land. As Chinen, (1958, 16) states, “the lands of King
Kamehameha III were to be recorded in the same book as all other allodial [fee simple]
titles … as a means of protecting his private lands in the event of an invasion.” Following
a chart documenting the ostensible chain of title to Crown lands and an analysis of
potential breaks in title, I offer a historical examination of the ceded lands with the
intention of addressing the discrepancies underlying recent ceded lands cases, address
remaining challenges, and conclude with a summary of the challenges to the State of
Hawaii’s title to the ceded lands.

SEQUENCE OF CROWN LANDS CONTROL
(Van Dyke, 2008, “owners” in bold, related events in brackets)

[1848 MĀHELE]

1848 KAMEHAMEHA III

1854 KAMEHAMEHA IV

[1863 In the matter of the Estate of His Majesty Kamehameha IV –
CONVERTS CROWN LANDS TO LIFE ESTATE?]

1863 KAMEHAMEHA V

[1865 STATUTE MAKING THE CROWN LANDS INALIENABLE]

1872 LUNALILO

1874 KALĀKAUA
There are several potential breaks in the preceding chain of title to Crown lands. Some of these involve international law, while others can be shown using domestic real
estate law. A primary factor in the series of “ceded” lands cases, most recently *State of Hawai‘i v. Office of Hawaiian Affairs*, is the question of whether the state actually has title to the ceded lands. Examination of the chain of title can [determine] or at least shed doubt on title. Avoiding for the moment the breaks based on international law, namely, the 1893 overthrow and 1898 transfer of the “sovereignty and property of the government of the Hawaiian Islands” (Coffman, 1998, 315), there are critical ruptures in the sequence above, the most fundamental of which involves the definition of “ceded” lands. Merriam-Webster’s Dictionary ([http://www.merriam-webster.com/dictionary/cede](http://www.merriam-webster.com/dictionary/cede)) defines the term “cede” as “to yield or grant typically by treaty” [emphasis mine]. The term “ceded” implies cession, or voluntary transfer of land by treaty (see also Ballentine’s Law Dictionary, 1969). Because no treaty or cession of lands took place in the case of Hawai‘i, “ceded lands” is an inaccurate name for the former Crown and government lands of the Hawaiian Kingdom. As the Apology Resolution states: the Provisional government “was unable to rally the support from two-thirds of the Senate needed to ratify a treaty of annexation.”

In an undated letter (HMCS) Dole states that “by the constitution of the Republic of Hawaii the Crown lands were placed on the same footing as government lands and have ever since been administered under the same laws. The area of Crown lands in 1894 was 971,463 acres; the area of government lands at the same time was 821,316 acres...” Dole considered the Crown lands part of the “entailed inheritance from former administrations” (Damon, 1957, 326).

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87 Hawaiian Mission Childrens’ Society Library and Archive.
In an 1895 article in *Overland Monthly* entitled “Evolution of Hawaiian Land Titles,” Dole attempts to obscure the distinction between Crown and government lands:

The principles adopted by the land commission use the words King and government interchangeably, and failed to reach any adjudication of the separate rights of the King in distinction from those of the government in the public domain, or in other words they failed to define the King’s public or official interests in distinction from his private rights, although they fully recognized the distinction. The Commission decided that the authority coming from the King to award lands represented only his private interests in the lands claimed. Therefore ... it follows that the King’s private interest was an undivided two-thirds, leaving an undivided one third belonging to the government as such.

As a Supreme Court judge of the Hawaiian Kingdom who became leader of the *coup* against the Kingdom, Dole was in a delicate situation – using his legal expertise to explain the land tenure system was meant to obscure the fact that he benefitted from confusion over its function. The King and government were “interchangable” in the sense that the King as head of state administered the government lands, but it is quite clear that *as a private individual* the King’s lands – the Crown lands – were meant to be his private property, and difficulties only arose upon their transfer from his heir, Alexander Liholiho to Lot Kapuaiwa, Kamehameha V.

In the Kingdom era foreigners continually pressured the King for more land. After the Māhele, much of the King’s private lands were sold to pay off his debts. In 1865, the legislature came to the aid of King Kamehameha V declaring his land inalienable, and
floating bonds to pay the debt that was both inherited and accumulated during his reign. This prevented the alienation of Crown lands before the overthrow. Kamehameha III had already declared the Crown Lands “inviolable” in the 1852 Constitution: “Paukū 41. Ua kapu loa ko ka Mōʻī mau ʻāina pono‘ī a me kona waiwai ʻē aʻe.” [Article 41. The King's private lands and other property are inviolable.]

Dole’s view above contradicts the Act of the 1865 Hawaiian Kingdom legislature that made the Crown lands inalienable. On January 3, 1865 the Kingdom Legislature passed “An Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable” (Van Dyke, 2008, 90). This law “pa[id] off the debts and extinguished the remaining mortgages left unsatisfied by the Estate of Kamehameha IV” (Van Dyke, 2008, 90). Finally the law declared that the Crown lands would “be henceforth inalienable, and shall descend to the heirs and successors forever” (Van Dyke, 2008, 90).

The law also established the Crown Lands Commission, whose minutes are comprised almost entirely of discussions of leases of Crown lands. Leases appear to increase exponentially after the Bayonet Constitution of 1887 (Minutes of the Crown Lands Commission, AH, Series 367). After 1887, the Crown Lands Commission appeared to be involved in some questionable transactions. A strategy to circumvent the inalienability of Crown lands seemed to emerge in 1889. A letter from Francis Hatch to Samuel M. Damon on November 11, 1889 notes that while “no act of the Commissioners can affect the title to any of those [Crown] lands [as] they have been made inalienable by

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the legislature … the lands unfortunately are not included in that schedule [the list of
Crown lands]. A November 9th, 1889 letter From Hatch to Lorrin Thurston read:

In accordance with the agreement arrived at verbally between us on yesterday and
in order to settle the dispute pending between us as to title to the lands below
named, we as Commissioners of Crown Lands hereby surrender to you the
following lands, *we being advised that we have no legal title to the same*
[emphasis mine]:

<table>
<thead>
<tr>
<th>Name of Land</th>
<th>Locality</th>
<th>Island</th>
<th>Area</th>
<th>Lessee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hakalau iki</td>
<td>Hilo</td>
<td>Hawaii</td>
<td>614 ac</td>
<td>C. Spreckels</td>
</tr>
<tr>
<td>Manowaiopae</td>
<td>Hilo</td>
<td>Hawaii</td>
<td>180 ac</td>
<td>W. Lydgate</td>
</tr>
<tr>
<td>Waiaha</td>
<td>Kona</td>
<td>Hawaii</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paomai</td>
<td>Lanai</td>
<td></td>
<td>9078 ac</td>
<td>W.M. Gibson</td>
</tr>
<tr>
<td>Kamoku</td>
<td>Lanai</td>
<td></td>
<td>8291 ac</td>
<td>WM Gibson</td>
</tr>
<tr>
<td>Kalulu</td>
<td>Lanai</td>
<td></td>
<td>6078 ac</td>
<td>WM Gibson</td>
</tr>
<tr>
<td>Kapaakea</td>
<td>Kona</td>
<td>Molokai</td>
<td>2178 ac</td>
<td>CR Bishop</td>
</tr>
<tr>
<td>Kuliouou iki</td>
<td>Kona</td>
<td>Oahu</td>
<td>400 ac</td>
<td>M. Paiko</td>
</tr>
<tr>
<td>Keaau</td>
<td>Waianae</td>
<td>Oahu</td>
<td>2431 ac</td>
<td>M Kawelo</td>
</tr>
<tr>
<td>Waiohuli</td>
<td>Kula</td>
<td>Maui</td>
<td>10734 ac</td>
<td>Wailuku</td>
</tr>
</tbody>
</table>

(Sugar Co.

(Minutes of the Crown Land Commission Meetings, vol 2, AH, Series 367)

At least one of these lands, Keaau in Wai‘anae, O‘ahu, can be found on this list of
Crown lands, as part of the ahupua‘a of Wai‘anae, the entirety of which was originally
Crown lands.
Some potential breaks remain, such as those brought to light by the 1910 case *Liliʻuokalani v. United States*, which suggested that the queen was the private owner of the Crown lands. The result, in favor of the United States in a US court, and examined below, may have been a legal fiction. According to Black’s Law Dictionary (2004, 804), legal fictions are “facts or situations assumed or created by courts which are then used to resolve matters before them.” These fictions are held to be more prevalent in common law countries, and are not seen as necessarily harmful, but rather as a means of bridging untenable positions in the law. The notion that the Crown lands are private is not especially controversial, and is attested to by the fact that Kamehameha IV’s account book of the Crown lands is entitled *Kamehameha IV Private Lands* (AH).

More than a decade after the overthrow, in 1910, Liliʻuokalani sued the US for the confiscation of the Crown Lands:

According to [Liliʻuokalani’s attorney Sidney M.] Ballou’s argument,

Hawaiʻi’s history and laws established that the Crown lands, which previously were the fee simple private lands of Kauikeaouli (Kamehameha III), had evolved into a ‘vested equitable life interest’ held by the reigning Monarch. This life interest, or ‘life estate,’ he argued, entitled each Monarch to the use and the revenues of the Crown Lands for the duration of the Monarch’s life (Van Dyke, 2008, 230).

Ballou “urged that … when the United States acquired legal title to the Crown Lands, it also acquired notice of the existing trust and became a trustee for the beneficiary, Liliʻuokalani” (Van Dyke, 2008, 230).
This argument rests on the claim that the US actually obtained the dominium (or territorial sovereignty) of the Hawaiian Kingdom. Even Van Dyke notes this inconsistency:

“It is also significant to note … that Ballou [Liliʻuokalani’s attorney] invoked international law principles in his arguments on behalf of the former Queen. He cited Chief Justice John Marshall’s decision in United States v. Percheman, for the proposition that “even in cases of conquest,” “[t]he modern usage of nations, which has become law, would be violated … and … the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled” (Van Dyke, 2008, 231).

The US Supreme Court ruled, using Kingdom law from In re Estate of Kamehameha IV, that rather than a life estate, the Crown lands “belonged to the office and not to the individual” and were “designed to provide the support and maintenance of the Crown” (Van Dyke, 2008, 232). Apart from the self-interest that is apparent in this case, this ruling is a reminder of the contingent use of Kingdom law by the US when it is convenient to do so. Had Queen Emma prevailed against Lot Kapuaiwa in 1864, the Supreme Court would likely have argued differently instead of praising Hawaiʻi Supreme Court Justice Robertson’s “exhaustive” and “exceedingly able opinion” (Van Dyke, 2008, 232). Certainly Robertson’s self-interest in supporting Lot Kapuaiwa was convenient for his position in relation to the King.

Liliʻuokalani v. United States broaches questions as to the status of the Crown lands within the ceded lands trust. As John Wise (1965, 83) described the case, Liliʻuokalani’s claim to the Crown lands “was refused, on the ground that if some
members of the royal house had been placed on the throne when the queen was deposed, the revenues would have gone to the new ruler, and that this was still the case though the form of government had been changed.” This is specious logic, because while the status of the Crown lands may have been somewhat different from fee-simple, they must have at minimum assumed the status of a life estate.

How were the Queen’s private rights to be “annulled,” as Ballou argued then, without exercising eminent domain? Neither the US Federal government, nor the Territory of Hawai‘i ever claimed to have exercised eminent domain. The lands are claimed to have been ceded by the Newlands Resolution alone. If, in fact, the Newlands Resolution had annexed Hawai‘i (I contend it did not), it would only convey the dominium to Hawai‘i’s land, and perhaps the fee to the government lands, but not the fee to the monarch’s private lands. As seen in the oral arguments in Hawai‘i v. Office of Hawaiian Affairs (2009), the State of Hawai‘i itself comes close to acknowledging the possibility that its title is clouded.

Attorney General Mark Bennett brought the issue of the State’s title to the ceded lands before the SCOTUS, stating “the Hawaii [sic] Supreme Court said there are questions regarding the title to the State’s ceded lands,” to which Justice Ginsburg replied “there may well be…” (Hawai‘i v. Office of Hawaiian Affairs, 2009). Bennett also evoked the deeper question in his oral argument over the nature of the State of Hawai‘i’s sovereign authority, stating: “the question presented talks about whether the Apology Resolution changed in any way the State's sovereign authority, and that question -- certainly anterior and predicate to an intelligent resolution of that question is the nature of the State sovereign” (Hawaii v. Office of Hawaiian Affairs, 2009). While the Attorney
General framed the question in terms of the Apology Resolution’s effect on the State’s sovereignty, it is possible that he was also alluding to claims of the State’s illegitimacy under international law. The most likely intent of this argument is to entice the Court to affirm the State of Hawai‘i’s sovereign authority in light of the multiple challenges to it from the Hawaiian community citing international law. Despite these questions over the State’s title, it went ahead with a plan to develop ceded lands.

In 2011, Governor Abercrombie signed Act 55 creating the Public Land Development Corporation, a quasi-public entity similar to a utility, given the authority to "develop" ceded lands. According to the Governor's website, the PLDC is:

a state entity whose purpose is to create and facilitate partnerships between state and county agencies, businesses, non-profits, and community groups to improve Hawai‘i’s communities, create jobs and expand public benefit through stewardship and responsible use of land resources. Ultimately, the PLDC seeks to make Hawai‘i’s lands better for Hawai‘i’s people.

The Governor's website assured voters that the entity would have to pay "a share" of its revenue to OHA, and that it would not be able to sell ceded lands. But this restriction was only initial and tentative. According to the governor's website:

The initial premise is that title will remain with the respective agency and only the development rights will transfer over to the PLDC; therefore, the PLDC cannot sell the fee title to any of the lands. If the respective title agency transfers the fee title to the PLDC, the PLDC may sell title, subject to the same restrictions as other state agencies (http://governor.hawaii.gov/)
By couching the restrictions in terms of relations between State agencies, the statement obscures the fundamental issue, which was addressed (though not resolved) by the 2009 OHA v. State of Hawaiʻi case in the SCOTUS - the issue of whether or not the State "owns" the ceded lands, either in fee simple or even by dominium. DLNR's website is even more obscure on the topic of the PLDC, focusing on the number of the original bill, and how board members are appointed. The five members represent DLNR, the Department of Business, Economic Development and Tourism (DBEDT), and the Department of Budget and Finance, and two include political appointments.

The PLDC's process is an involved one, with 16 steps merely leading to the "announcement of partnership." In recent hearings on Hawaiʻi and Oʻahu, community feedback was extremely critical of the PLDC's seeming stealth. Community members felt that the public had not been sufficiently notified of its creation before it began operation. Its activities will need to be carefully monitored to ensure that its stealth does not undermine the frail hold that Hawaiians, and Hawaiʻi's people have on the "public lands." The creation of the PLDC sparked protests and on November 23, 2012, Governor Abercrombie directed the agency to take all concerns into account before adopting rules.

In terms of international law, potential breaks in the chain of title exist at the points of the overthrow and annexation, and addressing them is nearly unavoidable even if one is to remain within the realm of domestic law. This is seen in the very definition of title search, in which ownership of land is verified by “start[ing] at the present owner and … search[ing] backwards in chronological order … until reaching when he [the present owner] acquired title … The process continues until the chain [of title] is complete to the
“soverign” [sic, emphasis mine] (Beasley, 2000, 129). This process of title search, which is standard in the State of Hawai‘i and all other US states, shows the sovereign has dominium – is the original owner – and thus title is, in some respects, also a matter of international law. Clouded title illustrates the genealogical nature of land title in Hawai‘i. The metaphor of the “cloud” shows the “gray” origin of titles and subsequent transactions. This cloud also affects title on the domestic level, as seen in the example of the “return” of Kaho’olawe from the Federal government to the State of Hawai‘i.

**Kaho’olawe**

One example of the cloud on the State’s title and of the undefined boundary between “domestic” and international law is the case of Kaho’olawe. “Seized under martial law” (MacKenzie, Native Hawaiian Rights Handbook, 1991, 30) in 1941 by the US Navy, the island was held for nearly 50 years as a bombing range, until pressure from Hawaiian activist groups caused the island to be “returned” to the state. According to the “Stewardship Agreement Pertaining to the Kaho’olawe Island Reserve:”

> on May 7, 1994, Kaho’olawe was returned to the State by ‘Quitclaim Deed from the United States of America To The State of Hawai‘i For the Island of Kaho’olawe, Hawai‘i,’ pursuant to Title X of Public Law 103-139, 107 Stat. 1418, 1479-1484.”

A quitclaim deed is:

> A deed of conveyance which operates, in effect, as a release of whatever interest the grantor has in the property; sometimes called a release deed. The grantee [receiver of granted property] takes the property ‘as is.’ The *quitclaim deed*
contains similar language to a deed, with the exception that rather than using words of ‘grant and release,’ it contains language such as ‘remise, release, and quitclaim.’ The grantor therefore does not warrant title or possession. He only passes whatever interest he may have ‘if any.’ In effect, he forever quits whatever claim he has in the property and the deed effectively closes the claim, if in fact any existed … the quitclaim deed transfers only whatever right, title and interest the grantor had at the time of the execution of the deed and does not pass to the grantee any title or interest subsequently acquired by the grantor. Thus the grantee cannot claim a right to any after-acquired title [italics original] (Reilly, 1975, 270).

A quitclaim deed is, therefore, acknowledgement of the possibility of clouded title.

Normally, real estate is transferred via a warranty deed:

A deed in which the grantor fully warrants good clear title to the premises [or property]. Also called a general warranty deed. The usual covenants of title are:

covenant of seisin⁹¹, covenant of quiet enjoyment, covenant against encumbrances,⁹² covenant of right to convey, and covenant of further assurance.

A warranty deed is used in most Hawai‘i real estate deed transfers (Reilly, 1975, 363).

The reason warranty deeds are “used in most Hawai‘i real estate transactions” is that land held by a quitclaim deed cannot be insured, and is essentially undevelopable.

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⁹¹ “(Also spelled ‘seizen’) Actual possession of property by one who claims rightful ownership of a freehold therein. A person is seized of property when he is in rightful possession with the intention of claiming a freehold estate” (Reilly, 1975, 304). Freehold is “an estate in real property, the exact termination date of which is unknown. Freehold estates may be categorized as ‘estates of inheritance’, such as fee simple, and lesser ‘estates for life’” [life estates] (Reilly, 1975, 141).

⁹² See section on PASH, native tenant rights and gathering rights below.
Further, the covenants involved may have prevented the US Federal Government from issuing a warranty deed. As the Hawai‘i v. OHA case itself shows, the State’s title (derived from the Federal government) is questionable, thus the covenant of seisin would be difficult to guarantee. The same is true, by derivation, of the covenants of right to convey and further assurance, which “obligates the grantor to perform any[?] act necessary to perfect the title in the grantee” (Reilly, 1975, 80). All of this strongly suggests that the US Federal Government was aware it did not receive valid title to the ceded lands at the time of annexation. This was not the only course of action available to the Federal Government – it could have issued a warranty deed, which the Territory [did] regularly, and which may or may not have been a legal fiction. The Federal government’s decision not to issue a fictional warranty deed makes the case even stronger that it did not in fact have clear title to the Crown and government lands.

Mākua

Mākua makes for a manageable study, because of its relatively small size (13 land commission awards, totaling 111 acres), and population, which in 1855 included only 21 male taxpayers for an estimated population of 85 and 105 (Kelly, 1977, 36; McGrath, Brewer and Krauss, 1973, 29; Cordy, 2002, 119). What is usually called Mākua valley is actually two valleys, Mākua and Kahanahāiki (Cordy, 2002, 115). An invaluable study by Marion Kelly (1977) conducted for the US Army, shows how complex a history of land transactions can be even in a small area. The study shows that of the original land awardees, all of whom have Hawaiian names, most claimed inheritance from their fathers (Kelly, 1977, 35).
From these Lincoln McCandless acquired 15 parcels, most indirectly from others such as Samuel Andrews, a rancher in Mākua from 1869 (Kelly, 1977, 48; McGrath, Brewer and Krauss, 1973, 31). This was in addition to a government lease over 2000 acres, which, at one point was nearly converted to fee simple title. McCandless made his fortune drilling for sugar plantations and is most noted for the construction of the Waiāhole tunnel and ditch system.

The Mākua case shows that land holdings were not only complex but also insecure. McCandless’s holding were a complex “bundle” of fee simple holdings, leases and partial interests such as mortgages held on other owners’ properties. The Mākua Kuleana awards show place names that are more specific than those normally used today and award sizes larger than the commonly cited 3 acres.

Kuleana Awards in Mākua

<table>
<thead>
<tr>
<th>Awardee</th>
<th>Award No.</th>
<th>Acres</th>
<th>Place</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hoewaa</td>
<td>975</td>
<td>14.931</td>
<td>Haunouli</td>
</tr>
<tr>
<td>Kalama</td>
<td>236-K</td>
<td>3.136</td>
<td>Haunouli</td>
</tr>
<tr>
<td>Kuli</td>
<td>9709</td>
<td>14.967</td>
<td>Kaawa</td>
</tr>
<tr>
<td>Kawaa for Mauna</td>
<td>9054</td>
<td>18.1</td>
<td>Kalena</td>
</tr>
<tr>
<td>Napuupaa</td>
<td>6132</td>
<td>8.889</td>
<td>Kamakaakuholu</td>
</tr>
<tr>
<td>Kahueai</td>
<td>9052</td>
<td>7.680</td>
<td>Kaohai</td>
</tr>
<tr>
<td>Kauhi</td>
<td>9706</td>
<td>.690</td>
<td>Kaolekea</td>
</tr>
<tr>
<td>Kauhi</td>
<td>9706</td>
<td>.380</td>
<td>Kihanau</td>
</tr>
<tr>
<td>Puuiwa</td>
<td>9707</td>
<td>6.336</td>
<td>Kihanau</td>
</tr>
<tr>
<td>Kauhi</td>
<td>9706</td>
<td>10.260</td>
<td>Koiahi</td>
</tr>
<tr>
<td>Pulu</td>
<td>9708</td>
<td>7.100</td>
<td>Koiahi</td>
</tr>
<tr>
<td>---------</td>
<td>------</td>
<td>-------</td>
<td>--------</td>
</tr>
<tr>
<td>Keolohua</td>
<td>9053</td>
<td>21.922</td>
<td>Kulaelawa</td>
</tr>
<tr>
<td>Pulu</td>
<td>9708</td>
<td>5.996</td>
<td>Lanui</td>
</tr>
</tbody>
</table>

By 1908, McCandless had acquired lands of Kuli, Kauhi, Puiwa (from S. Andrews), Pulu, and Hoewaa, between 1899 and 1907 (Kelly, 1977, 48). Acreages are not given for these lands. This case study sheds light on the recent struggles to stop military live-fire training in the valley, as it shows the contested nature of the lands upon which training occurred (Ferguson and Turnbull, 1995), and suggests government liability for violation of usufruct.

Activism from the 1970s through the 2000s around stopping live-fire training at Mākua brought the small valley to the forefront in both the public eye and the emerging sovereignty movement (Burgess in Mast and Mast, 1996, 411). As MacKenzie (1991, 30) wrote, “Over 3000 acres of Mākua are lands set aside by the federal government and retained under section 5(d) of the Admission Act, while an additional 1500 acres are leased by the federal government from the state for a nominal fee.” Activists such as Kawaipuna Prejean in the 1970s, William Ailā in the 1990s and 2000s and others called for an end to the “target practice” (MacKenzie, 1991, 30) In 2010, live-fire training ceased under the Abercrombie administration and William Ailā, who was appointed Department of Land and Natural Resources director. Mākua remains a military training reservation, but serves as a potent symbol for Hawaiians that land struggles continue despite the return of Kaho‘olawe and other victories.
Remaining Challenges

Despite the numerous factors clouding the State’s title to ceded lands, some challenges remain. Ilya Shapiro, of the libertarian Cato Institute claimed, in a debate over the ceded lands case at the William S. Richardson School of Law (February 12, 2009), that the US Supreme Court has held that the United States does not need to recognize any cloud or encumbrance on title to land acquired through conquest. Further, as Van Dyke (2008, 212) notes:

the US Supreme Court gave tacit recognition to the legitimacy of the annexations of Texas and Hawai‘i when it said in DeLima v. Bidwell, 182 U.S. 1, 196 (1901), that ‘territory thus acquired [by conquest or treaty] is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress.’

However, while this argument ostensibly addresses the question over the legality of annexation from a US domestic perspective, it does not address the issue from the perspective of international law, which is the proper context for considering the extinguishing of sovereignty. A final possible refutation of my argument that native tenant rights remain intact is that a court could state that these rights are inconsistent with the common understanding of private property ownership in Hawai‘i. This argument, however, was pre-empted in the Kalipi case, in which the court stated the reverse – that common understandings of private ownership do not abridge native tenant rights. While these challenges problematize the Hawaiian case regarding ceded lands, the aforementioned factors, summarized below, constitute a potent Hawaiian claim to the ceded lands.
Conclusion

The SCOTUS claim that the State of Hawai‘i has clear title to the ceded lands is exceedingly problematic. As Van Dyke (2008) notes, there are many potential breaks in the chain of title to the ceded lands. These include: the original transfer of the Crown lands from the Republic to the United States by means of the Newlands Resolution, an act which violates the fundamental notion of grantor and grantee; the politicized case *Lili‘uokalani v. United States*, which argued for a strange status for the Crown lands and presumed an illegal method of transfer; the transfer of Kaho‘olawe by quitclaim deed, an act that tacitly acknowledges clouded title; and the notion of native tenant rights or kuleana, conflated with gathering rights as a diversion from the fact that Hawaiian retain a vested interest in land, quite apart from the 5(f) trust. This dubious title has been covered up by the perpetuation of misconceptions regarding land title and a land court established to perfect encumbered title. Despite remaining challenges to the Hawaiian case, any of these factors could be used by the Hawai‘i Supreme Court to create a block on the sale of ceded lands.

In the recent negotiations between the Office of Hawaiian Affairs (OHA) and the State of Hawai‘i over settlement of the issue of ceded lands revenue, both sides disregard the cloud that exists on title to ceded lands. As for privately owned lands, an implication of this chapter is the need for closer examination. This study has used several available case studies to garner general trends in land alienation, but there is a danger of extrapolating these finding too broadly, the need it points to is for extensive title research parcel by parcel. I suggest that the mechanisms in effect were private purchase,
government confiscation, legal mechanisms such as adverse possession, and erasure. But I do not suggest that this list is exhaustive – as this chapter has shown, the history of land transfers is complex, and other mechanisms may be enumerated as research continues on land alienation. Of the mechanisms listed, however, erasure may prove the most problematic as traditional knowledge (such as palena) knowledge is difficult to recover.

It is important to note that many of the laws that allowed essentially the legal theft of land were Kingdom laws, but often their application had more detrimental effects after the Bayonet Constitution of 1887 and overthrow of 1893, when Hawaiians lost control of the government. This point foreshadows one that I will examine briefly in the conclusion of this dissertation – the question is not what can the sovereign do to affect alienation, but which sovereign will do what to address alienation. The seemingly legal question of land ownership is again politicized.
HOPENA: CONCLUSION

In Kawa‘a, in the Ka‘u district, Hawai‘i Island, the Lui family has been struggling to obstruct the sale of ancestral land. Abel Lui and Ah Lui (who both also go by other names) have lived on a parcel of land for many years. In 2008, the County of Hawai‘i bought part of the parcel from “recognized” owner Ed Olson. The Lui family claim to be owners of undivided interests in the land, as descendants of Timoteo Keawe, who received the land in a Royal Patent. As fee-simple title passes to all the “heirs of [one’s] body,” not usually to a single owner, ownership of the Kawa‘a land is contested. The county is therefore enforcing a sale of which they are the beneficiaries. The Hawai‘i police and other agencies have harassed the Lui family, which in addition to their court battles, casts some suspicion on the county’s claim to the land. On October 25th, 2012, Lui was evicted from the land.

The issue of undivided title to land is common in Hawaiian land claims and creates disputes between Hawaiians. As in the Kawa‘a case, fractional land owners (owners of a fraction of the title, which is often divided between hundreds of owners) are paid nominal amounts, such as $1000, to settle their interests in these lands. The Lui family claim to be fractional owners who refuse to accept such payment. Their opponents hold that the Lui claim is based on a “hanging deed” – a land title that does not fit into the sequence of ownership. But as I have shown in this dissertation, the sequence of ownership of land in Hawai‘i is very often fractured, and is merely asserted, such as in the case of the Crown lands. Partly because of this, some involved in these kinds of land struggles have become involved in various Hawaiian sovereignty organizations. As Abel
Lui stated “This place is not for sale… This is the Hawaiian Kingdom” (McNarie, 2011).

One reason I chose to study land tenure for this dissertation is that it appeared to be more binary than notions of sovereignty – one either owned land or one did not. I have shown that this was not the case, and that questions over land tenure return once again to questions of sovereignty. This dissertation is a genealogy of land in two senses of the term. It is both a mo‘okū‘auhau, or Hawaiian genealogy, emphasizing continuity and familial relations, and a genealogy in the Nietzschean/Foucaudian sense, emphasizing historical rupture in the narratives of land law, tenure and chain of title. This project brings these competing notions of genealogy into conversation, using Hawaiian land as its focus. By concentrating on the ways in which power constitutes a central function of both methods, the disparate understandings of genealogy are brought into resonance.

Using a concept I call theoretical encounter, I examined the ways that Hawaiian and Euroamerican concepts of land confronted each other, were understood by both sides in the encounter, and ultimately produced a hybrid land tenure system that is still misunderstood.

Because land titles are normally understood to be binary in their logic, i.e., clear as to the question of whether or not an individual owns (or has a property in) land, they are an appropriate topic on which to apply a genealogical analysis. The Hawaiian concept of native tenant rights, or kuleana, clouds and problematizes the binary logic of land titles by creating “layers” of ownership and usage rights. Central concepts examined and problematized in this study include property itself, which is conceived not only as an object, but as a right, and dominium, the level (or layer) of ownership based on the possession of sovereignty. But most central is the notion of kuleana, or “native tenant
rights,” which, contrary to given legal narratives, constitute not gathering rights, but the right to fee simple title to land. By problematizing the notion of a deadline for makaʻāinana land claims, I show these rights may remain intact. The implications of this research are considerable, as they have the potential to cast doubt on most land titles and ownership in Hawai’i.

Finally, I used the concept of legal pluralism to apprehend the existence of dual, and often competing, land tenure systems. Often these systems were layered upon one another – such as Hawai’i State law, which was layered on top of Hawaiian Kingdom law, and had Kingdom law as its common law. The Hawai’i case, however, is one of two systems of state law, rather than state law layered over local custom, as studies by Merry (1988) and others describe. As the history of land ownership in Hawai’i was part of its engagement with imperialism, present-day ownership is part of a larger context of globalization – a process that began during the same period the Māhele was instituted, earlier than in many other Indigenous cultures. Hawaiians are, one might say, thoroughly globalized.

Globalization

In 1837 the Hawaiian scholar David Malo wrote “large and unfamiliar fishes will come from the dark ocean and when they see the small fishes of the shallows they will eat them up, such has always been the case with large countries, the small ones have been gobbled up.”\textsuperscript{93} Malo was referring to the colonialism taking place at that time, as well as Hawai’i’s emerging and subordinate, place in a new world. Today, what some refer to as

\textsuperscript{93} Malo to Kaʻahumanu II and Mathew, Aug 18, 1837, FO & Ex, Archives of Hawai’i.
neocolonialism, a new colonialism led by corporate interests rather than states, is linked to the process of globalization – a multi-faceted process of increased interconnectivity of the world’s economies and communications, with greater flows of capital, people and ideas across national boundaries.

Globalization is not entirely new – this is a new phase in an ongoing process – but this phase is based on a neoliberal ideology and is driven mainly by the needs of trade and investment. This neoliberalism is ostensibly a “return” to the “pure” doctrines of Adam Smith and David Ricardo, in which free markets, not protectionism – the shielding, through tariffs, of domestic industries from international competition – determine the course of economic development. Viewed more closely, however, the globalist agenda appears more focused on corporate and investor interests than on those of an abstract “market.” As the Clinton administration official Joan Spiro put it “one role [of government] is to get out of the way – to remove barriers to the free flow of goods, services and capital.” The fact that this is coming from a Democratic official shows the extent of the consensus on globalization across party lines.

The recent meeting of the Asia-Pacific Economic Cooperation (APEC) in 2011 provided an opportune moment to reflect on the role that local people and Native Hawaiians could have in Hawai‘i’s future economic development. Proponents claimed benefits of globalization are that increasing international trade promotes diversity and multiculturalism, benefiting the third world by raising living standards and promoting democracy. According to Manfred Steger (2001), advocates of the ideology he calls globalism also make the following claims; a) that it is about the liberalization and
integration of markets, b) that it is inevitable and irreversible, c) that nobody is in charge of globalization, d) that it benefits everyone, and e) that globalization spreads democracy.

Howard Wirada (2006), a conservative scholar on the topic, notes that losers in the process of globalization include Indigenous peoples, traditional cultures, small farmers, small shopkeepers, older workers, unionized workers, third world workers, the poorest countries, and the environment. The fact that these groups constitute the majority of the global population, casts some doubt on the claims that globalization benefits everyone, benefits the third world, and that it generally raises living standards. With the state of the global environment being what it is, with nearly every major natural system either in decline or stable and no systems improving, claiming that a process that harms the environment is beneficial defies all logic. Globalization certainly does benefit elites in all but the very poorest countries (many of which are in Sub-Saharan Africa). The unprecedented levels of inequality are evidence of this – both internationally and in the US.

In Hawai‘i, glossy magazines such as *Homes and Land* and *Island Homes Collection* advertise Hawai‘i real estate priced as high as $6 million or more for a single family home “where your dream becomes reality.” Homes in the Kahala neighborhood of Honolulu have sold for as much as $26 million. Real Estate in Hawai‘i is a global market. Publications such as *Homes and Land* do not cater to local buyers, but to wealthy visitors and part-time residents. According to the *Honolulu Star-Advertiser*, Honolulu has the highest rent in the United States. In *Real Estate Book*, another commercial real estate magazine, one advertisement for a property for sale in Wahiawa, O‘ahu, shows a tax map that notes that the property was “Crown Land.” While it is possible that this land was
sold during the reigns of Kamehameha III through Kamehameha V, it casts doubt on
some land sales, and shows the need for detailed studies on land title transfers.

The global capitalist paradigm is, in many ways, anathema to Hawaiian notions of
exchange and reciprocity. Kamakau (1976, 123) had this to say of capitalism:

[Hawaiians] have abandoned the works of the ancestors and have become lazy
and make a living peddling, a practice despised by the ancestors, who used to say
‘Child of a peddler! (Keiki a ka ma‘au‘auwa!) Wife of a peddler! Food of a
peddler! Fish of a peddler!’ It was a slanderous occupation; it was as bad as being
a red-eyed outcast, kauwa makawela … Peddlers were not allowed in the houses
of the chiefs; they could not eat with them. A peddler was a defiled person,
kanaka haumia, in ancient times.

I have shown that the global real estate market in Hawai‘i is based on a
fundamental fiction – that native tenant rights have been extinguished and replaced by
mere gathering rights. In a (perhaps unknowing) slight-of-hand, the oligarchy of the turn
of the twentieth century distracted Hawaiians from their right to fee-simple title.

Hawaiians later fought for a much less significant right to gather on private and public
lands. To “repair” (or obscure) the fictions upon which Hawai‘i land tenure is premised,
the oligarchy instituted several initiatives, including the Land Court and non-judicial
foreclosure, which constitute legal-political means of divesting native Hawaiians of
embedded land rights, intentionally or not.

The implications of this research are myriad, but the clearest cases are those of the
Crown lands, and the “ceded” lands in general. Private properties would need to be
examined on a case-by-case basis, and this study can be used as a guide or handbook for
such claims. Peterson (1979, 3) quotes the social ecologist Walter Firey, who held that “conflicts in land use must be regarded as conflicts between different value systems.” Peterson (1979) enumerates several values held by stakeholders in the Waiahole-Waikâne struggle of the 1970s regarding land; land as a commodity, land as a provider of (economic and other) rights, land as a resource.

Lorrin Thurston’s sequence of “fundamental” laws of Hawai‘i, with which I started this dissertation, is an example of the ruptures in the sequences of law (presumed to be linear) upon which the society is based. Genealogy can unravel and problematize these inconsistencies, but it cannot repair them. Only historical study followed by careful political action can remedy such a situation of “flawed origin.” This can be done with an eye toward retributive or reconciliatory justice. Such solutions will not be perfect, but I have shown that the architects of Hawai‘i’s land tenure system left structures that were clear enough to allow many land disputes to be traced to their source. Kuleana, or native tenant rights, are one of these structures that may have persevered, albeit in an altered form, in a way that can potentially be acted upon.

Overall, Hawaiians have significant assets at their disposal today. Within the current State framework, Hawaiian organizations have developed their assets effectively to the point that they are a major emerging force in Hawai‘i’s political economy, possibly the major force. When viewed together, Hawaiian entitlement programs and ali‘i trusts amount to an asset base that eclipses many small countries. In fact, Hawaiian assets surpass those of nine of the 23 member countries (or “economies”) present at the 2011 APEC conference. Table 8.1 below summarizes these trusts and programs:

Table 8.1: Hawaiian Trust Assets
<table>
<thead>
<tr>
<th>Organization</th>
<th>Assets</th>
<th>Land</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>State of Hawai‘i and US Government (&quot;Ceded&quot; Lands – Kingdom Crown and Government lands)</td>
<td>1.4 Million = 1.75 Million – 200,000 (DHHL) and other sold or traded lands. No government inventory</td>
<td>1.4 Million acres</td>
<td></td>
</tr>
<tr>
<td>Office of Hawaiian Affairs</td>
<td>$300 million (2009), in addition to $189 million value of Kaka‘ako settlement parcels</td>
<td>Waimea Valley, Wao Kele o Puna – 25,000 acres, Kaka‘ako settlement parcels, Gentry Pacific Design Center ($21 million)</td>
<td>$28 Million in loans to Native Hawaiians</td>
</tr>
<tr>
<td>Department of Hawaiian Home Lands</td>
<td>Lease Revenues, 2006: $6,929,978, $600 Million settlement ($30 Million per year from 1995)</td>
<td>201,660 acres</td>
<td>7000+ Native Hawaiians residing on HHL</td>
</tr>
<tr>
<td>Kamehameha Schools</td>
<td>$7.2 Billion (2009)</td>
<td>365,691 acres</td>
<td>44,000 children served by 25+ programs and 3 campuses $258 Million in educational spending FY 2009</td>
</tr>
<tr>
<td>Queen’s Hospital/Queen Emma Land Company</td>
<td>Lease Revenues, including International Marketplace in Waikiki</td>
<td>12,000 acres</td>
<td>Charter stipulates free medical care for native Hawaiians</td>
</tr>
<tr>
<td>Queen Lili‘uokalani Children’s Center</td>
<td>$11 - 14 Million operating budget</td>
<td>6,367 acres</td>
<td>9000 child beneficiaries in 2003</td>
</tr>
<tr>
<td>Lunalilo Home</td>
<td>$6,700,000 (1996)</td>
<td>5 acres (originally 161,200 acres)</td>
<td>37 Hawaiian residents</td>
</tr>
</tbody>
</table>

Niklaus Schweizer (1999) describes the Hawaiian political movement as “evolutionary rather than revolutionary.” He and others hold that Hawaiians are building the infrastructure of a nation within the current framework of occupation/colonization. My research implicates a further method of asset development at the individual and organizational level – the acquisition of fee simple title. But the legal questions that I raise return again to the original political question I began this dissertation with: which government will allow the exercise of the embedded kuleana rights? Answering that question is beyond the scope of this project, but at the time of this writing, there is a virtual race between the advocates of federal recognition, and advocates of international recognition. Federal recognition advocates have appropriated a new strategy of direct recognition through the department of interior given the failed Akaka Bill, and international recognition advocates have sought admission into the International Criminal Court and Geneva Convention under the auspices of the United Nations. The outcome of this “race” will directly impact whether kuleana rights will be realized, and the manner in which this could occur.
To His Majesty

Kamehameha III

Sire,

Agreeable to the Resolution of Your Majesty, this day passed in Privy Council, calling upon me to prepare certain rules to be submitted to Your Majesty for adoption in the division of the lands of Your Kingdom, I beg to submit the following:

Whereas, it has become necessary to the prosperity of our Kingdom, and the proper physical mental and moral improvement of our People, that the undivided rights, at present existing in the lands of our Kingdom, should be separated and distinctly defined:

Therefore,

We, Kamehameha III, King of the Hawaiian Islands and His Chiefs, in privy council assembled, do solemnly resolve, that we will be guided in such division by the following rules:

1

His Majesty, our Most Gracious Lord and King, shall in accordance with the Constitution and Laws of the Land, retain all of his private lands, as his own individual property, subject only to the rights of the tenants, to have and to hold to Him, His Heirs and Successors forever.

2
One third of the all the remaining lands of the Kingdom, shall be set aside as the property of the Hawaiian Government, subject to the direction and control of His Majesty, as pointed out by the Constitution – One third to the Chiefs of the Kingdom, in proportion to their possessions, to have and to hold to them, their heirs and successors forever – and the remaining third to the tenants, the actual possessors and cultivators of the soil, to have and to hold to them, their heirs and successors forever.

3

The division between the Chiefs and Tenants prescribed by rule second, shall take place whenever any Chief or Tenant shall desire such divisions, subject only to confirmation by the King in Privy Council.

4

The tenants of His Majesty’s lands, shall be entitled to a fee simple title to one third of the lands possessed and cultivated by them; which third shall be set off to the said Tenants in fee simple, whenever His Majesty or any said Tenants shall desire such division.

5

The divisions prescribed in the foregoing rules shall in no wise interfere with any lands that may have been granted by his Majesty or His Predecessors in fee simple, to any Hawaiian subject or foreigner nor in any way operate to the injury of the holders of unexpired leases.

6

It shall be optional with any Chief holding lands in which the Government has a
share, in the place of setting aside one third of said lands as Government property, to pay into the Treasury one third of the unimproved value of said lands, which payment shall operate as a total extinguishment of the Government rights in such lands.

7

All the lands of his Majesty shall be recorded in a Book entitled Register of the lands belonging to Kamehameha III King of the Hawaiian Islands, and all lands set aside as the lands of the Hawaiian government shall be recorded in a book entitled Register of the Lands Belonging to the Hawaiian Government, and Fee simple titles shall be granted to all other allottees upon the award of the Board of Commissioners to Quiet Land Titles.
APPENDIX B - KULEANA ACT

An Act confirming certain resolutions of the King and Privy Council passed on the 21st day of December 1849, granting to the common people allodial titles for their own lands and house lots, and certain other privileges … That the following section which were passed by the King in Privy Council on the 21st day of December A.D. 1849 when the legislature was not in session, be, and are hereby confirmed, and that certain other provisions be inserted, as follows:

Section 1. Resolved. That fee simple titles, free of commutation, be and are hereby granted to all native tenants, who occupy and improve, and whose claims to said lands shall be recognized as genuine by the Land Commission; Provided, however, that the Resolution shall not extend to Konohikis or other persons having the care of Government lands or to the house lots and other lands, in which the Government have an interest, in the districts of Honolulu, Lahaina and Hilo.

Section 2. By and with the consent of the King and Chiefs in Privy Council assembled, it is hereby resolved that fee simple titles free of commutation, be and are hereby granted to all native tenants who occupy and improve any lands other than those mentioned in the preceding resolution, held by the King or any chief or Konohiki for the land they so occupy and improve. Provided however, this Resolution shall not extend to house lots or other lands situated in the districts of Honolulu, Lahaina and Hilo.
Section 3. Resolved that the Board of Commissioners to quiet Land titles [sic] be, and is hereby empowered to award fee simple titles in accordance with the foregoing Resolutions; to define and separate the portions belonging to different individuals; and to provide for an equitable exchange of such different portions where it can be done, so that each man’s land may be by itself.

Section 4. Resolved that a certain portion of the Government lands in each island be set apart, and placed in the hands of special agents to be disposed of in lots from one to fifty acres in fee simple to such natives as may not be otherwise furnished with sufficient lands at a minimum price of fifty cents per acre.

Section 5. In granting to the People, their House lots in fee simple, such as are separate and distinct from their cultivated lands, the amount of land in each of said house lots shall not exceed one quarter of an acre.

Section 6. In granting to the people their cultivated grounds, or Kalo lands, they shall only be entitled to what they have really cultivated, and which lie in the form of cultivated lands; and not such as the people may have cultivated in different spots, with the seeming intention of enlarging their lots; nor shall they be entitled to the waste lands.

Section 7. When the landlords have taken allodial titles to their lands the people on each of their lands shall not be deprived of the right to take firewood, aho cord, thatch, or ti leaf from the land on which they live, for their own private use, should they need them,
but they shall not have a right to take such articles to sell for profit. They shall also inform the Landlord or his agent, and proceed with his consent. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all should they need them, on all lands granted in fee simple. Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use. Done and passed at the Council House, Honolulu, this 6th day of August, 1850.

(Maly, 2004, 46)


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