ORIGIN STORIES IN PROPERTY LAW

José Argueta Funes[*]

Abstract

Every property regime has an origin story about how it came to be. This Article argues that we should not take these stories at face value and should instead understand the choices and agents that shaped them. It uses deep archival research to reconstruct arguments about the origins of a property regime a bit beyond the mainstream of American legal scholarship—in the Kingdom of Hawai‘i—where legal actors vacillated between two competing stories about the origins of property in land. When, in 1848, the kingdom adopted private landownership, did this move make the world anew, washing away any previous land tenure relations, or did it build atop this crowded landscape? The kingdom's Supreme Court declined to answer definitively, instead producing a hybrid property regime that blended Hawaiian ideas with Anglo-American concepts of landownership. This hybridity persists to this day, at times portrayed as a symbol of resistance. But delving into the making of competing origin stories reveals a much more nuanced portrait, with insights into the development of property law in Hawai‘i and in other places within America's empire.

This Article highlights two such insights. The first builds on a vibrant strand in property theory that explains property as a system of communication. This vision of property assumes that the participants in the property regime share a conceptual universe they can use to communicate their claims to others. Origin stories offer a vehicle for authoritative legal institutions to shape that conceptual universe. This becomes clear in Hawai‘i, where litigants relied on Hawaiian land ways—the practices and relationships that Hawaiians had previously used to govern access to and allocation of resources—to make property claims in the aftermath of property reform in 1848. Eclectic accounts of the origins of property in the kingdom rendered these Hawaiian land ways part of the property regime, complicating a narrative that the creation of Americanized property regimes implied the elimination of preexisting Indigenous relations to the land. Indeed, in Hawai‘i and elsewhere, settlers proved quite competent at refashioning Indigenous land ways to articulate novel property claims.

This leads to a second insight—namely, that economic incentives informed the ways in which Hawaiian land ways were refashioned in this new

[*] Assistant Professor of Law, UC Berkeley School of Law. [TK]

property regime, such that political economic visions shaped the contours of property law. This is precisely why a picture of hybridity as a symbol of resistance is incomplete, because it underestimates how much hybridity could be mobilized to achieve goals that were detrimental to the majority of Native Hawaiians. Examining contests over origin stories reveals instead how hybridity reflected efforts to shape the kingdom's property regime to serve the interests of large landholders. At the same time, once this hybridity was a fixture of the property regime, it could be reinterpreted decades later to challenge the claims of these large landholders. We should thus see hybridity less as destiny, and more as a feature of the property regime, deliberately created to protect particular economic interests yet open to reinterpretation in the service of different goals.

TABLE OF CONTENTS

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

-Damon v. Territory of Hawaii
194 U.S. 154, 158 (1904) (Holmes, J.)

INTRODUCTION

Property law is no stranger to storytelling. For example, property students are likely to come across a cautionary tale by Garrett Hardin about resource depletion in the absence of private entitlements—a story that serves as a foundational justification for private property.[1] And as Carol Rose has pointed out, Hardin's was hardly the first story that property theorists have deployed to shore up the moral foundations of private property.[2] Stories are powerful, Rose argues, because they structure our "experience and imagination."[3] As Critical scholars might put it, stories can shape what worlds we think are possible.[4]

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

---

[1] Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. Chi. L. Rev. 711, 712 (1986) (citing Hardin as articulating the "obverse" of the foundational idea in property law that "exclusive property is thought to foster the well-being of the community").

[2] *See* Carol Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 Yale J. L. & Humanities 37 (1990) (surveying stories about cooperation at property's origins in the writings of thinkers like Blackstone and Locke).

[3] *Id*. at 55.

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

Studying these stories offers two important insights. First, these origin stories highlight an important but understudied assumption in property theories that portray property as a system of communication: every property regime relies on a conceptual universe that will inform the kinds of property claims that participants in this regime can make. For example, antebellum chattel slavery in the American South relied on an intricate and unstable notions of "race" as a means of articulating and contesting property claims over persons.[5] Thus, ideas about race structured and constrained the kinds of property claims that were permissible and intelligible in this society. Origin stories can help us map out phenomena which, like race, are part of the conceptual universe shared by the participants in a property regime.

Second, we can also understand origin stories as sites of redistributive contests. Because every property regime arises out of preexisting entitlement distributions,[6] how an origin story accounts for, eliminates, or rearranges these distributions can reallocate means of creating value. Origin stories involve attempts to inscribe a political economy at the very foundations of property.

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

Hawai'i is a fruitful site to explore the telling of property origin stories.[7] The creation of private property came about at a tumultuous period in the history of the kingdom, as a demographic collapse and mounting foreign threats led Hawaiian chiefs to find new mechanisms to address foreign and

---

[5] For a discussion of the role of ideas around race and racial identity in chattel slavery, see *infra* Part I.B.

[6] Other scholars have investigated the role of storytelling in the turn from no property or common property to private property—most notably, Carol Rose. *See* Rose, *supra* note __. Although I have built on this work, I find that this scholarship cannot get at important questions implied in regime change, particularly around the costs of going from one regime to another, and around the way in which power distributions within a property regime inform the kinds of stories told.

[7] Case studies are a mainstay of property literature. Maureen Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 882-83 (2019). This is in part because land has "long been the subject of remote and highly localized control." *Id*. at 885.

domestic crises.[8] Private landownership arose as one of these mechanisms, regarded by many—back in the nineteenth century as well as in the present—as a radical departure from Hawaiian land ways.[9] At the same time, the mechanics of property reform in the kingdom in fact relied on Hawaiian land ways, casting doubt on this vision of landownership as a complete novelty.[10] These conditions made it possible to tell at least two different property stories—one in which private landownership was something entirely new, another in which landownership built upon prior practices. The kingdom's authoritative institutions never chose one story definitively over the other, making it possible for us to explore how narrative choices betrayed considerations about meaning and value allocation in the new property regime.[11]

Recovering and exploring these alternate stories about Hawaiian property offers two main contributions. The first one concerns questions about the relationships between private property and Indigenous ways of relating to land. Histories of Hawai'i have long portrayed property reform in the kingdom as a radical turning point away from Hawaiians' conception of their relationships with their land.[12] Private landownership, these scholars argue, was antithetical to these relationships,[13] and was a key event in both the loss of Hawaiian sovereignty and the dispossession of Native Hawaiians.[14] Recent

---

[8] On the history of property reform see LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? (1992). Stuart Banner has argued that chiefly concerns about consolidating landholdings in the face of impending colonization also lent support for property reform. STUART BANNER, POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA 126-162 (2007).

[9] For instance, foreign reformers in the kingdom argued that private landownership would eliminate the hierarchical relationships that previously governed access to and use of land and other resources in the kingdom. KAME'ELEIHIWA, *supra* note __, at 219.

[10] For an argument that property reform built atop preexisting Hawaiian land ways, see KAMANAMAILAKANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION 104 (2014).

[11] See *infra* Parts III & IV.

[12] For instance, Lilikalā Kame'elihiwa has argued that property reform "transformed the traditional Land system from one of communal tenure to private ownership on the capitalist model." KAME'ELIHIWA, *supra* note __, at 8. This shift was important because before 1848, she noted, "Land 'ownership' was not a part of the Hawaiian metaphor, although trusteeship was; nor was there any specific word in the Hawaiian language for the Western idea 'to own.'" *Id*. at 9.

[13] Kame'eleihiwa makes this argument by contrasting traditional Hawaiian relationships against capitalism. "In the Hawaiian world," she argues, "the hallmark of civilization was, and still is, generosity; that is, the willingness to share one's *waiwai* (accumulated wealth). Hawaiian generosity was thus diametrically opposed to the basic tenets of capitalism, which Hawaiians found repugnant by their own standards." KAME'ELIHIWA, *supra* note __, at 11. Accordingly, Kame'eleihiwa argues that "the vast majority of Native Hawaiians simply did not understand the capitalist uses of private ownership of" land. *Id*. at 11.

[14] For the argument that property reform dispossessed Native Hawaiians, see KAME'ELIHIWA, *supra* note __, at 10; JONATHAN KAY KAMAKAWIWO'OLE OSIORO,

scholarship, however, has argued that property reform was an example of how the Hawaiian chiefs selectively blended Hawaiian traditions around governance with Euro-American practices to produce a hybrid legal regime that could withstand threats from foreign imperial powers.[15] These scholars have argued that landownership was not so foreign to Native Hawaiians that they would not understand it or engage with it.[16] Land reform produced a hybrid property regime which could serve as a "means to resist colonialism and to protect Native Hawaiian and national interest."[17]

This Article refines and challenges this treatment of hybridity. It shows that Hawaiian land ways were certainly part of the conceptual universe that could be used to give meaning to property, thus allowing us to characterize the Hawaiian property regime as a meaningfully hybrid one. At the same time, one of the most striking findings of this Article is that *haole* (foreign) landowners reinterpreted Hawaiian land ways in order to make more expansive property claims.[18] These interpretations tended to privilege much more coercive readings of Hawaiian land ways—that is, interpretations that disregarded the demands of reciprocity embedded in rank distinctions among

---

DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002). Some scholars have argued specifically that Hawaiians did not understand property reform and assumed they would continue to living under the authority of their chiefs, as they had done before reform. Jocelyn Linnekin, *The Hui Lands of Keanae: Hawaiian Land Tenure and the Great Mahele*, 92 J. POLYNESIAN SOC'Y 169, 174 (1983). For the argument that property reform also led to the loss of sovereignty, see KAME'ELIHIWA, *supra* note __, at 15 ("[T]he real loss of sovereignty began with the 1848 [property reform] when the [king] and the [chiefs] lost ultimate control of the [land].").

[15] For example, Kamanamaikalani Beamer has argued that the chiefs "*selectively appropriated* Euro-American tools of governance while modifying existing indigenous structures to create a hybrid nation-state as a means to resist colonialism and to protect Native Hawaiian and national interests." BEAMER, *supra* note __, at 3-4. Beamer argues that property reform was precisely this kind of "hybrid initiative." *Id*.

[16] For instance, new scholarship challenges earlier assessments of how much Hawaiians engaged in landownership. Scholars have long pointed to the fact that proportionately few Hawaiians made claims to land using the statutory mechanism that allowed them to do so as evidence of the foreignness of landownership in Hawaiian society. BEAMER, *supra* note __, at 143 ("many scholars describe [property reform] as a means of dispossession for most native subjects of the Hawaiian Kingdom"). Recent scholarship, however, has pointed out that Hawaiians found other mechanisms of acquiring land. Donovan Preza, The Empirical Writes Back: Reexamining the Dispossession Resulting from the Māhele of 1848, 138 (unpublished M.A. thesis, University of Hawai'i at Mānoa) (on file with author); NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO HAWAIIAN COLONIALISM 42 (2004). *See generally* J. KĒHAULANI KAUANUI, PARADOXES OF HAWAIIAN SOVEREIGNTY: LAND, SEX, AND THE COLONIAL POLITICS OF STATE NATIONALISM 90-97 (2018) (discussing this literature).

[17] BEAMER, *supra* note __, at 4.

[18] See *infra* Parts III & IV.

Hawaiians.[19] This is an important finding because it highlights the fact that the creation of Americanized property regimes—in Hawai'i and elsewhere—did not only imply the elimination of preexisting modes of relating to the land.[20] People—settlers included—could reconfigure those modes of relating to the land to make new kinds of claims. This invites us to take a more skeptical or ambivalent stance to hybridity as a means of resisting colonialism or protecting Indigenous interests, and to pay closer attention to how different individuals wield hybridity to different ends.

These conflicting Hawaiian stories about property offer a second contribution, this time to scholarship on the relationship between law and capitalism, and more specifically on how courts seek to shape economic life. Scholars have long argued that legal institutions and actors wield law in ways that benefit some economic actors over others, shaping the economy and contributing to phenomena like industrialization and inequality.[21] This Article contributes to this literature by surfacing the role of storytelling as one of the tools that legal institutions and actors could use to influence economic life. Much as courts and lawyers could see doctrinal shifts as a means of buttressing particular modes of economic activity, they could also see the property stories they told as means of achieving similar ends.[22]

---

[19] See, e.g., Part IV.B.2., *infra*. For a discussion of reciprocity in Hawaiian rank relationships, see KAUANUI, *supra* note __, at 88-90; KATRINA-ANN R. KAPĀ'ANAOKALĀOKEOLA NĀKOA OLIVERIA, ANCESTRAL PLACES: UNDERSTANDING KANAKA GEOGRAPHIES 45 (2014).

[20] On the argument that settler property regimes relied on the erasure of Indigenous relationships with the land, see, e.g., Kame'eleihiwa, *supra* note __. We might liken this argument to the distinction that Dipesh Chakrabarty drew between "histories 'posited by capital'" and histories "that do not belong to capital's life process." DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE 50 (2000). Chakrabarty argues, following Marx, that the former histories are prone to "totalizing thrusts" turning local contingencies into abstractions for capital reproduction, thus erasing local difference and particularity. *Id*. at 65-66. For a discussion of how property law doctrine and pedagogy itself contributes to this erasure, see K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022).

[21] *See, e.g.*, MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 254-55 (1977) (arguing that in the decades following the American Revolution, American jurists remade private law to serve nascent industrial interests); KATHARINA PISTOR, THE CODE OF CAPITAL: HOW LAW CREATES WEALTH AND INEQUALITY x (2019) (arguing that law turns assets into capital and thus grant the assets' owners "a comparative advantage over others").

[22] Storytelling is akin to the rhetorical and logical moves that courts employ as they engage in their "painstaking elaboration of the immanent rationality of the way things" are. CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 296 (1993). Thus, storytelling contributes to legal efforts to constitute the world and to convince others that this "the only attainable world in which a sane person would want to live." Gordon, *supra* note __, at 109.

At the same time, this Article adds a qualification to an important throughline in this scholarship which tethers the expansion of market economies to the elimination of Indigenous or traditional practices. Although we certainly see evidence of this trend in Hawai‘i, the persistence of Hawaiian land ways should give us pause. This persistence suggests that actors invested in economic development did not perceive these land ways as antithetical to their goals. They could, in fact, selectively rearticulate them. And although it is tempting to see this as a part of Hawai‘i’s seeming exceptionalism within American empire, the Hawaiian experience in fact invites us to look at the legal landscape of the United States’ continental empire from a new perspective. If we know where to look, we might find a similar reliance on Indigenous land ways that requires explanation and reflection.

This Article proceeds in five Parts. Part I offers a familiar example of the kind of storytelling at issue here: Chief Justice John Marshall’s opinion in *Johnson v. M’Intosh* (1823).[23] I think through Marshall’s story using the lenses of meaning and value. Building on the work of property theorists who have argued that property law serves a uniquely communicative function, I argue that every property regime must make an antecedent choice about the conceptual universe that will facilitate that communication. We can see this at play in *M’Intosh*, in Marshall’s contempt for Native land ways and his effort to limit their significance in land transactions. Turning to questions of value, I think through how Marshall’s story about the origins of property in the United States could make it easier—and more specifically, cheaper—to turn land into a source of wealth, specifically by eliminating means of creating value rooted in Native land ways. I close Part I by suggesting some ways in which the quest for meaning and value in property law might inform each other, which will guide my investigation into Hawaiian property.

Part II then begins building the case study that will form the bulk of this Article. It offers a sketch of the world of Hawaiian land ways before reform. It then turns to explain how the kingdom reached the point of engaging in land reform, and how it went about it. The process of land reform, I argue, made it possible to tell at least two stories about property in Hawai‘i: one of radical departure from Hawaiian land ways—a blank slate story—and one of incremental accretion atop these land ways—a crowded slate story.

Parts III and IV use deep archival research to explore how these two stories played out before the kingdom’s Supreme Court, and how the Court itself oscillated between them. Part III focuses on the blank slate story the Court told in *Oni v. Meek* (1858),[24] where it held that property reform had eliminated Hawaiians’ right to bring their animals to pasture on their chiefs’

[23] 21 U.S. 543
[24] 2 Haw. 87.

lands. I contrast the Court's story of reform with the story that the plaintiff, Oni, told—one in which property built atop Hawaiian land ways. I then demonstrate how the Court omitted critical facts in its decision, which make it harder to tell Oni's story. Part IV shows how, despite its holding in *Oni*, the Court never completely turned its back on a story in which property in the kingdom built atop Hawaiian land ways. Using a case involving access to fisheries[25] and another involving surface water allocation,[26] I show that litigants, lawyers, and judges were all comfortable reasoning about property rights after reform by relying on their own interpretations of Hawaiian land ways.

Part V then develops the two insights these cases help us see. First, these cases make clear that Hawaiian land ways were part of the conceptual universe underlying the Hawaiian property regime. And although this made Hawaiian property a hybrid regime, we should be careful not to assume that hybridity worked to the advantage of Hawaiians. Instead, hybridity was a feature of the Hawaiian property regime that could be wielded to different ends—including both more expansive property claims by haole landholders in the nineteenth century, and greater protection for Hawaiian claimants by advocates of Hawaiian sovereignty and rights in the twentieth century.[27] Second, I argue that the Hawaiian Supreme Court's refusal to pick one story about property over the other suggests its commitment to economic development. And while in Hawai'i, as elsewhere, the expansion of a market economy brought about the demise of Indigenous or traditional practices, it is worthwhile to note the persistence and rearticulation of Hawaiian land ways within that market economy. Throughout, Part V also suggests ways in which these insights are not limited to Hawai'i, but also invite further research in other parts of the United States' empire.

---

[25] Haalelea v. Montgomery, 2 Haw. 62 (1858).

[26] Peck v. Bailey, 8 Haw. 658 (1867).

[27] As other scholars have noted, Hawaiian custom—rooted in Hawaiian practices—remains an important form of law in the state today. Melody Kapilialoha MacKenzie, Hawaiian Custom in Hawai'i State Law, 13-14 Yearbook of New Zealand Jurisprudence 112 (2010); Troy Andrade, *E Ola Ka 'Ōlelo Hawai'i: Protecting the Hawaiian Langauge and Providing Equality for Kānaka Maoli*, 6 THE INDIGENOUS PEOPLE'S JOURNAL OF LAW, CULTURE, AND RESISTANCE 3, 39-44 (2020). Moreover, recently the Hawaiian Supreme Court has signaled an openness to challenge state administrative practices that endanger traditional farming practices. *Carmicheal et al. v. Bd. of Land & Nat. Res. et al.*, 506 P.3d 211 (Haw. 2022). Additionally, many rights "exercised by the general public [today] are based on and find their roots in Hawaiian custom and practice." Melody Kapilialoha MacKenzie, *Introduction*, *in* NATIVE HAWAIIAN LAW: A TREATISE, at xi, xii (Melody Kapilialoha MaxKenzie, Susan K. Serrano, and Kapua'ala Sproat eds., 2015).

I. WHY ORIGIN STORIES

This Part investigates a particular kind of story in property law: every property regime has an origin story it tells about itself, an account of how it came to be. My goal here is to situate these stories in two scholarly conversations. The first is a conversation among property theorists who have placed information and meaning at the core of property law. These theories rely on an assumption which every property regime must make: an antecedent choice about the conceptual universe that participants in that regime will use. Stories about a property regime's origins offer a helpful tool with which to critically examine this choice. At the same time, these stories can have distributional consequences, particularly in deciding whether a property regime will recognize or eliminate existing entitlement distributions that predate the property regime itself. Studying these stories therefore can contribute to studies on how law influences economic life. In short, we should study these property stories because they give us insight into how people imbue property with meaning, and how legal institutions allocate means of creating value.

To anchor these two conversations, I begin with a familiar example of this kind of storytelling: Chief Justice John Marshall's opinion in *Johnson v. M'Intosh* (1823). *Johnson* told a story about how the United States' property regime came into being through European discovery. Marshall held that discovery had two property consequences: (1) it created property rights in the English crown which the United States' federal government now possessed; and (2) it reduced Native rights in land to mere occupancy, which could be extinguished at the pleasure of the conqueror. But lurking in the background of Marshall's opinion was another origin story that he could not quite shake off: discovery created no property rights, and the United States' property regime originated in selective engagement with Native notions of property and Native assertions of power.

These two accounts of property in the United States illustrate two different kinds of property stories. *Johnson* is an example of a blank slate story—the United States' property regime largely erased preexisting property relationships, replacing them with a new set of property relationships. Meanwhile, the background story is an example of a crowded slate story—the United States' property regime arose from pre-existing property relationships. The choice between these two kinds of stories has important implications for property law, which I explore through a case study rooted in Hawai‘i in the remainder of this Article.

A. Blank Slates, Crowded Slates, and Property in America

Let's start with the story in *Johnson*. All the relevant plot points can be found in this passage:

> This opinion conforms precisely to the principle which has been supposed to be recognized by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverer possessed the exclusive right of acquiring.[28]

According to Marshall, Indians were not the owners of their lands. Instead, they only had a right of occupancy.[29] The only entity with the power to transform this right of occupancy into a right of ownership was the United States' federal government.[30] This power came to rest with the federal government once it stood in the shoes of the British monarch.[31] And the British monarch, in turn, came to hold this power through the doctrine of discovery.[32] American property thus had its origins in European discovery and conquest, which in effect created a new property regime in the continent.

Marshall's story is a blank slate story. It imagines a world before the United States' property regime was born, and it posits that much of that world was eliminated by discovery. This kind of story is in line with historical accounts of the United States' property regime which emphasize that some of the defining features of American property law today—title recordation and simple conveyancing—represent important departures from long-established English practices.[33] Distance from England certainly facilitated this kind of innovation.[34] But another factor enabling this innovation was a

---

[28] *Johnson*, 21 U.S. at 592.

[29] *See id*. at 591 ("[T]he Indian inhabitants are to be considered merely as occupants[.]").

[30] *See id*. at 587 ("The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. . . . They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy[.]").

[31] *See id.* ("The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees.").

[32] *See id.* at 573 ("[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made against all other European governments, which title might be consummated by possession.").

[33] CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA 5-6 (2021).

[34] Daniel Hulsebosch has argued that the mobility inherent in empire facilitated a transformation of English law from a collection of institutional rules protecting various interests in English land to a body of jurisprudence around property generally—that is, empire facilitated the move from writs to rights. DANIEL HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830, 27-28 (2005). Moreover, Claire Priest has argued that colonists "building a new society from the ground up" enjoyed "the opportunity for modifications of

willingness to ignore existing Native relationships with the lands that Americans took.[35]

It is tempting to take this innovative streak in American property law for granted. Indeed, because we know how the story ends—we know that the nineteenth century witnessed a massive redistribution of property from Native to settler hands—it is hard to imagine that Americans could do anything other than tell a blank slate story.[36] And yet, they did.

Not long before *Johnson v. M'Intosh*, Americans—either as colonists or citizens of the new republic—rooted their property regime in Native land claims and land practices.[37] They even explicitly rejected the idea that discovery created any property rights in the land. As John Adams put it on the eve of revolution: "Discovery . . . could give no title to the English king, by common law, or by the law of nature, to the lands, tenements, and hereditaments of the native Indians here."[38] Instead, Adams claimed, his "ancestors were sensible of this, and therefore honestly purchased their lands of the natives."[39]

If *Johnson* offers a blank slate story of how the United States' property regime came to be, then Adams account is an example of a crowded slate story. In this account, settler title derived not from monarchical authority, but from transactions with Native sovereigns. This mean that figuring out what could be owned and in what way required engagement with Native notions of property.

British legal traditions, which led sometimes, in aggregate, to dramatic change." PRIEST, *supra* note __, at 5.

[35] This ignorance was selective, and took some time to set in. But by the time John Marshall wrote *Johnson v. M'Intosh* in 1823, he could claim that Indians "were not the owners of the land but had merely a 'right of occupancy'" which the United States could extinguish by the logic of conquest. STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 150 (2005).

[36] Writing on the history of the nineteenth-century American West, the historian Anne Hyde observed that American settlers "demanded empty landscapes, without people or history, where entirely new histories could be enacted without the inconvenience of the past." ANNE HYDE, EMPIRES, NATIONS, AND FAMILIES: A NEW HISTORY OF THE NORTH AMERICAN WEST, 1800-1860, 496 (2012).

[37] On colonists' reliance on Native notions of property, see Jenny Hale Pulsipher, *Defending and Defrauding the Indians: John Wompas, Legal Hybridity, and the Sale of Indian Land*, *in* JUSTICE IN A NEW WORLD: NEGOTIATING LEGAL INTELLIGIBILITY IN BRITISH, IBERIAN, AND INDIGENOUS AMERICA 89, 93 (Brian P. Owensby & Richard J. Ross eds., 2018). In the Northwest Territory after the Revolution, moreover, federal officials were "required . . . to understand and honor at least some Native law" pertaining to landownership. GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 24 (2019).

[38] JOHN ADAMS AND JONATHAN SEWALL, NOVANGLUS AND MASSACHUSETTENSIS 97 (1819).

[39] ADAMS AND SEWALL, *supra* note __, at 97.

Why would Americans tell this kind of story about their property regime? Adams was clearly making a political argument against monarchical and parliamentary jurisdiction over the colonies, hence his rejection of the idea that discovery could create property (and political) rights in the crown.[40] But this crowded slate story also does a better job than Marshall's blank slate one at capturing the realities of land transactions throughout the colonial and early republican periods. This is because the crowded slate story better captures the complex power relationships across the land.

Settler claims to power remained a precarious affair throughout this time. Indeed, settler officials often understood that their claims to power and property would either have to work around Native sovereigns or rely upon them explicitly.[41] Consider a striking example from the 1730s, when the son of William Penn claimed to have found a deed from Lenni Lenape chiefs to his father, allegedly giving him as much land "as far as a man can go in a day and a half."[42] Through this "Walking Purchase," settlers deprived the Lenni Lenape of their "last lands in the upper Delaware and Lehigh Valleys."[43] And in order to quiet Lenni Lenape protestations, the governor of Pennsylvania called on chief Canasatego of the Onondaga, thus relying on Haudenosaunee power and diplomacy to assert settlers claims over Native land.[44]

Notice how difficult it is to fit the "Walking Purchase" into Marshall's story. This episode opens with a mysterious deed representing an alleged cession of land from Native owners to settler claimants. It ends with reliance on the power and authority of one Native sovereign to quell the complaints of another Native sovereign. European claims to discovery cannot explain these events; only an understanding of the power of Native sovereigns can.[45]

---

[40] Adams specifically wanted to articulate a way out of a jurisdictional conundrum on the eve of the Revolution. On the one hand, he wanted to claim that parliament had no jurisdiction over the colonies. On the other, he did not want to put the colonies at the mercy of the crown's unfettered power. The crown's authority over the colonies, therefore, derived not from discovery, but from the acts of settlers and specifically their legitimate purchasing of land from Indians. James Muldoon, *Discovery, Grant, Charter, Conquest, or Purchase: John Adams on the Legal Basis for English Possession of North America*, *in* THE MANY LEGALITIES OF EARLY AMERICA, 25 (Christopher L. Tomlins & Bruce H. Mann eds., 2012).

[41] On early reliance on Native land claims see Pulsipher, *supra* note __. The power of Native sovereigns helps explain the widespread use of wampum belts and calumet pipes in diplomatic discussions throughout the colonial period. COLLIN G. CALLOWAY, PEN AND INK WITCHCRAFT: TREATIES AND TREATY-MAKING IN AMERICAN INDIAN HISTORY 25-35 (2014).

[42] CALLOWAY, *supra* note __, at 38.

[43] *Id.* at 39.

[44] *Id*.

[45] To be sure, the claim of discovery only operated to limit the claims of other European sovereigns, leaving the relationships between the British (and later American) sovereign and Native Peoples to be determined by the former. See, Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of Indian Lands*, 148 U. PA. L. REV. 1065

And these dynamics continued into the early national period. While early territorial "federal officials disliked trying to understand Indigenous property law, . . . Native leaders repeatedly forced them into this role"—a testament to "the persistence of Native power."[46]

To be clear, these two accounts of property are not mutually exclusive. Indeed, one of the more puzzling features of Marshall's opinion in *Johnson* is the degree to which he contemplates discovery's inability to completely settle the question of property's origins in the United States. We see this at two distinct points: first, in Marshall's slippage between conquest and purchase as a means of eliminating Native occupancy rights;[47] second, in Marshall's contemplation that settlers might continue purchasing lands from Native sovereigns.[48] I will have more to say about these points in Marshall's reasoning in a moment—for now it is enough to note that even his blank slate account cannot help but acknowledge a world before discovery which might yet have some bearing on the meaning and scope of property after discovery.

And yet, it is helpful to highlight the distinction between blank and crowded slate accounts of property's origins in the United States. Doing so helps us interrogate some assumptions built into theoretical accounts of property which center information and meaning making. It also helps illustrate how choices between these two stories can have redistributive consequences by eliminating or reallocating means of creating value. I explore these two arguments in the following Subparts.

B. Meaning and Property

A vibrant strand of theorizing about property situates information and meaning-making at the core of property law. A common thread running through much of this literature is the importance of community to the creation and development of property rules. More specifically, communities share a

---

(arguing that *M'Intosh* created a two-tiered rule). But even this description fails to capture the power differentials that put settlers at the mercy of Native power, thus understating the degree to which the United States' early property regime depended on Native power and sources of law.

[46] ABLAVSKY, *supra* note __, at 90.

[47] *Johnson*, 21 U.S. at 587 ("The United States . . . hold . . . an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest[.]")

[48] Here, Marshall took on a warning tone:

> The person who purchases lands from the Indians, within their territory, incorporates himself within them so far as respects the property purchased; holds their title under their protection, subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

Id. at 593.

conceptual universe that delimits what kinds of property arrangements are permissible and what kinds of property arguments are possible or desirable. Exploring stories about property's origins can help us to avoid taking these communities and their modes of communication and meaning-making for granted. Choosing a story about property's origins, in effect, is an effort by specific agents and institutions within the property regime to delimit the kinds of signifiers and concepts that participants in the property regime can use to give meaning to property.

In discussing the work of scholars who emphasize information and meaning in property law, I want to group together two lines of thinking. On the one hand, some scholars argue that property reduces the transaction costs that come with the complexities of everyday life, and that therefore property's most important functions involve managing information.[49] Property delineates bundles of things—say, a parcel of land—and sends information to others about how they may or may not engage with this parcel of land—"keep out" or "come in." This makes it easier for people to understand their legal duties without undertaking intensive investigations.[50] On the other hand, some scholars contend that property does not merely reduce transaction costs to streamline private relationships; it also can give character and content to these relationships. For these scholars, the meaning of property implicates something beyond signifiers of inclusion/exclusion; it concerns the degree to which property can "reflect and shape our deepest values."[51]

There are important differences between these two approaches to property and meaning, but it is nonetheless worthwhile to think about them together.[52] This is because they share a critical assumption: the existence of

---

[49] Henry Smith, *Property as the Law of Things*, 125 HARVARD LAW REVIEW 1691, 1716 (2012).

[50] *Id.* at 1693 ("Property is a shortcut over the 'complete' property system that would, in limitlessly tailored fashion, specify all the rights, duties, privileges, and so forth, holding between persons with respect to the most fine-grained uses of the most articulated attributes of resources.").

[51] Joseph W. Singer, *Property as the Law of Democracy*, 63 DUKE L. J. 1287, 1299 (2014). Jedediah Purdy has advanced a slightly different version of this argument, maintaining that property as an institution arises "within traditions of principle, argument, and aspiration, which in turn take some of their coherence and force within [their] larger social and legal imagination." JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION 18 (2010). Purdy's work traces the rise of the competing and complementing values that American legal academia associates with property to nineteenth-century Scottish Enlightenment thought. *Id.* ("We still inhabit a legal imagination that owes its shape to the early-modern social imagination . . . of the Scottish Enlightenment and its immediate descendants.").

[52] These two accounts of property disagree on the relationship between property and social order. Built into the first school is a vision of the world that centers individual actions, perceptions, and preferences—in other words, this informational account works from (and seeks to aid) a social order shaped by privately articulated values.[52] This is akin to what

a community defined by its shared conceptual universe. As Carol Rose explains, people must be able to claim ownership "in a language that is understood" by others—meaning that property's signaling functions only work if others understand the signals.[53] Joseph Singer similarly relies on a shared conceptual universe when he argues that American property law should reflect democratic values and eschew power dynamics that are antithetical to democracy.[54] This argument flows from Singer's account of democracy, which Singer defines by reference to American history.[55] Singer assumes a community that shares in these values, from which flows a set of

---

Gregory Alexander described as the "property-as-commodity" understanding of property in the United States, which depicts property as delineating "the legal and political sphere within which individuals are free to pursue their own private agendas and preferences." GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970, 1 (1999). The central puzzle from this standpoint becomes: How can people build their lives in a world full of other people, similarly engaged in building their own lives? Property has a crucial role to play in solving this puzzle by facilitating people's interactions with each other. Calls to consider systemic values and to further investigate the character of people's relationships to each other—as Henry Smith might put it, "[p]romoting the promiscuous employment of contextual information in property"—only makes people's interactions with each other more costly, thus undermining property's function. Smith, *supra* note __, at 1717.

By contrast, the second school argues that making property bundles inevitably implicates value judgments. Singer, *supra* note __, at 1291 ("[Smith] wants to focus on the structures of property that are necessary to enable *any* legitimate values to be promoted. Yet despite these ambitions, Smith does not eschew value choices."). The vision of the social order underlying this account of property is one in which people already share commitments to different norms, such that the choices among different property arrangements implicate choices among different values. In other words, this is a vision of private ordering in which private choices are informed by and implicate questions of public good. Singer, *supra* note __, at 1299 (arguing that Smith's emphasis on information costs "take our attention away from values and value choices that are not only basic elements of property law but are also fundamental to both private and public law more generally"). On this note, Singer's account is part of a family of property theories that take a skeptical stance towards the centering of individual self-interest in property law. *See* Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107, 110-11 (2013) (discussing strands of "progressive property" theories that emphasize the underlying plural values that property serves and reflects); Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1903 (2006) (arguing that moral objections to property "generally are drawn from the sense that property concedes too much to human self-interest"). Others in this school agree that property is foundational to social order, but contend that individuals are "inherently social being[s], inevitably dependent on others not only to thrive but even just to survive." ALEXANDER, *supra* note __, at 1-2.

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

[54] Singer, *supra* note __, at 1301.

[55] This is most striking in his somewhat synecdochical treatment of the Declaration of Independence. Singer, *supra* note __, at 1299 ("Property is not just about information or complexity; it is about promoting 'Life, Liberty, and the Pursuit of Happiness.'").

normative prescriptions about how property law should operate.[56]

The upshot here is that if a property regime seeks to reduce transaction costs or have property relations communicate values, it must make an antecedent choice about the conceptual universe it will rely upon to achieve these goals. This point echoes Rose's argument that participants in a property regime must be able to express their claims in a language that others understand, but it also goes beyond that. This is because a shared language alone is not enough to make the property regime work. Participants in a property regime also share values, interests, and incentives—for instance, scholars studying the rise of private ownership in the absence of centralized planning have argued that tight-knit communities of repeat players with shared interests are key to creating private ownership.[57] We can say something similar about participants in a property regime created not through private action but through centralized planning or coercion—they, too, "share" in this coercion insofar as they suffer or benefit from it and the beliefs that justify it.[58] Participants in a property regime thus share not only a language they can use to communicate their claims; they share beliefs, ideas, practices that allow them to express their claims, and which also—as I will discuss below—delineate the kinds of claims they can make.[59] This is a

---

[56] For instance, Singer has analogized a situation in which a mortgage lender offers "onerous terms to someone who is desperate to become a home owner and get a share of the American Dream" to the kinds of relationships—"master/slave" and "lord/vassal"—that are precluded by his interpretation of American democracy. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1048 (2009).

[57] For instance, Robert Ellickson argues that a traditional story of property rights arising in response to a need to internalize externalities presumes a "close-knit" community in which "power is broadly dispersed and members have continuing face-to-face interactions with one another." Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1320 (1993). Similarly, James Krier argues that a precondition to the rise of a respect for possession as a basis for property rights was the existence of a community whose members were "relatively few in number, known to each other," and who shared "common interests and interact[ed] repeatedly." James E. Krier, *Evolutionary Theory and the Origins of Property Rights*, 95 CORNELL L. REV. 139, 149 (2009). I take the existence of a conceptual universe as a proxy for these preconditions.

[58] James Krier has argued that some degree of cooperation or collective action—along with shared commonalities among cooperators—is necessary to explain how property comes to be, even if property comes to be through coercion. *Cf.* Krier, *supra* note __, at 148 ("Much the same can be said of . . . centralized intervention by some sort of governing authority. How did the authority come into being, absent cooperation and collective action?").

[59] There is an imperfect analogy here to Pierre Bourdieu's concept of the *habitus*, or "systems of durable, transposable dispositions, structed structures predisposed to function as structuring structures," which "can be collectively orchestrated without being the product of the organizing action of a conductor." PIERRE BOURDIEU, THE LOGIC OF PRACTICE 53 (Ricard Nice trans., 1990). *See also* Hendrik Hartog, Landlocked: On American Property, 295 The Nation 31, 35 (2012) (discussing the idea of a "habitus" of "property ownership in

property regime's conceptual universe.[60]

Consider an example from *Johnson*. Underlying Marshall's opinion is a sense that Native relations to land were inferior to settler relations to land.[61] This would help justify Marshall's blank-slate narrative: because Native relations to land were inferior, their complexity could be ignored and reduced instead to the metric of occupancy.[62] *Johnson* thus chooses a particular community's conceptual universe as the one which the United States' property regime would use to communicate about ownership.

The choice of a conceptual universe deserves closer examination, and it is here that origin stories can be particularly helpful. This is not to say that origin stories are the only way to study a property regime's conceptual universe, but rather that deciding on a property regime's origins will also decide questions about the scope and content of that property regime's conceptual universe. I will highlight three reasons why these stories are fruitful objects of study.

First, these stories focus our attention on specific storytellers, thus highlighting that fact that *someone* must make a choice about what the property regime's conceptual universe will be. This point bears emphasizing. Some scholars have argued that the property regime's conceptual universe is largely a function of audience. For instance, they have argued that larger and

---

America," the tacit and unchallengeable understandings of what it means to hold property"). I say imperfect, however, because I am less concerned than Bourdieu was with whether actors consciously rely upon a property regime's conceptual universe or whether they act in accordance with it without thinking about it, as Bourdieu seemed to suggest about the habitus. *Cf.* Bourdieu, *supra* note __, at 54 (describing the habitus as a "product of history . . . deposited in each organize in the form of schemes of perception, thought and action" that "tend to guarantee the 'correctness' of practices and their constancy over time").

[60] There are echoes of this idea in American jurisprudence around what constitutes a regulatory taking. The U.S. Supreme Court has held that a regulation does not constitute a taking when it merely codifies or clarifies a limitation that already "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon landownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1029). Just what these background principles are remains unclear. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 177 (2021) (Breyer, J., dissenting) (highlighting the lack of clarity around what constitutes a background principle of property law). These background principles of property law are part of a property regime's conceptual universe insofar as they seem to inform property owners of the kinds of possible uses and claims they may make about their property (hence why it would not constitute a taking to merely codify or clarify these principles, although the line around what constitutes either codification or clarification also remains vague).

[61] *Cf. Johnson*, 21 U.S. at 590 (expressing concern that to "leave [Native sovereigns] in possession of their country, was to leave the country a wilderness.")

[62] Rose makes a similar argument, namely that *Johnson* essentially punishes a group that "did not play the approved language game and refused to get into the business of publishing or reading the accepted texts about property." Rose, *supra* note __, at 85.

more heterogenous audiences require a simpler conceptual universe that can cut across distance and difference in order to deliver the desired message.[63] But note that this involves an antecedent choice to speak to a larger and more diverse audience; not all property regimes choose to do this.[64] To put the point more clearly: someone, perhaps a group of people, choose who their property will speak to.

This brings up a second point that stories can help us understand: once we are thinking about specific storytellers, we should also be thinking about their position within the property regime and their power over other participants. Not every storyteller will be able to make their account authoritative. *Johnson* is somewhat illustrative here, too, in the sense that it is not obvious that Marshall had the power to eliminate private transactions with Native sovereigns. On the one hand, it is possible that he was articulating a position already shared by other settlers.[65] On the other, as I noted earlier, portions of his opinion suggest that it remained possible to enter into land transactions directly with Native sovereigns. Marshall warned his audience that an individual acquiring property from Native sovereigns "incorporates himself with them" and "holds their title under their protection, and subject to their laws."[66] We might think of this as a warning to those seeking to purchase lands directly from Native sovereigns—and a particularly stark warning in a Jacksonian America attuned to the civilizational lines that allegedly divided Americans and Indians.[67] That he contemplated the possibility, however, suggests that Marshall thought that Native power as a

---

[63] Henry Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1125 (2003) ("The larger and more diverse the target audience, the more courts will intervene to enforce a limit on the intensiveness of information carried by the set of symbols."); Henry Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES IN LAW 5, 12 (arguing that custom places an "informational burden" on "duty-holders who are farther removed from the community that originated the custom") (2009); Maureen Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 881 ("[U]nder conditions of land scarcity and growing population size and diversity, standardized information demarcating boundaries became more important because it facilitated transactions and reduced the rising tide of litigation.").

[64] For instance, Brady argues that early New Haven employed a much more customized conceptual universe around boundaries in part because it had a smaller and more homogenous community. But this was a smaller and more homogenous community by choice. As she explains: "New England settlers, including residents of New Haven, defined themselves against others: new immigrants, other settlers from different colonial powers, and Native Americans. Exclusion was built into the structure of society." Brady, *supra* note __, at 946.

[65] BANNER, *supra* note __, at 150.

[66] *Johnson*, 21 U.S. at 593.

[67] *Cf.* DEBORAH ROSEN, BORDER LAW: THE FIRST SEMINOLE WAR AND AMERICAN NATIONHOOD 131-34 (2015) (discussing how concepts of "savagery" and "civilization" worked to place Native sovereigns beyond the scope of the rules of war).

source of property rights remained too deeply embedded in his audiences' mind for him to completely ignore.

And this leads to a third reason why it is useful to delve into a property regimes' origin stories: they can shed light on the community's conceptual universe and how storytellers try to situate themselves in relation to it. Paying attention to the scope and content of a property regime's conceptual universe is important because it can help us understand how participants in this regime will articulate property claims. To that end, origin stories might operate as a means to shape a property regime's conceptual universe.[68] I will illustrate these dynamics with another familiar historical example: the role that ideas about race played in antebellum America's chattel slavery regime.

It hardly needs mentioning that ideas about race—and specifically the association between Blackness and enslavement—were integral to maintaining the institution of chattel slavery in the United States. This was not always the case,[69] and the category of Blackness was itself always more a terrain of argumentation than a discoverable fact.[70] But there is no question that race or claims about race were part of the conceptual universe that allowed American antebellum slavery to work by delineating the boundaries of who counted as property and who was free. Thus, for example, participants in the property regime might understand that, even absent a piece of paper confirming title over another person, the performance of authority and domination over a person who could be deemed Black might be enough to create a property right in that person—provided that the audience of this claim understood the performance and bought the signifiers of racial identity and their significance.[71] The same might be true of the performance of

---

[68] I develop this insight from Carol Rose's own work on storytelling in property theory. Rose argues that telling stories is a way of "structuring our experiences of events," thus inviting us to change "our minds, and . . . reconsider and reorder our approach to events." Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. L & HUMANITIES 37, 55 (1990).

[69] For instance, there was uncertainty during the colonial period about whether persons born from interracial couples were considered enslaved. As Jennifer Morgan has argued, "Africans and their descendants" had to be "located . . . in ledgers and bills of sales, not as members of households or families." JENNIFER L. MORGAN, RECKONING WITH SLAVERY: GENDER, KINSHIP, AND CAPITALISM IN THE EARLY BLACK ATLANTIC 4 (2021).

[70] *See*, *e.g.*, ARIELA GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 8 (2008) (arguing that race is "a powerful ideology, which came into being and changed forms at particular moments in history as the product of social, economic, and psychological conditions").

[71] This is what Rebecca Scott and others have called "peremptory enslavement," or "a designation of status that requires no show of title or evidence." Andrew J. Walker, Anna María Silva Campo, Jane Manners, Jean M. Hébrard, and Rebecca J. Scott, *Impunity for Acts of Peremptory Enslavement: James Madison, the U.S. Congress, and the Saint Domingue Refugees*, 79 WILLIAM AND MARY QUARTERLY 425, 426 n.3 (2022). *See also* Rebecca Scott, *Social Facts, Legal Fictions, and the Attribution of Slave Status: The Puzzle of Prescription*,

signifiers of freedom and autonomy by a Black person, which others might understand as a claim *against* property.[72]

Of course, to say that ideas about race were part of chattel slavery's conceptual universe does not tell us *how* those ideas related to property rights. This is why it is important to investigate how participants in this and other property regime mobilized these ideas to give meaning to property and contest others' claims. Consider, for instance, the Missouri case of *Davis v. Evans* (1853).[73] Margaret Davis, a free Black woman, commenced this action for adverse possession.[74] She claimed that she had adversely possessed her daughter, Patsy, whom she argued was in fact her slave.[75] Whether Margaret meant what she said or whether she understood that this was one way to secure custody of her daughter in a slave society, I do not know. In any event, the defendants replied that Patsy was not her mother's slave, but theirs;[76] that they had placed Patsy under Margaret's care only for "safe keeping" and essentially as an act of altruism;[77] and that to find adverse possession here would be only to punish the master's "kindness" in "permitting the child to remain with its mother."[78] The Missouri Supreme Court agreed with the defendants that allowing Margaret to establish adverse possession would indeed "torture[]" the master's "humanity."[79] And yet we can discern behind the cruelty of this judgment some disagreements about the relationship between race and property. Judge Scott, who authored the Court's opinion, thought that even if the case did not present such magnanimous defendants, Margaret would nonetheless lose because "a negro, under our laws, cannot hold slaves."[80] However, two of his colleagues disagreed with him on this point, refusing to use racial identity to delimit the category of property owners.[81] In other words, while ideas about race informed this property regime over people, the relationship between racial identity and rights of ownership was not obvious. It was, instead, something that could be argued over.

Once we understand a property regime's conceptual universe as

---

35 LAW AND HISTORY REVIEW 9, 17-18 (2017) ("The appearance of control over a person deemed to be of African descent would generally do the trick.").

[72] *See, e.g.*, Scott, *supra* note __, at 19-20.

[73] 18 Mo. 249.

[74] *Id*. at 249.

[75] *Id*.

[76] *Id*. at 249-50.

[77] *Id*. at 250.

[78] *Id*. at 252.

[79] *Id.*

[80] *Id*.

[81] *Id.* (Gamble and Ryland, JJ, concurring in part, dissenting in part) ("We do not concur in the opinion, that a free negro may not legally hold slaves.").

something to be contested, we can understand origin stories as attempts to define the scope of a property regime's conceptual universe. *Davis* also suggests that delimiting the conceptual universe might be particularly important in more socially heterogenous contexts. Had the members of the Missouri Supreme Court been of one mind about the magnanimity of the master, the case might have come out differently, heightening the stakes of defining the contours of a property regime's conceptual universe and the relationships among its constituent parts. To return to the insights gleaned from scholarship that understands property as communication, in more socially heterogenous contexts, origin stories might serve to manage complexity in property relations by delimiting the universe of permissible sources of meaning that participants in the property regime may use to make property claims.

To summarize, theories that explain and explore property as a means of communicating information must make an antecedent choice about the conceptual universe that will facilitate this communication. Taking seriously a property regime's origin story (or stories) allows us to critically explore this choice. It highlights the actors involved in choosing and their relative power to turn their choice into an authoritative command on other participants in the property regime. Moreover, by asking how storytellers situate themselves within the relevant conceptual universe, we can understand how storytellers work to make their accounts persuasive and to delimit the contours of permissible property arguments.

C. Value and Property

In addition to using stories about property's origins as a means of studying the conceptual universe underlying a particular property regime, we can also investigate how different stories about property's origins can shape economic life. In particular, the choice between a crowded slate and a blank slate narrative is in itself a redistributive choice: either recognize preexisting entitlements and translate them into the new property regime or propose that the new property regime distributes the world anew.[82] In telling a story about property, then, different legal actors can seek to use law to shape economic activity. This Subpart explores this dynamic through the lens of *Johnson v. M'Intosh*. My goal here is not to make the historical claim that Marshall wrote his opinion with these distributive consequences in mind.[83] Moreover, I do

[82] *Cf.* Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359, S364 (2002) ("The cost of valuation and allocation are likely to be even higher in the transition from one already existing property system to another. . . . Once rights get allocated, reallocation may be too expensive a hurdle to get over.")

[83] For such an analysis, see, e.g., Kades, *supra* note __, at 1071-72 (2000) (arguing that

not make a causal argument connecting different property stories with subsequent distributions.[84] Rather, I want to think through how a choice to depict the origins of the United States' property regime one way as opposed to another might affect economic behavior.

We can begin in familiar territory. It is well understood that parties come to the bargaining table with their own expectations, and that these expectations shape their behavior. What I want to show here is how stories about property could support or undermine those expectations, in the process reifying, creating, or eliminating different means of creating value. If my means of making a property claim relied on a connection between the worlds before and after the new property regime, I might advocate for a vision of this new property regime as arising out of a crowded slate of preexisting property entitlements. Conversely, if I am hindered by preexisting property claims, I might argue that the new property regime arose out of a blank slate.

But stories about property's origins do not just affect individual participants in the property regime; they can have systemic effects.[85] It is useful to think through what these effects might be through the lens of *Johnson*. And to do that, we must venture briefly into the chaos of the early American land market—a chaos brought about in no small part by the competing claims of individuals, corporations, and sovereigns to Native lands.

Fletcher v. Peck (1810) is illustrative. In the aftermath of the American Revolution, the Georgia legislature agreed to sell much of its land (sizeable portions of today's Alabama and Mississippi) to some companies engaged in land speculation.[86] Much of this land belonged to different Native nations—indeed, Georgia sold the land on the cheap because it was uncertain of its own claim to title.[87] These companies had bribed legislators with company stock to secure the sale.[88] The scheme so angered the Georgia electorate that a subsequent legislature rescinded the sale and "literally burned the earlier

---

Johnson "was an essential part of the regime of efficient expropriation because it ensured that Europeans did not bid against each other to acquire Indian lands, thus keeping process low"). Although I borrow much in this discussion from Kades' efficiency analysis, I do not make the historical argument he made. *See id.* at 113 (arguing that the trial court and the Supreme Court understood the "efficiency motivation for the custom against private purchases of Indian land" which undergirded Marshall's holding).

[84] Such a causal relationship would depend on many other factors, not least of all that either the Supreme Court or Marshall's decisions had the power to effect change.

[85] *Cf.* Kades, *supra* note __, at 1111 ("From an American *societal* point of view, . . . the rule of *M'Intosh* solved a collective action problem that permitted the nation to avoid expensive bidding wars for Indian lands.").

[86] ABLAVSKY, *supra* note __, at 53.

[87] *Id.* at 53-54.

[88] *Id.* at 57.

statute."[89] In the interim, however, the companies had lured New Englanders into their land schemes—their efforts to sell claims to investors closer to Georgia proved more difficult, as people in the surrounding area understood the tenuous nature of the property claims at issue.[90] But in the aftermath of the legislative rescission, what, if anything, did these New England claimants own?

This was the question that reached the Supreme Court in *Fletcher*. Marshall construed the case as one involving the federal constitutional protection of contractual rights. But it is not hard to see how this case also highlighted the chaos created by underdetermined means of claiming ownership over lands owned by Native Nations. In this sense, the claims of federal supremacy with regard to Indian lands might also translate into gains across settler society. In depositing in the federal government the power to turn Indian land into land that could be owned, Marshall's story could also reduce the need for due diligence into the origins of property claims.[91]

We might point to other efficiency gains, too. For instance, because Marshall's story reduced Native rights to occupancy, it narrowed the universe of Native relationships to land which would-be purchasers needed to understand, thus reducing the cost of translating between Native relationships to the land and the Anglo-American conception of landownership. Under this story, it would be unnecessary to delve into the ways in which Native societies thought about and allocated value in land—there was, in a sense, nothing to translate.[92] All that settlers needed to figure out was who occupied the land. Once they knew this, the story could play out: the federal government could extinguish that singular right and create a new right of ownership. Additionally, a kind of choice-of-law efficiency also follows from dismissing Native ways of governing land. Because Indians only had a right of occupancy which the federal government could erase, the process of erasure also eliminated the need to look to Native property law in figuring out subsequent property disputes.[93] Extinguishing the right of occupancy

---

[89] *Id*.

[90] *Id.* at 209.

[91] This assumes, of course, that land-hungry settlers were invested in due diligence. At the very least, however, the events in Georgia represented a challenge to "federal official's vision of orderly settlement under national authority," and limiting state power to create this kind of title nightmare could in theory make it easier to achieve that vision. *Id*. at 57.

[92] Indeed, Carol Rose has noted that the claimants in *Johnson* argued that Indians had not done enough to make their claims to the land known, and thus could not establish property claims. Thus, Rose frames *Johnson* as involving an example of a group that "did not play the approved language game and refused to get into the business of publishing or reading the accepted texts about property." Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 85 (1985).

[93] *Cf.* Kades, *supra* note __, at 1095-94 (arguing that Marshall opted for a broader holding than necessary in part to discourage would-be purchasers of land from turning to

cleared the doctrinal slate, making Anglo-American property law the only source of law that could resolve property disputes.

These efficiencies all follow from the central plot point of a blank slate story: when the slate is clear, it becomes easier to set the ground rules for the new property regime.[94] Extinguishing Native claims to land eliminated one of the costs of setting up a new and innovative property system. Marshall's story paints a picture of the world in which these claims do not extend beyond occupancy and are written off at the mercy of the conqueror. In this sense, Marshall's story could redistribute means of creating value across the land by reifying some avenues to value creation (like the federal government's power to grant land patents) while eliminating others (purchasing or acquiring land from Native sovereigns in accordance with their laws).

One could interpret Marshall's thinking in *Johnson* as an example of a trend in American jurisprudence which Morton Horwitz identified some time ago.[95] Horwitz argued that by the early decades of the nineteenth century, American judges had come to think of themselves as playing "a central role in directing the course of social change."[96] Across a range of doctrinal areas, Horwitz argued that judges threw away "eighteenth century precommercial and antidevelopmental common law values," engaging in doctrinal shifts to bring about their desired visions of social change.[97] We could speculate that, in addition to these doctrinal shifts, judges might also tell stories about property's origins with an eye toward the distributive consequences that might attach to their narrative choices. Again, I am not making the historical claim that Marshall did this in *Johnson*; but I am also not ruling out the possibility.

Indeed, this way of thinking about judges provides an opportunity to merge my analysis of value and meaning in stories about property. The way in which a property regime's authoritative institutions tell the story about property's origins might well reflect a quest to support particular avenues of value creation. The choice of a conceptual universe might follow from this this quest. The search for value might guide meaning. At the same time, it would be a mistake to underestimate the power of a community's conceptual universe to shape property claims. As I noted earlier, it is telling that Marshall did not dismiss the possibility that settlers might still purchase land from Native sovereigns. Maybe these kinds of transactions were too deeply

---

"Indian courts" or Native sources of authority more broadly).

[94] *Cf.* Banner, *supra* note __, at S364 ("The cost of valuation and allocation are likely to be even higher in the transition from one already existing property system to another. . . . Once rights get allocated, reallocation may be too expensive a hurdle to get over.")

[95] *See generally*, MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 254-55 (1977) (describing the shift).

[96] *Id.* at 1.

[97] *Id*. at 253.

entrenched in the minds of participants in the United States' property regime to simply write off. Perhaps meaning, too, could guide the search for value. In the Parts that follow, I explore these possibilities by reconstructing an example that will be less familiar to American legal scholars: the creation of private landownership in the Kingdom of Hawai'i.

II. HAWAIIAN LAND REFORM

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

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

A. Hawaiian Land Ways

Before we explore the crises that led to reform in the middle of the nineteenth century, we need to understand Hawaiian's relationship to the land before reform. Hawaiians did not think about land as something to be owned in fee simple absolute.[98] This did not mean that Hawaiians lacked a concept

[98] KAME'ELEIHIWA, *supra* note __, at 9-10.

of property; rather resources across the islands were governed not through a system of private entitlements, but through a web of status relationships.[99] I cannot hope to convey the complexity of these relationships here. My goal, instead, is to highlight two features of Hawaiian land ways that became important in the aftermath of reform. The first is the way in which status relationships structured resource governance. The second is the way in which Hawaiians connected different parts of the landscape to achieve significant agricultural production. This interconnectedness would be imperiled by privatization, and efforts to re-enact it would be particularly important among the maka'āinana.[100]

As early as the fourteenth century, rulers on different islands ordered lands surveyed and boundaries drawn to avoid disputes among neighboring chiefs.[101] This process divided the islands into a series of nested units. The most important of these units for our purposes was the *ahupua'a*, which was typically wedge-shaped, as illustrated in the map below.[102] Usually, though not always, the boundaries between ahupua'a would trace natural features, running from the mountains to the sea and thus encompassing within the ahupua'a the various materials needed for sustenance—from coastal fisheries to upland thatch.[103] Upon assuming control of an island, each new ruler would reallocate the land among the chiefs, a process that allowed the ruler to consolidate power and ensure proper governance.[104] The chiefs could rely on a *konohiki* (steward) to administer the land by organizing agricultural production and collecting taxes.[105] And while this structure for governing the land could change with shifts in the kingdom's politics, the maka'āinana—the people on the land—remained largely in place, although they were always free to relocate.[106]

---

[99] For instance, as I will elaborate below, different access and use regimes applied to irrigated patches as opposed to shared pastures and kula land, suggesting different conceptions of ownership at play.

[100] This desire helps explain, for example, why some maka'āinana organized "hui"—"unincorporated voluntary associations"—to accumulate landholdings that would allow them to supplement the insufficient resources they received through privatization and to "retain some features of the traditional life of the ancestors." CARLOS ANDRADE, HĀ'ENA: THROUGH THE EYES OF THE ANCESTORS 103 (2008).

[101] KAME'ELEIHIWA, *supra* note __, at 26.

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

[103] KAME'ELEIHIWA, *supra* note __, at 27; KATRINA-ANN R. KAPA'ANAOKALAOKEOLA NAKOA OLIVEIRA, ANCESTRAL PLACES: UNDERSTANDING KANAKA GEOGRAPHIES 53 (2014).

[104] KAME'ELEIHIWA, *supra* note __, at 51-52.

[105] *Id.* at 29.

[106] OLIVEIRA, supra note __, at 45; HANDY ET AL., *supra* note __, at 288; SAHLINS, supra note __ at, 113-14.

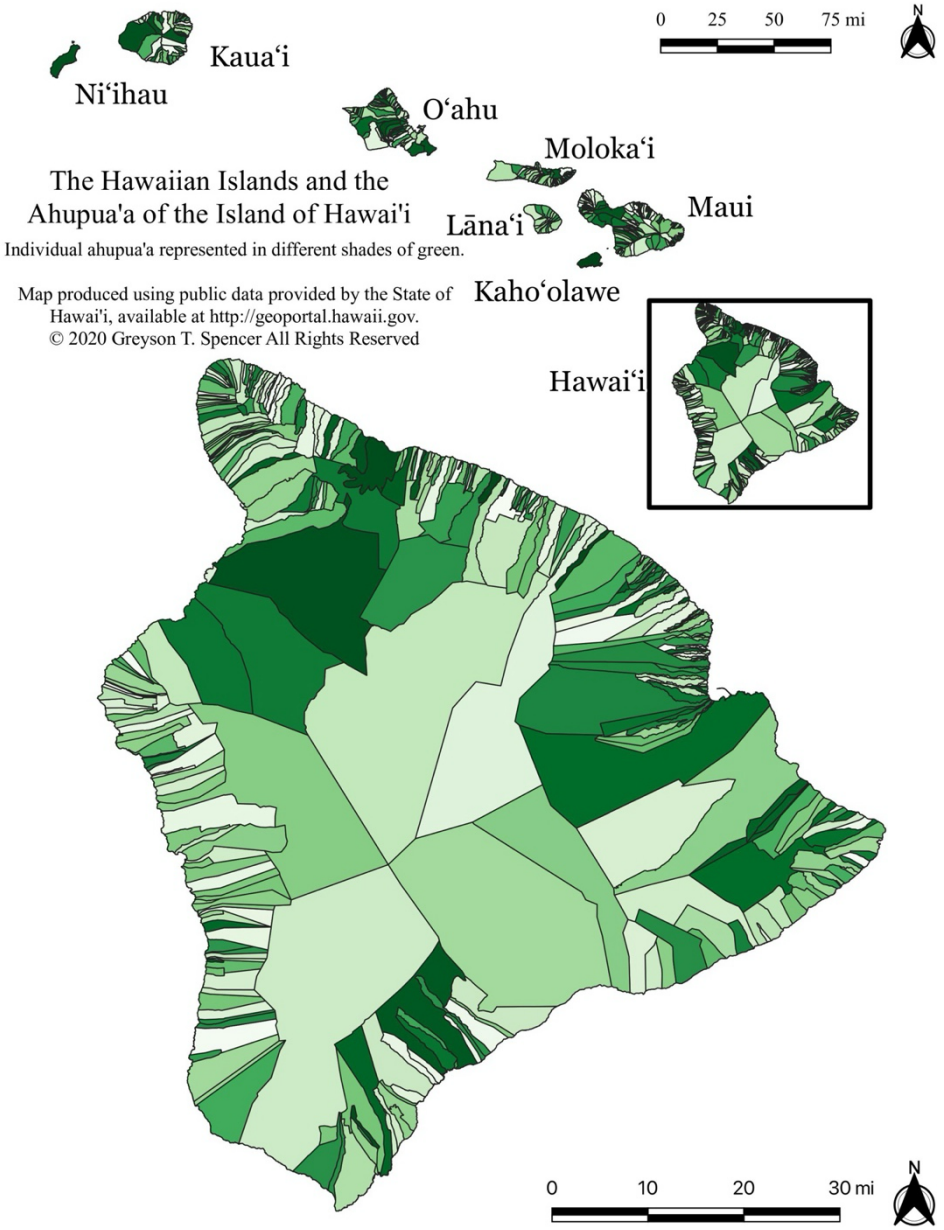

Figure 1. Map of the Hawaiian Islands and the Ahupua‘a of the Islands of Hawai‘i

Within each ahupua‘a, beginning from the ocean and running all the way up the mountains, Hawaiians organized the landscape into different regions with distinct productive uses.[107] Two of these regions or areas are particularly

[107] HANDY ET AL., *supra* note __, at 54-57.

important for our purposes: wet and dry lands. Wet lands were those irrigated by an intricate set of ditches bringing water from mountain streams to irrigated terraces, where Hawaiians cultivated several crops, most important among them *kalo* (taro).[108] Kalo production (as well as the chief's tax on this production) fell on the *'ohana*, the family unit, and irrigated terraces were allocated among these family units.[109]

Hawaiians also relied on dry land, or *kula* land, for cultivation. This land was "dry" because it was not part of the intricate irrigation system that fed the terraces.[110] Hawaiians used kula land to grow several crops, including breadfruit, sweet potato, banana, and a dryland variety of kalo.[111] Unlike the irrigated terraces, access to kula land was communal, and households could use kula land to supplement their cultivation in irrigated terraces and access other resources, like grasses or wood, subject to the konohiki's authority.[112]

This is only a cursory sketch of Hawaiian land ways, but it allows us to better understand two important features. The first is the way in which status relationships governed access to resources. The central figure here was the konohiki, or chief's steward. The konohiki were not only responsible for collecting tribute for the chiefs; they could also regulate access to common resources and organize labor to maintain critical infrastructure, like ditches.[113] This was a particularly important role, because the Hawaiian agricultural landscape, and especially kalo cultivation, required considerable labor and organization.[114] Importantly, however, the relationship between the

---

[108] *Id.* at 55; LAWRENCE MIIKE, WATER AND THE LAW IN HAWAI'I 47 (2004). It is difficult to overstate the importance of kalo in Hawaiian society and culture. Hawaiians regarded kalo "as the elder brother of the Hawaiian race." KAME'ELEIHIWA, *supra* note __, 24. And the "Hawaiian political geography was patterned in terms of agricultural districts topographically determined by the stream systems upon which [kalo] plantations were dependent for irrigation." HANDY ET AL., *supra* note __, at 77.

[109] Jocelyn Linnekin, *The Hui Lands of Keanae: Hawaiian Land Tenure and the Great Mahele*, 92 J. POLYNESIAN SOC'Y 169, 174 (1983); JOHN RYAN FISCHER, CATTLE COLONIALISM: AN ENVIRONMENTAL HISTORY OF THE CONQUEST OF CALIFORNIA AND HAWAI'I 56 (2015).

[110] FISCHER, *supra* note __, at 80. "Kula" can have several meanings, but the relevant cluster of definitions here is "[d]ry open land; grass land." "kula," PAUL NAHOA LUCAS, A DICTIONARY OF HAWAIIAN LEGAL LAND-TERMS 60 (1995).

[111] Linnekin, *supra* note __, at 174.

[112] *Id.*

[113] *See* Andrade, *supra* note __, at 88 (discussing the importance of konohiki organization for the maintenance and construction of ditches).

[114] This was so in no small part because of the complexity of constructing ditches to connect terraces to mountain streams. *See* HANDY ET AL., *supra* note __, at 58. It also bears emphasizing that this landscape was socially constituted. Wet and dry lands were not fixed categories. For example, dry lands could be transformed into wet lands by extending ditch networks to new regions. Marshall Sahlins has argued that irrigated terraces were expanded into the upper Anahulu Valley in O'ahu around 1804, as Kamehameha I's conquest of that

maka‘āinana and the konohiki (and the chiefs, for that matter) was not one of control alone. Indeed, the maka‘āinana were not tied to the land, and they could relocate to escape the demands of an overbearing superior, who might in turn be criticized for losing *aloha* (love) for the people.[115] In short, reciprocal status relationships among Hawaiians mapped on to the land, governing resource allocation and use.

The second aspect of Hawaiian land ways worth emphasizing is the interconnectedness of the Hawaiian agricultural landscape. Some agricultural practices followed clear spatial delineations—most obviously, the irrigated terraces—but these were not the only sites of resource extraction and production. As I already noted, Hawaiians supplemented these terraces with cultivation in the kula lands. Moreover, the maka‘āinana living within a specific ahupua‘a could also access fish ponds or coastal fisheries connected to that ahupua‘a. This interconnectedness is important to keep in mind, because it would be thrown into disarray through privatization. Securing homesteads for the maka‘āinana may have provided them a place to live and a spot on the ground to cultivate, but it extricated that spot from this interconnected landscape. This would make it harder to cultivate the land, and it would also endanger access to the broader range of resources available before reform.

B. Crisis and Reform

The Hawaiian Kingdom suffered a catastrophic loss of population in the first half of the nineteenth century.[116] By 1839, the Hawaiian scholar and chiefly advisor Davida Malo feared that the kingdom was “reduced to a skeleton, and is near death; yea, the whole Hawaiian nation is near to a close.”[117] This put the kingdom in a precarious position, as Malo warned in a letter to the chiefs the following year:

> The ships of the white man have come, and smart people have arrived from the great countries which you have never seen before, they know our people are few in numbers and living in a small country; they will eat us up, such has

island led to the relocation of Hawai‘i Island warriors to the O‘ahu backcountry. MARSHALL SAHLINS, ANAHULU: THE ANTHROPOLOGY OF HISTORY IN THE KINGDOM OF HAWAII, HISTORICAL ETHNOGRAPHY 52 (1992).

[115] Sahlins, *supra* note __, at 114.

[116] KAME‘ELEIHIWA, *supra* note __, at 140. The decline was driven by diseases brought from abroad and a low fertility rate. SETH ARCHER, SHARKS UPON THE LAND: COLONIALISM, INDIGENOUS HEALTH, AND CULTURE IN HAWAI‘I, 1778-1855, 167-201 (2018). One estimate places the kingdom’s population in 1778 at 800,000 inhabitants. DAVID STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAI‘I ON THE EVE OF WESTERN CONTACT 59 (1989). Kame‘eleihiwa estimates that by 1849, the kingdom had lost 83 percent of this population. KAME‘ELEIHIWA, *supra* note __, at 140-41.

[117] ARCHER, *supra* note __, at 199.

> always been the case with large countries, the small ones have been gobbled up.[118]

In an effort to restore *pono* (righteousness) to the kingdom, the chiefs embarked on a project to remake the kingdom through law. In 1840, Kamehameha III promulgated the kingdom's first written constitution, which created a new judicial system and a new bicameral legislature.[119] The legislature went on to enact reforms touching virtually every aspect of Hawaiian life. Among the most critical changes that came about in this period, and the focus of this subsection, was the creation of private property in land.

For many of the haole advising the chiefs, private landownership held the key to solve the kingdom's population crisis.[120] For instance, the Harvard-trained lawyer William Little Lee argued for private landownership by likening the kingdom's situation to that of Prussia.[121] The Prussian peasantry, he argued, had "no independent rights in the soil they cultivated, industry was checked, industry sunk, and the whole kingdom reduced to poverty and want."[122] These conditions were the "inevitable consequence of such a system of landed tenure. . . . No country can long thrive where the people do not own the lands they cultivate."[123] Indeed, Christian missionaries in the kingdom advocated for land reform as a cure for what they diagnosed as Hawaiian "licentious, indolent, improvident, and ignorant" tendencies.[124] They argued that once Hawaiians owned the land they cultivated, free from the "oppressive nature" of the land tenure system, Hawaiians would be

---

[118] ARCHER, *supra* note __, at 200. This had long been a fear among the chiefs. In the 1820s, the chief Kuakini worried that England would "give us laws [and] . . . send men to see they are executed. Our harbors will be filled with ships of war and our vessels can not go out or come in without their permission. . . . We shall no more be able to do as we please." ARISTA, *supra* note __, at 217.

[119] José Argueta Funes, *The Civilization Canon: Common Law, Legislation, and the Case of Hawaiian Adoption*, 71 UCLA L. REV. 128, 153-57 (2024).

[120] It was not a foregone conclusion that the chiefs would listen to these advisors, and the role these advisors—and particularly Christian missionaries—came to play in these reform projects owes much to historical accident. For instance, when the English missionary William Ellis arrived in Hawai'i in 1823, he brought along with him three Tahitian converts who proved much more capable and compelling interlocutors than previous missionaries. KAME'ELEIHIWA, *supra* note __, at 143; DAVID CHANG, THE WORLD AND ALL THE THINGS UPON IT: NATIVE HAWAIIAN GEOGRAPHIES OF EXPLORATION 92-97 (2016). And as Noelani Arista has demonstrated, the missionary William Richards became an influential figure in the kingdom's government in part because he demonstrated careful understanding of Hawaiian governance practices in the 1820s. Arista, *supra* note, __, at 222.

[121] On Lee, see JON VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 36-40 (2008).

[122] KAME'ELEIHIWA, *supra* note __, at 219.

[123] KAME'ELEIHIWA, *supra* note __, at 219.

[124] KAME'ELEIHIWA, *supra* note __, at 202.

"industrious, moral, and happy."[125] These haole advisors advocated for landownership, then, as a break from Hawaiian land ways, which, they argued, contributed to the kingdom's precarious position.[126]

Land reform—known as the Māhele—came in 1848. It began with a series of meetings between Kamehameha III and the kingdom's chiefs to disentangle their interests in the land by allocating ahupua'a among them. This meant that these preexisting administrative units served as the blueprint for landownership in the kingdom, forever tying landownership to this older property regime.[127] This initial division did not, however, accomplish private landownership, because it did not address a third important claim on the land: that of the maka'āinana. Indeed, chiefly land claims were subject to the claims of the people living on the land. The maka'āinana could claim homesteads consisting of their houses and their cultivation lands.[128] These claims were known as *kuleana* (right, privilege, responsibility), and the legislature would go on to further spell out the extent of these claims in the Kuleana Act of 1850. Chiefly and kuleana claimants were to present their claims to the Board of Commissioners to Quiet Land Titles, or the Land Commission, as it is commonly known. This was a legislative creation empowered to adjudicate claims to land and issue Land Commission Awards, which served as prima facie evidence of title.[129]

Very few kuleana claims were made and granted,[130] although the

---

[125] KAME'ELEIHIWA, *supra* note __, at 202.

[126] The faith of missionaries and other Anglo-American foreigners in landownership reflected a deeply held conviction in landownership as the natural basis of political organization. On the lineage of this idea, see Carol Rose, "Mahon Reconstructed: Why the Takings Issue Is Still a Muddle," *Southern California Law Review* 57, no. 4 (1984): 561–602. The idea of fee simple ownership of land, particularly by individual farmers, remained a powerful and recurrent theme in American political rhetoric around the American West over the course of the nineteenth century. Tamara Venit Shelton describes the convictions underpinning this idea: "A large base of independent proprietors would protect the United States from the dependency and degeneracy that many associated with the old-world tenants and peasants of Europe. . . . [T]here was more at stake in the disposal of western land than access to the natural resources . . . ." Tamara Venit Shelton, *A Squatter's Republic: Land and the Politics of Monopoly in California, 1850-1900* (Berkeley: University of California Press, 2013), 7.

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

[128] OSORIO, *supra* note __, at 53-54.

[129] On the mechanics of the Māhele see KAME'ELEIHIWA, *supra* note __, at 201-25; WILLIAM DEWITT ALEXANDER, A BRIEF HISTORY OF LAND TITLES IN THE HAWAIIAN KINGDOM (1882).

[130] KAME'ELEIHIWA, *supra* note __, at 295.

maka‘āinana did find other ways of claiming land.[131] Beyond the number and size of these claims, though, it is important to emphasize that these claims posed important challenges to the ways in which the maka‘āinana had used the land before reform. As irrigated terraces made clear, Hawaiians understood the land they cultivated as interconnected with its surroundings—after all, the proper functioning of an irrigated terrace depended on a network of ditches that brought water down from the mountains. Moreover, because they cultivated and collected resources from many areas, their land claims were unconsolidated.[132] When they approached the Land Commission to file their claims, many maka‘āinana also claimed scattered patches of various crops or stands of trees for canoe-making.[133] These claims were less successful than their claims for taro cultivation, which scholars have argued were "more amenable to the Western notion of 'parcels.'"[134] The end result, as we will see in more detail in the following Parts, was that privatization limited the material base from which the maka‘āinana could secure sustenance.[135]

This brief sketch of the mechanics of land reform in the kingdom helps illustrate two important features about the shift toward private landownership in the kingdom. The first is that privatization built upon Hawaiian land ways. This was true in the sense that the chiefs had relied on ancient administrative units as a mechanism to divide the land. But it was also true in that, at least initially, the maka‘āinana made sense of privatization in light of their prior uses of the land—hence their move to make claims not only to the lands in which they cultivated taro, but also to other lands and resources. This is an important observation, because it adds some nuance to the claim that privatization was incompatible with Hawaiian land ways. This claim often rests on the idea that privatization violated fundamental tenets of Hawaiian culture, not least of which was the sense that land was an elder that could not be owned, bought, or sold.[136] Privatization did present challenges to Hawaiian understandings of land, but these kuleana claims suggest that these challenges did not preclude Hawaiians from making sense of privatization through the lens of Hawaiian land ways. To put the point more bluntly, we should not read these claims as evidencing a failure on the part of the maka‘āinana to understand private landownership; we should read them, instead, as their own interpretations of landownership rooted in Hawaiian

---

[131] SILVA, *supra* note __, at 42.

[132] Stuart Banner has identified a similar tension between spatial and functional allocations of property rights in New Zealand. Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 LAW & SOCIAL INQUIRY 807 (1999).

[133] Linnekin, *supra* note __, 175.

[134] Linnekin, *supra* note __, 175.

[135] ANDRADE, *supra* note __, at 97.

[136] KAME‘ELEIHIWA, *supra* note __, at 9-12.

land ways. This is important, because as we will see in Parts III and IV, the kingdom's haole denizens similarly relied on Hawaiian land ways to articulate property claims.

At the same time, these kuleana do highlight a second important feature of privatization: private landownership threatened the interconnectedness that characterized Hawaiian land uses before reform.[137] More generally, there was much about the shift to private landownership that did imply a shift away from Hawaiian land ways, if not a radical rejection of them. For the haole advisors who supported privatization, eliminating Hawaiian land ways was the whole point of property reform. Moreover, even if we ignore these reformers' intent, for many of the people living in Hawai'i, property reform opened the door to eschew Hawaiian land ways. A missionary claimed that, after reform, some chiefs and konohiki "forbid all such [maka'āinana] who get their land titles, the privileges they formerly enjoyed from the *kula* of the landlord."[138] For some, then, property reform was a radical break from the past.

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

III. PASTURAGE RIGHTS AND THE BLANK SLATE

This Part unpacks an example of how property stories can create, eliminate, and allocate value by unburdening a property regime from the property relations that preceded it. In *Oni v. Meek* (1858), the Supreme Court held that the Māhele had eliminated whatever pasturage rights the maka'āinana held before property reform. The Court represented property reform as a revolutionary act that razed preexisting property relations and replaced them with a new understanding of landownership. *Oni* is striking, as this Part will show, because all parties to the lawsuit had operated under the opposite assumption: that property reform in the kingdom in fact built upon, rather than eliminated, Hawaiian land ways. Uncovering this assumption makes the Court's effort to shape the property regime's conceptual universe

[137] This was not the first threat. As Subpart II.B. will detail, the expansion of cattle capitalism in the Islands posed challenges to the maka'āinana's ability to access kula resources even before reform.

[138] Linnekin, *supra* note __, 176.

clearer. It also renders legible the Court's effort to inscribe a particular political economy in the kingdom's property regime.

A. The Court's Story: Property as Revolution

In 1858, a Hawaiian man named Oni sued a white man named John Meek for stealing two of his horses while the horses grazing in the ahupua'a of Honouliuli in O'ahu. Meek ran a cattle ranch on this ahupua'a. He had obtained this land by entering into a series of leases with the chiefs Mikahela Kekau'ōnohi and Levi Ha'alelea between 1847 and 1853. Meek responded that he had assumed the horses were strays trespassing on his land, which is why he had them impounded and sold.

Oni, meanwhile, asserted that his horses were not trespassing. Instead, he articulated two bases—one customary, the other statutory—for his right to pasture his horses. The customary claim was relatively straightforward: in exchange for laboring for the chiefs, the maka'āinana were entitled to pasture their horses on the chief's land, Meek's lease notwithstanding. His statutory claim was a little more convoluted. An 1846 statute—which I will call the Joint Resolution of 1846—provided that the maka'āinana could "pasture [their] horse[s] and cow[s] and other animals on the [chief's] land, but not in such numbers as to prevent the [chief] from pasturing his." This statute also articulated other rights belonging to the maka'āinana. In 1850, with the enactment of the Kuleana Act, the legislature omitted any mention of pasturage rights at the same time it listed other rights belonging to the maka'āinana. Oni's lawyer contended that this omission was not an abrogation, that the provisions of the Joint Resolution were still good law, and that therefore Oni had a statutory right to pasturage. The Supreme Court would conclude, however, that whatever Oni's rights might have been before property reform, they had been eliminated with the transition to private property.

This case fits quite neatly with a particular strand of property theory that sees the right to exclude as the core of ownership. When Meek leased the lands from the chiefs, he obtained the right to exclude others from them. When the horses entered this land, they became trespassers who infringed on his right to exclude, and he earned the power to remove them from the land.[139] From this point of view, all the Supreme Court did was vindicate the core of what landownership meant: the right to exclude others from the land one owns. Indeed, the opinion reads as though the Court was merely vindicating the obvious meaning of private landownership against a right that would cut

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

against that obvious meaning by sacrificing the right to exclude.[140]

In service of that goal, the Court adopted a reading of property reform in the kingdom as a turning point in the history of Hawaiian land relations, a break from the past. The Joint Resolution, the Court reasoned, was enacted "at a time when the old system as to the tenure of lands was still in existence."[141] But its provisions had been "entirely superseded by other more expeditious arrangements."[142] The Kuleana Act, by contrast, was "passed at a time when the entire change of system, which has taken place since 1846, was in full progress, and had already, to a great extent, been achieved."[143] This meant that Oni had no statutory right to pasturage, because the Kuleana Act said nothing about such rights. It also meant that Oni had no customary right to pasturage, because such a right would be "so unreasonable, so uncertain, and so repugnant to the spirit of the present laws, that it ought not to be sustained by judicial authority."[144] In sum, Oni could claim no pasturage rights because the Māhele, alongside the Kulena Act, had "brought about and perfected that entire revolution in the law affecting rights in land, and land titles, which has taken place since the year 1846."[145] In other words, the Court concluded that property reform had made the world anew. If only that had been true.

B. Oni's Story: Property as Reform

It is difficult to glean from the opinion alone just how much the Court was making some important interpretive choices in telling the history of property reform in the kingdom. This is because once we assume that landownership implies the right to exclude, Oni's claim cannot help but sound implausible. As the Court itself framed it, Oni was claiming for himself—and for others similarly situated—a right to infringe on property arrangements across the kingdom in a way that undermined the centrality of the right to exclude.[146] Framing the claim in this way makes it appear

---

[140] See *infra*, Part V.B. (pointing to language in *Oni* suggesting disbelief at the nature of the claim Oni asserted).

[141] *Oni*, 2 Haw. at 92.

[142] *Oni*, 2 Haw. at 92.

[143] *Oni*, 2 Haw. at 94.

[144] *Oni*, 2 Haw. at 90.

[145] *Oni*, 2 Haw. 92.

[146] As the Court stated at the outset, the case "involve[d] some questions of great importance, and will determine the rights of many other persons besides the present plaintiff and defendant." *Oni*, 2 Haw. at 87. The Court returned to this concern later, stating that Oni's claims rested "upon . . . broad[] grounds," which made it a case "of great importance, not only to the large landed proprietors throughout the Kingdom, but to thousands of the common people." *Id*. at 89.

antithetical to the very meaning of property, which in turn contributes to the feeling that it is a right that could not have survived property reform. But if we reconstruct the series of events leading up to the lawsuit, it becomes clear that Oni's claim fit quite well within the expectations that the kingdom's denizens formed after property reform. This is because people in the kingdom assumed that private landownership built upon Hawaiian land ways. We might expect Oni and others like him to do as much—although there are reasons, as I will discuss momentarily, why we should not assume this was the case. It is more surprising, though, to find Meek forming a similar kind of expectation. And yet, he did.

In this Subpart, I reconstruct the course of dealing among the parties in the lawsuit (including some characters not directly involved in the lawsuit) to highlight how much people in the kingdom assumed that private landownership built upon preexisting Hawaiian land ways. More specifically, I show that Meek entered into a series of leases assuming that Hawaiian status relationships mapped on to the land he was leasing. He understood that the chiefs' status conferred on them the authority to call upon the maka'āinana's labor. And he tried to capture this ability to command Hawaiian labor through a property transaction. It was only once he soured on this economic arrangement that he changed his tune on the relationship between property and Hawaiian land ways, turning toward the right to exclude. This background makes Oni's claim much more intelligible. It also allows us to understand the legal arguments that Oni's lawyer used try and bring this context into the case—that is, to present quite a different property story.

1. Hawaiian Labor

The bounty that Hawai'i contributed to the Pacific economy in the early nineteenth century depended on the labor of the maka'āinana, for it was they, as the chiefly counselor Davida Malo once remarked, "who did all the work on the land."[147] It was "relatively easy" for the chiefs to "muster[] the labor" of the maka'āinana because the chief who controlled the land could also call upon the labor of the maka'āinana living upon it.[148] But just because it was easy does not mean it did not take work. Because the maka'āinana were not bound to the land, the chiefs needed to be judicious in their demands.

---

[147] HANDY, HANDY, AND PUKUI, *supra* note 119 at 323. This was true when the primary export from the kingdom was sandalwood, and it would remain true after sandalwood extraction declined and provisioning whaling expeditions in the Pacific became the core of the Hawaiian economy. NOELANI ARISTA, THE KINGDOM AND THE REPUBLIC: SOVEREIGN HAWAI'I AND THE EARLY UNITED STATES 24 (2019); MARSHALL SAHLINS, HISTORICAL ETHNOGRAPHY 111 (1992).

[148] ARISTA, *supra* note 152 at 24; SAHLINS, *supra* note 152 at 90; ANDRADE, *supra* note 82 at 88.

By some accounts, the Māhele was supposed to sever this connection between land and labor. In the late 1840s, the legislature had abolished the labor tax for certain classes of people, including those maka‘āinana who had obtained private land claims.[149] Some members of the Land Commission instructed these recipients that they should no longer perform this labor.[150] But the transition to private property did not immediately end this practice; instead, people kept arguing over its regulation. Thus, on May 19, 1851, Kapehe, a member of the House of Representatives, presented a petition from the maka‘āinana of Waimea, in Kaua‘i, which complained that "the Konohikis [were] requiring the sick tenants to work as soon as they got well," and asked for various reforms to the konohiki's authority.[151] This petition, along others like it presented during the 1851-53 legislative sessions, suggest traditional labor patterns survived in various parts of the kingdom.[152] These petitions also show that Hawaiians had divergent opinions about this kind of labor. Some petitioners thought that labor dues should end.[153] Other petitions, like the one from Waimea discussed above, asked for regulation of the konohiki's power—perhaps reducing, but not eliminating, the labor due.[154]

Why would the maka‘āinana want to continue this labor practice? It is not enough to say that they had done so in the past. Indeed, by the middle of the nineteenth century, the maka‘āinana were experiencing worsening labor conditions as population continued to decline and extractive activities

---

[149] Joint Resolution on the Subject of Rights in Lands and the Leasing, Purchasing and Dividing of the Same, 1847 Statute Laws of His Majesty Kamehameha III, Vol. II, p. 71, § 4 [hereinafter Joint Resolution].

[150] Representative Robertson, who had served on the Land Commission, explained that the Commission "have the right to grant certificates to those who held allodial titles instructing those people not to work for the Konohikis." Record of the House of Representatives of the Kingdom of Hawai‘i, 1851 Session, 38 (May 19, 1851) [hereinafter May 19 Record]. Robertson would later go on to turn his reading of reform authoritative in writing the Court's opinion in *Oni v. Meek*.

[151] *Id.* at 36.

[152] *See, e.g.*, *id.* ("That the number of labor days of the Konohikis and Government be reduced from three to two per month."); Record of the House of Representatives of the Kingdom of Hawai‘i, 1852 Session, 127 (April 14, 1852) ("to abolish the Konohiki working days"); Record of the House of Representatives of the Kingdom of Hawai‘i, 1853 Session, 431 (May 23, 1853) ("That the Konohiki labor days be lessened.").

[153] Thus, in another petition from the maka‘āinana of Kaua‘i submitted by Representative S.P. Kalama on April 23, 1853, the petitioners asked that "those people without fee Simple lands be given a chance to acquire some: That they were being oppressed by the Konohikis, and consequently some people have left with their children." Record of the House of Representatives of the Kingdom of Hawai‘i, 1853 Session, 355 (April 27, 1853) [hereinafter April 27 Record]. That same day, Representative Koiku introduced a petition "containing 91 names praying: That the Konohiki labor days be abolished." April 27 Record, 352.

[154] *See, e.g.*, May 19 Record, 38.

demanded more of the islands' resources.[155] Instead, we should understand the persistence of traditional labor practices as a response to an important obstacle introduced by privatization: the breaking down of the ahupuaʻa as a collection of common resources. The homesteads the makaʻāinana could claim after the Māhele represented a fraction of the resources they could previously access. They were effectively cut off from areas of kula land where they might grow other crops or from which they might obtain thatch or timber. Moreover, irrigated patches relied on networks of ditches which might now require an easement to reach and repair.[156] Traditional labor practices could open negotiations to give the makaʻāinana access to these resources.

With this background on the connection between land and labor, we can return to the ahupuaʻa of Honouliuli and trace a different set of land transactions. Between 1847—that is, before the Māhele—and 1853, John Meek obtained from Kekauʻōnohi and Haʻalelea a series of leases for kula land on Honouliuli, depicted on the following map.[157] These instruments make clear that Hawaiian land ways informed how parties understood and made claims about landownership in the aftermath of property reform.

[155] SAHLINS, *supra* note 152 at 91, 111; KAMEʻELEIHIWA, *supra* note 79 at 205; ARISTA, *supra* note 152 at 24. Several petitions submitted to the legislature complained that the konohiki were being oppressive. *See, e.g.*, Record of the House of Representatives of the Kingdom of Hawaiʻi, 1852 Session, 33 (May 17, 1852) ("complaining against the Konohikis for being oppressive"), 209 ("against the Konohikis for being oppressive"); Record of the House of Representatives of the Kingdom of Hawaiʻi, 1852 Session, 168 (April 30, 1852) ("complaining against the Konohikis for being oppressive"); April 27 Record, *supra* note __, at 355 ("That they were being oppressed by the Konohikis, and consequently some people have left with their children.").

[156] OSORIO, *supra* note 124 at 53.

[157] Chiefs leased land to foreigners before the Māhele, even as private ownership of land was not possible during that time. The chiefs conceived of leases as a means of protecting Hawaiian sovereignty. Thus, in 1834, Kamehameha III advised a chief named Kakioʻewa to follow his example and lease land to foreigners rather than ceding that land as repayment for Kakioʻewa's debts. Leasing, Kamehamhea III explained, meant that "if we should decide to remove them, then we take back the [land]." KAMEʻELEIHIWA, *supra* note 79 at 117.

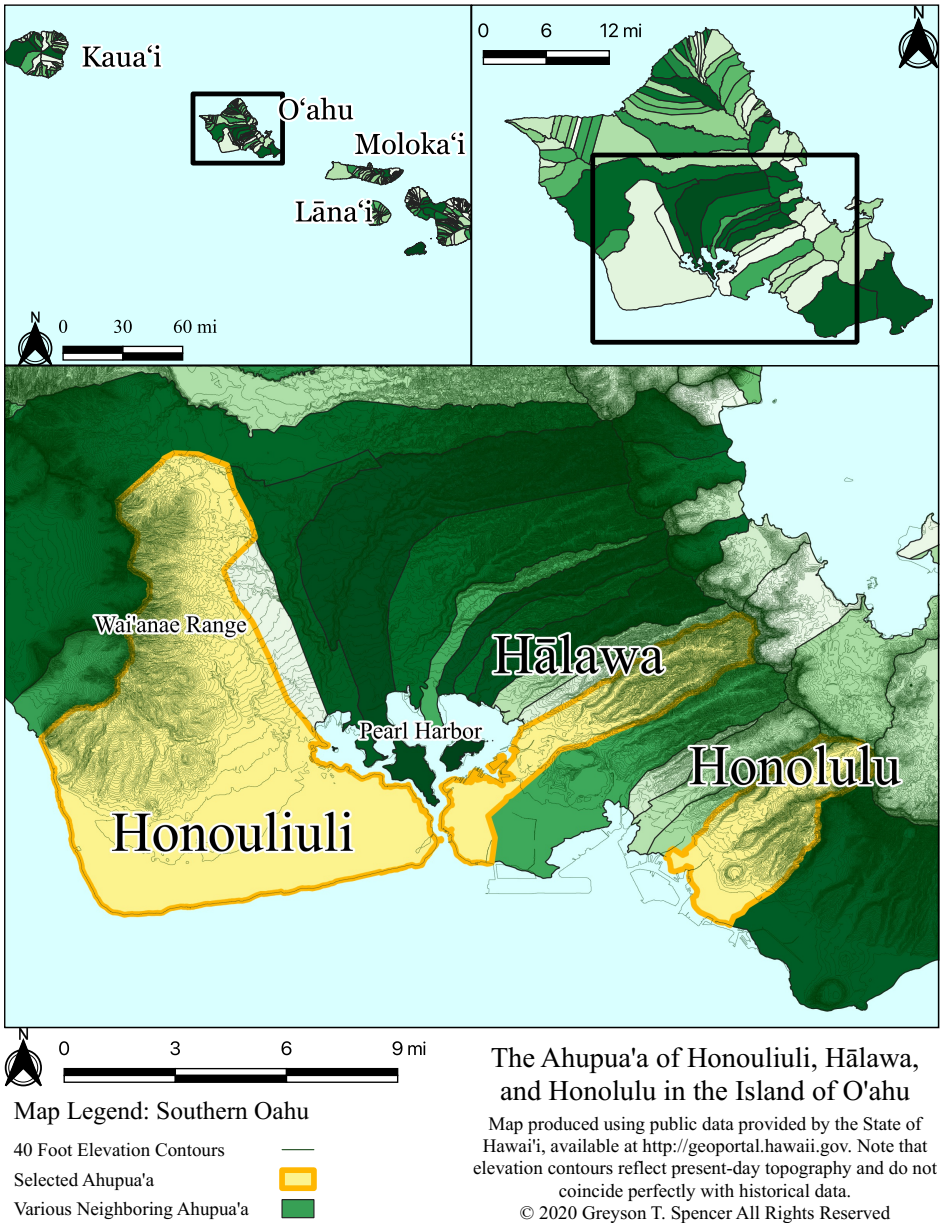

Figure 2. The Ahupua'a of Honouliuli, Hālawa, and Honolulu in the Island of O'ahu

Although it was the theft of horses that triggered the contest between Oni and John Meek, the case was born out of the troubles arising from the islands' burgeoning cattle economy. Cattle was introduced to Hawai'i in the late-eighteenth century, one of many gifts from Euro-American merchants

seeking the chiefs' favor.[158] Cattle disrupted Hawaiian agricultural patterns by turning kula land—which had previously served as a site for cultivation and collection of various resources—into pastures.[159] This shift limited the maka'āinana's ability to reproduce patterns of production they had relied upon for generations.[160] At the same time, the cattle industry needed the labor of the very maka'āinana whose life it was disrupting, for cattle required not only vast pastures to graze, but also laborers capable of managing growing herds.[161] The maka'āinana provided the bulk of this labor by learning how to handle horses, yet another gift to the chiefs in the early nineteenth century, and another drain on the islands' resources.[162]

Meek's foray into the cattle industry began sometime in the 1830s.[163] By the late 1840s he was in need of more land and labor, which he sought to obtain by leasing land in Honouliuli from Kekau'ōnohi. This is important to emphasize: *Meek believed that acquiring land was also a vehicle for*

---

[158] FISCHER, *supra* note __, at 32. After the sandalwood trade declined, cattle rose to prominence in the Hawaiian economy as part of the whaling trade. *Id.* at 116. Cattle hides and tallow were "the most valuable trade goods in the eastern Pacific" in the 1830s and 1840s. *Id.* at 86. Indeed, in 1837, cattle hides accounted for a fourth of the kingdom's exports. *Id.* at 122.

[159] FISCHER, *supra* note __, at 60-64.

[160] *Id*. at 62. Leases to foreigners made matters more difficult, as these foreigners curtailed access to kula resources and could resort to violence in protecting what they regarded as their property. *Id.* at 166; RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1778-1854: FOUNDATION AND TRANSFORMATION 128 (1938). Unsurprisingly, several maka'āinana legislative petitions asked that "the Konohiki be required to lease their lands to the natives and not to the foreigners," that "the Chiefs [be] prohibited from leasing their lands to the foreigners," and that "leasing of the lands owned by the Konohikis, to foreigners and others be prohibited." April 27 Record, 354; Record of the House of Representatives of the Kingdom of Hawai'i, 1853 Session, 357-58 (April 28, 1853); Record of the House of Representatives of the Kingdom of Hawai'i, 1853 Session, 374 (May 4, 1853).

[161] The development of a skilled laboring class capable of engaging in this work called for very deliberate public investment. Starting in the 1830s, the Hawaiian government imported expertise in the form of California *vaqueros* who could then train the maka'āinana in managing and capturing the longhorn cattle introduced to the islands several decades earlier. FISCHER, *supra* note __, at 143-45. While chiefs and haole owned the cattle enterprises that developed in Hawai'i in the 1830s and 1840s, it was the maka'āinana that provided the bulk of the labor required to make these enterprises profitable. *Id.* at 129.

[162] FISCHER, *supra* note __, at 81. As larger cattle operations acquired more kula resources, those Hawaiians who owned horses and cattle would have experienced greater difficulties in grazing their own animals. In the *Oni* litigation, Ha'alelea testified that some of the horses on Honouliuli belonged to the maka'āinana. He explained that horses first came to Honouliuli when Kekau'ōnohi was "Lord of the Land," and that "[s]ome of the horses belonged to the tenants within 10 years after that time. They purchased them." First Transcript of Hearing, at 8-9, Oni v. Meek, 2 Haw. 87 (Oct. 25, 29, 1858) [hereinafter First Transcript of Hearing] (Law No. 788, Box 22, Series 006, Hawai'i State Archives)

[163] FISCHER, *supra* note __, at 84-85.

acquiring labor, an expectation that grew out of Hawaiian land ways.[164] Specifically, in the second of three leases he secured (dated 1851), Meek obtained not only more land for his herd, but also a specific kind of labor due to the chiefs. The 1851 lease gave Meek "the monthly Poalimas (labor days)" that the makaʻāinana owed to Kekauʻōnohi.[165] *Pōʻalima* was the labor performed for the chiefs on a particular day. It was distinct from other labor taxes that the makaʻāinana owed to their superiors, the most important of which were the konohiki labor days.[166] Indeed, the lease emphasized this distinction: "This Lease does not include the konohiki's labor days, only the Poalima are included."[167]

As this transaction makes clear, Hawaiian land ways gave content to the meaning of landownership. Meek did not pay the makaʻāinana who worked for him, instead allowing them to pasture their animals on his land as Kekauʻōnohi and Haʻalelea might have done before leasing the land to him.[168] Testimony from Haʻalelea in the ensuing litigation suggests that the makaʻāinana labored for Meek precisely to retain some access to the resources he was gobbling up. Haʻalelea recalled that "when the new law passed" the makaʻāinana told him they were worried they "should be losers by it and wished to continue the labor."[169] Haʻalelea confirmed this understanding, telling them that "if they do not work on labor days they could not enjoy [their] rights."[170] Laboring for Meek seemingly preserved a connection to the resources the makaʻāinana needed.

Cast in this light, we can also understand the transactions for land as efforts by Kekauʻōnohi and Haʻalelea to enable foreigners to access the islands' resources without abdicating their responsibilities to care for those

---

[164] He was not the first haole to attempt to command Hawaiian labor in this way, though further research is necessary to determine whether this was a systemic practice. The former missionary Richard Armstrong "submitted an application [to the chiefs] to purchase a parcel of land on Oʻahu 'with the old feudal rights of labour from the native' . . . [which the chiefs] denied 'because he wants to buy the labor of the people.'" Beamer, *supra* note __, at 150.

[165] Lease, at [1], Oni v. Meek, 2 Haw. 87 (July 15, 1851) [hereinafter 1851 Lease] (Law No. 788, Box 22, Series 006, Hawaiʻi State Archives).

[166] A DICTIONARY OF HAWAIIAN LEGAL LAND-TERMS, 93–94 (Paul Nahoa Lucas ed., 1995); SAHLINS, *supra* note 152 at 111.

[167] 1851 Lease, *supra* note __, at [1].

[168] One witness recalled that the makaʻāinana "did not receive any pay on the working days. They came on their own horses." First Transcript of Hearing, [15]. Another witness similarly recalled that "Meek had an arrangement with some [makaʻāinana] to work for him at times in consideration for pasturing their animals." Second Transcript of Hearing, at [3]-[7], Oni v. Meek, 2 Haw. 87 (Oct. 25, 29, 1858) (Law No. 788, Box 22, Series 006, Hawaiʻi State Archives) (note that the case file contains two transcripts of the same hearing).

[169] First Transcript of Hearing, 11.

[170] First Transcript of Hearing, 11.

under them.[171] This strategy became clearest in the third lease, dated 1853, which Meek obtained from Haʻalelea (who had succeeded Kekauʻōnohi as owner of Honouliuli after her death in 1851). Through this lease, Haʻalelea gave Meek "all that remaining part of his (Kula) pasturage Land at Honouliuli."[172] This grant would have been significant for the makaʻāinana: if they wished to access kula resources hereafter, they would have to deal with Meek. Perhaps for this reason, Haʻalelea inserted a provision protecting the rights of the makaʻāinana: "Aole e hiki i keia hoolimalima ke kue aku i ka pono o na kanaka e noho ana malalo o **ka malu** o [Haʻalelea]. | This Lease is not to be adverse to the rights of the kanakas (people) living under the **(protection) malu** of [Haʻalelea]."[173] The word *malu* (protection) is important, for it suggests Haʻalelea's own attempt at bringing Hawaiian ideas about land to bear on the meaning of landownership. "Malu," meaning "shade" or "protection," referred to the "the manner in which a chief's care and physical and spiritual protection extended canopy-like over a person or group."[174] Haʻalelea thus blended Hawaiian ideas around land tenure and governance with private landownership, building protection for the makaʻāinana into the lease.

We do not know exactly how this merging of Hawaiian land ways and private landownership worked out. Things certainly took a turn for the worse in the middle of the 1850s, as Hawaiian cattle faced increased competition from Brazil and Argentina.[175] Perhaps Meek felt the sting of this downturn and became overzealous of his margins, turning his attention to the makaʻāinana's horses, which he now felt competed with his cattle for precious grass. Meek "repeatedly warned [the makaʻāinana of Honouliuli] . . . to remove their animals from the land . . . under penalty of having to pay pasturage."[176] A changing economic position seemingly shifted Meek's understanding of property decidedly away from Hawaiian land ways.

We know what happened next. Meek took two horses he found on his land and had them impounded and sold; Oni sued him for the theft of these horses. Oni secured a victory before the Honolulu Police Court in 1858.[177]

---

[171] Indeed, around the same time Oni sued Meek, Haʻalelea sued a man named Isaac Montgomery, who also held a lease from Kekauʻōnohi, and who Haʻalelea alleged was wrongfully precluding the people of Honouliuli from accessing the ahupuaʻa's fisheries.

[172] Lease, at [1], Oni v. Meek, 2 Haw. 87 (Feb. 16, 1853) [hereinafter 1853 Lease] (R.G. Davis, trans.) (Law No. 788, Box 22, Series 006, Hawaiʻi State Archives).

[173] For the Hawaiian see *Oni*, 2 Haw. at 88 (emphasis added). For the English translation see 1853 Lease, [3] (emphasis added).

[174] ARISTA, *supra* note 152 at 194..

[175] FISCHER, *supra* note 121 at 195–96.

[176] Second Transcript of Hearing, [2].

[177] Police Court Decision, Oni v. Meek, 2 Haw. 87 (Sept. 22, 1858) (Law No. 788, Box 22, Series 006, Hawaiʻi State Archives).

He would lose before the Supreme Court a few months later. But it is worthwhile pausing to explore how his lawyer, Charles Coffin Harris, tried to present this complicated context to the Court, because in doing so he offered a different story of property reform.

2. Legal Hooks for an Alternative Property Story

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

> [Oni] is one of the original kamaainas [one born in a particular place] of Honouliuli, under the shade of the chief. Kamaainas always have had the right to pasture their animals on the Ahupuaas. Meek holds the land by a lease from the konohiki . . . with a saving clause in favor of the rights of the kanakas [persons, specifically Hawaiians] living under the malu of the konohiki.[178]

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

a. Custom and Trade Usage

Harris first claimed that the maka'āinana enjoyed a right to pasture their horses in exchange for laboring for the konohiki. A man named Kaope testified that the maka'āinana enjoyed an "ordinary privilege . . . in return for their work on the konohiki's labor days."[179] These rights included "the right to wood, fish, and [pasture] our horses."[180] Ha'alelea also testified extensively on the pasturage custom. He explained that "[e]ver since the land came to [him] in 1851 [he knew] the tenants of Honouliuli have run their cattle on the land as a right."[181] This right "was allowed to those "who went on labor days."[182] Further testimony established that Oni labored as required under this relationship, entitling him to pasture his horses on the kula land.[183]

---

[178] Second Transcript of Hearing, [1]. On the meaning of kama'āina see LUCAS, *supra* note __, at 48. On the meaning of kanaka see *id*. at 49.

[179] Second Transcript of Hearing, [2].

[180] First Transcript of Hearing, [5].

[181] First Transcript of Hearing, [7].

[182] First Transcript of Hearing, [11].

[183] First Transcript of Hearing, [12]-[13].

But if this was a customary right, it was not clear why the makaʻāinana had been forced to bargain with Haʻalelea in order to exercise it.[184] During oral argument, Justice John Papa ʻĪʻī, the only Hawaiian member of the Court, observed that after the Māhele, the makaʻāinana "had to make arrangements for their horses, but not so their other rights."[185]

Harris, therefore, switched tracks to root Oni's right to pasturage in the agreement to preform labor. This path had its own problems, because Meek could claim that any such agreement bound Haʻalelea and the makaʻāinana, but not him. Indeed, Meek claimed he never knew of such an agreement.[186] But clearly Meek could not claim total ignorance. After all, he had bargained for land expecting to get Hawaiian labor, too. This kind of expectation could become legally relevant through the doctrine of trade usage. As Simon Greenleaf explained in his treatise on evidence (to which Harris cited), trade usage allowed courts to reconstruct "the habits, modes, and courses of dealing, which are generally observed, either in any particular branch of trade, or in all mercantile transactions."[187] Hawaiian land ways, including reciprocal obligations and labor dues, informed how parties approached land negotiations in the kingdom. Meek knew this—otherwise, why did the 1851 lease include a grant of the pōʻalima labor days? As Harris reminded the Court: "We have always done our poalima labor for Haalelea. If he has transferred his rights to Meek, very well, let him notify us to labor."[188]

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

---

[184] Indeed, the Court concluded that Oni's witnesses admitted that any pasturage right was terminated by "the operation of the new laws affecting land tenure" precisely because they had to bargain for this right. *Oni*, 2 Haw. at 91.

[185] First Transcript of Hearing, [13]-[14].

[186] Second Transcript of Hearing, [7]-[8].

[187] SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 273 (9th ed., 1863). At oral argument, Harris referred specifically to "2 Greenleaf Sec. 251." Second Transcript of Hearing, [6].

[188] Second Transcript of Hearing, [6].

b. Common Law and Statute

Harris' argument thus far assumed Oni had not taken land under the Kuleana Act—a factual question that remained open.[189] But if Oni had land under the Act, then his rights would be determined by the statute. This raised a question about how one should read the Kuleana Act. As I noted earlier, the Joint Resolution of 1846 clearly protected Oni's right to pasturage: "He may also pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the konohiki from pasturing his."[190] But the Kuleana Act of 1850 did not mention pasturage rights, even as it did mention other rights listed in the Joint Resolution.[191] Did this mean that the legislature had eliminated the right to pasturage when it enacted the Kuleana Act?

To answer this question, Harris argued that the Court should read the Kuleana Act against a backdrop of Hawaiian land ways. This argument reflects a mode of argument among nineteenth-century lawyers in Hawai'i to sometimes treat Hawaiian customs and practices as a common law.[192] This had several implications, but the one that bears emphasizing here concerns the relationship between common law and statute. For nineteenth-century Anglo-American jurists, statutes were written against a preexisting common law, and judges were not to assume that a statute changed (or, in technical language, derogated) the common law unless the legislature explicitly stated its intention to do so.[193] We see a similar relationship between common law and statute playing out in the courts of the Hawaiian Kingdom.

Indeed, Harris made precisely this argument, in two parts. First, he argued that the Joint Resolution of 1846 was a declaratory statute. Declaratory

---

[189] *Oni*, 2 Haw. at 87-88.

[190] Joint Resolution, at § 1. On hoa'āina see Davianna Pōmaika'i McGregor, *An Introduction to the Hoa'āina and Their Rights*, 30 HAW. J. HIST. 1 (1996).

[191] An Act Confirming Certain Resolutions of the King and Privy Council, Passed on the 21st Day of December, A.D. 1849, Granting to the Common People Allodial Titles for their Own Lands and House Lots, and Certain Other Privileges, Penal Code of the Hawaiian Islands Passed by the House of Nobles and Representatives on the 21st of June, A.D. 1850, pp. 203-204 To Which Are Appended the Other Acts Passed by the House of Nobles and Representatives During their General Session for 1850, 202-204, § 7 [hereafter Kuleana Act].

[192] See, José Argueta Funes, The King's Wharf, Custom, and Common Law (July 3, 2024) (unpublished manuscript, on file with author).

[193] This reasoning about the relationship between common law and statute was embedded in the canon applicable to statutes in derogation of the common law. This canon was a much reviled yet longstanding feature of American debates around legislation. Theodore Sedgwick's 1857 treatise on statutory interpretation complained that the "condition of things has very essentially altered since the time of Lord Coke," such that the canon of derogation "has now truly no solid foundation in our jurisprudence." THEODORE SEDGEWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 317 (1857).

statues, as a contemporary treatise explained, were those which "declare[d] or explain[ed] the law or the right as it stood previous to the statute."[194] This meant that the Joint Resolution of 1846 amounted to something of a declaration of what the kingdom's common law was at the time of its enactment, a list of rights and relationships among landholders at the time. Second, because the Kuleana Act of 1850 had not explicitly repealed the Joint Resolution of 1846, the Court should not assume that merely omitting the right to pasture from the Kuleana Act was enough to abrogate that provision in the Joint Resolution of 1846. In other words, the Kuleana Act's silence around pasturage was not enough to revoke that right.

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

C. What the Court Left Out

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

The most important omission from the Court's opinion was any sustained discussion of the 1851 lease. This omission was important because this lease was the clearest piece of evidence that Meek understood that Hawaiian land ways informed the meaning of landownership after reform—how else would Meek think to ask for labor along with land? This is likely why Harris reminded the Court that Oni had always performed his pōʻalima labor for Haʻalelea. This was the exact type of labor tax that Meek came to claim through the 1851 lease. And yet, the opinion bore no mention of Meek's own attempts to capitalize on the merging of Hawaiian land ways and private landownership.

---

[194] *Id.* at 36.

The Court did not explain this omission, but we can speculate about why it decided to leave it out by thinking with the legal concept of notice.[195] If we read the opinion assuming that Meek knew nothing about the specific ways in which Hawaiians negotiated access to kula resources, the demands of people like Oni begin to look unreasonably onerous. How was Meek supposed to know about this arrangement? It would seem unfair to expect landowners in the kingdom to understand these complicated labor practices. Indeed, even though Meek's third lease included a provision protecting the rights of the maka'āinana, how was he supposed to know what those rights were? Omitting Meek's own understanding of Hawaiian land ways, in short, has the effect of making those land ways appear more incompatible with private landownership, thus helping make the outcome of the case appear all the more obvious.

This interpretive choice also had two important distributive consequences. First, it unburdened Meek from having to know much, if anything, about Hawaiian land ways. Second, it increased the cost that people like Oni would have to pay to protect their rights. For instance, Oni might have to enter into private agreements for pasturage and figure out ways to bind people like Meek to those agreements. And this all assumed that parties remained willing to enter into these agreements. The Court's property history, then, eliminated means of value creation that the maka'āinana enjoyed before reform to the benefit of people like Meek, who now faced—to use some technical terms—lower information and transaction costs.

This suggests that *Oni* was an effort to inscribe a particular political economy into the kingdom's new property regime—crucially, a political economy in which the maka'āinana lost some of the mechanisms that would have allowed them to negotiate for access to resources they previously enjoyed. The Court, of course, did not state as much. But we can point to two instances in the opinion that support this reading of *Oni*. The first is that the Court sensed in the case an opportunity to address not only Oni's rights, but also the rights of "the large landed proprietors throughout the Kingdom," as well as the rights of "thousands of the common people."[196] The Court itself, in short, envisioned the broad reach of its conclusion.

The second portion of the opinion supporting this reading of *Oni* is the Court's interpretation of the Kuleana Act. Recall the Court's holding that, in

---

[195] The concept of notice operates in the background of the opinion. The Court argued that the labor relationship between the maka'āinana and the chiefs could not create an obligation for Meek because he did not know anything about that agreement. *Oni*, 2 Haw. at 91 ("And whatever private agreement as to pasturage rights may have existed between the plaintiff and the konohiki, that, of course, cannot affect the defendant's rights under his lease, unless he had special notice of such agreement, and bound himself to respect its terms.").

[196] *Oni*, 2 Haw. at 89.

enacting the Kuleana Act, the legislature had meant to eliminate whatever rights it did not explicitly include. Because the Kuleana Act did not list pasturage rights, it followed that the statute eliminated those rights. But the Kuleana Act also omitted any mention of access to fisheries, which had also been listed as rights under the Joint Resolution of 1846. And yet the Court in *Oni* was unwilling to conclude that the Kuleana Act abrogated those rights.[197] Indeed, just a few months earlier, the Court had held that fishing rights survived property reform.[198] Moreover, it had shown itself willing to extend those rights to a new class of people: purchasers of land.[199] This unequal treatment suggests that the reasoning in *Oni* was partly motivated by an effort to limit the maka'āinana's bargaining power by depriving them of rights they enjoyed before reform, and which they had managed to rearticulate after reform. But to see this more clearly, we need to delve into that fishing rights case and explore the rather different property story on which the Court relied there.

IV. FISHERIES, WATER, AND THE CROWDED SLATE

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

A. Fisheries in Honouliuli

Let us first return to the ahupua'a of Honouliuli. A few months before the Courts' decision in *Oni*, Levi Ha'alelea, the konohiki of Honouliuli, sued

---

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

[198] Haalelea v. Montgomery, 2 Haw. 62 (1858).

[199] *Haalelea*, 2 Haw. at 71 (concluding that when "Isaac Montgomery . . . received a conveyance of a portion of the Ahupuaa of 'Honouliuli," he acquired along with it a common right of piscary in the fishing ground adjacent").

another haole man, David Montgomery. Haʻalelea alleged that Montgomery was taking fish that belonged to Haʻalelea and also that Montgomery was preventing those under Haʻalelea from accessing the fisheries abutting Honouliuli. Haʻalelea's claims, and Montgomery's defense, both assumed that the meaning of landownership in the kingdom derived in part from pre-reform Hawaiian land ways. And the Court itself would resolve the dispute by fitting Hawaiian land ways into a new property regime.

1. Governing/Owning Fisheries

Shortly after the Māhele, the chief Mikahela Kehauʻōnohi sold a portion of the ahupuaʻa of Honouliuli to a man named Isaac Montgomery. Kekauʻōnohi died shortly thereafter, leaving her vast estate to her husband, Levi Haʻalelea. By the late 1850s, Isaac had transferred title over the land in Honouliuli to his brother, Daniel Montgomery. And Daniel, it seems, started excluding other people in Honouliuli from the fisheries next to the land his brother had purchased. In 1858, Haʻalelea brought a suit against Daniel for interfering with both his and his tenants' rights in the fisheries.

Haʻalelea's attorney, Asher B. Bates, framed two claims against Daniel: first, Daniel had taken "a large number of fish" that belonged to Haʻalelea under the kingdom's laws; second, Daniel had prohibited Haʻalelea and those "under him" from accessing the fisheries, also in violation of the kingdom's laws.[200] Understanding this complaint thus requires first knowing something about the laws governing fisheries and about the chief's use of *kapu* (oral legal pronouncement, taboo) to govern resources.

The chiefs relied on kapu to regulate access and distribution of resources. For example, a chief could declare a kapu to prohibit or limit the catch of a specific species of fish from a coastal fishery during a particular season. Access to the fisheries flowed from living in the ahupuaʻa, under the konohiki's jurisdiction. A man named Keahunui, who had enforced kapu on behalf of Kekauʻōnohi, explained this practice in 1858: "[a]ll the people mauka [(inland)] and makai [(seaward)] had a right to take" fish that were not under kapu.[201] "When other people came from some distance [within the ahupuaʻa] and fished," he continued, "there was no complaint."[202]

This mechanism for governing resources was codified in 1840, when the legislature enacted a statute that guaranteed the makaʻāinana access to the

[200] Complaint, Haalelea v. Montgomery, 2 Haw. 62 (Law No. 348, Box 12, Series 006, Hawaiʻi State Archives).

[201] Transcript of Hearing, at 7, Haalelea v. Montgomery, 2 Haw. 62 (Jan. 27, 1858) [hereinafter Transcript of Jan. 27 Hearing] (Law No. 348, Box 12, Series 006, Hawaiʻi State Archives).

[202] *Id.*

fisheries "from the coral reefs to the sea beach" subject to the konohiki's power to declare kapu in regulating these fisheries.[203] A statutory revision in 1846 left this structure in place, declaring the fisheries to be the "private property" of the konohiki "for the equal use of themselves and the tenants on their respective lands."[204]

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

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

This reading of property reform would depart from pre-Māhele fisheries' regulation in an important way. Recall that Keahunui, who enforced kapu over the fisheries, testified that any inhabitant of an ahupuaʻa could access that ahupuaʻa's fisheries, regardless of whether they lived close to the beach or not. But under Haʻalelea's theory, it would matter a great deal where in an ahupuaʻa a potential claimant lived. Indeed, Haʻalelea's view of the effects of selling land on fisheries access would seem to curtail the rights of the makaʻāinana who lived in the land Daniel owned.[205] But the upshot of his

---

[203] "O ke kai hoi mai kua nalu a kihi i kahakai no na konohiki no ia, a me na makainana o kona aina iho no, aole ko hai mai. | But the fishing grounds from the coral reefs to the sea beach are for the landlords, and for the tenants of their several lands, but not for others." Note that the Hawaiian statute refers to "makaʻāinana" and "konohiki," thus relying on the traditional divisions of Hawaiian society, while the English version rendered these concepts as "tenant" and "landlord." KEPA MALY AND ONAONA MALY, VOLUME I: KA HANA LAWAIʻA A ME NĀ KOʻA O NA KAI ʻEWALU: A HISTORY OF FISHING PRACTICES AND MARINE FISHERIES OF THE HAWAIIAN ISLANDS 244 (2003).

[204] *Id*. at 246.

[205] It is not clear who lived on the lands that Isaac had purchased. At oral argument, Haʻalelea's lawyer objected to the introduction of a witness who lived on that land, contending that "any person living under Montgomery had no right to fish there, and this man living there, was as much interested as Montgomery in the right to fish there." Transcript of Jan. 27 Hearing, *supra* note __, at 5.

jurisdictional theory was that it could put Haʻalelea in a position to negotiate the effects of private property within the ahupuaʻa, and particularly to address any issues created by troublesome new owners of land, like Daniel.[206]

Turning to Daniel's view on the fisheries, one might expect, given the foreignness of private property in Hawaiʻi, to find him recoiling from any allusion to Hawaiian social relations regulating fisheries before reform. But he did no such thing. Instead, he advanced his own version of a nexus between private property and Hawaiian land ways. Kekauʻōnohi was no ordinary seller of land; she was a konohiki. When Isaac bought the land in Honouliuli from her, he "became the possessor of everything that she possessed," including the fisheries, which after all the 1846 statute declared to be the "private property" of the konohiki.[207] Daniel owned the fisheries, subject only to Haʻalelea's statutory property right to declare a kapu over some fish.[208] In short, Daniel tried to use Hawaiian land ways to secure a greater property claim after reform.[209]

---

[206] In this sense, Haʻalelea's jurisdictional reading of property reform is an example of the mechanisms through which Hawaiian rulers tried to use law to reconfigure preexisting governance mechanisms in order to address new resources contests. Before property reform, the chiefs used leases to regulate access to the kingdom's resources by haole inhabitants. Thus, an 1847 lease between Kekauʻōnohi and Isaac Montgomery, which gave Isaac control over some salt fields, included a provision that Isaac would not "perform unlawful acts in this Kingdom while he occupies this land." Ōlelo Hoʻolimalima, Bureau of Land Conveyances, Liber 3, p. 212-13 (July 16, 1847) (Devin Forrest trans.). And this lease also contemplated that Isaac would exercise not only a property right over this land, but also a form of jurisdictional authority, providing that he would "make all decisions for this area, similar to how M. Kekauonohi always did." *Id.* Placed alongside this lease's grant of jurisdictional authority to Isaac, Haʻalelea's own jurisdictional reading of property reform might reflect the sense that the sale of land severed the relationships that would have existed between lessor and lessee, and thus threatened Haʻalelea's ability to step in and negotiate resource contests between Montgomery and the makaʻāinana living under Haʻalelea. The different property relations under the lease and the sale required a different jurisdictional reading of property reform: one which did not imagine jurisdiction over the fisheries as running with the sale, but which imagined instead that the sale of land excised land and people from the konohiki's jurisdiction.

[207] Transcript of Hearing, *supra* note __, at 5.

[208] This is also how the Court understood his claim. *See Haalelea*, 2 Haw. at 64.

[209] Daniel, like other haole contemporaries, may have understood Hawaiian governance practices through the lens of feudalism, and therefore interpreted the power of the stewards to govern the fisheries as boundless or authoritarian. *See* OSORIO, *supra* note __, at 49 (noting the reliance on feudalism to explain Hawaiian power relations). But this framing ignored the legal context in which the chiefs and the konohiki exercised their power. As Noelani Arista explains, "The good of any aliʻi was expressed in Hawaiian by the word pono—the pono of the chief encompassed the nature of his rule, his protection of the people, and his ability to maintain healthy balance in the world through the proper administration of lands and resources, through the veneration of the akua (gods)." ARISTA, *supra* note __, at 40.

2. Purchasing Land and Reproducing Status

The Court did not take either position, downplaying the effects of landownership's novelty for the regulation of fisheries and holding that Daniel was a "tenant" within the meaning of the statute. The Court reasoned that when Isaac purchased land in Honouliuli, "he became, for the purposes of the law, governing this subject, a tenant of the Ahupuaa, and as such entitled to take fish in the sea adjoining." This conclusion followed from a specific reading of the word "tenant" in the statute: "We understand the word tenant, as used in this connection," he wrote, "to have lost its ancient restricted meaning, and to be almost synonymous, at the present time, with the word occupant, or occupier, and that every person occupying lawfully, any part of 'Honouliuli,' is a tenant within the meaning of the law."[210]

What warranted this reading of "tenant"? The Court's reading relied in large part on an analogy to the statutory rights of the maka'āinana in obtaining a kuleana land claim.[211] Among those rights was the right to access the fisheries of an ahupua'a. The Court reasoned that if a kuleana holder sold some of their land, the purchaser would also get a right to access the fisheries, even if the right was not explicitly transferred through the sale.[212] It then assumed that the same would be true if the konohiki sold land, even though the konohiki's title did not derive from the statutes governing kuleana land.[213]

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

The litigation around the Honouliuli fisheries thus illustrates how some of the meaning of landownership in the kingdom could derive, rather than depart, from Hawaiian land ways. Litigants like Ha'alelea and Daniel Montgomery advanced different interpretations of property reform, but each of them reached back to the world before private landownerships and to the status relationships that governed access to resources in that world in order to articulate property claims. And the Court in *Haalelea* reasoned that private property did not eliminate all incidences of these status relationships, but rather built upon them.

The outcome in *Haalelea* is striking because it relies on a view of private property that the same Court—indeed, the same judge—would abandon just

---

[210] *Haalelea*, 2 Haw. at 71.
[211] *Id.*
[212] *Id.*
[213] *Id*.

a few months later in *Oni*. As I noted earlier, the Court in *Oni* had to craft an exception to its reasoning there in order to salvage its ruling in *Haalelea*. Recall that *Oni* assumed that the legislature had meant to eliminate any rights it did not explicitly preserve in the Kuleana Act of 1850. This included *both* pasturage rights *and* fishing rights. But if fishing rights had also been abrogated by the transition to private property, then the Court's central analogy between the sale of land by a konohiki and the sale of land by a kuleana holder would fall apart. To avoid that, the Court took on a much more selective approach to the world of Hawaiian land ways that preceded reform.

B. Water in Maui

This section reconstructs litigation over surface water in the island of Maui. Like the litigation around Honouliuli's fisheries and kula land, this contest over surface water highlights how Hawaiian land ways informed landholders' understandings of their property rights. Indeed, reliance on pre-Māhele physical infrastructure to carry water to individual plots of land was a powerful reminder of the regime that had preceded private property, a regime which landowners worked to recreate in the aftermath of property reform. The litigation I reconstruct here—*Peck v. Bailey* (1867)—illustrates an effort by a landowner named Sherman Peck to escape this regime by articulating an expansive property claim. This claim was rooted in his own reading Hawaiian land ways, which privileged the power of the konohiki over the reciprocity between the konohiki and the maka'āinana. Peck argued that he had obtained title to his land from the konohiki, and he claimed that the konohiki had the power to withhold water from subordinates along the watercourse.

Peck's attempt to escape this regime for allocating surface water was unsuccessful, but it nonetheless highlights two important facts about how legal actors made sense of property in the aftermath of reform. First, it affords yet another example of landowners relying on pre-Māhele status relationships to make sense of private landownership. Second, it surfaces the political economic concerns that informed how the Court articulated the relationship between the kingdom's property regime and the Hawaiian land ways that had preceded it. This Subpart begins by surveying the mechanisms Hawaiian used to collect and allocate surface water before the Māhele and goes on to demonstrate how the people in Wailuku, Maui, worked to rearticulate these mechanisms after property reform. It then zooms in on Sherman Peck's efforts to monopolize water in Wailuku. It closes by unpacking how the kingdom's Chancellor rejected Peck's efforts while leaving the door open to the kinds of claims that Peck articulated.

1. Reconstructing Ditches and Rights

Hawaiians built *ʻauwai* (irrigation ditches) that connected mountain streams to the terraces they used to grow kalo (taro). The connection between surface water rights and kalo continued to structure water governance long after the Māhele. As an American jurist put it sometime in the turn of the twentieth century, "generally but little has remained of the customary law except the system of water rights, apportioned according to certain hours and days for use upon the kalo lands which require thorough irrigation."[214] The physical infrastructure necessary to sustain this system of rights remained in place after the Māhele, and Hawaiians worked to reconstruct the legal infrastructure needed to keep the system running as well.

The ditches that fed irrigated terraces required coordination and continuous labor to work. Their construction was directed by the konohiki, who would call upon those who would benefit from the ditch to provide labor for its construction and maintenance.[215] The share of water to be received was determined by the amount of labor contributed to these efforts.[216] The konohiki "controlling most of the water was 'water boss'," and had the power to adjust water allocation in times of drought.[217] The planter who was to have water would inspect the ditch with the konohiki and repair it as needed.[218] He would then use earth clods or rocks to stop water from running into other inlets flowing from the ditch and open his own inlet.[219] This system required constant repairs.[220] Freshets—floods produced by heavy rain—could destroy the ditch and impede the flow of water.[221] In short, kalo cultivation required coordination among neighbors and continuous labor to maintain the necessary flow of water.

This system for allocating water survived both the Māhele and the turn to new agricultural ventures. But its survival turned on concrete efforts by the islands' inhabitants to recreate the coordination that made this system work. We observe one such effort in the ahupuaʻa of Wailuku on the island of Maui,

---

[214] Alfred Hartwell, *Forty Years of Hawaii Nei*, 54 ANN. REP. HAWAIIAN HIST. SOC'Y 11, 14 (1945).

[215] HANDY ET AL., *supra* note __, at 58.

[216] *Id.*

[217] HANDY ET AL., *supra* note __, at 59.

[218] *Id.*

[219] *Id.*

[220] *Id*.

[221] For example, a man named Kahele, who was a judge in the island of Maui, recalled that in 1840 "a very heavy freshet . . . washed away the bed of the [local ditch] so that the water could not run down" the entire course of the ditch. Transcript of Hearing, at 78, Peck v. Bailey, 8 Haw. 658 (July 22-Aug. 1, 1866) [hereafter Transcript of Water Hearing] (Equity No. 305, Box 27, Series 004, Hawaiʻi State Archives).

where the Wailuku River flowed into the lands of Maui's central valley.

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

The resulting association recreated significant aspects of pre-Māhele water governance. Its articles of agreement—a recorded instrument—specified that the members of the association would select three "executors" empowered to enforce the terms of the agreement. Kauma noted that the first executors of the Wailuku Water Association were three Hawaiians: Pepe, Kahokukula, and Namailo. Kauma also explained that these executors had two main responsibilities: "one was to distribute water to this land and that land and [another was] . . . to call upon the people to come and repair the ditch or clear it out from obstructions."[225] Much as it had before the Māhele, water flow was conditioned on labor. Under the terms of the agreement, members with parcels under five acres were required to send one person to work on the ditch when repairs were needed, and the number of workers required increased with the acreage under cultivation.[226]

This association suggest continuities in the allocation of surface water before and after property reform. Even as privatization was taking place and Hawaiians were claiming kuleana parcels, they and their neighbors made sense of property by looking back to the status regime that had connected the konohiki and the maka'āinana and the structures and practices that had developed around this relationship. One man named Olelo summarized this conceptual move: "The common people are konohikis now. . . . Everybody now that has a kuleana of his own is a konohiki."[227]

Of course, we should not take these continuities at face value without examining the changes taking place on the land. The method of allocating

---

[222] Transcript of Water Hearing, *supra* note __, at 170.

[223] Transcript of Water Hearing, *supra* note __, at 170.

[224] Transcript of Water Hearing, *supra* note __, at 170.

[225] Transcript of Water Hearing, *supra* note __, at 172.

[226] Wailuku Water Course Articles of Agreement, at § 6, Peck v. Bailey, 8 Haw. 658 (Devin Forrest, trans.) (Equity No. 305, Box 27, Series 004, Hawai'i State Archives).

[227] *Id.* at 79.

water may have been similar, even identical, before and after property reform, but the uses of the land were changing. An 1866 letter to the editor of the *Ka Nupepa Kuokoa* newspaper alerts us to the shifts taking place on Maui's landscape:

> A letter from S.D. Hakuole of Kula Maui has arrived at our offices, stating that the lands of Wailuku are completely cultivated in sugarcane. It further states that the irrigated taro fields are being dried out by Foreigners, as a place to plant sugarcane. He relates his fear that the people in this area will no longer eat poi,[228] and will perhaps exclusively consume the hardtack that hurts the teeth, and the light [bread] that does not satisfy the hunger of the Hawaiian people. Since the people are accustomed to eating poi.[229]

Sugar was displacing kalo on the land—as Hakuole explained, the lands were being "dried out," meaning that the flooded terraces used to grow taro were being eliminated. This would have had downstream effects, as water would traditionally flow on to lower terraces. Moreover, processing sugarcane invited new uses for water, like mills, which required not just water to irrigate lands, but a certain volume and flow of water to power the mill.[230] These new uses for the water of Wailuku led Sherman Peck to try and find out a way out of the Wailuku Water Association and claim more water for himself.

2. Water for the Sugar Mill

Sometime before 1865, Sherman Peck and his associates acquired some land in Wailuku and created the Wailuku Sugar Company. The Company was part of a boom in Hawaiian sugar production fed by the American Civil War and the collapse of American sugar production, which translated into more and more landowners and tenants in Wailuku repurposing lands to grow sugar cane.[231] The plantation they set up was on a site that had housed Kamehameha III's own sugar plantation in the 1840s, but which had since been abandoned. In the process of setting up a new sugar plantation, the Wailuku Sugar Company rebuilt the king's old sugar mill, which had once turned with the help of water from the Wailuku River.[232] By the following year, it seems that

---

[228] Mashed steamed kalo. HANDY ET AL., *supra* note __, at 77.

[229] *Auwe! Pau Wailuku i ka mahiko*, KA NUPEPA KUOKOA, Jan. 13, 1866, at 2 (Devin Forrest, trans.).

[230] Mills figure prominently in the construction of rights regimes over water. *See generally* HORWITZ, *supra* note __; Carol Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEG. STUD. 261 (1990).

[231] On the effects of the Civil War on American sugar production see generally MOON-HO JUNG, COOLIES AND CANE: RACE, LABOR, AND SUGAR IN THE AGE OF EMANCIPATION (2006). On the turn to sugar cane in Wailuku see generally Transcript of Water Hearing, *supra* note __.

[232] On Kamehameha III's venture and the mill, see Carol MacLennan, *Foundations of Sugar's Power: Early Mai Plantations, 1840-1860*, 29 HAW. J. HIST. 33, 36-40 (1995).

the water running from the River to the ditch that fed the mill was not enough to turn the machinery.[233]

Why was there not enough water? At least some of the shortage must have stemmed from the fact the Wailuku Sugar Company was itself extending cultivation to new lands. But the owners and operators of the Company put the source of the shortage elsewhere, specifically in the work of one of their neighbors, Edward Bailey. In March 1866, the manager of the Company's plantation sent a letter to Bailey claiming that Bailey had started ploughing some new land in Maui, and that he was about to start planting sugarcane on that land. The Company would "protest against [Bailey] taking water from the Wailuku Stream to irrigate the said land . . . as any such appropriation of water they [would] regard as a trespass on their vested rights."[234] Bailey replied with a terse letter. He believed he had "a right to his usual amount of water, and he [did] not expect to be interfered with in the use of it whether he choose to water with it one part of his own plantation or another part."[235] In June of that year, Peck and his associates brought a bill in equity against Bailey, seeking an injunction against Bailey to keep him from using any means to dam the river and interrupt the flow of water to the Company's mill.

In this bill, Peck and his associates made a striking claim about the scope of their rights over the waters of the Wailuku River. They argued that they could in fact preclude Bailey from getting *any* water for his sugarcane venture from the River. They asserted that they had obtained their land from the konohiki of Wailuku. They then claimed that in ancient times, the konohiki had the power of "lord paramount of the river."[236] Bailey, moreover, had acquired land which was not entitled to use water "in any other way than was of ancient times allotted to . . . by the konohiki for the use of certain kalo patches."[237] Because Bailey was now growing sugarcane on this land, Peck and his associates, stepping in the shoes of the former "lord paramount of the river," could preclude Bailey from using any water from the Wailuku River.[238]

---

[233] Transcript of Water Hearing, *supra* note __, at 110.

[234] Letter from N.W. Gallant to Edward Bailey, March 7, 1866, Peck v. Bailey, 8 Haw. 658 (Equity No. 305, Box 27, Series 004, Hawai'i State Archives).

[235] Letter from Edward Bailey to N.W. Gallant, Mar. 7, 1866, Peck v. Bailey, 8 Haw. 658 (Equity No. 305, Box 27, Series 004, Hawai'i State Archives).

[236] Complaint, at [2], Peck v. Bailey, 8 Haw. 658 (June 6, 1866) (Equity No. 305, Box 27, Series 004, Hawai'i State Archives) ("And Complainants further show that their title to their plantation or farm is derived almost entirely from the Konohiki of the said Ahupuaa of Wailuku who these Complainants aver has the right of Lord Paramount of the Wailuku Stream as an appurtenance of his Ahupuaa.").

[237] *Id*. at [2]-[3].

[238] The Court interpreted the claim thus: "It is contended by the complainants that as the

3. The Trouble with "Illiberal" Rights

The Chancellor (and Chief Justice) of the kingdom, Elisha Hunt Allen, traveled to the island of Maui in late July to take testimony on the question of the konohiki's water rights. Over eleven days and some two hundred pages of handwritten testimony, it became clear that Peck and his associates had left much out of their account of the water shortage—including their own expanding sugar operation,[239] and their knowledge of the agreement among Wailuku landholders to maintain the requisite infrastructure and share the water.[240] Allen denied the requested injunction to preclude Bailey from diverting any water. Allen's opinion is worth entertaining briefly for two reasons—first, because it confirms the importance of Hawaiian status relationships for making sense of property; second, because it gives us a glimpse at a political-economic logic used to assess these status relationships.

Allen's disposition of the bill suggests that he was mindful of the importance of pre-Māhele status relationships for making sense of landownership in the aftermath of reform. He could not award the injunction, for this kind of remedy was not available for the "infringement of even doubtful rights until [these rights] have been established at law."[241] He instead dismissed the application and ordered the parties to pay their own costs. This was an equitable result because, to his mind, the parties were earnestly confused about what landownership meant in terms of water allocation. Both parties, he wrote, had "mistaken ideas of their rights, which were very honestly entertained."[242] This suggest that Peck's claim about the scope of his rights, rooted in the power of the konohiki, was not so implausible that he should have known better. The evidence did not bear out his claim, but perhaps under different circumstances a property transfer from a konohiki to someone else might yield such a result. Allen's opinion suggests at the very least an openness to rooting property claims in status relationships.

---

defendant has the right only to use the water . . . for the watering of twelve acres of kalo land, the extension of the ditch . . . from the kalo patches to cane was illegal, because it was originally appropriated for this kalo land and always used as such." 665.

[239] "From the general current of the evidence, it appears to me most manifest that the injury which the complainants have received, from want of the usual flow of water to the mill, has arisen from their own acts. They have diverted a large quantity of water by the Kalaniauwai, which was accustomed to flow in the Wailuku river, and which supplied the Kamaauwai and the mill water course." 664

[240] "Various parties interested in the Kamaauwai have hitherto mutually agreed upon the diversion of water, and for a period the complainants participated with them." 665-66.

[241] 673

[242] 673.

Nonetheless, Allen was skeptical of Peck's account of his rights. Peck's claim that Bailey could only use water to grow kalo struck Allen as "an illiberal construction of the prescriptive right and one which would do infinite mischief."[243] This construction was "illiberal" in that it circumscribed the uses to which Bailey could put his water and his land. In casting doubt on this construction, Allen delineated a political economic vision underlying his understanding of property rights, a vision which favored innovation and development.[244] It was "well settled" in American law,[245] Allen noted, that once a right to use a certain quantity of water had been acquired, that right could be used however the rightsholder saw fit, provided that the use did not injure other rightsholders.

Allen quoted no lesser figure than New York's Chancellor Kent for an explanation of the policy underlying this rule: landholders could not be required to "to use water in the precise manner, or to apply it to the same mill, for such a construction of the rule would *stop all improvements in machinery*."[246] In this account, property had a forward momentum leading toward improvement and economic growth; restricting how property holders could use their property also restricted this momentum. This is why Allen was suspicious of Peck's claim, because it limited Bailey's range of choice regarding how he used his property. This helps explain why Allen claimed to root his own decision not only in "general principles of law and equity," but also in "the common judgment of the practical planter."[247]

Peck v. Bailey confirms the importance of Hawaiian status relations for making sense of property in the aftermath of reform. Rather than thinking about property reform as a move entirely away from status, we should think of it as unsettling a world in which status relationships structured access to the islands' many resources. But even as property unsettled this world, Hawaiian land ways remained available as hermeneutic devices with which to make sense of private property in land. This was true not only for Hawaiians, but also for the kingdom's haole denizens.

---

[243] 665.

[244] As Morton Horwtiz argued in the context of water rights in New England, American courts in the first half of the nineteenth century renounced what Horwitz called an absolute vision of property rights in favor of a relative one. They did so, according to Horwitz, to facilitate economic growth. *See generally* HORWITZ, *supra* note __, at 31-62.

[245] Quoting Joseph Angell's *Treatise on the Common Law in Relation to Watercourses* (1833), Allen wrote: " 'In this country' (the United States) . . . 'the doctrine is well settled, that where a right has been acquired . . . to use a certain quantity of water, a change in the mode and objects of use is justifiable; and here as in England the only restriction is, that the alterations made from time to time shall not be injurious to those whose interests are involved.'" 667.

[246] 668.

[247] 673.

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

V. MEANING AND VALUE IN HAWAIIAN PROPERTY STORIES

Oni v. Meek, *Haalelea v. Montgomery*, and *Peck v. Bailey* show that in the aftermath of property reform, it remained possible to tell two origin stories about property in the kingdom. One of these accounts was a blank-slate story: as told in *Oni*, property reform revolutionized land relationships in the kingdom and created a new property regime wholesale. The second account was a crowded-slate story: as suggested in *Haalelea* and *Peck*, property reform built upon preexisting Hawaiian land ways, which claimants could reinterpret in their efforts to make property claims. The Hawaiian Supreme Court never picked one story over the other. This is most striking when we consider *Haalelea* and *Oni*. Both were written months apart by the same judge, who sensed that his blank-slate story in *Oni* was in tension with his crowded-slate story in *Haalelea*.

Read together, these cases offer two sets of insights. The first concerns meaning and property. The cases highlight the fact that Hawaiian land ways were part of the conceptual universe that the kingdom's denizens could use to give meaning to property. Identifying this conceptual universe as an element of the Hawaiian property regime is useful, because it allows us to characterize the property regime as a hybrid one. Other scholars have made similar claims about Hawaiian property, although they have tended to focus on how much hybridity reflected the agency of the Hawaiian chiefs in transforming the kingdom, casting hybridity in a largely positive light. My account, meanwhile, takes a more ambivalent stance toward hybridity. This is because, as the cases I have reconstructed make clear, hybridity in Hawaiian property could allow landholders to make more expansive property claims with detrimental effects on the bulk of the Hawaiian people. At the same time, long after the illegal overthrow of the kingdom in 1893 and annexation in 1898, advocates of Hawaiian sovereignty and rights could wield that same conceptual universe to constrain the property claims of an entrenched planter elite. Hybridity did not require either of these outcomes,

but it shaped how people in the Islands pursued them. This is a dynamic worthy of understanding on its own, but also because it suggests important parallels with colonial property regimes in other places.

The second set of insights arises from a puzzle suggested by the first: if Hawaiian land ways were sometimes available to give meaning to property, why did they control in some cases but not in others? Scholars have suggested one possibility: that the Hawaiian property regime looked to Hawaiian land ways only when these were compatible with the idea of private landownership itself. But this explanation cannot account for the fact—elaborated through this paper—that the meaning of property was not obvious at its inception, and that new property relations could be interpreted in different ways by relying on Hawaiian land ways. Instead, the cases here suggest that a quest for value informed how judges related to Hawaiian land ways. A particular vision of economic development seemed to guide when judges might look to Hawaiian land ways for meaning, and when they might cast Hawaiian land ways as fundamentally incompatible with private property. Thus, Hawai‘i challenges the assumption that the quest for economic development implied the elimination of local or traditional customs and practices.

A. Meaning Revisited

Oni, *Haalelea*, and *Peck* offer us a sketch of the conceptual universe that the kingdom's denizens used to make property claims. Crucially, they emphasize the place of Hawaiian land ways within that universe. Reconstructing how different participants in the property regime told different stories about property's origins and relied on these land ways is important for two reasons. First, it helps us see property as something that had to be made and argued over, rather than an institution that arrived in the kingdom fully formed. We can see the conceptual universe, and Hawaiian land ways specifically, as an important part of that institution.

Second, and relatedly, this allows us to think about the Hawaiian property regime as a hybrid one which merged Anglo-American notions of property with Hawaiian land ways. Although other scholars have described the Hawaiian property regime in this way, they have done so in ways that raise two problems. First, they tend to describe land reform as codifying Hawaiian land ways, which is a poor descriptor for how people in the aftermath of reform thought about and argued over property. Second, they tend to conflate hybridity with the protection of Hawaiian sovereignty in ways that are also at odds with the historical record. These cases, after all, cast hybridity in a more critical light—while some Hawaiians could use hybridity to protect themselves, haole landholders could also use it to make more expansive

property claims. And this dynamic is not limited to Hawai‘i—it mirrors reliance on Indigenous land ways in other colonial contexts. By identifying this hybrid conceptual universe as an element of Hawaiian property, however, we can understand how a diverse cast of characters—including haole planters and advocates for Hawaiian sovereignty and rights today—could use the same conceptual universe to articulate quite different property claims.

1. Hawaiian Land Ways and the Making of Property

Let's begin by exploring how Hawaiian land ways informed the kinds of property claims that Hawaiians made. These land ways both informed Hawaiians' expectations around property and the ways in which they articulated property rights and relationships. For example, the relationship between land and labor informed how the maka‘āinana (people on the land) of Honouliuli went about securing continued access to kula land in the aftermath of property reform—by approaching Ha‘alelea and getting him to agree to allow them to pasture their animals in exchange for continued labor. Hawaiian land ways thus helped form expectations around property. They also helped frame new property rights. For instance, Olelo, who testified on the aftermath of reform in Wailuku, framed landownership by referencing Hawaiian land ways: "The common people are konohikis [chief's steward] now. . . . Everybody now that has a kuleana of his own is a konohiki."[248] This statement relied on Hawaiian land ways to describe the meaning of landownership in ways that resonated with pre-reform practices.

This reliance by Hawaiians on Hawaiian land ways might be expected, but we should treat it with care. To say they relied on these Hawaiian land ways is not to say that they expected the world to remain the same. Take, for example, Ha‘alelea's jurisdictional argument about the consequences of selling a portion of Honouliuli to David Montgomery. Ha‘alelea argued that the sale excised people and land from his jurisdiction as a konohiki, meaning that landownership changed the contours of the relationship between the konohiki and the maka‘āinana. At the same time, this argument would have left him in a position to mediate access to the fisheries—perhaps excluding Montgomery from them, but not those living on the lands the Montgomery now claimed as his. In other words, we should not understand reliance on Hawaiian land ways as an inability to adapt to a rapidly shifting legal landscape.

More generally, I do not want to portray this reliance as a failure to understand the meaning of landownership.[249] Some scholars have argued that

[248] *Id.* at 79.

[249] For an example of this kind of argument see DAVID CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAI‘I 3 (2010) (citing "unfamiliarity with European

the makaʻāinana may have believed—erroneously—that they would be able to continue accessing resources as they did before reform.[250] But this assumes that there was a correct way to interpret property reform. Parts III and IV show this is a tenuous assumption. In relying on Hawaiian land ways, Hawaiians articulated what they believed private landownership meant. And the cases I have reconstructed here suggest they were hardly alone in relying on Hawaiian land ways to interpret landownership.

Indeed, in each of these cases, haole landholders advanced their own interpretations of landownership rooted in Hawaiian land ways. John Meek relied on the connection between land and labor to turn a lease into an instrument that could help him secure the labor he needed to run his cattle ranch. David Montgomery reasoned from Kekauʻōnohi's status as konohiki that he could own the fisheries adjacent to Honouliuli and control who could access them. And Sherman Peck argued that his lease from a konohiki entitled him to control who could use water from a common watercourse, and for what purpose.

Moreover, reliance on Hawaiian land ways did not imply attempts at preserving them. Consider Peck's and Montgomery's claims. Both litigants advanced expansive property claims rooted in the pre-Māhele status of the konohiki. To do so, both claims flattened the relationship between the konohiki and the makaʻāinana into one of domination and control. Daniel's reading of this relationship ignored the reciprocal nature of the relationship in order to claim a right to exclude anyone other than himself from the fisheries. This exaggerated the konohiki's authority—under the statutory regime enacted in the 1840s, the konohiki could declare certain prohibitions on the fisheries, but could not exclude the makaʻāinana entirely from the fisheries.

Peck's claim similarly flattened the reciprocity of Hawaiian status relationships, while emphasizing the power of the konohiki. Before the Māhele, the konohiki would have commanded the labor of the makaʻāinana to construct the ditches that would carry water to the kalo patches. The konohiki would also extract a certain amount of kalo as a tax or tribute. Peck turned these aspects of the relationship into an absolute bar against the use of water for other purposes. In doing so, he ignored the limits on the konohiki's power. For one thing, the makaʻāinana could always move elsewhere to escape the rule of an overbearing konohiki. For another, the relationship between the konohiki and the makaʻāinana involved not only control and command, but also protection and care. Nonetheless, to make the kind of

concepts of landownership" as one of the reasons why Hawaiians lost their lands).

[250] *Cf.* Linnekin, *supra* note __, at 174 ("Clearly, many natives did not comprehend the meaning of private *kuleanas*, and believed that they could continue to live "under the *konohiki*" as they had always done.").

property claim he wanted to make, Peck turned the konohiki into the "lord paramount" of the Wailuku River, capable of withholding water to anyone who extended cultivation beyond ancient kalo patches, for purposes other than kalo cultivation.

To say that parties relied on Hawaiian land ways to make their property claims therefore does not mean that they all relied on the same way or toward the same goals. It would be a mistake to characterize these arguments as merely taking pre-existing property relationships and recognizing them under a new property regime. There is a lot more interpretive work going on here. What this reliance does mean, however, is that Hawaiian land ways were part of the conceptual universe from which the kingdom's denizens drew to give meaning to property.

We can take this point further and say that Hawaiian land ways were part of Hawaiian property law, particularly insofar as lawyers clearly drew upon them to make legal arguments about landownership. We saw this most clearly in *Oni*, where Charles Coffin Harris pointed to specific status relationships to make an argument about the property consequences that should attach to these relationships. Lawyers for Montgomery and Peck seemed similarly conversant in Hawaiian land ways, at least to the degree of making expansive claims about the power of the konohiki over the makaʻāinana. This would remain true for a long time. Thus could Antonio Perry, sitting on the territorial Supreme Court, describe water rights in Hawaiʻi in 1914 as "rightful in their inception under ancient Hawaiian customs and regulations and lawfully passing to their present holders by grant, devise or descent."[251]

This, again, points us to the problem with thinking that the makaʻāinana misunderstood property reform when they assumed or expected that Hawaiian land ways could inflect the meaning of property. It is more accurate to say that litigants like Oni put forward a particular reading of reform, that they did so in ways that were intelligible to their contemporaries, and that their particular interpretation lost in that case. But *Oni* did not eliminate the possibility of relying on Hawaiian land ways to give meaning to landownership. The Court had already embraced that mode of interpreting property reform in *Haalelea*, and the kingdom's Chancellor seemed sufficiently committed to this mode of interpretation in *Peck* to take significant amounts of testimony on the prerogatives of the "lord paramount of the river." Oni, like other people in the kingdom, gave meaning to landownership by drawing from Hawaiian land ways, and this was a mode of interpretation that the Hawaiian legal regime recognized, but did not always accept.

What these Hawaiian cases allow us to see, then, is an attitude toward

[251] Antonio Perry, *Hawaiian Water Rights*, 23 YALE L.J. 437, 444 (1914).

Indigenous property law quite different from the one that Marshall articulated in *Johnson*. This reflects, in part, the different historical trajectories of the Hawaiian Kingdom. But the differences can be misleading. Indeed, we can find across the United States a similar reliance on Native property law, even after *Johnson*. We just need to know where to look.

One telling set of sources involves land litigation in the aftermath of allotment—the federal policy which sought to eliminate tribal sovereigns by turning reservations held in common into private property. In several states, litigants—both settler and Native—entered state courts and asked that these courts apply Native family law as a means of legitimating property claims. For instance, in 1912 the Oklahoma Supreme Court reversed a trial court's rejection of a claim rooted in Muscogee law, finding error in the trial court's refusal to consider whether Muscogee law recognized plural marriages.[252] This is striking because it would mean that property rights could turn on Native law that recognized a form of marriage that American legal authorities had resoundingly rejected.[253]

This case and others like it point us to a longstanding feature of the conceptual universe underlying American property law: that marriage to an Indian woman or marriage under tribal authority was a recognized avenue to landownership.[254] Thus could the *Oregon Mist* run a squib in 1901 titled "Marriageable Heiresses," promising "a great opportunity for local admirers of dusky, dark-eyed maidens": go to Indian Territory, "marry one of these Indian heiresses," "become a member of the Choctaw or Chickasaw tribe," and become "entitled to [your] part of the land to be allotted to the individual members of the tribe."[255] Much like Hawaiian land ways, then, Tribal marital regimes provided material for settlers to articulate property claims.

2. Assessing Hybridity

Once we see the centrality of Hawaiian land ways to the meaning of property after reform, we can more clearly characterize the Hawaiian property regime as a hybrid one by reference to its conceptual universe. This universe encompassed elements derived from different cultural backgrounds. How these elements could or should be combined remained an open and contested question, as *Oni*, *Haalelea*, and *Peck* show. In other words,

---

[252] Oklahoma Land Co. v. Thomas, 127 P. 8 (Okla. 1912).

[253] *Reynolds v. United States*, 98 U.S. 145 (1879) (upholding Congress' power to prohibit polygamy).

[254] PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 95 (2009) ("Marriage between men and Indian women was so intimately linked to American land settlement that it was never far from the minds of legislators.").

[255] "Marriageable Heiresses," *Oregon Mist*, Sept. 6, 1901.

hybridity was not destiny—it could be mobilized to different goals. This has important implications for how we assess not only hybridity, but also modern-day attacks on efforts to rely on Hawaiian land ways to articulate the meaning of landownership.

Other scholars have characterized the Hawaiian property regime as a hybrid one, to different effects. Lilikalā Kame'eleihiwa argued that the turn to private property "disfigured" Hawaiian land ways by introducing a form of individualism that was entirely foreign to Hawaiian culture. In this view, hybridity seems to imply a destruction or loss of Hawaiian culture. More recently, Kamanamaikalani Beamer has argued that Kame'eleihiwa's view overstates the loss that accompanied the transition. Beamer argues that the transition to private property was made up of "hybrid laws" which "codified many traditional Hawaiian relationships between people and property."[256]

At stake for Beamer in this distinction is an important problem—depicting the transition to private property as "disfiguring" Hawaiian practices runs the risk of portraying Hawaiians as incapable of adapting to changing conditions. This is a problem that Indigenous scholars have long identified: the trouble with essentializing Indigenous people by tethering them to an unchanging essence, implying that the more they change the less Indigenous they become.[257] To counter this problem, Beamer highlights the agency of the Hawaiian chiefs in transforming the kingdom's laws, and specifically the kingdom's property regime.[258] The chiefs, Beamer argues, engaged in a selective merging of foreign and Hawaiian modes of governance, creating a hybrid legal regime that illustrate Indigenous peoples' ability to adapt to changing times without losing their sense of self.[259] And this hybridity, he argues, was a "means to resist colonialism and to protect Native Hawaiian and national interest."[260]

There is much to recommend Beamer's view—most importantly, he accurately highlights the Hawaiian chiefs' power to help define the conceptual universe that would shape subsequent property arguments in the

---

[256] Beamer, 151-52.

[257] *See* NED BLACKHAWK, VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST 4 (2006) ("When Native peoples adapt to foreign economies or utilize outside technologies, they are assumed to abandon their previous—that is, 'inferior'—ways while in the process losing parts of themselves; they lose the very things that according to others defined them.").

[258] *Cf.* Beamer, *supra* note __, at 3 ("Ali'i . . . were able to draw from their knowledge of the Hawaiian and Euro-American world, and, at the same time, guide their country and people in ways that they saw fit.").

[259] *Id.* at 3-4 ("The essential argument of this book is that the ali'i selectively appropriated Euro-American tools of governance while modifying existing indigenous structure to create a hybrid nation-state[.]").

[260] *Id*. at 4.

islands. Their choice to turn ancient administrative units into parcels of real estate set the stage for how people in the kingdom understood the transition to private property.

And yet, Beamer's assessment of hybridity as a mechanism to resist colonialism and protect Hawaiian interests raises two problems. The first has to do with his claim that the chiefs "codified" traditional Hawaiian practices. Codification assumes a straightforward correspondence between the worlds before and after reform in ways that underestimate the creativity with which people in the kingdom used Hawaiian land ways to articulate new ways of relating to land. To return to Haʻalelea's jurisdictional argument about the effects of property reform—his account of the consequences of selling land did not merely reproduce Hawaiian land ways; he reasoned from them and introduced a new possibility: that selling land could remove the land from the konohiki's jurisdiction. We might say something similar about Olelo's claim that, in the aftermath of reform, every owner of a kuleana claim was a "konohiki" in their own right. This statement transposed a way of thinking about responsibility over land into a new context, changing what this responsibility entailed and how someone might come to acquire it. Thus, while the chiefs did frame the conceptual universe that people in the kingdom could use to make property arguments, their initial choice to rely on Hawaiian land ways left unanswered many questions about what that choice implied. Subsequent efforts to give meaning to property could rely on Hawaiian land ways in creative ways that went well beyond codification.

This creativity highlights a second problem with Beamer's assessment of hybridity—its conflation of hybridity and resistance, or more broadly its presentation of hybridity as a means of protecting Hawaiian interests. As I noted earlier, a striking feature cuts across all three cases reconstructed here: haole landholders relied on hybridity to advance more expansive property claims at the expense of the bulk of the Hawaiian people. Thus, we should be careful not to assume that hybridity in Hawaiian property law was inherently a tool that could defend the rights and interests of Hawaiians. This is what I mean when I say that hybridity was not destiny—it was, instead, a feature of the legal regime, embodied most clearly in its conceptual universe, which participants in that property regime could mobilize to different ends.

On that note, it is worth emphasizing that, at different points in time, Hawaiian litigants have indeed mobilized hybridity in efforts to protect their interests. We saw, for example, how Oni tried to negotiate for continued access to kula land by importing the connection between land and labor that was integral to pre-reform Hawaiian land tenure relationships.

And this dynamic in fact helped dramatically reshaped Hawaiian property law in twentieth century. One of the principal agents of this transformation was Chief Justice William S. Richardson, the first Hawaiian lawyer to hold

the state's highest judicial office.[261] In 2007, Richardson explained this transformation in an address before the American Bar Association by rooting it in Hawaiian land ways:

> Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While the ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai'i's territorial period, the decisions of our highest court reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawai'i's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawai'i. The result can be found in the decisions of our Supreme Court beginning after Statehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases—and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.[262]

All of this is to say that Hawaiian land ways remain part of the conceptual universe of property in Hawai'i, and that therefore the Hawaiian property regime remains a hybrid one in a meaningful sense. But we should not assume that hybridity's mere existence is enough to vindicate Hawaiian sovereignty claims or—as Chief Justice Richardson did—to delimit the property claims of an entrenched elite.[263] Participants in the property regime must wield hybridity for these ends.

In doing so, their interpretations may well come under attack, and I want to focus briefly here on one such attack. Among the many changes to Hawai'i's property law in the twentieth century was a revitalized doctrine of custom as a means of vindicating Native Hawaiian "traditional and customary rights."[264] Some commentators have criticized this development, arguing that the Hawai'i Supreme Court has enacted its own kind of counter-revolution by upending well-settled law, and doing so in ways that contravene the very meaning of property. We are now well situated to understand how this critique uses storytelling to make a quite contestable claim about the Hawaiian property regime's conceptual universe.

This critique begins by adopting a familiar story about property in

---

[261] Troy J.H. Andrade, *Hawai'i 78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, 24 U. PA. J. L & SOCIAL CHANGE 85, 118 (2021).

[262] Melody Kapilialoha MacKenzie, *Ka Lama Ku O Ka No'eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 6-7 (2010).

[263] On the class conflict around the transformation of Hawaiian property law after statehood, see Williamson B.C. Chang, *Reversal of Fortune: The Hawaii Supreme Court, the Memorandum Opinion, and the Realignment of Political power in Post-Statehood Hawai'i*, 14 U. HAW. L. REV. 17, 20 (1992).

[264] Melody Kapilialoha MacKenzie, *Hawaiian Custom in Hawai'i State Law*, 13-14 YEARBOOK OF NEW ZEALAND JURISPRUDENCE 112, 113 (2010).

Hawai‘i: “As rights in land which were formerly regulated by custom and chiefly prerogative became subjects of written law in the Western fashion, the officials of the kingdom looked to Western judicial tradition rather than to Hawaiian custom when interpreting, protecting and enforcing those rights.”[265] This narrative choice imputes a clear intent to the very creation of property: a “transition from a feudal tenure to individual fee simple ownership in the Western mode.”[266] This critique then argues that this original intent controlled how people and institutions in the kingdom interpreted property reform, most clearly seen in *Oni*.[267] The goal behind narrating property’s origins in this way is to depict the revival of custom as a defiant and unreasonable rejection of the intent behind property’s very creation. Having conflated property and “Western fashion[s],” considering Hawaiian land ways at all appears as a rejection of the very idea of property.

We now know enough about the conceptual universe underlying Hawaiian property to understand why this property story, and its attendant critique, is unconvincing. Indeed, by its own terms, the critique leaves us wondering why some aspects of Hawaiian land ways remain an unproblematic part of Hawaiian property law.[268] This is a worthwhile question to ponder, and one which I think we can begin to answer by looking at how questions of value informed debates over Hawaiian land ways in the aftermath of property reform. I turn to this question next.

B. Value Revisited

As I argued in Part I, the United States Supreme Court in *Johnson* seemed to tell a blank-slate story about how the United States’ property regime came to be. In striking contrast, the Hawaiian Kingdom’s Supreme Court seemed to waver between blank-slate and crowded-slate stories across *Oni*, *Haalelea*, and *Peck*. This wavering commitment to one or the other story begs for an explanation. On one account—of a piece with the critique of custom’s revival I have just recounted—the court ignored Hawaiian land ways when the right to exclude was at stake. Some scholars have argued that the right to exclude is the sine qua non of property, so that property law’s internal logic acted as a limit on when Hawaiian land ways could inform the meaning of landownership.

---

[265] Paul Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai‘i*, 20 U. HAW. L. REV. 99, 125 (1998).

[266] *Id*. at 117.

[267] *Id*. (arguing that this intent was “confirmed in the case of *Oni v. Meek*”).

[268] *Cf. id*. at 122-23 (“early judicial decisions of the kingdom on adoptions and the devolution of property at death and particularly on matters of water rights reflected a studied concern for protecting the reasonable expectations of Hawai‘i’s populace based on custom”).

I think this is a fine account, but I find it lacking in its engagement with the context surrounding these cases. I propose a different explanation: the Court's reliance on Hawaiian land ways turned in part on its commitment to a developmental political economy. Where it did not sense tension between economic development and Hawaiian land ways—as in *Haalelea* and *Peck*—it entertained arguments that Hawaiian land ways could inflect the meaning of landownership. Where it sensed a tension with economic development—as in *Oni*—it made reliance on Hawaiian land ways seem like anathema to the very meaning of property.

Therefore, I argue, a concern with political economy informed doctrinal developments, much as Morton Horwitz argued took place in early-nineteenth-century America. Importantly, Horwitz argued that a concern with economic development translated into doctrinal shifts that undermined local and customary relations in favor of abstract legal forms. Hawai‘i shows that this was not necessarily the case. Courts concerned with promoting economic development might nonetheless privilege local and customary relations—like Hawaiian land ways.

1. Why Conflicting Stories?

How to explain the Hawaiian Supreme Court's uneven treatment of Hawaiian land ways? One reading might center the right to exclude, which some property scholars argue is at the core of property itself.[269] On this reading, Hawaiian land ways threaten the integrity of the right to exclude. This was clearest in *Oni* because Oni claimed the right to enter the lands belonging to someone else. The Court reacted in disbelief: "Can it be claimed that, after a division of the land between the several parties, . . . the [maka‘āinana] still had the right to 'pasture his horse and cow and other animals on the land,' of the konohiki, to an indefinite extent? We think not."[270] This reaction is striking because the statute did not contemplate an indefinite right to pasture; it provided for its own limitation: the maka‘āinana could pasture their animals, but not in such numbers as to prohibit the konohiki from pasturing his own. The Court construed Oni's statutory right as a boundless infringement on the right to exclude, making it seem fundamentally incompatible with private landownership. Neither *Haalelea* nor *Peck* presented quite so stark a challenge to the right to exclude. In fact, they involved resources—fisheries and surface water—that might best be

[269] I develop this reading by extrapolating from a critique of the modern revival of custom. This reading argues that, in turning to Hawaiian traditions and customs, the modern Hawaiian Supreme Court has rejected exclusivity in ways that "contravene[]" the meaning of landownership. *See* Sullivan, *supra* note __, at 157 n. 346.

[270] *Oni v. Meek*, 2 Haw. 87, 93 (1858).

allocated through governance rather than exclusion strategies.[271] On this reading, the differences in disposition toward Hawaiian land ways reflects the internal structure of property law.

This is a plausible reading, but I find it unsatisfying. It assumes too much rationality from too scant a historical record. First, it assumes that property law has a timeless logic. Second, it assumes that legal institutions will work to uphold this timeless logic. This is sensible as an exercise in ex post rationalization akin to how a lawyer might try to make sense of seemingly inconsistent precedent.[272] But I find it lacking as an exercise in historical explanation. I leave it to advocates of this reading, and this mode of interpreting doctrinal evolution generally, to offer evidence that shows this is why judges acted this way. Allow me, instead, to offer a different explanation for why the Hawaiian Supreme Court treated Hawaiian land ways differently in these cases; for why it adopted a blank-slate narrative at times, and a crowded-slate narrative at others.

The uneven treatment of Hawaiian land ways seems to reflect a commitment to a developmental political economy. I gather as much from the concerns the Court raised at different times over the possibility of relying on Hawaiian land ways to make property claims. In *Oni*, for instance, the Court was explicitly concerned with the economic impact of the claims that Oni was articulating. Oni's claim presented "questions of great importance" that would "determine the rights of many other persons besides the present plaintiff and defendant."[273] And these many other persons were differentiated by the asymmetric distribution of resources across the land: this case was "of great importance not only to the large landed proprietors throughout the Kingdom, but to thousands of the common people."[274] This case, in other words, pit the landed few against the (possibly landless) many. And in that contest, the Court made sure to remove an important avenue—Hawaiian land ways—which the thousands of the common people could use to address the asymmetries of that political economy. The property protections the Court awarded in this case would, of course, also accrue to those among the common people who managed to secure their own land claims. But the right of exclusion would mean something different to these smaller landholders,

---

[271] *See* Smith, *supra* note __, at 1718 (contrasting exclusion and governance strategies); Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 445, 448-49 (2008) (arguing that governance strategies are more appropriate over water because of its fugitive nature) .

[272] *Cf.* Gordon, *supra* note __, at 3 ("While lawyers are concerned to find continuities between past and present, historians employing 'contextual' or 'structuralist' approaches will emphasize discontinuous breaks, epistemic shifts in the ways in which social actors sonstruct their worlds.").

[273] *Oni*, 2 Haw. at 87.

[274] *Id*. at 89.

who would be left to reckon with the resource asymmetries resulting from the Māhele.

The concern with political economy is even more explicit in *Peck*. There, recall, Chancellor Allen worried that the right Sherman Peck and his associates claimed—the right to preclude their neighbors from using water for purposes other than kalo cultivation—threatened the islands' changing agricultural focus. Recognizing such an "illiberal construction" of water rights would freeze land uses, or at the very least make it very difficult to repurpose water for different uses, thus "do[ing] infinite mischief."[275] What followed this assessment was a collection of British and American cases in which courts warned that prohibiting water rights to be put to new uses would defy "law [and] common sense."[276] Thus, the Chancellor rejected Peck's claim not because it relied on Hawaiian land ways that had been superseded by property reform, but because claims of this nature could make resources unavailable for new uses made possible by technological developments. What these judicial opinions suggest, then, is that a concern with the productive use of the land bent judges' disposition toward reliance on Hawaiian land ways to give meaning to landownership.

This helps explain why the Court refused to recognize some claims rooted in Hawaiian land ways, though it does not explain why the Court would acknowledge some of these claims. But the cases reconstructed here offer some clues on this regard, too. Indeed, *Peck* is striking because the Chancellor did not dismiss Peck's claim as frivolous or implausible. As I noted earlier, the Chancellor believed "there was evidently on the minds of both parties mistaken ideas of their rights, which were very honestly entertained."[277] Peck was not wrong to transform chiefly authority into a claim of absolute power over water allocation; but given these facts, the Chancellor could not recognize a right that would condemn other landholders to modes of land use that had been overtaken by sugar production already. To build on the framework I developed earlier, Hawaiian land ways were too much part of the conceptual universe underlying the Hawaiian property regime to dismiss out of hand. Indeed, the Court itself in *Haalelea* would reason from pre-reform Hawaiian land tenures to imply a right to access fisheries from the sale of land. Hawaiian land ways were simply too much a part of the way people made sense of landownership in the kingdom for the Court to ignore. But the Court could try to shape how people mobilized these land ways, seemingly in an effort to shape economic life toward extractive agriculture.

---

[275] *Peck*, 8 Haw. at 665.
[276] *Id*. at
[277] *Id*. at 673.

2. Hawai‘i in Perspective

What emerges from these cases is a concern with ensuring that property law support particular forms of economic activity. This is not unlike the dynamic that Morton Horwitz claimed brought about a transformation in American private law in the late-eighteenth and early-nineteenth centuries. But Hawai‘i challenges this account in important ways. It particular, it questions the assumption that the quest for economic growth would lead necessarily to eliminating customary or local practices.

As noted in Subpart I.C., Horwitz argued that American judges came to see themselves as "playing a central role in directing the course of social change."[278] Moreover, they aligned themselves with nascent industrial interests, and sought to provide them with legal subsidies that would alleviate the costs of industrialization.[279] They did this by revising "[a]nticommerical legal doctrines," such that "[l]egal relations that had once been conceived of as deriving from natural law or custom were increasingly subordinated to the disproportionate economic power of individuals or corporations that were allowed the right to 'contract out' of many existing legal obligations."[280] Horwitz argued, for example, that courts displaced the role of communities in adjudicating contract disputes by relying on community norms and customs, embracing instead a mode of interpreting contracts centered on ascertaining the will of the parties.[281] Horwitz, of course, was articulating a piece of a much larger global story: one in which industrial capitalism undermined traditional communitarian life patterns, replacing them with legal relations that could more easily fit into industrial modes of production.[282] This argument is reminiscent of the work of another scholar—E.P. Thompson—who found a comparable dynamic in eighteenth-century England, where community norms around prices and resource allocation were displaced by the free market.[283]

---

[278] HORWITZ, *supra* note __, at 1.

[279] *Cf*. *Id.* at 253 ("Legal rules providing for the subsidization of enterprise and permitting the legal destruction of old forms of property for the benefit of more recent entrants had triumphed.").

[280] *Id*.

[281] *Id*. at 160. This claim was heavily attacked by scholars claiming that Horwitz was really commenting on judicial efforts to circumscribe the jury rather than a transformation in judicial notions of contractual relations. On this critique, and subsequent scholarship which reinforced some aspects of Horwitz' claim about the transformation of contract, see ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW, 100-101 (2017).

[282] On the parallels between Horwitz' work and this broader story, see GORDON, *supra* note __, at 103.

[283] E. P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76 (1967).

We see a similar development in Hawai‘i, most clearly illustrated by Oni’s troubles. After the Māhele, Oni had attempted to rely on the means of value creation available to him before reform. He had performed labor when required so that he could retain access to the kula land of Honouliuli. Whether this was just to pasture his horses or to collect other resources, we do not know. But in telling a blank-slate story about property reform, the Court in *Oni* eliminated that avenue to value creation which had previously been available to him. If Oni now wanted to pasture his horses, he would have to pay Meek for that privilege, or he might resort to a labor contract with Meek that included a right to pasturage. Either way, Oni would have to enter the market and bargain. And in this bargain, he would have no legal entitlements on Meek’s land; no preexisting obligation that Meek was bound to observe, and which Oni could leverage in negotiation. Instead, he would face Meek—the owner virtually all the remaining kula land in Honouliuli—who would be able to set terms accordingly.

Hawai‘i thus offers a familiar story of asymmetric bargaining as a defining feature of the history of expanding market economies. At the same time, I would like to draw two distinctions from the cases I have reconstructed here. The first one is minor. Other scholars have focused on shifts in doctrine as the vehicle through which courts intervene in economic life. In these Hawaiian cases, however, the intervention happens not through doctrinal shifts, but through the choices it made about how to tell the story of property’s origins in Hawai‘i. In choosing whether or not to entertain arguments rooted in Hawaiian land ways, courts sought to shape the way in which parties could make property arguments and use their property toward the goal of economic development.

The second distinction is more consequential. An important throughline in the scholarship on the expansion of market economies (and of settler colonialism, for that matter) is the elimination of Indigenous modes of relating to the land. We have already seen, through the lens of *Johnson v. M’Intosh*, why this elimination might be important, perhaps even necessary, to establish a market in land. Eliminating Indigenous modes of relating to land could, crudely put, reduce the costs of setting up a market for land in settler terms. It could also force Indigenous people into land transactions in less-than-favorable terms. We see elements of these processes taking place in Hawai‘i. At the same time, the cases I have reconstructed here show that the process of elimination was never quite complete. Not just that—these cases show that the Hawaiian Supreme Court, along with haole landholders, were quite comfortable relying upon and rearticulating Hawaiian land ways in making property claims. These actors, in other words, did not see Hawaiian land ways as inherently opposed to their quest for economic development—particularly, it seems, where it allowed them to recast the power of the chiefs

as a means of articulating more expansive property claims.

The persistence of Hawaiian land ways thus seems to set Hawai‘i apart from a master narrative of capitalism and colonialism in the United States. In recent years, important work has called attention to the centrality of colonialism to wealth creation in the United States, along with its subsequent erasure from this history of wealth creation.[284] Hawai‘i suggests that thinking about colonialism strictly as the erasure of Indigenous land ways might offer us only a partial account of how this process of wealth creation unfolded. And while it is tempting to think of this as another consequence of Hawai‘i’s seeming exceptionalism in the history of American empire, we might take it instead as an invitation to ask different kinds of questions about how settlers related to Indigenous land ways in the mainland United States. It is worth more thought and research,[285] for example, that Samuel Thomas Bledsoe, who would become president of the Atchison, Topeka and Santa Fe Railway,[286] would also pen a treatise titled *Indian Land Laws* in 1909.[287] The treatise would be popular enough to warrant a second edition in 1913,[288] and would be followed by other treatise writers intent of offering practitioners the means of understanding Indian land laws in Oklahoma.[289] Much as in Hawai‘i, it seems, lawyers could only work within Oklahoma’s property landscape by engaging with Indigenous relationships with the land.

---

[284] K-Sue Park has argued that Marshall’s opinion in *Johnson*, and specifically its creation of a racial hierarchy, “allowed Marshall . . . to regulate a land market and make land a source of unprecedented commercial value. Park, *supra* note __, at 1092. At the same time, Park argues that the “predominant understanding of U.S. law and legal institutions . . . is built on a narrative from which histories of colonization and enslavement . . . have been erased over time.” *Id*. at 1067.

[285] In future work, I will explore the persistence of Tribal law in the aftermath of allotment.

[286] KIETH BRYANT, HISTORY OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY 260 (1974).

[287] Bledsoe opened with a statement about why this work was important:

> No more complicated and difficult questions are presented for the consideration of the legal profession of to-day than those arising out of . . . Indian lands. Title to more than one-half of the lands in the State of Oklahoma is dependent upon the property construction of legislation of this character. The same is true to a greater or lesser degree with reference to every Western State

S.T. BLEDSOE, INDIAN LAND LAWS: BEING A TREATISE ON THE LAW OF ACQUIRING TITLE TO, AND THE ALIENATION OF, ALLOTTED INDIAN LANDS iii (1909).

[288] S.T. BLEDSOE, INDIAN LAND LAWS iii (2d ed. 1913) (“While but five years have elapsed since the publication of the first edition of Indian Land Laws, the unusually rapid development of this phase of the law of land titles in Oklahoma seems to render desirable a second edition.”).

[289] *See, e.g.*, WELLINGTON L. MERWINE, THE TRIAL OF TITLE TO LAND IN OKLAHOMA: BEING A TREATISE ON THE LAW OF REAL ESTATE, WITH PRACTICE, FORMS, AND PROCEDURE (1913); LAWRENCE MILLS, OKLAHOMA INDIAN LAND LAWS (1924).

CONCLUSION

Two different stories about property's origins in Hawai‘i swirled about the kingdom in the aftermath of property reform—and to this day. On one account, property was a foreign innovation at odds with Hawaiian land ways. On another, property built atop those land ways, transforming them into something new that nonetheless bore a relationship to what came before. These conflicting stories make it hard to tell a simplistic story of property as merely abandoning Hawaiian land ways in favor of foreign and supposedly modern ways of organizing control over resources. It also means that we might pay close attention to *when* and *why* different actors privileged one story over the other. Indeed, in toggling between these stories, the Hawaiian Kingdom's Supreme Court seemed to privilege what it considered to be productive uses of the land. The avenues that most Hawaiians might have used to articulate claims to resources before property reform seemed to vanish, even as it remained possible for large landholders to transfigure the power of the chiefs into more expansive property claims. Paying close attention to competing origin stories, however, makes it clear that these outcomes were not obvious, but rather the result of interpretive choices.

These competing accounts also offer lessons for property regimes beyond Hawai‘i. First, they highlight the importance of a property regime's conceptual universe to the kinds of property claims that people make. Part of making property claims involves learning the make them in a way that the audience understands. This is critical—because a distinctive feature of property rights is that they are good against the world, their effectiveness will turn not only on the property owner's ability to enforce them, but also on the audience's ability to understand what the owner is claiming. This makes a property regime's conceptual universe integral in its functioning. These Hawaiian stories invite us to think of a conceptual universe less as a given, however, and more as something that can be shaped in ways that privilege some claims over others.

The second lesson we should take from these Hawaiian property stories builds upon the first: Hawaiian land ways were part of the conceptual universe enabling landownership in the kingdom, and a cursory glance at the mainland suggests that something similar was true in other parts of America's empire. Once we see past a simplistic account of property reform as eliminating Indigenous modes of relating to the land, we can seize upon moments in which settlers and colonial authorities selectively relied upon and transformed those Indigenous modalities to suit their goals. These moments are important—not because they turn Indigenous dispossession into something better, but because they undermine the tendency to portray dispossession as something that just happened, rather than something that

someone did. These moments also make it harder to turn to the past for support in claiming that Indigenous legal traditions are so strange or foreign (or barely legal at all) that they should not be recognized by colonial authorities in the present. Past reliance ought to inform the present.