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ARTICLE: THE KULEANA ACT REVISITED: THE SURVIVAL OF TRADITIONAL HAWAIIAN COMMONER RIGHTS IN LAND.

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This Article reflects my belief that cultural diversity is a good in itself, and expresses my gratitude to the Hawaiian people for letting me know a little of who they are. Many have helped and supported me in the writing of this manuscript. Lamson Lam and Truong Buu Lam gave the gifts of love and forbearance. I also owe much, for their aid, encouragement, and comments, to: Scott Allen, Marjorie Au, Edward D. Beechert, R. Kekuni Blaisdell, Donna Burns, Williamson Chang, John P. Craven, Philip Elman, Michael C. Hare, Lilikala Kame'eleihiwa, Marion Kelly, Duncan Kennedy, Teresa Mansson, Mari Matsuda, David Stannard, Carol Stimson, Bill Tam, Haunani-Kay Trask, Mililani Trask, Charles F. Wilkinson, and Ida Yoshinaga. Andrea Lairson and Deborah Dwyer edited the manuscript and strengthened it immeasurably. I alone, unfortunately, bear responsibility for deficiencies.

LEXISNEXIS SUMMARY:

... In 1850, the Legislative Council of the sovereign and independent nation of Hawai'i, which was ruled by King Kamehameha III, enacted a statute, popularly known as the Kuleana Act, which granted the common people fee simple title to their cultivated lands and house lots, provided certain conditions were met. ... Further, the *Principles* stated, in the course of establishing a private property land regime, the government could assign one-third of the kingdom to each of the three classes of possessors of land: King/government, landlord/konohiki, and tenant. ... The time has come to reassess thoroughly the survival of traditional Hawaiian commoner rights in land. ...

HIGHLIGHT: *Abstract:* The issue of aboriginal land rights raises significant legal and moral questions. The starting point for discussion of Native Hawaiian land rights is the Kuleana Act of 1850. This Act enabled Hawaiian commoners, for the first time in Hawaiian history, to acquire fee simple title to land. The Act did not, however, contain provisions simultaneously terminating their traditional rights in land. What these traditional rights consist of, and to whom they apply, remain relevant issues. The author examines the Act in the context of its surrounding history, laws,

and judicial interpretations, and concludes that the Kuleana Act introduced a system of rights parallel to traditional Hawaiian land rights, not in derogation of them. Consequently, the author argues, traditional land rights remain available, under the law, to descendants of the commoners of 1850.

TEXT:

[*234] I. INTRODUCTION n1

In 1850, the Legislative Council of the sovereign and independent nation of Hawai'i, which was ruled by King Kamehameha III, enacted a statute, n2 popularly known as the Kuleana Act, n3 which granted the common people n4 fee simple title to their cultivated lands and house lots, provided certain conditions were met. These were, in the main, that claimants demonstrate to an appointed Board of Commissioners to Quiet Land Titles ("Land Commission") that they in fact occupied and had improved the claimed lands, be these in governmental, Crown, or chiefly domains. n5

Until the passage of the Kuleana Act, the common people of Hawai'i had held, to use Western parlance, undivided interests in the land in common with the King and the chiefs. n6 The first Constitution [*235] of Hawai'i, granted by Kamehameha III in 1840, described the traditional land system as follows:

Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. n7

This traditional system suffered its first major legal onslaught in 1848 n8 when, pursuant to discussions, the King, the chiefs, and their land agents separated out their respective interests in the land. n9 These divisions came to be known as the Great Mahele. n10 In it the King, and the chiefs and land agents, who were collectively known as Konohiki, n11 agreed, in separate bilateral compacts, to accept certain allotted areas of the kingdom as their own while quitclaiming all interests in the others' assigned portions. n12 These agreements were recorded in a volume called the Mahele Book. n13

The King, n14 and by degrees the konohiki, n15 then conveyed or commuted to the government a portion of the lands they thus acquired. n16 In this manner the government of Hawai'i became, like the King and the chiefs, an allodial landholding party. Although each of these three sets of landowners now held land independently of one another, their holdings remained subject to the rights of native tenants living [*236] thereon. n17 This commingling of landholder and tenant interests in land continued undisturbed until the passage of the Kuleana Act in 1850. The Act, in fact, constituted the government's response to the complaints voiced by foreign residents, as well as ali'i or chiefs, n18 against the continued commingling of landowner and tenant interests. By its own terms, the new Act envisaged that, once fee simple titles were awarded, "each man's land may be by itself." n19

Prominent members of the Hawaiian government evidently expected that Hawaiian commoners would, without either hesitation or hindrance, embrace the Western-derived entitlement to fee simple ownership which was being extended to them for the first time under the Kuleana Act. Chief Justice William L. Lee, who drafted the Act, n20 for one assumed that commoners would readily lay claim to fee simple awards of land. In describing the Kuleana Act to the Hawaiian people, Lee said: "Two courses then are open for you. Either to secure your lands, work on them and be happy, or to sit still, sell them and die. Which do you choose?" n21 The choice, as he portrayed it, was not between getting or not getting fee simple title. The choice, instead, hovered between tillage and sale after obtaining title. Another American member of the government, Richard Armstrong, published remarks with similar assumptions. "Each man will be his own Konohiki," n22 he declared. Following this, Armstrong set out, in earnest detail, the idyllic vision of a New England-style nuclear family, rooted in sedentary agriculture, which now awaited the fortunate Hawaiian commoner. n23 Subsequent events, however, proved less than fortunate for Hawaiians.

Standard estimates place the Hawaiian population of 1778, at Captain James Cook's arrival, at somewhere between

200,000 and 400,000. n24 Seven decades later their descendants, who then numbered about 80,500, n25 received some 8200 fee simple awards under the Kuleana Act, representing title to less than one percent of the kingdom's [*237] land. n26 This startlingly meager figure compels us to ask whether the Act, in extending a fee simple regime to a few commoners, thereby also extinguished the traditional rights which they and the rest of the class had enjoyed in the land. The present Article, which examines the Act, its historical context, and subsequent Hawai'i State Supreme Court decisions, concludes that traditional commoner rights in land were not abrogated by the Act, but remain essentially intact, and are available to descendants of commoners today.

This conclusion clearly raises profound legal, political, economic, and moral issues for Hawai'i. Nevertheless, the reading of Hawaiian land rights presented here is not unprecedented, but parallels assertions of indigenous land rights established by mainland American Indians in recent but already historic litigation. n27 If traditional Hawaiian land rights survived the passage of the Kuleana Act, as research here shows they have, major adjustments in land title in Hawai'i will be required, with obvious and serious consequences. That consequences may be sweeping, however, is no reason to avoid a comprehensive and straightforward examination of the issues.

II. HISTORICAL CONTEXT

The present section reviews the historical circumstances of the Kuleana Act to see what may be learned of its intended purpose and scope. Relevant to the review are, first, certain political and economic features of traditional Hawaiian society; and second, the impact of the West through the first half of the nineteenth century.

A. Background

From 1778, when Captain James Cook first arrived in Hawai'i, n28 until 1850, when the Kuleana Act was passed, Hawaiian society suffered a series of systemic shocks of an ideological, social, and, at times, physical nature. These shocks characterized, everywhere in the Pacific, the contact of island subsistence societies with Western [*238] mercantilistic and capitalistic intruders. n29 Rarely, however, even for the Pacific, was the resulting devastation of native society as thorough and speedy as in Hawai'i. For example, in 1819, a mere forty years after Cook's visit and before the first missionary ever set foot on Hawaiian soil, the Hawaiian government, on its own initiative, formally repudiated the old religion -- gods, taboos, and all. n30 Such a sudden, explicit, and radical denial of a belief system, and hence of the social order which the system underpinned, is rare in the annals of societies. Its occurrence attests to the extraordinary impact that Western civilization exerted on native Hawaiian culture.

Ideological disinheritance was, if anything, surpassed by the material losses accruing in later years. Figures tell a blunt story. By 1896-97, Westerners, who comprised 21% of the population, n31 owned 57% of all taxable lands and paid 67% of the real estate tax in Hawai'i. n32 At the same time, persons of Hawaiian ancestry, who made up 36% of the population, n33 paid only 24% of the same tax. n34 The loss of land paralleled the staggering loss of population. As already stated, approximately 300,000 Hawaiians inhabited the islands in 1778; n35 by 1850 only 80,500 remained. n36 This phenomenal decrease resulted in part from the island population's utter lack of immunity to the sickness brought by the foreigners, such as smallpox, measles, and venereal disease. n37 In other part, however, population decline was related to the alienation of the people from their land. n38 Without land, Hawaiians could not secure adequate material sustenance or maintain stable social relationships, which in turn drastically affected their ability to live and their desire to reproduce. n39

The process of alienation from the land is best understood by first recalling the traditional nature of the Hawaiian polity and its land [*239] tenure system and, second, by reviewing the manner and scope of the Western intrusion which tolled their demise. This interplay between tradition and intrusion, in the late eighteenth and early nineteenth centuries, will, in turn, shed light on whether the Kuleana Act was enacted to accelerate, retard, or fend off the process of land alienation.

B. The Traditional Political Structure n40

Scholars believe that the Hawaiian archipelago, which consists of eight main islands, n41 was ruled by four paramount chiefs, or ali'i nui, at Cook's arrival in 1778. n42 This number varied according to the success with which particular chiefs conquered new territories or defended old ones. n43 Kamehameha I may have been the first ali'i nui to dominate the entire island chain, and that only after many years of scheming, warfare, and foreign assistance. n44 Regardless of how many ali'i nui ruled over the islands, the structures by which they ruled appear to have been fairly stable and uniform at the time of contact with the West. n45

In essence, the political system placed an ali'i nui with supreme authority at the head of a territory which he had, more often than not, conquered. n46 The ali'i nui carved up his territory into districts over [*240] which he placed trusted chiefs drawn from the ranks of aides, relatives, or allies. These chiefs or ali'i, in turn, placed still lower chiefs or retainers at the head of smaller and smaller subdivisions. At the bottom were the maka'ainana, or commoners, who worked the land. n47 Conversely, the surplus product of maka'ainana labor moved upwards, through several levels -- four, five, or six deep -- to support agents, chiefs, and the ali'i nui. n48

While the broad outlines of this system recall Western feudalism, significant distinctions stand out. First, the system was by no means militaristic. Maka'ainana did not owe military service to the ali'i. n49 Second, the ali'i class enjoyed no hereditary claim to the land. On the death of the ali'i nui, lesser chiefs lost their holdings unless his successor confirmed them, an event which was rare. n50 Third, maka'ainana were not bound to the territory of a particular chief, but could move freely in search of better conditions. n51 Extensive kinship networks, which cut across boundary lines, facilitated this continual reallocation of persons to land. n52

Because the wealth and power of the ali'i flowed from the labor of the maka'ainana, who could withhold their services by moving to another division, the ali'i generally exercised restraint in their demands on the commoners. n53 Furthermore, even though Hawai'i [*241] was, of all Pacific societies, the most ideologically hierarchical, n54 materially it remained a subsistence economy. Traditional Hawaiians did not produce technologically elaborate luxury goods, or surplus products sufficient to exchange for such goods. In any event, until Cook's time, such products were unknown and unobtainable. The ali'i, then, after extracting their share of food, clothing, shelter, and minimal luxuries from the maka'ainana, found little else to command. In sum, the traditional political structure gave the maka'ainana little formal power, but considerable economic security. The ali'i, on the other hand, retained what formal glory there was, but enjoyed little political stability. n55

C. The Traditional Land Tenure System

Early foreign visitors wrote admiringly of the well-tended gardens of taro, yam, and sweet potatoes which supported a dense population of healthy-looking Hawaiians. n56 The size and welfare of the population rested on an extensive land use system. A Western observer, in 1875, keenly noted that the long occupancy of the islands had produced a "minute subdivision of land, and nomenclature thereof. Every piece of land had its name, as individual and characteristic as that of its cultivation." n57 The complexity of exploitation reflected in the observed nomenclature demonstrated the degree, outstanding in Polynesia, n58 to which Hawaiians had come to master and depend upon terrestrial, rather than marine, resources. Just about every nook, [*242] cranny, field, landform, altitude, and species were exploited: "Hawaiian life vibrated from uka, mountain, whence came wood, kapa, for clothing, *olona*, for fish-line, ti-leaf for wrapping paper, *ie* for ratan lashing, wild birds for food, to the *kai*; sea, whence came *ia*, fish, and all connected therewith." n59 This extensive exploitation made sense given the geological youth of the islands, which had as yet welcomed relatively few plants and animals to their shores. What species existed had, of necessity, to be used regularly, and ingeniously. n60

Both the land and sea yielded food to the maka'ainana. n61 Up in the wet valleys, they cultivated lush, high-yielding irrigated gardens of taro. Down in the more arid plains, they grew yam, sweet potato, and dry-land taro. In addition, commoners tended subsidiary crops of sugar cane, bread-fruit, banana, and coconut. At sea, in the mountains, and on fallow and uncultivated lands, Hawaiians hunted or gathered fish, birds, wood, fiber, leaves, roots, and other products needed in their dietary and household practices. They also raised pigs and fowl, which typically

foraged for their own food. While to the untutored Western eye, then, Hawaiians may have appeared to use only those lands that were under cultivation, which may have amounted to as little as one percent of the island's surface, n62 in reality the islanders exploited a much wider terrain. n63

A key land-use institution, the ahupua'a, organized this wide-ranging mode of exploitation. n64 In its ideal conception, the ahupua'a was a self-sufficient economic and administrative unit of land running from the summit of a mountain to a broad coastal base. n65 The model ahupua'a encompassed, within its borders, all the types of terrain, resources, and species useful to Hawaiian livelihood. n66 In practice, [*243] however, ahupua'a varied considerably in form and expanse. n67 Nevertheless, most took in some coastline and enough of the slopes to satisfy the standard needs of their occupants for the products of the sea, plain, valley, and mountain. n68

The administration of the ahupua'a rested with the konohiki. n69 The konohiki enjoyed certain rights to the land and resources of the ahupua'a, and to the labor and surplus products of its occupants. n70 In return, he secured for the ali'i nui the latter's expected share of the ahupua'a's wealth. n71 The necessity of providing adequately for both himself and the ali'i nui generally compelled the konohiki to manage the economy of the ahupua'a in such a way as to both conserve and enrich its human and natural resources. The building and regulation of canals and ditches, which carried water into the highly productive wet taro terraces, for example, became a primary responsibility of the konohiki. n72

[*244] The administrative and ecological parameters of the ahupua'a thus fostered an economic self-sufficiency that required little supplementation from inter-ahupua'a barter. n73 Self-sufficiency was further advanced by a land tenure system that conferred liberal rights in the resources of the ahupua'a upon the maka'ainana, who were thereby encouraged to extend the range of their economic activities. Activities commonly carried on by the occupants of an ahupua'a included: The cultivation of plots of land for family consumption; the clearing of stretches of kula n74 for dry-land crops; the use of water from springs, streams, and ditches to irrigate wet taro; the catching of fish off shore; the hunting of birds and gathering of wild plants; the raising of pigs and fowl; the building of various structures in which to conduct rituals, sleep, cook, eat, and store items. n75 Finally, occupants enjoyed freedom of movement within the ahupua'a, n76 both to realize these rights, and to engage in the exchange of goods and services.

D. The Impact of the West n77

That maka'ainana should enjoy such varied rights in the use of the land and the sea, based solely upon their occupancy of, and labor in, an ahupua'a, was well-nigh unfathomable to the foreigners who followed Cook to the islands. Incomprehension, in due course, metamorphosed into opposition. By the early decades of the nineteenth century, foreigners, anxious to develop Hawai'i's land, banded together to overcome what, for them, constituted an intolerably broad range of maka'ainana rights in the ahupua'a. n78

[*245] *1. The Needs of Westerners*

The foreigners who flocked to Hawai'i after 1778 included explorers, traders, missionaries, whalers, and investors. n79 They arrived somewhat in that order, bearing somewhat different histories and ambitions. Captain James Cook's voyages coincided with the first phase of European industrialization which, as it progressed, propelled Europeans into the non-Western world to seek out raw materials and new markets. Although an Englishman first made Hawai'i's existence known to the West, England thereafter evinced little interest in the archipelago. n80 It fell to Americans, first from the East Coast and then from the West, to fully exploit, and indeed ravage, Hawai'i's physical and social resources.

The material havoc that Western contact produced poses no puzzle when one recalls that the island ecosystem, like its people, had been isolated from the rest of the world for several centuries. Both proved highly vulnerable when stressed by heretofore unknown predators, diseases, and demands. And demand there was, as the ecosystem confronted the heavy task of reprovisioning the many whaling ships and trading vessels that rapidly followed Cook to the islands. n81 The personnel of these vessels, in addition, left behind certain physical and economic legacies that changed the face of Hawai'i. While the crews of the ships were busy spreading devastating illnesses among the general population

gathered around the harbor towns, the merchants who shipped with them were themselves infecting another class of Hawaiians, the ali'i, with a different disease: the love of foreign goods. The chiefs first paid for these goods with food and water, then with sandalwood, and finally, with land. n82

When traditional supplies of food dwindled, reprovisioning simply took on a new form. Enterprising foreigners stepped in to raise [*246] imported crops and animals for the shipping clientele. n83 The agricultural success of the foreign farmers, however, developed at the expense of the maka'ainana, whose premium lands and waters the King and chiefs too readily committed to the reprovisioning trade. n84 Lands not reassigned did not thereby necessarily escape devastation: introduced stocks of sheep, goats, and cattle wandered over the commoners' lands, grazing, nibbling, or trampling away many of the indigenous flora upon which Hawaiians relied. n85

The success of the foreign establishment attracted yet more Western capital and people to the islands. By 1820, the missionaries also arrived, n86 making complete the elementary framework of Western civilization: Corn, wheat, sheep, goats, cows, capitalists, and clerics. But one ingredient crucial to Western culture was still missing: the private ownership of land. Increasingly, foreigners chafed at its absence. Their frustration mounted when, due to the uncertainty of the whaling enterprise, the reprovisioning trade faltered. n87 The foreign community needed to find a new way to make money. The solution that soon presented itself to them was large-scale agricultural production for the booming market of California. n88 First, however, the perceived indeterminacy and insecurity of landholding in Hawai'i had to be corrected.

2. *Conflicting Values*

The Westerners' frustration with traditional Hawaiian land tenure exposed the fundamental incompatibility that in fact existed between Hawaiian and Western economic thought. Nineteenth century capitalism revolved around the concept of individual enterprise. Additionally, it assigned a definite monetary value to goods and services, and espoused "rational" economic transactions in which the maximization of profit counted for everything. By contrast, the Hawaiian economy assumed that neither individuals nor classes could be self-sufficient. Ali'i needed maka'ainana and vice versa: the one mediated with the gods and allocated resources, such as land and water; the other provided manpower and produced food. Furthermore, families at the coast typically exchanged fish for taro with families in the interior, and [*247] within kin groups, continuous exchanges of labor, for such things as building houses and making canoes, took place. Because families, classes, and ahupua'a existed from time immemorial, by Hawaiian reckoning, and would continue to exist, it was unnecessary as well as unwise to calculate the exact value of particular transactions. n89 Over the long run, losses and gains balanced out and, in any event, a valuable long term relationship should not be sacrificed for a short term advantage. What Westerners called rational maximization of profit, Hawaiians rejected as intransigent, antisocial, short-sighted and down-right foolish behavior. n90

Land, which capitalists treat like any other commodity or factor of production, was for Hawaiians an economic valuable also, but one enmeshed in social relationships and pregnant with spiritual meaning. The term for family, "ohana," consists of the word "oha," denoting offshoots or sprouts of the parent taro plant, and the suffix "na," meaning "that which." n91 A family, attached to its house lots and garden plots, is therefore like a taro plant rooted in the soil: both send out and sustain younger offshoots. Residence and labor in an ahupua'a, in turn, conferred rights to water and other valuable resources which the family alone could not control. Finally, submission to the paramount chief connected the individual, his family, and his lands to the ali'i nui's great spiritual power, or mana. n92 Land, then, bound together [*248] classes, ahupua'a residents, and families in a network of wealth that was diffusely produced and reciprocally exchanged. In pre-contact Hawai'i, no other source of wealth existed. When foreigners came bearing ships, guns, clocks, silks, and the knowledge of a wider world, they in effect presented themselves as an alternate source of wealth. This new source quickly displaced, or at least depreciated, the old source, which was the land, and those who made it fruitful, the commoners. Consequently, when the ali'i chose to pay for foreign goods and services with bits and pieces of Hawaiian land, they were, in that fateful gesture, handing over the thread that would unravel the fabric of Hawaiian society.

3. *The Role of the Ali'i*

As stated, the physical devolution of the natural and human resources of Hawai'i may be accounted for by the untested nature of both its ecology and its inhabitants' immune systems. Responsibility for the severity of the subsequent social disintegration, however, must be laid, in large part, with the Westerners and the ali'i. These two groups, intentionally or otherwise, acted in concert to pry the maka'ainana from their traditional lands. n93

The relationship between chiefs and foreigners was established when Captain James Cook, on his visits, met with various ali'i to negotiate for the needs of his ship, crew, and research mission. n94 When Cook's companion, Captain George Vancouver, returned to the islands in the early 1790's, he encouraged the several ali'i to support the drive of one [*249] of them, Kamehameha, to unite the islands. n95 A single King, as opposed to several ali'i nui, would make the foreign task of negotiating agreements far more efficient. Vancouver's exhortations received the persuasive backing of Kamehameha's already considerable display of Western support -- advisors, ships, and guns. n96 Most chiefs soon enough acquiesced. n97 Thus casually did monarchy come to Hawai'i, not springing from internal necessity, but slipping into place, so to speak, because native ambition chanced to coincide with foreign convenience. n98

The alliance between ali'i and Westerner, of which monarchy was only the most dramatic byproduct, linked together, again and again, local chiefs and a succession of enterprising, knowledgeable, or simply astute white men who congregated to the islands. n99 In essence, their alliance was economic. The ships that came to Hawai'i needed provisions on a large scale. n100 Only the ali'i, by giving tacit approval if not active direction, could sanction the transfer of such vast quantities of goods. In return, the chiefs received the major part of the foreigners' bounty: n101 at first, trinkets, nails, and other petty metal goods; n102 later, luxury items, weapons, and even ships. As the goods brought by the foreigners increased in value, so did their demands on the ali'i.

Other than food and water, outsiders initially desired only sandalwood, which grew in the high interior. Kamehameha I, who declared a monopoly on foreign trade and claimed the precious sandalwood for himself, purchased six large foreign ships with it. n103 After his death, a weaker King, Liholiho, was forced to share the precious resource with the ali'i. n104 This set off a cutting frenzy, during which thousands of commoners were sent up into the mountains to bring down the [*250] fragrant wood, with drastic effect upon agriculture. n105 Fields were abandoned, and famine became common. Underfed and ill prepared for the long, cold, and damp days in the mountains, commoners, who were by now exposed to new diseases, died at an alarming rate. n106 Their deaths, in turn, deprived the chiefs of the labor which the latter needed to sustain the traditional economy. n107

Unable to produce goods with which to pay for foreign purchases, Liholiho and the chiefs took the time-honored step of people who live beyond their means: they went into debt. By 1826, traders in Honolulu were claiming an ali'i indebtedness of \$ 200,000. n108 Some of the debt was paid off, over the years, through the imposition of taxes, including taxes payable in sandalwood. n109 But by 1830, the sandalwood was almost gone. n110 Many commoners had died, and many now lived in the new coastal towns to which they had drifted, out of curiosity, and in the hope of avoiding the onerous task of hauling sandalwood. Besides, the neglect of fields and waterways over the years had rendered many traditional gardens unworkable, thereby further constricting traditional agriculture. The drop in population, finally, fundamentally disrupted the social and economic life of rural communities. n111

Chiefs, however, continued to run up debts, and foreign agents continued to collect on them. These creditors, now comfortably established in the islands as resident merchants, usually on lands granted or leased by a grateful King or a spendthrift chief, in time demanded protection for their holdings and investments. n112 They were able to back up their demands with telling references to the military might of their home governments, whose warships conspicuously cruised, now and then, in Hawaiian waters. n113

[*251] 4. *The Recourse to Law*

Many of the concessions sought by foreigners had to be guaranteed in law. The monarchy did not, however,

single-mindedly rush to gratify every foreign legal whim. Some laws, on the contrary, were drafted for the specific purpose of warding off foreign rapacity. n114 Ambivalence, in other words, marked the origin and development of modern Hawaiian law. This was hardly surprising, for, by 1839, when the Hawaiian government promulgated its first major modern law, the Declaration of Rights, n115 a new social complexity had emerged. Sixty years of exposure to the outside world had by then sufficiently unsettled Hawaiian society, spawning in the process new native and foreign subgroups which pursued socially inconsistent ends, that the law would come to reflect, if not resolve, the contradictions at hand.

Kamehameha III and his highest chiefs, some of whom later joined his advisory Privy Council, n116 initially exercised the power to enact laws. The prestige and relative material security of this group permitted it to express, via the early laws, a considerable magnanimity towards the commoners, whose plight the Council frequently recognized and attempted to ameliorate. The lesser chiefs and konohiki, who were more easily manipulated by foreigners, also participated, after the 1840 Constitution, in a House of Nobles endowed with legislative powers. n117 The same Constitution also empowered commoners to participate in the legislative process, through their popularly chosen delegates, who sat in a House of Representatives. n118 Many who served in that lower chamber were not, of course, typical maka'ainana, but graduates of missionary schools, n119 where they had learned a fair body of Western social and legal concepts which they now put to use to advance the interests of their class.

As for the foreigners, their allegiances, legal or otherwise, shifted about between complex considerations: National, denominational, and occupational. Ultimately, however, they looked most to their material self-interest, which they could pursue with aggressive [*252] determination. A fraction only, usually from among the missionaries or personalities in the service of the Hawaiian government, evinced any real concern for maka'ainana interests. That concern, however, inevitably exhibited its own tinge of cultural blindness or arrogance, which expressed itself, for example, in the insistence that what was good for a New England yeoman was also ideal for a Hawaiian maka'ainana. n120 It is, then, against this background of general physical devolution, social antinomy, and ideological implausibility, that the laws affecting land tenure, enacted between 1839 and 1850, must be examined. n121 The Article now turns to these laws.

III. THE KULEANA ACT

When Kamehameha I unified the islands in 1810, n122 he assigned his newly amassed lands in accordance with ancient and well-tested political principles. The choicest lands he kept for his personal use and enjoyment; the remainder he gave to his principal warrior chiefs who, in turn, distributed their shares to lesser retainers. n123 Under Kamehameha's reign, only one practice departed significantly from tradition: Kamehameha I "permitted the heirs of a deceased chief to remain on the ahupua'a" n124 where formerly the holding would have reverted to the ali'i nui. All who possessed land, from commoners on up, owed Kamehameha I a land tax, services he demanded at will, and a portion of the land's products. n125

Kamehameha II, when he came to the throne, did not institute any major change in the land tenure system, except that, by "leaving the great majority of the lands with the chiefs who had been rewarded by his father," n126 he further strengthened the stability of ali'i tenure and reinforced the expectation that chiefs would hold land hereditarily. In this expectation, the chiefs were joined by the white residents who, "accustomed in their homeland to possessing lands in fee simple . . . vigorously challenged the right of the King and the chiefs to dispossess them at will." n127 Together, the ali'i and the foreigners compelled the government, during the reign of Kamehameha III, to enact a series of [*253] laws to westernize the nature of land tenure. The Kuleana Act, passed in 1850, culminated that series.

A. *The Pre-1850 Land Tenure Laws* n128

The early laws were of two kinds: Constitutional and statutory. The former, which predated the latter and controlled their interpretation, consist of the 1839 Declaration of Rights n129 and the 1840 Constitution, n130 both granted by Kamehameha III. Several land tenure statutes were then enacted between 1840 and 1846. Significant

provisions of those statutes were restated in an 1846 document called the *Principles Adopted by the Board of Commissioners to Quiet Land Titles in the Adjudication of Claims Presented to Them ("Principles")*.ⁿ¹³¹ The relevance of these three documents to the Kuleana Act is examined below.

1. *The Declaration of Rights*

Kamehameha III and his chiefs first legally addressed, in the Western sense, the issue of land tenure in the Declaration of Rights of 1839.ⁿ¹³² The Declaration initiated a "peaceful but complete revolution in the entire polity of the Kingdom"ⁿ¹³³ because it started the process, carried forward in the 1840 Constitution, of limiting the powers and attributes of the King as absolute ruler, and of grounding his government on certain enunciated principles. The most important of these, in relation to land tenure, stated:

[*254] Protection is hereby secured to the persons of all the people, *together with their lands*, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual *except by express provision of the laws*.ⁿ¹³⁴

The Declaration also broadly committed the government to upholding the welfare of the commoners:

God has also established government, and rule for the purpose of peace; but in making laws for the nation it is by no means proper to enact laws for the protection of the rulers only, without also providing protection for their subjects; neither is it proper to enact laws to enrich the chiefs only, without regard to enriching their subjects also, and hereafter *there shall by no means be any laws enacted which are at variance with what is above expressed*, neither shall any tax be assessed, nor any service or labor required of any man, in a manner which is at variance with the above sentiments.ⁿ¹³⁵

2. *The First Constitution*

In the next significant legal act of his reign, Kamehameha III granted, in 1840, the kingdom's first Constitution.ⁿ¹³⁶ Under the rubric "Exposition of the Principles on Which the Present Dynasty is Founded," the Constitution stated:

Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.ⁿ¹³⁷

The Constitution then clarified the role of the monarch: he is the sovereign of all the people and the chiefs; lands forfeited for nonpayment of taxes revert to him; and no one "can convey away the smallest portion of land" without his consent.ⁿ¹³⁸ This attribute of kingly sovereignty was vividly displayed in Kamehameha III's declaration of new fishing rights the previous year:

His Majesty the King, hereby takes the fishing grounds from those who now possess them, from Hawaii to Kauai, and gives one portion of them to the common people, another portion to the landlords, and a portion he reserves to himself.ⁿ¹³⁹

[*255] 3. *Land Commission Principles and Practices*

Between 1840 and 1846, when the Land Commission began its work, a number of land tenure laws were passed. The *Principles* adopted by the Land Commission restated those provisions of the laws which were relevant to its work, and the legislature endorsed the restatement in October of 1846.ⁿ¹⁴⁰ At its creation in 1845, the Land Commission was asked to undertake, among other things, "the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this Act."ⁿ¹⁴¹ Foreigners were, at this time, advancing claims to lands allegedly granted to them by kings, queens, chiefs, and governors. Because their claims could trigger the dangerous involvement of the emissaries of their home governments,

the Hawaiian monarchy looked to the Land Commission to defuse the issue, by either confirming or quieting the contested titles. n142

The Land Commission, in pursuit of its task, was to observe "principles established by the civil code of the kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy -- primogeniture and rights of adoption." n143

Because its work entailed serious social and political consequences, the Land Commission adopted as its first task the study of traditional Hawaiian land tenure. n144 The conclusion of that study is expressed in the *Principles*. The latter, however, also contained proposals for modifying the traditional system. Nonetheless, as the Hawaii Supreme Court has recognized, the *Principles* did, in their retrospective parts, enunciate the historical, legal, and equitable elements of the traditional system of land tenure recognized by the government of Hawai'i in 1846, four years before the passage of the Kuleana Act. n145 For this reason, significant provisions of the document are extensively summarized below. n146

[*256] 1. Under Kamehameha I, principal and inferior chiefs, and tenants holding under them, had rights in the lands, or the productions of them. The proportions were not clearly defined, but were universally acknowledged. All owed to the King a land tax, service, and some portion of the productions of the land. Failure to render any of these was considered a just cause for which to forfeit the lands. It is therefore certain that the tenure was far from being allodial. The same rights which the King possessed over the superior landlords, landlords possessed over their inferiors, so that there was a joint ownership of the land, the King really owning the allodium, and the person in whose hands he placed the land holding it in trust. The superior always had the power to dispossess his inferior, but it was not considered just and right to do it without cause, and dispossession did not often take place. n147

2. The Declaration of Rights of 1839 protected persons, lands, buildings, and property, and also prohibited the arbitrary dispossession of tenants. n148

3. The King, in disposing of the allodium, should offer it first to the superior lord holding in trust for him, to safeguard that lord's interests. n149 Even when the superior lord shall receive an allodial title from the King, however, he can

no more seize upon the rights of the tenants and disposes them, than the King can now seize upon the rights of the lords, and dispossess them. This appears clear, not only from the first principles of justice, but also from the act of 1839, declaring protection for tenants as well as for landlords. n150

4. Three parties only had vested rights in land: The King, the landlord, and the tenant. However, ancient practice awarded the tenant less than justice and equity would suggest, and the King more than "the permanent good of his subjects would allow." n151

[*257] 5. The rights of the parties in land could be divided out in the proportions of one-third to each, with allodial titles given to both tenants and landlords. n152

6. Great wrong accompanied a system where several classes of persons had undivided rights in the same lands, and where each class was liable to claim more than its due proportions. Persons of superior power or rank had generally been the oppressors, from the throne down. n153 The Land Commission was formed to counter this situation. n154

7. The whole power of the King to confer and convey land, where a private equitable claim was recognized, now rests in the Land Commission. n155

8. The King, however, has not relinquished his prerogatives as sovereign, which include the prerogative "to enforce the usufruct of lands for the common good." n156 Awards and titles of the Land Commission are subject to the

King's prerogatives. n157

9. By ordinance of June 7, 1839, landlords became proprietors of lands actually in cultivation, but subject to claims of tenants. Uncultivated lands were under the "community of ownership" of the government and the landlords, to be distributed to those who wished to cultivate but had no land. n158

10. As late as June 7, 1839, chiefs were tenants at special will of the King in his capacity as head of the nation. But dispossession could occur only in the interest of the public well-being. n159

11. Hawaiian rulers have developed regard for the immutable law of property. They know that the well-being of their country depends upon the development of resources, the principal resource being land. Its [*258] holder must now have a stake in it more solid than the bare permission to derive his daily bread therefrom. n160

12. Hawaiian rulers realize that civilized nations recognize private property and they now wish "to conform themselves in the main" to that practice, so as to comport with these powers. n161

13. Absent an apposite law, the Land Commission could judicially declare a principle, if in accordance with ancient usage, not in conflict with existing law or facts, and if equitable and liberal towards claimants, as against the government. n162

14. An award by the Land Commission followed by the payment of a commutation to the Minister of the Interior, equal to one-third the unimproved value of the land, extinguishes "the private rights of the King in the land," and confers an allodium on claimants subject only to the corporate rights of the body politic and the private rights of tenants. n163 This, because even "the King has no power to convey away the rights of individuals without their consent." n164

By act of the Legislative Council, n165 the above principles became law on October 26, 1846. n166 Until 1848, however, the Land Commission could only separate out the King's portion where a party claimed directly from the King or government. Where chiefs and maka'ainana also possessed interests in a particular parcel, no award could issue. The provisions protecting the interests of tenants, in particular, were too numerous and explicit to permit it. Clearly then, the demand of chiefs and foreigners that land be freely bought and sold required [*259] more drastic measures. Such measures, adopted over the next four years, were: The Great Mahele of 1848 separating Crown from konohiki interests; the Act of July 10, 1850, n167 authorizing foreigners to own in fee; and the Kuleana Act of August 6, 1850, extending the fee simple regime to maka'ainana.

However, even as the government of Kamehameha III stood poised to enact the Great Mahele and the Kuleana Act, it clearly was bound by the Declaration of Rights, the Constitution, and the *Principles* to observe certain fundamental understandings and goals pertaining to maka'ainana interests in the land. Those understandings and goals may be summarized as follows: Three classes of persons possessed land in the kingdom -- King, landlord, and tenant; the landlords in the kingdom held in trust from the King; neither the King nor the ali'i could dispossess tenants below them at will; dispossession in the past had always been rare; notwithstanding the admitted stability of traditional maka'ainana tenure, something inadequate and uncivilized still marked the absence of private property; the monarchy will, therefore, now advance this new concept.

Further, the *Principles* stated, in the course of establishing a private property land regime, the government could assign one-third of the kingdom to each of the three classes of possessors of land: King/government, landlord/konohiki, and tenant. The Land Commission, in separating out interests in the land, will observe native custom. If interests are separated out, the King may relinquish his feudal rights, but he may not yield his sovereign power, which includes the power to promote the exploitation of the land. Finally, under both the Declaration of Rights and the Constitution, the lands, property, and building lots of the people shall not be taken except by express provision of law.

4. *The Great Mahele*

The Mahele was an agreement between the King and the chiefs to separate out, and mutually quitclaim, their interests in land. n168 The Mahele did not, in itself, alter the rights of maka'ainana in the land. Although the division of lands affected the King and more than 240 konohiki and involved the entire surface of the kingdom, the process took less than three months. n169 Its preparation, however, had commanded the attention of the Legislature and the Privy Council for [*260] more than a year. n170 By December 18, 1847, the Privy Council agreed on a set of rules to guide it through the Great Division. n171

First, the rules stated, the King shall retain his private lands as his own individual property, subject to the rights of tenants. Second, one-third of the remaining land shall become the government's, one-third the konohiki's, and one-third the tenants'. Third, konohiki and tenants shall divide their interests on the initiative of either party. Fourth, tenants on the King's private lands shall obtain a fee title to one-third of the lands possessed and cultivated by them whenever they or the King desire such a division. n172 Fifth, konohikis shall satisfy the government's one-third share in their domains by setting aside one-third of their lands, or its money equivalent, to the government. n173

The konohiki did not receive title to their lands by virtue of the Great Mahele. n174 Title required the additional steps of conforming claims with the Land Commission, and of tendering commutation to the Minister of the Interior, who then issued Royal Patents upon the awards. n175 Deadlines for taking out awards were extended to 1854, 1862, and then 1895. n176

The King, wishing to keep his private domain intact in the event foreigners conquered the islands, executed, the day after the completion of the Mahele, two documents to stave off foreign appropriation. n177 In the first, he gave to the government, for the benefit of the chiefs and the people, approximately 1.5 million acres out of the nearly 2.5 million acres that he claimed in the Mahele. n178 In a second document, the King registered the remaining royal lands for himself, his heirs, and successors. n179 The lands so registered became known as Crown Lands, in contradistinction to government lands. n180 The Legislature later confirmed these instruments executed by Kamehameha III. n181

[*261] The Mahele, then, created three categories of landlords with rights to allodial titles: The King, the government, and the konohiki. The Mahele documents, however, did not themselves create unencumbered fee simple titles. They specifically stated, on the contrary, that each of the three categories of landlords held "subject to the rights of native tenants." n182 When, after the Mahele, landlords sold their lands, questions arose concerning the meaning of this clause. The Privy Council, on December 21, 1849, adopted resolutions drafted by Chief Justice William L. Lee to clarify and protect the "rights of native tenants." n183 The resolutions formed the basis of the Act passed by the Legislature on August 6, 1850, n184 which came to be known as the Kuleana Act.

B. The Provisions of the Kuleana Act

The Act, which consisted of seven sections, provided in substance as follows: n185

1. Fee simple titles, free of commutation, are granted to all native tenants who occupy and improve any government land, to the extent of such occupation and improvement, provided the Land Commission recognizes their claims. Konohiki are not tenants covered under this Act, and government lands in the towns of Honolulu, Lahaina, and Hilo are excepted.

2. The above provision applies, in like terms, to tenants who occupy and improve konohiki and Crown Lands.

3. The Land Commission will award fee simple title in accord with the above, define and separate the lands of different individuals, and provide for an equitable exchange of these, where possible, "so that each man's land may be by itself." n186

4. Certain government lands shall be sold in lots of one to fifty acres to natives not furnished with sufficient land.

5. House lots which are separated from cultivated lands shall not exceed one-fourth of an acre.

6. In granting cultivated lands, awards shall issue only for lands really in use, and not for waste lands, or lands cultivated in different spots to enlarge a lot.

[*262] 7. When the landlords have taken allodial titles to their lands, the people on them may not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, but they may not sell such articles for profit. The people shall inform the landlord or his agent of their use of the land and proceed with his consent. The people are entitled to drinking water, running water, and the right of way. Springs, running water, and roads are free to all, on lands granted in fee simple, but wells and water courses built by individuals for their own use are excepted. n187

The maka'ainana ultimately received some 8200 awards on the basis of the Kuleana Act. n188 Several reasons may account for this low figure. n189 First, the two years allotted for registering claims, and the less than four years for processing them, were hardly realistic given that the maka'ainana class comprised some 80,000 individuals at the time. n190 Of these, approximately 29,000 might have been eligible male claimants. n191 By contrast, the konohiki claimants under the Mahele, who numbered only 245, n192 benefitted from a forty-four year period in which to secure their awards. n193 Second, the Act failed to reach effectively a population still ill at ease with the written word and suspicious of the written law. Third, commoners, who had little cash, could not afford the survey fees which, by contrast, konohiki did not pay because they received named and therefore already delimited ahupua'a, or sub-divisions thereof, called ili. n194 Fourth, taking an award might limit the task of making a living to awarded lots only where formerly traditional subsistence required the exploitation of the whole ahupua'a. Fifth, [*263] preferring to live as of old, some tenants assumed that if they did not act to change anything, the old tenurial system would simply continue. Finally, some, no doubt, feared that any attempt to file for kuleana lots within the ahupua'a or ili of the konohiki would invite reprisal.

IV. THE CONTEMPLATED DISTRIBUTION OF LAND

The Kuleana Act clearly fell short of transforming the traditional cultivators of the soil into its modern fee simple owners. How much land the government intended to secure for the commoners via the Kuleana Act is not deducible from the Act itself. As stated earlier, the 1846 *Principles* advocated a division of the kingdom into three equal parts for the King, the chiefs, and the tenants. When, in 1847, on the eve of the Mahele, the Privy Council settled on a set of guiding rules for the division of lands, the persistent formula of one-third each was again invoked, but with a new ambiguity. The King, the rules read, should first identify and set aside his domain, of which his tenants could claim one-third of that which they possessed and cultivated. Thereafter only, the rules continued, was the remainder of the kingdom to go in absolute one-third parts to three parties: The government, the konohiki, and the tenants. n195

At the Mahele, then, the King took some 2.5 million acres, and left the chiefs with the remaining 1.5 million acres, which they were to share in equal one-third portions with the government and the commoners. The King next divided his original share into two parts: one totalling approximately 1.5 million acres which he gave to the government, and the other 1 million acres which he reserved as Crown Lands for himself and his heirs. n196 The chiefs, to obtain awards to their shares, were required to commute to the government one-third of the value of their lands, in currency or in kind. n197

Assuming, for purposes of understanding the contemplated distribution of land, that all lands were equal in value, and that the chiefs would pay the one-third value of their domains to the government in land, rather than currency, this would have added another 0.5 million acres to the governmental domain. After the Mahele then, had shares been divided out as contemplated, the roughly 4 million acres of the kingdom would have been initially apportioned as follows according to the Privy Council's own rules:

[*264] 1. *King's private lands.* (still subject to tenants' claims to one-third of what they possessed or cultivated thereon): 1.0 million acres.

2. *Government lands.* Add 1.5 million acres derived from the King's original share (still subject to tenants' claims

to one-third of what they possessed or cultivated thereon) to 0.5 million acres commuted by the chiefs: 2.0 million acres.

3. *Konohiki or chiefly lands.* Subtract from the original 1.5 million acres the 0.5 million acres commuted to the government, and the 0.5 million acres owed to tenants: 0.5 million acres.

4. *Tenant lands.* Counting only the one-third share of the chiefs' original 1.5 million acres, since the figure for the tenants' share of one-third of what they possessed or cultivated on the King's original domain is unknown: 0.5 million acres.

The Privy Council rules, it is clear, treated the King and the chiefs asymmetrically. They allowed tenants on the King's original domain to claim only one-third of what they actually possessed or cultivated therein, but permitted them to claim a full one-third share of the chiefs' lands. Whether this divergence in the prospective application of the one-third formula was intentional or accidental cannot be answered here. In any event, the Kuleana Act, enacted three years after the adoption of the Privy Council rules which guided the Mahele, did not itself reinvoke the one-third formulation in any version. The Act simply offered commoners awards to lands, whether kingly, chiefly, or governmental, wholly commensurate with what they possessed or improved. It has been estimated that Hawaiians, before contact, may have cultivated as little as 1% of the islands' total surface.ⁿ¹⁹⁸ If this is true, then the kuleana awards, which covered some 0.9% of the kingdom's lands,ⁿ¹⁹⁹ and included house lots as well as cultivated plots, seem to have fallen short of safeguarding even cultivation. On the other hand, the Hawaiian population in 1850 had been reduced to one-third its size at Western contact. Presumably, areas under cultivation correspondingly contracted. Whatever the cultivation figure in 1850, however, the area exploited by the commoners, pre- and post-contact, covered a much wider share of the kingdom than 0.9%.

[*265] How much land tenants actually possessed or cultivated in the King's original 2.5 million acres is not known. Consequently, their reserved one-third portion of such lands remains indeterminable. For this reason, it is impossible to ascertain how much land the King, the chiefs, the government, and the commoners would have ultimately received had the Privy Council rules been fully executed as worded. However, if the prescription (first enunciated in the *Principles*, and later repeated in the Privy Council rules, albeit with new ambiguity) that a one-third share of the land is to devolve on tenants is presumed to be the formula intended all along, and if, following court practice in this matter, the categories of "King" and "government" are collapsed,ⁿ²⁰⁰ then a final partition that is consistent with both the *Principles* and the Privy Council rules may be projected from the initial Mahele allocation of lands. The three steps below demonstrate that projection (figures are rounded to the first decimal point):

A. THE MAHELE STEP.

1.	<i>The King:</i>	2.5 million acres
2.	<i>The remaining chiefs:</i>	1.5 million acres
	Total:	4.0 million acres

B. THE CONVEYANCE/COMMUTATION
TO THE GOVERNMENT STEP.

1. *The government.* Add King's 1.5 million acre conveyance (still subject to tenants' one-third share) to the 0.5 million acres commuted by the ali'i:

2.0 million acres.

2. *The chiefs, including the King.* Add King's Crown Lands of 1 million acres (still subject to tenants' one-third share) to the 1 million acres

held by the ali'i (still subject to tenants' 0.5 million acre share):

2.0 million acres.

Total: 4.0 million acres

C. THE CONVEYANCE TO THE TENANTS STEP.

1. *The government.* Add 1 million acres of the King's conveyance (after 0.5 million acres have been set aside for tenants) to 0.5 million acres commuted by the chiefs:

1.5 million acres.

2. *The chiefs, including the King.* Add the King's remaining share of 0.7 million acres (after 0.3 million acres have been set aside for tenants) to the chiefs' remaining share of 0.5 million acres (after 0.5 million acres have been set aside for tenants):

1.2 million acres.

3. *Tenants.* Add 0.5 million acres from the chiefs, to 0.3 million acres from the King, to 0.5 million acres from the government:

1.3 million acres.

Total: 4.0 million acres.

[*266] This scheme, had it been realized, would have assigned an approximate one-third share of the kingdom's lands to each of three parties: The government, 1.5 million acres; the ali'i (chiefs and King), 1.2 million acres; and the tenants, 1.3 million acres. *The government of Kamehameha III, I submit, contemplated this division all along, because it would have secured the traditional livelihood of the maka'ainana, which was the stated aim of his government, as early as 1839.*

The Kuleana Act itself provides no figures to either support or contradict the above projection. The Act does not, for example, specify that tenants shall inherit one-third of the kingdom. The Act states, instead, that tenants on virtually all lands owned by the King, the government, and the konohiki shall be entitled to fee simple awards of lots coextensive with lands they either possessed or had improved. Such lots, when combined with the use rights conferred by the Act in the resources of the rest of the ahupua'a, would have essentially preserved the traditional land-use patterns of the commoners. The Kuleana Act, in other words, protected, as did the Declaration of Rights, the Constitution, and the *Principles*, the traditional livelihood of the maka'ainana. The Act's silence on the proportions of land that each party -- government, ali'i, and commoners -- would finally hold arguably left undisturbed the quantitative formulations laid out in the earlier *Principles* and Privy Council rules.

The offer of fee simple awards contained in the Kuleana Act, I further submit, represented a device to secure maka'ainana land interests as much as to separate them out from other interests. Indeed, the Act may be seen as the Hawai'i government's special effort, however inefficient or unrealistic, to help commoners secure premium taro lands which, at the time, were probably in special danger of falling into foreign hands. Certainly, the government of Kamehameha III did not create the fee simple option for the purpose of cutting off the commoners [*267] from their sources of livelihood. That livelihood, until the Act, had consistently been recognized and carefully protected in the Declaration of Rights, the Constitution, and the *Principles* of the Land Commission. The latter additionally

recommended that the maka'ainana receive one-third of the kingdom's lands.

History, admittedly, transformed the Kuleana Act from an instrument for the confirmation of maka'ainana livelihood (which this Article argues it was) into one for its undoing. The Land Commission handed to maka'ainana fee simple awards to 0.9% of the surface of the kingdom, a figure in itself not necessarily inconsistent with the estimated percentage of lands traditionally cultivated, n201 but wholly out of keeping with lands traditionally exploited. When the Hawai'i Supreme Court then tried to limit all commoner land rights to that mere 0.9%, it was acting in direct contravention of the mandate that the maka'ainana shall inherit one-third of the lands, and/or be assured a secure livelihood.

V. THE INTERPRETATION OF THE KULEANA ACT

Clearly, to limit commoner land rights to 0.9% of the land is to effect a tragic dispossession of native Hawaiians. Whether the law permits this dispossession and, if not, whether traditional rights can still be asserted, remain questions of utmost importance. The answers to these questions lie, respectively, in the legal constraints operating on the Kuleana Act at its enactment, and in later case law interpreting the Act.

A. *Legal Constraints Operating on the Kuleana Act*

The Kuleana Act was launched into a legal universe inhabited by the 1839 Declaration of Rights, the 1840 Constitution, and the 1846 *Principles* of the Land Commission. Being only statutory, the Act must be read to conform with the Declaration of Rights and the Constitution. As for the *Principles*, which are also statutory, and of earlier vintage than the Act, they arguably yield, where inconsistent, to the Act. The *Principles*, however, governed the work of the Land Commission, which remained active some five years beyond the passage of the Kuleana Act. n202 At the very least, therefore, the *Principles*, which stated the government's fundamental laws and policies on land tenure, will illuminate, where not inconsistent, the terms of the Act.

[*268] The Declaration of Rights guaranteed that the people would not be dispossessed of their lands except by express provision of law. n203 The Kuleana Act, while offering fee simple rights to maka'ainana, contained no language expressly causing the forfeiture of older rights. An inference of loss, therefore, may not be read into the Act. Under the protection of the Declaration of Rights alone, then, traditional maka'ainana rights, where not specifically repudiated, would have survived the passage of the Kuleana Act.

The Declaration of Rights, however, went further. It stipulated that it was not "proper to enact laws to enrich the chiefs only, without regard to enriching their subjects also, and hereafter there shall by no means be any laws enacted which are at variance with what is above expressed." n204 Because the Kuleana Act transferred only 0.9% of the kingdom in fee simple to maka'ainana, the Act could not, without violating the Declaration's prohibition against enrichment laws, simultaneously remove the remaining 99.1% from commoner possession and use. consistency with the Declaration therefore additionally required that the Act either preserve, or else enhance, maka'ainana rights. n205 Finally, the 1840 Constitution firmly established the source of those rights when it pronounced that the land "belonged to the chiefs and people in common." n206

The *Principles* of the Land Commission, which administered the Act, also support the view that the Act offered new rights without thereby compelling the termination of old ones. To begin with, the Land Commission was required to protect inferior lords and tenants. n207 Its decisions had to conform to "native usages in regard to landed tenures . . . tenancy and subtenancy." n208 In awarding fee title under the Kuleana Act, therefore, the Land Commission could neither reduce nor contravene the customary rights of tenants, especially when not explicitly commanded to do so by the Act. The customary [*269] rights of occupants of ahupua'a included not only the rights of cultivation, but also gathering, use, and access. n209

Sections 6 and 7 of the Kuleana Act jointly safeguarded this traditional complex of rights. According to section 6, fee simple title was available for "cultivated grounds, or kalo lands" n210 which provided the primary source of food

for maka'ainana households. Section 7, in turn, specified that the people's gathering rights in the ahupua'a would continue even "when the landlords have taken allodial titles to their lands." n211 Irrigated kalo, or taro, lands constituted an ahupua'a's most productive and therefore valuable assets. n212 It is thus probable that, after the Great Mahele, they also became the lands most susceptible to alienation. The Kuleana Act, therefore, offered maka'ainana a modern means -- the fee simple title -- for securing such lands against alienation by the konohiki. Gathering rights, on the other hand, constituted a separate privilege. They were not circumscribed by the act of taking fee title, but endured, instead, throughout the ahupua'a. n213

Furthermore, the *Principles*, like the Declaration of Rights and the Constitution, made clear that not even the King, who held the allodium, could "convey away the rights of individuals without their consent." n214 Likewise, when the allodium of certain lands passed from the King to the konohiki after the Mahele, they too could not "seize upon the rights of the tenants and dispossess them." n215 An allodial title held by a konohiki merely extinguished the "private rights of the King in the land," n216 not the rights of the tenants.

Although the concept of private property clearly imbues the Kuleana Act, it was not a concept that was adhered to either absolutely, or exclusively, by the government of Kamehameha III. The *Principles* state only that the government wished to conform "in the main" to the [*270] concept of private property. n217 For example, the government retained the right "to enforce the usufruct of lands for the common good," even where fee simple titles had issued. n218 Finally, both the *Principles* and the Kuleana Act show that the government intended that commoners shall have enough land to meet their needs.

To say that the *Principles*, the Mahele, and the Kuleana Act all contemplated nothing more than the welfare of the maka'ainana would be to overstate the case. Clearly, the foreign pressure to buy land, coupled with the desire of the ali'i to sell it, brought modern land laws into being. Nevertheless, the laws reacted against modern pressures as much as served them. Legal provisions were crafted which, on their face, protected maka'ainana interests. Only later, when the court got involved, would maka'ainana rights be whittled away. The process started early. By the 1850's, Western grantees of konohiki lands were already bringing suit against commoners for their continued use and occupancy of ahupua'a land. The resulting decisions, rather than specific statutory language, became the means by which commoners were dispossessed of their land.

B. Judicial Interpretations of the Kuleana Act n219

Decided in 1858, *Oni v. Meek* n220 stands as the leading case on the Kuleana Act. There, a maka'ainana brought suit to recover the value of his two horses taken by the defendant Meek and sold as strays because they grazed on land leased by Meek from the konohiki of the ahupua'a in which Oni also resided. Meek held his lands under three separate leases. The latest lease reserved the "rights of the people living under the shade" of the konohiki. n221 Whether Oni was a kuleana awardee or not was unclear. n222

The plaintiff claimed the right to graze his horses on three grounds: The reservation in the lease, custom, and statute. n223 The court held [*271] against the plaintiff on all grounds. First, it found that Oni had not shown that the horses grazed on lands covered by the reservation; n224 and that, in any event, whatever rights were reserved to hoa'aina, n225 or tenants, in the third lease, were rights secured by statutory law, not by contract. n226 The reservation in the third lease, in other words, was superfluous.

Next, the court dismissed the plaintiff's claim under custom after finding that horse grazing failed to satisfy certain necessary elements of custom -- such as immemorial duration, reasonableness, certainty, and consistency with the laws. n227 In addition, the court related, the hoa'aina of that ahupua'a had met with the konohiki of the place after 1851, and expressed the understanding that the Kuleana Act terminated the old order. n228 They had then requested the konohiki to nevertheless accept their old obligations and grant their traditional rights, anew. n229 The meeting thus marked the end of custom and its replacement with contract. The court further noted that, if the plaintiff was a kuleana awardee, his fee simple tenure alone would act to terminate his customary rights. n230 By implication, the court allowed that

nonawardees did not lose those rights.

Finally, the *Oni* court rejected the plaintiff's claim under an 1846 statute that specifically permitted ho'a'aina to graze horses in the ahupua'a. n231 The court found that the Mahele and the Kuleana Act had separated out interests in lands such that horses and other animals could no longer graze, with statutory blessing, on konohiki lands, any more than "cultivation on unoccupied parts" could legally continue. n232 Section 7 of the Kuleana Act enumerated the only statutorily protected traditional land tenure rights not implicitly repealed by [*272] post-1846 developments, and that section did not cover horse grazing. n233 The court rounded off its opinion with two significant remarks: Section 7 rights applied equally to kuleana awardees and nonawardees; and "people" in section 7 was synonymous with "tenants." n234 "Tenants," a later opinion clarified, included all lawful occupants of an ahupua'a. n235

In sum, *Oni* stands for three propositions. First, notwithstanding the Declaration of Rights, which permitted dispossession only through express provision of law, the court will infer the loss of customary rights in an informal agreement between tenants and konohiki that the old order had ended. Second, customary rights also ceased upon acquisition of fee simple title to a kuleana. Third, section 7 of the Kuleana Act listed the only traditional rights statutorily still available to kuleana awardees, and to nonawardees who had repudiated the old order. The court remained silent over the fate of nonawardees who had not repudiated the old order.

A companion case of the same year, *Haalelea v. Montgomery*, n236 adjudicated the fishing rights of konohiki and tenants. This case established important propositions on the nature of rights to resources. The piscary laws of 1839, as amended in 1846, gave the fishing grounds from the shoreline of the ahupua'a to the outer edge of the adjoining reef to the konohiki, as "private property," to hold "for the equal use of themselves and of the tenants on their respective lands." n237 Plaintiff Haalelea, who inherited an ahupua'a from its konohiki, brought suit to determine fishing rights against defendant Montgomery, who owned a beach front section of the ahupua'a sold to him by the konohiki. n238 Montgomery had prevented the plaintiff and other ahupua'a residents from fishing adjacent to his beachfront. n239

The court confirmed that the kuanalu (beach to reef) grounds belonged to the konohiki, for his use and the use of ahupua'a tenants. n240 The deed to Montgomery did not expressly convey the konohiki's piscary rights. n241 Those rights, therefore, remained available to their traditional beneficiaries. Their loss may not be inferred though the konohiki subsequently failed to assert them. Indeed, had [*273] the deed specified a conveyance of the piscary right, it still would not have extinguished the tenants' share of that right, which was an ongoing incident of tenancy in the ahupua'a. n242 Unlike the tenants, however, the konohiki possessed a piscary right that was a private property right, not incident to residency in the ahupua'a, but effective at all times, unless expressly conveyed away. n243

Haalelea is considerably more enlightened than *Oni* in at least three respects. First, it refused to infer the loss of konohiki or tenant rights from the mere behavior of private parties. Second, it recognized rights incident to residency in an ahupua'a that were available to all tenants, awardees or not. Furthermore, these rights related to vast offshore resources that were not specifically enumerated in section 7 of the Kuleana Act. Third, it permitted the resources of an ahupua'a to be claimed under two different but parallel systems of rights: Private property in the case of the konohiki, and traditional occupancy in the case of the maka'ainana.

The next major case interpreting the Kuleana Act, *Maikai v. A. Hastings & Co.*, n244 was decided in 1884. Although only three paragraphs long, *Maikai* proves troublesome beyond measure. Kuleana awardees and nonawardees sued the remote lessee of a konohiki for the waters of a stream needed to irrigate their lands. The lease from the konohiki reserved two hours of water for the konohiki's taro patches and "sufficient water for all kuleana rights." n245 The court held that kuleana awardees rightfully claimed water for their full needs since the konohiki could not contract away their rights, which were secured by the Kuleana Act. n246 The ho'a'aina or nonawardees, however, could only receive as much water as the konohiki gave from his own reserved two hours. n247 This opinion, contrary to both *Oni* and *Haalelea*, thus proposed that the Act's section 7 water rights attached to kuleana awardees alone. n248 Concurrently, it advanced the novel proposition that nonawardees enjoyed water rights strictly at the sufferance of the konohiki. n249

[*274] The same Justice, n250 writing eleven years later in *Dowsett v. Maukeala*, n251 reasserted the notion that nonawardees enjoyed only such rights to ahupua'a resources as the konohiki granted. Plaintiff Dowsett, the remote grantee of a konohiki, sought to evict from the ahupua'a defendant Maukeala, who claimed portions of land through adverse possession. The court found, as a matter of law, that the defendant's ancestors, who entered the ahupua'a before the Land Commission awarded it to the original konohiki, entered permissively, i.e., without the hostile intent necessary to prove adverse possession. n252 Unlike *Oni*, then, this court found that the relationship between konohiki and maka'ainana had always been contractual, even before the passage of the Kuleana Act. Because their descendants had not altered that permissive occupancy by giving notice of hostile intent, until a recent withholding of rent, the necessary twenty-year period for adverse possession had not run, and Maukeala could not claim by adverse possession. n253

The defendant argued that if pre-1850 entry was permissive, the Kuleana Act thereafter made defendant's presence upon the land hostile. The court countered that nonawardees like the defendant were presumed to have been "content with their prior status as tenants by permission of the land owner. Such tenancy would therefore, in law, be considered as continuing until some act of theirs changed their holding from the permissive nature to one of an adverse or hostile nature." n254

The court also rejected the argument that the grant of specific rights to commoners under section 7 of the Kuleana Act, and under the piscary laws elaborated in *Haalelea v. Montgomery*, n255 was inconsistent with the notion that ho'a'aina were tenants at sufferance of the konohiki. These rights, the court said, applied narrowly only to "those who have lawful right to reside [on an ahupua'a], whether upon kuleanas or by the will of the owner." n256

According to the *Dowsett* court, then, all Hawaiian commoners were, from time immemorial until the passage of the Kuleana Act, tenants at sufferance of the konohiki. *Dowsett* thereby contradicted the 1839 Declaration of Rights, the 1840 Constitution, and the *Principles* [*275] of the Land Commission of 1846, which all emphasized that the King, the chiefs, and the commoners held land in common, and that konohikis in particular held in trust from the King, such that tenants could not be dispossessed without cause, express provision of law, or consent. n257 Though *Dowsett's* characterization of the old order as one in which commoners enjoyed nothing more than a "permissive" hold on the land at the sufferance of the konohiki was constitutionally erroneous, n258 the case nevertheless advanced this very significant proposition: *that commoners not claiming fee simple title under the Kuleana Act thereby legally availed themselves of the old order.*

These four cases established the court's basic approach to the Kuleana Act and to commoner subsistence rights. The cases show that the court responded more to the economic pressures of the day than to either doctrinal consistency or the legal duty to protect commoners, which was spelled out in the 1839 Declaration of Rights, the 1840 Constitution, and the *Principles* of the Land Commission. The *Oni* court, in particular, early contravened the existing legal mandate by inferring the termination of customary rights on an ahupua'a from little more than an apparent consensus among its konohiki and maka'ainana that the old order had ended. Given that the presumed consensus coalesced in the early days of the Kuleana Act, when uncertainty and confusion reigned, it is doubtful that the consensus ever amounted to an informed consent to terminate custom.

Intriguingly, the same court that decided *Oni* found, in *Haalelea*, that the commoners' traditional right to take fish adjacent to their ahupua'a had not expired. The old order, it seemed, remained valid as to fish. The foreigners of the day, of course, pressed hard for land, but apparently not yet for fish, which may account for the difference between the two decisions.

Significantly, these early cases, except *Maikai*, held that section 7 rights applied to kuleana awardees and nonawardees alike. In *Maikai*, where a commodity much in demand by white planters (irrigation water) was at issue, the court instead found that section 7 rights were limited to awardees.

The recognition in *Haalelea* of traditional commoner fishing rights, which were not enumerated in section 7, showed that traditional rights flowed through more than the section 7 channel. *Oni*, of course, found that horse grazing

did not rise to the level of a customary practice. It [*276] also found that a specific event, and not the passage of the Kuleana Act itself, annulled custom on a particular ahupua'a. *Haalelea*, decided the same year, clearly distinguished between private property and occupancy as bases of rights, and legitimized both. *Dowsett*, unfortunately, expanded the *Oni* and *Maikai* view, that the Kuleana Act supplanted customary rights with contractual ones, into the assertion that traditional rights had always been permissive or contractual. This assertion, as indicated, directly contradicts the language of the 1839 Declaration of Rights, the 1840 Constitution, and the *Principles* of the Land Commission. Ironically, however, *Dowsett* also offered the proposition, eminently useful to maka'ainana descendants, that their ancestors who did not claim fee simple title to land are legally deemed to have opted for the continuation of the old order.

Later cases simply fine tuned, albeit in important respects, the basic approach of these leading four. Only in December of 1982, when *Kalipi v. Hawaiian Trust* n259 was decided, did the court at last, under the leadership of an outgoing part-Hawaiian Chief Justice, William S. Richardson, undertake a full reassessment of the status of section 7 rights, as well as other traditional Hawaiian land rights.

The pre-*Kalipi* fine tuning occurred in fishing and access rights cases. n260 In *Hatton v. Piopio*, n261 the court considered whether an ahupua'a land owner could delegate his right to fish to a second party, and whether that party in turn could sell the fish he caught. The court decided that mere permission to fish obtained from an owner of land did not confer fishing rights in the ahupua'a. n262 Where the defendant fisherman lawfully occupied the ahupua'a, however, he could, as an [*277] incident of occupancy, take fish from the sea. n263 The court then decided that while section 7 forbade the taking of ahupua'a resources for sale, fishing laws, on the other hand, contained no such prohibition. n264 The defendant could therefore sell his fish so long as his catch did not reduce the share of the konohiki. n265 The court thus reasoned that a practice was not illegal simply because it was new; under certain conditions, a sale of today functionally reproduces the permissible barter of yesterday. n266

In another fishing case, *Damon v. Tsutsui*, n267 the court decided that while a tenant of an ahupua'a could relinquish his fishing rights incident to occupancy, and be estopped from reclaiming them, his relinquishment did not deprive his grantees of those same rights, since the rights flowed, not from him, but from occupancy of the land. n268 Furthermore, though an ili or ahupua'a be abandoned by tenants, so that fishing rights reverted wholly to the konohiki, the same set of rights remained "subject to open," n269 i.e., claimable by new tenants entering the ahupua'a. n270

Palama v. Sheehan, n271 an access case, allowed kuleana owners to enter and exit from their lots through adjoining property provided alternative access routes were impassable, and that the burden imposed on the servient estate was not unreasonable. The court held that this access privilege covered vehicular traffic. n272 The decision was based on section 7, n273 as well as on the common law doctrine of access by reason of necessity. n274

In *Haiku Plantations Association v. Lono*, n275 the court considered whether section 7 alone, in addition to granting ingress and egress, also permitted a kuleana owner and his guests to park their cars on the right-of-way through another's land. Hawaiian cases had never interpreted [*278] the right-of-way provision under section 7 to include more than an easement for ingress and egress. n276 Assuming, without granting, that section 7 is "an unrestricted grant of right-of-way whose parameters are determined by evidence of historical and customary usage," n277 the court concluded that the defendants had historically parked in a relative's lot, not on the easement, and hence could not claim customary usage. n278 The case, by squarely considering whether section 7 could cover cars, and by leaving open the possibility that parking would be permitted where long established, paralleled the *Hatton* holding in which the court countenanced a new practice, the sale of fish, because it functionally matched an old protected practice, the barter of fish.

Oddly enough, gathering rights granted by section 7 of the Kuleana Act did not reach the Supreme Court before *Kalipi v. Hawaiian Trust Co.* n279 Plaintiff Kalipi asserted a right to a long-established family practice of entering defendants' undeveloped lands to gather natural products used in traditional Hawaiian cultural practices. n280 The plaintiff owned a taro patch in the ahupua'a of Manawai on Moloka'i, and an adjoining house lot in the neighboring

ahupua'a of Ohia. n281 Raised in these ahupua'a, he resided there until shortly before the trial. n282 The defendants were the remote grantees of the konohiki of Manawai and Ohia. The original award for Manawai contained the reservation that "the kuleanas of the people therein are excepted." n283 The original award for the relevant eastern portion of Ohia stated: "And we do hereby declare these lands to be set apart as the lands of the Hawaiian Government, subject always to the rights of tenants." n284 The defendants' lands were largely undeveloped, supporting hunting and grazing primarily. n285

The plaintiff claimed gathering rights based on: First, section 7 of the Kuleana Act; second, custom and tradition as safeguarded since 1892 in Hawaii Revised Statutes; n286 and third, the language of the [*279] original awards. n287 The defendant countered that traditional claims, as a matter of policy, must be dismissed because they represent "dangerous anachronisms which conflict with and potentially threaten the concept of fee simple ownership in Hawaii." n288 *Oni v. Meek*, n289 defendant added, established that all former customary rights now resided exclusively in section 7 of the Kuleana Act, such that no independent source of custom could be countenanced. n290

The court held for the defendant on the ground that the plaintiff, though he owned land in the ahupua'a, lacked standing to claim gathering rights since he no longer resided there at the time of trial. n291 The opinion then offered intriguing interpretations of traditional Hawaiian rights which, undoubtedly, will be tested in future cases. First, the court categorically rejected the defendant's policy argument that traditional rights should no longer be entertained. It pointed to the state constitution, which mandates that "[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." n292

The court then recapitulated the history of Hawaiian land tenure. The ahupua'a provided Hawaiians with all things necessary for survival. n293 The use of "undeveloped lands" for subsistence and culture supported the well-being of both chiefs and commoners. n294 The introduced trading economy, however, placed a value on land "apart from the labor of those who worked it," n295 leading to the Great Mahele and the Kuleana Act. The King added section 7 to the Act because he feared that a "little bit of land even with allodial title, if they [the people] be cut off from all other privileges would be of very little value." n296

[*280] The court then reconciled section 7 with the exclusivist nature of Western land tenure. Section 7, it said, must be interpreted to "assure that lawful occupants of an ahupua'a may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupua'a to gather those items enumerated in the statute. Such activities would, of course, be subject to further governmental regulation." n297

The court itself set certain limits on the gathering right it recognized. The right to gather applied to products only at the moment that they are reduced to possession. n298 It did not entitle an occupant of an ahupua'a to preemptively prevent its owner from developing the land, or reducing or destroying its resources. n299

The court's review of section 7 gathering rights thus in fact spelled out five limitations. First, as in the past, the rights are restricted to occupants. n300 Second, items gathered must be for the purpose of practicing Hawaiian custom, n301 for section 7 rights "were necessary to insure the survival of those who, in 1851, sought to live in accordance with the ancient ways. They thus remain, to the extent provided in the statute, available to those who wish to continue those ways." n302

The next three limitations are new. Gathering is prohibited on developed lands. n303 To permit it, in the context of current culture, would "so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers." n304 Gathering on the developed lands of others would also violate the "traditional Hawaiian way" of "cooperation and non-interference with the well-being of other residents." n305

[*281] Next, the court invited the government to regulate section 7 rights. n306 Finally, a dictum proposed that the right to gather could not include the right to restrict the development or diminution of the ahupua'a and its resources. n307

The *Kalipi* court also commented on Hawaii Revised Statutes section 1-1, which establishes traditional Hawaiian usage as a general source of law. n308 The court interpreted the statute to mean that the rule of custom could prevail over Western common law provided it "did not unreasonably interfere with the spirit of the common law." n309 Ultimately, however, "the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area." n310 The court made clear that items not specifically enumerated in section 7, which nevertheless met the above test, were gatherable under section 1-1 of Hawaii Revised Statutes. n311

The most important achievement of the *Kalipi* court was its careful review and accurate reinterpretation of *Oni v. Meek*. n312 *Oni*, the court pointed out, neither ruled out custom as a source of law, nor limited its applicability to the items enumerated in section 7. n313 Horse grazing had simply failed to meet the test of custom in the particular ahupua'a implicated in *Oni*. Custom itself, however, remained a source of rights [*282] where not specifically repudiated. n314 In a footnote quite discerning of anthropological reality, the *Kalipi* court then rejected any intimation that traditional rights may have all been contractual, or permissive:

The opinion implies that all traditional rights may have been, in essence, contractual rather than customary insofar as commoners cultivated their lands and enjoyed privileges in exchange for services to the lord of that ahupua'a. We do not, however, adopt this conclusion. For we find it difficult to imagine any custom in any ancient culture which did not exist to in some fashion benefit those who ruled. The relevant inquiry is therefore not whether those who once ruled continue to benefit, but rather whether the privileges which were permissibly or contractually exercised persisted to the point where it had evolved into an accepted part of the culture and whether these practices had continued without fundamentally violating the new system. n315

Finally, the court read *Oni* to state that section 7 of the Kuleana Act enumerated all statutorily protected custom, not that all other unenumerated custom had been extinguished. n316

In summary, *Kalipi* concluded that Hawaiian custom remained an independent source of rights which survived the Kuleana Act, and which Hawaii Revised Statutes section 1-1 recognizes. The decision also noted that the State had an obligation, under the Hawaii Constitution, n317 to protect these customary rights. Whether in a particular instance a right prevailed or not would be decided on a case-by-case basis according to the balancing test set out in *Kalipi*. The Kuleana Act, it is clear, conferred special statutory protection for the gathering rights spelled out in its section 7. Even so, the gathering rights there were also to be exercised in conformity with parameters laid down in *Kalipi*. Whether via custom or section 7, all such rights remained available only to occupants of the ahupua'a in which the items to be collected are located. n318

VI. CONCLUSION

From Captain Cook's arrival in 1778 until the present, many factors combined to deprive Hawaiian commoners of their land and its benefits: The forced delivery to foreign ships of food, water, and sandalwood, [*283] which led to the neglect of gardens and waterways; the lure of work in the towns in exchange for cash and novelty goods; the depletion of manpower through death and disease which rendered untenable a traditional system based on extensive exploitation and exchange of resources; and the outright conveyance of land to foreigners.

The newcomers' hunger for land pushed the early monarchical government to pass laws which ultimately entitled foreigners, chiefs, and commoners alike to hold land in fee simple. In the process, the government remained conscious of its special duty to protect the commoners' traditional means of livelihood. The Declaration of Rights of 1839, the Constitution of 1840, and the *Principles* of the Land Commission of 1846 enshrined this special duty. The latter also

stipulated that commoners be given one-third of the kingdom in any future division of its lands. The government tried, in the Kuleana Act, to execute its special duty to protect the livelihood of the commoners by granting them secure cultivation rights, via the fee simple option, as well as liberal hunting and gathering rights, via traditional ahupua'a occupancy. The Kuleana Act, then, not only attempted to separate the tenants' interests in the land from those of the King, the government, and the chiefs -- it also tried to preserve their livelihood. Contemporary fishing laws, in addition, secured fishing rights for all ahupua'a residents. The government of Kamehameha III thus acted, clearly and repeatedly, to safeguard the commoners' traditional right to subsist on the land. Admittedly, the mixed legal regime that the government offered to secure that right did not accomplish its end.

Ultimately, few commoners claimed or received fee simple title to their gardens and house lots. n319 This fact, coupled with the Hawaii Supreme Court's tendency, until recent times, to read the Kuleana Act to restrict traditional rights, frustrated the goal of Kamehameha III's government and its laws. That goal was two-fold: That commoners would not be dispossessed of their lands or alienated from their traditional livelihood; and that any division of the kingdom would confer one-third of the lands to the maka'ainana.

Notwithstanding the disappointing judicial record on Hawaiian land rights, space remains for reconsideration. The supreme court has never categorically held, for example, that tenants who failed to claim kuleana awards were thereby deprived of all cultivation rights in an ahupua'a. In the domain of fishing, from which rights could be analogized [*284] to apply to other kinds of hunting and gathering activities, the court recognized two alternative sources of rights: Konohiki ownership n320 and occupancy of the ahupua'a. n321 This recognition of ownership and occupancy as dual sources of rights could logically be extended to cultivation rights as well, especially when case law recognizes that those not claiming kuleana awards in the early 1850's were presumed to have wanted the old order to continue. n322 The characterization of the old order as entirely subject to konohiki will was never accurate, and was rejected in the *Kalipi* decision. n323

Case law has also accommodated the evolution of custom, which permits the application of old rights to new practices. For example, selling fish as opposed to exchanging them, n324 and transiting another's property by car as opposed to going on foot, n325 have both received customary sanction. The court has further maintained that the occupancy rights to the resources of an abandoned ahupua'a remain available to new or returning occupants. n326

Finally, the landmark case of *Kalipi v. Hawaiian Trust Co.* n327 sets out three clear propositions. First, the present Constitution protects customary rights, not just for religious practice and cultural ritual, but for "subsistence." n328 Second, Hawaii Revised Statutes section 1-1 safeguards any customary claim which exhibits historical validity and meets the interest balancing test. n329 Third, section 7 of the Kuleana Act enumerates only certain *especially* protected traditional rights, not *all* remaining traditional rights. n330

The time has come to reassess thoroughly the survival of traditional Hawaiian commoner rights in land. Indeed, the reassessment is overdue. This Article presents elements and issues around which such a reassessment might be developed. First, the goal of Kamehameha III's government that commoners shall enjoy a secure livelihood, and that they shall, in any division of the land, receive one-third of its surface or value, merits careful consideration. Second, the Kuleana Act, long seen as an instrument for the dispossession of native [*285] Hawaiians, must be reevaluated, both as to its intent and its implementation -- ahupua'a by ahupua'a. Finally, the 1839 Declaration of Rights, the 1840 Constitution, and the 1846 *Principles* of the Land Commission, as well as article XII, section 7 of the present constitution and Hawaii Revised Statutes Section 1-1 (both of which legitimize Hawaiian custom), need to be studied, as an integrated complex, for the purpose of synthesizing a legal cosmology of native Hawaiian rights to guide the decades ahead.

The difficult political question that next arises is whether these rights, once consolidated, are to be asserted via the judicial or the legislative process. n331 Either way the assertion will be difficult, for in Hawai'i today, as before, the dominant culture dismisses, and the dominant economy rebuffs, traditional practices. The Hawai'i Supreme Court, for example, for some 130 years so disregarded the 1840 Constitution's ample protection of traditional Hawaiian rights that

the last Constitutional Convention had to draft an amendment securing similar protection. n332 The fate which befell the 1840 Constitution could again waylay its successor. The temptation to ignore the new 1978 Constitutional amendment exists precisely because the language used is strong. The amendment speaks, among other things, of protecting traditional Hawaiian "*subsistence*" rights. n333 Already, in *Kalipi*, the defendant urged that traditional rights be set aside because they were the outdated but still dangerous foe of the dominant fee simple regime. n334

As in the days of Kamehameha I and Captain George Vancouver, Western culture continues to demand accommodation from native Hawaiians, while offering little in return. Indeed, the capitalist economy of Hawai'i today, more than ever, exerts pressure for a unified Anglo-American legal regime that can guarantee it the control, predictability, and stability it needs to realize its large-scale development ventures. Looking beyond the present economy, however, towards values more permanent and perhaps more sublime, we confront the question whether, having devoted considerable resources in the last five decades to the pursuit of equality under the law, we will now summon [*286] the time and energy needed to support diversity as well, and the difficult legal adjustments that it requires. In Hawai'i, certainly, the justice owed to native Hawaiians, as well as the goodness available to us all when we keep open cultural alternatives, beckon us to recognize and support the Hawaiian people's traditional rights in their land.

[*287] APPENDIX: THE KULEANA ACT

BE IT ENACTED by the House of Nobles and Representatives of the Hawaiian Islands, in Legislative Council assembled:

That the following sections which were passed by the King in privy council on the 21st of December, A.D. 1849, when the legislature was not in session, be and are hereby confirmed; and that certain other provisions be inserted, as follows:

1. That fee-simple titles, free of commutation, be and are hereby granted to all native tenants, who occupy and improve any portion of any government land, for the lands they so occupy and improve, and whose claims to said lands shall be recognized as genuine by the land commission: Provided, however, that this resolution shall not extend to konohikis or other persons having the care of government lands, or to the house lots and other lands in which the government have an interest in the districts of Honolulu, Lahaina and Hilo.
2. By and with the consent of the King and chiefs in privy council assembled, it is hereby resolved, that fee-simple titles, free of commutation, be and are hereby granted to all native tenants who occupy and improve any lands other than those mentioned in the preceding resolution, held by the King or any chief or konohiki for the land they so occupy and improve: Provided, however, that this resolution shall not extend to house lots or other lands situated in the districts of Honolulu, Lahaina and Hilo.
3. That the board of commissioners to quiet land titles be, and is hereby empowered to award fee-simple titles in accordance with the foregoing resolutions; to define and separate the portions of lands belonging to different individuals; and to provide for an equitable exchange of such different portions, where it can be done, so that each man's land may be by itself.
4. That a certain portion of the government lands in each island shall be set apart, and placed in the hands of special agents, to be disposed of in lots of from one to fifty acres, in fee-simple, to such natives as may not be otherwise furnished with sufficient land, at a minimum price of fifty cents per acre.
5. In granting to the people, their house lots in fee-simple, such as are separate and distinct from their cultivated lands, the amount of land in each of said house lots shall not exceed one quarter of an acre.
6. In granting to the people their cultivated grounds, or kalo lands, they shall only be entitled to what they have really cultivated, and which lie in the form of cultivated lands; and not such as the people may have cultivated in

different spots, with the seeming intention [*288] of enlarging their lots; nor shall they be entitled to the waste lands.

7. When the landlords have taken allodial titles to their lands, the people on each of their lands, shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee-simple: Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use.

Done and passed at the council house in Honolulu, this 6th day of August, A.D. 1850.

KAMEHAMEHA.

KEONI ANA.

Legal Topics:

For related research and practice materials, see the following legal topics:

Governments Native Americans Property Rights Real Property Law Estates Present Estates Fee Simple Estates Real Property Law Water Rights Nonconsumptive Uses Fishing

FOOTNOTES:

n1. A limited discussion of some of the issues raised in this article was presented earlier in Lam, *The Imposition of Anglo-American Land Tenure Law on Hawaiians*, 23 J. LEGAL PLURALISM & UNOFFICIAL L. 103 (1985). For a concise introduction to land tenure in Hawai'i, see Kelly, *Land Tenure In Hawaii*, 7 AMERASIA J., Fall/Winter 1980, at 57. For a cross-cultural look at traditional land tenure systems in the Pacific, see LAND TENURE IN OCEANIA (H. Lundsgaarde ed. 1974). For discussions of the modern relevance of land in Hawai'i, see G. COOPER & G. DAWS, LAND AND POWER IN HAWAII: THE DEMOCRATIC YEARS (1985); R. HORWITZ & N. MELLER, LAND & POLITICS IN HAWAII (2d ed. 1963).

n2. 2 REV. LAWS HAW. 2141 (1925). The full text of the law is reproduced in the Appendix.

n3. The Act was so called because the lots awarded came to be known as "kuleana," a Hawaiian term meaning "[r]ight, title, property, portion, responsibility, jurisdiction, authority, interest, claim, ownership." M. PUKUI & S. ELBERT, HAWAIIAN DICTIONARY 165 (1971).

n4. This Article uses "common people" and "commoners" to refer to all Hawaiians who were not King, chiefs, or land agents. The Act itself uses the terms "native tenants," "natives," and "people" interchangeably to refer to the same class of Hawaiians.

n5. 2 REV. LAWS HAW. 2141 (1925).

n6. L. THURSTON, THE FUNDAMENTAL LAW OF HAWAII 3 (1904). To say that land tenure was "in

common" is to force an Anglo-American legal construct on a uniquely Hawaiian social reality. This problem of linguistic noncalibration, unfortunately, dogs any discussion of the development of modern Hawaiian law. That Hawaiian law has been cast in largely Western molds over the last 140 years may oblige students to talk in terms of Western legal constructs. It should not, however, lure us into forgetting that a uniquely Hawaiian system of land-related rights and obligations once prevailed which may be accurately understood only on its own terms, linguistic and cultural.

n7. *Id.*

n8. The real onslaught on the traditional land tenure system came earlier. A Western market economy was already developing before 1848. Unlike the traditional Hawaiian subsistence and exchange economy, the Western system required that factors of production, including land, be readily alienable. Land held in common obviously lacked this quality. For this reason, Westerners clamored very early on for laws that would confer individual ownership of land. See R. KUYKENDALL, *THE HAWAIIAN KINGDOM 1778-1854*, at 273 (1980). For a detailed discussion of the impact of Westerners on traditional Hawaiian land tenure, see M. Kelly, *Changes in Land Tenure in Hawaii 1778-1850* (June 1956) (unpublished thesis available at the University of Hawai'i Library).

n9. See J. CHINEN, *THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848*, at 15-16 (1958).

n10. *Id.* at 20.

n11. The term "konohiki" originally referred to a land agent appointed by a superior chief. The term was later extended to include the chief himself. J. CHINEN, *supra* note 9, at 24 n.19.

n12. *Id.* at 16.

n13. *Id.* at 20.

n14. *Id.* at 25.

n15. *Id.* at 21-24.

n16. Because all the lands "belonged" to the King, see *supra* text accompanying note 7, whatever he yielded to the government was considered a gift. *Id.* at 26. The chiefs, on the other hand, who initially "held" from the King, were required to pay a commutation to the government, in cash or surrender of land, equal to one-third the value of the lands claimed. *Id.* at 21.

n17. *Id.* at 29.

n18. M. PUKUI & S. ELBERT, *supra* note 3, at 19.

n19. 2 REV. LAWS HAW. 2142 (1925).

n20. R. KUYKENDALL, *supra* note 8, at 291.

n21. *The Polynesian*, Feb. 16, 1850, at 1, col. 5.

n22. *Id.*

n23. *Id.*

n24. M. Kelly, *supra* note 8, at 118. This figure has recently been challenged and dramatically revised upwards to as much as 800,000. *See* D. STANDARD, *BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT* 78-80 (1989).

n25. R. SCHMITT, *DEMOGRAPHIC STATISTICS OF HAWAII 1778-1965*, at 72 (1968).

n26. Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 856 (1975).

n27. *See* *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *United States v. Sioux Nation*, 448 U.S. 371 (1980); *see also* Note, *County of Oneida v. Oneida Indian Nation: The Continuing Saga of American Indian Territorial Wars*, 4 PACE ENVTL. L. REV. 221 (1986).

n28. W. SCHURZ, *THE MANILA GALLEON* 229 (1939). Spanish galleons sailed between Mexico and Manila beginning in the 16th century. *Id.* at 193. While one or more of them may have reached Hawai'i before 1778, the evidence is inconclusive. *Id.* at 228-29. Convention continues to date Western contact to Cook's arrival in 1778. *See* R. KUYKENDALL, *supra* note 8, at 3, 12-13.

n29. For an overview of this Pacific-wide trauma, see D. OLIVER, *THE PACIFIC ISLANDS* 155-316 (rev. ed. 1962). For a Hawai'i-specific account, see D. STANNARD, *supra* note 24.

n30. R. KUYKENDALL, *supra* note 8, at 65-70. In effect, the Hawaiian rulers, who were both architects and devotees of the traditional religion at its state level, repudiated only the state religion in 1819. Folk religion, in one form or another, continues to this day. *See also* Davenport, *The "Hawaiian Cultural Revolution": Some Political and Economic Considerations*, 71 AM. ANTHROPOLOGIST 1 (1969).

n31. A. LIND, *HAWAII'S PEOPLE* 34 (4th ed. 1980).

n32. A. LIND, *AN ISLAND COMMUNITY* 57 (1938).

n33. A. LIND, *supra* note 31, at 34.

n34. A. LIND, *supra* note 32, at 57.

n35. *See supra* note 24 and accompanying text.

n36. R. SCHMITT, *supra* note 25, at 72.

n37. D. OLIVER, *supra* note 29, at 260.

n38. Malo, *On the Decrease of Population on the Hawaiian Islands*, 2 THE HAWAIIAN SPECTATOR 121, 127 (Apr. 1839).

n39. *Id.* at 127-28.

n40. The view of traditional land tenure contained in legal and administrative documents is discussed later in Sections III, IV, and V. The description of the political structure given here is that of historians and social scientists who, better than lawmakers, are trained to describe social phenomena. The object of this section is to describe what the reality was, as much as possible, not what subsequent lawmakers thought or desired it to be. The principal historical and anthropological sources used in the description that follows are: G. DAWS, *SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS* (1968); E. HANDY & M. PUKUI, *THE POLYNESIAN FAMILY SYSTEM IN KA'U, HAWAII* (1958); M. Kelly, *supra* note 8; R. KUYKENDALL, *supra* note 8; C. LYONS, *A HISTORY OF THE HAWAIIAN GOVERNMENT SURVEY WITH NOTES ON LAND MATTERS IN HAWAII* (1903); Malo, *supra* note 38.

n41. The eight islands are, starting with the geologically oldest and northernmost: Ni'ihau, Kaua'i, O'ahu, Moloka'i, Lana'i, Maui, Kaho'olawe, Hawai'i. G. MACDONALD & A. ABBOTT, *VOLCANOES IN THE SEA: THE GEOLOGY OF HAWAII* 6, 268 (1970).

n42. M. Kelly, *supra* note 8, at 11.

n43. *Id.* at 11-12.

n44. G. DAWS, *supra* note 40, at 29-44 (1968). Whether Kamehameha I could have united the chain without Western support will remain the eternally debatable question.

n45. *See* M. Kelly, *supra* note 8, at 12. For a discussion of Hawaiian prehistory from earliest settlement to Western contact see P. KIRCH, *FEATHERED GODS AND FISHHOOKS: AN INTRODUCTION TO HAWAIIAN ARCHAEOLOGY AND PREHISTORY* (1985). For the role of hierarchy in Hawaiian traditional culture, see V. VALERI, *KINGSHIP AND SACRIFICE: RITUAL AND SOCIETY IN ANCIENT HAWAII* (1985).

n46. *See* R. KUYKENDALL, *supra* note 8, at 9-10. Another high chief was the kahuna nui who, as supreme ritual specialist, guided the ali'i nui in the worship of gods. M. Kelly, *supra* note 8, at 45. He was very powerful and, theoretically, could exercise that power to check the ali'i nui. In practice, however, both the

kahuna nui and the kalaimoku, or land divider, served only as the ali'i nui's principal counselors, ritual and secular. *Id.* at 43-44.

n47. "Maka'ainana" comes close to the English word "commoner." M. PUKUI & S. ELBERT, *supra* note 3, at 207. "Hoa'aina" is translated as "tenant." *Id.* at 68. Strictly speaking, maka'ainana denotes a status which is fixed, while hoa'aina denotes a relative position in a relationship based on land. A person could be the hoa'aina of a particular chief and in turn be the landlord of another hoa'aina. A person could not, however, be chief and maka'ainana at the same time.

n48. The stratification intensified in the first half of the 19th century, such that land had six or eight owners at the same time, one above the other. Linnekin, *The Hui Lands of Keanae: Hawaiian Land Tenure and the Great Mahele*, 92 J. POLYNESIAN SOC'Y 169, 171 (1983).

n49. J. CHINEN, *supra* note 9, at 6.

n50. *Id.* at 5. Even the son of an ali'i nui did not typically succeed to his father's status and property. Usurpations via wars were fairly standard means of succeeding to ali'i nui status. See R. KUYKENDALL, *supra* note 8, at 10. A new ali'i nui would not likely trust his predecessor's retainers sufficiently to reappoint them: "[W]hen a chief was overthrown in war his followers also moved on." S. KAMAKAU, *RULING CHIEFS OF HAWAII* 376 (1961).

n51. J. CHINEN, *supra* note 9, at 6.

n52. For descriptions of this typically Polynesian tradition which permits a highly flexible rearrangement of population to fit available resources, see R. FIRTH, *PRIMITIVE POLYNESIAN ECONOMY* (2d ed. 1965); E. HANDY & M. PUKUI, *supra* note 40; J. LINNEKIN, *CHILDREN OF THE LAND: EXCHANGE AND STATUS IN A HAWAIIAN COMMUNITY* (1985). For a lighter version of the same observation, see F. CALKINS, *MY SAMOAN CHIEF* (1962).

n53. "[F]or a chief was called great in proportion to the number of his people. . . ." Malo, *supra* note 38, at 125.

n54. Elsewhere in the Pacific, the bases of social organization were kin groups, not classes. Power, instead of being concentrated in the ali'i, was dispersed among family or lineage heads. The anthropologist Marshall Sahlins believes this class feature -- where the ali'i ceased to be kinsmen of, but had become alien to, the maka'ainana -- combined with Hawai'i's relative proximity to the American continent to effect the spectacular disintegration of Hawaiian society. The ali'i never exerted quite the same care for the maka'ainana that other Polynesian family heads expended on their relatives. Nonetheless, the old technologically primitive economic order checked the potential for abuse by the ali'i. When, however, Westerners positioned themselves as the ali'i's new suppliers of sophisticated goods, the latter quickly dispensed with whatever consideration they may have had for the maka'ainana. Lecture by M. Sahlins to the Pacific Islands Studies Program, Honolulu (1981). For a structuralist analysis by an anthropologist of the relationship between ali'i, commoner, and foreigner, see M. SAHLINS, *HISTORICAL METAPHORS AND MYTHICAL REALITIES: STRUCTURE IN THE EARLY HISTORY OF THE SANDWICH ISLANDS KINGDOM* 28-32 (1981).

n55. See S. KAMAKAU, *supra* note 50, at 376. "But it was they [the chiefs] who were the wanderers; the people born of the soil remained. . . ." *Id.*

n56. THE JOURNALS OF CAPTAIN JAMES COOK ON HIS VOYAGES OF DISCOVERY: THE VOYAGE OF THE RESOLUTION AND DISCOVERY 1776-1780, at 612, 618-20 (J. Beaglehole ed. 1967) [hereinafter JOURNALS].

n57. C. LYONS, *supra* note 40, at 23.

n58. Except for the Maori in Aotearoa (New Zealand), other Polynesian cultures (included in a triangular zone bounded by Hawai'i, New Zealand, and Easter Island) developed on islands that were smaller, closer to the tropics, and therefore richer in lagoon life, than Hawai'i. As a result, their people relied relatively less on the land, and more on the sea, than the Hawaiians.

n59. C. LYONS, *supra* note 40, at 24.

n60. For a recent study of the chronological span of human ecology in Hawai'i, see J. CULLINEY, ISLANDS IN A FAR SEA: NATURE AND MAN IN HAWAII (1988).

n61. See R. KUYKENDALL, *supra* note 8, at 6.

n62. M. Kelly, *supra* note 8, at 3.

n63. Nineteenth century documents often speak of "waste land" when they mean wild or fallow lands. This conceptual confusion did much to legitimize the alienation of maka'ainana from their lands, for it fostered the view that maka'ainana did not use, and therefore could not claim, such lands.

n64. For an early description of the ahupua'a, see C. LYONS, *supra* note 40, at 23-29.

n65. J. CHINEN, *supra* note 9, at 3. The fisheries law enacted in 1839 indicates that the seaward boundary of the ahupua'a took in the far side of the reef. *Haalelea v. Montgomery*, 2 Haw. 62, 65-66 (1858).

n66. See J. CHINEN, *supra* note 9, at 3.

n67. See *id.* Ahupua'a, cut off by the odd shape of neighboring divisions, often failed to extend to either the mountain or the seashore. They ranged in size from 100 to 100,000 acres. *Id.*

n68. See *id.*

n69. *Id.* Few administrative systems are as simple as their models suggest. While Hawaiian lands were generally divided into ahupua'a, with an ali'i or konohiki at the head of each, there existed another land use unit

which in part copied, and in part disordered, the neat scheme of the ahupua'a. This was the ili, or the subdivision of the ahupua'a. C. LYONS, *supra* note 40, at 27.

Ili were of two types: the ili of the ahupua'a, and the ili kupono. The former remained under the jurisdiction of the chief of the ahupua'a, and was established purely for administrative convenience. The chief might, for example, appoint separate agents to oversee the different ili of his ahupua'a. The ili kupono, however, was directly awarded by the ali'i nui to another chief who, therefore, owed nothing to the konohiki of the ahupua'a. The ili kupono, then, remained practically independent of the ahupua'a in which it was located. At the death of the head of the ahupua'a, while the rest of the ahupua'a might be reassigned by the ali'i nui, the ili kupono was not. Simply put, the ili kupono was like an ahupua'a within the ahupua'a. *See id.* at 28.

Physically speaking, ili could consist of a single tract of land, or of discontinuous pieces. In the latter case, they were called ili lele ("jumping" ili). The pieces could be in one or more ahupua'a. The rationale for the "jump" was to provide chiefs and occupants of ili lele with terrain sufficiently heterogeneous that a diversified and therefore self-sufficient economy could be established under their control. *See id.* at 27. For another description of the ili system, see J. CHINEN, *supra* note 9, at 3-6.

n70. J. CHINEN, *supra* note 9, at 5-6.

n71. M. Kelly, *supra* note 8, at 38. The ahupua'a derived its name from the fact that its "boundary was marked by a heap (ahu) of stones surmounted by an image of a pig (pua'a), or because a pig or other tribute was laid on the altar as tax to the chief." M. PUKUI & S. ELBERT, *supra* note 3, at 8. At the annual makahiki festival, when the ali'i nui's entourage circled the island to collect taxes, it would pick up what the occupants of the ahupua'a deposited at this altar. M. Kelly, *supra* note 8, at 37-38.

n72. A. Perry, A Brief History of Hawaiian Water Rights 7, Address at the Annual Dinner of the Hawaiian Bar Association (June 15, 1912) (available at the University of Hawai'i Library). The word "kanawai," which in Hawaiian means law, or regulation, originally denoted rules dealing specifically with the use of water. M. PUKUI & S. ELBERT, *supra* note 3, at 119. For the theory, tested primarily against ancient Asian societies, that civilization and law arise typically as a result of a leader taking charge of a system of irrigation, boosting crop production, collecting the surplus, and thereby feeding a nonproductive class of specialists (military, ritual, administrative, and artistic), see generally K. WITTFOGEL, *ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER* (1957).

n73. *See* M. Kelly, *supra* note 8, at 31-32.

n74. Relatively dry open plains lying between higher wetlands and the coast are known as kula. M. PUKUI & S. ELBERT, *supra* note 3, at 164.

n75. *See* R. KUYKENDALL, *supra* note 8, at 5.

n76. *See supra* text accompanying notes 51, 52.

n77. This subsection relies heavily on the work of Marion Kelly in which she states:

Changes in land tenure, rights, and use are part of the total picture of cultural change and cannot be treated

as a separate subject in the earliest stages of culture contact. One question might be used as a guide: Why did the Hawaiian culture disappear so rapidly and so completely? An answer should include a statement about the Europeans who came to the islands with new ideas. . . .

M. KELLY, *supra* NOTE 8, AT 50

n78. *See* R. KUYKENDALL, *supra* note 8, at 273-78, 294-98.

n79. M. Kelly, *supra* note 8, at 81-89. These were anything but mutually exclusive categories as, typically, explorer turned trader, and saint became sugar baron. The metamorphosis, predictably, veered in the direction of increased accumulation of power and wealth. For an account of these transformations, see generally G. DAWS, *supra* note 40.

n80. Hawai'i was simply too small and too far away. Cook's task had been to discover the long-posed Northwest Passage that would miraculously contract the distance between England and China. It was the immensity of the Chinese empire, and not the scattered islands of Hawai'i, that tantalized the commercial appetite of Europe. *See* JOURNALS, *supra* note 56, at xxxii-xxxiii.

n81. In 1822 over 60 whalers anchored in Hawaiian ports. Between 1826 and 1829 the port of Honolulu alone averaged 140 whalers annually. In 1841 a station on Maui reported 30 ships anchored in Lahaina at any given time, with more than 400 sailors on shore daily. M. Kelly, *supra* note 8, at 101.

n82. *See id.* at 94-100.

n83. *See id.* at 101-03; R. KUYKENDALL, *supra* note 8, at 317-18.

n84. M. Kelly, *supra* note 8, at 116-17.

n85. "Left unmolested, the cattle multiplied and prospered, eventually contributing to the ruin of subsistence agriculture in many parts of the islands." Linnekin, *supra* note 48, at 176.

n86. G. DAWS, *supra* note 40, at 63-65.

n87. R. KUYKENDALL, *supra* note 8, at 310-11.

n88. *Id.* at 310.

N89. Unwise, because a transaction in which a perfectly equivalent exchange takes place tends to terminate a relationship, and the goal was to extend indefinitely relationships that could be called on in the future. Thus, Hawaiians who accepted a moderately sized nail from Cook in return for enough hog to feed his entire ship's crew for a day were not thereby undervaluing their hog in some foolish way. Rather, they may have been acknowledging what they took to be a token of his desire to maintain a relationship. M. Kelly, *supra* note 8, at 53.

n90. The economic anthropologist Karl Polanyi provides the analytical tools with which to understand this contrast. In speaking of types of exchanges that differentiate economies, he draws attention to two that are not primarily associated with Western systems: reciprocity and redistribution. The fish and taro that Hawaiian families exchanged, and the Christmas gifts that Westerners give one another, are examples of reciprocal goods, approximately equivalent in value, moving directly between parties of equal standing, as an incident and binder of their social relationship. Redistributive goods are what Hawaiians sent to the ali'i, for the latter's consumption, and for redistribution to chiefly retainers and other specialists -- such as priests and managers of the dikes -- who, in turn, presumably provided a service to the maka'ainana. The taxes that modern governments levy and use to build roads and schools are another example of redistributive exchange. Market exchanges, on the other hand, are what dominate the economic life of industrialized countries: groceries, for example, received in return for an exact amount of dollars tendered to an unknown seller. This market economy was unknown in traditional Hawai'i. See K. POLANYI, *THE GREAT TRANSFORMATION* 43, 47-48 (1944).

n91. E. HANDY & M. PUKUI, *supra* note 40, at 3.

n92. "Mana" is a concept shared by all Polynesian societies. It is that which makes the fish plentiful, the land fruitful, and the chief successful. Perhaps best described as a raw and powerful force of nature, it is not associated with gods. Only certain individuals, usually chiefs, are strong enough to capture, tolerate, and radiate this incorporeal, but natural, force. See D. OLIVER, *supra* note 29, at 72-73.

n93. Needless to say, not all foreigners and chiefs acted with blame. For many, however, the picture fits. For detailed histories of the relationship between ali'i and Westerners, see generally G. DAWS, *supra* note 40; R. KUYKENDALL, *supra* note 8; M. Kelly, *supra* note 8. A little appreciated phenomenon of colonial situations is that colonialists and native aristocrats are never so powerful as when they team up. A Westerner at home may believe in unbridled economic individualism but will normally lack the political power to translate that belief into economic monopoly. In a society like traditional Hawai'i, on the other hand, the aristocrats theoretically detained all political power but were, in practice, restrained by a primitive technology and a communitarian ethic. In the colonial context, both sets of restraints fall and a new synthesis of absolute power emerges. The relationship between ali'i and Westerners in Hawai'i was not necessarily smooth, happy, or even actively nurtured. All the same, it was patterned, potent, and apparently mutually convenient for it lasted some one hundred years, until the overthrow of the monarchy in 1893. By then, an alien system of laws already protected foreign capital in the islands. Americans owned most of the land, controlled the government, and had a favorable relationship with the United States. The ali'i had outlived their usefulness. See G. DAWS, *supra* note 40, at 251-92.

n94. See G. DAWS, *supra* note 40, at 1-28.

n95. M. Kelly, *supra* note 8, at 70.

n96. *Id.* at 73.

n97. *Id.* at 69-73.

n98. *Id.* It is not contended here that chiefs did not try to unify the islands before Western contact, or that Kamehameha I unified Hawai'i for the convenience of foreigners. What is noted is that the traditional society

had defeated earlier attempts at unity, and that, whatever the impact, Kamehameha's campaign received ample Western backing.

n99. G. DAWS, *supra* note 40, at 46. There were, of course, many white men in the islands who did not fit this description. At the turn of the century, almost every district on the large islands had one or two white residents, most of whom were "miserable loafers, human flotsam and jetsam." *Id.*

n100. M. Kelly, *supra* note 8, at 53-54.

n101. *Id.* at 65-66.

n102. Metal was highly prized, because the Hawaiians did not mine any themselves. G. DAWS, *supra* note 40, at 5.

n103. M. Kelly, *supra* note 8, at 95.

n104. *Id.* at 96.

n105. *Id.*

n106. *Id.*

n107. *Id.* at 97.

n108. R. KUYKENDALL, *supra* note 8, at 91, 434-36.

n109. M. Kelly, *supra* note 8, at 98.

Missionaries living on Hawaii during these years wrote that long lines of people carrying logs were seen all the way from Waimea to Kawaihae, a distance of about twelve to fifteen miles. The chiefs now served as unofficial deputies for the commercial agents in the exploitation of the Hawaiian people and forests. They were in effect 'captive' chiefs.

Id. at 99.

n110. *Id.* at 99-100.

n111. *See id.* at 96; R. KUYKENDALL, *supra* note 8, at 88-90.

n112. *See supra* text accompanying note 78.

n113. J. CHINEN, *supra* note 9, at 7.

n114. For example, Kamehameha III divided the lands he claimed in the Great Mahele into government and Crown Lands, governed by separate regimes, because he was advised that should a foreign power usurp the kingdom, it would lay claim only to government, not Crown, lands. *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 722 (1864).

n115. The Declaration of Rights can be found in L. THURSTON, *supra* note 6, at 1-2.

n116. R. KUYKENDALL, *supra* note 8, at 263.

n117. *Id.* at 169.

n118. *Id.*

n119. The most famous missionary school in the islands was Lahainaluna on Maui. The Hawaiian historian David Malo, who was trained there, in time became an influential nationalist writer, activist, and social critic. *See id.* at 111, 157; *see also supra* note 38.

n120. *See supra* text accompanying note 23.

n121. The evolution of land rights in Hawai'i, from the time of Kamehameha I's unification of the islands at the beginning of the 19th century until the 1848 execution of the Great Mahele, is briefly summarized in J. CHINEN, *supra* note 9.

n122. G. DAWS, *supra* note 40, at 43.

n123. J. CHINEN, *supra* note 9, at 6.

n124. *Id.*

n125. *Id.*

n126. *Id.*

n127. *Id.* at 7.

n128. This Section, in contrast to Section II, presents the legal, as opposed to anthropological, analysis of relevant events between 1839 and 1850. However, bills of rights, constitutions, statutes, and laws are all, anthropologically speaking, artifacts of a culture alien to the Hawaiians of the time. Polynesians did not view Western legal instruments in the same light as those culturally attached to such things. No doubt the Hawaiians

were aware of the foreigners' fondness for these oddities and, out of necessity as well as self-interest, consented to enact laws that Westerners would accept. That the written law could not quickly reform social reality, however, is borne out by this passage from the *Principles* of the Land Commission:

Neither the laws of 1839 nor of 1840 were found adequate to protect the inferior lords and tenants, for although the violators of law, of every rank, were liable to its penalty, yet it was so contrary to ancient usage, to execute the law on the powerful for the protection of the weak, that the latter often suffered. . . .

Principles Adopted by the Board of Commissioners to Quiet Land Titles in their Adjudication of Claims Presented to Them, *reprinted in* 2 REV. LAWS HAW. 2124, 2127 (1925) [hereinafter Land Commission Principles].

n129. L. THURSTON, *supra* note 6, at 1.

n130. *Id.* at 2.

n131. 2 REV. LAWS HAW. 2124 (1925).

n132. L. THURSTON, *supra* note 6, at 1. The Declaration of Rights stated the overall policy of the government vis-a-vis the general corpus of rights of the people. Those rights, however, preeminently concerned land.

n133. *In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715, 720 (1864).

n134. L. THURSTON, *supra* note 6, at 1 (emphasis added).

n135. *Id.* (emphasis added).

n136. *Id.* at 2.

n137. *Id.* at 3.

n138. *Id.*

n139. *Haalelea v. Montgomery*, 2 Haw. 62, 65 (1858).

n140. J. CHINEN, *supra* note 9, at 12.

n141. *Id.* at 8.

n142. For this reason, the Land Commission's official name was Board of Commissioners to Quiet Land Titles. *Id.*

n143. *Id.* at 9.

n144. *Id.*

n145. *In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715, 718 (1864).

n146. Propositions in the original *Principles* are not numbered. For the sake of clarity, this paper extracts those propositions that are relevant to maka'ainana rights in land, and enumerates them, generally in the order in which they arise in the *Principles*.

n147. Land Commission Principles, *supra* note 128, at 2124-25.

n148. *Id.* at 2125.

n149. *Id.* The Land Commission clearly recognized that the land interests of the various social classes in the kingdom remained undivided. Indeed, until the Great Mahele (1848) and the Kuleana Act (1850), the Land Commission, for this very reason, issued few awards and those, generally, in leasehold only. It simply found the task of awarding titles, where interests remained undivided, too difficult. J. CHINEN, *supra* note 9, at 12. Many of the principles stated by the Land Commission, therefore, are prospective in nature, suggesting ways in which the government might approach not just current land claims, but also the future of land tenure in Hawai'i.

n150. Land Commission Principles, *supra* note 128, at 2126.

n151. *Id.*

n152. *Id.*

n153. *Id.* at 2127.

n154. *Id.*

n155. *Id.* at 2128.

n156. *Id.*

n157. *Id.*

n158. *Id.* at 2128-29. This provision restricts the landlord's control to lands "actually in cultivation" in his ahupua'a or subdivision thereof. *Id.* The two American members of the Land Commission thus succeeded in introducing the Western distinction between idle and productive land. In Hawaiian agriculture, land, to be productive, must remain idle at certain intervals, especially if it is unirrigated kula land. Ironically, then, in

providing for landless maka'ainana, the Land Commission may have dispossessed other maka'ainana of their fallow land, or land reserved for wild species, both of which played a necessary role in maintaining the total subsistence economy. *See* Linnekin, *supra* note 48, at 174-78.

n159. Land Commission Principles, *supra* note 128, at 2129. The traditional ali'i nui practice of reassigning land upon conquest, or the death of a tenant ali'i, already eroded under Kamehameha I and Kamehameha II, was perhaps implicitly rejected here.

n160. *Id.* at 2129-30. The Western perspective is shown in the reference to daily bread. The Hawaiian staple was poi, derived from taro. A later passage of the *Principles* exhibits a more serious Western bias: a benefit of separating out the King's interests, it states, is that a claimant will be able

to use his property more freely, by mortgaging it for commercial objects, and by building upon it, with the definite prospect that it will descend to his heirs. This will tend more rapidly to an export, and to a permanency of commercial relations, without which, there can never be such a revenue as to enable the Government to foster its internal improvements.

Id. at 2134.

n161. *Id.* at 2130.

n162. *Id.* at 2133.

n163. *Id.* at 2136.

n164. *Id.* Three highly significant points are made here: First, the earlier suggestion that each party with interest in land (King/government, landlord, tenant) receive one-third of its value is restated here as law, at least as concerns the government's share; second, an allodial title, i.e., free from feudal burdens imposed by a superior lord, is not a title in fee but remains subject to tenants' rights; third, the King, in conformity with the 1839 Declaration of Rights, may not unilaterally convey away tenant's rights.

n165. The Legislative Council was composed of the House of Nobles and the House of Representatives sitting in joint session.

n166. J. CHINEN, *supra* note 9, at 12.

n167. 2 REV. LAWS HAW. 2233-34 (1925).

n168. J. CHINEN, *supra* note 9, at 16.

n169. From January 27, 1848 to March 7, 1848. *Id.*

n170. *Id.* at 15.

n171. *Id.*

n172. *Id.* at 16. This provision is consistent with the spirit of the second provision only if tenants cultivated and possessed all of the King's private lands such that the one-third awardable to them under the fourth provision paralleled the one-third intended under the second provision.

n173. *Id.*

n174. *Id.* at 20-21.

n175. *Id.*

n176. *Id.* at 21-24.

n177. *Id.* at 25.

n178. *Id.* at 25, 31.

n179. *Id.* at 25.

n180. *Id.* at 26.

n181. *Id.*

n182. *Id.* at 29.

n183. *Id.*

n184. *Id.* The Land Commission, originally set up in 1845 to investigate and act upon land claims filed against the government, had its life extended to March 31, 1855, so that it could also examine and confirm konohiki and maka'ainana claims filed pursuant to the Great Mahele and the Kuleana Act. *Id.* at 13.

n185. *See* Appendix for the full text.

n186. *See* Appendix for the full text.

n187. Much litigation subsequently centered around this provision. When the Act was repealed in 1859, this provision was retained and now appears as HAW. REV. STAT. § 7-1 (1976). It was added to the Act by King Kamehameha III who, in adding it, noted that a "little bit of land even with allodial title, if they [the people] be cut off from all other privileges would be of very little value." *Kalipi v. Hawaiian Trust Co.*, 66 Haw.

1, 7, 656 P.2d 745, 749 (quoting Privy Council Minutes, July 13, 1850 (available in Public Archives of the State of Hawaii)). The King, with these words, acknowledged, and sought to safeguard, the wide-ranging exploitation of resources that characterized the traditional economy.

n188. *See supra* note 26 and accompanying text; *see also* Kelly, *supra* note 1, at 65.

n189. No sufficiently conclusive study of the agrarian turmoil of the time has been published to date. Such a study could, for example, draw separate profiles for each of the ahupua'a, to see how many tenants lived in each, how many filed claims, and how many received them. Reliable patterns of behavior, and the reasons for them, might then emerge. In the meantime, some scholars have suggested some of the reasons listed here for the low count of awardees. *See, e.g.*, Kelly, *supra* note 1, at 67-69; Linnekin, *supra* note 48, at 174.

n190. An 1850 census counted 80,539 Hawaiians. R. SCHMITT, *supra* note 25, at 72. One researcher estimates that around 735 of these were chiefs. Kelly, *supra* note 1, at 65.

n191. Kelly, *supra* note 1, at 66.

n192. *Id.* at 65.

n193. J. CHINEN, *supra* note 9, at 21-24.

n194. *See supra* note 69.

n195. J. CHINEN, *supra* note 9, at 15-16.

n196. *Id.* at 31.

n197. *Id.* at 16.

n198. M. Kelly, *supra* note 8, at 3.

n199. *See* Levy, *supra* note 26, at 856.

n200. The Hawai'i Supreme Court, in discussing land tenure changes under Kamehameha III, collapsed the landholding categories of King and government. *In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715, 719 (1864).

n201. M. Kelly, *supra* note 8, at 3.

n202. J. CHINEN, *supra* note 9, at 13.

n203. L. THURSTON, *supra* note 6, at 1.

n204. *Id.*

n205. Were it not for the prohibitions against dispossession and unequal enrichment contained in the 1839 Declaration of Rights, an argument could be made that maka'ainana cannot simultaneously hold traditional undivided interests in an ahupua'a and a fee simple title to part of the same. The "necessary" loss of traditional rights in the ahupua'a is, arguably, incurred, or compensated for, by the new fee title to a kuleana. The "loss," furthermore, theoretically occurred with the consent of the maka'ainana, who gave it when he filed for fee title. Note that no such compensation and consent, however, can be alleged for extinguishing the traditional rights of maka'ainana who did not file for or receive fee awards.

n206. L. THURSTON, *supra* note 6, at 3.

n207. 2 REV. LAWS HAW. 2126 (1925).

n208. J. CHINEN, *supra* note 9, at 9.

n209. *See supra* Section II. C. (traditional land tenure system).

n210. 2 REV. LAWS HAW. 2142 (1925).

n211. *Id.* at 2142.

n212. J. CHINEN, *supra* note 9, at 31.

n213. This reading of sections 6 and 7 of the Kuleana Act reconciles the direct effect of the Act -- 0.9% of all lands were awarded in fee to maka'ainana -- with that provision in the *Principles*, repeated in the Mahele rules, which stipulated that one-third of the land of the kingdom should go to the maka'ainana. The goal of the one-third stipulation is roughly realized after the passage of the Kuleana Act only if three sets of rights are added together: Fee title for new kuleana awardees, traditional cultivation rights for those not taking out awards, and traditional gathering rights for both sets of maka'ainana.

n214. 2 REV. LAWS HAW. 2136 (1925).

n215. *Id.* at 2126.

n216. *Id.* at 2136.

n217. *Id.* at 2130. Section 7 of the Kuleana Act clearly shows that the concept of private property was being adopted only approximatively: "The springs of water, and running water, and roads shall be free to all,

should they need them, on *all lands granted in fee-simple*. . . ." *Id.* at 2142 (emphasis added).

n218. *Id.* at 2128.

n219. This section discusses judicial interpretations of traditional rights to resources associated with occupancy of an ahupua'a. For a discussion of a line of cases presented to the court after 1870, when adverse possession law was used to *remove* kuleana awardees from their lands, see Lam, *supra* note 1, at 115-18.

n220. 2 Haw. 87 (1858).

n221. *Id.* at 88.

n222. *Id.*

n223. *Id.* at 88-89.

n224. *Id.* at 88.

n225. The court uses the term "hoa'aina," or tenant, rather than "maka'ainana" or commoner, when talking of non-ali'i on an ahupua'a. For the difference between the two, see *supra* note 47.

n226. *Oni*, 2 Haw. at 88-89. In talking about rights secured to hoa'aina by law in 1853, when the dispute presumably arose, the court asserted that "it was not in the power of the konohiki, had he been so disposed, to alienate a single right secured by law to the plaintiff." *Id.* at 89.

n227. *Id.* at 90. Concluding that horses had been introduced into the ahupua'a in 1833, the court sidestepped the issue of whether that was "immemorial." Had the court found that horse grazing was not immemorial, the argument presumably could still be made that other practices, such as the free foraging of pigs and fowl, were. See Section II. C. (traditional land tenure system).

n228. *Oni*, 2 Haw. at 91.

n229. *Id.*

n230. *Id.* at 90.

n231. *Id.* at 91-92.

n232. *Id.* at 93. By merging grazing and cultivation rights, the court makes light of the distinction in the traditional Hawaiian economy between raising crops, letting domestic animals forage, and hunting and gathering wild species.

n233. *See* Appendix for text of the Kuleana Act.

n234. *Oni*, 2 Haw. at 87.

n235. *See infra* note 242.

n236. 2 Haw. 62 (1858).

n237. *Id.* at 65-66.

N238. *Id.* at 63.

n239. *Id.* at 64.

n240. *Id.* at 66.

n241. *Id.* at 70.

N242. *Id.* at 70-71. The term tenant meant any lawful occupant of the ahupua'a, including former tenants of the konohiki who now occupied kuleana in the ahupua'a. *Id.* at 71.

n243. *Id.*

n244. 5 Haw. 133 (1884).

n245. *Id.* at 134.

n246. *Id.* at 133.

n247. *Id.* at 133-34.

n248. Although the case does not explicitly refer to § 7 of the Kuleana Act, the context indicates the section is at issue.

n249. The court refers to nonawardees as *hoa'aina*, whom it describes as "tenants at sufferance under the konohiki." *Maikai*, 5 Haw. at 133.

n250. Chief Justice Judd was the author of the opinions in both *Maikai* and *Dowsett*.

n251. 10 Haw. 166 (1895).

n252. *Id.* at 168.

n253. *Id.* at 171.

n254. *Id.* at 169.

n255. 2 Haw. 62, 71 (1858).

n256. *Dowsett*, 10 Haw. at 171.

n257. *See supra* Section III. A. (discussing pre-1850 land tenure laws).

n258. An obvious problem here is that the court is forcing a Hawaiian mode of land tenure into one of two Western categories which do not suit it: Permissive and hostile.

n259. 66 Haw. 1, 656 P.2d 745 (1982).

n260. A substantial amount of water rights case law has also developed in Hawai'i. The issues addressed there concern not only commoner rights, but the nature of the public trust vested in the government to manage the waters of the state, and how that public trust affects private property rights. Because of the complexity of the legal domain of water rights and its treatment as a field somewhat unique in itself, this Article skirts the area even though what happens there affects, in a very real sense, commoners' rights to the use of the land and its resources. For the relevant case law, see *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986, Territory v. Gay, 31 Haw. 376 (1930), *aff'd*, 52 F.2d 356 (9th Cir. 1931), *cert. denied*, 284 U.S. 677 (1931); *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982), *cert. denied*, 471 U.S. 1014 (1985); *McBryde Sugar Co. v. Robinson*, 55 Haw. 260, 517 P.2d 26 (1973), *cert. denied and appeal dismissed*, 417 U.S. 962 (1974); *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973); *Davis v. Afong*, 5 Haw. 216 (1884); *Peck v. Bailey*, 8 Haw. 658 (1867); *see also* Chang, *Unravelling Robinson v. Ariyoshi: Can Courts "Take" Property?*, 2 U. HAW. L. REV. 57 (1979) [hereinafter Chang, *Unravelling Robinson v. Ariyoshi*]; Chang, *Missing the Boat: The Ninth Circuit, Hawaiian Water Rights and the Constitutionality of Retroactive Overruling*, 16 GOLDEN GATE U.L. REV. 123 (1986).

n261. 6 Haw. 334 (1882).

n262. *Id.* at 336.

n263. *Id.*

n264. *Id.* at 336-37.

n265. *Id.* at 337.

n266. *Id.* The court, in other words, protected the principle behind the custom, and not just its form, which must be permitted to change with time, or become meaningless.

n267. 31 Haw. 678 (1930).

n268. *Id.* at 689-90.

n269. *Id.* at 691.

n270. Note, however, that the Organic Act of April 30, 1900, which organized the new government of the Territory, terminated the *exclusive* use of the fisheries by ahupua'a occupants. See L. THURSTON, *supra* note 6, at 287.

n271. 50 Haw. 298, 440 P.2d 95 (1968).

n272. *Id.* at 303, 440 P.2d at 99.

n273. *Id.* at 300, 440 P.2d at 97.

n274. *Id.* at 301, 440 P.2d at 98.

n275. 1 Haw. App. 263, 618 P.2d 312 (1980).

n276. *Id.* at 266, 618 P.2d at 314.

n277. *Id.*

n278. *Id.* at 266-67, 618 P.2d at 314.

n279. 66 Haw. 1, 656 P.2d 745 (1982).

n280. *Id.* at 3-4, 656 P.2d at 747.

n281. *Id.* at 3, 656 P.2d at 747.

n282. *Id.*

n283. *Id.* at 12, 656 P.2d at 752.

n284. *Id.*

n285. *Id.* at 3, 656 P.2d at 747.

n286. HAW. REV. STAT. § 1-1 (1976).

n287. *Kalipi*, 66 Haw. at 4, 656 P.2d at 747.

n288. *Id.*

n289. 2 Haw. 87 (1858).

n290. *Kalipi*, 66 Haw. at 9-10, 656 P.2d at 750.

n291. *Id.* at 9, 656 P.2d at 750. The court thus relied on the principle embodied in the holding of *Hatton v. Piopio*, 6 Haw. 334, 336 (1882), that tenant fishing rights derive from occupancy, not ownership.

n292. *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 5, 656 P.2d 745, 748 (1982). The quoted section of HAW. CONST. art. XII, § 7, was added by the 1978 Constitutional Convention, and adopted by election on November 7, 1978.

n293. *Kalipi*, 6 Haw. at 6, 656 P.2d at 749.

n294. *Id.* at 6-7, 656 P.2d at 749.

n295. *Id.* at 7, 656 P.2d at 749.

n296. *Id.* (quoting Privy Council Minutes, July 13, 1850).

n297. *Id.* at 7-8, 656 P.2d at 749.

n298. *Id.* at 8 n.2, 656 P.2d at 749 n.2.

n299. *Id.*

n300. *Id.* at 8, 656 P.2d at 749.

n301. *Id.* at 9, 656 P.2d at 750. As the first gathering rights case, this decision deals not just with traditional land *rights*, but with specifically gatherable *items*. The latter are enumerated in section 7 of the Kuleana Act. The *Kalipi* court points out that, while water and access rights were *generally* stated in section 7, the language relating to gathering was *specific*. *Id.* at 5, 656 P.2d at 748.

n302. *Id.* at 9, 656 P.2d at 750.

n303. *Id.* at 8-9, 656 P.2d at 750.

n304. *Id.* The statement recalls the argument that horse grazing was too unreasonable, uncertain, and inconsistent with current laws to qualify as permissible custom. *Oni v. Meek*, 2 Haw. 87, 90 (1858).

n305. *Kalipi*, 66 Haw. at 9, 656 P.2d at 750.

n306. *Id.* at 8, 656 P.2d at 749.

n307. *Id.* at 8 n.2, 656 P.2d at 749 n.2.

n308. That statute reads:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage. . . .

HAW. REV. STAT. § 1-1 (1976).

n309. *Kalipi*, 66 Haw. at 10, 656 P.2d at 751. The language of Hawaii Revised Statute § 1-1 in fact specifically subordinates Anglo-American common law to Hawaiian usage. *See supra* note 308. No support can be found in the statute for the court's suggestion that the "spirit" of the English common law somehow prevails over Hawaiian usage. Such preeminence over the federal Constitution, for example, would be clearly repudiated. Yet the statute lists the Constitution and Hawaiian usage concurrently. That and the plain language of the statute would seem to give Hawaiian usage precedence over Anglo-American common law.

n310. *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 9, 656 P.2d 745, 750 (1982).

n311. *Id.* The Kuleana Act listed only five items that Hawaiians could gather under statutory protection. Hawaiians today report that on certain ahupua'a, the listed items have all disappeared. A native Hawaiian participant at a Hawaiian rights conference in 1983 instead listed approximately 60 new items now useful and gatherable on a single day on the island of Moloka'i. *See W. Ritte, Summary of Presentation by Walter Ritte to the Native Hawaiian Rights Conference, May 27-28, 1983* (on file at *Washington Law Review*).

n312. 2 Haw. 87 (1858).

n313. *Kalipi*, 66 Haw. at 11-12, 656 P.2d at 751-52.

n314. *Id.*

n315. *Id.* at 11 n.5, 656 P.2d at 751 n.5.

n316. *Id.* at 11-12, 656 P.2d at 751-52.

n317. HAW. CONST. art XII, § 7.

n318. *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 13, 9, 656 P.2d 745, 752 (1982). The court did not elaborate on the third ground for plaintiff's claim -- the reservations in the awards -- because it considered the point moot. *Id.* at 12-13, 656 P.2d at 752.

n319. On the last day for filing petitions, fewer than 13,490 claims had been received; of those, 4290 were turned down. Another 1000 probably belonged to chiefs and foreigners. Commoners received some 8200 awards. Kelly, *supra* note 1, at 65.

n320. *Hatton v. Piopio*, 6 Haw. 334, 335 (1882).

n321. *Id.* at 336.

n322. *Dowsett v. Maukeala*, 10 Haw. 166, 169 (1895).

n323. *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 11 n.5, 656 P.2d 745, 751 n.5 (1982).

n324. *Hatton*, 6 Haw. at 337-38.

n325. *Palama v. Sheehan*, 50 Haw. 298, 303, 440 P.2d 95, 99 (1968).

n326. *Damon v. Tsutsui*, 31 Haw. 678, 690-91 (1930).

n327. 66 Haw. 1, 656 P.2d 745 (1982).

n328. *Id.* at 4-5, 656 P.2d at 748.

n329. *Id.* at 11-12, 656 P.2d at 751-52.

n330. *Id.* at 5, 656 P.2d at 748.

n331. I am grateful to Professor Duncan Kennedy of Harvard University for alerting me to 19th century case law which deals with the taking issue as it relates to judicial, rather than legislative, action, and for suggesting that this case law might be fruitfully investigated and applied to the Hawaiian situation. Unfortunately, time did not permit me to carry out his suggestion before going to print. But see Chang, *Unravelling Robinson v. Ariyoshi*, *supra* note 260, on judicial "taking" in Hawai'i.

n332. HAW. CONST. art. XII, § 7.

n333. *Id.*

n334. *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 4, 656 P.2d 745, 747 (1982).