THE EMPERICAL WRITES BACK: RE-EXAMINING HAWAIIAN DISPOSSESSION

RESULTING FROM THE MĀHELE OF 1848

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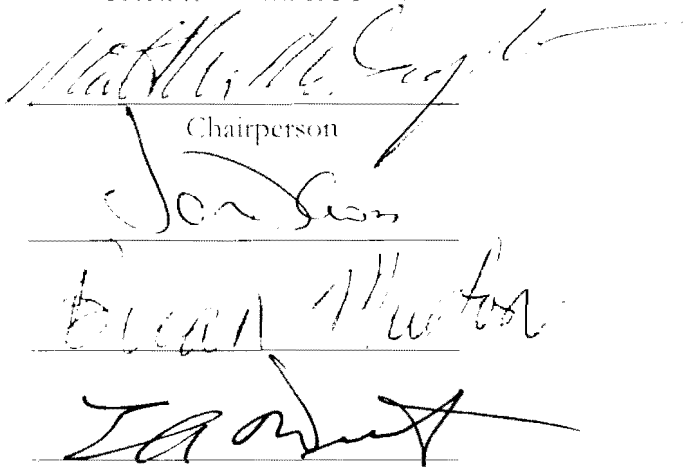

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"Wisdom sits in places" (Keith Basso)

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Aloha ʻĀina

ABSTRACT

This research examines the transition of land tenure in Hawai‘i to a system of private property. Known as the Māhele, this transition was believed to have been the cause of dispossession of Hawaiians from land. This thesis questions presumptions identifying the Māhele as a sufficient condition for dispossession. Historical approach, interpretation, authority and evidence types are examined while questioning and contributing to such debates. The Māhele process is re-examined and a nuanced description of the process was provided. This resulted in the identification of previously un-examined set of data: the fee-simple sale of Government Land. Analysis of these sales revealed an alternate explanation for dispossession in Hawai‘i: the loss of governance. Ultimately this is a story of dispossession, how it has been understood, misunderstood, and re-understood in Hawai‘i.

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Chapter 1. Introduction

> A, B, C, D or all of the above. Stand-off with the police. Guy gets shot in the chest. Runs back into his burning house, inhaling smoke as he goes. Roof collapses. Air conditioning unit falls on his head. He dies. What killed him?
> -- Gil Grissom (*Crime Scene Investigators*)

This thesis examines the transition of land tenure in Hawai‘i from the feudal-like Hawaiian system of Kālai‘āina (system of land redistribution) to an allodial (fee-simple private property) land system. This transition is known as the Māhele (division) and it is the process through which a system of private property was established in Hawai‘i in the mid-19th century. The Māhele can also be described as an "event" occurring between January 27th, 1848 and March 7th, 1848 which resulted in a series of quitclaims (relinquishment of one's rights or claims) between Kauikeauoli, the highest ranking Konohiki and the remaining Konohiki (chief) class. This "event" has been identified as the first major step in the transition to private property in Hawai‘i involving the division (māhele) of rights in land.

In the broader literature, there is no disagreement on the results of land tenure reforms involving foreigners and indigenous people, "The consensus today among historians is that wherever these schemes were rigorously carried out they were disastrous for the indigenous people involved…Because of their results, these land tenure reforms are often viewed with considerable cynicism today as thinly veiled colonial land grabs" (Banner 2005, 274). Harris (2002) concurs, "The underlying intention of almost any native land policy in a settler colony was the dispossession, with as little expense and trouble as possible, of Native peoples of most of their lands" (14). The significance of land to indigenous

people is expressed by an indigenous scholar, "It is easy to understand why Indigenous people around the world lamented the loss of their land for it was a loss of part of themselves" (Cajete 2000, 94). In the colonial discourse, it is well established that institutions of private property are considered to dispossess.

The Hawai'i case has not differed. The introduction of a system of private property has since been used to explain why Hawaiians currently do not own land and are statistically at the bottom of the barrel when it comes to indicators of quality of life. Kame'eleihiwa (1992) identifies the Māhele as a better explanation for dispossession than the loss of sovereignty, "Recently, much attention has been focused on the 1893 overthrow of Queen Lili'uokalani and the demise of the Hawaiian Monarchy. But the real loss of sovereignty began with the 1848 Māhele, when the Mō'ī and Ali'i Nui lost ultimate control of the 'Āina" (15). With the importance of land to aboriginal people one can see why such a reframing has not been questioned.

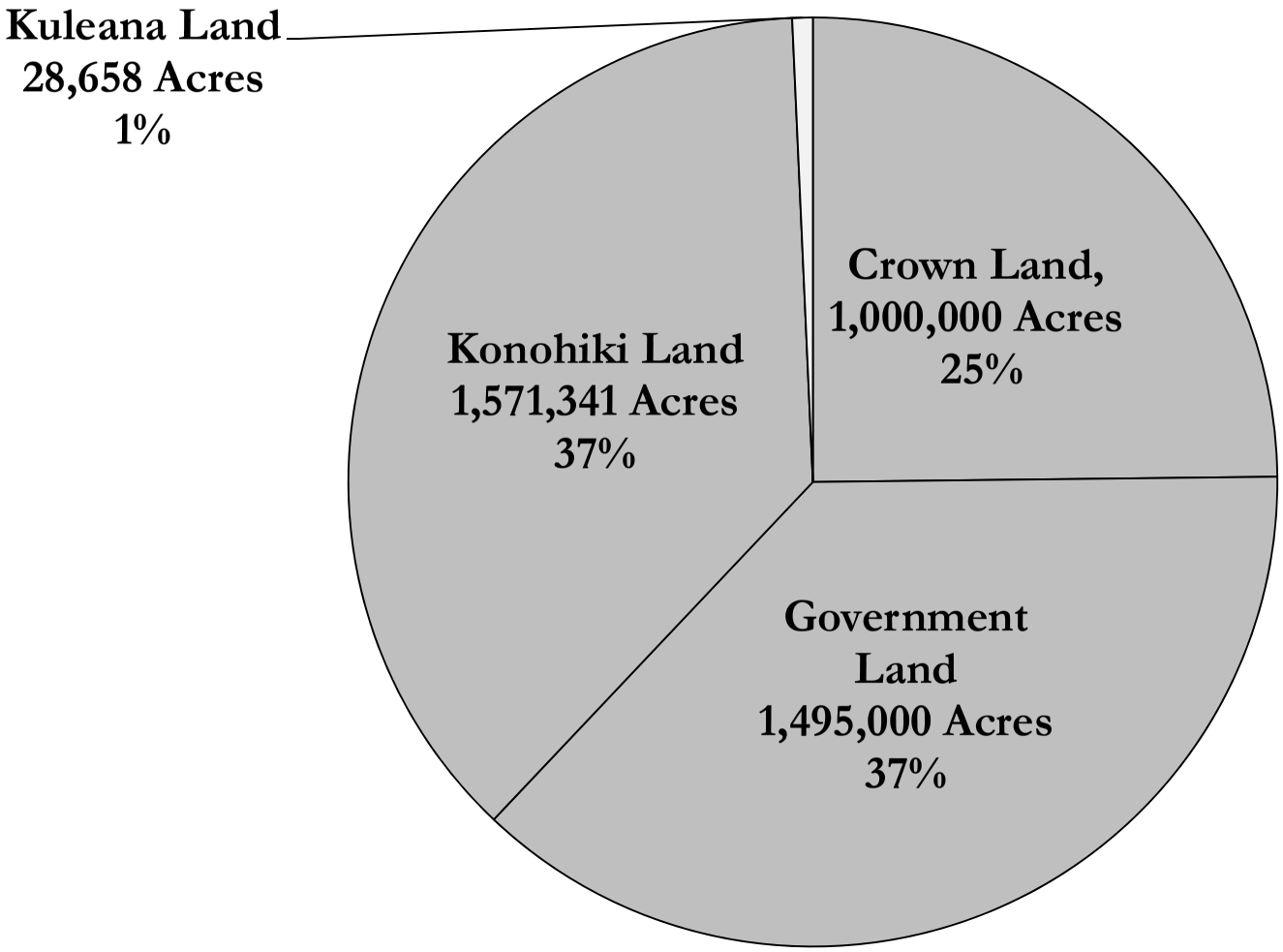
Research Question

This thesis argues that the establishment of private property through the Māhele was a necessary but not a sufficient condition for the dispossession of Hawaiians. Holt-Jensen (1999) defines sufficient conditions as mechanisms which are enough in "themselves to explain beyond doubt the reasons why the events happened" whereas necessary conditions are defined as "mechanisms that need to be in place in order that events may happen" (223). More specifically, this thesis questions the current understanding (discussed in chapter two) that the maka'āinana received only 28,658 acres of land, less than 1 percent of Hawai'i's

approximate 4.0 million acres through the Māhele process. Under that presumption, the maka'āinana's access to land were thought to be limited to the *Kuleana Act of 1850 (Kuleana Act),* resulting in summarizations of the Māhele as shown in Figure 1. Throughout this paper, *Kuleana Lands* are defined as those lands received in fee-simple by the maka'āinana through the *Kuleana Act*. This accounting lacks context: maka'āinana could acquire land in numerous ways as provided for by the Māhele process. This thesis focuses on the purchase of Government Lands by the maka'āinana. These lands are not accounted for in the *Kuleana* statistic because they are a different species of original title. The Land Commission was authorized by statute to handle *Kuleana Awards* while the Minister of the Interior was in charge of the fee-simple sale of Government Land. These sales were accounted for by different government agencies. Accounting for the sale and trends of Government Land reveals a better explanation for dispossession: the loss of governance resulting from the overthrow of the Hawaiian government in 1893.

The Māhele is the institution which created private property in Hawai'i. Prior accountings have focused on the amount of land awarded as *Kuleana Lands* and have not accounted for the other ways Hawaiians could acquire land. The fact that the maka'āinana acquired only 28,658 acres of *Kuleana Land* is not being disputed. Instead, what is under dispute is the understanding of the Māhele which limits land acquisition by the maka'āinana to just the *Kuleana Act*.

Figure 1. Thrum's (1895) "Results" of the 1848 Māhele



Overall Approach

Dispossession is defined as the "deprivation of, or eviction from, possession of property" (Black and Garner 1999, 485). Prior arguments for dispossession focused on the "deprivation of" the maka'āinana class from acquiring land via the Māhele. The dispossession argument is supported by the presumption that the maka'āinana received only 28,658 acres of *Kuleana Lands* which accounts for less than one percent of the total acreage of Hawai'i. This thesis measures dispossession in Hawai'i by examining its antithesis: the possession of land by the maka'āinana. New evidence, namely the sale of Government Land to the maka'āinana, is presented as a direct measure of the actual "on the ground" possession of land by the maka'āinana.

Another approach which is followed in this thesis is adherence to precision in definition. Precision of definition helps to bind arguments in meaningful ways by keeping terminology clear and concise. This is directly applicable in two ways. First, a distinction is made between categorizations of Hawai'i's territory being either colonized or non-colonized. Approaches which categorize Hawai'i's territory as being colonized will differ from those that do not share this assumption in terms of authority and assumed agency of the actors involved. Second, precision of definition is important in terms of describing the steps involved in the Māhele process which influences understandings of how the maka'āinana were able to acquire land.

Finally, historical approach and understanding the different ways of interpreting history are a crucial part of this analysis. For this thesis, interpretations of history are based within the context of the time period under examination rather than taking the form of

presentist or consequentialist histories whereby history is interpreted as a series of connected events and ones written by the "winners". Implementing a historical interpretation grounded in the context of the time is an attempt to avoid reliance on broad and general brushstrokes, instead of an articulation of the nuances and particularities of Hawai'i's own unique history. This thesis stresses the importance of understanding Hawai'i in its own particular context due to its unique history.

Roadmap

My personal experience in discussing this thesis with others was initially met with a lot of resistance, especially by students or scholars who would categorize Hawai'i's history within a colonial paradigm. As a result, it was decided that a nuanced argument was needed to acknowledge both the "theory" and the "real world" perceptions concerning dispossession. This thesis attempts to bridge this gap. As a result, the argument is much more nuanced and complex. It is not as simple as a presentation of "new" empirical evidence which counters "older" statistics. Instead, it attempts to provide an argument explaining what the current perception or understanding is, continues by offering a "correction" to the existing view by addressing the flaws and anomalies in the existing argument, and concludes by offering empirical evidence supporting the proposed "correction".

Chapter one places Hawai'i in the larger debate of the dispossession of aboriginal people. The thesis is identified, arguing that the establishment of private property through the Māhele was a necessary but not a sufficient condition for the dispossession of Hawaiians.

In broader terms this identifies a distinction between the loss of sovereignty (governance) and the loss of land. This paper argues that the loss of governance resulting from events surrounding the overthrow of 1893 is a better explanation for dispossession than the creation of the institution of private property. Chapter one frames the overall approach and outlines how the question of dispossession will be measured and answered.

Chapter two focuses on a review of the existing literature, describing previous approaches and understandings of dispossession. This chapter identifies that the majority of scholarship within the Māhele discourse shares the interpretation that the Māhele is the sufficient condition for dispossession. This is what is termed in the rest of this paper as the "misunderstanding". This chapter provides a "genealogy" of the misunderstanding which describes the foundations and assumptions of the arguments that the "misunderstanding" are based on.

Chapter three offers a "correction" to the "misunderstanding" that the Māhele was a sufficient condition for dispossession. This "correction" is the result of a reconciliation of anomalies which were not previously accounted for in the literature. Prior accounts of the Māhele approach it as a division of the land. Chapter three provides an explanation of the Māhele as a division of rights in land. Approaching the Māhele in this way provides a better understanding of the nuance of this division. From this approach, one can understand the Māhele in a broader context as a transition of existing Hawaiian rights, usages, and custom rather than as an imposition of American rights, usages, and custom. It is from such an understanding that Government Grants were identified as a viable alternative and means for the maka'āinana to acquire land.

Chapter four provides an analysis of the sale of Government Land. This data is offered in support of the "correction" articulated in the previous. Examining the sale of Government Land provides empirical evidence supporting the argument that the maka'āinana acquired land via the Māhele process. Analysis of the trends in the sale of Government Land is the basis for the argument that the overthrow of the Hawaiian Kingdom government was the sufficient condition for dispossession.

Chapter five discusses the implications and contributions of this thesis to the broader body of knowledge. One of the broader and more general contributions of this thesis is its contribution to debates between the loss of sovereignty (governance) and the loss of land (real-property). Additionally, this chapter discusses this research's contribution to debates of objectivity and subjectivity, nomothetic and idiographic approaches and the need for both in the production of knowledge, discussions of necessary versus sufficient causes, and approaches to historiography and their affect on interpretation.

The introductory quote is from the CBS television series *Crime Scene Investigators (CSI)* and highlights the complexity of arguments of causality. Contrary to Occam's Razor, this thesis provides a nuanced and layered argument against dispossession. In an attempt to simplify these nuances, this thesis begins by identifying the "misunderstanding" articulated within the existing discourse, provides a "correction", and offers evidence in support of the "correction".

One of the main approaches of this thesis is to show the complexity of historical interpretation. Various arguments are presented showing that numerous factors influence any argument for or against dispossession. This thesis ultimately concludes with a mono-

causal and arguably "simple" explanation. The framing of a mono-causal correction was deliberate because the original argument for dispossession was presented in the same manner. It seemed unfair to argue against a mono-causal argument by merely suggesting that the topic is "more complicated" than a mono-causal argument allows for. As such, an alternative mono-causal argument was offered. But the nuances presented should not be lost. A, B, C, D or all of the above. This thesis agrees that Hawaiians were dispossessed but the question that is re-examined is: how were Hawaiians dispossessed?

Chapter 2. Genealogy of the Misunderstanding

> No one disagrees that the privatization of lands proved to be disastrous for maka'āinana, yet the focus of every study, from Jon Chinen's 1958 work to Kame'eleihiwa in 1992, has been to try and establish the principal responsibility for its 'failure'. (Osorio 2002, 44)

This chapter introduces what is identified as the "misunderstanding" of the existing majority of scholarship: the identification of the Māhele as a sufficient condition for dispossession rather than just a necessary one. The quote above illustrates the pervasiveness of the misunderstanding as "no one disagrees" that the Māhele had disastrous results. This chapter begins with an examination of the Māhele literature and identifies the major arguments supporting dispossession. For each of these arguments, the underlying approaches and assumptions were examined. The second part of this chapter introduces a "correction" to the approaches and assumptions identified in the literature review.

The Māhele literature can be divided into four categories: 1) "Genealogy of Dispossession" 2) Empirical Assessments of the Māhele 3) Geo-Histories and 4) Causes of the Māhele. The first section focuses specifically on the literature supporting dispossession and identifies the argument and evidence used to support it. The final three sections reflect categorizations of the broader Māhele discourse. The second category focuses on research which examines pertinent primary source documentation describing the Māhele process. The *Geo-Histories* section focuses on particular geographical or historical studies of particular places (case-studies). The fourth section covers those works focused on identifying those factors which caused the Māhele to occur. Each of these categorizations reveals interesting trends in the literature which will be discussed in each particular section.

Genealogy of Dispossession

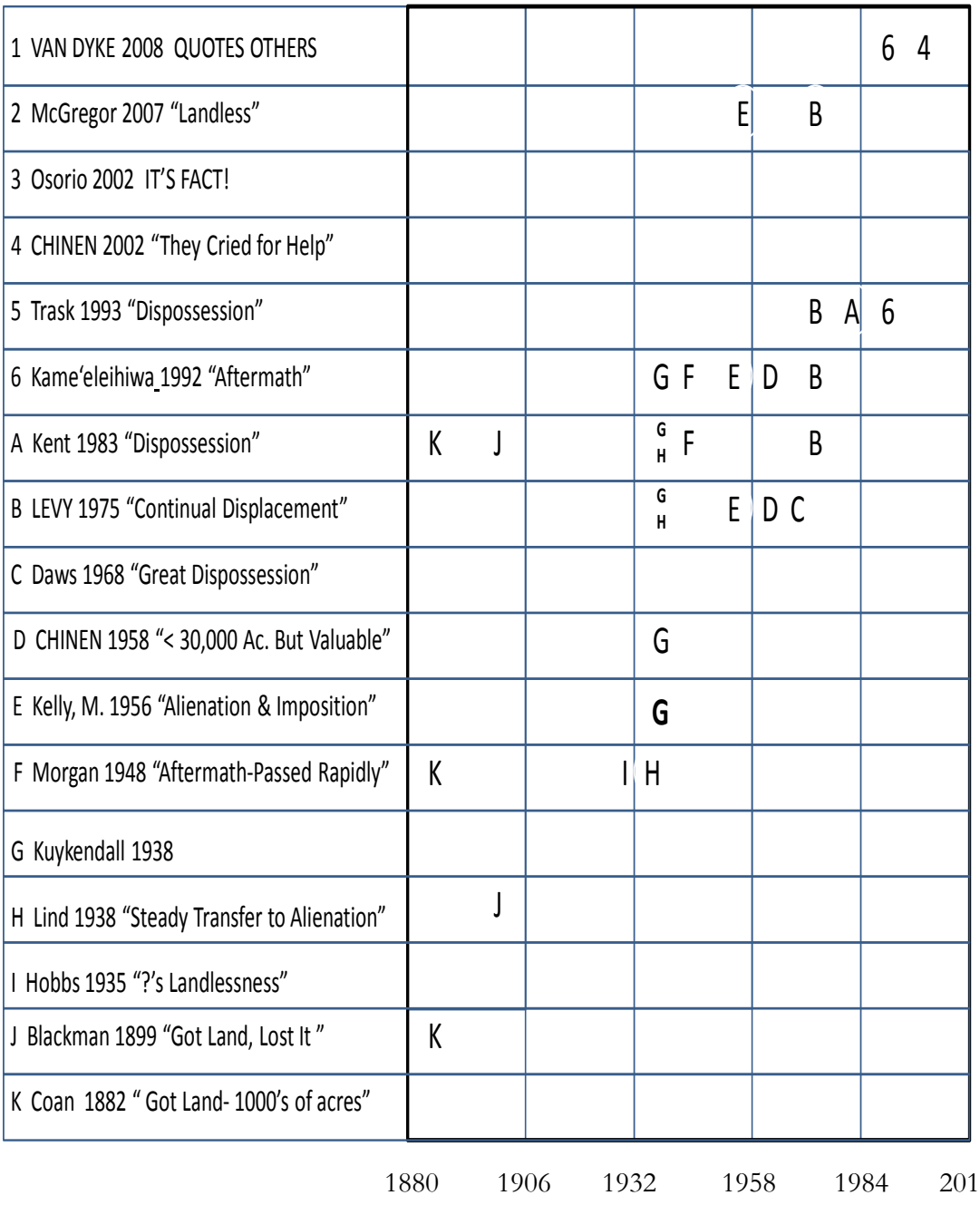
This research attempts to interpret historical events in their proper historical context, what Foucault (1984) terms "genealogy". Genealogy is a metaphor used to bridge three concepts: an academic literature review, arguments supporting historical interpretation based within the context of the time and reconciling the use of Hawaiian metaphors in regards to historical approach.

The "Genealogy of Dispossession" categorization focuses on the citation links within the works of six selected scholars (Van Dyke 2008, McGregor 2007, Osorio 2002, Chinen 2002, Trask 1993, and Kameʻeleihiwa 1992) from Hawaiʻi writing on the Māhele and Hawaiian history more generally. The position of each scholar on dispossession is traced through an intellectual "genealogy" of the works they directly cite. The theme of dispossession is traced for each, and continuing through each of their sources.

Figure 2 provides a visual representation of the "genealogy" of each of the six original historians. Reading from left to right one can determine who a particular author cites. Reading vertically, one can identify those works which are frequently cited. Levy is designated as "B" and is cited by McGregor, Trask, Kameʻeleihiwa, and Kent. The identified citations are limited to the specific chapters and sections in which each respective author is speaking specifically of "dispossession" and are not meant to be an exhaustive overview of each complete work. Instead it narrowly focuses on each work's arguments supporting dispossession in those chapters or sections designated as such. Once a link was identified, the subsequent work was then examined, in a similar manner, for its analysis on

Figure 2. Graphic of the Literature Review

Figure 2 is a graphical representation of the literature review. The six historians are numerically ordered by date of publication. The works cited by any of these six historians are identified alphabetically. Both the vertical and horizontal axes represent time and are chronologically organized from left to right and bottom to top. Here are a few examples: McGregor (2) cites Levy (B) and Kelley (E); Trask (5) cites Kame'eleihiwa (6), Kent (A), and Levy (B); Osorio (2) does not cite anyone.



dispossession and the process continued. These six historians were chosen as representative of the recent discourse from Hawai'i historians.

Two themes or types of dispossession were identified in the existing Māhele literature. The first suggests that maka'āinana were dispossessed through an "initial" dispossession by the new legal processes established by the Māhele. This argument is based on summary statistics of the 28,658 acres of *Kuleana Land* acquired by the maka'āinana via the *Kuleana Act*. This acreage comprises less than one percent of Hawai'i's total land area. To summarize, the law and legal processes created as a result of the Māhele are thought to have limited the maka'āinana's ability to acquire land, resulting in an "initial" dispossession through which the maka'āinana received less than 1 percent of the total acreage of the kingdom.

The second explanation suggests that maka'āinana were "eventually" dispossessed of land through its sale which was made possible by the creation of a system of private property. An eventual dispossession suggests that the process of dispossession happened over a longer period of time and that the Māhele was not necessarily a catastrophic event whereby Hawaiians did not acquire land. Arguments for an initial dispossession and an eventual dispossession are mutually exclusive. Either the maka'āinana got land via the Māhele or they did not; possession of land is a necessary precursor to dispossession. An eventual dispossession is proposed for those places where the maka'āinana received land via alternative processes to the *Kuleana Act*. Such examples add nuance to the dispossession argument but also provides evidence against an "initial" dispossession.

The Six Hawai‘i Historians

This section identifies, summarizes and provides a critique of the arguments and approaches implemented by the six Hawai‘i historians' analyses on dispossession. In addition to the two aforementioned arguments for dispossession, a third argument is introduced. Although there are two variations of how the Māhele dispossessed, it was not until Osorio (2002) that an alternative to the Māhele was postulated. This section will discuss this genealogy.

Van Dyke (2008) characterizes dispossession in Hawai‘i in a larger historical context, "The history of Hawai‘i is a history of lands moving from the Native Hawaiian People into the hands of others" (1). This statement is supported by referencing other's work, "the 'poor natives' never received anything near the one-third or one-fourth they were promised, and they were the clear losers in the division" (Van Dyke 2008, 45). Dispossession is further supported by reference to the *Kuleana Award* statistic, "Thus, out of the 1,523,000 acres given to the Government by Kauikeauoli for his people, only 28,658 acres, or less than one percent of Hawaii's land area, was awarded to the maka‘āinana" (2008, 48). For Van Dyke (2008) dispossession was about the loss of land resulting from an initial dispossession. Van Dyke (2008) relies on the prior establishment of dispossession citing Kame‘eleihiwa (1992), Thrum (1896), and the "Blount Report" and the maka‘āinana's receipt of, "less than 1 percent of Hawaii's land area" (2008, 48).

Van Dyke (2008) provides a significant contribution for its analysis of a specific dispossession that occurred: the seizure of the Crown Lands. This dispossession occurred after Hawaiian control over governance was loss following the overthrow of 1893. Van

Dyke (2008) is significant for its analysis of the chain of title for the Crown Lands as few others have attempted to deal with this specific dispossession in regards to land title. Land titles by their nature are not matters of opinion or rhetoric. Either one has evidence of the proper transfer of land title or one does not.

McGregor (2007) relies on statistical summations supporting an "initial" dispossession and relies on the work of Kelly (1956) and Levy (1975), which analyzes the *Kuleana Award* statistic by gender, "Although all of the 29,211 adult males in Hawai'i in 1850 were eligible to make land claims, only 29 percent received land; 71 percent remained landless" (1975, 38). Land Commission Awards consisting of approximately "8,000 yeoman holdings" (Levy 1975, 856) were divided by the 29,000 males, resulting in 29 percent of the male population receiving a *Kuleana award*. This analysis provides a nuanced description of the landlessness of Hawaiian males in 1850 based on an analysis of *Kuleana Lands*.

McGregor cites Kelly (1956) and Levy (1975). Kelly (1956) references Kuykendall's reference to the *Kuleana award* statistic while emphasizing the importance of agriculture and the working class maka'āinana. Kelly (1956) emphasizes class and class struggle, "Without their farms, commoners were deprived of the intimate relationship with the land which was a fundamental principle of Hawaiian civilization" (1956, 141-142). This is evident in the language used suggesting the "alienation" and "exploitation" of the maka'āinana class as evidenced through their apparent dispossession of land. These works seem to be influenced by issues of class struggle and inequality. This class difference is exacerbated by the "elites" (Konohiki), seeming to have benefited from the process of land redistribution while, "in the interest of the establishment of a free enterprise system the land of the Hawaiian people was alienated and their ancient cultural ties severed" (1956, 142).

Levy (1975) also alludes to perceived class inequalities, "Moreover, the government's commitment to selling its remaining land put westerners, with their access to capital, in a position to take Hawaiian land through the legal procedures they had established. Western Imperialism had been accomplished without the usual bothersome wars and costly colonial administration" (1975, 857). For Levy, the emphasis is on the sale of real property and the gradual loss of land facilitated by the introduction of capitalism. Levy comments on foreigner's perceived advantage to buy land but does not provide evidence to support such an analysis beyond the *Kuleana Award* statistic.

There is a critical distinction to be made here between the Māhele providing the opportunity for foreigners to buy land and foreigners actually acting upon that opportunity immediately following the Māhele. To support an argument for an initial dispossession, one would expect land acquisition immediately following the Māhele to be dominated by foreigners.

For Osorio (2002), the "fact" of dispossession is established, thereby no citations or other evidence are offered in support. Instead, Osorio (2002) offers a departure from the identification of the Māhele as the sufficient condition and instead identifies the institution of "law" as the sufficient condition for dispossession. Arguing for the Euro-American imposition of law, Osorio (2002) suggests that the Māhele was not a "failure" at all as it was designed by foreigners to accomplish exactly what it had done: the dispossession of Hawaiians from their land.

Osorio (2002) adds a subtle nuance to Kameʻeleihiwa's (1992) argument but is not necessarily a complete departure. Kameʻeleihiwa (1992) is specific in its reference to a

particular set of laws surrounding the creation of private property. Osorio (2002) makes a broader and more general appeal to law. This thesis agrees with Osorio's framing of dispossession in the broader context of laws and legal structure but differs with its interpretation of Hawaiian Kingdom law as a "western" institution. Osorio (2002) is illustrative of an approach which operates within either/or binaries of interpretation. More specifically it illustrates the colonial binary of assimilation/resistance where there are but two possible outcomes. It is an example of the types of "simple stories" which are told when discussing the interactions between foreigners and aboriginal people.

Whether it is private property (Kameʻeleihiwa 1992) or law (Osorio 2002), those following the colonial paradigm assume that such "western" institutions were necessarily a foreign imposition and a measure of assimilation. Other works shared this assumption (Levy 1975, Trask 1993) but Stauffer (2004) is one of the most vocal, "The kingdom's government was often American-dominated if not American-run. The emotionally charged changing of the flag on January 17, 1893, it can be argued, was simply the acknowledgement of an already accomplished fact" (2004, 73). This assumption will be questioned in later chapters, but it is reflective of the dominance of the paradigm and is reflective of the approaches taken.

In 2002, Chinen jumped into the historical mix. Chinen is a former judge and his previous works (1958) and (1961) had been focused on more legal and descriptive approaches of the Māhele. These prior works are amongst the main authorities on the Māhele for their legal description. Chinen (2002) concludes the Māhele was a major dispossessing factor, "The hoaʻāina pleaded and cried for help. But there was no relief" (144). Chinen supports the argument citing petitions written by the makaʻāinana of Puna,

Hawai'i and Lāhaina, Maui, asking for help in the land acquisition process. The book's title, "*They Cried for Help*", reflects Chinen's argument that the Māhele was unfavorable to the maka'āinana.

Chinen's citation of petitions is a good measure of the "native mind" but not necessarily the best measure of dispossession. Petitions reflect the existence of a particular problem but they do not necessarily reflect if and how it was dealt with. If the petition went unanswered, then it could be a good measure of dispossession. But if the grievances within the petition were answered then the petition does not measure dispossession. This is not a specific critique against petitions or any other form of literary evidence. Instead it is differentiating between good measures of dispossession with better measures. The best measure of dispossession would be a measure of the possession of land and this can be examined by looking at land deeds. Chapters three and four focus on such a measure and will provide evidence countering Chinen (2002) by providing evidence showing that the maka'āinana's cries for help were in fact answered.

Trask (1993) does not directly focus on the Māhele but does comment on its perceived negative effects, "This dispossession of the Hawaiians' birthright…allowed foreigners to buy land...By 1888, three-quarters of all arable land was controlled by haole" (1993, 8). Trask's comments are slightly more complicated as they introduce the "control" of land rather than strictly defining dispossession to foreigner's possession of land. The issue of control versus ownership of land is a significant one as it gets at the distinction between a loss of governance (control) and the loss of real property (ownership). Non-recognition of sovereignty through colonization preceded most, if not all, transitions to

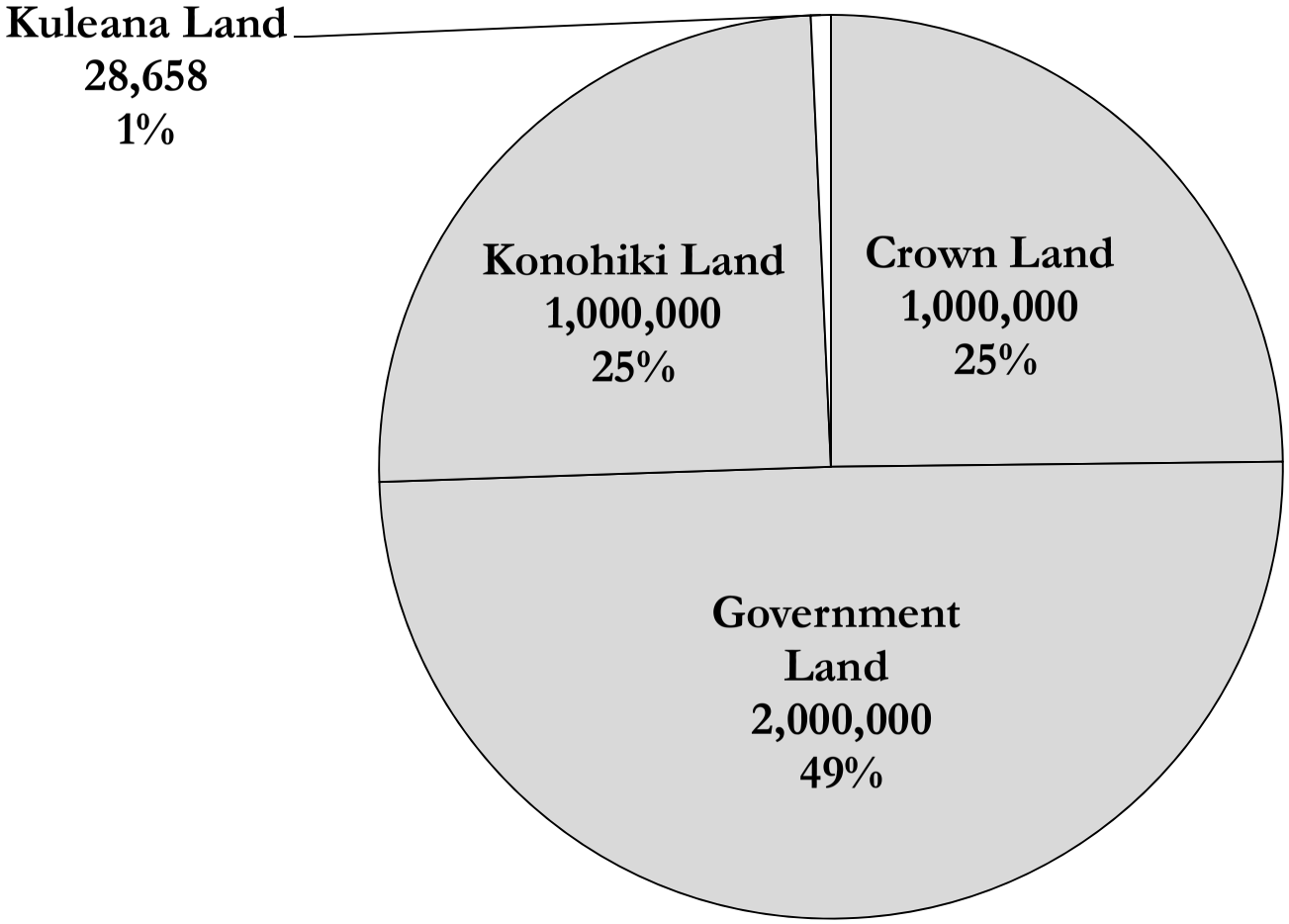
systems of private property by aboriginal people. Such was not the case in Hawai'i and this fact is not reconciled by any of these aforementioned works.

Kame'eleihiwa (1992) is cited by Trask as providing a "pathbreaking account of the Māhele from a Hawaiian point of view" (1993, 26) and is concerned with an initial dispossession, "Of the 14,195 kuleana claims, only 8,421 were actually awarded, which means that only 29 percent of eligible males received awards. These awards amounted to a total of 28,658 acres of Land, which is less than 1 percent of the total acreage of Hawai'i" (1993, 295). Kame'eleihiwa (1992) provides an excellent analysis of the chiefly genealogies and their influence on the Māhele. The problem is that it takes the approach of highlighting the loss of land rather than providing an explanation of the Māhele process. Kame'eleihiwa (1992) effectively shifted the argument from one of sovereignty to one of real property in the identification of the Māhele as the "real loss" of sovereignty. This shift of focus from the loss of governance to a loss of land is identified as the "misunderstanding".

Summarizing Existing Conclusions and Approaches

All are in agreement on the results of the Māhele. There are two variations; the first suggests there was an initial dispossession and the second accounts for variations where the commoners did in fact get land but instead eventually lost it. These variations will be specifically discussed in the "Geo-histories" section. In terms of approach, most of these scholars can be categorized as envisioning Hawai'i through a colonial/post-colonial paradigm whereby Hawai'i's history is imagined as reflective of other places who were victims of both territorial and cultural colonization. This severely distorts Hawaiian history.

Figure 3. Post-1855 Māhele "Results": After Konohiki Payment of Commutation



Inherent in the colonial paradigm are particular ways of interpreting history which rely on particular assumptions about knowledge and cultural transfer and the imposition of western ideals. An example of these assumptions are the either/or interpretations reflective of the colonial binaries of assimilation and resistance. Part of the "correction" that will be provided is the introduction of approaches allowing for interpretations outside of these two outcomes.

Causes of the Māhele

The next focus of this literature review addresses debates of the factors responsible for causing the Māhele. The literature in this category is the most abundant in terms of the number of works. Most scholars have come to accept existing interpretations of the results and consider dispossession as an established "fact". The scholarship has moved on from the issue of dispossession, no longer questioning the results, and instead focuses on the causes.

An excellent summary of these works is provided by Banner (2005). Banner identifies three themes, "In broad outline, there is a traditional explanation, a relatively recent variation on the traditional explanation, and a new explanation" (Banner 2005, 275). The traditional explanation is the notion of well intentioned white settlers pushing ideas of "progress" on a "selfless" King attempting to modernize his nation. For this Banner cites Cheever (1856), Hopkins (1869), Anderson (1870), Lyons (1903), Hobbs (1935), and Kuykendall (1938).

The second theme is a "recent variation" of the traditional explanation, "Hawaiians were still persuaded by whites that land tenure reform represented progress, but Hawaiian

acquiescence was given with something less than complete free will" (2005, 276). For this, Banner cites more recent works such as Daws (1968), Parker (1989), Osorio (2002), Lam (1985), and Kame'eleihiwa (1992). Banner is especially impressed with Kame'eleihiwa, "The most sophisticated such account comes from Lilikalā Kame'eleihiwa, who persuasively details how the first few decades of contact with whites shattered much of traditional Hawaiian religious belief and cultural practice" (2005, 276).

The third and "new" interpretation is that the King and Konohiki wanted to increase and maintain their individual wealth through tax revenues generated through land sales and taxes. For this explanation Banner references La Croix & Roumasset (1993). Banner (2005) can also be placed in this "new" interpretation as his conclusion is that the King and Konohiki were motivated to look out for their own individual wealth by securing their land interests via the establishment of private property.

These three categorizations can be summarized as follows: the "traditional explanation" is one of foreign imposition and assimilation, the "recent variation" is one of "resistance" by Hawaiians and the "new" explanation is a mixture of the previous two where the "elites" assimilate for their own self interests, while the commoners "resist" assimilation and don't benefit from the change. These three different explanations are consistent in approach. Again, these categorizations express the either/or binaries of assimilation and resistance and serve as further examples of the types of "simple stories" used to explain Hawaiian history. The existing scholarship has stopped questioning dispossession and instead the focus has been on building a corpus of evidence which supports the presumption of dispossession. The problem with such an approach is that evidence which does not support the presumption (anomalies) are often ignored or overlooked. The following

chapters focus on these anomalies and suggest that there is enough evidence to call the presumption of dispossession into question.

Descriptive & Empirical Assessments of the Māhele

There are few descriptive accountings of the Māhele process. Stauffer (2004) describes the difficulty of synthesizing the "perhaps five hundred thousand to a million" land tenure documents and the "lack of any kind of electronic filing or searching mechanisms for this massive amount of material" as reasons why more in-depth studies have not been completed (6). Reliance on purely legal and descriptive analyses is placed on a handful of scholars (Chinen 1958 & 1961, Cannelora 1974), while others offer descriptive and historical accounts (Kuykendall 1938, Linnekin 1987, Kameʻeleihiwa 1992, Stauffer 2004).

The word māhele means to divide. In most accountings, the Māhele is explained as a division of land. Agard (1984) is one of the few to offer a description of the Māhele as a division of rights in land. Agard (1984) articulates a more nuanced descriptive understanding of the Māhele process from which he postulates his argument. For Agard, "The short four and a half years under the Kuleana Act to make a claim before the act was dissolved in 1855 only meant a suspension in the process till some other method was developed"(1984, 115). It approaches the Māhele as a division of rights in land and presents an argument which suggests that the makaʻāinana's rights did not cease with the *Kuleana Act.* This is a significant interpretive difference with other scholarship. Although the details of Agard's argument could be improved, it is one of the few, if not only, to explain the Māhele process as a

division of rights. The significance of this will be discussed in the next chapter which provides a detailed interpretation of the division of rights in land known as the Māhele.

Another valuable and not often cited resource for its empirical analysis is Horwitz (1969). This study was cited by Levy (1975) and Van Dyke (2008). It is easily missed as it is but one footnote in Levy (1975). Horwitz (1969) provides an analysis of the sales of Government Land between 1846 and 1893 and provides a valuable contribution in its Appendix 1, Tables 24-37. Table 24, "Sales of Public Land in Hawaii 1846-1893" summarizes the acreage, total number of sales, and mean price per acre by year for Government Lands. These tables provide summary statistics for the same set of data under examination for this research in chapter four. One limitation of *Table 24* for interpretations on dispossession is that it lacks an identification of "who" was purchasing the land. This missing gap is filled in chapter four.

Since the publication of Stauffer (2004) the availability of electronic databases increased with materials from the Māhele corpus including the work of Lloyd Soehren and Victoria Creed. Unfortunately these authors have not had any derivative works published. Victoria Creed is associated with "Waihona", www.waihona.com, which is a private for-profit entity with much of the Māhele data available for purchase. Soehren's work is done as a "hobby" in his retirement as an archaeologist and is available free of charge on "Ulukau", www.uluakau.org. It is truly amazing the amount of work these individuals have been able to accomplish in their individual lifetimes.

Very late in the research process (September 2009), it was discovered through personal communication with Lloyd Soehren that he had in fact written an approximate

fourteen-page unpublished manuscript describing the sales of Government Land through 1893. The data for Soehren's article is based on similar data contained in the electronic databases that he provides for "Ulukau". As of September 2009, the manuscript remained unpublished by any Hawai'i journals but it would be an excellent resource for those interested in cross-referencing the findings of this work, Horwitz (1969) or Thrum (1895). Ironically, both Soehren and this work shared a quote of C.J. Lyons and had similar interpretations.

Linnekin (1987) was one of the first to attempt any kind of extensive empirical analyses of primary source Māhele documents. A computer database was created from a sample of the Māhele data and used for analysis. This sample was taken from the more than 12,000 Land Commission Awards. The fact that Linnekin examined only a sample of this data is reflective of the difficulty of such a task,

> Yet the precise effects of the land division on local politics, land tenure, and social organization are poorly understood, in part because of the nature of the materials. The primary documentary evidence for the Māhele spans several volumes…The volume of these records, their fragmentary quality, and their poor internal organization are daunting...Moreover, the order of claims in these volumes is not numerical, but is roughly chronological by the date of the filing or testimony. Discerning patterns in these materials- seeing the forest for the trees- is particularly difficult. (Linnekin 1987, 16-17)

Linnekin (1987) examined a survey of Land Commission Awards. Such an attempt is both impressive and revealing. It is impressive for its empirical examination of primary source Māhele documents. And it is revealing because of its focus on *Kuleana Awards*.

Understanding the Māhele process is a daunting task. It involves understanding Hawaiian Kingdom law, traditional land tenure, and traditional social structure which all need to be understood in order to see how "rights" and "interests" in land were later transitioned to private property. Most of this information is located in archival sources, often in the form of manuscripts and microfilm. These rare documents are very difficult to access. With all of the technological advancements in the last 160 years, few of these documents are available today in any format other than microfilm. This lends to the difficulty in "discerning patterns" in these documents. Surprisingly, there are very few empirical assessments. The few that do exist focus most of the attention on *Kuleana Awards*.

Geo-Histories

Three geo-histories or case studies trace land tenure changes in three different places in Hawai'i. The work of Andrade (2008), McGregor (2007) and Stauffer (2004) are examined to identify how specific case studies have contributed to the dispossession discourse. These geo-histories reveal interesting trends in approach and interpretation and have all been published in the last six years. This section provides a summation of these works. A "correction" to the approaches and specific arguments presented in each geo-history will be provided in the section titled: *Offering a Correction: The Results of the Māhele.*

Kahana

Stauffer (2004) offers a geo-history of Kahana ahupuaʻa in the district of Koʻolaupoko, Oʻahu. Stauffer straddles the interpretations of Kameʻeleihiwa (1992) and Osorio (2002). Kameʻeleihiwa (1992) attributed the "real loss of sovereignty" to the Māhele and shifted the focus off of the overthrow of 1893. Stauffer (2004) concurs with this identifying the overthrow as nothing more than the "acknowledgement of an already accomplished fact" (73). Stauffer expounds on the perceived assimilation by Hawaiians of American values, citing a court case in which "the Hawaiʻi Supreme Court decided with the U.S. tradition, which is, after all, how the Hawaiians saw all this" (111). There is an implied causality expressed in Stauffer's analysis; what was in the imagination of the American-mind became the reality in Hawaiʻi.

Stauffer (2004) working from Osorio's (2002) identification of "law" as the sufficient condition for dispossession identifies a specific law, the Mortgage Act of 1874 as the new sufficient condition for dispossession. Stauffer (2004) argues "that the people [of Kahana] were not naïve victims, as is popularly assumed. They quickly learned the ropes of the Western legal system and tenaciously used legal maneuvers to hold on to their lands. They resisted strongly in many innovative ways" (2). Stauffer (2004) offers a slight revision to approaches which identify the Māhele as the event which caused dispossession, "So it is correct to say that technically the māhele did not lose a single acre to aliens. Rather, it produced a set of circumstances that predisposed the almost complete taking of indigenous land…None of these losses [in Kahana] would have been possible without the Great Māhele" (76).

Stauffer (2004) identifies the Māhele as a set of circumstances opening the door to the eventual dispossession of Hawaiians of land rather than as a circumstance causing an immediate dispossession of land. But Stauffer's interpretation departs from Kameʻeleihiwa's and instead relies on Osorio's identification of the "law" as the sufficient condition. Stauffer's interpretation is complicated by evidence on the ground showing that the people of Kahana were in possession of land. Instead of using this to question dispossession, Stauffer presents the nuance of an eventual dispossession. The underlying assumptions of Osorio and Stauffer's interpretations will be dealt with in chapter three.

Puna

McGregor (2007) contributes to the dispossession discourse by offering a case-study of the district of Puna, Hawaiʻi. Puna is "distinguished as the district on Hawaiʻi with the smallest amount of private land awards under the 1848 Māhele and Kuleana Act" (158). McGregor goes on to state that "almost the entire population of Puna did not apply or receive land" (2007, 160). McGregor argues that the limited awarding of *Kuleana lands* in Puna "illustrates the plight of Native Hawaiian kuaʻāina who lived outside from the mainstream of communication and transportation networks" (2007, 160). McGregor argues that Puna is illustrative of how the Māhele did not provide Hawaiians with land via the Māhele process, thus serving as an initial dispossession.

Unlike Hāʻena and Kahana, the people of Puna are argued to have never received land from the Māhele process based on the number of *Kuleana Lands* awarded in Puna. The limitation of McGregor (2007) is its emphasis on *Kuleana Lands*. Petitions and other textual

evidence reflecting the "native mind" are used to supplement the argument for dispossession. Such evidence shares the same aforementioned problem with Chinen (2002): petitions may be a potentially good measure of dispossession but better measures exist. Petitions reflect a potential grievance but they do not measure how the grievance was handled.

Hāʻena

Andrade (2008) provides a detailed study of the evolution of property in Hāʻena ahupuaʻa in the district of Haleleʻa, Kauaʻi. Hāʻena, relative to other ahupuaʻa, had numerous Land Commission Awards. In January 1875, the makaʻāinana of Hāʻena purchased the remaining land in the ahupuaʻa, through the formation of a "hui" (land partnership), from the konohiki of Hāʻena (2008, 99). Hāʻena is an example of an exception to the argument of an initial dispossession because the makaʻāinana ended up purchasing the ahupuaʻa directly from the konohiki. These types of purchases are not accounted for by the *Kuleana* statistic.

Andrade's approach to the Māhele is consistent with the consensus, "It would be a mistake to think that because the Mahele was framed almost entirely in Hawaiian words, the theory underlying it and its outcomes were the results of Native Hawaiian thinking. The Mahele was largely instigated and carried out by haole (foreigners); the way kuleana and ahupuaʻa were granted in the Mahele did not reflect the traditional relationships and interests of the aliʻi and the makaʻāinanana. And although this chapter has been about what took place over a century and a half ago, the process of alienating Hawaiians from the land continues" (101).

Inherent in such a view is the articulation of a static view of culture whereby any non-traditional solutions are necessarily interpreted as foreign impositions (assimilation) rather than the expression of a Hawaiian adaptation. This is expressed in Andrade's cautioning that "it would be a mistake" to think the Māhele was an expression of native ideals even though it was "framed almost entirely in Hawaiian words". Such an accounting resists any change in the traditional structures and categorizes any such change as assimilation. The only other alternative would have been "resistance" to change. Again these are the types of "simple stories" that are often told to explain Hawai'i's history.

Offering a Correction to Previous Approaches

In regards to studies focused on measuring dispossession, Harris (2004) provides a critique of colonial/post-colonial approaches whereby "culture is treated as a primary locus of colonial power" (2004, 165). It discusses historical approaches which tend to foreground European colonial thought and culture which "as many have pointed out...tends to be Eurocentric" (2004, 166). Harris argues that measurements of "culture" may not be the best measures of dispossession and argues for a distinction between approaches intended to measure dispossession rather than "the workings of the imperial mind" (2004, 166). Harris concludes, "To proceed the other way around is to impose a form of intellectual imperialism on the study of colonialism, a tendency to which the postcolonial literature inclines" (2004, 167). This "intellectual imperialism" results in Eurocentric and deterministic histories, even those attempting to "write back" (Aschcroft 2002) by emphasizing the "native mind".

In a discussion on nationalism, Chatterjee (1993) offers an oft cited critique of modernist's views, in this case Anderson (1991), of the nation-state and the privileging of European imaginations and the "imperial mind":

> I have one central objection to Anderson's argument. If nationalisms in the rest of the world have to choose their imagined community from certain "modular" forms already made available to them by Europe and the Americas, what do they have left to imagine? History, it would seem, has decreed that we in the postcolonial world shall only be perpetual consumers of modernity. Europe and the Americas, the only true subjects of history, have thought out on our behalf not only the script of colonial enlightenment and exploitation, but also that of our anticolonial resistance and postcolonial misery. Even our imaginations must remain forever colonized.
> (Chatterjee 1993, 5)

Chatterjee alludes to the dominance of modern approaches which foreground European colonial thought. Chatterjee's allusion to the indigenous as having nothing "left to imagine" is reflective of the determinism and Euro-centric tendencies alluded to by Harris (2004) in colonial/postcolonial and modern/postmodern studies.

White (1991) seeks an alternative place, a "middle ground" in interpreting the interactions between Indians of the mid-north United States and foreigners. This approach differs from Anderson (2004) in allowing for identities that are not necessarily derivative from Europe and the rise of the modern nation-state. He eloquently argues against simple stories of assimilation and resistance in his comparative metaphor of "rock" and "sea".

> The story of Indian-white relations has not usually produced complex stories. Indians are the rock, European peoples are the sea, and history seems a constant storm. There have been but two outcomes: The sea wears down and dissolves the rock; or the sea erodes the rock but cannot finally absorb its

> battered remnant, which endures. The first outcome produces stories of conquest and assimilation; the second produces stories of cultural persistence. The tellers of such stories do not lie. Some Indian groups did disappear; others did persist. But the tellers of such stories miss a larger process and a larger truth. The meeting of sea and continent, like the meeting of whites and Indians, creates as well as destroys…Something new could appear. (White 1991, ix)

This metaphor of Europeans as the "sea" and Indians being the "rock" and the existence of "but two outcomes" is illustrative of over simplicity in representation of the interaction between the "west" and the "other". White identifies the fallacy of there being "but two outcomes". A middle ground is created from approaches focusing on the particular details of the interactions between foreigners and indigenous people and by employing a historiography which interprets phenomenon in proper temporal context. While White's argument is being applied to a "colonial site", its broader value is in the potential alternatives that are created to the determinism expressed in the two outcomes of "conquest" and "resistance". White (1991) offers an alternative to the "simple stories" of assimilation and resistance.

Historiography: Genealogy vs. Consequential Histories

Stocking (1968) and Foucault (1984) express similar ideas, using different terminology, of what they consider to be "good" historical interpretation. These histories counter the linear historical interpretations often expressed in the colonial/postcolonial literature. This research attempts to interpret historical events in their proper historical context. Much of the critique offered in this work of existing histories on dispossession in

Hawai'i can be described by what Stocking and Foucault would consider to be less appropriate approaches to history. Good histories go beyond the mere search for "origins" as Foucault's use of the term "genealogy", opposes itself to the search for "origins" (1984). For Foucault, history is not characterized as a linear sequence of events towards progress. For Foucault "the origin always precedes the fall" and "the lofty origin is no more than 'a metaphysical extension which arises from the belief that things are most precious and essential at the moment of birth'" (1984, 79). Foucault juxtaposes his idea of "genealogy" and good historiography against what others describe as presentist, consequential or "Whig" histories (Stocking 1968, Fischer 1970). Approaches resulting in consequential histories are often employed within the framework of colonial/postcolonial studies. In arguments of dispossession it takes the form of looking to the "source" of the "fall". Critiques of these types of historical approaches lending to a Euro-centric determinism are derived from Harris (2004), Chatterjee (1993), White (1991) and Foucault (1984).

Offering a Correction: Precision of Definition

Winichakul's *Siam Mapped* and Benedict Anderson's *Imagined Communities* draw a distinction between places whose territory was not colonized and those whose was, "His [Winichakul's] account is instructive precisely because Siam was not colonized" (Anderson 2004, 171). This definition of "colonized" clearly emphasizes the colonization of territory, suggesting the absence of a colonial-state. In his analysis, Winichakul (1994) uses the term "indirect colonization" to show how Siam's elite had been influenced by the West, through a

"colonization of the mind" (Ngugi wa 1986) and culture thus making a distinction between the two forms of colonization.

This research is not focused on a critique of the "colonization of the mind" in Hawai'i. Beamer (2008) deals with such an analysis. Winichakul (1994) is used for the precision it provides in categorizations between colonization and non-colonization of territory. Due to the non-colonization of Siam's territory, Winichakul (1994) argued how Siam's elite had been "colonized in the mind" leading to similar effects with other places whose territories had been colonized. Such is not the case for Hawai'i where the non-colonization of Hawai'i's territory has been ignored and not accounted for.

Unique Conditions: Hawai'i an Independent-State

Hawai'i's territory during the time of the Māhele was not colonized; it was an internationally recognized independent-state. On November 28, 1843 the governments of France and Great Britain jointly signed a treaty which explicitly recognized "the Sandwich Islands as an Independent State" (Anglo-French Proclamation of 1843). In this treaty both countries also agreed "never to take possession neither directly or under the title of protectorate or under any other form of any part of the territory of which they are comprised" (Anglo-French Proclamation of 1843). Originally published in 1894, Westlake (1982) makes reference to Hawai'i's recognized status in international law:

> The international society to which we belong, and of which what we know as international law is the body of rules, comprises - First, all European States...Secondly, all American States...Thirdly, a few Christian States in other parts of the

> world, as the Hawaiian Islands, Liberia and the Orange Free State….
> (Westlake 1982, 81)

In 1848, at the time of the Māhele, Hawaiian sovereignty was recognized and Hawaiians were directly in charge of governance, not foreigners. Hawai'i was not a dependent colony. Foreigners were influential and held positions in government which gave them direct input into the Māhele process and they were definitely vocal in their desires for private ownership of land, but their authority was derived from and subject to King Kamehameha III.

Banner (2005) is the first and only, in print (to my knowledge), to incorporate the fact of Hawai'i's non-colony status in an analysis of the Māhele. For Banner the significance of Hawai'i not being a colony was to determine why Hawaiians engaged in a change of land tenure "on their own", one that was not imposed by foreigners. Banner (2005) suggests, "The object of the Mahele was to ensure that in the event of annexation, Kamehameha III and other elite Hawaiians would not be dispossessed of their landholdings" (2005, 273). This is clearly supported by discussions in Privy Council.

In a discussion of the seizure of property in the event of imperial conquest Kent (1826) writes, "The general usage now is not to touch private property upon land, without making compensation" (88). In 2003, through personal communication, Dr. Keanu Sai identified a discussion in Privy Council which referenced James Kent's *Commentaries on American Law* and alluded to the fact that Kamehameha III and his advisors were aware of the law of nations. Kent (1826), amongst other authorities in international law, was an available reference to King Kamehameha III's government. Following is a discussion in Privy Council on July 29th, 1845:

> Should it become a question in the Royal mind how far your Majesty is authorized to go by the Law of Nations it is my duty to refer your Majesty to the following authorities.
>
> Elements of International Law by Henry Wheaton L.L.D. resident Minister of the United States, to the Court of Berlin, printed at London 1836.1-Vol. 275-6.
> The American Diplomatic Cody by Jonathan Elliott printed at Washington 1834. Vol 2. pages 400 to 410.
>
> The Principles of Nature applied to the conduct and affairs of Nations and Sovereigns by M.D. Sattel translated from the French 1820. 4 B. C.7.S.97 to 110.
>
> Commentaries on the Laws of England by Sir Wm Blackstone Knt. New York Ed. 1838-1 Vol. p 253-4
>
> Commentaries on American Law by James Kent.- New York 1826- 1 Vol. p 38.
>
> Commentaries on the Constitution of the United States by Joseph Story L.L.D. Dans Professor of Law in Harvard University Boston. printed 1833. Vol 3- p 418-9-1562
>
> The Spirit of Laws translated from the French of M. de Lecondat Baron de Montesqueu- London 1823- Vol 2. p. 248.
> (Privy Council, Volume 1)

Only those lands belonging to the government could be confiscated in the event of conquest by an invading country. This was undoubtedly on the mind of Kamehameha III as discussed on December 18th, 1847 in Privy Council, "if a Foreign Power should take the Islands what lands would they respect?" (Privy Council, Volume 2). Recognition as a nation-state in 1843 prevented the legal colonization of Hawai'i but Kamehameha III was well aware of the threat of imperialism. The acquisition of another state's territory through

conquest was not outlawed in international law until the Kellogg-Briand Pact in 1929. This topic was discussed in Privy Council on December 18th, 1847:

> The King remarked before this rule was passed if his lands were merely entered in a Book, the Government lands also in a Book and all private allodial titles in a Book, if a Foreign Power should take the Islands what lands would they respect. Would they take possession of his lands?
>
> Mr. Wyllie replied that after the recognition of His Majesty's Independence by the United States, Great Britain and France, and the engagement of the two latter powers near to take possession of any part of the Islands, he thought the danger adverted to by the King was exceedingly remote. Those Great Powers held the World in check, and they were not likely to permit that any other Powers should take a possession of the Islands which they bound themselves not to take. So long as the King, as hitherto, governed his Kingdom justly and with due regard to the rights of all Foreigners and to the laws of Nations, no Nation could have a plea to seize the Islands.
>
> Mr. Lee gave it as his opinion, that except in the case of resistance to, and conquest by, any foreign power the King's right to his private lands would be respected.
>
> The King said unless it were so, he would prefer having no lands whatever, but he asked during the French Revolution were not the King's lands confiscated?
>
> Mr. Wyllie replied they were confiscated, but that was by the King's own rebellious subjects, and it was to prevent such a risk here, that he regreted that Mr. Lee had not added to his rules one to the effect that in the event of Treason to, or rebellion against, the King, all lands of the King, held by Chiefs Landlords or whomsoever should ipso facto revert to the King.
>
> The King observed that he would prefer that his

> private lands should be registered not in a separate Book, but in the same Book as all other allodial Titles, and that the only separate Book, should be that of the Government lands. (Privy Council, Volume 2)

It is clear that Kamehameha III wanted to ensure that his lands were to be considered private rather than government property. But the creation of private property would secure all lands considered private property not just the King's land. Banner (2005) does not substantiate the statement that, "The Mahele did not provide much land to Hawaiian commoners" (307) and instead concludes that "it was not supposed to" (307).

Banner (2005) describes the Māhele as "a story in which indigenous elites anticipated the land tenure changes that were coming and figured out how to position themselves for those changes" (308). He continues, "The Mahele was a means by which the Hawaiian elite hoped to preserve its elite-ness under colonial rule, by holding on to its land" (2005, 307). This statement is complicated as it expresses a half-truth. While it is true that the so-called elites would not be "dispossessed of their landholdings", neither would any other private property be lost to a military invasion. Banner relies on the presumption that the maka'āinana were not in possession of land in order to substantiate his conclusion that the Māhele exclusively benefited the "elites" (King and chiefs). Banner's suggestion that the Māhele was designed to preserve only the King's private property is imprecise.

Precision of definition and categorization is important for Hawai'i considering the non-colonization of Hawai'i's territory. Recognition as a nation-state did not make Hawai'i immune from imperialism as evidenced by Kamehameha III's concern with the potential for imperial conquest. But recognition of Hawai'i's territory does signal that the relationship

between Hawai‘i and other colonial powers at that time was very different from those colonies who were not afforded recognition.

Osorio's concern regarding approaches which focus on Hawai‘i's recognition as a state, should be addressed. I am not arguing that Hawaiians should "claim a kind of immunity from colonialism" (Osorio 2003, 230) because of its recognition as a nation-state. Instead, I contend that the particularities of Hawaiian history should be properly explored, contextualized, and not be pre-judged. These kinds of pre-judgments lead to a kind of colonial determinism which allows for the acceptance of less-rigorous arguments to be accepted as truth.

Offering a Correction: The Results of the Māhele

This section offers a correction to the perceived results of the Māhele. A nuanced understanding of the Māhele process reveals the many different ways for a maka‘āinana to acquire land. This includes the purchase of land from the Konohiki (such as Hā‘ena) or the purchase of Government Land (such as Puna). This section offers a critique of the geo-histories introduced earlier. The overall purchase of Government Land is covered in detail in chapter four.

Sale of Konohiki Land

The examples of Kahana and Hā‘ena reveal that the maka‘āinana could acquire land in various ways. One such mechanism was the purchase of Konohiki Lands, which would

not show up in government accountings of land sales, as they are private transactions not including the government.

Andrade (2008) focuses on representations of the "native mind" expressed by his sub-title: *Through the Eyes of the Ancestors.* This "writing back" or foregrounding of the thoughts and perceptions of natives is consistent with other post-colonial works attempting to de-center the "imperial mind". As a measure of dispossession, Harris critiques such approaches as they often fail to reconcile the connections between what is in one's mind and what actually happens on the ground and are thus better measures of potential. Andrade describes his approach, "In order to underscore how differently Hawaiians viewed these changes, this chapter contrasts and compares the terminology used by Euro-Americans to describe Hawaiian society to language aboriginal people used to describe themselves. These nuances of language demonstrate how differently, in many instances, the Native people perceived the changes that were wrought in their homeland. Another important contribution to understanding the changes that came about in later years is to examine the traditional structure of society as seen through Hawaiian eyes" (2008, 69-70).

This reveals an inconsistency in Andrade's approach and the use of language as a measure of the "native mind". Andrade was previously quoted as stating, "It would be a mistake to think that because the Mahele was framed almost entirely in Hawaiian words, the theory underlying it and its outcomes were the results of Native Hawaiian thinking" while also suggesting that it is possible to compare "the terminology used by Euro-Americans to describe Hawaiian society to language aboriginal people used to describe themselves." It seems that comparisons of language are valid when measuring the maka'āinana's "native mind" but not the King's "native mind". Again, there is a juxtaposition of class.

Andrade identifies the experience of those in Hāʻena as differing from the prevailing presumption of dispossession:

> In Hāʻena, the situation evolved in a slightly different way than happened elsewhere. Here, Native Hawaiians, by pooling their resources, were successful in acquiring ownership and most of the control over land considerably longer than in other areas. This contributed greatly toward their ability to exercise traditional customs and practices, at least until the 1960s. (97)

The makaʻāinana of Hāʻena formed a hui and purchased the entire ahupuaʻa and this possession was not interrupted until the 1960s. This directly counters arguments for an "initial" dispossession. Andrade deals with this anomaly by suggesting an "eventual" dispossession. This thesis is not disputing the fact of this eventual dispossession, but instead it is questioning the perceived cause. Andrade argues for an "eventual" dispossession occurring post-1960. Such a historiography identifies the Māhele as the "origin" of the disruption of the makaʻāinana's relationship with the land even though the makaʻāinana were able to "to exercise traditional customs and practices, at least until the 1960s."

Identifying the Māhele for this eventual dispossession is over simplified and it is the result of a historical approach searching for origins and blame rather than one describing phenomenon in their historical context. Hāʻena's story of dispossession is complicated by many factors including people moving due to a tidal wave, increased rates of property taxes and many other factors. Blaming the Māhele is convenient, but it lacks precision.

Kahana

Stauffer (2004) is another good example of the tension that exists when the empirical evidence does not match the dominant paradigm. Stauffer provides a detailed analysis of the history of land sales in Kahana and writes, "By looking in detail at what happened in the land division of Kahana on Oʻahu, however, we see a picture that challenges and supplants conventional wisdom" (2). Stauffer's empirical examination presented facts inconsistent with the dominant paradigm's notion of dispossession. Stauffer offers a reformulation, "So it is correct to say that technically the māhele did not lose a single acre to aliens. Rather, it produced a set of circumstances that predisposed the almost complete taking of indigenous land…None of these losses would have been possible without the Great Māhele" (76). Andrade (2008) shares this interpretation of an eventual dispossession.

The dissonance created between Stauffer's empirical evidence for Kahana and the historical approach employed is evident, "Hence, it is popular to say that the Great Māhele was responsible for the loss of native land. But how so? The facts, at first blush, appear to contradict the very idea of the Great Māhele as culprit" (2004, 73). Stauffer provides another example of the clash between theoretical imagining and facts on the ground and the dominant paradigm's influence to shape interpretation, even in the absence of direct evidence, "While none of the Kahana kuleana were taken because of tax or license liens, such government policies almost appear designed to dispossess the makaʻāinana". Such a statement reflects the need to link theory with practice. The use of law and other structures may provide for the opportunity to dispossess but potential does not always mirror reality. This is the danger of the determinism inherent in the historiography of the colonial paradigm. Such causal links are often assumed rather than proven.

Sale of Government Land

A review of the literature revealed that some of the early scholarship (Coan 1882, Blackman 1899) suggests that the maka'āinana were in possession of thousands of acres of land. On the other hand, recent scholarship (Kame'eleihiwa 1992, Trask 1993, Osorio 2002, McGregor 2007, Van Dyke2008) emphasize that the maka'āinana received very little land. These views are not necessarily contradictory if one understands that they emphasize different parts of the Māhele process and both are factually accurate in their own contexts. As chapter four will show, the maka'āinana were in possession of thousands of acres of Government Land while it is also true that they received very few *Kuleana Land*. The problem is that the current discourse is not precise enough in accounting for such "anomalies" in their analyses of dispossession.

As one of the major authorities on the Māhele, Kame'eleihiwa (1992) is as interesting for its omissions as it is for its actual citations (see Figure 2). Kame'eleihiwa (1992) provides a summary of previous historical work, "The 1848 Māhele was a complicated event. Several histories have been written about it from various angles (i.e., histories by Hobbs, Kuykendall, Kelly, Chinen, Cannelora, and Levy)" (1992, 12). Examining Figure 2, one can determine that Lind (1938), Daws (1968), and Kent (1983) are not mentioned although each are cited by other scholars cited by Kame'eleihiwa.

The omissions by Kame'eleihiwa (1992) are of works cited within the Levy (1975) genealogy and of Kent (1983). These omissions are significant because the scholars that are omitted are linked to Coan (1882) which identifies the purchase by the maka'āinana of thousands of acres of land which counters notions that they did not get land. Kame'eleihiwa

directly cites Levy. Levy cites Daws (1968) who cites Chinen (1958) and Kelly (1956). Levy also cites Kuykendall (1938), Lind (1938) and Hobbs (1935). Kame'eleihiwa excludes Kent, Daws and Lind from her "intellectual genealogy" on dispossession. Either, Levy was directly referenced and Hobbs, Chinen, Kelly and Kuykendall were independently examined, or Daws (1968) and Lind (1938) were intentionally excluded from her analysis of dispossession.

Neither is Kent (1983) directly cited for his analysis on dispossession. Kent (1983) cites Levy (1975), Morgan (1948), Kuykendall (1938), Lind (1938), Blackman (1899) and Coan (1882) in his intellectual genealogy. Kent (1983) is directly cited by Trask (1983, 8), a contemporary of Kame'eleihiwa. More interesting is that Kame'eleihiwa (1992) shares citations with Kent's entire genealogy less Blackman (1899) and Coan (1882). Both Morgan (1948) who is cited by Kent (1983) and Kame'eleihiwa (1992) share the chapter title "Aftermath".

The omission of Coan (1882) has the largest significance because this work expresses evidence which counters arguments of dispossession. Coan writes:

> Lands were also put into market at nominal prices, so that every man might obtain a piece if he would. I have known thousands of acres sold for twenty-five cents, other thousands for twelve and a half cents, and still others for six and a quarter cents an acre. These lands were, of course, at considerable distances from towns and harbors. But even rich lands near Hilo and other ports sold at one, two, or three dollars per acre. Thus the people were encouraged to become land-owner.
> (Coan 1882, 124)

The lands to which Coan refers were under the jurisdiction of the Minister of Interior (Government Grants) and not the Land Commission (Land Commission Awards). This illustrates why an accurate descriptive understanding of the Māhele process is so crucial because without such an understanding one might ignore this evidence or assume that it was already accounted for in the *Kuleana Award* statistic. As the literature review reveals, there are few descriptive accountings of the Māhele. Chapter three provides a descriptive accounting of the Māhele process and is part of the "correction" offered. Coan's statement provides evidence which could potentially shift the entire argument of dispossession by acknowledging that the maka'āinana were not themselves dispossessed as a class via the Māhele process.

Another related point is Kame'eleihiwa's dismissal of Hobbs (1935). Hobbs (1935) is described as being, "a defense of missionary behavior, wherein Hawaiians are described as 'happy brown folk'" and the "redeeming feature of the work is her appendix B: 'Land Transactions of American Missionaries to Hawaii'" (Kame'eleihiwa 1992, 12). While I agree that Hobbs' representation of Hawaiians is problematic, neither is it useful to completely reject Hobbs' work less the appendix. Hobbs (1935) does provide some interpretive value, "Close scrutiny of the records of the Land Office in Honolulu will reveal, however, that a much larger area of land remained in the possession of Hawaiians and part-Hawaiians than is generally thought to have been the case" (1935, 61). Proceeding from Hobbs (1935) and Coan (1882) one can infer that the case for dispossession may be more complicated than it is represented in the existing discourse. Both of these sources are omitted by one of the major authorities on dispossession. What is lost in these omissions is evidence countering dispossession. The omission is not Kame'eleihiwa's alone, as subsequent scholars have also

failed to reconcile these conflicting ideas. This phenomenon plays out in the intellectual genealogies of these scholars. The lesson here may be the familiar, "Do not throw the baby out with the bathwater". While non-Hawaiian historians writing in the 20th century may in fact display racist tones, complete dismissal of their work is also problematic.

Puna

One of the more recent examples of the effect of not reconciling Hobbs (1935) and Coan (1882) can be found in McGregor's (2007) accounting of *Ka Māhele of Puna* (158-166). McGregor (2007) uses Puna as a case study for dispossession. It focuses on the approximate 32 acres of *Kuleana Land* awarded in Puna as evidence of dispossession while ignoring the 16,000 plus acres (see chapter four) of Government Land that were sold in Puna in the 1850s and 1860s. A more nuanced and contextual explanation would have accounted for the sale of government land because as McGregor notes, "the bulk of Puna lands were designated as public lands either to the monarchy, as Crown lands, or to the government of the Hawaiian Kingdom" (2007, 159).

McGregor starts by introducing Puna as a "district with 311,754 acres, [where] only nineteen awards of private land were granted" including only "three small parcels totaling 32.33 acres [which] were granted to commoners" (2007, 159). The 32.33 acres granted to the commoners is a sub-total of the 28,658 acre total of *Kuleana Lands (*Thrum 1896). While factually accurate, McGregor (2007) removes these historical facts from the larger context.

McGregor (2007) makes the effort to account for the 50,876 plus acres given via Land Commission Awards to the "ten chiefs who lived outside of Puna" (159). This

argument plays into notions of "class" difference and the fact that the Konohiki (the "elites") got land, while arguing that the maka'āinana (commoners) from Puna did not get land.

The Puna example continues with a characterization of the three awardees receiving Land Commission awards. Baranaba is described as being "one of the first converts to Christianity and the first to teach the Hawaiian language to Titus Coan" (159) and "given his position" probably had the means to acquire land. The second awardee's 13.64 acre plot was discussed and Haka, the third awardee, was described as being a possible "former house servant of Coan's" (159). The implication is that these awards went to those maka'āinana with missionary connections while the remaining kua'āina (Native Hawaiians who remained in the rural communities) went landless. Incidentally, Titus Coan is the author of the 1882 work which alludes to the purchase of government land by the maka'āinana.

McGregor then asks the question "why then, were only three of the inhabitants of Puna awarded land" (2007, 159)? This question is answered with supposition illustrating "the plight of Native Hawaiian kua'āina who lived outside of the mainstream of Hawai'i's economic and social development" (2007, 160). The maka'āinana are framed as victims of circumstance, "It is very probable that the kua'āina of Puna were not aware of the process or did not realize the significance of the law" (2007, 160). Another "possible" reason for so few Kuleana awards is that the maka'āinana "did not have a way to raise the cash needed" (160). The continued "volcanic activity" in Puna is thought to also have discouraged potential claimants. The final explanation is that the maka'āinana submitted their claims after the deadline.

McGregor (2007) does mention the "526 land grants and patents" which were issued in Puna between 1852 and 1915 but offers no analyses of this data. Also identified but not given proper consideration for its explanatory power are the "epidemic of fall 1848 that, according to Samuel Kamakau, claimed the lives of one-third of the population" (160), the smallpox epidemic of 1853, and the epidemic of colds in 1857. Although mentioning all of this death and population loss from disease, the author states, "Very definitely, in February 1848 there were substantially more than three Kanaka ʻōiwi who would have qualified as applicants for land" (2007, 160).

I would argue that over one-third of the population of Puna dying, two subsequent epidemics, volcanic activity covering parts of Puna with fresh lava, and the large number of government land purchases in Puna are better explanations for the low number of applications in Puna than supposing that the makaʻāinana lacked cash. McGregor (2007) argues that a lack of industry and "few wage-earning jobs in Puna" (160) explain the limited amount of land received. But this supposition does not explain how the makaʻāinana of Puna had cash to purchase Government Land as shown in chapter four.

McGregor's emphasis on textual measures of the "native mind" is further exemplified in the citation of an unpublished manuscript referencing a petition in the 1850s from the people of Puna expressing their desire to acquire land. This petition is presented as representative of the "native mind", evidence of dispossession and the plight of the makaʻāinana class. That unpublished manuscript was unavailable to this author. If it were a signed petition, it would be interesting to compare the names on the petitions to those awardees purchasing government land in Puna to see if any of those petitioners eventually bought land.

Chinen (2002) also refers to a petition from the maka'āinana of Puna, Hawai'i, "On May 16, 1851, Kaapa, a member of the House of Representatives presented a petition from the people of Puna, Hawai'i, 'praying that the right to make claims to land be again opened, and to award them without commutation fees.' The petition was referred to the Committee on Public lands" (82). Chinen concludes that "there was no relief for the hoa'āina" (82). No additional evidence is presented to support the claim that there was no relief and the argument seems to instead be supported by the limited amount of *Kuleana Land* received.

Osorio (2002) offers an analysis of the 1851 legislature in a section of his book titled: *1851 Election: Haole in the House of Representatives.* Osorio describes the representatives, "Of the twenty-four representatives in the House that year, seven were white" (68). He continues "but it seems that when the Hawaiian voters went to the polls in 1851, they voted for candidates, haole or kanaka, that knew the law" (73). According to Osorio, this had a significant effect, "As American law was grafted onto the Hawaiian political system, it provided for foreigners, and especially Americans, an 'āina of their own…the law provided not just the instrument for the dispossession of Natives, but continual evidence of the superiority of the West, a superiority that made that dispossession, in the minds of haole, inevitable" (73).

An article in the *Polynesian* dated June 18, 1851 offers evidence of the 1851 representatives providing relief for those without land:

> To the Makaainanas of the Hawaiian Islands :-
> We, the undersigned, Representatives of the People, feeling it our duty to render an account of the manner in which we have discharged the trust reposed in us, hereby submit to you a summary of those laws, passed during the last session of the Legislature, which we consider of most interest to the People at large.

One of the most important branches of our legislation, has been that relating to the rights of Piscary. We have procured the passing of an Act granting the fisheries, heretofore owned exclusively by Government, to the People. From this time henceforth, all men are entitle to fish on the Kilohee, the Luhee, and the Malolo grounds, and on all other grounds belonging to the government; and no portion of the fish that may be taken on any of those grounds, will hereafter belong to the Aupuni.

Another Act has been passed, relating to private fisheries, by which the rights of the People and the Konohikis, in these fisheries, are more distinctly defined, than in the old law. Its main provisions are, that no konohiki shall, under a penalty of One hundred Dollars, taboo more than one kind of fish not tabooed. It also provides that any person who has, heretofore purchased, or may hereafter purchase, any Government land, shall have no greater right to the fish in the sea belonging to said land, than any other person.

Secondly.-We have obtained for the People a right to take firewood, house timber, aho cord, thatch, and ki leaf, from the lands on which they live, without the consent of the konohikis, or their limas: Provided, however, that they shall take those articles for their private use only, and not for sale.

This is a great point gained for the People; and the King and Chiefs, in giving their assent to a measure of such importance to the Hawaiians, deserve our most profound gratitude.

Thirdly.- We have passed an Act for the appointment of agents, in every district where there are Government lands for sale, whose duty it shall be to sell lands to the Makaainanas residing in such districts, in lots of from one to fifty acres, at a minimum price of fifty cents per acre.

Hereafter, there can be but little doubt that each man, not already provided with sufficient land, will become possessed of a small farm. Save your money then and improve the opportunity, now afforded, of purchasing a homestead for yourselves and families. Those of you who have no kuleanas, or who have neglected to send in your claims to the Land Commissioners, must not fail to avail yourselves of this privilege…

[signed]

Z. Kaauwai,	L.S. Ua,
S.M. Kamakau,	G.M.Robertson,
M.S. Kalaihoa,	Ukeke,

S. Kaapa,	Francis Funk,
P. Barenaba,	A.W. Parsons,
D. Lokomaikai,	William L. Lee,
J.W. Kapehe,	J. Kekaulahao,
E. Kaahalama,	J. Richardson,
Moses Kauohai,	G. Rhodes,
Wahinemaikai,	T.C.B. Rooke,
J. Kalili,	Kahookui,
G.W. Lilikalani,	P.J. Gulick.

This notice was signed by all 24 of the representatives elected in 1851 and it directly expresses and articulates the sale of Government Land as a viable option for those "who have no kuleanas." Barenaba was the representative for Hilo, Hawai'i (Osorio 2002, 69). This is the same namesake for one of the three Land Commission Awards identified by McGregor receiving a *Kuleana Award* in Puna, Hawai'i. Barenaba was thus aware of the availability of the sale of Government Land to the maka'āinana. Another oft cited historian is Samuel Kamakau who is also a representative in the 1851 legislature. Kamakau is frequently quoted offering insights into the minds of the maka'āinana during the period. It seems that Kamakau is also aware of the availability of Government Lands to the maka'āinana. Chapter four includes an analysis of the overall sale of Government Land and specifically for the sales in Puna. It shows that the maka'āinana were major purchasers of land in Puna prior to 1893 and thus had their "cries for help" answered.

Halele'a, Kaua'i

While Hā'ena is a Konohiki land, Andrade (2008) briefly mentions the sale of government lands in Halele'a, the district in which Hā'ena resides,

> Although it did not occur in Hāʻena, the increasingly Western-oriented government acquired large portions of the ahupuaʻa lands in Hawaiʻi. In the aftermath of the Mahele and Kuleana Act, the government sold much of the land it had acquired through deeds call Royal Patent Grants. Although numbers of Hawaiians acquired lands in this way, haole (foreigners), having capital, were able to afford most of the larger parcels...However, the great majority of acreage, at least in Haleleʻa, went to haole (100).

This statement is accurate but not precise. Examination of the overall sale of Government Land in chapter four verifies that foreigners do in fact appear to account for the purchase of the "larger parcels" however analysis of the sale of Government Land in Haleleʻa is more complicated than Andrade alludes especially considering additional evidence isn't offered supporting the assertion that the "great majority" of acreage went to "haole".

The following ahupuaʻa were identified as belonging to the district of Haleleʻa from the *Māhele Book*: Lumahai, Waipa, Waioli, Waikoko, Wainiha, Hanalei, Kalihikai, Haena, and Waioli and are reproduced here without diacriticals consistent with the *Māhele Book*. This corresponds with the map provided by Andrade (2008, 28) less Kalihiwai which is listed in the *Māhele Book* as belonging to the district of Koʻolau (Māhele Book 1848, 22). Of these ahupuaʻa only Waiʻoli is listed as Government Land in the *Māhele Book*. Hanalei is Crown Land and the remaining ahupuaʻa are all Konohiki Land. This example will be returned to in chapter four where evidence of the sale of Government Land is presented.

Summary

This chapter examined what is described as the "Genealogy of the Misunderstanding". This thesis argues that the Māhele has been mistakenly identified as a

sufficient condition for dispossessing the maka'āinana of land. The predominant argument is one of an "initial" dispossession which is supported with basic summary statistics accounting for just *Kuleana Awards* in the Māhele process. Various forms of supporting evidence are cited offering insights into the "minds", desires and intentions of both the foreigners and maka'āinana. Such analyses linking such textual evidence beyond *Kuleana Awards* are not offered. Amongst other evidence, the few detailed empirical analyses that were identified (Stauffer 2004, Andrade 2008) refute the argument of an initial dispossession showing that the maka'āinana were possessed of land and were instead "eventually" dispossessed of their land through the mechanisms which the Māhele established. For these scholars, the Māhele is seen as laying the foundation for future dispossessions and the Māhele is thus seen as the "origin" of the fall.

Debates of historiography are central to the overall argument of dispossession in Hawai'i. Critiques of approaches employing "consequential histories" resulting in the identification of "origins" and "blame" were offered. It was also argued that these approaches are based on un-nuanced descriptions of the Māhele process.

This thesis argues that the Māhele was not the sufficient condition for dispossession as measured either by an initial or eventual dispossession. Instead it is hypothesized in the chapters that follow that besides severe depopulation, the loss of control over governance due to the overthrow of 1893 was the leading cause of dispossession in Hawai'i. The Māhele created the potential for dispossession but this potential was actualized only after Hawaiians lost control of their governance. The "haole" involved with implementing the Māhele had very different motivations than those "haole" involved in the overthrow. Generalizing foreigners of the 1850's and those of the 1890's as necessarily sharing the same "vision" is

problematic and simplistic. While agriculture and more specifically the sugar industry had a major influence on Hawaiian history, extending the reach, influence and dominance of this industry requires large leaps and generalizations which rely on the identification of an "origin" or "source" of blame.

The "genealogy" of the literature reviewed in this chapter revealed the dominance of a particular paradigm or way of seeing and interpreting Hawaiian history with roots to colonial frameworks and discourses. The dominance of the paradigm is exemplified by the acceptance of the results of the Māhele resulting in most works instead debating its causes. The effects of this are exemplified in the findings of those geo-histories whose results are inconsistent with the dominant paradigm and are thus made to fit within the paradigm rather than to provide a reformulation of the paradigm itself. This was further exemplified in approaches which assumed dispossession and contributed to the argument by introducing new forms of evidence emphasizing the "native mind" and it's accounting of dispossession. This has resulted in the lack of testing, verifying or falsifying the paradigm and is reminiscent of Thomas Kuhn's book *The Structure of Scientific Revolutions* and the argument of the subjectivity of the knowledge creation process, the dominance of "paradigms" and the role of "scientists" in *deciding* when to accept or reject new evidence.

Chapter 3. The Correction: From Rights to Title

> Means and remedies may be altered, but the rights themselves, if vested, cannot be constitutionally disturbed. This is one admitted doctrine of civilized jurisprudence. Another of its admitted doctrines, even in the exposition of new law is, that the old law must first be understood and the mischief intended to be cured by it, in order to apply the remedy. (Ricord 1846, 4)

This chapter offers a "correction" to existing descriptive accountings of the Māhele process. The problem with existing descriptions is the lack of definition of critical terminology. Descriptions which lack nuance, do not articulate the various mechanisms available for maka'āinana to acquire land. This thesis fills these gaps. Dr. Keanu Sai was instrumental in presenting an explanation of this structure to which further analysis has been added in this research. The Māhele has been imagined as a Hawaiian assimilation mimicking American (or Western) property law. As chapter two illustrates, there are very few descriptive accountings of the legal process.

The Evolution of Land Tenure

Pukui & Elbert (1986) defines the word māhele as a "division" or "to divide" (219). The Māhele of 1848 is usually described as a division of the land. Land was in fact divided and redistributed but this occurred as the result of a different division: a division of rights to land. In order to understand how rights in land were divided by the Māhele, one must first understand the nature of such rights as articulated by Kālai'āina (the traditional system of land redistribution). This is the source of rights in land which would eventually be divided

(māhele). In western legal language, custom or customary law is defined as "a practice that by its common adoption and long, unvarying habit has come to have the force of law" (Black and Garner 1999, 390). Examination of the details of the Māhele process reveals that the Māhele was a transition of Hawaiian custom rather than the imposition of a completely new system. To be clear, systems of private property are undoubtedly of western origin but the laws and customs which went into, formed, and comprised the system of private property in Hawai'i are of Hawaiian origin resulting in a hybrid form of private property unique to Hawai'i. The opening quote of the chapter by Ricord provides insights into how to approach such an undertaking, "the old law must first be understood…in order to apply the remedy".

Divisions of Society

Hawaiian historian Samuel Kamakau explains the division of Hawaiian society in traditional times, "After the time of Wākea and Papa, people were divided into chiefs, priests, commoners, and outcasts: ali'i, kāhuna, maka'āinana, and kauwā" (1991, 35). Since this time, Hawaiian social structure was very hierarchical consisting of nā Akua (the Gods) at the top of the social hierarchy, with the Ali'i Nui (high chief) and Ali'i (chiefs) below the Akua in this hierarchy. It was the Ali'i's responsibility to mediate the relationship between the Akua and maka'āinana. This hierarchy was reinforced through kapu (sacred protocols). Higher ranking chiefs had stricter kapu. Maka'āinana were noa (free of kapu). This structure of kapu was known as the 'aikapu (forbidden eating) which helped to regulate

society from the time of Papa and Wākea until its abolishment in 1819 by Kamehameha II (Kameʻeleihiwa 1992).

During the Māhele era, the term "Konohiki" was used to generally refer to any rank of chief (Aliʻi), a usage that is at odds with definitions used in prior times. Kamakau (1991) writes about the social hierarchy (kūlana) within the Aliʻi class, "In olden times, the kinds of aliʻi were classified according to their birth and the height at which each aliʻi stood, *ka nuʻu i kū ai*, that is, his status was clear" (39). Ten different ranks of Aliʻi are identified and the genealogical requirements for each are given, ranging from highest to lowest, Aliʻi Niʻaupiʻo to Kūkae Pōpolo (1991, 39). These ranks were governed by genealogical relationships. A "Konohiki" would have been considered but one of the lower ranks of Aliʻi during this time (1991, 39).

Each individual had a place (kūlana) in society and within their respective class. This manifested itself in terms of mana (varying forms of power). In the context of mana, it would be difficult to argue that a makaʻāinana was "equal" to an Aliʻi. Malo speaks to this in terms of dividing the lands during a Kālaiʻāina, "To the chiefs that were his near relations the king assigned districts; to others, he assigned kalana, okana, poko, ahupua'a, and ili. To the commoners were given such small sections of land" (Malo 1980, 192).

The rights of these different classes were not equal, nor were the rights between the various ranks of Aliʻi equal. Depending on the "height at which" one stood, one would get use of a proportionate amount of land. This traditional concept was also followed in the Māhele of 1848. Kameʻeleihiwa (1992) gives a thorough analysis of the varying amount of land received by the respective chiefs of the Māhele reflecting the mana of each.

The concept of mana helps to govern this relationship and class distinction. Mana governed one's class or place in the social structure and was regulated by genealogy, relationships, marriage and warfare. Kameʻeleihiwa refers to two paths to mana (1992). One path was through the war god Kū. Warfare and the subsequent acquisition of land/territory was one way for a chief to increase his mana through the path of Kū. Mana and control of land were often directly related. An increase in one resulted in an increase in the other. In describing the evolution of land and governance, Judge C.J. Allen states, "Land was the main property which gave authority. It was the only resource to support the retainers which were necessary to sustain the dignity of the King and his chiefs, and the titles of all the lands were held by the King, it was literally true that the Kingdom was his" (Rex v. Booth 1863).

The second path to mana was through Lono (God of Fertility and agriculture). In this case, a male konohiki could increase his mana by mating with a higher ranking female with more mana. Females were the "source" of mana and subsequently could lower their children's mana through relations with a lower ranking male. In this way, women held a higher status than the males (Kameʻeleihiwa 1992).

An individual Aliʻi could be considered to be occupying an "office" within the social hierarchy. A genealogical link to the Aliʻi class was a prerequisite for acceptance into the office. But the individual Aliʻi's character, judged through his pono behavior, determined one's reign in office. When an Aliʻi conducted himself in a manner unbecoming of an Aliʻi, the makaʻāinana often revolted. In doing so, they were revolting against the "office" of the Aliʻi. When the individual Aliʻi that was being revolted against was killed or removed, another Aliʻi took his position. I am not familiar with any moʻolelo in Hawaiian history in

which a makaʻāinana "raised himself" to the Aliʻi class to replace an Aliʻi that was overthrown. Vacancies were filled from within the Aliʻi class. This was the makaʻāinana's check and balance on the system.

In Hawaiʻi, the makaʻāinana did not revolt against the "system" or structure of governance but instead replaced un-pono leaders. Unlike France, Hawaiʻi did not experience numerous changes in the form of government due to internal revolt. Malo (1980) provides historical context, "It was the king's duty to seek the welfare of the common people, because they constituted the body politic. Many kings have been put to death by the people because of their oppression of the makaainana…It was for this reason that some of the ancient kings had a whole-some fear of the people. But the commoners were sure to be defeated when the king had right on his side" (195). When the makaʻāinana revolted, the intention was to replace the bad leader rather than to topple the system of governance. The consistency in form of government suggests that in matters of governance, the makaʻāinana followed their Aliʻi's leadership. It was the kuleana (responsibility) of the Aliʻi to be pono leaders. The makaʻāinana's role was to keep the Aliʻi accountable within this structure.

The stories of Māʻilikūkahi (Kamakau 1991), Umi-a-Liloa (Kamakau 1992), and those other chiefs responsible for creating the ahupuaʻa system around the 16th and 17th centuries are examples of Aliʻi taking on the kuleana of managing the relationship between makaʻāinana and ʻāina. Māʻilikūkahi and Umi-a-Liloa were known to be pono chiefs (Kamakau 1991). Their reigns saw increases in population, the increased productivity of the ʻāina, and peace and other social circumstance characteristic of pono behavior (Kelly 1989).

The reigns of these Aliʻi saw an increase in population and subsequent competition for resources which created many problems (Kelly 1989). The response of these Aliʻi to

increases in population and competition over resources inspired the imposition of hierarchy and boundaries in resource management. Kelly argues that the combination of increased population and technological advancements in food production "resulted in changes in the socio-political structure, producing a hierarchical class structure…unmatched in Polynesia" (1989, 83). These "socio-political" changes were responses by Hawaiian Aliʻi to changing social-circumstance, "During his reign Umi-a-Liloa set the laborers in order and separated (hoʻokaʻawale) those who held positions in the government" (Fornander 1996, 89). These changes were peaceful social revolutions instigated by the Aliʻi class. Setting the "labourers in order" was a remedy applied by an Aliʻi to deal with a new social problem: population growth. In this sense, these Aliʻi were fulfilling their kuleana through the "ordering" of society.

Divisions of Land

Kelly (1989) discusses the ordering of society. Another socio-political response by the Aliʻi of the 16th and 17th century was the establishment of the ahupuaʻa system on each respective island which served to order the land. Fornander describes the establishment of this system, "He (Māʻilikūkahi) caused the island to be thoroughly surveyed, and boundaries between differing divisions and lands be definitely and permanently marked out, thus obviating future disputes between neighboring chiefs and landholders" (1996, 89). These "disputes" resulted from the population increase during this time and the resultant competition for resources.

Kamakau (1991) comments on the population of the time, "In the time of Māʻili-kūkahi, the land was full of people. From the brow, lae, of Kulihemo to the brow of Maunauna in ʻEwa, from the brow of Maunauna to the brow of Puʻukua [Puʻu Kuʻua] the land was full of chiefs and people" (55). Māʻilikūkahi used his authority as Mōʻī (Highest Ranking Aliʻi) and "ordered" the creation of land boundaries to end the "confusion" over resource use. Kamakau writes:

> When the kingdom passed to Māʻili-kūkahi, the land divisions were in a state of confusion; the ahupuaʻa, the kū [ʻili kūpono], the ʻili ʻāina, the moʻo ʻāina, the paukū ʻāina, and the kīhāpai were not clearly defined. Therefore Māʻili-kūkahi ordered the chiefs, aliʻi, the lesser chiefs, kaukau aliʻi, the warrior chiefs, pūʻali aliʻi, and the overseers, luna to divide all of Oʻahu into moku and ahupuaʻa, ʻili kūpono, ʻili ʻāina, and moʻo ʻāina.
> (Kamakau 1991, 54-55)

Many scholars have produced descriptions of these land divisions. Detail and subtlety of definition get lost in these summaries. One of the more nuanced descriptions is presented by C.J. Lyons, "This branch of the subject has been admirably treated by Mr. C.J. Lyons in the Islander, published in 1875" (Alexander 1882, 3). Lyons' primary source description is informative as he was writing during the time the Māhele was still playing out. This period has very few written accounts on this subject. Lyons' account is also more detailed than most. The detail has not been stripped by summative approaches and authors subsequently making the description "their own" by eliminating the descriptive details.

Today ahupuaʻa are often conceived as "pie shaped wedges from the mountain to the sea". This description has made the term ahupuaʻa synonymous with valleys. While this definition may generally be true for the windward sides of the islands and the island of

Kauaʻi, there are many examples where this generalization is not true. These types of miscontextualizations of land divisions can then influence one's understanding of the process of redistributing these same land divisions through the Māhele process.

Another generalization that has helped to compound the problem of understanding the nature of Hawaiian land tenure is the imagery created by this "mountain to the sea" metaphor. There are two problems that this image creates. The first is that the image shows flowing rivers and loʻi (irrigated pond fields) and other resources and implies that such features are typical. Not every ahupuaʻa had flowing surface water (in the form of rivers) and not every ahupuaʻa necessarily had loʻi. The significance of water and loʻi is not what is in dispute. To suggest the prominence of loʻi, or any other resource for that matter, in every single ahupuaʻa ignores the topographical variation of the islands and the particularities of place. Places are sometimes distinct and this distinctiveness is lost through these types of generalizations.

While an ahupuaʻa may have had the "necessary" resources for survival, this does not translate to an ahupuaʻa having "every" resource. This distinction is crucial as the assumption of Hawaiians having everything they needed within an ahupuaʻa can take on various connotations which shape the imaginations of traditional life and how the Māhele may have affected such changes. Ahupuaʻa were "self-sufficient" but this did not equate to an ahupuaʻa having "every" resource.

In turn this conception of the ahupuaʻa has reinforced notions of communal sharing. Sharing and other similar values were undoubtedly an important characteristic of Hawaiians, but categorizations foregrounding such values downplays the significance that ahupuaʻa

boundaries played in ordering and managing access to resources. The Hawaiian Kingdom Supreme Court Case, *In the Matter of the Boundaries of Pulehunui,* articulates how ahupua'a boundaries regulated access to resources, "Opunui, the third witness, says—I am a kamaaina of Waikapu. We used to go mauka (above) of Pohakiikii to snare plover, and this place mauka of Pohakiikii divided Waikapu and Pulehunui. If the people of Kula came down makai (below) of Pohakiikii it was stealing, and the Waikapu people could take their birds away" (247- 248). The fact that people from one ahupua'a going into another ahupua'a and taking resources (birds) was considered stealing illustrates the role of boundaries in governing access to resources. General categorizations of traditional land tenure as "communal" overly generalize the traditional system.

Kelly (1989) identifies "systematic dryland agriculture" as an innovation which produced greater agricultural productivity in Hawai'i. Systematic dryland agriculture was a technique of growing particular things in the conditions that were most conducive to their growth thereby maximizing farming efficiency. Certain places were known for their abundance of certain resources. For example, Puna was well known for Hala (*Pandanus odoratissimus)*, "Puna paia 'ala i ka hala. Puna, with walls fragrant with pandanus blossom" (Pukui 1983, 301). While ahupua'a no doubt contained important and valuable resources needed for survival, they did not contain "every" resource.

In order to preserve the detail and subtle distinctions of defining an ahupua'a, included is the following lengthy description:

> In the first place, each island was divided into several Moku or Districts, of which there are six in the island of Hawai'i, and the same number in O'ahu. There is a district called

Kona on the lee side, and one called Koʻolau on the windward side of almost every island. On Maui there are some sub-districts called Okana(s), of which there are five in the Hana district, while Lahaina is termed a Kalana. The next subdivision of land below the Moku is the Ahupuaʻa, which has been termed the unit of land in the Hawaiian system. Its name, as explained by Mr. Lyons, 'is derived from the Ahu or alter, which was erected at the point where the boundary of the land was intersected by the main road alaloa, which encircled each of the islands. Upon this alter, at the annual progress of the akua makahiki (i.e. year god), Lonomakua, was deposited the tax paid by the land whose boundary it marked, and also an image of a hog, puaʻa, carved out of kukui wood and stained with red ochre.' The typical Ahupuaʻa is a long narrow strip extending from the sea to the mountain, so that its chief may have his share of all the various products of the uka or mountain region, the cultivated land, and the kai or sea. On east Maui the principal lands all radiate from a large rock on the northeast brink of the crater of Haleakala, called Palaha. Eight ahupuaʻa(s), one in each district of East Maui, meet at this rock. The Ahupuaʻa(s) are extremely unequal. In several districts a few larger ahupuaʻa(s), widening as they extend inland, cut off all the smaller lands and take the whole mountain to themselves. The same lands generally monopolized the deep sea fisheries, leaving to the smaller ahupuaʻa(s) only the fishery along their shores, where the water was not more than five feet deep. On Maui the lands of Waikapu and Wailuku appropriated almost the whole of the isthmus so as to cut off half of the lands in the district of Kula from access to the sea. These two ahupuaʻa(s), together Waiʻehu and Waiheʻe, which were independent, belonging to no Moku, were called Na Poko, and have been formed into a district in modern times. While some districts are regularly divided up into ahupuaʻa(s) averaging only a quarter of a mile in width and several miles in length; in others we find ahupuaʻa(s) like Honouliuli, in Oʻahu, which contains over forty thousand acres, or the four great mountain lands of Hawaiʻi, viz: Kahuku, Keauhou, Humuʻula and Kaʻohe, of which the first mentioned contains 184,000 acres, mostly on the mountains.
(Alexander 1882, 5)

Interaction Between the Hierarchies: Social & Geographic

Increased hierarchy in land and social structure resulted from Hawaiian Aliʻi responding and adapting to the changing social circumstances, in this case, population increase. Such interaction between man and land constantly changed. The way in which Hawaiians related to each other and to land changed when social circumstance no longer supported the "traditional" way of doing things. Adapting to demographic changes were a result of the Aliʻi fulfilling their kuleana.

Kālaiʻāina

Understanding this system of "rights" and redistribution of land, one can then better understand how the Māhele of 1848 divided "rights" to land. Hawaiians may not have "owned" land in the western conception of property, but Hawaiians did have a system of rights and responsibilities to land. Kālaiʻāina has been described in various ways with interpretations ranging from a feudal system to a communal system (Kameʻeleihiwa 1992). This variation is based on interpretations of the interaction between such complex and unique social structures existing in Hawaiʻi and how these systems have been approached and described.

There has been much debate whether Kālai'āina can or should be compared as "feudal" in the Māhele discourse. The definition of feudal used here follows Blackstone (1979), "The grand and fundamental maxim of all feodal [sic] tenure is this; that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown"(58). One person pledged an oath of allegiance and in return was

granted the use of land for this allegiance and the land would revert to the "source" upon the death of either of the parties or other circumstance affecting the two parties. In this general context, feudalism is an appropriate comparison to Kālaiʻāina. Alexander (1882) writes, "The ancient system of land titles in the Hawaiian Islands was entirely different from that of tribal ownership prevailing in New Zealand, and from the village or communal system of Samoa, but bore a remarkable resemblance to the feudal system that prevailed in Europe during the Middle Ages" (3). While Hawaiʻi did not exactly mirror the forms of feudalisms in European countries, neither did any two European countries' feudalisms mirror each other, "From this one foundation, in different countries in Europe, very different superstructures have been raised" (Blackstone 1979, 58). Blackstone acknowledges that forms of European feudalism shared this basic maxim but also evolved in various forms in different places in Europe:

> But as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert it's influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence.
> (Blackstone 1979, 53)

Most arguments against a comparison of Kālaiʻāina with European feudalism (if one can even generalize such a thing) are based on arguments of terminology and representation. Blackstone (1979) comments on how the term vassal has come to take on negative connotations, "[vassal] was only another name for the tenant or holder of the lands; though,

on account of the prejudices we have justly conceived against the doctrines that were afterwards grafted on this system, we now use the word vassal opprobiously [sic], as synonymous to slave or bondman" (53). The inappropriateness of such connotations is one of the major problems scholars have had with the description of feudalism being applied in Hawai'i: such descriptions miscontextualize Kālai'āina. Andrade (2008) expresses dissatisfaction with such a comparison for Hawai'i.

Those scholars who have suggested the importance of using proper Hawaiian terminology and meanings when describing Kālai'āina make a valid point. But the use of proper terminology does not necessarily negate a conceptual comparison between the two. Many scholars have resisted using feudalism as a comparison because of its European origins and a hesitance to define one's self using such Western concepts. There is no doubt that feudalism is most prominently associated with Europe but other places, Japan for example, exhibited a comparable institution. In this broader perspective, the concept is not European at all, having developed in several regions independently.

This is especially true when we consider that Kālai'āina existed in Hawai'i long before any Europeans arrived here, "The feudal system of land tenure in England had a curious duplicate in the system evolved by the Polynesian race" (Weaver 1898, 393). These early Europeans did not conceptualize Kālai'āina as originating from European models. In talking about the early interactions between Hawaiians and Europeans, Weaver elaborates with some humor:

> There is no tradition, however, of any of these adventurous colonizers bringing with them Coke on Littleton, Blackstone, nor any learned work on the feudal land tenure. It is not generally believed that Kamehameha I. (who flourished as a

> contemporary of Napoleon, whose miniature counterpart he was) had ever been a great student of Blackstone; oh, happy man! We are not informed that he ever heard of William the Conqueror, or of the battle of Hastings, or of the Domesday [sic] book. Therefore, we can claim that the great warrior, or his predecessors, built up their system of land tenure, without consulting the eminent authorities, and what similarity there is between the Hawaiian and the feudal system is the result of applying the most ready solution to the same problem. (Weaver 1838, 347)

Kālaiʻāina was a Hawaiian concept. It was not borrowed from Europe. It is an example of the independent invention of an idea rather than the diffusion of an idea from Europe. In this context, feudalism does not "belong to" nor is it "owned" by Europeans but instead it can be a useful analogy for those not familiar with Hawaiian history to begin to understand Hawaiʻi's unique system of land redistribution.

Assistant Surveyor General, C.J. Lyons offers further insight, "Civilization came to these islands to find an already existing land system, such as it was. What might be called 'no man's land' did not exist here, and the peculiarly American term 'taking up' land has practically no place here. The land was 'taken up' probably a thousand years or more ago. The 'ahupuaa' may be regarded as the primary division of Hawaiian land" (Lyons 1903, 3). This pre-existing land and social system serves as the foundation for the rights which would later be "divided" in the Māhele. Lyons's statement is also significant because it recognizes that Hawaiʻi was not considered *terra nullius* or a "blank canvas" for foreigners to inscribe themselves upon, a sentiment is echoed by Banner (2005), "Whites respected the property rights of native Hawaiians, rather than treating Hawaii as terra nullius, or un-owned land, as in some other parts of the world" (278). While the institution of private property can be considered to be a western concept, the details of how this transition took place are based in

pre-contact Hawaiian custom. The form looks "western", but if one considers the context and pays attention to the particular details, then one can see the creation of a Hawaiian hybrid system of private property.

The *Principles of the Land Commission* offers a description of this system of tenure:

> The tenures were in one sense feudal, but they were not military, for the claims of the superior on the inferior were mainly either for produce of the land or for labor, military service being rarely or never required for the lower orders. All persons possessing landed property, whether superior landlords, tenants or sub-tenants, owed and paid to the King not only a land tax, which he assessed at pleasure, but also, service which was called for at discretion, on all the grades from the highest down...They owed obedience at all times...the tenure was far from being allodial, either in principal or practice.
> (Principles of the Land Commission 1846)

A judge in the Hawai'i Supreme Court case Thurston v. Bishop comments, "It must be remembered that these 'Principles,' … were statutory law, having been adopted by the Legislative Council, consisting of the Nobles and Representatives, on the 26th October, 1846" (Thurston v. Bishop 1888). In a separate court case, the makeup of the legislature in the 1850s was described by Judge C.J. Allen as "a legislative council, composed mainly in the House of Representatives, of aboriginal inhabitants, elected by the suffrages of the people; and in the House of Nobles, by the high chiefs of the land, together with the Ministers, and finally…his Majesty the King" (Rex v. Booth 1863).

Allen's characterization of the composition of the legislature is in stark contrast to Osorio (2002). Osorio emphasizes the foreigners, who in this case are the minority and account for only 7 of the 24 representatives. Allen emphasizes the majority, who are

composed of "aboriginal inhabitants". By privileging the role of the seven whites, Osorio implies that the law of that time is not representative of the "native mind" and is instead reflective of the "imperial mind".

Establishing "Title" to Land

It is important to understand that the system of land tenure was in flux from the time of unification by Kamehameha I to his death in 1819. Kamehameha I's unification of the Hawaiian Islands was the first time in Hawaiian history that the major island kingdoms had been unified. This established Kamehameha I's title to the territory while also changing the social context for Kālaiʻāina. This change in context influenced how Kālaiʻāina would take place and how peace would be maintained after the land was redistributed. The process of the unification of the islands effectively eliminated any domestic threats to Kamehameha I. A proper Kālaiʻāina was a major consideration to maintain peace. Kamehameha I's Kālaiʻāina had to acknowledge the role of the Aliʻi who fought alongside of him during his conquest. Kamehameha's major domestic task was to keep those warriors who helped him win the war content so as to avoid any subsequent internal revolution.

Kameʻeleihiwa (1992) comments on the subtle changes to Kālaiʻāina under Kamehameha, "The system [Kālaiʻāina] seemed to be changing under Kamehameha's rule, but slowly and for only a very few individuals" and continues "why did Kamehameha, who was so staunchly traditional in most religious and political matters, decide to give the right of Land inheritance to even those very few?" (60). Kameʻeleihiwa goes on to answer this question suggesting, "it is likely that this innovation was not one influenced by Western

ideas…It is just as plausible that Kamehameha was inspired by ʻUmi's gift to the old kāhuna Nunu and Kākohe, because Hawaiian Aliʻi were inspired by traditional wisdom" (1992, 60). The difficulty in answering such a question from a Hawaiian perspective is that there isn't any precedent in Hawaiian tradition for a Kālaiʻāina under a unified kingdom.

The idea of the hereditary succession of property was first contemplated during the time of Kamehameha I and later between Boki and a British ship captain on the H.M.S. Blonde. At a meeting on this vessel, the chiefs are said to have contemplated the idea of hereditary succession. During this time, one's rights in land were beginning to be acknowledged even after their death. An important distinction is to be made between "rights" to land and "title" to land as "title" to land did not yet exist.

Depopulation due to disease was another major influence in the years following Kamehameha I's reign. Depopulation directly resulted in the lands being less productive. Vancouver (1984) describes the state of agriculture in late 18th century Hawaiʻi, "The care & industry with which they were transplanted watered & kept in order surpassed any thing of the kind we had ever seen before" (860). By the 1820s, the effect of depopulation caused by foreign disease would start to show itself on the landscape. Banner (2005) quotes French shipmaster Auguste Duhaut-Cilly who, while visiting Hawaiʻi in the late 1820s, found "large stretches of land where the remains of dikes, already reduced almost to ground level, show in an incontestable way that here there once were cultivated fields" (2005, 280). The effects of depopulation were beginning to show itself on the land. The ʻāina was not being taken care of as there were not enough people to take care of it.

The continued depopulation of Hawaiians was a significant pressure affecting the need for a change in land tenure systems. Kamehameha III speaking to the Nobles and Representatives states, "The public health is one of the objects most worthy of your consideration. Cholera, that scourge of humanity, has only recently ceased its ravages" (Lydecker 1918, 31). The "traditional" Hawaiian system of land management and its maintenance was highly labor intensive and without a sufficient population to provide this labor it was vulnerable to collapse. This collapse is clearly measured by the lack of productivity of the ʻāina in the decades leading up to the Māhele. The unproductive lands that foreigners saw in the 1840's were the result of over 60 years of exposure to disease.

1839 Declaration of Rights

The 1839 Declaration of Rights represents the first moment where Hawaiian custom transitioned to a body of written law. There had been written law since the mid-1820s but it was not carried out in a systematic way. For the most part, the laws of this period were written on an individual basis and not as a part of a broader body of law.

The English translation of the declaration appears in a book, *The Hawaiian Spectator*. Here, the declaration is described as having been "printed in a pamphlet of duodecimo form, containing twenty-four pages" (1838, 347). These "twenty-four pages" include the Laws of 1839 and not just the Declaration of Rights. The Declaration of Rights of 1839 was later incorporated in the first section of the Constitution of 1840 and is often referred to as the preamble to this constitution. The Declaration of Rights is a broad and general assertion of

rights ranging from the right to life, limb, and liberty to a protection of rights in property. A transcription follows below:

> 1. God hath made of one blood all nations of men, to dwell on the face of the earth in unity and blessedness. God has also bestowed certain rights alike on all men, and all chiefs and all people of all lands.
>
> 2. These are some of the rights which he has given alike to every man and every chief, life, limb, liberty, the labor of his hands and productions of his mind.
>
> 3. God has also established governments and rule for the purposes of peace, but in making laws for a nation it is by no means proper to enact laws for the protection of rulers only, without also providing protection for their subjects; neither is it proper to enact laws to enrich the chiefs only, without regard to the enriching of their subjects also; and hereafter, there shall by no means be any law enacted which is inconsistent with what is above expressed, neither shall any tax be assessed, nor any service or labor required of any man in a manner at variance with the above sentiments.
>
> 4. These sentiments are hereby proclaimed for the purpose of protecting alike, both the people and the chiefs of all these islands, that no chief may be able to oppress any subject, but that chiefs and people may enjoy the same protection under one and the same law.
>
> 5. Protection is hereby secured to the persons of all the people, together with their lands, their building lots and all their property and nothing whatever shall be taken from any individual, except by express provision of the laws. Whatever chief shall perseveringly act in violation of this Constitution, shall no longer remain a chief of the Sandwich Islands, and the same shall be true of the governors, officers and all land agents.

This is the entirety of the Declaration of Rights of 1839. It was written by a graduate of Lāhainaluna "at the direction of the King" (1838, 347). This written instrument went through a very rigorous process involving the Hawaiian Aliʻi. It was they who revised and

reviewed it. The person who was directed to write the declaration wrote about "one-third" of it before it was reviewed by the "king and several of the chiefs, who met and spent two or three hours a day for five days in succession, in the discussion of the laws. In some particulars the laws were pronounced defective, in others erroneous, and the writer was directed to review them, and conform them to the views that had been expressed" (1838, 347). After the revisions were completed by the writer, "the king and all the important chiefs of the Islands" met again to review the laws. "At this reading a longer time was spent than at the first. They were still pronounced defective and further additions and corrections were made in the same manner and by the same person as before. After these corrections were made they then were passed through a third reading at which time the chiefs, after being asked of their approval, replied in the affirmative and the king replied, 'I also approve'" (1838).

In the example of the Declaration of Rights of 1839, the person who was "instructed" to draft the law was a Hawaiian, of the Aliʻi class, who was schooled by missionaries at Lāhainaluna. The more important point is that the writer's authority was derived from the King. Kamehameha III as king and absolute monarch (Hawaiʻi did not have its first written constitution until 1840) had the authority and agency to delegate tasks to those he deemed competent. This authority is often misplaced in arguments that identify the writer of a law as having the authority. Such an argument minimizes the authority of the King by not considering the fact that these laws were discussed, debated, and most importantly approved by the King and other high ranking Aliʻi.

David Malo describes the office of the king using the metaphor of a house where he writes, "The office of an independent king (alii ai moku, literally one who eats, or rules over,

an island) was established on the following basis: He being the house, his younger brothers born of the same parents, and those who were called fathers or mothers (uncles and aunts) through relationship to his own father or mother, formed the stockade that stood as a defence [sic] about him" (1980, 191). Malo goes on to describe the role of the king's other advisors, "Another wall of defence about the king, in addition to his brothers were his own sisters, those of the same blood as himself. These were people of authority and held important offices in the king's government. One was his kuhina nui, or prime minister; others were generals (pukaua), captains (alihi-kaua), marshals (ilamuku), the king's executive officers, to carry out his commands" (191). The king formed the structure and main supports while his closest allies were the "walls" that protected him. These walls extended all the way down to the maka'āinana, "So it was with the king; the chiefs below him and the common people throughout the whole country were his defence [sic]" (1980, 191). This is the context within which interpretations of agency should be judged.

Section five of the declaration deals specifically with property and frames the kuleana (responsibility) of the Konohiki, governors, officers, and land agents. It explicitly secures to all of the people, not just the chiefs, protection of their land and house lots and states that nothing can be taken from any individual "except by express provision of the law". This is one of the first examples through which written law secures the rights of the people to their lands.

Section five also alludes to the idea that a "chief" (Konohiki) is an "office" embodied by a person, "Whatever chief shall perseveringly act in violation of this Constitution, shall no longer remain a chief of the Sandwich Islands, and the same shall be true of the governors, officers and all land agents". A chief who acted in "violation of this Constitution" could be

removed from the "office" of Konohiki. A chief became eligible for the office of Konohiki through genealogy but his worldly actions determined if he maintained that status and was worthy of staying in "office". There were still mechanisms to ensure pono behavior and the accountability of a chief. Genealogy did not guarantee undisturbed security for a chief. This is evidenced by Leleiohoku's loss of rank as chief. This decision was discussed in Privy Council on December 7, 1847:

> That His Majesty the King, with the aid of
> His Privy Council, having considered the
> charges against Leleiohoku, all which he has
> confessed, hereby sentence Leleiohoku to be
> suspended from all his honors and official
> trusts, under the Crown, but the King will re-
> store him to his honors and official rank
> whenever his future good behaviour may
> render him worthy, in His Majesty's judge-
> ment of being so restored.
> This sentence is not to affect his property.
>
> The King dictated in Native something to
> the effect of the following Sentence;
>
> Having heard all that has been said, I
> wish that Leleiohoku be called in, and informed of
> all that has been said and of the sentence pro-
> nounced against him, depriving him of his rank
> and official trusts, and that if he repent and leave
> his evil course, he will be again raised up, but if
> he does not his punishment will be confirmed for
> ever without any further trial.
>
> The King having asked Kekauonohi what
> she thought, she remarked that she was very sorry that
> Leleiohoku's good name is affected by this, and
> that he loses his rank as a Chief, but still she
> approves of the Sentence. She is sorry that the only
> Chief left of her family is about to be degraded—
> thinks with John Ii that all the blame lies, with
> the bad education he had received. It would
> be a great loss to Leleiohoku to lose his name

and rank as a Chief.

The King remarked that having heard all that was said on both sides, his opinion is that Leleiohoku be broke, not suspended, and deprived of all his honors and trusts, and that when he reforms and shows that he is worthy of them, we will again receive him with open arms.

The Declaration of Rights of 1839 and the Laws of 1839 are the source and impetus for subsequent land law and subsequent division (māhele) of rights in land for the people of Hawai‘i. This declaration does not go into the specifics of what those rights or provisions of law were. Such articulations can be found in the later laws.

The year 1839 is described as the year of a "peaceful but complete revolution in the entire polity of the Kingdom" (In the Matter of the Estate of His Majesty Kamehameha IV 1864). This was an important time for governance as well as for land reform, both of which occurred through peaceful, non-armed revolutionary means. One year later, through the Constitution of 1840, Kamehameha III voluntarily divested his absolute powers, inherited from his father as Ka Na‘i Aupuni (conqueror). This was the beginning of the end of absolutism in Hawai‘i and was not the result of an internal revolution by the people but rather a voluntary divestment of power from the monarch.

Laws of 1839

The Laws of 1839 offer insights into the minds of those in charge of governance at the time and are compiled and reproduced by Adameck (1994). Section 6 (see Appendix A)

of the Laws of 1839, *Respecting applications for farms, forsaking of farms, dispossessing of farms, and the management of farms,* makes dispossession illegal, "No man living on a farm whose name is recorded by his landlord, shall without cause desert the land of his landlord. Nor shall the landlord causelessly dispossess his tenant. These are crimes in the eyes of the law" (Adameck 1994, 24).

These laws speak to the importance of returning the lands to productivity by making both the dispossession of land (by a Konohiki) and desertion of a Konohiki's land (by a maka'āinana) illegal. Caring for the 'āina was the direct responsibility of the people. This is further evidenced by the fact that if "any portion of the good land be overgrown with weeds, and the landlord sees that it continues thus after a year and six months from the circulation of this law of taxation, then the person whose duty it is shall put that place which he permitted to grow up with weeds under a good state of cultivation, and then leave it to his landlord. This shall be the penalty for all in every place who permit the land to be overrun with weeds" (Adameck 1994, 24). This is an expression of the kuleana of the maka'āinana to keep the 'āina productive.

This relationship was intended to promote both the private interest of the individual and the welfare of the country "[f]urthermore, let every man who possesses a farm in the Hawaiian kingdom labor industriously with the expectation of there by securing his own personal interest, and also of promoting the welfare and peace of the kingdom." The maka'āinana were provided with sufficient means to fulfill their kuleana:

> Those men who have no land, not even a garden nor any place to cultivate, and yet wish to labor for the purpose of obtaining the object of their desire, may apply to the land agent, or the Governor, or the King for any piece of land

> which is not already cultivated by another person, and such places shall be given them. The landlords and King shall aid such persons in their necessities, and they shall not go to the field labor of the King and landlords for the term of three years, after which they shall go. But if neither the landlords nor King render them any aid until they bring such uncultivated ground into a good state of cultivation, and they eat of the products of the land without any aid, then they shall not for four years be required to go to the field on the labor days of the king, nor of the landlords. After these years they shall go to the field and also pay taxes. But the poll tax they shall always pay. (Adameck 1994, 24)

It is clear by these laws that the intention was to put people back on the land and to encourage similar agricultural productivity to those times before depopulation. In approximately 50 years, about two generations, the lands were in the exact opposite state of productivity. Foreigners were in fact promoting the concept of private property for its perceived effect on increased agricultural productivity during this time. This decrease in productivity was not the result of indolence. Rather, it was the result of population collapse. The goal of agriculturally productive ʻāina is not of Western origin. ʻĀina literally means "that which feeds" and keeping the ʻāina productive ensured that the people were also taken care of. In this respect, goal of agriculturally productive land was not a foreign idea.

The question the Aliʻi were facing was how to make the land productive again, lands that had been deprived of its caretakers (the makaʻāinana) through decades of disease. One solution that was offered by foreigners was the institution of private property. Changing social context due to depopulation and the unification of the islands are also plausible causes for a change in how land was managed and divided during the Māhele era. Had the lands still been productive and a change been made, an argument for foreign imposition would be stronger.

1840 Constitution

The Constitution of 1840 was the first written constitution of Hawai'i and implicitly created a constitutional monarchy. Prior to this, Kamehameha III was the absolute sovereign of Hawai'i. Article 14 expounds on the foundation of land title in Hawai'i.

> 14. EXPOSITION OF THE PRINCIPLES ON WHICH THE PRESENT DYNASTY IS FOUNDED.
> The origin of the present government, and system of polity, is as follows. Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.

Article 14 gives some background and context for how Hawaiian custom is transitioning into written constitutional law. This article articulates the notion that Kamehameha I did not have exclusive rights in the land (real property). Hawaiians did not "own" land in the same way that foreigners from other places did whereby all land belonged to the King and any such assumptions would incorrectly characterize the Māhele process.

What sounds like "communal" ownership can be articulated by the distinction between the concepts of Tenants in Common and Ownership in Severalty which are both forms of ownership in Western property law. Tenants in Common "hold an undivided interest in a property. An undivided interest is a share of the entire property, rather than ownership of a particular part of the property…Tenants in common may hold different percentages of ownership in the property" (Cortesi 2001, 132). On the other hand,

Ownership in Severalty is the same as the sole owner…in law it [severalty] means separate or severed" ownership (Cortesi 2001, 130).

According to article 14, Kamehameha I was not considered the "sole owner" of the land. As article 14 suggests "It belonged to the chiefs and people in common". But the interests of the chiefs and makaʻāinana was not an equal one. The chiefs and makaʻāinana had what could be considered "different percentages" of ownership based on mana and their "place" in the social hierarchy. This is a radical distinction from how other monarch's characterized their land ownership whereby the King was considered to be the "sole owner" of the land in his domain. Of these two concepts, Tenants in Common is the more accurate description of the ownership rights shared between the Government, Konohiki, and Tenants as articulated by the "Principles of the Land Commission".

Malo (1980) expressed the makaʻāinana's right to possession of "such small sections of land" (192). The makaʻāinana had a right of possession and use to land although this right did not directly translate to western notions of fee-simple absolute as the makaʻāinana's rights were subject to the will of the king. Malo (1980) describes this in more detail.

The Aliʻi class also had kuleana (interests) and rights to land. Possession and access to land were fostered by reciprocal relationships under Kālaiʻāina, the ahupuaʻa system, kapu system, makahiki season, and other social structures which provided for mutual rights and responsibilities between superior and inferior, in this case between Konohiki and Makaʻāinana. These rights were contextualized earlier in this chapter.

Suffice to say, a makaʻāinana in pre-contact Hawaiʻi had the right to use and possess land, to the point of the exclusion of those outside of his family. This right to land was a part

of the ahupua‘a system of tenure as the Konohiki was provided with laborers to help make the land productive and the maka‘āinana had access, use and possession of ‘āina. Under normal custom, a commoner always had access to land provided that they fulfilled their kuleana. This kuleana is expressed in the laws of 1839 which states:

> It is furthermore recommended that if a landlord perceive a considerable portion of his land to be unoccupied, or uncultivated, and yet is suitable for cultivation, but is in possession of a single man, that the landlord divide out that land equally between all his tenants. And if they are unable to cultivate the whole, then the landlord may take possession of what remains for himself, and seek new tenants at his discretion.
> (Adameck 1994, 24-25)

This law is expressing the significance of the concept of usufruct. Usufruct is a right to use another's property for a time without damaging or diminishing it" (Black and Garner 1999, 1542) "usually for life" (Walker 1980, 1268). In the Hawaiian context "usufruct" would equate to a maka‘āinana's kuleana (responsibility) to keep the ‘āina productive. This is why the tenure of the maka‘āinana was considered as being at the will of the Konohiki.

Under Hawaiian custom, the Konohiki and maka‘āinana both had a form of possessory right to land, although they did not have the right to transfer this right to anyone they wished. The right to transfer sub-ordinate rights to land (which essentially describes fee-simple absolute ownership) belonged to the Mō‘ī and was regulated by Kālai‘āina. While the King, chiefs, and people may have had rights in the land "in common", their rights were not necessarily equal. Each had rights in land which were regulated by custom and were a complicated mix of both individual and communal rights. This is an articulation of the kūlana or class structure and social hierarchy which existed in Hawai‘i.

The Land Commission

The Organic Acts, under the Organization of the Executive Branch and the statute of December 10, 1845 created the Board of Commissioners to Quiet Land Titles (Land Commission). This was an important first step in the evolution of transitioning from rights in land to title to land, "It was not until the organization of the Commission to Quiet Land Titles [that] the chiefs and people had any titles to land" (Knudsen v. Board of Education 1890). By statute, the Land Commission was to be a board consisting of five members, appointed by Kamehameha III, "for 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" (Principles of the Land Commission 1846).

The Land Commission needed to determine what types of interests in property existed outside of the system of Kālaiʻāina. Since the time of Kamehameha I, foreigners had been arriving in the islands for various reasons. Some visitors stayed while others left. Those who stayed often were in need or want of land. Kamehameha I or one of his high chiefs would often grant these foreigners an "interest" in land. An "interest" in land should not be assumed to be a fee-simple interest. Land Commission Award #132 to Samuel Thompson speaks to this effect:

> This is a claim to a house-lot situated in Honolulu, which claim is based upon the following deed:
>
> Know all men by these presents, that I Peter Brothers, carpenter in the village of Honolulu, Island of Oahu, in consideration of the sum of one thousand dollars to me paid by Samuel Thompson in the same village, the receipt thereof hereby acknowledge do hereby give, grant, bargain, sell and convey into the said Samuel Thompson, his heirs & assigns a certain tract or parcel of land situate in the village of

Honolulu aforesaid, bounded and described as follows...To have and to hold the afore granted premises to the said Samuel Thompson and his heirs and assigns in fee-simple fore ever [sic]: and the said Peter Brothers, for myself and my heirs, executors and administrators do covenant with the said Samuel Thompson and his heirs and assigns, that I am lawfully seized in fee of the afore granted premises, that they are free from all encumbrances that I have good right to sell and convey the same to the said Samuel Thompson as aforesaid, and that I will, and my heirs, executors and administrators shall warrant and defend the same unto the said Samuel Thompson and his heirs and assigns fore ever [sic], against the lawful claims and demands of all persons, and in witness whereof I have here unto set my hand and seal...

[The award continues with comments from the Land Commission] The only question of importance arising in the investigation of this claim is what was the title of Brothers, the Grantor, in the deed? For whatever right or title Brothers had in this land, belongs to his Grantee, Thompson, and no more. This is clear from the well established maxim of the law of real property, that no person can convey or grant any greater title in land to another person, than he himself possesses in such land. It appears from the testimony of Robert Boyd and T.B. Rooke, that Brothers came into possession of the lot in question, some time previous to the year 1830, in the same way as most foreigners got land in those days: but from who he procured this land does not appear. It further appears, that from the year 1830 down to the 30th of January 1845 the time of executing the above deed, that Brothers occupied and improved the land. This is the substance of all the testimony offered in the case, and from this it clearly appears, that the title of Brothers was the same as the native tenures of this Kingdom-namely a title by gift, which gave him a right to hold the land during the pleasure of the donor or King. But by the first rule adopted by the Board and approved by the Legislative Council for its government in settling land titles, we are authorized, where the land has been continuously occupied by the claimant from a time anterior to the 7th of June 1839 to award such claimant a freehold title in said land, less than allodial.

The claimant Thompson stands in this case, in the same place, and holds the same rights in the land, that Brothers would possess, had he never parted with this land and we do therefore award to Samuel Thompson a freehold title less than allodial in the lot claimed, according to the

> annexed survey of Theophilus Metcalf on 28 Dec. 1847
> which title the claimant may by commutation, convert into a
> fee-simple as prescribed by law.

This Land Commission Award is significant because it contextualizes fee-simple ownership by foreigners prior to the Land Commission and articulates the well established principle of law that "no person can convey or grant any greater title in land to another person, than he himself possesses in such land".

This Land Commission Award also defines the nature of the "native tenures" of the Kingdom which are described as a "title by gift, which gave him a right to hold the land during the pleasure of the donor or King". This Land Commission Award clearly expresses the need to understand the nature of rights and interests held in land prior to the Māhele as this is what was guiding the Land Commission in their decision making process. The Land Commission did not inscribe a new process of rights and instead relied on the existing system. It shows that the Māhele was a methodical process and was not subject to the whim of the people on the Land Commission.

There are a variety of "interests" in land, as conceptualized in western property rights. These include leases, life-estates, and fee-simple interests (Black and Garner 1999). While this terminology is specific to Western models of property and not Kālaiʻāina, some of the concepts are not necessarily foreign. For example, a life-estate is an "estate held only for the duration of a specified person's life" (Black and Garner 1999, 568). Conceptually speaking, an Aliʻi received a "life-estate" after a Kālaiʻāina took place in traditional times. Hawaiians did not call it this, nor was this word used, but what it represented was not

foreign. Aliʻi had the right to "use" land and "exclude" other Aliʻi from using this land but not the right to pass it on to heirs or to sell it.

The interests in land investigated by the Land Commission were often expressed in early oral transactions. There were no written titles to land at this time. Land transfers occurred orally and were given by those who had the authority to do so. An Aliʻi could not give an interest in land that he himself did not have the authority to divest.

> Claims of one character and another to the possession of land had grown up, but there was no certainty about them, and all was confusion; and finally, after years of discussion had between the King, the chiefs, and their foreign councilors [sic], the plan of a Board of Commissioners to Quiet Land Titles was evolved, and finally established by law, for the purpose of settling these claims and affording an opportunity to all persons to procure valid paper titles emanating from the Government representing the sovereignty, the source of all title to land in this Kingdom, to the land which they claimed. (Thurston v. Bishop et al. 1888)

The Land Commission, "was authorized to consider possession of land acquired by oral gift of Kamehameha I or one of his high chiefs, as sufficient evidence of title to authorize an award therefore to the claimant" (Harris v. Carter 1877). Such oral gifts reference "interests" in land which were outside of Kālaiʻāina, a system "which was never imposed on the foreigner here" (Rex v. Booth 1863). Relationships with these early foreigners were handled differently than the Aliʻi and makaʻāinana relationship. These "oral gifts" are not referencing a Makaʻāinana receiving land from Kamehameha I or another Aliʻi through the traditional system. It is referencing those transactions between the King and others, "whether natives or foreigners", which occurred outside of normal Hawaiian custom or usage. That is to say, these foreigners who received these interests in land were not

required to participate in the Kālai'āina system and pay tribute to the Konohiki or any other chief but neither can they be considered to have "owned" the land they were given:

> The treaty which was negotiated in 1836, between this Government, and Lord Edward Russell on behalf of the British Government, shows the views then entertained by the contracting parties. It is therein declared "that the land on which the houses were built is the property of the King." This sketch illustrates the nature of the tenures, and the titles by which the lands were held.
> (Rex v. Booth 1863)

Foreigners were not in a privileged position by not having to pay tribute, but rather they were excluded and not viewed as participants in the Kālai'āina system. Therefore, they did not share the same rights as native tenants within the system and it was the job of the Land Commission to ascertain the nature of such "interests" in land. Some foreigners were treated differently and were incorporated into the Ali'i class. Foreigners such as John Young and Isaac Davis are examples. They had a different type of interest in land as they were incorporated into a different class of Hawaiian society.

After 1840, King Kamehameha III was no longer absolute ruler with all sovereignty and power vested in him. He had voluntarily relinquished this in the creation of the Constitution of 1840 and the subsequent Organic Acts setting up the executive, legislative, and judicial branches of government. Included was the Land Commission, a government office, "representing the sovereignty, the source of all title to land in this kingdom" (Thurston v. Bishop 1888) from which those with claims to land could seek valid titles. The King's previously absolute powers had been divested to the various branches of government. The Land Commission represented the interests of the government for this purpose.

The 1848 Māhele: Division of the Konohiki's Rights in Land

As articulated in the English translations of the *Principles of the Land Commission* of 1846*,* "there are but three classes of persons having vested rights in the land,-1st the government, 2nd, the landlord (Konohiki), and 3rd, the tenant (maka'āinana), it next becomes necessary to ascertain the proportional rights of each." This reflects the previously defined concept of Tenants in Common where the "government", "landlord", and "tenants" can all be considered to have an "undivided interest" or share of the entire property. This means that every person in each of these classes has a right of ownership in land. Figure 4 shows a graphic representation of "undivided interests" for O'ahu's ahupua'a. This is what "undivided interests in land" looked like before the Māhele of 1848.

The Māhele has been described as both "event" and "process" (Stauffer 2004, 35). The Māhele process more generally refers to the transition of land tenure from Kālai'āina, a structured feudal-like system to a freehold system whereby lands are not held by a superior. The event refers to the division of the undivided rights of the Konohiki class which took place between January 27, 1848 and March 7, 1848. While the event itself took place over this period and was not a single act, it can still be considered as one:

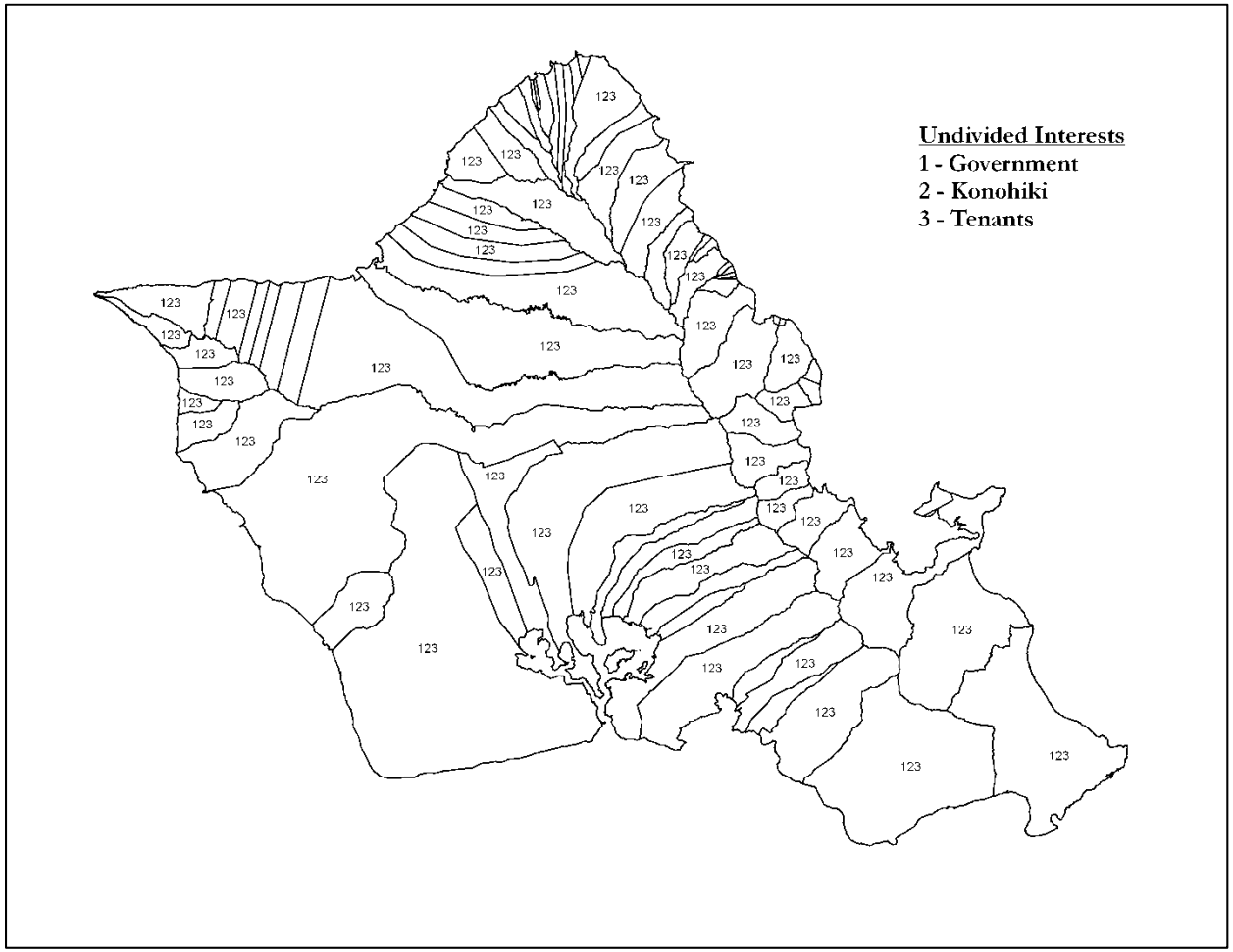
> Now, although these maheles were executed day after day until the work was completed, it was because it was too great a task to be all completed in one day, and they might well have all been dated on one and the same day. It was all one act. None of the maheles by the King to any chief could claim by virtue of its earlier date any priority or superiority of title over the mahele by any chief to the King.
> (Harris v. Carter 1877)

The *Māhele Book* consists of an inventory of the rights and interests each respective Konohiki held in particular ahupuaʻa and ʻili kūpono which were articulated from the Māhele and serves as the foundation for all land titles in the Kingdom. This written document has helped to preserve traditional knowledge in written form. The Māhele of 1848 was accomplished without a mapping project and instead relied on pre-existing knowledge of place-names. A count, by this author, of the ahupuaʻa listed in the *Māhele Book*, places the number of ahupuaʻa at over 1,000.

These quitclaims, effectively gave the 252 Konohiki life-estates to the lands in which they retained rights. An example of the konohiki's quitclaim is included in *Harris v. Carter,* "Ke ae aku nei au i keia Mahele, ua maikai, Ko ka Moi na Aina i kakauia maluna. Aohe o'u kuleana maloko" which is translated as "I hereby agree to this division; it is satisfactory. The lands above inscribed are the King's; I have no right to them". Kauikeauoli made a similar quitclaim, "Ke ae aku nei au i keia Mahele, ua maikai. No [Konohiki's name] na aina i kakauia maluna; ua ae iaʻku [sic] hiki ke lawe aku imua o ka Poe Hoona Kuleana" which is translated as "I hereby agree to this division; it is satisfactory. The lands above inscribed are [Konohiki's name]; she has permission to take them before the Land Commission" (Harris v. Carter 1877). The clause expressing the Konohiki's need to take their claims before the Land Commission extended the duties of the Land Commission. Prior to this time the Land Commission was investigating claims to land outside of the system of Kālaiʻāina.

This division took place between the King and each individual konohiki whereby the rights of all of the Konohiki to the various ahupuaʻa were divided. These rights were codified in the 1839 Declaration of Rights. These vested rights refer to "interests" in land,

Figure 4. Map Showing the Concept of "Undivided Interests" in Land



but these interests were segregated by class and did not imply an equality of rights between the government, Konohiki class, and Maka'āinana class. Under Kālai'āina, the King can be thought to have held absolute title to land as sovereign and was the source of governance, "The Government was as exclusively in him as the titles to the lands were" (Rex v. Booth 1863).

Prior to the Māhele there were numerous discussions in Privy Council trying to identify in what capacity Kamehameha III was to participate in the Māhele, "The King now claims to be Konohiki of a great portion of the lands. He therefore makes known to the other Konohikis, that they are only Holders of Lands under him, but he will only take a part and leave them a part" (Privy Council, Volume 1: 87). This was not a self-demotion of title but rather a clarification defining in what capacity Kauikeauoli was participating in this particular part of the process.

The Māhele "event" resulted in the division of the previously "undivided" rights of the Konohiki class in the dominium of Hawai'i. The Māhele "event" did not establish one's title to land, "The Mahele itself does not give a title. It is a division, and of great value because, if confirmed by the Board of Land Commission, a complete title is obtained. By the Mahele, His Majesty the King consented that [Konohiki's name] should have the land, subject to the award of the Land Commission" (Kenoa et al v. John Meek 1872). After a Konohiki took their claim to the Land Commission, their rights and interests in land were confirmed and title to land was established through the issuance of a Land Commission Award.

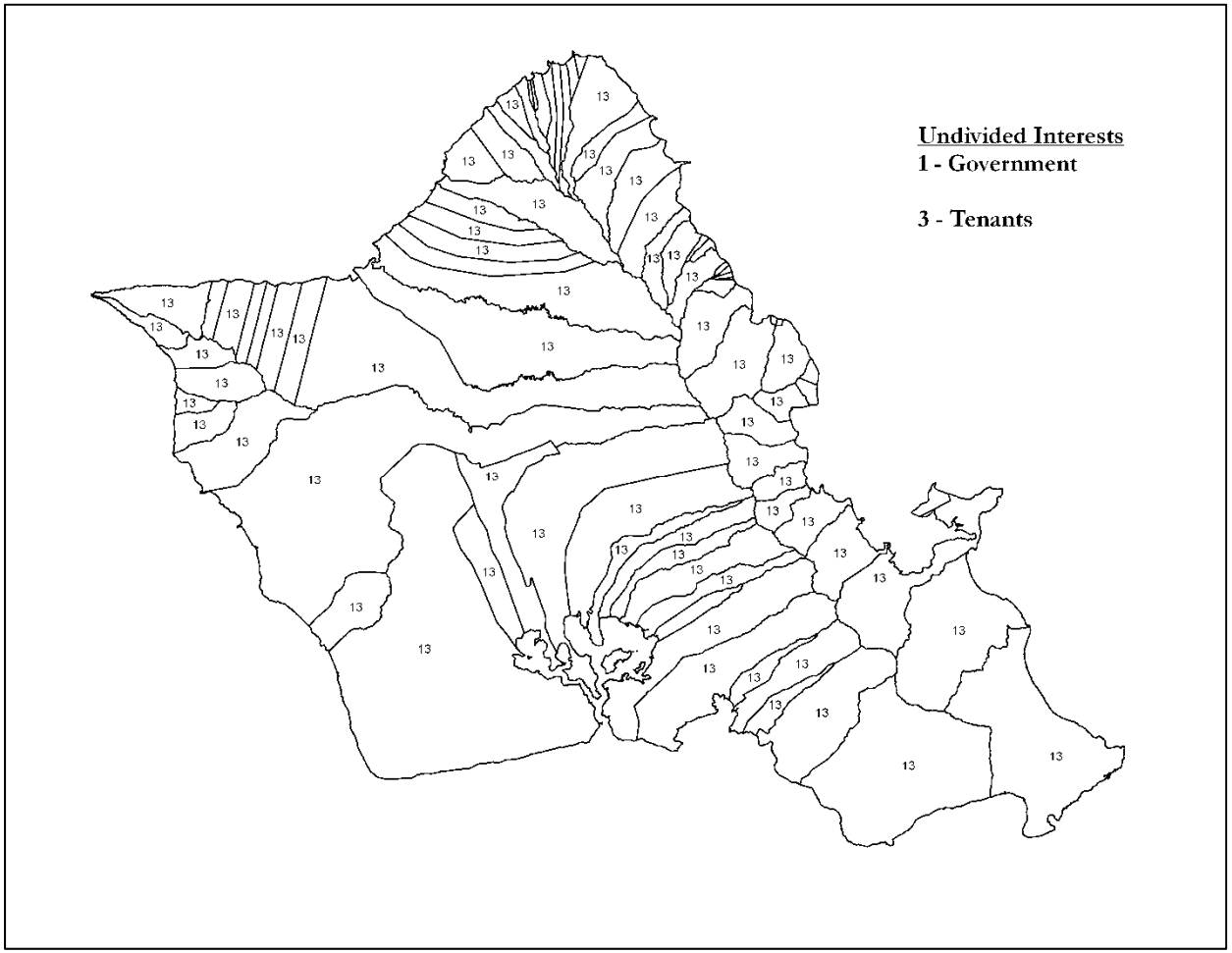
Figure 5 shows the division of the Konohiki's interests in land. After the Māhele event each Konohiki had defined rights to particular ahupua'a's and the division of these rights is exemplified by the exclusion of the "2", representing the Konohiki's interest.

Konohiki Lands

The Māhele "event" resulted in the dividing of 252 Konohiki's rights in land. Each individual Konohiki's rights to specific ahupua'a were acknowledged. Each Konohiki was then required to go to the Land Commission to receive a Land Commission Award (LCA) thereby establishing title to these ahupua'a. These Land Commission Awards did not award fee-simple title; instead they awarded life estates (freehold less than allodial). The fee-simple title still belonged to the government as represented by the "government's interest". The "government's interest" could later be divided out through the payment of commutation which is explained in more detail later.

As a result of this division, Kauikeauoli, as the highest ranking Konohiki, received over 2.5 million acres of land. These lands are often referred to as the King's Land (after 1865 called Crown Lands) which is mistakenly distinguished from Konohiki Lands. Kauikeauoli participated in this division (Māhele) which separated the undivided rights of the Konohiki class. Interpreting the Māhele as a division of land (versus rights in land), contributes to this confusion due to the large amount of land initially divided between Kauikeauoli (2.5 million acres) and the remaining Konohiki (1.5 million acres).

Figure 5. Undivided Interests After the Māhele of 1848



The King's Lands are considered to be the private property of Kauikeauoli:

> In our opinion, while it was clearly the intention of Kamehameha III. to protect the lands which he reserved to himself out of the domain which had been acquired by his family through the prowess and skill of his father, the conqueror, from the danger of being treated as public domain or Government property, it was also his intention to provide that those lands should descend to his heirs and successors, the future wearers of the crown which the conqueror had won; and we understand the act of 7th June, 1848, as having secured both those objects. Under that act the lands descend in fee, the inheritance being limited however to the successors to the throne, and each successive possessor may regulate and dispose of the same according to his will and pleasure, as private property, in like manner as was done by Kamehameha III.
> (In the Matter of the Estate of His Majesty Kamehameha IV 1864)

The King's Land is the predecessor to the "Crown Lands". The term Crown Lands originates from the 1865 statute making the King's Lands inalienable. Proceeds and income from these lands were used and benefited Kauikeauoli personally rather than the government.

Government Lands

On March 8, 1848, the day after the great division (Māhele) between the Konohiki class, Kauikeauoli divided the 2.5 million acres of land in his possession between his private estate and the government. As a result of this division he kept approximately 1 million acres of land for himself as his private property (King's Land) and relinquished 1.5 million acres of land to the Hawaiian Kingdom government creating what is called "Government Land".

Government Lands are those lands which are considered to be used for the benefit of the country as a whole and constitute approximately 1.5 million acres. Any proceeds from Government Lands went to the government treasury and were used to benefit the citizenry of the country. Thrum (1895) is the source of the data in Figure 3 showing the approximate acreage of Government Lands resulting from this division. Government Lands are the focus of chapter four and are an alternative mechanism through which the maka'āinana acquired land. Prior works have essentially ignored these lands and seem to assume that foreigners were purchasing these lands instead.

Commutation: Dividing the Government's Interest

Commutation is the most misunderstood concept in the Māhele process. A basic legal definition of commutation is, "An exchange or replacement" (Black and Garner 1999, 274). In the Hawaiian Kingdom, Commutation is the exchange of money or land of equal value as determined by Privy Council in exchange for the "Government's interest" in that land between a person with a freehold (fee-simple or life estate) or lease and the government. Payment to the government was deposited to the treasury department (government) and not the King's personal estate.

The "government's interest" or "government's commutation" is one of those vague terms in the secondary literature but it is defined by the Hawaiian Supreme Court:

> The terms 'king' and 'government' are, as we see, used interchangeably. They mean the 'State' in each case. A fee simple was obtained by the lord by extinguishing the right of the King, either by a payment in money, or by a surrender of other lands in value equal to the King's interest in the land.

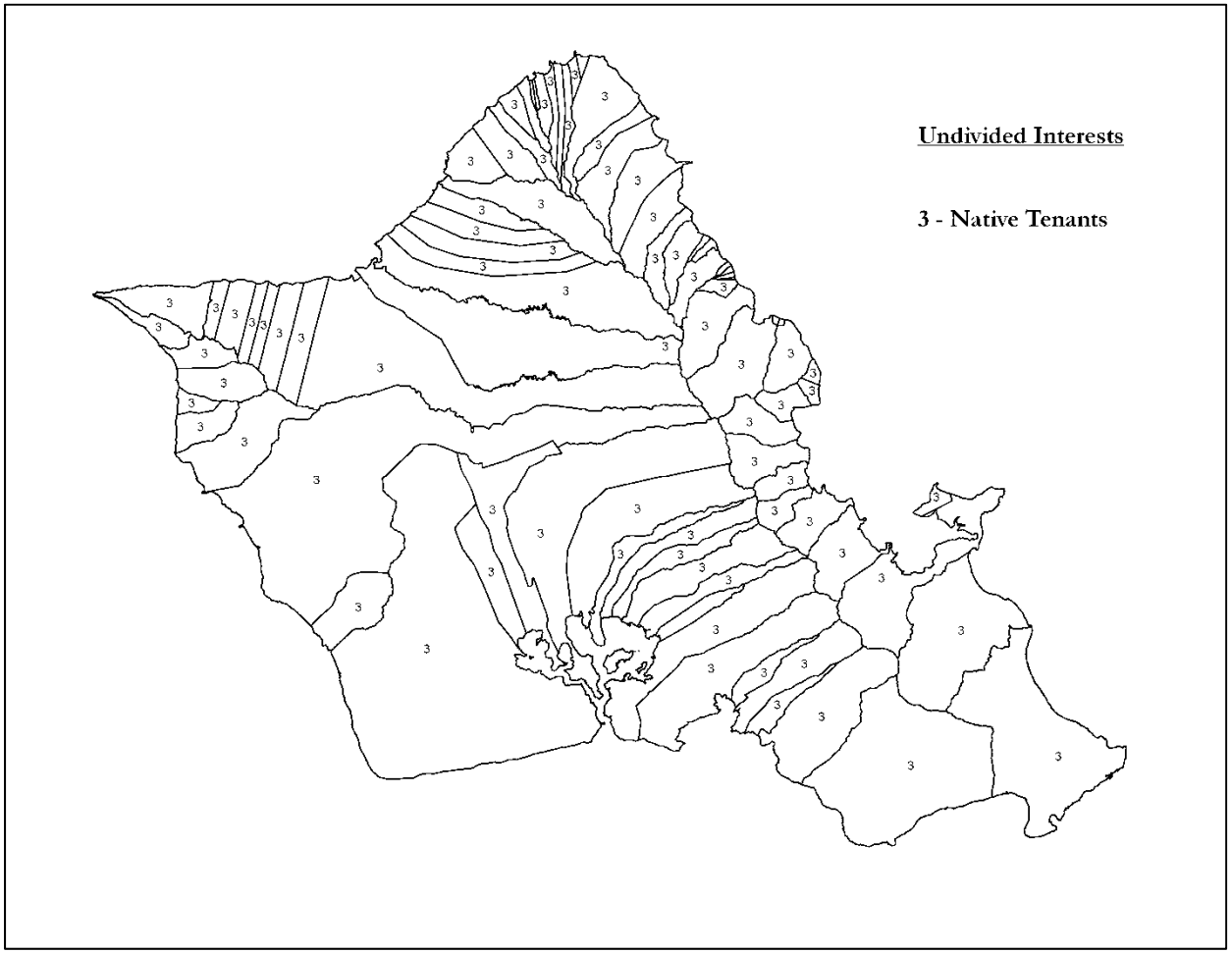
> This is called the 'Government's Commutation,' and the money paid or the lands surrendered invariably went to the Government.
> (Thurston v. Bishop 1888)

Going back to the concept of Tenants in Common, the "government's interest" in the Hawaiian context was the "fee-simple" ownership of property. If anyone in Hawai'i could be considered to have owned the land, it would be the King as representative of government. Commutation was an exchange between one with a lesser estate (such as a life-estate) and the government. The government relinquished its right to the fee-simple ownership of a particular piece of land in exchange for cash or land as determined by Hawaiian Kingdom law.

The basic types of interests in land that are acknowledged fall under the category of "Freehold Estates". A Freehold Estate is, "An estate in land held in fee simple, in fee tail, or for term of life [Life Estate]" (Black & Garner 1999, 675). The Hawaiian example could also include leases (In re Vida 1852). This is not the case in American or British common law. The 1852 court case, *In Re: Vida,* is instructive as it explains whether the original leases from the King and Konohiki could be considered equal to a life-estate, "The Hawaiian legislators of that day…beyond doubt included leases for years, the then prevailing, if not the best, title, under the head of immoveable property" (1852). This becomes important when determining how some leases in the Hawaiian Kingdom were "commuted" for fee-simple title. Lease to fee conversion would be considered an anomaly in the American system.

Freehold is more generally used to designate non-feudal tenure. Under feudal tenure land was held under a Lord or Sovereign and would revert to the Lord under certain conditions. Freehold refers to land which is held "free" of a Lord or Sovereign in which the

Figure 6. Undivided Interest After Payment of Commutation



right of inheritance or ability to alienate is in the person who holds title and not in the Lord. Freehold estates come in two forms: inheritable freeholds (Fee-Simple, Fee-Tail, and Life Estates) and leases which are considered non-inheritable freeholds (Cortessi 2001, 102-103).

So when speaking of title, a Land Commission Award and Royal Patent are instruments which serve as evidence of title which define and articulate rights, duties, entitlements, or liabilities, in property of a specific nature. Generally speaking they will show evidence of a fee-simple, fee-tail, Life Estate, or a Lease. When tracking title, the most important thing to figure out is who possesses the fee-simple as the "highest form of ownership interest recognized by law" is the fee-simple (Cortessi 2001, 103).

The model, structure and legal language of the Māhele are a hybrid of the Hawaiian, American and British models of private property. At no time prior to the Māhele did Hawai'i ever have or implement a "freehold" model of tenure. This post-Māhele model was definitely of European origins. But it was not a model that mimicked the British and American model; it was adapted to Hawaiian custom: "To seek for light in the subtle distinctions of the common law relating to real property, by which to interpret our statutes, would lead us into confusion and difficulties inextricable. The question is, not what meaning the common law attaches to 'immoveable and fixed property,' but what meaning did the Hawaiian legislature, which passed the statute, attach to this phrase?" (In re Vida 1852) The court offers further insight:

> At the time of enacting this statute, there was no such thing known as a title in fee simple, the chiefs themselves holding their lands under the King, and the very leasehold in question being considered one of the most durable and valuable titles, then in existence. Nearly all the lands possessed by foreigners were held under leases for years, or at

> the will of the King, or some chief, and in common parlance, real estate, or fixed or immoveable property was understood to mean any interest whatever in lands. The Hawaiian legislators of that day knew nothing of the common law distinctions respecting real estate, and beyond doubt included leases for years, the then prevailing, if not the best, title, under the head of immoveable property.

The institution of "private property" in Hawai'i was a hybrid system incorporating many of its own unique features from Hawaiian custom. The common law of the U.S. and Britain were used as guides but the Hawaiian context guided the interpretation of law. It is admitted by the court that such European terminology was not in use or the consciousness of these early framers of the Māhele. The Māhele was not a pre-planned and imposed institution by foreigners which the U.S. common law would govern.

The difficulty of past interpretations of the Māhele process, more specifically the concept of commutation, is that they do not trace how "rights" and "interests" in land transferred to "title". Cannelora expounds on a specific example of this:

> The certificates of award issued by the Land Commission to successful claimants for all but kuleana claims purported to convey to the awardee 'a freehold title less than allodial,' while awards on kuleana claims did not specify the character of the title conveyed. Neither the statute creating the Land Commission nor the Principles Adopted by the Land Commission defined the nature of a 'freehold estate less than allodial,'
> (Cannelora 1974, 24)

Cannelora is correct in stating that the phrase, "freehold less than allodial" has not been well defined. The lack of understanding of this phrase is at the root of approaches which do not account for the type of title that exists at each step of the "award" process. In other words,

existing descriptions describe the procedures of the Māhele process but do not explain the theory or principles underlying those procedures. Commutation is one such anomaly that is not well accounted for in terms of American property law. But the mistake is in assuming that American property law should by itself explain Hawaiian property law.

The phrase "Freehold less than allodial" is not uncommon in Hawaiian land documents. It can be found in archival source material. For example it is clearly articulated in a Royal Patent Upon Confirmation of Land Commission Awards (R.P. on LCA). These R.P. on LCAs are evidence of the extinguishment of the government's interest in land. Jon Chinen (1958) includes a reproduction of R.P. on LCA #1612. This Royal Patent states:

> Whereas, the Board of commissioners to Quiet Land Titles have by their decision awarded unto (Akoni) (Claim No 2944B) an estate of Freehold less than Allodial, in and to the land hereafter described, and whereas (the said Akoni has commuted the title, as awarded for a Fee-Simple title by the payment of six dollars unto the Royal Exequere); Therefore, Kamehameha, by the Grace of God, King of the Hawaiian Islands, by this Royal Patent, makes known unto all men, that he has, for himself and his successors in office, this day granted and given absolutely, in Fee Simple, unto (Akoni) all that certain piece of land situated at (Kapuukolo).

In this R.P. on LCA, the phrase "freehold less than allodial" is clearly articulated. The wording of this instrument is instructive into the specific type of title that Akoni possessed. Allodial means "held in absolute ownership; pertaining to an allodium (an estate held in fee-simple absolute" (Black & Garner 1999, 76). This phrase can then be interpreted as "freehold less than fee-simple". The types of freehold estates that are "less than fee-simple" are either fee-tail or life estates.

Through interpretation, it is clear that Akoni was awarded an estate "less than fee" by the Land Commission. Akoni did not possess a fee simple title until receipt of the Royal Patent which states, "by this Royal Patent" the government has "this day granted and given absolutely, in Fee Simple unto Akoni" the land at Kapuukolo. Prior to receiving the R.P. on L.C.A, Akoni had an "award" (Land Commission Award) which articulated an interest that was "less than fee" (Freehold less than allodial). The point here is to identify the specific type of title or interest.

A definition of "freehold less than allodial" was first presented to this researcher by Dr. Keanu Sai giving the example of Land Commission Award #433 (see Appendix B) which states, "and we do therefore award to the aforesaid claimant, William Crowningburgh, a freehold title less than allodial, or in other words a life estate in said land, which he may commute for a fee simple title as prescribed by law". Explicitly stated, a "freehold title less than allodial" is a life-estate. This explicit definition has major ramifications on title. It allows one to clearly and specifically identify the nature of title one has throughout the Māhele process.

None of the major authorities have offered a meaningful definition for the term "freehold less than allodial". Lucas (1995) *A Dictionary of Hawaiian Legal Land-Terms* does not have an entry for "commutation" or "freehold less than alodio". Lucas (1995) does include separate entries for the Hawaiian translation of "freehold less than allodial", 'Ma lalo o ke ano allodio". In Lucas (1995) the phrase "ma lalo" is defined as "less than" (74) and "alodio", a variant spelling of allodial (which has no unique entry of its own) as "fee simple" (9).

Neither does Chinen (1958) describe or explain the significance of commutation or "freehold less than allodial" in his early work. Chinen (2002) does define "freehold less than allodial" as "an estate held by free tenure of uncertain duration. It could be an estate for the life of the tenant only or be an estate that may be inherited" (147). Chinen uses somewhat vague wording in this definition, "it could be" an estate for life "or be" an inheritable estate to which he cites *Harris v. Carter*. This court case does not offer this explicit definition of "freehold less than allodial".

Some have defined commutation to be "like a tax". This is inaccurate and lacks precision. Commutation is "an exchange" (Black & Garner 1999, 274). In compliance with the law, awardees exchanged cash or land for the fee-simple title in their remaining land. Payment of commutation is evidence that the "government's interest", the fee-simple absolute ownership of land, had been extinguished. Prior to this, a Konohiki's right was limited to that of a life-estate as the "government's interest" still remained in the land. The "government's interest" was defined in Thurston v. Bishop, "the Government representing the sovereignty, the source of all title to land in this Kingdom". This was reiterated with additional clarification in Land Commission Award #690 to Louis Gravier. This is a complicated award and should be read in its entirety. A brief excerpt defining the government's interest is provided here:

> …In other words, the said Kekuanaoa and Kalole, conveyed to the said Elizabeth, a fee-simple title in said lot, which was more than they had any right or power to convey, as they thereby conveyed away the rights of the King or Government in the lot…and the Land Commission have no power to grant such a title in conformity with the deed aforesaid, unless the Government first relinquish their rights in said lot.

Harris v. Carter defines who is meant by the "King or Government" in the previous quote:

> The whole context of these "Principles" shows that the land tenures of this Kingdom were to be settled on the basis that the King -- meaning the State or Government -- had one-third of any given land held by a landlord (generally a chief); and if it had tenants upon it (if all parts of the land were equally valuable) the landlord would take one-third, and the tenants the remaining third. An allodial title would be given by the Land Commission to the lord (the chief), an allodial title in severalty to the tenants, and a third would remain in the King or Government. The terms "King" and "Government" are, as we see, used interchangeably. They mean the "State" in each case.

These passages clearly define the government as the "state" and that the government's interest is the fee-simple title to all of the lands (real property). Commutation represents a conversion of title from a subordinate estate to fee-simple title, "A fee simple was obtained by the lord [Konohiki] by extinguishing the right of the King, either by a payment in money, or by a surrender of other lands in value equal to the King's interest in the land. This is called the 'Government's Commutation', and the money paid or the lands surrendered invariably went to the Government" (Harris v. Carter 1888). In most cases, it is evidence that a life-estate has been converted to a fee-simple title by paying (commuting) for the government's interest (the fee-simple title).

Chinen (1958, 10) includes a reproduction of LCA #433 to William Crowningburgh. This is interesting for a couple of reasons. Chinen (1958) does not mention or define the term "freehold less than allodial" anywhere in his text, although LCA #433 clearly defines the term as a "life-estate". Was the choice of this Land Commission Award deliberate for the definition it provided or merely a coincidence? A deliberate choice of reproducing this award in his book would suggest Chinen either could not explain the significance of this

definition or chose not to. Whatever the case, forty-four years later Chinen (2002) offers a definition of "freehold less than allodial" but does not explain it. A definition for this phrase is a significant anomaly that has not been precisely described in the literature. It is significant because it defines the type of ownership an awardee has in property. In common language it represents the difference between owning a piece of property and leasing a piece of property.

As mentioned in chapter two, descriptions which provide an understanding of the Māhele process through a legal lens or analysis are limited. Others have chosen to approach the Māhele historically. Such historical interpretations have relied on these few legal approaches. These legal authorities have offered limited understandings of the Māhele process by failing to explain how rights to land were transitioned to title to land. This is compounded by the fact that many of these historical scholars (Kameʻeleihiwa 1992, Stauffer 2004, McGregor 2007) share the assumption that the Māhele was a foreign imposition, and therefore approach it as a mimicry of American institutions of property rather than its own hybrid variation with details distinct to Hawaiʻi. This limitation is exemplified through the explicitly expressed lack of definition of the phrase "freehold less than allodial". This phrase, as demonstrated, is critical to understanding concepts of "commutation" and "government's interest" which in turn is critical to understanding how the three classes' vested rights in land was to be divided (māhele) out.

Kuleana Act of 1850

Figure 6 reveals that the undivided interests of the maka'āinana still remain and have not yet been divided. The *Kuleana Act* was one mechanism which was used to divide out the interests of the maka'āinana class. The *Kuleana Act* is comprised of seven sections: Sections 1and 2 address, "Fee simple titles to be granted to natives occupying certain lands"; Section 3 empowers the Land Commission "to grant fee-simple titles"; Section 4 permits, "Certain government lands on each island to be offered for sale"; Section 5 states that "house lots not to exceed one quarter of an acre"; Section 6 limits "grants of kalo ground to...actual cultivation by each claimant"; and Section 7 states that "certain rights [are] reserved to natives". Kuleana Lands, as we know them today, effectively derive from sections 1-3 and 5-7. The fee-simple sale of Government Lands as articulated in section 4, are not accounted for by the 28,658 acre statistic. Instead, these sales would be accounted for within the 652,521.17 acres (see chapter four) of government lands sold through 1893. Section 4 of the *Kuleana Act* states,

> 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.

This section of the *Kuleana Act* was reproduced in the 1851 representative's letter to the maka'āinana in the *Polynesian* newspaper. This section of the *Kuleana Act* identifies an alternative method for natives who "may not be otherwise furnished with sufficient land" to acquire land. Considering the context of the time and the high depopulation rate, Hawaiians may not have been actively cultivating land with the same productivity as they were during the time that Vancouver and other foreigners made their observations of productive

agriculture. This would make it difficult for a maka'āinana who did not already have land in cultivation to file a claim for land that was "in actual cultivation". This section of the *Kuleana Act*, provided for such cases where Hawaiians who may have intended or desired to farm but had not yet had the chance to do so. It shows that there was an explicit intent to put 'āina in the hands of the maka'āinana whether already in cultivation or with the intent for future cultivation.

Puna "Kuleana Land"

Closer examination of the Land Commission Awards for Puna provides further context for the three categories of Land Commission Awards. Thrum (1895) provides a breakdown of the LCAs for Puna giving a total of 32.1 acres (the hundredths digit is illegible in the original). Examination of the LCAs for Puna yields three LCAs whose acreage adds up to the 32 acre total: LCA 8081, 13.64 acres; LCA 1-M, 7.37 acres; and LCA 2327, 11.32 acres. These three acreages total 32.33 acres as compared with the 32.1 acre total from Thrum (1895, 39). This difference is considered negligible as either a minor calculation error by the original compilers or some other factor. This interpretation is substantiated by the fact that there are no other LCAs in Puna whose size is less than 32.1 acres. Therefore these are the only three LCAs which are eligible for consideration for this sub-total.

The remaining LCAs on this page are predominantly for entire ahupua'a and represent the second characterization of LCAs: Awards to those Konohiki named in the *Māhele Book*. Cross referencing the awardees with the *Māhele Book* verified that each were Konohiki given lands in the Māhele of 1848 (Figure 8). This verifies the different categories

Figure 7. Land Statistics: Thrums (1895)

LAND STATISTICS.

Estimates of Area Included in All Government Grants (Land Sales) to June, 1893, in Acres.

Prepared by Government Survey Department.

Hawaii—Kohala	21,520.95	Maui—Lahaina	364.17
Hamakua	63,439.41	Kaanapali	2,675.00
Hilo	14,884.41	Wailuku	25,825.51
Puna	17,411 85	Hamakua	18,711.53
Kau	215,538.81	Koolau	2,024.72
Kona	56,101.16	Hana	6,210.92
		Kipahulu	1,540.03
Total	388,896.47	Kaupo	11,534.73
Oahu—Kona	5,549.10	Kahikinui	3,595.67
Ewa	7,401.31	Honuaula	15,100.84
Waialua	19,596.47	Kula	13,054.92
Koolau	12,321.94		
		Total	100,645.04
Total	44,868.82		
Lanai	735.95	Kauai	15,123.25
Molokai	55,960.90	Niihau	61,088.00

Grand Total ..... 667,317.41 acres.

The foregoing estimate of areas is largely increased by the inclusion of several exceptionally large grants, viz.:

Grant 2769 to J. P. Parker, in Hamakua	37,888	acres.
" 2791 to C. C. Harris in Kau	184,298	"
" 3343 to C. Spreckels, in Wailuku	24,000	"
" 3146 to C. R. Bishop, on Molokai	46,500	"
" 2944 to J. M. and F. Sinclair, Niihau	61,038	"
Total	353,714	"

Approximate Division of Lands 1848–55.

Government	1,495,000	acres in 1848.
Kuleanas	28,658	" "
Crown Lands	915,000	" in 1893.
Bishop Estate	420,000	" "
Other Chief's Lands surveyed before '55	133,013	
Chief's Lands not surveyed before '55	1,018,329	
Total	4,010,000	acres.

Total of Chief's Lands including Bishop Estate 1,571,341 acres.

Total Area of Land Commission Awards (Kuleanas.)

Hawaii—Hilo District	466.35 acres.	Kona District	2,119.00 acres.
Hamakua "	2,542.00 "	Kau "	2,124.18 "
Kohala "	2,129.16 "	Puna "	32.18 "

Total area of Hawaii Kuleanas	9,412.87	acres.
" " Maui "	7,379.74	"
" " Molokai "	2,288.87	"
" " Oahu "	7,311.17	"
" " Kauai "	1,824.17	"
" " Lanai "	441.97	"
Grand Total	28,658.49	"

of LCAs as those LCAs totaling the 32.1 acres are but a sub-set of those LCAs listed in the *Index of Land Commission Awards* (see Figure 9). What needs to be empirically verified is whether those LCAs consisting of claims prior to 1846 are also included in the *Kuleana Award* statistic as they could generally speaking also be considered "Kuleana". For this research Kuleana Awards were assumed to be those strictly characterized by the *Kuleana Act*.

Multiple definitions of Kuleana

As often as this *Kuleana Award* statistic is cited, the discourse has not examined or defined exactly what a *Kuleana Award* is comprised of. The example of Puna shows the narrow definition of the *Kuleana Award* statistic limiting the articulation to just three of 19 Land Commission Awards. Generally speaking, the Konohiki who received Land Commission Awards via the Māhele could also be considered to have a *Kuleana Award* by definition 6 of Lucas (1995, 61). This definition of "kuleana" meaning any "interest" in land whether it be a fee-simple, fee-tail, life-estate, or lease. Lucas (1995) articulates at least 14 definitions for the term "kuleana" (61). This alludes to the various contexts in which the term is used. The following are some examples of definitions of the term "kuleana": a right of property in any business; a small area of land; small parcels of land within an ahupua'a; interest; privileges; a part, portion or right in a thing; ownership; a small land claim inside another's land; right; title; property; claim; stake; and lien. Suffice to say, our understanding of such a basic term is limited and further research needs to be done to further explain the subtle nuances of this hybrid Hawaiian system.

Figure 8. Puna Konohiki Receiving Land via the Māhele

Konohiki	**Māhele Book Page**
Lunalilo, W.C.	18,20,22
Kamamalu, V.	2,4,6
Kaoanaeha, M.	165
Kanaina, C.	32
Leleiohoku, Wm. P.	24,26
Kakauonohi, M.	26, 28
Kalama, H.	148
Keohokalole, A.	10,12
Kale	167
Lahilahi, G.M.	163

Figure 9. Land Commission Award Index for Puna, Hawai'i

PUNA, HAWAII

Awardee	L. C. A.	Book	Page	R.P.	Book	Page	Location	Area	AP.
Baranaba	2327	5	390	7602	28	345	Kalaihina	11.32 Acs	1
Davis, Kale	8522-B	10	465	2236	9	605	Waikahekahe (Ahp.)	.....	1
Haka	1-M	7	677	8029	34	293	Kehena	7.37 "	1
Hewahewa	8081	5	389	4360	17	717	Halauloa	13.64 "	1
Kalama	4452	10	467	7483	25	231	Kula (Ahp. Ap. 1)	2902.00 "	3
Kamamalu V.	7713	10	437	6884	25	81	Kahuwai (Ahp. Ap. 12)	2869.00 "	1
Kamamalu V.	7713	10	437	8199	35	417	Kauwalehua (Ahp. Ap. 13)	1822.00 "	1
Kamamalu V.	7713	10	437	8200	35	425	Kauaea (Ahp. Ap. 14)	1568.00 "	1
Kanaina, C.	8559	10	632	8177	35	329	Kapoho (Ahp. Ap. 5)	4060.00 "	1
Kaoanaeha	8515-B	10	297	1665	6	267	Kamomoa (Ahp. Ap. 1)	..... "	1
Kekauonohi, M.	11216	9	661	8095	35	5	Waiakahiula & Panau	2972.00 "	2
Keohokalole, A.	8452	10	431	4386	18	97	Puua	4919.00 "	1
Lahilahi, G.	8520-B	10	6	1668	6	279	Waikahekahe	..... "	1
Leleiohoku, W. P.	9971	10	609	7714	29	53	Paalaa	1110.00 "	1
Lunalilo, W. C.	8559-B	10	479	8030	32	43	Kahaualoa	26,000.00 "	1
Lunalilo, W. C.	8559-B	10	479	8094	35	1	Keahialaka	5562.00 "	1
Lunalilo, W. C.	8559-B	10	480	7223	25	149	Keaau	64,275.00 "	1

Summary of Land Commission Awards

The Land Commission investigated three different types of claims, of which Kuleana Awards, which account for the 28,658 acres of land received by the makaʻāinana via the *Kuleana Act*, were just one type. These are the three types of Land Commission Awards: 1) awards of claims to land existing prior to 1846 2) awards to those Konohiki named in the *Māhele Book* and directed to obtain an award from the Land Commission and 3) "Kuleana Awards" from the *Kuleana Act*.

Prior to the *Kuleana Act*, the Land Commission did not have the authority to grant fee simple titles. It was statutorily limited to investigate title and to issue an award based on a previous claim to title. These refer to the oral claims outside of the system of Kālaiʻāina. This was the initial kuleana (responsibility) of the Land Commission. After the Māhele of 1848, the Konohiki were directed by Kamehameha III to go before the Land Commission to receive title to those lands articulated in the *Māhele Book*, "Ua ae ia [a]ku e hiki ke lawe aku imua o ka Poe Hoona Kuleana". This was the second kuleana of the Land Commission. The *Māhele Book* articulated "rights" to land and not "title" to land. Title was awarded through the award of the Land Commission based on rights articulated in the *Māhele Book*. The Land Commission did not have authority to grant new title until given that authority through section 3 of the *Kuleana Act*. This was the third kuleana of the Land Commission. If one were to assume that the Land Commission was empowered to create fee-simple title in 1846 one would be mistaken. Interpretation consistent within the temporal context is crucial in this example to explain what the authority of the Land Commission actually was at a particular time in history.

An argument for an "initial" dispossession relies on the presumption of the maka'āinana's receipt of just 28,658 acres of land. It is interesting that other summary statistics have not received the same amount of attention in analysis or at least raised a curiosity in the discourse. This may be due to the bias that a perspective which assumes that the Māhele was a foreign imposition imposes. Thrum (1895) provides a breakdown of the 28,658 acre statistic by island, "Total Area of Land Commission Awards (Kuleanas)" (see Figure 7) and also includes an "Estimate of Area Included in All Government Grants (Land Sales) to June, 1893". An obvious question that follows is who bought this land especially considering that section 4 of the *Kuleana Act* provided for the fee-simple sale of Government Land to natives without land. If one assumes the Māhele to be a foreign imposition fulfilling foreign desires one may conclude the answer to be foreigners. Chapter four provides empirical evidence arguing that following the Māhele, Hawaiians account for the most number of purchases of these lands.

Summary

The dispossession argument relies on a description of the Māhele process that has serious anomalies. One anomaly is the definition of the terms "commutation" and "freehold less than allodial" found in Hawaiian land documents. Imprecise definition of such terminology has serious implications on both land title and how the overall Māhele process is interpreted. A description of the Māhele process was offered which accounted for these anomalies by giving precise definitions as articulated in Hawaiian Kingdom law. From this

nuanced understanding, alternative mechanisms for maka'āinana to acquire land were identified.

Evidence was presented explaining how Hawaiian custom was incorporated into the law. Decisions from Hawaiian Kingdom Supreme Court cases were used to show that even the foreign judges of the time were interpreting land law through "Hawaiian eyes". Hawaiian custom was the authority in such decisions and not American or British common law. Such evidence refutes arguments by Osorio (2002) and Stauffer (2004) suggesting that the legal system was American dominated.

Understanding the Māhele process in a more precise and nuanced way allows for the identification of alternative ways for the maka'āinana to acquire land. The next chapter will focus on the fee-simple sale of Government Land. Examining trends in the sale of these lands will help to determine how dispossession occurred and when. If the Māhele produced an initial dispossession, one would expect to see the majority of the land transferring into foreign hands. Alexander's comment that "between the years 1850 and 1860, nearly all the desirable Government land was sold, generally to natives" (1882, 24) does not support the expectations of an initial dispossession. The examination of Government Grants in chapter four reveals that Hawaiians purchased a significant amount of land. The more interesting pattern is in the distribution of sales through time to Hawaiians and Non-Hawaiians which suggests an alternative causal mechanism for dispossession.

The significance of this research is not just a matter of additional information being considered but more importantly one of approach. While this work specifically seeks to

provide an empirical measure of dispossession, it also seeks to contextualize how such a measure should be interpreted.

Chapter 4. Supporting "the Correction": Government Grants

Government Lands comprised approximately 50 percent of Hawai'i's total land area after the Māhele. Chapter three focused on the laws and procedures involved in the Māhele process. These laws framed rights in land and created the "potential" to deprive the maka'āinana of land but chapter three argues against this; suggesting instead that the laws preserved the rights of the maka'āinana. Chapter four examines the sale of Government Land and examines how section four of the *Kuleana Act* contributed to the acquisition of land by the maka'āinana.

Chapter four focuses on whether lands were *actually* purchased and by whom. Measuring the *actual* possession of land is a more precise way of measuring dispossession than inferring intent or potential. As the previous chapter explains, assumptions of foreign imposition and un-nuanced understandings of the processes and procedures of the Māhele have contributed to interpretations identifying the Māhele as the sufficient condition for dispossession. Examination of the trends in sales of Government Lands and how land was actually being used leads to alternative explanations.

Government Grants refer to the fee-simple sale of Government Land and take the form of "Royal Patents", "Royal Patent Grants", or "Grants". These terms are often used interchangeably. They are often confused with "Royal Patents on Land Commission Awards" which are a separate type of title. The distinction between Royal Patent Grants and Royal Patents on Land Commission Awards is articulated in Section 43 of the Civil Code, "A royal patent signed by the King and countersigned by the Kuhina Nui and the Minister of the Interior, shall issue under the great seal of the kingdom, (1) to the purchaser in fee simple of any government land or other real estate and (2) also to any holder of an award

from the Board of Commissioners to quiet land titles for any land in which he may have commuted the government rights" (Brunz v. Mott-Smith 1877, 784). The first example refers to the fee-simple sale of Government Land which is the focus of this chapter. While using similar terminology, "Royal Patents" refer to two different mechanisms of the Māhele process thus reinforcing the need for precision in terminology in order to avoid confusion.

Data Source

In the mid 19th century, the Hawaiian Kingdom Government compiled an index of the Royal Patent Grants. This index included information from the actual awards (Royal Patent Grants). The name of the awardees, location of the award, amount of acreage of the award, date of the award and other similar information were included in this index. This index was published as a book (hereafter 1916 index) in Honolulu and was based on an earlier version "In the preparation of this much-needed book it was necessary to follow the form of the original Grant Index published in 1887" (1916). The index is especially useful because it was created by the government during a time when the statistics on Hawaiian land were first derived and is most likely the source of the statistics presented in Thrum (1896, 36).

Procedures

The data in the 1916 index was scanned and optical character recognition (OCR) software was used for the initial data entry. Verification of the scanned entries was still

necessary and was completed manually by visually checking the electronic entry versus the original index. This data was then compiled using an ESRI ArcGIS product so that this information could be later linked to the geographic data in future research. Similar work could have been accomplished in any database or spreadsheet package.

This electronic transcription from the 1916 index was re-verified for data entry errors. Once the accuracy of the transcription of the 1916 index was assured, the transcription was verified against the individual award documents. This limited the potential for transcription error by the original compilers of the 1916 index entering this research. These 3,630 award documents (see Appendix C for a sample award) each span at least two pages, front and back and some of the awards are written in both English and Hawaiian (see Figure 10). This resulted in the examination of more than 10,000 pages of material. This material is available via microfilm at the Hawai'i Bureau of Conveyances, but no state agency has a printed and publicly available copy of this data set. The original documents are at the Hawai'i State Archives and access to these documents is limited for preservation purposes. Linnekin's reference to the "volume of these records, their fragmentary quality, and their poor internal organization" are well known to this researcher and the task is indeed "daunting".

Defining Terminology: Identifying "Hawaiians"

The *Kuleana Act* was a mechanism which allowed native tenants to divide out their previously undivided interest in land. Native Tenants are aboriginal Hawaiians. Some non-aboriginal Hawaiians who arrived in Hawai'i prior to the Māhele were consolidated into the

Konohiki class, such as John Young and Isaac Davis "foreigners who came and worked for Kamehameha were treated in a manner similar to kaukau alii" (Kameʻeleihiwa 1992, 159). Other foreigners were not included in the system of Kālaiʻāina and were not considered to be of the Makaʻāinana class, they were outside of it. The Hawaiian Kingdom Supreme Court case, *Rex v. Booth,* articulates such differences in identity and how laws have been passed specifically for the protection of the natives (aboriginal Hawaiians):

> The argument of counsel was very able and eloquent in its application to the rights of British subjects under the British Constitution, and to the rights of an American citizen under the Constitution of the United States, on the great principle that laws should affect all people alike; but its fallacy consisted in its misapprehension of the true spirit, intent and purpose of the Hawaiian Constitution as applicable to Hawaiians...The Legislature of the Kingdom has always been peculiar in this, that it has made certain provisions of laws exclusively in reference to native subjects, since the formation of the Government.
> (Rex v. Booth 1863)

Foreigners, even those naturalized as Hawaiian Nationals, were not considered Native Tenants and therefore, they were not eligible for a Land Commission award from the *Kuleana Act*. Differentiating awards to aboriginal Hawaiians and to others was necessary to determine if the makaʻāinana were purchasing land. Thus, it is important to determine the ethnicity of the person receiving each Government Grant so that statistics comparing acreage totals for purchases of Government Lands could be compared with the *Kuleana Award* Statistic.

Awardees Name

The most accurate measure of Hawaiian ethnicity would be the complete genealogies for each of the total 3,470 Government Grant awardees. This is obviously infeasible. Therefore, certain assumptions were made in order to arrive at a surrogate measure of ethnicity. The awardees' name was used to indicate their ethnicity. If the awardee's name appeared to the author to be a Hawaiian name, the awardee was categorized as Hawaiian. The same procedure was used to categorize Non-Hawaiians. The guidelines for this categorization are as follows. If the name followed proper Hawaiian language grammatical rules and spelling then it was categorized as "Hawaiian". This included names which were limited to a combination of the 13 letters in the Hawaiian alphabet and ended in a vowel. Usage of letters not included in the Hawaiian alphabet or ending with a consonant were categorized as "non-Hawaiian". This is a subjective process but it could be duplicated by any reasonable person who has lived in Hawai'i for a couple of years.

It is quite possible that many names may have been "Hawaiian-ized", that is to say, may have taken on Hawaiian spellings of otherwise non-Hawaiian names. While this would incorrectly add to the Hawaiian total, this phenomenon would also serve as evidence of foreign assimilation into Hawaiian culture. One assuming the Māhele to be a foreign imposition would probably not expect such a phenomenon to be prevalent. Hawaiians taking on English names would underestimate the total and would provide additional support to the argument of this thesis once such discoveries were made.

Language of the Written Instrument

A second independent measure was used as an indicator of ethnicity: the language in which the award was written. The actual awards are written in Hawaiian, English, or both Hawaiian and English. These categorizations reveal interesting patterns in language use from 1846 through 1893. Between 1846 and 1854, Royal Patent Grants were written predominantly in Hawaiian (see Figure 3). Some Royal Patent Grants were written in both languages during this time which would seem to reflect the bi-lingual nature of Hawaiians during this time. After 1854, Royal Patent Grants are written in either English or Hawaiian. It would appear as if the awardee was given a choice of languages because judging by the awardees' names it appears that those with Hawaiian names chose to receive their Royal Patents in the Hawaiian language and vice versa. Royal Patent Grant 3162 is the last award written in the Hawaiian language and this occurred in 1877. After this time, RPGs are exclusively issued in English. Therefore, after 1877, the language of the written instrument does not necessarily correlate to the awardees' ethnicity as the choice was standardized for whatever reason.

While not the direct focus of this paper, Figure 10 shows interesting trends for those interested in the evolution of language in Hawai'i. This evidence suggests that if the English language was imposed in Hawai'i, this could not have occurred until sometime after 1877 as Hawaiian was still being used in government land documents. In 1858, precedent was set regarding what language had authority in law in relation to land, "Where the exact legal signification of the terms of a deed could not be expressed in Hawaiian without great difficulty, recourse was had to the English original" (Haalelea v. Montgomery 1858, 62). It is interesting that English was not exclusively used in official Hawaiian government deeds until

19 years later. This seems to suggest that this law may not have had such a direct impact on language until years later.

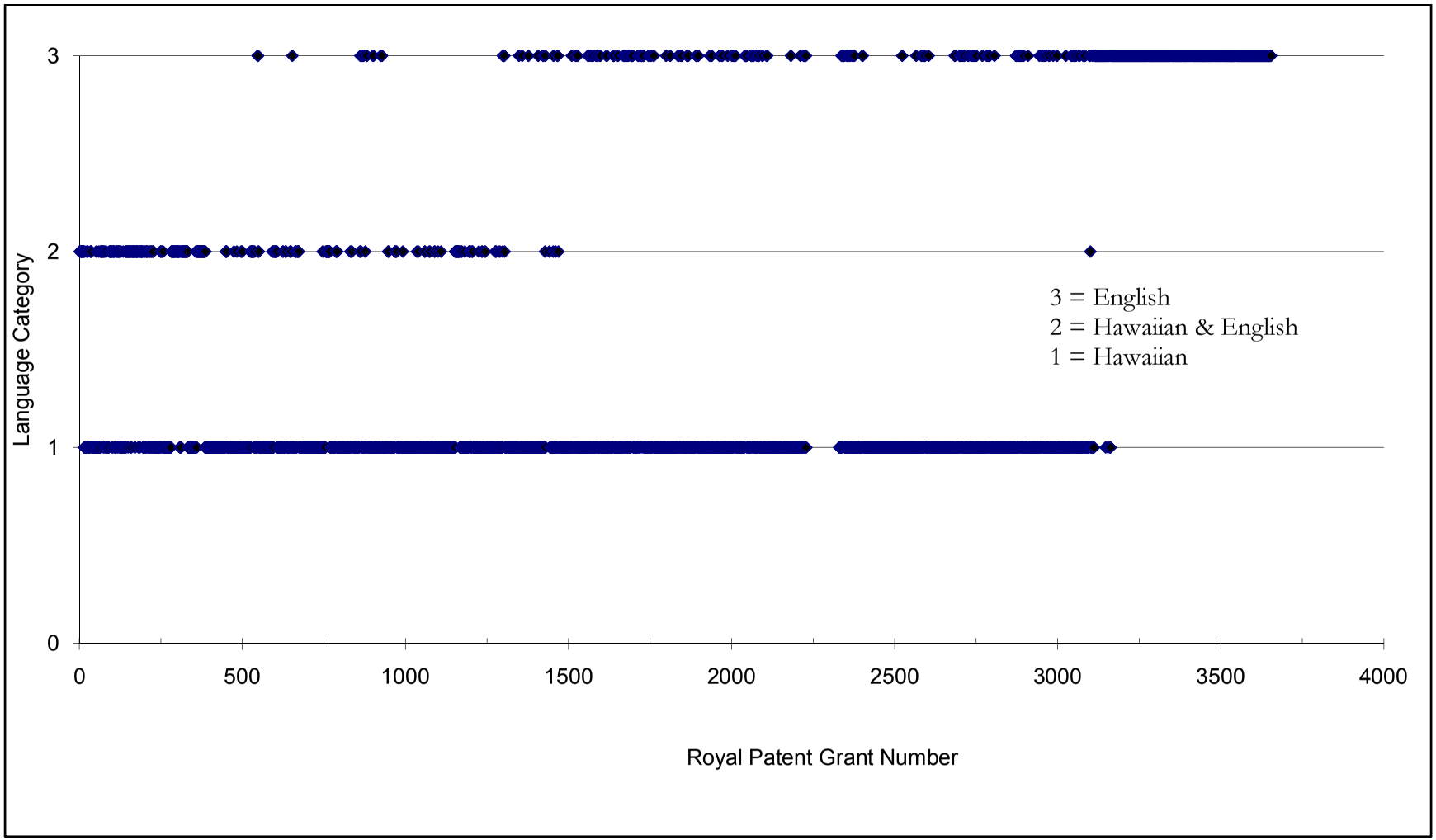
For categorization purposes, it was assumed that ethnic Hawaiians spoke Hawaiian and would have chosen to receive a deed for land in the Hawaiian language, as opposed to English. It was also assumed that non-ethnic Hawaiians would have chosen to receive a deed in English, as opposed to the Hawaiian language. It is assumed that bi-lingual speakers, of English and Hawaiian, would have preferred to receive a deed for land in their mother tongue, thus indicating their ethnicity. Those awards that are written in both languages are categorized according to the name of the awardees.

The awardee's "name" and the "language" of the instrument are independent measures which were used to determine an awardee's ethnicity. A similar analysis was later found to have been done independently by Victoria Creed, "The earliest LG [Royal Patent Grant] records (1846) are in both English and Hawaiian. If the Government land was sold to a foreigner the text is in English. If the purchaser was Hawaiian the document is in Hawaiian. By 1915 the documents became written entirely in English, regardless of the purchaser's ethnicity" (Creed 2009).

Final Categorization

The final categorization of the awardees as "Hawaiian" or "Non-Hawaiian" was done using a combination of these two measures. In cases where the categorizations of the "name" and "language" were identical, these cases were categorized to match. For example, in cases where the "name" and "language" were both categorized as "Hawaiian", the

Figure 10. RPG Language Scattergram



awardees' ethnicity was categorized as "Hawaiian" and vice versa. This was especially useful between RPG 1469 and 2684 where there appears to be a choice between Hawaiian or English language templates. In cases where categorization of the "name" and "language" differed, the final categorization was based on the "name". This is true after RPG 3162 where English templates were used exclusively.

Time Period of Evaluation

The last variable requiring definition is the time period for analysis. The 28,658 acre statistic reflects lands which were awarded through 1855, the year that the Land Commission was dissolved. Many scholars assume that maka'āinana were subsequently barred from the Māhele process post-1855. The dissolving of the Land Commission is seen as an end to the maka'āinana's right to acquire land and divide out their interests. There is no doubt that the Land Commission was dissolved in 1855, but whether the dissolving of a government agency could abolish the vested rights of the Native Tenants is something that should be further examined.

Two arguments of dispossession were identified through the literature review discussed in chapter two. The first was one of an "initial" dispossession. This is the basis of the idea that 1855 represents the time period of the initial dispossession. The second argument was that Hawaiian lands "eventually" ended up in the hands of foreigners. In either case, the perceived transfer of land to foreigners land was not an instantaneous process and did not occur by 1855 and instead would have transpired over a much longer time span.

By 1855, even many of the Konohiki did not yet have fee-simple title to their lands as evidenced by their non-receipt of a Royal Patent upon Confirmation of a Land Commission Award. The Māhele process was still unfolding during this time. If the Konohiki themselves did not yet have fee-simple title, then they could not have sold or transferred any fee-simple title to the foreigners.

After 1855, the Minister of Interior assumed the duties of the Land Commission in dealing with the Konohiki who failed to acquire fee-simple title through payment of commutation. In 1860, a law was passed extending the deadline for Konohiki to pay commutation and acquire fee-simple title to their lands (1860). The transfer of land by the government did not stop once the Land Commission was dissolved. Instead, jurisdiction fell in the hands of the Minister of Interior.

Data for the sale of Government Lands was examined through 1917. Many of the statistics that are reported on for this research show data only through 1893. This date was consciously chosen for two reasons. First, this is the time period used in Thrum (1895) and Horwitz (1969). Limiting the presentation of the statistics thru 1893 allows for comparison between the various sources allowing for some form of validation of each of the data sources.

The second reason is to allow comparison before and after the intervention by the U.S. military. On January 16th 1893, United States marines landed on Hawaiian soil without permission from the legal constitutional government resulting in the occupation of Hawai‘i (Sai 2008). These troops were there to support a "revolutionary" party who would eventually call themselves the Provisional Government (Sai 2008). This intervention

effectively insured the loss of control over Hawaiian governance, evidenced by the overthrow of the queen. 1893 was the last year that Hawai'i had a constitutionally legal monarch and the authority of any subsequent government to sell these lands, as a matter of title, is questionable. As a result, statistics covering 1893 through 1917 are not provided in the same manner as those pre-1893. Instead, a sample of the data for this period is presented for those places identified in the Geo-histories section of the literature review.

Examination of Government Grants

This section provides a description of the overall data set, summary statistics of the overall data, and the data categorized as "Hawaiian" and "Non-Hawaiian". These statistics show, in different ways, the nature of Hawaiians' participation in the process of acquiring land through Government Grants. There were several anomalies in the original numbering of the actual awards by the Hawaiian Kingdom Government. The 3,470 Government Grants bear sequence numbers "1" through "3,654", an apparent difference of 184 awards. A sequence of one hundred-eleven numbers, Royal Patent Grant numbers 2229 through 2330, was not used. The remaining differences are for awards that were either "not issued" or "cancelled".

Eighteen grants share grant numbers (1892 A, 1892 B, 3111 A, 3111B, 3553 A, 3553 B, 3698 A, 3698 B, 4511, 4511 A, 1892 A, 1892 B, 3443, 3442 B, 3448, 3448 B, 3939, 3939 B, 3049, 3049 B, 3065, 3065 B, 2132, 2132 ½, 3286, 3286 ½, 1411, 1411 ½, 1793, 1793 ½, 1311, 1311 ½, 1407, and 1407 ½) distinguished by adding an "A", a "B" or a "½". Royal Patent Grant 131 B is an exception: there is no other Royal Patent Grant "131".

Summary of the Overall Data

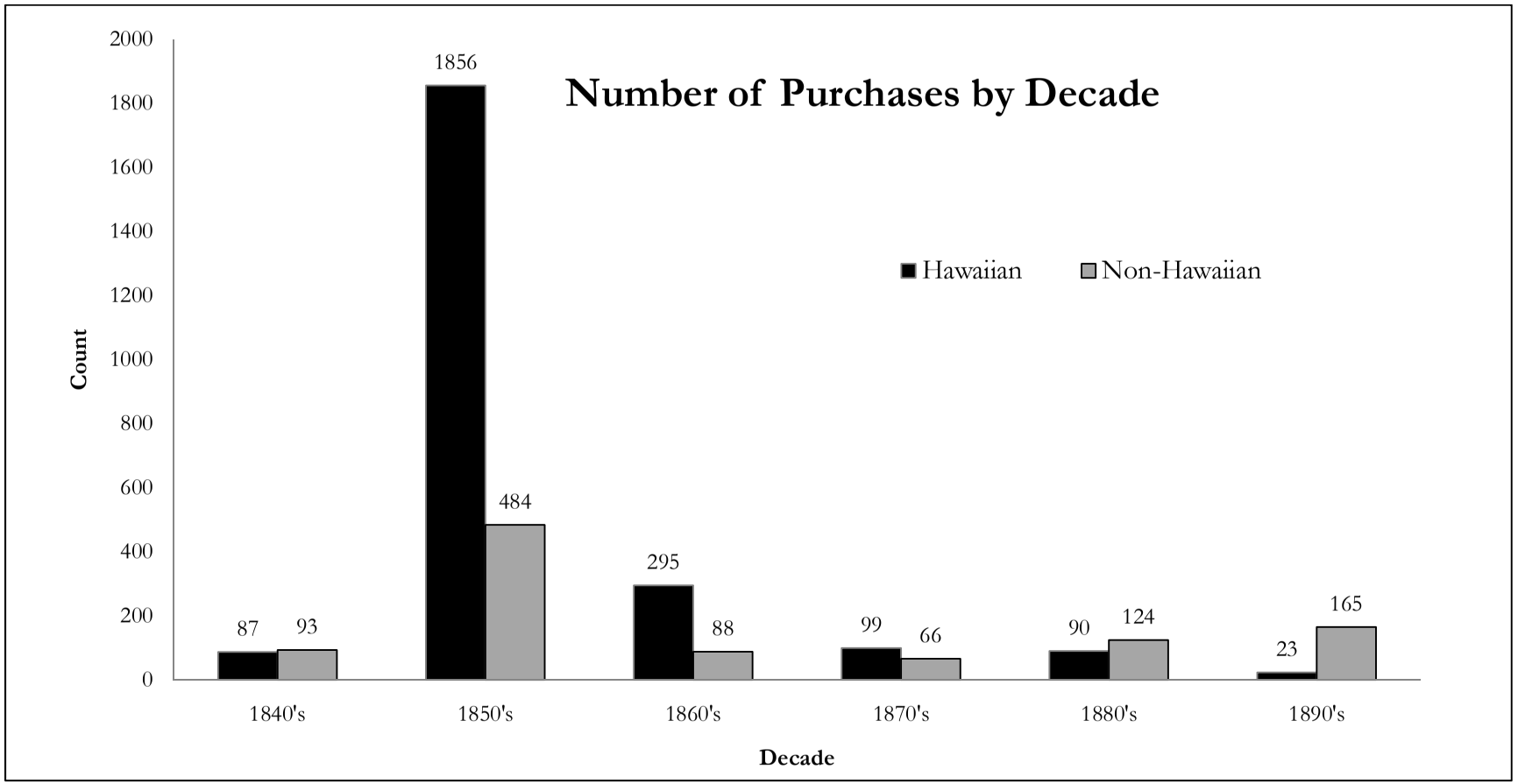
From 1846 through June 1893, a total of 652,521.17 acres of Government Land was sold to both natives and foreigners, via Royal Patent Grants. This land came from the approximately 1.5 million acres (Thrum 1895, 39) of Government Land allocated during the Māhele. This acreage compares with a total of 667,317.41 (Thrum 1895) and 613,233 (Horwitz 1969). Figure 12 show the overall distribution of these sales. The y-axis scale was clipped at 10,000 acres to better show the distribution of the majority of the data set.

The average size of a parcel purchased through 1893 was 188.05 acres. The median size was 18.50 acres. The largest parcel purchased was 184,298 acres. The large difference between the median (18.50 acres) and mean (188.05 acres) reflects a handful of very large sized purchases which skews the distribution. The parcel size that was purchased most frequently was fifty acres.

Number of Awards Purchased

Of the 3,470 awards, 2,450 (71 percent) of the Government Grants were purchased by "Hawaiians". "Non-Hawaiians" purchased 1,020 awards (29 percent). The arguments identified in the discourse suggest either an initial dispossession or an eventual dispossession. Examination of Government Grants addresses both of these arguments. An "initial" dispossession would seem to suggest that Non-Hawaiians would initially have purchased all of the available government land once private property was established. An "eventual" dispossession would suggest that this occurred consistently over a longer period of time. In

Figure 11. Number of Purchases by Hawaiians & Non-Hawaiians by Decade



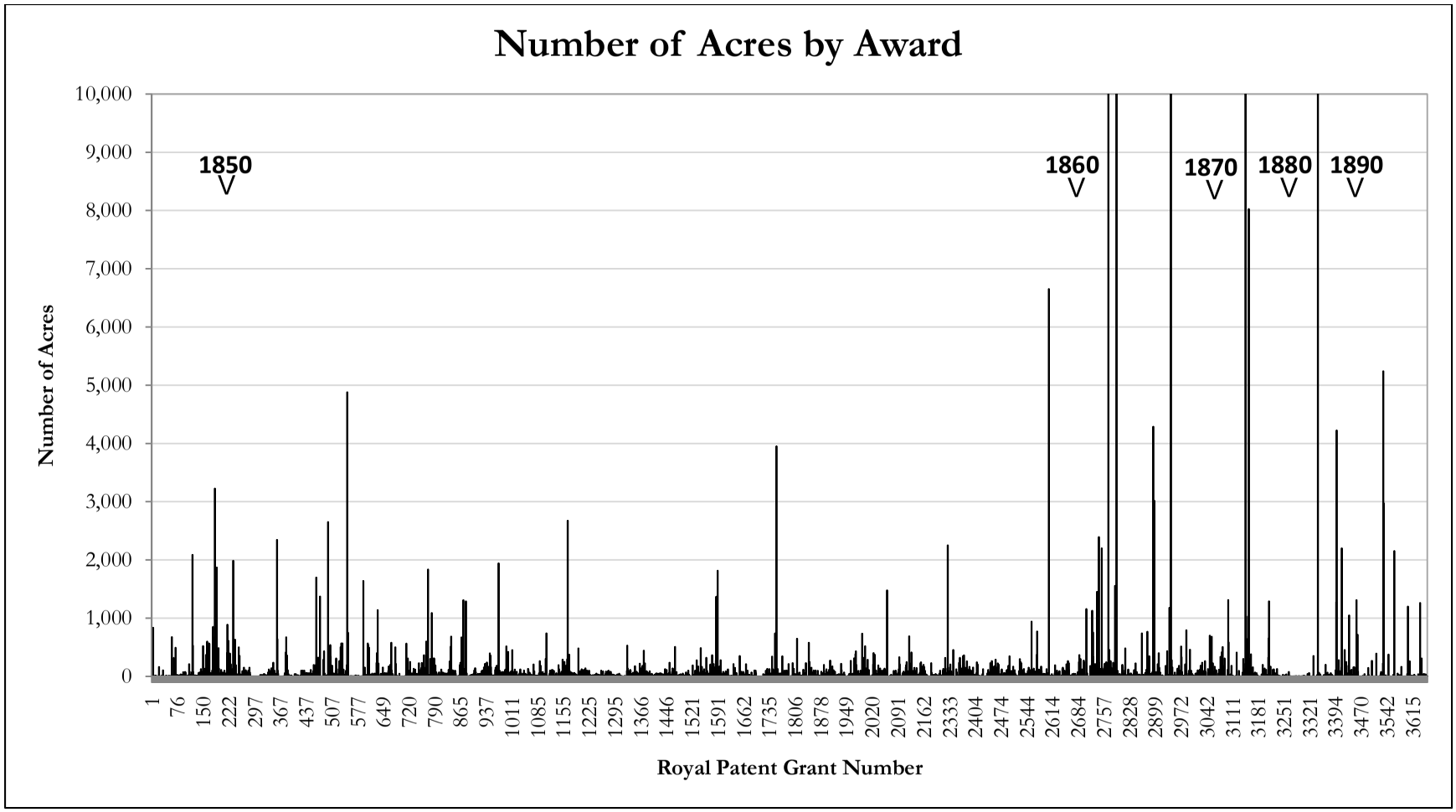
either case, one would expect to see Non-Hawaiians out-purchase Hawaiians in number and acreage. More revealing than the overall totals are the trends through time.

By Decade

The 1850s were the most active decade involving the sales of Government Land (see Figure 12). A total of 2,340 awards were purchased in the 1850s accounting for 67 percent of the total number of sales. Hawaiians account for 1,856 purchases (79 percent) and Non-Hawaiians comprise 484 purchases (21 percent). Thrum (1895) provides census statistics for the population of Hawai'i by nationality. Thus they would express the maximum end of the range of ethnic Hawaiians as a national Hawaiian definition could include non-ethnic Hawaiians. According to the Census of 1853, the total population of Hawai'i was 73,138: consisting of 71,019 Hawaiians and 2,119 foreigners (Thrum 1895, 12). The relatively high percentage of Non-Hawaiian purchases could be explained by the fact that Non-Hawaiians did not have existing rights in land while the maka'āinana already did.

The 1860s were the second most active decade overall. Hawaiians purchased 295 awards during this decade while Non-Hawaiians purchased 88 awards. Referring to Figure 12, one can see that the empirical data supports Alexander's comment that between "the years 1850 and 1860, nearly all the desirable Government land was sold, generally to natives" (1882, 24). This chapter will provide further quantitative evidence to support this statement. According to the Census of 1860, the total population of Hawai'i was 69,800; consisting of 67,084 Hawaiians and 2,716 foreigners (Thrum 1895, 12). The Hawaiian

Figure 12. Number of Acres by Award



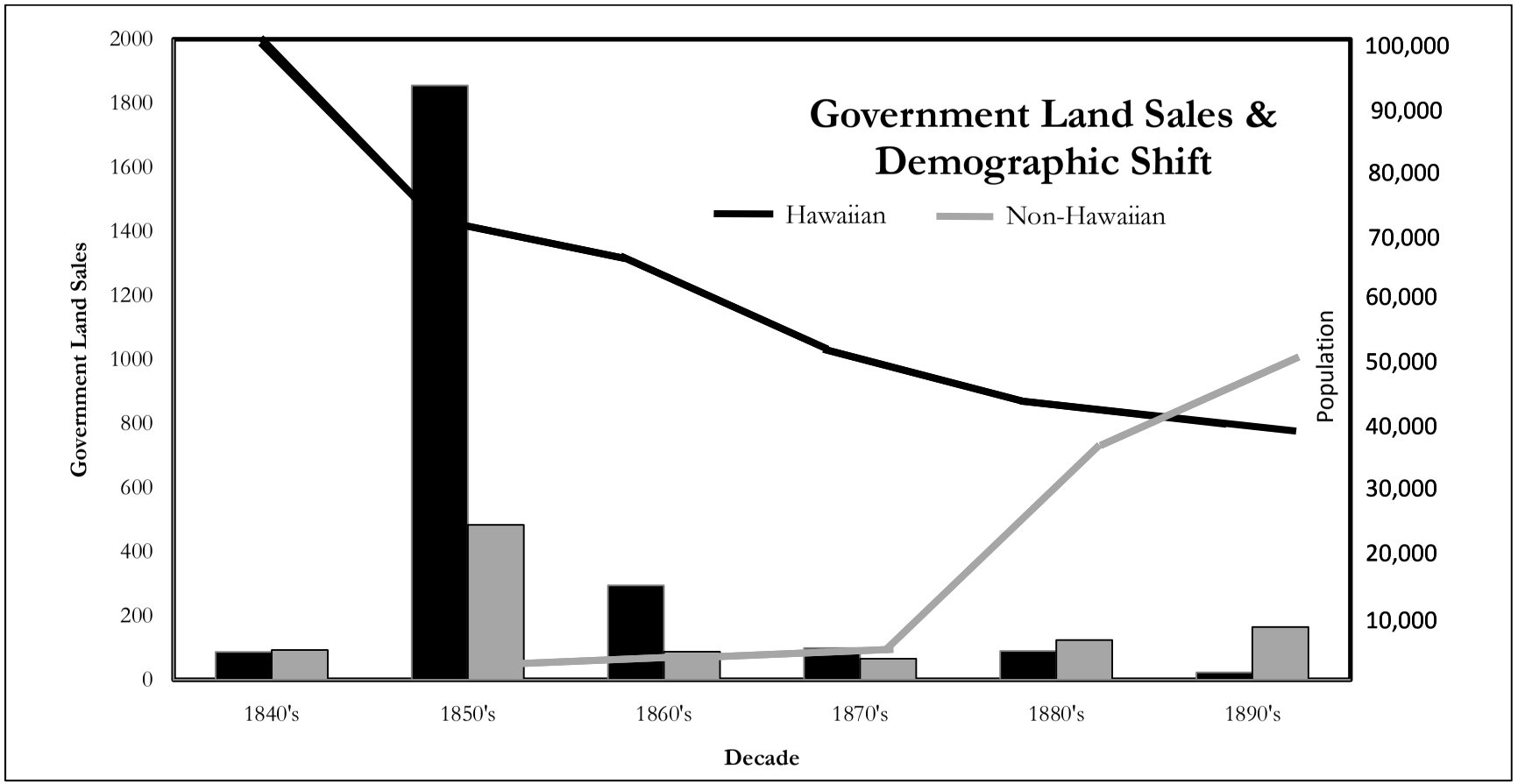
population was declining while the Non- Hawaiian population increased by 28 percent. The increase in population did not translate into a shift of the major purchasers of Government Land. The sale of Government Land was in a steep decline after the 1850s and 1860s.

The 1870s showed a steep decline in the total number of overall sales (165) of Government Land by both Hawaiians (99 Awards) and Non-Hawaiians (66 Awards). According to the Census of 1872, the total population of Hawai'i was 56,987; consisting of 51,531 Hawaiians and 5,456 foreigners (Thrum 1895, 12). The Hawaiian population continues its decline while the foreign population nearly doubles (see Figure 13). Despite the drastic shift in demographics Hawaiians still out-purchase Non-Hawaiians during this period.

There were very few sales in the 1880s, with Hawaiians purchasing 90 awards and Non-Hawaiians purchasing 124 awards. This is the first decade that Non-Hawaiians out purchase Hawaiians. While there is no suggestion of any necessary causal relationship, the decline in purchase by Hawaiians corresponds to the shift in demographics of the time. According to the Census of 1884, the total population of Hawai'i was 80,578: 44,232 Hawaiians and 36,346 foreigners (Thrum 1895, 12). At this time the foreign population is nearly equal to the Hawaiian population and the shift in purchases of Government Lands and the demographic shift both occur in this decade (See Figure 13).

The years 1890 through 1893 saw a continued shift in the trend of purchase of Government Land. In just four years, 188 sales of Government Lands were made and 165 of those awards (88 percent) were made by Non-Hawaiians. According to the Census of 1890, the total population of Hawai'i was 89,900: 40,622 Hawaiians and 49,278 foreigners

Figure 13. Government Land Sales & Demographic Shift



(Thrum 1895, 12). Six years after the "Bayonet Constitution" and at the time of the overthrow, Hawaiians were for the first time the demographic minority. In those decades in which Hawaiians were in control of government, Hawaiians were purchasing land in numbers surpassing Non-Hawaiians. It was not until the late 1880s that this pattern shifts. For whatever reason, neither Hawaiians nor Non-Hawaiians purchased very much government land in the 1870s and 1880s.

One potential explanation is that most of the useful lands were already purchased. This was the allusion made in the quote by Alexander about the "good lands" already being sold. I would hypothesize that the remaining Government Lands were probably located in the interior and more remote areas of the islands. Future research showing the distributions of the sale of these lands would be useful to validate such a hypothesis.

Another potential explanation for the low number of sales in the 1870s and 1880s is the tendency for the sugar plantations to lease instead of purchase land. Horwitz (1969) provides an analysis of the land leasing policy in Hawai'i, "During the half century following the mahele until the revolution of 1893 a large part of the most prosperous sugar plantations and ranches in the Island relied upon leased land for their operations" (109). This would have allowed for Non-Hawaiians to be in "possession" of a large amount of land. The significance of the leasing of land by the sugar plantations will be discussed later in this chapter.

The most significant statistic shown is the number of purchases by Hawaiians in the 1850s. Purchases by Hawaiians (1,856) in the 1850s alone outnumbers the total number of

purchases by Non-Hawaiians (1,020) from 1846-1893. More Hawaiians bought land in the 1850s than Non-Hawaiians did between 1846 and 1893.

By Island

The number of sales by island reflects similar trends to the overall purchase of Government Land. Table 1 shows a summary of the number of purchases (count), the "Percent of Hawaiian Purchases" (count divided by 2,450), "The Percent of Total Purchases" made by Hawaiians (count divided by 3470), the "Percent of Non-Hawaiian Purchases Total" (count divided by 1020) and the "Percent of Total Purchases" made by Non-Hawaiians (count divided by 3470).

Overall, the island with the highest number of purchases was Hawai‘i (32 percent), followed by O‘ahu (31 percent), then Maui (28 percent). Moloka‘i, Lāna‘i, and Ni‘ihau account for the remaining 9 percent of purchases. Hawaiians out-purchased Non-Hawaiians on every island less Ni‘ihau. The majority of Non-Hawaiian sales on O‘ahu were for smaller parcels in Honolulu. In general Non-Hawaiians purchased many smaller parcels (less than 1 acre) and a few very large sized parcels (over ten thousand acres). Hawaiians on the other hand seemed to be consistently purchasing farm sized parcels.

Most Frequently Purchased Parcel Size

The most frequently purchased sized land by Hawaiians was 50 acres (Table 2). There were a total of eighty-eight purchases of 50 acre lots and Hawaiians accounted for

Table 1. Number of Purchases by Hawaiians & Non-Hawaiians by Island

ISLAND	Count	% of Hawaiian Purchases	% of Total Purchases
Hawaii	911	37%	26%
Maui	777	32%	22%
Oahu	559	23%	16%
Molokai	98	4%	3%
Kauai	92	4%	3%
Lanai	12	< 1%	< 1%
Niihau	1	< 1%	< 1%
Total	**2,450**	**100%**	**71%**
Non-Hawaiians - # of Purchases by Island			
ISLAND	**Count**	**% of Non-Hawaiian PurchasesTotal**	**% of Total Purchases**
Hawaii	202	20%	6%
Maui	213	21%	6%
Oahu	531	52%	15%
Molokai	27	3%	1%
Kauai	45	4%	1%
Lanai	1	< 1%	< 1%
Niihau	1	< 1%	< 1%
Total	**1,020**	**100%**	**29%**

Table 2. Parcel Sizes Most Frequently Purchased by Hawaiians

Rank	Acres	**Count**
1	50.00	**84**
2	100.00	**25**
3	48.00	**21**
4	10.00	**19**
5	2.00	**18**
6	1.00	**17**
7	40.00	**16**
8	5.00	**15**
9	60.00	**14**
10	20.00	**11**
11	0.50	**10**
12	18.00	**10**
13	4.00	**9**
14	6.00	**9**
15	23.00	**9**
16	30.00	**9**
17	31.00	**9**
18	8.00	**8**
19	9.00	**8**
20	45.00	**8**
21	80.00	**8**
22	0.00	**7**
23	1.40	**7**
24	1.50	**7**
25	12.00	**7**
26	16.00	**7**
27	22.00	**7**
28	24.00	**7**
29	56.00	**7**
30	70.00	**7**
31	0.14	**6**
32	0.22	**6**
33	0.75	**6**
34	0.80	**6**

eighty-four (95 percent) of these purchases. In the case of purchase by Hawaiians, 50 acre parcels are more than three times as common as the second most frequently purchased lot size, 100 acres. Section 4 of the *Kuleana Act* articulated that "lots from one to fifty acres" be sold to "such natives as may not be otherwise furnished with sufficient land". The purchase of fifty acre lots, the maximum size allowed under Section 4 of the *Kuleana Act* does not appear to be coincidental. This suggests that Hawaiians were in fact aware of the law, as articulated in Section 4 of the *Kuleana Act*, and were acting on it.

Laws allowing the sale of Government Land were in place since 1846. Section 4 of the *Kuleana Act* was not the first law allowing for the purchase of Government Land. Nor was it a law which narrowed or limited the sale to this range. This can be seen by the fact that there are numerous purchases above 50 acres post-1850. As the *Kuleana Act* was legislation for Native Tenants, this is an example of "certain provisions of laws exclusively in reference to native subjects" (Rex v. Booth 1863).

The most frequently purchased size of land by Non-Hawaiians was 100 acres but the frequency was only 14 purchases (Table 3), as opposed to the greatest frequency of 84 purchases for Hawaiians. Hawaiians were purchasing same sized parcels in greater frequency than Non-Hawaiians. This is a six-fold difference between the respective modes. This difference supports the idea that Hawaiians are acting on structures provided for in the law whereas Non-Hawaiians seem to be purchasing parcels in sizes that suit their individual needs. One must also consider that there was no pre-existing mapping project in Hawai'i which could have helped to create numerous similar sized parcels. The systemic mechanism that accounts for the higher frequency of similar sized parcels for Hawaiians is partially explained by Section 4 of the *Kuleana Act*.

Table 3. Most Frequently Purchased Sized Parcels by Non-Hawaiians

Rank	Acre	**Count**
1	100.00	**14**
2	1.38	**11**
3	0.35	**7**
4	0.69	**7**
5	10.00	**7**
6	0.34	**6**
7	0.46	**6**
8	2.00	**6**
9	0.17	**5**
10	0.28	**5**
11	0.69	**5**
12	1.00	**5**
13	0.00	**4**
14	0.17	**4**
15	0.23	**4**
16	0.26	**4**
17	0.56	**4**
18	1.15	**4**
19	1.38	**4**
20	2.75	**4**
21	32.00	**4**
22	36.00	**4**
23	40.00	**4**
24	50.00	**4**
25	62.00	**4**
26	300.00	**4**
27	0.16	**3**
28	0.22	**3**
29	0.27	**3**
30	0.32	**3**
31	0.35	**3**
32	0.63	**3**
33	0.67	**3**
34	0.73	**3**

Acreage Purchased

In total 652,521 acres were sold through 1893. From this total, Hawaiians bought 167,290.45 acres (26 percent) and Non-Hawaiians account for more than 485,230.73 acres (74 percent) of the total acreage. From this, one might assume that Hawaiians were dispossessed from this process. But these purchases by Non-Hawaiians are skewed by a few very large purchases of mostly non-agricultural lands (ranch lands). Approximately 75 percent of the land purchased by Non-Hawaiians (361,751 acres) is accounted for by just five purchases which were purchased for use as cattle ranches rather than sugar plantations.

The mean size of a parcel of land purchased by Hawaiians was 68.28 acres. The median parcel size was 22.0 acres. The mean is larger than the median indicating that Hawaiians were purchasing smaller parcels of land. But Hawaiians were also buying land in greater numbers than non-Hawaiians. The largest parcel that was purchased by a Hawaiian was 5,240 acres.

The mean size of a parcel of land purchased by Non-Hawaiians was 475.72 acres. The median was 6.3 acres. The difference between the mean (475.72 acres) and median (6.3 acres) is much larger in the case of Non-Hawaiians than Hawaiians. The relatively large difference between the mean and median indicates that Non-Hawaiians were purchasing numerous small parcels and a handful of very large parcels. Although Non-Hawaiians were purchasing larger parcels of land, they did so in numbers far fewer than Hawaiians. C.C. Harris, RPG 2791 in Kahuku, Kāʻū, Hawai'i is the largest parcel purchased by a Non-Hawaiian at 184,298 acres.

Considering this dataset to 1893 allowed for comparison and verification of data with other research providing statistics over this same period (Table 4). The total compiled acreages for the sales of Government Lands through 1893 for the three data sets were 652,521.17 (Preza 2010); 667,317.41 (Thrum 1896); and 613,233 (Horwitz 1969).

The Hawaiian Government Survey would have used some form of manual calculation to derive their total. Calculations for this research were done using a computer, reducing the potential for human calculation error. The Hawaiian Government Survey's statistics shows errors in calculation as printed in Thrum (1896). Within this data, manually calculating the acreage totals for each island yields a total of 667,255.18 acres. The printed total is 667,317.41. This leaves a difference of 62.23 acres. While this difference is negligible for interpretation purposes, it is evidence of errors in calculation by either the compiler of the Hawaiian Annual or the Hawaiian Government Survey.

Table 4. Comparison of Thrum (1896) & Preza (2010)

	HGS Total (1896)	Preza (2010) Total	Difference
Hawai‘i	388,896.47	375,144.52	13,751.95
O‘ahu	44,868.47	44,204.07	664.40
Lāna‘i	735.95	736.19	-0.24
Moloka‘i	55,900	61,043.82	-5,143.82
Maui	100,643.04	95,180.10	5,462.94
Kaua‘i	15,123.25	15,124.48	-1.23
Ni‘ihau	61,088	61,088	0
Printed Total	667,317.41		
Calculated	**667,255.18**	**652,521.18**	**14,796.23**

By Year

Considering acreage purchased annually is another interesting way to view the data. This organization reduces the affect that the "outliers" have on the data set. Table 5 compares the amount of acreage purchased, each year, by Hawaiians and Non-Hawaiians and also lists the cumulative total. Between 1852 and 1872, Hawaiians purchased more acreage in every year except 1861, 1863 and 1864. Prior to 1861 the cumulative acreage purchased by Hawaiians (117,368 acres) was greater than that of Non-Hawaiians (92,232 acres). After 1861, one large purchase skews such an analysis.

By Island

Hawaiians account for more purchases of Government Land on all islands (see Table 6). Oʻahu is the only island where there were a comparable number of sales for each. On Oʻahu, Non-Hawaiians are purchasing smaller acreages in large number. Most of the sales to Non-Hawaiians on Oʻahu are smaller "lots" in Honolulu and the business district. These lands usually sold for approximately $700 which breaks down to thousands of dollars per acre rather than the $0.92 per acre average (Horwitz 1969).

Most of the sales of Government Land were on Hawaiʻi island which accounts for 32 percent of the total number of sales. Purchases by Hawaiians on Hawaiʻi, Maui, and Oʻahu account for 64 percent of all purchases of Government Land. Hawaiians purchased the most land, by both acreage and number, on Hawaiʻi island. More than half the acreage (59 percent) of all government land purchased by Hawaiians was on Hawaiʻi island. The acreage purchased on Hawaiʻi (59 percent) island is nearly triple that on Maui (20 percent)

Table 5. Annual Acreage Purchased by Hawaiians and Non-Hawaiians

Year	Acres - Hawaiian	Acres - Non Hawaiian	Cumulative Acres - Hawaiian	Cumulative Acres - Non-Hawaiian	Total Acres
1846	0.00	849.62	0.00	849.62	849.62
1847	181.17	1,981.07	181.17	2,830.69	3,011.86
1848	524.05	325.96	705.22	3,156.65	3,861.87
1849	4,328.17	10,460.77	5,033.39	13,617.42	18,650.81
1850	10,137.28	17,592.36	15,170.67	31,209.78	46,380.45
1851	7,930.48	12,658.91	23,101.14	43,868.69	66,969.84
1852	22,094.29	10,242.14	45,195.44	54,110.83	99,306.26
1853	6,217.25	5,794.64	51,412.69	59,905.47	111,318.16
1854	6,717.68	2,624.76	58,130.37	62,530.23	120,660.59
1855	15,177.70	12,381.83	73,308.07	74,912.05	148,220.12
1856	13,627.84	5,668.10	86,935.91	80,580.16	167,516.07
1857	9,871.14	1,710.89	96,807.05	82,291.05	179,098.10
1858	6,191.18	185.80	102,998.23	82,476.85	185,475.08
1859	8,100.65	7,001.15	111,098.88	89,478.00	200,576.87
1860	6,269.26	2,754.37	117,368.14	92,232.37	209,600.51
1861	5,066.96	228,807.42	122,435.10	321,039.79	443,474.89
1862	7,718.51	1,420.49	130,153.61	322,460.28	452,613.89
1863	791.91	3,781.91	130,945.52	326,242.19	457,187.71
1864	4,302.23	61,647.16	135,247.75	387,889.35	523,137.10
1865	1,246.86	794.33	136,494.61	388,683.68	525,178.29
1866	1,154.38	289.26	137,648.99	388,972.93	526,621.92
1867	2,177.56	166.38	139,826.55	389,139.31	528,965.86
1868	376.00	0.00	140,202.55	389,139.31	529,341.86
1869	326.06	0.00	140,528.61	389,139.31	529,667.92
1870	259.62	338.27	140,788.23	389,477.58	530,265.81
1871	1,507.01	244.16	142,295.24	389,721.74	532,016.98
1872	50.78	0.00	142,346.02	389,721.74	532,067.76
1873	848.90	1,431.96	143,194.92	391,153.70	534,348.62
1874	227.59	1,032.67	143,422.51	392,186.36	535,608.87
1875	126.08	47,143.00	143,548.59	439,329.36	582,877.95
1876	1,484.90	8,479.72	145,033.49	447,809.08	592,842.57
1877	150.53	397.74	145,184.02	448,206.82	593,390.84
1878	412.67	10.74	145,596.69	448,217.56	593,814.25
1879	1,417.14	2,066.22	147,013.83	450,283.79	597,297.62
1880	174.23	122.04	147,188.06	450,405.83	597,593.89
1881	31.38	62.42	147,219.44	450,468.25	597,687.69
1882	596.48	24,038.60	147,815.92	474,506.85	622,322.77
1883	467.79	31.58	148,283.71	474,538.43	622,822.14
1884	122.15	0.34	148,405.86	474,538.77	622,944.63
1885	57.45	15.62	148,463.31	474,554.40	623,017.70
1886	106.00	16.41	148,569.31	474,570.80	623,140.11
1887	8,278.72	734.79	156,848.03	475,305.59	632,153.62
1888	255.48	1,431.83	157,103.51	476,737.42	633,840.93
1889	254.28	2,430.70	157,357.79	479,168.12	636,525.91
1890	2.44	554.90	157,360.23	479,723.01	637,083.24
1891	8,592.14	3,143.17	165,952.37	482,866.19	648,818.55
1892	56.67	1,789.41	166,009.04	484,655.60	650,664.64
1893	1,281.42	575.13	167,290.45	485,230.73	652,521.18

Table 6. Comparison of Acreage Purchased by Hawaiians & Non-Hawaiians by Island

Hawaiians - Acreage Purchased							
ISLAND	**Count**	**Min**	**Max**	**Average**	**Total Acreage**	**% of Total Acreage**	**% of Population**
Hawaii	911	0.07	4289	108.34	98,696.57	15%	30
Maui	777	0	4879	43.44	33,754.20	5%	19
Oahu	559	0	2345	38.29	21,401.93	3%	35
Molokai	98	0.02	5240	110.78	10,856.61	2%	3
Kauai	92	0.13	740	20.9	1,922.95	< 1%	13
Lanai	12	1.64	236.68	50.68	608.19	< 1%	with Molokai
Niihau	1	50	50	50	50	< 1%	-
Total	**2,450**				**167,290.45**	**26%**	
Non-Hawaiians - Acreage Purchased							
ISLAND	**Count**	**Min**	**Max**	**Average**	**Total Acreage**	**% of Total Acreage**	
Hawaii	202	0.08	184,298.00	1,368.55	276,447.95	42%	30
Maui	213	0.00	24,000.00	288.38	61,425.90	9%	19
Oahu	531	0.00	2,650.00	42.94	22,802.15	3%	35
Molokai	27	0.00	46,500.00	1,858.79	50,187.21	8%	3
Kauai	45	0.25	3,953.50	293.37	13,201.53	2%	13
Lanai	1	128.00	128.00	128.00	128.00	< 1%	with Molokai
Niihau	1	61,038.00	61,038.00	61,038.00	61,038.00	9%	-
Total	**1,019**				**485,230.73**	**74%**	

Table 6 shows a summary of the number of purchases (Count), smallest sized parcel purchased (Min), largest sized parcel purchased (Max), the mean size of a parcel (Average), the total acreage purchased (Total Acreage) for each island, the percent of the total acreage of all Government Lands purchased for each island (% of Total Acreage), and the percentage of the overall population on each island (% of Population).

There were relatively few sales of Government Land on Kauaʻi, Lānaʻi and Niʻihau as compared to the other islands. According to the census of 1890, 35 percent of the population lived on Oʻahu, 30 percent of the population lived on Hawaiʻi, 19 percent on Maui, 13 percent on Kauaʻi, and 3 percent on Lānaʻi and Niʻihau (Thrum 1895, 12).

Comparing the acreage purchased with the population of each island shows that 67 percent of the total acreage was purchased on Hawaiʻi, which accounts for 30 percent of the total population. Maui accounts for 14 percent of the total acreage purchased and 19 percent of population and Oʻahu accounts for 6 percent of the total acreage and 35 percent of the overall population. Molokaʻi and Lānaʻi accounts for 12 percent of the total acreage and 3 percent of the population. While Kauaʻi accounts for 3 percent of the total acreage sold and 13 percent of the population.

Table 6 shows that Non-Hawaiians purchased the most acreage on Hawaiʻi island but most of their sales were made on Oʻahu (52 percent). Following the sale of the island of Niʻihau, Maui and Molokaʻi account for the next largest purchases of acreage behind Hawaiʻi. On Molokaʻi, the low "count" and relatively large "mean" indicate that large parcels are being purchased by Non-Hawaiians. Maui on the other hand, has a relatively large "count", second only to Oʻahu's, and a relatively lower mean, indicating that purchases on Maui were probably used for smaller home farming as opposed to larger plantations.

Discussion & Interpretation: How Much is Enough?

All of these statistics beg the question: how much land being sold to the makaʻāinana would be sufficient for a reasonable person today to conclude that Hawaiians were not

deprived or dispossessed via the Māhele? This thesis takes a nuanced examination resulting in the examination of a multitude of factors which highlights the complexity of answering such a question. This approach identifies alternative explanations, but more importantly it discusses various ways one could approach the question.

Based on the "one-third interest" that native-tenants had in the land, one could literally interpret this to suggest a number in the proximity of 1.3 million acres (4.0 million acres of land divided by a one-third interest). The maka'āinana class had a one-third undivided interest in the land secured by the laws of the Kingdom but this does not mean that those maka'āinana alive in 1855 had a right to possess in fee-simple 1.3 million acres of land. This would be a mis-contextualization of "undivided interests" and possibly reflective of one looking at remedying past injustices rather than explaining the phenomenon in its proper context.

While a literal interpretation of one-third interests may seem reasonable, such an analysis assumes a couple of things: 1) That the intention of the Māhele was to divide the land amongst all of those living at the time of the Māhele and 2) that ahupua'a are valued based on their size. If the first presumption is true, then it seems that the Māhele was indeed a tragic failure as nowhere near 1.3 million acres was in the possession of the maka'āinana. The second presumption examines differing ways of measuring "value". Agricultural productivity was influenced by many factors beyond size such as soil type, availability of water, climate, temperature, annual rainfall, etc. Therefore a measurement of size is not necessarily the best measure of value.

The maka‘āinana were not entitled to an “equal” distribution but rather a “fair” distribution which acknowledged their existing rights at the time. The answer to the question, “How much land is enough” may be better answered by a subjective measure of whether the maka‘āinana were “deprived of” land. More important than any actual figure approaching the 1.3 million acre total is an identification of the mechanisms within the law allowing for the acquisition of land and evidence of the maka‘āinana acting upon those mechanisms. Ultimately this is how dispossession is measured in this research.

The following metaphor may provide an insight into a Hawaiian context for this idea. Growing up in Hawai‘i, one is taught to never pick all of the flowers from a tree at one time. It is okay to pick some of the flowers, but one should leave some blossoms on the tree in case someone else after you needs flowers. Expecting that all 1.3 million acres of land should have been distributed via the Māhele by 1855 would suggest that it is okay to pick the “tree” bare. This action would not provide future generations of maka‘āinana with land, if it were all distributed in 1848.

The Hawaiian Supreme Court offers insights into its decision making process which describes the appropriateness of using Hawaiian tradition, custom and culture as guiding factors in their decision making process , “The history of the country, and the origin of the present form of Government, are familiar to the Court, and have a proximate bearing upon this question; for the Court is not bound to adopt the construction contended… merely because general theory might give it a degree of countenance, independent of all practice and the prevailing understanding, since the foundation of the government” (Rex v. Booth 1863). This court case acknowledges the importance of the “prevailing understanding” of those who framed the laws rather than reliance on “general theory”.

This can be further contextualized by the Hawaiian Kingdom Supreme Court Case *Rex v. Booth.* The court case is directly concerned with the sale of liquor to natives. But in the discussion of the case, the court talks about the source of authority for governance:

> It is contended [by the plaintiff's lawyer] that 'It is an axiom in all constitutional Governments, that all legislative power emanates from the people; the Legislature acts by delegated authority, and only as the agent of the people;' that the Hawaiian Constitution was founded by the people; 'that the Government of this Kingdom proceeds directly from the people, was ordained and established by the people'.

The court goes on to clarify this misconception:

> Here is a grave mistake -- a fundamental error -- which is no doubt the source of much misconception...The Hawaiian Government was not established by the people; the Constitution did not emanate from them; they were not consulted in their aggregate capacity or in convention, and they had no direct voice in founding either the Government or the Constitution. King Kamehameha III originally possessed, in his own person, all the attributes of absolute sovereignty. Of his own free will he granted the Constitution of 1840, as a boon to his country and people, establishing his Government upon a declared plan or system, having reference not only to the permanency of his Throne and Dynasty, but to the Government of his country according to fixed laws and civilized usage, in lieu of what may be styled the feudal, but chaotic and uncertain system, which previously prevailed. The recognition of his independence by the great powers of Christendom; the claims of commerce; the influx of foreigners, and the gradual advancement of his native subjects, rendered necessary still further changes. The Government had to be regularly organized, the different powers separated and defined, and the whole land system of the Kingdom to be remodeled. The first Constitution no longer furnished a sufficiently broad foundation. The King, by and with the advice and consent of the Nobles and the House of Representatives, voluntarily granted and proclaimed the present Constitution on the 14th of June, 1852. As before, the people at large were not consulted, and they

> performed no direct part in the adoption of the Constitution. That instrument was framed and sanctioned by the legislative body, consisting of the King, the House of Nobles and the House of Representatives, in whom, collectively, is now vested that supreme, absolute power of legislation, which was originally vested in the Monarch alone. Not a particle of power was derived from the people. Originally the attribute of the King alone, it is now the attribute of the King and of those whom, in granting the Constitution, he has voluntarily associated with himself in its exercise. No law can be enacted in the name, or by the authority of the people. The only share in the sovereignty possessed by the people, is the power to elect the members of the House of Representatives; and the members of that House are not mere delegates. The several parts of the Legislative body, acting in unison, have power to change the form of Government, to amend and modify the Constitution, or to abrogate it entirely and adopt another, without ratification by the people at large, as they did in 1852; and they possess full power to enact all manner of wholesome laws, general or special, which in their wisdom they may deem conducive to that highest of all objects -- the public weal, within the express restraints of the Constitution. They are limited to that extent, and no further, by the rules which they have prescribed for themselves.

This passage alludes to the divisions of society (kūlana) based on mana, genealogy, and Hawaiian social organization. As discussed, it was the approach of the Hawaiian Kingdom Supreme Court to base their decisions on an understanding of the traditions and customs of the time. A potential bias that could be introduced is the replacement of such an approach with one that is instead more familiar to one's own experiences and understanding. One coming from a perspective or experience of a republican form of government, whereby authority comes "from the many" may find the above quote difficult, whereas one with background with a monarchical form of government may have different views. This is not a debate of which view is correct but instead what is the proper context within which to make an interpretation. This is where paying attention to Hawai'i's unique history is important.

Instead of imposing either of these frameworks as models of interpretations, the Hawaiian Kingdom Supreme Court instead relied on an understanding of the particularities of Hawaiian custom and tradition. This is especially important because the evolution to a constitutional monarchy was not the result of popular revolt by the people. Sai (2008) elaborates on the significance of this point. This seemingly minor point is easily glossed over if one assumes that Hawaiian governance is simply described as a constitutional monarchy.

Depending on the approach taken, one will interpret the concept of "undivided interests" very differently. Chapter three attempted to provide a context and understanding of Hawaiian custom and tradition as pertinent to land law to provide a framework for a particular and nuanced understanding which could serve as a framework for interpretation. Arguably this is the same type of approach implemented by the Hawaiian Kingdom Supreme Court when making its decisions. Interpretive approach is crucial in this debate because the present-day frame of reference is most likely a framework viewed through the lens of republican forms of government where governance is derivative "from the people" thereby implying "equality". This is arguably not the proper context as Hawai'i had a unique historical evolution of its constitutional monarchy and did not have a republican form of government.

A different argument suggesting the inappropriateness of an "equal" distribution of land was discussed in chapter three: mana. To argue that the maka'āinana should have received an "equal" distribution would suggest an equality of mana. Maka'āinana were never "equal", in terms of genealogy and social organization, to the Ali'i. To argue that the maka'āinana as a class should have literally received one-third of the lands would imply that

these three classes were in some way equal. Instead, I argue that the standard should be one of "fairness" rather than "equality" and that this fairness should be based on traditional rights and customs. The context for a subjective measure of "fairness" was provided in chapter three where the kuleana of the chiefs and makaʻāinana were articulated.

Another hidden assumption of the dispossession affecting how dispossession should be measured deals with the inter-generational transfer of knowledge amidst all of the population collapse. Depopulation arguably had the largest impact on Hawaiian society in the 19th century. Is it reasonable to expect that farming knowledge was transmitted to all people in all places thus giving them the ability to farm? The argument of dispossession should take into account the effects of population collapse and the shifting economy. Captain Cook's lieutenant estimated the population of Hawaiʻi in 1778 at approximately 400,000. In 1850, the population of Hawaiians was approximately 80,000. In approximately 70 years the population was reduced to 20 percent of its previous total. The forty years after the Māhele shows a sharp decline. In 1890, the population of Hawaiians was approximately 40,000. Between the implementation of the Māhele in 1848 and 1890, Hawaiʻi's population was cut in half.

Many ahupuaʻa were completely abandoned after contagious diseases devastated the population. The story of migration and abandonment of ahupuaʻa for Puna is discussed by McGregor (2007). The Hawaiʻi Supreme Court case, *Akowai v. Lupong ,* articulates a hoaʻāina of Waipiʻo, Oʻahu's testimony on the effects of disease in this particular ahupuaʻa in the early 1850s, "Huluhulu says that from the time of the smallpox which reduced the population very [sic] greatly in that district, all cultivation there ceased". With the extent of the population collapse across all of the Hawaiian Islands from 400,000 to 80,000 Hawaiians during this

period, it seems reasonable to assume that the effects spoken of in Waipiʻo and Puna were not isolated incidents. Disease and population collapse were a major contributor to the increased mobility of the remaining population. *Kuleana Awards* were limited to lands that were in "actual cultivation" but section 4 of the *Kuleana Act* provided a remedy for this by allowing those without "sufficient land" to purchase land elsewhere.

Akowai v. Lupong also ruled that "the statute of limitations of real actions does not run against the holder of a grant to a tenant [kuleana] in favor of the owner of the land from which the kuleana is taken [konohiki], unless the possession of the konohiki of the kuleana is real and actual. The general possession by the konohiki of the ili or ahupuaa is not hostile to the owner of the kuleana". In this court case, a Native Tenant abandoned his "Kuleana" and the heirs to this estate returned 20 years later. The court stated:

> This question is one of wide importance, and affects the owners of estates throughout the Kingdom. The Court is aware that there are many kuleanas in the same position as this, totally deserted for over twenty years, hitherto deemed valueless by their owners, and only recently of any market value. I incline to the opinion that the position of the plaintiff is sound. In order to bar the legal title to the kuleana, the possession of the konohiki of the particular kuleana in question must be actual, visible, notorious, distinct and hostile.

This decision speaks to the fact that "there are many kuleanas in the same position" which implies that such abandonment was a systemic incident rather than one isolated to this particular place. Even though these kuleana were "abandoned", the makaʻāinana were not dispossessed by the rule of law. Instead their rights were preserved as long as the land had not been put into use by the surrounding landholder. Productive ʻāina was always the

goal of such a land management system in Hawai‘i. The maka‘āinana had a right to possess land but they also had a kuleana (responsibility) to keep it productive. This decision effectively preserved the rights of a Kuleana holder. The "trump card" relates to usufruct: the right of enjoying and using property.

The term usufruct is of foreign origin but the concept is not. In the traditional land tenure system, a maka‘āinana's rights to land were directly linked to his use and cultivation of it. A maka‘āinana could not have "speculative" type rights. If the land was not being used by one, it would be given to another but if a piece of land was under cultivation others were excluded from that land. *Akowai v. Lupong* preserved a maka‘āinana's right to his Kuleana from the surrounding landholder unless that land had been put into "actual" use. In this way, the larger landholder could not speculate on land but he could put it into use and through this action acquire rights to it. Rights to land were grounded in its use and cultivation which usually meant agriculture. This all ties back into Kamehameha III's vision of making the lands productive. On July 31, 1846, in a speech to the Nobles and Representatives Kamehameha III stated, "I trust that the labors of the Land Commissioners will result in rendering the titles to land clear and fixed, and thus lay a foundation for agricultural enterprise" (Lydecker 1918, 18) The Māhele was the means to satisfy this goal, "It is my [Kamehameha III's] wish that my subjects should possess lands upon a secure title" (Lydecker 1918, 18).

Finally, one's need to possess or own land should be contextualized against alternative economic industries that did not necessarily require the ownership of land. One such industry that would not have required individual investment in large amounts of land is the cattle industry. In the early 1800s, after the introduction of cattle by Vancouver,

Kamehameha I placed a kapu (taboo) on cattle and they were allowed to roam free on Government Land. As a result, cattle were a pervasive problem in Honolulu that a wall was erected in Mānoa to keep the cattle from getting into town (Lee 1997). Early Hawaiian Kingdom laws also reflected the roaming nature of the cattle and the problems they could pose, "A law respecting mischievous beasts" (Adameck 1994, 58) outlines the kuleana of various people in securing roaming cattle so as to minimize the damage caused to property. Lee (1997) highlights the significance of this growing industry during the kingdom era.

The cattle industry was a lucrative alternative to farming during this era. The cover art for Andrade (2008) shows a picture of a maka'āinana from Hā'ena sitting on the back of a bull. The cattle problem was so pervasive in Hā'ena that the maka'āinana wrote a letter to Keoni Ana:

> We complain to you of our trouble, this is the first trouble,
> our houses are destroyed by the cattle, the second trouble is
> about our gardens, our crops are trampled on by the cattle…

The cattle industry was an alternative to farming that many Hawaiians engaged in and it is one that would not require the individual ownership of land. Many Hawaiians chose the paniolo (cowboy) lifestyle as salted beef had a higher trade value than agricultural produce due to its longer shelf life, and trade and export to ships involved in the whaling trade up until the 1870s was a part of the changing economy. This should not be taken to suggest that the paniolo did not know how to farm but rather that an alternative industry was available and potentially more lucrative than farming. The difference is one of farming for subsistence versus farming for trade or as an industry.

All of the factors discussed in this section are meant to broaden our perceptions of what life was like in Hawai‘i in the mid-19th century and what opportunities were available. The economy of Hawai‘i was diversifying and changing while at the same time Kamehameha III was attempting to encourage agricultural productivity for the maka‘āinana’s personal well being as well as that of the country. There were numerous social circumstances which would have affected a maka‘āinana’s need and desire to own land. More important is the framework and authority for interpretation. An argument was presented to suggest that the most appropriate framework for interpretation is one that provides an understanding of the particular details of Hawaiian history and tradition in their proper context. Finally evidence was presented suggesting that this was how interpretations and decisions of law were "actually" made in the Hawaiian Kingdom rather than this being a contemporary argument suggesting how it "should" be done.

Identifying the Sufficient Condition for Dispossession

Through the year 1860 the cumulative acreage purchased by Hawaiians is greater than that purchased by Non-Hawaiians. In 1861, J.P. Parker purchased 37,888 acres in Hāmākua, Hawai‘i and C.C. Harris purchases 181,296 acres in Kahuku, Ka‘ū, Hawai‘i. Due to these large purchases, 1860 is the last year that the cumulative acreage total for Hawaiians is greater than that of Non-Hawaiians. This data set is severely skewed by these "outliers" (Table 7). The outliers consist of very large parcels of land, in most cases entire ahupua‘a. For example, one purchase by C.C. Harris (RPG 2791, totaling 181,926 acres), represents 28 percent of the total acreage of all Government Land. The purchase of the island of Ni‘ihau

by James and Francis Sinclair (RPG 2944, totaling 61,038 Acres), accounts for approximately 9 percent of the total acreage of all the Government Land sold. One can argue that these purchases may have dispossessed Hawaiians living or wanting to live in those places but such purchases do not by themselves represent a systemic dispossession of all Hawaiians in all places.

Table 7. Five Largest Purchases of Government Land

RPG #	Acres	Year	Awardees
2769	37,888	1861	J.P. Parker
2791	181,296	1861	C.C. Harris
2944	61,038	1864	James Sinclair
3146	46,500	1875	C.R. Bishop
3343	24,000	1882	Spreckles

While impressive by acreage standards, these isolated purchases may not necessarily have dispossessed a large number of people. If one were to take a consequentialist lens, Niʻihau, for example, is currently home to the largest population of pure Hawaiians. Niʻihau is home to the largest community of pure Hawaiians and is also one of the few areas where Hawaiian as a first language has survived.

The purchase of Niʻihau by James and Francis Sinclair (RPG 2944), accounts for 61,038 Acres of Government Land. The story of how Niʻihau was purchased is an interesting one. The Sinclair's were looking for lands for ranching and had been looking in a couple of different countries. The following is an account of their search:

> In looking about for ranches that would suit us … it was difficult to find what we wanted, as a law, 'The Great Māhele' had recently been passed by the Hawaiian Legislature enabling the natives to take up little land holdings wherever

> they liked. Such numbers of these had been taken up all over the islands that it was well nigh impossible to find a large enough tract for our purposes. The holdings are called kuleanas and though they broke up the large ranchlands, no reasonable person could object to this law, as it was a fine thing for the natives.
> (Stepien 1988)

According to this passage, "kuleanas" had been taken up in such a number that the majority of the available ranch lands were broken up by these "kuleanas". They went on to comment:

> After some months of looking, during which we were offered Kahuku on northern Oahu by Mr. Wyllie, Ford Island in Pearl Harbor by Dr. Ford, and the adjoining lands of Honouliuli and Ewa, all of which could have been bought for a song and which James Campbell bought in 1877, we gave up and decided to leave for California. When King Kamehameha IV heard of this he told us that if we would stay in Hawaii he would sell us a whole island, having a population of about three hundred natives. After my brothers (Francis and James) had investigated the place they were so enthusiastic that we accepted the King's offer, and for $10,000 we bought the island of Niihau off the coast of Kauai.
> (Stepien 1988)

While one could read into this in many different ways, it is interesting that Stepien (1998) alludes to the fact that so much land had been taken up by smaller landholdings, which disrupted otherwise contiguous plots of land that may have been suitable for ranching. Its use in Sinclair's statement is probably referencing the more general use of the term "interest" in land. Sinclair's statement, backed with the number of Kuleana Awards and sales of Government Grants to Hawaiians suggests that Hawaiians were in fact in possession of numerous landholdings in Hawai'i in the post-Māhele era. The Sinclairs could not find a contiguous piece large enough and suitable for their needs due to the scattered

"kuleanas". It is important to note that the proposed use of Niʻihau was for ranching purposes and therefore did not consist of prime agricultural lands.

The award to C.C. Harris comprises a large area of land that was also to be used for cattle. Much of it is not necessarily habitable or of prime agricultural value as it consists of land in the higher elevations along the southern slope of Mauna Loa. Even though Harris acquired a lot of acreage, this purchase did not necessarily dispossess Hawaiians of valuable agricultural lands. Furthermore, Native-Tenants rights in land were preserved by the reservation on title, "Subject to the Rights of Native Tenants".

When considering the mean (68.28 acres) and median (22.0 acres) sized parcel purchased by Hawaiians, one can see that Hawaiians were purchasing parcels in the size of small farms. These acreages are much larger than the quarter-acre house-lots that were claimed via the *Kuleana Act*. According to Horwitz (1969), the average price per acre of Government Land sold through 1893 was $0.92 (186). Hawaiians were not disenfranchised from this process due to the cost of Government Land, instead Horwitz suggests, "the apparent purposes for which this land was purchased was for the development of numerous family farms, small ranches, and orchards—in addition to the provision of home sites" (1969, 162). Judge C.J. Allen suggests the natives during this time were very industrious, "While the native population very largely predominates, still, in commerce and general business, the foreigners exert a large influence, and we regard it as the part of wisdom, that the peculiar wants, necessities and dangers of the native subject should be especially regarded by legislation" (Rex v. Booth 1863). Such allusions question whether Hawaiians lacked industry and access to cash.

Halele‘a – Pre/Post 1893 Analysis

As previously mentioned, Andrade (2008) offers just one paragraph of analysis to the sale of Government Land in the district of Halele‘a, Kaua‘i. It is essentially dismissed and it is asserted that the majority of acreage in Halele‘a “went to haole” (100). Hā‘ena, the focus of Andrade’s work, is a Konohiki Land and not a Government Land and therefore one should not expect there to be any sales of Government Land in Hā‘ena as it didn’t belong to the government. But Andrade does comment on the trends of sales of government in Halele‘a, the district within which Hā‘ena resides.

Wai‘oli is a Government Land in Halele‘a and Andrade presents a letter from the maka‘āinana of Wai‘oli stating the letters contain “the voices of the dispossessed, and provide a looking glass into the kinds of hardships maka‘āinana faced as they adjusted to the new property regime” (100). Examination of land sales for the district of Halele‘a between 1848 and 1916 reveal that there were a total of 82 sales for a total acreage of 3,820 acres. The ahupua‘a of Wai‘oli, the source of the petition, accounts for 62 of the total sales in the district. One would expect this because Wai‘oli was the only Government Land in Halele‘a. The remaining 20 sales of land will be dealt with shortly.

The 62 awards in Wai‘oli are for a total of 122 acres. Prior to 1893, there were 36 sales in Wai‘oli for 110 acres. After 1893, there were 26 sales for a total of 12 acres. Most of the Government Land that was purchased in Wai‘oli was purchased by 1860. This is consistent with the trends of the overall sales. A discussion in Privy Council set the terms for the sale of land in Wai‘oli:

> Resolved; That Mr.W. H. Pease be and is hereby authorized
> to sell parcels of land to the natives of Waioli and Hanalei

> (not exceeding one quarter of an acre to any one individual) of the unoccupied lands belonging to Government in Waioli on the East side of the Waioli river, at a minimum price of fifty cents per acre – The Minister of the Interior is hereby charged with the execution of the above resolution, and is authorized to issue Royal Patents for the land sold under the same, at the price of two dollars per each patent. (Privy Council, Aril 21, 1851)

Non-Hawaiians were also applying to buy land in Waiʻoli but in the example that follows it was precluded as it would have impinged on the rights of the natives "The application of C. Titcombe to purchase more land at Waioli was read and negatived [sic], as it is the only wood land there for the use of the people" (Privy Council, July 10, 1854). The best interests of the makaʻāinana were secured and the desires of this particular foreigner did not manifest into the actual dispossession of land in this case.

The more interesting analysis for Haleleʻa concerns the 20 sales made outside of Waiʻoli. These purchases were made in Anahola, Hanalei, and Olohena. Of these lands only Olohena belonged to the government who had a one-half interest in the ahupuaʻa from the Māhele. Kiaimoku was the Konohiki who received the other one-half interest at the time of the Māhele and he ended up purchasing 1,217 acres in Olohena from the government in 1893. Rufus Spaulding also purchased 419 acres in Olohena in 1910.

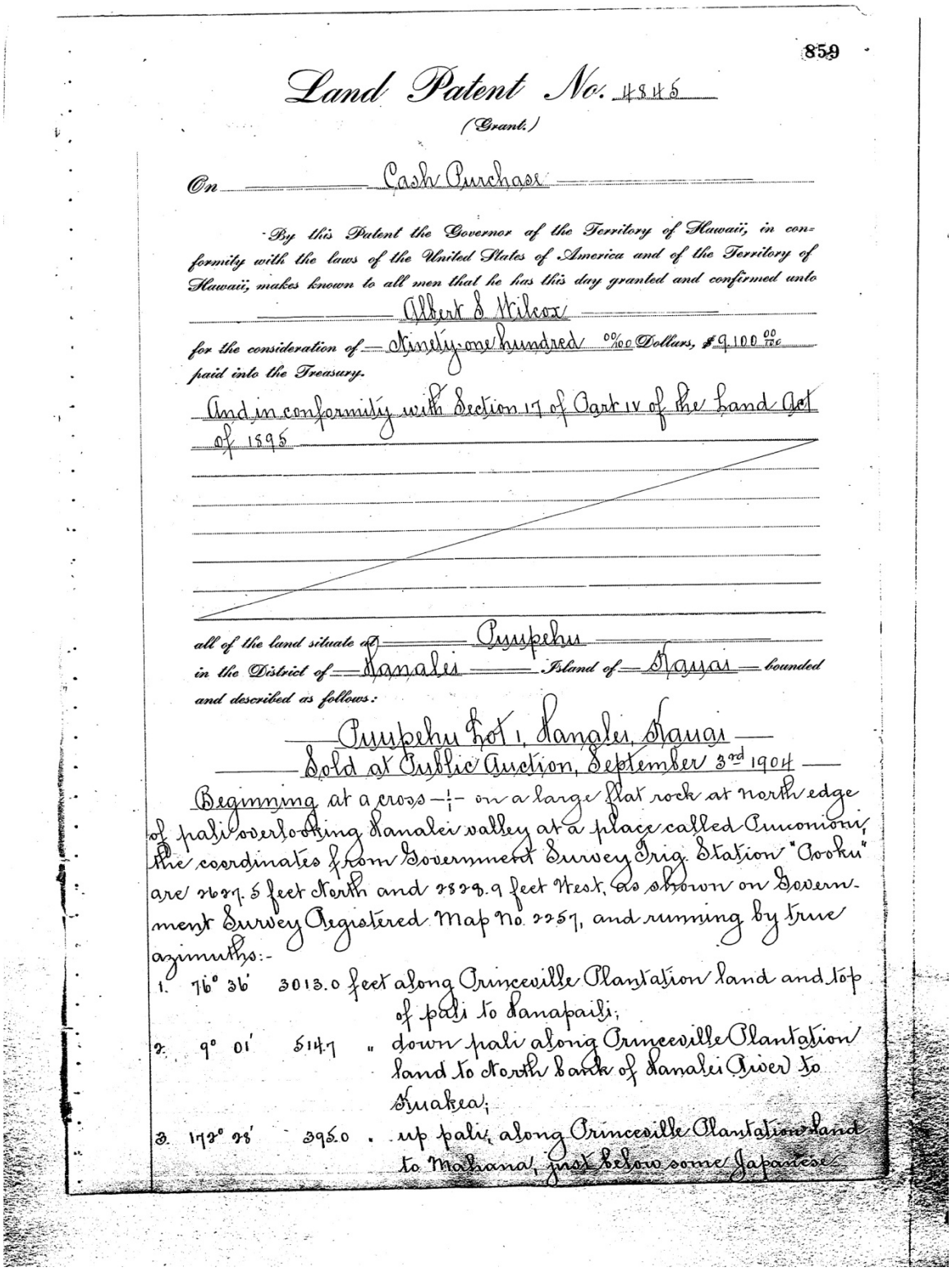
Hanalei and Anahola are the more interesting examples as they are Crown Lands. All of the sales in Anahola were in 1909 and 1910. There were a total of 8 sales in Hanalei with three in 1848, one in 1850, three in 1904, and one in 1907. Six of the eight grantees have non-Hawaiian names. In 1904, in two separate purchases 1,863 acres of Hanalei were purchased. Combining these sales with the two sales in Olohena yields a total of 3,499 acres

of a total of 3,820 for the entire district. It is from this foundation that Andrade states that the majority of the acreage went to Non-Hawaiians.

Arguably these sales were not made possible by the Māhele but instead were made possible by the overthrow of the government in 1893 and subsequent Land Act of 1895 whereby the Crown Lands were seized and taken from Liliʻuokalani and included in the government inventory. Royal Patent Grant 4845 to Albert Wilcox for 984 acres in Hanalei was written "in conformity with Section 17 of Part IV of the Land Act of 1895" (See Figure 14). So while I agree with Andrade that the majority of lands were sold to Non-Hawaiians, detailed analysis of the sale of Government Land in Haleleʻa supports the overthrow of 1893 as a sufficient condition for dispossession, rather than the Māhele, as it was not until the Crown Lands were seized that the "majority" of lands transferred to the hands of Non-Hawaiians. The analysis for Puna, Hawaiʻi that follows will make a stronger case for this point.

There is an added complication to this analysis. Albert Wilcox's father was a foreigner but his mother was Hawaiian. So technically speaking this land went to a Hawaiian. This introduces another layer of interpretation because the Wilcox family has ties to the sugar industry on Kauaʻi and the sugar planters were the main benefactors of the overthrow and are often viewed synonymously with those conspirators. Putting arguments of loyalty, allegiance and ethnicity aside for a second, what cannot be disputed is that the Crown Lands were made inalienable in 1865 and would not have been available for purchase without the overthrow and subsequent Land Act of 1895 which essentially "stole" these lands from Queen Liliʻuokalani. The majority of the sales in Haleleʻa consist of the sale of Crown Lands. The illegality of this act is the premise of Van Dyke (2008).

Figure 14. Land Patent Grant 4845



859

Land Patent No. 4845

(Grant.)

On Cash Purchase

By this Patent the Governor of the Territory of Hawaii, in conformity with the laws of the United States of America and of the Territory of Hawaii, makes known to all men that he has this day granted and confirmed unto

Albert S Wilcox

for the consideration of Ninety-one hundred 00/100 Dollars, $9100.00/100 paid into the Treasury.

And in conformity with Section 17 of Part IV of the Land Act of 1895

all of the land situate at Puupehu in the District of Hanalei Island of Kauai bounded and described as follows:

Puupehu Lot 1, Hanalei, Kauai
Sold at Public Auction, September 3rd 1904

Beginning at a cross +- on a large flat rock at north edge of pali overlooking Hanalei valley at a place called Cuconioni, the coordinates from Government Survey Trig. Station "Cooke" are 2627.5 feet North and 2828.9 feet West, as shown on Government Survey Registered Map No. 2257, and running by true azimuths:-

1. 76° 36' 3013.0 feet along Princeville Plantation land and top of pali to Hanapaili;
2. 9° 01' 514.7 " down pali along Princeville Plantation land to north bank of Hanalei River to Waikea;
3. 172° 28' 395.0 " up pali, along Princeville Plantation land to Makana, just below some Japanese

Puna – Pre/Post 1893 Analysis

The district of Puna, Hawai'i offers an interesting case study when tracking land ownership through time. There were a total of 32.17 acres of Kuleana Land in Puna. This acreage is accounted for by three Kuleana Awards from the Land Commission: LCA #2327, 11.32 acres to Baranaba; LCA #8081, 13.64 acres to Hewahewa; and LCA #1-M, 7.37 acres to Haka. Puna is one example showing the importance of examining all structures in the Māhele process for evidence of land acquisition. Between 1846 and 1893, Hawaiians purchased 13,045 acres (80 percent of the total acreage for this period), consisting of 88 awards (93 percent of the total number of sales for this period). Hawaiians were active participants in the purchase of government land in Puna. This activity may account for their inactivity in the Kuleana process. The importance of a nuanced understanding of the Māhele structure is illustrated by this discrepancy.

Between 1893 and 1915, 29,062 acres consisting of 439 sales were made in Puna. This is more than four times the number of sales in the prior forty-seven year period. Hawaiians account for 130 sales and 2,414 acres. On the other hand, Non-Hawaiians account for 309 sales (70 percent of the total number of sales for this period) and 26,648 acres (92 percent of the acreage for this period). Nearly double the acreage was sold in Puna to Non-Hawaiians in the 22 year period following the overthrow as compared with the 47 year period before the overthrow (see Figure 15).

The majority of the lands purchased post-1893 by Non-Hawaiians were in Ola'a which accounts for 325 (61 percent) of a total 535 sales for this post-overthrow period. Non-Hawaiians did not start to dominate the purchase of Government Lands until

Table 8. Summary of Government Grants Purchased in Puna: Pre 1893/Post 1893

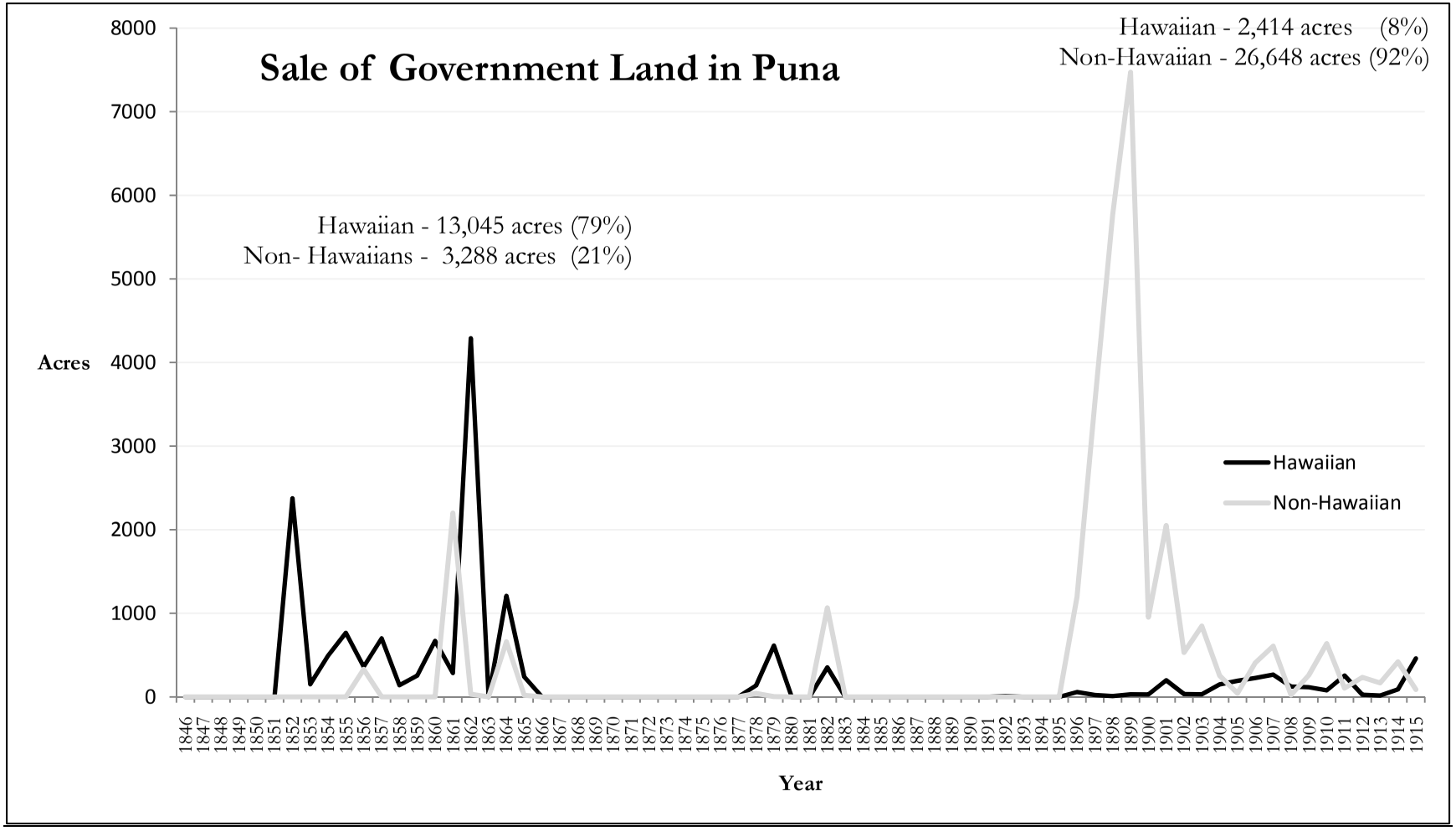
	# of Sales	# of Sales	Acreage	Acreage
	Pre- 1893	**Post-1893**	**Pre-1893**	**Post-1893**
Hawaiian	88 (91%)	130 (30%)	13,045 (79%)	2,414 (8%)
Non-Hawaiian	8 (9%)	309 (70%)	3,288 (21%)	26,648 (92%)
Total	96	439	16,333	29,062

after 1893 when Non-Hawaiians were in control of governance. This was directly influenced by Dole's new land policy: the Land Act of 1895. Dole intentionally attempted to lure Americans to Hawai'i, with the promise of homesteading, "As of yet but little had been done in the way of introducing Americans from the mainland to these islands. Although the preparation of the Act of 1895 was distinctly made with that object in view" (Hawaii State Archives: Dole Collection).

Prior to 1893 there were no sales of Government Land from Ola'a because Ola'a was the private property of the reigning monarch (Crown Lands) since the time of the Māhele. It was not until the Land Act of 1895 when Sanford Dole illegally consolidated the Crown Lands with the Government Lands, collectively calling them the "Public Lands", that the "sale" of these lands was made possible. The seizure of the Crown Lands allowed for a land base of approximately 915,000 acres (Thrum 1896) to be exploited. This specific dispossession is the focus of Van Dyke (2008) and is evidence of a dispossession that occurred as a direct result of a loss of governance. Institutions of private property were in existence since 1848 and furthermore the Crown Lands were made inalienable in 1865 thus the institution of private property did not make this dispossession possible: the overthrow did.

From examination of the trends in the sale of Government Land and the Sinclairs' inability to find suitable land for ranching in Hawai'i, I would hypothesize that the remaining Government Lands were mostly comprised of the deep interior and mountain areas of the islands. This may explain Sanford Dole's need to seize the Crown Lands as most of the good Government Lands had already been sold. Prior to the overthrow as a legislator, Dole recommended "the repeal of the legislative enactment of 1865, through which the royal

Figure 15. Sale of Government Land in Puna, Hawaii by Hawaiians & Non-Hawaiians



domain (the Crown Land) had been made inalienable, and that this land be made available as needed for homesteads" (Horwitz 1969, 4). Dole needed a new land base in order to implement his Jeffersonian vision of governance and "homesteading" promoting ideals of the "yeoman farmer". Unfortunately for Hawaiians, Dole's vision imagined Americans as the farmers rather than Hawaiian subjects.

The dilution of the indigenous population with people from the U.S. was the beginning of what is described in the colonial/post-colonial literature as a "settler colony" (Aschroft 2000, 211). This process rapidly increased only after the loss of governance resulting from the overthrow in 1893 caused by the belligerent occupation of Hawai'i by the United States. Beamer (2008) describes this process in Hawai'i as "Faux-Colonialism". It was the intent of Dole to use the Land Act of 1895 to encourage immigration to Hawai'i and this intent was later actualized through homesteading programs such as those in Puna, Hawai'i.

Institutions of private property and law were not the critical dismemberment of Hawaiians; the overthrow and occupation of Hawai'i by the United States resulting in the loss of governance and control over those institutions and law-making ability were. The overthrow was the sufficient condition leading to dispossession because it led to the deprivation of property by encouraging settlement in Hawai'i with the promise of land. This process was interrupted a few years later by the purported annexation of Hawai'i to the U.S. but the dispossessions continued with the U.S. military's use of hundreds of thousands of acres of land. All of these dispossessions were enabled only after governance was lost and the ability to implement new land policy was gained by foreigners. Non-Hawaiian's land

purchases did not escalate until foreigners were in direct control of government upon which time they implemented a planned immigration of settlers to occupy Hawaiian land.

Puna exemplifies the direct impact that the overthrow of governance played on the distribution of land in Hawai'i. Prior to the overthrow, Hawaiians were the major purchasers of land both in number and acreage. After the 1893 overthrow and Dole's 1895 Land Act encouraging homesteading by American immigrants, Hawaiians were in fact subsequently dispossessed of land and Hawai'i started to share characteristics of a settler colony, whereby, "the invading Europeans (or their descendants) annihilated, displaced and/or marginalized the indigenes to become a majority non-indigenous population " (Ashcroft 2000, 211). Sai (2008) highlights the United States re-presenting Hawai'i on the United Nations list of non-self governing territories in the mid-20th century (135). This action by the U.S. facilitated the imagining of Hawai'i as a settler colony. It is after 1893 that Hawai'i begins to be treated and imagined as a "settler colony" of the U.S. in an effort to hide the U.S. occupation of Hawai'i (Sai 2008).

Alternatives to Purchase: Leasing of Government Land

Examination of the leasing of land introduces an interesting nuance into the dispossession argument. The leasing of land was an already established practice since the time of Kamehameha I. Leases were the predominant interest in land investigated by the Land Commission. These were the "oral claims" which the Land Commission was initially established to investigate. The fact that foreigners were pushing for fee-simple ownership is not disputed. Instead the ascribing of this impetus to the sugar plantations that followed is.

Individual foreigners in the 1840s did not have the same needs or concerns as those foreigners in the 1900s. Generalizing the presence of one "imperial mind" with constant and similar motivations throughout the 19th century is oversimplified and does not fit the evidence.

A detailed analysis of the history of the sale of Government Land reveals the purchase of a handful of large parcels before 1893 but these purchases are not dominated by the sugar plantations. Instead many of the large purchases are made for cattle ranches. Horwitz (1969) indicates that the sugar plantations favored leasing land rather than its outright purchase as it was a safer long term investment. If one purchased a large amount of acreage for sugar lands that proved unproductive, there was not a big re-sale market. The sugar planters did not initially act on the potential created by the Māhele to purchase land in fee-simple. The conversion to private property did not directly benefit the sugar plantations.

The Crown Lands accounted for 25% (see Figure 3) of the available land in the Kingdom. In 1865, legislation made the Crown Lands inalienable meaning the fee-simple sale of these lands was made illegal and these lands could thereafter only be leased. This was an attempt to preserve the land base for future monarchs. Horwitz (1969) describes the prominence of leasing land, "In 1890, as King Kalakaua's reign neared its end, the total acreage of crown and government land leased to plantations and ranchers, each of whom leased not less than 1,000 acres, was approximately 750,000 acres, nearly one-sixth of all the land of the islands" (110).

The Māhele of 1848 created the potential to own private property in Hawai'i. Immediately following the Māhele the sugar plantations were more likely to lease land rather

than purchase land due to the economic risks involved in purchasing large amounts of land with little re-sale value. Trends in the sale of Government Lands show that Hawaiians were active participants in the purchase of these lands. In 1865, a law was passed making the sale of the Crown Lands illegal and instead making leasing the only available option for these lands. As Horwitz alludes, by 1890 more than one-sixth of the Hawaiian Kingdom was leased and these lands were mostly from the Crown and Government.

Summary

The majority of this chapter examines the sale of Government Land prior to 1893 which allows for comparisons with other sources. Examination of this data reveals interesting trends in Hawaiian and Non-Hawaiian purchases over time. These trends suggest that accurate and precise interpretations may require more than simply looking at overall acreage statistics. The 1870s and 1880s began to show a shift in the sales of Government Land from Hawaiians to Non-Hawaiians. This shift was examined through 1917 for a few of those places identified in the literature review and showed drastic shifts in trends occurring before and after the overthrow. These shifts in trends were used as evidence to support the thesis: the Māhele was a necessary but not a sufficient condition for dispossession. The overthrow of 1893 and resultant loss of governance was the sufficient condition for the dispossession of Hawaiians.

In 1893 the Hawaiian Kingdom government is overthrown and the leadership is replaced by foreigners led by Sanford Dole. In 1895 the Land Act of 1895 is passed by the new government and the intention of the act is to encourage the immigration of "Anglo-

Saxons" from the "continent" in an effort to offset the demographic vote (Beamer 2008). Dole is worried that the children of the immigrants brought in to work on the sugar plantations, having acquired citizenship and voting rights by their birth on Hawaiian Kingdom soil, are going to soon outnumber the Anglo-Saxons thus causing them to lose political power. In addition, the Land Act of 1895 confiscates the Crown Lands from the reigning monarch and includes these lands into the government inventory. Once incorporated into the government inventory these lands are eventually made available for sale.

The confiscation of the Crown Lands and the overthrow of the monarchy in 1893 enable three different visions for Hawai'i to come true. Sanford Dole, the sugar interests in Hawai'i and the U.S. military all benefited from and had their particular interests met by these two acts. Sanford Dole was able to implement his Jeffersonian ideals of placing small farm lots in the hands of immigrants form the U.S. through his homesteading programs. As mentioned, this also served the purpose of maintaining the control of the demographic majority. The sugar interests benefited from the overthrow and subsequent "annexation" (occupation) by maintaining their sugar markets in the U.S. The U.S. military benefited from the overthrow through its use of Hawai'i as a refueling station during the Spanish-American war in 1898.

In relation to dispossession, Hawaiian sugar interests and the U.S. military both benefited from the Land Act of 1895 and the consolidation of the Crown Lands into the "Public Land" inventory. These Crown Lands were eyed by the U.S. military for future military installations such as Schofield Barracks, Hickam Air Force Base, and the list goes on (Horwitz 1969). The sugar planters benefited from the consolidation of the Crown Lands

because they acquired the ability to "purchase" lands which were previously inalienable. The incentive for the sugar planters to purchase land in the 20th century is because these lands have already proved their worth with successful crops of sugar. Between 1865 and 1895, the sugar plantations and ranches did not have the ability to purchase Crown Lands which was made possible by the Land Act of 1895 and the Land Act was made possible by the overthrow of the monarchy. These are the events which facilitated the sugar plantations "ownership" of those lands which were previously leased most of which are still in the possession of these large land-owners.

To better measure dispossession, this chapter presented evidence dealing with the actual possession and use of land by Hawaiians and Non-Hawaiians as measured through the direct purchase of Government Lands and the leasing of both Crown and Government Land. Examination of the trends in purchase and lease reveals that Hawaiians were active participants in this process, the potential for which was created and secured by the laws of the Hawaiian Kingdom. In 1895 new land law was passed which drastically shifted the vision and direction of how and by whom land would be used.

Investigating the trends in sales of Government Land revealed that contrary to popular perception, the sugar plantations were not as active as one would expect when it came to purchasing Government Land. Of larger importance is the shift in trend before and after the overthrow. This is the time in which direct acts of dispossession occurred. The potential for dispossession was created by the Māhele but it was not actualized until governance was lost. In 19th century Hawai'i, the loss of governance was the single most critical dismemberment of Hawaiian society.

In debates outside the particularities of the Hawaiian context, this example contributes to debates of loss of land versus a loss of governance or sovereignty. In the Hawai'i example, a loss of sovereignty did not precede the transition to private property and sovereignty was instead acknowledged and recognized. But after the intervention of the U.S. military and subsequent occupation of Hawaiian territory, Hawai'i was treated and its history is very similar to other places whose territory was colonized. The problem is when such an interpretive lens is used prior to the loss of governance in 1893. The loss of land, although important, is secondary to what happens when sovereignty or governance is lost.

Chapter 5: Conclusions

The first chapter placed Hawaiian dispossession in the broader context of the dispossession of aboriginal people. Chapter two summarized the works and approaches of the dispossession discourse. This chapter identifies what is termed a "mis-understanding". The next chapter offers a "correction" on interpretations identifying the Māhele as the cause of dispossession by providing an accounting of what traditional rights in land were and how they were divided after the Māhele. Chapter four provided the largest contribution by providing empirical evidence for the on the ground measurement of dispossession.

Trends in the sale of Government land are argued to show 1) that the law provided mechanisms to allow access to land and 2) that Hawaiians were acting on these mechanisms to a larger extent than Non-Hawaiians pre-1893 when Hawaiians were in control of governance. From this evidence, it is argued that there wasn't an "initial" dispossession of the maka'āinana from land. The overthrow of 1893, Land Act of 1895, subsequent filling of lands with immigrants, and selling of land to these same immigrants are argued to be a better explanation for dispossession. While the Māhele was a necessary condition for dispossession, the overthrow was the sufficient condition.

The fee-simple purchase of Government Lands were a viable alternative to the *Kuleana Act* for maka'āinana to acquire fee-simple title to land. These sales show that Hawaiians were active participants in the purchase of Government Lands through 1893. Trends from these sales offer insight into when and how dispossession occurred in Hawai'i. The example of Halele'a, Kaua'i and Puna, Hawai'i show how the loss of governance and Dole's 1895 Land Act reversed the trends of land acquisition by Hawaiians and Non-

Hawaiians pre and post overthrow. In the words of Dole "Land without people on it is really worthless; that the value of the land depends simply on there being somebody to collect its produce" (Horwitz 1969, 3). By filling the land with Non-Hawaiians, specifically Anglo-Saxons from America, the large-scale dispossession began. Returning to Harris's question, if the intent is to measure dispossession rather than the "imperial mind", this thesis argues that the sale of Government Land shows that dispossession in Hawai'i resulted from the overthrow of Hawaiian governance and not the Māhele of 1848.

Broader Contributions

> To sit in judgment on the past is not always advisable. It is easy, in the light of subsequent events to perceive what would have been the wiser course. But it is not always easy to put ourselves in the places of our predecessors; to realize what difficulties may have beset them, and what obstacles may have prevented the carrying out of their own conceptions of what should have been done. This remark applies to the work of the Land Commission.
> (Lyons 1903, 37)

This thesis is attempting to bridge the gap between approaches emphasizing the particular versus the universal. It is "writing back" against representations which are over-generalized and deterministic and which are not precise in their categorizations of Hawai'i. Harris writes "as the literary theorist Benita Parry puts it, the postcolonial emphasis on language and texts tends to offer 'the World according to the Word' (1997, 12)—and the word tends to be European" (166).

In conclusion I would like to offer a modified version of White's metaphor of "rock" and "sea":

> The story of Hawaiian-American relations has not usually produced complex stories. Hawaiians are the rock, Americans are the sea, and history seems a constant storm. There have been but two outcomes: The sea wears down and dissolves the rock; or the sea erodes the rock but cannot finally absorb its battered remnant, which resists and endures. The first outcome produces stories of conquest and assimilation; the second produces stories of resistance. The tellers of such stories do not lie. Some Hawaiians did disappear; others did persist. But the tellers of such stories miss a larger process and a larger truth. The meeting of sea and continent, like the meeting of Hawaiians and Americans, creates as well as destroys…Something new appeared: surfers.

Hawai'i is the home of surfing and was the sport of the Hawaiian Ali'i. The skill of surfing requires one to understand nature and to work with it. Hawaiians could not stop what was carried to Hawai'i by the winds and tides from those often treacherous seas. But neither were Hawaiians passive observers watching the erosion of their land. In 1893 a freak set rolled in causing a huge wipeout holding Hawaiians underwater for a very long time. We have been looking for our boards ever since, so we can paddle back out.

6. Respecting applications for farms, forsaking of farms, dispossessing of farms, and the management of farms.

No man living on a farm whose name is recorded by his landlord, shall without cause desert the land of his landlord. Nor shall the landlord causelessly dispossess his tenant. These are crimes in the eyes of the law. If any portion of the good land be overgrown with weeds, and the landlord sees that it continues thus after a year and six months from the circulation of this law of taxation, then the person whose duty it is shall put that place which he permitted to grow up with weeds under a good state of cultivation, and then leave it to his landlord. This shall be the penalty for all in every place who permit the land to be overrun with weeds. The same rule shall apply to sub-landlords and sub-tenants.

But if any man in straitened circumstances, wish to leave his farm, or if he have business in another place, this is the course he shall pursue. He shall first give notice to his landlord, and having informed him, he shall then put the farm in as good a state as he found it, after which he may leave it.

Furthermore, let every man who possesses a farm in the Hawaiian kingdom labor industriously with the expectation of there by securing his own personal interest, and also of promoting the welfare and peace of the kingdom.

Those men who have no land, not even a garden nor any place to cultivate, and yet wish to labor for the purpose of obtaining the object of their desire, may apply to the land agent, or the Governor, or the King for any piece of land which is not already cultivated by another person, and such places shall be given them. The landlords and King shall aid such persons in their necessities, and they shall not go to the field labor of the King and landlords for the term of three years, after which they shall go. But if neither the landlords nor King render them any aid until they bring such uncultivated ground into a good state of cultivation, and they eat of the products of the land without any aid, then they shall not for four years be required to go to the field on the labor days of the king, nor of the landlords. After these years they shall go to the field and also pay taxes. But the poll tax they shall always pay.

It is furthermore recommended that if a landlord perceive a considerable portion of his land to be unoccupied, or uncultivated, and yet is suitable for cultivation, but is in possession of a single man, that the landlord divide out that land equally between all his tenants. And if they are unable to cultivate the whole, then the landlord may take possession of what remains for himself, and seek new tenants at his discretion.

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Claim N° 433 William Crowningburgh

This is a claim to a Land in Waikapu, Island of Maui, known by the name of "Pohakoi".

From the Evidence it appears, that the claimant, owning in right of his Wife, a small land in Waikapu, by the name of Pilipili, exchanged the same with Papahoehoe, in the Year A.D. 1832 for "Pohakoi," the land now Claimed; and that he has Continued to occupy the same in peace down to the present time.

This Title is made clear by the first Rule of the Board; and we do therefore award to the aforesaid Claimant - William Crowningburgh, a freehold title less than allodial; or in other words a life Estate in said land; which he may Commute for a fee simple title as prescribed by law.

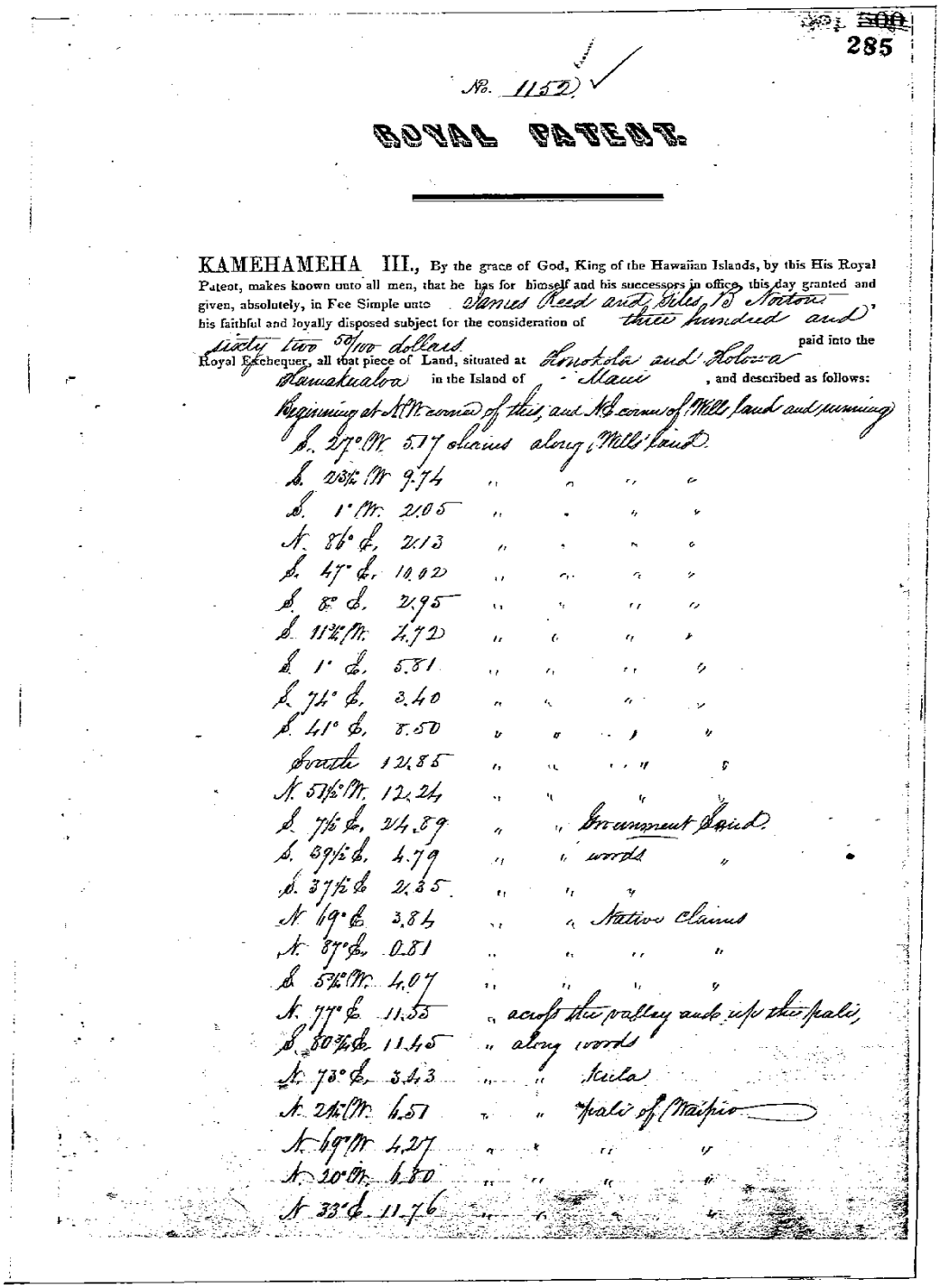
The Survey of the above awarded Lands is as follows: -

"Notes of Survey of Pohakoi in Waikapu Maui"

"Commencing at S.E. corner of Wall enclosing this lot joining Antonio Catalena's land, and Running N. 8° 30' W. 7 Ch. 6 7/12 Lks. along E. Wall to angle - thence N. 25° W 39 7/12 Lks. to N.E. Corner of this lot - thence S. 82° 15 W. 3 Ch. 60 Lks. along N. Wall to angle - thence S. 37° W. 4 Ch. 19 10/12 Lks. along Wall to angle - thence S. 23° 15 W. 39 7/12 Lks. along Wall to Wm Humphreys Lands - Thence S. 4° W. 5 Ch. 17 2/12 Lks. along Wm Humphreys to S.W. Corner of this Lands - Thence S. 87° E. 1 Ch. 27 8/12 Lks. along A. Catalena's to angle of Wall. thence direct to place of Commence: Including an area of Acres 5 93/100

Metcalf Surv

Sept 29 - 1847.



500
285

No. 1152.

ROYAL PATENT.

KAMEHAMEHA III., By the grace of God, King of the Hawaiian Islands, by this His Royal Patent, makes known unto all men, that he has for himself and his successors in office, this day granted and given, absolutely, in Fee Simple unto James Reed and Giles B Norton, his faithful and loyally disposed subject for the consideration of three hundred and sixty two 50/100 dollars paid into the Royal Exchequer, all that piece of Land, situated at Honokala and Holowa Pauwahualoa in the Island of Maui, and described as follows:

Beginning at N.W. corner of this, and N.E. corner of Mill land and running
S. 27° W. 5.17 chains along Mill land.
S. 23½ W. 9.74 " " " "
S. 1° W. 2.05 " " " "
N. 86° E. 2.13 " " " "
S. 47° E. 10.02 " " " "
S. 8° E. 2.95 " " " "
S. 11½ W. 4.72 " " " "
S. 1° E. 5.81 " " " "
S. 74° E. 3.40 " " " "
S. 41° E. 8.50 " " " "
South 12.85 " " " "
N. 51½° W. 12.24 " " " "
S. 7½ E. 24.89 " " Government land.
S. 89½ E. 4.79 " " woods "
S. 37½ E. 2.35 " " " "
N. 69° E. 3.84 " " Natives claims
N. 87° E. 0.81 " " " "
S. 5½° W. 4.07 " " " "
N. 77° E. 11.55 " across the valley and up the pali,
S. 80¾ E. 11.45 " along woods
N. 73° E. 3.43 " " Kula
N. 24½ W. 6.51 " " pali of Waipio
N. 69° W. 4.27 " " " "
N. 20° W. 4.80 " " " "
N. 33° E. 11.76 " " " "

N. 2° W. 11.33 chains along kula Honokola
N. 2° E. 40.36 " " " "
N. 5¼° E. 4.68 " " " "
N. 88½° W. 13.73 " " Road to Hana
N. 84° W. 16.00 " " " " "
S. 88¼° W. 12.66 " down the pali and across the stream
to the place of beginning

Reserving in Honokola the Kuleanas of Naone Uakeke Kauhi and Hanauwaha — and in Holawa, those of Manoa, Mua, Kaio and Kiilawe — in all amounting to 4.13 acres.

Containing Two hundred and ninety ——— Acres, more or less: excepting and reserving to the Hawaiian Government, all mineral or metallic Mines of every description.

To have and to hold the above granted Land in Fee Simple, unto the said James Reed and Giles B Norton, their Heirs and Assigns forever, subject to the taxes to be from time to time imposed by the Legislative Council equally, upon all landed Property held in Fee Simple.

In Witness Whereof, I have hereunto set my Hand, and caused the Great Seal of the Hawaiian Islands to be affixed, at Honolulu, this eleventh day of July 1853.

Signed Kamehameha

Signed Keoni Ana

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