Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii

Stuart Banner

In the late nineteenth and early twentieth centuries, throughout the Pacific Rim, European and American colonizers reorganized indigenous systems of property rights in land to make them look more like European property systems, with disastrous effects for the indigenous people involved. The very first of these schemes, however, was the Māhele of 1845–1855, which took place not in a colony but in the independent Kingdom of Hawaii. Why did the Hawaiians do this to themselves? I argue that the Māhele was a sophisticated and partially successful response to the prospect that Hawaii would soon be colonized. The object of the Māhele was to ensure that in the event of annexation, Kamehameha III and other elite Hawaiians would not be dispossessed of their landholdings. The strategy was to convert those landholdings into a legal form that would be recognized by an incoming colonial government—whether American, British, or French—as private property.

In the late nineteenth and early twentieth centuries, throughout the Pacific Rim, European and American colonizers reorganized traditional indigenous systems of property rights in land in order to make them look more like European property systems. In New Zealand, the British colonial government established the Native Land Court in the 1860s to convert Maori usufructuary rights into English fee simple titles (Williams 1999). Soon after, Britain set up a similar institution to reallocate property rights in Fiji (France 1969:129–64). In the western United States, the Dawes Act of 1887 authorized the same kind of reorganization of tenure in much of the land still possessed by American Indians (Hoxie 1989:147–87). Similar processes took place in the German colonies of New Guinea and Samoa, in French Polynesia, and in the joint British-French New Hebrides (Sack 1973:127–36; Gilson 1970:404–15; Newbury 1980:216–24; Van Trease 1987:63–91).

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While the details of these schemes varied, they were all structurally similar to the enclosure of European common fields over the preceding several centuries. Government-appointed commissioners were to determine who owned the right to use the various resources present on the land, and to replace those customary use-rights with written documents evidencing the ownership of parcels of land itself. Indigenous oral property systems based on command over individual resources were converted into European written property systems based on command over zones of land (Banner 2002).

These reforms were intended by their framers to serve two goals. Colonial governments expected that converting land tenure to the European style would facilitate the civilization of indigenous people, by providing them with greater incentives toward agricultural productivity. At the same time, colonial governments hoped that the eradication of complex indigenous property systems would bring indigenously owned land more efficiently onto the real estate market, where it could be purchased by settlers of European descent.

The consensus today among historians is that wherever these schemes were rigorously carried out they were disastrous for the indigenous people involved. In the United States, the allotment of Indian reservations smoothed the way for the Indians to lose tens of millions of acres of land and, instead of encouraging Indian farming, actually reduced the amount of Indian land under cultivation (Carlson 1981; McDonnell 1991). New Zealand's Native Land Court was the engine that drove a massive transfer of land from the Maori to British settlers and their government (Williams 1999; Ward [1974]1995). Because of their results, these land tenure reforms are often viewed with considerable cynicism today as thinly veiled colonial land grabs.

It comes as a bit of a jolt, then, to recall that the very first of these schemes took place in the independent Kingdom of Hawaii. The Māhele (or Division) of 1845–1855 dismantled much of the traditional Hawaiian system of property rights in land and replaced it with the Anglo-American system of alienable fee simple titles. The remarkable thing about the Māhele is that it was undertaken by the Hawaiians themselves. Land tenure reform elsewhere throughout the Pacific Rim was imposed on indigenous people by colonizers, often over bitter resistance from those whose property rights were being reformed. But Hawaii at the time of the Māhele was not a colony. To be sure, Hawaii was weak relative to the United States and the European powers. By the time of the Māhele, many Europeans and Americans were living in Hawaii, some of whom occupied significant positions in the government of Kamehameha III. As we will see, foreign residents had been urging

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land tenure reform on Kamehameha and other powerful Hawaiians for a long time before the Māhele, and non-Hawaiians played important roles in designing and implementing the details. But it would be a mistake to understand the Māhele simply as an act of colonization pressed upon Hawaii from the outside. In both its conception and its implementation, the Māhele had the support of the indigenous Hawaiian governing class. The story of Hawaii complicates the conventional account of colonial land tenure reform. Why did the land tenure reform movement of the late nineteenth and early twentieth centuries receive its earliest implementation in, of all places, Hawaii? Why did the Hawaiians do this to themselves? What did they hope to gain from it? This article attempts to answer these questions. At the end, I briefly suggest why the answers may shed some light on the process of colonization in other times and places, and thus why the answers may be of interest to people who are not historians of Hawaii.

I

The Māhele was one of the fundamental events shaping modern Hawaii, and for that reason many historians of Hawaii have tried to explain why it occurred. In broad outline, there is a traditional explanation, a relatively recent variation on the traditional explanation, and a new explanation. All three theories have some truth to them, but all are incomplete, because none has any substantial comparative dimension. All three rely on factors that were present not just in Hawaii but in many other parts of the world as well. As a result, none of the three does a very good job of explaining why no other self-governing indigenous society undertook anything like the Māhele.

The traditional explanation is that the Māhele unambiguously represented progress. In this version, Kamehameha III was an enlightened monarch wishing to help his people advance along the path from barbarism to civilization. Contact with well-intentioned white settlers persuaded him that private property in the Anglo-American style would help achieve that goal, so he selflessly gave up his control of all the land in Hawaii in order that his nation might modernize. This account meshed well with nineteenth-century American beliefs about progress and race relations, so among white authors it quickly became the standard history of the Māhele (Cheever 1856:69–70; Hopkins 1869:329–30; Anderson 1870:173). It remained the standard account for some time. In 1892, a bit more than a year before he became president of the short-lived Hawaiian Republic, Sanford Dole was a judge under the monarchy and a student of Hawaiian legal history. In his treatise on the

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evolution of Hawaiian land tenures, Dole (1892:18) repeated the common depiction of the Māhele: it was an effort "to climb the difficult path from a selfish feudalism to equal rights, from royal control of all the public domain to peasant proprietorship and fee simple titles for poor and for rich," a climb made possible because "foreign intercourse . . . and the spirit of a christian civilization had an educating influence upon the eager nation." Historians of Hawaii agreed for much of the twentieth century (Lyons 1903:62; Hobbs 1932:26–33; Kuykendall 1938–67: 269–98).

More recently, as the prevailing academic view of Euro-American expansion has grown darker, historians of Hawaii have offered a more sinister variation of this explanation. In this version, Hawaiians were still persuaded by whites that land tenure reform represented progress, but Hawaiian acquiescence was given with something less than complete free will (Daws 1968:124–8; Parker 1989:105–15; Osorio 2002:44–56; Lam 1985). The most sophisticated such account comes from Lilikalā Kame'eleihiwa (1992), who persuasively details how the first few decades of contact with whites shattered much of traditional Hawaiian religious belief and cultural practice. Left to put the pieces back together again, Hawaiian elites grasped at the straws offered by missionaries and other Westerners who arrived in the islands: concepts such as Christianity, trade, and written law. The Māhele, in this context, was part of a network of Western cultural patterns accepted by Hawaiians to fill the void created by the destruction of crucial aspects of pre-contact Hawaiian life.

The difficulty with these explanations of the Māhele, both the bright and the dark versions, is not that they are wrong, but rather that they are not unique to Hawaii. White residents of Hawaii did indeed extol the virtues of "private property," but so did white residents of many other places. Throughout the Pacific—indeed, throughout the world—whites tried to persuade nonwhites to adopt a bundle of ideas that whites believed would facilitate the spread of civilization, and one of these ideas was the European mode of land tenure. White settlement, meanwhile, devastated indigenous social and religious customs in just about every part of the world, which opened a door to the reception of all sorts of new practices. Why, then, was Hawaii the only indigenous society to undertake land tenure reform on its own, before sovereignty was lost to whites? Why did the Māhele take place in Hawaii rather than, say, Tonga, where white settlement likewise caused significant religious and legal changes, or New Caledonia, where Europeans amounted to 40% of the population by the end of the nineteenth century (I. C. Campbell 1992:64–106; Ward 1982:15)?

A similar shortcoming afflicts the remaining explanation for the Māhele. Sumner La Croix and James Roumasset (1990; see

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also Roumasset & La Croix 1993) argue that the Māhele was undertaken by the Hawaiian government in order to maximize tax revenues. The king and the chiefs traditionally received revenue from commoners in kind, in the form of a certain number of days per year of agricultural labor and a certain proportion of the commoners' own produce. Contact with whites produced two shocks to this system: it caused the Hawaiian population to decline sharply (mostly from disease), and it caused many Hawaiians to shift from farming to more trade-related lines of work, such as cutting sandalwood and whaling. Both changes caused tax revenues to decline, La Croix and Roumasset suggest, and accordingly caused the government to look for alternative sources of income. The solution, they conclude, was marketable parcels of land, which the government could sell for revenue in the short term and tax for revenue in the long term.

Again, however, this is a theory that would predict Māheles in many places besides Hawaii. The idea that the government could take in more revenue by switching the tax base from labor to land was indeed discussed during the Māhele, and, as we will see, it may well have been one of the factors motivating government officials to support land tenure reform. But indigenous elites in other places faced the same incentive. Throughout the world, colonial contact produced sharp drops in the indigenous population from exposure to new diseases and caused many indigenous people to take up new forms of labor directed at trade with the settlers. Indigenous groups throughout the region faced the same dilemma of revenue extraction that the Hawaiians faced. To be sure, some indigenous groups lacked a Hawaiian-style aristocracy that lived off the labor of others, and such groups would have had less occasion to cast about for alternative sources of revenue. But Hawaii's precontact social structure was hardly unique (see, e.g., Cummins 1977). Why did other indigenous groups not hit upon the same idea?

Existing explanations of the Māhele thus rely on conditions that may have been necessary but were not sufficient. To be complete, an account of the Māhele must distinguish Hawaii from other places. It should explain why there was only one Māhele rather than multiple Māheles throughout the Pacific or throughout the world.

My argument is that the Māhele took place because of a combination of circumstances that were present in Hawaii but nowhere else:

1. Whites respected the property rights of native Hawaiians, rather than treating Hawaii as *terra nullius*, or unowned land, as in some other parts of the world;

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2. Hawaii was located in a place convenient for white settlement, which caused the white population to increase quickly;
3. Hawaiians were sufficiently politically unified that the Hawaiian government could effectively prohibit land sales to whites, a power that few other indigenous groups anywhere in the world possessed, and a power that resulted in pent-up demand to purchase land;
4. That same degree of political organization meant that Hawaii, unlike most non-European polities, had the capacity to engage in top-down land tenure reform; and, most important of all,
5. In the 1840s, Hawaiians had good reason to expect that annexation by a foreign power was imminent. This expectation proved wrong, but of course there was no way to know that at the time.

This last factor deserves some emphasis. The Māhele, I will argue, was an intelligent response on the part of the Hawaiian elite to the prospect that Hawaii would soon be colonized. The object of the Māhele was to ensure that, in the event of annexation, Kamehameha III and other Hawaiian elites would not be dispossessed of their landholdings. The strategy was to convert those landholdings into a legal form that would be recognized by an incoming colonial government—whether American, British, or French—as private property. The Hawaiians, advised by some legally savvy Britons and Americans working for Kamehameha III, adopted Western land tenure ahead of time, in the hope that when they lost their sovereignty they would not lose their land as well.

In the end, this strategy worked only in part. For reasons I will discuss, it failed in its most visible application when, after annexation by the United States in the 1890s, the royal family's landholdings were deemed to be public land (and were thus ceded to the government of the United States) rather than Queen Liliuokalani's private domain. The long delay between the Māhele and annexation, meanwhile, meant that by the time the Hawaiians lost sovereignty they had already sold much of their land to foreigners, so by the 1890s there was much less left to protect. These failures, combined with the rhetoric of progress and civilization that dominated the historiography of the subject for so long, have obscured the Hawaiian elite's primary motivation for the Māhele. They weren't primarily trying to modernize, or to increase their tax revenues, although the Māhele may have had those effects too. They were trying to maintain their position as elites under what they expected would be a new regime.

Thinking of the Māhele in this manner suggests new ways of interpreting structurally similar instances of colonial land tenure reform elsewhere. With some recent exceptions (Meyer 1994;

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Greenwald 2002), histories of allotment in the United States, for example, or of the Native Land Court in New Zealand, tend not to linger over the Indians or the Maori who *supported* these programs, or over the ways in which precolonial social stratification gave different sorts of people different incentives with respect to land tenure reform, or over the strategies pursued by those who engaged with the new system. Land tenure reform posed dangers, but it also offered possibilities. Members of weak groups have often been able to advance their goals by invoking the most deeply held norms of the majority (Comaroff 2001:306–7). Among Anglo-Americans, the fee simple ownership of land was one such norm. Even the most thoroughly racist colonist might think differently about grabbing land that was owned by indigenous people in fee simple. This was one of the main reasons land tenure reform was so popular among whites who were self-conscious humanitarians—they hoped, among other things, to stop their less-enlightened fellow settlers from trespassing on indigenously owned land. It was hardly irrational for the indigenous owners to have the same expectation. Land tenure reform, meanwhile, promised to redistribute wealth *within* indigenous communities. The broadest lesson of the Māhele may simply be to remind us of the variety of incentives facing indigenous people on the cusp of colonization, and the wide range of legal strategies available to them.

II

The Hawaiians were skilled farmers. The first Europeans to reach Hawaii, James Cook and his colleagues, marveled at what Cook's lieutenant James King described as "regular & extensive plantations" and "cultivated ground as far as they could see." King concluded that "it is hardly possible that this Country can be better cultivated or made to yield a greater sustenance for the inhabitants" (Beaglehole 1961–68:521, 524). By the 1790s, Hawaii was already known as a place where American and European ships could load up with local fruits and vegetables on their way across the Pacific (Ingraham 1918:4, 33). The British explorer George Vancouver did just that in Maui in 1793. Archibald Menzies, the botanist accompanying Vancouver, was amazed that even steep slopes were "cultivated & watered with great neatness and industry, even the shelving cliffs of Rocks were planted with esculent [i.e., edible] roots, banked in & watered by aqueducts from the Rivulet with as much art as if their level had been taken by the most ingenious Engineer." Menzies reported that "the indefatigable labor in making these little fields in so rugged a situation, the care & industry with which they were transplanted watered & kept in or-

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der surpassed any thing of the kind we had ever seen before" (Vancouver 1984:860, n. 3).

Praise for Hawaiian agricultural skill quickly became a common theme in early-nineteenth-century British and American travel narratives. The Scottish seaman Archibald Campbell (1825:124–5), who visited Oahu in the first decade of the century, thought that Hawaiian irrigation systems were built with such "great labour and ingenuity" that the Hawaiians "are certainly the most industrious people I ever saw." When the English missionary William Ellis (1825:28) toured the Big Island in 1823, he found fields "planted with bananas, sweet potatoes, mountain taro, tapa trees, melons and sugar-cane, flourishing luxuriantly in every direction." In 1825, the British government sent the HMS *Blonde* to Hawaii to return the bodies of the Hawaiian king and queen, who had died of measles while visiting England. One officer of the *Blonde* reported that irrigation at Maui "is managed with great care and skill"; the ship's botanist thought Lahaina, the island's largest town, "looked like a well cultivated garden"; and the artist aboard the *Blonde* pronounced the town "in an excellent state of cultivation" (Anon. 1826:107; Macrae 1972:12; Dampier 1971:34). It was well-known among foreign visitors and their readership in Europe and the United States that the Hawaiians were an agricultural people (Townsend 1839:206; Olmsted 1969:191; Simpson 1847:33; Hill 1856:131–2).

Contact with whites had profound effects on Hawaiian farming, effects that ran in both directions. Incoming ships provided new markets for agricultural goods, which stimulated production (Cordy 1972). Those same ships, however, brought microorganisms that killed Hawaiians in enormous numbers (Bushnell 1993; Stannard 1989). By the 1820s, depopulation had resulted in the abandonment of many fields. The sandalwood trade further depleted the labor supply, by causing many survivors to abandon agriculture (La Croix & Roumasset 1984:162–3). The French shipmaster Auguste Duhaut-Cilly (1997:217), trading in Hawaii 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." As we will see, by the middle of the century such observations would cause many whites to write less favorably about Hawaiian agriculture, and that dim view of Hawaiian farming would provide ammunition for proponents of land tenure reform. But despite such criticism, there was no doubt among whites that Hawaiians were farmers.

That knowledge was important, because it predisposed Anglo-Americans to think of the Hawaiians as the owners of their land. By the late eighteenth and early nineteenth centuries, Britain had had two very different experiences planting settler colonies. In Aus-

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tralia, reached by Cook only a few years before he landed in Hawaii, the British had not recognized the Aborigines as landowners. They treated Australia as *terra nullius*—as unowned land—and concluded that colonization vested ownership of the land in the British government. In North America, by contrast, British policy by the middle of the eighteenth century was to acknowledge American Indians as possessors of property rights in their land. American settlers and colonial governments often acquired the Indians' land in transactions structured as purchases, transactions with no parallels in Australia.

There were a few differences between Australia and North America that accounted for this disparity, but the most important difference was that American Indians were farmers while Aboriginal Australians were not (Banner 2005). Europeans were heirs to a long tradition of thought associating agriculture with property rights in land. By the time whites began settling in Hawaii, this tradition, filtered through writers from Aquinas (1964:13) to Locke (1970:304–19) to Blackstone (1783:7), was pervasive. Even the settler press in Hawaii conceded that the Hawaiians owned their land. Although settlers desperately needed land, the *Polynesian* (23 June 1849, p. 22) acknowledged that to compel Hawaiians to give it up "would be a shocking morality." Whites recognized Hawaiian property rights in land because they had so much evidence of Hawaiian agriculture.

Educated visitors to Hawaii sometimes analogized Hawaiian land tenure to the feudal system that had once characterized Europe, and while the comparison was not perfect, it was close. No one in Hawaii "owned" land in the sense in which the word was used in nineteenth-century Europe and the United States (Kelly 1956:1–49). *Maka'āinana*, or commoners, had rights to use zones of land allocated by *ali'i*, or chiefs, in exchange for providing labor and agricultural products to the ali'i. (Rights to use land were not contingent on military service, as in feudal Europe.) The maka'āinana were supervised by lesser chiefs, called *konohiki*, who were accountable to the ali'i. The rights of the maka'āinana were perpetual, and handed down from generation to generation, so long as the maka'āinana satisfied the demands of the konohiki and ali'i. Maka'āinana were not tied to the land (this was another difference between Hawaiian land tenure and European feudalism); they could move to land given them by a different chief. No one's property rights were capable of being sold, however—neither the commoners' nor the chiefs' (McGregor 1996:6–8; Linnekin 1983:169–71).

When behavior was appropriate on both sides, patterns of land use seem to have been very stable. "In the old days," recalled the mid-nineteenth-century Hawaiian historian Samuel Kamakau

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(1976:8), "the lands were divided up according to what was proper for the chiefs, the lesser chiefs, the prominent people, and the people in general to have. Each family clearly understood what was 'their' land and 'their' birthplace." The same knowledge was kept by the chiefs, who "knew what lands they had given to this or that person, and the obligations that went with each portion of the land."

This system could be exploited by opportunistic konohiki or ali'i, however, and Kamakau also recalled that such exploitation was not unusual. "If a chief became angry with a commoner he would dispossess him and leave him landless," Kamakau (1961:229) explained. "It was not for a commoner to do as he liked as if what he had was his own. If a chief saw that a man was becoming affluent, was a man of importance in the back country, had built him a good house, and had several men under him, the chief would take everything away from him and seize the land, leaving the man with only the clothes on his back." Foreign critics of Hawaiian land tenure seized upon such accounts as evidence of the system's utter backwardness. "Not a common man owned a foot of the soil," insisted the pastor T. Dwight Hunt (1853:15–6). "Not one could claim for his own the food he cultivated, the garment he wore, or the house he reared. All that grew upon the land, all that swam in the sea, all that was made or reared by the hand of man, could be seized and appropriated by the reigning chiefs" (see also Bingham 1849:49; Meyers 1955:45; L. F. Judd 1928:63).

Some foreign observers were more positive about Hawaiian land tenure. The missionary William Ellis found the Hawaiians to possess "a kind of traditionary code" governing the rights of property, a set of rules

> which are well understood, and usually acted upon. The portion of personal labour due from a tenant to his chief is fixed by custom, and a chief would be justified in banishing the person who should refuse it when required; on the other hand, were a chief to banish a man who had rendered it, and paid the stipulated rent, his conduct would be contrary to their opinions of right, and if the man complained to the governor or the king, and no other charge was brought against him, he would most likely be reinstated. (1826:399–400)

Recently, historians sympathetic to traditional Hawaiian ways have likewise tended to describe Hawaiian land tenure as a well-ordered system of reciprocal obligations, which implies that incidents of exploitation by chiefs were rare (e.g., Kame'eleihiwa 1992:26–33). In the absence of any quantitative evidence on this point, there is no way to tell who is right.

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At the top of the pyramid, above the ali'i, was the king, who allocated land to the ali'i. The king was in principle an absolute monarch. As Kamehameha III (1833:n.p.) proclaimed shortly after assuming power, "[d]eath and life, to disapprove and to approve, all pleasures, all laws, and all actions in the land, are mine." The nineteenth-century Hawaiian scholar and government official David Malo (1951:58) described a world in which "every thing went according to the will or whim of the king, whether it concerned land, or people, or anything else – not according to law." Kings sometimes seized crops or pigs belonging to commoners, Malo reported, and even confiscated commoners' land (1951:195–6; 1839:127). Again, recent historians have suggested that kings in fact were more restrained than accounts like Malo's indicate, and again there is not enough evidence to resolve the issue one way or the other.

Early white settlers in Hawaii inserted themselves into this system. Some received land grants from the king under circumstances suggesting the king meant to treat them as ali'i. In the first decade of the nineteenth century, for example, the American adventurer Samuel Patterson received a tract on Oahu from Kamehameha I. "On looking the land over we found it produced numerous kinds of vegetables," Patterson related. "We then returned to the emperor and told him we were delighted with our present. He then gave us a canoe and servants to wait on us, and to till our ground, and told us to take wives of any women we saw on the island, excepting the chiefs' wives" (Anon. 1817:67–8). The Scottish sailor Archibald Campbell had a similar experience, when Kamehameha I granted him 60 acres near the present site of Pearl Harbor. "My farm, called Wymannoo, was upon the east side of the river, four or five miles from its mouth," Campbell (1825:111–2) explained. "Fifteen people, with their families, resided upon it, who cultivated the ground as my servants." With grants like these, Kamehameha seems to have been assimilating white visitors into the traditional hierarchy of land tenure. Patterson and Campbell, like other ali'i, enjoyed the right to demand a certain amount of labor and of crops from the commoners who worked "their" land (see also Holt 1979:74).

In the 1810s and 1820s, as the white population increased, kings continued granting parcels to white settlers, especially as a form of compensation for services rendered. These later grants were apparently outside the traditional labor hierarchy: white grantees had no right to the labor of commoners on the land, but neither did they owe any labor to anyone higher up the ladder (Greer 1996). By 1844, the American missionary-turned-government-official Gerrit Judd (1844b) found 125 such grants recorded with the Hawaiian Treasury, most to Americans and Britons, and he presumed that many more remained unrecorded.

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All these grants to foreigners, regardless of the details, were grants under traditional Hawaiian principles of land tenure. The grants were revocable at any time. The land could not be sold. In these respects, foreigners were in the same position as Hawaiians.

Of course, foreign residents of Hawaii were in a very different position from that of landholders in their countries of origin. In Britain, in the United States, and in all the other places from which white settlers had come, landholders had the power to sell their land, and they had little reason to worry about government expropriation. By the 1830s, the inability to own land in fee simple absolute—i.e., to own land in the Euro-American sense—was a major source of complaint among the foreign residents of Hawaii (Bradley 1942:278–82; Daws 1969). This was in part a concern to preserve their own investments. Many had built houses, planted farms, and so on, and they feared that all might be lost. This fear was particularly sharp among foreigners who had extended credit to the king or to the chiefs. In the early nineteenth century, Hawaiian elites ran up considerable debts in the sandalwood trade and in purchasing ships and other things manufactured by whites (Mills 2003). Their white creditors were nervous that the king or the chiefs might drive them out of Hawaii, and reclaim their farms and houses, as a way of avoiding having to pay these debts. Their apprehensions reached such a pitch that in 1831, when Hawaiian soldiers disrupted two whites playing billiards, 26 foreign residents of Oahu signed a petition claiming the incident was intended "to drive us to desperation and induce us to leave the islands as the best means of paying the debts due to us" (French 1831:n.p.). But one did not have to be a creditor of the Hawaiian elite to want to leave one's home to one's children, or to want to sell one's land upon leaving Hawaii. The desire for fee simple ownership was pervasive among the settlers.

Many of the complaints about the impossibility of fee simple ownership, however, focused not on recouping past investment but on encouraging future investment. White settlers in Hawaii wanted to attract more white settlers, for economic reasons (more settlers would raise the value of their land) and for cultural reasons (for most settlers, more whites would make Hawaii a more pleasant place to live). For the large majority of the foreign residents of Hawaii, real estate development unambiguously represented progress. The inability to own land in the full Euro-American sense, they feared, was deterring white settlement and white investment. "Foreigners who would be glad to engage in agricultural labors, requiring a great outlay of capital, are prevented by the certainty that if any malady, or any motive whatever, should induce them to leave the country, they would lose at once the fruit of their labors," observed Théodore-Adolphe Barrot (1978:118), who

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stopped off in Hawaii in 1836 on the way to the Philippines to serve as French consul. "Consequently, agriculture has made no progress, and instead of immense establishments which a more enlarged policy would have caused to spring up, no other cultivation is seen on the fertile plains of the Sandwich Islands than that of the taro." Gorham Gilman (1970:142), who arrived in Honolulu from Maine in 1841, noted that "it has always been the policy of the Govt never to alienate their title to the soil – the fruits of this short sighted policy is obvious cramping investment – & retarding improvements." By the 1840s, white residents of Hawaii were making the same complaint over and over—that the government's refusal to permit them to own land in fee simple was bottling up development (e.g., *The Friend*, 1 July 1844, p. 65).

In the 1830s, in response to pressures from British residents of Hawaii, the British government tried to secure by treaty the right to fee simple land ownership, but the Hawaiian government refused (Jarves 1843:279–80). The government of the United States tried the same tactic in the 1840s, but with no greater success (Ten Eyck 1847, 1848). As Kamehameha III explained during one discussion of a British resident's land claim, "[w]e indeed wish to give Foreigners lands the same as natives and so they were granted, but to the natives they are revertable and the foreigners would insist that they have them for ever" (Privy Council Records, 15 June 1846, 1:149). From the perspective of the Hawaiian governing elite, the retention of traditional land tenure served several goals: it prevented the number of foreign residents from growing unmanageably large, it allowed the king and the chiefs to retain their traditional control over the allocation of land, and—not least—it ensured that the beneficiaries of any rise in land values would be Hawaiian, not foreign. The minutes of Hawaii's Privy Council relate that "the King and Chiefs laughed very heartily" on at least one occasion, while contemplating the desire of white residents to own land in fee simple, "remarking, – so they think we are fools – that we know not the value of our own lands" (Privy Council Records, 13 August 1846, 1:189–91). Before the Māhele, the greatest concession the government would make was to permit leases for periods as long as 50 years. Even then, the government was careful to specify that leases near the upper end of that range would be obtainable only at higher rents (Kamehameha III 1841).

The more reflective among the settlers came to a grudging admiration for what was, after all, a logical response to the danger posed by white immigration. "Should the number and wealth of the foreign population increase in an excessive ratio compared with that of the native," one white editorialist acknowledged, "the result would be nearly the same as if another government held the reins of state" (*Polynesian*, 13 November 1841, p. 90; see also 13

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March 1841, p. 158; 17 July 1841, p. 22). When the American naval officer Henry Wise (1849:374–5) visited Hawaii in the late 1840s, he recognized that Kamehameha and the chiefs "are much too shrewd not to perceive, with prophetic vision, that the very moment the lands are thrown open to foreign enterprise and competition, a preponderating influence will be acquired by the wealth and intelligence of foreigners themselves, [and] the lands will slip like water through the hands of the chiefs." As we will see in a moment, the Hawaiian governing elite included some men who were aware of the course of colonization in other parts of the world. They understood the value of maintaining traditional Hawaiian land tenure.

Many, perhaps all, indigenous societies would have benefited from the same strategy, but it required a sufficient level of political organization to implement, and Hawaii was one of very few places in the non-European world where political authority was not fragmented among several small tribes. On the North Island of New Zealand, Maori tribes were able to organize so as to prevent land sales to whites for a decade or two in the mid-nineteenth century, but that coalition fell apart after the colonial government reorganized the land market to make it easier for dissident tribe members to sell as individuals (Banner 2000a:64–70). In the mid-eighteenth century, the Creeks and Cherokees in colonial North America worked toward developing a mutual land sale policy and discussed the issue with representatives of other tribes as well. Within a few years, however, the Cherokees offered to sell to the colony of Georgia land claimed by the Creeks (Braund 1993:150–2). In many societies, including in North America and New Zealand, individual tribes often lacked the capacity to prevent even their own members from selling land to whites, because political power was so widely dispersed. Organization on a larger scale was even harder to achieve. An indigenous polity had to be relatively large and relatively hierarchical for the Hawaii strategy to work. Few were. Tonga was one such polity—like Hawaii, Tonga was governed by a single king and many chiefs, and they were able to prohibit land sales to non-Tongans throughout the nineteenth century (Rutherford 1977:157–60). But Hawaii and Tonga were unusual in this respect.

From the perspective of the settlers most directly affected, this insistence on holding onto the land looked like yet another example of the tyranny of the Hawaiian elite. "The Government is a feudal despotism" (Anon. 1844:A10–11), thundered the Briton Richard Charlton, whose dispute with the government over his rights to land was one of the major issues of Hawaiian foreign relations off and on between the late 1820s and the early 1840s. "Large tracts of valuable land lie waste, as the common people have

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no encouragement to cultivate it; if a man should get a piece of ground in good order, he would be certain that the King or some of the chiefs would take it from him" (Anon. 1844:A10–11). The British trader John Turnbull (1813:201) declared that "the despotism and wantonness of command in the chiefs is only equalled by the correspondent timidity and submission of the people." He drew a more general lesson from his years in Hawaii. "Philosophers are much mistaken who build systems of natural liberty," Turnbull concluded. "Rousseau's savage, a being who roves the woods according to his own will, exists no where but in his writings."

As the white population of the islands increased, foreign residents' desire to own property by Anglo-American tenure increasingly came into conflict with the Hawaiian government's policy of making land grants only according to Hawaiian tenure. One of these forces would have to give way. As in most settler societies throughout the world, it was the settlers' desire that would prevail. Beginning in the 1840s, Hawaii would radically reorganize its property system, in the series of events that would come to be called the Māhele.

III

Hawaii reorganized its government before its property system. The Constitution of 1840, Hawaii's first written constitution, established a constitutional monarchy on the British model, with a bicameral legislature consisting of a house of nobles and an elected chamber. Within a few years Hawaii had a Supreme Court and a Privy Council, as well as ministries of foreign relations and finance, among others. In its details, the form of the government was clearly influenced by the British and American missionaries who taught the Hawaiians who drafted the constitution, but that influence extended even more deeply, to the tacit political theory underlying the constitution. Before 1840, the government of Hawaii did not exist as a set of institutions independent of the men who happened to occupy positions of leadership at any given time. There was no distinction before 1840, for example, between land belonging to the king and land belonging to the government, because there was no such institution as "the government" separate from the person of the king that was capable of holding land. The Constitution of 1840 changed that, by importing from Europe and the United States a conception of the government as an abstract entity, as distinguished from the personal identities of the king and other officeholders. The Constitution made this distinction explicit as to property. It provided that the king "shall have the direction of

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the government property." In the next sentence, the Constitution stated, "He also shall retain his own private lands" (Swindler 1973–79:16). For the first time, Hawaiian law distinguished between the king's land and the government's land, a difference that would prove to be important in later years.

Kamehameha III quickly began hiring foreigners to staff this new government. By 1844, the Hawaiian government included six men from the United States, six from Britain, one from France, and one from Denmark (G. P. Judd 1844b). By 1851, these 14 had grown to 48. "Were it not for the foreigners living under his jurisdiction he would require no Foreign Officers," Kamehameha III explained to the British Admiral George Seymour in 1846. "He could manage his own subjects very easily, – even his word was always enough for them, but foreigners with great cunning and perseverance often sought to involve him in difficulty, and . . . by experience he found that he could not get along, but by appointing foreigners to cope with them" (Privy Council Records, 24 August 1846, 2:20). These men were a mixed lot. George Brown, the United States consul in Hawaii in the mid-1840s, did not think highly of them. "I don't believe a more stupid if not unprincipled set, ever surrounded a throne, than the King's advisors here," he informed a friend back home in Massachusetts. "There will be some queer developments by and by" (Brown 1846:n.p.). Some were lawyers, some ex-missionaries, some adventurers; probably none would have become high-ranking government officials had they not moved to Hawaii. But whatever their faults, they swore their allegiance to Kamehameha, and they (or at least the ones who figured prominently in land tenure reform) seem to have been interested in advancing what they viewed as the best interests of Hawaii. Some were motivated by a missionary-like enthusiasm. Gerrit Judd, who left his post as a missionary physician to serve "the Dynasty of the King my Master" Kamehameha, declared his hope that with his assistance an independent Hawaii could "raise out of the aboriginal population of this distant part of the Earth a Government that could evince reason and could conduct its affairs upon the principles of the Law of Nations and could apply the Code of civilized administrations in its transactions" (G. P. Judd 1844a:n.p.). These white advisors would play a crucial role in the Māhele.

Strictly speaking, the Māhele was a single event that took place in 1848, but colloquially the term has come to describe a process that consisted of five separate events between 1845 and 1855 (Chinen 1958). The first, in 1845, was the creation of a Board of Commissioners to Quiet Land Titles. The statute creating the Land Commission, as it came to be called, explained that the Commission was "to be a board for the investigation and final ascertain-

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ment of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this act" (Anon. 1846:107–10). Once the Commission published a notice of its existence in the newspaper, any person, Hawaiian or foreign, with any claim to land, had to file that claim with the Commission within two years. All claims not filed by the deadline, February 1848, would be forever barred. Once a claim had been confirmed, the claimant could obtain a patent in fee simple, upon paying a fee to the government (Anon. 1846:107–10).

The Commission had no power to change the law or to grant rights where none had existed previously. "The true object" of the Commission, the *Polynesian* (14 February 1846, p. 169) explained to a readership that must have included many foreign land claimants, "is to raise order and security out of the present involved and confused system of titles and tenures, and by putting all on a uniform and correct basis, give a wholesome spur to the landed interest of the country." The claims that the Commission would hear were still, as always, founded on a grant from a chief or from the king directly, and they were still revocable at the chief's or king's option. The purpose of the Commission was only to clarify, and to write down, which land had been granted to whom (Board of Commissioners 1847).

There was an enormous mismatch, however, between the Commission's narrow ostensible purpose and the broad scope of its actual power, and that mismatch suggests quite strongly that other goals were at work beyond simply tidying up Hawaii's land titles or resolving disputes between competing claimants to the same land. The Commission was charged, not just with cases where two people claimed the same land, and not just with land claims from foreigners, but with converting *all* the land in Hawaii from an oral tenure to a scheme of written titles, even land that had been uncontroversially used by particular Hawaiian families for as long as anyone could remember. This was a massive transformation of the Hawaiian property system, for the purpose of creating a formal written record of who owned what, on every square foot of every island. Such a major undertaking was hardly necessary merely to resolve existing conflicts or even to prevent new ones. Something else was going on.

The second of the events constituting the Māhele was the Māhele proper, the great division of land between the king and the chiefs. Between January and March 1848, Kamehameha III reached more than 240 agreements with individual ali'i and konohiki, each of which divided lands between the king and a chief. The chiefs were then to submit claims to the Land Commission for their parcels.

The third event was another important land division. In March 1848, after completing the division between the chiefs' land and his

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own, Kamehameha signed two documents in which he divided his own land into two kinds, a larger portion that would be owned by the Hawaiian government, and a smaller portion he would own in his personal capacity.

The final two events took place in 1850. In July, the Legislature for the first time allowed foreigners to acquire land in fee simple. This measure appears to have been the only segment of the Māhele that aroused significant domestic opposition. When the idea was first suggested by foreign-born officials within the Hawaiian government in the mid-1840s, it drew petitions of protest from maka'āinana, or commoners, throughout Hawaii, who feared they would be turned off the land by white purchasers. "You chiefs must not sell the land to the white men," insisted more than three hundred citizens of Kona, on the Big Island. "If the chiefs are to open this door of the government as an entrance way for the foreigners to come into Hawaii, then you will see the Hawaiian people going from place to place in this world like flies" (Petition 1845:n.p.). Three hundred and one residents of Lāna'i pleaded with the government not "to open the doors for the coming in of foreigners. . . . We are afraid that the wise will step on the ignorant, the same as America and other lands, – on you and on us" (reproduced in Kame'eleihiwa 1992:333). A similar group from Maui offered a prediction of the consequences of opening up land sales to foreigners, a prediction that turned out to be quite accurate:

> Foreigners come on shore with cash ready to purchase land; but we have not the means to purchase lands; the native is disabled like one who has long been afflicted with a disease upon his back. We have lived under the chiefs, thinking to do whatever they desired, but not according as we thought; hence we are not prepared to compete with foreigners. If you, the chiefs, decided immediately to sell land to foreigners, we shall immediately be overcome. If a large number of foreigners dwell in this kingdom, some kingdom will increase in strength upon these islands; but our happiness will not increase; we, to whom the land has belonged from the beginning, will dwindle away. (*The Friend,* 1 August 1845, p. 119)

The proposal to allow foreigners to purchase land revealed a division along class lines. The chiefs supported it, while the opposition came from the maka'āinana.

That same class conflict over the same issue reappeared in 1850, when after years of discussion land purchasing was finally opened up to foreigners. In the Legislature the proposal had the unanimous support of the House of Nobles, but the other house, the one composed of elected representatives, opposed the measure at first, because, as one official explained, "they were afraid the foreigners . . . would own all the lands and some day there would

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be trouble" (Journal of the Legislature, July 9, 1850:n.p.). Ukeke, one of the representatives, noted that he opposed allowing foreigners to buy land "because my constituents the common people have requested me" (Journal of the Legislature, July 10, 1850:n.p.). Even after the measure passed, the settler press acknowledged that opponents had grounds for concern. "We know that it met with strong opposition from the immediate representatives of the people in the legislature," the *Polynesian* (13 July 1850, p. 34) editorialized, "and that the opinion is quite prevalent among the natives that they will suffer in their rights, from want of skill and ability to compete with the foreigner. This is a natural fear, and one that should not be treated with contempt."

In August 1850, finally, the Kuleana Act was enacted. A *kuleana* means a right or an interest; in the Kuleana Act, it referred to the rights of maka'āinana in the land that they used. The Act granted fee simple titles to commoners "who occupy and improve any portion" of land belonging to the government, to the king, or to a chief, "for the land they so occupy and improve" (Lam 1989: 287–8; Levy 1975:855–7). Before 1850, maka'āinana who filed an appropriate claim with the Land Commission had the right to continue to use such land, subject to the traditional labor and produce owed to the konohiki, but not the right to sell it. After 1850, maka'āinana had the full bundle of rights associated with fee simple ownership, including the right to sell, and were freed from any obligations to the konohiki. "The Konohiki has no claim upon the tenant," the missionary Richard Armstrong exulted when the measure was approved by the Privy Council. "Each man will be his own Konohiki" (*Polynesian*, 16 February 1850, p. 157). This freedom, and particularly the right to sell, would prove to be a mixed blessing.

The Land Commission received approximately 13,500 claims by the 1848 deadline. When it wound up its work in 1855 it had (in round numbers) granted 9,300, rejected 1,500 as unfounded, deemed another 1,500 to be duplicates of other claims, and concluded that the remaining 1,200 had been abandoned by the filers (Board of Commissioners 1856:13–5). The large majority of grants were to maka'āinana, who constituted the large majority of the population. There were 12,000 claims filed by maka'āinana, at a time when the total number of maka'āinana was roughly 72,000, which works out to approximately one claim for every six people (Linnekin 1987:27). Many of these claims were filed by men on behalf of families, so the number of maka'āinana who missed the opportunity to file a claim was not as large as five in six, but it nevertheless seems to have been substantial. Many of the maka'āinana were illiterate (Hawaii lacked writing before European contact), many lived in remote areas, and so many simply missed the

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1848 deadline. Similar problems of communication and translation over great distances would later bedevil the parallel schemes of land tenure reform in New Zealand and the United States. After 1848 the Legislature refused to extend the deadline for maka'āinana, despite several petitions asking for an extension. Chiefs who missed the deadline, by contrast, were granted a series of extensions, the last of which did not expire until 1895 (Chinen 1961: 20–1, 32–3).

In many cases, maka'āinana refused to submit claims, or renounced claims they had already filed, because they preferred to continue living under traditional principles of land tenure. Such commoners inadvertently left themselves in a precarious position. When the land was sold, whether by the government, the king, or a chief, the purchaser had no obligation to respect the traditional rights of maka'āinana who had not received grants from the Land Commission. In other cases, ali'i and konohiki threatened their tenants in order to prevent them from filing claims with the Commission (Chinen 2002:75–96).

Government officials were well aware of these obstacles preventing many maka'āinana from submitting claims. Some, at least, tried to encourage the filing of claims. In December 1847, with only two months left to go before the deadline, Chief Justice William Lee wrote to five ministers on the Big Island and three on Kauai, urging them to exhort Hawaiians to submit their land claims. "I learn with great pain," Lee (1847a:n.p.) declared in his letters to the Big Island ministers, "that there are not a dozen native claims received from the whole Island of Hawaii, while from the smaller islands of Maui and Oahu we have nearly 1200." The following month, as the deadline drew nearer and he heard reports that certain chiefs were preventing their maka'āinana from filing claims, Lee (1848a:n.p.; emphasis in original) insisted that "no Chief or Konohiki will have land awarded to him, except upon the condition of respecting, *to the fullest extent*, the rights of the tenants." But Lee was whistling in the wind. Neither he nor the Land Commission had any authority to protect the rights of anyone who did not submit a claim.

Because the Land Commission confirmed existing rights rather than granting new ones, and because Hawaii was a highly stratified society, grants to chiefs were far larger than grants to commoners. In one large sample, the mean size of grants to maka'āinana was 2.7 acres. The mean size of grants to konohiki was 74 acres; to ali'i, 1,523 acres; and to foreigners, 141 acres (Linnekin 1987:30). When the Māhele was finished, property ownership in Hawaii was no more egalitarian than it had been before. The chiefs ended up with 1.6 million acres of land. The government got 1.5 million acres. The king, in his personal capacity, received nearly

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1 million. And the makaʻāinana, the vast majority of the population, ended up with 29,000 acres (Schmitt 1977:298).

In only a decade, the independent Kingdom of Hawaii had transformed its system of land tenure. Before 1845, all the land in Hawaii was nominally owned by the king and in practice was allocated by chiefs to commoners in the form of grants revocable at the chiefs' will, in return for which the commoners were obliged to provide the chiefs with labor and produce. These rights were inalienable, whether to foreigners or to other Hawaiians. After 1855, everything had changed. Now land was held in fee simple, just like in Britain or the United States. Land could be sold by anyone to anyone, whether foreigner, commoner, chief, or the king. The old land-related obligations between commoners and chiefs had ceased to exist. Rights to land were no longer revocable by the king. A new landowner had been created—the government, as distinct from the person of the king—and the government quickly became a major seller of land. All these changes had been encouraged by the Britons and Americans holding office in the Hawaiian government, but they had been adopted willingly by the Hawaiian governing elite. The only significant opposition came from commoners, who feared, rightly as it turned out, that land tenure reform posed the risk that foreigners would acquire a disproportionate share of the land.

What motivated all this change? Why were Hawaiian elites so ready to adopt Anglo-American land tenure?

IV

Long before the Māhele, there was a widely held belief among the white residents of Hawaii that traditional Hawaiian land tenure provided little incentive for hard work. "One of the strongest inducements to labor – that of a right of property – is entirely unknown," affirmed the missionary C. S. Stewart (1839:117), who lived in Hawaii in the 1820s. "Two-thirds of the proceeds of anything a native brings to the market, unless by stealth, must be given to his chief; and, not unfrequently, the whole is unhesitatingly taken from him." Nor, Stewart insisted, did commoners have any incentive to accumulate wealth. "Any increase of stock, beyond that necessary to meet the usual taxes, is liable to be swept off at any hour; and that, perhaps, without any direct authority from a king or chief, but at the caprice of some one in their service." Stewart then recounted a story circulating among the foreign residents of Oahu, a tale that would be repeated by other critics of Hawaiian land tenure.

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> A poor Hawaiian by some means obtained the possession of a pig, when too small to make a meal for his family. He secreted it at a distance from his house, and fed it till it had grown to a size sufficient to afford the desired repast. It was then killed, and put into an oven, with the same precaution of secrecy; but when almost prepared for appetites whetted by long anticipation to an exquisite keenness, a caterer of the royal household unhappily came near, and, attracted to the spot by the savory fumes of the baking pile, deliberately took a seat till the animal was cooked, and then bore off the promised banquet without ceremony or apology! (1839:118)

The pig, whisked away at the last moment, was a metaphor for the fruits of one's labor. Without private property in the Anglo-American style, Anglo-Americans often asserted in the years before the Māhele, Hawaiians had little incentive to be industrious (Mathison 1825:449–50; Bishop 1838:56–7; Eveleth 1839:30).

That view remained the conventional wisdom among white residents in Hawaii at the time of the Māhele. In 1846, Robert Wyllie, Hawaii's minister of foreign relations, circulated a questionnaire to missionaries throughout the islands. A few of the questions concerned the "indolence and indifference" of the natives, and one requested the missionaries' advice as to "the best means of abolishing that indolence and indifference, and introducing habits of general industry." Almost every respondent suggested giving Hawaiians fee simple title to their land (Anon. 1848:7–13). The settler press editorialized repeatedly on the same theme. "It is impossible at present to predict the amount of prosperity which would result to the nation from changing the present feudal tenure of lands to the allodial," asserted the *Polynesian* in one representative issue (31 May 1845, p. 6), "but from the greater security and better definement of property, the inducements to enterprise which such a change would bring about, it would undoubtedly lead to a great improvement in the agricultural industry of the kingdom" (see also 9 August 1845, p. 49; 25 October 1845, p. 94; 2 June 1849, p. 11; 5 January 1850, p. 133; 23 March 1850, p. 178).

The argument was also made again and again by the foreigners within the government: fee simple title was the surest way to turn Hawaiians from indolence to industry. William Lee was a tireless propagandist for land tenure reform, writing letter after letter in support of the Māhele to other white residents. "The present system of landed tenures in this Kingdom rests upon the nation like a mountain, pressing and crushing them to the very earth," Lee (1847d:n.p.) declared in one letter. "Remove it, and the fettered resources and depressed energies of the nation will rise, and cover the land with prosperity and plenty. Unless the people – the real

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cultivators of the soil, can have an absolute and independent right in their lands – unless they can be protected in those rights, and have what they raise as their own – they will inevitably waste away.'' He told another correspondent (1848b:n.p.), ''Before the people of Hawaii can prosper and thrive I am firmly convinced that this feudal system of landed tenures must come to an end.'' Lee was not a missionary in the religious sense—he was a lawyer—but when it came to land tenure reform he was very much like a missionary in his zeal to reform Hawaiian practices for what he was certain was the benefit of Hawaiians. ''This silent and bloodless revolution in the landed tenures of Your Kingdom,'' he reported to Kamehameha, ''will be the most blessed change that has ever fallen to the lot of Your Nation. It will remove the mountain of depression that has hitherto rested upon the productiveness of your soil'' (Lee 1847b:n.p.). Lee may have been more enthusiastic than the rest of the foreigners in Hawaii, but the substance of his views was typical. The most commonly expressed reason for land tenure reform, on the part of whites, was the hope that fee simple titles, and the ensuing ability of commoners to keep the benefits of their labor, would encourage Hawaiians to work harder. Recent economic analysts of property rights would agree (e.g., Ellickson 1993).

Foreign residents of Hawaii of course had a personal stake in the matter: a thriving economy, coupled with the ability to own land themselves, would allow them to make their fortunes. They accordingly viewed traditional land tenure not just as a disincentive to local labor, but also as a deterrent to the foreign investment whites knew would be needed before agricultural production could expand to any significant extent. This was, in part, a matter of mixing foreign capital with local labor. ''Foreigners will never bring capital to your islands unless they can make a good profit upon that capital,'' Wyllie (1847:n.p.) lectured Kamehameha. ''To enable them to do so, your native subjects must have land to cultivate . . . and they must be sure that what they work for and what they produce will not and cannot be taken from them.'' It was also, in part, a matter of inducing foreigners to come and settle in Hawaii themselves. Large-scale land transfer to whites ''need not prejudice the natives,'' insisted the *Polynesian* (25 November 1848, p. 110). ''On the contrary, it will benefit them, not only by enhancing the value of their lands, but it is the surest means of providing a market for all they can produce, and of encouraging them, by influence and example, to labor more steadily.''

Whites often expressed distaste for the inequality that characterized Hawaiian political and social life, and this provided Hawaii's foreign community with a second motivation for the Māhele. The Americans, in particular, were horrified at the power the king and the chiefs could exercise over commoners. ''There *must grow up a*

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middle class, who shall be farmers, tillers of the soil, or there is no salvation for this nation," Lee (1848c:n.p.; emphasis in original) declared in one of his many letters advocating reform. "My sympathies are all with the mass – the poor, Konohiki-ridden mass of common Kanakas, and my anxiety to have them send in their claims, and get their rights committed to writing, is beyond expression." As chief justice, Lee wasted no time in upholding the new written rights of the maka'āinana against claims by others, even the claims of foreigners based on grants from the king. "The people's lands were secured to them by the Constitution and laws of the Kingdom, and no power can convey them away, not even that of royalty itself," Lee affirmed in one of the first reported cases of the Hawaii Supreme Court (*Kekiekie v. Dennis* 1851:43). Lee was hardly alone in his disapproval of the Hawaiian aristocracy. The settler press acknowledged that among foreign residents there was a widespread "preference in favor of small farmers," and argued that the traditional hierarchy was not just inefficient but a "baneful influence upon the moral welfare of the people" because of the power some Hawaiians wielded over others (*Polynesian*, 3 February 1849, p. 150; 16 September 1848, p. 70). British and American reformers could sincerely view themselves as genuine progressives, on the side of the common Hawaiian, seeking to break up an obsolete and tyrannical political structure, and in its place introduce a more egalitarian way of life.

This view was unlikely to be held by many Hawaiian elites themselves, and it may even have been risky for other Hawaiians to express it out loud. The intellectual and government official David Malo, one of the most Westernized Hawaiians at mid-century, was afraid to admit publicly that he too supported land tenure reform as a method of reducing the power of the Hawaiian aristocracy over the commoners. If land could be owned in fee simple, he reasoned in a letter to the missionary William Richards, "this high handedness exercised by the chiefs would cease." But after making an eloquent case for reform, he promptly pleaded with Richards, "Don't mention that I have urged you to do this" (Malo 1846:n.p.).

Although members of the Hawaiian governing elite would have had little interest in this sort of egalitarian political reform, they had an interest in economic reform. They too stood to gain from increased agricultural productivity, in two senses. First, they were major landowners, so they would benefit from any general rise in land values, and the ability to sell their land (especially to foreigners) would allow them to capitalize on an asset that had previously been unmonetizable. Second, some were government officials. They had an interest in expanding the revenues received by the government, to the extent that those revenues could be derived from people other than themselves. Land tenure reform raised this

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possibility by abandoning the old in-kind taxes, the labor and produce received from the makaʻāinana, and replacing them with property taxes payable in money and with the revenue from government land sales. The prospect of reorganizing the kingdom's public finances in this way was discussed in the Hawaiian press (*Polynesian*, 14 November 1846, p. 103; 26 December 1846, p. 129; 26 January 1850, p. 147). From such measures, Interior Minister Gerrit Judd earnestly hoped, "the revenue may eventually be so far improved as not only to provide for the current expenditure upon its present scale, but for an increase of the present low salaries allowed to public officers" (Anon. 1845:9). Among those public officers were some of the Hawaiian nobility, who no doubt agreed.

The king stood to profit most of all from land tenure reform. He was simultaneously the largest landowner and the largest consumer of tax revenue, so he would gain more than any chief from a rise in property values, from the ability to sell land to foreigners, and from an increase in government revenue. Kamehameha seems to have been well aware of these prospects. In the midst of a discussion of the impending Māhele, Judd (1847:n.p.) noted, "King wishes to sell & rent for himself to raise money for his own use." From Kamehameha's perspective, land tenure reform offered a chance to be free from the constraints of traditional Hawaiian public finance, by opening up a private revenue stream that could be expected to dwarf the existing public treasury.

The Hawaiian elite thus had some enduring reasons to undertake land tenure reform. But why did that reform take place in the 1840s rather than before or after? These motivations for the Māhele were all securely in place long before the Māhele actually occurred. Foreigners had been complaining about the inefficiencies and inequalities of traditional Hawaiian land tenure, and trying to persuade the Hawaiian elite to change their property system, for decades. Whatever fiscal benefits the king and the chiefs might have anticipated from reform in the 1840s could just as easily have been anticipated in the 1820s, or, for that matter, in the 1860s. What happened in the 1840s to make these benefits more salient?

The answer is that the Hawaiian governing elite had good reason to believe that Hawaii would not remain independent for long. In 1840, Britain assumed sovereignty over New Zealand. In 1842, France assumed sovereignty over Tahiti and the Marquesas. In Hawaii, members of the nobility were well aware of these developments and were concerned that Hawaii might be next. In August 1842, after a conversation with Kekuanaoa, the governor of Oahu, the missionary Stephen Reynolds (1842) noted in his diary that "Kekuanaoa asked me about France taking possession of Marquesas Islands & seemed much alarmed thinking they would come here." Queen Pomare of Tahiti corresponded with Kame-

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hameha in 1844 and 1845. "I have frequently heard of your troubles and of the death of your Government and of your grief," Kamehameha commiserated with Pomare, "but I don't have the power within me to help you" (quoted in Kameʻeleihiwa 1992:189). Accounts of events elsewhere in the Pacific were published in Hawaiian newspapers. In Hawaii, in the early 1840s, annexation by a foreign power seemed imminent.

Britain and France had recently been sending warships to Hawaii, which reinforced the fear among Hawaiian elites that their turn was coming soon (see, e.g., Castle 1839). When the United States Exploring Expedition arrived in Hawaii in 1840, Charles Wilkes, the expedition's commander, found that Kamehameha was already nervous about antagonizing the foreign residents of Hawaii, for fear that one of these ships would eventually bear foreigners who would annex the kingdom in retaliation for something he had done (Wilkes 1845:8–19).

Indeed, for a few months in 1843, Hawaii actually was annexed, by Britain. Lord George Paulet, the commander of a single British frigate, thinking he was protecting the property interests of British residents of Hawaii, forced Kamehameha to relinquish his kingdom to Britain. When news reached London, the imperial government promptly ordered Paulet to give the kingdom back. Paulet, having governed since February, returned sovereignty to Kamehameha in July (Kuykendall 1938–67:206–26). The episode seems farcical in retrospect, but it could not have been amusing to the Hawaiian governing elite, who for a time saw their sovereign power vanish, and who must have been nervous about their landholdings as well.

For years afterward, Hawaiians heard recurring rumors of impending foreign annexation. French sailors rampaged through Honolulu in summer 1849, destroying government property, before returning to their ship and sailing away (Daws 1968:133–4). A few months later, the Privy Council discussed a letter recently received from San Francisco, describing shadowy plans circulating in California to overthrow the Hawaiian government (Privy Council Records, 20 December 1849, 3:415). "Annexation is thought to be very near at hand," Chief Justice William Lee (1854:n.p.) confided a few years after that, "& expectation is on tip toe for its arrival. It is generally thought that it will take place in a month." Charles de Varigny (1981:149), a Frenchman who lived in Hawaii in the 1850s and 1860s (and who was Hawaii's finance minister for a few years in the 1860s), recalled in his memoirs feeling how "the great maritime powers, France, England, and the United States of America, watch Hawaii with jealous eyes." The genuine threat of colonization was a constant presence in Hawaii, from the early 1840s onward.

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In this climate, the Hawaiian elite did the rational thing: they began making plans to protect their property in the event they had to give up their sovereignty. They knew they could not resist a colonizer's overwhelming military advantage; that much had been demonstrated in 1843, when a single British ship annexed the kingdom. They began instead to put their affairs in order.

A couple of the Americans working in Kamehameha's government, John Ricord and William Lee, were lawyers. Lee was in the habit of quoting Mansfield, Story, and Kent, apparently extemporaneously, in his jury charges (*Wood v. Stark* 1847:10; *Shillaber v. Waldo* 1847:22–3). Kamehameha's other foreign advisors were not as well-read as Lee, but Lee, at least, was sophisticated enough to know the basic legal history of previous American territorial expansions, and others may have been as well. They would most likely have known that when the United States assumed sovereignty over new areas, the U.S. government recognized pre-existing property rights derived from earlier sovereigns (*Mitchel v. United States* 1835:734). After the Louisiana Purchase, for instance, existing property owners, based on grants from France and Spain, got to keep their land (Banner 2000b:137). The United States likewise recognized Spanish land grants after the acquisition of Florida (*United States v. Clarke* 1834). If Hawaii were to be colonized by the United States, it would be prudent to put Hawaiian land titles into a form that resembled the titles recognized in these earlier expansions.

Some of Kamehameha's American advisors would also most likely have known that land possessed by American Indians, land that had never been formally granted to the Indians by the United States or any of its European colonial predecessors, received a far lesser degree of protection when the United States took over a new territory. Under the law of the United States, the Indians were deemed to hold merely an ambiguous "right of occupancy" in such land, a right that might not be strong enough to withstand foreign conquest (*Johnson v. M'Intosh* 1823). And in some cases, where Indian tribes had fought wars against the United States or its colonial predecessors, the United States had claimed the tribes' land by right of conquest. The most well-known example had taken place after the American Revolution, when the new federal government had confiscated land possessed by many of the tribes who had fought on behalf of Britain. The lesson here was obvious. Traditional Hawaiian land tenure looked more like American Indian tenure than it resembled the written grants of France or Spain. To preserve its property in the event of colonization, the Hawaiian elite ought to convert its system of land tenure, ahead of time, to a form more likely to be respected by the United States.

British and French land policy was less clear. Kamehameha's advisors would most likely have been aware that in 1840 Britain

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annexed New Zealand in a treaty that recognized an undefined category of Maori property rights in land, and that the 1842 document establishing French sovereignty over Tahiti likewise preserved Tahitian land possessions (Orange 1987; Newbury 1980:107–9). They might also have known, however, that in colonizing Australia a few decades earlier, the British had not recognized Aboriginal Australians as owners of their land at all, but had simply taken the land and doled it out to Britons (H. Reynolds 1987). This uneven record suggested that unless Hawaii converted its system of land tenure, the Hawaiian elite was no more likely to retain its landholdings in a British Hawaii or a French Hawaii than in an American Hawaii. Each of the potential colonizers tended to draw a distinction between land owned under a customary indigenous property system and land owned under a European-style system, in which rights were evidenced by written grants emanating from a sovereign. Where land was owned in traditional tenure, the colonized nation ran a considerable risk that traditional property rights might not be recognized by the colonizer, and that land might accordingly be confiscated by the colonial government. Where land was owned in fee simple, however, the colonizer was far more likely to respect the property rights of the colonized.

Legal historians of mid-nineteenth-century Hawaii conclude that Hawaiians were quick to adopt Anglo-American legal concepts and use them to their advantage (Merry 2000:35–114; Matsuda 1988), and the events of 1845–55 support that conclusion very well. At a Privy Council meeting in 1847, Kamehameha asked, "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?" He recalled an earlier instance of a monarch who had lost his power, on the other side of the world: "during the French Revolution were not the King's lands confiscated?" William Lee responded with an accurate picture of American land policy in earlier territorial expansions: "except in the case of resistance to, & conquest by, any foreign power," he explained, "the King's right to his private lands would be respected." Robert Wyllie added that the French Revolution was a very different case: Louis XVI's lands "were confiscated, but that was by the King's own rebellious subjects," not by a foreign colonizer. Protecting his own land in the event of a foreign takeover was of paramount importance to Kamehameha. "Unless it were so," he told his Privy Council—unless he could be confident of retaining his land under a foreign sovereign—" he would prefer having no lands whatever" (Privy Council Records, 18 December 1847, 4:304).

Two aspects of Lee's advice deserve emphasis. First, if Hawaii were to fight a war against a colonizer, the land in Hawaii was liable

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to be confiscated by the conqueror, particularly land belonging to people who participated in the fighting. The king would of course be a particularly conspicuous combatant were he to lead Hawaiian resistance to colonization, so his land would be particularly at risk. This consideration counseled against offering armed resistance to colonization if resistance seemed likely to fail, as it surely did.

Second, Lee might well have placed an emphasis on the word *private* when he explained that Kamehameha's private lands would be respected. An incoming colonial government would be certain to claim ownership of any land belonging to the Hawaiian government. (The U. S. government, for example, had assumed ownership of all the land in the Louisiana Purchase territory that had previously been owned by the government of France.) For that reason it was crucial to Kamehameha's planning that his own private land be clearly separated from the government's land. He knew this very well. After Lee gave his response, "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 Records, 18 December 1847, 4:304). This was a shrewd idea, and one that the Privy Council immediately adopted. Kamehameha was worried, reasonably enough, that an incoming colonizer might consider his land more "public" than "private." If the written evidence of the king's private domain differed in any way from the written evidence of the land belonging to other Hawaiians, that would offer a ground for distinguishing between the king and everyone else, and thus for placing the king's land on the "public" side of the line. Kamehameha was suggesting that steps be taken to depict the true distinction as being between government land and private land, regardless of the identity of the owner. (As we will see, this precise issue would arise decades later, after the United States annexed Hawaii, in a dispute between Queen Liliuokalani and the United States over the status of the Queen's private land.)

When Kamehameha suggested that he might "prefer having no lands whatever" if he could not be sure of retaining his land after colonization, he may have been suggesting a clever alternative strategy. If Lee had been unable to reassure him that denominating his land as "private" would allow him to keep it after colonization, a second-best plan would have been for Kamehameha to formally divest himself of all his landholdings, most likely by conveying parcels to individual ali'i. Before colonization, the traditional Hawaiian social structure would most likely have allowed Kamehameha to go on living as before, with an implicit understanding from the ali'i that although they were now the formal owners of the land, they were merely keeping it for the king. Should colonization

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occur, there would be no land for the new sovereign to confiscate, because Kamehameha would not own any land. Even if he were actually using the land, the ali'i would be the owners. This alternative was never seriously explored, probably because Lee and Kamehameha were confident that a division between government land and the king's private land was enough to do the trick.

A clear division between these two categories of land—government land and the king's private domain—was thus a crucial component of Hawaiian planning for what appeared to be imminent colonization. In 1847, when the Board of Land Commissioners published the principles that would guide its decisions, this distinction was one of them. The Land Commission explained that in the Constitution of 1840, "the government or body politic and the King are for the first time, contradistinguished." The king still controlled the public lands, but only in his capacity as the head of the government, "and from these is contradistinguished his own private lands," which he owned in his personal capacity, like any landowner (Board of Commissioners 1847:7). When members of the government mistakenly asserted, as Robert Wyllie did, that "the King as an Individual and as the Head of the Nation should be regarded as one," or, as Kekuanaoa did, that "the King & Government ought to be considered the same," Lee stepped in immediately to correct them. It was a "great error" to believe that "the King & Government were *one* in their lands," he informed Wyllie. "The constitution recognises no such unity of property." To Kekuanaoa he replied, "The King and Government were one and the same in most things, but not in every thing. From the Constitution it seemed clear that in property the King and Government were two separate and distinct persons." In preparing for Kamehameha's future, it was crucial to be sure that "the King's lands and the Government's interest in lands are clearly treated as separate and distinct" (Privy Council Records, 11 and 14 December 1847, 4:254, 272; Lee 1847c).

The importance of clarity on this point was especially evident when the Hawaiian Legislature formally accepted the division of land between the King and the government. Some legislators were not entirely sure what had taken place, so Gerrit Judd provided an account. Kamehameha "reserved unto his own private use a portion of the lands which are set out in this Act," Judd related. "The rest of the lands he has given to the Chiefs and people which constitute the Government." And then Judd told the Legislature why: "If no explanation of this kind is made, it will mix matters later on, and some of the foreigners will come later on and say they have an interest in the lands too" (Journal of the Legislature, 6 June 1848:n.p.). The Hawaiian government was doing its best to make the new land tenure arrangements as legible as possible, to protect the king's property after colonization.

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For other Hawaiians, the task of preparing to be colonized was simpler. To protect their property, all they could do was obtain written titles from the Hawaiian government and hope for the best. In the event of colonization, Wyllie (1849:n.p.) recognized, "all the natives, high and low, become hewers of wood and drawers of water. In such a case, it is only private property that is respected, and therefore it would be wise to put every native family throughout the Islands, in possession of a good piece of land, in fee simple, as soon as possible." Even if Hawaiians would become a lower caste in an American (or British or French) Hawaii, the hope was that they would at least be able to hold on to their land. With some advance planning, and with some legal advice from Kamehameha's foreign assistants, Hawaiians might place themselves in a better position than the indigenous peoples previously colonized by white powers.

The Māhele, then, was a kind of vaccine. By adopting one particular aspect of the colonizer's law, the Hawaiian elite was inoculating itself against the catastrophic consequences of colonization. Even under a foreign sovereign, they hoped, they would still own vast tracts of land; they would still be an elite.

If one asks what caused the Māhele, the answer is a mixture of long-term causes that were present in many places and short-term causes present only in Hawaii. As in much of the non-European world, Hawaii had its Europeans (and American descendants of Europeans) who were eager to see indigenous people adopt European property practices. And as in much of the non-European world, land tenure reform presented the possibility of improving the collection of tax revenue. These may have been necessary conditions of the Māhele, but they were not sufficient conditions, because they did not precipitate Māheles in other locations. Unlike most other places Europeans and Americans settled, however, Hawaii had a government that was sufficiently unified and powerful before colonization (1) to prevent foreigners from buying land in the early years, (2) to engage in a top-down reform of land tenure later on, and, most important, (3) to hire foreign legal advisors, who provided accurate advice about their home governments' law and the likely effects of colonization on land ownership. Hawaii is, to my knowledge, the only place on earth where indigenous people were able to engage in this degree of advance legal planning before being colonized.

V

The plan worked, in some respects. The Māhele, considered as a device to protect the landholdings of the Hawaiian elite, achieved

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much of what it was intended to achieve. Colonization did not come until the 1890s, but when the United States took over, the United States did indeed recognize the property rights that had been formalized during the Māhele. Much of this land was still owned by the descendants of the chiefs who had received fee simple title two generations before. By then many of the original Māhele awards had been subdivided among children and grandchildren, and there had been some intermarriage between Hawaiians and non-Hawaiians, but even in the mid-1930s there were still native Hawaiians who owned tens of thousands of acres of land in fee simple (Hobbs 1935:128).

Had the Māhele never occurred—had Hawaii retained its traditional system of land tenure through the 1890s—it is extremely unlikely that the United States would have recognized these massive estates. Rather, upon annexation the federal government would have become the fee simple owner of all the land in Hawaii. Hawaiians would have been deemed to hold their land by right of occupancy, the same tenure accorded to the indigenous inhabitants of the mainland. The federal government was then in the midst of allotting Indian reservations, and it would probably have done the same in Hawaii. The government would have given the chiefs no particular solicitude during this process; as on the mainland, the chiefs would have received the same allotments as everyone else. For the aristocratic Hawaiian families who managed to keep their landholdings intact through the nineteenth century, the Māhele was thus a tremendous success. By converting from Hawaiian to Anglo-American land tenure, they saved their land.

In some respects, however, the Māhele failed to work as planned. Most obviously, it allowed Hawaiian landowners, who were often land-rich but cash-poor, to sell their land to foreigners, and many did. Within a few months of the enactment of the statute that allowed foreigners to buy land, there was already a thriving market. "Real Estate has advanced to a high figure, and has not yet reached its height," William Lee reported in December 1850. "All of Waikiki Plain has been divided into lots 100ft × 150ft and sold at auction, at an average price of over $100 per lot. The 5 lots owned by us, I have been offered $500 for." A few months later, Lee related that he had purchased a 27-acre farm up in the mountains from Governor Kekuanaoa for $2,000. "Lands adapted to the cultivation of Sugar Cane, coffee, potatoes, etc., are daily increasing in value," he explained (Lee 1850, 1851:n.p.). The missionaries jumped in as well: Elias Bond, for instance, noted in his journal around 1850 that he had bought a tract in Halaula for his brother, whom he hoped would come from Maine "to start a farm to give the natives employment" (Damon 1927:180). By the early 1850s, even Americans on the mainland were buying up Hawaiian land as

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an investment (King 1982:69–70). Some of these purchases were from the government, but many were from private landowners newly empowered by the Māhele to sell.

Within a decade or two, it was already a commonplace among English-speaking travelers to Hawaii that Americans had bought most of the good land. Mark Twain (1938:104) visited in 1866 and discovered that "Americans . . . own the great sugar plantations; they own the cattle ranches; they own their share of the mercantile depots." Charles Nordhoff's 1874 tourist guide (1974:90) agreed that "almost all the sugar-plantations – the most productive and valuable property on the Islands – are owned by Americans; and the same is true of the greater number of stock farms." Nordhoff concluded that "if our flag flew over Honolulu we could hardly expect to have a more complete monopoly of Hawaiian commerce than we already enjoy." The English lawyer Hugh Wilkinson (1883:243) was disappointed when he arrived in Honolulu in 1881, because his hoped-for exoticism had vanished. All he found were "churches, chapels, homes and meeting-houses, libraries, schools and colleges galore! The town is laid in squares, after the American fashion." By the time of annexation, a half-century after the Māhele, the Hawaiian aristocracy had already sold off much of its land. The Māhele protected what was left, but the Māhele had also enabled the sales.

Indeed, the Māhele stood in a complicated relationship with annexation. On the one hand, had foreigners not been allowed to purchase land, annexation might have come sooner. The foreign community in Hawaii was steadily growing at mid-century, and the pressure to purchase land might have become so great as to encourage, sometime in the middle of the century, the sort of white revolution that eventually took place in the 1890s. On the other hand, by permitting foreigners to purchase land, Hawaiians inadvertently facilitated their own annexation. The Māhele led to the formation of a class of wealthy American landowners who became the driving force behind the overthrow of the Hawaiian monarchy. Hawaii would likely have been colonized with or without the Māhele, and it is hard to say whether the Māhele accelerated annexation or retarded it.

The Māhele failed most conspicuously in the case of the royal family, but for reasons that its framers could not have anticipated. Kamehameha III emerged from the Māhele with a private domain of nearly 1 million acres. He died in 1854; the successor to his crown and to his lands was his adopted son Alexander Liholiho, who became Kamehameha IV. Nine years later, Kamehameha IV died, leaving a widow, Queen Emma, but no children, and no will. His older brother became Kamehameha V. A dispute soon arose between Emma and Kamehameha V over

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the status of the king's private domain. Emma argued that for purposes of inheritance the land once possessed by her husband in his personal capacity should be treated as ordinary private property, just like land possessed by any other person in Hawaii. Such treatment would have entitled her under Hawaiian intestacy law to the standard widow's share: one half of the land in fee simple, and dower (i.e., a life estate) in the other half. Kamehameha V argued that as the successor to the crown he was entitled to all the land possessed by the former king. In 1864 the dispute was submitted to the Supreme Court of Hawaii, which split the difference. Emma, the court held, was entitled to the ordinary dower rights of a widow, but not to fee simple title in any of the land. The court determined that the king's private domain was unlike ordinary private land, in that inheritance was limited to successors to the throne. While a king was alive, he could do anything with his private domain that a private landowner could do: he could sell the land, or lease it, or alienate it any way he chose. But the one thing he could not do was convey it upon his death to someone other than the next king (*In re Estate of His Majesty Kamehameha IV* 1864).

With this decision, the Supreme Court undid much of what had been done in the Māhele with respect to the king's land. The aim of Kamehameha III had been to make land owned in his personal capacity resemble ordinary privately owned land as closely as possible, to ensure that an incoming colonizer would treat it that way. Now, however, the king's private domain was clearly marked as different from other people's private land, and in a way that made it look quasi-public, because (unless sold during a king's lifetime) it would follow the Hawaiian monarchy forever. This was exactly what Kamehameha III did *not* want to do. The Supreme Court's opinion rests on an implausible reading of the events of the late 1840s. It can only be justified as a practical expedient—perhaps to avoid unduly antagonizing the new king, Kamehameha V, or perhaps to ensure that the royal private domain would not be dissipated over the generations.

The Supreme Court's decision led to an even more surprising event the following year. The kingdom's legislature, evidently emboldened by the court's opinion, passed a statute (reproduced in Hobbs 1935:68–9) providing that the king's private domain would thenceforth be inalienable (except for leases not exceeding 30 years) and would descend intact to subsequent monarchs forever. With this step, the king's private lands now looked more like public lands than private. Now the government was protected against land losses caused by an improvident monarch, but the monarch was no longer protected against expropriation in the event of colonization.

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Sure enough, when colonization came, expropriation of the monarchy's private domain followed. Upon annexation, the United States respected the Māhele-derived land titles of everyone except the monarch then in place, Queen Liliuokalani. The United States deemed her land to be public, not private, and the federal government accordingly assumed ownership of it, just as it did with land once owned by the Hawaiian government. When Liliuokalani challenged this decision in the Court of Claims, the court disposed of her claim with little trouble. The Court of Claims found that the Hawaii Supreme Court, in its 1864 resolution of the dispute between Emma and Kamehameha V, had fashioned a royal private domain that was "limited as to possession and descent by conditions abhorrent to a fee-simple estate absolute." "It is clear from the opinion," the Court of Claims continued,

> that the crown lands were treated not as the King's private property in the strict sense of the term. While possessing certain attributes pertaining to fee-simple estates, such as unrestricted power of alienation and incumbrance, there were likewise enough conditions surrounding the tenure to clearly characterize it as one pertaining to the support and maintenance of the Crown, as distinct from the person of the Sovereign. They belonged to the office and not to the individual. (*Liliuokalani v. United States* 1910:426–7)

That conclusion was reinforced by the 1865 statute, which the court found "expressly divested the King of whatever legal title or possession he theretofore had in or to the Crown lands." In short, "the Hawaiian Government in 1865 by its own legislation determined what the court is now asked to determine" (*Liliuokalani v. United States* 1910:426–7). The royal private domain had become public land, not private, and as public land it was ceded to the United States upon annexation. The worst nightmares of Kamehameha III had come true.

The Māhele thus failed in some important respects. These failures have, I think, obscured the fact that the Māhele was a genuine success from the perspective of many of its intended beneficiaries. The Hawaiian royal family lost its land to the government of the United States, but only because the other two branches of the Hawaiian government left the monarchy exposed to expropriation, many years after the Māhele was over. Many Hawaiian aristocratic families also lost their land to whites, but that was not due to annexation either; it was because they sold it. The Māhele did not provide much land to Hawaiian commoners, but it was not supposed to. The Māhele was a means by which the Hawaiian elite hoped to preserve its eliteness under colonial rule, by holding on to its land. In that sense, it worked.

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VI

The Māhele, then, is a story of agency on the part of indigenous people, but it is not a story of resistance to colonization. Rather, it is a story in which indigenous elites anticipated the land tenure changes that were coming and figured out how to position themselves for those changes.

This is hardly the place for a worldwide survey of indigenous people in the same situation, but we can at least compare Hawaii with the western United States, where the federal government reorganized Indian land tenure in a parallel way a half-century after the Māhele. The Allotment Act of 1887 is usually depicted as a "reform" intended to rob the Indians of their land, and many Indians did indeed lose their land as a result of allotment. This outcome makes all the more striking a fact that tends to be omitted in histories of allotment: In the years leading up to 1887, field reports from the Interior Department's Indian Agents were consistently filled with expressions of support for allotment from the Indians under their supervision. From the Crow Creek Agency in the Dakota Territory, the agent W. E. Dougherty reported in 1881 that "last spring the demand of the Indians for the subdivision of the land and the allotment of it in severalty became general" (Washburn 1973:313–4). From the Santee Reservation in Nebraska, the agent Isaiah Lightner explained that the Santees felt the same way (Washburn 1973:313–4). A group of tribes gathered on the Round Valley Reservation in California pleaded with the Interior Department in 1885 to allot their land. They "have been promised land in severalty for a great many years," they despaired, "but have been put off from time to time, until we have about come to the conclusion that the good time will never come" (H.R. Exec. Doc. No. 21, 49th Cong., 1st Sess., 8 [1886]). With accounts like these coming in year after year, government officials were confident that, as one put it, "the demand for title to lands in severalty by the reservation Indians is almost universal" (Commissioner of Indian Affairs 1880:xvii). Reformers outside the government were equally confident. The Indians were pleading for land in severalty, affirmed Merrill Gates (1885:5), the president of Rutgers College. The humane thing to do would be to let them have it.

There was doubtless some wishful thinking going on here, an eagerness to find more support among the Indians for allotment than actually existed, but there were too many such reports to dismiss them all as fanciful. Even if allotment did not command as much support among Indians as among whites, there must have been many Indians who favored it. We can ask the same question we asked about the Hawaiians who engineered the Māhele. Why? What did these Indians think they stood to gain from allotment?

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The most likely answer, as in Hawaii, is that when change seems inevitable, indigenous people are not limited to choosing between a futile resistance and a passive acquiescence. There is always the middle ground of anticipating the change and ordering one's affairs so as to come out as well as possible under the new regime. In the western United States in the late nineteenth century, just as in Hawaii at mid-century, the adoption of Anglo-American land tenure was a rational strategy for those who expected the white population to increase and who doubted that whites would respect property rights organized under traditional systems of tenure. Maybe this calculation was the wrong one with respect to allotment, but there was no way to know that at the time.

In the end, the value of understanding the Māhele (for people who are not historians of Hawaii) is that it focuses our attention on this kind of strategizing, midway between resistance and acquiescence. All over the world, colonizers replaced one legal system with another, but change did not occur overnight. Colonization was a long, slow process in most places. Indigenous people often had the time and the knowledge to see it coming. As in Hawaii, they had the opportunity to prepare to be colonized.

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