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The Civilization Canon: Common Law, Legislation, and the Case of Hawaiian Adoption

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ABSTRACT

Recently, scholars have uncovered many ways in which our traditional understandings of the U.S. Constitution have failed to grapple with American empire and colonialism. This work has shown that the nation's history of mistreating Indigenous peoples is constitutive of its legal order. In this Article, I provide evidence of a similar kind of imperialistic effect in the realm of statutory interpretation. To the extent there is a conventional understanding about statutory interpretation, it does not attach special significance to the demands of empire. But much like American constitutional design, statutory interpretation has not been neutral with respect to imperial expansion and colonization.

To illustrate this dynamic, I reconstruct a contentious debate over the laws of adoption and inheritance in nineteenth century Hawai'i. Judges construed these statutes with the stated aim of imposing civilization on Hawaiians, challenging settled assumptions about the relationship between common law and legislation in America. Empire thus implicated not only an imposed statutory regime, but also interpretive presumptions against relying on Hawaiian customs and practices. In relying on this civilization canon, judges articulated Hawaiians as racialized legal subjects who had to be transformed before courts would presume that the legislature intended to preserve their worldviews and cultural practices in law.

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INTRODUCTION

How do courts in empire read statutes? In empire, as elsewhere, any theory of statutory interpretation must build upon assumptions about a society's legitimate lawmaking institutions and the relationships among them.[1] In the American[2] context, for instance, "statutory legitimacy is closely linked to representative democracy,"[3] and courts generally aim to read statutes in ways that vindicate this connection between lawmaking and representation.[4] But different contexts implicate different visions of legitimacy. Allusions to representative democracy are difficult to maintain in imperial contexts, particularly because a primary goal of imperial rule is the subordination of people often portrayed as racially inferior.

1. Jerry Mashaw, *As if Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation . . . must at the very least assume a set of legitimate institutional roles and legitimate procedures that inform interpretation."); John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2401 (2017) (noting that competing statutory interpretation theories disagree over "institutional roles and relationships").
2. Throughout the Article, I use "America" and "United States" interchangeably.
3. William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 675 (1999).
4. This connection is vindicated in the assumption that the legislature is the "chief policy-determining agency of the society." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). But modern presumptions about statutory interpretation reflect the history of American democracy, and we should explore how ideas about legislation shift across time. For instance, legislation used to be a vehicle for resolving private issues, not setting broadly applicable standards. Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 720 (2018) [hereinafter Peterson, *Interpretation as Statecraft*]. *See also* Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 271 (2004); Maggie McKinley [Blackhawk], *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1145–46 (2016) (noting that petitions allowed disenfranchised groups to influence the political process). Far from being representative, legislatures could be corrupt and therefore distrusted. *See* Farah Peterson, Statutory Interpretation and Judicial Authority, 1776–1860, at 255 (2015) (Ph.D. dissertation, Princeton University) (on file with author) [hereinafter Peterson, Statutory Interpretation]; Charles Chauncey Binney, *Restrictions Upon Local and Special Legislation in the United States*, 41 U. PA. L. REV. 613, 618 (1893). Moreover, change did not stop in the nineteenth century. Americans live in a moment of "unorthodox lawmaking." BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS, at xiii (5th ed. 2017). Courts and scholars have suggested that current theories and methods of statutory interpretation must "bend to meet the realities of the modern legislative process." Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 97 (2015).

Perhaps for this reason, American legal scholarship has largely ignored how empire might shape statutory interpretation.[5] In addressing this question, this Article contributes to our understanding of legislation—and the common law—as phenomena that should be studied in their particular sociohistorical contexts.

First, some context: the events I recount here took place prior to the 1898 annexation of Hawai'i, when the Hawaiian Kingdom remained an independent polity. This, in turn, requires clarification on my use of the terms "empire" and "colonialism." Hawaiian chiefs in the midcentury period hoped that wide-ranging reform—creating a constitutional monarchy ruled by written laws—could help fend off foreign threats to Hawaiian sovereignty.[6] The statutes I discuss were enacted by a legislature mostly made up of Hawaiian legislators, but in which non-Hawaiian legislators and other state actors held sway.[7] The kingdom was thus

5. An important exception is the field of federal Indian law, where scholars have advocated the use of statutory interpretation to mitigate the blow of colonial legislation. *See, e.g.*, Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 428 (1993) (arguing that courts should limit "future exercises of colonialism" that the U.S. Congress has not explicitly authorized); ROBERT T. ANDERSON, SARAH A. KRAKOFF & BETHANY BERGER, AMERICAN INDIAN LAW: CASES AND COMMENTARY 168 (4th ed. 2020) ("[E]ven if Congress has the authority to damage tribal interests, in this instance the statute is not clear enough to overcome the canonical presumption against such a congressional intent."). While I share this literature's concern for the ways in which empire shapes statutory interpretation, the interpretive moves that these scholars have studied are "unique to Indian law." Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 978 (2022). Federal Indian law focuses on the relationship between the American federal government and federally recognized tribes. *Cf.* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 565 (2021) ("Federal Indian law is about conquest—the diminishment of Indian sovereignty as a matter of federal law."). The history I recount here does not involve the federal government at all. Instead, I focus on how imperial pressures and presumptions imported by Anglo-American lawyers working in the kingdom shaped the reading of statutes. This invites a broader reflection on the ways in which empire operated historically, which went beyond acts of direct violence and colonization. *Cf.* J. KĒHAULANI KAUANUI, PARADOXES OF HAWAIIAN SOVEREIGNTY: LAND, SEX, AND THE COLONIAL POLITICS OF STATE NATIONALISM 23–24 (2018) ("[The] radical restructuring of Hawaiian society as a protective measure against Western imperialism became a form of colonial biopolitics linked to the regulatory power of Hawaiian state racism in the early nineteenth century.").

6. *See generally* LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 189–190 (1992) (reproducing a letter in which Kamehameha III explained how "righteous foreigners" helped the chiefs decide "what was for our good and what should be done"); STUART BANNER, POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA 128–62 (2007) (arguing that Hawaiians adopted private property in land in response to the threat of colonization).

7. On the composition of the legislature in the early 1840s, see JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 26–27, 264 n.9 (2002). On how one of these Hawaiian legislators perceived the influence of non-Hawaiian actors, see *id.* at 27.

transformed under duress, in the shadow of empire.[8] As a white American judge put it in 1872, the Hawaiian chiefs enacted "a code of laws . . . radically at variance with former national customs" because their "foreign friends" had led them to believe that doing so would "induce foreign powers to recognize" Hawaiian sovereignty.[9] Or, as the nineteenth-century Hawaiian intellectual Samuel Mānaikalani Kamakau (1815–1876) explained, foreigners believed "that the Hawaiian group has a government prepared to administer laws like other governments and hence it is that they allow Hawaii to remain independent."[10] In Sally Engle Merry's arresting formulation, *Kānaka Maoli* (Hawaiians)[11] tried to "purchase independence with the coin of civilization."[12] The structural conditions imperial powers placed on Hawaiian independence thus warrant thinking about the kingdom's legal transformation as part of a history of empire and colonialism, even as the kingdom remained independent throughout the period I discuss here.

I explore how empire can shape standard tools or principles of statutory interpretation by reconstructing a fraught yet underappreciated debate over the meaning of Hawaiian statutes of adoption and descents in the nineteenth century.[13] This debate arose in a series of cases argued before the Hawaiian Kingdom's

8. KAUANUI, *supra* note 5, at 17.
9. In re Nakuapa's Estate (Nakuapa II), 3 Haw. 342, 354 (1872) (Hartwell, J., dissenting). Scholars have demonstrated that this transformation also involved repurposing Hawaiian traditions and practices. *See generally* NOELANI ARISTA, THE KINGDOM AND THE REPUBLIC: SOVEREIGN HAWAIʻI AND THE EARLY UNITED STATES 8 (2019) (arguing that transformations in the 1820s "were Hawaiian responses to 'colonial' disorder, rather than well-organized colonial impositions upon Hawaiian disorder"); KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION 3–4 (2014) (arguing that the chiefs "*selectively appropriated* Euro-American tools of governance while modifying existing indigenous structures to create a hybrid nation-state as a means to resist colonialism and to protect Native Hawaiian and national interests").
10. OSORIO, *supra* note 7, at 7.
11. I use the terms Hawaiian and Kanaka Maoli interchangeably (along with their plural forms, Hawaiians and Kānaka Maoli). On this terminology, see Troy J.H. Andrade, *Hawaiʻi 78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, 24 U. PA. J.L. & SOC. CHANGE 85, 87 n.1 (2021).
12. SALLY ENGLE MERRY, COLONIZING HAWAIʻI: THE CULTURAL POWER OF LAW 13 (2000); *see also* KAUANUI, *supra* note 5, at 18 (arguing that independence was conditioned upon enacting "racialized and gendered socioeconomic and political hierarchies according to an invented Eurocentric standard").
13. Other scholars have studied these cases but have not examined what they reveal about statutory interpretation. David Forman offers an excellent analysis of the doctrine of custom in Hawaiʻi through some of the adoption cases I discuss here. *See* David M. Forman, *The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence*, 30 U. HAW. L. REV. 319 (2008). And Judith Schachter powerfully contextualizes these cases in a longer history of redelegating parenthood and constituting kinship ties in and out of the courtroom. *See* Judith Schachter, *"A Relationship Endeared to the People": Adoption in Hawaiian Custom and Law*, 31 PAC. STUD. 211 (2008).

Supreme Court, in which adopted children claimed rights to inherit the estates of their adoptive parents. The arguments or set pieces that judges and lawyers relied upon in these cases are familiar to modern American legal scholars—for instance, that the legislature has the power to change the common law. But this familiarity is superficial. Underlying these cases were imperial anxieties fed by the desire to civilize Hawaiians by assimilating them to Anglo-American culture. This led judges and lawyers to move familiar set pieces in statutory interpretation in unexpected ways. In other words, the desire to impose civilization on Kānaka Maoli shaped the exercise of statutory interpretation.

The arguments around these cases yield two important insights. The first is the surprising potential of the common law to serve as an aid to adopted children's claims. Lawyers in the kingdom relied on a Hawaiian common law to articulate a "fictional continuity" between the times before and after family reform.[14] Because adoption was a crucial kinship relationship in Hawaiian society before reform, it followed that any statutory silences on adopted children's rights should be read without prejudice against them. These cases thus challenge widespread interpretations of common law as a conservative restraint on progressive statutory change.[15] As one Kanaka Maoli lawyer put it, relying on the common law could

14. Robert W. Gordon, *The Common Law Tradition in American Legal Historiography*, *in* TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 17, 24 (2017). Understanding this form of argument can also help explore a remarkable feature in Hawaiian law today, which is that many rights "exercised by the general public are based on or find their roots in Hawaiian custom and practice." Melody Kapilialoha MacKenzie, *Introduction*, *in* NATIVE HAWAIIAN LAW: A TREATISE, at xi, xii (Melody Kapiliahola MacKenzie, Susan K. Serrano & D. Kapuaʻala Sproat eds., 2015).

15. Of course, the common law is not categorically regressive. Constitutional law scholars, for example, have argued that a common-law method enables us to understand the U.S. Constitution as a document that evolves with changing times. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 33–49 (2010). Nonetheless, the idea that the common law is a conservative institution informs how legal scholars understand and think about American governance. As Kunal Parker explains, the "standard account" for why the common law declined as the preeminent method of governance in America at the end of the nineteenth century focuses on the common law's inability to govern an increasingly complex society. KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM 3–4 (2011); *cf.* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 4 (1992) (discussing how the "dislocating forces of urbanization, massive immigration, and industrialization" unsettled the "Classical Legal Thought" vision of a neutral, nonredistributive state). In this standard account, Parker explains how the common law, particularly when "joined to the U.S. Constitution and applied by federal courts, was widely considered a bastion of past-oriented conservatism, threatening the viability of urgently needed social democratic legislation." PARKER, *supra* note 15, at 3–4.

avoid putting "too much weight" on foreign law when deciding the meaning of adoption in Hawai'i.[16]

This interpretation of the kingdom's statutes lost, however, and its failure offers a second important insight. Superficially, these cases might appear to stand for the commonplace assumption that the legislature has the power to modify the common law.[17] This assumption reflects the belief that the legislature best represents the people.[18] But, as I show in Part III, the resolution of the Hawaiian adoption cases had nothing to do with the legislature's representative competencies.[19] Instead, the triumph of legislation—that is, the judicial choice to read statutes as overriding and even erasing Hawaiian common law—reflected the imperial demand that law operate as an instrument to impose civilization on the Hawaiian people.[20]

I focus on the legal redefinition of family relations in the inheritance context, thus implicating two areas—property rights and family law—where the imperial concern with distinguishing between "civilized" and "uncivilized" practices was particularly acute.[21] But it is important to keep in mind that civilization was an

16. *See infra* note 254 and accompanying text (noting Keohokalole's hope that looking to Hawaiian common law could vindicate Hawaiian views on adoption).

17. *Cf.* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 4 (1982) (noting that the development of American common law by judges retained democratic credentials because the legislatures always have "the last say").

18. *Cf.* Eskridge, Jr., *supra* note 3, at 675 ("In our polity, statutory legitimacy is closely linked to representative democracy. The people participate in lawmaking indirectly but powerfully by choosing representatives who reflect their preferences and by monitoring the representatives' performance through subsequent elections.").

19. The problem of representation—already a fraught question in the American context (*see* Ashraf Ahmed, The Concept of Representation in the Law of Democracy (Dec. 3, 2021) (unpublished manuscript) (on file with author))—becomes even more complicated in the context of nineteenth-century Hawai'i. *See* OSORIO, *supra* note 7, at 1–43 (discussing ironies and puzzles around representative government in the 1840s). Hawaiian legislators remained important and active players in the kingdom's legislature, even as *haole* (white) legislators gained in numbers and influence. It might be tempting to perceive the latter as decidedly anti-Hawaiian, and to see Hawaiian legislators as responsible for vindicating Hawaiian worldviews and representing Hawaiians in the legislative process. But what "representation" meant in this context is hard to pin down. Some of these legislators, like Samuel Kamakau and Davida Malo, could simultaneously see a need to adopt the trappings of civilization while lamenting the loss of earlier practices. *Id.* at 4–5, 14–15. They could embrace reform that introduced significant changes to Hawaiian society while insisting that Hawaiian views could inform the meaning of reform. *Cf. id.* at 67 ("It was not apparent to [Hawaiian legislators] that this could not be done."). As I show in Subpart III.B., however, what is distinctive about how the Hawaiian Supreme Court reasoned about representation is that it affirmatively dismissed the possibility that Hawaiian legislators could have intended to bring Hawaiian worldviews into the meaning of law.

20. MERRY, *supra* note 12, at 23 (discussing "incorporation on condition of assimilation").

21. The family angle in these cases is obvious, as the central concern within them was the meaning of legally created parent-child relationships. But contemporaries also understood these

arbitrary and elusive concept. Indeed, one reason why the work of empire in shaping legal argument becomes legible in these cases is because the lawyers and judges who argued them disagreed over whether adoption was a civilized practice or a vestige of Hawaiian ideas about family relationships. As Gail Bederman has argued, "civilization" was "protean in its applications," such that "the interesting thing about 'civilization' is not what was meant by the term, but the multiple ways it was used to legitimize different sorts of claims to power."[22] Lawyers and judges invoked civilization in these cases to preclude bringing Hawaiian customs, beliefs, and worldviews into the process of interpreting the kingdom's laws. This move reinforced the structural constraints on Hawaiian independence by casting Hawaiian proclivities as incompatible with the demands of civilization, thus creating a need for "foreign friends"[23] to guide Hawaiians toward civilization.

It is worth emphasizing, however, that the idea that legislation could or should be used to change a people's custom held a tenuous place in nineteenth-century Anglo-American legal thought.[24] Eighteenth-century jurists thought that

adoption cases as property disputes. *See* HAW. GAZETTE, Jan. 24, 1872, at 2 ("[I]nasmuch as [these cases] pertain to the succession of property in this country, they present a subject of interest infinitely beyond the ingenuity with which the arguments are drawn."). These cases thus allow us to explore how two strands of imperial control related to each other. On the one hand, imperial family regulations reflected a preoccupation with sexualities that deviated from imperial norms. *See* ANN LAURA STOLER, RACE AND THE EDUCATION OF DESIRE: FOCAULT'S *HISTORY OF SEXUALITY* AND THE COLONIAL ORDER OF THINGS 112 (1995) ("The family . . . should not be seen as a haven from the sexualities of a dangerous outside world, but as the site of their production. Colonial authorities knew it only too well."). On the other, concerns over property reflected extractive interests at the core of many imperial regimes. Sometimes these concerns could coincide. For instance, in other colonial contexts, imperial powers sometimes left questions of inheritance or family disputes to be resolved at tribunals run by colonized or Indigenous leaders, or by courts applying the laws of these colonized or Indigenous communities. *See, e.g.*, MITRA SHARAFI, LAW AND IDENTITY IN COLONIAL SOUTH ASIA: PARSI LEGAL CULTURE, 1772–1947, at 26 (2014) ("Under the East India Company, the colonial courts applied Hindu and Islamic law to Hindu and Muslim family cases, respectively."). But sometimes "[s]eemingly irrelevant cases of inheritance or marriage property could quickly become crucial to the production of labor, revenue collection, or the regulation of land markets," prompting colonial authorities to want jurisdiction over these disputes. LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900, at 22 (2002).

22. GAIL BEDERMAN, MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917, at 23 (1995).
23. *Nakuapa II*, 3 Haw. 342, 354 (1872) (Hartwell, J., dissenting).
24. We can see the idea that Hawaiians could be changed through law in an 1848 missionary report on Hawai'i celebrating the enactment of new laws on domestic relations. Before these laws were enacted, the missionaries wrote, "[t]here were no stated laws which defined the duties of parents towards children and of children towards parents; they regarded parental authority if they were quite at leisure to do so, and only so far as suited their convenience." MERRY, *supra* note 12, at 240. But the "present generation are in a different position." *Id.* "Then there was

some realms of social life could not be reformed through statutes, an idea that resonated with nineteenth-century American legal thinkers.[25] Indeed, the conviction that new laws could easily change Hawaiian conceptions of family represents a stark contrast to the difficulties with reforming family law in nineteenth-century America.[26] These different trajectories were a product of empire, reflecting different attitudes toward American and Hawaiian common law. In the United States, judges beholden to the past often insisted that legislative innovations in family law must be harmonized with American customs as incorporated in the common law.[27] In Hawai'i, Anglo-American lawyers similarly framed Hawaiian customs predating reform as a common law,[28] and argued that it could inform the meaning of the kingdom's statutes.[29] In these adoption cases,

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no law; nothing to regulate society. Now all the natural social and domestic relations are respected—the duties of each in some measure respected, and regulated by good and wholesome laws." *Id.*

25. As David Lieberman argued, Lord Kames thought that "legislator[s] needed to recognize the large number of social practices which could only be altered by customs, manners, and education and the like." DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 164 (1989). "As Kames observed in his principal didactic tract, 'manners, depending on an endless variety of circumstances, are too complex for law; and yet upon manners chiefly depends the well-being of society.' In such areas legislation could 'do little' and the sovereign had to work by 'example and precept.'" *Id.* A striking American example of this view of legal change can be found in the writings of the lawyer and treatise author Joel Prentiss Bishop. Indeed, the final chapter in his treatise on the law of married women opened with a critique to those who would seek to change American conceptions of marriage through legislation:

> Those persons who seek to carry what they deem to be reforms by the power of the law, instead of first addressing themselves to the habits and seeking to change them by reason and persuasion, consider that the law makes the habits; and they do not shudder to contemplate any change in the law, in itself deemed desirable, however much it may be pushed forward in advance of the desired change in habits. But experience proves that the habits make the law, and not the law the habits.

JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN UNDER THE STATUTES OF THE SEVERAL STATES AND AT COMMON LAW AND IN EQUITY § 881 (1871).

26. *See infra*, Subpart I.A. (discussing adoption reform) and Subpart III.A. (discussing marital reform).

27. Michael Grossberg has argued that we should understand the work of judges in this context as articulating a "judicial patriarchy" which "limited the possibilities of significant reform." MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 303 (1985).

28. *See infra*, Subpart II.A. (demonstrating how lawyers could blur the line between custom and common law).

29. The belief that customs could inform the meaning of legislation enjoyed a very long life. After annexation, a lawyer named Lorrin A. Thurston compiled several statutes from the kingdom era that he thought were "necessary . . . to have a comprehensive understanding of existing Hawaiian law." LORRIN A. THURSTON, THE FUNDAMENTAL LAW OF HAWAII, at iii (1904). Among

however, the Hawaiian Supreme Court came to see Kanaka Maoli customs as obstacles to the project of civilization. Rather than seeing customs as a common law that could inform statutory interpretation, they theorized statutes as tools to uproot Hawaiian practices and worldviews, implying a view of Hawaiians as racialized legal subjects who had to be changed before their worldviews found expression in legislation.[30] There was a biting irony here: to impose civilization on Hawaiians, law had to operate in ways that contravened assumptions about custom, common law, and legislation in America.

In surfacing the role that the civilizational mission played in these arguments, this Article contributes to a growing body of scholarship on the development of American law in empire while also inviting connections with studies of other imperial regimes.[31] Some scholars have argued that we should think of empire as

these he included the kingdom's earliest statutes, which "embodied many of the preexisting laws and customs of the country and therefore throw a strong light upon the origin and development of much of the present law." *Id.* at iv.

30. These cases help illustrate the importance of the default legal person—the able-bodied white man—in American legal thought. BARBARA YOUNG WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES 2 (2010). One might argue, borrowing Bob Gordon's observations on the concept of ordered liberty, that these judges did not think Hawaiians possessed the "appropriate . . . character demanded for the appropriate function of the sphere of natural liberty." Robert W. Gordon, *The Constitution of Liberal Order at the Troubled Beginnings of the Modern State*, 58 U. MIAMI L. REV. 373, 380 (2003). Hawaiians first had to change their worldviews; they had to become civilized.

31. Scholars have used the terms "empire" or "colonialism" to refer to a broad range of phenomena in American history. *See, e.g.*, K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 LAW & SOC. INQUIRY 1006 (2016) (discussing colonialism in property law); STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005) (same); MARGARET D. JACOBS, WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880–1940 (2009) (discussing imperial policies on education); LISA FORD, SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788–1836 (2010) (discussing the expansion of settler jurisdiction over Indigenous peoples); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999) (discussing judicial unease with tribal sovereignty); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004) (exploring the relationship between empire and immigration law); FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001) (analyzing the role of empire in constitutional interpretation); Aziz Rana, *How We Study the Constitution: Rethinking the* Insular Cases *and Modern American Empire*, 130 YALE L.J. F. 312 (2020) (same); Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 779 (2005) (same); Symposium, *Introduction to the Special Issue on the Law of the Territories*, 131 YALE L.J. 2390 (2022) (same); Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181 (2014) (same); Asli Bâli & Aziz Rana, *Constitutionalism and the American Imperial Imagination*, 85 U. CHI. L. REV. 257 (2018) (discussing the global expansion of American economic, political, and military influence).

constitutive of, rather than peripheral to, American law.[32] I add to this literature an example not only of how laws have been enacted to carry out imperial policies, but of how reasoning about law itself has been shaped by imperial conditions.[33] This insight also suggests connections with studies of other imperial contexts. A particularly fruitful point of comparison exists between these Hawaiian cases and studies on the development of liberalism in European empires. Liberalism's claims to universality were deeply challenged by encounters with, and rule over, societies beyond Europe.[34] Ideas about civilization, its absence, and what would be

32. AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 13 (2010) ("[S]ettler exclusion was more than a distant period of conquest and subordination; it provided the basic governing framework for American life for over three centuries."). Scholars have advanced diverse arguments within this framework. Some have argued that erasing colonialism ignores the role "that racial violence has played in producing the systems, practices, norms, and ideals" at the core of American private law. K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1069 (2022). For example, rather than thinking about the various doctrines used to justify the start of a chain of title as concerning individual claims over "unowned things," centering colonialism emphasizes that acquiring property meant taking something from someone else *and* advancing a systemic justification for that taking in racial terms. *Id.* at 1135–36. Public-law scholars, particularly those writing on constitutional law, have also shown that we have much to lose by ignoring empire and colonialism. Some scholars have shown that empire is a critical part of American constitutional history. For example, in a constitutional culture beholden to original meanings, erasing the centrality of settler-Indian relations in the early republic can lead us to misunderstand the impetus behind key constitutional provisions. *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1002 (2014). Consider, too, the controversy over citizenship for the denizens of overseas territorial acquisitions. Denying them citizenship went hand in hand with efforts to circumscribe the Reconstruction Constitution by reifying white supremacy in American governance. *See* SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE 30–31 (2019). Other scholars have argued that refusing to reckon with America's colonial experience limits our constitutional imagination. *See, e.g.*, Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1797–1800 (2019). Centering the experiences of federal power from the perspective of the victims of colonial dispossession can also illuminate new ways of solving pressing constitutional problems, like the protection of minorities. *Id.*

33. I build on recent work on the problem of legal internalism. *See* Shyamkrishna Balganesh & Taisu Zhang, *Legal Internalism in Modern Histories of Copyright*, 134 HARV. L. REV. 1066 (2021). Balganesh and Zhang describe legal internalism as the tendency of lawyers to regard law as normative, epistemologically self-contained, and internally, logically coherent. *See id.* at 1093. This tendency, they argue, gives rise to a puzzle when legal professionals confront phenomena external to law: how "to direct and process external forces so as to bring about changes in the content and structure of law" while retaining and furthering their vision of law. *Id.* at 1106. My work explores this puzzle in the imperial context.

34. UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT 1 (1999) ("Liberalism in those centuries was self-consciously universal as a political, ethical, and epistemological creed. . . . In the empire it found a challenge to this creed, even before nationalism along with other responses expressed that challenge, because there was no avoiding the strange and unfamiliar.").

required to obtain it, became instrumental in justifying the "radically different political standards for different people implied by imperialism."[35] Thus a supporter of liberal democracy like John Stuart Mill[36] could nonetheless advocate for "educating Indians but *not yet* deeming them worthy of autonomy."[37] In other words, the way in which lawyers and judges imagined Kānaka Maoli as subjects who could and should be changed—and the justifications for bringing this change about through law—resonated far beyond Hawai'i.[38]

This Article proceeds in three Parts. Part I provides the background to the Hawaiian adoption cases. Over the course of the nineteenth century, adoption remained a stigmatized form of kinship in America, while in Hawai'i it remained a crucial and flexible form of kinship both before and after the midcentury reforms. I use adoption to frame a question about the kingdom's midcentury transformation: when the Hawaiian legislature enacted statutes regulating adoption and descents, was it importing an American understanding of that relationship or rearticulating Hawaiian practices?

Part II draws on judicial opinions, private correspondence, probate records, court testimony, and lawyers' archival papers to explore two conflicting answers to this question. In one reading, the statutes preserved what they did not explicitly eliminate, leaving in place the centrality of adoption in Hawaiian society. In another reading, the statutes created new family relationships distinct from pre-

35. JENNIFER PITTS, A TURN TO EMPIRE: THE RISE OF IMPERIAL LIBERALISM IN BRITAIN AND FRANCE 5 (2005). This "civilizing mission" was not an immutable fact of empire, and in the British context it would shift radically by the end of the nineteenth century. As Karuna Mantena has argued, colonial uprisings in the middle of the nineteenth century would lead British imperial agents to conceive of colonized subjects as incapable of attaining civilization. This would require a shift to a different justification for empire: the protection of a theorized traditional society from the threats of modernization. KARUNA MANTENA, ALIBIS OF EMPIRE: HENRY MAINE AND THE ENDS OF LIBERAL IMPERIALISM 5 (2010).

36. *See John Stuart Mill*, STAN. ENCYC. OF PHIL. (Aug. 25, 2016), https://plato.stanford.edu/entries/mill/#AuthDemo [https://perma.cc/M267-VJQC] ("[Mill's] sensitivity towards the very real dangers of populism in modern societies is . . . never allowed to overshadow his basic commitment to liberal democracy as the political system most suited to the cultivation of a free, active, and happy citizenry.").

37. MEHTA, *supra* note 34, at 30.

38. Indeed, another connection could be drawn to the history of international law. As Ntina Tzouvala has observed, the concept of civilization was once "an omnipotent force that regulated the acquisition of international legal subjectivity." Ntina Tzouvala, *Civilization, in* CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT 83, 83 (Jean d'Aspremont & Sahib Singh eds., 2019). Echoes of the kind of tutelage that foreign advisors in the kingdom purported to give the Hawaiian chiefs could be heard later in the Mandate System created by the League of Nations to manage "former German colonies and territories detached from the Ottoman Empire." *Id.* at 92. There, as in Hawai'i, civilization influenced the kinds of legal impositions thought permissible and necessary.

existing Hawaiian cultural practices. The Hawaiian Supreme Court largely adhered to the latter reading.

Part III analyzes what these cases tell us about the exercise of statutory interpretation. The two possible readings of these statutes recall Karl Llewellyn's challenge to the view that canons of statutory interpretation "provide neutral, predictable legal rules."[39] Llewellyn argued that for every "thrust"—read the statutes narrowly to preserve Hawaiian worldviews—there was a "parry"—read the statute broadly to override existing practices.[40] Canons might provide interpretive rules, but the judge must still choose a rule.[41] In the cases I reconstruct here, empire informed what rule judges chose: pick the reading of the statute that advances the goal of civilizing Hawaiians. The pursuit of civilization thus operated to curtail the kinds of materials judges could import into the process of interpretation, functioning as something of a canon of statutory construction. For instance, the most ardent opponent of adopted children's inheritance rights felt "compelled to deny the power of this Court" to rely on "native ideas and usages which prevailed before the establishment of the present system of government."[42] He invoked civilization—embodied in the laws imported from abroad and legible to imperial powers—as a limit on judicial power to interpret legislation, which is precisely what some advocates of the canons claim they are designed to do.[43] This way of reading statutes also implied a theory of how to bring about legitimate legal change, one which conceived of Kānaka Maoli as racialized legal subjects whose legal traditions were not worthy of preservation and who had to be changed in the name of civilization.

I. ADOPTED CHILDREN IN CHANGING WORLDS

The worlds of adopted children in America and Hawai'i, as well as their respective positions in those worlds, changed much over the course of the

39. Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 912 (2016).
40. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). The arguments in these cases broadly fit into Llewellyn's second pair of thrusts and parries: "Statutes in derogation of the common law will not be extended by construction," but "[s]uch [statutes] will be liberally construed if their nature is remedial." *Id.*
41. *Cf. id.* at 401 ("Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon[.]").
42. *Nakuapa II*, 3 Haw. 342, 354–55 (1872) (Hartwell, J., dissenting).
43. *Cf.* Krishnakumar, *supra* note 39, at 982–89 (discussing canons as part of a textualist approach to statutory interpretation designed to "restrict the opportunity for 'strong-willed judges to substitute their own personal political views for those of the legislature'").

nineteenth century. This Part begins by reconstructing social and legal practices around adoption in America and Hawai'i to highlight the different lenses through which Americans and Hawaiians understood this form of kinship.[44] In America, adoption was a stigmatized form of kinship whose legal implications were jealously delimited by a judiciary convinced that adoption worked a legislative derogation on the common law. Kānaka Maoli, by contrast, practiced two forms of adoption—*hānai* (to feed) and *ho'okama* (to make a child)—neither of which carried any stigma. In fact, these different forms of adoption were common across Hawaiian society and essential to Hawaiian social reproduction.

Adoption offers a powerful lens into the transformation of the Kingdom of Hawai'i in the nineteenth century. Although many reforms introduced at midcentury imported concepts and relationships foreign to Hawaiian society—in particular, private property in land—adoption legislation enacted in the 1840s raised a puzzle: were these statutes impositions of foreign law, or did they grow out of Hawaiian practice? This question, as I show in Part II, turned the exercise of interpreting statutes into a site of contest over the relationships among custom, common law, and statute in the kingdom.

A. Adoption in America

American legal culture inherited the English suspicion toward adoption, itself grounded in "a moral dislike of illegitimacy" and a desire to "protect the property rights of blood relatives in cases of inheritance."[45] Of course, even in England and colonial America, children moved between households. But whereas today we tend to think of adoption as the construction of affective ties, for many centuries, the movement of children between households in the Anglo-American world was tethered instead to various forms of child labor.[46] Although adoption was not

44. The comparison I present here is admittedly asymmetrical, contrasting American *legal* views on adoption with Hawaiian *general* views on adoption. Unquestionably, American legal views on adoption tended to downplay the role of adoption in American family life, portraying adoption as more of an anomaly than it actually was. *See generally* Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263, 264 (2002) (describing a "standard history of adoption" that portrays adoption as a legislative invention of the middle of the nineteenth century and therefore as a novelty in American society); Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1117 (2003) ("Adoption as an individual legal action appeared well recognized, if not universally accepted.").

45. E. Wayne Carp, *Introduction*, *in* ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 1, 3 (E. Wayne Carp ed., 2002).

46. *See* Pustilnik, *supra* note 44, at 275. Destitute children were "bound out" and put to work, and children from more affluent families were placed in apprenticeships. *See* E. WAYNE CARP,

uncommon before the middle of the nineteenth century, it was one among other means—including apprenticeships and private contracts—through which children moved between households.[47]

In the first half of the nineteenth century, however, changes in American society yielded a new vision of childhood. Americans abandoned the idea that children were sinful creatures in need of religious revival. Children, instead, could be molded into good adults.[48] At the same time, the development of a market economy and its disruption of earlier modes of economic production and exchange welcomed a gender ideology that separated society into different spheres, ascribing to public economic activity masculine traits and encoding private life in feminine terms.[49] In this private sphere, women were responsible for the production of gentility—indeed, mothers were portrayed as uniquely capable, because of their gender, to enable children's development.[50] Insistence on child development and wellbeing was also central to placement efforts beginning in the 1850s, like those led by Charles Loring Brace and his Children's Aid Society in New York.[51] Brace and his contemporaries believed that the best way to deal with growing populations of displaced and impoverished children in American cities was not to

FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 5–6 (1998); CLAUDIA NELSON, LITTLE STRANGERS: PORTRAYALS OF ADOPTION AND FOSTER CARE IN AMERICA, 1850–1929, at 8 (2003). *See also* JOY SCHULZ, HAWAIIAN BY BIRTH: MISSIONARY CHILDREN, BICULTURAL IDENTITY, AND U.S. COLONIALISM IN THE PACIFIC 20–25 (2017) (noting complaints from American missionary parents in Hawai'i about lack of apprenticeship opportunities).

47. For example, in the 1857 case *Van Duyne v. Vreeland*, the New Jersey Supreme Court upheld a contract between two brothers in which one brother "exchanged custody rights to his son for a promise that the boy would be given full family status and inheritance rights in his uncle's home." GROSSBERG, *supra* note 27, at 269. As Hendrik Hartog has argued, the adopted son succeeded in claiming his inheritance in no small part because lawyers constructed a record that would allow the court to see how the uncle had come to shape his adopted son's life. HENDRIK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE 182–85 (2012). *Van Duyne* is an example of "private adoption arrangements," which Amanda Pustilnik has argued have a long history in the United States. Pustilnik, *supra* note 44, at 271 (noting that while dominant accounts of adoption reform portray adoption as a statutory innovation, "private adoption arrangements" have a long history in America which casts doubt on the persuasiveness of dominant accounts).

48. *See* NELSON, *supra* note 46, at 9.

49. *See* Amy Dru Stanley, *Home Life and the Morality of the Market*, *in* THE MARKET REVOLUTION IN AMERICA: SOCIAL, POLITICAL, AND RELIGIOUS EXPRESSIONS, 1800–1880, at 74, 83–84 (Melvyn Stokes & Stephen Conway eds., 1996); NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780–1835, at 65–66 (2d ed. 1997).

50. COTT, *supra* note 49, at 85 ("Mothers have as powerful an influence over the welfare of future generations as all other earthly causes combined.").

51. On Brace's program, see generally CARP, *supra* note 46, at 9–10.

put them in orphanages, but to ship them out to the countryside, where they would come under the influence of farmers.[52]

52. For a historical reconstruction of the placing out system, see LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION 3–19 (1999). On the critiques of orphanages, see generally E. Wayne Carp, *Orphanages vs. Adoption: The Triumph of Biological Kinship, 1800–1933*, *in* WITH US ALWAYS: A HISTORY OF PRIVATE CHARITY AND PUBLIC WELFARE 123, 123 (Donald T. Critchlow & Charles H. Parker eds., 1998) ("Both Gilded Age and Progressive Era child-welfare reformers denounced orphanages, advocating instead that dependent, abandoned, or neglected children be placed in families."). On the construction of American rural life as an ideal space for children, see MEGAN BIRK, FOSTERING ON THE FARM: CHILD PLACEMENT IN THE RURAL MIDWEST 17–42 (2015).

The centrality of the placing out system to the story of how adoption developed in American law and society is an important reminder not to lose sight of the relationship between custody disputes and child labor in the nineteenth century. This relationship is particularly important when exploring histories of subordination in America. As Dylan C. Penningroth has argued about the nineteenth-century South after the Civil War, "[i]n the lean postwar economy, the calculus of raising and controlling children prompted some ex-slaves to petition for custody of children who had only distant blood ties." DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH 167 (2003). Contests over child labor through custody disputes were particularly important in this context because local officials might rearticulate the conditions of bondage. Penningroth elaborates: "[Ex-slaves] went to Freedmen's Bureau offices to 'demand' their 'great grand child[ren]' and young cousins, saying that even if the parents were dead, those children should not have been 'apprenticed' out to white planters 'without the knowledge or consent of any of [their] kin people.'" *Id.* The subordination of nonwhite children to exploit their labor was a phenomenon that extended beyond the American South. For example, it is worthwhile to consider at length the harrowing story of Nora Jewell's childhood in the Puget Sound region:

> Just two years after losing her Danish father, Coast Salish mother, and métis sisters to an undocumented tragedy in 1877, Nora Jewell faced another tragic ordeal. The twelve-year-old cleared fields and mended fences for James Smith, a guardian appointed by the court to protect her body and estate until she reached eighteen or married. As Nora confided to her maternal aunt Ellen Jones, however, Smith repeatedly assaulted her in the marshy grasslands of central San Juan Island, a secret she would have kept had he not put her "in family way" by the age of fourteen. Ellen's immigrant husband encouraged his niece to report Smith's crimes to the justice of the peace. The ensuing trial revealed that Nora had been placed with Edward Boggess, an elderly and crippled bachelor whom islanders deemed untrustworthy, and then with James Smith, a married homesteader who earned his living by farming, mining, and performing odd jobs. Witnesses described Smith as a strict master who limited Nora's interactions with Salish relatives, schoolmates, and potential suitors, and put her to hard physical labor on his homestead. Nevertheless, the jury of Smith's peers acquitted the workingman, apparently in reasonable doubt of Smith's abuses and paternity and seemingly convinced that Nora's mixed-race and fatherless background proved her promiscuity.

Katrina Jagodinsky, *"In Family Way": Guarding Indigenous Women's Children in Washington Territory*, 37 AM. INDIAN Q. 160, 160 (2013).

The new view of childhood that fed these developments also transformed American jurisprudence around child custody.[53] Granted, American law continued to favor a father's right to his children.[54] But concern for a child's wellbeing and a belief in the unique properties of a mother's love led jurists to conclude that, in some situations, custody over a child might more properly lie with the mother.[55]

It was in this context that American states began reforming the law of adoption. Before adoption reform, adoptive parents could request a private legislative bill changing the child's name to match theirs, thus legalizing an informal relationship.[56] In 1851, Massachusetts passed a new law sending adoptive parents to the courts, where a judge would probe their ability to care for their adopted child, thus centering the concern for the child's welfare that had developed in the context of child custody law over the previous two decades.[57] This new mechanism for adopting children "spread at a phenomenal rate."[58] The Massachusetts statute became "the national model."[59] By the end of the nineteenth century, resistance to offering a legal procedure to carry out an adoption "had been overcome in almost every state."[60]

But even as earlier resistance abated, suspicion around adoption remained, particularly in the inheritance context.[61] For several American legal commentators in the late-nineteenth and early-twentieth centuries, adoption ran counter to their

53. *See* Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851*, 73 NW. U. L. REV. 1038, 1055 (1979).

54. For instance, Justice Joseph Story argued that fathers have a paramount right over their children, though "not on account of any absolute right to the father." GROSSBERG, *supra* note 27, at 255. Instead, it was because "the law presum[ed] it to be for [the child's] interest to be under the nurture and care of his natural protector, both for maintenance and education." *Id.*

55. In an 1830 custody dispute, a Maine court reasoned that a daughter "require[ed] peculiarly the superintendence of a mother." Zainaldin, *supra* note 53, at 1058. And while younger sons "may probably be as well governed and instructed by [the mother] as by the father," the court resolved in favor of the mother, noting that "'parental feelings of the mother toward her children are naturally as strong, and generally stronger, than those of the father.'" *Id.*

56. *See* GROSSBERG, *supra* note 27, at 269–70.

57. *See id.* at 271–72; Zainaldin, *supra* note 53, at 1046.

58. GROSSBERG, *supra* note 27, at 272.

59. *Id.* at 271.

60. *Id.* at 272.

61. Lawrence M. Friedman argues that adoption statutes were "statutes about inheritance. Nobody needs an adoption statute to take in a child . . . and raise that child, love it, cherish it, and treat it as your own. But then if the 'adoptive' parent dies intestate, what becomes of the child? Does it have a claim to any of the family property?" LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 56 (2009).

core assumptions about the natural ordering of American kinship.[62] They thought that adoption differed from heterosexual marriage, which, like adoption, was socially constructed, but which legal commentators regarded as foundational in American life.[63] An American judge put it thus early in the twentieth century: marriage was "in conformity to natural rights. But the right of adoption is contrary to natural law . . . ."[64] Indeed, adoption was often portrayed as a threat to marriage, because it removed "one great barrier to illegal connections" between men and women by allowing a man "though unmarried, legally [to] make [illegitimate] offspring his legal children, while their mother remain[ed] unwed."[65]

For these legal commentators, adoption also ran against nature in a more fundamental sense, negating a natural relationship between parent and child. Echoes of this view reverberate across the decades between Reconstruction and World War II. In 1867, the Pennsylvania Supreme Court explained that "[a]dopted children are not children of the person by whom they have been adopted," and Pennsylvania's adoption statute did not "attempt the impossibility of making them such."[66] Similarly, an American lawyer argued in 1930s Hawai'i that an adoption statute "could give an adopted child rights of inheritance which it did not before possess," but it could not change "from what woman the child issued."[67]

This belief that adoption was unnatural translated into arguments that adoption was a legislative derogation of the common law that should be narrowly

62. In using the term "natural" or "nature," I rely on the work of anthropologist David M. Schneider on American kinship. According to Schneider, Americans believed their views on kinship encoded naturally occurring relationships into law. DAVID M. SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT 109–10 (2d ed., 1980). Of course, "nature" was always a socially constructed ideal, and in some instances, law constructed kinship by fabricating or negating biological ties. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2272 (2017) (discussing the marital presumption). Schneider's conceptualization of kinship may already have been dated by the time he proposed it in the 1960s. *See* Hendrik Hartog, *Romancing the Quotation*, *in* LAW IN THE LIBERAL ARTS 155, 157 (Austin Sarat ed., 2004); GROSSBERG, *supra* note 27, at 306. Nonetheless, anxieties about "nature" or the "natural order" explain much of the opposition to adoption in American legal commentary.

63. *See* JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS 9–10 (3d ed., 1882) ("The most interesting and important of the domestic relations is that of husband and wife.").

64. Non-she-po v. Wa-win-ta, 37 Or. 213, 216 (1900).

65. WILLIAM HENRY WHITMORE, THE LAW OF ADOPTION IN THE UNITED STATES, AND ESPECIALLY IN MASSACHUSETTS 75 (1876).

66. Schafer v. Eneu, 54 Pa. 304, 306 (1867) (emphasis added).

67. Opening Brief of John T. Walker, et al., Appellants, at 14, Walker v. O'Brien, 115 F.2d 956 (9th Cir. 1940) (No. 9533).

construed.[68] For example, Pennsylvania courts decided that although biological children were not required to pay a collateral inheritance tax under state law, adopted children owed this tax because the legislature did not expressly extend that exemption to adopted children, and "[g]iving an adopted son a right to inherit, does not make him a son in fact."[69] Similarly, adopted children faced steep challenges in articulating claims to the estates or testamentary bequests of their adoptive parents' biological kin.[70] If a decedent made a bequest to his children's "issue," for instance, courts were unwilling to read the word "issue" to include adopted grandchildren on the theory that the decedent could not have contemplated the adoption when he wrote the will.[71] Put differently, adoption was a "choice" that deviated from the ordinary course of a life, and courts would not extend the consequences of adoption beyond the property of the party that had made that "choice."[72]

Adoption's advocates did not deny the importance of nature; instead, they argued that adoption reproduced nature through familial love and affection. As one lawyer argued in 1906: "Like a bud that has been cut from its natural stem and grafted into a foreign tree, [the adopted child] grew into the family and became a part of its very life."[73] Indeed, Americans developed a cultural narrative normalizing adoption as a form of kinship that reinstated the natural order of things by resolving two tragedies: the parentless child and the childless couple. This affective vision of adoption would win out. By the early twentieth century, courts and legislatures largely erased distinctions between the rights and obligations of adopted and biological children.[74] But America's cultural narrative around

68. For these and other examples, see Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 496–505 (1971).
69. Commonwealth v. Nancrede, 32 Pa. 389, 390 (1859).
70. *See* GROSSBERG, *supra* note 27, at 276.
71. *See, e.g.*, Jenkins v. Jenkins, 64 N.H. 407, 407–10 (1887) (holding that the adoption of an illegitimate daughter by a father does not render that daughter the father's "issue," and thus did not entitle the daughter to the property her adoptive grandfather left for her father's "issue").
72. *See, e.g.*, Rodgers v. Miller, 182 N.E. 654, 655–56 (Ohio Ct. App. 1932) ("[W]hen a stranger to the adoption employs the language 'child' or 'children,' relating to children other than his own, the presumption attends that he does not mean to include other than natural children.").
73. Hockaday v. Lynn, 98 S.W. 585, 586 (Mo. 1906). Or as James Schouler explained in his 1882 treatise on domestic relations, using a similar natural metaphor, adoption allowed "an unfruitful couple at the present day, and in our own country, [to graft] the tree, in obedience to the best of parental instincts." SCHOULER, *supra* note 63, at 317.
74. *See* FRIEDMAN, *supra* note 61, at 57. For instance, in 1931, when the Supreme Court of Puerto Rico surveyed American decisions on adoption and inheritance, it noted that "[c]ourts have generally concluded that adopted children must . . . be considered issue or descendants, even though it is clear that neither of these words could originally refer to anything other than

adoption mattered a great deal, because it normalized adoptive kinship only insofar as the adopted child was assimilated into the place of the biological child.[75] To the extent adopted children participated in the distribution of family property, then, they did so by eliding how they became a part of the family unit.[76]

B. Adoption in Hawai‘i

As American legal commentators looked askance at adoption in the nineteenth century, Hawaiians took a different view. They practiced two different forms of adoption. One was called *hānai*, which has several meanings, including "to feed."[77] The other was called *ho‘okama*, which means "to make a child."[78] There is a tendency to conceptualize these relationships by alluding to the Anglo-American distinction between fosterage and adoption, or by characterizing them as informal and formal adoption.[79] I reject this tendency, however, because it seems to assume that the family is a unit with clearly delineated and perhaps even obvious boundaries separating those who are in (and thus formally part of the family) from those who are out (and thus only informally part of the family). This vision of the family unit is a poor tool with which to understand the Hawaiian world of the nineteenth century, into which legal reform introduced new kinds of property relationships that did not previously exist in Hawai‘i. Such presentism can obscure the longstanding centrality of adoptive practices in Hawaiian society. And it is

offspring." *Ex parte* Ortíz y Lluberas, 42 D.P.R. 350, 1931 WL 4966, at *3 (1931) (author's translation).

75. *See* JUDITH S. MODELL, A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION 5 (2002).

76. Changing legal views on adoption thus seem to follow what Melissa Murray calls the "functional turn" in family law. *See* Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985, 1989 (2015). Murray explains that in the twentieth century, courts and policymakers attempted to treat as "families" certain groups of people who did not "comport[] with the formal indicia that traditionally are used to establish family status." *Id.* at 1989. But even as courts modified doctrine to reflect changes in the structure of the family, they "emphasized the degree to which these [differently structured] families comported with the basic structure and functions of the marital family," thus reifying the marital family model. *Id.* at 1990.

77. N. Kanale Sandowski & K. K‘ao‘i Walk, *Pili ‘Ohana: Family Relationships*, *in* NATIVE HAWAIIAN LAW: A TREATISE 1126, 1140 (Melody Kapilialoha MacKenzie, Susan Serrano & D. Kapua‘ala Sproat eds., 2015).

78. *Id.* at 1139.

79. *See id.* ("Although ho‘okama and hānai may be the approximate equivalents of adoption and fosterage respectively, limiting these concepts to such narrow definitions for legal convenience betrays the full understanding of their cultural aspects, which made them quite different from their English equivalents.").

crucial that we reconstruct this centrality, for it allowed litigants and lawyers in the kingdom to articulate culturally distinct understandings of family and property.

This Subpart reconstructs Kanaka Maoli adoptive practices using probate records, genealogical accounts, autobiographical writing, and court testimony. I use the terms "adoption" or "adoptive practices" and their variants to allude generally to the ways in which Hawaiians brought children into new households. I do not mean to collapse the differences between hānai and hoʻokama, although the sources I use here do not always make clear which relationship was at issue. My aim here is not to provide an account of the differences between these practices. Rather, my aim is to show that adoptive practices were a crucial form of kinship in Hawaiian society.[80]

Everywhere in the kingdom over the course of the nineteenth century, children moved from one household to another, often across different islands, to live with relatives other than their biological parents. Although Kānaka Maoli also used adoption to bring non-related children within the family,[81] the prevalence of intrafamilial adoption is a striking feature of Hawaiian kinship. It is a feature that points more generally to the enduring importance of kinship ties beyond the household: the *ʻohana*, or extended family.

The word ʻohana means "off-shoots" or "that which is composed of off-shoots"[82]—a reference to the *kalo* (taro) plant, the elder sibling of the Hawaiian people.[83] The kalo plant helps illustrate Hawaiian kinship as offshoots from a common source: the *kūpuna*, or elders. The Hawaiian family is stratified by generations descending from these elders. This generational organization eliminates "kinship distance"[84]: for instance, children could refer to all males in the parents' generation as *makua kāne* (father), and to the females as *makuahine* (mother).[85] This vision of kinship provides necessary context for the practice of adoption. In 1834, the American missionary Sarah Lyman wrote that "very

80. Nonetheless, the distinction between hoʻokama and hānai was important. Testimony on the differences between these practices led judges and lawyers in the kingdom to conclude that only some adopted children could make claims to their adoptive parents' estates. This understanding of Hawaiian adoptive practices would shape the litigation I reconstruct in Part II.

81. *See infra*, notes 114–119 and accompanying text (quoting contemporary witness testimony on the practice of adopting non-blood relatives).

82. E.S. CRAIGHILL HANDY & MARY KAWENA PUKUI, THE POLYNESIAN FAMILY SYSTEM IN KA-ʻU, HAWAIʻI 3 (1958).

83. *See* KAMEʻELEIHIWA, *supra* note 6, at 24.

84. MARSHALL SAHLINS, ANAHULU: THE ANTHROPOLOGY OF HISTORY IN THE KINGDOM OF HAWAIʻI: HISTORICAL ETHNOGRAPHY 197 (1992).

85. J. KĒHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 48 (2008).

few [Hawaiians] have children of their own" but that "almost all have adopted children."[86] What Lyman witnessed, but perhaps did not understand, was how the framework of ʻohana shaped generational relationships to make adoption common. Scholars have long observed that adoption by members of the parents' or grandparents' generation was common in Hawaiian society.[87] Indeed, as a witness explained to the Hawaiian Supreme Court in the 1870s, "[i]t was a custom from ancient times to give a child to an aunt or uncle to bring up. A custom from the royal family down."[88]

These adoption practices served a wide range of functions. One particularly important function, which continues to this day, was for grandparents to impart social and cultural knowledge to younger generations to facilitate the reproduction of the ʻohana.[89] For example, the Kanaka Maoli scholar Mary Kawena Pukui lived with her maternal grandparents in the late nineteenth century. They taught her Hawaiian language and her family's genealogy. "Every day," Pukui recalled, "Grandmother would quiz me: 'Do you remember the place we went to yesterday and the *ʻaumakua* [ancestral guardian] who guards it?' . . . I memorized our family history."[90] Pukui also learned how to manage family relations, including "what to do when a family member died, how to talk to quarreling members, and how *hoʻoponopono* [rectification gatherings] helped keep family harmony."[91]

Hawaiian adoptive practices could also help elder or ailing ʻohana members secure care, as suggested by two stories from the kingdom's probate records. Consider, first, the adoption of a boy named Abenela by his uncle, Kāʻailauhala. In the 1840s, Kāʻailauhala was living in Honolulu. At some point before 1847, he fell

86. MERRY, *supra* note 12, at 237.
87. *See* SAHLINS, *supra* note 84, at 198.
88. Proceedings, at 16, Kiaiaina v. Kahanu, 3 Haw. 368 (April 17, 1871) (Law 1641, Box 47, Series 006—1st Circuit Court Law, Hawaiʻi State Archives) [hereinafter Proceedings in *Kiaiaina v. Kahanu*].
89. On the persistence of this practice, see Donna J. Grace & Alethea Kuʻulei Serna, *Early Childhood Education and Care for Native Hawaiian Children in Hawaiʻi: A Brief History*, 183 EARLY CHILD DEV. & CARE 308, 309 (2013); Noreen Mokuau, Paula Higuchi, Colette V. Browne, Kathleen M. Sweet, Lana S. Kaʻopua & Kathryn L. Braun, *Native Hawaiian Grandparents: Exploring Benefits and Challenges in the Caregiving Experience*, 4 J. INDIGENOUS SOC. DEV. 1 (2015); Loriena A. Yancura, *Justifications for Caregiving in White, Asian American, and Native Hawaiian Grandparents Raising Grandchildren*, 68 J. GERONTOLOGY SERIES B: PSYCHOL. SCI & SOC. SCI. 139 (2013).
90. SAHLINS, *supra* note 84, at 200. Transmitting the Hawaiian language would have been particularly important given efforts after the illegal overthrow of the Hawaiian monarchy to outlaw the teaching of Hawaiian. *See* Troy J.H. Andrade, *E Ola Ka ʻŌlelo Hawaiʻi: Protecting the Hawaiian Language and Providing Equality for Kānaka Maoli*, 6 INDIGENOUS PEOPLES' J.L. CULTURE & RESIST. 3, 18–27 (2020).
91. SAHLINS, *supra* note 84, at 200.

ill, and he wrote to his older brother, Kapule, who was then living in the island of Hawai'i, to ask him whether he would "give. . . one of his children."[92] One witness claimed that by 1847 Kā'ailauhala "was lo-lo [likely *lōlō*, meaning paralyzed] and continued to be so till he died."[93] Perhaps, then, he turned to the ties of 'ohana to secure help in his final days. A witness testified: when "Kaailauhala expressed his intention to send to Kapule for one of his children, shortly after that Abenela came down from Hawaii to live with him. Kapule did not come with him. Abenela may have been 9 or 10 years old."[94]

Consider a second story of old-age care through adoption. The story comes from probate proceedings following the death of a man named Hū'eu. In life, Hū'eu and his wife had adopted a boy named Samuela. During the probate proceedings, a witness named Kapu explained that he had "lived together [with Hū'eu] for 5 years in Honolulu" and that he "took care of [Hū'eu] for several years."[95] Samuela's adoption was critical in motivating Kapu to care for Hū'eu. As Kapu testified, "Samuela is a son of my younger brother and knowing that he was adopted by Hueu, it led me to take more care and interest in Hueu."[96] It seems, then, that Kapu chose to care for Hū'eu as an act of reciprocity after Hū'eu had assumed adoptive care of Kapu's nephew.

The kingdom's nineteenth-century demographic crisis likely heightened adoption's significance as a mechanism in the "Hawaiian cultural toolbox . . . for cushioning the blow of unusual mortality within a family."[97] The probate proceedings for the estate of a man named Kanehailua illustrate these dynamics. Kanehailua was married to a woman named Kahaleahuawa, whose older sister, Kamanahiwa, had two children—a boy named Napua and a girl named Kamokulei. After Kamanahiwa passed away, Kanehailua and Kahaleahuawa adopted their niece, Kamokulei. The girl's biological father recalled the moment of the adoption: "[A]t the time my wife was taken ill, her younger sister, Kahaleahuawa, was present, my wife told her younger sister that I could take the boy, Napua, and that the

92. Proceedings, at [3] In re Estate of Laumaka (June 27–July 2, 1862) (Probate 554, Series 007—1st Circuit Probate, Hawai'i State Archives) [hereinafter Proceedings on the Estate of Laumaka] (page numbers in brackets do not appear in the original and have been generated by the author).
93. *Id.* at [10] (emphasis in original).
94. *Id.* at [4].
95. Proceedings, at [1]–[2], In re Estate of Hū'eu (August 15, 1863) (Probate 327, Series 007—1st Circuit Probate, Hawai'i State Archives).
96. *Id.* at [3]–[4].
97. SETH ARCHER, SHARKS UPON THE LAND: COLONIALISM, INDIGENOUS HEALTH, AND CULTURE IN HAWAI'I, 1778–1855, at 181 (2018). On the kingdom's demographic crisis see *infra* Part I.C.

younger sister could take Kamokulei and bring her up."[98] In the demographic crisis that marked nineteenth-century Hawaiian life, then, adoption could serve to secure care and support for different family members.

Beyond its social functions in reproducing family knowledge and securing family care, adoption was also an important tool in Hawaiian politics. This can be seen, for example, in the writings of the Kanaka Maoli lawyer and intellectual Joseph Moku'ōhai Poepoe, specifically in his "Ka Moolelo Hawaii Kahiko (Ancient Hawaiian history)."[99] One portion of this history, published serially in the Hawaiian-language newspaper *Ka Na'i Aupuni* in 1906,[100] contains a story about Papa (the earth-mother) and Wākea (the sky-father) which highlights the importance of adoption as a tool of chiefly alliances.[101] In the story, Papa, in her form as Haumea, came to the windward side of O'ahu where the daughter of one of the high-ranking chiefs, 'Olopana, was having trouble giving birth.[102] Haumea assisted in the birth by administering medicinal plants, and in exchange she asked for the child as her hānai.[103] By this time, the current ruler of the island—Kumuhonua—had demonstrated that he was not a *pono* (righteous) ruler, and Haumea had articulated reasons why he should no longer control the land.[104] In taking the child of one of O'ahu's high-ranking chiefs as her hānai, Papa lessened the chances that 'Olopana might turn against Papa and Wākea when they challenged Kumuhonua's rule.[105]

The importance of adoption as a tool of chiefly politics in the nineteenth century was reflected not just in popular mythology but also in chiefly practices. Consider but one example of how adoption shaped the lives of Hawai'i's rulers:

98. Proceedings, at [7], In re Estate of Kanehailua (June 30, 1865) (Probate 1765, Series 007—1st Circuit Probate, Hawai'i State Archives) [hereinafter Proceedings on the Estate of Kanehailua].
99. NOENOE K. SILVA, THE POWER OF THE STEEL-TIPPED PEN: RECONSTRUCTING NATIVE HAWAIIAN INTELLECTUAL HISTORY 174 (2017).
100. *See id.* at 183 (noting the name of the newspaper), 197 (noting that this particular portion of "Ka Moolelo Hawaii Kahiko" ran from May to June of 1906).
101. Noenoe K. Silva describes this portion of "Ka Moolelo Hawaii Kahiko" as "the first long historical, legendary, and possibly religious narrative in the work." *Id.* at 197. This is a helpful source in understanding the role of adoption in Hawaiian society because, as Silva argues, Poepoe wrote from a "commitment to teaching the younger generations of his own time." *Id.* at 174.
102. *See id.* at 200.
103. *See id.*
104. *See id.* at 198.
105. *See id.* at 201 ("'Olopana is a powerful ali'i nui [high chief], and it is a political move for Haumea to ask for the child to hānai, as that brought the two ali'i nui families together, lessening any chance of 'Olopana turning against Haumea and Wākea when they take over the rule of the island.").

Queen Liliʻuokalani, the hānai daughter of Abner Pākī and Laura Konia. During the probate proceedings for Pākī's estate, Liliʻuokalani's biological father recalled that as "soon as [Liliʻuokalani] was born, Paki and his wife . . . asked me to give them the child. I and my wife both agreed to do it. They took the child at that time and she has lived with them ever since . . . . [S]he was given upon the same principles as was customary among the chiefs at that time in giving and taking children."[106]

We have seen, then, that different forms of adoption were common across Hawaiian society, and that these practices served important functions, like transmitting knowledge between generations, securing care for different family members, and articulating political alliances and relationships. Indeed, adoption was a remarkable feature of Hawaiian society in the nineteenth century—one which, as Queen Liliʻuokalani noted in her memoir, was "not easy to explain . . . to those alien to [Hawaiian] life," but seemed "perfectly natural" for Kānaka Maoli and fostered "the ties of friendship between the chiefs."[107] The practice of having children raised by other relatives or by close friends "was, and indeed is," she wrote, "in accordance with Hawaiian customs."[108] And unlike in the United States, where adoptive kinship carried social stigma,[109] the fact that Hawaiians did not conceal adoptive relationships shows that they did not attach prejudice to either hānai or hoʻokama adoptions.[110]

As I noted earlier, however, this does not mean that all adoptions were the same. Indeed, in the inheritance context, they could acquire important differences.[111] Before the creation of private property in land in the 1840s,[112] Hawaiian inheritance practices were tied to the transmission of authority among the chiefs.[113] According to Samuel Mānaiakalani Kamakau, perhaps the most

106. Proceedings, at [2], In re Estate of Pākī (June 29, 1865) (Probate 1061, Series 007—1st Circuit Probate, Hawaiʻi State Archives).
107. LILIʻUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 4 (1898).
108. *Id.*
109. *See* Carp, *supra* note 52, at 132–33 (discussing social stigma around adoption in the United States).
110. On this history of secrecy in American adoption practices, see generally CARP, *supra* note 46.
111. David Forman argues, and Kamakau's testimony discussed here, *see infra* notes 114–116 and accompanying text, seems to confirm that the keiki hoʻokama relationship carried an inheriting dimension to it. *See* Forman, *supra* note 13, at 345. Nonetheless, Kamakau's indication that keiki hānai could also inherit suggests, as Forman himself notes, the importance of "analyzing claims involving Hawaiian custom and usage on a case-by-case basis." *Id.* at 343.
112. *See infra*, Subpart I.C. (describing legal reforms taking place in the 1840s, including the creation of private property in land).
113. On the chiefs' inheritance practices in this context, see KAMEʻELEIHIWA, *supra* note 6, at 95–135. Kamakau explained that before reform, common people "had property they could dispose of," and it was the custom of the country to make such bequests through a verbal will.

famous Hawaiian intellectual of the nineteenth century, *keiki hoʻokama* (hoʻomaka children) "were children not relatives,"[114] while *keiki hānai* (hānai children) were "blood relations[, c]hildren of brothers, etc."[115] Kamakau also explained that keiki hoʻokama "became heirs of those who took them" and "inherited *sovereignty*."[116] This might suggest that keiki hānai did not inherit from their adoptive parents. But Kamakau suggested this was not necessarily the case, noting that hānai children "inherited same as children,"[117] and "[i]f there was *no will* keiki hanai inherit[ed] without dispute invariably . . . . Keiki hanai had their rights of inheritance."[118] Indeed, Kamakau went as far as stating that when a parent died without making a bequest "and without own child the estate [went] to *keiki hanai*."[119]

Despite these indications of the inheritance rights of hānai children, Kamakau's explanation of the practice of hoʻokama, his emphasis on its use among the chiefly class, and his striking declaration that keiki hoʻokama "became heirs" and "inherited sovereignty"[120] seems to have led judges and lawyers to the conclusion that there was a particular kind of adoption in ancient Hawaiʻi (hoʻokama) that conferred a right to inherit property upon the adopted child, and which was different from the many other kinds of adoptive relationships (hānai) that connected ʻohana everywhere around the kingdom. Such court-drawn distinctions reflect the challenges of imposing Anglo-American property relations on a society whose family structures do not conform to Anglo-American culture. As courts attempted to draw these distinctions, they wrestled with whether and how to bring Hawaiian understandings of adoption into new legal relationships. The rights of adopted children, especially hānai children, thus brought into sharp relief a broader puzzle in Hawaiian society: As the chiefs remade the kingdom to defend

Trial Transcript, at 6, *In re* Nakuapa's Estate, 3 Haw. 143 (July 12, 1869) [hereinafter *Nakuapa* Trial Transcript] (Folder I, Probate 2419, Series 007—1st Circuit Probate, Hawaiʻi State Archives). However, the makaʻāinana (the people on the land) had "personal property only"; there "was no real property in the ownership of the people." *Id.* at 6–7. The makaʻāinana thus made bequests "of their . . . canoes, taro patches, etc." *Id.* at 7. The "[g]eneral custom," he added, "was to bequest personal property equally between adopted children, natural children, etc." *Id.* at 8.

114. *Id.* at 4.
115. *Id.*
116. *Id.* at 5 (emphasis added). The idea of inheriting sovereignty supports the view that some scholars have articulated of hoʻokama adoptions as a sort of "elevating instrument" through which a childless chief could anoint a successor. Sandowski & Walk, *supra* note 77, at 1139–40.
117. Proceedings in *Kiaiaina v. Kahanu*, *supra* note 88, at 17.
118. *Id.* at 18.
119. *Id.*
120. *Nakuapa* Trial Transcript, *supra* note 113, at 4.

Hawaiian sovereignty, to what extent would the world after legal reform resemble the world before it?

C. The Transformation of the Kingdom of Hawai'i

By the 1830s, the Kingdom of Hawai'i was in crisis. Diseases from abroad, together with a low fertility rate, resulted in a catastrophic loss of population.[121] As the Kanaka Maoli intellectual Davida Malo commented in 1839, "[t]he kingdom is sick,—it is reduced to a skeleton, and it is near death; yea, the whole Hawaiian nation is near to a close."[122] The strain from the loss of people was only exacerbated by foreign threats to Hawaiian sovereignty, as foreign sailors caused trouble wherever their ships harbored and Euro-American powers used the debts the chiefs owed foreign merchants as a lever to extract privileges from Hawaiian rulers.[123] By the middle of the nineteenth century, then, the Hawaiian chiefs were desperate to restore *pono* (righteousness) in the kingdom, and they turned to the advice of foreigners, including American missionaries and lawyers, about how to address the kingdom's ills.[124] Between the late 1830s and the early 1850s, the chiefs radically transformed the kingdom's government.[125]

Chiefly governance gave way to constitutional monarchy. A Declaration of Rights in 1839 proclaimed protection for "the persons of all the people, together

121. *See* ARCHER, *supra* note 97, at 167–201. One estimate places the kingdom's population in 1778 at 800,000 inhabitants. DAVID STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAI'I ON THE EVE OF WESTERN CONTACT 59 (1989). Kame'eleihiwa estimates that by 1849, the kingdom had lost 83 percent of this population. KAME'ELEIHIWA, *supra* note 6, at 140–41.

122. ARCHER, *supra* note 97, at 199.

123. For an exploration of chiefs' trading practices with foreign merchants, see ARISTA, *supra* note 9, at 18–51. As Arista explains, around 1825 merchant agents began "to demand the transformation of individual chiefly debt into a new 'national' debt." *Id.* at 51. The most distressing infringement of Hawaiian sovereignty came in the early 1840s, when the British Admiral George Paulet forced Kamehameha III to cede sovereignty of the kingdom to him. The kingdom was restored to Kamehameha III a few months later by another British Admiral, Richard Thomas. OSORIO, *supra* note 7, at 47, 264 n.30.

124. For an account of why the chiefs turned to the missionaries, see generally KAME'ELEIHIWA, *supra* note 6, at 141–42 (arguing that the demographic collapse of Hawaiian society led the chiefs to seek new ways of organizing Hawaiian society, including the teachings of Christian missionaries); *see also* DAVID A. CHANG, THE WORLD AND ALL THE THINGS UPON IT: NATIVE HAWAIIAN GEOGRAPHIES OF EXPLORATION 24–25 (2016). That these missionaries could serve as counselors was not obvious from the moment of their arrival on the islands in 1820. Instead, as Noelani Arista has shown, one of the missionaries, William Richards, earned the trust of the chiefs by demonstrating a subtle understanding of Hawaiian governance practices. *See* ARISTA, *supra* note 9, at 212–13, 228.

125. *See* BEAMER, *supra* note 9, at 3–4; MERRY, *supra* note 12, at 4; *see generally* OSORIO, *supra* note 7, 1–74 (describing transformations in Hawaiian governance in this period).

with their lands, their building lots, and all their property."[126] The Constitution of 1840—the first written instrument of its kind in the kingdom—incorporated these protections and organized a new government. Among other changes, it created a bicameral legislative body which would come to include both Kanaka Maoli and *haole* (white) members. The upper house, the House of Nobles, was made up of high-ranking chiefs named individually in the Constitution.[127] The lower house, which became the House of Representatives, was to be chosen annually by the people.[128] This Constitution also created a Hawaiian Supreme Court composed of the king, the *kuhina nui* (premier of the kingdom), and four other judges appointed by the legislature.[129] A new Constitution in 1852, however, removed the king and premier from the Supreme Court. Thereafter, that body was largely made up of Anglo-American lawyers chosen by the legislature.[130]

This new government, constituted by law, introduced many changes to the kingdom's legal landscape. Among the most important of these changes was the creation of private property in land through a process known as the *Māhele* of 1848.[131] Legal reform also brought change to Hawaiian families, including the introduction of heterosexual marriage and the condemnation of same-sex relationships that were previously an unproblematic part of Hawaiian life.[132]

126. TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III 10 (1842) [hereinafter 1842 CONSTITUTION AND LAWS].
127. *Id.* at 15.
128. *Id.* at 16.
129. *Id.* at 19–20.
130. *See* MERRY, *supra* note 12, at 90–93. On one of the Hawaiian members of the Supreme Court, John Papa ʻĪʻī, see MARIE ALOHALANI BROWN, FACING THE SPEARS OF CHANGE: THE LIFE AND LEGACY OF JOHN PAPA ʻĪʻĪ 117–35 (2016).
131. The Māhele was an incredibly complex process that I cannot hope to comprehensively describe here. On the reasons behind and operation of the Māhele, see generally KAMEʻELEIHIWA, *supra* note 6, at 201–85. But because property in land was at the center of most of the disputes I discuss in Part II, it is important to highlight this change in the kingdom's legal fabric. Indeed, the island press emphasized that these cases had important implications for land rights. *Cf.* HAW. GAZETTE, *supra* note 21, at 2 ("[I]nasmuch as they pertain to the succession of property in this country, they present a subject of interest infinitely beyond the ingenuity with which the arguments are drawn.").
132. For example, the *ʻaikāne* was a "romantic same-sex friend, generally and unproblematically assumed to be a sexual partner." CHANG, *supra* note 124, at 44. On the ʻaikāne and the prohibition of sodomy in the kingdom, as well as implications ancient Hawaiian conceptions of gender and sexuality might have on modern Hawaiian law, see Robert J. Morris, *Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy*, 8 YALE J.L. & HUMAN. 105 (1996); Robert J. Morris, *An Eight-Strand Braided Cable: Hawaiian Tradition*, Obergefell, *and the Constitution Itself as "Dignity Clause,"* 40 U. HAW. L. REV. 1 (2017).

Moreover, while long-term intimate relationships between men and women were common, they were not understood strictly as long-term monogamous commitments governed by

New laws also endowed family relationships with propertied implications that did not exist before reform,[133] which was clearest in the enactment of a statute of descents. The kingdom adopted several statutes regulating the descent of intestate estates; salient for our purposes is the one included in the 1859 Civil Code. It provided, in relevant part: "The property shall be divided equally among the intestate's children, and the issue of any deceased child by right of representation, and if there is no child of the intestate living at his death, his estate shall descend to all his other lineal descendants."[134]

While these property law reforms represented a radical break from the past, some of the legal changes to the family appeared to build upon Hawaiian family practices. In 1841, the Hawaiian legislature created a process for the adoption of children in the kingdom.[135] The child, the child's biological parents, and the parents seeking to adopt the child were all to go before an officer and commit the adoption to writing:

> Ina manao na makua e haawi lilo loa i ka laua keiki na hai e malama, pono ia laua, ke hele imua o kekahi luna, a e palapala laua e like me ko laua manao ae like, a ike ka luna, ua pono, a kau ka luna i kona inoa i hoike, alaila, ua paa ia palapala. Ina aole palapala, a kau ole paha ka lunaahau a me ka lunakanawai i kona inoa, alaila aole lilo ke keiki, aia no i na makua ponoi **ka olelo** no ua keiki la.[136]
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> —
>
> If parents wish to commit their child to the care of another, it is well for them to go before an officer, and make their agreement in writing, and he being a witness to the correctness of the transaction, and signing his

church or state. *See* CHANG, *supra* note 124, at 168–69. However, laws promulgated in the 1820s–30s introduced a vision of marriage tethered to Christianity. This included a prohibition against polygamy for both men and women as well as delimitations on marital exits, such that a man could not "cast off his wife at his pleasure," and neither could a woman "cast off her husband at her pleasure." 1842 CONSTITUTION AND LAWS, *supra* note 126, at 71. For a discussion of the law on marriage and divorce in the kingdom, see Jane L. Silverman, *To Marry Again*, 17 HAW. J. HIST. 64 (1983).

133. *See* KAME'ELEIHIWA, *supra* note 6, at 99.

134. CIVIL CODE OF THE HAWAIIAN ISLANDS PASSED IN THE YEAR OF OUR LORD 1859 § 1448.

135. This statute was amended in 1846, as part of a much longer statute reorganizing the kingdom's government. *See* STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 198 (1846). The 1846 statute left much of the same procedure in place. Whether a child was adopted under the 1841 statute or the 1846 statute was not material in the litigation I discuss here.

136. KUMU KANAWAI, A ME NA KANAWAI O KO HAWAII PAE AINA, UA KAUIA I KE KAU IA KAMEHAMEHA III 82 (1841) (compilation of statutes in Hawaiian as enacted by the kingdom's legislation) (emphasis added).

> name as such, the writing shall be legal. If there be no writing or no officer sign his name, the child can not be transferred. The true parents still have **the direction** of the child.[137]

The way in which the statute describes parental authority—as having "ka olelo" (the direction) over a child—points to a distinctly Hawaiian legal consciousness. "Ka ʻōlelo" signifies "speech, language, word, statement."[138] In the 1840 Constitution and the laws enacted shortly thereafter, this word was used to denote the concepts of power, authority, or decisionmaking.[139] The use of this word reflects "the centrality of speech to [Hawaiian] governance,"[140] particularly through chiefs' use of *kapu* (chiefly oral legal pronouncement).[141]

This statute presents a puzzle about the kingdom's midcentury legal transformations. On the one hand, the backdrop for its enactment was a massive shift in Hawaiian law and society. On the other, given the statute's invocation of ka ʻōlelo, together with our knowledge of Kanaka Maoli adoptive practices, the statute seems to reflect distinctly Hawaiian legislative priorities. Was this statute a foreign imposition, or did it grow out of Hawaiian practices and customs? Thus recast, the question of how to interpret this statute, along with the statute on descents, sets the stage for a contentious debate over what forms of authority could shed light on the meaning of Hawaiian statutes.

II. HAWAIIAN COMMON LAW AND THE RIGHTS OF ADOPTED CHILDREN

After the enactment of statutes on adoption and descents, did adopted children inherit from their adoptive parents when the latter died intestate? Some thought that the prevalence of adoptive practices in Hawaiian society meant that adopted children should be regarded as heirs. Others thought that adopted children had only the rights the legislature explicitly gave them, which did not include inheritance. As litigants in the late 1860s and early 1870s brought this question to the Supreme Court of the Hawaiian Kingdom, the justices—particularly Chief Justice Elisha Hunt Allen and Justice Alfred S. Hartwell—found themselves disagreeing over how much authority to give Hawaiian customs and traditions within the exercise of statutory interpretation. I carefully reconstruct their disagreement here, using judicial opinions and archival research.

137. 1842 CONSTITUTION AND LAWS, *supra* note 126, at 111 (emphasis added).
138. Noenoe K. Silva, *Mana Hawai'i: An Examination of the Political Uses of the Word Mana in Hawaiian*, *in* NEW MANA: TRANSFORMATIONS OF A CLASSIC CONCEPT IN PACIFIC LANGUAGES AND CULTURES 37, 41 (Matt Tomlinson & Ty P. Kāwika Tengan eds., 2016).
139. *See id.*
140. ARISTA, *supra* note 9, at 133.
141. *See id.* at 2.

In these cases, legal actors representing the interests of adoptive children looked to Kanaka Maoli customs and traditions as a vehicle to imbue the kingdom's statutes of adoption and descents with meaning. This was possible, I show, because lawyers and judges understood Hawaiian customs and traditions as a Hawaiian common law that should inform the interpretation of written legislation. New statutory rights could thus be rooted in the past even though they lacked exact corollaries in the legal relations that preceded the enactment of statutes. The clearest articulation of this view came from the writings of a Kanaka Maoli lawyer named A. Keohokalole, who coined a Hawaiian term for the common law—*ke kānāwai mana'o*—in a brief to the Supreme Court arguing that his client should be entitled to inherit her adoptive mother's estate.

After reconstructing this way of thinking about and through the common law in Subpart II.A, I show how lawyers and judges used it to argue that Hawaiian adoptive practices inflected the meaning of the kingdom's statutes on adoption and descents in ways that granted more rights to adopted children in Subpart II.B. However, these arguments were largely rejected, revealing a dominant conviction among lawyers and judges that giving Hawaiian customs the status of common law would unduly interfere with the demands of empire.

A. Blurring Custom and Common Law

In the aftermath of reform, lawyers and judges in the kingdom understood that the new legal order they inhabited—defined by constitutions, codes, and bound reporters imported from abroad—was connected to a past Hawaiian legal order.[142] Scholars who have studied the connection between these two legal orders have tended to focus on the doctrine of custom.[143] They have noted that Hawaiian courts in the aftermath of reform recognized certain Hawaiian practices as customs that

142. *Cf.* MERRY, *supra* note 12, at 35 (arguing that the kingdom's legal transformation "was not a simple substitution of one form of law for another but a negotiation of the meaning and practices of law in various places over time. The practices of the old shaped the practices of the new . . .").

143. For example, Merry has emphasized the absence of customary law in the kingdom, and specifically of courts devoted to hearing contests between Hawaiians and to thereby develop Hawaiian customary law, as an important aspect in the Americanization of law in the kingdom. *See* MERRY, *supra* note 12, at 103 (arguing that the 1852 Constitution "eliminated any space within which Hawaiian customary law could legitimately exist"); Sally Engle Merry, *Law and Identity in an American Colony*, *in* LAW & EMPIRE IN THE PACIFIC: FIJI AND HAWAI'I 123, 132 (Sally Engle Merry & Donald Brenneis eds., 2003) ("There was to be only one [legal] system, but it was an Anglo-American one. . . . To settle for a separate legal system was to surrender the hope of transforming conduct. This approach drove Hawaiian customary law and practices underground, where they survived in rural areas or in close-knit urban communities.").

were legally enforceable. In this view, "the law of the kingdom was in most respects the common law of England and America," but Hawaiian practices could be integrated into this law as exceptions to otherwise foreign jurisprudence.[144]

This was not, however, the only way in which legal actors in the kingdom understood Hawaiian common law, or this common law's relationship to custom. They also thought the kingdom had its own common law. For instance, in 1862, Chief Justice Elisha Hunt Allen observed in an inheritance dispute that he was "of [the] opinion that there was a common law of inheritance [before the reforms of the 1840s], liable to be modified or defeated, but perfectly good until such an event."[145] In that case, Allen went on to hear copious testimony about the chiefs' inheritance practices as a means of figuring out what this common law was.[146] Thus, Allen blurred the lines between custom and common law, a conceptual move enabled by the persistent idea that the common law was a body of law articulated by judges but always tethered to the people's customs.[147] He was not

144. Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 123 (1998). Paul Sullivan recognizes that Hawaiian common law deviated from common law rules elsewhere in the Anglo-American world, but hastens to add that these departures "were not [meant] to accommodate [Hawaiian] customs and traditions," but were instead supposed to avoid rules "'based on conditions that no longer exist[ed],'" were "'merely technical and subversive of justice or the intentions of the parties,'" or had been "'generally altered or abrogated by statute elsewhere.'" *Id.* David Forman takes a similar view of the relationship between common law and custom—that is, he sees custom as an exception to the common law—but demonstrates that these exceptions did in fact respond to Hawaiian traditions. According to Forman, the kingdom "preserved Hawaiian usage 'in conjunction with the transition to a new system of land tenure,' as a 'kind of vaccine' or inoculation against the catastrophic consequences of likely colonization." Forman, *supra* note 13, at 321. Consequently, Hawaiian custom and usage "remained an important element of society in these islands" from the kingdom to the present day. *Id.* 13.

145. Keelikolani v. Robinson, 2 Haw. 514, 516 (1862).

146. This case has been referred to as "the first time a court applied ancient traditions, customs, practices, and usages to Hawai'i's laws." Justin Lee, Note, *The Curious Case of Land Inheritance: Metaphor and Hawaiian Land Tenure*, 13 ASIAN-PACIFIC L. & POL'Y J. 252, 253 (2012).

147. William Blackstone, for instance, claimed as a "characteristic mark[] of English liberty" that the "common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people." 1 WILLIAM BLACKSTONE, COMMENTARIES *73–74. In the nineteenth century, the American jurist Chancellor James Kent similarly connected the common law to the American people's customs. He described the common law as "the common jurisprudence of the people of the United States" which "was brought with them as colonists from England, and established here, *so far* as it was adapted to our institutions and circumstances." 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 342 (4th ed. 1840). Kent went on to elaborate that the common law suffused life in America, implying that judges articulating the common law were also deeply connected to the life of the people: "we live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake, and when we lay down to sleep, when we travel and when we stay at home; and it is interwoven with the very idiom that we speak; and we

alone in this assessment. The preface to the translation of the 1842 Constitution and Laws, likely penned by the missionary William Richards, included a very clear invocation of a distinctly Hawaiian common law: "At these Islands as well as in more civilized countries there is some thing like a system of common law, independent of special statutes. It consists partly in their ancient taboos, and partly in the practices of the celebrated chiefs as the history of them has been handed down by tradition . . . ."[148]

American lawyers think about common law and custom differently today—more specifically, they think of custom as a doctrine *within* the common law, requiring claimants to establish a set of factors before courts will give legal force to a community practice.[149] But this conceptual rigidity hinders our understanding of how nineteenth-century lawyers and judges thought about law and legal change. We should instead embrace the conceptual ambiguity inherent in these categories, and question how lawyers and judges might channel this ambiguity towards diverging ends in their arguments.

To illustrate the ambiguity around custom and Hawaiian common law, and the possibilities this ambiguity offered, I explore how lawyers argued for and against a claimed customary right by adopted children to inherit from their adoptive parents. The Hawaiian Supreme Court recognized this right in *Kiaiaina v. Kahanu* (1871),[150] where it held that "an adoption of a child as heir, according to Hawaiian custom and usage, made prior to the written law, is valid under existing laws."[151] The phrasing here is important. As I discussed above, various forms of adoption were common across Hawaiian society,[152] but the Court believed that, as Kamakau put it, only some children "inherited sovereignty," and therefore only these children were entitled to inherit from their adoptive parents.[153] Litigants seeking to claim this customary right to inherit therefore had to prove, as a factual matter, that they had been adopted as heirs. But a few years before the Court's decision in *Kiaiaina*, a couple of litigants—the siblings Peter and Mary Ann Mellish—had tried to get around this evidentiary burden by blurring the line

cannot learn another system of laws, without learning, at the same time, another language." *Id.* at 342–43.

148. 1842 CONSTITUTION AND LAWS, *supra* note 126, at 3.

149. *See* Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 8 (2009) (describing a test for "whether a custom should be adopted by judicial decision" which "has been and continues to be an influential reference point").

150. 3 Haw. 368 (1871).

151. *Id.* at 369.

152. *See supra* Part I.B. (describing adoptive practices in Hawaiian society).

153. Nakuapa Trial Transcript, *supra* note 113, at 4.

between custom and common law, between what litigants had to prove and what courts were presumed to know.

Peter and Mary Ann's case began as an action of ejectment against Eugene Bal and William Adams over some land in Lahaina, Maui. Peter and Mary Ann claimed that Eugene and William had wrongfully acquired possession of that land from the estate of a man named George Lawrence. George, they claimed, was the adoptive father of Peter and Mary Ann's mother—Beke Mellish.[154] Peter and Mary Ann alleged that Beke had been wrongfully excluded from George's estate, and that, by virtue of being Beke's children, they were the lawful owners of the land Eugene and William were occupying.[155]

At trial, William C. Jones, counsel for Peter and Mary Ann, was able to establish that Beke was indeed the adopted child of George Lawrence—more specifically, it seems, that Beke was George's hānai child.[156] But counsel for Eugene and William, Albert Francis Judd, then moved for a nonsuit, arguing that although plaintiffs had established that Beke was George's hānai, they had not established that hānai was "an inheriting relation."[157]

In arguing against this motion, Jones advanced a vision of custom as part of the common law of the islands, and therefore something that courts were presumed to know. Jones argued that the question presented by this case was "one peculiarly of law for the Court, and not for the jury."[158] The Court, he argued, "was bound judicially to know the law; that the ancient Hawaiian customs are a part of the common law of Hawaii and should be judicially recognized by the Court, and that if the Court is not fully satisfied, inquiry should have been instituted as to what

154. The adoption took place in Oʻahu, though it is unclear when. Beke's father appeared to be out of the picture, and she was living with her biological mother, Manini. Manini consented to give her daughter in adoption to George and Kiki. At some point (again, it is unclear when), this family moved to Maui, where Beke continued living with her adoptive parents until she married a man named Joseph Mellish. Kiki passed away soon thereafter, and Beke continued to spend time with George. She once told a witness, after visiting George, that she "had been to see her makua kane [father, male of the parental generation]." And a witness claimed that George "appeared to be very fond of Becky, thought a great deal of her." There are also suggestions that there was "an estrangement" between Beke and George before George's death in 1849. Deposition of William Jones, at [2], Mellish v. Bal, 3 Haw. 123 (Dec. 11, 1869) (Law 745, Box 22, Series 006—1st Circuit Court Law, Hawaiʻi State Archives).

155. Complaint, at [2]–[3], Mellish v. Bal, 3 Haw. 123 (Apr. 7, 1869) (Law 754, Box 2, Series 006—1st Circuit Law, Hawaiʻi State Archives).

156. *Cf.* Motion of Nonsuit, Mellish v. Bal, 3 Haw. 123 (July 20, 1869) (Law 754, Box 2, Series 006—1st Circuit Law, Hawaiʻi State Archives) (noting that not all keiki hānai were entitled to inherit).

157. *Id.*

158. Plaintiff's Points on Exceptions, Mellish v. Bal, 3 Haw. 123 (Law 754, Box 2, Series 006—1st Circuit Law, Hawaiʻi State Archives).

the law was."[159] In other words, the burden should not be on the plaintiffs to establish the law of the kingdom.

Judd, meanwhile, argued that custom "did not become law until recognized or affirmed by a formal decision of the Supreme Court on the exact point."[160] In drawing a distinction between custom and law, Judd relied on familiar objections against custom. For instance, he claimed that the "enactment of written laws abrogates unwritten customs,"[161] invoking the belief that the customs of an unknown and undefined community could not defeat legislative enactments.[162] Judd also raised an epistemic problem around custom: how could a judge know that an alleged custom was real, and not a fabrication of the party relying upon it?[163] "How does the Court know," asked Judd, "whether this may not be a custom peculiar to only one of the Islands of this Kingdom[?]"[164]

So far, Judd's distinction between custom and law rehearsed familiar arguments against custom. But along with these contentions, he also made racially charged arguments signaling what he thought were the stakes of the

159. *Id.*

160. Brief of A.F. Judd for Defendants on the Nonsuit, at [1], Mellish v. Bal, 3 Haw. 123 (Law 745, Box 22, Series 006—1st Circuit Law, Hawai'i State Archives) [hereinafter Brief of A.F. Judd for Defendants on the Nonsuit] (emphasis in the original).

161. Proceedings, at [11], Mellish v. Bal, 3 Haw. 123 (July 17, 1869) (Law 745, Box 22, Series 006—1st Circuit Law, Hawai'i State Archives).

162. This was a recurring note against custom in American jurisprudence: that custom was an exercise of power by a minority unauthorized to issue binding rules. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 742 (1986). Rose makes this point through an 1860 Virginia case:

> *Delplane v. Crenshaw & Fisher*, . . . [involved] a claimed 'customary' right of grain inspectors to be paid in kind from inspected goods. The state constitution vested lawmaking authority in the legislature, said the court, whereas a right based on custom would permit 'comparatively . . . few individuals' to make a law binding on the public at large, encroaching on the people's right to be bound only by laws passed by their own 'proper representatives.' Indeed, if an unorganized community could claim to act authoritatively through custom, then custom could displace orderly government.

Id.

163. By the middle of the nineteenth century, this objection against custom had also become an objection against the common law. Theodore Sedgwick, in his treatise on statutory interpretation, complained that judges could not "be presumed to have any official knowledge of the general state of the community, or of every local disturbance or local want." THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 240 (1857). More recently, Henry Smith has articulated a similar argument, warning that proponents of custom "need to be more sensitive to the informational burden placed on duty-holders who are farther removed from the community that originated [the] custom." Smith, *supra* note 149, at 12.

164. Brief of A.F. Judd for Defendants on the Nonsuit, *supra* note 160, at [3] (emphasis in the original).

custom/common law divide. The Court, he argued, should ignore the usage claimed, because "[t]his Government is a civilized form engrafted upon a heathen form."[165] The Court itself, he argued, was "founded upon statutes adopted from civilized countries," with judges "introduced from civilized Countries"—and unless such a "civilized" institution was "satisfied of [the usage's] real character," it was "not bound to take judicial notice" of it.[166] For Judd, then, the need to prove customs before they became law was also a function of the difference between "heathen" and "civilized" forms of government. And while the label "heathen" more readily suggests religious rather than racial differentiation, it is important to understand that the two forms of differentiation informed and reinforced each other. As Kathryn Gin Lum has argued, the "heathen category has not only racialized those bearing the label as unable to care for themselves; it has also shored up the self-understanding of White Protestant Americans as people who hold themselves to be the heathen's savior."[167]

In deciding *Mellish v. Bal*,[168] the Supreme Court sided with Judd's view of custom, granting the motion for a nonsuit on the theory that Peter and Mary Ann had not sustained the burden of establishing that their mother's adoption was an inheriting relation under ancient law. "[N]o one would claim," wrote the Court, "that every relation of keiki hanai carried the inheritance."[169]

But we should be careful not to read the outcome of the case too broadly as a turn away from the blurring of custom and common law that Jones had espoused. Indeed, the Court recognized that customs could be part of the common law of the kingdom, to such a degree as to not require the parties to prove a particular custom before a court could enforce it: "If the usages in regard to the force and meaning of adoption prior to 1841, had been uniform, so as to establish a custom having the force of law, in all cases of adoption, this case would present a different aspect; for proof of the unwritten law of the land is never required."[170] Jones, then, seems to have articulated a view of the relationship between custom and common law that was recognizable to his contemporaries. The problem was not that Hawaiian custom could not amount to common law; rather, the problem, more narrowly, was that the custom at issue—the inheritance rights of hānai children—had not been sufficiently established.

165. *Id.* at [1]–[2] (emphasis in the original).
166. *Id.* at [2].
167. KATHRYN GIN LUM, HEATHEN: RELIGION AND RACE IN AMERICAN HISTORY 15 (2022).
168. 3 Haw. 123 (1869).
169. *Id.* at 127.
170. *Id.* at 126–27.

Jones's blurring of custom and common law opened intriguing possibilities. One possibility he hoped would materialize—that the Court would treat Hawaiian custom as law—ultimately did not.[171] But treating Hawaiian customs as common law also pointed to a second possibility that did gain some traction: that Hawaiian customs around adoption could function as social or cultural context to guide judicial interpretation of the kingdom's legislation around adoption and inheritance, much as judges could read statutes against the common law. If that was the case, then the meaning of those statutes—and the rights of adopted children to the estates of their adoptive parents—could be articulated by referencing Hawaiian adoption practices. I turn to these arguments next.

B. Interpreting Statutes Against Hawaiian Common Law

With a better sense of how nineteenth-century lawyers understood the kingdom's common law, we can reconstruct how they used it in answering the question: do adopted children inherit from their adoptive parents? I explore here the answers to this question in two cases decided by the Hawaiian Supreme Court, and the disagreement this question generated between two of its jurists: Chief Justice Elisha Hunt Allen and Associate Justice Alfred Hartwell.

Allen was born in Massachusetts and graduated from Williams College in 1823, thereafter apprenticing in law at his father's practice and eventually gaining admittance to the Vermont bar in 1825.[172] After a few years in private practice, he entered New England Whig politics, spending 1841–1843 as a U.S. Representative from Maine.[173] In 1849, President Zachary Taylor appointed Allen

171. This points us to a sociological quandary about judges in Hawai'i that calls for further research. Although the kingdom's Supreme Court came to be staffed largely by Anglo-American lawyers, many of the kingdom's lower courts were presided over by Hawaiians. Further research should investigate whether their familiarity with Hawaiian practices translated into a different treatment of customary claims. There seemed to have been some concern that having Hawaiian judges opened the door for Hawaiian views to enter the realm of law. *See infra* note 193 (quoting from an editorial arguing that the proper way for Hawaiian customs to influence cases before the Hawaiian Supreme Court was through testimony rather than through the judges' knowledge of these customs). If this was a concern among the white judges of the Supreme Court, then the debate over interpretation in these cases might also have been a debate about how to limit judicial discretion to adapt law to local conditions. For an example of this dynamic in the British imperial context, see Shyamkrishna Balganesh, *Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint*, 63 AM. J. COMP. L. 33 (2015).

172. Frederick H. Allen, "Elisha Hunt Allen," at 1 (unpublished manuscript) (on file with author) ("Biographical," Box 6, Elisha Hunt Allen Papers, Library of Congress).

173. *Id.*

as the American consul to the Hawaiian Islands, which brought him to the kingdom in 1850.[174] He was replaced in 1853, but King Alexander Liholiho Kamehameha IV then asked him to join his government as Minister of Finance, which Allen accepted. He would eventually serve as the kingdom's Chief Justice and Chancellor.[175]

In 1867, with the death of Associate Justice George Robertson, Allen turned to his New England network to fill the vacancy. He wrote to Emory Washburn, then a professor at Harvard Law School, who eventually reached out to Alfred Hartwell about the job. Hartwell had graduated from Harvard after serving in the American Civil War. He had thereafter also entered New England politics, serving as the Republican representative from Natick. He left Boston for Hawai'i in August of 1868, "intending an absence of two or three years only, to obtain the new experience."[176] He would remain in the kingdom for most of his life, holding various public offices and eventually becoming Chief Justice of the territorial Supreme Court following American annexation.

This Subpart reconstructs the disagreements between Hartwell and Allen in two cases—the first concerning the statute of adoptions, the second concerning the statute of descents. In the first case, *In re Maughan's Estate*,[177] the parties argued over whether a child adopted under the kingdom's adoption statute automatically inherited from the adoptive parents. I show how lawyers for the plaintiff used Kanaka Maoli customs as a legislative backdrop—much as their counterparts in the United States used the common law—to read the statute in favor of adopted children. The Court rejected that reading in ways that presaged the ultimate grounds of disagreement between jurists in these cases: allowing Hawaiian views on adoption to influence the interpretation of statutes imperiled the project of civilization. I then turn to reconstruct *In re Nakuapa's Estate*,[178] where the lawyers advanced a similar set of arguments as those in *Maughan*. The adopted litigant in *Nakuapa* secured a narrow victory in the interpretation of the statute of descents,

174. *Id.*

175. *Id.* at 2. For another biography of Allen see PAUL T. BURLIN, IMPERIAL MAINE AND HAWAI'I: INTERPRETIVE ESSAYS IN THE HISTORY OF NINETEENTH-CENTURY AMERICAN EXPANSION (2006) (exploring broader connections between Maine residents and the Hawaiian Islands in the nineteenth century).

176. Alfred Stedman Hartwell, Thirty-Five Years in Hawaii 2 (1897) (unpublished manuscript) ("X-Reminiscences, 1897," M-56, Manuscript Collections, Hawai'i State Archives) (on file with author).

177. 3 Haw. 262 (1871).

178. 3 Haw. 354 (1872).

which the Court read as recognizing that children adopted as heirs by custom had rights of inheritance.[179]

Although one case dealt with the statute of descents and the other with the statute of adoption, we should examine these two cases together because the justices who decided them believed they were connected. When the parties in *Maughan* first argued their case before Justice Hartwell in probate, he informed them that he would hold resolution pending the Court's decision in *Nakuapa*.[180] Indeed, Allen had recently returned to America with his wife when *Maughan* first came before Hartwell in probate, and Hartwell wrote to Allen informing him of the case:

> You have received my letter concerning adoption matters. I have confessed my utter uncertainty whether my present view will be yours and Judge [Widemann's]. I think that it is hardly right that I should undertake to persuade Judge [Widemann] in your absence on the matter and will try to have to remain open until your return.[181]

The technical distinctions between these two cases should not occlude the fact that the judges who decided them thought they were interrelated. For them, these cases raised the same set of complicated questions about how to understand the legal changes taking place in the kingdom.

1. Interpreting the Statute of Adoptions

In re Maughan's Estate held that the kingdom's adoption statute did not confer upon children adopted under it any inheritance rights.[182] In doing so, the Hawaiian Supreme Court rejected an argument that the prevalence of adoption in Hawaiian society before the reforms of the 1840s meant that the statute on adoption should be read without any prejudice against adopted children.[183] The Court instead adopted what we might see as a textualist reading of the statute, which did not explicitly grant adopted children rights of inheritance.[184] The Court's opinion nonetheless raised some important non-textualist grounds for its

179. *Id.*

180. Proceedings, at [6]–[7], *In re* Maughan's Estate, 3 Haw. 262 (Sept. 3, 1869) (Probate 731, Series 007–1st Circuit Probate, Hawai'i State Archives) [hereinafter Proceedings on Maughan's Estate] ("The Court stated that it would give its decision with regard to [the heirs of] this property after the decision of the Estate of Nakuapa was delivered.").

181. Letter from Alfred S. Hartwell, Associate Justice of the Kingdom of Hawai'i, to Elisha H. Allen, Chief Justice of the Kingdom of Hawai'i (Nov. 27, 1869) ("From Alfred S. Hartwell, Sept. 13, 1869-Nov. 27, 1869," Box 3, Elisha Hunt Allen Papers, Library of Congress).

182. *In re Maughan's Estate*, 3 Haw. at 266.

183. *Id.* at 267.

184. *Cf. id.* at 268 ("[T]o say that an agreement of adoption has the force of a testamentary act . . . is [to say] that whenever the Legislature speaks of children generally, they do not mean legitimate issue, but adopted children as well.").

decision. Specifically, the Court voiced a concern that the reading of the statute proposed by counsel for the adopted child opened the kingdom's law to Hawaiian ideas about the parent-child relationship which were inconsistent with the project of civilization.[185]

In 1855, a woman named Hannah Maughan entered into an agreement with a man named Moewale to adopt his daughter, Pauahi. Moewale "release[d] all control and right over the said child . . . in consideration" of certain "covenants" Hannah entered into—namely, to "adopt the said Pauahi as her own, and to clothe, educate, and in every way care for the said child as becomes the duty of a good parent."[186] Pauahi lived with Hannah until 1861, when Pauahi married a man named Mahi and moved away to live with him.[187] Hannah passed away in 1869, and Pauahi and Mahi filed a petition to administer her estate.[188] Pauahi claimed the entirety of Hannah's estate as her adopted daughter.[189] Their petition was opposed by Hannah's sister, Nancy Wirt, who claimed that as Hannah's only surviving blood relative, she was entitled to Hannah's estate.[190] Sitting in probate, Justice Alfred Hartwell concluded that Nancy, not Pauahi, was entitled to Hannah's estate.[191] Pauahi then appealed to the Supreme Court.[192]

Nancy was represented by Robert Grimes Davis, a Hawaiian lawyer who had occupied several posts in the kingdom's government, including Associate Justice of the Supreme Court between 1864 and 1868.[193] His argument before the Supreme Court for why Pauahi could not inherit rested on two premises. The first was that it "is and has been the policy of both modern and ancient nations to

185. *Cf. id.* at 267 (arguing that "ancient" or "present customs or ideas of natives of this Kingdom" were "no longer legitimate" and could not "prevail against our statutes of wills . . . and of descents").
186. *In re Maughan's Estate*, 3 Haw. at 262.
187. *See* Proceedings on Maughan's Estate, *supra* note 180, at [3]–[4] ("Pauahi lived with decedent till she was married . . . . [She was] married I think in 1861.").
188. *See* Petition, at [2], *In re* Maughan's Estate, 3 Haw. 262 (Aug. 10, 1869) (Probate 731, Series 007–1st Circuit Probate, Hawai'i State Archives).
189. Her lawyer claimed she was the "sole heir to the estate of decedent." Proceedings on Maughan's Estate, *supra* note 180, at [5].
190. Nancy's lawyer claimed that she was "the only blood relative," that Pauahi was an "only an adopted child," and that the statute of descents referred only to "blood children." *Id.*
191. Decision, *In re* Maughan's Estate, 3 Haw. 262 (Nov. 10, 1869) (Probate 731, Series 007–1st Circuit Probate, Hawai'i State Archives).
192. Notice and Bond of Appeal, *In re* Maughan's Estate, 3 Haw. 262 (Nov. 15, 1869) (Probate 731, Series 007–1st Circuit Probate, Hawai'i State Archives).
193. *See The Supreme Court*, PAC. COM. ADVERTISER, Feb. 1, 1873, at 2 (available at https://chroniclingamerica.loc.gov/lccn/sn82015418/1873-02-01/ed-1/seq-1/ [https://perma.cc/8G3B-WAH4]); A. GROVE DAY, HISTORY MAKERS OF HAWAII: A BIOGRAPHICAL DICTIONARY 32 (1984).

preserve property in the family from whence it was derived," a policy which Davis noted "seems to be in accordance with the natural dictates of justice and equity."[194] The second premise was that no statute—either the statute on adoption or descent—said anything about the rights of adopted children.[195] To conclude that Pauahi was entitled to inherit, argued Davis, was to read into the statute a consequence that would overturn nature: the Court would "create[] a new *stirpes* of inheritance, and the estate [would go] irrecoverably out of the family from whence it was derived."[196]

Pauahi, meanwhile, was represented by Albert Francis Judd. Recall that Judd had argued in *Mellish v. Bal*[197] against a customary right to inheritance by adoption. But in representing Pauahi, he emphasized two facts: first, that she had been adopted in accordance with the statutory procedure; and second, that adoption was prevalent in Hawaiian society. "In all countries where adoptions exist," he contended, "the inheriting qualification attaches to it. As adoptions have existed in the Hawaiian Kingdom from the earliest times, by analogy, adopted children ought to inherit here."[198] Because adoption was common in Hawaiian society since "the earliest times,"[199] the kingdom's adoption statute should be read as making adopted children heirs of their adoptive parents.

Davis and Judd thus presented the Court with two competing backdrops against which to interpret Hawaiian legislation. Davis's portrait of adoption would have fit well with American legal commentary on adoption of the time: adoption was an artificial creation in tension with the natural dictates of justice and equity. To assume that adopted children inherited from their adoptive parents thus ran counter to the natural impulse to keep property within the family, understood as an entity bound by blood ties. Judd, on the other hand, pointed to the prevalence of adoption in Hawaiian society. Although he did not explicitly invoke the common law, his argument would have been familiar to common lawyers: Hawaiian customs and practices formed a backdrop against which the legislature enacted statutes.[200] Against this backdrop, the Court could not presume

194. Brief of the Contestant, at [1], In re Maughan's Estate, 3 Haw. 262 (Jan. 17, 1871) (Probate 731, Series 007–1st Circuit Probate, Hawai'i State Archives).
195. *See id.* at 2.
196. *Id.* at 3.
197. 3 Haw. 368 (1871).
198. Brief of A. F. Judd, Atty for Pauahi (w) Appellant, at [3], *In re* Maughan's Estate, 3 Haw. 262 (Jan. 17, 1871) (Probate 731, Series 007–1st Circuit Probate, Hawai'i State Archives).
199. *Id.*
200. For instance, Chancellor Kent claimed that the common law "fills up every interstice, and occupies every wide space which the statute law cannot occupy." KENT, *supra* note 147, at 343.

a heightened suspicion of adoption; therefore, it should conclude that adopted children were entitled to inherit from their adoptive parents.

Justice Hartwell wrote the opinion of the Court, in which Justice Hermann Widemann concurred and from which Chief Justice Allen dissented.[201] Hartwell shared Davis's sense that allowing adopted children to inherit would have unnatural consequences, specifically by allowing "the property of the adopting family [to be] diverted from its blood."[202] He would only reach this outcome if the legislature ordered it, which he did not think it had.[203] True, the statute of adoptions made adoptive parents "liable from the day of adoption to all parental duties and obligations," but "[t]o make even a legitimate child an heir is neither legally nor morally a parental duty. Neither the agreement nor the statute makes the adopted child an heir."[204] As for the statute of descents, Hartwell noted that the statute defined who constituted an heir, and never mentioned adopted children.[205] He argued it would be strange to assume that when the legislature spoke "of *children* generally, they do not mean legitimate issue, but adopted children as well."[206]

Hartwell denigrated Kanaka Maoli kinship practices to justify ignoring them. Whatever "ancient" or "present customs or ideas" existed among Hawaiians on

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For examples on how the common law as a backdrop influenced statutory interpretation in contemporaneous cases in the United States, see *infra* Subpart III.A.

201. Justice Herman Widemann wrote only that it was "clear to [him] that the written articles of adoption, without any further evidence of the intentions of the adopter, are insufficient under the law and statutes of the land to establish a title to inheritance for the adopted child." *In re* Maughan's Estate, 3 Haw. 262, 270 (1871). Indeed, Justice Widemann's views on these cases remain a mystery, for he wrote very little. An editorial from the *Pacific Commercial Advertiser* complained that on "the occasions when the whole Court sit together, [Widemann] contribute[d] the fact of his presence." *The Supreme Court*, *supra* note 193, at 2. The editorial suggested he had been named to the Supreme Court because he was familiar with Hawaiian traditions and language, which the author did not think a relevant qualification for sitting on the Court: "[I]f any ancient customs or traditions are to have any bearing on a case, they are to be brought to the knowledge and aid of the Court by testimony, and not by the personal knowledge of any one member of the Court." *Id.*

202. *Maughan*, 3 Haw. at 268.

203. *Cf. id.* at 268 ("If adopted children were heirs at law, the statutes would be strangely and unfortunately defective, in failing to provide for the heirs of the adopted child—its own blood heirs, or its adopted parents' blood heirs.").

204. *Id.* at 269. This view of inheritance reflects the principle of testamentary freedom. *See* HARTOG, *supra* note 47, at 67–71 (discussing the use of this principle to negotiate old-age care); Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959 (2006) (discussing the sociolegal construction of limits to testamentary freedom).

205. *See Maughan*, 3 Haw. at 268 (delineating the succession of estates according to the statute and noting the failure to include adopted children or to provide for the heirs of these adopted children were they to predecease the decedent).

206. *Id.*

"adopting children, fathers or mothers," or "in regard to relations between the sexes" were irrelevant.[207] Those ideas were "once recognized by custom and not prohibited" but were "no longer legitimate."[208] Therefore, "such customs and ideas can not prevail against our statutes of wills . . . and of descents," which did "not mention[] adoption."[209] Hartwell thus drew a sharp line between Hawaiian ideas and law: "An adopted father is as much an own father, in the native mind, as an adopted child, but neither is an *heir at law*."[210] In drawing this line, Hartwell cast Hawaiian views on adoption as incompatible with the exercise of statutory interpretation, refusing to rely on Hawaiian adoptive practices as a common law that could inform the meaning of the statute at issue.

For Chief Justice Allen, this refusal was a mistake. Allen thought there was "no doubt that there was an adoption, which was recognized in ancient times as giving the right of inheritance."[211] His phrasing here was important: he understood there were many forms of adopting children, but his focus was on the kind of adoption he thought was meant to convey a property interest. This relationship, moreover, was one he was prone to understand through the lens of the cultural narrative Americans used to make sense of adoptive kinship: the resolution of the dual tragedies of the parentless child and the childless couple. "Usually," Allen reasoned, "persons adopt a child when they have none of their own. In instances of this kind, the affections of the persons who adopt became as much interested in the child as if it was their own by blood."[212] This cultural narrative around adoption predisposed Allen to see adopted children as possessing the rights of biological children.

But the legal basis for Allen's conclusion was not that this was the correct view of the adoptive relationship; it was that the correct way to interpret the statutes on adoption and descents was against Hawaiian common law. Given that Kānaka Maoli practiced this kind of property-conferring adoption, it "was very wisely determined by the Legislature that this relationship, which was regarded by the Hawaiians as very sacred, should be established in writing, so that it should not depend on testimony which might become uncertain from length of time."[213] In other words, the Hawaiian legislature enacted its adoption and descent statutes

207. *Id.* at 267.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 263 (Allen, C.J., dissenting).
212. *Id.* at 265.
213. *Id.* at 263.

against a Hawaiian common law that included the practice of inheritance by adoption: "I regard the meaning, 'adopted child,' as synonymous with child, in its legal effect. As when a statute declares that the property shall be divided equally among the intestate's children, it includes all children, whether by adoption or by blood, and hence it was unnecessary to make an express provision for each."[214]

Maughan held that articles of adoption that did not mention rights of inheritance did not confer upon adopted children a right to inherit from their adoptive parents. Hartwell's opinion achieved this result by apparently foreclosing the possibility of relying on Hawaiian adoptive practices as a common-law backdrop for the kingdom's legislation. A year later, however, the Supreme Court decided a case concerning the rights of a child adopted by ancient custom which suggested that the possibility was still on the table. The case involved the efforts of a woman named Kaowaopa[215] to claim the estate of her adoptive mother, Naomi Nakuapa.

2. Interpreting the Statute of Descents

In re Estate of Nakuapa presented a related question to the one the Court answered in *Maughan*: whether children adopted by custom, rather than by statute, were heirs under the statute of descents.[216] Lawyers in *Nakuapa* advanced similar arguments from and against Hawaiian common law to those I recounted in the *Maughan* litigation. In *Nakuapa*, however, the adoptive claimant managed a narrow but important victory that demonstrates the viability of statutory interpretation arguments rooted in Hawaiian common law.[217]

Naomi Nakuapa died in Honolulu on January 23, 1869, without leaving a will.[218] Shortly after her death, several claims to her estate appeared before Chief Justice Allen in probate.[219] I focus here on the claims of Kaowaopa, who claimed

214. *Id.* at 264.
215. Her name has several spellings in the record. I have chosen this version because it is how she signed her petition to administer Naomi Nakuapa's estate. *See* Petition of Kaowaopa, at 3, *In re* Nakuapa's Estate, 3 Haw. 143 (Mar. 9, 1869) (Devin Forrest trans.) (Folder I, Probate 2419, Series 007–1st Circuit Probate, Hawai'i State Archives) [hereinafter Petition of Kaowaopa].
216. *Nakuapa II*, 3 Haw. 342, 342–44 (1872).
217. *Id.* at 347–48 ("The majority of the Court are of opinion that there was, prior to the written law, a custom and usage which recognized an adoption, if clearly defined in the contract, by which the child adopted might be an heir to the property of the adopter. . . . [T]he same view of these rights of the adopted child was entertained by the different Legislative bodies of the Kingdom, although the specific term is not used in the law of descents.").
218. Petition of Keahi, at 1, *In re* Nakuapa's Estate, 3 Haw. 143 (Feb. 5, 1869) (Devin Forrest trans.) (Folder I, Probate 2419, Series 007–1st Circuit Probate, Hawai'i State Archives).
219. A man named Keahi claimed he should be her executor because he was her cousin. *Id.* Another man named Pahau claimed that he should be appointed as executor because he was Nakuapa's

she was "he kaikamahine hanai" (an adopted daughter) of Naomi Nakuapa.[220] The facts surrounding Kaowaopa's adoption remained uncertain over the course of three separate trials on this factual question, but a general outline of the adoption is necessary to understand the arguments lawyers and judges made in this case. The chief Puhalahua adopted Kaowaopa in 1827 or 1828, before he married Naomi Nakuapa.[221] Nakuapa, it seems, later joined Puhalahua in adopting Kaowaopa. Puhalahua died in 1866, leaving all his property to Nakuapa.[222] Kaowaopa's claim turned on the factual question of whether she had been adopted, and what the terms of that adoption had been.

Judicial resolution of these questions was complex and protracted, involving four separate Supreme Court opinions between 1869 and 1873.[223] I focus here on the second opinion (*Nakuapa II*), on whether to grant a new trial to determine whether Kaowaopa, whom an earlier jury had found was Nakuapa's keiki hānai (hānai child),[224] was also adopted as an heir. In *Nakuapa II*, Chief Justice Allen took the opportunity to decide what was ostensibly a procedural question—whether to grant a new trial—to further the arguments he had made in dissent in *Maughan* about the propriety of looking to Hawaiian adoptive practices when

ke kaikunāne pono'ī (true brother), and proceeded to explain that Nakuapa's father and his mother were siblings. Petition of Pahau, at 2, *In re* Nakuapa's Estate, 3 Haw. 143 (Mar. 8, 1869) (Devin Forrest trans.) (Folder I, Probate 2419, Series 007–1st Circuit Probate, Hawai'i State Archives). Pahau's use of "true brother" to describe himself as a cousin of Nakuapa seems to reflect the Hawaiian custom, described in *supra* Subpart I.B., of eliminating kinship distance between households by seeing members of the same generation as siblings. As Mary Kawena Pukui explains:

> With Hawaiians, family consciousness of the same 'root of origin' was a . . . unifying force, no matter how many offshoots came from offshoots. You may be 13th or 14th cousins . . . but in Hawaiian terms, if you are of the same generation, you are all brothers and sisters. You are all 'ohana'.

KAUANUI, *supra* note 85, at 56 (quoting MARY KAWENA PUKUI, H.W. HEARTIG & CATHERINE A. LEE, NĀNĀ I KE KUMU 167 (1972)).

220. Petition of Kaowaopa, *supra* note 215, at 2.

221. I have taken this account of Kaowaopa's adoption from Forman, *supra* note 13, at 339 n.105.

222. *Id.*

223. *See In re* Estate of Nakuapa (Nakuapa I), 3 Haw. 143 (1869) (refusing motion to set aside jury verdict that Kaowaopa was the hānai child of Nakuapa and her husband and refusing to grant a new trial); *Nakuapa II*, 3 Haw. 342 (1872) (granting a new trial to determine whether Nakuapa and her husband took Kaowaopa as their hānai with the intention of making her an heir); *In re* Estate of Nakuapa (Nakuapa III), 3 Haw. 400 (1872) (granting yet another new trial on the grounds that the jury was influenced by an improperly admitted written statement); *In re* Estate of Nakuapa (Nakuapa IV), 3 Haw. 410 (1873) (holding that the evidence did not support Kaowaopa's claim that she was adopted as an heir).

224. *Nakuapa I*, 3 Haw. at 143; Olelo Hooholo, *In re* Nakuapa's Estate, 3 Haw. 143 (July 13, 1869) (Folder I, Probate 2419, Series 007–1st Circuit Probate, Hawai'i State Archives).

interpreting the kingdom's statutes.[225] And Justice Hartwell, whose turn it was to dissent, extended his attack on Hawaiian custom, shedding further light on his refusal to rely on Hawaiian common law when interpreting statutes.[226]

Writing for the Court, Chief Justice Allen made clear that the merits of Kaowaopa's claim rested specifically on Hawaiian law, not the law of other places.[227] "This question," he wrote, "must be decided upon our own usages and customs, and written laws, and none other."[228] And while he understood that Kaowaopa's claim was rooted in custom and not statute, his resolution of this question could not help but brush up against the problem of statutory interpretation.[229] He read *Maughan* as interpreting the adoption statute, but not the statute of descents. Thus, if a child was adopted before the enactment of any adoption statutes and their adoptive parents died after the enactment of the statute of descent, then that child's rights to the adoptive parents' estate was not controlled by *Maughan*.[230]

Underlying this legal conclusion was a view of Hawaiian common law as a source of meaning for statutory enactments. Allen had previewed this argument in

225. *Nakuapa II*, 3 Haw. at 347–348.
226. *Id.* at 353–55 (Hartwell, J., dissenting).
227. Allen distanced himself not only from Hartwell's reliance in *Maughan* on Anglo-American concepts of adoption and common law, but also from one of the arguments that Kaowaopa's counsel had put forth: that adoption in the civil law tradition could inform readings of the Hawaiian statutes. This argument relied on depicting Hawaiian practices less as unique to Hawaiians and more as expressions of a natural desire to secure an heir: "The object of adoption is to secure succession and to perpetuate the possession of property, and often, as in ancient Rome, to give perpetuity to a name." Brief of Counsel for Claimant Kaowaopa, at 3, *In re* Nakuapa's Estate, 3 Haw. 143 (Dec. 19, 1870) (Folder I, Probate 2419, Series 007–1st Circuit Probate, Hawai'i State Archives). American lawyers articulating inheritance claims on behalf of adopted litigants made a similar move to import the civil law as an interpretive framework, with mixed success. *Compare* Commonwealth v. Nancrede, 32 Pa. 389, 390 (1859) (questioning "whether the Roman law on the subject of adoption can furnish us any valuable analogies" to interpret Pennsylvania's adoption statute), *with* Humphries v. Davis, 100 Ind. 274, 276 (1885) (emphasis added) ("When [Indiana's] statute is read by the light of the civil law *from which its principles are borrowed, and is considered in* connection with the general principles of the law of descent and the statutes upon that subject, it becomes clear that its construction must be that which natural justice requires."). Allen did reference the civil law in his opinion, but his decision rested firmly on Hawaiian common law. *See Nakuapa II*, 3 Haw. at 345–46.
228. *Nakuapa II*, 3 Haw. at 345.
229. One argument against Kaowaopa was that no statute recognized the inheritance rights of adopted children, which meant that "no such incident attached to [adoption] before the first enactment on the subject." *Id.* at 343. But Allen rejected this argument by advancing the same reading of the statute he earlier articulated in dissent: "we account for this omission of special reference to an adopted child, in terms, to the fact that when one was adopted in that relation, he was so regarded as a child in the family, and entitled to all the rights of a child of the blood, and hence the general term was used." *Id.*
230. *See id.* at 347.

his dissent in *Maughan*, and he now developed it at length. Hawaiians, he argued, "cherished" adoption;[231] it was a relation "endeared to the people, and regarded by them of the highest importance;"[232] they regarded it as a "sacred relation."[233] This was manifest in the fact that "[b]y their first written laws, there was a provision that the act of adoption must be done in writing."[234] Contemporary enactments also provided that "when the parent dies, the child is the heir."[235] Once one understood just how important adoption was for Hawaiians, it followed that the word "child" in the statute of descents "applied to the adopted child, as well to a child of the blood,"[236] even though "the specific term is not used in the law of descents."[237] The legislature, in other words, did not have to be more specific because it legislated against the backdrop of Kanaka Maoli customary practices constituting a common law.

Hartwell's dissent in *Nakuapa II* was broad–ranging and unfocused.[238] I explore his arguments—particularly his theory of legal change—in greater detail in Part III. For now, it is enough to note his opposition to reading the statute of descents in this way, and what he thought was at stake in this interpretation: nothing short of the integrity of Hawai'i's government. "I am compelled to deny the power of this Court," he wrote, "to read this statute according to native ideas and usages which prevailed before the establishment of the present system of government, and which are inconsistent with the simple, unambiguous and consistent meaning of the entire wording of the statute."[239] Hartwell believed the "ancient modes of transmitting [property] to adopted heirs were fitted for a different form of government, different relations in domestic life and different tenure of property than now exist or are legitimate."[240] As he had done in *Maughan*, he depicted

231. *Id.*
232. *Id.*
233. *Id.* at 348.
234. *Id.* at 347.
235. *Id.*
236. *Id.*
237. *Id.* at 348. We should be careful to not read this as a defense of Hawaiian sovereignty. In private correspondence, Allen speculated that Hawai'i would not belong to Hawaiians for long: "The Hawaiian race are decreasing, and the royal family are depreciating . . . . And you may remember my prophecy that it will not be long ere the same principles, if not the same flag, will govern this Archipelago as does our own country." Letter from Elisha Hunt Allen, U.S. Consul to Hawai'i, to Mary Harrod Hobbs (Dec. 13, 1851) ("To Mary Hobbs Allen (1849-Nov. 13, 1854)," Box 1, Elisha Hunt Allen Papers, Library of Congress).
238. For instance, as he searched for ways to articulate the threat he thought Hawaiian common law posed, he reached for comparisons to "Mohamedan, Hindoo and Gentoo law . . . in India." *Nakuapa II*, 3 Haw. At 353 (Hartwell, J., dissenting).
239. *Id.* at 354–55.
240. *Id.* at 353.

Hawaiian adoption as an illegitimate practice.[241] And lest it was not clear why he thought it was illegitimate, he linked adoption to practices he thought were immoral, noting that inheritance by adoption was more common "in eastern countries where plurality of wives is allowed, where a laxity in the marriage tie exists."[242]

Over Hartwell's dissent, the Court granted a new trial to establish whether Kaowaopa's adoptive parents had intended to adopt her as an heir. That jury returned a verdict against her, and she appealed again to the Supreme Court, contending that the jury had been improperly influenced.[243] Counsel for both sides filed relatively short briefs on the procedural question.[244] But one of Kaowaopa's attorneys, A. Keohokalole, filed an additional brief addressing the substance of her claim.[245] Keohokalole's brief deserves careful attention because he deftly mobilized the common law to broaden Allen's argument in *Nakuapa II*.

Keohokalole set Kaowaopa's adoption in the time before there was any legislation on adoption or descents, or what he called "o ia wā kahiko" (this ancient time)[246] or "'o ia wā kānāwai 'ole" (this lawless time.)[247] "Lawless" here referred specifically to the absence of written law, or *kānāwai*, which was distinct from other forms of law that organized Hawaiian life before the chiefs embraced written law as a tool of governance.[248] The time of Kaowaopa's adoption determined the legal framework that the Court should use to interpret her rights as an adopted child, for Keohokalole argued that "new laws [could not] contradict, deny, and deprive those rights of the ancient time."[249] Kaowaopa's adoption thus endowed her

241. *See supra* notes 207–210 and accompanying text (denigrating Hawaiian adoptive practices).
242. *Nakuapa II*, 3 Haw. at 352 (Hartwell, J., dissenting).
243. *See In re* Estate of Nakuapa (*Nakuapa III*), 3 Haw. 400, 400–02 (1872).
244. *See* Brief of Counsel for Keahi, In re Nakuapa's Estate, 3 Haw. 143 (Oct. 7, 1872) (Folder II, Probate 2419, Series 007–1st Circuit Probate, Hawai'i State Archives); Claimant's Brief, In re Nakuapa's Estate, 3 Haw. 143 (Folder II, Probate 2419, Series 007–1st Circuit Probate, Hawai'i State Archives).
245. *See* Brief of A. Keohokalole, at 1, *In re* Nakuapa's Estate, 3 Haw. 143 (Oct. 12, 1872) (Devin Forrest trans.) (Folder II, Probate 2419, Series 007–1st Circuit Probate, Hawai'i State Archives) [hereinafter Keohokalole's Brief].
246. *Id.* at 5.
247. *Id.* at 6.
248. Kānāwai refers to "[p]ublished or written law" specifically, and is different from kapu, which was "proclaimed expressly by the ali'i [chiefs] or 'aha 'ōlelo [chiefly council]." ARISTA, *supra* note 9, at 238. Thus, Keohokalole here does not claim there was no law in the past, but rather that there were no statutes.
249. Keohokalole's Brief, *supra* note 245, at 5 ("ua hiki 'ole i nā kānāwai o ke au hou ke kū ē a hō ole a ho'onele aku ho'i i ko lākou mau kuleana pa'a o kēlā au kahiko").

with rights which neither the passage of time nor the enactment of statutes could abrogate.

These rights were part of Hawaiian common law, which judges were bound to uphold. This was such an important part of his argument that Keohokalole deemed it necessary to coin a Hawaiian term for the common law: "ke kānawai manaʻo (common law)."[250] This was a body of law "that God [had] given to the hearts of man, like that commonly seen amongst the Hawaiian populace."[251] The term surfaced again when he referred to British common law, which was no longer *the* common law, but rather a specific type of common law that required reference to its place of origin: "ke kānāwai manaʻo (common law) o Beretania Nui" (the common law of Great Britain.)[252]

His use of the phrase "ke kānāwai manaʻo" suggests two important insights. First, that he added a parenthetical defining the phrase as "common law" suggests that this was not a commonly used term.[253] Coining a Hawaiian term to refer to the common law emphasized the claim he was making, for it identified a uniquely Hawaiian body of law that should be used to adjudicate Kaowaopa's rights. Indeed, he hoped that his arguments would "broaden the considerations of the Court to not give too much weight to the laws of foreign lands" when deciding Kaowaopa's case.[254] Second, Keohokalole was also careful to connect ke kānāwai manaʻo with Christianity. This was perhaps an effort to preclude the sorts of arguments that Hartwell had advanced about the incompatibility between Hawaiian practices and the kingdom's new form of government. It also suggests Keohokalole's literacy in lawyerly invocations of natural law as a kind of law that was "based on the nature of human beings."[255]

250. *Id.* at 7.
251. *Id.*
252. *Id.* at 7–8.
253. The words he used to create this term further suggest an effort to meld old and new understandings of Hawaiian lawmaking. The term "kānāwai" referred to published or written law, a form of legal pronouncement that arose in the kingdom in the 1820s and was part of the Hawaiian chiefs' efforts to "control and discipline foreigners behaving badly on Hawaiian soil." *See* ARISTA, *supra* note 9, at 137. This was a new form of lawmaking. But Keohokalole's phrase also alluded to an older form of lawmaking, one in which the chiefs deliberated and declared oral commands and prohibitions. The word "manaʻo" means "thought or opinion," and it could often be found "in letters written by aliʻi as part of a 'hallmark' phrase, as in 'Eia kuʻu wahi manaʻo" (here then is my humble opinion), to relate a finding, decision, or official opinion that has been considered." *Id.* at 240.
254. Keohokalole's Brief, *supra* note 245, at 9.
255. STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 13 (2021).

With Hawaiian common law in place, Keohokalole went on to argue analogically from it. To be sure, not all adopted children inherited from their adoptive parents in the past. But that was in no small part because the concept of property—itself an innovation—had changed the meaning of family. Such change did not mean that Kānaka Maoli had renounced the importance of adoption. "In ancient times," he wrote, "chiefs and commoners did not have property; . . . therefore they did not have heirs or successors."[256] This "lack of property" did not alienate Hawaiians from their "true born children" or their "adoptive children."[257] So why should property alienate them from their adopted children now? "These once property-less people . . . now have property in this new era . . . that they can bequeath to their true born children, adoptive children, successors or assigns."[258]

Of course, Keohokalole likely knew that this argument was pushing past Allen's position in *Nakuapa II*. While it was true that adoption was common in ancient times, Allen seemed to believe that only some adopted children were treated as heirs. Keohokalole seemed to advocate a more capacious understanding of adoption and inheritance. But he seemed to moderate his argument in a way that his audience—or at least Allen—was likely to understand—namely, by likening Kaowaopa, an adopted daughter, to the biological child that Puhalaua and Nakuapa never had. He argued that since children born in "the time of no laws" were the heirs of their biological parents under the present laws,[259] it followed that the same applied in the case of Nakuapa, who was "deprived of true born children" and instead adopted Kaowaopa.[260] Keohokalole thus portrayed Kaowaopa as functionally equivalent to Nakuapa's biological child, seemingly invoking Allen's view of adoption as a mechanism that reproduced the natural relationship between parents and children in circumstances where parents were unable to have biological

256. *Id.* at 4.
257. *Id.* at 5.
258. *Id.* Keohokalole's argument here raises a question about how we might understand Hawaiian legal consciousness in a time of tremendous legal change. Mari Matsuda has argued that in the 1840s, Hawaiians turned to courts to adjudicate disputes, making it harder for them to challenge the legitimacy of different elements of the new legal regime which existed in tension with Hawaiian cultural practices. *See* Mari J. Matsuda, *Law and Culture in the District Court of Honolulu, 1844–1845: A Case Study in the Rise of Legal Consciousness*, 32 AM. J. LEGAL HIST. 16, 37–40 (1988). But Keohokalole's argument suggests an effort to articulate, within the terms of a new and Americanized legal framework, a legal consciousness that understood the world after reform as meaningfully tethered to the world that preceded it.
259. Keohokalole's Brief, *supra* note 245, at 6.
260. *Id.* at 7.

children. In closing, he expressed hope that, with these circumstances in mind, the Court might grant Kaowaopa "ka pono" (equity)."[261]

But the equity Keohokalole sought did not materialize. Although the Court did grant a new trial,[262] the jury subsequently found that Kaowaopa was not adopted as an heir, and the Supreme Court held that she was not entitled to inherit from Nakuapa.[263] The carve-out from *Maughan* that Allen had articulated in *Nakuapa II* therefore did not apply. Indeed, it is important to note how narrow this carve-out was: because it applied only to children adopted before the enactment of the statute of adoptions, only a finite set of litigants could rely on it. Keohokalole's bid to read the kingdom's legislation against Hawaiian common law and thereby produce a more capacious view of adoption and inheritance thus failed.

III. EMPIRE AND LEGAL CHANGE

In the preceding discussion, litigants, lawyers, and judges in the kingdom struggled with legal change brought about by statutes. I have recovered two readings of these statutes. On the one hand, the likes of Chief Justice Allen argued that the kingdom's statutes should be interpreted with no prejudice against adopted children because of their place in Hawaiian society before reform. On the other, those who agreed with Justice Hartwell contended that the statutes enacted new family relations with no connection to previous Hawaiian conceptions of family. With the relatively narrow exception recognized in *Nakuapa II*—children adopted as heirs before the enactment of the statute on adoptions would inherit as heirs under the statute of descents—Hartwell's view of legal change prevailed.

This Part articulates the theories of legal change animating these disagreements over adopted children's inheritance rights and takes a comparative approach, placing these interpretive debates alongside similar controversies surrounding statutory innovations in family law in nineteenth-century American jurisdictions. For Allen and Hartwell, who learned to think like lawyers in the United States, arguments about legal change were also arguments about the relative competencies and authority of legislation and the common law.[264] For instance,

261. *Id.* at 9.
262. *See Nakuapa III*, 3 Haw. 400, 405 (1872).
263. *See Nakuapa IV*, 3 Haw. 410, 413 (1873) ("There being no proof of any notoriety whatever, and with such frail evidence of the 'adoption as heir,' the claim must fall.").
264. The relationship between common law and legislation as a proxy for thinking about legal change has a long pedigree in Anglo-American legal thought. For instance, David Lieberman demonstrated that debates about the scope of legislative authority vis-à-vis the common law centered on the question of legal change. LIEBERMAN, *supra* note 25, at 2 ("My first objective

one might interpret a statute broadly, arguing that the legislature, which represents the community, meant to change the legal landscape to better respond to new community expectations or conditions.[265] Alternatively, one might interpret a statute narrowly, arguing that the legislature introduced changes that were out of step with the current state of the community or the preexisting rules at common law.[266] Situating the disagreement over adopted children's inheritance rights in Hawai'i within this set of interpretive options can help us understand how empire informed the ways in which legal professionals like Allen and Hartwell thought about legal change.

At first glance, Hartwell's success appears foretold. One might read these Hawaiian cases for the widely shared assumption in American legal thought that the legislature has the power to change the common law, which seems to be what these statutes did. But reading the cases in this way would be a mistake. The existence of an alternative interpretation—indeed, its success, however partial, in *Nakuapa II*—reminds us that behind Hartwell's reading was an interpretive choice. As Karl Llewellyn observed long ago, interpretive canons often come in contradictory pairs, in "thrusts" and "parries."[267] Each canon in a pair can justify a different reading of the statute, but neither canon can explain why the judge picked one reading over the other. As Llewellyn put it, "the construction contended for must be sold, essentially, by means other than the use of the canon."[268] What "sold"

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in examining this eminent eighteenth-century science [of jurisprudence] is to recover an important contemporary discussion of the rival claims of common law and legislation within the English legal system, . . . to indicate the way in which questions regarding legal change and law reform came to be framed in terms of this discussion.").

265. In other words, one might argue that the canon of statutes in derogation of the common law risks lengthening the life of a body of law that no longer responds to the needs of the community. Theodore Sedgwick articulated this argument against the canon of statutes in derogation of the common law in his 1857 treatise on statutory interpretation:

> The condition of things has very essentially altered since the time of Lord Coke. . . . [T]he liberties of that portion of our race at least which occupies American soil, rest upon a surer basis than ancient customs. It would appear, therefore, that the doctrine that statutes in derogation of the common law are to be strictly construed, has now truly no solid foundation in our jurisprudence; and, though it will long, no doubt, be familiar to the forensic ear, that there is really no reason whatever why the innovating statutes of our day should be regarded with any peculiar severity, or be subjected to any particularly stringent rules of interpretation, because they abrogate some ancient rule of that renowned, but somewhat obsolete, system of jurisprudence.

SEDGWICK, *supra* note 163, at 317–18.

266. *See, e.g.*, *infra*, notes 272–282 and accompanying text (recounting judicial efforts to narrowly interpret statutes changing the rights of married women).

267. Llewellyn, *supra* note 40, at 401.

268. *Id.*

Hartwell's reading of the statutes? The answer lies in empire, which called for whatever reading of the statutes furthered the project of civilizing Kānaka Maoli.

Once we see civilization operating as a canon of statutory interpretation, we can discern in Hartwell's reasoning—as he himself did—a break with background principles underlying statutory interpretation in American jurisprudence. Specifically, Hartwell conceptualized Hawaiians as racialized legal subjects. From this view flowed his conviction that Hawaiian legal heritage was not to be treated with the reverence reserved by American judges for American common law. And this, in turn, informed his view of legal change: when the legislature has enacted statutes, the courts should read these expansively whenever relying on Hawaiian common law might threaten the project of civilization. What at first blush seems like a straightforward instance of familiar legislative supremacy becomes, on closer view, a reflection of how empire shaped legal reasoning by racializing Kānaka Maoli and representing their legal heritage and customs as artifacts that could and should be erased through legislation. It would be a mistake, therefore, to read these cases as merely instantiating a modern understanding of the relationship between common law and legislation under democracy.

To demonstrate how empire shaped the common law-legislation relationship in these cases, I first situate Chief Justice Allen's interpretation of the statutes in a broader American context of legislation reforming domestic relations. Allen's narrow reading of the statutes mirrors similar narrow readings of American legislation transforming the status of married women. These readings evince a conviction that legal change should happen slowly and in an accretive fashion. I then turn to analyze Hartwell's view of legal change. As a general matter, Hartwell believed, too, that legal change should happen slowly. But his racialized understanding of Hawaiians as legal subjects led him to carve an exception to this belief, and to advocate instead for radical legal change in the name of civilization.[269]

269. This move echoes the tendency among several nineteenth-century liberal philosophers to conclude that different forms of government—notably, more autocratic and despotic forms of government—were permissible over colonized peoples because the latter did not yet possess the attributes of civilization. *See, e.g.*, MEHTA, *supra* note 34, at 2 ("[I]t is liberal and progressive thinkers such as Bentham, both the Mills, and Macaulay, who . . . endorse the empire as a legitimate form of political and commercial governance; who justify and accept its largely undemocratic and nonrepresentative structure; who invoke as politically relevant categories such as history, ethnicity, civilizational hierarchies, and occasionally race and blood ties[.]"); PITTS, *supra* note 35, at 15 ("John Stuart Mill . . . was . . . confident that a British despotism was the best government to which backward societies could aspire, and also that such a despotism could be exercised knowledgeably and benignly to induce progress in such societies.").

A. The Possibilities of *Ke Kānawai Mana'o* (The Common Law)

In a surprising turn of legal thinking, lawyers in the kingdom claimed the common law as a fountain of greater rights for adopted children. The common law allowed lawyers to argue by analogy to the Hawaiian past: adopted children's exalted status in Hawaiian society before reform meant that they could now claim new rights, like the right to inherit from their adoptive parents.[270] This is surprising because, in the American context, adopted children experienced the common law as a limitation on their rights as members of their adoptive families.[271] And they were not alone. Other efforts to reform the American family by securing greater rights for married women, for example, faced similar restrictions.

The nineteenth century witnessed many efforts by feminist advocates to transform and improve the status of women in American society through legislation.[272] But courts tended to take a skeptical or restrictive views of these statutes. One New York jurist articulated this view in 1877: "The disabilities of a married woman are general . . . and exist at common law. The capabilities are created by statute, and are few in number, and exceptional."[273] Reva Siegel's work on judicial interpretation of earnings legislation illustrates how courts could fill legislative silence with common law presumptions about marriage to limit the kinds of rights wives could claim.[274] In 1873, for example, Iowa enacted a statute providing a "wife may receive the wages of her personal labor and maintain an action therefor in her own name."[275] Two years later, the Iowa Supreme Court refused to believe that the legislature meant to release "the wife from her common law and scriptural obligation and duty to be a 'help-meet' to her husband."[276] To

270. *See supra* notes 256–258 and accompanying text (noting how Keohokalole bridged the times before and after property reform to claim inheritance rights for adopted children).
271. *See supra* Part I.A. (describing the conservative view of the adoptive relationship prevalent in American legal commentary).
272. Barbara Welke cautions that the "principal force" behind many of these reforms, particularly married women's property acts, was "to liberate land and men from the burdens of coverture." WELKE, *supra* note 30, at 46.
273. NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 218 (1982) (quoting Nash v. Mitchell, 71 N.Y. 199, 203–4 (1877)).
274. *See* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1179–89 (1994) [hereinafter Siegel, *Home as Work*]. Of course, nineteenth-century legislatures were themselves reluctant to go as far as feminist activists wanted them to, and Siegel argues that ultimately "legislatures and courts . . . collaborated in devising ways to reform the common law without threatening core aspects of the family relation." Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2140 (1994).
275. Siegel, *Home as Work*, *supra* note 274, at 1181–82.
276. *Id.* at 1183.

reason otherwise, the Court cautioned, would inevitably entitle a wife to "a right of action against the husband for any domestic service or assistance rendered by her as wife," a consequence the Court deemed too farfetched to entertain.[277]

Hendrik Hartog points to a similar episode in New York, concerning an 1860 statute declaring that a wife was "the joint guardian of her children, with her husband, with equal power, rights and duties with regard to them."[278] This was a radical provision. By the 1860s, the doctrine of the best interest of the child had made inroads into the father's presumed absolute authority over his children, and courts were likely to grant custody to separated mothers, though only if they deemed the reasons for separation legitimate—that is, related to the husband's failures or misdeeds.[279] To grant married mothers equal custody rights with their husbands, however, was a different proposition. Indeed, the New York Supreme Court's Appellate Division decided this went too far. As Hartog explains, the court seemed to believe that a literal reading of the statute "implied a transformation in the whole inherited structure of legal marriage."[280] And while the legislature was entitled to change the laws governing the people, the court concluded that such a radical transformation could only come through "very plain and explicit" language, for "nothing should be taken in favor of social anarchy and domestic anarchy, by implication."[281] The court's solution was to construe the statute to a nullity by reifying the husband's common-law rights, concluding that all the statute did was to give the wife "a form of custody that had to be exercised with her husband, 'not away from him or exclusive of him.'"[282]

These exercises in statutory interpretation exemplify what happens when legislatures pass statutes changing or derogating the common law and courts put such statutes through the "ordeal" of strict interpretation.[283] This canon is part of a broader phenomenon, a skeptical stance in American jurisprudence toward legislation, particularly legislation that redistributes property and thus threatens to transform American life.[284] Indeed, we should understand the canon as signaling

277. *Id.*
278. HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY, 212–13 (2000).
279. *See* Siegel, *Home as Work*, *supra* note 274, at 212; WELKE, *supra* note 30, at 67–68.
280. HARTOG, *supra* note 278, at 213.
281. *Id.*
282. *Id.* at 214.
283. *See* CALABRESI, *supra* note 17, at 4.
284. *See* HARTOG, *supra* note 278, at 291 (noting that judges regarded family law reform as "unjustified redistributions of rights and powers from husbands to wives"). This phenomenon extends beyond domestic relations law. Morton Horwitz, for instance, identifies an "antilegislative trend" in antebellum jurisprudence, a "widespread fear of legislatively authorized redistributions of wealth" that "overshadow[ed] the enthusiasm for eminent

a commitment to a particular vision of how legal change should happen: slowly and by accretion. Only slow and accretive change, the argument goes, can simultaneously recognize the changing needs of the people while protecting their settled expectations. Joel Prentiss Bishop's 1871 treatise on the law of married women offered a stark articulation of this view of legal change: "[E]xperience proves that the habits make the law, and not the law the habits; and that it is unnatural, and it tends to disturb the just repose of the community, to press forward a reform in either of these directions much in advance of the other."[285]

Of course, for Bishop and his contemporaries, arguments over legal change were also arguments over the relationship between common law and legislation.[286] To insist on slow and accretive change was also to insist on judicial supremacy, for it was judges who guarded the common law and thus judges who secured the proper rate of change.[287] Bishop explored this idea when he warned of the

domain as an important instrument of cheap economic growth." MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 259–60 (1977). In yet another context, John Witt has shown that Judge William Werner, who authored the opinion holding unconstitutional New York's first major workman's compensation statute, was committed to a vision of the judge as a "heroic guardian" who, in Werner's words, protected society from the "haste in the pursuit of passing phantoms." JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 159–60 (2004).

285. BISHOP, *supra* note 25, at § 881. I have followed Michael Grossberg's lead in using Bishop to illuminate this conservative vision of legal change. *See* GROSSBERG, *supra* note 27, at 291–92.

286. *Cf.* PARKER, *supra* note 15, at 16 ("The common law judge was uniquely privileged, far more so than any elected legislature, to 'read' the community that presented itself to him in his courtroom."). David Lieberman has identified a similarly configured debate in the British context. For instance, Lieberman argues that the Scottish jurist Henry Home, Lord Kames, argued that judicial equity was better than legislation at securing a harmony between people and their law. According to Kames, legislation always responded to particular circumstances but "automatically created a general rule." LIEBERMAN, *supra* note 25, at 163. But if the particular circumstance was actually an exception or anomaly, then the statute would hinder social function. By contrast, judges could respond to particular circumstances with particular decision which only acquired a general character through subsequent interpretation, itself responsive to new and particular circumstances. *See id.* Finally, discussing the jurisprudence of Justice Story, Morton Horwitz noted that his private law opinions tended to be highly "utilitarian and self-consciously attuned to the goals of promoting pro-commercial and developmental legal doctrines," whereas his public law opinions were "starkly formalistic, often antiquarian." HORWITZ, *supra* note 284, at 255. Horwitz explains this difference as a reflection of how Story thought legal change should happen:

> These differences . . . can be traced directly to an underlying conviction held by all orthodox nineteenth century legal thinkers that the course of American legal change should, if possible, be developed by courts and not by legislatures. The persistent formalism of public law, in short, was related to the infinitely greater threat of redistribution that statutory interferences with the economy presented.

Id. at 255–56.

287. Advocates of this approach would certainly not have called it judicial supremacy. They may instead have argued that legislatures must be mindful not to overstep the bounds of authority

consequences of codification. He depicted the common law as a "system of reason" that was "one of the great departments of our governmental structure."[288] Legislation was the opposite: "Statutes are not reason, they are mere command."[289] Americans, he argued, "need[ed] more reason, not less. We need jurists, and not pirates and thieves in legal literature. We need writings compact of the reason of the common law, not the naked legislative command which murders reason."[290] Taken together with the view of legal change in his treatise, Bishop's thoughts on codification betray a concern that legislation threatened to change too much too quickly; only the conservative function of the common law could ensure that legislative reforms did not "disturb the just repose of the community."[291]

In Hawai'i, by contrast, the common law offered an avenue to argue that adopted children could claim new rights under the kingdom's statutes. And the common law did so by working precisely as more conservative American lawyers and judges thought it should: by preserving settled truths in the face of legislative change. The crucial difference, of course, was the body of relevant common law: not the ancient common law of England and America, but, as Keohokalole put it in his brief, "ke kānāwai mana'o (common law)."[292] Keohokalole was certainly among the boldest in declaring a particular Hawaiian common law, though he was not the only legal actor to do so—other lawyers, along with the kingdom's Chief Justice, agreed with Keohokalole about the importance of Hawaiian attitudes on

given to them by the people, which required courts to narrowly construe legislation. *Cf.* Peterson, *Interpretation as Statecraft*, *supra* note 4, at 767–68.

288. JOEL PRENTISS BISHOP, COMMON LAW AND CODIFICATION 3 (1888).

289. *Id.*

290. *Id.* at 4.

291. BISHOP, *supra* note 25, at § 881.

292. This use of the common law sets Hawai'i apart from colonial contexts in which the relevant common law has been the law of the metropole, and the question has been whether the colonies get to claim it or not. *See* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 105 (2005) ("Throughout the colonial period, many had argued that the colonists did not enjoy English law and especially the common law by right, but the imperial agents in New York were the first to attempt to withdraw parts of the common law from the colony."); Christian Burset, *Why Didn't the Common Law Follow the Flag?*, 105 VA. L. REV. 483, 485–86 (2019) (arguing that whether a colony did or did not get the common law was a political decision by the metropole reflecting what kind of colony the metropole thought it was creating). In these contexts, non-British imperial subjects might seek ways out the common law, too, as Mitra Sharafi has demonstrated in her study of Parsi legal culture. *See* SHARAFI, *supra* note 21, at 5 ("Through the steady consumption of colonial law, the Parsis built up a knowledge of how legislation and litigation worked. This legal know-how enabled them to create pockets of autonomy right at the heart of state legal institutions.").

adoption as a backdrop for legislation.[293] Once Hawaiian common law came into view, judges were tasked with rendering statutory constructions that harmonized legislation with this culturally specific backdrop to produce slow and accretive change, which in this case would mean that adopted children should enjoy the same property rights as their biological counterparts. Thus, ke kānāwai manaʻo could produce a vision of adoption that comports with both modern ideas about the place of adopted children in the family and Hawaiian customs of the nineteenth century.

I want to add here two caveats. First, that these outcomes might reflect the importance of adoption in Hawaiian society is not to say that they preserved Kanaka Maoli views on adoption unaltered. Keohokalole's brief on behalf of Kaowaopa sidestepped the keiki hānai/keiki hoʻokama distinction, placing all adopted children in the same category. And second, Keohokalole's arguments relied on a cultural script that was meaningful for Chief Justice Allen, according to which the adopted child essentially took the place of the biological child.[294] This script did not necessarily reflect the role of adoption in Hawaiian culture, however, which did not attach stigma to the adoptive relationship and which therefore did not need to equate adopted children with biological children to render them as legitimate family members. These two moves preserved adoption's importance but scarified its diversity.[295] To borrow and alter a phrase, relying on the common law could work a sort of "transformation-through-preservation"—adoption would

293. *See supra* notes 145-148 and accompanying text (collecting examples in which other legal actors refer to Hawaiian customs as a common law).

294. *See supra* notes 259–261 and accompanying text (noting that Keohokalole likened Kaowaopa to a biological child).

295. In the early twenty-first century, a federal judge in Hawaiʻi allegedly suggested that because adoption was so prevalent in Hawaiian society, the "non-Hawaiian child of a woman who was the hoʻokama daughter of a Native Hawaiian father should be admitted to Kamehameha Schools, which has a preference policy for Native Hawaiian students." Sandowski & Walk, *supra* note 77, at 1136; *see also* Forman, *supra* note 13, at 327 n.32 ("Although [the court's] remarks were apparently transcribed by the court, the author has not been able to verify the accuracy of his reported statements."). This episode helps illustrate the stakes of the debates over adoption in the present-day context, and how they introduce a variable—membership in an Indigenous nation in a colonial context—that was not part of the debate under the kingdom. David Forman argues that even if an adopted child were able to establish inheritance rights as a hoʻokama child, "such facts would not necessarily confer rights upon him" to attend Kamehameha Schools. *Id.* at 345. This is a powerful reminder that the past rarely offers an obvious form of authority, and that we must always interrogate the ways in which relying upon the past occludes or confuses modern-day problems.

remain important but might lose some of the characteristics that made it distinctly Hawaiian.[296]

Moreover, I do not want to present Allen's reliance on Kanaka Maoli views on adoption as reflecting a broader openness toward Hawaiian ideas and values. In this regard, it mattered that the question at issue was the meaning of adoption. As noted in Part I, American attitudes toward adoption changed over the course of the nineteenth century. Hartwell articulated a waning but stubborn orthodoxy, while Allen drew from a rising affective view of adoption. From this vantage point, Allen could argue that Hawaiian ideas about adoption were compatible with the project of remaking the Hawaiian Kingdom in the image of Anglo-American law. That is to say, his reliance on the common law was preceded by a judgment that adoption was not incompatible with the broader project of transforming the kingdom.

Nonetheless, it is remarkable that lawyers in the Kingdom of Hawai'i could mobilize the common law to argue that statutes should be interpreted against a rich backdrop of Hawaiian customary practices, and that this exercise in contextualizing novelty yielded new rights for adopted children. Of course, this argument was ultimately unsuccessful. At most, it allowed a finite set of litigants to make claims on their adoptive parents' estates. But this failure, too, is instructive. For, in explaining why this interpretation of the kingdom's statutes could not prevail, Hartwell revealed the ways empire shaped his legal reasoning.

B. Civilization as a Canon of Statutory Interpretation

The common law's failure in the Hawaiian adoption cases was also the triumph of a reading of legislation that insulated statutes from Hawaiian worldviews and tethered them instead to Anglo-American ideas about blood, family, and property. In the hands of Justice Alfred Hartwell, legislation emerged as an instrument of radical legal change. Like several of his American contemporaries, he defended the legislature's power to bring about change that could address new and mounting problems beyond the common law's reach. In the American

296. Reva Siegel uses the phrase "preservation-through-transformation" to explain the ways in which the enforcement of different forms of status relationships can "chang[e] shape as [they are] contested," thus maintaining the viability of various forms of status subordination even as the social and political conditions that originally structured such status relationships disintegrate. Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–79 (1996); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

context, it was the people's demands that legitimated such change.[297] But in the shadow of empire, Hartwell did not anchor his statutory readings in the demands of the Hawaiian people. In his dissent in *Nakuapa II*, he conceived of statutes, instead, as instruments to change the people themselves. That he could do so, in turn, illuminates his view of Hawaiians as racialized legal subjects, on whom law could operate differently because of their race. Kānaka Maoli had to be brought to civilization before their worldviews could find expression in legislation.

Hartwell understood legal change much in the same way as Joel Bishop did: As the people changed, their laws changed.[298] It was "generally true," Hartwell wrote, "that the manners and customs of a people . . . express their character and established convictions, and are incorporated expressly or by necessary implication in their positive law."[299] Hartwell believed there was—or should be—a unity between the people's character and the laws governing them. It followed that legal changes tracked changes in the people themselves: "When the customs, needs and wishes of a people change, their laws of inheritance are likely to change also."[300] This account of legal change addressed the concern that changing the laws defeated the people's reliance interest in the existing legal regime by positing that the people had already moved past that regime and were themselves prepared for change.

But this view of legal change, by Hartwell's own account, did not work in Hawai'i. The kingdom, he argued, "present[ed] a remarkable instance of a change in the laws antedating a change in the general usages and convictions of the race."[301] Although he reiterated his sense that Hawaiian adoption practices were no longer "legitimate," he could not deny the persistence of adoption in Hawaiian society.[302]

297. In J. Willard Hurst's canonical phrase, the guiding principle in nineteenth-century American law was "release of energy," the belief that "the legal order should protect and promote the release of individual creative energy." JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 6 (1956). Of course, scholars have long pointed out that Hurst's framework offered, at best, a selective synthesis of American legal history, one which privileged the experiences of white Americans of a particular social class over those of other people living both in and outside the United States who did not, to say the least, find their energies released by American law. *See* WELKE, *supra* note 30, at 41–42; Hendrik Hartog, *Four Fragments on Doing Legal History, or Thinking With and Against Willard Hurst*, 39 LAW & HIST. REV. 835, 854 (2021) (noting limitations for those "who did not belong to what might clumsily and inadequately be called the middle class").

298. Take, for instance, Bishop's succinct articulation of something like a natural law governing legal change: "The habits of a community and the laws by which it is governed will, in some way, adjust themselves to each other, whether we think they ought to do so or not. This is a fact which the thinking part of mankind has always observed." Bishop, *supra*, note 25, at § 881.

299. *Nakuapa II*, 3 Haw. 342, 352 (1872) (Hartwell, J., dissenting).

300. *Id.*

301. *Id.* at 354.

302. *See id.* at 353–54.

The best he could do was speculate that Hawaiians cared deeply about both their long-held views and their new laws: "Native customs and ideas concerning the adoption of parents or of children . . . and many other subjects on which legislation from abroad has been introduced, are undoubtedly as dear and sacred to their minds as are the new forms of law."[303] This kind of reasoning—where the legislature imposes laws in tension with the people—would have raised red flags in the United States. There, courts adopted a conservative stance in statutory interpretation that reflected a Jacksonian fear that corruptible legislatures might exceed the authority delegated to them by the people.[304] Hartwell believed that Hawaiians regarded adoption as "dear and sacred."[305] Once he had taken that position, what could justify imposing on Hawaiians laws that Hartwell believed were in tension with their beliefs?

Part of the answer to that question resides in Hartwell's view of Hawaiians as racial others. Anglo-American missionaries and officials like Hartwell deployed "[r]acially coded understandings" of Hawaiians to justify their own authority in the kingdom's government, using race to naturalize their belief that Hawaiians were not capable of self-government without foreign guidance.[306] Hartwell's writings indicate that he understood adoption as a deviant social practice associated

303. *Id.* at 354.

304. *See* Peterson, *Interpretation as Statecraft*, *supra* note 4 at 767–71; Peterson, Statutory Interpretation, *supra* note 4, at 281. An important test of that delegation of popular authority arose in various efforts to transform the law of civil procedure in American states and territories in the latter half of the nineteenth century and the early twentieth century. Reformers looked to the proposed 1850 New York code, often copying large swathes of text from it. *See* Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132, 148–56 (2018). This textual reuse created a "problem of local sovereignty" by untethering the people from the laws that governed them. *Id.* at 143. An Iowa newspaper explained the problem thus: "To be governed by a foreign law, especially when that law is not preknown to the people whose conduct is to be regulated thereby . . . is something repugnant to the idea of Democratic Republican government." *Id.*

305. *Nakuapa II*, 3 Haw. at 354 (Hartwell, J., dissenting).

306. MERRY, *supra* note 12, at 75, 89. As discussed earlier, the conception of Hawaiians as "heathens" was simultaneously a racialization of Hawaiians as subjects in need of guidance and of Anglo-Americans as saviors capable of guiding them. *See supra* notes 163–64 and accompanying text. Jonathan Osorio has articulated a similar idea:

> In Hawai'i, although Native Hawaiians made up the majority of the population, many haole, like the Anglo-Saxon majorities in North America, believed that they should properly be in charge. It was their very foreignness that they believed was valuable to the government and the society. Their cultural and racial being, in their minds, gave them certain rights among traditional peoples everywhere and also guaranteed that there could be no successful nationhood in places like Hawai'i without their participation.

OSORIO, *supra* note 7, at 64–65.

with racial inferiority. Adoption, he noted, was common in "eastern countries" and associated with polygamy.[307] It was associated with Hawaiians' peculiar ideas on the "relations between the sexes."[308] Hartwell was convinced that new laws concerning domestic relations had "displaced the ancient customs of the Hawaiian family group which included polyandry and the adoption of children."[309] Hartwell's association between adoption and Hawaiian sexuality is particularly telling because it echoes racially charged efforts to naturalize an alleged Hawaiian inferiority by tethering it to Hawaiian sexual practices deemed uncivilized.[310]

Hartwell's writings thus suggest that he understood Hawaiians as racialized legal subjects—that is, legal subjects on whom law must operate differently because of their race.[311] Recognizing this racialization is critical, because it allows us to explain Hartwell's deviation from the traditional conservative view of the relationship between common law and legislation.

Hartwell inverted the relationship between common law and legislation embodied in the canon of derogation. As noted before, underlying that canon is a belief that legislatures do not lightly overturn the legal landscape on which a people have long relied. Hartwell assumed, by contrast, that whenever the Hawaiian legislature enacted statutes, it impliedly razed the existing legal landscape, even if it did not affirmatively say so. Hawaiian common law—which Hartwell identified only as "customs," "usages," or "ideas"—could not prevail (read: survive) in the face of statutory enactments. Hartwell did not care for preservation or continuity. Instead, he rendered statutes as tools well-suited for the project of remaking the Hawaiian family—well-suited because statutes would not have to contend with the

307. *Nakuapa II*, 3 Haw. at 352 (Hartwell, J., dissenting).
308. *In re* Maughan's Estate, 3 Haw. 262, 267 (1871).
309. Alfred Stedman Hartwell, *Forty Years of Hawaii Nei*, *in* FIFTY-FOURTH ANNUAL REPORT OF THE HAWAIIAN HISTORICAL SOCIETY 9, 14 (1945). Hartwell seems to have written drafts of this piece in the last years of the nineteenth century and the early years of the twentieth century.
310. *See* MERRY, *supra* note 12, at 236–42.
311. Scholars who have considered the role of race in legal arguments in the Hawaiian context have tended to focus on the territorial and statehood periods. *See, e.g.*, ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 178–210 (2008) (discussing the legal transformation of Hawaiians from "subjects of Queen Lili'uokalani" to "racial types"); Troy J.H. Andrade, *Belated Justice: The Failures and Promise of the Hawaiian Homes Commission Act*, 46 AM. INDIAN L. REV. 1, 18 (2022) (arguing that the Hawaiian Homes Commission Act of 1920 "provided an opportunity for the ugliness of America's poisonous obsession with race to penetrate Hawai'i and divide Hawaiians"); Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2689 (2022) (discussing efforts by the Supreme Court in *Rice v. Cayetano*, 528 U.S. 495 (2000) to "collapse[] ancestry into race, walling the two off from Indianness and eliminating indigeneity and colonized status as separate frames of legal inquiry"). Hartwell's reasoning in these cases suggests ways in which ideas about race informed legal argument during the kingdom period.

common law and could redefine relationships and entitlements wholesale. There is something familiar to us moderns in Hartwell's view of legislation. We, too, assume that legislature is "the government's most direct representative[] of the people," and as such is entitled to have "the last say."[312] These representative bona fides allow the legislature to remake the world as needed and make us suspicious of attempts to circumscribe the ability of the legislature to enact change.[313]

But this familiarity is superficial. Hartwell did not legitimize upending the Hawaiian legal landscape through statute by alluding to the demands of the Hawaiian people. He viewed Kānaka Maoli, after all, as racialized legal subjects who had to be changed, to be civilized. Thus, radical legislative transformations did not derive their legitimacy from democratic principles or representative competencies. Instead, it was empire that provided both the impetus behind legal change and the source of its legitimacy. Hartwell set all of this out in a breathless sentence:

> The Hawaiian native leaders, trusting the good sense and wisdom of their foreign friends domesticated here, foreseeing the advantages of a certain, definite and codified system of law and the necessity of applying to the changed circumstances of the nation a theory of law which should foster the accumulation of property and induce foreign powers to recognize a country ruled in a secure and consistent manner, caused the enactment of a code of laws which in many respects were radically at variance with former national customs, and in advance of the usages of the people at large.[314]

Granted, Hartwell did pay lip service to the political authority of "Hawaiian native leaders."[315] But after acknowledging the chiefs' agency in transforming the kingdom, he sketched the structural limitations conditioning their agency: the advice of "foreign friends," the needs of property holders (he had earlier alluded to the kingdom's "enlightened and acquisitive community"[316]), and the need for foreign recognition. These structural conditions cast an imperial shadow on the kingdom, threatening Hawaiian sovereignty from the outside and demanding internal reorganization to accommodate foreign desires. Empire explained why legal change was legitimate despite the tension between Hawaiian worldviews

312. CALABRESI, *supra* note 17, at 4.
313. In this sense, modern American legal culture is quite different from nineteenth-century American legal culture. As Kunal Parker has argued, for many nineteenth-century Americans, "the world was, in crucial ways, beyond the power of the democratic subject to remake." PARKER, *supra* note 15, at 14.
314. *Nakuapa II*, 3 Haw. 342, 354 (1872) (Hartwell, J., dissenting).
315. *Id.*
316. *Id.* at 353.

and the new laws: if Kānaka Maoli stuck to their preexisting beliefs, they would be deemed unfit for independence in the eyes of imperial powers.

Indeed, it is worth noting that Hartwell seemed to understand the interpretive problems raised by these cases as imperial problems. This became clearest in his comparison between the Hawaiian context and India under British rule. "English statutes," he observed, "expressly permit Mohamedan, Hindoo and Gentoo law to be retained in India with English law. But for this statutory reservation, it is hard to see how the statutes could have been set aside by distinct customs and laws of an opposite nature."[317] Had the English statutes not affirmatively preserved these bodies of customary law, he argued, the statutes would have eliminated custom. Statutes in India thus allowed the customs of colonized peoples to persist while also setting out the boundaries of customary authority. Put another way, statutes articulated the limits of legal and cultural difference in empire, lest "laws of an opposite nature" become part of the law of empire.[318] What he advocated in Hawai'i—that statutory silence be interpreted as eliminating Hawaiian common law—seemed to stem from how he thought statutes worked in other imperial contexts.

For Hartwell, then, empire operated as a constraint or condition on the exercise of legislative power, creating an interpretive presumption that statutes erased rather than preserved Hawaiian common law. Hartwell's adoption jurisprudence thus suggests a civilizational canon of statutory interpretation: assume that whenever the legislature enacts a statute, it is ignoring whatever existed before, for the statute is a building block in a project to civilize the Hawaiian people. Imperial conditions thus meant that law operated differently in Hawai'i than it did in the United States. Theorizing legal change in America as Hartwell did in Hawai'i would raise troubling questions about law's legitimacy. But in the Hawaiian context, the likes of Hartwell thought this theory of legal change was necessary to produce a civilized nation that could be recognized by imperial powers. Hawaiian common law threatened to get in the way of this imperial project, and thus could not be relied upon to discern the meaning of legislation. In the shadow of empire, lawyers and judges structured the relationship between common law and legislation in a way that was familiar to American law, but which relied on premises that contravened fundamental faiths in American legal thought.

317. *Id.*
318. *Id.*

CONCLUSION

Let us return to the Hawaiian chiefs and their responses to the kingdom's nineteenth-century crises. Scholars agree that one of their responses—perhaps the most distinctive one—was to adopt Anglo-American law.[319] The chiefs created an Anglo-American legal system—one that borrowed some aspects of Hawaiian governance,[320] but which cohered into a set of institutions very similar to those of an American jurisdiction.[321] Scholars disagree about how best to understand the rise of this legal system, but they tend to agree that what the chiefs imported and what they created was essentially Anglo-American law.

The Hawaiian adoption cases call this agreement into question. Specifically, these cases suggest a critical difference in judicial attitudes toward the common law between Hawai'i and the United States. This difference, in turn, had important ramifications for the meaning of statutes. The common law was, after all, "an integral mode of governance and public discourse" in nineteenth-century America.[322] It was not only a body of judge-made law. It was also a habit of mind that allowed legal actors to organize social phenomena in ways that imbued them with legal implications: for instance, by portraying adoption as a legislative fiction that threatened to rupture a picture of the family inherited from ancient times. Indeed, so crucial was the common law in American governance and legal thought that Chief Justice Allen would simply assume there to be a distinctly Hawaiian common law, and the Kanaka Maoli lawyer Keohokalole would go so far as to coin a Hawaiian term for the common law—ke kānāwai mana'o—to anchor his arguments.

319. Burset, *supra* note 292, at 539 n.313 (noting that Hawai'i sits uneasily in assessments of American colonial policy that emphasize the persistence of multiculturalism because the kingdom "voluntarily adopted Anglo-American law").

320. Kamanamaikalani Beamer argues that the chiefs created a legal system that "was neither completely Anglo-American nor 'traditionally' Hawaiian"; but a "combination of both." BEAMER, *supra* note 9, at 123. I agree with Beamer that some elements of post-reform Hawaiian governance borrowed from Hawaiian traditions, thus introducing important differences into various areas of Hawaiian law, like landownership and water rights. I will address these differences in future work.

321. Indeed, this is how Hartwell portrayed Hawaiian legal institutions in his reminiscences:

> The system of law was not, I am happy to say, the code system, but that of the common law of England, the procedure being similar to that of Massachusetts. I brought the Massachusetts reports with me and found that cases were prepared and decided about as they would be in that state. There was much admiralty practice, and in this as in equity cases, a New England lawyer found himself quite at home.

Hartwell, *supra* note 309, at 14.

322. PARKER, *supra* note 15, at 1.

As I have shown, Hawaiian common law was defeated by legislation in a way that seems familiar today. But that familiarity is misleading because it conceals the role that empire played in structuring the interpretation of statutes. The statutory elimination of Hawaiian customs and traditions had nothing to do with the representative values Americans generally assign to legislation. It was, instead, a step toward remaking Hawaiian society to comport with the demands of civilization. The refusal to treat Hawaiian customs as a common law—and thus as a legislative backdrop—in these adoption cases thus points to a crucial way in which Hawaiian law differed significantly from Anglo-American law.[323] This difference was rooted in the demands of empire.

At the same time, it would be a mistake to think that the idea of civilization only influenced the interpretation of law in Hawai'i.[324] Worldwide, liberal justifications of empire invoked the concept of civilization to explain why European colonizers could treat colonized subjects in ways that offended liberalism's claims to universality.[325] And the colonial conditions of nineteenth century Hawai'i revealed civilizational anxieties that were ubiquitous in America as well. In the aftermath of the American Revolution, jurists like Chancellor James Kent were anxious to articulate an American common law that recognized American difference while

323. This is not to suggest that American lawyers and judges did not bring civilizational concerns into their work in the United States. As Kent Newmyer noted long ago, the likes of Joseph Story were preoccupied with ensuring that the American republic followed a particular course of social and economic development foreordained by history's inherent logic of progress. *See generally* Kent Newmyer, *Justice Joseph Story, The Charles River Bridge Case and the Crisis of Republicanism*, 17 AM. J. LEGAL HIST. 232, 239 (1973) ("What Story wanted to achieve through law was not just economic expansion, as some historians have assumed, but economic expansion *and* the preservation of Republican morality."); R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, 74 J. AM. HIST. 814, 825 (1987) (noting that the German-American jurist Francis Lieber believed lawyers "were destined to be agents in God's 'vast plans for the development of civilization, and in the great mental exchange of the moving nations of the earth'").

324. Indeed, a similar puzzle about legal change arose in Puerto Rico, where the idea of civilization took a different tone. Attorney General James Harlan publicly opposed radical legal change in the aftermath of American annexation. "The work of revision," he wrote, "will doubtless by conducted, as it should be, with conservatism and without sudden or radical changes." Eulalio A. Torres, *The Puerto Rico Penal Code of 1902–1975: A Case Study of American Legal Imperialism*, 45 REV. JUR. U.P.R. 1, 29 (1976) (quoting 1901 P.R. Att'y. Gen. Ann. Rep. to U.S. Att'y Gen. in I Op. Att'y Gen. P.R. 245). After all, Puerto Rico had been under "Spanish civilization," and "that civilization is not devoid of a jurisprudence of high character." *Id.* Nonetheless, Harlan would go on to chair a legislative committee that proposed a new set of codes for Puerto Rico, which he would describe as "taken . . . almost word for word . . . from the penal code and code of procedure of the State of California." *Id.* at 30.

325. *See* PITTS, *supra* note 35, at 15.

preserving America's connection to European civilization.[326] Ideas about civilization were also embedded in the concept of "liberty" that organized much of late-nineteenth-century American jurisprudence.[327] As Robert Gordon has argued, this form of liberty presupposed an "individual character" that was "a complex social product, the outcome of a long, slow process of historical evolution toward a civilized society peopled with civilized individuals—of inherited traits, inherited institutions, and a thick web of supporting social arrangements and institutions."[328] Sometimes, the project of imposing civilization invited reading statutory ambiguity against people deemed to lack the requisite character, as in the Hawaiian case. But the idea of civilization could also operate in other ways. Military command, for example, could interpret the laws of war in ways that justified massacring Indian women and children but not white Confederate women and children, for the latter belonged to civilization while the former stood outside it.[329] Ideas about civilization also operated to guard and shape the polity. Federal administrators could interpret federal statutes to deny American citizenship to foreign-born children on the theory that marriage was "an institution of our civilization," such that birth to parents married under the laws of "uncivilized lands like Samoa" could not support a claim to citizenship.[330]

Indeed, wherever marriage came up, civilization and its strictures were not far away. Recall that, for Hartwell, adoption invited the specter of polygamy, and thus threatened civilization. This same anxiety would reach the U.S. Supreme Court a few years later. When Mormons tried to argue that a federal prohibition against polygamy turned them into "mere colonists" in a way that the

326. *See* HULSEBOSCH, *supra* note 292, at 277.
327. *See* Gordon, *supra* note 30, at 380.
328. *Id.*
329. One of the perpetrators of the 1864 Sand Creek Massacre—where Union forces attacked Chief Black Kettle's band of Cheyenne and Arapaho Indians—recalled that "[i]t was not easy to distinguish the sexes during the fight," but that it was "on purpose during that battle to kill old and young of both sexes." HELEN M. KINSELLA, THE IMAGE BEFORE THE WEAPON: A CRITICAL HISTORY OF THE DISTINCTION BETWEEN COMBATANT AND CIVILIAN 100 (2011). By contrast, "[n]o such massacres occurred in the Confederate South," which Helen Kinsella attributes to the fact that military command thought "Indians lay somewhere beyond the bounds of civilized warfare." *Id.* at 101. After the Civil War, moreover, military command was confident that "the rules of civilized war no longer put undue restraints on the soldiers" fighting against Indians. JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 337 (2012).
330. Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2163 (2014).

U.S. Constitution would not allow,[331] they found a Supreme Court ready to read the Constitution through the lens of "civilization."[332] Marriage, the Court reasoned, provided "the principles on which the government of the people . . . rests," and the trouble with polygamy was that it led "to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism."[333] With democracy and civilization at stake, the U.S. Congress could not be denied the power to enact prohibitions against polygamy in the territories.[334]

All these legal interpreters may not have agreed on what, precisely, civilization required,[335] but it is undeniable that they converged around white supremacy and gender hierarchies.[336] Lawyers, judges, legislators, and administrators, in other words, were not isolated from the powerful social and cultural ideologies used to naturalize domination and power. They brought those ideologies into the interpretation of law. The Hawaiian history sketched here allows us to see this more clearly, to understand how lawyers and judges could articulate a relationship between legislation and common law to wield law as a civilizing instrument. But Hawai'i only reveals a deeper truth—that we cannot fully understand legal interpretation without accounting for how civilizational anxieties have shaped how legal actors understand law itself.

331. SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 125 (2002).
332. *Id.* at 121–22 ("The [*Reynolds*] opinion reassured congressmen, lobbyists, newspaper editors, and husbands and wives in the states that the marital structure they inhabited was indeed the very marrow of the Constitution, the highest expression of civilization, and the essential building block of democracy.").
333. Reynolds v. United States, 98 U.S. 145, 165–66 (1878).
334. *See id.* at 166.
335. As Gail Bederman has explained, "civilization" was "protean in its applications." BEDERMAN, *supra* note 22, at 23.
336. *Id.* ("'Civilization,' as turn-of-the-century Americans understood it, simultaneously denoted attributes of race and gender.").