The “Civilization” Canon:

Common Law, LEgislation, and

The CAse of Hawaiian ADoption

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Abstract

In recent years, scholars have made substantial headway uncovering the many ways our traditional understandings of the Constitution have failed to grapple with American empire and colonialism. This work has demonstrated, among other things, that the nation’s history of mistreating Indigenous Peoples is constitutive of America’s 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 is one that does not attach special significance to the demands of empire. Yet that may be a mistake. Much like American constitutional design, the act of statutory interpretation has not been neutral with respect to empire; it has sometimes aided and abetted it. As I demonstrate through a reconstruction of a fraught yet underappreciated debate over the law of adoption in nineteenth century Hawai‘i, judges construed statutes not in keeping with traditional interpretive theories, but rather with the stated aim of “civilizing” Hawaiians. Empire, in other words, had two bites at the apple: it both drove the adoption of statutory regimes modeled after Anglo-American law and returned as a tool for construing statutory ambiguity against Hawaiians. In relying on this “civilization” canon, moreover, judges articulated Hawaiians as racialized legal subjects who had to be transformed before courts would presume that the legislature meant to preserve their worldviews in statutes.

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# Introduction

Conventional accounts of statutory interpretation tend to omit considerations of empire and colonialism. It is understandably difficult to imagine where colonialism might fit in statutory interpretation, particularly since debates in the field tend to proceed from assumptions about the relationship between the legislature and the courts.[[2]](#footnote-2) These debates can assume that courts and legislatures are institutions with inherent competencies and prerogatives, truths going back to the nation’s origins that remain true today.[[3]](#footnote-3) In fact, however, the relationship between these institutions, and their relative lawmaking powers, have changed over the nation’s history.[[4]](#footnote-4) Moreover, this change has not taken place in a vacuum; context matters. And as recent scholarship has emphasized, empire and colonialism are important and oftentimes overlooked parts of that context.[[5]](#footnote-5)

Indeed, scholars of Federal Indian law have persuasively argued that heeding the colonial context is necessary to properly interpret federal legislation affecting Indian tribes. Because the Supreme Court has refused to identify constitutional limitations on Congress’ power over the tribes, statutory interpretation has played a key role in mediating, and sometimes mitigating, the blow of colonial legislation.[[6]](#footnote-6) Thus, for example, Philip P. Frickey argued that the doctrinal foundations of Federal Indian law required Congress to explicitly state “whether future exercises of colonialism should occur,” rather than expect courts to fill in gaps left behind.[[7]](#footnote-7) Courts have developed a set of interpretive canons “unique to Indian law,”[[8]](#footnote-8) and the Supreme Court has warned that “the standard principles of statutory interpretation do not have their usual force in cases involving Indian laws.”[[9]](#footnote-9) In other words, colonialism works to modify the relationships between courts and legislation; whatever theories and methods of statutory interpretation apply elsewhere must be modified to reflect the fact that we live in an age that is, at the very least, skeptical of colonialism and the racial logics that buttress it.[[10]](#footnote-10)

It would be a mistake to assume that only the field of Federal Indian law bears the mark of colonialism. To the contrary, this Article provides a powerful example of how empire shaped standard tools or principles of statutory interpretation. I do so by reconstructing a fraught yet underappreciated debate over the meaning of Hawaiian statutes of adoption and descents. 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 common law serves as a legislative backdrop. 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 Hawaiians shaped the exercise of statutory interpretation, functioning as a pro-empire interpretive canon.

 In arguing that empire has shaped judicial practices of statutory interpretation in ways that harm Indigenous Peoples, this Article contributes to a growing literature that uses the frame of empire to recast or provide a more complete picture of the development of American law.[[11]](#footnote-11) In recent years, scholars have worked to center empire in the study of law as a means of correcting a tendency to “erase[] . . . the colonial structure of the American past.”[[12]](#footnote-12) Legal scholars of empire advance a similar argument to that put forth by legal scholars studying slavery: these historical phenomena are constitutive of America’s present moment.[[13]](#footnote-13) I add to this literature an example not only of how laws could be enacted to carry out imperial policies, but of how reasoning about law itself could be shaped by imperial conditions.[[14]](#footnote-14)

The events I reconstruct here took place when the Hawaiian Kingdom remained an independent polity, which in turn requires clarification on my use of the terms “empire” and “colonialism” and their derivatives. Nineteenth-century Hawaiian chiefs hoped that wide-ranging reform could help fend off threats to Hawaiian sovereignty from marauding Euro-American powers circulating the Pacific.[[15]](#footnote-15) The theory was that rendering Hawaiian governance in forms familiar to these Euro-American powers would compel recognition of Hawaiian sovereignty.[[16]](#footnote-16) To this end, the chiefs repurposed existing governance practices and imported expertise in the form of Anglo-American legal actors and texts.[[17]](#footnote-17) These adaptations happened under duress, in the shadow of empire.[[18]](#footnote-18)

This means that empire functioned both as external pressures and as the arbitrary standards which conditioned Hawai‘i’s place “among the civilized nations of the earth.”[[19]](#footnote-19) The kingdom had to enact “racialized and gendered socioeconomic hierarchies according to an invented Eurocentric standard.”[[20]](#footnote-20) These arbitrary and invented standards constituted a “civilizational ideology.” When I refer to imperial conditions or anxieties, I am referring to the concern and effort that went into giving effect to this ideology by establishing and maintaining lines between “civilized” and “uncivilized” practices. Importantly, legal actors relied on racial beliefs to justify drawing and maintaining these lines. Here, I focus on such line-drawing in the context of reforming the Hawaiian family by privileging the heterosexual marital union and its children at the core of “family.”

The ease in reforming the Hawaiian family is a stark contrast to the difficulties with reforming family law in nineteenth-century America.[[21]](#footnote-21) These different trajectories are a product of empire, reflecting different attitudes toward American and Hawaiian common law. In the United States, judges beholden to the past would often insist that legislative innovations in family law must be harmonized with American common law. But in Hawai‘i, the Anglo-American judges who came to control the kingdom’s Supreme Court came to see the background customs that some called the Hawaiian common law as an obstacle to “civilization.” They theorized statutes as tools to uproot Hawaiian worldviews to change the people, which implied a view of Hawaiians as racialized legal subjects who had to be changed before their worldviews found expression in legislation.[[22]](#footnote-22) There was a biting irony here: to “civilize” Hawaiians, law had to operate in ways that contravened assumptions about common law and legislation in America.

To develop this argument, I reconstruct litigation around the rights of adopted children in Hawai‘i to inherit from their adoptive parents.[[23]](#footnote-23) These efforts involved the interpretation of the kingdom’s statutes on adoption and descents, enacted by a legislature made up mostly of Hawaiian legislators, but in which non-Hawaiian legislators and other state actors held sway.[[24]](#footnote-24) The Hawaiian Supreme Court interpreted these statutes in ways that yield two important insights. The first is the surprising potential of the common law as an aid to adopted children’s claims. Lawyers in the kingdom relied on Hawaiian common law to articulate a “fictional continuity” between the times before and after family reform.[[25]](#footnote-25) 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 highlight articulations of rights claims rooted in the past in ways that are surprising given the regressive interpretations of statutory change some associate with the common law.[[26]](#footnote-26)

This interpretation of the kingdom’s statutes lost, however, and its failure offers a second important insight. These cases might stand for the commonplace assumption that the legislature has the power to modify the common law.[[27]](#footnote-27) This assumption reflects the belief that the legislature best represents the people.[[28]](#footnote-28) But the resolution of the Hawaiian adoption cases had nothing to do with the legislature’s representative competencies.[[29]](#footnote-29) Instead, the triumph of legislation, the ability of statutes to ignore and erase Hawaiian common law, reflected the imperial demand that law operate as an instrument to “civilize” the Hawaiian people.[[30]](#footnote-30)

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 was a crucial and flexible form of kinship long before the mid-century reforms and remained so thereafter. I use adoption to frame a question about the kingdom’s mid-century transformation: when the Hawaiian legislature enacted statutes regulating adoption and descents, was it importing an American understanding of that relationship or codifying Hawaiian practices?

Part II draws on judicial opinions, private correspondence, probate records, court testimony, and lawyers’ archival papers, to explore two answers to this question. On one reading, the statutes preserved what they did not explicitly eliminate, leaving in place the centrality of adoption in Hawaiian society. On another reading, the statutes created new family relationships with no relation to how Hawaiians understood family before reform. The Hawaiian Supreme Court largely adhered to the latter reading.

Part III then 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.”[[31]](#footnote-31) 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.[[32]](#footnote-32) Canons might provide interpretive rules, but you still need a rule to pick a rule.[[33]](#footnote-33) In the cases I reconstruct here, empire operated as such a meta-rule: pick the reading of the statute that advances the goal of “civilizing” Hawaiians. In relying on this “civilization” canon, judges articulated Hawaiians 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 nineteenth century. This Part begins by reconstructing adoption in America and Hawai‘i to highlight the different lenses through which Americans and Hawaiians understood this form of kinship.[[34]](#footnote-34) In American legal literature, adoption remained 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. Hawaiians, by contrast, practiced two forms of adoption—*hānai* (to feed) and *ho‘okama* (to make a child)—neither of which carried any stigma. Moreover, these different forms of adoption were common across Hawaiian society.

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 quite foreign to Hawaiian society, adoption legislation enacted in the 1840s raised a puzzle: were these statutes impositions of foreign law, or codifications of Hawaiian practice? This question, as we will see in Part II, turned the rather mundane exercise of interpreting statutes into a site of contest over the relationship between common law and statute in the kingdom.

## Adoption in America

American legal culture inherited the English suspicion towards adoption, itself grounded in a desire to “protect the property rights of blood relatives in cases of inheritance” and “a moral dislike of illegitimacy.”[[35]](#footnote-35) Of course, even in England and colonial America children moved between households. But whereas today we more readily think of adoption as the construction of affective ties, the movement of children between households in the Anglo-American world was tethered instead to various forms of child labor.[[36]](#footnote-36) 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 in favor of the belief that children could be molded into good adults.[[37]](#footnote-37) 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.[[38]](#footnote-38) 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.[[39]](#footnote-39)

This new view of childhood and the family transformed American jurisprudence around child custody.[[40]](#footnote-40) American law continued to favor a father’s right to his child’s labor, 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.[[41]](#footnote-41) 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.[[42]](#footnote-42) 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 put them in orphanages, but to ship them out the countryside, where they would come under the influence of farmers.[[43]](#footnote-43)

It was in this context that American states began reforming the law of adoption. Although adoption was not 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.[[44]](#footnote-44) Adoptive parents could request a private legislative bill changing the child’s name to match theirs, thus legalizing an informal relationship.[[45]](#footnote-45) This legislative process gave way to a new legal means of adopting children in 1851, when Massachusetts passed a new law sending would-be parents to the courts, where a judge would probe their ability to care for their would-be 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.[[46]](#footnote-46) This new mechanism for adopting children “spread at a phenomenal rate,” and earlier resistance to adoption had been overcome across the several states by the end of the nineteenth century.[[47]](#footnote-47)

But even as earlier resistance abated, suspicion around adoption remained, particularly in the inheritance context.[[48]](#footnote-48) For several American legal commentators in the late-nineteenth and early-twentieth centuries, adoption ran counter to core assumptions about the “natural” ordering of American kinship.[[49]](#footnote-49) Adoption differed from heterosexual marriage, which, like adoption, was socially constructed, but which legal commentators regarded as foundational in American life.[[50]](#footnote-50) 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.”[[51]](#footnote-51) 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 the mother remain[ed] unwed.”[[52]](#footnote-52)

Adoption also ran against “nature” in a more fundamental sense, negating a “natural” relationship between parent and child. We hear echoes of this view of across the decades between Reconstruction and the advent of 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.”[[53]](#footnote-53) 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 that child issued.”[[54]](#footnote-54)

The sense that adoption was “unnatural” translated into arguments that adoption was a legislative derogation of the common law that should be narrowly construed.[[55]](#footnote-55) For example, although biological children were not required to pay a collateral inheritance tax under Pennsylvania law, an adopted child owed this tax because the legislature did not extend that exemption to adopted children, and “[g]iving an adopted son a right to inherit, does not make him a son in fact.”[[56]](#footnote-56) Similarly, adopted children faced steep challenges in articulating claims to the estates or testamentary bequests of their adoptive parents’ biological kin.[[57]](#footnote-57) 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.[[58]](#footnote-58) 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.”[[59]](#footnote-59)

Adoption’s advocates did not deny the importance of “nature”; instead, they argued that adoption reproduced “nature” through 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.”[[60]](#footnote-60) Indeed, Americans developed a cultural narrative that normalized 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 were already erasing distinctions between adopted and biological children.[[61]](#footnote-61) But America’s cultural narrative around 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.[[62]](#footnote-62) 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.[[63]](#footnote-63)

## Adoption in Hawai‘i

As Americans looked askance at adoption in the nineteenth century, Hawaiians took a very different view. They practiced two different forms of adoption. One was called *hānai*, which has several meanings, including “to feed.”[[64]](#footnote-64) The other was called *ho‘okama*, which means “to make a child.”[[65]](#footnote-65) 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.[[66]](#footnote-66) 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 “informally” part of the family). This clear and obvious vision of the family is a poor tool with which to understand the Hawaiian world of the nineteenth century, in which legal reform introduced new kinds of relationships with ideological attachments to property that did not exist in Hawai‘i before reform. This presentism gets in the way of understanding the centrality of adoptive practices in Hawaiian society. And it is crucial that we reconstruct this centrality, for it allowed litigants and lawyers in the kingdom to articulate different understandings of family and property.

This section reconstructs Hawaiian 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 ho‘okama, 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, I want to show that adoptive practices were a crucial form of kinship in Hawaiian society that was not understood narrowly, as Americans did, through the reproduction of “natural” kinship. Nonetheless, the distinction between ho‘okama 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.

Everywhere in the kingdom over the course of the nineteenth century children moved from one household to another, often in different islands, to live with relatives other than their biological parents. Although Hawaiians also used adoption to bring non-related children within the family,[[67]](#footnote-67) the prevalence of this 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 *‘ohana*, or extended family.

The word ‘ohana means “offshoots” or “that which is composed of offshoots”[[68]](#footnote-68)—a reference to the *kalo* (taro) plant, the elder sibling of the Hawaiian people.[[69]](#footnote-69) 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”[[70]](#footnote-70): for instance, children could refer to all males in the parents’ generation as *makua kāne* (father), and to the females as *makuahine* (mother).[[71]](#footnote-71) This vision of kinship provides helpful context for the practice of adoption. In 1834, the American missionary Sarah Lyman wrote that “very few Hawaiians have children of their own” but that “almost all have adopted children.”[[72]](#footnote-72) What Lyman witnessed, but perhaps did not understand, was how the framework of ‘ohana 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.[[73]](#footnote-73) 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.”[[74]](#footnote-74)

This form of adoption served a wide range of functions. One particularly important one, which continues to this day, was for grandparents to impart crucial social and cultural knowledge to younger generations.[[75]](#footnote-75) For example, the Hawaiian scholar Mary Kawena Pukui was taken by her maternal grandparents in the late nineteenth century. They taught her Hawaiian and her family’s genealogy. “Every day,” Pukui recalled, “Grandmother would quiz me: ‘Do you remember the place we went to yesterday and the *‘amakua* [ancestral guardian] who guards it?’ . . . I memorized our family history.”[[76]](#footnote-76) Pukui also learned how to manage family relations, “what to do when a family member dies, how to talk to quarreling members, and how *ho‘oponopono* [rectification gatherings] helped keep family harmony.”[[77]](#footnote-77) Adoption, therefore, could foster a bond between generations to transmit critical knowledge about the reproduction of the ‘ohana.

Hawaiian adoptive practices could also help elder or ailing ‘ohana members secure care, as suggested by two stories from the kingdom’s probate records. Take, for example, the adoption of a boy named Abenela by his uncle, Kā‘ailauhala. In the 1840s, Kā‘ailauhala was living in Honolulu. At some point before 1847, he fell 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 [Kā‘ailauhala] . . . one of his children.”[[78]](#footnote-78) One witness claimed that by 1847 Kā‘ailauhala “was lo-lo [likely *lōlō*, meaning paralyzed] and continued to be so till he died.”[[79]](#footnote-79) Perhaps 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.”[[80]](#footnote-80)

Consider another story of old-age care through adoption. The story comes from the 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.”[[81]](#footnote-81) Samuela’s adoption was critical in bringing Kapu and Hū‘eu together. 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.”[[82]](#footnote-82) In this case, then, the care Samuela received led Kapu to care for Hū‘eu.

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.”[[83]](#footnote-83) The probate proceedings for the estate of a man named Kanehailua illustrate this point. Kanehailua was married to a woman named Kahaleahuawa, whose younger sister, Kamanahiwa, had two children—a boy named Napua and a girl named Kamokulei. Kanehailua and Kahaleahuawa adopted their niece, Kamokulei, after Kamanahiwa passed away. The girl’s biological father recalled the moment of the adoption: “at 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 she the younger sister could take Kamokulei and bring her up.”[[84]](#footnote-84)

Beyond its social functions in reproducing family knowledge and securing family care, adoption was also an important tool in Hawaiian politics. This was a lesson to be drawn from the serialized genealogy of Kamehameha I written by the Hawaiian intellectual Joseph Moku‘ōhai Poepoe and published in the Hawaiian-language newspaper *Ka Na‘i Aupuni* in the early twentieth century.[[85]](#footnote-85) In tracing Kamehameha’s lineage back to Papa (the earth-mother) and Wākea (the sky-father), Poepoe told a story of how adoption functioned as a tool of chiefly alliances. 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.[[86]](#footnote-86) Haumea assisted in the birth by administering medicinal plants, and in exchange she asked for the child as her hānai.[[87]](#footnote-87) By this time, the current ruler of the island—Kumuhonua—has demonstrated that he is not a *pono* (righteous) ruler, and Haumea has articulated reasons why he should no longer control the land.[[88]](#footnote-88) In taking the child of one of the islands’ high-ranking chiefs as her hānai, Papa lessened the chances that ‘Olopana might turn against Papa and Wākea when they challenged Kumuhonua’s rule.[[89]](#footnote-89)

Consider but one example of how adoption shaped the lives of Hawai‘i’s rulers: that of Queen Lili‘uokalani, who was the hānai daughter of Abner Pākī and Laura Konia. During the probate proceedings for Pākī’s estate, Lili‘uokalani’s biological father recalled that as “soon as [Lili‘uokalani] . . . was born, Paki and his wife . . . asked me to give them the child. I and my wife both agreed to it. They took the child at the 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.”[[90]](#footnote-90) In her memoir, Queen Lili‘uokalani remarked that the practice of having children raised by other relatives or by close friends was widespread across Hawaiian society. This practice, she wrote,

was, and indeed is, in accordance with Hawaiian customs. It is not easy to explain its origin to those alien to our national life, but it seems perfectly natural to us. As intelligible a reason as can be given is that this alliance by adoption cemented the ties of friendship between the chiefs. It spread to the common people, and it has doubtless fostered a community of interest and harmony.[[91]](#footnote-91)

Adoption was thus common across Hawaiian society. And unlike in the United States, where adoptive kinship carried with it social stigma,[[92]](#footnote-92) the fact that Hawaiians did not hide the adoption shows that they did not attach prejudice to either hānai or ho‘okama relationships.

As I noted earlier, however, this does not mean that the two relationships were the same. Indeed, in the inheritance context, they could acquire important differences.[[93]](#footnote-93) Before the creation of private property in land in the 1840s,[[94]](#footnote-94) Hawaiian inheritance practices were tied to the transmission of authority among the chiefs.[[95]](#footnote-95) According to Samuel Mānaiakalani Kamakau, perhaps the most famous Hawaiian intellectual of the nineteenth century, *keiki ho‘okama* (ho‘omaka children) “were children not relatives,”[[96]](#footnote-96) while *keiki hānai* (hānai children) were “blood relations[, c]hildren of brothers, etc.”[[97]](#footnote-97) Kamakau also explained that keiki ho‘okama “became heirs of those who took them” and “inherited *sovereignty*.”[[98]](#footnote-98) This might suggest that keiki hānaidid not inherit from their adoptive parents, but Kamakau again suggests this was not necessarily the case. He noted that hānai children “inherited same as children,”[[99]](#footnote-99) and “[i]f there was no will keiki hanai inherit[ed] without dispute invariably. . . . Keiki hanai had their rights of inheritance.”[[100]](#footnote-100) Indeed, Kamakau went as far as stating that when a parent died without making a bequest “and without an own child the estate [went] to keiki hanai.”[[101]](#footnote-101)

Nevertheless, Kamakau’s explanation of the practice of ho‘okama, his emphasis on its use among the chiefly class, and his striking declaration that keiki ho‘okama “became heirs” and “inherited sovereignty,”[[102]](#footnote-102) had a tremendous impact on litigation on the rights of adopted children explored in Part II. This testimony seems to have led judges and lawyers to the conclusion that there was a particular kind of adoption in ancient Hawai‘i that conferred a right to inherit on the adopted child, and which was different from the many other kinds of adoptive relationships that connected ‘ohana everywhere around the kingdom. The rights of adopted children brought into sharp relief a broader puzzle in Hawaiian society: as the chiefs remade the kingdom to defend Hawaiian sovereignty, did the world before reform inform the world after it?

## The Transformation of the Kingdom of Hawai‘i

By the 1830s, the Kingdom of Hawai‘i was in crisis. Diseases brought from abroad and a low fertility rate resulted in a catastrophic loss of population.[[103]](#footnote-103) As the Hawaiian intellectual Davida Malo commented in 1839, “The kingdom is sick,—it is reduced to a skeleton, and it is near death, yea, the whole Hawaiian nation is near to a close.”[[104]](#footnote-104) 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.[[105]](#footnote-105) 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.[[106]](#footnote-106) Between the late 1830s and the early 1850s, the chiefs radically transformed the kingdom’s government.[[107]](#footnote-107)

Chiefly governance gave way to a constitutional monarchy. A Declaration of Rights in 1839 proclaimed protection for “the persons of all the people, together with their lands, their buildings, and all their property.”[[108]](#footnote-108) 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. The upper house, the House of Nobles, was made up of high-ranking chiefs named individually in the Constitution.[[109]](#footnote-109) The lower house, which became the House of Representatives, was to be chosen annually by the people.[[110]](#footnote-110) This Constitution also created a Supreme Court composed of the king, the *kuhina nui* (premier of the kingdom), and four other judges appointed by the legislature.[[111]](#footnote-111) 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.[[112]](#footnote-112)

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 in a process known as the *Māhele* of 1848.[[113]](#footnote-113) Legal reform also brought much 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.[[114]](#footnote-114)

New laws also endowed family relationships with propertied implications that did not exist before reform,[[115]](#footnote-115) which was clearest in the enactment of a statute of descents. The kingdom adopted several statutes regulating the descent of intestate estates, but the relevant one for our purposes will be 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 linear descendants.”[[116]](#footnote-116)

Nonetheless, some of the legal changes to the family, appeared to build upon Hawaiian family practices. In 1841, the Hawaiian legislature created a process for how to adopt children in the kingdom.[[117]](#footnote-117) The child, the child’s biological parents, and the parents seeking to adopt the child would all go before an officer and commit the adoption to writing:

Ina manao na makua e haawi lilo loa i ka laua keiki nah ai 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.[[118]](#footnote-118)

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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 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.[[119]](#footnote-119)

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 ‘ōlelo” signifies “speech, language, word, statement.”[[120]](#footnote-120) In the 1840 Constitution and the laws enacted shortly thereafter, this word was used to denote the concepts of power, authority, or decision-making.[[121]](#footnote-121) The use of this word reflects “the centrality of speech to [Hawaiian] governance,”[[122]](#footnote-122) particularly through chiefs’ use of *kapu* (chiefly oral legal pronouncement).[[123]](#footnote-123)

This statute presents a conundrum about how we should think about the kingdom’s mid-century legal transformations. On the one hand, the backdrop for its enactment was a massive shift in Hawaiian law and society. On the other, given what we know about Hawaiian adoptive practices, this statute reflects distinctly Hawaiian legislative priorities. Was this statute a foreign imposition, or a codification of Hawaiian practice? Thus recast, the mundane question of how to interpret this statute, along with the statute on descents, set 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. The answer to this question divided the justices of the Supreme Court of Hawai‘i as litigants in the late 1860s and early 1870s presented it to them. Specifically, it pitted Chief Justice Elisha Hunt Allen against Justice Alfred S. Hartwell. Their disagreements on this question point us to fundamentally different understandings of legal change, which I will unpack in Part III. Here, I carefully reconstruct the debate on this question using judicial opinions and archival research.

Legal actors in these cases used the common law 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 practices and traditions as a Hawaiian common law, and regarded it as a legislative backdrop that informed the meaning of written laws. This view of Hawaiian common law made it possible to reason analogically from Hawaiian practices and traditions, new rights could be rooted in the past even though they did not have exact corollaries in the legal relations that existed before the enactment of statutes. After reconstructing this way of thinking about and through the common law, 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. These arguments enjoyed only limited success, however. Their failure points us to the conviction by some justices that this vision of a Hawaiian common law interfered with the project of “civilizing” the kingdom. Between the former and the latter, they argued, “civilization” should win.

## Adoption, 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.[[124]](#footnote-124) Scholars who have studied the connection between these two legal orders have tended to focus on the doctrine of custom.[[125]](#footnote-125) They have noted that Hawaiian courts in the aftermath of reform recognized certain Hawaiian practices as customs that 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.[[126]](#footnote-126)

However, this was not 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, its own legal fabric that predated any statutory enactments.[[127]](#footnote-127) And they argued that Hawaiian customs were not exceptions to this common law, but its component parts.

We can illustrate the ambiguity around custom and Hawaiian common law, and the possibilities this ambiguity offered, by reconstructing how lawyers argued for and against a claimed customary right by adopted children to inherit from their adoptive parents. The Supreme Court recognized this right in *Kiaiaina v. Kahanu* (1871), 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.”[[128]](#footnote-128) The phrasing here is important. As we have seen, various forms of adoption were common across Hawaiian society,[[129]](#footnote-129) but the Court understood that, as Kamakau put it, only some children “inherited sovereignty,” and therefore only these children were entitled to inherit from their adoptive parents. Litigants seeking to claim this customary right to inherit therefore had to prove a factual questions: 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 between custom and common law, between what litigants had to prove and what courts were presumed to know.

Peter and Mary Ann’s legal ordeal began as an action of ejectment against Eugene Bal and William Adams over some land in Lahaina, Maui. They 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 or Becky Mellish.[[130]](#footnote-130) 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.[[131]](#footnote-131)

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.[[132]](#footnote-132) 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.”[[133]](#footnote-133) 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. Judd, meanwhile, presented custom as an exception to the kingdom’s law which had to be proven to be given legal effect.

Jones argued that the question presented by this case was “one peculiarly of law for the Court, and not for the jury.”[[134]](#footnote-134) 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 the law was.”[[135]](#footnote-135) In other words, the burden should not be on the plaintiffs to establish what the law of the kingdom was.

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.”[[136]](#footnote-136) 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,”[[137]](#footnote-137) invoking the belief that the customs of an unknown and undefined minority could not defeat legislative enactments.[[138]](#footnote-138) 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?[[139]](#footnote-139) “How does the Court know,” asked Judd, “whether this may not be a custom peculiar to only one of the Islands of this Kingdom[?]”[[140]](#footnote-140) If no proof of custom was required to make custom legally enforceable, warned Judd, “then by a similar process the right of ‘primogeniture’ might be urged in this court, or any other absurd custom.”[[141]](#footnote-141)

So far, Judd’s distinction between custom and law rehearsed familiar arguments against custom. But along with these contentions, he made racist arguments signaling what he thought were the stakes of the custom/common law divide. The Court, he argued, was

not bound to take notice of such a usage. This Government is a civilized form engrafted upon a heathen form. This Court is founded upon statutes adopted from civilized countries; the judges of this Court are introduced from civilized Countries, and so constituted this Court is not bound to take judicial notice of such a usage unless satisfied of its real character by testimony of persons familiar with the usage.[[142]](#footnote-142)

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. Indeed, Judd went as far as articulating the ironic proposition that “civilizing” the kingdom’s government made Hawaiian custom *foreign* law that must be proven before enforced: “These ancient usages, the Government now being civilized, are nearly allied with ‘foreign statutes’ which must be strictly proven.”[[143]](#footnote-143) This reliance on the racialized concept of “civilization” is a recurrent theme in these adoption cases. Legal actors relied on racialized views of Hawaiians to make legal arguments—specifically in these cases, arguments about the relationship between statute and common law in the kingdom.

In deciding *Mellish v. Bal* (1869),[[144]](#footnote-144) the Supreme Court sided with Judd’s view of custom. It granted 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.”[[145]](#footnote-145) Peter and Mary Ann were required to establish that Beke was adopted as an heir specifically. But even in reaching this holding, the Court did not exactly renounce Jones’ blurring of custom and common law: “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.”[[146]](#footnote-146)

Although Jones’ argument did not carry the day, then, he seems to have articulated a view of the relationship between custom and common law that was recognizable to his contemporaries. His blurring of custom and common law opened intriguing possibilities. One possibility he hoped would materialize ultimately did not: the Court would not assume knowledge of Hawaiian custom as law.[[147]](#footnote-147) 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 a backdrop for the kingdom’s legislation around adoption and inheritance. Contra Judd’s insistence that statutory enactments abrogated customs, it was possible to argue that statutes on adoption and inheritance in fact *built* upon a Hawaiian common law of adoption. And 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.

## 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? Legal actors disagreed over whether, in answering this question, it was possible, necessary, or permissible to look to Hawaiian views on adoption for an answer. Over two cases decided in the 1870s, the kingdom’s Supreme Court offered a complicated answer to the question presented. In *In re Maughan’s Estate*, 2 Haw. 262 (1871), the Court held that children adopted pursuant to the kingdom’s adoption statute did not automatically become their adoptive parents’ heirs. The Court’s decision in *In re Nakuapa’s Estate*, 3 Haw. 342 (1872), meanwhile, established that children adopted before the enactment of statutes were heirs under the statute of descents if their adopted parents had intended to make them heirs by adopting them.

We should examine these two cases together because the justices of the Supreme Court who decided them believed they were interrelated.[[148]](#footnote-148) Chief Justice Elisha Hunt Allen thought that Hawaiian practices necessarily informed the meaning of the statutes of adoption and descents, and created a presumption that children adopted under the kingdom’s written laws were the heirs of their adoptive parents. Justice Alfred S. Hartwell, meanwhile, fretted that allowing Hawaiian practices to shed light on the meaning of Hawaiian law threatened the kingdom’s standing in the eyes of Euro-American powers. He therefore rejected the analogic potential of the common law in favor of a textualism that imported an American orthodoxy around adoption into the kingdom’s statutes.

### Interpreting the Statute of Adoptions

In 1855, a woman named Hannah Maughan entered into an agreement with a man named Moewale to adopt his daughter Pauahi. The agreement read:

Articles of agreement made and concluded this twenty-seventh day of August, A.D. 1855, between Moewale, the father and only surviving parent of Pauahi, a female child about thirteen years old, and Hannah Maughan, of Honolulu, witnesseth: That the said Moewale does hereby given unto the said Hannah Maughan, his child, the said Pauahi, to be adopted by her as her own child, and doth release all control and right over the said child onto the said Hannah Maughan, in consideration of the covenants hereinafter entered into by the said Hannah Maughan, and the said Hannah Maughan agrees to adopt the said Pauahi as her own child, and to clothe, educate, and in every way care for the said child as becomes the duty of a good parent.[[149]](#footnote-149)

There is only so much that the text of the agreement can tell us about the conditions leading up to Pauahi’s adoption. Indeed, the covenants Hannah agreed to, particularly the promise to educate Pauahi, reflected statutory requirements that parents send their children to school.[[150]](#footnote-150)

In any case, Pauahi lived with Hannah until 1861, when Pauahi married a man named Mahi and moved away to live with him.[[151]](#footnote-151) Hannah passed away in 1869, and Pauahi and Mahi filed a petition to administer her estate.[[152]](#footnote-152) Pauahi claimed the entirety of Hannah’s estate as her adopted daughter.[[153]](#footnote-153) 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.[[154]](#footnote-154)

It appears that Hannah had written a will a long time ago which left some money to Pauahi and included gifts to Nancy and to Hannah’s’ stepdaughter, Elizabeth Colburn.[[155]](#footnote-155) But at some time before her death, Hannah’s home had burned down, and the will was lost to the fire. Elizabeth, who lived with Hannah, testified that Hannah often said she was “glad the will was burnt” because she was no longer in good terms with her sister, Nancy, and she would not have wanted her sister to inherit anything from her.[[156]](#footnote-156) Hannah also told Elizabeth that when she wrote her new will, she “would not forget her adopted daughter,” Pauahi.[[157]](#footnote-157) But it seems Hannah never got around to making another will. Hannah thus died intestate, and the distribution of her estate would be dictated by the operation of the kingdom’s statute of descents. Sitting in Probate, Justice Alfred Hartwell concluded that Nancy, not Pauahi, was entitled to Hannah’s estate.[[158]](#footnote-158) Pauahi then appealed to the Supreme Court.[[159]](#footnote-159)

Nancy was represented by Robert Grimes Davis, a Hawaiian lawyer who had occupied several posts in the kingdom’s government, including as Associate Justice of the Supreme Court between 1864 and 1868.[[160]](#footnote-160) 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 preserve property in the family from whence it derived,” a policy which Davis noted “seems to be in accordance with the natural dictates of justice and equity.”[[161]](#footnote-161) The second premise was that no statute—either the statute on adoption or descent—said anything about the rights of adopted children.[[162]](#footnote-162) 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] irrevocably out of the family from whence it derived.”[[163]](#footnote-163)

Pauahi, meanwhile, was represented by Albert Francis Judd. Recall that Judd had argued in an earlier case against a customary right to inheritance by adoption. But in representing Pauahi, he emphasized the fact that she had been adopted as required by statute, and that both the terms of the adoption agreement and the practice of adoption in Hawaiian society favored her claim. As to the text of the agreement, Judd emphasized that Hannah “adopted [Pauahi] as her own child.”[[164]](#footnote-164) He contended that the Court should construe these words “as a Will, which took effect immediately upon the death of Mrs. Maughan.”[[165]](#footnote-165) And he warned that not doing so would “disturb the impressions and opinions which have prevailed in the Country until lately.”[[166]](#footnote-166) Indeed, Judd contended that the right of adopted children to inherit “seems not to have been questioned” until the *Mellish* case—the case in which he had argued against customary adoptions.[[167]](#footnote-167) But to support this position he pointed only to cases where the Court had either discussed wills that made adopted children heirs[[168]](#footnote-168) or had, in dicta, discussed inheritance by adoption.[[169]](#footnote-169)

Perhaps sensing that this authority was too thin to support the claim he was making, Judd then shifted to make a broader argument. “In all countries where adoptions exist,” he contended, “the inheriting qualification attaches to it. As adoptions have existed in the Hawaiian Islands since the earliest times, by analogy, adopted children ought to inherit here.”[[170]](#footnote-170) By “adopted children” Judd clearly meant children who had been adopted in compliance with the statute on adoptions.[[171]](#footnote-171) His broader argument was therefore a statutory interpretation argument about how to read the kingdom’s adoption legislation. Because adoption was common in Hawaiian society since “the earliest times,” he argued, 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 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 ran counter to the “natural” impulse to keep property within the family, understood as an entity bounded by blood ties. Judd, on the other hand, pointed to the prevalence of adoption in Hawaiian society. Against this backdrop, the Court could not presume a heightened suspicion of adoption, and therefore it should conclude that adopted children were entitled to inherit form their adoptive parents.

Justice Hartwell wrote the opinion of the Court, in which Justice Widemann concurred[[172]](#footnote-172) and from which Chief Justice Allen dissented. Hartwell shared Davis’ 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.”[[173]](#footnote-173) He would only reach this outcome if the legislature ordered it, which he did not think it had. True, the statute of adoptions made adoptive parents “liable from the day of the adoption to all parental duties and obligations,” but “[t]o make a legitimate child an heir is neither legally or morally a parental duty. Neither the agreement nor the statute makes the adopted child an heir.”[[174]](#footnote-174) As for the statute of descents, Hartwell noted that the statute defined who constituted an heir, and never mentioned adopted children. He thought 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.”[[175]](#footnote-175)

In other words, Hartwell refused Judd’s invitation to use the widespread practice of adoption in Hawaiian society as a legislative backdrop to understand the meaning of the kingdom’s statues. Indeed, Hartwell denigrated Hawaiian kinship practices to justify ignoring them:

Whatever the ancient or the present customs or ideas of natives of this Kingdom on the subject of adopting children, fathers or mothers, and I may add in regard to relations between the sexes, once recognized by custom and not prohibited, but which are no longer legitimate, such customs and ideas can not prevail against our statute of wills, which prescribe what constitutes a will, and of descents, prescribing all the inheriting relations but not mentioning adoption. An adopted father is as much an own father, in the native mind, as an adopted child, but neither is an heir at law.[[176]](#footnote-176)

Hartwell articulated here a dichotomy between custom and law. He then characterized custom as a collection of past and current practices that were “no longer legitimate” after the enactment of statutes. The dichotomy was more of a hierarchy. This idea resurfaced a few paragraphs later, when he explained that this was “not a case in which any custom is alleged as having the force of law,” and that if it were, such a custom “could have no force in the face of explicit statute provisions.”[[177]](#footnote-177) Hartwell thus articulated a line between Hawaiian customs and Hawaiian law, and refused to follow the common-law arguments presented before him to read statutes in ways that reflected the centrality of adoption in Hawaiian life.

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.”[[178]](#footnote-178) 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.”[[179]](#footnote-179) This cultural narrative around adoption predisposed Allen to see adopted children as biological children, coloring his understanding of the case.

But the legal basis for his 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 Hawaiians 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.”[[180]](#footnote-180) In other words, the Hawaiian legislature enacted its adoption and descent statutes against a Hawaiian common law that included the practice of inheritance by adoption: “I regard this 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.”[[181]](#footnote-181)

*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 estate of a woman named Naomi Nakuapa, and the efforts of a woman named Kaowaopa[[182]](#footnote-182) to claim her estate as her adopted child.

### Interpreting the Statute of Descents

Naomi Nakuapa died in Honolulu on January 23, 1869. She died without leaving a will, and shortly after her death several petitions for appointment as executor of her estate came to Chief Justice Allen in probate. A man named Keahi claimed he should be her executor because he was her cousin.[[183]](#footnote-183) Another man named Pahau claimed that he should be appointed as executor because he was Nakuapa’s “ke kaikunāne pono‘ī | true brother,” and proceeded to explain that Nakuapa’s father and his mother were siblings.[[184]](#footnote-184) But our focus will be on the efforts of Kaowaopa, who claimed she was “he kaikamahine hānai | an adopted daughter” of Naomi Nakuapa, to inherit from her adoptive mother.

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. Nakuapa, it seems, later joined Puhalahua in adopting Kaowaopa. Puhalahua died in 1866, leaving all his property to Nakuapa. Nakuapa intended to make a will, but by the time her lawyer arrived at her home, she was too feeble to do so.[[185]](#footnote-185) Kaowaopa’s claim turned on the factual question of whether she had been adopted, and what the terms of that adoption had been.

The judicial resolution of these question was tortured, involving four separate Supreme Court opinions between 1869 and 1873.[[186]](#footnote-186) By the end of the process, Kaowaopa’s bid to inherit as Nakuapa’s adopted daughter had failed.[[187]](#footnote-187) Her ordeal nonetheless offers the clearest efforts to wield Hawaiian common law as a means of securing greater rights for adopted children, as well as the most strident declarations about why the Court should not rely on the Hawaiian common-law backdrop to interpret the kingdom’s legislation.

Kaowaopa’s initial effort to claim Nakuapa’s estate failed in probate, where Chief Justice Allen concluded that she had not established herself as Nakuapa’s adopted child.[[188]](#footnote-188) An appeal of fact was taken to a jury, which returned a verdict that Kaowaopa was the keiki hānai (hānai child) of Puhalahua and Nakuapa.[[189]](#footnote-189) In the first decision on the case (*Nakuapa I*), the Supreme Court declined a motion to set aside this verdict.[[190]](#footnote-190) With the jury verdict in hand, Kaowaopa moved for a judicial declaration that she was Nakuapa’s heir.[[191]](#footnote-191)

Chief Justice Allen seems to have granted the motion on the understanding that the order would be immediately appealed to the Supreme Court.[[192]](#footnote-192) His reason for doing so became obvious shortly thereafter: although the verdict established that Kaowaopa was Nakuapa’s keiki hānai, Allen was not convinced that this also meant she was Nakuapa’s heir. In *Nakuapa II*, Allen wrote the Court’s decision granting a new trial to ascertain the intention behind the adoption.[[193]](#footnote-193) 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 interpreting the kingdom’s statutes. And Justice Hartwell, whose turn it was to dissent, furthered his racist attack on Hawaiian custom, shedding further light on his refusal to rely on Hawaiian common law when interpreting statutes.

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.[[194]](#footnote-194) “This question,” he wrote, “must be decided upon our own usages and customs, and written laws, and none other.”[[195]](#footnote-195) 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.[[196]](#footnote-196) My sense is that 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*. Hence his articulation of the holding: “The majority of the Court is of opinion that there were children by adoption who were regarded in all aspects as one’s own children, *and that in the enactment of laws, the same terms were applied to them as to children of the blood, that is, they were regarded as the intestate’s children*.”[[197]](#footnote-197)

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 his dissent in *Maughan*, and he now developed it at length:

The principle of adoption was cherished by the Hawaiians. By their first written laws, there was a provision that the act of adoption must be done in writing and before an officer to witness the transaction, otherwise “the child could not be transferred.” And by the same law it was provided that when the parent dies, the child is the heir, if there be any child living. And it is very evident that the word child, applied to the adopted child, as well as to a child of the blood. The law makers of that day wisely provided that the contract of adoption should be in writing, that the rights of the parties should be clearly understood. It is very clear that when the child was transferred, it became the child in law of the adopting parent, and to this class the law of inheritance applied.

. . . .

As adoption was recognized by the ancient customs and has continued to be by the laws of the Kingdom, it is evident that it was a relationship endeared to the people, and regarded by them of the highest importance. Is it reasonable to suppose then, that it imparted no rights—that it was a relationship of a day, and for a comparatively unimportant purpose? To the Hawaiian, it was a sacred relation, and having all the rights, duties and obligations of a child of the blood; and the opinion which the majority of the Court entertain is, that by ancient customs and usage an adopted child was an heir of his adopted parents, when so stipulated, and that the 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.[[198]](#footnote-198)

Whereas Hartwell had refused to read Hawaiian views into the adoption statute, Allen argued that when the legislature first enacted the statute of descents, it meant to include within the meaning of “children” those children who had been adopted as heirs by ancient custom. This was true even though the legislature did not specify as much. But the legislature did not have to specify, because it legislated against the backdrop of Hawaiian common law.

Hartwell’s dissent in *Nakuapa II* was broad-ranging and unfocused,[[199]](#footnote-199) and I will 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 statue.”[[200]](#footnote-200) Hartwell believed the “ancient modes of transmitting to adopted heirs were fitted for a different form of government, different relations of domestic life and different tenure of property than now exist *or are legitimate*.”[[201]](#footnote-201) As he had done in *Maughan*, he depicted Hawaiian adoption as an illegitimate practice.[[202]](#footnote-202)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.”[[203]](#footnote-203)

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 moved for a new trial, contending that the jury had been improperly influenced.[[204]](#footnote-204) Her motion was denied, and she appealed to the Supreme Court. Counsel for both sides filed relatively short briefs on the procedural question.[[205]](#footnote-205) But one of Kaowaopa’s attorneys, A. Keohokalole, who was ill and could not attend the hearing on the appeal, filed an additional brief that addressed not whether Kaowaopa was entitled to a new trial, but the substance of her claim.[[206]](#footnote-206) 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”[[207]](#footnote-207) or “‘o ia wā kānāwai ‘ole | this lawless time.”[[208]](#footnote-208) “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 new tool of governance.[[209]](#footnote-209) The time of her adoption determined the legal framework that the Court should use to interpret her rights as an adopted child:

He mua ka hāʻawi ʻia ʻana o Kaoaopa, a lilo iā Nakuapa mā; he hope mai nei nā kānāwai no ka hoʻokama keiki ʻana; a me nā kānāwai waiwai ili i nā hoʻoilina; a pēlā nō paha e hiki ai ke hoʻomanaʻo nui ʻia, *ua hiki ʻole i nā kānāwai o ke au hou ke kūʻē a hōʻole a hoʻonele aku hoʻi i ko lākou mau kuleana paʻa o kēlā au kahiko.*

—

The transfer of Kaoaopa to Nakuapa et. al. was done prior to the institution of the laws governing child adoptions; as well as the laws pertaining to the inheriting of property; which is perhaps why we may infer that *the new laws cannot contradict, deny, and deprive those rights of the ancient times*.[[210]](#footnote-210)

Kaowaopa’s adoption thus endowed her with rights which neither the passage of time nor the enactment of statutes could abrogate.

These rights were to be found in common law of Hawai‘i, which Keohokalole identified as a body of law that not only predated statutes, but which judges had a continuing duty to uphold. Judges, he wrote, must decide cases

e hiki nō ke hana ʻia ma muli o ke kaulike ma ka noʻonoʻo pū ʻana i **ke kānāwai manaʻo (common law)** a ke Akua i hāʻawi mai ai i loko o ka naʻau o Kānaka, e like me ka hana mau i maʻa i waena o ka Lāhui Hawaiʻi, a e like pū nō ho‘i me **ke kānāwai mana‘o o Beretania Nui**.

—

in the interest of justice and looking to **the Common Law** that God has given into the hearts of man, like that commonly seen amongst the Hawaiian populace and similar to **the common law of Great Britain**.[[211]](#footnote-211)

His use of the phrase “ke kānāwai mana‘o” suggests a few things. First, that he added a parenthetical defining the phrase as “common law” suggests that this was perhaps not a commonly used term. 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. In context, his use of the term suggested that he did not think of Hawaiian common law as another version of British common law; the latter had to be separately described as its own form of “ke kānawai mana‘o.” He alluded to this view of the common law in closing his brief, hoping that his arguments could

e lilo nō paha ia i mea a ākea ai ko ka 'Aha mana'o me ka nānā nui 'ole i nā kānāwai o nā 'Āina 'ē a me nā kānāwai a hapa kānā wai 'ē a'e a pau o kēia Aupuni.

—

broaden the considerations of the Court to not give too much weight to the laws of foreign lands.”[[212]](#footnote-212)

Second, Keohokalole was also careful to connect ke kānāwai mana‘o with Christianity. It is difficult to say, without knowing more about him, what he thought the reference to God achieved.[[213]](#footnote-213) But between this reference and the comparison to British common law, it is possible that Keohokalole wanted to preclude the sorts of arguments that Hartwell had advanced about the compatibility between Hawaiian practices and the kingdom’s new form of government.

So far, Keohokalole’s argument had tracked Allen’s opinion in *Nakuapa II*: adoption before legislation could confer a right which no statute explicitly abrogated. But by the time he was writing this brief, Keohokalole knew that a jury would likely conclude that Kaowaopa had not been adopted in the way Allen envisioned would convey a property interest. Therefore, Keohokalole went beyond Allen’s argument in *Nakuapa II* and articulated something closer, though perhaps beyond, what Allen had envisioned in his *Maughan* dissent. To do so, he relied on the common law’s power to make legal arguments by analogizing between past practices and present conditions.

Keohokalole argued that Hawaiian views on adoption remained constant across the nineteenth century, even as legal innovations, like private landownership, endowed family relationships with new meaning. Hawaiian ideas about adoption should influence the meaning of family in the aftermath of property reform.

He wā waiwai ʻole o nā ʻliʻi, a me nā makaʻāinana, ka wā kahiko[.] . . . ʻO ka hoʻokama keiki ʻana o ia wā, he hāʻawi ʻoiaʻiʻo, he hana mau i maʻa i ka lāhui Hawaiʻi, mai kahiko loa mai, he hāʻawi ma ka manaʻo, he pai lima, he hoʻohiki ʻana e hōʻoiaʻiʻo ai. A ʻo ua poʻe waiwai ʻole lā o ia wā, ua loaʻa iā lākou ma kēia au hou, he mau waiwai paʻa kūpono loa no lākou iho, e hoʻoili ʻia aku ai no kā lākou poʻe keiki ponoʻī, a hānai; no nā hope hoʻi, a me nā waihona o lākou.

—

In ancient times, chiefs and commoners did not have property[.] . . . The adoption of this time was a true transfer that was common amongst the Hawaiian people since ancient times, it was a transfer in mind/commonly understood, by oath and pledge to validate it. These once property-less people of this time, now have property in this new era, they have real personal property that they can bequeath to their true born children, adoptive children, successors or assigns.[[214]](#footnote-214)

Thus, whereas the judges of the Court were prone to use Anglo-American concepts—like inheritance—to interpret the Hawaiian past, Keohokalole tried to use Hawaiian worldviews derived from past practices to discern the meaning of Hawaiian law. If Hawaiians loved their adoptive children just as they did their biological children before they had property, why should they now distinguish between them?

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 thought that only some adopted children were treated as heirs. What Keohokalole seemed to advocate for was a more capacious understanding of adoption and inheritance. But he moderated his argument in a way that his audience—or at least Allen—was likely to understand: 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,[[215]](#footnote-215) it followed that the same was

nō ho‘i o Nakuapa i ho‘onele ‘ia i ke keiki pono‘ī ‘ole, a ua loa‘a iā ia ‘o Kaoaopa, he kaikamahine hānai nāna o kēlā au kahiko kānāwai ‘ole.

—

true of Nakuapa who was deprived of true born children, for which she did get Kaoaopa, an adoptive daughter during the ancient time.[[216]](#footnote-216)

Keohokalole thus portrayed Kaowaopa as 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 children. In closing, he hoped that, with these circumstances in mind, the Court might grant Kaowaopa “ka pono | equity.”[[217]](#footnote-217)

But the equity Keohokalole sought did not materialize. Although the Court did grant a new trial,[[218]](#footnote-218) 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.[[219]](#footnote-219) 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, as it applied only to children adopted before the enactment of the statute of adoptions, and thus only a finite set of litigants would be able to 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, however, failed.

# III. Common Law, Legislation, and Empire

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 how Hawaiians understood family. With the relatively narrow exception recognized in *Nakuapa II*, Hartwell’s view of legal change prevailed.

At first glance, Hartwell’s success appears foretold. We might read these 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 there was an interpretive choice. As Karl Llewellyn observed long ago, interpretive canons often come in contradictory pairs, in “thrusts” and “parries.” 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.”[[220]](#footnote-220) What “sold” Hartwell’s reading of the statutes? The answer lies in empire, which called for whatever reading of the statutes furthered the project of “civilizing” Hawaiians.

Once we see “civilization” operating as a canon of statutory interpretation, we can discern in Hartwell’s reasoning—as he himself did—a major distortion of background principles underlying statutory interpretation in American law. Specifically, Hartwell conceptualized Hawaiians as *racialized* legal subjects. From this view flowed his conviction that Hawaiian legal heritage—that is, Hawaiian common law—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 enacted statutes, the courts should read these expansively whenever they might conflict with Hawaiian common law. What at first blush seems like a straightforward instance of a familiar legislative supremacy becomes, on closer view, a reflection of how race shaped legal reasoning in the imperial context. It would be a mistake, therefore, to read these cases merely as instantiating our modern understanding of the relationship between common law and legislation.

To demonstrate how empire shaped the common law-legislation relationship in these cases, I will 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 mirror similar narrow readings of American legislation transforming the status of married women. These readings evinced a conviction that legal change should happen slowly and in an accretive fashion. I will then turn to analyze Hartwell’s view of legal change. 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.”

## The Possibilities of Ke Kānawai Mana‘o (The Common Law)

In a surprising turn of events, 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.[[221]](#footnote-221) This is surprising because, in the American context, adopted children experienced the common law as a serious limitation on their rights as members of their adoptive families.[[222]](#footnote-222) 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.[[223]](#footnote-223) 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.”[[224]](#footnote-224) 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.[[225]](#footnote-225) 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.”[[226]](#footnote-226) 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.”[[227]](#footnote-227) To reason otherwise, the Court cautioned, would inevitably entitle a wife to “a right of action against the husband for any domestic service or assurance rendered by her as a wife,” a consequence the Court deemed too far-fetched to entertain.[[228]](#footnote-228)

Hendrik Hartog points to a similar episode from New York, this time concerning an 1860 statute which declared that a wife was “the joint guardian of her children, with her husband, with equal power, rights and duties with regard to them.”[[229]](#footnote-229) This was quite 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, tethered to the husband’s failures or misdeeds).[[230]](#footnote-230) To grant *married* mothers equal custody rights with their husbands was a different proposition, however. Indeed, the New York Supreme Court’s Appellate Division thought 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.”[[231]](#footnote-231) 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.”[[232]](#footnote-232) The court’s solution was the 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 or exclusive of him.’”[[233]](#footnote-233)

These exercises in statutory interpretation are examples of what happened when legislatures changed or derogated the common law and courts put the statute through the “ordeal” of strict interpretation.[[234]](#footnote-234) This canon was part of a broader phenomenon, a skeptical stance in American jurisprudence toward legislation, particularly legislation that redistributed property and thus purported to transform American life.[[235]](#footnote-235) Indeed, we should understand the canon as signaling a commitment to a particular vision of *how* legal change should happen: slowly and by accretion. Only slow and accretive change could simultaneously recognize the changing needs of the people and protect 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: “experience 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.”[[236]](#footnote-236)

Of course, for Bishop and his contemporaries, arguments over legal change were also arguments over the relationship between common law and legislation.[[237]](#footnote-237) To insist on slow and accretive change was also to insist on something like judicial supremacy,[[238]](#footnote-238) for it was judges who guarded the common law, and thus judges who secured the proper rate of change. Bishop explored this idea when he warned of the consequences of codification. He depicted the common law as “system of reason” that was “one of the great departments of our government structure.”[[239]](#footnote-239) Legislation was the opposite: “Statutes are not reason, they are mere command.”[[240]](#footnote-240) But Americans “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.”[[241]](#footnote-241) 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 common law could change American law in ways that did not “disturb the just repose of the community.” As we have seen, this commitment to accretive change in effect meant that the common law served to limit legislative change and, often, to limit or circumscribe rights.

In Hawai‘i, however, 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 *what* lawyers in these cases seemed to think the relevant common law was: not the ancient common law of England and America, but, as Keohokalole put it in his brief, “ke kānāwai mana‘o | the common law.”[[242]](#footnote-242) Keohokalole was certainly the boldest in declaring a particular Hawaiian common law, though he was not the only legal actor to do so—Allen, after all, agreed with him about the importance of Hawaiian attitudes on adoption as a backdrop for legislation.[[243]](#footnote-243) Once Hawaiian common law came into view, judges were tasked with rendering statutory constructions that harmonized legislation with this Hawaiian backdrop to produce slow and accretive change, which in this case meant that adopted children should enjoy the same property rights as their biological counterparts under the kingdom’s new statutory framework and property regime. Thus, ke kānāwai mana‘o could produce a vision of adoption that comports with more modern ideas about the place of adopted children in the family and which reflected the importance of adoption in Hawaiian society of the nineteenth century.

I want to add here a word of caution, however. That these outcomes might reflect the importance of adoption in Hawaiian society is not to say that they preserved Hawaiian views on adoption unaltered. Keohokalole’s brief on behalf of Kaowaopa sidestepped the keiki hānai/keiki ho‘okama distinction to make all adopted children the same. What is more, Keohokalole seemed to think it was important to rely on a cultural script that was meaningful for Chief Justice Allen, in which the adopted child essentially took the place of the biological child.[[244]](#footnote-244) These moves preserved adoption’s importance but scarified its diversity.[[245]](#footnote-245) To borrow and alter a phrase, relying on the common law could work a sort of “transformation-through-preservation”—adoption would remain important but might lose some of the characteristics that made it distinctly Hawaiian.[[246]](#footnote-246)

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 adoption, 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.

## “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 context, it was the people’s demands that justified such change.[[247]](#footnote-247) 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. Hawaiians had to be “civilized” *before* their worldviews found expression in legislation. Anything that interfered with this imperial project was to be uprooted.

Hartwell understood legal change much in the same way as Joel Bishop did: as the people changed, their laws changed. 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.”[[248]](#footnote-248) 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.”[[249]](#footnote-249) This account of how legal change happened 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 looking for a 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.”[[250]](#footnote-250) Although he reiterated his sense that Hawaiian adoption practices were no longer “legitimate,” he could not deny the persistence of adoption in Hawaiian society.[[251]](#footnote-251) 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 laws.”[[252]](#footnote-252) 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.[[253]](#footnote-253) For Hartwell, who came of age in this tradition, what would have legitimized using statutes to impose on Hawaiians laws that were in tension with their firmly held 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.[[254]](#footnote-254) One gets the sense from Hartwell’s writings that he understood adoption as a deviant social practice associated with racial inferiority. Adoption, he noted, was common in “eastern countries” and associated with polygamy.[[255]](#footnote-255) It was associated with Hawaiians’ peculiar ideas on “the relations between the sexes.”[[256]](#footnote-256) Hartwell was convinced that new laws concerning domestic relations had “displaced the ancient customs of the Hawaiian family group which had included polyandry and the adoption of children.”[[257]](#footnote-257) 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.”[[258]](#footnote-258)

Hartwell’s writings thus suggest that he understood Hawaiians as racialized legal subjects—that is, legal subjects on whom law could operate differently because of their race. Recognizing this racialization is critical, because it allows us to distinguish Hartwell’s view of the relationship between common law and legislation from how American law understands that relationship today.

Hartwell inverted the relationship between common law and legislation embodied in the canon of derogation. As I noted before, underlying that canon was a belief that the legislature would not lightly overturn the legal landscape on which the people had long relied. Hartwell assumed, by contrast, that whenever the Hawaiian legislature enacted statues, it also impliedly razed the existing legal landscape, even if it did not affirmatively say as much. Hawaiian common law—which Hartwell identified only as “customs,” “usages,” or “ideas”—could not prevail (read: survive) in the face of statutory enactments. He 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 they would not have to contend with the common law and could redefine relationships and entitlements with no regard for preexisting Hawaiian sociolegal organization. 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.”[[259]](#footnote-259) 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.[[260]](#footnote-260)

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 Hawaiians, 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.[[261]](#footnote-261)

After acknowledging the chiefs’ agency in transforming the kingdom, Hartwell sketched 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”[[262]](#footnote-262)), 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 happened and why it was legitimate despite the tension between Hawaiian worldviews and the new laws: if Hawaiians stuck to their preexisting beliefs, they would fall victim to empire.

Empire operated as a constraint or condition on the exercise of legislative power in Hawai‘i, creating an interpretive presumption that statutes erased rather than preserved Hawaiian common law. Hartwell’s adoption jurisprudence thus suggests something like 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.

# 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[[263]](#footnote-263)—was to adopt Anglo-American law. The chiefs created an Anglo-American legal system—one that certainly borrowed some aspects of Hawaiian governance,[[264]](#footnote-264) but which cohered into a set of institutions very similar to those of an American jurisdiction.[[265]](#footnote-265) The chiefs imported large swathes of foreign statutes and relied on foreigners trained in the practice of law. 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 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.[[266]](#footnote-266) It was not only a body of judge-made law, but 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 Hawaiian lawyer Keohokalole would go out of his way to coin a Hawaiian term for the common law—“ke kānāwai mana‘o”—to anchor his arguments.

As I have shown, however, these arguments were largely unsuccessful. In Justice Hartwell’s adoption jurisprudence, that common law was defeated by legislation in a way that seems familiar to us 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 common law had nothing to do with the representative values Americans assign to legislation today. It was, instead, a step in remaking Hawaiian society to comport with the demands of “civilization.” The refusal to treat Hawaiian common law as a legislative backdrop in these adoption cases thus points us to a crucial way in which Hawaiian law differed significantly from Anglo-American law. This difference was rooted in the demands of empire.

At the same time, it would be a mistake to think that the “civilization” canon and the ideology from which it sprung was a curiosity of Hawaiian history alone. The colonial conditions of nineteenth century Hawai‘i revealed “civilizational” anxieties, but these anxieties where everywhere in America, and informed law there, too. “Civilization” operated, for example, to justify cruelty in war toward Indian tribes that could not have been justified against white Confederates during the Civil War, for the latter belonged to “civilization” while the former stood outside it.[[267]](#footnote-267) Ideas about “civilization” also operated to guard and shape the polity. State constitutional provisions enfranchised “civilized male inhabitants.”[[268]](#footnote-268) A state court could interpret a statute prohibiting “Indians” from testifying against whites to also create a prohibition against Chinese testimony, for “the same rule which would admit [Chinese witnesses] to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls”—possibilities that were not merely the product of an “over-heated imagination,” but which presented “an actual and present danger.”[[269]](#footnote-269) Federal administrators interpreted 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 a marriage under the laws of “uncivilized lands like Samoa” could not support a claim to citizenship.[[270]](#footnote-270)

Indeed, wherever marriage came up, “civilization” and its strictures were not far away. After all, the trouble with adoption according to Hartwell was that it invited the specter of polygamy, and thus threatened “civilization.” This same anxiety would reach the United States 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 Constitution would not allow,[[271]](#footnote-271) they found a Supreme Court ready to read the Constitution through the lens of “civilization.”[[272]](#footnote-272) 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, while that principle cannot long exist in connection with monogamy.”[[273]](#footnote-273) With democracy and “civilization” at stake, Congress could not be denied the power to enact prohibitions against polygamy in the territories.[[274]](#footnote-274) The “civilization” canon thus informed the meaning of constitutional powers.

All these legal interpreters may not have agreed on what, precisely, “civilization” required,[[275]](#footnote-275) but it is undeniable that they converged around white supremacy and gender hierarchies.[[276]](#footnote-276) 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 the act of interpreting law without accounting for the ways in which “civilizational” anxieties shaped how legal actors understood law itself.

1. \* Academic Fellow, Columbia Law School. [Acknowledgments]. [↑](#footnote-ref-1)
2. *See, e.g.*, Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1374 (William N. Eskridge, Jr. & Phillip. Frickey eds., 1994) (courts must respect “the position of the legislature as the chief policy-determining agency of the society”); John F. Manning, *Without the Pretense of Legislative Intent*, 130 Harv. L. Rev. 2397, 2413-25 (2017) (describing the “institutional settlement” that operates behind the allocation of interpretive power); Jerry Mashaw, *As If Republican Interpretation*, 97 Yale L.J. 1685, 1686 (1988) (“Any theory of statutory interpretation is at base a theory about constitutional law. It must at the very least assume a set of legitimate institutional roles and legitimate institutional procedures that inform interpretation.”). *Cf.* Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 Md. L. Rev. 712, 715 (2018) (noting that judges today see themselves “either as legislatures’ mechanical agents or dutiful disciplinarians,” but that an earlier model of collaboration between courts and legislatures fostered a different mode of statutory interpretation). [↑](#footnote-ref-2)
3. *Cf.* Peterson, *supra* note \_\_, at 715 (2018) (“Busy grappling with the question of how early American judges reached across the divide between the judicial branch and the legislative, they did not stop to consider how that divide may have changed over the intervening two hundred years.”). [↑](#footnote-ref-3)
4. For example, the work of legislatures changed over the course of the nineteenth century. Statutes in the early republic were “private bills rather than broadly applicable rules. . . . Broad statutes setting forth standards—for divorce or fixing the circumstances under which a lottery could be held to raise money—did not yet dominate the business of legislation.” Peterson, *supra* note \_\_, at 720. *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) (“Until the mid- to late-nineteenth century, state legislatures mostly enacted local, private, and special legislation, and very little general legislation.”). Concerns that this mode of legislation enabled corruption led to efforts to circumscribe the exercise of legislative power in this way. *See* Farah Peterson, Statutory Interpretation and Judicial Authority, 1776-1861, 255 (2015) (unpublished Ph.D. dissertation) (“States were not moving to general legislation because they saw in it an attribute of modernity. . . . Instead, the conventions show citizens were so fed up by the corruption, delay, and expense engendered by private legislation that they were willing to take a gamble on something many did not fully trust. It was out of this impetus that many states’ conventions in the 1830s, 1840s, and 1850s inserted prohibitions on various classes of private acts into state constitutions, in spite of the fact that many delegates did not at first see all of the benefits that a general legislation scheme might offer.”); Charles Chauncey Binney, Restrictions upon Local and Special Legislation in State Constitutions v (1894) (“The branch of constitutional law treated in the following pages . . . is unique in owing its origin to a widespread lack of confidence, on the part of the people of the several States of the Union, in their own representatives in the State legislatures[.]”).

Change did not stop in the nineteenth century, either. Legislation scholars have long observed that we are living in a moment of “unorthodox lawmaking,” such that the “legislative process for major legislation is now less likely to conform to the textbook model than to unorthodox lawmaking.” Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress (5th ed. 2017). One consequence of this shifting legislative process is a growing sense among courts and scholars 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’ Plan in the Era of Unorthodox Lawmaking*, 129 Harv. L. Rev. 62, 97 (2015). [↑](#footnote-ref-4)
5. See *infra* notes \_\_-\_\_ and accompanying text [footnotes on recent literature on empire and law]. [↑](#footnote-ref-5)
6. These arguments often proceed by arguing that “even 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 congressional intent.” Robert T. Anderson, Sarah A. Krakoff & Bethany Berger, American Indian Law: Cases and Commentary 168 (4th ed. 2020). [↑](#footnote-ref-6)
7. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 428 (1993). [↑](#footnote-ref-7)
8. Matthew L.M. Fletcher, *Muskrat Textualism*, 116 Nw. U.L. Rev. 963, 978 (2022) [↑](#footnote-ref-8)
9. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). *But see* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 431, 436 (2005)(noting that in the 1970s the Supreme Court began “flattening federal Indian law into broader American public law by importing general constitutional and subconstitutional values into the field,” and that, as a result, “in our time of great skepticism concerning colonization, our least democratic branch has become our most enthusiastic colonial agent”). [↑](#footnote-ref-9)
10. *See* Frickey, *supra* note \_\_, at 436. [↑](#footnote-ref-10)
11. Scholars have used the terms “empire” or “colonialism” to refer to a broad range of phenomena in American history. This includes the expropriation, extermination, and coerced assimilation of Native People in the American continent along with the expansion of Anglo-American settler claims to ownership and jurisdiction over Native People and their lands. *See, e.g.*, K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 Law & Soc. Inquiry 1006 (2016); Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier (2005); Margaret Jacobs, White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia, 1880-1900 (2009); Lisa Ford, Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836 (2010); 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). Empire also includes the annexation of overseas territories and the construction of a constitutional architecture that denied the claims of territorial residents to equal rights under American law. *See, e.g.*, Mae Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America (2004); Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution (Christina Duffy Burnett & Burke Marshall eds., 2001); Paul Kramer, The Blood of Government: Race, Empire, the United States & the Philippines (2006); Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 Am. Q. 779 (2005); Symposium, *Special Issue on the Law of the Territories*, 131 Yale L.J. 2390 (2022); Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change,* 102 Cal. L. Rev. 1181 (2014). And it refers also to the expansion of American economic and political influence around the world, along with military and legal intervention and in the domestic affairs of other countries. *See, e.g.*, Asli Bâli & Aziz Rana, *Constitutionalism and the American Imperial Imagination*, 85 U. Chi. L. Rev. 257 (2018); Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 130 Yale L.J.F. 312 (2020). [↑](#footnote-ref-11)
12. Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. Irvine L. Rev. 263, 267 (2015). [↑](#footnote-ref-12)
13. Aziz Rana, The Two Faces of American Freedom 13 (2010) (“Even when the interconnections between internal liberty and external subordination—the two faces of American freedom—are raised in popular discourse, settler exclusivity is always viewed as an original sin. It embodies a past episode that while reprehensible has little to say about the development of collective institutions. However, settler exclusion was more than a distant period of conquest and subordination; it provided the basic governing framework for American life 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 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 1134-36.

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. Gregory Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999 (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. 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. 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. Maggie Blackhawak, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787 (2019). [↑](#footnote-ref-13)
14. I build on recent work on the problem of legal internalism. Shyamkrishna Balganesh and 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. *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 the law” while retaining and furthering their vision of law. *Id.* at 1106. My work explores this puzzle in the imperial context. [↑](#footnote-ref-14)
15. *See generally* Lilikalā Kame‘eleihiwa, Native Land and Foreign Desires: Pehea Lā E Pono Ai? (1992); Stuart Banner, Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska 128-62 (2007). [↑](#footnote-ref-15)
16. Sally Engle Merry, Colonizing Hawai‘i: The Cultural Power of Law 86-89 (2000). [↑](#footnote-ref-16)
17. *See generally* Noelani Arista, The Kingdom and the Republic: Sovereign Hawai‘i and the Early United States (2019); Kamanamaikalani Beamer, No Mākou Ka Mana: Liberating the Nation (2014). [↑](#footnote-ref-17)
18. J. Kēhaulani Kauanui, Paradoxes of Hawaiian Sovereignty: Land, Sex, and the Colonial Politics of State Nationalism 17 (2018). [↑](#footnote-ref-18)
19. *Hawaiians Compared with Other Polynesians*, 23 The Friend 89 (1865). Sally Engle Merry describe the chief’s “struggle for sovereignty” as an effort to “purchase independence with the coin of civilization.” Merry, *supra* note \_\_, at 13. Law was instrumental in this process, and my work adds nuance to Merry’s portrait of law, highlighting the ways in which law’s internal ideology could buttress or complicate efforts to redefine persons and relationships. [↑](#footnote-ref-19)
20. Kauanui, *supra* note \_\_, at 18. [↑](#footnote-ref-20)
21. *See infra*, Part I.A. (discussing adoption reform) and Part III.A. (discussing marital reform). American family law did change over the course of the nineteenth century, primarily through judicial innovation—what Michael Grossberg has called a “judicial patriarchy”—that was committed to incremental rather than rapid change. *See* Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 289-94 (1988). [↑](#footnote-ref-21)
22. In this sense, judges in Hawai‘i departed from the default legal person embedded at the core of American law in the nineteenth century: the able-bodied white man. Barbara Young Welke, Law and the Borders of Belonging in the Long Nineteenth Century United States 2 (2010) (“From the outset, personhood, citizenship, and nation were imagined in able, racialized, and gendered terms: able white men alone were fully embodied legal persons, they were America’s ‘first citizens,’ they were the nation.”). [↑](#footnote-ref-22)
23. I build on the work of other scholars who have studied some of this litigation. David Forman has offered an excellent analysis of the doctrine of custom in the Hawai‘i through some of the adoption cases I discuss here. *See* David 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 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). [↑](#footnote-ref-23)
24. 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, 26-27, 264 n.9 (2002). On how one of these Hawaiian legislators perceived the influence of non-Hawaiian actors, see *id*. at 27. [↑](#footnote-ref-24)
25. Robert 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). [↑](#footnote-ref-25)
26. Of course, whether the common law is regressive is all a matter context. And constitutional law scholars have argued that a common-law method enables us to understand the Constitution as a document that evolves with changing times. *See, e.g.,* David 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 Parker, Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism 3 (2011); *cf.* Morton J. Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy, 4 (1992) (discussing attacks of the “Classical Legal Thought” vision of a neutral, non-redistributive state stemming from “the dislocating forces of urbanization, massive immigration, and industrialization”). In this standard account, Parker explains, 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 \_\_, at 3-4. [↑](#footnote-ref-26)
27. *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”). [↑](#footnote-ref-27)
28. *Cf.* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 675 (1999) (“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.”). [↑](#footnote-ref-28)
29. Of course, 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 \_\_, 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 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, of 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 will show in Part III.C., however, what is distinctive about how the 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, [↑](#footnote-ref-29)
30. Merry, *supra* note \_\_, at 23 (discussing “incorporation on condition of assimilation”). [↑](#footnote-ref-30)
31. Anita S. Krishnakumar, *Dueling Canons*, 65 Duke L.J. 909, 912 (2016). [↑](#footnote-ref-31)
32. Karl L. 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 the 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*. [↑](#footnote-ref-32)
33. *Cf. id.* (“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[.]”) [↑](#footnote-ref-33)
34. The comparison I present here—between American legal views on adoption on the one hand and general Hawaiian views on adoption on the other—is asymmetrical. 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*, 20 Yale L. & Pol’y Rev. 263 (2002). [↑](#footnote-ref-34)
35. E. Wayne Carp, *Introduction*, *in* Adoption in America: Historical Perspectives 1, 3 (E. Wayne Carp ed., 2002). [↑](#footnote-ref-35)
36. Pustilnik, *supra* note \_\_, at 268. Destitute children were “bound out” and put to work, and children from more affluent families were placed in apprenticeships. *See* E. Wayne Carp, 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, 8 (2003). *See also* Joy Schulz, Hawaiian by Birth: Missionary Children, Bicultural Identity, and U.S. Colonialism in the Pacific 20-25 (2020) (noting complaints from American missionary parents in Hawai‘i about lack of apprenticeship opportunities). [↑](#footnote-ref-36)
37. Nelson, *supra* note \_\_, at 9. [↑](#footnote-ref-37)
38. Amy Dru Stanley, *Home Life and the Morality of the Market*, *in* The Market Revolution in America: Social, Political, and Religious Expressions, 1800-1880, 74, 83-84 (Melvyn Stokes & Stephen Conway eds., 1996); Nancy Cott, The Bonds of Womanhood: “Woman’s Sphere” in New England, 1780-1835, 65-66 (1977). [↑](#footnote-ref-38)
39. Cott, *supra* note \_\_, at 85 (“Mothers have as powerful an influence over the welfare of future generations as all earthly causes combined.”). On the development of a culture of gentility, particularly among American middle classes, see Richard Bushman, The Refinement of America: Persons, Houses, Cities (1992). [↑](#footnote-ref-39)
40. Jamil 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). [↑](#footnote-ref-40)
41. In an 1830 custody dispute, a Maine court reasoned that a daughter “require[ed] peculiarly the superintendence of a mother.” 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 “paternal feelings of the mother toward her children are naturally as strong, and generally stronger, than those of the father.” *Id.* at 1058. [↑](#footnote-ref-41)
42. On Brace’s program see Carp, *supra* note \_\_, at 9-10. [↑](#footnote-ref-42)
43. 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 (Donald Critchlow & Charles Parker eds., 1998). 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). [↑](#footnote-ref-43)
44. For example, in the 1857 case *Van Duyne v. Vreeland*,the New Jersey Supreme Court upheld a contract between two brothers in which on 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 \_\_, at 269. On the role of lawyers in crafting a record that would allow the court to see how the uncle had come to shape his adopted son’s life, see Hendrik Hartog, Someday All This Will Be Yours: A History of Inheritance and Old Age 182-85 (2012). On private ordering in adoption see generally Pustilnik, *supra* note \_\_. [↑](#footnote-ref-44)
45. Grossberg, *supra* note \_\_, at 269-270. [↑](#footnote-ref-45)
46. *Id.* at 271-72; Zainaldin, *supra* note \_\_, at 1046 [↑](#footnote-ref-46)
47. Grossberg, *supra* note \_\_, at 272. [↑](#footnote-ref-47)
48. Lawrence 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 if the ‘adoptive’ parent dies intestate, what becomes of the child? Does it have a claim to any of the family property?” Lawrence Friedman, Dead Hands: A Social History of Wills, Trusts, and Inheritance Law 56 (2009). [↑](#footnote-ref-48)
49. In using the term “natural” or “nature,” I rely on the work of anthropologist David Schneider on American kinship. According to Schneider, Americans believed their views on kinship organized through law otherwise naturally occurring relationships. David Schneider, American Kinship: A Cultural Account 109-10 (1968). Of course, “nature” was always a socially constructed ideal, and in some instances the 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. Hendrik Hartog, *Romancing the Quotation*, *in* Law in the Liberal Arts 155, 157 (2004) (“[T]he legal and cultural centrality of heterosexual marriage was being dethroned at the very moment he was positing a model dependent on its regnant presence.”); Grossberg, *supra* note \_\_, at 306 (1985) (noting a “increasing number of conflicts” over family law in the 1960s). Nonetheless, anxieties about “nature” or the “natural order” explain much of the opposition to adoption in American legal commentary. [↑](#footnote-ref-49)
50. James Schouler, A Treatise on the Law of Domestic Relations § 4 (3d ed. 1882) (“the most interesting and important of the domestic relations is that of husband and wife”).” [↑](#footnote-ref-50)
51. *Non-she-po v. Wa-win-ta*, 37 Or. 213, 216 (1900). [↑](#footnote-ref-51)
52. William Henry Whitmore, The Law of Adoption in the United States 75 (1876). [↑](#footnote-ref-52)
53. *Schafer v. Eneu*, 54 Pa. 304, 306 (1867) (emphasis added). [↑](#footnote-ref-53)
54. Opening Brief of John T. Walker, et als, Appellants, at 14, Walker v. O’Brien, 115 F.2d 956 (9th Cir. 1940) (No. 9533). [↑](#footnote-ref-54)
55. For these and other examples see Stephen Presser, *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443, 496-505 (1972). [↑](#footnote-ref-55)
56. *Commonwealth v. Nancrede*, 32 Pa. 389, 390 (1859). [↑](#footnote-ref-56)
57. Grossberg, *supra* note \_\_, at 276. [↑](#footnote-ref-57)
58. *See, e.g.*, *Jenkins v. Jenkins*, 64 N.H. 407 (1888) (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”). [↑](#footnote-ref-58)
59. *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.”). [↑](#footnote-ref-59)
60. *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 parental instincts.”Schouler, *supra* note \_\_, at § 232. [↑](#footnote-ref-60)
61. Friedman, *supra* note \_\_, 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 offspring.”*Ex parte Ortíz y Lluberas*, 42 D.P.R. 350, 1931 WL 4966, \*3 (1931) (author’s translation). [↑](#footnote-ref-61)
62. Judith Schachter, A Sealed and Secret Kinship: The Culture of Policies and Practices in American Adoption 5 (2002). [↑](#footnote-ref-62)
63. Changing legal views on adoption thus seem to follow what Melissa Murray calls the “functional turn” in family law. Murray explains that in the twentieth century, courts and policymakers attempted to treat as “families” groups of people who did not “comport[] with the indicia that traditionally are used to establish family status.” Melissa Murray, *Family Law’s Doctrines*, 163 U. Pa. L. Rev. 1985, 1988 (2015). But even as courts modified doctrine to reflect changes in the structure of the family, they “emphasiz[ed] the degree to which these [differently structured] families comported with the basic structure and function of the marital family,” thus reifying the marital family model. *Id*. at 1990. [↑](#footnote-ref-63)
64. Kanale K. Sandowski and 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). [↑](#footnote-ref-64)
65. *Id.* at 1139. [↑](#footnote-ref-65)
66. *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.”) [↑](#footnote-ref-66)
67. *See infra*, notes \_\_-\_\_ and accompanying text [Kamakau’s testimony]. [↑](#footnote-ref-67)
68. E.S. Craighill Handy & Mary Kawena Pukui, The Polynesian Family System in Ka-‘u, Hawai‘i 3 (1958). [↑](#footnote-ref-68)
69. Lilikalā Kame‘eleihiwa, Native Land and Foreign Desires: Pehea Lā E Pono Ai? 24 (1992). [↑](#footnote-ref-69)
70. Marshall Sahlins, Historical Ethnography—Anahulu: The Anthropology of History in the Kingdom of Hawai‘i 197 (1992). [↑](#footnote-ref-70)
71. J. Kēhaulani Kauanui, Hawaiian Blood: Colonialism and the Politics of Sovreignty and Indigeneity 48 (2008). [↑](#footnote-ref-71)
72. Merry, *supra* note \_\_, at 50. [↑](#footnote-ref-72)
73. Sahlins, *supra* note \_\_, at 198. [↑](#footnote-ref-73)
74. Proceedings, at 16, Kiaiaina v. Kahanu, 3 Haw. 368 (April 17, 1871) [hereinafter Proceedings in *Kiaiaina v. Kahanu*](Law 1641, Box 47, Series 006—1st Circuit Court Law, Hawai‘i State Archives). [↑](#footnote-ref-74)
75. On the persistence of this practice see Donna Grace and Alathea Ku‘ulei Serna, *Early Education and Care for Native Hawaiian Children in Hawai‘i: A Brief History*, 183 Early Child Dev. & Care 308, 309 (2013); Noreen Mokuau et al. *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, and Native Hawaiian Grandparents Raising Grandchildren*, 68 J. Gerontology Series B: Psychol. Sci & Soc. Sci. 139 (2013). [↑](#footnote-ref-75)
76. Sahlins, *supra* note \_\_, 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 Andrade, *E Ola Ka ‘Ōlelo Hawai‘i: Protecting the Hawaiian Language and Providing Equality for Kānaka Maoli*, 6 Indigenous People’s J. L. Culture & Resistance 3, 18-27 (2020). [↑](#footnote-ref-76)
77. Sahlins, *supra* note \_\_, at 200. [↑](#footnote-ref-77)
78. Proceedings, at [3] In re Estate of Laumaka (June 27-July 2, 1862) [hereinafter Proceedings on the Estate of Laumaka] (Probate 554, Series 007—1st Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-78)
79. *Id.* at [10]. [↑](#footnote-ref-79)
80. *Id*. at [4]. [↑](#footnote-ref-80)
81. Proceedings, [1]-[2] In re Estate of Hū‘eu (August 15, 1863) (Probate 327, Series 007—1st Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-81)
82. *Id.* at [3]-[4]. [↑](#footnote-ref-82)
83. Seth Archer, Sharks upon the Land: Colonialism, Indigenous Health, and Culture in Hawai‘i, 1778-1855, 181 (2018). On the kingdom’s demographic crisis see *infra* Part I.C. [↑](#footnote-ref-83)
84. Proceedings, 7, In re Estate of Kanehailua (June 30, 1865) [hereinafter Proceedings on the Estate of Kanehailua] (Probate 1765, Series 007—1st Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-84)
85. Noenoe K. Silva, The Power of the Steel-Tipped Pen: Reconstructing Native Hawaiian Intellectual History 174 (2017). [↑](#footnote-ref-85)
86. *Id*. at 200. [↑](#footnote-ref-86)
87. *Id*. [↑](#footnote-ref-87)
88. *Id.* at 198. [↑](#footnote-ref-88)
89. *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 brough the two ali‘i nui families together, lessending any chance of ‘Olopana turning against Haumea and Wākea when they take over the rule of the island.”). [↑](#footnote-ref-89)
90. Proceedings, at [3], In re Estate of Pākī ((June 29, 1865) (Probate 1061, Series 007—1st Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-90)
91. Lili‘uokalani, Hawaii’s Story by Hawaii’s Queen 10 (Hui Hānai 2013) (1898). [↑](#footnote-ref-91)
92. Carp, *supra* note \_\_, at 132-33 (discussing social stigma around adoption in America). [↑](#footnote-ref-92)
93. David Forman argues, and Kamakau’s testimony discussed here, *see* *infra* notes 73-80 and accompanying text, seems to confirm, that the keiki ho‘okama relationship carried an inheriting dimension to it. *See* Forman, *supra* note \_\_, 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. [↑](#footnote-ref-93)
94. *See infra*, Part I.C. [↑](#footnote-ref-94)
95. One the chiefs’ inheritance practices in this context see Kame‘eleihiwa, *supra* note \_\_, at 95-135. Kamakau explained that before reform, common people “had property they could dispose of,” and it was the custom of the county to make such bequests through a verbal will. 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, Hawai‘i State Archives). However, the maka‘āinana (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 maka‘āinana 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. [↑](#footnote-ref-95)
96. *Id.* at 4. [↑](#footnote-ref-96)
97. *Id*. [↑](#footnote-ref-97)
98. *Id*. at 5 (emphasis added). [↑](#footnote-ref-98)
99. Proceedings in *Kiaiaina v. Kahanu*, *supra* note \_\_, at 17. [↑](#footnote-ref-99)
100. *Id.* at 18. [↑](#footnote-ref-100)
101. *Id*. [↑](#footnote-ref-101)
102. *Nakuapa* Trial Transcript, *supra* note \_\_, at 4. [↑](#footnote-ref-102)
103. Archer, *supra* note \_\_, 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 \_\_, at 140-41. [↑](#footnote-ref-103)
104. Archer, *supra* note \_\_, at 199. [↑](#footnote-ref-104)
105. For an exploration of chiefs trading practices with foreign merchants see Arista, *supra* note \_\_, 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 \_\_, at 47, 264 n.30. [↑](#footnote-ref-105)
106. For an account of why the chiefs turned to the missionaries, see generally Kame‘eleihiwa, *supra* note \_\_; *see also* David 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. Arista, *supra* note \_\_, at 212-13, 228. [↑](#footnote-ref-106)
107. Beamer, *supra* note \_\_, at 3-4; Merry, *supra* note \_\_, at 4; *see generally* Osorio, *supra* note \_\_. [↑](#footnote-ref-107)
108. Translation of the Constitution and Laws of the Hawaiian Islands, Established in the Reign of Kamehameha III 10 (1842) [hereinafter 1842 Constitution and Laws]. [↑](#footnote-ref-108)
109. *Id.* at 14-15. [↑](#footnote-ref-109)
110. *Id.* at 16. [↑](#footnote-ref-110)
111. *Id.* at 19-20. [↑](#footnote-ref-111)
112. Merry, *supra* note \_\_, at 90-93. On one of the Hawaiian members of the Supreme Court, John Papa Ī‘ī, see Marie Alohalani Brown, Facing the Spears of Change: The Life and Legacy of John Papa Ī‘ī 117-135 (2016). [↑](#footnote-ref-112)
113. The Māhele was an incredibly complex process that I cannot hope to accurately describe here. On the reasons behind and operation of the Māhele see generally Kame‘eleihiwa*, supra* note \_\_. But because property in land was at the center of most of the disputes I will 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, Jan. 24, 1872, at 2 (“inasmuch 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”). [↑](#footnote-ref-113)
114. For example, the *‘aikāne* was a “romantic same-sex friend, generally and unproblematically assumed to be a sexual partner.” Chang, *supra* note \_\_, at 44. On the ‘aikāne and the prohibition of sodomy in the kingdom, as well as on 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 church or state. Chang, *supra* note \_\_, 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 exists, 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 \_\_, at 71. For a discussion of the law on marriage and divorce in the kingdom see Jane Silverman, *To Marry Again*, 17 Haw. J. Hist. 64 (1983). [↑](#footnote-ref-114)
115. Kame‘eleihiwa, *supra* note \_\_, at 99. [↑](#footnote-ref-115)
116. Civil Code of the Hawaiian Islands Passed in the Year of Our Lord 1859 § 1448. [↑](#footnote-ref-116)
117. 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; Passed by the Houses of Nobles and Representatives, During the Twenty-First Year of His Reign 198 (1846) [hereinafter Statute Laws of 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 no material in the litigation I discuss here. [↑](#footnote-ref-117)
118. Kumu Kanawai, a me Na Kanawai o ko Hawaii Pae Aina, Ua kauia i ke kau ia Kamehameha III 81-82 (1841). [↑](#footnote-ref-118)
119. 1842 Constitution and Laws, *supra* note \_\_, at 111. [↑](#footnote-ref-119)
120. 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). [↑](#footnote-ref-120)
121. *Id*. [↑](#footnote-ref-121)
122. Arista, *supra* note \_\_, at 133. [↑](#footnote-ref-122)
123. Arista, *supra* note \_\_, at 2. [↑](#footnote-ref-123)
124. *Cf.* Merry, *supra* note \_\_, 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.”). [↑](#footnote-ref-124)
125. For example, Merry has emphasized the absence of customary law in the kingdom, and specifically of courts devoted to hear 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 \_\_, at 103 (arguing that the 1852 Constitution “eliminated any space within which Hawaiian customary law could legitimately exist”); Merry, supra note \_\_, at 132 (“There was to be only one [legal] system, but it was to be 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 and close-knit urban communities.”). [↑](#footnote-ref-125)
126. Paul Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai‘i*, 20 U. Haw. L. Rev. 99, 123 (1998). 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 existed,” were “merely technical or 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 colonization.” Forman, *supra* note \_\_, at 321. Consequently, Hawaiian custom and usage “remained an important element of society in these islands” from the kingdom to the present day. *Id.* [↑](#footnote-ref-126)
127. The most striking declaration to this effect came from Chief Justice Allen in an 1862 case, where he stated he was “of [the] opinion that there was a common law of inheritance [before 1827], liable to be modified or defeated, but perfectly good until such an event.” *Keelikolani v. Robinson*, 2 Haw. 514, 516 (1862). [↑](#footnote-ref-127)
128. Kiaiaina v. Kahanu, 3 Haw. 368, 369 (1871). [↑](#footnote-ref-128)
129. *See supra* Part I.B. [↑](#footnote-ref-129)
130. The factual record in this case is riddled with competing accounts of how the adoption took place of who George Lawrence was, and who his wife—Kiki—was. *See generally* Testimony Taken Before the Clerk of the Supreme Court, Mellish v. Bal, 3 Haw. 123 (Dec. 9 1868) (Law 745, Box 22, Series 006—1st Circuit Court Law, Hawai‘i State Archives). We can nonetheless sketch a general outline of the facts. The adoption took place in O‘ahu, 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 George, a witness claimed, “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 (Deb. 11, 1869) (Law 745, Box 22, Series 006—1st Circuit Court Law, Hawai‘i State Archives). [↑](#footnote-ref-130)
131. Complaint, at [2]-[3], Mellish v. Bal, 3 Haw. 123 (Apr. 7, 1868) (Law 754, Box 2, Series 006—1st Circuit Law, Hawai‘i State Archives). [↑](#footnote-ref-131)
132. *Cf.* Motion of Nonsuit, Mellish v. Bal, 3 Haw. 123 (July 20, 1869) (Law 754, Box 2, Series 006—1st Circuit Law, Hawai‘i State Archives) (noting that not all keiki hānai were entitled to inherit). [↑](#footnote-ref-132)
133. *Id*. [↑](#footnote-ref-133)
134. Plaintiff’s Points on Exceptions, Mellish v. Bal, 3 Haw. 123 (Law 754, Box 2, Series 006—1st Circuit Law, Hawai‘i State Archives). [↑](#footnote-ref-134)
135. *Id.* [↑](#footnote-ref-135)
136. Brief of A.F. Judd for Defendants on the Nonsuit, at [1], Mellish v. Bal, 3 Haw. 123 [hereinafter Brief of A.F. Judd for Defendants on the Nonsuit] (Law 745, Box 22, Series 006—1st Circuit Law, Hawai‘i State Archives). [↑](#footnote-ref-136)
137. 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). [↑](#footnote-ref-137)
138. 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.* [↑](#footnote-ref-138)
139. 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 father removed from the community that originated the custom.” Henry Smith, *Community and Custom in Property*, 10 Theoretical Inquiries L. 5, 12 (2009). [↑](#footnote-ref-139)
140. Brief of A.F. Judd for Defendants on the Nonsuit, *supra* note \_\_ at [3]. [↑](#footnote-ref-140)
141. *Id.* at [2-3]. [↑](#footnote-ref-141)
142. *Id.* at [1]-[2]. [↑](#footnote-ref-142)
143. *Id.* at [3]. [↑](#footnote-ref-143)
144. Mellish v. Bal, 3 Haw. 123 (1869). [↑](#footnote-ref-144)
145. *Id.* at 127. [↑](#footnote-ref-145)
146. *Id*. at 126-27. [↑](#footnote-ref-146)
147. 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. [↑](#footnote-ref-147)
148. 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*. Proceedings, at [7], In re Maughan’s Estate, 3 Haw. 262 (Sept. 3, 1869) [hereinafter Proceedings on Maughan’s Estate] (Probate 731, Series 007-1st Circuit Probate, Hawai‘i State Archives) (“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.”). 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] on the matter in your absence and will try to have it remain open until your return.

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). [↑](#footnote-ref-148)
149. *In re Maughan’s Estate*, 3 Haw. 262, 262 (1871). [↑](#footnote-ref-149)
150. “It shall be incumbent on all parents, guardians, and adopters of children, between the ages of four and of fourteen years, to send such children to some school hereinafter prescribed.” Statute Laws of 1846, *supra* note \_\_, at 199. A similar promise appears in the 1865 agreement between a man named Namauu to have his daughter, Teraka, adopted by a man named Kaikaika.

Know All Men By These Presents, that I, Namauu, of the town of Lahaina, Island of Maui, by these instruments have given, granted, conveyed, quit and do absolutely give my daughter named Tereka Namauu, about seven years of age, to Kaikaika, of this same place, to care, raise and educate, and henceforth he has authority over this said child until she reaches the age of majority.

I, Kaikaika, of Lahaina, do agree and swear to fulfill all the aforesaid conditions, and I will raise Tereka Namauu and provide everything for her wellbeing, in sickness and in health, and will send her to school and I will be her genuine father and she is my legal heir.

Letter of Adoption, In re Estate of Namauu (Nov. 11, 1865) (Jason Achiu trans.) (Probate A107, Series 012—2nd Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-150)
151. Proceedings on Maughan’s Estate, *supra* note \_\_, at [4]-[5] (“Pauahi lived with decedent till she was married. . . . [She was] married I think in 1861.”) [↑](#footnote-ref-151)
152. 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). [↑](#footnote-ref-152)
153. Her lawyer claimed she was the “sole heir of the decedent.” Proceedings on Maughan’s Estate, *supra* note \_\_, at [6]. [↑](#footnote-ref-153)
154. Nancy’s lawyer claimed that she was “the only blood relation,” that Pauahi was an “only an adopted child,” and that the statute of descents referred only to “blood children.” *Id.* [↑](#footnote-ref-154)
155. *Id.* at [6]-[7]. [↑](#footnote-ref-155)
156. *Id.* at [7]. [↑](#footnote-ref-156)
157. *Id.*  [↑](#footnote-ref-157)
158. Decision, In re Maughan’s Estate, 3 Haw. 262 (Nov. 10, 1869) (Probate 731, Series 007-1st Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-158)
159. 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). [↑](#footnote-ref-159)
160. [I am still tracking down the secondary sources to develop his background.] [↑](#footnote-ref-160)
161. 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). [↑](#footnote-ref-161)
162. *Id.* at 2. [↑](#footnote-ref-162)
163. *Id.* at 3. [↑](#footnote-ref-163)
164. Brief of A.F. Judd, Atty for Pauahi (w) Appellant, at [1], In re Maughan’s Estate, 3 Haw. 262 (Jan. 17, 1871) [hereinafter Brief of Appellant] (Probate 731, Series 007-1st Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-164)
165. *Id.* at [1]. [↑](#footnote-ref-165)
166. *Id.* at [2]. [↑](#footnote-ref-166)
167. *Id.*. [↑](#footnote-ref-167)
168. *Id.* (citing *In re Estate of Kamehameha IV*, 2 Haw. 715 (1864) and “the Matter of the Will of ‘Achu’”). *Kamehameha IV* discussed the will of Kamehameha III, which made Kamehameha IV his heir and successor to the throne. *Kamehameha IV*, 2 Haw. at 724.Judd’s mention of the “Matter of the Will of ‘Achu’” is likely a reference to Wei See v. Young Sheong, 3 Haw. 489 , 490 (1873). *See* Forman, *supra* note \_\_, at 343 n. 128 (noting a different reference to “Ah Chu”). In *Wei See*, the Court discussed the will of a Chinese man which left a life interest in some of his property to his Hawaiian wife which was then to pass upon her death to his adopted daughter. 3 Haw. at 490. [↑](#footnote-ref-168)
169. Brief of Appellant, *supra* note \_\_, at [2] (citing *Abenela v. Kailikole*, 2 Haw. 660 (1863)). In *Abenela*, the Supreme Court upheld an action of ejectment brought by a plaintiff against an adopted child who claimed that he had inherited the property of his adoptive parents. The adopted child was a man named Abenela, whose adoption I discussed above. *See supra* text accompanying notes \_\_ - \_\_. The Supreme Court rejected Abenela’s claim because his adoption had not been recorded as required under by statute. In doing so, the Court intimated that adoption carried important property consequences, which is why recording the articles of adoption was necessary: “all agreements of adoption . . . are of great importance, as affecting the rights in property.” *Abenela*, 2 Haw. at 661. [↑](#footnote-ref-169)
170. Brief of Appellant, *supra* note \_\_, at [3]. [↑](#footnote-ref-170)
171. Indeed, he noted that now that adoptions were required to be in writing and recorded, “there can be no difficulty of proving the fact of adoption.” *Id.* He surmised that it was this difficulty that precluded the Court in cases concerning adoptions conducted before the enactment of statutes on adoptions from recognizing the inheritance rights of adopted children. But with this difficulty out of the way, “Courts can have no embarrassment in this regard.” *Id.* [↑](#footnote-ref-171)
172. 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.” 270. Indeed, Justice Widemann’s views on these cases remain a mystery, for he wrote very little. An editorial from the *Pacific Commercial Advertiser*, a pro-American newspaper, *see* Helen Geracimos Chapin, Shaping History: The Role of Newspapers in Hawai‘i 61 (noting criticism from Hawaiian-language press that the *Advertiser* focused on the interests of *haole* (white) businessmen), complained that on “the occasions the whole Court sit together, [Widemann] contribute[d] the fact of his presence,” *The Supreme Court*,Pac. Com. Advertiser, Feb. 1, 1873, 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: “if 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*. This suggests that the epistemic problems around custom and Hawaiian practices, and the racist beliefs that framed this problem, were part of broader concerns among haole observers about the operation of law in the kingdom. [↑](#footnote-ref-172)
173. *Maughan*, 3 Haw. at268. [↑](#footnote-ref-173)
174. *Id.* at 269. This view of inheritance reflects the principle of testamentary freedom. See Hartog, *supra* note \_\_, at 67-71 (discussing the use of this principle to negotiate old-age care); Susanna 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). [↑](#footnote-ref-174)
175. *Maughan*, 2 Haw. at 268. [↑](#footnote-ref-175)
176. *Id.* at 267. [↑](#footnote-ref-176)
177. *Id*. at268. I agree with David Forman that this statement about the force of custom is dicta because, per Hartwell’s own account, the force of custom was not a question before the Court. Forman, *supra* note \_\_, at 343 n. 128. [↑](#footnote-ref-177)
178. *Maughan*, 3 Haw. at263 (Allen C.J., dissenting). [↑](#footnote-ref-178)
179. *Id.* at 265. [↑](#footnote-ref-179)
180. *Id.* at263. [↑](#footnote-ref-180)
181. *Id.* at 264. [↑](#footnote-ref-181)
182. 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 2, In re Nakuapa’s Estate, 3 Haw. 143 (Mar. 9, 1869) [hereafter Petition of Kaowaopa] (Devin Forrest trans.) (Folder I, Probate 2419, Series 007-1st Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-182)
183. 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). [↑](#footnote-ref-183)
184. Petition of Pahau, at 1, 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 feature of Hawaiian kinship, described above, to eliminate kinship distance between households by seeing members of the same generation as siblings. As Mary Kawena Pukui explained:

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 \_\_, at 56. [↑](#footnote-ref-184)
185. I have taken this account of Kaowaopa’s adoption from Forman, *supra* note \_\_, at 339 n.105. [↑](#footnote-ref-185)
186. *In re Estate of Nakuapa*, 3 Haw. 143 (1869) [hereinafter *Nakuapa I*] (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); *In re Estate of Nakuapa*, 3 Haw. 342 (1872) [hereinafter *Nakuapa II*] (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*, 3 Haw. 400 (1872) [hereinafter *Nakuapa III*] (granting yet another new trial on the grounds that the jury was influenced by an improperly admitted written statement); *In re Estate of Nakuapa*, 3 Haw. 410 (1873) [hereinafter *Nakuapa IV*] (holding that the evidence did not support Kaowaopa’s claim that she was adopted as an heir). [↑](#footnote-ref-186)
187. *Nakuapa IV*, 3 Haw. 410 at 413. [↑](#footnote-ref-187)
188. Proceedings, at 37, In re Nakuapa’s Estate, 3 Haw. 143 (Apr. 3, 1869) ([7] Folder I, Probate 2419, Series 007-1st Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-188)
189. *Nakuapa I*, 3 Haw. at 143; Olelo Hooholo, In re Nakuapa’s Estate, 3 Haw. 143 (July 13, 1869) ([16-20] Folder I, Probate 2419, Series 007-1st Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-189)
190. *Nakuapa I*, 3 Haw. at 146. [↑](#footnote-ref-190)
191. Motion of Kaowaopa to Be Declared Heir, In re Nakuapa’s Estate, 3 Haw. 143 (Dec. 19, 1870) ([23-26] Folder I, Probate 2419, Series 007-1st Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-191)
192. Order, In re Nakuapa’s Estate, 3 Haw. 143 (Dec. 19, 1870) ([23-26] Folder I, Probate 2419, Series 007-1st Circuit Probate, Hawai‘i State Archives) (“The Court ordered judgment for the complainant. (pro forma).”). [↑](#footnote-ref-192)
193. *Nakuapa II*, 3 Haw. at 348 (“But the evidence as to the right of the keiki hanai to inherit, is somewhat conflicting, and the Court are uncertain what the intention of the jury was in rendering the verdict, by the terms used, and therefore they regard it as an act of justice to the parties, that a new trial should be granted.”). [↑](#footnote-ref-193)
194. Allen distanced himself from Hartwell’s reliance in *Maughan* on Anglo-American concepts of adoption and common law *and* from one of the arguments that Kaowaopa’s counsel had put forth: 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 4, , In re Nakuapa’s Estate, 3 Haw. 143 (Dec. 19, 1870) ([8] 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) (“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.” (emphasis added)).Allen did reference the civil law in his opinion, *see Nakuapa II*, 3 Haw. at 345-46, but his decision rested firmly on Hawaiian common law. [↑](#footnote-ref-194)
195. *Nakuapa II,* 3 Haw. at 345. [↑](#footnote-ref-195)
196. 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 of the family, and entitled to all the rights of a child of the blood, and hence the general term was used.” *Id.* [↑](#footnote-ref-196)
197. *Id.* at 347. [↑](#footnote-ref-197)
198. *Id*.at 347-48. We should be careful 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 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). [↑](#footnote-ref-198)
199. 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). [↑](#footnote-ref-199)
200. *Id.* at 354-55 (emphasis added). [↑](#footnote-ref-200)
201. *Id*.at 353 (emphasis added). [↑](#footnote-ref-201)
202. *See supra* notes \_\_-\_\_ and accompanying text. [↑](#footnote-ref-202)
203. *Nakuapa II,* 3 Haw. at 352 (Hartwell, J., dissenting). [↑](#footnote-ref-203)
204. *Nakuapa III*, 3 Haw. at 401. [↑](#footnote-ref-204)
205. Brief of Counsel for Keahi, In re Nakuapa’s Estate, 3 Haw. 143 (Oct. 7, 1872) ([Part 3] Folder II, Probate 2419, Series 007-1st Circuit Probate, Hawai‘i State Archives); Claimant’s Brief, In re Nakuapa’s Estate, 3 Haw. 143 ([Part 3] Folder II, Probate 2419, Series 007-1st Circuit Probate, Hawai‘i State Archives). [↑](#footnote-ref-205)
206. Brief of A. Keohokalole, at 1, In re Nakuapa’s Estate, 3 Haw. 143 (Oct. 12, 1872) [hereinafter Keohokalole’s Brief] (Devin Forrest trans.) ([Part 3] Folder II, Probate 2419, Series 007-1st Circuit Probate, Hawai‘I State Archives). [↑](#footnote-ref-206)
207. *Id.* at 5. [↑](#footnote-ref-207)
208. *Id.* at 6. [↑](#footnote-ref-208)
209. Kānāwai refers to “public 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 \_\_, at 238. Thus, Keohokalole here does not claim there was no law in the past, but rather that there were no statutes. [↑](#footnote-ref-209)
210. Keohokalole’s Brief, *supra* note \_\_, at 5 (emphasis added). Elsewhere, Keohokalole returned to this theme, writing: “Ua ʻane hiki ʻole loa nō ke hōʻole aku nā kānāwai o kēia wā; i nā hana a me nā mea i hala ma mua o ko lākou kaulia ʻana | It is nearly impossible for the laws of this time to deny the things that have occurred prior to their enactment.” *Id.* at 7. [↑](#footnote-ref-210)
211. *Id.* at 7 (emphasis added). [↑](#footnote-ref-211)
212. *Id.* at 9. [↑](#footnote-ref-212)
213. He also returned to this religious theme later in the brief:

He kaulike ʻole ke kāpae aʻe i ke kānāwai o ka pono maoli, i waiho ʻia mai ai e ka Mea Mana Loa i loko o ka naʻau o ke kanaka; ke kahua a ke Akua i hoʻolako ai, no ka pono o nā noʻonoʻo ʻana e kūkaʻi ai, a hoʻopaʻa aku ma ke paʻi ʻana i luna o nā pepa me ka waihoʻoluʻu o nā ʻano wai ānuenue o kēia au, kahi nō hoʻi o ko Kaoaopa kūlana i manaʻo mau ʻia ai; a hōʻike ʻia aku ai i ka ʻAha Kiʻekiʻe ma ke keʻena i ʻōlelo ʻia ma luna, ma ke ʻano waiwai ili i nā hoʻoilina.

—

It is unjust to set aside the laws of righteousness that has been left by The All Powerful in the heart of man; the foundation that God has supplied us to properly think and converse about, and to affirm by fixing it upon the documents with all the different colors of the rainbow of this time, where Kaoaopaʻs status is always thought of; and presented to the Supreme Court in the office stated above, as inheritance to the heirs.

*Id.* at 8. [↑](#footnote-ref-213)
214. *Id.* at 4-5. [↑](#footnote-ref-214)
215. *Id.* at 6. [↑](#footnote-ref-215)
216. *Id.* at 7. [↑](#footnote-ref-216)
217. *Id.* at 9. [↑](#footnote-ref-217)
218. *Nakuapa III*, 3 Haw. at 405. [↑](#footnote-ref-218)
219. *Nakuapa IV*, 3 Haw. at 413 (Widemann, J., for the Court) (“There being no proof of any notoriety whatever, and with such frail evidence of the ‘adoption as heir,’ the claim must fall.”). [↑](#footnote-ref-219)
220. Llewellyn, *supra* note \_\_, at 401. [↑](#footnote-ref-220)
221. *See supra* note [directing to Keohokalole’s brief talking about the times without property]. [↑](#footnote-ref-221)
222. *See* *supra* Part I.A. [↑](#footnote-ref-222)
223. Barbara Welke cautions that the “primary 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 \_\_, at 46. [↑](#footnote-ref-223)
224. Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York 218 (1982). [↑](#footnote-ref-224)
225. Reva 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 Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 Geo. L.J. 2127, 2140 (1994). [↑](#footnote-ref-225)
226. Siegel, *Home as Work*, *supra* note \_\_, at 1181-82. [↑](#footnote-ref-226)
227. *Id*. at 1183. [↑](#footnote-ref-227)
228. *Id*. [↑](#footnote-ref-228)
229. Hendrik Hartog, Man and Wife in America: A History, 212-13 (2000). [↑](#footnote-ref-229)
230. *Id* at 212; Welke, *supra* note \_\_, at 67-68. [↑](#footnote-ref-230)
231. Hartog, *supra* note \_\_, at 213. [↑](#footnote-ref-231)
232. *Id.* [↑](#footnote-ref-232)
233. *Id.* at 214. [↑](#footnote-ref-233)
234. Calabresi, *supra*  note \_\_, at 4. [↑](#footnote-ref-234)
235. Hartog, *supra* note \_\_, at 291 (noting that judges regarded family law reform as “unjustified redistributions of rights and powers from husbands to wives.”). This phenomenon extended beyond domestic relations law. Morton Horwtiz, 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 domain as an important instrument of cheap economic growth.” Morton Horwitz, The Transformation of American Law, 1780-1680, 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). [↑](#footnote-ref-235)
236. 1 Joel Prentiss Bishop, Commentaries on the Law of Married Women Under the Statutes of the Several States, and at Common Law and in Equity § 884 (1871) (emphasis added). I have followed Michael Grossberg’s lead in using Bishop to illuminate this conservative vision of legal change. *See* Grossberg, *supra* note \_\_, at 291-92. [↑](#footnote-ref-236)
237. *Cf.* Parker, *supra* note \_\_, 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 \_\_, 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. *Id.* [↑](#footnote-ref-237)
238. Although its advocates would certainly not have called it that. They might instead argue that legislatures should be mindful not to overstep the bounds of the authority given to them by the people, which required courts to narrowly construe legislation. *Cf.* Peterson, *supra* note \_\_, at 767-68. [↑](#footnote-ref-238)
239. Joel Prentiss Bishop, Common Law and Codification 3 (1888). [↑](#footnote-ref-239)
240. *Id*. [↑](#footnote-ref-240)
241. *Id.* at 4. [↑](#footnote-ref-241)
242. 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. Daniel J. Hulsebosch, Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830, 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 (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* Mitra Sharafi, Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772-1947, 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.”). [↑](#footnote-ref-242)
243. *See supra* notes \_\_-\_\_ and accompanying text [point to Jones’ argument in *Mellish*]. [↑](#footnote-ref-243)
244. *See* *supra* notes \_\_-\_\_ and accompanying text [on equitable argument]. [↑](#footnote-ref-244)
245. In the early twenty-first century, a federal judge in Hawai‘i allegedly suggested that because adoption was so prevalent in Hawaiian society, the “non-Hawaiian child of a woman who was the ho‘okama 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 \_\_, at 1136; *see also* Forman, *supra* note \_\_, 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 ho‘okama child, “such facts would not necessarily confer right upon him” to attend Kamehameha Schools. Forman, *supra* note \_\_, 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. [↑](#footnote-ref-245)
246. Reva Siegel uses the phrase “preservation-through-transformation” to explain the ways in which the enforcement of different forms of status relationships could “chang[e] shape as [they were] contested,” thus maintaining the viability of various forms of status subordination even as the social and political conditions that had originally structured these status relationships disintegrated. Reva Siegel, *“The Rule of Love”: Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2179 (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) . [↑](#footnote-ref-246)
247. In J. Willard Hurst’s canonical phrase, the guiding principle in nineteenth-century American law was the “release of energy,” the belief that “the legal order should protect and promote the release of individual creative energy.” J. 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 \_\_, 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”). [↑](#footnote-ref-247)
248. *Nakuapa II,* 3 Haw. at 352 (Hartwell, J., dissenting). [↑](#footnote-ref-248)
249. *Id*. [↑](#footnote-ref-249)
250. *Id.* at 354. [↑](#footnote-ref-250)
251. *Id.* at 353. [↑](#footnote-ref-251)
252. *Id.*  at 354. [↑](#footnote-ref-252)
253. Peterson, *supra* note \_\_, at 767-71; Farah Peterson, Statutory Interpretation and Judicial Authority, 1776-1861, 281 (2015) (unpublished Ph.D. dissertation). [↑](#footnote-ref-253)
254. Merry, *supra* note \_\_, at 75, 89. [↑](#footnote-ref-254)
255. *Nakuapa II,* 3 Haw. at 352 (Hartwell, J., dissenting). [↑](#footnote-ref-255)
256. *Maughan*, 2 Haw. at 267. [↑](#footnote-ref-256)
257. Alfred Hartwell, *Forty Years of Hawaii Nei*, 54 Ann. Rep. Hawaiian Hist. Soc’y 11, 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. [↑](#footnote-ref-257)
258. Merry, *supra* note \_\_, at 236-42. [↑](#footnote-ref-258)
259. Calabresi *supra* note \_\_ at 4. [↑](#footnote-ref-259)
260. 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 \_\_, at 14. [↑](#footnote-ref-260)
261. *Nakuapa II*, 3 Haw. at 354 (Hartwell, J., dissenting). [↑](#footnote-ref-261)
262. *Id.* at 353. [↑](#footnote-ref-262)
263. Burset, *supra* note \_\_, 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”). [↑](#footnote-ref-263)
264. 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 \_\_, at 123. I agree with Beamer that some elements of Hawaiian governance after reform borrowed from Hawaiian traditions, thus introducing important differences into different areas of Hawaiian law, like landownership and water rights. I address these differences in future work. [↑](#footnote-ref-264)
265. *Cf.* Hartwell, *supra*, note \_\_, at 14 (“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 in that state. There was much admiralty practice, and in this as in equity cases, a New England lawyer found himself quite at home.”). [↑](#footnote-ref-265)
266. Parker, *supra* note \_\_, at 1. [↑](#footnote-ref-266)
267. Helen Kinsella, The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian 102 (2011). [↑](#footnote-ref-267)
268. Gregory Ablavsky, “With the Indian Tribes”: Race, Citizenship, and Original Constitutional Meanings, 70 Stan. L. Rev. 1025, 1064 n.190 (2018) (noting provisions from the Michigan and Minnesota state constitutions conditioning enfranchisement upon “civilization”). [↑](#footnote-ref-268)
269. *People v. Hall*, 4 Cal. 399 (1854). *See* William J. Novak, New Democracy: The Creation of the Modern American State 43 (2022) (describing *People v. Hall* as “one of the more remarkable feats of statutory interpretation in the antebellum period”). [↑](#footnote-ref-269)
270. Kristin A. Collins, *Illegitimate Borders: “Jus Sanguinis” Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2163 (2014). [↑](#footnote-ref-270)
271. Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America 125 (2002). [↑](#footnote-ref-271)
272. *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.”). [↑](#footnote-ref-272)
273. *Reynolds v. United States*, 98 U.S. 145, 165-66 (1878). [↑](#footnote-ref-273)
274. *Id*. at 166. [↑](#footnote-ref-274)
275. Indeed, 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.” Gail Bederman, Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880-1917, 23 (1996) [↑](#footnote-ref-275)
276. *Id*. (“‘Civilization,’ as turn-of-the-century Americans understood it, simultaneously denoted attributes of race and gender.”). [↑](#footnote-ref-276)