

“How Missionaries Thought: About Property Law, For Instance”

Alfred L. Brophy*

ABSTRACT

“How Missionaries Thought: About Property Law, For Instance” looks to a limited set of data—the writings of missionaries to Hawai‘i in the antebellum era—as a gauge of American attitudes towards property more generally. Those writings analogize Hawaiian property law to feudalism, which interfered with alienability of land and left many dependent on their lords, and then suggest that property should be made more secure. They offer a prescription of Christianity, property, and the market as a solution to the ills of feudalism they have identified. Those prescriptions correlate with American attitudes more generally towards property, law, and religion in that period, and they suggest how pervasive and intertwined those ideas were.

When Chief Justice John Marshall wrote *Johnson v. M’Intosh*¹ in 1823, Christian missionaries from Connecticut had been living in the Hawaiian Islands (known to them as the “Sandwich Islands”) for three years. Though they were separated by 5000 miles, the missionaries spoke a language similar to Marshall, of Christianity, civilization, and property. For Marshall wrote in *Johnson* to explain why land occupied by the Native Americans was not owned by them.² Marshall explained that European countries agreed to a policy that the country that “discovers” a land and then takes control of it, either through conquest or purchase, has title to the property.³ Marshall rested part of the conclusion on the ways that the European settlers had developed a set of property rights.⁴ He recognized that some of the claims were extravagant, perhaps opposed to “natural right,”⁵ like the argument that the

* Reef C. Ivey II Professor of Law at the University of North Carolina. Many thanks to Aviam Soifer, William S. Brewbaker, Justin Levinson, and, most especially, Carl Christensen for their assistance.

¹ 21 U.S. (8 Wheat.) 543 (1823).

² *Id.*

³ *Id.* at 587.

⁴ *Id.* at 590.

⁵ *Id.*

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

inhabited Americas had been “discovered” and that Christianity was adequate compensation for deprivation of land. Marshall phrased it skeptically: “The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.”⁶ Yet, he also recognized that “the [c]ourts of the conqueror” could not deny the claim of conquest.⁷

As Marshall was writing, a similar intellectual process of justification of colonization, led by the next generation of Americans, was taking place on the other side of the earth.

The image of missionaries has shifted about as much as any figures in American history over the last one hundred fifty years.⁸ Though depicted in their own time as, literally, the agents of the Lord, recent historians view them differently. There has been much writing on the role of the missionaries in the process of colonization (or what's now called by some in Hawai'i, occupation). Lilikala Kame'eleihewa's *Native Land and Foreign Desires* interprets the missionaries as agents of capitalism. In Kame'eleihewa's eyes, it was the combination of Christianity, the protection of property, and the market that led to the undoing of Hawaiian culture.⁹ Other scholars identify similar patterns.¹⁰ Robert H. Stauffer's *Kahana: How the Land was Lost*,¹¹

Id. at 591. For more on the “discovery doctrine,” see ROBERT WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 314 (Oxford Univ. Press 1990).

⁶ *M'Intosh*, 21 U.S. (8 Wheat.), at 573.

⁷ *Id.* at 588; see also *The Antelope*, 25 U.S. (12 Wheat.) 546 (1827).

⁸ WILLIAM R. HUTCHISON, *ERRAND TO THE WORLD: AMERICAN PROTESTANT THOUGHT AND FOREIGN MISSIONS* (1987). Hutchison, in a twist on Perry Miller's *Errand to the Wilderness*, draws upon the writings of American missionaries throughout the world—from Africa to Hawai'i to Asia. Whereas Miller wrote of the Puritans' self-described goals for their world in New England (the wilderness), Hutchison details the missionaries' self-described goals outside of America, of bringing evangelical Christianity to other people. Those self-described goals tell us much about what they sought and about the missionaries' minds. It is up to others, of course, to draw inferences about the morality of what the missionaries sought.

⁹ LILIKALA KAME'ELEIHEWA, *NATIVE LAND AND FOREIGN DESIRES* 174-78 (1992). A similar story appears in JONATHAN KAY KAMAKAWIWO'OLE OSORIO, *DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887* (2002).

¹⁰ Mari Matsuda found, for instance, the growth of a western legal system in her detailed study, *Law and Culture in the District Court of Honolulu, 1844-1845: A Case Study of the Rise of Legal Consciousness*, 32 AM. J. LEGAL HIST. 16 (1988). More recently Wendie Ellen Schneider has interpreted the increasing turn to Hawaiian courts in the 1840s as part of the process of accommodation between western merchants and local leaders. See Ellen Schneider, *Contentious Business: Merchants and the Creation of a Westernized Judiciary in Hawaii*, 108 YALE L.J. 1389 (1999). Ronald Takaki portrays the difficult life of plantation work in this period. See RONALD TAKAKI, *PAU HANA: PLANTATION LIFE AND LABOR IN HAWAII, 1835-1920* (1983).

¹¹ ROBERT H. STAUFFER, *KAHANA: HOW THE LAND WAS LOST* (2004).

about forfeiture of native lands in the late nineteenth century, and Noenoe K. Silva's *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism*,¹² which details native protests against colonization in the 1890s, both present the now-dominant interpretation that colonization led to loss of land and other rights.

Much recent writing has focused on the Hawaiians' reactions to the newcomers. Stuart Banner, for instance, asks why native Hawaiians adopted western patterns of land ownership.¹³ His answer is that the powerful among the natives were "preparing to be colonized"—that is, they saw what was happening and wanted to maintain their wealth and power, to the extent possible, following colonization.¹⁴ They could do this, they thought, by adopting a western property regime.¹⁵

This essay pursues a parallel track: how missionaries thought about property law.¹⁶ It mines the missionaries' writings to understand how they saw property rights fitting into their world. The essay takes its title from Marshall Sahlins' much-discussed book, *How Natives Think: About Captain Cook, For Instance*. Sahlins was engaged in a debate with Princeton anthropologist Gananath Obeyesekere over whether native Hawaiians actually thought that Captain Cook was Lono, a god of the new year—or whether that was merely how westerners thought natives thought.¹⁷ The question whether

¹² NOENOE K. SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM* (2004); OSORIO, *supra* note 9 (analyzing ways that western legal regimes affected Hawaiian identity); JON M. VAN DYKE, *WHO OWNS THE CROWN LANDS OF HAWAII?* (2007). More traditional interpretations of Hawaiian history are still being produced. *See, e.g.*, THURSTON TWIGG SMITH, *HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER?* (1998).

¹³ Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 *LAW & SOC'Y REV.* 273, 275 (2005) [hereinafter Banner, *Preparing to Be Colonized*]. Banner has recently expanded that analysis in *POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA* (2007).

¹⁴ Banner, *Preparing to Be Colonized*, *supra* note 13, at 303.

¹⁵ *Id.* Carl Christensen suggests that some of the adoption of a western property system might also relate to the desire to have their property rights respected. *Calvin's Case*, for instance, suggested that the legal system (and property rights) of conquered Christian nations are preserved until changed by the conqueror, but that "the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature." *Calvin's Case*, 77 Eng. Rep. 377, 398 (1608); *see also* Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 *LAW & HIST. REV.* 439, 461-62 (2003).

¹⁶ The missionaries' thinking about feudalism is distinct, of course, from what happened in the Hawai'i courts and from the process of conversion to a western property regime. *See* SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* (2000); MARSHALL SAHLINS, *1 ANAHULU: THE ANTHROPOLOGY OF HISTORY IN THE KINGDOM OF HAWAII* (1992).

¹⁷ *Compare* MARSHALL SAHLINS, *HOW "NATIVES" THINK: ABOUT CAPTAIN COOK, FOR EXAMPLE* (1995) [hereinafter SAHLINS, *HOW "NATIVES" THINK*], *with* GANANATH

natives believed Cook was a god has implications for our understanding of how natives thought. Obeyesekere opened the debate with a challenge to Sahlins: that Sahlins' argument that natives believed Cook was a god indicated Sahlins' adoption of a western viewpoint.¹⁸ The western viewpoint, in Obeyesekere's opinion, was that natives would think some westerner was god.¹⁹ In fact, westerners since the time of Columbus had told themselves that natives believed them to be gods.

Sahlins responded that Obeyesekere imposed his own set of values on the natives about what is rational.²⁰ And so Sahlins turns what was an attack on him for imposing western values (what one might phrase as "of course, the unsophisticated natives must have thought that Cook was Lono") into a claim that he respected natives' ideas more than Obeyesekere (maybe some in the west think it's irrational for natives to think that Cook was Lono, but it made sense within their world). The exchange is complex and an engaging read, in part for Sahlins' sparkling prose. The first line of the book captures the essence of the argument: "Heinrich Zimmermann heard it directly from the Hawaiians: Cook was Lono."²¹

The missionaries' writings about Hawai'i offer an important vantage for viewing ideas about property's place in human society, particularly in the years leading into the Civil War. There is substantial debate among legal historians about the nature of legal thought in that time, particularly about the role of property and religion.²² Historians have identified a constellation of ideas circulating in antebellum America, where talk of moral and technological progress, Christianity, and economic development (called "improvement") was common. Factors such as the gradual amelioration (or evolution) of the common law from feudalism towards stable rules promoting the economy,²³ moral philosophy,²⁴ Christianity, and considerations of humanity²⁵

OBEYESEKERE, THE APOTHEOSIS OF CAPTAIN COOK: EUROPEAN MYTHMAKING IN THE PACIFIC (1992) [hereinafter OBEYESEKERE, THE APOTHEOSIS OF CAPTAIN COOK].

¹⁸ OBEYESEKERE, THE APOTHEOSIS OF CAPTAIN COOK, *supra* note 17, at xiii-xiv.

¹⁹ *Id.*

²⁰ SAHLINS, HOW "NATIVES" THINK, *supra* note 17, at 9.

²¹ *Id.* at 17. Zimmermann's journal of his voyage with Cook provides an account of Cook's and Zimmermann's dealings with the Native Hawaiians. *Id.*

²² See discussion *infra*.

²³ See, e.g., William W. Fisher, *Ideology, Religion, and the Constitutional Protection of Private Property, 1760-1860*, 39 EMORY L. J. 65 (1990). Recently, Claire Priest writes of the development of an American law of property emphasizing alienability. See Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385 (2006). Her picture of doctrinal evolution parallels the cultural ideas illustrated here and in more theoretical areas. College orations were particularly helpful in tracing the gradual moral, technological, and economic progress. See, e.g., LEVI WOODBURY, AN ORATION BEFORE THE PHI BETA KAPPA SOCIETY OF DARTMOUTH COLLEGE (Hanover, Dartmouth Press 1844).

became muddled. Previous historians have found predominance of instrumentalism,²⁶ formalism,²⁷ or humanity,²⁸ or some combination of those constructs. Historians of religion have also provided a framework for comprehending the missionaries' conjoining of Christianity with the market.²⁹ In the missionaries' writings, we can view the ideas behind the conversion to western patterns of property rights.³⁰

The age was enamored of the idea of progress captured so well by Samuel Bailey's *Essays on the Pursuit of Truth and the Progress of Knowledge* (London, R. Hunter 1829), which was cited in HENRY TUTWILER, ADDRESS DELIVERED BEFORE THE EROSOPHIC SOCIETY, AT THE UNIVERSITY OF ALABAMA, August 9, 1934, at 10 (Tuscaloosa, Robinson & Davenport, Printers 1834). Yet, many believed that the progression might be going too far. John Lord said that "in government [the theory of progress] is pushing liberty to the very verge of anarchy, and laying the axe of destruction, which is called, for the occasion, reform and progress, to the foundations upon which rest the sacred rights of person and property." JOHN C. LORD, THE PROGRESS OF CIVILIZATION AND GOVERNMENT, in LECTURES ON THE PROGRESS OF CIVILIZATION AND GOVERNMENT, AND OTHER SUBJECTS 9, 35-36 (Buffalo, Geo. H. Derby & Co. 1851). Other recent research has confirmed the predominance of economic considerations in antebellum law, from contracts and property to slave law. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) (finding predominant ideology among judges is an "instrumental conception" to use law to promote economic growth); JENNY WAHL, THE BONDSMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY (1997).

²⁴ Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161 (1999); Susanna Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959 (2006); Susanna Blumenthal, *The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law*, 26 L. & HIST. REV. 99 (2008).

²⁵ PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997).

²⁶ HORWITZ, *supra* note 23 (framing changes in terms of "instrumental conception" of law).

²⁷ ROBERT COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS (1975); Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987) (considering antislavery formalism as a response to proslavery law).

²⁸ KARSTEN, *supra* note 25. While some outsiders, like abolitionists, spoke in terms that we might call a jurisprudence of sentiment, it seems that the majority of judges separate law from considerations of humanity. Brophy, *supra* note 24, at 1184-85 (sketching the difference between a jurisprudence of sentiment and common law jurisprudence).

²⁹ See, e.g., NATHAN HATCH, THE DEMOCRATIZATION OF CHRISTIANITY (1989); MARK NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN (2002). One might, of course, reasonably ask whether the missionaries were different from other antebellum Americans in matching talk of Christianity with the market. The modest data set here will not support speculation on that important topic. This data correlate with historians of American religion who have identified multiple ways that evangelical Christianity supported and grew in conjunction with the market economy. See, e.g., PAUL E. JOHNSON, A SHOPKEEPER'S MILLENNIUM: SOCIETY AND REVIVALS IN ROCHESTER, NEW YORK, 1815-1837 (1978).

³⁰ Antebellum property law has benefited from some of the richest writing in any area of legal history in recent years. Much of the focus has been on the ideology of property. See, e.g.,

This essay, then, is concerned with what the early missionaries (those who were in Hawai'i in the 1820s and 1830s) thought about what they were doing. It turns to the ideas of missionaries, just as much recent historical work has looked to traditional ideas more generally. Those ideas, so powerful and important in their period, deserve special attention because they contain the keys to central and large pieces of American culture. What the missionaries thought they were doing has some implications for understanding antebellum history generally. Questions include: What motivated the missionaries? How did the missionaries reflect the values of their brethren who remained on the mainland? How did ideas about progress, Christianity, and property all fit together? This is fertile ground for understanding intellectual history and the process of colonization. Queries about intellectual history and colonization include: How did the intellectual structure behind colonization work? Did Christianity include the common law? How was Christianity related to the market economy? The missionaries emerge as part of a larger intellectual world, which has been discussed in depth by historians of traditional thought, such as Elizabeth Fox-Genovese and Eugene Genovese,³¹ Michael O'Brien,³² Drew Faust,³³ and Richard Brown,³⁴ among many others.³⁵

The missionaries' writings offer the hope of putting into context the relationships between Christianity and property rights, and also between the imagery of feudalism and the market, where property was freely alienable and where individuals were not beholden to lords.

During the antebellum era, the language of independence and property appeared in numerous places; the conflicting ideologies were developed perhaps best in the anti-rent movement, which stretched across the upper

GREGORY ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1997); DANIEL W. HAMILTON, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR* (2007); Fisher, *supra* note 23. Sometimes the work takes the form of exploration of Native American rights. *See, e.g.*, LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2007); STUART BANNER, *HOW THE INDIANS LOST THEIR LAND* (2007).

³¹ ELIZABETH FOX-GENOVESE & EUGENE D. GENOVESE, *THE MIND OF THE MASTER CLASS: HISTORY AND FAITH IN THE SOUTHERN SLAVEHOLDERS' WORLDVIEW* (2005).

³² MICHAEL O'BRIEN, *CONJECTURES OF ORDER: INTELLECTUAL LIFE AND THE AMERICAN SOUTH, 1810-1860* (2004).

³³ DREW GILPIN FAUST, *A SACRED CIRCLE: THE DILEMMA OF THE INTELLECTUAL IN THE OLD SOUTH, 1840-1860* (University of Pennsylvania Press 1986) (1977); DREW GILPIN FAUST, *THE CREATION OF CONFEDERATE NATIONALISM: IDEOLOGY AND IDENTITY IN THE CIVIL WAR SOUTH* (1990); DREW GILPIN FAUST, *JAMES HENRY HAMMOND AND THE OLD SOUTH: A DESIGN FOR MASTERY* (1985).

³⁴ RICHARD D. BROWN, *KNOWLEDGE IS POWER: THE DIFFUSION OF INFORMATION IN EARLY AMERICA, 1700-1865* (1991).

³⁵ *E.g.*, DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* (1984).

Hudson River of New York from the late 1830s to the Civil War.³⁶ The movement arose when tenants and sharecroppers protested against the continued enforcement of the servitudes that imposed those terms. Those conflicts appeared at oblique angles, so that some of the people most interested in individual property rights—those who represented the landlords—were at conflict with those who asked for independence and autonomy over property. Some went so far as to ask why landlords have property and others do not.³⁷

George Bancroft, a leading intellectual of the Democratic Party in the 1830s, spoke harshly of the Whigs and the idea of vested rights in a speech on July 4, 1836, even before the anti-rent movement brought the conflicts into relief.³⁸ They were the party of vested rights and law:

The whig professes to cherish liberty, and he cherishes only his chartered franchises. The privileges that he extorts from a careless or a corrupt legislature, he asserts to be sacred and inviolable. He applies the doctrine of divine right to legislative grants, and spreads the mantle of superstition round contracts. He professes to adore freedom, and he pants for monopoly. Not that he is dishonest; he deceives himself; he is the dupe of his own selfishness; for covetousness is idolatry; and covetousness is the only passion which is never conscious to itself of its existence.³⁹

That picture of Whigs as the party of aristocracy, law, and property, and the Democrats as democracy and disorder was well-entrenched, even if somewhat a caricature.⁴⁰

There were several key points in opposition to the movement. The first, represented by conservative Whigs like Daniel Barnard and James Fenimore Cooper, held that the movement was a breakdown of law. The movement was

³⁶ CHARLES W. MCCURDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865* (2001).

³⁷ *See What is Reason? "How Much Land and Property, and I Have None!"*, 16 U.S. MAG. & DEMOCRATIC REV. 17 (1845). The anti-feudalism imagery of the anti-rent movement was of a different origin from the anti-feudalism of the missionaries. While both groups critiqued feudalism, for the anti-renters imagery of feudalism carried notions of dominance by land lords. *See, e.g.*, MCCURDY, *supra* note 36, at 17 (referring to anti-rent protest against "an unconditional submission to the will of one man, elevated by an aristocratic law, emanating from a foreign monarchy"). For the missionaries, the imagery of feudalism carried notions of limitation of property rights. Commoners in Hawai'i attempted to cling to aspects of the older property regime, which had traditions that protected commoners in some ways. For example, the Hawai'i Supreme Court rejected a claim for native pasturing rights in *Oni v. Meek*, 2 Haw. 87 (1858), as a right extinguished by the transition to western property holding.

³⁸ George Bancroft, *An Oration Delivered Before the Democracy of Springfield and Neighboring Towns, July 4, 1836* (Springfield, George and Charles Merriam, 1836).

³⁹ *Id.*

⁴⁰ *See, e.g.*, MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* (1957); HOWE, *supra* note 35.

led by demagogues, who catered to the interests of the propertyless (or relatively small property holder), which sought to shake the foundations of property, for relatively little gain. Barnard, a well-known Whig attorney, spoke frequently about the importance of property and respect for law.⁴¹ He wrote perhaps the leading defense of the tenures, published in the *Whig Review* in 1845 and in pamphlet form. He saw the movement at base as an appeal to “public licentiousness,” akin to other popular movements that tended to destroy respect for law.⁴² Barnard considered the anti-rent movement treasonous and appealed to the Constitution and to a return to principles of respect for property and principles in place of those of both Whigs and Democrats who “look to the end, and . . . easily quiet themselves about the means.”⁴³ Those popular appeals led to the movement. “There seems to be nothing so intrinsically base or wicked, that respectable and apparently well-meaning persons may not be found to encourage and support it, provided only it have the sanction of numbers in its favor.”⁴⁴

The second basis for opposition was that there was not much to complain about. Barnard found the leases—or “fee farms”—to be reasonable, the result of a desire to help buyers finance their purchase, which imposed minimal fees at that.⁴⁵ Such supposedly anti-republican provisions, such as the perpetual rents and quarter-sale provisions, were relatively unimportant. One opponent of the movement thought the complaints about their anti-republican nature

⁴¹ See, e.g., DANIEL D. BARNARD, *MAN AND THE STATE: SOCIAL AND POLITICAL: AN ADDRESS DELIVERED BEFORE THE CONNECTICUT ALPHA OF PHI BETA KAPPA AT YALE COLLEGE* (New Haven, B.L. Hamlen 1846).

⁴² See, e.g., Daniel Barnard, *The “Anti-Rent” Movement and Outbreak in New York*, 2 *WHIG REV.* 577, 578 (1845).

In a country of very large liberty, it is not wonderful that some should occasionally trespass on the extreme limits of the law of order and safety, or that some others should habitually struggle for the very largest liberty—for absolute freedom from all restraint—for unbridled indulgence. Said Plato, long ago: ‘Law is the god of wise men—licentiousness is the god of fools.’

Id. at 577.

⁴³ *Id.* at 578; see also *Anti-Rent Disturbance*, 4 *NEW ENGLANDER & YALE REV.* 92, 93 (1846).

[A] few citizens combined and associated themselves to resist a portion of the established law, which they considered as founded in injustice, and from a small number increased to nearly one third of the population, and advanced from step to step in their treasonable acts, till as a closing part of the game they were playing, they murdered a valuable and honest public officer, while in the discharge of his duty.

Id.

⁴⁴ Barnard, *supra* note 42, at 580.

⁴⁵ *Id.* at 581, 583. Barnard’s detailed analysis of the legal status of the lease system helped to minimize the anti-renters’ complaints by suggesting that the infringements on their liberty were minor; see also *Anti-Rent Disturbance*, *supra* note 43, at 99-101, 106 (discussing details of the “lease” system and arguing that lease terms are not oppressive).

overdrawn. "The degradation of the tenants has been dwelt upon, until they feel sunken in public estimation, and suffer perhaps as keenly under imaginary evils as they would under real."⁴⁶ Politicians played on the inequality of wealth, and the great number of tenants, to structure an argument that the tenants were being oppressed and hence needed relief:

"Why, here is a gross disproportion in the distribution of wealth, and this must be all wrong if there be any virtue or excellence in republican equality. This is *tribute* which we are paying; this man is a lordling in a republican country, and we are serfs!" From this to the cry of "Down with the Rent," was but a short step.⁴⁷

Barnard provided a classic conservative Whig defense of the Constitution, the rule of law, and the rights of property. Barnard divided the anti-renters into three groups. The first group were those who sincerely believed that the leases were anti-republican and who were law-abiding. Presumably Governor William Seward was one such person. Others, perhaps the majority of anti-renters, were lawless. Still others, even more radical, were socialists, Fourierists and Owenites, "who [gave] a ready support to every scheme, however wide from nature, or wanting in common sense, joined themselves to the two former, and gave them their sympathy and assistance."⁴⁸

Jurists invoked anti-rent to liken it to the destruction of property. The Indiana Supreme Court in 1855 confronted a claim that a restriction on alcohol sale violated the rights of its owners.⁴⁹ Yet, the court dismissed the references to natural rights and suggested that they could not be the basis for relief: "It is the common pretense of communists, anti-renters, and other outlaws, that society has invaded their abstract and inalienable rights; but until society is revolutionized and instituted upon a different basis, these claims will be

⁴⁶ *Anti-Rent Disturbance*, *supra* note 43, at 109.

⁴⁷ BARNARD, *supra* note 41, at 580.

⁴⁸ *Anti-Rent Disturbance*, *supra* note 43, at 101.

[T]he flame has been kindled, in person and through the press, by agrarians and demagogues, who regard revolutions as useful, progressive steps toward what they call perfect equality, another name for unbridled anarchy. That society and government are but contrivances of the rich to oppress the poor—that an equal division of property is just, and that no one should possess more land than in person he can occupy—doctrines such as these, popular with those classes whose condition no change can render worse, and attractive to the ignorant, discontented population which always exists, have been advocated, and rooted in the minds of those who are already disturbed; and lest the flame should die away, appeals, skillfully contrived with cunning sophistry, have been sent forth by world-conventions, and working men's associations, composed of free thinkers and free actors, moved by such men as Owen and Fourier.

Id. at 110.

⁴⁹ *Beebe v. State*, 6 Ind. 501 (1855).

disallowed.”⁵⁰ Anti-renters were believed to be socialists, fanatics. Those references to the destruction of property keyed into other elements of thought, such as the widespread belief that respect for property was a central value, which led to moral and economic progress⁵¹ and to a contempt for socialism.⁵² Indeed, fanaticism was a favorite adjective to describe those who urged a restriction on private property.⁵³ The “ravings of . . . demagogues” deserved

⁵⁰ See *id.* at 548. Justice Lipscomb employed references to radicalism to support modest reform, such as the Texas Homestead exemption law. *Trawick v. Harris*, 8 Tex. 312 (1852); see also JOHN H. SMYTH, *THE LAW OF HOMESTEAD AND EXEMPTIONS* 53 (San Francisco, Sumner Whitney & Co. 1875).

The laws should punish crime, but not misfortune; . . . the latter should be protected, and should not permit the unfortunate to be treated as animals and hunted down, by the aid of the law, as culprits. When this is not done some of the most benevolent hearts are driven, by such omissions and defects in the law, into ultraism, socialism, and Fourierism, and an opposition to all municipal regulations. Hence, the profound wisdom of our homestead law. It is natural to the unfortunate to be grateful to those from whom they receive aid in their afflictions, and they will love and venerate the laws when they protect misfortune and not force them into the class of culprits. The homestead is a point from which they can start, released from any fear of their families being turned out without a home, and can commence again, *Antaeus*-like, with renewed energy and strength and capacity for business from their fall, unscathed by temptation; and, from experience, more practical and useful members of society. With the homestead protection thrown around him the husband may well exclaim: “I am a king, and my wife is a queen, and our domain is our home, that none dare invade.”

Id. at 53.

⁵¹ NATHAN BEVERLY TUCKER, *A SERIES OF LECTURES ON THE SCIENCE OF GOVERNMENT* 119-23 (Philadelphia, Carey & Hart 1845) (citing HENRY HALLAM, *VIEW OF THE STATE OF EUROPE DURING THE MIDDLE AGES* (1821)).

⁵² See, e.g., *State ex rel. Ball v. Hand*, 1 Ohio Dec. Reprint 238 (Ohio Super. 1848) (“As a general thing, I have a very poor opinion of all common property communities, from that formed on the plains of Shinar 4000 years ago, down to the latest phalanx of Fourierism. Their objects may be benevolent, but their tendency is to degenerate and demoralize man.”).

⁵³ See, e.g., *In re New Orleans Draining Co.*, 11 La. Ann. 338, 355 (1856) (“So, too, fanaticism under the plea of philanthropy and the public good, is ready to purge and renovate society, revolutionize governments, and reconstruct the world according to its new ideas, provided that the cost and the consequent pain and sufferings, shall be borne by its beneficiaries.”); *People v. Gallagher*, 4 Mich. 244, 285 (1856) (lamenting inability of penal laws to take away property used to manufacture alcohol).

The first temperance society ever organized in the United States was in the year 1813. In 1831 there were over 4,000 organized societies, and more than 600,000 members. In the mean time over 1,000 distilleries had been entirely stopped by their owners; about 5,000 drunkards had been entirely reclaimed, and over 1,000,000 of people in the United States were entirely abstaining from the use of all kinds of intoxicating drinks. From 1824 to 1830, the importation of liquors into the United States was reduced by temperance efforts 4,189,747 gallons; and during the year 1830, over two hundred vessels sailed from American ports without provision of spirits. But the fate of these societies was sealed when they were induced by political demagogues, in conjunction with

little respect and in some cases monarchy was to be preferred to those who purported to be working for republicanism.⁵⁴

Those who opposed such radicalism as abolitionism or the anti-rent movement threatened greater harm than they promised to avoid. As Cooper concluded in *The Redskins*:

There is not a single just ground of complaint in the nature of any of these leases, whatever hardship may exist in particular cases; but, admitting that there were false principles of social life, embodied in the relation of landlord and tenant, as it exists among us, *it would be a far greater evil to attempt a reform under such a combination, than to endure the original wrong.*⁵⁵

fanatical clergymen, to enter the political field, and take political action as a party. This was but the natural consequence of such a course of action. The cause, instead of being benefited by it, was ruined—the moral influence of the societies entirely paralyzed by party, political action, and political proscription.

Gallagher, 4 Mich. at 285.

⁵⁴ R. Wheaton, *The Revolution of 1848 in Sicily*, 69 N. AM. REV. 499, 506 (1849).

We cannot see that Americans are any more bound to sympathize with every radical movement in Europe, which dignifies itself with the name of republican, than we should be to lend a favorable ear to the ravings of our own demagogues,—of those, for instance, who recently kindled a civil war in Rhode Island, or of the Anti-rent party who assassinated sheriffs and constables in New York. The sympathies of the true American should be enlisted on the side of liberty and order, and when he becomes convinced that those two blessings can only be attained in Europe,—at least for the present,—by a constitutional monarchy, his sympathies should be with that form of government.

Id. at 506.

It is unsafe even in America to allow the doctrines of the socialists to be preached to the people without supplying an antidote to the poison. The *flour riot*, which took place in New York some twelve years ago, and the Anti-rent war, which more recently disgraced that State, were significant warnings. . . . The educated and reflecting portion of our community ought not to wait . . . till they are reminded by the thunder of the cannon directed against the barricades . . . that they also have a work to do for the preservation of society and the interests of truth.

French Ideas of Democracy and a Community of Goods, 69 N. AM. REV. 277, 325 (1849).

⁵⁵ JAMES FENIMORE COOPER, *THE REDSKINS; OR, INDIAN AND INJIN* 222 (New York, Burgess & Stringer 1846). Cooper employed a similar argument in the preface of *The Redskins*:

The common-place argument against [leases], that they defeat the civilization of a country, is not sustained by fact. The most civilized countries on earth are under this system; and this system, too, not entirely free from grave objections which do not exist among ourselves. . . . [T]he ultra friend of humanity, who decries the condition of a tenant, should remember that if he had not been in this very condition, he might have been in a worse. It is, indeed, one of the proofs of the insincerity of those who are decrying leases, on account of their aristocratic tendencies, that their destruction will necessarily condemn a numerous class of agriculturists, either to fall back into the ranks of the peasant or day-labourer, or to migrate, as is the case with so many of the same class in New England.

Id. at xiii.

Judges at the time frequently invoked images of feudalism, particularly when they wanted to discredit or distinguish a precedent.⁵⁶ They saw the evils of feudalism in two ways. First and most frequently, feudalism illustrated backwards rules, which were anti-commercial (like restraints on alienation).⁵⁷ Second, they were anti-republican rules, which subject some to the arbitrary will of others.⁵⁸

Judges in the antebellum era were particularly vocal in their criticism of feudalism for its effects on the economy. Justice Battle of the North Carolina Supreme Court, for instance, drew upon Blackstone's *Commentaries* for evidence of why mortmain statutes prohibited the transfer of real property to corporations, allowing unproductive accumulation of property into corporations:

In England, the statutes were designed to prevent the accumulation of the landed property of the kingdom in the dead hands of the corporations, particularly the religious houses, whereby "it was observed that the feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the

⁵⁶ See, e.g., *Edrington v. Harper*, 26 Ky. (3 J.J. Marsh.) 353, 360 (1830).

But even where the common law still prevails as a system, some of its ancient iron doctrines on the rights and duties of *baron* and *feme* (the remnants of feudality), have, after a stubborn conflict, resembling that betwixt ignorance and knowledge, barbarism and civilization, yielded to some of the more mild and benevolent principles of the civil code. One of the fruits of this progressive innovation on feudalism, is the modern doctrine, that the chancellor will not compel, or even invite the husband to coerce or influence his wife to surrender a right which the law has vested in her.

Id.

⁵⁷ See, e.g., *Trs. of Davidson Coll. v. Ex'rs & Next of Kin of Chambers*, 56 N.C. (3 Jones) 253, 266 (1857).

⁵⁸ Thus, counsel in *United States v. Percheman*, 32 U.S. 51 (1833), argued:

Free governments are constructed upon the principle of entrusting as little power as possible, and providing against its abuse preventively by all species of checks and limitations. Arbitrary ones proceed upon the principle of bestowing ample powers and extensive discretion, and guarding against their abuse by prompt and strict accountability and severe punishment. Both have been invented by mankind for purposes of mutual defence and common justice, but the pervading spirit of the one is preventive, of the other vindicatory.

How absurd would it be, then, to apply the maxims of the one government to the acts of the other. As well might we judge the life of Pythagoras by the law of the New Testament, or the philosophy of Zoroaster by that of Newton, as subject the administration of a Spanish governor to the test of magna charta, the bill of rights, the habeas corpus act, or the principles of American constitutional law.

Even the laws of the Indies, obscure, perplexed, and sometimes even unintelligible as they are, hardly reached across the ocean; and the decline of the Spanish, like that of the Roman empire, was marked by the absolutism of the distant prefects.

Id. at 51-52.

lords were curtailed of the fruits of their seignories, their escheats, wardships, reliefs and the like."⁵⁹

Feudalism's limitations on alienability—its limits on the sale of land and its resulting limitations on commerce—was a central focus of the antebellum judicial attack. A New Jersey court refused to require express words of devise in a will.⁶⁰ It found the rule was

at best a technical rule, having its origin in feudal principles, and based on feudal reasons, to prevent an abeyance of the fee to the trust of the lord, and when pushed beyond its natural and well defined bounds, it becomes, true to its origin, not a protection to property, but an engine of injustice.⁶¹

Justice Hemphill of the Texas Supreme Court upheld the power of a record owner to alienate property that was being adversely possessed.⁶² He found

the power to alienate property is a necessary consequence of ownership, and is founded on natural right. True, it must be subjected to the restraints suggested by convenience, and dictated by the laws; but wherever restrictions of any rigor, from considerations of policy, well or ill-founded, have been imposed on alienation, history reveals the fact of incessant struggles against the thralldom. And the success of these efforts appears to have been commensurate with the advancement of civilization, and of more just and enlightened views relative to the true uses of property as subservient to the multiplied wants of refined social life. Without recurring to English history, and the ages of perpetual warfare there against the feudal shackles on the rights of alienation, we may, from the events of our own time and history, perceive how extremely distasteful are all restrictions on the power of the owner to dispose of his property.⁶³

In South Carolina, Chancellor Dargan wrote of the origins of the law's preference for devisees (those inheriting real property) over legatees (those inheriting personal property) in the law of feudalism. It arose from feudalism's preference for landed property and the relative unimportance of personal property. Chancellor Dargan illustrates the common understanding of the power of precedent, as well as the reasons for rejecting precedent, and he illustrates the common understanding that feudal rules were backwards:

⁵⁹ Trs. of Davidson Coll., 56 N.C. (3 Jones) at 266 (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 270 (1765-1769)). A few decades earlier, the Virginia Supreme Court explained the fear of accumulation of property as the basis for law's suspicion of charitable corporations. See *Gallego's Exrs' v. Attorney Gen.*, 30 Va. (3 Leigh) 450, 478 (Sup. Ct. App. 1832), *overruled by* *Episcopal Soc'y v. Churchman's Reps.*, 80 Va. 718 (1885).

⁶⁰ *Elle v. Young*, 24 N.J.L. 775 (1854).

⁶¹ *Id.* at 785.

⁶² *Carder v. McDermet*, 12 Tex. 546 (1854).

⁶³ *Id.* at 549 (citing JAMES KENT, 4 COMMENTARIES 441 (1830)).

Among a people living under the feudal system, landed estate constituted the predominant element in the social and political organization. And hence, we can hardly be surprised at the vast importance that was attached to its possession. The aggregate of the personal property then, embraced but a small portion of the wealth of the nation, while the few goods and chattels, that were possessed by the humbler classes, were insecure, and liable to be snatched away by the lawless, marauding barons. The lands were all monopolised and held by the strong arm of military power. Commerce had not then expanded her sails upon every sea, and in co-operation with the mechanic arts, and a more enlightened agriculture, swelled the wealth of the nation in personal property, to the enormous and incalculable amount that now exists. The feudal system yielded to the irresistible influence of advancing civilization; but it yielded slowly, and its stern features are still, and for a long period to come will remain, deeply impressed upon the civil polity of the British Isles.⁶⁴

The importance of land, thus, explained the preference for a devisee over a legatee. Yet, such a preference was unreasonable and it might be changed because of the increasing importance of personal property. Still, even though feudalism had ended, there was a danger in changing the rules too quickly and causing upheaval. They could not make all of the changes at once:

The hereditary nobility constitute the great bulwark of the British monarchy; the privileged classes form a barrier, that interposes between the throne, and popular encroachments and republican tendencies. . . . They support the throne, not as their warlike ancestors did, by the sword and by military array, but by the influence of their enormous wealth, and their power as hereditary legislators. They are the strong pillars that support this ancient monarchy. Volcanic and pent up fires smoulder beneath the venerable pile; the waves of popular discontent dash madly round the foundations. Take away the barrier, from which the surge is made to recoil; remove the weight by which the popular upheaval is repressed, and the flood and the earthquake would do their work in an instant; and this proud and powerful monarchy, in all its colossal proportions, would be swept away at once and forever. No reflective mind that has pondered upon the rise and fall of empires, can doubt for a moment, that the same revolutionary vortex that swallows up the British nobility, will also engulf the British monarchy. These views are forcibly felt, if not acknowledged, by their enlightened statesmen and public functionaries. They are appreciated by the middle classes, and by all the friends of peace, order and stability, who hence submit to admitted evils and abuses, "rather than fly to those they know not of."⁶⁵

Restraints on alienation were seen as relics of feudalism and therefore not suited to the United States. As a Wisconsin court wrote in 1849:

⁶⁴ Hull v. Hull, 24 S.C.Eq. 65 (3 Rich. Eq. 1850).

⁶⁵ *Id.* (speaking of "aristocratic" and "republican forms of society").

The maxims and principles of law, as applied to real property, originating in the policy of the feudal ages, are, in many instances, entirely inapplicable in a country like ours, and particularly in the new states and territories, where there is such a vast public domain, where the spirit of emigration is so rife, and where the genius of our institutions, as well as an enlightened public policy, favors the removal of all unnecessary restraints upon the alienation of land.⁶⁶

Another case, which held that joint tenancy does not include a right of survivorship, similarly invoked images of feudalism and its interference with alienation:

The doctrine of entails and primogeniture, and the *jus accrescendi*, and the abolition of all patents of nobility, were the feudal badges which the American governments intended to sweep away, and thus break down all hereditary family succession by unfettering property and distributing it equally and justly among all the members of society.⁶⁷

Judges, too, invoked feudalism as evidence of unfairness, even if the case related to something other than property. In a case on contingency fees, the Delaware Supreme Court likened the rule against contingency fees to feudalism: "It is a principle which, like many of the doctrines regarding the titles to and transmission of property, having their origin in feudal times, tends to strengthen the strong hand at the expense of the weak, to whom it might, in many instances, amount to a denial of justice."⁶⁸

Feudalism implied economic backwardness; it also implied servility. Justice Roane of Virginia argued in dissent from a decision that upheld quit-rent payments in 1809 that the quit-rent was a form of backwards feudalism:

Can it be denied that the rent in question is a servile and feudal rent, or that the appellant can claim it only as successor to the lord of the fee? for the lot in question had never been specifically appropriated by lord Fairfax to his own use. If the decision of the district court be now reversed, will you not, sir, create a lord paramount as to the property in question? And will not the inhabitants of Winchester be subjected forever to the degrading vassalage of paying to such lord paramount, a servile, feudal and perpetual revenue? Will you not place those citizens in that abject state, from which the legislature of our country, at the very instant of the revolution, solicitously laboured to emancipate all our people? Will you not in fact, sir, revive upon the people of the Northern Neck, a partial proprietorship? How far that proprietorship may hereafter be attempted to be extended in consequence of the precedent now to be set, and the principles now contended for, I pretend not to determine. Great, as I trust the respect of this court will ever be for the rights of private property claimed by any suitor, I hope

⁶⁶ Woodward v. McReynolds, 2 Pin. 268, 273 (Wis. 1849).

⁶⁷ Trammell v. Harrell, 4 Ark. 602, 604 (1842).

⁶⁸ Bayard v. McLane, 3 Del (3 Harr.) 139 (1840).

we shall never favour mere feudal and seignoral rights: nor permit ourselves to carry back our people, or any section of our people, to that degrading state of vassalage, so strongly depicted by our laws; and, from which, the revolution ought to have liberated them.⁶⁹

The imagery of feudalism was an important part of antebellum thought, from popular treatises like Blackstone's *Commentaries* and Kent's *Commentaries*,⁷⁰ to histories of law, like Thomas Roderick Dew's *A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations*,⁷¹ to radical literature that critiqued the legal system. One of the worst insults that William Sampson could muster against the common law was that it was a relic of feudalism—a precedent leftover from the age of barbarism. He spoke of the ancient and mysterious common law:

[L]ong after [Americans] had set the great example of self-government upon principles of perfect equality, . . . [they] had still one pagan idol to which they daily offered up much smoky incense. They called it by the mystical and cabalistic name of Common Law. A mysterious essence. Like the Dalai Lama, not to be seen or visited in open day; of most indefinite antiquity; sometimes in the decrepitude of age, and sometimes in the bloom of infancy, yet still the same that was, and was to be, and evermore to sit cross-legged and motionless upon its antique altar, for no use or purpose, but to be praised and worshipped by ignorant and superstitious votaries.⁷²

The imagery of feudalism stretched half way around the world, to those missionaries who washed ashore on the Hawaiian Islands.

HOW MISSIONARIES THOUGHT: ABOUT PROPERTY, FOR INSTANCE

Many of the missionaries to Hawai'i wrote accounts of their visions for what they hoped to accomplish, as well as accounts of what happened in Hawai'i. Probably the most comprehensive was that of Hiram Bingham, a

⁶⁹ *Marshall v. Conrad*, 9 Va. (5 Call) 364, 390 (1805).

⁷⁰ *See, e.g.*, JAMES KENT, 4 COMMENTARIES 6 (1830) (noting “the rule was founded originally on principles of feudal policy, which no longer exist”); *id.* at 82 (“In New York and Pennsylvania, this feudal notion of forfeiture is expressly renounced, and doctrine placed upon just and reasonable grounds.”).

⁷¹ THOMAS R. DEW, A DIGEST OF THE LAWS, CUSTOMS, MANNERS, AND INSTITUTIONS OF THE ANCIENT AND MODERN NATIONS (New York, D. Appleton & Co. 1853). Dew wrote of the role of property in purchasing freedom from feudalism in his essay on the Virginia legislature's debate about abolition. Thomas R. Dew, *Professor Dew on Slavery*, in THE PRO-SLAVERY ARGUMENT, AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES 313-17 (Charleston, Walker, Richards & Co. 1852).

⁷² WILLIAM SAMPSON, ESQ., AN ANNIVERSARY DISCOURSE: DELIVERED BEFORE THE HISTORICAL SOCIETY OF NEW YORK 17 (Dec. 6, 1823).

former Yale student, who was in the first group of missionaries sent by the American Board of Foreign Christian Missions, to the Hawaiian Islands. Bingham's memoirs, *Twenty One Years in the Sandwich Islands*, tell his story of the unfolding of the missions and the progress of the propagation of Christianity.⁷³ The scions of the Bingham family appear periodically on our country's stage. Hiram Bingham's grandson, Hiram Bingham III, taught at Yale University in the early twentieth century and was responsible for acquiring some treasures from Peru for the Yale art museum.⁷⁴ Hiram Bingham IV was a diplomat to Europe during the second world war, who worked mightily to free victims of Nazi persecution.⁷⁵

Hiram Bingham begins his discussion of his arrival in Hawai'i, on March 31, 1820, with a provocative statement about his views of the native people and his goals there:

Their manoeuvres in their canoes, some being propelled by short paddles, and some by small sails, attracted the attention of our little group, and for a moment, gratified curiosity; but the appearance of destitution, degradation, and barbarism, among the chattering, and almost naked savages, whose heads and feet, and much of their sunburnt swarthy skins, were bare, was appalling. Some of our number, with gushing tears, turned away from the spectacle. Others with firmer nerve continued their gaze, but were ready to exclaim, "Can these be human beings! How dark and comfortless their state of mind and heart! How imminent the danger to the immortal soul, shrouded in this deep pagan gloom! Can such beings be civilized? Can they be Christianized?"⁷⁶

Not surprisingly, Bingham, because he was a missionary, focused on the goal of conversion to Christianity and "civilization." What did that mean? What was the role of property and the "rule of law" in "civilization"? In part it meant respect for property rights. There were in Bingham's short recitation of the history of the islands echoes of celebration of property rights. He portrayed land ownership as a feudal system—which in the early nineteenth century was viewed with universal disdain in the United States—and suggested that such patterns of ownership, and lack of the rule of law more generally, left the people without an incentive to develop economically:

⁷³ HIRAM BINGHAM, *A RESIDENCE OF TWENTY ONE YEARS IN THE SANDWICH ISLANDS, OR THE CIVIL, RELIGIOUS, AND POLITICAL HISTORY OF THOSE ISLANDS* (Hartford, Hezekiah Huntington, 3d ed. 1849).

⁷⁴ See, e.g., David Montgomery, *Peru Tries to Recover Gold From Yale's Ivory Tower*, WASH. POST, Mar. 9, 2006, at C01 (discussing Hiram Bingham III's excavations at Machu Picchu).

⁷⁵ Maura Casey, *A Diplomat's Quiet Battle to Rescue Jews Emerges*, N.Y. TIMES, July 11, 1999, at 14 Civ.

⁷⁶ BINGHAM, *supra* note 73, at 81.

Claiming the right of soil throughout his realm, and the right to make and abrogate regulations at pleasure, and using the privilege of a conqueror who could not endure to have others enjoy their just rights, Kamehameha wielded a despotism as absolute probably as the islands ever knew. Retaining a part of the lands as his individual property, which he intended should be inherited by his children, he distributed the remaining lands among his chiefs and favorites, who, for their use, were to render public service in war or peace, and in raising a revenue. These let out large portions of their divisions to their favorites or dependants, who were in like manner to render their service, and bring the rent; and these employed cultivators on shares, who lived on the products which they divided, or shared with their landlord, rendering service when required, so long as they chose to occupy the land. Thus, from the poor man who could rent 1/8 or 1/4 of an acre, up to the sovereign, each was, in some sense, dependent on the will of a superior, and yet, almost all had one or more under them whom they could control or command.

This, in a conquered, ignorant and heathen country, without the principles of equity, was a low and revolting state of society; where the mass could have no voice in enacting laws, or levying taxes, or appropriating the revenue, or in establishing a limited rent for the use of lands, fisheries or fish-ponds. To conceive of all as supremely selfish, and each superior as desirous to aggrandize himself at the expense of others, would do them no injustice.

With the limited knowledge and skill they possessed, it would hardly be expected that cheerful and productive industry would thrive, even in such a clime and soil, unless the principles of benevolence or a high public spirit could be engrafted in the hearts of the people, or that the population could multiply while the means of subsistence were scanty, clothing and lodging miserable, possessions utterly insecure, and all inheritance hopeless or uncertain.⁷⁷

Other missionaries and westerners writing about Hawai'i at the time invoked the imagery of feudalism to describe Hawai'i's land-holding regime. Thus, the *Missionary Record* invoked feudalism and conquest in language reminiscent of *Johnson v. M'Intosh*: "In some respects the government resembles the ancient feudal system of the northern nations. . . . The king is acknowledged, in every island, as the lord and proprietor of the soil by hereditary right, or the law of conquest."⁷⁸ Others expanded on what that feudalism looked like in Hawai'i: "These raatiras, who resembled the barons of the feudal system, kept the people under them in a state of the greatest subjection, and received from them not only military service, but a portion of the production of their lands, and personal labour whenever required."⁷⁹

⁷⁷ *Id.* at 50.

⁷⁸ THE RELIGIOUS TRACT SOCIETY, *MISSIONARY RECORDS: SANDWICH ISLANDS* 97 (London, The Religious Tract Society 1839).

⁷⁹ 3 WILLIAM ELLIS, *POLYNESIAN RESEARCHES, DURING A RESIDENCE OF NEARLY EIGHT YEARS IN THE SOCIETY AND SANDWICH ISLANDS* 121-22 (London, Fisher, Son, & Jackson 1838).

Timothy Dwight Hunt similarly wrote about the Hawaiian land-holding system as one of feudalism and tyranny: "Their system of government was feudal in its character. Power was delegated by inferiors, by whom again it was divided, so that under one despot numerous petty tyrants imposed successive burdens on their serfs."⁸⁰

Daniel Wheeler expanded on the relationship between feudalism and the dangers of lack of private property rights. He worried about the "ruin that awaited these islands . . . [unless] the private property of the poor inhabitants is respected and protected by the wholesome laws, firmly executed, without particularity. At present these people are groaning under an arbitrary feudal system, kept up with shameful and oppressive tyranny on the part of the chiefs."⁸¹

Even worse than feudalism was the fear and destruction wrought by war. This was the era of the gothic story, and feudalism and war played their part in stories of Hawai'i. William Ellis's 1833 history told of war and insecurity of property: "The whole island was again involved in war, and the conquering party scoured the coast . . . burning every house, destroying every plantation, plundering every article of property, and reducing the verdant and beautiful districts . . . to a state of barrenness and desolation."⁸²

It was not just missionaries in early Hawai'i who likened Hawai'i's property and legal regime to feudalism. Courts interpreting the law in Hawai'i employed allusions to feudalism to describe Hawai'i's real property regime. In 1862, Hawai'i's court explained the nation's legal history through a construct of feudalism in *Keelikolani v. Robinson*:⁸³

⁸⁰ TIMOTHY DWIGHT HUNT, *THE PAST AND PRESENT OF THE SANDWICH ISLANDS* 16 (San Francisco, Whitton, Towne & Co. 1853).

⁸¹ DANIEL WHEELER, *EXTRACTS FROM THE LETTERS AND JOURNAL OF DANIEL WHEELER: WHILE ENGAGED IN A RELIGIOUS VISIT TO THE INHABITANTS OF SOME OF THE ISLANDS OF THE PACIFIC OCEAN* 163 (Philadelphia, Joseph Rakestraw 1840); *see also* JAMES JACKSON JARVIS, *HISTORY OF THE HAWAIIAN OR SANDWICH ISLANDS* 185 (2d ed., Boston, James Munroe & Co. 1844) ("This was apportioned among his followers according to their rank and deserts; they holding it on the feudal tenure of rendering military services . . ."); EPHRAIM EVELETH, *HISTORY OF THE SANDWICH ISLANDS: WITH AN ACCOUNT OF THE AMERICAN MISSION ESTABLISHED THEREIN 1820*, at 46 (Philadelphia, American Sunday-School Union 1829) ("The property, and even the lives of his subjects, are at his disposal. His power over them is unlimited."); CHARLES SAMUEL STEWART, *A RESIDENCE IN THE SANDWICH ISLANDS* 101 (Boston, Weeks, Jordan & Co. 1839) (mentioning predominance of feudalism prior to Kamehameha).

⁸² 2 WILLIAM ELLIS, *POLYNESIAN RESEARCHES, DURING A RESIDENCE OF NEARLY EIGHT YEARS IN THE SOCIETY AND SANDWICH ISLANDS* 110 (Harper's Stereotype ed., New York, J. & J. Harper 1833).

⁸³ 2 Haw. 522 (1862).

The analogy of this system of tenure is very striking to that of the feudal system which has prevailed in Europe, the theory of which was that all property in land was originally in the King or chief who governed the country; that it was granted to his followers for services rendered and to be rendered, but the superior theoretically retained the title in the land itself. There was the lord and vassal, and were similar in relation to each other to that which existed here. The chiefs here gave certain rights and privileges in lands which were granted to them by the King, to chiefs of lower grades, and so in England the tenure was not limited to the paramount lord and vassal, but it extended to those to whom such vassal may have divided his own lands, and they became his vassals; so that he became a mesne lord between his vassals and the lord paramount. Heirship was a provision in that code. The right of primogeniture was derived from the martial policy of the system. It had, like the system in every country, provisions of inheritance peculiar to itself; such for example as the total exclusion of females, which is in contrast to the Hawaiian. Chancellor Kent says that "the transmission of property by hereditary descent, from the parent to his children, is the dictate of the natural affections; and Dr. Taylor holds it to be the general direction of Providence."

Immediately on the death of Kalaimoku, his son, Leleiohoku, by his guardian, designated by his father, claimed the heirship of the property, was recognized as such by the respondent during his life, which was a period of more than twenty years. The heirship was asserted and recognized, and against those rights no claim or interference was made. So far as a single instance aids in the proof of a general usage, this is very strong, from the fact that the respondent was, from time to time, paying the proportion of Kalaimoku's interest for the use and occupation of the King's wharf, according to the agreement to his son, who was regarded as the heir. By the evidence given, by the history of the times, and by the resolutions adopted by the Board of Commissioners to quiet land titles, it is very evident that the rights of heirs were disregarded to a greater or less extent, for the purpose of rendering aid to favorites; but when their inheritance was regarded, and they enjoyed its fruits for a time, which is sufficient to give a title to property by an adverse possession, it would seem to be a late day for a Court, governed by laws regulating descent of property to children, to so far disregard a law based upon principles of natural justice, and defeat a right which, in the darkest days of the feudal system, was held sacred by the King, and earnestly contended for by many of the chiefs of that day.⁸⁴

Still, there was no respect for precedent; a mere association with feudalism would not invalidate every rule. Chancellor Kent thought that there were still reasons to follow feudal rules:

[A]ssuming the rule to have been introduced on feudal principles, yet to disregard rules of interpretation sanctioned by a succession of ages, and by the decisions of the most enlightened judges, under pretence that the reason of the rule no

⁸⁴ *Id.* at 528.

longer exists, or that the rule itself is unreasonable, would not only prostrate the great land-marks of property, but would introduce a latitude of construction boundless in its range and pernicious in its consequences.⁸⁵

That history of feudalism was important because it explained to missionaries and others the backwardness of Hawai'i. There were solutions, however, missionaries believed. Gilbert Mathieson's 1825 *Narrative* established early on the themes of feudalism and the insecurity of property on one side and Christianity and property on the other. Mathieson thought life on Hawai'i "very preferable to a seaman's life; but complained, nevertheless, of the insecure tenure by which property is held in this country. . . . and only retained possession of his property by acceding to every demand, and propitiating with continual presents the favour of the great man."⁸⁶ The King in Hawai'i was characterized as a despot.

The King then is a complete autocrat—all power, all property, all persons, are at his disposal: the Chiefs receive grants of land from him, . . . for if he is disposed to be industrious, and bring his land into good cultivation, or raise a good breed of live stock, and becomes rich in possessions, the Chief is soon informed of it, and the property is seized for his use⁸⁷

Yet, in a section headed "Blessings of Christianity," Mathieson held out hope that Christianity "may ameliorate the present system of arbitrary government, and encourage the industry of individuals, by securing the rights of private property."⁸⁸

Sheldon Dibble's 1843 *History of the Sandwich Islands* critiqued the economic backwardness of the feudal system in the greatest depth of any of the works. Dibble explained in detail how what he identified as feudalism hindered the economy and kept Hawai'i's people in poverty.⁸⁹ "[T]he soil was considered the exclusive property of the chiefs" and that led to extraordinary dependence on them.⁹⁰

The lands being divided, those who hold them are considered as owing every duty and perfect obedience to the chieftain from whom they are received; and expect the least failure of service to be followed by dispossession. On these

⁸⁵ *Loving v. Hunter*, 16 Tenn. (8 Yer.) 4, 8 (1832) (quoting JAMES KENT, 4 COMMENTARIES 221 (1830)).

⁸⁶ GILBERT FARQUHAR MATHIESON, NARRATIVE OF A VISIT TO BRAZIL, CHILE, PERU, AND THE SANDWICH ISLANDS, DURING THE YEARS 1821 AND 1822, at 412-13 (London, S. & R. Bentley 1825).

⁸⁷ *Id.* at 449-50.

⁸⁸ *Id.* at 477.

⁸⁹ SHELDON DIBBLE, HISTORY OF THE SANDWICH ISLANDS 88 (Lahainaluna, Press of the Mission Seminary 1843).

⁹⁰ *Id.* at 72.

landlords the King relies to promote his plans, forward his interests, and to fight his battles. They, of course, have every inducement, to support his authority, for both their power and property are by an indissoluble chain connected with his. Each of these landlords divides out his particular land into smaller portions, the occupants of which owe the same service, duty and obedience to him as he acknowledges to his superior. In this way the conquered territory is divided and subdivided, down perhaps to the sixth or seventh degree.

This was the only system of government with which, anciently, the Hawaiians were acquainted. They had no conception that authority and subordination could be maintained in any other way.

This system was exceedingly oppressive. The common laborers did not probably receive, on an average, more than one-third of the avails of their labors, while the different grades of chiefs received the remaining two-thirds. But what was worse, even this one-third they received was not safe, there being no distinct dividing line by which the tenant might know and hold any thing as his own. If a man, by uncommon industry, brought his patch of ground to a higher state of cultivation than his neighbor, or if, by skill and invention, he acquired anything more than usually desirable, it was of no avail to him; his possessions serving merely, like Naboth's vineyard, to tempt the rapacity of his superior.

The system too was peculiarly oppressive on account of the sudden changes to which it was liable. On the accession of a new king every grade of landlords, and the mere tenants too, were liable to dispossession. So if a chief either of high or low rank deceased, then all the estates under his particular authority, were liable to revolution and change. And even without the occurrence of death; favoritism, jealousy, natural fickleness of character and other like motives, led to frequent and distressing changes. On account of this, landlords ridiculed the idea of making extensive improvements; and tenants sought patches of ground under different chiefs, so that when dispossessed of one they might be saved from starvation by the produce of the other. There being no fixed law, no courts of justice, nor any place of appeal, the people were really tenants at will, each particular class to their direct landlords. Usually, too, when a man was dispossessed of his lands his personal property was also confiscated.⁹¹

Bingham thought the process of “civilization” entailed the development of a Christian beliefs, middle class “modesty,” and the market economy.⁹² Those things went together; however, many people were limited in their property rights—and that, along with a lack of capital, impeded the process of conversion:

But how difficult and long must be the process of learning to make use, or keep in order and enjoy the variety of useful articles which the arts of civilized life

⁹¹ *Id.* at 73-74.

⁹² BINGHAM, *supra* note 73, at 170.

supply, had the chiefs and people possessed money or exportable products in abundance, to purchase the materials at pleasure! But not one in a thousand had the money or the exportable products at command, and while it seemed to us a difficult thing for the chiefs to pay for half a dozen brigs and schooners, for which they had contracted, and to build and furnish houses for themselves, it seemed equally difficult for the common people to supply themselves, who had not the means to purchase the soil they cultivated, if they had been allowed to buy it, nor the capital to put a plough, a pair of oxen, and a cart upon a farm, if farms were given them in fee simple; nor the skill and enterprise to use them advantageously, if every hand-spade-digger of kalo and potatoe ground had been gratuitously furnished with land, teams, and implements of husbandry, like the yeomanry of New England.⁹³

In many places, Bingham remarks on commercial progress and the connections of the market economy to Christianity. Thus, after a meeting in Honolulu, he saw many people departing for other islands.

Embarking on board eight brigs and schooners, mostly owned by them and under native commanders, leaving the harbor in regular and quick succession, and spreading all their white sails to the six knot N.E. trades, and stretching over Waikiki Bay, in full sight from the mission houses, they gave us a beautiful and striking illustration of their advancement in navigation, and of the facility, safety, and comfort with which they could pass from island to island, for pleasure or business, instead of depending on their frail canoes. This peaceful and apparently commercial scene, not only showed their ability to make progress towards a state of civilization, but was symbolical of the liberty and facility now expected to be extended to those who desired it, to acquire the knowledge of letters and of salvation, and to practise the duties and enjoy the privileges of the Gospel.⁹⁴

At other points, it is easy to remember that Bingham was writing during the Romantic era; and while he and Ralph Waldo Emerson would have had little to say to one another, there are important echoes of Romanticism in parts of the memoirs. Bingham wrote of the snow-capped volcano a "striking view of the majestic Maunakea, distant about 120 miles, whose icy and snowy summit glittered in the morning sunbeams, beckoning them onward to the station beyond its south-eastern base."⁹⁵ But often there was a juxtaposition of the romantic with the missionaries' goals. There was the beauty of nature against the missionaries' settlements:

The romantic might easily imagine Hilo to be a very inviting location, among barbarians, on account of the beauty, grandeur, and wonders of nature, which are there so interesting. Nay, it may too be thought, even by the sober, pious mind,

⁹³ *Id.* at 170.

⁹⁴ *Id.* at 205.

⁹⁵ *Id.* at 206.

to be now a desirable residence, because the wonders of nature and the wonders of grace are there united and so distinguished; yet, to this day, no civilized family on earth is known to have chosen it for a residence, except those who are sent there to dispel the moral darkness, and to watch over the spiritual interests of thousands too indigent and too imbecile, with all the salubriousness and fertility of their rough country, to give a decent maintenance to their missionaries in their arduous labors of love. Such a location could hardly be chosen by a cultivated family, for the sake of its privileges, unless doing good to the needy be esteemed, as it justly might be, a privilege.⁹⁶

The missionaries were, indeed, pushing against the romantic life:

To a spectator from the missionary's door, or from the fort, or other precipice, is presented a good specimen of Sandwich Islands scenery. On a calm and bright summer's day, the wide ocean and foaming surf, the peaceful river, with verdant banks, the bold cliff, and forest covered mountains, the level and fertile vale, the pleasant shade-trees, the green tufts of elegant fronds on the tall cocoanut [sic]—trunks, nodding and waving, like graceful plumes, in the refreshing breeze; birds flitting, chirping, and singing among them, goats grazing and bleating, and their kids frisking on the rocky cliff, the natives at their work, carrying burdens, or sailing up and down the river, or along the sea-shore, in their canoes, propelled by their polished paddles that glitter in the sun-beam, or by a small sail well trimmed, or riding more rapidly and proudly on their surf-boards, on the front of foaming surges, as they hasten to the sandy shore, all give life and interest to the scenery. But the residence of a Christian missionary, toiling here, for elevating thousands of the heathen, and an humble house of God erected by once idolatrous hands, where from Sabbath to Sabbath the unsearchable riches of Jesus were proclaimed, amid the ruins of the bloody temples of heathenism, gave the peculiar charm to the scene which it never had for ages of pagan darkness, and which Cook, when he gazed on this landscape, did not expect it would ever have. For it was the opinion of that navigator, that the fairest isles of the Pacific would never be evangelized.⁹⁷

Bingham was not alone in his interpretation of the Hawai'i government in terms of property. Rufus Anderson, another missionary, wrote in similar terms in 1827:

The government could not remain unchanged, and the people become free and civilized. The people must own property, have acknowledged rights, and be governed by written, well-known, established laws. This was far from their condition before the year 1838. The government was then a despotism. The will of the king was law, his power absolute; and this was true of the chiefs, also, in their separate spheres, so far as the common people were concerned. All right of property, in the last resort, was with the king. How were the people to attain

⁹⁶ *Id.* at 209.

⁹⁷ *Id.* at 217-18.

the true Christian position? Obviously the rulers had duties to learn and to perform, equally with the people; and the missionaries were the Christian teachers of both classes, with God's Word for their guide.⁹⁸

Some credited missionaries with reforming and standardizing the tax system. According to Henry Theodore Cheever's *Life in the Sandwich Islands: Or, the Heart of the Pacific, as It Was and Is*:

Till very recently the commoners of this archipelago, like the peasants of France before the revolution, or of Canada before the conquest, were . . . taxable and taskable at discretion, while they were deterred alike from evasion or complaint by a mixture of feudal servility and superstitious terror.

But, within the last year or two, certain laws, for their share in which the missionaries deserve great credit, have so far remedied this evil as to subject the amounts and times of tasking and taxing to fixed rules; and though the ascertained burdens are still too heavy and too numerous, comprising work for the . . . king, work for the public, rent for land and a poll-tax on both sexes, yet the restriction in question, if fairly carried into actual effect, will engender in the serf the idea of property, and inspire him at once with the hope and the desire of improving his physical condition by the application of his physical energies.⁹⁹

Similarly, Sheldon Dibble linked the end of feudalism to Christianity's inroads in Hawai'i. He linked the reform of law with Christianity:

Formerly the government had no constitution and no laws except customs and usages. In such a state of things, confusion, discord and oppression were the natural results. The burdens of the people were very great and no motive was held forth for industry and improvement. After the gospel was introduced and knowledge advanced, the evils of the government began to be seen by the chiefs and people, but could not be soon removed. It was far easier to discover the faults of the old feudal system . . .¹⁰⁰

And others looking back on Hawai'i's history thought that the introduction of western ideas of economy and Christianity—such as presented in Francis Wayland's work on political economy—was the turning point in Hawai'i's economy.¹⁰¹ The *North American Review* reported in 1843 in an essay built

⁹⁸ RUFUS ANDERSON, *THE HAWAIIAN ISLANDS: THEIR PROGRESS AND CONDITION UNDER MISSIONARY LABORS* 232 (Boston, Gould & Lincoln 1864).

⁹⁹ HENRY THEODORE CHEEVER, *LIFE IN THE SANDWICH ISLANDS: OR, THE HEART OF THE PACIFIC, AS IT WAS AND IS* 353-54 (New York, A.S. Barnes & Co. 1856) (1851) (emphasis omitted) (quoting SIR GEORGE SIMPSON, *AN OVERLAND JOURNEY ROUND THE WORLD, DURING THE YEARS 1841 AND 1842* (1847)).

¹⁰⁰ DIBBLE, *supra* note 89, at 432.

¹⁰¹ See Gerard Hallock, *William Richards*, in *2 ANNALS OF THE AMERICAN PULPIT; OR COMMEMORATIVE NOTICES OF DISTINGUISHED AMERICAN CLERGYMEN* 688, 690 (William Buell Sprague ed., 1857).

[William Richards] translated Dr. Wayland's *Treatise on Political Economy*, and formed

around Jarves' *History of the Hawaiian or Sandwich Islands* that "[t]here is much, also, suggestive of new ideas . . . in [Jarves'] sketches of the rapid civilization of the people of this small cluster of islands,—of the working of their feudal system and constitutional monarchy, and of the management of their House of Representatives and their double Executive."¹⁰² There is certainly a lot to say about this topic—this is an era in which Christianity and the common law were related.

There is irony, of course, in the expressions by early missionaries for the oppression wrought by what they deemed a feudal system and the actions in post-Mahele Hawai'i. While the missionaries and others created a western property regime at the time of the Mahele,¹⁰³ they shortly instituted a form of feudalism as to the person through the enactment in 1850 of the Masters and Servants Act, which permitted five-year long labor contracts.¹⁰⁴ That led to another form of serfdom, which made immigrant laborers a form of property alienable at the behest of their employers. This alteration is in keeping with similar ideological approaches to property and to workers in legal thought on the mainland. As United States law emphasized individual property rights, the opposition to feudalism, and later anti-slavery, in the years after Civil War, its primary emphasis shifted towards protection of individuals' rights to contract.¹⁰⁵ This conflict appeared, for instance, in *Hilo Sugar Co. v. Mioshi*,¹⁰⁶ in which a labor contract was signed in Japan between a laborer (known only by his first name Mioshi), and a representative of the Hawaiian government's Board of Immigration.¹⁰⁷ When Mioshi arrived in Honolulu, the Board of Immigration directed him to work for the Hilo Sugar Company.¹⁰⁸

an interesting class, which he daily instructed on that and kindred subjects. Here they first saw clearly defined the duties of rulers and the rights of the common people. Despotism began now gradually to yield. The old Feudal system was broken down, and the King and Chiefs became willing to give up their lands to the people in fee simple, and afterwards allow them a voice in legislation.

Id.

¹⁰² *Jarves's History of the Sandwich Islands*, 57 NORTH AM. REV. 257 (1843) (reviewing JAMES JACKSON JARVES, *HISTORY OF THE HAWAIIAN OR SANDWICH ISLANDS* (1843)).

¹⁰³ *See generally* Reppun v. Bd. of Water Supply, 65 Haw. 531, 542-45, 656 P.2d 57, 65-67 (1982) (providing overview of the events leading up to and including the Mahele of 1848).

¹⁰⁴ Penal Code of 1850, Masters and Servants Act § 1418 (King. Haw.).

¹⁰⁵ *See generally* AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998); ROBERT STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* (1991); CHRISTOPHER TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993).

¹⁰⁶ 8 Haw. 201 (1891).

¹⁰⁷ *Id.* *See generally* EDWARD D. BEECHERT, *WORKING IN HAWAII: A LABOR HISTORY* 40-78 (1985).

¹⁰⁸ *Mioshi*, 8 Haw. at 201.

The Hawai'i Supreme Court gave substantial deference to the legislature and assessed the constitutionality of the "master and servant" law.¹⁰⁹ Then it cited *The Slaughterhouse Cases* as part of its conclusion that the master and servant law did not establish slavery.¹¹⁰ A dissenting opinion thought that there was a system of slavery or semi-slavery, for a laborer comes to employers "without having the opportunity of choosing his employers, by a process suspiciously similar to that by which a Honolulu hack, horse and harness are hired out to a driver."¹¹¹

During the early missionaries' time, people in the United States spoke often of what they believed was moral, economic, social, and religious progress. So the missionaries set as their goal the propagation of "Christian civilization." By that they meant alteration of the moral character; part of that meant the establishment of property rights. Hiram Bingham portrays a similar but distinct picture. He conveys the centrality of the relationship between the market, respect for property rights, and Christianity. Each provided support for the other, as Americans moved towards a world view that saw upward economic and moral progress, amelioration of a common law based in feudalism, and legal support for the market economy. Together those ideas governed American law and American thought, wherever it stretched—from the Supreme Court's chambers in Washington to Honolulu, Hilo, and Lahaina.

¹⁰⁹ *Id.* at 205-06.

¹¹⁰ *Id.* at 206 (contrasting slavery with "Mexican peonage" and the "Chinese coolie labor system") (citing *The Slaughterhouse Cases*, 83 U.S. 36, 72 (1872)); see also *Nott v. Kanahele*, 4 Haw. 14 (1877) (enforcing long-term labor contract, even after sale of plantation to new owners).

Carl Christensen has remarked on this transition and seeming contradiction:

While one must distinguish between the actions of the missionaries themselves and the acts of those haoles, many of them descendants of missionaries, who later were influential in pushing for the Mahele, this latter group's affection for a form of feudalism that very much favored their own commercial interests causes one to ask how much of the criticism of the "feudal" customary landholding system had any deeper basis than the critics' antipathy toward a landholding system that prevented alienation of Hawaiian lands into their own hands.

E-mail from Carl Christensen, Professor of Law, William S. Richardson School of Law, University of Hawai'i at Mānoa, to Alfred L. Brophy (July 26, 2007, 05:23 EST) (on file with author).

¹¹¹ *Mioshi*, 8 Haw. at 208-09.