ʻO ka ʻĀina ke Ea: The Waitangi Tribunal and the Native Hawaiians Study Commission

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Mechanisms of land alienation were similar in both Hawaiʻi and Aotearoa/New Zealand, yet Māori appear to be ahead of Native Hawaiians in the area of reclamation. This is partly because the infrastructure for regaining land and resources is more highly developed in Aotearoa/New Zealand, particularly in the Waitangi Tribunal, an influential governmental arbitrative body that adjudicates on land and resource claims. In this article, the tribunal is compared with the 1983 Native Hawaiians Study Commission, established to address Native Hawaiian reparation claims. The comparison sheds historical light on the potential and the perils of governmental arbitration of indigenous claims in the era of the Akaka Bill.

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In their struggle for self-determination, sovereignty, and economic self-sufficiency, both Native Hawaiians—*Kānaka Maoli*—and the Māori of Aotearoa/New Zealand have viewed reclamation of land and natural resources as essential.[1] This article compares the lessons of the Māori experience in the areas of land alienation and land reclamation with the Hawaiian case, to discern whether there are applicable models for Hawaiians to reclaim a land and natural resource base, and to provide some perspective on current debates over government initiatives such as the Akaka Bill.[2] Both peoples are Pacific Islanders with roughly equivalent populations whose colonizing situations led them to becoming minorities in Western liberal democracies. Both are engaged in nonviolent movements that are evolutionary rather than revolutionary. In other words, Native Hawaiians and Māori are developing cultural and political institutions under the wardship of the United States and New Zealand governments.

In New Zealand and Hawai'i, four means of alienation from land existed: government confiscation; government land purchase; legal initiatives including the Native Land Court and the Mahele (land distribution process), both of which served to privatize land; and private purchases, often under pressure and of a questionable nature. Five strategies of reclamation and revitalization of land have been used by both groups: occupation, governmental arbitrative bodies, claims on government land, land retention, and land development. This article focuses on the role of governmental arbitrative bodies in the reclamation process—the Waitangi Tribunal in New Zealand and the Native Hawaiians Study Commission in the case of Hawai'i. Comparison of the Māori and Hawaiian cases illustrates both the potential and the limits of governmental arbitrative bodies. The Waitangi Tribunal represents the potential of government initiatives pertaining to indigenous peoples' land and resources, with careful research and arbitration leading to settlements that most parties agree are fair. The Native Hawaiians Study Commission illustrates the perils of government initiatives, in which political appointees use a majority position to subvert fair consideration of the issues.

The Māori appear to be ahead of Hawaiians in the movement to reclaim land and natural resources. According to University of Hawai'i professor of law Jon Van Dyke,

> [Māori] efforts to recover land, resources and autonomy parallel in many ways the efforts of Native Hawaiians. The Māori, however, are considerably farther along in this struggle, and the courts of their country have acted repeatedly to protect and effectuate their rights. (Van Dyke, 1998, p. 95)

But the gains made by Māori more often consist of recognition and compensation of claims rather than return of land and natural resources. Recognition has led to construction of the infrastructure for further gains by Māori. This infrastructure is highly developed, most notably in the Waitangi Tribunal, an influential governmental arbitrative body used to settle claims over Māori land and resources. A similar arbitrative body in Hawai'i led to no such gains. In New Zealand, compensation has amounted to settlements that could be used to repurchase land but usually are used for economic development and education. The most comparable effort in the Kānaka Maoli case was the Native Hawaiians Study Commission, which in 1983 found no basis for reparations for Native Hawaiians.

In this article I ask why Māori were able to achieve gains that are significantly greater than those made by Hawaiians when conditions were similar in terms of colonization, population, government, and history of land alienation. Four reasons present themselves for exploration here. First, the tribal structure of Māori society allows for more effective decision making. Second, greater equality in New Zealand, particularly in education, may be responsible for an indigenous population better able to operate in Western modes of law and debate. Third, greater sensitivity to world opinion may compel New Zealanders to treat their indigenous hosts more humanely. Indeed, there appears to be a commitment among New Zealanders to an egalitarian society. Fourth, some believe that colonization by Britain, as opposed to the United States, may be responsible for all of the disparities mentioned above. The first three factors are revisited in the conclusion to determine their relevance and utility for Native Hawaiians.

Theoretically, Niklaus Schweizer's view (1999) of the Hawaiian sovereignty movement as an evolutionary, rather than a revolutionary, process informs my analytical perspective, as does Stewart Firth's view (2000) that indigenous minorities in Western liberal democracies will not decolonize as those nations have in which the indigenous group has remained a majority. This theoretical framework is problematized, however, by the emerging view of Hawai'i as an independent state, a view that was given credibility by the Permanent Court of Arbitration at the Hague in its consideration of the question of the continued existence of the Hawaiian Kingdom. To view the arbitral award from the Permanent Court of Arbitration, see http://www.pca-cpa.org/ENGLISH/RPC/LAHK/lahkaward.html.

Brief History of Māori–Pākehā Relations

Abel Tasman, in 1642, was the first *Pākehā* (European) to reach Aotearoa (Walker, 1990). Over a century passed before James Cook arrived in 1769. By 1807, whaling ships from France, the United States, Norway, Spain, and the East India Company were stopping in the islands. A period of open trade began that lasted into the 1830s and brought new resources to the Māori as well as the scourges of alcohol and disease, accompanied by general lawlessness—particularly among Pākehā—in the Bay of Islands, a major trading region. This lawlessness was the motivation (on the part of the Māori) for signing the treaty of Waitangi. This period also saw the beginning of a massive population decline. By 1840, the Māori population had been reduced by 40% (Walker, 1990).

Economic colonization was followed quickly by Christian missionaries in 1814. Ironically, contact with missionaries led to the Māori leader Hongi Hika obtaining the muskets with which he began the "musket wars," a major cause of early Māori population decline (Walker, 1990). Hongi's campaigns across the North Island led to an arms race, which exacerbated this decline.

In 1835 British Resident James Busby organized a meeting of 34 chiefs from the North Island who drafted and signed a declaration of independence and confederation, legalizing and recognizing Māori sovereignty over Aotearoa/New Zealand (Walker, 1990).[3] This created the United Confederation of Tribes and was in response to the actions of a Frenchman, Baron de Thierry, who planned to declare

himself King of New Zealand, residing on land bought from Māori in Hokianga. The declaration prevented neither British colonization nor Māori warfare. New Zealand was annexed by Britain on January 14, 1840, and on February 6, 1840, the treaty of Waitangi was signed.

The treaty was a means for the Māori chiefs to delegate governance to Britain, primarily to control the situation in the port town of Russell (Kororareka)—called "the hellhole of the Pacific"—and the Bay of Islands. British motivation for the treaty was to allow for land purchases, as the treaty gave the Crown the "first right of preemption," that is, the first right to buy land offered for sale. In return, in the Treaty of Waitangi, Article 2, the Māori were guaranteed the "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their desire to retain the same in their possession." Debate has raged for more than 150 years over the meaning of the treaty, particularly over whether governance or sovereignty was ceded. The center of the debate lies in the fact that there were two versions of the treaty, one in English and one in Māori. In the Māori language version, Māori were to cede *kawanatanga,* or governance, whereas in the English version, Māori would cede "all the rights and power of sovereignty" over their lands (Orange, 1989, p. 30).

With the treaty in place, the Crown went about purchasing large amounts of land from the Māori. Between 1844 and 1863 the entire South Island was purchased in less than a dozen blocks for a total of £14,800 (Walker, 1990). One-tenth of this land was to be reserved for Māori, but many of these reserves did not materialize, and a Pākehā-dominated board controlled those that did. The more densely populated North Island was another matter. As the burgeoning city of Auckland expanded, pressure for land purchase extended toward tribal land south of the capital, creating an urgency that sparked a Māori nationalist movement (Walker, 1990).

The "King movement" was an effort to create a Māori monarch in whom to invest land title and slow the tide of land sales. In 1858, Te Wherowhero of Tainui was installed as the Māori king and took the title of Potatau I (Walker, 1990). This monarchy persists today. The Crown made attempts to weaken the position of the king, as the monarchy had slowed land purchases. In the 1860s, the New Zealand Wars erupted, beginning in Waikato and Taranaki and spreading to most of the North Island. The New Zealand Settlements Act "authorized the confiscation of lands of

those in 'rebellion' in any district of New Zealand" (Orange, 1989, p. 55). In 1880, a depression led to a "back to the land" movement, and undeveloped land existed by this time only in "King Country," that is, Tainui (Walker, 1990, p. 137).

An institution was created in New Zealand for the purpose of privatizing land tenure. This was the Native Land Court, established by the Native Land Act in 1865 (Durie, 1998). Pressure from the Crown, privatization of land by the Native Land Court, and Pākehā control of Māori Reserve Lands combined to cause a dramatic decline in Māori ownership of land. Two million hectares remained in Māori ownership by 1920, whereas 24.4 million hectares had been alienated (Walker, 1990).

Traditional Hawaiian Land Tenure

Hawaiian land tenure was uniform throughout the archipelago. The *ali'i* (chiefs) possessed land and granted usufruct (the right to use) to *maka'āinana* (commoners) and even to *haole* (foreigners). With the increasing concentration of power (culminating in the Kamehameha dynasty) came centralization in land tenure. This led to a situation in which piecemeal land alienation could not occur, as land title was invested in the preeminent chief of a domain, or *mō'ī*. This domain could consist of part of an island, an entire island, or the entire archipelago in the case of the Kamehameha line. Prior to Kamehameha, land tenure was based on conquest by war. But the ali'i insulated the maka'āinana from the effects of warfare, so that usufruct was maintained, even when leaders changed. This earlier system may have prevented the rapid usurpation of power by foreigners. While it was the foreigners' expertise that allowed Kamehameha's conquest of the entire archipelago, the formidable military he built may have prevented an even more rapid foreign takeover.

Traditionally, land was the basis of sovereignty, and all political power stemmed from it. Land could be given to chiefs, but not sold. *'Āina* (land) was controlled rather than owned (Kame'eleihiwa, 1992). Originally the rights to land did not include the right to inheritance, so an ali'i's children did not automatically gain control of their father's land. Land was usually transferred in redistribution initiatives called *kālai 'āina* (to carve the land) whenever there was a new mō'ī (Kame'eleihiwa, 1992).

Major changes in land tenure began slowly under Kamehameha I. As the first mōʻī of the archipelago, he found it necessary to divide land and power more widely than his predecessors had done. Kamehameha gave his four uncles from Kona (who were generals in the wars of unification), his chief, and his potential rivals large tracts of land in perpetuity, inheritable by their offspring, and also governorships over entire islands (Kameʻeleihiwa, 1992).[4] This set a new precedent, as land had formerly reverted to the mōʻī upon the death of an *aliʻi nui* (high chief).

The Westernization of Hawaiʻi—beginning with Western contact in 1778 and the arrival of missionaries in 1820—led to further changes in the land tenure system in Hawaiʻi. The most notable changes came in 1848 and 1850 with the Mahele and Kuleana Act. The Mahele was an effort to modernize the land tenure system in Hawaiʻi and consisted of a redistribution of all land in the kingdom between Kamehameha III, the ruling king at that time, and 250 other individuals, mainly aliʻi. The Kuleana Act allowed makaʻāinana to claim agricultural and residential lots from their previous owners (which included the government).

The changes were based on a new conception of land ownership in which "layers" of ownership existed. The dominion[5] of the kingdom consisted of a three-tiered system of interest in land: The king, all classes of aliʻi in their capacity as *konohiki* (land supervisors), and the makaʻāinana each held a one-third undivided interest in all the land in the kingdom. The system of proprietary interests, consisting of fee-simple title, leaseholds, and life estates, existed on top of this domain of vested rights in land.[6] The Mahele was a starting point for a process of alienation of Hawaiian land that continued through the kingdom period and its overthrow in 1893 and into the territorial and statehood periods. The history of land alienation in Hawaiʻi as well as Aotearoa/New Zealand is summarized in the following section.

Alienation of Māori and Kānaka Maoli Land

Four mechanisms existed for alienation of land in both Hawaiʻi and Aotearoa/New Zealand: (a) government land confiscation; (b) government land purchase; (c) decisions of legal bodies initiated to privatize land—the Native Land Court and the Board of Commissioners to Quiet Land Titles, which executed the Mahele; and (d) private purchases (Durie, 1998). The Waitangi Tribunal is the primary source of

research on land alienation in New Zealand and also the primary recommendatory body for the return of land and resources to Māori. The tribunal has thus become a highly credible interpreter of history in the area of land alienation.

An analog does not exist in Hawai'i. Therefore, data on alienation are less reliable and less extensive. The greater capacity for researching the historical record of land and resource alienation is part of the advantage Māori possess over Hawaiians in the process of reclamation. An important aspect of the research in New Zealand is the documentation of oral land histories, a process that has not occurred in Hawai'i to a significant extent. Lacking equivalent data (in quality and quantity) for Hawaiian land alienation, parallels are drawn where they exist. Some inference that the Māori case suggests mechanisms of alienation of land in Hawai'i will be necessary. Mechanisms of land alienation are summarized in Table 1.

TABLE 1 Alienation of Māori and Native Hawaiian land

Method	Māori case	Result	Native Hawaiian case	Result
Private purchase	Piecemeal alienation, New Zealand company purchases		Land Law of 1850	Concentration of land ownership in plantations
Government purchase	Pre-emption 1840–1862	Purchase of entire South Island		
Government confiscation	Crown confiscation	3.25 million acres in North Island	Transfer of government and Crown lands to Republic of Hawai'i	1.75 million acres removed from Native Hawaiian control
Legal mechanisms	Native Land Court	Individualization of land title, piecemeal alienation	Mahele 1848 Kuleana Act 1850	28,658 acres awarded to maka'āinana (less than 1% of land in Hawai'i)
			Adverse Possession	Corporate seizures of land

Source: Durie (1998), Kame'eleihiwa (1992), Parker (1989).

Reclamation

Five strategies have been used by Kānaka Maoli and Māori to reclaim land and natural resources: occupation, arbitrative bodies, land retention, land development, and claims on government land. Occupation stands out among these methods in that it is not a legal means of reclaiming land, while the other methods are legal. Occupation is viewed here as a strategy that is complementary to the legal strategies that often reinforce the former, though many activists who use this strategy do not set out with this goal in mind. Land development stands out as a method with which Kānaka Maoli have had very little success. This is tied to the fact that very little land is in the control of Kānaka Maoli, other than their residential plots. Land development is, more precisely, a method of revitalization of land rather than a method of reclamation. Land that is not owned cannot be revitalized. While Māori have achieved considerably greater success in each of these categories, all five have been used by Native Hawaiians. Table 2 summarizes Māori and Native Hawaiian land reclamation.

TABLE 2 Methods of land and resource reclamation

Method	Māori examples	Result	Native Hawaiian examples	Result
Occupation	Bastion Point	Land returned	Kalama Valley	Eviction
	Moutoa Gardens	High Court claim dismissed	Kaho'olawe Makapu'u	Island returned, restored
			Makapu'u	35 acres granted by state
Governmental arbitrative bodies	Waitangi Tribunal	Numerous settlement recommendations acted upon by Crown	Native Hawaiians Study Commission	Found no basis for a legal Hawaiian claim for reparations
	Office of Treaty Settlements	Tainui Settlement Ngai Tahu Settlement Whakatohea Settlement		
Claims on government land	SOE Appeal Court Challenge	Treaty of Waitangi (SOE) Act 1988	State claims on federally controlled lands	2501 acres returned
	Surplus Railways Land	Congress-Crown Joint Working Party	ALOHA Assoc. claim—2.5 million acres	Passed U.S. senate, killed in U.S. House
	Surplus Crown Land	Consultative Clearance Process		
Land retention	Māori Freehold Land	Approx. 4 million acres total	Ceded land trust	1.7 million acres OHA to receive proprietary revenue
	Māori Lease Lands			
			Hawaiian Home Lands	188,000 acres for Native Hawaiian homesteading
Land development	Greater economic returns from Māori land	Incorporations	Office of Hawaiian Affairs	$400 million budget; $15 million in expenditures per year
		Aotearoa Financial Services		
		Māori Land Investment Group		

Source: Durie (1998), Native Hawaiians Study Commission (1983a), MacKenzie (1991), Parker (1989).

Governmental Arbitrative Bodies

Māori have a choice between two mechanisms for settlement of their claims: the Waitangi Tribunal and direct negotiation with the Crown through the Office of Treaty Settlements. The tribunal offers a chance of a less-biased finding arrived at through thorough and rigorous research, but its findings are merely recommendatory, though increasingly binding power was granted in 1988 (Ward, 1999). Another disadvantage of the tribunal is that the backlog of claims slows the process of achieving a settlement. Direct negotiation assures a more rapid settlement but involves more "hard bargaining," and Māori settlements are subject to a combined de facto $1 billion cap. The Hawaiian experience with governmental arbitrative bodies was limited to the Native Hawaiians Study Commission, which considered Native Hawaiian claims under the lens of federal Indian law and found that no compensable claims existed.

The Waitangi Tribunal

The Waitangi Tribunal was created by the fourth Labour Government in 1975 as a means of avoiding rather than confronting Māori claims (Sharp, 1997). It was underfunded, understaffed, and proceeded very slowly in its first 10 years. To make matters worse, it operated in a legalistic, non-Māori manner, in a formal setting in a hotel (Sharp, 1997). It was only given jurisdiction over claims after 1975, the date of its creation. The tribunal worked in anonymity through the conservative National government administration. It received only 14 claims and made recommendations on 3 of these claims in its first 9 years.

In 1986, several changes reversed this situation. The so-called second tribunal had an expanded staff of six members, four of whom were Māori. The chairman was Chief Judge Edward Durie, chair of the Māori Land Court. The tribunal's jurisdiction was extended backward, from the original post-1975, to include all cases after 1840, the date of the treaty of Waitangi. The tribunal also moved its meetings to local marae and incorporated kawa ceremonies into its proceedings (Sharp, 1997).[7] Its initial caseload was small, but a backlog emerged and increased to the point at which claims numbered 770 in 1998. Approximately 70 claims were arriving per year (Ward, 1999). Meanwhile, 34 reports and many smaller

publications had been issued containing recommendations to the Crown for settlement of claims. As a time-saving device, the tribunal combined claims that were similar, but the backlog was still considerable.

In the State Owned Enterprises Act, a privatization initiative, a provision was added on the recommendation of the tribunal that sales of lands to the State Owned Enterprises (SOE) be protected from loss due to load shedding—the sale of state assets. It also included a clause allowing no transfers of assets that would be "inconsistent with the principles of the treaty of Waitangi" (Ward, 1999, p. 35). The meaning of this clause was debated in the courts in *New Zealand Māori Council v. Solicitor General*. The outcome of this case was that the court prohibited all sales of SOE assets without court approval.

PRIVATIZATION. The tribunal process occurred before a backdrop of a sweeping privatization reform movement undertaken by the ruling Labour Party. This strategy of "devolution" affected the ability of the New Zealand government to implement the recommendations of the tribunal, as load shedding diminished the resources available to the government. Further, from a Māori perspective, the sale of assets represented a loss of the resources that the treaty was meant to protect. In the government's hands, the resources were retrievable through the treaty-claims process. In the hands of private owners, they were irretrievable.

In 1988, however, the treaty of Waitangi (State Owned Enterprises) Act stipulated that if Crown land was sold, it would carry a memorial that alerted buyers that the land could be repurchased by the Crown at market price if the land became the subject of a Waitangi Tribunal claim. The tribunal now had binding power to order the return of land. Business groups objected that this undermined the perfect market conditions on which the privatization initiative was based (Joseph, 2000). But the tribunal proved to be very judicious with this power and did not order the Crown to repurchase land until 1998, and then only after the Crown and claimants could not agree over the level of compensation for treaty breaches in the Turangi case. Further, it only issued binding recommendations for the return of 15 private commercial properties and nonbinding recommendations for the return of 15 Crown properties. The tribunal's fair approach was lauded by Māori and by Douglas Graham, minister in charge of treaty negotiations, who was relieved that the settlement of a small claim such as Turangi would not set a precedent that would make larger claims impossible for the Crown to settle (Ward, 1999).

MĀORI FISHING. One application of the principles of the treaty was the issue of fishing rights. The tribunal initiated a process that led to the "Sealords deal." Te Ohu Kaimoana (TOKM), a Māori holding company with stock in major fishing companies, was created when the government paid $150 million for half the shares in Sealord Products, New Zealand's largest seafood company. In addition to stock, TOKM has fishing quota rights that can be allocated to various tribes. The Māori have accepted that their fishing rights and obligations have been honored through this arrangement (Joseph, 2000).

In regulating its fisheries, the New Zealand legislature added a provision in the 1877 Fish Protection Act for Māori fishing rights, but only traditional, noncommercial rights. The quota management system in the 1983 Fisheries Act (a result of depletion of fisheries by large industrial fishing operations) came to be seen as the "antithesis of the guarantees of the treaty" (Durie, 1998, p. 157). This finding of the Waitangi Tribunal resulted in the Māori Fisheries Act of 1989, which allocated 10% of the quota to Māori. This fell far short of the 50% quota that Māori consensus held was their due. Some claimed that treaty rights entitled them to 100% of fishing quota rights. Sealord Products was a holder of a 26% quota. The company was purchased by the government and held in trust for Māori as a means of settling the fisheries claim. When Sealord Products' 26% quota was added to the 10% Māori possessed and 1.5% previously held by TOKM, the total was brought up to 37.5% of the fishing quota (Durie, 1998). Though this fell short of the 50% Māori expected, the settlement was seen by many as a fair compromise that was affordable to the Crown.

The majority of Māori agreed to the settlement under certain conditions, notably that traditional fishing rights were in addition to the commercial rights contained in the agreement. While some *iwi* (tribes) did not consent to the deal, negotiators and the Crown agreed that the level of consensus was sufficient to claim that adequate consultation had occurred (Durie, 1998). Negotiators included 43 signatories from 17 iwi and 32 plaintiffs from Māori fish actions in the courts. As in the original treaty of Waitangi, nonsignatory tribes were ignored but included as beneficiaries.

The Sealords deal was compatible with both treaty principles and privatization. TOKM is also an example of the complications of such settlements. As its leaders' self-interest (and presumably that of the Māori as a whole) is to maximize fish harvest, TOKM has found itself in opposition to United Nations environmental guidelines,

and its practices are much closer to large-scale industrial fishing methods than to traditional fishing practices (Joseph, 2000). But this was the distinction made between Māori commercial fishing rights as separate from, and in addition to, traditional fishing rights.

Direct Negotiation With the Crown

In response to the fear that the tribunal process would produce recommendations that would be impossible to enact, the Crown converted the Treaty of Waitangi Policy Unit (TOWPU) into the Office of Treaty Settlements (OTS) and commenced direct negotiations with tribes for settlement of claims (Ward, 1999).[8] The OTS encouraged Māori to bring claims before it for settlement, and its budget is much larger than that of the tribunal ($15.8 million in 1998 compared with the tribunal's $4.9 million). The tribunal budget was cut to $2 million in 2001.[9] OTS required proof that a breach in treaty principles had taken place that required reparations, but this process did not have to occur through a Waitangi Tribunal hearing. Thus, it provided a potentially swifter settlement, bypassing the intermediary step of the tribunal.

This process was initiated with the so-called "fiscal envelope," in which settlements were to be capped at $1 billion for all Māori, and tribes could expect only a fraction of this. However, Māori rejected the fiscal envelope in 1995 (Ward, 1999). Despite this, anxiety has set in among Māori that the Crown has limited funds for compensation of claims. The Tainui settlement of $170 million in December 1994 set a precedent representing 17% of this de facto cap, and other tribes were anxious that they would receive only small settlements or be excluded from settlement altogether. The 17% was fixed and would remain constant if the value of the $1 billion trust increased over time. Ngai Tahu, from the South Island, took a settlement recommendation from the Waitangi Tribunal to OTS and also received a settlement worth $170 million in 1996, also at a fixed 17%. The smaller Whakatohea tribe received a settlement in 1996 of $40 million, but not at a fixed proportion of the fiscal cap, which had been rejected by this time but was still seen by the Crown as a de facto limit on settlement payments (Durie, 1998).

Native Hawaiians Study Commission

On December 22, 1980, the Native Hawaiians Study Commission was created by Public Law 96-565, the Native Hawaiians Study Commission Act. One of President Carter's last acts was to appoint the members of the commission, but President Reagan later rejected the Carter-appointed members and appointed new members. The commission was then divided with the five Reagan-appointed commissioners opposing the four Hawaiʻi commissioners.

The commission found that the Native Hawaiian claim for reparations was invalid because U.S. complicity in the overthrow of the Hawaiian monarchy could not be shown (Coffman, 1998). It based this finding on a multilayer argument. First, it concluded that Native Hawaiians did not possess aboriginal title to Hawaiian land because of the failure to pass three tests required to keep with the provisions of the Fifth Amendment and the Indian Claims Commission Act, the two laws under which a claim could be made.

The first test was that there must have been a "single landowning entity," that is, common ownership of land among all group members (U.S. Native Hawaiians Study Commission [U.S. NHSC], 1983a, p. 336). Native Hawaiians were found to meet some but not all of the criteria for a single landowning entity because post-Mahele conditions were similar to Western land tenure and economic development, and because foreign ownership of land existed. Therefore, the Hawaiian government did not represent only the Native Hawaiian people and was not a single landowning entity. It should be noted that because of their tribal structure, the Māori would have failed to pass this test of aboriginal title as well.

The second test was that the single landowning entity must have had "exclusive use and occupancy of specified lands (i.e., government and Crown lands) for a long time before title was extinguished" (U.S. NHSC, 1983a, p. 337). Again, because of post-Mahele haole land ownership, the commission found that the Hawaiian government did not have exclusive use and occupancy of Hawaiʻi's land.

The third test was that "use and occupancy must have continued for a long time before being extinguished" (U.S. NHSC, 1983a, p. 338). The study again points to post-Mahele conditions of foreign land ownership and adds that "given the [pre-Mahele] system of occupancy by chiefs, rather than people in common, it is doubtful if common use and occupancy by all native Hawaiians existed." The

commission concluded that "it cannot be established, therefore, that the native Hawaiians meet the above three tests for showing the existence of aboriginal title" (U.S. NHSC, 1983a, p. 338).

The report next asked if the United States had extinguished any aboriginal title that did exist and found that if any aboriginal title had existed, that title was extinguished by the Hawaiian government prior to the overthrow of the monarchy in 1893. It tacitly admitted U.S. involvement in the overthrow by stating that "any United States participation in the fall of the Hawaiian monarchy does not constitute an extinguishment of aboriginal title for which the United States is liable" (U.S. NHSC, 1983a, p. 339).

Finally, the report addressed whether Native Hawaiians had a right to compensation under either the Fifth Amendment or the Indian Claims Commission Act. The report of the commission found that even if Kānaka Maoli had met all of the requirements for compensation for loss of aboriginal title (which the report concluded they did not), they would not be eligible for compensation under the Fifth Amendment because "aboriginal title is not a vested property right, but instead only a right of occupancy, which the sovereign may terminate at any time without payment of compensation" (U.S. NHSC, 1983a, p. 339). Further, Native Hawaiians were not found to be eligible for compensation under the Indian Claims Commission Act because claims under that act had to be filed by 1951 (U.S. NHSC, 1983a).

Volume 2 of the commission's report was a formal dissent to the commission's findings. The minority report advised the Congress that "Native Hawaiians have a moral basis for compensable claims in the loss of ancestral land rights" and stated that "these claims echo, but do not duplicate, similar claims by Native American and Alaska Natives" (U.S. NHSC, 1983b, p. 1). The latter statement reinforced the minority's contention that the findings of Volume 1 were "fatally-flawed" because of "contextual and attitudinal errors" (U.S. NHSC, 1983b, p. 10). They titled the volume "Claims of Conscience."

In *Nation Within,* Tom Coffman argued that the mood, tactics, and aspirations of the United States, when seen in context, are decisive proof of U.S. complicity in the overthrow of the Hawaiian monarchy. Coffman described the "fruitless search for a 'smoking gun,'" which the Native Hawaiian members of the commission were sent on, a search that focused on "the narrow specific rather than the broad pattern," which was toward a U.S. takeover (Coffman, 1998, p. 111).

Comparison: Waitangi Tribunal and Native Hawaiians Study Commission

The New Zealand government continuously increased the power of the Waitangi Tribunal, which began as an obscure recommendatory committee and became an authority on land issues. In contrast, the Native Hawaiians Study Commission found that even if Hawaiians had claims to settle, which the commission asserted they did not, the U.S. government was not required to compensate for those claims. These disparate outcomes were the result of several factors. The New Zealand government was conscious that violence could occur if claims were not addressed in a prompt manner. The Moutoa Gardens incident showed that all Māori could not be expected to be infinitely patient or to remain within the law even when their own tribal leaders advised it (Durie, 1998).

The threat of violence may have been taken seriously to avoid negative public exposure that would tarnish New Zealand's egalitarian and democratic international image rather than in fear of a threat to national security. The threat of violence was not discussed by the American committee. This may have been related to the indigenous groups' proportion of their nation's populations. Alienating the 10% of the population who identify as Māori would have had a real effect on its ability to govern. Doing likewise to Native Hawaiians, who constitute 20% of Hawai'i's population but only a minuscule proportion of the U.S. population, would not have had the same effect.

Moreover, the combination of New Zealand's susceptibility to international scrutiny and its slight stature as a military and economic power caused such internal affairs to be important. The United States, on the other hand, as the dominant global power, had no such concern. Hawaiian grievance would be drowned out for media attention by myriad other issues, and its military and economic power would render it relatively immune to such pressure, were it to occur.

Both the majority and the minority factions within the Native Hawaiians Study Commission agreed, nevertheless, that the United States had no legal obligation to Native Hawaiians, although the Hawai'i contingent claimed that there was a moral obligation. This underscores the importance of the treaty of Waitangi to these varying outcomes 150 years later. This difference also suggests that Western governments may be inclined to respect their own law but will be less inclined to honor any moral obligation put before them. The government's incentive to fulfill

such legal obligations is that claims based on the treaty are extinguished once the claimants agree to accept compensation and state that their claims have been honored. However, an emerging norm in Aotearoa/New Zealand is that settlements cannot fully extinguish claims because reparations can never fully restore what was lost by the group.[10]

Conclusion and Implications

Comparison of the Māori experience with the Waitangi Tribunal and the Hawaiian experience with the Native Hawaiians Study Commission illustrates the potential as well as the perils of governmental arbitrative bodies. Specifically, it shows the range of possible outcomes regarding land claims. Generally, it presents the range of outcomes for native peoples operating within a "domestic" rather than international arena.

While the Akaka Bill is open-ended in terms of land, financial, and legal outcomes, it is highly dependent on the political landscape—both locally and nationally—during the crucial phases of establishing the Native Hawaiian governing entity and negotiating for settlement of claims. A well-crafted law could create a process that would be credible to both Hawaiians and non-Hawaiians, but this would involve factors that are difficult to control: leadership that maintains credibility that crosses cultural/racial lines, respect for law, and a widespread agreement on the process itself. The process would need to take into account the effect on non-Hawaiians and on the state government. These are the intangible factors that have contributed to the relative effectiveness and credibility of the Waitangi Tribunal; however, such conditions would be difficult to reproduce in Hawai'i.

The factors mentioned above that contribute to the cultural and institutional differences between Hawai'i and New Zealand may be viewed as methods of reproducing a similar political climate in Hawai'i that could facilitate a sound process around the Akaka Bill. Ironically, the tribal structure that facilitates relatively effective decision making on the part of Māori would most likely be facilitated by the Akaka Bill process itself, but it could also be achieved through politicized family associations. Similarly, while socioeconomic equality is seen as an outcome

of self-determination, it is also a prerequisite to reproducing the conditions that could facilitate its attainment. The lack of sensitivity to world opinion is a U.S. phenomenon and, again, a symptom of statehood. These are long-term projects, and all are dependent on the very self-determination that the Akaka Bill promises.

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Notes

1 I use Aotearoa in this article to refer to the land of the Māori people. New Zealand refers to the nation (Māori and non-Māori) and government of that nation.

2 The Native Hawaiian Government Reorganization Act of 2005, S.147, also known as the Akaka Bill, would create a process for the establishment and recognition of a Native Hawaiian governing entity within the United States. It was pending in the U.S. Senate as of August 2005, when this article was submitted.

3 In lieu of an ambassador, the official "resident" was Great Britain's diplomatic presence in Aotearoa/New Zealand.

4 The four Kona uncles of Kamehameha were Keʻeaumoku, Kamanawa, Kameʻeiamoku, and Keaweaheulu.

5 Dominion is the government's ownership of all land that exists beneath fee-simple ownership and is based on its possession of sovereignty.

6 For a discussion of the Mahele and related events, see Alexander (1891).

7 Marae are traditional meeting grounds for Māori tribes (see http://www.tourism.net.nz/new-zealand/about-new-zealand/maori-culture.html). Kawa in this context refers to the set of protocols surrounding a tribe's receiving of visitors (see http://www.newzealand.com/travel/about-nz/culture/powhiri/the-ceremony/kawa-protocol.cfm).

8 The TOWPU was created under the Labour Government to assist with treaty policy and was renamed by the National government while the Waitangi Tribunal was underfunded and working in anonymity.

9 Miria Pomare, personal interview, June 15, 2001.

10 Geoff Melvin and Tom Bennison, personal interview, June 15, 2001.