HAWAIIAN REPARATIONS: NOTHING LOST, NOTHING OWED

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The Native Hawaiian Study Commission has released a draft report finding that Hawaiians have no present legal right to reparations.1/ Its final report will consider whether Hawaiians have any moral right to reparations. This is a matter where moral rights cannot be entirely divorced from legal rights. If no one has stolen anything which you had a legal right to, then you have no moral right to reparations for theft.

The basic thesis of this article is simple. Most Hawaiians owned no land in 1893 and had no political power. No Hawaiian lost land because of the Revolution and few permanently lost power. Those who lost nothing could claim nothing for damages; those who lost something are dead. Since there is no moral right to inherit political power, the losers' descendants have no moral right to reparations.

Reparations are payments made to correct past injustices. They should not be confused with payments made to help someone because he is poor through no fault of his own.2/ A man gets welfare because he is poor; he gets reparations because he has been wronged.3/

Proponents of Hawaiian reparations assume that if they can show that American intervention in the 1893 Revolution was unjust then it automatically follows that the United States government owes enormous reparations in cash, land and political power to Hawaiians.4/ The Aboriginal Lands of Hawaiian Ancestry Association (ALOHA) suggests that a billion dollars cash and several billion dollars worth of land would be a fair amount.5/ The Office of Hawaiian Affairs (OHA) has suggested that the Hawaiians may be entitled to the present value of the former Crown lands and Government lands of the Hawaiian Monarchy -- over 1.75 million acres.6/ OHA has also argued that the Hawaiians are also entitled to substantial powers of self-government: roughly like Indian tribes, they should form a state within a state.7/

The issue is whether the law should be changed to fit the opinion that Hawaiians have a moral right to reparations. If there were now a legal right to reparations the Hawaiians could have sued the U.S. government and won years ago. There would be no need for a special commission or a special act of Congress. This claim is before Congress rather than the courts because there is now no legal remedy for the alleged moral wrong.8/

Even assuming that American intervention in 1893 was improper, no moral right to reparations follows. Advocates of reparations have ignored at least nine other questions which must be answered before they can prove their case:

1. What did the alleged "victim" have at the time of the "theft?" If he did not have it, it could not have been stolen.
2. Of what the "victim" had, what did he have a moral right to at the time of the "theft?" If he had no moral right to it, he has no moral right to get it back or to get compensation for its loss.
3. What was taken from whom?
4. Assuming that what was taken was taken immorally, has any of it been restored?
5. If the "victims is dead, do any of his descendants inherit his moral claim for reparation?
6. Who, if anyone, inherits it?
7. Have any benefits been received by the victim" or his heirs as a result of the "thefts?
8. Should reparations be reduced by the amount of those benefits?
9. If people disagree on which moral principles decide these questions, how do we decide which is the true moral principle to be applied? This question is buried at the bottom of the whole discussion, for if there is no agreement on moral principle there can be no agreement that the reparations are morally due.

Since reparations proponents are the ones who are claiming billions of dollars in public money and land as well as demanding more political power, they have the burden of persuasion on all of these issues.

Any moral right to reparation from the American government rests on the theft of land or of political power or both as a result of American intervention in the Revolution of 1893.9/

Nothing before 1893 counts. The claim is against the U.S. government. The government is liable only for the actions of its officers. The United States had no responsibility for non-Americans such as British Royal Navy Captain James Cook who first exposed Hawaiians to the Western World.10/ Still less was it responsible for the actions of native-born citizens of Hawaii such as Lorrin A. Thurston and Sanford Dole, the leaders of the Revolution. Nor did the American government have any responsibility to see that private American citizens in Hawaii obeyed Hawaii law.11/ It was and is up to each nation to enforce its own laws.

The only intervention in the Hawaiian kingdom by American officials and military forces occurred during the 1893 Revolution. The day before the 1893 Revolution,

American Minister Stevens ordered American marines from the U.S.S. Boston to land in Honolulu, allegedly to prevent fighting which might endanger American lives or property.12/ The next day, the revolutionaries, without assistance from American troops, seized the government building.13/ Queen Liliuokalani put up no armed resistance to the takeover.14/ Minister Stevens recognized the provisional revolutionary government but did not use force or say that he would use force to support the Revolution.15/ The Queen apparently believed the presence of American troops in the city was an implied threat to use them to support the rebels.16/ She put her surrender of power in the form of a "surrender to the superior forces of the United States."17/ In 1898, America annexed Hawaii at the request of the Republic of Hawaii, a regime which came to power as a result of the successful revolution.18/ Thus, the case for reparations can be built only on the results of the 1893 Revolution.

I. Claims Arising From Alleged Theft of Land

For our purposes, there were three kinds of land in 1893: private lands, Crown lands and Government lands.

1. Private Lands

Various individual Hawaiians owned various pieces of private real estate or interests in private real estate in 1893. However, only about 9% of all Hawaiians at that time owned private land.l9/ By 1893 about eighty percent of all privately owned land was owned by Caucasians.20/ Hawaiians who did not own private land could not have had it stolen from them and so could not have any claim for reparations arising from a theft of private land.

Apparently, no private land was seized as a result of the 1893 Revolution.21/ If any was seized, only its individual owner or owners would have had any moral claim to compensation for the seizure. Theft of private land, even if it occurred, could not be a basis for reparations for any significant number of Hawaiians. Thus, as to private lands there is no need to ask the other questions noted above.

2. Crown Lands

The Crown lands in 1893 were neither private nor Government property. Rather than distort the picture by trying to squeeze the Crown lands into any modern legal category, it is best to look at who actually had what rights, duties, privileges and powers relating to them. 22/

Justice Oliver Wendell Holmes noted that a right or other legal relationship is a prophecy of what the courts will do in fact. A "legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by the judgment of the court; and so of a legal right.23/

In 1893 the total area of the Crown lands amounted to approximately 971,463 acres.24/ Property interests in the Crown lands were regulated by the Acts of June 7, 1848 and of January

3, 1865 and by the 1887 Constitution of the Kingdom of Hawaii.25/ Queen Liliuokalani had a right to receive the income from the Crown lands, an income which amounted to about $50,000 per year.26/ She seems to have been able to spend the money as she wished although the act of 1865 says that the Crown lands were "for the purpose of maintaining the Royal estate and dignity."27/ However, the Queen had no control over the land itself. She had no power to lease, sell or transfer the lands or to decide how they would be used.28/

All such decisions were made by three Crown land commissioners.29/ The commissioners who served at the time of the Revolution had been appointed by the Queen or her predecessors but could not be removed by her.30/ Two of the three commissioners had to be cabinet members.31/ Legal title to the Crown lands was vested in the Commissioners as officials, not as individuals.32/ Suits concerning the Crown lands were brought against the commissioners, not against the Queen.33/ The commissioners had the duty, right and privilege to manage the land as they saw fit; they could lease it but could not sell it.34/ They had a duty to pay the Queen the annual income from the land.35/

Liliuokalani could pass on neither the Crown lands nor their income to her personal heirs. When a monarch died the Crown lands passed to the next monarch.36/ The 1887 Constitution set out the rule for succession to the Crown: Liliuokalani was named in the Constitution as King Kalakaua's successor.37/ Since she had no children she had the constitutional power to nominate an heir subject to approval by the Nobles.38/ The Nobles were a group of legislators who were overwhelmingly Caucasian.39/ Liliuokalani appointed her niece Princess Kaiulani as her heir and the Nobles approved.40/

The 1887 Constitution provided that if a monarch died childless and without a living appointed heir the legislature of the Kingdom was to elect an ali'i as monarch. 41/ The legislature also occasionally passed acts (with the monarch's approval) empowering the Crown land commissioners to sell certain pieces of land.42/

Thus Liliuokalani had only a right to receive the income of the Crown lands for her life. This was all she lost in 1893 when she lost the Crown. Kaiulani had only the hope of inheriting the right to receive income from the land for life if she outlived her aunt. The rest of the Hawaiians had no rights, privileges, or powers over the Crown lands, or their income at all.43/ The Crown lands themselves belonged not to any individual or to any group of individuals but to the "Crown," *i.e.* to the office of the Sovereign, not to the individual who wore the Crown.44/

Serious doubts might be raised as to whether Liliuokalani had any moral right to the Crown land income. She acquired that income by being named as the heir to the Crown in the Constitution of 1887, a document which she herself said, "was never in any way ratified, either by the people, or by their representatives, even after violence had procured the King's signature to it."45/ She had been named as heir to the throne under the prior, defunct constitution of 1864 by her brother, Kalakaua.46/ Her nomination was approved only by the then-unelected Nobles.47/ The Constitution of 1864 was a result of a bloodless coup d'etat led by King Kamehameha V after the proposals embodied in it had been rejected by an elected constitutional convention.48/ The Crown lands in 1893 were the last remnant of lands seized by Liliuokalani's royal predecessor Kamehameha I in aggressive warfare.49/ People who believe that American title to the land today is invalid because it is founded on conquest may be hard put to explain why Liliuokalani's claim was not equally invalid. If Liliuokalani had no moral right to the income, then she had no moral right to compensation for its loss.

Liliuokalani lost the income from the Crown lands as a result of being deposed from the throne by the Revolution of 1893. The Government of the Republic of Hawaii took over the Crown lands and provided explicitly in the Constitution of the Republic that those lands were Government lands.50/ Liliuokalani's suit against the United States to recover the lands after Hawaii had become an American territory was unsuccessful.51/

Even assuming that the former Queen had a moral right to compensation for the loss of the Crown land income, that right died with her. Princess Kaiulani predeceased the Queen by eighteen years.52/ Because the income was payable only "for the use and benefit of the Hawaiian

Sovereign,”53/ the only person who could claim the income from the Crown lands now is that person who has been elected by the Legislature of the Hawaiian Kingdom as sovereign. Of course, there is no such person. Consequently, today's Hawaiians have no moral claim to reparations regarding the Crown lands.54/

3. Government lands

As with the Crown lands, the first question is who actually had what rights, duties, privileges and powers relating to the Government lands at the time of the Revolution.

Statutes and case law established that the Government lands belonged to the Government, a legal person separate and distinct from all natural persons.55 / Day-today decisions about land use, sales and leasing were made by the Minister of the Interior.56/ After the establishment of the 1887 Constitution the Minister of the Interior was always Caucasian.57/ The Cabinet, in the exercise of its general executive authority, could make decisions about land use but could not lease or sell Government land.58/ Final power and right to decide how and when Government land was to be used, sold or leased was vested in the Legislature.59/

Private individuals had no powers, rights or privileges to use Government land without Government authorization or to decide how it was to be used.60/ Hawaiians, like any other individuals, using Government land without Government authorization could be convicted of trespass.61/ If Hawaiians had any rights or powers regarding Government land they had only the political right and power to participate in controlling the Government.62/ Since no Hawaiian owned the Government lands in 1893, no Hawaiian had any claim for reparations due to their supposed "theft."

Advocates of reparations may argue that at least the Hawaiians inherited the Government lands or a moral claim to reparations for their loss when the Government of Hawaii ceased to exist in 1898. The change of form of government in 1893 from a monarchy to a provisional government and the further change in 1894 from the provisional government to the Republic did not alter the ownership of the land by the Government of Hawaii. Ownership changed only in 1898 when the Government of Hawaii gave the Government lands to the Government of the United States. 63/ The question is whether Hawaiians in 1898, although a minority of the population of the Islands, had an exclusive moral right to inherit from the Government, even though the positive law said that they did not.

Property is a set of legal relationships among people concerning things.64/ Property interests are created and maintained by positive law: constitutions, statutes, regulations and case law. "Property and law are born and must die together. Before the laws there was no property: take away the laws, all property ceases . . . .65/ Inheritance of property is one sort of purely legal relationship.66/ A person inherits either by will or by intestate succession. Wills are effective only because the positive law says so.67/ When a person dies without a will a statute determines who will get his property.68/ There is no inheritance except according to positive law.

Legally, the land belonging to the Hawaiian Government in 1898 has passed to the U.S. Government and to the State of Hawaii.69/ Inheritance from the Government contrary to positive law is even more impossible than inheritance from a natural person contrary to positive law since the government is created by law (a constitution) and receives all its powers to transfer land from that law. Therefore, the Hawaiians did not inherit land from the Government of Hawaii.

To refute this analysis, reparations advocates would have to prove that there is a specific, universal, moral law of inheritance which, when applied to Hawaiian history, overrides a century of positive law and gives only the Hawaiians a moral right to Government land. Even proving that the people of a country sometimes have a right to inherit from the government is not enough. Reparations proponents must prove that the "moral law" has a racial restriction: that even though the Hawaiians were far less than half the population of Hawaii in 1898 they were somehow entitled to all of the Government land.70/

Some have suggested that the Hawaiians had "aboriginal title" or "recognized title" to the Government and Crown lands and that these rights are inherited by Hawaiians today.71/ The issue is whether Hawaiians had such a property right in 1893.72/

"Aboriginal title" is an American legal concept defining a set of legal relationships among the U.S. government, individual white Americans, and various Indian tribes living in the United States but living apart from white American society. Under the doctrine of "aboriginal title" the land on which an Indian tribe was living was owned in fee simple absolute by the United States government.73/ This fee simple ownership arose initially from discovery of the land by white Americans or by subjects of a European power which subsequently transferred its claim to the U.S.74/

Aboriginal title "is not a property right:" the Indian tribe has only the mere "right of occupancy."75/Land held by Indians under "aboriginal title. was held collectively by the tribe, or by a subgroup of the tribe such as a clan, not by any individual Indians.76/ In Hohfeldian terms, this "right of occupancy would be characterized as the "privilege" of the tribe to use the land as it saw fit.77/ However, this privilege did not carry with it the Hohfeldian "right" that the U.S. government not interfere with the tribe's use. The U.S. government had the exclusive right and privilege to extinguish the Indian tribe's aboriginal title by purchase or conquest.78/ The U.S. could take the land without being obliged by the Fifth Amendment to pay just compensation.79/ Purchases from Indian tribes were valid even if the Indians sold literally "under the gun."80/

Consequently, even if Hawaiians had aboriginal title to the Government lands under Hawaii law in 1893 they did not have a property right and were not entitled to compensation.

"Recognized title" is similar to aboriginal title except that the government owes compensation under the Fifth Amendment for taking land held by recognized title.81/ "Recognition" means that Congress as Sovereign has granted an Indian tribe the right to permanently use and occupy certain land.82/ The grant is to the tribe as a corporate entity, not to the individual Indians.83/

Since the U.S. Congress was not Sovereign in Hawaii before 1898, it could not have granted Hawaiians recognized title.84/ In none of the treaties between the U.S. and the Hawaiian Kingdom did the U.S. purport to grant any land in Hawaii to the Kingdom.85/ Nor were Hawaiians Indians. 86/

But perhaps there was an equivalent doctrine in 1893 Hawaiian law in which the Hawaiian Government had played Congress' role as sovereign and the Hawaiians played Indians. Did the Hawaiian Government recognize a "Hawaiian tribe's" title to the Government lands?

There was no express mention of any doctrine of recognized title in the law of the Hawaiian Monarchy.

This is not surprising. There was no place and no need for recognized title. The doctrine was created for and existed in a situation in which a powerful, dominant, Western society with a Western legal and political system was pushing into land held by weak, primitive, non-Western tribes operating with only "customary law." The tribes existed on the margins--geographically and politically--of the dominant society. The doctrines of recognized title and aboriginal title existed to satisfy the contradictory desires of the dominant society to grab all the land that was worth grabbing, yet salve its conscience by giving the tribes a minimally fair deal.

In Hawaii in 1893 there were no marginal tribes. The Hawaiians were not and never had been tribal.87/ They were the largest part of the society and a majority of the electorate. They had long since adopted the Western political system of constitutional monarchy and much Western culture. The Kingdom had adopted the Anglo-American common law.88/ The Government already owned the Government land; it had no need to grab it.

If the pure form of recognized title did not exist openly, was some "quasi-" form secreted in Hawaiian law? Proponents of reparations have suggested three quasi-recognitions of collective Hawaiian title: the 1840 Constitution; King Kamehameha III's Mahele Grant to the Government; and the Legislature's acceptance of the granted lands.89/

The Kingdom's Constitution of 1840 declared that to "Kamehameha I . . . belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common of whom Kamehameha was the head and had the management of the landed property."90/ The Constitution went on to provide that Kamehameha III had succeeded to Kamehameha I's position and prerogatives.91/

The 1840 Constitution is no support for extending recognized title doctrine to Hawaii. It was repealed in 1852 and by 1893 had been a dead letter for 41 years.92/ The Constitution of 1852, which replaced it, had no provision recognizing common rights to land, nor did the Constitution of 1887, which was in effect in 1893.

Even before the 1852 Constitution was adopted, the Mahele separated the various undivided interests in each piece of land.93/ The Principles of the Land Commissioners, was the official and authoritative gloss on the reference to common rights in the 1840 Constitution as well as on the old land customs and new land law.94/ The commissioners, interpreting the ancient customs of land holding, explained that the King owned an undivided interest in all the land of Hawaii, approximating one-third of its total value.95/ Each konohiki owned an approximate one-third undivided interest only in that particular piece of land to which the King had given him feudal rights.96/ Each tenant had an approximate one-third undivided interest only in the particular piece of land which he farmed.97/ The theory that every Hawaiian owned an undivided interest in every square inch of Hawaii is simply wrong.98/ Moreover, as a result of the land reforms of the 1840's Hawaii adopted the Anglo-American common law of property.99/ During the Mahele the King conveyed most of his share of the lands to the Government.l00/ The conveyance says that the King was giving "to the chiefs and people the larger part of my royal land, for the use and benefit of the Hawaiian Government."101/ The legislature in the act of June 7, 1848 accepted the gift, saying that the land had been made over to his chiefs and people in the keeping of the House of Nobles and Representatives or such person or persons as they may from time to time appoint, to be disposed of in such manner as the House of Nobles and Representatives may direct, and as may best promote the prosperity of this Kingdom and the dignity of the Hawaiian Crown. . . ."102/ By statute the legislature, "declared these lands to be set apart as the lands of the Hawaiian Government".103/

Both Kamehameha III and the legislature used the phrase "chiefs and people" as legally interchangeable with "the Hawaiian Government."l04/ The Hawaii Supreme Court during the Monarchy repeatedly interpreted the King's grant and the Legislature's acceptance of it as vesting land ownership in the Government alone.105/ Statutes passed during the Monarchy confirm this view.l06/

If the Hawaiians as a group had recognized title to Government land then the Government would have been required to compensate them every time it sold, leased or used any Government land. But it did not do so and was never required by law to do so.

No nineteenth century precedents recognize any judicially enforceable duty of the Government to act as trustee of the land for the Hawaiians. A beneficiary has a property interest in a trust because if the trustee violates his fiduciary duty the court will order the trustee to cease the violation and to pay for the damage he did. 107/ But there are no reported cases during the monarchy in which a Hawaiian successfully challenged in court a government action regarding the Government lands as a violation of the Government's supposed fiduciary duty. If a citizen disliked a use or sale of government land, his only recourse was to try to get the responsible government officials voted out of office 108/

If the Hawaiians as a separate group did not hold collective recognized title to the Government land, perhaps the Hawaiian Government was itself the "tribe" which had recognized title.

The Kingdom of Hawaii was not a tribe; it was a sovereign state, modeled on Britain, and was a foreign state as far as the U.S. was concerned. 109/ A tribe is not a foreign state,ll0/ so a foreign state is not a tribe. Tribesmen are tribesmen because their parents were tribesmen.111/

But under the laws and 1887 Constitution of the Kingdom a person did not need to be an ethnic Hawaiian to be a citizen of the Kingdom nor did he need to be a citizen to vote.l12/

The doctrine of recognized title makes sense only if there is a sovereign state distinct from the tribe whose title the sovereign recognizes.113/ Since the Hawaiian Government was the sovereign it could not also have been the "tribe."

Ultimately, the attempt to squeeze recognized title doctrine into Hawaiian law boils down to the trivial truism that the Hawaiian Government owned the Government lands. We have already seen that the Government was a legal person separate from the individual Hawaiians, singly or collectively.114/ And we have seen that the Hawaiians did not "inherit" land from the Government.115/

"When you ain't got nothing you got nothing to lose."116/ Since the Hawaiians had no recognized title to land in 1893 they could not have such title stolen from them. Their descendants today cannot claim reparations for theft of land held by recognized title.117/

II. Claims Arising From Loss of Political Power

If the Hawaiians of 1893 had anything stolen from them for which reparations are due to their descendants today, it could only have been political power.118/

What political rights and power did the Hawaiians of 1893 have to control the Government of the Kingdom, particularly with regard to land use? Most had none at all and those who had some had more than they morally deserved.

Four classes of political power-holders can be distinguished in the Hawaiian Kingdom in 1893: (1) Queen Liliuokalani; (2) the cabinet ministers; (3) legislators; and (4) voters. The majority of people in Hawaii in 1893 fell into the powerless group of nonvoters.

The Queen's powers were essentially restricted to the power to appoint cabinet ministers to fill vacancies and the power to veto legislation subject to an override by two-thirds of the legislature.119/ Apart from these powers, the Queen could act only on the advice of her cabinet and could not refuse to act if a majority of the cabinet told her to act.l20/ She could not remove the cabinet ministers.121/ The cabinet ministers she chose could only be removed from office by a legislative vote of no confidence.122/ Of the five cabinets she appointed in the last year of her reign, four were dismissed by legislative votes of no confidence and the fifth was removed by the Revolution.123/

As was noted above, the Queen's moral claim to her position and consequently to its powers is disputable.124/ It is debatable whether the Queen's power was legitimated by the consent of the governed. The Queen claimed popular support from the Hawaiians but Hawaiians made up well less than half of the population in 1893. 125/

Even if she acquired a moral right to reparations for the loss of her political power, she shared her claim with no one because she shared her power with no one. There is no one today who can claim that power as the rightful monarch of Hawaii under the 1887 Constitution.126/

At the time of the revolution only one of the four cabinet ministers, Samuel Parker, was even part-Hawaiian.127/ Of the 48 legislators, only about one-half were Hawaiian or part-Hawaiian.128/ The great majority of Hawaiians and part-Hawaiians were not even eligible to serve in the legislature. They were excluded by constitutional provisions requiring legislators to be men and to be literate in Hawaiian or a European language and to meet stiff property requirements.129/ The powers held by Parker and the Hawaiian and part Hawaiian legislators in January of 1893 were not hereditary; they were to last only as long as their jobs did.

About three out of four Hawaiians could not vote at all.130/ Since they had no political power they lost no political power in the Revolution of 1893 and had no claim for reparations. Of those who could vote, a further three out of four Hawaiians could vote only for Representatives but could not vote for Nobles.131/ They were thus denied any political power or influence over half the Legislature. Only about one out of sixteen Hawaiians could vote for both Nobles and Representatives.132/ Of course, there were no popular elections for monarch or for the cabinet ministers.133/

However, those Hawaiians who could vote had far more political power than was morally justified. Hawaiians who could vote for Representatives amounted to about two-thirds of the electorate for Representatives.l34/ But they were only about 15-18% of the total adult population of the islands.l35/ Those Hawaiians who could vote for Nobles amounted to about one-third of the electorate for Nobles, but only about 4.5% of the adult population.l36/

The electoral power of those Hawaiians who could vote was so disproportionate to their numbers in the general population because the vast majority of the adult population was excluded from the ballot box by racial, sex and wealth discrimination. No women or Orientals could vote.l37/ Voters also had to be literate in Hawaiian, English or a European language.l38/ They had to have lived in Hawaii for at least one year to vote for Representatives and three years to vote for Nobles139/ but foreigners could vote, unless they were not Caucasian.l40/ Voters also had to have paid all their taxes and had to have registered to vote.l4l/ "Idiots," the "insane," and convicted felons could not vote.l42/ Persons voting for Nobles had to meet the additional qualification of either owning property of at least $3,000 net value or having an income of at least $600 per year.l43/ This property qualification alone cut out about three-quarters of the persons otherwise eligible. 144/ There were more Oriental adults in Hawaii in 1893 than there were adult Hawaiians.l45/ True, most of them were aliens, but white aliens could vote; the discrimination was purely racial.146/

Presumably everyone agrees that all adult citizens (with the exception of insane and retarded persons) had a moral right to vote and that it was immoral to deny the vote to anyone because of race, sex, or poverty.l47/ Since white aliens were allowed to vote, the exclusion of non-white aliens was immoral racial discrimination. Thus the morally proper voting strength of those Hawaiians who could vote was their number divided by the total number of adults in the Kingdom: about 15-18% of the electorate. Their power over that amount was immoral. They had no moral right to reparations for its loss.

During the period of the provisional government and the Republic political power was tightly held by the revolutionary leadership.l48/ However, when Hawaii became an American territory everyone who had been disenfranchised regained his vote.l49/ Furthermore, the racial and property qualifications were dropped; in 1920 women got the right to vote.l50/ Thus, many Hawaiians who had no political power or rights under the monarchy obtained rights and power.

Hawaiians today have exactly the same political rights as everyone else and exactly the same voting rights: one person--one vote.l51/ To claim any more than that because a minority of their ancestors had more power, or to claim reparations because a few of their ancestors may have lost political power is to claim a moral right to inherit political power. No one has any such right.l52/ Inheritance of political power is the principle of absolute monarchy, of aristocracy, and of racism. It has no place in democratic American society.

Since no Hawaiian living today was deprived of any morally justified political power in 1893, no Hawaiian today has any right to any reparations for loss of that power. We have already seen that no one today has any right to reparations for loss of land. The conclusion is clear: there is no moral obligation to pay Hawaiian reparations.

FOOTNOTES

1/ NATIVE HAWAIIAN STUDY COMMISSION DRAFT REPORT OF FINDINGS DEVELOPED AND PUBLISHED FOR PUBLIC COMMENT IN ACCORD WITH P. L. 96-565, TITLE III S 303(C) (1982) (hereinafter "NHSC Draft") at 227-243.

2/ This distinction is explained in more detail in R. Amundson, *Fairness and Hawaiian Native Claims,* in AMUNDSON, THE ISSUE OF HAWAIIAN NATIVE CLAIMS: A SOURCE BOOK 14-15 (1980).

3/ Consequently, statistics showing that the average Hawaiian is poorer than the average member of some other ethnic groups do not justify reparations. If poverty is the problem, reparations are not the remedy. Reparations would be both over- and under-inclusive: they would go to rich Hawaiians but not to poor non-Hawaiians. Opposition to Hawaiian reparations should not be mistaken for opposition to programs which assist all poor people regardless of race.

4/ *See e.g.* excerpted statements from Congressional hearings in AMUNDSON, *supra* n. 2. For the purposes of this article a "Hawaiian" is anyone with any Hawaiian ancestry. Since the thesis of this article is that no reparations are due to any living "Hawaiians" there is no need to consider whether people who have more Hawaiian ancestry should get more reparations than people who have less. *See* n. 152 *infra.*

5/ At ALOHA's request a bill was submitted to Congress to give Hawaiians one billion dollars in the form of a trust fund. N. Levy, *Native Hawaiian Land Rights*, 63 CAL. L.REV. 848, 881 (1975).

6/ *Reparations and Restitution: Documents Submitted to the Native Hawaiian Study Commission by the Office of the Hawaiian Affairs*, 17 (1982).

7/ *Id.* at 5-10.

8/ *See* NHSC Draft at 227-243. Karen N. Blondin suggests in *A Case for Reparations for Native Hawaiians*, 16 HAW. B.J. Winter 1981, at 13, 16-17, 25-28 (1981), that Hawaiians are an "Indian tribe," eligible to put in a claim for lost land under the Indian Claims Commission Act, 66 Stat. 1049, 25 U.S.C. _ 70 (1976). Even if Hawaiians are an "Indian tribe," despite being neither Indians nor tribal, that Act's statute of limitations expired in 1951:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, *nor will such claim thereafter be entertained by the Congress*. Aug. 13, 1946, c. 959, sec. 12, 60 Stat. 1052. 25 U.S.C. sec. 70K. [Emphasis added.]

If Hawaiians are an "Indian tribe," they have slept on their rights. There appears to be no reason to give them another chance for recovery which other "Indian tribes" are denied.

9/ Melody K. MacKenzie, *Sovereignty and Land: Honoring the Hawaiian Native Claim* (OHA, 1982) at 82-91 proposes an alternative basis for reparations: an alleged breach of trust by the U.S. She compares the role of the U.S. as sovereign acting as trustee of tribal lands with the U.S. Government's past role as trustee of Hawaiian Homes land. A trust cannot be breached before it

exists. The alleged breach of trust was American intervention in 1893 but on her analysis the trust did not begin until Congress passed the Hawaiian Homes Commission Act in 1920.

10/ If their complaint is that the Hawaiians did not adapt well to contact with the Western World, Hawaiian groups might consider taking their claim to the British Parliament since Capt. Cook was an agent of Britain sailing under British government orders to explore the Pacific and report on any islands he found.

11/ H. KELSON, PRINCIPLES OF INTERNATIONAL LAW 196-203 (2d ed. 1967) (a state is responsible only for the authorized and unauthorized acts of its agents, and for failing to prevent private persons *in its territory* from injuring another state). If the American government had the duty to enforce laws in Hawaii then it must have had the privilege to use force in Hawaii; otherwise it could not have done its duty. Yet opponents of reparations deny that the American government had any privilege to intervene in Hawaii. Therefore they must agree that the U.S. government had no duty to intervene.

12/ 3 R. KUYKENDALL, THE HAWAIIAN KINGDOM, 594-596 (1967) (hereinafter KUYKENDALL). As to the events of the Revolution *see generally,* 3 KUYKENDALL 502-605.

13/ *Id.* at 599-600, 602.

14/ *Id.* at 599-605.

15/ *Id.* at 601-605.

16/ *Id*.

17/ *Id*. at 603.

18/ *Id*. at 605-650. The Republic was created by the revolutionary leadership to "'hang on' until annexation [to America] became possible." *Id.* at 648. Stevens probably acted beyond his authority when he ordered the Boston's troops to land. But American annexation of Hawaii -- accepting the fruits of Stevens' action -- amounted to a ratification of his acts. Consequently the U.S. should be considered morally responsible for any reparations that may be due. *Cf.*, RESTATEMENT (SECOND) AGENCY sec. 98.

19/ *See*, THRUM'S HAWAIIAN ANNUAL 14 (1892)(giving 1890 census figures). In 1890 there were 3,666 Hawaiian and part-Hawaiian land-owners. They were 78% of all landowners in the Kingdom.

As a result of the Great Mahele of 1848, 245 konohikis (feudal landlords subordinate to the King) received quit-claims to land from the King. 1 KUYKENDALL, 287 (1938). However, some of these persons never got title to the lands because they failed to get Land Commission Awards or failed to pay the required commutation fees. As late as 1909, the government was still trying to get land claimants to acquire title to land offered to them as a result of the Mahele. Act of April 20, 1909, Act 90 sec. 1 1909 Haw. Sess. L. 118. Persons who did not pay the commutation fees within the allotted time (which was extended to 1895) simply did not own the land. It belonged to the government which could, and occasionally did, sell it to someone else. *See* Kenoa v. Meek, 6 Haw. 63 (1871), Thurston v. Bishop, 7 Haw 421 (1888). About 8205 Hawaiian commoners received kuleana grants under the Kuleana Act of 1850. Act of August 6, 1850, sec. 1 [1850] Haw. Laws 202 in 2 R.L.H. (1925) at 2141. Study by Marion Kelly, of the Bishop Museum cited in Levy, *Native Hawaiian Land Rights*, 63 Cal. L.Rev. 848, 856 (1975).

The 1853 Census reported that there were 71,019 Hawaiians and part-Hawaiians; so only about 12% of the Hawaiians and part-Hawaiians received land as a result of the Mahele and Kuleana Act. Commoners received a total of less than 30,000 acres, less than 1% of the land in the Islands. J. CHINEN, THE GREAT MAHELE: HAWAI`I'S LAND DIVISION OF 1848, at 31 (1958).

20/ G. DAWS, SHOAL OF TIME, 128 (1968).

21/ The only seizure of land by the revolutionaries recorded by Kuykendall and Daws was the seizure of the Crown Lands discussed below.

22/ This analysis applies the fundamental legal conceptions as developed by W.N. Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913), 26 YALE L.J. 710 (1917). For a general discussion of the Crown lands *see* T. M. Spaulding, *The Crown Lands of Hawaii*, Hawaii University Occasional Papers, No. 1 (1924).

23/ O. W. Holmes, *The Path of the Law*, 10 HARV. L.REV. 457, 458 (1897).

24/ T.M. Spaulding, *The Crown Lands of Hawaii*, 20, citing Report of the Commissioners of Crown Lands, 1894, p. 8. *But see* LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN, 260 (1898((Tuttle ed. 1964) giving the figure of 915,000 acres.

25/ Act of June 7, 1848, L. 1848, p. 22, reprinted in 2. R.L.H. (1925) at 2152; Act of Jan 3, 1865, L. 1864 p. 69, reprinted in 2 R.L.H. (1925) at 2177; Constitution of 1887, reprinted in LYDECKER, ROSTER: LEGISLATURES OF HAWAI`I: 1841-1918 (hereinafter LYDECKER) at 159 (1918), and in THURSTON, FUNDAMENTAL LAW OF HAWAII, 181 (1904).

26/ Act of January 3, 1865, *supra*. The income figure is given in LILIUOKALANI, *supra*, at 260.

27/ Act of January 3, 1865 2 R.L.H. (1925) at 2178. This purpose was reaffirmed in Gibson v. Doper, 5 Haw 383 (1885) and Hawaiian Government v. Cartwright, 8 Haw. 697 (1890) (per Judd, C.J.) but apparently was never used to limit the monarch's actual use of the money.

28/ Act of Jan. 3, 1865.

29/ *Id.*

30/ *Id.*

31/ *Id.*

32/ Harris v. Carter, 6 Haw. 195, 208-209 (1877) (per Judd, J.); Gibson v. Soper, 5 Haw. 383 (1885).

33/ *E.g.* Harris v. Carter, *supra*; Gibson v. Soper, *supra*, Keelikolani v. Commissioners of Crown Lands, 6 Haw. 446 (1883). All but one of the commissioners who got their names in the case reports were Caucasian: H.A.P. Carter, J. Mott Smith and J.O. Dominis in Harris v. Carter, *supra*; C. H. Judd, W. M. Gibson, J.M. Kapena, and J.S. Walker mentioned in Gibson v. Soper, 5 Haw. at 384-385.

34/ Act of 1865, *supra*, section 4. By 1893, 752,431 acres of Crown lands and Government lands had been leased to foreigners. Levy, *Native Hawaiian Land Rights*, 63 Cal. L.Rev. 848, 859.

35/ Act of 1865, sec. 4.

36/ In the Matter of the Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864); Act of 1865, *supra* at 2177.

37/ Constitution of 1887 Art. 22.

38/ *Id.*

39/ The qualifications and powers of the Nobles were provided for in Articles 56-59 of the 1887 Constitution. LYDECKER 165-166. The Nobles sat together in one House with the other half of the Legislature, the Representatives. 1887 Constitution Act 44; LYDECKER 164. In the 1887 legislative session 22 of 24 Nobles had Caucasian surnames; in the 1888 session 23 of 25 Nobles had Caucasian surnames; in the 1890 session 22 of 25; in the 1892 session 21 of 27. LYDECKER at 172, 175, 178, 182. Of those with Caucasian surnames approximately two, Samuel Parker and Mark P. Robinson, were part-Hawaiian. 3 KUYKENDALL 187, 558. Robinson was a Noble in the 1887 and 1888 sessions, Parker in 1890. LYDECKER,172, 175, 178. As discussed below at two-thirds of the registered voters for Nobles were Caucasian. 3 KUYKENDALL 453.

40/ 3 KUYKENDALL, 476-477.

41/ Constitution of 1887, Art. 22.

42/ *E.g.* Act to Authorize the Commissioners of Crown Lands to Execute a Deed of Confirmation to a Certain Lot of Land in Wailuku, Island of Maui. Act of June 23, 1868 Sess. L. 1868 p. 21. Act to Enable the Commissioners of Crown Lands to Convey Certain Parcels of Land Belonging to the Royal Domain, July 21, 1870 Sess. L. 1870 p. 56; Act to Enable the Commissioners of Crown Lands to Convey a Certain Parcel of Land Belonging to the Royal Domain July 29, 1872 Sess. L. 1972 p. 31; Act to Authorize the Commissioners of Crown Lands to Convey Certain Portions of Such Lands to Claus Spreckels in Satisfaction of All Claims He May Have on Such Lands. Sess. L. 1882 c. 10. For $10,000 Spreckels had bought from Princess Ruth Keelikolani, a sister of Kamehamehas IV and V, a quitclaim to all her interest in the Crown Lands. Although *Estate of Kamehameha IV* and the Act of 1865 established that the quitclaim deed was worthless, *see* Keelikolani v. Commissioners of Crown Lands, 6 Haw. 446 (1883), Spreckels prevailed on the Legislature and the King to give him 24,000 acres of cane land in fee simple to drop his claim. 3 KUYKENDALL 61 (1967).

43/ Of course, a lessee, whether Hawaiian or not, had a leasehold interest in the part of the Crown lands he leased, according to the terms of his lease.

44/ Liliuokalani v. United States, 45 Ct. Claims 418,427-428 (1910):

> They belonged to the office and not to the individual . . . . The reservations made [by King Kamehameha III in 1848] were to the Crown and not the King as an individual. The Crown lands were the resourceful methods of income to sustain in part, at least, the dignity of the office to which they were inseparably attached. When the office ceased to exist they became as other lands of the Sovereignty and passed to the defendants [the United States] as part and parcel of the public domain.

The Court of Claims followed the Hawaii Supreme Court holding In the Matter of the Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864), distinguishing Crown lands from Government lands. The Court of Claims held that the Crown lands had never been the *private property* of

Liliuokalani because they had been neither public nor private lands before the overthrow of the monarchy. 45 Ct. Claims 426-428. When the office of monarch ceased to exist in 1893 the Crown lands became Government lands. *Id.* at 428. The 1894 Constitution of the Republic explicitly provided that the former Crown lands were Government lands and that Liliuokalani had no rights in them. *Id.* Since the lands were not private property at the time the U.S. took them in 1898 the Fifth Amendment did not require that just compensation be paid to Liliuokalani. *See* NHSC Draft at 231. *But see* K. Blondin, *A Case for Reparations for Native Hawaiians*, 16 HAW. B.J. Winter 1981 27, interpreting *Liliuokalani v. U.S.* as holding that "the lands were reserved to the office of the Crown whose chief beneficiaries were the Hawaiian Nation and its people." To the contrary, the Court of Claims cited the Act of 1865 which expressly said that the beneficiary of the Crown lands' income was the individual who was monarch. 45 Ct. Claims at 426, Act of 1865, sec. 4. Melody K. MacKenzie, *Sovereignty and Land: Honoring the Hawaiian Native Claim,* makes an argument similar to Blondin's at 75-76 (OHA, 1982).

45/ LILIUOKALANI, HAWAII'S STORY 180-181. For a more detailed account of the origins of the 1887 Constitution *see* 3 KUYKENDALL 344-372. The 1887 Constitution was imposed on King Kalakaua by a predominantly white group who included many of the 1893 revolutionaries. Nevertheless, we must look at who had what under that constitution to determine who had what to lose in 1893. Since the U.S. did not help impose the 1887 Constitution it is not morally responsible for that document's effects.

46/ 3 KUYKENDALL 197.

47/ Id. When she was approved twelve or thirteen of the 21 Nobles were Caucasian. LYDECKER 136. Under the Constitutions of 1852 and 1864 Nobles were appointed by the King.

48/ 2 KUYKENDALL 127-134 (1953).

49/ In the Matter of the Estate of His Majesty Kamehameha IV, 2 Haw. 715, 725 (1864). As to the conquest of Hawaii by Kamehameha I, *see generally,* 1 KUYKENDALL 29-60 (1938) and DAWS, SHOAL OF TIME 29-44 (1968).

50/ Constitution of the Republic (1894) Article 95, LYDECKER p. 222.

51/ Liliuokalani v. United States, 45 Ct. Claims 418 (1910). *See* n. 44 *supra.*

52/ N. WEBB & J.F. WEBB, KAIULANI: CROWN PRINCESS OF HAWAII, 197, 208 (1962). After Kaiulani died in 1899, the ex-Queen named Jonah Kuhio Kalanianaole and David Kawananakoa as heirs to the nonexistent throne. DAWS at 295. Since the office of Noble had been abolished along with the rest of the Monarchic government in 1893 their nomination was never confirmed by the Nobles. Article 22 of the 1887 Constitution required such confirmation before Kuhio and Kawananakoa could become the heirs to the Crown. Without it they never became heirs.

53/ Act of 1865, *supra*, sec. 4; 1887 Constitution Art. 22.

54/ There is thus no need to examine the other questions listed above at 108.

55/ *See*, In the Matter of the Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864) (interpreting the Mahele between the Crown lands and Government lands and the Act of June 7, 1848, which accepted the King's grant, as vesting ownership of the Government lands in the Government and the Crown lands in the King); Harris v. Carter, 6 Haw. 195, 201 (1877) (per

Judd, C.J.); Kenoa v. Meek, 6 Haw. 63 (1871); Thurston v. Bishop, 7 Haw. 421, 430 (1888). *See* Act of July 11, 1851 to Provide for the Appointment of Agents to Sell Government Lands to the People, 1851 Sess. Laws 52, reprinted at 2 R.L.H. (1925) 2196; Act of July 6, 1853 to Amend the Second Section of the Act to Provide for Appointment of Agents to Sell Government Lands to the People, L. 1853 p. 55, reprinted at 2 R.L.H. (1925) 2197; Disposition of Government Lands, CC 1859 secs. 39, 46, 47; Cp. L secs. 39, 46, 47, C.L. secs. 166, 174, 175, reprinted in 2 R.L.H. (1925) 2198; 1874 Sess. L. c. 24 (allowing Minister of Interior as agent for the Government to lease sell or transfer land owned by Government); 1876 Sess. L. c. 44 and 1878 Sess. L. c. 5 (regulating sale of Government land); Act to Facilitate the Acquiring and Settling of Homesteads. 1884 Sess. Laws c. 45 (regulating sale of government land to the people), amended by 1888 Sess. Laws c. 54 and 1890 Session Laws c. 85; Act to Determine the Status of the Landings of the Kingdom and the Rights of the Public Therein, 1892 Sess. Laws c. 44 (granting private persons the right to use government landings).

56/ *See e.g.* Act to Organize the Executive Departments, 1846, 1 Haw. Statute Laws pp. 71, 95-109, 192, Act to Provide for the Appointment of Agents to Sell Government Lands to the People, 1851 Sess. L. 52, reprinted at 2 R.L.H. (1925) 2196; the Homestead Acts cited in n. 55 *supra*; 1874 Sess. L. c. 24 (Minister of Interior authorized to sell, lease or transfer any land worth less than $5,000.00); 1874 Sess. L. c. 32 (Minister of Interior to take and hold land for Honolulu Waterworks; 1876 Sess. L. c. 44 and 1878 Sess. Laws c. 5 (Minister of Interior to administer public auctions of Government lands), 1884 Sess. Laws c. 37 (approving Minister's purchase of land for Molokai leper colony), 1886 Sess. L. c. 8 (Minister to auction off land escheating to Government); 1892 Sess. L. c. 44 (authorizing Minister to make study of Government landings); 1892 Sess. L. c. 68 (authorizing Minister to issue Royal Patents to Government lands).

57/ During most of the duration of the 1887 Constitution the Minister of the Interior was Lorrin A. Thurston, leader of the Annexationist revolutionaries. 3 KUYKENDALL 365. The other Ministers of the Interior were Charles Spencer, *id.* at 461, Charles T. Gulick, *id.* at 553, 557, and George N. Wilcox, *id.* at 557.

58/ 1887 Constitution Articles 31, 41, 78. Selling and leasing government land was the Minister of the Interior's job, *see* n. 56 *supra*. As the law stood at the time of the Revolution neither the Minister nor the Cabinet could sell land worth over $5,000.00. The Minister of Interior could sell land worth over $5,000.00 only if the Privy Council approved. 1874 Sess. L. c. 24. But the 1887 Constitution prohibited the Privy Council from doing anything not specifically authorized by the Constitution and selling Government land was not one of its authorized functions. 1887 Constitution Article 40. The Supreme Court held that any action which required approval of the Privy Council could not be done if the 1887 Constitution did not authorize the Privy Council to decide such matters. In the Matter of Powers of the Cabinet as to Matters Within Control of the Privy Council, 8 Haw. 586 (1891).

59/ 1887 Constitution Article 44. For the sort of laws which the Legislature used its authority to enact *see e.g.* the statutes cited in n. 55 and 56 *supra*.

60/ The Kuleana Act, 1850 Sess. Laws. p. 202, abolished the right of individual Hawaiians to grow crops and pasture animals on Government land. NHSC Draft at 230; Levy, *supra* n.34, at 857. The Government sometimes gave special statutory authorization to members of the public to use Government lands. *See e.g.* 1892 Session Laws c. 44 (re public use of boat landings) 1 Haw. Statute 192 (permission to cut timber and fuel on Government land in accordance with provisions of Act of November 9, 1840.

61/ *E.g.*, 1880 Session Laws p. 56.

62/ *See infra* at 118-121.

63/ *See* KELSON, *supra* n. 11 at 384-385.

64/ W. N. Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning,* 23 YALE L.J. 16, 22-24 (1917).

65/ 1 J. BENTHAM, WORKS 309 (1859).

66/ Hohfeld, *supra* at 23.

67/ Before the Statute of Wills, 32 H. VIII c. 1 (1540), wills of land were not recognized at English common law. *See* T.F.T. PLUNKETT, A CONCISE HISTORY OF THE COMMON LAW, 587 (5th ed. 1956) Wills in Hawaii today are governed by the Uniform Probate Code H.R.S. c. 560. H.R.S. sec. 560-2:501 empowers any person eighteen years or over who is of sound mind to make a will.

68/ In Hawaii this is determined by H.R.S. secs. 560:2-101 to 560:2-401.

69/ Treaty of Annexation Article II, in THURSTON, THE FUNDAMENTAL LAW OF HAWAII 244; Annexation Resolution, in THURSTON 251-252; Organic Act secs. 73, 99, Act of April 30, 1900 C. 339, 31 Stat. 141; Admission Act secs. 5, 16; Pub L. 86-3 73 Stat. 4. Some land has been sold by the U.S. or the State to private persons.

70/ In 1896, Hawaiians and part-Hawaiians were 36.24% of the population of Hawaii; in 1900 they were 25.75%. R. SCHMITT, HISTORICAL STATISTICS OF HAWAII 25 (1977).

71/ Blondin, *supra*, n. 8; MacKenzie, *supra* n. 44 at pp. 64-83.

72/ The NHSC Draft looks at whether Hawaiians have aboriginal title or recognized title under American law in 1982. NHSC Draft pp. 228-239. But the issue relevant to the moral claim is whether Hawaiians in 1893 had any property right under the law of the Kingdom. If they had no such right the land could not have been stolen from them.

73/ *E.g.* Johnson and Graham's Lessee v M'Intosh, 8 Wheat. 543 5 L.Ed. 681 (1823), Beecher v. Wetherby, 95 U.S. 517 24 L.Ed. 440 (1877), Oneida Indian Nation of New York State v County of Oneida, 414 U.S. 661, 670, n. 6, 94 S.Ct. 772, 39 L.Ed. 2d 73, 81 (1974). The doctrine was developed from pre-Revolutionary British law. Johnson and Grahams Lessee v. M'Intosh, *supra* at 576-585.

74/ Johnson and Graham's Lessee v M'Intosh, *supra*. n. 73, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 280 75 S.Ct. 313, 99 L.Ed. 314 (1955).

75/ *Id.* at 279: "This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

76/ Johnson and Graham's Lessee v. M'Intosh, *supra*, n. 73, Tee-Hit-Ton Indians v. U.S., *supra*, n. 74.

77/ *See* Hohfeld, n. 64 *supra.*

78/ Tee-Hit-Ton Indians v. U.S., *supra*, n. 74; Johnson & Graham's Lessee v. M'Intosh, *supra*, n. 73: "Conquest gives a title which the courts of the conqueror cannot deny." 8 Wheat. at 588.

79/ Tee-Hit-Ton Indians v. U.S., *supra*, n. 74, U.S. v. Sioux Nation of Indians, 448 U.S. 371, 415, n. 29, 100 S.Ct. 2716, 65 L.Ed. 2d 844, 875. The Indian Claims Commission Act of 1946 25 U.S.C. secs. 70 *et seq.*, permitted recovery for loss of aboriginal title under some circumstances. Otoe & Missouria Tribe of Indians v. U.S., 131 Ct. C1. 593, 131 F.Supp. 265 (1955). But the Indian Claims Commission Act was not the law of Hawaii in 1893.

80/ Tee-Hit-Ton Indians v. U.S., *supra*, n. 74, 348 U.S. at 288-290: ". . .Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation. Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of this land."

81/ Tee Hit-Ton Indians v. U.S., *supra* n. 74, 348 U.S at 277-278. Inupiat Community v. U.S., 680 F.2d 122; 128 (Ct. C1. 1982).

82/ *Id.* Sac & Fox Tribe of Indians of Oklahoma v. U.S., 161 Ct. C1. 189, 197 (1963), *cert. denied* 375 U.S. 921 (1963).

83/ *E.g.*, Fleming v. McCurtain, 215 U.S. 56, 54 L.Ed. 88 (1909)(per Holmes, J.)

84/ NHSC Draft 234.

85/ NHSC Draft 234-235. The treaties covered only friendship, navigation, commerce and tariffs. *Id.*

86/ 1 ENCYCLOPEDIA BRITANNICA 305 (1981) defines "American Indians" as "a group of human populations (local races and microraces) of North America and South America and the Caribbean islands." This accords with the anthropological definition. *See e.g.* A.M. JOSEPHY, THE INDIAN HERITAGE OF AMERICA,10-29 (1968); P. FARE, MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE, 235-273 (1968). The Interior Department's regulations for recognizing a group to be an Indian tribe" include the requirements that the group be within the continental U.S. and descended from aboriginal inhabitants of the continental U.S.; and that it be recognized as an Indian entity by anthropologists, historians and other scholars. 25 C.F.R. secs. 54.1, 54.3, 54.4, 54.7. In U.S. v. Native Village of Unalakleet, 411 F.2d 1255, 1257 (Ct. Clms. 1969) the court defined "Indians" to include all "the descendants of any pre-Columbian inhabitants of North America." Blondin, *supra* n. 8 at 28 suggests that excluding Hawaiians from the class of "Indians may violate the Fourteenth Amendment's ban on racial classifications. However, she proposes a racial classification that would leave out whites, blacks and Asians.

87/ For the anthropological definition of a tribe *see* Farb, *supra* n. 86, at 106-107. Notably, a tribe "is egalitarian; there are still no full-time specialists such as soldiers, artisans, priests, or political office-holders. . . . The tribe . . . possesses no strong political organization or permanent office of control . . . ." *Id.* Compare 1 KUYKENDALL 7-10 (1938); D. MALO, HAWAIIAN ANTIQUITIES 52-72, 187-203 (1898 ed.); M. Kelly, Changes in Land Tenure in Hawaii 1778-1850, at 27-49 (1956) (master's thesis in University of Hawaii library), on the far more complex and aristocratic, social and political organization of pre-contact Hawaii. The legal definition of a

tribe is set out in 25 C.F.R. secs. 54.1, 54.7. And *see* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 268-272 (1971 reprint of 1941 ed.).

88/ *See e.g.* Oni v. Meek, 2 Haw. 87 (1858) Keeliokalani v. Robinson, 2 Haw. 522, aff'd 2 Haw. 540, 544-46 (1862); Principles Adopted by the Board of Commissioners to Quiet Land Titles in their Adjudication of Claims Presented to Them, L. 1847, p. 81 reprinted at 2 R.L.H. (1925) 2124 and ratified and adopted as statute law, L. 1847 p. 94 reprinted at 2 R.L.H. (1925) 2137. CHINEN *supra* n. 19 at 15-21, 1 KUYKENDALL 269-298, DAWS 124-128. All the real property cases in the first eight volumes of the Hawaii Reports make it clear that the Anglo-American common law of property was adopted as the property law of the Hawaiian Kingdom. *See e.g.*, In the Matter of the Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864) (adoption of common law rules of dower). H.R.S. S 1-1 (adopted in 1892) made the English and American common law the common law of Hawaii except where it was contrary to the Constitution or laws of Hawaii, or Hawaiian precedent or usage.

89/ Blondin, *supra* n. 8 at 29-30; MacKenzie, *supra* n. 44 at 73-74, 81.

90/ LYDECKER, *supra* n. 25, at 9-10. There were no legal limits on Kamehameha I's power. Cf. Holmes, *supra* n. 23. *Compare* Constitution of the Hawaiian Republic Art. 95, LYDECKER at 222, stating that the Crown lands had always been Government lands and would continue to be. Both constitutional provisions seem to be instances of a new regime trying to buttress its authority by claiming to be only a continuation of the old. 91/ LYDECKER at 10.

92/ *See* Constitution of 1852, set out at THURSTON 155 and LYDECKER 36, which repealed and replaced the 1840 Constitution. *See* 1 KUYKENDALL 266-268 (1938) for the history of the change of constitutions. The 1852 Constitution was the only one of the four constitutions of the Kingdom which was approved by elected representatives of the people before its adoption.

93/ Levy, n. 34 at 854-855; Morris, *The Land System of Hawaii*, 21 ABB. JOURNAL 649, 650 (1935); NHSC Draft 229.

94/ Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them, L.1847 p. 81, reprinted at 2 R.L.H. (1925) 2124 and adopted as statute law L.1847 p. 24, reprinted at 2 R.L.H. (1925) 2137. *See* CHINEN *supra* n. 19 at 8-12.

95/ *Id.*

96/ *Id.*

97/ *Id.* An Act Confirming Certain Resolutions of the King and Privy Council, Passed on the 21st Day of December AD 1849, Granting to the Common People Alloidal Titles For their Own Lands and House Lots and Certain Other Privileges, L. 1850 p. 202, reprinted at 2 R.L.H. (1925) 2141; CHINEN *supra* n. 19 29-31 (native tenants required to prove that they actually cultivated the lands they claimed and consequently only about 30,000 acres, less than 1% of the land in the Islands went to tenants.)

98/ The idea that as a result of the Mahele all the lands of the Kingdom were divided into three parts, one-third to the King, one-third to the chiefs and one-third to the commoners is "wholly erroneous." 1 KUYKENDALL 282 (1938).

99/ *See* n. 88 *supra*.

100/ In the Matter of the Estate of His Majesty Kamehameha IV, 2 Haw. 715, 722 (1864).

101/ MAHELE BOOK, translated by Court In the Matter of the Estate of His Majesty Kamehameha IV, 2 Haw 715, 723 (1864). Read literally, this would have made the chiefs and people the trustees for the Government.

102/ Act of June 7, 1848.

103/ *Id.*

104/ *Id.* and King's Mahele Grant.

105/ *See* cases cited in n. 55 *supra*.

106/ *See* statutes cited in n. 55 *supra*.

107/ *See* 3 SCOTT, THE LAW OF TRUSTS sec. 197-226 (3d ed. 1967); Holmes *supra* n. 23.

108/ *See infra* at . Most citizens could not vote.

109/ MacKenzie, *supra* n. 44, at 58, 81.

110/ Cherokee Nation v. Georgia, 5 Pet.1 (1831), Santa Clara Pueblo v. Martinez, 436 U.S. 49, 123, 98 S.Ct. 1670, 56 L.Ed. 2d 106, 123 (1978).

111/ Monty v. United States, 180 U.S. 261, 266, 21 S.Ct. 358, 45 L.Ed. 521, 523 (1901) (a "tribe" is a body of Indians of the same or similar race). Some tribes allowed white men who married Indians to become tribesmen, COHEN, *supra* n. 87 at 2-5.

112/ Naturalization of foreigners was provided for in 1884 Competed Laws secs. 428-434 as amended by 1887 Sess. L. c. 10 and 1890 Sess. L. c. 24. Voter qualifications are discussed below at ; being ethnically Hawaiian was not required. Constitution of 1887, Articles 59 and 62.

113/ But *see* MacKenzie, *supra* n. 44, at 81, apparently suggesting that the Hawaiian Government was both the "tribes and the sovereign state recognizing the tribe's title.

114/ *Supra* at 113.

115/ *Supra* at 114. *Cf.* Fleming v. McCurtain, 215 U.S. 56, 54 U.S. 88 (1909) (individual Indians could not inherit from a defunct tribe).

116/ Bob Dylan, "Like a Rolling Stone."

117/ It is therefore unnecessary to discuss any of the other questions listed above at p. 108.

118/ The NHSC Draft at 236-239 and MacKenzie, *supra* n. 44 at 57-64 discusses this notion under the heading of "loss of sovereignty." The Government of Hawaii was the sovereign and remained the sovereign until its powers passed to the U.S. Government in 1898. The real issue is who had the political power to control the sovereign at a given time.

119/ Constitution of 1887, Articles 31, 41, 48, 78; Everett v. Baker, 7 Haw. 229 (1888), In re Right of the Sovereign to Appoint a New Cabinet on Taking the Throne, 8 Haw. 579 (1891), In

re the Signature of the Sovereign to Amendments to the Constitution, 8 Haw. 606 (1892) (her signature held unnecessary), Spaulding, *Cabinet Government in Hawaii 1887-1893*, HAWAII UNIVERSITY OCCASIONAL PAPERS No. 2 (1924).

120/ *Id.*; 1887 Constitution Articles 41, 78. In re Responsibility of the Cabinet, 8 Haw 566 (1890); In re Responsibility of the Cabinet, 8 Haw. 572 (1890); Spaulding, *Cabinet Government.*

121/ Constitution of 1887 Article 41; In re Right of Sovereign to Dismiss the Cabinet, 8 Haw. 578 (1891); In re Right of the Sovereign to Appoint a New Cabinet on Taking the Throne, 8 Haw. 579 (1891); Regina v. Poor, 8 Haw. 521 (1892), Queen v. Costa, 8 Haw. 552 (1892); Spaulding, *Cabinet Government.*

122/ Constitution of 1887 Article 41; cases cited in n. 120; Spaulding, *Cabinet Government.*

123/ 3 KUYKENDALL 549; Spaulding, *Cabinet Government* at 12. One Cabinet lasted only a few hours. 3 KUYKENDALL 556-557.

124/ *See supra* at pp. 111-112.

125/ In 1890, Hawaiians and part-Hawaiians were 45.15% of the population; by 1896 their share fell to 36.24%. SCHMITT, *supra* n. 70. In 1893 they were presumably about 40% of the population.

126/ *See* discussion *supra* at 112.

127/ 3 KUYKENDALL 581, 187.

128/ LYDECKER 182.

129/ Constitution of 1887, Articles 56 and 61. Approximately one-third of all Hawaiians and part-Hawaiians were minors and about half the adults were women. THRUM'S HAWAIIAN ANNUAL FOR 1900, at 39-40, citing statistics from the 1896 census. The property qualification to be a Noble was the same as that required to vote for Nobles: either owning taxable property in the Kingdom of a net value of at least $3,000.00 or having an income of at least $600.00 per year. Constitution of 1887 Articles 56 and 59. This property qualification excluded about three quarters of those otherwise eligible to vote. DAWS, ATLAS OF HAWAII 26-27 (l970). Compare percentages of population voting for representatives with those voting for Nobles as given in R. SCHMITT, HISTORICAL STATISTICS OF HAWAII 597 (1977) and Schmitt, *Voter Participation Rates in Hawaii Before 1900*, 5 THE HAWAIIAN JOURNAL OF HISTORY 50 (1971), indicating about four times as many people voted for representatives as voted for Nobles. Representatives had to own real estate with a net value of at least $500.00 or have an annual income of at least $250.00. Constitution of 1887, Article 61.

130/ *See* 1890 census statistics reported in THRUM'S HAWAIIAN ANNUAL FOR 1892 p. 16, showing that 23.5% of all Hawaiians were registered voters in 1890. Constitutional limits on eligibility were set out in the 1887 Constitution Articles 59 and 62. About two-thirds of the Hawaiian and part-Hawaiian population were excluded because of age and/or sex. *See* n. 129 *supra*. Some men were apparently excluded because of non-payment of taxes or conviction of a felony but statistics on this are not available. Some were also probably excluded because of illiteracy. The 1890 census reported that 70% of all Hawaiians and part Hawaiians were literate. THRUM'S HAWAIIAN ANNUAL FOR 1892 at 14-15. But the census figures do not show how many

otherwise eligible Hawaiian men were excluded because of illiteracy. The literacy requirement was waived for men born before 1840 and for men who voted in the 1887 election.

131/ *See* n. 129 *supra*; Constitution of 1887, Articles 59, 62, and 73.

132/ *See* nn. 129, 130 *supra*; Constitution of 1887, Articles 59, 62 and 73.

133/ Constitution of 1887, Articles 22 and 41.

134/ 3 KUYKENDALL 453. In 1890 Hawaiian and part-Hawaiian voters made up 70.3% of all registered voters. THRUM'S ANNUAL (1892) n. 129, *supra*.

135/ Estimates drawn from 1890 and 1896 census figures given in THRUM'S HAWAIIAN ANNUAL (1892) and (1900) and SCHMITT, HISTORICAL STATISTICS OF HAWAII 21, 25; and Schmitt, Voter Participation Rates in Hawaii Before 1900, n. 129, *supra*.

136/ 3 KUYKENDALL 453, population statistics estimated from statistics given in sources cited in Nan. 129, 130 *supra*.

137/ Constitution of 1887, Articles 59 and 62. HA question in the 1890 census revealed that Chinese and Japanese accounted for 51.8% of all males of voting age but none of the registered voters." Schmitt, Voter Participation in Hawaii before 1900, n. 129 *supra*, at 56, citing census figures reprinted in THRUM'S ANNUAL (1892) at 16. Even Orientals who were Hawaiian citizens and who had been able to vote before the 1887 Constitution was adopted were deprived of their voting rights. Ahlo v. Smith 8 Haw. 420 (1892).

138/ Constitution of 1887, Articles 59 and 62.

139/ *Id.* However the residency and literary requirements did not apply to persons residing in the Kingdom when the 1887 Constitution was adopted if they registered to vote in the 1887 election. *Id.*

140/ *Id.*; Ahlo v. Smith, 8 Haw. 420 (1892)

141/ Constitution of 1887, Articles 59 and 62.

142/ Constitution of 1887, Article 73.

143/ Constitution of 1887, Article 62. Only cash income counted, not the value of board and lodging received by employees. In the Matter of the Qualifications of Voters for Nobles, 8 Haw 563 (1890). This decision excluded a major source of income for plantation workers who typically received low cash wages plus board and lodging.

144/ *See* n. 129 *supra*.

145/ *See* THRUM'S ALMANAC (1892) and (1900) nn. 129, 130 *supra* .

146/ *See* n. 137 *supra*.

147/ The literacy requirement cannot be justified by the usual argument that a person must be able to read and right the language(s) in which public business is conducted to be able to intelligently cast his vote. Public business in 1893 was conducted in English and Hawaiian. A

man literate only in Albanian or Polish could vote while a man literate only in Chinese or Japanese could not.

148/ G. DAWS, SHOAL OF TIME 280-281 (1968), 3 KUYKENDALL 649. In the Republic's only general election only 0.9% of the population of Oahu voted. SCHMITT, HISTORICAL STATISTICS n. 110 *supra*, p. 597. Most of the voters were Caucasian. RUSS, THE HAWAIIAN REPUBLIC, 1894-1848 26-34 (1961). Since the Oahu population was more Caucasian and probably richer on the average than the populations on the Neighbor Islands, the Oahu figure probably overstates the figure for the Republic as a whole.

149/ Organic Act sec. 60, reprinted in Vol. 1 of the Haw. Rev. Stat. at 50.

150/ *Id.*; U.S. Constitution, Nineteenth Amendment. However, the citizenship requirement excluded Oriental aliens as well as Caucasian aliens.

151/ Or perhaps more than everyone else. Only persons of Hawaiian ancestry are eligible to vote for trustees of the Office of Hawaiian Affairs or to be OHA trustees, State Constitution Article 12, S 5. The question of whether this racial restriction on voting and holding public office violates the Fourteenth and Fifteenth Amendments is beyond the scope of this article.

152/ Those who think political power is hereditary musts in addition to giving reasons for that belief, face several other questions, *e.g.*: How is it decided how the political power descends to people today? If many living people are descended from one 1893 voter do they split his claim? On what terms? Or does only one of his heirs get it? If one living person is the only descendant of two 1893 voters does he get twice as much reparations? Do descendants of persons who could vote for Nobles get more than descendants of those who could vote only for Representatives? Do people descended from Cabinet ministers, Nobles or Representatives have a larger claim? Do persons with more Hawaiian ancestry get more? Do descendants of ali`i get more? Do some people with very little Hawaiian ancestry get nothing? Do the descendants of non-Hawaiian royalists who lost power in 1893 get anything? If not, why that racial exclusion? What about someone descended from a royalist and a revolutionary? How can the right to vote be evaluated in terms of cash or land? How much was the right to vote for Nobles worth? The right to vote for Representatives? Should reparations for lost power be reduced by the value of the rights to vote in state and federal elections? How much are those rights worth? Since the author of this article maintains that political power is not hereditary, he need not reach these questions. This is fortunate because he would not know how to begin to answer them.