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ARE HAWAIIANS INDIANS?

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The political status of Native Hawaiians in US law is precarious, and attempts to experiment with this precarious position have intensified in the past two decades. The US Supreme Court decision in *Rice v. Cayetano* (2000) generated much of this momentum.[1] It is a landmark case that continues to frame federal and state law in ways that constrain rights for Native Hawaiians as well as other Indigenous peoples under US regulation yet without formal recognition. I begin with *Rice v. Cayetano* to unravel a neglected thread in its legal genealogy. In his lawsuit, Harold "Freddy" Rice alleged that the State of Hawai'i violated the Fourteenth and Fifteenth Amendments of the US Constitution because he was restricted from voting in a state election on the basis of race. In 1978, the State of Hawai'i, caving to pressure by the modern Hawaiian sovereignty movement, created the Office of Hawaiian Affairs (OHA) as an

agency to be led by Native Hawaiian trustees elected by Native Hawaiians.[2] When Rice, a US citizen born in Hawai'i and non-Native Hawaiian resident of the State of Hawai'i, was restricted from voting for OHA trustees, he brought the suit against Governor Ben Cayetano. Rice lost in lower courts but found solace with the US Supreme Court. The Supreme Court ruled, viewing the qualification of Native Hawaiian ancestry to be a proxy for race, that OHA elections instituted race-based voting—the State of Hawai'i had violated the Fifteenth Amendment.

Now, all residents of the State of Hawai'i, not just Native Hawaiians, vote in OHA elections and shape how OHA administers resources, programs, and services expressly for Native Hawaiians. It was a devastating decision for advocates of Native Hawaiian rights, self-determination, and sovereignty. Critically though, a core debate in the case pivoted on whether the legal category "Hawaiian" was a political or racial status. Before arguments were heard by the court, an amicus brief filed on May 27, 1999, in support of the plaintiff, raised serious legal and political concerns. The brief had an enduring impact and lingers as a nagging trace within biopolitical operations of US settler-state geopower. Brett Kavanaugh, an attorney and partner at Kirkland and Ellis LLP at the time, argued in the brief that "Hawaiian" is a racial classification. He suggested that Hawaiians do not share the political status of Indians because the Commerce Clause of the US Constitution recognizes the sovereignty only of Indian tribes. "Hawaiians," the brief noted, "do not and could not qualify as an American Indian tribe." The Supreme Court eventually agreed and blighted Hawaiian rights to self-determination and sovereignty.

A few months after submitting the brief, Kavanaugh published an op-ed titled, "Are Hawaiians Indians?"[3] I was hesitant to use this as my chapter's title, especially since it was intended to be reductive, offensive, and divisive. But taking great care to redirect it, I repurpose and inhabit the question because, as I show, it permeates the management of Hawaiian life by the federal government. The op-ed resurfaced in 2018 when Kavanaugh was nominated to replace Supreme Court Justice Anthony Kennedy, who inauspiciously wrote the majority opinion in *Rice v. Cayetano*. It circulated as damning evidence during his confirmation hearing before the Senate Judiciary Committee. Democratic Senator Mazie Hirono from Hawai'i was a member of the committee and pressed him: "Your view is that Hawaiians don't deserve protections as indigenous people under the constitution and your argument raises a serious question on how you would vote on the constitutionality of programs benefiting Alaska natives."[4] Hirono connected how Kavanaugh's anti-Hawaiian view contained pernicious consequences for other Indigenous communities,

such as Alaskan Native Corporations with special programs created from congressional legislation like the Alaska Native Claims Settlement Act. Not only did the confirmation hearing put Kavanaugh's perpetration of sexual assault, performance of toxic masculinity, and perspective on abortion on full display, it also illustrated his white supremacist and colonial desire to dismantle affirmative action protections.[5] Sexual, gendered, and racialized violence became indelibly linked to colonial conquest. Kavanaugh's op-ed and discussions about it elucidate how questioning whether Hawaiians are Indians can be weaponized as a calculated test that perpetuates settler colonialism in Hawai'i.

Rather than providing an answer, I am greatly concerned with the work this question executes. My analysis does not forward a definition of the category "Indian" to determine whether or not Hawaiians fit. Instead, I question what kind of discursive work the question performs. My chapter stews on how the question and answers to it marshal a biopolitical management of Native Hawaiians that can serve the US settler-state's geopower in Hawai'i. Returning to the op-ed illuminates why the question is so nefarious. Further, it elucidates why the question is necessary for understanding "colonial governmentality," which Glen Coulthard discusses in the context of Canadian settler-state practices for managing First Nations, and I examine in US settler-state techniques for managing Kanaka Maoli (Indigenous people of Hawai'i).[6] My analysis here offers fresh insight about particular operations of colonial governmentality in Hawai'i.

Kavanaugh inquires "Are Hawaiians Indians?" to hypothesize that Native Hawaiians are indeed not Indians. What ensues in the op-ed is a dizzying exhibition of colonial racism. Severely misrepresenting conceptualizations of Indigeneity, nationality, race, ethnicity, and immigration, he describes Rice's legal claim and suggests there is an unconstitutional "naked racial-spoils system" that unfairly privileges and benefits Native Hawaiians.[7] Doing so, Kavanaugh mocks a brief, filed by the US Department of Justice supporting the defendant in *Rice v. Cayetano*, that contends the Native Hawaiian community is an Indigenous population equivalent to American Indian tribes. Ridiculing the claim, he opines that only federally recognized Indian tribes are entitled to special political benefits, and neither Congress nor the US Department of the Interior (DOI) has acknowledged Native Hawaiians as an Indian tribe. This contention comes into clearer focus in my analysis. "Hawaiians," Kavanaugh rambles, "have never even applied for recognition as an Indian tribe. The reason is obvious. They don't have their own government. They don't have their own system of laws. They don't have their own elected leaders. They don't live on reservations or in territorial enclaves. They don't even live together in Hawaii. Native Hawaiians are dispersed

throughout the state of Hawaii and the United States. In short, native Hawaiians bear none of the indicia necessary to qualify as an Indian tribe."[8] Dripping in alternative facts, he contrives that Hawaiians are ineligible for the special political benefits available to Indigenous people in the United States because Hawaiians are not federally recognized like an Indian tribe. The Supreme Court listened to Kavanaugh so much so that he now sits as a justice on the court. The court concurred in *Rice v. Cayetano* with a conservative decision that harmed affirmative action protections for Native Hawaiians as well as Indigenous Oceanic people more broadly.[9] Nonetheless, the decision sparked a liberal race to federally recognize Native Hawaiians. The question of whether or not Hawaiians are Indians oozes from the lips and writings of conservative American politicians and, simultaneously, it pervades liberal US policies for federal recognition of Native Hawaiians framed like the vaccine rather than a mutation of the virus.

Progressive politicians, even those who are Kānaka Maoli (Native Hawaiians), have been hailed by the question and compelled to pursue federal recognition. Former Democratic Senator Daniel Akaka from Hawai'i began introducing legislation in 2000, immediately following *Rice v. Cayetano*, to establish a federal process to reestablish a government-to-government relationship between the United States and the Native Hawaiian community. The idea was that this could protect Native Hawaiian self-determination over resources, programs, and services bestowed by the United States. Although liberal politicians supported what became known as the Akaka bill, conservative politicians opposed it and mimed Kavanaugh's arguments concerning *Rice v. Cayetano*. Many Kanaka Maoli activists rejected it, too. Some suggested that Kanaka Maoli have never relinquished national and territorial sovereignty and the sovereignty offered would be limited under plenary power. Some posited further that Kanaka Maoli are not Indians and do not want to be recognized as an Indian tribe. Kavanaugh's question started seeping into criticisms of federal recognition. Along with advocates from OHA and elsewhere, Akaka labored in Congress over the next decade to get his bill passed, without success. Picking up where he left off, the DOI launched a campaign in 2014 to reestablish a government-to-government relationship with Native Hawaiians. The question of whether Hawaiians are Indians appears more and more like a structural pattern, not an isolated, past utterance. In this chapter, I show how the DOI experimented with whether or not Hawaiians are Indians by testing the biopolitical status of Native Hawaiians to legitimate the US settler-state's geopower over Hawai'i. Although the federal government is anxiously seeking to incorporate Hawaiians as Indians without land, I argue that Kānaka Maoli have rejected and refused the new colonial governmentality for federal recognition through

articulations of ʻaʻole (no) that expose the precarity of settler sovereignty in Hawaiʻi.

Advancing Reconciliation

On June 20, 2014, the DOI published an Advanced Notice for Proposed Rulemaking (ANPRM) to propose an administrative rule to federally recognize a reorganized Native Hawaiian government. The primary purpose was to solicit input on a possible rule. Five threshold questions were provided to guide the content of feedback:

1. Should the Secretary propose an administrative rule that would facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian community?
2. Should the Secretary assist the Native Hawaiian community in reorganizing its government, with which the United States could reestablish a government-to-government relationship?
3. If so, what process should be established for drafting and ratifying a reorganized Native Hawaiian government's constitution or other governing document?
4. Should the Secretary instead rely on the reorganization of a Native Hawaiian government through a process established by the Native Hawaiian community and facilitated by the State of Hawaii, to the extent such a process is consistent with Federal law?
5. If so, what conditions should the Secretary establish as prerequisites to Federal acknowledgement of a government-to-government relationship with the reorganized Native Hawaiian government?[10]

Input could be submitted in written and oral formats. Verbal comments would be collected during testimony at public meetings. A key mandate, the ANPRM declared the DOI would conduct meetings across the Hawaiian archipelago and in Indian Country on the continent. The first meeting was scheduled three days after publication of the ANPRM. This executive process, perhaps by design, was rushed. The ANPRM forged a legal history for advancing reconciliation by reestablishing a government-to-government relationship with Native Hawaiians. In it, re-establishment of a government-to-government relationship would reconcile past wrongs done to Kanaka Maoli. Creating a new pathway for federal recognition, distinct from prevailing mechanisms of congressional legislation and current executive procedures, the ANPRM emphasized that a special political relationship with trust responsibilities already exists between

the federal government and Native Hawaiians. This legal history, claiming wrongdoing to engineer a special trust relationship for legitimating juridical authority, undergirds the entire rulemaking process.

The legal history described three narratives that rationalize federal recognition. First, congressional statutes created a special political and trust relationship with the Native Hawaiian community. Reiterating that Native Hawaiians are an Indigenous people who governed the Hawaiian Kingdom, the ANPRM identified that throughout the nineteenth century and until 1893 the United States "recognized the independence of the Hawaiian Nation . . . [and] extended full and complete diplomatic recognition to the Hawaiian Government."[11] This initial legal relationship was without special trust obligations; it was diplomacy between two independent nation-states. However, this relation was supplanted with another. Discussing that the Hawaiian Kingdom was overthrown by Americans with US military forces, the ANPRM asserted that a Joint Resolution passed by Congress in 1898 to annex Hawai'i crafted a new relationship. This inaugurated the federal government's original recognition of a domestic relationship with Hawaiians as a community claiming prior belonging to US territory. Subsequently, the ANPRM discussed that Congress instituted the Hawaiian Organic Act in 1900 to create the Territory of Hawai'i and acquire "ceded lands" that had been seized from the Hawaiian Kingdom by the Provisional Government and later transferred to the Republic of Hawai'i, inasmuch as a portion of proceeds from the lease and sale of these lands would come to benefit inhabitants of Hawai'i, including Kanaka Maoli. It then mentioned that Congress passed the 1920 Hawaiian Homes Commission Act (HHCA) to "rehabilitate the native Hawaiian population" after their decline, "by some estimates from several hundred thousand in 1778 to only 22,600," by designating approximately 200,000 acres of "ceded lands" for "native Hawaiians" to reestablish traditional lifeways. J. Kēhaulani Kauanui posits that the HHCA "institutionalized a trust agreement, constituting a special legal relationship."[12] Finally, the ANPRM reflected that, through the 1959 Admissions Act, Congress vested authority in the State of Hawai'i to manage and administer the lands set aside for rehabilitating "native Hawaiians" under the HHCA. Hence, the ANPRM argued, "Congress has enacted more than 150 statutes recognizing and implementing a special political and trust relationship with the Native Hawaiian community."[13] These statutes constitute a legal relationship that the DOI invokes to classify the US-Hawaiian relation as politically special and premised on trust. However, this relationship is not recognized as one between governments.

Second, congressional statutes instituted federal programs and services for the benefit of Native Hawaiians. A number of the listed statutes—the American

Indian Religious Freedom Act, National Museum of the American Indian Act, and Native American Graves Protection and Repatriation Act—categorize Hawaiians as Indians. This is where the ANPRM began to evacuate Hawaiian national sovereignty by including Kanaka Maoli in a framework of civil rights and affirmative action protections. "Congress," as the ANPRM phrased it, "has consistently enacted programs and services expressly and specifically for the Native Hawaiian community that are, in many respects, *analogous to, but separate from*, the programs and services that Congress has enacted for federally recognized tribes in the continental United States."[14] Such language is deliberate to interpellate Kanaka Maoli as domestic subjects of federal law. This maneuver, suggesting Native Hawaiians are analogous to but separate from Native Americans, is a sly technique of settler-state power.

Third, federal recognition of Native Americans represents a formal government-to-government relationship. This government-to-government relationship imparts self-determination, sovereignty, and other benefits to American Indian tribes. "Yet," according to the ANPRM, this has "long been denied to one place in our Nation, even though it is home to one of the world's largest indigenous communities: Hawaii."[15] On the one hand, the benefits of a government-to-government relationship have been denied to Kanaka Maoli. Exclusion rationalizes new instruments for inclusion that get signified as equality, justice, and reconciliation. On the other hand, acknowledging that Native Hawaiians constitute a large community of Indigenous people, Hawai'i is claimed as "one place in our Nation." Hawai'i has been *geographically included* within the territoriality of the US settler state, but Kanaka Maoli are *politically excluded* from a legal status and set of rights bestowed to tribes.

In 2001, a group of Native Hawaiian individuals and organizations filed a lawsuit that challenged the DOI's Procedures for Federal Acknowledgement of Indian Tribes, in Part 83 of Title 25 in the Code of Federal Regulations, which excluded Native Hawaiians from eligibility. In *Kahawaiolaa v. Norton* (2004), the DOI's procedures were upheld. The ANPRM noted that this case "upheld the *geographic limitation* in the part 83 regulations, 'concluding that there was a rational basis for the Department to distinguish between Native Hawaiians and tribes in the continental United States.'"[16] Yet the ANPRM proposed to bypass the geographic limitation because the ruling in *Kahawaiolaa v. Norton* expressed that the DOI may apply its expertise to determine whether Native Hawaiians could be recognized on a government-to-government basis. Flagging the administrative rule for federal recognition as an accommodating gesture of political inclusion, the ANPRM continued, "Reestablishing a government-to-government relationship with a reorganized sovereign Native

Hawaiian government that has been acknowledged by the United States could enhance federal agencies' ability to implement the established relationship between the United States and the Native Hawaiian community, while strengthening the self-determination of Hawaii's indigenous people and facilitating the preservation of their language, customs, heritage, health, and wealth."[17] Recognition would re-establish a formal government-to-government relationship that could ameliorate federal enforcement of the special trust affiliation and therein strengthen the self-determination necessary to preserve Indigenous language, customs, heritage, health, and wealth in Hawai'i—these were the so-called benefits offered in the deal.

But the ANPRM is not the first proposal to federally recognize Kanaka Maoli. The Akaka bill was an earlier attempt. Kauanui disentangles key legal developments that configured advocacy for the recognition offered by the Akaka bill.[18] She says that *Rice v. Cayetano* opened up programs and services for Native Hawaiians to attack. In its wake, lawsuits emerged alleging that state and federal policies implementing programs and services for Native Hawaiians were racially discriminatory. As the result of raiding civil rights and affirmative action protections, the political status of Hawaiian Indigeneity was reduced to a racial identification. "Within the broader context of these legal assaults, which deem any indigenous-specific program racist," Kauanui explains, "many Native Hawaiians and their allies support Akaka's proposal for federal recognition, since he pitched the legislation as a protective measure against such lawsuits."[19] Federal recognition therein developed into a protective response. Kauanui notes that when Akaka introduced the bill, he referenced the 1993 Apology Resolution as the legal footing for pursuing reconciliation. "In the post-*Rice* climate," she writes, "he suggested that the apology provided the foundation for reconciliation and that the Akaka Bill was the means by which a resolution was best served."[20] The resolution has offered the ultimate opportunity in federal law for advancing reconciliation with Native Hawaiians via recognition.

The ANPRM invoked the apology to justify federal recognition. "In 1993," it stated, "Congress enacted a joint resolution to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians."[21] Turning to Congress's words, the ANPRM identified that the federal government "express[ed] its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." Restaging the apology for overthrowing the Hawaiian Kingdom, this manipulated US admission of culpability to demonstrate that "there has been no formal, organized Native Hawaiian government since 1893, when

the United States overthrew the Kingdom of Hawaii," and thus suggest that re-establishing a government-to-government relationship could reconcile this.[22] Significantly, the ANPRM acknowledged that the United States thwarted Hawaiian rights to national and territorial sovereignty. As the Apology Resolution outlines, "The indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." This is a remarkable law because it holds that Kanaka Maoli have never surrendered sovereignty of the Hawaiian Kingdom's national lands. But the apology is surreptitious, and the ANPRM mimicked its furtiveness. The resolution went on: "Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States." The ANPRM echoed that the United States is a "sorry state," borrowing Kauanui's phrasing.[23] It did so by weaponizing apology: "Promulgating a rule would not (1) alter the fundamental nature of the political and trust relationship established by Congress between the United States and the Native Hawaiian community; (2) authorize compensation for past wrongs; or (3) have any direct impact on the status of the Hawaiian homelands."[24] The apologetic settler state, pretending to want to cure harms it perpetrated, opens up legal mechanisms for federal recognition under a veil of reconciliation to complete legal settlement over territory. Commenting on the settlement process enacted through federal recognition, Maivân Clech Lâm, in an interview with Julian Aguon, refers to this as "the red carpet the assassin lays out before the murder takes place."[25] Settling Kanaka Maoli legal claims against the United States and acquiescing to American settlement of Hawai'i, in this way, could perhaps be the final nail in the coffin.[26]

Articulating 'A'ole

When the DOI held public meetings in 2014 to solicit feedback on whether and how the United States should re-establish a government-to-government relationship with Native Hawaiians, Kānaka Maoli overwhelmingly said no. It was explicit and unequivocal. At the initial meeting in Honolulu, Juanita Kawamoto politely told DOI representatives, "No, thank you." She stressed: "I'd like to be clear, all the things that you're doing here today are completely inappropriate, and I'm speaking in clear English so that all of you can understand, this is very inappropriate, to the point of absolutely disrespectful to our people here."[27] On the same day, Shane Pale generously addressed each threshold question at the Waimānalo meeting: "The short answer, again no, no, no, no and no."[28] With little notice, Kānaka Maoli mobilized quickly. Kawamoto

and Pale declined recognition unapologetically, and others followed suit. The official transcripts of recorded oral testimony from these meetings are peppered with Kanaka Maoli voices rejecting federal recognition and refusing the US government's gift of reconciliation. Repudiating the executive rulemaking and proposed rule was articulated through the utterance "'aʻole," which means no.[29] This expression became part of a larger moʻokūʻauhau (genealogical succession) of Kanaka Maoli resistance to American imperialism, empire, colonialism, and settler colonialism in Hawaiʻi. The ʻaʻole to federal recognition was articulated in relation to histories, discourses, and embodiments of Hawaiian national and Indigenous sovereignties, contributing to what I call an archive of Kanaka Maoli refusal.

Testimony from the meetings illuminates that Kanaka Maoli overwhelmingly disapproved of a new rule to reestablish a government-to-government relationship. In Kapaʻa, James Alalan Durest tackled the ANPRM's threshold questions: "For you guys' answers for the questions, hell no."[30] For Durest and many others, disapproval was vehement and explicit. But it was much more than an answer of no. Opposition was distinctively vocalized as ʻaʻole. At the same meeting in Kapaʻa, Puanani Rogers posited, "I protest and oppose the advance notice proposed rulemaking . . . and say ʻaʻole, which means no in English."[31] Those testifying against the DOI and its ANPRM wielded this concise word with commanding meaning in ʻōlelo Hawaiʻi (Hawaiian language) to reject settler-state recognition. Gale Kuʻulei Baker Miyamura Perez attended the meeting in Waimea and told the DOI, "I'm here to say ʻaʻole, or no, to all of your questions."[32] Although five threshold questions oriented input, nineteen procedural questions regarding governmental reorganization and drafting and ratifying a constitution were tucked into the ANPRM's conclusion that Kanaka Maoli such as Perez answered. E. Kalani Flores also testified in Waimea: "We say ʻaʻole, no, to all the questions. What it's been is occupation, and the occupation has caused destruction, desecration to our lands."[33] Flores juxtaposed the symbolic proposition of recognition with realities of military occupation and environmental desecration. Re-establishing a government-to-government relation does not and cannot address the materiality of settler-state violence toward the ʻāina (land) and that which feeds. Building on these comments, Mitchell Alapa noted in Kapaʻa, "All I got to say to you folks is ʻaʻole. All these things is ʻaʻole."[34] The ʻaʻole went even farther. It suggested that the DOI leave or, as Healiʻi Kauhane phrased it in Keaukaha, "Go away."[35] Queries about whether and how the DOI should create an administrative rule for federal recognition were not turned down mildly.[36] The rejection vigorously asserted that the federal government retreat. Lawrence Aki issued an order in Kaunakakai: "You need

to go home."[37] "These hearings," Walter Ritte summarized at the same meeting, "represent an honest reaction from the Hawaiian community. The majority is in no mood to continue our subservient relationship with the United States."[38] This was "a politicized expression of Indigenous anger and outrage directed at a structural and symbolic violence that still structures our lives, our relations with others, and our relationships with land."[39] According to a quantitative study led by Healani Sonoda-Pale on the ANPRM oral feedback, approximately 95 percent of Kanaka Maoli testifiers opposed the proposed rule.[40] The honest reaction, in the words of Ritte, was qualitatively and quantitatively significant. It communicated an unquestionable disapproval of federal recognition and contempt, disgust, and resentment for the colonial relations of subordination the settler-state desires to continue.

'A'ole emerged in relation to an intergenerational history of resistance. "Oh, honest Americans," Lākea Trask joshed in Keaukaha, "I stand before you today empowered by the nearly 40,000 who signed the Kū'ē Petitions and said no to annexation, the hundreds who testified already on their behalf. I stand here, humbled, ha'aha'a, that you folks have come all this way to meet us face to face, alo to alo. And I stand before you, angered and outraged at your motives for being here, for trying once again to steal our identity."[41] Many at the Arizona meeting, including me, testified that their ancestors had authorized the Kū'ē Petitions to fight against US annexation of Hawai'i in 1897, illustrating a truth that the Hawaiian Kingdom never consented to submit to US sovereignty and the Indigenous people of Hawai'i continue to refuse consent. As Trask remarked, the proposal represented a contemporary iteration of prolonged efforts to burgle Kanaka Maoli Indigeneity and steal Hawaiian sovereignty. The Kū'ē Petitions successfully protected against this in the late nineteenth century, and they provide a genealogical context and rationale for resistance to the US settler state. "Refusal holds on to a truth," Audra Simpson asserts, "structures this truth as stance through time, as its own structure and comingling with the force of presumed and inevitable disappearance and operates as the revenge of consent."[42] So in Kahului, Napua Nakasone stood firm on her truth: "Just as my kupuna wahine's signature proudly sits on the Kū'ē Petition of December 1897. I want my children, and my children's children, and their children after that to know beyond a shadow of a doubt that I wholeheartedly oppose the United States' occupation of my Hawai'i."[43] In the spirit of ancestors who opposed the commencement of US occupation, Kānaka Maoli testifying against the DOI refused to reconcile by re-establishing a government-to-government relationship because federal recognition obfuscates the unabated occupation of Hawai'i.

The ʻaʻole was produced through and furthers an archive of Kanaka Maoli refusal. On one hand, ʻaʻole to federal recognition had been established through an enduring history of refusals. On the other, these expressions contribute to a genealogical archive of Kanaka Maoli refusal. The archive is full of moʻolelo (histories, stories, and accounts) of our steadfast refusal. "The past is referred to as *Ka wa mamua*, 'the time in front or before.' Whereas the future, when thought of at all, is *Ka wa ma hope*, or 'the time which comes after or behind.' It is as if the Hawaiian stands firmly in the present," Lilikalā Kameʻeleihiwa says, "with his back to the future, and his eyes fixed upon the past, seeking historical answers for present-day dilemmas."[44] With 1,795 pages of transcripts from twenty meetings, the official record is overflowing with, and haunted by, ʻaʻole. My analysis does not explore the video recordings of meetings, which are available online, or in situ observations. What I am arguing is that this archive of refusal, documenting explicit articulations of ʻaʻole, is based on and perpetuates moʻolelo to overturn the US settler state in Hawaiʻi as a domain of knowledge that shapes truth for Kanaka Maoli in the ongoing struggle over federal recognition.

Nevertheless, some testimony against recognition turned anti-intersectional. I want to unpack one testimony that is particularly revealing. In Keaukaha, Mililani Trask opposed the colonial relationship that the US settler state extended to Kanaka Maoli: "When the federal government and the state agreed to impose upon our peoples the yoke of perpetual wardship, this yolk, we break. We cannot accept it any further."[45] Trask then conveyed specific disapproval: "Our response to the interrogatories that are posed by [the Department of the] Interior are all no. And the reason why is because we are capable of being self-governing. But we are not capable of expressing our right to self-determination because federal policy limits this. We are not Indians. We will never be Indians and the federal Indian policy is inappropriate for our peoples."[46] Although Kauanui has critically probed this statement, I want to say something slightly different about it.[47] The comment is an example of what Amy Brandzel terms anti-intersectionality.[48] Brandzel suggests that the settler state does not desire intersectionality but refutes it by proliferating anti-intersectionality, or "epistemologies of identity that are normative, single-axis, and comparatively valued against other categories of identity."[49] They argue, "Hegemonic anti-intersectionality renarrativizes the naturalness and idealization of normative categories and reenacts violence to non-normative categories by renaturalizing their inhumanity."[50] Reflecting on the DOI meetings, they identify that the US settler state uses disciplinary powers of racialization to pass through and divide Indigenous populations regulated by its colonial power: "Kanaka Maoli

argued that they are 'not Indians,' and that the offer to recognize a 'government to government' relationship on the U.S. nation-state's terms was a process of transforming Kanaka Maoli into 'tribes' and 'Indians.'"[51] While some Kanaka Maoli opposed federal recognition in solidarity with Native Americans and tribal governments, Brandzel asserts that testimony equating Indianness with an inability to be self-determining in governance hindered possibilities for intersectional coalitions within the identificatory category of Indigeneity. Trask concluded her testimony: "You can braid my hair and stick feathers in it, but I would never be an Indian. I will always be a Hawaiian."[52] This anti-intersectional rhetoric, reifying gendered colonial racism, is scattered throughout transcripts. In so doing, Kanaka Maoli have renarrated "'Indian' as sign within U.S. colonial discourse," which, Jodi Byrd says, "serves as a deracinated supplement that signifies the underside of imperial dominance."[53] My hope in this discussion is to name rather than silence, to denaturalize instead of normalize, an anti-Indian rhetoric in the moʻokūʻauhau of our resistance to US settler colonialism. Otherwise, paradigmatic Indianness will continue to fuel American colonialism and empire. "Because 'Indianness' serves as the ontological scaffolding for colonialist domination," Byrd writes, "anticolonial resistances, which align themselves against 'Indianness' as a manifestation of empire," such as the protest of Trask and others, "risk reflecting and reinscribing the very colonialist discourses used to possess and contain American Indian nations back onto the abjected 'Indian' yet again."[54] Instead of challenging recognition through paradigmatic Indianness, I suggest that 'aʻole can offer an intersectional framework to filter the cacophony of settler-state techniques of racialization and colonization. Testifying 'aʻole to federal recognition in (racialized) abjections of the Indian testifies ʻae (yes) to material conditions of (colonial) violence to which Indigenous peoples are subjected through federal Indian law. This is a dialectic orientation to consider the contradictions within what refusal rejects and what it may affirm. 'Aʻole thus is a critical framework for asserting 'aʻole to federal recognition without saying 'ae to the conquest of other Indigenous peoples.

Notices of Settlement

Despite explicit opposition to the proposed rule by Kanaka Maoli, the DOI issued a Notice for Proposed Rulemaking (NPRM) on October 1, 2015. It suggested that a majority of written comments submitted for the ANPRM supported a rule. Exactly 5,164 written comments had been received, "more than half of which were identical postcards submitted in support of reestablishing a

government-to-government relationship through Federal rulemaking."[55] Privileging written comments over verbal testimony was a blatant dismissal of input from Kanaka Maoli. Consequently, the DOI claimed that the general public favored federal recognition for Native Hawaiians. I contend that the ANPRM and NPRM were published as notices of settlement. The ANPRM and NPRM were legal notices that announced the federal government was attempting to settle the precarious biopolitical position of Hawaiians to geopolitically settle Hawai'i. The NPRM was the second component in this process. What the DOI garnered from public input was that federal law should open a door for Native Hawaiians to choose to walk through or not. The so-called choice is ours. When the NPRM addressed fourteen thematic responses to the ANPRM, it scorned opposing responses that objected to US jurisdiction over Kanaka Maoli and Hawai'i. "Comments about altering the fundamental nature of the political and trust relationship that Congress has established between the United States and the Native Hawaiian community," the DOI retorted, "were outside the ANPRM's scope and therefore did not inform the development of the proposed rule."[56] The rulemaking process openly omitted these comments, these choices. The NPRM subsequently posited, "The Department is bound by Congressional enactments concerning the status of Hawaii. Under those enactments and under the United States Constitution, Hawaii is a State of the United States of America."[57] Any opposition based in claims that the federal government and State of Hawai'i do not maintain jurisdiction over Kanaka Maoli and Hawai'i would be dismissed from the rulemaking. Valuing written comments, the NPRM did not hold public meetings. Feedback was accepted only in writing, which in the case of the ANPRM supported federal recognition vis-à-vis identical postcards that were repeatedly submitted and uniquely counted.

The NPRM manipulated the ANPRM's legal history to rationalize that plenary power over Native Americans extends to Native Hawaiians, and a new administrative rule for federal recognition would not alter that juridical power but strengthen its territorial sovereignty in Hawai'i. Whereas the ANPRM pronounced a legal history for advancing reconciliation, the NPRM suggested that legal history is a settled matter under congressional authority. "The existing body of legislation makes plain that Congress determined repeatedly, over a period of almost a century," the NPRM said, "that the Native Hawaiian population is an existing Native community that is within the scope of the Federal Government's powers over Native American affairs and with which the United States has an ongoing special political and trust relationship."[58] In such logic, reestablishing a government-to-government relationship with a reorganized Native Hawaiian government would not mirror the nation-to-nation association

developed between the United States and Hawaiian Kingdom. The NPRM asserted, "The Native Hawaiian Governing Entity would remain subject to the same authority of Congress and the United States to which those tribes are subject and would remain ineligible for Federal Indian programs, services, and benefits."[59] Kanaka Maoli would be further denationalized as subjects of the Hawaiian Kingdom and, not formally constituting a tribe eligible for federal Indian programs and services, regulated as an Indigenous population subject to US juridical and territorial sovereignty. The language that Native Hawaiians are "analogous to but separate from" Native Americans provided an answer about whether Hawaiians are Indians to settle the territoriality of Hawai'i as geographically within the United States. The NPRM blatantly argued, "Reestablishment of the formal government-to-government relationship will not affect title, jurisdiction, or status of Federal lands and property in Hawaii. This provision does not affect lands owned by the State of Hawaii or provisions of State law. . . . And nothing in this proposed rule would alter the sovereign immunity of the United States or the sovereign immunity of the State of Hawaii."[60] The proposed rule would confirm the federal government's avowed special trust relationship, pulling Kanaka Maoli deep into the undertow of plenary power, and could formally recognize a new Native Hawaiian government as a ward of the settler state without a land base. The notices acknowledged, discussed, and rationalized that the legal status of Native Hawaiians would be settled, and Hawai'i would become settled as territory possessed by the settler state.

Rule of Recognition

The DOI's final rule strengthens the geopower of US settler-colonial biopolitics, and, I argue, it institutionalizes a new colonial governmentality for federal recognition that seeks to incorporate Hawaiians as Indians without land. The DOI created an administrative rule on October 14, 2016, to facilitate federal recognition for Native Hawaiians. Now the choice is either to submit an application for federal recognition of a Native Hawaiian Governing Entity (NHGE) or maintain the juridical status quo with an existing special trust relationship. The exercise of federal law on Indigenous people purports to provide a liberal democratic freedom of choice while deceitfully working in practice to fortify the disciplinary and regulatory jaws of the settler state's vice grip. Interrogating the rule, I demonstrate that it is the US assertion of sovereignty in Hawai'i that is indeed precarious. Looking again at meeting testimony, I track how Kanaka Maoli refusal of federal recognition exposed the incoherence of US

settler sovereignty upon the ʻāina of Hawaiʻi. I end the chapter by explicating the biopolitical animus aimed at Native Hawaiians for geopolitical settlement of Hawaiʻi and the ways in which Kanaka Maoli disrupt the sovereign nucleus of US settler-colonial biopower.

The biopolitical and geopolitical schematics within the settler state's offer of recognition employ colonial techniques of race, gender, and sexuality. In the final rule, the rhetorical maneuver that previously marked Native Hawaiians as "analogous to but separate from" Native Americans transforms into a discursive formation. Regarding programs and services provided to Native Hawaiians as analogous to but separate from those bestowed on Native Americans in federally recognized Indian tribes, the rule regulates Kanaka Maoli as an Indigenous group akin to Native Americans, which stands in for a racialized categorization of populations subject to US settler sovereignty. Referencing plenary power over Indian affairs and support in case law, the DOI suggests that the rule flows from and enforces Indian law and policy. For example, the rule cites the Federally Recognized Indian Tribe List Act of 1994 to explain that, because statutes already acknowledge a special trust relationship with Native Hawaiians, "the language of the List Act's definition of the term 'Indian tribe' is broad and encompasses the Native Hawaiian community."[61] Here, Hawaiians are considered Indians who constitute a tribe. Discussing *Johnson v. M'Intosh* (1823), *Cherokee v. Georgia* (1831), and *Worcester v. Georgia* (1832), Joanne Barker observes that the US settler state "asserted that tribes were weaker—uncivilized races living as barbarians in a permanent state of nature."[62] The rule reifies, as Barker puts it, US national narrations that racialize Indigenous peoples as perverse primitives, merciless savages, domestic dependents, and childlike wards—racializing monikers of inferiority that are gendered and sexualized—which are tropes of white supremacist and heteropatriarchal settler colonialism.

The rule of recognition that suggests Hawaiians are Indians is, however, limited through logics of land. To be clear, the federal government is seeking to assimilate Hawaiians as Indians without land. Institutionalizing a dangerous archetype for colonial dispossession in federal Indian law and policy, the rule attempts to absorb new tribes that are without jurisdiction over territory and resources, which the settler state and its settler citizenry can then call its own. For instance, it interprets the Indian Reorganization Act of 1934, delimiting the geographic scope for definitions of "Indian," to suggest that "Indian land" cannot be taken into trust for an NHGE. It similarly deciphers the Indian Gaming Regulatory Act of 1988 and declares the NHGE would not be eligible to conduct gaming due to definitions of "Indian lands" for "Indian tribes." The Gaming Act "was enacted to balance the interest of states and tribes and to

provide a framework for regulating gaming on 'Indian lands.' There are no such lands in Hawaii."[63] Here, Hawaiians are considered Indians but without Indian land. Other measures such as the Indian Child Welfare Act and Violence against Women Act would also not apply, since "Congress provides a parallel set of benefits to Native Hawaiians within the framework of legislation that also provides programs to other Native groups."[64] These legal instruments—an inclusive biopolitical exclusion of Native Hawaiians that runs parallel to, but is premised on, the peculiar juridical status of Native Americans—pivot on the logical extension of settler-state territoriality. "*Because there is no Indian country in Hawaii*," the rule elaborates, "upon reestablishing a government-to-government relationship with the United States, *the Native Hawaiian Governing Entity would not have territorial jurisdiction*."[65] Barker laments, "The rub as it were, for Native peoples, is that they are only recognized as Native within the legal terms and social conditions of racialized discourses that serve the national interest of the United States in maintaining colonial and imperial relations with Native peoples."[66] The biopolitical management of Native Hawaiians as a racialized, gendered, and sexualized population like Native Americans manufactures a discursive formation that, in turn, creates rules and limits according to "analogous but separate" legal logics that shore up the geopower of US settler-colonial biopolitics. Settling the biopolitical status of Kanaka Maoli not only functions to settle the geopolitical status of Hawai'i but, concomitantly, fashions a fresh liberal paradigm for federal Indian law and policy that desires to recognize and incorporate tribes without land or territorial jurisdiction. This new colonial governmentality is quite perilous and should be studied further.

In testimony against the rule, Kānaka Maoli disrupted these biopolitical and geopolitical calculations. In Kahului, Kaleikoa Ka'eo exclaimed, "No consent, never. No, Department of the Interior. No treaty, never. No, Department of Interior. No cession of our citizenship. No, Department of Interior. No justice for our people for 120 years. No to the Department of Interior. No lawful authority to sit upon our people and step upon our necks. No to the Department of Interior."[67] His words illustrated how the US settler state exercises heteropatriarchal colonial power by disregarding Kanaka Maoli consent. Furthermore, Ka'eo extended consent's revenge to assert that a treaty of annexation was never signed, Hawaiian national citizenship has never been resigned, and the federal government does not have juridical authority to regulate Kanaka Maoli. "I am not American, I am not American," Guy Hanohano Naehu declared on Moloka'i, "and shame on you guys for perpetrating the illegality. Shame on you guys for perpetrating the fraud."[68] Naehu stated that he is not American; that Kanaka Maoli are not US citizens; and that the rule of recognition perpetuates a fraudulent construction that

Kanaka Maoli are Americans because of a special trust relationship stemming from an unlawful occupation of Hawai'i. These mo'olelo combined the rejection of recognition through Indigenous resurgence with a refusal of US settler-state sovereignty. "Indigenous peoples' individual and collective expressions of anger and resentment," Coulthard writes, "can help prompt the very forms of self-affirmative praxis that generate rehabilitated Indigenous subjectivities and decolonized forms of life in ways that the combined politics of recognition and reconciliation has so far proven itself incapable of doing."[69] The archive of Kanaka Maoli refusal represents a collective self-affirmation that seeks decolonization and deoccupation in the same step. Tisha-Marie Beattie responded on Maui to questions from the DOI: "Your answer from me is no. . . . You cannot give me back something I never gave up. . . . [T]ake your thing you wanna give us, throw 'em in the trash."[70] Mo'olelo combated recognition by challenging how the settler state was attempting to solidify its geopower through biopolitics. National and territorial sovereignty could not be given back to Kanaka Maoli because they have never been relinquished. The offer of recognition is trash, a thing to be thrown away. "We don't want it," Beattie concluded. "We sovereign."[71]

Assertions of Hawaiian sovereignty expose and upend a settler state of exception. Rather than amending the process for acknowledgment, the rule manufactured a new administrative procedure to facilitate federal recognition for Native Hawaiians. It instituted an exception to the geographic limitation barring Kanaka Maoli from acknowledgment under Part 83 of Title 25 in the Code of Federal Regulations. Hence the rule should be viewed as a US settler state of exception. The executive branch declared an exception to existing legal frameworks of formal acknowledgment to create new law for federal recognition that precariously attempts to signify sovereign power through the extension of law in its suspension.[72] Building on theorizations by Michel Foucault and Giorgio Agamben, the (sovereign) rulemaking includes Hawaiians (biopolitically) within existing regulations of Indian affairs only insofar as we are excluded from territorial authority and jurisdiction (geopolitically).[73] Mark Rifkin suggests that Indigenous claims of sovereignty can unmask and antagonize the emptiness of settler sovereignty as it nervously attempts to stabilize through settler states of exception.[74] Kānaka Maoli did just this. On Kaua'i, Ka'iulani Lovell told the DOI, "We're not part of your state. We're not here to create something where we're working together. We don't need to be recognized by you. We know who we are."[75] Kanaka Maoli articulating 'a'ole unveiled federal recognition to be a sham of settler sovereignty, attempting to cohere US geopower in Hawai'i by answering the question of whether or not Hawaiians are Indians. Amid the biopolitical sleight of hand, Kanaka Maoli have responded

that we are not part of the US settler state. Kanaka Maoli do not wish to collaborate with the federal government. And Kanaka Maoli do not need to be recognized by the US settler state because we know exactly who we are.

NOTES

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