The Honourable Bill English, MP Leader of the New Zealand National Party, Leader of the Opposition, at the New Zealand Centre for Public Law Wellington, 7 May 2002

The Treaty of Waitangi and New Zealand citizenship

Seven weeks ago, on 21 March, TV 3 broadcast a documentary called 2050 What If & [1] Three times in the first five minutes, tino rangatiratanga was defined as absolute sovereignty. The show's premise was that by 2050, Maori sovereignty had been restored. So if you crossed Maori land in your car, for example, you might have to pay a toll. Crossing from one rohe to another, you might be required to show a passport. Te Reo could become compulsory in schools, and necessary to hold some jobs. That part of the programme was all good entertainment.

What was not so entertaining were the views expressed in the gaps between the What If & scenarios. Donna Hall said that separation Pakeha from Maori, Maori from Pakeha would be okay. Jane Kelsey assured viewers that there was no question that we will have tino rangatiratanga. The question is how tauiwi will respond to that assertion. This was shortly after Dr Ranginui Walker had again repeated that tino rangatiratanga was full and absolute chieftainship.

The Treaty, in other words, is not what its words say it is.

There is little public debate on the meaning of the Treaty. But there should be. Uncontested assertions are shaping government policy, judicial thinking and political debate. In the manner of the marae, our common interests are best served by robust debate, in an environment of mutual respect. Today I will argue that the Treaty created one sovereignty and so one common citizenship. I owe much to the work of my former colleague Simon Upton and advisor Bernard Cadogan for the historical material.

I say that unless New Zealanders accept Te Tiriti o Waitangi at something much closer to its face value, we could destroy something unique. New Zealand's whakapapa of sovereignty, our genealogy as New Zealanders, is unique. Although our country has relatives in the world, we have no twin. This is because of the way in which New Zealand sovereignty was established by the Treaty of Waitangi. In the lead-up to New Zealand's creation in 1840, the Maori political and social environments had been devastated by more than two decades of musket wars. From 1817, warlords and their forces killed tens of thousands. Entire areas were ethnically-cleansed. It was likely that further slaughter could not be avoided by traditional means, nor could further violent dispossessions of hapu of their traditional homelands, be prevented. An outside arbiter was thought to be absolutely necessary by an increasing number of Maori. [2] Many Maori began to seek law, either from the Bible, or from the British. [3] So they also began seeking a legislative sovereign power to make that law, and to enforce it.

On the British side, the political and intellectual environment at the time of New Zealand s creation, was the principled libertarianism of Britain in the 1820s and 1830s. That age saw Britain's abolition of slavery; emancipation of Catholics and other religious minorities; recognition of the new Latin American republics and the establishment of protective exclusion zones around them; intervention in

the Greek war of national liberation; and evolution of a principled colonial policy in India. The Reform Bill transformed the political landscape. Free trade and repeal of the Navigation Acts had begun to transform Britain's economy and those of its colonies. And the British did one other thing: the Colonial office invented New Zealand.

New Zealand was to be an entirely new type of colony. Its people were supposed to co-evolve. The new land's British subjects, of both founding races, were to intermarry. Later generations would become amalgams of 1840's Maori and European populations, hence that derided term these days, amalgamation. It was expected in the 1830s and 1840s that upper class Maori would intermarry with upper class European, the middle and the working classes likewise. The two peoples were to embrace. New Zealand was to become a racially -homogenous community, like those that had emerged in Peru, Chile, Venezuela or Mexico, all recently liberated from Spain.

Roman law, which was often mentioned in ius gentium discussions about colonies, distinguished between commercium, and connubium, as two qualitatively different relationships. While New Zealand lay in the British sphere of interest, the relationship between Maori and the British in New South Wales, for example, had been that of commercium. [4]

In Britain, a policy advisor by the name of the Reverend Montague Hawtrey persuaded both James Stephen, the head of the Colonial Office, Edward Gibbon Wakefield, and others, that in New Zealand, commercium and the status quo would not be beneficial for Maori. So that Maori would not suffer the same fate as the Indians of North America, the desirable course was connubium and then, common citizenship. This would require the establishment of British sovereignty.

There was a further expectation, later expressed by the Colonial Office's man on the ground, Sir George Grey, that the new New Zealanders would slowly mix culturally, as well as ethnically. As Grey said when he was farewelling Ngati Toa, Ngati Raukawa and Atiawa chiefs at Otaki in 1853: Hereafter, a great nation will occupy these Islands, and with wonder and gladness they will look back upon the works of those men who assisted in founding their country; and when the children in those times ask their parents who were the men who founded so great a country, they will answer them, the men who did these things in the olden times were our ancestors. Yes, those things were done, not by our European ancestors alone, but partly also by our ancestors who where the original native inhabitants of these Islands, and they will tell them many names, and amongst them those of my friends. [5]

Both peoples would act. Both would shape the future. Each would assimilate the other, creating an entirely new people, their constitution and civilisation to be founded on that of Britain.

So, to establish this new sovereignty, Lord Normanby, the Secretary of State for the Colonies in the Melbourne government, instructed Captain Hobson that certain pre-conditions had to be satisfied before any treaty could be signed with the Aborigines of New Zealand. I have already stated, Lord Normanby wrote in Hobson s Instructions, that we acknowledge New Zealand as a Sovereign and independent State & . He then immediately, albeit implicitly, acknowledged that this was a polite legal fiction: New Zealand was a Sovereign and independent State so far at least as it is possible to

make that acknowledgement in favour of a people composed of numerous, dispersed and petty Tribes, who possess few political relations to each other, and are incompetent to act, or even deliberate, in concert.

Even so, Lord Normanby continued, the admission of their rights [emphasis added], though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate Predecessor & disclaims for herself and for her Subjects, every pretention to seize on the Islands of New Zealand, or to govern them as part of the Dominion of Great Britain, unless the free and intelligent consent of the Natives, expressed according to theirestablished usages [emphasis added], shall first be obtained. & In conclusion, Normanby told Captain Hobson that: Her Majesty's Gov[ernmen]t have resolved to authorise you to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any parts of those Islands which they [emphasis added]may be willing to place under Her Majesty's Dominion.

This is all a reminder of just how powerful the British were at the time. Yet in 1820s and 30s Britain, global power had to be wielded conscientiously. The realpolitik and overt racism that characterised the Empire later in the century were not yet evident.

So why did the British negotiate to extend full British sovereignty over New Zealand? For the option of establishing a protectorate was available. [6]

Protectorate status for indigenous peoples was seen as an attractive remedy in many colonial situations. For one thing, protectorate status maintained a degree of sovereignty for those being protected. The last Grand Master imperialist, Lord Curzon, Viceroy of India, declared: A Protectorate is a plan adopted for extending the political or strategical, as distinct from the administrative, Frontier of a country which the protecting Power is, for whatever reason, unable or unwilling to seize and hold itself, and, while falling short of the full rights of property or sovereignty [emphasis added], it carries with it a considerable degree of control over the policy and international relations of the protected State. [7]

The British Crown, however, was never a suzerain over any protectorate. [8] The British had to reconcile the Maori desire to come under British law, and so become British subjects, with what further colonisation would demand.

If Maori in 1840 had refused to surrender their sovereignty, Hobson could have annexed only the land under contemporary British settlements. This, however, would have prevented the expansion of settlements beyond what would almost literally have been beachheads. Pakeha would have remained beachcombers , and incapable of providing the economic development and capital that Maori so desired.

Hobson's choice would then have been to secure the sale of adequate land to the settlements and the conversion of not just title, but of sovereignty as well, piece by piece. Maori surely would have been utterly perplexed by having to demarcate iwi homelands as British Protectorates, while the lands in between their designated refugia and British settlements constituted a kind of no man's land. But as

Hobson s Instructions made perfectly clear, he was to extinguish the source and practice of aboriginal sovereignty, and ultimately of self-government. The Treaty of Waitangi was the first in a series of instruments and actions to effect this.

Article I conveyed all indigenous sovereignty to the Crown.

Article II was designed to end war and raiding and dispossession, by stating that land could only be transferred via the new government.

And Article III expressly declared all members of Maori hapu or iwi to be British subjects, and therefore, today, New Zealand citizens. Maori would no longer be members of domestic, or dependent, first nations.

By comparison North American Indians such as the Cherokee were adjudged to be domestic dependent nations by Chief Justice John Marshall in the United States. [9] Because American Indians were not automatically American citizens, they had to claim citizenship individually.

In 1840, it was also international legal practice that protectorates and jurisdiction could be established in or over territories without a paramount authority. [10] As the British extended their sphere of interest across the Tasman, Maori first sought protectorate status from William IV in 1831. And British Resident James Busby and Bay of Island chiefs proclaimed a Confederation of the United Tribes of New Zealand in October 1835. Colonial Secretary Lord Glenelg informed the Governor of New South Wales, Sir Richard Bourke, in 1836, that: His Majesty will continue to be the Parent of their infant State and its Protector from all attempts on its Independence. [11][12]

The parties, Maori and the British, continued moving toward one another. Their next international legal encounter was the signing of the Treaty of Waitangi. The Treaty extinguished Maori sovereignty. The British would not have come into New Zealand unless it did. But the Treaty' s establishment of a new sovereign power has since been challenged. Hone Heke was the first to do so in 1843. The King Movement followed suit in the 1860s. Recently, those early challengers have been succeeded by post-colonial theorists and indigenous rights activists, who consider it inevitable that portions of New Zealand should soon become autonomous iwi statelets.

Irredentism is the desire of any nationalist movement to reclaim lost land or cultural heritage. Maori irredentism has moved on from land and resource claims and is now directed towards sovereignty itself. This position seems founded on the belief that what the Treaty established in 1840 was indeed a protectorate. This formula is separate yet co-ordinate sovereignties, and separate citizenships. The TV3 documentary showed how this might look in practice. It looked to be a disaster.

I for one am not giving up on New Zealand.

Assertions of Maori sovereignty are usually buttressed by the claim that the international legal principle of contra preferentem should prevail. This principle was first propounded in 1899 by the United States Supreme Court, in the case Jones v. Meehan. [13] Contra preferentem is the legal

principle which states that, where the language of a contract is said to be ambiguous, the contract must be construed against the party selecting the terms in it.

Contra preferentem is also the last resort for people who do not share in the citizenship of the country asserting sovereignty over them, to obtain remedy for grievance. I consider that in New Zealand, contra preferentem is a valuable principle, but not a supreme one. It is sound American law, but the concept does not fully extend to cover New Zealand's circumstances. Maori, by Article I, in international law, fully ceded sovereignty, and by Article III, became British subjects just like Pakeha.

In any dispute about the meaning or effect of the Treaty of Waitangi, the United Nations 1969 Vienna Convention on the Law of Treaties, ratified by New Zealand in 1971, over-rides contra preferentem. Article 33, clause 4 states: & when a comparison of authentic texts [in two or more languages] discloses a difference of meaning & the meaning which best reconciles [emphasis added] the texts, having regard to the object and purpose of the treaty, shall be adopted. So, does Article II of the Treaty of Waitangi mean that New Zealand should ultimately be dissolved into separate and autonomous tribal governments, plus a state representing the Rest of New Zealand , plus an over-arching authority? Some argue that British intentions in signing the Treaty of Waitangi were and are irrelevant and that the meaning of rangatiratanga is what some Maori say it means, an unextinguished aboriginal right to self-government, according to the contra preferentem principle. [14] Article 33 of the Vienna Convention, however, means that British as well as Maori intentions are highly relevant in any discussions of the meaning and long-term significance of the Treaty of Waitangi.

So Article 33 restores bilaterality to Treaty interpretation. Maori were indeed sovereign in 1840. But the Treaty of Waitangi fully conveyed that sovereignty. This was recognised by the other international maritime powers in the Pacific at that time - France, the United States and Russia in particular. It has been asserted in recent years that Maori expected to retain some degree of sovereignty. Surely, just as the constituent states of the United States had handed over various sovereign powers, but had retained others, Maori also retain an unextinguished aboriginal right to self-governance. [15]

Voluntary cession of sovereignty and incorporation of nations into others has occurred throughout history, around the world. In the Pacific, the last king of Kauai in the Hawaiian archipelago, Kaumualii, finally bequeathed his island monarchy to Kamehameha II in 1824, so completing the unification of the Kingdom of Hawaii. Kaumualii had previously submitted to Kamehameha I in 1810, in exchange for being recognised as a tributary monarch.

Any call for aboriginal self-government in New Zealand can only be based on unextinguished indigenous right. But sovereignty was ceded. We know this because: 1. The British intended it to be so. 2. Maori must have intended it, as well.

Rangatiratanga could simply not have meant independence as it had in the Maori version of the 1835 Declaration of the United Tribes of New Zealand. It would have been, and still is, a logical contradiction in Maori, English, or any language. In the practical politics of the time, Maori were

prepared to cede their sovereignty, because of the anticipated benefits of a common, non-segregated polity in New Zealand. [16]

As Simon Upton pointed out in 2000, the British in 1840 knew they were not dealing with ignorant savages. Since Marsden's arrival in 1814, missionaries had been living among Maori, people were becoming increasingly bi-lingual to survive and Maori literacy had burgeoned throughout the 1830s. That is not to say that the chiefs who signed [the Treaty] were seasoned old solicitors. But they were dealing with missionaries and officials who respected their grasp of events and who needed and wanted their willing accession to the Treaty. In light of suggestions (not unreasonable) that the British side would have put the best light on their formula for seeking to persuade the chiefs, Pakeha views were not necessarily all the same either. Bishop Jean Baptiste Pompallier, a French national, was accused by some of sowing doubts in the minds of some chiefs. [17]

Pompallier explained himself soon afterwards: It was for them [that is, the chiefs] to determine what they might desire to do with their national sovereignty, whether to keep it or to transfer it [emphasis added] to a foreign nation; they were therefore at liberty to sign or not to sign the treaty which was going to be put before them. [18]

The history of seeking a protectorate from William IV, the formation of the United Tribes in 1835 and the discussions between missionaries and Maori all indicate both Maori and Pakeha understood that the Treaty of Waitangi was an international treaty. The Treaty of Waitangi is not only indigenous law. Because it transferred sovereignty, it is also international law. So the Treaty, juridically speaking, is itself is a hybrid. As the Treaty is, so are New Zealand's citizens meant to be.

Article III extends the rights of British subjects to Maori. This is not to say they became citizens - it's the role of the liberal participatory state to turn subjects into citizens. Let's call this state subjecthood as others have - what kinds of subjecthood did the transfer of sovereignty create?

Hobson and the missionaries took great pains to explain to Maori the decision they had to make, and the kind of sovereignty and order the British would create. As Williams wrote later, about the discussions of 5 February 1840 on Te Tii Marae: We gave them but one version, explaining clause by clause, showing the advantage to them of being taken under the fostering care of the British Government, by which act they would become one people with the English, in the suppression of wars, and of every lawless act; under one Sovereign, and one Law, human and divine. [19]

What no-one made wholly explicit however, was that existing practices and customs would stand only for the time being . The confusion over rangatiratanga has arisen because de facto Maori self-government persisted under the new regime. Article 71 of NZCA (NZ Constitution Act) 1852 did not make matters much clearer. [20]

British colonial policy created two kinds of British subjecthood in New Zealand in the two decades after the Treaty. Maori remained under tutelage as subjects, equal before the law, but unable to take part in representative government. Collective land ownership excluded them from the franchise.

Pakeha had the full rights of citizenship - voting and representation. The British extended enough subjecthood to enable orderly land transactions.

The NZCA of 1852 set up central and provincial government. Maori were effectively excluded, confined in their political identity as British subjects through their iwi and hapu. There was no universal franchise, only property franchise, and Maori could only become citizens if they eventually established individual ownership. Article 71 of the New Zealand Constitution Act 1852 gave Maori the right to limited and local self government. The question of whether these rights emanated from Article II of the treaty of Waitangi was avoided, as the Colonial Office and the British Government did not think that they did. But it is evident that Article 71 was a temporary expedient, another of Sir George Grey's way-stations on the road to amalgamation.

Herman Merivale, Permanent Under-Secretary of the Colonial Office, summed up contemporary policy to Sir George Grey on 29 November 1848:[21] In a country where there is great readiness for rebellion, allowing the organisation of the tribes to fall into decay is a safeguard for our authority.

There had been no question of integrating Maori as Maori into settler political institutions under the New Zealand Constitution Act of 1852. Maori individuals with individualised land tenure, however, could exercise their franchise and stand for election. Racism was not necessarily behind the limitation, nor was the policy to encourage them to individualise land tenure altogether insidious in intent. Liberals everywhere in the mid-nineteenth century were convinced, in all honesty, that corporate mortmain was an evil. [22] As William Gladstone himself observed in 1869 in relation to Irish land tenure: To get lands out of Mortmain would be very desirable, if there are any means short of compulsion by which we can promote it. A corporation is almost under a natural incapacity for the full discharge of the duties of a Landlord .

Mortmain is the locking up of land and resources in corporate ownership, and then throwing away the key - the land is off the market. The land and resources in question may or may not be well managed, but bad managers cannot be removed. That applied to established churches, universities, certain feudal privileges; and for iwi as well. Iwi ownership was seen to be feudal and inconsistent with liberal citizenship. It is a classical ethical and economic doctrine.

The 1852 Constitution Act failed. It relied on Maori patterns of land tenure to change, and they didn't. And it took another two decades, and war, to resolve the question that Maori had exactly the same kind of British subjecthood as Pakeha. They could participate in representative government. Maori representation by Maori, was part of the post-war settlement. The Maori Representation Act 1867 established universal male suffrage for Maori, in advance of Pakeha. The franchise for Maori and Pakeha remained unsynchronised for the next hundred years. [23]

The general principle was indeed that Maori and Pakeha were equal subjects, but should, or needed to be, separate for the time being. The result was that Maori subjecthood and Pakeha subjecthood were not of the same order. [24] In the 15 years from 1840, the British administration permitted and even encouraged Maori local self-government to continue. There were two governments, coordinated at

the level of the Governor. Grey offered provincial government, against growing pressure to sort out the Maoris , and war began.

By what right did the British, and later, settler governments, feel entitled to overrule Maori custom and usage, and eventually phase it out? Was this just racism? Or an assertion of ethnic superiority? Or ruthless power politics? Actually, there was more to it than that. The British believed in the superiority of a legislative sovereign over a proprietary sovereign. They adhered to the doctrine that legislative sovereignty gradually but steadily would transform custom and usage into statute. And if we to try and reconcile both Maori and English text according to Article 33 of the Vienna Convention, this has to be taken into account.

This calls for legal archaeology. But while digging, we have to keep in mind that the polar opposites in indigenous law are the tendencies either to be a-historical, or historicist. We may either disregard history in an attempt to achieve some great abstraction, or we can be totally absorbed in hermetically-sealed and ideology-driven interpretations of the past. The proper balance between these two extremes when it comes to the Treaty of Waitangi has yet to be found.

Henry Sumner Maine, the great juridical historian, defined sovereignty in his 1875 Lectures on the Early History of Institutions. [25] For Maine there are two kinds of sovereign power, those which legislate and those which do not. The latter are executive and proprietary sovereigns, capable of enforcing civil order and upholding customary law. Maine cited numerous Indian examples to illustrate this kind of sovereignty. However, a legislating sovereignty overwhelms all proprietary sovereigns with the sheer energy of legislation, and reduces customary practice and village usage into 'customs of manors' or local habits.

This is why the formula for the time being appears in NZCA 1852, Article 71. This is a good example of Victorian legal historicism in action. Like Anglo-Saxon and Indian village customary law, Maori usage was to vanish before the legislation of the new Sovereign. For some years, parallel structures could persist. By Maine's benchmark, Maori did not legislate. They had customary law. In the minds of the 19th century jurists, this customary law retreated inexorably before legislation, as darkness is dispelled by sunrise. This is not to say that to the British mind, Maori could never have legislated. The Kingdom of Hawaii as already indicated, was a recognised nation state with a legislating sovereign, Kamehameha I. [26]

So whatever tino rangatiratanga may have meant in the Maori language of 1840, it did not mean a like power or capacity to legislate like this. The Maori signatories to the Treaty of Waitangi were not in the business of altering customary law with legislative acts as in Hawaii. Unable to accomplish what Kamehameha I and his successors had achieved, Maori leaders were willing to become British subjects to achieve the same end.

What has taken place in New Zealand since 1840, is not assimilation, nor even amalgamation. What actually began in 1840 was incorporation, the incorporation of Pakeha into Maori and Maori into Pakeha. The Treaty extinguished Maori sovereignty, and constituted a single sovereignty. What was intended was convergence of the two different kinds of subjects created while New Zealand was a

Crown Colony. The New Zealand mind has taken some long time to accept and adapt to one standard of citizenship. 19th century Governments ran roughshod over Maori because Maori were seen as subjects, but not citizens. We can only move forward - not on different paths but on one path - by fulfilling citizenship, not dividing it. In any case our demography will defeat attempts to apply indigenous law from places where populations are much smaller, or geographically defined. Which means that in its own way, William Hobson's description is almost right. Even though we are not, even now, all one people , since 1840, we have been becoming one. We were always meant to fuse our two versions of subjecthood into common New Zealand citizenship. Let's not lose faith in New Zealand, now. It has already brought us a long way.

Maori 'blood soil and language' nationalist arguments promise not a single remedy for Maori advancement, or for their country's advancement. These arguments are 200 years old. New Zealand is in fact a post-nationalist response to racial coexistence. New Zealand will not continue 'Onward' as our national motto used to say, by going back to the duality of the 1840s to the 1860s.

It's against this background that we need a deeper debate about the principles of the Treaty. Questioned in the House on the principles of the Treaty, Labour evaded answers and then ultimately fell back on the 1989 statement by the Palmer Government. This is no basis for the Attorney-General s preference for judicial activism to interpret the Treaty. Our judiciary is competent and intelligent, but they breathe the same thin air as the politicians on Treaty issues. They cannot make mature consideration without deeper, more open debate about the Treaty. Unless more New Zealanders become aware of the content of modern Treaty discourse, and where that discourse will inevitably take us, we are going to wake up one day, and find that New Zealand has been reconfigured more or less as that shown in the TV3 documentary 2050 What if & . Then New Zealanders, Pakeha , Pacific and Asian, and Maori too - for most Maori want to be just New Zealanders - will ask How could this have happened? And the judges will keep explaining in their judgments, and the Ministers will remain silent, the media will bite on the sensational aspects of it, and no ordinary New Zealander will be any wiser.

I admit that the New Zealand Government and the British Government before it, have been responsible for breaches of the quasi-contractarian dimension of the Treaty. But the solution to the challenges that the Treaty presents to all New Zealanders, lies in a single standard of citizenship for all. And considering the Treaty's original intent, I for one will not apologise for being proud of being a New Zealander.

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[1] 2050 What if & , Part 2 of TV3's Inside New Zealand documentary series, aired on 21. 3. 02.

[2] Tamati Waka Nene, for example, said on 5. 2. 1840 on Te Tii Marae, that Hobson should be a father, a judge, a peacemaker . Reported on p. 50 of The Treaty of Waitangi, Claudia Orange, Allen & Unwin, 1987.

[3] For example, the letter quoted on p. 27, Ch. 3, A Show of Justice, Alan Ward, AUP, 1974, from GBPP 1838, 680, p. 272.

[4] See R˚misches Staatsrecht , Vol. 1, Theodor Mommsen, Basel 1952.

[5] The frontispiece in The Origin of The Maori Wars, Keith Sinclair, NZUP, 1957. [6] The model would have been the protectorate extended over the Fante people, in what is now Ghana, in 1830.

[7] Lord Curzon of Kedleston, from the 1907 Romanes Lecture, Frontiers, http://www-ibru-dur. ac. uk/docs/curzon4. html

[8] As the CA decision in Mighell v. the Sultan of Johore in 1884 declared, the relations between Queen Victoria and the Sultan were those of alliance and not of suzerainty and dependence . CA 1893, Nov. 4, 27, 28, 29. (Mighell v. the Sultan of Johore is a breach of promise case, resulting from the Sultan's philanderings as one Albert Baker .) Moreover, a British Protectorate did not make British subjects out of the inhabitants of the territory in question. They remained subjects of, to use specific historical examples, the Kings of Tonga or Swaziland. The only space , then, for indigenous sovereignty was either within a protectorate or as a domestic dependent nation.

[9] Cherokee Nation v. State of Georgia (1831). See http://odur. let. rug. nl/~usa/D/1801-1825/marshallcases/mar06. htm.

[10] See The Sierra Leone Act 1861.

[11] GBPP, 1838/680 p. 159, Glenelg to Bourke, 25. 5. 1836.

[12] In the 1830s, the French had an increasing interest in New Zealand. Capt. Lavaud, of the corvette L Aude, was instructed by the French Minister of the Marine, Amiral Duperry, to establish a semi-official and symbolic occupation at Akaroa as Commissaire du Roi, over as large a territory as possible. The French government hoped to build the core of a French possession out of the Catholic mission in New Zealand, the Akaroa settlement, and the whale fishery. It should be assumed that Duperry, the French imperialist who conquered Algiers in 1830, had serious territorial ambitions.

[13] The key passage in the Jones v Meehan decision is as follows: In construing any Treaty between the United States and an Indian tribe, it must always & be borne in mind that the negotiations for the Treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the Treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the term in which the Treaty is framed is that imported to them by the interpreter employed by the United States; and that the Treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by Indians.

[14] Claudia Orange correctly notes (on p. 41 of The Treaty of Waitangi) that the word kawana in the Treaty text, would have reminded Maori of Pontius Pilate, the Roman Governor who acquiesced in the execution of Christ. This most valuable insight should be pursued. All four gospel accounts of the arrest, trial and execution of Christ, offered Maori a working model of the disposition of sovereignty, and of indigenous governance, in Roman Palestine. Both Herod Antipas as a client king, and Pontius Pilate, served at Caesar's, i. e. , the sovereign's, pleasure.

[15] This ironically resembles John C Calhoun's argument from 1832 that South Carolina had the right to nullify federal laws and to secede from the Union. Despite Calhoun's claim that there was a constitutional right to own slaves, American states did not retain a right to withdraw from the Union, as the Armies of Lincoln's Federal Government had to prove between 1861 and 1865, and as the law of the United States still insists.

[16] It strains belief that, having transferred sovereignty to the Crown in the first article, Williams would posit a principle of omni-present Maori authority in the second, yet recent analysis is dependent on this being the case. The British did, of course, care about securing the colony's land base. This is logically why confirmation of tino rangatiratanga is paired with advice on how to go about selling the land. The logic, and the crudeness of the pairing, point to rangatiratanga's referring not to culture in the sense of Maoriness itself, but specifically to land and resource ownership. From: The pursuit of modernity in Maori society -The conceptual bases of citizenship in the early colonial period , by Lyndsay Head, in Histories, Power and Loss, Andrew Sharp and Paul McHugh, eds. , Bridget Williams Books, 2001.

[17] The Rt. Hon. Simon Upton, in Upton-on-Line, 17. 8. 00.

[18] Pompallier to P∂re Colin, 14. 5. 1840.

[19] Quoted on p. 51 of The Treaty of Waitangi, Claudia Orange.

[20] LXXI. And whereas it may be expedient that the Laws, Customs, and Usages of the aboriginal or native Inhabitants of New Zealand, so far as they are not repugnant to the general Principles of Humanity, should for the present be maintained for the Government of themselves, in all their Relations to and Dealings with each other, and that particular Districts should be set apart within which such Laws, Customs, or Usages should be so observed: It shall be lawful for Her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from Time to Time to make Provision for the Purposes aforesaid, any Repugnancy of any such native Laws, Customs, or Usages to the Law of England, or to any Law, Statue, or Usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.

[21] CO 209/63, quoted on p. 197 of The Colonial Office: A History, Henry L Hall, Longmans, 1937.

[22] Mortmain: A term applied to denote the alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. These purchases having been chiefly made by religious

houses, in consequence of which lands become perpetually inherent in one dead hand , this occasioned the general appellation of mortmain to be applied to such alienations. Black's Law Dictionary, 1990.

[23] Pakeha men got a secret ballot in 1870, all Maori gained the secret ballot only in 1937, and Maori only gained the freedom to select their electoral roll in 1975. Maori of more than half Maori ethnicity were only allowed to stand as candidates for general seats from 1967, although they were not allowed to register as general electors until 1975.

[24] New Zealand could easily have been partitioned among the European and Atlantic powers during the 1840s, just as Samoa was between Germany and the United States: the island of New Guinea was partitioned three-ways, between the Netherlands, Germany and Great Britain. New Zealand may well have been partitioned between Maori, Britain and France . [25] See http://www. blupete. com/Literature/Biographies/Law/Maine. htm, for further information.

[26] This explains why Kamehameha I has his statue in the Capitol Building, in Washington, along with other great legislators and jurists from history. Kamehameha was renowned from Washington to St Petersburg. And in the Bay of Islands. Kamehameha's Law of the Splintered Paddle or Ke Kanawai Mamalohoe, was the first Hawaiian enactment to protect people from violent assault in public places. Kamehameha expressly declared that old men and women and children may lie along the roadside and not be molested.