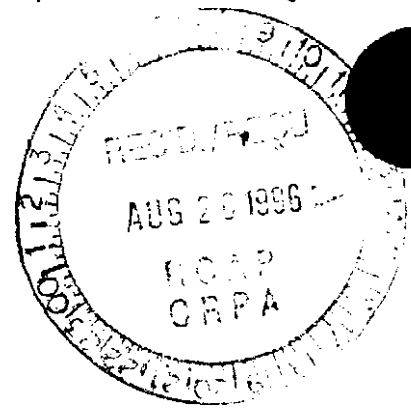


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**DOCTRINES OF DISPOSSESSION:
A CRITICAL ANALYSIS OF FOUR RATIONALES FOR THE DENIAL
OR EXTINGUISHMENT OF ABORIGINAL RIGHTS IN CANADA**

Richard Spaulding

Prepared for the Royal Commission on Aboriginal Peoples

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[W]e choose among goals defined and made meaningful by tradition. Even in assessing the consequences of our actions for posterity, we populate the future with people committed to the same traditions to which we are committed. On the other hand, in choosing a future, we also interpret tradition and so choose a path. Just as we make the future meaningful by linking it to the past, we make the past meaningful by imagining it as a portal to a better future.²

Guyora Binder

Introduction

The law of Aboriginal rights has been likened to an archaeological site, at which a good deal of work remains to be done before the constitutional foundations of Canada are properly understood. The author of this image also warns of a danger, however, that the modern guarantee of Aboriginal rights "can become a legal prison, locking native peoples into historically-based structures that impede them from playing their proper role in modern society." "This danger", writes Brian Slattery, "can be averted only by interpreting [s. 35 of the *Constitution Act, 1982*] in the light of the fundamental values that inform it."³

When we examine the fundamental values informing Canada's Aboriginal rights guarantee, we find ourselves honouring Canada's colonial history, but also striving to overcome it. This is because some, but not all, of the history that grounded Crown/Aboriginal relations in British North America was honourable. Also, the values by which we interpret our history constitutionally today mirror some of the values that prevailed in colonial times, but stand in deep opposition to others.

This paper identifies certain historical components of Aboriginal rights law unearthed in the modern jurisprudence, but not, it is submitted, examined critically enough by the courts in

the light of fundamental values, before being offered for inclusion in the renewed law of Aboriginal rights promised by the constitution.

Four legal doctrines are examined, each of which purports to rationalize either the denial of Aboriginal rights, or their unilateral extinguishment, with the effect that Aboriginal peoples are dispossessed of their lands or territories upon colonization by the Crown.

The first three doctrines are interrelated.

The act of state doctrine defines the boundaries of the courts' authority to supervise Crown assertions of sovereign power. This doctrine flourished in 19th century colonial law as an ostensibly neutral rationale for the law's acquiescence in colonial seizures of Aboriginal territory. With its citation in the recent decision of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia* and by the High Court of Australia in *Mabo v. Queensland*, the act of state doctrine appears to be reemerging as a legal account, in particular, for the unilateral extinguishment by the Crown of Aboriginal sovereignty. This paper will argue that the fundamental value of the rule of law calls for curtailment of the conventional act of state doctrine; in particular, for recognition of the courts' authority to affirm the legal right of Aboriginal peoples to internal sovereignty coordinate with the Crown's limited sovereignty, notwithstanding Crown assertions of absolute sovereignty over Aboriginal peoples.

The recognition doctrine houses several legal theories (including the act of state doctrine) having the effect of requiring some act of recognition by a state before an Aboriginal right can be affirmed by the courts. The effect of such theories on gradations of Aboriginal rights, from private rights, through laws of a private nature, to public law jurisdiction will be examined. It will be argued in this paper that the recognition doctrine has survived in modified form its rejection in the context of private rights by the Supreme Court of Canada in 1973, and that the Canadian jurisprudence now stands at a crossroads between the Court of Appeal's inclination in *Delgamuukw* to apply the recognition doctrine to assertions of Aboriginal law-making rights, and the strong line of authority from *Worcester v. Georgia* through *Connolly v. Woolrich* to

Sioui, applying a countervailing doctrine of continuity to such matters.

The doctrine of supersession by law posits the displacement of common law Aboriginal rights by any inconsistent exercise of the Crown's sovereign authority. The Supreme Court of Canada's ruling in 1990 that Aboriginal rights cannot have been extinguished before their constitutional protection in 1982 except with the sovereign's clear and plain intention appeared to signal the demise of this doctrine in Canada, but the trial and Court of Appeal decisions in *Delgamuukw* have reinvigorated the doctrine in a modified form. Under a rationale that can be termed the doctrine of sovereign dispossession, the *Delgamuukw* rulings effectively hold that sovereignty is not susceptible of legal right, that Crown sovereignty is by definition absolute, and that, regardless of the intentions of colonial authorities, the colonial assertion of Crown sovereignty necessarily displaced any sovereignty held pre-colonially by Aboriginal peoples. This paper will argue that this reasoning, which also qualifies as a species of "recognition" rationale, lacks authoritative support, depends upon an ahistorical and arbitrary legal fiction, and misconstrues the nature of sovereignty, which should not be equated with absolute power and does form the subject of rights and duties in peoples.

In the main, the foregoing doctrines posit the effective unilateral extinguishment of Aboriginal rights at the moment of the Crown's taking sovereign title to the territory now known as Canada. The fourth doctrine examined in this paper is notorious for having been condemned by the International Court in 1975 and by the High Court of Australia in 1992. In its unique application to Aboriginal peoples, the doctrine of *terra nullius* holds that even before their colonization by European powers, Aboriginal societies lacked rights cognizable by English law, so that at colonization the Crown could treat their lands and territories as juridically empty. It will be argued in this paper that the *terra nullius* doctrine possesses unacceptable currency in Canadian law; in particular, that the "organized society" requirement for proof of Aboriginal rights, the doctrine of peaceful settlement, and the ancillary rationales under which Aboriginal land rights have been treated as "usufructuary", and Aboriginal rights confined to uses notionally frozen at the moment of contact with settler societies, all owe an unacceptable debt to this

discredited theory.

The limited aim of this paper is to criticize problematic lines of reasoning contained in the substrata of Aboriginal rights law, not to reconstruct that law. Each of the three fundamental values informing this paper's critique, however, undoubtedly also informs the appropriate measure of any renewed law of Aboriginal rights in Canada. The rule of law is the cornerstone of Canada's *Charter*, and does not tolerate claims of absolute power. The requirement that the law be rational, not arbitrary (either in the sense of lacking reason, or serving vested interests alone) is a longstanding touchstone of the common law. The third value, ethnic and racial equality between individuals and peoples, was strikingly absent among the imperatives driving English law and imperial policy in the 19th century, when most of the Aboriginal territory in Canada was colonized. In the era of human rights, however, equality is a value of unquestionable standing in democratic societies and the community of nations. In addition to applying these standards, this paper will assess the level of jurisprudential support for each of the doctrines examined.

It should be emphasized that this paper's critical project does not presume that renovations to the law that might overcome the defects identified here must restore absolute rights to Aboriginal peoples, and none to the descendants of settlers. None of the values just mentioned support such a stance, and few human rights are considered unsusceptible to justifiable limitation. In arguing, in particular, that the doctrines examined here do not justify denying Aboriginal land rights the status of property in English law, or Aboriginal rights of self-government the status of internal sovereignty, this paper does not claim that non-Aboriginal people hold no valid deeds of title from the Crown or that Canada's sovereignty is chimerical. Rather, if the analysis advanced here is persuasive, colonial law must look elsewhere than these doctrines to justify entitlements coordinate with Aboriginal rights.

Some introductory guidance might also assist on the relation of this analysis to study of the issue of unilateral extinguishment of Aboriginal rights generally. Before the rendering of the 1991 trial decision in *Delgamuukw*, the modern case law and legal commentary in Canada on

this issue concentrated on actions taken on behalf of the Crown *after* Crown sovereignty was acquired. In 1973 the Supreme Court of Canada had affirmed the continuity of certain Aboriginal rights, through the Crown's acquisition of sovereignty; thus it was natural to treat the *terra nullius* doctrine as an Australian legal phenomenon, and to attend principally in Canada to the fate of continuing Aboriginal rights at the hands of the Crown.

In *Delgamuukw*, however, the plaintiff Aboriginal peoples have asserted, more directly than ever before in the modern era, an Aboriginal right to maintain a degree of the sovereignty they had enjoyed before the Crown acquired its sovereignty colonially. Based on the arguments drawn in response on behalf of the Crown, the judgements to date in *Delgamuukw* have given unprecedented modern attention to claims of the unilateral extinguishment of Aboriginal rights (especially extinguishment of rights of sovereignty or jurisdiction), purportedly flowing from the Crown's acquisition of sovereignty itself. In commenting on the law of unilateral extinguishment of Aboriginal rights in Canada after the trial and Court of Appeal decisions in *Delgamuukw*, this paper focuses upon extinguishment claims arising from this prior, threshold stage in Crown/Aboriginal relations. Though its constitutional implication differs from extinguishment, the doctrine of *terra nullius* fits closely with these rationales in that its ultimate effect is to render Aboriginal rights subordinate to Crown interests, and protection of Aboriginal lands and cultures contingent upon the beneficence of the state.

While concentrating on the colonial law that forms part of the English law introduced into Canada with colonization, the following analysis engages international and domestic legal doctrines, and interactions between them, in an integrated way. One sphere of law and justice is emphasized, that of "intersocietal"⁴ or "intercultural"⁵ relations. It is submitted that domestic courts have an obligation to administer intersocietal law in accordance with principles based on equal respect for Aboriginal and settler societies.⁶ Intersocietal law is grounded both in traditional principles of justice and relatively modern concepts of basic human rights.

1. Act of State Doctrine

It has been very truly said that, in the Middle Ages, the royal prerogative often appears to be simply some advantage over the subject which the law gives to the king when their rights conflict.⁷

William Holdsworth, *A History of English Law*

[I]f societies are not related to each other by law how are they to regulate their affairs together?⁸

J.A. Andrews

1.1 Acts of state under English law⁹

The English law inherited by Canada provides that domestic courts have no authority to question the validity of an exercise of sovereign power.¹⁰ When the Crown represented by the executive, for example, declares war upon another state, or annexes new territory, the courts may determine the domestic law implications¹¹ of such "acts of state",¹² but they may not question their validity.¹³

Institutional considerations may have some bearing,¹⁴ but the main rationale for the act of state doctrine concerns the substantive mandate of the executive branch of government. The executive is deemed authoritative because traditionally the Crown has held prerogative power in the conduct of foreign affairs.¹⁵ By contrast, it is sometimes added, the courts are creatures of the very sovereign authority whose validity is at issue in such matters, disqualified, in effect, from adjudicating such questions by their own mandate.¹⁶

The legal consequence of such a mandate is profound. In effect, the doctrine curtails the law itself.¹⁷ Not only is the executive sole arbiter of such matters, it engages in them beyond the common law's reach, neither applying nor being governed by it.¹⁸ In societies subscribing to the rule of law, the act of state doctrine represents an extraordinary kind of authority.

A number of limits on the scope and exercise of the act of state power exist. International laws govern many, though not all of the matters exempted from domestic law by the doctrine.¹⁹ Where the act of state doctrine, for example, leaves a government free to declare war for any purpose, international law constrains resort to force for the settlement of international disputes,²⁰ and proscribes (since 1945) the forcible acquisition of new territory by a state.²¹ Except in so far as international law has been incorporated into domestic law, however, the act of state doctrine directs domestic courts to uphold an act of state even where its execution violates international law.²²

Domestic law imposes some constraints upon the doctrine. Since the source of the doctrine is the common law, domestic courts themselves define the doctrine's scope, and decide whether or not a particular act falls within the class of matters encompassed by the doctrine.²³ One of the doctrine's boundaries, for example, is the common law rule that "[t]here can be no act of state against British subjects on British soil".²⁴ In addition, Parliament possesses full constitutional authority to control the scope and exercise of the power²⁵, and could eliminate it altogether if it were to deem this advisable.

The doctrine is also subject to any constitutional constraints upon the Crown's exercise of its foreign affairs prerogative power, including instruments such as the *Royal Proclamation of 1763*. Canada's adoption in 1982 of a constitution dedicated to the supremacy of the rule of law,²⁶ regulating legislative and executive exercises of state power in relation both to citizens and non-citizens, curtails the act of state doctrine from 1982 forward. In fact, to the extent that the *Charter* regulates by law the conduct of governments in all spheres of their activity, including foreign affairs,²⁷ the act of state doctrine has been abrogated in Canada. *Part II* of the *Constitution Act, 1982*, concerning the rights of the Aboriginal peoples of Canada, should have the same effect in so far as the act of state doctrine might affect rights recognized and affirmed in that Part.²⁸

We shall return to questions concerning the basis for and limits of the act of state

doctrine after reviewing the ways in which the doctrine has been applied to assertions of Aboriginal rights. At this stage, two points deserve emphasis. First, the act of state doctrine does not purport to decide the rightness or wrongness of an act of state or to justify the act legally. If the courts determine that a matter falls within the scope of the doctrine and thus outside the ambit of their review, that is all that their decision represents: it does not vindicate the act in question.²⁹

The second point to emphasize is that as an incident of the royal prerogative, the act of state doctrine is in fact "the residue of royal authority left over from a time before it was effectively controlled by law."³⁰ English subjects "struggled and fought through the centuries to establish the rights of the subject to be protected from arbitrary acts of the King's servants."³¹ That struggle, which began at a time when the doctrine reserved to the monarchy unfettered power to declare *any* matter an act of state,³² was English society's contest for democracy and the rule of law. Along with other incidents of the political branch of the royal prerogative, the act of state doctrine constitutes one of the "survivals of an obsolete form of political society".³³

1.2 Acts of state in the law of extinguishment of Aboriginal rights

The fundamental "act of state" upon which British courts have relied in relation to Aboriginal rights is the acquisition of sovereignty, or *imperium*, over foreign territory:

These courts have generally held that where the Crown has officially advanced an unequivocal claim of sovereignty over a certain territory, British courts should recognize and enforce that claim without further scrutiny, regardless of the degree of control actually exerted by the government,³⁴ the legal pedigree of the claim, or the presence of competing claims by other states and peoples. This is considered part of the "act of state doctrine".³⁵

A case arising in territory now within India exemplifies this application of the doctrine³⁶ in the sphere of English common law known as colonial law. When the Aboriginal ruler of Tanjore died in 1855 without male heirs, the trading company representing the British Crown

in the region pronounced the ruling dynasty extinct and seized the territory for the Crown, opposing the female heir's suit to recover items of formerly sovereign property in the British courts. The Judicial Committee of the Privy Council held that "the act so done, with its consequences, is an act of state" not open to challenge in British courts:

Of the propriety and justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy.³⁷

Building upon this foundation, courts deciding cases from formerly British colonies have held that the acquisition of territorial sovereignty by the Crown has the effect of diminishing Aboriginal sovereignty, to the extent that Aboriginal sovereignty is inconsistent with that acquired by the Crown.³⁸ In territories acquired by "derivative" means - i.e. by conquest or cession - the Crown's sovereign title is treated as having been acquired from the previous Aboriginal sovereign. (Aboriginal laws are presumed to continue operating, but subject to alteration by exercise of the Crown's sovereign authority.³⁹) In territories acquired "originally" - i.e. by "peaceful settlement" - Aboriginal sovereignty is conventionally considered never to have existed, in which case the rule that Crown acquisition of sovereignty is unreviewable by the courts, plays no necessary part in the denial of Aboriginal sovereignty: see part 4, "*terra nullius*", below. Increasingly, however, courts reluctant to base their conclusions upon the distorted doctrine of *terra nullius* alone, give this rule as a reason to reject claims of continuing Aboriginal sovereignty in "settled" territories.⁴⁰ (Similarly, this rule appears to be the basis for the qualification - often referred to in commentaries upon the continuity of Aboriginal laws in "settled" territory - that any Aboriginal laws must be consistent with the sovereignty of the Crown.⁴¹)

In these cases (except where it is claimed that Aboriginal sovereignty was non-existent) the act of state doctrine plays an instrumental role in the purported extinguishment of Aboriginal

sovereignty, as follows. When the Crown asserts sovereignty over a new territory in fact, the courts attribute legal meaning to the claim (i.e. the courts determine whether the Crown intends to be claiming that it has acquired sovereignty as a matter of law). The courts also attribute to the claim, legal consequences. The law governing both of these judicial determinations might be said to form part of the act of state doctrine, but the cardinal feature of the doctrine in this context concerns the latter matter, the legal consequences of the Crown's claim. This feature is the rule that the courts must accept any claim to acquisition of sovereignty by the Crown, as legally effective, such that any true claim must be treated as valid title. This rule follows from the premise that acquisition of territory is the Crown's prerogative: the Crown not only possesses authority to acquire territory; it is its own judge whether it has done so. The matter of the validity of its claim to having done so is outside the jurisdiction of the courts.

The effect of this rule in relation to Aboriginal sovereignty can be understood as having two dimensions. First, the validity of the Crown's claim to acquisition of sovereignty over Aboriginal territory is unassailable in a domestic court. Second - a corollary - any inconsistent Aboriginal claims may not be entertained. Inconsistent Aboriginal claims are not directly cancelled as a consequence of this rule, but they are rendered void as a matter of colonial law, effectively extinguished.

It should be noted that the definition of the sovereignty acquired by the Crown is not addressed by this rule. The act of state doctrine only restricts the courts' mandate to define the nature of the Crown's sovereignty over new territory in so far as the doctrine directs the courts to give effect to the Crown's intention to acquire sovereignty. Presumably this means that where the Crown unequivocally declares that absolute sovereignty has been acquired, the courts are bound to agree, while reserving to themselves the mandate to interpret the meaning of absolute sovereignty in law. In the absence of such an unequivocal declaration, however - and such declarations are historically rare where colonial relations have developed relatively peaceably - the act of state doctrine does not tell the courts how to define the sovereignty of the Crown.

To the extent that the Crown asserts a sovereignty *consistent* with Aboriginal sovereignty,

or that colonial law so defines the Crown sovereignty asserted,⁴² the acquisition of Crown sovereignty has no extinguishing effect. Where some such consistency exists, the acquisition has only a partial extinguishing effect, to the extent of the inconsistency between the two sovereignties. Nonetheless, upon the law attributing a meaning to Crown sovereignty inconsistent in some respect with the sovereignty of Aboriginal peoples, it is the act of state doctrine which immunizes the Crown's claim - however arbitrary its basis - from what might otherwise be the legal effect of the competing claim.

Building further upon the fundamental act of state in such cases, the jurisprudence from formerly British colonies also provides that an Aboriginal sovereign's proprietary title to lands or goods held in its sovereign capacity (generally called "public" property in English law) is necessarily inconsistent with Crown sovereignty, and is therefore extinguished upon acquisition of the latter.⁴³ (These cases concern "derivative" acquisitions, in which such title is deemed necessarily to have passed to the Crown as part and parcel of the acquired sovereign title to territory. In cases of "peaceful settlement", where prior sovereignties are deemed not to have existed, neither is prior "public property".⁴⁴) Again, this conclusion depends also upon the courts' definition of the sovereignty acquired by the Crown, but it is the act of state doctrine that effects the purported extinguishment by barring judicial review of the Crown's action in the domestic courts.⁴⁵

Some British colonial precedents have taken the further step of declaring that *any* former proprietary interest (or equivalent right) is necessarily extinguished by Crown acquisition of territorial sovereignty.⁴⁶ That assertion is contrary to established authority (particularly firm in Canada⁴⁷) which recognizes a common law presumption that the Crown will respect the private property or equivalent prior rights of the inhabitants of newly acquired territory.⁴⁸ The erroneous assertion depends upon the act of state doctrine in the following way. As noted above, the appropriation of "public" property is considered part and parcel of the acquisition of territorial sovereignty, unreviewable by virtue of the act of state doctrine. Included in the catalogue of "acts of state", however, as an incident of the prerogative to acquire territory, is the power to confiscate the private property of aliens in a territory undergoing acquisition.⁴⁹

If such confiscation occurs, the act of state doctrine precludes its review in domestic courts. The contention that acquisition of sovereignty necessarily extinguishes the rights of private property of the formerly alien inhabitants - and that any subsequent proprietary claims of such persons must depend upon some act of positive recognition by the British Crown - rests on the incorrect assumption that the act of acquiring sovereignty over new territory necessarily or presumptively operates as a seizure of private property formerly held by non-subjects.⁵⁰

The weight of authority requires instead that some distinct act of seizure on behalf of the Crown must have been taken in the course of acquiring territorial sovereignty, for an extinguishment of this nature to occur.⁵¹ It should be noted, however, that should the property of Aboriginal peoples be shown to have been actually confiscated in this way, the act of state doctrine would effect an extinguishment, by shielding the seizure from investigation as to its justice or legality.

The act of state doctrine and especially its American counterpart, the political questions doctrine,⁵² also underpin - indefensibly, it will be argued here - certain judicial pronouncements that, *after* acquisition of Crown sovereignty, the extinguishment of Aboriginal rights unilaterally by the Crown is not governed by the law.⁵³ It is true that where, in the course of acquiring sovereignty, the Crown expressly elects to reserve to itself a power to dispose of previous property rights, British courts have treated the election as part of an act of state, and have given it effect as such even after sovereignty is acquired and the Crown is otherwise subject to domestic law in the conduct of domestic affairs.⁵⁴ But once territorial sovereignty has been acquired, the act of state doctrine, by its own terms, has no place in domestic law otherwise:

[t]he Crown's ability to deal with a territory and its inhabitants under its general authority in foreign affairs ceases after the country becomes part of the Sovereign's dominions and the inhabitants are received into its protection as British subjects.⁵⁵

Indeed, subject to the exception just noted, there can be no act of state against British subjects on British soil.⁵⁶

On one reading, these cases have simply extended the act of state doctrine so as to make it apply to a matter ordinarily subject to domestic law - the taking of private property within the realm.⁵⁷ Without some justification for such an extension being given - and none appears in these cases - this proposition would appear not only to be arbitrary,⁵⁸ but contrary to the foreign affairs rationale of the doctrine itself,⁵⁹ and discriminatory against Aboriginal peoples, who, exclusively amongst the Crown's subjects, would thereby be denied recourse to the courts for the taking of their property.⁶⁰

On another reading of some of these cases, something "international" is presumed retained in the Crown/Aboriginal relationship after acquisition of Crown sovereignty, such as a continuing nation-to-nation relationship reflected in the allocation of legislative jurisdictions between the Crown and Aboriginal nations.⁶¹ Such a perspective treats both Crown and Aboriginal sovereignty as less than absolute, and the two as coexisting in one state. That perspective has been partially adopted in the United States,⁶² and would appear to have substantial merit. From that point of view, application of the act of state doctrine to Crown conduct interfering with the "foreign" elements of Aboriginal rights, might appear, superficially, consistent with the thrust of the doctrine.⁶³

The problem with this application of the act of state doctrine in Canada, however (apart from the serious problems inherent in the doctrine itself, discussed below), is that in the perspective this latter reading depends upon, Aboriginal persons are dual citizens, not aliens; Aboriginal governments constitute one of three orders of government within Canada, not foreign governments; and one of the other two orders of government possesses a degree of shared sovereignty over Aboriginal territory, subject to constitutional constraints *enforceable by the courts* - including the *Royal Proclamation of 1763*, the succession of Imperial Orders-in Council reaffirming the Proclamation's principles and, since 1982, s. 35 of the *Constitution Act, 1982*. If Aboriginal territories and their inhabitants are integrated to this degree into Canada's domestic constitution, special Crown immunity for interference with Aboriginal rights on the basis of the act of state doctrine would entail the same arbitrariness and discrimination present in the extended notion of the doctrine, canvassed as the first reading of these cases above.⁶⁴ Further,

recognition of an act of state prerogative of this nature for one of the partners in confederation and not another, would appear discriminatory as between nations, and contrary to the reciprocal logic of the doctrine as it has been applied to foreign states.⁶⁵ Yet that logic works poorly in the sphere of international relations,⁶⁶ and would invite legal chaos if incorporated into a domestic constitution.⁶⁷ The fair and practical alternative to recognizing a reciprocal power in Aboriginal peoples and their associated states to seize each others' territory arbitrarily would be to vest no such prerogative in either partner.

To summarize, according to the jurisprudence stemming from British colonization, the conventional act of state doctrine shields from judicial review the potentially arbitrary extinguishment of any gradation of Aboriginal entitlement, from sovereignty, through "public" property belonging to Aboriginal sovereigns, to proprietary rights of a "private" nature⁶⁸, during the course of Crown acquisition of a new territory. In this last-mentioned instance, the cases which hold prior inhabitants' property rights so extinguished during Crown acquisition of sovereignty, in the absence of an actual seizure, are not authoritative, but Crown power to make Aboriginal peoples trespassers in their homelands by such means is guaranteed by this doctrine nonetheless. Some courts have relied upon a variation of the doctrine or its American counterpart, to exempt from the rule of law the unilateral extinguishment of any Aboriginal entitlement by the Crown, at any time after sovereignty is acquired. This line of authority, too, runs afoul of a basic tenet of colonial law, but its current influence is significant.

In all of these applications, the act of state doctrine offers no justification for the arbitrary dispossession of Aboriginal peoples by the Crown.⁶⁹ Instead it purports to bar any challenge to the validity of such conduct, placing it beyond the reach of domestic law.

1.3 Acts of state in the Canadian jurisprudence concerning extinguishment of Aboriginal rights

Canadian courts appear to assume the validity of the rule referred to above as governing the "fundamental" act of state, where Aboriginal rights are concerned. It appears to be assumed

in Canada that the act of state doctrine immunizes from judicial review the acquisition of territorial sovereignty by the Crown.⁷⁰

Canadian appellate authorities have relied upon the act of state doctrine to determine that two of the three gradations of Aboriginal rights reviewed above were extinguished during the course of Crown acquisition of sovereignty in Canada. (The "public property" gradation has been ignored, perhaps because the Canadian authorities generally do not treat Aboriginal peoples as having ceded sovereignty or as having been conquered.⁷¹) In the recent British Columbia Court of Appeal decision in *Delgamuukw*, Wallace J.A. relied in the alternative upon the act of state doctrine to determine that Aboriginal sovereignty or jurisdiction was superseded upon Crown acquisition of sovereignty. In *Calder v. Attorney General of British Columbia*,⁷² the British Columbia Court of Appeal misapplied the doctrine so as to presume extinguishment of "private rights" in the course of territorial acquisition. This latter ruling has since been overruled by several Supreme Court judgements.⁷³

Some appellate opinions have also adopted the post-acquisition variation of this doctrine to rationalize unilateral extinguishment of common law Aboriginal rights by the Crown. In *Calder*, the ruling which marked the modern re-emergence of Aboriginal rights in Canadian jurisprudence, three members of the Supreme Court of Canada appear to have adopted this conception of Crown authority to extinguish Aboriginal rights. Subsequently, the Supreme Court of Canada construed that judgement as having turned on the doctrine of Parliamentary sovereignty, but the act of state or, more accurately, the political questions basis of Judson J.'s opinion in *Calder* continues to have influence.

The status of the doctrine in Canada in each of the two instances where it has current effect - extinguishment of Aboriginal sovereignty upon the Crown's claiming Aboriginal territory, and extinguishment of any Aboriginal right after Crown sovereignty has been acquired - may be described more fully as follows.

In the Court of Appeal's ruling in *Delgamuukw v. British Columbia*, Wallace J.A., wrote one of the two majority judgements, treated the Aboriginal plaintiffs' claim to rights of a jurisdictional nature as a claim to Aboriginal sovereignty.⁷⁴ (This analysis does not take issue with that characterization.) Wallace J.A. relied upon the act of state doctrine - in conjunction with an absolute definition of the sovereignty claimed by the Crown - as one basis for dismissal of the claim to Aboriginal sovereignty.⁷⁵ Macfarlane J.A., who wrote the other majority judgement (with which Wallace J.A. also agreed), concluded that any Aboriginal jurisdictional rights were "superseded" by the imposition of the Crown's legislative power.⁷⁶ It appears that Macfarlane J.A.'s theory of supersession relies implicitly upon the act of state doctrine, but that question may be left for examination under part 3, "doctrine of sovereign dispossession", below.⁷⁷ (In support of their dismissal of the claim to Aboriginal jurisdiction, both judgements also purport to follow Supreme Court of Canada precedent in *R v. Sparrow* holding (without comment on the implications for Aboriginal sovereignty or jurisdiction) that "sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown".⁷⁸ Further, both judgements conclude that the *British North America Act* extinguished any Aboriginal sovereignty which might have survived acquisition of Crown sovereignty, as an exercise of Imperial Parliamentary sovereignty.⁷⁹ Leave to appeal the Court of Appeal decision in *Delgamuukw* has been granted by the Supreme Court of Canada.)

As noted above, the judgement written by Mr. Justice Judson in *Calder* adopted as the basis for determining whether Aboriginal title had been extinguished *after* Crown acquisition of sovereignty, the post-acquisition variation of the act of state (or political questions) doctrine referred to in section 1.2.⁸⁰ Judson J. wrote that the trial judge had been right to hold that Aboriginal title could be extinguished well after acquisition of Crown sovereignty, by the exercise of "absolute sovereignty" over territory, "inconsistent with any conflicting interest".⁸¹ As authority for this proposition, Judson J. relied upon the decision of the United States Supreme Court in *United States v. Santa Fe*, which stated that the power of Congress to extinguish Aboriginal title is "supreme" and that "the manner, method and time of such extinguishment raise political, not justiciable issues".⁸² The influence of American law's political questions

doctrine on the opinions written in *Calder* is considered further in section 1.4 below.

Judson J.'s act of state/political question rationale for post-acquisition extinguishment did not win majority support in *Calder*. Subsequently, in *R. v. Sparrow*, the Supreme Court of Canada treated Judson J.'s "test" for determining unilateral extinguishment as flowing from Parliamentary sovereignty,⁸³ rather than the act of state doctrine, and appeared to reject Judson J.'s test in favour of that articulated by Hall J. in *Calder*.⁸⁴ Elements of Judson J.'s rationale have, however, resurfaced in the British Columbia Court of Appeal decision in *Delgamuukw*.⁸⁵ In light of the *Delgamuukw* reasoning, and in view of the fact that the Supreme Court of Canada has not, since *Calder*, articulated a firm rationale for the power of unilateral extinguishment of Aboriginal rights, it appears that Judson J.'s act of state rationale has not yet been laid to rest in Canada.

Before reflecting upon the act of state doctrine's claim to legitimacy in the context of extinguishment of Aboriginal rights, further examination of the influence of the political questions doctrine upon the Canadian law relating to post-acquisition extinguishment, may be instructive.

1.4 The influence of the American political questions doctrine in the Canadian jurisprudence

Calder, in whose reasons American authorities on post-acquisition extinguishment of Aboriginal title predominate,⁸⁶ is the first decision of Canada's highest court on the question of Crown authority to extinguish Aboriginal title unilaterally.⁸⁷

The relevant cases from the United States Supreme Court raise the political questions doctrine at two different stages, in a somewhat confusing way. In the early decisions of Chief Justice Marshall, an early version of the doctrine informs statements such as "conquest gives a title which the Courts of the conqueror cannot deny".⁸⁸ Marshall C.J. was referring in this statement to a conquest he deemed to have occurred, and to have had limited extinguishing effect

upon Aboriginal rights, at the point of the Crown's acquisition of limited Crown sovereignty over territory.⁸⁹ But since the Chief Justice also stated in *Johnson v. M'Intosh* that the Aboriginal title that *survived* acquisition of Crown sovereignty could be extinguished by "conquest",⁹⁰ the political questions dimension of his reasoning has a dual resonance.

As noted above, the opinion of Judson J. in *Calder* clearly treated the decision of the United States Supreme Court in *Santa Fe* as authority for application of this or a similar doctrine at the post-acquisition stage.⁹¹ Judson J. also relied for his post-acquisition extinguishment rationale on a later American case, *Tee-Hit-Ton Indians v. United States*.⁹²

In *Tee-Hit-Ton* the Supreme Court presumed that on acquisition of United States sovereignty, the tribe in question lost, by operation of the political questions doctrine applied in the Marshall decisions, any entitlement to its lands that could be characterized as a legal right.⁹³ (Marshall C.J. had defined the Aboriginal title surviving Crown acquisition of sovereignty, as having legal status, and proprietary incidents.⁹⁴ Thus *Tee-Hit-Ton* revised (several commentators argue, distorted⁹⁵) the Marshall Court's doctrine of Aboriginal title.) Thenceforth, according to *Tee-Hit-Ton*, tribal occupation of the lands was by the deemed permission of the United States, rather than by right. Termination of such permission, which in *Tee-Hit-Ton* the Supreme Court also referred to as "extinguish[ment]" of "Indian occupancy",⁹⁶ was thus the right of the United States, as sovereign owner of the land in question.

On this basis for decision *Tee-Hit-Ton* need not have referred at all to the political questions doctrine at the post-acquisition stage, because a mere occupant of land whose lawful stay depends solely upon the permission of the owner, possesses no legal rights to be extinguished, and no claim to put to a court. The law itself entitles the owner to dispossess such an occupant, and judicial review would not afford a remedy.⁹⁷ The need felt by Marshall C.J. in *Johnson v. M'Intosh* to deal with a possible subsequent conflict between Aboriginal title and sovereign authority does not arise. The Court in *Tee-Hit-Ton*, however, reinforced its decision by holding alternatively that the act of terminating a tribe's surviving permission to occupy is

itself a "conquest", invoking the "political questions" doctrine again to refuse judicial review. In this respect, *Tee-Hit-Ton* purported to follow *Sante Fe* and related authorities.⁹⁸

From this review of *Tee-Hit-Ton* it should be apparent that Judson J. might implicitly have imported into his judgement in *Calder* an element of the Court of Appeal's reasoning, that extinguishment of Aboriginal title can be lightly implied *because no true legal rights in Aboriginal peoples survived acquisition of sovereignty in any event*.⁹⁹ But it is only *Tee-Hit-Ton*'s latter alternative ground - that sovereign extinguishment of rights surviving acquisition of sovereignty can be lightly implied, because even then such conduct raises only a political question, unreviewable by the courts - that is consistent with Judson J.'s reasons, and which Judson J. appears to have meant to follow.¹⁰⁰

Before examining the American political questions doctrine more closely, it is important to note that both of these alternative rationales for sovereign extinguishment of Aboriginal title purport to depend exclusively upon the political questions doctrine (in other words - subject to the comments to follow - American law's equivalent to the English law act of state doctrine) to render the act of extinguishing Aboriginal title unchallengeable in the courts. If there were any doubt that the Court of Appeal's rationale is absent from Judson J.'s reasons, there is no doubt that in one form or another, the act of state doctrine or its equivalent is the sole basis given in Judson J.'s reasons for giving effect to the Crown's claim that Aboriginal title had been extinguished.¹⁰¹

What, then, is the "political questions" doctrine in American law, and what, if any, is its relationship to the English law act of state doctrine? To begin with the first question, the independent existence of the political questions doctrine in constitutional law is a matter of some controversy in the United States.¹⁰² According to those who deem it meaningful, the doctrine treats as "non-justiciable", "[constitutional] matters as to which departments of government other than the courts, or perhaps the electorate as a whole, must have the final say. With respect to these matters, the judiciary does not define constitutional limits."¹⁰³ Beyond this, the nature

of the doctrine is somewhat uncertain, but according to Laurence Tribe there is, at least in cases decided since the mid-19th century, a central line of authority that treats as a "political question" a constitutional mandate granting to Congress or the Executive "authority to act", but which "is not susceptible of an interpretation which would yield judicially enforceable rights".¹⁰⁴ According to Tribe, in other words, whatever other limits apply to this doctrine, it does *not* remove from the judiciary the power and constitutional responsibility to review any challenge to the exercise of government authority based on an alleged infringement of legal rights.

In contrast to the English law act of state doctrine, the political question doctrine applies to legislative, not just executive authority, and to domestic, in addition to foreign matters. Moreover (though the point is not without contention in either case), "political questions" are conventionally understood as a function of the institutional limitations of the courts, whereas the English law act of state doctrine, as we have seen, is primarily a function of jurisdictional subject-matter.¹⁰⁵

If we focus our attention on the foreign branch of the American doctrine to begin with, however, we find that in practice, this branch of the doctrine is applied in much the same way as the English law act of state doctrine. And the practical difference in the application of the American doctrine in foreign, as opposed to domestic affairs - despite the two branches' notionally common root in the issue whether judicially enforceable "rights" might be involved - would appear to be important to analysis of the doctrine in Aboriginal rights cases. In the foreign sphere, the question whether enforceable rights might be involved is largely deemed to have been answered in the negative upon determining that the question falls within the subject matter of foreign affairs. As Anne-Marie Slaughter Burley explains, "[a]mong domestic constitutional scholars, the debate over the political question doctrine reflects a ... contest over the legitimacy and scope of judicial review"; "[a]mong scholars of foreign affairs law, however, the debate ... is actually a conflict about whether judicial review should apply to foreign affairs."¹⁰⁶ Practically, the issue in the sphere of foreign affairs appears to be one of the *vires*, or jurisdiction of the courts, rather than justiciability.

According to Thomas Franck, two of the factors which shaped the early development of the foreign affairs branch of the doctrine were an historical struggle for power between American courts and the executive resulting in concession of a power of judicial review over domestic matters in return for noninterference in foreign affairs¹⁰⁷; and "unreflective adoption" of the English law act of state doctrine.¹⁰⁸

In summary, the American "political questions" doctrine has a domestic and a foreign branch. The domestic branch is restricted to issues considered non-justiciable because they do not involve potentially enforceable rights. The foreign branch, however, originates partially in the English law act of state doctrine's rule of jurisdiction, and is applied in a quasi-jurisdictional manner, despite the fact that its justification has since merged with that of its domestic counterpart.

From this standpoint, the role of the "political questions" doctrine in the American cases relied upon by Judson J. in *Calder* can be critically examined. As we have seen, the first type of "conquest" alluded to by Marshall C.J. in *Johnson v. M'Intosh* was of territory considered "foreign" prior to its acquisition.¹⁰⁹ Marshall C.J. was thus applying a nascent but straightforward version of the foreign branch of the "political questions" doctrine when he held that this kind of conquest "gives a title which the courts of the conqueror cannot deny."¹¹⁰ Had he not been addressing sovereign conduct *after* sovereignty had been acquired, Judson J. in *Calder* could have placed the *Johnson v. M'Intosh* precedent in line with the Privy Council act of state authorities, and interpreted them all to similar effect.

But Judson J. used the American political question precedents to formulate a test for extinguishment of Aboriginal rights surviving acquisition of sovereignty. Can this be justified on the American law principles? As noted above, in *Johnson v. M'Intosh* Marshall C.J. also contemplated "conquest" occurring, and the United States having related authority to extinguish Aboriginal title, after Crown acquisition of sovereignty. But by conquest at this latter stage

Marshall C.J. stated in *Johnson* that he meant "bloody wars",¹¹¹ not the stroke of an executive pen. Chief Justice Marshall's reasons for judgement in *Johnson v. M'Intosh* are famously ambiguous.¹¹² The relationship in time contemplated between the armed conflicts referred to, acquisition of Crown sovereignty, and possible extinguishment of the Indians' right of occupancy by conquest, is not presented consistently. It appears, however - at least before Marshall C.J. withdrew his conquest theory as a basis for extinguishment of Aboriginal title in *Worcester v. Georgia* - that Marshall C.J. was contemplating suspending the ordinary rule of law only in cases of major post-acquisition conflict.¹¹³ The Chief Justice may have had in mind warfare over the Crown's taking of sovereignty itself (in which case, the more sweeping extinguishment that would result from Crown victory could be considered a reconquest, accompanied by a confiscation of property) or an insurrection jeopardising the sovereign's capacity to govern (a situation where, in most common law jurisdictions, Parliament - though not common law prerogative - empowers the executive to take "war" or "emergency" measures abrogating the ordinary rule of law).

In *Worcester v. Georgia* Marshall C.J. withdrew this theory of post-acquisition extinguishment of Aboriginal title altogether, referring only to purchase as a mode of extinguishment at that stage. In *Worcester* the United States Supreme Court contemplated the gaining of rights by the Crown consequent upon war with the Indians solely in the pre-acquisition context ("the very terms [of the colonial charter in question] imply the existence of a country to be invaded") and even then, only as a function of defensive war or warfare undertaken with- just cause.¹¹⁴ Certainly *Worcester* does not suggest that the unilateral confiscation of Aboriginal lands, if permitted at all, could be exempt from municipal law or the courts' supervision. Remarkably, neither *Tee-Hit-Ton*, *Sante Fe*, nor Judson J.'s opinion in *Calder* referred to *Worcester v. Georgia* in this context.¹¹⁵ *Worcester* was the Marshall Court's most complete elaboration of the nature and status of Aboriginal rights in United States law.¹¹⁶

Even *Johnson v. M'Intosh* by itself, however, does not support the expansive 'political question' theory of extinguishment attributed to it by that subsequent line of cases. According

to *Johnson* any post-acquisition extinguishment of Aboriginal title that the courts could "not deny", could occur without the consent of an Aboriginal people only in the most extraordinary circumstances, when Aboriginal property is seized in the course of protecting the existence of the state, or the survival of the settlers.¹¹⁷ The original and conventional 'foreign affairs' branch of the political questions doctrine was not greatly extended by such reasoning. Nor did such reasoning flout the English colonial law rule that acts of state can not be taken against subjects within the realm, though it certainly infringed it.

In *Calder*, however, no factual element of even the expanded concept of 'foreignness' implicit in the *Johnson* theory of post-acquisition extinguishment entered into Judson J.'s reasoning. Judson J. was concerned with the effect of legislative measures enacted under conditions of peace.¹¹⁸ Unless some other element of 'foreignness' is deemed to continue in the Aboriginal/Crown relationship after acquisition of Crown sovereignty (the difficulties with this view as a justification for act of state reasoning are noted in section 1.3 above) the *Tee-Hit-Ton* line of authority relied upon by Judson J. must be justified on the American principles, if at all, under the *domestic* branch of the political questions doctrine.

It is submitted that the domestic branch of the political questions doctrine cannot possibly support the usage to which Judson J. attributed the doctrine in the 20th century American cases he cited. On the first reading of *Tee-Hit-Ton* discussed above, no enforceable rights were involved when executive permission granted to tribes to occupy federal lands was withdrawn, but on this reading the United States was simply acting within its ordinary legal rights as the owner of land. Thus no constitutional question was involved either, and the domestic branch of the political questions doctrine need not and could not have come into play.¹¹⁹ On the alternative reading of *Tee-Hit-Ton*, however - and in *Santa Fe* and the authorities cases cited therein - enforceable legal rights were involved, recognized by the United States Supreme Court since *Johnson v. M'Intosh*. The "no rights" restriction¹²⁰ on the domestic branch of the political questions doctrine would not permit the extinguishment of such rights to be shielded from judicial review as a 'political question.'

This opinion is supported by the ruling of the United States Supreme Court, subsequent to *Calder*, that the view that "relations between [the United States] and the Indian tribes are a political matter, not amenable to judicial review" "has long since been discredited in takings cases" and was "expressly laid to rest" in a 1977 decision of the Court.¹²¹ The 1977 decision referred to quoted with approval the opinion, rejected by *Tee-Hit-Ton*, that "[t]he power of Congress over Indians may be of a plenary nature, but it is not absolute".¹²²

It follows that there is reason to doubt the soundness of Judson J.'s reliance upon the American authorities to justify refusing to review the validity of purported post-acquisition extinguishments of Aboriginal title by the sovereign. In so far as Judson J.'s formulation of a "test" for unilateral extinguishment might have relied upon the view that initial acquisition of Crown sovereignty negated the continuance of Aboriginal title as a legal right (it has been argued here that this was not Judson J.'s view)¹²³ Judson J.'s position complied with the rationale for the foreign branch of the political questions doctrine, but misconstrued the Marshall doctrine of Aboriginal title. On the more likely ground for which Judson J. depended upon *Tee-Hit-Ton* and the related American political question precedents, the precedents themselves, at least as Judson J. wished to use them, defied the rationale upon which the domestic branch of the political questions doctrine has depended before and since, a problem which the United States Supreme Court has since acknowledged and at least partially rectified.¹²⁴ The latter error comes into sharp relief for purposes of Canadian law when we recall that the doctrine which Judson J. treated as analogous to the American political questions rule - the English law act of state doctrine - not only contains no "domestic branch", but positively forbids the commission of an act of state against a subject on domestic soil.

Without addressing the issue directly, Hall J. made it clear in his judgement in *Calder* that the post-acquisition version of the political questions or act of state doctrines has no place in the rationale for unilateral extinguishment of Aboriginal title.¹²⁵

Hall J.'s comments on the act of state doctrine responded to the Court of Appeal's reliance upon this doctrine to deem any Aboriginal property in land seized by the Crown on

acquisition of the territory. Judson J. had not addressed that argument directly, though clearly he did not accept it. Hall J.'s response to this ground of the Court of Appeal's decision, however - considered in the light of his treatment of the issue of subsequent extinguishment of Aboriginal title - provides an important counterpoint to Judson J.'s political questions/act of state rationale for post-acquisition extinguishment of Aboriginal rights.

Having already held that the laws of Aboriginal peoples are presumed to continue in force following a change of sovereignty by "discovery" as they would following acquisition by conquest,¹²⁶ Hall J. responded to the Court of Appeal's contrary opinion as follows:

The Act of State doctrine has no application in the present appeal for the following reasons: (a) It has never been invoked in claims dependent on aboriginal title. An examination of its rationale indicates that it would be quite inappropriate for the Courts to extend the doctrine in such cases; (b) It is based on the premise that an Act of State is an exercise of the Sovereign power which a municipal Court has no power to review.¹²⁷

By the first of these reasons, Hall J. apparently meant that the doctrine has never been properly invoked to effect a seizure of Aboriginal property by legal fiction, on acquisition of Crown sovereignty. Rather, the doctrine has only protected the Crown from claims inconsistent with proprietary rights actually acquired by the Crown.¹²⁸ Hall J. stated that the act of state doctrine "is no more than a recognition of the Sovereign prerogative *to acquire territory* in a way that cannot later be challenged in a municipal court."¹²⁹ [emphasis added]

More importantly, for the purpose of this analysis, Hall J. appears to have meant by the second reason given, that municipal courts should not lightly relinquish their powers to guard against invasions of rights.¹³⁰

In the context of the Court of Appeal's misapplication of the act of state doctrine, this second reason meant that no invasion of Aboriginal rights to land should have been presumed to have occurred in the process of settlement. This reason also has a corollary, however, relevant to the post-acquisition security of Aboriginal rights. *If it is clear that an invasion of*

rights has occurred, municipal courts should be reluctant to ascribe the cause to an unreviewable political question, or act of state. Hall J. did not frame his objections to Judson J.'s theory of post-acquisition extinguishment of Aboriginal title expressly in these terms, but implicit in Hall J.'s radically different use of the American precedents is rejection of any theory which places extinguishment of the Aboriginal title incorporated into the common law in the category of an extra-legal act. Instead, Hall J. insisted that if unilateral extinguishment of Aboriginal title is to be justified, justification must be found in the law itself.

Hall J., too, looked primarily to the American precedents to derive a rule governing any post-acquisition, unilateral extinguishment of Aboriginal title.¹³¹

Hall J. was careful to point out that the plaintiffs had chosen to exempt Crown grants from the ambit of the declaration sought.¹³² Hall J. ignored, but also implicitly rejected, the American precedent relied upon principally by Judson J. to formulate his test for such extinguishment - *Tee-Hit-Ton*.¹³³ As noted above, Judson J. had drawn directly on *Tee-Hit-Ton* and the cases *Tee-Hit-Ton* relied on for the proposition that the exercise of complete dominion by the sovereign, adverse to any right of occupancy, is sufficient to extinguish Aboriginal title. Ignoring *Tee-Hi-Ton*, Hall J. followed the earlier decision of the United States Supreme Court which *Tee-Hit-Ton* had overruled.¹³⁴ In *Tillamooks #1*, the United States Supreme Court had held that Aboriginal land title is - though subject to a sovereign power of unilateral extinguishment - a legal right, the sovereign's respect for which is prompted by "[s]omething more than sovereign grace".¹³⁵ A taking of such title by the sovereign is therefore governed by the law of the constitution, and is subject to a requirement of fair compensation.¹³⁶ In effect, any involuntary extinguishment of Aboriginal title must be considered an expropriation, and must follow the stringent rules imposed by law upon the exercise of such a power. Consistently with this view, Hall J. held that the test for extinguishment of Aboriginal title must be akin to the common law test for expropriation of private property rights: any extinguishment must be by legislation, and the intention to extinguish Aboriginal title must be clearly and plainly indicated.

There are important differences between expropriation of private rights, and extinguishment of a title quasi-"public" in character and subject to the constitutional guarantees of the *Royal Proclamation of 1763*. Hall J.'s analogy may not have been entirely apt. But the crucial difference between Hall J.'s 'test' for post-acquisition extinguishment and that of Judson J., is not merely one of specificity, or evidence required. Hall J. held that the power of unilateral extinguishment involves a taking of a legal right, and is therefore governed by the law, and fully reviewable by the courts.¹³⁷ For Judson J., the power is extra-legal, effectively an act of state. This basic difference was not resolved by the Supreme Court of Canada in *Calder*.

In *Delgamuukw v. British Columbia* the Court of Appeal majority¹³⁸ rejected the plaintiffs' contention that the Crown may not extinguish Aboriginal title affirmed under colonial law, unilaterally.¹³⁹ Much of the Court's discussion of the issue of unilateral extinguishment dwelt upon the threshold required to show that the sovereign intended to extinguish Aboriginal rights. Macfarlane J.A., however, strongly implied that executive measures could extinguish Aboriginal rights.¹⁴⁰ Though Macfarlane J.A. referred primarily to Canadian authorities in this context, he also cited with apparent approval *Sante Fe*'s assertion that Aboriginal title may be extinguished by, among other means, "the sword, ... the exercise of complete dominion adverse to the right of occupancy, or otherwise."¹⁴¹ Macfarlane J.A. thus appears to have incorporated in his reasons, without discussion and possibly without having analysed its full implications, the 'political questions/act of state' premise adopted by Judson J. in *Calder*. This understanding of Macfarlane J.A.'s position is reinforced by Macfarlane J.A.'s characterization of Judson J.'s restatement of the *Sante Fe* description, in *Calder*, as the majority view in *Calder*.¹⁴² Not having grounded the power of unilateral extinguishment in the law, Macfarlane J.A. implied that the power resides in a prerogative, akin to that entailed in the act of state doctrine.

Though not a Canadian case, mention should also be made in this context of the Australian High Court's decision in *Mabo v. Queensland*, released prior to the British Columbia Court of Appeal's decision in *Delgamuukw*. Brennan J. held in *Mabo* that Aboriginal peoples who elude the "Scylla" of denial of their ancestral rights at the point of Crown acquisition of

sovereignty, face a "Charybdis" in the subsequent power of the Crown to extinguish their rights unilaterally,¹⁴³ and that this power may be exercised by the executive (subject to legislative constraints such as Australia's *Racial Discrimination Act*) in accordance with the *Sante Fe* and *Tee-Hit-Ton* line of American authority.¹⁴⁴ While perhaps not freeing its exercise entirely from judicial review,¹⁴⁵ Brennan J. attributed this authority directly and apparently solely to the Crown's sovereignty.¹⁴⁶ None of the three other judgements in *Mabo* adopted this rationale for extinguishment.¹⁴⁷ Given its support among three of the seven members of the High Court panel, however, Brennan J.'s reasoning on this issue can be expected to receive close attention in future colonial law cases in Canada and elsewhere.¹⁴⁸

It is submitted that neither the act of state doctrine nor its American counterpart found a power of unilateral extinguishment of Aboriginal rights by the Crown, after Crown acquisition of sovereignty. This is so whether or not it is accepted, as argued next, that the conventional rules of the act of state doctrine should not be applied to Aboriginal rights where the Crown acquires coordinate sovereignty over Aboriginal territory.

1.5 Problems with the act of state doctrine as a rationale for the unilateral extinguishment of Aboriginal rights

Known in law as the "act of state" doctrine, courts have traditionally imagined executive and legislative action in relation to the acquisition of new territory to fall outside the purview of domestic courts. Whatever may have been the case prior to 1982, however, the passage of s. 35(1) of the *Constitution Act, 1982* dramatically changes the role of the judiciary as it relates to the legal and constitutional position of Canada's First Nations. Section 35(1) expressly "recognize[s] and affirm[s]" aboriginal and treaty rights of Canada's indigenous population. The content of those rights is directly dependent upon a judicial assessment of the legitimacy of the assertion of territorial sovereignty by European nations at the time of European settlement: Canadian sovereignty over its indigenous population is now a question for domestic constitutional law. ... For courts to invoke the "act of state" doctrine in such a context would be, in Brian Slattery's words, to "conced[e] their status as passive instruments of colonial rule."¹⁴⁹

Patrick Macklem

Whatever the position in British law, it would be mechanical for a modern Canadian court to apply without a murmur even the most outlandish claims made by the Crown in the past, without regard to the true international position, and in particular without regard to the sovereignty of the First Nations. The latter factors, it would seem, should temper and inform a Canadian court's reconstruction of this country's past and lead judges to assess the Crown's historical claims with a healthy dose of scepticism.¹⁵⁰

Brian Slattery

The foregoing analysis has attempted to identify the operation of the act of state doctrine in the law of extinguishment of Aboriginal rights. Perhaps because the doctrine is not a source of positive justification for sovereign conduct, courts, and especially Canadian courts, have paid little direct attention to this doctrine when considering the scope of Aboriginal rights surviving Crown acquisition of sovereignty, and the power of the Crown to extinguish Aboriginal rights thereafter. But the foregoing analysis suggests that, far from playing a minor role, the doctrine is quite central to the law of extinguishment of Aboriginal rights. More often than not, domestic courts give no reason for holding that the Crown has the power to extinguish Aboriginal rights. When a reason is given, the act of state doctrine, or a similar premise, often provides its foundation.¹⁵¹

We have seen that in one instance - extinguishment of "private rights" upon acquisition of Crown sovereignty - the act of state doctrine has sometimes been misconstrued. Canadian courts have generally avoided this error. In another instance, the doctrine (or its American counterpart, the 'political questions' doctrine) has been applied to sovereign invasions of rights incorporated into domestic law, where by its own terms, the doctrine should have no application. The opinion of Hall J. in *Calder* avoids this error, but the error has reappeared in subsequent Canadian case law.

Errors in application aside, there remain deeper concerns with judicial resort to this doctrine to effect the unilateral extinguishment of Aboriginal rights.

To return to its original rationale, a rule which descends directly from the dictate of "the King can do no wrong"¹⁵² should have stirred deep concern in societies subscribing to the rule of law, before the twentieth century. This original maxim was not an expression of administrative prudence. It was the English monarchy's declaration of open defiance to the courts, who in medieval times simply lacked the power to enforce their judgments against the monarchy. It was the monarchy's version of Machiavelli's dictum, "might makes right", and its justification was roughly the same as that given by Machiavelli himself:

You must know there are two ways of contesting: the one by law and the other by force. The first method is proper to men, the second to beasts, but because the first is frequently not sufficient, it is necessary to have recourse to the second.¹⁵³

In fact, English democrats battled the domestic predecessors of the act of state doctrine for centuries, in the Petition of Right (which specifically forbade executive imposition of martial law)¹⁵⁴, the Bill of Rights¹⁵⁵, and later reforms. Their struggle to enshrine the rule of law in English society had ancient roots, expressed in the Roman law maxim that "legal rights will not arise out of wrongdoing."¹⁵⁶ If, as Dicey has said, the royal prerogative is "the residue of ... arbitrary authority, which at any time is left in the hands of the Crown",¹⁵⁷ then the English law act of state doctrine is by its own definition an anachronism, and the question must be asked, why has the doctrine survived for so long?

Part of the answer, it appears, is that once the doctrine was reduced to matters of "foreign" affairs, its principal potential victims shifted from the citizenry of the state to non-citizens and an assortment of 'outsider' subjects.¹⁵⁸ According to one American commentator, "its a jungle out there" remains to this day the principal justification for the closely related political questions doctrine,¹⁵⁹ and echoes of this sentiment can often be heard in Aboriginal rights cases.¹⁶⁰ This fact overshadows the claim that, institutionally, the executive branch of the government offers a more representative and accountable means than the courts for the exercise of the foreign affairs power.¹⁶¹ (Of course, as critics of the doctrine have pointed out, the rule of law and the power of judicial review which is its principal instrument do not

exercise, but only control government power.¹⁶²) While judicially enforceable rights offer marginalized groups limited forms of social accountability to their interests, the exercise of power at the executive level of government offers virtually none.¹⁶³

Of course, it is a simple matter to define "rights" entirely in terms of allowances majoritarian institutions are willing to grant, and the courts have not always eschewed this means of avoiding the challenge of competing rights and interests in Aboriginal rights cases.¹⁶⁴ Unlike its modern American counterpart, however, the English law act of state doctrine cannot be excused on the basis that its boundary is restricted by the boundaries of rights: on the contrary - and most starkly in the case of competing Aboriginal rights - the English law doctrine serves precisely to defeat claims of right before they can possibly reach the courts.

If there exist worthy institutional reasons to permit the executive a free hand in certain matters relating to foreign affairs, these should not be permitted, either, to mask the oppressive substantive objectives the act of state doctrine has in fact traditionally served when applied to the acquisition of territory. For despite its neutrality on the question of the justice or propriety of the sovereign conduct it protects, the act of state doctrine has systematically facilitated particular state projects. In the Aboriginal rights context, the sweeping application of the doctrine in the 19th century - by the British courts throughout the Empire, and by the American courts throughout the western frontier¹⁶⁵ - demonstrates how conveniently the doctrine served colonialism.¹⁶⁶ When, for example, the Privy Council said in 1919 that with an 1893 conquest of an African sovereign "the old state of things ... has passed away and another and, as their Lordships do not doubt, a better has been established in lieu of it", the highest court of the colonies gave its permission to a particular colonial project, and also its imprimatur.¹⁶⁷ The Privy Council's remark upon the merits of the Rhodesian project broke with the neutrality promised by the act of state doctrine, but it nevertheless provides a glimpse of the judicial workings which made the doctrine such a useful tool. To similar effect is the extraordinary recent assertion by a Canadian judge, unsupported by the letter of the act of state doctrine but embraced by its spirit, that "the common law ... recognizes the *right* of the Crown to create colonies and settle them with its subjects". [emphasis added]¹⁶⁸

In recent times, the legitimizing function of the act of state doctrine is perhaps exemplified in the reception given by governments and the courts, until very few years ago, to Aboriginal peoples' assertions of an Aboriginal right of self-government, and especially to claims of continuing Aboriginal jurisdiction and sovereignty. It had been the policy of Great Britain in the 18th century and earlier to recognize the continuing sovereignty of the Aboriginal nations,¹⁶⁹ and the United States Supreme Court recognized in 1832 an inherent right of Aboriginal self-government.¹⁷⁰ But until very recently such assertions were commonly depicted by governments and the courts in Canada as "political" claims, threatening the fabric of Canadian society. Though seldom articulated in this way, the fact that the act of state doctrine precluded legal recognition of any claim that might possibly qualify the sovereignty of the Canadian state, has always buttressed this position. By keeping the possibility of competing claims outside the sphere of the law, the act of state doctrine has served to legitimize simplistic and absolute notions of Canadian sovereignty which lacked credibility even at the height of the colonial era, and to suppress understandings of mutual endeavour, interdependence, and authority grounded in Canada's shared histories.

If the age of imperialism¹⁷¹ gave to the act of state doctrine a utility¹⁷² and, in notions of 'manifest destiny'¹⁷³ and 'the white man's burden',¹⁷⁴ an apology it did not enjoy previously and which has only discredited the doctrine since, then the 20th century decolonization of most of the territories of India and Africa in which the doctrine flourished suggests that institutionally-grounded arguments for maintenance of the doctrine should not be assessed ahistorically. As Brian Slattery has said of the "prudential" defence of the doctrine:

Whatever the merits of this argument in other contexts, it is doubtful whether it should induce modern Canadian or American courts to accept fictitious accounts of the manner in which their countries came into being, accounts that accept even the most extravagant imperial claims at face value and ignore the historical presence and viewpoints of indigenous peoples. When it comes to reconstructing the legal history of their own countries, courts cannot take refuge in the act of state doctrine without forfeiting their moral authority and acting as passive instruments of colonial rule. In this context the act of state doctrine is mischievous and should be modified.¹⁷⁵

● Surely the essential failure in an 'act of state' rationale for extinguishing Aboriginal rights is the complete absence of any ethical basis for the doctrine in the context of colonization of territory. Judges often react with indignation to the claim that by an act of state, Aboriginal peoples may be made trespassers in their own homelands.¹⁷⁶ But if the seizure of Aboriginal property is an ethical matter, the suppression of Aboriginal political institutions and laws equally requires positive justification. Without such justification, application of a narrow presumption of continuity to "private property" rights alone has the appearance of an ethnocentric afterthought, leaving to the previous inhabitants rights that would be important to Britishers, but presuming at the same time that their loss of sovereignty and law-making power has either negligible effect, or net gain, their system having 'given way to its better'. Further, no amount of concern for the institutional integrity of one society can justify outlawing the institutions of other societies whose territory has been taken without their consent. As Brian Slattery has demonstrated, the ethical principles required for the regulation of relationships between different peoples are necessarily principles having intersocietal validity:

If the standards of one domestic legal system are chosen over those of another without explanation, the solution is arbitrary. If reasons are supplied, they must be founded on principles that transcend the competing domestic systems involved, for to draw reasons from just one system or another is both circular and arbitrary. *The question of which system of law should govern cannot be resolved by reference to principles secreted by one of the competing systems without assuming the supremacy of that system, which is the very question to be resolved.*¹⁷⁷ [emphasis added]

By banishing the question of the ethical basis for colonial authority from legal discourse, the act of state doctrine dismisses a necessary source of its justification.

In *R. v. Sparrow*, the Supreme Court of Canada quoted approvingly of the following statement by Noel Lyon:

... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. *It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.*¹⁷⁸ [emphasis added]

Two years before enactment of section 35, the United States Supreme Court declared that the political questions doctrine "has long since been discredited in takings cases" concerning relations between the United States and Indian tribes.¹⁷⁹

In *Operation Dismantle*, the Supreme Court of Canada held that the constitutionality of executive decisions made pursuant to the royal prerogative is subject to judicial review, and that without doubt, "disputes of a political or foreign policy nature may be properly cognizable by the courts."¹⁸⁰ It was argued in that case that the courts lack the ability to resolve such disputes. Madame Justice Wilson responded:

The real issue ..perhaps... is not the ability of judicial tribunals to make a decision on the questions presented, but the appropriateness of the use of judicial techniques for such purposes. ... I think we should focus our attention on whether the courts should or must rather than on whether they can deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us.¹⁸¹

In response to the claim that the courts *should* defer to the executive in such cases, Wilson J said:

It seems to me that the point being made by Lord Devlin, as well as by Tigar and Henkin in their writings, is that *the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state.*¹⁸² [emphasis added]

...

[I]f the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the court would have to decline. It cannot substitute its opinion for that of the executive to whom the

decision-making power is given by the Constitution. ... The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. ... *I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called 'political question'...*¹⁸³ [emphasis added]

Wilson J. concluded:

[I]f we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second-guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.¹⁸⁴

Thus the act of state doctrine was constitutionally renounced in Canada with enactment of Canada's *Charter*. And its counterpart has been discredited in the American courts in so far as seizures of Aboriginal land are concerned. The question remains, how should the law today treat claims by the Crown that the act of state doctrine validly extinguished Aboriginal rights forever, in a time when application of the doctrine to this end was considered routine? Without attempting a complete answer here, it is suggested that the following considerations, in addition to the foregoing ethical criticisms, are pertinent.

If conditions of war may sometimes require curtailment of the ordinary rule of law, the seizure of territory belonging to another people has never justified arbitrary extinguishment of the rights of that people. This is simply a corollary of the ancient principle that "legal rights will not arise out of wrongdoing."

Parliamentary supremacy has a more solid foundation in democratic societies than does the act of state doctrine as a reason for judicial deference, but the fact that many Aboriginal rights cases relying upon the act of state doctrine involve legislative measures fails to answer

most of the concerns raised above regarding the legitimacy of acts of state. Converted insistence that "Parliament can do no wrong", Parliamentary supremacy would risk being transformed into a justification for arbitrary measures, particularly where the victims of such measures possessed neither a colonial nor Imperial franchise. Reference to the act of state doctrine in cases involving legislative measures often seems to signal that Parliamentary sovereignty and the breadth of Parliament's intention are at risk of being inflated. Properly construed, the act of state doctrine poses no barrier to judicial determination of the extent of Parliamentary sovereignty,¹⁸⁵ or to recognition of sovereignties consistent with that of Parliament. Nor does the doctrine of Parliamentary supremacy itself.

Judicial pronouncements of the 19th century commonly framed the choice between an Aboriginal peoples' total subjection to the sovereignty of a colonial power, and retention of prior entitlements, as one between the survival of Aboriginal populations as subjects and their eventual disappearance as outsiders.¹⁸⁶ In part 4 below it will be seen how difficult it was for 19th century statespersons and jurists to conceive of any positive fate for Aboriginal peoples but assimilation. This prejudice served political interests, but it also entailed a moral judgement. Had judges in that era accepted that Aboriginal societies are not culturally or politically doomed, and that liberal-democratic societies can coexist with 'nations within', they could not so easily have justified embracing a doctrine that effaces Aboriginal peoples' distinct legal existence.

Lastly, it is important that historical practice, as distinguished from abstract prescription, be recognized as a source of colonial law. Both British and intersocietal practice have contributed to the federal common law of Canada, and qualified the act of state doctrine in this part of the empire.¹⁸⁷ Imperial orders such as the *Royal Proclamation of 1763* clearly override the doctrine, but more general customs of treaty-making and informal reciprocal relations may also have this effect. It would be doubly unjust to rely upon discredited legal theories of the past to justify the continuing dispossession of Aboriginal peoples while refusing to affirm historical practices that respected Aboriginal rights.

2. Recognition Doctrine

If, ... at the time Britain acquired the territory, the Gitksan and Wet'suwet'en had ... a cognizable polity and legal system - however different from the English legal system - then the fate of this system upon the arrival of the colonists must somehow be explained in law. The conclusion that it simply "gave way" to a new British regime cannot be correct in itself, for despite all the perceived faults of British colonialism, in British colonial law legal systems never simply disappeared: the indigenous *lex loci* either continued at common law, subject to imperial legislation or Crown prerogative, or was held not to have existed in the first place.¹⁸⁸

Mark Walters

In *Calder v. A.-G. British Columbia* the Attorney-General of British Columbia argued in the Court of Appeal as follows:

There is no Indian Title capable of judicial recognition in the courts of Canada unless it has previously been recognized by the Legislature or Executive Branch of Government.¹⁸⁹

According to this view, once the Crown has acquired territorial sovereignty, positive recognition by the new sovereign is required in order to render an Aboriginal right cognizable by the courts. Accepting the province's argument, Chief Justice Davey held in *Calder* that proof of Aboriginal title requires a showing that "by a prerogative or legislative Act, or by a course of dealing by the Crown from which a prerogative Act can be inferred, the Crown ensured to the [claimants] aboriginal rights to the lands in question, which might be asserted and enforced in the courts ...

"190

2.1 Various accounts of the doctrine

An assortment of versions of the recognition doctrine has appeared in the cases and commentaries. It is useful at the outset of this part to review each account and indicate whether it currently holds support in the jurisprudence.

In one account of the doctrine, acquisition of Crown sovereignty is deemed to extinguish¹⁹¹ rights held under the previous sovereign, such that subsequent Aboriginal claimants must rely upon acts of sovereign acknowledgement "which give them the right they wish to be declared."¹⁹² Under one variation upon this reasoning, the pre-existing rights are terminated, but may somehow be revived in their previous state upon sovereign "recognition".¹⁹³ Under a simpler variation, which Brian Slattery refers to as the "doctrine of radical discontinuity",¹⁹⁴ the terminated rights may not be revived: thenceforward the only "Aboriginal" rights cognizable by the courts are rights granted to Aboriginal peoples anew - perhaps of similar character to their previous rights, but with a different source - by authority of the new sovereign.¹⁹⁵ From this latter perspective, "recognition" inaccurately refers to the substitution of one set of rights for another.

Under a different account, sovereign recognition protects Aboriginal rights from extinguishment in the first instance: unrecognized Aboriginal rights are terminated automatically upon acquisition of Crown sovereignty, but recognized rights are saved from this fate intact.¹⁹⁶

The act of state doctrine, discussed in part 1 above, is usually offered as the basis for either of these two accounts of the doctrine of recognition.¹⁹⁷ As we have seen,¹⁹⁸ this claim either assumes that a seizure of Aboriginal property occurred upon acquisition of Crown sovereignty, or that with sovereignty the Crown acquired rights inconsistent with the Aboriginal right asserted. The act of state doctrine is said to immunize the seizure or acquisition of an inconsistent Crown right from judicial review, and thus nullify the affected Aboriginal right. Recognition of the Aboriginal right in question by the sovereign is said to be required in order (depending on the particular version of the recognition doctrine applied) to grant back the taken right, restore the taken right to its original holder, or rebut the presumption that a seizure has occurred. The Privy Council's frequently cited dictum in *Vajesingji Joravarsingji* illustrates the general idea:

[W]hen a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through its officers, recognized. Such rights as he had under the rule of predecessors avail him nothing.¹⁹⁹

For the reasons we have reviewed,²⁰⁰ the act of state basis for the doctrine of recognition has been discredited in Canada in relation to Aboriginal rights of a 'private' nature. To the extent that the Aboriginal right asserted in *Calder* consisted of 'private' property, for example, the reasoning of Chief Justice Davey above has thus been rejected. As we have seen, there is some support in the Canadian cases for an extinguishing application of the act of state doctrine to other gradations²⁰¹ of Aboriginal right, such as Aboriginal sovereignty and associated 'public' property.

A related theory can be generally described as the "doctrine of common law dispossession".²⁰² This doctrine, which also posits the automatic nullification of Aboriginal rights, rests alternatively on three distinct legal arguments. Some commentators do not treat this doctrine as part of the recognition doctrine *per se*, in part, perhaps, because the negation of Aboriginal rights supposed to be involved results from the operation of the common law (which in most cases²⁰³ may be introduced into a territory either at or after acquisition of Crown sovereignty) rather than from the acquisition of sovereignty itself. Also, nullification of Aboriginal rights is caused under the most prominent version of this doctrine (an argument based on the feudal theory of tenures) by an operation somewhat different from the immunization of Crown claims which the act of state doctrine involves. The theory of tenures argument would nullify Aboriginal rights by displacing,²⁰⁴ disqualifying,²⁰⁵ or overreaching²⁰⁶ them.

In its "patrimony of the nation" and "royal prerogative" accounts, the doctrine of common law dispossession does purport to effect a more direct extinguishment of Aboriginal rights. Both of these arguments claim that upon the reception of English law in a newly acquired

territory, certain Aboriginal rights are implicitly cancelled by operation of the common law. The patrimony of the nation argument holds that since the Crown enjoys power to rule colonial lands for the benefit of the nation as a whole, the common law, upon its introduction in a colony, necessarily dispossesses the previous inhabitants of their property in land, in service of the new national interest.²⁰⁷ The royal prerogative claim holds that the common law concedes to the Crown as a matter of prerogative, universal and absolute ownership of colonial lands, inconsistent with any surviving Aboriginal title.²⁰⁸ Both of these theories are derived from Australian jurisprudence, and were repudiated by the High Court of Australia in its recent decision in *Mabo v. Queensland*.²⁰⁹

As we have noted, the third and most prominent basis for the doctrine of common law dispossession - the feudal theory of tenures - is said in this argument not to effect a taking or cancellation of rights directly, but to disqualify Aboriginal title from common law affirmation nonetheless.²¹⁰ By a legal fiction, the theory of tenures deems the Crown originally to have owned all of the lands in England. Transported to the colonies, the theory in this argument is said to disqualify from judicial affirmation any title to land originating in a source independent of the Crown. This basis for the doctrine of common law dispossession depends upon displacement and disqualification rather than direct appropriation, but the legal result is in most respects practically the same as extinguishment: Aboriginal rights are "invalidated" or rendered "void".²¹¹ The argument that the feudal theory of tenures has this invalidating effect upon Aboriginal title has had no currency in Canada since at least the time of the Supreme Court of Canada's decision in *Guerin*,²¹² and was rejected recently by the High Court of Australia in *Mabo v. Queensland*.²¹³ At least in any of these land rights variations, the doctrine of common law dispossession is unsupported by the Canadian jurisprudence.

A further related theory might be called the doctrine of 'sovereign dispossession'. As in the case of the theory of tenures basis for the doctrine of common law dispossession, this argument does not necessarily entail a taking of a right, or its cancellation, but treats Aboriginal rights instead as displaced or superseded, such that any subsequent Aboriginal 'entitlements' depend on some grant from the new sovereign.²¹⁴ Unlike the theory of tenures argument, this

claim does not depend on a positive rule of the common law. It holds that Aboriginal rights lose any basis for affirmation by the courts, either upon the Crown's acquisition of sovereignty, or upon the exercise of that sovereignty. No rule of colonial law, or any independent legal foundation, appears to have been advanced in support of this reasoning. This argument shares a troubling affinity with the discredited act of state claim which assumed that, because the courts accord the Crown power to seize Aboriginal lands at a particular moment, the Crown should be presumed to have done so. In Canada, this argument was recently accepted by the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*, as an alternative ground for declining to affirm Aboriginal rights of jurisdiction.²¹⁵ We shall return to it in that context below, and in more depth in part 3, "supersession by law".

The doctrine of recognition and these closely related theories have often been applied in conjunction with the notion that something peculiar about the nature of Aboriginal society at the time the Crown acquired a territory, precluded affirmation of Aboriginal rights under English law, absent sovereign recognition.²¹⁶ Theories holding that a pre-existing Aboriginal right has no continuing force, and theories holding that no Aboriginal right cognizable as such preceded the Crown's acquisition of sovereignty, tend to share important thematic features.²¹⁷ Conceptually, however, it can be important to distinguish between these two kinds of argument. The former depends upon the extinguishment, or at least the displacement of Aboriginal rights; the latter upon denial of their existence.²¹⁸ Henceforward in this part all of the theories which fit into the former class will be treated as variations of the doctrine of recognition. The latter class is reserved for discussion under part 4, "*terra nullius*" below.

With the enactment of s. 35 of the *Constitution Act, 1982*, the conceptual distinction between theories of extinguishment of Aboriginal rights upon acquisition of Crown sovereignty or reception of English law, and theories of their denial at those moments, gained constitutional significance. Pre-existing Aboriginal rights, though possibly susceptible to extinguishment prior to 1982 (subject to earlier constitutional constraints), are now constitutionally protected unless they were so extinguished, whereas rights which never existed in the eyes of colonial law, were never eligible for constitutional protection.²¹⁹

2.2 The countervailing doctrine of continuity

As the foregoing description indicates, the doctrine of recognition has been applied to a range of gradations of Aboriginal right, from sovereignty, through to laws or legal systems, and 'private' rights. As we have seen, the recognition doctrine has been thoroughly rejected in Canada in so far as 'private' rights are concerned.²²⁰ Instead, a "doctrine of continuity", presuming survival of pre-existing private rights upon Crown acquisition of territory, governs the determination of such rights.²²¹ The doctrine of continuity clearly defeats both the claim that seizure of private property occurs automatically in the act of state by which territorial sovereignty is acquired, and the claim that reception of the common law in a territory has some similar extinguishing effect.²²²

2.3 Continuity of Aboriginal sovereignty and jurisdiction

The present status of the recognition doctrine in Canada is less clear respecting Aboriginal sovereignty and jurisdiction.

We have canvassed the status of the act of state basis for the recognition doctrine in relation to these matters in part 1. In 1988 Professor James Crawford advised the Canadian Bar Association that in his opinion, Aboriginal sovereignty would have had to have been recognized by the Crown in Canada in order to remain in existence following acquisition of Crown sovereignty, and that in his view, the history of Canadian state practice does not disclose such recognition.²²³ Crawford's opinion applies the doctrine of recognition - and rejects the argument that the principle of continuity should apply - to claims of Aboriginal sovereignty and jurisdiction.

Crawford argued that the act of state doctrine immunizes the acquisition of Crown sovereignty from judicial review,²²⁴ and that, subject to contrary legislation, the Crown ordinarily acquires a sovereignty that is "substantially unfettered" until legislatures are

established, regardless of the mode of acquisition.²²⁵ Further, the opinion asserts that the Marshall Court's doctrine of inherent tribal sovereignty, under which the Crown's acquisition of "external" sovereignty had limited consequences for the "internal" sovereignty of Aboriginal peoples,²²⁶ constituted "not so much the recognition of a right ... as of a state of affairs accepted by the sovereign as part of the structure of government of a subject people."²²⁷ By contrast, argued Crawford, such a "state of affairs" has generally not been recognized in the historical treaty-making or legislative practice of Canada's Crown.²²⁸

It is submitted that Chief Justice Marshall's conception of inherent and continuing tribal sovereignty in *Worcester v. Georgia*²²⁹ does not support Professor Crawford's reading. Since *Worcester v. Georgia* remains the foundation case on the issue of continuing Aboriginal sovereignty and jurisdiction in colonial law, the main points of Marshall C.J.'s analysis merit examination.

In *Worcester v. Georgia* the plaintiff, a white missionary, had been convicted by a state court of "residing within the limits of the Cherokee nation without a licence ... and without having taken the oath to support and defend the constitution and laws of the state of Georgia", contrary to a Georgia statute.²³⁰ The plaintiff had been sentenced to imprisonment.²³¹

The United States had signed several treaties with the Cherokees.²³² The plaintiff argued that the statute in question violated the treaties in force, and therefore violated the U.S. constitution, which guarantees the provisions of treaties.²³³ Marshall C.J. upheld both this and the plaintiff's alternative argument, that the state lacked jurisdiction in Cherokee territory in any event, because the power to regulate intercourse with Indian nations was exclusively reserved to the federal government under the constitution.²³⁴

Marshall C.J. approached the case expressly on the premise that both the "rights, if they have any" and the "political existence" of the Cherokee nation were directly in issue.²³⁵ (Evidently, had the Cherokee nation not possessed "rights", the Chief Justice was prepared to say as much.) Marshall C.J. accepted that the purported effect of the Georgia statute, taken in

its entirety, was to "abolish" the "institutions" and "laws" of the "whole Cherokee country", "and annihilate its political existence".²³⁶ The Chief Justice considered the plaintiff's alternative argument first, inquiring on what basis the state might claim jurisdiction over the Cherokee nation, "[t]he extra-territorial power of every legislature being limited, in its action, to its own citizens or subjects."²³⁷ Most of the judgement is taken up with Marshall C.J.'s response to this question.

Marshall C.J.'s reasons for holding that no basis for state jurisdiction existed, can be stated as follows:

i) before European contact, the Aboriginal inhabitants of America were "divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws";²³⁸

ii) the "pre-existing rights" of such nations were not "annulled" by European discovery of their territory,²³⁹ but superior might gave to the discovering European nation rights, which could be realized upon possession of the territory;²⁴⁰

iii) the right of the discoverer amounted to "title ...against all other European governments, which title might be consummated by possession"; but this principle "could not annul the previous rights of those who had not agreed to it", and "could not affect the rights of those already in possession";²⁴¹

iv) the relations between a discovering European nation and Aboriginal nations were determined by the European nation claiming rights of discovery;²⁴²

v) colonial charters granted by British monarchs "asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned";²⁴³

vi) for advantage over other European nations, the Crown purchased the "alliance" of the

Indian nations "and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only", and the *Royal Proclamation of 1763* confirmed this relationship;²⁴⁴

vii) during and after the revolutionary war Congress treated with the Indian nations on a basis of equality, assuming, by consent, the same protective role which the British Crown had discharged previously, and the first Cherokee treaty's description of the Cherokees as "under the protection" of the United States therefore involves "practically, no claim to their lands, no dominion over their persons", and no "surrender of their national character";²⁴⁵

viii) wording in the treaty implying that "instead of granting, [the Cherokees] were receiving lands" should not be so construed, because "the actual subject of contract was the dividing line between the two nations", and the Cherokees "were not critical judges of our language";²⁴⁶

ix) acknowledgement of Congressional authority to "manage all their affairs" in the treaty, "for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions", was not a "surrender of self-government" on the part of the Cherokees, but only a cession of limited powers relating to regulation of trade;²⁴⁷

x) subsequent treaties with the Cherokees were of the same nature, consistent with relations established with the British;²⁴⁸

xi) Congress subsequently passed statutes evincing the intention to honour the previous relationships established, and to protect the security of the tribes;²⁴⁹

xii) as between the states and the United States, the constitution assigns to the latter, exclusive powers comprehending "all that is required for the regulation of our intercourse with the Indians".²⁵⁰

Marshall C.J. concluded with the following description of the contemporary status and rights of the Cherokee nation, and of the Cherokees' relationship to the states and federal government:

The Cherokee nation, then, is a distinct political community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia can have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.²⁵¹

Because of its extra-territorial nature, and because the Cherokees were not citizens or subjects of the state, Marshall C.J. ruled that the Georgia statute was void. Supreme Court power to reverse the lower court's order required, however, infringement of the United States constitution or of a federal law or treaty, and Marshall C.J. therefore founded his reversal of the conviction and sentence upon findings of such infringements.²⁵²

Great reliance is placed in *Worcester v. Georgia* upon British and American policy towards sovereign Aboriginal peoples, and upon treaty practice and legislative acts, but none of these measures are conceived of as granting rights to the Indians, or as saving Aboriginal rights from extinguishment. On the contrary, the dominant themes of Marshall C.J.'s reasons are that Indian nations were "distinct, independent political communities" before, during, and after Crown acquisition of sovereignty; that Aboriginal jurisdiction and property are inherent in their status, derived from natural law's acknowledgement of the original and continuing sovereignty of Aboriginal peoples; and that such entitlements qualify, as a matter of "right", for affirmation by the courts. Historically, positive measures secured Aboriginal rights when such security was strategically important, and provided guarantees against external interference, but in the colonial law which emerged from the Crown/Aboriginal relationship, Marshall C.J. accorded to Aboriginal sovereignty and jurisdiction a legal status independent of these acts.²⁵³

Worcester v. Georgia thus applies a principle of continuity, rather than a requirement of

recognition, to the issue of survival of Aboriginal sovereignty and jurisdiction in post-"discovery" North America.²⁵⁴ In the next two sections two more specific arguments against the continuity of Aboriginal sovereignty and jurisdiction appearing in the case law and commentaries are reviewed. Under the first, only 'private' rights qualify for continuance under colonial law. Under the second, some "laws", or "systems of law" also continue, but only those which are 'private' in nature.

2.3.1 Continuity of 'private rights', or laws?

At the time of Professor Crawford's opinion there was little Canadian authority at the appellate level on the question whether *Worcester v. Georgia* would be followed in Canada, and the principle of continuity applied to Aboriginal sovereignty and jurisdiction.²⁵⁵ Some commonwealth decisions, however, expressed the doctrine of continuity in the language of private rights, raising a question whether any distinction in principle might exist between the status of 'private' and other Aboriginal rights under the doctrine. Some such distinction is implied in both of the majority decisions of the British Columbia Court of Appeal in *Delgamuukw*, which concluded in 1992 that Aboriginal sovereignty and jurisdiction were automatically extinguished or displaced upon the Crown's assertion of sovereignty over the plaintiff people's territory.²⁵⁶

Alone within the majority in *Delgamuukw*,²⁵⁷ Wallace J.A. adopted reasons which presume a distinction in this context between rights of a private nature, and rights of a private law nature. This section addresses Wallace J.A.'s argument that only the former rights are encompassed within the doctrine of continuity.

In one of the leading cases adopting the doctrine of continuity, the Privy Council stated that "[a] mere change in sovereignty is not to be presumed as meant to disturb rights of private owners".²⁵⁸ In *Delgamuukw*, Wallace J.A. acknowledged that in territories acquired derivatively, the Privy Council had affirmed, additional to the continuity of rights of private ownership and other rights of a private nature, the continuity of "native law systems", which

"may have retained the capacity to create new rights and customs ... justiciable in the courts, and binding upon all inhabitants".²⁵⁹ Wallace J.A., held, however, that in settled colonies, the Aboriginal rights which survive reception of the common law do not encompass systems of law.²⁶⁰ According to Wallace J.A., only rights of a private nature continue in effect, as creatures of the common law.²⁶¹

In the view of Wallace J.A., the "settled-conquered distinction" and in particular, the relatively truncated protection which Wallace J.A. understood to be afforded pre-existing rights in settled, as opposed to conquered or ceded colonies, is "a fundamental premise of our legal system," which need not accord with principles of contemporary justice and human rights, because it forms part of the "skeleton of principle which gives the body of our law its shape and internal consistency."²⁶² Wallace J.A. defined the distinction as follows:

Since the very beginning of British involvement in territory outside of England, the common law has distinguished between colonies acquired by conquest and those acquired by settlement. In colonies acquired by conquest or cession, the common law rule was that the indigenous law continued in the colony until altered by the Sovereign or parliament. In contrast, the common law has long been held to automatically prevail as the system of law in a settled colony.²⁶³

While acknowledging that in settled colonies such as British Columbia the common law would be adjusted to protect certain Aboriginal practices and customs,²⁶⁴ Wallace J.A. derived from this distinction the "principle" that in settled colonies "the adjusted common law became the law of all subjects - native and non-native alike".²⁶⁵ In stating the distinction and "principle" this way, Wallace J.A. posited an imperative that there be a uniform system of law in colonies, with allowance in settled colonies for "special"²⁶⁶ Aboriginal rights. Since Aboriginal rights thus conceived were exceptions to the general rule, it followed that they must be narrow in scope.

Under part 4 below we will examine the premises upon which the settlement basis for Crown acquisition of territory rests in colonial law. It should be noted here that the doctrine that the Crown may acquire territorial sovereignty by settlement was originally developed to provide for a practical and sufficient mode of acquisition of *unoccupied* territory. In its international law

origin, the doctrine depended upon the principle, derived from Roman property law, that title to unoccupied lands could be acquired by occupation.²⁶⁷ Even after the settlement doctrine was enlarged (or, more accurately, distorted) so as to apply to territory occupied by non-European societies, the settlement doctrine, and in particular, the colonial law rule that in settled territories the common law follows the settlers, continued to depend upon the fiction of "enlarged *terra nullius*", i.e. the assumption that no sovereign or system of law was present in such territory prior to its acquisition by the Crown.²⁶⁸ In other words, under Wallace J.A.'s "settled/conquered distinction", English law applied automatically in settled territory *because there was assumed to be no other law in place*.²⁶⁹

This premise was false in the case of territories occupied by Aboriginal peoples,²⁷⁰ and the settlement theory is thus incoherent as a rationale for the authority of British legal systems in occupied territory. It would compound this incoherence, however, if the myth of enlarged *terra nullius* were treated, further, as a *principle requiring abrogation* of Aboriginal legal systems wherever occupied territory was acquired by this mode alone. Nothing in the colonial law's settled/conquered distinction has ever suggested that conquered subjects should presumptively enjoy the benefit of their previous system of laws, in preference over subjects whose territory has been "settled", who ought not; nor has the distinction implied that the settlers' law might be more suited to prior inhabitants than might the law of a conqueror.²⁷¹

There is substantial authority in support of a different position than that adopted by Wallace J.A. The different view does not support the "principle" of uniformity affirmed by Wallace J.A. It suggests instead that the underlying logic of the rule that "English law accompanied the colonists to the extent it was applicable to local circumstances"²⁷² can and should transform Wallace J.A.'s 'simple' account of the settlement doctrine where, in those local circumstances, prior sovereignty and a system of law were present. In the resulting 'complex' account, Aboriginal laws continue to apply to Aboriginal peoples in settled territory, while English law applies to the settlers. This distinction in the colonial law between 'simple' rules of acquisition, prescribing one system of unwritten law for all subjects in a colony, and 'complex'

rules, prescribing the coordination of Aboriginal and English systems, is delineated by M. Walters, in an article building on the work of Brian Slattery, Geoffrey Lester, and Kent McNeil.²⁷³ As will appear, the jurisprudence contains examples of 'complex' rules of acquisition for territories acquired derivatively (i.e. by conquest or cession) and originally (i.e. by settlement).

It is evident from their genesis that the judicial rules governing applicability of *any* system of law in a colony were designed largely to suit British settlers and British imperial interests, regardless how a colony was actually acquired.

Naturally, this concern determined which law would apply in uninhabited territories settled by British colonists. In such territories, some legal system had to apply, and it might as well have been British, since no other system was in place, and no other persons were affected.²⁷⁴

The same consideration determined that English law would apply to the settlers in inhabited territories classified as settled.²⁷⁵ The appropriateness of this rule is less self-evident, but once the leap that sovereignty could be acquired by occupying an occupied territory was taken - a leap dependant on the "enlarged" *terra nullius* myth that no society deserving of consideration occupied the territory²⁷⁶ - the enunciation of a rule suited to the colonists of the new sovereign was perhaps not far reaching.

More striking, in the context of the evolution of rules Wallace J.A. conceived of as based on a principle of uniformity of law, is the fact that concern for the distinctive interests of the settlers and their governors appears to have spurred the creation of the fiction of enlarged *terra nullius* itself.²⁷⁷ The 'simple' alternative to such a fiction was, after all, subjection of all of the inhabitants of such territory to a pre-existing regime that was alien to the settlers, either on the basis of the 'simple' doctrine of conquest or cession,²⁷⁸ or (disregarding the act of state doctrine, which contained no rule itself for application of laws) on the basis that no British sovereignty at all had been acquired by the occupation of occupied territory.²⁷⁹ In some

● applications of the fiction, the courts avoided the pretence that Aboriginal societies did not occupy settled territories, but in those cases, concern for the settlers and the distinct interests their presence served, led the courts to declare forthrightly the British interests preferred by the myth, rather than abandon it. One British judge, for example, acknowledged that the distinction between the applicability of rules of settlement and conquest depended not on the presence or absence of prior inhabitants in a territory, but "had always practically corresponded with that, between the absence and the existence of a *lex loci* by which the British settlers might, without inconvenience, for a time, be governed..." [emphasis added].²⁸⁰ Similarly, as recently as 1979 a Justice of the High Court of Australia would declare that the conquest rule applied only in colonies "in which there was an established system of law of European type"; and the settlement doctrine, where the territory "by European standards, had no civilized inhabitants or settled law".²⁸¹

In this last-mentioned instance, concern for the serviceability of laws to British interests operates not only as a reason to uphold the distorted doctrine of *terra nullius*, but as the determinant whether a colony could qualify as conquered.²⁸²

The genesis of these rules demonstrates that in developing the distinction between settled and conquered territories, "neither British nor colonial courts were prepared to apply Aboriginal customary law to British settlers."²⁸³ Instead, "the suitability of local law to British interests became the important point."²⁸⁴ Rather than generate a principle that one set of laws (adjusted or not) should govern everyone in territories acquired in a certain manner, the jurisprudence sanctioned extraordinary distinctions between particular peoples and their systems of law, demonstrating "tender concern"²⁸⁵ for the distinct cultural and political interests of the dominant party to the colonial relationship. The emergent pattern was 'English law for British settlers and their interests', not 'one law for all'.

The impact of such assiduous concern upon the doctrine of peaceful settlement was patently one-sided and ethnocentric. Rather than cement the skeleton of principle upon which colonial law depends, the fiction of enlarged *terra nullius* distorted the doctrine of peaceful

settlement, undermining the whole basis in principle - acquisition of unoccupied territory occupation - upon which it was founded. Yet as Walters has observed, "[t]his explanation sheds light on why aboriginal territories in places like Canada and Australia were classified with vacant territories, but it does not indicate why, or whether, from the perspective of British constitutional law, the laws and customs of aboriginal peoples automatically ceased to exist within aboriginal communities upon the introduction of English law for British settlers."²⁸⁶ If the cultural and political imperatives of the settlers and their governments might be permitted to determine which system of law applied to the settlers, then the rule that local circumstances are relevant might at least respond to the "reality of cultural pluralism" which, as Walters notes, is "inevitable under a policy of colonialism".²⁸⁷ At a minimum, the necessary response is to introduce "dimensions of legal pluralism"²⁸⁸ or, in other words, to recognize that Aboriginal systems of laws and institutions of government are equally important to Aboriginal peoples, and should govern them.²⁸⁹

Wallace J.A. acknowledged in his opinion that in some parts of the empire British courts did apply the derivative rule of conquest or cession to non-European territories, affirming the continuation of Aboriginal systems of law.²⁹⁰ But Wallace J.A.'s analysis, and the impetus for the doctrine of enlarged *terra nullius*, noted above, overlooked the fact that the 'simple' conquest rule itself had often been modified, applying British law to the British settlers despite the early prescription that the pre-existing system of law apply to everyone in such colonies, unless altered.²⁹¹ In such cases, Aboriginal law continued to apply to the Aboriginal communities in conquered territories, under a regime of legal pluralism.²⁹²

This division of the 'simple' rule of conquest into a 'complex' regime shows just how firmly colonialist interests guided the course of the colonial law on such matters, protecting settlers in such colonies from the culturally and politically negative consequences of a doctrine rooted in a principle of justice, and in powerful military and administrative considerations. Yet this innovation also demonstrates the capacity of the colonial law to develop in a pluralistic direction. Further, its adoption appears to refute - absent some special reason why settled colonies should not have the benefit of legal pluralism²⁹³ - the contention that the

settled/conquered distinction values uniformity of law above the cost of imposing upon a people a foreign system of law.²⁹⁴

Also largely overlooked in Wallace J.A.'s opinion is the substantial, direct judicial support for a reciprocal, 'complex' settlement rule, under which English law governs the colonists, but Aboriginal law continues to apply to Aboriginal peoples. Significant support for such a rule is present in cases arising from other countries with British colonial origins.²⁹⁵ The leading Canadian authority for the 'complex' settlement rule is the decision of the Quebec Superior Court in *Connolly v. Woolrich*.²⁹⁶ Although none address the issue of continuing Aboriginal systems of law as directly as does Wallace J.A. in *Delgamuukw*, several Canadian cases decided since *Connolly v. Woolrich* have adopted reasoning generally consistent with its holding.²⁹⁷

The 'complex' settlement rule has been expressed differently by different commentators.²⁹⁸ Common to all of its formulations is the continuity of Aboriginal systems of law within Aboriginal communities.

Kent McNeil states the rule as follows:

... English law would apply in so far as local conditions warranted. It would have accompanied the settlers to that extent because they were in need of it, and because they were entitled to the benefit of its protection as British subjects. But indigenous people who had their own systems of law would not be in need of English law to regulate their internal affairs. As long as they were not integrated into the settler society, their laws respecting civil matters (provided they were not immoral or unconscionable by English standards) would evidently be more appropriate for that purpose. With respect to those matters at least, English law would be inapplicable to them. However, as British subjects and residents of one of the Crown's dominions, in general they would have to respect English public law, especially the law relating to serious crimes.²⁹⁹ By the same token, they would be protected by English law, not only in the criminal domain, but in civil areas where their own system was inadequate.³⁰⁰

According to Walters, the general rule is that:

(1) with respect to settlers and indigenous inhabitants within British communities, English law relevant to their circumstances applies; and (2) with respect to indigenous inhabitants living in distinct communities, indigenous law applies, to the extent such law is not inconsistent with justice, humanity or Britain's sovereignty and has not been altered or abrogated by express British legislation.³⁰¹

Brian Slattery's formulation incorporates Crown-Aboriginal practice in North America and, more forthrightly than does McNeil's or Walters', embraces jurisdictions, including those which entail distinct institutional status and capacity:

[T]he complex process by which the Crown gained authority over Canadian territories did not terminate the Aboriginal rights of First Nations, which continued to exist under the common law of Canada. Prominent among these rights, I suggest, is the Aboriginal right of self-government. This view is supported by *R. v. Sioui*, where the Supreme Court cited a passage from *Worcester v. Georgia*, summarizing British practice in North America prior to the American revolution:

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical expositions of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection, and she made treaties with them, the obligation of which she acknowledged.

On this view, Aboriginal peoples became autonomous nations living under the Crown's protection, exercising powers of self-government within a larger constitutional structure partially generated by joint British and Aboriginal practice.³⁰²

The Supreme Court of Canada decision in *Sioui*, cited by Slattery in the foregoing passage, also stated plainly that in North America, whose Canadian area has generally regarded as settled vis a vis Aboriginal peoples,³⁰³ "[t]he British Crown recognized that the Indians had certain ownership rights in their land ... It also allowed them autonomy in their internal affairs, intervening in this area as little as possible."³⁰⁴

Thus there is substantial judicial authority in support of the view that the principle of continuity forming part of Canada's colonial law incorporates Aboriginal systems of law, in addition to rights of a strictly 'private' nature.

2.3.2 Continuity of 'private laws', or sovereignty and jurisdiction?

Several commentators have pointed out that under the simple rule of conquest/cession, the laws which continue following the change in sovereignty include "the entire body of private law which governs the relationship between subject and subject, as opposed to the law which governs the relationships between the subject and the institutions of government".³⁰⁵ Some commentators therefore reason that the latter, 'public' body of law must be "supplanted"³⁰⁶ upon the change in sovereignty (or, to use equivalent terms we have encountered above, 'displaced', or 'superseded').

James Crawford, in his 1988 opinion, drew from this distinction between private and public systems of law the general conclusion that in any colony, whether settled, conquered, or ceded, the doctrine of continuity applies only to "private law rights".³⁰⁷ Such rights would apparently include, beyond the range of land-related customs and practices Wallace J.A. was prepared to affirm in *Delgamuukw*, the rights to follow Aboriginal legal standards and procedures in personal and social relationships, such as marriage and adoption. In this limited sense, Aboriginal 'laws' or 'systems of law' would continue in force in relation to Aboriginal peoples.³⁰⁸

Two questions might assist in determining the limit of the range of rights included in this view of the doctrine of continuity. Are rights to exercise *jurisdiction*, as claimed in *Delgamuukw*, included? Further, is the full scope of subject-matters over which peoples or nations can ordinarily make laws integral to their societies, affirmed? (If not, the doctrine would apply only to 'private' matters.)

Another way of posing the first of these two questions is to ask, if Aboriginal peoples'

'private laws' continue in relation to themselves and their private property, would their power to make and revise their laws continue in force? The answer is no, not in a formal way. To use a familiar Canadian example, on this view of the principle underlying the doctrine of continuity, the colonial law guaranteed Quebecois inhabitants the right to have their civil law continue following the British conquest, but not the right to an institution of government offering them or their descendants any significant control over the evolution of that law. On this view, whatever government is installed by the colonial powers takes over from its predecessor the formal powers to change the civil law, by legislation, and to establish the courts applying the law: if the people of Quebec happen to control those institutions, they have never done so as a matter of right. No jurisdiction whatsoever may survive a change in sovereignty.

Informally, Crawford's view allows for some Aboriginal control over the evolution of Aboriginal customary law, because common law courts treat customary law as a matter of fact rather than common law.³⁰⁹ Aboriginal peoples alone may alter its content, without any need for involvement by legislators.³¹⁰ Courts must interpret customary law, but they are not entitled to overrule Aboriginal law-makers themselves on questions of definition.³¹¹ Nevertheless, in this 'private law rights' conception of the doctrine of continuity, Aboriginal laws may be superseded in any respect by legislation enacted by political institutions representing the Crown. The jurisdiction to make such paramount laws, either generally, or specifically in relation to Aboriginal peoples, would belong to those Crown institutions, rather than Aboriginal peoples themselves.

A negative answer to the second question posed above also follows from this view. Only Aboriginal systems of law relating to 'private' matters would continue following a change in sovereignty. Such matters would include, for example, family law and private property, but not the power to govern Aboriginal territory as though it belonged to Aboriginal peoples in their governmental capacity.

One difficulty with this 'private law rights' conception of the doctrine of continuity is that it derives from, and makes hypothetical sense in the context of, the 'simple' rule for conquered

and ceded territories only.³¹² As we have seen, 'simple' rules for the application of laws ultimately proved inadequate to the purposes of colonial law. Hypothetically, it is possible that in those conquered or ceded colonies where 'simple' regimes prevail, and Aboriginal law serves as the unwritten law throughout the territory, continuation of such laws without Aboriginal jurisdiction or any cognizable and distinct institutional support, might have some utility. Since rival systems of laws for the non-Aboriginal population would be absent, colonial institutions themselves might be expected to respect to some degree the pre-existing legal regime, and its underlying values. In a pluralistic, 'complex' regime, however, informal status for the pre-existing system would inevitably render it token. The everyday business of colonial courts and governments would be to implement a rival and dominant system of law. Institutional autonomy would be required for Aboriginal peoples. Without such support, any purportedly 'complex' regime would almost certainly fail to respect cultural pluralism.

More fundamentally, this conception of the doctrine of continuity provides no defensible reason for its dramatic distinction between the status of 'private' and 'public' matters for Aboriginal peoples, the former of which it purports to value, and the latter of which it consigns to disappearance.³¹³

The only justification which positive law appears to offer for this distinction relies upon the fact that the Crown possesses prerogative power to establish new constitutions for colonies.³¹⁴ There are two difficulties with treating the existence of this power as necessarily displacing or extinguishing Aboriginal 'public laws'. First, this argument suggests no reason why the prerogative to establish new constitutions should be presumed to have an extinguishing or displacing effect upon pre-existing rights, when the principle of continuity generally denies such a presumptive effect to exercise of the prerogative to acquire territory in the first instance. To the extent of its validity, and subject to constitutional limitations, the conventional act of state doctrine permits the Crown to effectively abrogate pre-existing laws concerning private property when acquiring territory, but the doctrine of continuity presumes that such extinguishment of rights does *not* occur in the absence of positive action. Why should the power to organize the government of the settlers be presumed to have abrogated the equivalent powers of Aboriginal

peoples, when the Crown's powers to abrogate laws of a 'private' nature are not presumed to have had equivalent effect? This justification appears to suffer from the same casual approach to fundamental rights which characterizes the doctrine of recognition generally.

Second, the purported extinguishment or displacement of Aboriginal 'public laws' by the installation of colonial governments, after sovereignty has been acquired, would plainly violate the rule that acts of state can not be carried out against British subjects upon British soil. This second concern is discussed further under part 3, "supersession by law" below.³¹⁵

Finally, the 'private law rights' restriction upon the doctrine of continuity contravenes a significant line of judicial authority. The conceptual starting point for differentiating between Aboriginal and Crown jurisdictions under colonial law remains that established by Marshall C.J. in *Worcester v. Georgia*, and confirmed in Canada by *Connolly v. Woolrich*.³¹⁶ On this strong account of the doctrine of continuity, internal Aboriginal sovereignty and related jurisdictions, including institutional status and capacities, clearly continue in relation to Aboriginal peoples and their territory, after the acquisition or assertion of sovereignty by the Crown. Further, the scope of such jurisdiction is conceived, subject to 'external' limitations, as "the entire store of authority possessed by any nation".³¹⁷ On this understanding, colonial law affirms the internal sovereignty of Aboriginal peoples, and safeguards the integrity of their societies.

The Marshall Court's doctrine of inherent Aboriginal sovereignty is sometimes assumed to be the source of the ethnocentric "plenary powers" doctrine, under which tribes are considered "wards" of the United States because their habits and capacities are assumed inferior to those of the American polity. Under the plenary powers doctrine, articulated famously in *United States v. Kagama*,³¹⁸ the federal government possesses authority to preempt Aboriginal laws arbitrarily, and even to extinguish Aboriginal sovereignty, as "guardian" of the Indians. There is certainly ethnocentric reasoning contained in the Marshall judgements, especially in the two cases which preceded the Court's affirmation of the inherent and continuing sovereignty of tribes, but the Marshall judgements on Aboriginal rights do not appear to support the "plenary powers" doctrine, which several commentators have shown - convincingly, it is suggested - took

hold during a later, virulently anti-Indian period in the jurisprudence.³¹⁹ Certainly such a doctrine is not a necessary ingredient of the basic principles espoused either by Marshall C.J. in *Worcester v. Georgia* or by the Canadian courts in *Connolly v. Woolrich* and *R. v. Sioui*.

Without advocating a particular approach to implementation of the doctrine of continuity, the foregoing analysis suggests that internal Aboriginal sovereignty and jurisdiction should be presumed not to have been extinguished or displaced upon Crown acquisition of sovereignty, and that the legal basis for a contrary presumption is not well founded.³²⁰

2.4 Transforming the colonial legacy

A recurring theme of the preceding discussion is the need to strip from the colonial law its colonialist premises. That the legal pluralism initiated in the 'complex' rules of settlement and conquest, for example, was instrumental to a larger project of domination of one people by another, can hardly be ignored. Rummaging in the debris of the "doctrine of conquest" and a distorted "doctrine of *terra nullius*" for principles to govern an honourable partnership between Aboriginal and non-Aboriginal peoples, is a deeply paradoxical exercise. It may be necessary, because colonialism shaped Canada's only history, but it certainly cannot succeed by itself. Equally, the effort must be transformative.

Colonialist attitudes, for example, undoubtedly imbued the rules for choosing which law applies to an Aboriginal individual in settled territories, with the assumption that Aboriginal peoples would eventually assimilate into the non-Aboriginal population. It was also taken for granted by the colonizers that introducing a strong measure of English law to Aboriginal territory was by definition a good thing. Thus some expressions of the 'complex' settlement rule reviewed above imply that Aboriginal jurisdiction may never reach beyond Aboriginal territory, whereas colonial jurisdiction reaches settlers residing within Aboriginal communities, even in relation to matters ordinarily regulated on a territorial basis. If the doctrine of continuity is to be anchored in principles of equal respect and reciprocity, such historical skewing of pluralist regimes must be transformed. It seems clear, for example, that the choice of Aboriginal or non-

Aboriginal law cannot depend solely upon personal membership. And just as Aboriginal jurisdiction must have a strong territorial component, there are clearly also some matters for which Aboriginal jurisdiction must follow Aboriginal members wherever they reside.

The striking of a just balance between Aboriginal and Crown spheres of authority is a sensitive matter reaching beyond the scope of this paper. The obvious need for such a balance in the relationship between Aboriginal peoples and the Crown, however, is of crucial importance to the present topic. The basic injustice of the doctrine of recognition, in any of its forms, is that by casually presuming extinguishment or displacement of Aboriginal rights at the moment the Crown takes charge, it casts the future of this relationship irrevocably in terms of domination by the colonial power.

3. Supersession by Law

[O]ne is reminded of De Visscher's comment that the irremissible weakness of positivists was their moral indifference.³²¹

J.A. Andrews

3.1 In federal comprehensive claims policy: Judson J.'s test for extinguishment in *Calder*

In successive policies between 1973 and 1990, the government of Canada declined to negotiate comprehensive land claims agreements with Aboriginal peoples whose Aboriginal title had either been extinguished by treaty, or "superseded by law".³²²

As Bruce Clark has noted, the term 'supersession' is not a term of legal art.³²³ It is used most commonly in reference to laws or legal provisions.³²⁴ In legal systems governed by Parliamentary supremacy, for example, statutes override or supersede the domestic common law in the event of conflict.³²⁵ Similarly, a statutory provision may supersede an earlier one.³²⁶ In these contexts, 'supersede' means to "take the place of"³²⁷ or, to use an equivalent term we

have encountered above, to 'displace'. Notably, the term 'supersession' suggests no account of what happened to the thing superseded: what matters is only that something else has taken its place. In its conventional usages, this suitably describes the effect of new enactments: Parliament is internally supreme, and the displacement of former laws is strictly a matter of process.

In legal discourse, rights, as opposed to laws or legal provisions, are not ordinarily thought of as simply superseded. Rights are generally understood to merit some accounting for.³²⁸ Thus, in legal systems governed by Parliamentary sovereignty, a canon of statutory construction provides that rights held at common law are presumed to be respected by Parliament unless a contrary intention is shown.³²⁹ Depending upon their status, rights might be limited, or even intentionally altered or extinguished, but they do not ordinarily simply "give way".³³⁰ It also strains the meaning of 'supersession' somewhat, to designate a right 'superseded', where no right takes its place: something more transpires in that case than when one law supersedes another. Thus "supersession by law" is an incomplete explanation of the fate of a right.

Supersession of Aboriginal rights "by law" could simply be a formalistic expression for denying the legal validity of Aboriginal rights. On this reading the expression would depend upon the *terra nullius* theory, under which no rights cognizable as such are considered to have preceded the introduction of English law into a colony. English law would supersede whatever system came before. The incongruity of displacing 'rights' by 'law', with no accounting given, would be circumvented, because 'supersession' would really signify the fate, not of rights, but of the system of social control in which noncognizable claims would be seen to have originated. If this reading were correct, no separate analysis of 'supersession by law' as a theory of dispossession of Aboriginal peoples would be necessary here, because this concept would be encompassed by the theory of *terra nullius* to be discussed in part 4. It is, however, unlikely that this is what federal comprehensive claims policy statements meant when they suggested that Aboriginal title may have been "superseded by law". Such statements implied that supersession may happen to an Aboriginal title that previously existed, and which otherwise would have given rise to a negotiable land claim.

It is more in keeping with the federal policy statements to construe 'supersession by law' in this context as equivalent to 'extinguishment by law'. The term 'supersession' was apparently meant to refer, in particular, to the method of unilateral extinguishment which Judson J. described as extinguishment by the sovereign exercise of "complete dominion ... adverse to any right of occupancy", in *Calder*.³³¹ This method is distinguished from other purported methods of unilateral extinguishment of Aboriginal rights, by, among other features,³³² the relatively low threshold of intention required on the part of the competent Crown representative.³³³ This method of extinguishment involves a level of intention that is at most reckless, and at least careless as to the consequences for Aboriginal rights. The Crown representative need not have adverted to the extinguishing consequence. The effect of measures knowingly taken (such as the general land tenure enactments examined in *Calder*)³³⁴ must simply be necessarily inconsistent with, or adverse to, the Aboriginal right in question. It is enough that the sovereign authority intended to take measures having such an effect, as it might have, for example, when it "opened up ... lands for settlement"³³⁵ in colonial times.³³⁶

On this reading, "superseded" is a euphemistic description, but it aptly signifies the indifference with which pre-existing rights may be disposed of by this method. Effectively, Aboriginal rights are nullified by the displacement, or supersession of their common law foundation. A further, if redundant consequence is attributed to this process, which provides a minimal accounting for the fate of such rights: Aboriginal rights are also deemed to have been intentionally, if casually, cancelled, or extinguished.

In 1985 the Task Force To Review Comprehensive Claims Policy criticized federal policy's reliance upon this concept, observing that the Supreme Court had decided in *Simon*³³⁷ that a strict onus of proof rests upon the party alleging extinguishment of treaty rights.³³⁸ The Task Force concluded that "[t]he superseded-by-law concept should no longer be applied to exclude from the comprehensive claims process those aboriginal societies that have not been a party to a treaty or the subjects of extinguishment legislation".³³⁹

It is submitted that the Supreme Court of Canada clearly held in *R. v. Sparrow* that the

method of extinguishment relied upon by this reading is invalid.³⁴⁰ The current federal comprehensive claims policy statement, issued in 1993, acknowledges that 'supersession by law' is a flawed test for extinguishment of Aboriginal title, though it does not renounce the test plainly.³⁴¹ A study of government conduct in litigation undertaken for the Royal Commission on Aboriginal Peoples suggests that the Federal Department of Justice continues to apply the 'supersession by law' test in its assessments of the validity of Aboriginal claims, and has not identified publicly the modifications, if any, which the Department has made to its working standard as a result of *Sparrow*.³⁴²

3.2 In *Delgamuukw v. British Columbia*: The doctrine of sovereign dispossession

The *Delgamuukw* case has revitalized the theory of supersession of Aboriginal rights by law, in a new form. The Court of Appeal's conclusion in *Delgamuukw* that Aboriginal jurisdiction and sovereignty were superseded by the assertion of Crown sovereignty has been discussed in part 2, "recognition doctrine", above. It was argued in that part that there are sound reasons for applying a presumption of continuity to internal Aboriginal sovereignty and jurisdiction following the acquisition of Crown sovereignty in Canada. This part examines more closely the reasoning by which the trial and appeal courts in *Delgamuukw*, instead, held Aboriginal sovereignty and jurisdiction to have been displaced. In view of its affinity with the doctrine of common law dispossession discussed above,³⁴³ this reasoning will be referred to as the 'doctrine of sovereign dispossession'.

3.2.1 Rulings at trial and in the Court of Appeal: supersession of Aboriginal sovereignty and jurisdiction

The trial judge in *Delgamuukw* applied the same test for extinguishment of Aboriginal sovereignty and jurisdiction³⁴⁴ that he applied to the issue of post-acquisition extinguishment of Aboriginal rights of a 'private' nature. He developed his general test primarily from Judson J.'s opinion in *Calder*, construing *Sparrow* (incorrectly, it is submitted)³⁴⁵ as substantially supportive of Judson J.'s opinion.³⁴⁶

With respect to the particular fate of Aboriginal sovereignty and jurisdiction, McEachern C.J. adopted two alternative grounds for decision, indicating a preference for one.³⁴⁷ If he were wrong in the view he preferred, said McEachern C.J., then it would be his judgement that "the Crown clearly and plainly intended ... to extinguish any aboriginal jurisdiction or sovereignty which survived the assertion of British sovereignty."³⁴⁸ Because it "more correctly describes the historical reality", however, McEachern C.J. preferred the alternative view that "aboriginal sovereignty did not survive the assertion of British sovereignty."³⁴⁹ According to that theory, "the establishment of the Colony of British Columbia, for example, should be classified as a displacement of one sovereignty by a different one which the law recognizes."³⁵⁰

McEachern C.J.'s separate analysis of the effect of British sovereignty contains the principal elements of his theory that Aboriginal sovereignty and jurisdiction were completely displaced by the sovereignty of the Crown:

Upon the Crown through the Imperial Parliament establishing the Colony in British Columbia in 1858, it authorized the appointment of a Governor, made arrangements for a Legislative Council, imposed English law, and embarked upon the construction of a legal regime for the ownership and governance of the Colony. This, in my view, is what sovereignty is all about, but Professor Dicey has a more complete definition ... :

...There is no person or body of persons who can, under the English Constitution, make rules which override or derogate from an Act of Parliament or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament. [McEachern C.J.'s emphasis]³⁵¹

[D]eserving deference, is the opinion of the Privy Council in *Re: Southern Rhodesia*:

...According to the argument the natives before 1893 were owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveller, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white

settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the Aboriginal system gave place to another prescribed by the Order in Council.³⁵²

That, in my view, is what happened in the territory, that is the aboriginal system to the extent that it constituted aboriginal jurisdiction or sovereignty, or ownership apart from occupation for residence and use, gave way to a new colonial form of government which the law recognizes to the exclusion of all other systems.

...

After that, aboriginal customs, to the extent they could be described as laws before the creation of the colony became customs which depended upon the willingness of the community to live and abide by them, but they ceased to have any force, as laws, within the colony.³⁵³ [citations omitted]

In the Court of Appeal, the majority³⁵⁴ held that the assertion of Crown sovereignty in British Columbia superseded Aboriginal sovereignty and jurisdiction,³⁵⁵ essentially adopting the trial judge's theory of sovereign dispossession. There are, however, two possible readings of the majority holding, which express the theory differently. (The trial judgement is also susceptible to both interpretations.)³⁵⁶ On the first reading, which appears to have stronger support in the majority judgements, the *acquisition*, or, in other words, the *initial gaining* of Crown sovereignty, itself effected the supersession. On the second, alternative reading, Aboriginal sovereignty and jurisdiction were superseded by the *exercise* of Crown sovereignty, once Crown sovereignty had been acquired.

Bruce Ryder interprets the majority judgements as having divided on this potentially important point. Ryder has set out the reasons for judgement and factors involved succinctly. Both judgements are ambiguous as to which theory is endorsed, and Macfarlane J.A.'s reasons appear susceptible to a reading consistent with Wallace J.A.'s probable position (the first described above). Also, Ryder's more general analysis does not differentiate between different rationales or mechanisms of extinguishment, and thus does not distinguish between supersession and "extinguishment" in a more general sense. With those qualifications in mind, Ryder's

summary may serve as the basis for this section's subsequent analysis:

[The majority] found that any Aboriginal right of the plaintiffs' to exercise legislative jurisdiction over their lands and peoples had been extinguished³⁵⁷ by either the acquisition or exercise of sovereignty over the mainland colony in 1846 and 1858 respectively, or, in the alternative, by the entry of B.C. into Confederation in 1871. In Macfarlane J.A.'s judgement, "any vestige of aboriginal law-making competence was superseded" on "the date that the legislative power of the Sovereign was imposed". He agreed with the trial judge that this likely occurred in 1858 when the mainland colony was established and the governor was empowered by imperial legislation to make all laws necessary for the good government of the colony.³⁵⁸ If he was mistaken with respect to colonial extinguishment, Macfarlane J.A. was of the opinion that continuing rights of self-government were "inconsistent with the division of powers found in the Constitution Act, 1867 ... Sections 91 and 92 ... exhaustively distribute legislative power in Canada... The division of governmental powers between Canada and the Provinces left no room for a third order of government."³⁵⁹

Wallace J.A. fixed the moment of extinguishment of Aboriginal self-government in B.C. at an earlier date, namely the acquisition of sovereignty by the British over the territory in 1846 pursuant to the Oregon Boundary Treaty.³⁶⁰ At that point, "supreme legal authority vested with the British Crown" and "the Indians became subjects of the Crown and the common law applied throughout the territory and to all inhabitants." Like Macfarlane J.A., Wallace J.A. was of the view that, in the event that any rights of self-government survived the colonial period, they were eliminated by the exhaustive distribution of power between parliament and the provincial legislature that came into force in 1871.³⁶¹

Wallace J.A. also approved of the trial judge's displacement theory³⁶² on the basis that its "essence" is the act of state doctrine's bar against challenging Crown claims to the acquisition of sovereignty over new territory.³⁶³

The two majority judgements may not have intended to distinguish between the "exercise" (or "assertion") and "acquisition" of Crown sovereignty in this ruling.³⁶⁴ In one sense, colonial law presumes such an equivalence. Because the conventional act of state doctrine assigns to the Crown the prerogative power to acquire territory,³⁶⁵ colonial law considers the fact of an unambiguous assertion, or claim, of sovereignty by the Crown, to be sufficient evidence of the legal result that territorial sovereignty has been acquired.³⁶⁶ Once the Crown has made its

governing intention clear, the method of acquisition falls to be determined incidentally.³⁶⁷ To this extent at least, this reading of the doctrine of sovereign dispossession implicitly relies upon the conventional act of state doctrine.³⁶⁸ On this reading (functionally the first reading noted above), the Court meant by "assertion" of sovereignty, simply the claim to possess it.³⁶⁹

The alternative, second reading treats the terms "acquisition" and "assertion" of Crown sovereignty in these judgements as having been intended to describe separate and potentially successive legal events, each with different implications for the continuing existence of Aboriginal sovereignty. If, as Macfarlane J.A.'s reasons might possibly imply, assertion, or at least the legislative assertion of sovereignty might occur some years after sovereignty is acquired,³⁷⁰ the power to displace Aboriginal sovereignty may lie dormant in the interim, with little or no interim effect upon Aboriginal sovereignty.³⁷¹ On this reading, the "assertion" of sovereignty is its exercise or activation, once gained.

3.2.2 General features of the doctrine

Before examining the doctrine's implications, it is useful to identify the general features of the doctrine of sovereign dispossession shared by both possible readings noted above, including those which render this doctrine a theory of 'supersession by law'.

Rather than cancel Aboriginal rights of sovereignty directly, the doctrine of sovereign dispossession nullifies such rights³⁷² by deeming their source superseded.³⁷³ Supersession of the source of an Aboriginal right is one of the features of Judson J.'s theory of extinguishment of rights in *Calder*, discussed above.

The nullification of rights in Judson J.'s theory has been attributed above to a distinct effect of the measures involved: the measures which superseded the common law were also deemed under that theory to convey the sovereign intention to extinguish rights incorporated in the common law.³⁷⁴ In contrast, nullification of Aboriginal sovereignty under the doctrine of sovereign dispossession is exclusively a function of supersession: no distinct extinguishment is

implied, and no intention to extinguish is required. *In fact, this doctrine attributes no particular intention to the Crown apart from the intention to acquire new territory or to exercise sovereignty therein: indeed, the particular effect of the measures by which the Crown exercises power is deemed irrelevant.*³⁷⁵

The doctrine of sovereign dispossession thus provides no accounting for its nullification of the Aboriginal right of sovereignty, even in the minimal sense of attributing to the competent power a clear and plain intention to abrogate such a right. This would be anomalous if the doctrine accorded Aboriginal sovereignty the status of a right.³⁷⁶ It is submitted that this doctrine's simplicity, however, stems from its implicit *denial* of such status to Aboriginal sovereignty.³⁷⁷ The doctrine of sovereign dispossession simply treats Aboriginal sovereignty as a prior source of law (and rights), displaced by another source deemed to have precedence. The legal effect envisaged is directly analogous to that of the conventional supersession of a common law provision, for example, by statute. Aboriginal sovereignty is certainly nullified,³⁷⁸ but no accounting is deemed necessary, because Aboriginal sovereignty is not considered a right. This feature of the doctrine is examined further below.

The doctrine of sovereign dispossession entails supersession "by law" in the sense that law is the instrument of the supersession that results.³⁷⁹ Rather than displace one form of law, such as the common law, with a higher form such as statute, however, the doctrine of sovereign dispossession entails supersession of the authority to make law itself.

In neither this case nor in Judson J.'s theory of extinguishment,³⁸⁰ however, does supersession "by law" imply control by the law over the process involved, or its ultimate consequence. *Neither the rule of law itself nor, as noted below, any positive rule of colonial law*³⁸¹ *governs the unilateral process which the doctrine of sovereign dispossession, in particular, sanctions.* In its most developed form, to use James Crawford's term, the doctrine is a "reflex".³⁸² It simply describes the consequence which flows from combining an absolute conception of the sovereignty acquired by the Crown, with an exclusionary conception of the

origin of legal rights and a legal fiction that any prior power "gave way". Law is employed in this doctrine solely as an instrument for the colonial imposition and subsequent maintenance of Crown sovereignty.

The remaining outline of this doctrine emerges from consideration of three issues: the logical role of "supersession" in the doctrine posited; the related role of the tenet of absolute Crown sovereignty, and the basis for denial that Aboriginal sovereignty is the subject of a right.

Without acknowledging that a right is at issue, the doctrine of sovereign dispossession does presume the prior existence of Aboriginal sovereignty.³⁸³ It might therefore be expected that the doctrine would ground the claim that Aboriginal sovereignty has been "superseded," in some process recognized by the law. Instead, however, the doctrine simply posits the fact of supersession, with the implicit rationale, apparently, of *fait accompli*. It is presumed that something has been done - displacement of Aboriginal sovereignty - which cannot or need not be undone.³⁸⁴ Notably, no judicial authority, and no rule of colonial law, is cited in the *Delgamuukw* judgements in support of the claim that Aboriginal sovereignty is superseded by the acquisition or exercise of Crown sovereignty.³⁸⁵ Apparently this is considered an implicit consequence of the "legal reality"³⁸⁶ that the Crown possesses sovereignty. The judgements' absence of concern for this proposition's grounding in positive law, however, appears also to reflect the primacy in this doctrine of a separate tenet: Crown sovereignty is defined as necessarily absolute and exclusive,³⁸⁷ leaving "no room"³⁸⁸ for a parallel and consistent Aboriginal order of government.

Transported to a colony, Professor Dicey's maxim that the internal sovereignty of Parliament precludes the existence of any independent law-making power within England, possesses by itself sufficient reason to deny the continuance of any Aboriginal sovereignty. Disregarding colonial law, and presuming that the Crown possesses some sovereignty at present, the extended Diceyan vision would render the continuance of Aboriginal sovereignty logically impossible. From this vantage point, which was clearly central for McEachern C.J. at trial and for the majority in the Court of Appeal,³⁸⁹ the proposition that Aboriginal sovereignty was

superseded in the past is logically irrelevant. Professor Dicey's maxim, however, does not address the actual fate of prior sovereignties,³⁹⁰ whose existence, as noted above, is acknowledged in these judgements. It is therefore convenient, though not strictly necessary, for the doctrine of sovereign dispossession to fill the historical/legal gap which would otherwise exist between the acknowledgement that Aboriginal peoples were sovereign, and the claim that Crown sovereignty is now absolute. The proposition that the latter sovereignty superseded the former at some point in the past adds to Professor Dicey's abstraction the minimum possible explanation for the foregone conclusion that Aboriginal sovereignty no longer exists: Aboriginal sovereignty must have been superseded in the past, because it cannot possibly exist now.

It thus appears that under the doctrine of sovereign dispossession, the supersession of Aboriginal sovereignty constitutes a convenient legal fiction, like the theory of tenures we have encountered above.³⁹¹ It need have no grounding in fact.³⁹² Its sole purpose and effect is to posit an historical/legal event which explains the logical consequence of a tenet deemed indispensable to the law, but which lacks an historical basis otherwise. Despite the inconvenient fact of pre-existing Aboriginal sovereignty, Professor Dicey's rule, as construed by this doctrine, defeats any claim to continuing Aboriginal sovereignty by itself.³⁹³

The basis upon which the doctrine of sovereign dispossession denies to Aboriginal sovereignty the status of a right, is straightforward. Despite some contrary indications in these judgements,³⁹⁴ rights appear to be conceived of entirely as creatures of domestic legal systems, which in turn are understood to owe their existence exclusively to the sovereignty which created them.³⁹⁵ Incursions upon sovereignty, and the sovereign dispossession that results, are therefore deemed to occur beyond the realm of rights cognizable by domestic courts. The doctrine thus circumvents entirely the issue of the Crown's *entitlement* to displace the sovereignty of a separate people with its own. That displacement is ascribed to "historical reality" in McEachern C.J.'s opinion,³⁹⁶ but the theory underpinning the doctrine is radically ahistorical, dependent upon the abstract premises of an extreme form of legal positivism.

3.2.3 Some problems with the doctrine

Each of the doctrine of sovereign dispossession's cardinal features entails problems of validity or fundamental justice.

In part 1 above it was argued that the core premise of the act of state doctrine, that the Crown may acquire occupied territory extra-legally, leaving Aboriginal peoples no recourse for their sovereign dispossession, is unnecessary to the law and fundamentally unjust. The same premise is adopted by this doctrine. Absent this premise, the doctrine of sovereign dispossession would require some justification in law for deeming occupied territory acquired by the Crown.

The presumption that the sovereignty acquired by the Crown in occupied territories acquired by 'settlement' is absolute in scope, is unnecessary and of doubtful validity.³⁹⁷ Absent this most central tenet, the doctrine of sovereign dispossession would lose its basis for claiming that all Aboriginal sovereignty is necessarily nullified upon the acquisition or exercise of Crown sovereignty.

In part 1 above it was argued that a rule which vests in a colonial power absolute authority to determine the legality of its dispossession of colonized peoples, can not be a just rule. Analogously, any conception of 'rights' which accords solely to the internal law generated by a colonial power the mandate to define the 'rights' of colonized peoples, does not satisfy standards of justice in societies holding 'rights' to be fundamental. Sovereignty, in particular, for such societies, is not "jurisdiction to define jurisdiction", or "ultimate authority";³⁹⁸ it is a subject of rights and duties itself. It is "inherent in every people, just as liberty is inherent in every being".³⁹⁹ Absent its premise that 'rights' are exclusively creatures of the internal common law, and absent, in particular, its assumption that sovereignty is not the subject of a 'right', the doctrine of sovereign dispossession would have to account for its nullification of Aboriginal rights of sovereignty and jurisdiction.

As has been noted above, the legal fiction that Aboriginal sovereignty and jurisdiction

were "superseded" by the acquisition or exercise of Crown sovereignty, lacks any basis in colonial law precedent. Rejection of this fiction would remove from the doctrine the implicit excuse that something has been done in the sovereign dispossession of Aboriginal peoples, that cannot or need not be undone.

There remain further, more particular difficulties with this doctrine. Two which concern the difference between the two possible readings of the doctrine, identified in section 3.2.1 above,⁴⁰⁰ are considered next. Those discussed thereafter are common to both readings, except as noted otherwise.

The second, alternative reading of the doctrine of sovereign dispossession noted above, under which Aboriginal sovereignty is superseded by the exercise of Crown sovereignty, once gained, contravenes the fundamental rule that acts of state cannot be carried out against British subjects on British soil.

The supersession of sovereignty entailed in the first reading of the doctrine of sovereign dispossession identified above, is consistent with the conventional formulation of the act of state doctrine.⁴⁰¹ Displacement of Aboriginal sovereignty would occur in the course of Crown acquisition of sovereignty, and would cease thereafter.⁴⁰² Upon the acquisition of Crown sovereignty, however, Aboriginal persons would become British subjects, and the territory would become British. The second, alternative reading of the doctrine of sovereign dispossession plainly contravenes the rule that acts of state cannot be carried out against British subjects on British soil,⁴⁰³ by decreeing the displacement of Aboriginal sovereignty *after* Crown sovereignty has been acquired. If acquisition of sovereignty, and the dispossession that results, is classified as an act of state, then it must follow that the subsequent assertion of sovereignty and the resulting dispossession, mandated solely on the basis of Crown sovereignty, is also be an act of state, and must be subject to the same constraint.

This constraint is avoided if the sovereign action in question can be attributed to the law, as opposed to sovereign power alone.⁴⁰⁴ But the doctrine of sovereign dispossession can hardly

constitute such a mandate, and no other legal authority for the supersession entailed is cited in the *Delgamuukw* judgements. Any claim that the doctrine of sovereign dispossession itself vests the displacement of Aboriginal sovereignty involved with the status of a common law rule, would appear to be discriminatory against Aboriginal subjects,⁴⁰⁵ and lacks support in the jurisprudence. To emphasize, once Crown sovereignty has been acquired, its exercise is fully subject to the rule of law.

The possibility that the law might constrain the effect of the Crown's sovereign action on any Aboriginal sovereignty surviving the acquisition of Crown sovereignty, is not acknowledged in the *Delgamuukw* judgements.⁴⁰⁶ (The opinion of Macfarlane J.A. attributed supersession of Aboriginal sovereignty solely to the legislative assertion of Crown sovereignty.⁴⁰⁷ Parliament is the supreme source of law in the English law system, but, as noted above, Macfarlane J.A. relied for this conclusion not on the effect of the laws enacted by Parliament, but rather on the fact that the supreme Crown institution had thereby asserted its sovereign power.⁴⁰⁸) It is submitted that this oversight casts serious doubt on the legal validity of this reading.

The appearance that the second, alternative reading might possess a stronger grounding in historical fact and substantive law than one that posits the instantaneous acquisition of absolute Crown sovereignty, does not withstand scrutiny.

Superficially, the second, alternative reading reflects the historically common pattern (especially prevalent in settled territories)⁴⁰⁹ of gradual extension of Crown authority over 'new' territory. That pattern, however, *precedes* the acquisition of sovereignty.⁴¹⁰ Such a factual pattern is more accurately reflected in colonial law by means of the first reading. Applying that reading to the pattern of gradual extension of Crown authority, the Crown might enlarge its sphere of influence in Aboriginal territory over time, but displacement of Aboriginal sovereignty would not occur until Crown sovereignty were acquired. Thereafter (though the *Delgamuukw* judgements either overlooked or did not find it necessary to consider this implication) the exercise of Crown sovereignty should be subject to the rule of law, and in

particular, to the constraint on the act of state doctrine noted above.

As a justification for the dispossession of Aboriginal peoples, the second alternative reading might also appear less abstract, and perhaps less arbitrary, than the first. The second reading founds the supersession of Aboriginal sovereignty in positive action, rather than symbolic declarations. However, the second reading ignores a substantive legal implication that would appear to follow from such a commitment, leaving its consequence equally dependant on abstract premises. If Aboriginal sovereignty is a substantive power which takes concrete action to displace, then the nature of that action and the limits of its actual effect should surely - quite apart from the question of the status of Aboriginal sovereignty as a right - limit its displacing consequence. Such factors, along with the particular intention involved, are the primary measures of direct extinguishment of Aboriginal rights envisaged by the law, however loosely they might be applied in theories of that nature.

By ignoring such standards, both readings of the doctrine of sovereign dispossession appear simply to avoid difficult issues with difficult implications, in favour of a judicial invention with no real connection to "historical reality".⁴¹¹ The second reading, in particular, would remove an impediment from the sphere of Crown authority without relying upon the overtly self-serving device of symbolic declarations, yet this reading fails to confront the harsh implications of any doctrine of extinguishment of rights, and lacks the relatively stringent criteria that the law normally attaches to such rules.

In its potential application to Aboriginal rights of a 'private' nature, and in its general premise that the law generated by the Crown's sovereignty is the exclusive source of cognizable rights, the doctrine conflicts with the modern jurisprudence of the Supreme Court of Canada.

As noted in part 2 above,⁴¹² the doctrine of sovereign dispossession may be applied to any Aboriginal right, not only Aboriginal sovereignty and jurisdiction. As noted previously, this simply requires that the Aboriginal right be denied the status of a right incorporated in the common law.

In identifying the view that "the simple fact of prior possession confers no rights enforceable against the acquiring sovereign, unless that new sovereign has recognized the antecedent rights", Geoffrey Lester, for example, stated the doctrine of sovereign dispossession in its most sweeping form.⁴¹³ Lester was describing a general approach to the characterization of Aboriginal rights epitomized in the United States Supreme Court ruling in *Tee-Hit-Ton*,⁴¹⁴ a case analysed in part 1 above. In its broadest formulation, the doctrine of sovereign dispossession nullifies *any* pre-existing Aboriginal right by adopting the following reasoning, the first two steps of which we have encountered above: a) Crown sovereignty necessarily displaces all Aboriginal sovereignty; b) Aboriginal sovereignty is the exclusive source of Aboriginal rights; c) (following from a) and b)) no Aboriginal claims are enforceable against the Crown unless the Crown provides them with a new source, by recognizing them.

In Canada, this third step has been rejected by the courts in relation to Aboriginal claims of a 'private' nature. These authorities hold that the common law incorporates Aboriginal claims independently of any positive action on behalf of the Crown.⁴¹⁵ As Wallace J.A.'s opinion demonstrates, it is possible to rationalize that qualification consistently with the doctrine of sovereign dispossession. Provided that the incorporated, 'private' Aboriginal claims are conceived of not as pre-existing rights, but as rights created by the exercise of Crown sovereignty, the only change that need be made to the *Tee-Hit-Ton* formulation described by Lester, is to ascribe the required recognition of Aboriginal rights to a different agent of Crown sovereignty, i.e. to the courts, rather than the executive or Parliament. Both the implicit, '*fait accompli*' rationale of the doctrine, and its central tenet that the sovereignty of the Crown is absolute, are undisturbed by this modification, which necessarily implies that the Aboriginal rights recognized by the courts are (subject also to any constitutional constraints imposed on behalf of the Crown upon itself) subject to sovereign derogation or extinguishment, by Parliament.

But this conception of Aboriginal rights clearly conflicts with that of the Supreme Court of Canada, which provides that Aboriginal rights relating to land are "pre-existing" rights,⁴¹⁶

and are, in particular, creatures of colonial (in this usage, intersocietal) law.⁴¹⁷ To this extent the doctrine of sovereign dispossession itself conflicts with the Supreme Court's modern jurisprudence, by denying the possibility of rights having an intersocietal validity independent of the Crown's sovereignty. As we have seen in the discussion of the principle of continuity above, additional authorities such as *Worcester v. Georgia*⁴¹⁸ and *Connolly v. Woolrich*⁴¹⁹ - ignored by the Court of Appeal in *Delgamuukw* - affirm Aboriginal rights to continuing Aboriginal sovereignty as a doctrine of colonial, or intersocietal law.

To the extent that courts adopting this doctrine recognize Aboriginal rights of a 'private' nature, the basis upon which the rights so derived are defined, is arbitrary.

As Brian Slattery has shown, and this paper has emphasized above in relation to the fate of Aboriginal sovereignty, the displacement of one system of law by another cannot possibly be justified by principles of fairness entirely internal to the dominant system.⁴²⁰ If the authority of an imposed legal system is not rooted in some notion of fairness, even the 'private' rights of colonized peoples affirmed by such a system will lack a legitimate basis. If a minority of individual Canadians were to choose to associate in a group practising 18th century British customs, for example, the fairness of recognizing their 'right' to do so may properly be determined, human rights considerations aside, by principles of justice internal to Canada, their sovereign governing polity. But the characterization in *Delgamuukw* of Aboriginal 'private' rights as frozen in the past,⁴²¹ or indeed any characterization of such rights which denies the reciprocal capacity of evolving Aboriginal polities to generate entitlements and therefore ignores the need to ground Aboriginal rights in intersocietal norms, is necessarily arbitrary.

A quid pro quo rationale, purporting to justify the displacement of Aboriginal sovereignty on the ground that Canadian citizenship is provided in its place, appears also to inform this doctrine. Such a rationale fails, however, to respect Aboriginal peoples equally: citizenship in a colonial state cannot redress the suppression of Aboriginal sovereignty.

We have seen above that in its ordinary usage the term "supersession" implies that

● something takes the place of the thing superseded. At a very basic level this implication makes 'supersession' appear less harsh, and less obviously unfair than the bare idea of unilateral extinguishment of rights. The mechanical neatness of this term may have influenced the Court of Appeal's preference in *Delgamuukw* for 'supersession' over 'extinguishment' as a means to characterize the nullification of Aboriginal sovereignty.

McEachern C.J., at trial, and Wallace J.A. in the Court of Appeal, defended their narrow conception of residual Aboriginal rights on the ground that in other respects, Aboriginal peoples made up for what was lost in the process of colonization.⁴²² As did the Attorney General for Canada,⁴²³ Wallace J.A., in particular, emphasized that Aboriginal persons may now participate in Canada's economic life⁴²⁴ and political sovereignty,⁴²⁵ as full and equal citizens. Further, Wallace J.A. implied, without arguing directly, that expanding the scope of residual Aboriginal rights beyond cultural practices frozen at the time of assertion of Crown sovereignty, might offend principles of equal economic opportunity and citizenship.⁴²⁶

In fact, equal political participation was denied Aboriginal individuals soon after British Columbia became a province. At the time, Aboriginal persons formed a clear majority in the territory.⁴²⁷ Most were denied the provincial franchise until 1947, several decades after the settlers achieved dominant numbers.⁴²⁸

Apart from its one-sided character, the basic shortcoming in this rationale is that it fails to acknowledge or redress the actual consequence of the doctrine, the nullification of *the collective sovereignty of a people*. The history of manipulation of the provincial franchise in British Columbia⁴²⁹ underscores the fact that colonialism entails fundamentally the *collective* domination of one nation by another. Surely few Canadians content with their citizenship in Canada would be impressed by this justification if they were handed such a *quid pro quo* for the unilateral annexation of their country by a vastly larger foreign state.

The doctrine of sovereign dispossession and other theories of displacement of Aboriginal

rights, share important properties with theories of denial of such rights, addressed below under the 'doctrine of terra nullius'.

This doctrine treats the superseding system of law as the exclusive basis of validity for surviving Aboriginal rights. As noted above, it then becomes arbitrary, in intersocietal terms, whether any particular Aboriginal interest survives the change in sovereignty with the status of a right. Other displacement theories encountered earlier in our review of the "recognition doctrine" reserved to the superseding system of law the exclusive mandate to disqualify Aboriginal rights from eligibility for common law affirmation.⁴³⁰ It is a small, if important step from either line of reasoning, to the contention that Aboriginal polities and the systems of law or social control they generate are simply unworthy of notice because, by the "civilized" standards of the colonizing sovereign, they are of inferior quality. Theories based on the latter contention are examined next.

4. *Terra Nullius*

Political concepts are generally shaped by theorists who are not simply grammarians or logicians but who are seeking to justify something. The most solid basis on which to justify an institution or a right is to derive it from the supposed essential nature and needs of man.⁴³¹

C.B. Macpherson

Indian peoples were found scattered wide-cast over the continent, having, as a characteristic, no fixed abode, but moving as the exigencies of living demanded. As heathens and barbarians, it was not thought that they had any proprietary title to the soil, nor any such claim thereto as to interfere with the plantations, and the general prosecution of colonization. They were treated 'justly and graciously', as Lord Bacon advised, but no legal ownership of the land was ever attributed to them.⁴³²

Chancellor Boyd, *R. v. St. Catherine's Milling Co.*

To maintain their position the appellants must assume that the Indians have a regular form of government, whereas nothing is more clear than that they have no government and no organization, and cannot be regarded as a nation holding lands

... It is a rule of the common law that property is the creature of the law and only continues to exist while the law that creates and regulates it subsists. The Indians had no rules or regulations which could be considered laws.⁴³³

Attorney General for Ontario, *St. Catherine's Milling Co. v. The Queen*

If the numerous quotations on the subject furnished to us by the appellants ... must be interpreted as recognizing a legal Indian title as against the Crown, all I can say of these opinions is, that a careful consideration of the question has led me to a different conclusion. The necessary deduction from such a doctrine would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race.⁴³⁴

Taschereau J., Supreme Court of Canada, *St. Catherine's Milling Co. v. The Queen*

4.1. The initial principle: acquisition of uninhabited territories; vacant lands

International law has traditionally recognized that a sovereign power may acquire territorial sovereignty over unoccupied territory by occupation.⁴³⁵ The territory subject to this rule is known as *terra nullius*, meaning "territory belonging to no-one",⁴³⁶ or (more specific to the international law rule), territory "previously 'without a master' or sovereign."⁴³⁷

The international law rule derives by analogy from a rule of Roman civil law concerning, not sovereignty over territory, but property in land. Under the Roman law doctrine of *occupatio*, property in unowned and unoccupied lands (or unowned and unappropriated chattels) could be acquired by occupation.⁴³⁸

The basic Roman law principle also applies, in one way or another, to Crown acquisition of lands under English colonial law. On one view, the Crown acquires ownership of "vacant"

or "waste" lands in a colony, solely by operation of this principle.⁴³⁹ On another view, Crown acquires a limited paramount lordship⁴⁴⁰ over *all* lands in a colony on the basis of a transported theory of tenures, and the lordship includes unqualified ownership of vacant lands, on the basis, shared with the Roman law principle, that "there would be no *other* proprietor".⁴⁴¹ The theory of tenures giving rise to paramount lordship over occupied lands is itself rooted in this principle, relying in large part⁴⁴² upon the legal fiction that the monarch originally occupied all the lands in the realm, and subsequently granted them to subjects.⁴⁴³

English colonial law governing acquisition of Crown sovereignty also incorporates this principle as the basis of the doctrine of peaceful settlement. According to Blackstone, the Crown may acquire territorial sovereignty for domestic law purposes over "desert uninhabited" territory, by occupation, or "settlement".⁴⁴⁴ As might its international counterpart, this rule could function independently of the rule respecting acquisition of property in land.

The applicable rules respecting sovereignty and property work independently of one another in so far as "occupation" for purposes of territorial sovereignty involves different considerations from those which apply to property in land. The primary difference important to our subsequent analysis is that the occupation pertinent to sovereignty is that of "tribes or peoples having a social or political organization,"⁴⁴⁵ whereas the occupation pertinent to private property in land may be that of an individual or a group having no social character.⁴⁴⁶

The principle reflected in all of these rules has a necessary, inverse meaning. If occupation⁴⁴⁷ of something unoccupied (and unowned) is sufficient to acquire it, then occupation of something already occupied cannot be sufficient to acquire it (or the thing could not have been 'acquired' by the initial occupation in the ordinary sense).⁴⁴⁸ This is the meaning most obviously significant for Aboriginal rights.⁴⁴⁹ The International Court has stated this as a rule of international law:

"Occupation" being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid "occupation" that the territory should be *terra nullius* - a territory

belonging to no one - at the time of the act alleged to constitute the "occupation" (cf. *Legal Status of Eastern Greenland*, P.C.I.J., Series A/B, No. 53, pp. 44 f. and 63 f.). In the view of the Court, therefore, a determination that Western Sahara was a "*terra nullius*" at the time of colonisation by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of "occupation".⁴⁵⁰

Similarly, applying English colonial law in relation to land, Brennan J. stated in *Mabo v. Queensland* that "[t]he general rule of the common law was that ownership could not be acquired by occupying land that was already occupied by another."⁴⁵¹ With respect to the colonial law doctrine of peaceful settlement, the same meaning is implied by Brennan J.'s comment in *Mabo v. Queensland*⁴⁵² that Blackstone "was unable to declare any rule by which the laws of England became the laws of a territory which was not a 'desert uninhabited' country when the Crown acquired sovereignty over that territory by discovery and occupation as *terra nullius*."⁴⁵³ Speaking mainly in terms of the natural law basis of this rule, Blackstone remarked upon the process of colonization by settlement as follows:

[S]o long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to christianity, or to reason, deserved well to be considered by those, who have rendered themselves immortal by thus civilising mankind.⁴⁵⁴

Of the foregoing rules with contemporary significance, only the international law rule is formally expressed in terms of "*terra nullius*", but it is appropriate to analyse their history together, for several reasons. Evidently, all of them flow from the same principle described above, which may be referred to for convenience as the principle of *occupatio*.⁴⁵⁵ In relation to Crown acquisition of sovereignty over Aboriginal territory, modification of the colonial law rule "march[ed] in step"⁴⁵⁶ historically with modification of its international counterpart (though the colonial law was evidently not subservient). Further, that change shaped the parallel

alteration of the colonial law rule respecting property in land, in relation to Aboriginal occupiers.⁴⁵⁷

4.2 Distortion of the principle: acquisition of inhabited but 'unoccupied' territory; inhabited but 'unoccupied' land

[T]he concept of *terra nullius* has come to have little to do with the original meaning of literally uninhabited land. Rather, at least in the context of colonialism, its function has been, through association with ideas of barbarism, to deprive indigenous peoples of their original independent or separate existence.⁴⁵⁸

G.C. Marks

Commencing with the 'discovery' of the 'New World', the principle that occupied land or territory could not be acquired by occupation was subverted over time in several ways, all of which purported to validate European occupation of Aboriginal territory by devaluing Aboriginal occupation, on the ground that Aboriginal peoples were inferior to the peoples of Europe. The "enlarged"⁴⁵⁹ doctrine of *terra nullius* became the basis for violating, in relation to Aboriginal peoples, the very principle on which the doctrine was founded.⁴⁶⁰

With respect to the acquisition of territorial sovereignty, it came to be widely assumed, if never plainly adopted as a legal rule, that a people could permanently "inhabit" their homeland without necessarily "occupying" it.⁴⁶¹ "Occupation" came to be defined by culturally Eurocentric and politically biased standards, reflected in a variety of legal tests. Aboriginal peoples were deemed, on account of their presumed inferiority, "inhabitants", whose permanent connection to territory must be tested before it could qualify as occupation. The territory of peoples who failed the test was deemed to be *terra nullius*, freely available for acquisition by occupation on behalf of European sovereigns. A relatively liberal example of such tests is described by Brennan J. in *Mabo v. Queensland*:

The great voyages of European discovery opened to European nations the

prospect of occupying new and valuable territories that were already inhabited. As amongst themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers, provided the discovery was confirmed by occupation and provided the indigenous inhabitants were not organized in a society that was united permanently for political action.⁴⁶²

The text writer who espoused this test derived it for application to the world's "backward races".⁴⁶³

Similarly, it came to be said that property in Aboriginal land could be acquired by occupation, on the premise that Aboriginal peoples lived on and from the land without ever occupying it.⁴⁶⁴

4.2.1 Justifications for the distortion: 15th to 18th centuries

A plethora of justifications was advanced in support of the distorted doctrine of *terra nullius*.⁴⁶⁵ The claim to a divine right to spread Christianity through imperialism had emerged in the Crusades, and was a popular defence of 15th and 16th century Spanish imperial claims in South and Central America, even (in a qualified form) amongst supporters of indigenous peoples' rights.⁴⁶⁶ Amongst subsequent English rationales, a similar claim was contained in the argument that the taking of Aboriginal territory was more than compensated for by the benefits of Christianity.⁴⁶⁷ Closely related to the claim based on Christianity was the secular claim that the benefits of "civilization"⁴⁶⁸ outweighed the loss necessarily entailed for colonized Aboriginal peoples. These arguments did not necessarily deny that Aboriginal peoples possessed sovereign title to their territories, but they contributed to such an idea, by devaluing Aboriginal claims to territory relative to those of the European colonizers.⁴⁶⁹

Two philosophical arguments affected the law on this question more directly. The first simply posited that Aboriginal persons do not live in societies, at least in the sense of political communities. The second claimed that something about Aboriginal connections to land disqualified such connections from the status of occupation. The two arguments were related,

in their cultural bias, and in their ideological origins and usages.

It is difficult to locate precisely in the 15th and 16th centuries, the predecessors of these two ideas, or to follow their early evolution. The dominant European image of Aboriginal peoples in that period, however, certainly established the starting point from which colonial and international law were to construct the distorted doctrine of *terra nullius*. This was Aristotle's image of the 'barbarian', mutable in many respects, and susceptible to subclassifications,⁴⁷⁰ but always representing an outsider whose character is inferior to that of the European image-maker.⁴⁷¹ At the famous debate of Valladolid over the justice of the Spanish conquest, Spain's most prominent Aristotelian philosopher and official historian of the Spanish Emperor⁴⁷² argued that because the Aboriginal peoples encountered by Spain were by nature barbarians, they were "natural slaves", lacking capacity to possess true property, and born to be ruled by civilized peoples.⁴⁷³ Sepulveda's opponent at Valladolid - Bishop Las Casas - parsed the general argument thus:

This is the way they worked it out: to assert falsely that the Indians were so lacking in the reason common to all men that they were not able to govern themselves ... they did not hesitate to allege that the Indians were beasts or almost beasts ... Then they claimed it was just to subject them to our rule by law, or to hunt them like beasts, and then reduce them to slavery.⁴⁷⁴

Aristotle's designation of 'barbarians' as subhuman peoples destined by nature for subordination remained the predominant image of Aboriginal peoples in Europe until well into the 17th century,⁴⁷⁵ and its impact on colonial stereotypes of Aboriginal peoples was to endure.

Against arguments such as Sepulveda's the jurist Vitoria contended in the 16th century that the barbarian nature of Aboriginal peoples⁴⁷⁶ did not disqualify them from entitlement to property, or to some form of self rule.⁴⁷⁷ Vitoria argued that Aboriginal people are rational beings,⁴⁷⁸ though perhaps with the undeveloped capacity of children, owing to an inferior cultural upbringing.⁴⁷⁹ Specifically, Vitoria rejected the argument that Aboriginal peoples' territory could be treated as unoccupied. Vitoria reaffirmed the Roman law principle that "natural reason admits the title of the first occupant to that which previously had no owner",⁴⁸⁰

holding that "these aborigines were true owners alike in public and private law before the advent of Spaniards among them."⁴⁸¹ Spain's claim to have "discovered" the 'New World' "by itself gives no support to a seizure of the aborigines any more than if it had been they who had discovered us."⁴⁸²

According to O. Dickason, Vitoria was thus applying the original principle of *occupatio* in the standard way of medieval jurisprudence: "[t]ype of use as a criterion for rights of occupation was a development of the Age of Discovery; one looks in vain in medieval jurisprudence for such an approach. In earlier formulations, original acquisition was equated with occupation, and there were no qualifiers as to mode of life or usage".⁴⁸³ "Hunting and fishing", in particular, "were occupations by which original entitlement was acquired."⁴⁸⁴

Dickason traces the juristic idea that different uses of land might create different entitlements to property or sovereignty to one of Vitoria's successors among international jurists, Hugo Grotius. Grotius, whose country, Holland, was then a colonizing power,⁴⁸⁵ wrote in 1625 that "uncultivated land ought not to be considered occupied" in relation to proprietary interests.⁴⁸⁶ Grotius wrote, however, that this rule applied "except in respect of sovereignty, which remains unimpaired in favour of the original people".⁴⁸⁷

Apologists for the dispossession of Aboriginal peoples in the American colonies fast took up such claims, extending them to cover sovereignty as well as property, and mixing them with Christian rhetoric.⁴⁸⁸ In the 17th century the American colonies produced a vast polemical literature, well distributed in England, containing arguments for dispossession ranging from the right to conquer infidels and Sepulveda's rationale, through the extended argument from Grotius, to the utopian claim that land and resources should be distributed amongst humankind according to need.⁴⁸⁹

The American colonial literature and the writings of Grotius had substantial impact on the thinking of the 17th and 18th century pioneers of liberal political theory.⁴⁹⁰ Such thinkers revised Aristotle's categories of human nature, rejecting the view that some types of human were

innately irrational and therefore unfit for property or democratic rights.⁴⁹¹ They found convenient to their theories of individual rights and social contract, however, to posit a primordial state of nature, in which people necessarily existed without political community. Such a state was by definition backward in time from European norms, but also retarded in its progress towards civilization, a condition as presumptively superior in natural law as had been Aristotle's concept of "man" as citizen.⁴⁹²

The quality of life in the state of nature varied with the theory: for Thomas Hobbes⁴⁹³ life in that state was inevitably "solitary, poor, nasty, brutish, and short";⁴⁹⁴ for Rousseau it was beatific, as in the life of the "noble savage" popularized by Montaigne and others.⁴⁹⁵ Whatever the image of "natural man" posited by the theory, however, its author claimed that its example is found in or illustrated by Aboriginal life in far away lands.⁴⁹⁶ These images of Aboriginal life were philosophical constructs,⁴⁹⁷ serving theories exclusively concerned with European interests, but they caught hold in the law and in statecraft, apparently because they were ideologically useful to the Europeans;⁴⁹⁸ they reflected contemporary popular prejudice in Europe;⁴⁹⁹ and they served the colonial projects of European nations practically. If the Aboriginal inhabitants of newly 'discovered' territory lived in a state of nature, they did not live in society; without society, they could neither occupy territory as sovereigns, nor resist the competing claims of powers which could.

Building upon Grotius, and incorporating colonial views, these writers also argued that Aboriginal forms of connection to land did not amount to occupation. This second argument had ramifications both for territorial sovereignty under international and colonial law, and property rights under colonial land law.⁵⁰⁰

John Locke, the most influential English liberal philosopher of the 17th century,⁵⁰¹ appears to have had the greatest influence of the early liberal theorists on the distorted doctrine of *terra nullius*.⁵⁰² In their main elements, Locke's arguments concerning both Aboriginal sovereignty and property were incorporated into international legal theory by Emerich Vattel. Notwithstanding their relatively civil tone, Locke's arguments epitomize the stereotyping and

righteous self-justification which have characterized this legal doctrine since. (In one respect 19th and early 20th century legal conceptions of Aboriginal peoples were to retreat from Locke's to Sepulveda's premises about the original condition of different peoples. We will encounter that shift presently.)

Locke was heavily engaged in the politics and commerce of the American colonies.⁵⁰³ He adapted the image of America as the state of nature⁵⁰⁴ to his theories both of sovereign authority and property. 'Illustrating' his argument with "examples of life in native America",⁵⁰⁵ Locke posited that in the state of nature *individuals* are self-governing,⁵⁰⁶ such that political society need not and does not exist.⁵⁰⁷ The result, observes James Tully, is that Locke's theory "defines political society in such a way that Amerindian government does not qualify as a legitimate form of political society".⁵⁰⁸ Locke responded directly to the contrary argument:

Locke was aware that the native peoples did not govern themselves in the wholly independent manner laid out in his description of the state of nature, but were organized politically into nations. However, he describes their national forms of government in such a way that they are not full 'political societies' and thus native Americans can be dealt with as if they are in a late stage of the state of nature. In chapter 8 he asserts that, although Amerindians are called 'nations' (41) and are ruled by elected 'kings' (108), they fail to meet the criteria of a distinct political society. The reason for this is that their kings '*are little more than Generals of their Armies*, who, although 'they command absolutely in War', in peacetime and in internal affairs 'they exercise very little Dominion, and have but a very moderate Sovereignty, the Resolution of peace and War, being ordinarily either in the people, or in a Council' (108, cf.I.131). They lack the European institutions that, according to Locke, constitute the universal criteria of a political society: an institutionalized legal system, institutionalized judiciary, legislature and executive (87), and the sovereign right to declare war and peace removed from popular control and lodged exclusively in the hands of the King or 'federative' authority.

The reason Amerindians do not have these institutions is that they have no need of them. They have 'few Trespasses, and few Offenders', 'few controversies' over property and therefore 'no need of many laws to decide them' (107). As a result, they settle the few disputes they have on an ad-hoc and individual basis, as in the state of nature (107).⁵⁰⁹

The posited absence of political society in America⁵¹⁰ thus furnished a vacuum into which European society and the sovereignty it represented, could extend without impediment.

Locke also argued, from a position radical in England for its transformation of the basis for related royal authority,⁵¹¹ that property is a product of individual labour. In the state of nature⁵¹² natural law provides that "every man has a *Property* in his own *person*. This no body has any right to but himself. The *Labour* of his body, and the work of his hands, we may say, are properly his."⁵¹³ "Thus" (in Robert Williams' summary), "the things of nature removed from their natural state by human effort become an individual's property by virtue of combining labour with those natural goods".⁵¹⁴ All individuals are entitled to subsist from the things of nature (including land) in this way.⁵¹⁵ As long as "'there is enough, and as good left in common for others'", "[c]onsent from the other commoners is not required to justify this appropriation."⁵¹⁶

Locke himself made the direct connection to the "wild woods and uncultivated waste of America".⁵¹⁷ According to Locke, Aboriginal individuals subsisting in their state of nature mix their labour with, and so acquire as property, the "Fruits [the earth] naturally produces, and Beasts it Feeds".⁵¹⁸ Such labour, however, does not create property in the "*Earth it self*; as that which takes in and carries with it all the rest."⁵¹⁹ It followed that Aboriginal lands were effectively vacant, available for acquisition by anyone prepared to engage in the necessary labour⁵²⁰. The labour necessary to acquire land was, according to Locke, of a different sort than that which the "wild Indian"⁵²¹ engaged in: "*as much land* as a man tills, plants, improves, cultivates, and can use the product of, so much is his Property. He by his labour does, as it were, inclose it from the common."⁵²² Having, in the state of nature, an equal right to subsistence, and being tillers of the land itself, the colonists of America possessed the right under Locke's theory to acquire any Aboriginal land they decided to cultivate, without the consent of Aboriginal persons, provided 'enough and as good' remained for others.⁵²³

James Tully has shown that although it was addressed also to non-colonial contexts, Locke's claim that uncultivated⁵²⁴ lands in America were "waste"⁵²⁵ lands available for

appropriation by cultivation, followed closely, and in places appears to have adopted directly, the line of polemic by which American colonists had been justifying their dispossession of Aboriginal peoples in the half century preceding the publication of Locke's *Two Treatises on Government*.⁵²⁶

There is one further step in Locke's theory directly relevant to the subsequent distortion of the doctrine of *terra nullius*. Locke posited that life in America was not only anachronistic,⁵²⁷ but (despite its idealized harmony and simplicity) *morally* backward, because the Aboriginal peoples were not sufficiently industrious.⁵²⁸ For Locke, a Christian and European "ethic of 'industriousness' ... drives and legitimates the process"⁵²⁹ by which humankind moves from the state of nature into political society through the development of politics and property.⁵³⁰ The colonists could supply the necessary virtue,⁵³¹ but with greater industry must come, inevitably for Locke, money, trade, population increase, motivation to acquire more than one needs, scarcity of land and heightened conflict in interpersonal relations.⁵³² An important need would then arise. The logical conclusion to Locke's moral judgement that Aboriginal peoples lack an "ethic of industriousness" which the settlers are entitled to follow at will is described by Tully:

The dynamic development unleashed by the expansion of human desire for possessions after the introduction of money leads to interminable property disputes *and so to the need to set up modern states to regulate and govern property relations*.⁵³³ [emphasis added]

Locke did not expressly conclude - as did the colonists who adopted his views⁵³⁴, Emerich Vattel, and later legal theorists - that European sovereigns were entitled to impose their authority upon Aboriginal peoples without Aboriginal consent, but Locke's identification of a morally predetermined need in colonial America for European structures of government⁵³⁵ pointed directly towards such a conclusion. Aboriginal customs could not possibly serve, since "[f]rom this perspective, Amerindian societies are ... defined by the specifically European institutions they lack".⁵³⁶ In Locke's theory colonialism was a self-fulfilling and self-justifying prophecy.⁵³⁷

Locke's writings were widely distributed in Europe in the 18th century,⁵³⁸ and became hugely popular in revolutionary America.⁵³⁹ Misgivings expressed by a few Americans about some of Locke's premises suggest that the arbitrariness of adjudging Aboriginal rights exclusively by European standards developed for European needs, and in a manner transparently biased toward European interests, did not pass unnoticed. Benjamin Franklin said, "Savages we call them, because their Manners differ from ours, which we think the Perfection of Civility; they think the same of theirs".⁵⁴⁰ John Adams wrote:

Reasonings from a State of Nature are fallacious, because hypothetical. We have not the facts. Experiments are wanting. Reasonings from Savage Life do not much better. Every writer affirms what he pleases.⁵⁴¹

4.2.2 19th century justifications, and the zenith of the distorted doctrine in international law

As adopted by Emerich Vattel,⁵⁴² the basic elements of Locke's theory entered international legal theory and remained influential in that form until at least the mid-19th century. Vattel argued (as summarized by Brennan J. in *Mabo v. Queensland*) that "new territories could be claimed by occupation if the land were uncultivated, for Europeans had a right to bring lands into production if they were left uncultivated by the indigenous inhabitants."⁵⁴³ James Tully explains Vattel's position as follows:

In 1758 Emeric de Vattel (1714-67) stipulated that agricultural improvement and a political society with established laws are necessary conditions for the recognition of sovereignty and nationhood in international law. Accordingly, the Indians of North America not only lacked sovereignty but they also failed in their natural law duty to cultivate the soil. Employing these familiar Lockean concepts he concluded that the establishment of 'various colonies upon the continent of North America' has been 'entirely lawful'.⁵⁴⁴

While denying that the Aboriginal peoples of North America possessed property in their lands, Vattel nevertheless lauded (as had many of the colonial publicists) the generosity of those New England colonists who had shown the "moderation" to purchase Aboriginal lands. Vattel's theoretical justification for Aboriginal dispossession also drew heavily upon the "idle wastrel"

caricature⁵⁴⁵ disseminated by the colonial publicists, and dominant in Locke's image of Indians:

The cultivation of the soil ... is ... an obligation imposed upon man by nature Every Nation is therefore bound by the law of nature to cultivate the land which has fallen to its share. ... There are others who, in order to avoid labour, seek to live upon their flocks and the fruits of the chase Now that the human race has multiplied so greatly, it could not subsist if every people wished to live after that fashion. Those who still pursue this idle mode of life occupy more land than they would have need of under a system of honest labour, and they may not complain if other more industrious nations, too confined at home, should come and occupy parts of their lands. Thus, while the conquest of the civilized Empires of Peru and Mexico was a notorious usurpation, the establishment of various colonies upon the continent of North America might, if done within just limits, have been entirely lawful. The peoples of those vast tracts of land roamed over them rather than inhabited them.⁵⁴⁶ [T]he law of nations will only recognize the *ownership* and *sovereignty* of a nation over unoccupied lands when the nation is in actual occupation of them, when it forms a settlement upon them, or makes actual use of them. ... It is asked whether the nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers cannot populate the whole country. We have already pointed out ... that these tribes cannot take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions cannot be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them. ... [I]f each Nation had desired from the beginning to appropriate to itself an extent of territory great enough for it to live merely by hunting, fishing, and gathering wild fruits, the earth would not suffice for a tenth the part of the people who now inhabit it. Hence we are not departing from the intention of nature when we restrict the savages within narrower bounds.⁵⁴⁷ However, we cannot but help praising the moderation of the English puritans who first settled in New England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the land of which they intended to take possession.⁵⁴⁸ This laudable example was followed by William Penn, and the colony of Quakers that he conducted to Pennsylvania.⁵⁴⁹

In arguing that European powers could impose their own sovereignty upon Aboriginal peoples on the basis of 'cultivating occupation', Vattel made explicit the ultimate ramification of John Locke's argument.⁵⁵⁰

Vattel's opinion achieved influential status in 19th century Europe.⁵⁵¹ The international law⁵⁵² and practice⁵⁵³ of this period also contained strongly opposing strains.⁵⁵⁴ To the extent of Vattel's influence, however, international law licensed European acquisition of North American territory and the expansion of established colonies, on the basis that Aboriginal territory could be treated as unoccupied.

Applying international law as it existed in 1884, the International Court repudiated the distorted doctrine of *terra nullius* in 1975. A parallel, though limited repudiation of the colonial law analogue has also occurred. Before considering these developments, however, it is important to identify the 19th century's distinctive contributions to the doctrine.

In the 19th and early twentieth century two intellectual trends inspired by the age of imperialism⁵⁵⁵ sharpened and hardened the image of Aboriginal peoples in European and colonial thought. Social Darwinism held that wealth and power naturally tended to be distributed amongst individuals and groups according to preordained laws of nature.⁵⁵⁶ By the latter 19th century, most Aboriginal peoples in North America had been economically subjugated: social Darwinist thought presumed Aboriginal peoples' relative impoverishment to be the natural consequence of dependence upon a way of life which must, as society evolves naturally, 'give place to its better'.⁵⁵⁷ In the same era science and public policy embraced 'race' as a legitimate biological indicator of individual and group behaviour.⁵⁵⁸ The two trends readily combined with one another in the context of European imperialism to produce scientifically respected and officially sanctioned theories of the evolutionary superiority of the 'white' race over others.⁵⁵⁹ Evelyn Kallen describes the consequence for Aboriginal peoples as follows:

Historically, one of the most insidious political uses of Social Darwinist theories lay in their provision of a pseudoscientific basis for Colonialism. Indeed, the pejorative connotation which has come to be attached to the term Colonialism derives from the racist consequences of theories of White Supremacy, used to legitimate the subordination and exploitation of colonized non-White peoples by White colonizers.

Ideologies of White Supremacy developed by European whites in the grand era of empires and colonial expansion, in which they reigned supreme, depict the

White races, variously defined, as the "fittest," i.e. as culturally and biologically superior to all other so-called races. At the bottom of this purported scale are the dark-skinned "savages". Their supposed inferior or uncivilized culture and technology is attributed to an assumed evolutionary lag by virtue of which they are deemed biologically incapable of achieving the fullest human and cultural development. Such ideologies have served to endow the words "primitive" and "native" with a connotation of innate inferiority, and have served, at the same time, to legitimize paternalistic Colonial mythologies and to dehumanize government policies toward aboriginal peoples so-defined.⁵⁶⁰

From this perspective the 'civilization' brought by 'white' colonizing powers to colonized peoples carried layers of meaning. Rudyard Kipling's label, "lesser breeds without the Law", came to represent colonialism's presumption of the inferiority of its 'uncivilized' objects.⁵⁶¹

"Civilization" itself became the standard of "occupation" under a prominent 19th century account of the distorted doctrine of *terra nullius*.⁵⁶² The presumption of European superiority baldly asserted by such a standard had been implicit, of course, in Locke's dismissal of Aboriginal forms of government, and in his insistence that history determines that cultivation is a more advanced form of labour than hunting and gathering, and that morality deems it more virtuous. Racialist⁵⁶³ and evolutionist dogma, however, permitted nineteenth century jurists to extend such thinking along a path similar in one fundamental way to that which Sepulveda had followed in the 16th century: the Aboriginal 'barbarian' once again became categorically separated from Europeans by immutable laws of nature. According to the nineteenth century version of that view, Aboriginal peoples must be denied sovereign capacity until they have evolved to a sufficiently European form of society; in the meantime, any European sovereign may acquire their territory by occupation.

The most prominent of the international jurists adopting such a view was John Westlake. According to M.F. Lindley, Westlake argued that "the only territorial titles recognized by International Law are those which are held by States that are so far organized that they can protect the white settler in the pursuits of the civilized life to which he has become accustomed, and administer justice in the questions arising out of them; or, at least, States that can do these things with consuls accredited to them."⁵⁶⁴ According to Lindley, Westlake also approved of

another jurist's assertion that "cessions made by native chiefs, half or wholly savage, to the chance comer who gives them the most" can have no legal effect, because such leaders (and, implicitly, their communities) possess no "constituted sovereignty, that being a political right derived from civilization".⁵⁶⁵ Similarly, Oppenheim distinguished formally and equally arbitrarily between (in Lindley's summary) "land inhabited by natives under a tribal organization whose community is not to be considered as a State," and "the territory of any State", holding that "Occupation is applicable" only to the former.⁵⁶⁶ Others argued that "any territory unappropriated by a civilized or semi-civilized state" may be acquired by occupation; or that only States belonging to the Family of Nations can avoid losing territory by occupation, "the attainment of some slight degree of civilization and political coherence" not being enough by itself to bar acquisition by occupancy.⁵⁶⁷

Some of these authors allowed that Aboriginal peoples should be considered full possessors of their lands so as to give them a proprietary title which (in Westlake's phrase) "may be of legal validity even under the white government to be ultimately established."⁵⁶⁸ But the typical criterion for such allowance was consistent with Westlake's basic standard. According to Lindley, "[p]roperty and its transfer are matters which, Westlake considers, the natives can understand, 'but certainly not the complicated arrangements of a modern state'".

4.2.3 The colonial law parallels

The foregoing sections have identified the influence of several historical developments on the course by which a distorted doctrine of *terra nullius* took shape in international law. The same developments had significant impact on the related colonial law, which is concerned both with property and sovereignty.⁵⁶⁹

4.2.3.1 Property

When ... a court begins an opinion in an Indian property case by referring to Indians moving from one place to another as *roaming*, *wandering*, or *roving*, we can be pretty sure that it will end up by denying the claimed property rights of

the Indians. For these words are words which are commonly applied to buffalo, wolves and other sub-human animals. They suggest that the relation of an Indian to the land is purely a physical relation and not a social one. They are plainly 'out-grouping' or 'they' words... Only when we regard a person as strange or perhaps sub-human do we customarily impute aimless motion to him.⁵⁷⁰

Felix Cohen

In *Mabo v. Queensland* Brennan J. said that the "common law" (in this context, colonial law) "has had to march in step" with international law's distortion of the doctrine of *terra nullius*.⁵⁷¹ (Brennan J.'s term for the change is "enlarge[ment]".⁵⁷²) According to Brennan J:

When British colonists went out to other inhabited parts of the world, including New South Wales, and settled there under the protection of the forces of the Crown, so that the Crown acquired sovereignty recognized by the European family of nations under the enlarged notion of *terra nullius*, it was necessary for the common law to prescribe a doctrine relating to the law to be applied to such colonies, for sovereignty imports supreme internal legal authority.⁵⁷³

Brennan J. was directly concerned with 19th century Privy Council and Australian judicial precedents propounding the colonial law doctrine of peaceful settlement. With respect to the Privy Council precedents, one set approved the classification of a territory "as though it were 'desert uninhabited' country' ... on the hypothesis that there was no law already in existence in the territory".⁵⁷⁴ Another set explicitly affirmed that hypothesis in relation to certain inhabited territories.⁵⁷⁵

In Brennan J.'s assessment, the false, "[e]x hypothesi" rationale of the peaceful settlement doctrine⁵⁷⁶ was that Aboriginal peoples lived in a "barbarous or unsettled" state,⁵⁷⁷ in which they "were ... taken to be without laws, without a sovereign and primitive in their social organization."⁵⁷⁸ So understood, the colonial law of the 19th century mirrored Westlake's view of the related international law, reviewed above. Brennan J. emphasized that by contrast, as late as 1830 (i.e. long after Locke's and Grotius' opinions had been disseminated in Europe, and after Vattel's views had become prominent enough to be pleaded as authority in the United

States Supreme Court⁵⁷⁹) Blackstone's *Commentaries* disputed the validity of claims to Aboriginal territory based on settlement, on both colonial law and natural law grounds.⁵⁸⁰ (The historical development of the doctrine of peaceful settlement as it relates to sovereignty is reviewed further in the next section below.)

If colonial law did simply march in step with international law in purporting to validate sovereign acquisition of inhabited territory by occupation, the Australian and, in important respects, the late 19th century Privy Council version of that law also *extended* the distorted international notion into the sphere of property rights. As had a *minority* of international law writers,⁵⁸¹ the Australian courts simply equated the basis for property rights with the basis for sovereignty, rejecting Aboriginal peoples' qualification for both:

As the indigenous inhabitants of a settled colony were regarded as "low in the scale of social organization",⁵⁸² they and their occupancy of colonial land were ignored in considering the title to land in a settled colony. Ignoring those rights and interests, the Crown's sovereignty over territory which had been acquired under the enlarged notion of terra nullius was equated with Crown ownership of the lands therein, because, as Stephen C.J. said, "there was no other proprietor of such lands".⁵⁸³ Thus, a Select Committee on Aborigines reported in 1837 to the House of Commons⁵⁸⁴ that the state of Australian Aborigines was "barbarous" and "so entirely destitute ... of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of their soil, have been utterly disregarded." The theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs.⁵⁸⁵

For its part, the Privy Council never held that property may not precede and survive the acquisition of an inhabited territory by settlement, but in *Re Southern Rhodesia* the Privy Council adopted a remarkable permutation on the doctrine of peaceful settlement's basis for denying Aboriginal sovereignty. Having assumed, in the two earlier cases quoted by Brennan J. in *Mabo*,⁵⁸⁶ that their "barbarous or unsettled" state disqualified all of the previous inhabitants of "settled" territories from sovereign entitlement, the Privy Council introduced in *Re Southern Rhodesia*⁵⁸⁷ a *second order test* for Aboriginal occupation of land. According to this test, *some* of those 'barbarous' peoples might yet save their private property, while *others lower still on*

"the scale of social organization" could not. According to Brennan J., in *Mabo v. Queensland*:

It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the antipodes, its first fruits were to strip them of their right to occupy their ancestral lands. Yet the supposedly barbarian nature of indigenous people provided the common law of England with the justification for denying them their traditional rights and interests in land, as Lord Sumner speaking for the Privy Council said in *Re Southern Rhodesia*:

"The estimation of the rights of Aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them."⁵⁸⁸

As Brennan J. noted, the Privy Council also buttressed its view that the Aboriginal people in question probably failed its second order test,⁵⁸⁹ by espousing a rationale for the Crown's presence and policy in the territory which starkly reflects the social Darwinist and racist assumptions of the test itself: "white settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown"; "maintenance of [native] rights was fatally inconsistent with white settlement".⁵⁹⁰ Brennan J. repudiated the Privy's Council's test for Aboriginal land rights on the ground that it discriminates racially or ethnically against those to whom it is applied. In Brennan J.'s opinion the discrimination inherent in the test consisted of "den[ying] [the indigenous inhabitants] the right to occupy their traditional lands" on account of "the[ir] supposed position on the scale of social organization".⁵⁹¹

Brennan J.'s opinion was concurred in by two of the six other members of the High Court panel in *Mabo v. Queensland*.⁵⁹² None of the three other members of the majority affirming the Aboriginal plaintiffs' title applied the Privy Council's "scale of social organization" test in their analysis,⁵⁹³ and two of those members expressly rejected the previous Australian distortion of the doctrine of *terra nullius* on the ground that it treated "the Aboriginal people of

the continent ... as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands."⁵⁹⁴ It is fair to conclude that in rejecting any criterion for Aboriginal title that denies land entitlements to Aboriginal peoples on the basis of perceived social deficiencies or lower "form[s] of life," the High Court of Australia has rejected the *Re Southern Rhodesia* "scale of social organization" test as a rule of colonial law.⁵⁹⁵

4.2.3.2 Sovereignty

[T]he wildest Indians in America agree upon some forms of Government ... [and] their civil and earthly governments be as lawfull and true as any Governments in the World.⁵⁹⁶

Roger Williams, circa 1633

It appears doubtful whether the international law always led the colonial law in subverting either the sovereignty or property dimensions of the doctrine of *terra nullius*. Certain historical dynamics appear to have influenced colonial law's notion of acquisition of sovereignty by settlement quite directly. (The judgements of the Marshall Court reviewed in this section also contain important contributions to the colonial law of Aboriginal property rights, which should be considered in conjunction with the foregoing discussion.)

As a theory of acquisition of inhabited territory, the doctrine of peaceful settlement did not become ensconced in colonial law until well into the 19th century. Settlement continued to be recognized by prominent colonial law authorities solely as a means of acquiring uninhabited territory until at least as late as 1837.⁵⁹⁷ Indeed, the sources reviewed for this analysis would appear to indicate that the only Privy Council decision to adopt the doctrine unequivocally as a rule applicable to inhabited territory, was *Cooper v. Stuart*, decided in 1889.⁵⁹⁸

The origins of the colonial law doctrine of peaceful settlement are not easily identified.⁵⁹⁹ The sources reviewed for this analysis suggest that in its earliest phase the doctrine emerged from the 'complex' rule of conquest we have encountered in part 2,

"recognition doctrine", above.⁶⁰⁰ The rule that English law (and, if the sovereign's man-
were given, English sovereignty) follows the settlers into vacant territory, was first extended into
inhabited territory in cases of conquest. As we have seen, the 'simple' rule that the previous law
of the conquered territory remains in force until altered by the conquering sovereign was
modified out of concern that it might not be suitable for English settlers. In that case, the law
of the conquered territory continued to apply to the previous inhabitants, under a regime of legal
pluralism.

The historical course appears to have been that colonists - chiefly American colonists,
commencing in John Locke's era, and building upon the precedent of English justifications for
the conquest and later subjugation of the Irish⁶⁰¹ - and also their lawyers, governors, and old
country publicists, converted the claim that the heathenism and barbarism of Aboriginal peoples
justified conquest and the subsequent, 'complex' application of English law to the *settlers*, into
the claim that in territory inhabited by heathen and barbarous peoples, *no sovereignty, law, or
property could have pre-existed that derived from the Crown.*⁶⁰² Therefore, the argument went,
Crown sovereignty and English law could be unilaterally applied wherever the colonists planted,
whether or not there had been actual conquest, whether or not any war had been just, and
regardless of the requirement otherwise that the law of conquered peoples must continue to
apply, at least to them, until altered by the Crown.⁶⁰³ As in the case of its international law
counterpart, the outlines of this colonial law argument appear to have originated in the rhetoric
of 17th century colonial pamphleteers.⁶⁰⁴

It is difficult in the extreme to rationalize the claim that Crown sovereignty extends into
inhabited territory for the sake of English settlers, from the legal premise of conquest. Title to
territory acquired by conquest is derivative: the conqueror acquires the title held by the previous
sovereign.⁶⁰⁵ The validity of the *Crown's* territorial title in a conquered colony therefore
depends - act of state doctrine aside - upon acknowledgement of the predecessor's sovereignty.
Further, the extension of English law to the settlers in a conquered colony was itself - according
to colonial law, if not in the minds of the colonists - a special exception to the general rule that

the laws of the previous sovereign continue to apply until changed.⁶⁰⁶ Marshall C.J. was to build upon the conquest doctrine's acknowledgement of Aboriginal sovereignty⁶⁰⁷ and the principle of reciprocity implicit in settler demands for culturally suitable laws,⁶⁰⁸ in his theory of internal Aboriginal sovereignty (which presumes that the 'discovery converted into conquest' by which the Crown acquired sovereignty was partial and largely fictional, and that Crown interests in property are based largely on negotiated treaties).⁶⁰⁹

Of course, the view that the peoples whose laws were 'unsuitable' for settlers under the 'complex' rule of conquest were "barbarous," already demeaned those peoples, so it is unsurprising that the theme of Aboriginal inferiority was exploited further by the pamphleteers. When their argument was put to the United States Supreme Court, it initially fared strongly. Initially it appeared that the United States Supreme Court might dismiss claims to Aboriginal title wholesale on this basis.

Chief Justice Marshall implied in 1810 that Indian land could be considered "vacant" as far as state authority to grant private titles was concerned.⁶¹⁰ In 1823, in one part of his judgement in *Johnson v. M'Intosh*, Marshall C.J. stated that "[s]o far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians".⁶¹¹ Indeed, the main argument of the successful party in the latter case appears to comprise the most fullblown apology for distortion of the doctrine of *terra nullius* appearing in the reports of superior court colonial law cases, fusing as it does the "state of nature" arguments of Vattel and the early liberal theorists - presented as fact - with direct, 19th century assertions of racial superiority. The defendants in *Johnson v. M'Intosh* argued as follows (annotations refer mainly to the defendants' citations of works discussed above):

[T]he uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations.⁶¹² ...[T]he whole theory of [civilized nations'] titles to lands in America, rests on the hypothesis, that the Indians have no rights of the soil as

sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives.⁶¹³ The sovereignty and eminent domain thus acquired, necessarily precludes the idea of any other sovereignty existing within the same limits. ... It is unnecessary to show, that they are not *citizens* in the ordinary sense of that term, since they are destitute of the most essential rights which belong to that character. They are of that class who are said by jurists not to be citizens, but perpetual inhabitants with diminutive rights.⁶¹⁴ The statutes of Virginia, and of all the other colonies, and of the United States, treat them as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupillage of the government. ... By the law of nature, they had not acquired a fixed property capable of being transferred. The measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants, and their capacity of using it to supply them.⁶¹⁵ It is a violation of the rights of others to exclude them from the use of what we do not want, and they have an occasion for. Upon this principle the North American Indians could have acquired no proprietary interest in the vast tracts of territory which they wandered over; and their rights to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it. The use in the one case, as well as the other, is not exclusive.⁶¹⁶ According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators. All the proprietary rights of civilized nations on this continent are founded on this principle.⁶¹⁷

In subsequent judgements the Marshall Court was to categorically reject the claim that farmers' use of the land yields a title better than that of hunters,⁶¹⁸ and insist that the legal relationship between Aboriginal peoples and settlers be founded in the principle of equality between nations.⁶¹⁹ In *Johnson v. M'Intosh*, however, Marshall C.J. responded to the defendants' arguments equivocally.⁶²⁰

Stressing that the only legal issue in the case was the validity in colonial law of a transfer of land title directly from an Aboriginal people to settlers⁶²¹ (the point decided in the defendant's favour, in the negative), Marshall C.J. vowed to avoid questions of "abstract principle" altogether,⁶²² but did not. As noted above, Marshall C.J. designated Aboriginal lands "vacant" in so far as the Crown's power to grant titles is concerned. Marshall C.J. introduced his reasons for qualifying the ordinary rule that the property rights - transferable or

not - of conquered persons survive conquest,⁶²³ by expressing antipathy to the Aboriginal grantors: "although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them."⁶²⁴ The Chief Justice then identified the Indians' objectionable character and habits by the same stereotype promulgated and exploited by the colonial pamphleteers:

the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce.⁶²⁵

Essentially, Marshall C.J. reasoned that the inferior culture of Aboriginal peoples rendered Aboriginal control over the disposition of Aboriginal lands unacceptable in light of the settlers' designs on the "wilderness", but that despite its claim of conquest, the Crown could not afford to assert the full authority of a conquering nation without jeopardizing its foothold in Aboriginal territory.⁶²⁶ Notwithstanding that "this restriction may be opposed to natural right, and to the usages of civilized nations", Marshall C.J. held for those reasons that "the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others."⁶²⁷ Alternatively, Marshall C.J. held that such a capacity might be fully recognized under the "laws and usages" of the Indians, and that the grant in question might have been fully valid under such laws, but the subsequent grant of the same land by the tribe to the United States must be taken in colonial law to have annulled the earlier grant, and the colonial law courts have no jurisdiction to question such an annulment.⁶²⁸

Having affirmed a restriction on alienation of Aboriginal title, Marshall C.J. rejected the defendant's main argument that Aboriginal property in land is non-existent. Marshall C.J. expressly recognized the occupancy⁶²⁹ of Aboriginal peoples, and endorsed no restriction on their title other than that on alienation. Specifically, he ruled that Aboriginal peoples "were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain

possession of it, and to use it according to their own discretion."⁶³⁰ In Howard Berman's assessment:

Although the use of terms such as "absolute title" to describe the rights of the United States, and "occupancy" to describe the rights of the Indian nations seems to indicate a hierarchy of land tenures, a careful reading of the text reveals that these characterizations of property interests did nothing to effect the essential relationships described by Marshall in this case. Whether the Indian interest was termed "title" or "occupancy", it stood as a legal right that was only qualified by a limitation over which European nations might acquire the interest. The natives "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion," and their rights to complete sovereignty were only diminished by the distributional preference of the discovery principle.⁶³¹

Similarly, M.F. Lindley concludes that "[n]o doubt the right of occupancy which was allowed to the Indians after the sovereignty over their territory had been acquired was considered in the main to be in the nature of a property right"⁶³²

In his subsequent decision confronting the nature and scope of Aboriginal rights of sovereignty and property directly - *Worcester v. Georgia* - Marshall C.J. adopted the position which follows directly from the legitimate point embedded in the early colonists' "extravagant and absurd"⁶³³ "pretensions"⁶³⁴: if the colonists' cultural interests should exempt them from the Aboriginal regime that would otherwise apply to territory partially acquired by a judicially imagined feat, then, at a minimum, the internal sovereignty and property of Aboriginal peoples should be recognized reciprocally.

Worcester v. Georgia's holdings have been examined above;⁶³⁵ it need only be emphasized here that Marshall C.J.'s judgement in *Worcester* firmly rejected the distorted doctrine of *terra nullius*,⁶³⁶ respecting both sovereignty⁶³⁷ and property,⁶³⁸ conceiving instead of the Crown/Aboriginal relationship as one between sovereign nations equal in every respect but political and military power. In the latter 19th century the United States Supreme Court was to adopt an overtly racist and social Darwinist rationale for subordinating

Aboriginal sovereignty to that of the United States.⁶³⁹ In 1955 the Court distorted Marshall C.J.'s holding in *Johnson v. M'Intosh* so as to reduce the status of Aboriginal title in American law to permissive occupancy⁶⁴⁰ posing no legal constraint on the actions of the American sovereign. But the Marshall Court's decisions represent the colonial law foundation of the American jurisprudence, and it is that foundation which is of importance to comparable regimes originating in English colonial law.⁶⁴¹

No parallel judicial constraint on expansionist fervour appeared in the Privy Council's rulings in the age of imperialism. It is thus remarkable, perhaps, how late in the 19th century the doctrine of 'peaceful settlement', as a basis for acquiring inhabited territory, received the Privy Council's approval. According to the sources reviewed for this analysis, the first case in which the Privy Council applied the doctrine in that context was *Bengal v. Surnomoye Dossee*, decided in 1863.⁶⁴² There the Privy Council stated that English law and English sovereignty follow the settlers into "uninhabited or barbarous country" (and that English law does not apply to unintegrated "barbarous" peoples otherwise).⁶⁴³ The *obiter dicta* in *Surnomoye Dossee* were not applied determinatively by the Privy Council until 1889.⁶⁴⁴ *Cooper v. Stuart* led to classification of the entire continent of Australia as 'settled'. Subsequently, Sierra Leone⁶⁴⁵ and the Gold Coast Colony⁶⁴⁶ were classified as 'settled' by senior courts, despite the agricultural basis of the indigenous economies in those territories, and virtually concurrent statutory and judicial recognition of indigenous customary laws!⁶⁴⁷ The Bahamas, Bermuda, and Kenya also came to be classified as settled.⁶⁴⁸

4.3 Rejection of the distorted doctrine in international law: *Western Sahara*

In 1975, pronouncing international law as of the period beginning in 1884, the International Court of Justice rejected the distorted doctrine of *terra nullius* in the following terms:

[A] determination that Western Sahara was a "*terra nullius*" at the time of colonisation by Spain would be possible only if it were established that at that time the territory belonged to no one in the sense that it was then open to

acquisition through the legal process of "occupation".

Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers. ... [S]uch agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.

In the present instance, the information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.⁶⁴⁹

In a separate opinion one member of the Court wrote that "it cannot be arbitrarily required" of the people in question that "its institutions should be a carbon copy of European institutions, for on that basis almost the entire African continent would have to be declared *terra nullius*."⁶⁵⁰ The Vice-President of the Court declared that "the concept of *terra nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonisation, stands condemned."⁶⁵¹

The issue before the Court concerned territorial sovereignty, but, as Judge Ammoun observed, the principle that a people's habitation of territory constitutes occupation also applies to property in land.⁶⁵²

Read narrowly, the majority opinion of the International Court might appear to entertain continued ethnological argument about the location of the line to be drawn between aggregations of individuals, and "peoples having a social and political organisation".⁶⁵³ It is submitted, however, that to construe this ruling so as to permit the inhabitants of any territory to be denied the status of occupants, would be to miss the Court's essential message. Affirming that all human beings are equal and that human beings live in societies,⁶⁵⁴ the International Court has

insisted that the law accord all human societies equal respect.⁶⁵⁵ That is why Justice Brennan of the High Court of Australia drew from *Western Sahara* the simple conclusion that "the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support".⁶⁵⁶

To put this point another way, the International Court's concept of "tribes or peoples having a social or political organization" should be understood as a *description* of human communities generally, not as a *prescription* for distinguishing meritorious human groups from those whose territory is freely available for colonial takings. This means, at a minimum, that the 19th century "civilization" standard for measuring peoples has been dealt a "fatal blow".⁶⁵⁷ territory occupied by peoples not regarded as 'civilized' by European standards may not be acquired by European nations by occupation. It also means, it is submitted, that no avowedly non-Eurocentric, neutral ethnological test for "social", "political", "organization", or some combination of these elements, may be administered to a permanent grouping of Aboriginal persons in order to determine their qualification as occupants of the territory they inhabit. Any prescriptive test would perpetuate the treatment of Aboriginal peoples "as the objects rather than the subjects of international law".⁶⁵⁸ Applying any such test would be tantamount to requiring that persons prove their humanity by standards of behaviour, before they receive equal respect.⁶⁵⁹ This is the fundamental reason why, in the colonial law context, Brennan J. adjudged the 'barbarism' classification in *Mabo* not only "false in fact", but "unacceptable in our society".⁶⁶⁰

Drawing on anthropological analysis and the logic of human rights, Michael Asch and Catherine Bell have shown that "[t]here can be no people so primitive that they have no social organization or system of rules regulating behaviour".⁶⁶¹ Evidentiary issues surrounding Aboriginal boundaries, descentance from the initial Aboriginal rights-holding group, and individual and group membership in a people may be intricate, but the basic entitlement of the initial Aboriginal occupants of territory has never been a subtle matter. Because they would perpetuate discrimination against the peoples they disqualify,⁶⁶² even avowedly neutral criteria

for the minimal content of "society" are unsupportable as requirements for proof of Aboriginal rights:

If the equality of peoples, rather than their inequality was the assumption ... it would make more sense to invoke a presumption of social organization and rights common to all self-determining peoples. ... [Aboriginal] plaintiffs should not be required to prove the existence of a catalogue of institutions and uses to rebut a presumption ... that their ancestral societies ranked so low on a scale of societal organization that their institutions were too imprecise to give rise to rights ...⁶⁶³

The essential principle upon which the undistorted doctrine of *terra nullius* is based makes precisely such a presumption, protecting the sovereign and proprietary interests of all prior occupants of territory, regardless of the manner in which they relate to each other, organize themselves, structure their institutions, or derive their subsistence.⁶⁶⁴

4.4 Partial rejection in colonial law: *Mabo v. Queensland*

In *Mabo v. Queensland* Brennan J. repudiated the colonial law's distorted doctrine of *terra nullius* because it depends on "discriminatory denigration of indigenous inhabitants, their social organization and customs".⁶⁶⁵ "If it were permissible in past centuries to keep the common law in step with international law", said Brennan J., "it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination".⁶⁶⁶ The equality principle⁶⁶⁷ underlying *Western Sahara* is the High Court of Australia's explicit ground for rejecting the distorted doctrine.⁶⁶⁸

The issue before the Court in *Mabo* concerned the proprietary rights of an Aboriginal people.⁶⁶⁹ It was thus the dimension of the distorted doctrine giving rise to "the theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land,"⁶⁷⁰ on which Brennan J. concentrated his criticism. In fact, despite having made the ruling in *Western Sahara* central to his reasoning, Brennan J. left the colonial law's distorted doctrine of *terra nullius* undisturbed in so far as it relates to the acquisition of territorial sovereignty. The

plaintiffs had not challenged the colonial law's doctrine of 'peaceful settlement' in that respect.⁶⁷¹ Ultimately, Brennan J. relied on the conventional act of state doctrine to excuse judicial determination of the issue of territorial sovereignty under colonial law.⁶⁷²

Brennan J. did not shy away, however, from the implications for the doctrine of peaceful settlement of the discriminatory foundations he had unearthed. The stereotype of Aboriginal peoples on which the distorted doctrine depended did not permit avoidance of this issue. That stereotype fused the negation of property, sovereignty, civilization, and equal worth into a single image, according to which "the state of Australian Aborigines was 'barbarous' and so entirely destitute ... of the rudest forms of civil polity, that their claims, *whether as sovereigns or proprietors of the soil*, have been utterly disregarded" [emphasis added].⁶⁷³

Brennan J.'s critique of the colonial law's "enlarged" doctrine of *terra nullius* commences by examining the justifications by which European nations in the past had defended their acquisition of sovereignty by occupation over territories already inhabited by peoples they called "backward".⁶⁷⁴ Finding it unlikely that any of the historical justifications canvassed - offsetting benefits of Christianity or civilization, or the absence of indigenous cultivation of the land - were supported by the facts (the Meriam people having been, among other things, "devoted gardeners") Brennan J. accepted nonetheless that the colonial law had adopted precisely this theory to explain how the Crown had acquired sovereignty in Australia.⁶⁷⁵ In doing so, the colonial law adopted what Brennan J. took to be international law's pre-*Western Sahara* hypothesis that no law existed in such territories, because its inhabitants were uncivilized, or 'barbarous'. "Ex hypothesi, the indigenous inhabitants of settled colony had no recognized sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign, and primitive in their social organization".⁶⁷⁶ Although he declined to rule upon its validity as a basis for sovereignty, Brennan J. left no doubt as to his opinion of the merits of this theory: "[t]hus the Meriam people ... became British subjects owing allegiance to the Imperial Sovereign And this is so irrespective of the fact that ... the Meriam people were settled on their land, the gardens were being tilled, the Mamoose⁶⁷⁷ and the London Missionary Society were

keeping the peace and a form of justice was being administered."⁶⁷⁸

Because the 'barbarian' stereotype anchors the "enlarged" doctrine of *terra nullius*, Brennan J.'s holding that the proprietary dimension of the doctrine is racially or ethnically discriminatory applies with equal force to the doctrine's sovereign dimension. That the High Court left the sovereign dimension of the distorted doctrine undisturbed has attracted criticism from commentators,⁶⁷⁹ but the force of the Court's analysis remains undiminished. By insisting that justice requires that Aboriginal peoples be acknowledged to have been the occupants of their territory in colonial times, the High Court has demonstrated that the doctrine of peaceful settlement is logically inapplicable to inhabited territory. Not even the distorted doctrine of *terra nullius* claimed that territory acknowledged to be occupied could be acquired by occupation.⁶⁸⁰ A reconceptualization of the basis for Crown authority in such territories is therefore clearly called for.

It should be noted that, in so far as Aboriginal property rights are concerned, *Mabo v. Queensland* implemented the interpretation of *Western Sahara* adopted expressly by Brennan J., and advocated above. Claimants of Aboriginal title are required under the majority ruling in *Mabo* to trace their descentance from the "people" (or "community", or related "clan" or "group") holding the lands when the Crown asserted sovereignty,⁶⁸¹ but the fact of political and social organization within such communities is presumed, and descendants are not required to prove as a threshold of entitlement that their ancestral communities possessed such things. (The Court held that the content of ancestral laws or customs governs the incidents of Aboriginal title, and so must be proven as a matter of fact for this purpose.⁶⁸² It is submitted that this is a flawed approach to a question of intersocietal law,⁶⁸³ but having adopted this approach, the Court adhered to the principle of equality of peoples as closely as would appear possible,⁶⁸⁴ by presuming that Aboriginal territory is not a "legal desert".)⁶⁸⁵

4.5 Status of the distorted doctrine in Canada

We hold these lands by the best of all titles ... and we believe that we cannot be deprived of them by anything short of direct injustice. ... Would it be right for our Chiefs to give licenses to members of the tribe to go to the district of Victoria to measure out, occupy, and build upon lands in that district now held by white men as grazing or pasture land? Would the white men now in possession permit it, even if we told them that as we were going to make a more profitable use of the land they had no right to interfere? Would they not at once interfere and drive us out? If it would not be right for us so to act, how can it be right for the white man to act so to us?⁶⁸⁶

Petition of the Gitksan chiefs of Gitwangak to the government of British Columbia, 1884

In principle, the Supreme Court of Canada has condemned the prejudice underlying the distorted doctrine of *terra nullius* in terms no less strong than those used by the High Court of Australia in *Mabo v. Queensland*. Speaking for three of the seven sitting members of the Court in *Calder*, Hall J. denounced the Court of Appeal's caricature of Aboriginal peoples and the prejudice evidenced in *Johnson v. M'Intosh*, discussed above:

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws, or culture, in effect a subhuman species. This concept of the original inhabitants of America led Justice Marshall in his otherwise enlightened judgement in *Johnson and Graham's Lessee v. M'Intosh* ..., which is the outstanding judicial pronouncement on the subject of Indian rights to say, ... "But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war..." We know now that this assessment was ill-founded. The Indians did in fact engage in some tribal wars but war was not their vocation and *it can be said that their preoccupation with war pales into insignificance when compared to the religious and dynastic wars of "civilized" Europe of the 16th and 17th centuries.* Chief Justice Marshall was, of course, speaking with the knowledge available to him in 1823. Chief Justice Davey in the judgement under appeal ... with all the historical research and material available since 1823 and notwithstanding the evidence in the record which Gould J ... found was given "with total integrity", said of the Indians of the mainland of British Columbia ... :

... they were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society,

and none at all of our notions of private property.

In so saying this in 1970, he was assessing the Indian culture of 1858 by the same standards that the Europeans applied to the Indians of North America two or more centuries before.⁶⁸⁷ [emphasis added]

In *Simon v. The Queen*, overruling a lower court precedent denying the capacity of Aboriginal peoples to enter into treaties,⁶⁸⁸ Dickson C.J. stated for a unanimous Court:

It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and, indeed, is inconsistent with a growing sensitivity to native rights in Canada.⁶⁸⁹

In substance, Canadian law appeared to depart from 19th century denials of Aboriginal rights in *St. Catherine's Milling v. the Queen*,⁶⁹⁰ when the Privy Council recognized a usufructuary right in Aboriginal lands based on the *Royal Proclamation of 1763*. Viewing today's law as a cumulative product, however, it is clear that the Supreme Court's desire to rid Aboriginal rights law of its legacy of racial and ethnic prejudice remains unfulfilled. Important remnants, in particular, of the distorted doctrine of *terra nullius* survive in Canadian case law, affecting the judicial reception of Aboriginal claims to both sovereignty and property. Before examining these theories the historical context of the *St. Catherine's Milling* ruling bears reflecting upon.⁶⁹¹

Chancellor Boyd's reasons for judgement at trial in *St. Catherine's Milling* are quoted in the preface to this part.⁶⁹² Chancellor Boyd held that because Aboriginal peoples were regarded as "scattered ... heathens and barbarians"⁶⁹³ when the Crown asserted sovereignty, the *Royal Proclamation* could not possibly have accorded them property rights based on their occupation of land.⁶⁹⁴ This was also the argument made on behalf of the Crown by Ontario's Attorney General,⁶⁹⁵ bolstered in the Supreme Court of Canada⁶⁹⁶ by reference to the pertinent views of, amongst others, John Locke⁶⁹⁷ and Emerich Vattel,⁶⁹⁸ reviewed above.⁶⁹⁹ The Supreme Court of Canada gave assorted reasons for its ruling, but prominent

among them was Taschereau J.'s opinion that Aboriginal peoples cannot possibly have had property in their lands, because otherwise "all progress of civilization and development in this country is and always has been at the mercy of the Indian race."⁷⁰⁰

Chancellor Boyd's and Taschereau J.'s statements have been the subject of modern judicial comment. Stressing the eminence and enduring reputation of Chancellor Boyd,⁷⁰¹ the trial judge in *Bear Island* held in 1984 that Chancellor Boyd's characterization of the nature of Aboriginal title remains good law.⁷⁰² In Steele J.'s opinion Chancellor Boyd's analysis and related sources should serve to correct any modern inclination to assume that the Crown might have intended to treat Aboriginal peoples as equals in the period of the *Royal Proclamation*.⁷⁰³ In *Delgamuukw*, the trial judge cited the statement quoted above from Taschereau J.'s opinion in *St. Catherine's Milling*, among other authorities, in support of his ruling that Aboriginal peoples never held rights of a proprietary nature in their lands.⁷⁰⁴ As had Steele J. in *Bear Island*, McEachern C.J. placed this conclusion in a historical context that demeaned Aboriginal societies. McEachern C.J. cited, in particular, the usual passage from Vattel,⁷⁰⁵ and the statement in *Johnson v. M'Intosh* that "the character and religion of [America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."⁷⁰⁶

These examples illustrate that the "biases and prejudices of another era" did not have isolated impact in that era, and continue to affect the legal process. The language used by Patterson J. in *Syliboy* may have been crude,⁷⁰⁷ but the image of Aboriginal peoples it conveys was hardly exceptional in the jurisprudence. On the contrary, Chancellor Boyd's opinion in *St. Catherine's Milling* exudes a prejudice that was manifestly pervasive and systematic, ingrained in official policy⁷⁰⁸ and judicial reasoning.⁷⁰⁹ These examples also show that the Canadian proponents of the distorted doctrine of *terra nullius* did not assemble their arguments in a vacuum. They drew extensively upon the European and American theories and precedents we have reviewed above, in addition to uniquely Canadian sources.

Lord Watson, who characterized *Royal Proclamation* rights in *St. Catherine's Milling* as "personal and usufructuary"⁷¹⁰ in nature, a "mere burden" on the "proprietary estate" of the Crown,⁷¹¹ and "dependent upon the good will of the sovereign,"⁷¹² authored the Privy Council's decision in *Cooper v. Stuart* less than four months later.⁷¹³ As we have seen, *Cooper v. Stuart* represented the Privy Council's first unequivocal endorsement of the distorted doctrine of *terra nullius* that had figured so prominently in Australian colonial policy and in the decisions of the Canadian courts in *St. Catherine's Milling*. The authority of *Cooper v. Stuart* has since been rejected by the High Court of Australia because of the doctrine's racially discriminatory premise.⁷¹⁴ Lord Watson's proximate authorship of both judgements is perhaps only a coincidence of legal history, but the thematic commonality between these two superficially dissimilar judgements is difficult to dismiss when the Privy Council's role as the keeper of the empire's law is considered, and when it is noted that Lord Watson's concept of the personal usufruct inspired generations of rulings denying that the ancestors of Aboriginal peoples in Canada held property in their land.⁷¹⁵

Evidently Canada's courts have not been immune to the attitudes and influences which gave rise in other British colonial jurisdictions to the notion that Aboriginal peoples never possessed any rights of sovereignty or property cognizable in law. In matters of public policy and scientific understanding, there is no reason to believe that 19th century racist and social Darwinist thought was less firmly entrenched in Canada than elsewhere in the western world.⁷¹⁶ Since its 1973 decision in *Calder* the Supreme Court has endeavoured to overcome this legacy, by giving substance to the doctrine of continuity. It is a task in deep tension with the darker aspect⁷¹⁷ of the foundations of British colonial law.⁷¹⁸

4.5.1 The "organized society" requirement

In 1979, citing a statement made by Judson J. in *Calder*, a Federal Court judge held that in order to be eligible for Aboriginal land rights an Aboriginal party must descend from an "organized society" occupying the land when the Crown asserted sovereignty.⁷¹⁹ Mahoney J.'s conception of the legal function of this criterion in *Baker Lake* was not free of ambiguity,⁷²⁰

but a number of subsequent Canadian decisions have treated it as prescriptive in the sense we have discussed above.⁷²¹ According to the trial judgement in *Bear Island*,⁷²² for example, failure to meet this criterion disqualifies Aboriginal claimants from eligibility for any Aboriginal rights.⁷²³ The Supreme Court of Canada has expressed dissatisfaction with the *Baker Lake* test for Aboriginal rights as applied in *Bear Island*,⁷²⁴ and the Court's dissatisfaction probably involves this criterion,⁷²⁵ but the nature of the Court's concern has not been stated, and the Supreme Court has not ruled on the validity of such a prescriptive criterion directly.⁷²⁶

It is submitted that Judson J.'s important statement in *Calder* that "when the settlers came, the Indians were there, *organized in societies* and occupying the land as their forefathers had for centuries"⁷²⁷ was clearly descriptive in function.⁷²⁸ Its express purpose was to illustrate that "[t]his is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'".⁷²⁹ It is not suggested anywhere in *Calder* that some Aboriginal peoples might not have lived in societies, or that this should be an element of proof of an Aboriginal claimant's case. Judson J.'s purpose was to describe his analytical starting point, much as Marshall C.J. had intended when he wrote that "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of the rest of the world, *having institutions of their own, and governing themselves by their own laws.*" [Hall J.'s emphasis, as quoted in *Calder*].⁷³⁰

In conceiving of Aboriginal peoples as 'organized societies' in *Baker Lake*, Mahoney J. also relied upon the statement from *Worcester v. Georgia* just quoted, and noted its importance to Hall J. in *Calder*. This might suggest that Mahoney J.'s idea was itself descriptive. (Indeed, for all of its periodic disparagement of tribes, subsequent American Supreme Court jurisprudence has not revoked Marshall C.J.'s acknowledgement that Aboriginal peoples lived in political society, and does not appear to put Aboriginal peoples to the proof of this fact in cases involving inherent tribal rights.)⁷³¹ A prescriptive concept entered Mahoney J.'s analysis, however, when he asserted that the rationale for these other references to "organized societies" and "separate nations" is *Re Southern Rhodesia*'s "scale of social organization" test for distinguishing

sufficiently 'civilized' peoples from those who are not. Again, Judson J.'s and Marshall C's statements implied the opposite premise, that Aboriginal rights proceed from the understanding that all human beings share in common the fact of existence in societies. They did not hint that some peoples might be graded too low on a scale of organization to qualify for rights.

In this way the distorted doctrine of *terra nullius* entered into the modern Canadian jurisprudence.⁷³² *Re Southern Rhodesia*'s rule has been rejected as racially discriminatory by three judges of the High Court of Australia,⁷³³ but Canada's Supreme Court has not yet relieved Aboriginal peoples of the requirement to show that their ancestors lived in human societies, or answer the claim that they did not. The legacy of Sepulveda, John Locke, and Herbert Spencer thus continues to determine how Canadian courts conceive of Aboriginal peoples and Aboriginal rights. The "organized society" test is the first hurdle any Aboriginal party faces in seeking to assert Aboriginal rights in the courts. One need only peruse the reported trial judgements in *Bear Island* and *Delgamuukw* to appreciate the enormous expenditure of human and material resources that Aboriginal litigants have been forced to expend in this degrading exercise.

Only in the *Bear Island* trial decision has a modern Canadian court disqualified an Aboriginal people from any entitlement to Aboriginal rights for failure to satisfy the *Re Southern Rhodesia* test. In the Court of Appeal decision in *Delgamuukw*, rendered after the Supreme Court criticized Steele J.'s holding in *Bear Island*, some members of the Court of Appeal majority appeared to treat the test as a formality.⁷³⁴ As Michael Asch and Catherine Bell have emphasized, however, a mere passing grade on the Canadian version of this test can drastically diminish the substance of the Aboriginal rights the courts are prepared to affirm.⁷³⁵ We shall return to this implication of the Canadian test in our discussion of *Delgamuukw*, and subsequently, below. More generally, the process of applying the test casts an ethnocentric shadow over the entire judicial inquiry. In *Baker Lake*, for example, where the court clearly endeavoured to treat Inuit culture with respect, application of the test led to this conclusion:

The fact is that the aboriginal Inuit had an organized society. It was not a society

with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive. The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did.⁷³⁶

Comparing this statement with Marshall C.J.'s introduction in *Worcester v. Georgia* permits immediate insight into the reasons why Aboriginal peoples in Canada continue to struggle for judicial recognition of their inherent sovereignty more than a century and a half after the United States Supreme Court recognized the sovereignty of the Cherokee nation.

In *Delgamuukw*, application of this test at trial led to a patronising threshold finding:

If it were necessary to find that the Gitksan and Wet'suwet'en, as aboriginal peoples rather than villagers had institutions and governed themselves, then I doubt if this requirement has been satisfied. ... I think, however, there is much wisdom in the dictum of the Privy Council in *Re Southern Rhodesia*⁷³⁷ ... I am quite unable to say that there was much in the way of pre-contact social organization among the Gitksan and Wet'suwet'en simply because there is so little reliable evidence. Based upon *Re Southern Rhodesia*, however, I find that no particular level of sophistication should be required. I adopt the view of Mahoney J. at p. 559 of *Baker Lake* that "... the relative sophistication of the organization of any society will be a function of the needs of its members, [and] the demands they make of it". Assuming Gitksan and Wet'suwet'en village customs furnished whatever social organization the law requires, I accept the opinion of Professor Ray that the minimal social organization described by Trader Brown at Babine Lake⁷³⁸ could not have been borrowed or developed just since contact. This, and the further facts that there were villages in the vicinity of Kisgegas and reports of larger Skeena villages to the west, and the probability I have expressed that some of the ancestors of the plaintiffs have been present in the territory for a long, long time, persuade me this requirement has been satisfied.⁷³⁹

Substantively, the *Delgamuukw* trial judge apparently engaged in a dual assessment of the level of "organization" of Aboriginal rights claimants. Considering the centrality of the issue to the case, the reasons presented are vague,⁷⁴⁰ but the judgement appears to hold that, outside the vicinity of their villages,⁷⁴¹ the plaintiffs' ancestors were "organized" enough to qualify for minimal, non-exclusive "sustenance" rights,⁷⁴² but not sufficiently "organized" to qualify

for rights of ownership or sovereignty.⁷⁴³ (As the passage quoted above illustrates, the ruling might also be interpreted as holding that the plaintiffs simply failed the *Re Southern Rhodesia* test outside village areas.⁷⁴⁴ In the result, however, the difference is not material, because McEachern C.J. affirmed minimal sustenance rights in the larger area in any event (implicitly adding, on the latter reading, a second, lower grade to that established by *Re Southern Rhodesia*) and because Aboriginal claims to sovereignty and property are denied on the same basis - insufficient 'civilization' - under both readings.⁷⁴⁵) The *Delgamuukw* trial judgement thus illustrates that despite its ordinary expression as a prescriptive "threshold", the "organized society" test also functions as a floating standard, affecting all gradations of Aboriginal rights claims. A passing but low grade on this test does not free an Aboriginal people from further prescriptive assessment of the people's level of 'civilization.'

McEachern C.J. based his conclusion that organization in the larger area was insufficient to establish property or sovereignty, on his findings that outside the villages and adjacent sites⁷⁴⁶ the plaintiffs' ancestors had followed their instincts rather institutional norms,⁷⁴⁷ "roamed for sustenance purposes"⁷⁴⁸ rather than used or developed the land in an organized way; and failed to develop European institutions of government or property.⁷⁴⁹ (Alternatively McEachern C.J. also hinted that in some parts of the territory he might have found the physical presence of ancestors too scarce to constitute occupation,⁷⁵⁰ and held, more firmly, that any ancestral occupation shown in the larger area was insufficiently exclusive to establish ownership or jurisdiction.⁷⁵¹)

In the result, although McEachern C.J. distanced himself from the language of barbarism in some parts of his reasons,⁷⁵² and applied a floating standard rather than a single threshold, he disqualified the plaintiffs' ancestors from entitlement to sovereignty and property in the greater part of their traditional territory⁷⁵³ on the basis of the same discriminatory standard which the Privy Council had applied in the precedents⁷⁵⁴ repudiated by the High Court of Australia.⁷⁵⁵ In thus invoking and relying upon the distorted doctrine of *terra nullius*, McEachern C.J. may or may not have relied upon a legal fiction immune from disproof, as did

the pre-*Mabo* Australian cases, but he imposed on the plaintiff peoples a requirement to prove that they lived in human society, and he applied the transparently Eurocentric, discredited test of 'civilization' to the evidence.⁷⁵⁶

Unlike Brennan J. in *Mabo v. Queensland*, McEachern C.J. apparently assumed that this test accords with modern norms of fundamental justice. Equality concerns with the requirement do not appear in McEachern C.J.'s reasons. Unlike even the *Mabo* court's Australian predecessors,⁷⁵⁷ McEachern C.J. held that with respect to most of the claimants' traditional territory, Lord Watson's assumption that Aboriginal peoples could lack "settled law" was simply borne out by the facts.⁷⁵⁸

Emphasizing their factual dimension, and without either adopting or rejecting the trial judgement's version of the distorted doctrine of *terra nullius*, the Court of Appeal declined to disturb McEachern C.J.'s conclusion that the descendants of the plaintiffs ancestors lacked any rights of jurisdiction or property outside the vicinity of villages.⁷⁵⁹

It is important to identify the distinct implications of the Canadian "organized society" test for Aboriginal rights in land, and Aboriginal sovereignty.

Baker Lake's "organized society" test did not purport to determine an Aboriginal people's territorial sovereignty.⁷⁶⁰ It adopted *Re Southern Rhodesia's* 'second order' test for rights to land. (It may be recalled from our discussion of *Re Southern Rhodesia* above that although that case concerned a 'conquered' territory, its 'second order' test of civilization has come to be applied to peoples already deemed under the doctrine of peaceful settlement's 'first order' measure, too 'uncivilized' to possess territorial sovereignty.⁷⁶¹) This 'second order' test relating to land is the foundation of the "organized society" test adopted substantively at trial in *Delgamuukw*, and at least formally in the Court of Appeal. An Aboriginal people failing this test entirely is deemed ineligible for Aboriginal land rights of any kind.⁷⁶²

A 'passing but low' grade on the scale of social organization also has distinct implications for Aboriginal land rights. The 'civilization' standard continues to be applied to the proprietary claims of peoples who pass the threshold test. We have noted this function of the test in the foregoing discussion of *Delgamuukw*, but its origin appears to derive from the *Baker Lake* judgement itself. Upon having found the "organized society" threshold met because the Inuit were organized to survive from the land, Mahoney J. continued: "[t]hat was about all they could do: hunt and fish and survive. The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did."⁷⁶³ The *obiter* inference is that Aboriginal rights are *limited* by the grade a people sufficiently "organized" to qualify for such rights, achieves on the test for organization. Had the Inuit claimed an entitlement, based on their ancestral occupation, to use the land in a more "sophisticated"⁷⁶⁴ way, Mahoney J. apparently would have denied it. It seems likely that the Privy Council in *Re Southern Rhodesia* intended merely to apply a 'pass/fail' test to proprietary claims,⁷⁶⁵ but the Eurocentric basis for such a threshold gave Mahoney J. ample reason to presume that Eurocentric standards should also govern the character of the land rights affirmed.

The discriminatory consequence of this floating "organized society" standard is that the Aboriginal claimants to whom it applies are denied the defensive benefit of the principle of *occupatio*, in that the land they occupy remains susceptible to acquisition by the occupancy of someone else.⁷⁶⁶ In the result, the Crown is permitted to acquire a proprietary title to occupied Aboriginal land by occupancy.⁷⁶⁷ All Aboriginal occupiers who have passed the threshold "organized society" test may attempt to show that their societies score as high on the scale as those of European proprietors, and thus to reserve a relatively broad set of land rights as Aboriginal rights, but no such peoples enjoy the ordinary protection of the principle of *occupatio* against an acquisition of their lands by occupancy.⁷⁶⁸ Aboriginal occupation of land is thus accorded a second class status under this test.

No distinct reason for this subordinate status of Aboriginal occupation is given in the cases. The result simply proceeds from the rationale for the "organized society" test in the first

instance, extended to justify a floating standard. The law is not permitted to presume that Aboriginal occupiers have undisturbed possession of their lands, because Aboriginal peoples - even the ones sufficiently "organized" to possess cognizable Aboriginal rights - are assumed insufficiently 'civilized' to benefit from the ordinary legal presumptions enjoyed by European societies.⁷⁶⁹

The implications of the Canadian "organized society" test for Aboriginal sovereignty have only begun to be elaborated. *Delgamuukw* is the first case in the modern era of Canadian Aboriginal rights litigation to raise squarely the issue of continuing Aboriginal sovereignty ("jurisdiction", in the plaintiffs' terms). At trial McEachern C.J. applied the "organized society" test as a measure of ancestral sovereignty, as much as of property in land, and the Court of Appeal did not criticize this approach. This approach has two implications. First, although both judgements are equivocal on this point, McEachern C.J.'s apparent willingness to entertain the possibility that this test could have been met in relation to sovereignty⁷⁷⁰ suggests that the Crown's acquisition of territorial sovereignty by peaceful settlement might not preclude acknowledgement by the courts of Aboriginal ancestral occupation sufficient to support rights of sovereignty. This implication is considered further below, under "doctrine of peaceful settlement." At minimum, this suggests that the version of the distorted doctrine of *terra nullius* which continues to govern the Australian approach to the question of territorial sovereignty, might be relaxed in Canada.

If the *Delgamuukw* trial decision on this issue were to remain undisturbed, a racially discriminatory standard would determine ancestral Aboriginal sovereignty in Canada. The result of its application in a particular case would not be predetermined by a legal fiction. Any Aboriginal people able to prove that its ancestors were sufficiently 'civilized' might have its sovereignty affirmed by the courts, subject to arguments concerning the effect of the Crown's acquisition or exercise of sovereignty.

The second implication of *Delgamuukw*'s application of the "organized society" test to the claim of sovereignty is that the basis of entitlement to Aboriginal sovereignty is thereby tied

to entitlement to Aboriginal rights in land. This is consistent with the principle of *occupation*. At least defensively, occupation is the presumptive foundation of both forms of entitlement, in that occupation should preclude the acquisition of such rights by someone else. The trial judge in *Delgamuukw* did not discuss the relationship between the "organized society" test for land rights and the test for sovereignty. Practically, McEachern C.J. applied them as a single floating standard in relation to a claim to "ownership and jurisdiction", but his reasons for finding the standard unsatisfied on both counts leave undecided whether different gradations might yet enter into the determination, such that an ancestral society might be "organized" enough to own its land, but insufficiently "organized" to possess sovereignty. It is possible that McEachern C.J. adopted the pre-*Mabo* Australian presumption that peoples too 'uncivilized' to possess sovereignty may not possess property,⁷⁷¹ but it is also possible that the *Delgamuukw* trial judgement intended to follow the approach of several of the 19th century international law advocates of the distorted doctrine of *terra nullius*, under which 'primitive' peoples too low on the scale to have sovereignty, might yet hold property in land.⁷⁷²

Brennan J.'s penetrating critique of the *Re Southern Rhodesia* "organized society" test in *Mabo v. Queensland*, together with the Supreme Court of Canada's apparent discomfort with the current Canadian test for proof of Aboriginal rights, give reason to hope that the "organized society" test will be discarded by the Supreme Court of Canada. Such a ruling would appear essential to the Court's task of expunging past prejudice from the jurisprudence of Aboriginal rights. In the meantime, the presence of this test in the jurisprudence obstructs the anti-colonial project of the doctrine of continuity. The continuity of rights can not be affirmed where their very existence is denied.

4.5.2 The doctrine of "peaceful settlement"

Canada's courts have been reticent to embrace any theory of Crown acquisition of territorial sovereignty. One respected commentator concluded recently that no such theory exists in Canadian law. According to Douglas Sanders, "Canadian law has never used either 'discovery' or 'terra nullius'. Our legal tradition has been so self-confident, so arrogant, that it

felt no need to have any legal theory justifying British colonialism."⁷⁷³

If no single theory of acquisition has been firmly adopted by the Canadian courts, one theory has been assumed to prevail. The fact that parts of Canada were ceded to Britain by France complicates its application, but whether the Crown first claiming sovereignty over Aboriginal territory was English or French, it has been generally assumed that the initial European claim depended upon the doctrine of peaceful settlement, or a French law equivalent.⁷⁷⁴

The genesis of the doctrine of peaceful settlement in British colonial law has been outlined by Brennan J. in *Mabo v. Queensland*,⁷⁷⁵ and is reviewed above.⁷⁷⁶ A number of Canadian decisions have referred to the doctrine as one of "discovery"⁷⁷⁷ rather than "settlement", but the difference in meaning is slight for our purposes.⁷⁷⁸ Some early international law theories awarded sovereignty to the first European nation to "discover" *terra nullius*, but such theories probably never commanded general support,⁷⁷⁹ and *terra nullius* was more often considered available for acquisition by occupation, with room for debate as to whether and to what extent the occupation could be "symbolic", as opposed to "effective".⁷⁸⁰ For our purposes, however, the important point is that colonial law's equivalent doctrine of peaceful settlement depends upon the principle of *occupatio*, and should therefore accord territorial sovereignty to the Crown only where the territory settled was unoccupied.⁷⁸¹

As we have seen, from its beginnings the doctrine of peaceful settlement has been susceptible to distortion in the form of the racially discriminatory premise that territory occupied by Aboriginal peoples could be treated as unoccupied, on account of the 'barbarism', 'savagery', or 'unsettled' or 'uncivilized' ways of Aboriginal peoples. The sway of the distorted doctrine has never been more than sporadic; the Privy Council responsible for expounding colonial law has adopted it in very few of its many colonial law cases. The distorted doctrine has never been free, in particular, of the criticism that the 'civilized/uncivilized' distinction on which it depended was arbitrary, though such criticism was muted during the height of British colonialism. Though its conclusions are limited to matters relating to property, Brennan J.'s

recent critique of the doctrine of peaceful settlement in *Mabo v. Queensland* leaves the doctrine completely discredited.

Brennan J.'s critique renders the doctrine of peaceful settlement incoherent as a foundation of Crown sovereignty because it demonstrates that the doctrine contradicts the principle of *occupatio* on which it is founded, respecting Aboriginal territory. Once the racially discriminatory basis of the distorted doctrine of *terra nullius* is acknowledged and rejected,⁷⁸² Aboriginal inhabitants must be acknowledged to have occupied their territories. Theories of acquisition of Aboriginal territory based on occupancy then lose any force, because they do not explain how the presence of settlers carrying the flag of the Crown should have any different status from that of the peoples already "there, organized in societies and occupying the land as their forefathers had for centuries".⁷⁸³ Territory that is occupied cannot be acquired by occupation.⁷⁸⁴

Of course, *occupatio* is not the only basis upon which the Crown might have acquired territorial sovereignty. In Brian Slattery's historical accounts of the origin of Crown sovereignty in Canada, for example, elements of force (threatened or applied) appear,⁷⁸⁵ as does the suggestion that some Aboriginal peoples might have tacitly consented or at least acquiesced to colonial rule.⁷⁸⁶ These claims raise their own problems of legitimacy.⁷⁸⁷ *Occupatio* is, however, the only logical basis of the doctrine of peaceful settlement. It does not fortify claims based on that doctrine to rely also on other modes of acquisition involving advantages over or concessions by prior inhabitants, because no other theory makes the availability of territory for acquisition contingent upon the territory's vacancy.

The courts of Australia appear to remain willing to adhere to the doctrine of peaceful settlement by treating the sovereign vacancy of pre-colonial Australia as a legal fiction, immune from historical disproof.⁷⁸⁸ With the Supreme Court of Canada's acknowledgement in *R v. Sioui* that both Britain and France maintained relations with the Aboriginal peoples of North America "very close to those maintained between sovereign nations", regarding the "Indian

nations ... as independent nations",⁷⁸⁹ fictions of that nature would appear untenable in Canada. Even the trial decision in *Delgamuukw*, which can be fairly described as unreceptive to the claim of Aboriginal sovereignty, did not avoid investigating the claim's factual basis.⁷⁹⁰

It has been argued above that Aboriginal peoples' occupation of territory may not be subjected to a prescriptive criterion disqualifying peoples insufficiently "organized" from status as occupiers. If Canadian courts are to weigh Crown claims to sovereignty based on "settlement" factually, organization sufficient to resist acquisition of their territory by occupation should be presumed on the part of prior inhabitants, because all human groups live in society, and all societies have equal worth. It follows that Crown claims to sovereignty based on peaceful settlement should be considered rebutted by facts demonstrating that the territory in question was inhabited by an Aboriginal people. Since most parts of Canada probably were so inhabited when Britain and France first brought settlers to Aboriginal territories, an undistorted doctrine of peaceful settlement would not support Crown claims to territorial sovereignty in most parts of the country.⁷⁹¹

It is beyond the scope of this analysis to attempt to construct a satisfactory account of Crown sovereignty in Canada. It is clear, however, that the discredited doctrine of peaceful settlement is an invalid instrument of Aboriginal dispossession. It suggests no valid reason for denying Aboriginal peoples sovereignty over their territory.

The past ambivalence of Canada's courts on this issue may now afford a unique opportunity. The dispossessive effect of the doctrine of peaceful settlement might be avoided in a number of ways, each of which contemplates coordinate sovereignties on the part of the Crown and Aboriginal peoples. Several commentators have argued that the settlement doctrine should be abandoned altogether,⁷⁹² and replaced by more principled and historically grounded bases for limited Crown sovereignty. A range of entitling criteria for Crown sovereignty have been suggested, from formal Aboriginal consent,⁷⁹³ through implicit forms of interdependency,⁷⁹⁴ to prescription⁷⁹⁵ and a fiduciary mandate based on the unilateral assertion of the Crown's power.⁷⁹⁶ A different approach might modify the principle of *occupatio* and the settlement

doctrine, affirming the coexistence of settlers and Aboriginal peoples in a conception of "joint occupation," as suggested by Monk J. in *Connolly v. Woolrich*.⁷⁹⁷ Once the discriminatory premise of the doctrine of peaceful settlement is rejected, however, it is clear that the validity of Crown sovereignty in Canada may no longer rest on the assumption that the ancestors of Aboriginal peoples could not have occupied their territory.

4.5.3 Ancillary doctrines: "usufructuary" and 'frozen' rights

The distorted accounts of the doctrine of *terra nullius* reviewed above deny to Aboriginal peoples the ordinary status of occupiers of their land or territory. Two ancillary doctrines which continue to influence Canadian law ignore, without denying, the status of Aboriginal peoples as occupiers, and thus avoid the ordinary implications of occupation in English property law. One defines Aboriginal land rights as "usufructuary"; the other limits the rights affirmed to historically defined, "Aboriginal" forms of land use. The latter doctrine is referred to in this paper as the doctrine of 'frozen rights'.

According to Kent McNeil, English land law is reasonably clear in the ordinary case as to the implications of occupation of otherwise unowned land, independently of a Crown grant.⁷⁹⁸ If the occupation is effectively original (i.e. if the land was unowned and unoccupied when occupation occurs, such that the occupation qualifies as "occupancy") proprietary title vests in the occupant.⁷⁹⁹ If not, or the prior history of the land is unknown, the occupation precludes acquisition of the land by occupancy,⁸⁰⁰ and, further, the occupier is presumed to have proprietary title in the nature of a fee simple estate, subject to proof of a better title on the part of someone else.⁸⁰¹ In either case, absent expropriation and subject to rights validly acquired by adverse possession, occupation of unowned land precludes a grant by the Crown of property in the land to someone else, because the Crown cannot grant what it does not have.⁸⁰²

The contention that Aboriginal title is usufructuary in nature avoids all of these implications by defining Aboriginal title as a function of uses⁸⁰³ of land, exclusive of property.⁸⁰⁴ The Crown's title, by contrast, may thereby be treated as though it were acquired

by occupancy,⁸⁰⁵ and thus as a proprietary interest in land subject only to a special "burden" entitling Aboriginal peoples to use the land. Although justifications for such treatment sometimes refer vaguely to the special nature of Aboriginal land use⁸⁰⁶ or of Aboriginal conceptions of land rights,⁸⁰⁷ the usufructuary rights doctrine *ensures* that these results follow, independently of such considerations, by confining the Aboriginal right affirmed to a non-proprietary interest.⁸⁰⁸ Indeed, the oral argument before the Privy Council in *St. Catherine's Milling*, and the tenor of the judgement itself, suggest that it was these negative consequences, rather than any characteristic of Aboriginal property regimes or relationships to the land, which moved the Privy Council to define *Royal Proclamation* rights as "usufructuary".⁸⁰⁹ The term has never been defined positively in Aboriginal rights jurisprudence.⁸¹⁰

It is not unusual in English property law to deal separately with rights of use or enjoyment from the bundle of other rights, such as rights of disposition or waste, making up the estate in land. What is extraordinary about the doctrine of usufructuary rights is that the implications of Aboriginal occupation of land *for title to the estate* are simply disregarded. It is no answer to this concern to say that Aboriginal cultures do not conceive of estates or like interests, when the same doctrine *relies upon* Eurocentric, medieval law tenets to attribute to the Crown precisely the estate denied to Aboriginal peoples, reducing their interest to one that is subordinate, "ephemeral",⁸¹¹ and just as culturally alien.

It is submitted that the one-sided nature of such reasoning is not accounted for, either, by allusion to the Supreme Court of Canada's warning in *Sparrow* that "[c]ourts must be careful ... to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgement in *Guerin* referred to as the *sui generis* nature of aboriginal rights".⁸¹² It is submitted that this important caution refers to the uniquely intersocietal nature of Aboriginal rights law.⁸¹³ *Sparrow* does not counsel preferential treatment for Crown over Aboriginal interests. Kent McNeil's answer to the 'cultural sensitivity' defence of the courts' tendency to depart from ordinary principles in Aboriginal rights cases is telling in this context:

Arguably, the Crown's acquisition of territories inhabited by indigenous people presented ... [an] exceptional situation. To apply English real property law to people who may not have had even a concept of ownership of land would be illogical, on this view, and would have anomalous consequences. The relationship of hunters and gatherers to land clearly does not correspond with that of English people, whose legal system contains intricate rules governing proprietary interests in land. ... In response to this, it may first be noted that English land law has been thought to be applicable where the supposed effect has been to *deny* land rights to indigenous people. Blackburn J.'s decision in *Milirrpum v. Nabalco Pty.* is a prime example of this. ... [I]t must be remembered that at the time a territory was made British by settlement, the other principal claimant to lands occupied by indigenous people would be the Crown. Surely one cannot seriously argue that English law would apply to give title to the Crown, while at the same time denying the benefit of that law to the people who were actually on the land, using and occupying it as their ancestors had done for centuries. Any suggestion that English law should be applied in such a selective and unequal manner deserves to be rejected as a transparent attempt to manipulate the law in favour of the colonizers.⁸¹⁴

Arbitrary treatment is no more justifiable in determinations of rights based on intersocietal norms than it is in judgements based on positive English law.

The Supreme Court's unanimous decision in *C.P.R. v. Paul*, rendered in 1988, appeared to put the "usufructuary" characterization of Aboriginal title to rest,⁸¹⁵ by stipulating that Aboriginal title is "more than the right to enjoyment and occupancy"⁸¹⁶ and rejecting the view that Aboriginal title "is merely a personal right which cannot be elevated to the status of a proprietary interest so as to compete on an equal footing with other proprietary interests."⁸¹⁷ At least one member of the majority panel in *Delgamuukw*, however, has treated the doctrine of usufructuary rights as alive and significant, without offering clarification as to its meaning.⁸¹⁸

Remarkably, the 'frozen rights' doctrine - which depends on the same premise that Aboriginal rights are a function of use or enjoyment rather than proprietary interests, and adds time-limited constraints to the types of uses included in the right⁸¹⁹ - appears to be undergoing a revival in Canadian jurisprudence just as the usufructuary conception of Aboriginal rights

might appear to be on the wane. This tension is present in the opinion of two members of the three member majority in the Court of Appeal in *Delgamuukw*, authored by Macfarlane J.A.. On one hand, Macfarlane J.A. cited the Supreme Court's comments in *Paul* as reason not to reject outright the contention that Aboriginal peoples have property in their lands⁸²⁰ (a contention rejected by the trial judge, primarily on the basis of *St. Catherine's Milling*⁸²¹). Further, Macfarlane J.A. laid great emphasis on the factual finding by the trial judge that the Aboriginal ancestors of the plaintiffs had insufficiently exclusive occupation of their lands to support a claim to ownership,⁸²² strongly implying that on different facts an Aboriginal claim to an interest tantamount to ownership, if not strictly cognizable as "beneficial ownership" because of the restriction on alienation,⁸²³ could have been vindicated. Yet, without acknowledging the inconsistency in his reasoning, Macfarlane J.A. appears to have precluded affirmation of any Aboriginal right of the latter sort,⁸²⁴ by adopting the view that the practices permitted by Aboriginal rights are frozen as of the time of assertion of Crown sovereignty.

Nothing in *St. Catherine's Milling* had suggested that Aboriginal user rights should be limited as to the *kinds of uses* encompassed.⁸²⁵ Conventional definitions of usufructuary rights provide, on the contrary, that rights to all the profits from the property are commonly included in such rights, and that plenary uses (short of any which waste or damage the property) are commonly entailed.⁸²⁶ Indeed, as John Hurley has emphasized, the Privy Council implied in *St. Catherine's Milling* that the Crown acquired the commercial timber interest in dispute *from the Saulteaux people* by virtue of their treaty surrender of Aboriginal title.⁸²⁷ As applied to the Cherokee people in the early 19th century after they had taken up farming and settler styles of government in order to gain acceptance from Georgia,⁸²⁸ and as recently applied to the Gitksan and Wet'suwet'en peoples by the British Columbia Court of Appeal, the 'frozen rights' doctrine, however, denies any Aboriginal entitlement to 'non-traditional' uses of the land, or to any other type of use which Europeans attribute to their own interaction with Aboriginal peoples, exclusive of practices originating with Aboriginal peoples before European assertions of sovereignty.

The Court of Appeal in *Delgamuukw* expressed this theory in both cultural and temporal

terms. According to the majority, "not all practices in existence in 1846⁸²⁹ were necessarily to be regarded as aboriginal rights".⁸³⁰

To be so regarded those practices⁸³¹ must have been integral to the distinctive culture of the aboriginal society from which they are said to have arisen. A modernized form of such a practice would be no less an aboriginal right: see *Sparrow*. A practice which had not been integral to the organized society and its distinctive culture, but which became prevalent as a result of European influences would not qualify for protection as an aboriginal right.⁸³²

It would be untenable to claim that practices temporally identified as pre-colonial qualify as Aboriginal rights only if they are also physically (and for that reason deemed to be culturally) dissimilar in kind from those of the settlers.⁸³³ Instead, what the Court of Appeal appears to mean is that pre-colonial practices qualify as Aboriginal rights unless they were newly introduced to the Aboriginal people during that period by the settlers.⁸³⁴ Thus, a temporal limitation disqualifies all practices developed after assertion of Crown sovereignty from status as Aboriginal rights, and an ostensibly cultural limitation disqualifies practices adapted or borrowed at any time from settler culture.⁸³⁵ All told, this argument claims exclusively for colonizing peoples cultural and legal credit for any adaptations in Aboriginal land use which responded to or occurred after the arrival of colonists.

In so far as it might serve to distinguish rights to be affirmed by the common law from rights there are positive grounds to disregard, this version of the 'frozen rights' doctrine would function more as a species of recognition doctrine than a *terra nullius* argument. Wallace J.A.'s apparent 'equality of citizens' rationale for the doctrine can be understood in that light.⁸³⁶ Wallace J.A. appeared to reason that the principle of equality of treatment between citizens demands that citizens similarly situated with respect to the theory's temporal and cultural criteria must be treated similarly. In other words, on this view the only relevant difference between Aboriginal citizens and non-Aboriginal citizens that the principle of equality respects, is adherence to customs which predated Canadian citizenship and for which the Canadian sovereign can take no cultural credit.⁸³⁷ Otherwise Aboriginal citizens must not be permitted to do as of right what other citizens may only do in so far as valid public laws permit. This is a theory of

extinguishment rather than a doctrine of *terra nullius* in the sense that it advocates nullifying rights which could have been affirmed had they not failed to conform (on a mistaken equality analysis, it is submitted) to rights of equality.

The one-sided nature of Wallace J.A.'s equality comparison has been noted in part 3.⁸³⁸ Two further observations are pertinent. First, the only cultural criterion that the jurisprudence might suggest relates to the Crown's corresponding title to land, is the now-discredited 'civilization' criterion which had operated to efface Aboriginal occupation of land upon Crown settlement. (As has been emphasized throughout this section, the basis for *Mabo v. Queensland's* discrediting of the 'civilization' criterion is that the criterion violates the principle of equality). Wallace J.A.'s view gives no explanation why culturally associated land use practice should enter into the definition of an Aboriginal peoples' intersocietal property rights where cultural factors do not validly affect the basis for the Crown's title. Second, if culture were presumed relevant to the title gained by the settlers' sovereign, we should expect that "European" practices would delimit the entitlements enjoyed by settlers under grants acquired from the Crown - at least vis-a-vis Aboriginal entitlements - but no such limitations are present in Canadian property law. Instead, "European" practices give rise to the Crown's entitlement to have and to grant virtually absolute property rights, unbounded by cultural practice. The obvious disutility of resolving this uneven treatment of European and Aboriginal cultural traditions by defining Crown property rights by European land use practise, only demonstrates the critical importance of the first of these two observations where intersocietal rights are at issue. To define the proprietary relationship between the Crown and Aboriginal peoples by limiting Aboriginal entitlements culturally and defining the Crown's interests in universal terms is to subordinate Aboriginal to European culture.

The other members of the Court of Appeal majority in *Delgamuukw* did not comment upon Wallace J.A.'s equality rationale for the 'frozen rights' doctrine, and it is not clear from Wallace J.A.'s reasons themselves whether the equality principle is understood to actually constrain the incorporation of pre-existing rights (as considered above) or whether the equality principle simply confirms the fairness of a conclusion reached independently. Apart from the

Court of Appeal's reference to the Supreme Court's conception of Aboriginal rights in *Sparrow* (to which we turn next), no other explanation for the 'frozen rights' limitation is offered in the majority judgements. In this circumstance it must also be considered whether the doctrine is assumed to reflect some limitation inherent in the nature of Aboriginal peoples' pre-existing rights themselves. Of course, viewed in that light, the 'frozen' rights doctrine fits in the long tradition of distorted accounts of the *terra nullius* doctrine, reviewed above. On this view, European sovereigns may take cultural credit for the practices introduced to America in the form of property rights, because those practices reflect progress on a scale that adjudges European societies more advanced, and because European, or civilized society, is assumed to be infinitely capable of further progress. Aboriginal cultural differences, by contrast, are understood as necessarily fixed in a regressive state of nature, with no scope for evolution except towards settler society's values. Aboriginal peoples' rights are accordingly 'frozen' by nature.⁸³⁹ Aboriginal peoples may either adhere to practices which, by definition, are of little or no value in the settler society, or assimilate to settler ways and abandon any prior entitlements in the process. The trial judge in *Delgamuukw* was very explicit about this choice and its underlying rationale.⁸⁴⁰ The majority in the Court of Appeal was not, but this implication of the doctrine is impossible to ignore in light of the history of such thinking in the jurisprudence.

It is submitted that the Supreme Court's judgement in *Sparrow* rejects such assumptions of European superiority,⁸⁴¹ and does not support the doctrine of 'frozen rights' approved by the Court of Appeal in *Delgamuukw*. The Supreme Court treated respect for and protection of Aboriginal peoples' distinctive cultures as a principal purpose of section 35 of the *Constitution Act, 1982*.⁸⁴² This purpose does not appear to permit, let alone require that the distinctive cultural interests to be protected in the 20th century should be defined exclusively by reference to pre-colonial practices. In an article that influenced the Supreme Court's first pronouncement on the meaning and status of section 35 in *Sparrow*, Brian Slattery noted that versions of 'frozen rights' doctrine had appeared previously in the case law:

The doctrine of aboriginal rights attributes to a native group a sphere of autonomy, whereby it can determine freely how to use its lands.⁸⁴³ Its decisions

may be influenced, of course, by "traditional" notions, but the stronger influence in the end will likely be current needs and attitudes. For most native groups, land use is a matter of survival not nostalgia. Some courts, however, have expressed the view that a native group is permanently limited in its use of aboriginal lands to customary practices followed at a distant historical period, such as the time the Crown first acquired sovereignty The difficulty with this conception, of course, is that native people are not waxen figures on display for tourists, but living people who depend on the land for their livelihood. Any rule that would hold them in permanent bondage to ancient practices must be regarded with scepticism.⁸⁴⁴

...

We must guard against the notion that native societies are essentially static in nature, that the only true aboriginal land uses are those that were practised "aboriginally". In fact, of course, native societies have never been static, and have often been characterized by an ability to adapt to shifting circumstances in a highly flexible manner. Without this flexibility, they would have had little chance of survival. Significant changes in lifestyle occurred from time to time among many groups in pre-European times, and further changes took place in response to European contact. But such adaptations did not entail the abandonment of a group's essential identity. The better view, then, is that aboriginal title gives native people the right to exclusive use and possession of their land, and the right "to use it according to their own discretion". The latter words were adopted in the *Guerin* case, and should be taken as a rejection of the theory restricting aboriginal title to historically-based practices So far as the doctrine of aboriginal rights is concerned, a native group that in the past lived mainly by hunting, fishing, and gathering may now turn its lands to farming, ranching, tourism, or mineral development.⁸⁴⁵

Slattery's emphasis upon the right and need of Aboriginal peoples to survive⁸⁴⁶ as peoples surely points up the fallacy of the 'frozen rights' idea. Aboriginal rights cannot at the same time be "in keeping with the culture *and existence* of the [Aboriginal] group,"⁸⁴⁷ [emphasis added] and disappear as the culture of the group inevitably changes over time.

In rejecting the plaintiffs' account of this view the Court of Appeal majority in *Delgamuukw* emphasized that the Supreme Court had said expressly in *Sparrow* only that the "manner" by which an existing Aboriginal right may be exercised may evolve over time (and implicitly, without limitation as to cultural origin). The Court of Appeal posited a distinction between the form of a practice, which, consistently with *Sparrow*, may evolve,⁸⁴⁸ and the

practice itself, which may not. The difficulty with this view is that nothing in *Sparrow* had either suggested that Aboriginal land rights should be confined to practices, or that any such limitation should also be 'frozen,' temporally or culturally.

Great emphasis was placed by the Court of Appeal majority⁸⁴⁹ in *Delgamuukw* on the Supreme Court's statement in *Sparrow* that the plaintiffs ancestors had regarded the taking of salmon as "an integral part of their distinctive culture".⁸⁵⁰ The context of this statement is important. The Court had already concluded that 1982 regulatory schemes cannot define "existing" Aboriginal rights by being deemed to extinguish or render unexercisable any inconsistent rights:

Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly *so as to permit their evolution over time*. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," ... the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35 (1) which would incorporate "frozen rights"⁸⁵¹ must be rejected.⁸⁵² [emphasis added]

This conclusion concerned extinguishment of rights already affirmed, rather than the definition of Aboriginal rights initially affirmed by the common law, but the "evolution" of rights "over time" cannot occur if rights are defined as 'frozen' in time. The Court of Appeal assumed that the Supreme Court was *only* concerned to ensure that the "form" or "manner of exercise" of rights could evolve, but again, no distinction between practices and forms of practice was made by the Supreme Court. On the contrary, the Supreme Court said that Aboriginal rights themselves must be permitted to evolve over time.

When the Supreme Court made the statement relied upon by the Court of Appeal in *Delgamuukw*, the Court had already held that the initial existence of the right in question had been proven. It was in that context that the Court had emphasized the trial judge's finding that the accused had been fishing for salmon in "ancient tribal territory"; that "the taking of salmon

was an integral part of [the Musqueam's] lives and remains so to this day", and that the existence of the right in question was "not the subject of serious dispute" at trial.⁸⁵³ The statement relied on in *Delgamuukw* was included in the following passage:

The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on *to establish the existence of the right* suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.⁸⁵⁴ [emphasis added]

The Court then proceeded to consider the opposing parties' arguments concerning the scope of the Aboriginal right in question. The government parties argued that the right to fish was limited to the taking of fish for food; the Aboriginal defendant argued that the right was to fish for any purpose by any non-dangerous method. The Court declined to resolve the issue, because the only right asserted at trial had been expressed in the terms of the fisheries regulations challenged, which restricted net lengths under a food fishing licence. In the result, the Supreme Court did not disturb the lower court's affirmation of a right to fish for food and social and ceremonial purposes.⁸⁵⁵ The scope of the Musqueam's Aboriginal right to fish under section 35 remained undelineated.

It is submitted that too much was made by the Court of Appeal in *Delgamuukw* of the fact that the case in which the Supreme Court first affirmed a section 35 right happened to involve a regulatory restriction on the manner in which an Aboriginal right may be practised. It was because the length of a fishing net was the basis of the charge against Mr. Sparrow that the Supreme Court focused its attention on the issue whether the manner of exercise of an Aboriginal right may evolve.⁸⁵⁶ Nothing in *Sparrow* suggests that Aboriginal practices themselves may not evolve as of right, and the general principles affirmed in *Sparrow* point strongly to the opposite conclusion. Without adopting Lambert J.A.'s notions of settler Sovereignty or of legal rights versus their social and economic reflection, it is submitted that

Lambert J.A.'s dissenting comment on this ruling in *Delgamuukw* properly applies these principles:

The necessity to give a purposive construction to s. 35 was set out clearly by Chief Justice Dickson and Mr. Justice La Forest ... in *Sparrow* The purpose of s. 35, when it was prepared in 1982, cannot have been to protect the rights of Indians to live as they lived in 1778, the date of the first certain contact between the Indians and people of European origin in what is now British Columbia. No constitution could accomplish that. Its purpose must have been to secure to Indian people, without any further erosion, a modern unfolding of the rights flowing from the fact that, before the settlers with their new Sovereignty arrived, the Indians occupied the land and the resources through a social system which they controlled through their own institutions. That modern unfolding must come not only in legal rights, but, more importantly, in the reflection of those rights in a social organization and in an economic structure which will permit the Indian peoples to manage their affairs with some independence from the remainder of Canadian society and also with honourable interdependence between all parts of the Canadian social fabric.⁸⁵⁷

There are several further reasons to doubt the validity of the 'frozen rights' doctrine adopted by the Court of Appeal in *Delgamuukw*. In *Guerin*, Dickson J. characterized the common law nature of Aboriginal title as the same as that which underlies title to Indian reserves,⁸⁵⁸ and as Brian Slattery points out, "it has never been thought that Indians can only use their Reserves in ways known to them in pre-contact times."⁸⁵⁹ Consistently with Chief Justice Marshall's holding in *Johnson v. M'Intosh* that Aboriginal title includes the right of Aboriginal peoples "to use [the land] according to their own discretion",⁸⁶⁰ modern American jurisprudence does not contain the notion of 'frozen rights'.⁸⁶¹ (Slattery emphasizes that Marshall C.J.'s statement was approved by Hall J. in *Calder*, and quoted with apparent approval by Dickson J. in *Guerin*.⁸⁶²) Finally, despite divergence otherwise respecting the nature of Aboriginal rights, the majority judgements of the High Court of Australia in *Mabo v. Queensland* all rejected the contention that the Aboriginal rights affirmed by colonial law are 'frozen' in time.⁸⁶³

Summary and Conclusion

[R]ecurrence to beginnings ... reminds us of the contemporary significance of the early ... history, and it invites us to reflect on age-old fundamentals. But it also bears unfortunate negative potential. By referring present decisions to the past, Indian nations and wrongs done to them are made to appear anachronistic. That both the tribes and the offences have present vitality and importance is lost to view, and we may be thought confronted only by what an *Oneida* dissent called "forefathers' misdeeds" which are to be balanced against innocent present "expectations in the ownership of real property". The conclusion can then follow: "ancient claims are best left in repose".⁸⁶⁴

Milner Ball

If Canada's constitutional guarantee of Aboriginal rights is to uphold the fundamental values represented by the rule of law, the imperative against arbitrary law-making, and equality of individuals and peoples, the legal doctrines reviewed in the foregoing pages should not be attributed the validity today that they might have been given in an earlier era. Moreover, it would seem too late in this country's history of Crown/Aboriginal relations and in the movement towards respect for human rights for claims of self-determination to be met with new devices for the extinguishment of rights, lacking the authority of precedent.

The act of state doctrine is the vestige of an antidemocratic past. Employed in the age of imperialism to shield from judicial review seizures of Aboriginal territory, this doctrine ceased to apply long ago to state conduct towards citizens within the realm. Its remnants affect only outsiders, and these persons the doctrine exposes to the arbitrary exercise of political power, exempt from the rule of law.⁸⁶⁵

The claim that the act of state doctrine authorized the executive extinguishment of Aboriginal rights after the Crown acquired sovereignty and prior to their constitutional protection appears to be implicit in Macfarlane J.A.'s reliance in *Delgamuukw* upon a line of American authority said to have similar effect.⁸⁶⁶ This reasoning is in fact unsupported by the American version of the act of state doctrine, which does not countenance the political extinguishment of

legal rights in domestic territory under conditions of peace, and in any event has been held inapplicable to seizures of Aboriginal land since at least 1980.⁸⁶⁷ American authority to the contrary effect of the authority cited by Macfarlane J.A. was cited by Hall J. in the Supreme Court of Canada's decision in *Calder*, and overlooked in Macfarlane J.A.'s judgement.⁸⁶⁸ Further, the English law act of state doctrine does not by its own terms authorize the Crown to take extra-legal measures against a territory's inhabitants after the Crown has acquired sovereignty in the territory.⁸⁶⁹

Wallace J.A.'s judgement in *Delgamuukw v. British Columbia* holds more fundamentally still that the act of state doctrine disqualifies from judicial consideration any assertion of Aboriginal sovereignty inconsistent with the sovereignty claimed to have been acquired in colonial times by the Crown.⁸⁷⁰ Yet in its hallmark ruling on the reach of the *Charter* in *Operation Dismantle*, the Supreme Court of Canada has rejected the contention that institutional considerations should now lead the courts to continue exempting "weighty matters of state" from judicial review for the enforcement of constitutionally protected rights.⁸⁷¹

Existing Aboriginal rights have the protection of Canada's constitution. Having renounced the act of state doctrine in relation to protected rights, Canada's courts will remain beholden to an unjust tradition if this doctrine is not also renounced so as to submit previous claims by the Crown to unlimited sovereignty over Aboriginal peoples to the rule of law, permitting Aboriginal assertions of internal sovereignty to be weighed by the courts on their merits, eligible for constitutional protection. Short of this step it is difficult to imagine colonial law's ever achieving the legitimacy in Aboriginal communities that can be claimed by an intersocietal law rooted in history⁸⁷² and equally respectful of the rights and interests of the country's founding communities.

The act of state doctrine and the assortment of distinct historical rationales requiring "recognition" of an Aboriginal right by the state before the courts may enforce it restrict arbitrarily the scope of Aboriginal rights that may be asserted by an Aboriginal people

independently of "sovereign grace".⁸⁷³ The Supreme Court of Canada's decision in *Calder* was principally responsible for overcoming in Canada the mistaken application of such reasoning to Aboriginal rights of a 'private' nature, recurrent in the previous commonwealth case law, and for refocussing the attention of modern courts on the countervailing doctrine of continuity.⁸⁷⁴ Beyond its application to 'private' rights, the doctrine of continuity, as pronounced by the United States Supreme Court in *Worcester v. Georgia*,⁸⁷⁵ the Quebec Superior Court in *Connolly v. Woolrich*,⁸⁷⁶ and the Supreme Court of Canada in *Sioui*,⁸⁷⁷ affirms the continuation, through acquisition of Crown sovereignty, of Aboriginal rights to make laws of a private and public nature.⁸⁷⁸

Wallace J.A.'s holding in *Delgamuukw* that, in colonies acquired by 'settlement', the doctrine of continuity applies only to rights of a private, non-lawmaking nature,⁸⁷⁹ rests on an overly rigid view of colonial law's historical encounter with the fact of cultural pluralism. Colonial law did not generate a "principle" that in settled colonies "the adjusted common law became the law of all subjects - native and non-native alike".⁸⁸⁰ Rather, confronted with the fact of deep cultural difference in all of England's colonies, the colonial law was inclined from its inception to treat partially the cultural interests of the settlers and their superiors. In conquered colonies this bias led to early departure from the initial, simple rule that one law should apply to all the inhabitants of a conquered colony - the law of the conquered Aboriginal sovereign - unless altered by legislation, and to a complex, plural regime, under which settler law was applied to the settlers, and the prior system of law applied to the prior inhabitants.⁸⁸¹ Wallace J.A.'s perspective in *Delgamuukw* on the genesis of colonial law ignores this development,⁸⁸² and his reasons largely overlook the important line of authority (including *Connolly v. Woolrich* and its Canadian successors)⁸⁸³ that has generated a similar, complex rule in settled colonies.⁸⁸⁴ To hold that the myth of *terra nullius*, upon which the simple settlement rule depends, requires in principle the abrogation of extant Aboriginal systems of law⁸⁸⁵ would extend a discriminatory rationale for the denial of Aboriginal rights beyond its furthest historical reach.

The unique contribution of *Delgamuukw* to the Canadian jurisprudence concerning extinguishment of Aboriginal rights is the set of assertions referred to in this paper as the doctrine of sovereign dispossession.⁸⁸⁶ This doctrine assumes that any sovereignty acquired by the Crown in Canada at some point in the past must have been absolute in its status and scope.⁸⁸⁷ This assumption is not a necessary ingredient of the act of state doctrine, which, weak as is its normative foundation, at least commands some substantial support in precedent. Under the conventional act of state doctrine, the Crown must assert an absolute sovereignty over a territory before all prior sovereignty is nullified.⁸⁸⁸ The judgements of the Court of Appeal majority in *Delgamuukw* have determined a fate for Aboriginal sovereignty previously untold in the jurisprudence, complete supersession on the introduction by the Crown of any degree of sovereign power.

The assumption that Crown sovereignty must be supreme and unlimited originates in an English constitutional jurist's conception of the sovereignty of the Crown in England, a unified state. This conception neither accounted for the colonization of foreign territories, nor addressed the fate of prior sovereignties.⁸⁸⁹ Having anchored their ruling in Professor Dicey's premise,⁸⁹⁰ yet also expressed the Court's willingness to contemplate the prior existence of Aboriginal sovereignties in Canada,⁸⁹¹ the Court of Appeal majority judgements in *Delgamuukw* appear to have created a new legal fiction in colonial law in order to reconcile the premise of a uniform and at least notionally original sovereign, with the colonial reality of competing sovereignties and Crown incursion upon already occupied territory.⁸⁹² Having transported the premise of absolute sovereignty to a colonially acquired territory, the Court of Appeal appears to have reasoned that Aboriginal sovereignty must have been superseded in the past, because it cannot exist now.⁸⁹³ No judicial authority or rule of colonial law is cited by the Court in support of the proposition that prior sovereignties are superseded in this way,⁸⁹⁴ and the strong line of authority holding that there is indeed room for coordinate Aboriginal jurisdiction in the constitutions of federal states is not addressed.⁸⁹⁵

The version of this doctrine that appears to attract greatest support in the Court of Appeal's reasons in *Delgamuukw* - holding that supersession occurred at the moment the Crown

● *acquired* sovereignty - disregards both the actual intentions of Crown authorities historically,⁸⁹⁶ and the actual history of relations between Crown and Aboriginal authorities.⁸⁹⁷ It is an arbitrary rationale in that it provides no reason - not even an institutional defence, such as the modern remnants of the act of state doctrine tend to draw forth - for the legal nullification of institutions and authorities upon which Aboriginal societies had depended for centuries.⁸⁹⁸ Such reasoning adheres thinly to the rule of law by treating the fiction created as a conclusion of law, but provides for no juridical control over either the substance or process of coercive nullification of the freedom of colonized peoples.⁸⁹⁹

Though perhaps appearing to offer a firmer footing in fact, the alternative version of this doctrine considered in *Delgamuukw* - holding that supersession occurred at the moment the Crown *exercised* the sovereignty it had acquired - overcomes none of the shortcomings of its companion rationale. Crown presence alone in a foreign territory does not give the Crown sovereign title, and once such title is acquired, the process and substantive consequences of the exercise of Crown sovereignty are normally fully subject to the rule of law.⁹⁰⁰

On either version of the doctrine, the Court of Appeal's willingness in *Delgamuukw* to entertain such a mechanistic account of the demise of Aboriginal jurisdictions also reflects an assumption that no normative accounting is really necessary for the fate of a nation's sovereignty, because sovereignty does not form the subject of legal rights; it merely creates them.⁹⁰¹ But such positivistic logic strains our basic sense of the right of political communities to self-determination,⁹⁰² underestimates the dependence of political sovereignty upon the rights of peoples,⁹⁰³ and fails to address the respect for the "territorial rights"⁹⁰⁴ of Aboriginal peoples the colonial law has previously granted, and which Canadian cases not referred to by the Court of Appeal in *Delgamuukw* have upheld.⁹⁰⁵ Such reasoning contradicts, in particular, the premise by which the Supreme Court of Canada has repeatedly affirmed in its modern rulings that Aboriginal rights are "pre-existing" in their source.⁹⁰⁶

In its first ruling on the effect of Canada's constitutional guarantee of Aboriginal rights,

the Supreme Court of Canada held out this guarantee as an offer of a new deal for Aboriginal peoples, ending the law's complicity in a game in which the sovereign's courts were denied the authority to question the sovereign's mandate in Aboriginal territory.⁹⁰⁷ Because it turns the colonial law to the service of Crown interests alone, the doctrine of sovereign dispossession fails to meet the Supreme Court's normative standard for the constitutional protection of Aboriginal rights,⁹⁰⁸ and should not be further applied in Canada.

A number of strands of the modern Canadian jurisprudence on Aboriginal rights still depend upon the distorted doctrine of *terra nullius*, which, before being condemned as discriminatory by domestic and international courts in the modern era,⁹⁰⁹ denied the existence of pre-colonial rights by denigrating the Aboriginal societies that assert them.⁹¹⁰ Though its distinctive constitutional effect is to disqualify the rights denied from constitutional protection *ab initio*, regardless of the Crown's adverse claims,⁹¹¹ *terra nullius* reasoning shares with the foregoing doctrines, which rationalize Crown extinguishment of rights, the arbitrary consequence that Crown interests and the interests of the dominant culture or cultures served by Crown institutions determine the extent to which Aboriginal rights may be affirmed by the courts.⁹¹²

Terra nullius reasoning withholds from Aboriginal rights claimants the benefit of the ordinary legal ramifications of their prior occupation of land and territory.⁹¹³ The peaceful settlement doctrine, generally assumed in the Canadian case law to ground the Crown's acquisition of sovereignty in Canada, grants territorial sovereignty to the Crown on the basis of Crown occupation of the territory.⁹¹⁴ Canadian courts tend not to discount axiomatically the historical fact of prior Aboriginal occupation, a stance that, in any event, the Supreme Court's recognition of prior Aboriginal sovereignty in *Sioui* should rule out.⁹¹⁵ But Canada's law of Aboriginal rights has not yet come to grips with the incoherence of treating peaceful settlement as a mode of acquisition of sovereignty, once prior occupation of the territory is acknowledged. Even in its most distorted historical versions, the peaceful settlement doctrine has never supported the acquisition by occupation (or "settlement") of any but unoccupied territories.⁹¹⁶ Canadian courts' past reticence to embrace firmly a theory of Crown acquisition appears to afford an opportunity in Canada to develop a more historically sensitive and normatively

sustainable view of the origins of this state's authority, respectful of the unsundered authority of Aboriginal peoples, and free of the discriminatory premise of the peaceful settlement doctrine.⁹¹⁷

Unequal respect for Aboriginal rights claimants is also shown by the Canadian threshold criterion for proof of eligibility for Aboriginal rights, known as the "organized society" requirement.⁹¹⁸ Occupation of land or territory is normally sufficient in law to resist adverse claims based on occupation.⁹¹⁹ The unique requirement of Canadian Aboriginal rights law that an Aboriginal people prove that its ancestors were "organized", before it may assert any Aboriginal rights based on its society's prior occupation, burdens Aboriginal rights claimants unequally, and is traceable in the jurisprudence to directly discriminatory, 19th century reasoning that required a culture to be "civilized" by European standards before it qualified for legal consideration.⁹²⁰ The first instance of the threshold "organized society" test in the modern Canadian jurisprudence, the pronouncements made in the Federal Court ruling in *Baker Lake*, mistook descriptions by American and previous Canadian authorities of the presumptive nature of Aboriginal societies for a prescription that claimants are required to meet.⁹²¹ The presumption that Aboriginal peoples live in societies having a reliance upon land and territory that merits respect is now required by basic understandings of human rights.⁹²² It is emphatically part of the Australian law of Aboriginal land rights declared by the High Court in *Mabo*,⁹²³ and appears accepted by American constitutional law.⁹²⁴

The Canadian jurisprudence, and especially the trial decision in *Delgamuukw*, also contains a derivative "organized society" test, which affects the scope of Aboriginal rights cognizable by the courts even after the threshold test has been met.⁹²⁵ This floating restriction upon the scope of Aboriginal rights may have been drawn from the Privy Council's "scale of social organization" comment in *Re Southern Rhodesia*, though the better view appears to be that the Privy Council meant to apply such a standard only at the threshold of cognition of any Aboriginal land right by the courts.⁹²⁶ The Canadian modification, urged by the Attorney-Generals of British Columbia and Canada in the *Delgamuukw* trial,⁹²⁷ has been to grade the

degree of organization shown by an Aboriginal rights claimant passing the threshold test, so that the rights proven, whether to land⁹²⁸ or territory,⁹²⁹ may be circumscribed by the degree of organization demonstrated in almost unlimited ways, without any showing of Crown extinguishment, and without regard for the more extensive defensive entitlements that would be accorded non-Aboriginal claimants of land or territory on account of occupation alone.⁹³⁰ No effort has yet been made in the Canadian jurisprudence to justify the discrimination inherent in such reasoning.⁹³¹

The historical, 'usufructuary' and 'frozen rights' restrictions upon the scope of Aboriginal rights are not commonly analysed in conjunction with the *terra nullius* doctrine. Both theories, however, are ancillaries of *terra nullius* thinking in that, while not necessarily denying that Aboriginal peoples were the prior occupiers of colonized lands,⁹³² these theories set aside without explanation, the normal implications that flow from this fact, substituting instead one-sided restrictions on the possible scope of Aboriginal land rights. In restricting the rights they acknowledge to a function of mere uses of land, both theories deny to Aboriginal occupiers, in particular, the defensive benefit that occupation normally resists adverse claims based on occupation and the positive benefit that occupation normally gives rise to a presumption of fee simple title in the occupied lands.⁹³³

The 'usufructuary rights' theory stems in Canada from the unbalanced judgement of the Privy Council in *St. Catherine's Milling*,⁹³⁴ and might have been thought laid to rest by the Supreme Court of Canada's 1988 decision in *C.P.R. v. Paul*,⁹³⁵ were it not for the positive reception given it by the judgement of Wallace J.A. in *Delgamuukw*.⁹³⁶ This theory's transmutation of occupation into the use of Aboriginal lands is sometimes defended on the basis of Aboriginal cultural understandings, or the uniqueness of Aboriginal rights in English law. Neither defence is convincing. The usufructuary rights theory works to strip Aboriginal land rights of the status of property systematically, independently of cultural considerations, and in cautioning that Aboriginal rights law must be considered unique, the Supreme Court of Canada did not rule in *Sparrow* that the law should favour Crown over Aboriginal interests.⁹³⁷

Reaching beyond the precedent of *St. Catherine's Milling*,⁹³⁸ the 'frozen rights' theory adds to the usufructuary rights theory the restriction that only some uses of land or territory entitle Aboriginal peoples to Aboriginal rights based on usage, those for which settler cultures cannot possibly claim credit.⁹³⁹ The argument, implicitly advanced by Wallace J.A. in *Delgamuukw*, that equality of citizens might demand such a restriction, is unpersuasive, because it takes no account of the deep cultural and political inequality inherent in the uncompensated passing of ownership of public lands and sovereignty over territory, from Aboriginal to Crown authorities.⁹⁴⁰ The 'frozen rights' theory also assumes an unwarranted, essentialist role for culture in determining contested claims to property or sovereignty, and yields unbounded entitlements to Anglo-Canadian cultural practices, while deeming Aboriginal entitlements culturally limited.⁹⁴¹ The 'frozen rights' theory is not supported by the Supreme Court of Canada's ruling on methods of Aboriginal fishing in *Sparrow*,⁹⁴² and appears to depart from the approach to Aboriginal land rights commended by the Supreme Court of Canada in *Guerin*.⁹⁴³ It is clearly absent from the understandings of colonial law applied in the United States and Australia.⁹⁴⁴

The introduction to this paper emphasized the critical purpose of the foregoing analysis, which has submitted doctrines dispossessing Aboriginal peoples of their lands and territories in law to the test of normative and jurisprudential standards. It is appropriate to conclude with a few remarks on the nature of the corrective enterprise that might be undertaken, should this analysis be persuasive. First, it would seem necessary to abandon rigid and counterhistorical, 'winner-take all' assumptions about how property and authority might be held, in order to ground settler societies' rights and interests upon normative foundations that meet contemporary standards of fairness. Second, envisionment of an honourable Crown/Aboriginal relationship in a post-colonial era might benefit from greater attention to the demands of distributive justice, concerned to ensure 'fair shares', than is immediately attracted by the colonial law's focus upon contests over title.⁹⁴⁵ *Worcester v. Georgia* and *Connolly v. Woolrich* are examples of historical authorities that do invite analysis along both of these lines.⁹⁴⁶ Finally, if we are to confront the law's role in the continuing dispossession of Aboriginal peoples without dismissing

the genuine and authoritative efforts of past law-makers to dispense justice, it would appear that a thoroughgoing commitment to reinterpret the law that has governed colonization is necessary. As Guyora Binder observes, "in choosing a future, we also interpret tradition and so choose a path. Just as we make the future meaningful by linking it to the past, so we make the past meaningful by imagining it as a portal to a better future."⁹⁴⁷

Notes

1. This paper originated in a more general study of extinguishment of Aboriginal rights. The author is indebted to the peer reviewers of this paper for their helpful comments, and to Paul Joffe, Mary Ellen Turpel, and Chris Tennant for several valuable suggestions regarding sources and arguments to consider. The opinions expressed are the author's alone. Not considered here in any detail are the legal effect on the doctrines examined of the *Royal Proclamation of 1763*, and modern human rights instruments. The research upon which this paper is based was completed in February, 1995.
2. G. Binder, "The Case for Self-Determination" 29 Stan. J. Int'l L. 223 (1993), at 254.
3. B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. B. Rev. 727, at 783. For the image of Aboriginal rights law as a poorly excavated archaeological site, see *ibid.*, at 727.
4. See B. Slattery, *ibid.*, at 744-745 ("[The doctrine of aboriginal land rights] is an autonomous body of law that bridges the gulf between native systems of tenure and the European property systems applying in the settler communities. It overarches and embraces these systems, without forming part of them."); and "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681, at 690-691 ("the best framework for understanding relations between Aboriginal nations on the one hand and Canada and the United States on the other is provided by a distinctive body of inter-societal law that was generated in the seventeenth and eighteenth centuries by interaction between native peoples and settler governments").
5. See M. Asch and C. Bell, "Definition and Interpretation of Fact in Aboriginal Title Litigation: An Analysis of *Delgamuukw*" (1993) 19 Queen's L.J. 503, at 549 n 142 ("We are advocating the development of an 'intercultural' concept of justice. We do not accept the presumption that cultural relativism implies that any practice of any society is necessarily appropriate").
6. The Privy Council's inquiries into the status of the Mohegan people, conducted in the first half of the 18th century, encountered the need for such principles directly. Commissioner Horsmanden observed: "[A] matter of property in lands in dispute between the Indians *a distinct people* (for no act has been shewn whereby they became subjects) and the English subjects cannot be determined by the laws of our land, but by a *law equal to both parties*, which is the law of *nature and nations*" (original emphasis); Commissioner Horsmanden, 1743, *Governor and Company of Connecticut, and Mohegan Indians, by Their Guardians: Certified Copy Book of proceedings Before Commissioners of Review* (1769), at 126-127, quoted by R. Barsh, *infra*, note 36, at 18.
7. W. Holdsworth, *A History of English Law*, vol 3, 5th ed. (London: Methuen, 1942), at 329, quoted in G. Chipeur, "The Royal Prerogative and Equality Rights: Can Medieval Classism Coexist with Section 15 of the Charter?" (1991) Alta. L. Rev. 625, at 630.
8. J. Andrews, "The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century" (1978) 94 Qtl'y Rev. 408, at 412.
9. This analysis concerns the English law act of state doctrine relating to executive conduct on behalf of the Crown. The American doctrine by the same name relates to conduct on behalf of a foreign sovereign. Until 1981, courts applying English law (including Canadian courts) generally dealt with the latter issues as matters of sovereign immunity, though the term "act of state" was sometimes also used in that context, and the English rules applied in the two contexts have shared historical origins: see W. Holdsworth, *infra*, note 10, esp. 1315-1316; 1318-1320). In 1981 the British House of Lords adopted a version of the American doctrine which may be distinguished as the "act of foreign state" doctrine. The question of the appropriate mandate of the courts in both contexts engages

common issues of principle. See generally D. Jones, "Act of Foreign State in English Law: The Ghost Goes" 22 Virginia J. Int'l L. 433 (1982), esp. 433-436; 476-479; H. Kindred, "Act of State and the Application of International Law in English Courts" [1981] C'n. Y.B. Int'l L. 271; and H. Kindred, "Acts of State and the Application of International Law in Canadian Courts" (1979) 10 R.D.U.S. 271. Section 1.4 below considers the influence on the Canadian law of extinguishment of Aboriginal rights, of the American counterpart to the English law act of state doctrine, the "political questions" doctrine.

10. "An act of state is essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal courts": *Salaman v. Secretary of State for India*, [1906] 1 K.B. 613 (C.A.), at 639. For analysis of the act of state doctrine under English law, see generally W. Holdsworth, "The History of Acts of State" (1941) 41 Columbia L.R. 1313; J. Collier, "Act of State as a Defence Against a British Subject" [1968] Cambr. L.J. 102; E. Wade, "Act of State in English law: Its relations with International Law, (1934) 15 Br. Y.B. Int'l L. 98; *Halsbury's Laws of England*, 4th ed., ed. Lord Hailsham of St. Marylebone (London: Butterworth, 1973), Vol. 18, paras 1413 -1420, at 725-730; and W. Moore, *Act of State in English Law* (London: John Murray, 1906). The leading English case at present is *Attorney-General v. Nissan* [1970] A.C. 179 (H.L.).

11. For example, the courts have determined that under British colonial law, the inhabitants of newly acquired territory become British subjects upon the territory's acquisition by the Crown: K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), at 163.

12. According to J. Collier, the most common definition of act of state is as follows:

"Act of State means an act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown."

(*supra*, note 10, at 103, quoting E. Wade, *supra*, note 10, at 103.) More generally, the Executive mandate in question relates to foreign affairs: see W. Holdsworth (mandate to perform acts of state is "part of the Crown's prerogative in relation to foreign affairs": *supra*, note 10, at 1313) and E. Wade, *ibid.*, at 101. In addition to the acquisition of territory and declaration of war, J. Collier lists among the acts which qualify as acts of state, "the making of treaties and of peace, the seizure of property by act of war or conquest, making a person a prisoner of war, the recognition of foreign states and governments and the reception of their diplomatic agents, and the commission of tortious acts against persons who are without the allegiance": *ibid.*, at 103.

13. The doctrine's constraint upon judicial review is generally explained as a limit of the municipal courts' jurisdiction: see K. McNeil, *supra*, note 11, at 163 (act of state "an act of sovereign power which is outside the jurisdiction of the courts"); W. Holdsworth, *supra*, note 10, at 1313; E. Wade, *supra*, note 10, at 100, 102; W. Moore, *supra*, note 10, at 1-2; J. Collier, *supra*, note 10, at 118-119.

It should also be noted that an unequivocal declaration by the Crown - such as a declaration of territorial sovereignty - is conclusive as to whether the act in question has occurred, but where this is unclear, municipal courts must determine the issue. The intention of the Crown governs the ruling. See K. McNeil, *ibid.*, at 111. In the case of acquisition of territorial sovereignty (*id.*, at 112):

"in order to decide whether a particular territory has been acquired one needs to examine the acts of the Crown to ascertain its intentions. Often there would be a clear expression of intent, as where the Crown accepted title to territory by signing a treaty of cession, or authorized British subjects to settle an unclaimed region in its name, or simply made an unambiguous assertion of sovereignty. In other instances there may have been a gradual extension of jurisdiction by the Crown over a territory, in which case it may be difficult to determine the precise moment of acquisition. Furthermore, the means employed by the Crown to assert territorial claims have varied from time to time and from one region to another, making a

comparative approach to the question essential in ambiguous situations. But in any case it is the intention of the Crown, gathered from its own acts and surrounding circumstances, that determines whether a territory has been acquired for English law purposes."

14. According to B. Slattery, for example, the doctrine presumes that "the executive must have the freedom to conduct foreign policy without fear of second-guessing by the judicial branch": "Aboriginal Sovereignty and Imperial Claims," *supra*, note 4, at 692. In R. Schaffer's (now Balkin's) account, "under the ... doctrine, ... municipal courts ... recognize that the conduct of foreign policy is best left to the executive arm of government and that, in these areas, it would be unwise for the state to speak, as it were, with both its executive and judicial voices": "International law and sovereign rights of indigenous peoples", in B. Hocking, ed. *International Law and Aboriginal Human Rights* (Sydney: The Law Book Company, 1988), 19, at 20. According to H. Kindred, the view that "the state cannot speak with two voices" on such matters "has been echoed through a long line of cases right up to current times" ("English Courts", *supra*, note 9, at 284-285, referring to both the act of state and act of foreign state doctrines). Compare *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441, per Wilson J., at 471-472, quoted in text accompanying notes 183 and 184, *infra*.

With respect to choice of the executive as the appropriate single decision-maker or voice in foreign affairs, see P. Cane, "Prerogative Acts, Acts of State and Justiciability", (1980) 29 Int'l & Comp. L. Q'tly, 680, at 681 (capacity of the courts to adjudicate such matters considered inferior, because by their nature war and like matters are "most unsuitably conducted by judicial methods of decision-making", and further, the courts should not rule on the propriety of matters of "high policy" because "they are neither representative nor responsible"). Compare *Operation Dismantle*, per Wilson J., *ibid.*, and M. Tigar, *infra*, note 161.

Blackstone defended the prerogative on similar grounds in 1765:

"With regard to foreign concerns, the king is the delegate and representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king therefore, as in a centre, all the rays of his people are united, and formed by that union, a consistency, splendour, and power, that make him feared and respected by foreign potentates: who would scruple to enter into any engagement that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the nation."

(*Blackstone's Commentaries*, quoted by T. Franck, *infra*, note 102, at 32.)

15. According to B. Slattery, "British law assigns to the Sovereign broad powers of conducting international affairs. These include dealing with foreign states and their subjects, concluding treaties, engaging in war, acquiring territory, and so on. The Crown holds these powers by virtue of the prerogative in the broadest sense" (*The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of their Territories* (D. Phil. Thesis, Oxford Univ., 1979, reprinted Saskatoon: Univ. of Sask. Native Law Centre, 1979), at 46, footnotes omitted). See also K. McNeil (*supra*, note 11, at 2, 131 n. 104, and 162); H. Kindred ("English Courts", *supra*, note 9, at 273); D. Jones, *supra*, note 9, at 436, and the authorities cited in relation to the jurisdictional character of the doctrine in note 13, *supra*. (Some case law suggests that the Crown's "prerogative" normally includes only domestic matters, but there appears to be general consensus amongst commentators and substantial precedent in support of the view that the foreign relations mandate stems from and remains within the prerogative, and that acts of state involve its exercise: see J. Collier, *supra*, note 10, at 103.)

B. Slattery attributes application of the doctrine to sovereign acquisition and loss of territory to (apart from the institutional factors referred to in note 14, *supra*) the view that "these are high matters of state that should remain within the exclusive purview of the government": "Aboriginal Sovereignty and Imperial Claims", *supra*, note

4, at 692. According to R. Schaffer, "[t]he courts in these circumstances have chosen, for reasons of policy, not to query the validity of actions which fall into the category of acts of states. The proclamation of sovereignty is an act of state. The courts will not adjudicate on such a proclamation, even if it appears to be in violation of international law": *supra*, note 14, at 20.

16. R. Schaffer suggests that the courts will weigh this consideration in any event: "[t]he act of state doctrine apart, no municipal court which derives its authority from the sovereign, would entertain the possibility of casting aspersions on the validity of that authority" (*supra*, note 14, at 20.) Compare the Supreme Court of Canada's decision in *Operation Dismantle*, quoted *infra*, text accompanying note 180.

Since "act of state" is not a term of art and is often not employed in the judgements which apply the doctrine (see J. Collier, *supra*, note 10, at 103), it is not always possible to ascertain whether this factor is being treated as a rule. It does appear to have operated as part of the analogous doctrine in *Johnson v. M'Intosh* (1823) 8 Wheat. 543 (U.S.S.C.), wherein Marshall C.J. declared that "[c]onquest gives a title which the Courts of the conqueror cannot deny" (at 588). (See discussion in note 35, *infra*, and accompanying text.) In a similar vein, *Halsbury's*, *supra*, note 10, citing the English Court of Appeal decision in *Salaman* (*supra*, note 10), states that an act of state is not susceptible to challenge under municipal law because "it is a catastrophic change, constituting a new departure, and the municipal law has nothing to do with the act of change by which the new departure comes about": para. 1414, at 725.

17. W. Holdsworth explains that the act of state power "is subject to law" in the sense that "the courts can inquire whether the act alleged to be an act of state is an act which the Crown by its prerogative is able to do", but "the courts cannot interfere if the act done is really an act of state": *supra*, note 10, at 1314.

18. Commentators and the courts routinely note this implication of the doctrine. In connection with unilateral extinguishment of Aboriginal rights under United States law, G. Lester calls the effect of the doctrine "the exercise not of law but supreme power", a power that is "awesome", "absolute and unrestrained": *Inuit Territorial Rights in the Canadian Northwest Territories: A Survey of the Legal Problems* (Ottawa: Tungavik Federation of Nunavut, 1984), at 7.

With respect to acquisition of territory, K. McNeil states that "the Crown can proceed as it likes in extending its sovereignty over new territory", and attributes this "freedom of action" to one "inherent in the prerogative to annex territory by act of state": *supra*, note 11, at 131, n. 104 [citations omitted]. (See also McNeil's text and accompanying notes at p. 111).

With respect to the act of state doctrine generally, B. Slattery states that "the common law is generally silent as to the exercise of the Sovereign's conduct in this sphere": *Land Rights*, *supra*, note 15, at 46. E. Wade called the doctrine "the absolutism of the Executive" (*supra*, note 10, at 100), citing the following description from Keir and Lawson, *Cases in Constitutional Law*:

"At municipal law and in the eyes of municipal courts the Crown is absolute in relation to foreign affairs. Therefore it may act towards foreign states and their subjects outside the realm in a perfectly arbitrary fashion; towards them the Crown has no duties, but only powers."

W. Moore stated (*supra*, note 10, at 1-2) that the relation to which the doctrine applies

"is not one of law, or, at any rate, of municipal law. The type of 'matter of state' is the matter between states, which, whether it be regulated by international law or not, and whether the acts in question are or are not in accord with international law, is not a subject of municipal law jurisdiction."

In *Salaman* (*supra*, note 10), Fletcher Moulton L.J. held that

"[a]n act of state is essentially an exercise of sovereign power.... Its sanction is not that of law, but that of sovereign power, and whatever it be, municipal courts must accept it, as it is, without question." (at 639)

In *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992), P. Hogg notes that the royal prerogative in general "consists of the powers and privileges accorded by the common law to the Crown" (at 13). Quoting Dicey, however, Hogg describes the power itself as "the residue of discretionary or arbitrary authority, which at any time is left in the hands of the Crown." (*id.*)

19. While it is accurate to say that acts of state "fall within the sphere of international rather than municipal law", they concern any matter of state "whether it be regulated by international law or not": W. Holdsworth, *supra*, note 10, at 1313. A pertinent gap in international law at present is the absence of any basis for standing on the part of an Aboriginal people challenging denial of its sovereignty by a state purporting to have acquired territorial sovereignty over the people's territory.

20. See M. Akehurst, *A Modern Introduction to International Law*, 6th ed. (London: Unwin Hyman, 1987), at 259-269.

21. *U.N. Charter*, art. 2, para. 4: see M. Akehurst, *ibid.*, at 148-150.

22. B. Slaterry, *Land Rights*, *supra*, note 15, at 46 and 63; R. Schaffer, *supra*, note 14, at 20; K. McNeil, *supra*, note 11, at 111; W. Holdsworth, *supra*, note 10, at 1313; E. Wade, *supra*, note 10, at 104-106. Domestic courts may, however, consider international standards when ascertaining the intention informing an act of state, following the domestic law rule that "the Sovereign is presumed not to act in violation of international rules to which it subscribes": Slaterry, *ibid.*, at 63. See also McNeil, *ibid.*, at 111.

23. See note 17, *supra*. Historically,

"[t]he view that the King could by his prerogative withdraw from the common law courts any matter which he chose to say was matter of state, and decide it as he pleased was finally disposed of by the Great Rebellion and the Revolution. The result is that though the courts cannot interfere if the act really is an act of state, they can hold that the act is not really an act of state, because the thing done is something which the Crown by the rules of English law had no power to do."

(W. Holdsworth, *supra*, note 10, at 1314.) With respect to the royal prerogative generally, P. Hogg notes that "[t]he prerogative is a branch of the common law, because it is the decisions of the courts which have determined its existence and extent": *supra*, note 18, at 13.

With respect to the status of acts associated with the acquisition of territory, K. McNeil notes that "a court will hold an act not to be an act of state if committed under colour of some legal right more specific than the Crown's general right to acquire territory": *supra*, note 11, at 163, n 11.

24. K. McNeil, *supra*, note 11, at 164 n. 13. See also B. Slaterry, *Land Rights*, *supra*, note 14, at 47-48; Halsbury's, *supra*, note 10, at para. 1418; and J. Collier, *supra*, note 10. In *Nissan*, *supra*, note 10, at 207, Lord Reid expressed this rule as follows: "[w]here an act of a servant of the Crown in this country infringes the rights of a British subject it has been settled law for centuries that it is no defence to plead that the act was ordered and ratified by the Crown or the government." (In referring to the acts of a Crown servant Lord Reid was not framing a subsidiary rule. Until the twentieth century the English Crown could not be held liable at all for wrongs done its subjects, on the theory, rooted in the same historical power from which the act of state doctrine derives, that "the Crown can do no wrong": *ibid.*, at 208, quoting *Johnstone v. Pedlar* [1921] 2 A.C. 262, at 271.)

25. See K. McNeil, *supra*, note 11, at 111, n. 11, and *Operation Dismantle*, *supra*, note 14, per Wilson at 463-464. Nothing in the doctrine prevents Parliament, for example, from enacting a statute binding on the executive and enforceable in the courts, restricting the bases upon which Canada could acquire additional territory.

26. The preamble to *Schedule B of the Constitution Act, 1982 - the Canadian Charter of Rights and Freedoms* - affirms that "Canada is founded upon principles that recognize the supremacy of God and the rule of law".

27. *Operation Dismantle*, *supra*, note 14, per Dickson J., at 455, 459; per Wilson J., at 463-472.

28. In *R. v. Sparrow* [1990] 1 S.C.R. 1075, the Supreme Court of Canada quoted with approval the Ontario Court of Appeal's statement that "the principle that the Constitution should be interpreted in a liberal and remedial way ... applies [no] less strongly to aboriginal rights, than to the rights guaranteed by the Charter" (at 1107). The Supreme Court also noted the opinion of N. Lyon that s. 35 of the *Constitution Act, 1982*, "renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown" (at 1106).

29. As R. Barsh notes, in relation to colonial acquisitions of territory:

"The act of state doctrine is nothing more than a political statement that the Crown's actions cannot be questioned in the Crown's own courts. This is essentially a procedural rule, since it does not pretend that territorial aggression was just, only that it cannot be redressed in municipal courts.... However stated, it amounts to saying that the government is above the law, at least when it interferes with the freedom or property of noncitizens or certain disfavoured or legally segregated groups."

("Indigenous peoples and the right to self-determination in international law", in B. Hocking, ed., *International Law and Aboriginal Human Rights*, *supra*, note 14, 68, at 75-76.

More generally, according to J. Collier, the effect of the Crown's pleading the doctrine as a defence to a suit is that "it is not a substantive defence, turning what would otherwise be ... a wrongful act into a rightful one, the only result is that, once the courts are satisfied that an act is truly an act of state, they must decline to take any jurisdiction over any claim arising over it": *supra*, note 10, at 118. P. Cane objects to Collier's statement on the basis that acts of state are by definition "lawful", in the sense of *intra vires* (*supra*, note 14, at 684), but this objection appears to miss Collier's and Barsh's point: the licence provided by the doctrine does not assure that acts of state have any legal justification.

30. *Halsbury's Laws of England*, vol 8, 4th ed. (London: Butterworths, 1974), at 583, quoted by G. Chipeur, *supra*, note 7, at 631. Because this doctrine represents a remnant of feudal legal theory, W. Moore remarked that "[t]he subject is one in which history is more than ordinarily important": *supra*, note 10, at 5.

31. *A.G. v. Nissan*, *supra*, note 10, at 208 (per Lord Reid).

32. See W. Moore, *supra*, note 10, at 14, and the quotation from Holdsworth, *supra*, note 23.

33. W. Holdsworth, *A History of English Law*, (describing the incidents of the "political" branch of the royal prerogative attaching to the monarch as head of state, as distinct from "personal" prerogatives, with which this analysis is not concerned), *supra*, note 7, at 468-469, quoted by G. Chipeur at 632. Blackstone described such incidents as "exceptions, in favour of the crown, to those general rules that are established for the rest of the community" (*id*).

34. Consistently with this formulation, Deane and Gaudron JJ. stated the view in *Mabo v. Queensland* (1992) 107 A.L.R. 1 (Aust. H.C.), at 58, that international law's requirement of "effective occupation" does not qualify this rule:

"[C]ontemporary international law would seem to have required a degree of actual occupation of a 'discovered' territory over which sovereignty was acquired by settlement and it is scarcely arguable that the establishment by Phillip in 1788 of the penal camp at Sydney Cove constituted occupation of the vast areas of the hinterland of eastern Australia However, in so far as the establishment of British sovereignty is concerned, those problems do not exist for the purposes of our domestic law. Under British law in 1788, it lay within the prerogative power of the Crown to extend its sovereignty and jurisdiction to territory over which it had not previously claimed or exercised sovereignty or jurisdiction. The assertion by the Crown of an exercise of that prerogative to establish a new colony by "settlement" was an act of State whose primary operation lay not in the municipal arena but in international politics or law. The validity of such an act of State (including any expropriation of property or extinguishment of rights which it effected) could not be challenged in British courts. Nor could any promise or undertaking which it embodied be directly enforced against the Crown in those courts. The result is that, in a case such as the present where no question of constitutional power is involved, it must be accepted in this court that the whole of the territory designated in Phillips Commissions was, by 7 February 1788, validly established as a "settled" British Colony." [paragraphing omitted]

In *Delgamuukw v. British Columbia*, Lambert J.A., dissenting, took a contrary view: "Sovereignty, of course, does not occur when the first sea captain steps ashore with a flag and claims the land for the British Crown. Cook did that in 1778. Sovereignty involves both a measure of settled occupation and a measure of administrative control": [1993] 5 W.W.R. 97 (B.C.C.A.), at 287.

Neither of these recent statements considered that the Privy Council might have already imposed the qualification accepted by Lambert J.A. at the turn of the century, in relation to acquisition of Aboriginal territory. K. McNeil has pointed out that in *Ontario Boundaries* and *Staples v. R.* (unreported decisions from 1884 and 1899 respectively) the Privy Council declined to accept the contention that the Crown had acquired Aboriginal territory unilaterally, apparently for the reason that effective occupation by the Crown had not been demonstrated: "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What it Didn't Have", in D. Drache and R. Perin, eds., *Negotiating with a Sovereign Quebec* (Toronto: Lorimer, 1992), 107, at 113-117, esp. n 47. (According to McNeil, during argument in *Staples* the Lord Chancellor stated that the terms of a grant contained in a Royal Charter cannot "give jurisdiction of sovereignty over a place Her Majesty has no authority in": *ibid.*, at 116.) McNeil reports that the Privy Council has not since applied this rule without such a qualification where Aboriginal territory is concerned.

35. B. Slattery, "Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, at 692. See also K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 111 and accompanying notes, and at 131, n 104.

The rule is well established in cases originating in British colonies decided by the Privy Council. From the former colony of India, see *Vajesingji Joravarsingji v. Secretary of State for India* (1924) L.R. 51 IA 357 (P.C.), at 360. From former colonies in Africa, see *Cook v. Sprigg* [1899] A.C. 572, at 578; *Sobhuza II v. Miller* [1926] A.C. 518 (P.C.), at 522-555, and *Re Southern Rhodesia* [1919] A.C. 211 (P.C.), at 239-241.

See also the decisions of the High Court of Australia in *New South Wales v. Commonwealth of Australia* (1975) 135 C.L.R. 337, at 388 (per Gibbs J.: "The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state"); and *Mabo v. Queensland*, *supra*, note 34, at 20 (per Brennan J., quoting Gibbs J. in *New South Wales*, *id.*, with approval); at 58 (per Deane and Gaudron JJ: "...in 1788, it lay within the prerogative power of the Crown to extend its sovereignty ...to territory over which it had not previously claimed or exercised sovereignty The assertion by

the Crown of an exercise of that prerogative ... was an act of State whose primary operation lay not in the municipal arena but in international politics or law. The validity of such an act of State (including any expropriation of property or extinguishment of rights which it effected) could not be challenged in British courts"); and at 142-143 (per Toohey J., apparently presuming that annexation of territory is an act of state and noting, in the context of considering the implications of annexation of territory for property rights, that "[a] sovereign can, by a positive act, seize private as well as public property in the act of acquiring sovereignty and the seizure is non-justiciable").

A counterpart to this rule, framed in terms of a 'political questions' doctrine respecting foreign affairs, emerged early in American Aboriginal rights jurisprudence and has continued to have significant influence on the American law governing extinguishment of Aboriginal rights. See *Johnson v. M'Intosh*, *supra*, note 16, at 588 ("Conquest gives a title which the courts of the conqueror cannot deny"); 591 ("However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of people originates in it, it becomes the law of the land, and cannot be questioned"); 591-592 ("concomitant" restriction on Aboriginal peoples' capacity to transfer absolute title "certainly cannot be rejected by Courts of justice") and 596-597 ("According to the theory of the British constitution, the royal prerogative is very extensive, so far as respects the political relations between Great Britain and foreign nations", and is the source of authority for "quieting [Indian] alarms for their property" through the *Royal Proclamation of 1763*, by means of restricting settlers' capacity to purchase title, "for the preservation of peace"). See generally H. Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States" (1978) 27 Buff. L. Rev. 637, esp. 647; K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 244-265; G. Lester, *supra*, note 18, esp. 4-8; and the discussion and authorities cited in section 1.4 below.

For early applications of this rule in Canada in the context of criminal proceedings in which the territorial status of the situs and subject-matter of the alleged offence was disputed, see *R. v. Baker* (1828) 1 N.B.R. 211 (S.C.), at 214-215, and *R. v. Hannawell* (1831) 1 N.B.R. 324 (S.C.), at 343-344, cited by B. Slattery, "The Independence of Canada" (1983) 5 Supreme Court L. Rev. 369, at 375. The rule was applied recently by one member of the Court of Appeal majority in *Delgamuukw*: see note 75, *infra*. In *Sparrow*, *supra*, note 28 - the Supreme Court of Canada's first ruling on the nature and status of existing aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982* - the Supreme Court of Canada did not refer to this rule. The Court said, in response to the assertion of an Aboriginal right to regulate the Aboriginal fishery (at 1103):

"It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown; see *Johnson v. M'Intosh* (1823) 8 Wheaton 543 (U.S.S.C.); see also the Royal Proclamation itself (R.S.C., 1985, App. II, No. 1, pp.4-6); *Calder*, *supra*, per Judson J., at p.328, Hall J., at pp. 383 and 402."

36. *Secretary of State for India in Council v. Kamachee Boye Sahaba* (1859) 7 Moo. IA 476, reviewed in R. Barsh, "Behind Land Claims: Rationalizing Dispossession in Anglo-American Law" [1986] 1 Law & Anthropology 15, at 24-25, and K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 166-167.

37. *Ibid.*, at 540.

38. In *Johnson v. M'Intosh*, *supra*, note 16, the United States Supreme Court held that with acquisition of Crown sovereignty the rights of the original inhabitants "to complete sovereignty, as independent nations, were necessarily diminished (at 574.) In *Coe v. Commonwealth of Australia* the High Court of Australia extended this logic (alternatively denying the initial existence of Aboriginal sovereignty): (1979) 53 A.L.J.R. 403. Apparently assuming Crown sovereignty to be absolute in scope, the High Court treated the Crown's acquisition of sovereignty as foreclosing the existence of any continuing Aboriginal sovereignty:

"The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged. [citations omitted] If the amended statement of claim intends to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the constitution, or that there is an aboriginal nation which has sovereignty over Australia, it cannot be supported. In fact, we were told in argument, it is intended to claim that there is an aboriginal nation which has sovereignty over its own people ... in other words, it is sought to treat the aboriginal people of Australia as a domestic dependant nation, to use the expression which Marshall C.J. applied to the Cherokee Nation of Indians [citation omitted]. However, the history of the relationships between the white settlers and aboriginal peoples has not been the same in Australia and the United States The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or territory, confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain. (Per Gibbs J, at 408)

...

The first part is apparently intended to dispute the validity of the British Crown's and now the Commonwealth of Australia's claim to sovereignty over the continent of Australia in the face of sovereignty alleged to be possessed by the Aboriginal nation. Paragraphs 2A and 3A are in much the same form as the original statement of claim but the word "wrongfully" has been added, thus disputing the validity of the Crown's proclamations of sovereignty and sovereign possession. These are not matters of municipal law but of the law of nations and are not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged. As such, they are embarrassing and cannot be allowed. I would also strike out ... para 3B [asserting that "The claims ... on behalf of King George III ... were contrary to the rights ... of the aboriginal people both individually and in tribes and of the aboriginal community and nation ..."].... Thus what I have called the first branch of the proposed statement of claim cannot be allowed because generally it is formulated as a claim based on a sovereignty adverse to the Crown." (per Murphy J., at 410).

See also the case note on the unreported recent interlocutory ruling of Mason C.J., interpreting the sovereignty implications of the High Court's judgement in *Mabo v. Queensland*, discussed *infra*, note 788.

39. B. Slattery, *Land Rights*, *supra*, note 15, at 10-12; 50-51; K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 112-114; 162-164; 171-179.

40. In *Mabo v. Queensland*, for example, Brennan J. condemned the premises of the doctrine of "peaceful settlement" as discriminatory, but relied chiefly upon the act of state doctrine to decline to review the Crown's claim to effectively absolute sovereignty in Australia. Brennan J. declined to question, in particular, the Crown's claim to unfettered power to extinguish Aboriginal title: see note 145 and discussion following; note 320, *infra*; and section 4.4 below. Deane and Gaudron JJ. also relied upon the act of state doctrine to adjudge the validity of the Crown's acquisition of the territory by settlement, unchallengeable: see note 34, *supra*.

In *Delgamuukw v. British Columbia*, Wallace J.A. classified British Columbia as "settled" without reservation: see note 75, *infra*. Rather than denying the Aboriginal plaintiffs' claim to rights of jurisdiction (treated as a claim to sovereignty) on this ground, however, Wallace J.A. accepted for the sake of argument that the plaintiffs ancestors might have possessed a form of jurisdiction, and held (alternatively to his ground that the *British North America Act* effected a legislative extinguishment of such rights) that the Crown's assertion of sovereignty, clad in the act of state doctrine's protection against judicial challenge, automatically "superseded" any Aboriginal

sovereignty in British Columbia. This theory is examined in part 3, "doctrine of sovereign dispossession" b. See, *supra*, note 34, at 198-199; 223; 224-225.

41. See B. Slaterry, "The Independence of Canada", *supra*, note 35, at 376, 378; K. McNeil, *supra*, note 11, at 113 (re: derivative acquisitions), 180-183 (re: settled territories, stating that "in general [Aboriginal peoples] would have to respect English public law" (though remaining subject to their own laws respecting civil and other matters appropriate to their local conditions), and rejecting the proposition that reception of English law itself "would ...have extinguished rights previously existing under local law"). See also B. Slaterry, "Understanding Aboriginal Rights", *supra*, note 3, at 738, and M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) Queen's L.J. 350, at 384 (framing the qualification in terms of inconsistency with asserted Crown sovereignty, rather than with a change in sovereignty). The act of state doctrine is also the premise of commentators' assumption that subject to British constitutional constraints, Parliament may exercise unlimited legislative control over Aboriginal law and custom in settled territories: see Slaterry, "The Independence of Canada", *ibid.*, at 376-377; McNeil, *ibid.*, at 113-116, and Walters, *ibid.*, at 384).

42. The American doctrine of inherent tribal sovereignty, for example, under which Aboriginal peoples retain internal sovereignty circumscribed by limited federal powers, treats the two sovereignties as consistent in a broad sphere of legislative subject-matter. (American decisions rendered subsequent to the judgements of the Marshall Court have held that United States sovereignty includes the power to extinguish the retained sovereignty of the tribes. See, for example, *United States v. Wheeler*, 435 U.S. 313 (1978), at 323: "[tribal sovereignty exists] only at the sufferance of Congress and is subject to complete defeasance". It is submitted that this position is not necessary to the Marshall Court's doctrine: see text accompanying note 319, *infra*.) The basic tenet of the Marshall Court's Aboriginal rights decisions is that substantial Aboriginal sovereignty consistent with the Crown's survived Crown acquisition of sovereignty. On this view the latter sovereignty is not necessarily paramount.

43. "The public lands of the former sovereign in a cession or conquest, and lands that were unoccupied or unowned in a settlement would vest in the Crown as a consequence of the act of state by which the territory was acquired, but other lands would remain unaffected": K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 192 (and see 162, 165). See also B. Slaterry, *Land Rights*, *supra*, note 15, at 45. (Slaterry also treats the private property of a foreign sovereign as subject to the same rule: *ibid.*, at 47.)

44. See K. McNeil, *supra*, note 11, at 165-167; 264; 299.

45. K. McNeil, for example, argues that the decision of the United States Supreme Court in *Tee-Hit-Ton* treats Aboriginal title as "public property" extinguished in this application of the act of state (or, in American terms, political questions) doctrine: *Common Law Aboriginal Title*, *supra*, note 11, at 259-264. See *Tee-Hit-Ton Indians v. U.S.* 348 U.S. 272 (1954). McNeil argues that the Court in that case treated the Aboriginal claimants as a conquered sovereign entity whose "public" proprietary title to lands necessarily passed to the conquering sovereign along with territorial sovereignty, the acquisition of which was shielded from judicial inquiry by the act of state doctrine. If, on this analysis, the common law were to treat Crown sovereignty as not necessarily incorporating the "public property" of a sovereign predecessor, the immunizing effect of the act of state doctrine would not involve an extinguishment. But since the courts do attribute to Crown sovereignty a meaning inconsistent with any competing claim to "public property", an extinguishment of rights is thus barred from judicial review.

46. In K. McNeil's opinion the most frequently cited authority for this proposition - *Vajesingji Joravarsingji* (*supra*, note 35) - endorses this view in its *obiter* comments: *Common Law Aboriginal Title*, *supra*, note 11, at 166. B. Slaterry argues that the same comments can be explained on other grounds: *Land Rights*, *supra*, note 15, at 56-57. McNeil also treats a further authority relied upon in *Vajesingji Joravarsingji* - *Secretary of State for India v. Bai Rajbai* (1915) L.R. 42 1A 229 (P.C.) - as adopting this rule (at 170). Slaterry treats the latter case as a weak statement of the doctrine of continuity, expressing the presumption of continuity of pre-existing rights in terms of

an implied election by the Crown to respect such rights (at 58).

From Australia, see *New South Wales v. Commonwealth*, *supra*, note 35, at 438-439; and *Milirrpum v. Nabalco Pty.* (1971) F.L.R. 141 (N.T.S.C.), at 226-227. From New Zealand, see *Re Ninety-Mile Beach* [1963] N.Z.L.R. 461 (N.Z.C.A.), at 468. From the United States, see *Tee-Hit-Ton*, *supra*, note 45, at 279 (Indian title following acquisition of United States sovereignty "is not a property right", and "discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained"); 280 (quoting with approval (and in the view advanced here, misconstruing - see text accompanying note 111, *infra*) the statement in *Johnson v. M'Intosh* that "[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever ... private and speculative opinions may be ..., respecting the original justice of the claim"); and 284, n. 18 (in the United States, as opposed to territory where it was the purpose of the United States' acquisition "to administer property and rights for the benefit of the inhabitants", the applicable rule is "a rule of sovereign ownership or dominium").

47. *Calder v. A.-G. British Columbia* (1973) 34 D.L.R. 145 (S.C.C.), per Hall J., at 208, 218; *Guerin v. The Queen* (1984) 13 D.L.R. (4th) 321 (S.C.C.), per Dickson J., at 335-336; *Roberts v. Canada* [1989] 1 S.C.R. 322, at 340; *Sparrow*, *supra*, note 28, at 1105, 1108 (affirming Dickson J.'s characterization of Aboriginal rights in *Guerin*, *id.*); *Ontario (Attorney General) v. Bear Island* [1991] 2 S.C.R. 570, at 574-575.

48. *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399 (P.C.), at 407-408, 408-410; *Re Southern Rhodesia*, *supra*, note 35, at 233, 235; *R. v. Symonds* (1847) [1840-1932] N.Z.P.C.C. 387 (N.Z.S.C.), at 390; *Nireaha Tamaki v. Baker* [1901] A.C. 561 (P.C.), at 579; *Johnson v. M'Intosh*, *supra*, note 16, at 574; *Worcester v. Georgia* (1832) 6 Pet. 515 (U.S.S.C.), at 543-544; 545, 546; 552; *Mabo v. Queensland*, *supra*, note 34, at 30-41 (per Brennan J.); 60-62 (per Deane and Gaudron JJ); 142-144 (per Toohey J.).

49. See J. Collier's list of "acts of state", quoted *supra*, note 12; B. Slattery, *Land Rights*, *supra*, note 15, at 47; and K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 167; 179; 191.

50. K. McNeil explains the misconception as follows:

"The view that only those rights which had been recognized would be enforceable probably arose from failure to distinguish the act of state by which the Crown acquired territorial sovereignty and public property from acts of state amounting to seizures of private property. Though both might take place, the former would not necessarily involve the latter, even in the absence of some form of recognition of pre-existing rights."

(*Common Law Aboriginal Title*, *supra*, note 11, at 165.) According to McNeil, private property must "actually [have] been taken into possession by an apparent act of state" in order for the doctrine to deny the prior inhabitants their right to such property (167). (McNeil also reviews authorities, *id.*, n. 25, suggesting that, apart from actual seizures, the same result might obtain if the Crown were to expressly declare, in the course of acquiring a territory, that the private property rights of prior inhabitants were at an end.) See also B. Slattery, *Land Rights*, *supra*, note 15, at 54-59.

51. See authorities cited in notes 47 and 48, *supra*, and the analysis by B. Slattery and K. McNeil referred to in notes 49 and 50.

52. See section 1.4 below.

53. *Wi Parata v. Bishop of Wellington* (1877) 3 N.Z. Jur. (NS) SC 72 (N.Z.S.C.); and the judgement of the Court of Appeal referred to in *Nireaha Tamaki v. Baker*, *supra*, note 48, at 575 (rev'd on other grounds, *id.*). Although perhaps also explicable on other grounds - see text following note 92, *infra*, - the decision of the United States Supreme Court in *Tee-Hit-Ton*, *supra*, note 45, purports to adopt this proposition, and to find supporting

authority for such a rule in several of that court's previous judgements, including *Johnson v. M'Intosh*, *supra*, note 16, and *United States v. Santa Fe Pacific Railroad* (1941) 314 U.S. 339. For this reading of *Tee-Hit-Ton* and *Johnson v. M'Intosh*, see G. Lester, *Inuit Territorial Rights*, *supra*, note 18, at 4-8. For a similar reading of *Johnson v. M'Intosh* see K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 245-246, 261. The majority rulings in *Delgamuukw v. British Columbia* (B.C.C.A.) and *Mabo v. Queensland* (Aust. H.C.) appear to adopt elements of this reasoning from the American case law in their rationales for a unilateral power of extinguishment: see text following notes 140 and 144, *infra*.

Recently, in *Mabo v. Queensland*, *supra*, note 34, at 143, Mr. Justice Toohey of the Australian High Court expressly repudiated this proposition:

"[S]eizure of private property by the Crown in a settled colony after annexation has occurred would amount to an illegitimate act of state against British subjects since in a settled colony, where English law applies, there is no power to make laws, except pursuant to statute. Emergency powers aside, the common law required legislative authority for compulsory takings of property."

54. B. Slattery, *Land Rights*, *supra*, note 15, at 48. K. McNeil argues that such an election may only be given subsequent effect "if the election itself amounted to an actual expropriation; for the Crown could not reserve to itself power to deal with the property after the act of state was complete" (*Common Law Aboriginal Rights*, *supra*, note 11, at 178, n 69). (In common law jurisdictions, domestic law generally prohibits executive takings of private property, requiring legislative action, and presuming a right of fair compensation.)

55. B. Slattery, *Land Rights*, *supra*, note 15, at 47-48. Under British colonial law, once a territory becomes part of the Crown's dominions, its inhabitants become British subjects: K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 163; Slattery, *ibid.*, at 48.

56. See note 24, *supra*, and accompanying text.

57. G. Lester reads *Tee-Hit-Ton* (*supra*, note 45) in this way, such that the sovereignty first acquired by discovery over Indian territory is treated as permitting Congress later to "conquer" tribes more or less administratively, seizing their lands and extinguishing their title without compensation, by act of state: *Inuit Territorial Rights*, *supra*, note 18, at 7-8. See also K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 245-246; 261; 265. McNeil argues (at 246) that Marshall C.J. "was evidently bothered" by such a detour from the colonial law in *Johnson v. M'Intosh*, but chose to ignore the rule against acts of state against subjects, for reasons of "practical necessity" (at 261):

"he simply would not turn the clock back and examine the legality of acts upon which the land titles of so many Americans depended. However, what he and subsequent Supreme Court Justices seem to have done, in drawing this judicial blind on the past, was to sanction future seizures of Indian lands as well by assigning the whole matter to the political arena."

In *Nireaha Tamaki*, the English Court of Appeal held that "the mere assertion of the claim of the Crown [to proprietary title] is in itself sufficient to oust the jurisdiction of this or any other Court in the Colony" to inquire into a claim that Aboriginal title had not been lawfully extinguished (quoted by the Privy Council, *supra*, note 48, at 575). The Crown's argument, and the decision of the New Zealand Supreme Court in *Wi Parata*, *supra*, note 53, relied on by the Court of Appeal, depended expressly on the act of state doctrine for this proposition: see report of the Privy Council judgement, *supra*, note 48, at 565-566. (The Privy Council reversed on the ground that the act of state doctrine had no application to Crown conduct undertaken pursuant to statutory authority. The statutory validity of the grant in question was therefore adjudged reviewable (at 575-576).) For commentary on the extension of the act of state doctrine attempted in *Wi Parata* and subsequent New Zealand cases, see R. Barsh, *supra*, note 36, at 25-26.

58. See Toohey J.'s response to this proposition in *Mabo*, quoted *supra*, note 53.

59. As noted below, text following note 103, the American political questions doctrine also has a domestic branch, but the American cases applying the doctrine to post-acquisition extinguishment of Aboriginal rights do not depend on the domestic branch of the doctrine, which in any event does not apply where rights of citizens are concerned.

60. By K. McNeil's account, for example (see note 57, *supra*), in so extending the doctrine, Marshall C.J. involved the Court in the advancement of the interests of settlers at the exclusive and potentially unlimited expense of Aboriginal peoples. Brennan J. recently identified and repudiated such preferential treatment in the reasons of the Privy Council in *Re: Southern Rhodesia*: see *Mabo v. Queensland*, *supra*, note 34, at 29 (concluding that "an unjust and discriminatory doctrine of that kind can no longer be accepted").

61. For the view that an analogue of the foreign affairs branch of the political questions doctrine was the basis of Chief Justice Marshall's pronouncement in *Johnson v. M'Intosh* that "[c]onquest gives a title which the Courts of the conqueror cannot deny", see H. Berman, *supra*, note 35, at 647. (B. Slattery suggests that this and related passages merely established which law the American courts would apply to matters of Aboriginal title - English law or natural or international law: *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983), at 24-25. Marshall C.J.'s statement, however, while not foreclosing review of the nature of the "conqueror"'s title, appears to bar from judicial acknowledgement any competing claim.) See also (supplementary to the basis cited in note 57, *supra*) K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 245 (noting that the United States Supreme Court thrice at the turn of the twentieth century affirmed that the United States may make war upon Indians within its own territory); 246-247 (noting that after *Johnson v. M'Intosh*, the Marshall Court held that tribes, though not "foreign" within the meaning of the text of the United States constitution, were "nations", and "distinct, independent political communities"), 249, n. 20, 261-262. The text following note 111, *infra*, discusses the alternative views that Marshall C.J. treated Aboriginal peoples as foreign within the narrow context of possible future attempts to drive the Crown out of their territories; or as subject, narrowly, to an unlegislated "emergency powers" doctrine. For the relevant excerpts from *Johnson v. M'Intosh*, see note 35, *supra*.

62. See note 42, *supra*, and text following note 229, *infra*.

63. For discussion of this rationale in the American Aboriginal rights jurisprudence since *Johnson v. M'Intosh*, see K. McNeil's analysis referred to in note 61, *supra*; N. Newton, "Federal Power over Indians: Its Sources, Scope, and Limitations" 132 Univ. of Pennsylvania L. Rev. 195 (1984), at 195-196, 199-205, 209-211, 219 ("by feats of analytical legerdemain, [the Supreme Court] alternatively invoked the seemingly incompatible semi-sovereign status of Indian tribes and the guardian-ward relationship ... as rationales for allowing the exercise of plenary power to deny tribal or individual rights"); 221-223, 231, 233-235, 248, 260; M. Ball, "Constitution, Courts, Indian Tribes" [1987] Am. Bar Foundation Research J. 1, at 11, 54, 56; and R. Kronowitz, et. al, "Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations" 22 Harv. Civil Rights-Civil Liberties L. Rev. 507, at 537-538 (quoting the opinion of R. Coulter that application of the doctrine to Indian cases is "an implicit categorization of Indian matters within the field of foreign relations" such that "Indian nations are treated in certain fundamental and critical respects just as other nations of the world in the United States courts" and that "fairness and consistency suggest that Indian nations be regarded as separate nations for other legal purposes").

N. Newton, *ibid.*, cites the following cases (among others) in which the United States Supreme Court barred or approved the barring of claims of governmental infringement of Aboriginal rights from judicial review, on the basis of the foreign branch of the political questions doctrine: *United States v. Rogers* 45 U.S. (4 How.) 567 (1846) at 572 (upholding federal legislative incursion on tribal sovereignty); *Stephens v Cherokee Nation* 174 U.S. 445 (1899) at 445, 485 (upholding congressional incursion on tribal sovereignty - power to determine membership in tribes); *Cherokee Nation v. Hitchcock* 187 U.S. 294 (1902), at 294, 308 (legislative incursion on tribal

sovereignty - leasing of tribal mineral rights without tribal consent); *Lone Wolf v. Hitchcock* 187 U.S. 553 (1903), at 565 (upholding federal incursion on tribal sovereignty - individual allotment of lands guaranteed to tribe by treaty - and barring complaints of fraudulent misrepresentation, failure to abide by the consent requirements stipulated in a treaty, and infringement of a constitutional guarantee of due process); *United States v. Celestine* 215 U.S. 278 (1909) at 278, 290 (upholding incursion on tribal sovereignty - criminal liability of 'enfranchised' reservation Indian); *United States v. Sante Fe*, *supra*, note 53, at 347 (*obiter dicta*, approving unilateral extinguishment of Aboriginal title); *Tee-Hit-Ton*, *supra*, note 45 (upholding unilateral extinguishment of Indian title without compensation, and barring complaint of infringement of a constitutional guarantee against uncompensated takings of property).

64. For the analogous objection to application of the political questions doctrine to cases of Congressional infringements of tribal rights, see N. Newton, *ibid.*, at 202 (the doctrine was never apt in so far as "courts applied to Indian affairs doctrines peculiar to the federal foreign affairs power without necessarily distinguishing the special status of Indian tribes as domestic rather than foreign nations"), and 236 (the doctrine is now an anachronism in any event, because the settlers are settled, the division of powers respecting tribes between the federal and state levels of government is now adequately marked on other grounds, and in terms of domestic judicial authority, "Indian law has become domestic law"). According to Newton (at 231, 235) and Kronowitz et. al. (*ibid.*, at 537), the political questions doctrine's application in tribal rights cases has been wholly repudiated by the United States Supreme Court since at least 1980 (citing *Delaware Tribal Business Comm. v. Weeks* 430 U.S. 73 (1977), at 84 (political questions doctrine not applicable in cases raising constitutional rights violations); and *United States v. Sioux Nation* (448 U.S. 371 (1980), at 413 (the invocation of the political questions doctrine in *Lone Wolf* (*supra*, note 63) has "long since been discredited in takings cases", and was "expressly laid to rest" in *Weeks*).

65. Historically the English law act of state doctrine and what has since become the act of foreign state doctrine have a common source in the reasoning that, if the King has the prerogative to act in the sphere of foreign affairs, the courts should accord the same prerogative to foreign sovereigns acting within their dominions. See W. Holdsworth, *supra*, note 10, at 1315-1316; 1318-1322.

With respect to acquisition of territory, B. Slattery notes that the logic of the act of state doctrine leads to the result that "[i]f the British government, emboldened by victory in the Falkland Islands, should lay claim to the ancient fief of Normandy, British courts might well feel compelled to participate in this bit of flim-flam, though they would no doubt employ every judicial stratagem at their disposal to avoid doing so. For their part, the courts of Normandy would be given the opportunity to express a quantity of healthy indignation, but would not otherwise be much exercised in disposing of the claim" ("The Independence of Canada", *supra*, note 35, at 386). To extend Slattery's example, if the French government retaliated by claiming Sussex, the courts of Normandy would, if an analogous act of state doctrine were in effect in France, be similarly deferential. Stalemate in either court between the act of state doctrine and the reciprocal rule for foreign sovereigns would be avoided by the act of state doctrine's direction that the domestic sovereign's claim to territory be accepted without question.

66. See D. Chow, "Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe" 62 Wash. L. Rev. 397 (1987), esp. 443-447, for a review of the problems besetting the current American act of foreign state doctrine, including the obstacle it poses to meaningful recognition and enforcement of human rights.

67. In practice, exclusive factual control of territory usually reserves territory to the sovereignty of one state or another: see B. Slattery, "Independence of Canada", *supra*, note 35, at 386. In theory, within states subject to a single sovereign power, the act of state doctrine ensures that that power has no competitors: see note 65, *supra*. Neither of these determinants of the issue of whose law applies, would be present in a domestic regime recognizing dual sovereignties. If reciprocal act of state powers were recognized, irresolvably competing claims of immunity from the rule of law could result, precluding the development of legal rules and dispute settlement mechanisms for the rational integration of jurisdictions.

68. These gradations could be broken down further. Aboriginal rights to the continuity of systems of law are considered distinctly in section 2.3 below.

69. This is not to suggest that, if the courts were to examine the validity of purported extinguishments founded in this doctrine, they would conclude that all such extinguishments are invalid.

70. The Supreme Court of Canada has not ruled on this question in any of the cases reviewed in this paper. See the reference to *Sparrow* and other Canadian rulings in note 35, *supra*, and the treatment of this issue in the Court of Appeal judgements in *Delgamuukw*, discussed, *supra*, note 34 (re: Lambert J.A.'s comments in dissent on a requirement of effective occupation) and *infra*, text following note 74. Hall J.'s unexplained assertion in *Calder* that the Crown may acquire sovereignty by "declaration" (*supra*, note 47, at 199) might also be based upon this premise. B. Slattery has expressed the view that this is a basic premise of the Canadian case law in several articles. See, for example, "The Independence of Canada", *supra*, note 35, at 375, and "Understanding Aboriginal Rights", *supra*, note 3, at 735-736.

71. See discussion in section 4.5.2, "doctrine of peaceful settlement", below.

72. *Calder v. A.-G. of British Columbia* (1970) 13 D.L.R. (3d) 64 (B.C.C.A.), per Tysoe J.A., at 70-73 (relying upon *Cook v. Sprigg* and *Vajesingji Joravarsingji v. Secretary of State for India*, *supra*, note 35, and *Secretary of State for India in Council v. Kamachee Boye Sahaba*, *supra*, note 36); per Davies J.A., at 67 and 69 (concurring with this opinion of Tysoe J.A., and following the same authorities); and per McLean J.A., at 100-106, (relying upon *Vajesingji Joravarsingji*, *id.*, *Johnson v. M'Intosh* and *Tee-Hit-Ton*, *supra*, notes 16 and 45 respectively, treating all three authorities as standing for the same proposition).

73. The members of the Supreme Court of Canada who addressed this contention in *Calder* itself (in the judgement written by Mr. Justice Hall) rejected this view, following instead the authorities providing that private property rights are presumed to survive a change of sovereignty. For subsequent Supreme Court of Canada rulings adopting Hall J.'s view, see note 47, *supra*.

74. *Supra*, note 34, at 233.

75. Wallace J.A. stated (*supra*, note 34, at 198-199, paraphrasing, citations, and the excerpt from *Sparrow* quoted at note 35, *supra*, omitted):

"The plaintiffs ... did not contest Canadian sovereignty over any part of the territory over which they claim aboriginal rights. To do so successfully would have been difficult since the certainty of Canadian sovereignty in British Columbia, which has its root in the sovereignty of the British Crown, was confirmed by the Supreme Court of Canada in *R v. Sparrow*. ... In any event, it is beyond the competence of a municipal court to question the validity of the acquisition of sovereignty over new territory which is an act of state: see *Sobhuza v. Miller*... and *Mabo v. Queensland* ... where Brennan J. stated: 'The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court'. This is the essence of the view of the trial judge expressed at p. 387 of his reasons: 'They [aboriginal people] often refer to the fact they were never conquered by military force. With respect, that is not a relevant consideration at this late date, if it ever was. Similarly, the absence of treaties does not change the fact that Canadian and British Columbian sovereignty is a legal reality recognized both by the law of nations and by this court.'" [emphasis added]

Immediately following this statement Wallace J.A. added that "[t]he territory in what is now British Columbia and Vancouver Island was acquired by peaceful annexation" and "came under British sovereignty as a 'settled colony'" (at 199).

The plaintiffs had argued (in Wallace J.A.'s summary, at 223), that "Crown sovereignty can and does co-exist with the pre-existing right of jurisdiction of the aboriginal people to govern themselves and their territory." Wallace J.A. responded, in the alternative to his other grounds for dismissal of the jurisdictional claim, as follows (at 224-225, paragraphing omitted):

"[I]t is the common law which recognized and protected pre-sovereignty aboriginal activities and practices and gives them their force as aboriginal rights. Thus, any claim to aboriginal jurisdiction would require that rights of jurisdiction ... were recognized ... by the common law. The circumstances of this case do not support any such recognition.... Prior to the acquisition of sovereignty over British Columbia, the Indians exercised jurisdiction over the territory to the extent made possible by their social organization. However, once sovereignty was asserted, the Indians became subjects of the Crown and the common law applied throughout the territory and to all its inhabitants. As was noted in *Mabo* ... "sovereignty imports supreme ... legal authority.... Thus, with the acquisition of sovereignty, supreme legal authority vested with the British Crown. ... When British Columbia became a British territory the Imperial parliament, complete with the doctrine of parliamentary sovereignty, became the supreme legal authority. ... A declaration that the Province's jurisdiction is subject to the plaintiffs' jurisdiction, is a claim which is incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846. ... Thus, upon the exercise of sovereignty, any powers of government of the indigenous people were superseded by the introduction of the common law and the jurisdiction of the Imperial Parliament

...

I agree with the conclusion of the trial judge that the plaintiffs, after 1846 and certainly after 1871 [the date of entry into confederation, which Wallace J.A. treated as an alternative basis of extinguishment of Aboriginal jurisdiction] no longer retained any aboriginal right of self-government or jurisdiction over the territory nor any jurisdiction to govern the members of the Houses in accordance with Gitksan and Wet'suwet'en laws."

76. Ibid., at 151-152. These reasons, and their implicit relation to the act of state doctrine, are examined in section 3.2, "doctrine of sovereign dispossession", below.

Macfarlane J.A. made no express reference to the act of state doctrine in his judgement. The logic of Parliamentary sovereignty also appears to inform his pertinent statements. Macfarlane J.A. also dated the assertion of Crown sovereignty in British Columbia well before his date for extinguishment of Aboriginal sovereignty by supersession. It appears possible that an element of the act of state rationale informed Macfarlane J.A.'s unelaborated assertion that "when the British began to exercise sovereignty over British Columbia ... the underlying title to the land and its resources vested in the Crown, subject only to the unique interest of the Indian people" (at 177); and Macfarlane J.A.'s apparently approving observation that the trial judge concluded "aboriginal jurisdiction did not survive the assertion of British sovereignty" (at 151).

77. The position of Lambert J.A. (dissenting in the result) may be outlined as follows. Lambert J.A. also presumed that Crown assertion of territorial sovereignty is conclusive, at least where a measure of settled occupation and administrative control is involved (*supra*, note 34, at 257, 287). Lambert J.A. stated affirmatively that surviving Aboriginal rights, including local customs, may not be "inconsistent with the concept of Sovereignty itself" (at 274); that pre-existing rights, laws and customs repugnant to Crown sovereignty, including laws and customs relating to external affairs, were necessarily "abrogated" or "implicitly extinguished" upon acquisition of Crown sovereignty (288-289, 361); that the common law introduced as a function of Crown sovereignty might also have "brought about an implicit extinguishment" of pre-existing rights of self-government inconsistent with the common law (362); that with sovereignty the Crown acquired, by virtue of the nature of sovereignty, the power to "abrogate" Aboriginal rights subsequently, exercisable by legislation (288, 297); that the requirement of some principle for determining which interest must give way as between native and other interests is subject to the clear and plain intention of the sovereign authority (304-305); that the claim to Aboriginal jurisdiction should not be understood as a claim to

sovereignty, legislative power, or the power to regulate the conduct of non-members within Aboriginal territory (348-351, 360), and that the possession of political sovereignty by "the entire British Columbian and Canadian communities ... could never be successfully disputed" (379).

78. Ibid., at 198 and 153 respectively. For the full quotation from *Sparrow*, see note 35, *supra*.

79. Ibid., at 224-225 and 152-153, 178 respectively.

80. This analysis of Judson J.'s rationale for unilateral extinguishment by the Crown follows G. Lester's argument in *Inuit Territorial Rights*, *supra*, note 18, at 34-36.

81. *Supra*, note 47, at 160. In his concluding remarks, Judson J. also said that "the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation" (at 167).

82. Quoted *ibid.*, at 160-161. In the quoted passage the United States Supreme Court also referred to its earlier judgements in *Buttz v. Northern Pacific* 119 U.S. 55 (1886), and *Beecher v. Wetherby* 95 U.S. 517 (1877), the latter as authority for the assertion that the "justness" of such extinguishment "is not open to inquiry in the courts", whether accomplished by treaty, by the sword, by purchase, or "by the exercise of complete dominion adverse to the right of occupancy." In the same passage, the Court in *Sante Fe* also quoted Chief Justice Marshall as saying in *Johnson v. M'Intosh* that "the exclusive right of the United States to extinguish" Indian title has never been doubted. By "exclusive right" in this context, Chief Justice Marshall quite clearly meant a right held exclusive of third parties, not a power to be exercised exclusive of the law. In fact, the persuasive view is that Marshall C.J. was referring to the Crown's exclusive option to take a voluntary cession of Aboriginal title, and not to any unilateral power: see B. Slattery, *Ancestral Lands*, *supra*, note 61, at 25-28, 33; and H. Berman, *supra*, note 35, at 646-650. Mr. Justice Judson, however, gave no indication in *Calder* that he regarded *Johnson* as standing for any different proposition than the one he derived from *Sante Fe*.

Judson J. also relied, apart from *Sante Fe*, on the Privy Council's decision in *Re Southern Rhodesia*, *supra*, note 35, stating that the Privy Council's reasons were "to the same effect" as those in *Sante Fe* (at 161). G. Lester takes a similar view of *Re Southern Rhodesia*: see *Inuit Territorial Rights*, *supra*, note 18, at 4, n 4. This interpretation seems to be fair, if not the only one plausible. In *Re Southern Rhodesia* the Privy Council said that it need not confirm its hypothesis that the Aboriginal people in question scored too low on the applicable "scale of social organization" to qualify for status as rights-holders under the common law (see our discussion under subheading 6.4.2.3.1 below), for the following reason (*ibid.*, at 234-235):

"According to the argument the natives before 1893 were owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveller, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council.

This fact makes further inquiry into the nature of the native rights unnecessary. If they were not in the nature of private rights, they were at the disposal of the Crown when Lobengula fled and his dominions were conquered; if they were, any actual disposition of them by the Crown upon a conquest, whether immediately or four years later, would suffice to extinguish them as manifesting an intention expressly to do so. ... [references to executive provisions for native reserves enacted soon after the conquest, and to Crown grants to settlers, omitted] By the will of the Crown and in exercise of its rights the old state of

things, whatever its exact nature, as it was before 1893, has passed away and another and, as their lordships do not doubt, a better has been established in lieu of it. Whoever now owns the unalienated lands, the natives do not." [emphasis added]

It seems possible to explain these statements on the basis that certain positive conduct of the Crown "upon" conquest (or at least soon enough afterwards to be insignificant for legal purposes), may be understood to confiscate, by an act of state incidental to the acquisition of sovereignty, certain private property. In equating these reasons with the effect of *Sante Fe*, however - a case which Judson J. treated as governing extinguishment of rights that had survived acquisition of sovereignty - Judson J. clearly treated *Re Southern Rhodesia* as affirming a post-acquisition rule for extinguishment. So understood, the rule Judson J. affirmed was that state confiscation of Aboriginal property occurring well after acquisition of Crown sovereignty, must be dealt with as though it were an act of state outside the purview of the municipal law already applying in the territory. (Judson J. treated Crown sovereignty over the territory in question as having been acquired in 1846, and the Aboriginal title as having been extinguished between 1858 and 1871.) G. Lester's conclusion is thus unavoidable:

"Judson J's argument therefore reduces itself to the propositions that the Crown, in exercising supreme rights over the territory, can commit an Act of State on British soil; and that the Crown can conquer its own subjects - in an extreme case, send in the troops and put the Inuit and Indians up against the wall."

(*Supra*, note 18, at 35.) Lester adds that "both of these propositions are demonstrably wrong as a matter of law": *id.*

83. *Supra*, note 28, at 1098-1099. The unanimous Supreme Court said:

"In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. states in *Baker Lake*, *supra*, at p. 568:

'Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal right as of any other common law right.'

See also *Attorney-General for Ontario v. Bear Island Foundation*, *supra*, at pp. 439-440. That in Judson J.'s view was what had occurred in *Calder*, *supra*, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title."

84. Immediately following the statement quoted, *ibid.*, the Court said:

"But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'". (Emphasis added.) The test of extinguishment to be adopted, in our opinion, is that the Sovereign's opinion must be clear and plain if it is to extinguish an aboriginal right."

85. Discussed, *infra*, text following note 138.

86. Judson J. also relied, in the part of his reasons discussing the nature of Aboriginal title, on the Privy Council's *dictum* in *St. Catherine's Milling* that Aboriginal title is "dependent on the goodwill of the Sovereign" (*supra*, note 47, at 156). In his discussion of extinguishment, Judson J. also relied on the Privy Council decision in *Re Southern Rhodesia*, reading the latter case as though it expresses the same rule Judson J. derived from the American authorities: see note 82, *supra*.

87. It should be noted that the Privy Council's *dictum* in *St. Catherine's Milling* that the title of the Saulteaux people is "dependent upon the good will of the Sovereign", was based entirely upon an interpretation of the *Royal Proclamation's* text, and was offered in a ruling which disavowed expression of an opinion on "the precise quality of the Indian right": *St. Catherine's Milling and Lumber Company v. The Queen* (1888) 14 App. Cas. 46 (P.C.), at 54, 55. The facts involved a purported cession of rights in a treaty, not measures purporting to extinguish rights unilaterally.

88. *Johnson v. M'Intosh*, *supra*, note 16, at 588.

89. *Id.* (esp., "The British government ... asserted a title to all the lands occupied by Indians... It asserted also a limited sovereignty over them ..."). See H. Berman, *supra*, note 35, at 647-649.

90. *Ibid.*, at 587 ("They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise"). See G. Lester, *Inuit Territorial Rights*, *supra*, note 18, at 7; G. Lester, "Primitivism versus Civilization: A Basic Question in the Law of Aboriginal Rights to Land", in Carol Brice-Bennett, ed., *Our Footprints are Everywhere: Inuit Land Use and Occupancy in Labrador* (Ottawa: Labrador Inuit Association, 1977), 351, at 359; K. McNeil, *supra*, note 10, at 246; H. Berman, *supra*, note 35, at 649-650.

91. See note 82, *supra*, and accompanying text.

92. Note 45, *supra*.

93. *Ibid.*, at 279 ("after conquest [the tribes] were permitted to occupy portions of territory over which they had previously exercised 'sovereignty' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants..."); 279 (citing the statement in *Johnson v. M'Intosh* that discovery gave an exclusive right to extinguish the Indian right of occupancy, either by purchase or conquest, and interpreting this to mean that "discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained"); 284, n. 18 (positing that the rule in the United States, as opposed to the Philippines where "the purpose of our acquisition ... was to administer property and rights for the benefit of the inhabitants thereof", is "a rule of sovereign ownership or dominion", because "the dominant purpose of the whites in America was to occupy the land"); 288-289, n.21 (quoting as reflective of the Court's view that no compensation is required constitutionally for Congressional extinguishment of Aboriginal title, government parties' submissions that "no rights presently exist on the basis of aboriginal occupancy or title" and that "there is no legal or equitable basis for claims or rights allegedly arising from 'aboriginal occupancy or title'"); 289-290 ("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 conqueror's will that deprived them of their land."); 290 (quoting with approval a previous statement by a Supreme Court Justice that "no legal rights are today to be recognized in the Shoshones by reason of this treaty. We agree ... as to their moral deserts. We do not mean to leave the impression that the two have any relation to each other.")

94. For commentaries supporting this interpretation of the Marshall Court's position following *Worcester v. Georgia*, see B. Slattery, *Ancestral Lands, Alien Laws*, *supra*, note 61, at 32-33; K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 252-261; P. Macklem, *infra*, note 149, at 397-406; J. Hurley, "Aboriginal Rights, the Constitution and the Marshall Court" (1982-83) 17 R.J.T. 403, esp. 423, 434; H. Berman, *supra*, note 35, at 649-650, 655, 660-665; N. Newton, "Federal Power over Indians", *supra*, note 63, at 207-209; N. Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered" 31 Hastings L.J. 1215 (1980), at 1221-1225; P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" 107 Harv. L. Rev. 381 (1993), at 397; and J. Hookey, "Settlement and Sovereignty", in P. Hanks and B. Keon-Cohen, *Aborigines and the Law* (Sydney: George Allen and Unwin, 1984), 1, at 10-12. For the contrary view that

Tee-Hit-Ton rightly interpreted *Johnson v. M'Intosh* as according no legal rights to Aboriginal inhabitants following acquisition of Crown sovereignty, see the two commentaries by G. Lester, referred to, *supra*, at note 90. For analysis of the relevant text in *Johnson* and *Worcester*, see section 4.2.3.2 below, text following note 629.

95. See J. Hurley, *ibid.* at 407 (*Tee-Hit-Ton* and Judson J.'s treatment in *Calder* represent "distortions of the Marshall Court's views on Aboriginal rights"); N. Newton, "At the Whim of the Sovereign", *ibid.*, at 1232-1241 ("evisceration" of the Marshall Court's conception of Aboriginal title in *Tee-Hit-Ton* was accomplished by a "feat of judicial legerdemain") R. Kronowitz, et. al., *supra*, note 63, at 534 ([In *Tee-Hit-Ton*] "the Court perpetuated the misinterpretation of the discovery doctrine, holding that discovery conferred legal title to Indian lands upon the federal government"); and T. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas*, 1492-1992 (Vancouver: Douglas & McIntyre, 1991), at 83 ("Why should farmers living off the land, but not Indians living off the land, be entitled to Fifth Amendment protection? The legal arguments [in *Tee-Hit-Ton*] are pure sophistry. ... Nevertheless, John Marshall's reasoning was so powerfully stated, his judgements so compelling, that they guide the courts all over the world today.) United Supreme Court decisions preceding *Tee-Hit-Ton* which deemed Aboriginal title never to have existed as a legal right, following the distinct logic of the distorted doctrine of *terra nullius*, are referred to in section 4.2.3.2 below, note 649.

96. *Supra*, note 45, at 288-289.

97. The Aboriginal interest envisaged in *Tee-Hit-Ton* was thus roughly equivalent to a revocable licence to occupy. See, for example, A. Oosterhoff and W. Rayner, *Anger and Honsberger Law of Real Property*, 2d ed. (Aurora: Canada Law Book, 1985), Vol. 2, at 918-919.

98. *Supra*, note 45, at 280-281. For critical analysis of *Tee-Hit-Ton*'s use of these authorities, see N. Newton, "At the Whim of the Sovereign", *supra*, note 94, at 1244-1246.

99. The passage from *Tee-Hit-Ton* upon which Judson J. relied most directly supported this view, describing Aboriginal title as "a right of occupancy which the sovereign grants": *supra*, note 47, at 165.

100. Judson J. ignored the several Privy Council precedents in which the Court of Appeal had sought authority for *Tee-Hit-Ton*'s first ground of decision, and pointedly avoided the Court of Appeal's conclusion that no Aboriginal rights survived Crown acquisition of sovereignty, holding instead (*supra*, note 47, at 152, 156) that the *Royal Proclamation of 1763* was not the exclusive source of Aboriginal title, and that post-acquisition extinguishment of such title by the sovereign would have to be shown in order to defeat a claim to Aboriginal title (at 156).

101. Judson J. also referred in his discussion of the nature of Aboriginal title to the Privy Council's dictum that Aboriginal land rights recognized under the *Royal Proclamation* were "dependent upon the goodwill of the Sovereign": see note 82, *supra*. But in his separate discussion of extinguishment Judson J. gave no indication that this statement might have any relevance to extinguishment different from that of the American authorities.

102. In "Is There a Political Questions Doctrine?", 85 Yale L.J. 597 (1976), L. Henkin argues that the doctrine has no independent existence in the jurisprudence. T. Franck, an advocate of abolition of the doctrine as it currently operates in foreign affairs matters, argues that the doctrine is in a state of "jurisprudential chaos": *Political Questions/Judicial Answers: Does The Rule Of Law Apply To Foreign Affairs?* (Princeton: Princeton Univ. Press, 1992), at 8. L. Tribe, a proponent, acknowledges that the doctrine "is in a state of some confusion": *American Constitutional Law*, 2d ed. (Mineola: Foundation Press, 1988), at 96.

103. L. Tribe, *ibid.*, at 97. The full passage reads:

"One conventional view of the doctrine grounds it in the assumption that there are certain constitutional questions which are *inherently* non-justiciable. These 'political questions,' it is said, concern matters as to

which departments of government other than the courts, or perhaps the electorate as a whole, must have the final say. With respect to these matters, the judiciary does not define constitutional limits."

104. Id. By "judicially enforceable rights", Tribe means "rights whose enforcement would either constrain congressional or executive action or alternatively provide the basis for an exercise of judicial power parallel to the actions of the political branches" (*id.*).

105. In the leading modern case on political questions, the United States Supreme Court put this distinction in the following terms:

"The doctrine of which we treat is one of 'political questions', not one of 'political cases'. The courts cannot reject as 'no lawsuit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."

(*Baker v. Carr*, 369 U.S. 186 (1962), at 217). Tribe explains that in *Baker* the court took "the traditional approach" to the doctrine, "asking whether the constitutional provision which the litigants invoked could be successfully translated into judicially enforceable rights" (*supra*, note 102, at 100). By contrast, it is as "political cases", in these terms, that the English law act of state doctrine treats the relatively narrow range of foreign affairs matters which fall within its ambit: but for the act of state doctrine, the law applied by the courts would govern such matters.

106. A. Burley, "Are Foreign Affairs Different?: Book Review, *Political Questions/Judicial Answers*", 106 Harv. L. Rev. 1980 (1993), at 1980-1981. Burley further explains the jurisdictional account of the political questions doctrine in the American case law, according to which the American constitution creates "a plenary Executive foreign affairs power ... shielded from judicial review", as follows (at 1981, n. 13):

"In *Curtiss-Wright*, Justice Sutherland elaborated his personal theory of how the powers that comprise the 'external sovereignty' of the United States passed directly from England 'to the colonies in their collective and corporate capacity as the United States' and lodged in the executive. ... A year later, Justice Sutherland expanded on this theory by holding that 'the conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power was not subject to judicial inquiry or decision.' Thus was the foundation laid for the claim that all questions concerning the conduct of foreign policy are political questions." [citations omitted]

This rationale, which parallels Marshall J.'s account in *Johnson v. M'Intosh*, is practically the same as the predominant rationale for the English law act of state doctrine.

107. *Supra*, note 102, at 19. Franck calls this a "Faustian pact ... the giveback practice of judges who enlarge their sphere of jurisdiction over domestic political conflicts but then seek to pacify the enraged political beast by making a grand gesture of jettisoning judicial review of disputes touching foreign affairs" (at 19).

Summarizing Franck's analysis, Burley notes that "the initial bargain was struck" by Chief Justice Marshall in the case which established the authority of the judicial branch to determine the constitutionality of the exercise of power by the other branches of government (*supra*, note 106, at 1983, n 15.). Burley notes that when *Marbury v. Madison* was decided in 1803, "the Supreme Court was still weak" (*id.*). Further (*id.*):

"Chief Justice Marshall used a foreign affairs example to demonstrate the proposition that [quoting *Marbury*] '[T]he President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and in his political conscience The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs.... The acts of such an officer, as an officer, can never be examinable by the courts.'" [citation omitted]

108. A. Burley, *supra*, note 106, at 1983, paraphrasing Franck. Burley describes the English law doctrine as "a British precedent that affirmed an absolute and unreviewable royal foreign affairs power and accepted a monarchic tradition that the [United States Supreme] Court steadily rejected in domestic affairs": *ibid.*, at 1983-1984. (The other contributing factor identified by Franck was a judicial penchant to disclaim judicial review in one part of a decision while reaching the merits by a different route in another: *supra*, note 102, at 21.)

109. See note 89, *supra*, and accompanying text. Marshall C.J. referred to Indian nations in *Johnson v. M'Intosh* as "independent" or "independent nations" at this stage, *supra*, note 16, at 573, 574, and 590. Although Marshall C.J. rationalized the restriction on alienation of Aboriginal title posed by the *Royal Proclamation of 1763* on the ground that the "peculiar situation" of the Indians placed them "in some respects, as a dependent, and in some respects as a distinct people", he conceived of the *Proclamation* itself as an exercise of the "royal prerogative" respecting "the political relations between Great Britain and foreign nations": *ibid.*, at 596.

110. T. Franck does not refer to *Johnson v. M'Intosh*, treating *Cherokee Nation v. Georgia* 5 Pet. 1 (1831) (U.S.S.C.) and *Worcester v. Georgia* as the earliest invocations of the foreign affairs branch of the doctrine in the field of Aboriginal rights (*supra*, note 102, at 59-60). For the view that *Johnson v. M'Intosh* treated the acquisition of sovereignty by conquest (or discovery converted notionally into a conquest) as an incident of the Crown's foreign affairs power, see H. Berman, *supra*, note 35, at 647, 654; R. Kronowitz et al, *supra*, note 63, at 515-517; and S. McSloy, "Back to the Future: Native American Sovereignty in the 21st Century", 20 N.Y.U. Rev. L. & Soc. Change 217 (1993), at 230-233, 255.

111. *Johnson v. M'Intosh*, *supra*, note 16, at 590. See also N. Newton, "At the Whim of the Sovereign", *supra*, note 94, at 1242-1243.

112. See the assessments by commentators noted, *infra*, note 620.

113. The main portion of the excerpt from *Johnson v. M'Intosh* discussing the implications of conquest of the Indians is quoted, *infra*, at note 278.

114. *Supra*, note 48, at 545. For a more complete quotation of these passages, see note 243, *infra*. See also H. Berman, *supra*, note 35, at 662.

115. *Sante Fe* does not cite *Worcester*. *Tee-Hit-Ton* mentions *Worcester* as among the treaty-based cases founded in American policy succeeding the *Royal Proclamation of 1763*, which *Tee-Hit-Ton* need not address: *supra*, note 45, at 274, n. 2. (The position argued in this paper is that *Worcester's* conception of inherent Aboriginal rights clearly treats Aboriginal rights as acknowledged but not created by treaty or statute: see section 2.3.2 below.) In *Calder* Judson J. asserted that *Worcester v. Georgia* had strongly influenced the Canadian courts in *St. Catherine's Milling*, and noted that it raised the question of Aboriginal title to land, but Judson J. did not rely on *Worcester* otherwise: *supra*, note 47, esp. 151.

116. See H. Berman, *supra*, note 35, at 660. There appears to be consensus among American commentators that *Worcester v. Georgia* remains of central importance to the American jurisprudence, regardless of interpretive differences as to its legacy, and regardless whether reaffirmation of or departure from its holdings is advocated. See, for example, C. Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987) at 55-63; W. Walters, "Review Essay: Preemption, Tribal Sovereignty, and *Worcester v. Georgia*" 62 Oregon L. Rev. 127 (1983), at 127; N. Newton, "Federal Power over Indians", *supra*, note 63, at 199-203; R. Kronowitz et al, *supra*, note 63, at 510, 519-522; P. Frickey, *supra*, note 94, esp. 398, 428. In *Williams v. Lee* 358 U.S. 317 (1959), the United States Supreme Court stated that despite modification by subsequent cases, "the basic policy of *Worcester* has remained", and that "the broad principles of that decision came to be accepted as law" (quoted by Wilkinson, *ibid.*, at 59).

117. In related passages in *Johnson* Marshall C.J. appeared simply to prefer the desire for land of the settlers, to the Indians' proprietary interest. See notes 278 and 625 below, and accompanying text. Such ethnocentric sentiment is elevated to the status of a rule of law in *Tee-Hit-Ton*: see, for example, the passages quoted in note 93, *supra*. The result of such thinking in *Johnson*, however, was simply to add a further justification to others more legitimate, for confining the alienability of Aboriginal title to transfers to the Crown, enabling the Crown to control settlement of the frontier. See H. Berman, *supra*, note 35, at 649.

118. Quoting the Court of Appeal's historical summary, Judson J. acknowledged (*supra*, note 47, at 156) that "frequent clashes with the Indians" had occurred in the years leading up to passage of the measures in question, and that the colonial authorities were anxious at the time to avoid possible warfare triggered by encroachment on Aboriginal lands. As events transpired, however, war did not break out, and the ordinances in question were enacted under conditions of general peace. The measures were general and of indefinite duration. Judson J. did not suggest that the issue of hostilities made any difference to the test for extinguishment he enunciated. See *ibid.*, at 155-156, and 160-168.

119. See note 103, *supra*, and accompanying text. In Tribe's conception the political questions doctrine circumscribes the constitutional mandate of the courts: it does not affect the rights ascribed to owners by courts acting squarely within their mandate.

120. See note 104, *supra*, and accompanying text.

121. See the statements from *United States v. Sioux Nation* quoted, *supra*, note 64, referring to the effect of the Court's 1977 decision in *Weeks*.

122. *Delaware Tribal Business Comm. v. Weeks*, *supra*, note 64, at 84.

123. See note 100, *supra*, and accompanying text.

124. Despite having repudiated *Tee-Hit-Ton*'s 'political questions' foundation, the Supreme Court in *Sioux Nation* expressly declined to disturb *Tee-Hit-Ton*'s holding that "the taking by the United States of 'unrecognized' or 'aboriginal' Indian title is not compensable under the Fifth Amendment": *supra*, note 64, at 415, n. 29.

125. Hall J. did accept without comment an assertion of the United States Court of Claims, based on *Santa Fe*, that the selection of a means of extinguishing Aboriginal title is "a government prerogative", while the intention to extinguish must be indicated clearly and plainly: *supra*, note 47, at 202, quoting *Lipan Apache Tribe et al. v. United States* (1967) 180 Ct. Cl. 487, at 491-492. But it is consistent with Hall J.'s conception of a legally controlled power of extinguishment that the sovereign's choice of a valid means to employ could be unreviewable, provided the validity of the means adopted may be reviewed.

126. *Supra*, note 47, at 199.

127. *Ibid.*, at 210-211 (citing *Salaman*, *supra*, note 10, at 639-640, and *Cook v Sprigg*, *supra*, note 35, at 578).

128. "When the Sovereign, in dealings with another Sovereign (by treaty of cession or conquest) acquires land, then a municipal Court is without jurisdiction to the extent that any claimant asserts a proprietary right inconsistent with acquisition of property by the Sovereign - i.e., acquisition by Act of State": *ibid.*, at 211. (Hall J. had already concluded, relying upon *Amodu Tijani*, *Nireaha Tamaki* (note 48, *supra*) and other precedents supporting the presumption that private property rights survive a change in sovereignty, that "when the Nishga people came under British sovereignty...they were entitled to assert, as a legal right, their Indian title" (at 208), and that the title asserted "does not in any way deny the Crown's paramount title as it is recognized by the law of nations" (at 174)). "The appellants are *not* challenging an Act of State - they are asking this Court to recognize that settlement of the

north Pacific coast did not extinguish the aboriginal title of the Nishga people ..." (at 211).)

(In the same passage Hall J. also noted, consistently with later analysis by commentators such as B. Slattery (*Land Rights, supra*, note 15, at 52-53), that unlike Aboriginal title claims, the claims advanced in the act of state precedents relied on by the Court of Appeal depended in part upon international treaty provisions, which municipal courts cannot uphold in the face of municipal law to the contrary. Hall J. also distinguished the two kinds of claim on the basis that the latter claims depended upon grants from a previous Sovereign rather than upon a title "which has its origin in antiquity".)

129. *Ibid.*, at 211.

130. In the paragraph preceding the passage in which Hall J. gave his two reasons for finding that the doctrine has no application, Hall J. said (*ibid.*, at 210):

"This doctrine denies a remedy to the citizens of an acquired territory for an invasion of their rights which may occur during the change in sovereignty. English Courts have held that a municipal Court has no jurisdiction to review the manner in which the Sovereign acquires new territory."

131. Hall J.'s discussion of *United States v. Alcea Band of Tillamooks* (*Tillamooks #1*), *infra*, note 134, formed part of Hall J.'s analysis of the issue whether any Aboriginal title survives acquisition of Crown sovereignty. Subsequently, after citing *Oyekan et al. v. Adele* [1957] 2 All E.R. 785, *Amodu Tijani* and *R. v. Symonds* (*supra*, note 48) as authority for a presumption in the affirmative, Hall J. derived his test for extinguishment as follows (*supra*, note 47, at 210):

"[Reference should also be made to] the statement of Davis, J., in *Lipan Apache* ... that:

... in the absence of a 'clear and plain indication' in the public records that the sovereign 'intended to extinguish all of the (claimants') rights' in their property, Indian title continues ...

It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian titles lies on the respondent and that intention must be 'clear and plain'. There is no such proof in the case at bar; no legislation to that effect."

132. *Ibid.*, at 174.

133. Hall J. also quoted with approval passages from *Johnson v. M'Intosh* and *Worcester v. Georgia* confirming that Aboriginal title is an enforceable legal right; *supra*, note 47, at 194-196.

134. *United States v. Alcea Band of Tillamooks et al.* (1946) 329 U.S. 40, cited by Hall J., *supra*, note 47, at 196.

135. *Ibid.*, at 48, quoted by Hall J., *supra*, note 47, at 197 (Hall J.'s emphasis).

136. The plurality opinion said (*supra*, note 134, at 52):

"the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon".

...

In our opinion, taking original Indian title without compensation and without consent does not satisfy the 'high standards of fair dealing' required of the United States in controlling Indian affairs. The Indians have

more than a merely moral claim to compensation." [citations omitted]

137. This would be so, on the reasoning adopted by Hall J., even for takings, if any, effected by imperial legislation such as the *British North America Act*. The doctrine of Parliamentary sovereignty would allow that legal rights could be arbitrarily extinguished by such legislation, but the law would presume the contrary, and the intention of the *British North America Act* to set aside this presumption would have to be indicated clearly and plainly. Further, Hall J.'s test would logically govern any imperial extinguishment of Aboriginal rights of a jurisdictional nature. For the different approaches to this issue taken by members of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*, *supra*, note 34, see note 77, *supra* (summarizing Lambert J.A.'s reasons in dissent) and note 219, *infra* (discussing the majority view).

138. On the question of post-acquisition extinguishment of Aboriginal rights, Wallace J.A. said that he was "in complete agreement with the reasons and conclusions expressed by Mr. Justice Macfarlane in his reasons on this issue": *supra*, note 34, at 227. In summarizing those reasons (at 228), Wallace J.A. did not refer to unilateral extinguishment by a means other than legislation. Hutcheon J.A. appears to have understood *Sparrow* as preferring the test for unilateral extinguishment laid down by Hall J. in *Calder* over that stated by Judson J. (*ibid.*, at 386) but Hutcheon J.A. nonetheless endorsed Macfarlane J.A.'s analysis of the basis of and test for unilateral extinguishment (at 387).

139. *Supra*, note 34, at 153-154 (per Macfarlane J.A.) and 227-228 (per Wallace J.A.). The plaintiffs' argument relied upon the terms of and underlying policy expressed by the *Royal Proclamation of 1763*; *Sikyee v. R.* (1964) 46 W.W.R. 65, *aff'd* [1964] S.C.R. 642; and *R. v. Symonds*, *supra*, note 48.

140. Macfarlane J.A. stated that extinguishment of Aboriginal rights occurs by "a valid exercise of governmental power" (*ibid.*, at 126, citing, without differentiating between the reasons of Judson J. and Hall J. in *Calder* as to the basis for such unilateral authority) or of "constitutionally valid sovereign power" (at 154). Macfarlane J.A. added that "[i]t must be remembered that the Crown had the power to ...extinguish the Indian interest [which] could be exercised in many ways" (157-158). (In his list of examples illustrating the latter proposition (at 158), Macfarlane J.A. did not distinguish between examples of valid extinguishment of Aboriginal rights, and valid "impairment." The list does not refer to statutory authority, and includes extinguishment "by conveyance of title").

141. Quoted *ibid.*, at 154. Macfarlane J.A. did not quote expressly the further statement in *Sante Fe* that the "justness" of such extinguishment "is not open to inquiry in the courts" (*supra*, note 53, at 347). As Macfarlane J.A. noted (at 154), the Supreme Court of Canada has also cited *Sante Fe* since *Calder*, in its unanimous decision in *Simon v. The Queen* [1985] 2 S.C.R. 387. But in that case Dickson C.J. cited *Sante Fe* only for the important and distinct rule that "extinguishment cannot be lightly implied": *id.*, at 406, quoting *Sante Fe*, *ibid.*, at 354.

142. Macfarlane J.A. said, in the course of reviewing the trial judge's reasons for decision (*supra*, note 34, at 159), that "[t]he view of seven judges was captured by Judson J. in this passage from p. 344 of *Calder*:

'In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.'

143. *Supra*, note 34, at 45.

144. For commentary on the majority's conception of the power of unilateral extinguishment, see G. Nettheim, "Judicial Revolution or Cautious Correction? *Mabo v. Queensland*" (1993) 16 *Univ. of New South Wales L.J.* 1, at 21-22; J. Malbon, "The Implications of *Mabo v. Queensland* (No. 2)" (1992) 2 *Aboriginal L. Bulletin*, no. 57, 7, at 7-8; L. Strelein, "Aboriginal Land Rights in Western Australia: The Implications of *Mabo v. Queensland*"

(1993) Asia Pacific L. Rev. 89, at 97-98; R. Lumb, "Native Title to Land in Australia: Recent High Court Decisions" (1993) 42 Int'l & Comp. L. Ql'y 84, at 95-97; H. Reynolds, "The Mabo Judgement in the Light of Imperial Land Policy" (1993) 16 Univ. of New South Wales L. J. 27, at 42-43.

145. "The sovereign power may or may not be exercised with solicitude for the welfare of indigenous inhabitants but, in the case of common law countries, the courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power": *supra*, note 34, at 46, citing as authority *United States v. Sante Fe Railroad Co.* (*supra*, note 53), and *Tee-Hit-Ton Indians v. United States* (*supra*, note 45). Brennan J. expanded on his distinction between the merits and legality of a measure in this context as follows (*id.*, paragraphing omitted):

"However, under the constitutional law of this country, the legality (and hence the validity) of an exercise of a sovereign power depends on the authority vested in the organ of government purporting to exercise it; municipal constitutional law determines the scope of authority to exercise a sovereign power over matters governed by municipal law, including rights and interests in land. In Queensland, the Crown's power to grant an interest in land is, by force of ... the Constitution Act of 1867 (Qld.), an exclusively statutory power and the validity of a particular grant depends upon conformity with the relevant statute. When validly made, a grant of an interest in land binds the Crown and the Sovereign's successors. ... Therefore an interest validly granted by the Crown ... cannot be extinguished by the crown without statutory authority. As the Crown is not competent to derogate from a grant once made, a statute which confers a power on the crown will be presumed ... to stop short of authorising any interest in land granted by the Crown But, as native title is not granted by the Crown, there is no comparable presumption affecting the conferring of any executive power on the Crown the exercise of which is apt to extinguish native title."

"Where a power has purportedly been exercised as a prerogative power," Brennan J. added, "the validity of the exercise depends on the scope of the prerogative and the authority of the purported repository in the particular case" (at 52). In relying upon *Sante Fe* and *Tee-Hit-Ton* to define the scope of a prerogative power to extinguish Aboriginal title, Brennan J. appears to have left the exercise of this particular prerogative effectively untrammelled.

146. *Ibid.*, at 46. Immediately preceding that statement, Brennan J. said: "Sovereignty carries the power to create and extinguish private rights and interests in land within the Sovereign's territory. [citing *Joint Tribal Council of the Passamaquoddy Tribe v. Morton* (1975) 528 Fed. 2d. 370, at 376 n.6.] It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power."

147. Dawson J., dissenting in the result, held that any Aboriginal title in existence after Crown acquisition of sovereignty would have been a permissive occupancy of the sort posited by the first alternative reading of *Tee-Hit-Ton*, discussed, *supra*, text following note 93. Dawson J. held that the Crown's permission to occupy could be withdrawn by the executive, and concluded that permission had been withdrawn by legislation and policy in the process of white settlement: *supra*, note 34, at 105-107. Deane and Gaudron expressly rejected *Tee-Hit-Ton*'s proposition that Aboriginal title is nothing more than a permissive occupancy revocable (in Deane and Gaudron JJ.'s phrase) "at the whim of the Executive, however unjust": *supra*, note 1, at 67. Without discussing the Marshall Court's reasoning, Deane and Gaudron included *Johnson v. M'Intosh* and *Cherokee v. Georgia* 5 Pet. 1 (U.S.S.C.) (1831) among the American cases they considered to be consistent with *Tee-Hit-Ton* on this point. As we have seen, *supra*, note 95 and preceding text, the same view of *Johnson v. M'Intosh* has been taken after careful analysis by G. Lester, but the view advanced here is that the 'true legal rights' interpretation of the Marshall Court's doctrine of Aboriginal title is more convincing.

Expressing scepticism with all of the traditional rationales for a power of unilateral extinguishment of Aboriginal title, Toohey J. took the view, similar to that expressed by Hall J. in *Calder*, that Aboriginal title should not be subject to expropriation under rules any less stringent than those applying to ordinary rights of private

property: *ibid.*, at 150-153.

148. The High Court's judgement in *Mabo* contains an extensive comparative analysis of the colonial law pertaining to Aboriginal rights. Canadian precedents, from *St. Catherine's* to *Sparrow*, are closely examined. The British Columbia Court of Appeal's reliance upon salient rulings and statements from *Mabo* in *Delgamuukw* would appear to portend considerable influence for this decision in Canada.

149. P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) McGill L.J. 382, at 451-452.

150. B. Slattery, "The Legal Basis of Aboriginal Title", in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville: Oolichan/IRRP, 1992), 113, at 123-124.

151. Alternatively, such a power is in some cases assumed to derive from parliamentary sovereignty. See, for example, the reference to *R. v. Sparrow* in note 82, *supra*. Without the act of state doctrine or some other rule giving relative paramountcy to the sovereignty of the Crown, however, parliamentary sovereignty by itself is a tautological justification for a power to extinguish an entitlement to independent sovereignty. The proposition that Parliament's sovereignty is absolute depends upon but does not support the claim that the sovereignty acquired by the Crown represented by Parliament has paramountcy over any preceding sovereignty. Nor does it suggest why, in particular, if Parliament's sovereignty is absolute, colonial law should not have regarded the prior sovereignty of Aboriginal peoples as absolute.

152. See H. Kindred, "Act of State ... in English Courts", *supra*, note 9, at 284, and A. Dolar, "Act Of State And Sovereign Immunities Doctrines: The Need To Establish Congruity" 17 Univ. of San Francisco L. Rev. 91 (1982), at 93.

153. *The Prince* (1513, W.K. Marriott trans. 1952), at 25, quoted in W. Hough, "The Annexation of the Baltic States and its Effect on the Development of Law Prohibiting Forcible Seizure of Territory" 6 N. Y. Law School J'l of Int'l & Comp. Law 300 (1985), at 303, n. 2. Referring to origins common to both the act of state and act of foreign state doctrines, D. Chow notes that "[t]he historical roots of the act of state doctrine can be traced to the doctrine of sovereign immunity", and that "[t]he system of sovereign immunity developed in twelfth century feudal England because there was no way of enforcing law against kings, who controlled the courts": *supra*, note 66, at 404, n. 35, citing, among other authorities, F. Pollock & F. Maitland, *The History of English Law*, 2d ed., 517-518 (1899). According to H. Evatt, Hallam held the view that "Prerogatives are not for the good of the public but represent the powers seized by the Norman kings by superior force for their own advantage": S. Gray, "Planting the Flag or Burying the Hatchet: Sovereignty and the High Court Decision in *Mabo v. Queensland*" (1993) 2 Griffith L. Rev. 39, at 46, quoting H. Evatt, *The Royal Prerogative* (Sydney: The Law Book Company, 1987), at 117.

154. *Statutes of the Realm*, V, 23 f, enacted in 1628, reprinted in C. Stephenson and F. Marcham, *Sources of English Constitutional History* (New York: Harper & Row, 1937), at 450-452.

155. *Statutes of the Realm*, VI, 142 f: I William and Mary, st. 2, c. 2, reprinted in C. Stephenson and F. Marcham, *ibid.* See also W. Moore, *supra*, note 10, at 5, 21 (referring to the Glorious Revolution of 1688-1689 which resulted in passage of the Bill of Rights, establishing the supremacy of the English Parliament, in 1689).

156. Quoted in W. Hough, *supra*, note 153, at 303-304.

157. *Supra*, note 18.

158. See R. Barsh's comment, *supra*, note 29.

159. According to T. Franck, current judicial support for the political questions doctrine depends upon the "case that 'its a jungle out there' and that the conduct of foreign relations therefore requires Americans to tolerate a degree of concentrated power that would be wholly unacceptable domestically": *supra*, note 102, at 14.

160. See, for example, the remarks of Chancellor Boyd and Mr. Justice Taschereau in *St. Catherine's Milling*, quoted below in the preface to part 4.

161. As M. Tigar has noted, even the majorities to whom executive representatives are in theory accountable in democratic societies have been resistant historically to executive demands for immunity from judicial review where rights are at stake:

"when judges speak of 'the people' as 'the ultimate guardian of principle' in political-question cases, they overlook the fact that 'the people' are the same 'undifferentiated mass' that 'historically, unmistakably and, at times, militantly insisted that when executive power immediately threatens personal liberty, a judicial remedy must be available'".

(T. Franck, *supra*, note 102, at 157, quoting from M. Tigar, "Judicial Power, the 'Political Questions' Doctrine, and Foreign Relations", 17 U.C.L.A. L. Rev. 1135, at 1178-1179 (1970)).

162. See, for example, Wilson J.'s comment in *Operation Dismantle*, quoted in text, *infra*, accompanying note 184.

163. In *Andrews v. Law Society of British Columbia* (1989) 56 D.L.R. (4th) 1, the Supreme Court of Canada recognized that in Canada, non-citizens are a "discrete and insular minority" (per McIntyre J., at 24). Wilson J. held that non-citizens' "vulnerability to becoming a disadvantaged group" is "captured by John Stuart Mill's observation ... that 'in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked'" (at 32). La Forest J. noted that non-citizens "are an example without parallel of a group of persons who are relatively powerless politically", and that in Canada there has been a "history of ... intolerance" towards foreign nationals which, "from early times [has] been an inseparable companion of discrimination on the basis of race and national or ethnic origin" (at 39).

164. Contingency of Aboriginal rights upon majority acceptance is the common feature of the doctrine of recognition and the distorted doctrine of *terra nullius*, discussed in parts 2 and 4 below. See generally M. Asch and P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.v. Sparrow*" (1991) 29 Alta. L. Rev. 498. In *Delgamuukw v. British Columbia* Wallace J.A. applied such reasoning to the common law itself. Wallace J.A. argued that in newly claimed territory the intruding system of law delimits cognizable Aboriginal rights at the time imperial sovereignty is asserted, according to the colonial interests it serves: see note 261, *infra*. (Although Wallace J.A. did not account for the fact, the common law of that period served "majoritarian" interests only within England: in British Columbia, as in most colonies at the time British sovereignty was asserted, British settlers were in the minority.)

165. The courts' application of the political questions doctrine to assertions of Aboriginal rights on the American western frontier in the 19th century is reviewed by N. Newton, "Federal Power Over Indians", *supra*, note 63, at 203-205, 216-219.

166. For discussion of the dependence of the act of state doctrine on a positivist conception of the law which facilitated sweeping imperial claims on the part of states, see K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 177, n 67 and D. Chow, *supra*, note 66, at 404-409.

167. The "better" way was charted by Cecil Rhodes, founder of the British South Africa Company. Rhodes was responsible for the Order in Council construed by the Privy Council in *Re Southern Rhodesia*: *supra*, note 35, at 222-223. In his parting tract, Rhodes proclaimed the world too small for the colonies he dreamt of:

"The world is nearly parcelled out, and what there is left of it is being divided up, conquered and colonized. To think of these stars that you see overhead at night, these vast worlds which we can never reach. I would annex the planets if I could; I often think of that. It makes me sad to see them so clear and yet so far."

(*The Last Will and Testament of Cecil Rhodes*, quoted by L. Stavrianos, *The World Since 1500: A Global History* (Englewood Cliffs; Prentice-Hall, 1975), at 337.) The subsequent course of British policy in Rhodesia has been dubbed by Commonwealth historians "the most painful and protracted of imperial hangovers": D. Judd and P. Slin, *The Evolution of the Modern Commonwealth* (London: Macmillan Press, 1982), at 2.

168. *Delgamuukw v. British Columbia* [1991] 3 W.W.R. 97 (B.C.S.C.), at 231 (per McEachern C.J.B.C.), quoted with approval on appeal by Wallace, J.A., *supra*, note 34, at 227.

169. See *R. v. Sioui* [1990] 1 S.C.R. 1025, at 1054.

170. *Worcester v. Georgia*, *supra*, note 48, at 559-561.

171. See note 555, *infra*.

172. See D. Chow's analysis, referred to *supra*, note 164.

173. Proclaimed by American journalist John Louis O'Sullivan in 1845: "[o]ur manifest destiny is to overspread the continent allotted by providence for the free development of our yearly multiplying millions": quoted from J. Bartlett, *John Bartlett's Famous Quotations*, 15th ed., Emily M. Beck ed. (Little Brown, 1980), by S. McSloy, *supra*, note 110, at 241, n. 181. William Gilpin, first governor of the Colorado territory wrote in 1846 that "[t]he untransacted destiny of the American people is to subdue the continent - to rush over this vast field to the Pacific Ocean": quoted from H. Smith, *Virgin Land: The American West as Symbol and Myth* (1950), at 37, by McSloy, *ibid.*, at 241, n. 182.

174. See note 555, *infra*, and text following.

175. "Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, at 692.

176. See, for example, the response by Hall J. in *Calder*, *supra*, note 47, at 217, and by Brennan J., Deane and Gaudron J.J., and Toohey J. in *Mabo v. Queensland*, *supra*, note 34, at 18, 82 and 143-144 respectively.

177. "Aboriginal Sovereignty and Imperial Claims", *supra*, note 2, at 691.

178. *Supra*, note 28, at 1105-1106.

179. Text accompanying note 121, *supra*.

180. *Supra*, note 14, at 459 (per Dickson J.).

181. *Ibid.*, at 466-467 (per Wilson J.).

182. *Ibid.*, at 471.

183. Ibid., at 472.

184. Id.

185. Authorities such as *Johnson v. M'Intosh*, *supra*, note 16, *Worcester v. Georgia*, *supra*, note 48 and *Connolly v. Woolrich* (1867) 1 C.N.L.C. 70 (Que. S.C.), for example, have treated the sovereignty asserted and acquired by the Crown over Aboriginal territories as less than absolute.

186. In *St. Catherine's Milling*, *infra*, note 326, for example, Chancellor Boyd declared that the "rude red-men of the North-West" could make the "transition from barbarism to civilization" by surrendering their lands through treaties, accepting "conciliat[ion] ... in the presence of an ever-advancing tide of European and Canadian civilization" (at 211, 228). For Boyd C. this alternative required that the Indians be "train[ed] and restrain[ed]", and their occupation of territory "necessar[ily] ... constrict[ed]" (211). The object of the reserve system thus created "is to segregate the red from the white population, in order that the former may be trained up to a level with the latter" (228). Should the Indians refuse this alternative, said Boyd C., "the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so, sooner or later, to displace them" (229-230). Boyd C. gave no reason why the Crown should be empowered to dispossess Aboriginal peoples unilaterally. Apart from his more general assumption of the moral superiority of the race represented by the Crown over Aboriginal peoples, Boyd C. appears to have believed that white settlement of Aboriginal territory was ordained by natural law and assured by superior power:

"If the Government had not made arrangements for the voluntary surrender of the lands, the white settlers would gradually have taken possession of them, without offering any compensation whatever; it would at that time have been as impossible to resist the natural laws of society and to guard the Indian territory against encroachment of the whites, as it would have been impolitic to check the tide of immigration. The Government therefore adopted the most humane and most just course in inducing the Indians, by offers of compensation to remove quietly to more distant hunting grounds, or to confine themselves within more limited reserves, instead of leaving them and the white settlers exposed to the horrors of a protracted struggle for ownership."

(212, quoting *Journals of the Legislative Council of Canada*, vol 4, app. EEE, 1844-1845, joint report of Messrs. Rawson, Davidson & Hepburn, prepared in 1844.)

Crown policy-makers in the mid-nineteenth century considered cultural assimilation the "salvation" of Aboriginal populations, and "the only possible Euthanasia for savage communities". See, respectively, P. Tennant, "Aboriginal Rights and the Canadian Legal System: The West Coast Anomaly", in *Law for The Elephant, Law for the Beaver: Essays in the Legal History of the North American West*, ed. J. McLaren, H. Foster and C. Orloff (Regina: Canadian Plains Research Center, 1992), 106, at 109 (characterizing the belief of James Douglas, first Governor of Vancouver Island and Governor of the Colony of British Columbia until 1864), and D. McNab, "Herman Merivale and Colonial Office Indian Policy in the Mid-Nineteenth Century", in I. Getty and A. Lussier, eds., *As Long As The Sun Shines And The Water Flows* (Vancouver: Univ. of British Columbia Press, 1983), 85, at 87 (quoting H. Merivale, writing as an academic in 1841, subsequently Britain's permanent undersecretary of state at the Colonial Office from 1848 to 1860). According to D. McNab, *ibid.*, at 93, the predominant view at the Colonial Office in this era was that "the Indians would either become extinct or assimilate with the non-Indian population".

187. For an account of the basis of colonial constitutional law and its reception into Canadian federal law see B. Slaterry, "Understanding Aboriginal Rights", *supra*, note 4, at 736-741.

In *Ancestral Lands, Alien Laws*, *supra*, note 61, at 39-43, Slaterry reviews the decision of the New Zealand Supreme Court in *R. v. Symonds*, a landmark case on the subject of colonial constitutional law relating to Aboriginal

peoples. Chapman J. held in *Symonds* that the centuries-old practice of "fair purchases" of Aboriginal title in treaties "is now part of the law of the land" and that native title "is entitled to be respected, and ... cannot be extinguished (at least in times of peace) otherwise than by free consent of the native occupiers": *supra*, note 48, at 390. Thus even if the post-acquisition act of state basis for unilateral extinguishment of Aboriginal title were to be considered valid otherwise, it may well have been overtaken by a contrary rule of colonial constitutional law.

188. *Supra*, note 41, at 351.

189. *Supra*, note 72, at 70.

190. *Ibid.*, at 67.

191. Extinguishment, or an analogous result, is said to be the consequence of lack of recognition of an Aboriginal right, under all versions of this doctrine. The State of Queensland's position in *Mabo v. Queensland*, *supra*, note 34, is indicative. According to Brennan J. (who, with the majority, rejected the argument) "[t]he defendant ... submits that, by the common law governing colonisation, pre-existing customary rights and interests in land are abolished upon colonisation of inhabited territory, unless expressly recognized by the new sovereign" (at 38). Brennan J. also described Aboriginal rights as being "lost" upon the Crown's acquisition of sovereignty under this argument (at 40). Dawson J., dissenting, understood the defendant's position in similar terms (at 93):

"The defendant argues that if the traditional land rights claimed by the plaintiffs ever existed, they were extinguished from the moment of annexation. It contends that those rights could not have survived the assertion of sovereignty by the Crown unless they were recognized in some way. The defendant argues that ... any traditional land rights over the Murray islands [were] not recognized"

192. *Vajesingji Joravarsingji v. Secretary of State for India*, *supra*, note 35, at 361, quoted in *Mabo v. Queensland*, *supra*, note 34, at 39 (per Brennan J.).

193. According to Brennan J. in *Mabo v. Queensland*, *supra*, note 34, at 39, "[p]resumably, until the relevant 'acts of acknowledgement' occur, the Crown would be the absolute owner of private property but, when those acts occur, the rights and interests acknowledged would revert in their erstwhile possessor." "One might think", said Brennan J., "that the consequence of such a rule would be to create or compound chaos" (*id.*). In the same case, Toobey J. also found "startling" the "difficult idea that on acquisition of sovereignty rights disappear, only to spring back to life immediately recognition occurs" (*ibid.*, at 143). For similar criticism, see K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 176-177.

194. *Ancestral Lands, Alien Laws*, *supra*, note 61, at 8-9.

195. Hall J. appears to have interpreted the Court of Appeal's judgement in *Calder* to this effect, rejecting as "wholly wrong" the proposition he attributed to the Court of Appeal, that "after conquest or discovery the native peoples have no rights at all except those subsequently *granted or recognized* by the conqueror or discoverer" [emphasis added]; *supra*, note 47, at 218. Dawson J.'s dissenting opinion in *Mabo v. Queensland* appears also to contain elements of this reasoning: see note 196, *infra*.

196. According to Chief Justice Davey in *Calder*, for example, the colonial law permitted judicial affirmation of "definite notions of rights of private property" held prior to Crown acquisition of a territory, only because "it was presumed the Crown intended to respect and recognize" such definite rights and "intended [them] to be supported by the municipal courts" (*supra*, note 72, at 66-67). Davey C.J.B.C. held that proof of positive acts of recognition by the Crown was required in the case of rights based on more "primitive" notions of property (*id.*).

This is the prevalent conception in the dissenting opinion of Dawson J. in *Mabo v. Queensland*, *supra*, note

34, though Dawson J. also referred to a notion of discontinuity. Dawson J. held that "if native interests in land are not recognized at all by the new sovereign, they will be extinguished at the time sovereignty is assumed" (at 97) and conversely, that "the annexation of land does not bring to an end those rights which the Crown chooses, in the exercise of its sovereignty, to recognize" (at 93). Similarly, Dawson J. interpreted the treaty in *Amodu Tijani* (*supra*, note 48) to have "conferred no rights" but instead to have afforded evidence of "recognition of those rights by the new sovereign" (at 95); and cited with approval the Privy Council statement in *Oyekan et al. v. Adele* (*supra*, note 131) that upon acquisition of a territory, the Crown may "recognise existing rights or extinguish them or ... create new ones". To similar effect, see also Dawson J.'s explanation of the defendant's submission on this issue, quoted in note 190, *supra*. Dawson J., however, also quoted approvingly pronouncements that Aboriginal rights claimants must rely upon positive acts which "give them the right they wish to be declared", and that only such rights as the Crown "chose to confer" are enforceable (at 97). Further, Dawson J. warned that it would be a mistake to consider recognized Aboriginal rights to have a "continued existence in precisely the same form as any pre-existing rights", because upon their "acceptance" by the Crown, such rights are for the first time held "of" or "under" the Crown (at 98). According to Dawson J., the appearance that such rights "continue undisturbed" is not legally accurate (*id.*).

197. See B. Slattery, *Ancestral Lands, Alien Laws*, *supra*, note 61, at 8-9; K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 162-171; 175-180; *Mabo v Queensland*, *supra*, note 34, at 38-40 (per Brennan J.).

198. See discussion in section 1.2 above.

199. *Supra*, note 35, at 360.

200. See text following note 46, *supra*.

201. See section 1.4 above.

202. This paper applies this term to a class of theories slightly more broad than the class referred to originally by B. Slattery, in *Ancestral Lands, Alien Laws*, *supra*, note 61, at 12-16. Slattery used the English law theory of tenures to illustrate how the doctrine of common law dispossession has been applied. More generally, Slattery explained (at 12):

"The argument rests on the premise that when English law replaces a local legal system all rights held under the former legal system which do not conform to the local legal system automatically cease. The land rights of the local inhabitants are said to be void, not because the Crown has nullified them, but simply because they do not satisfy the requirements of English property law."

According to K. McNeil, such an argument depends not so much on the effect of the replacement of local law by English law upon particular rights, but upon the extent of reception of English law itself in a territory: the argument is that "the law upon which [Aboriginal rights] depended would have been displaced by English law", and that for that reason, such rights "could not exist after the territory became British": *Common Law Aboriginal Title*, *supra*, note 11, at 180. Conversely, according to McNeil, continuance of Aboriginal rights depends upon "[t]he extent to which English law was received and local law preserved" (*ibid.*, at 181).

This analysis applies the term "doctrine of common law dispossession" to both such arguments, including all three "positive" theories of common law dispossession considered (and rejected) in *Mabo v. Queensland* by Brennan J (i.e. "patrimony of the nation", "royal prerogative", and the theory of tenures argument for dispossession of Aboriginal title-holders).

203. In the exceptional circumstance discussed in note 269, *infra*, English law may precede Crown acquisition of a territory, applying to British settlers on a personal basis.

204. See the description by K. McNeil, *supra*, note 202.

205. According to B. Slattery, *supra*, note 202, "the land rights of the local inhabitants are said to be void, not because the Crown has nullified them, but simply because they do not satisfy the requirements of English property law."

206. See the description by G. Lester, note 210, *infra*. (Lester includes theories of this nature in his account of the doctrine of recognition. See note 214, *infra*.)

207. See *Mabo v. Queensland*, *supra*, note 34, at 37-38 (per Brennan J.).

208. *Ibid.*, at 38.

209. Brennan J., with whom two justices concurred, rejected both theories expressly, *supra*, note 34, at 37-38. The remaining members of the majority rejected such theories implicitly in concluding that Aboriginal title presumptively survives the reception of English law into a settled colony: see, for example, the summary of the majority consensus by Mason C.J. and McHugh J., at 7.

210. See B. Slattery's account, note 202, *supra*. According to G. Lester, *supra*, note 18, at 21, under this application of the theory of tenures, Aboriginal rights, "while not actually extinguished, are overreached", and may not, in particular be "vindicated in competition with the Crown's legal rights" acquired by the fiction upon which the theory is based.

211. B. Slattery, *Ancestral Lands, Alien Laws*, *supra*, note 61, at 13, 12.

212. In *Guerin*, *supra*, note 47, at 335-336, Dickson J. interpreted the Supreme Court's decision in *Calder* consistently with the basic conception of Aboriginal title affirmed in the Marshall Court's doctrine of Aboriginal title as set out in *Johnson v. M'Intosh* (*supra*, note 16) and *Worcester v. Georgia* (*supra*, note 48), and in the presumption of continuity expressed in *Amodu Tijani* (*supra*, note 48). According to this view, Aboriginal title "predated and survived the claims to sovereignty made by various European nations" as "an independent legal right", coexisting with the "ultimate title" acquired by the European sovereign. The surviving Aboriginal interest in land "is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision": *ibid.*, at 336. See also the subsequent Supreme Court of Canada decisions affirming this view, cited in note 47, *supra*. For the argument that any title acquired by the Crown along with its partial sovereignty does not authorize extinguishment of Aboriginal title without the consent of the Aboriginal title holder. see P. Macklem, *supra*, note 149, at 405-406, 410-414.

213. Brennan J., *supra*, note 34, at 32-37, held that the doctrine of tenures applies in colonies but accords to the Crown only a paramount lordship or "radical" title, concomitant with sovereignty, respecting lands occupied by Aboriginal peoples, and that this title is not inconsistent with the continuance of an Aboriginal title originating independently. To similar effect Deane and Gaudron JJ. held, at 59-60, that "the mere fact that the radical title to all lands of the Colony was vested in the British Crown did not preclude the preservation and protection, by the domestic law of the new Colony, of any traditional native interests in land which had existed under native law or custom at the time the Colony was established." For the argument that the doctrine of tenures "supports Aboriginal land claims, rather than negating them", by creating a presumption in settled territories that Aboriginal peoples in occupation of their lands hold them under a grant from the Crown, see K. McNeil, "A Question of Title: Has the Common Law been Misapplied to Dispossess the Aborigines?" (1990) 16 Monash Univ. L.R. 91, at 103-107; and *Common Law Aboriginal Title*, *supra*, note 11, at 216-221.

214. In G. Lester's account, this theory forms one of two possible bases of the recognition doctrine. According to Lester, who coined the term, the recognition doctrine provides that "the simple fact of prior possession confers no rights enforceable against the acquiring sovereign, unless that new sovereign has recognized the antecedent rights or at least acted in such a way as to evince an intention to forbear from diminishing, modifying, or extinguishing them": *Inuit Territorial Rights*, *supra*, note 18, at 4. Lester's reference to extinguishment or other diminution of antecedent rights accords with a variation of the first account of the recognition doctrine reviewed above (text accompanying note 196, *supra*). But the alternative reference in Lester's statement may be isolated as follows: "...the simple fact of prior possession confers no rights enforceable against the acquiring sovereign, unless that new sovereign has recognized the antecedent rights" Lester does not distinguish between these two bases in his analysis, which treats the recognition doctrine as a corollary of the act of state doctrine where territory is acquired by conquest or cession. Lester's prime example of the recognition doctrine - the United States Supreme Court's decision in *Tee-Hit-Ton*, discussed *supra*, text following note 92 - appears equally susceptible to either of these interpretations.

In the statement isolated above, Lester appears to be describing the view that only the system of law which owes its existence to the sovereign in power may confer enforceable rights. On this view any purported basis of entitlement originating elsewhere is merely a "simple fact". No positive rule of English law need be cited in order to disqualify an Aboriginal right from enforceability under such a theory. The claimant need merely fail to identify an English law rule which confers the right in question. It is not the positive law that disqualifies the Aboriginal right from enforceability, but the presence of a new sovereign, which displaces or supersedes the source of the Aboriginal right. J. Crawford's opinion (*infra*, note 224) that Aboriginal sovereignty and jurisdiction may not be affirmed by Canadian courts in the absence of Crown recognition parallels Lester's interpretation of *Tee-Hit-Ton*. In effect, Crawford applied Lester's account of the recognition doctrine, and presumed either that the Aboriginal rights in issue were displaced, or directly extinguished: see discussion, *infra*, note 224 and text following. The trial judge in *Delgamuukw* adopted similar reasoning, identifying but declining to choose between the displacement and direct extinguishment hypotheses: see text following note 347, *infra*. The Court of Appeal in that case adopted a similar view, with the majority apparently preferring the displacement theory (referred to in this paper as the doctrine of 'sovereign dispossession'), and to that extent preferring, in particular, the view that displacement of Aboriginal sovereignty and jurisdiction occurred when sovereignty was asserted: see text following note 354, *infra*.

215. See text following note 354, *infra*.

216. In *Calder*, *supra*, note 72, for example, Chief Justice Davey combined these two arguments. He assumed, in accordance with the doctrine of recognition, that pre-existing rights may not survive acquisition of Crown sovereignty unless recognized by the Crown: see note 196, *supra*. Adding a rationale for the denial of Aboriginal rights, Davey C.J. reasoned that the character of the Nishga land tenure system was too "primitive" to place Nishga title in a category of private property rights which the courts would presume the Crown intended to recognize following the Crown's acquisition of sovereignty (at 66). According to this reasoning, had Nishga title not been denied the necessary status, it would have been presumed recognized by the sovereign, and thus rendered enforceable.

217. See, for example, M. Asch and P. Macklem, *supra*, note 164, for an analysis of both classes of theory under the rubric, "contingent rights".

218. Theories entailing the displacement rather than the cancellation or appropriation of Aboriginal rights do share certain features in common with theories of denial of Aboriginal rights. This issue is addressed further under "supersession of law" below. Theories of displacement are not classified as theories of denial in this analysis, because displacement theories do not necessarily deny the validity of Aboriginal rights under Aboriginal or other systems of law, or deny the separate validity of any other system of law itself. They would apply equally to rights originating in any non-English legal system. They hold, instead, that rights which may be valid under those other systems of law are negated for English law purposes because they do not comply with or are not positively affirmed

by English law, which they presume is the only system applicable. The theories of denial of Aboriginal rights examined under "*terra nullius*" below leave to speculation, at best, the prospect that Aboriginal rights and any system of law affirming Aboriginal rights, have any validity whatsoever, because they hold that Aboriginal rights have no prior existence cognizable under English law. To use the Privy Council's expression from *Re: Southern Rhodesia*, *supra*, note 35, at 233, theories of denial hold that between Aboriginal rights and English law conceptions of rights exists a "gulf" which "cannot be bridged".

219. M. Walters points out, for example, *supra*, note 41, at 358, that if the trial judge in *Delgamuukw* meant that the rights of the plaintiffs were extinguished when he said that the plaintiffs' systems of government "gave way" to the new colonial system of government, then McEachern C.J. needed to justify his exclusion of such rights from the constitutional category of Aboriginal rights, prior to his extinguishment analysis. "On the other hand, if by 'gave way' he meant *ipso facto* disappearance, that is, that aboriginal government and customary law was never cognizable in common law, even prior to considerations of extinguishment, then, arguably, the judgement conflicts with British imperial constitutional law" (because, as Walters and the authorities and commentators reviewed below argue, colonial law affirmed, rather than denied, pre-existing Aboriginal rights of a governmental nature): *id.*

One of the legal implications of asking whether Aboriginal rights were extinguished, rather than denied, at this early stage of the Aboriginal/Crown relationship, is that the same reasons which favour a strict legal test for proof of extinguishment of Aboriginal rights at any point *after* the acquisition of Crown sovereignty and introduction of English law, would appear to weigh against lightly assuming negation of Aboriginal rights *at this earlier stage*. The majority of the Court of Appeal in *Delgamuukw* presumed the existence of some Aboriginal jurisdiction prior to Crown acquisition of the territory: see the reasons of Macfarlane J.A., *supra*, note 34, at 178, and of Wallace J.A., at 224. Neither majority judgement, however, accepted this implication in holding that such jurisdiction was extinguished or displaced upon Crown assertion of sovereignty in the territory. Macfarlane J.A. rejected it implicitly, holding that the "clear and plain" test for extinguishment derives from the special Aboriginal/Crown relationship "which has existed *since the assertion of sovereignty*" [emphasis added] (at 156). Wallace J.A. did not address the issue. (The trial judge held, alternatively to his ruling that Aboriginal sovereignty and jurisdiction had been displaced, that such rights had been extinguished with the clear and plain intention of the Crown upon the introduction of English law into the territory: see text accompanying note 349, *infra*. It may be questioned whether McEachern C.J. applied the correct test, or with the requisite stringency.) B. Ryder argues that the Court of Appeal erred in failing to apply a strict presumption against extinguishment of Aboriginal jurisdiction ("*Aboriginal Rights and Delgamuukw v. The Queen*" (1994) 5 Constitutional Forum 43, at 45-46):

"Macfarlane and Wallace JJ. failed to apply the clear and plain intention test for extinguishment to this issue. They did not discuss the test for extinguishment until later in their reasons, as if somehow it was not relevant to the question of whether an Aboriginal right of self-government continues to exist. If they had applied the test they developed, they would have found extinguishment of an Aboriginal right of self-government only if there was no other possible interpretation of the consequences of British and Canadian sovereignty."

220. See the authorities cited in note 47, *supra*. Those rulings effectively reject the doctrine of recognition and related theories in all of the variations canvassed above, respecting Aboriginal rights of a 'private' nature.

221. The term "doctrine of continuity" originates in B. Slattery's thesis, *The Land Rights of Indigenous Canadian Peoples*, *supra*, note 15, at 50-51. In that analysis Slattery described the doctrine as having two branches, the first applying to all colonies, presuming that "rights of private property under local systems of law and custom" survive acquisition of a territory by the Crown, and the second applying to conquered and ceded colonies, presuming that "existing systems of private laws and consequential rights remain generally in force until altered by legislation". Slattery's thesis topic was restricted to the status of land-related Aboriginal rights. In *Ancestral Lands, Alien Laws*, *supra*, note 61, whose focus remained land rights, Slattery gave the following account of the "principle of presumptive continuity", applicable in any colony (at 10):

"This doctrine distinguishes between sovereignty and private property rights and holds that the Crown's acquisition of sovereignty over a new territory does not automatically entail the confiscation of all private property. Rather the presumption is to the contrary. Although the Crown initially holds the power to terminate local property rights as an act of state, if it elects not to exercise that power, then local rights are presumed to survive intact, subject to any modifications necessarily flowing from the change of sovereignty proper."

See also K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 179-180. The opinion upon which Slattery relied in this latter formulation as Canadian authority - Hall J.'s opinion in *Calder* - does not limit the ambit of the principle recognized to private rights, or rights of property, but states that the rule that "the laws of a conquered country continue in force, until they are altered by the conqueror" must also apply to territory acquired by "discovery or by declaration" (*supra*, note 47, at 199).

222. The effect of the doctrine of continuity upon Aboriginal rights is the inverse of that of the doctrine of recognition, so that acceptance that one of these doctrines applies to a particular gradation of Aboriginal right necessarily precludes application of the other.

223. J. Crawford, *Aboriginal Self-Government in Canada* (Ottawa: Canadian Bar Association, 1988). Professor Crawford's relevant conclusions are that "the aboriginal peoples of North America exercised a 'sovereign' right of self-government before European contact" (at 14 - later, at 63, Crawford described this as Indian nations' "inherent right to self-government"); and that the inherent right to self-government, "which the Indian nations had before colonization, was lost by the combination of:

- (a) the acquisition of sovereignty by Great Britain, and then Canada, over the Indians and their lands;
- (b) the failure to stipulate for a continuing right to self-government in the various treaties;
- (c) the failure of Great Britain and then Canada (evidenced by the history of legislative regulation of the Indians, in particular the *Indian Act* 1876 (Can)) to treat tribes as domestic dependent nations;
- (d) the absence in common law as received and applied in Canada of any guarantee of an acquired right to self-government which the courts could have applied to invalidate legislation and executive action contrary to any such right." (at 64)

224. *Ibid.*, at 25.

225. *Ibid.*, at 55-56.

226. *Ibid.*, at 25, interpreting, in particular, the statement in *Worcester v. Georgia*, quoted in full at note 251, *infra*, that "the Indian nations have always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate that the first discoverer of the coast of the particular region claimed."

227. *Ibid.*, at 57. In full, Crawford stated, *id.*:

"Marshall, C.J.'s recognition of the self-governing Indian nations was essentially the recognition of a state of affairs which neither Great Britain nor the United States had extinguished, but which they had on the contrary recognized and dealt with as such. It was thus not so much the recognition of a right, still less of a right sought to be established after a lengthy period of suppression, as of a state of affairs accepted

by the sovereign as part of the structure of government of a subject people."

For a similar account of Marshall C.J.'s conception of Aboriginal rights, based primarily upon the first two Aboriginal rights opinions given by the Marshall Court, see G. Lester, *Inuit Territorial Rights*, *supra*, note 18, esp. 4-11. In this analysis, Lester views *Fletcher v. Peck*, 10 U.S. (Cranch) 87 (1810) and *Johnson v. M'Intosh* (1823) as in contradiction with the Marshall Court's later judgements in *Cherokee Nation* (1831), *supra*, note 110, and *Worcester v. Georgia* (1832). In an earlier article - "Primitivism versus Civilization", *supra*, note 90, esp. 359-361 - Lester interpreted even the language of legal rights in the latter cases as having no substantive significance. Lester may have altered his view on this important question in the more recent study (*ibid.*, at 28-29), but he treats the former two cases as prevailing in any event, and interprets them as applying the same doctrine of recognition later applied in *Tee-Hit-Ton*, *supra*, note 45. Ultimately, on the basis of its *terra nullius* reasoning and its incorporation of the doctrine of recognition, Lester concluded that his earlier conception of the Marshall decisions describes "a rule ... that people who are regarded as primitive and barbaric, in short, uncivilized, have no legal rights": "Primitivism versus Civilization", *ibid.*, at 361.

The predominant view, adopted here, is that the language of legal rights in all of the Marshall decisions is substantive, and that inconsistencies between *Johnson v. M'Intosh* and *Worcester v. Georgia*, in particular, are properly reconciled by treating the later judgement as modifying its predecessor. See, for example, B. Slattery, *Ancestral Lands, Alien Laws*, *supra*, note 61, at 24-36; H. Berman, *supra*, note 35, at 642-665; and N. Newton, "Federal Power over Indians" *supra*, note 63, esp. 207-210. Without agreeing as to the degree of protection afforded Aboriginal title in *Johnson*, all of the further commentaries addressing *Johnson* referred to in notes 63, 94, 95, and 116 share this view.

228. *Ibid.*, at 40-48; 57-61. Contrary to Crawford's view (at 47-48), there are substantial reasons to view the *Royal Proclamation of 1763* (which was relied upon by Marshall C.J. in formulating his doctrine of inherent tribal sovereignty) as affirming the sovereign status of Aboriginal peoples under colonial law. Crawford did not consider the implications of the *Royal Proclamation's* constitutional status, and presumed, at 33-34, that Confederation eclipsed the *Proclamation* in relation to Indian policy.

Similar efforts to distinguish the Marshall doctrine of inherent Aboriginal rights from the imperial colonial law governing other former British colonies, on the basis that the doctrine depends upon unique American recognition of tribal rights in treaties and other positive acts by the state, are made in *Calder*, *supra*, note 72, per Davey C.J.B.C., at 67-69; *Delgamuukw*, *supra*, note 168, per McEachern C.J.B.C., at 339-340; *Coe v. Commonwealth* (per Gibbs J.) quoted *supra*, note 38; and *Mabo v. Queensland*, per Dawson J., dissenting, *supra*, note 34, at 100, 103-104, 127-129. All of these opinions, with the exception of Gibbs J.'s reasons in *Coe* (which did not address the further issue) rely extensively upon the Marshall decisions and later American jurisprudence in their treatment of the issue of post-acquisition extinguishment of Aboriginal title. For references to the Supreme Court of Canada's reliance upon the Marshall decisions in formulating a Canadian doctrine of Aboriginal rights in the era since *Calder*, see generally B. Slattery, "Understanding Aboriginal Rights", *supra*, note 3; B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261; and P. Macklem, *supra*, note 149.

229. *Supra*, note 48.

230. *Ibid.*, at 528-529, 532.

231. *Ibid.*, at 523, 532.

232. *Ibid.*, at 538.

233. *Ibid.*, at 535, 561-562.

234. Id.

235. Ibid., at 536.

236. Ibid., at 542.

237. Ibid., at 542.

238. Ibid., at 542-543.

239. "It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors": *ibid.*, at 543.

240. "But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions": *ibid.*, at 543.

241. Ibid., at 543-544. Later in his reasons Marshall C.J. ascribed the entitlements of Aboriginal nations to "their original natural rights, as the undisputed possessors of the soil" (at 559), and to the "original right, possessed by the undisputed occupants of every country" (at 560).

242. "The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them": *ibid.*, at 544. (It should be emphasized that Marshall C.J. was still speaking here of the rights of European states or their successors, *vis-a-vis* each other. He was not suggesting that one party to a Crown-Aboriginal relationship may determine relations unilaterally. He was thus not departing from his holding in *Johnson v. M'Intosh* that "[t]hose relations which were to exist between the discoverer and the natives, were to be regulated by themselves" (emphasis added): *supra*, note 16, at 573. Nor was Marshall C.J. attributing to the discovering nation's pre-emptive privilege, any power to extinguish unilaterally the rights maintained by the Aboriginal nations.)

243. Ibid., at 544-546. In the same analysis, Marshall C.J. held that the colonial charters granted by British kings before Britain took possession of American colonies, conveyed only the title belonging to discoverers, not the soil from sea to sea, which "was occupied by numerous and warlike nations, equally willing and able to defend their possessions"; that the "extravagant and absurd idea, that the settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man"; that the charters granted to the colonies powers to make war, but the "very terms" of such charters "imply the existence of a country to be invaded, and of an enemy who has given just cause for war"; that "[t]hese barbarous nations... were surely not considered as the subjects of Penn [charter founder of a colony later to become a state], or occupying his lands during his pleasure"; and that "[t]he power of war is given only for defence, not for conquest".

244. Ibid., at 546-549. Later in his reasons, at 561, Marshall C.J. treated this protectorate relationship as an instance of the following "settled doctrine of the law of nations":

"... a weaker power does not surrender its independence - its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under

the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.'

245. Ibid., at 549-552.

246. Ibid., at 552-553. Further, Marshall C.J. held that even if that implication were unavoidable, such language could not be upheld, because "its being misunderstood is so apparent" that it must "be taken in the sense in which was most obviously used": *id.*

247. Ibid., at 553-554. According to Marshall C.J., to interpret this provision as a surrender of the right of self-government "would convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties": *id.*

248. Ibid., at 555-556.

249. Ibid., at 556-557.

250. Ibid., at 558-559.

251. Ibid., at 561. More expansively, linking this status with the American constitution's assignment of powers of treaty-making, war and peace, and regulation of commerce with foreign nations, Marshall C.J. stated (at 559-560):

"The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which the European potentates imposed on themselves, as well as on the Indians. The very term 'nation', so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are all applied in the same sense."

252. Ibid., at 561-563.

253. In *St. Catherine's Milling and Lumber Co. v. The Queen* (1887) 13 S.C.R. 577, at 612-613, Justice Strong of the Supreme Court of Canada, dissenting on more particular grounds, affirmed this view of the Marshall Court's conception of Aboriginal rights. Strong J. took notice of the British colonial policy and practice common to the origins of Canada and the United States, and maintained "that if there had been an entire absence of any written legislative act ordaining this rule [i.e. the rule under which it is uniform practice "to recognize the Indian title as one which could only be dealt with by surrender to the crown"] as an express positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such . . ." See also Justice Strong's additional remark that the colonial law may have imported this rule from the law of nations, at 615-616.

This is also the predominant view of *Worcester v. Georgia*'s effect in the commentaries. See, for example,

P. Macklem, *supra*, note 149, at 403-406; J. Hurley, *supra*, note 94, at 429-434, esp. 430; B. Slattery, *Aboriginal Lands, Alien Laws*, *supra*, note 61, at 25-26, 31-35; B. Slattery, "Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, at 689, 701; H. Berman, *supra*, note 35, at 660-665; C. Wilkinson, *supra*, note 116, at 55-56, 58; W. Walters, *id.*, esp. 131, 139; M. Ball, *supra*, note 63, at 31-34; R. Kronowitz et al., *supra*, note 63, at 517-522; S. McSloy, *supra*, note 110, at 237-239; P. Frickey, *supra*, note 94, at 393-406. Describing the legacy of *Worcester*, *Cherokee Nation* and *Johnson*, F. Cohen wrote:

"Perhaps the most basic principle of all Indian law ... is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation".

(*Handbook of Federal Indian Law*, 1st ed., 1942, at 122, reprinted (New York: AMS Press, 1972).)

254. J. Crawford concluded alternatively (*supra*, note 223, at 58) that any surviving Aboriginal sovereignty or jurisdiction was negated after Crown acquisition of Aboriginal territory in Canada, by the exercise of Parliamentary sovereignty through the *Indian Act*. (In reaching this conclusion, written before the Supreme Court first interpreted s. 35 of the *Constitution Act, 1982* in *Sparrow*, *supra*, note 28, Crawford did not distinguish between the regulation of the right of self-government, and its extinguishment.)

255. For his conclusion (*supra*, note 223, at 62) that "Canadian courts have generally (if often implicitly) rejected the notion that there is an inherent right to self-government of Indian bands", Crawford relied principally upon pre-1982 lower court decisions concerning Parliamentary abridgement of rights long after the Crown's acquisition of sovereignty or reception of English law (i.e. after the point at which it must be determined whether the right is affirmed as a matter of colonial constitutional law). The cases in this category relied upon were *Logan v. Stryes* (1959) 20 D.L.R. (2d) (Ont. H.C.) 416, at 424; *Isaac v. Davey* (1973) 38 D.L.R. (3d) 23, at 28, 31 (Ont. H.C.), rev'd on other grounds (1974) 51 D.L.R. (3d) 170 (Ont. C.A.), [1977] 2 S.C.R. 897; and *Re Stacey and Montour* (1981) 63 C.C.C. (2d) 61 (Que. C.A.). Crawford also based his conclusion upon the dictum of Mr. Justice Steele in *Attorney-General for Ontario v. Bear Island Foundation* (1984) 15 D.L.R. (4th) 321, at 407 (Ont. H.C.) that "[a]lthough it was the custom in Canada not to interfere with the internal affairs of the local band or to extinguish aboriginal rights except by treaties, there was no legal right of internal administration or self-government by the local band. It was purely at the sufferance of the Crown". The opinion makes no reference to the trial or appeal decisions in *Connolly v. Woolrich*, discussed, *infra*, note 296, or to Justice Strong's opinion in the Supreme Court in *St. Catherine's Milling's*, referred to *supra*, note 253.

256. *Supra*, note 34. Wallace J.A. held that "with the acquisition of sovereignty, supreme legal authority vested in the Crown", and that a claim of paramount Aboriginal jurisdiction "is incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846" (at 224, 225). "Thus, upon the exercise of sovereignty, any powers of government of the indigenous people were superseded by the introduction of the common law and the jurisdiction of the Imperial parliament" (at 225). Wallace J.A. concluded that the trial judge had been correct to hold that the plaintiffs "after 1846 and certainly after 1871 [the date of British Columbia's entry into Confederation] no longer retained any aboriginal right of self-government or jurisdiction over the territory nor any jurisdiction to govern the members of the Houses in accordance with Gitksan and Wet'suwet'en laws" (*id.*).

Macfarlane J.A. held that "any vestige of aboriginal law-making competence was superseded" "on the date that the legislative power of the Sovereign was imposed", and that this "likely occurred when the mainland colony was founded and became a territory under the jurisdiction of the Imperial parliament in 1858" (at 151-152). Macfarlane J.A. also approved of the trial judge's view (as summarized by Macfarlane J.A.) that "when the Crown imposed English law on all the inhabitants of the colony and, in particular, when British Columbia had entered Confederation" the plaintiffs became "subject to the legislative authorities in Canada and their laws". The excerpt

from the trial judge's opinion quoted by Macfarlane J.A. stated that another form of government "could not exist" after the Crown had established the colony and had in the process, set up institutions of colonial government and "imposed English law" (by which, in context, the trial judge meant, proclaimed English law to have been introduced in the territory). Macfarlane J.A. stated that he understood this to mean that the trial judge "tied the extinguishment of any aboriginal law-making power to the imposition of English law in the colony of British Columbia in 1858".

(Wallace J.A. also concluded, in the alternative, that any Aboriginal jurisdictional rights surviving assertion of Crown sovereignty during the colonial period were subsequently extinguished by the *British North America Act*: *ibid.*, at 255. Macfarlane J.A. treated passage of the 1867 imperial statute as a relatively late alternative instance of the "supersession" of Aboriginal jurisdiction: see *infra*, note 359.)

257. It appears possible to construe Macfarlane J.A.'s position, *ibid.*, that Aboriginal jurisdiction was displaced by the imposition of English law in the territory, as reflective of Wallace J.A.'s reasoning, but Macfarlane J.A. did not hold expressly that Aboriginal systems of law were entirely negated. The construction followed here takes Macfarlane J.A. to have adopted the less restrictive position analysed in the next section.

258. *Amodu Tijani v. Secretary, Southern Nigeria*, *supra*, note 48, at 407.

259. *Supra*, note 34, at 211.

260. Wallace J.A. held that in colonies acquired derivatively "the indigenous system of law continued until altered by the Sovereign or Parliament", but that "in contrast", in a settled territory such as British Columbia, "the common law has long been held to automatically prevail as the system of law": *ibid.*, at 199-200. Accordingly, upon establishment of "Britain's exclusive sovereignty" by an international boundary treaty with the United States signed in 1846, the common law "automatically came into force" and "thereby superseded any indigenous system of laws". To the same effect, "while customary practices received the protection of the common law ... any aboriginal system of customary law did not ...". This ... follows from the institution of the common law as the one system of law in British Columbia" (at 210).

261. Wallace J.A. allowed, in particular, that in settled colonies "the common law was introduced subject to qualification by the dictates of local circumstances", and that therefore "the acquisition of sovereignty by the British Crown did not, in itself, extinguish the right of the aboriginal people to continue their traditional *customs, practices and use of the tribal land* in a manner integral to that indigenous way of life" [emphasis added]: *ibid.*, at 201. However, he continued, "this important protection given to aboriginal practices by the common law ... cannot be altered and expanded by the use of such labels as the "doctrine of continuity" (at 202). Further (*ibid.*):

"The assertion of an all encompassing aboriginal right to an exclusive social and legal system - under the so-called "doctrine of continuity" - would result in the common law affording protection to a system which is both outside and independent of the common law and, at the same time, extend to the aboriginal community the benefits and protections afforded by the common law to all residents of the province. This would be inconsistent with, and a fundamental departure from the principle that, upon the exercise of sovereignty, the adjusted common law became the law of all subjects - native and non-native alike. Certainly it overturns the settled/conquered distinction which is a fundamental premise of our legal system."

Although he cited approvingly the statement from *Amodu Tijani* quoted above in this part of his analysis (at 210, 206), Wallace J.A. himself distinguished only between "rights" and "systems of law" in this context. He stated, in particular (at 206) that "judicial powers or powers to legislate" are "quite different from the concepts of "title" or "rights of property" or a "usufructuary interest" (only the latter of which Wallace J.A. considered eligible for common law protection). The difference is described in Wallace J.A.'s preceding complaint that "indiscriminate" use of the term "right" has caused "considerable confusion" in the analysis of Aboriginal claims, "particularly when the relevant legal relations being analyzed are created by, and arise as a consequence of the exercise of sovereignty

and the introduction of the common law" (at 202, emphasis added). In other words, Wallace J.A. defined contentions of rights either to 'laws' or jurisdiction in this view of the doctrine of continuity, because he defined cognizable "rights", in the abstract, as necessarily creatures of, and thus wholly subordinate to, Crown sovereignty and the law which Crown sovereignty alone generates. (In the result, the content of the remnant rights thus envisioned encompasses only the customs and practices which constitute, "from a European point of view, a 'traditional way of life'" (at 203). Another factor which led Wallace J.A. to this narrow view of the Aboriginal rights incorporated in the common law was the Privy Council's reference to land rights under the *Royal Proclamation of 1763* as 'personal and usufructuary' in *St. Catherine's Milling* (*supra*, note 87), a reference which Wallace J.A. took to exclude from the category of Aboriginal rights, rights not related to land (at 205, 206). Non-land related rights, however, were not at issue in *St. Catherine's Milling*.

262. *Ibid.*, at 202. In referring to a skeleton of principle which need not accord with contemporary notions of justice and human rights, Wallace J.A. was quoting from the judgement of Brennan J., in *Mabo v. Queensland* (*supra*, note 34, at 18). Brennan J. did not refer to the settled/conquered distinction in his general statement, and did not apply the statement to that distinction in his judgement. The statement guided Brennan J. in his decisions to reject the theory of "enlarged terra nullius", the extinguishing/displacing accounts of the theories of "patrimony of the nation", "royal prerogative" or "feudal theory of tenure", and the doctrine of recognition in so far as it presumed a seizure of private rights by act of state upon the acquisition of a territory. Brennan J. considered none of those purported rules to form part of the law's skeleton of principle, and all of them to contravene contemporary notions of justice and human rights, particularly - in the "common theme or thread [which] runs through them" - the right of equality before the law (at 19, 41). The statement may also have influenced Brennan J.'s decision to uphold an account of the feudal theory of tenures consistent with the continuity of Aboriginal title in settled territories. Brennan J. said (at 19):

"It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rules should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning."

263. *Supra*, note 34, at 199.

264. See note 261, *supra*.

265. *Ibid.*, at 202.

266. Wallace J.A. stated (*ibid.*, at 207, paragraphing omitted):

"The issue is one of determining the nature and scope of the aboriginal rights which are recognized by the common law as rights of the aboriginal peoples which are additional to the common law rights which every citizen of the province enjoys. The respondents emphasized that aboriginal people enjoy the same rights as non-natives to participate in contemporary activities - particularly beneficial economic activities, in the province. As an example, they referred to the considerable native participation in the licensed commercial fishing industry. ... The fact that aboriginal people engage in a particular activity does not qualify such activity for the special protection afforded to aboriginal rights. To hold otherwise is to ignore the 'aboriginal' dimension of aboriginal rights." [emphasis added]

267. See note 438, *infra*, and accompanying text.

268. In *Mabo v. Queensland* Brennan J. described international law as "enlarging .. the concept of terra nullius" in order to justify the acquisition of sovereignty by occupation of the occupied territory of "backward peoples" (*supra*, note 34, at 21; see also 24, 27). Colonial law "march[ed] in step" (at 21), adopting a reciprocal doctrine of settlement, according to which, "when sovereignty of a territory could be acquired [in international law] under the enlarged notion of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as 'desert uninhabited' country'" (at 24). The colonial law rationale was as follows (*id.*):

"The hypothesis being that there was no local law already in existence in the territory, the law of England became the law of the territory (and not merely the personal law of the colonists). Colonies of this kind were called "settled colonies". Ex hypothesi, the indigenous inhabitants of a settled colony had no recognized sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organization. In *Advocate-General of Bengal v. Ranee Surnomoye Dossee* Lord Kingsdown used the term 'barbarous' to describe the native state of a settled colony... ." [citations omitted]

For further discussion see part 4 below.

269. It should be noted that in the limited circumstance that occupation of vacant territory by British settlers preceded Britain's unequivocal assertion of sovereignty over the territory, English law itself would probably have already applied to the settlers personally (i.e. to their interrelations, including their private property) but would not have applied to the territory itself. In that circumstance the territory would have remained *terra nullius*. See K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 147-148.

270. In *Mabo v. Queensland*, *supra*, note 34, at 26, for example, Brennan J. said that "the facts as we know them today do not fit the 'absence of law' or 'barbarian' theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory". Rather than continue to apply the theory on a fact specific basis, Brennan J. held that in relation to its corollary that the Crown owns all ungranted lands in a settled colony as if they were vacant, "the distinction between inhabited colonies that were terra nullius and those that were not" should be discarded (at 27, 29). Accordingly:

"The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognizes in the indigenous inhabitants of a settled colony the rights and interests recognized by the Privy Council in *Re Southern Rhodesia* as surviving to the benefit of the residents of a conquered colony."

See also the discussion in section 4.2.3 below.

271. Hall J. adopted this view when he stated in *Calder* that "a fortiori", the rule of continuance of indigenous laws ought to apply equally in discovered as in conquered territories (see note 221, *supra*). Lambert J.A., dissenting in *Delgamuukw*, stated the case more forcefully: "[i]f the laws of a conquered territory remain in force following the conquest, how much more should the laws of an occupied, organized but unconquered territory remain in force when Sovereignty is asserted over the organized society already present in the territory?": *supra*, note 34, at 257.

272. This formulation is from K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 114. See also M. Walters, *supra*, note 41, at 359 (in the early cases "the basic rule provides that, after discovery and occupation of uninhabited territory, settlers were subject to English common law and Acts of Parliament relevant to their local circumstances"). In Wallace J.A.'s formulation, *supra*, note 34, at 201, "[t]he common law was introduced subject to qualification by the dictates of local circumstances". Wallace J.A. also adopted Deane and Gaudron JJ.'s view from *Mabo v. Queensland* (*supra*, note 34, at 59) that "[t]he common law so introduced was adjusted in accordance with the principle that, in settled colonies, only so much of it was introduced as was 'reasonably applicable to the

circumstances of the colony". Wallace J.A. made no comment on the statement of Deane and Gaudron JJ. immediately following, that "[t]his left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law".

McNeil's formulation is used here because it appears to correspond to Deane and Gaudron JJ.'s statement without implying, as might Wallace J.A.'s, that the rule does not affect the application, as distinct from the substance, of the common law.

273. M. Walters, *supra*, note 41.

274. See note 269, *supra*. In *Mabo v. Queensland*, *supra*, note 34, at 22-25, Brennan J. explained that the idea that settlers carried British law with them personally as their "birthright", formed the basis of the application of British law to British colonial territory abroad. In its application to vacant territory acquired for the Crown by settlement, the "birthright principle" applied to the settlers personally, and to the territory.

275. An early expression of the differential consideration accorded settlers (and their sponsors) and indigenous inhabitants under the settlement doctrine may be found in the Holt opinion, circa 1675, according to which "by ye Law of Nations if any people make discovery of any Country of Barbarians the Prince of yt people who make ye Discovery hath ye Right of ye Soyle and Govemt of yt place ... in this the Common Law of England and ye Civill law doth agree" (quoted by M. Walters, *supra*, note 41, at 362). According to Walters, this opinion concluded that colonists in New York may not acquire title to land except from the Crown, and was indicative of the emergent "birthright principle" under which English law applied automatically in settled territories: *ibid*.

According to G. Lester, "invoking the presumption of the survival of the *lex loci*" - the presumption that would apply under the simple rule of conquest, which was the only other rule originally available - "meant that ... theoretically the colonists became subject to the local customs and laws of the conquered people - the aboriginal inhabitants. Perish the thought. Some way had to be found out of this bind." Hence, application of the "birthright principle" in inhabited, "settled" territory: "Primitivism and Civilization", *supra*, note 90, at 355, 358.

276. This issue is examined in detail in section 4.2 below. Brennan J. explained in *Mabo v. Queensland*, *supra*, note 34, at 22-25, that in the early 19th century Blackstone's *Commentaries*, which compiled the "birthright" principle, did not contemplate the acquisition of sovereignty over occupied territory except by conquest or cession. (For a similar reading of Blackstone, see B. Slattery, *Ancestral lands, Alien Laws*, *supra*, note 61, at 4-6; compare M. Walters, *supra*, note 41, at 363-364). The "enlarged" *terra nullius* theory did not fully emerge in colonial law until later: see section 4.2.3 below.

The claim before him was to Aboriginal rights of a 'private' nature, but Brennan J. was clearly troubled by the enlarged *terra nullius* theory in its entirety, including its implications for Aboriginal sovereignty and jurisdiction. Brennan J. adjudged the theory's 'barbarian' hypothesis (referred to, *supra*, notes 268 and 270) "unacceptable in our society", and attributed the view that "their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded" to a "discriminatory denigration of indigenous inhabitants, their social organization and customs" (at 27). Brennan J. also placed heavy reliance upon the fact that international law had by 1975 repudiated the enlarged *terra nullius* theory as a basis for acquiring sovereignty, in rejecting the theory's 'private law' implication that Aboriginal peoples' property rights may not survive acquisition of territorial sovereignty by the Crown. Having acknowledged the constraints of the conventional act of state doctrine, however, and having noted that Australia had maintained uninterrupted control over the territory, Brennan J. concluded drily as follows (at 21):

"Thus the Meriam people in 1879, like Australian Aborigines in earlier times, became British subjects owing allegiance to the Imperial Sovereign entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided. And this is so irrespective of the fact that,

in 1879, the Meriam people were settled on their land, the gardens were being tilled, the Mamoose and the London Missionary Society were keeping the peace and a form of justice was being administered."

277. Other political factors also influenced the development of this myth, including settler opposition to the prospect of prerogative lawmaking in derivatively acquired territory, before a legislature was promised or English law introduced. See M. Walters, *supra*, note 41, at 366, n. 44.

278. When it was insisted in Blackstone's *Commentaries*, for example, that the American colonies must have been conquered, because occupied territory may not be acquired by settlement, one prominent American jurist abandoned the relatively subtle response supplied by the Marshall Court's doctrine of Aboriginal rights (which departed from Blackstone's rule but permitted Aboriginal law to continue to apply to Aboriginal peoples, with state law applying to the settlers: see note 251, *supra*, and accompanying text), stating flatly that "[t]he Indians could in no just sense be deemed a conquered people They were considered as a people not having any regular laws, or any organized government, but as mere wandering tribes": Story, *Commentaries on the Constitution of the United States*, 5th ed. (1891), vol. 1, at para. 152, quoted and discussed in M. Walters, *supra*, note 41, at 364. Story elaborated:

"As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations. The territory over which they wandered, and was used for their temporary, and fugitive purposes, was, in respect of Christians, deemed as if it were inhabited only by brute animals... ."

(*Commentaries on the Constitution*, *ibid.*, quoted by G. Lester, *Inuit Territorial Rights*, *supra*, note 18, at 17.) In this example, the myth of enlarged *terra nullius* appears to have been seized upon precisely to avoid the ordinary rule of continuance of laws of a conquered territory. See also Lester's analysis referred to, *supra*, note 275.

Prior to developing his 'complex' rule for the application of Aboriginal and American law, Marshall C.J. himself had refused to apply a 'simple' rule of conquest, out of similar partiality to the settlers' interests:

"The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction is gradually lost, and they become one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, or hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either

of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred. Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill prevailed. ... The soil...was parcelled out according to the will of the sovereign power. ... That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better to be adapted to the actual state of things, was unavoidable."

(*Johnson v. M'Intosh*, *supra*, note 16, at 589-591, paragraphing reduced.)

279. The conventional act of state doctrine prevented such an argument from succeeding, at least where effective occupation had been achieved on behalf of the Crown; the Crown's assertion of sovereignty had been unequivocal; and no constitutional constraints had been violated. The argument was nevertheless forceful, particularly in the era when Blackstone's *Commentaries* confined the doctrine of settlement to 'desert' territories. It was advanced directly (though subsequently tempered) in an Australian case as follows:

"This country was not originally desert, or peopled from the mother country... Neither can it be called a conquered country, as Great Britain was never at war with the natives, nor a ceded country either: it, in fact, comes from neither of these, but was a country having a population which had manners and customs of their own, and we have come to reside among them; therefore in point of strictness and analogy to our law, we are bound to obey their laws, not they to obey ours."

(*R. v. Jack Congo Murrell* (1836) 1 Legge 72 (N.S.W.S.C.). See M. Walters, *supra*, note 41, at 364, and Australian Law Reform Commission, *Report No. 31, Recognition of Aboriginal Customary Laws* (Canberra: Australian Government Publishing Service, 1986), at para. 40. The court replied that the alternative was to leave to Aboriginal persons "no sanctuary" in English law. Defence counsel subsequently submitted that "[t]he reason why subjects of Great Britain are bound by the laws of their own country is, that they are protected by them; the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which offer them no protection.")

It was argued in an early Lower Canada case that the Crown's "precarious" presence in the Indian Territories in 1818 did not at the time oust exclusive Aboriginal jurisdiction at least over Aboriginal persons and non-British subjects. See H. Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act Cases*" (1992) 21 Man. L.J. 343, at 373-375, discussing the proceedings of the trial of Charles De Reinhard, reported in W. Simpson, *Report at Large of the Trial of Charles De Reinhard* (Montréal: J. Lane, 1819).

280. *Freeman v. Fairlie* (1828), 18 E.R. 117 (Ch), at 128, per Master Stephen (1823), quoted by M. Walters, *supra*, note 41, at 364-365.

281. *Coe v. Commonwealth*, *supra*, note 38, at 408 (per Gibbs J., relying on the statement in *Cooper v. Stuart* (1889) 14 App. Cas. 286 (P.C.) that New South Wales was not acquired by conquest, but was "practically unoccupied, without settled inhabitants or settled law at the time it was peacefully annexed to the British dominions" (at 291)). Dissenting in *Coe*, Murphy J.'s criticism of the fiction posited by *Cooper v. Stuart* was uncompromising (*ibid.*, at 412, citation omitted):

"'Occupation' was originally a legal means of peaceably acquiring sovereignty otherwise than by secession [sic] or conquest. It was a cardinal condition of a valid 'occupation' that the territory should be terra nullius - a territory belonging to no one - at the time of the act alleged to constitute the occupation. 'Territory

- a t.....y b.l.o.g.i g o o o . - h ime of the act alleged to constitute the occupation. "Territory inhabited by tribes or peoples having a social or political organization cannot be of the nature terra nullius'.... Although the Privy Council referred in *Cooper v. Stuart* to peaceful annexation, the aborigines did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement by the Privy Council may be regarded as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land." [citation omitted]

282. In K. McNeil's view, once the settlement doctrine had taken hold the classification of colonies did not depend on this criterion alone, though the level of 'civilization' of the inhabitants of territory was always considered relevant: *Common Law Aboriginal Title*, *supra*, note 11, at 117-133. It appears from McNeil's analysis that some Aboriginal territories were classified as having been acquired by conquest or cession (see esp. 118-119), but that European territories were never classified as settled.

283. M. Walters, *supra*, note 41, at 364.

284. *Id.*

285. *Mabo v. Queensland*, *supra*, note 34, per Brennan J., at 23 (the "tender concern of the common law of England in foreign parts led to the recognition that such settlers should be regarded as living under the law of England if the local law was unsuitable for Christian Europeans".)

286. *Supra*, note 41, at 365.

287. *Ibid.*

288. *Ibid.*

289. In *Connolly v. Woolrich*, *supra*, note 185, at 82, Monk J. illustrated his argument for the fairness of affirming Cree law for the Crees with the following example, in which the speaker's opponents apparently sought to extend English law throughout a conquered territory, despite the 'simple' rule of conquest:

"Mr. Fox, in the great debate upon his system of Government for India, said: "It had been often suggested that it would be advisable to give to the Gentoos the laws of England. But such an attempt would be ridiculous and chimerical. The customs and religion of India clashed too much with them."

290. *Supra*, note 34, at 210-211, citing several cases from Nigeria and India. Such cases depart from the Privy Council's inclination noted in *Coe v. Commonwealth*, *supra*, text accompanying note 281, to avoid classifying Aboriginal territory as conquered.

291. The most frequently cited authority for this simple rule of conquest is *Campbell v Hall* (1774) 98 E.R. 1045 (K.B.), relied upon by Wallace J.A, *supra*, note 34, at 199-200. According to K. McNeil, however, in a line of cases originating earlier than *Campbell v Hall* and continuing later, "in conquered and ceded territories where local law was unsuitable for Europeans, the colonists were held to be subject to English law instead": *Common Law Aboriginal Title*, *supra*, note 11, at 114-115. See also M. Walters, *supra*, note 41, at 364, and 373-375.

Walters discusses two examples, in particular, of the adoption of a complex rule in conquered or ceded territory. In the first, *Freeman v. Fairlie*, *supra*, note 282, the local law of Calcutta was adjudged unsuitable to British settlers because of its non-Christian content. However, the whole body of local law was found to be "interwoven with and dependent on ... religious institutions", so that the religious components of the local law could not have been abrogated without abrogating all local law in the territory (Walters, at 374). Rather than apply non-

Christian law to the British, or treat the territory as settled, Master Stephen determined the legal rights of the British as if the territory were settled, and the legal rights of the local inhabitants as though the territory had been conquered or ceded, subject to certain exceptions respecting interaction between the two groups.

In *Ruding v. Smith*, (1821) 161 ER 774, the court held similarly that in the conquered territory of Cape Good Hope, the previous Dutch local law continued to govern marriage between Dutch inhabitants, while English law applied to British persons. Walters notes, at 375, that Lord Mansfield's statement in *Campbell v. Hall* that in conquered or settled territories "an Englishman ... has no distinct right from the natives while he continues there" was considered by the court, and distinguished with the comment that Lord Mansfield's rule had been "expressed in very general terms [and therefore] is subject to exceptions".

Brennan J.'s analysis in *Mabo v. Queensland, supra*, note 34, at 23-24, parallels that of McNeil and Walters. Brennan J. stated that as a general rule, the common law's "tender concern" for the interests of British settlers "in foreign parts", "led to the recognition that such settlers should be regarded as living under the law of England if the local law was unsuitable for Christian Europeans" (at 23, citing as authority *Freeman v. Fairlie*, and *Ruding v. Smith, ibid.*). Brennan J. noted that "[t]his rule was applied even to English residents in Eastern countries which were not under British sovereignty" (*ibid.*). As a further example of the extremes to which courts in the colonial period went to cloak British settlers with British law, Brennan J. noted that in *Campbell v. Hall* "Lord Mansfield suggested that Jamaica should be regarded as a settled colony because the English colonists arrived after the Spaniards had left, the negro inhabitants presumably being of no significance" (at 24).

292. The four authorities other than *Campbell v. Hall* upon which Wallace J.A. relied for his formulation of the settled/conquered distinction, all appear to be consistent with complex rules of conquest and settlement in previously occupied territories (*supra*, note 34, at 199-202). *Blankard v. Galdy* (1693) 91 E.R. 356 (K.B.), which, though not embracing a complex rule of conquest, departed from *Campbell v. Hall*'s later prescription in its holding that the laws of conquered "infidels" continue unless they "are against the law of God" (see M. Walters, *supra*, note 41, at 360-361), also expressed the doctrine of settlement solely in terms of "uninhabited country". Similarly, the passage which Wallace J.A. relied upon for the same proposition from *Lyons Corp. v. East India Co.* (1836) 12 E.R. 782 (P.C.), expressly contrasts the rule of conquest with the rule of settlement in "an uninhabited country". (For further comment on this case, see note 597, *infra*.) Similarly, in *Sammut v. Strickland*, [1938] A.C. 678, the case upon which Wallace J.A. relied as the modern exemplar of the settled/conquered distinction, the Privy Council did not treat the simple rule of settlement as applicable to occupied territory, stating instead that the derivative rule applies "where ... the territory was acquired by cession or conquest, *more particularly where there was an existing system of law*" [emphasis added.] Further, Wallace J.A. cited the Privy Council's ruling in *Freeman v. Fairlie* in support of his formulation of the settled/conquered distinction without noting Master Stephen's complex modification to the rule of conquest, affirmed without comment by the Privy Council, discussed in note 293. B. Ryder has made the same point, concluding as follows (*supra*, note 219, at 44):

"The legal basis for untrammelled British, and later Canadian, sovereign authority over Aboriginal nations has never been adequately explained. Ultimately it rests on the common law doctrine of discovery, or the notion that sovereignty over an uninhabited territory vests in the discovering or settling power. In applying this principle to British North America, judges have managed to skirt the fact that Aboriginal peoples did indeed inhabit the territory. The *Delgamuukw* decision continues a tradition that has woven this ugly fiction into the fact of our law. Wallace J.A., for example, relied upon decisions that limited the application of the doctrine of discovery to 'uninhabited' or 'unoccupied' territories, yet he did not find it necessary to explain how the principle could possibly be relevant to territories occupied by the Gitksan and Wet'suwet'en." [emphasis added]

293. In his reasons for judgement in *Delgamuukw, supra*, note 34, at 201-202, Wallace J.A. suggested that the lesser protection he understood to be afforded by the common law to Aboriginal peoples in settled, as opposed to conquered territories, might be justified by the fact that such limited "protection" was guaranteed subject only to

legislative alteration, whereas the "precarious" status of Aboriginal rights in conquered territories was subject, initially, to the prospect of Aboriginal peoples being exterminated or driven out of their territories and having all of their property seized during the conquest, and subsequently, to abrogation by prerogative act of the conquering sovereign, before a legislature might be promised. But this argument simply asserts that the victims of colonialism are fortunate to salvage whatever they are left with by rules designed to exploit them. The comparative brutality of war crimes does not justify peaceable dispossession. Further, the reason, in particular, that the executive had no power to abrogate rights in settled territory was that a) English law applied automatically in such territory because Aboriginal legal systems were assumed, falsely, to be nonexistent, and b) English law prohibited executive abrogation of the rights of British subjects. It is surely impossible to read into this flawed rationale a principled trade-off between the private rights it protected, and the Aboriginal jurisdictional rights to which it was blind.

294. See M. Walters, *supra*, note 41, at 374-375, 412-413.

295. In *Mabo v. Queensland*, *supra*, note 34, for example, Deane and Gaudron JJ. stated, citing as authority *Sammut v. Strickland*, *supra*, note 294, that the rule that in settled colonies only so much of the common law as was "reasonably applicable to the circumstances of the Colony" applied, "left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law" (at 59).

M. Walters finds support for the complex settlement rule outside Canada in the following cases: (from New Zealand) *R. v. Symonds*, *supra*, note 48; *In re The Landon and Whitaker Claims Act, 1871* (1872), 2 N.Z.C.A. 41 (N.Z.C.A.) at 49; *Nireaha Tamaki v. Baker*, *supra*, note 48, *Hineiti Rirerire Arani v. Public Trustee of New Zealand* (1919) N.Z.P.C.C. 1 (P.C.), and *Te Weehi v. Regional Fisheries*, [1986] 1 N.Z.L.R. 680 (N.Z.S.C.); and (from Ocean Island) *Tito v. Waddell No. 2*, [1977] 3 All E.R. 129 (Ch), at 378. Walters also notes that in an obiter comment, Lord Kingsdown said in *A.-G. Bengal v. Raneesurnomoye Dossee* (1863) 15 E.R. 811 (P.C.), (a case from India which Walters views as supporting the complex conquest rule) that "[w]here English men establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own state; and those who live amongst them and become members of their community become also partakers of and subject to the same laws" (814), implying at least that Aboriginal people who continue to live in distinct societies remain outside the ambit of English law.

Walters also considers the status of the Marshall rulings on Aboriginal rights in the "classic dichotomy" between settlement or conquest, to be debatable (at 378). The view of the Marshall Court's doctrine of Aboriginal rights taken in this paper, however, is that Marshall C.J. effectively merged the settled/conquered distinction in the way that B. Slattery and others have described the 'complex' rule for all Aboriginal territories, however acquired (see text following note 298, *infra*). It is submitted that the Marshall rulings thus provide strong judicial support for the complex settlement rule described by Walters.

296. *Supra*, note 185. This case is treated as the leading case in Canada respecting application of the doctrine of continuity to Aboriginal systems of law and Aboriginal jurisdictions, by B. Slattery, *Ancestral Lands, Alien Laws*, *supra*, note 61, at 14-15, and M. Walters, *supra*, note 41, at 379-385, 388-393. See also Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Supply and Services Canada, 1993), at 5-8, 19. (With respect to continuity of Aboriginal systems of law, see also K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 181, 182, and Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Intervenor Participation Program of the Royal Commission on Aboriginal Peoples* (Ottawa, March 31, 1994), 21-25.

In dispute was the validity of the marriage of a British settler and Cree person, performed under Cree law. The trial judge treated the territory in question as subject to British sovereignty as of the date of the marriage, 1803. Monk J. ruled that the French had acquired part of the area in question by settlement and subsequently ceded it to England, while the British had acquired other parts by settlement. Relying principally upon Marshall C.J.'s ruling

in *Worcester v. Georgia*, Monk J. held that regardless which area was the situs of the marriage, Cree law survived both the Crown's acquisition of the territory and reception of English law. The marriage was therefore held to be valid. Specifically, Monk J. held that had either area not been occupied by Aboriginal peoples when the European power in question acquired it by discovery and occupancy, the law of the parent state would simply have applied, but "this doctrine would apply only to newly discovered and uninhabited regions" (at 79). Because, in both cases, "the discoverers and first settlers found these wild regions occupied by numerous and powerful tribes of Indians; by aboriginal nations, who had been in possession of these countries for centuries", Monk J. ruled that the law of the European state applied within the trading posts and settlements, but Aboriginal "territorial rights, political organization... or ...laws or usages" were, "so far from being abolished", "left in full force, and were not even modified to the slightest degree, in regard to the civil rights of the natives" (*id.*). To the same effect, when considering the possible effect of the Hudson's Bay Charter of 1670, Monk J. stated, at 85:

"It is easy to conceive, in the case of *joint occupation* of extensive territories by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. History is full of such instances, and the dominions of the British Crown exhibit cases of that kind. The Charter did introduce the English law, but did not, at the same time ... abrogate the Indian laws and usages ... Their laws of marriage existed and exist under the sanction and protection of the Crown of England. [emphasis in original]"

The trial decision was affirmed by the Quebec Queen's Bench in *Johnstone v. Connolly*, 1 C.N.L.C. 151.

297. For listings of Canadian decisions affirming the continuity of Aboriginal customary law, many of which combine reliance upon *Connolly v. Woolrich* and its successors with reliance upon English common law's acknowledgement of local custom, see M. Walters, *supra*, note 41, at 384, and K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 181-182. Hall J. endorsed a rule of continuity of laws for settled and conquered territory in *Calder*, not limited to matters of property: see note 221, *supra*. The important related statements of the Supreme Court of Canada in *R. v. Sioui*, which involve both Aboriginal systems of law and jurisdiction, are noted, *infra*, notes 302, 304 and accompanying text.

Ambivalent support is present in the opinion of Lambert J.A. (dissenting) in *Delgamuukw*, *supra*, note 34. Lambert J.A. stated that "the laws of an occupied, organized but unconquered territory [should] remain in force when Sovereignty is asserted over the organized society already present in the territory": *supra*, note 271. Later in his reasons, reviewing the colonial law authorities, Lambert J.A. followed much the same rule (at 275):

"In my opinion the true distinction is between colonized lands where there was an organized society with its own customs having the force of laws before colonization, and colonized lands where there was no organized society and no customs having the force of laws before colonization. In the former case the customs having the force of laws were recognized by the colonizing power as continuing until changed by the colonizing power. In the latter case the laws of the colonizing power accompanied the settlers into the empty land."

Elsewhere, however, Lambert J.A. adopted a more circumscribed principle, subordinating Aboriginal custom, social organization and practice to English common law, subject to the unidentified protective effect of s. 35 of the *Constitution Act, 1982* (at 274-275):

"[In Aboriginal territory settled by settlers from common law jurisdictions] those settlers would carry with them, as amongst themselves, their common law relationships, but the rights and title of the indigenous people, and the social system of those indigenous people, would remain within the exclusive control of the indigenous people themselves.

If, either before or after the beginning of the process of settlement, Sovereignty was asserted by the

Crown, that Sovereignty would carry with it the power to make just laws for all the inhabitants of the land over which Sovereignty was asserted, but Sovereignty itself would not displace the existing rights and social systems of the indigenous people.

If sovereignty was asserted by the Crown, and either then or later the Crown adopted the common law as the law of the territory over which Sovereignty was claimed, then the common law itself recognized, adopted and affirmed the rights and titles of the indigenous people in relation to land and in relation to their own customs and practices for control of land and for control of their other rights except to the extent that their rights were inconsistent with the concept of Sovereignty itself, or inconsistent with laws clearly made applicable to the whole territory and all of its inhabitants, or with the principles of fundamental justice. That recognition, adoption and affirmation made those rights themselves part of the common law, carrying with those rights all the remedies and protection of the common law." [emphasis added]

Later, Lambert J.A. also stated that "[a]boriginal rights of self-government and self-regulation do not rest on 'laws'. They rest on the customs, traditions, and practices of the aboriginal people to the extent that those customs formed and form an integral part of their distinctive culture." (at 351)

298. According to M. Walters, the complex settlement interpretation "has a long history of academic support, although articulated in different ways by different commentators": *supra*, note 41, at 378-379. In addition to B. Slattery and K. McNeil, whose views are noted next, M. Walters includes among the commentators who recognize an intermediate category between the simple rules of conquest and settlement, G. Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories* (Doctoral Dissertation, Osgoode Hall Law School, 1981), at xxxvii; P. McHugh, *The Aboriginal Rights of the New Zealand Maori at Common Law* (Doctoral Dissertation, Cambridge University, 1987), at 157, and D. Elliot, "Aboriginal Title", in B. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (rev'd 1st ed.) (Ottawa: Carleton Univ. Press, 1989), at 59-60.

299. In a note to this statement, McNeil observes that the courts have "occasionally ... taken customary law into account in applying criminal law, especially with regard to sentencing": *infra*, at n 81. Not all commentators view criminal law as 'public' in this context. P. Hogg, for example, places criminal law within the ambit of the private laws Hogg treats as continuing in conquered or ceded colonies: *supra*, note 18, at 33.

300. *Common Law Aboriginal Title*, *supra*, note 11, at 181-182. By "inadequate", McNeil apparently means not fully self-enforcing, as where Aboriginal law might be lacking a remedy for seizure by a non-Aboriginal agent of Aboriginal lands, in which case English law remedies would be available. See McNeil's discussion at 182-183, *ibid*.

301. *Supra*, note 41, at 384.

302. "First Nations and the Constitution," *supra*, note 228, at 278-279. Later in this article (at 280-282), Slattery describes the right of self-government as consisting of "powers" (including "legislative powers") inherent in their origin, limited in their extent (i.e. limited to a "residue of the powers [Aboriginal communities] originally held as independent nations prior to European settlement"), and "supreme" in their exclusivity. Somewhat inconsistently with this latter view, Slattery posits that a federal statute relating to any matter within the legislative competence of Aboriginal governments takes precedence in the event of conflict with an Aboriginal law, provided the federal law complies with the trust obligations incorporated in s. 35 of the *Constitution Act, 1982* (*ibid.*, at 282-283).

The implied source of authority for Slattery's concept of Aboriginal self-government is continuing Aboriginal sovereignty: Slattery argues that the right of self-government "does not warrant a claim to complete sovereignty" but that within its sphere, Aboriginal authority is "supreme" (*ibid.*, at 281). In "Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, Slattery argues that Aboriginal peoples held "sovereign status and title to the territories they occupied at the time of European contact" (at 690), and that the body of intersocietal law developed since contact recognizes that Aboriginal peoples continue to possess "a residue of the sovereignty they once

a province (at 701).

In earlier formulations, Slattery described the continuity of Aboriginal powers and laws as follows:

"... the Crown, in offering its protection to such peoples, accepted that they would retain their lands, as well as their political and cultural institutions and customary laws, unless the terms of treaties ruled this out or legislation was enacted to the contrary. Native groups would retain a measure of internal autonomy, allowing them to govern their own affairs as they found convenient, subject to the overriding authority of the Crown in Parliament. The Crown assumed a general obligation to look out for their best interests - what the judges have described as a fiduciary or trust-like obligation. In return, native peoples were required to maintain allegiance to the Crown, to abide by her laws, and to keep the peace.

...

When the Crown gained sovereignty ..., colonial law dictated that the local customs of the native peoples would presumptively continue in force and be recognizable in the courts, except insofar as they were unconscionable or incompatible with the Crown's assertion of sovereignty. In this respect, the rule resembles that applied in conquered or ceded colonies, where the local law is held to remain in force in the absence of acts to the contrary. But the rule respecting native custom applies regardless of whether the territory is deemed to have been acquired by conquest, cession, peaceful settlement, or in some other way."

("Understanding Aboriginal Rights", *supra*, note 3, at 736, 738.)

303. See discussion in section 4.5.2 below.

304. *Supra*, note 169, at 1054, quoted by B. Slattery, *ibid.*, n 62.

305. See, for example, P. Hogg, *supra*, note 18, at 538, 28. M. Walters, who endorses the contrary premise that continuity of Aboriginal systems of law, jurisdiction, and rights of self-government are co-extensive, also entertains this argument, *supra*, note 41, at 388-393. See also B. Slattery's reference to continuity of "private laws" in his early formulation of the doctrine of continuity applicable to conquered territories, quoted, *supra*, note 221, and K. McNeil's comments on the applicability of English law of a "public" nature to Aboriginal peoples, in the passage quoted, *supra*, text accompanying note 300.

306. See, for example, P. Hogg, *supra*, note 18, at 538 (In s. 8 of the *Quebec Act, 1774*, "which restored the French civil law as the private law of the conquered colony of Quebec", the phrase 'property and civil rights' "meant the whole body of law governing relationships between individuals - the body of law that did not need to be supplanted by the conquest of a foreign power").

307. *Aboriginal Self-Government in Canada*, *supra*, note 223, at 51-57. Relying upon *Amodu Tijani*, *supra*, note 48, related commonwealth cases, and also the Supreme Court of Canada decision in *Guerin*, *supra*, note 47, Crawford argued that the "doctrine of acquired rights ... clearly applies only to rights of a private law or proprietary kind."

As noted above, Crawford presumed that the "substantially unfettered" sovereignty which he understood *Amodu Tijani* and other authorities to attribute to the Crown in any colony, precludes any Aboriginal right of self-government. Crawford recognized that the affirmation of inherent tribal sovereignty in *Worcester v. Georgia* is discordant with this presumption. It was in answer to his own rhetorical question - how can the Marshall decisions be reconciled with this "principle"? (at 57) - that Crawford argued that the Marshall rulings depend upon the doctrine of recognition. That view has been criticized above. A further comment on Crawford's reliance upon *Guerin* in this context is necessary. It might well be possible to read Dickson J.'s reasons in *Guerin* (which rely upon both *Johnson v. M'Intosh* and *Worcester v. Georgia*, in addition to *Amodu v. Tijani*, for the proposition that

pre-existing title survives a change in sovereignty), as not being "concerned with any issue relating to self-government" (Crawford, at 51). To the extent this were possible, however, *Guerin* would not necessarily support Crawford's proposition that "the content of native title ... does not extend to rights which are clearly of a public law character, such as the right to self-government would be" (at 55) if this is intended to suggest that *Guerin* precludes a conception of Aboriginal rights with public law dimensions. Even if it were accepted for the sake of argument that the Court would not have recognized a fiduciary duty upon the Crown in *Guerin* if the Crown were not acting in a private law context (an argument that *Sparrow, supra*, note 28, decided after Crawford wrote, would appear to defeat) this would not imply any restriction upon the governmental or quasi-'public' authority which the Court might be prepared to recognize as vesting in *Aboriginal peoples* by virtue of their Aboriginal rights. In other words, it is quite conceivable that Aboriginal rights involve public law and private law dimensions, and *Guerin* does not appear to preclude the attribution of quasi-'public' features even to Aboriginal proprietary interests.

308. Despite Wallace J.A.'s contrary view it is equally possible (though in the view taken here, clearly not sufficient) to conceptualize Aboriginal *land* rights as "private law rights". In *Mabo v. Queensland*, for example, Brennan J. emphasized the "private law" dimension of Aboriginal title when refuting the claim that acquisition of Crown sovereignty necessarily included ownership of land, to the exclusion of any surviving Aboriginal interest. Brennan J. pointed out, *supra*, note 34, at 30, that "Sir John Salmond distinguished the acquisition of territory from the Crown's acquisition of property:

'The first conception pertains to the domain of public law, the second to that of private law. Territory is the subject matter of the right of sovereignty or *imperium* while property is the subject-matter of the right of ownership or *dominium*. These two rights may or may not co-exist in the Crown in respect of the same area. Land may be held by the Crown as territory but not as property, or as property but not as territory, or in both rights at the same time....'

The general rule respecting ownership of land, as distinguished from title to territory, said Brennan J., was that "ownership could not be acquired by occupying land that was already occupied by another" (at 31). Therefore, Brennan J. concluded if the "hypothesis that there was nobody in occupation" of Aboriginal territory be rejected, "the notion that sovereignty carried ownership in its wake must be rejected too" (*id.*).

Brennan J.'s reasons for holding that the Crown did not acquire absolute ownership with sovereignty do not necessarily imply that the Crown acquired absolute sovereignty. In fact, as pointed out above, the original rule for acquiring territorial sovereignty by occupation was the same rule Brennan J. attributed to ownership - that such a thing could not be acquired by the occupation of occupied land. The need to recognize significant limitations upon the Crown sovereignty acquired by settlement arises directly from the consequences which flowed from abandoning that rule. It should also be noted that, as B. Slattery has emphasized, colonization entailed forces and relationships to which neither British nor Aboriginal internal systems of law could possibly respond by themselves. The basis of entitlement underlying Aboriginal title, for example, cannot be a particular rule of particular, 'private' Aboriginal laws, but must surely be possession, understood as a principle respected by an intersocietal body of law. See B. Slattery, "Understanding Aboriginal Rights", *supra*, note 4, at 744-745, and "Aboriginal Sovereignty and Imperial Claims", *supra*, note 3, at 691-692, 701. Self-determination - the overarching principle upon which all Aboriginal rights are based - must similarly be understood as an intersocietal norm.

309. "At common law, custom is a matter of fact which cannot be taken account of judicially until proved": K.McNeil, "A Question of Title", *supra*, note 213, at 93, n 15.

310. This appears to have been Wallace J.A.'s point when he conceded (assuming a 'simple' regime) that in derivatively acquired territories, native law systems "may have retained the capacity to create new rights and customs ... justiciable in the courts, and binding upon all inhabitants", *supra*, note 34, at 211.

311. This follows from the common law rule that custom is a question of fact. The common law does make the courts to refuse to enforce a custom inconsistent with certain common law norms: see, for example, K. McNeil's proviso that Aboriginal laws affirmed under colonial law must not be immoral or unconscionable by English standards: *supra*, text accompanying note 300. But in exercising this mandate the courts are refusing to enforce a custom, not redefining it.

312. P. Hogg's account, for example, depends expressly and exclusively upon the 'simple' rule of conquest examined above, as did B. Slattery's early reference, noted, *supra*, note 221. Hogg warns, however, that the simple rules of conquest and settlement "were not as useful as they might appear" (*supra*, note 18, at 28):

"In the first place, they were often applied in disregard of the existence of the aboriginal peoples, who were in possession of much of North America before the arrival of the Europeans. Their presence, supported by their considerable military capability, may explain the survival of aboriginal customary law in parts of North America. It seems clear that all aboriginal customary law did not disappear at the time of European settlement, as the rule of reception for a settled colony might imply."

In footnotes, Hogg attributes the survival of Aboriginal customary law in the jurisprudence to *Connolly v. Woolrich*, which, as pointed out, *supra*, note 296, affirms the continuance of Aboriginal jurisdictions (including "political institutions" and rights of "self-government") in addition to laws. Hogg declines to pursue "the complex issue of the survival of aboriginal customary law", referring the reader, *ibid.*, to, among other sources, B. Slattery's critique of "the Eurocentric assumptions of international law and the domestic law of reception" in "Aboriginal Sovereignty and Imperial Claims", *supra*, note 4. As does *Connolly v. Woolrich*, Slattery's argument supports a strong doctrine of continuity affirming Aboriginal jurisdictions.

313. J. Crawford, *supra*, note 223, at 55-56, argued that non-continuance of public law rights is a "reflex of basic rules of the common law relating to the position of the Crown in newly-acquired territories", regardless how they are acquired. Crawford argued (*id.*) that "[s]ubject to any contrary statutory provision, the Crown when it acquires a new territory assumes something analogous to an independent or original sovereignty over that territory, a sovereignty which is substantially unfettered until representative institutions are established for the territory."

This "reflex", it should be noted, does not itself suggest any justification for the absolute powers it attributes to the Crown. In terms of positive common law rules, its only foundation is the act of state doctrine, which simply permits the Crown to seize power arbitrarily, outside the rule of law. As we have seen part 1 above, the act of state doctrine itself does not determine that the sovereignty actually acquired by the Crown in any colony is absolute. 19th century positivism, upon which such an assumption is based, became prominent *after* Crown sovereignty was asserted in much of Canada.

314. See M. Walters, *supra*, note 41, at 390-393. Walters, who does not accept the distinction, does not claim to explore its possible justifications fully. Walters also argues that if some version of the distinction were adopted, only Aboriginal 'public' laws inconsistent with Crown sovereignty might be affected; that the different nature of Aboriginal legal cultures might result in no Aboriginal 'public' laws being affected; and that Aboriginal 'public laws' ought to have survived at least the interim period during which the British common law applied but colonial governmental regimes were not yet established.

315. Text following note 401, *infra*.

316. As we have seen, these authorities clearly recognize the continuity of rights of self-government, including jurisdictions and the capacity to maintain political institutions with cognizable status. For a persuasive rebuttal to B. Clark's suggestion in *Native Liberty, Crown Sovereignty* (Montreal and Kingston: McGill-Queen's Univ. Press, 1990), 17-19, that the appeal court limited the principle of continuity upheld in *Connolly v. Woolrich* to matters of private law, see M. Walters, *ibid.*, at 388-390.

317. C. Wilkinson, *supra*, note 116, at 62. The full statement is: "tribal powers are defined initially by looking to the entire store of authority possessed by any nation, not by searching for federal statutes establishing tribal prerogatives". Wilkinson is describing in this passage one of several basic implications of the doctrine which he refers to as the "Marshall-Cohen" view of Aboriginal rights, founded principally upon *Worcester v. Georgia*.

318. 118 U.S. 375 (1886). In a judgement written not long after many of the western tribes had been driven from their territories by the United States Army, the Court said:

"These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. ... Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so lately due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. ... The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection. ... It must exist in that government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

(At 384-385, as excerpted by M. Ball, *supra*, note 63, at 52, original emphasis.) M. Ball traces the modern assertion of Congress' "superior position over the tribes" to this statement: *ibid.*, at 50, quoting from *Merrion v. Jicarilla Apache Tribe* 435 U.S. 130, 155 (1980).

The racially discriminatory origins of this doctrine are traced in Note, "Constitutional Law: Congressional Plenary Power over Indian Affairs - A Doctrine Rooted in Prejudice", 10 Am. Indian L. Rev. 117 (1982) and Note, "Rethinking the Trust Doctrine in Federal Indian Law" 98 Harv. L. Rev. (1984). According to the latter note, *Kagama* was decided "[d]uring the period when the cultural theory of [federal trust] obligation held sway" (at 427):

"For almost forty years, from the late nineteenth to the early twentieth century, the Supreme Court expounded what may be called a 'cultural theory' of obligations. According to this view, the United States, as a 'superior and civilized' nation, had a duty to behave as 'a Christian people in their treatment of an ignorant and dependent race'. The Court's opinions emphasized the supposed primitivism of the Indians and reasoned that the United States consequently had an obligation to protect and care for them.

Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed by crude customs inherited from their ancestors, [pueblo Indians] are essentially a simple, uninformed, and inferior people.

... [A]s a superior and civilized nation [the United States has] the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders. ... "

The decisions quoted are *Beecher v. Weatherby*, one of the foundation cases for Judson J.'s theory of a Crown power of unilateral extinguishment in *Calder* (see note 82, *supra*, and accompanying text) and *United States v. Sandoval* 231 U.S. 28 (1913). As the Harvard note observes, *Sandoval*'s assessment of Indians as an "essentially inferior people" "indicates a virulently racist attitude" (at 426). The note rejects the cultural theory of obligation on two grounds (at 426-427, citations omitted):

"First, the theory is inconsistent with widely accepted tenets of contemporary morality. It is grounded on both cultural intolerance for nonwhite institutions and the conviction that Indians are inherently inferior to Americans of European descent. Such attitudes contradict the principle, broadly reflected in American law, that all individuals should be accorded equal respect regardless of race.

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"First, the theory is inconsistent with widely accepted tenets of contemporary morality. It is grounded on both cultural intolerance for nonwhite institutions and the conviction that Indians are inherently inferior to Americans of European descent. Such attitudes contradict the principle, broadly reflected in American law, that all individuals should be accorded equal respect regardless of race.

Second, the theory's prescriptive implications are vague. Standing alone, the assertion that a "superior" culture must "care" for an "inferior" one is so vague that it could justify actions by the allegedly higher culture that would as likely destroy the inferior one as support, educate, or protect it. The danger is not simply hypothetical. [Examples from Supreme Court rulings omitted.] A theory of 'trust' that permits, indeed invites, such oppression of the 'beneficiary' is plainly a misnomer, and a cruel one."

319. This is not to suggest that the federal trust obligation regulating Congress' exercise of its constitutional authority did not originate in the Marshall Court decisions, but only that the extraconstitutional plenary power declared in *Kagama* and related cases did not. It is submitted that Marshall C.J.'s "guardian" "ward" description of the Crown Aboriginal relationship in *Cherokee Nation*, *supra*, note 110, at 17, refers to the intraconstitutional trust obligation, though in terms poorly suited to the trustee's standard of care. (*Cherokee Nation* also held that the Cherokee nation is "a distinct political society, separated from others, capable of managing its own affairs and [of] governing itself": *ibid.*, at 16. For criticism of a dependency-based standard of care, see B. Slattery, "First Nations and the Constitution", *supra*, note 228, at 264, n 15, 275, 289-290; Note, "Rethinking the Trust Doctrine in Federal Indian Law", *supra*, note 320, esp. 426-429; R. Clinton, "Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government" 33 Stan. L. Rev. 979 (1981), esp. 1002; and M. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law", (1993) 27 U.B.C. L. Rev. 19, at 30-32, 49.)

The commentaries whose view is adopted here are M. Ball, *supra*, note 63, at 46-49; W. Walters, *supra*, note 116, esp. 131, 141-143, n. 66; R. Clinton, *ibid.*, at 1001-1002; R. Kronowitz et al., *supra*, note 63, at 514-529 (acknowledging that *Johnson's dicta* justifying conquest on the basis of tribal inferiority have been relied upon in subsequent rulings propounding existence of a plenary power, but arguing that *Cherokee Nation* and *Worcester* discarded this rationale and rejected the imposition of such a power); and S. McSloy, *supra*, note 110, at 237-238 (esp. note 153) and 244-247.

A number of commentators have taken positions to the contrary, arguing that the basis for the untrammelled plenary power now established in the American jurisprudence is indistinguishable from or at least not independent of the Marshall Court's idea of a federal trust obligation or a broader Congressional power. See, for example, J. Casey, "Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty", 79 Cornell L. Rev. 404 (1994), at 410-411; N. Newton, "Federal Power Over Indians", *supra*, note 63, at 201-204 (tracing from *Worcester*, emergence of the claim to unlimited foreign affairs authority over Indians, but noting that this rationale is inconsistent with the "domestic" element of Marshall C.J.'s concept of Aboriginal nationhood, and that *Kagama* contradicted *Worcester's* holding that the protectorate relationship does *not* involve protected nations "submitting as subjects to the laws of a master") and 207-210 (tracing to *Johnson* a property-based concept of the plenary power, but noting that this concept did not emerge without distorting *Johnson's* concept of the doctrine of discovery); D. Williams, "Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law", 80 Virginia L. Rev. 403 (1994), at 410-415 (noting, however, that he has argued differently elsewhere, and treating *Worcester* as either inconsistent with this view, or consistent only with a non-plenary version of an intrusive Congressional power); P. Frickey, *supra*, note 94, esp. at 395 (treating *Worcester* as having implicitly endorsed and thus settled the existence of a plenary power to implement colonization, subject to structural and procedural constraints supervised by the courts).

320. Further comment on the reasons of Brennan J. in *Mabo v. Queensland*, *supra*, note 34, is appropriate here. In note 308, *supra*, it was seen that Brennan J. found support for the doctrine of continuity in the distinction to be made between the "private law" concept of ownership, and the "public law" concept of territorial sovereignty. In that part of his reasons Brennan J. held that the Crown had acquired sovereignty over the territory, but not ownership of its occupied lands. In note 276, *supra*, however, we also observed Brennan J.'s discomfort with the theory by which the Crown is said to have acquired territorial sovereignty in Australia, which Brennan J. criticized in virtually identical terms to those he applied to the claim that the Crown becomes absolute owner of lands in settled colonies. Brennan J. found it unnecessary to resolve this tension in this part of his analysis, and did not

attempt to do so, because the claim in issue was limited to Aboriginal ownership of land. Upon turning next to the issue of the Crown's power to extinguish Aboriginal title following acquisition of sovereignty, however, Brennan J. did adopt a virtually absolute concept of the sovereignty the Crown had acquired, taking as his founding premise that "Sovereignty carries the power to create and extinguish private rights and interests in land within the Sovereign's territory" (at 46). Here Brennan J. apparently endorsed the post-acquisition act of state rationale for extinguishment of Aboriginal title, which this paper argues is invalid. (See text following note 143, *supra*.)

It is submitted that Brennan J.'s conceptualization in these two parts of his reasons of ownership and sovereignty as entitlements that must be held exclusively by one party or another, was detrimental to his analysis. Such an understanding is incapable of meeting the pluralistic challenge taken up by the principle of continuity. Separately, in his conclusions respecting the nature of Aboriginal title, Brennan J. confronted the fact that although the Crown did not acquire ownership upon acquiring territorial sovereignty, Aboriginal title to land could not be absolute either. In that analysis Brennan J. endorsed a pluralistic (if not sufficiently reciprocal) approach to the sharing of land by Aboriginal peoples, holding that Crown and Aboriginal proprietary interests in land coexist (at 35). Unfortunately the opinion does not carry forward such an approach in its treatment of Crown sovereignty. For concurring criticism by Australian commentators, see note 788, *infra*.

321. J. Andrews, *supra*, note 8, at 412, paraphrasing De Visscher, *Theory and Reality in International Law*, trans. P.E. Corbett, 1957, at 52. Andrews was remarking in this comment on the arbitrary character of 19th century international law rules for determining eligibility for admission to the family of recognized sovereign states. Andrews' criticism of radically positivistic legal theory applies equally, it is submitted, to the doctrine reviewed in this section, which arbitrarily excludes Aboriginal sovereignty from colonial law's class of recognized "rights".

322. The first modern policy stated that "[i]n essence, these claims relate to the loss of traditional use and occupancy of lands in certain parts of Canada where Indian title was never extinguished by treaty or superseded by law": *Statement made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People*, (Ottawa, Indian and Northern Affairs Canada, August 8, 1973). This position was reaffirmed in *Comprehensive Native Land Claims in Canada* (Ottawa: Indian Affairs and Northern Development, 1977), at 1, quoted by B. Clark, *supra*, note 316, at 167; *In All Fairness* (Ottawa: Indian Affairs and Northern Development, 1981), at 27 (affirming the continuation of unamended policy generally); and *Comprehensive Land Claims Policy* (Ottawa: Indian Affairs and Northern Development, 1987), at 7 (affirming unamended policy). The policy was publicly amended in 1993: see note 341, *infra*, and accompanying text.

323. *Supra*, note 316, at 160.

324. B. Clark, for example, notes that Ontario's *Statutes Law Revision Act, 1868-69* classified certain enactments as "repealed and superseded", and others as "repealed as obsolete": *supra*, note 316, at 165.

325. B. Clark, *supra*, note 316, at 33. In a related context, Mahoney J. contemplated the precedence of English law introduced by sovereign authority, over Aboriginal law, when he held in *Hamlet of Baker Lake v. Min. of Indian Affairs* that the Hudson's Bay Charter of 1670 "did not purport to supersede with English law, the laws by which the aborigines governed themselves": (1979) 107 D.L.R. (3d) 513 (F.C.T.D.), at 588.

326. B. Clark notes, for example, that Chancellor Boyd in *St. Catherine's Milling & Lumber Co. v. The Queen* (1885) 10 O.R. 196 (Ont. Ch.), at 227, treated the issue of precedence between the *Royal Proclamation of 1763* and the *Quebec Act, 1774* as a function of supersession of the earlier statute by its successor: *supra*, note 316, at 165.

327. According to *The Concise Oxford Dictionary*, 8th ed., R. Allen, ed. (Oxford: Clarendon Press, 1990), "supersede" means "1 a adopt or appoint another thing in place of. b set aside; cease to employ. 2 (of a person or thing) take the place of." : 8th ed. (Oxford: Oxford University Press, 1990). It derives from the Latin

supersedere, meaning "be superior to" (*id.*).

328. R. Dworkin describes the analogous status of moral rights inversely: "[r]ights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole": "Rights as Trumps", in J. Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984), at 153. If moral rights trump ordinary justifications, their displacement requires particular justification.

329. In *Laidlaw v. Municipality of Metropolitan Toronto*, [1978] 2 S.C.R. 736, for example, in deciding the effect of an expropriation statute on a property owner's entitlement to compensation, the Supreme Court stated that "[a] remedial statute should not be interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute" (at 748). See generally P. Coté, *The Interpretation of Legislation in Canada* (Cowansville: Les Editions Yvon Blais Inc., 1984), at 375-380.

330. See the passage from the trial judgement in *Delgamuukw*, quoted, *infra*, text accompanying note 353, and M. Walters' comment, *supra*, text accompanying note 188.

331. *Supra*, note 47, at 167. The Report of the Task Force To Review Comprehensive Claims Policy states that the concept of "superseded by law" in federal claims policy "was drawn from the judgement of Mr. Justice Judson" in *Calder: Living Treaties: Lasting Agreements* (Ottawa: Indian Affairs and Northern Development, 1985), at 44. In full, Judson J. stated that "[i]n my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation": *ibid.*

332. Section 1.4 above examines the different root of authority for the Crown's action which Judson J.'s 'test' for extinguishment appears to presume - an extra-legal power in the nature of a Crown prerogative.

333. According to Judson J. in *Calder*, for example, the enactments in question revealed a "unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to 'aboriginal title'" (*supra*, note 47, at 160, quoting with approval from the trial judgement).

334. *Supra*, note 47, at 158-159 (per Judson J.).

335. *Supra*, note 47, at 167 (per Judson J.).

336. The federal government's reliance upon this theory is exemplified in a case described by the Commissioner on Indian Claims (an office discontinued in 1977). According to the Commissioner's report, the federal government rejected a land claim advanced by the Tobique Band in 1974 on the ground, among others, that there is "considerable doubt whether there was ever any need for a surrender since the Government of New Brunswick had opened up the lands in question for settlement prior to Confederation, under the authority of statutes of 1844 and 1854" (Commissioner's summary): *Commissioner on Indian Claims: A Report: Statements and Submissions* (Ottawa: Minister of Supply and Services, March, 1977), at 33.

According to M. Jackson, the federal government has recently taken the position in British Columbia that in localities such as the city of Vancouver "in which, as a result of extensive alienations, First Nations have been effectively, if not legally dispossessed from all but those areas established as Indian Reserves ... any aboriginal title to the land has been 'superseded by law', which seems to mean that they are extinguished": *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, A Report Prepared for the Royal Commission on Aboriginal Peoples, February, 1994, at 107.

337. *Supra*, note 141. The Court said:

"The respondent's argument that the treaty of 1752 has been extinguished is based on *R. v. Isaac*, *supra*, at pp. 476, 479; *Calder et al. v. A.G. B.C.* (1973), 34 D.L.R. (3d) 145 at p. 151; *United States v. Sante Fe Pacific Ry. Co.* (1941), 314 U.S. 339 at p. 347; *Johnson and Grahams Lessee v. McIntosh* (1823), 21 U.S. 543 at pp. 586-8, and *Worcester v. Georgia* (1832), 31 U.S. 515. The respondent submits that absolute title in the land covered by the treaty lies with the Crown and, therefore, the Crown has the right to extinguish any Indian rights in such lands. The respondent further submits, based on *Isaac*, that the Crown, through occupancy by the white man under Crown grant or lease, has, in effect, extinguished native rights in Nova Scotia in territory situated outside of reserve lands. ...

In my opinion, it is not necessary to come to a final decision on the respondent's argument. Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises. As Douglas J. said in *United States v. Sante Fe Pacific Ry. Co.*, *supra*, at p. 354, 'extinguishment cannot be lightly implied'."

338. Task Force to Review Comprehensive Claims Policy, *supra*, note 331, at 45. The Task Force noted that Judson J.'s test for extinguishment had not commanded majority support in *Calder*, and stated that with the Supreme Court's ruling in *Simon*, "[t]he proposition that aboriginal title can be implicitly superseded by law lacks a solid legal basis."

339. *Ibid.*

340. The Court stated, *supra*, note 28, at 1098-1099:

"In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in *Baker Lake*, *supra*, at p. 568:

'Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other aboriginal right.'

See also *Attorney-General for Ontario v. Bear Island Foundation*, *supra*, at pp. 439-40. That in Judson J.'s view was what occurred in *Calder*, *supra*, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated (at p. 404) that 'the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain''. '[Emphasis by the Court in *Sparrow*] The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."

341. According to the *Federal Policy for the Settlement of Native Claims* (Ottawa: Dept. of Indian and Northern Affairs, March, 1993), at 6,

"[t]he application of the claims acceptance criteria derived from *Baker Lake* has been amended in response to the 1990 Supreme Court judgement in the *Sparrow* case. This decision established a test for the unilateral ending of Aboriginal rights by lawful means. In order to establish that such lawful elimination has occurred, it must be demonstrated that the Crown exercised a clear and plain intention to do so. In response to the court's guidance, the federal government has undertaken a review of claims which have been rejected on the basis of supersession by law to determine if the *Sparrow* test leads to different conclusions

concerning acceptability" (at 6). New claims submissions are being reviewed in accordance with the *Sparrow* decision."

This statement appears to announce an unspecified amendment of the 'supersession by law' criterion, without indicating which elements of the former criterion, if any, remain in use.

342. P. Hutchins, D. Soroka, and P. Dionne provide the following account of the Department's practice before and after *Sparrow*:

"Supersession by law has been defined by a federal representative as including:

'[L]egislation by the federal government directly or indirectly extinguishing or circumscribing aboriginal rights. It also includes valid provincial legislation and acts of the provincial governments, such as patents of land, resource regulation and restrictions on hunting, fishing or other aboriginal activities which have the effect of restricting or extinguishing such aboriginal rights. This interpretation derives from the Judson thesis in the *Calder Case*. While this issue has not been conclusively determined by the Supreme Court of Canada, subsequent decisions have tended to support the validity of legislation imposing this type of restriction.' [Letter from the Director General Comprehensive Claims to legal counsel for the Sechelt Band, June 20, 1988. Hutchins et al. note that the 'claim' rejected on this basis was accepted for negotiation after *Sparrow* was decided, and that subsequently Canada agreed to negotiate with all British Columbia bands.]

Now that the Supreme Court had conclusively determined that this issue contrary to the 'Judson thesis' and contrary to the position adopted in this definition of 'superseded by law', one would expect that the federal government would have revised the concept of 'supersession by law'... However, as of the time of completion of this paper, the federal government still considers supersession by law as a factor in reviewing comprehensive claims. [Citing a telephone conversation with a representative at Program Development and Policy, Comprehensive Claims Branch of Indian and Northern Affairs Canada, November 4, 1993].

According to the representative at the Comprehensive Claims Branch, the *Sparrow* decision is taken into account, but the policy of supersession by law itself has not changed. Thus claims which the federal government believes have been superseded by legislation are not negotiated. Legal analyses of the *Sparrow* decision and directives issued pursuant to it have been circulated in the department. However, when asked whether the policy had been changed by a public or internal policy document on the *Sparrow* decision, the representative said that to the best of her knowledge it had not."

(*Renouncing The Old Rules Of The Game: Crown Conduct Within The Context Of Litigation Involving Aboriginal Peoples*, Draft Report, prepared for the Royal Commission on Aboriginal Peoples, November 15, 1993).

343. See text following note 202, *supra*.

344. McEachern C.J. equated the plaintiffs' claim to jurisdiction, with a claim to Aboriginal sovereignty: *supra*, note 168, at 369. In the Court of Appeal Wallace J.A. agreed with this characterization: *supra*, note 34, at 223. Macfarlane J.A. confined himself to the terms "jurisdiction" (adopted in the statement of claim), "law-making competence", and "self-government". Except where the context warrants separate treatment, the term 'sovereignty' is used in part 3 of this paper to include jurisdiction.

345. See note 351, *infra*.

346. Accordingly, for Aboriginal jurisdiction and sovereignty, as for all Aboriginal rights, McEachern C.J. accepted that the Crown's intention to extinguish must be clear and plain, but asserted (*supra*, note 168, at 407) that "[i]ntention, in this context, must be a matter of implication":

"... intention in this context must relate not to a specific or precise state of mind on the part of the historical actors, but rather to the consequences they intended for their actions. In other words, the question is not did the Crown through its officers specifically address the question of aboriginal rights, but rather did they clearly and plainly intend to create a legal regime from which it is necessary to infer that aboriginal rights were in fact extinguished."

347. "I do not find it necessary to consider or decide whether the establishment of the Colony of British Columbia, for example, should be classified as a displacement of one sovereignty by a different one which the law recognizes, or whether the legal arrangements which were put in place during the colonial period amounted to an extinguishment of the earlier sovereignty. I tend to think the former more correctly describes the historical reality...": *ibid.*, at 407.

348. *Ibid.* McEachern C.J. continued: "[t]his, of course, was accomplished by the government arrangements the Crown put in place during the colonial period which were clearly intended to apply throughout the colony and to bind everyone who lived there. It is inconceivable in my view, that another form of government could exist in the colony after the Crown imposed English law, appointed a Governor with power to legislate, took title to all the land of the colony and set up procedures to govern it by a Governor and Legislative Council under the authority of the Crown."

This list of extinguishing acts is virtually identical to the list of acts incidental to "establishment of the Colony of British Columbia," given in McEachern C.J.'s description of the displacement process in Part 14 of his judgement (quoted below, text following note 350). Nevertheless, in this part of his reasons McEachern C.J. apparently intended that displacement must have resulted, at least notionally, from a prior legal event. According to his displacement theory "aboriginal sovereignty did not survive the assertion of British sovereignty" (text accompanying note 349, *infra*): extinguishment, on the other hand, happened to "any aboriginal jurisdiction or sovereignty which survived the assertion of British sovereignty". A distinction might be implied here between "the Crown ... establishing the colony", and the virtually concurrent exercise of the sovereignty established, but this is not made clear.

McEachern C.J. added next that enactment of the *Constitution Act, 1867* and the Colony's adherence to that Act in 1871 "also clearly and plainly extinguished any residual aboriginal legislative or other jurisdiction, if any, which might have existed in the colonial period" (at 407-408).

349. *Ibid.*, at 407.

350. *Ibid.*

351. McEachern C.J. added here that "[t]his, in my view, is what the Court meant in *Sparrow* when it said... '...there was from the outset never any doubt that sovereignty and legislative power and indeed the underlying title to such lands vested in the Crown...' ". The Supreme Court's statement, however, does not necessarily confirm or add to McEachern C.J.'s 'displacement' analysis. It does not, in particular, hold that the Crown's sovereignty in Canada is of an absolute nature, or that Aboriginal sovereignty was automatically displaced, or superseded, by the Crown's acquisition of sovereignty. The Supreme Court appears to have affirmed by this statement solely the proposition upon which Wallace J.A. relied in the Court of Appeal, that the Crown possesses sovereignty, legislative jurisdiction and underlying title to traditional Aboriginal lands in Canada: see note 75, *supra*.

352. It should be noted that this is the passage from the Privy Council's reasons subsequently adjudged racially discriminatory by Brennan J. in *Mabo v. Queensland*: see note 591, *infra*.

353. *Supra*, note 168, at 384-386. McEachern C.J. then added that the *Constitution Act, 1867* exhaustively distributed legislative jurisdiction between the federal and provincial levels of government; that the jurisprudence shows that "aboriginal interests existed only at the pleasure of the Crown"; that "[r]ights which are subject to extinguishment can hardly be absolute, as jurisdiction and ownership would be expected to be"; that even after enactment of s. 35 of the *Constitution Act, 1982*, *Sparrow* had confirmed that "Federal legislative powers continue", and that "[i]f there was aboriginal sovereignty it would be valid against federal as well as provincial jurisdiction, but it clearly is not" (at 386). In his conclusions to this part of his reasons, at 386-387, McEachern C.J. stated:

"After much consideration, I am driven to find that jurisdiction and sovereignty are such absolute concepts that there is no half-way house. No Court has authority to make grants of constitutional jurisdiction in the face of such clear and comprehensive statutory and constitutional provisions. The very fact that the plaintiffs recognize the underlying title of the Crown precludes them from denying the sovereignty that created such title.

... [N]either this nor any Court has the jurisdiction to undo the establishment of the Colony, Confederation, or the constitutional arrangements which are now in place. Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any Court to award.

...

They [i.e. "some aboriginal persons"] often refer to the fact that they were never conquered by military force. With respect, that is not a relevant consideration at this late date if it ever was. Similarly, the absence of treaties does not change the fact that Canadian and British Columbian sovereignty is a legal reality recognized by both the law of nations and by this Court.

The plaintiffs must understand that Canada and the provinces, as a matter of law, are sovereign, each in their own jurisdictions, which makes it impossible for aboriginal peoples unilaterally to achieve the independent or separate status some of them seek. In the language of the street, and in the contemplation of the law, the plaintiffs are subject to the same Constitution as everyone else. The Constitution can only be changed in the manner provided by the Constitution itself."

354. In judgements written by Macfarlane J.A. (with whom Taggart J.A. concurred) and Wallace J.A. (agreeing with the "reasons and ... conclusions" of Macfarlane J.A., and approaching the issues "from a somewhat different perspective", attaching "greater significance to certain factors": *supra*, note 34, at 183).

Hutcheon J.A., dissenting in part, held, in relation to the claim for a declaration of Aboriginal jurisdiction, that the plaintiffs have an unextinguished right of self-regulation, exercisable through their own institutions, to preserve and enhance their social, political, cultural, linguistic and spiritual identity, which should not be described in terms of "laws" and "self-government" because those terms convey "the notion that the terms were enforceable by some state authority", and that (quoting a proposal of the plaintiffs) the task of defining with greater specificity "the areas and terms under which the Appellants and the federal and provincial governments will exercise jurisdiction in respect of the appellants, their institutions and laws" should be left to negotiation (at 394-397). (Hutcheon J.A. also held that the plaintiffs accept that provincial laws of general application apply to them, subject to s. 88 of the *Indian Act* (at 397).) The related reasons of Lambert J.A., dissenting (at 359-364; 372-374; 377-378), may be summarized as follows:

a) the trial judge had been wrong to treat the plaintiff's claim as one to sovereignty, or plenary or overriding law-making power (see also, in particular, the excerpts quoted in note 299, *supra*); accordingly, arguments based on the division of legislative powers between Canada and the provinces under the

Constitution Act, 1867, have no relevance; the claim involved, instead, a measure of self-government and self-regulation, including continuation of related customary laws;

b) upon assertion of Crown sovereignty in 1846 the plaintiffs held an Aboriginal right of self-government and self-regulation whose origin and nature is the same as that of other Aboriginal rights, i.e., deriving from distinctive custom, tradition and practice, but adopted by and incorporated in the common law;

c) assertion of Crown sovereignty (and introduction of the common law between 1846 and 1858) would have had diminishing consequences on that right as follows: i) any rights relating to sovereignty or (in other words) inconsistent with British sovereignty, including rights to make war and to impose Aboriginal customs on the settlers, would have been implicitly extinguished; ii) rights necessarily repugnant to natural justice, equity and good conscience would not have been absorbed by the common law; iii) rights inconsistent with the common law, where that law was not from local circumstances inapplicable, might have been implicitly extinguished by the common law;

d) the incorporated Aboriginal right of self-government and self-regulation is consistent with Crown sovereignty, and the functions entailed will "in large measure be supplementary to and entirely consistent with the overall functions" carried out by governments representing the Crown;

e) between 1846 and 1982 the right may have been subject to specific extinguishment of specific rights by the clear and plain extinguishing intention of the sovereign power, legislatively expressed, through the legislation itself or acts authorized by the legislation, provided clear and plain intention to extinguish was contained in the legislation;

f) the unextinguished right is recognized and affirmed by s. 35 of the *Constitution Act, 1982*, such that distinctive customary laws of self-government and self-regulation are now constitutionally protected; in particular, there may be some functions of Aboriginal self-government and self-regulation which "supplant and prevail over general laws which are inconsistent" with the distinctive cultural practices, traditions and customs upon which such self-government functions rest;

g) a declaration to the effect of b), c) and e) should issue, stating also i) that the present Aboriginal rights of self-government and self-regulation are exercisable through the plaintiffs' own institutions to preserve and enhance their identity, and ii) that in relation to Aboriginal title, such rights include certain specified rights in relation to that title.

355. For the relevant reasons of Wallace J.A., see note 75, *supra*. Wallace J.A. also agreed with the trial judge, alternatively, that the exhaustive division of powers in the *Constitution Act, 1867* effected a direct extinguishment of such capacities (*supra*, note 34, at 225).

For Macfarlane J.A. this was the sole ground for adjudging Aboriginal sovereignty and jurisdiction nullified. Macfarlane J.A. also found that the 1867 Act divided jurisdiction exhaustively, but treated that nullifying effect as an instance of supersession rather than extinguishment *per se*.

Macfarlane J.A. also noted (at 152) but apparently neither accepted nor rejected the trial judge's further alternative view that assertion of Crown sovereignty in the colonial period extinguished any undisplaced Aboriginal sovereignty. Macfarlane J.A. approved, in particular, of the trial judge's view (as summarized by Macfarlane J.A.) that "when the Crown imposed English law on all the inhabitants of the colony and, in particular, when British Columbia had entered Confederation, the Indians became subject to the legislative authorities in Canada and their laws" (*id.*). The excerpt from the trial judgement thus summarized related, in the trial judge's scheme, to direct extinguishment of Aboriginal sovereignty, as distinct from its displacement. Macfarlane J.A. did not make this distinction, and instead treated the trial judge's opinion as illustrating his own view that "on the date that the

legislative power of the Sovereign was imposed ... any vestige of aboriginal law-making competence was superseded" (*id.*).

356. See note 370, *infra*.

357. Ryder's analysis does not differentiate between different rationales or mechanisms of extinguishment, and thus does not distinguish between supersession, and "extinguishment" in the direct sense in which, for example, McEachern C.J. and Wallace J.A. used the latter term to describe the effect of the *British North America Act*.

358. Immediately after the statement just quoted by Ryder, Macfarlane J.A. said that "[t]his likely occurred when the mainland colony was founded and became a territory under the jurisdiction of the Imperial Parliament in 1858": *supra*, note 34, at 152.

Macfarlane J.A. also repeated, apparently with tacit agreement, the trial judge's conclusion that "aboriginal jurisdiction did not survive the assertion of British sovereignty": *supra*, note 34, at 151. He did not discuss the 'acquisition' of sovereignty *per se*, but in earlier sections, had used the term 'assertion' equivalently. See pp. 124-125, and 156. Macfarlane J.A. dated the assertion of Crown sovereignty generally as 1846 (at 125).

359. "Supersession" was the particular effect of Confederation contemplated by Macfarlane J.A.: "[in 1871] [a]ny form of Indian self-government, then existing, was superseded by the *Constitution Act, 1867*, as adopted by the province in 1871" (*supra*, note 34, at 178). It may also be added to this summary that Macfarlane J.A. made no direct reference in his reasons to the act of state doctrine.

360. According to Wallace J.A., "upon the *exercise* of sovereignty, any powers of government of the indigenous people were superseded by the introduction of the common law and the jurisdiction of the Imperial parliament": *supra*, note 34, at 225 (emphasis added). Earlier in his judgement, Wallace J.A. had addressed the *acquisition* of Crown sovereignty (at 198-199), concluding that the act of state doctrine ruled out any challenge to the Crown's sovereignty, and that sovereignty was acquired by peaceful annexation or settlement in 1846 (at 199-200). In this later section he appears to have used the terms 'acquisition' and 'assertion' of sovereignty interchangeably. (See note 75, *supra*, for excerpts.) The statement just quoted, in which "exercise" is the operative term, appears as Wallace J.A.'s conclusion to this section's analysis of the effect of the 'acquisition' or 'assertion' of Crown sovereignty. Despite the interchanging terms, it appears that Wallace J.A. considered supersession of Aboriginal sovereignty and jurisdiction to have occurred at the same time Crown sovereignty was acquired, in 1846.

361. B. Ryder, *supra*, note 219, at 45. Citations to page numbers from Ryder's summary are omitted.

362. Quoting, in particular, McEachern C.J.'s comment, also quoted *supra*, note 353, that it is not relevant how Aboriginal peoples' sovereignty gave way to that of the Crown, because "Canadian and British Columbian sovereignty is a legal reality recognized both by the law of nations and by this court."

363. *Supra*, note 34, at 198-199, referring, in particular, to the rule that "it is beyond the competence of a municipal court to question the validity of the acquisition of sovereignty over new territory which is an act of state". McEachern C.J. had not referred directly to the act of state doctrine in his reasons.

From the comments which accompanied it (quoted, *supra*, note 353), it appears that McEachern C.J.'s remark combined two premises, one of which stems from the doctrine of sovereign dispossession, and the other from the act of state doctrine. In part, the trial judge was adopting the doctrine of sovereign dispossession's premise that in the exercise of their jurisdiction to determine the bounds of the Crown's sovereignty, the courts must hold as a matter of law that there are none: "jurisdiction and sovereignty are such absolute concepts that there is no half-way house"; the relevant statutory and constitutional provisions are "clear and comprehensive". (For the role of this premise in the logic of the doctrine of sovereign dispossession, see text following note 386). At the same time,

however, McEachern C.J. was disclaiming any judicial function, on the act of state doctrine's premise that the law does not govern this sphere, and that the courts lack jurisdiction to undo the Crown's sovereign work: "[n]o Court has authority to make grants of constitutional jurisdiction..."; "neither this nor any Court has the jurisdiction to undo the establishment of the Colony, Confederation, or the constitutional arrangements which are now in place. Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any Court to award."

364. Lambert J.A., dissenting, took this position without indicating any disagreement with the majority on the point. Lambert J.A. treated the date of initial British sovereignty over the territory as "the date when British Sovereignty is first exercised over the aboriginal territory": *supra*, note 34, at 287-289.

365. In *Common Law Aboriginal Title*, *supra*, note 11, for example, K. McNeil explains (at 111-112):

"English law ... assigns power to acquire new territory to the Crown as part of its prerogative [citations to act of state doctrine authorities omitted]. Accordingly, it has been held that a declaration of sovereignty by the Crown ... is conclusive. ...

Since it is up to the Crown to determine the extent of its own dominions, in order to decide whether a particular territory has been acquired one needs to examine the acts of the Crown to ascertain its intentions." [footnotes omitted]

366. As noted above (note 12), under colonial law the intention of the Crown governs the judicial determination whether the Crown has acquired a particular territory. According to K. McNeil, such an intention would be considered clearly shown "where the Crown accepted title to territory by signing a treaty of cession, or authorized British subjects to settle an unclaimed region in its name, or simply made an unambiguous assertion of sovereignty" [emphasis added]: *Common Law Aboriginal Title*, *supra*, note 11, at 112. (For the argument that this rule has been modified to the extent that effective occupation by the Crown must also be shown, see note 34, *supra*.)

It should be noted that if the 'acquisition' of Crown sovereignty over new territory is equated with its 'assertion' in the sense that factual assertion is conclusive evidence of acquisition, the legal consequence for Aboriginal sovereignty is the consequence of 'acquisition'. In colonial law the acquisition of sovereignty over new territory appears to be an indispensable concept: without having been gained - whether derivatively, or by 'peaceful settlement' - sovereignty over new territory cannot be possessed.

367. This is not to diminish the critical importance of the method of acquisition. As K. McNeil states, "the means employed by the Crown to assert territorial claims have varied from one time and one region to another"... . But in any case it is the intention of the Crown, gathered from its own acts and surrounding circumstances, that determines whether a territory has been acquired for English law purposes" (*Common Law Aboriginal Title*, *supra*, note 10, at 112). On "the ways in which territorial sovereignty could be acquired", however, "would depend the constitutional status of the territory and, consequently, the laws in force and the extent of the Crown's prerogative powers" (*ibid.*, at 110).

368. The alternative reading also relies implicitly on this element of the conventional act of state doctrine in its presumption that Crown sovereignty was acquired symbolically. The alternative reading simply requires, further, that such sovereignty be exercised in order to displace Aboriginal sovereignty.

369. It is not suggested that this resolves the difference in dates relied upon by Macfarlane J.A.

370. See note 358, *supra*. See also text following note 357, in which Macfarlane J.A. contemplates a "vestige" of Aboriginal jurisdiction surviving the acquisition, but not the legislative imposition, of sovereign power.

The fact that McEachern C.J. contemplated (without adopting) separate dates for the origin of British

sovereignty in British Columbia, and the displacement of Aboriginal sovereignty, makes the trial judgement susceptible to a similar reading. (McEachern C.J. was prepared to assume that the date of British sovereignty may have been as late as 1858 (i.e. "when the Mainland Colony of British Columbia" was established - McEachern C.J.'s moment of displacement); as much as 55 years earlier, (i.e. "when criminal jurisdiction was extended over the so called Indian territories"); or dates in between (i.e. when certain British forts were established, or the *Oregon Boundary Treaty* was completed): *supra*, note 34, at 369.) It is not clear whether McEachern C.J. had in mind the possible displacement implications of his comments in that section of his reasons, which dealt with the latest date at which "aboriginal" practices, viewed as frozen in time, could become the subject of common law Aboriginal rights. Complicating the import of the trial judgement further is McEachern C.J.'s suggestion in yet a separate section that Aboriginal sovereignty and jurisdiction were ultimately lost over the course of a long period stretching far past establishment of the colony (*supra*, note 168, at 208):

"The events of the last 200 years are far more significant than any military conquest or treaties would have been. The reality of Crown ownership of the soil of all the lands of the province is not open to question and actual dominion for such a long period is far more pervasive than the outcome of a battle or war could ever be. The law recognizes Crown ownership of a territory in a federal state now known as Canada pursuant to its Constitution and laws."

McEachern C.J. may have considered the substantive nature of the actions taken by the Crown in establishing the mainland colony relevant to the question of displacement. Although McEachern C.J. relied upon the same absolute definition of Parliamentary sovereignty emphasized by both majority judgements in the Court of Appeal, his list of displacing events (quoted in text preceding note 351, *supra*) might be construed as requiring some actual conflict between Aboriginal and Crown measures, or some indication that the Crown had intentionally occupied certain fields of sovereign authority, before Aboriginal sovereignty could be deemed displaced.

371. If Wallace J.A.'s opinion were read in this way, the different 'supersession' dates identified in the two judgements might possibly be attributed to a difference in the significance attached to the signing of the boundary treaty. Wallace J.A. might be understood to have viewed Britain's action in signing the treaty as an active exercise of sovereignty sufficient to displace Aboriginal sovereignty, while admitting the possibility that an unequivocal declaration of sovereignty by the Crown, sufficient to acquire the territory, might not have such an effect. Macfarlane J.A., on the other hand, might be understood to have treated the treaty signing as a declaration with little practical effect upon local Aboriginal peoples. For Macfarlane J.A. a more active assertion of control over Aboriginal territory, such as the enactment of applicable general legislation (regardless of its nature) might have been necessary.

372. As noted above, the distinction between extinguishment and supersession of Aboriginal sovereignty as the effect of assertion of Crown sovereignty is explicit in the reasons of the trial judge: see text following note 347, *supra*. Both majority judgements in the Court of Appeal employ only the term supersession in this context, with Wallace J.A. reserving extinguishment to describe the alternative theory based on the intention and substantive effect of a post-acquisition statute, the *Constitution Act, 1867*. At one point Wallace J.A.'s reasons indicate that extinguishment and supersession in this context are not unrelated (implying that prior supersession of Aboriginal sovereignty and jurisdiction might affect "the possibility that aboriginal powers of self-government remain unextinguished": *supra*, note 34, at 225). But the connection apparently implied here is that both events result in the nullification of the right or other entity in question: Wallace J.A. did not imply that the two terms have the same meaning. For his part, Macfarlane J.A. implied that the concept of supersession obviates the need to consider whether Aboriginal jurisdiction was ever extinguished directly, in the following passage (at 178):

"I have said that there is no question the Gitksan and Wet'suwet'en people had an organized society. It is pointless to argue that such a society was without traditions, rules and regulations. *Insofar as those continue to exist there is no reason why those traditions may not continue* as long as members of the Indian community agree to adhere to them. *But those traditions, rules and regulations cannot operate if they are*

in conflict with the laws of the Province or of Canada. In 1871, when British Columbia joined Confederation, legislative power was divided between Canada and the provinces. The division exhausted the source of such power. Any form of Indian self-government, then existing, was superseded by the Constitution Act, 1867, as adopted by the Province in 1871." [emphasis added]

That supersession involves the complete nullification of Aboriginal jurisdiction, is made clear in Macfarlane J.A.'s earlier statement that "a continuing aboriginal legislative power is inconsistent with the division of powers found in the Constitution Act, 1867.... Sections 91 and 92 of that Act exhaustively distribute legislative power in Canada" (*ibid.*, at 152).

373. McEachern C.J.'s idea that Aboriginal customs (including, presumably, rights relating to land tenure) survive the displacement of Aboriginal sovereignty in so far as Aboriginal communities are willing to abide by them, but lose their force as laws, exemplifies this feature of the doctrine: see the excerpt from McEachern C.J.'s reasons quoted above, text accompanying note 353. Similarly, see the excerpt from Macfarlane J.A.'s opinion quoted, *supra*, note 372.

374. See text following note 336, *supra*, and text accompanying note 333.

375. The irrelevance of the effect of the measures taken follows logically from this doctrine's tenet that Crown sovereignty is absolute: once any sovereignty whose nature is absolute is exercised, no inconsistent sovereignty may remain in effect. See text following note 388, *infra*. Wallace J.A.'s reasons point up this feature of the doctrine clearly, asserting that all that is necessary to the supersession of Aboriginal sovereignty is "introduction of the common law and the jurisdiction of the Imperial parliament": note 360, *supra*. According to Wallace J.A., those events occurred automatically upon the annexation of the colony in 1846 (see notes 75 and 260, *supra*): their significance is thus independent of the substance of the law introduced, and of the nature of the legislative measures by which Parliament's jurisdiction would be exercised.

Although Macfarlane J.A. attributed supersession of Aboriginal sovereignty solely to legislative power, his reasons also treat the nature of the measures enacted as irrelevant: Aboriginal law-making competence was superseded "on the date that the legislative power of the Sovereign was imposed", which likely occurred "when the mainland colony...became a territory under the jurisdiction of the Imperial Parliament in 1858": *supra*, note 358 and preceding text. Macfarlane J.A. also attributed the supersession alternatively to the later introduction to the territory of a particular Imperial statute - the Constitution Act, 1867 - which Macfarlane J.A. construed as distributing all possible legislative jurisdiction exhaustively: see note 372, *supra*. But if Macfarlane J.A. felt that the particular terms of that statute graphically illustrated his point, a less dramatic example would appear to have sufficed. In arguing, *ibid.*, that the division of powers in the Constitution Act, 1867 "exhausted the source of such power" Macfarlane J.A. appears to have meant that all of the legislative subject-matter of the Imperial Parliament's absolute jurisdiction had been thereby delegated, not that the Imperial Parliament's jurisdiction in the territory might have been circumscribed otherwise, and Aboriginal sovereignty left unsuperseded. At most, it appears that Macfarlane J.A. might have contemplated a difference in consequence for Aboriginal sovereignty between legislative measures so inconsequential in substance that they do not effectively exercise Crown sovereignty, and consequential measures which do: see text following note 370, *supra*.

376. See discussion, *supra*, text accompanying note 328.

377. The plaintiffs had clearly asserted the contrary position that Aboriginal jurisdiction is possessed as a matter of right: see note 389, *infra*. Only Wallace J.A. responded directly, holding that rights are creatures of positive (English) law, and that English law does not recognize continuing Aboriginal rights of a jurisdictional nature: see notes 263 and 75, *supra*. Wallace J.A.'s most complete explanation of this position is quoted at note 395, *infra*.

378. See note 372, *supra*.

379. Law is the instrument by which the common law and the jurisdiction of the Imperial parliament are introduced into the territory in Wallace J.A.'s analysis (see notes 75 and 260, *supra*) and the instrument by which sovereign legislative power is imposed in Macfarlane J.A.'s analysis: see text accompanying note 358.

380. See discussion in section 3.1 above.

381. See text preceding note 400, *infra*.

382. See note 313, *supra*.

383. Wallace J.A. held that the exercise of Crown sovereignty superseded "any powers of government of the indigenous people" (note 360, *supra*); Macfarlane J.A. expressed his ruling in terms of "any ... aboriginal law-making competence" (text preceding note 358, *supra*). Wallace J.A. also stated affirmatively that "[p]rior to the acquisition of sovereignty over British Columbia, the Indians exercised jurisdiction in the territory to the extent made possible by their social organization": *supra*, note 75. (At this point, however, Wallace J.A. also repeated the trial judge's disparaging description of the plaintiff ancestors' social organization, apparently to emphasize its minimal nature: see note 734, *infra*.) For Macfarlane J.A.'s abstract acknowledgement of the plaintiffs' ancestral organized society, see note 372, *supra*. As noted above (text following note 352) the trial judge presumed the prior existence of Aboriginal sovereignty and jurisdiction for the sake of argument. His cryptic acknowledgement of the fact of some such prior power, in village sites only, was, however, token, and perhaps dismissive: McEachern C.J. stated that he would "assume ... that, in the legal and jurisdictional vacuum which existed prior to British sovereignty, the organization of these people was the only form of ownership and jurisdiction which existed in the areas of the villages" (*supra*, note 168, at 384).

384. For discussion of the place of the *fait accompli* rationale generally in legal justifications for the dispossession of Aboriginal peoples, see R. Barsh, "Indigenous peoples and the right to self-determination in international law", *supra*, note 29, at 77.

385. For the propositions that the Crown has acquired sovereignty in British Columbia, and that the municipal courts lack jurisdiction to question the Crown's acquisition of sovereignty in any event, Wallace J.A. cited authority (at 198-200, including, as authority for the former proposition, the statement from *Sparrow* quoted in full, *supra*, at note 35). (The latter proposition is the act of state doctrine, applied to acquisition of territorial sovereignty). Wallace J.A. also cited authority for the further proposition that Parliament's sovereignty is absolute (at 224-225), and then concluded, without reference to authority, that Aboriginal powers of government must have been superseded. As noted above (note 75 and accompanying text) it appears probable, reading these two sections of the judgement together, that Wallace J.A. reached his supersession conclusion by combining the act of state doctrine with the Diceyan maxim that Parliament is supreme. The latter section by itself suggests that Wallace J.A. could have reached the same conclusion by inference from the Diceyan maxim alone.

Having affirmed earlier that the Crown possessed sovereignty and underlying title over the territory (at 125, relying upon the statement from *Sparrow* cited by Wallace J.A., among other authorities), Macfarlane J.A. concluded that imposition of sovereign legislative power superseded Aboriginal law-making competence, or, in other words, left "no room for a third order of government" (152). For the view that the division of powers in the *Constitution Act, 1867*, in particular, precludes the existence of any such room, Macfarlane J.A. cited authorities (at 153). Macfarlane J.A. also cited authority in support of the proposition that Parliament is supreme (at 153-154), and treated such authority as supportive of his supersession conclusion. Without explaining how, Macfarlane J.A. also stated that the statement from *Sparrow* he had relied upon earlier accords with his supersession conclusion (at 154). No authority is cited in Macfarlane J.A.'s reasons for the supersession conclusion itself.

As noted, *supra*, note 351, the *Sparrow* statement referred to in both judgements affirms that "sovereignty ... legislative power, and ... underlying title" to traditional Aboriginal lands in Canada had "vested in the Crown".

The statement does not refer to the scope of the Crown's sovereignty, or to the effect of its acquisition on Aboriginal sovereignty.

386. Per McEachern C.J. (quoted *supra*, note 353), cited with apparent approval by Wallace J.A., *supra*, note 34, at 199.

387. The trial judgement and both Court of Appeal majority judgements rely for this proposition principally upon Professor Dicey's description of the nature of Parliament's internal sovereignty under England's constitution, adding that the *Constitution Act, 1867*, distributed such legislative power exhaustively within Canada. For McEachern C.J.'s reference to Dicey, see text accompanying note 351. The Court of Appeal majority references appear, *supra*, note 34, at 153 (per Macfarlane J.A.), and 224 (per Wallace J.A.).

388. McEachern C.J. initially used this phrase to describe the extinguishing consequence of the division of powers in the *Constitution Act, 1867*: *supra*, note 168, at 386. Macfarlane J.A. applied it to what he regarded as the supersession consequence of the same statute: see note 385, *supra*.

389. Wallace J.A., for example, prefaced his reasons respecting the supersession of Aboriginal sovereignty and jurisdiction by directly acknowledging the plaintiffs' counter argument (*supra*, note 34, at 223):

"The plaintiffs do acknowledge the sovereignty of Canada and British Columbia, and accept the consequential underlying radical title of the Crown to the land. However, *the plaintiffs' position is that Crown sovereignty can and does co-exist with the pre-existing right of jurisdiction of the aboriginal people to govern themselves and their territories*. Moreover, they say that this right of jurisdiction must take priority over provincial laws in the territory where there is conflict between the two." [emphasis added]

390. Indeed, contrary to the Court of Appeal's presumption, the Diceyan maxim does not even contemplate the possible continuing existence of prior, independent sovereignties, which is one reason why the maxim appears inapplicable to colonies created by the settlement of occupied territory.

391. See text following note 210, *supra*, and K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 80-84. According to McNeil the theory of tenures depends upon a legal fiction, by which English law explains the tenet of the Crown's paramount lordship, or underlying title: the Crown must have once owned all the lands in England, because the Crown is now the paramount lord. In suggesting that the supersession of Aboriginal sovereignty constitutes a legal fiction, it is not argued here that the historical facts necessarily disprove the fiction. The fiction of supersession is so ambiguous as to the facts it presupposes that it would appear impossible to factually disprove. McNeil cites one definition of the term 'legal fiction' under which the fiction of supersession might not qualify for this reason. According to that definition a legal fiction is "some supposition in law, for a good reason, against the real truth of a fact in a manner possible to have been actually performed, according to that supposition" (*ibid.*, at 84, n 26). The fiction of supersession would appear to meet the following definition cited by McNeil, however (*ibid.*, at 218, n 92): "[things] that have no real essence in their own body, but are so acknowledged and accepted in law, *for some special purpose*" [McNeil's emphasis]. The following rules governing legal fictions may thus be applicable to the fiction of supersession (*id.*):

"[A]s fictions were generally invented to prevent mischief and do justice, they cannot do wrong or cause injury.... Thus, where 'a fiction of law works injustice, and the facts which by fiction are supposed to exist are inconsistent with the real facts, a Court of Law ought to look to the real facts'.... '[A] fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted'.... So when a fiction 'is urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth'." [citations omitted]

392. This is particularly clear in the reasons of Wallace J.A., reviewed, *supra*, note 75. Lambert J.A., dissenting, would have required that the Crown's acquisition of sovereignty in the territory (though not, specifically, the nullification of prior Aboriginal sovereignty) have a factual grounding in the effective occupation of the territory: see note 34, *supra*. (At trial, as noted above, McEachern C.J. emphasized certain assertions of Crown sovereignty over others, apparently relying upon those which he deemed to have significant factual consequence for Aboriginal peoples: see note 370, *supra*. McEachern C.J. also entertained a distinct rationale for the loss of Aboriginal sovereignty based solely on the factual dominance of Crown authority in the territory over a long period: *id*.)

393. To make this point conversely, the doctrine's '*fait accompli*' rationale would clearly not sustain the *Delgamuukw* conclusion that all Aboriginal sovereignty has been necessarily superseded, if this central tenet were factored out of the doctrine. The effect of the '*fait accompli*' rationale (discussed above, text accompanying note 384) by itself would be the same as that of the conventional act of state doctrine. All Aboriginal sovereignty inconsistent with that of the Crown would be deemed nullified, but since Crown sovereignty might yet be defined relationally, internal Aboriginal sovereignty, consistent with the Crown's sovereignty, might remain undisturbed.

394. Wallace J.A., for example, appeared to assume once in his reasons that the Aboriginal power superseded under the doctrine might have been the subject of a 'right', responding that "the plaintiffs, after 1846 and certainly after 1871, no longer retained any aboriginal right of self-government or jurisdiction over the territory nor any jurisdiction to govern the members of the Houses..." (*supra*, note 34, at 225). (This statement concludes an analysis of both supersession and extinguishment of Aboriginal sovereignty, and might have been intended to refer to 'rights' only in the latter context). Just previously, however, Wallace J.A. had rejected the possibility of a right being at issue, on the ground that for its part, the Crown possesses unqualified power: "A claim of self-government of the nature which the plaintiffs advance; namely, a right to govern the territory, themselves and the members of their Houses ... and a declaration that the Province's jurisdiction is subject to the plaintiff's jurisdiction, is a claim which is incompatible with every principle of the parliamentary sovereignty which vested in the Imperial parliament in 1846" (*ibid.*). Wallace J.A.'s argument is perhaps encapsulated by Keir and Lawson's comment on the implications of the act of state doctrine for foreign states and subjects "outside the realm", quoted *supra*, note 18: "towards them the Crown has no duties, but only powers".

Conversely, McEachern C.J. assumed once in his reasons, without citing authority, and in opposition to the ostensibly neutral rationale of the act of state doctrine, that "the common law ... recognizes the right of the Crown to create colonies and settle them with its subjects": *supra*, note 168, at 231 (approved by Wallace J.A., *supra*, note 34, at 227). McEachern C.J.'s only express justification for the supremacy of the Crown, however, was an argument of '*fait accompli*' based on long standing power, and not on any question of entitlement: see note 370, *supra*.

395. Wallace J.A. expounded upon this position (*supra*, note 34, at 202-203):

"3. What makes an aboriginal custom or practice a right?

In my view, considerable confusion has arisen when analyzing aboriginal claims through the indiscriminate use of the term 'right', particularly when *the relevant legal relations being analyzed are created by, and arise as a consequence of the exercise of sovereignty and the introduction of the common law.*

In this case, in the pre-sovereignty period, the ancestors of the native claimants were members of an organized society, which had regulated its affairs over an extended period of time.... This social system had developed its own rules, customs and practices to regulate the affairs of the community. the system included the roles played by the Chief and subsidiary Chief, the houses, the Clans, the Feast, and provided for the devolution of property interests, etc. The community occupied certain lands and used them for sustenance purposes....

Prior to the exercise of sovereignty and the introduction of the common law, the issue of aboriginal 'rights' did not arise. For the aboriginal peoples to have the right, vis-a-vis European settlers, to engage in those traditional practices and uses of land which were integral to their aboriginal society there must be recognition of such a right by those outside the aboriginal community and some mechanism requiring them to respect such a 'right'. An enforceable right, as against European settlers, came only with the protection which was extended to aboriginal rights by the adjusted common law.

Upon the exercise of sovereignty by the Crown, the adjusted common law recognized the aboriginal community's 'right' - vis-a-vis the settlers - to engage in those practices and activities associated with the use of the land they occupied which were traditional, integral and distinctive to the aboriginal society and way of life. The English common law imposed a correlative duty upon the Crown to protect from unjustifiable interference and impairment, the aboriginal community's right to engage in those aboriginal customs and practices [Hohfeld: 'Fundamental Legal Conceptions As Applied In Judicial Reasoning'....]

The authorities before this court make clear that aboriginal rights take their force from the common law. ...

In sum, the aboriginal rights with which we are concerned in this litigation, are rights at common law. These rights reflect the traditional practices which were integral to the native society occupying tribal lands when the common law was introduced. They are rights additional to those enjoyed by every Canadian citizen, native and non-native." [emphasis added]

Similarly, Macfarlane J.A. was prepared to envisage existence of a fiduciary duty upon the Crown correlative to Aboriginal rights, only in the period "since the assertion of sovereignty": *supra*, note 34, at 156.

396. See note 353, *supra*.

397. The need for and validity of such a presumption are critically examined in P. Joffe and M.E. Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives*, November 17, 1994, Draft Report prepared for the *Royal Commission on Aboriginal Peoples*, subheadings 4.1, 4.2 and 4.5.

398. G. Rémillard, "Souveraineté et fédéralisme" (1979) 20 C. de D. 237, at 244, quoted by P. Joffe and M.E. Turpel, *ibid.*, at 165, n. 916.

399. Separate opinion of Vice-President Ammoun, *Namibia (South West Africa) Advisory Opinion* [1971] I.C.J. 16, at 68, quoted by P. Joffe and M.E. Turpel, *ibid.*, at 174, n. 955.

400. Text following note 356, *supra*.

401. Displacement of Aboriginal sovereignty results, under the act of state doctrine, from the doctrine's withholding from the courts jurisdiction to entertain claims that compete with the sovereignty acquired by the Crown: *supra*, text following note 41. Displacement results, under this reading of the doctrine of sovereign dispossession (logically) from the tenet that whatever sovereignty has been acquired by the Crown is necessarily absolute, and (as a matter of legal fiction) from the postulation of such a displacement upon acquisition of Crown sovereignty: *supra*, text accompanying note 391.

402. Displacement of Aboriginal sovereignty would be complete from the moment the Crown acquired sovereignty under this reading, because the sovereignty acquired is deemed absolute. It should be emphasized that although the premise of absolute Crown sovereignty has often been adopted in act of state cases, it is not an

ingredient of the act of state doctrine: see text following note 41, *supra*.

403. K. McNeil summarizes this rule in the form, "[t]here can be no acts of state against British subjects on British soil": *Common Law Aboriginal Title*, *supra*, note 11, at 164 n 13. More expansively, McNeil states that "once the Crown accepted the territory into its dominions, the subjects of the former sovereign would be British subjects, and as a result the Crown's power to deal with them and their property by act of state would be at an end" [footnotes omitted] (*ibid.*, at 163-164).

McNeil notes that in some cases the Crown has exercised power in foreign territory prior to having acquired territorial sovereignty, and that the courts have held that the act of state power continues in those cases until sovereignty is acquired (*ibid.*, at 164 n. 13). But those rulings do not extend the act of state power past the moment that Crown sovereignty is acquired. In *Criminal Law in India* (1896), (cited by McNeil, *ibid.*, at 178 n 69), J. Mayne argued that in a transition period before the previous inhabitants "settled down into the regular legal relations of subject and sovereign ... all proceedings taken by the Crown in settling the new country would simply be acts of State". This is certainly the tenor of the Court of Appeal's approach to the fate of Aboriginal sovereignty in *Delgamuukw*, on either reading of the doctrine of sovereign dispossession. But as McNeil notes, "[i]f such a period exists, it would have to precede annexation of the territory to the Crown's dominion, because thereafter the inhabitants would be British subjects" (*id.*).

404. "[T]hough courts have no jurisdiction over acts of sovereign power, they do have jurisdiction to decide whether a given act really is an act of state... . In particular, a court will hold an act of state not to be an act of state if committed under colour of some legal right more specific than the Crown's general right to acquire territory": K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 163 n. 11.

405. That is, other British subjects would be protected entirely by the rule of law from the moment the Crown acquires sovereignty in settled territories, yet Aboriginal peoples would be denied this protection until *after* their rights of sovereignty and jurisdiction are nullified.

406. It might be argued that such a possibility is contemplated in McEachern C.J.'s alternative ruling that any surviving Aboriginal sovereignty was extinguished by the exercise of sovereign dominion, with the sovereign's clear and plain intention. We have seen in section 1.4 above, however, that the authority for this argument - Judson J.'s opinion in *Calder* - depends upon commission of an act of state against British subjects on British soil, and not upon the law.

407. *Supra*, note 355.

408. See note 375, *supra*, and accompanying text.

409. P. Hogg notes (*supra*, note 18, at 29-30), for example, that for historical reasons the simple rule that in uninhabited territory "the first settlers were deemed to have imported English law with them" often yielded no obvious date for reception of English law in settled territories:

"The importation was deemed to have occurred on the date of the first settlement of the colony, but in practice settlement was a gradual process and the date of the first settlement was unknown or disputable. The courts which later had to identify the rules of English law which had been received selected the date of 'the institution of a local legislature in the colony' as the date of reception. ... The dates of reception thus derived are quite artificial and are really cut-off dates, marking the end of a period of continuous reception, rather than single events."

As noted in part 2, *supra*, note 269, English settlers could import English law with them personally without the Crown having acquired territorial sovereignty in a new land. Where prior and contending sovereignties exist,

identification of the moment of Crown acquisition of sovereignty carries implications much beyond that of the one for fixing the English law rules internal to the settlers. As Hogg observes, *ibid.*, the theory which governed the rule of reception in settled colonies was that "[i]n the absence of any competing legal system, English law followed British subjects and filled the legal void in the new territory" [emphasis added].

410. K. McNeil, for example, states that in some instances "there may have been a gradual extension of jurisdiction by the Crown over a territory", citing, among similar examples, one case in which the authority of the Crown "grew" for some time, exercised by a chartered company, before the territory was acquired, and another in which the Privy Council refused to infer Crown intention to acquire a territory over which Britain had exercised authority for several years, because the authority had been exercised pursuant to the *Foreign Jurisdiction Act: Common Law Aboriginal Title*, *supra*, note 11, at 112, and n 17. But such cases demonstrate only that "it may be difficult to determine the precise moment of acquisition" (*ibid.*, at 112). They do not suggest that the moment of acquisition may stretch over a period during which the rule of law applies less stringently than it does once acquisition is finally complete.

411. See note 353, *supra*.

412. Note 214, *supra*.

413. As suggested in note 214, *supra*, Lester appears to mean by this statement that only the system of law which owes its existence to the sovereign in power may confer enforceable (i.e. valid) rights. Any purported basis of entitlement originating elsewhere is merely a "simple fact". The positive law does not disqualify Aboriginal rights from having validity; Aboriginal rights simply lack any validity without being positively conferred by the system of law generated by the Crown.

414. *Supra*, note 45.

415. See note 47, *supra*, and accompanying text.

416. *Guerin v. The Queen*, quoted *supra*, note 47.

417. *Roberts v. Canada*, *supra*, note 47, at 340. For a brief discussion of this implication of *Roberts*, see B. Slattery, "Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, at 702.

418. *Supra*, note 48, analysed above in text following note 229, *supra*.

419. *Supra*, note 185, analysed in note 296, *supra*.

420. Slattery's central point, quoted *supra*, text accompanying note 177, bears repeating: "[t]he question of which system of law should govern cannot be resolved by reference to principles secreted by one of the competing systems without assuming the supremacy of that system, which is the very question to be resolved."

421. *Supra*, note 34, per Macfarlane J.A. (at 125-126, 129, affirming as Aboriginal rights, specific historical practices incorporated into distinctive Aboriginal culture by the time the Crown asserted sovereignty, whether historical or modern in form; disqualifying any practice "which became prevalent as a result of European influences"); and per Wallace J.A. (at 204-207, affirming as Aboriginal rights, historical practices that were "part and parcel of the pre-sovereignty aboriginal society", whether exercised in an historical or modern manner; disqualifying "contemporary practices not pursued by the Indian society before sovereignty"; concluding that a "'modern aboriginal right' is a contradiction in terms".) At trial, the same conception of the nature of Aboriginal rights led McEachern C.J. to suggest that such rights are not important to Aboriginal persons today in any event: "many witnesses said the young people were not interested in aboriginal activity" (*supra*, note 168, at 170); "most

Gitksan and Wet'suwet'en people do not now live an aboriginal life" (*ibid.*, at 178). See also the discussion in section 4.5.3 below.

422. McEachern C.J., in particular, left no doubt as to his assessment either of the relative insignificance of the loss (*supra*, note 168, at 126) -

"[i]t would not be accurate to assume that even pre-contact existence in the territory was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not uncommon, wars with neighbouring peoples were uncommon, and there is no doubt, to quote Hobbes, that aboriginal life in the territory was, at best, 'nasty, brutish and short'."

- or of the magnitude of the potential gain:

"In my view the Indians' lack of cultural preparation for the new regime was indeed the probable cause of the debilitating dependence from which few Indians in North America have yet escaped. ... Being of a culture where everyone looked after himself or perished, the Indians knew how to survive But they were not as industrious in the new economic climate as was thought to be necessary by the newcomers in the Colony; they became a conquered people, not by force of arms, for that was not necessary, but by an invading culture and a relentless energy with which they would not, or could not compete". ... "the source of Indian difficulty was not the loss of the land for aboriginal purposes... . As in so many parts of the world, the seeds of present difficulties were sown, not intentionally, but by mixing two cultures, and by indifference, during the colonial period" (*ibid.*, at 268-270, paragraphing omitted).

While I had the sense that the Gitksan and Wet'suwet'en may be substantially better off than many aboriginal people in British Columbia, (largely because of the generally prosperous local economy based mainly upon fishing and the forest industry in which many of them have worked), they remain socially and economically disadvantaged. I recently recall hearing Mr. Miles Richardson, a spokesman for the Haida nation, being interviewed. He was asked why his people have become active in land claims and he only replied, 'Have you seen how our people live?' Without intending any offence, I have driven through some of the reserves which demonstrate disadvantages, and I have witnessed first-hand how some of them live. It is interesting to note that housing on reserves seems to be much better where there is a payroll such as from the sawmill at Kitwangak. The most distressing evidence I heard during the entire trial was firstly ... that the High School drop-out rate [for Kitwangak]... is 80%, and secondly that the saw mills at Hazelton and Gitwangak are closing. ... The most obvious wisdom I heard was from Mr. R.M. McIntyre, who has been employed by Canada working with Indians since 1956. He said ... 'the biggest problem facing these people today is one of lack of economic opportunity, ... if they had an improved economic circumstance ... many of their social problems might be lessened.' (*ibid.*, at 336-337, paragraphing omitted)

McEachern C.J. also concluded, in evident reference to gains made since contact: "[c]ompared with many Indian bands in the province, the Gitksan and Wet'suwet'en peoples have already achieved a relatively high level of social organization. ... I cannot, of course, speak with confidence about other Indian peoples because I have not studied them. I'm impressed that the Gitksan are ready for an intelligent new arrangement with both levels of government" (*ibid.*, at 478).

423. Who argued as follows:

"This respondent submits that Aboriginal rights specifically recognized and protected by the common law and now by Section 35 of the Constitution are those rights which pre-existed British sovereignty or the coming of the Europeans. These rights describe Aboriginal, pre-contact life. With Europeans came other economic opportunities. Europeans brought different ways of living in the environment. As European

settlement took place, a new regime and different opportunities for economic activity were put in place and Aboriginal people became part of that regime. Aboriginal people had their rights arising from their pre-existing society as recognized in the new regime and rights as citizens of the new regime regardless of their Aboriginality.

...

Aboriginal society changed as a result of contact with European society. It is submitted those changes in Aboriginal society do not constitute evolved pre-existing rights. After contact two kinds of rights existed which were recognized by the British legal regime: Aboriginal rights and rights of Canadian citizens. Aboriginal people have available to them both sets of rights."

(Factum of the Attorney General of Canada, Vol. 1, para 318-320, British Columbia Court of Appeal, as quoted by M. Jackson, *supra*, note 336, at 38.)

424. See note 426, *infra*.

425. "[W]hen the Crown acquired sovereignty ... Parliament acquired power to give effect to policies considered beneficial to all the inhabitants. All of the inhabitants, native and non-native were protected by the common law which could be altered only through Parliament": *supra*, note 34, at 227.

426. *Supra*, note 34, at 204 ("They are rights additional to those enjoyed by every Canadian citizen, native and non-native"); at 202 ("The assertion of an all encompassing aboriginal right to an exclusive social and legal system ... would result in the common law affording protection to a system which is both outside and independent of the common law and, at the same time, extend to the aboriginal community the benefits and protections afforded by the common law to all residents of the province. This would be inconsistent with, and a fundamental departure from the principle that, upon the exercise of sovereignty, the adjusted common law became the law of all subjects - native and non-native alike"); and at 208:

"The issue is one of determining the nature and scope of .. rights ... which are additional to the common law rights which every citizen of the province enjoys.

The respondents emphasized that aboriginal people enjoy the same rights as non-natives to participate in contemporary activities - particularly beneficial economic activities - in the Province. As an example, they referred to the considerable native participation in the native commercial fishing industry. Engaging in activities that are different in nature and scope from those integral to aboriginal society and traditional ways of life cannot be said to be the exercise of an aboriginal right. The fact that aboriginal peoples engage in a particular activity does not qualify such activity for the special protection afforded to aboriginal rights. To hold otherwise is to ignore the "aboriginal" dimension of aboriginal rights."

427. According to McEachern C.J. in *Delgamuukw*, *supra*, note 168, in 1858 the population of the mainland colony consisted of approximately 25,000 - 40,000 "Indians", and 5,000 whites (at 268).

428. According to P. Tennant, "Indians" were entitled to vote in British Columbia elections at Union in 1871, but were prohibited from voting - along with persons of Chinese, Japanese, and Indo-Pakistani descent - in 1872: *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990), at 45, 191. The prohibition remained in force until 1947. According to J. Miller, Aboriginal persons constituted the majority of British Columbia residents until the 1880's: J. Miller, *Skyscrapers Hide the Heavens: A History of White-Indian Relations in Canada*, rev'd. ed. (Toronto: University of Toronto Press, 1989), at 147.

429. Manipulation of the participatory rights of involuntary "subjects" was a colonial strategy that had already been applied elsewhere in Canada by Crown representatives. W. McConnell describes the strategy followed by colonial governors for more than a decade following the fall of New France as follows:

"Although the successive Royal Governors who administered Canada on behalf of George III after 1763 were directed to convoke a representative assembly, like those in the colonies to the south, neither James Murray nor Guy Carleton considered it appropriate to do so. As Stanley mentions, imperial policy was predicated on the assumption that there would be a veritable tide of British immigration into the conquered colony which would inundate and 'assimilate' the French Canadians, making possible the establishment of representative political institutions dominated by English-speaking North Americans. This did not happen. The 600 English settlers in Quebec after the conquest formed only about one per cent of the total population."

("The *Calder Case* in Historical Perspective" (1974) 38 Sask. L. Rev. 88, at 98, citation omitted.) McConnell does not mention that imperial instructions themselves ensured that the "new subjects", as the Canadiens were called, would not have been represented in an assembly in this period in any event. The *Royal Proclamation of 1763* and related instructions denied political office to Roman Catholics: see B. Wilson, *Colonial Identities: Canada from 1760 to 1815* (Ottawa, National Archives of Canada, 1988), at 32. According to C. Dufour, had an assembly been called, "sixty-five thousand Canadiens would be excluded from the House; it would be restricted to representing the two or three hundred English merchants now established in the colony." According to Dufour, until the Quebec Act of 1774 was enacted, imperial policy made "Canadiens ... more or less outlaws in their own country. They would now be known, in all seriousness, as His Majesty's new subjects. The *old* subjects were the British merchants who had just arrived. ... England was showing its conqueror side": *A Canadian Challenge/ le défi québécois* (Lantzville and Halifax: Oolichan and IRPP, 1990), at 32.

It is submitted that the defect in Wallace J.A.'s 'citizenship' rationale for denying continuing sovereignty to Aboriginal peoples is that identified by M. Asch in "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30 Alta. L. Rev. 465. After identifying the discriminatory and thus anti-universalist premises of the peaceful settlement theory of acquisition of Crown sovereignty (see subheading 6.4.5.2 below), Asch states (487-488):

"[O]ur current ideological premise is 'universalism'. ... [U]niversalism models the relationship between the state and its citizens. [T]his thesis focuses on the presupposition that the state must only see individuals and, ... sees each individual as structurally equal (or identical)... . The recognition of a pre-existing political society conflicts with universalism in that it supports the existence of a structurally separate community within an ideology that will not accept any community other than that composed of equal individuals who make up 'the people'. ... Better, if one is bound by universalism, to support 'majority rule,' than inherent rights of minority peoples.

The settlement thesis, then, especially in its colonialist form, fits neatly with universalistic ideology. ... Within this frame, Aboriginal peoples, rather than being conceptualized as a unique collective segment of society, become considered as merely one small component of the total population; one that is required, like the others, to accept the domination of the institutions of the majority population. *Such a thesis is legitimate to the extent that the majority as it is defined by universalism is legitimate.*

... Were aboriginal sovereignty nonexistent or, at least, extinguished by the mere assertion of sovereignty by Great Britain and, later, Canada, then history begins with contact. Thus, as no one can claim 'prior' status, the legitimate majority becomes the majority that evolved after contact *Hence, the settlement thesis, which is itself colonialist in nature, becomes an important foundation for the ideology of universalism which, as it is often expressed, strongly disavows such concepts.*

The way out of this structural impasse is to accept the proposition that Canadian constitutional identity is not to be construed as arising from premises, such as the settlement thesis, that presume the inferiority of the Aboriginal nations that now find themselves within Canada."

430. See, for example, the discussion of the theory of tenures basis for the doctrine of common law dispossession, *supra*, note 210, and accompanying text.

431. "Liberal-Democracy and Property", in C.B. Macpherson, *Property: Mainstream and Critical Positions* (Toronto: Univ. of Toronto Press, 1978), 199, at 201.

432. *Supra*, note 326, at 206. (Lord Bacon was counsel to Calvin in *Calvin's Case*, *supra*, note 469, decided in 1608. Lord Bacon's hypothetical reference in argument to territorial acquisitions in the Indies "by conquest or occupation" appears to be the earliest example given by B. Slattery of the suggestion that the colonial law might enable the Crown to acquire inhabited territories by occupation: *Land Rights*, *supra*, note 15, at 20. According to Slattery, the common law "remained unaffected" at the time, even in relation to uninhabited territories, though Crown lawyers drafting colonial Charters were beginning to posit a similar power in relation to sparsely populated territory": *ibid.*, at 20-21.)

433. *Infra*, note 434, at 596-597.

434. *St. Catherine's Milling and Lumber Company v. The Queen* (1887) 13 S.C.R. 577, at 649.

435. I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990), at 177; M. Akehurst, *supra*, note 20, at 144; J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979), at 173.

436. *Advisory Opinion on Western Sahara* [1975] 1 I.C.J.R. 12, at 39.

437. B. Hocking, "Colonial laws and indigenous peoples: past and present law concerning the recognition of human rights of indigenous native peoples in British colonies with particular reference to Australia", in B. Hocking, ed. *International Law and Aboriginal Human Rights* (Sydney: The Law Book Company, 1988) 3, at 6, quoting from *Island of Las Palmas Case* (1928) 2 R.I.A.A. 831 at 838, *per* Huber J. Similarly, see J. Crawford, *The Creation of States in International Law*, *supra*, note 435, at 173 ("territory unoccupied and unacquired"); M. Akehurst, *supra*, note 20, at 144 ("territory which, immediately before acquisition, belonged to no state"); and B. Slattery, "Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, at 685 ("territory not belonging to any recognized legal entity").

438. According to B. Hocking (*ibid.*, at 6-7):

"In classical civil and international law doctrines, which derive from Roman property law, the doctrines concerning the acquisition of ownership of, or title to, private property have been transposed to the acquisition of sovereign title over territory (known as the radical or ultimate title). Original sovereignty is acquired only through original occupation and control amounting to first possession of territory previously 'without a master' or sovereign - i.e. *terra nullius* (land 'belonging to no-one').

This is the equivalent of the doctrine of *occupatio* in Roman property law. It follows that the acquisition of sovereignty over territory that is not *terra nullius* can only be by derivation from the prior existing sovereign or sovereign." [endnotes omitted]

In the 16th century Francisco de Vitoria expressed the rule thus: "Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant, as is expressly laid down in the ... [Roman]

Institutes: *De Indis et De Iure Belli Relectiones*, ed. E Nys., trans. J. Bate (1917), at 73, quoted by R. Williams, *The American Indian*, *infra*, note 465, at 99. Hugo Grotius wrote that "discovery *per se* gives no legal rights over things unless before the alleged discovery they were *res nullius*", *Mare Liberum*, trans. R. van D. Magoffin c. 1633 text (New York: Oxford Univ. Press, 1916, at 12, quoted by D. Greig, "Sovereignty, Territory and the International Lawyer's Dilemma" (1988) 26 Osgoode Hall L.J. 127, at 148. Emerich Vattel said: "All men have an equal right to things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession. When, therefore, a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has given sufficient signs of its intention in this respect, it may not lawfully be deprived of it by another Nation": *The Law of Nations*, trans. c. 1758 ed. (New York: Oceana, 1964), at 84-84, quoted, *id.*, at 145.

See also G. Lester, *Inuit Territorial Rights*, *supra*, note 18, at 17; B. Slattery, "Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, at 685-686; D. Greig, *ibid.* esp. 140; 145-155; and M. Lindley, *infra*, note 465, at 10-11, 139.

439. According to K. McNeil, for example, the Crown acquires vacant lands in colonies by virtue of the English law rule that "an original title to property which is unowned and unoccupied can be acquired by taking possession of it, i.e., by occupancy": "A Question of Title", *supra*, note 213, at 97.

440. K. McNeil argues that the Crown does not need or have paramount lordship over previously vacant lands acquired by the Crown by occupancy: *ibid.*, at 98. For McNeil's description of the nature of the Crown's paramount lordship over lands occupied at the time Crown sovereignty was acquired, see note 767, *infra*. In *Mabo v. Queensland* Brennan J. described the lordship applicable to all landholders as "such a title to land as would invest the Sovereign with the character of Paramount Lord in respect of a tenure created by grant and would attract the incidents appropriate to the tenure, especially the Crown's rights to escheat": *supra*, note 34, at 33.

441. *Mabo v. Queensland*, *supra*, note 34, at 34 (paraphrasing the opinion of Stephen C.J. in *Attorney-General v. Brown* (1847) 1 Legge 312, at 319) (per Brennan J.). As noted, *supra*, note 262, Brennan J. held that the theory of tenures should apply in Australia because, in his view, the theory is an "an essential principle" of Australian land law, apparently forming part of the "skeleton of principle" which, according to Brennan J., the courts may not disturb.

442. According to Brennan J. (*ibid.*, at 32-33) the fiction of "original" Crown ownership of all the lands in England originates in beliefs about England's history following the Norman Conquest, according to some of which the Crown's lands were acquired derivatively, from Anglo-Saxon Kings. Brennan J. did not suggest that similar beliefs could or should hold in the colonies.

443. According to Brennan J., "whatever the fact, it is the fiction of royal grants that underlies the English rule" providing (quoting Blackstone) "that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has, mediately or immediately, been derived 'as a gift from him, to be held upon feudal services'": *ibid.*, at 33.

444. This is the interpretation of Blackstone followed by Brennan J. in *Mabo*, *supra*, note 34, at 22; B. Slattery, *Ancestral Lands, Alien Laws*, *supra*, note 61, at 4-6; K. McNeil, *supra*, note 11, at 118; J. Crawford, *The Creation of States in International Law*, *supra*, note 435, at 179; and G. Simpson, in "Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence" (1993) 19 Melbourne Univ. L. Rev. 195, at 199. For the contrary view that Blackstone approved acquisition of occupied but uncultivated territory by settlement (convincingly refuted, it is submitted, by Slattery), see, for example, G. Bennett, "Aboriginal Title in the Common Law: A Stony Path Through Feudal Doctrine" 27 Buffalo L. Rev. 617 (1978), at 627-629; M. Walters, *supra*, note 41, at 363-364, esp. n. 40; and J. Hookey, *supra*, note 94, at 11.

445. *Western Sahara*, *supra*, note 436, at 39.

446. K. McNeil emphasizes that the common law rule, in particular, that possession is proof of ownership, "does not require occupation of lands by an organized society": "The High Cost of Accepting Benefits From the Crown": A Comment on the Temagami Indian Land Case" [1992] 1 C.N.L.R. 40, at 43, n. 18.

447. The correct term for occupation in this context under English land law is "occupancy": see note 766, *infra*.

448. "If land was *terra nullius* it could be acquired through occupation. The corollary to this was that title could only be acquired through occupation if the land was *terra nullius*": G. Simpson, *supra*, note 444, at 203. English property law appears to derive the same corollary from the premise that occupation is an exclusive concept: see K. McNeil, "A Question of Title", *supra*, note 213, at 105, n. 87, citing the dictum from *Holden v. Smallbrooke* (1668) 124 ER 1030, at 1031, that "none can have right to that by reason of possession, whereof another is already possess'd, for then there would be two plenary possessors severally of the same thing at the same time, which is impossible." (If joint occupation were contemplated, the modified latter rule would presumably bar acquisition of the entire property in jointly occupied land, on the strength of one co-titleholder's occupancy alone).

449. Later this will be referred to as the defensive benefit of the principle of *occupatio*. K. McNeil also argues that a very important positive benefit attaches to Aboriginal occupation of land prior to Crown acquisition of territorial sovereignty, that of a presumption of fee simple ownership: see note 766, *infra*. The latter presumption does not arise directly from the principle of *occupatio*. For discussion of a possible relationship, see note 766, *infra*.

450. *Western Sahara*, *supra*, note 436, at 39.

451. *Supra*, note 34, at 31, citing Blackstone's *Commentaries* (Bk II, ch 1, p 8) as follows: "Occupancy is the thing by which the title was in fact originally gained; every man seizing such spots of ground as he found most agreeable to his own convenience, *provided he found them unoccupied by any one else*." [Brennan J.'s emphasis]

452. *Ibid.*, at 22.

453. Brennan J. treated acquisition of sovereignty in this passage as a foregone conclusion, despite the principle which the passage identifies, on the basis of the conventional act of state doctrine: *ibid.*, at 20-21. See note 40, *supra*, and accompanying text.

454. W. Blackstone, *Commentaries on the Laws of England*, 17th ed. (1830), Bk II, ch 1, at 7, quoted by Brennan J. in *Mabo v. Queensland*, *supra*, note 34, at 22.

455. Adapting D. Greig's term for the concept embodied in the Roman rules, and from which the international law rule derives: see *supra*, note 438, esp. 154.

456. See text accompanying note 571, *infra*.

457. The influence of this change upon the common law rules was twofold. It came to be claimed at common law that if Aboriginal peoples did not have sovereignty they could not have property, because property derives from sovereignty. It also came to be claimed as a matter of common law that for the same reason Aboriginal peoples are unqualified for sovereignty, they are or may also be unqualified for property.

458. "Indigenous Peoples in International Law: The Significance of Francisco de Victoria and Bartolome de Las Casas", (1992) 13 Aust. Y. B. Int'l L. 1, at 29.

459. Brennan J.'s term in *Mabo v. Queensland*, *supra*, note 34, esp. 21-30.

460. Because the 'enlarged' doctrine violates this original premise, it is described in this paper instead as "distorted". The analysis to follow endeavours to explain how such a distortion took place. The critical turning point in Australian jurisprudence prior to the Australian High Court's recent decision in *Mabo v. Queensland* is described from a similar vantage point by G. Simpson, as follows (*supra*, note 444, at 199-200):

"For Blackstone, ... there were three principal means of claiming sovereignty over a piece of territory. These were occupation, conquest and cession. ... Occupation... could only occur when the land was 'desert and uncultivated'. These categories were the subject of judicial review in *Cooper v. Stuart*. ... Blackstone's distinctions were accepted as part of the common law. ... The Court chose to reinterpret Blackstone by stating that the land must be 'practically unoccupied' to satisfy the requirement of *terra nullius*. In this way, the people that did inhabit the land were redefined as physically present but legally irrelevant and their history was obliterated. Thus began the series of elisions and slippages that came to characterize Australian judicial pronouncements on acquisition." [emphasis added to the latter statement only]

Brennan J.'s critique itself identifies the distortion entailed: "The view was taken that ... territory (though inhabited) could be treated as a 'desert uninhabited' country" (*supra*, note 34, at 24); "settlement of an inhabited territory is equated with settlement of an uninhabited country" (*ibid.*, at 25).

461. See M. Lindley, *infra*, note 465, at 1-3; 10-23. Writing in 1925, Lindley argued, in particular, that the classic definition of *terra nullius* based on the principle adopted by the Romans (at 10-11)

"tell[s] us ... that, where a tract of territory is not subject to any sovereignty - either because it has never been so subject, or, having once been in that condition, has been abandoned - the sovereignty over it is open to acquisition by a process analogous to that by which property can be acquired by an ownerless thing. But a rule so stated does not carry us far in practice. Its application is clear and universally admitted to the case of uninhabited territory not under any sovereignty. But when we are dealing with inhabited lands such a rule is of little use, because the point at issue is whether, having regard to the degree of political development and other characteristics of the inhabitants, the territory can be considered to be already under an effective sovereignty, and with that the Roman rules do not deal."

462. *Supra*, note 34, at 21.

463. In an analysis relatively enlightened at the time for its resistance to cultural bias, M. Lindley categorized backward territory and backward races in 1925 as follows (*infra*, note 465, at v-vi):

"The term 'Backward Territory' is not one that is known to International law, nor is it possible or desirable to give it any exact definition or denotation for our present purpose. At the one extreme, it may perhaps be said to be marked by territory which is entirely uninhabited; and it clearly includes territory inhabited by natives so low in the scale of civilization as those of Central Africa. On the other hand, all that can be said as to its upper limits probably is that it is obviously intended to exclude territory which has reached the level of what is sometimes known as European or Western civilization.

The term is a relative one, and as civilization advances it may cease to apply to territory which would today be said to be included within it; or it may conceivably become applicable to countries which would not, in the circumstances of the present time, be called 'backward'.

The advanced States have, from time to time, acquired the entire or partial sovereignty over territory exhibiting very varied degrees of backwardness. Before the War, there was discernible a tendency, which has now abated, to extend this process to countries comparatively high in the scale of civilization. International Law has followed, and must continue to follow, such movements.

...

[M]any of these rules have regard to races which cannot be said to be Subjects of International Law, but whose welfare is becoming so increasingly the concern of the advanced peoples who constitute the International Family that those peoples are making the protection of the backward races the subject of legal rules which are binding upon and between themselves."

464. See, for example, the trial judge's statement in *R v. St. Catherine's Milling*, quoted in the preface to this part, text accompanying note 432, *supra*, and the discussion of the second, Aboriginal class of occupation posited in *Delgamuukw*, in section 4.5.3 below. Significantly, several of the 19th century international law jurists advocating a distorted *terra nullius* doctrine in relation to sovereignty, argued that international law affirms Aboriginal property in land: see text accompanying note 568, *infra*. The international law rule relating to Aboriginal property in land is not examined in any detail in this analysis.

465. There is an extensive literature spanning several disciplines on this topic. Apart from Brennan J.'s analysis in *Mabo v. Queensland*, *supra*, note 34, the main sources relied upon in the following analysis are J. Chamberlin, *The Harrowing of Eden: White Attitudes toward Native Americans* (New York: Seabury Press, 1975); T. Berger, *supra*, note 95; M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-1990) 6 Can. Human Rights Y. B. 3; D. Gormley, "Aboriginal Rights as Natural Rights" (1984) 4 Can. J. Native Stud. 29; K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11; O. Dickason, "Concepts of Sovereignty at the Time of First Contacts", in L. Green and O. Dickason, *The Law of Nations and the New World* (Edmonton: Univ. of Alberta Press, 1989) 141; M. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green & Co. Ltd., 1926); A. Snow, *The Question of Aborigines in the law and practice of Nations* (New York: G.P. Putnam's Sons, 1921); J. Crawford, *The Creation of States in International Law*, *supra*, note 435, esp. 173-185; A. Pagden, *The Fall of Natural Man: the American Indian and the origins of comparative ethnology* (Cambridge: Cambridge Univ. Press, 1982); Francisco de Vitoria, "On the American Indians", in A. Pagden and J. Lawrance, eds., *Francisco de Vitoria, Political Writings* (Cambridge: Cambridge Univ. Press, 1991); W. Washburn, "The Moral and Legal Justifications for Dispossessing the Indians", in J. Smith ed., *Seventeenth Century America: Essays in Colonial History* (Chapel Hill, University of North Carolina Press, 1958); R. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Vintage Books, 1979); R. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford Univ. Press, 1990); F. Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill, Univ. of North Carolina Press, 1975); and R. Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind* (Baltimore: Johns Hopkins Press, 1965).

466. In its medieval and Spanish form, this was an argument for conquest of peoples, rather than for disregarding their occupation of territory. According to M. Lindley, "the general trend of opinion" among jurists and theologians of the Middle Ages who debated the justice of wars against "pagans" and "infidels," "was in the direction of denying sovereign rights to non-Christians, but, even among those who held this view, it was put forward as legitimizing a war of Conquest and not as rendering the lands of non-Christians *territoria nullius* which could be acquired by Occupation": *ibid.*, at 11. Lindley notes that, following Thomas Aquinas, Vitoria advocated recognizing the sovereignty of infidel peoples, and Vitoria denied that American Indian territory could be treated as *terra nullius*. Vitoria contended, however, that impediment to the preaching of the Gospel by the Indians would justify their conquest, including their sovereign dispossession: *ibid.*, at 11-12.

467. See *Mabo v. Queensland*, *supra*, note 34, at 21 (per Brennan J.).

468. See generally R. Ashcraft, *infra*, note 493.

469. The history of the international and colonial law rules pertaining to the conquest of "infidels", which can not be examined here in any detail, appears to illustrate this contribution in a complex and ambiguous way. After the medieval period it appears to have become clear that conquest is a derivative mode of acquiring sovereignty,

applicable only to territory held previously by another sovereign. Thus in *Calvin's Case* (1608) 7 CO. R. 1a, the laws of infidels were deemed abrogated by conquest, such laws apparently having been understood to flow from the infidels' previous sovereignty. Such an abrogation of the rights of infidels would appear to have departed from the general natural law rule espoused by Grotius, who argued against the claim that infidel territory could be acquired by discovery, from a position rejecting any divine right to subjugate infidels (*Mare Liberum* (1633), at 12, quoted by D. Greig, *supra*, note 438, at 148):

"Vitoria ... has the most certain warrant for his conclusion that Christians ... cannot deprive infidels of their civil power and sovereignty merely on the ground that they are infidels, unless some other wrong has been done by them. For religious belief, as Thomas Aquinas rightly observes, does not do away with either natural or human law from which sovereignty is derived. Surely it is heresy to believe that infidels are not masters of their own property; consequently, to take from them their possessions on account of their religious belief is no less theft and robbery than it would be in the case of Christians."

In medieval times, however, according to M. Lindley (*supra*, note 465) the sovereignty of non-Christian peoples was itself denied (at least by most advocates of a special rule for the conquest of infidels) without treating the territory of infidels as *terra nullius per se*, and thus without attributing sovereignty over their territories to a Christian monarch, short of conquest. As will be observed, *infra*, text following note 599, the distorted doctrine of peaceful settlement appears to have originated in reasoning roughly to the effect that if it is just to conquer non-Christian peoples and thus acquire sovereignty over their territory, perhaps conquest of such peoples is unnecessary, such that their sovereignty may simply be denied and their territory acquired by occupation. Of course, such an argument is unsupported by either the medieval rule described by Lindley, or the subsequent colonial law rule in *Calvin's Case*, but all three rationales share in common the penchant to subordinate non-Christian interests to those of Christian monarchs.

470. According to G. Marks. Bishop Las Casas, who framed his defence of the Indians within Aristotle's categories, distinguished four types of 'barbarians': "those who behave in a barbarous (savage) manner, even though not actually barbarians; the unlettered peoples; the 'true barbarians' to whom the doctrine of natural slavery applies; and finally, non-Christians": *supra*, note 458, at 26, n. 119. F. Jennings' analysis of the 'savage'/'barbarian' distinction suggests the variety of classifications made possible by such a way of thinking (*supra*, note 465, at 8-9, paragraphing omitted):

"At other times and on other occasions powers bent on conquest have been able to point to more substantial differences between their own cultures, always deemed as civilization, and the uncivilized societies of their opponents. Most frequently, perhaps, the difference has been one of religion. At other times it might have been the nomadic instead of sedentary habitation or one mode of subsistence versus another: communities without agriculture - or those possessing horticulture but lacking animal husbandry - were barbarous or savage. Some social scientists have tried to bring validity and precision to these conceptions by making literacy the criterion of civilization. All of these floundering attempts at explanation only serve to obscure the essential fact that the civilized-uncivilized distinction is a moral sanction rather than any given combination of social traits susceptible to objective definition. It is a weapon of attack rather than a standard of measurement. ... The myth's moral antithesis has survived superficial changes in terminology. ... The ancient myth cast a heavy shadow over the nineteenth century social scientists who attempted to structure the evolution of societies in *three* stages of savagery, barbarism, and civilization. A pioneer in this effort was the American lawyer-ethnologist Lewis Henry Morgan, whose work on the Iroquois Indians is often said to have founded the science of anthropology in the United States. Torn between his sympathy for the Indians and his contempt for their conditions, Morgan recognized that they were not the savages of crude popular myth, but he was equally certain of the inferiority of their culture to his own. Thus he put them in between the bottom and top and gave their intermediate position the name of barbarism, which had earlier been synonymous with savagery as a term of debasement. ... His major theoretical work ended with an overt declaration of racial elitism:

'It must be regarded as a marvellous fact that a portion of mankind five thousand years ago, less or more, attained to civilization. In strictness but two families, the Semitic and the Aryan, accomplished the work through unassisted self-development. The Aryan family represents the central stream of human progress, because it produced the highest type of mankind, and because it has proved its intrinsic superiority by gradually assuming the control of the earth.'

471. A. Pagden describes the origin and purpose of the "barbarian" concept as follows (*The Fall of Natural Man*, *supra*, note 465, at 13-14, 15-16):

"In [sixteenth and early seventeenth century] European eyes most non-Europeans, and nearly all non-Christians, including such 'advanced' peoples as the Turks, were classified as 'barbarians'. ... [T]his word plays a crucial role in nearly every attempt to characterize the Amerindian and his culture... .

The prime function of the term 'barbarian' and its cognates, 'barbarous', 'barbarity', etc., was to distinguish between those who were members of the observer's own society and those who were not. The observers themselves - those, that is, who applied these terms to others, since it was they who were faced with the task of classifying and describing something they felt to be alien to *them* - rarely troubled to attempt a self-definition. They assumed themselves to be all that the 'barbarian' was not; and the word 'barbarian' does have an antonym in the terms 'civil' or 'politic'. ... 'Barbarian', however, is an unstable term for it was applied to many different groups. The Berbers of North Africa, the Turks, the Scythians, the peoples of 'Ethiopia', even the Irish and the Normans were all described at one time or another as barbarians. Like all such categories of description, the word can be readily adapted to fit the user's particular needs. The one thing, however, which all usages had in common was the implication of inferiority. The Greeks of the seventh and sixth centuries B.C. who coined the word employed it, it is true, simply to mean 'foreigner'; and they applied it to peoples such as the Egyptians, whom they respected. But by the fourth century, *barbaros* had become, and was forever to remain, a word which was used only of cultural or mental inferiors."

Similarly, F. Jennings explains (*supra*, note 465, at 6-7):

"From very ancient times self-consciously 'civilized' peoples have favourably compared themselves with their neighbours. The Greeks invented the term *barbarian* to apply to outsiders - even such as Egyptians and Persians - and the Romans were not slow to adopt the idea. As W. R. Jones has remarked, 'The antithesis which opposed civilization to barbarism was a highly useful cliché, and one which served equally well as a means of self-congratulation and as a rationalization for aggression.' Barbarism's definition varied from century to century, sometimes stressing linguistic or cultural differences, sometimes denoting little more than heathenism in religion, but always retaining a core meaning of inferiority in moral worth. In Jones's words, 'The image of the 'barbarian', whatever its specific historical context and to whomever applied, was the invention of civilized man who thereby expressed his own sense of cultural and moral superiority.'" [citation omitted]

Reflecting on the contemporary importance of the Valladolid debate, G. Marks argues that "[t]he accusation of barbarism is the fundamental racial basis of colonialism - it provides the justification for the subordination of one society by another ... that one race of people is, for whatever reason, inferior to another": *supra*, note 458, at 27.

472. Juan Gines de Sepulveda: see A. Pagden, "Dispossessing the barbarian: the language of Spanish Thomism and the debate over the property rights of the American Indians," in A. Pagden, *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge Univ. Press, 1987) at 37; and L. Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Philadelphia: Univ. of Penn. Press, 1949), at 113-115.

473. Las Casas' account of his opponent's arguments is summarized by G. Marks, *supra*, note 458, at 25-26. See also A. Pagden, "Dispossessing the barbarian", *supra*, note 472, at 90-92. For an English translation of excerpts of Sepulveda's argument, see Contemporary Civilization staff of Columbia College, Columbia University, *Introduction to Contemporary Civilization in the West*, Vol. 1, 3d ed., (New York: Columbia University Press, 1960), at 523-52. In classifying the Aztecs and other victims of the Conquest as "barbarians", Sepulveda said (*ibid.*, at 526-528):

"You can well understand, ... if you know the customs and manners of different peoples, that the Spanish have a perfect right to rule these barbarians of the New World and the adjacent islands, who in prudence, skill, virtues and humanity are as inferior to the Spanish as children to adults, or women to men, for there exists between the two as great a difference as between savage and cruel races and the most merciful, between the most intemperate and the moderate and temperate and, I might even say, between apes and men. ... [R]ecall ... the prudence and talents of the Spanish Compare, then, these gifts of prudence, talent, magnanimity, temperance, humanity, and religion with those possessed by these half-men (*homunculi*), in whom you will barely find the vestiges of humanity, who not only do not possess any learning at all, but are not even literate or in possession of any monument to their history except for some obscure and vague reminiscences of several things put down in various paintings; nor do they have written laws, but barbarian institutions and customs. ... Although some of them show a certain ingenuity for various works of artisanship, this is no proof of human cleverness, for we can observe animals, birds, and spiders making certain structures which no human accomplishment can competently imitate. And as for the way of life of the inhabitants of New Spain and the province of Mexico, ... these people are considered the most civilized of all, and they themselves take pride in their public institutions, because they have cities erected in a rational manner and kings who are not hereditary but elected by popular vote, and among themselves they carry on commercial activities in the manner of civilized peoples. But see how they deceive themselves, and how much I dissent from such an opinion, seeing, on the contrary, in these very institutions a proof of the crudity, the barbarity, and the natural slavery of these people; for having houses and some rational way of life and some sort of commerce is a thing which the necessities of nature itself induce, and only serves to prove that they are not bears or monkeys and are not totally lacking in reason. But on the other hand, they have established their nation in such a way that no one possesses anything individually, neither a house nor a field, which he can leave to his heirs in his will, for everything belongs to their masters whom, with improper nomenclature, they call kings, and by whose whims they live, more than by their own, ready to do the bidding and desire of these rulers and possessing no liberty. And the fulfilment of all this, not under the pressure of arms but in a voluntary and spontaneous way, is a definite sign of the servile and base soul of these barbarians. They have distributed the land in such a way that they themselves cultivate the royal and public holdings, one part belonging to the king, another belonging to public feasts and sacrifices, with only a third reserved for their own advantage, and all this is done in such a way that they live as employees of the king, paying, thanks to him, exceedingly high taxes. ... And if this type of servile and barbarous nation had not been to their liking and nature, it would have been easy for them, as it was not a hereditary monarchy, to take advantage of the death of a king in order to obtain a freer state and one more favourable to their interests; by not doing so, they have stated quite clearly that they have been born to slavery and not to civic and liberal life." [paragraphing omitted]

474. Bartolomé Las Casas, *De Unico Vocationis*, quoted from L. Hanke, *All Mankind is One*, 1974, at 157, in G. Marks, *supra*, note 458, at 27. Retrospectively, G. Nash assesses the deterministic function of a rhetorical concept closely related to that of the 'barbarian,' in similar terms: "To imagine the Indian as a savage beast was a way of predicting the future and preparing for it and of justifying what one would do, even before one caused it to happen": quoted in K. Sale, *The Conquest of Paradise: Christopher Columbus and the Columbus Legacy* (New York: Alfred A. Knopf, 1990), at 281.

475. In the 16th and early seventeenth century Aristotle's image dominated European thinking about Aboriginal peoples, in popular myth, political thought and 'anthropology': see A. Pagden, *The Fall of Natural Man*, *supra*, note 465, at 13-14, 15. See also W. Washburn, *supra*, note 465, at 22 ("[n]ext to treacherousness, 'barbarism' was the most convenient accusation to hurl against the Indian in the seventeenth century"). According to R. Ashcraft, the Europeans' image of the Indian in the seventeenth century was paradoxical: "[i]n the clear light of Aristotelianism, men stood above the beasts, and Christians added, devils were beneath the latter. The exact classification of the Indians posed something of a problem, however, since they were men who lived like beasts and, generally, worshipped the devil": R. Ashcraft, *infra*, note 493, at 1089.

476. See M. Lindley, *supra*, note 465, at 12.

477. Vitoria's position was fairly clear respecting Aboriginal property in land. There continues to be some disagreement among scholars, however, as to the extent to which Vitoria acknowledged a substantive form of Aboriginal sovereignty. Vitoria appears to have used "*dominium*" to express what today would be considered proprietary and also, in some respects, sovereign entitlements: see G. Marks, *supra*, note 458, at 38-39. Vitoria's concept of Spanish guardianship of the Indians is also a source of ambiguity for modern interpretation: *ibid.*, at 46-47. In G. Marks' review of the commentaries (which notes that the issue has received uneven treatment) the following commentators are said to understand Vitoria as having accorded Aboriginal peoples some form of sovereignty, inherent right of self-government, or international legal personality: V. Leary; J. Henderson, M. Lindley, and F. Cohen. Marks implies that R. Williams holds the contrary view. A. Pagden and J. Lawrance find Vitoria ambivalent:

"[According to Vitoria the Indians] were in full possession of their rights [including *dominium*], but without the capacity to exercise them. ... Vitoria concluded ... that the Castilian crown might (but only might) be able to claim a right to hold the Indians and their lands in tutelage until they reached the age of reason ... Vitoria ... left his king with only a slender claim to jurisdiction (*dominium iurisdictionis*) in America, but no property rights whatsoever."

("Introduction", in *Vitoria: Political Writings*, *supra*, note 465, at xxvi-xxvii.) According to Marks (*ibid.*, at 49):

"it can be concluded that Vitorian doctrine asserts the legitimate public title of indigenous peoples - an assertion which was eroded in international law at least until the modern decolonisation era, and which remains contentious in respect of indigenous enclave groups in independent countries. However, the nature of the sovereignty so asserted was restricted by the norms of the natural law system on which it was premised. There is little room in such a system for an indigenous perspective on the rights and wrongs of the relationship with the colonizing power, or on any successor state."

478. "They are not of unsound mind, but have, according to their kind, the use of reason ... there is a certain method in their affairs, for they have politics which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops ... all of which call for the use of reason": *De Indis et de Jure Belli Relectiones*, 1st ed., (1557), reprinted in J. Scott (ed.) *Classics in International Law* (1964), trans. J. Bate, quoted by G. Marks, *supra*, note 458, at 38.

479. "I for the most part attribute their seeming so unintelligent and stupid to a bad and barbarous upbringing, for even among ourselves we find many peasants who differ little from brutes": quoted in R. Williams, *The American Indian*, *supra*, note 465, at 99. In M. Lindley's summary Vitoria suggested, further, "with hesitation that, if the Indians were not capable of forming a State, then, in their own interests, the King of Spain might acquire sovereignty over them in order to raise them in the scale of civilization, treating them charitably and not for personal profit" (*supra*, note 465, at 12). Vitoria's hesitation as to the soundness of this argument, if not as to his sentiments, was considerable: "I dare not affirm it at all, nor do I entirely condemn it" (*De Indes et de Juri Belli Relectiones*, quoted by G. Marks, *supra*, note 458, at 47).

480. Quoted in O. Dickason, *supra*, note 465, at 233.

481. Quoted in D. Kennedy, "Primitive Legal Scholarship", 27 Harv. Int'l L. J. (1986) 1, at 24.

482. Quoted in R. Williams, *The American Indian*, *supra*, note 465, at 99.

483. O. Dickason, *supra*, note 465, at 234. To similar effect, see M. Lindley, *supra*, note 465, at 11.

484. O. Dickason, *supra*, note 465, at 235.

485. Grotius' first treatise, *The Law of Prize*, was prepared in 1605 on retainer from the East India Company for the purpose of justifying the Company's practice of capturing enemy goods: see E. Dumbaud, *The Life and Legal Writings of Hugo Grotius* (Norman: University of Oklahoma Press, 1969), at 7, 25. The treatise, which concludes that the practice was "honourable and expedient, as well as lawful", ends with a paean to Dutch imperialism in the "remote" and "pagan" parts of the world (quoted *ibid.*, at 28-29):

"I beseech the immortal God ... Whom it hath pleased to choose the Dutch above all others that through them He might show how feeble is every human greatness when measured against his might, and moreover to make known the glory of that people in the most remote parts of the world created by Him, humbly praying, first that he might give them such demeanour as befits the Christian name, lest their vices among pagan nations harm the true religion, next that He may confound the cruel counsels of our enemies, and that it be not His will that the innocent succumb to their ferocity, but that he might strike down those with disaster and slaughter, ... and that to all He may give such wisdom that we may use and enjoy victory, which we recognize as the gift of heaven, with pure and thankful hearts."

According to Dumbaud (at 54-56), this lesser known work established most of the basic themes developed in *The Law of War and Peace* (cited elsewhere in this analysis as *Mare Liberum*), published in 1625.

D. Greig situates Grotius among "the apologists of the second wave of colonizers" whom it "suited ... to deny Spanish and Portuguese claims by reference to the rights of the original inhabitants": *supra*, note 438, at 148 (and see the excerpt from *Mare Liberum* quoted in note 438.) It appears Grotius was also prepared to nuance this position. In 1605 Dutch colonial expansion in the western hemisphere was in its earliest phase, centred mainly in South and Central America. The North American Province of New Netherlands was founded in 1623. For a brief survey of Dutch colonization in the 'New World' see R. Sanders, *Lost Tribes and Promised Lands: The Origins of American Racism* (Harper Perennial: New York, 1992), at 329, 345-346, 352, 372-375.

486. Quoted by O. Dickason, *supra*, note 465, at 235. If, as appears likely, Grotius' statement influenced John Locke and Emerich Vattel's justifications for appropriation of Aboriginal territory and land in the 'New World,' it should be noted that Grotius did not suggest that application (L. Green, "Claims to Territory in Colonial America", in L. Green and O. Dickason, *supra*, note 465, 1, at 58-59) and that the character of Dutch colonialism in the New World was relatively non-obtrusive:

"[The Province of New Netherlands] was primarily just a collection of trading outposts of the Dutch West India Company, in one respect a far northern extension of the Caribbean network, in another, a counterpart to the French enterprise in Canada, manifesting its equivalent to the *coureurs de bois* in some of the adventurous patrols and their comrades in the north. ... New Netherlands was ... largely a place for the type of colonist ... more in search of adventurous profiteering than of a new homeland. ... [O]n the whole, race relations along the Hudson were so good that the Dutch friendship with the Iroquois, later inherited by the English, was to turn into the longest lasting and most powerful European-Indian alliance in all of the Americas."

(R. Sanders, *supra*, note 485, at 373 (paragraphing omitted). See also the review of early Dutch/Aboriginal relations in H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776," in O. Lyons et al., *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution* (Sante Fe: Clear Light, 1992) 125, at 135-139. Grotius' writings evidently did share with those of Locke and Vattel the important assumptions that colonisation was inherently virtuous, and that the ways of his people were superior to those of other (particularly non-Christian) peoples.

487. Id. M. Lindley observes that in other sections of the same work, Grotius was equivocal as to the exception he had made for sovereignty, and that Samuel Pufendorf later attempted to explain the ambiguity by construing Grotius as having distinguished in an unconventional way between "sovereignty over men", covered by the exception, and "sovereignty over lands", acquirable over inhabited but unoccupied lands (*supra*, note 465, at 14). Lindley understands Pufendorf to have meant that "Grotius did not intend to convey the idea that sovereignty can be acquired over inhabited lands by Occupation" (*id.*). If Lindley's view is correct, Grotius is the only international jurist discussed in this analysis who might have been prepared to affirm the sovereignty of Aboriginal hunting and gathering societies while denying them property in their lands.

488. See generally G. Lester, "Primitivism versus Civilization", *supra*, note 90; R. Ashcraft, *infra*, note 493; and J. Tully, "Rediscovering America", *infra*, note 502.

489. See generally the sources noted, *ibid.*

O. Dickason notes that Thomas More had argued in his *Utopia* that "people holding a piece of ground void and vacant for no good and profitable use" could be justly conquered and dispossessed by peoples who "by the law of nature ought thereof to be nurtured and relieved": *supra.*, note 465, at 234. (As noted, *supra*, notes 466 and 469, conquest rationales do not necessarily deny the original right of the conquered peoples. They formally fall within the category of theories of extinguishment or disqualification addressed in preceding sections of this paper. But where conquest theories did not deny Aboriginal rights, they often served to weaken their status and so diminish any duty to respect them.) Dickason also notes that a student of Vitoria's disputed the sweep of More's theory on the basis that a community's abundance alone is not cause "to be deprived of the ownership of its lands, unless it be for some other reason that has to do with the common good so that he who abounds is to give to the needy" (*id.*). For discussion of Sir Walter Raleigh's doubt-ridden reliance on More's theory in defence of colonial claims, see W. Washburn, *supra*, note 465, at 24-25. It is beyond the scope of this analysis to pursue the important issue of need as a justification for dispossession, which is a theme (pursued unevenly in the extreme) also of Locke's and Vattel's writings. For thoughtful discussions, see D. Gormley, *supra*, note 465, at 39-40, and (in a more general context) T. Honoré, "The Human Community And The Principle of Majority Rule", (1979) 8 Sydney L. Rev. 599. B. Slattery's discussion of the Crown's duty to balance Aboriginal and public interests in "well-being and survival," among other interests, in "First Nations and the Constitution", *supra*, note 228, at 287-293, also addresses this issue. For a modern judicial response to a needs-based argument for Aboriginal ownership, see Wallace J.A.'s comments in *Delgamuukw*, quoted, *infra*, note 836.

490. See generally R. Ashcraft, *infra*, note 493, and J. Tully, "Rediscovering America," *infra*, note 502.

491. See R. Ashcraft, *infra*, note 493, esp. 1091-1092. Hobbes' anti-Aristotelian vision of the equality of citizens was negative: while positing that all human beings have the capacity to enter into the social contract, Hobbes' argued (in Ashcraft's summary) that "men are naturally equal ... not because they are 'reasonable' creatures, but because they are equal in their capacity to kill each other": *ibid.*, at 1091. Locke's initial equality premise was more positive (*Two Treatises*, *infra*, note 501, *Second Treatise*, c.2, s. 4, at 309):

"[W]e must consider what State all Men are naturally in, and that is, a *State of perfect Freedom* ... [and a] *State also of Equality*, wherein all the Power and Jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that Creatures of the same species and rank, promiscuously

born to all the same advantages of Nature, and the use of the same faculties should also be equal one amongst another without Subordination or Subjection, unless the Lord and Master of them all, should by any manifest Declaration of his Will set one above another, and confer on him by an evident and clear appointment an undoubted right to Dominion and Sovereignty."

492. Even Rousseau considered 'civilization' a necessary development, finding in 'nature' not a means of escape from civilization but ameliorating impulses:

"Man is born free; and everywhere he is in chains. One thinks himself the master of others, and still remains a greater slave than they. How did this change come about? I do not know. What can make it legitimate? That question I think I can answer."

(*The Social Contract*, quoted in M. Adler and P. Wolff, *infra*, note 496, at 153.)

493. Hobbes' views, written in defence of the Royalist side during the Commonwealth, were pre-liberal, in that they sought exit from the state of nature by social contract, yet placed almost unlimited sovereign power in the government to be created, with minimal provision for retained individual right. See generally P. Wolff and M. Adler, *infra*, note 496, at 101-115, and R. Ashcraft, "Hobbes's Natural Man: A Study in Ideology Formation" (1971) 33 *Journal of Politics*, 1076.

494. The full passage reads:

"Whatsoever therefore is consequent to a time of war, where every man is enemy to every man, the same is consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry, because the fruit thereof is uncertain; and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."

(P. Wolff and J. Adler, *infra*, note 496, quoting from *Leviathan*. (This is the passage to which Hobbes subsequently alludes in the statement quoted, *infra*, note 496.)

495. See, for example, note 496, *infra*. Montaigne claimed that Aboriginal society resembled life in the "golden age" described by the ancient poets: R. Ashcraft, *supra*, note 493, at 1093 (quoting Montaigne's *Essays*). According to R. Berkhofer, *supra*, note 465, at 74-75:

"The transition from description of the American Indian as Noble Savage to the use of the Noble American Indian as a critic of European society and culture is difficult to date, but scholars generally agree that most of the chief milestones occurred in France from the late sixteenth century to the late seventeenth century. Scholars usually credit Montaigne's synthesis of French and Spanish accounts of Mexican and South American Indians with French scepticism and humanism as the first full-length portrait of the Noble Savage as critic of contemporary European civilization and model of what men ought to, and could, be. ... Rousseau, Voltaire, Diderot, and other famed philosophers of the eighteenth century had but to continue a tradition well established by their day of using the Noble Savage in general and the American Indian in particular for their moral and political purposes."

496. Hobbes warned as follows (excerpted from *Leviathan* in M. Adler and P. Wolff, *The Development of Political Theory and Government* (Chicago: Encyclopedia Britannica, 1959), at 102):

"It may peradventure be thought,... there was never such a time or condition . . . ; and I believe it was never generally so, all over the world: but there are many places where they live so now. For the savage people in many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all, and live at this day in that brutish manner, as I said before."

For further examples of Hobbes' extensive reliance upon stereotypes of Aboriginal life reflecting the "commonly held cultural prejudices of his readers", see R. Ashcraft, *supra*, note 493, esp. 1096-1097, 1101, 1110-1111.

Rousseau illustrated his idealization of 'natural man' with anecdotes such as the following (excerpted from *Discourse upon the Origin and Foundation of the Inequality among Mankind* in R. Venables, "American Indian Influences on the America of the Founding Fathers", in O. Lyons, J. Mohawk et al., *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution* (Sante Fe: Clear Light Publishers, 1992), 73, at 79-80):

"Savage man and civilized man differ so much at the bottom of their hearts and in their inclinations, that what constitutes the supreme happiness of one would reduce the other to despair. The first sighs for nothing but repose and liberty; he desires only to live, and to be exempt from labour; nay, the ataraxy of the most confirmed Stoic falls short of his profound indifference to every other object. Civilized man, on the other hand, is always in motion, perpetually sweating and toiling, and racking his brains to find out occupations still more laborious; he continues a drudge to his last minute Among other Stories I remember one concerning the Chief of some North-American Indians brought about thirty years ago to the Court of London. A thousand things were laid before him, in order to find out what Present would be acceptable to him, without hitting upon anything that he seemed to like [until] at length, he was observed to take up a Blanket, and seemed to take great pleasure in wrapping himself up in it. You must allow, said the Europeans about him, that this, at least, is an useful piece of furniture? Yes, answered the Indian, I think it almost as good as the skin of a Beast. And even this he would not have allowed, had he worn both under a shower."

It may be noted that as much as Rousseau's story idealised the Indian, the image of Indians being disinclined to work and unconcerned with property also coincided with less envious caricatures.

497. The state of nature existed at different distances from reality for each of Hobbes, Locke, and Rousseau. Hobbes believed that English society and many others had emerged from that state in the past; that some people actually live in it; and that latent characteristics were apparent in contemporary English society. See generally R. Ashcraft, *supra*, note 493, and M. Adler and P. Wolff, *supra*, note 496, at 102. For Hobbes, however, empirical allusion merely served to buttress analytical claims:

"Hobbes approach to politics was fundamentally analytical,... his model of science was geometry, not biology.... [H]is statement, 'experience concludeth nothing universally' expressed his general attitude toward the fact-gathering alternative to his own methodology. ... Hobbes begins his discussion of politics, as he began his physiological discussion of man, by 'feigning' the 'annihilation' of the world ... he therefore did intend to produce a 'fiction' to be used as the starting point for his reconstruction of political society."

(R. Ashcraft, *ibid.*, at 1076). Ashcraft disagrees with the "clear consensus among Hobbes scholars" that the state of nature for Hobbes was "in no sense a product of realistic political observation", and has nothing to do with either history or anthropology." Rather, Ashcraft (who uses "ideology" to refer to "an articulated defence of certain political interests in society" in the context of a struggle for power (at 1079)) argues that

"Hobbes attempted to use his notion of the state of nature as an ideological weapon against his opponents, partly by incorporating their historical and philosophical positions into his own, partly by an appeal to

anthropological evidence and to the commonly held cultural prejudices of his readers. ... In effect, through Hobbes, the savage and the anarchist became synonymous labels to be applied to any enemy of the order and 'civilization' of English society".

(at 1077). Since "the Indians were almost universally regarded by Englishmen as culturally inferior beings", 17th century 'anthropology' and popular beliefs served Hobbes' ideological purpose admirably (*ibid.*, at 1095). Building on "anomalous evidence of hostility on the part of the Indians" (*ibid.*, at 1095) Hobbes could draw "a bestial portrait of men in general", the Indians "naturally represent[ing] for him the primary living illustration" of his concept of the state of nature "as the condition of total war" (*ibid.*, at 1097). In Ashcraft's estimation, Hobbes' opponents also made considerable "polemical use .. of empirical evidence gathered from the growing stockpile of travel literature", but "Hobbes was able to make more effective use of anthropological evidence than were his opponents", "given his simplified and theologically unencumbered cosmology" (*ibid.*, at 1106).

"Hobbes's example of the American Indians as 'natural men' was a powerful one because, whatever else his critics believed, they did not think the Indians civilized. The Indian in the seventeenth century was 'important for the English mind, not for what he was in and of himself, but rather for what he showed civilized men they were not and must not be'. [citation omitted]. ... [P]recisely because the Americans were viewed as inferior beings, Hobbes' equation of their existence with a state of nature to be avoided fused together his contemporaries' cultural prejudices and their fear of a return to civil war and anarchy into an effective ideological picture of anarchy as savagery": (*ibid.*, at 1108).

Rousseau's use of the construct was more simple. "For Rousseau the state of nature is a hypothesis which throws light on the present condition of man" (J. Adler and P. Wolff, *supra*, note 506, at 154). According to Adler and Wolff, Rousseau argued that philosophers had "not in fact been able to find a single historic example of men living in a state of nature", but Rousseau considered such a failure irrelevant (at 153). Philosophers should begin instead "by laying facts aside, as they do not affect the question. The investigations we may enter into ... must not be considered as historical truths, but only as mere conditional and hypothetical reasonings, rather calculated to explain the nature of things, than to ascertain their actual origin: just like the hypotheses which our physicists daily form respecting the formation of the world" (*ibid.*, at 153-154, quoting from *The Social Contract*). Thus Rousseau's anecdotes and plays on the subject of Aboriginal life were self-consciously mythical.

(Locke's construct, which served an intermediate function, is reviewed, *infra*, at note 504.)

498. R. Berkhofer (*supra*, note 465, at 22) attributes the tendency of the philosophers of this period to adopt diametrically opposed images of Aboriginal peoples, to the ideological purpose served by the images in their theories:

"For John Locke 'in the beginning all the World was *America*' also, but he contradicted Hobbes in equating the state of nature with the state of war, for men could live in reason and peace without government as the Europeans knew it. That the two eminent English philosophers believed the Indian proved their opposing claims shows the ambivalence of the imagery as well as the implications of using a general name for all North Americans regardless of what Whites knew of the social and cultural diversity among the inhabitants of the Western Hemisphere. In the books of Hobbes and Locke the Indians had moved from the contrasting descriptions of explorers and settlers to the ideological polemics of social philosophers."

499. R. Ashcraft notes, for example, that the Third Earl of Shaftesbury, a pupil of John Locke, would complain that "[o]ur relish or taste must of necessity grow barbarous, whilst barbarian customs, savage manners, Indian wars, and wonders of the terra incognita, employ our leisure hours and are the chief materials to furnish out a library. These are in our present days what books of chivalry were in those of our forefathers": *supra*, note 493, at 1115. (Of course, such myths continue to have influence. For analysis of images of the "primitive" - "noble" and "ignoble" - appearing in contemporary legal literature, see C. Tennant, "Indigenous Peoples, International

500. Locke, for example, evidently assumed that negligible labour was expended in Aboriginal hunting societies, animals being caught "spontaneous[ly]": see note 509, *infra*. Generally,

"[b]oth Hobbes and Locke picture labouring activity as regulated and 'limited' by ... government. The key term they use to describe and legitimate this political economy is 'improvement' and they contrast this ethos of European improvement with Amerindian hunting and gathering society.... Indeed, the emphasis on labour, cultivation, and improvement is the standard justification of the dispossession of Amerindians,"

("After the Macpherson thesis", in J. Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge; Cambridge Univ. Press, 1993) 71, at 86. The dispossessive consequences of Locke's theory of property are discussed further, *infra*, text following note 516.

501. Locke published his *Two Treatises* in 1689. (Subsequent references in this analysis not attributed to secondary sources are to J. Locke, *Two Treatises of Government*, P. Laslett ed. (New York: Mentor, 1963)). The extraordinary impact of Locke's thought on political theory and political action, in Europe and in America, was largely a phenomenon of the following century: see generally J. Dunn, *Locke* (Oxford: Oxford Univ. Press, 1984).

502. See generally J. Tully, "Rediscovering America: the Two treatises and aboriginal rights" in J. Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge; Cambridge Univ. Press, 1993) 137. For Locke's influence on natural law theory in particular, see note 542, *infra*. W. Washburn writes that the claim that "hunters might justly be forced to alter their economy by a pastoral or agricultural people" was "the most popular eighteenth- and nineteenth-century justification for dispossessing [the Indians]", and that Locke "was perhaps its most famous exponent": *supra*, note 465, at 22.

503. J. Dunn describes Locke's "worldly prospects" and political commitments in the years following Locke's rise to favour, as follows (*supra*, note 501, at 11-12):

"In the fifteen years which remained to him before his death his political commitments remained as diverse as ever. Some were political in the narrowest sense: the consolidation of William's constitutional and political position, the reorganization of the English coinage, the establishment of an effective credit system for the English State through the new Bank of England, and the development of new institutions through which the government could exercise more effectively its responsibilities for the prosperity of English foreign trade. In each of these Locke himself was actively engaged, in the last three as a trusted intellectual adviser to the country's leading statesmen and over foreign trade as a lavishly rewarded public official on the new Board of Trade. Each of these preoccupations represented, in some measure, a fulfilment of Shaftesbury's programme of the late 1660's and early 1670's, a programme of highly self-conscious commercial imperialism in a narrowly English interest."

J. Tully describes Locke's involvement in colonial matters as follows ("Rediscovering America," *supra*, note 502, at 140-141):

"Locke had extensive knowledge of and interest in European contact with aboriginal peoples. A large number of books in his library are accounts of European exploration, colonization and of aboriginal peoples, especially Amerindians and their ways. As secretary to Lord Shaftesbury, secretary of the Lord Proprietors of Carolina (1668-71), secretary to the Council of Trade and Plantations (1673-4), and member of the Board of Trade (1696-1700), Locke was one of the six or eight men who closely invigilated and helped to shape the old colonial system during the Restoration. He invested in the slave-trading Royal Africa Company (1671) and the Company of Merchant Adventurers to trade with the Bahamas (1672) and he was a Landgrave in the proprietary government of Carolina. His theoretical and policy-making writings

on colonial affairs include the *Fundamental Constitutions of Carolina* (1669), Carolina's agrarian laws (1671-2), a reform proposal for Virginia (1696), memoranda and policy recommendations for the boards of trade, covering all the colonies, histories of European exploration and settlement, and manuscripts on a wide range of topics concerning government and property in America".

Tully notes that in 1669 Locke assumed joint leadership with Lord Shaftesbury in the operation of the Carolina proprietorship, planning "to make a profit from land-rent and the trade of agricultural products": *ibid.*, at 143. When the colonists devoted their energies to trading in furs and slaves with the Aboriginal peoples of the territory, conflict between the colonists and Aboriginal peoples followed, which Locke attempted to resolve by introducing a law "forbidding Amerindian slavery and offering the native peoples individual plots of land under proprietary government": *ibid.*, at 144. The measure failed, the Indian slave trade flourished in Carolina, and in 1679 the colonists "declared war on the [neighbouring] Westos and killed those they were unable to enslave" (*id.*). Tully attributes Locke's claim that natural law endorses the punishment of theft and violence with death, in a state of war, not only (as have standard readings) to the justification for punishing a marauding King of England in armed revolt, but to the colonists' justification for "war" upon the Indians. Locke, in fact, illustrated his point by reference to the right of the governments of England, France and Holland to punish or put to death "an Indian" who breaches natural law: *ibid.*, at 144-145.

For further references in the political science literature to Locke's political and commercial interests and activities related to colonization, see Tully, *ibid.*, at 139 n. 3.

504. J. Tully explains the status of the state of nature in Locke's thought, and of its American example, in particular, as follows ("Rediscovering America," *supra*, note 502, at 141):

"In the *Two Treatises* America is immediately identified as one example of the 'state of nature' and then classified as the earliest 'age' in a worldwide historical development. '[I]n the beginning all the World was America', Locke asserts in section 49. America is 'still a Pattern of the first Ages in Asia and Europe' (108), and Amerindians and Europeans who make contact with them are 'perfectly in a State of Nature' (14, cf. 109)."

Generally, Locke characterized this condition as "a state of perfect freedom" in which individuals may "order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the will of any other man": R. Williams, *supra*, note 465, at 247, quoting from the *Two Treatises*. As Williams emphasizes, a frontier was thus imagined, which Aboriginal individuals inhabit perpetually, and into which colonists may enter at will. The fact that America's expanse of land and resources happened to be found in a state in which the colonists themselves were free of any social obligation and unaccountable to any government as long as they remained outside the bounds of non-Aboriginal organized society, suited colonial interests well.

505. J. Tully, "Rediscovering America" *supra*, note 502, at 141, 142.

506. In J. Tully's summary:

"[T]he inhabitants [of the state of nature] exercise what has come to be called 'individual popular sovereignty' or 'individual self-government'. That is, 'the Execution of the law of nature is in that State, put into every Mans hands' (7). This individual and natural exercise of political power comprises the abilities to know and to interpret standards of right (natural laws), to judge controversies concerning oneself and others in accordance with these laws, and to execute such judgements by punishments proportionate to the transgression and appropriate for purposes of restraint and reparation (7-12, 136). Individuals are free to order their actions within the bounds of natural laws and are equal in the 'Power and Jurisdiction' to govern the actions of those who transgress these bounds (4,6). This system of individual self-government

is illustrated with examples from America (9, 14, 107)."

("Rediscovering America", *supra*, note 502, at 142.)

507. Ibid., at 142: "Political society is then defined in explicit contrast to this natural mode of individual self-government: namely, where individuals have given their 'natural power' to the community and set up 'a common establish'd Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders" (quoting from the *Second Treatise*, section 89).

508. Ibid., at 139. More specifically, Tully also argues (at 142-145) that the premise that Aboriginal peoples exist in the state of nature enabled Locke to argue, along a line similar to that taken earlier by the natural law jurist Francisco de Vitoria, and subsequently by Grotius and Pufendorf, that the colonists could make war upon Aboriginal peoples without the authorization of their own sovereign, upon an Aboriginal people injuring them in violation of the law of nature (colonists and Aboriginal peoples alike being licensed within the state of nature to enforce the laws of nature as individuals).

509. Ibid., at 151-152. The passage continues (at 152):

"They have few disputes because they have limited and moderate amounts of property. In turn, the explanation for this, which explains their whole system, is that they have limited and fixed desires: 'confining their desires within the narrow bounds of each mans smal propertie made few controversies' (107). Their desires are limited and they have 'no Temptation to enlarge their Possessions of land, or contest for wider extent of Ground' because they lack money and large population which activate the desire to possess more than one needs (108). That is, they lack the acquisitive desire to enlarge their possessions that leads to disputes over property and thus to the need for a distinct political society with an established system of property law to settle them. Locke sums this up in *The third letter concerning toleration* (cited in the editor's note to the *Two treatises* 2. 108):

'Let me ask you, Whether it be not possible that men, to whom the rivers and woods afforded the spontaneous provisions of life, and so with no private possessions of land, had no enlarged desires after riches or power, should live in one society, make one people of one language under one Chieftain, who shall have no other power to command them in time of common war against their common enemies, without any municipal laws, judges, or any person with superiority established amongst them, but ended all their private differences, if any arose, by the extemporary determination of their neighbours, or of arbitrators chosen by the parties.'"

510. For the suggestion that Locke's discussion of the family authority of Aboriginal patriarchs acknowledged some form of Aboriginal right of self-government, see note 550, *infra*.

511. According to J. Dunn, "the main stimulus which led [Locke] to discuss property in [the] sense of entitlement to material possessions, was the wish to deny a right on the part of a reigning monarch to do as he chose with the material possessions of his subjects, without their express consent": *supra*, note 501, at 41. Dunn explains that the motive was pressing and current. Charles I's claim of entitlement to seize the possessions of subjects had been one of the main causes of a civil war. English politics was preoccupied, as the *Two Treatises* were written, with the possibility of revival of the practice by Charles II: *id.* Dunn describes Locke's related critique of royal absolutism and theory of popular sovereignty as "intensely seditious", noting that publication was delayed until after Locke returned from five years of exile undertaken on account of the hazard involved in his work (at 10-11).

512. "In the beginning all the World was America": *supra*, note 504.

513. R. Williams, *supra*, note 465, quoting from the *Two Treatises*. Referring to the *Second Treatise* J. Dunn summarizes the position as follows (*supra*, note 501, at 38):

"Labour is what distinguishes what is privately owned from what is held in common; the labour of a man's body and the work of his hands. Labour is the unquestionable property of the labourer; and by mixing his labour with material objects - hunting (II 30), gathering (II 28), but also cultivating the ground (II 32-4) - a man acquires the right to what he has worked on and to what he has made of this material."

(For Locke, the implication for hunting and gathering is that such labour is not mixed with the land itself, but only with the animals and plants, etc: hence the *produce* belongs to the hunter or gatherer, but not the land. The material object with which cultivation mixes labour, however, is the "ground" itself, and land therefore becomes the property of its cultivator. See note 522, *infra*, and accompanying text. In part, the distinction appears to have depended upon Locke's claim that the land-related labour involved in hunting was minimal, since its results are virtually "spontaneous": see note 509, *infra*.)

514. *Ibid.*, at 247, and see also J. Dunn's summary, *ibid.*

515. "Men, being once born, have a right to their preservation, and consequently to meat and Drink, and such other things, as Nature affords for their subsistence": *Two Treatises*, *supra*, note 501, section 25, at 327. (See also J. Dunn, *supra*, note 501, at 43). This right established the limit that appropriation in the state of nature may take place only in so far as "enough and as good" remains for others (see note 520, *infra*).

516. *Ibid.* See also J. Tully, "Rediscovering America", *supra*, note 502, at 142, 146 ("Everyone is free to exercise their labour in accordance with natural law for the sake of preservation and without the consent of others"; "The appropriation of common fruits and nuts, fish and game, and vacant land by means of individual labour is legitimate and creates a property right in the products as long as they do not spoil and there is enough and as good left in common for others").

517. The full sentence is: "For I aske whether in the wild woods and uncultivated wast of America left to Nature, without any improvement, tillage or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land doe in Devonshire where they are well cultivated": J. Tully, "Rediscovering America", *supra*, note 502, at 160, quoting from the *Second Treatise*, section 37.

518. *Two Treatises*, *supra*, note 501, at 328. The passage continues: "The Fruit, or Venison, which nourishes the wild *Indian*, who knows no inclosure ... must be his, and so his, *i.e.* a part of him, that another man can no longer have any right to it, before it can do him any good for the support of his life." J. Tully summarizes this element of Locke's argument as follows ("Rediscovering America", *supra*, note 502, at 142):

"The second aspect of life in America that is definitive of the state of nature is individual and exclusive rights over one's labor and its products. Everyone is free to exercise their labour in accordance with natural law for the sake of preservation and without the consent of others. Appropriation without consent is illustrated with examples of Amerindians acquiring fruit and venison (26), hunting deer (30), ... and so on. Property in political society is then defined in explicit contrast to their natural mode of labour-based property: namely, where labour, appropriation and its products are regulated by government and positive laws (30,38,50,129)."

519. *Two Treatises*, *supra*, note 501, II, 32, at 332. According to Locke there is a ghost of a property right "in the common things of Nature" held by all individuals existing in that state, but it is bounded by the use to which individuals could put it for their own subsistence. Private property depends for its status upon, not only the value of the labour invested in it to the investor, but also its value measured in money (which Locke considered, according

to J. Dunn, a "permanent store of value" whose worth is based on the consent of the other members of society). On the ground that they lack the capacity to produce monetary value, Locke classified hunting and gathering as forms of labour capable only of providing subsistence in the state of nature, and thus supporting merely the right to the use of common property. Aboriginal hunting and gathering could not, on this view, generate a right of private property itself. Locke considered money a liberating force in European society because it permitted an individual *justly* (in contrast to the means by which European monarchs had been accustomed to acquiring and distributing wealth) to "possess more than he can use the product of", by converting the surplus value produced by his property, into currency. To illustrate the social advantage of private property over common property in the state of nature, Locke contrasted the lot, in market terms, of an Aboriginal leader with the lot of an English labourer: in America, said Locke, "a King of a large and fruitful territory ... feeds, lodges, and is clad worse than a day labourer in England."

520. As for the "Earth itself", "Property in that too is acquired as the former": *supra*, note 501, *Second Treatise*, at section 32. (The "former" goods in this passage are "the Fruits of the Earth, and the Beasts that subsist on it": *id.*) In J. Tully's summary ("Rediscovering America", *supra*, note 502, at 145-146; 151):

"The second major conclusion Locke draws from the premise that America is a state of nature is that appropriation of land may take place without consent. Appropriation without consent is the main argument of chapter 5. The sections are carefully organized to prove and substantiate it. Nor is it surprising that Locke took such care in presenting his argument, for it is a departure from his earlier views, from the views of earlier natural law writers, and from the fundamental principle of western law: *Quod omnes tangit ab omnibus tractari et approbari debet* (what touches all must be approved by all). ... [T]he chapter is organized around a contrast between Europe, where appropriation without consent is not permitted because political societies exist, and America, where appropriation without consent is permitted because it is a state of nature [T]he argument justifies European settlement in America without the consent of the native people, one of the most contentious and important events of the seventeenth century

...
[summarizing functions of Locke's and the colonists' common argument] [B]y situating America in a state of nature ... the Amerindian system of property over their traditional territory is denied and it is replaced by a so-called natural system of individual, labour-based property, thereby dispossessing Amerindians of their traditional lands and positing a vacancy which Europeans could and should use without the consent of the first nations. ... [T]his 'agricultural' dispossession argument was usually advanced with the qualification that, from the colonists' perspective, at the time of appropriation there was enough and as good land left for the aboriginal peoples."

521. *Supra*, note 518.

522. R. Williams, *supra*, note 465, at 248, quoting from the *Two Treatises*.

523. See J. Tully's summaries quoted *supra*, note 520, at 151, and *supra*, note 516, at 146.

524. Tully presents a strong case for the view that Locke was perfectly aware that the Aboriginal peoples in much of the region he referred to were (contrary to the popular stereotype held by Locke's readers) agriculturalists themselves. According to Tully, Locke's argument that farmers who let their produce waste lose their moral entitlement to their lands, bears a marked resemblance to that advanced by settlers in order to justify seizing Indian fields in America, an argument that disparaged what were in fact soil conservation practices. See "Rediscovering America", *supra*, note 502, at 156-157. For an account of the tortuous logic by which the American settlers and their colonial sponsors discounted Aboriginal agriculture as a foundation for true possession, see F. Jennings, *supra*, note 465, at 61-69.

525. "Land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, *waste*; and we shall find the benefit of it amount to little more than nothing (42)": J. Tully, "Rediscovering America", *supra*, note 502, quoting the *Second Treatise*.

526. Tully observes that the notorious arguments of Samuel Purchas, Governor John Winthrop of Massachusetts, and counsel for Connecticut in the Mohegan appeals to the Privy Council in this period, together with the lesser known publications of John White of Virginia, Robert Cushman and Francis Higginson in New England, and John Cotton, are "strikingly similar", both in the "arguments and ... very terms used in the pamphlets", to chapter 5 of *Locke's Two Treatises*: "Rediscovering America", *supra*, note 502, at 149. Illustrating his point with a series of parallel quotations and rhetorical allusions between Locke's work and the colonial pamphlets, Tully concludes that "[n]o author puts forth an account that is as theoretically sophisticated as Locke's, but the basic terminology, premises, and conclusions for such a theory are present. Locke adds his own knowledge of colonial affairs and of the sophisticated analyses of money, labour and productivity by the mercantile writers of the Restoration to create the powerful theory in chapter 5": *ibid.*, at 149-150.

527. See note 504, *supra*.

528. In J. Tully's summary ("Rediscovering America", *supra*, note 502, at 156):

"Each stage in the development of a modern system of what is now called surplus production and accumulation is defined by contrast to the Amerindians' system of 'underproduction' and 'replacement consumption'. [citation omitted] First, the ethic of 'industriousness' that drives and legitimates the process is defined contrastively as superior to Amerindian land use. Although god gave 'the World to men in Common', he did not mean that they should leave it 'common and uncultivated', but rather that they should 'draw from it' the 'greatest conveniences of life'. Accordingly, he 'gave it to the Industrious and Rational, (and *Labour* was to be his *title* to it;)' (34). Amerindians are then said to draw less than one-hundredth the number of conveniences from the land that the English are able to produce (41). Second, Locke sets up cultivation as the standard of industrious and rational use, in contrast to the 'waste' and lack of cultivation in Amerindian hunting and gathering, thus eliminating any title they might claim (37, 41, 42, 43, 45, 48). The planning, coordination, skills, and activities involved in native hunting, gathering, trapping, fishing ... are not counted as labour at all, except for the very last individual step (such as picking and killing), but are glossed as 'unassisted nature' and 'spontaneous provisions' when Locke makes his comparisons (37, 42, 108 note); whereas European activities, such as manufacturing bread, are described in depth (42, 43). Moreover, the 'industrious' use of labour that gives rise to property rights is equated with European agriculture, based on pasturage and tillage (42), thereby eliminating Amerindian non-sedentary agriculture as a type of use and subverting any title that might have been derived from it."

(See also, *ibid.*, at 163 ("[t]hose who fail to improve the land and take [a non-consumptive] attitude towards it are looked upon as neither rational nor industrious, and sinful in not heeding god's injunction to appropriate and improve").) R. Pearce quotes Thomas Jefferson, a devotee of Locke, as having declared that "[t]hose who labour in the earth are the chosen people of God, if ever He had a chosen people. Whose breasts He has made his peculiar deposit for substantial and genuine virtue": *supra*, note 465, at 67. Pearce observes that "[f]or Americans the Lockean theory must have made savage society seem loose, immature, virtually anarchic, full of the false freedom of doing as one pleased" (*ibid.*, at 68).

529. J. Tully's summary, *ibid.*

530. J. Tully summarizes this process, and identifies "industry"'s instrumental role, as follows ("Rediscovering America", *supra*, note 502, at 155):

"Locke's theory of the historical development of politics and property comprises the following stages:

different degrees of industry among individuals account for differences in possessions in the pre-monetary stage of nature. Money and trade are gradually introduced, spurring the growth of population and the applied arts. An elastic desire for more than one needs comes into being, uprooting forever the pre-monetary economy of limited desires and needs. People seek to enlarge their possessions, either by honest industry or by preying on the honest industry of others, in order to sell the surplus in the market for a profit. All available land becomes occupied and put to use. To solve the quarrels and insecurities that inevitably follow people set up political societies with institutionalized legal and political systems to regulate and protect property."

531. Supra, note 528. For Locke, the colonists' mandate to inculcate America with such an ethic was certainly based on a moral licence, but Locke can also be understood to have promoted such activity as a matter of *duty*. J. Dunn explains this aspect of Locke's theory as follows (*supra*, note 501, at 38-39):

"God gave the world to men 'for their benefit', and the Greatest Conveniences of Life they were capable to draw from it'. But he gave it to them to use well by their exertions - 'to the use of the Industrious and Rational' and 'not to the Fancy or Covetousness of the Quarrelsome and Contentious' (II, 34). The industrious and rational are *obliged* to make good use of it. It is not simply theirs, to do with precisely as they fancy. They are its stewards and must display their stewardship in their industry as well as their rationality. They may appropriate and consume nature. (That is literally what nature is for). But they have no right whatever to waste any of it. ... entitlement and merit are fused together At least initially, those who possess more will be those who deserve to do so and they will have nothing to apologize for to those who possess less." [emphasis in original]

532. Supra, note 530. J. Tully analyses Locke's account of the function of labour, surplus value, and exchangeable commodities, in particular, in this transitional process, and concludes that "the central sections on labour, value, and commodities are designed to legitimate and to celebrate the superiority of English colonial market agriculture over the Amerindian hunting, gathering, and replacement agriculture that it forcibly displaced. The destruction of centuries-old native American socio-economic organizations and the imperial imposition of commercial agriculture is made to appear as an inevitable and justifiable historical development": "Rediscovering America", *supra*, note 502, at 162.

533. "Rediscovering America," *supra*, note 502, at 155.

534. See *ibid.*, esp. 166-170.

535. In J. Tully's further summary, *ibid.*, at 164:

"[B]y definition, a political society only comes into being on the basis of, and to govern, a regime of private property created by expanding needs and intensive agricultural production for the market. ... The formation of 'states and Kingdoms' is defined by a series of contrasts to Amerindian society (38,45). Since American Indians lack the dynamic system of market-oriented property ... they have no need for the institutions of a political society to regulate it, and therefore they do not have governments. ... In an even more ethnocentric conclusion, the system of modern states and commercial property is identified with civilization itself - 'those who are counted the Civiliz'd part of Mankind, who have made and multiplied positive Laws to determine property' - in explicit contrast to American Indians" (30).

536. J. Tully, "Rediscovering America", *ibid.*, at 155.

537. J. Tully summarizes the basis of Locke's theory respecting Aboriginal sovereignty and property as follows (*ibid.*, at 139):

"Locke constructed [his concepts of political society and property] in contrast to Amerindian forms of nationhood and property in such a way that they obscure and downgrade the distinctive features of Amerindian polity and property. ... First, Locke defines political society in such a way that Amerindian government does not qualify as a legitimate form of political society. Rather, it is construed as a historically less developed form of European political organization located in the later stages of the 'state of nature' and thus not on a par with modern European political formations. Second, Locke defines property in such a way that Amerindian land use is not a legitimate type of property. Amerindian political formations and property are thereby subjected to the sovereignty of European concepts of politics and property. Furthermore, these concepts serve to justify the dispossession of Amerindians of their political organizations and territories, and to vindicate the superiority of European, and specifically English, forms of political society and property established in the new world. In using these concepts in this way Locke was intervening in one of the major political and ideological contests of the seventeenth century."

In this sense Locke's argument served the same instrumental function attributed by G. Nash to the stereotype of savagery: the moral and evolutionary inferiority of Aboriginal peoples posited by Locke's argument "was a way of predicting the future and preparing for it and of justifying what one would do, even before one caused it to happen": *supra*, note 474.

538. See note 542, *infra*.

539. According to R. Williams, the *Two Treatises* had the status of "canonical text" for most of the American "radical" revolutionaries: *supra*, note 465, at 246. R. Pearce writes that "virtually all Americans were, in the most general sense, Lockean": *supra*, note 465, at 68. D. Schultz considers Locke's writings the "most influential" in the politics of early America: "Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding," 37 *Am. J. Legal History* (1993) 464, at 471.

540. Quoted in J. Smith, *supra*, note 465, at 13.

541. Quoted by R. Pearce, *supra*, note 465, at 253.

542. Apart from their widespread influence upon political thought in Europe generally (see J. Dunn, *supra*, note 501, at 18-19), Locke's writings bore two direct connections to legal theory, which in this period was based heavily upon natural law. First, Locke's theory of property was a direct descendant of the arguments of Hugo Grotius, who, according to J. Dunn, was with Samuel Pufendorf one of the "leading theorists" on property rights in Locke's time (*ibid.*, at 43-44). Grotius and Pufendorf were pioneers of modern international law. Locke's theory of property served to defend from royalist attack, as well as to reform, Grotius' theory of property (*ibid.*, at 36-39). Secondly, extensive treatment was given to Locke's theories in a series of critical editions and translations of the leading European writings on natural law published shortly after Locke's death. According to Dunn, "[f]or several decades these texts were probably read more widely in many European countries than any other modern writings on ethics and politics, and they were at the centre of a major branch of law teaching in a wide array of British and European universities" (*ibid.*, at 19-20). Natural law was the common theoretical language of Grotius, Locke, and Vattel.

543. *Supra*, note 34, at 21, citing Vattel's *The Law of Nations* (1797) Bk 1, at 100-101. M. Lindley summarized Vattel's position as follows: "[Vattel] laid down that a nation might take possession of such lands as are uninhabited and ownerless, or are in excess of what would be required by a people leading a pastoral or roaming life if they cultivated the soil; but the occupying state must be in need of more land": *supra*, note 465, at 17.

544. "Rediscovering America", *supra*, note 502, at 168.

545. See R. Williams, *supra*, note 465, at 248.

546. Vattel's terminology does not always fit Lindley's distinction between "occupation" and "habitation". The most of the advocates of distorted concepts of *terra nullius* reviewed in this analysis concede that Aboriginal peoples "inhabit" their territories or lands, and then distinguish such a connection from the "occupation" determining property relations, the statement just quoted, for example, treats habitation as the legally significant connection, and denies North American Aboriginal peoples the status of inhabitants.

Such terminology appears to have caused confusion in one of the opinions submitted for the International Court in *Western Sahara*. In that case Judge Ammoun treated Vattel as having declined to distort the concept of occupation by standards such as "civilization," and as having adopted the undistorted meaning of *terra nullius*, as "a land empty of inhabitants": *infra*, note 656, at 86. The confusion appears to have arisen mainly from the fact that Vattel sometimes used the terms occupation and habitation interchangeably. This appears to explain the statement just quoted. Elsewhere in the quotation "occupation" is even used in the sense most jurists reserved for habitation - i.e. some form of connection insufficient to preclude claims based on occupancy, or support title (see the fifth sentence quoted). (This view is reinforced by a comparison of this translation with that used by McEachern J.C. in *Delgamuukw*, *supra*, note 168, at 206-207. In that translation the term "unsettled habitation" is used where Green translates "uncertain occupancy.") More generally, Vattel appears to combine different standards in these terms in different statements, including, variously, need, efficiency of use, physical density of population, type of use, morality of use and lifestyle, and, apparently infusing all of these standards, savagery or civilization.

In A. Nussbaum's assessment "the ambiguity of Vattel's propositions - indeed the ambiguity of an oracle - made it ... the easier to refer to his treatise in diplomatic correspondence" and thus helped to secure Vattel's position for posterity: *A Concise History of the Law of Nations*, rev'd ed. (New York: Macmillan, 1953), at 161. In this vein, compare Vattel's assessment of the property rights of North American Aboriginal peoples, just quoted, with his assessment of the property rights of pastoral Arabs, quoted and construed as affirming the property rights of Cree hunters and fishers, in *Connolly v. Woolrich*, *supra*, at note 797.

547. Excerpted from L. Green's translation of *Le Droit des Gens ou Principes de la Loi Naturelle* (1758), *supra*, note 486, from Bk I, c. VIII, para. 81 and from ch. XVIII, ss. 207-210.

548. Here Vattel cites *History of the English Colonies in North America*.

549. (These two closing sentences follow the excerpt from Green's translation, *supra*, note 547, section 210. They are taken from *The Law of Nations; or, Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns*, trans. by J. Chitty (Philadelphia: Johnson, Law Booksellers, 1852), at 100. Paragraphing in the excerpts quoted has been omitted.)

550. As we have seen, Locke had not espoused that conclusion directly. In the light of Locke's particular theory of popular sovereignty, Locke's silence on this ultimate question is perhaps not surprising. Locke had argued, consistently with his principle of popular sovereignty and the original doctrine of *terra nullius*, that (in J. Tully's summary) "people may leave their home country and set up independent political societies by consent": "Rediscovering America", *supra*, note 502, at 171. Locke also argued (disingenuously, as Tully shows: *ibid.*, at 170) that in their trade relations with the colonists Aboriginal persons implicitly consented to the transitional step out of the state of nature represented by the introduction of money into economic relations. It appears, however, that Locke could not see his way to argue that the colonists could deny to Aboriginal persons either the right of all "men" to withhold explicit consent to membership in a political society, or the right to tacitly accept the authority of a government of which one is not a citizen. (For summaries of Locke's theory of consent respecting political authority, see J. Tully, "An introduction to Locke's political philosophy", in J. Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge Univ. Press, 1993) 9, at 33-37; and J. Dunn, *supra*, note 501, at 49-51.)

In some colonial settings this individual right would have been of little use to members of an Aboriginal

minority seeking to reassert the collective political mandate that Locke's theory denied them directly, but in many colonies, recognition of such a right could have posed a significant obstacle to colonial projects, notwithstanding that Locke's theory would apparently support colonial jurisdiction over Aboriginal territory exclusive of nonconsenting Aboriginal persons. Vattel's theory and the distorted doctrine of *terra nullius* ignore and thus implicitly deny any right of consent to Aboriginal individuals. (For a different view of the implications of Locke's theory of popular sovereignty (premised on Locke having intended to treat Aboriginal nations as political societies when he referred to their rulers' 'very moderate Sovereignty' and to the patriarchal authority of their family leaders), see J. Youngblood Henderson, "The Doctrine of Aboriginal Rights in Western Legal Tradition", in M. Boldt and J. Long, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), 185, at 196-197. Youngblood Henderson concludes that, but for the practice of nation-to-nation treaties, this reading of Locke would have made colonists citizens of Aboriginal polities, by the tacit consent involved in their trade with the Indians.)

551. In C. Fenwick's assessment, Vattel's "influence upon questions relating to international law" in the early 1800's equalled that of Grotius: "The Authority of Vattel" (1913) 7 *Am. Pol. Science Rev.* 395, at 395. The *Law of Nations* was at that time "the manual of the student, the reference work of the statesman, and the text from which the political philosopher drew inspiration. Publicists considered it sufficient to cite the authority of Vattel to justify and give conclusiveness and force to statements as to the proper conduct of a state in its international relations" (*id.*).

M. Lindley (*supra*, note 465, at 17) cites Phillimore, writing almost a century after Vattel, and Eugene Ortolan, as having approved of Vattel's position (as summarized, *supra*, note 543). (But see Monk J.'s quotation from Phillimore in *Connolly v. Woolrich*, quoted, *supra*, note 797.) Lindley also cites, as other writers who attached limits or conditions to the recognition they advocated for Aboriginal sovereignty, G.F. De Martens (Göttingen, 1789: making "an exception in the case of districts simply held by nomadic people" to the general rule ("although in fact too many examples of such appropriation exist") that "natural law does not authorize Christian people to take the districts already effectively occupied by savages against their will"); Pinheiro-Ferreira (Portugal, 1839) and Bluntschli (Germany, 1868: "the territory of backward peoples is open to occupation only so long as the natives do not resist the encroachments of the occupying State by force").

In Lindley's view "none of these opinions", including Vattel's, "appears to provide a satisfactory foundation for the formulation of a rule of International Law" (*id.*).

552. M. Lindley notes, for example, that Gunther (1778) and Klüber (1819) "laid down that no nation is authorized by its qualities, whatever they are, notably not by a higher degree of culture, to take from another nation its property, even from savages or nomads" (*supra*, note 465, at 14). In the same vein Lindley cites, among other international jurists (*ibid.*, at 15-16 - quotations are Lindley's summaries) Heffter (Germany, 1844: "Occupation does not extend to persons, and ... no power on earth has the right to impose its laws upon roving or savage peoples." However, "if the preservation and development of the human race is jeopardized by exclusion from any area, then the nations can join together to remove the obstruction"); Pasquale Fiore (Italy, 1868: "savage peoples" have "the right of sovereignty", "whatever their degree of barbarism", provided that "other nations" may "exploit such parts of the land as the savages are not using, but such a nation would not thereby acquire sovereignty over the natives, nor the right to exclude other nations from similarly making use of unexploited lands"); Pradier-Fodere (France, comparatively recently, responding to Vattel by "den[ying] the right of Christians on any pretext, even that of a higher degree of culture, to take countries effectively occupied by less civilized peoples though they may be savages"; Saloman (France, comparatively recently, arguing that "barbarous and savage peoples, though backward in civilization, exercise rights of sovereignty which, if rudimentary, are nevertheless sufficient to render wrongful any occupation of their country"); Bonfils and Jeze (France, comparatively recently: the natives have "the absolute right", and "any contrary theory would only sanction, under the pretext of civilization, the maxim, 'might is right'"); Despagnet ("lack of civilization is not a cause of forfeiture of the rights of sovereignty. The propagation of civilization justifies only the establishment of pacific relations with barbarous countries. Territory governed by

any sovereignty, however barbarous and rudimentary, should not be regarded as *territorium nullius*; but if it is inhabited by people without appreciable political organization and not having even the conception of sovereignty, then it may be considered as open to occupation, although even in such a case any rights of property or prior possession should be respected."); M. Engelhardt (1888: "There are some peoples who from certain points of view are savages, absolutely outside of the community of International law, and yet it would be extravagant to consider their territory as *territorium nullius*").

553. See M. Lindley, *ibid.*, at 28-44; J. Andrews, *supra*, note 8; and N. Wallace-Bruce, "Two Hundred Years On: A Reexamination of the Acquisition of Australia", 19 Ga. J. Int'l & Comp. L. (1989) 87, at 91-96.

554. M. Lindley's summary of the line of opinion commencing with Vitoria and continuing through the 19th century, referred to in note 552, is that "wherever a country is inhabited by people who are connected by some political organization, however primitive and crude, such a country is not to be regarded as *territorium nullius* and open to acquisition by Occupation": *supra*, note 465, at 17.

555. Roughly the latter half of the nineteenth century. For a description of British and French colonial conduct in the earlier part of that time span, see *infra*, note 559. L. Stavrianos identifies assumption of the "White Man's Burden" by colonizing peoples as a crucial attitudinal justification and consequence of European and American colonial activity (*supra*, note 167, at 336-337):

"The political, economic, and cultural dominance of Europe at the turn of the century naturally led Europeans to assume that their primacy arose from the superiority of their civilization, and that this in turn reflected the superiority of themselves as a race. It was confidently believed that god had created men unequal. He had made the Whites more intelligent so that they could direct the labor and guide the development of the inferior races who had broad backs and weak minds. Hence the concept of the White Man's Burden - a preaching that cloaked the imperialism of the times with a mantle of idealistic devotion to duty. In the well-known lines of Rudyard Kipling, written approximately at the end of the century (1899):

Take up the White Man's Burden -
Send forth the best ye breed -
Go bind your sons to exile
To serve your captives' need ...

On all continents the European masters accepted the homage of the 'lesser breeds' as part of the divine nature of things - as the inevitable out-come of the 'survival of the fittest'. In India they were addressed respectfully as 'sahib,' in the Middle East as 'effendi,' in Africa as 'bwana,' and in Latin America as 'patron'. Under these circumstances it is scarcely surprising that Europeans came to view the world with a myopia and a self-centredness that today seems incredible. Americans also shared this attitude. President Theodore Roosevelt in a message to Congress in 1904 warned Latin America that 'chronic wrong doing, or an impotency which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation'".

See also "Imperialism: The White Man Assumes a Burden", in L. Snyder, *The Making of Modern Man: From the Renaissance to the Present* (Princeton: Van Nostrand, 1967), at 541-549.

556. 'Social Darwinism' loosely describes a trend of thought originating with Herbert Spencer, characterized by R. Hofstadter in its conservative American political context as follows (*Social Darwinism in American Thought*, rev. ed., (Boston: Beacon Press, 1955), at 5-7, paragraphing omitted):

"The most popular catchwords of Darwinism, "struggle for existence" and "survival of the fittest", when

applied to the life of man in society, suggested that nature would provide that the best competitors in a competitive situation would win, and that this process would lead to continuing improvement. In itself this was not a new idea, as economists could have pointed out, but it did give the force of natural law to the idea of competitive struggle. Secondly, the idea of development over aeons brought new force to another familiar idea in conservative political theory, the conception that all sound developments should be slow and unhurried... [T]he conclusions to which Darwinism were first put were conservative conclusions. They suggested that all attempts to reform social processes were efforts to remedy the irremediable, that they interfered with the wisdom of nature, that they could lead only to degeneration."

See also J. Garraty and P. Gay, *The Columbus History of the World* (New York: Harper and Row, 1972), at 958-960; J. Miller, *supra*, note 428, at 97; and E. Kallen, *Ethnicity and Human Rights in Canada* (Toronto: Gage, 1982), at 22-24. R. Berkhofer examines the influence of this trend of thought in its larger social and scientific context, (*supra*, note 465, at 49-61). Berkhofer explains the emergence of social, and in particular, anthropological 'evolutionist' theory in the 19th century as follows (at 49-52, paragraphing omitted):

"Theories of evolution dominated scientific thinking in the nineteenth century, and evolutionism became the foundation of one science after another as they differentiated and became specific disciplines Species were no longer considered immutable; rather they changed over time. ... To be scientific at this time was practically synonymous with evolutionary theory in the newly developing social as well as the natural sciences. Therefore the history of human customs and institutions came to be seen in the terms of genesis and growth, of transformations from step to step in a sequence of development. Societies and cultures were portrayed as slow accumulations obeying laws natural and evolutionary. ... If Darwin had demonstrated that human beings were the end product of a long process of evolution, could not the institutions and customs of civilization have developed from savagery in the same manner according to the same laws? Auguste Comte, Karl Marx, and Herbert Spencer, who popularized the term 'evolution', were among the many social philosophers and intellectuals who attempted this task.... Evolutionism became the framework for the new anthropology... The method remained fundamentally the same as developed by thinkers in the previous century, but ... it gained new authority What was new was the trend to utilize more and better authenticated data, but the basic assumptions continued to be the same as earlier: uniformity of human mental characteristics and abilities over space and time allowed the comparison of peoples regardless of geography or history; similarity of stages in the course of cultural evolution of all peoples; and the use of European standards and the idea of progress to measure the direction and amount of development. Edward Tyler, the man who is usually claimed to be the founder of modern anthropology ... explains [in *Primitive Culture*, 1871]:

'[my] standard of reckoning progress and decline is not that of ideal good and evil, but of movement along a measured line from grade to grade of actual savagery, barbarism, and civilization. The thesis which I venture to sustain, within limits, is simply this, that the savage state in some measure represents an early condition of mankind, out of which the higher has gradually been developed or evolved, by processes still in regular operation as of old, the result showing that, on the whole, progress has far prevailed over the relapse.'"

557. See the Privy Council's 1919 characterization of the destiny of colonized peoples' systems of law, in *Re Southern Rhodesia*, *supra*, note 35, at 234-235. R. Berkhofer, describing the combined effect of the "changing intellectual currents of the nineteenth century", including "the laws of progress", "the biology of racism", and "the self-image of Americanism", explains (*supra*, note 465, at 156):

"By definition, the tribal Indian lacked the industry, the self-reliance, and the material desires and success appropriate to the good American. Throughout the nineteenth century, missionaries and philanthropists, government officials in Washington and on the frontier, military officers and Western settlers measured the tribal Indians by their standard of Americanism and found him wanting, according to the traditional

deficiency image."

See also J. Miller (describing policy-makers' reliance upon social Darwinist thinking in British North America and Canada to rationalize 19th century policies of coercive change for Indian societies), *supra*, note 428, at 97-98. Essentially the same justification for conditions of deprivation was applied to former slaves after the American Civil War (A. Smedley, *Race in North America: Origin and Evolution of a Worldview* (Boulder: Westview Press, 1993), at 262-263):

"Early census data showing a decline in the black population seemed to confirm the growing suspicion that, without the benign and beneficial conditions of slavery, the Negro was about to become extinct. According to Haller, 'The belief in the Negro's extinction became one of the most pervasive ideas in American medical and anthropological thought during the late nineteenth century'. In the 'struggle for existence,' it was proclaimed, only the superior white races would prevail. This extraordinary example of wishful thinking thus appealed to natural laws as expressed in Spencerian terms. Often confused with Darwin's theory of natural selection ... Spencer's ideas referred specifically to the exploitation of the poor and weak by the wealthy and powerful."

558. See generally the collection of papers contributed by UNESCO to the International Year to Combat Racism and Racial Discrimination in L. Kuper, ed., *Race, Science and Society* (London: Allen & Unwin, 1975). N.P. Dubinen, in "Race and Contemporary Genetics", explains that "[r]acial superiority provided the ideological foundation for colonialism in the eighteenth and nineteenth centuries, and was used to justify violence and repression" (*ibid.*, 68, at 70). Nineteenth and twentieth century theories of eugenics developed as follows (*ibid.*, at 70-71):

"In Europe, an Aryan cult was derived from Sanskrit legends about the blond conquerors of darker-skinned inhabitants of India and Persia. Europeans of Indo-European or 'Nordic' stock were held to be descendants of these conquerors. ... Gobideau [writing in 1853-1855] explained how Aryans are a biological master race, amongst whom the long-headed, light-skinned German race ranks highest. He believed that the mixture of the superior with inferior races was responsible for the disappearance of the great ancient cultures. Lapouge (1864-1936) explained social phenomena by biological racial differences (anthroposociology). At the International Congress of Eugenics in 1921, he advocated eugenic methods to replace Africans, Asians, and 'inferior' whites with whites of the 'superior' race. Chamberlain (1895-1927) and Galton (1822-1911), the founder of eugenics, held that the Nordics constituted a superior human race."

See also, *ibid.*, M. Leiris, "Race and Culture", 135, esp. 136 ("the Western white man ... is persuaded that his culture is of his own exclusive making and that only he can claim to have received - by right of blood and character - a 'civilizing mission'").

According to A. Smedley "[t]he cultural construction of the ideology of race culminated in its institutionalization as a worldview in the nineteenth century. At its developmental peak, in the latter half of the century, it had achieved systemic autonomy and uniqueness as a mechanism for the hierarchical structuring of society and as a rationalization for imposed inequalities (*supra*, note 557, at 255). "John S. Haller, Jr., grasped the situation astutely when he noted, 'The subject of race inferiority was beyond critical reach in the late nineteenth century'. [citation omitted] He might have added, well into the twentieth century": *ibid.*, at 270.

559. A. Smedley describes this combination as follows (*supra*, note 557, at 251-252, 264, citations omitted):

"The sociopolitical conditions of the midnineteenth century lent credence to the belief in the innate superiority of Europeans. In the 1850's the illegal slave trade flourished in the United States... . This decade also saw the first significant penetration of Africa ... which was to presage the eventual conquest of the last of the overseas continents to succumb to European domination. In Asia the Opium Wars ... had

led to the weakening of the dynastic leadership of China, and the British now literally handled the trade and foreign affairs of that sleeping giant. In the 1850's the ... conquest of Indian and Burma was completed. By 1859 all of the colonies and provinces of Australia had been founded and settled; from then on it was spoken of as a white man's land. ... In 1854 Faidherbe began the fateful French penetration up the Senegal River in West Africa. In 1851 the British invaded Lagos Island, in Nigeria... [B]y the time Ismail came to power in Egypt in 1863, British and French presence and influence in eastern Africa and the Middle East was already ineradicable.

In the 1850's, then, it was painfully apparent that Europeans (or some of them) were rapidly becoming dominant forces all over the world and for most there was no other explanation for it but their 'obvious' racial superiority. Thus, when in 1854 Robert Knox proclaimed 'race is everything: literature, science, art - in a word, civilization depends on it,' he was expressing this new dimension of social differentiation, as well as a new mode of interpreting history and new forms of power relationships that he and his contemporaries perceived as natural and universal. ...

During the latter part of the nineteenth century an elaborate edifice of social philosophy and theory was developed around the theme of white racial superiority. Theories of racial history were transformed into theories of world history. Facts that did not fit the racial worldview of white superiority and black degradation were ignored, deleted, or obfuscated. Typical was the widely read book by John Van Evrie, *White Supremacy and Negro Subordination*... Explaining the 'magnificent structures' of the ancient cultures of Mexico, Guatemala, Yucatan, and Peru, he reasoned that such high cultures were due to Caucasian adventurers or shipwrecked mariners who settled in these areas, became 'undisputed masters, built cities, organized governments, framed laws, and laid the foundations of a civilized society'. Likewise in Asia, van Evrie continued, all of the great leaders were white - Attila the Hun, Genghis Khan, Tamerlane... Confucius was also white, as were all the more progressive portions of Chinese society. Explications for advanced social systems in Africa, discovered or rediscovered in the late nineteenth century, were predicated on ascertaining the degree of Caucasian mixture in the aristocratic or ruling elements. Thus the Hamites, once the burnt-faced sons of Ham and lineage founder of blacks, were reinterpreted to be archaic caucasoids who conquered negro tribes and provided them with whatever aspects of order, law and civilization were discernible among them ... According to van Evrie, 'Progress and indefinite perfectibility are the specific attributes of the Caucasian'.

From the anthropologist Daniel Brinton in America to Herbert Spencer in England, writings poured forth expounding the virtues of racial purity and particularly the need to preserve that of the Aryans or Nordics, those English and other Germanic peoples whose intellectual prowess and qualities of character had become the sources of all civilization.

The procedures and ... findings [purporting to confirm the existence of 'racial type'] validated the image of races discrete and internally homogeneous, obscuring all the variability in the original data. By extrapolation and creative interpretations, some scholars used such data to confirm the assumption that some races were more developed than others. Frequent assertions were made that some races actually constituted primeval primitive types that had not evolved, or at least not as rapidly as the more advanced races. Lending a theoretical framework to the absolutism inherent in this perspective were the late nineteenth century generalized theories of evolution, both biological and social, especially those proposed by Spencer and his ideological compatriots. Clearly, if some people were able to evolve more complex and sophisticated social and political institutions, laws, and technologies, this was indicative of their superior intellectual endowments."

R. Berkhofer emphasizes that the resulting perspective pervaded social science in this period. Citing, for example, the "ethnological researches" of J.C. Nott, published in 1854, which concluded with the question, "[c]an anyone

recall the name of a single pure Indian of the *Barbarous* tribes who - except in death, like a wild cat - has anything worthy of remembrance" (at 59) Berkhofer explains (*supra*, note 465, at 56, 59-60):

"Certain counterassumptions about the common origin of the human species and the significance of the environment prevented most eighteenth century thinkers from carrying racist thinking to its logical extreme as a science, but the growing belief in the polygenetic origins of human life, the transformation of the idea of progress into social and biological evolution, and the scientific study of comparative anatomy all persuaded most nineteenth and early twentieth-century social scientists of the racial differences among nations and peoples and especially between the civilized and primitive peoples of the period.

...

By the 1860's the cultural hierarchy of social progress had been fused with the racial hierarchy of physical anthropology. ... Ascent up the ladder of social evolution was closely linked to mental capacity, and mental capacity was presumed a function of brain or cranial size... . The lower races, therefore, not only possessed darker skins and bad manners but their organic equipment was inferior as well. The reason that white-skinned peoples ruled the world and epitomized civilization was not accidental, according to scientific racism, but an inevitable result of biological inheritance. ... As a result of this confusion [regarding the mechanism of the transmission of cultural traits] most social scientists in the last decades of the nineteenth and the early decades of the twentieth centuries were both evolutionists and racists from a modern viewpoint... ."

560. *Supra*, note 556, at 23-24.

561. *Recessional*. The assumption that Kipling meant to describe colonized peoples in this phrase became so widespread that the phrase appears to have become something of an imperialist slogan: see, for example, L. Stavrianos, *supra*, note 555. The assumption is probably incorrect. Kipling probably meant to conjure a racialized category of *colonizing* peoples, adjudged "lesser" by Kipling because they flouted the "Law" of God. See G. Orwell, "Rudyard Kipling", in *The Penguin Essays of George Orwell* (Hammondsworth: Penguin, 1984), 209, at 210-211; and D. Judd and P. Slinn, *supra*, note 167, at 11-12.

562. "It was in the nineteenth century, when Europeans needed an *ex post facto* rationalization for the territories they were colonizing around the globe, that they attempted to elevate 'civilization' to a legal postulate": N. Wallace-Bruce, *supra*, note 553, at 91, n 19.

563. "Racist" refers here to explanations or predictions of people's behaviour according to ascribed racial characteristics. See K. Appiah, "Racisms", in D. Goldberg, ed., *Anatomy of Racism* (Minneapolis: Univ. of Minn. Press, 1990), 3, at 4-5; and (apparently using the term where a moral judgement correlating to "race" is also entailed) R. Berkhofer, *supra*, note 465, at 59.

An example from this period is the following description by Herman Merivale, undersecretary of state at the Colonial Office between 1848 and 1860, of the Indian people of British North America, and of the Metis, the latter of whom Merivale regarded (in D. McNab's summary) as fortunate beneficiaries of "amalgamation through the fur trade by miscegenation":

[T]hey seemed possessed of higher moral elevation than any other uncivilized race of mankind, with less natural readiness and ingenuity than some but greater depth and force of character; more native generosity of spirit, and manliness of disposition; more of the religious element; and yet, on the other hand, if not with less capacity for improvement, certainly less readiness to receive it; a more thorough wildness of temperament; less curiosity; inferior excitability; greater reluctance to associate with civilized men; a more ingovernable impatience of control. And their primitive condition of hunters, and aversion from every other, greatly increases the difficulty of including them in the arrangements of a regular community.

...

[Miscegenation experienced by the Metis] affords a considerable check to that mutual repulsion which arises merely out of prejudices of colour, and for which there can be no substantial reason where slavery does not exist. And there is strong testimony to the superior energy and high organization of many of these half-blood races."

(D. McNab, *supra*, note 186, at 88). According to D. McNab, Merivale was "representative of his contemporaries" in holding such opinions: *id.*

564. *Supra*, note 465, at 18.

565. *Ibid.*, at 19.

566. *Ibid.*, at 18.

567. *Ibid.*, at 19.

568. *Ibid.*, at 20, 19.

569. As the reference to Westlake's rationale just quoted illustrates, international law is also concerned with rights of sovereignty and property, but the foregoing international law analysis concentrates on the former set of entitlements.

570. "The Vocabulary of Prejudice", in L. Cohen, ed., *The Legal Conscience: selected papers of Felix S. Cohen* (New Haven: Yale University Press, 1960) 429 at 434, quoted by M. Asch and C. Bell, *supra*, note 5, at 511-512.

571. *Supra*, note 34, at 20-21, 24. Brennan J. identified as the imperative driving colonial law on this issue, not the international law rule alone, but the combination of that rule with the colonial law's act of state doctrine (which, by precluding a domestic law challenge to the Crown's claim to sovereignty renders "the manner in which a sovereign state might acquire new territory ... a matter for international law" (at 20)) and with a conception of Crown sovereignty as internally "supreme" (see quotation in text following).

572. *Ibid.*, at 21.

573. *Ibid.*, at 24.

574. *Ibid.*, at 24, citing *Cooper v. Stuart* (*supra*, note 281), *Lyons Corp. v. East India Co.* (*supra*, note 292); *The Lauderdale Peerage* (1885) 10 App. Cas. 692, at 744-745; and *Kielley v. Carson* (1842) 13 E.R. 225, at 233.

575. *Ibid.*, at 24-25. Brennan J. quoted in this context, in particular, the Privy Council's statements in *Advocate-General of Bengal v. Raneesurnomoye Dossee* (*supra*, note 295, at 824), and in *Cooper v. Stuart* (*supra*, note 281, at 291). Brennan J. also referred in this context to *Campbell v. Hall* (with reference to the implications for the negro inhabitants of Lord Mansfield's classification of Jamaica as settled: *supra*, note 291).

576. Brennan J. appears not to have intended to distinguish in this description between the doctrine as propounded in the two sets of precedents referred to, *supra*, notes 574, and 575.

577. "Thus the theory which underpins the application of English law to the Colony of New South Wales is that English settlers brought with them the law of England and that, as the indigenous inhabitants were regarded as *barbarous or unsettled* and without a settled law, the law of England including the common law became the law of

the colony (so far as was locally applicable), as though New South Wales were 'an uninhabited country... discovered and planted by English subjects'" [citation omitted; emphasis added]: *ibid*, at 25. See also notes 268 and 270, *supra*.

578. *Ibid.*, at 24.

579. For citations to Vattel's authority in arguments made in that Court in 1810 and 1823, see notes 610, 613, and 614, *infra*. Vattel's *Law of Nations* was first translated into English in 1760: see C. Fenwick, *supra*, note 551, at 406. Commenting on Congressional debates held in the 1820's and 30's over President Andrew Jackson's policy of "removing" the Cherokees and other Aboriginal peoples from eastern territories, R. Pearce writes that Vattel's *Law of Nations* was "the standard American authority for international law" and that it served as the most frequently cited text in those debates with respect to "problems rising from the relationship between farming and hunting societies": *supra*, note 465, at 70.

580. *Supra*, note 34, at 21-22, 23.

581. See M. Lindley, *supra*, note 465, at 20. For the view of Westlake and others who denied Aboriginal sovereignty while acknowledging Aboriginal property, see text accompanying note 568, *supra*.

582. Quoting the Privy Council judgement in *Re Southern Rhodesia*, *supra*, note 35, at 233. The full passage reads as follows:

"The estimation of the rights of aboriginal tribes is inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor 'richer than all his tribe.' On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit."

583. Quoting *Attorney-General v. Brown*, (1847) 1 Legge 312, at 319.

584. The British House of Commons.

585. *Mabo v. Queensland*, *supra*, note 34, at 27 (per Brennan J.).

586. *Bengal v. Surnomoye Dossee* and *Cooper v. Stuart*: see note 575, *supra*, and accompanying text.

587. This case concerned conquered territory, but it pronounced its "scale of organization" test for Aboriginal rights to land as a general rule, and the rule (as Brennan J. affirmed in *Mabo*, text accompanying note 585) has been subsequently treated as such. Of course, in adopting a theory of conquest, *Re Southern Rhodesia* acknowledged the sovereignty of the previous Aboriginal ruler. Logically, this undermined the 'civilization' standard of sovereignty applied by *Cooper v. Stuart* and *Surnomoye Dossee*. *Re Southern Rhodesia* would be incoherent if its acknowledgement of Aboriginal sovereignty were seen to reflect that standard, since at the same time, the decision placed the Aboriginal people involved "low" on virtually the same "scale" in relation to property rights. As Westlake's position perhaps illustrates, however (see text accompanying note 568), the inclination of jurists applying a test of barbarism differentially to Aboriginal sovereignty and property interests, was to relax the test in relation

to property rather than sovereignty. That inclination accords better than its inverse with the colonial project espoused in *Re Southern Rhodesia*, since exclusive sovereignty would generally include the power to expropriate private property. In light of the nature of its test for proprietary Aboriginal rights, and its white supremacist rhetoric, it seems untenable to interpret *Re Southern Rhodesia* as having rejected those earlier precedents in relation to the test for sovereignty. Rather, *Re Southern Rhodesia* appears to demonstrate, importantly, that the doctrine of peaceful settlement, while available when needed, was never the sole means of Crown acquisition of Aboriginal territory in colonial law. That optional status does undermine the logic of the doctrine of peaceful settlement fundamentally, since a people's sovereignty must either exist or not, and cannot depend under colonial law upon the choice of the Crown or an arbitrary judicial ruling. The *Re Southern Rhodesia* test for barbarism is a 'second order' test in that it can be supplemental to the 'first order' test of 'civilization' available for determining sovereignty. It is argued below, text following note 760, that this is the manner in which the *Re Southern Rhodesia* test has been applied by courts adopting the doctrine of peaceful settlement in Canada.

588. *Supra*, note 34, at 26-27.

589. "[C]learly they approximate rather to the lower than to the higher limit" of the scale: *supra*, note 582.

590. *Supra*, note 35, at 234, quoted by Brennan J., *supra*, note 34, at 28-29.

591. *Supra*, note 34, at 29. Brennan J. expressed this conclusion in terms of the combined effect of the Privy Council's second order test and the pre-*Mabo* Australian view that *all* Aboriginal peoples whose territory has been acquired by settlement, are deemed to have failed that test. The full statement quoted in the text is:

"It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."

Brennan J.'s characterization of the discrimination entailed in this combined doctrine as a function of the "scale of social organization" standard does not logically permit excision and saving of the Privy Council's test by itself. Brennan J. himself left no doubt that the Privy Council's test, as much as its Australian application, must be rejected as discriminatory (*ibid.*, at 27):

"As the basis of [the Australian] theory is false in fact and unacceptable to our society, there is a choice of legal principle to be made in the present case. *This court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher 'in the scale of social organization' than the Australian Aboriginals whose claims were 'utterly disregarded' by the existing authorities or the court can overrule the existing authorities, discarding the distinction between inhabited territories that were terra nullius and those that were not.*" [emphasis added]

Brennan J. chose the latter option (*id.*, at 41):

"The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognizes in the indigenous inhabitants of a settled colony the rights and interests recognized in *Re Southern Rhodesia* as surviving to the benefit of the residents of a conquered colony."

This not only entailed removing the previous Australian presumption that all inhabited territories acquired by settlement were devoid of property: if that step alone had been taken the Court would still have found it necessary to inquire whether the Meriam people met or failed *Re Southern Rhodesia*'s second order test (the inquiry identified in the second option Brennan J. rejected). Brennan J. rejected that option, not only because it contemplated ethnic or racial discrimination between one Aboriginal people and others (*ibid.*, at 15-16) but because the "scale of

organization" standard would be discriminatory in exactly the same way if applied (comparing the Aboriginal people with any people deemed 'higher' on the scale) to determine the land rights of *any* Aboriginal people. Brennan J. concluded (*id.*, at 28):

"The doctrines of the common law which depend on the notion that native peoples *may be* 'so low in the scale of social organization' that it is 'idle to impute to such people some shadow of the rights known to our law' *can hardly be retained*. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination." [emphasis added]

592. Mason C.J. and McHugh J.

593. For further discussion, see note 681, *infra*, and text following.

594. The full passage reads:

"Inevitably, one is compelled to acknowledge the role played, in the dispossession and oppression of the Aborigines, by the two propositions that the territory of New South Wales was, in 1788, terra nullius in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants. Those propositions provided a legal basis for and justification of the dispossession. They constituted the legal context of the acts done to enforce it and, while accepted, rendered unlawful acts done by the Aboriginal inhabitants to protect traditional occupation or use. The official endorsement, by administrative practice and in the judgements of the courts, of those two propositions provided the environment in which the Aboriginal people of the continent came to be treated as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands."

(*supra*, note 34, at 82, per Deane and Gaudron JJ.).

595. For a concurring interpretation of the majority position on this point, see R. Lumb, *supra*, note 144, at 87.

596. *The complete writings of Roger Williams*, 7 vols. (New York: Russell and Russell, 1963), at vol 3, p. 250, quoted by J. Tully, "Rediscovering America", *infra*, note 502, at 153.

597. The following sequence of opinions limiting settlement, as a means of acquisition, to uninhabited territory, is taken from B. Slattery, *Land Rights*, *supra*, note 15, at 22-23: Privy Council Memorandum of 1722; Blackstone's *Commentaries on the Laws of England* (23 editions, between 1765 and 1854); J. Chitty, *A Treatise on the law of the Prerogatives of the Crown* (London: Butterworth, 1820); *Forbes v. Cochrane* (1824) 107 E.R. 450 (K.B.); C. Clark, *A Summary of Colonial Law* (London: Sweet, Maxwell and Stevens, 1834); and the Privy Council's opinion (which Slattery reads as having considered the point settled) in *Lyons Corp. v. East India Co.*, *supra*, note 292. B. Ryder appears to agree with Slattery as to the rule in *Lyons*: see note 219, *supra*, at 44, and n 18, p. 47. See also the discussion of the latter case, *supra*, note 292. Brennan J.'s view in *Mabo v. Queensland* of the position of *Lyons* on this issue is unclear: see note 576, *supra*.

598. K. McNeil treats *Kielley v. Carson*, *supra*, note 584, as turning on the sparseness of the habitation of Newfoundland at the time Crown sovereignty was asserted: *Common Law Aboriginal Title*, *supra*, note 11, at 118. Indeed, McNeil points out that on the facts it assumed, *Cooper v. Stuart* can be understood to have practically turned on the same issue: *id.* (McNeil also analyses *Cooper v. Stuart* on the alternative basis that the Crown treated the Aboriginal inhabitants of the territory in question as "devoid of sovereignty": *ibid.* at 131.) It appears that the Privy Council's *obiter* and unelaborated statements in *Bengal v. Dossee* did endorse this latter view: see note 643,

infra., and accompanying text.

599. B. Slattery, whose topic was the reception of laws rather than acquisition of sovereignty, cautioned generally in *Land Rights*, *supra*, note 15 that "[t]he diversity of situations in which English law has been held to have been introduced into colonies, and the variety of reasons advanced to explain or justify its introduction, renders this branch of colonial law a remarkably complex one, not easily reduced to formulas" (at 30).

600. See text following note 291.

601. Elizabethan colonists in the New World transported prejudice against the "wilde Irish" and associated colonizing logic, including rationalizations for brutal and widespread dispossession of foreigners, directly to the New World. For a general account of the Irish 'apprenticeship' for New World colonialism, including analysis of the role of the "barbarian" concept in that context, see G. Lester, "Primitivism versus Civilization", *supra*, note 90, at 357. See also F. Jennings, *supra*, note 465, at 7-8 (self-serving construction of the savage/civilized dichotomy based on arbitrarily selected cultural differences, applied also to the highland and island Scots); 45-46 (barbarism as a justification for slaughter and dispossession), 114 (English designation of "tribal" leaders viewed as inferior political potentates, as "kings"); 153 (strategies of village and crop-burning); 166-168 (head bounties). A. Smedley emphasises that English images of Aboriginal peoples were influenced by a stereotype still developing in the seventeenth century, serving primarily to justify English appropriation of Irish land: *supra*, note 557, at 56-61. The stereotype and its associated rationale for dispossession assumed that Gaelic herding practices (viewed by the Gaelics as providing a "way of life far superior to the wretched lives of [English] farmers") were a "monstrous waste" of land; that the bestial and savage nature of the Irish was evidenced by their disinterest in commerce, their nomadic ways, supposed lack of any laws or social order, avoidance of work, uncleanness, love of liberty and lack of self-restraint, cannibalism, and sexual licentiousness; that the Irish were better off serving the English as slaves; that extermination of their women and children was a legitimate mode of warfare against them; that (in Cromwell's time) extermination and enslavement as punishment for rebellion were justified by the subhumanity of the Irish and their "stunted" capacity for civilization; and that their Catholicism amounted to a heathen abandonment of morality or religious virtue: *id.* Smedley notes that several English publicists embellished their reports of Irish life with analogous accounts by Spanish propagandists of Indian behaviour in the 'New World', and that at the close of the 16th century the English attempted to replicate the Spanish 'New World' *encomiendas* in Ireland, through a "plantation" system based on enforced servitude of the Irish (at 30).

According to K. McNeil, a special exception appears to have been made in the case of the Irish in English colonial law for some time after the conquest of Ireland in the late 16th century. Despite the general rule that on Crown acquisition the inhabitants of a conquered territory become subjects of the Crown, the conquered Irish in this period "apparently had inferior status in English law, resembling that of aliens in some respects": *Common Law Aboriginal Title*, *supra*, note 11, at 163, n.12. G. Lester concludes that the "ethnocentrism, which made inevitable that these [early 17th century] contemporaries thought that aboriginal land use and occupancy was such that vast territories lay waste and vacant", stemmed directly from the Irish precedent: *ibid.*, at 357.

602. Apart from Francis Bacon's apparently novel musing in 1608 (see note 432, *supra*) the earliest precursor to the doctrine of peaceful settlement identified by B. Slattery (*Land Rights*, *supra*, note 15, at 38) is the Holt opinion, *circa* 1675, delivered by eight eminent English lawyers, regarding the validity of purchases of Aboriginal titles by settlers in New York. (See also note 275, *supra*). This opinion held that "by the law of nations if any people make Discovery of any Country of barbarians the Prince of that people who make the discovery hath the right of the Soil and Government of that place" (B. Slattery, *ibid.*, at 38). Slattery explains that despite the "discovery" terminology used, the opinion argued that the rules ordinarily governing conquest apply. Slattery also notes that in subsequent opinions as Chief Justice of the King's Bench, one of the opinions' most prominent authors, John Holt, held firmly to the view that the American colonies were acquired by conquest. The next reference given by Slattery is an opinion given by a Virginia lawyer in 1683 (*ibid.*, at 24-25):

"A remarkably developed formulation of the [view that a general introduction of English law had occurred within settler communities] can be seen in a legal opinion written for a private cause by the Virginia lawyer, William Fitzhugh, in 1683. He points out firstly that Virginia must be governed by some laws, as the existence of courts of justice testifies. But, he argues,

We have no Original Laws amongst us derived from the natives here, for we found them at our first coming, (and they yet continue little better) so barbarous and rude that they had no other direction & Government amongst them but the Law of Nature...

... [H]e concludes [that] the laws of England must of necessity apply... The main point made is that, in the absence of some other provision, Britishers settling in a conquered land (as Fitzhugh deems Virginia to be) must be governed by their own laws where the lex loci is inapplicable."

Slattery also points out (*ibid.*, at 16, 38) that Fitzhugh argued, alternatively, that if Aboriginal peoples did have cognizable laws, they should be considered to have been "ipso facto abrogated" upon conquest, following the rule in *Calvin's Case* (subsequently repudiated in *Campbell v. Hall*, *supra*, note 291) regarding the fate of the laws of "conquered infidels". See also G. Lester, "Primitivism versus Civilization", *supra*, note 90, at 355 and accompanying notes.

Slattery's subsequent example is the commentary written in the American edition of Blackstone's *Commentaries*, published in 1803. There the editor accepts Blackstone's insistence that the American colonies must have been acquired by cession or "by right of conquest and driving out the natives (with what natural justice I shall not at present inquire)," but argues that, precisely because the natives were so driven out, the acquired territory was empty of law within settler communities, and that English law therefore applied there. Slattery notes that "the inference is that [among the Indians] their ancestral customs remained intact except where altered by competent authority" (*ibid.*, at 42).

603. For accounts of the *ad hoc* transformation of conquest as a basis for acquisition of territorial sovereignty into the doctrine of peaceful settlement and its hybrid American counterpart (differing in their interpretations of important cases, but agreeing as to this basic trend and as to the paradigmatic role of American colonization) see generally B. Slattery, *Land Rights*, *supra*, note 15, at 20-30; G. Lester, "Primitivism versus Civilization", *supra*, note 90, esp. 355-358; and R. Williams, *The American Indian*, *supra*, note 465, esp. 199-200, 268-269, 275, 300-302, 325-328. An intermediate example of such thinking, which bears remarkable resemblance to the theory adopted more than a century later in *Tee-Hit-Ton* (see text following note 92, *supra*), is the following summary of the defendant's counsel's submission in *Fletcher v. Peck*, *supra*, note 227, at 122:

"The Europeans found the territory in possession of a rude and uncivilized people, consisting of separate and independent nations. They had no idea of property in the soil but a right of occupation. A right not individual but national. This is the right gained by conquest. The Europeans always claimed and exercised the right of conquest over the soil. They allowed the former occupants a part, and took to themselves what was not wanted by the natives. ... The conquerors permitted the conquered tribes to occupy part of the land until it should be wanted for the use of the conquerors."

(Initially, this argument acknowledges some national status in Aboriginal peoples. By their "rude and uncivilized" nature, however, they are deemed not to have property, and what national status they had is deemed lost by exercise of a "right of conquest" recognized by the law as belonging to Europeans. After the "conquest" (which appears to be founded in the mere presence of the settlers and their assertion of English law) only permissive occupancy, and no legal right, remains with Aboriginal peoples.) The transformation is complete in the theory espoused by Joseph Story, rejecting Blackstone's assertion that the American colonies were acquired by conquest or cession:

"The European nations claimed an absolute dominion over the whole territories afterwards occupied by

them, not in virtue of any conquest of, or cession by, the Indian natives, but as a right acquired by discovery. ... The title of the Indians was not treated as a right of property and dominion, but as a mere right of occupancy. As infidels, heathen, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations. The territory over which they wandered, and which they used for their temporary and fugitive purposes, was, in respect to Christians, deemed as if it were inhabited only by brute animals. There is not a single grant... that affects to look to any title except that founded on discovery. Conquest or cession is not once alluded to."

(Story's *Commentaries*, quoted in M. Lindley, *supra*, note 465, at 29). G. Lester summarizes the colonial law outcome of the transformation as follows ("Primitivism versus Civilization", *supra*, note 90, at 357):

"What is clear from all this ... is that the Indians were denied to have any sort of rights in their lands which were cognizable by English law. Not only were they subject to the rule as to recognition of their rights in a conquest [i.e. the exception that the rights of 'infidels' were abrogated upon conquest, repudiated generally in 1774] and into which the common law had not been introduced, they were disqualified from having any sort of rights in their lands because of their heathenism and barbarism. The aboriginal inhabitants did not have cattle, had not (in English eyes) appropriated particular parcels of ground and manured them; they had vast territories which they did not seem to use and for which they had no use; they did not dwell in towns; indeed, as Purchas saw it, they could scarcely be called inhabitants. It is to be noticed ... that all of these defects are essentially secular - a want of culture and civility."

604. *Supra*, note 488, and text following. Prominent in the American circle was Governor John Winthrop of Massachusetts, a lawyer who may have been the first polemicist to draw from Aboriginal people's supposed failure to comply with the Biblical injunction to "subdue the earth" the conclusion (contrary to Vitoria) that Aboriginal land is unoccupied within the Roman law principle. Winthrop drew many of his arguments from the London-based chronicler of the Jamestown pilgrims (and propounder of a Biblically inspired theory of just conquest of the Indians), Samuel Purchas (see F. Jennings, *supra*, note 465, at 82, n 79, and note 526, *supra*). F. Jennings describes Winthrop's position, advanced between 1629 and 1642, as follows (*ibid.*, at 82, 135, 82):

"The process of reifying metaphor into purported actuality developed further in New England, where Purchas's logic was refined into the practical form of a legal fiction This development was contributed by a Puritan lawyer, Governor John Winthrop, Sr., of Massachusetts Bay. Winthrop was not interested in fanciful plays on the virginity of the land, but he seized on the equivalent conception that it had never been used.

...

Lawyer that he was, Winthrop declared that most land in America was *vacuum domicilium* - i.e. legally 'waste' - because the Indians had not 'subdued' it by methods recognized in English law and therefore had no "natural" right to it.

...

Morally (and pragmatically) Winthrop's Puritans were obliged to leave individual Indians in possession of tracts actually under tillage, because such small plots of cultivated land obviously qualified as "subdued" according to English cultural assumptions, but hunting territories were regarded as 'waste' available for seizure, no matter what status they held in native custom."

Winthrop also argued, apparently alternatively, that if Aboriginal peoples did have a natural right in their lands, it must yield to the civil right possessed only by Christian agriculturalists: *ibid.*, at 82, and G. Lester, "Primitivism, and Civilization", *supra*, note 90, at 357. Jennings recounts that Winthrop subsequently experienced a "change of heart" when it became advantageous to his colony to resist the claims of competitors for land by relying on a purported grant from the Indians (*ibid.*, at 138-143). For the interpretive argument that John Locke's version of the *terra nullius* conception of Aboriginal land and territory drew significantly on the arguments of Purchas, Winthrop,

and like-minded pamphleteers, see J. Tully, "America Rediscovered", *supra*, note 526.

605. See the sources cited in note 39, *supra*.

606. R. Williams and G. Lester emphasize that the American colonists and their sponsors attempted to exploit the *dicta* in *Calvin's Case*, *supra*, note 469 - not expunged from colonial law as a remnant of the "madness of the crusades" until 1774 - that the conquest of "infidels" abrogates their laws, including any rights of property, altogether. See *The American Indian*, *supra*, note 465, esp. 199-217; and "Primitivism versus Civilization", *supra*, note 90, at 355-358. But it would appear that no laws could have been abrogated had the rule for infidels in *Calvin's Case* not assumed that infidels possessed a kind of sovereignty.

607. In *Johnson v. M'Intosh* Marshall J. held that the "rights to complete sovereignty, as independent nations" of Aboriginal peoples were "necessarily diminished" by the notional and partial "conquest" by which the Crown acquired "such a degree of sovereignty, as the circumstances of the people would allow [it] to exercise": *supra*, note 16, at 574, 591, 587.

608. The principles of equality and reciprocity recur, in opposition to the theme of subordination informing the distorted doctrine of *terra nullius*, many times in *Worcester v. Georgia*. See note 238, *supra*, and notes and text following, for examples additional to the following. "The constitution ... admits their rank among those powers who are capable of making treaties" (*supra*, note 48, at 559). "It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors." (at 543). "The language of equality in which [the first treaty made by Congress with an Indian nation] is drawn, evinces the temper with which the negotiation was undertaken" (at 549). "The first and second articles stipulate for the mutual restoration of prisoners, and are of course equal" (at 551). "Protection does not imply the destruction of the protected" (at 552). "This relation was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting as subjects to the laws of a master. The third article contains a perfectly equal stipulation for the surrender of prisoners ... A boundary is described, between nation and nation, by mutual consent" (at 555). "[I]rresistible power ... excluded them from intercourse with any other European potentate than the first discoverer of the coast ... claimed; and this was a restriction which those European potentates imposed upon themselves, as well as on the Indians" (at 559). "The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense" (at 559-560).

609. In *Worcester v. Georgia*, Marshall C.J. further circumscribed the concept of partial and notional conquest introduced in *Johnson* (see note 89, *supra*, and text following). He clarified that the restriction on alienation of Aboriginal title which he had upheld in *Johnson* on the basis of discovery converted to notional conquest, "gave the exclusive right [to the discovering nation] to purchase, but did not found that right on the denial of the right of the possessor to sell": *supra*, note 48, at 544. The restriction on alienation was thus not a function of any defect in the proprietary status of Aboriginal title itself. Further, in the course of a detailed analysis of the text of Colonial Charters adopting the language of conquest, Marshall C.J. ridiculed the "extravagant and absurd" notion that such documents authorized their grantees to govern Aboriginal peoples or occupy their lands (at 544): "this soil was occupied by numerous and warlike nations, equally willing and able to defend their possession" (544). The Chief Justice held that some charters conferred a power to make "defensive war alone" [Marshall C.J.'s emphasis], while others also conferred a power "upon just cause, to invade and destroy the natives... but only 'on just cause', emphasising that "[t]he very terms imply the existence of a country to be invaded" (at 545). Another purported to convey a power of war on "so many barbarous nations", whose "incursions ... may probably be feared", but Marshall C.J. observed that such nations "were surely not considered as the subjects [of the proprietor], or occupying his lands during his pleasure" (at 545). Marshall C.J. concluded that the colonial charters granted "a power of war ... only for defence, not for conquest" (at 546); that "instead of rousing their resentments, by

asserting claims to their lands, or to dominions over their persons, [the Indians'] alliance was sought", and that such relations were maintained throughout the colonial era (at 546, 549).

610. *Fletcher v. Peck*, *supra*, note 227, at 142. As H. Berman has noted ("The Concept of Aboriginal Rights", *supra*, note 35, at 639-640) the arguments for the defendant in this case foreshadowed the defendants' argument in *Johnson v. M'Intosh*, discussed next. Counsel for the defendant in *Fletcher v. Peck* argued (at 121), citing Vattel, Montesquieu, and Adam Smith's *Wealth of Nations*, that "Indian title ... is a mere occupancy for the purpose of hunting." The Indians, claimed the defendant, "have no idea of a title to the soil itself". "It is overrun by them, rather than inhabited. It is a right not to be transferred but extinguished." Berman's comments illuminate the political and social context of the submission (*ibid.*, at 639-640):

"The law of nations, as cited in the pleadings, expressed a cultural definition of land tenure based on European institutions. The writings of Vattel concerning land tenures, in particular, were consistent with European designs of empire and the latter notions of 'manifest destiny'. John Quincy Adams, one of the attorneys for Peck, had been elaborating on these themes for some time. In an 1802 'Oration on the Anniversary Festival of the Pilgrims,' he discussed the scope of the Indians' possessory rights:

The Indian right of possession itself stands, with regard to the greatest part of the country, upon a questionable foundation. Their cultivated fields, their constructed habitations, a space of ample sufficiency for their subsistence, and whatever they had annexed to themselves by personal labor, was undoubtedly by the laws of nature theirs. But what is the right of a huntsman[?] ... Shall the lordly savage not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of the world? Shall he forbid the wilderness to bloom like the rose? Shall he forbid the oaks of the forest to fall before the axe of industry and rise again into the habitations of ease and elegance?

Adams argued that the Indian title was not a "municipal right" that could be recognized by the laws of the United States. His view was that by virtue of the cultural superiority of European institutions, the law of nations characterized the transfer of lands from aboriginal peoples to the European settler colonies as a natural law transaction that should not be impeded." [citations omitted]

611. *Johnson v. M'Intosh*, *supra*, note 16, at 596. The passage, which appears in the context of Marshall C.J.'s ruling that the *Royal Proclamation* defeated a purchase of Aboriginal title by a settler, continues as follows (*id.*): "[t]he title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians." See also *id.*, at 595, 597.

612. Citing, along with Montesquieu's writings, Adam Smith's *Wealth of Nations*, and Jefferson's *Notes* (which themselves relied heavily upon Locke), and Locke's *Second Treatise*, sections 87-89 (distinguishing between those "who are, and who are not, in *Political Society*", by listing the European institutions referred to in text accompanying note 519, *supra*) 143 (describing the function of legislative power in political society) and 123-130 (rationalizing the superiority of political society over the state of nature on the basis of the lack of security and safety of property in the latter state; describing the dearth of institutions of political society in the state of nature; and positing that individuals must give up their natural freedom to do as they think fit and to punish others for crimes against them, in order to establish political society).

(This paper's assumption that the section numbers for Locke's *Second Treatise* referred to in this and the subsequent 19th century American and Canadian cases we discuss, conform generally to the numbers used by Laslett, is based on Laslett's report that the American edition of the *Two Treatises* used in the 19th century originated in the same early version used by Laslett: see the *Two Treatises*, *supra*, note 501, at 23, 26, 27. Publications relied upon in the cases have not been examined.)

613. Citing, with Marten's *Law of Nations*, Vattel's *Droit des Gens*.

614. Citing Vattel, *Droit des Gens*.

615. Citing, with the writings of Grotius and Pufendorf, and Blackstone's *Commentaries*, Locke's *Second Treatise*, section 26 (reducing the appropriation of the goods of nature ascribed to the "wild Indian," to "[t]he Fruit, or Venison, which nourishes [him], who knows no Inclosure ... [which] must be his, and so his, *i.e.* a part of him, that another can no longer have any right to it, before it can do him any good for the support of his Life"); and sections 34-40 (which together set out Locke's theory of the moral superiority of economies based on surplus trade and money to subsistence economies).

(Section 34 claims that God intended natural goods to produce the "greatest Conveniences of life" which could be drawn from them, and concludes therefore that the world should not "always remain common and uncultivated". Section 35 asserts that "Dominion" over the earth is attained under God's command by "subduing or cultivating it". Section 36 states that, since the measure of property in the state of nature is an individual's labour, and individuals in the American state of nature possess very little, "let him plant in some in-land, vacant places in America, we shall find that the Possessions he could make himself upon the measures we have given, would not be very large, nor, even to this day, prejudice the rest of Mankind, or give them reason to complain, or think themselves injured by this man's encroachment". In section 37 Locke argued that "he who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind" by increasing the productivity, of land otherwise "lying waste in common", "[f]or I aske whether in the wild woods and uncultivated wast of America left to nature, without any improvement, tillage or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land in Devonshire where they are well cultivated?" Section 38 posits that the leaving of crops to rot in the ground, or fruits unpicked, converts even cultivated lands into "waste" land available for appropriation (see note 534, *supra*, regarding Aboriginal conservation practices and Locke's intention respecting appropriation of Aboriginal fields and crops coveted by the settlers). Section 40 asserts that labour justifies appropriation of common goods by individuals because labour produces nine-tenths of the value of goods in the world.).

616. Citing, with the writings of Grotius, Montesquieu, and Chalmers, and a previous decision of the Court, Locke's *Second Treatise*, sections 36-48 (asserting, in addition to the arguments noted, *supra*, note 624, that the poverty of goods produced by nature itself as opposed to labour is demonstrated by the fact that "a King of a large and fruitful Territory [in America] feeds, lodges, and is clad worse than a day Labourer in *England*" (section 41); that industry adds to the value of nature's goods, and that "amongst us, Land that is left wholly to nature, that hath no Pasturage, Tillage, or Planting, is called, as indeed it was, *wast*" (section 42); that as a matter of fact, "yet there are still great *Tracts of Ground* to be found, which (the Inhabitants thereof not having joyned with the rest of Mankind, in the consent of the Use of their common Money) *lie waste*, and are more than the People, who dwell on it, do, or can make use of, and so still lie in common. Tho' this can scarce happen amongst that part of Mankind, that have consented to the use of Money") (section 45); that the superior value of economies based on money is that money constitutes "some lasting thing that Men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful, but perishable supports of life" (section 47), and that the invention of money properly enabled "men" to enlarge possessions gained disproportionately by different degrees of industry, "For I ask, What would a man value Ten Thousand, or an Hundred Thousand Acres of excellent *Land*, ready cultivated, and well stocked too with Cattle, in the middle of the in-land parts of *America*, where he had no hopes of Commerce with other parts of the World, to draw *Money* to him by the Sale of the Product? It would not be worth the inclosing,...." (section 48).

617. *Supra*, note 16, at 567-570 (paragraphing omitted).

618. "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their right to its exclusive enjoyment in their own way, and for their own purposes, were as much respected": *Mitchel v. United States* 9 Pet. 711 (1835), at 746. Marshall C.J.'s reservations about agriculturalists' "existing pretensions" to a superior title first appeared in the form of an ironic question introducing his opinion in *Worcester v. Georgia* (*supra*, note 48, at 543):

"After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing.

Did these adventurers, by sailing along the sea coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturalists and manufacturers?"

619. See note 608, *supra*. P. Frickey has noted that this refrain in *Worcester v. Georgia*, adhered to despite colonialist terminology in the text of the treaty at issue, appears to have been framed to rebut the dissenting views of Johnson J. in *Cherokee Nation v. Georgia* (*supra*, note 110). See P. Frickey, *supra*, note 94, at 399. As did the trial judges in the Canadian cases of *St. Catherine's Milling and Bear Island v. Attorney-General of Canada* (see *infra*, notes 694 and 703 and accompanying text), Johnson J. had argued, in effect, that Crown policy had been to discriminate against Aboriginal peoples, and that the law should follow suit. (One of the difficulties faced by Justice Johnson in his characterization of the rights of the tribe in question was that the Cherokees, in an effort to survive as a political community in a fiercely hostile climate, and with the advice of President Jefferson, had adopted and implemented a constitution, system of government, and judicial system patterned after those of the new republic: see J. Ehle, *Trail of Tears: The Rise and Fall of the Cherokee Nation* (New York: Anchor, 1988), at 83-86, and generally R. Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman: Univ. of Oklahoma Press, 1975). Johnson J. was able to surmount the problem.) Dissenting from the majority view that the Cherokees were a "state", though not a "foreign" state within the meaning of the U.S. Constitution, and in connection with the same treaty to be analysed by Marshall C.J. in *Worcester*, Johnson J. wrote (*ibid.*, at 20-28, paragraphing omitted):

"With the morality of the case I have no concern; I am called upon to consider it as a legal question. ... I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are. I would not here be understood as speaking of the Cherokees under their present form of government; which certainly must be classed among the most approved forms of civil government. Whether it can be yet said to have received the consistency which entitles that people to admission into the family of nations is, I conceive, yet to be determined by the executive of these states. Until then I must think that we can not recognize it as an existing state When the eastern coast of this continent, and especially the part we inhabit, was discovered, finding it occupied by a race of hunters, connected in society by scarcely a semblance of organic government; the right was extended to the absolute appropriation of the territory, the annexation of it to the domain of the discoverer. It cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. ... In the very treaty of Hopewell ... we find the commissioners [stating] "The Commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favour and protection of the United States "on the following conditions". This is certainly the language of sovereigns and conquerors, and not the address of equals to equals.... It is clear that it was intended to give them no other rights over the territory than what were needed by a race of hunters; and it is not easy to see how their advancement beyond that state of society could ever have been promoted, or, perhaps, permitted, consistently with the unquestioned rights of the

states, or the United States, over the territory... The hunter state bore within itself the promise of vacating the territory, because when game ceased, the hunter would go elsewhere to seek it... Independently of the general influence of humanity, these people were restless, warlike, and signally cruel in their irruptions during the revolution. ... [I]t was wise to prepare them for what was probably then contemplated, to wit, to incorporate them in time into our respective governments: a policy which their inveterate habits and deep seated enmity has altogether baffled. ... [In the treaty at issue] they receive the territory allotted to them as a boon, from a master or conqueror. ... Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state?" ... The general policy of the United States ... always looked to these Indian lands as a certain future acquisition ... Their condition is something like the Israelites, when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal self-government has never been taken from them.... The right to expel them may exist ... [T]he constitution speaks of them ... as just what they were, Indian tribes, an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws nor government, beyond what is required in a savage state."

620. H. Berman calls this case "confusing and occasionally incoherent"; and "one of the most misunderstood cases in the Anglo-American law", the "ambiguity" of whose reasoning "on the nature of aboriginal rights was fundamental and extreme": "The Concept of Aboriginal Rights", *supra*, note 35, at 647, 655, and 659 respectively. G. Lester, who takes a different view of the case than that advanced by Berman and largely followed here, describes Marshall C.J.'s Aboriginal rights decisions generally as advancing "inconsistent and contrary positions": "Primitivism versus Civilization", *supra*, note 90, at 359.

621. "The inquiry, therefore, is, in a great measure confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this Country": *supra*, note 16, at 572.

622. "We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted": *supra*, note 16, at 588.

623. "That law which regulates, and ought to regulate in general, the relations between the conqueror and the conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable." (It should be noted that the circumstances alluded to here cannot be restricted to Marshall C.J.'s broad fiction, referred to in the previous paragraph, that the Indian population had simply "receded" in the face of conflict, following the game into "thicker and more unbroken forests", and leaving the soil "no longer occupied by its ancient inhabitants". The case actually stated was that "the particular tribes for whom these chiefs acted were in rightful possession of the land they sold": *supra*, note 16, at 572. (This appears to be one of the points upon which Marshall C.J.'s ruling in *Johnson v. M'Intosh* is "confusing and ... incoherent": see note 629, *supra*.) The driving out and treaty-based departures of Aboriginal peoples from some of the lands in the colonies was relied upon in the 1802 American edition of Blackstone's *Commentaries*, to support the same rule eventually adopted by Marshall C.J. in *Worcester v. Georgia*, that the settlers' laws should generally govern them in their own territory, and Aboriginal peoples' laws in theirs. See notes 602 and 251, *supra*, respectively.)

624. *Supra*, note 16, at 589. Earlier in the judgement Marshall C.J. had wryly reported such prejudice as a factor in state policy, without claiming to subscribe to it (*ibid.*, at 572-573):

"On the discovery of this immense continent, the great nations of Europe were eager to appropriate to

themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence."

(Consistently with the later judgement's departure from such premises, Marshall C. J. was to note in *Worcester v. Georgia*, *supra*, note 48, at 546, that the "objects [of] civilization of the Indians, and their conversion to Christianity" might be accomplished, alternatively, by "conciliatory conduct and good example; not by extermination".)

625. *Ibid.*, at 590.

626. Marshall C.J. noted in the same passage that the Indians "were ready to repel by arms every attempt on their independence": *supra*, note 16, at 590. Thus, "[t]he Europeans were under the necessity of abandoning the country, and relinquishing their pompous claims to it, or of enforcing their claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing their families to the perpetual hazard of being massacred": (*id.*).

Later, examining the policy underlying the *Royal Proclamation of 1763*, Marshall C.J. rationalized the *Proclamation's* restriction against alienations to private parties as a response to similar circumstances, but without the overtly discriminatory premise favouring European settlement of the "wilderness" (at 596-597):

"The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites ... "

This passage foreshadow's Marshall C.J.'s characterization of the *Proclamation* in *Worcester v. Georgia* as protective of Aboriginal property interests rather than appropriative, and responsive, in particular, to fraudulent practices on the part of speculators and settlers purchasing Aboriginal lands.

627. *Supra*, note 16, at 591. Elsewhere in the judgement (at 574), Marshall C.J. expressed this holding as follows: "Their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."

628. *Supra*, note 16, at 592-594.

629. "Occupancy" was to receive a diminishing gloss in Story's *Commentaries* (quoted, *supra*, note 603), and much later in the Supreme Court's ruling in *Tee-Hit-Ton* (quoted *supra*, text accompanying note 96). Nothing in Marshall C.J.'s reasons in *Johnson v. M'Intosh*, however, suggests that Marshall C.J. used this term other than as the basis for 'original' claims to sovereignty or property and the answer to claims of lawful dispossession based on someone else's occupation. Marshall C.J. affirmed this sense of the term "occupation" directly in *Worcester v. Georgia*: see note 636, *infra*.

630. *Supra*, note 16, at 574.

631. "The Concept of Aboriginal Rights", *supra*, note 35, at 649.

632. Supra, note 465, at 30.

633. Supra, note 48, at 544.

634. Supra, note 48, at 543.

635. Supra, text following note 229.

636. Twice in the judgement, first in discussing the origin in principle of the issues, and then in assessing the "actual state of things", Marshall reaffirmed the basic principle of *occupatio* (*supra*, note 48, at 542-543, 545):

"It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, *or over the lands they occupied*; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled *the pre-existing rights of the other*.

...

"*This soil was occupied by ... nations...* . The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by [the colonial charters] to govern the people, or *occupy the lands* from sea to sea, did not enter the mind of any man." [emphasis added]

In his conclusions Marshall C.J. alluded directly to the natural law basis of the principle, describing Aboriginal rights as a function of Indian nations' "original natural rights, as the undisputed possessors of the soil", and of the "original right, possessed by the occupants of every country" (*ibid.*, at 569-560 respectively). G. Lester has argued that Marshall C.J. meant to distinguish nonjusticiable natural law rights from enforceable civil law rights in such statements, as the colonists Samuel Purchas and John Winthrop had urged long before: "Primitivism versus Civilization", *supra*, note 90, at 356-357, 360-361. The judgement does not make such a distinction, however. The view taken here is that the judgement draws on natural rights to reinforce the moral legitimacy of the Court's legal reasoning.

637. *Ibid* (first quotation). The doctrine had been implicitly rejected earlier, in the holding in *Johnson v. M'Intosh* that prior to their "discovery" Aboriginal peoples possessed "complete sovereignty, as independent nations": *supra*, note 16, at 574.

638. "The Indians perceived in this protection only what was beneficial to themselves... . It involved, practically, *no claim to their lands, no dominion over their persons*" [emphasis added]: *ibid.*, at 552. See also the statements quoted in note 636, *supra*, which refer to proprietary interests as an incident of the territorial title of the Cherokees. In its last decision on Aboriginal rights the Marshall Court described the proprietary interest of Aboriginal peoples more specifically, as follows:

"One uniform rule seems to have prevailed, from [Britain's] first settlement, as appears by their laws; that friendly Indians were protected *in the possession of the lands they occupied, and were considered as owning them*, by a perpetual right of possession, in the tribe or nation inhabiting them, *as their common property*, from generation to generation" [emphasis added]

(*Mitchel v. United States*, *supra*, note 618, at 745.)

639. See note 318, *supra*, and accompanying text.

640. *Tee-Hit-Ton v. United States*, *supra*, note 45. See discussion, *supra*, note 93 and accompanying text. As the United States assumed an increasingly dominant position in its balance of power with Aboriginal peoples, the Marshall doctrine of Aboriginal rights was erratically reinterpreted and altered. Two early cases construed Marshall C.J.'s judgements as having adopted a *terra nullius* conception of Aboriginal habitation of land. In *Martin v. Waddell* 41 U.S. (16 Pet.) 367 (1842) the Supreme Court suggested that "the English possessions in America were not claimed by right of conquest, but by right of discovery Whatever forbearance may have sometimes been practised towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe, at their pleasure, as if it had been found without inhabitants" (at 409) [emphasis added]. Similarly, in *United States v. Rogers*, *supra*, note 63, in terms which flatly contradicted those of Marshall C.J. in *Worcester*, the Court stated (at 572):

"The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control."

641. See B. Slattery, *Ancestral Lands, Alien Laws*, *supra*, note 61, at 38; J. Hurley, *supra*, note 94, at 407-409. For the view that the Marshall Court's decisions are of limited application in Canada because they classified the American colonies as discoveries *cum* conquests and treated tribes after acquisition of Crown sovereignty as quasi-foreign entities, see K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 3-4, 244-250.

642. See text and notes following note 574, *supra*, for Brennan J.'s treatment of related Privy Council cases in *Mabo v. Queensland*.

643. *Advocate-General of Bengal v. Ranee Surnomoye Dossee*, *supra*, note 295, at [59-61, 2 Moo PC (NS) 22]:

"Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own state; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws."

B. Slattery observes that under this rule, English law "by implication ... does not extend ipso facto to local inhabitants who maintain an autonomous life under their own customs": *Land Rights*, *supra*, note 15, at 29. It is not entirely clear from this *obiter* statement whether the Privy Council would have restricted the reach of English sovereignty in "barbarous country" based on settlement alone, analogously to the reach of English law. K. McNeil apparently doubts that the Privy Council meant to imply such a limit: "by this [Lord Kingsdown] seems to have implied that a barbarous country could be acquired by settlement": *Common Law Aboriginal Title*, *supra*, note 11, at 119. McNeil's view is reinforced by the fact that the Privy Council contrasted the case of "an uninhabited or barbarous country" with the case before it, in which - the country settled being "highly civilized" - English law applied to the English settlers (and never to the local inhabitants, integrated or not) *only because the local sovereign permitted it*: Slattery, *ibid.*, at 29-30. The presence or absence of 'civilization' thus appears to have marked the presence or absence of sovereignty in the Privy Council's reasoning.

644. *Cooper v Stuart*, *supra*, note 281. In 1880 the Privy Council had classified British Honduras as 'settled': *A.G. for British Honduras v. Bristowe* (1880) 6 App. Cas. 143. According to K. McNeil, descendants of the former Mayan people continued to live in the interior region of the territory in question, in small numbers: *Common Law Aboriginal Title*, *supra*, note 11, at 141. The litigation proceeded "without regard for whatever rights the earlier inhabitants may have had": *ibid.*, at 142. McNeil discusses the case in the context of the jurisprudence relating to uninhabited territory.

645. K. McNeil considers it "authoritatively held" that the Peninsula of Sierra Leone was acquired by settlement: *Common Law Aboriginal Title*, *supra*, note 11, at 125 (citing *Palmer v. Stooke* (1953) [1950-56] A.L.R.S.L. 284, at 292-294, *aff'd* (1953) 14 W.A.C.A. 333; *Buck v. A.G.* [1965] Ch. 745, at 755-757, *aff'd* 760).

646. See K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 128 (citing *R. v. Koro Thompson* (1944) 10 W.A.C.A. 201, special leave to appeal refused by the Privy Council: *Palmer v. Stooke*, *supra*, note 645, at 291).

647. As K. McNeil notes, the inconsistency of the courts' application of the "level of civilization", or barbarism standard, to the classification of Aboriginal territory as "settled" or not (see note 282, *supra*, and McNeil's several further examples at 118-132), was purportedly excused in law by the act of state doctrine. Although the courts were the final arbiter of the classification of a colony according to its method of acquisition, the act of state doctrine provided that "the Crown can proceed as it likes in extending its sovereignty over new territory", permitting the courts to classify colonies "on the basis of the Crown's conduct and any other relevant circumstances": *ibid.*, at 131. Of course, consistently with Crown practice, the judicial rule appears to have been that "territory could be acquired from a member of the international community only by conquest or cession (or, formerly, descent)": *ibid.*, at 118. Aboriginal territories, however, were treated variously as 'settled' or not by the Crown, according to the Crown's political interests and military capacity: *ibid.*, at 130-132.

648. See K. Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966) at 812, 815, 762.

649. *Western Sahara*, *supra*, note 436.

650. Separate concurring opinion of Judge Forster, *supra*, note 436, at 103.

651. Separate concurring opinion of Judge Ammoun, *supra*, note 436, at 86. Specifically, Judge Ammoun rejected definitions of *terra nullius* that depend upon European standards of 'civilisation,' favouring instead a concept of peoples "having a social and political organisation" which affirms, in particular, the spiritual connection of Aboriginal peoples to their lands and territories (*ibid.*, at 85-86):

"Mr. Bayona-Ba-Meya goes on to dismiss the materialistic concept of *terra nullius*, which led to this dismemberment of Africa following the Berlin Conference of 1885. Mr. Bayona-Ba-Meya substitutes for this a spiritual notion: the ancestral tie between the land, or 'mother nature', and the man who was born therefrom, remains attached thereto, and must one day be returned thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. This amounts to a denial of the very concept of *terra nullius* in the sense of a land which is capable of being appropriated by someone who is not born therefrom. It is a condemnation of the modern concept, as defined by Pasquale Fiore, which regards as *terrae nullius* territories inhabited by populations whose civilisation, in the sense of the public law of Europe, is backward, and whose political organisation is not conceived according to Western norms."

652. *Ibid.*

653. I. Brownlie, for example, formulates the current international law definition of *terra nullius* in terms that might appear to permit such argument. Paraphrasing the majority opinion in *Western Sahara*, Brownlie writes that the modern definition permits extension of sovereignty by means of effective occupation, over "new land, ... territory abandoned by the former sovereign, or territory not possessed by a community having a social and political organization" (emphasis added): *supra*, note 435, at 139.

The pre-*Mabo* debate in Australia over classification of the continent as *terra nullius* prior to white settlement illustrates the sort of claims such argument can generate. Expert opinion in the legal anthropological literature divided over whether certain Aboriginal peoples are or were at contact "people without politics"; whether

"all of this is simply kinship"; whether "the [Aboriginal] community had no recognized political leaders, no hierarchy of government"; or, on the contrary, whether "big men" or "bosses" could be discerned, at the regional level; or whether "a visible, centralized governmental system" is not a prerequisite of organized society: see N. Wallace-Bruce, *supra*, note 553, at 96-99. According to Wallace-Bruce "it [was] not really disputed" by the parties to the debate "that Aborigines had a means of regulating their society": *ibid.*, at 99.

654. "Society" may be defined as "the sum of human conditions and activity regarded as a whole functioning interdependently": *Concise Oxford Dictionary*, *supra*, note 327.

655. Judge Ammoun's separate opinion stresses this underlying theme, in the statement quoted, *supra*, note 651, and as follows (*supra*, note 436, at 86):

"One might go still further ... so as to say that he would exclude from the concept of *terra nullius* any inhabited territory. ... This is the reply which may be given to the participants in the Berlin Conference of 1885, who, during the fierce blaze of nineteenth century colonialism, the success of which they sought to ensure by eliminating competition, regarded sub-Saharan Africa as an immense *terra nullius* available for the first occupier, whereas that continent had been inhabited since prehistoric times, and flourishing kingdoms had there been established - Ghana, Mali, Bornu - whose civilization survived until the colonial period, and only succumbed to the wounds inflicted by colonization and the slave trade. It was in the southern part of this continent and in Kenya that the ethnologists discovered the remnants of the first hominoids." [citation and paragraphing omitted]

656. *Mabo v. Queensland*, *supra*, note 34, at 28. Justice Brennan quoted in this context Judge Ammoun's comment in *Western Sahara* that "one might go still further in analysing the statement of the representative of Zaire so as to say that he would exclude from the concept of *terra nullius* any inhabited territory. His view thus accords with that of Vattel, who defined *terra nullius* as a land empty of inhabitants": *id.* (For discussion of the apparent cause of this confusing depiction of Vattel's position, see note 546, *supra*.)

657. "It is noteworthy that the Court [in *Western Sahara*] did not make any reference to 'civilization', and the positivist doctrine of the nineteenth century was thus dealt a fatal blow": N. Wallace-Bruce, *supra*, note 553, at 95. See also J. Crawford, *The Creation of States*, *supra*, note 435, at 181 ("[t]he *Western Sahara Case* ... provides a decisive refutation of the criterion of 'civilization' as a test for *terra nullius*".)

658. "As long as indigenous communities are classified as the objects rather than the subjects of international law ... they will be unable to vindicate through the courts any rights they enjoy under that law": G. Bennett, "The Developing Law of Aboriginal Rights" (1979) I.C.J. Review 37, at 40-41.

659. The unequal respect for (or discrimination against) human beings entailed in prejudiced conceptions of Aboriginal society is a principal theme of M. Asch's legal anthropological writing. See, for example, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Scarborough: Nelson, 1984), at 42-53; 74-88 (criticising, in particular, the "scale of social organization" test in *Re Southern Rhodesia*, and applying the principle of equal consideration to reconceived Aboriginal/Crown relationships); "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity", *supra*, note 429, at 471 n. 19, (arguing that the Attorney-General of Canada's denial of the ancestral sovereignty of the plaintiffs in *Delgamuukw* is analogous to denial of "another person's claim that he or she is a human being", and thus asserts that "certain people ... are less equal than others") and "Errors in *Delgamuukw*: An Anthropological Perspective", in F. Cassidy, ed.: *Aboriginal Title in British Columbia: Delgamuukw v. the Queen* (Lantzville: Oolichan and IRPP, 1992) 221, at 228-229, 239 (explaining the modern, anti-ethnocentric anthropological stance "that, in principle, all cultures are equally worthy of respect and must be understood on the basis of their own value systems", and emphasising that since culture and social relations are essential human attributes, "[t]here can be no people so primitive that they have no social organization").

G. Marks emphasizes that an essentially similar understanding structured the response of Las Casas to Sepulveda in the 16th century (*supra*, note 458, at 28):

"It is the alleged lack of capacity for self-government which establishes the right of the coloniser to subject the indigenous people to their rule, and Las Casas aimed not only to defend the objective regime of Indians rights and interests, but at a more fundamental level to defend the reputation of Indians as rational beings, with societies which required no external interference or control. ... He linked the equality of the Indians as rational beings with the legitimacy of their laws and their capacity for self-government... There is a vital connection between the question of the status of the indigenous inhabitants - their alleged "barbarism", "primitiveness", "backwardness", etc. and the territorial concept of *terra nullius*. By defining away the essential humanity of the inhabitants, and by denigrating their capacity for self-government, it becomes possible to convert inhabited land to empty land ... available for the first taker. ... In this contention, the individual qualities of indigenous persons and their personal rights and liberties at the same time define their collective rights to self-government and freedom from external control. To separate out the individual human rights of the indigenous persons from the collective political rights of indigenous peoples creates a dichotomy which would appear to be largely lacking in the thinking of Las Casas (and Vitoria). They argued that the Americas were indeed inhabited by human beings the equal of the Spaniards, and were therefore not *terrae nullius*."

Similarly, starting from the premise that individuals have an equal need and right to survive, B. Slattery argues in "Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, that peoples' presumptive rights to territory derive from individuals' right to well-being. In particular (at 698):

"As a matter of experience, we know that an individual's well-being cannot be secured apart from a social group. The group need not be a large one and may in fact be fairly small, limited to an extended family or several families. But some such group must exist to provide an individual with the basic characteristics and capacities of a human being. Even a hermit carries society to the desert, in the basic skills, capacities, ideas, and values that only an upbringing in human society can engender."

Upon showing that all social groups must have moral capacity and status - including the moral right to defend territories in their possession against outside intrusion - in order to protect the interests of their members, Slattery concludes that "[i]t cannot be argued that the right of native American groups to the lands used to sustain their members was automatically outweighed by the needs and ambitions of European states and their subjects without impliedly asserting that the lives of Europeans were more valuable than those of native Americans": *ibid.*, at 699.

660. *Supra*, note 34, at 27.

661. *Supra*, note 5, at 524. Similarly, speaking to the misconception that some societies might lack "property" as defined by supposedly universal criteria, A. Allott writes ("Aboriginal Rights and Wrongs: The Mabo Land Case" (1993) *Law & Justice* 84, at 100):

"A further danger is that one may be tempted to decide (as the Privy Council apparently did in *Re Southern Rhodesia*) that if a ruler - in the sense of a visible chief or king - is lacking in a given society, this necessarily entails that that society has no law or no scheme of land rights. It is my submission ... that there is no society, however small and even if appearing to lack some of the organs of government such as courts and police, which is without law or a legal system. Indeed, it is my contention that it is in principle logically impossible for an organised society, *as all must be*, to be without law." [emphasis added]

B. Slattery's argument, *supra*, note 659 is similar, though it introduces the marginally contingent factor of basic need as the foundation of all human rights. (Aboriginal peoples had territorial entitlements when Crown sovereignty was asserted, according to Slattery, "to the extent that they needed them to survive and flourish" (*ibid.*, at 699).)

It is submitted that Slattery's argument captures the necessity of attributing the legal status of occupation to any peoples' habitation of territory: "every human society whose members draw the essentials of life from territories in their possession (whether collectively or individually) has a right to these territories as against other societies and individuals": "Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, at 697.

662. *Supra*, note 5, at 526, 528.

663. "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*", *supra*, note 5, at 526. (The quoted statement appears in a discussion of the burden of proving the substantive elements of the test for Aboriginal title. The authors use the term "burden of proof" broadly, to include issues surrounding "the content of what must be proven": *ibid.*, at 521. But the authors' evidentiary argument also impugns the substantive basis for the "organized society" requirement itself. Although the authors conclude that "[t]he onus should be on the Crown to prove that certain institutions ... do not exist ... or are too imprecise", their substantive case, it is submitted, renders any such exercise illegitimate. Defendants against Aboriginal rights claims should not be entitled to adduce their own "catalogue of institutions and uses" in an effort to rebut the substantive presumption advocated by the authors, by showing that Aboriginal ways somehow fall short of the ways of an "organized society.")

664. Before the Australian High Court decision interpreting *Western Sahara* in this way was rendered, J. Crawford argued that *Western Sahara* had merely adopted, in effect, M. Lindley's criterion for "occupation" of territory: see *The Creation of States*, *supra*, note 435, at 179-181.

Lindley tended to resist the prejudices of his time, but his analysis nevertheless assumed that a minimum degree of 'progress' must be demonstrated before a community could be accorded sovereignty, adopting a social Darwinist premise which is, it is submitted, insupportable. (See note 463, *supra*, for Lindley's explanation of the title of his treatise.) Lindley thought that the wrong determinant of sovereignty had been relied upon by 19th and early twentieth century jurists: "[t]he proper distinction is not between civilization and no civilization, but between one kind of civilization and another, or *one stage of development or another*" [emphasis added]; *ibid.*, at 20. Accordingly, "however primitive and crude" a people might be (at 17; see also p. 45), they might yet have sovereignty if they have attained the necessary *minimum* stage of development, defined generally as connection by "some political organization" (17) or "political society" (21-22; see also p. 45). Lindley defined "political society" in terms of size and regulation of the conduct of members: at minimum there must be "a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards" (23). According to Crawford, "[p]ut negatively, this involves the proposition that only 'an unsettled horde of wandering savages not yet formed into civil society' [quoting Wheaton] or, more neutrally, only nomadic tribesmen lacking all regular political organization, could be regarded as not legal occupants of their territory" (*ibid.*, at 180). Accordingly, Crawford reasoned that *Cooper v. Stuart*'s colonial law test of "settled inhabitants or settled law" was consistent with the *Western Sahara* ruling, and that the validity of classifying Australian Aboriginal territory as *terra nullius* depended merely on facts to be determined in "the light of modern anthropological knowledge": *ibid.*, at 180.

It is submitted that Slattery's reservation regarding Lindley's standard adequately responds to Crawford's position, and restores to its place the equality value so important to the reasoning in *Western Sahara* and *Mabo* ("Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, at 700):

"To tie territorial rights too closely to the size of a group or to the internal conduct of its members is to overlook the reason for attributing territorial rights to any society in the first place: namely, to allow it to protect and advance the well-being of its members, both present and future. Human lives are not more valuable in a large, highly structured society than in a small group of independently-minded hunters and there would seem to be no less reason to attribute territorial rights to the latter than the former."

665. *Supra*, note 34, at 27.

666. *Ibid.*, at 28. See also the excerpts from Brennan J.'s opinion quoted, *supra*, note 591.

667. See text accompanying notes 654-656, *supra*. In *Mabo*, Brennan J. identified destruction of "the equality of all Australian citizens before the law" as "the common thread or theme" running through all of the doctrines of Aboriginal dispossession rejected by the court, including the doctrine of recognition and the "enlarged" doctrine of *terra nullius*: *supra*, note 34, at 41, 19.

668. Brennan J.'s opinion represented the concurrence of three members of the seven member panel. For Deane and Gaudron JJ.'s supporting view, see note 594, *supra*, and text following. Toohey J. held that "[t]he idea that land which is in regular occupation may be *terra nullius* is unacceptable, in law as well as in fact. Even the proposition that land which is not in regular occupation may be *terra nullius* is one which requires scrutiny: there may be good reasons why occupation may be irregular. Rather, in terms of *Western Sahara (Advisory Opinion)*, the question is whether, at the time of colonisation, the land belonged to no-one": *supra*, note 34, at 142.

669. "Sovereignty was not an issue in *Mabo* except in the very limited sense of the plaintiffs' arguments that any power to extinguish indigenous title belonged only to the "international sovereign" - Britain, succeeded by Australia, but never Queensland": G. Nettheim, "'The Consent of the Natives': *Mabo* and Indigenous Political Rights" (1993) 15 Sydney L. Rev. 223, at 228.

670. *Supra*, note 34, at 27.

671. *Supra*, note 34, at 19 (per Brennan J.) and 142 (per Toohey J.).

672. *Supra*, note 34, at 20-21. See also *ibid.*, at 58 (per Deane and Gaudron JJ.). As G. Marks has pointed out, the High Court's stance has left the sovereign rights of Australian Aborigines in the same position they occupied under the 1837 Select Committee's barbarism rationale - "utterly disregarded": *supra*, note 458, at 29 n 128. For the argument that the Court should have exercised its undoubted authority to reexamine the method by which Crown sovereignty had been acquired, and that its critique of the "enlarged" doctrine of *terra nullius* should have led it to conclude that Australia must have been acquired derivatively, see G. Simpson, *supra*, note 444. For the argument that the Court's critique exposes the inequity of the act of state doctrine itself, see S. Gray, *supra*, note 153.

673. *Supra*, note 34, at 27 (quoting the 1837 Report of the Select Committee of the House of Commons).

674. *Supra*, note 34, at 21.

675. *Id.*

676. *Supra*, note 34, at 24. Similarly, Brennan J. concluded: "[t]hus the theory which underpins the application of English law to the colony of New South Wales is that English settlers brought with them the law of England and that, as the indigenous inhabitants were regarded as barbarous or unsettled and without a settled law, the law of England ... became the law of the Colony ... as though New South Wales were "an uninhabited country ... discovered and planted by English subjects" (at 25).

677. (A peace-keeper selected by the Meriam people at the behest of Crown representatives: *ibid.*, at 11.)

678. *Ibid.*, at 26.

679. See, for example, the commentaries referred to in note 672, *supra*.

680. The incoherence of the doctrine of peaceful settlement in Canada and other jurisdictions purporting to acknowledge the occupation of Aboriginal peoples prior to Crown acquisition, is discussed in part 2, "recognition doctrine" above (text accompanying note 267).

681. *Supra*, note 34, at 43-44 (per Brennan J.). See also, *ibid.*, at 145-146 (per Toohey J.).

682. "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs": *supra*, note 34, at 42 (per Brennan J.). See also, *ibid.*, at 64, 65 (per Deane and Gaudron JJ.). (Toohey J.'s different position relies primarily upon an intersocietal principle: "[t]raditional title arises from the fact of occupation, not the occupation of a particular society or way of life" (*ibid.*, at 150).)

683. In a dichotomy disturbingly similar to the one applied in *Re Southern Rhodesia*, for example, Brennan J. held that alienability of Aboriginal title dependent upon "a mere matter of the custom observed by the indigenous inhabitants", as opposed to the same incident "provided for by law enforced by a sovereign power", could not be affirmed by the courts: *supra*, note 34, at 42. The Privy Council's concept of an "unbridgeable gulf" between 'civilized' and 'uncivilized' legal orders appears to reemerge here, and Brennan J. appears to have lost sight of the fact that it was intersocietal norms - respect for the occupancy of independent peoples, and the equality of persons - and not a rule of either the *internal* English common law or of the *internal* law of a particular Aboriginal people, that led the Court to affirm Aboriginal title in the first instance. (In the foregoing historical review of the principles underlying the doctrine of *terra nullius*, these intersocietal norms have usually informed rules of "natural law"). There may be reasons of intersocietal fairness which support a restriction on alienability of Aboriginal title, such as those which the *Royal Proclamation of 1763* recites, but this and the other main incidents of Aboriginal title regulating Aboriginal/Crown interaction fall to be determined, it is submitted, by intersocietal rules common to every Aboriginal/Crown relationship. See B. Slatery, "Understanding Aboriginal Rights", *supra*, note 3, at 742-750. In fact, Brennan J. did entertain several "general propositions about native title [which] can be stated without reference to evidence" (*ibid.*, at 42), including rules, such as the proposition that a fiduciary duty on the Crown arises if native title is "surrendered" to the Crown in expectation of a grant, which appear to reflect intersocietal principles. But Brennan J. did not acknowledge the significance of intersocietal law or apply it to his analysis of the incidents of Aboriginal title. (For a primarily intersocietal law analysis, see the opinion of Toohey J., *ibid.*, at 144-150).

684. Except in the case of Brennan J.'s remarks on the difference between custom and law as the source of a transfer of Aboriginal property, which appear to have been intended not to apply to incidents of title other than alienability: see note 692, *supra*.

685. "[O]nce it is acknowledged that an inhabited territory which became a settled territory was no more a legal desert than it was 'desert uninhabited' in fact, it is necessary to ascertain by evidence the nature and incidents of native title": *supra*, note 1, at 42 (per Brennan J.). Toohey J., who did not tie existence of Aboriginal title to factual proof of particular laws or customs, made a stronger presumption of the same nature (*ibid.*, at 146-147):

"[A]part from a prohibition against discriminatory treatment of some indigenous societies, an inquiry into the kind of society from which rights and duties emanate is irrelevant to the existence of title, because it is inconceivable that indigenous inhabitants in occupation of land did *not* have a system by which land was utilised in a way determined by that society. There must, of course, be a society sufficiently organised to create and sustain rights and duties, but there is no separate requirement to prove the kind of society, beyond proof that presence on land was part of a functioning system. ... Presence would be insufficient to establish title if it was coincidental only or truly random, having no connection with or meaning in relation to a society's economic, cultural or religious life."

686. Petition of the Gitksan chiefs of Gitwangak to the government of British Columbia, 1884, quoted by Lambert J.A., dissenting, in *Delgamuukw v. British Columbia*, *supra*, note 34, at 369.

Three years later, speaking to a delegation of Nisga'a and Tsimshian chiefs in Victoria, the Province's Premier informed Aboriginal leaders asserting the same rights that the Queen had granted reserves to "her Indian children" only "because they do not know so well how to make their own living the same as a white man," and that the province was within its rights to deny the existence of Aboriginal title, because "[w]hen the whites first came among you, you were little better than the wild beasts of the field": Premier William Smythe, *Sessional Papers*, 1887, at 257, 264, quoted by P. Tennant, "Aboriginal Rights and the Canadian Legal System", *supra*, note 186, at 114.

687. *Supra*, note 47, at 169-170.

688. *R. v. Syliboy* [1929] 1 D.L.R. 307 (N.S. Co. Ct.). Acting Judge Patterson had stated (at 313-314):

"[T]he Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it. ... The Treaty of 1752 ... is at best a mere agreement with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual." [paragraphing omitted]

689. *Supra*, note 141, at 399.

690. *Supra*, note 87.

691. See S. Cottam, "Indian Title as a 'Celestial Institution': David Mills and the *St. Catherine's Milling Case*"; and A. Hall "The *St. Catherine's Milling and Lumber Company versus the Queen*: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth Century Canada", in K. Abel and J. Friesen, eds., *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg: University of Manitoba Press, 1991), at 247, 267.

692. *Supra*, text accompanying note 432.

693. *Id.*

694. Chancellor Boyd took the 1675 Holt opinion's view that treaty-making with the Indians reflected mere "prudence and Christian charity", to be an accurate statement of constitutional law: *supra*, note 326, at 207. Boyd C. also relied upon the isolated statements from *Johnson v. M'Intosh* that "so far as respected the authority of the Crown no distinction was taken between vacant lands and lands occupied by the Indians", and that Crown title is "absolute": *ibid.*, at 209. (For discussion of the context of those statements, see text following note 620, *supra*.) With respect to the *Proclamation* itself Boyd C. held that, in the light of "all the intervening years of progress, material, legislative, and political", its substantive provisions "must be regarded as obsolete" (at 227). To illustrate, Boyd C. expounded upon the difference between the Christianized Indians of Lower Canada and the "untaught and uncivilized" and "rude" peoples of Upper Canada, and in particular, on the "more than usually degraded Indian type" represented by the *Saulteaux* people whose treaty was at issue (at 210-211, 227-228). Far from according such people rights of property, Boyd C. explained, treaty policy supplanting the *Proclamation* sought to conciliate Aboriginal peoples "in the presence of an ever-advancing tide of European and Canadian civilization", and to provide for "the necessary territorial constriction of the Indian occupants" by ensuring, amongst other things, that

the "Indian" is "train[ed] and restrain[ed] ... so that being delivered by degrees from dependency and pupillage, he may be deemed worthy to possess all the rights and immunities and responsibilities of complete citizenship" (at 211). In Boyd C.'s vision, the *Proclamation* had accommodated Indians in their barbarous state of nature, while modern policy, reflected in the *British North America Act*, sought to deliver them from that state (at 228):

"There is an essential difference in meaning between the "reservations" spoken of in the Royal Proclamation, and the like term in the B.N.A. Act. The proclamation views the Indians in their wild state, and leaves them there in undisturbed and unlimited possession of all their hunting ranges. ... The territorial jurisdiction of the Dominion extends only to lands *reserved* for them. Now it is evident from the history of 'the reserves,' that the Indians there are regarded no longer as in a wild and primitive state, but as in a condition of transition from barbarism to civilization. The object of the system is to segregate the red from the white, in order that the former may be trained up to a level with the latter."

Chancellor Boyd's decision was upheld unanimously by the Ontario Court of Appeal: (1886) 13 Ont. App. R. 148.

695. The provincial attorney-general was the only Crown representative to appear in the case prior to the Privy Council hearing, where the federal attorney-general intervened. At trial the Attorney-General for Ontario relied, in particular, on the Holt opinion of 1675 (quoted *supra*, note 602), which contended that the Crown acquires sovereignty over and ownership of any "Country of Barbarians" upon discovery: *supra*, note 326, at 206-208.

The development of the province's argument, which was presented personally at trial and before the Privy Council by Oliver Mowat, Ontario's Premier and Attorney-General, is traced by S. Cottam, *supra*, note 691. The constitutional expert relied upon by the province was David Mills, an erudite Liberal MP who acted, in amongst other capacities, as "Mowat's man in Parliament" (*ibid.*, at 254). Mills appeared as co-counsel for the province in the Ontario Appeal Court and Supreme Court of Canada. Cottam attributes Mills' theory of Indian title primarily to the influences of social Darwinist, racial supremacist and colonialist thought, and of John Locke's argument against Indian property in land (*ibid.*, at 259-260, footnotes and paragraphing omitted):

"What were the bases of Mills' thorough rejection of Indian property rights? One was his acceptance of the popular belief in the supremacy of the Anglo-Saxons and the Darwinian notion that not the "best...but the fittest" would survive. The fittest race, of course, was the Anglo-Saxon one, but it needed a "great mission...to justify its existence". For Mills, this mission was the struggle against the Slavic race for supremacy, a struggle which would continue, he believed, for the next two centuries before the Anglo-Saxons won in the end. Here Mills's idea of racial supremacy met his views on imperialism: the justification for the British Empire was a logical extension of Anglo-Saxon superiority, the demise of "inferior" peoples being a sad but inevitable consequence of the movement of Europeans throughout the world. A second element was his rejection of socialist solutions to the problems of society. ... Mills relied heavily on Locke's ideas of property in his arguments against [Henry] George:

"There was no conception of property in land among the North American Indians, until it was suggested by white men. They had expended no labour upon it. The occupant of the cave was undisturbed while in possession; but if he abandoned it, and another found it vacant, he did not think of setting up title based upon previous occupancy. Mr Locke observes that where human labour is mingled with the soil, the idea of property, at once, arises, just as it does, where a piece of wood is shaped into a bow or arrow, or into a piece of household furniture. The returned hunter that makes no claim to the cave which he has abandoned, will do so, in case he finds another occupying the hut, which by his labor, he has erected, and which but for that labour would not have existed."

Mills argued even against the existence of collectivist practices... . 'Where is there evidence that a collective community are entitled to land, or to mines of gold and silver, as inalienable possessions?' To require the value that labour adds to the soil to accrue to the collective instead of the labouring individual

'would lead you a long way back towards barbarism.' Clearly, Mills did not try to gain an understanding of Indians as people, as his statements on Indian property uses reveal. ... Mills' thinking admitted no possibility that the Indians should be treated as nations with valid laws; English law could not be mixed with the natural rights of the Indians. The division of the world into civilized and uncivilized peoples indicates his acceptance of a racial hierarchy; Europeans transcended Aboriginal peoples in customs, manners and law. Mills was an absolutist in the sense that English law could not conceivably recognize or incorporate anything that did not share its fundamental assumptions."

696. In the Supreme Court the Attorney-General for Ontario argued that "nothing is more clear than that [the Indians] have no government and no organization, and cannot be regarded as a nation holding lands": *supra*, text accompanying note 433. Further, the Attorney-General argued that "[a]t the time of discovery of America, and long after, it was an accepted rule that heathen and infidel nations were perpetual enemies, and that the Christian prince or people first discovering and taking possession of the country became its absolute proprietor, and could deal with the lands as such": *supra*, note 434, at 596-597.

697. Locke's *Two Treatises* were relied upon in support of the proposition that "[t]he Indians had no rules or regulations which could be considered laws": *supra*, note 434, at 597. The Attorney-General cited from Locke's *Second Treatise* section 28 (individual labour makes the difference between goods held in common and individual property); section 32 (Aboriginal labour does not create property in land, because "[a]s much land as a Man Tills, Plants, Improves, Cultivates, and can use the product of, so much is his Property. He by his Labour does, as it were, inclose it from the Common"); and section 42 (inversely, "land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, waste; and we shall find that the benefit of it amount to little more than nothing": see also note 616, *supra*).

698. Vattel's *Law of Nations* was cited in support of the contention that it was "part of the common law of Europe" that "the crown had never recognized the aboriginal inhabitants of a country who were without any settled government as the proprietors of the soil": *supra*, note 434, at 596. The sections cited (Bk. 1, Ch. 7, s. 81; Ch. 18 ss. 205-209) contain the main account of Vattel's version of the *terra nullius* doctrine, and have been quoted, *supra*, text following note 545. In summary, they argue that only uninhabited land and territory may be acquired by occupation, but that as "savages [who] made no actual and constant use" of the land, the Aboriginal peoples of North America "ranged through rather than inhabited" their territories, violating natural law's duty to cultivate the soil. Accordingly those "who, to avoid labour, choose to live only by hunting, and their flocks" "usurp" more territory than they need and have no cause to complain when "other nations, more industrious and too closely confined, come to take possession of a part of those lands."

699. See text following notes 501 and 542, *supra*, respectively. Before the Privy Council the province's counsel simply dismissed the Indians as an "inferior race" who were "in an inferior state of civilization": E. Blake, *The Ontario Lands Case: Argument of Mr. Blake, Q.C. before the Privy Council* (Toronto: The Budget, 1988) at 6-7, quoted by A. Hall, *supra*, note 691, at 277. Hall explains the context of Blake's oral submission as follows (*ibid.*, at 277-278, paraphrasing and footnotes omitted):

"While he did not veer away from the hoary old theories of conquest and discovery on which his client's case depended, the counsel advanced these ideas in more modern Darwinian terms that had about them a slight suggestion of scientific authority. Blake referred to the Indians as an 'inferior race' who were 'in an inferior state of civilization.' Because of the Indians' consequent vulnerability, continued Blake, it was necessary that they have a 'guardian or protector'. This need, said the lawyer, was best met by the Dominion government. By adding this new element to the case, Blake was able to claim that Ontario's position was partly founded in concern for the Indians' welfare. 'I contend,' he said, 'that possibly, nay probably, the Indian position is by our construction of the Act materially improved.' The Dominion's responsibility, Blake asserted, was to be the 'vindicator of the Indian rights'. It was to see 'that the Indian is not overborne or oppressed or tricked'. The Dominion government could offer such 'independent,

disinterested intervention' however, only if it was *not* the beneficiary of the Aboriginal interest conveyed to the Crown through treaties. Blake's assertion of the Dominion's responsibility as a vindicator of the Indian rights was ironic. It was couched in a larger thesis that denied recognition of much real substance to these same rights."

700. Text accompanying note 434, *supra*.

701. "I agree with Arnup J.A.'s assessment of the judgment of Chancellor Boyd": *A.-G. Ont. v. Bear Island Foundation* (1984) 15 D.L.R. (4th), 321 (Ont. H.C.), at 350. The quoted assessment read:

"The nature of Indian title in Ontario, and the policy of the British Crown in relation to Indians and their rights has been authoritatively determined in a series of cases, in which much of the historical background is recounted, particularly in those cases decided when the events of the last 15 years of the 18th century were still present in the minds of living persons in the middle of the 19th century, and were recorded in documents available to the Judges of that time. As Osler J. did, *I find the judgement at trial of Chancellor Boyd - a most learned, accurate, and respected judge - in R. v. St. Catherine's Milling & Lumber Co., to be of great assistance.* ... [T]he history of public lands is dealt with ... , and the colonial policy of Great Britain concerning the aboriginal populations in America is dealt with at length... . The judgement was affirmed [in the Canadian appeal courts] ... and by the Privy Council." [Steele J.'s emphasis]

702. "I agree with Chancellor Boyd, except where he decided that federal jurisdiction under s. 91(24) was restricted to ceded lands or reserves": *ibid.*, at 350. Specifically, Steele J. quoted the following excerpts from Chancellor Boyd's reasons (*ibid.*, at 348):

"While in the nomadic state they may or may not choose to treat with the Crown for the extinction of their primitive right of occupancy. If they refuse the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so, sooner or later, to displace them. ... Before the appropriation of reserves the Indians have no claim except upon the bounty and benevolence of the Crown. [Steele J.'s emphasis]

...

[S]urrender to the Crown by the Indians of any territory adds nothing in law to the strength of the title paramount ... "[Steele J.'s emphasis]

Upon reviewing Lord Watson's judgement for the Privy Council, and before repeating that "Chancellor Boyd was also upheld by majorities in the Court of Appeal ... and Supreme Court of Canada" Steele J. concluded that "on the nature of aboriginal rights, Chancellor Boyd and the Privy Council were in agreement" (at 349).

703. Interpreting the 1760 Articles of Capitulation at Montreal, Steele J. held, in response to the Aboriginal party's contention that the document accorded their ancestors "equal rights with all Canadians", that "both the French and the English treated Indians as unequal to Europeans and dealt with them separately in art. 40 as they dealt with Negroes separately in art. 47," so that the promise of protection of the property of "all other persons whatsoever" "was not meant to include Indians": *ibid.*, at 343. Steele J. stressed that "in the eyes of 18th- and-19th century Europeans, the Indians of the Canadian Shield ... were wanderers who had no fixed abode", cautioning that "[t]his point should be remembered when dealing with documents of that time period, such as the Royal Proclamation" (at 347). On this view the paramouncy of white over Indian interests was presupposed by the *Royal Proclamation* itself: "[i]t was clear that the white colonists intended to occupy the lands. The problem was how to make certain that the Indians accepted this with good grace and without bloodshed" (at 345). Subsequently, according to Steele J., "wherever the Crown felt that it could defend its white citizens, it did not provide for treaties with the Indians" (at 347). Upon reviewing Chancellor Boyd's opinion, the line of subsequent cases relying upon it, and 19th century statements of government policy, Steele J. concluded that subordination of Aboriginal interests

should have the status of an interpretive principle for the *Royal Proclamation of 1763* and contemporaneous documents (at 352):

"In [a commission report laid before the Legislative Assembly of Canada in 1842] reference was made to *Vattel on the Law of Nations* indicating that the commissioners considered that the Indians did not have any proprietary right in the lands, that the Indian occupation could not be considered as a true and legal habitation, and that the Europeans were lawfully entitled to take possession of the land and settle it with colonies. Whether or not this was proper law or a proper view, it was the view in 1845 of persons in what is now Ontario, and it must be borne in mind in interpreting any legislation or contracts or treaties made at that time. *This view is consistent with my interpretation of the meaning of the Royal Proclamation itself.* [emphasis added]

It followed for Steele J. that at the time of the *Royal Proclamation* "Europeans did not consider Indians to be equal to themselves and it is inconceivable that the king would have made such vast grants to undefined bands, thus restricting his European subjects from occupying these lands in the future except at great expense" (at 354).

704. McEachern C.J. analysed the Privy Council ruling in *St. Catherine's Milling* by comparison to the opposing views in the Supreme Court of Canada of Taschereau J. (supporting the majority conclusion that no property in land passed to the federal government in the treaty in question) and Strong J. (dissenting). After quoting the passage from Taschereau J.'s opinion containing the statement excerpted in the text above, McEachern C.J. remarked that in the Privy Council judgement Lord Watson "expressed himself in terms far closer to the views of Taschereau J." than the views of Strong J., "particularly the passage ... that 'the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign'": *supra*, note 168, at 345. McEachern C.J.'s comment on the import of *St. Catherine's Milling* encapsulates the trial judgement's principal rulings against the plaintiffs' claim (*id.*):

"Although Lord Watson expressly stated that it was not necessary to express an opinion upon the precise quality of 'the Indian right,' the description of being a 'burden' on the Crown's title is hardly descriptive of a proprietary interest in the Indians. Standing alone, *St. Catherine's Milling* is authority against any aboriginal ownership and jurisdiction and it establishes that aboriginal rights exist 'at the pleasure of the Crown'. Those are judicial pronouncements of fundamental importance."

See also, *ibid.*, at 369 and 383.

705. *Law of Nations*, Bk. 1, Ch. 18, s. 209, quoted by McEachern C.J., *supra*, note 168, at 206-207 (quoted, *supra*, text accompanying note 546).

706. *Supra*, note 16, at 573. Remarkably, McEachern C.J. construed *Johnson v. M'Intosh* as having accepted Vattel's "principle": *supra*, note 166, at 207. McEachern C.J. failed to note that Marshall C.J. had confined the consequent diminishment of Aboriginal "independence" to a restriction on alienation of title, and that in the passage McEachern C.J. quoted, Marshall C.J. had depicted European claims to colonial sovereignty strictly in terms of a regime governing relations between European nations "as between themselves". Far from denying the initial sovereignty of Aboriginal peoples in North America, as had Vattel, Marshall C.J. expressly acknowledged in *Johnson v. M'Intosh* "their rights to complete sovereignty as independent nations": *supra*, note 16, at 574. See discussion, *supra*, note 631, and accompanying text.

707. See note 688, *supra*.

708. See, for example, Premier William Smythe's response to assertions of Aboriginal rights in British Columbia in 1884, quoted *supra*, note 686. In *St. Catherine's Milling* Chancellor Boyd relied extensively upon official government reports and correspondence for his characterization of Aboriginal title and related Crown policy. The

Following is an excerpt of the passage from an 1844 report printed in the Journals of the Legislative Council of Canada, quoted by Boyd C. in relation to treaty policy (*supra*, note 326, at 212):

"As the settlement of the country advanced, and the land was required for new occupants, or the predatory and revengeful habits of the Indians rendered their removal desirable, the British Government made successive agreements with them for the surrender of portions of their lands . . . If the Government had not made arrangements for the voluntary surrender of the lands, the white settlers would gradually have taken possession of them, without offering any compensation whatever; it would at that time have been as impossible to resist the natural laws of society and to guard the Indian territory against encroachment of the whites, as it would have been impolitic to check the tide of emigration. . . . In every case the Indians had either the opportunity of retreating to more distant hunting grounds, or they were left on part of their wild possessions with a reserve supposed at the time to be adequate for all their wants, and greatly exceeding their requirements as cultivators of the soil at the present day, to which were added the range of their old haunts, until they became actually occupied by settlers, and, in many cases, an annuity to themselves and their descendants forever, which was equivalent at least to any benefit they derived from the possession of the lands".

The same image of Aboriginal treaty beneficiaries is conveyed by the response of a stipendiary magistrate appointed to inquire into Saulteaux objections to the compensation paid under the treaty reviewed in *St. Catherine's Milling*. According to S. Cottam (*supra*, note 691, at 265, n. 90) E.B. Borron "argued that the compensation of the Indians for their land could be much less than the value of that land. While the Indians felt cheated, stated Boron, before the European discovery of North America,

...the fertile land had lain waste and uncultivated; the timber uncut, had been destroyed by fire, or rotted on the ground; and the ores and minerals, useless to the Indians as rocks and stones, had remained buried in the earth. Now is there any good reason to believe that either now or at any future period, these resources would ever have been utilized, or of the least value whatever to the Indians, had they been left to themselves? Any value that they now possess is due to the superior knowledge and industry of white men, and the wants and necessities of a higher civilization than that of the Indians. Hence rightly or wrongly the dominant and so called civilized races, whether English or French, when taking possession of this Continent have apparently shown little or no regard for the *proprietary rights* of the Indians, either in respect of the soil, timber, or minerals. The compensation (if any) . . . has been given in consideration of the loss of their hunting grounds, and the necessity sooner or later of their making a living in ways other than as hunters and trappers." [original emphasis].

(Quoting PAO, Irving Papers, mu1468, 30/36/6[3], E.B. Borron, report of 10 October 1894.)

709. D. Sanders discusses two further examples of judicial attitudes during this era (*infra*, note 773, at 123-124):

"While the politicians continued to sign treaties, the courts began undercutting any ideas of Indian rights in cases coming from eastern Canada. If Indians had become a 'domestic' matter, it was up to the Canadian legal system to determine whether Indians had rights. In *Sheldon v. Ramsay* in 1852 an Ontario Court held that the Six Nations Indians had no legal rights to their reserve lands, because the common law could not be 'part savage and part civilized'. In 1921 in *Sero v. Gault*, an Ontario Court quoted the Attorney-General as saying that treaties with the Mohawks made as much sense as treaties 'with the Jews in Duke street.' In *Regina v. Syliboy* in 1929, a Nova Scotia Court ruled that a treaty between the Mic Mac and England was a nullity. Indians were 'uncivilized' and 'savages'. The treaty had been made with a 'handful of Indians'. Of course a 'handful of Indians' would have no rights, for the words describe a collection of individuals with no political or legal organization. . . . These cases were all racist lower court decisions. Yet for decades the Government of Canada referred to the *Syliboy* decision as defining the status of treaties in Canadian law."

710. *Supra*, note 87, at 54.

711. *Ibid.*, at 59.

712. *Ibid.*, at 54. Lambert J.A., dissenting in *Delgamuukw*, commented as follows on such language (*supra*, note 34, at 295):

"When the Victorian cases speak of rights being held 'at the pleasure of the Crown' and 'dependent on the good will of the Sovereign' they are expressing thought processes in language appropriate to the highest style of Imperial glory. ... Employing such language in a contemporary decision as a reason for denying aboriginal rights seems to me to be permitting the worst aspects of a discredited Imperial and Colonial approach to indigenous peoples to persist into the present day. I have already referred to the passages from the reasons of Mr. Justice Brennan in *Mabo* which warn against that danger."

713. The two judgements were issued on December 12, 1888 and April 3, 1889 respectively: *supra*, note 87, at 51; *supra*, note 281, at 288.

714. *Supra*, text accompanying notes 594, 660, 665, 666 and 676.

715. Lord Watson remarked in the oral argument of *St. Catherine's Milling* that "a pretext has never been wanted for taking land": S. Cottam, *supra*, note 691, at 261 (quoting from the published account by the successful counsel in the case, E. Blake, *supra*, note 699, at 45.) A representative sampling of the succeeding cases, culminating in the Supreme Court of Canada's statement in *Smith v. The Queen* [1983] 1 S.C.R. 554 that Aboriginal rights are an "ephemeral" entitlement to possess, use, or enjoy "property belonging to another", is given by Steele J. in *Bear Island*, *supra*, note 701, at 349-353. The unanimous Supreme Court subsequently overruled *Smith* on this issue, rejecting in *C.P.R. v. Paul* the view that "Indian title is merely a personal right which cannot be elevated to the status of a proprietary interest so as to compete on an equal footing with other proprietary interests", and confining the meaning of the term "personal" in this context to the restriction on alienability of Aboriginal title: [1988] 2 S.C.R. 654, at 677. (For a concurring opinion on the effect of *Paul*, see K. McNeil, "The High Cost of Accepting Benefits from the Crown", *supra*, note 446, at 59-60.) In *R. v. Sioui* the Supreme Court went further, describing the initial entitlement of Aboriginal peoples recognized by the British Crown as "certain ownership rights over their land": *supra*, note 169, at 1055.

The Supreme Court's holdings in *Paul* and *Sioui* did not dissuade McEachern C.J. from relying in *Delgamuukw* upon *St. Catherine's Milling* and *Smith* to reject the plaintiffs' claim to ownership of their lands: *supra*, note 168, at 345-346. The Court of Appeal rejected the same claim principally upon the trial judge's alternative ground that if Aboriginal rights in land might amount to ownership in some cases, the necessary exclusive possession of land had not been proven outside village sites: *supra*, note 34, at 130-133 (per Macfarlane J.A.) and 216 (per Wallace J.A., concurring). The Court of Appeal kept the *St. Catherine's Milling* line of reasoning alive, however, by interpreting the Supreme Court decision in *Guerin* (*supra*, note 47), alternatively, as precluding proof that Aboriginal title could ever amount to beneficial ownership: *ibid.*, at 130 (per Macfarlane J.A.) and 216 (per Wallace J.A., concurring).

716. Readings on the nature and influence of social Darwinist theory are referred to, *supra*, note 556. Further sources are listed by A. Hall, *supra*, note 691, at 282, n. 1. Hall refers to readings examining the Canadian context, as follows:

"Christian Bolt, *Victorian Attitudes to Race* (Toronto: University of Toronto Press, 1971) ... On the effect of Darwinian views on the natural sciences in Canada see Carl Berger, *Science, God and Nature in Victorian Canada* (Toronto: University of Toronto Press, 1983). On the place of Indians in Victorian anthropology in Canada see Bruce G. Trigger, "Giants and Pygmies: The Professionalization of Canadian

Archaeology", in Glyn Daniel, ed., *Towards a History of Archaeology* (London: Thames and Hudson, 1981). For a good biography that demonstrates the pervasiveness of Darwinian views throughout virtually every field of science in Victorian Canada, but especially in the field of anthropological theory, see Gerald Killan, *David Boyle: From Artisan to Archaeologist* (Toronto: Ontario Heritage Foundation, 1983)."

See also, emphasizing the fields of history and anthropology, B. Trigger's chapter entitled "The Indian Image in Canadian History", in *Natives and Newcomers: Canada's 'Heroic Age' Reconsidered* (Kingston and Montreal: McGill-Queen's University Press, 1985), at 3-49.

Trigger reports that Canadian anthropologists of the late 19th century tended not to endorse the evolutionary theories of their American contemporaries. According to Trigger these scholars had some influence upon Canadian historians of the time, but Trigger does not suggest that the impact of the Canadian scholars upon public attitudes and official policy compared with that of widely read evolutionary thinkers such as Francis Parkman.

717. "The acts and events by which that dispossession in legal theory was carried into effect constitute the darkest aspect of the history of this nation": *Mabo v. Queensland, supra*, note 34, at 82 (per Deane and Gaudron JJ).

718. Apart from *Simon, Sioui and Paul* (the latter two cases of which are discussed in note 715, *supra*), the Supreme Court's ruling in *R. v. Sparrow* (*supra*, note 28) is particularly important in this context. In *Sparrow* the Court pledged to interpret the *Constitution Act, 1982*'s affirmation of existing Aboriginal and treaty rights from a new and vigorously respectful point of view. The Court acknowledged that over the years since issuance of the *Royal Proclamation of 1763* "the rights of the Indians were often honoured in the breach", and that "[w]e cannot recount with much pride the treatment accorded to the native people of this country" (quoting MacDonald J. from *Pasco v. Canadian National Railway Co.* 1 C.N.L.R. 35 (B.C.S.C.)). The Court acknowledged, in particular, that in the early 20th century the very idea of Aboriginal rights had come to be ignored in legal discourse (*ibid.*, at 1103):

"For many years, the rights of the Indians to their aboriginal lands - certainly as legal rights - were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960's, aboriginal claims were not even recognized by the federal government as having any legal status."

The 1982 constitutional amendment, said the Court, "represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights" (at 1105). As emphasized earlier in this paper (see text accompanying notes 28 and 178, *supra*) the Court held that the significance of s. 35 extends beyond the effects of providing a constitutional basis for future negotiations, and providing for basic protection and enforcement of Aboriginal and treaty rights (at 1105-1106):

"In our opinion, the significance of s. 35(1) goes beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95 says the following about s. 35 (1), at p. 100:

"...the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."

In contrast to the premise by which 19th century courts had routinely elevated settlers' interests above Aboriginal claims, the Court also quoted with approval the Court of Appeal assurance that "the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter" (at 1106).

719. *Supra*, note 325. According to Mahoney J. (at 549), "the elements which the plaintiffs must prove to establish an aboriginal title cognizable at common law are:

1. That *they and their ancestors were members of an organized society.*
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England." [emphasis added]

720. The view taken here is that Mahoney J. was using this idea prescriptively. For the view that Mahoney J. was primarily describing Inuit society, see Toohey J.'s opinion in *Mabo v. Queensland*, quoted in part, *supra*, note 685. On one hand, Mahoney J. stated that "proof that the plaintiffs and their ancestors were members of an organized society is required by the authorities", and that "proof of the existence of a society" sufficient "to demonstrate that there existed among the aborigines a recognition of the claimed rights" must be given: *supra*, note 325, at 543. On the other hand, as noted below, some of the authorities Mahoney J. relied upon used the concept of "organized society" descriptively, and Mahoney J.'s conclusion that "it was a society organized to exploit the resources available ... and to sustain human life there" is arguably tautological.

721. See text following note 656, *supra*.

722. *Supra*, note 701, at 341, 361-362. Employing essentially the same distinction John Locke had used to differentiate Aboriginal social authority from civil political authority, Steele J. held that the "family" is not a sufficient form of organization, while the "band" is (at 362). Incidentally to his finding that at the relevant date the Aboriginal party's ancestors did not live in a band, Steele J. also found "that there was no strong legal or spiritual attachment to the lands" (at 378).

723. As one of several alternative grounds for declining to affirm the plaintiffs' Aboriginal rights, Steele J. held in *Bear Island* that the plaintiffs' ancestors failed this test as of the relevant date (*ibid.*, at 341):

"I will deal with the entitlement of the defendants to aboriginal rights in the Land Claim Area. *I find that the defendants have failed to prove that their ancestors were an organized band level of society in 1763; that, as an organized society, they had exclusive occupation of the Land Claim Area in 1763; or that, as an organized society, they continued to exclusively occupy and make aboriginal use of the Land Claim Area from 1763 or the time of coming of settlement to the date the action was commenced.* [emphasis added]

The trial judgement in *Delgamuukw* also treated the *Baker Lake* test as prescriptive (*supra*, note 168, at 148, 388-390), while creating a special, subordinate category of non-proprietary rights in areas where it deemed the level of Aboriginal organization only minimally sufficient. As will be seen below, because of the consequence of a 'passing but low' grade on this test, the difference between the *Delgamuukw* and *Bear Island* trial judgement approaches is immaterial in many cases.

724. See *Ontario (Attorney-General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, at 575. (The Ontario Court of Appeal did not address this ruling in its decision, upholding Steele J.'s refusal to affirm the Aboriginal rights of the claimants on the alternative ground that any such rights had been extinguished: (1989) 68 O.R. (2d) 395.)

725. So much can be inferred from the facts that the Supreme Court expressly declined to disturb any of the trial judges' relevant findings of fact (*ibid.*, at 574-575); that in the trial judgement excerpt faulted by the Supreme Court, failure to satisfy the "organized society" test was an independent basis for the trial judge's conclusion that existence of Aboriginal title had not been shown (quoted, *ibid.*, at 574); and that the Supreme Court reversed the trial judge's conclusion. Had the Supreme Court accepted both the trial judge's ruling that proof of an "organized society" is necessary, and the trial judge's characterization of the nature of that criterion, the Supreme Court could only have reached the conclusion it did if the error it found pertained to the application of this legal test to the unquestioned facts. Part of the Court's cryptic ruling might imply that the error was solely one of application (*ibid.*, at 574-575):

"We do not take issue with the numerous specific findings of fact in the courts below, and it is, therefore, not necessary to recapitulate them here. ... It does not necessarily follow, however, that we agree with all the legal findings based on those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right".

(The Court then cited its previous decisions in *Simon v. The Queen* (*supra*, note 141) - presumably in reference to its statement there that the courts will not impose an impossible burden of proof in such cases (at 408)) - and *R. v. Sparrow*, *supra*, note 28 - presumably referring to the Court's statement that even "scanty" evidence can in some cases establish "sufficient continuity" for proof of an Aboriginal right (at 1095)). But the Supreme Court then proceeded to hold that "the trial judge was misled by the considerations which appear in the passage from his reasons" (*Bear Island*, *ibid.*, at 575, referring to the reasons of the trial judge excerpted, *supra*, note 723). Thus, Steele J.'s reading of the law itself was impugned. This suggests that the Supreme Court is questioning either the imposition of any requirement of proof of an "organized society" in such cases, or, alternatively, the legal characterization of the nature of such a requirement. K. McNeil appears to prefer the latter alternative reading, but notes that both readings (amongst, in his view, others still) are plausible:

"In order to find that the Teme-Augama Anishnabai had an Aboriginal right to their lands, the Supreme Court probably disagreed with Steele on this point, concluding instead that they were an organized society at the relevant time. ... The court may even have questioned his requirement that the Teme-Augama Anishnabai prove that their ancestors were an organized society at that time."

("The High Cost of Accepting Benefits from the Crown", *supra*, note 446, at 43.)

726. In *R. v. Sparrow*, *supra*, note 28, the Supreme Court noted in the course of holding that the existence of an Aboriginal right to fish had been proven, that "[t]he evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers" (at 1094). The Court quoted anthropological evidence that "[a]s part of the Salish people, the Musqueam were part of a regional social network covering a much larger area but, as a tribe, were themselves an organized social group with their own name, territory and resources. Between the tribes there was a flow of people, wealth and food. No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others" (*id.*). Apart from confirming a need to distinguish between the Musqueam's ancestral society and others, this reference appears to be largely descriptive. Neither *Calder*, *Worcester v. Georgia*, nor *Baker Lake* are cited in this part of the judgement. Thus, while not precluding a prescriptive, "organized society" criterion, *Sparrow* does not confirm the validity of such a criterion.

727. *Supra*, note 47, at 156 (emphasis added).

728. K. McNeil appears to concur: "[t]his requirement came from *Baker Lake v. Minister of Indian Affairs* ... and was apparently derived from Judson J.'s statement in *Calder v. A.G. of British Columbia* But did Judson intend to make the existence of an organized society a prerequisite for Aboriginal title, or was he simply stating a general fact of Aboriginal life?" ("The High Cost of Accepting Benefits from the Crown", *supra*, note 446, at 43, n. 18.)

729. *Supra*, note 47, at 156.

730. *Ibid.*, at 195.

731. The presence of conquest in the hybrid rationale for acquisition of Crown sovereignty in the American jurisprudence resists any contrary approach, because even the "infidels" whose laws *Calvin's Case* suggested were abrogated upon conquest, were not imagined to lack political society: see note 606 and accompanying text, *supra*. For a review of the status of tribes in American Indian law, see C. Wilkinson, *supra*, note 116, at 53-86. Though directed at the maintenance rather than the foundation of Aboriginal political society, Wilkinson's summary describes the basis for tribal existence in American law:

"[T]ribalism is ultimately a matter of self-definition. Federal recognition may be withdrawn. The tribal unit may change when a catastrophic event occurs ... and a tribe may redefine itself ethnologically. But tribalism continues until the members themselves extinguish it. *Tribalism depends on a tribe's own will.*" [emphasis added]

(at 77, footnote deleted). Some American Supreme Court cases have introduced a prescriptive criterion resembling the "organized society" test when assessing the continuity of tribal existence, or collective membership in a tribe, for statutory purposes. In *Montoya v. United States*, for example, the Supreme Court stated that for the purpose of determining a tribes' statutory liability for the wrongdoing of a group alleged to belong to the tribe, "[b]y a 'tribe' we understand a body of Indians of the same or similar race, *united in a community under one leadership or government*, and inhabiting a particular though sometimes ill-defined territory; by a 'band', a company of Indians not necessarily, though often, of the same race or tribe, but *united under the same leadership in a common design*" [emphasis added]: 180 U.S. 261 (1901), at 266. (For critical comment, see G. Torres and K. Milun, "Translating *Yonondio* by Precedent and Evidence: The Mashpee Indian Case" [1990] *Duke L.J.* 625.) But such precedent, which really addresses which political society holds certain rights or obligations rather than whether an ancestral group qualified as a political society in the first instance, appears not to have affected the determination of the inherent rights of ancestral peoples in the American case law.

732. The Attorneys General for Canada and British Columbia both argued in *Delgamuukw* that (in McEachern C.J.'s summary) the plaintiffs' ancestors' "civilizations, if they qualify for that description, fall within a much lower, even primitive order" compared to "others which have received much greater prominence": *supra*, note 168, at 148. According to the trial judge the Attorneys-General supported this claim by "point[ing] to the absence of any written history, wheeled vehicles, or beasts of burden" in the plaintiffs' ancestral societies: *id.* The trial judge agreed. "The evidence suggests that the Indians of the territory were, by historical standards, a primitive people without any form of writing, horses, or wheeled vehicles. Peter Skene Ogden, the controversial trader-explorer visited Hotset in 1836 and noted their primitive condition in his journal" (at 141).

733. *Supra*, note 591, and accompanying text. Deane and Gaudron JJ.'s equality objection to the 'enlarged' Australian doctrine of *terra nullius* is also consistent with Brennan J.'s reasoning, and is directly opposed to the *Re Southern Rhodesia* rationale: see note 668, *supra*, and text following note 592.

734. Macfarlane J.A. held that "the trial judge was correct in applying the test from *Baker Lake*": *supra*, note 34, at 145. However, Macfarlane J.A. continued, "[t]here is no question that the Gitksan and Wet'suwet'en people had an organized society," and "it is pointless to argue that such a society was without traditions, rules and

regulations" (at 176-177, 178). Wallace J.A. held, on one hand, that the plaintiffs' ancestors had possessed some jurisdiction in their territory ("[p]rior to the acquisition of sovereignty over British Columbia, the Indians exercised jurisdiction in the territory to the extent made possible by their social organization" (at 224)). On the other hand, Wallace J.A. repeated in this context the trial judges' reasons for finding the plaintiffs' social organization minimal in scale (i.e. that the organization was for "social" as opposed to legal purposes; that it was based on "peer pressure", and that outside village sites and adjacent areas it consisted of possession of "empty lands" merely for "sustenance" (at 223)).

735. Asch and Bell note that under the *Baker Lake* approach, "once the four tests articulated by Mahoney J. have been met, the content of aboriginal title is ascertained by looking to the nature of social organization ... of the ancestral group": *supra*, note 5, at 523. In Asch and Bell's view this, amongst other considerations, "allowed McEachern C.J. to find sufficient social organization to establish a claim, and at the same time to conclude that the ancestral society was so low on the scale of social organization ... that few of the alleged ... practices and uses were precise enough to enforce in law": *id.* (As Asch and Bell show, this effect of the "organized society" test overlaps with the effect of the "frozen rights" limitation by which some Canadian courts have confined the scope of Aboriginal rights affirmed by English law: see section 4.5.3 below.)

McEachern C.J. also treated authorities such as *St. Catherine's Milling* as precluding affirmation of Aboriginal rights of a scope more substantial than "residential and sustenance gathering rights" (*supra*, note 168, at 390; see also note 744, *infra*). Since it reduces Aboriginal rights to a matter of bare human survival, this constraint could render any investigation into the nature of ancestral societies inconsequential. The trial judgement does not indicate whether or how this and the "organized society" constraint on Aboriginal entitlement might operate together. There appear to be three possibilities consistent with the trial judgement's conclusion that no more substantial set of Aboriginal rights could have been affirmed. The *St. Catherine's* line of authority could function independently and practically displace the former constraint; it could create a factual presupposition about the level of organization of Aboriginal societies in Canada that is rebuttable; or it could create a legal fiction immune from disproof. In light of his view that the Privy Council upheld Taschereau J.'s reasons in the Supreme Court, it appears that McEachern C.J. viewed *St. Catherine's* as turning upon the nature of Aboriginal society, and not upon independent considerations. Thus it appears that McEachern C.J. favoured the latter two possibilities, perhaps without choosing between them. In terms of emphasis, it appears that McEachern C.J. favoured the first of these two possibilities, because he examined the evidence of ancestral sovereignty at length: see note 747, *infra*, and accompanying text. The Court of Appeal's reliance upon *Guerin* as a limitation on the scope of Aboriginal rights creates similar ambiguity in the Court of Appeal majority ruling: see note 759, *infra*.

736. *Supra*, note 719, at 544. In *Home and Native Land*, *supra*, note 659 (at 54), M. Asch remarked of this conclusion:

"Such a view runs counter to the principle of cultural relativity [i.e. that "no culture can be properly seen as inferior to another"] and appears, in a veiled form, as an attempt to return to earlier notions based on an evolutionary bias. Clearly, ethnocentric biases die hard."

737. Here McEachern C.J. quoted in full the passage from *Re Southern Rhodesia* quoted, *supra*, note 582.

738. Professor Ray described ancestral control and regulation of hunting territories by "nobles" - Trader Brown's term - on behalf of "lineages", participating in an ancestral regional "exchange network": *supra*, note 168, at 201. Reviewing this evidence, McEachern C.J. had cautioned that a "larger picture" also emerged (at 201-202):

"First, it would be incorrect to assume that the social organization which existed was a stable one. Warfare between neighbouring or distant tribes was constant, and the people were hardly amenable to obedience to anything but the most rudimentary form of custom. Brown held them in no high esteem, partly because of their addiction to gambling, and [trader] Ogden, about whom there are different views (Dr. Sage called

him "kindly," while others refer to his "scorched earth policy in Oregon country"), described them most unkindly."

Elsewhere the trial judge emphasized that "Brown reports some minimal levels of social organization but the primitive condition of the natives described by early observers is not impressive", and that "Brown ... had great difficulty getting the natives in his area to be as industrious in their trapping as he wished they would be" (at 140, 142).

739. *Supra*, note 168, at 389-390 (paragraphing omitted).

740. This reading conforms to Asch and Bell's analysis (see note 735, *supra*). On this view McEachern C.J. deemed the test barely passed for the entire territory. Some statements in the trial judgement directly support this view. For example, in a preliminary, general discussion of the nature of the plaintiffs' ancestral societies McEachern C.J. stated that "[b]ecause of the low threshold ... it will not be necessary for me to quantify the level of aboriginal social organization in the territory at any particular time" [emphasis added] *supra*, note 168, at 148. Further, within the passage just quoted in the text, McEachern C.J. relied upon Trader Brown's account of such societies, which describes institutional organization extending well beyond the vicinity of villages. Elsewhere McEachern C.J. downplayed the significance of that element of Trader Brown's descriptions, emphasizing their derogatory features: *supra*, note 738. The trial judge concluded nevertheless that "there was indeed a rudimentary form of social organization in the Babine area, and it is reasonable to infer that similar levels of organization then existed in the territory" (at 202). In an equivocal summary, McEachern C.J. held that "the evidence supports that by 1822 the Indians of the Babine Lake region had a structure of nobles or chiefs, commoners, kinship arrangements of some kind and priority relating to the trapping of beaver in the vicinity of the villages. There is no reason to believe the neighbouring Indians of the territory had any lesser degree of social organization at the same time" (at 204).

741. While employing the image of "roaming" Indians conventional in historical *terra nullius* theories, McEachern C.J. also counted the year round residence of the Gitksan and Wet'suwet'en peoples in villages as a mark *against* their Aboriginal claim, by taking this as proof that they did not occupy their outlying hunting territory in a substantial way (*supra*, note 168, at 370, paragraphing omitted):

"Prior to the arrival of European influences in the territory, aboriginal practices were probably confined reasonably close to village sites where salmon could most easily be obtained, and probably included trapping some animals by snares and deadfall traps and other means. There was no reason for them to travel other than between the villages or far from the great rivers for these or other aboriginal purposes, or to take more animals than were needed for subsistence although it is also reasonable to assume they would have travelled as far as was necessary for such purposes. I consider it highly significant that there is no evidence of village sites in the territory north of Gitengasx or south of Moricetown as I would have expected if those areas were populated before contact. I find that the aboriginal practices of the plaintiffs' ancestors were, first residence, and secondly subsistence. ..."

742. "[T]he plaintiffs have established, as of the date of British sovereignty, the requirements for continued residence in their villages, and for non-exclusive aboriginal sustenance rights within those portions of the territory I shall later define": *supra*, note 168, at 395.

743. McEachern C.J. equated sovereignty with jurisdiction in this context (*supra*, note 168, at 369). Occupation of village sites and surrounding lands is contrasted with a non-governmental and non-proprietary form of presence elsewhere in the territory in the following passages (*ibid.*, at 382, 384 respectively):

"Before [contact] there was no reason for the plaintiffs' ancestors, individually or collectively, to purport to govern the wilderness beyond the areas surrounding their villages even though they may have used such areas from time to time for aboriginal purposes.

...
I am satisfied that at the date of British sovereignty the plaintiffs ancestors were living in their villages on the great rivers in a form of communal society, occupying or using fishing sites and adjacent lands as their ancestors had done for the purpose of hunting and gathering whatever they required for sustenance. They governed themselves in their villages and immediately surrounding areas to the extent necessary for communal living, but it cannot be said that they owned or governed such vast and almost inaccessible tracts of land in any sense that would be recognized by the law. In no sense could it be said that Gitksan or Wet'suwet'en law or title followed (or governed) these people except perhaps in a social sense to the far reaches of the territory."

See also the related passages quoted in notes 744, 747 and 749, *infra*.

744. Compare also this statement: "I am prepared to assume for the purposes of this part of my judgement that, in the legal and jurisdictional vacuum which existed prior to British sovereignty, the organization of these people was the only form of ownership and jurisdiction which existed in the areas of the villages. I would not make the same finding with respect to the rest of the territory, even to the areas over which I believe the ancestors of the plaintiffs roamed for sustenance purposes": *supra*, note 168, at 384.

Apparently for ironic effect, the related reasons are inscrutable in other passages, as where the larger area is said to be both empty and occupied (*ibid.*, at 381):

"While peer pressure in the form of customs may have governed the villages, there was, in my judgement, no difference between aboriginal sovereignty or jurisdiction in the large empty lands of the territory on one hand, and occupation or possession of the same empty lands for aboriginal sustenance on the other hand."

Where the judgement contemplates some "social" ancestral presence in the larger territory (see note 743, *supra*), the contrast appears to be with legal, proprietary, or governmental presence.

McEachern C.J. also posited (citing no authority for the distinction except the Privy Council's reference to "usufructuary rights" in *St. Catherine's Milling*) a distinction between true occupation, and "bare occupation for the purpose of subsistence": *supra*, note 168, at 372; 369-370. McEachern C.J. also called the former concept "occupation or possession for aboriginal use" as opposed to occupation "for ownership": *ibid.*, at 383.

745. It should be noted that historian A. Ray, the principal witness presenting the Trader Brown and related evidence to the Court, argues that McEachern C.J. failed to justify his refusal to accept that evidence as establishing societal occupation sufficient to support a presumption of ownership and jurisdiction in the larger territory:

"[N]either he, nor Crown Counsel ... denied that extensive inter-regional trade was a key component of the aboriginal economy. It follows that Gitksan and Wet'suwet'en villagers traditionally exploited their territories to obtain resources for exchange purposes as well as for their immediate subsistence needs. In my view, to define Gitksan and Wet'suwet'en "Aboriginal" economic rights as comprising only subsistence pursuits denies a key aspect of their heritage. It is predicated on the notion that commercial intercourse, defined as trade for gain or profit, was introduced to North America by Europeans. In adopting this position, McEachern has placed himself clearly on one side of a long-standing historical and philosophical debate about the nature of Aboriginal economic behaviour. The contention that Aboriginal interests did not include ownership and jurisdiction over the territory is equally problematic. Apparently McEachern came to this conclusion because Brown discussed only the exercise of 'chiefly' authority in reference to beaver conservation. From this the trial judge surmised that 'the chief's control of territories was not exclusive.' I believe this is an illogical conclusion. As I informed the court, when we rely on Brown as an observer, we must bear in mind that he was primarily concerned with increasing the Native output of beaver in his

trading district. For this reason, any other conservation schemes that might have been in operation would have been of little concern to him. Even if, for the sake of argument, we allow that the heads of the houses did limit the execution of their authority to the management of beaver stocks, it nonetheless establishes the fact that they had the jurisdiction to do so. Also, the selective exercise of this power on behalf of their followers does not tell us that lineages lacked collective sovereignty over their territory. Historical evidence introduced in the trial made it clear that house members regarded transgressions by outsiders into their lands as tantamount to a declaration of war. Research into the operation of common-property systems around the world has shown that effective conservation schemes work effectively only when outsiders are excluded. This assures that the resource users have a communal interest in management. Thus, in my view, the judge denied the legitimacy of the whole system because he could see only part of it through the blinkered historical record."

(A. Ray, "Fur Trade History and the Gitksan-Wet'suwet'en Comprehensive Claim: Men of Property and the Exercise of Title", in *Aboriginal Resource Use in Canada*, *supra*, note 691, 301, at 313 (footnotes and paragraphing omitted).)

746. It should be noted that according to McEachern C.J., in the year following 1858 - the latest date at which the trial judgement treats Crown sovereignty as acquired - the relative populations of the entire province were estimated to be 25,000 to 40,000 Indians and 5,000 settlers: *supra*, note 168, at 268. (Elsewhere comparative estimates of 80,000 and 1200-7000, respectively, are mentioned: *ibid.*, at 246, 253. The Colonial Secretary described the settlers in 1858 as a "stream of adventurers"; Hansard of the same year described them as "wild", perhaps "transitory", and in a "crude" form of society: *ibid.*, at 242-243. Governor Douglas is quoted as reporting of his 1860 tour into the interior of the colony that "[w]ith the exception of the miners assembled on Thompson river at Rock Creek and Similkameen, the part of British Columbia through which my route lay, is still exclusively occupied by the native Indian tribes, a race of bold and active hunters": *ibid.*, at 256. The judgement does not give comparative figures for the claimed area. Evidence of the local Aboriginal population in the 1820's included estimates of between 1,000 and 7,000 people: *ibid.*, at 141; according to the trial judge "the first farmers moved into the area around 1900": *ibid.*, at 146.) (On appeal, Hutcheon J.A.'s assessment was that "by 1871 very little settlement, if any, had taken place in the area in question" (*supra*, note 34, at 387).

Against this factual background McEachern C.J. held that the Crown had acquired its absolute sovereignty over the territory claimed, including an underlying proprietary title in land, by "discovery and occupation", or "occupation and settlement" (*ibid.*, at 208), and that Aboriginal peoples, by comparison, had merely "roamed" over the territory outside the vicinity of villages, for "subsistence", or occupied it "barely" for such purposes (note 744, *supra*). Counsel for the Cherokees' response to Georgia's claim of title based on discovery is perhaps pertinent: "The argument against the title of the Indians to their land, compared with the argument in favour of our title to them, presents the strangest absurdity. ... We say ... that they can have no title but to so much land as they can now cultivate; ... whilst we hold that we have a perfect title to millions upon millions of acres confessedly beyond our present capacity for cultivation": see note 839, *infra*.

747. In response to the plaintiffs' argument that their ancestors had "maintained their institutions and exercised their authority over the Territory through their institutions", McEachern C.J. stated (*supra*, note 168, at 373): "I do not accept that the ancestors 'on the ground' behaved as they did because of 'institutions.' Rather I find they more likely acted as they did because of survival instincts which varied from village to village." Similarly, the trial judge held that the plaintiffs had "harvested, managed and conserved" the resources within the territory solely to the extent that they had followed "commonsense subsistence practices" (at 372). (In this respect the trial judge's assessment of the Aboriginal economic and social system in question closely resembled Locke's assumption that hunting culls the "spontaneous" fruits of the soil: see note 500, *supra*. For a participant observer's account of the knowledge, skill, organization and labour involved in contemporary Aboriginal hunting in northeastern British Columbia, see H. Brody, *Maps and Dreams* (London: Norman & Hobhouse, 1981). Brody testified on behalf of the plaintiffs in *Delgamuukw*, but his evidence was not referred to in the trial judgement, apparently for the reason

that the trial judge's considered his own observations "on the ground" more reliable than those of anthropological participant observers: *supra*, note 168, at 169-172.

748. See note 744, *supra*.

749. The trial judge also applied this latter criticism to ancestral organization within villages. See, for example, *supra*, note 168, at 374 (deficiency in proof of ancestral sovereignty due in part to the absence of a "legislative institution" for the regulation of land); 379 (failure to prove the existence of ancestral "law" on the basis that the evidence established only "a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves"); 381 (proof of organization "for social purposes, but not "what we would call laws of general application"); 384-385 ("this is what sovereignty is all about", referring to the Crown's appointment of a governor for the colony, establishment of a legislature, imposition of English law, construction of a legal regime for ownership and governance, and Dicey's definition of English Parliamentary sovereignty, quoted, *supra*, text accompanying note 351).

750. "[T]here was, in my judgement, no difference between aboriginal sovereignty or jurisdiction in the large empty lands of the territory on one hand, and occupation or possession of the same empty lands for sustenance on the other hand": *supra*, note 168, at 381.

751. "They governed themselves in their villages and immediately surrounding areas to the extent necessary for communal living, but it cannot be said that they owned or governed such vast and almost inaccessible tracts of land in any sense that would be recognized by the law. In no sense could it be said that Gitksan or Wet'suwet'en law or title followed (or governed) these people except possibly in a social sense to the far reaches of the territory. To put it differently, I have no doubt that another people, such as the Nishga or Talthan, if they wished, could have settled at some location away from the Gitksan or Wet'suwet'en villages and no law known to me would have required them to depart."

(*Supra*, note 168, at 384.)

752. *Supra*, note 168, at 153: "[t]here were also some aboriginal practices associated with feasting which some persons of different cultural background classified as barbaric. These were some of the causes of an insult suffered by Indians which is still deeply resented." (Elsewhere, in reifying Hobbes' image of Aboriginal life as "nasty, brutish and short" (at 126), and contributing several original derogatory sketches of its own, the trial judgement shortened such distance considerably.)

753. The trial judge declined to affirm ancestral Aboriginal rights in the vicinity of village sites because reserves were later established by the Crown covering some of the same area. McEachern C.J. found it regrettable that a Royal Commission had not resolved the fact that "some hunting grounds adjacent to villages were not included in reserves": *supra*, note 168, at 382. McEachern C.J. observed that "some reserves should be larger than they are", noting that "[i]t is also regrettable that the Indians themselves did not take more effective steps to secure larger reserves if they really wished to have larger tracts of land allotted to them": *id.* (According to McEachern C.J., reserves include 45 of the territory's 22000 square miles: *ibid.*, at 383.)

754. *Cooper v. Stuart*, discussed *supra*, notes 575 and 577, and *Bengal v. Surnomoye Dossee*, discussed *supra*, note 643.

755. *Supra*, notes 594, 660, 665, 666, 676, and accompanying text.

756. McEachern C.J. left no room for doubt that he regarded the "organized society" test as based on a European measure (*supra*, note 168, at 148): "I have no doubt life in the territory was extremely difficult, and many of the badges of civilization, as we of European culture understand that term, were indeed absent. Because of the

low threshold, however, it will not be necessary for me to quantify the level of aboriginal social organization in the territory at any particular time."

757. Brennan J. reviewed the example of *Milirrpum v. Nabalco Pty Ltd* (*supra*, note 46) in *Mabo v. Queensland* (*supra*, note 34, at 26):

"When it was sought to apply Lord Watson's assumption in *Cooper v. Stuart* that the colony of New South Wales was "without settled inhabitants or settled law" to Aboriginal society in the Northern Territory, the assumption proved false. In *Milirrpum v. Nabalco Pty Ltd* Blackburn J. said:

'The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is shown in the evidence before me.'

Faced with a contradiction between the authority of the Privy Council and the evidence, his Honour held that the class to which a society belonged was a question of law, not of fact The facts as we know them today do not fit the 'absence of law' or 'barbarian' theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the common law which were a product of that theory." [footnotes omitted]

758. See notes 744, 747, 749 and 751, *supra*.

759. As noted, *supra*, note 734, both Macfarlane J.A. and Wallace J.A. treated the "organized society" test generally as a formality, finding it satisfied.

With respect to the level of ancestral organization in the larger area, Macfarlane J.A. found cause for concern, but no error, in the trial judge's characterization of certain evidence:

"Undoubtedly there are areas of the evidence, when viewed in isolation from the rest of the evidence, that cause concern. For instance, it is not entirely clear what the trial judge meant when he said that the evidence of Mr. Brown was equivocal. It does not seem equivocal in the sense that what he wrote is ambiguous. But Brown's observations and conclusions may not, when viewed in the light of the whole of the evidence, give rise to the inferences which the plaintiffs would have us draw. The evidence may be equivocal in the sense that it does not necessarily support an inference of ownership and control of the whole territory. It may give rise only to an inference of some presence in part of the territory by the ancestors of the plaintiffs. But it may not give rise to an inference of sufficient use and occupation to establish the territorial rights which are asserted."

(*Supra*, note 34, at 141. The trial judge had said that "[i]t is true that trader Brown referred to some Indians as men of property and other similar terms but that is equivocal. He also suggested exclusive use of some undefined land was restricted to trapping for beaver": *supra*, note 168, at 383. For the trial judge's treatment of Mr. Brown's evidence of territorial economical and governmental institutions, see note 738, *supra*, and accompanying text.) Macfarlane J.A. upheld the trial judge's mixed conclusion of fact and law that insufficient exclusivity had been shown to establish ownership rights in the larger area (*supra*, note 34, at 130-131), and interpreted the Supreme Court's ruling in *Guerin* as precluding the characterization of Aboriginal title as beneficial ownership regardless of the evidence (at 130). Macfarlane J.A. refused to characterize the non-exclusive sustenance rights acknowledged by the trial judge, as property rights, on the ground that the authorities consider it futile to characterize *sui generis* Aboriginal rights as proprietary or non-proprietary (at 143). Apart from his abstract acknowledgement of ancestral organization (see note 372, *supra*) Macfarlane J.A. neither affirmed nor denied the existence of ancestral sovereignty in the larger area, upholding the trial judge's alternative conclusion that any Aboriginal sovereignty (or

"jurisdiction", in Macfarlane J.A.'s terms) must have been displaced or extinguished upon the assertion of Crown sovereignty (at 151-152)). Wallace J.A., who generally agreed with Macfarlane J.A.'s reasons (at 183) agreed that the plaintiffs had failed to prove sufficient exclusivity to found a claim of ownership (at 215-217). Wallace J.A.'s equivocal statements regarding ancestral sovereignty are noted, *supra*, note 734.

760. The tentative assumptions made respecting the doctrine of peaceful settlement in *Calder, Baker Lake* and other Canadian cases are reviewed in section 4.5.2 below.

761. See note 587, *supra*, and accompanying text.

762. As noted, *supra*, text accompanying note 744, it is possible to construe the *Delgamuukw* trial judgement as having disqualified the Aboriginal claimants in that case from entitlement to ownership and sovereignty for having failed to meet the *Re Southern Rhodesia* standard, but on that reading the minimal sustenance rights affirmed in the pertinent area would appear to reflect the meeting of an additional, lower threshold of organization, rather than the affirmation of Aboriginal rights independently of any such standard.

763. See note 736, *supra*.

764. *Hamlet of Baker Lake*, *supra*, note 325, at 543 ("the relative sophistication of the organization of any society will be a function of the needs of its members, [and] the demands they make of it").

765. The Privy Council said in *Re Southern Rhodesia* (*supra*, note 35, at 233) that "it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed ... that the conqueror has respected them ...". The Privy Council also said (at 234) that in contrast to tribes low on the scale of social organization "there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law".

766. The position of the Crown and its subjects as potential acquirors on this basis differs in some respects: see K McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 73-78; 106-107; 134-136; 157-160; 216-217.

The derogation from the principle of *occupatio* outlined in the foregoing sections of this part parallels certain of the departures from English property law which McNeil has documented in Aboriginal title jurisprudence. Several general points of comparison are important:

a) The principle called *occupatio* in this paper underlies English property law as much as the other spheres of law examined in this analysis: *ibid.*, at 135, n. 3 and accompanying text.

b) This analysis treats this principle as a norm of intersocietal law and justice. The moment at which English law first applied to land - an issue important to McNeil's analysis of presumptive Aboriginal title based on occupation (*ibid.*, at 205-207) - is not critical to this analysis.

c) English land law distinguishes between the direct acquisition of title to unowned land by "occupancy", and the rebuttable presumption that anyone in "occupation" of land holds valid title: *ibid.*, at 73-78; 205-207. McNeil relies upon the latter presumption as the common law basis for Aboriginal title: *ibid.*, at 205-208. The sources reviewed in the foregoing analysis usually refer to direct acquisition of territorial sovereignty or land in terms of "occupation", but "occupancy" is the correct term in English law for the concept underlying the doctrine of *terra nullius*: see, for example, *ibid.*, at 135 (re: territorial sovereignty); and at 73 (re: title to land)).

d) The principle of *occupatio* informs the law relating to title by "occupancy" most directly. This principle precludes acquisition of occupied Aboriginal territory or lands by occupancy. Because occupation precludes acquisition of land or territory by occupancy, the principle of *occupatio* would logically defend land and territory occupied by Aboriginal peoples against acquisition by the occupancy of the Crown, regardless how the Aboriginal property interest is characterized, and in particular, regardless whether that interest could constitute title by occupancy. It is this defensive benefit that the floating "organized society" standard completely denies to Aboriginal occupiers.

e) Due to this paper's focus upon dispossession, this analysis has emphasized the defensive benefit of the principle of *occupatio*. The principle also appears to affect the English law concept of presumptive title based on occupation, although other considerations relating to the merits of competing claims also influence that concept. According to McNeil, the presumptive title arising from Aboriginal occupation of land is a fee simple title: *ibid.*, at 208. To the extent that the principle of *occupatio* governs that characterization (as it appears to in the case of the fee simple characterization of title by occupancy) denial of this positive benefit of the principle may discriminate against Aboriginal peoples as much as denial of the principle's defensive benefit. According to McNeil, denial in Aboriginal title jurisprudence of the presumption of fee simple ownership to Aboriginal occupiers is most likely founded in the same prejudice reviewed in this analysis: see McNeil, *ibid.*, at 208-211; 301).

f) Since this analysis also addresses derogation from the principle of *occupatio* in the colonial law governing acquisition of territorial sovereignty, it has treated Aboriginal peoples as presumptively sovereign entities, and their property in land as more akin to "public" than private property. Although McNeil analyses Aboriginal occupation principally in terms of the private property rights of unincorporated associations (*ibid.*, at 211-215), the general principle of *occupatio* appears to apply similarly in the two cases.

767. Due to the restriction on alienation of Aboriginal title imposed independently under colonial law, private persons may not acquire property in Aboriginal lands except through a grant from the Crown: see K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 221-235, and note 683, *supra*.

On the basis of feudal tenets colonial law assigns "paramount lordship" over land to the sovereign holding territorial sovereignty. Thus, upon acquiring territorial sovereignty, the Crown is assured of gaining some interest relating even to occupied lands within the new domain. But this interest, though it may be described as "real property," is not a proprietary title to land, and does not diminish the title held by the occupiers of the land. See K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 80-82, 220-221. McNeil describes the Crown's interest in already occupied lands over which territorial sovereignty is acquired, as follows (*ibid.*, at 220):

"[T]he Crown would be unable to establish a title in itself. ... Due to the doctrine of tenures, however, the Crown would have a paramount lordship over [the occupiers'] lands. This lordship would itself be real property, an incorporeal thing of which the Crown would be seised in demesne. But although a lordship 'hovers' over the land to which it relates, it is essential to realize that it is quite distinct from the land itself, and in no way detracts from a freeholder's seisin and title. ... The Crown would ... be entitled to whatever services and incidents of tenure might be due, but it would have no right to the land as long as the interest of the occupiers continued." [footnotes omitted]

By effectively removing the ordinary bar against acquisition of occupied lands by occupancy, the floating "organized society" test permits the Crown to acquire a proprietary title along with its paramount lordship, subject only to whatever "burden" demonstrable Aboriginal uses of land might constitute.

768. The same result follows from the doctrines of usufructuary and 'frozen' rights, to be reviewed next. Both of those doctrines stipulate that Aboriginal rights be defined as non-proprietary, and completely ignore this basic consequence.

769. Two further discriminatory implications of the floating "organized society" standard should also be noted here, though it is arguable whether they flow from a departure from the principle of *occupatio*. First, plenary rights to use the land "according to their own discretion", such as were recognized by Marshall C.J. in *Johnson v. M'Intosh*, are denied distinctly to Aboriginal occupants who do not score sufficiently 'high' on this test. (To adapt Vattel's example, Aboriginal peoples who could score as 'high', perhaps, as the Aztecs reputedly might have on the European scale, might establish an Aboriginal title akin to fee simple ownership, by proof of hierarchically organized, large scale industrial and commercial uses of land. (This possibility is subject to the Court of Appeal's proviso that *Guerin* might preclude such a result independently. If such a result were possible, the Crown's proprietary title would presumably include a relatively slim set of substantive rights.) Even such 'sophisticated' Aboriginal peoples would have to satisfy a Eurocentric and dehumanizing measure of the worth of their society in order to secure such rights. Those who score 'low' on the test are left with a subordinate and relatively narrow set of rights to use the land for purposes limited by their 'level' of organization.) Second, the presumption of fee simple title ordinarily available to independent occupiers is denied distinctly to all Aboriginal peoples by the test. See note 766, *supra*, for a summary of K. McNeil's account of this presumption, and discussion of its possible connection to the principle of *occupatio*.)

770. See, for example, notes 743 and 744, *supra*, and compare the position in *Milirrpum*, reviewed *supra*, note 757. As a matter of emphasis, however, McEachern C.J. appears to have treated the plaintiffs' failure to prove the requisite level of ancestral organization as his primary reason for denying the jurisdiction of the plaintiffs' ancestors. The Court of Appeal's position is more equivocal still: the Court of Appeal also deferred to precedent it appeared to construe as limiting the possible scope of Aboriginal rights (see note 759, *supra*), yet discouraged criticism of ancestral levels of organization without abandoning this standard (see note 734, *supra*).

771. The pre-*Mabo* Australian cases did not recognize a category of lesser, non-proprietary Aboriginal rights to land equivalent to those affirmed by McEachern C.J. in *Delgamuukw*. For a review of the Australian jurisprudence, see K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 290-297.

772. Several of the 19th century advocates of the distorted doctrine of *terra nullius* in international law stopped short of denying property to the 'uncivilized' peoples to whom they denied territorial sovereignty. Some of these writers relied upon this concession to define the Aboriginal incapacity they posited, as one relating specifically to the exercise of political rights in a democratic society: see note 568, *supra*, and accompanying text.

773. D. Sanders, "The Supreme Court of Canada and the 'Legal and Political Struggle' over Indigenous Rights" (1990) 22 Cn. Ethnic Studies, 122, at 122. According to Sanders (writing before the Australian High Court adopted essentially the same view in *Mabo v. Queensland*) the doctrines of "discovery" and "terra nullius" are "racist", and thoroughly discredited: *ibid.*, at 122-123. In a previous article Sanders argued that a theory of settlement appears in the Canadian jurisprudence but has not been adopted, and is inconsistent with the thrust of s. 35 of the *Constitution Act, 1982* and the Supreme Court's decision in *Guerin*:

"Acquisition theory, that is, the legal principles involved in the acquisition of colonies, can be used either to establish that some aboriginal rights survive the acquisition of the area as a colony or be used to limit or deny the survival of aboriginal rights. ... Now that Canadian law accepts the survival of aboriginal rights, acquisition theory could be used in this country to establish limitations on those rights. Canadian law currently has no acquisition theory, as such, that could explain which aboriginal rights survive and which do not. The only acquisition theory currently around in Canadian law is 'occupation and settlement', which would deny the survival of any aboriginal rights and therefore is in conflict with both *Guerin* and section 35. The logical analytical framework, consistent with *Guerin*, is for the courts to begin with the

proposition that Indians and Inuit had a full range of territorial, legal and political rights. European colonial powers first took control over Indian foreign relations by effectively asserting suzerainty over the tribes... Incrementally other rights were assumed by the European colonial power and Indian autonomy was further reduced. This historical approach abandons two alternative theories that are both now indefensible. The first is that the Indian tribes had no legal order. The second is that 'discovery' or the planting of a flag or some blind imperial enactment aimed at the new world had the effect of completely ending Indian rights on a particular date."

("Pre-Existing Rights: The Aboriginal Peoples of Canada", in G. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989), 707, at 732 (paragraphing omitted).)

774. "The assertion of jurisdiction over native peoples by Canada conformed to dominant understandings of international law principles governing the acquisition of territorial sovereignty in the face of an indigenous population. ...[I]t was widely accepted among colonial powers that territorial sovereignty over vacant lands vested with the discoverer as against subsequent arrivals. With respect to occupied lands, sovereignty could only be acquired through conquest or cession. Yet, despite the presence of indigenous populations, international law and European nations treated the American continent as vacant. Territorial sovereignty could be asserted without resort to conquest or treaty. British settlement was sufficient to acquire sovereignty over lands not controlled by a competing colonial power, and British sovereignty over lands settled by other European powers was obtained through conquest or cession, as was the case with New France and the *Treaty of Paris* in 1763."

(P. Macklem, "First Nations Self-Government", *supra*, note 149, at 414). "Discovery", or unilateral "declaration", was apparently assumed to be basis for Crown acquisition of sovereignty in Canada by Hall J. in *Calder*, *supra*, note 47, at 195, 199. In *Guerin* (*supra*, note 47, at 335-336), Dickson J. (two other members of the Court concurring) appeared to approve of the limited concept of acquisition by discovery pronounced in *Johnson v. M'Intosh*:

"In *Johnson v. M'Intosh* Marshall C.J. ... was nonetheless of the opinion that the rights of the Indians in the lands they traditionally occupied prior to European colonization both pre-dated and survived the claims to sovereignty by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which first discovered it. In that respect at least, the Indians' rights to the land were obviously diminished; but their rights of occupancy and possession remained unaffected."

(*Johnson v. M'Intosh* is also referred to in *Sparrow* in support of the proposition that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title to [native traditional lands] vested in the Crown": *supra*, note 28, at 1106. This reference to the Marshall doctrine of Aboriginal title, premised in *Johnson* on an original independence of Aboriginal nations subsequently diminished only by a restriction on alienation, appears to suggest that the Supreme Court was asserting the Crown's sovereignty in this statement without denying that of Aboriginal peoples: see note 351, *supra*. For concurring views, see T. Berger, *supra*, note 95, at 75-83, and H. Foster, *supra*, note 279, at 347, 349, 355-359. For the argument that a *terra nullius* concept does inform the statement in *Sparrow*, see M. Asch and P. Macklem, *supra*, note 164, at 511). Of the two majority opinions rendered by the British Columbia Court of Appeal in *Delgamuukw*, *supra*, note 34, one adopted the doctrine of peaceful settlement (buttressed also by the act of state doctrine) as the basis for Crown acquisition of sovereignty in British Columbia (per Wallace J.A., at 198-199), and the other affirmed the Crown's overriding sovereignty without stating how it was acquired (per Macfarlane J.A., at 150-152).

See also G. Lester, *Inuit Territorial Rights*, *supra*, note 18, at 19-20, 34; B. Slaterry, "The Independence of Canada", *supra*, note 35, at 377-378; and K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 267-272 (treating large areas of the country as 'settled', without expressing an opinion as to the status under French law of

the remaining parts ceded by France to Britain).

775. *Supra*, note 34, at 21-29.

776. Text following note 599, *supra*.

777. See, for example, Hall J.'s statements in *Calder* and Dickson J.'s statements in *Guerin*, referred to *supra*, note 774. Several Canadian commentators use the same terminology: see, for example, P. Macklem, *supra*, note 149, at 400-402, and T. Berger, *supra*, note 95, at 75-83. Marshall C.J.'s "doctrine of discovery", expounded in *Johnson v. M'Intosh* and modified in *Worcester v. Georgia*, is often cited as a source in the Canadian references. However, with important exceptions such as *Connolly v. Woolrich* (*supra*, note 296) and *R. v. Sioui* (*supra*, notes 302 and 304), Canadian cases often leave unstated the difference between Marshall C.J.'s limited concept and acquisition of unlimited sovereignty over Aboriginal territory.

778. In B. Slattery's summary, for example, the "traditional model of American international history" held that "North America was juridically a vacant territory at the period of European exploration and settlement - in technical language, *terra nullius*", such that European states could acquire an original sovereign title to such lands, with the authorities disagreeing chiefly "as to how an original title could be obtained":

"Some argue that the first European state to 'discover' or explore American lands gained title. Others say that a symbolic act of taking possession, such as the planting of a cross, a flag, or royal insignia, was necessary. Still others insist that none of these methods was valid, that the incoming European power had to occupy the territories in an effective manner before sovereignty vested, as by establishing settlements, a governmental apparatus, or at least the elements of factual control. All these methods - discovery, symbolic acts, and effective occupation - presuppose that North America was legally vacant at the relevant time, that there were no existing rights capable of impeding the smooth flow of incoming sovereignty."

("Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, at 685-686, paragraphing omitted). In that article Slattery criticizes the distorted doctrine of *terra nullius* in its international law manifestation. His critique is equally applicable, however, to the colonial law doctrine of peaceful settlement. Slattery's stated purpose in the article is to begin to provide, generally, "a legal framework for understanding the historical relations between Aboriginal peoples and incoming settler groups" (*ibid.*, at 685). He criticizes and partially rejects the colonial law's act of state doctrine (*ibid.*, at 691-692), and concludes by advocating an intersocietal conception of colonial law free of the tenets of the "traditional" *terra nullius* model rejected (*ibid.*, at 700-703).

779. "In the effort to improve their position relative to one another, the colonial powers at times advanced extraordinary claims, and sought to justify them by resort to extraordinary principles. At various points, Papal Bulls, early discoveries or explorations, symbolic acts, or feeble coastal settlements were invoked by European nations to support pretensions to vast territories they neither occupied nor controlled. These claims had little foundation in either fact or reason, and usually met with the scorn of competing European powers, even if the same powers on occasion indulged in similar diplomatic fantasies. As Elizabeth I of England tartly observed to the Spanish Ambassador: to sail to and fro, to build huts, to name a river or a promontory could not confer ownership, since prescription without possession was of no effect."

(B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) Am. J. Comp. L. 361, at 362.) Discovery or symbolic acts were sometimes said, alternatively, to confer an entitlement less than sovereignty in international law, operating principally as between rival European competitors. Some international jurists argued that at least for a reasonable period the discovering nation held a right of preemption or inchoate title, permitting that nation alone to acquire sovereignty, by independent means. According to M. Lindley, for example, "[w]hat the discoverer's state obtained, as against other European powers, was the right to acquire the lands discovered - what in later times might have been called a 'sphere of influence'": *supra*, note 465, at 29. See also D. Greig, *supra*,

note 438, at 146-148. Along with the *Royal Proclamation of 1763* this international law concept probably influenced Marshall C.J.'s conception of a colonial law restriction on alienation of Aboriginal title. See *Worcester v. Georgia*, *supra*, note 48, at 544 (discovery "gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell"); H. Berman, "The Concept of Aboriginal Rights", *supra*, note 35, esp. 651-653, 661, 664 n 124; and N. Newton, "Federal Power over Indians", *supra*, note 63, at 207-209.

780. See F. von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law" (1935) 29 Am. J'l Int'l L. 448, esp. 452-457.

781. See text accompanying notes 444, 452, *supra*.

782. Before *Mabo* was decided, many Canadian commentators had advocated rejection of the distorted account of the settlement doctrine for essentially this reason, describing the doctrine's denial of Aboriginal occupancy as racist, ethnocentric, or inimical to the human rights of Aboriginal peoples. Building upon the case he had presented in *Home and Native Land*, *supra*, note 659, at 41-54, M. Asch, for example, argued in "Aboriginal Self-Government" (*supra*, note 429, at 469) that the doctrine rests on "assumptions about the moral legitimacy of our occupation of Canada that have colonial and racist overtones." B. Slattery argued in "First Nations and the Constitution" (*supra*, note 228, at 263) that the claim that Aboriginal peoples have lost their independent status cannot depend upon the "discovery" doctrine, because "[t]o invoke European discoveries is to employ ethnocentric criteria that cannot meet neutral standards of justification". See also M.E. Turpel, *supra*, note 465, at 33-34; T. Berger, *supra*, note 95, at 83-84, 157-159; L. Mandell, "Indian Nations, Not Minorities" (1986) 27 *Cahiers de Droit* 101, at 110-111 (framing the objection in terms of illegitimate imperialist assumptions); D. Sanders, quoted in note 773, *supra*; and P. Macklem, "First Nations Self-Government," *supra*, note 149, at 415-416. While attributing the Crown's unilateral acquisition of sovereignty in colonies primarily to the act of state doctrine, K. McNeil has argued that "[t]he assumption of the Crown and courts of English law that the Aboriginals were devoid of sovereignty is rooted in a European view of the world which probably would have been incomprehensible to the Aboriginals. It involves a denial of the existence of a valid Aboriginal perspective, and is thus characteristic of the self-serving ethnocentricity upon which colonialism is based": "A Question of Title", *supra*, note 213, at 91-92. Similarly, see G. Lester, "Primitivism versus Civilization", *supra*, note 90, esp. 355-358.

783. *Calder v. A.-G. British Columbia*, *supra*, note 47 (per Judson J.), at 156.

784. Thus, for example, having identified and rejected the ethnocentric underpinnings of the distorted doctrine of *terra nullius*, B. Slattery concludes that "it cannot be true that the modern states of Canada and the United States trace their legal origins to 'discoveries,' symbolic acts, or acts of occupation carried out by European states. These modes of acquisition are operative only in legally vacant territories and so could not apply to most of North America at the time of European contact. Accounts based on contrary assumptions are misguided." ("Aboriginal Sovereignty and Imperial Claims", *supra*, note 4, at 701). This conclusion applies equally to international and colonial law versions of the distorted doctrine: see note 778, *supra*.

785. See for example, "The Independence of Canada", *supra*, note 35, at 372 ("[c]ontrol over the indigenous peoples was gained by a gradual process continuing until the turn of the last century, sometimes involving armed conflict, but more usually the peaceful assertion of authority backed by overwhelming might") and at 375:

"To recapitulate, Canadian territories were acquired by Great Britain largely by virtue of military power, whether manifested in outright conquest or simple intimidation. The Crown gradually extended its power over the country, ousting European rivals and bending indigenous polities to its rule, thereby bearing witness to the dictum of Sir John Fortescue that, 'amongst nearly all peoples, realms have come into being by usurpation ...'"

786. "The Indian inhabitants of British Columbia acquiesced in the assertion of British rule only with reluctance, and in most areas never parted by treaty with their ancestral lands": *ibid.*, at 373. In "Understanding Aboriginal Rights", *supra*, note 3, at 753, Slattery wrote that the Crown's general fiduciary duty towards Aboriginal peoples "has its origins in the Crown's historical commitment to protect native peoples from the inroads of British settlers, in return for a native undertaking to renounce the use of force to defend themselves and to accept instead the protection of the Crown as its subjects." In a later article Slattery argued that the legitimacy of Crown sovereignty in Canada depends upon principles independent of Aboriginal consent, express or implied: see "First Nations and the Constitution", *supra*, note 228, esp. 276.

787. For criticism, see P. Joffe and M.E. Turpel, *supra*, note 397, subheadings 4.4.2, 4.6.

788. See, for example, G. Nettheim, "Casenote: *Isabel Coe on behalf of the Wirajdurie Tribe v. Commonwealth of Australia and the State of New South Wales*," (1994) 3 Aboriginal Law Bulletin, at 14-15, reviewing an interlocutory decision by Mason C.J. of the High Court of Australia, issued on December 23, 1993 (application for leave to appeal to the full High Court pending). According to Nettheim the plaintiffs framed their argument in support of their claim to continuing Aboriginal sovereignty primarily in terms of the U.S. doctrine of 'domestic dependent nations' (*ibid.*, at 14). The Chief Justice granted the defendants' motion to strike the statement of claim. The claim to sovereignty, in particular, was rejected on the basis (in Nettheim's summary) that "nothing decided in *Mabo* (No. 2) affected what had been said in *Coe* (*id.*). (In *Coe v. Commonwealth*, Gibbs J. had contended that Aboriginal people "have no legislative, executive or judicial organs by which sovereignty might be exercised" (note 38, *supra*), and that *Cooper v. Stuart* properly deems Australia to belong to the class of settled territories "which, by European standards, had no civilized inhabitants or settled law" (text accompanying note 281, *supra*.) Mason C.J. stated, in particular, that the *Mabo* decision is not only "entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia," but "is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are 'a domestic dependent nation' entitled to self-government and full rights (save the right of alienation)... ." (*id.*)

For the argument that *Mabo*'s critique of the doctrine of peaceful settlement logically forecloses such continued reliance upon the doctrine, see G. Marks, *supra*, note 458, at 29 n. 128 ("[i]n fact, in terms of the Select Committee of 1837, the rights of Australian Aborigines as sovereigns remain 'utterly disregarded'"); G. Nettheim, *supra*, note 669 (restating M. Mansell's query, "if Australia was not *terra nullius* in terms of land ownership, how could it have been *terra nullius* in terms of sovereignty?" (at 228) and arguing that at least a "subordinate" version of the Marshall doctrine of inherent tribal sovereignty is supported by the principles applied by the High Court to Aboriginal land rights (at 230-231); and (discussing the effect of the combination of the doctrine of peaceful settlement with the act of state doctrine) S. Gray, *supra*, note 153, at 43-44 ("Brennan J ... expresses amazement at the operation of the supposed doctrine of exclusive Crown ownership of all land in the Australian colonies It might be suggested that the operation of a doctrine which, from the moment Governor Phillip caused his Second Commission ... to be read ... , dispossessed the unknowing Aboriginal peoples of Australia of the right to govern their land and made whatever proprietary rights they did continue to possess entirely subject to the whim of the Anglo-Australian common law, would also be open to question along many of the same lines").

789. *Supra*, note 169, at 1053. In the same case the Supreme Court quoted with approval Marshall C.J.'s statement in *Worcester v. Georgia*, *supra*, note 48, that "[s]uch was the policy of Great Britain towards the Indian nations ... she considered them as nations, capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged." [Lamer J.'s emphasis]

790. As noted, *supra*, note 704, McEachern C.J. also implied that he was bound by precedent to conclude that Aboriginal rights do not include entitlements other than land rights of a usufructuary nature. For discussion of McEachern C.J.'s possible readings of *St. Catherine's Milling*, see note 735, *supra*.

791. For B. Slattery's conclusion to this effect, see note 784, *supra*.

792. See for example, B. Slattery, quoted in note 784, *supra*; M. Asch and P. Macklem, *supra*, note 164, esp. 512-515; D. Sanders, "Pre-Existing Rights", quoted *supra*, note 773.

793. See M. Asch and P. Macklem, *supra*, note 164, at 512-514.

794. See B. Slattery, "First Nations and the Constitution", *supra*, note 228, at 276 ("the legitimacy of our Constitution is grounded primarily in our factual and moral interdependency as members of Canadian society, as this has evolved historically, and depends on the degree to which the Constitution reflects just arrangements, given our history").

795. In "Aboriginal Sovereignty and Imperial Claims" (*supra*, note 4, at 699, n. 18) B. Slattery suggests that it can be argued that the process of prescription transforms, "by passage of time", "territories illegitimately acquired" into "legitimate dominions". Slattery does not elaborate on this view in his subsequent exposition of the legitimacy of Crown and Aboriginal sovereignty in Canada, in "First Nations and the Constitution", *supra*, note 228. In "Aboriginal Self-Government", *supra*, note 429, at 483, M. Asch observes that such a view "[is] [n]either ... congruent with ... the philosophy of decolonization nor with the universal support in the world community for the acts by which former colonizing powers relinquished their claims to sovereignty over their colonies, even in cases where the regime has lasted hundreds of years".

796. See B. Slattery, "First Nations and the Constitution", *supra*, note 228, esp. 272 (describing the constitutional trust relationship embodied in the *Royal Proclamation of 1763* as apposing "justice with regal self-interest, Aboriginal autonomy with British suzerainty, Indian land rights with the Crown's territorial title") and 277 ("[W]e should generally obey laws enacted by governmental authorities actually in place; but those authorities are bound by trust-like obligations which, if violated in a fundamental way, may invalidate governmental acts or release us from our duty to comply").

797. As noted *supra*, note 296, Monk J. concluded his analysis in *Connolly v. Woolrich* of the possible effect of the Hudson's Bay Charter of 1670 as follows:

"It is easy to conceive, in the case of *joint occupation* of extensive territories by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. History is full of such instances, and the dominions of the British Crown exhibit cases of that kind. The Charter did introduce the English law, but did not, at the same time ... abrogate the Indian laws and usages Their laws of marriage existed and exist under the sanction and protection of the Crown of England." [original emphasis]"

Monk J. evidently took the concept of joint occupation from Phillimore's commentary upon the Crown-Aboriginal relationship, quoted and summarized in Monk J.'s earlier analysis of the legal effect of the Crown's presence *per se* in a territory Monk J. acknowledged (*supra*, note 185, at 79) to have been "occupied ... by aboriginal nations":

"Phillimore, in his *International Law*, CCXLI, p. 208, Ed. of 1854, says: 'The nature of Occupation is not confined to any one class of description: it must be a *beneficial use and occupation* ... but it may be by a settlement for the purpose of prosecuting a particular trade, such as a fishery, or for working mines, or pastoral occupations, as well as agriculture', though Bynkershoek is correct in saying '*cultura utique et cura agri possessionem quam maxime indicat*.' [roughly translated: 'surely the cultivation and care of the fields, as much as anything possibly could, indicates possession.']) Vattel justly maintains that the pastoral occupation of the Arabs entitled them to the exclusive possession of the regimes which they inhabit. 'Si les Arabes pasteurs voulaient cultiver soigneusement la terre, un moindre espace pourrait leur suffire. Cependent, aucune autre nation n'est en droit de les resserrer, a moins qu'elle ne manquat

absolument de terre; car enfin ils *possèdent* leur pays; ils s'en servent a leur maniere; ils tirent un usage convenable a leur genre de vie, sur lequel ils ne re[c]oivent la loi de personne.' It has truly been observed that, 'agreeably to this rule, the North American Indians would have been entitled to have excluded the British fur- traders from their hunting grounds; and, not having done so, the latter must be considered as having admitted to a *joint occupation of the territory*, and thus to have become invested with a similar right of excluding strangers from such portions of the country as their own industrial operations pervade.'" [Monk J.'s emphasis]

(*ibid.*, at 82).

798. See K. McNeil, "A Question of Title", *supra*, note 213, at 103-105. These implications generally receive little attention because persons who occupy land already subject to the radical title of the Crown are in most instances bound, by the theory of tenures and related procedural rules, to make out any title through a grant from the Crown: see *Common Law Aboriginal Title*, *supra*, note 11, at 79-80; 106-107.

799. "In English law, an original title to property which is unowned and unoccupied can be acquired by taking possession of it, ie. by occupancy": K. McNeil, "A Question of Title?", *ibid.*, at 97. McNeil explains that title by occupancy is unavailable to Aboriginal inhabitants because their occupation predates English law itself, and in some cases the land may have been acquired in any event from a prior occupant: see *Common Law Aboriginal Title*, *supra*, note 11, at 205-207.

800. This follows from the rule for acquiring title by occupancy itself, because such title may only be acquired in unoccupied land: *ibid.* "[W]ould the Crown have acquired title [by occupancy] to lands occupied by aboriginals? The answer is definitely no, for the simple reason that lands have to be both unowned and unoccupied to be available for acquisition by occupancy." K. McNeil, "A Question of Title", *supra*, note 213, at 105. This is the implication of occupation referred to in *Mabo v. Queensland* by Brennan J. in the context of Crown acquisition of territorial sovereignty over lands occupied by Aboriginal peoples, as follows (*supra*, note 34, at 34, citation omitted):

"The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the crown's purposes. But it is not a corollary of the Crown's acquisition of land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were desert and uninhabited, truly a terra nullius, the Crown would take an absolute beneficial title (an allodial title) to the land for the reason given ... in *Attorney-General v. Brown*: there would be no other proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land."

Similarly, Toohey J. held that upon acquisition of territorial sovereignty in Australia, "[t]he Crown did not acquire a proprietary title to any territory except that truly uninhabited": *ibid.*, at 142.

801. "In English law, persons who are in occupation of land are presumed to have title. This presumption is rebuttable by adverse claimants who can show better title in themselves, but cannot be rebutted by proving that the occupiers have no title apart from their occupation. ... As against those who cannot show a better right, occupation of itself is a sufficient title. Regarding the interest to which occupiers are entitled, it is presumed to be a fee simple estate, for occupation is prima facie evidence of seisin in fee."

K. McNeil, "A Question of Title", *ibid.*, at 104 (paragraphing and footnotes omitted). In *Mabo v. Queensland* Toohey J. stated this rule as follows: "English land law, in 1879 and now, conferred an estate in fee simple on a person in possession of land enforceable against all the whole world except a person with a better claim" (*supra*,

note 34, at 165). Brennan J. expressed essentially the same rule in different terms in relation to Aboriginal occupants as follows (*id.*, at 36, citation omitted):

"If it be necessary to categorize an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category. Whether or not land is owned by individual members ..., a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor. It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of 'property' which require alienability under the municipal laws of our society, to deny that the indigenous people owned their land. The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners."

802. This, too, is a result of the basic principle of *occupatio* underlying the rule that occupied land may not be acquired by occupancy. K. McNeil explains this result in the context of the premise that Aboriginal title is a fee simple estate (*Common Law Aboriginal Title*, *supra*, note 11, at 242-243):

"Because the Crown would be lord paramount over lands subject to common law aboriginal title, it could no doubt include those lands within its grants; but in that case the grants would take effect as subinfeudations, creating mesne lordships in-between the indigenous landholders and the Crown. The grants would not, and could not, affect the fee simple title which the indigenous people would have by virtue of their occupation."

For McNeil's explanation of the Crown's paramount lordship as a proprietary interest not attaching to the land itself, see note 767, *supra*.

803. "Usufruct" is a Roman civil law term whose contemporary common law meaning is ambiguous, but which accords to the holder rights defined by use or enjoyment, reserving the property in question to someone else. *Black's Law Dictionary*, 5th ed., defines "usufruct" as, "[i]n the civil law, the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing" (St. Paul: West Publishing, 1979); and the term "usufructuary" as, "[i]n the civil law, one who has the usufruct or right of enjoying anything in which he has no property". P. Joffe and M.E. Turpel point out, *supra*, note 397, at 29, note 146, that the current *Quebec Civil Code* defines "usufruct" as "the right of use and enjoyment, for a certain time, of property owned by another as one's own". The *Shorter Oxford Dictionary* quoted in *Smith*, *supra*, note 715, at 249 defines the legal term "usufruct" as "[t]he right of temporary possession, use, or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice to it."

804. As the definitions cited, *ibid.*, demonstrate, user rights include, in this context, rights of profit or yield. As the term "enjoyment" implies, such user rights may even be conceived of as rights to possess or occupy (see *Black's Law Dictionary*, *ibid.*), and the usufructuary conception of Aboriginal title is sometimes expressed as a "right of use and occupation" or something similar. (See, for example, *Smith v. The Queen*, *supra*, note 715, at 564 ("the released interest was but the right of the Indians in question to enjoy the use of the land under federal legislative regulation") and 568 ("the release of the right of occupancy is unfettered and absolute"). Such references to a usufructuary right to "occupy" are confusing, but they should not be mistaken as affirming the ordinary entitlements flowing from occupation or occupancy at common law. What is expressed in the usufructuary right to occupy or possess is solely a right to *do* something, while in the ordinary case, occupation or occupancy determine common law rights of property. A distinction between user rights and proprietary rights thus remains central to the concept of the usufruct, despite such terms.

805. In P. Macklem's account, for example, occupancy is the fictional basis of the proprietary title which some courts attributed to the Crown by extending the feudal doctrine of tenures:

"The common law of aboriginal title represses the fact that native people were the original inhabitants of North America. ... Anglo-Canadian property law extended the 'English law fiction ... that all lands in the realm were *originally possessed, and accordingly owned*, by the Crown'" [emphasis added]

("First Nations Self-Government", *supra*, note 149, at 412-413, quoting from K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 11.)

806. John Locke's distinction between Aboriginal hunters and gatherers' property in the "spontaneous" fruits of the soil, but not in the soil itself, and settlers' property in Aboriginal lands acquired by "tillage" [or] "enclosure", is the most elaborate and famous example. See section 4.2.1 above. Locke's theory was relied upon heavily by the successful party in *St. Catherine's Milling*: see text accompanying notes 695 and 697, *supra*.

807. The most famous example is the statement in *Re Southern Rhodesia* concerning "tribes so low in the scale of civilization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society": "[i]t would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them" (quoted in full, *supra*, note 582). G. Bennett writes of this logic:

"But this is wholly to misconstrue the doctrine of native title. The purpose is not to translate indigenous customs into 'transferable rights of property known to English law,' but to accord proprietary status to the existing, aboriginal system of land holding. The American experience has shown that what matters is the fact of aboriginal occupation, and the courts ought not to go behind the native system in search of common law notions of property which communal native possession neither knows nor requires."

("Aboriginal Title in the Common Law", *supra*, note 444, at 622-623). A. Allott, an authority on the comparative nature of indigenous African legal systems, is more critical:

"An article, if not a book, could be written by way of comment on, and refutation of, these sentiments and findings. Such a eurocentric, 'know-nothing' and insular attitude hardly sits with the fact that, for at least a century before this finding, British judges in West Africa had been happily and respectfully administering and recognizing customary legal systems and rights in land derived from them, the peoples so involved being no more, and no less, 'developed' and their laws no more 'precise' than those of the Shona and Ndebele chiefdoms. One can only tender two excuses for their Lordships. The first excuse is one of ignorance; it would seem that they were totally ignorant of comparative law, despite having a jurisdiction which covered the whole of the British Empire, and had not had the benefit, as we now have, of serious juristic study of African (and other) customary laws. The second excuse is not intellectual but political: they felt it to be their duty to ratify the status quo in Southern Rhodesia, and the acquisition by the Company, the Crown, and the settlers of total and unqualified power to the disadvantage of the legitimate claims of the indigenous populations. In any event, what they had to say would soon be qualified by what was held in the subsequent appeal to the Privy Council, only two years later, from Nigeria, that of *Amodu Tijani*."

(*Supra*, note 661, at 93.) More generally, B. Slattery explains why internal Aboriginal land tenure systems should not be expected to anticipate and define external relations with the Crown ("Understanding Aboriginal Rights", *supra*, note 3, at 744-746, paragraphing omitted):

"The doctrine of aboriginal land rights does not originate in English or French property law, and it does not stem from native custom. It is an autonomous body of law that bridges the gulf between native systems of tenure and the European property systems applying in the settler communities. It overarches and

embraces these systems, without forming part of them. ... [W]hile the doctrine of aboriginal lands rights governs the title of a native group considered as a collective unit, it does not regulate the rights of group members among themselves. ... Thus, the doctrine of aboriginal land rights attributes to native groups a collective title with certain general features. The character of this collective title is not governed by traditional notions of practices, and so does not vary from group to group. ... These considerations explain why it is possible for a native group to hold aboriginal title to land at common law even if it has no traditional notions of private land ownership. So long as the group meets the requirements of the doctrine of aboriginal land rights, notably the requirement of actual use and possession, it holds a collective title. The fact that group custom does not acknowledge private ownership may be relevant determining the rights of individual group members, but it does not affect the title of the group as a whole."

808. The Privy Council's decision in *Amodu Tijani* (*supra*, note 48) referred to by A. Allott, *ibid.*, avoided *Re Southern Rhodesia*'s pretensions of colonial superiority, but nonetheless borrowed from *St. Catherine's Milling* and a succeeding case the characterization of Canadian Aboriginal land rights as "usufructuary" in nature, treating this as an indigenous conception, rather than the Privy Council's construction of the *Royal Proclamation* and reserve legislation:

"As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. ... As the result of cession to the British Crown by former potentates, the radical title is now in the British Sovereign. But that title is throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and recognized."

(at 403-404, citation and paragraphing omitted). As a description of indigenous land tenure systems, A. Allott finds this passage unsatisfactory, but more importantly, Allott rejects the implication that indigenous land rights are by definition something less than proprietary (*ibid.*, at 97, 98-99, paragraphing omitted):

"One can have a certain sympathy with the desperate efforts of their Lordships ... to express in terms which they, and English lawyers generally, could understand the system of proprietary rights in land in an African traditional society. Unfortunately, the outcome is a grotesque distortion. ... One cannot understand what is meant here by the distinction between property and possession. One can agree that it is not helpful to resort to it to explain indigenous land tenures. ... This so-called radical or final title of the paramount ruler is a figment of the Privy Council's imagination. In so far as customary laws recognize a hierarchy of interests, the superior interest is vested in the society or community, and not in the ruler: he is merely the manager of it. ... Talking of 'usufructuary rights', an expression borrowed from British India and ultimately from Roman law, is ... perilous and inappropriate. Classical Roman law was constructed on the basis of an absolute title, *dominium*, vested in the *dominus* or owner, with all other rights over the property no more than usufructuary rights, or 'rights in another's property' (*iura in re aliena*) - African customary land laws are not.

...

A satisfactory discussion of the nature of traditional and customary land tenure systems cannot be obtained unless two cardinal points are borne in mind: - I. *One must employ a proper system of analysis and*

description of the property system in question. ... II. There is no single universal scheme of property rights in land, even if one can elaborate a universal scheme for describing them. The *Amodu Tijani* case and other cases are dangerous if they suggest that there is. A further danger is that one may be tempted to decide (as the Privy Council apparently did in *Re Southern Rhodesia*) that if a ruler - in the sense of a visible chief or king - is lacking in a given society, this necessarily entails that society has no law or scheme of land rights. It is my submission, which I have defended elsewhere, that there is no society, however small and even if appearing to lack some of the organs of government such as courts and police, which is without law or a legal system. Indeed, it is my contention that it is in principle logically impossible for an organized society, as all must be, to be without such law. If this thesis is correct, then the assumption of the colonists, the colonial authorities, and the Crown that the aboriginal inhabitants of Australia were without a legal system and hence without 'rights', whether in land or otherwise, must have been wrong, and could only be attributable to a total failure to comprehend the point I have just made."

809. As has been emphasized by several commentators, the Saulteaux themselves were not represented at any stage of the litigation in *St. Catherine's Milling*: see P. Joffe and M.E. Turpel, *supra*, note 397, at 27-28. S. Cottam (*supra*, note 691, at 262, n. 9) quotes Ontario's counsel's report of the oral argument as follows:

"Watson asked, 'What difference do you think it makes to your case that the Indian title should be greater or less so long as there is a substantial interest underlying it in the Crown? Does the precise extent or limit of the Indian title matter much ... so long as there is left a right in the Crown, a substantial right, not a mere casualty which will depend on the Indian title but a substantial title?' Blake was quick to reply: 'So long as it is agreed there is such an interest ... I care for nothing more.'"

Compare the following statement in the judgement:

"There was a great deal of learned discussion at the bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished."

(*Supra*, note 87, at 55). Cottam concludes (at 261, quoting in part from G. Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories*, *supra*, note 298, at 1203):

"[T]he courts did not use the concept of the usufruct to clarify the Indian title as such but to establish its position relative to that of the Crown.... [T]he acquisition of a legal right by the Indians through *St. Catherine's Milling* was 'an historical accident ... arising out of the necessity of reconciling the various claims of the Dominion and Ontario.' ... The courts could leave the Indian right in vague terms once it was established as less than fee simple ownership, for the survival of the Indian and the land-claim problems of today were not anticipated ... [I]n the process of removing the 'cloud' from the Crown title, the *St. Catherine's* case cast a long shadow over Indian title."

810. S. Cottam describes this legacy of *St. Catherine's Milling* as follows:

"The Indians gained a right with a basis in law, not custom and practice, as Ontario had argued. The nature of that right, however, is still being debated. The usufruct as a right has been described as 'stultifying; ... there has been no determination of the interests it assures to Indian people.' The usufruct is a mystery: 'No one knows what it is, except in the most general and least helpful terms.'"

(*supra*, note 691, at 261, quoting W. Henderson, "Canada's Indian Reserves: The Usufruct in our Constitution" (1980) 12 Ottawa L. Rev. 167.) The most recent substantive comment on the nature of usufructuary rights in this

context appears to be that of McEachern C.J. in *Delgamuukw* (referring to Lord Watson's description of *Real Proclamation* rights as "personal and usufructuary, dependent upon the goodwill of the Sovereign," and his Lordship's characterization of Crown title as "all along a present proprietary estate in the land, upon which the Indian title was a mere burden"):

"Although Lord Watson expressly stated that it was not necessary to express an opinion upon the precise quality of 'the Indian right', the description of being a 'burden' on the Crown's title is hardly descriptive of being a proprietary interest in the Indians. Standing alone, *St. Catherine's Milling* is authority against aboriginal ownership and jurisdiction and it establishes that aboriginal rights exist 'at the pleasure of the Crown.' ... *St. Catherine's Milling* is powerful authority, binding on me, that aboriginal rights, arising by operation of law, are non-proprietary rights of occupation for residence and aboriginal user which are extinguishable at the pleasure of the Sovereign."

(*Supra*, note 168, at 345-346 (paragraphing omitted)). In the Court of Appeal, Macfarlane J.A. defined Aboriginal rights as a function of "enjoyment" of land, and did not object to the trial judge's characterization of the Aboriginal rights in question as non-exclusive "user rights" (*supra*, note 34, at 130, 143). Macfarlane J.A. also relied upon Dickson J.'s statement in *Guerin* that Aboriginal land rights do not amount to "beneficial ownership" (*ibid.*, at 128, 130). He declined, however, to classify such rights as "non-proprietary", treating the Supreme Court's decision in *Paul* and comments from the High Court of Australia in *Mabo* as establishing that the attempt to characterize such rights as proprietary or non-proprietary is "futile" in this context: *supra*, note 34, at 126-129, 143). Wallace J.A. agreed with Macfarlane J.A. that the proprietary/nonproprietary distinction is unnecessary (*ibid.*, at 206), but drew upon the "usufructuary" characterization of such rights for the conclusion that the common law does not affirm non-land related rights (*ibid.*, at 205-206):

"Lord Watson, in characterizing aboriginal title, purposely chose the term "usufructuary"; a property concept from the civil law tradition which he knew would be entirely familiar to Quebec jurists, and entirely familiar to their compatriots. It indicates, at least, the approximate bounds of what 'aboriginal title' entails; it shows that interests in land and beneficial uses of land are the basic category of what was protected as aboriginal rights. This is a broad category indeed. In respect of land, it may range from an exclusive and plenary beneficial interest over certain parcels of land, to occasional presence for sustenance activities. A host of practices fall within the category including fishing, hunting and gathering. The description of aboriginal title in *St. Catherine's Milling*, and in other decisions such as *Amodu Tijani* ... and *Re Southern Rhodesia* ... strongly suggest that only those aboriginal practices which relate to occupation and use of land were recognized and protected by the common law. Judicial powers or powers to legislate for instance are quite different from the concepts of 'title' or 'rights of property', or a 'usufructuary interest'."

Lambert J.A., dissenting, stated: "the use of common law land tenure concepts tends to obscure rather than assist an understanding of Indian title. It seems to me, even more so, that the use of the usufructuary concept, derived from Roman law, with which common law lawyers are usually unfamiliar, does not provide any insight into aboriginal title and is indeed both inaccurate and misunderstood": *id.*, at 258.

811. *Smith v. The Queen*, *supra*, note 715, at 569.

812. *Supra*, note 28, at 1112. Macfarlane J.A. cited this and similar cautions in explaining his remark in *Delgamuukw* that the *sui generis* nature of aboriginal rights "has made them difficult, if not impossible, to describe in traditional property law terminology": *supra*, note 34, at 126.

813. The restriction on alienation of Aboriginal title is an example of the sort of unconventional concept which the interrelationship of settler and Aboriginal societies has given cause to rely upon. B. Slattey explains the relationship between intersocietal norms and the *sui generis* concept, using the restriction on alienability as an

example, as follows:

"The doctrine of aboriginal land rights does not originate in English or French property law, and it does not stem from native custom. It is an autonomous body of law that bridges the gulf between native systems of tenure and the European property systems applying in the settler communities. It overarches and embraces these systems, without forming part of them. As Dickson J. recognizes in the *Guerin* case, aboriginal land rights are thus *sui generis*.

...

[I]t could be argued that, since property is characteristically alienable, the restrictions on the transfer of aboriginal title prevent it from being truly proprietary in nature. This is an overly rigid view. While there may be grounds in English law for linking property with alienability, there seems to be no compelling reason for identifying the two in principle. In any case, aboriginal title is not a concept of English land law but a *sui generis* right. The restrictions on its transfer stemmed historically from the need to accommodate the rule, binding on settlers, that title to land flows from the Crown. These restrictions are only partial, for aboriginal title may in fact be alienated to the Crown, and possibly to other native groups."

("Understanding Aboriginal Rights", *supra*, note 3, at 744-745, 750). Although it concentrates on the implications of occupation for sovereignty rather than property in land, Slaterry's argument in "Aboriginal Sovereignty" illustrates the importance and the feasibility of identifying culturally appropriate, intersocietal norms in this context, consistent with both Aboriginal and European legal conventions.

814. *Common Law Aboriginal Title*, *supra*, note 11, at 302-303.

815. In B. Slaterry's 1987 analysis, the opinion of Dickson J. in *Guerin* had already accomplished the main part of this task by placing the Privy Council's reference to "personal" Aboriginal rights in its appropriate context:

"It might be thought obvious that, as a legal right to the exclusive possession of land maintainable against the world, aboriginal title is a property right. Yet this conclusion has sometimes been doubted. Once again, the confusion stems in part from the *St. Catherine's* case, where the Privy Council, in an unfortunate phrase, described Indian title as a 'personal and usufructuary right'. This might be taken to mean that Indian title is not a property right but a right held in some personal capacity against the Crown. However, this interpretation was effectively discounted in the *Star Chrome* case, where the Privy Council explained that Indian title is 'a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.' The Supreme Court adopts the same view in *Guerin*, thereby laying any doubts to rest."

("Understanding Aboriginal Rights", *supra*, note 3, at 749-750 (footnotes omitted)). For less sanguine readings of Dickson J.'s ultimate position on this issue in *Guerin*, see J. Hurley, *infra*, note 818, at 572-582, and K. McNeil, *Common Law Aboriginal Title*, *supra*, note 11, at 284-288.

816. *Supra*, note 715, at 678.

817. *Ibid.*, at 677.

818. See the reference to Wallace J.A.'s comments in *Delgamuukw*, *supra*, note 810. It should be noted that, perhaps in the light of *Paul*, Wallace J.A. appears to have avoided relying upon the very distinction which, on most definitions, begins to define the "usufruct" - i.e. the distinction between a usufruct and property (*id.*, referring to the former as a "property concept" which may extend to a "plenary beneficial interest"). If the usufructuary rights doctrine continues to command any support in Canadian law, its meaning thus would appear more mysterious than ever. (For the argument that Lord Watson used "usufruct" in a non-technical way in *St. Catherine's Milling*, on an equal footing with a proprietary "beneficial interest", see J. Hurley, "The Crown's Fiduciary Duty and Indian Title:

Guerin v. The Queen" (1985) McGill L.J. 559, at 579-581. Hurley emphasizes (at 582) that in *Amodu Tijani* (*supra*, note 47, at 409-410, later in the judgement than the statements quoted in note 815, *supra*) the Privy Council stated that the real character of the title to land occupied by a native community is "prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference.")

819. Macfarlane J.A.'s approving comment in *Delgamuukw* upon the judgement of Mahoney J. in *Baker Lake* illustrates the relation between the two theories: "[o]bviously he did not regard proof of occupation as encompassing a broad, unrestricted aboriginal title, extending to all possible uses of the land. Instead the focus was on specific traditional activities recognized by the aboriginal society as integral to its distinctive culture": *supra*, note 34, at 129.

820. *Supra*, note 34, at 143, 126-127.

821. See note 704, *supra*.

822. *Supra*, note 34, at 130.

823. *Id.*, citing Dickson J.'s statement to this effect in *Guerin*.

824. Wallace J.A.'s adoption of the same view appears to conflict similarly with Wallace J.A.'s surmise that in some cases usufructuary Aboriginal rights might amount to "an exclusive and plenary beneficial interest over certain parcels of land": *supra*, note 34, at 206.

825. Of the judges forming the majority in *Delgamuukw* Wallace J.A., in particular, appears to have treated *St. Catherine's Milling* as supportive of such limits: *supra*, note 34, at 201. (Macfarlane J.A. also sought commonwealth precedent for the 'frozen rights' doctrine in the opinion of Deane and Gaudron JJ. in *Mabo v. Queensland*; in particular their statement (*supra*, note 34, at 65-66) that the content of Aboriginal title may vary from one community to the next "according to the extent of the pre-existing interest" and in some cases may only amount to a "limited special use" of land where concepts of ownership are unknown. But a 'frozen rights' interpretation of these statements appears to miss Deane and Gaudron JJ's point. It is submitted that Deane and Gaudron JJ's conception of the nature of Aboriginal rights is deficient for its exclusive reliance upon internal Aboriginal rules, and its corresponding failure to recognize the need for intersocietal rules between the Crown and Aboriginal peoples of the sort Slattery and Bennett refer to in the excerpts quoted, *supra*, note 807. Nonetheless, Deane and Gaudron JJ. made it clear that their concept of Aboriginal entitlement (based largely on the Privy council's ruling in *Amodu Tijani*: see note 808, *supra*) is a function of *customary conceptions of right, not of practices engaged in at one point in time or another*. On this view what must be proved is that "the local law or custom involve an established entitlement of an identified community, group or (rarely) individual to the occupation or use of particular land and that the entitlement to occupation or use be sufficiently significant to establish a locally recognized special relationship between the particular community, group or individual and that land": *supra*, note 34, at 64. The same passage quoted by Macfarlane J.A. states that customary title can in some cases be practically equivalent to "full ownership". No fixed list of "practices" alone could give rise to such an entitlement, to which the capacity to choose how to use the land is obviously a central component. Deane and Gaudron JJ.'s specific negative response to Queensland's 'frozen rights' argument, quoted in note 863, *infra.*, was not referred to by Macfarlane J.A.

826. See note 803, *supra*.

827. The Privy Council stated that Provinces have a "beneficial interest in these [Indian] lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title," and in particular, that continuing federal jurisdiction over the exercise of treaty rights does not empower the federal government to

dispose "of that beneficial interest in the timber which has now passed to Ontario": *supra*, note 87, at 59, 60. See J. Hurley, *supra*, note 818, at 575-579.

828. See note 839, *infra*.

829. I.e. the time of assertion of Crown sovereignty.

830. *Supra*, note 34, at 125 (per Macfarlane J.A.).

831. Macfarlane J.A. also referred to the entitlements embraced by Aboriginal rights as "activities" (*ibid.*, at 129), "traditions" (at 124) and "enjoyment" (at 130). Wallace J.A.'s separate reasons employ the same terminology; see *ibid.*, at 203 ("practices and uses"; "practices and activities associated with the use of the land they occupied") and 204 ("practices"; "practices and ways").

832. *Ibid.*, at 125-126. In related passages Macfarlane J.A. said that "[w]hat the law protects is not bare presence or all activities, but those which were an integral part of and recognized by an aboriginal society prior to the assertion of sovereignty" (at 145) and that "a practice ...integral to the aboriginal society" would "be an aboriginal practice", whereas "a practice resulting only from European influences" would not, "unless it was a modernization of the way in which an aboriginal practice was exercised" (at 147). Similarly, Wallace J.A. held that the Aboriginal right incorporated in the common law is the right "to engage in those practices and activities associated with the use of the land they occupied which were traditional, integral and distinctive to the aboriginal society and way of life" (*ibid.*, at 203) and that "aboriginal rights ... have as their basis the historic occupation and use of the land": "[i]t is the traditional practices and ways of the aboriginal people associated with this occupation which attract common law protection" (at 204).

833. The majority's insistence that Aboriginal practices may not qualify as Aboriginal rights unless they are "distinctively" Aboriginal might appear to suggest this position. Such a position would mean, however, that Aboriginal peoples whose ancestors were farmers like settlers, for example, could claim no Aboriginal entitlement. Because farming had not been relatively distinctive, the argument would go, no prior farming rights would be affirmed, and it would be up to the colonial government whether to grant Aboriginal farmlands to settlers, or to the prior occupants. (Even the Georgian theory referred to in note 839, *infra*, apparently did not go that far, relying instead on the view that something peculiar about the nature of Aboriginal peoples makes them unfit to keep their land as farmers.) Rather than 'distinctive' in physical activity, it thus appears that the majority meant 'distinctive' in origin. This view treats cultures as proprietors of the practices developed internally to them, and further, treats some (European) cultural practices as the basis for a title unbounded by cultural practices, and other (Aboriginal) practices as the basis for entitlements permanently circumscribed culturally.

834. This meaning is reinforced in both majority judgements' reasons for declining to overturn the trial judge's holding that eligible practices must have been present within Aboriginal society for a long time prior to assertion of Crown sovereignty. See *supra*, note 34, at 145-147 (per Macfarlane J.A.). The majority appears to reason that practices engaged in by an Aboriginal society for a sufficiently long time before European contact effectively belong to it, and thus become "integral" and "distinctive" to that society (subject, of course, to the proviso that after contact Aboriginal societies are accorded no capacity to acquire new customs with legal significance). Thus, it was essential according to Wallace J.A. that the plaintiffs establish that "in the pre-sovereignty period, the ancestors of the native claimants were members of an organized society which had regulated its affairs over an extended period of time - a sufficient period of time to constitute, from a European point of view, a 'traditional way of life'" (*ibid.*, at 203). It is not clear whether or to what extent pre-colonial change in Aboriginal practices as a function of influences other than settler interaction is contemplated by this reasoning.

835. Wallace J.A.'s reasons provide the most detailed defence of the majority's 'frozen rights' doctrine (*supra*, note 34, at 206-207, and see also note 836, *infra*):

"It must be emphasized that aboriginal rights, although having an historic and traditional basis, may be exercised in a modern manner: see *Sparrow* at p. 1099. The plaintiffs, in their submissions about the modern form of their aboriginal rights, contended the scope of aboriginal rights should not be limited to merely a modern version of the kind of activities actually engaged in by their ancestors. Instead, they contended their rights should be characterized more generally, and that their historic occupation, use, and enjoyment of their tribal lands should found the right to use the lands for any purpose they see fit in order to satisfy their needs. Such uses might involve contemporary practices and activities not pursued by the Indian society before sovereignty, but would come within a broadly framed right to exploit the land and its resources to further the interests of native society. They assert that aboriginal rights must be permitted to evolve to maintain contemporary relevance to the needs of the holders as those needs change in accord with the changes of overall society.

Characterizing activities such as fishing, hunting and food-gathering as simply one mode of exercising a more general aboriginal right to occupation and use of tribal lands is not the common law approach to aboriginal rights. As reflected by the authorities, the aboriginal right to engage in a specific activity must be connected to traditional practices. The Supreme Court of Canada in *Sparrow* held that fishing for 'food or ceremonial purposes' was the appellants' protected aboriginal entitlement. Thus, the Court adopted an approach which requires that the nature and scope of an aboriginal right be specified by referring to the character of the aboriginal practice which gave rise to it. In *Sparrow*, it so happened that this character was intimately tied to the *purpose* of the practice, but the traditional practices may have other features which help to delineate and give content to the aboriginal right which are based upon them.

It is crucial, in my view, to distinguish between the evolution or modernization of a right, and a modern manner of exercising a right. A 'modern aboriginal right' is a contradiction in terms. It is the *manner* of exercising the right which may assume a contemporary or modern form: see *Sparrow*." [original emphases]

836. The passage from Wallace J.A.'s judgement quoted, *ibid.*, continues:

"In this connection, I must emphasize that the contemporary *needs* of native society cannot be used to define the scope of common law aboriginal rights any more than the needs of non-aboriginal Canadians can define their rights. Such needs are satisfied, or fail to be satisfied, by the same societal forces which confront us all. Aboriginal rights receive protection under s. 35 of the Constitution Act, 1982. It would be absurd to contend that constitutionally entrenched aboriginal rights could be defined by the currently perceived needs of aboriginal peoples.

The plaintiffs assert that aboriginal rights should not be characterized by the court as 'the right of Indian people to renounce the contemporary world and revert to the life of their ancestors'. I agree. There is no reason why any citizen - native or non-native - should 'revert' to any former life unless they so desire. That is not the question with which we are faced in this litigation. The issue is one of determining the nature and scope of the aboriginal rights which are additional to the common law rights which every citizen of the Province enjoys.

The respondents emphasized that aboriginal people enjoy the same rights as non-natives to participate in contemporary activities - particularly beneficial economic activities - in the Province. As an example, they referred to the considerable native participation in the licensed commercial fishing industry. Engaging in activities that are different in nature and scope from those integral to aboriginal society and traditional ways of life cannot be said to be an exercise of an aboriginal right. The fact that aboriginal peoples engage in

a particular activity does not qualify such activity for the special protection afforded to aboriginal rights. To hold otherwise is to ignore the 'aboriginal' dimension of aboriginal rights."

837. For the equality refrain in Wallace J.A.'s reasons, see *ibid.*, and also, *supra*, note 426 and accompanying text.

838. Text following note 426.

839. An extraordinary example of the 'frozen rights' theory reflecting these views is discussed by T. Berger, *supra*, note 95. Berger recounts that in a letter to William Wirt, counsel to the Cherokees, James Madison wrote in 1830 that the Cherokee land claim was deficient, because (echoing Locke's argument adopted by the state in *Johnson v. M'Intosh*: see note 615, *supra*, and discussion following) "[By] not incorporating their labour and associating fixed improvements with the soil, they have not appropriated it to themselves, nor made the destined use of its capacity for increasing the number and enjoyments of the human race" (*ibid.*, at 76, quoting from G. White, *History of the Supreme Court of the United States* (New York and London: Macmillan, 1971) Chapter X, "Natural Law and Racial Minorities: The Court's Response to Slaves and Indians". Berger notes that "[t]he Cherokees, however, did not fit neatly into Madison's thesis. Many of them had given up hunting, had become farmers, established schools and adopted White institutions": *ibid.*, at 76. Wirt replied, in effect, that such absurd reasoning could not apply to the Cherokees unless the "new and strange" claim were advanced that the Indians had no "right" to follow Locke's prescription for acquiring property, and informed Madison that precisely such a claim was being mounted against Cherokee farmers by the Georgians:

"The argument against the title of the Indians to their land, compared with the argument in favour of our title to them, presents the strangest absurdity. ... We say ... that they can have no title but to so much land as they can now cultivate; ... whilst we hold that we have a perfect title to millions upon millions of acres confessedly beyond our present capacity for cultivation. In [the Cherokees'] improved condition as civilized agriculturalists, you will perceive that the argument drawn from writers on natural law, applied to them in their savage state, is unanswerable, unless we admit the new and strange ground, now taken, that they had no right to alter their condition and become husbandmen." [emphasis added]

840. See note 422, *supra*. McEachern C.J. also stated that the Aboriginal peoples of British Columbia "have remained dependent too long." "[I]t is obvious they must make their way off reserves." They must withdraw from "the increasingly cacophonous dialogue about legal rights and social wrongs." See F. Cassidy, "Rethinking British Columbia: The Challenge of *Delgamuukw*," in F. Cassidy, ed.: *Aboriginal Title in British Columbia: Delgamuukw v. the Queen* (Lantzville: Oolichan and IRPP, 1992), 5, at 12.

841. See, for example, the statements from *Sparrow* quoted in note 718, *supra*.

842. Commenting on Aboriginal fishing rights recognized and affirmed under s. 35, for example, the Court stated: "They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgement in *Guerin* ... referred to as the "*sui generis*" nature of Aboriginal rights": *supra*, note 28, at 1112.

843. For a concurring opinion, see K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments", (1993) 19 Queen's L.J. 95, at 123 ("Aboriginal rights encompass the use of other natural products of lands and waters covered by Aboriginal title, as well as an interest in the land itself. They may also include any other uses to which Aboriginal lands can be put...") and 134 ("... Aboriginal and treaty rights ... include all aspects of Aboriginal life").

844. "Understanding Aboriginal Rights", *supra*, note 4, at 746 (paragraphing omitted).

845. *Id.* at 747-748 (paragraphing omitted).

846. See also B. Slattery, "The Hidden Constitution", *supra*, note 779, at 123-124 ("An Indian band that originally lived by hunting or fishing might turn to farming when wild game became depleted, or to ranching, lumbering, or mining. To hold that native peoples were permanently wedded to certain historical practices would in some cases have been to sentence them to slow starvation; in any case it would have denied them the right to adapt to new conditions or exploit their lands more productively".)

847. *R. v. Sparrow*, quoted *supra*, note 842 (emphasis added).

848. See text accompanying note 832, *supra*.

849. Macfarlane J.A. held that "[t]he nature and content of an aboriginal right is determined by asking what the organized aboriginal society regarded as 'an integral part of their distinctive culture': *R. v. Sparrow*" (*supra*, note 34, at 124, and see the passage from pp. 125-126 quoted above, text accompanying note 832). According to Wallace J.A.:

"It is the traditional practices and ways of the aboriginal people associated with this occupation which attract common law protection. In *Sparrow* ..., Dickson C.J. and La Forest J. said that the protection of aboriginal rights extended to those practices which were "an integral part of their distinctive culture". This feature of aboriginal rights imports an historical dimension, which requires that the practices receiving protection be part and parcel of the pre-sovereignty aboriginal society."

(*ibid.*, at 204, citation omitted.) In support of this position the Court of Appeal majority also relied upon the Federal Court, Trial Division judgement in *Baker Lake* (*supra*, note 325). For Macfarlane J.A.'s comments, see note 819, *supra*. Wallace J.A. drew such support from Mahoney J.'s statement in *Baker Lake* that "the thrust of all the authorities is not that the common law necessarily deprives aborigines of their enjoyment of the land in any particular but, rather, that it can give effect only to those incidents of that enjoyment that were, themselves, given effect by the regime that prevailed before": *supra*, note 325, at 543. In the trial judgement, McEachern C.J. had been careful to note that his 'frozen right' criterion of "long time aboriginal practices" was additional to those adopted in *Baker Lake* for proof of Aboriginal rights, although McEachern C.J. used the hunting and fishing rights claimed in *Baker Lake* as examples of claims fitting within his 'frozen' notion of an "aboriginal purpose": see *supra*, note 168, at 350-353; 388-390.

850. The argument that a doctrine of 'frozen rights' is located in this statement appeared in the literature soon after issuance of the *Sparrow* decision, in an article written by the principal negotiator for the federal Department of Justice in the unsuccessful constitutional conferences convened between 1983 and 1987 to define the rights contained in s. 35: see W. Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning" (1990) 15 Queen's L.J. 217. (For reference to the position initially advanced on behalf of the federal government in the process, see D. Sanders, "The Supreme Court of Canada and the 'Legal and Political Struggle'", *supra*, note 773, at 125.) Binnie argued in "The *Sparrow* Doctrine" that *Sparrow*'s requirement of proof of the historical existence of an Aboriginal right means that "collective Aboriginal rights ... *predate* the transplanted European legal system and now flow from ethnicity," whereas Aboriginal individuals acquire "rights acquired under the ordinary law *subsequent* to the exercise of European sovereignty ... as do other individuals, in the ordinary way": *ibid.*, at 224 (and see 247, n. 47). The same argument was made on behalf of the federal Attorney-General intervening in *Delgamuukw*: see note 423, *supra*. It is the foundation of Wallace J. A.'s 'equality of citizens' rationale for the 'frozen rights' doctrine: see text following note 836, *supra*.

Binnie also contended that earlier examples of 'frozen rights' thinking appear in the Canadian jurisprudence. It should be noted that Binnie's interpretation of the statement from *Sparrow* was advanced as a complement to the main objection that the Supreme Court leaned so far in *Sparrow* towards securing Aboriginal rights against

governmental interference that the Court cannot afford to invest the content of s. 35 with the "liberal and generous" meaning promised, even if the Court were so inclined. "It was inevitable," according to Binnie, "that there would be a trade-off between the scope of the rights and the strength of the constitutional protection against encroachment. The checks and balances of the Constitution ... do not favour both a 'liberal and generous' reading of the rights and a high level of immunity": *ibid.*, at 218. The greater part of Binnie's article elaborates the thesis, in particular, that "the *Sparrow* doctrine, significant though it is in the narrow scope of hunting, fishing, and gathering rights, will undermine seriously achievement of the broader section 35 vision asserted by native organizations - namely, achievement of self-government and an economic base": *ibid.*, at 217.

851. Here the court was alluding to its own earlier statement: "[A]n existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations": *supra*, note 28, at 1091.

852. *Supra*, note 28, at 1093.

853. *Ibid.*, at 1094-1095. In that earlier section of the judgement the Court also quoted at length from a summary of an anthropologist's evidence elaborating on, among other things, the importance of salmon fishing in Musqueam society.

854. *Ibid.*, at 1099.

855. *Supra*, note 28, at 1100-1101.

856. Lambert J.A., dissenting in *Delgamuukw*, expressed this point more generally as follows (*supra*, note 34, at 276):

"During the course of argument there was a good deal of reference to the extensive evidence about specific practices, traditions and customs of the Gitksan and Wet'suwet'en people. It was difficult, at times, to be clear about whether those specific practices, traditions and customs were themselves to be regarded as encompassing in each case a particular aboriginal right, which must be regarded as having been brought forward in a modern form, or whether those ... were, in pre-Sovereignty times, examples of the exercise of more general rights, and it was those more general rights which were to be regarded as having been brought forward in a modern form. For example, is evidence about an aboriginal practice of canoe-building to be taken as evidence demonstrating an aboriginal right to build canoes, which in its modern form, would encompass small boat-building of all kinds? Is such a right enshrined in the Constitution and can it only be regulated in accordance with the justificatory tests set out in *Sparrow*? I will not multiply examples. But the fact that many of the Canadian cases are criminal cases in which the question is whether shooting a goose or catching a fish on a particular date at a particular place in a particular way was an act done in the exercise of an aboriginal right, has tended to make the focus for consideration of aboriginal rights a specific and particular focus rather than a general and comprehensive focus." [emphasis added]

857. *Supra*, note 34, at 277-278 (citation and quotation omitted). Lambert J.A. concluded (at 281, paragraphing omitted):

"If the aboriginal right that is established is an encompassing and general right, such as a right of exclusive occupation, possession, use and enjoyment of land, and the right carries with it, as it would be expected to do, the right to enjoy the fruits of the land including the game, the fact that the taking of game was done in a particular way for a particular purpose before Sovereignty would not limit the way game may be taken nowadays. Because taking game is not the right in question. Taking game is just a way of exercising a broader right to the exclusive occupation, possession, use and enjoyment of land. ... So a claim may be made that the installation of a sanitary landfill site or a waste recycling depot on an Indian reserve is done

in the exercise of an aboriginal right to exclusive occupation, possession, use and enjoyment of the reserve land, and not as a modernization of a more specific right to create middens."

858. *Supra*, note 47, at 336-337.

859. B. Slattery, "Understanding Aboriginal Rights," *supra*, note 3, at 747, n. 69.

860. *Supra*, note 16, at 574.

861. According to B. Slattery it appears to be the position in United States law that "aboriginal land rights are not confined to 'traditional' uses of land": "Understanding Aboriginal Rights", *supra*, note 3, at 746, n. 62. In support of this view Slattery cites *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *United States v. Klamath Indians*, 304 U.S. 119 (1938); F. Cohen, "Original Indian Title" 32 Minn. L. Rev. (1947) 28, at 54-55; and F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), at 491.

862. "Understanding Aboriginal Rights", *supra*, note 3, at 747, referring to Hall J.'s quotation and restatement in *Calder*, *supra*, note 47, at 194 and 195 respectively, and to Dickson J.'s reasons in *Guerin*, *supra*, note 47, at 336.

863. Brennan J. stated (*supra*, note 34, at 44):

"Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed. Here, the Meriam people have maintained their own identity and their own customs. The Meriam Islands clearly remain their home country. Their land disputes have been dealt with over the years by the Island Court in accordance with the customs of the Meriam people."

Deane and Gaudron JJ. held (*id.*, at 83):

"Since the title preserves entitlement to use and enjoyment under the traditional law or custom of the relevant territory or locality, the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom. The traditional law or custom is not, however, frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land. ... [The rights of an Aboriginal tribe or clan entitled to the benefit of a common law native title] ... can ... be lost by the abandonment of the connection with the land or by the extinction of the relevant tribe or group. It is unnecessary, for the purposes of this case, to consider whether they will be lost by the abandonment of traditional customs and ways. Our present view is that, at least where the relevant tribe or group continues to occupy or use the land, they will not."

Toohy J. wrote (*id.*, at 150):

"An argument to the effect that, regardless of the state of things at the time of annexation, the Meriam people do not have title because they no longer exercise 'traditional' rights and duties and have adopted European ways also fails. There is no question that indigenous society can and will change on contact with European culture. Since annexation a school, hospital, the Island Court, the Island Council, a police force

and other government agencies have been introduced to the islands. Christianity has had a profound influence; so too have changed means of communication. The economy of the islands is now based on cash from employment rather than on gardening and fishing. But modification of traditional society in itself does not mean traditional title no longer exists. Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life. So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life."

- 864. M. Ball, *supra*, note 63, at 13.
- 865. See section 1.5, text accompanying notes 152-174.
- 866. See section 1.2, text accompanying notes 52-67; section 1.3, text accompanying notes 80-85; and section 1.4, text accompanying notes 91-101, 115, 118, 138-142.
- 867. See section 1.3; and section 1.4, text accompanying notes 86-124.
- 868. See section 1.4, text accompanying notes 131-136, 142.
- 869. See section 1.1, text accompanying note 24; section 1.2, notes 55 and 56; and section 1.3, text following note 124.
- 870. See section 1.2, text following note 71 and text accompanying note 75. For the Australian High Court holding in *Mabo*, cited by Wallace J.A., to the effect that the act of state doctrine renders Crown claims to have acquired territorial sovereignty unreviewable by the courts, see section 1.2, notes 34, 35, and section 4.4, note 672. For the Australian High Court's reliance upon this doctrine in *Coe v. Commonwealth of Australia* (1979) to determine that Aboriginal sovereignty had been extinguished upon the Crown's acquisition of sovereignty, see section 1.2, note 38.
- 871. See section 1.5, text accompanying notes 180-184.
- 872. See section 1.5, text accompanying note 187.
- 873. See section 1.4, text accompanying note 135. For the assortment of rationales treated in this paper as variations upon the "recognition doctrine", see section 2.1.
- 874. See section 1.2, text accompanying notes 47-50; section 2.1, text accompanying notes 200, 220-222.
- 875. See esp. section 2.3, text accompanying notes 225-254.
- 876. See section 2.3.1, text accompanying note 296.
- 877. See section 2.3.1, text accompanying notes 302-304.
- 878. For discussion of the doctrine of continuity's application to matters of a public law nature, see section 2.3.2.
- 879. See section 2.3.1, text accompanying notes 257-266.
- 880. See section 2.3.1, text accompanying note 265.

- 881. See section 2.3.1, text accompanying notes 272-294.
- 882. See section 2.3.1, text accompanying notes 290-291.
- 883. See section 2.3.1, text accompanying notes 296-297.
- 884. See section 2.3.1, text accompanying notes 295-297, and notes 261, 272, and 292-293.
- 885. See section 2.3.1, text accompanying notes 267-271.
- 886. See generally section 3.2.1, text following note 348, and section 3.2.2.
- 887. See section 3.2.2, text accompanying notes 387-388.
- 888. See section 1.2, paragraphs preceding note 42.
- 889. See section 3.2.2, text accompanying notes 389-390.
- 890. See section 3.2.2, text accompanying notes 387-388.
- 891. See section 3.2.2, text accompanying note 383.
- 892. See section 3.2.2, text accompanying notes 391-393.
- 893. See section 3.2.2, text following note 390.
- 894. See section 3.2.2, text accompanying note 385.
- 895. See section 3.2.3, text accompanying note 418-419.
- 896. See section 3.2.2, text following note 374.
- 897. See section 3.2.2, text accompanying note 396.
- 898. See section 3.2.2, text accompanying notes 375, 376,
- 899. See section 3.2.2, text accompanying note 381, and section 3.2.3, text preceding note 397.
- 900. See section 3.2.3, text accompanying notes 400-411.
- 901. See section 3.2.2, text accompanying notes 376-378, 394-396.
- 902. See section 3.2.3, text following note 423-429.
- 903. See section 3.2.3, text accompanying notes 398-399.
- 904. *Connolly v. Woolrich*, quoted, *supra*, note 296.
- 905. See section 3.2.3, text accompanying notes 418-419.
- 906. See section 3.2.3, text accompanying notes 412-417.

907. *R. v. Sparrow*, quoted in section 1.5, text accompanying note 178.
908. See section 3.2.3, text preceding note 397.
909. For the High Court of Australia's recent rejection of the doctrine in its application to Aboriginal land rights, see section 4.4. For the International Court's rejection of the doctrine, see section 4.3. For the Supreme Court of Canada's related rejections of 19th century premises of individuals' and peoples' inequality, see section 4.5, text accompanying notes 687-689.
910. See generally section 4.2.
911. See section 2.1, text accompanying notes 216-219.
912. See section 3.2.3, text accompanying note 430; section 2.4; and Brian Slattery's comment pertaining to both act of state and *terra nullius* reasoning, quoted in section 1.5, text accompanying note 177.
913. See section 4.1, section 4.2, text preceding note 464.
914. See section 4.5.2, text accompanying notes 773-781.
915. See section 4.5.2, text accompanying notes 788-790.
916. See section 4.2; section 4.4, text accompanying note 673-680; section 4.5.2, text accompanying notes 782-784.
917. See section 4.5.2, text accompanying notes 773-774, 790-797.
918. See section 4.5.1., text preceding note 736, and text accompanying note 770.
919. See section 4.1, esp. text accompanying notes 447-454; and section 4.5.1, text accompanying notes 766-768. In the case of land rights, occupation also normally gives rise to a positive presumption of title: see section 4.5.1, note 766; and section 4.5.3, text accompanying note 801.
920. See, for example, section 4.5.1, text accompanying note 760-762 (discussing *Baker Lake*'s reliance upon the discriminatory reasoning of *Re Southern Rhodesia*) and text accompanying note 737 (quoting the trial judgement in *Delgamuukw*'s reliance upon the same authority).
921. See section 4.5.1, text accompanying notes 719-732.
922. See section 4.3, text accompanying notes 653-664; and section 4.5.2, text accompanying note 791.
923. See section 4.3, text accompanying notes 656 and 660.
924. See section 4.5.1, text accompanying note 731.
925. For discussion of this test in the trial judgement in *Delgamuukw*, see section 4.5.1, text accompanying notes 740-756. The Court of Appeal declined to disturb the trial judgement's conclusion on this point: see section 4.5.1, note 759 and accompanying text. For discussion of the test's previous, *obiter* endorsement in *Baker Lake*, see section 4.5.1, text accompanying notes 763-765.
926. See section 4.5.1, text accompanying note 765.

927. See section 4.5.1, note 732.
928. See section 4.5.1, text accompanying notes 763-769.
929. See section 4.5.1, text accompanying note 770-772.
930. See section 4.5.1, text accompanying note 766-768.
931. See section 4.5.1, text accompanying notes 757-758, and 769.
932. The 'frozen rights' theory as adopted in *Delgamuukw* also appears to apply to claims of a jurisdictional nature. See summary below.
933. See generally section 4.5.3, text accompanying notes 798-802. For this implication of the 'usufructuary rights' theory, see text accompanying notes 803-810.
934. See section 4.5.3, text accompanying notes 809, and section 4.5, text accompanying notes 690-704.
935. See section 4.5.3, text accompanying notes 815-817.
936. See section 4.5.3, text accompanying note 818. For the equivocal treatment given this reasoning in Macfarlane J.A.'s judgement, see note 810, and text accompanying notes 820-823.
937. See section 4.5.3, text accompanying notes 807-814.
938. See section 4.5.3, text accompanying notes 825-827.
939. See section 4.5.3, text accompanying notes 828-835.
940. See section 4.5.3, text accompanying notes 836-838, and section 3.2.3, text accompanying notes 423-429.
941. See section 4.5.3, text accompanying notes 838- 841.
942. See section 4.5.3, text accompanying note 848-857.
943. See section 4.5.3, text accompanying note 859.
944. See section 4.5.3, text accompanying notes 860-863.
945. P. Macklem, for example, has argued that the overarching principle of intersocietal justice between Aboriginal and non-Aboriginal peoples is equality of peoples. See P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993), 45 Stanford L. Rev. 1311, esp. 1355-1363; and "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's L.J. 173, 215-218.
946. For references in *Worcester v. Georgia* to the theme of equal respect between nations, and to some of this principle's distributional implications, see note 608, *supra*. For analysis, see P. Frickey, *supra*, note 94. For *Connolly v. Woolrich*'s endorsement of a concept of shared title between the Crown and Aboriginal peoples, see note 797.
947. *Supra*, note 2.

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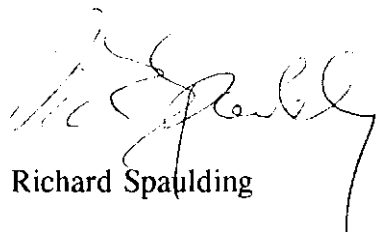
January 14, 1995

Dear David,

*see
final
version*
Re: *Doctrines of Dispossession linked to Extinguishment of Aboriginal Rights, January, 1995: Peer Review Draft*

Further to my letter of December 30, I enclose one unbound copy of this paper for your office and two bound working copies for peer reviewers' use. I have sent a bound copy to Mary Ellen Turpel separately.

Yours truly,



Richard Spaulding

c.c. Mary Ellen Turpel, Senior Research Associate, RCAP