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From Mabo to Yorta Yorta: Native Title Law in Australia

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INTRODUCTION

In more than a decade since *Mabo v. Queensland II*'s[1] recognition of Indigenous peoples' rights to their traditional lands, the jurisprudence of native title has undergone significant development. The High Court of Australia decisions in *Ward*[2] and *Yorta Yorta*[3] in 2002 sought to clarify the nature of native title and its place within Australian property law, and within the legal system more generally. Since these decisions, lower courts have had time to apply them to native title issues across the country.

This Article briefly examines the history of the doctrine of discovery in Australia as a background to the delayed recognition of Indigenous rights in lands and resources. It further examines the way the *Mabo* decision sought to reconcile the recognition of rights with the protection of the interests of the state. In doing so, the Article examines two strands of developing native title jurisprudence that have significantly limited the potential of native title for Indigenous peoples—the doctrine of extinguishment and the role of law and custom in the proof of native title.

The principles established in *Mabo* contained the seeds of current constraints of native title law, through which Indigenous rights have been confined to narrow property interests and subordinated to the interests of others. The doctrine of extinguishment, developed in

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1. Mabo v. Queensland II (1992) 175 C.L.R. 1.
2. W. Australia v. Ward (2002) 191 A.L.R. 1.
3. Members of the Yorta Yorta Aboriginal Cmty. v. Victoria (2002) 194 A.L.R. 538.

Ward, has played a significant role in the case law by limiting the recognitions and protections of Indigenous peoples' interests. Critiques by United States Indigenous jurists of the act of state doctrine are equally applicable.

The *Mabo* decision contained elements of recognition that have been applied in Canada, South Africa and Malaysia. In particular, the emphasis of such application is on the laws and customs of Indigenous peoples as the source of rights. However, what is generally regarded as a significant contribution to Indigenous rights jurisprudence has been a double-edged sword for Indigenous peoples seeking native title. The *Yorta Yorta* decision: (1) highlights that the identification of a different source of rights and laws within the state has challenged the capacity of the courts; and (2) has resulted in a level of incoherence that has in turn placed an undue burden on Indigenous peoples in relation to proof.

This Article analyzes these two elements in order to understand the impact of conceptual inconsistencies on the substantive outcomes in recent native title determinations, which reinforce the subordination of Indigenous rights.

I. THE DENIAL OF INDIGENOUS RIGHTS IN SETTLER STATES: THE DOCTRINE OF DISCOVERY

The former British sovereignty that is now Australia is hampered with questions of whether Britain still controls Australia's sovereignty jurisdiction and title. Historically, native title, resources and jurisdictions questioned the assertion of British sovereignty, jurisdiction and title over its Australian territory. The assertions of sovereignty were legitimated first by political theory, natural law theory and international law, and finally by the municipal courts. The initial justification for the acquisition of sovereignty was the superiority of the colonizers over the inhabitants, particularly in relation to political organization, but also with respect to religion, land use, social institutions and skin color.[4] The law of nations, while positing equality of nations as a central tenet, was also formulated to

4. Michael Asch & Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on* R v. Sparrow, 29 ALTA L. REV. 498, 511 (1991).

justify colonization and to limit the recognition of Indigenous peoples.[5]

Fransisco De Vitoria, a theologian and leading natural law theorist of the sixteenth century, acknowledged that the Indigenous peoples of the new world should be allowed to govern themselves "both in public and private affairs."[6] However, Indigenous peoples were equally obliged to accept the benefits of colonization.[7] Superiority in land use and the "right" of civilized peoples to cultivate the land was the justification for taking the territories from the Indigenous peoples.[8] Recognition was dependent upon a Eurocentric evaluation of the social and political development of Indigenous peoples and was dismissive of the Indigenous governmental structures that were in place.[9]

Theorists of natural law and political theory adopted this sixteenth century view as an attempt to reconcile natural law rights with the colonization of the Americas.[10] James Anaya explains that by the

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5. *See* BARTOLOMÉ DE LAS CASAS, HISTORY OF THE INDIES (Andrée Collard trans., Harper & Row 1971) (1875); FRANCISCO DE VITORIA, *On the American Indians*, *in* POLITICAL WRITINGS 233 (Anthony Pagden & Jeremy Lawrence eds., Cambridge University Press 1991) (1539). *Compare* HUGO GROTIUS, THE FREEDOM OF THE SEAS (James Brown Scott ed., Ralph Van Deman Magoffin trans., Oxford University Press 1916) (1608), *with* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE: INCLUDING THE LAW OF NATURE AND OF NATIONS (A.C. Campbell trans., M.W. Dunne 1901) (1738).

6. VITORIA, *supra* note 5, at 251.

7. *Id.*

8. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 31–38 (Richard H. Cox ed., H. Davidson 1982) (1698). This imposition of the West's vision of the "truth" on the non-Western world is the basis of Robert Williams' critique of the law as supporter of these assumptions. *See* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

9. For a summary of the theoretical approaches, see M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 11 (1926). Vitoria viewed the "Indians" of the new world as having "a certain method in their affairs" with "polities" that are "orderly arranged"—laws, economy and religion. VITORIA, *supra* note 5, at 127. Yet, they are not "proper laws," and they are not capable of governing themselves as a state. *Id.* at 161. Thus colonizers could assume authority for the Indian's own benefit. *Id.* Similarly, where they refused, this justified war and conquest. *Id.* at 156.

10. *See, e.g.*, THOMAS HOBBES, DE CIVE: THE ENGLISH VERSION (Howard Warrender ed., Clarendon Press, 1983) (1651); THOMAS HOBBES, LEVIATHAN (Edwin Curley ed., Hackett, 1994) (1668); SAMUEL VON PUFENDORF, 2 DE JURE NATURAE ET GENTIUM LIBRI OCTO (C.H. Oldfather trans., Oceania 1964) (1688); CHRISTIAN WOLFF, 2 JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM xxxii, xxxix (Joseph H. Drake trans., Oceania, New York 1964) (1764).

early nineteenth century, positivist international law began to reframe the law of nations as existing "between," rather than "above," states.[11] International law extended rights, responsibilities and protections to the community of states who recognized one another.

In the earliest understandings of the international law of nations, "discovery" carried with it rights against other European nations of exclusive trade, purchase of lands and the right of conquest.[12] The motivation of European powers in securing trading partners and allies was superseded by a new, more intrusive agenda. The primary focus of colonial expansion turned to the control of lands and resources.[13] The "discovering" states laid claim to all the lands of the colonized territory as a sole sovereign. For some theorists, the absence of a political force in the community of nations meant that Indigenous lands with no colonial presence could be legally occupied as *terra nullius*, i.e., viewed as vacant land.[14]

From the earliest of times, the rules of international relations and the acquisition of territory were domesticated into the British common law.[15] As international law assumed a more statist character, Indigenous peoples were less the subjects of international law and more the objects of domestic jurisdiction. M.F. Lindley, in his 1926 study, suggested that once colonization had become a *fait accompli*, international law recognized its results.[16] The implications of colonization became primarily a matter of domestic law. Nevertheless, British courts had always purported to recognize the rights of inhabitants of newly "acquired" territories where their traditions and values were similar to those of the British.[17] In

11. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 26 (2d ed. 2004) (citing LASSA OPPENHEIM, INTERNATIONAL LAW 383–84 (Ronald F. Roxburgh ed., 3d ed. 1920)).

12. *Id.* at 29.

13. Jane Smith, *Republicanism, Imperialism, and Sovereignty: A History of the Doctrine of Tribal Sovereignty*, 37 BUFFALO L. REV. 527, 535 (1988).

14. ANAYA, *supra* note 11, at 29.

15. *See* Campbell v. Hall, (1774) 98 Eng. Rep. 848, 895–96.

16. LINDLEY, *supra* note 9, at 45–46.

17. See, for example, Calvin's Case (1608), 77 Eng. Rep. 377, 398, in which the test had a distinctly religious aspect:

> [F]or if a King come to a Christian kingdom by conquest, seeing that he hath *vilce et nicis potestatem*, he may at his pleasure alter and change the laws of the kingdom: but until he doth make alteration of those laws the ancient laws of that kingdom remain.

contrast, the legitimacy of the Crown's assertion of sovereignty was justified if the territories could be characterized as a political and legal vacuum.[18] This reasoning led to the development of a "test" of civilization drawing on political and natural law theories that would determine the rights of peoples.

The classic pronouncement of the methods of acquiring new territories under British common law is found in Blackstone's *Commentaries on the Laws of England*.[19] Each of the methods had different implications:

> Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have either gained, by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations.[20]

Where a colony was established by force, through conquest or cession, in a territory whose inhabitants had a legal and political system in place, the doctrine suggests that the local law continued unless contrary to British concepts of morality and justice, or until it was altered by the Crown.[21] This was distinguished from the rules of settlement, by which the Crown could discover an uninhabited country and settle it with English subjects, and by which the laws of England as appropriate to the circumstances would be immediately transplanted.[22]

> But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature . . . .

Id.; *see also* WILLIAMS, *supra* note 8, at 199–200. *See generally* MICHAEL ASCH, HOME AND NATIVE LAND: ABORIGINAL RIGHTS AND THE CANADIAN CONSTITUTION 42 (1984).

18. *Campbell*, 98 Eng. Rep. at 898.

19. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 104 (Legal Classics Library 1983) (1823).

20. *Id.*

21. The basis of the conquest rule can be traced to the decision in *Campbell*, 98 Eng. Rep. at 895–96; *see also* Blankard v. Galdy, (1693) 90 Eng. Rep. 1089; Calvin's Case, (1608) 77 Eng. Rep. 377.

22. 1 BLACKSTONE, *supra* note 19, at 104–05.

Where lands were already inhabited, the doctrine of discovery did not envisage immediate acquisition of sovereignty unless ceded or conquered. However, a fourth method of acquisition of territories emerged from British colonial practice which turned on Blackstone's idea of cultivation and the test for social organization.[23] This latter category of acquisition by settlement simply did not recognize the occupation of territory by the original inhabitants.

The particular interpretation of what constituted "desert and uncultivated" did not necessarily coincide with Blackstone's own conception of the justification for acquiring title to lands. Indeed, Blackstone went so far as to question the role of the law in legitimizing the acts of state that wrested sovereignty and title from Indigenous peoples.[24] The common law approach to conquest and settlement relied on assumptions of superiority, whether religious or political, that characterized the political and natural law theories.[25] The following section examines how the courts incorporated these justifications in their "reasoning" to reassert a test of civilization by which the British superiority could be used to justify the denial of the rights and interests of the Indigenous peoples and of their sovereignty and independence.

II. CONQUEST AND ACTS OF STATE: THE UNITED STATES' APPROACH

Between 1823 and 1832, when natural law theory still held sway, the United States Supreme Court, under Chief Justice Marshall,

23. This method is epitomized by the Privy Council decision in *Cooper v. Stuart*, (1889) 14 App. Cas. 286, 291.

24. 2 BLACKSTONE, *supra* note 19, at 2. Blackstone's distinctions were primarily concerned with the implications of introducing the law of England to new territories, rather than of recognizing the rights of the Indigenous inhabitants. BLACKSTONE, *supra* note 19, at 7, outlined a concern for the treatment of Indigenous peoples:

> But how far the seising 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 reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

25. ANAYA, *supra* note 11, at 24.

handed down a series of decisions that formed the basis for the common law recognition of Aboriginal rights in the United States, Canada, and eventually Australia.[26] In *Johnson v. M'Intosh*,[27] the Court had its first opportunity to face squarely the issue of rights over Indian lands.[28] Confronted with a dispute between colonists over deeds to Indian lands, Chief Justice Marshall treated the loss of independence and control over lands as accomplished fact.[29]

While conceding that the "pretension of converting discovery of inhabited country" into a form of title was an "extravagant" one, Marshall abdicated judicial responsibility for the rights of peoples against the exercise of power by the state.[30] Phillip Frickey argued that in embracing colonialism, Chief Justice Marshall relied on two "starkly colonial visions" of cultural superiority and judicial inferiority.[31] For example, Marshall stated: "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."[32]

In *Johnson*, Marshall both recognized European arrogance and reinforced it, relying on a perception of the courts' institutional impotence.[33] While Marshall expressly avoided judgments about the

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26. *See* Williams v. Lee, 358 U.S. 217 (1958); R v. Sioui, [1990] 70 D.L.R. 427, 449; Mabo v. Queensland II (1992) 175 C.L.R. 1, 60.

27. Johnson v. M'Intosh, 21 U.S. 543 (1823).

28. One significant earlier case in which Chief Justice Marshall commented on the status of the lands past the Western frontier was *Fletcher v. Peck*, 10 U.S. 87 (1810). Marshall referred to Indian lands as "the vacant lands within the United States." *Id.* at 142. Williams described this case as the "preliminary ceremonies in the legal interment [sic] of the doctrine that American Indians possessed natural rights to the lands they had occupied since time immemorial." WILLIAMS, *supra* note 8, at 309.

29. *Johnson*, 21 U.S. at 591

30. *Id.*

31. Philip Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 388 (1993).

32. *Johnson*, 21 U.S. at 588; *see also id.* at 572, 589, 591–92. Chief Justice Marshall used the term "courts of the conqueror." *Id.* at 588; *see also* Hamar Foster, *Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases*, 21 MAN. L.J. 343, 355–56 (1992); Frickey, *supra* note 31, at 394–95; Brian Slattery, *Aboriginal Sovereignty and Imperial Claims*, 29 OSGOODE HALL L.J. 681, 685 (1991).

33. Chief Justice Marshall stressed the need to accept "the actual state of things," and engaged in a process of rationalizing the acts of the state in law. *Johnson*, 21 U.S. at 591. Williams argued that in *M'Intosh*, Chief Justice Marshall merely legitimated the outcome of United States military campaigns and commercial agreements, and "silently ignored" the rights

justness of colonization or the assertions of superiority, the decision "immunized" those questions from judicial review.[34] Robert Williams noted that "[t]he dominant themes of Marshall's denial of Indian natural-law rights in *Johnson* are clearly established in those early evasions of judicial accountability."[35] *Johnson* established the dichotomy between power and law that was to form the foundation of the judicial inaction that has become known as the "act of state" doctrine.

In *Johnson*, the doctrine of discovery was adopted into the domestic law of the United States, but was formulated on the narrowest construction. This gave the discovering nation the exclusive right to extinguish Indigenous peoples right of occupancy, and recognized no natural law based rights to sovereignty in the Indigenous peoples.[36]

> [T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired . . . [T]heir rights to complete sovereignty, as independent nations, were necessarily diminished, and 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.[37]

Later cases involving the Cherokee Nation elaborated on the "diminished" sovereignty alluded to in *Johnson*.[38] The *Cherokee*

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of the Indigenous peoples. WILLIAMS, *supra* note 8, at 308. However, Marshall displayed his own prejudices and falsities:

> [T]he 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.

Johnson, 21 U.S. at 590.

This sentiment reiterated Marshall's earlier observation that there was "some excuse, if not justification, [for colonization] in the character and habits of the people whose rights had been wrested from them." *Id.* at 589.

34. *Johnson*, 21 U.S. at 588; *see also* Frickey, *supra* note 31, at 388–89.
35. WILLIAMS, *supra* note 8, at 312.
36. *Johnson*, 21 U.S. at 573–74; *see also* WILLIAMS, *supra* note 8, at 313.
37. *Johnson*, 21 U.S. at 574.
38. Cherokee Nation v. Georgia, 30 U.S. 1 (1831); *see also Johnson*, 21 U.S. at 574.

cases, unlike *Johnson*, involved a claim by Indigenous peoples in which sovereignty was a central issue.[39] While dismissing the claim on a technical, jurisdictional question, Chief Justice Marshall constructed a model of Indian status that posited the Indigenous peoples not as foreign states, but certainly as sovereign entities within the Constitution of the United States.[40] Remarkably, Marshall accepted the Cherokee's arguments and underlying assumptions claiming their status as "nation," as well as the integrity of their relationship with the United States under treaty.[41] Marshall stated that the Cherokee, with other Indian nations, were "a distinct political society."[42]

This construction of Indian status was confirmed in *Worcester v. Georgia*[43] in 1832. Chief Justice Marshall concluded that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States."[44]

During this period, there was some dissent among Chief Justice Marshall's peers, who saw the Indian nations as foreign and independent.[45] Although Marshall's peers noted that tribes may have entered into a protection arrangement with the more powerful state, they considered this a frequent occurrence among independent nations.[46] However, the argument was defeated and the principle of equal sovereignty was replaced by one of "relative sovereignty," which established the hierarchy between Indigenous peoples and the colonizing state in the common law under the "dependent nation" idea.[47]

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39. *Cherokee Nation*, 30 U.S. 1.
40. *Id.* at 18.
41. *Id*. at 15.
42. *Id*. at 16.
43. Worcester v. Georgia, 31 U.S. 515, 515 (1832).
44. *Id*. at 557.
45. Fletcher v. Peck, 10 U.S. 87, 146 (1810) (Johnson, J., dissenting); *Cherokee Nation*, 30 U.S. at 59 (Thompson, J., dissenting).
46. *Id.*; *see also* Thomas Flanagan, *From Indian Title to Aboriginal Rights*, *in* LAW AND JUSTICE IN A NEW LAND: ESSAYS IN WESTERN CANADIAN LEGAL HISTORY 81, 87 (Louis A. Knafla ed., 1986); Patrick Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, 36 MCGILL L.J. 382 (1991).
47. 1 BLACKSTONE, *supra* note 19, at 105. Blackstone characterized the American

While less strident in its commitment to judicial impotence, *Worcester v. Georgia* reaffirmed the act of state doctrine: "[P]ower, 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 . . . ."[48]

Historical acts of aggression by the state were seen as merely part of the fabric of legal history.[49] Williams concluded:

> White society's exercise of power over Indian tribes received the sanction of the Rule of Law in *Johnson v. McIntosh* . . . [and] [w]hile the tasks of conquest and colonization had not yet been fully actualized on the entire American continent, the originary legal rules and principles of federal Indian law set down by Marshall in *Johnson v. McIntosh* and its discourse of conquest ensured that future acts of genocide would proceed on a rationalized, legal basis.[50]

By assuming the supremacy of the federal government, the doctrine legitimized the exercise of power to extinguish the rights of Indigenous peoples without consent and unrestricted by any natural or common law rights. Chief Justice Marshall's rejection of the natural law literature and his embrace of the state power were explicit. For example, in *Worcester v. Georgia,* Chief Justice Marshall stated that "natural law and abstract principles of justice must take a back seat to power and accomplished fact."[51]

In short, respect for the equality of peoples was disregarded in the face of absolute power. While Indigenous peoples continued to exercise sovereignty over their remaining lands and peoples, the law no longer recognized their independence. The creation of a hierarchy of sovereignty subordinated Indian nations and left Indigenous peoples without recourse against the state's exercise of power to dispossess them of their lands. The status of Indian Nations was

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plantations as having been obtained by conquest, by driving out the Indigenous inhabitants, or by treaty. *Id.* As such, "the common law of England . . . has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions." *Id.*

48. *Worcester*, 31 U.S. at 543.
49. Frickey, *supra* note 31, at 395.
50. WILLIAMS, *supra* note 8, at 317.
51. *Worcester*, 31 U.S. at 543.

domesticated by the act of state doctrine. The relationship between Indigenous peoples and the colonizing states became a matter solely for domestic law.

III. CHARACTERIZING AUSTRALIA AS A SETTLED COLONY

The actions of the colonial officials in Australia were inconsistent with the Admiralty's instructions to Lieutenant James Cook in 1768, which reflected the more accepted approach of building alliances, establishing trade, and securing settlements.[52] Colonization proceeded on the false assumption that the continent was sparsely populated.[53] As Henry Reynolds observed, the advantages of assuming the absence of people were so great that the legal doctrine simply continued to depict the colony as one acquired by occupation of *terra nullius.*[54]

The settlement thesis, which allowed the "discovery" of inhabited territories, was extended to deny rights under the law of the land as well as under international law. The fiction of *terra nullius* asserted that the discovery of uninhabited lands gave rise to rights of occupation in the sovereign, leading to a greater fiction in domestic law of the state as first occupier of all the territories claimed, articulated in the doctrine of absolute Crown ownership.[55] The interests of the emerging colonial state were served best by the complete denial of the rights of the Indigenous inhabitants of the "acquired territory." The fiction of *terra nullius* fulfilled the imperial

52. Garth Nettheim, *Mabo and Aboriginal Political Rights: The Potential for Inherent Rights and Aboriginal Self-Government*, *in* MABO AND NATIVE TITLE: ORIGINS AND INSTITUTIONAL IMPLICATIONS 46, 46 (Will Sanders ed., 1994).

53. Reynolds suggests that this may have been in part due to information provided by Joseph Banks that the environment was too hostile to sustain substantial populations. HENRY REYNOLDS, ABORIGINAL SOVEREIGNTY: REFLECTIONS ON RACE, STATE AND NATION ix–x, 17–21 (1996). However, with the arrival of the First Fleet, information to the contrary quickly came to light. *See* WATKIN TENCH, SYDNEY'S FIRST FOUR YEARS 51–52 (1961) (noting that the area around Sydney Harbour was "more populous than it was generally believed to be in Europe").

54. REYNOLDS, *supra* note 53, at x.

55. *See* David Ritter, *The "Rejection of Terra Nullius" in* Mabo*: A Critical Analysis*, 18 SYDNEY L. REV. 1, 5, 63 (1996).

imperative for control over resources, allowing the state to govern the use of land and resources to serve its own purposes.[56]

Such wholesale dispossession was not unique to Australian colonies. However, even the limited recognition of rights of the indigenous peoples, as in the Marshall decisions, was not adopted in Australia. Nineteenth century Australian courts were aware of the Marshall decisions.[57] Justice Willis of the Supreme Court of New South Wales followed similar reasoning as that of *Johnson v. M'Intosh* in describing the Aboriginal peoples of Australia as domestic dependent nations. In *R v. Bon Jon*,[58] Justice Willis conceived Indigenous peoples as "dependent allies" who were entitled to be left undisturbed in their possession, save for the right of the Crown to preemption.[59] Willis refused to continue the trial of an Aboriginal person for a breach of British criminal law.[60] Instead, he accepted evidence that the Indigenous people had a complete system of punishment among themselves that was appropriate for every sort of offense.[61] Further, Willis found that British law was not applicable to the Indigenous peoples, particularly in disputes among themselves.[62] Therefore, Willis considered that Indigenous peoples were not "unqualified subjects" of the Crown and the introduction of the common law to the colony was thought insufficient to extinguish Indigenous laws and jurisdiction.[63]

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56. Smith, *supra* note 13, at 541.

57. *See* R v. Jemmy (V.S. Ct.), *in* ARGUS, Sept. 7, 1860 (referring to the "laws of the Conqueror" but determining that "[t]he jurisdiction of the Court is [supreme] in fact, throughout the colony, and such regard to all persons in it").

58. R v. Bon Jon (N.S.W.S. Ct.), *in* PORT PHILLIP PATRIOT, Sept. 16, 1841.

59. That is, the right as against other European nations (and against individuals) to purchase lands from the Indigenous peoples. *Id.* This decision was a likely contributing factor to the dismissal of *Willis* by the New South Wales Supreme Court in 1843. *See* John Hookey, *Settlement and Sovereignty*, *in* ABORIGINES AND THE LAW 1, 2 (Peter Hanks & Brian Keon-Cohen eds., 1984).

60. R v. Bon Jon (N.S.W.S. Ct.), *in* PORT PHILLIP PATRIOT, Sept. 16, 1841.

61. *Id.*

62. *Id.; see also* Hookey, *supra* note 59, at 2–5 (reviewing the *Bon Jon* case); REYNOLDS, *supra* note 53, at 63–64, 69–71 (discussing a 1847 South Australian Grand Jury decision).

63. R v. Bon Jon (N.S.W.S. Ct.), *in* PORT PHILLIP PATRIOT, Sept. 16, 1841.

Justice Willis recognized that the imposition of an alien legal system on peoples who had no comprehension of it was simply discriminatory.[64] Willis stated:

> As a British subject he is entitled to be tried by his peers. Who are the peers of a black man? Are those of whose laws, customs, language, and religion he is totally ignorant his peers? He is tried in his native land by a new race to him, and by laws of which he knows nothing.[65]

However, an earlier case had drawn a distinction between the Indigenous peoples of Australia and those of North America. In *R v. Jack Congo Murrell*,[66] Justice Burton of the New South Wales Supreme Court argued:

> [A]lthough it be granted that the aboriginal natives of New Holland are entitled to be regarded by Civilized nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people among them to such a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own.[67]

Even in *Murrell*, the Court showed some understanding of the natural law traditions. The Court recognized the private rights of Indigenous peoples and considered their rights to be protected by the common law at least in theory, if not in practice.[68] This recognition

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64. *Id.*

65. Mary W. Daunton-Fear & Arie Frieberg, *"Gum-tree" Justice: Aborigines and the Courts, in* THE AUSTRALIAN CRIMINAL JUSTICE SYSTEM 45, 49 (Duncan Chappel & Paul Wilson eds., 2d ed. 1977) (quoting G.B. Vasey, *John Walpole Willis, The First Resident Judge of Port Phillip*, 1911 VICTORIAN HIST. MAG. 48); *see also* M'Hugh v. Robertson (1885) 11 V.L.R. 410, 431. The difficulties were admitted by the High Court of Australia in *Tuckier v. The King* (1934) 52 C.L.R. 335. Justice Starke noted: "He lived under the protection of the law in force in Australia, but had no conception of its standards. Yet by the law he must be tried. He understood little or nothing of the proceedings or of their consequences to him." *Id.* at 349.

66. R v. Jack Congo Murrell (N.S.W.S. Ct.), *in* SYDNEY HERALD, Feb. 8, 1836, *aff'd*, R v. Wedge (1976) 1 N.S.W.L.R. 581.

67. *Id.*

68. *Id.*

distinguishes between the assertion of sole sovereignty and the denial of rights; that is, an assertion of sovereignty does not necessarily result in loss of title to lands and resources.

In *MacDonald v. Levy*,[69] Justice Burton denied that Indigenous peoples had laws at all.[70] Instead, the inhabitants of the colony were described as "the wandering tribes of its natives, living without certain habitation and without laws."[71] The "scale of organization" test had become a useful tool for denying Indigenous peoples' sovereignty in international law. This particular interpretation of the test allowed the courts to ignore the fact of a self-governing and sovereign people with their own laws. The Australian legal system can, therefore, be credited with an ignominious originality:

> [T]he distinctive and unenviable contribution of Australian jurisprudence to the history of relations between Europeans and the Indigenous people of the non-European world . . . was not to provide justification for conquest or cession of land or assumption of sovereignty—others had done that before Australia was settled—but to deny the right, even the fact, of possession to people who had lived on their land for 40,000 years.[72]

Regardless of any natural law rights to retain even private rights or possessions, prescriptions for peaceful settlement would not be observed in practice as the battles for land were already being fought and lost at the hands of the colonists.[73] The settlers and squatters were aware of the claims of Indigenous peoples to particular tracts of lands, but they had the intellectual affirmation of superiority and the sanction of the state. In effect, the absence of an Indigenous legal system became an irrebuttable presumption.

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69. MacDonald v. Levy (N.S.W.S. Ct.), *in* SYDNEY HERALD, Mar. 11, 1833.

70. *Id.*

71. *Id.* The same reasoning led the Privy Council of England to conclude that "there was no land law" existing in the colony at the time of colonization in *Cooper v. Stuart*, (1889) 14 App. Cas. 286, 292 (P.C.).

72. HENRY REYNOLDS, THE LAW OF THE LAND 3–4 (2d ed. 1992).

73. *Id.* at 21–22 (claiming that "[d]espite coming under the protection of the common law, over 20,000 Aborigines were killed in the course of Australian settlement . . . and neither lawyers nor judges appear to have done much to bring the killing to an end").

The Judicial Committee of the Privy Council gave credence to this view in 1889 in *Cooper v. Stuart*,[74] on appeal from the Supreme Court of New South Wales.[75] The Court distinguished New South Wales as "a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law."[76] The notion that Indigenous peoples possessed any rights after the assertion of sovereignty was flatly rejected in *Cooper*.[77]

The fundamental contradiction between law and fact created a dilemma for future courts in which evidence was actually presented regarding indigenous peoples' laws and political systems. In 1971, a single judge of the Supreme Court of the Northern Territory struggled with the incongruent fact and legal fiction. *Milirrpum v. Nabalco*[78] was the first case in which Indigenous peoples brought evidence of their continuing ownership of traditional lands, seeking a declaration of their title.[79]

In that case, the Yolgnu people brought an action against the Nabalco Company and the Commonwealth for recognition of their right to control access to lands on the Gove Peninsula over which mining leases had been granted.[80] For Justice Blackburn, the evidence revealed:

> [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

74. *Cooper*, 14 App. Cas. 286.

75. *Id*.

76. *Id*. at 291–92.

77. This view was reaffirmed by the Privy Council of England in *Re Southern Rhodesia*, [1919] A.C. 211, 233–34 (P.C.). In 1976, Justice Rath of the New South Wales Supreme Court stated that "[u]pon Settlement, there was, in the colony, only one sovereign, namely the King of England, and only one law, namely the English law." R v. Wedge (1976) 1 N.S.W.L.R. 581, 581. Justice Rath followed the decision in *R v. Jack Congo Murrell* (N.S.W.S. Ct.), *in* SYDNEY HERALD, Feb. 8, 1836.

78. Milirrpum v. Nabalco (1971) 17 F.L.R. 141.

79. *Id.*

80. The Yolgnu unsuccessfully petitioned the Federal Government in 1963. The "bark petition" hangs in the Parliament House in Canberra.

> government of laws, and not of men", it is that shown in the evidence before me.[81]

Despite this admission, Justice Blackburn felt compelled by the decision in *Cooper v. Stuart* to disregard the facts and arguments before the court.[82] The rationalization for the rejection of the claim turned on the idea of property.[83] His Honour concluded that there was so little resemblance between "property" in our understanding and the claims of the plaintiffs, that they could not be argued to have a proprietary interest in the soil.[84]

Justice Blackburn perpetuated the fictional claim to title by relegating the facts into irrelevance, reasoning that the colony's characterization was a matter of law, not of fact.[85] Blackburn followed the Privy Council decision and concluded that a common law doctrine of communal title did not form and "never ha[d] formed, part of the law of any part of Australia."[86]

This discussion illustrates the responsibility that the courts bear for the current status of Aboriginal law in Australian society. The choice was available to the courts to acknowledge Aboriginal law to some degree. In the United States, the Marshall court had established the "domestic dependent nation" doctrine under which the Indigenous peoples of North America were regarded as sovereign, although within a hierarchy. Thus, their laws continued, subject to the imposition of a level of jurisdiction in the federal government.[87] While this approach should not be considered a model, it places the Australian courts' approach in a contemporary context.

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81. *Milirrpum*, 17 F.L.R. at 267. Further, Justice Blackburn stated that "the natives had established a subtle and elaborate system of social rules and customs which was highly adapted to the country in which the people lived and provided a stable order of society remarkably free from the vagaries of personal whim or influence." *Id.* at 143; *see also id.* at 223, 250.

82. *Id.* at 245.

83. *Id.* at 198.

84. *Id.* at 272–73.

85. *Id.* at 244.

86. *Id.* at 245.

87. This was the case, for example, in India and even closer to home in Papua New Guinea. *See* Admin. of Papua v. Daera Guba (1973) 130 C.L.R. 353, 397. The decision in *Daera Guba* is particularly interesting given Barwick's criticisms of the High Court's *Mabo* decision.

The Australian courts were aware of the Marshall decisions, as is evidenced by comments of Justices Willis and Burton in the 1830s.[88] However, the courts chose to distinguish the cases in Australia with reference to the "level of social organization test."[89] The approach by the United States Supreme Court was also distinguished on the basis of the settlement and conquest doctrines.[90] In *Milirrpum*, the classification of the colony as settled was considered sufficient to deny a sphere of operation for Aboriginal law or a right to possession of their lands even as a private interest.[91]

Important implications of the settlement fiction reverberate through current doctrines that impact the relationships between Indigenous peoples and the institutions of the state. Justice Kriewaldt thought it would be a "serious reflection upon our capacity to assimilate the aboriginal part of our community" if Indigenous peoples were not punished for breaches of British law.[92] For Justice Chamberlain in *R v. Skinny Jack*,[93] assimilation was the goal: "'[T]heir first lesson should be to obey our laws.'"[94]

The fictions of *terra nullius*, settlement and absolute Crown ownership that denied the continuing rights of Indigenous peoples to land were a direct result of the courts' deference to the power of the state and the assertion of sole sovereignty. While the law maintained the appearance of consistency through this hall of mirrors, the gross abuse of rights perpetrated under its protection remain the "darkest aspect of the history of this nation."[95] Justice Blackburn's decision in *Milirrpum v. Nabalco* remains perhaps the best illustration of the fracture between law and fact that has characterized much of Australia's legal history. The decision prompted the government to

88. *See* Hookey, *supra* note 59, at 4-5 (discussing *R v. Bon Jon* (N.S.W.S. Ct.), *in* PORT PHILLIP PATRIOT, Sept. 16, 1841 and *R v. Jack Congo Murrell* (N.S.W.S. Ct.), *in* SYDNEY HERALD, Feb. 8, 1836).

89. Justice Willis in *R. v. Bon Jon*, (N.S.W.S. Ct.), *in* PORT PHILLIP PATRIOT, Sept. 20, 1841, is a notable exception.

90. Cooper v. Stuart, (1889) 14 App. Cas. 286, 291 (P.C.).

91. *Milirrpum*, 17 F.L.R. at 244.

92. M. C. Kriewaldt, *The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia*, 5 W. AUST. L. REV. 1, 24 (1960).

93. R v. Skinny Jack (unreported decision, July 13, 1964), *cited in* Daunton-Fear & Frieberg, *supra* note 65, at 60.

94. *Id.*

95. Mabo v. Queensland II (1992) 175 C.L.R. 1, 109.

conduct a commission of inquiry into Aboriginal land rights.[96] The government accepted evidence of clear and ongoing occupation of the lands under Aboriginal law and sought to establish a statutory scheme to hear claims for return of lands and to vest inalienable title.[97] But the legislation only applied in the Northern Territory.[98]

IV. THE *MABO* DECISION: "OVERTURNING TERRA NULLIUS"?

With the authority of the Privy Council, the law seemed settled by the 1850s, particularly in light of *Milirrpum* a century later.[99] The decision in *Cooper v. Stuart* clearly asserted the settled status of the colony of New South Wales and the implication of settlement for the introduction of British law. However, the decision was strongly criticized by commentators and overseas courts,[100] and in the years following *Milirrpum* the High Court hinted at the possibility that it would be willing to hear an argument on the issue.

In *Coe v. Commonwealth*,[101] the High Court foreshadowed its willingness to hear argument on the implications of the Crown's assertion of sovereignty, despite rejecting the case on its pleadings.[102] In addition, various judges questioned the correctness of the findings in *Cooper*.[103] Justices Jacobs and Murphy both agreed that argument

96. ABORIGINAL LAND RIGHTS COMM'N, FIRST REPORT 1–3 (1973) (on file with author); *see also* ABORIGINAL LAND RIGHTS COMM'N, PARLIAMENT OF THE COMMONWEALTH OF AUSTL., PAPER NO. 69, SECOND REPORT (1975) (on file with author).

97. *Id.*

98. The resulting legislation is the Aboriginal Land Rights (Northern Territory) Act, 1976.

99. Until the passage of the Australia Acts, 1986, the Privy Council of England was the highest court of appeal for Australian cases.

100. M.C. Blumm & Justin Malbon, *Aboriginal Title, Common Law and Federalism: A Different Perspective*, *in* THE EMERGENCE OF AUSTRALIA LAW (M.P. Ellinghaus et al. eds., 1989); John Hookey, *The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?*, 5 FED. L. REV. 85 (1972); Kent McNeil, *A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?*, 16 MONASH U. L. REV. 91 (1990). The decision was criticized by the Canadian Supreme Court in *Calder v. Attorney Gen. of B.C.*, [1973] 34 D.L.R. 3d 145, 218. In *Milirrpum*, Justice Blackburn relied on the decision of the lower court in *Calder*, [1971] 13 D.L.R. 3d 14, to assert that no such principle existed in Canadian law. Milirrpum v. Nabalco (1971) 17 F.L.R. 141, 223.

101. Coe v. Commonwealth (1979) 53 A.L.J.R. 403, 408, 411–12.

102. *Id.*

103. *Id.* at 411–12; *see also* Justice Gibbs' comments, *id.* at 408, and Justice Murphy's comment that "[t]he 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," *id.* at 412.

should be heard on the issue of whether Australia was a conquered territory.[104] Justice Murphy argued there was sufficient material to support the argument,[105] and Justice Jacobs noted that no decision of an Australian court had confirmed the categorization.[106]

In *Gerhardy v. Brown*,[107] Justice Deane expressed grave reservations about the law as it stood:

> [T]he common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall C.J., in *Johnson v. McIntosh*, accepted that, subject to the assertion of ultimate dominion . . . by the State, the "original inhabitants" should be recognised as having "a legal as well as just claim" to retain the occupancy of their traditional lands.[108]

By this time, proceedings were under way in the most important case in relation to Aboriginal land rights in Australia.

In 1981, Eddie Koiki Mabo and four other plaintiffs from Murray Island in the Torres Strait claimed title to their lands under a system of Meriam land law, including Malo's law.[109] In June 1992, a majority of six judges of the High Court in *Mabo v. Queensland* agreed that traditional Indigenous titles to land in the Murray Islands had continued after the colonization of the continent.[110] The High Court found that the common law recognized and protected the

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104. *Id.*

105. *Id.*

106. *Id.* at 411. Justice Jacobs stated that "while the view has generally been taken that Australian colonies were settled colonies . . . there is no actual decision of this Court or of the Privy Council to that effect." *Id.* Compare Justice Gibbs' position with that of Justice Aicken, who admitted that this was an arguable question if properly raised. *Id.* at 408.

107. Gerhardy v. Brown (1985) 159 C.L.R. 70.

108. *See also* N. Land Council v. Commonwealth II (1987) 61 A.L.J.R. 616.

109. The five original claimants were Eddie Koiki Mabo, Sam Passi, Reverend Dave Passi, James Rice, and Celuia Salee. For a version of events leading to the beginning of the case, see NONIE SHARP, NO ORDINARY JUDGMENT 22–30 (1996). Sharp describes Malo's law as the set of principles or rules, identified by the witnesses, that combine religious and secular law, joining together the eight totemic clans of the Meriam. *Id.* at xx. Malo's law determines rights to land and inheritance. *Id.* at 7.

110. Mabo v. Queensland II (1992) 175 C.L.R. 1. Eddie Koiki Mabo died six months before the High Court handed down its decision. The personal cost of his struggle for land rights is documented in his diaries and papers, which are held in the National Library of Australia.

traditional Indigenous titles to land across the continent.[111] The settled status of the colonies was not contested, but the Court was prepared to review the implications of "settlement" for the recognition of Indigenous law and rights.[112] The Court dismissed the earlier doctrine, which denied the rights of Indigenous peoples based on a supposed scale of social organization, as unjust and discriminatory.[113] The theory was criticized as "false in fact and unacceptable in our society."[114] In recognizing that Indigenous peoples' rights to land had survived colonization, the Court overturned jurisprudence that held Australia as a land without law prior to the arrival of the colonizers.

Interestingly, throughout the judgment the High Court relied on positive and normative international law and shared colonial legal jurisprudence regarding the rights of Indigenous peoples. The High Court based the recognition of native title of Indigenous land law on the concepts of "justice and human rights (especially equality before the law)."[115] Justice Brennan concluded:

> The fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country. . . . Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the [I]ndigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.[116]

The Court applied a combination of positive international law, decisions of International Courts, and common law practices of other settled states. The Court paid particular attention to decisions of the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria*,[117] as

111. *Id*. at 54–57, 82, 182.
112. *Id.* at 57, 82–83, 183–84.
113. Justice Brennan stated "that 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." *Id.* at 42.
114. *Id.* at 40; *see also id.* at 182, 187.
115. *Id.* at 30, 58.
116. *Id.* at 42.
117. Amodu Tijani v. Sec'y, S. Nig., [1921] 2 A.C. 399 (P.C.).

well as to common law jurisprudence from the British colonies of New Zealand, Canada and the United States.[118]

Justice Brennan affirmed the view of the Privy Council in *Amodu Tijani* "that a mere change in sovereignty does not extinguish native title to land."[119] In this regard, the Court sought to remove the distinction between Indigenous peoples of a settled colony and those of a conquered or ceded colony for the purpose of recognizing rights and interests in land.[120]

To counter criticisms of unwarranted judicial activism, commentators argued that the *Mabo* decision was merely a correction of local laws to come into line with the common law of the rest of the world.[121] Sir Anthony Mason, Chief Justice of the Court at the time, argued that rather than representing an "adventure" on the part of the Court, the decision merely reflected a view that had not yet been accepted by Australia, but which had been accepted "in the great common law jurisdictions of the world and the international Court."[122]

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118. *Mabo*, 175 C.L.R. at 43 (referring to the International Convention on Civil and Political Rights and the Optional Protocol, which, while not part of Australian law, are an important influence on its development). In relation to international court decisions, particular reliance was placed on the decision of the International Court of Justice in Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 39. *See Mabo*, 175 C.L.R. at 40–41. Justice Brennan and Justices Deane and Gaudron discussed the Privy Council decision in *Amodu Tijani*, 2 A.C. 399. *Mabo*, 175 C.L.R. at 44–46, 71–72. Emphasis was placed on decisions of overseas courts in *R v. Symonds*, [1847] N.Z.P.C.C. 387 (P.C.), and *Te Weehi v. Reg'l Fisheries Officer*, [1986] 1 N.Z.L.R. 682 (P.C.), from New Zealand; *Calder v. Attorney Gen. of B.C.*, [1973] S.C.R. 313, *Hamlet of Baker Lake v. Minister, Indian Affairs and N. Dev.*, [1979] 107 D.L.R. 513, and *R v. Sparrow*, [1990] 70 D.L.R. 385, from Canada; and *Johnson v. M'Intosh*, 21 U.S. 543 (1823), and *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1914), in the United States.

119. *Mabo*, 175 C.L.R. at 56–57 (referring to *Amodu Tijani*, 2 A.C. at 407); *see also* Adeyinka Oyekan v. Musediku Adele, (1957) 1 W.L.R. 876, 880 (stating that "the courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected").

120. In *Mabo*, 175 C.L.R. at 57, Justice Brennan relied on *Amodu Tijani*, 2 A.C. at 407. For a discussion of the distinction between the categories for the acquisition of territories by states under the law of nations and under the common law, see Ritter, *supra* note 55.

121. *See* Garth Nettheim, *Judicial Revolution or Cautious Correction?* Mabo v. Queensland, 16 U. N.S.W. L.J. 1, 2 (1993). The title of this paper was a direct challenge to an early collection of papers by the University of Queensland Law Journal entitled *MABO*: A JUDICIAL REVOLUTION: THE ABORIGINAL LAND RIGHTS DECISION AND ITS IMPACT ON AUSTRALIAN LAW (M.A. Stephenson & Suri Ratnapala eds., 1993).

122. Anthony Mason, *Putting* Mabo *in Perspective*, 28 AUSTL. LAW. 23 (1993).

The notion of a universal common law or customary international law has some currency. This section looks at how the *Mabo* case and the principles of native title have been applied in former colonies and cited with approval in jurisdictions with existing forms of aboriginal title. The relationship to developing human rights and the interpretation of positive instruments has underpinned successful prosecution of rights in Asia, Southern Africa and South America.

In 2002, the High Court of Malaysia recognized the land interests of the Orang Asli Aboriginal peoples in *Sagong Bin Tasi v. Government of Malaysia*.[123] The decision concerned a claim by the Temuan tribe of Kuala Langat who had been forcibly removed from their territories in order to construct a highway.[124] The Court overturned earlier jurisprudence, which recognized only usufructuary rights.[125] In recognizing the rights of the Adong Asli in their traditional territories, Justice Mohd Noor Ahmed agreed with Justice Brennan in *Mabo* and stated:

> 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 organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[126]

Justice Mohd Noor Ahmed concluded: "Therefore, in keeping with the worldwide recognition now being given to aboriginal rights, I conclude that the proprietary interest of the orang asli in their customary and ancestral lands is an interest in and to the land."[127] The decision was appealed by the government of Malaysia. The Court of Appeal upheld the decision of the trial judge.[128]

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123. Sagong Bin Tasi v. Malaysia, [2002] M.L.J. 591. *See generally* Jerald Gomez, The Malaysian Experience, Paper Presented to the Native Title Conference 2002: Outcomes and Possibilities, Geraldton, Western Australia (Sept. 3–5, 2002) (unpublished manuscript, on file with author).

124. *Sagong Bin Tasi*, [2002] M.L.J. at 591.

125. *Id.* at 615; *see also* Adong bin Kuwan v. Kerajaan Negeri Selangor, [1997] M.L.J. 418.

126. *Sagong Bin Tasi*, [2002] M.L.J. at 615 (citing *Mabo*, 175 C.L.R. at 42).

127. *Id.*

128. Malaysia v. Sagong Bin Tasi (unreported judgment, no. 8-02 419-2002, Jun. 14,

Similarly, in *Alexkor Limited and the Government of South Africa v. The Richtersveld Community*,[129] the Constitutional Court of South Africa confirmed the decision of the lower court that the Richtersveld community held ownership rights in their territories under indigenous law (or customary law) that survived the annexation of those territories.[130] The Court held that grants of interests in the land to others was racially discriminatory, and therefore open to a claim for restitution under the Restitution of Land Rights Act of 1994.[131] The lower court had relied extensively on comparative common law of Australia, Canada and the Privy Council.[132] While distinguishing the constitutional position of South Africa, the Constitutional Court acknowledged the relevance of overseas comparative law and accepted the lower court's findings.[133] However, the Court took the further step of finding that as a result of the recognition of customary law in the Constitution, Indigenous law forms part of the law of South Africa and should not be viewed through the lens of the common law.[134]

In his second edition of *Indigenous Peoples in International Law*, James Anaya traced the re-emergences of customary international law in relation to the treatment of Indigenous peoples.[135] He suggested that "customary international norms take shape around a certain consensus of what counts as legitimate in relation to Indigenous peoples," while the specific contours are still evolving.[136] These customary norms are reinforced by conforming domestic law and practice, including judicial action in cases such as *Mabo*.[137]

2005).

129. *Alexkor Ltd. v. Richtersveld Cmty.* 2003 Case CCT 19/03 (unreported judgment, Oct. 14, 2003) ¶ 84, at 41 (S. Afr.), *available at* http://www.constitutionalcourt.org.za/Archimages/758.PDF.

130. *Id.* ¶ 103, at 50-51.

131. *Id.*

132. *See Richtersveld Cmty. v. Alexkor Ltd.* 2003 (6) BCLR 583 (SCA) (S. Afr.).

133. *Alexkor Ltd.*, Case CCT 19/03 ¶ 84, at 41, *available at* http://www.constitutionalcourt.org.za/Archimages/758.PDF.

134. *Id.* ¶ 51, at 25. The decision in *Alexkor* is cited with approval by the Malaysian Court of Appeal in *Malaysia v. Sagong Bin Tasi* (unreported judgment, no. 8-02 419-2002, Jun. 14, 2005).

135. ANAYA, *supra* note 11, at 61–72.

136. *Id.* at 72.

137. *Id.* at 72, 199.

The use of these developing customary norms to inform the interpretation of multilateral human rights instruments and domestic constitutions was adopted in *Awas Tingni v. Nicaragua*.[138] In upholding the claim of the Awas Tingni to their proprietary rights in their traditional territories, the Inter-American Court of Human Rights pointed to the "evolutionary interpretation of international instruments for the protection of human rights."[139] The Court used this principle to interpret the right to property under Article 21 of the American Convention on Human Rights 1969 as extending to Indigenous communities.[140] The Court observed:

> Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[141]

It continued:

> Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the

138. The Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001). In that case, the people of Awas Tingni brought an action before the Inter-American Court of Human Rights to protect their territories from the Nicaraguan government's grant of logging concessions and sought recognition of their proprietary rights in their territories. *Id.* The people of Awas Tingni sought a declaration that the State must establish a process for the demarcation of Indigenous property rights, the cessation of grants over natural resources until community land tenure had been resolved, and compensation for damages suffered by the Community. *Id.* at 2–4. *See generally* S. James Anaya & Claudio Grossman, *The Case of* Awas Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1 (2002).

139. *Awas Tingni*, 2001 Inter-Am. Ct. H.R. ¶ 148, at 79.

140. *Id.*

141. *Id.* ¶ 149, at 79.

> land to obtain official recognition of that property, and for consequent registration.[142]

Anaya noted that the *Mabo* decision, while exemplifying the use of international standards in the application of domestic rules, bows to political considerations and judicial incompetence.[143] Anaya pointed to the doctrine of extinguishment, established in *Mabo*, as falling short of the aspirations of Indigenous peoples and contemporary international norms.[144]

Drawing on the jurisprudence of *Mabo*, Chief Justice Lamer of the Supreme Court of Canada spoke of aboriginal title as a reconciliation of prior occupation by Indigenous peoples with the assertion of Crown sovereignty.[145] As such, Lamer suggested that courts must take into account both perspectives and accord due weight to Indigenous perspectives.[146] But the fundamental compromise of Indigenous rights maintains its place at the center of the doctrine.

The High Court in *Fejo v. Northern Territory of Australia*[147] rebuffed the perceived over-reliance on overseas precedents. All of the judgments in this case argued that decisions in other common law jurisdictions could offer little guidance to the High Court because the legal, political and historical considerations were so markedly different.[148] For Justice Kirby, the belated recognition of native title in Australia was seen as a significant factor which negated the value of overseas authority.[149] Again, this approach is disappointing in that it suggests that our own political and legal history provides an excuse for a limited response to the claims of Indigenous peoples.

Absent this reference to overseas jurisprudence, the Australian judiciary has developed the doctrine of native title in ways that have limited its effectiveness for the recognition of Indigenous interests in their territories. The aspect of the decision that is often lauded—the acknowledgement of the role of Indigenous law and custom in

142. *Id.* ¶ 151, at 80.
143. ANAYA, *supra* note 11, at 197.
144. *Id.* at 198–99.
145. Delgamuukw v. British Columbia, [1997] S.C.R. 1010.
146. *Id.* ¶¶ 81–82; R v. Van der Peet, [1996] S.C.R. 507, ¶¶ 42, 49–50.
147. Fejo v. N. Terr. of Austl. (1998) 156 A.L.R. 721, 740.
148. *Id.*
149. *Id.* at 756, 760.

defining the source and the content of the title—has become a significant concern in its application to the standards of proof.

The following sections address in some detail the way in which the Australian courts have narrowed the legal scope of native title through the nature of the proof required and the extent of extinguishment. This examination reveals the fundamental contradictions that the compromise of Indigenous rights has caused for Australian jurisprudence.

V. THE SOURCE OF NATIVE TITLE RIGHTS AND INTERESTS: *YORTA YORTA* AND THE NOTION OF INDIGENOUS "SOCIETY"

The High Court's decision in *Mabo* determined that Indigenous peoples in Australia may hold rights under their own laws and customs and that those rights, in relation to land at least, should be accommodated within the Australian legal system. The device used to provide recognition of those rights is now known as native title: "[I]nterests and rights of Indigenous inhabitants in law, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the [I]ndigenous inhabitants."[150]

The Court immediately drew a distinction between the source of the rights asserted and the source of the protection being provided: "Native title, though recognized by the common law, is not an institution of the common law . . . ."[151] Instead:

> 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.[152]

150. Mabo v. Queensland II (1992) 175 C.L.R. 1, 57. The term "native title" now used in Australia was adopted by Justice Brennan (and later incorporated into the Native Title Act, 1993) from *Amodu Tijani v. Sec'y, S. Nig.*, [1921] 2 A.C. 399 (P.C.).

151. *Mabo*, 175 C.L.R. at 59.

152. *Id*. at 58. Justices Deane and Gaudron similarly observed that "the content . . . will of course, vary according to the extent of the pre-existing interest of the relevant individual, group or community." *Id.* at 88.

The title was described as *sui generis*, or unique, because it reflected the rights and entitlements of Indigenous peoples under their own laws.[153] To characterize native title in this way was an explicit acknowledgment that native title should not be understood by reference to common law property rights.

In *Western Australia v. Ward*,[154] the High Court held that the Native Title Act of 1993 ("NTA"), not the common law, must be the starting point of any investigation of native title.[155] The High Court has since reiterated that it is the NTA that regulates the determination, protection and extinguishment of native title where an application for a determination under the NTA is lodged.[156] Thus, section 223 of the NTA determines the nature of the inquiry. Section 223 defines native title in similar terms as those stated by the High Court in *Mabo*. Section 223 states:

> (1) [T]he expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

153. The preamble to the Native Title Act states that "the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands." Native Title Act, 1993, Preamble. The primary object of the Act is stated in section 3(1) as "to provide for the recognition and protection of native title." *Id.* § 3(1).

154. W. Australia v. Ward (2002) 191 A.L.R. 1.

155. *Id.* at 16.

156. Yorta Yorta Aboriginal Cmty. v. Victoria (2002) 194 A.L.R. 538, 549. Indigenous peoples are not required to seek a formal determination of native title under the Act. They may instead rely on the existence of their title under the common law. However, most have chosen to pursue a determination under the Native Title Act because of the procedural notification and negotiation rights available to registered applicants and because of the perception of actively asserting their rights and their title. Registered applicants may also enter into binding agreements that will stand regardless of the eventual outcome of the determination process.

> (c) the rights and interests are recognized [sic] by the common law of Australia.[157]

The High Court has determined that this section requires two separate inquiries.[158] First, the native group must identify traditional laws and customs and translate those laws and customs into protectable rights and interests.[159] The Court has acknowledged the difficulty of this translation, but has insisted that it is required by the NTA.[160]

Second, the evidence must demonstrate the connection to land through those laws and customs.[161] The High Court has confirmed that "connection" in section 223(1)(b) does not require a physical connection.[162] Moreover, the inquiry is not directed to how Indigenous peoples use or occupy the land.[163] Therefore, absence of recent evidence does not lead to the conclusion that there is no relevant connection.[164]

The standards of proof outlined in *Ward* were further developed by the High Court shortly thereafter in *Members of the Yorta Yorta Aboriginal Community v. Victoria*.[165] The appeal was taken from one of the most controversial native title determinations to date. At trial, Justice Olney denied the claim by the Yorta Yorta people based on the conclusion that "the tide of history" had washed away any real acknowledgement of the traditional laws and customs that were important to the original inhabitant at the time of settlement.[166]

Despite petitions to the Crown for the protection of their lands, Justice Olney considered several factors affecting the Yorta Yorta when making his decision. First, Olney considered the forced settlement on missions within Yorta Yorta's traditional territories.[167]

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157. Native Title Act, 1993, § 223(1); *see also Mabo*, 175 C.L.R. at 58–59, 69.
158. *W. Australia*, 191 A.L.R. ¶ 18, at 17, applied by the Full Federal Court in *De Rose v. S. Australia* [2002] F.C.A. 1342, ¶ 160 (Nov. 1, 2002).
159. *W. Australia*, 191 A.L.R. ¶ 18, at 17.
160. *Id.* ¶ 14, at 15.
161. *Id.* ¶ 18, at 17.
162. *Id.* ¶ 64, at 32.
163. *Id.*
164. *Id.*
165. Yorta Yorta Aboriginal Cmty. v. Victoria [1998] F.C.A. 1606 (Dec. 18, 1998).
166. *Id.*
167. *Id.* ¶¶ 36–49.

Second, Olney examined the suppression of language and old forms of cultural expression.[168] Finally, Olney considered the taking up of paid employment to admit a "settling down to more orderly habits of industry."[169] From this evidence, Olney determined that by 1881, a mere forty years after settlement of the area, the Yorta Yorta had lost their culture and their status as a "traditional society."[170]

The High Court confirmed that the rights and interests protected by native title are recognized by Australian law; however, the Court concluded that they have their source in the law of the Indigenous society.[171] The High Court expressed this by establishing that the laws and customs relied upon are part of a normative system, based on a set of rules with "normative content."[172] In legal terms, this means that they must be more than merely "observable patterns of behaviour."[173]

However, giving primacy to the NTA, the majority of the Court suggested that the construction of section 223 requires a different conception of tradition than would be suggested by the ordinary meaning of the word.[174] While the majority agreed that "tradition[]" means the transmission of law or custom from generation to generation, usually by word of mouth and common practice, they argued that in the context of the NTA, more was required.[175]

First, the Court suggested that the NTA conveys an understanding of the age of the traditions; that is, the source of the rights and interests must be found in normative rules that existed prior to the assertion of sovereignty by the Crown.[176] Second, the Court suggested that the present tense language of the provisions requires that the normative system has had a continuous existence and vitality

168. *Id.* ¶ 118.

169. *Id.* ¶¶ 119–20 (referring to the 1881 Petition to the Governor General of New South Wales signed by forty-two residents of Maloga Mission who requested that lands be reserved for them so that they could "support [them]selves by [their] own industry;" rather than as evidence of the ongoing struggle for the return of lands, as it was urged by the applicants, it was adjudged evidence of abandonment of laws and customs).

170. *Id.* ¶ 129.

171. Yorta Yorta Cmty. v. Victoria (2002) 194 A.L.R. 538, ¶ 33, at 549.

172. *Id.* ¶ 38, at 550.

173. *Id.* ¶ 42, at 551.

174. *Id.* ¶¶ 46–47, at 552–53.

175. *Id.*

176. *Id.*

since sovereignty.[177] The continued existence of this system, it was argued, depends on its maintenance and observance by the group who has bound itself to it.[178] In this sense, the Court suggested, the maintenance of the normative system defines the society.[179] The Court was careful not to require a continuous tracing of activities or rights and interests to pre-contact times; instead, it is the "body of law" that must have continued.[180] The content of that body of law may undergo evolution and development, but it must not suffer substantial interruption.[181]

The Court stated quite frankly that the "difficulty of the forensic task which may confront claimants does not alter the requirements of the statutory provision."[182] It accepted that claimants may invite the Court to infer from the evidence that the content of the traditional laws and customs of earlier times is rooted in the pre-sovereignty normative system.[183] However, the Court noted that the more restricted evidentiary rules introduced by the Native Title Amendment Act in 1998 may make such inferences more difficult than under the previous provisions.[184]

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177. *Id.* ¶ 47, at 553. The High Court's reasoning in *W. Australia v. Ward* (2002) 191 A.L.R. 1, 32, suggested that abandonment is not a form of common law extinguishment outside of the Native Title Act. That is, native title can not be extinguished contrary to the Act. Abandonment is not a basis for extinguishment contemplated in the Act and cannot be introduced through reference to the definition of native title in section 223, which requires that native title be "recognised by the common law." Native Title Act, 1993, § 223(1)(c). This was confirmed in *Yorta Yorta*, 194 A.L.R. ¶ 90, at 563.

178. *Yorta Yorta*, 194 A.L.R. ¶ 50, at 554.

179. *Id.* ¶¶ 47–48, at 553.

180. *Id.* ¶ 50, at 554.

181. From the *Mabo* case and since, the High Court has firmly stated that it does not expect that the laws and customs that sustain native title will be frozen in time or reflect some arcane notion of being "traditional" as reflecting pre-contact activities. It was accepted that native title rights and interests are regulated by law and custom internal to the group and that such interests change and evolve as the society changes. Mabo v. Queensland II (1992) 175 C.L.R. 1, 110, 192. In *Yorta Yorta*, the High Court confirmed that some change to or adaptation of the system of law and custom or interruption in the enjoyment of native title rights and interests will not "necessarily" be fatal to the claim, but in a particular case they may take on considerable significance. *Yorta Yorta*, 194 A.L.R. ¶¶ 83, 87, 89, at 562–63. Compare the dissenting judgment of Justices Gaudron and Kirby, who rejected the requirement that connection be "substantially maintained," suggesting that this term finds no expression in the Native Title Act. *Id.* ¶ 109, at 567–68.

182. *Yorta Yorta*, 194 A.L.R. ¶ 80, at 561.

183. *Id.* ¶¶ 77, 80, at 559, 561.

184. *Id.* ¶ 81, at 562.

In determining that the Yorta Yorta no longer observed the same normative system that "burdened" the Crown's acquisition of sovereignty, the High Court held that the Yorta Yorta who came to the Court to assert native title were in fact a different society to that which had originally held native title.[185] The Court deferred to the judgment of the trial judge, holding that it was open to Justice Olney to determine on the facts that there had been a significant disruption in the system of law and custom that sustained native title.[186] Thus, the Court found that the claimant group was not bound by the same normative system that existed at the assertion of British sovereignty, and the members were not, therefore, holders of native title.[187]

The Court determined that native title recognizes the intersection of two bodies of law—that of the prior sovereignty and that of the new sovereign.[188] However, the Court explained that only the normative system in existence prior to the assertion of British sovereignty could create rights and interests.[189] Thus, the body of law and custom before the Court in a native title application must have its roots in that pre-existing system.[190]

In *Yorta Yorta*, the Court introduced a logical disjunction into the doctrine of native title that creates a schism between the existence of Indigenous law and the legal consequences thereof. The Court surmised that native title rights must find their source in traditional law and custom. However, because the introduction of a new legal order denied the efficacy of any parallel law making system, the rights and interests claimed must have been brought into existence when the normative society now claiming native title was able to validly create new rights, interests and duties. Rights and interests created by a society coming into existence after the assertion of sovereignty that were not recognized by the common law and were not sourced in the new legal order could not be given legal effect.[191]

185. *Id.* ¶ 95, at 564.
186. *Id.* ¶ 94, at 564.
187. *Id.* ¶¶ 95–96, at 564–65.
188. *Id.* ¶ 31, at 548–49.
189. *Id.* ¶ 43, at 552.
190. *Id.* ¶ 38, at 550.
191. *Id.* ¶¶ 43–44, at 552.

By requiring proof of continued acknowledgement of a system of laws as a precondition for the recognition of native title, the Court has disavowed any continuing authority within Indigenous societies capable of recognition by the courts. The Court relied on the act of state doctrine to reassert that the acquisition of sovereignty cannot be challenged by a municipal court.[192] This abdication of judicial responsibility was exacerbated by the Court's adherence to the suggestion that it is the NTA which limits the ability to recognize Indigenous peoples' rights to their lands, and that there is no continuing role for the common law in determining the underlying concepts or proper interpretation of the NTA.[193]

A large part of the problem in *Yorta Yorta* still lies with the assessments of Justice Olney. His Honor concentrated on the discontinuity with the expansion of settlement of practices and traditions of the group in terms of economic and other lifestyle changes, and he discounted the continuity of social relations and responsibility for land.[194] Even before the High Court's decision in *Yorta Yorta*, similar conclusions had been reached by Justice O'Loughlin in *De Rose v. South Australia*.[195] The decision in *De Rose* concerned pastoral property in the far northwest section of South Australia. A group of Aboriginal people asserted native title over the area as Nguraritja, or traditional owners, of the land.[196]

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192. *Id.* ¶ 37, at 551.

193. *Id.* ¶ 75, at 560. Justice McHugh, in dissent, questioned this reasoning, stating that he was "unconvinced that the construction that this court has placed on § 223 accords with what the parliament intended." *Id.* ¶ 129, at 572.

194. Yorta Yorta Aboriginal Cmty. v. Victoria [1998] F.C.A. 1606 (Dec. 18, 1998). For example, taking up paid employment and participating in the local pastoral industry was seen as evidence of a rejection of traditional society. *Id.* ¶¶ 34, 45–46, 120. Contemporary practices of cultural heritage protection and environmental management were not seen as continuity of tradition, but as new traditions of a differently constituted Yorta Yorta society. *Id.* ¶¶ 121–25; *see also* Lisa Strelein, *Members of the Yorta Yorta Aboriginal Community: Comment*, 2 LAND RTS. L.: ISSUES NATIVE TITLE 21 (2003).

195. De Rose v. S. Australia [2002] F.C.A. 1342, ¶ 106 (Nov. 1, 2002).

196. *Id.* ¶ 37. The applicants sought a determination of native title based on their status as Nguraritja. *Id.* Many applicants referred to themselves as Yunkunytjatjara; others referred to themselves, or to their parents, as Pitjantjatajra, or Antikirinya. *Id.* ¶ 31. Evidence of the Aboriginal witnesses that the claimed area fell within Yunkunytjatjara country was accepted. *Id.* The claimant group is part of the Western Desert society and follows the laws and customs of the broader community.

At the trial level, Justice O'Loughlin determined that any physical or spiritual connection to the land by the applicants had been abandoned and had led to a breakdown in the observance of traditional customs that was fatal to their application.[197] The decision was alarming because of the applicants' presence on the property up until relatively recently and because of their strong acknowledgment of law, customs and language of the Western Desert.[198]

In part, like Justice Olney, Justice O'Loughlin overemphasized the spiritual and cultural elements of Indigenous society over the more mundane economic and social relations. His Honor judged the connection of many of the claimants to the area as primarily for employment.[199] As a corollary, it was work and education that took individuals away from the area. These were said to be decisions based on "non-aboriginal factors."[200] Again like Justice Olney, Justice O'Loughlin made his own assessment about whether the community had done enough to maintain its right to the land.

Justice O'Loughlin's decision was overturned on appeal.[201] The Full Federal Court was critical of Justice O'Loughlin in making his own judgments about whether individuals had maintained rights based on his personal assessment of their compliance with traditional law.[202] The Full Federal Court held that this was in fact a matter for the traditional laws and customs to determine internally within the group.[203] The applicants were not required to show that they constituted a discrete society.[204] The Western Desert Bloc was the normative system upon which the claim could successfully be

197. *Id.* ¶ 911.
198. *Id.* ¶¶ 898–900.
199. *Id.* ¶ 902.
200. *Id.* ¶ 681.
201. De Rose v. S. Australia (2003) 133 F.C.R. 286. While the trial judge was found to have erred in law, the full court was unable to make a positive determination of native title without further arguments and/or evidence. A final determination was handed down in June 2005, recognizing native title. De Rose v. S. Australia II [2005] F.C.A. 110 (Jun. 8, 2005).
202. Distinguishing this case from *Yorta Yorta*, the full court pointed to the broader system of Western Desert law as constituting the society to which the claimants belonged. *De Rose*, 133 F.C.R. ¶ 313. This normative system had continued uninterrupted and it was this law that was to determine whether individual Nguraritja had exercised their responsibilities and maintained their interest in the area.
203. *Id.* ¶ 315.
204. *Id.* ¶ 275–76.

founded.[205] It existed at the time of sovereignty and its traditional laws and customs had continued substantially uninterrupted throughout the period.[206]

Yorta Yorta leaves us with the problem of determining the line at which the courts will recognize that traditions may evolve, but nonetheless take the view that the fundamental structure of the normative system has become so affected, or interrupted, that native title is destroyed. In its application, it appears that the definition of the community in *Yorta Yorta* based on the operation of a body of law and custom, rather than on the specific rights and interests or activities over land, provides a degree of flexibility in the way that groups are determined for the purposes of recognizing native title.

Despite repeated objections from respondent parties, various conglomerate groups have been accepted in a large number of determinations under the NTA. In the recent determination regarding the Wanjina-Wunggurr community, Justice Sundberg was not concerned that the idea of a Wanjina-Wunggurr community may be an anthropological construct or of recent origin, and accepted that it need not even be a term used by the claimants themselves.[207] While the claimants identify as Ngarinyin, Worrorra and Wunambul, and by their Dambun (clan) relationships, they also clearly articulate the extent of the society with which they share a system of law and custom, particularly in relation to land. This is the extent of the Wanjina-Wunggurr community.

Justice Sundberg pointed to the reasoning of the High Court and of the lower courts in *Ward* as an example where the courts accepted the Miriuwung Gajerrong community as the appropriate native title holding group, despite the development of a closer association between the two groups post contact and in recent times.[208]

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205. *Id.*

206. *Id.* ¶¶ 275–82.

207. Neowarra v. W. Australia [2003] F.C.A. 1402, ¶ 395 (Dec. 8, 2003).

208. Variations on this theme include *Hayes v. Northern Territory* (1999) 97 F.C.R. 32 (the Alice Springs determination), in which three estate groups were recognized as holding title; *Yarmirr v. Northern Territory* (1998) 156 A.L.R. 370, in which five clans claimed a communal title; and *Lardil, Kaiadith, Yangkoal & Gangalidda Peoples v. State of Queensland* [2001] F.C.A. 414, in which a composite of groups was recognized as sharing laws and customs that defined them as a normative society for the purposes of native title. In consent determinations over areas also within the Western Desert cultural bloc, the Federal Court has recognized the

His Honor rejected the respondents' contention that the acknowledgement of laws and customs had been washed away by the impact of European settlement, by the settling of the claimants in communities, by the dilution of knowledge about the laws and customs, and by lack of enforcement.[209] Referring to the High Court's decision in *Yorta Yorta*, Justice Sunberg held that an interruption to exercise of custom is not necessarily fatal to a claim unless the interruption is so substantial that it results in the creation or requires the re-creation of an altogether different normative society.[210] Laws and customs need not be "mandatory" in order to be normative. Further, a custom does not cease to exist, nor does a person cease to be a member of a society if they do not obey the normative rules.[211] Justice Sundberg highlights that it is the possession of rights and interests, not the exercise of those rights and interests, that is central to the inquiry.[212]

Justice Sundberg noted that although he would examine the laws and customs individually, the system must be looked at as a whole in order to obtain an accurate picture.[213] His Honor recognized a connection between the laws and customs now acknowledged and observed by the claimants and those laws and customs in existence at the acquisition of sovereignty, finding that they derive their content from the normative system in existence at the time.[214] However, Justice Sundberg also acknowledged that such a connection may be inferred by the Court from the evidence.[215]

The proof of a coherent and continuous society defined by a pre-sovereignty normative system creates an enormous grey area in the requirement of proof. The nature of the group has emerged as a

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connection between a number of language/dialect groups who comprise the Martu native title group, James v. W. Australia [2002] F.C.A. 1208, and the connection of the "Kiwikurra mob," a group of twenty local descent groups who hold rights and interests primarily within the determination area, Brown v. W. Australia [2001] F.C.A. 1462.

209. *Neowarra*, [2003] F.C.A. ¶ 338.

210. *Id.* ¶ 163; *see also* Yorta Yorta Aboriginal Cmty. v. Victoria (2002) 194 A.L.R. 538, ¶ 82–83.

211. His Honor used the example of speed limits in Australian Road Traffic Laws to demonstrate this point. *Neowarra*, [2003] F.C.A. ¶ 310.

212. *Id.* ¶ 40.

213. *Id.* ¶ 162.

214. *Id.* ¶ 335.

215. *Id*. ¶ 38.

fundamental threshold question for native title claimants. The High Court's defense of the views of the trial judge in *Yorta Yorta* demonstrates the vagaries of an assessment based to a significant degree on the judge's perceptions of the group. The High Court has done little to guide trial judges away from their pre-existing biases and prejudices in making such an assessment. Native title claimants must rely on the ability of a non-Indigenous judiciary to conceive the contemporary expressions of Indigenous identity, culture and law. What native title law is able to recognize in terms of rights and interests derived from Indigenous society is affected by judicial understandings of the relationship between traditional and pre-colonial society.

VI. THE PRICE OF RECOGNITION: EXTINGUISHMENT AND THE EXERCISE OF CROWN POWER

The final determination of native title and its pendant rights and interests requires more than just the translation of a normative system that regulates behavior among a group into a proprietary title understandable in the Australian property system. This may, in itself, seem a difficult task, but the process is further complicated by the associated task of determining the impact of extinguishment. The conflation of these two processes in devising a final determination has created significant obstacles for the proof of native title and has undermined titles in many instances.

The structure of Australian native title does not replicate the Aboriginal rights doctrine of Canada or the domestic dependent nation doctrine of the United States, yet all three share a common deference to the state's power to unilaterally extinguish Indigenous rights.[216] At the same time that the courts recognized Indigenous peoples' rights to land, they also asserted that the state has power to divest those rights unilaterally, without consent or recompense. Native title, they argued, can be extinguished by a valid exercise of

216. *Compare* Mabo v. Queensland II (1992) 175 C.L.R. 1, 68–74, 94–100, 194–95, *with* Johnson v. M'Intosh, 21 U.S. 543, 588 (1823). *See also* United States v. Sandoval, 231 U.S. 28 (1913); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 346–47 (1914). In Canada, compare *St. Catherine's Milling and Lumber Co. v. The Queen*, [1887] S.C.R. 577, with the fiduciary duty doctrine in *Guerin v. The Queen*, [1984] S.C.R. 335.

governmental power that demonstrates a clear and plain intention.[217] This is premised on the notion of an underlying title of the state that may be perfected by the exercise of complete dominion.

The majority of the *Mabo* judges held that such "acts of state," though adverse to the rights of Indigenous peoples, could not be legally wrong.[218] The *Mabo* court held that prior to the introduction of the Racial Discrimination Act of 1975, the Crown, in right of the Commonwealth or of the States, was free to discriminate against Indigenous property holders and divest them of rights and interests without consent or compensation.[219] Despite authority to the contrary, the court refused to provide any common law protection for native title holders.[220] Michael Dodson has criticized these limitations:

> The *Mabo* decision does not recognize equality of rights or equality of entitlement: it recognizes the legal validity of Aboriginal title until the white man wants that land . . . For the vast majority of Indigenous Australians the *Mabo* decision is a belated act of sterile symbolism. It will not return the country of our ancestors, nor will it result in compensation for its loss.[221]

In the *Native Title Act* case, the majority of the High Court confirmed extinguishment as "a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment

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217. *Mabo*, 175 C.L.R. at 64 (relying on *Calder v. Attorney Gen. of B.C.*, [1973] S.L.R. 313, 404).

218. *Id*. at 92, 94, 100. Justices Deane and Gaudron initially commented on wrongful extinguishment, but reverted to the power of the state. *Id.* Justice Toohey was the only judge to affirm the rights of Indigenous peoples against arbitrary exercise of power by the state. *Id.* at 195. The brief judgment of Chief Justice Mason and Justice McHugh confirmed the ratio of the case in this regard. *Id*. at 15–16.

219. *Id.* at 15–16. Chief Justice Mason and Justice McHugh purported to "confirm" the view of the Court in relation to compensation.

220. This aspect of the decision has been criticized for denying Indigenous people's rights that are enjoyed by non-Indigenous interest holders under common law, statute and constitutional provisions. *See* KENT MCNEIL, EMERGING JUSTICE?: ESSAYS ON INDIGENOUS RIGHTS IN CANADA AND AUSTRALIA 357–415 (2001).

221. Michael Dodson, *Statement on Behalf of the Northern Land Council*, *in* THE AUSTRALIAN CONTRIBUTION: UN WORKING GROUP ON INDIGENOUS POPULATIONS, TENTH SESSION, GENEVA, JULY 1992, at 35 (1992).

of native title."[222] As such, the extent of extinguishment or impairment would depend on the extent of any inconsistency.

This view was reaffirmed by the decision of the High Court in *Wik Peoples v. Queensland*,[223] in which the High Court clarified the extent to which native title can co-exist with other interests granted or with uses by the Crown. There, the court examined the nature of the pastoral lease, which is a legislative limited purpose lease, to access the extent of inconsistency. The court found that the lease was not entirely inconsistent with the continued enjoyment of some elements of native title.[224] This did not mean that past legislation or inconsistent grants were ineffective. Indeed, the Court has repeatedly affirmed that where an inconsistency arises, the non-native title interests are preferred.[225]

Courts have recognized instances in which an interest granted by the Crown may be so extensive as to be fundamentally inconsistent with the maintenance of the connection that sustains native title, such that native title is extinguished. This has been the case in relation to freehold or fee simple titles, where the nature of freehold is "inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title."[226]

The *Fejo* court placed the emphasis on an "inherent vulnerability" of native title as the basis for determining that native title had been extinguished by later Crown grants.[227] Indeed, in rejecting any possibility of co-existing rights, Justice Kirby stated that "the inconsistency lies not in the facts or in the way in which the land is actually used. It lies in a comparison between the inherently fragile native title right, susceptible to extinguishment or defeasance, and the legal rights which fee simple confers."[228]

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222. W. Australia v. Commonwealth (1995) 183 C.L.R. 373, 439.
223. Wik Peoples v. Queensland (1996) 187 C.L.R. 1.
224. *Id*.
225. *Id.* at 133.
226. Fejo v. N. Terr. of Austl. (1998) 156 A.L.R. 721, 736. An estate in fee simple is said to be the closest thing to absolute ownership that exists in the Australian system of land tenure, by which it allows "every act of ownership which can enter into the imagination." Commonwealth v. New S. Wales (1923) 33 C.L.R. 1, 42.
227. *Fejo*, 156 A.L.R. ¶ 105, at 756.
228. *Id.*

The idea of such an "inherent vulnerability" in native title was an undercurrent of previous judgments. In *Mabo*, for example, Justice Brennan observed that, by the assertion of sovereignty by the Crown, "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."[229] Similarly, Justices Deane and Gaudron argued that native title could be extinguished by an exercise of sovereign powers in a manner inconsistent with native title.[230] However, Justices Deane and Gaudron claimed that native title was not protected against impairment by subsequent grant, which was unlike an earlier title emerging from the non-indigenous tenure system.[231]

The NTA and the Native Title Amendment Act of 1998 ("NTAA") have undeniably played a role in shaping the extinguishment of native title. The High Court's decision in *Ward* confirms that recognition by the NTA may cease where, as a matter of law, native title has been extinguished. This is true even where the facts of Indigenous peoples' continued rights and interests in relation to land would continue under Indigenous law. The NTA's validation provisions cast no doubt as to the validity of past acts. The NTA was introduced in response to the *Mabo* decision. Like the *Mabo* decision itself, the NTA contained a number of compromises of native title in favor of other interests. Yet, many argued that it provided a number of advantages over reliance on the common law.

The NTA declares that native title is recognized and protected according to the Act and cannot be extinguished except according to the procedures set out in the Act.[232] But, the courts had already placed native title at the lowest point in the hierarchy of rights and interest under common law, saved only, to a limited extent, by the RDA.[233]

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229. Mabo v. Queensland II (1992) 175 C.L.R. 1, 63. The Court specifically foreshadowed extinguishment by freehold grant. *Id.* at 89, 110; *see also W. Australia*, 183 C.L.R. at 422; *Wik Peoples*, 187 C.L.R. at 176, 250.

230. *Mabo*, 175 C.L.R. at 94–100.

231. *Id.* at 89.

232. *See* Native Title Act, 1993, §§ 10–11.

233. Mabo v. Queensland I (1988) 166 C.L.R. 186. Under the common law, the date of the introduction of the RDA had a significant impact upon the validity of certain acts. From that date, just terms provisions for the compulsory acquisition of property by government were said to apply equally to native title.

Thus, the NTA reinforced and built upon discriminatory aspects of the common law.

The courts have made it clear that the NTA creates a detailed and technical regime of statutory extinguishment.[234] The fundamental compromise of Indigenous rights by the courts was built upon in the 1993 NTA, which validated titles issued between the introduction of the RDA and the articulation of the law of native title in *Mabo* by suspending or overriding the operation of the RDA.[235] The 1998 amendments went further, creating a number of new categories of valid acts to which the RDA would not apply.[236] While confirming the validity of these acts, Commonwealth and state governments remained liable for compensation.[237]

The High Court in *Ward* concentrated on the complex web of statutes that now frames native title and tried to articulate the process for determining the relationship between native title and other interests. The Court concentrated on the intricacies of determining the extinguishing effects of two hundred years of dealing with Indigenous peoples' land without consideration of their property rights. They confirmed that prior grants and interests could extinguish native title in part, thereby extracting particular rights and interests from native title permanently. The patchwork of tenures granted over land throughout Australia's history, therefore, leaves a permanent

234. W. Australia v. Ward (2002) 191 A.L.R. 1; Erebum Le (Darnley Islanders) 1 v. Queensland [2003] F.C.A. 227 (Oct. 14, 2003).

235. Native Title Act, 1993, § 7(3).

236. Native Title Amendment Act, 1998 [hereinafter NTAA]. Among the aims of the amendments were to validate further titles issued in contravention of the 1993 Act, and to legally confirm the extinguishment of native title by various acts and reservations. Many of these concessions have gone beyond the compromises found in the common law, further impacting on native title, and have required the state to establish compensatory provisions. Previous exclusive possession acts (section 23B), previous non-exclusive possession acts (section 23F), and intermediate period acts (section 232) were introduced alongside the existing provisions relating to past and future acts (sections 228 and 233, respectively). The NTAA confirmed and, in some instances, extended this complete extinguishment through specific provisions; for example, with respect to public works, or in relation to prescribed interests contained in Schedule 1 of the NTA. *Darnley Islanders*, [2003] F.C.A. 227.

237. Specific provisions for determining compensation are contained in the NTA. Native Title Act, 1993, § 51. The NTA also provides for non-monetary compensation, including transfer of property or provision of goods and services. *Id.* § 51(b). Section 51A, however, seeks to limit compensation to freehold value. *Id.* § 51A.

imprint on native title that cannot be removed unless statutory provision is made.

Thus, the native title doctrine establishes a hierarchical relationship between Indigenous interests and the interests of others and re-introduces an element of dependency of Indigenous rights on the good will of the state.[238] The courts, as a matter of policy, chose to subordinate the rights of Indigenous peoples to other interests as a matter of expediency, even limiting the availability of compensation for the damage caused by past acts and policies. The courts have relied on the source of the rights, as emerging from Indigenous society, as the source of vulnerability.

The selective use of native title to reinforce its susceptibility to extinguishment is a disappointing aspect of the doctrine of native title. While recognizing that native title has its origins in, and is given its content by, the laws of Indigenous peoples, the judgments of the courts nonetheless have continually undermined the status of those laws. While reaffirming that native title is neither an institution of the common law nor a form of common law title, the courts affirm that while the existence of Indigenous law is necessary to establish native title, it is not sufficient.

The existence of land rights under Indigenous law will not be enough to receive recognition under the common law. The High Court dismissed any claim to the revival of native title that seeks "to convert the fact of continued connection with the land into [a] right to maintain that connection."[239] The Court's decision with regard to revival combines with the reasoning of the judgments concerning inconsistency to ensure that native title must fit within the cracks left by the Australian land tenure system to be enforceable under the common law.

In *Ward*, the Court required even greater detail of Indigenous peoples' land laws and customs to establish the rights and interests conferred by native title. In doing so, the Court implicitly, and often explicitly, recognized that Indigenous peoples have a sphere of authority to make laws with respect to their relationship with land.

238. *See* Macklem, *supra* note 46.

239. *Ward*, 191 A.L.R. ¶ 627 (citing Fejo v. N. Terr. of Austl. (1998) 156 A.L.R. 721, ¶ 46).

Yet, the courts have been quick to undermine that authority by readily imputing extinguishment of any native title right to make decisions with respect to access and use.

Even where the court has found the elements of proof of title satisfied, the extinguishment doctrine has served to undermine the nature of that title. In *Neowarra v. State of Western Australia*,[240] Justice Sundberg suggested that to determine the rights "possessed under their traditional laws and customs" under section 223(1)(a), the laws must be looked at from the Indigenous perspective.[241] His Honor found that the claimants possessed what they would describe as the right to speak for country, to control access, or to own or rule the land. Sundberg found that the evidence sustained a claim to "possession, occupation, use and enjoyment to the exclusion of all others."[242] His Honor noted that the claims were not disputed by any other Indigenous group, and indeed were supported by witnesses from neighboring groups.[243] His Honor held that this would be sufficient to meet the requirements of the NTA where extinguishment was not an issue.[244] Unless the evidence established a more "modest collection of rights and interests," it was unnecessary to articulate the rights and interests encompassed by that broad right of ownership to any greater level of particularity.[245]

Despite the recognition that traditional laws of the Wanjina-Wunggurr region translated broadly into native title rights and interests, Justice Sundberg suggested that the comprehensive right would need to be "unbundled" into its component parts to determine the impact of extinguishment.[246] The applicants had argued that with this underlying recognition of exclusive possession the most

240. Neowarra v. W. Australia [2003] F.C.A. 1402.
241. *Id.* ¶ 364.
242. *Id.* ¶ 380.
243. *Id.* ¶ 379.
244. *Id.* ¶ 380. Section 225(b) of the NTA sets out the requirements of a determination. Referring to the applicability of the form of the order in *Mabo v. Queensland* II (1992), 175 C.L.R. 1, Justice Sundberg suggested that even in *Ward*, 191 A.L.R. 1, the High Court had accepted that absent extinguishing acts, the trial judge's finding of exclusive possession would have been sufficiently described by the form "possession, occupation, use and enjoyment." *Neowarra*, [2003] F.C.A. ¶¶ 380–82.
245. *Neowarra*, [2003] F.C.A. ¶ 380.
246. *Id.* ¶ 382.

appropriate way to determine the impact of extinguishment was by what I would describe as an "exclusive possession—minus" methodology. That is, the exclusive possession title is reduced by the extent of the interests granted. Under this methodology the court would assess the rights and interests conferred by the non-indigenous interest and the native title would be extinguished only to the extent necessary to give effect to those rights.

Further, the laws and customs relied upon by the native title holders in establishing their claim would be exercisable subject to the rights of the interest holder. Justice Sunberg rejected the notion of what he called "conditional rights" based on the decisions of the High Court in *Ward* and *Yarmirr*.[247] His Honor favored a direct comparison of each law and the rights it confers against the rights already conferred. As a result, as demonstrated in *Ward* and in later determinations, the grant of any interest in the land, by taking away the "exclusivity" of the title, denies any ongoing role of the native title holders to make decisions in relation to access and use of their country.

The result of the extinguishing impact of pastoral leases in the area is that the Indigenous peoples' rights in relation to large tracts of land are limited to general access hunting and fishing rights for personal communal or ceremonial and non-commercial use. Because the relationship with traditional law and custom is so tenuous under such an exercise, the judge took the advice of the High Court in *Ward* and resorted to a consideration of the kinds of activities that could be exercised in pursuit of the native title. These activities, it was said, do not define the legal content of the right, but nevertheless express the relationship between native title and the other interests in the area. Such invasive extinguishment is not necessary to give effect to the limited rights encompassed by many of these interests, and unnecessarily entrenches upon the rights of the native title holders.

247. *Id.* ¶ 475.

CONCLUSION

The Australian courts and the legislature have been compliant in the subjugation of native title to the interests of the Crown and to private interests. Nevertheless, the *Mabo* decision set a benchmark for recognition, even though it may not have met its potential or the expectations of Indigenous peoples. However, the *Mabo* decision still provides an unprecedented level of protection over Indigenous land rights that is binding on the state—the courts, the legislature and the executive—as well as on its grantees.

While alternative approaches exist within the common law for the recognition and accommodation of Indigenous peoples' laws and rights over their territories, the inconsistencies and hierarchies that characterize these approaches suggest that a novel approach is needed.[248] Australian courts are faced with an interesting route for the future. In recognizing the prior sovereignty of Indigenous peoples, they have undermined the discovery doctrine and the settlement thesis. Moreover, in recognizing the continuing rights, laws and authority of Indigenous peoples, the courts have identified a sphere of authority that can legitimately be claimed to be sovereign. The foundations exist in the *Mabo* decision for an accommodation of the self-determination claims of Indigenous peoples in a way that respects their distinct identity and authority as peoples.

However, the inconsistent treatment of the theory of Indigenous rights has meant that Indigenous sovereignty is excluded from the scope of rights that can be claimed before the courts. While the tenor of recent judgments appears respectful of Indigenous peoples, the law they set down still contains vestiges of the assumptions of superiority. The requirements of proof of social organization and traditional connection since the assertion of sovereignty, as well as the emphasis on tenure history and extinguishment, are all examples of the way in which the law has subordinated Indigenous society. An

248. For example, though many commentators have proposed the domestic dependent nation model set forth in *Johnson v. M'Intosh*, 21 U.S. 543 (1823), this model has been described by Thomas Flanagan as an "uneasy compromise" between the Indigenous peoples view of themselves as sovereign peoples and the colonial view of them as "uncivilized populations subject to the imposed sovereignty of colonising powers." Flanagan, *supra* note 46, at 84.

approach that begins from the premise that all peoples are equal, and that their rights are worthy of protection against the excesses of the state, would produce a different result.

Illustrating the commonality of the Indigenous experience in common law countries, Robert Williams Jr. lamented that "legal doctrines . . . continue to be asserted today to deny respect to the Indian's vision and to assert its truths in a world which has not yet learned that freedom is built [sic] on my respect for my brother's vision and his respect for mine."[249]

The common law has been responsible for inculcating the policies of the state and has perpetuated injustices against Indigenous peoples in Australia and throughout the common law world. Michael Dodson observed that "the machinery of the Australian legal system has acted as the legitimising arm of colonialism."[250] This criticism was echoed in the United States by Robert Williams, Jr.: "For the native peoples of the United States, Latin America, Canada, Australia, and New Zealand . . . the end of the history of their colonization begins by denying the legitimacy of and respect for the rule of law maintained by the racist discourse of conquest of the Doctrine of Discovery."[251]

Through legal fictions, such as *terra nullius* and the doctrine of discovery, the courts have unquestioningly adhered to assertions of sole sovereignty and superiority by the more powerful colonizing state. These assumptions are also reflected in the construction of specific doctrines of Indigenous peoples' rights, such as that of native title.

Both American and British courts created legal fictions to justify state acts in assuming sovereignty of Indigenous peoples and their lands. Chief Justice Marshall was frank in admitting that the compromise doctrine promulgated by his decisions in the *Cherokee* cases was based more on political expediency and the policy needs of the state than on the notions of justice or human rights, or indeed on

249. Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 298–99 (1986).

250. Michael Dodson, *From Lore to Law: Indigenous Rights and Australian Legal Systems*, ABORIGINAL L. BULL., Feb. 1995, at 2.

251. WILLIAMS, *supra* note 8, at 325.

the facts.[252] These same compromises have been reached in the emerging common law of native title in Australia.

Notwithstanding the importance of the recognition of common law native title rights, the courts continue to assume the inferiority of Indigenous sovereignty and of Aboriginal law.[253] Future claims asserting greater self-determination goals cannot rely solely on the development of a doctrine of native title, the foundations of which reassert inequality. Future claims must question the legitimacy of the hierarchical relationship built into native title, and the entrenched position of the Crown's authority. Otherwise, the result, as we have seen in the domestic dependent nation doctrine, is simply to "reproduce the dependency in a new form."[254]

With the retention of the original settlement thesis for all but title to land, the test of social organization remains the foundation of Australian sovereignty. Paul Patton has argued that because of the failure to consider issues of sovereignty directly, the "hierarchy of cultures and powers established at colonisation remains essentially intact."[255] The doctrine of native title artificially separates issues relating to land title from other aspects of Indigenous society. Michael Dodson criticized this aspect of the doctrine, as established in the *Mabo* decision, saying that "[t]he Australian legal system must take the further step of accepting that native title is inseparable from the culture which gives its meaning."[256]

The scope of the recognition of Indigenous society as a source of public, or collective, rights has been limited by the High Court's unquestioning acceptance of the Crown as sole sovereign. A major limitation was foreshadowed in the notion that the sovereignty of the state is non-justiciable.[257] While the classification of the colony of

252. *See* Fletcher v. Peck, 10 U.S. 87 (1810); *Johnson*, 21 U.S. 543; Cherokee Nation v. Georgia 30 U.S. 1 (1831).

253. *See* Walker v. New S. Wales (1994) 126 A.L.R. 321; Coe v. Commonwealth (1993) 118 A.L.R. 193.

254. Macklem, *supra* note 46, at 410, 414. Macklem argued that decisions that build upon these foundations (for example, the fiduciary duty) frustrate rather than facilitate a greater degree of self-determination. *Id.* at 412.

255. Paul Patton, *Mabo, Freedom and the Politics of Difference*, 30 AUSTL. J. POL. SCI. 108, 111 (1995).

256. Dodson, *supra* note 250, at 2.

257. The High Court reiterated the view that any assertion of sovereignty was a challenge

New South Wales as settled was confirmed, the judges argued that this classification had no impact on the rights of the Indigenous peoples to retain their lands.[258] Yet, settlement remains not only the justification for acquisition of sovereignty without consent, but also for the denial of other rights. This creates an inconsistency in the treatment of rights. Michael Mansell has argued:

> The Court refused to follow precedent on the issue of *terra nullius* for to do so would be to maintain a legal fiction based on political convenience. Yet the very same convenience was relied on by the Judges to shut the door to any Aboriginal hopes for arguing Aboriginal sovereignty in the courts. This aspect of the judgment is pure hypocrisy.[259]

While embracing the continuity of Indigenous law and custom in relation to land title, the Australian courts have sought to avoid one of its implications, that is, a recognition of Indigenous sovereignty, which gives the land title its content and meaning.

The *Mabo* case was an important precedent; however, reliance on a doctrine emerging from this decision requires a measure of caution. While rejecting the notion of superiority in relation to the use of land and, in the same context, the nature of political and social organization, the courts have refused to hear argument on the continuing sovereignty of Indigenous peoples.

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to the legitimacy of the state that could not be heard by a municipal court. Mabo v. Queensland II (1992), 175 C.L.R. 1, 31, 33, 69, 78–79, 95. However, sovereignty was not explicitly challenged in that case. *See also Coe*, 53 A.L.J.R. at 408; *cf.* McNeil, *supra* note 100, at 99. McNeil compiled an extensive survey of Australian and English decisions that support the view that acquisition of sovereignty by whatever means the Crown chooses is an act of state, the validity of which cannot be questioned in the courts. *See* Cook v. Sprigg, [1899] A.C. 572, 578 (P.C.); *Vajesingji v. Sec'y of State* (1924) 51 I.A. 357, 360; *Coe*, 53 A.L.J.R. at 408; *see also* R v. Kent Justices, [1967] All E.R. 560, 564; Post Office v. Estuary Radio Ltd., (1968) 2 Q.B. 740.

258. *Mabo*, 175 C.L.R. at 33, 58.

259. Michael Mansell, *The Court Gives an Inch but Takes Another Mile*, ABORIGINAL L. BULL., Aug. 1992, at 4.