Sovereignty in Law:

The Justiciability of Indigenous Sovereignty in Australia, the United States and Canada

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Despite recognizing Indigenous title to land in the early 1990s,[1] *Australia's domestic law has consistently refused to accommodate Indigenous claims of sovereignty or self-government. Unlike other common law countries, Australia's High Court continues to propagate the legacy of* terra nullius *by maintaining that sovereignty claims are non-justiciable by the courts of that state. It claims that the original assertion of sovereignty over Australia by the British is an "act of state" that cannot be challenged. By comparing the reasoning of the Australian High Court with that of the US Supreme Court and Canadian courts, I argue that the High Court's unwillingness to draw these claims into domestic jurisdiction reflects a construction of sovereignty that is unsustainable and unconvincing. Like its common law neighbours, Australia's highest court should acknowledge that the structure of authority in a state is a legitimate issue for its courts, and should deal substantively with the claims of Indigenous Australians.*

I INTRODUCTION

Two hundred and seventeen years ago, an officer of the King of England stood on the sandy soil of a vast southern continent and, buffeted by the wind, planted a British flag in the ground in front of him. After reading a declaration to the few onlookers before him, he had completed his task. From that moment on, according to legal doctrine, the British Crown possessed a comprehensive array of rights over eastern Australia. It had the right to make laws, set up authoritative courts, divide up the soil, and to be acknowledged by other states as the legitimate ruler of the whole of the territory. The flag-planting ceremony was an assertion of sovereignty.[2] Sovereignty, with all it was understood to entail, was now vested exclusively in the British Crown, and no other form of authority would be recognized to exist. The significance of this assertion of sovereignty for Indigenous peoples would only become evident with time.

According to the Australian High Court, the assertion of sovereignty over Australia by the British cannot be questioned by an Australian court. In *Coe v. Australia*,[3] the claimants challenged the assertion of British sovereignty and claimed that a form of Indigenous sovereignty still existed. In response, the High Court ruled that the only law that can legitimately

1. In *Mabo v. Queensland [No.2]* (1992), 175 C.L.R. 1 [*Mabo*].
2. While it is also argued that sovereignty over Australia was asserted by Captain Cook in 1770, according to Deane and Gaudron JJ. (in *Mabo, ibid.* at para. 3), "the preferable view is that it was the intention of the Crown that the establishment of sovereignty … would be effected when, after the arrival of the First Fleet, Phillip … caused his Commission as Governor to be read … on 7 February 1788."
3. [1978] H.C.A. 41 [*Coe*].

examine the act of asserting sovereignty is international law.[4] It considered that an important principle stops a domestic court from examining the substance of an Indigenous sovereignty claim. The taking of territory for the first time falls within that category of "act of state," which the High Court says it cannot examine without breaching the independence of the executive branch of government.[5]

Australia's High Court has used two main explanations to describe what it can adjudicate. It maintains that it is only authorized to examine the "consequences" that flow from the "act" of asserting sovereignty, but not the "act" itself.[6] In *New South Wales v. Commonwealth*,[7] the Court described sovereignty as having two different facets—it referred to "internal" and "external" sovereignty.[8] The former is justiciable by domestic courts, according to the High Court, while the latter is an international law matter.[9] Despite its recognition of these different facets of sovereignty—"internal" and "external,"[10] and "act" and "consequences"[11]—not all of them justiciable, the High Court has responded to all claims of Indigenous sovereignty as if they challenge the validity of the British Crown's assertion of sovereignty.

The refusal to adjudicate Indigenous claims of sovereignty and the employment of the "act of state" doctrine to justify this refusal is problematic for a number of reasons. First, such a refusal stands in the way of fundamental questions about how Australia is governed. Second, this refusal operates in an insidious way that purports to make no adjudication whilst still upholding a position in favour of the state. And finally, the claim of non-justiciability poses problems for the coherence of the High Court's position on Indigenous rights (particularly since *Mabo*), as well as for a convincing construction of sovereignty.

The purpose of this paper is to examine the way sovereignty has been articulated in the Australian High Court, and the way the "act of state" doctrine has been applied in claims for Indigenous sovereignty. I suggest that the distinctions employed in its own jurisprudence—particularly in relation to "internal" and "external" sovereignty—could equally be used by the High Court to justify proper judicial appraisal of Indigenous sovereignty. I will then turn to US and Canadian jurisprudence to look at North American articulations of sovereignty and self-government. Significantly, the experience of countries other than Australia shows that the "act of state"

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4. *Ibid.* at para. 3, Jacobs J.
5. *Ibid.* at para. 12, Gibbs J.
6. *Mabo, supra* note 1 at para. 32, Brennan J.
7. [1975] H.C.A. 58 [*Seas and Submerged Lands Case*].
8. *Ibid.* See McTiernan J. at paras. 375-76; Gibbs J. at paras. 385-90, 392, 407-10; Stephen J. at paras. 438-48, 451-56; Jacobs J. at paras. 479-80.
9. *Ibid*.
10. *Ibid*.
11. *Mabo, supra* note 1 at para. 32, Brennan J.

doctrine can be confined to a more appropriate ambit. Canadian jurisprudence also invites contemplation of the difference between claims of sovereignty and claims of self-government, and the extent to which the latter can be interpreted to refer to very specific rights of autonomy.

Before examining the jurisprudence of the three different jurisdictions, section two will look at Indigenous and non-Indigenous definitions of sovereignty from outside the courtroom. The intention is to provide context to the judicial articulations of sovereignty and self-government that follow in the succeeding sections, and to illuminate underlying assumptions in classical and contemporary, and Indigenous and non-Indigenous, understandings of sovereignty.

However, before even moving to those considerations, there are four issues that need to be briefly addressed: sovereignty as an issue for law; whether international or domestic law is more appropriate to deal with sovereignty; the difference between sovereignty and self-government; and the dangers of comparative research.

First, the denial of Indigenous sovereignty in Australia is an issue for law precisely because it has not been adequately justified by either the courts or the legislature. Some argue that the most appropriate way to recognize Indigenous sovereignty is through politics, not law.[12] But just as law and politics are interrelated, "the notion of a sovereign state … hovers on the edge of the political and yet also on the edge of the legal."[13] While political claims are properly part of the negotiation of sovereignty, the hybrid politico-legal quality of the concept also means that the courts cannot shy away from their role in determining disputes about sovereignty.

I believe there are strong normative reasons for why the High Court should address Indigenous sovereignty claims, and these reasons acknowledge the interrelationship between law and politics. These reasons do not imply that the Court, and not the legislature, is the most appropriate forum—but rather that responsibility for addressing the issue falls in both directions, for many of the same reasons. The current explanation for sovereignty is not acceptable when told by either the Australian government or the High Court. The reason why one should do it is not because the other will not, but because each institution has been complicit in the present unjust situation.

A judicial decision on sovereignty would no doubt also have instrumental value. "To confine the question of Indigenous sovereignty to the realm of politics," Otto argues, "is to fundamentally misrepresent where

12. See, for example, N. Pearson, "Aboriginal Law and Colonial Law Since Mabo" in C. Fletcher, ed., *Aboriginal Self-Determination in Australia* (Canberra: Aboriginal Studies Press, 1994) at 155-156.

13. N. MacCormick, "Beyond the Sovereign State" (1993) 56 Modern L. Rev. 1.

power resides and how it shifts."[14] Power is challenged in both political and legal discourse, and each has an effect on the other.[15] It is important to critique the way the courts have presented and dealt with sovereignty, because sovereignty is a concept, an amalgam of ideas and, as with many ideas, "the way in which it is theorised and motivated can … have consequences for the way in which this fact takes legal and political shape."[16]

In addition, a judicial adjudication does not mean that the issue of Indigenous sovereignty has for all time been handed over to the care of unelected representatives. It is possible a court can recognize the *right* to Indigenous self-government, but leave government policies or bilateral treaties to work out the definition and content of that right. The judicial recognition of Native title in Australia,[17] which was followed by the *Native Title Act*, *1993*, is an example where legislation has followed common law recognition.

The issue of whether international law or domestic law is better served to adjudicate Indigenous sovereignty claims can be answered normatively and instrumentally (according to prospects for success in court). It is beyond the scope of this paper to consider the international law prospects for a determination of whether Indigenous sovereignty exists.[18] Although the "act of state" doctrine expressed in Australia ostensibly directs sovereignty questions to an international legal forum, I will note only two things in passing: First, to bring an action in the International Court of Justice, a litigant must already be a state.[19] Further, the Indigenous right of "self-determination" so often declared in domestic policy debates is by no means a formally endorsed right under international law. The *Draft Declaration on the Rights of Indigenous People*, which includes a right of self-

14. D. Otto, "A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia" (1995) 21 Syracuse J. of Int'l L. & Com. 65 at 93.
15. *Ibid.*
16. I. Hunter, "Native Title: Acts of State and the Rule of Law" in M. Goot & T. Rowse, *Make a Better Offer: The Politics of Mabo* (Sydney: Pluto Press, 1994) at 97. Here Hunter is referring to Native title, but I think such a sentiment can also apply to other concepts that are a matter of legal and political construction.
17. *Mabo, supra* note 1.
18. For analysis of Indigenous claims for sovereignty at international law, see Otto, *supra* note 14; H. Reynolds, *The Law of the Land* (Ringwood, Victoria: Penguin, 1987); N.L. Wallace-Bruce, "Two Hundred Years On: A Reexamination of the Acquisition of Australia" (1989) 19 Ga. J. Int'l & Comp. L. 87.
19. Only states can bring actions in the I.C.J.: *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7. 42, at art. 34.

determination, has, after a decade of debate, still not been passed in the UN Assembly.[20]

Regardless of the possibilities in international law, as stated above, I believe there are compelling normative reasons why a domestic court should address the conditions of its own country's sharing of power. Even if no other cases specifically challenging sovereignty come before the courts, the rationales in legal reasoning for not examining the issue remain unsustainable and unconvincing. The questions about the authority to govern Australia still remain, and need to be considered rather than assiduously avoided.

The question of whether "sovereignty" claims are significantly different from "self-government" claims will be examined in detail when I look at Canadian jurisprudence—most of which focuses on "self-government" claims rather than claims of sovereignty. However, because it is an important preliminary issue of terminology and framing, it is important to note at least briefly my reasons for arguing that "sovereignty" is what the Australian High Court should address, rather than "self-government." I focus on sovereignty not only because claims using this terminology have been brought in litigation,[21] but also because I believe sovereignty is the most logical starting point for a judicial explanation of whether Australia's Indigenous people have a right to autonomous control over their own affairs.

It seems to me that, should a claim be made in the Australian High Court for a right of "self-government," the right would at some level derive from the particular relationship between the colonizers and the colonized—from the facts as they existed at the time of the arrival of Europeans and the way these facts are interpreted according to legal principles. Because Australia does not have a clause in its *Constitution* guaranteeing "Aboriginal rights" as does Canada in s. 35(1) of its *Constitution Act*, *1982*, a common law right of Indigenous self-government in Australia would seem to require a new explanation of the assertion of British sovereignty. The British assertion would have to be examined to work out what was left for Indigenous people—whether it be a form of sovereignty, self-government or otherwise. For this reason, it is "sovereignty" (the British assertion of, and Indigenous claims to), rather than "self-government" that I see as the central issue for judicial scrutiny in Australia.

The final caveat to be made before continuing on a wider exploration of what sovereignty means is that any sort of comparative study has its limitations. It is widely recognized that applying foreign judicial decisions

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20. See the 10th session report of the Working Group on the *Draft United Nations Declaration on the Rights of Indigenous Peoples*, 61st Sess., UN Doc. E/CN.4/2005/89 (2005), online: <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.89.doc>.

21. In *Coe*, *supra* note 3; and *Wiradjuri Tribe v. Commonwealth*, [1993] H.C.A. 42 [*Wiradjuri Tribe*].

may be problematic because of differences in history, and social and political organization between countries. Kirby J. of the High Court made this point in *Jim Fejo and David Mills on behalf of the Larrakia People,*[22] in the context of discussion about whether Native title could be said to have revived after changes in land tenure. He opined:

> [C]are must be exercised in the use of judicial authorities of other former colonies and territories of the Crown because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organisation of the Indigenous peoples concerned and applicable geographical or social considerations. In the United States of America, for example, the law governing the rights of Indigenous peoples to land was affected by the early recognition of a measure of sovereignty of, and the provision of a special constitutional status to treaties with, the Indian tribes. The position in Canada and New Zealand has followed a different course again.[23]

While there are good reasons why authorities from other jurisdictions should be used cautiously, I believe that certain types of claim are more comparable than others. If it is possible for one common law jurisdiction to inquire into the beginning of European sovereignty to assess the possibilities for Indigenous autonomy, then it must be possible for other jurisdictions to do the same. As shall be discussed further in section three, the common law doctrine of "act of state" is invoked to justify non-justiciability of sovereignty in Australia, but not in other countries. Because this doctrine has the same purpose in all the common law countries—to prevent interference by the judiciary in the affairs of the executive—it is possible to argue that it should be used in the same way between jurisdictions.

Differences between countries will, of course, mean that what a recognition of Indigenous sovereignty means *in practice* will certainly vary according to the particular social, historical and political circumstances of the country in question. When it comes to working out the practical consequences of such a finding, the experience of other countries could only be a useful resource, rather than a constraining influence. This is especially so because such decisions are shaped by political processes.

Section two will now survey various definitions of sovereignty that have emerged outside the court context, with the purpose of shedding light on some of the assumptions underlying both judicial and claimants' articulations of sovereignty and self-government. By considering these underlying assumptions, and by looking at the historical mutations in the way sovereignty in particular has been understood, it becomes clear that current Australian jurisprudence evokes a view of sovereignty that is archaic and distinctly non-inclusive.

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22. [1998] H.C.A. 58.
23. *Ibid.* at para. 101 [footnotes omitted].

II DEFINITIONS OF SOVEREIGNTY: A DIVERSITY OF MEANING

"At its most general, sovereignty is about the power and the authority to govern."[24] However, the subtle differences in the way that sovereignty is articulated are important because they can inform the way the concept and its attendant rights are given expression either through litigation or political negotiation. While it is not the purpose of this paper to come up with a comprehensive account of the different ways "sovereignty" has been understood, I will briefly sketch some understandings of the term that have particular relevance to definitions of sovereignty adopted explicitly and implicitly by Australian and North American courts. Identifying changing notions of what sovereignty means can illuminate assumptions made in the reasoning of litigants as well as judges, and in a small way may offer traction to arguments that a more inclusive, pluralistic structure of state authority is possible.

Non-Indigenous Definitions of Sovereignty

The earliest non-Indigenous views of sovereignty are ones that emphasize centrally-held authority, and an "us and them" mentality, in which the subjects of government are also a threat to the institutions of government. Writing in the 16th century when the authority of the French monarchy was on the brink of collapse, French lawyer, philosopher and writer Jean Bodin promoted sovereignty as "legal and political authority constructed to be absolute and monolithic as a bulwark against social chaos."[25] Credited as the "father" of sovereignty, it was apparently Bodin's desire to save the monarchy that led him to promote the "concentration of supreme power in as few hands as possible."[26]

Sovereignty is a concept that arose with the development of the nation state, and was employed to justify its power structures.[27] It is a term that is used to describe a nation state that has particular qualities—and denotes that an entity within the nation-state system has a certain legitimacy. While ultimately, perhaps, sovereignty requires power, it also requires recognition by other sovereign powers (at least for state sovereign status under international law). The Supreme Court of Canada noted this issue in

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24. S. Brennan, B. Gunn & G. Williams, "'Sovereignty' and its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments" (2004) 26 Sydney L. Rev. 307 at 311.
25. *Ibid.* at 310, quoting S. Beaulac, "The Social Power of Bodin's 'Sovereignty' and International Law" (2003) 4 Melbourne J. Int'l L. 1 at 22.
26. Beaulac, *ibid*.
27. K. McNeil, "Sovereignty on the Northern Plains. Indian, European, American and Canadian Claims" (2000) 39 Journal of the West 10 at 11 [McNeil, "Sovereignty"].

Reference Re Secession of Quebec,[28] in which it acknowledged that sovereign status among international states is very much a matter of political reality.

Speculating about the conditions under which international law would recognize a new state, the Canadian Supreme Court acknowledged, "international law will in the end recognize effective political realities."[29] It identified international recognition as the key to "the viability of a would-be state in the international community," but cautioned that, depending on prevailing attitudes, recognition could be withheld if the seceding state was thought to have disregarded legitimate obligations.[30] Despite the ultimate role of political power in determining external sovereignty over a territory, the Supreme Court acknowledges that law has a part to play in regulating the "fact" of sovereignty: "No one doubts that legal consequences may flow from political facts, and that 'sovereignty is a political fact for which no purely legal authority can be constituted.'"[31]

The notion of sovereignty as concentrated power in the hands of a mighty ruler has declined, along with the shrinking supremacy of the nation state and the corresponding advent of institutions that wield power across national borders. Sovereignty as synonymous with "absolute, monopolistic and irrevocable power" is being challenged by a view that sovereignty is "divisible and capable of being shared or pooled across different entities or locations."[32] Turner argues that following the rise of transnational corporations, full national sovereignty no longer exists because "no political body can fully control economic operations in the physical space over which it presides."[33] Likewise, the rise of supra-national institutions such as the European Union and the European Community indicates that, for some purposes and in some areas, political arrangements that spread power over wide areas and embrace different tiers of jurisdiction are considered not only workable, but favourable.[34]

Sovereignty as supreme legal and political authority vested in a state has also been countered by a concept of "popular sovereignty," which emphasizes that ultimate political control resides in the people.[35] The idea is that the government is made up of the people, so that the people of a state are the ones who ultimately hold the power. Sovereignty, therefore, becomes

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28. [1998] 2 S.C.R. 217.
29. *Ibid.* at 276.
30. *Ibid.* at 289.
31. *Ibid.* at 288, quoting H.W.R. Wade, "The Basis of Legal Sovereignty" (1955) Cambridge L.J. 172.
32. *Ibid.* at 312.
33. S. Turner, "Sovereignty, or the Art of Being Native" (2002) 51 Cultural Critique 74.
34. See H. Reynolds, "Sovereignty" in N. Peterson & W. Sanders, eds., *Citizenship and Indigenous Australians* (Cambridge: Cambridge University Press, 1998) at 212.
35. R. Chandler, R. Enslen & P. Renstrom, eds., *The Constitutional Law Dictionary*, vol. 2 (Santa Barbara: ABC-CLIO, 1987) at 654.

akin to a theory of democratic government. In other words, sovereignty and government are only validly held while they have the support of the citizens of the territory.

The idea that sovereignty relies on the consent of the governed is particularly relevant to an appraisal of Indigenous claims of sovereignty in Australia. According to Mick Dodson and other Indigenous leaders, Indigenous people in Australia have never given consent to be governed by the Australian state.[36] If "popular sovereignty" is taken as the basis of the sovereignty over Australia, then arguably Indigenous people have no part in this, and popular sovereignty in Australia is incomplete. Brennan, Gunn and Williams compare the lack of consent gleaned from Indigenous people, to the latter-day practice of excluding women from the franchise, while still referring to the government as a democratic government.[37] It may be that this kind of hypocrisy operates still.

Finally, state sovereignty is often thought of as being fixed in the moment sovereignty was asserted. By focusing upon the "act" of taking sovereignty, sovereignty becomes a "once-and-for-all-issue." This means that the form of its original assertion survives as the blueprint for the organization of authority, even after generations have passed since the original "act" of asserting sovereignty. This frozen-in-time approach can be seen in the Australian jurisprudence, in which the nature of the sovereignty in the Australian state is determined by the elements of the "act" of acquisition, rather than by "the continuous working out of agreed principles and values for the legitimate exercise of authority by government over people."[38] Whether these views align with or diverge from Indigenous views of sovereignty is important to now consider.

Indigenous Definitions of Sovereignty

It is important to remember that sovereignty is a Western concept. While it may not be possible to equate Indigenous and non-Indigenous uses of the term, when used by Indigenous people, it necessarily brings with it Western connotations. Because of this, McNeil warns that "care needs to be taken in applying the concept in other parts of the world, where societies were not necessarily organized on the nation-state model, and where an equivalent conception of sovereignty may not have existed in the minds of the people."[39]

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36. M. Dodson, *Aboriginal and Torres Strait Islander Social Justice Commission Annual Report* (Canberra: Australian Government Publishing Service, 1993) at 50.
37. Brennan, Gunn & Williams, *supra* note 24 at 346.
38. *Ibid*. at 345.
39. McNeil, "Sovereignty", *supra* note 27 at 11.

According to Brennan, Gunn and Williams, Indigenous explanations of sovereignty often focus on a "sense of prior or fundamental authority." Watson offers this explanation of sovereignty as it applies to Indigenous people:

> We were "sovereign" peoples, and we practiced our sovereignty differently from European nation states. Our obligations were not to some hierarchical god, represented by a monarch. Our obligations were to law and we were responsible for the maintenance of country for the benefit of future carers of law and country.[40]

Other Indigenous people use the term sovereignty to describe a more personal aspect of control. Behrendt refers to this extract from the National Aboriginal and Islander Health Organisation:

> Sovereignty can be demonstrated as Aboriginal people controlling all aspects of their lives and destiny. Sovereignty is independent action. It is Aborigines doing things as Aboriginal people, controlling those aspects of our existence which are Aboriginal. These include our culture, our economy, our social lives and our Indigenous political institutions.[41]

This sense of personal control is also present in the views of Indigenous medical workers Mackean and Watson. To them, the denial of Indigenous sovereignty is directly linked to the poor health of many Indigenous people. Moreover, the most successful health programs are "based on elements of sovereignty"—these elements being found in community-controlled health organizations.[42]

Some Indigenous people like Noel Pearson doubt whether sovereignty is an appropriate descriptor for Indigenous peoples' lives or aspirations, and see sovereignty claims as a distraction.[43] This seems to be based on a strategic judgment that such a claim will not find favour, and hence that Indigenous energies should be concentrated on other issues. However, at the time Pearson expressed that sentiment, he still advocated agitation for land rights, "and the right to self-determination and self-government."[44] This seems to indicate that it is not the rights of autonomy that he considers a

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40. I. Watson, "Aboriginal Laws and the Sovereignty of Terra Nullius" (2002) 1:2 Borderlands E-Journal, online: <http://www.borderlandsejournal.adelaide.edu.au/vol1no2_2002/watson_laws.html>.
41. National Aboriginal and Islander Health Organisation, "Sovereignty" (1983), online: <http://www.kooriweb.org/foley/news/story8.html>, quoted in L. Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Sydney: Federation Press, 2003) at 100.
42. T. Mackean & M. Watson, "Indigenous Sovereignty and Indigenous Health" (2004) 6:7 Indigenous Law Bulletin at 19-20.
43. See N. Pearson, "Reconciliation: To Be or Not To Be" (1993) 3:61 Aboriginal Law Bulletin 14.
44. *Ibid.*

distraction, but rather that, when sovereignty is synonymous with "nation-state" style sovereignty, Indigenous claims are too readily misconstrued.

While it may be the case that some Indigenous people use the term sovereignty in order to challenge the order that has set the terms of the debate, it should be kept in mind that

> [b]y using a concept borrowed from Western legal and political thought, Indigenous advocates run the risk of their opponents selecting the most politically damaging interpretation available, to invalidate all competing interpretations.[45]

It will be seen in the following section that the High Court of Australia has largely interpreted Indigenous sovereignty claims according to the "most politically damaging interpretation available," one which silences claims without substantive appraisal.

III THE JUSTICIABILITY OF SOVEREIGNTY IN AUSTRALIA

Sovereignty in the High Court of Australia

Claims of Indigenous sovereignty in Australia have taken two main forms. The difference in what they assert is important and has consequences for the response of courts. The different claims illustrate the different conceptions of sovereignty that are possible even within positivist legal logic. One type of claim asserts Indigenous sovereignty over the whole country and denies the sovereignty of the Australian state. The other claim is that Indigenous people have a form of subordinate sovereignty that exists alongside the ultimate sovereignty of the parent state.[46] The difference in these two types of claim has become obscured by the High Court's positioning of the cloak of non-justiciability. The remainder of this section will look at how the High Court has defined "sovereignty" (in Indigenous and non-Indigenous cases), and will then examine how the Court has married its doctrine of non-justiciability to this definition.

Definitions of sovereignty put forward by the High Court have varied depending on the nature of the claim before it. Perhaps its most elaborate explanation of what sovereignty means can be found in a case that has nothing to do with Indigenous claims. In the *Seas and Submerged Lands Case*,[47] a dispute between the federal and state governments about rights to territorial waters, McTiernan J. and Stephen J. referred to Wheaton's leading

45. Brennan, Gunn & Williams, *supra* note 24 at 314.
46. G. Nettheim, "'The Consent of the Natives': Mabo and Indigenous Political Rights" (1993) 15 Sydney L. Rev. 223 at 228.
47. *Supra* note 7.

19th century text on international law to establish the meaning of "sovereignty." The definition is worth quoting at length because I believe its identification of two different types of sovereignty offers conceptual traction for a more logical approach to justiciability, which nonetheless incorporates established jurisprudential theory.

According to Wheaton,

> [s]overeignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public laws … but which may more properly be termed constitutional law.
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> External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law … but may more properly be termed international law.[48]

The significance of this definition is that it refers to internal sovereignty as "inherent in the people of any State" and that its operation is a matter for "internal public laws." In contrast, external sovereignty is possessed by a society that is independent of all other political societies, and it is international law that governs these "international relations."[49] Wheaton's classic statement is only one definition of sovereignty—but it is one that, I believe, lends itself to a more nuanced view of the justiciability of Indigenous sovereignty claims, particularly because it has already been endorsed by the High Court.

According to Wheaton's definition, Indigenous groups that claim for themselves "external" sovereignty would require an international law forum. Clearly, a domestic court would not be able to find void the authority of the whole state within which it operates, without impugning its own validity. For groups who claim a limited form of sovereignty that recognizes that they are not "independent" of the Australian state, and who do not claim the right to engage in "international relations" with other states, the claim is one of public municipal law, and as such should be dealt with by a domestic court.

It was only three years after the *Seas and Submerged Lands Case* that the High Court had the chance to consider whether Indigenous Australians possessed the sort of sovereignty enjoyed by a nation-state (which I will continue to call "external" sovereignty) or whether they had a limited or

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48. *Ibid.* at para. 8, McTiernan J., quoting H. Wheaton, *Elements of International Law*, English ed. (London: Stevens and Sons, 1878) at 28-29.
49. *Ibid.*

"internal" sovereignty.[50] *Coe*[51] was the first explicit challenge to the sovereignty status quo by Indigenous people in the High Court. Paul Coe asserted that, "from time immemorial prior to 1770 the [A]boriginal nation had enjoyed exclusive sovereignty over the whole of the continent now known as Australia"; that "some of the [A]boriginal people still exercise these rights" and that "Captain James Cook … [and] Captain Arthur Phillip … wrongfully treated the continent now known as Australia as *terra nullius* whereas it was occupied by the sovereign [A]boriginal nation." In the alternative, he claimed that Aboriginal people should be treated as a "domestic dependent nation."[52]

The High Court unanimously rejected the claim that Australia was not a sovereign state, and hence found that exclusive Indigenous sovereignty over the Australian continent was impossible. The claim that Indigenous people exercised a more limited form of sovereignty of the sort recognized of the Indians in the US was also dismissed. Gibbs J. conflated the plaintiff's two different claims of sovereignty—that of exclusive and limited sovereignty—and suggested that because Indigenous Australians do not possess the requirements for exclusive sovereignty, they did not have "limited" sovereignty either:

> The [A]boriginal people … have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an [A]boriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.[53]

Thus, Gibbs J. considers "legislative, executive or judicial organs" (presumably similar in character to Western ones) as conditions of both types of sovereignty. Years later, the High Court itself recognized that a search for parallels between traditional laws and customs and Western state-based sovereignty "may not be fruitful."[54] By that point, it had already discredited assessments of Indigenous society like Gibbs', which denied Indigenous legal rights because the society did not replicate Western organization. Most notably in *Mabo*, the Court recognized the existence of Indigenous laws, customs and rights to land.

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50. The case I am referring to is *Coe*, *supra* note 3. The point of course is that the Court in *Coe* did not separate the different claims of the plaintiff. I use the terms "external" and "internal" to suggest the differences between the claims, and how the different types of claim align with the types of sovereignty expressed by Wheaton.
51. *Ibid*.
52. *Ibid.* at para. 1, Gibbs J. (restating the plaintiff's claim).
53. *Ibid.* at 12.
54. *Yorta Yorta Aboriginal Community v. Victoria* (2002), 194 A.L.R. 538 at 551, per Gleeson C.J., Gummow and Hayne JJ.

The *Mabo* judgment explicitly steered away from dealing with sovereignty in too much depth. Brennan J. offered these brief definitions: "Sovereignty imports supreme internal legal authority,"[55] he said, and "a sovereign enjoys supreme legal authority in and over a territory."[56] This again evokes the centralized authority envisaged by Bodin and others. Brennan J. then postulates what sovereign power involves. "Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory," according to Brennan J.;[57] and it also gives the right to apply one's own laws.[58] Discussion about the parameters of sovereignty is closely linked to a discussion about justiciability. That is, the way that sovereignty has been characterized in Australian jurisprudence is very much related to the High Court's characterization of what it is able to adjudicate in sovereignty cases. How the boundaries of justiciability are set illuminates what sovereignty means to the Australian High Court.

What is Justiciable According to the Australian Courts?

An "act of state" refers to an act of the executive that is not considered justiciable by the courts of that state. It is a doctrine acknowledged by common law countries who endorse a division between executive and judicial power. The closest that the Australian courts come to defining it is to give examples of "acts of state." One such act is the acquisition of territory by a sovereign state. In the *Seas and Submerged Lands Case,* Gibbs J. held that "the acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state."[59]

He reaffirmed this position in *Coe*,[60] this time in the context of an Indigenous challenge to the British assertion of sovereignty.[61] Despite Indigenous sovereignty not being explicitly at issue in *Mabo*, Brennan J. nonetheless confirmed that the sovereignty of the state was not questionable, stating that the "act of state" principle "precludes any contest between the executive and the judicial branches of government as to whether a territory is or is not within the Crown's Dominions."[62]

The Court's position on the justiciability of Indigenous sovereignty has not changed according to the type of sovereignty asserted. In other words,

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55. *Mabo, supra* note 1 at para. 36. Brennan J. refers for this definition to A. James, *Sovereign Statehood: The Basis of International Society* (London: Allen and Unwin, 1986) at 203-209.
56. *Mabo, ibid*. at para. 50, Brennan J.
57. *Ibid.* at 73.
58. *Ibid.* at 32.
59. *Supra* note 7 at 15.
60. *Supra* note 3.
61. *Ibid.* at 12.
62. *Mabo, supra* note 1, Brennan J.

"internal" and "external" sovereignty are conflated. In *Coe*, both the claims of exclusive and limited sovereignty were seen to hinge upon the validity of the Crown's assertion of sovereignty, and therefore both were constrained by the "act of state" doctrine.[63] According to Gibbs J.,

> [i]t is clear that the allegations … [that there was an Aboriginal nation that had sovereignty at the time of settlement, and still has sovereignty; and that Cook and others wrongfully proclaimed sovereignty] could not form the basis of any cause of action …. The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged.[64]

In *Wiradjuri Tribe*,[65] Mason J. explicitly states that the two sorts of claim were the same as far as the law was concerned:

> The allegation … that the Wiradjuri are a dependent domestic nation, entitled to self-government and full rights over their tribal lands, is but another way of putting the sovereignty claim. The allegation has no basis in domestic law. Likewise, the claim … that the Wiradjuri are a free and independent people is but another aspect of the sovereignty claim, having no independent legal significance.[66]

This refusal to acknowledge the different legal implications for a claim of "internal sovereignty" is criticized by those who see parallels in public law disputes between entities with co-existing sovereignties. Brennan, Gunn and Williams note that "history demonstrates that courts can deal rationally with the idea that internally, power and authority are shared between 'polities,'" and say that disputes about federalism are evidence of this.[67] It is also clear from the Marshall trilogy[68] in US jurisprudence that the two different forms of sovereignty do not have to be conflated. There, the claim of an internal form of sovereignty was recognized[69] despite a parallel recognition that the acquisition of North America by the various European powers was beyond question by the court.[70]

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63. Gibbs J.'s comments, mentioned earlier, that Indigenous Australians were not politically organized like the American Indians were from ancillary comments to his determination that the question of sovereignty is not even justiciable in a municipal court. The contradiction and hypocrisy of reasoning is clear—the courts contend they cannot make an adjudication while still pronouncing an opinion about the possibility of Indigenous sovereignty.
64. *Coe*, *supra* note 3 at 12.
65. *Supra* note 21.
66. *Ibid.* at 28.
67. *Supra* note 24 at 348.
68. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) [*Johnson*]; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) [*Cherokee Nation*]; and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) [*Worcester*].
69. *Cherokee Nation*, *ibid.* at 22.
70. *Johnson*, *supra* note 68 at 574.

The *Mabo* court considered justiciability to be dependent on a different distinction—that of the "act" of asserting sovereignty, compared to the "consequences" of such an assertion. According to Brennan J., "[a]lthough the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law."[71]

The "act" in international law through which the territory of Australia was acquired was settlement.[72] However, there are competing ideas about what practices actually constituted a legal acquisition by "settlement"—particularly whether it required simply a proclamation and flag-planting, or whether further physical gestures are required.

As Gaudron and Deane JJ. point out,

> contemporary international law would seem to have required a degree of actual occupation of a "discovered" territory over which sovereignty was claimed by settlement and it is scarcely arguable that the establishment by Phillip in 1788 of the penal camp at Sydney Cove constituted occupation of the vast areas of the hinterland of eastern Australia designated by his Commissions.[73]

In any event, any challenges to the validity of the act of settlement, whether on the basis of how well practice accorded with legal doctrine or otherwise, are not considered within the bounds of the Court's jurisdiction.

In contrast to the "act," the "consequences" of the acquisition of sovereignty are justiciable in domestic law.[74] According to the Australian position, it is up to the common law to determine what exactly are the "consequences" of the taking of territory. The way the territory was acquired in international law (for example, through settlement, conquest or cession) will influence at least one of the "consequences" flowing from the act—the importation of the common law into the territory. As Brennan J. explained,

> the municipal courts must determine the body of law which is in force in the new territory. By the common law, the law in force in a newly-acquired territory depends on the manner of its acquisition by the Crown. Although the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step with international law in order to provide the body of law to apply in a territory newly acquired by the Crown.[75]

Although the domestic law has to determine what law will operate in the new territory, this does not include assessment of whether a form of Indigenous sovereignty or right of self-government has survived alongside

71. *Mabo*, *supra* note 1 at 32.
72. *Ibid.* at 36, per Brennan J.
73. *Ibid.* at 3.
74. *Ibid.* at para. 32, Brennan J.
75. *Ibid.*

Indigenous rights to land. The consequences of the Crown's assertion of sovereignty exclude the possibility of a surviving Indigenous sovereignty. Any suggestion of such sovereignty is instead caught by the "act of state" doctrine, and hence alleged to be outside the law. The illogic of the Court's "act" and "consequences" distinction in relation to sovereignty claims has been pointed out by many. Declining to question Britain's assertion of external sovereignty over Australia is, on most views, a legitimate approach for a court constituted as a result of that assertion. However, this does not preclude the High Court from determining what consequences the assertion of sovereignty has had for the existing systems of law.[76]

Hunter argues that the *Mabo* decision operates in a different way. He says that what the High Court called a determination of the "consequences" of the acquisition of sovereignty—the question of what body of law applies to the colony—was actually part of the "act" of state. According to this view, the nullification of Indigenous laws and customs was part of the founding act, and hence, according to established doctrine, is non-justiciable:

> In founding a state through conquest or settlement the sovereign can annul all the prior customs and entitlements of a territory's inhabitants. And—given the supralegal character of such acts of state—this means that nullification, including nullification of [N]ative title, is not "justiciable" in the Australian legal system.[77]

He argues that the High Court majority justified their infringement of the act of state by appealing to a "natural law discourse" that privileges natural or human rights over the autonomy of the founding acts of state. The use of transcendent "natural law" principles arguably offers another way of justifying what the High Court sees as an incursion into executive territory. While on the one hand "acts of state … are radically autonomous of effective legal and moral judgment,"[78] the example of Native title recognition shows that it is within the realm of possibility to subordinate the act of state doctrine "to a philosophical or natural law discourse that treats rights as metaphysical entities capable of surviving state action and forming the basis for the latter's moral-legal problematisation."[79]

Hunter's critique, which contends that the line between "act" and "consequences" should be moved in one direction, shows how contingent and artificial it is to separate some effects of a state act in order to place them outside the law.

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76. Brennan, Gunn & Williams, *supra* note 24 at 348.
77. Hunter, *supra* note 16 at 99.
78. *Ibid.* at 100.
79. *Ibid.* at 101.

The High Court case of *Wik Peoples v. Queensland*[80] continues the rhetoric of non-adjudication (in relation to the British assertion of sovereignty), whilst nonetheless negating the possibilities for Indigenous sovereignty. In a case that examined whether Native title could exist on land subject to pastoral leases, Kirby J. made it clear that the recognition of Native title in *Mabo* did not in any way imply that there were "dual system[s] of law" in operation.[81]

Going on to explain that any force Native title has in an Australian court is due to its recognition by the common law or statute, Kirby J. confirms that Indigenous people in Australia are not considered to have any inherent sovereignty, but offers no further explanation on the topic. He says:

> Different considerations may arise in different societies where Indigenous peoples have been recognised, in effect, as nations with inherent powers of a limited sovereignty that have never been extinguished. This is not the relationship which the Indigenous people of Australia enjoy with the legal system of Australia.[82]

This clearly shows that while the Court claims it cannot make any adjudication—an adjudication is nonetheless made, but without a convincing explanation for its conclusions. The explanation for a lack of sovereignty is even less convincing because Kirby J. considered that "the exercise of sovereignty" alone could not extinguish Native title to the area.[83]

According to Kirby J., the view that only an exercise of sovereignty was required to extinguish Native title, stemmed from

> the political notion that in the one nation there cannot be two sovereigns. Specifically, there cannot be two sources of title to land. All land is held of the Crown, otherwise the Crown's claim to sovereignty is put in doubt …. Thus where, in effect by legislation, the Crown grants any estate or interest in land (however limited in rights and time), by the very act of doing so it has exercised its sovereignty in a way that is inconsistent with the common law's recognition of [N]ative title.[84]

He goes on to present the absurdity of a position that says Indigenous legal rights could be killed off in one instant just by invoking sovereignty:

> To the complaint that it would be extraordinary that the rights of Aboriginal peoples in Northern Queensland, possibly enjoyed for millennia, could be extinguished by the actions of officials in Brisbane of which they were

80. (1996), 187 C.L.R. 1 [*Wik*].
81. *Ibid.* at 214.
82. *Ibid.*
83. *Ibid.* at 223, per Kirby J. "The exercise of sovereignty" was when "the Crown proceeded in any way to convert its ultimate or radical title into some other estate or interest in land": *Ibid.* at 221, per Kirby J.
84. *Ibid.* at 234.

> completely unaware, the answer is given: that is the way that sovereign powers of a modern state are exercised.[85]

This is ironic considering the High Court's inferences (including those by Kirby J.) that just such a remote act extinguished rights of sovereignty or self-government. The contradictions of such a position, though propped up by precedents that invoke the "act of state," are only too evident when Native title rights survive mere executive "act."

IV THE JUSTICIABILITY OF SOVEREIGNTY IN THE US

The Assertion of Sovereignty over North America

Before examining whether Indigenous sovereignty has been recognized in North America, it is worthwhile identifying the nature of the sovereignty that the US and Canadian states claim for themselves. This will show that the "act" of acquiring sovereignty is similarly non-justiciable in North America as it is in Australia.

According to Slattery, there is still no consensus among scholars about how the European powers that laid claim to North America came to have sovereignty over its territory. This was a sovereignty that other powers or states recognized, and which changed hands between these powers in a way that was recognized by legal principles developed by these powers.[86]

Slattery states that the acquisition of this type of sovereignty over North America (which I will call "external sovereignty") is usually justified by legal scholars according to some variant of the "discovery" doctrine. He identifies three main strands. According to some scholars, the European powers originally acquired external sovereignty over North America by discovery alone. Others say that discovery plus symbolic acts (like the planting of a flag) were required, and still others argue that discovery and effective occupation of the territory were necessary for the acquisition of sovereignty.[87]

The application of the discovery doctrine to North America has been criticized for much the same reasons that the settlement doctrine has been criticized in the Australian context. Discovery, like settlement, presupposes that there are no inhabitants who can be recognized at international law, and so the land becomes "legally vacant," a *terra nullius*, ripe for discovery and settlement.[88] The difference between settlement and discovery is largely

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85. *Ibid.*
86. B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681 at 682.
87. *Ibid.*
88. *Ibid.*

semantic. To some extent it refers to what kind of action confers sovereignty over an area: simply "finding" it (which is what discovery connotes), or "finding" it plus "settling" it by setting up camps, or the like. The different views about what discovery involves—whether it requires acts of settlement and what level of "settlement" is required (for instance, just flag-planting or effective control)—suggest that the difference is one upon which not much hinges when comparing the colonization of North America to the colonization of Australia.

The United States Supreme Court and Indigenous Sovereignty

Like the assertion of sovereignty over Australia by the British, the US courts do not question the claims of the European powers that asserted sovereignty over North America. In *Cherokee Nation*,[89] Johnson J. said two things about the assertion of sovereignty by the European discoverers—that it cannot be questioned, and in any case, it would be futile to now question the assumption of ultimate title:

> It is in vain now to inquire into the sufficiency of the principle that discovery gave the right of dominion over the country discovered …. It cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights, and there is not an instance of a cession of land from an Indian nation in which the right of sovereignty is mentioned as a part of the matter ceded.[90]

Importantly, the use of the discovery doctrine does not preclude an examination by the courts of the way "internal" sovereignty of North America is organized. In *Johnson*,[91] Marshall C.J. of the US Supreme Court explained that the substance of the sovereign title conferred by discovery was the ability to exclude all other European governments. But this sovereign title did not automatically include possession of all land—this had to be negotiated (under municipal law) with the Indians.

> [D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession …. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the [N]atives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.[92]

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89. S*upra* note 68.
90. *Ibid.* at 22.
91. *Supra* note 68.
92. *Ibid.* at 572-574.

Indeed, in *Worcester*,[93] Marshall C.J. says the idea that the mere act of discovery and setting up camp gave the Europeans "occupation" of the land and the power "to govern the people" is "absurd."[94] Despite this absurdity, the legal fiction of the "discovery" of an inhabited continent is allowed to stand as a way of determining sovereignty of the European powers *as against each other*, but does not determine how internal sovereignty is to be configured.

In *Johnson,* decided nine years before *Worcester*, Marshall C.J. held that "relations" between the discoverer and Indigenous inhabitants were to be "regulated by themselves" and that these relations would have to be tempered by the "legal claims" of the Indians. The rights of the Indians, in the negotiation of these relations, were rights that fell short of "complete sovereignty," but the implication is that the rights nonetheless stemmed from a type of sovereignty. These rights could be negotiated through relations (by treaties or otherwise) and municipal law was the proper arbitrator of their outcome:

> Those relations, which were to exist between the discoverer and the [N]atives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them. In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished.[95]

Despite the recognition that the "relations, which were to exist between the discoverer and the [N]atives, were to be regulated by themselves," Marshall C.J. clearly does not envisage that the Indians' claim to subordinate sovereignty has its source in the treaties themselves.

> The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights as undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer.[96]

The occupation of the land, and government, of the people was not a right that the "discoverers" procured just by discovery. These were rights held by Indians, and which could only be negotiated by purchase or treaty. Thus, the

93. *Supra* note 68.
94. *Ibid.* at 517.
95. *Johnson*, *supra* note 68 at 574.
96. *Worcester*, *supra* note 68 at 519.

lack of treaties in Australia does not limit the application of Marshall C.J.'s reasoning to Australia. As Meyers points out, "treaties don't give rights, treaties take away rights … the rights arise from occupation of the land."[97] In the US, the rights of Indigenous people were considered to have survived intact, and the content of these rights could only be varied by agreement.

The "original natural rights"[98] of the Indians have to be traced back to something more fundamental. The natural rights that the US courts recognize can perhaps be attributed to a view that the Indians were socially evolved enough (according to European standards) to have rights to land and self-government:

> They found [America] in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.[99]

Or perhaps the view is rather that they were socially evolved enough to physically enforce their rights to land and self-government against the fledgling colonies, and so legal principle followed practical reality:

> The soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions.[100]

The natural rights of Indians recognized by the US courts could also be based on what Slattery refers to as basic principles of justice. That is, the Indians had a right to life. To remain alive, they had to have land from which to procure sustenance. Their rights to land needed to include the ability to organize collectively, so that their land could be protected if necessary. So, they had a right to territory (including a right to govern themselves) that could not be simply abrogated without agreement.[101]

In the latter half of the 20th century, litigation increasingly defined the scope of the Indians' right to govern themselves. The judgments emphasize not only the "diminished" sovereignty held by the Indians, but perhaps also the susceptibility of sovereignty to varying interpretations depending on the attitude of the court. In the 1978 case of *United States v. Wheeler*,[102] the Supreme Court found that although tribal sovereignty included the right to

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97. G. Meyers, "Governance Structures for Indigenous Australians, On and Off Native Title Lands" in *Session 1: Context for the Project. International Standards and Comparative Experience* (2000), online: Australian Legal Information Institute, Indigenous Law Resources <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/IndigLRes/2000/2/gov-SESSION.html>.
98. *Worcester*, *supra* note 68 at 519.
99. *Ibid.* at 543.
100. *Ibid.* at 519.
101. See Slattery, *supra* note 86 at 697-698.
102. 435 U.S. 313 (1978) [*Wheeler*].

govern tribal members and territory, it generally did not give the right to govern the activities of non-members on Indian country.[103]

Also in 1978, in *Oliphant v. Suquamish Indian Tribe*,[104] the Supreme Court had to decide whether the tribal court had the jurisdiction to prosecute two non-Indians for criminal offences committed on tribal land under the tribe's *Law and Order Code*. One defendant resisted arrest and assaulted a tribal police officer, and the other refused to pull over for tribal police and crashed into a tribal police car after a high-speed chase. After tribal jurisdiction was upheld in the lower courts, the Supreme Court held that Indian tribal courts have no criminal jurisdiction over non-members;[105] the rationale was that such criminal jurisdiction is inconsistent with their diminished status as sovereigns.[106]

In *Montana v. United States*,[107] the Supreme Court clarified the scope of Indian authority over non-members who were hunting and fishing on non-Indian owned land, which was within an Indian reservation. The court reiterated the general principle in *Wheeler*, that "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe,"[108] but it also defined two specific circumstances when regulation of non-members was justified. First, where a non-member entered into a consensual commercial relationship with the tribe or its members, the tribe had the right to regulate the relationship through taxation, licensing or other means.[109] Second, "when th[e] conduct [of a non-member] threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe," the tribe could extend civil regulation over the non-member if she or he was on reservation land.[110]

The reasoning in *Montana*, as can be said of all of the judgments referred to, illustrates the willingness of the US Supreme Court to adjudicate not just the existence of, but also the parameters of Indigenous sovereignty. Like it would a dispute over federal and state jurisdiction in a federal system, the US Supreme Court considers the interplay of the dual sovereignties (US state and Indian) to be a matter for law and so within its jurisdiction.

The 1997 Supreme Court case of *Strate v. A-1 Contractors*[111] concerned a civil action brought before a tribal court following a car accident involving non-members on a section of state highway. The highway ran through an

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103. *Ibid.* at 323.
104. 435 U.S. 191 (1978) [*Oliphant*].
105. *Ibid.* at 194-195.
106. *Ibid.*
107. 450 U.S. 544 (1981) [*Montana*].
108. *Supra* note 102 at 323.
109. *Montana*, *supra* note 107 at 565.
110. *Ibid.*
111. 520 U.S. 438 (1997) [*Strate*].

Indian reservation, and was held in trust for three tribes, but was maintained by state authorities.[112] The Supreme Court held that the tribal court had no jurisdiction to hear the civil case, because "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[113] It referred to the rationale in *Montana*, that the authority of a tribal court does not generally extend to the activities of non-members on non-Indian fee lands,[114] and found that the two exceptions to the general rule in *Montana* did not apply.[115]

In *Nevada v. Hicks*,[116] the issue for the Supreme Court was whether a tribal court had jurisdiction to hear a civil action brought against state game wardens by a tribal member. The member's house on tribal land was searched for game allegedly caught illegally under state law. The Court held that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations," and that, therefore, the tribal court had no jurisdiction over the wardens.[117] Scalia J. went on to say that "the State's interest in execution of process is considerable"[118] and that "[t]hough tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries." [119]

Decisions from the last three decades show an interpretation of Indigenous sovereignty that is steering away from the broad concept articulated by the Marshall court almost two centuries ago. *Oliphant v. Suquamish* has been criticized as weakening Indian sovereignty[120] and leaving tribes powerless to deal with non-Indian crimes on reservations.[121] Referring to judgments from the previous two decades, Nettheim, Meyers and Craig argue that "[t]he current Supreme Court views Tribes more as proprietary voluntary organizations … than as sovereign governments."[122]

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112. *Ibid.* at 442-443.
113. *Ibid.* at 453.
114. *Ibid.*
115. *Ibid.* at 460.
116. 533 U.S. 353 (2001).
117. *Ibid.* at 364.
118. *Ibid.*
119. *Ibid.* at 361. Marshall C.J.'s statement comes from *Worcester*, *supra* note 68 at 561. Scalia J. reiterated the comments made in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) at 141.
120. See for example, P.S. Volk, "The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction over Crimes By and Against Reservation Indians" (1984-85) 20 New Eng. L. Rev 247.
121. G.C. Heisey, "*Oliphant* and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction" (1998) 73 Indiana L.J. 3.
122. G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (Canberra: Aboriginal Studies Press, 2002).

Thus, the inherent sovereign power retained by the Indian tribes is indeed limited, and according to some, too limited. While the US Supreme Court is interventionist in the sense that it has a heritage of specifically defining the parameters of tribal sovereignty, it is worth noting that where Indigenous sovereignty is acknowledged to be justiciable, a court adjudication can produce results that provoke some to claim that "the Supreme Court can no longer be seen as the protector of tribal interest and sovereignty."[123] Like political articulations of sovereignty, judicial versions can be seen as working against Indigenous interests. However, the point remains that in a system that has never addressed Indigenous sovereignty, as in the Australian court system, sovereignty is nonetheless a crucial part of the story of legal foundation that needs to be elaborated.

Issues for Australia

The US Supreme Court viewed internal sovereignty as a matter for law. It considered it possible to recognize "natural rights" while at the same time endorsing the non-justiciability of the assertion of external sovereignty by the European powers. There is no fundamental difference between the basis for "natural rights" for Indigenous Americans and the basis for "natural rights" for Indigenous Australians. If Native Americans have "natural rights" to land and self-government anchored in a principle of a right to life, then so do Indigenous Australians. If the basis for rights is the level of social organization or resistance to occupation at the time of European "discovery" (and while this was one of the themes of 17th and 18th century jurisprudence, there is no convincing reason why it should be the basis of recognizing rights now), then there is ample evidence, much of it recognized by Australian courts, that Indigenous people in Australia had a complex system of social organization,[124] and also that there was protracted and fierce opposition to white settlement almost wherever it took place in Australia.[125]

The US example is an important one because it indicates that the logical boundaries between what is ostensibly adjudicated and not adjudicated cannot exist without a *decision.* The decision is necessarily made, and the question of whether it is given substantive justification is a separate issue. The claim by courts that no adjudication can be made is deceptive. Before a domestic court can decide whether the question of Indigenous sovereignty is justiciable, it must undertake a substantive exploration of the nature of the Indigenous sovereignty that could actually exist. It must distinguish whether

123. *Ibid.* at 31.
124. See *e.g.*, Blackburn J.'s comments in *Milirrpum v. Nabalco Pty Ltd.* (1971), 17 F.L.R. 267 (N.T.S.C.); and Deane and Gaudron JJ.'s judgments in *Mabo*, *supra* note 1 at 99-100.
125. See H. Reynolds, *Aboriginal Sovereignty* (Sydney: Allen & Unwin, 1996) at Chapter 6.

the claim is in fact a bid for Indigenous external sovereignty—and as such, a claim that the external sovereignty held by colonial powers is invalid because wrongly asserted—or a claim to some other version of independence.

The very acceptance of justiciability by the US Supreme Court is no doubt influenced by the political reality of treaties and land transactions in the US. Nonetheless, despite inheriting a legal explanation for the founding of the country that is premised on *terra nullius,* the US Supreme Court manages to produce an explanation of the founding of the country that resurrects Indigenous people from the "legal vacuum," while still acknowledging the practical and doctrinal reality that the validity of the foundation cannot be questioned. An arrangement of internal sovereignty, which includes a form of Indigenous sovereignty, unavoidably contradicts the legal premise for the assertion of external sovereignty—the "discovery" of a legally vacant land. In other words, municipal law contradicts the international law explanation for the valid acquisition of territory. However, it is here that the "act of state" doctrine is properly invoked to explain why this contradiction should not freeze a domestic court's consideration of domestic sovereignty arrangements.

If the "act of state" is conceived of as only comprising the acquisition of ultimate control over a territory, then the legal justification for this "act of state" (the justification of discovery) may be indirectly discredited *in fact* by an explanation of internal sovereignty that says a sovereign people were present at the time of the "act of state." At the same time, the very nature of the "act of state" also precludes external sovereignty from being debunked *in law*. In other words, the international law explanations for the acquisition of the colony that became the United States, or the colony that became Australia, are indeed rendered immune from criticism by the operation of the "act of state" doctrine.

The overall sovereignty of the Australian state, the "external" sovereignty that is justified under international law, need not be challenged even though internal authority is challenged. As Nettheim says,

> the approach taken by the majority of the High Court in *Mabo* in regard to land rights is at least capable of being applied to acknowledge some forms of sovereignty or inherent powers of self-government in Aboriginal or Torres Strait Islander peoples that retain a sufficient degree of social cohesion. Recognition of such self-government rights would not challenge the overall sovereignty of the Australian state, and would not require the abandonment of traditional methods of social ordering in favour of "Western" models.[126]

The Australian High Court, like the US Supreme Court, can re-render the explanation of the legal and governmental arrangements (the internal

126. Nettheim, *supra* note 46 at 231.

sovereignty) of their country without denying Australian statehood. In this context, the "act of state" doctrine can actually be seen as an impermeable barrier between international law and domestic law, one that may actually aid a conceptual realignment of domestic governance. I now turn to Canadian jurisprudence, to look at the relationship between claims to Indigenous "self-government" in that jurisdiction, the external sovereignty of the Canadian state and the operation of the "act of state" doctrine.

V THE JUSTICIABILITY OF SOVEREIGNTY IN CANADA

Judicial Recognition of Indigenous "Self-Government"

In Canada, most claims for Indigenous autonomy have been presented as claims for "self-government" rather than "sovereignty." Although the Supreme Court does not offer any excuses of jurisdiction, it nonetheless has been able to avoid until now the need to make a decision about whether a right of self-government exists. This is because it has been able to characterize the claims before it as claims to rights to use the land in a particular way, or to engage in activity related to Aboriginal title. It remains to be seen whether this trend will continue, or whether the Supreme Court will follow government policy and recognize an inherent right of self-government for its First Nations under the *Constitution*. As yet, only a provincial court has held that self-government rights fall within the constitutional protection.[127] Although the way the Canadian courts have approached these claims is jurisdiction-specific (to the extent that they are based on a constitutional clause), the judges' reasoning is nonetheless a useful juxtaposition to the way Australian claimants have framed their assertions, and raises questions about the breadth of any self-government right sought by Indigenous peoples.

Like in the US, the special status of the First Nations in Canada was historically recognized through the signing of treaties. In what is the closest the Canadian Supreme Court has come to acknowledging Indigenous sovereignty, in *R. v. Sioui*,[128] the Supreme Court of Canada held that the state practice of concluding treaties with the Indians indicated that they had the status of nations, and implied that they came close to being "sovereign nations."

> We can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.

127. *Campbell v. British Columbia (A.G.)* (2000), 189 D.L.R. (4th) 333 [*Campbell*].
128. [1990] 1 S.C.R. 1025 [*Sioui*].

> The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.[129]

However, the Supreme Court has declined to develop this line of argument further. In contrast, government policy has in fact recognized that Indigenous Canadians have a degree of independence since the early days of the Canadian colonies. The first major policy statement on the topic of Indian rights was the *Royal Proclamation* of 1763, which applied over all of British-held North America.[130] It recognized that Indian nations had a right to the land they occupied until they chose to sell it, with the British Crown the only possible purchaser.[131] The *Proclamation*'s "reaffirmation" of Indian title to land[132] reflects English colonial policy in North America, which recognized that land could not just be "settled" as was thought the case in Australia, but the terms of possession had to be negotiated.[133] In short, the Indians were assumed to have had some legal status based on the fact that they were there first.

Similar to the US, the treaties signed in Canada typically not only negotiated title to land, and outlined specific rights like hunting and fishing, but also contained agreement that the colonists would not interfere in tribal governance.[134] However, like in the US, treaty promises were frequently broken (including through the passage of limiting legislation) and it was not until the 1970s that the Canadian Supreme Court made decisions that broadened the scope of Indigenous rights and spurred government action.[135] After 1982, court and political claims were also strengthened by the inclusion of s. 35(1) in the Canadian *Constitution*, which guarantees "existing [A]boriginal and treaty rights of the [A]boriginal peoples of

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129. *Ibid.* at 1052-53.
130. The British colonies of North America to which the *Proclamation* applied were the first 13 states of what was to become the US, as well as Canada and Florida. See R.N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs" 69 B.U.L. Rev. 329.
131. K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 Tulsa J. Comp. & Int'l L. 253 at 254 [McNeil, "Aboriginal Rights"].
132. Nettheim, Meyers & Craig, *supra* note 122 at 81.
133. M. Jackson describes the *Proclamation* as "a restatement of the principles which have previously been embodied in compacts with the various Indian nations." See M. Jackson, "The Articulation of Native Title Rights in Canadian Law" (1984) 18 U.B.C.L. Rev. 255 at 259.
134. Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 141-176 [*Royal Commission Report*].
135. Nettheim, Meyers & Craig, *supra* note 122 at 83.

Canada."[136] Importantly, since 1993 the Canadian federal government has, as a matter of policy, recognized an inherent right to Aboriginal self-government under s. 35 of the *Constitution*.[137] This is likely to have influenced the attitude of judges who preside over self-government claims.

The claim that triggered the modern era of Indigenous rights litigation was the 1973 case of *Calder v. British Columbia (A.G.)*,[138] in which the Canadian Supreme Court recognized the right of its First Peoples to land title. Like in the US and in Australia after *Mabo*, the Canadian Supreme Court confirmed that this title was inherent and did not depend on any state act: "Aboriginal title is an independent legal right that does not depend on the Proclamation for its existence."[139] The source of the title was simply that Indians occupied the land before Europeans arrived,[140] also described as "a title which has its origin in antiquity."[141] "Prior occupancy" was described as the source of rights to land, rather than prior sovereignty. This inherent right to land was re-affirmed in *Guerin v. The Queen*,[142] in which Dickson J. held that the Indian "interest in their lands is a pre-existing legal right not created by Royal Proclamation ... or by any other executive act or legislative provision."[143]

The test for establishing an Aboriginal right, which has been important in cases asserting self-government, was articulated in the 1996 Supreme Court case of *R. v. Van der Peet.*[144] In that case, the Court said that to fall within the definition of an Aboriginal right, "an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right."[145] While stating that courts must be mindful of "the precise nature of the claim" (among many other considerations),[146] in practice, a variety of characterizations have been applied to the same activity. Because this characterization is vital to a conclusion of whether the Aboriginal right has been made out, it is often the subject of dispute. It can be seen from the cases in which a right of self-government has been alleged that the same activity can be characterized as an Aboriginal right to engage in a particular activity on land, whilst an

136. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
137. "Federal Policy Guide: Aboriginal Self-Government. The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government", online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html>.
138. (1973), 334 D.L.R. (3d) 145 (S.C.) [*Calder*].
139. In McNeil's words in "Aboriginal Rights", *supra* note 131 at 255.
140. *Calder, supra* note 138 at 156.
141. *Ibid.* at 161.
142. [1984] 2 S.C.R. 335.
143. *Ibid.* at 379.
144. (1996), 137 D.L.R. (4th) 289 (S.C.) [*Van der Peet*].
145. *Ibid.* at 310.
146. *Ibid.* at 309-310.

alternative characterization is that the Aboriginal right is the right to self-government, so that participation in the particular activity is simply an expression of that encompassing self-government right.

The fate of such a self-government claim can be seen in the Supreme Court case of *R. v. Pamajewon.*[147] In this case, the Indigenous defendants had been prosecuted for running a "high-stakes gambling house," which was illegal under Canada's criminal law. At trial, the two First Nations stated in their defence that "they should not be convicted because their actions were taken pursuant to laws enacted by persons in possession of *de facto* sovereignty."[148] However, after the trial judge dismissed that claim, it was not pursued on appeal.[149] In the Ontario Court of Appeal, Osborne J.A. dismissed the revised claim of an inherent right to self-government, and said if a right of self-government existed, it must be linked to land. He held that there was no broad right to self-government, but it was open to inquiry whether a specific right of self-government arose from the traditional culture and use of land by the Aboriginal claimants.[150]

The Supreme Court decided to assess the case on other grounds and leave the self-government issue essentially unresolved. The First Nations asserted their right (under s. 35(1)) to self-government, and to be self-regulating in economic activities. However, the majority of the Supreme Court considered the more appropriate characterization to be whether the right to regulate and participate in gambling was an "Aboriginal right" within the scope of s. 35 of the *Constitution*.[151] Finding that this right was not made out, the majority did not consider it necessary to decide the issue of self-government.

Significantly, however, Lamer C.J. did add:

> Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in *Van der Peet* …. In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of [A]boriginal rights and must, as such, be measured against the same standard.[152]

And in reasoning reminiscent of the Ontario Court of Appeal judge, Lamer C.J. went on to add:

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147. [1996] 2 S.C.R. 821 [*Pamajewon*].
148. Lamer C.J. explaining the defendants' arguments in *ibid.*
149. *Ibid.*
150. *Ibid.* at para. 18, Lamer C.J. in the Supreme Court judgment explaining Osborne J.A.'s reasoning.
151. *Ibid.* at 834, per Lamer C.J. delivering the majority judgment on behalf of himself, La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.
152. *Ibid.* at 832-833, Lamer C.J.

> The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands." To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case.[153]

L'Heureux-Dube J. also stated that it was unnecessary to decide whether s. 35(1) included a right of self-government, but did say that she was in "general agreement" with the reasons of Osborne J.A. This included an endorsement of his opinion that if a right of self-government existed, it would be a specific right tied to a particular traditional activity or use of land, and like other Aboriginal rights, had to be assessed according to historical evidence.[154] From the statements made by the Supreme Court justices in this case, it would seem likely that should the Court choose to address a right to self-government in the future, it would construe such a right narrowly.

By characterizing self-government as a narrow or "specific" right, self-government starts to resemble the "Aboriginal right" to engage in particular activities. By treating the right of self-government as like other Aboriginal rights—and therefore subject to the *Van der Peet* test—the Supreme Court would have to decide whether the right of self-government was "an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right."[155] The answer seems self-evident if self-government is viewed holistically: Surely the right to govern themselves was an integral part of the First Nation's culture—otherwise they could have been governed out of existence by external powers. However, by narrowing down the scope of the right to govern, and assessing the particular activities undertaken before European contact, it seems it would be possible to decide that the rights of autonomy in relation to specific affairs were not integral to Indigenous culture.

The Supreme Court was again confronted with the question of self-government only a year later in *Delgamuukw v. British Columbia.*[156] Originally a claim for ownership and jurisdiction over an area of British Columbia, it was subsequently amended to be a claim for Aboriginal title and self-government.[157] The Supreme Court majority referred to its decision in *Pamajewon* that "rights to self-government, if they existed, cannot be framed in excessively general terms."[158] It found the evidence presented in *Delgamuukw* to support the right was too general, and that a decision upon

153. *Ibid.* at 834.
154. *Ibid.* at 839-840, L' Heureux-Dube J.
155. *Van der Peet*, *supra* note 144 at 310.
156. [1997] 3 S.C.R. 1010 [*Delgamuukw*].
157. *Ibid.* at 1013, Lamer C.J. also on behalf of Cory, McLachlin and Major JJ.
158. *Ibid.* at 1114.

the issue was not required to decide the case.[159] In what is considered a seminal case on Native title, the Court did hold that Aboriginal title was held communally,[160] and its comments were later relied upon by Williamson J. in the Supreme Court of British Columbia in *Campbell* to justify his finding of a right of self-government. According to the *Delgamuukw* court, Aboriginal title was "a collective right to land held by all members of an [A]boriginal nation. Decisions with respect to that land are also made by that community."[161]

In articulating the content of Aboriginal title, Lamer C.J. held:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves Aboriginal rights. Rather, it confers the right to use the land for a variety of activities, not all of which need to be aspects of practices, customs and traditions … integral to the distinctive culture of Aboriginal societies.[162]

The uses of the land, however, could not be antithetical to the First Nation's attachment to the land that forms the basis of the land title.[163] Land title and rights were also subject to restriction if there was a "compelling and substantial"[164] legislative purpose, but this could not violate the fiduciary duty owed to Indigenous people.[165]

Nettheim, Meyers and Craig argue that the Supreme Court's ruling in *Delgamuukw* that Aboriginal title includes full beneficial use of the land (subject to the limitations above), "strongly suggests that Aboriginal title encompasses self-government rights."[166] They believe that, given political developments[167] and the Supreme Court's willingness to refer the self-government issue back to trial, "such diminished sovereignty claims are surely within the ambit of rights associated with Aboriginal title."[168] However, it is yet to be seen if the Supreme Court will take this view.

As yet, it is only a provincial court that has decided that First Nations have a right of self-government. In *Campbell*,[169] Williamson J. of the Supreme Court of British Columbia affirmed that s. 35 includes the right of self-government.[170] It is important to note the context of this case: It was

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159. *Ibid.*
160. *Ibid.* at 1082-83.
161. *Ibid.*
162. *Ibid.* at 1080.
163. *Ibid.*
164. *Ibid.* at 1107.
165. *Ibid.* at 1108.
166. Nettheim, Meyers & Craig, *supra* note 122 at 108.
167. Including the 1995 federal policy statement, the increasing number of negotiated agreements, and indeed the declaration of the self-governing territory of Nunavut.
168. Nettheim, Meyers & Craig, *supra* note 122 at 108.
169. *Campbell*, *supra* note 127.
170. *Ibid.* at 181.

brought by members of the Legislative Assembly of British Columbia, who alleged that a treaty concluded between the Government of Canada, British Columbia and the Nisga'a Nation, was unconstitutional. This was after over 20 years of negotiation, and after both federal and provincial governments finally signed the treaty.

Williamson J. dismissed the claim of unconstitutionality, rejecting the argument that all legislative power had been allocated between the federal and provincial governments at the time of Confederation, thus leaving none for the Nisga'a.[171] He asserted that instances of Canadian courts enforcing Aboriginal laws shows that "at least a limited right to self-government, or a limited degree of legislative power, remained with [A]boriginal peoples after the assertion of sovereignty and after Confederation."[172]

Referring to Aboriginal title recognized under s. 35(1), Williamson J. considers that because this title is communally held, it must include "the right of the communal ownership to make decisions about that occupation and use, matters commonly described as governmental functions."[173] Relying on *Delgamuukw*, he found:

> The right to [A]boriginal title "in its full form," including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by section 35.[174]

The right to govern themselves stems from the fact that First Nations were on the land before European arrival. In direct contrast to Australian jurisprudence and with much similarity to US decisions, Williamson J. held:

> [A]fter the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of [A]boriginal people to govern themselves was diminished, it was not extinguished.[175]

Like the US jurisprudence, the assertion of European sovereignty is noted as a moot point, one that does not get in the way of a contemplation of the other rights to govern.

The recognized right of self-government is by no means absolute, not just according to the theoretical division of authority following British assertions over the territory. Williamson J. recognized that the treaty itself contained detailed provisions about which law was to prevail—that of the Nisga'a or federal or provincial government—in the event of an

171. *Ibid.* at 59.
172. *Ibid.* at 86.
173. *Ibid.* at 114.
174. *Ibid.* at 137.
175. *Ibid.* at 179.

inconsistency.[176] Moreover, s. 35 only provides a "limited guarantee." Where "interference can be justified and is consistent with the honour of the Crown," the treaty rights set out in the Nisga'a Nation treaty could be infringed by the Canadian Parliament.[177]

In *Mitchell v. M.N.R*,[178] the Supreme Court had to consider a different perspective: whether state sovereignty could be infringed by an Aboriginal right. Interestingly, what the respondent argued was an Aboriginal right, was considered by the Supreme Court to be an attribute of external sovereignty. The case was brought against a member of the Mohawk nation who crossed the St. Lawrence River between the US and Canada, carrying goods bought in the US. He refused to pay customs tax (duty) on the items, saying that Aboriginal and treaty rights exempted him from paying duty.[179] However, the majority of the Supreme Court found that the Aboriginal right had not been made out, and that the customs tax did in fact apply.[180]

McLachlin C.J., delivering the majority judgment, said the right in question should be characterized as "the right to bring goods across the Canada–United States boundary at the St. Lawrence River for purposes of trade."[181] She found that although trade was a "distinguishing feature" of Mohawk society, the evidence did not establish that there was "ancestral" trade north and south of the St. Lawrence River, but rather that trade was conducted east and west of the river.[182] In any event, according to McLachlin C.J., even if the scant evidence of northerly trade was given credit, it still did not establish that the northerly trade was "a defining feature of the Mohawk culture."[183]

Because she did not find that an Aboriginal right to trade across the St. Lawrence River existed, McLachlin C.J. did not have to address the government's argument[184] that such a right could not be recognized because it would be "fundamentally contrary to Canadian sovereignty."[185] For what its worth, although McLachlin C.J. declined to decide whether the "sovereign incompatibility" test was now part of the *Van der Peet* test, as alleged by the government,[186] she did not expressly deny that it was either.[187]

Binnie J.'s judgment is more explicit in his assessment of what is acceptable under Canadian sovereignty. While he agreed with McLachlin

176. *Ibid.* at 183.
177. *Ibid.* at 181.
178. [2001] 1 S.C.R. 911 [*Mitchell*].
179. *Ibid.* at 911.
180. *Ibid.* at 912.
181. *Ibid.* at 913.
182. *Ibid.* at 914.
183. *Ibid.*
184. *Ibid.* at 954.
185. *Ibid.* at 922, per McLachlin J.
186. *Ibid.* at 954, per McLachlin J.
187. *Ibid.*

C.J. that the evidence failed to show that northern trade over the St. Lawrence River was a "defining feature of the Mohawk culture"[188] or "vital to the Mohawk's collective identity"[189] prior to European contact, he also made his decision based on whether such a right was compatible with Canadian sovereignty.[190] Binnie J. acknowledged that the respondent did not challenge Canadian sovereignty, and sought instead a form of "Mohawk autonomy within the broader framework of Canadian sovereignty."[191]

In attempting to characterize the interplay between "autonomy" for First Nations and the Canadian sovereignty, Binnie J. referred to the Royal Commission on Aboriginal Peoples, which said, "the Aboriginal right of self-government in section 35(1) involves circumscribed rather than unlimited powers."[192] However, the judge made it clear that it was unnecessary "for present purposes, to come to any conclusion about these assertions."[193] His intention was simply to illustrate the limited nature of any autonomy that the First Nations might enjoy.

He emphasized that the exercise of Indigenous autonomy could not be incompatible with the sovereignty of the Canadian state, referring to a shared sovereignty, which he believed had to be largely harmonious:

> If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that [A]boriginal and non-[A]boriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort.[194]

Because some rights that could otherwise be made out under s. 35(1) would be incompatible to Crown sovereignty, Binnie J. found that "sovereign incompatibility … must be a part of the s. 35(1) test":

> I do not accept that the Mohawks *could* acquire under s. 35(1) a legal right to deploy a military force in what is now Canada, as and when they choose to do so, even if the warrior tradition was to be considered a defining feature of pre-contact Mohawk society …. In my opinion, sovereign incompatibility continues to be an element in the s. 35(1) analysis, albeit a limitation that will be sparingly applied.[195]

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188. *Ibid.* at 948, per McLachlin J.
189. *Ibid.* at 952.
190. *Ibid.* at 954, per Binnie J.
191. *Ibid.* at 970-971.
192. *Royal Commission Report*, *supra* note 134 at 214, quoted by Binnie J. in *Mitchell, supra* note 178 at 980.
193. *Mitchell, ibid.* at 981, per Binnie J.
194. *Ibid.* at 977.
195. *Ibid.* at 987, per Binnie J.

He concluded that the right to trade across the international border necessarily involved "external relations"[196] and was incompatible with Canadian sovereignty.[197] However, Binnie J. was at pains to point out that he passed no judgment on the compatibility of "*internal* self-governing institutions of First Nations with Crown sovereignty, either past or present."[198] It is clear from Binnie J.'s analysis that he is well aware of the different consequences for claims of external self-government, compared to claims for internal self-government. This stands in contrast to the Australian High Court's conflation of the two aspects of governance (expressed by Wheaton as two aspects of sovereignty) in *Coe*[199] and *Wiradjuri Tribe.*[200]

Issues for Australia

Canada is another example of a jurisdiction that does not rely on the "act of state" doctrine to shield its courts from examining Indigenous peoples' right to autonomy—in Canada, most often expressed as a right to self-government. Of course, the right to Indigenous self-government in Canada has not been recognized by the Supreme Court. Indeed, on at least two occasions, the Supreme Court has declined to decide the issue of whether an Indigenous right of self-government exists, and has instead decided the cases on other grounds.[201] However, the Supreme Court did not fail to decide the self-government issue because it thought such an adjudication would question the Canadian government's assertion of overall sovereignty over Canada, and therefore infringe the independence of an "act of state." The Court's explicit rationales for not making the determinations about self-government were that those adjudications were unnecessary in the particular cases.[202]

Such a position, that decisions upon self-government were unnecessary, is not tacit acknowledgment that those adjudications would be doctrinally illegitimate. Rather, the Supreme Court specified that, assuming a right of Indigenous self-government existed, the right would have to be established according to existing tests applied to determine "Aboriginal rights." Lamer C.J. in *Pamajewon* stated that the *Van der Peet* test would have to be applied in order to determine any potential right of self-government.[203] The very fact that the Court is willing to postulate what legal test should be applied to

196. *Ibid.* at 993, per Binnie J.
197. *Ibid.* at 991, per Binnie J.
198. *Ibid.* at 992.
199. *Supra* note 3.
200. *Supra* note 21.
201. See *Pamajewon, supra* note 147 and *Delgamuukw, supra* note 156, discussed above.
202. *Pamajewon, ibid.* at 834, Lamer C.J.; and *Delgamuukw, ibid.* at 1114, Lamer C.J., also on behalf of Cory, McLachlin and Major JJ.
203. *Pamajewon, ibid.,* Lamer C.J. at 832-833.

work out whether a right of self-government exists indicates that it does not consider that there is a prior barrier to making an adjudication. The reasoning examined in the cases suggests that should a case require adjudication upon self-government, the Supreme Court would apply the *Van der Peet* test (and, in light of *Mitchell*,[204] possibly also the sovereign incompatibility test[205]) in order to work out whether a right of self-government existed. The Canadian Supreme Court, by all indications, does not consider itself bound by the "act of state" doctrine when working out the internal organization of authority in Canada.

Although the "act of state" doctrine does not seem to pose a problem for Canadian Indigenous claims—the claims in Canada are, of course, for self-government, and not for sovereignty as they have been in Australia. Despite Canadian claims focusing on whether self-government falls under s. 35(1) of the *Constitution*, there are significant points of comparison for Australia. To assume that it is possible that the right of self-government does exist means that the Canadian judges also assume that there is no fundamental reason why such a right could not exist, and thereafter could not be expressed by the *Constitution*. The assumption is that it is possible that there are powers of government available to Indigenous people despite overarching Canadian sovereignty. Indeed, there is never any question that the state of Canada does not have "external" sovereignty. Although Canadian sovereignty is not in dispute in *Mitchell*, Binnie J. nonetheless states that an Aboriginal right can only be recognized if it is not incompatible with Canadian sovereignty.[206]

Like in the US jurisprudence, what is crucial for Australia is that Canadian courts are willing to make a distinction between ultimate, or "external," state sovereignty and whatever rights of autonomy or government that may be still held by Indigenous people within that umbrella of overall sovereignty. Whether a form of authority is held by Indigenous people is a justiciable question because it does not require a domestic court to overstep its authority to debunk the overall sovereignty of the parent state.

The Canadian jurisprudence also invites consideration of whether Indigenous claims framed as "self-government" claims would be more likely to succeed in Australia than Indigenous "sovereignty" claims. It appears unlikely that re-framing Indigenous claims in Australia as claims of "self-government" would make the High Court more amenable to adjudication of Indigenous sovereignty or governance. Ultimately, the claim is that the British assertion of sovereignty did not displace all other authority in the land. Whether the authority is presented as sovereignty or self-government would still seem to require the Australian High Court to acknowledge the possibility of recognizing different forms or tiers of governance, even

204. *Supra* note 178.
205. See above discussion of *ibid.* at the text accompanying note 178.
206. *Ibid.* at 987.

without finding that the British acquisition of sovereignty is invalid. That is the conceptual shift that the Australian High Court feels it cannot make and that, it seems, will require stronger winds of change than a shift to "self-government."

There are also possible discursive advantages to asserting sovereignty, compared to asserting a right of self-government. Recognition of sovereignty may well convey a greater sense of prior authority and, perhaps, a sense of standing comparable to the powerful nations that took over Indigenous lands. Certainly, if a right of self-government is only derivative, then its existence is arguably more tenuous, and it conveys less authority than does a recognition of sovereignty. However, an inherent right of self-government may well be as good in practice as the rights afforded by subordinate or "internal" sovereignty. This is especially the case when one considers that the "content and definition" of both concepts is fluid and up to the legislature to ultimately determine.

A claim of sovereignty is perhaps also more readily conceived as a broad right, while self-government seems more adaptable to being conceived of very narrowly—as it has been in Canada in cases where the courts have contemplated specific rights to government over certain activities. Writing before the *Campbell* decision in 2000, McNeil argues that a recognition of Indigenous sovereignty is necessary to avoid a piecemeal recognition of certain "existing [A]boriginal rights."

> Except where Aboriginal title is concerned, Aboriginal peoples are being asked to establish very specific rights, one by one, on the basis of historical practices, customs and traditions …. The solution to this problem … takes account of the reality of Aboriginal nationhood. It subsumes all Aboriginal rights, including land rights and self-government, under one all-encompassing right to territory. In so doing, it places Aboriginal assertions of sovereignty at the forefront as the primary issue to be addressed.[207]

Of course, a lot depends on how any recognition of Indigenous autonomy is implemented. Judicial recognition is by no means the end of the story.

VI CONCLUSIONS

The question of whether Indigenous sovereignty exists in Australia will remain an issue until it is properly resolved by either the courts or through political negotiation.

The High Court's response to sovereignty claims has obscured instead of resolved the issues. By refusing to acknowledge differences in the content of Indigenous claims to sovereignty, the Court has interpreted every claim as

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207. McNeil, "Aboriginal Rights", *supra* note 131 at 292.

a threat to the original assertion of sovereignty by the British in the 18th century. It has deferred questions of Indigenous sovereignty to international law, despite the lack of any real possibility that international law will decide the issue. The result is that questions of sovereignty and Indigenous people are outside the law. Sovereignty as it is articulated by the Court in response to Indigenous claims becomes synonymous with an "act of state" that occurred over 200 years ago.[208]

A nuanced version of sovereignty that recognizes both "internal" and "external" aspects, though recognized by the High Court in relation to the division of federal powers, is denied application to Indigenous claims. Arguments to a limited, "internal" Indigenous sovereignty are conflated with claims challenging the validity of the Australian state. This is despite the Court's willingness in *Mabo* to recognize a system of traditional laws and customs that existed at the time of the British assertion of sovereignty, and gave rise to rights to land. Such recognition was defined by the Court as adjudication of the "consequences" of the assertion of British sovereignty, rather than examination of the "act" of state itself.

The High Court's consistent claim that issues of Indigenous sovereignty are outside domestic law is belied by a body of foreign cases in which Indigenous claims to internal governance have been substantively examined. US courts have recognized a limited form of Indigenous sovereignty, while Canadian jurisprudence, although more reluctant to address government rights in the courtroom, has contemplated how a right of self-government would be established according to domestic law tests. In both jurisdictions, the initial assertion of sovereignty by the colonial powers has been considered beyond question, but what the assertion means for internal arrangements of authority is validly open to judicial appraisal.

Sovereignty is a concept that exists at the intersection of what is legal and what is political. The recognition of Indigenous sovereignty by the courts does not have to be considered a usurpation of the executive and the legislature. Indeed, as in North America, a court can recognize a general right or inherent status, but it is then up to Parliament to give the status its form and content. Behrendt describes the recognition of sovereignty as

> a device by which other rights can be achieved. Rather than being the *aim* of political advocacy, it is a *starting point* for recognition of rights and inclusion in democratic processes. It is seen as a footing, a recognition, from which to demand those rights and transference of power from the Australian state, not a footing from which to separate from it.[209]

208. That act of state is of course the assertion of sovereignty by the British in 1788.

209. L. Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Sydney: Federation Press, 2003) at 99.

Seeking Indigenous sovereignty may well be preferable to claiming self-government, because sovereignty provides a basis from which other rights arise, and it prevents the need for individual rights to be recognized on a piecemeal, *ad hoc* basis.

Although it is beyond the scope of this paper to look substantially at what effect the recognition of Indigenous sovereignty might have, it is worth mentioning in passing that the consequences of recognition might not be as dramatic as they may first appear. While there is the problem of a territorial base for a form of Indigenous government (given the dispersal of Indigenous people all over Australia), Australia's federal structure might well make it not unsuited to accommodating another body of laws and government.[210]

Ultimately, regardless of the political implications, there is an important issue of principle at stake, which the Australian High Court must address. By refusing to adjudicate the issue of Indigenous sovereignty, the Australian High Court has produced an adjudication of sorts. However, the explanations it has offered for the founding of the country are inconsistent, illogical and unconvincing. The Court's professed inability to confront questions fundamental to legal authority weakens its own credibility and leaves Australians without substantive answers to basic questions about the nature of legal and political authority in Australia.

Just as other common law countries have done, it is possible for the Australian High Court to draw non-European sovereignty into its jurisdiction and examine it as it would other disputes about the distribution of internal authority. The existing concepts of "internal" sovereignty and the "consequences" of the assertion of British sovereignty could logically include an examination of a limited Indigenous sovereignty. Such an approach recognizes that domestic law needs to address Indigenous claims if it is to reflect modern conceptions of popular sovereignty. Shifting the line on what is justiciable will also leave behind the view that a colonial assertion made two centuries ago permanently prevents domestic law from adjudicating internal governance.

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210. See *e.g.*, Cheryl Saunders, "Blurring Distinctions: A review of Henry Reynolds' *Aboriginal Sovereignty*" (1996) 2 Australian Humanities Rev., online: <http://www.lib.latrobe.edu.au/AHR/archive/Issue-July-1996/saunders.html>. She argues that federalism may make the country receptive to legal pluralism.