

'NOT PURELY OF LAW'— THE DOCTRINE OF BACKWARD PEOPLES IN MILIRRPUM

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ABSTRACT

The *terra nullius* doctrine is commonly asserted to be the basis upon which Great Britain claimed territorial sovereignty over eastern New Holland in 1788 and, subsequently, the remainder of the Australian continent. However, in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, in which the only comprehensive account in the Anglo-Australian jurisprudence to examine this issue prior to the 1992 *Mabo (No 2)* decision, it was not *terra nullius* which was declared to be the foundation but the Doctrine of Backward Peoples, which posits that a territory inhabited by 'uncivilized inhabitants in a primitive state of society' can be dispossessed by 'more advanced peoples'. In this article, the unusual provenance and the ultimate integrity of this Backward Peoples doctrine is explored, analysed and found to be of doubtful legitimacy. Despite this, the *Milirrpum* decision had one remarkable feature, a finding of fact that the indigenous Yolngu People had a system of law in 1788 which remained extant and vibrant nearly 200 years after the assertion of British sovereignty. Their system survived the assertion of British sovereignty and, most problematically, this finding of fact threw the rarely-exposed constitutional common law foundations of Australia, including the orthodox theory of British sovereignty over New Holland/Australia, into stark relief.

I INTRODUCTION

The Gove Peninsula, on the northeastern coast of the Northern Territory of Australia, is within the vast swathe of New Holland that was claimed by King George III as 'Our Territory of New South Wales' and to which the Commissions issued to 'Captain-General and Governor in Chief' Arthur Phillip RN were expressed to extend.¹ The Peninsula thus became, theoretically, part of the colony of New South Wales on 7 February 1788.² However, this mattered not at all to the indigenous Yolngu People who had resided there for many millennia. It took a century after the assertion of British sovereignty before any grants of interests in land were made on the Peninsula. Then, in

* BA LLB(Hons) LLM PhD. Thanks to Richard Monypenny, Michael Drew and Jamie Fellows for their helpful comments on drafts of this article. Please note the author is reporting on and discussing the views expressed in the judgment and its surrounding jurisprudence, and is neither adopting nor endorsing these views or doctrines.

¹ Captain-General Phillip was first commissioned on 12 October 1786 and again on 2 April 1787. This 'Territory of New South Wales' was, in Evatt's words, 'an area vast in dimensions when compared to Captain Cook's modest claim' in 1770: see Elizabeth Evatt, 'The Acquisition of Territory in Australia and New Zealand' in Charles Henry Alexandrowicz (ed), *Studies in the History of Nations* (Martinus Nijhoff, 1970) 16, 27.

² WG McMin, *A Constitutional History of Australia* (Oxford University Press, 1979), 1-3. Popularly, this is celebrated on 26 January but the present legal consensus is 7 February 1788; see the joint judgment of Deane and Gaudron JJ in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 78. For a more recent acceptance of this date as appropriate, see *Rrumburriya Borroloola Claim Group v Northern Territory of Australia* [2016] FCA 776, (30 June 2016) [43] (Mansfield J).

1931 a large tract of the Gove Peninsula was reserved for the ‘use and benefit of the aboriginal native inhabitants of the Northern Territory’ and named ‘the Arnhem Land reserve’.³ It was only when Methodist missionaries set up at Yirrkala in north-eastern Arnhem Land in 1935 – nearly 150 years after the assertion of British sovereignty – that any Anglo-Australians resided permanently there.

Large deposits of bauxite were located north of Yirrkala and by the early 1960s these areas were excised from the Arnhem Land reserve, and mineral leases were granted to permit mining and refining of the bauxite and the necessary infrastructure, including a township. The Yolngu People had not been consulted and had expressed their opposition to the increasing development for some years, including presenting to the Commonwealth Parliament bark petitions in 1963 requesting the cessation of these activities.⁴

Losing the political battle, in December 1968 the Yolngu People commenced an action in the Supreme Court of the Northern Territory claiming a traditional proprietary interest in the lands excised from the reserve for the mining operations. The Yolngu sought relief against the leaseholder, Nabalco Pty Ltd, and the Commonwealth of Australia.⁵ After interlocutory proceedings in which the Commonwealth sought summary judgment alleging the proceedings showed no cause of action failed,⁶ the matter proceeded to trial before Judge Blackburn in 1970.⁷

In the following, the arguments of the litigants are outlined, and the territorial acquisition principles relied upon by Blackburn J in making his decision are interrogated. It will be shown that his Honour’s reliance on his sources for these ‘not purely of law’ principles was largely ill-founded and grave errors were made. Finally, the impact on Anglo-Australian jurisprudence of the court’s one remarkable finding of fact is examined. The finding that the Yolngu People retained a subtle and elaborate system of laws and customs nearly 200 years after the assertion of British sovereignty meant that the landscape of colonial New Holland/Australia could no longer be said to ‘law’-less but rather seen to be populated by many such systems of laws cradled in many hundreds of Indigenous societies like that of the Yolngu. The orthodox theory of British sovereignty holds that the New Holland/Australian landscape was empty in 1788. Judge Blackburn’s finding of fact in *Milirrpum* challenges that emptiness. It had forms in it: human, jural, and societal. None of these forms is accommodated within the current orthodox theory of sovereignty.

A The Arguments

The legal issue central to the proceedings was whether the Yolngu had a traditional proprietary interest in the claimed land which was cognisable to the Anglo-Australian common law. The Yolngu People alleged that they had been in continuous use and

³ Arnhem Land was ‘discovered’ and its coast mapped by Willem Joosten van Coolsteerdt (aka Colster) in 1623. The term ‘discovery’ is used throughout this article in its technical sense under the Occupation/Discovery doctrine in international law, not its ordinary sense of ‘the first to find or to find out’.

⁴ The classic text which surveys the Yolngu People is Nancy M Williams, *The Yolngu and their Land: A System of Land Tenure and the Fight for its Recognition* (Australian Institute of Aboriginal Studies, 1986).

⁵ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (‘*Milirrpum*’).

⁶ This is reported as *Mathaman v Nabalco Pty Ltd* [1969] 14 FLR 10.

⁷ At the time of this judgment, Northern Territory Supreme Court judges were known as Judge: see <http://www.supremecourt.nt.gov.au/about/judges/former/blackburn.htm>, accessed 15 August 2016.

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occupation of this land 'time out of mind'. Their counsel, Woodward QC, in his opening address, asked the court to note 'the intense spiritual connexion between the aboriginals and their land':

They believe that the land was given to them by their spirit ancestors, and that their own spirits came from the land and will return to it after their death.

Their relationship with their land is therefore timeless and it is inextinguishable. It is far more real and significant in our submission than the ownership in fee simple, which is the highest right recognized in our normal system of land tenure.⁸

In the proceedings, there was no direct challenge by the Yolngu People to the assertion of British territorial sovereignty over the relevant lands in 1788. The argument made on the Yolngu's behalf, in essence, was that 'sovereignty' over and the ultimate title to their traditional lands vested in the British Crown by reason of what Captain-General Phillip did in pursuance of his Commissions at Port Jackson in early 1788.⁹ Hence, from that moment in time, the common law of England applied to all subjects of the Imperial Crown, including the forebears of the plaintiff Yolngu, in New South Wales and

at common law the rights, under native law or custom, of native communities to land within territory acquired by the Crown, provided that these rights were intelligible and capable of recognition by the common law, and were rights which persisted, and must be respected by the Crown itself and by its colonizing subjects, unless and until they were validly terminated.¹⁰

Their argument was one of communal native title, that the English common law in migrating to New Holland as part of the Imperial constitutional common law carried with it a doctrine that respected the customary proprietary titles of its indigenous peoples.

The Commonwealth of Australia resisted the claim arguing that the Yolngu plaintiffs could not establish as a matter of evidence that they held the same links to the same land as their ancestors were said to have. And, in any event, it was argued that the common law which arrived in New Holland in 1788 did not recognise any communal aboriginal title. In essence, this reduced to an assertion that the Yolngu People were so low in the scale of social organisation that their conceptions of rights, duties and of title were not and could not be recognised in Anglo-Australian law. The Commonwealth of Australia essentially adopted an argument accepted by the Judicial Committee of the Privy Council in *Re Southern Rhodesia* in 1919, in which Lord Sumner stated:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some

⁸ *Milirrpum*, above n 5, Transcript of Proceedings, Darwin, 25 May 1970, 4 (Woodward QC), (during argument). Original spelling maintained.

⁹ In light of relevant international legal principles on effective control of territory, 'there are problems' with this conclusion according to Justices Deane and Gaudron; see *Mabo (No 2)* (1992) 175 CLR 1, 78. Unless indicated otherwise, the term 'sovereignty' in used, inter-temporally, to mean the command of a territory with no allegiance or duty owed to another outside that territory. It also accepted that this sovereignty has both external and internal aspects; see the *locus classicus* in Australian law in *New South Wales v Commonwealth* (1975) 135 CLR 337, 479-80 (Jacobs J).

¹⁰ (1971) 17 FLR 141, 149.

shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.¹¹

Any 'system' demonstrated by the Yolngu evidence, the Commonwealth argued, did not have the necessary characteristics of a system of 'law' for an Anglo-Australian court to recognise it as such. The 'usages and conceptions of rights and duties' of the Yolngu, and their tribal organisation, were so low on 'the scale of social organization' as to be ignored by the 'institutions and legal ideas of civilized society'. Yes, this argument ran, the Yolngu were human but were on the other side of an unbridgeable gulf, and thus they were not rights-bearing humans. Essentially the Commonwealth argument was that 'such people', being the uncivilised Yolngu, could not possess rights of property, individually or collectively, known to the Anglo-Australian law. There was no 'change' of sovereignty to the British Crown because there were no antecedent sovereignties in New Holland. The colony of New South Wales had neither been conquered nor ceded, but 'occupied' and any native systems there were displaced. 'And that', according to Solicitor-General Robert Ellicott for the Commonwealth of Australia, 'was that'.¹²

The Yolngu claims failed in every major respect, save one. After a trial of over 50 days,¹³ Blackburn J found, as a matter of fact, he could not be satisfied that the Yolngu plaintiffs had the same links presently to the contested land as those which their ancestors had in 1788. And, in any event, Judge Blackburn determined the communal native title claimed by these Indigenous persons was not recognised – and had never been recognised – in Anglo-Australian law and, therefore, any claimed allodial rights to, or interests in, land by any Indigenous inhabitants were unenforceable.¹⁴ The one saving for the Yolngu People was the finding of fact by Blackburn J that the Yolngu People, nearly 200 years after the assertion of British sovereignty, continued still to possess and maintain an elaborate and vital system of traditional laws and customs which ordered their society.¹⁵

II THE SOVEREIGNTY ISSUE

In the course of this 250 plus page judgment is the most comprehensive discussion in the Anglo-Australian jurisprudence – to that time – of the basis upon which the British asserted territorial sovereignty over New Holland/Australia. Although the issue was not alive in the proceedings, Judge Blackburn was required to determine the basis upon which territorial sovereignty was purportedly acquired by Great Britain in order to then determine the circumstances of the arrival of European law on the shores of New Holland in 1788.

¹¹ [1919] AC 211, 233-34. This opinion of the Board was short-lived as it would appear to have been repudiated in *Amodu Tijani v Secretary for Southern Nigeria* [1921] 2 AC 399 (PC).

¹² This 'memorable phrase', used in the Solicitor-General's final oral submission on the interlocutory summonses, is quoted in WEH Stanner, *White Man Got No Dreaming* (Australian National University Press, 1979), 290.

¹³ The trial was conducted in Darwin and Canberra in 1970, and the judgment was handed down in Alice Springs on 27 April 1971.

¹⁴ This conclusion was criticised by many commentators: see, for example, John Hookey, 'The Gove Rights Land Case: A Judicial Dispensation for the Taking of Aboriginal Land in Australia' (1972) 5 *Federal Law Review* 83, and Bryan Keon-Cohen and Bradford Morse, 'Indigenous Land Rights in Canada and Australia' in Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (Allen & Unwin, 1984) 74.

¹⁵ (1971) 17 FLR 141, 267. This finding will be discussed below.

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On this antecedent issue, Blackburn J candidly determined that the 'philosophical' basis for the assertion of British territorial sovereignty over colonial New South Wales was that 'more advanced peoples' can dispossess, as necessity demanded, 'less advanced' peoples.¹⁶ Unusually, the source of this 'philosophical justification' was not in the Anglo-Australian legal discourse but in the jurisprudence of the incipient United States of America. As the source of a principle centrally relevant to the British acquisition of an approximate 3.0 million square kilometre portion of New Holland in 1788, the post-Revolutionary writings of an American jurist is an unusual source.

A 'Certain wide principles, not purely of law'

There can be little doubt that Judge Blackburn clearly understood the magnitude of the task before him in addressing the issue of whether the Yolngu People possessed the interests they claimed in the land, the first such assertion by an Indigenous people in the Anglo-Australian legal system. At the outset of the judgment he stated:

There are great and difficult moral issues involved in the colonization by a more advanced people of a country inhabited by a less advanced people. These issues, though they were rightly dealt with as relevant to the matters before me, were not treated as at the foundation of the plaintiffs' case. Had they been so treated, the case would have involved an examination, not merely of some aspects of the dealings of some European people with some aboriginal races over the last four hundred years (as it did), but of much of the history of mankind.¹⁷

In his Honour's assessment, therefore, 'European people' were the more advanced of the human races and the 'aboriginal races' the 'less advanced'.¹⁸

1 The first principle of acquisition of colonial territory

In addressing the Yolngu argument, Judge Blackburn sets out in his judgment what he called the *Principles applied to the acquisition of colonial territory*. His Honour stated that there are 'certain wide principles, not purely of law, which must be set out as a necessary background to a statement of the law applicable to colonial possessions'.¹⁹

The first of these 'wide principles' bears quotation in full as the balance of the judgment rests substantially, if not wholly, upon it.

The first is a principle which was a philosophical justification for the colonization of the territory of the less civilized peoples; that the whole earth was open to the industry and enterprise of the human race, which had the duty and the right to develop the earth's resources; *the more advanced peoples were therefore justified in dispossessing, if necessary, the less advanced*. Kent explains this principle shortly (*Commentaries on American Law*, vol. III, p. 387): he mentions its earlier expression by Vattel, but as a philosophical doctrine it no doubt had a longer pedigree. The Puritans of Massachusetts looked upon it as the application of a command given by God at the Creation: Kent's *Commentaries*, vol. III, p. 388, note (a).²⁰

Thus, the judge's first principle of territorial acquisition is that 'less civilised' peoples can be dispossessed, if necessary, in the furtherance of the duty and the right to develop the planet's resources, by 'more advanced peoples'. This was a 'philosophical doctrine' of doubtless ancient pedigree, his Honour opined, and seemingly driven by a Christian

¹⁶ Ibid 200.

¹⁷ Ibid 149.

¹⁸ Please note the author is neither adopting nor endorsing these 'not purely of law' principles.

¹⁹ (1971) 17 FLR 141, 200.

²⁰ Ibid (emphasis added).

imperative. For the provenance of this ‘philosophical justification’ his Honour turns to James Kent’s *Commentaries on American Law*,²¹ which in turn is said to rely on the writings of an early Swiss publicist, Emmerich de Vattel and also calling in aid the creation beliefs of the early 17th century Puritans of the Massachusetts Bay Colony of New England. Needless to say, these are unique sources of legal principle for a judge of first instance in the Anglo-Australian legal system in the early 1970s to place reliance upon. Yet Blackburn J stated that these three sources evinced both the expression and the application of his first principle of colonial territorial acquisition.

The central reliance on the work of Chancellor James Kent by Judge Blackburn, given the veneration in which the Chancellor is held in the jurisprudence of the United States of America, and the sheer breath of this ‘philosophical doctrine/justification’ attributed to him deserves investigation, and in focusing on Kent’s *Commentaries on American Law* each of the lesser sources will be investigated.

(a) *Reliance on Kent’s Commentaries on American Law*

The citation of an American jurist, particularly a post-Revolutionary one such as Chancellor James Kent, was a rare, perhaps then unprecedented, event by an Anglo-Australian court in 1971 at a time when the apex of the judicial system was incontrovertibly the London-based Judicial Committee of the Privy Council.

The much-revered Chancellor Kent published six editions of his *Commentaries on American Law* during his lifetime.²² Upon his retirement as Chancellor (of Equity) of New York in 1823, Kent was immediately appointed to a professorship at Columbia College, now Columbia University, in New York City. Although his repackaged law lectures were originally intended to be a single volume, the 1st edition of his *Commentaries on American Law*, published over the period 1826 to 1830, ran to four volumes, as did all subsequent editions in his lifetime.²³

Blackburn J cites from Volume III of the Kent’s *Commentaries on American Law* but omits to nominate in his judgment upon which edition he was placing reliance. He does note that Chancellor Kent was writing between 1826 and 1830.²⁴ This would strongly indicate that it was the 1st edition of Volume III, published in 1828.²⁵

The year in which Chancellor Kent was writing is of no slight importance. This is because during the first decades of the 19th century, as Kent was drafting, editing and publishing his early editions, the then-fledgling United States Supreme Court was asserting its role in the post-Revolutionary constitutional framework and, in particular, developing the principles of the jural relationship between the newly-minted United States of America and the Amer-Indian indigenous peoples within its still-expanding

²¹ James Kent, *Commentaries on American Law* (Clayton, 1st ed, Volume III, 1828) (‘Kent’s *Commentaries, 1st ed, Volume III*’).

²² John Theodore Horton, *James Kent: A Study in Conservatism 1763–1847* (D. Appleton-Century Co., 1969), x.

²³ *Ibid.* Chancellor Kent prepared all editions through to the 6th edition, which edition was published posthumously in early 1848. The 1st edition of Volume III was in 1828, the 2nd in 1832, and successively in 1836, 1840, 1844 and the 6th - and last under Kent’s personal authorship - in 1848.

²⁴ (1971) 17 FLR 141, 202. This point will be developed fully below.

²⁵ Kent’s *Commentaries, 1st ed, Volume III*, above n 21. The Special Collections section of the Law Library of Columbia University in New York holds all six editions of Kent’s *Commentaries* in the original. The library staff, in particular Whitney Bagnell, kindly allowed the author access to all these editions. The pagination referenced by Judge Blackburn is different from the 1828 edition of Volume III, but this can be explained if he were using a facsimile copy of the original edition, a common occurrence.

boundaries.²⁶ That law was seminal and was being created in large part by the US Supreme Court with John Marshall, known fondly in American jurisprudence as 'the Great Chief Justice', leading it.

(i) *Lecture L of the 1st edition*

In the 1st edition of Volume III, in Part VI, Chancellor Kent discusses the law relating to real property in the pre-Revolutionary colonies. The opening subject, in Lecture L, is *Of the Foundation of Title to Land*. Kent notes the continued adherence to the theory of feudal tenure, 'that the king was the original proprietor of all the land in the kingdom, and the true and only source of title',²⁷ a mainstay of common law real property. However, this pure theory was undergoing a fundamental re-working in the incipient jurisprudence of the United States in the early 19th century because this theory of feudal tenure sat uncomfortably with the position of the indigenous peoples of North America, where it was plainly acknowledged that their aboriginal title to their lands – which was implicitly and immediately recognised in the Imperial constitutional law – was not sourced in any Old World monarch.

Two US Supreme Court decisions prior to the 1st edition of *Commentaries on American Law*, those of *Fletcher v Peck*²⁸ and *Johnson v M'Intosh*,²⁹ had made instructive annexures to the pure feudal tenure theory. Speaking of the respective rights of the European colonisers and the Amer-Indian peoples, Marshall CJ wrote in *Johnson v M'Intosh*:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. [...] But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery 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 natives, and establishing settlements upon it. It was a right with which no Europeans could interfere.³⁰

In this Lecture L, Chancellor Kent upholds the continued adherence to the theory of feudal tenure, even with respect to 'Indian reservation lands',³¹ of which the Indians still retained the occupancy. Kent notes that the validity of a patent (land grant) had not hitherto been permitted to be challenged on the basis that the Indian right and title had not been extinguished.³² Chancellor Kent then explains that the claims of European

²⁶ For example, the purchase by the United States of America of the Louisiana Territory from France in 1803 almost doubled its area.

²⁷ Kent's *Commentaries 1st ed, Volume III*, above n 21, 307.

²⁸ 10 US (6 Cranch) 87 (1810).

²⁹ 21 US (8 Wheat) 543 (1823).

³⁰ *Ibid* 595. This statement can be contrasted with that of Brennan J in *Mabo (No 2)* (1992) 175 CLR 1, 32, where this principle is considerably broadened to not merely regulate the European nations *inter se* but also to operate to dispossess any inhabiting aboriginal peoples of any sovereignties.

³¹ The term 'Indian reservation lands' is here to be construed broadly as including all lands still occupied by Amer-Indian Nations at this point in time and not merely to formal reservations of land made to them under treaty or otherwise.

³² Kent's *Commentaries 1st ed, Volume III*, above n 21, 308.

nations to the sovereignty of lands in North America, and to the ‘ultimate dominion’ over the Indian tribes, had been accepted by the American courts. The ‘solidity’ of those claims, Kent wrote, had been ‘to a qualified extent, explicitly asserted by the courts of justice in this country’. He then discusses the decision of *Johnson v M’Intosh*, which he paraphrases:

The European nations which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the right to grant a title to the soil, subject only to the Indian right of occupancy. The practice of Spain, France, Holland, and England, proved the very general recognition of this principle. The United States adopted the same principle, and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil, and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned.³³

Chancellor Kent then discusses the basis of European sovereignty over the Indians and their lands, asserting the practicality and justice of this ‘qualified dominion over the Indian tribes’. Addressing the grander question of the ultimate (or radical) title, he does justice to the 1823 decision upon which he is commenting by unequivocally asserting:

But while the ultimate right of the American governments to all the lands within their jurisdictional limits, and the exclusive right of extinguishing the Indian title by possession, is not to be shaken; it is equally true, that the Indian title by possession is not to be taken from them, or disturbed, without their free consent, by fair purchase, except it be by force or consent.³⁴

This 1st edition of Volume III of 1828 then continues on to state:

*If the settled doctrine on the subject of Indian rights and title was now open to discussion, the reasonableness of it might be strongly vindicated on broad principles of policy and justice, drawn from the right of discovery; from the sounder claim of agricultural settlers over tribes of hunters; and the loose and frail, if not absurd title of wandering savages to an immense continent, evidently designed by Providence to be subdued and cultivated, and to become the residence of civilized nations.*³⁵

The ‘settled doctrine’ to which the chapeau refers is the incipient doctrine of aboriginal rights that the US Supreme Court, in *Johnson v M’Intosh* in particular, had endorsed unanimously. The ‘If’ is explained by the fact that the Court, led by Chief Justice Marshall, had stated this doctrine to be the law of the United States of America. The US Supreme Court had rested its enunciated principles on a foundation other than that which Chancellor Kent believed to be ‘the sounder claim’, the one ‘evidently designed by Providence’. The ‘absurd title of wandering savages’ of which he wrote had been upheld as having to be lawfully acquired ‘from the natives’ by the nation’s highest court on two fronts: their sovereignty over their territories must be gained by Conquest or Cession (whether original or derived) and then their aboriginal (or native) title in the land must also be lawfully acquired. The doctrinal basis of the ‘Indian rights and title’ was ‘settled’ by the Supreme Court, and was not ‘open to discussion’, but the retired Chancellor was still asserting an alternative view.³⁶ This discussion in the 1st edition, in essence, is an *ex-cathedra* dialogue with the US Supreme Court.

³³ Ibid 309.

³⁴ Ibid 311-12.

³⁵ Ibid 312 (emphasis added).

³⁶ It must be said in Chancellor Kent’s defence that much of what the US Supreme Court stated in *Johnson v M’Intosh*, although unanimous, was *obiter dicta*. The Chancellor thus had room to continue to urge an alternative theory.

A sense of the temper of this particular discourse, and the influence of Vattel, an early publicist in the development of the modern Law of Nations, can be gleaned from the Chancellor's next passage in which his alternative doctrine is outlined.

Erratic tribes of savage hunters and fishermen, who have no fixed abode, or sense of property, and are engaged constantly in the chase or in war, have no sound or exclusive title either to an indefinite extent of country, or to seas and lakes, merely because they are accustomed, in search of prey, to roam over the one, or to coast the shores of the other. Vattel had just notions of the value of these aboriginal rights of savages, and of the true principles of natural law in relation to them. He observed that the cultivation of the soil was an obligation imposed by nature upon mankind, and that the human race could not well subsist, or greatly multiply, if rude tribes, which had not advanced from the hunter state, were entitled to claim and retain all the boundless forests through which they might wander. If such people will usurp more territory than they can subdue and cultivate, they have no right to complain, if a nation of cultivators puts in a claim for a part.³⁷

Borrowing from the work of the Scottish loyalist and latter-day Vattelien advocate, George Chalmers,³⁸ Chancellor Kent writes that the 'aboriginal savages' had 'no fixed abodes', no 'sense of property' and 'no sound or exclusive title' to the territory over which they merely 'roam'. Chalmers had written in his *Political Annals*:

No conquest was ever attempted over the aboriginal tribes of America: their country was only considered as waste, because it was uncultivated, and therefore open to the occupancy and use of other nations. Upon principles which the enlightened communities of the world deemed wise, and just, and satisfactory, England deemed a great part of America a desert territory of her Empire, because she first discovered and occupied it.³⁹

This is an expansion of the ancient doctrine of Occupation/Discovery – which applied only to the acquisition of territorial sovereignty of an uninhabited territory – to territories occupied by the indigenous peoples of the New World. Such Indigenous territories were considered 'waste', being uncultivated, and therefore sovereign-less and ownerless, and so open to Occupation by the enlightened European nations. This purported extension of the doctrine of Occupation has been euphemistically referred to as the Occupation of Backward Territories⁴⁰ or, more accurately, the Occupation of Backward Peoples doctrine.⁴¹ Dr Lindley in his thesis, *The Acquisition and Government*

³⁷ Kent's *Commentaries 1st ed, Volume III*, above n 21, 313.

³⁸ George Chalmers, *Political Annals of the present United Colonies from their Settlement to the Peace of 1763* (Private Publication, 1780). This work, styled Book I, covered the British colonisation in North America to 1688. It was to have been followed by another volume, intended to cover the remaining period to 1763, which never appeared. Consequently, Book I pays no attention to the most important Imperial document of the era in Great Britain's North American territories, King George III's *Royal Proclamation of October 7, 1763*.

³⁹ Ibid 28. As we shall see, Chalmers was likewise attempting to massage the British North American colonies into Sir William Blackstone's nomenclature of 'desert and uncultivated' plantations.

⁴⁰ MF Lindley, *The Acquisition and Government of Backward Territory in International Law (being a treatise on the law and practice relating to colonial expansion)* (Negro Universities Press Reprint (1969), first published Longmans, Green & Co (1926)). In the oddest of Prefaces, given the title of his thesis, Lindley confesses that the term 'backward territory' is 'not one known to the International Law'; Preface, v.

⁴¹ Later in time, Brennan J in *Mabo (No 2)*, said of this Occupation of Backward Peoples doctrine: 'To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was *terra nullius*. They recognized the sovereignty of the respective European nations over the territory of 'backward peoples' and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest': *Mabo (No 2)* (1992) 175 CLR 1, 32. Later, at page 36, Brennan J referred to this particular doctrine as 'the enlarged notion of *terra nullius*'.

of *Backward Territory in International Law*, says it is not ‘possible or desirable to give it an exact definition’:

At the one extreme, it may perhaps be said to be marked by territory which is entirely uninhabited; and it is clearly includes territory inhabited by natives as low in the scale of civilization as those of Central Africa. On the other hand, all that can be said as to its upper limits probably is that it is obviously intended to exclude territory which has reached the level of what is sometimes known as European or Western civilization.⁴²

In discussing the ‘territory inhabited by natives’, Dr Lindley paints in broad strokes: those ‘as low in the scale of civilization as those of Central Africa’ are ‘backward’, while those who have attained ‘the level of what is sometimes known as European or Western civilization’ are not.

It needs to be perfectly understood that this purported expansion of the Occupation/Discovery doctrine to ‘backward peoples’ and ‘rude tribes, which had not advanced from the hunter state’ as stated by Chancellor Kent is both belated and bested. The Chancellor’s passage is a passionate rendition of Emmerich de Vattel’s ‘just notions’ in relation to the ‘value’ of the ‘aboriginal rights of savages’, albeit engorged by Chalmers,⁴³ but was not a statement of any extant principle of post-Revolutionary American law, or of the pre-Revolutionary Imperial constitutional law or practice, or of international law or practice. Certainly, the John Marshall-led US Supreme Court did not accept or adopt the abstracted philosophical arguments of the retired Chancellor Kent, of a sole Swiss jurist, or of Chalmers’ surfeited rendition of the British North American experience, into its jurisprudence. To the contrary, it wholly repudiated them. Far from disregarding the ‘aboriginal rights of savages’, the US Supreme Court had upheld the ‘loose, frail if not absurd’ aboriginal title of the Indian nations and, indeed, their independent sovereignties. The American jurisprudence makes no distinction between ‘backward’ and ‘non-backward’ peoples.

Despite favouring the ‘just notions’ of Vattel over the doctrine of aboriginal rights being fashioned by the US Supreme Court, Chancellor Kent’s scholarship cannot be impugned. He clearly states the relevant law as declared in *Johnson v M’Intosh* and then passionately argues an alternative theoretical basis based principally – but loosely – on the 17th century writings of the publicist Vattel.

(ii) *Lecture LI of the 2nd Edition*

Importantly for both Chancellor Kent in the moment and Judge Blackburn a century and a half later, the US Supreme Court had not yet finished developing the doctrine of aboriginal rights. Between the publication of the 1st edition of Volume III in 1828 and its 2nd edition in 1832, the important decisions of *Cherokee Nation v Georgia*⁴⁴ and *Worcester v Georgia*⁴⁵ were decided by that court.⁴⁶

⁴² Lindley, above n 40, v.

⁴³ It is a hyperbolic version of Emmerich de Vattel’s work. Vattel only ever argued that ‘part’ of the vast territories of the aboriginal peoples of the New World might be acquired and then settled by European colonists. Moreover, Vattel commended cession/treaty as the appropriate means of acquiring those parts of the New World territories, not unilateral annexation or conquest.

⁴⁴ 30 US (5 Peters) 1 (1831) This was the first case with an indigenous party in USSC jurisprudence.

⁴⁵ 31 US (6 Peters) 515 (1832).

⁴⁶ These decisions are known as the second and third tranches of the *Cherokee Nation* trilogy, the first being *Johnson v. M’Intosh* in 1823.

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For James Kent in retirement, revision was less a task than an inveterate habit.⁴⁷ In the 2nd edition of Volume III published in 1832, these newer decisions of the Supreme Court are faithfully rendered in detail, with an additional generous commentary.⁴⁸ Lecture *L* of the 1st edition becomes Lecture *LI* in the 2nd edition and, given the activity of the Supreme Court, the text of the revised Lecture *LI* almost doubles in size.⁴⁹ Having discussed the now decade-old *Johnson v M'Intosh* decision in this 2nd edition, Chancellor Kent adopts an ominous tone in introducing the latterly decisions.

This is the view of the subject which was taken by the Supreme Court in the elaborate opinion [of *Johnson v M'Intosh*] to which I have referred. The same court has since been repeatedly called upon to discuss and decide great questions concerning Indian rights and title; and the subject has of late become exceedingly grave and momentous, affecting the faith and character, if not the tranquillity and safety, of the government of the United States.⁵⁰

The Chancellor's language is guarded for it is not to be doubted that the issue was still politically explosive at the time of his writing. It is evidenced, perhaps apocryphally, by the famous rejoinder of President Jackson when he learned that the State of Georgia was defying the ruling of the Supreme Court in *Worcester v Georgia* in early 1831: '*John Marshall has made his decision; now let him enforce it*'.⁵¹

Chancellor Kent chronicles that a majority of the Supreme Court in *Cherokee Nation v Georgia* held that the Cherokee Nation was not a *foreign* state:

But it was admitted that the Cherokees were a state, or distinct political society, capable of managing its own affairs, and governing itself, and that they had uniformly been treated as such since the settlement of our country. The numerous treaties made with them by the United States, recognise them as a people capable of maintaining the relations of peace and war, and responsible in their political capacity. Their relation to the United States was nevertheless peculiar. They were domestic dependent nations, and their relation to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied, until that right be extinguished by a voluntary cession to our government.⁵²

Chancellor Kent discusses the next decision, *Worcester v Georgia*, in even greater detail stating that the Supreme Court 'reviewed the whole ground of controversy, relative to the character and validity of Indian rights within the territorial dominions of the United States'.⁵³ With the deftness of an advocate who senses the court deaf to a particular line of argument, Chancellor Kent now concludes that this decision 'was not the promulgation of any new doctrine' because 'the several local governments, before and since our revolution, never regarded the Indian nations within their territorial domains as subjects, or members of the body politic, and amenable individually to their jurisdiction':

⁴⁷ See Horton, above n 22.

⁴⁸ James Kent, *Commentaries on American Law*, Clayton, 2nd ed, Volume III, 1832, 381 (Kent's *Commentaries*, 2nd ed). Subsequent editions during Chancellor Kent's lifetime hold fast to the format of this 2nd edition.

⁴⁹ Lecture *L* is 13 pages in length, which in Lecture *LI* in the 2nd edition expands to 24 pages.

⁵⁰ Kent's *Commentaries*, 2nd ed, Volume III, above n 48, 381.

⁵¹ Quoted in Felix S Cohen, 'Original Indian Title' (1947) 32 *Minnesota Law Review* 28, 41. Andrew Jackson, US President from 1829 to 1837, is called the 'old Indian fighter' in Joseph C Burke, 'The Cherokee Cases: A Study in Law, Politics, and Morality' (1969) 21 (3) *Stanford Law Review* 500, 503.

⁵² Kent's *Commentaries*, 2nd ed, Volume III, above n 48, 382.

⁵³ *Ibid* 383.

They treated the Indians within their respective territories as free and independent tribes, governed by their own laws and usages, under their own chiefs, and competent to act in a national character, and exercise self-government and while residing within their own territories, owing no allegiance to the municipal laws of the whites.⁵⁴

Then, critically for our purposes, his discussion in the 1st edition of Volume III of an alternative theoretical basis for the territorial acquisitions in North America based on the Occupation of Backward Peoples notion, is wholly discarded. Chancellor Kent's 2nd edition of Volume III contains no such passages. The purportedly 'sounder' theory publicised by Vattel, the theory embraced by both George Chalmers and the Chancellor, is edited from the 2nd edition of Volume III of the *Commentaries on American Law* by James Kent himself. The '[e]rratic tribes of savage hunters and fishermen' in the 1st edition become 'distinct political societies' and 'Indian nations' in the second.

(iii) *'Loose opinions' and 'latitudinary doctrines'*

The US Supreme Court, in what was now a chain of relevant authoritative decisions, had scotched any such alternative theory proposed by Chalmers and advocated by Kent beyond continued plausible advocacy. Indeed, in *Worcester* the US Supreme Court stated that it was difficult to understand that European nations could have any lawful or original claims of dominion over the Amer-Indian nations or their territories under the Doctrine of Occupation/Discovery:

It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.⁵⁵

Instead, these two later *Cherokee Nation* cases continued to substantially buttress the doctrine of aboriginal rights in American jurisprudence and to enunciate the broad principles by which the incipient and still-acquisitive American nation would juridically accommodate these indigenous Amer-Indian nations within the territorial sovereignty of the expanding United States of America.

Chancellor Kent had lost his *ex-cathedra* debate with the US Supreme Court, and in his 2nd edition, he clearly acknowledges this in his discussion of these newer cases, and particularly so in this passage.

The original English emigrants came to this country with no slight confidence in the solidity of such doctrines, and in their right to possess, subdue, and cultivate the American wilderness, as being, by the law of nature and the gift of Providence, open and common to the first occupants in the character of cultivators of the earth. The great patent of New-England, which was the foundation of the subsequent titles and subordinate charters in that country, and the opinions of grave and learned men, tended to confirm that confidence. According to Chalmers, the practice of the European world had constituted a law of nations, which sternly disregarded the possession of the aborigines, because they had not been admitted to the society of nations. *But whatever loose opinions might have been entertained, or latitudinary doctrines inculcated, in favour of the abstract right to possess and colonize America, it is certain that in point of fact the colonizers were not satisfied, or did not deem it expedient, to settle the country without the consent of the aborigines, procured by fair purchase, under the sanction of the civil authorities.*⁵⁶

⁵⁴ Ibid 384-5.

⁵⁵ 31 US (6 Peters) 515 (1832), 542-43.

⁵⁶ Kent's *Commentaries*, 2nd ed, Volume III, above n 48, 387-9 (emphasis added).

Chancellor Kent explains the earlier justification, notes the 'solidity' it once held among grave and learned men, and then condemns it. What the Chancellor had advocated in his original Volume III, he now dismisses as 'loose opinions' and 'latitudinary doctrines'.

So completely does Chancellor Kent adopt the aboriginal rights doctrine stated in the USSC jurisprudence, as affirmed and developed in the newly-discussed cases in this 2nd edition of Volume III, that, in showing that these Supreme Court decisions disclose no novel doctrine, he cites the practices of both pre-Revolutionary British and post-Revolutionary American governments as acknowledging and respecting the inherent Indian title and provides manifold examples of consensual land acquisition from the Amer-Indian peoples based on these principles. And as to the earliest of Anglo-colonies, and of the Great Patent of 1620 given by King James I to the Puritans of the Massachusetts Bay Colony, Chancellor Kent now states: '[t]he pretensions of the patent of King James were not relied upon, and the prior Indian right to the soil of the country was generally, if not uniformly, recognized and respected by the New-England Puritans.'⁵⁷ Chancellor Kent then continues on to cite British colonial practice in Massachusetts, Pennsylvania, Maryland, Virginia, Georgia and New Netherlands/York (when under both Dutch and British rule).

The overwhelming import of the revised Lecture *LI* of 1832 is the complete abandonment of the engorged rhetorical version of Vattel's work as rendered by Chalmers, and as earlier adopted by Kent. The Occupation of Backward Peoples principles – those identified by Judge Blackburn as 'not purely of law' – are wholly abandoned. Each of the three sources relied upon by his Honour to ground his first principle of acquisition of colonial territory are jettisoned by Chancellor Kent himself. No textual support for any 'philosophical doctrine' that 'more advanced peoples were therefore justified in dispossessing, if necessary, the less advanced' peoples is to be found in this 2nd edition of Volume III of Chancellor Kent's *Commentaries on American Law*, or in any subsequent editions.

2 A fatal error of legal scholarship

It will be appreciated that Judge Blackburn, in seizing upon his first principle of territorial acquisition from Chancellor Kent's 1st edition of Volume III in 1828, has gravely erred. The 1st edition of Volume III of Kent's *Commentaries on American Law*, no doubt of immense antiquarian interest, did posit a belated and alternative theoretical basis but it was edited from the very next edition as being wrong in legal principle, contrary to the doctrine of aboriginal rights the US Supreme Court was relevantly and presently adopting as law, and historically inconsistent with Great Britain's colonial practices in North America. The legal scholarship of the *Milirrpum* judgment on this fundamental principle is fatally flawed.

B Judge Blackburn's Second Principle of Acquisition

Related to Judge Blackburn's first principle of acquisition is another, and his Honour now expressly enters the international law realm. His second principle of territorial acquisition is:

the doctrine that discovery was a root of title in international law: the sovereign whose subjects discovered new territory acquired title to such territory by the fact of such

⁵⁷ Ibid 389.

discovery. This principle was repeatedly said to be the basis by European sovereigns, including of course the British Crown, on the American continent [...].⁵⁸

Stated as baldly as it is, this statement of principle has no legitimacy in the international law of the late 18th and early 19th centuries or, indeed, earlier or later in time.

Discovery, *ipso facto*, did not suffice as a vesting of lawful 'title' to territory. If Judge Blackburn was correct in his stated second principle, the Dutch would have acquired 'title' to the vast majority of the land mass of New Holland centuries prior to Captain Cook's discovery of an eastern portion in 1770. And, more relevantly, the Netherlands would have acquired 'title' to the lands at issue in the litigation by reason alone of van Coolsteerdt's discovery of Arnhem Land in 1623.

The fundamental principle of the law of nations, known principally as Occupation (and at times Discovery), is that for newly-discovered uninhabited territory, discovery created a mere inchoate right which, unless followed by the taking of effective control of the territory discovered, was soluble. The ancient origins of this mode of territorial acquisition can be traced to the Roman law of the Eastern Empire, the *Corpus Juris Civilis*, codified in the reign of Emperor Justinian I (483-565AD), so lengthy is its provenance.⁵⁹ In Australian jurisprudence, this has been styled the doctrine of *terra nullius*.⁶⁰ It is notable that Judge Blackburn does not seek to rely upon this Occupation/Discovery doctrine as the lawful basis for territorial sovereignty over New Holland.⁶¹

Simply stated, his Honour is again in substantial error in proposing this second principle of acquisition as one ever accepted in the international law or practice. That it is completely contrary to British practice in the Law of Nations of the late 18th century can be evidenced by what is known as the Nootka Sound Controversy, an incident almost contemporaneous with the establishment of the British penal enclave in New Holland in 1788. It centred on a small trading post at Nootka Sound on the western shore of Vancouver Island, in what is now the Canadian province of British Columbia. Great Britain expressly rejected the Spanish claim to territorial sovereignty based merely on discovery arguing strenuously that discovery was insufficient in the Law of Nations to vest lawful title.⁶²

⁵⁸ (1971) 17 FLR 141, 200.

⁵⁹ RY Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963), 3. Robert Yewdell Jennings was a Member of the International Court of Justice from 1982 to 1991, and ICJ President from 1991 to 1994. Also see, FE Smith, *International Law* (JM Dent & Sons Ltd, 6th ed, 1917), 90-1.

⁶⁰ The term *terra nullius* has attracted much trivial points-scoring in Australian historiography but the underlying concept is undoubtedly an ancient one.

⁶¹ Professor Darrell Lumb, one of the foremost constitutional lawyers of his time and in full knowledge of the *Milirrpum* decision, wrote: 'The proposition therefore would seem to be firmly established that in the international law the British Crown gained a title to Australia by way of discovery followed by occupation in 1788.', see RD Lumb, 'Is Australia an 'Occupied' or 'Conquered' Country?' (1984) 11 (December) *Queensland Bar News* 16, 20. The statement is incorrect on a number of levels. On the 'discovery' aspect, Elizabeth Evatt expresses doubt that Captain Cook was 'authorised' to claim possession of the east coast of New Holland because his Secret Instructions were limited to the mythical continent, *Terra Australis Incognita*, and to islands not previously discovered by Europeans: Evatt, above n 1, 25.

⁶² See William Ray Manning, *The Nootka Sound Controversy* (Argonaut Press, 1966), 83-85. Manning asserts that Great Britain came near to a declaration of war in order to resist Spain's claim.

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To confirm this position more generally, in his *Great Britain and the Law of Nations*, Professor Herbert A. Smith makes this observation of the relevant British colonial practice:

During the period covered by the present work, it may safely be said that the government of Great Britain has neither advanced any territorial claims of its own, nor admitted any opposing claims on the mere fact of discovery unsupported by any acts of effective occupation and possession.⁶³

Blackburn J's second principle is plainly wrong and, moreover, is a wholly improbable principle of territorial acquisition in international law.

C Judge Blackburn's Third Principle of Acquisition

His Honour's allied third principle of territorial acquisition speaks to newly-discovered lands which are inhabited by aboriginal populations. For Blackburn J, a subject of the discovering sovereign had no power to acquire for themselves any 'native title' to land from aboriginal persons. 'Another way,' asserted his Honour, 'of expressing the same rule was to say that only the Crown, or the sovereign, had power to extinguish native title'.⁶⁴ The concept of a 'native title', that the inhabiting indigenous population had some form of aboriginal title cognizable to the Crown – and which was subject to extinguishment – is introduced into the judgment and is now presumed to exist by Judge Blackburn, although this 'native title' is otherwise left undefined.

In elucidating this third principle, Blackburn J is in very large part correct. A right of pre-emption to the sovereign of any 'native title' – which title had been implicitly recognised and honoured in Imperial constitutional law and practice – had been asserted by the British since their earliest colonisation of the New World Americas,⁶⁵ the most demonstrative vehicle of the relevant principles being the *Royal Proclamation of October 7, 1763* (George III) (*Royal Proclamation of 1763*).

1 The Royal Proclamation of October 7, 1763

In the wake of the first Treaty of Paris in 1763, which drew a close to the seven-year French and Indian War, King George III issued the *Royal Proclamation of 1763*. It sought to regulate relations with the relevant Amer-Indian peoples in all British possessions in North America, including the large newly-acquired territories such as Quebec which had been ceded by France to Great Britain under the terms of cession. Underpinning the *Royal Proclamation* were general principles which the British Crown had adopted in its dealings with indigenous populations in the Americas.⁶⁶ These

⁶³ HA Smith, *Great Britain and the Law of Nations* (PS King & Son, Limited, 1935), vol II, 1. The period to which Professor Smith refers is from the late 1700s to the early-20th century. This is based on the statements that his study would 'not be earlier than the period of the French Revolution': at vol I, Preface, viii, and be 'in the past century and a half': in vol I, Preface, ix.

⁶⁴ *Milirrpum* (1971) 17 FLR 141, 201.

⁶⁵ Professor Slattery explains the role of the Imperial constitutional law (also termed the Colonial Law) perfectly: 'Just as the eighteenth century colonial law harboured rules governing such matters as the constitutional status of colonies, the relative powers of the Imperial Parliament and local assemblies, and the reception of English law, it also contained rules concerning the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions.', see Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 *Canadian Bar Review* 727, 737.

⁶⁶ Fra Prucha, a leading authority on Amer-Indian history, cites a legal opinion from Thomas Jefferson in 1792 evincing that in the juridical discourse of the day, the reconciling and refining of the indigenous and settler rights to land was ongoing: see Francis Paul Prucha, *American Indian Policy in the Formative Years* (University of Nebraska, 1970) 140.

principles show that a ‘native’ or ‘aboriginal’ title in the indigenous Americans was expressly recognised by the British Crown at the very highest level of the Imperial constitutional law. First and foremost, the *Royal Proclamation of 1763* asserted sovereignty over the nominated colonies in North America, yet the Preamble acknowledged:

[T]he several Nations or Tribes of Indians with whom We are connected, and who live under our protection, shall not be molested or disturbed in the Possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds.

The document forbade the Commanders-in-Chief of the colonies of Quebec, and of East and West Florida and any other British colony in America, to grant warrants of Survey or to pass patents for any lands ‘not having been ceded to or purchased by Us’. The *Royal Proclamation of 1763* continued:

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving subjects from making any Purchase or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for the Purpose first obtained.

Moreover, the *Royal Proclamation* declared the public policy reasons for the principles it was expressing:

And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians; In Order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the advice of our Privy Council, strictly enjoin and require, that no private person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; [...].

Of relevance for our purposes is the immediate understanding that a ‘native’ or ‘aboriginal’ title held by the Indigenous Americans was expressly recognised by the British Crown at the very highest level of the Imperial constitutional law in 1763.

2 Colonial NSW in the Imperial constitutional law?

With this in mind, one of the more curious aspects of the *Milirrpum* litigation is that if there was an acceptance in the Imperial constitutional law in 1763 of legal principles respecting Indigenous sovereignties to territory and of their aboriginal or native titles to land in North America, how then, at the commencement of British colonisation of New Holland only a few years later, did the same colonial legal principles escape at least respecting the ‘native title’ of the Indigenous peoples of New Holland in that same epoch or, indeed, that of the Yolngu People two centuries later?⁶⁷

The answer, for Blackburn J, was that the English law received into the colony of New South Wales in New Holland in 1788 apparently knew no such doctrine of aboriginal

⁶⁷ The definitive modern work, Sir Kenneth Roberts-Wray's *Commonwealth and Colonial Law*, stated that in the Imperial constitutional law the emphasis has been on the ‘individual trees’ to the detriment of ‘the wood’: Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons, 1966) viii-ix.

title because Sir William Blackstone's *Commentaries on the Laws of England* did not say so. According to Judge Blackburn, the relevant principles of Imperial constitutional law surrounding the application of English law to overseas possessions of the British Crown were settled 'beyond doubt' by 1788. The primary source of this assertion is a passage from Blackstone's *Commentaries*. His Honour's judgment is quoted *in extenso* because it represents the core of his reasoning on this point.

There is a distinction between settled colonies, where the land, desert and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies. *The words 'desert and uncultivated' are Blackstone's own; they have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society.* The difference between the laws of the two kinds of colonies is that in those of the former kind all the English laws which are applicable to the colony are immediately in force there upon its foundation. In those of the latter kind, the colony already having law of its own, that law remains in force until altered. Blackstone cites several cases, forming a chain of authority which goes back to *Calvin's Case*. The whole doctrine was clear, though its application in any given case often caused difficulty, particularly the question whether a particular English law applied in a particular colony. The great case of *Campbell v Hall*, where the law of a ceded colony was in question, treats the doctrine as stated by Blackstone as settled beyond doubt, and in my opinion it was settled beyond doubt in 1788 and is so at this day, for settled colonies.⁶⁸

From his earlier rendition of the relevant acquisition principles, Judge Blackburn has made two bounds of reasoning. The first — an internal leap — is that the 'occupation' of a territory is now needed to establish 'title' in the discoverer. This can be read as an obvious correction to his Honour's earlier mis-stated second principle of territorial acquisition that discovery itself vested title. The other extension of principle, importantly, relates to the *habitation* of the newly-discovered territories which are said now to be '*desert and uncultivated*', so-called 'settled colonies', as no mention had hitherto been made of such colonies in any earlier discussion in the judgment. For Blackburn J, these words of Sir William Blackstone's are said to 'have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society'.

Judge Blackburn's assertion on Sir William Blackstone's text is absent any scaffolding and is not self-evident. The leap from a 'desert and uncultivated' territory to a 'settled colony' would seemingly require some legal bridgework. Even the bare terms 'desert' and 'uncultivated' are unexplained. Yet his Honour does not plumb further into Blackstone's text, he provides no citation to buttress his assertion of principle, and he does not attempt to trace any historical expansion or latter glossators of Blackstone's original phrase. The expression, unadorned as it is, is troubling and invites critical examination.

3 *Blackstone's Commentaries on the Laws of England*

Sir William Blackstone published his *Commentaries on the Laws of England* between 1765 and 1769.⁶⁹ Their publication was a hugely important juncture in English legal history as this was the first complete historical account of the development of English

⁶⁸ *Milirrpum* (1971) 17 FLR 141, 201 (emphasis added) (citations omitted).

⁶⁹ William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press 1979, (Facsimile Edition of the Four Books published by The Clarendon Press in the period 1765–69) ('*Blackstone's Commentaries*'). The quaintly named first volume, *Book the First*, of the *Commentaries*, 'Of the Rights of Persons', was published in November 1765 and *Book the Second*, 'Of the Rights of Things', the following October: see Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford University Press, 2008), 219.

law and the first exposition of this body of law as an organised, coherent system of law.⁷⁰ Significantly, publication was after the *Royal Proclamation of 1763*, the principal Imperial legal statement of that early colonial North American epoch.

The relevant paragraph from Sir William Blackstone's *Book the First* of the *Commentaries*, on which great weight is placed by Judge Blackburn, opens thus:

Besides these adjacent islands, our more distant plantations in America and elsewhere, are also in some respect subject to the English laws. Plantations or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother country; or where, when cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations.⁷¹

These distant 'plantations' of the New World are in Blackstone's nomenclature, 'desart and uncultivated' or 'already cultivated'. The term 'desart', an ancient form of 'desert', is here used not to mean an area of little or no vegetation, but an uninhabited – or if once inhabited, now deserted – territory.⁷² Cultivated is synonymous with occupied. Indeed, these 'desart and uncultivated' lands were to be '*peopled*' from the mother country. For Blackstone, thus, there were only two classes of colonial plantation, the uninhabited and the inhabited.⁷³ In the former, uninhabited lands are claimed by 'right of occupancy', that is under the ancient Occupation doctrine, whilst the latter, being inhabited, need to be acquired either by Conquest and/or Cession. '[B]oth these rights', that is, the 'right of occupancy' and that of conquest/cession, in Sir William Blackstone's opinion, could be founded in the law of nature, or '*at least*' upon that of the Law of Nations.

Speaking directly then of Great Britain's North American colonies, which were inhabited by aboriginal populations, Blackstone wrote: '[o]ur American plantations are principally of this latter sort [that is, inhabited], being obtained in the last century either by right of conquest in driving out the natives (with what natural justice I shall not at present inquire) or by treaties.'⁷⁴ Again, for any plantation already inhabited, the acquisition of territory was either by Conquest and/or by Cession. Blackstone's text itself detracts from any contention that he was, in any sense, addressing any 'settled' territories and no reference is made to any aboriginal populations being 'uncivilized' or 'in a primitive state of society'. In Sir William Blackstone's *Commentaries on the Laws of England* there is neither an intermediate hybrid class of inhabited or 'settled' territory which could be acquired under the Occupation/Discovery doctrine nor any doctrine in the Blackstonian collation of English law relating to 'uncivilized inhabitants in a primitive state of society'.

Book the First of Blackstone's Commentaries then continues:

For it hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English

⁷⁰ David M Walker, *The Oxford Companion to Law* (Oxford University Press, 1980), 136.

⁷¹ *Blackstone's Commentaries*, above n 69, *Book the First*, 104.

⁷² Continental publicists in the early Law of Nations, such as Grotius and Vattel, likewise used the spelling 'desart' but the usage appears to have fallen into desuetude in the international legal discourse by the early 1800s.

⁷³ The same conclusion has been drawn previously; see Peter Bayne (ed), *The Legal Status of Aborigines, The Australian People: an encyclopedia of the nation, its people and their origins* (Cambridge University Press, 2001), 115.

⁷⁴ *Blackstone's Commentaries*, above n 69, *Book the First*, 105 (emphasis added).

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subject, are immediately there in force (Salk 411, 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant colony; [...].⁷⁵

It is abundantly clear that *Blackstone's Commentaries* is addressing the issue of the reception of English law into an uninhabited country — *as is stated* — and not at all entering into any discussion or offering any conclusions about territories inhabited by so-called 'uncivilised', 'primitive' or 'less advanced' populations or, again, of any 'settled colonies' referred to by Judge Blackburn.

(a) Ground 'not pre-occupied by other tribes' in Book the Second

If there be any remaining doubt that the glossating of Blackstone by Judge Blackburn is specious, then one need only leave *Book the First* and enter *Book the Second of Blackstone's Commentaries* where Sir William Blackstone does address the acquisition of territory in international legal principle and practice. Citing first from the King James Bible, *Genesis 13*, where the division of territories was necessary to resolve the conflict for grazing land in the exodus from Egypt — Lot choosing the Plain of Jordan, leaving Abraham the Land of Canaan — Sir William Blackstone reasoned that this '*plainly implied an acknowledged right, in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes.*'⁷⁶ Blackstone wrote:

Upon the same principle was founded the right of migration, of sending colonies to find new habitations when the Mother Country was overcharged with inhabitants; which was practiced as well by the Phaenicians and Greeks, as [well as] the Germans, Scythians, and other northern people.⁷⁷

Then Sir William Blackstone returns to the parenthesised aside concerning 'driving out the natives' he made in *Book the First* when discussing the reception of English law in New World colonies, stating:

And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing of countries already peopled and driving out and massacring the innocent and defenceless natives, merely because they differed from the invaders in language, in religion, in customs, in government or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind.⁷⁸

Far from the purported justification claimed by Judge Blackburn, Blackstone states a deeply humanist view that speaks of 'the innocent and defenceless natives' and which respects their persons, their rights to their property and to their territories.⁷⁹ The seizing of countries already peopled by 'natives' who differ 'in language, in religion, in customs in government or in colour', was obviously abhorrent to Sir William Blackstone, and contrary to the law of nature, to reason and to Christianity.

While this textual analysis is abundantly clear, one may recall that Sir William Blackstone was writing and publishing at a time when the *Royal Proclamation of 1763* was freshly proclaimed. To accept the construction asserted by Judge Blackburn is to

⁷⁵ Ibid 107.

⁷⁶ *Blackstone's Commentaries*, above n 69, *Book the Second*, 7. Original spelling maintained.

⁷⁷ Ibid. Original spelling maintained.

⁷⁸ Ibid. Original spelling maintained.

⁷⁹ Blackstone was writing these words between November 1765 and October 1766; see Prest, above n 69.

also insist that in drafting his *Commentaries* Blackstone was ignorant of or failed to respect the principles of the Imperial constitutional law that King George III has just proclaimed into law in his North American colonies. That is a most unlikely prospect. And given what Sir William Blackstone writes of the dispossession of native peoples in the Americas, it is an impossible construction.

D Judge Blackburn Continues

Based on his interpretation of the *Commentaries*, that Blackstone proclaimed a hybrid class of territory ‘in which live uncivilized inhabitants in a primitive state of society’ and which was known as a ‘settled colony’, Judge Blackburn then embarks on an endeavour to determine how one identifies these ‘settled colonies’ and, in particular, to determine into which category the infant colony of New South Wales might fit. As a preamble, Blackburn J notes:

One would have thought that the question depended on matters of plain fact; and that had there been any doubt there would have been an express pronouncement either by the government at home or by the authorities in the colony, making clear what the basis of law in the colony was.⁸⁰

Noting that this pronouncement did not always happen in the administration of some colonies, and seemingly never in the administration of colonial New South Wales, it was sometimes thus a matter of debate. Judge Blackburn continues on to now *reject* Sir William Blackstone’s statement that ‘Our American plantations’ were acquired principally by Conquest and/or Cession, and then references and preferences George Chalmers, as writing ‘*more accurately*’, that the country of ‘the aboriginal tribes of America’ was considered ‘waste, because it was uncultivated, and therefore open to the occupancy and use of other nations’.⁸¹ Judge Blackburn opines that ‘Blackstone *perhaps* had in mind the island colonies [in the Caribbean] as well as those of the North American continent’.⁸²

Far from quelling the critical dissonance, his Honour then proceeds to outline an extraordinary common law methodology, that in determining into which class a particular colony might fall, legal fiction is to prevail over historical fact and the attribution of a colony to a class is a question of law which cannot thereafter be controverted on any reconsideration of the historical facts.⁸³ At this point, his Honour feels bound by the 1889 Privy Council decision of *Cooper v Stuart*,⁸⁴ the only decision in the Imperial constitutional law which addressed, though only in *obiter*, the basis upon which the territorial sovereignty over New South Wales had been asserted by Great Britain. This decision was an appeal from the Supreme Court of New South Wales,⁸⁵ the issue being whether the rule against perpetuities applied to a Crown grant of land in 1823. In discussing the reception of English law into British colonies, to ascertain if the rule had travelled, Lord Watson wrote for the Board:

⁸⁰ *Milirrpum* (1971) 17 FLR 141, 202.

⁸¹ Chalmers, above n 38, Book I, 28. The passage quoted by his Honour from Chalmers’ *Political Annals* is, as we have established, of dubious historical and legal veracity. A whole chain of decisions of the US Supreme Court contradicts his historiography, and the engorged-Vattelien jurisprudential theory Chalmers expresses, as we have noted, was abandoned and reversed by Chancellor Kent in the second and subsequent editions of his *Commentaries on American Law*.

⁸² *Milirrpum* (1971) 17 FLR 141, 202.

⁸³ *Ibid.* His Honour asserts that this methodology is *suggested* by Chancellor James Kent.

⁸⁴ (1889) 14 App Cas 286 (PC).

⁸⁵ *Cooper v Stuart* (1886) NSWLR 7 (Equity Reports).

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The often-quoted observations of Sir William Blackstone (1 Comm 107) appear to their Lordships to have a direct bearing upon the present case. He says:

It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (Salk. 411, 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant colony; such, for instance, [...].⁸⁶

'There is', stated their Lordships,

a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory, practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.⁸⁷

Their Lordships did not pause to explain their extrapolation from the 'uninhabited country' of Blackstone's text to the inhabited but 'practically unoccupied' territory of eastern New Holland which was apparently 'without settled inhabitants' and without 'settled law'.⁸⁸ However, for Judge Blackburn J there is no pause for consideration.

As I have already said, it is undoubted law that acquisitions of territory by the Crown fall into two classes: conquered or ceded territory and settled or occupied territory. [...] It is also in my opinion clear that whether a colony comes into one category or the other is a matter of law. [...] [I]n my opinion there is no doubt that Australia came into the category of a settled or occupied colony. This established for New South Wales by an authority which is clear and, as far as this court is concerned, binding: *Cooper v Stuart*.⁸⁹

On this jurisprudential survey, Judge Blackburn found that no doctrine of communal native title has found acceptance in any other settled colony where the English common law had been transported, other than by express statutory provision for such.⁹⁰ This conclusion is clearly inconsistent with the Privy Council decision of *Oyekan v Adele*.⁹¹ However, Blackburn J distinguished this decision on the ground that it related to a ceded, not settled, colony, and also that he found it 'impossible to believe' that their Lordships were asserting that the compulsory acquisition by the Crown of 'land from natives' vested a common law right in the natives to receive compensation.⁹² Consequently, his Honour determined the communal native title of a type claimed by

⁸⁶ (1889) 14 App Cas 286, 291 (PC).

⁸⁷ Ibid.

⁸⁸ Professor Simpson has written that the *Cooper v Stuart* opinion of Lord Watson represents the beginning of 'the series of elisions and slippages that came to characterise Australian judicial pronouncement on acquisition, and to provide the tools for a series of artificial and purely formal reconciliations of law, politics and history'. See Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 195, 200.

⁸⁹ *Milirrpum* (1971) 17 FLR 141, 242.

⁹⁰ Ibid 244. Hocking came to a diametrically-opposed view at about the same time as Judge Blackburn expressed his, stating: 'It has always been the accepted British practice to uphold any pre-existing native title in newly acquired colonies, that there are Privy Council decisions laying down the nature of the title so upheld and that there are principles laid down by which the native tenures have been accommodated within the various legal systems concerned': See Barbara Hocking, *Native Land Rights* (LLM Thesis, Monash University, 1971), 5-6.

⁹¹ [1957] 2 All ER 785 (PC).

⁹² *Milirrpum* (1971) 17 FLR 141, 233.

the Yolngu plaintiffs was not recognised — and had never been recognised — in the Anglo-Australian constitutional law.⁹³

Yet another of the curious aspects of the *Milirrpum* judgment is that if Judge Blackburn had the uncontradicted Privy Council authority of *Cooper v Stuart*, most certainly binding on the Supreme Court of the Northern Territory court, and which spoke directly to the colony of New South Wales being ‘a tract of territory, practically unoccupied, without settled inhabitants or settled law’, why did Judge Blackburn go so far afield to foray inexpertly through the early North American jurisprudence and then rely on the even-more-doubtful historiography of George Chalmers to seek justifications on Anglo-Australian issues? Did not this Privy Council decision have tailor-made answers to the issues? There were, in the opinion of the Board in *Cooper v Stuart*, ‘no settled inhabitants’ in New Holland, they were lawless and the 3 000 000 square kilometres of what was now labelled New South Wales was ‘practically unoccupied’. It rested on the same foundation of principle: New Holland/Australia was inhabited by humankind but these persons were not rights-bearing and were incapable of having individual rights of property or collective rights to territory. The highest judicial tribunal in the British Empire had stated as much. It was game, set, and match to Nabalco Pty Ltd and the Commonwealth of Australia in these proceedings.

The reason for the lengthy excursions by his Honour into non-Anglo-Australian law and history may lie in the circumstance that Judge Blackburn openly questioned of the notion that these Indigenous peoples had no ‘stable order of society’ upon the assertion of British sovereignty. He stated: ‘having heard the evidence in this case, I am, to say the least, suspicious about the truth of the assertions of the early settlers of New South Wales that the aboriginals had no ordered manner of community life.’⁹⁴

He then went on to challenge the dictate of their Lordships in *Cooper v Stuart* that there was no ‘settled law’ in colonial New South Wales and made a remarkable finding of fact in favour of the Yolngu People. Blackburn J wrote:

I am very clearly of [the] opinion, upon the evidence, that the social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called ‘a government of laws, and not of men’, it is that shown in the evidence before me.⁹⁵

The many weeks of evidence given in the *Milirrpum* litigation comprised the first searching examination of the juridical foundations of an Indigenous society in Anglo-Australian jurisprudence. His Honour, having considered that mass of evidence, found that the social rules and customs of the Yolngu People provided ‘a stable order of

⁹³ As noted earlier, this conclusion has been roundly condemned as wrong in law by most commentators. Its comprehensive destruction is Professor McNeil’s straightforward yet brilliant thesis that the application of ordinary and long-established English common law principles is sufficient to vest a presumptive estate in fee simple in the indigenous peoples in possession of land in newly-acquired territories, *howsoever the territory was acquired*, at the moment of acquisition by the Crown; see Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989). For a defence of the decision by the counsel for Nabalco Pty Ltd, see LJ Priestley, ‘Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case’ (1974) 6 *Federal Law Review* 150.

⁹⁴ *Milirrpum* (1971) 17 FLR 141, 266.

⁹⁵ *Ibid* 267. Former High Court Justice John Toohey called this statement one of ‘the most powerful affirmations’ of Indigenous law by someone not Indigenous: see Western Australian Law Reform Commission, ‘Aboriginal Customary Laws Reference – An Overview’, Reference document (1999) 191.

society', and evinced 'a subtle and elaborate system' of law. Blackburn J was scrutinising Yolngu society in 1970 but he would not accept that these Indigenous persons did not then possess, on the evidence presented in his court, a body of laws and customs which was cognisable to the Northern Territory Supreme Court as 'a system of law'. 'In my opinion', he wrote:

the arguments put to me do not justify the refusal to recognise the system proved by the plaintiffs in evidence as a system of law. Great as they are, the differences between that system and our system are, for the purposes in hand, differences of degree. I hold that I must recognise the system revealed by the evidence as a system of law.⁹⁶

Perhaps, even more remarkably, the finding was that on the evidence presented the Indigenous Yolngu People had a system of law in 1788 and that it had remained extant and vibrant nearly 200 years after the assertion of British sovereignty over their traditional territories.

III TROUBLING QUESTIONS

This simple finding of fact posed some troubling questions for the orthodox legal narrative surrounding the acquisition of territorial sovereignty of New Holland by the British. That narrative is that following the 'discovery' and declaration of 'possession' by Captain Cook in August 1770,⁹⁷ the Commissions of Captain-General Phillip were read at Port Jackson, a volley of muskets fired,⁹⁸ and the eastern portion of New Holland was thus wholly acquired by His Majesty, King George III, as 'New South Wales'. This orthodox theory holds that, with this simple ceremony, British 'sovereignty' instantaneously swept across 3 000 000 square kilometres of eastern New Holland. This British 'sovereignty' either met no other 'sovereigns' or 'laws' in its path, or, on meeting them, extinguished or failed to recognise them. This theory appears as to met humans in that landscape, but they were not rights-bearing subjects, they were sub-jural human beings, un-seen and unprotected by the incoming European law. His Majesty, under this orthodox theory, thus acquired an original and plenipotent sovereignty over a vast swathe of New Holland.

However with the finding of fact in *Milirrpum*, the jural landscape of New Holland/Australia could no longer be said to be 'law'-less in 1788 but rather to be populated by many hundreds of such systems of laws. It is estimated that there were some 500 distinct Indigenous peoples comprising 300 000 persons inhabiting the New Holland continent about the time of the British assertions of sovereignty in the late 18 and early 19th centuries.⁹⁹ In these many hundreds of Indigenous societies similar systems of laws, like that of the Yolngu People, ordered those societies. Far from being law-less, New Holland was resplendent with law and legal systems.

⁹⁶ *Milirrpum* (1971) 17 FLR 141, 268.

⁹⁷ Distorted, too, is the orthodox popular narrative, which has Cook claiming the *whole* of the continent at Botany Bay in April 1770: see, for example, Maria Nugent, *Captain Cook was here* (Cambridge University Press, 2009).

⁹⁸ Tench provides a firsthand account of this occasion. See Watkin Tench, *A Narrative of the Expedition to Botany Bay with an Account of New South Wales, its Productions, Inhabitants, & to which is subjoined, A List of Civil and Military Establishments at Port Jackson* (J Debrett, 1789) 65.

⁹⁹ Robert Hughes, *The Fatal Shore* (Collins Harvill, 1987) 9. Some estimates put the Indigenous population of New Holland as high as 750 000.

Secondly, it is clear that the various assertions of British sovereignty, in eastern, middle and western New Holland/Australia in 1788, 1824 and 1829 respectively, had no immediate effect on these Indigenous systems of laws. Those systems survived those assertions of sovereignty and continued unchanged, some for decades, and some like that of the Yolngu People remained vital but essentially unchanged for over two centuries of European presence on Australian soil.

Additionally, and most problematically, the source of these laws are not within any present Australian constitutional framework, neither that of the Commonwealth nor those of the States and Territories. These legal systems pre-date any assertion of sovereignty by Great Britain and certainly pre-date any assumption of a distinctly Australian sovereignty. These Indigenous systems of law, if they still exist, are sourced *outside* of the present formal Australian constitutional framework and therefore represent a source of law running parallel with the Crown in right of Australia and the States and Territories. These Indigenous systems are extra-constitutional. For the Kelsenite theorists, each and every set of these laws could be said to emanate from an allodial *grundnorm* other than the Australian legal *grundnorm*.

IV CONCLUSION

It is somewhat surprising that, despite being a trial decision and the precedential nature of the proceedings, the *Milirrpum* decision was not appealed. An appellate review may have uncovered Judge Blackburn's errors, in particular the dubious legitimacy of the 'not-purely-of-law' Occupation of Backward Peoples doctrine that he adopted, one which purportedly permits a territory inhabited by 'uncivilized inhabitants in a primitive state of society' — so-called 'backward peoples' — to be lawfully dispossessed of their territories and occupied by 'more advanced peoples'. The Yolngu People were advised against an appeal because of the fear that an appellate court may reverse the factual finding that the Yolngu possessed an elaborate system of laws.¹⁰⁰ It is a matter of record that the Yolngu plaintiffs accepted that advice. The Occupation of Backward Peoples doctrine, a notion of doubtful legitimacy in the international law, thus gained an enduring and possibly unique stronghold in Anglo-Australian jurisprudence. On the other hand, the finding that the Yolngu People possessed an elaborate system of laws — and consequently that many tens, if not hundreds, of Indigenous peoples in Australia had similar systems of laws — became undeniable in the Anglo-Australian common law.

It has been said that, with the *Mabo (No 2)* decision, there was a 'perceptible shift' in the constitutional common law foundations of Australia.¹⁰¹ If such a shift occurred in 1992, any critical inspection of those same constitutional foundations would have revealed a most serious fracture in 1971. For the *Milirrpum* decision accepted — on the evidence presented to the Supreme Court of the Northern Territory after a lengthy trial

¹⁰⁰ Woodward later stated: 'I had no confidence that the High Court, as it was then constituted, would produce any better result for the Aboriginal people than had already been achieved. Indeed, I was afraid that doubts might be cast on Justice Blackburn's findings about Aboriginal law. I therefore advised against an appeal.' See AE Woodward, 'Three Wigs and Five Hats', (Speech delivered as the Eric Johnston Lecture, State Reference Library of the Northern Territory, 10 November 1989) 6. Woodward also believed a political solution was possible. See Edward Woodward, *One Brief Interval: A Memoir* (Miegunyah Press, 2005) 106.

¹⁰¹ *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J).

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— that a system of law existed in an indigenous society in New Holland in 1788 and that that system was extant and vibrant and continued to order their society nearly 200 years later. The scales had fallen from the once-blinded eyes and the jural landscape of colonial New Holland could now be seen to be populated by many such systems of law each cradled in the hundreds of Indigenous societies like those of the Yolngu People. New Holland/Australia was far from law-less, it was replete with many systems of laws and customs and these systems were not only of great antiquity, they were presently vital. The New Holland landscape was not empty in 1788, it had forms in it: human, jural, and societal. Yet none of these forms is accommodated within the current orthodox theory of sovereignty. In 1971, with the *Milirrpum* decision, the orthodox theory — the 'story' — of Anglo-Australian sovereignty became implausible and in need of a fundamental re-working.

THE AUSTRALIAN ‘SONGLINES’: SOME GLOSSES FOR RECOGNITION

GARY LILIENTHAL* AND NEHALUDDIN AHMAD**

ABSTRACT

In Australia, successive governments have sought to extinguish ‘native title’, preferring English feudal socage, but not the Australian Indigenous systems of land title. Australian governments want courts, constituted overwhelmingly by non-indigenous lawyers, to decide land disputes as for feudal socage. Therefore, this article suggests a need to understand this attempted radical reframing of Australian Indigenous titles to land, through the convenient lens of Goffman’s frame analysis. The research question is whether Anglo-Australian frame transformation of the Indigenous land titles into mere religion, song and art, extinguishes land title. The article tries to show that Australian indigenous land title is communal allodial title, as a bundle of subsisting rights by operation of Australian Continental Common Law, which therefore cannot be extinguished by the fraud inherent in frame transformation. Indigenous land title is true communal allodial title, beset by a fraudulent colonial occupation, suggesting a lack of internal reason in colonial policy and administration. Successive governments have tried to frame transform the highly sophisticated and ancient indigenous legal and social system, including sophisticated celestial mapping and navigation systems, into mere religious art. This frame transformation is reversible by epideictic rhetoric. The Indigenous system is transmitted phylogenetically, in which governance government officials can have no participation. Indigenous land title cannot be extinguished.

I INTRODUCTION

In Australia, successive governments have sought to extinguish what is now called at law ‘native title’.¹ Australian land title is based on the English common law land title system of feudal socage, rather than on the ancient subsisting Indigenous Australian systems of land title. This implies a severe disadvantage to holders of ancient subsisting land title.

To explain socage, during the Middle Ages the villeins of England slowly changed their feudal food and labour obligations into an annual money payment, known as a quit-rent,

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¹ See especially the *Native Title Act 1993* (Cth) s 10 (‘NTA’), which limits recognition and protection of what it now calls ‘native title’, to be only in accordance with the Act. It appears to extinguish any subsisting common law land title. The *NTA* arguably appears to target rhetorically an audience of Australian government officials, court officials, and elected officials, in that it seeks no broad express public consent. See also Marcus Tullius Cicero, *Rhetorica Ad Herennium* (Harry Caplan trans, Harvard University Press, 2004). This sets out six sources of law: nature; statute; custom; previous judgments; equity; and, agreement. Custom is defined in it as that which in the absence of any statute is by usage endowed with the force of statute law, which it defines as law set up by the sanction of the people: at 91, 93.

creating a socage tenure.² The statute *Quia Emptores 1290*, 18 Edw 1, c 1 ('*Quia Emptores*'),³ the scarcity of labour after the Black Death, and lower values of land with the rise of trade and industry, increased the process of converting feudal dues into quit-rents, and by the 16th century quit-rents had become the norm.⁴ The one monetary conversion exception was the swearing of an oath of fealty to the lord, arguably still now in existence in the form of implied obligations of tenure.⁵ Arguably, none of this is relevant to Australia.

Australian governments want courts, constituted overwhelmingly by non-indigenous lawyers,⁶ to adjudicate the inevitable land disputes as matters of feudal socage.⁷ This argues a very substantive shift in frame, or context, for Australian Indigenous land title,⁸ arguably without Indigenous peoples' fully informed consent. Therefore, this article suggests a need to understand this attempted reframing of Indigenous titles to land, through the convenient lens of frame analysis, and to try to uncover something useful to resolving current disadvantage.

The concept of frame analysis is derived from Erving Goffman's 1974 work.⁹ Social scientists use it to analyse how people understand situations and undertakings. Its procedures can give the practitioner the ability to re-set perspectives. This article deals with the apparent reframing of what is essentially 'the customary laws of Indigenous Australian peoples', of the Continent of Australia, into an alternative non-Indigenous frame of the sacred, artistic, religious, and the so-called 'Dreaming'.¹⁰ Ronald Berndt says Australian Indigenous peoples have their own religious traditions of the so-called dreaming and ritual systems, with an emphasis on the life transitions of adulthood and death.¹¹ Eliade states: 'There is a general belief among the Australians that the world, man, and the various animals and plants were created by certain supernatural beings who afterwards disappeared, either ascending to the sky or entering the earth'.¹²

The Anglo-Australian legal system views the mythical narratives as mere religion and art.¹³ However, these Indigenous narratives may well serve a similar common law

² Sir Paul Vinogradoff, *Villainage in England: Essays in English Mediaeval History* (Cambridge University Press, 1892) 291–292, 306–307.

³ A 1290 statute preventing tenants from alienating lands by subinfeudation.

⁴ W F Finlason, *The History of Law of Tenures of Land in England and Ireland* (Stevens & Haynes, 1870) 54; Sir Frederick Pollock, *The Land Laws* (Macmillan, 1883) 72.

⁵ Sir Paul Vinogradoff, *Villainage in England: Essays in English Mediaeval History* (Cambridge University Press, 1892) 291–292, 306–307.

⁶ See especially Gary Lilienthal and Nehaluddin Ahmad, 'Australian Aboriginal Human Rights and Apprehended Bias: Skirting Magna Carta Protections?' (2015) 27 *Denning Law Journal* 146.

⁷ Sol Belleair, 'Australia Redefines Hypocrisy and Human Rights in Bid for UN Position', *Huffington Post*, (15 July 2016) <huffingtonpost.com.au/sol-belleair/australia-redefines-hypoc_b_8217768.html>.

⁸ Peter Sutton, 'The Robustness of Aboriginal Land Tenure Systems: Underlying and Proximate Customary Titles' (1996) 67(1) *Oceania* 7.

⁹ Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Harper and Row, 1974).

¹⁰ For which we adopt the term 'the customary laws of Indigenous Australians'.

¹¹ Ronald Murray Berndt, *Australian Aboriginal Religion* (E J Brill, 1974) 4–5.

¹² Mircea Eliade, *Australian Religions: An Introduction* (Oxford University Press, 1973) 1.

¹³ However, the Theogony of Hesiod was transmitted by song, as have been most ancient transmitted legal and cultural systems worldwide. See Hesiod, *Hesiod's Theogony* (Richard S Caldwell trans, Focus Classic Library, 1987) 4.

purpose, in Indigenous Australia, to that of the English legal and equitable maxims, in England, namely as containing and transmitting widely accepted customary laws.¹⁴

Kuypers regards frames as commanding rhetorical entities, equivalent in rhetorical force to an act of state. He describes frames as follows: '[Frames] induce us to filter our perceptions of the world in particular ways, essentially making some aspects of our multi-dimensional reality more noticeable than other aspects. They operate by making some information more salient than other information'.¹⁵

Reframing the Indigenous customary law into a religion, song, or art simply allows Anglo-Australian 'churches', for example, to deploy their 'priests' to reframe the Indigenous customary laws. They can force the more recent doctrines of Christianity onto a people whose cultural systems are tens of thousands of years older. Kuypers notes four categories of framing analysis: (a) frame bridging; (b) frame amplification; (c) frame extension; and, (d) frame transformation. Argument in this article deploys frame transformation.¹⁶ Frame transformation is an apparently forced process, for use when the planned frames 'may not resonate with, and on occasion may even appear antithetical to, conventional lifestyles or rituals and extant interpretive frames'.¹⁷

When this reframing is indicated, new significations are required to capture new support. Goffman named this process 'keying'.

Keying is a systematic transformation across materials, which are already meaningful according to a schema for interpretation. For keying to take place, those who participate must be aware that a systematic alteration will create a radical reconstitution. The keying must have an agreed time span.¹⁸

Thus, it suggests 'activities, events, and biographies that are already meaningful from the standpoint of some primary framework transposed in terms of another framework', such that they now are seen differently.¹⁹ For keying to be successful, to allow frame transformation to be stable, it must take place by informed conscious consent, or else the strength of the archaic heritage may reverse the process,²⁰ as it unravels just the same as does fraud.

By analogy, in the 1847 case of *Franks v Weaver*,²¹ the court teased out something of the nature of fraud. The report extracted the case as follows.

¹⁴ See especially William Noy, *The Grounds and Maxims and also an Analysis of the English Laws* (Riley, 1808) 39–41. This was rejected by imposition of a non-reframed reverse onus on the plaintiffs in *Milirrup v Nabalco Pty Ltd* (1970) 17 FLR 141, in which Blackburn J rejected the plaintiffs' claim of common law communal native title, because the plaintiffs did not establish that their predecessors had had the same links as themselves to the relevant areas of land, at the time of the establishment of New South Wales. See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, [41] ('*Mabo* (No 2)').

¹⁵ Jim A Kuypers, *Rhetorical Criticism: Perspectives in Action* (Lexington Press, 2009).

¹⁶ Jim A Kuypers, 'Framing Analysis From a Rhetorical Perspective' in Paul D'Angelo and Jim A Kuypers (eds), *Doing News Framing Analysis* (Routledge, 2010) 181.

¹⁷ David A Snow et al, 'Frame Alignment Processes, Micromobilization, and Movement Participation' (1986) 51 *American Sociological Review* 464, 473.

¹⁸ Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Northeastern University Press, 1985) 43.

¹⁹ *Ibid* 45.

²⁰ *Ibid* 43; See especially Sigmund Freud, 'Moses and Monotheism', in James Strachey and Anna Freud (eds), *The Standard Edition of the Complete Psychological Works of Sigmund Freud Volume XXIII (1937–39)* (Hogarth Press, 1939).

²¹ (1847) 50 ER 596; 10 Beav 297, 297–304 (Lord Langdale MR) ('*Franks v Weaver*').

The Plaintiff invented and sold a medicine under his own name. The Defendant also made and sold a similar medicine, and on his labels, he used the Plaintiff's name and certain certificates given of the efficacy of the Plaintiff's medicine, in such an ingenious manner, as, prima facie, though not in fact, to appropriate and apply them to his own medicine. Held, that, although there were other differences in the mode of selling, the proceeding was wrongful, and the Defendant was restrained by injunction.²²

Lord Langdale MR held that nobody could define what fraud was, because it is so multiform. Fraud is a form rather than as a state of affairs. He stated that in the present case it consisted in the crafty²³ adaptation of certain words in such a manner, ordinarily and constantly, as to be calculated to make it appear to persons when he was selling the product that the thing sold was prepared by the plaintiff.²⁴ Craftiness in words arguably means knowingly arranging a secondary meaning without prior public informed consent to the usage. The Defendant's attempt at a frame transformation without informed consent, unravels into litigation.

In the 1610 case of *Waggoner v Fish*,²⁵ the court held that strangers and foreigners devised and practised, by sinister and subtle means, ways of defrauding the charters, liberties, customs, good orders and ordinances of London. The court held that such acts were criminal fraud.²⁶ Mutatis mutandis, colonial frame transformation performed on the Australian Continental Common Law, without prior informed consent, would likely be criminal fraud under the English law itself, and would therefore inevitably unravel.

The two types of frame transformation are: (a) domain-specific transformations, as in attempts to alter group status; and, (b) global interpretive frame transformation, as in attempts to change world views by conversions of thought, or complete conquest such as religious conversion.²⁷ Both appear to be what the non-Indigenous majority are trying to do in Australia, by attempts at radical thought conversion of ancient land title-holders' status, and purporting to transform the frames of the land titles' underlying narratives,²⁸ without the victims' prior informed consent.

From all this, the question arises as to whether Anglo-Australian frame transformation of the Indigenous land titles as mere religion and art extinguishes those Indigenous titles. This article attempts to show that Indigenous land title is characterised as communal allodial title, as a bundle of subsisting rights by operation of Indigenous customary laws, which therefore cannot be extinguished by the criminal fraud inherent in frame transformation without informed consent. The article's methodology will be to try and reframe the term 'native title' into its true meaning.

The article's structure incorporates an initial briefing on the nature of allodial land title, and its failed struggle for emergence in English land law. Then, argument progresses to a critical analysis of Indigenous underlying titles and proximate titles. After setting this

²² *Franks v Weaver* (1847) 50 ER 596; 10 Beav 297, 297 (Lord Langdale MR).

²³ The word 'craft' was explained, in the *Rhetorica ad Herennium*, as 'the topic of an argument considering security. Security is to provide some plan for ensuring the avoidance of a present or imminent danger, the two subheadings for which are 'might' and 'craft'. Craft is exercised by means of money, promises, dissimulation, accelerated speed, deception and other similar means. Craft is only another name for strategy'. See Cicero, above n 1, 171.

²⁴ *Franks v Weaver* (1847) 50 ER 596; 10 Beav 297, 303.

²⁵ (1610) 2 Br & Gold 284; 123 ER 944.

²⁶ *Ibid.*

²⁷ Snow et al, above n 17, 43–44.

²⁸ For example, the British attempted to re-frame Indigenous creation mythical narratives into the pejorative term 'dreaming': interview with Rita Metzenrath, Senior Records Officer of the Australian Institute of Aboriginal and Torres Strait Islander Studies (Canberra, 22 November 2016).

scene, the article looks critically at the songlines as devices marking out a lawful system of land titles, and finally at how these songlines form chains of connection into an ancient and subsisting Indigenous Australian customary laws.

The research outcomes will strongly infer that it is most likely that Indigenous land title is true communal allodial title, arguing a fraudulent colonial occupation, and implying a lack of internal reason in colonial policy and administration. Colonial officials have tried to frame transform the highly sophisticated and ancient Indigenous legal and social system, including sophisticated celestial mapping and navigation systems, into a gallery of mere religious art. This ancient system is transmitted phylogenetically, to which governance colonial officials can therefore have no participation. The research shows that Indigenous land title cannot be extinguished. The research also suggests the frame transformation can be reversed by effective epideictic rhetoric.

II ALLODIAL TITLE

To illustrate the Common Law mindset on land title, in pre-Norman England, there were three kinds of estates, allodial, folcland and bocland.²⁹ The allodial proprietor held his land of no lord. He swore no oath of homage, as described below. With this, he was said to be free. However, despite this so-called freedom, he was subjected to the *onorous trinoda necessitas*: the duty of building bridges and castles; and, serving as a soldier to defend the community. Coke described homage as follows:

Homage is the most honourable service, and most humble service of reverence, that a franktenant may do to his lord. For when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shall kneele before him, on both his knees, and hold his hands jointly together between the hands of his lord, and shall say thus: I become your man from this day forward of life and limbe, and of earthly worship, and unto you shall be true and faithfull, and beare to you faith for the tenements that I claim to hold of you, saving the faith that I owe unto our soveraigne lord the king; and then the lord so sitting shall kisse him.³⁰

Even before the Norman conquest, either by subinfeudation or by commendation, much of the country's land was in feudal tenure, inferring the obligations of homage. The old universal allodial tenure receded into two classes of tenant. The first class was a few great magnates too strong for the king to remove. The second was a class of landowners too weak to cause trouble.³¹ These two types of freeholder, also called 'socmen', existed even in Anglo-Saxon times. Their socage meant the paradox of absolute land ownership along with the *trinoda necessitas*. However, the Norman kings retained only the name 'socage', altering its substantive meaning to a genus of land ownership always subject to a lord.³² This Norman discretionary expansion of socage obligations to the king could only fetter free alienation of land.

Allodium is almost as uncertain of meaning as in its origin. The Century Dictionary defines it as 'real estate held in absolute independence, without being subject to any

²⁹ William Stubbs, *Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First* (Clarendon Press, 1905) 7.

³⁰ Eduardo Coke, *The First Part of the Institutes of the Laws of England or a Commentary upon Littleton* (J & W Clarke, 1832) 64a.

³¹ Ibid 13; Augustus Henry Frazer Lefroy, 'Anglo-Saxon Period of English Law' (1917) 26(5) *Yale Law Journal* 388, 393.

³² R Storry Deans, *The Student's Legal History* (Stevens and Sons, 3rd ed, 1913) 5.

rent, service or acknowledgement to a superior'.³³ Despite the statement so frequently met in treatises and judicial opinions, that allodial ownership is absolute ownership of the soil, it is probable that no subject or citizen in any English-speaking country has ever been permitted to hold his land in 'absolute independence'.³⁴ Rather, 'every man holds his estate ... subject not only to the right of eminent domain, but to the right of the government to control the use of it by such rules and limitations as the public good requires',³⁵ such as taxes, stamp duty, excise, and similar obligations derived from tenure. 'Allodial' ownership, in the English-speaking realm, appears to retain the paradox of ownership freed from the more oppressive duties of service and fealty, with the accompanying liability to distress, owed to some person with superior interests, such as a superior lord, in the same land.³⁶ In this milieu, officialdom may not imagine true allodial title, and therefore its administrative decisions will be coloured so that allodial title holders do not exist.

III INDIGENOUS UNDERLYING TITLES AND PROXIMATE TITLE

A The Frame Transformation of Terra Nullius

Indigenous land title systems, within the ancient customary laws of mainland Australia, are dual systems comprising both an underlying and a proximate or relational (rather than subinfeudated) land title.³⁷ Contemporary holders of these specific land interests hold title to those lands in the proximate sense of conformance to the wider-spread customary laws. Regional customary laws maintain underlying titles, often transmitted over archaeological periods of time as lore.³⁸ Sutton effectively posits that this distinction is not the same as the Australian positive law distinction between radical title and beneficial ownership.³⁹ In the High Court of Australia's *Mabo* decision, there is only occasional use of the term 'underlying' instead of 'radical' title. Its mention is to apply a reverse onus, apparently without express public consent, and therefore frame transformation without consent. Thus, Brennan J in *Mabo (No 2)* stated:

What the Crown acquired was an underlying title to land and a sovereign political power over land, the sum of which is not tantamount to absolute ownership of land. Until recent times, the political power to dispose of land in disregard of native title was exercised so as to expand the underlying title of the Crown to absolute ownership but, where that has not occurred, there is no reason to deny the law's protection to the descendants of indigenous citizens who can establish their entitlement to rights and interests which survived the Crown's acquisition of sovereignty.⁴⁰

³³ William Dwight Whitney, *Century Dictionary and Cyclopaedia* (Century Company, 1914).

³⁴ Joseph Story, *Commentaries on the Constitution of the United States* (Hilliard Gray, 5th ed, 1891) 125, 126; *Wallace v Harmstad*, 44 Pa 492 (1863).

³⁵ Emory Washburn, *A Treatise on the American Law of Real Property* (Little Brown, 1876) 65.

³⁶ John Chipman Gray, *The Rule Against Perpetuities* (Little Brown, 3rd ed, 1915) 17.

³⁷ Proximate means, among other things, '1. next, nearest; 2. closely adjacent, very near; ... 4. next in a chain of relation': Arthur Delbridge (ed), *Macquarie Dictionary* (Herron Publications, 2nd ed, 1991) 1419 (definition of 'proximate').

³⁸ See especially Gary Lilienthal and Nehaluddin Ahmad, 'Abridgment and Conferral of Juridical Personality' (2015) 28 *The Journal Jurisprudence* 453.

³⁹ Sutton, above n 8, 11.

⁴⁰ *Mabo (No 2)* (1992) 175 CLR 1, 53.

Reay writes of 'residual rights' in the lands of an extinct clan by others of the same semi-moiety in the Northern Territory Borroloola region.⁴¹ These rights facilitate succession to abandoned lands by other groups. This garners further sustenance from later research in the same region by Trigger.⁴²

Williams writes of north-east Arnhem Land. She distinguishes 'radical title' to lands owned by a clan from a public formal grant procedure for establishing interests in small parcels of land for a non-clan group.⁴³ She observes that no absolute right in perpetuity is conveyed thereby, because the grant is subject to further 'renegotiation',⁴⁴ suggesting subjection to public rules. Keen describes this process, within the same region, as a grant of rights of ownership of small zones within a larger clan holding. The zones' root title remains within the clan.⁴⁵

Perhaps these instances indicate that there has been a denizen-like layering of entitlements,⁴⁶ which might operate within Indigenous land title, but without any denizen status limitations.⁴⁷

The English idea of a denizen was not that of a citizen because he did not have any political rights: he could not be a member of parliament or hold any civil or military office. However, the status of denizen allowed a foreigner to purchase property, although a denizen could not inherit property. Historically, paying for letters patent was thus a requirement of foreign land ownership in England.⁴⁸

Continuing the Anglo perspective on this, showing no separation of status and public law rules, an old English statute refers to denizens as follows:

All manners of persons being aliens born using any manner of handicraft, be they denizens or not denizens, and inhabited within the city of London or suburbs of the same ... or within two miles compass ... shall be under the search and reformation of the [companies'] wardens ... with one substantial stranger being a householder of the same craft by the same wardens to be chosen.⁴⁹

Thus, British colonial governments have long believed they can freely search denizens, in the perfect pejorative frame transformation of status, who have what they viewed as a lower status and more transient and ephemeral level of land tenure. Perhaps the British

⁴¹ Borroloola Land Claim, 1977-78. Includes 'Comments on the Borroloola land claim, submitted to Mr Justice Toohey', by Marie Reay [consultant to Aboriginal Land Commissioner]; and Borroloola land claim, report by Mr Justice Toohey, published 1979.

⁴² David S Trigger, *The Garawa/Mugularrangu (Robinson River) Land Claim* (Northern Land Council, 1989) 15.

⁴³ However, it is unlikely that any such thing as a formal grant really exists. See Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

⁴⁴ Nancy M Williams, 'A Boundary is to Cross: Observations on Yolngu Boundaries and Permission' in Nancy M Williams and Eugene S Hunn, (eds), *Resource Managers: North American and Australian Hunter-gatherers* (Westview Press, 1982) 141.

⁴⁵ Ian Keen, 'Yolngu Religious Property' in Tim Ingold, David Riches and James Woodburn (eds), *Hunters and Gatherers: Property, Power and Ideology* (Oxford University Press, 1988).

⁴⁶ It suggests the subsistence of a system with some elements of that of denizens. See Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

⁴⁷ Sutton, above n 8, 11.

⁴⁸ William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press 1979, (Facsimile Edition of the Four Books published by The Clarendon Press in the period 1765-69) book 1 ch X 374 ('Blackstone's Commentaries').

⁴⁹ Steve Rappaport, *Worlds Within Worlds: Structures of Life in Sixteenth-Century London* (Cambridge University Press, 1989) 45; Alexander Luders, *The statutes of the realm 1101-1713 printed by command of his majesty King George the Third; in pursuance of an address of the House of Commons of Great Britain; from original records and authentic manuscripts* (Record Commission, 1810) 208-9.

colonialists do not distinguish Indigenous people from denizens. Queen Elizabeth II personally signed the *Aborigines Welfare Ordinance 1954 (ACT)*,⁵⁰ providing for slavery-like systemic disadvantage, now fully repealed by the *Aborigines Welfare Repeal Ordinance 1965 (ACT)* s 2 on 11 November 1965, as follows:

For the purposes of section seven of this Ordinance and the last preceding section, a member of the police force, or a person authorized in writing by the Minister, shall have access at all reasonable times to an aboriginal at any place in which he is residing or employed and may make such inspections and inquiries as that member or person thinks fit.⁵¹

Underlying title in Indigenous customary laws consists of the constitution of a particular zone of land, including (a) its physical borders or focal nodes, (b) its internal structure such as drainage, or its ecology, (c) its demarcation according to specific cultural identities, such as a particular language, a subsection couple, a focal residential site, totemic entities, site-related mythical narratives, verses of songlines, objects separated from public common use, (d) its kind of property, such as being unavailable for alienation due to its communal character, and (e) proper principles for claims of right by Indigenous people, such as descent from prior land custodians, conception, ceremonial incorporation, or prescriptive residence.⁵²

Various groups often differ about the cultural content of an area of land. However, they tend to agree on a sufficient percentage of the issues, coinciding with the key juristic principles that determine customary proximate rights in land.⁵³ Underlying title inheres in living people through birth, succession or incorporation. Proximate title encompasses rights to make public land claims and, in consequence, to exercise rights, and satisfy custodial obligations to the land. These rights come through totem. In fact, the land has custodial obligations over the person.⁵⁴

In a cognate way, in the English legal doctrine of tenure, the Crown claims an absolute bundle of rights, called 'radical title', emanating from its claim to sovereignty. Everyone else's property interests are held by virtue of the Crown's claim to what it says is superior title. Thus, 'in feudal-based legal terms, "tenure" does not refer to the holding of the land but to the relationship between Paramount Lord and tenant'.⁵⁵ In this theory of held interests, occupation consisting of comings and goings over time, sometimes being transformed to other forms of holdings, and radical title going on undisturbed in perpetuity, the crown's sovereignty claim in Australia is the weakest link in its radical title argument. This is because it has always been based on an initial claim of terra nullius, in which the entire existence of the Indigenous peoples of New Holland was repressed as non-existent. This repression will unravel again and again.⁵⁶ Brownlie

⁵⁰ See *Aborigines Welfare Ordinance 1954 (ACT)* s 1.

⁵¹ *Aborigines Welfare Repeal Ordinance 1965 (ACT)* s 10(1).

⁵² Sutton, above n 8, 11.

⁵³ Ian Keen, *Knowledge and Secrecy in an Aboriginal Religion* (Clarendon Press, 1994).

⁵⁴ Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

⁵⁵ *Mabo (No 2)* (1992) 175 CLR 1, 53 (Brennan J). Land in Australian law is thus held of someone, not held absolutely, unless by the Crown.

⁵⁶ According to Freud, it is the insistent return of the repressed that can explain numerous phenomena that are normally overlooked: not only our dreams but also what has come to be called 'Freudian slips' (what Freud himself called 'parapraxes'). According to Freud, there is a 'psychology of errors'; that slip of the tongue or that slip of the pen, 'which have been put aside by the other sciences as being too unimportant' become for Freud the clues to the secret functioning of the unconscious. Indeed, he likens his endeavour to 'a detective engaged in tracing a murder'. Sigmund Freud, 'Volume XV Introductory Lectures on Psycho-Analysis (Parts I and II) (1915-1916)' in James Strachey (ed), *New Introductory*

illustrates this point, in which he suggests the rhetorical audience is other prospective invading colonial powers.

Even as to terra nullius, like a volcanic island or territory abandoned by its former sovereign, a claimant by right as against all others has more to do than planting a flag or rearing a monument. From the 19th century the most generous settled view has been that discovery accompanied by symbolic acts give no more than 'an inchoate title, an option, as against other states, to consolidate the first steps by proceeding to effective occupation within a reasonable time.'⁵⁷

This radical forced frame transformation is without Indigenous consent. They are not its rhetorical audience. Without effective sovereignty based on legality of transfer, the crown's radical title must fail in law as mere fraudulent encroachment.

Similarly, underlying Indigenous titles are always present by operation of law, formed in ancient ornamental epideictic rhetoric.⁵⁸ Although existing groups can enjoy underlying titles in their proximate meaning, extinction of landed groups and out-migration may leave lands unoccupied for a time. This is cognate to a kind of community title, where non-Indigenous officials have used the term 'sacred site' pejoratively, to refer to certain significant and important things administered by people of higher degrees of learning, pursuant to their duty to the world.⁵⁹ It refers to an absence of active claims as of right over the land, whether made in absentia or not.⁶⁰ Some Indigenous people describe this situation as 'orphan country', meaning country without occupying custodians for the time being, even while people from neighbouring areas actively look after it, as proxies.⁶¹

The survival of an underlying title over a parcel of land, in Indigenous customary law, is not vitiated by temporary absence of its proximate title-holders. Claiming to operate Indigenous land title by virtue of its claim to crown radical title, the *NTA* purports to reverse this rule, by requiring evidence of claimants having maintained their system of traditional law and custom,⁶² in a frame transformation to Imperial British thinking.⁶³

Lectures on Psycho-Analysis (The Standard Edition) (Complete Psychological Works of Sigmund Freud) (W W Norton, 1990) 27.

⁵⁷ Ian Brownlie, *Principles of Public International Law* (Clarendon Press, 4th ed, 1990) 146.

⁵⁸ See especially the argument on epideictic rhetoric constituting a form of control of law in Lilienthal and Ahmad, above n 38.

⁵⁹ Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

⁶⁰ Sutton, above n 8, 12.

⁶¹ Peter Sutton, *Country: Aboriginal Boundaries and Land Ownership in Australia* (Aboriginal History Monographs, 1995) 53. While Sutton calls these proxies 'regents', it appears there is no such suggestion of meaning in Indigenous land thought. See Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

⁶² *NTA* s 223(1).

⁶³ In 1866, in apparently new Imperial policy, Whitehall began what they speciously called a 'non-discrimination' policy in the Crown Colony of Hong Kong. This non-discrimination policy abandoned the earlier principle policy of having Chinese and British law administration side by side in Hong Kong. Whitehall thought that this 'experiment' of their merely indirect rule, by which Chinese people governed with their own officers by ancient Chinese law and custom, had broken down. Whitehall thought it could never work because of the specious aside that there was crime in the community, without saying what this really meant, and from whose point of view, suggesting frame transformation in operation. Thus, law and order had to be in firm British hands, with the Chinese officials having no authority. Whitehall felt that 'native' interests, used as a pejorative expression, would be served better through non-discrimination than by separate administration of Chinese law and custom run by Chinese officials. However, the policy stated that native law and custom must be respected 'as far as possible', except when the law was inapplicable. See Edwin Scott Haydon, 'The Choice of Chinese Customary Law in Hong Kong' (1962) 11(1) *The International and Comparative Law Quarterly* 231, 241.

This suggests continuing operation in Australia of the somewhat suspect international law doctrine of terra nullius, itself only said to have come from Roman Law.⁶⁴ European invaders applied this doctrine to take possession of foreign lands, and declare sovereignty, whenever they said no person was there for the time being. This sounds similar to the Spanish 'Regalian doctrine', by which any private title to colonial land has to be traced back to some grant, either express or implied, from the Crown of Spain.⁶⁵ It ostensibly had the same effect, as the English feudal legal maxim *nulle terre sans seigneur*, meaning there could be no land without a lord, a rule of English common law deriving from English custom, and therefore arguably of no relevance in Australia.⁶⁶

Active custodianships over vacant Indigenous lands need not necessarily be in place for the underlying title to subsist, within the Indigenous land rules.⁶⁷ In Indigenous practice, this is designated as 'the law', meaning the revered rules integrating lands with languages, totems, dreaming tracks and other demarcations in the landscape. These 'dreaming tracks' are better described as cultural learning tracks at the level of the world of continuing creation.⁶⁸ This pattern is set permanently, integrated with the world at the time of its creation. The regional law, rather than any council, is what generates proximate land entitlements. There is no Crown. Such a cultural system is not a separate juristic actor, in the same way as the Common Law fictionalises that all land belongs to the Sovereign.⁶⁹ Keen suggests this overlay of revered norms is:

⁶⁴ Terra Nullius appears to have been more a construction than a legal doctrine. Benton and Strauman argued that while *res nullius* was firmly rooted in Roman sources of law, *terra nullius* arose merely by analogical extension from *res nullius*. They added that neither concept constituted a doctrine of a legal vacuum. Thus, it would be misleading to use either term for imperial claims based on vacuum domicilium (vacancy). Brian Slattery, 'Paper Empires: The Legal Dimensions of French and English Ventures in North America' in John McLaren, A R Buck, Nancy E Wright (eds), *Despotic Dominion: Property Rights in British Settler Societies* (University of British Columbia Press, 2005) 51. Armitage made the connection that from the 1620s to the 1680s in Britain, and then in North America, Australia and Africa well into the nineteenth century, the argument from vacancy (*vacuum domicilium*) or absence of ownership (*terra nullius*) became a standard foundation for English and, later, British dispossession of indigenous peoples. David Armitage, *The Ideological Origins of the British Empire* (Cambridge University Press, 2000) 97. In this synthesis, *res nullius* underwent metamorphosis into *terra nullius*, only coming into use in the late 19th century, in international law discussions. Lauren Benton and Benjamin Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice', (2010) 28(1) *Law and History Review* 1, 6. *Contra* Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law* (Longmans, 1926).

⁶⁵ June Prill-Brett, 'Indigenous Land Rights and Legal Pluralism among Philippine Highlanders' (1994) 28(3) *Law & Society Review* 687, 691. In the US Supreme Court case of *Carino v Insular Government*, Holmes J stated '[E]very presumption is and ought to be against the government in a case like the present.... [W]hen, as far back as testimony and memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the way from before the Spanish conquest, and never to have been public land': *Carino v Insular Government*, 212 US 449, 460 (1909) (Holmes J).

⁶⁶ The legal maxim was 'there is no land in England without its lord': *nulle terre sans seigneur*, G A Guyot, *Institutes Feodales, ou Manuel des Fiefs et Censives, at Droits en Dependans* (Saugrain, 1753) 28.

⁶⁷ Sutton, above n 8, 12.

⁶⁸ Interview with Douglas Amar Amarfio (Canberra, 5 November 2016).

⁶⁹ *Mabo (No 2)* (1992) 175 CLR 1, 9, 27 (Brennan J).