

# NO DECOROUS VEIL: THE CONTINUING RELIANCE ON AN ENLARGED TERRA NULLIUS NOTION IN MABO [NO 2]

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*The Mabo [No 2] decision in 1992 is heralded as the judicial revolution which swept the enlarged notion of terra nullius from Australian jurisprudence. This notion held that indigenous populations ‘too low in the scale of social organization’ could not be regarded as ‘owners’ of land. This landmark decision condemned this notion as being unjust, discriminatory, and ahistorical. The Indigenous peoples of Australia were indeed owners of their lands, possessing a traditional set of rights and interests termed ‘native title’. Yet the decision exposed a troubling doctrinal paradox. Upon closer examination, this same enlarged terra nullius notion is stated in Mabo [No 2] to be the basis upon which territorial sovereignty over Australia was asserted — validly and rightfully, it is claimed — by Great Britain. The Indigenous peoples of continental Australia were ‘backward peoples’ because they ‘were not organized in a society that was united permanently for political action’ and, thus, their territories were deemed terra nullius and sovereign-less. Their territories could therefore be appropriated without reliance on any other legitimate mode of acquisition in international law. The Anglo-Australian constitutional common law, in self-contradiction, holds the enlarged notion of terra nullius to be both abhorrent and the juridical foundation upon which the sovereignty of the modern Australian nation rests. This article critically examines the history and application of the occupation of backward peoples doctrine in Australian jurisprudence, particularly as expressed in Mabo [No 2], and explores the implications for the present-day Australian sovereignty construct. Reliance on this doctrine renders the counterfactual orthodox theory of Anglo-Australian sovereignty extremely fragile and at a tipping point.*

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## I INTRODUCTION

In 1982, five Meriam commenced an action in the High Court of Australia claiming an inherent title to parcels of land on the island of Mer which had not been extinguished upon the assertion of British sovereignty in 1879.<sup>1</sup> *Mabo v Queensland [No 2]* ('*Mabo [No 2]*')<sup>2</sup> was the first occasion in which a claim of pre-existing Indigenous<sup>3</sup> interests in land in Australia was squarely before the High Court, and the litigation necessarily raised issues surrounding the acquisition of sovereignty over the New Holland/Australian territories by Great Britain. This is because the mode of acquisition of the territorial

<sup>1</sup> See generally BA Keon-Cohen, 'The *Mabo* Litigation: A Personal and Procedural Account' (2000) 24(3) *Melbourne University Law Review* 893, 911. Prior to 1879, a loose control was exerted by the colony of Queensland in the eastern Torres Strait, which included the islands of Mer, Dauar, and Waier (collectively known as the Murray Islands): see *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 19 (Brennan J) ('*Mabo [No 2]*'). The issuing of Imperial Letters Patent of October 1878 and the passage by the colonial Parliament of the *Queensland Coast Islands Act 1879* (Qld) had the stated consequence that the Murray Islands were annexed to the colony from 1 August 1879.

<sup>2</sup> *Mabo [No 2]* (n 1).

<sup>3</sup> In this article, the capitalised Indigenous will be a reference to the autochthonous peoples of New Holland/Australia and, without capitalisation, will be to indigenous peoples or populations generally.

sovereignty in international law is a question anterior to, and determinative of, the issue of what property law rights and interests might inure in an indigenous society after an acquisition.<sup>4</sup> The validity of the various assertions of British sovereignty over continental New Holland/Australia was not in issue at trial; however, the mode of such acquisition of territorial sovereignty was in question, and the consequences of the acquisition were certainly live issues.<sup>5</sup>

While the Judicial Committee of the Privy Council remained the judicial apex of the Australian legal system, the distant authority of the advice in the 1889 case of *Cooper v Stuart* ('*Cooper*'),<sup>6</sup> albeit in bald dictum, was accepted as binding. In *Cooper*, it was stated that the New South Wales territory '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'.<sup>7</sup> By the time *Mabo [No 2]* was argued in 1991, Privy Council precedent was no longer binding as the High Court of Australia had become the fundamental determiner of the common law of Australia.<sup>8</sup> When the reserved decision of the High Court was handed down in mid-1992, a majority of 6:1 declared that the assertion of British sovereignty had not extinguished the 'native title' of the Meriam people who were entitled to possession, occupation, use, and enjoyment of the island of Mer as against the whole world.<sup>9</sup>

This article concentrates on the ramifications of this landmark decision on the assertions of British sovereignty over continental New Holland/Australia in 1788, 1824, and 1829 respectively.<sup>10</sup> The property law aspects are canvassed

<sup>4</sup> See *Mabo [No 2]* (n 1) 32 (Brennan J).

<sup>5</sup> *Ibid* 31–2.

<sup>6</sup> (1889) 14 App Cas 286 ('*Cooper*').

<sup>7</sup> *Ibid* 291 (Lord Watson for the Court). *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (Supreme Court of the Northern Territory) ('*Milirrpum*') upheld *Cooper* and was the only trial decision in municipal law that touched these same issues. The lack of any appeal from *Milirrpum* meant that these scant judicial statements from *Cooper* on the basis of British territorial sovereignty over the Australian territories represented good law: see at 242–3 (Blackburn J).

<sup>8</sup> *Australia Act 1986* (Cth) s 11; *Australia Act 1986* (UK) s 11. The passage of these Acts, inter alia, ended any appeals to the Judicial Committee of the Privy Council from Australian courts.

<sup>9</sup> *Mabo [No 2]* (n 1) 76 (Brennan J, Mason CJ) and McHugh J agreeing at 15), 119 (Deane and Gaudron JJ), 216 (Toohey J). This was subject to some small exceptional parcels of extinguishing tenure: see, eg, at 71 (Brennan J).

<sup>10</sup> See generally Elizabeth Evatt, 'The Acquisition of Territory in Australia and New Zealand' in CH Alexandrowicz (ed), *Grotian Society Papers 1968: Studies in the History of the Law of*

only as a necessary backdrop. The *Mabo [No 2]* decision appeared to wholly reject earlier references to Australia as ‘practically unoccupied’, ‘without settled inhabitants or settled law’, or populated by ‘uncivilized inhabitants in a primitive state of society’ who could be dispossessed by ‘more advanced peoples’, as expressed in *Cooper*<sup>11</sup> and *Milirrpum v Nabalco Pty Ltd* (*Milirrpum*)<sup>12</sup> respectively. Yet when the international law aspects of the decision are closely examined, the Indigenous peoples of Australia are nominated in the leading judgment of Brennan J, with which Mason CJ and McHugh J concurred, as ‘backward peoples’ for the purposes of international law in 1788.<sup>13</sup> The historical justification Brennan J nominated for the proposition that international law regarded these peoples as ‘backward’ was that they ‘were not organized in a society that was united permanently for political action’.<sup>14</sup> New South Wales is stated to have been acquired by Great Britain under an engorged occupation mode of territorial acquisition which, at its core, has what Brennan J described as an ‘enlarged notion of terra nullius’.<sup>15</sup> ‘To these territories’, Brennan J stated, ‘the European colonial nations applied the doctrines relating to acquisition of territory that was terra nullius’.<sup>16</sup> Thus, the territories of the Indigenous peoples of Australia could be unilaterally appropriated as not ‘occupied’, without reliance on any other legitimate mode of acquisition of territorial sovereignty in international law.

This article interrogates this ‘enlarged notion of terra nullius’, especially as it is formulated in the leading judgment of Brennan J — lauded as perhaps the

*Nations* (Martinus Nijhoff, 1970) 16, 33, 35–6. References to ‘New Holland’ or ‘New South Wales’ in and around 1788 and to the turn of the 19<sup>th</sup> century include Van Diemen’s Land: at 26–7.

<sup>11</sup> *Cooper* (n 6) 291 (Lord Watson for the Court).

<sup>12</sup> *Milirrpum* (n 7) 200–1 (Blackburn J).

<sup>13</sup> *Mabo [No 2]* (n 1) 32.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.* 36. Sir Harry Gibbs, a former Chief Justice of the High Court, wrote in the wake of *Mabo [No 2]* that ‘the expression “terra nullius” seems to have been unknown to the common law’: Sir Harry Gibbs, ‘Foreword’ in MA Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (University of Queensland Press, 1993) xiii, xiv. This is of little critical weight because, firstly, it is not a concept of the common law, but one of international law. At common law, under the doctrine of feudal tenure, all land was titulary held by the Crown, so no comparative concept was necessary: see generally *Mabo [No 2]* (n 1) 45–8 (Brennan J). Moreover, the assertion of sovereignty not being justiciable in municipal courts meant that the expression is not often, if at all, found in municipal case law: see at 31.

<sup>16</sup> *Mabo [No 2]* (n 1) 32.

most influential judgment in Australian legal history.<sup>17</sup> It becomes clear that while an enlarged notion of terra nullius was condemned from the property law perspective in *Mabo [No 2]*, paradoxically the territorial sovereignty of the modern Australian nation-state rests on this selfsame enlarged notion of terra nullius — one which treats its Indigenous peoples as ‘backward’. Additionally, the decision exposed other ‘problems’ with the present orthodox theory of Anglo-Australian sovereignty,<sup>18</sup> not least the alleged instantaneity of the assertions of territorial sovereignty by Great Britain and the unbounded exercise of the so-called ‘radical title’ said to have been acquired by the Crown upon sovereignty.

The basis of territorial sovereignty, as stated by Brennan J, will be explored first in an attempt to source the provenance of this ‘enlarged notion of terra nullius’ with its ‘backward peoples’ concept in international law, to trace its manifestation in Imperial constitutional law, and to highlight the fundamental and inescapable reliance which is placed on this enlarged terra nullius notion in present-day Australian jurisprudence. It is shown that Australian jurisprudence continues to embrace an enlarged notion, one which views its Indigenous peoples as ‘backward’ — too low on a scale of sociopolitical organisation as to have ever been capable of being ‘sovereign’ or to have occupied their respective territories in international law.<sup>19</sup> To conclude, the various implications of the decision on the ahistorical orthodox theory of Anglo-Australian sovereignty will be examined. This orthodox theory, as presently constructed, is more story than history, and is in a counterfactual and parlous state.

## II THE SOVEREIGNTY ISSUE

Although the Meriam plaintiffs did not challenge the validity of British sovereignty over their traditional islands, some relevant principles of international law and Imperial constitutional law surrounding the acquisition of sovereignty of the Murray Islands and continental Australia were necessarily canvassed in the decision’s reasoning. All four majority judgments in

<sup>17</sup> A former High Court Justice wrote that Brennan J’s judgment in *Mabo [No 2]* ‘must rank as one of the most influential, if not the most influential single judgment written by a Justice of the Court’: Justice Ian Callinan, ‘The Queensland Contribution to the High Court’ in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003) 199, 212.

<sup>18</sup> See below Part VI.

<sup>19</sup> Please note the author is reporting on and discussing the occupation of backward peoples doctrine as expressed in *Mabo [No 2]* and the surrounding jurisprudence, and is neither adopting nor endorsing the views expressed or the stated doctrines.

*Mabo [No 2]* declared the common law of Australia as recognising the pre-existing ‘native title’ to land and waters of Indigenous Australian peoples.<sup>20</sup> Crucially, the common law of Australia was declaratory of such native title, but did not source it.<sup>21</sup> Brennan J defined this native title as ‘the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.’<sup>22</sup> His Honour’s opinion stated, after a ‘lengthy examination of the problem’, nine principles as being the common law of Australia.<sup>23</sup> Relevant to the sovereignty issue, these included:

- 1 The Crown’s acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.
- 2 On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.
- 3 Native title to land survived the Crown’s acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown’s acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.
- ...
- 6 Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connexion with the land. ...<sup>24</sup>

Brennan J accepted that the settled laws and customs of the Indigenous peoples — and, implicitly, the societies and normative systems generating

<sup>20</sup> *Mabo [No 2]* (n 1) 58–9, 61 (Brennan J, Mason CJ and McHugh J agreeing at 15), 85–6 (Deane and Gaudron JJ), 184, 191–2 (Toohey J). The dissentient, Dawson J, upheld the State of Queensland’s arguments, principally that if the traditional rights claimed by the plaintiffs ever existed, they were extinguished (or not recognised) from the moment of annexation in 1879: at 122, 175.

<sup>21</sup> *Ibid* 58–9 (Brennan J).

<sup>22</sup> *Ibid* 57.

<sup>23</sup> *Ibid* 69.

<sup>24</sup> *Ibid* 69–70.

these laws and customs — continued unabated after ‘a change in sovereignty’.<sup>25</sup> His Honour rejected that the contrary view could be accepted contemporarily, stating:

It is one thing for our contemporary law to accept that the laws of England, so far as applicable, became the laws of New South Wales and of the other Australian colonies. It is another thing for our contemporary law to accept that, when the common law of England became the common law of the several colonies, the theory which was advanced to support the introduction of the common law of England accords with our present knowledge and appreciation of the facts. When it was sought [in *Milirrpum*] to apply Lord Watson’s assumption in *Cooper v Stuart* that the colony of New South Wales was ‘without settled inhabitants or settled law’ to Aboriginal society in the Northern Territory, the assumption proved false.<sup>26</sup>

As to the property law aspects, Brennan J wrote:

The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.<sup>27</sup>

His Honour noted that any theory which had the British Crown acquiring an absolute beneficial title in all colonial land upon the relevant assertions of sovereignty was dissonant with Australian history:

The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. Dispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power.<sup>28</sup>

<sup>25</sup> Ibid 51.

<sup>26</sup> Ibid 38–9.

<sup>27</sup> Ibid 58.

<sup>28</sup> Ibid.

### A *The Modes of Acquiring Territorial Sovereignty*

Brennan J stated in his judgment that the accepted modes of acquiring territorial sovereignty in the international law of the late 18<sup>th</sup> century were relevantly threefold: conquest, cession, or occupation, the last being the discovery and occupation of an uninhabited territory.<sup>29</sup> Under this occupation mode of territorial acquisition, such an uninhabited territory was said to be *terra nullius* — ‘territory belonging to no-one’.<sup>30</sup> However, according to Brennan J, during the Age of Discovery this classical occupation mode was expanded from applying only to uninhabited *terra nullius* territories to apply to those New World territories ‘discovered’ by Old World explorers that were inhabited by ‘backward’ populations.<sup>31</sup> He explained:

The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. As *among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers, provided the discovery was confirmed by occupation and provided the indigenous inhabitants were not organized in a society that was united permanently for political action.* 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.<sup>32</sup>

Brennan J referred to this expansion of the *terra nullius* concept in the occupation mode as the ‘enlarged notion of *terra nullius*’.<sup>33</sup> This purported expansion of the classical occupation doctrine to allow the appropriation of those territories occupied by ‘backward peoples’ can be described, pursuant to

<sup>29</sup> See *ibid* 32. Under the intertemporal doctrine in international law, the relevant rules to be applied are those of the particular epoch in question: see RY Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963) 28.

<sup>30</sup> *Mabo [No 2]* (n 1) 41 (Brennan J).

<sup>31</sup> *Ibid* 32. The classical occupation doctrine applied to uninhabited territories or, if once inhabited, now deserted territories. Antarctica is a modern example of the former; Norfolk Island is a prime historical example of the latter. Although occupation is historically called the discovery doctrine, in his judgment Brennan J uses the term ‘occupation’ and that terminology has been maintained. The term ‘discovery’ is used throughout this article in its technical sense under the classical occupation doctrine in international law, not in its ordinary sense of ‘the first to find or to find out’.

<sup>32</sup> *Ibid* (emphasis added) (citations omitted).

<sup>33</sup> *Ibid* 36.



Lindley's analysis, as the occupation of backward territories doctrine,<sup>34</sup> or, perhaps more accurately, the occupation of backward peoples doctrine — as it is the peoples held to be 'backward', not the territory.<sup>35</sup>

### 1 *Acquisition of the Murray Islands*

Brennan J highlighted the 'various justifications' which underpinned the enlarged notion of terra nullius applying to territories inhabited by 'backward peoples'.<sup>36</sup> These justifications were that the benefits of Christianity and/or European civilisation needed to be extended to those peoples not possessed of them,<sup>37</sup> or that — if land was not cultivated by the inhabiting population — the European nations had a right to bring such lands into production.<sup>38</sup> Concisely stated, and with some overlap, the justifications for unilaterally appropriating the territories of 'backward' peoples as terra nullius were that these peoples were not 'civilised', not Christian, or not cultivators.

In applying these justifications to the Meriam, Brennan J doubted whether 'the facts would have sufficed to permit acquisition of the Murray Islands as ... terra nullius'.<sup>39</sup> This was because Moynihan J found in the determination of issues of fact that, on an abundance of evidence, by the time the assertion of British sovereignty was made over the Murray Islands, the Meriam had been proselytised by the London Missionary Society, the Meriam were not only fisherpersons of excellence but 'devoted gardeners',<sup>40</sup> and the Mamoose (civic leader) and missionaries provided a stable, peaceful society.<sup>41</sup> None of these available justifications were therefore applicable to the circumstances of the Meriam people in 1879: they were civilised, Christian, and cultivators.

<sup>34</sup> 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, 1969) 10–20. This is a reprint of the original publication: MF Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans, Green and Co, 1926).

<sup>35</sup> The occupation of backward peoples doctrine — as adverted to by Blackburn J in *Milirrpum* (n 7) 200–3 — is critically examined in Daniel Lavery, "Not Purely of Law": The Doctrine of Backward Peoples in *Milirrpum*' (2017) 23 *James Cook University Law Review* 53.

<sup>36</sup> *Mabo* [No 2] (n 1) 32.

<sup>37</sup> *Ibid* 32–3.

<sup>38</sup> *Ibid* 33.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Mabo v Queensland* (Determination of Issues of Fact, Supreme Court of Queensland, Moynihan J, 16 November 1990) vol 1, 99–101, 142, 157–9.

Brennan J seemed then to interrupt his own discussion, stating: ‘However that may be, it is not for this Court to canvass the validity of the Crown’s acquisition of sovereignty over the Islands which, in any event, was consolidated by uninterrupted control of the Islands by Queensland,’<sup>42</sup> as if issues of validity were emerging. His Honour rests this discussion on the suggestion that prescriptive title — presumably an unchallenged title — is the international legal basis upon which territorial sovereignty is held over the Murray Islands.<sup>43</sup> Unsatisfactorily, he leaves the exact mode of acquisition upon which the Murray Islands were appropriated by the British Crown in 1879 unstated.

## 2 *How Were the Various Parts of New Holland/Australia Acquired?*

As quoted earlier, Brennan J asserted that it was accepted state practice among European nations that territories inhabited by these ‘backward peoples’ were ‘parcelled out’ among themselves under an engorged occupation mode, ‘provided the discovery was confirmed by occupation *and* provided the indigenous inhabitants were not organized in a society that was united permanently for political action.’<sup>44</sup> His Honour then summarises that the British acquisition of territorial sovereignty over the colony of New South Wales ‘was regarded as dependent upon the settlement of territory that was terra nullius consequent on discovery.’<sup>45</sup> This, then, is the continuing and fundamental reliance upon the enlarged notion of terra nullius by Australian jurisprudence. The Indigenous peoples of Australia were ‘backward peoples,’ ‘not organized in a society that was united permanently for political action’;<sup>46</sup> thus, their deemed terra nullius territories could be unilaterally appropriated as if unoccupied and sovereign-less in the international law of the late 18<sup>th</sup> century under this occupation of backward peoples doctrine.

Yet, the question arising from Brennan J’s conclusion is *who* regarded the territory of New South Wales as terra nullius? And, perhaps more importantly, *when* did they do so? It is undeniable that this *Mabo [No 2]* judgment relies

<sup>42</sup> *Mabo [No 2]* (n 1) 33.

<sup>43</sup> Challenges to British/Australian sovereignty have been ever-present in the Torres Strait: for a chronicle of these challenges, see generally Nonie Sharp, *Stars of Tagai: The Torres Strait Islanders* (Aboriginal Studies Press, 1993).

<sup>44</sup> *Mabo [No 2]* (n 1) 32 (emphasis added) (citations omitted). Although Brennan J does not directly address the circumstances in which the central tranche of Australia was acquired in 1824, or in which the western tranche was acquired in 1829 to complete the taking of the balance of continental Australia/New Holland, presumably these assertions of territorial sovereignty by Great Britain rest on the same basis.

<sup>45</sup> *Ibid* 34 (citations omitted).

<sup>46</sup> *Ibid* 32.

on the occupation of backward peoples doctrine with its enlarged terra nullius notion to have been accepted state practice by European nations in the 18<sup>th</sup> century, and certainly by 1788; the doctrine must therefore have been relied upon by the British Crown in asserting territorial sovereignty over a 3 million square kilometre portion of eastern New Holland. Yet the epoch in which this engorged occupation doctrine is said to have emerged as a legitimate principle in international law, and/or been cemented as state practice, is nowhere stated in the judgment. Moreover, no other examples are given of any earlier or contemporaneous successful reliance on this enlarged notion of terra nullius — either by Great Britain itself or by any other European nation.

The lack of scaffolding of this broad doctrinal expansion asserted by Brennan J to have occurred in international law is certainly deserving of investigation, as is the statement that the Indigenous peoples of Australia were relevantly ‘backward’ under this ‘enlarged notion of terra nullius’. His Honour cites two sources for the proposition that British acquisition of sovereignty was dependent on this doctrinal expansion:<sup>47</sup> the Privy Council advice of *Cooper* from 1889,<sup>48</sup> and a paper by Elizabeth Evatt from the late 1960s.<sup>49</sup> Given that the ultimate integrity of the territorial sovereignty claimed by the Australian nation largely rests on these two external buttresses — a sole legal commentator and a lone decision from Imperial constitutional law — these authorities are less than reassuring on a number of levels.

(a) *Evatt’s Paper*

Dealing first with Elizabeth Evatt’s paper, Brennan J cites page 25, yet it is difficult to comprehend where support is garnered for the stated proposition.<sup>50</sup> Evatt openly challenges whether Captain James Cook was ‘authorised’ to lay any claim to the eastern section of New Holland he navigated in 1770 because his secret instructions were limited in their language to the mythical continent, Terra Australis Incognita, and to islands not previously discovered by Europeans.<sup>51</sup> On the discovery aspect, Evatt states that ‘Cook was careful to limit his claim to that territory of which he was the first discoverer’.<sup>52</sup> She

<sup>47</sup> Ibid 34 n 74.

<sup>48</sup> *Cooper* (n 6).

<sup>49</sup> Evatt (n 10).

<sup>50</sup> *Mabo* [No 2] (n 1) 34 n 74.

<sup>51</sup> Evatt (n 10) 25.

<sup>52</sup> Ibid. New Holland had been known to European nations for over 150 years prior to Cook’s navigation of the eastern coast in 1770: at 19. Cook had in his possession on the Endeavour a copy of *Archipelagus Orientalis sive Asiaticus*, a large-scale map of East Asia and the Pacific

notes the huge swathe of territory later nominated in Captain-General Phillip's Commissions as 'New South Wales' was 'an area vast in dimensions' compared to 'Cook's modest claim' in 1770.<sup>53</sup> Further, on the issue of whether this New South Wales territory had been effectively occupied in 1788 so as to perfect the bald assertion of sovereignty and in search for 'any slight evidence of sovereignty', she concluded:

[B]eyond the areas of actual settlement and inland exploration there was scarcely any evidence of such activity, apart from the formal instruments of annexation and some coastal exploration; it was not until after the rapid expansion between 1824 and 1851 that a reasonably strong case of effective occupation could be made out beyond the South-East area.<sup>54</sup>

Evatt thus questions Cook's authority to claim *any* part of New Holland, notes the massive engrossment of the territory nominated in Phillip's Commissions from that which Cook had actually discovered, and then dismisses any British ambit claim to be in immediate and effective occupation of the entirety of the territory of New South Wales circa 1788. Indeed, Evatt concludes her paper with a quote from Fauchille's 1925 treatise, *Traité de Droit International Public*, stating she prefers his 'robust' view:

*Les puissances civilisées n'ont pas plus de droit de s'emparer des territoires des sauvages, que ceux-ci n'ont le droit d'occuper les continents européens.*<sup>55</sup>

[Civilized powers have no more right to seize the territories of savages than the latter have the right to occupy the European continents.]<sup>56</sup>

circa 1663. It showed, with remarkable accuracy, northern New Holland, including the entire Gulf of Carpentaria, and most of the western and southern continent, including parts of Van Diemen's Land: 'Archipelagus Orientalis, sive Asiaticus', *National Library of Australia* (Web Page) <<https://nla.gov.au/nla.obj-232510007/view>>, archived at <<https://perma.cc/V5G7-MY3W>>. Relevantly, after the ceremony performed on Possession Island, Cook wrote in the Endeavour journal that the ship was leaving 'this Eastern coast of New Holland' and, as to the west, 'I can make no new discovery the honour of which belongs to the Dutch navigators': James Cook, 'Journal of HMS Endeavour: 1768-1771', *National Library of Australia* (Web Page) <<http://nla.gov.au/nla.obj-229063111/view>>, archived at <<https://perma.cc/D8F4-N5R4>>.

<sup>53</sup> Evatt (n 10) 26-7.

<sup>54</sup> Ibid 33.

<sup>55</sup> Ibid 45, quoting Paul Fauchille, *Traité de Droit International Public* (Rousseau, 1925) vol 1 pt 2, 699. *Traité de Droit International Public* was published almost contemporaneously with Lindley's *Backward Territory in International Law* (n 34). Upon his death the next year, Fauchille's work was called 'the most comprehensive treatise on the law of nations published within this generation': James Brown Scott, 'In Memoriam: Paul Fauchille' (1926) 20(2) *American Journal of International Law* 335, 336.

Far from supporting the proposition that the British assertion of territorial sovereignty over New South Wales and its inhabiting Indigenous peoples was based on the occupation of a terra nullius territory consequent on discovery, Evatt's paper appears to be in direct contradiction.

(b) *Cooper v Stuart (1889)*

The reliance on *Cooper* to support the proposition that the colony of New South Wales was acquired as terra nullius consequent on discovery is also not without its difficulties. The advice of *Cooper* occupies an uneasy place in Imperial constitutional law. It was decided by the Judicial Committee of the Privy Council within months of the leading Anglo-Canadian decision of *St Catherine's Milling & Lumber Co v The Queen*.<sup>57</sup> The latter is the seminal decision in the recognition of aboriginal title in Anglo-Canadian jurisprudence; in stark contrast, *Cooper* represents the wholesale denial in Anglo-Australian jurisprudence of the occupation of New Holland by its Indigenous peoples.<sup>58</sup>

Professor Slattery has pointed out that Imperial constitutional law was presented with similar legal issues in all modern nation-states where Great Britain asserted territorial sovereignty over, and then permanently colonised, already-inhabited territories, including New Holland/Australia:<sup>59</sup>

This [colonial] law was inherited by the United States and Canada upon independence, although it assumed variant forms in the two countries due to differences in constitutional structure. It now forms part of their basic common law. Since imperial constitutional law applied, not only in North America, but also to other British possessions, the same basic principles were arguably incorporated in the basic law of such Commonwealth nations as New Zealand and Australia.<sup>60</sup>

<sup>56</sup> Translation of this passage was assisted by Colin Sheehan and Catharine Burke.

<sup>57</sup> (1888) 14 App Cas 46 ('*St Catherine's Milling*'). This decision was handed down in late 1888 and *Cooper* (n 6) in early 1889. Both are reported in the same volume of the Appeal Cases.

<sup>58</sup> Lord Watson delivered the advice in both. Canadian and English counsel argued the appeal in *St Catherine's Milling* (n 57), whereas solely English counsel argued the Australian matter of *Cooper* (n 6). Viscount Haldane appeared as counsel in both appeals, and later, in his judicial role, featured in indigenous title cases, most notably *Tijani v Secretary (Southern Nigeria)* [1921] 2 AC 399 ('*Tijani*').

<sup>59</sup> See also Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66(4) *Canadian Bar Review* 727, 739.

<sup>60</sup> Brian Slattery, 'Aboriginal Sovereignty and Imperial Claims' (1991) 29(4) *Osgoode Hall Law Journal* 681, 702–3 (citations omitted).

Colonial law, therefore, should have had common resolutions to many of the fundamental issues, including the 'rules concerning the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions'.<sup>61</sup> The fundamental constitutional circumstances of New Holland were thus not novel or without precedent in Imperial constitutional law by 1788.

In the definitive modern work in this field, Sir Kenneth Roberts-Wray warns that in Imperial constitutional law the emphasis was on 'individual trees' to the detriment of 'the wood'.<sup>62</sup> Unfortunately, the wood suffered for the trees and '[m]ore often than not *ad hoc* solutions were adopted, occasionally by colonial officials without the benefit of expert legal advice or adequate instructions from London'.<sup>63</sup> 'The inevitable result', according to Professor McNeil, 'was a pot-pourri of irreconcilable approaches, often with a noticeable absence of sound legal principle'.<sup>64</sup> *Cooper* is that perfect example of an aberrant dictum in Imperial constitutional law which is at odds with established principles in the corpus of Imperial constitutional law and with other opinions of the Privy Council.<sup>65</sup> In short form, and in the complete absence of contradictors, *Cooper* effectively adopted the findings of a House of Commons Select Committee report from 1837 on the 'Aborigines' of New Holland.<sup>66</sup> In this report it stated that British colonists in New Holland had been 'brought into contact' with

Aboriginal tribes, forming probably the least-instructed portion of the human race in all the arts of social life. Such, indeed, is the barbarous state of these people, and so entirely destitute are they even of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded.<sup>67</sup>

The Judicial Committee of the Privy Council elevated these eugenic findings into an unsound and abnormal principle of Imperial constitutional law. A single sentence from their Lordships accepted the fact that Australia was

<sup>61</sup> Slattery, 'Understanding Aboriginal Rights' (n 59) 737.

<sup>62</sup> Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons, 1966) viii–ix.

<sup>63</sup> Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989) 2.

<sup>64</sup> *Ibid.*

<sup>65</sup> See, eg, *St Catherine's Milling* (n 57); *Tijani* (n 58).

<sup>66</sup> See *Cooper* (n 6) 291 (Lord Watson for the Court). See also Select Committee on Aborigines, *Report from the Select Committee on Aborigines (British Settlements)* (House of Commons Paper No 425, Session 1837) ('*Report on British Settlements*').

<sup>67</sup> *Report on British Settlements* (n 66) 82.

indeed inhabited by human societies yet envenomated Anglo-Australian jurisprudence with the notion that, although these ‘Aborigines’ were human, they were not rights-bearing humans; instead, they fell into some lesser jural species, not protected by relevant principles of international law and, indeed, left unshielded by Anglo-Australian common law from serious deprivation. In the absence of any challenge to *Cooper* for over 100 years, this injurious dictum survived in the backwoods of Imperial constitutional law until it became almost incontrovertible and inescapable. Over a century later its reach was still obvious. Even though in the discussion concerning the property law/native title aspects of the decision, Brennan J stated that the assumption of Lord Watson was ‘false’,<sup>68</sup> the equally untrue notion that ‘New South Wales’ was ‘practically unoccupied’ — taken from the same sentence in which the other falsity appeared — is utilised as a seemingly accurate statement of an ‘enlarged notion of terra nullius’ in international law.<sup>69</sup>

Whatever the status of this dictum in colonial law, it was of little or no weight in customary international law. Relevantly, the advice in *Cooper* was delivered in the same decade of the 1800s in which Spain purported to claim the Western Saharan territories under a similarly enlarged terra nullius notion.<sup>70</sup> That claim has been found *not* to be the customary international law or accepted state practice of that epoch by the International Court of Justice (‘ICJ’).<sup>71</sup>

### III WHICH JUSTIFICATION?

In discussing whether the Murray Islands could be regarded as terra nullius under an engaged occupation mode, Brennan J relevantly asked whether the Meriam people were civilised, Christianised, or cultivators, and doubted if any of these justifications applied.<sup>72</sup> However, in his general discussion of the enlarged notion of terra nullius, his Honour emphasised another justification. It was because, Brennan J stated, the Indigenous peoples were ‘not organized into a society that was united permanently for political action’ that their territories could be deemed terra nullius.<sup>73</sup> Unfortunately, the judgment does

<sup>68</sup> *Mabo* [No 2] (n 1) 38–9.

<sup>69</sup> *Ibid* 37, quoting *Cooper* (n 6) 291.

<sup>70</sup> *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 38 [77] (‘*Western Sahara*’).

<sup>71</sup> *Ibid* 39 [80].

<sup>72</sup> *Mabo* [No 2] (n 1) 32–3.

<sup>73</sup> *Ibid* 36.

not explore what factual evidence was relied upon to enable such a conclusion to be drawn and, indeed, when in Anglo-Australian jurisprudence this finding was so held or where the relevant historiography so concluded. There is no application of the known facts and historical circumstances of the Indigenous peoples of Australia, merely the unadorned statement that these societies were ‘not organized.’<sup>74</sup> Brennan J does, however, plainly acknowledge the source of the latter justification as Lindley’s thesis, *The Acquisition and Government of Backward Territory in International Law* (*‘Backward Territory in International Law’*).<sup>75</sup> His Honour does not pinpoint his reference of this newer justification, instead broadly citing both chapters three and four of Lindley’s work.<sup>76</sup> An exploration of these referenced chapters within the whole of Lindley’s thesis shows that the source does not support its citation.

#### A Lindley’s Backward Territory in International Law

Sir (Mark) Frank Lindley published his thesis, *Backward Territory in International Law*, in 1926.<sup>77</sup> In the oddest of prefaces, given the title of the work, Lindley observes the term “Backward Territory” is not one that is known to International Law.<sup>78</sup> ‘[N]or is it’, he states, ‘possible or desirable to give it any exact definition or denotation for our present purpose.’<sup>79</sup> Lindley continues:

At the one extreme, it may perhaps be said to be marked by territory which is entirely uninhabited; and it clearly includes territory inhabited by natives 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.<sup>80</sup>

It is apparent that Lindley circumspectly addresses the topic, for it is not ‘backward territory’ he is discussing but ‘backward peoples’, an issue which — by the 1920s and with the British Imperial century in decline — had to be approached sensitively. As to the means of acquiring territorial sovereignty

<sup>74</sup> Ibid.

<sup>75</sup> Lindley (n 34), cited in *ibid* 32 n 67.

<sup>76</sup> *Mabo [No 2]* (n 1) 32 n 67. Brennan J’s citation reads: ‘Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), Chs III and IV.’

<sup>77</sup> Lindley (n 34).

<sup>78</sup> *Ibid* v.

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid*.



over ‘backward’ peoples and their territories, the first principle stated by Lindley is ‘that if a tract of country were inhabited only by isolated individuals who were not united for political action, so that there was no sovereignty in exercise there, such a tract would be *territorium nullius*.’<sup>81</sup>

And:

[I]n order that an area shall not be *territorium nullius*, it would appear, from general considerations, to be necessary and sufficient that it be inhabited by a political society, that is, by a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards.<sup>82</sup>

‘If, conversely, ‘the inhabitants exhibit collective political activity which, although of a crude and rudimentary form, possesses the elements of permanence, the acquisition can only be made by way of Cession or Conquest or Prescription.’<sup>83</sup>

Lindley thus poses a number of relevant propositions. An inhabited territory capable of being acquired by occupation as *terra nullius*, to collate his various statements, would be one that is inhabited:

- 1 ‘by a number of individuals who do not form a political society’;<sup>84</sup> or
- 2 ‘by isolated individuals who [are] not united for political action’;<sup>85</sup>

but not where the inhabitants:

- 3 exhibit collective political activity, albeit crude and rudimentary, which has elements of permanence;<sup>86</sup> or
- 4 form a political society, being a ‘considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards.’<sup>87</sup>

<sup>81</sup> Ibid 23.

<sup>82</sup> Ibid 22–3.

<sup>83</sup> Ibid 45.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid 23.

<sup>86</sup> Ibid 45.

<sup>87</sup> Ibid 23.

### B Stating Lindley's Canon

It is notable that in chapter five, entitled 'International Law and Native Sovereignty', Lindley begins by drawing together his discussions from chapters three and four, writing:

Combining the results of our review of the practice of States in the last Chapter with those of our theoretical investigations in Chap III, the rule regarding appropriable territory can now be stated as follows:

The members of the International Family will not dispute the validity of the acquisition by one of them of territory in respect of which none of the others has a valid prior claim, and this recognition does not depend upon the method by which the acquisition has been made. *If the territory is uninhabited, or is inhabited only by a number of individuals who do not form a political society, then the acquisition may be made by way of Occupation.*<sup>88</sup>

Thus, for Lindley, if the individuals in a newly discovered territory did form an elemental and permanent political society, however rudimentary or different from European societies, their territories could not be treated as terra nullius and therefore 'appropriable territory' by way of occupation. An engagement with that relevant extant society would need to occur to legitimise any purported acquisition of its sovereign territory in international law.

Applying Lindley's canon, it would be difficult to assert — either in the late 18<sup>th</sup> century or presently — that the Indigenous peoples of New Holland/Australia, either individually or collectively, did not form 'a political society' based on our present knowledge and appreciation of the facts. Relevantly, in the *Milirrpum* decision — the first searching examination of the juridical foundations of an Indigenous society in Anglo-Australian law — Blackburn J concluded:

The evidence shows a subtle and elaborate system highly adapted to the country in which the [Yolngu] 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.<sup>89</sup>

Blackburn J was scrutinising Yolngu society in 1970, yet he would not accept that these Indigenous persons did not then possess 'social rules and customs'

<sup>88</sup> Ibid 45 (emphasis added).

<sup>89</sup> *Milirrpum* (n 7) 267.

which held their society together with a great deal of unity and permanence.<sup>90</sup> His Honour further held:

[T]he arguments put to me do not justify the refusal to recognize the system proved by the plaintiffs in evidence as a system of law. Great as they are, the differences between that system and our [Anglo-Australian] 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.<sup>91</sup>

The emphatic finding was that the Yolngu people had a system of law and that it had remained functional and vibrant nearly 200 years after the assertion of British sovereignty. It was ‘a subtle and elaborate system’, providing ‘a stable order of society’.<sup>92</sup> To argue that the Yolngu people — and the many other surviving Indigenous societies in Australia — did not thus constitute, on Lindley’s test, a political society is a difficult contention to maintain. In these circumstances, according to Lindley’s statement of the relevant canon, the territories of these Indigenous peoples could not have been validly acquired under any occupation of backward peoples doctrine as *terra nullius*, but only by way of cession, conquest, or prescription.<sup>93</sup>

It will be appreciated that despite citing Lindley’s thesis as authoritative, Brennan J did not adopt ‘the rule regarding appropriable territory’ distilled by Lindley in his chapter five.<sup>94</sup> Brennan J shifts the test of ‘backwardness’ to the higher end of proof on an unstated and Eurocentric scale of sociopolitical organisation, one which requires the inhabitants to be ‘organized in a society ... united permanently for political action’.<sup>95</sup> This is not Lindley’s determined ‘rule’. It seems entirely probable, given the non-specific citation in the judgment, that Brennan J took an impression from chapters three and four of Lindley’s work, being the discussions of ‘theoretical investigations’ and state practice respectively, without appreciating that this was not Lindley’s concluded view on the topic. There is a great measure of difference between the original authorial canon arrived at by Lindley and its rendition in Brennan J’s judgment such that the judgment must be found to be in significant error in

<sup>90</sup> Ibid.

<sup>91</sup> Ibid 268.

<sup>92</sup> Ibid 267.

<sup>93</sup> Lindley (n 34) 45.

<sup>94</sup> Ibid.

<sup>95</sup> *Mabo [No 2]* (n 1) 32.

the citation of Lindley's thesis and the adoption of the appropriate justifying canon.

#### IV INCONSISTENCY WITH OTHER SOURCES

It is notable, also, that Brennan J's iteration of an enlarged terra nullius notion in an occupation of backward peoples doctrine is not consistent with other relevant historical and legal sources. Writing of Chief Justice John Marshall's judgments in the early United States Supreme Court decisions concerning the juridical relationship between the incipient United States of America and the Amerindian indigenous peoples, Sir James Stephen — the Undersecretary of the Colonial Office in the 1830s and '40s — noted candidly: 'Whatever may be the ground occupied by international jurists they never forget the policy and interests of their own Country. Their business is to give to rapacity and injustice, the most decorous veil which legal ingenuity can weave.'<sup>96</sup>

Marshall CJ, styled the 'Great Chief Justice' of the United States,<sup>97</sup> is of particular relevance because he led the Supreme Court at a time when many of the same issues confronting the High Court of Australia in *Mabo [No 2]* were agitated — and relevant principles developed — in the early post-revolutionary American jurisprudence. In 1832, just three years after the western balance of Australia was claimed as British territory,<sup>98</sup> Marshall CJ had written for the Supreme Court in *Worcester v Georgia* ('*Worcester*'):<sup>99</sup>

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. *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*

<sup>96</sup> Quoted in Sidney L Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (University of Toronto Press, 1998) 21.

<sup>97</sup> See, eg, John F Dillon, 'A Commemorative Address on Chief Justice Marshall' (1901) 35(2) *American Law Review* 161; Douglas H Gordon, 'John Marshall: The Fourth Chief Justice' (1955) 41(8) *American Bar Association Journal* 698.

<sup>98</sup> In *Sampi v Western Australia* [2005] FCA 777, French J accepted this date to be 18 June 1829, upon the reading of the relevant proclamation: at [650]–[651].

<sup>99</sup> 31 US (6 Pet) 515 (1832) ('*Worcester*').

of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.<sup>100</sup>

A *The Differences between the US Approach and Mabo* [No 2]

There are manifold divergences between the relevant international law principles stated by Marshall CJ in *Johnson v M'Intosh*<sup>101</sup> in 1823, writing during the relevant epoch, and those enunciated by Brennan J in *Mabo [No 2]*, writing some 200 years in arrears. To permit a ready comparison, the pertinent statements of Brennan J and Marshall CJ are contrasted in Table 1.

Table 1

Marshall CJ <i>Johnson v M'Intosh</i> (1823)	Brennan J <i>Mabo [No 2]</i> (1992)
<p>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, <i>against all other European governments</i>, which title might be consummated by possession.</p> <p><i>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.</i><sup>102</sup></p>	<p>The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers, provided the discovery was confirmed by occupation and provided the indigenous inhabitants were not organized in a society that was united permanently for political action. 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.<sup>103</sup></p>

<sup>100</sup> Ibid 542–3 (emphasis added).

<sup>101</sup> 21 US (8 Wheat) 543 (1823) ('*Johnson*').

<sup>102</sup> Ibid 572–3 (emphasis added).

<sup>103</sup> *Mabo [No 2]* (n 1) 32 (citations omitted).

The first departure is that there is no engorged occupation/discovery doctrine known to international jurisprudence as stated by Marshall CJ in the early 19<sup>th</sup> century. For Marshall CJ, no distinction is drawn in the ‘native peoples’ of the New World between the ‘backward’ and non-‘backward’.<sup>104</sup> On Brennan J’s iteration, there is a stark distinction in these New World peoples. With ‘backward’ peoples — those *not* organised in a society united permanently for political action — the discoverer acknowledged no earlier sovereignty in these peoples and could seemingly claim a rightful and original sovereignty over their territories under the ‘enlarged notion of terra nullius’. Into this inferior class of humanity, necessarily on Brennan J’s expression, unflatteringly fall the Indigenous peoples of Australia.

The second divergence is that Marshall CJ restricts the occupation/discovery doctrine to governing only the relations between European nations. Discovery gave an inchoate right against ‘all other European governments’ — it had no application to ‘the natives’; ‘possession’ by a European nation of any of its territory had still to be consummated and sovereignty acquired from these indigenous ‘natives’ by conquest, cession, or prescription.<sup>105</sup> Any sovereignty subsequently acquired by the European nation over these ‘native peoples’ and their territories was not an original sovereignty but derived. Brennan J, on the other hand, states the principle far more broadly. The engorged occupation doctrine operates against the ‘backward peoples’ of the New World to deny any sovereignty they may possess and, additionally, gives the European nation a paramount ‘radical title’ over their lands which enables an unlimited, unilateral, and continuing power to ‘extinguish’ the pre-existing native titles of these peoples.<sup>106</sup> The very situation the US Supreme Court in *Worcester* mocked as ‘difficult to comprehend’<sup>107</sup> is what the *Mabo [No 2]* decision accepts as the lawful and rightful basis of territorial sovereignty asserted by Great Britain over the territories of the ancient occupants of Australia.<sup>108</sup>

The third observation is that while the statements of Marshall CJ are consonant with modern international law — from his expression in the early 19<sup>th</sup>

<sup>104</sup> See generally *Johnson* (n 101). Cf *Mabo [No 2]* (n 1) 32 (Brennan J).

<sup>105</sup> *Johnson* (n 101) 573 (Marshall CJ).

<sup>106</sup> *Mabo [No 2]* (n 1) 58 (Brennan J).

<sup>107</sup> *Worcester* (n 99) 543 (Marshall CJ).

<sup>108</sup> *Mabo [No 2]* (n 1). Although this sovereignty is taken to be original, not derived, Brennan J refers to a ‘change’ of sovereignty on no less than six occasions: at 51, 56, 63 (‘a change in sovereignty’); at 57 (‘a mere change in sovereignty’); at 57, 59 (‘the change in sovereignty’). Even Dawson J, in dissent, premised his opinion on ‘a change of sovereignty’: at 127.

century through to its expression by the ICJ in the 1975 *Western Sahara* advisory opinion<sup>109</sup> — the statements of Brennan J are not. The ICJ in *Western Sahara* stated:

Whatever differences of opinion there may have been among jurists, the State practice of the relevant period [circa 1885] indicates that territories inhabited by *tribes or peoples having a social and political organization* were not regarded as *terrae nullius*.<sup>110</sup>

One of the more curious aspects of the *Mabo [No 2]* decision is why Brennan J did not simply adopt the recent test stated in this leading and relevant decision of the ICJ, that of ‘tribes or peoples having a social and political organization.’<sup>111</sup> As we have established, instead, Brennan J adopts an abstract and ingravescient test from some 50 years earlier.

#### B *State Practice?*

Brennan J’s statement on the relevant state practice is also in marked departure from Lindley’s thesis. Brennan J clearly stated that the ‘new and valuable territories’ of the indigenous populations were parcelled out by the European ‘family of nations’ and that this was accepted state practice in international law.<sup>112</sup> While Brennan J did not categorically state when this engorged occupation doctrine came to be accepted state practice, Lindley is of the opinion that no occupation of backward peoples doctrine was *ever* accepted state practice. Summarising the evidence of the relevant state practice over 400 years, from 1500 to the early 1900s, Lindley writes:

As an induction from all these instances, extending over four centuries and derived from four continents, it appears that, on the whole, the European States, in establishing their dominion over countries inhabited by peoples in a more or less backward stage of political development, have adopted, as the method of such extension, Cession or Conquest, and have not based their rights upon the Occupation of *territorium nullius*.<sup>113</sup>

<sup>109</sup> *Western Sahara* (n 70).

<sup>110</sup> *Ibid* 39 [80] (emphasis added). The Court divided 13:3 on the request for an advisory opinion: at 68–9 [163]. Further, the Court unanimously decided that the Western Saharan territories, at the time of colonisation by Spain, were not *terra nullius*.

<sup>111</sup> *Ibid* 39 [80].

<sup>112</sup> *Mabo [No 2]* (n 1) 32, 36.

<sup>113</sup> Lindley (n 34) 43.

While Lindley accepts that the international law never legitimised any claim to territorial sovereignty over ‘backward peoples’ on the basis that the relevant territory was a sovereign-less *territorium nullius*, he does state an exception: Australia. Again circumspectly, he states:

Australia has usually been considered to have been properly *territorium nullius* upon its acquisition. ...

...

As the facts presented themselves at the time, there appeared to be no political society to be dealt with; and in such conditions, whatever ‘rudiments of a regular government’ subsequent research may have revealed among the Australian tribes, Occupation was the appropriate method of acquisition.<sup>114</sup>

Thus, the assertions of British territorial sovereignty over New Holland were not legitimised under any such state practice, according to Lindley, at any time. Far from being accepted state practice in customary international law, it appears the New Holland/Australian situation is unique.

Like Brennan J, Lindley does not identify who ‘usually’ considered Australia ‘properly *territorium nullius*’ or cite when or where exactly this occurred.<sup>115</sup> Despite stating that ‘British colonists’ had gone to other inhabited parts of the world and acquired sovereignty ‘under the enlarged notion of terra nullius’,<sup>116</sup> Brennan J provided no other examples of any contemporaneous assertions of this enlarged notion of terra nullius by Great Britain or any other European nation, and no instances of other territory or territories so acquired by any European nation, earlier in time or later. Assertions that the exercise of this occupation of backward peoples doctrine was frequent by European nations are not unique in the relevant literature, but the difficulty faced by such claims is that other examples of this ‘enlarged notion of terra nullius’ are hard to locate and substantiate. Professor RD Lumb wrote that ‘parts of the African continent’ were acquired by Great Britain under the engorged occupation mode but he did not identify which parts.<sup>117</sup> Lindley himself directly addressed British practice in Bechuanaland, Matabeleland, and Mashonaland in his thesis, but cites no other African examples.<sup>118</sup> More recently, Professor Wallace-Bruce has discredited any claim that engorged

<sup>114</sup> Ibid 40–1.

<sup>115</sup> Ibid 40.

<sup>116</sup> *Mabo [No 2]* (n 1) 36.

<sup>117</sup> RD Lumb, ‘The Mabo Case: Public Law Aspects’ in MA Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (University of Queensland Press, 1993) 1, 9.

<sup>118</sup> Lindley (n 34) 36–8.



occupation was the relevant mode of acquisition to Igboland, or to the territories of the Tallensi of northern Ghana, the Kikuyu of Kenya, the Nuer of Sudan, or the Tiv of West Africa.<sup>119</sup> Lindley posits the view that the assertions concerning examples in Africa are erroneous and result from a lack of appreciation of how loosely the term ‘occupation’ was used to describe the various African situations.<sup>120</sup> Further detailed research may uncover another example but, to date, the New Holland/Australian situation remains the only claimed application of this occupation of backward peoples doctrine with its ‘enlarged notion of terra nullius’. It was, however, never accepted state practice.

### C *Blackstone’s Commentaries*

Another source which is frequently overlooked on the issue of any enlarged notion of terra nullius in international law is an esteemed English source: Sir William Blackstone’s *Commentaries on the Laws of England* (‘*Commentaries*’).<sup>121</sup> Published through the latter part of the 1760s, the *Commentaries* contain no references that the territories of New World peoples could be unilaterally appropriated under any international legal doctrine which treated them as ‘backward’. Blackstone’s rendition of the classical occupation doctrine is stated as ‘an acknowledged right ... to occupy whatever ground he pleased, that was not pre-occupied by other tribes.’<sup>122</sup> He wrote:

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 already 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.<sup>123</sup>

As to the appropriation of the territories of ‘natives’, Blackstone wrote:

<sup>119</sup> Nii Lante Wallace-Bruce, ‘Two Hundred Years On: A Reexamination of the Acquisition of Australia’ (1989) 19(1) *Georgia Journal of International and Comparative Law* 87, 104.

<sup>120</sup> Lindley (n 34) 34.

<sup>121</sup> William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, 1979) (‘*Commentaries*’).

<sup>122</sup> *Ibid* vol 2, 6. Blackstone uses a ‘long s’ (‘f’), an archaic version of the lower case ‘s’.

<sup>123</sup> *Ibid* vol 1, 104. The term ‘desart’, an antiquated form of ‘desert’, is used not to mean an area of little or no vegetation, but an uninhabited — or if once inhabited, now deserted — country: *Oxford English Dictionary* (online at 19 April 2019) ‘desert’ (n<sup>2</sup>, def 1b).

And, so long as it was confined to the stocking and cultivation of desart uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out and massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.<sup>124</sup>

There is no occupation of backward peoples doctrine stated in the *Commentaries* of Sir William Blackstone and no ‘enlarged notion of terra nullius’. Blackstone, an assiduous student of continental jurisprudential developments and of the British expansion through North America,<sup>125</sup> was fully aware of His Majesty, King George III’s *Royal Proclamation of October 7, 1763*, the principal Imperial constitutional document of that epoch, which likewise did not assert or commend any such engorged occupation mode or any enlarged notion of terra nullius.<sup>126</sup>

#### V ‘BACKWARD PEOPLES’ IN INTERNATIONAL LAW

It is perhaps timely to consider whether these so-called ‘backward peoples’ came under the auspices of the international legal order at the time of the British assertions of sovereignty over New Holland/Australia in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries and, if so, whether the ‘backward peoples’ of New Holland could be said to be sovereign in an international legal sense during that epoch. Both have been assumed in the affirmative to this point but the answers are by no means beyond dispute.

Addressing, first, the issue of whether ‘backward peoples’ were under the auspices of the international legal order, an argument was advanced by a clique of English publicists that the rights of such peoples were not so protected.<sup>127</sup> This argument is condemned by Lindley as parochial and wrong:

We have now to consider how far it is true, as is sometimes stated, that International Law has no place for rules protecting the rights of backward peoples, and

<sup>124</sup> Blackstone (n 121) vol 2, 7.

<sup>125</sup> See Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford University Press, 2008) 292.

<sup>126</sup> See generally Lavery (n 35).

<sup>127</sup> See Lindley (n 34) 45–7.

that, therefore, such international rights as backward peoples have been recognized to possess were moral and not legal.

Although this view is now widely expressed in England, it is not, as we have already seen in Chapter III, so generally adopted by continental jurists, and it derives little support from the classical writers on International Law. Moreover, there have not been wanting in this country authorities who have maintained that International Law does, or should, extend its protection to independent peoples who are not of its community.<sup>128</sup>

Therefore, it seems reasonably certain that at the relevant times of the British assertions of sovereignty over New Holland/Australia, the ‘backward’ Indigenous peoples inhabiting the continent — estimated to be in the order of about 500 such peoples — came within the auspices of the international legal order and were so protected.

Addressing then the second issue, the definition accorded at that time, in the then-emerging and largely customary international law, was that a sovereign possessed a territory if no allegiance or duty was owed to another outside of that territory.<sup>129</sup> This closely aligns with the definition still accepted in modern international law as stated by Arbitrator Huber in the *Island of Palmas Case*:<sup>130</sup> ‘[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.’<sup>131</sup> On this definition, it is clear on the available historical and anthropological evidence that at the relevant times of assertions of sovereignty by Great Britain, New Holland/Australia was occupied by hundreds of sovereign Indigenous societies, seemingly autonomous, each possessed of a defined country.<sup>132</sup> No evidence has been found that these societies were heteronomous. In addressing the circumstances of colonial New South Wales circa

<sup>128</sup> Ibid 45. Lindley proceeds to quote Sir Robert Phillimore — a respected English commentator on international law — in stating that any assertion “that the International Law is confined in its application to European territories” is a detestable one: Sir Robert Phillimore, *Commentaries upon International Law* (T & JW Johnson, 1854–61) vol 1, 211, quoted in ibid 45.

<sup>129</sup> Lindley (n 34) 30. As the modes of acquisition of territorial sovereignty under examination are from the late 18<sup>th</sup> century, the definition must be from that relevant epoch: see generally at ch 4.

<sup>130</sup> *Island of Palmas Case (Netherlands v United States of America) (Awards)* (1928) 2 RIAA 829.

<sup>131</sup> Ibid 838.

<sup>132</sup> Cf Basil Sansom, ‘The Aboriginal Commonality’ in Ronald M Berndt (ed), *Aboriginal Sites, Rights and Resource Development* (University of Western Australia Press, 1982) 117. ‘Country’ is used in the Indigenous sense of the word to mean the range of their traditional territory.

1788, it is difficult not to echo Marshall CJ in *Worcester* in stating that what the British found in eastern New Holland were inhabitants, divided into separate territories/countries, 'independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws' and customs.<sup>133</sup> These Indigenous societies, *prima facie*, could thus be judged as 'sovereign' within their distinct territories in the international legal discourse of the late 18<sup>th</sup> and early 19<sup>th</sup> centuries.

Nonetheless, one potential (yet eugenicist) argument remains: although the autochthonous peoples of the New World were generally protected by, and within the auspices of, early modern international law, the 'backward' Indigenous peoples of New Holland/Australia were uniquely not so and were incapable of attaining, and/or maintaining, sovereignty over their respective territories/countries. Of such a proposition, Lindley states that the indigenous populations of the New World, even if deemed to be 'backward', were most certainly regarded as sovereign within their respective territories.<sup>134</sup> He wrote:

We have cited abundant evidence to show that advanced Governments do recognize sovereign rights in less advanced peoples with whom they come into contact, and do, in general, deal with such peoples on a treaty basis when acquiring their territory. In face of that evidence, and of such a pronouncement as that of the Judicial Committee of the Privy Council in the matter of the Southern Rhodesian lands, to which we have referred, *any rule of International Law which regarded the territory of independent backward peoples as being under no sovereignty and belonging to nobody would not only not be based upon 'evidence of usage to be obtained from the action of nations' but would be in direct conflict therewith.*<sup>135</sup>

We are thus left in the position that the Indigenous peoples of New Holland/Australia were rightfully sovereign within their independent countries at the turn of the 19<sup>th</sup> century. Their sovereignties would have been legitimated in the international legal order under the classical occupation mode of territorial acquisition, that is, by being the discoverers and occupiers of their respective territories from time out of mind.<sup>136</sup> Failing that contention, the

<sup>133</sup> *Worcester* (n 99) 542–3.

<sup>134</sup> See generally Lindley (n 34) 45–7.

<sup>135</sup> *Ibid* 46 (emphasis added).

<sup>136</sup> For acceptance of this principle, see also Kent McNeil, 'The Doctrine of Discovery Reconsidered: Reflecting on *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, by Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, and *Recon-*

Australian Indigenous peoples would appear to have good grounds in modern international law to claim to have consolidated their territorial sovereignties through the millennia to the turn of the 19<sup>th</sup> century under an unchallenged title by prescription.<sup>137</sup> Thus, despite the implicit scenario of these sovereignless yet inhabited territories presented in *Mabo* [No 2], it is incontrovertible that, as of 1788, the Indigenous peoples of New Holland were certainly territorial sovereigns of their respective countries in acknowledged customary international law, possessing prior, original sovereignties which had to be displaced legitimately in the international law of that epoch by either conquest, cession, or prescription. New Holland/Australia was not terra nullius, neither under the classical occupation principles, nor the engorged occupation version asserted by Brennan J.

In Australian jurisprudence, however, the position exposed in the *Mabo* [No 2] decision is the reverse of this international legal position. The 'backward' Indigenous peoples of Australia are not considered to have been protected by international law. The Indigenous peoples of Australia cannot claim to have discovered and occupied their respective territories/countries or consolidated their territorial sovereignty under a prescriptive title or even, perhaps, conquered another's territory to acquire such sovereignty because Australian jurisprudence regards these peoples as 'backward' — they were, in the words of Brennan J, 'not organized in a society that was united permanently for political action.'<sup>138</sup> Tellingly, none of these issues are considered by Brennan J in *Mabo* [No 2]. The judgment is silent other than stating the chilling conclusion that these Indigenous peoples were considered 'backward' peoples under international law, inferior human societies too low on an imaginary sociopolitical organisational scale to be acknowledged as having occupied their respective territories in international law.

*ciling Sovereignties: Aboriginal Nations and Canada*, by Felix Hoehn' (2016) 53(2) *Osgoode Hall Law Journal* 699, 699–700.

<sup>137</sup> As we are dealing with many tens of thousands of years, it is readily conceded that there may have been some to-ing and fro-ing of these territories for any number of reasons, particularly at the end of the last Pleistocene glaciation when many coastal territories would have been inundated. Also, one final defensive position may be that because the occupation mode was not formulated in writing until its codification in the laws of the Eastern Roman Empire, these principles may not have been accepted in prehistoric times. The very antiquity of this classical discovery/occupation mode makes this argument tenuous. In his *Commentaries*, Blackstone cites the Biblical division of territory in *Genesis* between the tribes of Israel, on escaping Egypt, as evidence of the agelessness of this principle: Blackstone (n 121) vol 2, 6.

<sup>138</sup> *Mabo* [No 2] (n 1) 32.

## VI 'THERE ARE [OTHER] PROBLEMS'

For Australian jurisprudence, the problems go much deeper than the doctrinal self-contradiction laid bare by the supreme Australian court in *Mabo [No 2]*. As Deane and Gaudron JJ understatedly noted in their joint judgment, 'there are problems.'<sup>139</sup> Their Honours wrote that it 'is scarcely arguable that the establishment by Phillip in 1788 of the penal camp at Sydney Cove constituted occupation of the vast areas of the hinterland of eastern Australia designated by his Commissions'.<sup>140</sup> Roberts-Wray had made this point a generation earlier when he wrote that it was 'incredible' to entertain any such scenario:

[C]ould a foothold in a small area on the east side of a sub-continent 2,000 miles wide be sufficient in English law (*as it certainly would not be in international law*) to confer not only sovereignty but also title to the soil throughout the hinterland of nearly three million square miles?<sup>141</sup>

It is indefensible in international law to assert that Great Britain effectively occupied the whole of eastern New Holland in early 1788, yet this is the counterfactual position adopted by Australian jurisprudence. It is more plausible, in proffering a coherent theoretical construct, that an external territorial sovereignty was gained over continental New Holland/Australia by an accretion of effective occupation in a piecemeal fashion in the decades following the assertions in 1788, 1824, and 1829. This external sovereignty could be said to have been perfected on or about 1901 upon the creation of the Commonwealth of Australia. While this may more accurately reflect the historical circumstances, this, too, is a convenient nostrum without any legitimate basis if it does not address the defects in the present orthodox theory as to how this external territorial sovereignty was lawfully secured in international law, or the thornier internal aspects of this acquired sovereignty.

The internal aspects of the ruptured sovereignty theory present other challenges. Australian law continues to require the fiction of instantaneity to be routinely upheld in federal courts as all native title determination applications

<sup>139</sup> Ibid 78.

<sup>140</sup> Ibid (citations omitted).

<sup>141</sup> Roberts-Wray (n 62) 631 (emphasis added). Vattel — the Swiss jurist who is frequently claimed to be the source of the enlarged notion of terra nullius — condemned, two centuries earlier, the engrossing of 'a much greater extent of territory' than a nation is able to populate or cultivate as 'an absolute infringement of the natural rights of men, and repugnant to the views of nature': M de Vattel, *The Law of Nations* (1797) bk 1, 99 [trans of: *Le Droit Des Gens* (1758)].

in New South Wales, Queensland, Victoria, and parts of the Northern Territory are measured against this '7 February 1788' test of sovereignty.<sup>142</sup> It is an ahistorical absurdity to impose on Indigenous applicants for native title the evidentiary burden of proving the uninterrupted continuity of their traditional laws and customs back to early 1788 when, say, in northern Queensland, effective British control of those regions could not be said to have even begun prior to 1860.<sup>143</sup>

The failure of the Anglo-Australian law to provide an adequate and protective legal process around the involuntary expropriation of the traditional property titles of its Indigenous subjects is also problematic. As Brennan J clearly states, it was not the assertions of sovereignty which effected the extinction of the private property rights of these Indigenous persons, including their native titles, but the continual exercise of this paramount 'radical title' in legislative or executive form.<sup>144</sup> The Lands Offices in Sydney, Brisbane, or Perth could grant an inconsistent title which could wholly or partially extinguish the traditional titles in the remotest parts of their respective colonies without any recourse to the traditional owners or without any compensation for their losses. Yet neither the assumption of this paramount title nor the consequential extinctions of Indigenous property rights and interests has any lawful basis in the international law of territorial acquisition. Even in the conquest scenario, the private property rights of individuals were generally respected and protected in customary international law.<sup>145</sup> The source of this paramount power to extinguish without any lawful process and/or without compensation must necessarily therefore be found in Imperial constitutional common law. But there is ample precedent in Imperial constitutional law that any acquisition of private property rights by the Crown must be according to law and that compensation is payable to Indigenous peoples for extinguishment of their traditional rights and interests.<sup>146</sup> Despite this precedent, the present Australian legal position is that, because these Indigenous peoples were 'backward peoples', any property rights they possessed, either privately or communally, under their traditional laws and customs

<sup>142</sup> See, eg, *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228, 237 [43] (Mansfield J).

<sup>143</sup> See *Mabo [No 2]* (n 1) 144 (Dawson J).

<sup>144</sup> *Ibid* 58.

<sup>145</sup> Lindley (n 34) 337.

<sup>146</sup> See especially *Oyekan v Adele* [1957] 2 All ER 785, 788 (Lord Denning) (Privy Council). This is the leading modern Imperial constitutional law authority.

could be unilaterally expropriated without any enveloping legal process at common law and without compensation for their deprivation.

Relevantly, it is infrequently recalled that three Justices in the *Mabo [No 2]* decision — Deane and Gaudron JJ, and Toohey J — held that without clear and unambiguous statutory provision to the contrary, the historical involuntary acquisition of these native titles by the respective Crowns was wrongful at common law and gave rise to a claim for compensatory damages.<sup>147</sup> Had it not been for the dissenting Dawson J — who viewed the Meriam people as mere permissive occupants<sup>148</sup> who might ‘have lawfully been driven into the sea’<sup>149</sup> — joining with Brennan J and his concurrenrs, compensation would have been payable to the surviving Indigenous peoples for all and any extinguishments of their traditional titles between 1788 and 31 October 1975. Given the *Mabo [No 2]* Court divided 4:3 on the lawfulness of these 187 years of wholesale extinguishment of native title — and with ample Imperial precedent that compensation is payable by the Crown to Indigenous peoples for the taking of their property rights — this issue is far from settled in Australian law.

## VII THE IRRECONCILABLE TENSIONS

The landmark *Mabo [No 2]* decision contains a deeply embedded doctrinal contradiction. All four majority judgments — those of Brennan J (with Mason CJ and McHugh J in agreement), Deane and Gaudron JJ, and Toohey J — expressly rejected an enlarged terra nullius notion.<sup>150</sup> It was said that Australian common law cannot continue to embrace such an abhorrent notion to deny the antecedent allodial interests in land of these Indigenous societies because they were ‘too low in the scale of social organization.’<sup>151</sup>

<sup>147</sup> *Mabo [No 2]* (n 1) 112 (Deane and Gaudron JJ), 195–6 (Toohey J). This must equally apply to the acquisition of the ‘radical title’ to their traditional lands which, again, could not have been acquired instantaneously, but necessarily by accretion of effective occupation over the course of (principally) the years of the 19<sup>th</sup> century.

<sup>148</sup> *Ibid* 175.

<sup>149</sup> The Solicitor-General of Queensland conceded under questioning by Gaudron J that the Meriam, at any time from the time of annexation, could ‘have lawfully been driven into the sea’: Transcript of Proceedings, *Mabo v Queensland [No 2]* (High Court of Australia, B12/1992, Mason CJ, Brennan J, Deane J, Dawson J, Toohey J, Gaudron J and McHugh J, 30 May 1991) 280 (Gaudron J and GL Davies QC).

<sup>150</sup> *Mabo [No 2]* (n 1) 58 (Brennan J, Mason CJ and McHugh J agreeing at 15), 109 (Deane and Gaudron JJ), 182 (Toohey J).

<sup>151</sup> *Ibid* 58 (Brennan J).



However, while this notion is discarded from a common law/property law perspective, the same enlarged terra nullius notion is maintained from the international law/sovereignty perspective. The Indigenous inhabitants of the Anglo-Australian colonies are said to be 'backward' peoples, too low on some imaginary sociopolitical organisational scale to be acknowledged as having been sovereign in and over their respective territories in international law.<sup>152</sup> Moreover, a paramount 'radical title' is somehow assumed over their territories in 1788, 1824, and 1829, with the consequence that traditional titles to their lands under their own system of laws and customs could be unilaterally expropriated by the relevant Crown, without any enveloping lawful process at common law<sup>153</sup> — a scenario mocked by the US Supreme Court during that very epoch as 'difficult to comprehend'.<sup>154</sup> In a supreme jurisprudential paradox, Anglo-Australian constitutional common law holds the enlarged notion of terra nullius to be abhorrent *and* then embraces it as the juridical foundation upon which the present-day territorial sovereignty of the modern Australian nation rests. It is truly an unenviable dilemma into which the modern Australian jurisprudence has delivered itself — the 'enlarged notion of terra nullius' is no readily disposable component, but rather remains at the beating heart of that jurisprudence.

What is critical to the integrity of any theory of territorial sovereignty is that it accords with an appreciation of the known historical facts and with our current knowledge; presently, the orthodox Australian theory does not. To the contrary, there is an air of the fantastical in the current story of Anglo-Australian sovereignty. It is claimed that, consequent upon the discovery by Cook in 1770 of a section of the eastern seaboard of New Holland and after a 15-minute ceremony around the reading of Phillip's Commissions on 7 February 1788 on a kerchief of newly cleared land at Sydney Cove,<sup>155</sup> an original and plenipotent British sovereignty coursed across a vast territory of some 3 million square kilometres in an instant. In substantial part, however, the New Holland/Australian territories claimed by the British in 1788, 1824, and 1829 were discovered, charted, and named by Dutch navigators.<sup>156</sup> Yet, in the *Mabo [No 2]* decision, Brennan J unequivocally stated that the territorial sovereignty over New South Wales was '*the settlement of territory that was*

<sup>152</sup> Ibid 32.

<sup>153</sup> See ibid 58.

<sup>154</sup> *Worcester* (n 99) 543 (Marshall CJ).

<sup>155</sup> See generally Evatt (n 10) 27.

<sup>156</sup> See generally Lavery (n 35) 66.

*terra nullius consequent on discovery*.<sup>157</sup> To claim this in the present day is less a theoretical sovereignty exercise than a series of historical and judicial deceptions hiding in plain sight. Each of the elements asserted by Brennan J is open to substantive challenge: that the ‘discovery’ was by the British; that New Holland/Australia was rightfully ‘terra nullius’ under this claimed engorged notion and therefore able to be appropriated under the international law of that epoch; and the euphemistic ‘settlement’ (echoing Lord Watson’s peaceful annexation).<sup>158</sup> Brennan J’s statement lacks the same historical fidelity as the *Cooper* falsities of 100 years earlier. Incredulity is pushed to tipping point by Australian jurisprudence by its continuing adherence to such a chimerical theory of territorial sovereignty.

#### VIII CONCLUSION

If law is the justifying discourse for the dispossession of the Indigenous peoples of Australia, as has been asserted, that discourse is unconvincing.<sup>159</sup> The original terms upon which the British Crown asserted territorial sovereignty over present-day Australia and its Indigenous societies are based on counterfactual rhetoric rather than grounded in known historical circumstances — more story than history — and founded on doubtful international legal principle: clearly an unsatisfactory and fragile state for Australian jurisprudence. This occupation of backward peoples doctrine, which has at its core this ‘enlarged notion of terra nullius’ and which views the Indigenous peoples of Australia as ‘backward’, is unequivocally claimed in *Mabo [No 2]* to be the rightful and lawful basis upon which the territorial sovereignty of modern-day Australia is grounded. Yet the facts as we presently know them show the Indigenous peoples of Australia whose societies remain extant are remarkably complex, with vital legal systems which are ‘subtle’, ‘elaborate’, ‘highly adapted to the country in which the people led their lives’, and which provide ‘a stable order of society’ within their respective countries.<sup>160</sup> It is hypocritical for a rational jurisprudence to claim the whole notion of their ‘backwardness’ to be ahistorical and discriminatory yet to maintain these Indigenous peoples of Australia are ‘backward peoples’ — sovereign-less because they were ‘not organized in a society that was united permanently for

<sup>157</sup> *Mabo [No 2]* (n 1) 34 (emphasis added) (citations omitted).

<sup>158</sup> *Ibid*; *Cooper* (n 6) 291.

<sup>159</sup> Peter H Russell, *Recognising Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (University of New South Wales Press, 2006) 31.

<sup>160</sup> *Milirrpum* (n 7) 267 (Blackburn J).

political action.<sup>161</sup> This justification, unbuttressed by adequate reasons and without substance given to the imaginary sociopolitical scale upon which these peoples were assessed, is an arbitrary canon upon which to judge such societies, and a perilous and insecure thread from which to hang the sovereignty of the Australian nation-state. Unfortunately for the Australian jurisprudence, its Indigenous peoples are not homo sapiens possessed of a full suite of rights at common law or in the international sphere, but are held, uniquely, to be of a lesser jural species.

However, whatever doctrinal contradictions were exposed in *Mabo [No 2]*, all judges stated that the validity of acts of state whereby the Australian colonies were appropriated by the British Crown — *by whatever means* — are beyond challenge in municipal courts.<sup>162</sup> So, are these issues presently germane? If the surrounding principles remain in the mostly forgotten backwoods of the increasingly distant Imperial constitutional law, is it not enough to let these issues — and the tortile ‘enlarged notion of terra nullius’ — remain unexamined? As unpalatable as the conversation may be in the present, it remains topical because the mode of acquisition stated to have been relied upon in the *Mabo [No 2]* decision, the most modern of the iterations of the engorged occupation doctrine in Anglo-Australian law, never had legitimacy in international law. The ‘enlarged notion of terra nullius’ based on the ‘backwardness’ of some human societies is of dubious international law provenance. The occupation of backward peoples doctrine with any ‘enlarged notion of terra nullius’ was not accepted state practice in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries and never was within the corpus of international law. Rather, it is an ill-formed and injurious creature of Imperial constitutional law posing as a legitimate doctrine of international law. As exposed in *Mabo [No 2]*, the Anglo-Australian jurisprudential mantle of sovereignty is no decorous veil. That veil is soiled and tawdry, with the rapacity spoken of by Sir James Stephen obvious to all who look. Whatever legal ingenuity may have been employed in its creation, its weave today is threadbare and unconvincing.

So, while the validity of the acquisition of territorial sovereignty is unchallengeable in municipal courts, the *mode* of acquisition of the Australian territories by Great Britain remains open to contestation. And, importantly, it is the mode of acquisition which determines the domestic consequences. The doctrinal paradox disinterred by the *Mabo [No 2]* decision means the consequences of the acquisition of territorial sovereignty in municipal law are still

<sup>161</sup> *Mabo [No 2]* (n 1) 32 (Brennan J).

<sup>162</sup> *Ibid* 31–2 (Brennan J, Mason CJ and McHugh J agreeing at 15), 78–9 (Deane and Gaudron JJ), 121 (Dawson J), 182 (Toohey J).

open to interrogation before, and consideration by, these same municipal courts. It is thus not merely an issue of antiquarian interest but is of continuing and national relevance to both the ancient and present joint occupiers of the vast Australian continent.