INDIGENOUS POLICY AND ITS HISTORICAL OCCLUSIONS: THE NORTH AMERICAN AND GLOBAL CONTEXTS OF AUSTRALIAN SETTLEMENT

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I Introduction

In this paper, I question the historical bases of Australia's peculiar investment in a territorial sovereignty that cannot tolerate Indigenous self-governance by describing legal practice in early New South Wales. I argue that from 1788, in every regard except the colony's failure to sign treaties with Indigenous Australians, New South Wales followed a pattern of Indigenous-settler legal relations established in North America centuries before. Mobilising evidence about everyday legal practice in the early colony of New South Wales, I argue that, before the 1820s, lawyers or administrators in the colony assumed that Indigenous people were independent of British law: their crimes against settlers and against other Indigenous people were governed either by laws of war, by practices of retaliation or by Indigenous customary law. After 1820, Canada, parts of the United States, New South Wales and, after the Treaty of Waitangi, New Zealand all began asserting a new type of sovereignty uniquely destructive of Indigenous rights. In this context, the colony of New South Wales is not exceptional. Rather, as Australia's response to the 2007 UN *Declaration on the Rights of Indigenous Peoples*[1] suggests, Australia was and is part of a community of Anglophone settler polities who between 1822 and 1840 began for the first time to define sovereignty over territory as a principle antithetical to Indigenous self-governance.

II Australian Exceptionalism in its Settler Context

On 13 September 2007, the General Assembly of the United Nations voted overwhelmingly to adopt the *Declaration on the Rights of Indigenous Peoples*. This document affirmed the rights of Indigenous peoples to land, to natural resources, to cultural difference and to self-government. One hundred and forty three countries adopted the *Declaration*, a further 11 abstained. Four countries voted against the measure.[2] These four countries were bound together by empire, settlement, law and language: Australia, Canada, New Zealand and the United States.

Each Anglophone settler polity protested against the ramifications of broad rights to self-governance grounded in real access to national resources. As the New Zealand candidate pointed out, the *Declaration*'s insistence on resource sharing, compensation and land rights could embrace every inch of settler territory.[3] However, self-government itself posed the biggest problem. Although Canada, New Zealand and the United States stressed their commitment to Indigenous rights and self-government, each set limits, asserting their power to curb Indigenous rights through (impliedly superior) democratic process. John McNee of Canada stressed that veto powers given to Indigenous people by the *Declaration* 'would be fundamentally incompatible with Canada's parliamentary system' and that the document failed to recognise the primacy of competing (ie, settler) interests 'settled by treaty.'[4] Rosemary Banks of New Zealand noted that rights to resources, redress and veto 'were fundamentally incompatible with New Zealand's constitutional and legal arrangements'.[5] Robert Hagen of the United States objected, *inter alia*, to the *Declaration*'s provisions on self-government. He insisted that Indigenous rights were a 'domestic' concern: 'Under United States domestic law, the United States Government recognizes Indian tribes as political entities'.[6]

Of all the Anglophone settler dissentients, Australia's Robert Hill alone talked explicitly about territorial sovereignty. He declared that Australia could not countenance Indigenous self-determination because

> [t]he Government of Australia … does not support a concept that could be construed as encouraging action that would impair … the territorial and political integrity of a State with a system of democratic representative Government.[7]

Hill's singular focus on territorial sovereignty was not just an extension of the Howard Government's conservatism. It has survived the demise of the Howard regime. Though Kevin Rudd has signalled his willingness to sign the *Declaration*, the Labor Party declared in November 2007 that it supported 'one law for all Australians' and 'will not be changing any Australian laws in response to the UN Declaration.'[8] The Rudd Government has also committed itself to continuing the Northern Territory intervention, a military-bolstered initiative begun by the Howard Government to perform territorial sovereignty at its most intimate level to stem lawlessness, alcoholism and child abuse in remote Indigenous communities. While the 2008 federal budget decreased the amount to be spent on the Northern Territory intervention, this funding cut does not extend to core initiatives aimed at controlling the lives of Indigenous people.[9] The intervention was and remains predicated on the suspension of the *Racial Discrimination Act 1975* (Cth), the enforcement of criminal law, the suspension of de facto customary legal regimes and the daily control of how Indigenous people spend welfare money. Indeed, the Federal Labor Government has increased spending on policing and welfare expenditure controls.[10] It is committed to illustrating the meaning of Australia's peculiar territorial sovereignty by exercising exhaustive jurisdiction over Australia's Indigenous people.

III Australian Exceptionalism in Law and History

Australia's peculiar territorial sovereignty is not just a creature of political rhetoric. It is a fundamental maxim of Australian common law based on either, or both, of two historical premises: that, despite the presence of Aboriginal peoples, perfect territorial sovereignty came to Australia with the First Fleet in 1788; and that, because the British Empire did not sign treaties recognising the rights of Indigenous Australians to property, settlement in New South Wales was uniquely destructive of Indigenous rights.[11] Underpinned by these two premises, the principle of territorial sovereignty has been laid down in a number of cases. The most important case never to be cited by a recent Australian court is the 1836 case of *R v Murrell*,[12] the first case in the history of the colony to assert jurisdiction over crimes between Aboriginal people. In *Murrell* it was held that Indigenous people had no sovereignty and no law cognisable by a British Court in the colony of New South Wales, and were therefore subject to the jurisdiction of colonial courts.[13] From this premise followed *Attorney-General (New South Wales) v Brown*,[14] in which the Supreme Court of New South Wales upheld the right of the colony to regulate land distribution by declaring that in 1788 the British Crown not only acquired territorial sovereignty in the eastern half of Australia; it became the absolute beneficial owner of the soil.[15] In *Cooper v Stuart*,[16] the Privy Council affirmed that British law was imported into Australia in 1788 because Australia was a 'tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions.'[17]

The ramifications of these decisions for Australia's Indigenous people have been affirmed repeatedly in the late 20th century. Most significantly, *Mabo v Queensland (No 2)*[18] made clear that, though some Australian Indigenous people may continue to hold a weak form of title to unalienated land, Australian courts could not question the territorial sovereignty of the Crown.[19] In *Coe v Commonwealth*[20] and *Walker v New South Wales*,[21] the High Court reaffirmed *Mabo*'s refusal to enquire into territorial sovereignty. When Denis Walker argued on the strength of *Mabo* that New South Wales had no authority to arrest him on what he alleged was tribal land, the Court defended territorial sovereignty:

> The proposition that [State] laws could not apply to particular inhabitants or particular conduct occurring within the State must be rejected. … There is nothing in the recent decision in *Mabo v Queensland (No 2)* to support the notion that the Parliaments of the Commonwealth and New South Wales lack legislative competence to regulate or affect the rights of Aboriginal people, or the notion that the application of Commonwealth or State laws to Aboriginal people is in any way subject to their acceptance, adoption, request or consent.[22]

The High Court has posited territorial sovereignty as a 'skeletal principle' of Australian law and has repeatedly affirmed the proposition that the Crown's territorial sovereignty in Australia is unencumbered by Indigenous sovereignty or even Indigenous customary law.[23] As a result, under current law, Indigenous self-government in Australia can only exist by the grace of State or Commonwealth legislatures.

In this regard, Australia's legal investment in territorial sovereignty differs from other Anglophone settler polities.

In 1831 and 1832, the United States Supreme Court recognised the special status of Indigenous tribes in the US, by labelling them 'domestic dependent nations', which were subordinated to US territorial sovereignty yet retained limited rights to self-government.[24] Since the Civil Rights Movement, the principles of these cases have been revived to allow federally recognised Native American tribes to run their own courts and, to some degree, administer their reservations in some parts of the United States. In Canada, since 1982, when the *Canadian Constitution*[25] was patriated and amended, Indigenous-state relations have been predicated on the assumption that the Royal Proclamation of 1763 established British sovereignty over Indigenous people in Canada but preserved in them limited rights to land and self-government. In New Zealand, the Treaty of Waitangi has, since 1975 with the passage of the *Treaty of Waitangi Act 1975* (NZ), been reinstated as a founding document in New Zealand law, grounding rights to some resources and limited self-government for Indigenous people in New Zealand.[26]

All of these settler polities continue to claim and to exercise the right to legislate for Indigenous people, but Australia is alone among them in maintaining that, as a result of its history, Indigenous people have no inherent rights whatever to customary law and self-government. As Gibbs J stated in *Coe v Commonwealth*:[27]

> the history of the relationships between the white settlers and the aboriginal peoples has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall CJ … [regarding] the Cherokee Nation, that the aboriginal people of Australia are organised as a 'distinct political society separated from others', or that they have uniformly been treated as a state.[28]

IV Sovereignty, Jurisdiction and the Legal Foundations of Anglophone Settlement

Australia's history, of course, did differ in many respects from other Anglophone settler polities. New South Wales was a post-revolutionary and late-18th century project. It was formed as a penal colony, though there is some controversy over whether it was designed as a place of exile and civil death or of exile and radical reform.[29] British settlement in North America was much older, though it was likewise mired in the economies of unfree labour, first of indentured servants and then of African slaves.[30] In North America, well-armed and diplomatically well-connected Indigenous people traded and treated with rival European empires. Treaty diplomacy between Indigenous North Americans and Europeans ensured that the goal of Indigenous dispossession was always tempered with formal recognition of Indigenous rights to land and self-government.[31] Not so in New South Wales, where new ideological and military tools and a range of other unprecedented British advantages combined to deprive Indigenous people of much of their bargaining power.[32] As a result, Australian Indigenous people were not armed or organised in a way that facilitated the repulsion of British settlement. This does not mean, however, that the British came armed with perfect territorial sovereignty that left no room for Indigenous self-governance.

Despite the many differences between them, the legal foundations for settlement in New South Wales were very similar to those laid for American colonies centuries before: American charters made the same claims to sovereignty and jurisdiction over land as Governor Phillip's Instructions and the First Charter of Justice in 1787 drafted for New South Wales.[33] The First Charter of Virginia of 1606 vested in a council of 13 men the right to grant land and manage and direct 'all Matters that shall or may concern the Government, as well of the said several Colonies, as of and for any other Part or Place, within' a territory from the east to the undiscovered west coast of America.[34] The Charter of Massachusetts Bay in 1629 gave property and jurisdiction to the company over a strip of land from the east to the west coast of America on the condition that the colony was not planted on land 'actuallie possessed or inhabited, by any other Christian Prince or State.'[35] Georgia's 1732 Charter vested in a board of proprietors property from coast to coast on the southern borders of Carolina (largely on land claimed by Spain) and jurisdiction over 'all and every person and persons who shall at any time hereafter Inhabit or reside within' those extensive boundaries.[36] Similarly, in 1787, Governor Phillip's Instructions and the New South Wales Charter of Justice gave the Governor and his legal officers jurisdiction over half the continent of Australia, though they had barely stepped foot on the mainland.[37]

These documents laid the basis for British claims to sovereignty and dominion in the New World. Patrick Wolfe has suggested that early colonial legal claims and land policies show definitively that settler colonialism in North America and elsewhere was always grounded in the 'discourse of *corpus nullius*': a discourse that at best presumed the 'naturalism' (and therefore the potential for destruction)

of Indigenous rights to land and self-government.[38] Others argue that legal claims to land and jurisdiction made in colonial charters had different meanings in different contexts at different times.[39] Most important for the purposes of this paper is the fact that in neither hemisphere did these claims to property, sovereignty and jurisdiction amount to a legal resolve to exercise jurisdiction over any sort of Indigenous theft or violence.[40] Instead, they answered other purposes. First, they attempted to displace competing European claims based on what Protestant theorists deemed to be flimsier premises, like Papal donation, discovery or the placement of markers.[41] Second, colonial charters functioned as supporting documents in the emerging field of the European law of nations.[42] Their key practical import, however, was to clarify the relationship between settlers and their settler governments.[43]

Only in the second quarter of the 19th century did settler polities try systematically to assert that their sovereignty gave them territorial jurisdiction over Indigenous people. Few Indigenous people were tried for crimes against settlers in North American colonies and states that could not point to the definitive defeat of local Indigenous peoples in war. In New York and Georgia, for example, the trial of Indigenous people for crimes against settlers remained extremely controversial well into the 19th century. Alan Taylor and Alyssa Mt Pleasant have argued that policy and legal practice with regard to Indigenous violence changed markedly in New York State after 1820.[44] My own research on early Georgia shows that Indigenous people were seldom tried for crimes against settlers before the 1820s, even when those crimes were committed within the boundaries of state counties. Federal policy in Indian country, combined with local settlers' investment in local exchange, legal pluralism and reciprocal violence, made it virtually impossible for the state to exercise jurisdiction over Indigenous people on the few occasions when they seriously tried to do so. Despite the claims to sovereignty, territory and jurisdiction contained in British charters, pluralism was a norm deeply entrenched in North America. It was only after 1820 that charters were systematically mobilised to abrogate Indigenous people's rights.

V A Lost History of Legal Pluralism

This was as true of New South Wales as it was of any colony or state in North America. Like their counterparts in North America, most people in early New South Wales thought that Indigenous people fell outside the purview of colonial law. So much is clear from that fact that the primary response of colonists to Aboriginal violence in Australia in this early period was of diplomacy and war. Governors and leading men, according to colonial records and newspapers, repeatedly undertook negotiations with hostile Indigenous people to ascertain their grievances and to make peace, though no treaties were signed.[45] When negotiations failed, the colony made war either by dispatching its very limited number of soldiers or by authorising colonists to shoot Indigenous people on sight. Military actions or state delegations of the power to kill were declared in 1790, 1795, 1799, 1801, 1804, 1805 and 1816.[46] None of these campaigns were accompanied by a declaration of martial law, which would have contained within it an assertion of martial authority over subjects or citizens.[47]

Moreover, no Indigenous people were tried by the Superior Court of New South Wales for any crimes until 1816.[48] Though at least 17 Indigenous people were incarcerated by the colonial state between 1788 and 1816, incarceration was less an act of jurisdiction than it was a tool of diplomacy. For example, when 11 Aboriginal people were captured after starting a fire in Parramatta in 1805, most were liberated after promising to bring in 'Mosquito and Jack'.[49] Tedbury, the son of the famous Aboriginal leader Pemulwey, was released when his relatives pledged themselves as surety for his future good conduct.[50] State and Indigenous violence ceased when Mosquito and a man named Bulldog were surrendered to the colonial state by their tribe. They were surrendered as objects of negotiation and diplomacy, and, in the same spirit, were transported without trial from the colony.[51]

Indigenous theft and violence fell uniformly outside the jurisdiction of New South Wales courts. In 1799, John Randall (an Aboriginal man) was accused by a servant and a constable of attempting to steal plates and glasses from the Governor's house. The Bench of Magistrates did not sentence Randall; rather they submitted his fate 'to His Excellency the Propriety of ordering the Offender such exemplary Punishment' as he thought most suitable. The Governor liberated Randall when the latter promised not to try to steal his china again.[52] Similar treatment was given to an Aboriginal man who stole property from a traveller on the Parramatta Road in 1815. Though settler-highwaymen were routinely hanged for the same crime, the *Sydney Gazette* reported that this Indigenous highwayman was incarcerated solely to induce him to return

the money stolen. He was released when, after two weeks in confinement, it became apparent that he could not return the money and he promised never to hold up traffic again. The whole transaction was completed without the intervention of a colonial court.[53]

The cases of Randall and the unnamed Indigenous highwayman were unusual insofar as the men were imprisoned for their crimes, then released from custody. More often, Aboriginal violence was understood in a retaliatory frame, as acts of aggression or of retribution. In November of 1811, the Coroner declared that Richard Luttril had been murdered by local Aboriginal people in the Hawkesbury region in just retaliation for his habit of consorting with Aboriginal women and stealing the weaponry of Aboriginal men.[54] When the Coroner announced that a number of named Aborigines were guilty of murdering Richard Evans at Portland Head in 1813, no warrants were issued for their arrest.[55] Rather, settlers requested that local Aborigines bring the perpetrators in dead or alive. The first case shows the degree to which law officers endorsed principles of retaliation between Aboriginal people and colonists. The second case defers to Aboriginal rights to arrest and surrender their kin or foes.

The absence of cases against Aboriginal people and these various reports in the newspapers confirm that Indigenous people's crimes were not punished by settler courts in the early 19th century – no matter whether their crimes were committed on the fringes or in the centres of the colony. The first trial of an Aborigine, in 1816, can also be understood in this frame. In September of 1816, an Aboriginal man called Daniel Mow-watty was tried for raping a settler girl in 'the vicinity of Parramatta'.[56] This was the first superior court trial of an Aborigine in the first three decades of settlement. But this trial was not a declaration of jurisdiction over Indigenous people and their crimes. Firstly, the crime occurred on a farm near the centre of settlement. Secondly, court officers and witnesses went to great lengths to explain the legal exceptionality of Mow-watty. Witnesses testified that Mow-watty 'was brought up in the families of Europeans', he had travelled in England, and he worked on a settler farm.[57] Mow-watty had adopted European ways, to some degree. A witness named Robert Lowe, esq, attested that Mow-watty was 'a sensible man; very intelligent, and … much pleased with the manners and customs of Europeans'.[58] Most importantly, however, a man called Mr Blaxland deposed that Mow-watty knew of and abided by European laws as a matter of choice, not as a necessary accoutrement of British sovereignty. Blaxland attested that, from his 'constant habits,' Mow-watty 'must be aware of any act that would give offence to our laws',[59] and more importantly:

> upon those occasions where it had been found necessary to proscribe certain natives for their atrocities against the settlers, he had always shielded himself under the protection of the law by adhering to the habits in which he had been reared.[60]

This case makes clear that settlers themselves drew careful distinctions between British sovereignty and the exercise of jurisdiction over Indigenous crime. This conclusion is supported by other acts of incarceration and punishment in 1816. In the months before Mow-watty came to court, more than 22 Indigenous men, women and children were held in Sydney gaols to bring a speedy end to Indigenous resistance on the western frontiers of the colony and to stem the flow of information about troops there.[61] One suspected ring leader, named Dual or Dewall – thought to be involved in theft and murder on settler farms – was 'banished' from the colony without trial. Unlike Mow-watty, Dewall was not considered to be an appropriate defendant before the courts.[62]

It was not until late 1822 that Indigenous people involved in frontier violence were tried by the Superior Court for murder.[63] The first Indigenous people were tried for frontier theft in 1832. Despite these legal landmarks, the trial of Aborigines throughout the 1820s and early 1830s was rare. Though frontier violence was endemic in the 1820s and 1830s, fewer than one Aboriginal person per year made it into the Supreme Courts after 1824.[64] Local magistrates, governors and soldiers thought it impossible, inappropriate or unnecessary to bring them into court. Crimes between Aboriginal people were not tried until 1836.[65] Indeed, before the 1830s local Indigenous people met freely to conduct intra-tribal punishments or merely to brawl on the streets of Sydney.[66]

In short, jurisdictional practice in New South Wales before the 1830s suggests a pervasive recognition of Aboriginal independence from settler law. Indigenous people were assumed to be a people apart, with civil organisation and authority to govern themselves, and to be fought and bargained with by the settler state. Their crimes were governed by their rules, by some variant of natural law retaliation or by war. Most importantly, British sovereignty

was not assumed to amount to territorial jurisdiction. It was a geographically and personally circumscribed order that left space for Indigenous self-government.

VI Legal Pluralism and Sovereignty in Global History

In this regard, New South Wales was not exceptional at all. Legal practice of the early 19th century confirms continuity between New South Wales and North American projects of settlement. In both places, with few exceptions, it was not law but diplomacy and war that governed Indigenous-settler relations. Instead of accepting that British settlement in New South Wales brought British law in 1788, we should look more closely at how settlers, their governments, and the British Empire understood their authority in this and other Anglophone settler polities. In the different world of early colonial settlement, British sovereignty had more contingent meanings; it was porous, personal, flexible. When sovereignty changed, it did so to reflect new legal ideologies, not timeless or necessary attributes of statehood and governance.

New scholarship suggests that territorial sovereignty as a strategy of governance has a much more recent history than many suppose. James Sheehan has argued that in Europe sovereignty came to be exercised through perfect territorial jurisdiction only after the Napoleonic Wars.[67] Lauren Benton has shown that imperial powers and diasporic states everywhere moved to control and in some cases extinguish pluralism in the second quarter of the 19th century.[68] Charles Maier has argued that 1800 to 1870 was the epoch of territoriality, when states from Europe to Japan began to conceive of their sovereignty as the capacity to control every inch of their national territory.[69]

In this frame, the advent of territorial sovereignty itself in Australia was part of a moment in global history.[70] Its implementation through the denial of Indigenous rights in New South Wales did not follow from the failure to sign treaties; it followed from the progressive extension of jurisdiction between 1816 and 1840 in Australasia and North America. From this period onwards, politicians, lawyers and settlers all began to claim new powers to punish and control Indigenous people's crimes, especially those committed close to major settlements.[71] They did so on the basis that settler sovereignty could not coexist with Indigenous self-government.

In 1822, the Court of Oyer and Terminer, Western District Assize in Upper Canada, decided that an Indigenous man could be tried for murdering an Indigenous woman on the streets of Amherstburg because jurisdiction, at least over townships, was a necessary aspect of British sovereignty.[72] In the same year, the execution of an Indigenous witch according to Seneca customary law prompted the legislature of New York State to pass a law facilitating the trial of Indigenous people for killing each other on Indian reservations.[73] In 1830, in the case of *Georgia v Tassel*,[74] a convention of Georgia judges declared that the State of Georgia could execute a Cherokee man named George Tassel for murdering another Cherokee on Cherokee land because that land lay within the territorial boundaries of the sovereign settler-state of Georgia. It is worth quoting the Georgia Convention at length, because the judgment is so similar to its New South Wales equivalents. In response to arguments that Tassel could not be tried because the Cherokee were a sovereign, self-governing people, the Convention replied that:

> Indeed it is difficult to conceive how any person, who has a definite idea of what constitutes a sovereign State, can have come to the conclusion that the *Cherokee Nation* is a sovereign and independent State. …. That a Government should be seized in fee of a territory, and yet have no jurisdiction over that country, is an anomaly in the science of jurisprudence; but it may be contended that, although the State of Georgia may have the jurisdiction over the Cherokee Territory, yet it has no right to exercise jurisdiction over the persons of the Cherokee Indians who reside upon the territory of which the State of Georgia is seized in fee.[75]

In *Cherokee Nation v Georgia*[76] and *Worcester v Georgia*[77], the Supreme Court of the United States rejected the reasoning in *Georgia v Tassel*. It declared that the Cherokee tribe was a domestic, dependent nation deemed by the European international community to be within the sovereignty and dominion of the United States, but free of the jurisdiction of the State of Georgia. These Supreme Court decisions continue to dictate the fragile limits of Indian rights in the United States. However, it was the reasoning in *Georgia v Tassel* that determined the fate of the Cherokee in 1830. The State of Georgia tried Cherokees in their hundreds from 1830 until the United States Federal Government presided over their forcible removal from the state in 1838.[78]

In 1836, the New South Wales Supreme Court decided in *Murrell* that British imperial law governed crimes among

Aboriginal people. Justice William Burton declared:

> 1st … that the aboriginal natives of New Holland … had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own.[79]

Furthermore, Burton J held that Britain had by statute granted the court jurisdiction over half the continent of Australia; '[t]hat the English nation has obtained and exercised for many years the rights of Domain and Empire over the country'; and that, though Aborigines were not full British subjects,

> there is no distinction in law in respect to the protection due to his person between a subject living in this Colony under the Kings [sic] Peace and an alien living therein under the Kings [sic] Peace …[80]

This understanding of sovereignty arrived soon after official British colonisation in New Zealand. Across the Tasman Sea, within weeks of signing the Treaty of Waitangi (1840), the British Government demonstrated the meaning of sovereignty by trying a Maori man for killing a settler New Zealander.[81] In 1847, Ranitapiripiri, alias Kopitipita was tried for murdering another Maori by 'drowning him … in the river Manawatu', because every murder in British territory came within the jurisdiction of British courts.[82]

The emergence of an understanding of sovereignty antithetical to Indigenous self-government has, in short, a shared Anglophone settler history. The fact that the colony of New South Wales signed no treaties with Indigenous peoples is one small exception in a common history of state-Indigenous legal relations. This is not to say that treaties have not been central to recent articulations of Indigenous rights. They have received enormous emphasis in the definition and curtailment of Indigenous rights in other Anglophone settler polities.[83] However, treaties have never exhaustively defined Indigenous rights in settler polities. Indigenous rights (and, indeed, the 'sovereign' authority of settler polities) were also defined by case law, state policy and everyday legal practice. It was case law, after all, that defined the process of Indigenous subordination in North America and Australia in the 19th century. In North America and New Zealand, cases often did so in defiance of treaties. Exercises of jurisdiction by courts defined sovereignty in its modern form: as government authority over every person living within bordered territory.[84] These practices were engaged in by courts not to correct errors or misunderstandings of law, but to choose a path to statehood, to adopt rapidly changing discourses linking sovereignty to the exercise of territorial jurisdiction, and to declare that they intended to operate like European states rather than plural, extractive colonies. As Canada, Australia and New Zealand followed the United States to democratic self-governance in the late 19th century, each added the normative weight of democracy to court-led efforts to crush Indigenous self-governance in the 1830s.[85]

VII Conclusions: Histories of Sovereignty and Contemporary Indigenous Rights

The legacy of 19th century territorial sovereignty in all Anglophone settler polities was never more evident than in their refusal to sign the *Declaration on the Rights of Indigenous Peoples* in 2007. The fact that Australia, Canada, New Zealand and the United States all rejected the strong affirmation of self-government in the *Declaration* shows that they are all very uncomfortable with the ramifications of Indigenous self-governance for settler sovereignty. To varying degrees each is still trapped in the moment of territoriality, unable to imagine the lost pluralism of the early 19th century.

However, Australia remains uniquely mired in the mythologies it embraced in the 1830s, and this is its fundamental divergence from Canada, the United States and New Zealand. Australia's contemporary jurisprudence of statehood, more than its history, marks it out as a settler polity uniquely oppressive of Indigenous rights. Canada, the United States and New Zealand have created some governmental space for Indigenous self-governance – sometimes in token ways and sometimes in tangible ways.[86] Significantly, their reintroduction of some degree of legal pluralism has not fractured skeletal components of their systems of property and criminal law. Clinging to a flawed understanding of its history, Australia stands aloof. Australia's response to the *Declaration*, Australian government policy and Australian legal precedent are all predicated on the mistaken assumption that Indigenous people in Australia do not have and never had any recognised rights to self-governance. Looking beyond the absence of treaties, history suggests that Australia too needs to come to terms with the uncomfortable plurality of its origins.

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1 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007).

2 UN GAOR, 61st sess, 107th plen mtg, 19, UN Doc A/61/PV.107 (2007).

3 Ibid 14.

4 Ibid 13.

5 Ibid 14.

6 Ibid 15.

7 Ibid 11.

8 Joe Ludwig, 'Customary Law' (Press Release, 2 November 2007) <http://www.alp.org.au/media/1107/msag020.php> at 9 August 2008. The Labor Government has 'sought the views of of the Aboriginal and Torres Strait Islander Social Justice Commissioner, among other stakeholders, on matters relating to how they ought to formally indicate their support for the Declaration': Human Rights and Equal Opportunity Commission, *Your Views Needed on Australia's Support of the* Declaration of the Rights of Indigenous Peoples <http://svc013.wic009tp.server-web.com/Social_Justice/declaration/comments.html> at 9 August 2008.

9 Patricia Karvelas, 'Intervention Cash Slashed by $200m Next Year', *The Australian* (Sydney), 14 May 2008, 9.

10 Ibid. For recent criticism of police persecution as a result of the intervention, see Sarah Smiles, 'Intervention Slammed as Police Persecution', *The Age* (Melbourne), 12 June 2008, 11. For other initiatives signalling the Rudd Government's investment in intimate control of Indigenous life, see Minister Jenny Macklin's call for greater control of the expenditure of moneys paid to titleholders by mining companies: Jenny Macklin, '2008 Mabo Lecture: Beyond Mabo: Native Title and Closing the Gap' (Speech delivered at James Cook University, Townsville, 21 May 2008) <http://www.fahcsia.gov.au/internet/jennymacklin.nsf/content/beyond_mabo_21may08.htm> at 9 August 2008. Note that, while Labor has expressed interest in creating a representative body 'in the next little while', it has made no moves to do so and suggests that such a body would not look like ATSIC: Matthew Franklin, 'People's Lives "Must Come Before Treaty"', *The Australian* (Sydney), 26 April 2008, 10. A group appointed recently to help look into the efficacy of the intervention is dominated by pro-intervention Indigenous leaders: Patricia Karvelas and Stuart Rintoul, 'Critics are Few on NT Review,' *The Australian* (Sydney), 7 June 2008, 1.

11 For the ongoing importance of 'treaties' in Australian fears about sovereignty, see Sean Brennan, Brenda Gunn and Georgia Williams, '"Sovereignty" and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307.

12 (1836) 1 Legge 72 NSWSC ('*Murrell*'). For reports of the case, see Macquarie University Division of Law ('Macquarie Law'), *R v Murrell and Bummaree*, Decisions of the Superior Courts of New South Wales, 1788–1899 <http://www.law.mq.edu.au/scnsw/cases1835-36/html/r_v_murrell_and_bummaree__1836.htm> at 9 August 2008.

13 *Murrell* (1836) 1 Legge 72 NSWSC.

14 (1847) 1 Legge 312.

15 Ibid.

16 (1889) 14 App Cas 286.

17 Ibid 291.

18 (1992) 175 CLR 1.

19 (1993) 175 CLR 1, 31 (Brennan J) ('*Mabo*').

20 (1993) 118 ALR 193.

21 (1994) 182 CLR 45.

22 Ibid 48 (Mason CJ) (citations omitted).

23 See Shaunnagh Dorsett and Shaun McVeigh, 'Just So: "The Law which Governs Australia is Australian Law"' (2002) 13 *Law and Critique* 289.

24 *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); *Worcester v Georgia*, 31 US (6 Pet) 515 (1832). For a classic overview of Indigenous rights in the US in the 19th and 20th centuries, see Wilcomb E Washburn, *Red Man's Land/White Man's Law: A Study of the Past and Present Status of the American Indian*, (2nd ed, 1995).

25 *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

26 For a discussion of Indigenous rights in Canada and New Zealand, see generally Paul Havemann (ed), *Indigenous Peoples' Rights In Australia, Canada and New Zealand* (1999); Andrew Sharp and Paul McHugh (eds), *Histories, Power and Loss: Uses of the Past; A New Zealand Commentary* (2001).

27 [1979] HCA 68.

28 Ibid [12].

29 See Gillian Whitlock and Gail Reekie (eds), *Uncertain Beginnings: Debates in Australian Studies* (1993).

30 See Lois Green Carr, Russell R Menard and Lorena S Walsh, *Robert Cole's World: Agriculture and Society in Early Maryland* (1991); Ira Berlin, *Many Thousand's Gone: The First Two Centuries of Slavery in North America* (1998).

31 See Daniel K Richter, *Facing East from Indian Country: A Native History of Early America* (2001); Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650–1815* (1991).

32 For a rich discussion of Aboriginal military success despite disease and technological disparity, see John Connor, *The Australian Frontier Wars, 1788–1838* (2002) 22–52. For late 18th century ideology, see Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (2005) 258–69; Bruce Buchan, '"Aboriginal Welfare" and the Denial of Aboriginal Sovereignty' (2002–2003) 20 *Arena Journal* 97; Bruce Buchan, 'The Empire of Political Thought: Civilization, Savagery and Perceptions of Indigenous Government,' (2005) 18(1) *History of the Human Sciences* 1.

33 'Governor Phillip's Instructions', 25 April 1787, in *Historical Records of Australia* ('*HRA*') (1914–25) series 1, vol 1, 9, 9; compare 'Warrant for the Charter of Justice', 2 April 1787, in *HRA*, series 4, vol 1, 6, 6.

34 *First Charter of Virginia*, Avalon Project, Yale University <http://www.yale.edu/lawweb/avalon/states/va01.htm> at 26 August 2008.

35 *Charter of Massachusetts Bay*, Avalon Project, Yale University, <http://www.yale.edu/lawweb/avalon/states/mass03.htm> at 26 August 2008. The same document, however, only vested jurisdiction over 'subjects'. For a discussion of the limits of early charters, see Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (2004) 91–98.

36 *Charter of Georgia*, Avalon Project, Yale University, <http://www.yale.edu/lawweb/avalon/states/ga01.htm> at 26 August 2008.

37 'Governor Phillip's Instructions', above n 33, 9; 'Charter of Justice', above n 33, 6. Note a certain ambiguity in the wording of the Charter – it refers to jurisdiction over 'our Subjects' in the 'place or Settlement': at 6–7.

38 Patrick Wolfe, '*Corpus Nullius*: The Exception of Indians and Other Aliens in US Constitutional Discourse' (2007) 10 *Postcolonial Studies* 127, especially 130.

39 For example, Paul McHugh, Antony Anghie and C H Alexandrowicz each point to a change in treaty practice in the United States (and in the international law of empire and colonialism generally) after 1790: McHugh, *Aboriginal Societies and the Common Law*, above n 35, 61–116; C H Alexandrowicz, 'Doctrinal Aspects of the Universality of the Law of Nations' (1961) 37 *British Year Book of International Law* 506; Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1. For a critique of Anghie and Alexandrowicz, see Wolfe, above n 38, 130–1. See also James Tully's notion of the emergence in the 18th century of an 'empire of uniformity', in James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995) ch 3. Cf Christine Helliwell and Barry Hindess, 'The "Empire of Uniformity" and the Government of Subject Peoples' (2002) 6 *Cultural Values* 139, especially 142–3. Helliwell and Hindess argue that Tully projects back a modern moment of political liberalism onto settler projects, masking the older hierarchical models of governance in place there.

40 In North America, particularly in the northeast, some colonies did exercise jurisdiction over Indigenous people: see Yasuhide Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630–1763* (1986); Yasuhide Kawashima, 'The Pilgrims and the Wampanoag Indians, 1620–1691: Legal Encounter' (1998) 23 *Oklahoma City University Law Review* 115; Wendy B St Jean, 'Inventing Guardianship: The Mohegan Indians and Their "Protectors"' (1999) 72 *New England Quarterly* 362; David Silverman, *Faith and Boundaries: Colonists, Christianity and Community among the Wampanoag Indians of Martha's Vineyard, 1600–1871* (2005), especially chs 3, 6. See also Katherine A Hermes, 'Jurisdiction in the Colonial Northeast: Algonquian, English and French Governance' (1999) 43 *American Journal of Legal History* 52; John A Strong, 'The Imposition of Colonial Jurisdiction over the Montauk Indians of Long Island' (1994) 41 *Ethnohistory* 561; Ann Marie Plane, 'Legitimacies, Indian Identities and the Law: The Politics of Sex and the Creation of History in Colonial New England' in Martin Daunton and Rick Halpern (eds), *Empire and Others: British Encounters with Indigenous Peoples, 1600–1850* (1999) 217. However, despite the fact that Indigenous people did at times come under colonial jurisdiction, this was not the norm. In Georgia, for example, treaties until the end of the 18th century (with one exception) preserved Indigenous jurisdiction over all Indigenous crime: see, eg, 'Treaty of Augusta, 1763' in J E Hays (ed) *Indian Treaties: Cessions of Land in Georgia, 1705–1837* (1941) 66.

41 See Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492–1640* (1995), ch 3; Lauren Benton, 'Passages to Imperial Sovereignty: The Geography of Treason in the European Atlantic World' (Paper presented at the Columbia Legal History Seminar, New York, 25 January 2007).

42 Brian Slattery, 'Paper Empires: The Legal Dimensions of French and English Ventures in North America' in John McLaren, A R Buck and Nancy E Wright (eds), *Despotic Dominion: Property Rights in British Settler States* (2005) 50.

43 Note the reference to 'subjects' in the first New South Wales Charter of Justice: 'Charter of Justice', above n 33, 6.

44 Alan Taylor, *The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution* (2007) 317–322; Alyssa Mt Pleasant, 'Reconsidering the Case of Tommy-Jemmy: Contexts for Criminal Prosecution in the Early Republic,' (Paper presented at the 29th Annual Meeting of the Society for Historians of the Early American Republic, Worcester, Massachusetts, 21 July 2007).

45 R H W Reece, 'Feasts and Blankets: The History of Some Early Attempts to Establish Relations with the Aborigines of New South Wales, 1814–1816' (1967) 2(3) *Archaeology and Physical Anthropology in Oceania* 190. See, eg, Letter from Governor King to Lord Hobart, 30 October 1802, in *HRA* (1914–25) series 1, vol 3, 581, 582. For magistrates' negotiations, see, eg, *Sydney Gazette* (Sydney), 5 May 1805; *Sydney Gazette* (Sydney), 22 December 1805. For Governor King's negotiations, see, eg, Letter from Governor King to Earl Camden, 30 April 1805, in *HRA* (1914–25) series 1, vol 5, 303, 306–7; *Sydney Gazette* (Sydney), 26 May 1805. For Macquarie's diplomacy, see, eg, *Sydney Gazette* (Sydney), 9 July 1814. See also Lachlan Macquarie, *Diary: 10 April 1816 – 1 July 1819* (Mitchell Library, Sydney, ML Ref A773), entries on: 6 June 1816 (re Bidjee Bidjee), 12 January 1817 (re Narrang Jack), 12 January 1817, 1 January 1818 (re annual feast); Letter from Sir Thomas Brisbane to Earl Bathurst, 14 February 1824, in *HRA* (1914–25) series 1, vol 11, 226; Letter from Macalister to Colonial Secretary, 24 January 1831, in *Colonial Secretary Correspondence*, Special Bundles, Aboriginal Outrages, 1830–1, 2/8020.4, State Records New South Wales ('SR NSW').

46 See generally John Connor, above n 32. See also *Sydney Gazette* (Sydney), 17 June 1804; Letter from Governor King to Lord Hobart, 14 August 1804, in *HRA* (1914–25) series 1, vol 5, 1, 17–18; 'General Order of Governor King', reprinted from *Sydney Gazette* (Sydney), 28 April 1805, in *HRA* (1914–25) series 1, vol 5, 820.

47 See W F Finlason, *Commentaries Upon Martial Law* (first published 1867, 1980 ed), 1. Finlason is quoted and discussed in Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995) 8–9. For the first declaration of martial law in New South Wales, see 'Proclamation of Martial Law', 14 August 1824, in *HRA* (1914–25) series 1, vol 11, 410.

48 *R v Mow-watty* (Unreported, New South Wales Court of Criminal Jurisdiction, Garling AJA, 27 September 1816). The case was reported in *Sydney Gazette* (Sydney), 28 September 1816, and has been transcribed and recorded at Macquarie Law, *R v Mow-watty and Bioorah*, Decisions of the Superior Courts of New South Wales, 1788–1899 <http://www.law.mq.edu.au/scnsw/html/R%20v%20Mow-watty,%201816.htm> at 9 August 2008. The *Sydney Gazette* names him 'Mow-watty' but he is also known as Daniel Moowattin. See Lisa Ford and Brent Salter, 'From Pluralism to Territorial Sovereignty: The 1816 Trial of Mow-watty in the Superior Court of New South Wales' (2008) forthcoming *Indigenous Law Journal*.

49 *Sydney Gazette* (Sydney), 30 June 1805. More were liberated later: see *Sydney Gazette* (Sydney), 7 July 1805.

50 *Sydney Gazette* (Sydney), 4 August 1805.

51 The Governor understood their transportation explicitly in terms of diplomacy: Letter from Governor King to Earl Camden, 20 July 1805, in *HRA* (1914–25) series 1, vol 5, 497. Their imprisonment prompted the first legal opinion on Indigenous legal status: see 'Judge-Advocate Atkins' Opinion on the Treatment of Natives', 8 July 1805, in *HRA* (1914–25) series 1, vol 5, 502–4. Mosquito and Bulldog tried to escape from prison before their transportation: see *Sydney Gazette* (Sydney), 11 August 1805. On their transportation: *Papers of the New South Wales Colonial Secretary, 1788–1825* ('*CSP*'), Reel 6040, 1/51, SR NSW, 41. In 1814, Governor Macquarie allowed the 'banished' (Macquarie's term) Mosquito to return to the colony on the application of his family: Letter from Colonial Secretary to Lt Governor Davey, 17 August 1814, in *CSP*, Reel 6004, 4/3493, SR NSW, 251.

52 *R v Randall* (Unreported, Bench of Magistrates, 7 June 1799). See *Bench of Magistrates Cases*, Reel 655 SZ767, SR NSW, 83.

53 *Sydney Gazette* (Sydney), 3 June 1815; *Sydney Gazette* (Sydney), 17 June 1815.

54 *Sydney Gazette* (Sydney), 16 November 1811.

55 'Coroner's Judgment', 3 January 1813, in *CSP*, Reel 6021, 4/1819, SR NSW, 193–7); *Sydney Gazette* (Sydney), 8 January 1813. Note that these SR NSW microform reels contain multiple files and page sequences.

56 *R v Mow-watty* (Unreported, New South Wales Court of Criminal Jurisdiction, Garling AJA, 27 September 1816). See Macquarie Law, *R v Mow-watty and Bioorah*, above n 48.

57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid.

61 See the diary entries for 3 June 1816 and 15 November 1816 in Macquarie, *Diary: 10 April 1816 – 1 July 1819*, above n 45.

62 'General Order Re Depredations of a Black Native Known as Dewall or Dual and His Exile to Port Dalrymple', Government and General Orders, 30 July 1816, in *CSP*, SZ759, Reel 6038, SR NSW, 232–3. Macquarie claimed to use the power 'vested in' him to 'remit the Punishment of Death, which his repeated Crimes and Offences had justly merited … And commute the same into Banishment from this part of His Majesty's Territory of New South Wales to Port Dalrymple, in Van Diemans Land, for the full Term of Seven years'.

63 *R v Hatherly* (Unreported,New South Wales Court of Criminal Jurisdiction, 2 January 1823). See Macquarie Law, *R v Hatherly and Jackie*, Decisions of the Superior Courts of New South Wales, 1788–1899 <http://www.law.mq.edu.au/scnsw/html/R%20v%20Hatherly,%201823.htm> at 9 August 2008; Informations, Depositions and Related Papers, Court of Criminal Jurisdiction, SZ800, Reel 1798, SR NSW, 1–19.

64 See the following cases from Macquarie Law, *Decisions of the*

Superior Courts of New South Wales, 1788–1899 <http://www.law.mq.edu.au/scnsw> at 9 August 2008: *R v Foley* (Unreported, New South Wales Supreme Court, Forbes CJ, 16 August 1824); *R v Devil Devil* (Unreported, New South Wales Supreme Court, Forbes CJ, 3 June 1825); *R v Tommy* (Unreported, New South Wales Supreme Court, Forbes CJ, 24 November 1827); *R v Binge Mhulto* (Unreported, New South Wales Supreme Court, Dowling J, 19 September 1828).

65 *Murrell* (1836) 1 Legge 72 NSWSC.

66 For some early examples see *Sydney Gazette* (Sydney) on the following dates: 18 March 1804; 21 October 1804; 13 January 1805; 17 March 1805; 31 March 1805; 14 July 1805; 10 November 1805; 15 December 1805; 29 December 1805; 12 January 1806; 2 February 1806; 16 March 1806; 23 March 1806; 25 December 1808; 1 January 1808 (this may have just been a drunken brawl); 15 January 1809; 27 November 1813. For efforts to exclude or control Indigenous violence, see Macquarie Law, *Proclamation Against the Natives, May 1816*, Original Documents on Aborigines and Law, 1797–1840 <http://www.law.mq.edu.au/scnsw/Correspondence/6.htm> at 9 August 2008; *R v Ballard* (Unreported, New South Wales Supreme Court, Forbes CJ, 21 April 1829) at Macquarie Law, *R v Ballard or Barrett*, Decisions of the Superior Courts of New South Wales, 1788–1899 <http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r_v_ballard_or_barrett__1829.htm> at 9 August 2008.

67 James J Sheehan, 'The Problem of Sovereignty in European History' (2006) 111 *American Historical Review* 1.

68 Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002).

69 Charles S Maier, 'Consigning the Twentieth Century to History: Alternative Narratives for the Modern Era' (2000) 105 *American Historical Review* 807. See also Lisa Ford, 'Empire and Order on the Colonial Frontiers of Georgia and New South Wales' (2006) 30(3) *Itinerario* 95.

70 Paul McHugh links territorial sovereignty to the rise of legal positivism: Paul McHugh, 'The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past' (1998) 61 *Saskatchewan Law Review* 393.

71 For some key moments in this transformation in the State of Georgia, for example, see: 'Governor's Message to the General Assembly of the State of Georgia', 8 November 1825, 'Proceedings of the Legislature of Georgia in Relation to the Treaty Made with the Creeks at the Indian Springs. Communicated to the House of Representatives, January 23, 1827', in *American State Papers: Indian Affairs*, vol 2, pub no 249, 779; 'Jackson County Resolution', *Savannah Georgian* (Savannah, USA), 8 August 1826; Georgia Legislative Documents, *Senate Resolution 22* (23 December 1825) <http://neptune3.galib.uga.edu/ssp/cgi-bin/legis-idx.pl?sessionid=b00591c8-96e4cbd256-0576&type=law&byte=7466691&lawcnt=22&filt=doc> at 9 August 2008. For calls for jurisdiction in Georgia, see: Letter from Allen Farmbrough to George Gilmer, 21 February 1830, in L F Hays (ed) *Cherokee Indian Letters, Talks and Treaties, 1786–1838* (1939) vol 1, 193, 205-208; Letter from Charles Hicks and John Ross to R J Meigs, 11 December 1826, in Gary E Moulton (ed), *Papers of Chief John Ross* (1983), vol 1 127; *Georgia v Martin*, October term 1818, Franklin Superior Court Records, Miscellaneous, 159–1–59, Georgia State Archives; *Georgia v Adair*, October term 1818, Franklin Superior Court Records, Miscellaneous, 159-1-59, Georgia State Archives; *Savannah Georgian* (Savannah, USA), 17 July 1826.

72 See Mark D Walters, 'The Extension of Colonial Criminal Jurisdiction Over the Aboriginal Peoples of Upper Canada: Reconsidering the *Shawanakiskie* Case (1822–26)' (1996) 46 *University of Toronto Law Review* 273.

73 Taylor, above n 44, 321–2; Mt Pleasant, above n 44.

74 *Georgia v Tassel*, 1 Dud 229 (Ga, 1830).

75 Ibid 233, 236.

76 *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831).

77 *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

78 See Tim Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* (2002).

79 *Murrell* (1836) 1 Legge 72 NSWSC. See Macquarie Law, *R v Murrell and Bummaree*, above n 12.

80 Ibid.

81 See William Hobson to Major Bunbury Kitt, 25 May 1840, The National Archives, Public Records Office, Colonial Office 209/6, f 245–7, Kew.

82 *New Zealand Spectator; Cook's Strait Guardian* (NZ), 4 December 1847. This is the earliest *inter se* case recovered so far by Shaunnagh Dorsett et al, who are recovering all early New Zealand case law. Note that Chapman J in this case only extended British jurisdiction over cases of murder *inter se* (cf theft or non-fatal violence). In 1877, the New Zealand Supreme Court achieved what these early trials portended, declaring that the British could neither countenance nor adjudicate Maori rights: P G McHugh, 'From Sovereignty Talk to Settlement Time: The Constitutional Setting of Maori Claims in the 1990s' in Paul Havemann (ed), *Indigenous Peoples' Rights In Australia, Canada and New Zealand* (1999) 447.

83 Note, for example, the extraordinary emphasis on the Treaty of Waitangi as a foundation document and the sole basis of Indigenous rights in New Zealand: see Sharp and McHugh (eds), above n 26. For a critical commentary on the value of treaties as a basis for Indigenous rights, see Paul Havemann, 'Introduction to Part II' in Paul Havemann (ed), *Indigenous Peoples' Rights In*

Australia, Canada and New Zealand (1999), 123.

84 See McHugh, *Aboriginal Societies and the Common Law*, above n 35, 117–213.

85 For one of the best presentations of the comparative erosion of Indigenous rights, see Paul Havemann, 'Indigenous Rights in the Political Jurisprudence of Australia, Canada and New Zealand' in Paul Havemann (ed), *Indigenous Peoples' Rights In Australia, Canada and New Zealand* (1999), 22. See also Washburn, above n 24.

86 The fragility of Indigenous rights to resources in Canada, New Zealand and the United States is apparent in debates over conservation: see Lloyd Burton, 'Indigenous Peoples and Environmental Policy in the Common Law Nation-States of the Pacific Rim: Sovereignty, Survival, and Sustainability' (1999) 10 *Colorado Journal of International and Environmental Law and Policy* 136. On recent erosions of Indigenous sovereignty in the United States, see E Andrew Long, 'The New Frontier of Federal Indian Law: The United States Supreme Court's Active Divestiture of Tribal Sovereignty' (2004–5) 23 *Buffalo Public Interest Law Journal* 1, 1-9, 49. See also *Cabazon Band of Mission Indians v Smith*, 388 F 3d 691 (9th Cir, 2004); *Confederated Tribes of the Colville Reservation v Washington*, 938 F 2d 146 (9th Cir, 1991). States are also successfully limiting gaming on Indian lands: see Justin Neel Baucom, 'Bringing Down the House: As States Attempt to Curtail Indian Gaming, Have we Forgotten the Foundational Principles of Tribal Sovereignty?' (2005–6) 30 *American Indian Law Review* 423; David J Bloch, 'Colonizing the Last Frontier' (2004–5) 29 *American Indian Law Review* 1; Steven Paul McSloy, 'Revisiting the Courts of the Conqueror: American Indian Claims Against the United States' (1994) 44 *American University Law Review* 537.