Decolonizing the Rule of Law: Mabo*'s case and Postcolonial Constitutionalism*

DUNCAN IVISON*

1 *Introduction*

Aboriginal claims for self-government in the Americas and Australasia are distinctive for being less about secession—at least so far—than about demanding an innovative rethinking of the regulative norms and institutions *within and between* already established nation-states. In particular, about rethinking the constitutional bases of these countries, including the conceptions of sovereignty that underpin regulative constitutional and legal norms.

Recent cases in Australia (and Canada) provide an opportunity to consider the nature of such claims, and some of the theoretical implications for regulative conceptions of sovereignty and the rule of law. A general question informing the entire discussion here is: how do particular conceptions of the rule of law affect Aboriginal claims?[1] Can a distinctive body of Aboriginal law survive in a liberal constitutional state already constituted in part by regulative ideals of the rule of law?

As a preliminary to answering these questions we need to establish the nature of claims to self-government and particularly (i) the relationship between claims to self-government and sovereignty and (ii) the internal scope of self-government, that is, the degree to which it shields Aboriginal communities from such legal instruments as a Charter of Rights. Consideration of these points suggests that claims to self-government are not reducible to claims for national sovereignty in the form of independent statehood. Nor do self-government claims entail any necessary violation of principles of human rights or respect for persons. Once we are clear as to what they are claims to and upon what grounds, as well as how they challenge existing understandings of sovereignty, we are left with a

* Department of Politics, University of York.
I am grateful to audiences at the University of Sydney, the University of Melbourne, the Research School of Social Sciences at the Australian National University, the London School of Economics and at the 1996 American Political Science Meeting in San Francisco, for extremely helpful discussions of earlier presentations of this paper. I am indebted to Brian Barry, John Brigham, Robyn Eccersley, Robert Goodin, Barry Hindess, Michael Janover, Will Kymlicka, Susan Mendus, Richard Mulgan, Lisa Strelein, Paul Patton, Philip Pettit, Henry Reynolds, Will Sanders, Natalie Stoljar, and Caroline West for their very generous comments on various drafts and presentations.

[1] For the sake of brevity, though not accuracy, 'Aboriginal' shall be used to refer to a diverse range of indigenous peoples, including the Inuit and Metis in Canada, and Torres Strait Islanders in Australia.

 Oxford Journal of Legal Studies Vol 17, No 2

more multilayered account of sovereignty truer to postcolonial conditions.[2] Given this, we can then examine how different conceptions of the rule of law affect these distinctive claims to self-government. This is attempted via a consideration of two recent cases in Australia. By mapping the decisions of these cases onto two 'interpretive regimes' associated with conventional understandings of the rule of law, we can measure the degree to which aboriginal interests are recognized or hindered.

In Australia, these cases have prompted enormous debate over not only specific issues to do with land ownership and management, but the very shape and character of the political community as a whole. Similar debates are taking place in Canada and New Zealand. The situation in the United States is different, in many respects, because of the early recognition of tribal sovereignty in the Marshall decisions. However questions to do with the scope of communal autonomy within a multinational state, and the nature of equality given deep cultural differences, are relevant here too.

James Tully has written of there being a hidden layer of contemporary jurisprudence capable of shaping the language of modern constitutionalism to fit the cultural diversity of citizens and institutions rather than the other way round.[3] This essay is a preliminary excavation in search of such a jurisprudence. We use a set of legal issues in a particular context to try and make sense of the general claim lying beneath Tully's proposition; that the accommodation of differences is essential to treating people equally in diverse political communities.

2 *Preliminary Considerations*

Self-government rights relate to certain crucial interests of aboriginal people. Firstly, as a means of ensuring the very survival of their culture. It doesn't follow that such protection can be achieved only through independent statehood, or that people can flourish only in their own culture somehow hermetically sealed off from all other influences. But the good of cultural membership for Aboriginal people is still significant, given the inter-relation between culture, land, law and community. If cultural identity plays a part in securing the good of self-respect—the sense that a conception of the good and/or plan of life is worth having, pursuing, and reflecting upon—then the destruction or assimilation of a culture is prima facie harmful to those who identify with it. Secondly, self-government provides a means of securing aboriginal perspectives in relation to the larger political system, perspectives which have been ignored and distorted

[2] They also push against the limits of conventional understandings of federalism. See J. Tomasi, 'Kymlicka, Liberalism, and Respect for Cultural Minorities' (1995) 105 *Ethics* 582. Cf. James Tully, 'Multirow Federalism and the Charter', in P. Bryden et al. (eds) *The Charter—ten years after*, (Toronto: University of Toronto Press, 1992). On the USA, where federalist principles have been used—paradoxically—to *trump* Indian claims see Philip P. Frickey, 'Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law' (1990) 78 *California LR* at 1141, 1175–6, 1222–1230; 'Marshalling Past and Present: Colonialism, Constitutionalism and Interpretation in Federal Indian Law' (1993) 107 *Harvard LR* at 389–440.

[3] James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) at 100.

within it. The harm caused by not securing an effective voice for Aboriginal communities is evident from the history of liberal-democratic governments' paternalistic relations with them. Given the disadvantages that follow from these interests not being protected, claims for self-government should be seen as relevant to considerations of what it means to treat Aboriginal people equally.

So securing self-government rights (more often than not) is about securing some external protection from the decisions and policies of non-Aboriginal communities which adversely affect the viability of Aboriginal ones. Any internal restrictions[4] that might be imposed as a result of these external protections must be judged in relation to the complex cultural context within which constitutional issues are situated and interpreted. This is only beginning to be explored in Australia. In the US, tribes and tribal courts are subject to an 'Indian Bill of Rights', but only to limited judicial review.[5] In Canada, some Aboriginal groups seek to be exempted from review under the Charter of Rights. Worries about the dilution of external protections (and thus the sustainability of their cultures), and the culturally biased nature of core political and social institutions (eg. the manner in which treaties have been interpreted by courts) inform such concerns, not the desire to suppress the liberty of their members. When it is a consequence of an external protection, however, that internal restrictions are placed on members in such a way that violate wider understandings of human rights or equality, then this will require a judgement as to (i) *who* should judge as to whether or not the internal restrictions are justified and (ii) *how* such a judgement will be carried out and with reference to what norms and reasoning. Neither of these yield straight-forward anti-self-government arguments. If it is mainstream courts who are deemed to be the appropriate body to decide (and that is a hotly contested point), then there might be certain interpretive norms and rules which constrain them from simply imposing a judgement without reference to relevant historical and cultural matters. They might be constrained, for example, by a constitution that recognizes a diversity of norms governing the interpretation of basic rights. We shall return to this issue below.

Principles do not instantiate themselves effortlessly in the world. They become manifest and are mediated through various concrete and culturally embedded institutions procedures, and practices. So Aboriginal leaders, for example, may have generally similar attitudes as non-Aboriginal people about the respect owed to persons or even about basic human rights, but still object to the more specific institutions and procedures the larger society has established to enforce them.[6] This makes sense given many Aborigines' experience of western political institutions (especially the legal system). Hence the importance of the second vital interest mentioned above. Securing their cultural perspective in relation to the

[4] The language of internal and external protections is from Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995).

[5] See Frank Pommersheim, 'The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisprudence', (1989) 31 *Arizona Law Review* at 361. Tribes, of course, also remain subject to the supreme plenary power of Congress.

[6] Joseph Carens, 'Citizenship and Aboriginal Self-Government' (1995) paper prepared for the Royal Commission on Aboriginal People (on file with the author).

wider political system is a means of overcoming the distortion and/or ignorance of their views in mainstream institutions.

This is a complicated issue. The similarity of views about the importance of equality, for example, might be so general as to be irrelevant given the heavily mediated and culturally embedded ways in which such a principle is then made concrete in legal devices such as a Charter of Rights or various Aboriginal customs and institutions. In other words, the forms of mediation might be so different that it becomes difficult to see how they are all instances of the same principle.[7] The scope for difference is thus both wide and deep. But getting clear the nuances of these differences, at least from a non-Aboriginal perspective, helps us to see how best to address them.

Closer consideration of these issues *in situ* should bring such considerations to the fore.

3 Mabo

In *Mabo* v *State of Queensland* (No. 2)[8], a majority of the Court held that the people of the Murray Islands retained native title to their land which was not extinguished by the annexation of the Islands to the colony of Queensland in 1879, nor by subsequent legislation. The significance of the decision was that the court abandoned the previously regulative doctrine of *terra nullius*.[9] As is well known, this doctrine enabled English colonisers to apply the laws of England to newly settled areas where there was not a recognizable set of laws already in

[7] Ibid at 23.

[8] *Mabo* v *State of Queensland* [No. 2] (1992) 66 *ALJR* at 408. See the published edition with commentary; Richard H. Bartlett, *The Mabo Edition* (Sydney: Butterworths, 1993). There is now a massive literature originating in Australia on this case and its consequences. See the special issue of the *Sydney LR* (1993) 15; the essays from this issue plus others are usefully gathered together in *Essays on the Mabo decision* (1993); also the *University of New South Wales LJ* (1993) 16; *The Aboriginal Law Bulletin* (1992) 2 57; and *The Australian Journal of Anthropology* (1995) 6; a discussion to which I am greatly indebted is Paul Patton, 'Sovereignty, Law, and Difference in Australia: After the *Mabo* Case' *Alternatives* (1996) 21 149. Some helpful collections of essays include; M.A. Stephenson and Suri Ratnapala (eds) *Mabo: A Judicial Revolution* (St Lucia: University of Queensland Press, 1993); Murray Goot and Tim Rowse (eds) *Make a Better Offer: The Politics of Mabo* (Sydney: Pluto Press, 1994); Will Sanders (ed) *Mabo and Native Title: Origins and Institutional Implications* (Canberra: CAEPR, 1994); Christine Fletcher (ed) *Aboriginal Self-Determination in Australia* (Canberra: Aboriginal Studies Press, 1994); Bain Attwood (ed) *In the Age of Mabo: History, Aborigines and Australia* (Sydney:, Allen & Unwin, 1996). Some helpful recent book-length treatments include Tim Rowse, *After Mabo: Interpreting Indigenous Traditions* (Melbourne: Melbourne University Press, 1993); H.C. Coombs, *Aboriginal Autonomy* (Melbourne: Cambridge University Press, 1994); and especially Frank Brennan, *One land, One nation* (St. Lucia: University of Queensland Press, 1995).

[9] It is important to note the most significant case prior to *Mabo—Millirrpum* v *Nabalco* [1971] FLR 17 (often referred to as the Gove Land Rights case). Only the most cursory background can be provided here. This case involved the Yolgnu, living in the far north-east of the Northern Territory, a consortium of mining companies who wanted to mine bauxite on land the Yolgnu considered 'traditional country', and the Commonwealth. Yolgnu traditional owners insisted that mining leases not be granted until proper consultations with them had occured. After political attempts failed, the traditional owners sued the miners and the Commonwealth in the Supreme Court of the Northern Territory. The Court ruled that the evidence presented by the traditional owners did not show a distinctly *legal* title to land, however much it demonstrated genuinely held religious beliefs. It also concluded that the common law only recognized *individual* title to land, and thus could not recognize the complex communal interests claimed by the Yolgnu. Finally, the Court declared that any Aboriginal interests in land had, in fact, been extinguished by the Crown's assertion of sovereignty over the territory. *Milirrpum* was never appealed, although it did provoke a political response which eventually generated limited rights in land for Aborigines in the Northern Territory. It was only in *Mabo* that the High Court finally addressed (in a legal sense) the most problematic and troubling aspects of Blackburn J's decision in *Milirrpum*.

place. It presumed, in other words, that the territory was literally empty before their arrival. This was enlarged to include settlement of lands inhabited by 'backward' or 'barbarous' peoples, whose laws or customs simply did not count as law. In overturning this assumption, the Court rejected the claim that the acquisition of sovereignty by the Crown made it universal and absolute beneficial owner of all land in the territory. If this were true, Aboriginal people would be made 'intruders in their own homes', as Brennan J put it in his lead judgement. 'Judged by any civilised standard' argued Brennan, 'such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned'.[10] The common law cannot be 'frozen in an age of racial discrimination'.[11]

So the two principles which underpinned the non-recognition of Aboriginal land rights—that Australia was unoccupied at settlement and if not the inhabitants were too low on the scale of civilization to even possess rights—were rejected.[12] The Crown held radical title to land in the territory, which allowed it to grant property in land etc, but 'it is not a corollary of the Crown's acquisition of radical title to land in an occupied territory that the Crown has acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants'. Thus, the common law can recognize indigenous rights and interests to land. The crucial questions then become: what kind of title is it, and where does it still exist?

The Court held that native title is recognized as existing in terms of the 'traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants ... The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs'.[13] There are particularities to the situation of the Meriam people which made the recognition of their title in these terms more straightforward than perhaps might be the case elsewhere. They were highly organized according to local customs, including having an Island Court based on local laws, and maintained a continuous presence on their land. But the basic principles still hold for elsewhere in Australia. Aboriginal people will have to show that at the time of settlement they were, and are still now, an 'identifiable community'.[14] Moreover, that they have (by their laws and customs) a 'traditional connection' with the land 'currently acknowledged and observed'.[15] This connection with the land must have been maintained by some degree of physical presence, though it could be intermittent for various reasons.[16] Given the vast amount of dispossession which

[10] *Mabo*, above n 8 at 416.
[11] Ibid at 422.
[12] See *Cooper* v *Stuart* (1889) 14 App. Cas. 286 at 291; *re Southern Rhodesia* [1919] AC 211 at 233–4.
[13] *Mabo*, above n 8 at 429.
[14] Ibid at 431.
[15] Ibid at 430.
[16] Establishing this connection to the land will present all kinds of evidentiary and procedural difficulties in the native title claim process, now established within the context of a Commonwealth Native Title Act 1993. For a discussion of some of these difficulties, with reference to a particular claim, see Francesca Merlan, 'The Regimentation of Customary Practice: From Northern Territory Land Claims to Mabo' (1995) 6*The Australian Journal of Anthropology* at 64–82.

occurred during and after settlement, and thus the dispersion and dispersal of Aboriginal communities across Australia, this presents a not insignificant barrier to future claims. Also, it is not clear the extent to which various 'incidents' of native title, from rights to hunt, transit territory, exploit materials, up to more broader varieties (as in *Mabo No. 2*), can coexist with interests granted by the Crown. Members of the Court expressed differing views as to the *exact* nature of native title [eg. personal vs. proprietary], which is still far from being settled.[17] Part of the problem is that it is not clear how to fit the unique nature of native title into the existing array of common law categories—or even whether it should be. Some have argued that to do so would be to demean the special character of native title, that is, its origin in the distinctive customs and laws of indigenous people. Still, *some* kind of translation has had to occur, in order to give it the necessary legal effect within the context of practical policy-making.

The Court did make clear, however, that native title was vulnerable to extinguishment by sovereign acts with a 'clear and plain intention' to do so (a law which merely 'regulates' title does not).[18] Interests granted that are wholly or partially inconsistent with a continuing right to enjoy native title extinguish it to the extent of the inconsistency. So Aboriginal rights and interests were not 'stripped away' by the common law at the point of settlement, but through the acts of sovereign governments. Extinguishment also occurs when there has been a loss of connection with the land, whether by actual separation or the abandonment of customary laws. This makes clear the difficulties many Aboriginal groups will have in seeking to establish native title, given the consequences of dispossession, which removed them from their traditional lands.[19] It is worth pointing out that under the terms of the decision, the vast majority of Aboriginal people have already lost their rights and title to traditional lands. Moreover, a majority of the Court refused to hold that extinguishment of native title gives rise to compensation, except in very particular circumstances.[20]

Extinguishment is the crucial limiting condition of the recognition of native title, and of Aboriginal law more generally. What kind of grants have extinguished title, and to what extent does native title survive and/or coexist with lesser grants [eg. vacant Crown land, national parks, conservation reserves etc.]? The political importance of these issues should not be underestimated. What impact does native title have on mining leases, for example?[21] A recent Federal Court decision has ruled that a pastoral lease in northwest Queensland extinguished native title, since it had no provision for Aboriginal use (the land is intended to be developed

[17] Frank Brennan, 'Mabo: options for implementation—statutory registration and claims processes' in Will Sanders, above n 8 at 36–8.
[18] *Mabo*, above n 8 at 408, 432.
[19] Ibid at 430–1, 435.
[20] Ibid at 410; on this complex point see Noel Pearson, '204 Years of Invisible Title' in Stephenson and Ratnapala, above n 8 at 83–7.
[21] See *Mabo*, above n 8 at 408, 34; cf. Forbes, 'Mabo and the Miners' in Stephenson and Ratnapala above n 8 at 206–25.

into one of the world's largest zinc mines).[22] The often long-vacant lands under pastoral leases are a prime concern to Aboriginal leaders, since large amounts of them (especially in Western Australia) are subject to Mabo-style claims. One Aboriginal leader has accused the Federal Court of replacing terra nullius now with 'retro nullius'; ie. 'ghost' leases capable of extinguishing native title despite there having been no actual interference with the laws and customs of the indigenous people.[23] This hardly constitutes the 'maximum degree of co-existence' sought by Aboriginal negotiators between native title rights and lesser interests granted by the Crown.[24]

Despite these limitations, *Mabo* is still of historical significance, if only in making explicit a legacy of 'unutterable shame' (as Justices Deane and Gaudron put it) at the centre of Australia's national mythology.[25] In particular, it brings to the fore the deeper issues of Aboriginal self-determination and self-government. For the logic of *Mabo* would seem to support claims of there being inherent rights of self-government—within the Australian nation—beyond the narrow terms of the decision itself.

4 Mabo *as a Source of Law*

Remember the basic formula for the recognition of native title in *Mabo*:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[26]

As one Aboriginal commentator has argued, the gist of this claim is the recognition of an 'inherent right—an original right that does not need to be granted by the Crown because it arises out of Aboriginal law and custom'. Thus, 'Aboriginal law and custom is now a source of law in [Australia]'.[27]

The implications for self-determination and self-government then are clear. If native title arises out of Aboriginal law and custom, then that law and custom will direct other forms of conduct on that land. And if inherent rights to land

[22] *North Ganalanja Aboriginal Corporation and Bidangou Aboriginal Corporation* v *The State of Queensland and CRA Exploration* (1995) unreported at time of writing.

[23] *The Australian*, 3 November 1995.

[24] See Mick Dodson, *Aboriginal and Torres Strait Islander Social Justice Commission First Report* (Canberra: Government Publishing Service, 1993). As this article was going to press, in *The Wik Peoples and Thayorre Peoples v State of Queensland* (1996) 141 ALR 129, the High Court ruled—by a majority of 4-3—that pastoral leases *do not* necessarily extinguish native title interests that may have survived. To the extent that there is any inconsistency, rights of the pastoralists prevail. This is an extremely important decision with potentially far-reaching consequences for Aboriginal land claims generally. Miners, pastoralists and certain state governments have, for the most part, reacted negatively (as have members of the Federal government), claiming it will create confusion and 'chaos'. The forthcoming political response looks ominous. Aboriginal groups, rightly, have hailed it as a major reaffirmation of their native title rights.

[25] *Mabo*, above n 8 at 449. It has also provoked comprehensive native title legislation, the difficulties of which can not be discussed here.

[26] Ibid at 429.

[27] Noel Pearson, 'From Remnant Title to Social Justice', in Goot and Rowse, above n 8 at 180–1.

exist, then why not inherent rights of self-government?[28] Granted, the settlement of land claims is logically distinct from the settlement of self-government claims.[29] Indeed historically, at least in Canada and Australia (different again in US or New Zealand), the former has tended to dominate relations between Aboriginal and non-Aboriginal people. But as land claims are negotiated and settled, in a range of different ways, territorial security will give rise to further jurisdictional claims.

But here we begin to see the manner in which regulative conceptions of law, and particularly the rule of law, interact with wider assumptions about the nature of the state, political institutions and constitutional norms. Consider a recent a post-*Mabo* case concerning the jurisdiction of Aboriginal law.

In *Denis Walker* v *State of NSW* (1994), Mason CJ (as he then was) stated that

> There is nothing in *Mabo* [No. 2] to suggest that the parliaments of the Commonwealth and [New South Wales] lack legislative competence to regulate or affect the rights of Aboriginals or that these laws are subject to their acceptance, adoption, request or consent ... English Criminal law did not, and Australian Criminal law does not, accommodate an alternative body of law operating alongside it.[30]

Walker had sought a declaration that the laws of New South Wales were inapplicable to him given that the offence for which he was charged occurred on Aboriginal land where customary laws and practices were still valid, and whose people had not consented to the imposition of British common law. Walker's counsel argued that to the extent that the Crown had superseded Aboriginal laws, they were only valid to the degree that they have been accepted by Aboriginal people. Moreover, that customary law was recognizable by the common law, as in *Mabo*. Mason CJ rejected this. If criminal statutes did not apply to Aboriginal people 'it would offend the basic principle that all people should stand equal before the law'. Different criminal sanctions applying to different persons for the same conduct, claimed Mason, 'offends [this] basic principle'.[31] Furthermore, even if 'customary criminal law' survived settlement, it had been extinguished by the passage of general criminal statutes. There can be no 'alternative body of law' operating 'alongside' Australian criminal law. So it must either be invisible to the court—unrecognizable—or have been extinguished.

Note that in an earlier decision, Mason CJ, quoting another justice, argued that Aboriginal people have

[28] For a comprehensive discussion in relation to the United States and Canada see Patrick Macklem, 'Distributing Sovereignty: Indian Nations and Equality of Peoples' (1993) 45 *Stanford LR* at 1311–1367.

[29] There might also be strategic reasons for focusing on land rights rather than sovereignty issues, as least in the short term. See Noel Pearson, 'To be or not to be—separate aboriginal nationhood or aboriginal self-determination and self-government within the Australian nation?' (1993) 3 *Aboriginal Law Bulletin* at 16.

[30] (1994) 126 ALR 321 at 322–3. A summary discussion of the case can be found in the *Aboriginal Law Bulletin* (1995) 3 at 39–41. See also Mason CJ in *Coe* v *Commonwealth* [1993] 118 ALR 193 at 200.

[31] *Walker*, above n 30 at 323.

no legislative, executive, or judicial organs by which sovereignty may be exercised, If such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.[32]

The relevant point for our discussion is to note the assumption that legislative and judicial organs do not exist save as those that are granted by the Commonwealth and also that sovereignty is only understandable in relation to European-style 'legislative, executive [and] judicial' organs.

This last assumption follows a long tradition in colonial political theory and jurisprudence. Defining the possession of sovereignty as dependent on the existence of a distinctive political or civil society, containing the necessary institutional differentiations (between executive and judicial etc.), neatly excludes any consideration of Aboriginal institutions and norms, and thus any reasonable consideration of their claims. Indeed it was invoked by Locke, amongst others, to help justify the expansion of English colonization in the Americas.[33]

What of the point about extinguishment? It *might* be the case that the criminal codes of different states have extinguished Aboriginal law on these matters, but this is far from obvious.[34] The Australian Law Reform Commission certainly did not presume so in an exhaustive and quite extraordinary report on the possible recognition of Aboriginal law.[35] There are complex issues to do with the compatibility of certain Aboriginal practices with the general law of Australia—certain forms of punishment for example—but that is a separate issue (see below).

So Mason CJ must assume that Aboriginal customary law—*except to do with land title and management*—is incompatible with Australian law. But this is an entirely arbitrarily drawn distinction according to the character of Aboriginal law from the perspective of Aborigines. As one Aboriginal commentator has put it, it is 'absurd [if] our title to land is recognized but the laws and customs which give meaning to that title are treated as if they do not exist'.[36] The presumptions informing the *Walker* decision cut against the possibilities suggested by *Mabo*.[37]

[32] *Isabel Coe on Behalf of the Wiradjuri Tribe* v *The Commonwealth of Australia and the State of New South Wales* (1993) 118 ALR 193 (quoting Gibbs J, *Coe* v *Commonwealth* (1979) 53 ALJR 403. Note that in *Milirrpum* v *Nabalco Pty Ltd*, above n 9 at 267, Blackburn J, though denying the existence of native title, did remark that his findings of fact led him to conclude that Aboriginal communities were characterized by 'a government of laws, and not of men'.

[33] For a comprehensive treatment see James Tully, 'The *Two Treatises* and Aboriginal Rights' in *An approach to political philosophy: Locke in contexts* (Cambridge: Cambridge University Press, 1993) 137–176.

[34] See K.E. Mulqueeny, 'Folk-Law or Folklore: When a Law is Not a Law. Or is it?' in Stephenson and Ratnapala, above n 8 at 177.

[35] *The Recognition of Aboriginal Customary Laws* 2 vols (Canberra, 1986).

[36] M. Dodson, 'From "Lore" to "Law": Indigenous Rights and Australian Legal Systems' (1995) 20*Aboriginal Law Bulletin* at 2.

[37] On the jurispathic elements of *Mabo* itself—in particular the allowance of the extinguishment of native title without compensation—see the thoughtful essay by M.J. Detmold, 'Law and Difference: Reflections on Mabo's Case' in *Essays on the Mabo Decision*, above n 8 at 39–47. I am not arguing that Mason got *Walker* absolutely wrong, given the particularities of the case. Judges are always constrained by the particularities at hand, and cannot depart from them at will. But I am interested in the underlying commitments which emerge in his engagement with the particularities.

5 *The Rule of Law and Deep Diversity*

Can we draw some general conclusions about the implications of these cases, and similar cases elsewhere (such as in Canada), for thinking about the manner in which Aboriginal claims are (or could be) dealt with given existing constitutional materials? More particularly, as foreshadowed in sections 1 and 2, how do different conceptions of the rule of law affect the kinds of claims examined above?

The rule of law entails that governments and citizens are governed by laws which are general, knowable and performable. Generality is the key, if ultimately controversial, characteristic. It appeals to a sense of impartiality. Rule by law presumes to exclude arbitrary exercises power, or at least fickle and particularistic exercises of power which favour narrow interests over general ones, and discretionary privileges over rights. Hence the classic contrast between the rule by law and rule by men. Lawful political power is a capacity limited in its action by general rules.

But in conditions of what Charles Taylor calls 'deep diversity'[38] and complexity—that is, not only a diversity of cultural groups but also of the ways in which members of these groups belong to the larger polity—governments govern in a myriad of particularistic and indirect ways which often violate any strict constraint of generality. Legal institutions are often called upon to adjudicate between divergent interests and sub-cultures, or between them and the government, and to establish and set limits upon the common standards to which everyone must conform. 'A key task for a legal system', writes Cass Sunstein, 'is to enable people who disagree on first principles to converge on outcomes in particular cases . . . to produce judgments on relative particulars amidst conflict on relative abstractions'.[39]

Aboriginal and non-Aboriginal people may share a concept of law as such, perhaps even 'the rule of law', but not similar conceptions of what it requires.[40] However these different practices of law and the rule of law are intertwined—mostly for the worse for Aboriginal people—given the pattern of colonialism in the Americas and Australasia.

The importance of the interdependent and relational character of these systems of law cannot be underestimated. Indeed the common law can and does host and/or frame indigenous systems it runs up against in being carried to new domains, as we have seen.[41] Careful scholarship has shown that there was a form of 'imperial constitutional law' which governed the acquisition of Crown sovereignty in settler states such as Australia and Canada. This was part of a body of fundamental constitutional law that was logically *prior* to the introduction

[38] Charles Taylor, 'Shared and Divergent Values', in Ronald Watts and D. Brown (eds) *Options for a New Canada* (Toronto: University of Toronto Press, 1991) 53–76.

[39] Cass Sunstein, 'Incompletely Theorized Agreements', (1995) 108 *Harvard LR* at 1171.

[40] Cf. James Youngblood Henderson, 'The Doctrine of Aboriginal Rights in Western Legal Tradition' in Menno Boldt, J. Anthony Long (eds) *The Quest for Justice* (Toronto: University of Toronto Press, 1985) 220; Robert Williams, *The American Indian in Western Legal Thought* (Oxford: Oxford University Press, 1990).

[41] Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 110–116, 181–3.

of common law, that is, it conditioned the introduction of English common law to settler states.[42] It included the presumptive legal structure applicable to settler—'native' relations, in addition to establishing the rights to property and sovereignty with respect to the exclusion of other *European* nations.[43] Much attention has been paid to the latter, more needs to be paid to the former. The crucial point—summarizing much complex historical literature—is that Aboriginal communities retain rights to land as well as a degree of autonomy in relation to the Crown according to the introduced common law as conditioned by the imperial constitutional norms. An assertion of sovereignty over a territory, according to this doctrine, does not automatically extinguish Aboriginal rights. The common law, in other words, *recognizes* Aboriginal practices and law; it recognizes this alternative source of law.[44] This historical scholarship played an important role in *Mabo*, and in earlier cases in Canada and elsewhere.

So, by definition, the sovereignty of Canada, the US and Australia is more complicated than usually assumed. For if there is a valid source of Aboriginal rights—in land, for example—then there must also be jurisdictional rights attached to them; that is, a body of law within which they live. There is, then, a kind of *coordinate sovereignty* which exists between Aboriginal people and the crown.[45]

By 'coordinate sovereignty' I mean the coordination, usually through negotiation, of these different sources of law. Perhaps the most striking examples of this are the Marshall decisions in the US (1823–32), and to a lesser extent, Canada's Royal Proclamation of 1763 (upon which the Marshall doctrines are partly built).[46] These—and the many hundreds of treaties signed between indigenous people and settlers between 1600–1900—are good examples of the complex *inter-societal* character of the constitutional structures of North America. Canada and the United States partly came into being through these interchanges (including not so peaceful ones) between Aboriginal 'nations' and settler groups. Though almost no such similar declarations have occurred in Australia, there was clearly awareness (in the early nineteenth century) that this doctrine of

[42] Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 *Canadian Bar Review* at 737–8; 'Aboriginal Sovereignty and Imperial Claims' (1991) 29 *Osgoode Hall Law Journal* at 681–703; Kent McNeil, above n 41 passim; Henry Reynolds, *The Law of the Land* (Penguin, 1992); 'Native Title and Pastoral Leases' in Stephenson and Ratnapala above n 8 at 119–131; John Hookey, 'Settlement and Sovereignty' in Peter Hanks and Bryan Keon-Cohen (eds) *Aborigines and the Law* (Sydney: Allen & Unwin, 1984) 1–18; Peter Kulchyski (ed) *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994); James Tully, 'Aboriginal Property and Western Theory: Recovering the Middle Ground' (1994) 11 *Social Philosophy and Policy* 153–80.

[43] As emphasized by Tully, above n 42 at 172.

[44] Slattery, above n 42 at 738.

[45] The phrase is adapted from Tully (above n 42 at 173) though he should not be held responsible for how I use it here. A similar point is made by Slattery above n 42 at 700–3.

[46] There are conflicting views over the extent to which the Crown actually recognized an equal Aboriginal sovereignty in the *Royal Proclamation*, however much it is clear that certain rights to land were recognized. Tully thinks the Crown was not exerting sovereignty over indian territories and recognized Aboriginal nations as equals, though mainly for strategic reasons (above n 42 at 170–1, 174–5). Cf. Patrick Macklem (who argues the opposite) in 'First Nations Self-government and the Borders of the Canadian Legal Imagination' (1991) 36 *McGill Law Journal* 407 at 414–15. The crucial issue is the extent to which sovereignty is retained by Aboriginal people despite being under the Crown's 'protection' and 'dominion'.

'common law Aboriginal rights' was intended to apply to its circumstances as well.[47]

Now, of course, 'in law' does not mean 'in practice', and it is clear that the principles and treaties supposedly governing Aboriginal-Crown relations were broken and abused many times over. (Nor am I assuming that the Royal Proclamation or Marshall decisions are the optimum form of recognition as such.) In fact, according to the common law, rights—including Aboriginal rights—can be extinguished or modified by a competent legislature (subject to some basic presumptions and in the absence of any explicit constitutional barriers). Moreover, customary law can be overridden if considered 'repugnant' or 'incompatible' with the common law generally.[48] However, proving extinguishment is immensely complicated, at least if considered in good faith. And where there have been constitutional provisions shielding Aboriginal rights from legislative intrusion—as in Canada for example—determining the degree of extinguishment or modification is even more complicated.[49] The crucial question thus becomes to what extent Aboriginal law and interests co-exist with or are recognized by the common law and the wider political community.

6 *Sovereignty and the Rule of Law*

Robert Cover has written of the 'jurispathic' and 'jurisgenerative' tendencies of the rule of law as enforced by the state.[50] Consider the latter first. Constitutions protect the civic autonomy of individuals, which includes their rights of association and thus protection of certain norm-generating capacities. (The extent of protection can vary depending upon the particular constitution, ie. the scope of associational rights and/or the presence of collective rights.) Individuals can thus create legal meaning insofar as they locate the formal *corpus juris* within a context and narrative that establishes a particular 'lexicon of normative action'.[51]

However, a multiplicity of norms, generated from a multiplicity of associations, means conflict between them. So the state and its courts frame and organize the competing and conflicting norms circulating within it. The role of judges is thus often literally *jurispathic*—law-killing. The state imposes an institutional discipline upon the 'juripotence' of the social for the sake of social unity and public order.[52]

[47] Slattery, above n 42 passim; Hookey, above n 42 passim; Reynolds, above n 42 passim; Garth Nettheim, 'Mabo and aboriginal political rights; the potential for inherent rights and Aboriginal self-government', in Sanders above n 8 at 46–60.

[48] See the helpful discussion by T.A. Gray, 'The Myths of Mabo', in *Essays on the Mabo Decision*, above n 8 at 148–177; McNeil, above n 41 at 181–3; Note the terms of references of *The Recognition of Aboriginal Customary Laws*, above n 35 at 8–9: [the Commission was required to consider] The need to ensure every Aborigine enjoys basic human rights . . . The need to ensure equitable, humane, and fair treatment under the criminal justice system to all members of the Australian community'; also at 126–141. Cf. *Idewu Inasa v. Oshodi* (1934) AC 99 at 105.

[49] Slattery, above n 42 at 82.

[50] Robet Cover, 'Nomos and Narrative' in Martha Minow, Michael Ryan and Austin Sarat (eds.) *Narrative, Violence, and the Law; The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) at 95–172.

[51] Ibid at 101.

[52] Ibid at 109, 157.

Jurispathesis is not, in and of itself, a bad thing. The point is whether the group trying to establish and protect its own laws and norms has a right to do so. Norms and customs are always killed off in the process of state-building and then again in securing the basic structure over time. But which groups have a right to their legal orders and customs being recognized by the wider political community? How can we, for example, recognize Aboriginal law but not Muslim law, or the customs of South Asian communities?

There are structural reasons why Aboriginal claims are not on par with other minority claims. Firstly, there might be existing treaties, terms of federation, or constitutional provisions which provide explicitly for such recognition. These may have been ignored for some time, but in so far as they form part of the constitutional structure—part of a body of intersocietal custom binding each party—they can not simply be presumed to have been extinguished. In other words, that the treaties and/or canons established to protect Aboriginal rights are not only about overcoming disadvantage and thus temporary, but structural and institutional ('inherent' as Canadians say).[53]

Secondly, immigrants (as opposed to refugees) can be considered to have waived certain rights to their legal customs and norms when deciding to leave their country. This means they are entitled to the effective exercise of common citizenship rights, which might, for example, include support and services for community projects directed at maintaining cultural or ethnic associations. But this involves adapting 'mainstream' institutions and practices to accommodate ethnic or cultural diversity, not recognizing distinct societies with inherent claims to territory and/or jurisdictional rights.[54] This is also, by and large, the desire of most migrants, who campaign usually to improve the terms of their participation in the mainstream culture of the larger political community. At least, that is, when the terms of participation are not based on a repudiation of their ethnicity or culture because it is somehow inferior or of a fundamentally lesser worth. Persistent racism and a refusal on the part of governments to recognize migrant concerns can drive such communities to reject a mainstream society they perceive as racist or generally hostile. This can result in calls for withdrawal from that society, or at least a widespread feeling of alienation from it, sometimes manifested in nationalist rhetoric and gestures.

Aboriginal claims are very different. Their incorporation into the basic structure of society was very different. They signed treaties or agreed to general terms of association that have been broken or ignored many times over, or they were slaughtered and dispossessed during European settlement. Their claims are about the nature of the political community over which 'the' government, authorized by 'the' people, is assumed to rule. Their claim is that the authority of the larger state cannot be assumed to take precedence over their pre-existing

[53] See Frickey, above n 2 at 424–5; Kymlicka, above n 4 at 30.
[54] Kymlicka, above n 4 at 30–1, 98–99.

rights of self-government, the 'residue of sovereignty' inherent in the inter-societal customs forming part of the basic constitutional structure.[55]

7 *Interpretive Regimes*

So how have multinational states attempted to coordinate radically diverse sources of law within their territories, and how have Aboriginal claims fared in particular?

Let us return to the jurispathic tendencies of the law of the sovereign. The degree to which a conception of the rule of law can be characterized in jurispathic or jurisgenerative terms is partly a function of the interpretive regime attached to it, and the object of that regime—ie that which it seeks to govern. By 'regime' I mean a system of norms and presumptions which regulate the interpretation of legal materials, as well as the relations between key political institutions as set out in a constitution (written or unwritten).[56] Interpretive regimes control for 'lawlikeness' in relation to changing assumptions and demands both from within and outside of the law (including social, economic, and political ones). By 'controlling for lawlikeness' I mean maintain the coherence and generality of the law through interpretation and construction (according to particular perceptions of coherence, justice and/or politics). Aside from its rights-protecting function, courts enhance the efficacy of law in a democratic system by enabling it to be reasonably coherent and transparent to citizens—a limited but still significant task.[57] Coherence is elusive given the problems of dynamic consistency. Sovereigns and legislatures change and along with them executive and legislative preferences, which works against the production of complete and coherent systems of law over time. Moreover, given the deep social diversity and complexity of late-modern societies, there is an ever-expanding need for the regulation of diverse and often conflicting social spheres. So courts are supposed to help maintain coherence—lawlikeness—in light of these conditions.

But courts don't exist in isolation from the 'political' branches, and this further complicates their task. Constitutional actors engage in a process of sequential interaction.[58] The interpretive postures of courts affect, both directly and indirectly, the incentives legislatures and executives face in making decisions. This is an important part of the way in which judicial interpretation gives effect to a particular distribution of authority in a political system. The courts define and

[55] Slattery, above n 42 at 701.

[56] I have adapted this from the work of William N. Eskridge Jr. and John Ferejohn, 'Politics, Interpretation, and the Rule of Law', in Ian Shapiro (ed) *The Rule of Law* (New York: New York University Press, 1994) at 264–294; Jane S. Schacter, 'Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation', (1995) 108 *Harvard LR* at 593–663; Cass Sunstein, 'Interest Groups and American Public Law', (1986) 38 *Stanford LR* at 29–87; and Macklem, above n 46 passim. Cf. Martin Loughlin, *The Political Theory of Public Law* (Oxford: Clarendon Press, 1992).

[57] Cf. Ronald Dworkin, *Law's Empire* (Cambridge Mass: Harvard University Press, 1986).

[58] See John Ferejohn, Barry Weingast, 'Limitation of Statutes: Strategic Statutory Interpretation' (1992) 80 *Georgetown LJ* at 566–7. With reference to the UK and Australia, see David Kinley, 'Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law' (1992) 22 *FLR* at 194–204.

then discipline 'wayward' actors acting out of jurisdiction, and arbitrate disputes over the boundaries of different jurisdictions. Conversely, judicial interpretations are sometimes explicitly repudiated by legislatures, and courts often shape their decisions in anticipation of legislative reactions, or on normative assumptions about how legislatures or other actors (including itself) *should* act. Maintaining coherence or generality is often counter-majoritarian, thus politically sensitive, and this unavoidably implicates the courts in wider political debates. Conversely, omitting to act (ie refusing to review legislation or agency behaviour, including legislative or agency inaction), can be interpreted as supporting the status quo or private ordering, and thus equally 'political' in character.[59] Maintaining the rule of law, in other words, is difficult to summarize as being essentially a 'negative value'.[60]

I want to flesh out this idea of different 'interpretive regimes' associated with the rule of law a bit more. After having done so, I will return to the cases examined above and draw some general conclusions.

Consider two different interpretive stances or styles taken towards the rule of law, one focusing on the importance of rules and the other on more particularistic reasoning.[61] To put it tersely: one where rules govern practice and another where practice governs rules. At the extreme, the rule of law understood as the 'law of rules' presumes that government by laws means government by rules.[62] That is, decisions should be made without the intervention of discretion in their application. The existence of a rule, in this strong sense, precludes a decision maker from evaluating whether the reasons for having the rule are sufficient to justify following it on this occasion.

Conversely, particularistic decision making aims to optimize for each case and treats normative generalizations as only temporary and approximate of the better results the decision maker should try to reach.[63] There might still be rules, but they are only rules of thumb, offering no independent reason for a decision when they indicate results other than those indicated by the direct application of the justifications lying behind established rule.[64] This is a form of 'all-things-considered' decision making. When prescriptive generalizations are under- or over-inclusive in particular cases, the decision maker may 'cure' that under- or over inclusion by appealing to a 'correct' result without constraint of the

[59] See Sunstein, above n 56 at 72–75.

[60] Cf. Joseph Raz, 'The Rule of Law and its Virtue', in *The Authority of Law* (Oxford: Clarendon Press, 1979), at 228 (who says it is).

[61] I am indebted here to Frederick Shauer, 'Rules and the Rule of Law' (1991) 14 *Harvard Journal of Law and Public Policy* at 645–694.

[62] A. Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago LR* at 1175–88; F. A. Hayek, *Law Legislation and Liberty* (Chicago: University of Chicago Press, 1976). For an analysis of the Renquist Court members who adhere to a 'rules' framework, see Kathleen M. Sullivan, 'The Supreme Court 1991 Term: The Justice of Rules and Standards' (1992) 106 *Harvard Law Review* 24. Cf. M. Radin, 'Reconsidering The Rule of Law' (1989) 69 *Boston University LR* at 792; Raz, above n 60 at 213, 226–8; 'The Politics of the Rule of Law' (1990) 3 *Ratio Juris* at 336–7; J. Waldron, 'The Rule of Law in Contemporary Liberal Theory' (1989) 2 *Ratio Juris*, at 82.

[63] Shauer, above n 61 at 646–7.

[64] See William Eskridge, *Dynamic Statutory Interpretation* (Cambridge Mass: Harvard University Press, 1994) at 200; Farber and Frickey, 'Practical Reason and the First Amendment' (1987) 34 *UCLA Law Review* 1615.

prescription or rule.[65] This might include appealing to other social norms or principles to which the rule must give way.[66]

In practice, the rule of law usually involves rules, process, and high principle all interacting to varying degrees.[67] I don't mean to fetishize rules or pragmatism. However, I think there is some plausibility in characterizing the general tendencies of certain approaches as being more rule-driven than others. There is a normative issue at stake. Is it desirable for decisionmakers to be able to revise their own roles in particular cases, that is, determine the amount of force possessed in a rule according to the circumstances of a particular case?[68] This concerns the power of decisionmakers and the design or shape of the environments in which they operate, including not only judges but other 'officials' and agencies, ie. those with the power to wield authority and apply law in specific instances. There will always be some room and discretion to make decisions which do not, strictly speaking, involve rule application. The point however is the degree to which rules still play an important role in any such domain.

The force of rules in this instance lies in their ability to *restrain* decision-makers from a certain range of actions. This is particularly the case with regard to the judiciary, who while not forbidden from engaging in rule (ie law) revision, nevertheless do so within certain institutional conditions which control for the power of the particular decisional mechanism. Rules thus have a 'justificatory presumption' where it is undesirable for a decision-maker to be able to re-evaluate and change her role at will in light of the particular facts, since such a revaluation entails a substantial exercise of power on the part of that decision-maker.[69] Of course constraints can be enabling too.[70] By limiting sovereign or majoritarian power (for example by entrenching basic rights, or protecting minorities), constitutions help maintain political stability and legitimacy by creating the conditions for effective public deliberation and policy making. Thus constitutional constraints can help reinforce governmental power by making it more effective.[71]

The converse ideal, particularized decision-making—or the 'rule of law as critical pragmatism' as it is sometimes called—is more amorphous, subsuming a number of antiformalist approaches. *It is not an ideal of rulelessness*, rather, it is a different way of conceiving of what the rule of law entails in particular contexts. It may also involve a different account of what law *is*, though I cannot consider that here. On this view, rules are not immutable general objects applied to particulars, but are only 'rule-like' in relation to the context of pre-existing

[65] Shauer, above n 61 at 648–9.

[66] Shauer argues against the particularistic approach for the 'presumptive' force of rules. On this account, rules exercise presumptive (in a 'justificatory' sense) but not conclusive force in decisionmaking environments; above n 61 at 674–8. Cf. Brennan J's ruminations on precedent in *Mabo*, above n 8 at 416–7.

[67] Eskridge, above n 64 at 109.

[68] Shauer, above n 61 at 681–4.

[69] Shauer speaks of it encouraging 'decisional modesty'; Ibid at 674–8, 689–90.

[70] Stephen Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (Chicago and London: University of Chicago Press, 1995).

[71] Ibid.

agreement in a particular community. The interpreter of law does not simply retrieve directives for application from a rule's 'plain meaning', but chooses to reinforce, de-emphasize, or ignore certain beliefs and norms in the course of (say) interpreting a statute or resolving a dispute. Similarly, the 'rule-taker' is always at the same time creating law insofar as he acquiesces and perpetuates a practice, or acts differently and helps create a new one.[72] The rejection of the hierarchy between rules and practice leads to a conception of law as 'practice'.

Can the rule of law survive the deconstruction of formalism? It appears it can. Citizens still consider it normatively appealing that they are governed by law rather than arbitrary power. So even if it is the case, in fact, that the distinction between creating and applying the law is a false one, the virtues of distinct institutional roles for the judiciary and legislature do not also disappear. But they can no longer be associated with a vision of the rule of law as pre-existing and objectively determinable rules, in which judges are restrained from creating law, legislatures restricted to making it, and citizens to taking it. In the case of judges, for example, instead of the legitimacy of law depending (in part) upon them as 'neutral retrievers' of the 'existing' meaning of rules and statutes, they become 'forces for democracy through the interpretive regimes they create and apply' (what Schacter calls, interestingly, a form of 'metademocracy').[73] And there can be any number of different interpretive regimes depending upon theoretic and historical preferences. Does the law enhance democratic deliberation (republican), privilege the status quo to the disadvantage of minorities (critical race theory), or enhance dynamic efficiency (law and economics)? What differentiates these various interpretive approaches or 'regimes' is the underlying political theory, and not the fact that one believes in judicial 'restraint' and the other in judicial 'activism'. What makes this a 'pragmatic' approach is the conception of the rule of law as a social practice that is situated within certain conventions, traditions and priorities. What make it critical is the use of 'interpretive moments' to evaluate the practice in which the issues are situated, appealing to different political traditions and norms.

Note that these two accounts of the rule of law are not inherently progressive or conservative. The rule of law as presumptively rule-based provides valuable protection against the potentially arbitrary power of decisionmakers unconstrained save for rules of thumb or 'social practice'. The wider social and political context within which the rule of law is situated is crucial for a more complete understanding.

This has implications for our consideration of Aboriginal claims. Legally valid treaties have been ignored, 'revised', and read down by Canadian and American governments and courts without constraint, and without consideration for Aboriginal expectations concerning the agreements.[74] At the same time, precedent

[72] See the discussion in Eskridge, above n 64 at 196; Cover, above n 50 at 17.
[73] Schacter, above n 56 at 610–11.
[74] Macklem, above n 46 at 429–35; Frickey, above n 2.

and apparently foundational (rule-like) presumptions have prevented the recognition of Aboriginal claims by courts and legislatures. I return to this in a moment.

8 *The Possibilities of Recognition*

I have linked different conceptions of the rule of law with interpretive regimes oriented according to different conceptions of rules and reason. They are further oriented according to particular assumptions about democracy and politics generally. Both elements (conceptions of rules/reason, and conceptions of politics) of an interpretive regime have consequences for the flourishing or extinguishment of the norms of different political/cultural associations—such as Aboriginal people—within a state. A complete examination of the underlying political presuppositions of different accounts of the rule of law can not be attempted here. Needless to say, accounts of the rule of law which emphasize the value of private ordering over legislative and regulatory ordering tend to work against the kinds of policies and regulatory schemes sought by Aboriginal people. A preference for deregulated markets, for example, works against correcting the impact they have on Aboriginal claims. Unrestricted rights to acquire and sell land undermine attempts by Aborigines to protect traditional lands, or recover those unjustly taken.[75] Conversely, property rights not reducible to familiar common law categories—'native title' for example—are said to increase transactions costs (by complicating jurisdictional issues and land exploitation) and undermine the 'certainty' of other forms of title (by questioning their legitimacy). Finally, narrow text-based interpretive rules applied by the judiciary to legislation—a favourite tactic of public-choice-inspired theorists and judges—deliberately reduce its scope when questions of meaning inevitably arise in particular applications, and discourage more pragmatic and purposive interpretations of statutes or constitutional norms which might 'improve' or correct legislative outcomes where needed.[76]

The extent to which rules or interpretive pragmatism might exert an undesirably jurispathic pressure on Aboriginal law and practices depends on the context. A rule favourable to Aboriginal claims—a form of constitutional protection for Aboriginal rights for example—might constrain judges and legislators in just the way Aboriginal people want. It might also, by providing 'constitutional space', enable Aboriginal practices and laws to adapt to new circumstances and thus become more secure and effective.[77]

Indeed, at least in Canada, the United States and New Zealand, indigenous people have been, in a sense, demanding that the treaties signed and executed between them and early colonists are legally binding and should be upheld—

[75] Will Kymlicka, *Liberalism Community and Culture*, (Oxford: Clarendon Press, 1989) at 146–9.
[76] See the comprehensive discussion in Shacter, above n 56.
[77] See Macklem, above n 46; Kent McNeil, 'Envisaging Constitutional Space for Aboriginal Governments' (1993) 19 *Queen's Law Journal* 95–135.

whatever the changing *nomos* of settler societies. The critical pragmatist approach to legal decision making thus could be seen to have undermined the bindingness of these treaties, undermining the *restraints* these treaties should have had upon political decision-makers. Had they not been excluded from the core 'rules' at the heart of a constitutional democracy governed according to the rule of law, there would be nothing intrinsically objectionable about the rule of law as the law of rules in relation to Aboriginal claims—in fact, quite the opposite.

However, most historical treaties and agreements are, by definition, incomplete and thus subject to interpretive construction. To form the basis of any contemporary institutional arrangements—including the coexistence of Aboriginal and European law for example—they have to be updated, revised and re-interpreted in light of contemporary circumstances. So it is hard to escape the need to expand upon and supplement rules emerging from such agreements, as indeed settlers did—cynically—to suit their own purposes (when not simply ignoring them). But less cynically, it is unclear whether the actual rules which emerged from these treaties best serve Aboriginal interests *today*. Insisting on the validity of rules determined in distant circumstances, prior to the expansion of settler colonies or the worst excesses of 'state-building', might prove favourable to Aboriginal claims in some contexts. However, such treaties were usually signed in conditions of unequal bargaining power (with some notable exceptions eg. the Treaty of Waitangi), and are now very distant from contemporary conditions and realities they could never anticipate.[78] A strict rules approach could thus still disadvantages Aboriginal claims, either by perpetuating sub-optimal arrangements due to unequal bargaining power, or by ignoring new kinds of disadvantage or injustice due to changed circumstances. Moreover, why should tribes or clans who never signed treaties and agreements have their claims excluded from consideration? An approach hinging on pre-existing treaties discriminates unfairly against them.[79] The underlying principles or norms of such treaties might still be useful in some other form, but that becomes then a very different interpretive approach.[80]

So there is nothing *intrinsically* wrong with rule-based approaches to Aboriginal claims. However, complaints of 'divided law' and reverse discrimination, along with the increased costs of multiple jurisdictions, disrupted expectations, and the 'politicization' of courts, have tended to be associated with interpretive stances rooted in a rules-based approach.[81] Problems flow from the rule of law as critical pragmatism as well, as we have seen. However, at least in recent times, the former has appeared to be the more hostile to Aboriginal aspirations. We can test this by returning briefly to our consideration of the cases examined above in section 3.

[78] See the helpful discussion in Richard Mulgan, *Maori, Pakeha and Democracy* (Auckland: Oxford University Press 1989).
[79] Kymlicka, above n 4 at 120.
[80] Mulgan, above n 78 at 102–21.
[81] To wit, Moens '*Mabo* and Political Policy-Making by the High Court', in Stephenson and Ratnapala above n 8 at 50, 59–60; Cooray, 'The High Court in *Mabo*' in Goot and Rowse above n 8 at 82–95.

Mabo represents a dramatic example of the overturning of previously unassailable assumptions and precedent concerning Aboriginal land rights (at least in Australia).[82] The recognition of native title in *Mabo* was, however, tightly circumscribed, and the scope for more ambitious claims left unclear. Moreover, the power of the state to regulate and extinguish title, given certain conditions, was left intact. This overarching power of the state is difficult to square with alternative regulative and law making power residing in Aboriginal communities. In fact, historically, maintaining the rule of law has been invoked by the state as justifying the extinguishment and/or regulation of Aboriginal practices and laws. Problems arise between the conflicting jurisdictions of states, the federal government and different Aboriginal communities, given the often conflicting value systems in play. Namely, that if federal or state power was excluded from Aboriginal communities, the spheres in question would, in an important sense, be *unregulated*. That is, the rule of law itself would be violated. This assumes there are no Aboriginal laws capable of regulating or governing local practices, and courts abhor a legal vacuum.[83]

Remember in *Walker* Mason CJ argued that there could be 'no alternative body of law' operating alongside Australian law. The recognition of Aboriginal law, and thus of some form of prior Aboriginal jurisdiction in matters other than land law, risked offending basic principles of equality before the law. But the central thrust of Mason's argument must be as suggested above; a fear that the rule of law would be violated if Aboriginal jurisdiction was admitted. If criminal statutes do not apply to Aboriginal people in the way they do to non-Aboriginal people, then Aborigines would be *unregulated* by criminal law. This must be the Court's concern because different treatment for similar conduct, on its own, surely cannot 'offend' the basic principle of equality before the law. Equal treatment is not, in every instance, synonymous with identical treatment, for there is the crucial question of equal in relation to what (and before which law)? The important point here is that Aboriginal law is assumed to be irrelevant to considerations of equality before the law.[84] But it is precisely this assumption which is contestable, and which had been given such careful consideration in *Mabo*. The counter-claim is that, given historical, social and economic circumstances, Aboriginal interests can only be treated equally if, in addition to

[82] See above n 9.

[83] See McNeil, above n 77 at 124; Cf. *Canadian Pacific Ltd* v *Matsqui Indian Band* (1995) SRC 3 113ff.

[84] Mason implies that the scope of criminal law deserves special considerations. This raises important questions as to why the criminal law should be especially overriding, whatever the scope for legal pluralism in other domains. The Canadian government, for example, has insisted on the Criminal Code prevailing, to a certain extent, over self-government arrangements generally—though this remains to be seen as negotiations develop. In the US, tribal courts have some exclusive and/or concurrent criminal jurisdiction involving Indian defendants (subject to governing federal statutes), but none over non-Indians. See Pommersheim, above n 5 at 332–3, 356–60. I am grateful to Susan Mendus for pointing out the distinctive problems raised by the criminal law in relation to the general themes of this paper, though I can't deal with them in any detail here (but see below n 85). On recent attempts at coordinating Aboriginal and 'Australian' law, see Coombs, above n 8 at 118–130.

equal civil and political rights, such considerations are relevant.[85] Hence the need for a more dynamic and critical application of the principle of equality. This might be achieved by a political decision to establish a rule which simply directs courts to take such considerations into account. But since rules must always be interpreted, this strategy would have to be supplemented by other interpretive commitments, ones based on a different understanding of the relations (and history) between the law and Aboriginal people.

What would a truly postcolonial interpretive regime look like, given the political and legal materials at hand? Legal and political regimes take Aboriginal claims seriously, I want to argue, in so far as they give the greatest amount of space possible for Aboriginal communities to negotiate their protection from, and engagement with, the wider political community. The question then is not the degree to which Aboriginal sovereignty can mimic the national sovereignty (once) exercised by nation-states. Their sovereignty, existing prior to and independent of European forms, is not reducible to those categories (nor explainable by them), though it is coordinate with them.

In *Walker*, Mason CJ emphasized the continuing 'legislative competence' of the Commonwealth to regulate or affect the rights of Aboriginal people without their consent or acceptance. So the protection of the rule of law includes the paramountcy of Parliament to regulate and affect Aboriginal interests without their consent. The latter part of this claim, whatever its status in law, is clearly unacceptable to Aboriginal people and cannot form the basis of any possible interpretive regime which might govern relations between Aboriginal communities and the state. The matter of legislative competence is more complex. The legislative competence and supremacy of Parliament is, of course, already subject to various limitations in Australia given the federal structure. In so far as federalism is a 'regime of multiple loyalties'[86], the challenge is to adapt and accommodate this 'legislative (omni) competence' to Aboriginal aspirations, and the recognition of a more diverse body of law.

Imaginative possibilities are at hand. In Canada, the Supreme Court has established a justificatory threshold (in *R* v *Sparrow*)[87] that government must meet in order to legitimately modify 'existing' Aboriginal rights (which have been recognized in the Canadian constitution). More significantly, it might give effect to a different interpretation of the distribution of power within the Canadian state, which has traditionally simply assumed provincial and federal sovereignty over Aboriginal people, whatever the disputes between the former.[88] The 'Sparrow test' signals to legislators the manner in which legislation affecting Aboriginal

[85] It is clear that equal protection requirements have included special measures directed at the particular circumstances of Aboriginal disadvantage, which might include 'discrimination' against non-Aboriginals. See the *Native Title Act No. 110. 1993*, p. 3. Note that such considerations are relevant to the criminal law; eg. in the Northern Territory and South Australia, the liklihood of customary punishments has been taken as mitigating circumstances when determining sentencing orders. This is discussed extensively in the *The Recognition of Aboriginal Customary Laws*, above n 35 at 351–98; see also Mildren J in *R* v *Minor* (1992) 2 NTLR 183, at 193–4.

[86] Cited in Macklem, above n 46 at 424.

[87] (1990) 1 SCR 1075.

[88] Macklem, above n 46 at 417–25. For the US see Frickey, above n 2 at pp. 424–5.

rights will be interpreted, including the conventions, principles, and sources the Court will appeal to. This *might* become an interpretive regime which disciplines legislatures and interest groups in ways favourable to Aboriginal people. In establishing the justificatory test in the manner that it has, it leaves open the possibility that if Aboriginal people can prove that Aboriginal and treaty rights *are* regulated by Aboriginal law, federal laws might not be able to impinge on them.[89] However the burden of proof for the recognition of customary law remains with the people alleging its resilience.[90] And this burden is a significant one given the practical difficulties of translating Aboriginal beliefs into admissible evidence at law, and the often radical differences between Aboriginal and non-Aboriginal beliefs about the very nature of law.

The point is not that some *a priori* account of 'Aboriginal law' should prevail in each and every case involving Aboriginal people, since like any kind of law it changes and adapts to new circumstances, as well as varies in form and resilience from community to community. The diversity amongst Aboriginal people in contemporary Australia, including the distinctive situation of urban Aborigines, needs to be recognized. Furthermore, the application of customary law in mixed communities—where victims, for example, might not be members of the Aboriginal community—is fraught with difficulties. But Aboriginal law is deserving of a presumptive consideration where it is relevant for a particular Aboriginal community, just in so far as it is a valid source of law (recognized by the common law) and a legitimate part of the complex constitutional structure of the postcolonial state.

Aboriginal communities, like other communities in liberal states, cannot insulate themselves from larger trends and movements (for example, affecting the interests of women[91] and young people), whatever the scope of self-government. The attempts by Aboriginal women's groups in Australia and Canada, for example, to seek protection from domestic violence has involved appeals to *both* Aboriginal and western norms and means. But denying the salience of customary law, or indeed blaming it for justifying such violence, has not been part of their claim—quite the opposite.[92] Securing women's interests has not been assumed to be incompatible with strengthening Aboriginal self-government.

[89] As McNeil argues, above n 77; cf. Macklem, above n 46 at 417–8, 451.

[90] 'Proving' the existence of customary law again raises problems to do with the intelligibility of one legal system to the other. See *The Recognition of Aboriginal Customary Law*, above n 35 chp 24 *passim*; G. Torres, K. Milpun, 'Translating Yonnondio By Precedent and Evidence: The Mashpee Indian Case' (1990) 6 *Duke LJ* 25; Michael Asch and Catherine Bell, 'Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of Delgamuukw', (1994) 19 *Queen's Law Journal* 503.

[91] On this important and complex issue see Mary Ellen Turpel, 'Home/land', (1991) 10 *Canadian Journal of Family Law* 17–40; A. Bolger, *Aboriginal Women and Violence* (Darwin: NARU, 1991).

[92] See the fascinating discussion of 'bullshit traditional violence' in Bolger, above n 91; and John C. Upton, 'By Violence, 'By Silence, By Control: The Marginalization of Aboriginal Women under White and 'Black' Law', (1992) 18 *Melbourne University LR* at 867–873. Also Turpel, above n 91.

9 *The Limits of Recognition*

It is an important question to ask whether even if greater jurisdiction was accorded to Aboriginal communities to govern themselves according to their laws and customs, how far courts and governments would allow them to deviate from western norms. It depends, ultimately, on the constitutional framework and other political norms of the particular country. Aboriginal claims for self-government are not, I have claimed, best understood as simply expressions of romantic nationalism extended to national minorities. But it does not follow, therefore, that there is *no* possibility for some form of collective autonomy on the part of Aboriginal people within a generally liberal constitutional order. Conflicts between liberal principles and Aboriginal practices will occur, but not always in terms of a zero-sum game.

Consider the issue of traditional punishments and their relation to civil rights and European law more generally (an issue which has attracted considerable attention in Australia and Canada recently). The whole question of punishment in Aboriginal law is handled differently than in 'European' law, the detail of which we cannot examine here. The important point is that disputes arise and are resolved with reference to the general moral framework of Aboriginal law, the goal of which is to rebalance relations upset by the offence or dispute. Punishments range from 'spearing' to duelling, shaming, compensation, and banishment. Failing to carry out such punishments can mean a dispute not being 'closed off', and thus perpetuate the conflict and sense of injustice felt by the victim, the families involved and the community as a whole.[93]

Many of these practices, and certainly the beliefs underpinning them, continue to be relevant in a number of Aboriginal communities today. Perhaps the most controversial of these has been spearing. This involves the offender being speared in the thigh or leg in a non-lethal way and in controlled circumstances. It has been made even more controversial given the fact that customary law does not always recognize that it is only the offender who should be punished, but sometimes the various kin relations as well. Thus blame and responsibility are distributed differently than in European systems. Some of these elements appear to violate the principles and spirit of the general criminal law, as well as aspects of the UN Declaration of Human Rights—at least in the case of spearings and beatings. Spearing might also simply be considered a form of torture, like clitoridectomy for example, and thus condemnable whatever the cultural circumstances.[94]

Now spearing is a form of punishment and not, strictly speaking, part of an initiation rite or ceremony required of all community members, or applicable exclusively to one sex. Nor is it meant to permanently disable the offender.[95] The circumstances of it occurring are, rather, regulated and mediated by communal

[93] See the-case-study presented by Deborah Bird Rose, *Dingo Makes us Human* (Melbourne: Cambridge University Press, 1992) at 153–64.

[94] See Amy Gutmann 'The Challenge of Multiculturalism', (1993) 22 *Philosophy and Public Affairs* at 195–6.

[95] See the discussion and references by Mildren J, above n 85 at 195–7.

processes which include both the victim and the offender—the latter usually in light of social opinion and pressure. It is justified as being a more appropriate punishment (in some but not all circumstances) compared to non-Aboriginal alternatives, namely imprisonment. This seems a reasonable position given the importance Aboriginal people place upon the socializing and (re)integrative effects of clan and/or kin networks, and the vast over-representation of Aboriginal people in Australian prisons.[96]

The explicit toleration of non-lethal spearing is, however, a difficult issue within the context of the wider legal framework. According to the common law, consent does not make deliberate woundings or beatings lawful, and indeed was rejected as a defence in one case concerning such a 'payback'.[97] And yet the practice of Australian police and prosecution services has been to take into consideration the voluntary nature of these punishments when deciding whether prosecution is warranted—prosecution has, in fact, been extremely rare.[98] However, explicit recognition on any wider scale has not been pursued.[99] Any leeway given has been at the discretion of particular judges and officials, thus engendering considerable uncertainty and confusion about the relevance or not of Aboriginal law in relation to the criminal law.[100] For the most part, in the states where traditional punishments are carried out, police and courts have allowed them to occur with the understanding that any 'serious' woundings are liable to being prosecuted as offences under Australian law. Courts in the Northern Territory have also taken into account the probability of traditional punishments in the sentencing orders of Aboriginal offenders, though they have not incorporated them into the sentences themselves, for various legal and practical reasons.[101]

The point is not that *every* aspect of Aboriginal beliefs about punishment is presumptively valid. It is important to remember the dynamic nature of the law within which they are set. Punishments are often transmuted into different kinds of compensation in the course of negotiations between the parties involved. As well, Aboriginal people have shown a willingness to reconsider their beliefs about punishment—given generally liberal concerns about human rights—in ways that

[96] *Royal Commission into Aboriginal Deaths in Custody* 5 vols. (Canberra: Australian Government Publishing Service, 1991).

[97] *Mamarika* v *The Queen* (1982) 42 ALR 94.

[98] *The Recognition of Aboriginal Customary Law*, above n 35 at 364.

[99] *The Recognition of Aboriginal Customary Laws*, above n 35 at 287. See K. Maddock, 'Two Laws in One Community' in R.M. Berndt (ed) *Aborigines and Change*, (Canberra: AIAS, 1977); N. Williams, *Two Laws: managing disputes in a contemporary Aboriginal community* (Canberra, 1987); *Three Years On.* (Canberra: Commonwealth of Australia, 1995) 148–178.

[100] See *Royal Commission into Aboriginal Deaths in Custody* 4, above n 96 at 101; Jenny Blokland, '*Minor*: Case and Comment', (1992) 16 *Criminal Law Journal* 363–4.

[101] *The Recognition of Aboriginal Customary Law*, above n 35 at 364–8, 372–3; and detailed case studies at 351–9; see the interviews with Aboriginal Legal Aid lawyers in Jon Faine, *Lawyers in the Alice: Aboriginals and Whitefellas' Law* (Sydney: Federation Press, 1993). See *Minor*, above n 85 at 193–195. In *Minor* the Crown appealed against sentences imposed in which evidence on the inevitability of 'payback' was taken into consideration by the sentencing judge. Mildren J rejected appeal and argued the payback was not unlawful, and that the original sentence was justified in taking into consideration the appliation of customary law: 'This was no occasion for blindly following an unthinking conservative path; it required, as this Court often has in the past been called upon to do when dealing with the approach to Aboriginals and the criminal law, to find a solution by means which ensured that justice was done, even if the means adopted were unusual or novel' (at 197).

many other courts and governments have not. In one community proposal, spearing was not banned outright, but the option of appealing to a (non-Aboriginal) magistrate or judge is provided, if the offender thinks the punishment is too severe.[102] Programs have also been established to allow for an exchange between customary law and European law, whereby non-customary instruments—such as community service orders—can be applied towards customary ends. But these kinds of negotiations are only possible where customary law is seen as a body of law already existing alongside 'Australian' law. And this is precisely what Mason CJ denied—'in law'—above. The emphasis on meaningful negotiation needs to be emphasized. I am not defending customary punishments (especially spearing) as an alternative to imprisonment as such, but rather the recognition of the law within which they are set.

At the margins there will always be some potential for conflict between the two legal systems. But Aboriginal law cannot be presumed to be necessarily incommensurable with, because fundamentally opposed to, civil and political rights. These are questions which touch on the shape and limits of self-government, and not its desirability *tout court*. The challenge is to establish how customary law and 'Australian' law can best work alongside each other equally, given the complex circumstances in which Aboriginal people find themselves in liberal constitutional states.

10 *Conclusion*

Some of these possibilities risk being overlooked given the way the spectre of indivisible sovereignty has been invoked in recent debates in Australia. The rather banal fact that the sovereignty of Australia is not justiciable in an Australian municipal court has been taken to rule out any reconsideration of the manner in which sovereignty was acquired, ie the *consequences* of that acquisition. But this is false. If the idea of there being a coordinate sovereignty between Aboriginal people and the Crown is coherent—and courts have increasingly recognized this to be the practical framework within which these issues can be considered[103]—then the possibilities for the recognition of Aboriginal law, and self-government more generally, remain open. The fact that the Court declares itself unable to pronounce on the question of sovereignty in any kind of comprehensive way, rightly or wrongly, does not rule out the rethinking of Australian sovereignty *qua* Aboriginal claims in other forums.[104] A constitutional recognition of Aboriginal rights, for example, would explicitly challenge the mythology of the 'act of state' doctrine

[102] The Yirrkala proposals, discussed in *The Recognition of Aboriginal Customary Law*, above n 35 at 377; and Coombs, above n 8 at 118–130.

[103] See *Mabo*, above n 8; Note that Brennan J in uses the phrase 'a change in sovereignty' throughout the judgement (eg. at 426, 428, 429, 431) to refer to events dating from 1788. This implies there was a from of prior sovereignty (not necessarily *qua* international law, but certainly *qua* English *imperial* law and practice) held by Aboriginal people—and depending on the context, could continue to be.

[104] In fact, the Court has not been consistent about whether or not it is competent to consider sovereignty issues (as argued in *Mabo*, and constantly reiterated by various commentators who reject Aboriginal sovereignty). It certainly considered them in *Walker*, as we have seen.

usually invoked to confirm the indivisible sovereignty of Australia,[105] and force courts to assess the constitutional doctrines flowing from such an assumption.

This is, in a sense, a point to do with public justification. Governments can not be allowed to simply *assert* that any presumptive rights have been extinguished or expropriated. They must justify such claims, and the courts remain *a* forum (not the only one) within which such justification and counter-claims can be put to the test. And since justification moves within particular horizons and frameworks of interpretation, whether in the public space of parliament or the High Court, and thus is subject to shifting standards and reference points in time, invocations of 'the public good' or precedent will not have necessarily consistent effects. Precedents (and established presumptions), for example, might be less binding precisely because they can no longer be sustained in a community in the process of reconfiguring its interpretive commitments in law.[106] *Mabo*, possibly, represents a new threshold, a different framework within which Aboriginal law and non-Aboriginal law are brought before each other. It might be then that certain jurisdictional rights, sourced from the very same place as native title, survive within or alongside Crown sovereignty and are, in the sense suggested above, coordinate with it.

Some final points. Courts are not capable of designing new institutions, or administering policy. There are strict limits as to what they can understand, consider and deliver. The development of the actual instruments of self-government will occur outside of the formal domains of law. Perhaps the attention and effort paid to winning legal battles is damaging, in the long run, to both Aboriginal interests and the legal system as a whole. The juridification of claims and arguments can ossify debate, and place unsustainable burdens upon unelected and generally narrow-minded judges to reconcile issues better handled in more overtly political forums.

I am, in general, sympathetic with such concerns. The potential for greater recognition of Aboriginal laws and customs depends on the willingness of federal and state governments to negotiate with Aboriginal communities over the terms of any such recognition—which might range from devolving down to Aboriginal groups the delivery of core local services to larger and more symbolic gestures. But law does have something to contribute to this process.[107] Consider some counterfactuals: would the Australian government have responded to Aboriginal claims without *Mabo*? How would the Canadian government act without *Sparrow*?

[105] See Slattery, above n 42 at 691–3 for a critique of the 'mythology' of the act of state doctrine; and Macklem, above n 46 at 451. Cf. Justices Dean and Gaudron's remarks on acts of state in *Mabo*, above n 8 at 445; cf. Brennan J at 417, 431–2.

[106] As Postema writes: 'Our common past can be accusatory. Our past can complicate and threaten, it can invite shame, regret and remorse. Practical attention to the past is not an exercise in theoretical explanation, but of uncovering the moral significance of that past for our present and future. That past, all of it, including the mistakes, is ours' (italics suppressed). Thus, '[b]eing true to one's community and keeping faith with one's fellow members ... may call for rejection of the demands of precedent'. Gerald Postema, 'On the Moral Presence of Our Past' 36 (1991) *McGill Law Journal* at 1179, 1178. Note that a failure to respect precedent was one of the critiques levelled at the *Mabo* decision. Brennan J's discussion of precedent is extremely interesting in this regard; see *Mabo*, above n 8 at 416–7 422–4 and especially at 429.

[107] Cf. Macklem, above n 46 at 393–5.

In the US, what would the situation be without even the minimal constraints imposed by the Marshall decisions?

The political theories underpinning the various interpretive regimes affecting Aboriginal interests in law have real enough consequences for Aboriginal claims generally. Constitutions fix certain institutional and conceptual boundaries in place, no matter how susceptible constituent parts are to reinterpretation. It might be that legal decisions and constitutional reform, at best, are only ever able to provide incentives for governments and business to negotiate with Aboriginal communities, as well as establish a baseline for positions adopted at the bargaining table. But these are not unsubstantial effects. Strengthening Aboriginal communities and institutions ensures that any subsequent dialogue is at least one in which Aboriginal interests are presented—as much as is possible—in their own terms. This sets a considerable challenge for thinking about the kind of political community that would be the outcome of any such negotiations. Would it be simply a *modus vivendi* between irreconcilable cultural differences piled upon unresolvable historical grievances? What incentives, other than mutual advantage and judicial coercion, would non-Aboriginal people have to negotiate fairly and in good faith? Though the legal pluralism advocated above does not provide ready-made answers to these difficult questions, it is, I think, a necessary condition of any potential response.