
Self-Government and the Inalienability of Aboriginal Title

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Aboriginal title to land, as defined by the courts, has a number of *sui generis* aspects. Prominent among these is its inalienability, other than by surrender to the Crown. Two explanations are usually given for this: the need to protect Aboriginal peoples from exploitation by unscrupulous European settlers, and the incapacity of the settlers to obtain title to land otherwise than by Crown grant.

While acknowledging that the need for protection of Aboriginal lands was important historically, this article argues that it is paternalistic to rely on this explanation for inalienability today. The incapacity of settlers is a more satisfactory rationale for inalienability, both theoretically and doctrinally. However, instead of basing that incapacity on the legally and historically flawed view that settlers can only acquire lands from the Crown, this article presents an explanation that is based on the nature of Aboriginal title itself.

Aboriginal title is communal, and entails decision-making authority vested in the Aboriginal nation that holds it. This authority, it is argued, is governmental in nature. It can therefore only be acquired by a political entity that has equivalent decision-making capacity, such as another Aboriginal nation or the Crown. As subjects of the Crown, British settlers have always lacked the capacity to acquire a title that has a governmental dimension. Explained in this way, inalienability only prevents Aboriginal nations from transferring Aboriginal title itself to private purchasers. It should not preclude the creation of lesser private interests by Aboriginal nations, as long as they retain their Aboriginal title. As a result, inalienability should not be an impediment to the economic development of Aboriginal title lands.

Le titre foncier autochtone, tel que défini par les tribunaux, possède un certain nombre d'aspects *sui generis*. Parmi eux se trouve son caractère inaliénable, autre que par cession à la Couronne. Deux explications sont habituellement avancées relativement à cette particularité: le besoin de protéger les peuples autochtones de l'exploitation par certains colonisateurs européens malhonnêtes, et l'incapacité de ces derniers d'obtenir un titre foncier autrement que par une concession de la Couronne.

Tout en reconnaissant l'importance historique du besoin de protéger les terres autochtones, cet article affirme qu'il est aujourd'hui paternaliste de se baser sur cette explication pour justifier leur caractère inaliénable. L'incapacité des colonisateurs offre un raisonnement beaucoup plus satisfaisant à cet égard, et ce tant au niveau théorique que doctrinal. Cependant, plutôt que de baser cette incapacité sur l'idée—légalement et historiquement fautive—selon laquelle les colonisateurs ne pouvaient acquérir de titre foncier que par la Couronne, cet article présente une explication basée sur la nature même du titre foncier autochtone.

Le titre foncier autochtone est de nature communautaire, impliquant une autorité décisionnelle investie dans la nation autochtone qui le détient. Cette autorité, affirme-t-on, est de nature gouvernementale. Elle ne peut donc être acquise que par une entité politique ayant une capacité décisionnelle équivalente, tel qu'une autre nation autochtone ou la Couronne. Or, à titre de sujets de la couronne, les colonisateurs anglais ont toujours manqué cette capacité d'acquérir un titre foncier ayant cette dimension gouvernementale. Expliquée de cette manière, l'inaliénabilité empêcherait seulement les nations autochtones de transférer les titres fonciers à des acheteurs privés. Cela ne devrait donc pas écarter la création d'intérêts privés moindres par les nations autochtones, dans la mesure cependant où elles conservent leur titre foncier. Par conséquent, le caractère inaliénable de leur titre ne devrait pas gêner le développement économique des territoires autochtones.

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Introduction

The inalienability of Aboriginal title, other than by surrender to the Crown, is a central tenet of the common law. This rule has been affirmed repeatedly by courts in leading decisions in Canada,¹ Australia,² and New Zealand.³ Indian title has also been held to be inalienable in the United States,⁴ where after the American Revolution it could only be extinguished by the federal government.⁵ But what is the basis for this restriction on alienation? Did it originate from British colonial policy that was eventually incorporated into the common law, or are there more fundamental doctrinal or theoretical justifications for it?

When the rule against alienation of Aboriginal title is traced back to the original British colonies in North America, one discovers considerable confusion over the validity of private purchases of Indian lands.⁶ In the American colonies, the matter was initially dealt with by locally enacted legislation.⁷ By at least the middle of the eight-

¹ See e.g. *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 320-22 (Judson J.), 377-79, 381-85 (Hall J., dissenting), 34 D.L.R. (3d) 145 [hereinafter *Calder* cited to S.C.R.]; *Guerin v. R.*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, 55 N.R. 161 [hereinafter *Guerin* cited to S.C.R.]; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, 22 N.R. 161 [hereinafter *Delgamuukw* cited to S.C.R.]; *Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)*, [2000] 2 C.N.L.R. 330 at 336, 338-39 (B.C. S.C.), aff'd [2001] 1 C.N.L.R. 310 (B.C. C.A.); *Chippewas of Sarnia Band v. Canada (A.G.)* (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, [2001] 1 C.N.L.R. 56 (C.A.) [hereinafter *Chippewas of Sarnia* cited to D.L.R.]; *Osoyoos Indian Band v. Oliver (Town of)* (2001), 206 D.L.R. (4th) 385 at paras. 42, 46, 2001 SCC 85, Iacobucci J.

² *Mabo v. Queensland (No. 2)* (1992), 175 C.L.R. 1 (H.C. Austl.) [hereinafter *Mabo*]; *Mason v. Tritton* (1994), 34 N.S.W.L.R. 572 at 583-84 (C.A.), Kirby P.; *Commonwealth v. Yarmirr* (1999), 168 A.L.R. 426 at 435 (Beaumont and von Doussa JJ.), 496 (Merkel J., dissenting in part) (Full F.C.) [hereinafter *Yarmirr*].

³ *R. v. Symonds* (1847), [1840-1932] N.Z.P.C.C. 387 (S.C.) [hereinafter *Symonds*]; *Nireaha Tamaki v. Baker*, [1901] A.C. 561 at 576, 579 (P.C.). In New Zealand, inalienability is usually described in terms of the Crown's "right of pre-emption" of Maori lands. See *Wallis v. Solicitor-General for New Zealand*, [1903] A.C. 173 at 179, 187-88 (P.C.), and discussion in P. McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991) at 78-80, 101-04, 321-22.

⁴ See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823); *United States v. Paine Lumber*, 206 U.S. 467, 27 S. Ct. 697 (1907) [hereinafter *Paine Lumber*].

⁵ See especially *Beecher v. Wetherby*, 95 U.S. 517, 24 L. Ed. 440 (1877); *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339, 62 S. Ct. 248 (1941); *Oneida (County of) v. Oneida Indian Nation*, 470 U.S. 226, 105 S. Ct. 1245 (1985).

⁶ For more detailed discussion, see K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 221-35.

⁷ See R.H. Akagi, *The Town Proprietors of the New England Colonies: A Study of Their Development, Organization, Activities and Controversies, 1620-1770* (Philadelphia: University of Pennsylvania

eenth century, the imperial government in Westminster had adopted a policy forbidding these purchases, expression of which can be found in instructions to various colonial governors.⁸ This policy was applied generally across British North America by the *Royal Proclamation* of 1763.⁹

Although judges have often referred to the *Royal Proclamation* when affirming the inalienability of Aboriginal title,¹⁰ it is nonetheless clear that a common law basis for the rule exists as well. In *Johnson v. M'Intosh*, the leading American case on the issue, Chief Justice Marshall gave three reasons for holding private purchases of Indian lands to be invalid, the last and apparently least important of which was a violation of the *Royal Proclamation*.¹¹ In *Delgamuukw*, the Supreme Court of Canada repeated the standard view that Aboriginal title is inalienable other than by surrender to the Crown, without reference to the *Royal Proclamation* in that context.¹² In Australia,

nia Press, 1924) at 22-30; W.C. MacLeod, *The American Indian Frontier* (London: Kegan Paul, Trench, Trubner, 1928) at 196-207; M. Harris, *Origin of the Land Tenure System in the United States* (Ames: Iowa State College Press, 1953) at 157-70.

⁸ See "Lords of Trade to the Governor of New York" (18 September 1753) in E.B. O'Callaghan, ed., *Documents Relating to the Colonial History of the State of New York*, vol. 4 (Albany: Weed, Parsons, 1853-87) 854, and instructions to the governors of New York (1755), Virginia (1756), and several other colonies (1761), in L.W. Labaree, ed., *Royal Instructions to British Colonial Governors, 1670-1776*, vol. 2 (New York: D. Appleton-Century, 1935) at 671, 687.

⁹ (U.K.), 3 Geo. III, reprinted in R.S.C. 1985, App. II, No. 1. See B. Slattery, *The Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of Their Territories* (D.Phil. thesis, Oxford University, 1979) at 310-12; J. Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Research Branch, Indian and Northern Affairs Canada, 1981) at 355-71.

¹⁰ See e.g. *St. Catherine's Milling and Lumber v. The Queen* (1888), 14 App. Cas. 46 at 53-55 (P.C.); *Guerin*, *supra* note 1 at 376-83, Dickson J.

¹¹ *Johnson v. M'Intosh*, *supra* note 4. See section II.C, below. One possible reason why the *Royal Proclamation* has not been given much prominence by American courts is that it was a prerogative document issued by George III, partly intended to contain the westward expansion of the colonies on the East Coast. On the relationship of the *Royal Proclamation* and the 1774 *Quebec Act* (14 Geo. III, c. 83, reprinted in R.S.C. 1985, App. II, No. 2) to the American Revolution, see J.M. Sosin, *Whitehall and the Wilderness: The Middle West in British Colonial Policy, 1760-1775* (Lincoln: University of Nebraska Press, 1961). According to a prominent Indian law scholar in the United States, "In almost two hundred years of American legal history, the Proclamation has been cited by the United States Supreme Court only eleven times, and usually only as a passing historical reference"; R.N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs" (1989) 69 B.U.L. Rev. 329 at 367.

¹² *Delgamuukw*, *supra* note 1 at para. 113 (Lamer C.J.C.), para. 190 (La Forest J.). See also *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119 at para. 152, 147 D.L.R. (4th) 1, 211 N.R. 241 [hereinafter *Opetchesaht Indian Band*], where Major J. said that "Both the common law and the *Indian Act* guard against the erosion of the native land base through conveyances by individual band members or by any group of members" [emphasis added]. In *Calder*, *supra* note 1, the Court had split evenly on the question of whether the *Royal Proclamation* even applies in British Columbia. In *Del-*

where the *Royal Proclamation* does not apply, the High Court in *Mabo* accepted without question that Native title (as Aboriginal title is called there) cannot be transferred out of the Indigenous community to which it pertains.¹³ In New Zealand, the 1840 *Treaty of Waitangi* between the Maori chiefs and Britain assured the Crown of a right of pre-emption of Maori lands; nevertheless, the Supreme Court held in *Symonds* that the common law would have prevented settlers from acquiring those lands directly.¹⁴

Given that the general prohibition against alienation of Aboriginal, Indian, Native, and Maori title has a common law basis, it is worth considering legal justifications for the rule. As we shall see, two rationales are usually given: first, the need to protect Indigenous peoples from unscrupulous European settlers, and second, the incapacity of the settlers to acquire lands other than by Crown grant.¹⁵ It will be argued that the first rationale is derived from a British colonial policy that, whatever its justification historically, is paternalistic and acts as an impediment to the economic development of Indigenous lands today. However, the second rationale is rooted in principle and has the potential to contribute to our understanding of the relationship between Indigenous land rights and self-government. Moreover, this rationale can be used to provide jurisdictional space for Indigenous peoples to rely on their own laws to govern the alienability of land rights within their territories, thereby facilitating the economic development of their lands without surrendering them to the Crown. The second rationale will be the main focus of this article, but first let us briefly consider the protection rationale.

I. The Protection Rationale

There can be no doubt that part of the motivation behind the British North American policy of prohibiting private purchases of Indian lands was the protection of Indian nations. The *Royal Proclamation* stated expressly that the reason why only the Crown could purchase Indian lands was that “great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests,

gamuukw, while the British Columbia Court of Appeal (1993), 104 D.L.R. (4th) 470, held that it does not apply there, this issue was not addressed directly by the Supreme Court. See La Forest J.’s discussion of the proclamation (*Delgamuukw*, *ibid.* at paras. 200, 203). See also Lamer C.J.C.’s discussion (*Delgamuukw*, *ibid.* at paras. 61, 67, 114).

¹³ *Mabo*, *supra* note 2 at 59-60, 70 (Brennan J.), 88, 110 (Deane and Gaudron JJ.), 194 (Toohey J.). This aspect of the *Mabo* decision will be discussed below, text accompanying notes 143-50.

¹⁴ *Symonds*, *supra* note 3 at 388-90 (Chapman J.), 393-96 (Martin C.J.).

¹⁵ A third, related rationale is occasionally mentioned, namely “the Crown’s desire to control settlement”: *Chippewas of Sarnia*, *supra* note 1 at 168. See generally Sosin, *supra* note 11. See also the discussion of Martin C.J.’s judgment in *Symonds*, *ibid.*, in text accompanying notes 44-48.

and to the great Dissatisfaction of the said Indians.”¹⁶ The proclamation also stated that it was

just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having being ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.¹⁷

The protection of the Indian nations from frauds and abuses therefore went hand in hand with the Crown’s interests, in particular the security of its North American colonies.¹⁸

Canadian case law has accepted the protection explanation for the inalienability of Aboriginal title. For example, in *Guerin*, Dickson J. said that the provision in the *Indian Act*¹⁹ for surrender of reserve lands to the Crown goes back to the *Royal Proclamation*, confirming the “historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties.”²⁰ In *Canadian Pacific v. Paul*, a unanimous Court said that “[t]his feature of inalienability was adopted as a protective measure for the Indian population lest they be persuaded into improvident transactions.”²¹ Similarly, in *Mitchell v. Peguis Indian Band*, La Forest J. said that

¹⁶ *Supra* note 9 at 6. While the *Royal Proclamation* provided that Indian lands could also be purchased in the name of proprietary governments, the authority of those governments came from the Crown. See W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765-69) at 108, where proprietary governments are described as having been “granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties-palatine: yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother-country.” See also *Pen[n] v. Lord Baltimore* (1745), Ridg. T. H. 332, 27 E.R. 847 (Ch.).

¹⁷ *Supra* note 9 at 5. For further evidence of the protection rationale and discussion of this aspect of the *Royal Proclamation*, see Slattery, *supra* note 9 at 192-93, 199-203; Stagg, *supra* note 9 at 356-70.

¹⁸ News of the outbreak of Pontiac’s War in the spring of 1763 had no doubt reached London by the summer, heightening the need to provide security measures to the colonies by pacifying the Indian nations. See Slattery, *ibid.* at 200-201; Sosin, *supra* note 11 at 64-78.

¹⁹ R.S.C. 1952, c. 149, now R.S.C. 1985, c. 1-5.

²⁰ *Guerin*, *supra* note 1 at 383; see also Estey J. (*ibid.* at 392).

²¹ [1988] 2 S.C.R. 654 at 677, 53 D.L.R. (4th) 487 [hereinafter *Paul* cited to S.C.R.]. See also *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at paras. 33-35, 130 D.L.R. (4th) 193, 190 N.R. 89, McLachlin J. [hereinafter *Blueberry River Indian Band*].

legislative restraints on the alienability of Indian lands are but the continuation of a policy that has shaped the dealings between the Indians and the European settlers since the time of the Royal Proclamation of 1763. ... The sections of the *Indian Act* relating to the inalienability of Indian lands seek to give effect to this protection by interposing the Crown between the Indians and the market forces which, if left unchecked, had the potential to erode Indian ownership of these reserve lands.²²

These decisions all emphasize the historic policy basis of protecting Aboriginal title lands by making them inalienable other than by surrender to the Crown.²³

In *Delgamuukw*, the leading case on Aboriginal title in Canada, Chief Justice Lamer affirmed that both protection and settler incapacity are behind the inalienability of Aboriginal title. He said:

Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. I have suggested above that the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy “to ensure that Indians are not dispossessed of their entitlements” ... What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.²⁴

Lamer C.J.C. thus linked inalienability to an inherent limit he placed on Aboriginal title lands that prevents them from being used in ways that are irreconcilable with the attachment to the land that forms the basis for the title.²⁵ Apparently, both are intended to preserve the lands for future generations,²⁶ which is another way of expressing the protection rationale. To the extent that the inherent limit and inalienability are designed to prevent Aboriginal title holders from acting against their own best interests,

²² [1990] 2 S.C.R. 85 at 129-30, 133, 141, 71 D.L.R. (4th) 193, 110 N.R. 241 [hereinafter *Mitchell* cited to S.C.R.].

²³ See also *Chippewas of Sarnia*, *supra* note 1, esp. at 164, 168.

²⁴ *Delgamuukw*, *supra* note 1 at para. 129 [reference omitted]. See also *Delgamuukw*, *ibid.* at para. 113, where Lamer C.J. described inalienability as one of the *sui generis* dimensions of Aboriginal title. La Forest J. expressed the same view (*ibid.* at para. 190). See also *Hopton v. Pamajewon* (1993), 16 O.R. (3d) 390 at 398-400, 109 D.L.R. (4th) 449 (C.A.) [hereinafter *Hopton*]; *Opetchesah Indian Band*, *supra* note 12 at para. 38, Major J.

²⁵ *Delgamuukw*, *ibid.* at paras. 125-32.

²⁶ See *ibid.* at para. 128, regarding the inherent limit.

however, they contain an element of paternalism that may not be acceptable in modern Canadian society.²⁷

Looking beyond North America, we can see that the protection rationale has been used in other jurisdictions to justify the inalienability of Indigenous land rights. In New Zealand, for example, Chapman J. observed that the exclusive right of the Crown to extinguish Maori title

necessarily arises out of our peculiar relations with the Native race, and out of our obvious duty of protecting them, to as great an extent as possible, from the evil consequences of the intercourse to which we have introduced them, or have imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the Natives in a very short time.²⁸

For Chapman J., however, the protection rationale seems to have been based more on principles of morality than of law.²⁹ As we shall see, the main legal reason both he and Martin C.J. gave for the inalienability of Maori title was the incapacity of settlers to acquire it without the intercession of the Crown.³⁰

Historically, the paternalism inherent in the protection rationale for the inalienability of Aboriginal title may have been justified. Differences between Indigenous peoples' relationships with the land and European conceptions of land ownership no doubt resulted in a lack of mutual understanding when transactions took place between Indigenous people and European settlers.³¹ This in turn led to exploitation, the

²⁷ On the paternalism behind the inherent limit, see K. McNeil, "The Post-*Delgamuukw* Nature and Content of Aboriginal Title" in K. McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 102 at 116-22 [hereinafter McNeil, "Nature and Content"]. It is also important to note that neither inalienability nor the inherent limit diminish the status of Aboriginal title as a property right (see *ibid.*, esp. at 108-11, 116-22, 127-34).

²⁸ *Symonds*, *supra* note 3 at 391. See also *Mabo*, *supra* note 2 at 194, where Toohey J. found support for the protection rationale in Chapman J.'s judgment. While the protection rationale has not been given prominence in Australian jurisprudence (no doubt because there was no equivalent of the North American policy of protection that found expression in the *Royal Proclamation* of 1763), it was relied upon by the Colonial Secretary, Lord Glenelg, as a reason for denying the validity of John Batman's 1835 purchase of land from Indigenous people in the Port Phillip region of what is now Victoria. See McNeil, *Common Law Aboriginal Title*, *supra* note 6 at 224-25.

²⁹ "From the protective character of the rule, then, it is entitled to respect on moral grounds, no less than to judicial support on strictly legal grounds" (*Symonds*, *ibid.*).

³⁰ See text accompanying notes 40-50.

³¹ On these differences, see L. Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm'" in J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986) 243; W. Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill & Wang, 1983) at 54-81; Canada, *Report of the Royal Commission on Abo-*

kind of frauds and abuses that the *Royal Proclamation* of 1763 was designed to prevent.³² But while there may have been good reasons for this policy of protection in the past, one may ask whether a restriction on alienation that is based on paternalism is acceptable today. Nevertheless, it is of vital importance for Indigenous peoples to preserve the small land bases that they have managed to retain.³³ Inalienability is still an important means of ensuring that more of the lands they hold in common are not lost.³⁴ For this reason, there is value in a justification for inalienability that does not rely on paternalism. The incapacity of settlers rationale meets this need. Properly understood, it supports the status of Indigenous nations as self-governing political entities with control over their communally owned lands and natural resources.

II. Incapacity of Settlers and the Political Aspect of Aboriginal Title

A. Jurisprudential Explanations

In *Delgamuukw*, Chief Justice Lamer said that “the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants.”³⁵ One problem with this is that the notion that settlers could only acquire title to land by Crown grant is inconsistent with

iginal Peoples, vol. 2, *Restructuring the Relationship* (Ottawa: Minister of Supply and Services Canada, 1996) at 424-64 [hereinafter *RCAP Report*].

³² See above note 16 and accompanying text.

³³ In its report, the Royal Commission on Aboriginal Peoples recommended that the land base of the Aboriginal peoples of Canada be *increased* in order “to facilitate Aboriginal economic self-reliance, cultural autonomy and self-government”: *RCAP Report*, *supra* note 31 at 574. Moreover, as maintenance of Indigenous land bases is probably essential to cultural preservation, emerging international norms may classify and protect “Aboriginal rights as inalienable human rights”. See P. Joffe, “National Implications and Potential Effects in Québec” in O. Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision* (Vancouver: Fraser Institute, 2000) 295 at 307-10. In some instances, the laws of Indigenous peoples themselves may also make their lands inalienable, even by surrender to the Crown. See K. McNeil, “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion” *Ottawa L. Rev.* [forthcoming] [hereinafter McNeil, “Extinguishment of Aboriginal Title”].

³⁴ In the United States, sale of “surplus” Indian lands and conversion of tribal lands into individual holdings that became alienable after a certain time had a disastrous impact on the Indian nations, causing loss of almost two-thirds of their lands in the period when this allotment policy was in place from 1887 to 1934. See D.S. Otis, *The Dawes Act and the Allotment of Indian Lands*, ed. by F.P. Prucha (Norman: University of Oklahoma Press, 1973); F.E. Hoxie, *A Final Promise: The Campaign to Assimilate Indians, 1880-1920* (Lincoln: University of Nebraska Press, 1984); C.F. Wilkinson, *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven: Yale University Press, 1987) at 19-23.

³⁵ *Delgamuukw*, *supra* note 1 at para. 129; see above note 24 and accompanying text.

both practice and precedent in many British colonies. On Pitcairn Island, for example, it appears that the settlers (who were actually the Bounty mutineers and their Polyneesian companions) did acquire lands for themselves by occupancy that gave rise to valid legal titles without Crown grants.³⁶ Similarly, in British Honduras (now Belize), British subjects occupied lands and acquired good titles against the Crown, by possession and statutory limitation.³⁷ In British West Africa and India, Englishmen were able to purchase lands directly from the local inhabitants.³⁸ Closer to home in what used to be New France, British subjects could acquire lands from the French Canadians, apparently without the intercession of the Crown.³⁹

In *Symonds*, the New Zealand Supreme Court provided more detailed explanations of why the British settlers there were unable to acquire Maori lands for themselves. Chapman J. held that this "restraint upon the purchasing capacity of the Queen's European subjects" originated from the corollary of the doctrine of tenures that "the Queen is the exclusive source of private title."⁴⁰ He elaborated as follows:

³⁶ See McNeil, *Common Law Aboriginal Title*, *supra* note 6 at 147-57.

³⁷ See *Attorney-General for British Honduras v. Bristowe* (1880), 6 App. Cas. 143 (P.C.), and discussion in McNeil, *Common Law Aboriginal Title*, *ibid.* at 141-47.

³⁸ For West Africa, see K. Bentsi-Enchill, *Ghana Land Law: An Exposition, Analysis and Critique* (London: Sweet & Maxwell, 1964) at 44-48, 60-65; R.W. James & A.B. Kasunmu, *Alienation of Family Property in Southern Nigeria* (Ibadan, Nigeria: Ibadan University Press, 1966) at 84-91; A. Allott, *New Essays in African Law* (London: Butterworths, 1970) at 298-338. For India, see *Freeman v. Fairlie* (1828), 1 Moo. Ind. App. 305, 18 E.R. 117 (Ch.); *Mayor of the City of Lyons v. East India Company* (1836), 1 Moo. P.C. 175, 12 E.R. 782; K.M. Chatterjea, *The Law Relating to the Transfer of Immoveable Property Inter Vivos* (Calcutta: Thacker, Spink, 1890) at 139-40.

³⁹ See *Drulard v. Welsh* (1906), 11 O.L.R. 647 (Div. Ct.), reversed on other grounds (1907), 14 O.L.R. 54 (C.A.). Provisions of both the 1760 *Articles of Capitulation of Montreal* (art. 35) and the 1763 *Treaty of Paris* (art. 4) provided expressly that French Canadians who decided to return to France or emigrate could sell their property to British subjects, see *Corinthe v. Séminaire de Saint-Sulpice* (1911), 21 B.R. 316 (Qc.), *aff'd* [1912] A.C. 872 (P.C.). These provisions, however, do not appear to have extended to French Canadians who chose to remain in Canada. See also the *Quebec Act*, *supra* note 11, s. 10, providing that persons who owned lands that they had a right to alienate *inter vivos* could leave those lands by will, "any Law, Usage, or Custom, heretofore or now prevailing in the Province, to the contrary hereof in any-wise notwithstanding." So the alienability of French Canadian lands (which both the *Drulard* and the *Corinthe* decisions seem to have accepted) would presumably have been due to French law (this is at least implicit in s. 10 of the *Quebec Act*) and the common law capacity of British subjects to purchase those lands. In other words, the land rights of the French Canadians were treated as private property, whereas the land rights of the Indian nations were not. See the references to the *Royal Proclamation* of 1763 (issued less than eight months after the *Treaty of Paris* was signed) *supra* notes 9, 16-18 and accompanying text.

⁴⁰ *Symonds*, *supra* note 3 at 391, 388. Note that Chapman J. acknowledged that this is subject to the "rules of prescription" (*ibid.* at 388).

Any acquisition of territory by a subject, by conquest, discovery, occupation, or purchase from Native tribes (however it may entitle the subject, conqueror, discoverer, or purchaser, to gracious consideration from the Crown) can confer no right on the subject. Territories therefore, acquired by the subject in any way vest at once in the Crown. To state the Crown's right in the broadest way: it enjoys the exclusive right of acquiring newly found or conquered territory, and of extinguishing the title of the aboriginal inhabitants to be found thereon. ... The rule, therefore, adopted in our colonies, "that the Queen has the exclusive right of extinguishing Native title to land," is only one member of a wider rule, that the Queen has the exclusive right of acquiring new territory, and that whatsoever the subject may acquire, vests at once, as already stated, in the Queen. And this, because in relation to the subjects, the Queen is the only source of title.⁴¹

What is particularly interesting about this passage is the way it links title to land and territorial sovereignty.⁴² In Chapman J.'s view, the two went hand in hand in the colonial context of New Zealand. The settlers could not acquire title to land for themselves because they could not acquire territory. As British subjects, they lacked the capacity to acquire personally that which could only pertain to a sovereign.⁴³

Chief Justice Martin, in arriving at the same conclusion in *Symonds* as Chapman J., probed deeper in search of the principle behind the rule that in the colonies British subjects could only acquire title to land from the Crown. He stated the underlying principle in this way: "[C]olonization is a work of national concernment, a work to be carried on with reference to the interests of the nation collectively; and therefore to be controlled and guided by the Supreme Power of the nation."⁴⁴ While acknowledging the feudal origins of the rule that the Crown is the source of all titles to land within its common law dominions,⁴⁵ he pointed out that it is now understood that Crown lands

⁴¹ *Ibid.* at 389-90.

⁴² While these are distinct concepts, the feudal foundation of the common law has caused them to be intertwined where the rights and authority of the Crown are concerned. See McNeil, *Common Law Aboriginal Title*, *supra* note 6 at 108-10.

⁴³ There would, however, be nothing to prevent British subjects from acquiring lands by purchase from the "natives" in other jurisdictions, such as France, where territorial sovereignty was not an issue. In other words, it was the *colonial context* of New Zealand and the fact that there was more at stake than private property that placed restrictions on the capacity of the settlers to acquire lands. Moreover, contrary to what Chapman J. said, it appears that British subjects could acquire lands for themselves in regions colonized by Britain as long as they did so *before* the Crown asserted sovereignty. See the discussion of British Honduras and Pitcairn Island in McNeil, *Common Law Aboriginal Title*, *ibid.* at 141-57.

⁴⁴ *Symonds*, *supra* note 3 at 395.

⁴⁵ As we have seen, it is not entirely accurate to say that the Crown is the source of all titles, see *supra* notes 36-39 and accompanying text. Even in England, the dogma that all private titles to land originated from Crown grants is generally acknowledged to be a legal fiction. See Blackstone, *supra* note 16, vol. 2, 51; J. Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative*

are to be administered for the national benefit. Consequently, when Native inhabitants of New Zealand ceded land to British subjects, the right acquired was "not the right of any individual subject of the Crown, not even of the person by whom the cession was procured, but the right of the Crown on behalf of the whole nation, on behalf of the whole body of subjects of the Crown."⁴⁶ Linking this to territorial sovereignty in much the same way as Chapman J. had done, Martin C.J. said:

If a subject of the Crown could by his own act, unauthorized by the Crown, acquire against the Crown a right to any portion of the lands of a new country, it is plain that he might, acting upon that right, proceed to form a colony there. Now, the law of England denies to any subject the right of forming a Colony without the license of the Crown. And when we consider the complicated responsibilities which flow out of the existence of a colony, and which may seriously affect the power to which *the settlers owe allegiance*, and from which they expect to receive protection, and when we also estimate the means and appliances needed for successful colonization, that denial can scarcely fail to appear reasonable and necessary.⁴⁷

So for Chief Justice Martin, like Chapman J., the incapacity of settlers to acquire Maori lands for themselves was derived from the common law rule that British subjects who owe allegiance to the Crown cannot acquire territory for themselves.⁴⁸ This rule is based in part on the British nation's public interest in controlling and benefiting from the acquisition of lands in colonial contexts. As was already apparent from our analysis of Chapman J.'s judgment, there is clearly more at stake here than private property.

We have seen that Chapman J. and Martin C.J. both approached the issue of the inalienability of Maori lands from the vantage point of the common law status and capacity of settlers. Neither of them said much about the nature of Maori title to land, as that issue was not before them.⁴⁹ However, the connection they made between the

Duties and Rights of the Subject (London: Joseph Butterworth & Son, 1820) at 211; McNeil, *Common Law Aboriginal Title*, *supra* note 6 at 82-84.

⁴⁶ *Symonds*, *supra* note 3 at 396.

⁴⁷ *Ibid.* at 395 [emphasis added].

⁴⁸ This rule is well established. See *Re Southern Rhodesia*, [1919] A.C. 211 at 221 (P.C.); Chitty, *supra* note 45 at 30; C.J. Tarring, *Chapters on the Law Relating to the Colonies*, 4th ed. (London: Stevens & Haynes, 1913) at 23; K. Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966) at 100. Sarawak, which although ceded to a British subject in 1841-42 was not acquired by the Crown until 1946, is regarded by the last two authors as an anomaly. See also Tan Sri Datuk Lee Hun Hoe, "Legal History of Sarawak" [1977] 2 *Malayan L.J.* ms lviii.

⁴⁹ Chapman J. did say that "[t]he legal doctrine as to the exclusive right of the Queen to extinguish the Native title ... is no doubt incompatible with that full and absolute dominion over the lands which they occupy, which we call an estate in fee"; *Symonds*, *supra* note 3 at 391. He evidently assumed that alienability is a fundamental attribute of a fee simple estate. This does not appear to be correct. Apparently the Crown can grant an inalienable fee simple, see Chitty, *supra* note 45 at 386, n. (h); J.C.

settlers' incapacity to acquire Maori lands and their incapacity to engage in colonization has important implications for Maori title. When Britain acquired territory from a European sovereign, such as France, there does not seem to have been any restriction on the ability of British subjects to acquire lands in that territory that were already owned by individuals. Those lands were regarded as private property, and so were alienable as such.⁵⁰ However, when Britain acquired sovereignty over a territory like New Zealand that was occupied by Indigenous peoples, British subjects could not obtain lands directly from them because acquisition of Indigenous lands, according to Martin C.J., was part of the colonizing enterprise. It therefore seems that the lands of Indigenous peoples cannot be equated with private property; they have a public aspect and so have to be acquired by the Crown before they can be transformed into private property by Crown grant.

Since *Symonds* was decided in 1847, the law of Native or Aboriginal title has undergone extensive development, especially in Canada and Australia.⁵¹ An important element of that development has been the confirmation of the communal nature of such title. In *Mabo*, the High Court of Australia held that the Meriam People have communal Native title to lands on the Murray Islands, even though their traditional laws and customs contain no concept of community title, as in their legal system all land belongs to individuals and groups.⁵² Although Brennan J. (as he then was) said that "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,"⁵³ the court went on to declare that "the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands."⁵⁴ Brennan J. said that this kind of "proprietary community title" could co-exist with "individual non-proprietary rights that are derived from the com-

Gray, *Restraints on the Alienation of Property* (Boston: Soule & Bugbee, 1883) at 11, n. 1. Moreover, in *Pierce Bell Sales Pty. v. Frazer* (1973), 130 C.L.R. 575 at 584 (H.C. Austl.), Barwick C.J. said that a statutory restraint on alienation of land granted by the Crown would not reduce, or make conditional, the fee simple estate obtained by the grantee.

⁵⁰ See above note 39 and accompanying text.

⁵¹ In the United States, the Supreme Court under Chief Justice Marshall had already laid down the parameters for Indian title and tribal sovereignty in *Johnson v. M'Intosh*, *supra* note 4, and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832), to be discussed further in text accompanying notes 109-42. These decisions influenced Chapin J. and Martin C.J. in the *Symonds* case.

⁵² *Mabo*, *supra* note 2 at 22, Brennan J. For detailed discussion of the implications of this, see K. McNeil, "The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law" in K. McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Centre, 2001) 416, esp. at 418-23 [hereinafter McNeil, "Traditional Laws and Customs"].

⁵³ *Mabo*, *ibid.* at 58.

⁵⁴ *Ibid.* at 217 [italics removed].

munity's laws and customs and are dependent on the community title,"⁵⁵ and that, "[a] fortiori, there can be no impediment to the recognition of individual proprietary rights."⁵⁶ Moreover, an Indigenous people's laws and customs, and so the nature of their intra-community land rights, could be modified after British colonization.⁵⁷ This presupposes the existence of community authority that must be governmental in nature.⁵⁸ It appears, therefore, that Native title involves a *relationship* between the Crown and an Indigenous people that is not merely proprietary.⁵⁹ While their communal title obviously has a proprietary aspect, it also has social, cultural, and political dimensions that are beyond the scope of standard conceptions of private property.

Likewise in Canada, the decision of the Supreme Court in *Delgamuukw* contains a concept of Aboriginal title that has a governmental quality.⁶⁰ In his discussion of the unique elements of Aboriginal title, Chief Justice Lamer said:

A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.⁶¹

⁵⁵ *Ibid.* at 52.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* at 61, 70 (Brennan J.), 110 (Deane and Gaudron JJ.), 192 (Toohey J.).

⁵⁸ It might be argued that the modifications to Indigenous laws and customs that the High Court envisaged could occur without conscious decision-making on the part of Indigenous communities. This argument is reminiscent McEachern C.J.'s discredited trial judgment in *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185, esp. at 441, 3 W.W.R. 97 (B.C. S.C.), where he said he did not accept that the ancestors of the Gitksan and Wet'suwet'en "behaved as they did because of 'institutions'"; instead, he found that "they more likely acted as they did because of *survival instincts* which varied from village to village" [emphasis added]. For critical commentary, see M. Asch, "Errors in *Delgamuukw*: An Anthropological Perspective" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 221; D. Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby, B.C.: Talon Books, 1998).

⁵⁹ See J. Webber, "Beyond Regret: Mabo's Implications for Australian Constitutionalism" in D. Ivison, P. Patton & W. Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) at 60.

⁶⁰ For further discussion, see K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 *Tulsa J. Comp. & Int'l L.* 253, esp. at 285-91; McNeil, "Nature and Content", *supra* note 27.

⁶¹ *Delgamuukw*, *supra* note 1 at para. 115 [emphasis in original]. See also *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 17, 179 D.L.R. (4th) 193, where the Supreme Court said that treaty rights to hunt and fish "do not belong to the individual, but are exercised by authority of the local [Aboriginal] community to which the accused belongs."

Commenting on this aspect of the *Delgamuukw* decision in *Campbell v. British Columbia*, Williamson J. concluded that the right of a community to make decisions regarding the use of its land includes “the right to have a political structure for making those decisions.”⁶² Moreover, that Aboriginal title is “a collective right held by all members of an aboriginal nation” suggests that Aboriginal nations as such have the capacity to own land and therefore have legal personality.⁶³ As Aboriginal nations have decision-making authority over their lands that is governmental, they cannot be equated with natural persons or private corporations. Nor are they like municipal corporations, which are created by statute. Their legal personality, like that of the Crown itself, is both inherent and public, arising from their existence as nations, and it includes political authority.⁶⁴ At common law, an Aboriginal nation can therefore be conceptualized as the aggregate of its members,⁶⁵ a legal and political body which holds Aboriginal title in a way that is both proprietary and governmental.⁶⁶

The recent *Mabo* and *Delgamuukw* pronouncements on the nature of Native or Aboriginal title make more understandable the *Symonds* court’s connection between

⁶² [2000] 4 C.N.L.R. 1 at 30, 189 D.L.R. (4th) 333 (B.C. S.C.). See also *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 199 D.L.R. (4th) 385, where Binnie J. (for himself and Major J.) envisaged the possibility of Aboriginal self-government to the extent that it is compatible with Canadian sovereignty.

⁶³ For further discussion, see McNeil, “Nature and Content”, *supra* note 27 at 122-25.

⁶⁴ The Crown is a corporation sole that owes its legal personality to its status as the titular head of state, see F. Pollock, *A First Book of Jurisprudence* (London: Macmillan, 1896) at 113. F.W. Maitland, in his incisive essay “The Crown as Corporation” in H.D. Hazeltine, G. Lapsley & P.H. Winfield, eds., *Frederic William Maitland: Selected Essays* (Cambridge: Cambridge University Press, 1936) 104 at 106-07, observed:

[M]edieval thought conceived the nation as a community and pictured it as a body of which the king was the head. It resembled those smaller bodies which it comprised and of which it was in some sort composed. What we should regard as the contrast between State and Corporation was hardly visible. The “commune of the realm” differed rather in size and power than in essence from the commune of a county or the commune of a borough.

See also E.H. Kantorowicz, *The King’s Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957); G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971) at 17-24.

⁶⁵ In some Aboriginal nations, members would probably include past and future as well as present generations. See Little Bear, *supra* note 31 at 245.

⁶⁶ In the *Delgamuukw* case, the Gitksan and Wet’suwet’en who brought the action appear to have conceived of their claim in a way that included proprietary rights (ownership) and governmental authority (jurisdiction). See “The Address of the Gitksan and Wet’suwet’en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia” [1988] 1 C.N.L.R. 17. By the time the case reached the Supreme Court of Canada, the claim had been recharacterized and argued primarily as a claim to Aboriginal title, see *Delgamuukw*, *supra* note 1 at para. 7, Lamer C.J.C. In its decision, the Court declined to deal with the jurisdiction or self-government claim directly, leaving that to be dealt with at a new trial (*ibid.* at para. 170 (Lamer C.J.), para. 205 (La Forest J.)).

acquisition of territorial sovereignty and acquisition of land. Both cases reveal that Aboriginal title is not a mere private property right. It is communal and has a governmental dimension that cannot be acquired by private persons. So the incapacity of the settlers stems not so much from the doctrine of tenures and the fiction that the real property rights of British subjects must originate from Crown grant, as from the fact that settlers are private individuals who owe allegiance to the Crown and so cannot acquire a title that is public in the sense that it is communal and entails governmental authority. Given these attributes of Aboriginal title, it is not surprising that it can only be transferred to an entity that has governmental capacity itself, like the Crown.

B. Constitutional History and Political Theory

Additional support for an explanation of the inalienability of Aboriginal title based on the communal and political attributes of the title itself can be found in English constitutional history. The concept of the Crown as a legal entity apart from the natural person of the king began to develop in the medieval period, and found judicial expression in the sixteenth century.⁶⁷ Around the same time, a notion took root that the king was not a personal ruler, but held an office that included certain responsibilities. Among these was an obligation not to alienate elements of the Crown's property and sovereignty, which included lands (the royal demesne), territory, and jurisdiction.⁶⁸ The main reasons given for this were that the king's property and powers were administered by him on behalf of his subjects as a whole,⁶⁹ and that he should maintain the realm and its appurtenances intact for his successor.⁷⁰ Where alienations of territory were concerned, the shifting of homage and allegiance of the king's subjects to a new ruler without their consent also involved a breach of feudal obligations.⁷¹ In Eng-

⁶⁷ See *Willion v. Berkley* (1559), 1 Plow. 223, 75 E.R. 339 (C.P.); *Case of the Duchy of Lancaster* (1561), 1 Plow. 212, 75 E.R. 325 (Q.B). See also discussion in Kantorowicz, *supra* note 64, esp. at 7-23.

⁶⁸ See P.N. Riesenber, *Inalienability of Sovereignty in Medieval Political Thought* (New York: Columbia University Press, 1956), discussing the development and application of this theory in continental Europe as well as in England. Riesenber states: "[T]he inalienable aspects of the Crown included not only landed property and feudal rights over the royal demesne, but also a freedom of action and prerogative which pertained to the ruler as king and which were qualitatively different from those of a feudal lord" (*ibid.* at 99). He explains that the theory of inalienability was designed to preserve "the regal and feudal rights which ... formed a necessary foundation to the state," as well as "the less tangible but ultimately more powerful assets of the monarchy: its very regality, dignity, freedom and scope of action" (*ibid.* at 15). See also Kantorowicz, *ibid.*, esp. at 347-58.

⁶⁹ Note the similarity to the explanation Martin C.J. gave in *Symonds*, *supra* note 3, for the rule that settlers could not acquire lands for themselves in British colonies. See text accompanying notes 44-46.

⁷⁰ Riesenber, *supra* note 68, esp. at 20, 109.

land, this restriction on the authority of the king to alienate the Crown's property and powers was incorporated into the coronation oath, at least as sworn by Edward II in 1308, if not before.⁷²

This theory of the inalienability of sovereignty was never rigidly applied, however.⁷³ Insofar as lands were concerned, the English kings continued to alienate the Crown's demesne by grant, as this was a means of obtaining necessary feudal services and revenues.⁷⁴ We nonetheless have to pay close attention to the way in which Crown lands were (and still are) alienated. As every first-year law student learns, the statute *Quia Emptores*,⁷⁵ enacted in 1290, prohibited the creation by subinfeudation of new feudal lordships. Henceforth, alienation of a fee simple by one private landholder to another had to take place by substitution.⁷⁶ This statute, however, has never applied to

⁷¹ *Ibid.* at 129-44. On the meaning and importance of allegiance and its relation to the feudal concept of fealty, see Blackstone, *supra* note 16, vol. 1 at 366-71. Regarding the impact on allegiance of the 1783 Treaty of Versailles, whereby the British Crown recognized the independence of the United States, see *Doe d. Thomas v. Acklam* (1824), 2 B. & C. 779, 107 E.R. 572 (K.B.) [hereinafter *Acklam* cited to B. & C.]; *Inglis v. Trustees of the Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 7 L. Ed. 617 (1830); H. Broom, *Constitutional Law Viewed in Relation to Common Law*, 2d ed., ed. by G.L. Denman (London: W. Maxwell & Son, 1885) at 34-36, 52-53.

⁷² See B. Wilkinson, "The Coronation Oath of Edward II and the Statute of York" (1944) 19 *Speculum* 445; H.G. Richardson, "The English Coronation Oath" (1949) 24 *Speculum* 44; E.H. Kantorowicz, "Inalienability: A Note on Canonical Practice and the English Coronation Oath in the Thirteenth Century" (1954) 29 *Speculum* 488.

⁷³ Riesenbergh, *supra* note 68, makes this point repeatedly. In his conclusion (*ibid.* at 178), he writes that basic to the theory's

fundamental importance as an element of public law, were its flexibility and its harmony with contemporary ideas. Since the theory of inalienability of sovereignty developed against the background of an essentially feudal society, it had to come to terms with that surrounding reality. This it did by moderating the tone with which it proclaimed its prohibitions. Not all alienations or delegations of ruling authority were forbidden to the rulers of a state split into local units; only those which would substantially block the progress of the new social and political order. By accommodating their theory to the status quo, the legists and theorists were able to give it real force.

⁷⁴ See generally R.S. Hoyt, *The Royal Demesne in English Constitutional History: 1066-1272* (New York: Greenwood Press, 1968). Some statutory restraints on alienation of Crown lands were enacted in the eighteenth century, see Chitty, *supra* note 45 at 203-05. But according to Blackstone, *supra* note 16, vol. 1 at 287, this was done "too late, after almost every valuable possession of the crown had been granted away for ever, or else upon very long leases." Chitty nonetheless states that, "Even at common law, the leaning and endeavour seems always to have been to preserve entire and to keep in the possession of the Crown its demesne lands and possessions, as materially conducive to its dignity and honour" (*ibid.* at 205).

⁷⁵ 18 Edw. I, cc. 1-3.

⁷⁶ That is, the alienee replaces the alienor as tenant in fee of the feudal lord. See J. Williams, *Principles of the Law of Real Property*, 17th ed., ed. by T.C. Williams (London: Sweet & Maxwell, 1892) at 45-46; C. Sweet, *Challis's Law of Real Property*, 3d ed. (London: Butterworth, 1911) at 18-20.

the Crown.⁷⁷ So when the Crown grants land in fee simple—and this is as true today as it was in 1290—the grantee holds the land in tenure from the Crown. In other words, the alienation takes place as an infeudation rather than as a substitution. Thus, “[i]f the king grants land to J.S. in fee, to hold as freely as the king is in his crown, yet he shall hold of the king.”⁷⁸ The significance of this is that it reveals that the Crown is incapable of giving up the feudal aspect of its sovereignty (otherwise known as its paramount lordship).⁷⁹ So the theory of the inalienability of sovereignty applies in England to prevent the Crown from creating real property interests that are inconsistent with its sovereign rights over all the lands in the realm.⁸⁰

Where alienation of territory is concerned, one has to consider international law as well as the common law. Cession of territory from one sovereign to another has long been accepted by European jurists in their expositions of the law of nations. Early jurists, however, thought there were restrictions on the authority of rulers to alienate territory and jurisdiction.⁸¹ Alberico Gentili, for example, in his 1598 work *De*

⁷⁷ See E.H. Burn, *Cheshire and Burn's Modern Law of Real Property*, 15th ed. (London: Butterworths, 1994) at 15; R. Megarry & W. Wade, *The Law of Real Property*, 6th ed., ed. by C. Harpum (London: Sweet & Maxwell, 2000) at 29.

⁷⁸ C. Viner, *A General Abridgement of Law and Equity*, 2d ed. (London: Robinson, Brook, Butterworth & White, 1791-94), “Tenure”, B.a.15. See Y.B. 14 Hen. VI, 1.43, fol. 11b at 12b. See also J. Comyns, *A Digest of the Laws of England*, 5th ed., ed. by A. Hammond (London: A. Straham, 1822), “Tenure”, A: “[T]hough the king releases to his tenant all services, yet he holds of him.” Comyns relied, first, on Y.B. 8 Hen. VII, fol. 12b, where it was said that “it is an incident to the king that all lands are held of him, and there cannot be any lands that are not held of him, mediately or immediately” [translated by author]; and second, on *Lowe's Case* (1603), 9 Co. Rep. 122b, 77 E.R. 909 (Ct. of Wards) at 123a, where it was held that the king cannot by grant extinguish the tenure because that would be an alteration of the law.

⁷⁹ As Maitland wrote in reference to the medieval period, “All land in England must be held of the king of England, otherwise he would not be king of all England”: F. Pollock & F.W. Maitland, *The History of English Law Before the Time of Edward I*, 2d ed., reissued, vol. 2 (Cambridge: Cambridge University Press, 1968) at 3. See also McNeil, *Common Law Aboriginal Title*, *supra* note 6 at 82-83, n. 19.

⁸⁰ Also, the Crown cannot make grants that infringe public rights to navigate and fish in tidal waters. It appears that the former cannot be derogated from by Crown grant due to the common law, whereas the latter have been protected since 1215 by *Magna Carta*. See *Malcomson v. O'Dea* (1863), 10 H.L.C. 593, 11 E.R. 1155; *Gann v. Free Fishers of Whitstable* (1865), 11 H.L.C. 192, 11 E.R. 1305 [hereinafter *Gann*]; *British Columbia (A.G.) v. Canada (A.G.)*, [1914] A.C. 153 (P.C.); *Harper v. Minister for Sea Fisheries* (1989), 168 C.L.R. 314 (H.C. Austl.); *Yarmirr*, *supra* note 2 at 471-77 (Beaumont and von Doussa JJ.), 539-60 (Merkel J., dissenting in part); *Halsbury's Laws of England*, 4th ed., vol. 8 (London: Butterworths, 1974) at para. 1419. In *Gann*, Lord Westbury said that the Crown's ownership of the bed of tidal waters “is for the benefit of the subject,” thus acknowledging the public nature of the Crown's sovereign rights in that context (*ibid.* at 207).

⁸¹ For a very useful discussion, see T. Meron, “The Authority to Make Treaties in the Late Middle Ages” (1995) 89 Am. J. Int'l L. 1.

iure belli libri tres, wrote that rulers may not make their subjects change rulers without their consent, as rulers and subjects “are bound by mutual obligations.”⁸² Similarly, Hugo Grotius expressed the view in his 1625 classic *De jure belli ac pacis libri tres* that, although a king can alienate the sovereignty he holds by inheritance, he cannot alienate part of a people without their consent because to do so would violate the original “voluntary compact.”⁸³ Nonetheless, Grotius saw “nothing to hinder a people, or even a king with the consent of the people, from alienating sovereignty over a place, that is, a part of its territory, for example, a part that is uninhabited or deserted.”⁸⁴ Vattel, in his influential work *Le droit des gens*,⁸⁵ first published in 1758, took a more categorical position:

Every true sovereignty is essentially inalienable. We shall easily be convinced of this if we consider the origin and aim of political society and of the sovereign authority. A Nation constitutes itself a social body to work for the common good as it shall think fit, and to live according to its own laws. With this object in view it establishes a public authority. If it confides this authority to a prince, even with the power to transfer his authority to other hands, that can never imply, unless the express and unanimous consent of the citizens be given, the right to really alienate it, or to subject the State to another political body; for the individuals who formed that society entered into it for the purpose of living

⁸² A. Gentili, *De iure belli libri tres*, trans. J.C. Rolfe, vol. 2 (Oxford: Clarendon Press, 1933) c. 15 at para. 608. To the argument that the people may have granted the ruler “full dominion and power over themselves”, he responded forcefully: “It is true that the people conferred all sovereignty and power, but they did so in order that they might be governed like men, not sold like cattle” (*ibid.* at para. 609).

⁸³ H. Grotius, *The Law of War and Peace*, trans. F.W. Kelsey (New York: Bobbs-Merrill, 1925) at bk. 2, c. 6, pts. 3-4. Grotius distinguished between territories where the king’s rights were proprietary or patrimonial, and territories where his rights were usufructuary because the kingship was conferred by succession or election (*ibid.* at bk. 1, c. 3, pt. 12, and bk. 1, c. 4, pt. 10). This distinction is even more prominent in C. Wolff, *Jus gentium methodo scientifica pertractatum* (1749), trans. J.H. Drake (Oxford: Clarendon Press, 1934) at §1007, where the author states that the people’s consent is required only in the latter case. See also *infra* note 97.

⁸⁴ Grotius, *ibid.* at bk. 2, c. 6, pt. 7. On the necessity for the people’s consent, he said that “both the whole territory and its parts are the undivided common property of the people, and therefore subject to the will of the people” (*ibid.*).

⁸⁵ E. de Vattel, *Le droit des gens, ou les principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, reproduction and trans. of 1758 edition, trans. C.G. Fenwick (Washington, D.C.: Carnegie Institution, 1916). In *Worcester v. Georgia*, *supra* note 51 at 561, Marshall C.J. used Vattel to support his position that the Indian nations did not surrender their right of self-government when they signed treaties of association and protection with Britain and the United States. Vattel was also mentioned in the judgments of Chapman J. and Martin C.J. in *Symonds*, *supra* note 3 at 392, 395. Martin C.J. quoted a passage from *Attorney-General v. Brown* (1847), 1 Legge 312 at 318 (N.S.W. S.C.), where Stephen C.J. relied on Vattel as authority that the sovereign, as “the representative and the executive authority of the nation,” is the “moral personality” that holds public lands as the “patrimony of the nation”.

in an independent State and by no means with the intention of submitting to a foreign yoke.⁸⁶

A common theme in the writings of each of these jurists is a requirement of consent by the people affected by the transfer of territory, stemming from the social contract between rulers and their subjects.⁸⁷

More recent international law experts, however, have been less willing to question the authority of sovereigns to alienate territory.⁸⁸ Oppenheim, for example, wrote in 1905:

Cession of State territory is the transfer of sovereignty over State territory by the owner State to another State. There is no doubt whatever that such cession is possible according to the Law of Nations, and history presents innumerable examples of such transfer of sovereignty. The Constitutional Law of the different States may or may not lay down special rules for the transfer or acquisition of territory. Such rules can have no direct influence upon the rules of the Law of Nations concerning cession, since Municipal Law can neither abolish existing nor create new rules of International Law. But if such municipal rules contain constitutional restrictions of the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession con-

⁸⁶ Vattel, *ibid.* at bk. 1, c. 5, §69; see also bk. 1, c. 21, §260. At bk. 1, c. 5, §69, Vattel answered the contrary argument from state practice in this way: "I know that several authors, Grotius among them, give us many instances of alienations of sovereignty. But the examples frequently prove only the abuse of power and not the right; and besides, the people consented to the alienation, either willingly or by force" [footnote omitted].

⁸⁷ The concept of a social contract as the basis of civil society was, of course, developed more fully in England by Thomas Hobbes and John Locke. See T. Hobbes, *Leviathan* (originally published in 1651), ed. by R. Tuck (Cambridge: Cambridge University Press, 1991); J. Locke, *Second Treatise of Government* (originally published in 1690) in *Two Treatises of Government*, ed. by P. Laslett (Cambridge: Cambridge University Press, 1988) esp. at §§44-74. For further discussion, see J.W. Gough, *The Social Contract*, 2d ed. (Oxford: Clarendon Press, 1957). For Locke, however, the contract was between all members of a society, rather than between ruler and subjects, though eighteenth-century English Whigs and American revolutionaries relied on Locke to support the latter sort of social contract theory (which is what the international jurists seem to have had in mind as well). See J.G. Marston, *King and Congress: The Transfer of Political Legitimacy, 1774-1776* (Princeton: Princeton University Press, 1987) at 16-20. See also Blackstone, *supra* note 16, vol. 1 at 233, referring to the "reciprocal duties" of "protection and subjection" arising from "the *original contract* between king and people" [emphasis in original].

⁸⁸ This may be due in part to a shift from the natural law approach of earlier jurists to a more positivist, state-practice orientation. See generally S.A. Williams & A.L.C. de Mestral, *An Introduction to International Law: Chiefly as Interpreted and Applied in Canada*, 2d ed. (Toronto: Butterworths, 1987) at 5. R. Phillimore, for example, relied mainly on state practice to reject the contention of Grotius that usufructuary kingdoms, and of Vattel that public property or domain, cannot be alienated without the consent of the people. R. Phillimore, *Commentaries Upon International Law*, vol. 1 (Philadelphia: T. & J.W. Johnson, 1854) at 222-30.

cluded by heads of State or Governments as violate these restrictions are not binding.⁸⁹

He acknowledged, however, the view of some writers that the inhabitants of a territory should not be forced to change their citizenship without their consent, expressed in a plebiscite.⁹⁰ This view is also supported by the modern principle of self-determination.⁹¹ Still, Professor Brownlie states that “at present there is insufficient practice to warrant the view that a transfer is invalid simply because there is no sufficient provision for expression of opinion by the inhabitants.”⁹² But even if this is correct internationally, there may still be a domestic law requirement of popular assent that may have an impact on the validity of a cession of territory—as Oppenheim noted.⁹³

We therefore need to ask whether the Crown, in English constitutional law, has the authority to transfer territorial sovereignty to another ruler. Historically, it seems very doubtful that the king could do this without the assent of the people, expressed through Parliament. We have already seen that at his coronation Edward II swore to maintain the rights of the Crown.⁹⁴ After 1308 this undertaking was dropped from the coronation oath, perhaps because the principle it expressed had become too en-

⁸⁹ L. Oppenheim, *International Law: A Treatise*, vol. 1 (London: Longmans, Green, 1905) at §213 [footnotes omitted]. This passage was substantially unchanged in volume 1 of the 8th edition, ed. by H. Lauterpacht (London: Longmans, Green, 1955) at §213. See also R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) at 16-19.

⁹⁰ Oppenheim, *ibid.* at §219. See also authorities cited in the 8th edition, *ibid.* at §219, n. 5. Oppenheim, however, suggested that this problem could be dealt with by a stipulation in the treaty of cession that the inhabitants have the option of retaining their old citizenship or emigrating, Oppenheim, *ibid.* at §219. See also T.J. Lawrence, *The Principles of International Law*, 4th ed. by P.H. Winfield (London: Macmillan, 1911) at 95ff. Compare W.E. Hall, *A Treatise on International Law*, 8th ed., ed. by A.P. Higgins (Oxford: Clarendon Press, 1924) at 54: “The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted into international law, and cannot be adopted into it until title by conquest has disappeared.”

⁹¹ See C.C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, vol. 1 (Boston: Little, Brown, 1922) at §§108-09. On the use of plebiscites to determine the will of the people of a territory in this regard, see M.M. Whiteman, *Digest of International Law*, vol. 2 (Washington, D.C.: U.S. Department of State, 1963) at 1168-72.

⁹² I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 167.

⁹³ However, Jennings, *supra* note 89 at 17-18, suggests that the validity of a treaty of cession in the constitutional law of the ceding state is not relevant to its validity in international law, at least “where there has been actual tradition [handing over] of the territory.” He relied on *Union of India v. Mamnull Jain* (1954), 41 A.I.R. Calcutta 615 (H.C.). In that case, however, the argument that was unsuccessfully made was that a cession of territory from France to India was invalid because it had not been assented to by the Parliament of India.

⁹⁴ See above note 72 and accompanying text.

trenched to be seriously questioned.⁹⁵ In any case, Sir Matthew Hale, in *The Prerogatives of the King*, which was probably written during the period of the Interregnum in the 1650s,⁹⁶ said of the king that "Neither could nor can he part with that right [the *jus summi imperii*] in all or any part of his dominions, but by consent of the people [and] states of the kingdom in parliament, for the relation and bond is reciprocal."⁹⁷ Hale gave several examples from English constitutional history to demonstrate the application of this principle, among which was a declaration by Parliament in 1366 that King John's cession of England and Ireland in 1213 to Pope Innocent III as feudal lord was null and void because "neither the said King John nor any other could bring himself or his realm or his people into such subjection without their assent."⁹⁸ Nonetheless, in practice the Crown has in the past relinquished its sovereignty over some of its colonial possessions without the direct concurrence of Parliament, as when it recognized the independence of the United States by the Treaty of Versailles in 1783.⁹⁹ Perhaps

⁹⁵ See Riesenber, *supra* note 68 at 126. Referring to the king, barons, and commons at that time, Riesenber writes, "All were alive to the fact that England was a kingdom whose destiny was, so to speak, immortal and independent of that of the king" (*ibid.* at 126-27).

⁹⁶ See D.E.C. Yale, ed., *Sir Matthew Hale's The Prerogatives of the King* (London: Selden Society, 1976) at ix, n. 1 [hereinafter *Hale's Prerogatives*]. Hale is generally recognized as one of England's great legists and judges. Baker wrote that Hale was "[f]ar superior to Coke" and was regarded as "an oracle in his own time", J.H. Baker, *An Introduction to English Legal History*, 2d ed. (London: Butterworths, 1979) at 165. Potter praised him by saying, "Besides being a learned lawyer and an historian, he possessed great grace of character, and it is his honesty of soul and purpose in a partisan age which gives to his work some of its peculiar value." A.K.R. Kiralfy, *Potter's Historical Introduction to English Law and Its Institutions*, 4th ed. (London: Sweet & Maxwell, 1958) at 289 [footnote omitted].

⁹⁷ *Hale's Prerogatives*, *ibid.* at 15. In this passage, Hale was repeating the view of medieval theorists that reciprocal feudal obligations prevented kings from unilaterally transferring their subjects' allegiance to other kings. See above note 71 and accompanying text. Hale also rejected the argument that England was the property of the king and thus transferable by him: "Though it be *regnum hereditarium*, yet it is not *regnum patrimoniale*, so as to be transferred by the absolute power of the king to any other without the consent of the kingdom and that in a regular and parliamentary way" (*ibid.* at 16). On the distinction between usufructuary and patrimonial kingships, which Hale obviously had in mind, see generally *supra* note 83.

⁹⁸ *Ibid.* at 17. The quotation is from the declaration itself, *Rotuli Parliamentorum*, 40 Edw. III, vol. 2 at 290, no. 7, as translated in C.H. McIlwain, *The Growth of Political Thought in the West From the Greeks to the End of the Middle Ages* (New York: Macmillan, 1932) at 380 [footnote omitted]. See also Meron, *supra* note 81 at 6. Hale also observed, *Hale's Prerogatives*, *ibid.* at 18, that Henry VIII had been unable to change the succession to the throne by letters patent or will without an enabling act of Parliament. See 28 Hen. VIII, c. 7; 35 Hen. VIII, c. 1.

⁹⁹ See Roberts-Wray, *supra* note 48 at 118: "Negotiation was authorized by Act of Parliament [22 Geo. III, c. 46; see also 18 Geo. III, c. 13] but not the surrender of sovereignty." See also W.R. Anson, *The Law and Custom of the Constitution*, 4th ed., ed. by A.B. Keith, vol. 2, part 2 (Oxford: Clarendon Press, 1935) at 138; S.A. de Smith & R. Brazier, *Constitutional and Administrative Law*, 8th ed. (London: Penguin Books, 1998) at 148. Compare *Acklam*, *supra* note 71 at 795-96, where Abbott C.J. said: "[I]f the sanction of the British Legislature could be thought necessary to give validity to

the explanation for this is that, in colonial contexts, the consent of the local inhabitants rather than the consent of Parliament is what matters.¹⁰⁰ According to Stanley de Smith and Rodney Brazier, however, “in modern practice the transfer of British territory and the implementation of a peace treaty are always effected by statute.”¹⁰¹ Moreover, they said, “It is very doubtful whether the Crown has a prerogative to cede any part of the United Kingdom.”¹⁰² So even in modern British constitutional law, the authority of the Crown to cede territory without the assent of either the local inhabitants or Parliament appears somewhat doubtful.¹⁰³

To sum up, the concept of the inalienability of sovereignty has deep roots in the political philosophy of medieval Europe. General acceptance of this concept accompanied the emergence of the principle that the rights and powers of kings are held on behalf of the people and so should be exercised for their benefit. In England, the same concept and underlying principle lay behind Edward II’s coronation promise to maintain the rights of the Crown. The concept of inalienability was accepted by Hale in his mid-seventeenth-century exposition of the prerogatives of the king. It also found its way into the law of nations, where it was strongly endorsed as late as 1758

this treaty [the Treaty of Versailles], such sanction has been abundantly given.” For other examples of cessions without the express concurrence of Parliament, see Roberts-Wray (*ibid.* at 119-26), Anson (*ibid.* at 138-40). Apparently the only other case on point is *Damodhar Gordhan v. Deoram Kanji* (1876), 1 App. Cas. 332 at 373-74 (P.C.), where Lord Selborne said that their Lordships entertain “grave doubts (to say no more) of the soundness” of the opinion of the High Court at Bombay that the Crown could not make a cession of territory without the concurrence of Parliament (the Privy Council did not have to decide this issue because, unlike the High Court, it found that a cession had not taken place). See discussion in Roberts-Wray (*ibid.* at 120-22); D.L. Keir & F.H. Lawson, *Cases in Constitutional Law*, 4th ed. (Oxford: Clarendon Press, 1954) at 108-09.

¹⁰⁰ This explanation may, however, be more satisfying to political theorists than to constitutional lawyers. There is nonetheless some support for it in constitutional law. See C.H. McIlwain, *The American Revolution: A Constitutional Interpretation* (New York: Macmillan, 1928; reprint Ithaca: Cornell University Press, 1958), arguing that men like James Wilson and John Adams were probably correct when they asserted that the British Parliament did not have jurisdiction over the American Colonies.

¹⁰¹ De Smith & Brazier, *supra* note 99. See also O.H. Phillips & P. Jackson, *O. Hood Phillips’ Constitutional and Administrative Law*, 7th ed. (London: Sweet & Maxwell, 1987) at 287.

¹⁰² De Smith & Brazier, *ibid.* On the same page, they described as “a flight of fancy” Walter Bagehot’s suggestion in *The English Constitution* (London: C.A. Watts, 1964) at 287, that the Crown has a prerogative right to cede Cornwall. See also Phillips & Jackson, *ibid.*, where it is suggested that the royal prerogative respecting cessions of territory does not apply in the United Kingdom.

¹⁰³ See Anson, *supra* note 99 at 137-42; E.C.S. Wade & A.W. Bradley, *Constitutional and Administrative Law*, 11th ed. by A.W. Bradley & K.D. Ewing (London: Longman, 1993) at 265-66. Compare W.S. Holdsworth, “The Treaty-Making Power of the Crown” (1942) 58 L.Q. Rev. 175 esp. at 182-83; E.W. Ridges, *Constitutional Law*, 8th ed., ed. by G.A. Forrest (London: Stevens and Sons, 1950) at 225; S.K. Agrawala, *International Law: Indian Courts and Legislature* (New York: Oceana, 1965) at 23-24.

by Vattel.¹⁰⁴ By the end of the eighteenth century, however, the concept seems to have been losing force both internationally and domestically in Britain, perhaps as a result of the growth of national states and of the influence of legal positivism. It began to re-emerge internationally in the twentieth century as a corollary to the right of self-determination.

The existence of this concept of inalienability when North America was being colonized by European nations in the seventeenth and eighteenth centuries assists us in understanding the inalienability of Aboriginal title. If the Aboriginal peoples were sovereign nations at the time, the stipulation in the *Royal Proclamation* that their lands could be purchased only in the name of the Crown "at some public Meeting or Assembly of the said Indians, to be held for that Purpose,"¹⁰⁵ is consistent with the principle that sovereigns could not alienate parts of their territory without the consent of the people. The Crown's exclusive right to purchase those lands is also consistent with the principle of British constitutional law that, unlike private property, territory can be acquired only by the Crown, not by private persons.¹⁰⁶ This principle is linked, in turn, to the doctrine of tenures, which prevents the Crown from alienating its paramount lordship because that is a feature of its sovereignty. So just as they are incapable of acquiring the Crown's lordship, private persons cannot acquire Indian lands because the Aboriginal title to those lands has attributes of sovereignty that can only be acquired by another sovereign, such as the Crown. This explains why the Crown has to acquire those lands first by accepting a surrender of Aboriginal title before the lands can be converted into private property.

This explanation for the inalienability of Aboriginal title is implicitly supported by *Johnson v. M'Intosh*¹⁰⁷ and *Worcester v. Georgia*,¹⁰⁸ the two leading decisions of the United States Supreme Court on the inalienability of Indian title and the sovereignty of the Indian nations. In those cases, Chief Justice Marshall decided that the exclusive right of the British Crown, and hence of the United States, to acquire Indian title was based on what he called the "doctrine of discovery". We therefore need to analyze those decisions to understand how the doctrine of discovery is related to Indian sovereignty and the concept of inalienability.

¹⁰⁴ See text accompanying note 86. As we have seen, this was around the same time the British Crown was implementing its policy of forbidding private purchases of Indian lands in North America, which found general expression in the *Royal Proclamation* of 1763. See above notes 8-9 and accompanying text.

¹⁰⁵ *Supra* note 9 at 6.

¹⁰⁶ See *supra* notes 40-48 and accompanying text.

¹⁰⁷ *Supra* note 4.

¹⁰⁸ *Supra* note 51.

C. Chief Justice Marshall and the Doctrine of Discovery

Johnson v. M'Intosh involved lands north of the Ohio River that had been sold to private purchasers in 1773 and 1775 by chiefs of the Illinois and Piankeshaw Nations. As the stated facts established the right of those nations to the lands and the authority of the chiefs to deal with them, the sole issue before the Supreme Court was whether private purchasers could acquire a valid title from Indian nations. Marshall C.J., for the court, gave three reasons for holding they could not. Taking them in reverse order, his third reason was that the *Royal Proclamation* of 1763 applied in the region at the time, making these purchases unlawful. His second reason, which we will return to later, was that the purchased lands would still be part of the territory of the Illinois and Piankeshaw Nations, and so would be subject to their laws. If they chose to resume those lands and include them in treaties of cession to the United States (as in fact happened), the purchasers could have no recourse to the courts of the United States. But these two reasons appear to have been secondary, as Marshall C.J. devoted most of his judgment to his first reason.

This reason was that, after the "discovery" of North America, to avoid conflict among themselves, the colonizing European nations adopted the principle "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."¹⁰⁹ He continued:

The exclusion of all other Europeans, necessarily gave the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere.¹¹⁰

If one accepts Marshall C.J.'s premise that discovery gave what has sometimes been called an inchoate title to the discovering sovereign,¹¹¹ his conclusion that other Euro-

¹⁰⁹ *Johnson v. M'Intosh*, *supra* note 4 at 573. In actual fact, however, the existence of such a principle is extremely doubtful, as there does not seem to have been much agreement among the European nations at the time over what was necessary to acquire territorial sovereignty. See J.T. Juricek, "English Territorial Claims in North America Under Elizabeth and the Early Stuarts" (1976) 7 *Terrae Incognitae* 7; B. Slattery, "Did France Claim Canada Upon 'Discovery'?" in J.M. Bumsted, ed., *Interpreting Canada's Past*, vol. 1, *Before Confederation* (Toronto: Oxford University Press, 1986) 2. See also L.G. Robertson, "John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine" (1997) 13 *J. L. & Pol.* 759, revealing the historical weaknesses in this aspect of Marshall's judgment.

¹¹⁰ *Johnson v. M'Intosh*, *ibid.* at 573.

¹¹¹ This aspect of his decision has attracted a lot of criticism. See e.g. G.I. Bennett, "Aboriginal Title in the Common Law: A Stony Path Through Feudal Doctrine" (1978) 27 *Buffalo L. Rev.* 617 esp. at 646-49; V. Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1985) at 85-111; R.A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990) at 312-

pean sovereigns could not interfere by acquiring lands from the Indian nations within the discovered territory makes sense, as otherwise a conflict between two European sovereigns could arise. However, it is not evident why *subjects* of the discovering sovereign would also be prevented from acquiring Indian lands. It appears from Marshall C.J.'s judgment that the reason for this is that the Indian title, while "entitled to the respect of all Courts until it should be legitimately extinguished,"¹¹² is simply "a right of occupancy" that cannot be sold or transferred, but can only be surrendered to the discovering sovereign who holds the "absolute, ultimate title" to the soil.¹¹³ In an oft-quoted passage that seems to sum up his views on the status and rights of the Indian nations after acquisition of a European title by discovery, he said:

They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.¹¹⁴

By recognizing that a European title based on discovery only *diminished* the rights of the Indian nations to *complete sovereignty*, this passage acknowledged the pre-existing sovereignty of the Indian nations, and prepared the ground for Marshall C.J.'s later acceptance of its continuation.¹¹⁵

17; S.T. Newcomb, "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. McIntosh*, and Plenary Power" (1993) 20 Rev. L. & Soc. Change 303; D.E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997) at 31-35.

¹¹² *Johnson v. M'Intosh*, *supra* note 4 at 592, citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810).

¹¹³ *Ibid.* at 588, 592. Marshall also stated: "[T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others" (*ibid.* at 591). Compare *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 at 756, 9 L. Ed. 283 (1835), Baldwin J. for the court, a case involving acquisition of Indian lands in Florida by private persons with the authorization of the Spanish governor, where the Indian title under the Spanish and the British was described as a "right of property". Note also that the Indian nations have the full beneficial use and possession of their lands, including surface and subsurface resources, in much the same way as Lamer C.J.C. held that the Aboriginal nations in Canada have the exclusive use and possession of their lands. See *Paine Lumber*, *supra* note 4; *United States v. Shoshone Tribe*, 304 U.S. 111, 58 S. Ct. 794 (1938) esp. at 116-17; *United States v. Klamath and Modoc Tribes*, 304 U.S. 119, 58 S. Ct. 799 (1938) at 122-23.

¹¹⁴ *Johnson v. M'Intosh*, *ibid.* at 574. This passage was quoted and emphasized by Lamer C.J.C. in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 36, 137 D.L.R. (4th) 289, 200 N.R. 1 [hereinafter *Van der Peet*].

¹¹⁵ See P.P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993) 107 Harv. L. Rev. 381 at 390.

In *Worcester v. Georgia*,¹¹⁶ Chief Justice Marshall cast further light on the issue of inalienability of Indian title. He began his analysis by affirming the pre-existing sovereignty of the Indian nations and by questioning his own conclusion in *Johnson v. M'Intosh* that discovery gave title to the discovering European nation:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.¹¹⁷

But taking a pragmatic approach, Marshall C.J. said nonetheless that “power, war, conquest, give rights, which, *after possession*, are conceded by the world.”¹¹⁸

He then explained what he had meant in *Johnson v. M'Intosh* when he outlined the principle of discovery:

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, *the sole right of acquiring the soil* and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. *It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession*, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. *It gave an exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.*¹¹⁹

Here we have a clear statement of how discovery gave the discovering nation an exclusive right *vis-à-vis other European nations* to acquire territory from the Indian nations, without diminishing their sovereignty or right to their lands.¹²⁰ Marshall C.J. put

¹¹⁶ *Supra* note 51. See also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831), where Marshall C.J. initiated the exposition of the doctrine of Indian sovereignty that he developed more fully in *Worcester v. Georgia*. For commentary, see J.C. Burke, “The Cherokee Cases: A Study in Law, Politics, and Morality” (1969) 21 *Stan. L. Rev.* 500; J. Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York: McGraw-Hill, 1996).

¹¹⁷ *Worcester v. Georgia*, *ibid.* at 542-43. This passage was quoted with apparent approval by Lamer C.J.C. in *Van der Peet*, *supra* note 114 at para. 37.

¹¹⁸ *Worcester v. Georgia*, *ibid.* at 543 [emphasis added].

¹¹⁹ *Ibid.* at 544 [emphasis added].

¹²⁰ Though Marshall C.J. did not say so, in *Worcester v. Georgia*, he evidently modified the principle of discovery he had articulated in *Johnson v. M'Intosh*, *supra* note 4. For further discussion, see K.

this even more forcefully in a subsequent passage, in reference to royal charters granted by the British Crown:

The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them [the charters] to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was *the exclusive right of purchasing such lands as the natives were willing to sell.*¹²¹

He later confirmed this by stating that “these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned.”¹²²

Throughout his judgment, Marshall C.J. affirmed that the Indian nations retained jurisdiction over and title to their territories even after they entered into treaties bringing them under the protection of the British Crown and later the United States.¹²³ In one such passage, he said:

The Indian nations had always been considered as *distinct, independent political communities*, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any

McNeil, “Sovereignty on the Northern Plains: Indian, European, American and Canadian Claims” (2000) 39:3 *Journal of the West* 10.

¹²¹ *Worcester v. Georgia*, *supra* note 51 at 544-45 [emphasis added].

¹²² *Ibid.* at 546. For a British colonial law perspective on the efficacy of royal charters, see *Staples v. R.* (1899, unreported), where the Privy Council decided that the British South Africa Company Charter could not, of itself, give the Crown territorial sovereignty over Matabeleland (Southern Rhodesia). In the course of the proceedings, the Lord Chancellor commented that the charter could not “give jurisdiction of sovereignty over a place Her Majesty has no authority in.” This is quoted and discussed in K. McNeil, “Aboriginal Nations and Quebec’s Boundaries: Canada Couldn’t Give What It Didn’t Have” in K. McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 1 at 11-12. The proceedings in *Staples* are printed in S.A. Scott, *The Prerogative of the Crown in External Affairs and Constituent Authority in a Constitutional Monarchy* (D. Phil. Thesis, Oxford University, 1968), App. I [unpublished]. For discussion of this issue in the context of the Hudson’s Bay Company Charter, see K. McNeil, “Sovereignty and the Aboriginal Nations of Rupert’s Land” (1999) 37 *Manitoba History* 2.

¹²³ He said that the treaties, which extended to the Indian nations “the protection of Great Britain, and afterwards that of the United States,” did not take away their right of self-government, as “a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection.” *Worcester v. Georgia*, *ibid.* at 560-61, relying on Vattel, *supra* note 85.

other European potentate than the first discoverer of the coast of the particular region claimed ...¹²⁴

Citing the *Royal Proclamation* of 1763, including its prohibition against private purchases of Indian lands, he observed:

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans ... she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.¹²⁵

Likewise the United States, in statutes (as well as in treaties), “manifestly consider[ed] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.”¹²⁶ Given the Indian nations’ status as “distinct, independent political communities” with territorial rights that included both governmental authority and title to land, British subjects and American citizens clearly would not have the capacity to acquire those rights from them. Only another sovereign could do that, and Marshall C.J.’s principle of discovery led him to conclude that, in the part of North America under consideration, the sovereign in question was first the British Crown, and then its successor, the United States. When read together, *Johnson v. M’Intosh* and *Worcester v. Georgia* therefore show that the inalienability of Aboriginal title arises first from the exclusive right of the Crown as the colonizing sovereign to acquire it, and second from the inability of private persons to receive a title that is cloaked with attributes of sovereignty.

This explanation of inalienability also provides a solution to another unresolved issue, namely whether Aboriginal title can be transferred from one Aboriginal nation to another after Crown acquisition of sovereignty. As the Aboriginal nations were not parties to the alleged agreement among European powers (that discovery gave the exclusive right of acquiring Aboriginal title to the discovering sovereign), they would not be bound by it.¹²⁷ Moreover, as they would all have sovereign status as distinct, in-

¹²⁴ *Worcester v. Georgia*, *ibid.* at 559 [emphasis added]. This passage was quoted and emphasized by Lamer C.J.C. in *Van der Peet*, *supra* note 114 at para. 37. See also *Cherokee Nation v. Georgia*, *supra* note 116 at 16-17, Marshall C.J.

¹²⁵ *Worcester v. Georgia*, *ibid.* at 548. This passage was quoted with approval by Lamer J. (as he then was) in *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1054, 70 D.L.R. (4th) 427, 109 N.R. 22 [hereinafter *Sioui* cited to S.C.R.].

¹²⁶ *Worcester v. Georgia*, *ibid.* at 557.

¹²⁷ See *ibid.* at 544, quoted in text accompanying note 119 above. This rule of privity, expressed by the Latin maxim *pacta tertiis nec nocent nec prosunt*, is also part of the modern law of treaties. See Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) at 309-10; C. Chinkin, *Third*

dependent political communities, they would not be handicapped by the incapacity suffered by private persons. As the inalienability aspect of Aboriginal title appears to be a result of inter-European diplomacy and settler incapacity, rather than an inherent feature of the title itself, absent restrictions in the law of the Aboriginal nations in question,¹²⁸ it should be transferable among them.¹²⁹ This is supported by La Forest J.'s judgment in *Delgamuukw*, where he said that continuity of occupation by an Aboriginal group need not date from the time of Crown sovereignty, as "one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society. As well, the occupancy of one aboriginal society may be connected to the occupancy of another society by conquest or exchange."¹³⁰

The inalienability of Aboriginal title could nonetheless be a serious impediment to economic development of Aboriginal title lands, as it prevents them from being sold to non-Aboriginal third parties without the intervention of the Crown. This could mean, for example, that an Aboriginal nation that wanted to receive the benefit of minerals under its lands by leasing them to a mining company would first have to surrender them to the Crown for that purpose.¹³¹ Another way of approaching this is more respectful of the decision-making authority of Aboriginal peoples regarding their lands,¹³² but is nonetheless in keeping with the inalienability of their title. Support for this approach can be found in Chief Justice Marshall's second reason for denying the validity of private purchases of Indian lands in *Johnson v. M'Intosh*.

D. Inalienability and Economic Development

We have seen that Marshall C.J.'s main reason for invalidating private purchases of Indian lands in *Johnson v. M'Intosh* was that the doctrine of discovery gave the

Parties in International Law (Oxford: Clarendon Press, 1993) at 26-27, 33; Brownlie, *supra* note 92 at 628; *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, art. 34 in I. Brownlie, ed., *Basic Documents in International Law*, 2d ed. (Oxford: Clarendon Press, 1972) at 233.

¹²⁸ See Little Bear, *supra* note 31 at 247, where, in the context of treaty-making, the author states:

In summary, the standard or norm of the aboriginal peoples' law is that land is not transferable and therefore is inalienable. Land and benefits therefrom may be shared with others, and when Indian nations entered into treaties with European nations, the subject of the treaty, from the Indians' viewpoint, was not the alienation of the land but the sharing of the land.

See also McNeil, "Extinguishment of Aboriginal Title", *supra* note 33.

¹²⁹ See B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 742-43.

¹³⁰ *Supra* note 1 at para. 198.

¹³¹ Though the *Indian Act*, *supra* note 19, does not apply to Aboriginal title lands that are not within reserves, it is worth noting that under the statute a surrender is required for reserve lands to be leased for such a purpose. See e.g. *Blueberry River Indian Band*, *supra* note 21 (dealing with surrender of mineral rights under an earlier version of the *Indian Act*).

¹³² See *supra* notes 60-66 and accompanying text.

discovering nation the exclusive right, *as against other European nations*, to acquire those lands. To a lesser extent, Marshall C.J. also relied on the *Royal Proclamation of 1763*. But he gave another reason which, though seldom commented on, has the potential to augment Indigenous peoples' control over their lands through the exercise of the inherent right of self-government that Marshall C.J. so strongly endorsed in his later decision in *Worcester v. Georgia*.

After presenting his lengthy exposition of the doctrine of discovery and its effects, the Chief Justice said that “[a]nother view has been taken of this question, which deserves to be considered.”¹³³ The Crown’s title, he said, could only be acquired from the Crown, and all that a private purchaser could acquire from the Indians was the Indian title. However, “[t]he person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.”¹³⁴ He then equated this situation with a grant made by an Aboriginal nation to one of its members, “authorizing him to hold a particular tract of land in severalty.”¹³⁵ Marshall C.J. continued:

As such a grant could not separate the Indian from his nation, nor give a title which our Courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a Court to say, that different consequences are attached to this purchase, because it was made by a stranger.¹³⁶

This part of his judgment is significant partly because it acknowledges that Aboriginal law continued to apply within the Indian nations after European colonization. Moreover, as Marshall C.J. also admitted the power of the Indian nations “to change their laws or usages,”¹³⁷ it supports the concept of Indian self-government that he developed in *Worcester v. Georgia*. As Professor Brian Slattery has pointed out, this explanation for inalienability was not necessarily offered as an *alternative* to the doctrine of discovery. Instead, the two appear to *complement* one another. Slattery’s analysis is worth quoting at length:

The court in effect recognizes that the situation under consideration is governed simultaneously by two distinct legal regimes, Anglo-American and Indian. The first argument approaches the question from within the context of Anglo-American law. ... [T]he second argument ... looks to the Indian side of the matter. It holds that the rules in force in settler communities do not directly apply to Indian peoples living independent lives in their own territories under their own laws. Just as an Indian nation may presumably confer exclusive land rights on

¹³³ *Johnson v. M’Intosh*, *supra* note 4 at 592-93.

¹³⁴ *Ibid.* at 593.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

particular members of the group (if the laws of the nation allow this), so also it is conceivable that an Indian nation might grant land to individual outsiders. In such a case, maintains the court, the outsider assimilates himself with the Indians, and holds his lands subject to their authority and under their laws. If the Indians subsequently surrender their lands to the government so as to extinguish not only the collective title of the group itself, but also any particular rights held by group members, then the rights of the outsider are nullified as well, for he stands in no higher a position than any other member of the group.¹³⁸

Marshall C.J.'s judgment provides us, in this context of inalienability, with a way to follow Chief Justice Lamer's direction in *Delgamuukw* that both the common law and Aboriginal perspectives have to be taken into account.¹³⁹ The result, as Slattery has explained, is that two separate legal regimes have to be considered. The common law of Aboriginal title operates at the level of intergovernmental relations between the Indian or Aboriginal nations and the American and Canadian governments. At that level, Aboriginal title is inalienable other than by surrender to the United States or the Crown, for the reasons we have discussed. But within Indian or Aboriginal nations, those reasons should not apply because no alienation of Aboriginal title is involved. If their own laws so permit, they could create interests in land within their own territories, while retaining their communal title to the whole of their territories. This would be an important aspect of the decision-making authority that Lamer C.J. said Aboriginal nations have with respect to their lands.¹⁴⁰ And as Marshall C.J. pointed out, if the laws of an Indian or Aboriginal nation can permit the creation of interests in favour of members of the nation, as must be the case, there appears to be no valid reason why they cannot also permit the creation of interests in favour of non-members. As the non-members' interest would be held under the nation's Aboriginal title and subject to

¹³⁸ B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 29.

¹³⁹ See *Delgamuukw*, *supra* note 1 at paras. 81-82, 112, 147.

¹⁴⁰ See *supra* notes 61-62 and accompanying text. It is worth noting that Indian bands do have limited authority of this kind with respect to their reserve lands under s. 20 of the *Indian Act*, *supra* note 19, which permits band councils to allot possession of reserve lands to Indians. However, exercise of this authority is subject to approval by the Minister of Indian Affairs. Also, s. 58(3) of the act authorizes the minister to lease reserve land that is in lawful possession of an Indian for his or her benefit. A lease can be made under this subsection to a non-Indian without a surrender of the land, so that it remains within the reserve and is therefore subject to the bylaw-making authority of the band council, e.g. respecting zoning. See *R. v. Devereux*, [1965] S.C.R. 567, 51 D.L.R. (2d) 546; *Boyer v. Canada* (1986), 2 F.C. 393, 65 N.R. 305 (C.A.), leave to appeal to Supreme Court of Canada refused (1986), 72 N.R. 365n.; *Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1999] 1 C.N.L.R. 258 (F.C.T.D.). See also s. 28(2), empowering the minister to "authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve."

their laws, the nation would retain control over the land.¹⁴¹ As Marshall C.J. pointed out, the land would still be part of their territory and so could be resumed by them through the exercise of their continuing authority to change and apply their own laws.¹⁴²

Support for limiting the application of the inalienability rule to transfers of Aboriginal title, so that the capacity of Aboriginal nations to create interests in land under that title is acknowledged, can also be found in Australia in the High Court decision in *Mabo*.¹⁴³ In that case, which involved a Native title claim to islands in the Torres Strait at the northern tip of Queensland, the court declared that “the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.”¹⁴⁴ Writing the principal judgment, Brennan J. (as he then was) addressed the inalienability of Native title:

*[U]nless there are pre-existing laws of a territory over which the Crown acquires sovereignty which provide for the alienation of interests in land to strangers, the rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants. Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived.*¹⁴⁵

Elaborating on this, he said:

It follows that a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, *does not acknowledge their laws and observe their customs*; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people. Such a right or interest can be acquired *outside those laws and customs* only by the Crown.¹⁴⁶

From this, it is apparent that Brennan J. thought there are two kinds of alienation of Native title land. The first involves creation of a right or interest that is still subject to the laws and customs of the Indigenous people in question, and apparently depends

¹⁴¹ This control should alleviate any lingering concerns over the need to protect Indigenous nations from exploitation. See Part I above.

¹⁴² *Johnson v. M'Intosh*, *supra* note 4 at 593.

¹⁴³ *Supra* note 2.

¹⁴⁴ *Ibid.* at 217 [italics removed]: see text accompanying notes 51-59. Note that the concept of Native title in Australia is more inclusive than the concept of Aboriginal title in Canada, as it can include rights that would be classified in Canada as free-standing Aboriginal rights not amounting to title. See K. McNeil, “Aboriginal Title and Aboriginal Rights: What’s the Connection?” (1997) 36 *Alta. L. Rev.* 117 esp. at 138-44; McNeil, “Traditional Laws and Customs”, *supra* note 52.

¹⁴⁵ *Mabo*, *ibid.* at 59 [emphasis added].

¹⁴⁶ *Ibid.* at 60 [footnote omitted, emphasis added].

on and is contained within their communal Native title.¹⁴⁷ The second involves loss of the Native title itself by surrender of it to the Crown and removal of the land from the community, thereby placing the land beyond the reach of their laws and customs. In other words, when an alienation of the first kind takes place the Native title and jurisdiction over it are retained by the community, whereas an alienation of the second kind involves giving up both title and jurisdiction.

Deane and Gaudron JJ., concurring in the result in *Mabo*, dealt with inalienability more briefly, but appear to have arrived at the same conclusions as Brennan J. Referring to limitations on Native title, they said:

The first limitation relates to alienation. It is commonly expressed as a right of pre-emption in the Sovereign, sometimes said to flow from "discovery" (i.e. in the European sense of "discovery" by a European State). The effect of such a right of pre-emption in the Crown is *not to preclude changes to entitlement and enjoyment within the local native system*. It is to preclude alienation *outside the native system otherwise than by surrender to the Crown*.¹⁴⁸

Toohy J., also concurring in the result, only touched on inalienability in the context of extinguishment of Native title, without mentioning whether rights or interests could be created subject to that title in accordance with Indigenous laws or customs.¹⁴⁹

It therefore appears that the concept of Indian or Native title that emerges from both *Johnson v. M'Intosh* and *Mabo* is a communal right over land that has jurisdictional as well as proprietary attributes. One way that jurisdiction can be exercised is through Indigenous laws and customs that provide for the creation and enjoyment of

¹⁴⁷ Brennan J. said, *ibid.* at 61-62 [footnote omitted, emphasis added], that where an Indigenous people,

as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or *by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. Those rights and interests are, so to speak, carved out of the communal native title*. A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title. A communal native title enures for the benefit of the community as a whole and for *the sub-groups and individuals within it who have particular rights and interests in the community's lands*.

¹⁴⁸ *Ibid.* at 88 [footnote omitted, emphasis added]. See also *ibid.* at 110: "The enjoyment of the rights [under Native title] can be varied and dealt with under the traditional law or custom. The rights are not, however, assignable outside the overall native system. They can be voluntarily extinguished by surrender to the Crown."

¹⁴⁹ *Ibid.* at 194. He did say, however, that "inalienability of the title says nothing of the Crown's power or the nature of the title. Rather, it describes rights, or restrictions on rights, of settlers and other potential purchasers" [footnote omitted].

land rights that depend on and are included within the communal title of the Indigenous people in question. Moreover, both the Supreme Court of the United States and the High Court of Australia have envisaged that land rights created by Indigenous laws and customs could be acquired by persons who are not members of the community if the laws and customs make provision for that. As the Indian or Native title would be retained by the community, there would be no alienation of that title and so no violation of the rule that Indian or Native title is inalienable. We have seen that the Supreme Court of Canada has also held that Aboriginal title is a communal right entailing decision-making authority that appears to be jurisdictional in nature.¹⁵⁰ So, as in the United States and Australia, Aboriginal nations in Canada should be able to make laws that provide for non-members to hold interests in land within the territory covered by their Aboriginal title.¹⁵¹ As this would not involve alienation of their communal title, it should be permissible under Canadian law.

Acknowledgment of the capacity of Indigenous nations to create rights or interests in their title lands in accordance with their own laws and customs raises an important question of enforceability. Would those rights or interests be enforceable only by whatever mechanisms are available within the Indigenous legal systems themselves, or would they be enforceable by Canadian, American, or Australian courts? In *Johnson v. M'Intosh*, Marshall C.J. appears to have taken the position that interests created by an Indian nation under its own laws would not be enforceable in the courts of the United States. An Indian grant of land, he said, "derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title."¹⁵² This approach is consistent with Marshall C.J.'s subsequent ruling on the sovereign status of

¹⁵⁰ See *supra* notes 60-66 and accompanying text.

¹⁵¹ This is possible under the *Nisga'a Final Agreement*, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex1_e.pdf> (date accessed: 6 June 2002). In chapter 11 of the agreement, paragraph 44(c), which deals with Nisga'a government, provides that the Nisga'a Lisims Government may make laws in respect of "the disposition of an estate or interest ... in any parcel of Nisga'a Lands." When the agreement came into force on 11 May 2000, Nisga'a lands became owned by the Nisga'a Nation in fee simple (c. 3, para. 3), and from that time on the Nisga'a Nation has had the authority to dispose of the whole of its estate in fee simple or of any lesser estate or interest "to any person" (c. 3, para. 4(b)). Significantly, however, "[a] parcel of Nisga'a Lands does not cease to be Nisga'a Lands as a result of any change in ownership of an estate or interest in that parcel" (c. 3, para. 5). Apparently a parcel of land will remain Nisga'a land and so continue to be subject to Nisga'a jurisdiction even after the Nisga'a Nation has disposed of its fee simple interest (a nice question arises, however, as to the nature of the interest the Nisga'a Nation retains in that land after disposal of its fee simple). For general discussion, see *The Nisga'a Treaty* (1998-99) 120 B.C. Studies; T. Molloy, *The World is Our Witness: The Historic Journey of the Nisga'a into Canada* (Calgary: Fifth House, 2000). I am grateful to Tom Molloy for his assistance in locating and understanding the relevant sections of the agreement.

¹⁵² *Johnson v. M'Intosh*, *supra* note 4 at 593.

the Indian nations in *Worcester v. Georgia*.¹⁵³ In *Mabo*, however, without concerning himself with the internal sovereignty of the Indigenous peoples of Australia,¹⁵⁴ Brennan J. adopted a somewhat different position on this question of enforceability. He said:

If alienation of a right or interest in land is a mere matter of the custom observed by the indigenous inhabitants, not provided for by law enforced by a sovereign power, there is no machinery which can enforce the rights of the alienee. The common law cannot enforce as a proprietary interest the rights of a putative alienee whose title is not created either under a law which was enforceable against the putative alienor at the time of the alienation and thereafter until the change of sovereignty or under the common law.¹⁵⁵

From this, it appears that a right or interest created, even before Crown sovereignty, under Indigenous *law* as opposed to "mere" *custom*, might be enforceable after sovereignty in a common law court. However, the reference to a pre-sovereignty origin of the right or interest in this passage makes it somewhat uncertain whether a non-Indigenous alienee would be in the same position.¹⁵⁶

Case law from the United States and Australia is therefore somewhat inconclusive on the question of enforceability. At the heart of the matter is the issue of self-government. On the one hand, respect for Aboriginal decision-making and autonomy may make it inappropriate for non-Indigenous courts to intervene in this situation, whether to protect the interests of community members, or of non-members who have voluntarily acquired rights under the laws of the nation in question. On the other hand, investors may be reluctant to engage in development on Indigenous lands if the rights they obtain are not enforceable in non-Indigenous courts. Complex policy issues therefore need to be considered before coming to definite conclusions on this question of jurisdiction.

¹⁵³ See *supra* notes 116-26 and accompanying text.

¹⁵⁴ Brennan J. nonetheless held that acquisition of Crown sovereignty over Australia was an act of state that could not be questioned by the courts: *Mabo*, *supra* note 2 at 31-32. Deane and Gaudron JJ. said the same thing (*ibid.* at 78-79, 95). See also *Coe v. Commonwealth of Australia* (1979), 53 A.L.J.R. 403 (H.C.). For related discussion, see D. Ritter, "The 'Rejection of Terra Nullius' in *Mabo*: A Critical Analysis" (1996) 18 Sydney L. Rev. 5.

¹⁵⁵ *Mabo*, *ibid.* at 59.

¹⁵⁶ See also the quotation *supra* note 147, from which it appears that subgroups or individuals who hold rights or interests dependent on a communal Native title could bring an action in an Australian court to protect those rights or interests *against outsiders*. Whether they could also bring an action to enforce the rights or interests *against their own community* is not so clear.

Conclusion

In Canada in particular, the inalienability of Aboriginal title has been justified in part by a recognized need to protect Aboriginal peoples from European settlers as a matter of policy. While this policy of protection undoubtedly served an important purpose historically, the paternalism inherent in it has undermined its value as a justification for the inalienability of Aboriginal title today. There is nonetheless a continuing need at least to preserve the land bases that Aboriginal peoples have been able to retain in the face of European colonization. I am therefore not arguing that Aboriginal title lands should be freely alienable. Nevertheless, inalienability should not act as a fetter that prevents Aboriginal nations from developing their lands economically without surrendering them to the Crown. Consequently, what is needed is a principled explanation for inalienability that avoids the paternalism of the protection rationale, and yet acknowledges that the Aboriginal peoples have the authority to engage in economic development of their lands through the exercise of their inherent right of self-government.

The incapacity of settlers rationale for the inalienability of Aboriginal title seems to serve this dual purpose. Political theories and international legal ideas that were current when the eastern portion of North America was being colonized conceived of sovereignty as inalienable, at least without the consent of the people concerned. The judgments of Chief Justice Marshall in the 1820s and 1830s revealed that the Aboriginal nations were sovereign prior to the “discovery” of America by the Europeans, and that they retained a degree of that sovereignty after colonization. More recent judicial decisions in Canada and Australia have affirmed that Aboriginal title is a communal right, and that decision-making authority over Aboriginal or Native title lands rests with the community involved. Aboriginal title therefore has governmental attributes that make it much more than a property right. It follows from this that private persons who have no authority to govern cannot acquire it for themselves. Aboriginal title is only alienable to an entity that does have governmental capacity—in Canada, another Aboriginal nation or the Crown.

An important practical consequence arises from attributing the inalienability of Aboriginal title to its governmental aspects. As Aboriginal title is both proprietary and jurisdictional, the two should be severable in much the same way as the proprietary element of the Crown’s title to public lands can be separated from the Crown’s sovereignty over those lands. When the Crown grants an interest in land, it always retains its paramount lordship and its jurisdiction because these cannot be acquired by the grantee. Similarly, alienation of land by an Aboriginal nation that does not terminate the communal and jurisdictional aspect of that nation’s title should be permissible. In that situation, the alienee could obtain a property interest in the land but would hold that interest subject to the jurisdiction and laws of the Aboriginal nation. As the nation

would retain the governmental aspects of its title, no violation of the rule against alienation of that title would occur. Moreover, we have seen that both the Supreme Court of the United States and the High Court of Australia have in fact accepted this, as they have held that Indigenous peoples can create interests in land within their territories without alienating their Indian or Native title.¹⁵⁷

Acknowledgment of the authority of Aboriginal nations to alienate interests in land that are subject to their Aboriginal title would facilitate economic development that is subject to Aboriginal control. It would avoid the dilemma of Aboriginal nations having to surrender their lands to the Crown in order to create third-party interests for the purpose of development. This approach also affirms the decision-making authority of Aboriginal nations regarding use of their lands, and acknowledges their responsibility for preserving their lands for future generations. In short, it is a practical and effective way to move from paternalism to self-determination.

¹⁵⁷ It would, of course, be up to each Aboriginal nation to decide whether to allow such purchases, and if allowed to define the nature of the rights and interests that could be acquired, through exercise of their decision-making authority over their lands, which we have seen is an aspect of self-government. See *supra* notes 60-66 and accompanying text.