

States, identities and the extinguishment of Indigenous title

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States and identities: a constructivist approach

Do states have identities? Is it possible that the complex ensemble of institutions and practices that is the modern state can be thought of as possessing an *identity*, which the OED describes as:

The quality or condition of being the same in substance, composition, nature, properties, or in particular qualities under consideration; absolute or essential sameness; oneness ... The sameness of a person or thing at all times or in all circumstances.

Briefly, I think it is possible to examine the extent of sameness in the composition of certain institutions of the state apparatus. More importantly we can ask whether this similarity (or its absence) presents non-state actors with opportunities for political action.

This paper is a preliminary discussion of this proposition that is part of a larger project that will explore the consistencies and relations between state identities and broader national, social and Indigenous identities. Here I situate this inquiry in the context of the legacies of colonisation and contemporary discussions about the rights of Indigenous peoples, particularly Indigenous rights to land and the power of the state to extinguish those rights. There are, I want to suggest, patterns of correspondence that become visible in the way that judicial actions have related to those of executives and legislatures. Specifically, the paper describes two pieces of jurisprudence in Australia and Canada, and then examines the consistency of the actions of other state institutions (executive and legislature) in the aftermath of those adjudications, as well as broader reactions among non-state groups.

Identities have been of particular interest to those scholars taking a constructivist approach to the analysis of international relations (IR). For them, identities arise out of what Stephen Toulmin called our “horizons of expectation”.¹ According to Reus-Smit: “Constructivists ... (hold) three ontological propositions: they emphasize the importance of normative and ideational structures in defining actors’ social identities and in shaping how actors interpret their material environment; they stress the way in which actors’ social identities affect their interests and the strategies they employ to realize those

¹ Stephen Edelston Toulmin, *Cosmopolis: the hidden agenda of modernity*, University of Chicago Press ed. (Chicago: University of Chicago Press, 1992).

interests; and they highlight the mutually constitutive relationship between the knowledgeable practices of actors and social structures.”²

Emanuel Adler has suggested that constructivism can assist us to “explain why people converge around specific norms, identities and cause-effect understandings, and thus where interests come from”.³ Taking a constructivist approach, scholars in IR have offered empirical accounts of the construction of norms and identities and their deployment: Audie Klotz showed that the end of apartheid could be attributed to the rise of a global norm of racial equality; Hawkins observed the stimulus of the passage of international human rights instruments on activism inside Chile under Pinochet; and Crawford has criticised the standard materialist accounts of the end of colonialism: “what mattered more in the long run was the making of persuasive ethical arguments containing normative beliefs about what was good and right to do to others. While the colonized had always resisted colonialism, sometimes with great success, what changed in the twentieth century was the content and balance of normative beliefs and the balance of proof. Where colonialism had been the dominant practice, or norm, for thousands of years, supported by strong ethical arguments, colonialism was denormalized and delegitimized in the twentieth century because anti-colonial reformers made persuasive ethical arguments.”⁴

I think we can develop a similar approach in order to think about the indigenous-settler problem. Certain forms of social identity are available to those living in settler-colonial societies like Australia and Canada and become visible as the state attempts to formulate policy. These identities reflect conjunctions of material and ideas and are easily mobilised in response to contingent openings in state identity. We can start to think about that by drawing on Peter Russell’s idea of an expansive constitution: “at the deepest level, constitutionalism is about the nature of the body politic – the political community and the people or peoples who constitute it”.⁵ In this conception, values and identities, as well as institutions, both comprise and inform the practices of forming and reforming constitutions.

Moreover, Reus-Smit has observed the existence of “constitutional structures”. He sees these as having three normative features: “a hegemonic belief about the purpose of the

² Christian Reus-Smit, *The moral purpose of the state: culture, social identity, and institutional rationality in international relations*, Princeton studies in international history and politics (Princeton, N.J.: Princeton University Press, 1999), 165.

³ Emanuel Adler, "Constructivism and international relations," in *Handbook of international relations*, ed. Walter Carlsnaes, Thomas Risse-Kappen, and Beth A. Simmons (London; Thousand Oaks, CA: Sage Publications, 2002), 102.

⁴ Audie Klotz, *Norms in international relations: the struggle against apartheid*, Cornell studies in political economy (Ithaca: Cornell University Press, 1995); Darren Hawkins, "Human rights norms and networks in authoritarian Chile," in *Restructuring World Politics: Transnational Social Movements, Networks, and Norms, Social Movements, Protest, and Contention*, ed. Sanjeev Khagram, Kathryn Sikkink, and James V. Riker, Social Movements, Protest, and Contention (Minneapolis: University of Minnesota Press, 2002); Neta Crawford, *Argument and change in world politics: ethics, decolonization, and humanitarian intervention*, Cambridge studies in international relations, vol. 81 (Cambridge, UK; New York: Cambridge University Press, 2002), 4.

⁵ Peter H. Russell, *Recognizing Aboriginal title: the Mabo case and indigenous resistance to English-settler colonialism* (Toronto; Buffalo: University of Toronto Press, 2005), 288.

state, an organizing principle of sovereignty, and a systemic norm of procedural justice. Hegemonic beliefs about the moral purpose of the state represent the core of this normative complex, providing the justificatory foundations for the organizing principle of sovereignty and informing the norm of procedural justice. Together they form a coherent ensemble of metavalues, an ensemble that defines the terms of legitimate statehood and the broad parameters of rightful state action. Most importantly for our purposes, the prevailing norms of procedural justice shapes institutional design and action, defining institutional rationality in a distinctive way, leading states to adopt certain practices and not others.”⁶

Questions about titles to land, particularly those that hinge on understandings of historical conflicts, reveal the connections clearly. According to Burch, these “are significant because they link the material and ideational aspects of social structures. Property rights are particularly noteworthy since rules deploy resources.”⁷ Therefore we can see that judicial rulings about indigenous peoples’ title link the material order of property, resources and their management, with ideas about equity in the distribution of lands and resources, the national interest, and a just response to the legacies of colonisation. As Hall has argued, “institutional forms of collective action change with prevailing, historically contingent conceptions of societal collective identity. *Significantly, that which constitutes an appropriate institutional vehicle through which society may take social action is strongly conditioned by what form of polity the society considers itself to be.*”⁸

So, returning to the indigenous-settler problem and the particular issue of extinguishment of indigenous title, how can these frameworks advance our thinking? First, as we will see, the findings in *Calder* and *Mabo* force both governments and societies to think again about the moral purpose of the state and the legitimacy of state sovereignty. By showing that state practices have been blind to the lawful entitlements of indigenous peoples, the judgements require new state policy and force the state to consider how to restore its own morality and legitimacy in the face of such long-standing denials. That restoration process is fundamentally an identity process and it is here that other types of social identity can be mobilised to influence and shape the reformulation of state policy.

The power of extinguishment

In this section I describe the ways courts have constructed state power in regards to the extinguishment of Aboriginal/native title. This includes the historical basis of the power itself, and the ways judges have characterised its legal exercise. I think it is possible to isolate the moment in each respective jurisdiction where the Supreme/High Court

⁶ Reus-Smit, 6.

⁷ Kurt Burch, "Toward a constructivist comparative politics," in *Constructivism and comparative politics*, ed. Daniel M. Green (Armonk, N.Y.: M.E. Sharpe, 2002), 69.

⁸ Rodney Bruce Hall, "Socially constructed contexts of comparative politics," in *Constructivism and comparative politics*, ed. Daniel M. Green (Armonk, N.Y.: M.E. Sharpe, 2002), 123.

addresses the same issue: does the Crown have the right to extinguish aboriginal/native title and if so, how can this power be exercised?

Of course, that issue only arises because of a much more fundamental finding: that indigenous peoples' titles continue to exist and that their source is independent of the Crown. In this way, each moment presents us with a shift in the way that judges are instructing settler societies to interact with indigenous peoples. Given the continuity and consistency of indigenous claims to land throughout colonial history and in multiple different contexts from the frontier on, and the fact that the judgements deal with the nature of state power, the shift takes place within the state's understanding of its own identity: settler-states are shifted from a position where they can choose to recognise indigenous peoples' entitlements to one in which they must choose to extinguish them. Given earlier findings that title existed at the "pleasure" of the Crown, the shift is also from *noblesse oblige* or magnanimity to obligation and recognition. This is the shift that takes place in the law and in the following sections I will examine what the wider responses to that shift have been. But first, I analyse the judgements themselves.

The Canadian Supreme Court's decision in *Calder* in 1973 was the culmination of the legal struggle of the Nisga'a peoples of NW British Columbia, led by Frank Calder and other leaders. The Nisga'a claimed that their aboriginal title had "never been lawfully extinguished" and sought a declaration to that effect. Seven judges of the Canadian Supreme Court heard the arguments and split 3-3 on the central factual issue of the persistence of the Nisga'a title; one judge rejected the appeal on the grounds that it had not been made with the permission of the BC provincial government. This meant the Nisga'a appeal was rejected but the finding was perceived as a major victory for Aboriginal peoples nonetheless. Three judges (Hall, Spence and Laskin) found the following:

Once aboriginal title is established, it is presumed to continue until the contrary is proven. When the Nishga people came under British sovereignty they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did the Parliament of Canada.

Even Judson, whose judgement led the other three (and was effectively the majority argument), found considerable unreality in the way that aboriginal peoples' presence in Canada had been understood hitherto:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign".

Briefly, the majority found that Nisga'a aboriginal title predated colonisation, but that provincial action in the form of general land legislation in the first decades of colonisation had in fact lawfully extinguished it. Yet this was a rejection with profound consequences: Aboriginal title may still exist (though not for the Nisga'a) and where it did it would receive all the protection of the common law. The Court recast the legality of state action that may impair or extinguish aboriginal title; now instances of extinguishment had to conform to a practice that respected common law rights.⁹

Historically, the exercise of state power to take away such “vested” rights (ie. rights or title not granted by statute, including those held at common law) has been subject to explicit rules regarding its exercise. Kent McNeil has put this plainly in a recent paper:

... the Crown, in its executive capacity cannot infringe or take away vested rights, especially rights in relation to land, without unequivocal statutory authority. This is a fundamental principle, going back at least to *Magna Carta*, that was firmly entrenched in the sometimes bloody struggle between the Stuart Kings and Parliament in the 17th century. It lies at the heart of both the rule of law and parliamentary sovereignty.”¹⁰

In his judgement Hall cited Chief Justice Mansfield's decision in the English case of *Campbell v. Hall* (1774), which set out the obligations of the Crown to deal fairly with the vested rights of peoples in newly annexed or conquered territories:

I will state the propositions at large, and the first is this: A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain. The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens. The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning. The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives. The 5th, that the laws of a conquered country continue in force, until they are altered by the conqueror ... In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known.

David Elliot has set out the ways in which “His Majesty's further pleasure” became known. Most obvious among these was “cession” in the form of treaties¹¹; there was also

⁹ There are perhaps other judgements where a move to characterize the power to extinguish aboriginal rights if not title was discussed, particularly *R. v Sikyee*; the Court discussed the treatment of aboriginal rights to wildlife resources in the context of international regulation of migratory birds. I am grateful to Kent McNeil for pointing this out and intend to pursue it further.

¹⁰ Kent McNeil, "The vulnerability of Indigenous land rights in Australia and Canada," *Osgoode Hall Law Journal* 42, 2 (2004): 271-301.

¹¹ Note that many First Nations tend not to see the earliest treaties nor modern agreements as involving extinguishment. Some have argued that the concept of extinguishment is not something indigenous peoples could have consented to as it was absent from their worldview. And in fact, decisions such as that of Morrow J in the case *Paulette* in the NWT Supreme Court leave quite open the question of whether treaties effect complete extinguishment of aboriginal rights. See the discussion of this in David Elliott, "Aboriginal

extinguishment by legislation; and finally by act of the executive.¹² Returning to Hall's judgement we see how he characterised the Crown's historical exercise of its power to extinguish aboriginal title. Hall drew from US and Canadian precedents a history of treaty-making as European interests in North America expanded westward, and saw these as indicative of Crown intentions and honour:

It was usual policy not to coerce the surrender of lands without consent and without compensation. The great drive to open western lands in the 19th century, however, productive of sharp dealing, did not wholly subvert the settled practice of negotiated extinguishment of original Indian title ... Something more than sovereign grace prompted the obvious regard given to original Indian title ... Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed.

Hall cited the US case *Lipan Apache*, drawing from it an explicit language of extinguishment: "In the absence of a 'clear and plain indication' in the public records that the sovereign 'intended to extinguish all of the (claimants') rights' in their property, Indian title continues..... It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'. There is no such proof in the case at bar; no legislation to that effect." Hall found that neither the formal Commission of the Governor of British Columbia nor subsequent instructions had given him the statutory authority to extinguish aboriginal title; so therefore if it was done, it was *ultra vires*, beyond the law. As Elliott pointed out, the new characterisation meant that accidental extinguishment would not be acceptable: "the requirement of a clear and plain intention to extinguish aboriginal title raises a form of presumption against extinguishment that should provide at least some protection against cases of 'extinguishment by oversight'."¹³

Mabo (No. 2) comes two decades later in the High Court of Australia. Eddie Mabo and other traditional land-owners on the Torres Strait Island of Mer sought recognition of their traditional tenures at Australia law. In 1992 the court agreed with the claimants and found that, "the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands". It was Justice Brennan who presented the main characterisation of the right to extinguish:

Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory ... It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power ... However, under the constitutional law of this country, the legality (and hence the validity) of an exercise of a sovereign power depends on the authority vested in the organ of government purporting to exercise it.

title," in *Aboriginal peoples and the law: Indian, Metis and Inuit rights in Canada*, ed. Bradford W. Morse (Ottawa: Carleton University Press, 1985), 112..

¹² Elliott, 112-14.

¹³ Elliott, 115.

Brennan went on to refer to the accepted mode of extinguishment of native title as it had evolved in other jurisdictions, drawing directly on reasoning from *Calder*:

... the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive. This requirement, which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealing with the extinguishing of the native title of Indian bands in North America ... reference to the leading cases in each jurisdiction reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless there be a clear and plain intention to do so.

Consequently, no extinguishment was worked by statutes that simply regulated native title, or created a system of management that was compatible with it. In particular, the practice of reserving lands for indigenous peoples was highlighted as not interfering with native title. This differs from Canada where reservations created pursuant to treaties were as we saw, clearly understood to have extinguished aboriginal title.

Deane and Gaudron JJ concurred and developed this reasoning: “the rights are not entrenched in the sense that they are, by reason of their nature, beyond the reach of legislative power. The ordinary rules of statutory interpretation require, however, that clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation”. In findings that were not in the majority, moreover, Deane, Gaudron and Toohey JJ, all pushed the interpretation of both title and the power to extinguish it much closer to Canadian readings, discussing the issues of consent and fiduciary responsibilities.

In fact, it must be noted that writing for the majority in *Mabo*, Brennan J allowed for a doctrine of “extinguishment by grant”; that is, extinguishment by executive action inconsistent (but not according to an explicit statutory power) with the continuing enjoyment of native title.¹⁴ As Kent McNeil has argued, Brennan’s reasoning lacks an “identification of the statutory provisions that clearly and plainly empowered the Crown to infringe or extinguish native title by grant.”¹⁵ In fact, Brennan relied for this finding on a faulty argument that the Crown was able to extinguish only those common law rights which it had itself not issued. It is hard to conclude otherwise than with McNeil that in Australia at least, the character of the power to extinguish was tainted and racially discriminatory from the outset.¹⁶ As Peter Russell noted, native title as constructed in *Mabo* was “an extremely light burden, a burden that the law of the settler society permits its government all too easily to remove.”¹⁷

However, judges in both jurisdictions have said that in the settler-colonies there are two independent realms from which peoples’ rights to land issue; that the dominance of one is

¹⁴ Kent McNeil, *Emerging justice? Essays on indigenous rights in Canada and Australia* (Saskatoon: Native Law Centre University of Saskatchewan, 2001), 369-79.

¹⁵ McNeil, “The vulnerability of Indigenous land rights in Australia and Canada.”

¹⁶ McNeil, *Emerging justice? Essays on indigenous rights in Canada and Australia*, 401-2.

¹⁷ Russell, 257.

subject to a range of restraints in the powers that it can exercise over the other. Of great significance now is whether the Crown draws attention to the exercise of its power; whether it becomes self-conscious in its actions regarding the interests of indigenous peoples. This has historic dimensions and a moral quality to it: that the stronger party to a relationship has an obligation to behave transparently.

State reactions: politics and policy

The behaviour of the respective executives in each case provides a marked contrast. Briefly, Canada moved into a policy of negotiating aboriginal claims, while Australia immediately assumed that a federal statute dedicated to native title was required.

First, to Canada. As many observers both at the time and subsequently have realised, the late 1960s and early 1970s were not a golden age for federal policy in Indian Affairs. The White Paper of 1969 was comprehensively rejected by Aboriginal peoples, not simply for being a policy developed in bad faith by ignoring an extensive round of consultations, but because of its fundamental ideological commitments to the progressive erasure of indigenous difference: “The White Paper became the single most powerful catalyst of the Indian nationalist movement, launching it into a determined force for nativism – a reaffirmation of a unique cultural heritage and identity.”¹⁸ Indigenous mobilisations from the end of the 1960s became steadily more visible, more effective and increasingly targeted against resource industries. During the 1970s these were boosted by the emergence of a global movement campaigning for the same issues. Aboriginal protests drew on Aboriginal traditions and sought to impair the functioning of the resource economy in particular.¹⁹

Yet though the government had retracted the White Paper, Trudeau dismissed the proposition that claims settlement must take into account aboriginal rights, saying, “Our answer, it may not be the right one and may not be the one that is accepted ... our answer is no.”²⁰

The decision in Calder was released on the morning of January 31, 1973 and it was soon clear that it had severely if not mortally wounded the government’s assimilationist policy. Trudeau was asked on February 1 whether he would agree to meet with the Nisga’a and said he would consider it. On the 8th, Trudeau’s comments to the House gave an insight

¹⁸ Sally M. Weaver, *Making Canadian Indian policy: the hidden agenda 1968-70*, Studies in the structure of power, decision-making in Canada; 9 (Toronto; Buffalo: University of Toronto Press, 1981), 171.

¹⁹ See variously Ravi de Costa, “New relationships, old certainties: Australia’s reconciliation and the treaty-process in British Columbia” (PhD, Swinburne University of Technology, 2002), 172-86.; Ravi de Costa, “Treaty how?,” *The Drawing Board: An Australian Review of Public Affairs* (2003).; Paul Tennant, “Native Indian political activity in British Columbia, 1969-1983,” *BC Studies* 57 (1983): 112-36; Paul Tennant, *Aboriginal peoples and politics: The Indian land question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990).; George Manuel and Michael Posluns, *The fourth world: an Indian reality* (New York: Free Press, 1974).; Peter McFarlane, *Brotherhood to nationhood George Manuel and the making of the modern Indian movement* (Toronto: Between the Lines, 1993).

²⁰ Cited by Flora MacDonald, *Debates* (April 11, 1973), p. 3207.

into his intellectual convolution, with him saying that the policy orientation of the White Paper was “not affected by this judgement... (because in light of the judgement) they were claiming not aboriginal rights but legal rights”.²¹ However, he did accept that there needed to be a new formulation of government policy: “we would plan some time in the future to make public the position on the whole matter of the Indians, which we think would be updated by the experiences we have had in communicating with them over the past few years and by the various briefs they have submitted to various courts.”²²

It is hardly surprising, given the split of the court and the complexity and paradigmatic nature of the case, that there was considerable confusion amongst MPs as to what the law now was. Moreover, as Saskatchewan’s Attorney-General Ken Lysyk pointed out at the time even lawyers capacity to grasp the issue was not great: “discussion of the subject at this time must contend with a credibility gap, an initial scepticism as to whether the concept of Indian title is one which has any basis at all in our jurisprudence.”²³ Flora MacDonald, a PC member, sought to move the entire debate into the Standing Committee for Indian Affairs and Northern Development. Some parliamentarians thought that the House should wait for further clarification from the Court: in the House of Commons, former Prime Minister John Diefenbaker urged that the question be put again to the Supreme Court so that “a final determination can be made, instead of the present uncertainty”.²⁴

However, on April 11, 1973, the House had its only substantive discussion on the import of the judgement before the government announced its new policy. Ostensibly the debate was whether to adopt a report of the Standing Committee which, “in a rare instance of disagreement with government policy”, included the recommendation (presented to the Committee by the National Indian Brotherhood), that the federal government adopt a policy of negotiation on the basis of aboriginal rights where there were no treaties, and discuss compensation to redress the injustices in existing treaties.²⁵ As several participants in the debate pointed out this was an historic moment, one pointing out that this was “the first time a formal proposition has been made to the House in respect of aboriginal rights on which there can be a vote.”²⁶ Sally Weaver pointed out that the thinking in the Committee reflected public sentiment which was then “strongly supportive of aboriginal claims settlement”.²⁷

Flora MacDonald opened the debate on aboriginal rights and title, saying “this is not a fad; it is a fact.” She quoted Trudeau, who had told a delegation of the Union of BC Indian Chiefs on February 7 that, “perhaps you have more legal rights than we thought you had when we did the White Paper.” She argued that the PC party’s negotiation policy would acknowledge aboriginal rights claims and proceed only in full consultation.

²¹ See Thomas R. Berger, *One man's justice: a life in the law* (Vancouver; Seattle: Douglas & McIntyre; University of Washington Press, 2002), 126.

²² Rt. Hon. Pierre Trudeau, *Debates* (February 8, 1973), p. 1082.

²³ Lysyk, cited in Weaver, 163.

²⁴ Rt. Hon. John Diefenbaker, *Debates* (February 5, 1973), p. 946.

²⁵ Weaver, 198.

²⁶ Frank Howard (NDP), *Debates* (April 11, 1973), p. 3210.

²⁷ Weaver.

Moreover, she at length argued that the Canadian government had *always* proceeded on the basis of aboriginal title, discussing the 1763 Royal Proclamation and the treaty-making policy on which Hall's judgement in *Calder* had also been based. The only aberration, she noted, was the White Paper. She also pointed out that the James Bay and Northern Quebec discussions were also tainted by the federal government and Trudeau's refusal to be explicit about their position post-*Calder* and acknowledge that title issues were at stake: "He has evaded the issue, avoided, abdicated, skirted around and brushed aside the fact that the government has the constitutional responsibility for the James Bay Indians and their claims as aboriginal citizens."²⁸

Some reflected on the broader significance of the judgement to the rising militancy of indigenous activism across North America, exemplified by the then unfolding siege at Wounded Knee. The Chairman of the Standing Committee Judd Buchanan thought that "the grievances voiced at Wounded Knee sounded very similar to those voiced in Canada."²⁹ But others were keen to focus on the pragmatic and responsible demands aboriginal peoples were actually making, rather than allowing speculation to distort the policy-making context. Chrétien had appeared on national television the week before this debate and had sought to demonise some aboriginal claimants, noting that the new concept of aboriginal title might mean that some Canadian cities were "perhaps not Canadian land." As we will see, there are unpleasant echoes of this rhetoric in Australia, but MacDonald was at the time rightly contemptuous of this: "Who is making such claims? None of the responsible Indian leaders I have been talking to. What is he trying to do by such extreme statements? Is he trying to create fear and uncertainty among Canadians to produce an over-reaction in the country among people who are not sure of the concept themselves because the government refuses to make its position known. The minister must know how easy it is to inflame prejudice."³⁰

But the government did meet with the Nisga'a in early 1973 and Minister for Indian Affairs Jean Chrétien agreed to write to the BC government urging that they negotiate the Nisga'a claim. He later noted the provincial government's "surprise" in receiving his request.³¹ Furthermore, when in February 1973 the Yukon Indian Brotherhood presented their claim to the government, Chrétien decided that Canada would negotiate with Aboriginal peoples who were not party to treaties, presaging the eventual policy.

So far, my research has uncovered little evidence that a national piece of legislation to provide a statutory framework for all negotiations (like the *Native Title Act*, see below) was ever seriously considered in Canada.³² Buchanan told the House on April 11 that the "Court's non-decision points up the need for Canadian law to recognise the question of aboriginal rights. To do this some legislative action is required". His argument was based on discussions in the Standing Committee and particularly a presentation by Peter

²⁸ Flora MacDonald, *Debates* (April 11, 1973), p. 3209.

²⁹ Judd Buchanan, *Debates* (April 11, 1973), p. 3222.

³⁰ Flora MacDonald, *Debates* (April 11, 1973), p. 3209.

³¹ Hon, Jean Chrétien, *Debates* (June 5, 1973), p. 4476.

³² However, an important way to shed further light on that question is to examine Cabinet submissions and minutes from the first half of 1973.

Cumming of Osgoode Hall Law School before the Committee, who advised the government to conduct settlements in the context of a dedicated statute: “as the parliament has complete control over any legislative settlement of aboriginal rights, nothing is really being given away through the recognition of such rights”.³³

However, in August the government released a new policy that took a quite different direction and cleared away the last baggage of the White Paper. In that statement, Chrétien announced a new policy of comprehensive claims settlement in all non-treaty areas.³⁴ In 1981, John Munro, the new Minister for Indian Affairs and Northern Development, set out the government policy in somewhat greater detail in the booklet, *In all fairness*. Finality appeared to be the overarching imperative: “What this statement contains above all, in this time of political uncertainty and fiscal restraint, is a formal affirmation of a commitment: that commitment is to bring to a full and satisfactory conclusion, the resolution of Native land claims.”³⁵ The cover did bear the work of an indigenous artist from Cape Dorset but how did the new policy offer a new respect for the aboriginal rights and title of such cultural groups?

Michael Asch has argued that there was a shift between the original 1973 statement and subsequent statements in 1978 and 1981: this was a move away from the view that aboriginal peoples had lost their traditional ways of life and negotiations should simply try to resolve that injustice via compensation, towards a view in which the goal of negotiations was to “translate the aboriginal interest into particular benefits that will promote social, cultural and economic continuity of aboriginal society.”³⁶ This suggests that Aboriginal people had become more effective in asserting the continuity of their traditions and their ongoing rights to be different.

Between its initiation in 1973 and the constitutional protection of aboriginal rights in 1982, the policy produced only two results: the *James Bay and Northern Quebec Agreement* (1975) and the *Northeastern Quebec Agreement* (1978). How did the government operationalise its policy of negotiation in the light of the new legal requirement for explicit intentions to extinguish aboriginal title?

In the James Bay agreements the government adopted both the surrender and grant-back model in which aboriginal rights henceforth flowed from the treaty itself, with an additional clause setting out that explicit extinguishment would come through a dedicated statute to enact each particular agreement. The negotiators for the James Bay Cree were told in no uncertain terms to negotiate a deal with Quebec or the federal government was going to legislate to extinguish their rights anyway.³⁷ Cree leader Billy Diamond certainly thought that the absence of an agreement in the face of concerted provincial

³³ Judd Buchanan, *Debates* (April 11, 1973), p. 3222.

³⁴ Jean Chrétien, ‘Statement by the Honourable Jean Chretien, on Claims of Indians and Inuit People’, (August 8, 1973) (Ottawa: DIAND Press Release).

³⁵ Canada, Minister for Indian Affairs and Northern Development, *In all fairness: A Native claims policy* (Ottawa: DIAND, 1981).

³⁶ Michael Asch, *Home and native land: Aboriginal rights and the Canadian Constitution* (Toronto; New York: Methuen, 1984), 66-67.

³⁷ Personal comment, Harvey Feit.

desire to develop their lands “might have called forth federal legislation extinguishing such rights in exchange for compensation, and compensation under such legislation might have been less generous than that achieved” in the JBNQA.³⁸

Living treaties, the 1985 report of the review of comprehensive claims, argued that there was “a serious question as to whether a sweeping clause on extinguishment is necessary to clear the title in circumstances where a voluntary surrender of rights has been procured... even if the extinguishment clause is not legally necessary to clear the title, it does not reduce the aboriginal rights by any greater degree than they have been reduced by the voluntary surrender of rights.”³⁹

However, I would suggest that this was due to the new judicial construction offered by Hall in *Calder*, which insisted that any exercise of the power to extinguish must be pursuant to an explicit statute. The real problem then becomes aboriginal peoples’ views about what they are being asked to agree to: “The blanket surrender and extinguishment of these rights suggests assimilation and cultural destruction.”⁴⁰ George Manuel spoke sadly after hearing the JBNQA had been signed: “Extinguishment of aboriginal rights means to me the extinguishing of Indian identity, totally and completely”.⁴¹

Is it necessary for Canada to exercise its extinguishment power in order to effect certainty? Does Canada have to extinguish aboriginality as title and rights in order to satisfy its own requirements? Another way to put this is to ask what aspects of aboriginal identity are compatible with the identity of the settler state. After 1982 though, the threshold for legal extinguishment is shifted higher because of the implication of a requirement for aboriginal peoples’ consent. Indeed, in recent negotiations such as in BC, some indigenous participants have thought that the approach of the state will allow them to maintain their identities and autonomy. But now, I want to examine the political and policy response to *Mabo*.⁴²

On June 3, 1992, the High Court of Australia gave its decision in *Mabo*. The immediate political response was muted. The scale of the “judicial revolution” that had taken place and would convulse the nation seems not to have been understood immediately. A decade later, the former Minister for Aboriginal Affairs, Robert Tickner, called it “a peaceful beginning”.⁴³ Don Watson, the then Prime Minister Paul Keating’s speechwriter, recollected that the “historic significance of the decision was obvious to everyone, except

³⁸ Billy Diamond, “Aboriginal rights: The James Bay experience,” in *The quest for justice: Aboriginal peoples and Aboriginal rights*, ed. Menno Boldt, J. Anthony Long, and Leroy Little Bear (Toronto: University of Toronto Press, 1985), 283.

³⁹ Canada. Task Force to Review Comprehensive Claims Policy, *Living treaties, lasting agreements: report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Dept. of Indian Affairs and Northern Development, 1985).

⁴⁰ Canada. Task Force to Review Comprehensive Claims Policy.

⁴¹ McFarlane, 181.

⁴² This narrative draws on three accounts in particular: Tim Rowse, “How we got a Native Title Act,” in *Make a better offer: The politics of Mabo*, ed. Murray Goot and Tim Rowse (Leichhardt, N.S.W: Pluto Press, 1994); Russell; R. E Tickner, *Taking a stand: Land rights to reconciliation* (Crow’s Nest, N.S.W: Allen & Unwin, 2001).

⁴³ Tickner.

all those who either had no history or something else on at the time. As this meant about 80 per cent of the public and up to 90 per cent of the (press) gallery, panic and excitement took some time to set in ... There were no visible signs of alarm.”⁴⁴

However, the power of native title as a potentially positive reconstituting force was immediately seized upon by Keating who told the House on June 4, 1992: “As a nation we are now far better prepared psychologically to proceed with the process of reconciliation.”⁴⁵ This assumes a strong connection between the realms of national identity and common law. Among the early responses, the Northern Land Council Chair Galarrwuy Yunupingu advocated the resurrection of a treaty and national land rights legislation, both proposals having been abandoned in the 1980s. The Queensland State Labor Premier Wayne Goss, however, saw little of value in the judgement for mainland Aborigines.

Vigorous dissent was not long in revealing itself. Hugh Morgan, the noted anti-communist and Chairman of Western Mining Corporation, was among the first, calling for the *Racial Discrimination Act* to be substantially amended or repealed, in order to repair the breach in state power; he sought an explicit use of the power to extinguish. Keating called him the “voice of ignorance, the voice of hysteria, and the voice of the nineteenth century”.

In terms of government response, an options paper was submitted to Cabinet on October 27, some months after the judgement. A process of consultations on the legislative framework began in late 1992 and unfolded through 1993 in a cacophony of misinformation and invective. Figures from all parts of the spectrum called for a swift national legislative response: Aboriginal advocates saw the preservation of native title as being the overriding imperative; while miners, state governments and conservative federal politicians called for widespread if not total extinguishment. I have found no evidence whatsoever that Keating and his government ever considered a negotiations model or some other non-statutory approach.

Tickner and perhaps the wider government thinking may be encapsulated in the following remark: “The task of governments was to establish a system to facilitate the determination of where that native title existed as an alternative to simply vacating the field and leaving hundreds of Mabo cases to be dealt with in the courts, a process that would have dragged on over many years.”⁴⁶ If we think of this in terms of identities, it is hard to see that the government had any confidence that Australians are capable of successfully negotiating solutions to the indigenous-settler problem: they require a paternalist state.

⁴⁴ Don Watson, *Recollections of a bleeding heart: A portrait of Paul Keating P.M.* (Milsons Point, N.S.W.: Knopf, 2002), 204.

⁴⁵ Cited in Russell, 283.

⁴⁶ Tickner, 123.

Keating acknowledged that they were trying to rush things, saying in August that “in most other countries this would be a decade process, not a one year process.”⁴⁷ ATSI leader Lois O’Donoghue warned “that complex legislation is being unnecessarily rushed.”⁴⁸ The immensely complex moral, political and legal tasks that take years to resolve in Canada, were all condensed into a year of private dealings and public fractiousness.

Yet throughout the period of consultation, whenever Indigenous interests were threatened by federal government conniving with state government and resource industry interests, there was angry rhetoric and a sense of betrayal but little by way of political mobilisation. Indigenous peoples held a major closed doors meeting in central Australia in mid-1993 that resulted in a set of principles they presented to government. And in October 1993, when those principles appeared to be largely ignored in the government’s draft, indigenous leaders held the “Black Friday” press conference at which they effectively withdrew their consent. Then the indigenous leadership split between those who saw the NTA as essential and those who would not agree to a statute forced on them at any cost.

On the other side, one state Premier was prepared to denounce the High Court’s decision and conservative politicians claimed that *Mabo* had “newly discovered Aboriginal rights which interfere with the long-held belief that all Australians are equal under the law.” The Leader of the NSW Nationals and Acting State Premier assured a meeting of farmers that he and his party would not allow them to be “dispossessed” by the legislation. Federal National party leader Tim Fischer even suggested the process was energising the secession movement in WA.⁴⁹ The *Wik* case entered the Federal Court and Goss portrayed this as evidence of how destabilising native title claims were to Queensland industry and jobs; the mining company CRA had publicly cavilled over its capacity to carry out intended mining and smelting operations in the face of the ongoing uncertainty. The Cape York leader Noel Pearson called this “contrived uncertainty”. But in June 1993 the *Australian* newspaper published a poll showing that a majority of Australians did not support the High Court decision, 46 to 43 per cent (though it did not report how many had actually read the judgment). Clearly the representational power of primary industries and their political advocates was influencing the debate.

Tickner wrote at length of his frustrations in trying to educate Australians about the facts of the case and the principles of native title, at one point concluding that it “was a waste of time trying to engage in a meaningful dialogue”. Morgan called for a national referendum to overturn the effect of the *Mabo* decision and senior state Liberals and mining executives endorsed his call; in July 1993, the WA State Liberal conference supported a national referendum on *Mabo* and a change to the appointment of High Court judges that would require a two-thirds majority of the Senate. There was a flourishing discourse on the impoverishment of indigenous cultures and achievements that emanated from business and conservative elites. Meanwhile High Court Chief Justice Sir Anthony Mason told a university audience that the criticism of the *Mabo* decision organised by

⁴⁷ Tickner, 159.

⁴⁸ Tickner, 173.

⁴⁹ Tickner, 129-33.

primary industry groups was “the most sustained and abusive that I can recall in my career as a lawyer.”⁵⁰ Tickner received a bomb threat at his home and his electorate office was destroyed by arsonists.

Tickner later confessed that “no Australian government in the 1990s would have legislated such a sweeping reform as was brought about by the Mabo decision, not because of the inherent weakness of politicians but because of the unchallenged power of industry bodies and the lack of empathy in sections of the Australian community.”⁵¹ He also acknowledged that the underpinning of the legislation was always geared towards primary industries and state governments: “Let there be no rewriting of history: indisputably, it was Cabinet’s priority to reach an accommodation with the states and territories”.⁵²

Surely the reason had a lot to do with the organised influence of the resources sector. The issue of “validation” of post-1975 grants of land exemplifies this. It was the Australian Mining Industry Council (AMIC) that promoted an analysis of the finding of native title that suggested that grants of land since the passage of the Racial Discrimination Act (RDA) in 1975 could now be considered discriminatory, as they had not taken into consideration potential native-title holders. AMIC prepared a draft bill that would validate all such titles using the “special measures” clause of the RDA that was designed to allow legislation that discriminated in favour of racial minorities.⁵³ They were very successful in lobbying the bureaucracy and key ministers because the Department of Prime Minister and Cabinet repeatedly advocated the suspension of the RDA as the only way to validate past acts without creating a chaotic administrative situation; and these proposals were endorsed by the Committee of Ministers which was dealing with the Mabo legislative response. Yet the entire argument was highly dubious from a legal standpoint: “The argument about RDA invalidity was conceived in the mining industry, nurtured by the bureaucracy and then, in a serious tactical error, recognised by indigenous people and their supporters and given currency as the most serious problem with the government’s legislation.”⁵⁴

In a newspaper article, Frank Brennan set out the two options for the Commonwealth government and the two for indigenous representatives. The government could seek the support of the minor parties or the Coalition in the passage of the legislation through the Senate where it did not have a majority; working with the minority parties would bring the legislation in line with indigenous interests, and working with the Coalition meant acceding to state and industry demands. Meanwhile, indigenous peoples had to decide whether to support a moderate legislative framework for native title or to abandon all support for legislation and work to extend their rights in the courts and with the protection of the RDA. Tickner argued that “if there is no Commonwealth law to protect native title holders there is little doubt that some State Governments, and in particular the

⁵⁰ Tickner, 135-40.

⁵¹ Tickner, 137.

⁵² Tickner, 183.

⁵³ Tickner, 101-2.

⁵⁴ Tickner, 174.

Western Australian government, will seek to obliterate the rights of native title holders.”⁵⁵

WA tried to do exactly that but their legislation was struck down by the High Court. However, the Native Title Act passed in December 1993 validated post-1975 grants as a “special measure” under the RDA; and it extinguished native title on freehold and leasehold grants where native title would be inconsistent with those grants. Without receiving the support of the conservative parties or their industry supporters, the act set in place a regime that has certainly recognised native title in a number of cases, but provides very little in the way of economic power.⁵⁶ Rather than reconciling Australians, native title, particularly since the change in federal government in 1996, appears to have had the opposite effect.

Restrictions of time and space forbid a comprehensive account of events relevant to this argument; as this project develops I want to extend it a number of ways. Most obviously, the project needs to account for the considerable reinforcement of powers of extinguishment and curtailment of native title rights in the Howard government’s amendments to the NTA in 1998, as well as the subsequent “practical reconciliation” policy. Furthermore, it needs to consider the modifications and revisions to the power of extinguishment made by the Courts in the last decade: as Kent McNeil has shown in several recent works, enlargements of the power to extinguish have been considerable and appear contradictory not only to earlier findings but in the case of Canada, to the constitutional protection of aboriginal rights and the division of powers between federal and provincial governments.⁵⁷ However, I think that both lines of inquiry will support the main contention of this paper, that contingent shifts in states’ identities are the occasion for powerful or well-organised actors to mobilise alternative identities.

Conclusions

There are a number of important differences in the periods under consideration. In the 1970s there was great momentum in indigenous movements worldwide, and Canada was central to these developments. Broader social shifts were taking place in liberal-democratic societies, with societies increasingly amenable to discussions about human rights. More specifically, the abject failure of the federal government’s attempt to abolish the Indian Act through the White Paper unquestionably narrowed the space for making new policy in the wake of *Calder*.

⁵⁵ Tickner, 178-79.

⁵⁶ Jon Altman, "The political economy of a treaty: Opportunities and challenges for enhancing economic development of Indigenous Australians," *The Drawing Board: An Australian Review of Public Affairs* 3, 2 (2002): 65-81.

⁵⁷ Kent McNeil, "Extinguishment of Aboriginal title in Canada: Treaties, legislation and judicial discretion," *Ottawa Law Review* 33, 2 (2001-2002): 301-46; McNeil, "The vulnerability of Indigenous land rights in Australia and Canada."; Kent McNeil, "Aboriginal rights, resource development, and the source of the provincial duty to consult in *Haida Nation* and *Taku River*," *Supreme Court Law Review: Second Series* 29 (2005): 447-60.

In Australia conversely, that Aboriginal and Islander mobilisation was part of global developments was less well appreciated. Moreover, by the late 1980s there was a backlash against the perceived economic and social demands of globalization which began to be used to prevent further acts of inclusion to the social order. The negotiation of Indigenous rights via treaties and national land rights legislation had been rejected and a new corporatist policy approach was visible in the creation of ATSIC and in reconciliation policy, which bound indigenous and state interests together.

However, of considerable importance in both cases was the mobilisation of identities that influenced state choices about how to exercise its power to extinguish. On the one hand, Aboriginal mobilisation in Canada and the steady articulation of indigenous distinctiveness, have forced the state into agreements with particular indigenous communities. Now First Nations often describe treaty negotiations as “nation-to-nation” and while there is considerable debate about whether recent agreements involve the exercise of the extinguishment power and how, we can see some acceptance of the principles of indigenous autonomy and difference, not least in the tacit acceptance of an aboriginal right of self-government.

Yet in Australia since the *Mabo* judgement the most activist groups have been those defending the status quo and promoting an identity in which the development of primary industries is foundational to social progress and national prosperity. The concurrent nature of power over indigenous affairs in Australia means that state governments wield much greater influence than in Canada, and their interest has been in restoring and maintaining that identity in the face of the judicial contingency of *Mabo*. Simultaneously, the deep streak of racism and denigration was given full voice, particularly in regards to the “viability” of indigenous communities. In its submission to a 2003 Senate inquiry on the progress of reconciliation the federal government argued that, “a concern with ‘rights’ was not merely irrelevant to ‘practical reconciliation’ but in tension with it.”⁵⁸

Peter Russell has noted the limits of judicial power: “High court jurisprudence cannot on its own accomplish decolonization. Whether it can be a catalytic force for Indigenous decolonization depends on how it is received and acted upon by the political forces of the country.”⁵⁹ In this preliminary discussion of the responses to *Calder* and *Mabo* I have sought to understand what role broader cultural and social identities may play in response to the contingent reinterpretation of the common law rights of indigenous peoples.

A great deal of the colonial and modern histories of settler-states has involved governments telling indigenous peoples how they should live their lives. Critical scholars have examined those interventions to show that these were enabling to the imperial/colonial project by freeing up lands and resources as well as eroding a significant source of social difference. In recent decades, indigenous peoples themselves have become very successful in resisting some of these interventions and in crafting their

⁵⁸ Tim Rowse, *The Politics of Being Practical: Howard and his quiet revolution in indigenous affairs*(2005, accessed July 17 2005); available from http://www.brisinst.org.au/resources/rowse_tim_indigenous.html/people/rowse_tim.html.

⁵⁹ Russell, 249.

own ideas about how they want to live their lives, in short, in asserting indigenous identities and autonomy.

But given that a great deal of what matters to indigenous peoples lies in the hands of the settler society and state, and that justice involves rethinking the way that we engage, scholars need to direct greater attention to the way that settlers' collective identities may be obstructing the provision of justice, and to reconstructing identities and identity-practices in ways that dissolve or remove those obstructions. While some work has been done on collective identities outside the formal institutions of the state, in the realm of national and social identities particularly, there remains considerable scope for analysing the connections between the two. In so doing, we may develop these as sites for political action and measures of justice for indigenous peoples.