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Aboriginal Sovereignty and Imperial Claims

Brian Slattery

Osgoode Hall Law School of York University, slattery@yorku.ca

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Abstract
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ABORIGINAL SOVEREIGNTY AND IMPERIAL CLAIMS©

BY BRIAN SLATTERY*

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* Associate Professor of Law, Osgoode Hall Law School, York University, Toronto, Canada. I am indebted to Michael Asch, Bruce Hodgins, Kent McNeil, and Gail Sax for their helpful comments on an earlier draft of this paper.

I. INTRODUCTION

The international legal history of North America has traditionally been presented as a series of military and diplomatic struggles among European states and their colonial offshoots, culminating in the grand treaty settlements of the eighteenth and nineteenth centuries in which the modern international boundaries of the United States and Canada were fixed.[1] The accounts differ in explaining exactly how the European powers originally gained sovereignty over North America, with some authors allowing for such supposed methods as discovery and symbolic acts, and others discounting these and arguing that effective occupation was necessary.[2] Despite these differences, the traditional accounts tend to assume that the original peoples of North America had no significant role to play in this high imperial drama. Indigenous peoples, it is thought, lacked sovereign status in law and so had no international title to the territories they occupied. On this view, the lands of North America were legally equivalent to vacant territories which could be appropriated by the first European state to discover or occupy them. The only role assigned to the original inhabitants of North America was subsidiary, as factual obstacles or aids to the spread of European sovereignty.

This approach is by no means dead. In a recent study of European claims to territory in America, L.C. Green concludes with this flat statement:

> Insofar as international law is concerned, there can be no doubt that the title to the land belonged, in the first instance, to the country of those who first discovered and settled thereon ... Moreover, international law did not recognise the aboriginal inhabitants of such newly discovered territories as having any legal rights that were good as against those who "discovered" and settled in their territories. From the

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[1] See, *e.g.*, the monumental work by M. Savelle, *The Origins of American Diplomacy: The International History of Angloamerica, 1492-1763* (New York: Macmillan, 1967).

[2] For a variety of views, see, *e.g.*, A.S. Keller, J. Lissitzyn & F.J. Mann, *Creation of Rights of Sovereignty through Symbolic Acts, 1400-1800* (New York: Columbia University Press, 1938); F.A.F. von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law" (1935) 29 Am. J. Int'l Law 448; J. Goebel, *The Struggle for the Falkland Islands* (New Haven: Yale University Press, 1927); and L.C. Green, "Claims to Territory in Colonial America" in L.C. Green & O.P. Dickason, eds, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989) 1.

> point of view of international law, such inhabitants became the subjects of the ruler exercising sovereignty over the territory. As such, they enjoyed no rights that international law would recognize, nor was international law concerned with the rights which they might enjoy or which they might claim under the national law of their ruler.[3]

These remarkable views, although prominent in histories of international law and diplomacy, are not restricted to that narrow genre. They permeate narratives of all kinds, from popular historical romances, through movies and television dramas, to newspaper editorials and legal decisions. Even when not explicitly stated, they show their influence in the structure of the story-line, the importance assigned to various episodes, and the terminology employed. Thus, such events as the fall of Quebec and the *Treaty of Paris of 1763* are assigned a central place in the history of North America, while the peace treaties with the various native American nations in the same era receive only scant attention outside of specialist literature. The great Aboriginal-British war that engulfed the eastern and mid-western regions of North America in the period 1763-64 is dubbed "Pontiac's Rebellion," on the assumption that native Americans were rebelling against legitimate British rule rather than asserting their rights against invading forces.

The Eurocentric premises of traditional accounts have come under heavy attack in recent decades. The heightened political activism of Aboriginal groups, the large numbers of native claims reaching the courts, and the revival of interest in native American history have all contributed to the development of more critical attitudes to the European penetration of the continent. This development is welcome and long overdue. Yet, while there is a growing consensus among historians and lawyers that the old legal framework is flawed, there is uncertainty and confusion as to how the situation may be remedied.

A historian, dismayed at the distortions caused by the old legal premises and daunted by the prospect of having to supply new ones, might well decide to avoid making any legal assumptions whatever and concentrate on the factual interplay of people and forces. By contrast, a lawyer or judge, bewildered at the complex historical panorama disclosed by the new scholarship, might think

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[3] Green, *ibid.* at 125-26.

that the only safe route lies in a legal analysis that steers clear of historical materials. If only, says the historian, there were no law to distort our understanding of the historical forces; if only, says the lawyer, there were no history to muddy the purity of the law.

But history and law are not so easily severed. From early times, Aboriginal-European relations were profoundly shaped by legal conceptions on both sides, to the extent that they can hardly be understood otherwise. For example, the numerous treaties concluded between First Nations and colonial governments played an essential role in determining the various parties' expectations and actions and in moulding their understanding (and misunderstanding) of the other parties. These treaties necessarily figure prominently in any historical account of Aboriginal-European relations. Moreover, they are central to the self-understanding of many native American groups today and are an important basis for contemporary legal claims. It would be difficult to give an account of the treaties that is sensible and informative and yet avoids dealing with the basic issues of their legal status, character, and effects.

Here we encounter fundamental problems. What sort of legal authorities are relevant to an understanding of a treaty between Europeans and native Americans? This depends on our initial characterization of the pact. Is it equivalent to an international treaty between equal and sovereign entities? Or is it some other sort of international or quasi-international agreement, such as might arise between a sovereign nation and a dependent or protected nation? Is it, perhaps, not an international instrument at all, but a constitutional pact between a state and a body of its subjects, or even a species of domestic contract? More radically, is it perhaps not a true agreement in any sense, but a unilateral state act imposing terms on a group of subjects, closer in character to a statute?

These questions raise the issue of the relative status of the European and native American parties at the time of the treaty. Were they both sovereign international entities, or was one party subject to the other, or a protected entity? How do we go about answering this question? Is it sufficient to invoke standard European authorities on international law, or must we also consult non-European sources, including Aboriginal law and custom?

Should we perhaps look beyond these sources to fundamental principles of justice or "natural law"?

The question of native sovereignty is not, of course, simply historical or academic. As the recent armed confrontations at Kanesatake and Kahnawake vividly illustrate, issues of sovereignty are implicated in many current disputes between native Americans and governmental authorities over such matters as land claims, treaty rights, the application of customary law, and powers of self-government. Follow these disputes to their roots and you will often encounter the unresolved issue of indigenous sovereignty. Until some understanding on this matter is reached, it seems unlikely that the disputes will be resolved or fade away.

Nevertheless, the task of providing a legal framework for understanding the historical relations between Aboriginal peoples and incoming settler groups is remarkably difficult. My aim in this paper is to make a start. I will examine a number of standard approaches to the subject and show that for various reasons they are flawed or inadequate. I will then suggest approaches that hold out more promise.

II. FRAMING THE QUESTION

Let us begin by considering the traditional model of American international history.[4] This model involves a number of premises which are grounded in a particular understanding of international law. The most fundamental of these holds that North America was juridically a vacant territory at the period of European exploration and settlement — in technical language, *terra nullius* — territory not belonging to any recognized international entity. On this view, European states were capable of directly appropriating American lands, securing what is known as an *original title*, that is, a title not derived from any other state or legal entity. The authorities disagree as to how an original title could be obtained.

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[4] The best general account of the issues is still M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law; Being a Treatise on the Law and Practice Relating to Colonial Expansion*, 1926 ed. (New York: Negro University Press, 1969).

Some argue that the first European state to "discover" or explore American lands gained title. Others say that a symbolic act of taking possession, such as the planting of a cross, a flag, or royal insignia, was necessary. Still others insist that none of these methods was valid, that the incoming European power had to occupy the territories in an effective manner before sovereignty vested, as by establishing settlements, a governmental apparatus, or at least the elements of factual control.

All these methods — discovery, symbolic acts, and effective occupation — presuppose that North America was legally vacant at the relevant time, that there were no existing rights capable of impeding the smooth flow of incoming sovereignty. In classic European thought, methods such as discovery, symbolic acts, or effective occupation cannot operate in territories that are already under the sovereignty of another power, no matter how small the territory or weak the incumbent power.[5] No one, for example, would seriously suggest that a visiting British official could gain title to Vatican City for the Queen simply by raising the Union Jack in St. Peter's Square. Where a territory is already held by a sovereign power, title to it can be won only by such methods as conquest, cession from the existing sovereign, or the continuous exercise of factual dominion for a period long enough to confer prescriptive title.[6]

The premise that America was legally vacant at the time of European contact has several corollaries. The first, as we have seen, holds that native American peoples did not have sovereignty over

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[5] As Grotius remarked with respect to Portuguese claims to the East Indies, "[D]iscovery *per se* gives no legal rights over things unless before the alleged discovery they were *res nullius*. Now these Indians of the East, on the arrival of the Portuguese, although some of them were idolators, and some Mohammedans, and therefore sunk in grievous sin, had nonetheless perfect public and private ownership of their goods and possessions, from which they could not be dispossessed without just cause." H. Grotius, *Mare Liberum (The Freedom of the Seas)*, ed. by J. B. Scott, trans. R. Van Deman Magoffin, 1608 ed. (New York: Oxford University Press, 1916) at 13.

[6] See, generally, Lindley, *supra*, note 4 at c. I-V; I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) c. VII; and D.P. O'Connell, *International Law*, vol. I, 2d ed. (London: Stevens & Sons, 1970) c. XV. There are considerable differences in terminology and classification among the authorities. I follow here a simplified version of the classic terminology developed by European doctrinal writers in the sixteenth to nineteenth centuries.

the territories they occupied or controlled. If they did, their lands would not be open to acquisition by discovery, symbolic acts, or occupation.

The second corollary goes further. It holds that native American peoples did not have any sort of lesser international title, short of sovereignty, sufficient to exclude others from their territories. This proposition meets the argument that, even if native groups did not have full sovereignty (such as states might hold), they did have sufficient territorial rights to prevent a legal vacuum from existing. It could, for example, be maintained that although a small band of Aboriginal hunters and fishers did not constitute a state, it nevertheless formed an independent political entity holding exclusive title to the territories it occupied. Were this the case, the lands in question would not be *terra nullius*.

The third corollary maintains that where the title of a European state to North American territories was not gained by an original appropriation it arose by succession to the title of another European state, by virtue of conquest, cession, or prescription.[7] A title gained in any of the latter ways is termed a derivative title because it stems from some previous titleholder. The standard model of legal title assumes that derivative titles could not be secured from the native peoples, but only from other European powers.

Large parts of North America are commonly thought to be held under European-derived titles. According to traditional accounts, Acadia was transferred by cession from France to Great Britain in the *Treaty of Utrecht of 1713* and the remainder of French Canada was conquered in 1759-60 and ceded to Britain by the *Treaty of Paris of 1763*. Twenty years later, the *Treaty of Paris of 1783* drew the boundary between the newly independent United States and British territories to the North, recognizing the transfer of sovereignty that occurred during the American Revolution. This treaty was later supplemented by others, extending the international boundary between the United States and British North America westward to the Pacific. Native American peoples were not parties

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[7] For economy's sake, I will use "European states" to designate not only the imperial powers proper, but also their colonial offshoots in North America.

to any of these transactions, and under the traditional model, they played no legal role in the process.

To hold that a European state obtained title to a certain part of North America by succession to another European state presupposes that the previous state (or some more remote predecessor) held an original title that it could pass on to others. If Britain obtained New France by cession from the French Crown in 1763, France itself must have held a good title to the territory, otherwise it would not have been capable of ceding it to Britain, any more than a Parisian hustler can sell you the Eiffel Tower.[8] On this hypothesis, France's title was either original or derivative. The usual view is that France obtained an original title to New France by virtue of the explorations of Jacques Cartier and the settlements initiated by Champlain.

Such is the standard scheme. The whole structure depends on the premise that North America at the time of European encounter was legally a vacant land available for appropriation, despite the obvious fact that it was occupied and controlled by native peoples. The critical question is whether this basic premise is justified.

On purely historical grounds, it seems very doubtful that European imperial powers consistently regarded Aboriginal America as vacant territory. Any balanced survey of European state practice reveals that although most imperial powers indulged on occasion in lofty claims based on discovery, symbolic acts, and occupation, these same powers often poured scorn on such claims when advanced by their European rivals. In short, they were not prepared to grant others the benefit of principles claimed on their own behalf. So, it may be doubted whether the supposed rules achieved true reciprocal

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[8] *Nemo dat quod non habet*; one cannot give to another what one does not possess oneself. As was stated in the *Island of Palmas Case* (1928), 2 U.N.R.I.A.A. 829 at 842, "The *title alleged by the United States of America* ... is that of *cession*, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region ... It is evident that Spain could not transfer more rights than she herself possessed" (emphasis in original).

acceptance, even among the nations that stood to benefit from them.[9]

Even if we assume that inter-European state practice was sufficiently uniform to support a doctrine of discovery, there is a wealth of historical evidence that some imperial powers, notably Great Britain and France, followed quite different practices in their direct dealings with native American peoples.[10] In effect, there were divergent streams of state practice, one inter-European, the other European-Aboriginal. One way of reconciling these differences is to say that the inter-European practice gave rise to a local rule which bound European states among themselves and, yet, had no effect on native American peoples, whose territorial rights were unimpaired.[11]

However, let us waive these objections and suppose that Spain, Portugal, Great Britain, France, and other European colonial powers consistently treated Aboriginal America as legally vacant territory and advanced claims to various parts of the continent on

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[9] The matter is considered in more detail in B. Slattery, *The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 66-125 [hereinafter *Land Rights*] and "Did France Claim Canada Upon 'Discovery'?" in J.M. Bumsted, ed., *Interpreting Canada's Past*, vol. 1 (Toronto: Oxford University Press, 1986) 1 at 2-26, an earlier version of which appeared in (1978) 59 Can. Hist. Rev. 139. For other discussions, see Goebel, *supra*, note 2 at 47-119; Lindley, *supra*, note 4; M.S. McDougal, H.D. Lasswell & I.A. Vlasic, *Law and Public Order in Space* (New Haven: Yale University Press, 1963) at 830-44; and von der Heydte, *supra*, note 2 at 452.

[10] See, *e.g.*, J.D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon: University of Saskatchewan Native Law Centre, 1985); P.C. Williams, The Chain (LL.M. Dissertation, Osgoode Hall Law School, York University, 1982); and *Land Rights*, *ibid.* at 95-125.

[11] A famous version of this view was espoused by Chief Justice Marshall of the United States Supreme Court in *Johnson* v. *M'Intosh*, 5 L.Ed 681, 8 Wheat. 543 (1823) and *Worcester* v. *Georgia*, 8 Law Ed 483, 6 Pet. 515 (1832) [hereinafter *Worcester* cited to Law Ed]. In *Worcester* at 544, Marshall said of the principle of discovery:

> 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.

See also O'Connell, *supra*, note 6 at 408-9. For a critical discussion of the Marshall view, see B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 17-38.

the basis of discovery, symbolic acts, or occupation. How can we determine whether such claims were well-founded?

In asking this question, we move into the realm of normative validity. Claims to title can of course be either valid or invalid. I can consistently claim ownership over the red Corvette in the window of my local car dealer, but if that claim is to be anything more than wishful thinking, I have to show that it can be justified in some manner. Were the grandiose claims to North America advanced by such states as Britain and France in the seventeenth and eighteenth centuries just wishful thinking? By what standards can they be appraised?

According to the standard scheme, there are basically two ways of answering this question. The first looks to some existing body of "positive" or "conventional" law laid down by authority or accepted by the people in question, such as the domestic law of the claimant European state, the law of the Aboriginal nation whose lands are at stake, or rules of positive international law. The second approach detaches itself from any single system of positive law and attempts to find some universal or transcendent basis for assessing the matter, such as basic human values, inherent human rights, or fundamental principles of justice. This is sometimes called a "natural law" approach. Of course, the two approaches can be combined in various ways. You might, for example, rely primarily on positive law but resort to basic principles of justice as an ultimate test of validity. Or you might use principles of justice in the very process of determining what the positive rules are. For purposes of clarity, however, these two approaches will initially be considered separately.

My basic argument is that any approach which purports to rely *exclusively* on a body of positive or conventional law is necessarily afflicted by arbitrariness or circularity. The only possible approach is one that draws to some extent on basic principles of justice. In fact, so-called "positive law" cannot be severed from "natural law," nor the latter from the former: they are both aspects of the unitary phenomenon of law. I will argue that native American peoples held sovereign status and title to the territories they occupied at the time of European contact and that this fundamental fact transforms our understanding of everything that followed. Finally, I will suggest that the best framework for understanding relations between Aboriginal nations on the one hand

and Canada and the United States on the other is provided by a distinctive body of inter-societal law that was generated in the seventeenth and eighteenth centuries by interaction between native peoples and settler governments.

III. POSITIVE LAW

A. *The Legal System of a Claimant Nation*

It could be argued that claims to sovereignty over North American territories, whether advanced by European or Aboriginal nations, should be judged according to criteria supplied by the internal legal system of the claimant nation. If the claim meets those criteria, then it is valid; if it fails to meet them, it is invalid.

There is an obvious difficulty with this approach, which has not prevented it from being surprisingly popular in practice. Where there are competing claims by different nations to the same territory (a common occurrence in North American history), this approach allows for each claim to be valid under the claimant's own laws. But since the claims are exclusive of each other, they cannot both be valid; one or the other (or both) must fail. For example, during the period 1713-63, France, Great Britain, and Aboriginal nations had overlapping claims to the territories now located in New Brunswick and Nova Scotia. If we were to examine the particular claim of each competing nation, we might well find that it satisfied the requirements of that nation's domestic legal system and so would be "valid" under that system. How should we go about resolving the resulting conflict?

If the standards of one domestic legal system are chosen over those of another without explanation, the solution is arbitrary. If reasons are supplied, they must be founded on principles that transcend the competing domestic systems involved, for to draw reasons from just one system or another is both circular and arbitrary. The question of which system of law should govern cannot be resolved by reference to principles secreted by one of the competing systems without assuming the supremacy of that system, which is the very question to be resolved. Where reasons going beyond the principles of a single system are sought or given, the

approach necessarily takes on a different character, one that looks to international law or basic principles of justice. These possibilities will be discussed below.

The attitude of British courts to the question of territorial claims advanced by the Crown resembles the approach considered above.[12] These courts have generally held that where the Crown has officially advanced an unequivocal claim of sovereignty over a certain territory, British courts should recognize and enforce that claim without further scrutiny, regardless of the degree of control actually exerted by the government, the legal pedigree of the claim, or the presence of competing claims by other states and peoples. This is considered part of the "act of state" doctrine.

The reasons generally given for this doctrine are prudential: it would be undesirable for the courts to review the acts of the executive in matters relating to the acquisition and loss of territory. On this view, these are high matters of state that should remain within the exclusive purview of the government; the executive must have the freedom to conduct foreign policy without fear of second-guessing by the judicial branch, which is ill-equipped to make decisions in these areas.

Whatever the merits of this argument in other contexts, it is doubtful whether it should induce modern Canadian or American courts to accept fictitious accounts of the manner in which their countries came into being, accounts that accept even the most extravagant imperial claims at face value and ignore the historical presence and viewpoints of indigenous peoples. When it comes to reconstructing the legal history of their own countries, courts cannot take refuge in the act of state doctrine without forfeiting their moral authority and acting as passive instruments of colonial rule. In this context, the act of state doctrine is mischievous and should be modified.

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[12] The point is considered in *Land Rights*, *supra*, note 9 at 63-65 and K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 110-12.

B. *International Law*

One possible way out of these difficulties is to look to international law for criteria capable of resolving the competing claims of European and Aboriginal nations. International law is in concept a body of rules governing relations among states and state-like entities, which among other things purports to determine the basis of sovereign title to territory. In principle, international law escapes from the objections against domestic legal systems advanced above.

Nevertheless, international law has its own problems. In the absence of a universal legislature, international rules are either a matter of convention, based on agreement or customary practice, or they flow in whole or in part from basic principles of justice. To the extent that they stem from basic principles of justice, they transcend positive international law and will be considered below. Here, I will treat international law as a body of exclusively conventional rules drawn from practice and agreement (henceforth described simply as "practice" for convenience).

At this point, a serious methodological problem arises. Assuming that practice is the basis for international norms, how does one ascertain which entities belong to the group whose practice generates the relevant norms? Remember that the question at stake is whether or not native American polities were ever sovereign entities. If the answer is affirmative, their practice must presumably be considered in determining the character of the international norms governing the acquisition of American territories. If the answer is negative, then their practice is arguably irrelevant.

The problem is this: it is logically impossible to determine the qualifications for membership in the international community by examining the practice of the members of that community. To proceed in this way assumes that one can identify in advance the members whose practice is relevant. But these entities can be identified only if one already knows the rules governing membership in the community — which is, of course, the very issue to be resolved.

An example may clarify the point. Suppose that around the year 1600 the world was made up of a large variety of factually

independent political entities, varying greatly in population, territory, wealth, military power, political and social organization, culture, religion, learning, and technology.[13] A group of these polities, composed of A, B, C, D, and E, in practice treat one another as sovereign and equal and recognize one another as members of an international community bound by certain rules. I will call this group the Arcadians. They regard the remaining political entities of the world, F through to Z, as failing to qualify for membership because of perceived deficiencies in religion, culture, and civilization. Polities F to Z, for their part, are not a homogeneous group. Polity F, for example, an ancient and powerful empire in an area remote from the Arcadians, considers itself the sole state worthy of the name and regards all other political entities as inferiors, to be dealt with, if at all, as tributary or subordinate powers. Its relations with the Arcadians are infrequent. Polity G, an empire in closer proximity to the Arcadians, has more varied attitudes to outside powers and is willing to deal with some on a basis of equality. But it usually insists on treating the Arcadians as inferiors, viewing them as infidels and barbarians. The remaining polities, H to Z, exhibit varying attitudes to outside powers. Many of them, however, show a pragmatic willingness to deal with other independent political groups on an equal basis, at least when it suits their purposes.

Which of these various political entities belong to the group whose practice generates the international rules governing the status and rights of political entities? It is clear that any selection process, if it is not purely random or arbitrary, must be governed by criteria concerning the nature and qualifications of a member. These criteria cannot be justified by reference to the practice of some select group among the entire field of polities without falling into logical circularity. Thus, for example, to argue that the practice of the Arcadians justifies the rule that only Arcadians are members of the international community is obviously self-serving. The question why one should restrict one's inquiry to the Arcadians cannot be answered by an inquiry restricted to those very entities.

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[13] I am not suggesting that this description is purely factual. Even the most "factual" accounts of the make-up of international society are grounded in certain ways of looking at things, which are tacitly normative and theoretical. However, this point does not affect my argument here.

Perhaps the solution lies in an empirical inquiry as to which polities *identify themselves* as belonging to a group bound by legal norms, on the theory that the group capable of generating international rules is self-identifying. This approach, however, is only capable of discovering a group of political entities that, like an exclusive club, has its own membership criteria and a distinctive body of rules *that bind exclusively the members.* The rules generated by such a group have no power to bind polities not belonging to the group. Just because the Arcadians agree among themselves that territorial rights to the rest of the world can be gained by discovery does not give a discovering Arcadian state any rights as against a non-Arcadian entity.

Moreover, several self-identifying groups of political entities might exist. Suppose that polities M through S make up a rival group called the Akkamites and that the rules of the Arcadians and the Akkamites differ on such matters as acquisition of territory. By what standards could it be decided which set of rules is correct? Or would one have to rest content with the trite observation that different groups have different rules? This conclusion, however, would bring our inquiry to an end, for it concedes that there are no universal international rules capable of resolving conflicting territorial claims.

It could be be argued that we should look to the practice of *all* factually independent polities in the world in order to determine the rules governing the international community, including its membership rules. This is an attractive approach. However, its attraction lies in a tacit appeal to basic principles of justice. To the extent that it purports to be based simply on practice, it cannot escape the error of circularity encountered above. For example, suppose that the *predominant* practice among political entities in our hypothetical world is to recognize all other autonomous political entities as holding sovereign status. It is not clear why one should prefer this body of practice over the more exclusive practice of the Arcadians and hold that it gives rise to norms binding on the Arcadians which they themselves do not accept.

So, the ultimate criteria for selecting those political entities whose practice is capable of generating international norms must be based on something other than international practice. But if the criteria cannot be justified by practice, they must be grounded in

normative sources that lie beyond convention, that is, in fundamental principles of justice. Of course, the above arguments do not demonstrate the *existence* of principles of justice capable of solving the problems we have encountered. To the extent that these arguments have been successful, they have only shown the *need* for such principles. The matter will be pursued in the next section.

One practical point may be drawn here. To rely exclusively on European state practice to prove that Aboriginal America was vacant territory is, on its face, a misconceived procedure. It assumes that European practice standing alone could generate customary international rules binding on the rest of the world, and in particular, customary rules permitting European powers to appropriate large sectors of the occupied world for themselves.[14] One might as well try to show that the Barbary states had the right to prey on Mediterranean shipping by invoking their maritime practices in the seventeenth and eighteenth centuries or cite the practices of ancient China and its neighbours to prove that the nations of the world owed tribute to the Middle Kingdom. At best, an exclusive appeal to European practice is capable of proving the existence of a customary rule binding European states among themselves, not one binding other nations and peoples.

IV. BASIC PRINCIPLES OF JUSTICE

It will not be possible here to develop a full set of fundamental principles governing the original status of Aboriginal nations and the territories they occupied.[15] My aim is more modest: to sketch out a line of argument which shows that the premise that North America was legally vacant when Europeans arrived cannot be justified by reference to basic principles of justice. I will attempt to

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[14] As Chief Justice Marshall of the United States Supreme Court noted in *Worcester*, *supra*, note 11 at 494: "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."

[15] For a thoughtful discussion, see D.G. Gormley, "Aboriginal Rights As Natural Rights" (1984) 4 Can. J. Native Stud. at 29.

do this by blending two different approaches. The first examines the implications of the premise that North America was *terra nullius* when Europeans first arrived and holds that this leads to unacceptable conclusions. The second argues from basic rights belonging to all human beings to the conclusion that native American territories were not legally vacant.

Were it true that native peoples did not hold any exclusive territorial rights at the era of European contact, North America would have been in a state of legal anarchy. No native group would have possessed territorial rights sustainable against any other native group, so that each group would have had as much right to areas held by its neighbours as to those under its own control, which is to say, no right at all.

My argument is that this conclusion contradicts a basic principle: every human society whose members draw the essentials of life from territories in their possession (whether collectively or individually) has a right to these territories as against other societies and individuals. I will call this the "Principle of Territoriality."

In saying that the Principle entails a *right*, I mean a justifiable claim assertible against other groups and individuals. In attributing this right to a *group*, I assume that groups and not only individuals may hold rights, an assumption that could be disputed. Without attempting a full justification here, we may note that the concept of group rights is fundamental to the notion of state sovereignty, itself a cornerstone of modern international law. Someone who claims that a European state — a collective entity — had the capacity to acquire rights of sovereignty over American lands is hardly in a position to deny the existence of group rights.

I am not, of course, suggesting that the Principle of Territoriality is the only principle of justice relevant to questions of territorial rights or that its concrete operation may not be modified in practice by other basic principles and values. I am simply saying that it is a principle of great weight that applies in the absence of serious countervailing considerations.

How is the Principle of Territoriality justified? The argument runs in outline as follows. Were the Principle untrue, a society would not have the right to protect the territories used by its members from external depredation and destruction, even though

these lands are essential to survival.[16] But this conclusion contradicts a more fundamental principle: all human beings have rights to life and the necessaries of life as against all other people. This second principle furnishes the ultimate justification for the Principle of Territoriality. I will now show how in more detail.

We start with the premise, which will not be justified here, that every human being has the right to life and to the things necessary to sustain life — what may be called comprehensively the "right to well-being."[17] This right holds good against all other individuals and groups. It obliges others not only to respect the individual's well-being, in the negative sense of refraining from interfering with it, but also in some contexts to take steps to protect and advance it.

As a matter of experience, we know that an individual's well-being cannot be secured apart from a social group. The group need not be a large one and may in fact be fairly small, limited to an extended family or several families. But some such group must exist to provide an individual with the basic characteristics and capacities of a human being. Even a hermit carries society to the desert, in the basic skills, capacities, ideas, and values that only an upbringing in human society can engender.

In order to be in a position to protect and advance the well-being of its members, a social group must be endowed with a collective moral capacity or status. In particular, it must have the capacity to act in the interests of its members and the right to defend them from external attack. This collective status and right of self-defence are maintainable against all other groups and individuals. They are justified by reference to the individual's abstract right to well-being coupled with experience of what is necessary in practice to secure it. In summary, a society has a right to protect the well-being of its members against outside groups and

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[16] Unless the Principle of Territoriality were replaced by another principle serving essentially the same purposes.

[17] For a stimulating defence and elaboration of these rights, see the works of A. Gewirth, especially, *Reason and Morality* (Chicago: University of Chicago Press, 1978) and *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982). For a critical discussion of Gewirth's arguments from a communitarian perspective, see B. Slattery, "Rights, Communities, and Tradition" (1991) 41 U.T.L.J. 447.

individuals. This collective right cannot be denied without denying the basic rights held by the group's individual members.

But, as noted earlier, in most (perhaps all) societies, the well-being of their members depends upon individual and collective uses of territory. Whether a society recognizes private ownership of land or only collective ownership, whether it acknowledges the concept of land ownership at all or only rights of use or possession, the position is the same. Any society has the right to defend territories in its possession against outside intrusion, insofar as these territories are necessary to the well-being of the members.

Since native Americans had rights to life and the necessaries of life, it follows that the societies and groups to which they belonged had rights to the territories they occupied at the time of European contact, to the extent that they needed them to survive and flourish. These rights held good against other groups, including both Aboriginal and European nations. It cannot be argued that the right of native American groups to the lands used to sustain their members was automatically outweighed by the needs and ambitions of European states and their subjects without impliedly asserting that the lives of Europeans were more valuable than those of native Americans.

The rights held by a native group to its territories were necessarily secure against invasion by others and were, to that extent, exclusive of other groups. It follows that in principle no outside group could gain control over or use of the territories in question without the consent of those already in possession.[18] Even if the possessing group was not a fully sovereign entity (perhaps because it was too small or loosely organized), its territories would not be *terra nullius*. Otherwise, an outside state could legitimately seize the territories and expel the inhabitants or deprive them of secure access to their lands.

This position is similar to that advanced by Lindley in a classic work on the subject.[19] He argues that an area is not *terra*

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[18] *Prima facie*, this would rule out acquisitions of territory by conquest. However, it may be argued that, for reasons associated with other basic values and principles of justice, territories illegitimately acquired may sometimes, by passage of time, be transformed into legitimate dominions – the process traditionally termed "prescription."

[19] Lindley, *supra*, note 4.

nullius when it is "inhabited by a political society, that is, by a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards."[20] Since he recognizes that a community composed of a number of families qualifies if the members conform to certain standards in their mutual relationships, his definition corresponds closely in practice to that advocated here and would seem to include most and perhaps all native American societies.

Nevertheless, the emphasis in Lindley's approach is a little misleading. To tie territorial rights too closely to the size of a group or to the internal conduct of its members is to overlook the reason for attributing territorial rights to any society in the first place: namely, to allow it to protect and advance the well-being of its members, both present and future. Human lives are not more valuable in a large, highly-structured society than in a small group of independently-minded hunters and there would seem to be no less reason to attribute territorial rights to the latter than the former.[21]

V. PRACTICAL IMPLICATIONS

I have argued that the premise that North America was legally vacant when Europeans arrived cannot be justified by reference to positive or natural law. Attempts to justify it on either basis are afflicted by arbitrariness or circularity, or they conflict with basic principles of justice. I have also maintained that native American polities originally had exclusive rights to the territories they occupied and were entitled to defend them against invasion or intrusion.

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[20] *Ibid.* at 21-23.

[21] For other opinions, see, in particular, C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, 1764 ed. (Oxford: Clarendon Press, 1934) Prolegomena, para. 16, c. III, para. 309-13 at 156-60; E. de Vattel, *The Law of Nations or the Principles of Natural Law*, 1758 ed. (Washington: Carnegie Institution of Washington, 1916) vol. I, Book II, c. VII, para. 96-98; and M. Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford: Clarendon Press, 1986) at 31-38.

A number of important consequences flow from these arguments, which I can only briefly describe here. First, and most obviously, it cannot be true that the modern states of Canada and the United States trace their legal origins to "discoveries," symbolic acts, or acts of occupation carried out by European states. These modes of acquisition are operative only in legally vacant territories and so could not apply to most of North America at the time of European contact. Accounts based on contrary assumptions are misguided.

Canada and the United States came into being, not simply through the activities of incoming European powers, but through a complex series of interactions among various settler groups and Aboriginal nations.[22] What forms those relations took — whether alliance, treaty, informal agreement, longstanding practice, or war — is a matter for detailed inquiry. But I suggest that the inquiry will reveal that Canada and the United States have more complicated constitutional structures than is sometimes assumed; structures based in part on inter-societal custom generated in the seventeenth and eighteenth centuries. Under these structures, Aboriginal nations continue to hold a residue of the sovereignty they once possessed. This conclusion has been broadly accepted in the United States, although its significance has been underestimated.[23] In Canada, the concept of internal sovereignty should come as no great novelty, for it has long been held that the provinces are autonomous within their constitutional spheres.

A second consequence affects our understanding of the genesis of international law. The fact that native American nations

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[22] Compare the conclusion of the International Court of Justice regarding the status of Western Sahara at the period of its colonization by Spain beginning in 1884:

> [T]he State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of terrae nullius by original title but through agreements concluded with local rulers ... In the present instance, the information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.

Western Sahara, Advisory Opinion, [1975] I.C.J. Rep. 12 at 39.

[23] See, especially, *Worcester*, *supra*, note 11.

had international status and title to their territories suggests that they were capable of contributing to the formation of international custom, ordinarily considered a principal source of international law. The extensive records of treaties and other relations between Aboriginal nations and European governments, particularly in the period 1600-1800, indicates that these nations did in fact make such contributions and that they did so at a crucial stage in the development of international law. So modern international law is not the exclusive product of European genius, as some texts fondly suggest. It stems from the activities and conceptions of a wide range of European and non-European nations, including the Aboriginal peoples of America.[24] Once again, this is a promising ground for historical investigation.

The third consequence is closely related to the previous two. The extensive relations between Aboriginal nations and the English colonies on the Atlantic seaboard in the seventeenth and eighteenth centuries gave rise to a distinctive body of inter-societal custom, recognized as binding among the parties. This custom was neither entirely English nor entirely Aboriginal in character, but incorporated elements from the legal cultures of all participants. Some of this custom contributed to the development of international law. But other parts were too local and specific for universal application. Important elements of this body of custom were incorporated in the embryonic constitutional law governing Britain's overseas territories, sometimes called "colonial law" or "imperial constitutional law."[25] This law was inherited by the United States and Canada upon independence, although it assumed variant forms in the two countries due to differences in constitutional structure. It now forms part of their basic common law.[26] Since imperial

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[24] For work that dispenses with a European centred methodology, see the pioneering legal-historical research of C.H. Alexandrowicz, notably, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press, 1967) and *The European-African Confrontation: A Study in Treaty Making* (Leiden, Netherlands: Sijthoff, 1973).

[25] The argument is elaborated in B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727.

[26] The point was apparently accepted by the Supreme Court of Canada in *Roberts* v. *Canada*, [1989] 1 S.C.R. 322 at 340; see the discussion in J.M. Evans & B. Slattery, "Case Note: Federal Jurisdiction - Pendent Parties - Aboriginal Title and Federal Common Law"

constitutional law applied, not only in North America, but also in other British possessions, the same basic principles were arguably incorporated in the basic law of such Commonwealth nations as New Zealand and Australia. In effect, the body of inter-societal law that developed on the Atlantic seaboard in the period 1600-1800 is the core of the law of Aboriginal rights, which in Canada has received explicit constitutional recognition.[27]

Above all, these reflections encourage us to find new ways of understanding our common and several histories, as native Americans and newcomers. For embedded in the past are the seeds of our future hopes.

(1989) 68 Can. Bar Rev. 817 at 831-32. See also *Montana Band* v. *Canada* (1 February 1991), T-617-85 (F.C.T.D.).

[27] Most recently in section 35(1) of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, which recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada." Recognition has also been extended in a series of earlier constitutional instruments, notably the *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No.1. Section 35(1) of the *Constitution Act, 1982* has recently been given a broad interpretation by the Supreme Court of Canada in *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.