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P. Fitzpatrick
University of London

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Abstract

With alarming alacrity, Professor Dauvergne spotted that one of my published pieces had already used the title of this article (cf Fitzpatrick 1995). That title is taken from Bagehot's saying of nation: 'We know what it is when you do not ask us, but we cannot very quickly explain or define it' (Bagehot nd: 20–1). The first excuse for recycling this title is that it is strikingly suited to the concern of this issue of Law Text Culture with challenging nation. Bluntly, my argument will be that we find it difficult to challenge nation because we cannot say what it is so as to identify it explicitly and thence confront it. A little more exactly, we are unable to do this from within the uniform plane of modernity since nation occupies a sacral dimension of being which the modern cannot integrate. Giving effect to that dimension may enable us to challenge modernist conceptions of nation, however. The other excuse for titular repetition refines that challenge. It stems not so much from wanting to reverse the more usual academic practice — offering here the same title but a different paper instead of much the same paper with a different title — as from wanting to intimate a continuance, a sustaining of nation despite, and because of, its elusiveness, and from wanting to show how, in terms of that very sustaining, nation is challenged intrinsically. This is where law, inevitably, will come in.

‘We know what it is when you do not ask us’: the unchallengeable nation¹

Peter Fitzpatrick

With alarming alacrity, Professor Dauvergne spotted that one of my published pieces had already used the title of this article (cf Fitzpatrick 1995). That title is taken from Bagehot’s saying of nation: ‘We know what it is when you do not ask us, but we cannot very quickly explain or define it’ (Bagehot nd: 20–1). The first excuse for recycling this title is that it is strikingly suited to the concern of this issue of *Law Text Culture* with challenging nation. Bluntly, my argument will be that we find it difficult to challenge nation because we cannot say what it is so as to identify it explicitly and thence confront it. A little more exactly, we are unable to do this from within the uniform plane of modernity since nation occupies a sacral dimension of being which the modern cannot integrate. Giving effect to that dimension may enable us to challenge modernist conceptions of nation, however. The other excuse for titular repetition refines that challenge. It stems not so much from wanting to reverse the more usual academic practice — offering here the same title but a different paper instead of much the same paper with a different title — as from wanting to intimate a continuance, a sustaining of nation despite, and because of, its elusiveness, and from wanting to show how, in terms of that very sustaining, nation is challenged intrinsically. This is where law, inevitably, will come in.

Let me first compensate for that opaque opening by way of the pellucid genius of Virginia Woolf. Woolf was certainly no nationalist but she showed the most attuned appreciation of nation in *Mrs Dalloway*

where, close to the beginning, she describes the mysterious yet palpable passage, a slow and silent passage, through an exalted part of London of a stately motor car, one containing ‘a face of the very greatest importance’, a presence that somehow evokes nation but cannot be exactly identified, an inscrutable presence resonant with authority and effect yet a mystery that ‘had brushed ... [the onlookers] with her wing’, momentarily suspending the transactions of ordinary life and inducing an intangible apprehension (‘The world has raised its whip; where will it descend?’), yet inducing also an expansion of the soul: ‘Mr. Bowley, who had rooms in the Albany and was sealed with wax over the deeper sources of life ... could be unsealed suddenly, inappropriately, sentimentally, by this sort of thing’; or the flower-seller ‘shawled Moll Pratt ... would have tossed the price of a pot of beer — a bunch of roses — into St. James’s Street out of sheer light-heartedness and contempt of poverty had she not seen the constable’s eye upon her, discouraging an old Irishwoman’s loyalty’ (Woolf 1925 [1992] : 11, 15–6). How then, or when, may we know this presence? It ‘will be known to curious antiquaries, sifting the ruins of time, when London is a grass-grown path and all those hurrying along the pavement this Wednesday morning are but bones with a few wedding rings mixed up in their dust and the gold stoppings of innumerable decayed teeth. The face in the motor car will then be known’ (Woolf 1925 [1992]: 13). It cannot be known, that is, short of a stilled end.

Whether all this should moderate or whether it should heighten the constant academic lament at not being able to say what nation may be is a question that can be answered as we proceed, but for now the failure can prove revelatory.² What is especially revealing about this failure is its persistence in the face of repeated efforts to overcome it. Diverse affirmations of what nation concretely is never become accepted either as distinctive of nation or as fully accounting for it. Nation is, in the result, left with no determinate content of its own. That outcome is pointedly confirmed in Dauvergne’s observation of a shift in the criterion taken to be most distinctive of nation, a shift from territoriality to control over the movement of peoples (2004a, 2004b). The vacuity of nation is further confirmed by attempts to capture it in

more transcendent terms — attempts to capture it as imagined or as an infinitely variable *élite* project, for example. These attempts, like the efforts to render nation concretely, also fail to produce anything that either marks nation distinctively or fully accounts for it. In the openness of their criteria, such attempts do intimate that nation can be, perhaps 'is', ever-changing. Yet the persistence of the efforts to endow nation with determinate content would at least suggest that there must be a continuous striving, a reductive striving perhaps, to render the protean nation in determinate terms, impossible as this would seem to be.

In more familiar if perhaps more complex terms, we could relate this divide to that between nation as particular and nation as universal. As particular, the nation of modern nationalism takes on a settledness and a completeness, and these are qualities which, historically at least, have been assumed or accepted mainly in terms of territory. But nation has not subsisted in such a contained and solitary way, avoiding any constituent relation to what is ever beyond such a straitened identity. The modern nation has, rather, always arrogated to itself the universal, and even if that is now rarely done in explicit terms, nation continues to do so through the prerogative claim to some commensurate capacity, such as being the exemplar of civilisation or humanity, or through the adoption of a universalising project, or through its quotidian yet illimitable relating to what is beyond its emplaced existence. There are obvious difficulties — difficulties to be confronted shortly — with a positive or posited constitution as universal, not least because if the universal 'could ever actualise itself in the real world as truly universal, it would in fact destroy itself' (Chatterjee 1986: 17). These difficulties were once overcome by constituting nation negatively, by setting it against those savages and others quite beyond the range of the universal. Being beyond the universal these others could only be absolutely beyond, and thence not within the domain of nation. This configuration changes, but its negative impetus remains, with the entry of almost everyone into the domain of nation. Thence, if the Orwellian adaptation may be forgiven, some are found to be more universal than others: some exemplify the universal (much) more fully than others; some have progressed or developed more markedly along a path to the

universal than others; some belong to collections of elect nations typifying the universal and others do not — the great or imperial nations, the comity or community of nations, the developed or the advanced. As universal, and in opposition to the nation's fixity as particular, nation is characterised by dynamism and movement, and this not only in the extraversion of nation, its going out and seeking to draw the possibility of the world to itself, but also in its more introverted effort to eliminate or surpass particular orders that would come between the nation-state and its solitary subject. Yet the universal, for all its constituent force, is needful of its instantiation in the particular. The particular, in turn, cannot protract and extend without its being drawn out by the universal. As well as this mutual dependence between them, there must also be a subsistent irresolution between the universal and the particular if the particular is to be elevated universally and the universal instantiated particularly.

Given these disparate yet irresolutely conjoined qualities of nation, we could return with more sympathy now to the unending stream of its apologists who would seek to say what it is and to endow it with some compendious, contained, even complete existence. To advance enquiry, we could take a cue from the latest book of one highly notable apologist, Anthony D Smith: his *Chosen Peoples: Sacred Sources of National Identity* (2003). The book is startling in its unoriginality (and that will eventually turn out to be a compliment). As between nation and the sacred, there is an abundance of tractable analogues, to put it no stronger than that for now. Doubtless the hugely predominant thrust of the theory and the ideology of nationalism has been modernist and secular, and nationalism so conceived counters sacral attachment and atavistic sentiment. Somehow it does not matter that leaders readily used and use such sentiment and such attachment in 'building' and sustaining nation; somehow it does not matter that nation retains many of the expressive features of this sentiment and attachment; somehow it does not matter that nation in its early history was often explicitly advanced as a substitute religion; and somehow it does not matter that even now 'it is difficult to separate out pre-modern and modern sources of the sanctity of the homeland' (Smith 2003: 12, 14, 21, 26, 134). What is so

significant about all this insignificance is the richness of the evidence Smith advances for what he sees as the prime and continuing valency of the 'deep-rooted, enduring religious beliefs and sentiments, and a powerful sense of the sacred' in the constitution and the continuance of nation — beliefs, sentiments and a powerful sense aligned with somewhat more operative notions of the communion of the people, the holiness of the land, varieties of myth, of law and sacrifice (Smith 2003: vii for the quotation). What the generosity of Smith's instances reveal so pointedly here is the yoking of the sacred to the authenticity and rightfulness of nation. The claimed presence or completeness of nation in its particularity is elevated beyond a mundane scepticism through such notions as the chosenness of the people, the sacredness of the land, or the sacredness of a community's attachment to it (Smith 2003: 255–6). And the impossibility of nation's universality is shielded from doubt through the attribution to nation of 'a unique role in the moral economy of global salvation', through a redemptive 'mission' or portentous 'destiny', and through the exemplary identification of nation with some transcendent universal entity (Smith 2003: 48–9, 66, 91, 203).

Looked at in another way, casting nation or its sources as sacred should not surprise us. Quite a while ago, Carl Schmitt cogently rendered the modern political and its forms, including sovereignty, as a secularised theology (1985: 36, 1996: 42). Amplifying this, Derrida sees the sovereignty of the nation-state as a secularised theological concept (2001: 49). But what could such an oxymoronic secularised theology be? And how might nation be conceived of in such terms? Perhaps the beginnings of an answer could be sought in a more straightforward theologic, exemplified for present purposes in the god of monotheism, and it will facilitate that search for an answer if we keep within range the sacred, and sacred sources, invoked by Smith.

The monotheistic god has to take on chasmically dual characters and bring them into a unity. One character can be found in the omnipresent and determinate god, the god of perfect order, the god of constancy, caught by his, usually 'his', own laws, by 'nature', and forbidden by Malebranche to 'disturb the simplicity of his ways' (Riley 1986:

40) — a god, in short, unable to be other than what he is. The alternative god, in stark contrast, is one of infinite and pure possibility. He can only ever be other than what he 'is', 'absolutely unconditional and subject to no limiting rules and norms' (Cassirer 1955: 238). This is the god of miracle, of nature confounded, of mystery and revelation, boundless, unrepresentable, an ineffable god, a god in whose presence there can only be dissolution. These deific characters have to be somehow combined in an impossible union. For Abu Ali ibn Sina (Avicenna), God was both rationally and 'simply' contained yet uncontainedly different from everything else, and apprehended most completely in the 'realm of the imagination — not through discursive reason' (Armstrong 1993: 184). Or, for Plotinus, the One 'is Everything and Nothing; it can be none of the existing things, and yet it is all' (Armstrong 1993: 102). What would seem to be a similar divide and combining mark other configurations of the sacred. It is common in myths of origin, for example, to pit variations of order and of incipient manifestation against chaos, possibility and the disparate. With such mythic sources however, as with other types of the sacred, the divide between these dimensions is a prelude to their creative combining. Having this generative power, the domain of the pre-modern sacred was conceived of as one of 'energy' and 'forces', and it was the profane which was the place of a set 'substance' and of 'things' (Caillois 1959: 34).

This contrasts with a reduced or constrained modern meaning of 'sacred'. In that reduction, the sacred is made fixed or inviolate, a matter of unshakeable belief or of what enduringly is, yet something also to be protected, enduringly 'held' against challenges to it. Sacredness is thence attributed to property and the nation, law and the constitution, life and stem cells. Doubtless this represents a much-remarked dimension of the sacred generally (eg Girard 1977: 39). The boldest of contrary claims for a still unbounded sacred is made by Eliade: 'the outstanding reality is the sacred; for only the sacred *is* in an absolute fashion, acts effectively, creates things and makes them endure' (Eliade 1965: 11, his emphasis). Neither effective action, nor the creation of things, nor their enduring can *be* in stasis, any more than they can *be* in nothing but change. Operatively, the sacred becomes the combining of

its own antithetical dimensions into force and form. As such, and for Bataille, 'the sacred is essentially that which, although impossible, is nonetheless there' (Bataille 1991: 214). It is there as a resolution in-between its antithetical dimensions, but it is only ever an expedient, a resolution 'for the time being'. More bluntly, resolution as the outcome of the sacred ritual is a deception (Girard 1977: 5–7; Adorno & Horkheimer 1979: 50–1). The resolved reality which the ritual, or office, or system, or symbolism, or law would enclose — and would shore up with iterations, incantations and solemnities — that reality subsists in its unsettling appetency for what is illimitably beyond it. And what is beyond 'remains "here below", remains in rapport' with the enclosed reality (Libertson 1982: 7). The enclosing, the protecting of the reality, the bringing to form and identity, is always a denial of what could otherwise be or have been, a sacrifice — 'the first representational economy' (Lyotard 1990: 21) — to invoke another momentous mode of effecting the sacred.

Once upon a time — that once which we now put upon a time — these contrary dimensions of the sacred were 'resolved' through a reference to a transcendent beyond, such as a reference to that god of monotheism we encountered a little earlier. Various entities which were existent yet partook of the transcendent, sovereigns and myths of origin for example, mediated between these contrary dimensions, combining them operatively, assuming a constituent unity, yet all the while retaining 'something of that duality' mediated, 'namely an ambiguous and equivocal character' (Lévi-Strauss 1968: 226). The world infused by such entities was still an heterogeneous one, not only as between the sacred and the profane but also as between the contrary dimensions of the sacred, a difference found in its famed 'ambiguous' character, as Agamben has it, an ambiguity captured in his elaboration of the Latin where '*sacer* means vile, ignominious, and also august, reserved for the gods; both the law and he who violates it are sacred' (Agamben 1991: 105). This vile sacred is the sacred as transgressive, ever challenging the existent and set order, something that was once channelled in rituals and roles every bit as conspicuous and 'public' as those attending the sacred as revered.

As against this heterogeneity, the new-created secular or rational world is one freed infinitely from any determining reference to a sacred realm set beyond our profane reality. Yet there is a view, clean contrary if less remarked, which sees modernism as an ironic apotheosis of the sacred rather than its utter denial, and this perception is something more thoroughgoing than those partial or exceptional resemblances some find between what were once manifestations of the sacred and their now attenuated secular counterparts. Notably, Adorno and Horkheimer in their critique of Enlightenment would render modernism itself as perfected myth, myth here being a form of the sacred, and they would find the sacred pervading the very modernity that would deny it: 'In the enlightened world, mythology has entered into the profane. In its blank purity, the reality which has been cleansed of demons and their conceptual descendants assumes the numinous character which the ancient world attributed to demons' (Adorno & Horkheimer 1979: 28). With this 'disenchantment of the world', with 'this dissolution of myth and the substitution of knowledge for fancy', and with the world straitened to 'the known, one and identical', the now pervasively numinous reality takes what was beyond, what was transcendent, into itself (Adorno & Horkheimer 1979: 3, 39). Yet in so doing, it would still claim intrinsically to oppose, surpass and displace the world of the sacred — something which Adorno and Horkheimer also observe, inevitably (46).

Given the analysis so far and the august authority of Adorno and Horkheimer, we could perhaps comfortably conclude that modernity is constituted within the very sacred it would deny. That conclusion could then be related to the sacred abiding in the unitary nation and its 'sources' (Smith 2003), to nation as that which 'is' of the sacred, yet of a sacred denied. In the result, we somehow know what nation 'is' but only when we are not asked to say what it is. That resolution could be bolstered by invoking renowned authority to the effect that nation must be seen as purely 'imagined', or that sovereignty can only now be a private, 'subjective' experience (Anderson 1991, Bataille 1991: 233). And that would complete the exordial agenda. But not quite. To say that the modern, enlightened, secular nation is something sacred is not

to say it is the same as a pre-modern sacral entity. It matters that what is constituent of nation is also denied in it. And denied in nation's ambient modernity with its own constituent claim to an homogenous universality. Let me now explore that denial a little further as it will be central to my overall argument.

Seeing nation as something we imagine does not account for why we imagine it as nation. There are attendant palpabilities to nation, such as territory, and even if none of these is taken as compendiously accounting for nation, they do lend materiality to imagination. And, further, these palpabilities would seem to provide more than a subjective experience of sovereignty and, indeed, would seem to substantiate nation every bit as effectively as those 'public' rituals and roles embodying the pre-modern sovereign. National sovereignty is somehow taken to be determinately emplaced yet possessed of an unconstrained and universal efficacy, able to be self-enclosed and self-adequate yet indefinitely extensive, and able to subsist finitely whilst incipiently encompassing what is ever beyond that finite existence. Understandably then, Rousseau would describe a variant of this sovereignty as 'sacred' (Rousseau 1762 [1968]: 50), and it can now be such, ostensibly, without a transcendent reference. Nation is rendered existent through its extensive openness always becoming immanent to its determinate particularity and, as Deleuze and Guattari aptly counsel, 'whenever immanence is interpreted as immanent *to* Something, we can be sure that this Something reintroduces the transcendent' (1994: 45).

This bringing to the determinate of the extensive openness of nation, of its orientation towards the universal, constantly throws up the inadequacy of the determinate. In the result national sovereignty ever fails in its being self-adequate. This failure has to be repeatedly rectified and accommodated to national sovereignty if its integral identity is to be sustained. Modern law is the determinative means of so doing, a law aptly characterised by legal positivists as a national or 'municipal' law, as a subordinated expression of national sovereignty. Yet it is also something necessarily more extensive than the operative existence of national sovereignty, for law must be capable of going beyond the

failures of national sovereignty and bringing that beyond into a secure determination. Yet even in this extending beyond, national law remains caught by the generative orientation of nation, caught by that bringing of what is beyond into a singularly determinate yet surpassing place. The movement of modern law and of modern nation alike is an imperial one.

I will now hasten to situate that culminating proposition about nation and national sovereignty. The very effort at situating returns us to the initial conundrum of how such nation and such sovereignty can be placed and delimited when their constituent claim is one to illimitability, and when both these contrary dimensions must subsist compatibly in an homogenous, secularised reality. The gist of my argument has been that they cannot. The incompatibility is so stark that to reveal it should take but little enquiry into a situated actuality. And if, as Kedourie would have it, 'nationalism sprang fully armed from the head of Immanuel Kant and the Enlightenment' (see Smith 2003: 11), then we need only follow the enlightened Kantian injunction to pursue any enquiry without constraint, daring to face any consequence (eg Cassirer 1955: 65). We may feel inhibited in so doing by Kant's prohibition of just such an enquiry since, for Kant, it would be 'futile' and would constitute 'a menace to the state' (Kant 1785 [1970]: 147). We could perhaps now readily agree that enquiry would be 'futile' if one were after an enduringly resolved answer as to what nation or sovereign power may 'be'. And we may also agree that the revelation of intrinsic irresolution in the constitution of nation and of sovereign power would be a menace to set and self-secure instantiations of the state. That Kant fully appreciated all this is evident in his intimating that, should we seek enlightenment on this score, should we dare to know, we would find that resolution had to resort to something 'sacred', to some 'infallible supreme legislator', even if that source is 'an idea expressed as a practical principle of reason' (Kant 1785 [1970]: 143).

Allow me, then, to seek practical reason in Canadian cases affirming national sovereignty as sacred and unquestionable in the face of secular challenges to it advanced by indigenous peoples. An expansive point of entry to this setting, and a first foray here *ab origine*, is provided by

the decision of the Canadian Supreme Court in *R v Van der Peet* (1996). There Chief Justice Lamer briefly derived content for 'aboriginal rights' and 'aboriginal title' from decisions attributed to Chief Justice Marshall in the Supreme Court of the United States in the early 19th century (*Van der Peet* [35]–[37]). By way of a borrowing from significant academic authority, Chief Justice Lamer finds that these so-called Indian cases provide 'structure and coherence to an untidy and diffuse body of customary law based on official practice', and that the cases are 'as relevant to Canada as they are to the United States' (*Van der Peet* [35], Slattery 1987: 739). He immediately goes on to consider what is taken to be the 'leading' case of this kind, *Johnson v M'Intosh* (1823), a case which accorded some recognition to indigenous title but one which is more aptly seen by Robert Williams as seminal in bringing occidental colonisation, with 'its wars and acts of genocide directed against Indian people', within the rule of law, or a claim to the rule of law (Williams 1990: 325). In a more compliant vein, for Bartlett this case has 'been recognized throughout the common law world' as the origin of a native title which provides 'the only possible accommodation of the rights of settlers and Aboriginal people' (Bartlett 1993: 182–3). The immediate problem with Marshall's judgment in this case is that its 'structure and coherence' remain quite elusive despite increasingly fantastic attempts to locate it (eg Kades 2001). Not the least indication of this absence of structure and coherence is that Marshall himself frequently acknowledged it, and not the least acknowledgment concerned the very issue to be decided in the case: whether indigenous people could transfer title in their land to settlers.

With some regard, perhaps, to a recent revolution based on universal or natural rights, on the rights of all 'men', Marshall did recognise that Indian peoples had 'natural rights' in their land, including the right to transfer ownership (*Johnson* 563). To deny them that right, which the case did, was indefensible, but 'may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them' (*Johnson* 588). It may not be incidental to add that to have done otherwise could well have proved disastrous for the fledgling union of the United States (Williams 1990: 231, 306–

8). But returning to the lamentable character and habits of Indian peoples, what these amounted to was ‘the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct entity’ (*Johnson* 590). That mixture of separation with subordination — which has, of course, endured — was still not enough for a further outcome of the case: its upholding grants of land made by the settler states. The fragile bridge between this outcome and the restriction on Indian peoples’ natural right to alienate lands was limned by Marshall in this way:

However this restriction may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice (*Johnson* 591–2).

The title founding such righteous settlement flows from ‘discovery’ by the British. Marshall fully acknowledges the arbitrary quality of ‘discovery’ in the next case Chief Justice Lamer considers, that of *Worcester v Georgia* (1832). Here Marshall found it ‘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’ (*Worcester* 542–3). No further regard was had to that ‘difficulty’, however.

That could still not be the end of Marshall’s anfractuous journey. Returning to the leading case of *Johnson v M’Intosh*, in Marshall’s view discovery only entitled the discoverer to acquire or conquer lands discovered. He recognised that the settlers’ overweening claims to the whole national territory corresponded to effective conquest. This, he also recognised however, was a conquest that had not taken place. Nor must it be considered to have taken place since, in Marshall’s concept of it, the law of conquest meant that ‘the conquered inhabitants can be blended with the conquerors or safely governed as a distinct people’; and as we have just seen, they could be neither: they were ‘a people

with whom it was impossible to mix, and who could not be governed as a distinct entity (*Johnson* 589–90). Marshall putatively resolved the conundrum like this:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned (*Johnson* 591).

There was something in addition to this pretension of force which also could not be gainsaid, and that was the 'right' of 'society' conceived of as 'the nation ... to prescribe those rules by which property may be acquired and preserved' (*Johnson* 572). More immediately, it was 'the government' which has 'given us ... the rule for our decision' (*Johnson* 572). By the time of *Worcester*, less than a decade later, a spectral conquest had acquired more substance: 'power, war, conquest, give rights which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend' (*Worcester* 543). That same and now 'irresistible power' has excluded Indian peoples 'from intercourse with any other European potentate', that being 'the single exception' to such peoples 'retaining their original natural rights, as the undisputed possessors of the soil' (*Worcester* 559), apparently forgetting that the natural right of alienation had already been 'excepted' in *Johnson v M'Intosh*.

There is then, if Marshall is to remain the chosen oracle, much which, echoing Kant, 'cannot be questioned', or 'drawn into question', or which must 'never be controverted'. I will now take that imperative unquestioning, that straitened acceptance, as a provocation to explore further what cannot be questioned and why. First, however, there is another case which Chief Justice Lamer calls in aid, one which has often been cited in the Canadian cases, and that is the decision of the Australian High Court in *Mabo v The State of Queensland* [No 2] (1992) (*Van der Peet* [38]–[40]). Here the almost cursory concern of the Chief Justice is with the finding by the High Court that indigenous peoples had 'native title'. A more sedulous examination of that case

would reveal basic similarities with *Johnson* and *Worcester*, not just in their constricting the title of ‘encapsulated societies’, to borrow the phrase from Geertz (1994: 3), but also in the prohibiting by *Mabo* of any questioning of how this all came about (Fitzpatrick 2002). With *Mabo*, and cognate cases, this is a self-denial, a matter of courts not being able to enquire into the exercise of a sovereign power of acquisition, bolstered by a concern that the outcome could be ‘embarrassing’ (Fitzpatrick 2002: 246–7). Yet the disruptive intrusion of such enquiry recurs throughout the judgments in *Mabo*, making the whole process no less turbid than that of Marshall’s convoluted but more candid engagement. And *Mabo* goes further than Marshall, in a sense, in finding the original ground of colonial acquisition in Australia, *terra nullius*, to have been invalid. Yet the acquisition miraculously remains valid, or remains at least a founding transgression which cannot be enquired into.

Before bringing this strange prohibition on enquiry to the Canadian situation, there is another set of cases, these coming from South Africa, decided recently and after the accommodating contribution of *Van der Peet*. Those cases have been considered in some detail by Hanri Mostert and myself in that over-optimistic realm of academic self-reference known as ‘elsewhere’ (Mostert & Fitzpatrick in press), and I merely mention them here so as to dramatise the significance of national sovereignty in that the South African cases arrive in the end at the same outcomes and in much the same ways as the Canadian, Australian and US cases, and indeed rely on these, but do so in the explicitly elevated setting of a liberated and democratic South Africa — not, that is, in the context of continually oppressive settler states.

To focus now on the injunction against enquiry in the Canadian setting may not seem propitious in that the Canadian courts seem to have come entirely to avoid enquiry. Reassuringly, however, the demand for enquiry does invade the judgments of these courts in oblique and muted ways (see Borrows 1999: 589–90). Much more manifestly, however, there is a ‘blocking’ of judicial enquiry effected by an ‘unreflecting acceptance of the Crown’s assertion of sovereignty over Aboriginal peoples’, an assertion the effectiveness of which, in one

pointed judicial estimate, there can 'from the outset never [be] any doubt' (see Borrows 1999: 548, 562 n134). It is that sovereign assertion which 'defines the terrain on which Aboriginal peoples must operate if they are going to dispute the Crown's actions in Canadian Courts' (Borrows 1999: 548). Such an encompassing outcome is already given by way of reference to the precedent 'authority' of the cases we have just considered, authority already endowing pre-existent 'structure and coherence' on that outcome (see *Van der Peet* [35]). All of which is in a sense unexceptional since resort to authority of this kind is a standard mode of illusory reference, a covering of ontological bareness, characteristic of legal reasoning (see Stone 1964: 339).

In short, as a result of *Van der Peet* and *Delgamuukw v British Columbia* (1997) and other recent cases, now 'Canada assumes that its acquisition of sovereignty and underlying title with respect to Indigenous peoples is unproblematic' (Asch 2002: 23). As it is rendered in such cases, an entirely surpassing sovereignty effects a remarkable reversal. The seeming protection of Aboriginal rights in section 35(1) of the *Constitution Act* 1982, such rights being 'hereby recognized and affirmed', becomes 'potentially eliminative' of these same rights (Christie 2002: 58). There is yet some obeisance to plurality. 'A court must take into account the perspective of the aboriginal people claiming the right' as well as the perspective of 'the common law' (*Van der Peet* [49], *Delgamuukw* [147]–[148]). However, the 'Aboriginal ... perspective must be framed in terms cognizable to the Canadian legal and constitutional structure', for 'aboriginal rights exist within the general legal system of Canada' (*Van der Peet* [49]). Even though the much vaunted purpose of section 35 is 'reconciliation', this has to be a 'reconciling of pre-existing Aboriginal societies with the assertion of Crown sovereignty over Canada' (*Van der Peet* [57]). Aboriginal title enters into contention only because it 'crystallized at the time sovereignty was asserted' (*Delgamuukw* [145]). Nor can sovereignty's diapason allow of a common idiom of contention. An attenuated *noblesse oblige* may allow of some recognition of an Aboriginal idiom, but evidence presented in that way must 'not strain "the Canadian legal and constitutional structure"' (*Delgamuukw* [82]). In all, the ostensible protection

of Aboriginal rights in section 35 of the Constitution amounts to no more than the legislature needing to have an ‘objective’ that is ‘compelling and substantial’ in order to eliminate them (*Delgamuukw* [161]). ‘The range of legislative objectives that can justify the infringement of Aboriginal title is fairly broad,’ added Chief Justice Lamer before going on helpfully to list an enormously ‘broad’ set of indicative ‘objectives’ (*Delgamuukw* [165]). The *terminus ad quem* arrived at by the Chief Justice is that, in achieving such objectives, the very ‘limiting’ of Aboriginal rights — rights which can thereby be limited to extinction — is ‘a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part’ (*Delgamuukw* [161]).

What follows from all this is a sustaining of the whole sorry and standard panoply of colonial encompassment: of the subordination and filtering of the ‘rights’ of the colonised through the benign hold of the coloniser (eg Westlake 1971: 47, 50–1); of these ‘rights’ being confidently entrusted to the ‘honour and good faith’ of the coloniser (*Delgamuukw* [203]–[204]); of the ‘special bond’ tying the colonised to ‘the land’, to inalienable land which cannot be used in any way that would ‘destroy’ its ‘unique’ value as part of their ‘traditional way of life’ (*Delgamuukw* [128]–[129], [194]); of their laws, customs and very ‘aboriginality’ being dependent on a ‘highly contextual’ and factual finding by the courts of the coloniser (*Van der Peet* [130], *Delgamuukw* [191]). As Chief Justice Lamer cautions, with emphasis, the rights which section 35(1) of the Constitution ‘recognizes and affirms are *aboriginal*’, and this ‘aboriginality’ means that the ‘rights cannot ... be defined on the basis of the philosophical precepts of the liberal enlightenment’, on the basis of their being ‘general and universal’ (*Van der Peet* [17]–[19]).

All of which imports a conception of rights that is intrinsically insupportable. Such putative ‘aboriginal’ rights are existentially encompassed by blocks of temporality — blocks prescribed by judges in ways that are markedly and tellingly varied. A sampling: the so-called rights depend on their being ‘integral’ to a reified, a stunted ‘distinctive culture’ which is ‘pre-contact’; and such rights depend as

well on their continuing in existence since 'contact' (*Delgamuukw* [142], [189]). Or, with title to land, the temporal touchstone becomes the time at which the colonist arrogated 'sovereignty'; but, again, there has also to be a continuing and broadly invariant occupation of the land combined in some miasmic measure with 'aboriginal law' (*Delgamuukw* [142], [147], [194]). Or it suffices for 'the aboriginal right ... to have been sufficiently significant and fundamental to the culture and social organization of the aboriginal group ... for a substantial continuous period of time', with 'the reference period of 20 to 50 years' being helpfully advanced (*Van der Peet* [175], [178]). And so on. The latter periodisation, borrowed from Justice Heures-Dubé, is part of her dissent from such pre-contact or sovereign retrospections as those just instanced. For her, these formulas recognise only 'frozen rights' by failing to 'permit their evolution over time'; instead, there has to be a "dynamic right" approach' in which 'aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live' (*Van der Peet* [165], [170], [172]). 'Permitting' rights to have this more indefinite temporal basis, however, only attenuates the more draconic formulations of her colleagues. This test still primarily delimits the supposed rights in a way that is incompatible with the nature of rights.³

Bluntly, a right cannot be a rendering of the future in terms of a rigidified past. Rather, rights are constituted iteratively in the converting of a past by way of its responsive relation to the future. It could be said, in some kind of descriptive sense, that such and such were the rights which certain people had in a past. But in a performative sense, and in an operatively legal sense, rights cannot be so hermetically contained. Doubtless, as Borrows points out, 'there is a certain amount of truth to the statement that Aboriginal rights are fact and site specific' (2002: 65). This is so with any right. There has to be a pre-existent content to the assertion of a right, but the right cannot be enduringly confined to any pre-existent. As a normative claim on futurity, a right has to be able always to become other than what it 'is'. It generatively trajects beyond any contained condition, temporal or otherwise. Such

is the impelling element of a right's being 'general and universal', of its surpassing any specificity — returning to Chief Justice Lamer's 'enlightened' formulation (*Van der Peet* [17]–[19]).

The instantiated sovereign seeks to encompass and embody right. The sovereign must, as we saw, originate and subsist not just in itself, in its instantiated and specific self, but also in relation to an infinite beyond of itself, a beyond inevitably contrary and contested. Assiduous enquiry into the constituent conditions of sovereign right would reveal its partial and provisional nature, would reveal that its 'generality must [also] be specific' (Neumann 1957: 28). It would reveal the historical and, which is the same thing, the continuing delimitation of its claim to authority. What shields Kant's 'supreme power', what preserves Auden's 'folded lie' that is 'the State' (Kant 1785 [1970]: 147, Auden 1979: 88), is the attribution to it of a completeness, a universality in its 'taking place', thus obviating any contained relation to an origin, to anything beyond itself (see Kant 1785 [1970]: 143–4). This is not only Kant's own 'extravagant pretension', to borrow Marshall's phrase. It is the operative claim of a modernist sovereignty, or of a sovereignty persisting into modernity. Supreme authority, then, is inevitably delimited in its finitude, yet its sovereign capacity must be elevated beyond limit; and this classic conundrum of sovereign power can in modernity no longer be solved, after a fashion, through a transcendental reference joining determinate rule to deific scope.

So far the very vacuity and 'extravagant pretension' of cases of foundation may not disturb a like vacuity and extravagance of the sovereign claim to universality and infinite extension. And the injunction against enquiry in the more recent of these cases may shield a national sovereignty against, borrowing the term again from *Mabo*, 'embarrassing' revelation of the threadbare nature of sovereignty's claim to an emplaced finitude or to a determinate authority. If, however, we go to the great originals in this line of cases, the so-called Indian cases in the United States, then we find an unabashed, if no less embarrassing identification of the determinate. We should come to this matter with the genealogical depth imported by Schmitt's account of how the appropriations of the Americas could 'take place' as they did, and of how

such appropriations accorded with the 'spatial orders' of occidental sovereignty and law (Schmitt 2003: 98). For present purposes, however, let me simply remark on a striking similarity. In the *longue durée* of the colonisation of the Americas, Schmitt delineates its hypostatisation as a fusion of an enveloping geography and cartography with a mix of militarism, science and culture (Schmitt 2003: 107–8, 132). In a somewhat shorter *durée*, Marshall's soaring global range replaced indigenous peoples of the Americas within a transcendent domain of 'our maps, geographical treaties', 'nautical science', and 'our arts and our arms' (*Worcester* 543, *Cherokee Nation v Georgia* (1831) 15, 17). In relation specifically to grounding the sovereign subordination of indigenous peoples, we saw that there was sufficient grounding quiddity for Marshall if this subordination were an inexorable response to the depraved condition of such peoples or if it simply flowed from the historical fact of 'discovery'. Sovereign arrogation could also emanate for Marshall, just as simply, from 'the actual state of things', or there was the deific fallback of its being brought about by 'the Creator of all things', or more robustly, by 'the sword'; or it could, still simply, be that which has been 'asserted' (*Johnson* 572, 574, 587–8, 591–2; *Worcester* 543). Or, as Justice Johnson put it a little more expansively in deciding a case with Marshall, 'it cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights', the questioning of which derivation by indigenous peoples being apt only for an 'appeal ... to the sword and to Almighty justice, and not to courts of law or equity' (*Cherokee* 22, 52).

So, the search for a determinate nation and its sovereign being returns us with a seeming inevitability to the sacred, either explicitly in the invocation of a deity, or in the surpassing, wilful assertion of the coloniser, a generative assertion endowing what would otherwise remain inert and inconsequential. The efficacy of that arrogation has been confirmed for our time by the finding of the South African Supreme Court of Appeal that the terms of colonisation depend on the intent of the colonizer (Mostert & Fitzpatrick in press). The replete and permeating being of the coloniser is at one with the Kantian will which 'proved

to be the revolutionary source of the doctrine of national self-determination developed by his followers' (Smith 2003: 11). And this is nation constituted as 'an undivided subject ... possessed of a unitary self and a singular will that arose from its essence ... [a subject] capable of autonomy and sovereignty' (Prakash 1990: 389). Enclosed in its primal and pre-emptive completeness, such nation comes to what is beyond it with an appropriative sameness.

To conclude, then, we could apply to this primal completeness of nation the radical criticism which Balibar would make of 'the proposition presupposed by most of the arguments concerning politics and power: that an efficient action can take place only when the agent has an exclusive control over some resources and is able to use them as a unified "sovereign subject," at the very least enjoying a stable and recognized identity' (Balibar 2004: 221).⁴ Balibar's criticism can, in turn, be exemplified in the 'reconciliation' provided for in section 35 of the Constitution. The verb 'to reconcile' can import being acceptantly reconciled to something, reconciled to one's fate for example. That is a meaning which operatively infects the noun 'reconciliation' as it is judicially extracted from section 35, a reconciliation of indigenous peoples to something that will always and ultimately require their submission. To what is complete and homogenous there can only be a reconciling to (cf Borrows 2002: 89–90, 140–1). But 'reconciliation' as a noun cannot be reconciled to such a claustration. In van der Walt's luminous perception: 'the patently reconcilable is in no need of reconciliation. It is the irreconcilable that calls for and opens up the possibility or *perhaps* of reconciliation' (van der Walt 2003: 18, his emphasis). And of such reconciliation there can be no end: it 'is always to come' (van der Walt 2003: 21).⁵ Which is not to deny the impelling necessity of emplaced positions, of archaic formations, of things to be reconciled. Yet 'displacement' or 'the process of dislocation is no less arch-originary, that is, just as "archaic" as the archaism that is always dislodged' (Derrida 1994: 82). So just as impelling as emplaced position is the displacement of position, the moving through and out beyond position receptively towards each other, impelling not just of a particular process of reconciliation but of our very being.

Notes

- 1 This article is based on a talk given to the 'Challenging Nation' series at the University of British Columbia in January 2004. Thanks to Catherine Dauvergne for the generosity of the invitation to participate in the series. And, for the generosity that accompanied it, thanks to Catherine again, to Ruth Buchanan, Dianne Newell and the Peter Wall Institute for Advanced Studies, Susan Boyd, Claire Young, and Wes Pue. Although their attempts to saturate me with the relevant knowledge may not have been entirely successful, my failures, inevitable and otherwise, would have been much more conspicuous without the generosity, concern and companionship of Brenna Bhandar, Shelby Fitzpatrick, Stewart Motha and Sara Ramshaw during this venture.
- 2 For a survey and analysis elaborating on the argument that follows see Fitzpatrick 2001: 111–29.
- 3 This, and the other modes of delimitation, being facilitated perhaps by what Stone sees as 'a tendency to identify the legal interests or "rights" in a thing with the thing itself' (1964: 138).
- 4 I am indebted to Pablo Sanges Ghetti for this reference.
- 5 The immediate quotations are from a text in English provided by Van der Walt.

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