# Contract and Domination

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polity

First published in 2007 by Polity Press

Polity Press
65 Bridge Street
Cambridge CB2 1UR, UK


Polity Press
350 Main Street
Malden, MA 02148, USA



ISBN-13: 978-07456-4003-7
ISBN-13: 978-07456-4004-4 (pb)

A catalogue record for this book is available from the British Library.

Typeset in 10.5 on 12 pt Monotype Times
by Servis Filmsetting Ltd, Manchester
Printed and bound by MPG Books Ltd, Bodmin, Cornwall

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# 2

# The Settler Contract

*Carole Pateman*

> I like a plantation in a pure soil; that is, where people are not displaced to the end to plant in others. For else it is rather an extirpation than a plantation.
>
> Francis Bacon, *On Plantations*, 1625

> The Procreation, or Children of a Common-wealth, are those we call *Plantations*, or *Colonies*; which are numbers of men sent out . . . to inhabit a Forraign Country, either formerly voyd of Inhabitants, or made voyd then, by warre.
>
> Thomas Hobbes, *Leviathan*, 1651

In June 1992, the High Court of Australia ruled in the case of *Mabo v. the State of Queensland* that the country was not *terra nullius* when the first settlers arrived from England in 1788.[1] The political importance of the doctrine of *terra nullius* is that it provided an answer to one of the most fundamental questions of modernity. Why was it legitimate for Europeans to sail across oceans and "plant" settlers in (i.e. colonize) faraway territories? Why was it justified to turn these lands into New England, Nova Scotia, and New South Wales, and then into the modern states of the United States, Canada, and Australia (the three countries

The origin of this chapter goes back to the late 1970s when I became interested in citizenship and Aboriginal peoples in Australia, which led me to *terra nullius*. My interest was also stimulated by the publication of Henry Reynolds's *The Other Side of the Frontier* in 1982. I began to collect material about *terra nullius* all those years ago, but have not been in a position to write about it until now.

[1] 175 CLR 1, 1992. The case began in 1982 when five members of the Meriam people argued that their rights to their land in the Murray Islands (in the Torres Strait) were not extinguished on the annexation of the islands by Queensland in 1879. Three of the plaintiffs, including Eddie Mabo, died before the verdict of the High Court, and Mabo's own claim was denied. In *Mabo* (pp. 25–6), Justice Brennan stated that the propositions on which the defendant relied were not specific to the Murray Islands but were "advanced as general propositions of law applicable to all settled colonies," and thus to the whole continent of Australia. (Page references to legal cases are in the text.)

with which I am concerned here)? In the political theory and the law of nations of the seventeenth and eighteenth centuries it was argued that if land is *terra nullius* then it may rightfully be occupied.

The general principle underlying this argument, that if something is "empty" it is unowned and so open to claims of ownership, goes back to ancient times. Roman law included the concept of *res nullius*, an empty thing, or a thing that belongs to no one. An empty thing is common to all until it is put to use, and the person who puts the thing to use becomes its owner (Pagden 1995: 76–7). *Terra nullius* is a very capacious concept. To call a tract of land *terra nullius* has a range of meanings: the territory is empty, vacant, deserted, uninhabited, *vacuum domicilium*; it belongs to no one, is *terrritoire sans maître*; it is waste, uncultivated, virgin, desert, wilderness.

Blackstone writes of "sending colonies to find out new habitations," and states that "so long as it was confined to the stocking and cultivation of desert, uninhabited countries, it kept strictly within the limits of the law of nature" (1899: bk II, ch. 1, 7; also Intro. §4, 95). The problem was that lands without any inhabitants were very few indeed. The question of the justification for such stocking and cultivation in inhabited territories thus looms very large, or it did in the early modern period. Until very recently contemporary political theorists largely managed to ignore it, in part because discussions of the legitimacy of the modern state (always taken for granted) have said nothing about the land on which the state is created.

Defenders of colonization in North America, including political theorists, frequently invoked two senses of *terra nullius*: first, they claimed that the lands were uncultivated wilderness, and thus were open to appropriation by virtue of what I shall call the *right of husbandry*;[2] second, they argued that the inhabitants had no recognizable form of sovereign government. In short, North America was a state of nature (see section II). Settlers in Australia also used these arguments but Australia is of special interest because, in the eyes of the law, the continent was *terra nullius* in the sense of unoccupied or uninhabited in

[2] Virgin territories had to be tamed and subject to careful husbanding. As John Donne wrote in "To His Mistress Going to Bed" in 1669:

> License my roving hands, and let them go
> Before, behind, between, above, below.
> O my America! My new-found-land,
> My kingdom, safeliest when with one man manned,
> My mine of precious stones, my empery,
> How blest am I in this discovering thee!
> To enter in these bonds is to be free;
> Then where my hand is set, my seal shall be.

1788.[3] The *Mabo* judgment was necessary because in Australia *terra nullius* was part of the law of the land.

The legitimacy of the states created in North America and Australia is ultimately based on the claim that, in one or another sense of the term, they were created in a *terra nullius*. Therefore, the potential ramifications of *Mabo* are, to say the least, extremely far-reaching. However, legal judgments in North America and Australia have focused on the Native (Indigenous, Aboriginal) peoples' prior occupancy and right to title to land. They have carefully cordoned off sovereignty and legitimacy from consideration. The British Empire "saw itself as founded upon law" (McHugh 2004: 34). My conclusion is that ultimately, given leading legal judgments in all three countries, the question of legitimacy is impossible to avoid.

During the 1990s, political theorists began to look at justifications offered for European colonial expansion in early modern texts (see, e.g., Arneil 1996; Pagden 1995; Tuck 1999; Tully 1993b, 1994, 1995). Locke's arguments, in particular, have been scrutinized, and a Locke has emerged who is pivotal in the justification of English colonial expansion to North America. I shall have something to say about Locke, and also about Grotius who is the key figure in the development of international law (the law of nations). I have learnt a great deal from this valuable new scholarship, but from my perspective it has two limitations.

First, the focus is on the Americas and the right of husbandry; little is said about empty lands as uninhabited territory. To fully grasp the political significance of *terra nullius* it is necessary to look at the southern as well as northern New World. Australia was set apart from the rest of the British Empire in its colonial practice. Dispossession, extermination, and cruel and brutal treatment do not distinguish Australian history from that of North America,[4] or from other European colonies;

[3] Controversy surrounding *Mabo* and policies concerning Aboriginal peoples has extended to "*terra nullius*." For example, it has been argued that "it was not the legal doctrine behind the 18th-century occupation of Australia," that it "is not part of the common law" and was first introduced in Australia in a case in 1977 that referred to a judgment of the International Court of Justice (Connor 2003: 76, 77). *Terra nullius* was explicitly discussed in the ICJ report on the Western Sahara (see note 8 below) but does the apparent absence of the term itself from common law cases mean that it is irrelevant? Without it, it is hard to see how we are to refer to the legal argument and political theory which I discuss below about planting and land lacking cultivation, laws, property, or properly political institutions. Whether or not the term was explicitly used, the set of political elements to which it refers was much discussed; see section IV. (My thanks to my friend Louise Taylor for drawing Connor's argument to my attention.)

[4] In North America, the colonization of Canada was less bloody than in the United States; "the peculiar Canadian combination of economic integration, government

rather, Australia stands out in the lack of any recognition of Aboriginal peoples' lands or their forms of society and government. For the most part, colonial governments in the British Empire left local laws and customs relatively undisturbed, a policy exemplified by family law in Muslim and Hindu communities in the Indian subcontinent. In stark contrast, Aboriginal peoples were disregarded from the moment the settlers landed in Australia and proclaimed British sovereignty. For example, no treaties were ever entered into with them. Hundreds of treaties were concluded in North America, and the rest of the British Empire offers numerous examples, including the Treaty of Waitangi (1840) between Maori and Pakeha in New Zealand which forms the basis of the constitution.[5]

The second limitation of the new scholarship is that stories of an original contract are a major feature of the early modern texts, but *terra nullius* has not yet been placed within that context. This is my aim here. I shall begin to analyze the logic of the original contract in the form of *the settler contract*. In *The Racial Contract*, Charles Mills discusses an expropriation contract appropriate to "the white settler state," where "the establishment of society thus implies the denial that a society already existed" (1997: 24, 13; see also 49–50). The settler contract is a specific form of the expropriation contract and refers to the dispossession of, and rule over, Native inhabitants by British settlers in the two New Worlds. Colonialism in general subordinates, exploits, kills, rapes, and makes maximum use of the colonized and their resources and lands. When colonists are planted in a *terra nullius*, an empty state of nature, the aim is not merely to dominate, govern, and use but to create a civil society. Therefore, the settlers have to make an original – settler – contract.[6]

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intervention, and treaty promises kept conflict to a minimum . . . . [T]he settler population found many means, typically short of armed conflict, of pushing the indigenous peoples to the margins of the emerging societies" (Coates: 1999: 143–4).

[5] The societies and cultures of the Maori and Aboriginal peoples and the histories of the two countries are very different. After the Treaty, a Native Rights Act and a Native Lands Act were passed in 1865, which recognized Maori rights in land and brought native title under the purview of the law of real property. A series of Maori Wars was fought between the government and the Maori peoples between 1856 and 1870. I should also note that the small population of settlers in Australia, the limited reach of the government, and the remoteness of many Aboriginal communities left some Aboriginal peoples to continue in traditional ways until well into the twentieth century.

[6] Strictly, it includes all three dimensions of the original contract, the social, sexual, and racial, but for analytical clarity I am leaving the sexual contract to one side in this chapter. I am also excluding a part of the racial contract, the slave contract, from discussion of North America (see chapter 5). The doctrine of manifest destiny, the invasion of Mexico in 1845, and the incorporation of Hawaii are also outside my scope here.

Colonial planting was more than cultivation and development of land. The seeds of new societies, governments, and states, i.e. new sovereignties, were planted in both New Worlds. States of nature – the wilderness and the wild woods of Locke's *Second Treatise* – were replaced by civil societies. The new colonies, and the texts of early modern political and legal theory, were part and parcel of the development of the international system of sovereign states, conventionally seen as beginning from the Peace of Westphalia in 1648. In the New Worlds, far away from the metropolis, *terra nullius* was at the heart of the creation of a new form of political organization. A modern state can have no competing sovereignties within its borders. Native peoples were not organized into states and were deemed insufficiently civilized to create one of their own, and so were forcibly incorporated into new state jurisdictions.[7]

The settler contract takes two forms. The first adheres to what I shall call the *strict logic* of the original contract; the second embodies a *tempered logic*. The two forms are illustrated respectively by Australia before the *Mabo* judgment and by North America.

Under the strict logic, the state of nature disappears as soon as the contract is concluded and is replaced by civil society. It is thus irrelevant whether or not a social order and a system of law were in existence in the state of nature (when the colonists first planted themselves). A new start has to be made, founded on the principles requisite to civil society, so no cognizance need be taken of what went before; the point of the enterprise is to leave it behind and create a civil society. But this means that the history and institutions of the state of nature (whether the conjectural histories to be found in the texts of political and legal theorists or the "natural" condition of the New Worlds) are obliterated. Once the (original) settler contract is concluded, the state of nature becomes a mere heuristic device; it acts as a threat and a warning of the disorder and nastiness that follow if the laws of the new state are not obeyed.

Under the tempered logic, aspects of the state of nature – pre-existing social orders – can be recognized. However, they can be

[7] Or, as Hobbes notes (quoted in my epigraph), a territory can be emptied. Between 1967 and 1973 the British government removed the inhabitants from the Chagos Islands, and the "vacant" island of Diego Garcia was handed to the Americans to turn into a military base. In 2000, the High Court ruled that the islanders had the right to return, but in June 2004 the Foreign Office used Orders in Council to overturn the judgment, referring to the increased military needs of the USA. The base was used in both wars against Iraq, and reportedly houses prisoners of the "war on terror." In May 2006 the High Court again found in favor of the islanders, declaring the Orders in Council null and void, but the British government appealed the verdict and the United States opposed the islanders' return. A year later the government lost the appeal. The islanders can return – but not to Diego Garcia.

acknowledged only as, or must be recast into, forms appropriate to a civil society, a modern state in the making with its own jurisdiction and boundaries. But the very fact that Native peoples and their governments are recognized means that the question of the legitimacy of the settlers' creation of a civil society always remains in the background. It cannot be buried so thoroughly as under the strict logic of the settler contract.

Let me stress again that I am discussing only the two New Worlds. Appeals to *terra nullius* are not confined to English common law jurisdictions. A forerunner to the *Mabo* decision was handed down in 1975, when the International Court of Justice issued an Advisory Opinion on the Western Sahara. The Court's discussion of *terra nullius* is brief (§§79–83), but the judgment was that the territories of Rio de Oro and Sakiet El Hamra were not *terra nullius* when Spain declared a protectorate in 1884.[8]

The assumptions embodied in the idea of *terra nullius* can be found well beyond either theories of an original contract or the British Empire. Whether or not they used the term, *terra nullius* has been

[8] The impetus for an Advisory Opinion came from Morocco in 1974 after Spain, earlier in the same year, had proposed holding a referendum on independence under UN auspices. For a detailed analysis of the ICJ Opinion (including discussion of the historical background, the Algerian ambassador's view of *terra nullius*, and the suggestion that the territory was not *terra nullius* because it was part of an Islamic *civitas*, the Dar El-Islam) see Shaw (1978). Morocco immediately responded to the ICJ ruling with a "Green March" invasion of some 350,000 civilians, followed by its military, and Spain ceded the Western Sahara to be partitioned between Morocco and Mauritania. The Polisario front was formed in 1973 to begin a struggle for national self-determination. The Sahrawi Arab Democratic Republic was declared in 1976 (and recognized by South Africa in 2004). Mauritania was no match for the Sahrawi forces and withdrew in 1979, but Morocco took over its territory and has continued its occupation and repression ever since. It has constructed a fortified berm, 1,500 miles in length, through the country. A cease-fire was declared in 1991, the UN Security Council accepted a Settlement Plan and the UN sent a Mission to oversee the referendum (by then) scheduled for 1992. Morocco has obstructed all attempts to draw up the electoral roll for the referendum. In 1997 James Baker was nominated by the US as personal envoy for Kofi Annan, the UN Secretary-General, and in 2001 presented a Framework Agreement. This effectively eliminated Sahrawi self-determination, since the proposed electorate for the referendum was all full-time residents of one year or longer; i.e. settlers could vote on the future of the Western Sahara. Since then, all UN proposals have come to nothing and Baker resigned in 2005. The Sahrawi and their fishing, minerals, and potential oil and gas deposits are now caught up in corporate expansion and the "war on terror." As Toby Shelley notes, for Security Council members "the fate of a quarter of a million Sahrawis is a matter of supreme indifference except to the extent that it impinges on their economic and political ambitions" (2004: 200). For details of the history since 1975 see Shelley (2004), and on recent demonstrations, Finan (2006).

invoked by a variety of colonizers who declared that lands were empty of populations or were mere desert or uncultivated wilderness. In a striking example, Golda Meir (1969) stated in an interview: "There was no such thing as Palestinians. . . . It was not as though there was a Palestinian people in Palestine considering itself as a Palestinian people and we came and threw them out and took their country away from them. They did not exist." I am leaving open the question whether the idea of a settler contract has any wider relevance, either to British or other European colonialism outside of North America and Australia or to more recent plantings by non-Europeans in the territories of Indigenous peoples around the world.

## I Occupation, Conquest, and Consent

"Occupation" is a term of art in international law that began to be developed in the early modern period. Sovereignty can be legitimately gained over a territory that is *terra nullius* through "occupation," or, in the language of the common law, "settlement." Colonies in Australia, like those in Canada, had legal status as settled colonies. Occupation (settlement) was one of four forms of legitimate territorial acquisition established by the European powers as part of efforts to regulate their expansion and avoid conflict over trading rights. The three others were cession, annexation (with neither of which I am concerned), and conquest: "It is only in our own times that it has become possible to argue that the right of conquest has ceased to be upheld by international law" (Korman 1996: 8).

The Spaniards led the expansion into the New World, and they were conquerors, *conquistadores*. They set sail under the authority of five Papal Bulls, issued in 1493 before they left Spain. The Pope made a grant of such land "as you have discovered or are about to discover" to the voyagers, by virtue of his temporal authority. Discovery was central to European colonialism, but what counted as "discovery"? According to Grotius (1983: 11–12), "to discover a thing is not only to seize it with the eyes but to take real possession thereof, . . . the act of discovery is sufficient to give a clear title of sovereignty only when it is accompanied by actual possession." In the late sixteenth century, the English agreed and argued that, although discovery was insufficient without "possession," it was unnecessary for possession that the whole of a claimed territory be occupied, an argument crucial in the settlement of Australia. The rule became that, if a territory had not already been claimed by a European power, then it came under the jurisdiction of the country that was first discoverer and occupier (for an example see Jennings 1971).

Neither the English nor the Dutch enjoyed the authority of Papal Bulls, so how were their colonies to be justified? By the latter part of the seventeenth century English settlement was in need of justification. Opinion had become unfavorable, especially since colonies were seen as an economic drain on resources (although Locke's patron, the Earl of Shaftesbury, was an eager proponent: see Arneil (1996: 90–4)). In North America, the legitimacy of settlement had already been questioned for some time.

Legitimacy followed conquest under the law of nations. In *The American Indian in Western Legal Thought* (1990), Robert Williams argues that English expansion into North America was based on "Discourses of Conquest" (his subtitle). As he points out, the English already had some practice in conquest and planting settlers; Queen Elizabeth had overseen the colonization of Ireland by force of arms in the latter part of the 1500s. Williams reads legal history after the American Revolution as a continuation of the British discourse of conquest. He takes one of Justice Marshall's famous judgments in the nineteenth century, *Johnson v. McIntosh* (1823), as authoritative. Williams's interpretation is that the case "provided Western legal thought and discourse with its single most important textual interpretation of the law governing the rights of indigenous tribal peoples in the territories they occupied." Marshall's acceptance of the "Doctrine of Discovery's discourse of conquest" encouraged further expansion, and "vested authority in a centralized sovereign to regulate the Indian's dispossession according to national interest" (Williams 1990: 289, 317).

The history on the ground is very hard to distinguish from conquest; in both America and Australia the settlers and the military used extensive violence to overcome the resistance of Native peoples and drive them off their land. Some of the settlers on both continents took the view that the land had been gained through conquest. So did Blackstone, who stated that "[o]ur American plantations" were obtained either by treaties (i.e. agreement) or "by right of conquest and driving out the natives (with what natural justice I shall not at present inquire)" (1899: Intro. §4, 96).

Grotius defended the right of conquest, arguing in *De Jure Belli ac Pacis* that all agreements enforced by victors in a formal war were valid; "they cannot be made void by reason of a fear unjustly inspired" (bk III, XIX, XI, §1; see also Forde 1998). But, even more importantly for colonial settlement, he provided a justification for conquest by corporations and colonists. In a *terra nullius* the settlers are in a state of nature, so the law of nature applies. Grotius was the first early modern theorist to argue, in *De Jure Praedae*, for what Locke (*Second Treatise* (henceforth II), §§8–9) later called the "very strange Doctrine" that each

individual has a natural right to punish offenders.[9] Grotius writes that the power of the state derives from a "collective agreement" (an original contract) and so "it is evident that the right of chastisement was held by private persons before it was held by the state" (cited in Tuck 1999: 82). In *De Jure Belli* Grotius states that the law of nature allows anyone "of sound judgement who is not subject to vices of the same kind or of equal seriousness" to inflict punishment (bk II, XX, VII, §1), and only when families united together in a political order did specially appointed judges supersede this individual right (bk II, XX, VIII, §4).

Grotius justifies "private war" in *De Jure Belli*, an extension of the right of punishment of offenders by individuals or nonstate entities. He identifies three circumstances when private war is legitimate. First, if the danger is so great that there is no time to bring the matter before a judge. Second, where judicial institutions are unavailable "either in law or in fact." Institutions are unavailable in fact if the judge refuses to take cognizance, or "those who are subject to jurisdiction do not heed the judge." They are unavailable in law in "places without inhabitants, as on the sea, in a wilderness, or on vacant islands, or in any other places where there is no state" (bk I, III, II, §1). Thus judicial remedies cannot be obtained and the individual writ of punishment runs in "a wilderness," or "where there is no state"; that is to say, in a *terra nullius*.

Third, war can legitimately be waged against those who breach the law of nature, whether or not a king or his subjects is directly affected, and punishments can include loss of ownership (bk II, XXII, X, §§1, 2). In a discussion of the right of waging war against "sin against nature," Grotius emphasizes again that the right of punishment and war arises from "that law of nature which existed before states were organized," and that it is "even now enforced, in places where men live in family groups and *not in states*" (my emphasis) (bk II, XX, XL, §4). He comments that "the most just war is against savage beasts, the next against men who are like beasts" (bk II, XX, XL, §3).

By the early decades of the seventeenth century, Native peoples had already been placed in the category of men who are no more than beasts. Alberica Gentili (from 1587 Professor of Civil Law at Oxford University) had argued in *De Iure Belli* (revised edn 1598) that the Spanish were fighting a just war against Indians "who practiced abominable lewdness even with beasts, and who ate human flesh, . . . such sins

[9] This, Richard Tuck states, "must count as one of the most striking examples of intellectual convergence" (1999: 82). Locke could not have seen Grotius's text because it was in the part of *De Indis* (1609) – as Grotius called *De Jure Praedae* – only discovered in De Groot family papers in 1864. It then became clear that *Mare Liberum* was in fact a chapter of *De Jura Praedae* (*De Indis*); see Tuck (1999: 81). *De Jure Belli* (1625) owed a good deal to the earlier text.

are contrary to human nature, . . . against such men, as Isocrates says, war is made as against brutes" (Gentili 1933 [1612]: bk I, XXV, 122). In the first edition of *De Jure Belli ac Pacis* (omitted from the Kelsey translation of the 1646 edition which I am using) Grotius includes as people against whom war may justly be waged, "those who kill Strangers that come to dwell amongst them" (cited by Tuck 1999: 103).[10] Thus both international law and Grotius's arguments provide justification for the conquest of Native peoples.

However, a number of scholars (e.g., Tully 1994; Pagden 1995; Tuck 1999) reject Williams's argument that English claims were couched in terms of conquest. James Tully (1994: 172), for example, states that "conquest was never the doctrine of the Crown," and he takes a very different view of the Marshall cases from Williams. Tully reads the cases as the culmination of a long tradition of negotiation between Native nations, the Crown, and then the United States, to find "a constitutional association just to both parties" (1995: 118). He argues that, in *Worcester v. the State of Georgia* (1832), Marshall corrected and repudiated his previous judgment in *Johnson*, "thereby providing a response to later commentators who take this earlier decision as authoritative" (1994: 175). Anthony Pagden, too, argues that the British "increasingly came to regard conquest as unsustainable in fact, and morally undesirable in theory" (1995: 88).

There were two important pragmatic reasons for any justification of English planting to avoid a discourse of conquest. First, by the seventeenth century the British had dug a theoretical gulf between their colonial practice and that of their Spanish enemies and wanted to distance themselves from the atrocities that had accompanied the Spanish conquest – an English translation of Las Casas' *A Brief Narration of the Destruction of the Indies*, popularly known as *The Spanish Cruelties*, was published in 1583. And by the late eighteenth century even the Spanish had backed away from argument from conquest, at least as far as other European powers were concerned. They too acknowledged that if one power had already occupied a territory then another could take possession only if the first was willing to cede it to their rival.[11]

[10] Tuck (1999: 96 n39) draws attention to the fact that Grotius made some significant changes in the second edition of *De Jure Belli*, published in 1631. Little account has been taken of the differences between the first and later editions. Editions of the 1640s, on which modern editions of Grotius are based, largely follow the text of 1631.

[11] In 1788 (the year the First Fleet landed on the shore of Australia) the British and Spanish both claimed Nootka Sound. The Spanish did not appeal to the Papal Bulls of 1493, as they had in another dispute with the British over the Falkland Islands in the 1760s, but insisted that their explorer, Martinez, had discovered the Sound before Cook and his men. By 1790, the British had mobilized their ships and Spain "conceded

Second, justification in terms of conquest placed an awkward constraint on settlement. The British agreed with international lawyers that conquered peoples should retain their own customs and property. After all, it was insisted that the Norman Yoke imposed by William the Conqueror had not extinguished ancient Anglo-Saxon freedoms and the common law. Sir Matthew Hale wrote that it was "a hard and over-severe thing to impose presently upon the conquered a Change of their Customs, which long Use has made dear to them" (cited by Tully 1995: 150).

Moreover, the premises of theories of an original contract ruled out justification from conquest. The theories are based on the assumption of natural freedom – some settlers in America came to see the Native peoples and their societies as "exemplars of liberty" (the title of Grinde and Johansen 1991) – equality and rights. Therefore, all rule is illegitimate unless based on the agreement (contract, consent) of those who are governed. Natural rights include the right to private property; thus it follows that settlement is justified only with the consent of the Native owners. In the famous debates in the 1630s in Massachusetts, Roger Williams questioned the legal basis of the State Charter, and insisted that the Crown could not grant lands already owned by the Indians. Rights of usufruct only, he argued, could be acquired, but these must be gained through treaty (agreement). He compared the Indian lands to the great estates of England and argued that, just as "Noble men in England possessed great Parkes, and the King, great Forrests in England onely for their game, and no man might lawfully invade their Propriety: So might the Natives challenge the like Propriety of the Countrey here" (cited in Tuck 1999: 125).

On the other hand, even without recourse to the "strange doctrine" of individual punishment, the dividing line between contract, consent, submission, and conquest can be very porous indeed in the hands of theorists of an original contract. This is demonstrated by the frequency with which explicit consent makes way for hypothetical consent inferred from some action or sign (see Pateman 1985) and, most obviously, in Grotius's and Hobbes's insistence that my "consent" is still genuine even when obtained with the conqueror's sword at my throat. Slavery, too, as Grotius and Pufendorf illustrate, can be presented as consensual in origin. And Locke is ambiguous about both conquest and consent.

In chapter XVI of the *Second Treatise*, Locke distanced himself from doctrines of conquest and argued that it gives only circumscribed rights; even in a just war, for example, a conqueror has no right to the

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Britain's right to settle the Nootka Sound region on the basis of prior discovery, negotiation with the Indians, and effective occupation" (Frost 1981: 518).

possessions or estates of the vanquished or their families (II, §§180–3). Locke states that

> *Conquest* is as far from setting up any Government, as demolishing an House is from building a new one in the place. Indeed it often makes way for a new Frame of a Common-wealth, by destroying the former; but, without the Consent of the people, can never erect a new one. (II, §175; 1988: 385)

As Tully has noted, this marks a shift from the tradition of continuity of old laws and customs under conquerors (1995: 150–1). And, given Locke's conception of "tacit" consent, the line between conquest and consent would be hard to maintain over time.[12]

In the *First Treatise* (henceforth I), Locke's criticism of Filmer's claim that all political power derives from Adam comes close to Grotius's argument about private war. Locke allows that, outside of "Politick Societies" (i.e. in a state of nature), masters of families have political power and can thus legitimately make war. One of his examples is a "Planter in the *West Indies*" who leads the men in his household "against the *Indians*, to seek Reparation upon any Injury received from them" (I, §130; 1988: 237). The state of war, he writes, does not consist in the numbers involved "but the enmity of the Parties, where they have no Superiour to appeal to" (I, §131; 1988: 238).

However, the settlers had a remarkable theoretical device at their disposal that bypassed the controversies over conquest and agreement. As used by English colonialists from the 1620s onward, the doctrine of *terra nullius* was an extremely powerful political fiction. Its brilliance was that it cut through all the problems of justification. In a *terra nullius* the settler contract could be concluded on a clean slate.

## II Grotius, Locke, and the Right of Husbandry

Thomas More's *Utopia* (1516) is commonly cited as the first major statement of a right of occupation and plantation. More writes that if the population of Utopia grows too big, the inhabitants send "a certain number of people from each town to go and start a colony at the nearest point on the mainland where there's a large area that hasn't

[12] Tully states that Locke brings "his theories of conquest and appropriation into harmony" by arguing that waste land can be used by a conqueror in the state of nature (1993b: 155). Tully's argument has been challenged by Squadrito (2002: 110–11). Locke writes (II, §184; 1988: 392) that where there is "more *Land*, than the Inhabitants possess, and make use of, any one has liberty to make use of the waste: But there Conquerors take little care to possess themselves of the *Lands of the Vanquished.*"

been cultivated by the local inhabitants." The Utopians produce enough for everyone, and if the local people are not satisfied with this arrangement they are expelled from the area. If they resist, "the Utopians declare war – for they consider war perfectly justifiable, when one country denied another its natural right to derive nourishment from any soil which the original owners are not using themselves. But are merely holding on to as a worthless piece of property" (More 1965: 79–80).

More thus offers a succinct statement of occupied but uncultivated land as "worthless," as waste, vacant, empty, virgin, wilderness – as *terra nullius* – that may rightfully be appropriated for productive use. In *The Rights of War and Peace*, Tuck argues that there is a direct line from *Utopia* to Grotius and Locke. He states that More's forthright declaration received little notice until Gentili "put the idea firmly in the minds of people engaged in constructing colonies in the New World" (1999: 50). Gentili writes that "True indeed, 'God did not create the world to be empty.' And therefore the seizure of vacant places is regarded as a law of nature" (1933: bk I, XVII, 80). Tuck reads Grotius as echoing the arguments of Gentili and suggests that, in the face of Pufendorf's (1934) criticisms, "much of [Locke's] *Second Treatise* can be read as a defence of Grotius's conclusions" (1999: 178).

Reading Locke's political theory as justifying the planting of settlers has its critics. William Uzgalis, for example, argues that "the point of [Locke's] comparison between Europe and America is not to provide a justification for European settlement, much less to justify the dispossession of Indian lands" (2002: 95). But the comparison is not only between Europe and America; it is, crucially, a contrast between a state of nature and the need to create a civil society. My argument does not depend on claims that Locke was a racist (discussed by Uzgalis (2002)), or that he or Grotius believed that Native peoples lacked reason.[13]

Both theorists were personally involved in the colonial enterprises of their own governments. Grotius wrote in defense of Dutch ventures in the East Indies, and his relatives were among the directors of the United East India Company. Locke was an investor in the Royal Africa

[13] For discussion and defense of Locke against this claim see, e.g., Squadrito (2002: 102–4) and Uzgalis (2002: 85–9). In setting out criteria for ownership, Grotius states that neither moral or religious virtue, nor great intellectual capacity, is required. But, he writes, it seems defensible to rule out "any peoples wholly deprived of the use of reason," though he "very much doubt[s]" that such people will be found. If they are, they cannot be owners, but charity prescribes that they should be provided with the necessities of life (bk II, XXII, X, §§1, 2). He adds that just as "universal common law" guarantees the maintenance of ownership for minors and the insane, so it does for "those peoples with whom there exists an interchange of agreements."

Company and in a company trading in the Bahamas. He was the first Landgrave (member of the nobility) in Carolina and was given land there. From 1668 to 1775 he worked as secretary to the Lords Proprietors of Carolina and helped draw up its constitution of 1669 (overthrown by the colonists in 1719); from 1672 to 1676 he worked for the Council on Trade, corresponding with settlers in America, and he was Commissioner for the Board of Trade and Plantations from 1695 until 1700.

Still, it is the theorists' use of the idea of *terra nullius* that is my concern. Arguments about the right of husbandry appear in their respective conjectural histories of the state of nature and the origin of private property, and they claim that Native territories are empty, waste lands. This is the reason why Grotius's arguments "started the seventeenth- and eighteenth-century Anglo-Dutch practice of justifying the seizure of aboriginal land on the grounds that the native peoples were not using it properly" (Tuck 1994: 167), and why Locke's "theory set the terms for many of the later theories that were used to justify the establishment of European property in America" (Tully 1994: 158).

Grotius argues that a thing that cannot be occupied cannot become property and remains open to the common use of everyone.[14] His conjectural history (with copious references to ancient sources) runs as follows. In the beginning, he writes in *Mare Liberum*, everything was held in common and could be used by all. The connection between the consumption of things and use shows that nature has pointed the way to the development of private property. Food, once consumed, cannot be used again, so "a certain kind of ownership is inseparable from use." Once use had been tied to ownership, the connection was extended to other things, such as "clothes and movables," and then to immovables, such as fields. The products of agriculture are necessary for future consumption, but there are not enough fields "for the use of everybody indiscriminately," and thus "the law of property was established to imitate nature." The system of individual property holding is called "occupation" and, once an individual has occupied a piece of property, the intention to maintain possession must be demonstrated. Moveables

[14] Part of Grotius's task was to separate property rights in land from any claims to the oceans. Free passage across the oceans was a major requirement for European colonialism, but it was generally held that states could exercise jurisdiction over the ocean as well as nearby waters. The sea, Grotius argues in *Mare Liberum*, cannot be owned in the same fashion as land. Neither the air nor the sea can be occupied and they are, therefore, naturally made for universal use. Grotius (1983: 67) states that "in the legal phraseology of the Law of Nations, the sea is called indifferently the property of no one (*res nullius*), or a common possession (*res communis*), or public property (*res publica*)." Tuck stresses the unrecognized "extreme originality of his view" (1999: 92).

have to be seized, and in the case of land the requirement is "the erection of buildings or some determination of boundaries, such as fencing in" (1983: 69–71).

Grotius's conjectures about the origins of property in *De Jure Belli Ac Pacis* are broadly similar to those in *Mare Liberum*, but he makes a significant enlargement of his argument. He extends it to cover the question of whether it is possible to have a right over things that are already owned. It is in this context that waste or deserted land, *terra nullius*, is introduced. In the earliest times, his argument runs, individuals took what they required for their use from the common stock. An individual had the right "to use things not claimed and consume them up to the limit of his needs, and anyone depriving him of that right would commit an unjust act" (bk I, II, I, §5). Such an arrangement required a very simple way of life, and this, Grotius states, is "exemplified in the community of property arising from extreme simplicity, [which] may be seen among certain tribes in America, which have lived for many generations in such a condition without inconvenience" (bk II, II, II, §1).

This simplicity no longer exists elsewhere; families ceased to be content to "feed on the spontaneous products of the earth,"[15] and men began to improve their condition and develop a division of labor (bk II, II, II, §4). "It is to be supposed" that, when communal ownership was abandoned, everyone agreed that existing possessions should become the property of their owners. Grotius argues that private property arose not by a deliberate act of will but by "a kind of agreement"; that is to say, an original contract (bk II, II, II, §5).[16] Occupation is now the primary means of acquisition and, he emphasizes, it has definite boundaries; things "are not divided until after they have become subject to private ownership" (bk II, II, III; see also Salter 2001: 539–46). Private property is created through an original contract and so is a civil arrangement, but communal property still exists in America which is thus a state of nature.

Grotius argues that the fact of ownership, in itself, does not entail the exclusion of others from access to, or even occupation of, property. He treats self-preservation as the fundamental natural right; thus "the right of necessity" applies in cases of dire need, and Grotius illustrates this

[15] On this concept see Hulme (1990).

[16] The agreement might be express, as in a division, or tacit, "as by occupation" (bk II, II, II, §§4, 5). Grotius remarks that acquisition by division took place "when the human race could assemble" (bk II, III, I). As Thomas Horne has noted, Grotius's argument is not as clear as it might be: "To what extent did agreement alone turn possessions into property?" He also notes that Pufendorf "virtually ignored the contractual element" in Grotius's theory (1990: 13–14).

by the example of the need to share provisions if they begin to run out during a voyage (bk II, II, VI–VIII).[17] He also postulates a right of "innocent use" of another's property. Property should be shared with another, if no inconvenience will be caused to an owner (bk II, II, XI). This is an example of "advantages [to others] which involve no detriment" to owners, such as the right to free passage over land or rivers, the right of temporary residence in a territory, or of permanent residence for foreigners seeking refuge (bk II, II, XV–XVI).

But foreigners have the right to do more than seek refuge and obtain sustenance; they also have rights over "desert places." Grotius states that

> if within the territory of a people there is any deserted and unproductive soil, this also ought to be granted to foreigners if they ask for it. Or it is right for foreigners even to take possession of such ground, for the reason that *uncultivated land ought not to be considered as occupied* except in respect to sovereignty, which remains unimpaired in favour of the original people. (my emphasis)

In support of this argument he notes that "the Latin aborigines" gave the Trojans 700 acres, and he quotes another ancient source: "they who bring under cultivation an untilled portion of the earth commit no wrong" (bk II, II, XVII). In short, Grotius argues that if lands are *terra nullius*, if they are uncultivated waste, they are open to rightful appropriation.[18] The right of husbandry is trumps.

Locke knew Grotius's arguments but, of course, he makes much more prominent use of the idea of an original contract. Locke's opponents were well aware that his assumption of an individual natural right to

[17] The right of necessity extends to the "acts" necessary to obtain that "without which life cannot be comfortably lived," although the consent of owners is required (bk II, II, XVIII–XXI).

[18] Some earlier remarks might seem to stand in tension with Grotius's argument about uncultivated land. He considers the case of land that has been "occupied as a whole" but is not yet parceled out into private property. He argues that "it ought not on that account to be considered as unoccupied property; for it remains subject to the ownership of the first occupant, whether a people or a king." He gives as examples "rivers, lakes, ponds, forests, and rugged mountains" (bk II, II, IV). Barbara Arneil argues that Grotius has in mind large tracts of territory claimed by a European power. Since the land will eventually be divided up into private allotments rival powers have no claim on it (1996: 52). But Grotius can also be read as making a general point about "ownership." The key is the intentions of the owners. In a case where the land will remain as unproductive waste, as *terra nullius*, like lands in North America, it is legitimately open for appropriation by foreigners (the nation that first discovers and occupies it). It is not open when the intention is that in due course the land will become private property.

property posed an obvious problem for English planting in North America. If settlement in the New World was to be justified, Locke had to find answers to two problems. First (the problem addressed in all the conjectural histories of the state of nature), how does communal property legitimately come to be divided up into private property; second, an explanation has to be provided, as Tully has emphasized (1993a, 1994), for the appropriation of land without consent. Locke explicitly states (II, §25; 1988: 286) that he will "endeavour to shew, how Men might come to have a *property* in several parts of that which God gave to Mankind in common, and that without any express Compact of all the Commoners."

Locke's arguments about appropriation have been discussed at length in the new scholarship (especially Tully 1993a, 1994, and Arneil 1996) and here I want only to emphasize three points. First, after his well-known claim that it is gathering or hunting, that is, the labor involved in appropriation, which creates property – God gave the world to "the use of the Industrious and Rational, (and *Labour* was to be *his Title* to it;)" (II, §34; 1988: 291) – Locke insists that the same line of reasoning applies to the appropriation of land. Although "the *chief matter of Property* being now not the Fruits of the Earth, and the Beasts that subsist on it, but the *Earth it self*; . . . I think it is plain, that *Property* in that too is acquired as the former" (II, §32; 1988: 290).

Second, he separates common land in England from that in America, a separation that relies on claims about stages of civilization. In England, a civil society, the commons are left unenclosed "by Compact, *i.e.* by the Law of the Land, which is not to be violated" (II, §35; 1988: 292). The common land belongs jointly to the members of a particular parish, and if some were to be enclosed it would not be as useful to the parishioners. In contrast, the whole of America is a commons in the sense that it is an example of "a Pattern of the first Ages in *Asia* and *Europe*" (II, §108; 1988: 339) – the pattern of a state of nature or a *terra nullius*. The condition of America is that of the first age of the world when it belongs to all mankind, a condition of "the beginning and the first peopling of the great Common of the World" where the "Law Man was under, was rather for *appropriating*" (II, §35; 1988: 292). America is still at the stage of history where it is nothing more than "wild woods and uncultivated wast . . . left to nature, without any improvement, tillage or husbandry" (II, §37; 1988: 294).

Third, Locke argues that enclosure is legitimate provided that good use is made of the land and nothing is left to spoil. Locke states that if fruit is planted but left on the tree to rot, "this part of the Earth, notwithstanding his Inclosure, was still to be looked on as Waste, and might be the Possession of any other" (II, §38; 1988: 295). Uzgalis asks

"what follows from" this passage, and argues that it is irrelevant to the "Dispossession Interpretation" of Locke because he does not refer to waste "in terms of relative productivity" (2002: 93). Uzgalis, however, does not mention Locke's other famous argument about the consensual introduction of money.[19] To be sure, Locke bolsters his argument about the appropriation of land in a Thomas More-like fashion by stressing how much better off everyone is, English and Indians both, when land is turned into private property and used productively. "Land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, *wast*; and we shall find the benefit of it amount to little more than nothing" (II, §42; and II, §41; 1988: 297). The point, however, is that money enables property owners to implement the right of husbandry and enlarge what they own, so that they can produce more than they need for their own use and trade the surplus.

The significance of money in a *terra nullius* is that it is central to the creation of a new civil society that includes an "economy." Locke writes of "*great Tracts of Ground*" that lie waste, where the inhabitants have not "joyned with the rest of Mankind, in the consent of the Use of their common Money" (II, §45; 1988: 299). That he has America in mind is clear three paragraphs later. He asks what is the worth to a man of a hundred thousand acres of cultivated, well stocked land isolated "in the middle of the in-land Parts of *America*," where there is no hope of commerce with the rest of the world "to draw *Money* to him by the Sale of the Product?" (II, §48; 1988: 301). The "in-land, vacant places of *America*" (II, §36; 1988: 293) must be brought into a system of states, and thus into a national and international trading system, before their worth can be realized.

By the mid-eighteenth century the line of argument found in Grotius and Locke culminated in the denial that Native peoples were "owners" at all. This view was enshrined as part of international law, notably by Vattel in his extremely influential *The Law of Nations* (1758). He insisted that the law of nature required all nations to cultivate their land. The Europeans had discovered lands where the population was so scanty that

[19] Uzgalis (2002: 95) also argues that another reason "to completely reject the idea that Locke wrote this section of the chapter 'Of Property' in order to justify English settlement" was that he did not "explicitly announce this as his project." It has been suggested that chapter 5, "On Property," was composed independently of Locke's *Second Treatise* and then inserted later. David Armitage (2004) has now found evidence to show that Locke was heavily involved in the revision of the Constitution for Carolina in 1682 when "On Property" was probably written. This explains why, even if he made no explicit statement, Locke was indeed very concerned with English settlement at the time and made many references to America in chapter 5.

vast acreages lay unoccupied and uncultivated and the population merely ranged over them. According to Vattel, the Native peoples' "unsettled habitation in those immense regions cannot be accounted a true and legal possession." He states that therefore land "of which savages stood in no particular need, and of which they made no actual and constant use" could lawfully be appropriated and colonized (bk I, XVIII, §209). He argued that settlement should not exceed just boundaries, but the logic of the settler contract meant the bounds were wide indeed.

## III An Original Contract

The right of husbandry was not the only theoretical trump held by the settlers. The Native peoples, it was held, also lacked sovereignty. In *De Jure Belli ac Pacis*, Grotius distinguishes sovereignty (*imperium*), which is exercised over both people and territory, from ownership (*dominium*). Sovereignty and ownership, Grotius notes, are usually acquired together, but that they differ – although Edward Keene remarks that "Grotius did not make the point entirely clear" (2002: 57) – is illustrated by the ownership of land by foreigners as well as citizens (bk II, III, IV). Grotius's arguments about conquest, "innocent use," and the right of husbandry mean that *imperium* outside of Europe is a rather poor thing. And where there is no proper sovereignty the way is open for large-scale settlement.

In *Leviathan*, Hobbes states that people in many parts of America "have no government at all." They have only "the government of small Families, the concord whereof dependeth on naturall lust" (1996: ch. 13, 89). Locke does not go that far. He, like Grotius, recognizes that Native peoples have governments and monarchs but, he argues, they exercise only "a very moderate sovereignty" (II, §108; 1988: 340). The manner of government found among the Native peoples in America in this "Pattern of the first Ages" of the world is suited to their condition: "The equality of a simple poor way of liveing confineing their desires within the narrow bounds of each mans smal propertie made few controversies and so no need of many laws to decide them." The major requirement in such societies is "to secure themselves against foreign Force" (II, §107; 1988: 339). Thus,

> [T]he *Kings* of the *Indians* in *America* . . . are little more than *Generals of their Armies*; and though they command absolutely in War, yet at home and in time of Peace they exercise very little Dominion, and have but a very moderate Sovereignty, the Resolutions of Peace and War, being ordinarily either in the People, or in a Council. Though the War it self, which admits not of Plurality of Governours, naturally devolves the Command into the *King's sole Authority*. (II, §108; 1988: 339–40)

In a note to this paragraph Peter Laslett cites Locke's *Letters on Toleration*, where Locke writes in similar terms of "nations in the West Indies." They are organized only for defense against common enemies. During peace, neither the wartime commanders "nor any body else has any authority over any of the society."

That is to say, the Native peoples lack both proper sovereignty and a properly political government. Locke is very clear that a civil government is the only properly *political* form.[20] The purpose of civil government is the protection of (private) property,[21] and such a government must be constitutional, limited, and representative, acting within the rule of law as an "umpire" between conflicting societal interests. In America, a *terra nullius*, there is no private property, no husbandry, no money, and no real sovereignty – neither proper *dominium* nor *imperium* – therefore the settlers have found themselves in a state of nature.

A major contribution of the new scholarship on early modern political theory and European expansion is to show that in the texts of theorists of an original contract "the state of nature" is not merely a theoretical construct or heuristic device, as we were all taught, but is also portrayed as a historical condition. Theorists of an original contract used the idea of the state of nature both as a thought experiment and as descriptive of an actual stage of historical development. They draw on each element as needed in their arguments.

On the one hand, "the state of nature" and "civil society" are abstractions that presuppose and stand in contrast to each other. Political theorists ask their readers to imagine what society would be like if it were empty of the institutions of a modern state and if individuals lacked civil characteristics. Each political theorist draws the picture of the natural condition that is required to justify his particular account of civil society and government. The modern state is justified because it keeps the inconveniences or war of the state of nature at bay, whether it is the state of Leviathan or Locke's "umpire." But even as an heuristic device, "the state of nature" is not completely disconnected from the real world, from the English Civil War or 1688.

On the other hand, in Locke's evocative words, "in the beginning all the World was *America*" (II, §49; 1988: 301). Europeans have discovered a world that is in its first stage of history; a state of nature that exists in the seventeenth century. This (actual) state of nature *waits to be transformed*

[20] I discuss this conception of "political" in Pateman (1975). This view is not unique to Locke; for its association with "methodological Rawlsianism" see Pateman (2002: 39–40).

[21] For the connection between Locke's broader and narrower senses of "property" and his argument about America, see Arneil (1996: 133–4).

*and developed*, to be turned into a civil society. The settlers know what they have to build because they are familiar with the opposition between the "natural" and the "civil." The antinomy harks back to the ancient Roman division between barbarians and members of the *civitas* (see Pagden 1995: ch. 1). It has a variety of expressions, but one of the most telling is between the "savage" and the "civilized." Hobbes wrote of the "savage people in many places of *America*," who still "live at this day in that brutish manner" (1996: ch. 13, p. 89), and the language of the "savage" became part of international law. In 1893, Frederick Turner wrote of the frontier as the "meeting point between savagery and civilization" (1994: 32). Lacking all the attributes of a civil condition, savages cannot undertake the transformation of their lands. Or, at least, they cannot take the first step, although once they have begun to develop in the requisite manner some may be permitted to participate.[22]

The settlers did not go to North America with the intention of joining, say, Iroquois or Mohegan society or to Australia to become part of Pitjantatjara or other Aboriginal communities. They could not become "savages." They planted themselves in the New Worlds to establish their own civil societies and could do so because they were English and so already "civilized" beings. As Blackstone states, the settlers "carry" law with them; "if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force" (1899: Intro. §4, 107). They had both the capacities to enter an original contract and an understanding of the institutions of a modern state. Having journeyed, or, in 1788 been transported, to a *terra nullius* the settlers were, so to speak, the natural figures of the thought experiment in the texts of political theory come to life.

The "state of nature" and the "original contract" are powerful political fictions, and their power derives from the fact that they have had purchase on and have helped create the modern world. The colonization of the New Worlds took a long time; in a sense it can be seen as a series of origins, of settler contracts. But in both New Worlds there is an "original" moment that marks the Founding of the "United States," the Confederation of "Canada," or the Federation of "Australia." A striking characteristic of the United States is the mythical political status of this moment, with its concomitants of constitution and flag. Arendt, for example, makes a great deal of this founding act and argues that "remembrance of the event itself" generates "an atmosphere of

[22] It was widely believed that, in Condorcet's words, the inhabitants of colonized lands "seem to be waiting only to be civilized and to receive from us the means to be so" (quoted in Pagden 1995: 10).

reverent awe." This ensures that "the authority of the republic will be safe and intact as long as the act itself, the beginning as such, is remembered" (1973: 204).[23]

Thus, a civil society created out of a state of nature has (is understood to have) its origin in an original contract. In a *terra nullius* the original contract takes the form of a *settler contract*. The settlers alone (can be said to) conclude the original pact. It is a racial as well as a social contract. The Native peoples are not part of the settler contract – but they are henceforth subject to it, and their lives, lands, and nations are reordered by it.

The settler contract also excludes the Crown. Vattel writes that when "a nation takes possession of a distant country, and settles a colony there, that country, though separated from the principal establishment, or mother-country, naturally becomes part of the state, equally with its ancient possessions" (bk I, XVIII, §210). That may have been true *de jure*, or in the eyes of the metropolis, but the settler contract sets other political mechanisms in motion. Legal decisions made in London and Crown policies about colonization had to be implemented a very long way away, and settlers often had a very different view of what was required.[24] The settler contract sets up new (civil) political institutions (Tully's (1995) imperial constitution or empire of uniformity; see also McHugh 2004) that mark the beginnings of a new state that will in due course, in its own right, be part of an international commercial network and system of modern, sovereign states.

The Native peoples regarded themselves as nations, on a par with the European nations from which the settlers had come. By the early eighteenth century the Crown had acknowledged Indian sovereignty. In the 1690s, in "one of the most famous cases in colonial history" (Tully 1994: 171), the colony of Connecticut and the Mohegan nation went to law over Connecticut's claim to jurisdiction over Mohegan territory. In the face of arguments by Connecticut, that included appeals to *terra*

[23] She also discusses theories of an original contract, during the course of which she writes: "America should have presented to the social-contract theories that beginning of society and government which they had assumed to be . . . fictitious . . . if it were not for the undeniable . . . fact that these theories in the Old World proceeded without ever mentioning the actual realities in the New World" (1973: 172). While it is true that theorists of an original contract are silent about the activities of the settlers, they have plenty to say about America!

[24] The colony of Carolina provides an early example of divergence between London and colonists, which involved Locke. Together with Lord Shaftesbury, he had "assumed leadership" of the colony in 1669, with a plan to establish agricultural development. In 1672 Locke introduced a law prohibiting slavery of Indians. The colonists ignored it, and by 1680 "the fur trade and the sale of Indian slaves to the West Indies were the staples of Carolina's economy" (Tully 1993b: 143–4).

*nullius*, the Mohegans insisted that as a sovereign nation under the law of nations they would negotiate only with the Crown. The Privy Council found in favor of the Mohegans in 1705 and, on appeal, in 1743.[25] In 1764, the Indian Superintendent appointed by the Crown wrote that a boundary should be negotiated with the Iroquois Confederacy, which "never having been conquered, either by the English or the French, nor subject to their Laws, consider themselves as a free people" (quoted in R. Williams 1990: 240).[26]

By the mid-eighteenth century the British were in need of alliances with the Native nations because of the conflict with France. Indeed, a Proclamation in 1761 stated that the peace and security of the North American colonies depended on their friendship (Borrows 1997: 261 n39). This was followed by the crucial Royal Proclamation of 1763, issued at the end of the Seven Years' War.[27] John Borrows argues that the Proclamation together with the Treaty of Niagara in 1764 reaffirmed Native sovereignty. In itself, the Proclamation is ambiguous; it "uncomfortably straddled the contradictory aspirations of the Crown and First Nations." But it was also central to the Treaty negotiated between the Crown and about 25 Native nations, represented at Niagara by some 2,000 chiefs. The Treaty was sealed diplomatically by a two-row wampum belt signifying peace, friendship, and mutual non-interference in internal affairs; that is to say, the sovereignty of the Native parties was acknowledged. In the 1840s Native peoples in (what became) Canada still possessed copies of the Proclamation (Borrows 1997: 160).

The Crown had set in motion a process of colonization from which it did not withdraw. However, the colonists had different ideas about both *imperium* and *dominium*. In (what became) the United States the Royal Proclamation brought matters to a head. The British government was concerned about the settlers' continued territorial expansion and its implications for alliances with Native nations. The Secretary of State

[25] P. G. McHugh argues that to speak of "sovereignty" in this case is anachronistic. Premodern common law judgments were made in a context of "a feudal tributary system [rather] than a modernist model of sovereignty" (2004: 44; also 26). But either way, the point is that Native peoples' governments and political systems were recognized as "nations."

[26] The Iroquois Confederacy had itself conquered other nations in the Ohio country over whom they exercised sovereignty, recognized by their tributaries.

[27] Tully (1995: 118) states that the Proclamation was based on a review "of treaties since 1664, Royal Commissions on Indian Affairs since 1665, Royal Instructions to Colonial Administrators since 1670, the Board of Trade's Recognition of Aboriginal Sovereignty in 1696 (when Locke was a member) and in the case of the Mohegan nation . . . of 1705, and the advice of the Superintendent of Indian Affairs in North America." He sees the Proclamation as exemplifying consent as the policy of the Crown.

wrote that the principle informing British policy was that "invasion or occupation of [the Indians'] hunting lands" was to cease, and possession "is to be acquired by fair purchase only" (quoted in R. Williams 1990: 235).

The Proclamation reserved the lands beyond the eastern mountains to the Indian nations, and stated that

> it is just and reasonable, and essential to our interest and the security of our colonies, that the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions or territories as, not having been ceded to or purchased by us, are reserved to them, or any of them, as their hunting grounds.

Anyone who had "either willfully or inadvertently seated themselves" in the reserved lands was "forthwith to remove themselves from such settlements." The Proclamation further laid down that if Indians wished to sell land it was to be purchased "only for us, in our name [i.e., the Crown] at some public meeting or assembly of the said Indians, to be held for that purpose by the Governor or commander in chief of our colony" (reprinted in Commager 1968: 48–9). Such restrictions on expansion and appropriation of land were anathema to colonial elites and the Proclamation became a precipitating cause of the American Revolution.

Tenure had been granted to the settlers in a number of different forms depending, for example, whether a colony had been set up by a noble proprietor or through a corporate settlement agency. But most agencies and proprietors had tenure "as of the Manor of East Greenwich, in free and common socage," i.e. it was unencumbered, resembling allodial tenure (see Keene 2002: 62–76).[28] English land law after the Norman Conquest was based on the feudal fiction that all land was held as a derivative title granted by the Crown. The provision in the Proclamation that "vacant" land had to be purchased and held in the name of the Crown derived from the feudal fiction. Blackstone writes that "it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, 'that the king is the universal lord and original proprietor of all the lands in his kingdom'" (1899: bk II, ch. 4, p. 475). Or, as stated by Marshall in *Johnson v. Macintosh*, the British constitution held that "all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative" (Marshall 1987: 274, 279).

[28] My thanks to Anthony Pagden for drawing my attention to the Manor of East Greenwich.

The colonists, including George Washington, were making large profits through land speculation and they were not inclined to limit the extent of settlement. One response to the Proclamation, not least by Thomas Jefferson, was a comparison with the English burdened by the Norman Yoke. The settlers maintained that the feudal fiction had no application in America. The English had brought Anglo-Saxon common law with them, including allodial tenure, and they should therefore be free to trade in land with the Indians. In a beautiful piece of colonial irony, the settlers turned to the principles of natural freedom and rights at the heart of theories of an original contract. These principles were now wielded in the interest of speculation and appropriation of territory. The Native peoples as the original occupiers, the settlers declared, had a natural right freely to dispose of their land to whom they pleased (see R. Williams 1990: chs 6, 7).

Nor were they inclined to let Crown acknowledgment of Native sovereignty stand in the way of the creation of a civil society from a *terra nullius*. The tempered logic of the settler contract is that any recognition of Native nations must be on the terms of the new *imperium*. Inside the territory of a modern state there can be only one sovereign power. Marshall's opinions are instructive. In *Johnson*, Marshall wrote that it has "never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned" (1987: 285). However, the rights of the Native peoples are now "necessarily, to a considerable extent, impaired." They lack the power to dispose of their land as they please, and "their rights to complete sovereignty, as independent nations, were necessarily diminished" (p. 264). The Native peoples in America were "fierce savages," skilled in warfare. They fought the settlers to retain their independence, yet they could not be governed as a "distinct people." The "inevitable consequence" is the necessity to "resort to some new and different rule" (pp. 274–6).

In 1831 and 1832 in *Worcester* and *Cherokee Nation v. Georgia*, Marshall arrives at the formulation of the "new and different rule." In *Worcester* he states that the King purchased Indian lands, but "never coerced a surrender of them. . . . [Nor] intruded into the interior of their affairs, or interfered with their self-government" (p. 431). The Native peoples live in nations in the same sense as in Europe; they are "distinct, independent political communities, retaining their original natural rights" (pp. 444–5).[29] But, as he states in *Cherokee*, the relation between

[29] The reputed reaction of President Andrew Jackson, who had no time for talk of sovereignty and treaties, to Marshall's decision in *Worcester* was that "John Marshall has made his opinion, now let him enforce it." The Cherokee, Choctaw, Creek, Chickasaw, and Seminole peoples were forcibly removed from their lands and (those who survived) relocated hundreds of miles away.

the Native nations and the United States is "marked by peculiar and cardinal distinctions." They are part of the United States and under its protection, but under the law of nations they are still self-governing. It is in this case that he designates the Native nations as standing in a relation like that of ward to guardian, as "domestic dependent nations" (p. 414).

One commentator on *Mabo* sees Marshall's decisions as pragmatic, not founded upon any theory of fairness or justice, but the "only possible accommodation of the rights of settlers and aboriginal people" (Bartlett 1993: 182). No other accommodation was possible within the tempered logic of the settler contract. In a civil society Native peoples must be, at best, something less than sovereign and the "justice" of any arrangement with them is justice according to the new authority of the modern state. The United States prides itself on being a fully modern nation, so feudal fictions were eliminated; a modern state speaks the language of the national interest and regulates its borders accordingly.

In Canada, the Proclamation continues to have a prominent legal place but, again, the tempered logic of the settler contract was followed.[30] Many treaties were concluded from the 1750s onward, first negotiated by officials of the Crown and then, after the British North America Act (1867), the numbered treaties were negotiated by the government of the Dominion. They extinguished Native title in exchange for reserved lands for Native peoples to occupy and hunting and fishing rights. In a case in the Quebec Supreme Court in 1867 it was held that "existing Aboriginal laws were left in full force, and were in no way modified by the introduction of European law with regard to the civil rights of the natives" (Murphy 2001: 115). But *St. Catherine's Milling* (1888), in which the judgment rested on the feudal fiction, became authoritative.[31] Lord Watson stated that when the Indians surrendered

[30] The Canadian Charter of Rights and Freedoms, Section 25, part of the Constitution Act of 1982, states: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763."

[31] *St. Catherine's Milling and Lumber Company v. the Queen*, 14 AC 46 (PC) was decided by the Privy Council on appeal from the Supreme Court of Canada. The case in effect was between the governments of the Dominion and the province of Ontario over who had control of licensing of use of resources in the territory in question; the First Nations took no part (Kulchyski 1994: 22). The judgment stated that "[t]he treaty leaves the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as are situated within the boundaries of Ontario being the property of that Province" (reprinted in Kulchyski 1994: 30).

their lands through treaty (No. 3 in 1873) they were not owners in fee simple; rather, the "Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden." Public land was vested in the Crown and the right to beneficial use was lodged with the Provincial or Dominion government. Since 1763, the character of Indian interest in the lands in question was "a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories'" (reprinted in Kulchyski 1994: 29, 27). The Native lands and inhabitants had become part of Canada, an expanding state and a self-governing Dominion within the British Empire.

In North America the logic of the settler contract was tempered and in the United States the Native peoples had their own jurisdictions, albeit mere remnants, within the bounds of the new state. In Australia the strict logic was followed. The doctrine of *terra nullius* was elevated to the law of the land and an entire continent was deemed uninhabited in the eyes of the law.

## IV *Terra Nullius* Transported

When the settlers left England for North America they knew from the reports of earlier voyagers and visitors that they were going to an inhabited country.[32] But the First Fleet set sail south in 1787 to a continent which was virtually *terra incognita*.[33] That there were at least a few inhabitants had been established by William Dampier in his voyage of 1688 on the west coast of Australia, and by observations and encounters on the east coast in Captain Cook's first voyage in 1770. The botanist Joseph Banks gave evidence before government committees, including the Committee on Transportation, about the proposal for a colony. He stated that in 1770 he had seen "very few" inhabitants, and "did not think there were above Fifty in all the Neighbourhood, and

[32] Locke's library, for example, was well stocked with such accounts. Tully states that when the Europeans began to colonize the Americas they found "sovereign indigenous nations with complex forms of social and political organization and territorial jurisdictions that were older (3,000–30,000 years), more populous (60–80 million) and more variegated than Europe" (2000: 38). Contemporary estimates are that the Australian continent was occupied for some 60,000 to 120,000 years before the British settlers arrived, and that in 1788 the population was around 1 million people (Day 2001).

[33] After 1776 transportation to America was no longer possible. The proposal for a colony in Botany Bay was one of several made by Pitt's administration in 1783 (in the event it was a substitute for another in South West Africa). There were some other reasons to establish a colony in New South Wales besides setting up a new depository for convicts; see Day (2001: 25–8).

had Reason to believe the Country was very thinly peopled; those he saw were naked, treacherous, and armed with Lances, but extremely cowardly." In his journal from the voyage of the *Endeavour*, Banks conjectured that the "immense tract of [inland] country" was "totaly uninhabited." He drew this conclusion because he believed that if there were inhabitants there must be cultivation; even in North America, he noted, the Indians inland had sown maize. Agriculture would surely have spread to the coastal people, "otherwise their reason must be suppos'd to hold a rank little superior to that of monkies." He had seen no cultivation along the coast and assumed the people there lived from the sea (quoted in Reynolds (1987: 31–2), and (1996: 17–18)). In 1785 Banks reported that cession and purchase in the proposed colony were not possible "as there was nothing we could offer that [the Aborigines] would take except provisions and those we wanted ourselves" (quoted in R. King 1986: 76–7).

Dampier had set the tone for many subsequent portrayals of the Aboriginal peoples. He said that they were "the miserablest People in the World . . . setting aside their Humane Shape, they differ but little from Brutes. . . They all of them have the most unpleasant Looks and the worst Features of any People that I ever saw, tho I have seen a great variety of Savages" (quoted in G. Williams 1981: 500–1). Cook took a very different view in his journal, and different again from that of Banks. Cook wrote that the Aboriginal people

> are far more happier than we Europeans; being wholy unacquainted not only with the superfluous but the necessary Conveniences so much sought after in Europe, they are happy in not knowing the use of them. They live in a Tranquility which is not disturb'd by the Inequality of Condition. . . . they seem'd to set no Value upon any thing we gave them, nor would they ever part with any thing of their own for any one article we could offer them. (Quoted in G. Williams 1981: 499)[34]

The view of Aboriginal peoples as savages, or even lower than savages, was very persistent. Even in 1979 an opponent of land rights wrote in the manner of Gentili: "The aborigines' use of 'his' land is much closer to that of the wild beasts than that of other non-agricultural hunting

[34] But Cook's comments remained unknown until his journal was published in the late nineteenth century. Cook, Williams suggests, showed "a readiness to view a strange and primitive life style on its own terms," and he notes that in his *Life* of Cook, published in 1974, Beaglehole comments that "Cook bursts into a panegyric that almost persuades me that he had spent the voyage reading Rousseau" (G. Williams 1981: 509, 499). For a brief account of some Aboriginal stories of "Captain Cook" see Hunter (1996: 2–4).

and gathering people" (quoted in Reynolds 1987: 158; for other early examples see Banner 2005).

There were critics of the plan for a colony who worried about dispossession and killing of any Native peoples. Cook had been instructed that land was to be obtained only with the consent of the inhabitants and in 1788 Captain Phillip was charged by the King to "open an intercourse with the natives, and to conciliate their affections," and if any were "wantonly destroy[ed]" the offender was to be punished. Phillip reported that "the natives have ever been treated with the greatest humanity and attention," and he hoped to teach them "the advantages they will reap from cultivating the land" (quoted in R. King 1986: 80, 83–4). The local population around Port Jackson was estimated to be about 2,000, and it soon became clear that not only were other parts of the country inhabited but that Aboriginal peoples had their own mutually recognized territories. A mode of interaction was quickly established. The settlers decimated stocks of fish and game, and in 1789 smallpox killed about half the Native population (Day 2001: 42–3) discusses whether it was deliberately introduced). By 1804, the Aboriginal peoples were telling the Governor that "they did not like to be driven from the few places that were left on the banks of the [Nepean] river, where alone they could procure food. . . . If they could retain some places . . . they should be satisfied and would not trouble the white men" (quoted in R. King 1986: 84–6, 89).

In Australia, as in America, policies made in London were frequently ignored by settlers and their governments. When plans were made to colonize Tasmania at the beginning of the nineteenth century there was no doubt that it was inhabited. In 1828, Governor Arthur wrote to London that he intended "to allot and assign certain specified tracts of land, for [the Aborigines'] exclusive benefit, and continued occupation" (quoted in Reynolds 1996: 113). The settlers had other intentions, and reports of the unremitting slaughter in Tasmania, under martial law from 1828 to 1833, were a major impetus to formation of the British and Foreign Aborigines Protection Society (successor to the Society for the Abolition of the Slave Trade).

After his experience in Tasmania, Arthur offered advice to the Colonial Office about the colonization of South Australia, a venture undertaken by a private company with free settlers. In 1832 he wrote that the "fatal error" in Tasmania was that "a treaty was not entered into with the natives, of which savages well comprehend the nature" (quoted in Reynolds 1996: 115). In a communication to the Commission in charge of settlement the Colonial Office referred to "Tribes of People, whose Proprietary Title to the Soil, we have not the slightest ground for disputing" (quoted in Banner 2005: 120). However, the Commission and

the settlers merely paid lip service to such instructions from officials in London and appropriated land in the new colony as they saw fit.[35]

In the *Mabo* judgment it is stated that *Cooper v. Stuart* (1889) was "seen as authoritatively establishing that the territory of New South Wales had, in 1788, been *terra nullius* not in the sense of unclaimed by any other European power, but in the sense of unoccupied or uninhabited for the purposes of the law" (p. 103).[36] This was one of two propositions that, Justices Deane and Gaudron write, "provided a legal basis for and justification of" dispossession. The second proposition was that "full legal and beneficial ownership of all the lands of the Colony [were] vested in the Crown, unaffected by any claims of the Aboriginal inhabitants" (p. 108). That is, the feudal fiction was held to apply as soon as the British set foot in Botany Bay and claimed sovereignty.

*Cooper v. Stuart* embodied the view that settled (occupied) colonies were without prior ownership of land. "There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peaceably annexed to the British dominions" (p. 291). A few paragraphs later Lord Watson stated that "[t]here was no land law or tenure existing in the Colony at the time of its annexation to the Crown" (p. 292). However, not everyone agreed that the New World was *terra nullius*. Some lawyers had presented dissenting views in cases (that concerned other legal matters) earlier in the nineteenth century.[37]

In 1827 (in *R. v. Lowe*), for example, one of the lawyers defending a soldier accused of murdering an Aboriginal man argued that the court had no jurisdiction because the manner in which the British had taken possession of the country was "repugnant to the law of nations"

[35] The South Australian Constitution Act had been drawn up by the company and referred to "waste and unoccupied lands." (For further details of the maneuverings by the Commission see Reynolds 1987: ch. 6; Banner 2005.) Reynolds writes that South Australia saw itself as "a child of the era of liberal reform, infused with the spirit of the Reform Bill and religious emancipation. What was discreetly dropped from the legacy was the powerful commitment to racial equality which ran through both the anti-slavery and Aboriginal protection movements" (1987: 121).

[36] 14 App Cas 1889; decided by the Privy Council on appeal from the Supreme Court of New South Wales. The case concerned a grant of land to a settler that contained a reservation about future public use. The government of New South Wales later resumed ten acres, and the action was challenged.

[37] The Privy Council would not have had access to two of the most relevant because the formal reports were only published after *Cooper v. Stuart* was decided. Indeed, "the scarcity of law reporting in early Australia" makes it difficult to determine when *terra nullius* was established in case law (Kercher 2002: 101).

(quoted in Banner 2005: 119). His colleague declared that there could be no "right of sovereignty over them [the Aboriginal peoples]; they are the free occupants of the demesne or soil, it belongs to them by law of nations, anterior to any laws which follow from human institutions" (quoted in McHugh 2004: 160). Two years later (in *R. v. Ballard*, another murder case) the judge argued that "although the notions of property may be very imperfect in the native[, the] Englishman has no right wantonly to deprive the savage of any property he possesses or assumes a dominion over" (quoted in Kercher 2002: 107).

But even those critical of the doctrine of *terra nullius* usually balked at the notion that the Aboriginal peoples should be recognized as owners. Instead they proposed the creation of reserves or compensation. However, such arguments appear to have been stifled by the mid-1830s. In 1834 the Chief Justice of New South Wales referred to "His Majesty's subjects settling an uninhabited country" (quoted in Banner 2005: 123). *R. v. Murrell* in 1836 "appears to be the founding case" in the legal consolidation of *terra nullius* (Kercher 2002: 108).[38] Interestingly, the existence and some rights of the Native peoples were acknowledged but, nonetheless, the judgment was that they were insufficiently civilized to exercise sovereignty. In his notes the judge stated that they merely wandered over the land which was thus open for appropriation. Kercher comments that *Murrell* was the only early case to be in the law reports and "was also the case most consistent with popular white views of the legal position" (2002: 114).

Two factors may help explain the judgment in *Cooper v. Stuart*, which was handed down well after Marshall had delivered his opinions and a year after the Privy Council had dealt with *St. Catherine's Milling*. By 1898 "the common law had industrialized" and the positivistic doctrine of undivided sovereignty held sway (McHugh 2004: 31). Moreover, modern ideas about "race" had reached their full development. The perception of the Aboriginal peoples was that they were lowest in the hierarchy of races. Late nineteenth-century international law was shaped by racial doctrines. For instance, in *Chapters on the Principles of International Law*, published in 1894, John Westlake discusses "civilization" in terms of a government that is able to stand against other European powers. No such government is to be found among the peoples of America or Africa: "Accordingly international law has to treat such natives as uncivilized." Thus "the first necessity is that a government should be furnished" by Europeans. In the absence of such a government, "the inflow of the white race cannot be stopped where

[38] This was another murder case but involving only Aborigines. Kercher's account is derived from newspaper and archival resources as well as a report published in 1896.

there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied" (Westlake 1894: 142–3; see also Roberts-Wray's gloss (1966: 540)). The division of the world among themselves by the European colonial powers from the late nineteenth century presupposed that only "civilized" societies could become states (see Shaw 1986: 43–5).

"Strictly speaking," Robert van Krieken argues, there was only one legal precedent when *Mabo* was heard; only once had the law directly addressed the question of native title (2000: 66). The precedent was *Milirrpum v. Nabalco* (1971) in which Justice Blackburn reaffirmed *Cooper v. Stuart*.[39] Blackburn has been harshly criticized since *Mabo*. Hocking, for example, states of his judgment that "the law was misinterpreted and grievously wrong" (1993: 188). But Justice Dawson interpreted the law in a similar fashion in his sole dissenting opinion in *Mabo*. And Blackburn's judgment is significant for my argument because it follows the strict logic of the settler contract.

Blackburn agreed with *Cooper v. Stuart* that whether a colony was categorized as settled or not "is a matter of law," and that Australia "came into the category of a settled or occupied colony. This is established for New South Wales by an authority which is clear and, as far as this Court is concerned, binding: *Cooper v. Stuart*" (p. 242). In fact, the justices in *Mabo* did not disagree about this particular legal point. The crucial question was whether status as a settled colony entailed that, in law, it was uninhabited and without a system of land tenure.[40] The plaintiffs in *Milirrpum* argued that the "subject land" was inhabited in 1788 and enjoyed a system of law, so the question, in Blackburn's words, was "does there exist at common law a doctrine of native title" (p. 151). It was on this point that Blackburn and Dawson are at odds with the *Mabo* judgment.

One aspect of the question was whether the Rirratjingu and Gumatj peoples had enjoyed a system of law. Blackburn concluded that the evidence before him, which included Aboriginal witnesses and two anthropologists, showed that they did. He could not have been more emphatic

[39] 17 FLR 1971 141; the Gove Land Rights Case. The case concerned land of the Rirratjingu and Gumatj peoples in the Gove Peninsula, north-east Arnhem Land – very remote, but included in the land over which the British flag was hoisted on January 26, 1788; it is now part of the Northern Territory. Permanent settlement did not take place until the 1930s. In 1968 Nabalco was granted a mineral lease by the federal government to mine bauxite. The plaintiffs argued that under common law they had always had a proprietary right in the land, so the lease was unlawful.

[40] The High Court Justices argued that the legal claim that Australia was settled drew on a "restricted" concept of *terra nullius*. That it was settled and "practically unoccupied" involved an "expanded" notion. I do not think this distinction is necessary.

on this point. He stated that he was "suspicious about the truth of the assertions of the early settlers of New South Wales that the aboriginals had no ordered manner of community life" (p. 266). His opinion was that it was not possible to dismiss the plaintiffs' "social rules and customs" as "lying on the other side of an unbridgeable gulf."[41] Rather, what the evidence revealed was

> a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men," it is that shown in the evidence before me. (p. 267)

Blackburn's response to the evidence was that "the question is *one not of fact but of law*" (my emphasis). He continued that "[w]hether or not the Australian aboriginals living in any part of New South Wales had in 1788 a system of law which was beyond the powers of the settlers at that time to perceive or comprehend, it is beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied colony" (p. 244). The presumption being that, if settled, it therefore was in law without Native title.

Blackburn's legal argument is striking for the manner in which it tracks the strict logic of the settler contract. When the first settlers planted themselves on the shore of (what became) New South Wales and sovereignty was proclaimed they had to (it was as if they had to) conclude an original pact. An original contract simultaneously presupposes, extinguishes, and replaces a state of nature. A settled colony simultaneously presupposes and extinguishes a *terra nullius*. Settlers plant themselves in order to create a civil society out of a state of nature, an empty, vacant land, where there is no pre-existing title. All title is created by civil government. Thus, even though Blackburn explicitly stated that the Rirratjingu and Gumatj enjoyed the rule of law, this was beside the point. To be acknowledged, their "law" had to be recast (had been recast by the settler contract) in terms of the judicial system of a modern state.

[41] His reference is to a much-cited case, *In re Southern Rhodesia* (1919), in which it was held that some peoples were "so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged" (cited, *Milirrpum*, p. 264; *Mabo*, p. 39). Blackburn's later reference to personal whims and influence also refers to this case; the peoples of Matabeleland were held to lack law because they were seen to be living entirely at the whim of their ruler, Lobengula. In addition to discussion of Australian cases in both *Milirrpum* and *Mabo*, cases from the United States, Canada, and other Imperial (later Commonwealth) countries were canvassed.

Thus Blackburn argues that Crown ownership of all land – the feudal fiction – had come into force with the proclamation of British sovereignty; "every square inch of territory in the colony became the property of the Crown. All titles, rights, and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown" (p. 245).[42] It followed, therefore, that if Native title existed it must do so not as a prior occupancy but as a title granted by the Crown. From his extensive survey of cases, Blackburn concluded that there was "no place" for a doctrine of native title in any jurisdiction where the common law had been introduced, unless it had been created by "express statutory provisions" and in Australia that had not happened (p. 244). After considering Australian legal history, Blackburn's conclusion is that, although there was an understanding that white occupation of the land "was ipso facto a deprivation of the aboriginals," there was no attempt to solve the problem by "the creation or application of law relating to title to land, which the aboriginals could invoke" (p. 256).[43]

Dawson, in *Mabo*, restates this legal view:

> The vesting of the radical title in the Crown upon the assumption of sovereign authority is, . . . incompatible with the continued existence in precisely the same form of any pre-existing rights. Necessarily the pre-existing rights were held of a former sovereign or in the absence of any sovereign at all. After the Crown has assumed sovereignty and acquired the radical title to the land, any pre-existing "title" must be held, if it is held at all, under the Crown. This new title is therefore not merely the continuation of a title previously held, notwithstanding that it may be identifiable by reference to the previous title. (p. 129)

Aboriginal title is thus occupancy permitted by the Crown, but in Australia the Crown "afforded no recognition to any form of native interest in the land" (p. 139). Dawson argues that the history of settlement shows that it was inconsistent with any such acknowledgment.

Given the number of cases from common law countries referred to in both *Milirrpum* and *Mabo* which included recognition of Native title, such a view can seem perverse. But Dawson's position follows the strict logic of the settler contract, not the tempered logic of the cases cited.

[42] In considering the plaintiffs' specific claim, Blackburn took the latter to mean that "property" existed as understood in non-Aboriginal law. "Property," he argued, included the rights of enjoyment and use, exclusion of others, and alienation. By that standard the plaintiffs had not shown that a "proprietary interest" existed (pp. 272–3).

[43] A "consistent feature" in Australia is that "the consciousness that a native land problem existed [went] together with the absence of even a proposal for a system of native title" (p. 259).

So in a settled colony the *terra nullius* vanishes; a civil society is developed as colonists plant themselves, husband the land, and create modern political institutions. In law, the original inhabitants and their societies are of no account and it is as if they no longer exist. They and their lands exist only if expressly recognized by the new state. However, the Australians "managed to evade law, to keep questions of indigenous interests in land out of law's reach" (van Krieken 2000: 74). In other words, they refused to follow the tempered logic of the settler contract and there was no recognition of Native peoples' prior occupancy within the common law.[44]

*Mabo* overturned *Cooper v. Stuart* and *Milirrpum*. Justice Brennan stated that there was a difference between accepting that in 1788 English law became the law of the new colony and accepting that "the theory which was advanced to support the introduction of the common law of England accords with our present knowledge and appreciation of the facts" (p. 38). He continued that:

> The facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory. It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands. (p. 39)

Brennan argued that either the social and cultural level of the Merriam people would have to be investigated or "the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were *terra nullius* and those which were not" (p. 40). Of course, as Brennan notes, Blackburn was very well aware of the facts too. The question was the interpretation of the common law – and the logic of the settler contract. Once Blackburn's position is rejected and appeal is made to the "facts," the strict logic of the settler contract becomes untenable. The way was thus opened for the Court to

[44] There is an interesting comparison in the Reasons for Judgment of Chief Justice McEachern in the Supreme Court of British Columbia in *Delgamuukw*. He argues that the plaintiffs' ancestors had governed themselves in villages but could not be said to have "owned or governed such vast and almost inaccessible tracts of land in any sense that would be recognized by the law." Before the colony of British Columbia was formed there was a "legal and jurisdictional vacuum" and, after 1858, "aboriginal customs . . . ceased to have any force, as laws, within the colony." After the union with Canada in 1871 "there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts" (McEachern 1991: 222–4). My thanks to Jamie Baugh for a copy of the Reasons.

recognize Native title and for the tempered logic of the settler contract to be followed.

The judgment brought Australian jurisprudence closer to that of Canada following *St. Catherine's Milling*. In recent years, a series of Canadian Supreme Court cases has emphasized prior occupancy; "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help . . . to call it a 'personal or usufructuary' right" (*Calder* (1973), reprinted in Kulchyski 1994: 69).[45] In 1982, the rights of the Native peoples were incorporated into the Constitution Act (§35.1), and in *Van der Peet* (1996, p. 548) these rights were characterized as "the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies."[46] This was echoed in *Delgamuukw* (1997): "aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law."[47]

But Australia before *Mabo* followed the strict logic of the settler contract and when *terra nullius* is at the center of the constitutional order a dark shadow is cast over the land. Aboriginal peoples were excluded from the new state with remarkable thoroughness. Under the common law doctrine of *jus soli*, they were, in principle, British subjects, having been born within the jurisdiction of the British Empire; "in reality they were dealt with as enemies of the state" (Markus 1994: 38). From the late nineteenth century through the first third of the twentieth century, "full blood" Aboriginals were commonly seen as a "dying race." The Aboriginal peoples were treated as politically non-existent. As I noted above, there were no official negotiations and no treaties were entered into with them.[48] The Commonwealth Constitution (1901) excluded

[45] *Calder v. AGBC* (1973) SCR 313. The case was brought by the Nishga'a people claiming an unextinguished right to the occupation and use of their lands in (present-day) British Columbia. The case was lost but it began a new era of legal and political activity. On Canadian jurisprudence see also McNeil (1997).

[46] *Van der Peet v. R* (1996) 70 DRL (4th) 385 (SCC). This case also originated in British Columbia and concerned the right to sell fish caught under a Native license.

[47] *Delgamuukw v. British Columbia* (1997) 3 SCR 1010, at para. 145. The case, originating in 1987, was about the claim of the Gitskan and Wet'suweten peoples to some 22,000 square miles of territory as prior occupants who had never surrendered their land through conquest or treaty. The Supreme Court ordered a new trial on the grounds of defects in pleadings and errors of fact by the trial judge. The judgment confirmed that oral histories should be given due weight as evidence and stated that there was a duty of consultation with First Nations.

[48] "Throughout Australia, Aboriginal people attempted to negotiate with those who first occupied their respective lands and although mutual compromises were sometimes

them from the census (§127), and from the federal power to "make laws for the peace, order, and good government of the Commonwealth" (§51, xxvi). In 1902 the Franchise Act excluded Aboriginal peoples from the national electorate. In subsequent legislation over the years they were denied citizenship benefits such as old age pensions, unemployment, and sickness benefits, widows' pensions, child endowments, and maternity allowances.[49] In the 1950s, the Australian government allowed the British government to test nuclear bombs in the deserts of South Australia, including Maralinga, which was sacred Aboriginal ground. Documents declassified in the 1980s showed that initially no "acceptable" radiation levels were even established for the Aboriginal populations who lived in the open. (See Milliken 1986 for the full story.)

The exclusions went hand-in-hand with the most detailed regulation. As John Chesterman and Brian Galligan (1997) have now documented, a vast and incredibly elaborate system of state and Commonwealth regulation was established that governed the most minute details of Aboriginal lives and movements, and included the removal of children from their parents.[50] By 1961, for instance, out of a population of some 17,000 people officially designated as Aborigines in the Northern Territory (under federal jurisdiction), all but 89 had been declared wards. Chesterman and Galligan comment that the "sheer amount of legislative ingenuity and administrative effort that went into devising and maintaining these discriminatory regimes is truly astonishing" (1997: 9). In *Mabo* the judges did not mince their words about this paradoxical

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reached, these had no legal standing" (McGrath 1995: 14). In 1835 one of the first settlers in Victoria, John Batman, drew up deeds, made payment of blankets, flour, etc., and promised a yearly rent in goods to the Kulin people in return for 600,000 acres. The treaty was quickly declared void and the Crown's right upheld (see Broome 1995: 125–7).

[49] The very complex story is told by Chesterman and Galligan (1997). They discuss the contortions necessary to provide criteria to distinguish "aboriginal natives" from other nonwhites and from the rest of the population. In 1944 in Western Australia, legislation was enacted to enable Aboriginals to apply for a Certificate of Citizenship. The criteria centered on ability to live a "civilized life." If granted the dog tag (as the Aborigines called it) an individual was no longer regarded as a "native or aborigine." The Act also stated that the Certificate holder had all the rights and duties "of a native born or naturalized subject of His Majesty" – an interesting insight into *jus soli* and who actually counted as a British subject! Chesterman and Galligan comment that it "enabled the holder, who had been born in Australia, to travel freely within the country," but not to be included in the federal electorate (1997: 132–3). They state that "researching and documenting" their book "has taken years of painstaking work, even though our study is by no means comprehensive" (1997: 9).

[50] The present-day survivors have formed a movement of The Stolen Generations. The story of two little girls who escaped from their kidnappers was recently dramatized by Peter Weir in his film *Rabbit-Proof Fence*.

regime. For example, Justices Deane and Gaudron wrote of "the conflagration of oppression and conflict" across the continent, the effect of which was "to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame" (p. 104); the dispossession justified by law constituted "the darkest aspect of the history of this nation" (p. 109).

Although, in essence, as van Krieken (2000) has argued, *Mabo* turned on a point of law, it has been called "the most radical piece of judicial law-making in Australian history" (Chesterman and Galligan 1997: 206), and it caused a political uproar. There were wild declarations that no backyard was secure. The judgment was criticized as political rather than judicial policy making (see, e.g., Lumb 1993 and Moens 1993), the High Court was said to have become an "unelected parliament," and echoes of old claims about savages were heard in statements about stationary cultures and backwardness (see Markus 1996). Contention has continued and successive governments under John Howard have been unsympathetic. The Native Title Act, passed after *Mabo* in 1993, was curtailed in the Native Title Amendment Act in 1998.[51]

The accusations of political judgments in *Mabo* had an element of truth. By 1992 *terra nullius* had become politically untenable. It was hardly surprising that all but one judge decided that historical facts now had bearing on the interpretation of the law. By 1992 not only had the Western Sahara case (cited in *Mabo*) been decided but a substantial change in the legal and political position of the Aboriginal peoples had taken place. They were enfranchised at the federal level in 1962, were counted in the census after a referendum in 1967, and other legislative reforms were made to end their exclusion from citizenship rights. From the 1960s onward, Aboriginal organizations and voices raised the question of dispossession in a manner that made it harder to ignore, including a tent embassy set up outside Parliament in Canberra. In the late 1970s calls for a treaty, a Makaratta, between the Aboriginal peoples and the Australian government, were made. Land rights began to be granted in the 1970s, and by 1989 Aboriginal peoples held about a third of the land in the Northern Territory and about a fifth in South Australia. In 1990 the Aboriginal and Torres Strait Islander Commission began its

[51] One question left open was whether pastoral leases, covering some 40 percent of the country, had extinguished Aboriginal title. This was decided in *Wik Peoples v. Commonwealth* (1996). The (narrow) majority judgment was that title survived and that the Crown does not necessarily become beneficial owner when the lease expires. The majority also held that pastoral leases were not leases in common law but bundles of statutory rights so the terms of each lease become crucial (see F. Brennan 1998; Reynolds 1993).

work and in 1991 a Council for Aboriginal Reconciliation was set up. Internationally, too, by 1992 Indigenous peoples were established on the political stage.

*Mabo* also illustrates that once the strict logic of the settler contract is tempered the problem of sovereignty is never far away. If *terra nullius* is rejected, Native title is acknowledged and the "facts" (historical, anthropological, social) provide a basis for the law, the problem of legitimacy begins to surface. If, as laid down in *Mabo*, Australia was not *terra nullius* in 1788, if "distinct aboriginal societies" existed in Canada, and if "nations" existed in the United States, what made it legitimate for settlers to be planted and a modern state constructed? Why was the settler contract justified? This question still remains on the table.

## V Past and Present

The process of decolonization and national self-determination that began after the Second World War has swept away all but tiny remnants of the colonies of the European powers, but the Native peoples of the two New Worlds, living within the boundaries of the states constructed from the plantation of settlers, have never been seen as candidates for sovereignty. From 1922 to 1924, the League of Nations refused to accept the Six Nations of the Iroquois Confederacy as members or to intervene on their behalf with the Canadian government, on the grounds that Canada's status as a sovereign state precluded recognition for peoples within its borders (Nichols 2005). The United Nations has followed in the footsteps of the League by supporting the maintenance of existing state boundaries and treating Indigenous peoples as national or cultural minorities, not nations or peoples. In other words, the sovereignty of states has been trumps. What effect the Draft UN Declaration on the Rights of Indigenous Peoples might have remains to be seen.[52]

However, we no longer live under the "sovereignty" of the Westphalian model. The inadequacy of the model in light of political developments over the past quarter-century, including the creation of the European Union, and the large economic and social changes gathered under the heading of globalization, has been much discussed. New political conceptions are being put forward to meet new circumstances; multilayered "sovereignty" and more flexible memberships would allow the sovereignty (autonomy) of the Indigenous peoples to be accommodated.

[52] For an argument that the Draft Declaration embodies the right of self-determination as a basic human right see Holder (2004).

A period of rapid change provides an opportunity to begin to refigure political relationships and remedy past injustice.

Jacob Levy has recently argued that the logic of the common law is incompatible with Aboriginal sovereignty and that the reasoning of Australian scholars who link *Mabo* to sovereignty is "fallacious" (2000: 170). He claims that it is only the logic of self-government, not the common law, that recognizes "a *lawmaker* in addition to, or instead of, *laws*. . . . Put another way, indigenous people are seen as having a right to give themselves laws rather than simply live according to their laws" (2000: 172). To refer to "living according to laws" sits easily with a view of Native peoples as cultural minorities. Talk of "giving themselves laws" raises the specter of self-governing nations. Levy's line of argument is a version of the tempered logic of the settler contract. Laws do not fall from heaven. When, under common law, Indigenous peoples are acknowledged as organized societies occupying their own territories, implicit acknowledgment is made not just of laws but lawmakers. To live according to laws means that life is lived under a system of government, which includes lawmakers (whether or not they operate in the same way as the lawmakers in a modern state). In recognizing Native title there is necessarily also recognition, albeit implicit, of a "people" that holds the title; that is, an organized self-governing society with laws that regulate social interaction (see Webber 2000).[53]

Levy comments that "land rights grounded in the self-government model . . . look more like political territory rather than like private property" (2000: 172). Indeed they do. The lands of Native peoples were not private property as justified in theories of original contracts or as understood by the settlers. That was, in part, why the lands were deemed *terra nullius*. Native lands belonged to peoples or nations, not private individuals or corporations. They were the equivalent of England, not of the landholdings of the Duke of Devonshire or John Doe. This is precisely why the question of the legitimacy of the settler contract – of sovereignty – arises.

The cases I have been citing have been concerned with *dominium*; *imperium* is always presupposed. As Borrows comments (referring to a statement in *Delgamuukw* that native title "crystallized" when sovereignty was proclaimed), sovereignty is "pretty powerful stuff. . . . simply conjuring sovereignty is enough to change an ancient peoples'

[53] "The tenure is 'collective' because the common law treats the land as the province of the community concerned; any internal allocation is left to the community" (Webber 2000: 70–1). He also points out that the Australian tendency to treat native title as if only recognition of proprietary rights were involved raises the dilemma that "if they do enforce an indigenous title like any other, they will, by that very act, displace the indigenous institutions on which the title depends" (2000: 73).

relationship to their land" (1999: 558). In *Mabo* it was held that Australian law had conflated sovereignty with ownership of land and so had clung to the view that Native title was extinguished on the declaration of sovereignty (see also Roberts-Wray 1966: 626, 631). Yet when sovereignty and ownership are separated and recognition of prior occupancy is granted, are there no implications for sovereignty?

The *Mabo* judgment explicitly stated (p. 32) that "the question whether a territory has been acquired by the Crown is not justiciable before municipal courts" (for an alternative view see Borrows 1999: 576–80). In Canada, in *Sparrow* (1990) the justices agreed that, while the Native peoples' right to land had been recognized since the Proclamation in 1763, "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown" (reprinted in Kulchyski 1994: 225).[54] This was recently reaffirmed in *Van der Peet* (p. 458); the Constitution is "the means by which prior occupancy is reconciled with the assertion of Crown sovereignty over Canadian territory."

For several reasons it might be objected that in the twenty-first century to raise the issue of sovereignty is a red herring. Use of the term "sovereignty," it could be argued, is misleading; most Native peoples are not seeking to set up their own states. They are realistic enough to recognize that in the decades to come the most powerful state in the world and two mid-sized powers are unlikely to wither away.[55] Moreover, as illustrated by the United States where Native peoples have long had their own jurisdictions, broad measures of self-government ("sovereignty") can be granted within existing states. Such rights of self-government have been used to open casinos on Indian lands. Recent developments in Australia and Canada reinforce this point. For example, in 1998 Canada entered into a treaty with the Nisga'a people under which they own their lands in fee simple, and Nunavut came into being in 1999, comprising around a fifth of Canadian territory. Again, it could be argued that, although manifest injustices occurred in the past, the damage was done long ago and non-Native inhabitants today are not to blame for those events. Any current injustices to Native peoples should be tackled, but that has nothing to do with original plantings and sovereignty.

This last objection raises a complex set of questions about the relationship between past and present. Everyone – including myself – who

[54] *R. v. Sparrow* (1990) 70 DRL (4th) 385 (SCC). The case was over fishing rights of the Musqueam Band in British Columbia and the size of a drift net. The Supreme Court also unanimously agreed "that 'existing' [rights] means 'unextinguished' rather than exercisable at a certain time in history" (reprinted in Kulchyski 1994: 219).

[55] Although challenges to sovereignty have been made. For Australia see *Coe v. the Commonwealth*, 1979; ALR, 24, 118.

lives in the two New Worlds is benefiting from the dispossession of the Native peoples. If remedies for present-day injustices are to be found, past and present cannot be so neatly separated as this line of argument suggests (see chapter 5 below). To understand why injustices today take particular forms is not possible without knowledge of the past. The fact, for example, that Native peoples score so poorly on all the standard social indicators – infant mortality, life expectancy, education, incidence of particular diseases, unemployment and so on – cannot be fully explained without reference to past events and attitudes, without reference to past relations between nations and peoples as well as to present policies.

Exactly how the connections between past and present are to be made is a controversial matter. Janna Thompson, for instance, has recently suggested some ways in which to think about this question, emphasizing that peoples and states are transgenerational entities. She points out that when a state enters into a treaty the supposition is that it will be honored by governments and citizens of the future. Similarly, today's governments and citizens have a responsibility, a historical obligation, to acknowledge and deal with past wrongs; whether or not they feel guilt or shame about the past is irrelevant to the responsibility they bear, as "national successors," for setting things to right (2002: 89). Reparation should take the form of just reconciliation; that is, the trust and mutual respect violated in the past should be reestablished.

There are no easy answers about how to do this. How best to rectify injustices of even the relatively recent past is an extremely fraught question, as shown by the debate and controversy surrounding various Truth and Justice Commissions, trials and amnesties of the last several years. There are also other complicated issues, such as whether the whole of the past is necessarily to be condemned (see Mulgan 1998) or about safeguarding human rights, especially those of women. And then, in addition to necessary policy changes, there is the issue of symbolic acts, such as demands for official apologies. Symbols can play an important role. The continued outright refusal of the Australian Prime Minister, John Howard, to make a public apology for dispossession and injustice hardly fosters mutual respect.[56] On the other hand, hundreds of thousands of citizens have signed "sorry books" and 250,000 people marched across Sydney Harbour Bridge in May 2000, accompanied by an aircraft writing "sorry" in the sky, in support of reconciliation.

The most fundamental symbolic act of all – and, given the political realities of a world of states and their military power, it will remain largely symbolic – is acknowledgment that the settler contract lacked justification, that, therefore, a question mark hangs over sovereignty.

[56] For a discussion of Howard's background and the refusal, see Marr (1999: ch. 2).

This is the action ruled out of court. While objections can be raised to talk of Native "sovereignty," no doubts are expressed about the legitimacy of the states constructed in the two New Worlds. Hobbes says at the conclusion of *Leviathan*, "there is scarce a Common-wealth in the world, whose beginning can in conscience be justified" (1996: 486). True though this is, a democratic state whose "beginning" is the settler contract requires the creation of a new political legitimacy, the building of a new settlement with Native peoples.

Political theorists have a part to play by bringing the question of legitimacy out of the shadows. A start has been made in recent discussions of the role of early modern theories in justifying European expansion and in debates about the rights of Indigenous peoples.[57] The problem is that most political theorists, including democratic theorists, take the modern state for granted. Tully has recently called attention to the way in which much contemporary political theory obliterates any discussion of embarrassing origins; argument proceeds from "an abstract starting point . . . that had nothing to do with the way these societies were founded" (2000: 44). The most prominent example of such an abstract starting point, contract theory as revived by John Rawls (1999h), is a direct successor to early modern theories of an original contract.

Rawlsian contract theory has become extraordinarily influential, but it takes no account of the actual origins of countries that, it is held, are best understood as if they were based on an agreement in an original position. Few traces can now be found of the settler contract and dispossession; contemporary contract theory is peopled by parties who are abstracted from social and political institutions and structures. The parties are provided with preferences, tastes, and a degree of risk aversion and are concerned with distributive justice rather than subordination or structural change. They are deprived of the knowledge that they systematically benefit from dispossession and the structures of racial privilege that constitute the modern democracies of the two New Worlds. For them to have such an understanding would require that the history and institutions so efficiently eliminated in contemporary

[57] The latter are to be found in political theory in the literature on multiculturalism, beginning from the mid-1990s (in particular in Kymlicka 1995; Tully 1995; and Levy 2000). The first problem is that "multiculturalism" is used to cover both the position of Native peoples and that of nonwhite groups (minorities) that have migrated to Europe and North America since the 1960s. Most discussions focus on the latter (and center round the same few examples) and have little to say about the connections between European colonialism and the more recent migrations. Second, as the term "multiculturalism" implies, the focus is on cultural differences, whereas many important questions, especially in the case of Indigenous peoples, are political.

contractual theorizing are put back in place, a very difficult task within the confines of Rawlsian theory.

The logic of theories of an original contract is that the "beginning," the creation of a new civil society, is made on a clean slate. Such a condition can be part of a thought experiment but it forms no part of the political world; the lands of the two New Worlds were not empty. *Terra nullius* is now a legally and politically bankrupt doctrine and questions about sovereignty and legitimacy will have to be tackled in the long run if a just accommodation and reconciliation is to be achieved. The three states where *terra nullius* was central to the justification of their creation pride themselves on their democratic credentials. The credentials will be more presentable once the settler contract is repudiated and a new democratic settlement is negotiated with the Native peoples.

# References


Ackerley, Brooke, et al. 2006. Symposium: John Rawls and the Study of Justice: Legacies of Inquiry. *Perspectives on Politics*, 4, no. 1: 75–133.

Alcoff, Linda Martín. 2002. Philosophy and Racial Identity. In Osborne and Sandford (2002).

Alcoff, Linda Martín, ed. 2003. *Singing in the Fire: Stories of Women in Philosophy*. Lanham: Rowman & Littlefield.

Allen, Theodore W. 1994. *The Invention of the White Race*, vol. 1: *Racial Oppression and Social Control*. New York: Verso.

Allen, Theodore W. 1997. *The Invention of the White Race*, vol. 2: *The Origin of Racial Oppression in Anglo-America*. New York: Verso.

America, Richard F., ed. 1990. *The Wealth of Races: The Present Value of Benefits from Past Injustices*. New York: Greenwood Press.

Amos, Valerie, and Pratibha Parmar. 2001 [1984]. Challenging Imperial Feminism. In Bhavnani (2001b).

Anderson, Elizabeth S. 1990. Women and Contracts: No New Deal. *Michigan Law Review*, 88, no. 6: 1792–810.

Antony, Louise M., and Charlotte E. Witt, eds. 2001. *A Mind of One's Own: Feminist Essays on Reason and Objectivity*. Rev. 2nd edn. (Orig. edn 1993.) Boulder: Westview Press.

Anzaldúa, Gloria. 2001 [1987]. *La Conciencia de la Mestiza*: Towards a New Consciousness. In Bhavnani (2001b).

Appiah, Anthony. 2000. The Uncompleted Argument: Du Bois and the Illusion of Race. In Bernasconi and Lott (2000).

Arendt, Hannah. 1973 [1963]. *On Revolution*. Harmondsworth: Penguin Books.

Armitage, David. 2004. John Locke, Carolina, and the *Two Treatises of Government*. *Political Theory*, 32, no. 5: 602–27.

Arneil, Barbara. 1996. *John Locke and America: The Defence of English Colonialism.* Oxford: Clarendon Press.

Asch, Michael, ed. 1997. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference.* Vancouver: University of British Columbia Press.

Ashcraft, Richard. 1972. Leviathan Triumphant: Thomas Hobbes and the Politics of Wild Men. In Dudley and Novak (1972).

Asturias, Laura E., and Virginia del Águila. 2005. Unrelenting Danger. *Amnesty International*, Fall: 14–19.

Attwood, Bain, ed. 1996. *The Age of Mabo: History, Aborigines, and Australia.* Sydney: Allen & Unwin.

Bacon, Francis. 1909 [1625]. On Plantations. In *Essays, Civil and Moral: and The New Atlantis.* New York: P. F. Collier & Son.

Baker, Houston A., Jr, Manthia Diawara, and Ruth H. Lindeborg, eds. 1996. *Black British Cultural Studies: A Reader.* Chicago: University of Chicago Press.

Bales, Kevin. 2002. Because She Looks Like a Child. In Ehrenreich and Hochschild (2002).

Bancel, Nicolas, Pascal Blanchard, and Sandrine Lemaire. 2000. Human Zoos. Trans. Barry Smerin. *Le Monde Diplomatique* (English language edition), Aug., pp. 8–9.

Banchetti-Robino, Marina Paola, and Clevis Ronald Headley, eds. 2006. *Shifting the Geography of Reason: Gender, Science and Religion.* Cambridge: Cambridge Scholars Press.

Banner, Stuart. 2005. Why *Terra Nullius*? Anthropology and Property Law in Early Australia. *Law and History Review*, 23, no. 1: 95–132.

Barry, Brian. 2005. *Why Social Justice Matters.* Cambridge: Polity.

Barry, Kathleen. 1984. *Female Sexual Slavery.* New York: New York University Press.

Barthélémy, Françoise. 2004. Peru: The Scandal of Forced Sterilisation. Trans. Julie Stoker. *Le Monde Diplomatique* (English language edition), May, pp. 8–9.

Bartlett, Richard. 1993. *Mabo*: Another Triumph for the Common Law. *Sydney Law Review*, 15, no. 2: 178–86.

Bell, Shannon. 1994. *Reading, Writing, and Re-writing the Prostitute Body.* Bloomington and Indianapolis: Indiana University Press.

Benn, S. I., and G. F. Gaus, eds. 1983. *Public and Private in Social Life.* New York: St Martin's Press.

Bernasconi, Robert. 2001a. Who Invented the Concept of Race? Kant's Role in the Enlightenment Construction of Race. In Bernasconi (2001b).

Bernasconi, Robert, ed. 2001b. *Race.* Malden: Blackwell.

Bernasconi, Robert. 2002. Kant as an Unfamiliar Source of Racism. In Ward and Lott (2002).

Bernasconi, Robert, and Tommy L. Lott, eds. 2000. *The Idea of Race.* Indianapolis: Hackett.

Bhavnani, Kum-Kum. 2001a. Introduction. In Bhavnani (2001b).

Bhavnani, Kum-Kum, ed. 2001b. *Feminism and "Race".* New York: Oxford University Press.

Blackstone, Sir William. 1899. *Commentaries on the Laws of England,* vol. 1. 4th edn. Chicago: Callaghan.

Blue, Gregory, Martin Bunton, and Ralph Croizier, eds. 2002. *Colonialism and the Modern World: Selected Studies.* Armonk: M. E. Sharpe.

Bogues, Anthony. 1998. Race and Revising Liberalism. *Small Axe: A Journal of Criticism,* no. 4: 175–82.

Bogues, Anthony. 2001. Review of *The Racial Contract,* by Charles W. Mills. *Constellations,* 8, no. 2: 267–72.

Bogues, Anthony. 2003. *Black Heretics, Black Prophets: Radical Political Intellectuals.* New York: Routledge.

Boose, Lynda E. 1994. "The Getting of a Lawful Race": Racial Discourse and the Unrepresentable Black Woman. In Hendricks and Parker (1994).

Borrows John. 1997. Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government. In Asch (1997).

Borrows John. 1999. Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia. Osgoode Hall Law Journal,* 37: 537–96.

Borstelmann, Thomas. 2001. *The Cold War and the Color Line: American Race Relations in the Global Arena.* Cambridge: Harvard University Press.

Boucher, David, and Paul Kelly. 1994a. The Social Contract and Its Critics: An Overview. In Boucher and Kelly (1994b).

Boucher, David, and Paul Kelly, eds. 1994b. *The Social Contract from Hobbes to Rawls.* New York: Routledge.

Boucher, David, and Paul Kelly, eds. 2003. *Political Thinkers: From Socrates to the Present.* New York: Oxford University Press.

Boucher, Joanne. 2003. Male Power and Contract Theory: Hobbes and Locke in Carole Pateman's *The Sexual Contract. Canadian Journal of Political Science,* 36, no. 1: 23–38.

Bowe, John. 2003. A Shameful Harvest. *American Prospect* (July–Aug.): 38–9.

Boxill, Bernard R. 1992. *Blacks and Social Justice.* Rev. edn. (Orig. edn 1984.) Lanham: Rowman & Littlefield.

Boxill, Bernard R., ed. 2001. *Race and Racism.* New York: Oxford University Press.

Boxill, Bernard R. 2003. A Lockean Argument for Black Reparations. *Journal of Ethics*, Special Issue: Race, Racism, and Reparations, 7, no. 1: 63–91.

Brace, Laura. 2004. How Is It that All Women Are Born Slaves? Feminism and the Social Contract. Paper presented at a conference at the University of Huddersfield, 2004: Just Something for the Girls: The Impact of Feminism on Political Concepts and Debates.

Breines, Winnifred. 2006. *The Trouble between Us: An Uneasy History of White and Black Women in the Feminist Movement.* New York: Oxford University Press.

Brennan, Frank. 1998. *The Wik Debate: Its Impact on Aborigines, Pastoralists and Miners.* Sydney: University of New South Wales Press.

Brennan, Samantha, ed. 2003. *Feminist Moral Philosophy*. Calgary: University of Calgary Press.

Brennan, Teresa. 2003. *Globalization and Its Terrors: Daily Life in the West.* New York: Routledge.

Brennan, Teresa, and Carole Pateman. 1979. "Mere Auxiliaries to the Commonwealth": Women and the Origins of Liberalism. *Political Studies*, 27, no. 2: 183–200. Reprinted in *Feminist Interpretations of Locke*, ed. Nancy J. Hirschmann and Kirstie M. McClure, University Park: Pennsylvania State University Press, 2007.

Bronner, Stephen Eric. 2004. *Reclaiming the Enlightenment: Toward a Politics of Radical Engagement.* New York: Columbia University Press.

Brooke, Christopher. 2001. Rousseau's Political Philosophy: Stoic and Augustinian Origins. In Riley (2001b).

Brooks, Roy, L., ed. 1999. *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice.* New York: New York University Press.

Broome, Richard. 1995. Victoria. In McGrath (1995).

Brown, Michael K., Martin Carnoy, Elliott Currie, Troy Duster, David B. Oppenheimer, Marjorie M. Shultz, and David Wellman. 2003. *Whitewashing Race: The Myth of a Color-Blind Society*. Berkeley and Los Angeles: University of California Press.

Brown, Wendy. 1995. *States of Injury: Power and Freedom in Late Modernity*. Princeton: Princeton University Press.

Burnham, Margaret A. 1992. The Supreme Court Appointment Process and the Politics of Race and Sex. In Morrison (1992).

Burton, Antoinette M. 1992. The White Woman's Burden: British Feminists and "The Indian Woman," 1865–1915. In Chaudhuri and Strobel (1992).

Cahn, Steven M., ed. 2002. *Classics of Political and Moral Philosophy*. New York: Oxford University Press.

Caine, Barbara, and Rosemary Pringle, eds. 1995. *Transitions: New Australian Feminisms*. New York: St Martin's Press.

Capistrano, Tricia. 2006. Emil's Big Chance Leaves Me Uneasy. *Newsweek*, June 19, p. 14.

Carby, Hazel V. 1987. *Reconstructing Womanhood: The Emergence of the Afro-American Woman Novelist*. New York: Oxford University Press.

Carby, Hazel V. 1996 [1982]. White Woman Listen! Black Feminism and the Boundaries of Sisterhood. In Baker, Jr, Diawara, and Lindeborg (1996).

Caton, Hiram. 1990. Gendering the Social Contract: Comment on Carole Pateman's *The Sexual Contract*. *Political Theory Newsletter*, 2: 64–8.

Chaudhuri, Nupur, and Margaret Strobel, eds. 1992. *Western Women and Imperialism: Complicity and Resistance*. Bloomington and Indianapolis: Indiana University Press.

Chesterman, John, and Brian Galligan. 1997. *Citizens without Rights: Aborigines and Australian Citizenship*. New York: Cambridge University Press.

Clark, Lorenne M. G., and Lynda Lange, eds. 1979. *The Sexism of Social and Political Theory: Women and Reproduction from Plato to Nietzsche*. Toronto: University of Toronto Press.

Clément, Carine. 2003. Russia: The Default Option. Trans. Barry Smerin. *Le Monde Diplomatique* (English language edition), Feb., pp. 10–11.

Clément, Carine, and Denis Paillard. 2005. Snapshots of Russia Now. Trans. Barbara Wilson. *Le Monde Diplomatique* (English language edition), Nov., pp. 6–7.

Coates, Ken. 1999. The Gentle Occupation: The Settlement of Canada and the Dispossession of the First Nations. In Havemann (1999).

Cohen, Philip N. 1999. Review of *The Racial Contract*, by Charles W. Mills. *Review of Radical Political Economics*, 31, no. 2: 102–5.

Cohen, Stanley. 2001. *States of Denial: Knowing about Atrocities and Suffering*. Cambridge: Polity.

Coleman, Jules. 1983. Moral Theories of Torts: Their Scope and Limits, Part II. *Law and Philosophy*, 2, no. 1: 5–36.

Colley, Linda. 2002. *Captives: Britain, Empire and the World, 1600–1850*. London: Jonathan Cape.

Combahee River Collective. 2000 [1977]. A Black Feminist Statement. In James and Sharpley-Whiting (2000).

Commager, Henry Steele, ed. 1968. *Documents of American History*. 8th edn. New York: Appleton-Century-Crofts.

Conley, Dalton. 1999. *Being Black, Living in the Red: Race, Wealth, and Social Policy in America*. Berkeley and Los Angeles: University of California Press.

Connor, Michael. 2003. Error Nullius. *The Book Bulletin*, Aug. 26, pp. 76–8.

Coole, Diana. 1990. Patriarchy and Contract: Reading Pateman. *Politics*, 10, no. 1: 25–9.

Coole, Diana. 1994. Women, Gender and Contract: Feminist Interpretations. In Boucher and Kelly (1994b).

Cooper, Anna Julia. 1998. *The Voice of Anna Julia Cooper: Including "A Voice from the South" and Other Important Essays, Papers, and Letters*, ed. Charles Lemert and Esme Blah. Lanham: Rowman & Littlefield.

Corlett, J. Angelo. 2003. *Race, Racism, and Reparations*. Ithaca: Cornell University Press.

Cornell, Drucilla. 1992. The Philosophy of the Limit: Systems Theory and Feminist Legal Reform. In Cornell, Rosenfeld, and Carlson (1992).

Cornell, Drucilla, Michel Rosenfeld, and David Gray Carlson, eds. 1992. *Deconstruction and the Possibility of Justice*. New York: Routledge.

Cott, Nancy F. 2000. *Public Vows: A History of Marriage and the Nation*. Cambridge: Harvard University Press.

Crenshaw, Kimberlé. 1992. Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill. In Morrison (1992).

Crenshaw, Kimberlé. 2000 [1989]. Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics. In James and Sharpley-Whiting (2000).

Cudd, Ann. 2003. Contractarianism. In *The Stanford Encyclopedia of Philosophy*, Spring 2003 edn, ed. Edward N. Zalta. At http://plato.Stanford.edu/archives/spr2003/entries/contractarianism/.

Cugoano, Quobna. 1999. *Thoughts and Sentiments on the Evil of Slavery* (1787 version), ed. Vincent Carretta. London: Penguin.

Darwall, Stephen, ed. 2003. *Contractarianism/Contractualism*. Malden: Blackwell.

Davidson, Julia O'Connell. 2002. The Rights and Wrongs of Prostitution. *Hypatia*, 17, no. 2: 84–98.

Davis, Angela. 1981. *Women, Race, and Class*. New York: Random House.

Davis, Angela. 2003. Racism, Birth Control and Reproductive Rights. In Lewis and Mills (2003).

Day, David. 2001. *Claiming a Continent: A New History of Australia*. Rev. edn. (Orig. edn 1996.) Sydney: HarperCollins.

Dean, Mitchell. 1992. Pateman's Dilemma: Women and Citizenship. *Theory and Society*, 21, no. 1: 121–30.

Dench, Geoff, ed. 1997. *Rewriting the Sexual Contract*. London: Institute of Community Studies.

De Tocqueville, Alexis. 2000 [1835–40]. *Democracy in America*. Chicago: University of Chicago Press.

Dickenson, Donna. 1997. *Property, Women, and Politics: Subjects or Objects?* New Brunswick: Rutgers University Press.

Di Stefano, Christine. 1991. *Configurations of Masculinity: A Feminist Perspective on Modern Political Theory*. Ithaca: Cornell University Press.

Doane, Ashley W., and Eduardo Bonilla-Silva, eds. 2003. *White Out: The Continuing Significance of Racism*. New York: Routledge.

Dubler, Ariela. 2003. In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State. *Yale Law Journal*, 112, no. 7: 1641–715.

DuBois, Ellen Carol. 1978. *Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848–1869*. Ithaca: Cornell University Press.

Du Bois, W. E. B. 1995 [1920]. The Souls of White Folk. In D. Lewis (1995).

Dudley, Edward, and Maximillian E. Novak, eds. 1972. *The Wild Man Within: An Image in Western Thought from the Renaissance to Romanticism*. Pittsburgh: University of Pittsburgh Press.

DWP (Department for Work and Pensions, UK). 2004. *Households Below Average Income 1994/95–2003/04*. London: DWP. At www.dwp.gov.uk/asd/hbai/hbai2004/contents.asp.

Dyer, Richard. 1997. *White*. New York: Routledge.

Edgeworth, Maria. 2003 [1804]. The Grateful Negro. In *The Novels and Selected Works of Maria Edgeworth*, vol. 12, ed. Elizabeth Eger, Clíona ÓGallchoir, and Marilyn Butler. London: Pickering & Chatto.

Edwards, Laura. 1996. "The Marriage Covenant Is at the Foundation of All Our Rights": The Politics of Slave Marriages in North Carolina after Emancipation. *Law and History Review*, 14, no. 1: 81–124.

Edwards, Paul, ed. 1967. *The Encyclopedia of Philosophy*. 8 vols. New York: Macmillan and Free Press.

Ehrenreich, Barbara, and Arlie Russell Hochschild, eds. 2002. *Global Woman: Nannies, Maids, and Sex Workers in the New Economy*. New York: Metropolitan Books.

Eisenberg, Avigail, and Jeff Spinner-Halev, eds. 2004. *Minorities within Minorities: Equality, Rights and Diversity*. New York: Cambridge University Press.

Ellerman, David. 2005. *Translatio* versus *Concessio*: Retrieving the Debate about Contracts of Alienation with an Application to Today's Employment Contract. *Politics and Society*, 33, no. 3: 440–80.

Ertman, Martha. 2001. Marriage as a Trade: Bridging the Private/Private Distinction. *Harvard Civil Rights-Civil Liberties Review*, 36.

Eze, Emmanuel Chukwudi. 1997a [1995]. The Color of Reason: The Idea of "Race" in Kant's Anthropology. In Eze (1997b).

Eze, Emmanuel Chukwudi, ed. 1997b. *Postcolonial African Philosophy: A Critical Reader.* Cambridge: Blackwell.

Eze, Emmanuel Chukwudi, ed. 1997c. *Race and the Enlightenment: A Reader*. Cambridge: Blackwell.

Ferguson, Moira. 1992. *Subject to Others: British Women Writers and Colonial Slavery, 1670–1834.* New York: Routledge.

Ferguson, Stephen C., II. 2004. Racial Contract Theory: A Critical Introduction. Ph.D. diss., University of Kansas.

Finan, Khadija. 2006. Western Sahara Impasse. *Le Monde Diplomatique* (English language edition), Jan., p. 14.

Forde, Steven. 1998. Hugo Grotius on Ethics and War. *American Political Science Review*, 92, no. 3: 639–48.

Forsyth, Murray. 1994. Hobbes's Contractarianism: A Comparative Analysis. In Boucher and Kelly (1994b).

Frankenberg, Ruth. 1993. *White Women, Race Matters: The Social Construction of Whiteness*. Minneapolis: University of Minnesota Press.

Fraser, Nancy. 1997a. Beyond the Master/Subject Model: On Carole Pateman's *The Sexual Contract*. In Fraser (1997b).

Fraser, Nancy. 1997b. *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition.* New York: Routledge.

Fredrickson, George. 1981. *White Supremacy: A Comparative Study in American and South African History.* New York: Oxford University Press.

Freeman, Samuel, ed. 2003. *The Cambridge Companion to Rawls*. New York: Cambridge University Press.

French, Peter A., Theodore E. Uehling, Jr, and Howard K. Wettstein, eds. 1990. *Midwest Studies in Philosophy: The Philosophy of the Human Sciences*. Notre Dame: University of Notre Dame Press.

Frost, Alan. 1981. New South Wales as Terra Nullius: The British Denial of Aboriginal Land Rights. *Historical Studies*, 19, no. 77: 513–23.

Frye, Marilyn. 1983. *The Politics of Reality: Essays in Feminist Theory*. Freedom: Crossing Press.

Füredi, Frank. 1998. *The Silent War: Imperialism and the Changing Perception of Race*. New Brunswick: Rutgers University Press.

Galton, Sir Francis. 1978 [1869]. *Hereditary Genius: An Inquiry into Its Laws and Consequences*. New York: St Martin's Press.
Galton, Sir Francis. 2000 [1909]. Eugenics: Its Definition, Scope and Aims. In Bernasconi and Lott (2000).
Garcia, Jorge. 2001. The Racial Contract Hypothesis. *Philosophia Africana*, 4, no. 1: 27–42.
Gatens, Moira. 1996. Sex, Contract and Genealogy. *Journal of Political Philosophy*, 4, no. 1: 29–44.
Gates, Henry Louis, Jr, ed. 1986. *"Race," Writing, and Difference*. Chicago: University of Chicago Press.
Gauthier, David P. 1986. *Morals by Agreement*. New York: Clarendon Press.
Gauthier, David P. 1997 [1977]. The Social Contract as Ideology. In Goodin and Pettit (1997).
Gentili, Alberico. 1933 [1612]. *De Iure Belli Libri Tres*, vol. 2, trans. John C. Rolfe. Oxford: Clarendon Press.
Geras, Norman. 1998. *The Contract of Mutual Indifference: Political Philosophy after the Holocaust*. New York: Verso.
Giddings, Paula. 1984. *When and Where I Enter: The Impact of Black Women on Race and Sex in America*. New York: Bantam Books.
Gilens, Martin. 1999. *Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy*. Chicago: University of Chicago Press.
Gilliam, Angela. 1991. Women's Equality and National Liberation. In Mohanty, Russo, and Torres (1991).
Gilman, Charlotte Perkins. 1908. A Suggestion on the Negro Problem. *American Journal of Sociology*, 14, no. 1: 78–85.
Gilman, Charlotte Perkins. 1966 [1898]. *Women and Economics: A Study of the Economic Relation between Men and Women as a Factor in Social Evolution*, ed. Carl N. Degler. New York: Harper & Row.
Gilman, Sander L. 1986. Black Bodies, White Bodies: Toward an Iconography of Female Sexuality in Late Nineteenth-Century Art, Medicine, and Literature. In Gates, Jr (1986).
Gilroy, Paul. 1993. *The Black Atlantic: Modernity and Double Consciousness*. Cambridge: Harvard University Press.
Gilroy, Paul. 2000. *Against Race: Imagining Political Culture beyond the Color Line*. Cambridge: Harvard University Press.
Glenn, Evelyn Nakano. 2002. *Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor*. Cambridge: Harvard University Press.
Goldberg, David Theo. 1993. *Racist Culture: Philosophy and the Politics of Meaning*. Cambridge: Blackwell.

Goldberg, David Theo. 2002. *The Racial State.* Malden: Blackwell.
Goodin, Robert E., and Philip Pettit, eds. 1993. *A Companion to Contemporary Political Philosophy.* Oxford: Blackwell Reference.
Goodin, Robert E., and Philip Pettit, eds. 1997. *Contemporary Political Philosophy: An Anthology.* Malden: Blackwell.
Gordon, David. 1998. Single-Issue Scholarship. *Mises Review* (Summer 1998): 1–3.
Gordon, Lewis R. 1998. Contracting White Normativity. *Small Axe: A Journal of Criticism*, no. 4: 166–74.
Gordon, Lewis R. 2006. *Disciplinary Decadence: Living Thought in Trying Times.* Boulder: Paradigm.
Gordon, Linda. 1990. *Woman's Body, Woman's Right: Birth Control in America.* Rev. edn. (Orig. edn 1976.) New York: Penguin Books.
Gough, J. W. 1978. *The Social Contract: A Critical Study of its Development.* 2nd edn. (Orig. edn 1936.) Westport: Greenwood Press.
Grinde, Donald A., Jr, and Bruce E. Johansen. 1991. *Exemplar of Liberty: Native America and the Evolution of Democracy.* Los Angeles: American Indian Studies Center, University of California, Los Angeles.
Grotius, Hugo. 1925 [1646 edn]. *De Jure Belli Ac Pacis Libri Tres*, vol. 2, trans. F. W. Kelsey. Oxford: Clarendon Press.
Grotius, Hugo. 1983. The Freedom of the Seas or the Right which Belongs to the Dutch to take part in the East Indian Trade. In *The Grotius Reader*, ed. L. E. Van Holk and D. G. Roeflofsen. The Hague: T. M. C. Asser Instituut.
Guinier, Lani. 1994. *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy.* New York: The Free Press.
Guy-Sheftall, Beverly, ed. 1995. *Words of Fire: An Anthology of African-American Feminist Thought.* New York: New Press.
Haggis, Jane. 2003. White Women and Colonialism: Towards a Non-Recuperative History. In Lewis and Mills (2003).
Hall, Barbara. 2005. Race in Hobbes. In Valls (2005).
Hampton, Jean. 1990. The Contractarian Explanation of the State. In French, Uehling, Jr, and Wettstein (1990).
Hampton, Jean. 1993. Contract and Consent. In Goodin and Pettit (1993).
Hampton, Jean. 1997. *Political Philosophy.* Boulder: Westview Press.
Hampton, Jean. 2001. Feminist Contractarianism. In Antony and Witt (2001).
Haney López, Ian F. 1996. *White by Law: The Legal Construction of Race.* New York: New York University Press.
Haney López, Ian F. 2005. Race on the 2010 Census: Hispanics and the Shrinking White Majority. *Daedalus*, 134, no. 1: 42–52.

Harris, Angela P. 2000 [1990]. Race and Essentialism in Feminist Legal Theory. In Montmarquet and Hardy (2000).

Harris, Cheryl I. 1993. Whiteness as Property. *Harvard Law Review*, 106, no. 8: 1709–91.

Haskell, Thomas L. 1985. Capitalism and the Origins of the Humanitarian Sensibility, Part 2. *American Historical Review*, 90, no. 3: 547–66.

Haslanger, Sally. 2000. Comments on Charles Mills' "Race and the Social Contract Tradition." Comments presented at the annual meeting of the Central Division, American Philosophical Association, 2000.

Havemann, Paul, ed. 1999. *Indigenous Peoples' Rights in Australia, Canada and New Zealand.* New York: Oxford University Press.

Hegarty, Paul. 1999. Doubling Legitimacy: Reading Rousseau's *Contrat Social* after Pateman's *Sexual Contract*. *French Studies*, 53, no. 3: 292–306.

Hegel, Georg Wilhelm Friedrich. 1956 [1830–1]. *The Philosophy of History*, trans. J. Sibree. New York: Dover.

Held, David, Anthony McGrew, David Goldblatt, and Jonathan Perraton. 1999. *Global Transformations: Politics, Economics and Culture.* Cambridge: Polity.

Hendricks, Margo, and Patricia Parker, eds. 1994. *Women, "Race," and Writing in the Early Modern Period.* New York: Routledge.

Heyrick, Elizabeth. 1824. *Immediate, not Gradual Abolition: or, An Inquiry into the Shortest, Safest, and Most Effectual Means of Getting Rid of West Indian Slavery.* 3rd edn. London: Hatchard.

Hill, Anita Faye. 1995. Marriage and Patronage in the Empowerment and Disempowerment of African American Women. In Hill and Jordan (1995).

Hill, Anita Faye, and Emma Coleman Jordan, eds. 1995. *Race, Gender, and Power in America: The Legacy of the Hill-Thomas Hearings.* New York: Oxford University Press.

Hill, Thomas E., Jr, and Bernard Boxill. 2001. Kant and Race. In Boxill (2001).

Hirsch, James S. 2002. *Riot and Remembrance: The Tulsa Race War and Its Legacy.* New York: Houghton Mifflin.

Hirschmann, Nancy J. 1990. Review of *The Sexual Contract*, by Carole Pateman. *Political Theory*, 18, no. 1: 170–4.

Hirshman, Linda R., and Jane E. Larson. 1998. *Hard Bargains: The Politics of Sex*. New York: Oxford University Press.

Hobbes, Thomas. 1981 [1651]. *Leviathan*. New York: Penguin.

Hobbes, Thomas. 1996 [1651]. *Leviathan*. Rev. student edn, ed. Richard Tuck. (Orig. edn 1991.) New York: Cambridge University Press.

Hochschild, Jennifer L. 2005. Looking Ahead: Racial Trends in the United States. *Dædalus*, 134, no. 1: 70–81.

Hocking, Barbara. 1993. Aboriginal Law Does Now Run in Australia. *Sydney Law Review*, 15, no. 2: 187–205.

Hoetink, Harmannus. 1967. *Caribbean Race Relations: A Study of Two Variants*, trans. Eva M. Hooykaas. New York: Oxford University Press.

Holder, Cindy. 2004. Self-Determination as a Basic Human Right: The Draft UN Declaration on the Rights of Indigenous Peoples. In Eisenberg and Spinner-Halev (2004).

Hollinger, David A. 2005. The One Drop Rule and the One Hate Rule. *Dædalus*, 134, no. 1 (Winter): 18–28.

Holmes, Rachel. 2007. *African Queen: The Real Life of the Hottentot Venus*. New York: Random House.

Honderich, Ted, ed. 1995. *The Oxford Companion to Philosophy*. New York: Oxford University Press.

hooks, bell. 2000 [1984]. Black Women: Shaping Feminist Theory. In James and Sharpley-Whiting (2000).

Hope, Donna P. 2006. *Inna di Dancehall: Popular Culture and the Politics of Identity in Jamaica.* Mona, Kingston: University of the West Indies Press.

Horne, Thomas A. 1990. *Property Rights and Poverty: Political Argument in Britain, 1605–1834*. Chapel Hill: University of North Carolina Press.

Horsman, Reginald. 1986 [1981]. *Race and Manifest Destiny: Origins of American Racial Anglo-Saxonism*. Cambridge: Harvard University Press.

Hughes, Cheryl, ed. 2003. *Social Philosophy Today: Truth and Objectivity in Social Ethics*, vol. 18. Charlottesville: Philosophy Documentation Center.

Hull, Gloria T., Patricia Bell Scott, and Barbara Smith, eds. 1982. *All the Women Are White, All the Blacks Are Men, but Some of Us Are Brave: Black Women's Studies.* New York: Feminist Press.

Hulliung, Mark. 2001. Rousseau, Voltaire, and the Revenge of Pascal. In Riley (2001b).

Hulme, Peter. 1990. The Spontaneous Hand of Nature: Savagery, Colonialism, and the Enlightenment. In Hulme and Jordanova (1990).

Hulme, Peter, and Ludmilla Jordanova, eds. 1990. *The Enlightenment and Its Shadows*. New York: Routledge.

Hund, Wulf D. 2006. *Negative Vergesellschaftung: Dimensionen der Rassismusanalyse.* Münster: Verlag Westfälisches Dampfboot.

Hunter, Rosemary. 1996. Aboriginal Histories, Australian Histories, and the Law. In Attwood (1996).

Hutton, Clinton. 1998. Opening up the Intellectual Closet of Modern Western Political Philosophy. *Small Axe: A Journal of Criticism*, no. 4: 183–90.

Ishiguru, Kazuo. 2005. *Never Let Me Go*. New York: Alfred A. Knopf.

Ivison, Duncan, Paul Patton, and Will Sanders, eds. 2000. *Political Theory and the Rights of Indigenous Peoples*. New York: Cambridge University Press.

Jacobs, Harriet. 1969 [1861]. *Incidents in the Life of a Slave Girl: Written by Herself*, ed. L. Maria Child. Reprint. Miami: Mnemosyne.

Jacobson, Matthew Frye. 1998. *Whiteness of a Different Color: European Immigrants and the Alchemy of Race*. Cambridge: Harvard University Press.

James, Joy, and T. Denean Sharpley-Whiting, eds. 2000. *The Black Feminist Reader*. Malden: Blackwell.

Jaquette, Jane S. 1998. Contract and Coercion: Power and Gender in *Leviathan*. In H. Smith (1998).

Jennings, Francis. 1971. Virgin Land and Savage People. *American Quarterly*, 23, no. 4: 519–41.

Joseph, Gloria, and Jill Lewis. 1981. *Common Differences: Conflicts in Black and White Feminist Perspectives*. New York: Anchor Press/ Doubleday.

Kant, Immanuel. 1965 [1764]. *Observations on the Feeling of the Beautiful and Sublime*, trans. John T. Goldthwait. Berkeley and Los Angeles: University of California Press.

Kant, Immanuel. 1978 [1798]. *Anthropology from a Pragmatic Point of View*, trans. Victor Lyle Dowdell. Carbondale: Southern Illinois University Press.

Kant, Immanuel. 1991a [1786]. Conjectures on the Beginning of Human History. In Kant (1991b).

Kant, Immanuel. 1991b. *Political Writings*. 2nd edn, ed. Hans Reiss, trans. H. B. Nisbet. (Orig. edn 1970.) New York: Cambridge University Press.

Kant, Immanuel. 1997 [17–]. Physical Geography (extract). Trans. Katherine M. Faull and Emmanuel C. Eze. In Eze (1997c).

Kant, Immanuel. 1999 [1798]. *Metaphysical Elements of Justice*, part I of *The Metaphysics of Morals*. 2nd edn, trans. John Ladd (orig. edn 1965). Indianapolis: Hackett.

Kant, Immanuel. 2000 [1777]. Of the Different Human Races. Trans. Jon Mark Mikkelsen. In Bernasconi and Lott (2000).

Kant, Immanuel. 2001 [1788]. On the Use of Teleological Principles in Philosophy. Trans. Jon Mark Mikkelsen. In Bernasconi (2001b).

Katznelson, Ira. 2005. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*. New York: W. W. Norton.

Keene, Edward. 2002. *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics.* New York: Cambridge University Press.

Kerber, Linda K. 1998. *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship.* New York: Hill & Wang.

Kercher, Bruce. 2002. Native Title in the Shadows: The Origins of the Myth of *Terra Nullius* in Early New South Wales Courts. In Blue, Bunton, and Croizier (2002).

Kinder, Donald R., and Lynn M. Sanders. 1996. *Divided by Color: Racial Politics and Democratic Ideals.* Chicago: University of Chicago Press.

King, Deborah K. 1995 [1988]. Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology. In Guy-Sheftall (1995).

King, Desmond. 2005. *The Liberty of Strangers: Making the American Nation.* New York: Oxford University Press.

King, Reyahn, Sukhdev Sandhu, James Walvin, and Jane Girdham. 1997. *Ignatius Sancho: An African Man of Letters.* London: National Portrait Gallery Publications.

King, Robert. 1986. Terra Australius: Terra Nullius aut Terra Aboriginum? *Journal of the Royal Australian Historical Society*, 72: 75–91.

Klausen, Susanne. 2002. The Imperial Mother of Birth Control: Marie Stopes and the South African Birth-Control Movement, 1930–1950. In Blue, Bunton, and Croizier (2002).

Korman, Sharon. 1996. *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice.* New York: Clarendon Press.

Krysan, Maria, and Amanda E. Lewis, eds. 2004. *The Changing Terrain of Race and Ethnicity.* New York: Russell Sage Foundation.

Kulchyski, Peter, ed. 1994. *Unjust Relations: Aboriginal Rights in Canadian Courts.* New York: Oxford University Press.

Kymlicka, Will. 1990. Review of *The Sexual Contract*, by Carole Pateman. *Canadian Philosophical Reviews*, 10, no. 9: 461–4.

Kymlicka, Will. 1991. The Social Contract Tradition. In Singer (1991).

Kymlicka, Will. 1995. *Multicultural Citizenship: A Liberal Theory of Minority Rights.* New York: Oxford University Press.

Ladd, John. 1999. Translator's Introduction to Kant's *Metaphysical Elements of Justice.* In Kant (1999).

Laden, Anthony. 2003. Radical Liberals, Reasonable Feminists: Reason, Power and Objectivity in MacKinnon and Rawls. *Journal of Political Philosophy*, 11, no. 2: 133–52.

Lange, Lynda, ed. 2002. *Feminist Interpretations of Jean-Jacques Rousseau.* University Park: Pennsylvania State University Press.

Laqueur, Thomas Walter. 1990. *Making Sex: Body and Gender from the Greeks to Freud.* Cambridge: Harvard University Press.
Laslett, Peter. 1967. Social Contract. In P. Edwards (1967), vol. 7.
Lenin, Vladimir I. 1996 [1916]. *Imperialism: The Highest Stage of Capitalism.* Chicago: Pluto Press.
Lessnoff, Michael. 1986. *Social Contract.* Atlantic Highlands: Humanities Press.
Levy, Jacob T. 2000. *The Multiculturalism of Fear.* New York: Oxford University Press.
Lewis, David Levering, ed. 1995. *W. E. B. Du Bois: A Reader.* New York: Henry Holt.
Lewis, Reina, and Sara Mills, eds. 2003. *Feminist Postcolonial Theory: A Reader.* New York: Routledge.
Lipsitz, George. 1998. *The Possessive Investment in Whiteness: How White People Profit from Identity Politics.* Philadelphia: Temple University Press.
Litwack, Leon F. 1998. *Trouble in Mind: Black Southerners in the Age of Jim Crow.* New York: Alfred Knopf.
Locke, John. 1988 [1690]. *Two Treatises of Government.* Student edn, ed. Peter Laslett. (Orig. edn 1960.) New York: Cambridge University Press.
Lorde, Audre. 2002 [1979]. The Master's Tools Will Never Dismantle the Master's House. In Moraga and Anzaldúa (2002).
Lott, Tommy L. 2002. Patriarchy and Slavery in Hobbes's Political Philosophy. In Ward and Lott (2002).
Loury, Glenn C. 2002. *The Anatomy of Racial Inequality.* Cambridge: Harvard University Press.
Lumb, R. D. 1993. The *Mabo* Case: Public Law Aspects. In Stephenson and Ratnapala (1993).
MacKinnon, Catharine A. 1987. *Feminism Unmodified: Discourses on Life and Law.* Cambridge: Harvard University Press.
MacKinnon, Catharine A. 1989. *Toward a Feminist Theory of the State.* Cambridge: Harvard University Press.
MacKinnon, Catharine A. 2005. Genocide's Sexuality. In M. Williams and Macedo (2005).
Macpherson, C. B. 1962. *The Political Theory of Possessive Individualism.* Oxford: Clarendon Press.
Macpherson, C. B. 1968. Introduction. In Thomas Hobbes, *Leviathan.* New York: Penguin.
Markus, Andrew. 1994. *Australian Race Relations, 1788–1993.* St Leonards, New South Wales: Allen & Unwin.
Markus, Andrew. 1996. Between Mabo and a Hard Place: Race and the Contradictions of Conservatism. In Attwood (1996).

Marr, David. 1999. *The High Price of Heaven*. Sydney: Allen & Unwin.
Marshall, John. 1987. *The Writings of John Marshall on the Constitution*. Littleton: Fred B. Rothman.
Martin, Jane Roland. 1994. Methodological Essentialism, False Difference, and Other Dangerous Traps. *Signs*, 19, no. 3: 630–57.
Marx, Anthony W. 1998. *Making Race and Nation: A Comparison of the United States, South Africa, and Brazil*. New York: Cambridge University Press.
Massey, Douglas S., and Nancy A. Denton. 1993. *American Apartheid: Segregation and the Making of the Underclass*. Cambridge: Harvard University Press.
Maynard, Mary. 2001 [1994]. "Race," Gender and the Concept of "Difference" in Feminist Thought. In Bhavnani (2001b).
McCarthy, Thomas. 1999. Review of *The Racial Contract*, by Charles W. Mills. *Ethics*, 109, no. 2: 451–4.
McCarthy, Thomas. 2002. *Vergangenheitsbewältigung* in the USA: On the Politics of the Memory of Slavery, Part I. *Political Theory*, 30, no. 5: 623–48.
McCarthy, Thomas. 2004. Coming to Terms with Our Past: On the Morality and Politics of Reparations for Slavery, Part II. *Political Theory*, 32, no. 6: 750–72.
McClendon, John H., III. 2002. Black and White contra Left and Right? The Dialectics of Ideological Critique in African American Studies. *APA Newsletter on Philosophy and the Black Experience*, 02, no. 1: 47–56.
McClintock, Anne. 1995. *Imperial Leather: Race, Gender and Sexuality in the Colonial Context*. New York: Routledge.
McEachern, Allan. 1991. *Reasons for Judgment of the Honorable Chief Justice (Delgamuukw v. British Columbia)*. Vancouver: Smithers Registry No. 0843.
McGary, Howard. 1999. *Race and Social Justice*. Malden: Blackwell.
McGary, Howard, ed. (forthcoming). *Reparations for African-Americans: Arguments For and Against*. Lanham: Rowman & Littlefield.
McGrath, Ann, ed. 1995. *Contested Ground: Australian Aborigines under the British Crown*. Sydney: Allen & Unwin.
McHugh, P. G. 2004. *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination*. New York: Oxford University Press.
McNeil, Kent. 1997. The Meaning of Aboriginal Title. In Asch (1997).
Mehta, Uday Singh. 1999. *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought*. Chicago: University of Chicago Press.
Meir, Golda. 1969. Golda Meir: 'Who Can Blame Israel?' *Sunday Times*, June 15.

Midgley, Clare. 1992. *Women against Slavery: The British Campaigns, 1780–1870.* New York: Routledge.
Mill, John Stuart. 1989 [1869]. *The Subjection of Women.* In *On Liberty; with the Subjection of Women; and Chapters on Socialism*, ed. Stefan Collini. New York: Cambridge University Press.
Millett, Kate. 1969. *Sexual Politics.* New York: Ballantine.
Milliken, Robert. 1986. *No Conceivable Injury: The Story of Britain and Australia's Atomic Cover-Up.* New York: Penguin Books.
Mills, Charles W. 1997. *The Racial Contract.* Ithaca: Cornell University Press.
Mills, Charles W. 1998a. *Blackness Visible: Essays on Philosophy and Race.* Ithaca: Cornell University Press.
Mills, Charles W. 1998b. Non-Cartesian *Sums*: Philosophy and the African-American Experience. In Mills (1998a).
Mills, Charles W. 1998c. Reply to Critics. *Small Axe: A Journal of Criticism*, no. 4: 191–201.
Mills, Charles W. 1998d. Revisionist Ontologies: Theorizing White Supremacy. In Mills (1998a).
Mills, Charles W. 2000. Race and the Social Contract Tradition. *Social Identities: Journal for the Study of Race, Nation and Culture*, 6, no. 4: 441–62.
Mills, Charles W. 2003a. Defending the Radical Enlightenment. In Hughes (2003).
Mills, Charles W. 2003b. *From Class to Race: Essays in White Marxism and Black Radicalism.* Lanham: Rowman & Littlefield.
Mills, Charles W. 2003c. The "Racial Contract" as Methodology. In Mills (2003b).
Mills, Charles W. 2003d. Reply to My Critics. In Stokes and Meléndez (2003).
Mills, Charles W. 2003e. White Supremacy and Racial Justice. In Mills (2003b).
Mills, Charles W. 2003f. White Supremacy as Socio-Political System. In Mills (2003b).
Mills, Charles W. 2004. Racial Exploitation and the Wages of Whiteness. In Krysan and Lewis (2004).
Mills, Charles W. 2005a. "Ideal Theory" as Ideology. *Hypatia: A Journal of Feminist Philosophy*, 20, no. 3: 165–84.
Mills, Charles W. 2005b. Kant's *Untermenschen.* In Valls (2005).
Mills, Charles W. 2006a. Comments on Anthony Bogues' *Black Heretics, Black Prophets.* Paper presented on an Author Meets Critics panel at the American Philosophical Association Central Division annual meeting, 2006.
Mills, Charles W. 2006b. Modernity, Persons, and Subpersons. In J. Young and Braziel (2006).

Mills, Charles W. 2006c. Rawls on Race. In Banchetti-Robino and Headley (2006).
Mills, Charles W. 2007. White Ignorance. In Sullivan and Tuana (2007).
Miriam, Kathy. 2005. Getting Pateman "Right": How to Read and Not Read *The Sexual Contract*. *Philosophy Today*, 49, no. 3: 274–86.
Mishel, Lawrence R., Jared Bernstein, and Sylvia Allegretto. 2006. *The State of Working America 2006/2007*. Ithaca: ILR Press/Cornell University Press.
Modood, Tariq. 1998. Anti-Essentialism, Multiculturalism and the "Recognition" of Religious Groups. *Journal of Political Philosophy*, 6, no. 4: 378–99.
Moens, Gabriel. 1993. Mabo and Political Policy-Making by the High Court. In Stephenson and Ratnapala (1993).
Mohanty, Chandra Talpade. 1991. Cartographies of Struggle: Third World Women and the Politics of Feminism. In Mohanty, Russo, and Torres (1991).
Mohanty, Chandra Talpade, Ann Russo, and Lourdes Torres, eds. 1991. *Third World Women and the Politics of Feminism*. Bloomington and Indianapolis: Indiana University Press.
Monbiot, George. 2005. Africa's New Best Friends. *Guardian Weekly*, July 15–21, p. 4.
Montmarquet, James A., and William H. Hardy, eds. 2000. *Reflections: An Anthology of African American Philosophy*. Belmont: Wadsworth/Thomson Learning.
Moraga, Cherríe L., and Gloria E. Anzaldúa, eds. 2002. *This Bridge Called My Back: Writings by Radical Women of Color*. Expanded and rev. 3rd edn. (Orig. edn 1981.) Berkeley: Third Woman Press.
More, Thomas. 1965 [1516]. *Utopia*. Harmondsworth: Penguin Classics.
Morris, Christopher. 1999a. Introduction. In Morris (1999b).
Morris, Christopher, ed. 1999b. *The Social Contract Theorists: Critical Essays on Hobbes, Locke, and Rousseau*. Lanham: Rowman & Littlefield.
Morrison, Toni, ed. 1992. *Race-ing Justice, En-Gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. New York: Pantheon Books.
Morrison, Toni. 2000a [1970]. *The Bluest Eye*. New York: Penguin USA.
Morrison, Toni. 2000b [1989]. Unspeakable Things Unspoken: The Afro-American Presence in American Literature. In James and Sharpley-Whiting (2000).
Mouffe, Chantal. 1993. *The Return of the Political*. New York: Verso.

Mulgan, Richard. 1998. Citizenship and Legitimacy in a Post-Colonial Australia. In Peterson and Sanders (1998).
Murphy, Michael. 2001. Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights? *Canadian Journal of Political Science*, 24, no. 1: 109–29.
Murray, Pauli. 1995 [1970]. The Liberation of Black Women. In Guy-Sheftall (1995).
Nagel, Mechthild E. 2003. Reforming the Contract? In Stokes and Meléndez (2003).
Nagel, Thomas. 2003. Rawls and Liberalism. In Freeman (2003).
Narayan, Uma. 2003. What's a Brown Girl like You Doing in the Ivory Tower? Or, How I Became a Feminist Philosopher. In Alcoff (2003).
Nash, Kate. 1998. *Universal Difference: Feminism and the Liberal Undecideability of "Women"*. New York: St Martin's Press.
Nelson, Jill. 1997. *Straight, No Chaser: How I Became a Grown-up Black Woman.* New York: G. P. Putnam's Sons.
Newman, Louise Michele. 1999. *White Women's Rights: The Racial Origins of Feminism in the United States.* New York: Oxford University Press.
Nichols, Robert Lee. 2005. Realizing the Social Contract: The Case of Colonialism and Indigenous Peoples. *Contemporary Political Theory*, 4, no. 1: 42–62
Nozick, Robert. 1974. *Anarchy, State, and Utopia.* New York: Basic Books.
Nussbaum, Martha. 2003. Rawls and Feminism. In Freeman (2003).
Nussbaum, Martha C., and Amartya Sen, eds. 1993. *The Quality of Life.* New York: Clarendon Press.
Okin, Susan Moller. 1989. *Justice, Gender, and the Family.* New York: Basic Books.
Okin, Susan Moller. 1990. Feminism, the Individual, and Contract Theory. *Ethics*, 100, no. 3: 658–69.
Okin, Susan Moller. 1992. *Women in Western Political Thought*, with a new afterword. (Orig. edn 1979.) Princeton: Princeton University Press.
Oliver, Melvin L., and Thomas M. Shapiro. 1995. *Black Wealth/ White Wealth: A New Perspective on Racial Inequality.* New York: Routledge.
Omolade, Barbara. 1995 [1983]. Hearts of Darkness. In Guy-Sheftall (1995).
O'Neill, Onora. 1993. Justice, Gender, and International Boundaries. In Nussbaum and Sen (1993).
Osborne, Peter, and Stella Sandford, eds. 2002. *Philosophies of Race and Ethnicity.* New York: Continuum.

Outlaw, Lucius T., Jr. 1996. *On Race and Philosophy*. New York: Routledge.

Overall, Christine. 1992. What's Wrong with Prostitution? Evaluating Sex Work. *Signs*, 17, no. 4: 705–24.

Pagden, Anthony. 1995. *Lords of All the World: Ideologies of Empire in Spain, Britain, and France, c.1500–c.1800*. New Haven: Yale University Press.

Pancevski, Bojan. 2005. German Zoo Sparks Outrage by Parading Africans Next to Baboons. *Daily Telegraph*, June 12, p. 29.

Pateman, Carole. 1970. *Participation and Democratic Theory*. Cambridge: Cambridge University Press.

Pateman, Carole. 1975. Sublimation and Reification: Locke, Wolin, and the Liberal-Democratic Conception of the Political. *Politics and Society*, 5, no. 4: 441–67. Reprinted in Pateman (1989a).

Pateman, Carole. 1980. Women and Consent. *Political Theory*, 7, no. 2: 149–68. Reprinted in Pateman (1989a).

Pateman, Carole. 1983. Feminist Critiques of the Public/Private Dichotomy. In Benn and Gaus (1983). Reprinted in Pateman (1989a).

Pateman, Carole. 1985. *The Problem of Political Obligation: A Critical Analysis of Liberal Theory*. 2nd edn. (Orig. edn 1979.) Cambridge: Polity.

Pateman, Carole. 1988. *The Sexual Contract*. Stanford: Stanford University Press.

Pateman, Carole. 1989a. *The Disorder of Women: Democracy, Feminism and Political Theory*. Stanford: Stanford University Press.

Pateman, Carole. 1989b. "God Hath Ordained to Man a Helper": Hobbes, Patriarchy and Conjugal Right. *British Journal of Political Science*, 19, no. 4: 445–63. Reprinted in *Feminist Interpretations and Political Theory*, ed. Mary Lyndon Shanley and Carole Pateman, University Park: Pennsylvania State University Press, 1991.

Pateman, Carole. 1990a. Contract and Ideology: A Reply to Coole. *Politics*, 10, no. 1: 32.

Pateman, Carole. 1990b. Reply to Reviews of *The Sexual Contract*. *Political Theory Newsletter*, 2: 78–82.

Pateman, Carole. 1990c. Sex and Power. *Ethics*, 100, no. 2: 398–407.

Pateman, Carole. 1996. The Sexual Contract and the Animals. *Journal of Social Philosophy*, 27, no. 1: 65–80.

Pateman, Carole. 1997. Beyond *The Sexual Contract*? In Dench (1997).

Pateman, Carole. 1998. Women's Writing, Women's Standing: Theory and Politics in the Early Modern Period. In H. Smith (1998).

Pateman, Carole. 2002. Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts. *Journal of Political Philosophy*, 10, no. 1: 20–53.

Pateman, Carole. 2003. Mary Wollstonecraft. In Boucher and Kelly (2003).

Pateman, Carole, and Elizabeth Gross, eds. 1997 [1987]. *Feminist Challenges: Social and Political Theory*. Boston: Northeastern University Press.

Paul, Diane. 1984. Eugenics and the Left. *Journal of the History of Ideas*, 45, no. 4: 567–90.

Peffer, R. G. 1990. *Marxism, Morality, and Social Justice*. Princeton: Princeton University Press.

Peterson, Nicolas, and Will Sanders, eds. 1998. *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*. New York: Cambridge University Press.

Phillips, Anne. 1989. The Original Contract? *Radical Philosophy*, no. 52: 38–40.

Pogge, Thomas W. 2002. *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*. Cambridge: Polity.

Polanyi, Karl. 1944. *The Great Transformation*. New York: Farrar & Rinehart.

Prewitt, Kenneth. 2005. Racial Classification in America: Where Do We Go from Here? *Dædalus*, 134, no. 1: 5–17.

Prince, Mary. 2000 [1831]. *The History of Mary Prince: A West Indian Slave*, ed. Sara Salih. New York: Penguin Books.

Procida, Mary A. 2002. All in the Family: Marriage, Gender, and the Family Business of Imperialism in British India. In Blue, Bunton, and Croizier (2002).

Pufendorf, Samuel. 1934. *On the Law of Nature*, trans. C.H. Oldfather and W.A. Oldfather. Oxford: Oxford University Press.

Puwar, Nirmal. 2004. *Space Invaders: Race, Gender, and Bodies Out of Place*. New York: Berg.

Rawls, John. 1996. *Political Liberalism*. Expanded paperback edn. (Orig. edn 1993.) New York: Columbia University Press.

Rawls, John. 1999a. *Collected Papers*, ed. Samuel Freeman. Cambridge: Harvard University Press.

Rawls, John. 1999b [1987]. The Idea of an Overlapping Consensus. In Rawls (1999a).

Rawls, John. 1999c [1997]. The Idea of Public Reason Revisited. In Rawls (1999a).

Rawls, John. 1999d [1985]. Justice as Fairness: Political Not Metaphysical. In Rawls (1999a).

Rawls, John. 1999e [1975]. A Kantian Conception of Equality. In Rawls (1999a).

Rawls, John. 1999f [1980]. Kantian Constructivism in Moral Theory. In Rawls (1999a).
Rawls, John. 1999g. *The Law of Peoples, with "The Idea of Public Reason Revisited."* Cambridge: Harvard University Press.
Rawls, John. 1999h. *A Theory of Justice*. Rev. edn. (Orig. edn 1971.) Cambridge: Harvard University Press.
Rawls, John. 2001. *Justice as Fairness: A Restatement*, ed. Erin Kelly. Cambridge: Harvard University Press.
Resnik, Judith. 1995. From the Senate Judiciary Committee to the Country Courthouse: The Relevance of Gender, Race, and Ethnicity to Adjudication. In Hill and Jordan (1995).
Reynolds, Henry. 1982. *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*. Ringwood: Penguin Books Australia.
Reynolds, Henry. 1987. *The Law of the Land*. Ringwood: Penguin Books Australia.
Reynolds, Henry, ed. 1989. *Dispossession: Black Australians and White Invaders*. Sydney: Allen & Unwin.
Reynolds, Henry. 1993. Native Title and Pastoral Leases. In Stephenson and Ratnapala (1993).
Reynolds, Henry. 1996. *Aboriginal Sovereignty: Three Nations, One Australia?* Sydney: Allen & Unwin.
Riley, Patrick. 1982. *Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant, and Hegel*. Cambridge: Harvard University Press.
Riley, Patrick. 2001a. Introduction: Life and Works of Jean-Jacques Rousseau (1712–1778). In Riley (2001b).
Riley, Patrick, ed. 2001b. *The Cambridge Companion to Rousseau*. New York: Cambridge University Press.
Roberts, Dorothy. 1999 [1997]. *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*. New York: Vintage Books.
Roberts, Rodney C. 2002a. Introduction. In Roberts (2002b).
Roberts, Rodney C., ed. 2002b. *Injustice and Rectification*. New York: Peter Lang.
Roberts-Wray, Sir Kenneth. 1966. *Commonwealth and Colonial Law*. New York: Praeger.
Roediger, David R. 1999. *The Wages of Whiteness: Race and the Making of the American Working Class*. Rev. edn. (Orig. edn 1991.) New York: Verso.
Roth, Benita. 2004. *Separate Roads to Feminism: Black, Chicana, and White Feminist Movements in America's Second Wave*. New York: Cambridge University Press.
Rousseau, Jean-Jacques. 1968 [1762]. *The Social Contract*, trans. Maurice Cranston. New York: Penguin.

Rousseau, Jean-Jacques. 1979 [1762]. *Emile:* or *On Education*, trans. and introd. Allan Bloom. New York: Basic Books.

Rousseau, Jean-Jacques. 1984 [1755]. *A Discourse on Inequality*, trans. Maurice Cranston. New York: Penguin.

Rousseau, Jean-Jacques. 1997a [1755]. *Discourse on the Origin and the Foundations of Inequality among Men,* or *Second Discourse.* In Rousseau (1997b).

Rousseau, Jean-Jacques. 1997b. *The "Discourses" and Other Early Political Writings*, ed. and trans. Victor Gourevitch. New York: Cambridge University Press.

Rousseau, Jean-Jacques. 1997c. Essay on the Origin of Languages. In Rousseau (1997b).

Rousseau, Jean-Jacques. 1997d [1762]. *Of the Social Contract.* In Rousseau (1997e).

Rousseau, Jean-Jacques. 1997e. *"The Social Contract" and Other Later Political Writings*, ed. and trans. Victor Gourevitch. New York: Cambridge University Press.

Ruiz, Vicki L., and Ellen Carol DuBois. 2000a. Introduction to the Third Edition. In Ruiz and DuBois (2000b).

Ruiz, Vicki L., and Ellen Carol DuBois, eds. 2000b. *Unequal Sisters: A Multicultural Reader in US Women's History.* 3rd edn. (Orig. edn 1990.) New York: Routledge.

Rydell, Robert W. 2002. Science in the Service of Empire; Empire in the Service of Science. In Blue, Bunton, and Croizier (2002).

Sala-Molins, Louis. 2006. *Dark Side of the Light: Slavery and the French Enlightenment*, trans. John Conteh-Morgan. Minneapolis: University of Minnesota Press.

Salih, Sara. 2000. Introduction to *The History of Mary Prince.* In Prince (2000).

Salter, John. 2001. Property and Consent. *Political Theory*, 29, no. 4: 537–55.

Salzberger, Ronald P., and Mary C. Turck, eds. 2004. *Reparations for Slavery: A Reader.* Lanham: Rowman & Littlefield.

Sample, Ruth J. 2003a. *Exploitation: What It Is and Why It's Wrong.* Lanham: Rowman & Littlefield.

Sample, Ruth J. 2003b. Sexual Exploitation and the Social Contract. In S. Brennan (2003).

Sandel, Michael J. 1998. *Liberalism and the Limits of Justice.* 2nd edn. (Orig. edn 1982.) New York: Cambridge University Press.

Saxton, Alexander. 2003 [1990]. *The Rise and Fall of the White Republic: Class Politics and Mass Culture in Nineteenth-Century America.* New York: Verso.

Schloesser, Pauline. 2002. *The Fair Sex: White Women and Racial Patriarchy in the Early American Republic*. New York: New York University Press.
Schmitt, Richard. 2003. Liberalism and Racism. In Stokes and Meléndez (2003).
Schochet, Gordon. 1998. The Significant Sounds of Silence: The Absence of Women from the Political Thought of Sir Robert Filmer and John Locke (or, "Why Can't a Woman Be More Like a Man?"). In H. Smith (1998).
Schott, Robin May, ed. 1997. *Feminist Interpretations of Immanuel Kant*. University Park: Pennsylvania State University Press.
Schröder, Hannelore. 1997. Kant's Patriarchal Order. Trans. Rita Gircour. In Schott (1997).
Seager, Joni. 2003. *The Penguin Atlas of Women in the World*. Rev. and updated edn (orig. edn 1997). New York: Penguin.
Sen, Amartya. 1990. More than 100 Million Women Are Missing. *New York Review of Books*, Dec. 20, pp. 61–6.
Severance, Mary Laura. 2000. Sex and the Social Contract. *English Literary History*, 67, no. 2: 453–513.
Shanley, Mary Lyndon. 1979. Marriage Contract and Social Contract in Seventeenth Century English Political Thought. *Western Political Quarterly*, 32, no. 1: 79–91.
Shapiro, Ian. 1999. *Democratic Justice*. New Haven: Yale University Press.
Shapiro, Thomas M. 2004. *The Hidden Cost of Being African American: How Wealth Perpetuates Inequality*. New York: Oxford University Press.
Shaw, Malcolm. 1978. The Western Sahara Case. *British Yearbook of International Law*, 119: 127–34
Shaw, Malcolm. 1986. *Title to Territory in Africa: International Legal Issues*. New York: Oxford University Press.
Shelby, Tommie. 2004. Race and Social Justice: Rawlsian Considerations. *Fordham Law Review*, 72: 1697–714.
Shelley, Toby. 2004. *Endgame in the Western Sahara: What Future for Africa's Last Colony?* London: Zed Books.
Shipler, David K. 2004. *The Working Poor: Invisible in America*. New York: Alfred A. Knopf.
Shklar, Judith N. 2001 [1991]. *American Citizenship: The Quest for Inclusion*. Cambridge: Harvard University Press.
Singer, Peter, ed. 1991. *A Companion to Ethics*. Cambridge: Blackwell Reference.
Slomp, Gabriella. 2000. *Thomas Hobbes and the Political Philosophy of Glory*. New York: St Martin's Press.
Smedley, Audrey. 1993. *Race in North America: Origin and Evolution of a Worldview*. Boulder: Westview Press.

Smith, Barbara. 2000a [1983]. Introduction. In B. Smith (2000c).
Smith, Barbara. 2000b. Preface to the Rutgers University Press Edition. In B. Smith (2000c).
Smith, Barbara, ed. 2000c [1983]. *Home Girls: A Black Feminist Anthology*. New Brunswick: Rutgers University Press.
Smith, Hilda L., ed. 1998. *Women Writers and the Early Modern British Political Tradition*. New York: Cambridge University Press.
Smith, Rogers M. 1997. *Civic Ideals: Conflicting Visions of Citizenship in US History*. New Haven: Yale University Press.
Spelman, Elizabeth V. 2001 [1988]. Gender & Race: The Ampersand Problem in Feminist Thought. In Bhavnani (2001b).
Squadrito, Kathy. 2002. Locke and the Dispossession of the American Indian. In Ward and Lott (2002).
Stanley, Amy Dru. 1996. Home Life and the Reality of the Market. In Stokes and Conway (1996).
Stephenson, M. A., and Suri Ratnapala, eds. 1993. *Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and Its Impact on Australian Law*. St Lucia: University of Queensland Press.
Stevens, Jacqueline. 2003. On the Morals of Genealogy. *Political Theory*, 31, no. 4: 558–88.
Stokes, Curtis, and Theresa Meléndez, eds. 2003. *Racial Liberalism and the Politics of Urban America*. East Lansing: Michigan State University Press.
Stokes, Melvyn, and Stephen Conway, eds. 1996. *The Market Revolution in America: Social, Political, and Religious Expressions, 1800–1880*. Charlottesville: University Press of Virginia.
Strobel, Margaret. 2002. Women's History, Gender History, and European Colonialism. In Blue, Bunton, and Croizier (2002).
Sullivan, Barbara Ann. 1995. Re-thinking Prostitution. In Caine and Pringle (1995).
Sullivan, Barbara Ann. 1997. *The Politics of Sex: Prostitution and Pornography in Australia since 1945*. New York: Cambridge University Press.
Sullivan, Shannon, and Nancy Tuana, eds. 2007. *Race and Epistemologies of Ignorance*. Albany: SUNY Press.
Swain, Carol. 1992. Double Standard, Double Bind: African-American Leadership after the Thomas Debacle. In Morrison (1992).
Tamang, Seira. 2002. Dis-embedding the Sexual/Social Contract: Citizenship and Gender in Nepal. *Citizenship Studies*, 6, no. 3: 309–24.
Thompson, Janna. 2002. *Taking Responsibility for the Past: Reparation and Historical Injustice*. Cambridge: Polity.
Todd, Barbara J. 1998. "To Be Some Body": Married Women and *The Hardships of the English Laws*. In H. Smith (1998).

Travis, Alan. 2002. Overhaul of Victorian Sex Laws Wins Cross-Party Support. *Guardian Weekly*, Nov 28–Dec. 4.

Truth, Sojourner. 1995. When Woman Gets Her Rights Man Will Be Right. In Guy-Sheftall (1995).

Tuck, Richard. 1994. Rights and Pluralism. In Tully with Weinstock (1994).

Tuck, Richard. 1999. *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*. New York: Oxford University Press.

Tully, James. 1993a. *An Approach to Political Philosophy: Locke in Contexts*. New York: Cambridge University Press.

Tully, James. 1993b. Rediscovering America: The *Two Treatises* and Aboriginal Rights. In Tully (1993a).

Tully, James. 1994. Aboriginal Property and Western Theory: Recovering a Middle Ground. *Social Philosophy and Policy*, 11, no. 2: 153–80.

Tully, James. 1995. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. New York: Cambridge University Press.

Tully, James. 2000. The Struggles of Indigenous Peoples for and of Freedom. In Ivison, Patton, and Sanders (2000).

Tully, James, with the assistance of Daniel M. Weinstock, ed. 1994. *Philosophy in an Age of Pluralism: The Philosophy of Charles Taylor in Question*. New York: Cambridge University Press.

Turner, Frederick. 1994. The Significance of the Frontier in American History. In *Rereading Frederick Jackson Turner: "The Significance of the Frontier in American History" and Other Essays*, ed. and with comments by John Mack Faragher. New York: Henry Holt.

UNDP (United Nations Development Programme). 2005. *Human Development Report 2005*. New York: UNDP. At http://hdr.undp.org/reports/global/2005/.

Uzgalis, William. 2002. "An Inconsistency Not to Be Excused": On Locke and Racism. In Ward and Lott (2002).

Valls, Andrew. 1998. Review of *The Racial Contract*, by Charles W. Mills. *American Political Science Review*, 92, no. 3: 691–2.

Valls, Andrew, ed. 2005. *Race and Racism in Modern Philosophy*. Ithaca: Cornell University Press.

Van Holk, L. E., and D. G. Roeflofsen, eds. 1983. *The Grotius Reader*. The Hague: T. M. C. Asser Instituut.

Van Krieken, Robert. 2000. From *Milirrpum* (1) to *Mabo* (2): The High Court, Terra Nullius and Moral Entrepreneurship. *University of New South Wales Law Journal*, 23, no. 1: 63–77

Vattel, Emer de. 1982 [1758]. *The Law of Nations*. New York: AMS Press.

Vulliamy, Ed. 2005. Streets of Despair. *Amnesty International*, 31, no. 4: 12–16.
Waldron, Jeremy. 1988. *The Right to Private Property*. New York: Oxford University Press.
Waldron, Jeremy. 1994. John Locke: Social Contract versus Political Anthropology. In Boucher and Kelly (1994b).
Wallace, Michele. 1995 [1975]. Anger in Isolation: A Black Feminist's Search for Sisterhood. In Guy-Sheftall (1995).
Walzer, Michael. 1995. Contract, Social. In Honderich (1995).
Ward, Julie K., and Tommy L. Lott, eds. 2002. *Philosophers on Race: Critical Essays*. Malden: Blackwell.
Ware, Vron. 1992. *Beyond the Pale: White Women, Racism and History*. New York: Verso.
Warren, Kenneth. 1997. Constructing Subpersons. *The Nation*, 265, no. 14: 44–5.
Washington, Mary Helen, ed. 1975. *Black-Eyed Susans*. New York: Anchor Books.
Washington, Mary Helen. 1982. Teaching *Black-Eyed Susans*: An Approach to the Study of Black Women Writers. In Hull, Scott, and Smith (1982).
Webber, Jeremy. 2000. Beyond Regret: *Mabo*'s Implications for Australian Constitutionalism. In Ivison, Patton, and Sanders (2000).
Welchman, Jennifer. 1995. Locke on Slavery and Inalienable Rights. *Canadian Journal of Philosophy*, 25, no. 1: 67–81.
Wells-Barnett, Ida B. 1995. Lynch Law in America. In Guy-Sheftall (1995).
Wells-Barnett, Ida B. 2002 [1892–1900]. *On Lynchings*. Amherst: Humanity Books.
Wertheimer, Alan. 1996. *Exploitation*. Princeton: Princeton University Press.
Westlake, John. 1894. *Chapters on the Principles of International Law*. Cambridge: Cambridge University Press.
Wilkins, Barry. 1999. See: Review of *The Racial Contract* and *Blackness Visible: Essays on Philosophy and Race*, by Charles W. Mills. *Radical Philosophy*, no. 95: 51–3.
Williams, Glyndwr. 1981. "Far More Happier Than We Europeans": Reactions to the Australian Aborigines on Cook's Voyage. *Australian Historical Studies*, 19, no. 77: 499–513.
Williams, Linda Faye. 2003. *The Constraint of Race: Legacies of White Skin Privilege in America*. University Park: Pennsylvania State University Press.
Williams, Linda Faye. 2004. The Issue of Our Time: Economic Inequality and Political Power in America. *Perspectives on Politics*, 2, no. 4: 683–9.

Williams, Melissa S., and Stephen Macedo, eds. 2005. *Political Exclusion and Domination. Nomos*, 46. New York: New York University Press.

Williams, Robert A. Jr. 1990. *The American Indian in Western Legal Thought: The Discourses of Conquest*. New York: Oxford University Press.

Winant, Howard. 2001. *The World Is a Ghetto: Race and Democracy Since World War II*. New York: Basic Books.

Winbush, Raymond A., ed. 2003. *Should America Pay? Slavery and the Raging Debate on Reparations*. New York: Amistad/ HarperCollins.

Wing, Adrien Katherine, ed. 2003. *Critical Race Feminism: A Reader*. 2nd edn. (Orig. edn 1997.) New York: New York University Press.

Wingo, Ajume. 2003. *Veil Politics in Liberal Democratic States*. New York: Cambridge University Press.

Wingrove, Elizabeth Rose. 2000. *Rousseau's Republican Romance*. Princeton: Princeton University Press.

Wright, Joanne H. 2004. *Origin Stories in Political Thought: Discourses on Gender, Power, and Citizenship*. Toronto: University of Toronto Press.

X, Malcolm. 1989 [1971]. *The End of White World Supremacy: Four Speeches by Malcolm X*, ed. Imam Benjamin Karim. New York: Arcade Books.

Yancy, George, ed. 1998. *African-American Philosophers: 17 Conversations*. New York: Routledge.

Yancy, George. 2004a. A Foucauldian (Genealogical) Reading of Whiteness: The Production of the Black Body/Self and the Racial Deformation of Pecola Breedlove in Toni Morrison's *The Bluest Eye*. In Yancy (2004b).

Yancy, George, ed. 2004b. *What White Looks Like: African-American Philosophers on the Whiteness Question*. New York: Routledge.

Young, Iris Marion. 1990. *Justice and the Politics of Difference*. Princeton: Princeton University Press.

Young, Joseph, and Jana Evans Braziel, eds. 2006. *Race and the Foundations of Knowledge: Cultural Amnesia in the Academy*. Urbana and Chicago: University of Illinois Press.

Young, Robert. 2006. Putting Materialism Back into Race Theory: Toward a Transformative Theory of Race. In Young and Braziel (2006).

Yuval-Davis, Nira. 1997. *Gender and Nation*. London and Thousand Oaks: Sage.

Zack, Naomi. 1997a. The American Sexualization of Race. In Zack (1997b).

Zack, Naomi, ed. 1997b. *Race/Sex: Their Sameness, Difference, and Interplay.* New York: Routledge.
Zack, Naomi, ed. 2000. *Women of Color and Philosophy.* Malden: Blackwell.
Zack, Naomi. 2003. The Racial Contract according to Charles Mills. In Stokes and Meléndez (2003).
Zerilli, Linda. 1989. In the Beginning, Rape. *Women's Review of Books,* 6: 6.