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# ANYWHERE BUT HERE: RACE AND EMPIRE IN THE MABO DECISION

EMMA CUNLIFFE

## Abstract

*The High Court of Australia's decision in Mabo v. Queensland (No.2) is among the most widely known and controversial decisions the Court has yet delivered. In this article, I explore the competing visions of legal history that are implicit within Brennan J's leading judgment and Dawson J's dissent. In particular, I discuss the ways in which both of these judgments render an incomplete and contradictory documentary record more coherent than it really is. Suggesting that neither judgment manages to escape the traces of racism, I argue that the alternative approaches tell us more about the fault lines within contemporary Australian political discourse than they do about the Australian colonial past. I conclude that Brennan J's efforts to render contemporary justice for past wrongs against indigenous Australians deserve acknowledgement, though his judgment is ultimately constrained by the force at the heart of the Australian common law. Much more remains to be done before the Australian common law can be said to recognise indigenous Australian cultures as complex, changeable, and contemporary.*

The stories told about the past speak powerfully to the self-image of the story teller. Collective stories define collective identities. Speaking about the past, we make for ourselves a present and project a future. (Pue, 1995: 732.)

This story is less about the past and present than about our relationship with the past and present, and how that relationship can reveal a great deal about us. In particular, I am interested in how responsibility for present injustices is often located somewhere else: elsewhere in time, or elsewhere in space, or both. In this article, I explore two ostensibly quite different, albeit related, pasts. The first comprises the narratives woven by judges about the legal history of indigenous land tenure in Australia after white settlement. The second past is the Privy Council's 1919 judgment *In re Southern Rhodesia* [1919] Appeal Cases 211, a decision that is famous for offering legal history one of its clearest proofs of the influence of racial science on early twentieth century English colonial law and policy. The "present," or more precisely the moment that I wish to explore, is the High Court of Australia's 1992 decision in *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1. In *Mabo*, a majority of the Mason High Court sought in a fragmented but powerful set of judgments to distance itself from some of the racist underpinnings of colonial law and to restore what it characterised as a degree of historical truth to the common law's story of the English colonisation of Australia.

In the course of producing a new Australian common law of native title, Brennan J<sup>1</sup> (as he then was) adopted a very particular version of the colonial past in order to vindicate the actions the High Court took to alter the colonial present and future (Tuhiwai Smith, 1999).<sup>2</sup> Brennan J advanced two propositions about colonial law that I wish to consider in greater detail. These propositions are: first, that the common law included a principle of "absolute and universal Crown ownership" of Australian land; and second, that it was desirable for the High Court of Australia to state unequivocally that the ratio decidendi

and findings of fact in *Southern Rhodesia* did not form a part of the Australian common law. In this article, I suggest that the first proposition rendered a fragmentary and ambiguous set of judicial statements about the effect of white settlement on aboriginal tenure more coherent than they actually were; and that the second proposition represented an attempt to consign the racist doctrine of English colonial law to the past. I also distinguish Brennan J's approach to legal history from that adopted by the sole dissenting judge, Dawson J. By comparing the two approaches, which roughly correspond with the two main camps in Australia's "history wars" (Hunter 1996), it becomes possible to see the ways in which the fault lines in historical visions correspond with disagreement about contemporary political values.

I should make it clear from the outset that it is not my intention to suggest that *Mabo* is an example of bad judicial decision-making or shoddy legal history.<sup>3</sup> I am conscious that my argument in this article could be read as making an argument similar to that of Michael Connor (2005, 2003), who castigated both the High Court's decision in *Mabo* and historian Henry Reynolds for introducing the legal fiction of terra nullius, only to knock it down. I disagree with Connor on several points. First, I believe as a matter of both principle and pragmatism that the courts have an important role to play in reconciliation and that judges not only have the power, but also the duty, to ensure that the common law moves away from racist and sexist doctrine. Fitzmaurice (2006) suggests that while the use of the term terra nullius was anachronistic, it served as a shorthand for the arguments used to justify dispossession. It does appear that the term "terra nullius" was unknown to colonial Australia, and Reynolds seems to have let himself down in his work on the phrase's supposed influence on the pattern of white settlement in Australia. Notwithstanding the unquestionable significance of this assertion for Reynolds' scholarship, my second point of disagreement with Connor

relates to the consequences of that revelation for *Mabo*. Connor says that: “By the time of *Mabo* in 1992, terra nullius was the only explanation for the British settlement of Australia. ... [Reynold’s work on terra nullius] underpinned the *Mabo* judges’ decision-making.” (Connor, 2003.) In fact, as I explain here, Brennan J’s decision in *Mabo* was predicated on the reasoning that, when Australia became part of the Crown’s dominion, the law of England (so far as applicable to the conditions of the colony) became the law of Australia. This law included the principle that, upon sovereignty, the Crown acquired the absolute ownership of waste lands in Australia. In *Southern Rhodesia*, the Judicial Committee of the Privy Council interpreted “waste lands” to include land occupied by people who had no recognizable conception of private property rights. Brennan J’s somewhat perplexing discussion of terra nullius does not displace his reasoning that the common law contained a thread of precedent to the effect that the waste lands of Australia became Crown land at the time of settlement. Nor does it obviate Brennan J’s conclusion that “waste lands” were interpreted by colonial courts to include land that was formerly occupied and used by Australian aborigines. This reasoning forms the focus of my discussion in this article.

Unlike Connor, I am tremendously glad that, at least for a short time, a majority of the High Court of Australia had the courage and imagination to propagate a vision of an Australian society that would acknowledge and seek partly to remedy the wrongs of the past. Historical narratives are *always* and necessarily selective (Wishart, 1997). I believe that Brennan J’s construction of legal history in *Mabo* is defensible, insofar as it is grounded in careful research and a particular idea about relevance. To be distracted by my suggestion that Brennan J’s version of history was selective into thinking that this means it was substandard is to miss the more interesting question of what we can learn from the selections we make in relation to history about our own view of ourselves. I

should also note that this article explores historical and contemporary constructions of indigenous people in predominantly white Australian discourse. I am interested in why, for a brief moment in the early 1990's, it seemed urgent for some powerful members of Australian society to distance themselves from its colonial past and to deal a modicum of present justice to indigenous Australians in recognition of past wrongs. I am not an indigenous Australian, nor do I purport to speak for how well or poorly *Mabo* reflected indigenous Australian priorities and concerns. Of course, this is not to say that those priorities and concerns are unimportant to me.

The *Mabo* decision is a landmark in the High Court's brief departure from the conservative approach to legal decision-making that is most characteristic of Australia's highest court. Brennan J's decision provides an exemplar for legal positivism in terms of its logical structure and careful analysis of colonial common law precedent.<sup>4</sup> Brennan J was careful to delineate the boundaries of the existing common law, and to identify when he chose to extend those boundaries. The leading judgment identified a moral imperative to depart from English precedent in some respects:

It must be acknowledged that, to state the common law in this way involves the overruling of cases which have held the contrary. To maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were ... to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land. Moreover, to reject the theory that the Crown acquired absolute beneficial ownership of land is to bring the law into conformity with Australian history. (*Mabo* per Brennan J at 57 - 58. See also 29 - 30.)

This passage represents a refreshingly honest moment in the development of Australian common law: a decision in which, for once, the judges acknowledged that their role is about more than how best to fit this case with the last. Brennan J's *Mabo* judgment was

also about myth-making in its grandest sense: fashioning a story of the past with which to juxtapose (indeed, to construct) a present and future that was more becoming to a tolerant and multicultural society. The propositions made by Brennan J about legal history permitted the court to characterise itself as making a break with the racist assumptions and practices of another time, another place. Locating racism in the past, and elsewhere, also deflected attention away from the ways in which the *Mabo* decision perpetuated a racialised order within Australian society. These are the currents that I wish to trace by unpacking Brennan J's *Mabo* judgment.

## 1. INDIGENOUS TENURE IN PRE-MABO AUSTRALIAN COMMON LAW

[T]he theory which underpins the application of English law to the Colony of New South Wales is that English settlers brought with them the law of England and that, as the indigenous inhabitants were regarded as barbarous or unsettled and without a settled law, the law of England including the common law became the law of the Colony (so far as it was locally applicable)[.] (*Mabo* per Brennan J. at 38.)

In his classic text on English colonial law, Roberts-Wray (1966: 636) suggested that certain general principles governed land tenure after colonisation by whatever means (conquest, cession or settlement). In any colony, ultimate title vested in the Crown. However, the Crown was taken to recognise and protect pre-existing private rights of property, and these rights were therefore considered unimpaired unless the occupiers of land agreed to the extinguishment of rights or rights were extinguished by clear legislative intention. As well as being a general statement of the common law, this position reflected that of Blackstone, who applauded the practice of settling colonies provided that:

it was confined to the stocking and cultivation of desert uninhabited countries ... But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in

religion, in customs, in government or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered [.] (1830, Bk II, ch. 1, p.7; see Brennan J in *Mabo* at 33).

The general position described by Roberts-Wray was given a particular gloss in the Australian context. In 1845, the Supreme Court of NSW held in *Attorney-General (NSW) v. Brown* (1847) 1 Legge 312 that “all the waste and unoccupied lands” of the colony vested in the Crown at the time of first white settlement in 1788 as there was at that time “no other proprietor of such lands” (at 319). This judgment was taken in *Mabo* and elsewhere to stand for the proposition that, upon white settlement, the Crown “became the universal and absolute beneficial owner of all the land” in the Australian continent (*Mabo*: 28 – 29; see also *Randwick Corporation v. Rutledge* (1959) 102 CLR 54 at 71). In *Cooper v. Stuart* (1889) 14 AC 286 the Privy Council held that:

[t]he extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. 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 at the time when it was peacefully annexed ... New South Wales belongs to the latter class. (At 291; see Hocking, 1993.)

In this judgment, the Privy Council does not quite go so far as to deny that the Colony of New South Wales was inhabited in 1788 when the first fleet arrived in Sydney Harbour. However, it is able to ignore the pre-existing Aboriginal relationships with the land. Classifying the territory as “*practically* unoccupied” asserts in this context both that the land was largely un-lived in and that the land was, for practical purposes, unutilised by its allegedly few Aboriginal inhabitants. Confining legal recognition of land use and ownership to terms that were comprehensible to 19<sup>th</sup> Century British eyes, the judgment simultaneously denies the violence that accompanied white settlement in Australia. Of course in this case, as in the other early judicial contemplations of the effect of British



sovereignty in Australia, the indigenous inhabitants were not represented before the court. It was accordingly easy to overlook the possibility that the story of colonisation might have been more complicated than litigation between settlers and colonial authorities suggested.

In 1913, Isaacs J confirmed that beneficial ownership of land in the colony of New South Wales vested in the Crown, provided that no other person could show “title” to the land:

It has always been a fixed principle of English law that the Crown is the proprietor of all land for which no subject can show a title. When Colonies were acquired this feudal principle extended to the lands oversea. The mere fact that men discovered and settled upon the new territory gave them no title to the soil.

There was, as [Jenks] says, "no Statute, no struggle, no heated debate. The Crown quietly assumed the ownership of Australian land." ... no act of appropriation, or reservation, or setting apart, was necessary to vest the land in the Crown. (*Williams v. Attorney- General for New South Wales* (1913) 16 CLR 404 at 436 per Isaacs J citing Jenks, 1895. Cf *Williams v. Attorney General* per Barton ACJ at 428 and Higgins J at 461 – 3.)

Isaacs J seems to have been influenced to a significant degree by Professor Jenks, a former dean of the University of Melbourne Faculty of Law, who wrote in relation to the Batman treaty: “[e]ither Port Phillip was in British territory or it was not. If it was, the aborigines could make no title without the consent of the Crown” (1895, 98). However this view was not universally shared by federation-era historians, and it can fairly be said that at the turn of the nineteenth to the twentieth century, the land question in Australia was not fully settled. Writing soon after Jenks, Jose (whose *History of Australasia* ran to 15 editions in the early twentieth century) was more circumspect about the effect of the transfer of sovereignty on Aboriginal tenure:

[w]hen Phillip landed in Sydney Cove, therefore, all the land of the new colony belonged – as far as British subjects and the civilized world were concerned – to the British

Government. (The aboriginal tribes were so small and scattered that their claims were rarely considered, though several Governors did their best to avoid interference with native hunting-grounds.) [emphasis added] (4<sup>th</sup> ed, 1911: 205.)

It is arguably implicit in Isaacs J's judgment in *Williams* that lands occupied by Aborigines were "waste lands" to which no subject could show title (see also *Williams* (1913) 16 CLR 404 at 440). Further support for this conclusion comes from Isaacs J's reference to the refusal to acknowledge Batman's treaty with the "native chiefs" in support of the

"unquestionable position that, when Governor Phillip received his first Commission ... the whole of the lands of Australia were already in law the *property* of the King of England." (At 439.)

If Isaacs J did indeed intend to assert in *Williams* that aboriginal tenure was severed at the time of settlement, this was the first statement to that effect in the common law regarding white settlement in Australia (by contrast, in *Cooper v. Stuart*, the Privy Council more or less pretended the indigenous population out of existence). Roberts-Wray called Isaacs J's proposition that the Crown acquired property in the whole of Australia upon settlement "startling and, indeed, incredible" (1966: 631) and this passage of *Williams* was identified by Deane and Gaudron JJ in *Mabo* as wrong in fact and law (at 106). Isaacs J's assertion is in some ways all the more startling because it was dicta: it was not necessary to advert to Aboriginal title in order to decide the dispute that was before the court in *Williams*. His fellow judges did not make any similar statement.

In Brennan J's decision in *Mabo*, the early cases of *Brown*, *Cooper v. Stuart* and *Williams* stand for the proposition that English colonial law wished the Australian aboriginal presence out of legal existence by classifying indigenous Australians as few in number, barbarous and unsettled. Historians differed in their reading of the

consequences of colonisation: some clearly believed that it severed Aboriginal title, while others sought to sideline the question by downplaying the number of Aborigines and the extent of their land use. No consensus or conclusive statement of authority points to a definite rule that aboriginal tenure was severed at settlement: and such a rule would have been inconsistent with the precedents described by Roberts-Wray (1966: Chapter 14). Arguably, the first judicial statement that unambiguously conflated absolute and beneficial Crown title to Australian land came from Windeyer J in *Randwick Corporation v. Rutledge* ((1959) 102 CLR 54 at 71).

Does all of this mean that it is open to conclude that aboriginal interests in land were protected at common law to a greater extent than Brennan J allowed in *Mabo*? To the best of my knowledge, there is no evidence to support this suggestion. Perhaps the most that can be said is that because Aboriginal interests could not be pressed in these early cases,<sup>5</sup> the courts were able to ignore the pre-existence of Aborigines in Australia or to brush over the question of whether the common law would recognise their interests with vague and general statements such as those in *Cooper v. Stuart* and *Williams*. Over time, as the white frontier advanced and the aboriginal population was increasingly successfully contained, it almost became possible to forget that indigenous Australians had once lived, worked on and maintained a relationship with the lands that now hosted newer Australians' cities and roads and farms. We know that the revolution was not as bloodless or as peaceful as has from time to time been suggested; but it was sufficiently far removed, in time and space, from the majority of the white twentieth century Australian population to be ignored. The task of telling the story of dispossession to a white Australian audience is a difficult one in light of this distance, and it becomes more difficult once one takes into account the conservative historians' suspicion of oral history and other non-traditional historical sources.<sup>6</sup> And yet, in *Mabo*, the High Court of

Australia was faced with two unavoidable truths: the Meriam people had lived and worked on Mer Island since long before the Torres Strait Islands were annexed to Australia; and the State of Queensland denied that the Meriam people owned or were entitled to possess Mer Island. Queensland's denial that the Meriam people owned or were entitled to possess the island was particularly stark in light of the fact that the State had historically relied on customary Meriam law to resolve conflicts and keep order on Mer (*Mabo* per Brennan J at 19 – 25). The difficulty faced by Mabo and the Meriam people, in light of the fact that dispossession was not for the most part achieved through courts of law, was finding some way to situate the case within existing authority.

The first reported case<sup>7</sup> in which an indigenous Australian plaintiff asserted a claim to a private property interest based on principles of native title was *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141. The claim was dismissed by Blackburn J, who concluded that the common law did not recognise a doctrine of communal native title such as that which was asserted by the plaintiffs. In an apparent misreading of Blackstone, Blackburn J stated that:

The words 'desert and uncultivated' are Blackstone's own; they *have always been taken* to include territory in which live uncivilized inhabitants in a primitive state of society. [Emphasis added.] (At 201.)

Blackburn J found that the relevant aboriginal communities evinced "a subtle and elaborate system ... If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me." (At 267.) However, he regarded himself as being bound by *Cooper v. Stuart* and other Privy Council authority to hold as a matter of law that New South Wales was a settled colony, and that communally held aboriginal land was "desert and uncultivated" territory.

If one confines one's consideration of the history of land tenure to judicial doctrine regarding Australia, or even to that which is concerned with settled colonies, Blackburn J's decision seems to rest on less secure foundations than he thought. Such statements as those in *Cooper v. Stuart* and *Williams* were either assertions of fact or they were dicta (see also Hocking, 1993). Blackburn J's conclusion that the common law extinguished indigenous communal title was not disapproved by Brennan J in *Mabo* – rather, Brennan J held that the Australian common law was entitled to develop in a different direction from that of English colonial law and that neither this line of precedent nor the racist logic underpinning it formed a part of the Australian common law. The racist logic, however: the conclusion that Australian aborigines and Torres Strait islanders were considered “uncivilised” and “primitive” by the English colonial law, is not wholly apparent from the cases that we have so far considered. Rather, the presence of the aborigines is either entirely ignored or it is baldly stated that their rights were abrogated upon settlement. The missing piece of the jigsaw – the case that forced the hand of the English courts to justify dispossession – is *In re Southern Rhodesia*.

## **2. IN RE SOUTHERN RHODESIA**

The theory that the indigenous inhabitants of a “settled” colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing principles and proceed to inquire whether the Meriam people are higher “in the scale of social organization” than the Australian Aborigines whose claims were “utterly disregarded” by the existing authorities or the Court can overrule the existing authorities[.] (*Mabo* per Brennan at 40.)

*In re Southern Rhodesia* revolved around a dispute between the British South Africa Company (**BSAC**) and the Crown over the ownership of land in Southern Rhodesia. Decided in 1919, the case was referred to the judicial committee of the Privy Council

after the Legislative Council of Southern Rhodesia passed a resolution that the British South Africa Company did not own “unalienated” land. In order to make sense of the dispute that precipitated the case, it is necessary to say a little bit about the history of Southern Rhodesia (now Zimbabwe). Southern Rhodesia was a British Protectorate from the late 19<sup>th</sup> century until 1923, when it became an English colony (Roberts-Wray, 1966: 749). Pursuant to the terms of its Royal Charter, BSAC had the right to grant land in Southern Rhodesia and to apply the proceeds of that function to the cost of administering the Protectorate. The BSAC relied on this right and on a similarly worded agreement with the erstwhile king of the Ndebele to assert that it owned the land that it had not yet granted. When the dispute between the BSAC and the Legislative Council reached the Privy Council, counsel representing the Ndebele and Shona were also given leave to appear before the Judicial Committee. The decision characterises the role of the Ndebele and Shona in this dispute in the following terms:

By the disinterested liberality of persons in this country their Lordships had the advantage of hearing the case for the natives who were themselves incapable of urging, and perhaps unconscious of possessing, any case at all. (*Southern Rhodesia* re Lord Sumner at 232.)

Lord Sumner explained that the evidence supporting the Ndebele and Shona’s case was “respectable but slender” and that “it was really a matter for conjecture to say what the rights of the original “natives” were and who the present “natives” are, who claim to be their successors in those rights.” In the absence of positive proof of the rights of the Ndebele and Shona, the Privy Council fell back upon racial science to “approximate” the type of society that existed in pre-colonial Southern Rhodesia:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are 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. (*Southern Rhodesia* re Lord Sumner at 233.)

Lord Sumner concluded that within the spectrum of indigenous social organization, the Ndebele and Shona “approximate rather to the lower than to the higher limit” and that there was no evidence that their societies permitted them “some shadow of the rights known to our law”. Therefore, after the Ndebele king had been conquered by a BSAC force on behalf of the Crown, the Crown’s title to the land was not impeded by any claim that could be made by the Ndebele or Shona. (It is perhaps important for the present discussion that the Privy Council characterised the Crown’s entitlement to beneficial title in land in Southern Rhodesia as “residuary, for if these lands are not shown to belong to any private owner, the practical conclusion would seem to be that they are the Crown’s” – *Southern Rhodesia* per Lord Sumner at 231.)

In *Southern Rhodesia*, colonial rhetoric about respect for private property was put directly to the legal test before the highest British colonial court for perhaps the first time in the second empire.<sup>8</sup> The Ndebele and Shona were legally represented, albeit inadequately, in this action and the Judicial Committee couldn’t escape the fact that they claimed the property rights to which English precedent said they were entitled (Roberts-Wray, 1966: 626 – 7). Nor was it possible to say that they had abandoned their claim or ceded their rights to the Crown; or that the Crown had acted to extinguish their private property rights. *Southern Rhodesia* therefore represents a moment in which the colonial rhetoric of legal and moral legitimacy clashed directly with the raw mechanisms of power that were the more quotidian indigenous experience of colonisation. The Privy Council’s response to the challenge was to create a new rule: the private property rights of indigenous inhabitants would only be acknowledged by the courts if they pre-existed colonialism in a form recognisable to English common law. The court was forced to

reveal (and to endorse) the moral logic underpinning dispossession in a way that it had previously been able to avoid. (Hussain, 2003: suggests that this was a relatively common legal response to the exigencies of colonial rule.)

Instead of suggesting that the Privy Council's decision in *Southern Rhodesia* might shed some particular insight on early twentieth century Australian society, I am interested in why Brennan J chose in 1992 to position *Southern Rhodesia* as a crucial part of the legal past from which the High Court of Australia sought to distinguish itself. The answer to this question lies at the heart of Brennan J's decision in *Mabo*. I have already suggested that the English and Australian courts were able to ignore or downplay the presence of indigenous Australians until the question came squarely before Blackburn J in *Milirrpum*. Similarly, it was now open to Brennan J to distinguish *Southern Rhodesia* on the basis that Meriam society was one of settled inhabitants governed by settled law, or on the basis that as a Privy Council decision it did not bind the Australian High Court. Notwithstanding that Blackburn J had considered the characterisation of Australian aboriginal society to be a question of law rather than fact; it was clearly open to Brennan J to decide the reverse. To have done so, however, would have cast a shadow over a decision that Brennan J plainly intended to constitute a break with the racist legacy of colonialism. If Brennan J had not overruled *Southern Rhodesia*, every subsequent Aboriginal and Torres Strait Islander native title claimant would have been faced with the prospect of establishing that his or her society was one that was sufficiently "civilised" for its system of land tenure to be recognised at common law. It was plainly unacceptable to Brennan J that future claimants should be placed in such a position. Accordingly, Brennan J cast the "discriminatory denigration of indigenous inhabitants, their social organization and customs" out of the Australian common law and into another time, another place:



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. Yet the supposedly barbarian nature of indigenous people provided the common law of England with the justification for denying them their traditional rights and interests in land ... (*Mabo* per Brennan J at 59.)

In place of the logic underpinning *Southern Rhodesia*, Brennan J sought to delineate a test that would respect the law and culture of indigenous Australians within a framework provided by the common law. This reflected Brennan J's concern to achieve present justice for indigenous Australians, while correspondingly securing the basic structure and principles of Australian common law. These concerns are better appreciated when we contrast Brennan J's approach with that of the sole *Mabo* dissident, Dawson J.

### **3. ANOTHER HISTORY**

[I]f traditional land rights (or at least rights akin to them) are to be afforded to the inhabitants of the Murray Islands, the responsibility, both legal and moral, lies with the legislature and not with the courts. (*Mabo* per Dawson J at para 110.)

Brennan J's belief that it was in the Australian community's common interest to recognise the native title interests of indigenous Australians was by no means universally shared, as many of the media and political responses to *Mabo* demonstrated. Dawson J's dissenting judgment reflects the now dominant approach to Australian history. In this dissent, Dawson J expresses regret for the actions of the Colonial authorities but denies that contemporary Australian courts have the power to correct historical or political wrongs. Although conservative historians are quick to charge their more liberal counterparts with a lack of scholarly rigour, liberal historians have also gone to some lengths to point out the sleights of hand and methodological gymnastics in

conservative accounts. As I suggested in the introduction, all history is selective, and I believe that we can learn far more from the debate around *Mabo* if we focus on what the competing historical accounts can tell us about our competing visions of the Australian present and future. Accordingly, rather than focusing on the gaps and choices in Dawson J's account of the legal history, I will discuss the contemporary concerns reflected in Dawson J's judgment before returning to what I see as the limitations of Brennan J's approach.

Dawson J's approach to legal history is encapsulated in the following lengthy quote from his *Mabo* judgment:

The policy of the Imperial Government during this period [of British appropriation of Australian land during the 18<sup>th</sup> and 19<sup>th</sup> centuries] is clear: whilst the aboriginal inhabitants were not to be ill-treated, settlement was not to be impeded by any claim which those inhabitants might seek to exert over the land. Settlement expanded rapidly and the selection and occupation of the land by the settlers were regulated by the Governors in a way that was intended to be comprehensive and complete and was simply inconsistent with the existence of any native interests in the land.

...

There may not be a great deal to be proud of in this history of events. But a dispassionate appraisal of what occurred is essential to the determination of the legal consequences, notwithstanding the degree of condemnation which is nowadays apt to accompany any account. The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that, and that is a matter for government rather than the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognize its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided. (*Mabo* per Dawson J at para 43 and 48.)

Like Brennan J's judgment, Dawson J's account of Australia's imperial history renders a fragmentary and contradictory documentary history cohesive and overwhelming. Implicitly claiming that his conclusions obviously and ineluctably follow from the historical sources, Dawson J presents a very different account of the relationship between historical government policy and the contemporary duties of Australian common law courts from that propounded by Brennan J. Dawson J's account is an eloquent example of the discourse also employed by conservative historians such as Geoffrey Blainey and by conservative politicians such as the present Australian Prime Minister, John Howard. These individuals argue that Dawson J's approach is both more honest than that of Brennan J in its account of imperial policies, and more appropriate in permitting contemporary Australian society to move beyond the wrongs of the past. Critics of the "black armband view of history", a pejorative term Australian conservatives commonly apply to the approach reflected in Brennan J's decision, argue that elitist compunctions about past injustices fail to engage with the more pressing demands of contemporary Australian society. The alternative conservative approach denies the continuing effects of colonisation on indigenous Australians and on contemporary Australian society as a whole, depicting today's Australian society as a democratic meritocracy in which present social and economic advantage are the consequences of individual skill and hard work. Although Dawson J. avoided commenting on contemporary relations between non-indigenous and indigenous Australians, his judgment helped enable the political discourse that severs contemporary government policy from Australia's colonial past. This is implicit within Dawson J's conclusion that while past injustices are regrettable, their effects are confined to the realms of history and politics and are outside the purview of the contemporary judicial system. By contrast, Brennan J's *Mabo* judgment connects the present inequalities between non-indigenous and indigenous Australians directly with

the past injustices of the English common law, opening space to construct an Australian common law that seems to break with its former complicity with political racism.

In the more sombre atmosphere of 2007, with the conservative approach to history prevailing in Australian political discourse, it seems almost churlish to suggest that Brennan J failed to escape the traces of racism in his *Mabo* judgment. Nevertheless, and particularly in light of the slightly disappointing native title decisions of the last few years,<sup>9</sup> it feels timely to ask whether *Mabo* was as revolutionary as has often been suggested. I began by suggesting that our characterisation of the past can tell us a great deal about our present and ourselves. In the final section, I return to that idea as a means of exploring the central paradox within Brennan J's judgment in *Mabo*. Seeking to move beyond the racial binary between the civilised Europeans and the barbarian Aborigines and Torres Strait Islanders; Brennan J created a distinction between contemporary Australian society and traditional indigenous laws and customs. Claiming for the common law a right to adapt and change; Brennan J denied the same right to indigenous Australians, thereby confining them to the past from which he had sought to distance the Australian common law.

#### **4. A NEW AUSTRALIAN COMMON LAW?**

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been subsequently maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native law has disappeared. (*Mabo v. Queensland (No. 2)* per Brennan J at 59 – 60.)

Brennan J's *Mabo* judgment is characterised by a sense of cautious optimism. The possibility of breaking with the past – recreating one's nation anew – was tangible in the early 1990's, at a time when the Berlin Wall had fallen and South Africa was moving towards the end of apartheid. The importance of being just to those who had suffered as a result of colonisation was reinforced by the events in Somalia, which was imploding under the weight of ethnic tensions; and in Zimbabwe, where President Mugabe had withdrawn from land reform discussions with the British government on the basis that they were proceeding too slowly. In Zimbabwe, formerly Southern Rhodesia, the denial of land to the black majority had resulted in a situation in which the white population (which in the early 1990's constituted 1% of the population) owned 70% of economically viable agricultural land. By the time that *Mabo* came before the High Court it was increasingly clear that Zimbabwe faced enormous social and political conflict as a result of its colonial history of dispossession. While there are enormous differences between the Australian and Zimbabwean colonial histories, Brennan J may have found the decision in *Southern Rhodesia* an unpleasant precursor to contemporary Zimbabwean race relations.

Domestically, there was also a heightened awareness of indigenous issues. The Report of the Royal Commission into Aboriginal Deaths in Custody was released in April 1991 (Johnston, 1991). The Commonwealth Parliament had voted unanimously in 1991 to establish the Council for Aboriginal Reconciliation (Reconciliation Australia, 2006). 1993 was to be the international year of indigenous people and in December 1992, six months after *Mabo* was decided, Paul Keating delivered his famous "Redfern speech". In this speech, Keating suggested that it was time for non-aboriginal Australians to take responsibility for the harm done to indigenous Australians as a result of colonisation:

The starting point might be to recognise that the problem starts with us non-Aboriginal Australians.

It begins, I think, with the act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion.<sup>10</sup>

In the political climate of 1992, it seemed more than possible to move away from the racism that had marked the colonial past.

There were at least three important limitations on Brennan J's ability to break with the past in his *Mabo* judgment. First, the legitimacy of the transfer of sovereignty to the Crown was not a justiciable issue in Australian courts (*Mabo* per Brennan J. at 31; Russell, 2005:248). Second, Brennan J concluded that he was constrained to ensure that his decision would not "fracture the skeleton of principle" on which the Australian legal system hung (at 29 – 30). Third, Brennan J concluded that the Crown could extinguish native title at any time provided that it evinced a clear and plain intention to do so (at 64, compare the decision of Deane and Gaudron JJ). While *Mabo* would therefore always represent a compromise (Russell, 2005: 248) between present-day colonial interests and present-day indigenous claims, Brennan J was determined to carve out a space within which indigenous communities could claim and be granted recognition for their prior claim to Australian land. The contours of that space were fundamentally determined by the limitations that Brennan J perceived, and these contours have been exhaustively mapped by Russell (2005), Pearson (1993) and many others. I am less concerned with these outer limits of the recognition of native title, and more interested in the substance of the space within which it is possible to assert title.

In *Mabo*, Brennan J set out a test for recognising native title. He expressed the test as one that depended more on the internal criteria of the society whose claim was at stake than it did on the external criteria of the common law: “Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.” (At 58.) The internal test then was one of traditional laws and traditional customs, with the external gloss that indigenous claimants must demonstrate an uninterrupted connection between the traditional laws, the traditional customs and the land. This test was predicated on a particular vision of what is distinctive about indigenous Australian societies – a notion that what is “authentic” about these communities can only be that which existed in a pre-colonial time (Tuhiwai-Smith, 1999: 24), perhaps with the odd “modern” accoutrement such as a motorised boat or refrigerator (*Yanner v. Eaton* [1999] HCA 53 per Gummow J at ¶¶68 - 70). Requiring native title claimants to prove tradition required them to deal with the obstacles presented by the colonial past that was disowned by Brennan J and to fit themselves within an idea about aboriginality that is largely a non-aboriginal construct (Anderson, 1995). While predominantly white “Australian” society can change and adapt itself to contemporary circumstances, an indigenous society that does the same risks being accused of “loss of culture, acculturation” (Frank, 2000:164) and worse: losing its land rights. Brennan J’s vision of the past demonstrates his faith in the ability of society to adapt to new circumstance and to acknowledge past wrongs: but it is a particularly asymmetrical vision – one in which indigenous societies have either remained static or been destroyed while dominant Australian society worked its way towards a more tolerant present. This characterisation of indigenous society as timeless demonstrates how thoroughly Brennan J regarded indigenous Australia as other to his European Australian self. The failure of his judgment in *Mabo* is a failure to see that other as being as complex, as changeable and as contemporary as himself.

Notwithstanding Brennan J's reference to the internal criteria of traditional indigenous laws and customs, the "museum culture" (Frank, 2000) imported by Brennan J into the Australian common law arguably constitutes a modern, and more kindly-intended, version of the ratio decidendi in *Southern Rhodesia*: the private property rights of indigenous inhabitants will only be acknowledged by the courts if they pre-existed colonialism in a form recognisable to [Australian] common law. This is not the same as saying that *Mabo* didn't change anything: it did offer indigenous Australians at least the hope of greater recognition of their place in Australian history, and it provided a more honest account of the relationship between Australian colonisation and indigenous dispossession. But in the final analysis, despite Brennan J's best intentions, *Mabo* did not displace racism and empire-building to another time and place. The common law of Australia, built as it is on the ultimate fact that sovereignty was wrested from indigenous Australians, retained the right to decide when and where race and empire comes into play. Native title is a white Australian construction: its necessity comes from the fact of colonialism; the questions of who is indigenous, when a law or custom is traditional, how a law or custom might be expressed are all ultimately constrained by the force at the heart of Australian law (Derrida, 1992). It is not possible fully to do justice to indigenous Australians through an Australian common law that owes so much to its colonial past – but nor is it justly possible to refuse to try. In a different time and place, Brennan J deserves recognition for having done at least that much. Much more remains to be done.

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<sup>1</sup> Except as identified in the text of this article, Mason C.J., Deane, Toohey, Gaudron and McHugh JJ agreed for relevant purposes with Brennan J's judgment in *Mabo v. Queensland*. Accordingly, I take Brennan J's judgment to be indicative of the High Court of Australia's treatment of the legal history of indigenous land tenure in Australia and of the place of *In Re*



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*Southern Rhodesia* in that history. Deane, Gaudron and McHugh JJ disagreed with Brennan J to the extent that Brennan J held that native title could be extinguished by a clear legislative intent of the Crown without the need to pay compensation and without a breach of fiduciary duty by the Crown. Dawson J dissented.

<sup>2</sup> Tuhiwai Smith (1999) argues persuasively that to speak of the “post-colonial” obscures the present and continuing incursion of white values, philosophies and mores into indigenous culture and society in societies such as Australia.

<sup>3</sup> See McGrath, 2006 and Fitzmaurice, 2006 for more thorough reviews of Connor’s book, including some suggestions that Connor may also have permitted himself the odd sleight of hand in making his case for the culpable invention of terra nullius.

<sup>4</sup> I am grateful to Professor W. Wesley Pue for helping me to clarify my understanding of this aspect of Brennan J’s reasoning. While Brennan J’s judgment is often criticised as an example of judicial activism (e.g. Lane 1996; Evans 1995), I read it as a judgment in which Brennan J identified that the pre-existing common law (other than *Southern Rhodesia*) did not compel a particular outcome. Brennan J was entirely forthright that he was extending the common law to cover a dispute that had not previously arisen in the same form in the jurisdiction. According to positivist legal theory, this is a necessary function of common law judges: “if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become a ‘source’ of law.” (Hart 1994 at 96, see also 273 – 4.)

<sup>5</sup> I use the words “could not be pressed” rather than “were not pressed” to make the point that, in the cases I am discussing (from *Attorney-General v. Brown* to *Williams v. Attorney-General*), the traditional indigenous owners of the relevant land were not parties to the case and had no legal representation. Furthermore, because of pervasive discrimination against Aborigines in relation to citizenship, education, living standards, access to the professions and the right to select land, the traditional owners had neither the means nor the opportunity to press their claims to land. See Wolfe (1994) for a description of the phases of colonization as they relate to Aboriginal Australians.

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<sup>6</sup> See, for example, the methodology adopted by Keith Windschuttle in *The Fabrication of Aboriginal History, Volume One: Van Diemen's Land 1803 – 1847* (2002). For a more sustained discussion of this point see Manne (ed.), 2003.

<sup>7</sup> I am using “case” in its narrow legal sense in this context. It should be clear from what follows (and, frankly, from the course of history) that I do not suggest that Aborigines had not asserted their rights to land via other (non-judicial) means before 1971. Rather, the *Milirrpum* case was, for a combination of historical reasons, the first occasion on which an Aboriginal plaintiff brought a “native title” case before an Australian court and the first time that an Australian or English court was required to rule directly, as opposed to obliquely, on the question of whether native title survived the transfer of sovereignty over Australian territory to the Crown.

<sup>8</sup> The second empire is defined by P.J. Marshall as the British Empire of the late eighteenth century, which ceased to consist primarily of communities of free settlers of British origin and became an empire of “peoples who were not British in origin and who had been incorporated into the empire by conquest and who were ruled without representation.” (Marshall, 2001 cited by Hussain, 2003: 25.

<sup>9</sup> Examples of these decisions include *De Rose v. State of South Australia* [2005] FCAFC 110 on the question of whether illegal acts of a pastoral leaseholder can extinguish native title; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 in relation to the need to demonstrate a continuing traditional connection with the land

<sup>10</sup> Paul Keating, speech delivered at Redfern Park in Sydney on 10 December 1992. The full text of this speech is available at <http://apology.west.net.au/redfern.html>.

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