# The Genealogy of *Terra Nullius*

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*This article examines the genealogy of the term* terra nullius, *which remains elusive even as it is now clear that the term is absent from the eighteenth- and early nineteenth-century historical record.*[1] *I show, however, that* terra nullius *was generated by the history of European expansion and, specifically, by the natural law tradition that since the sixteenth century was employed to debate the justice of colonisation. I conclude that the contemporary use of the idea of* terra nullius *is consistent with a tradition in which natural law was used to oppose colonisation.*

IT IS BECOMING widely acknowledged that the term *terra nullius* was not used in the eighteenth and nineteenth centuries to justify the dispossession of Australian Aborigines.[2] *Terra nullius*, it seems, was an impostor. Debate is turning to why we embraced this legal fiction. Beyond that, the obvious question is 'if not *terra nullius*, what was the legal reality of dispossession'? Several commentators argue that we should be turning away from a juridical history of dispossession.[3] They argue that legal histories turn dispossession into a legal event, abstracting it from reality. The dispossession of Aboriginal peoples, they observe, occurred through myriad different processes and events in everyday life and not through a body of legal and philosophical writings and court judgements completely removed from the colonial frontier.

I am sympathetic with this objection and I agree that dispossession should not be turned into a legal event. I would add, however, three reasons why the ways in which colonisation was justified (or not justified) are important to the history

[1] The author wishes to thank Saliha Belnessons, David Armitage, Bain Attwood and Duncan Ivison for extensive comments on earlier versions of this article.

[2] Since the mid 1990s a succession of historians, including David Ritter, Kate Beattie (one of my own research students), Michael Connor and Bain Attwood, have cast doubt on Henry Reynolds' and the Mabo judges' account of *terra nullius* as the doctrine of dispossession in Australia. See David Ritter, 'The "Rejection of *terra nullius*" in *Mabo*: A Critical Analysis', *Sydney Law Review* 18, no. 1 (1996); Kate Beattie, 'Terra Nullius and the Colonisation of Australia' (BA Honours thesis, University of Sydney, 1998); Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Sydney: Macleay Press, 2005); Bain Attwood, *'The Law of the Land* or the Law of the Land?: History, Law and Narrative in a Settler Society', *History Compass* 2 (2004): 1–30. Merete Borch, 'Rethinking the Origin of *Terra Nullius*', *Australian Historical Studies* 32, no. 117 (October 2001): 222, 1ff, acknowledges Ritter's point but prefers to use *terra nullius* as shorthand for a discourse of dispossession. Connor's recent attack on historians' use of *terra nullius* attracted media attention for having unmasked the myth but on that score he added nothing that Ritter had not already pointed out in his 1996 article. Clearly, the excitement generated in some quarters by Connor's work rests not upon the putative unmasking of *terra nullius* but upon a change in political context.

[3] See Ritter; Attwood; and Connor, *Invention of Terra Nullius*.

of colonisation. First, ideas shape and limit what it is possible for people to do. Second, legal ideas have been represented as the concern of social elites, but I would reject the idea that elite and popular mentalities were unbridgeable. This is particularly true of the natural law tradition of which *terra nullius* is a product. Natural law was not a formal or institutional system of law but a philosophy or, more accurately, a mentality. It informed the formal legal system at the same time that it informed and reflected Europeans' thinking more generally about their relations to each other and to the wider world. A third reason for examining the legal history of colonisation is that the justice of dispossession has become one of the most important political questions of the post-colonial world. This is not to say that questions in the legal present should be allowed to generate the historical past. But we cannot pursue reconciliation without addressing the justice of colonisation and we cannot address that question of justice without asking the historical question of whether and how colonisation was justified.

It would certainly seem wise to abandon 'juridical history' that has been responsible for anachronism in thinking about our past. But in doing so it is important not to sidestep the controversy created by the claim that *terra nullius* was a myth. That controversy must be met head on. If *terra nullius* was not employed in the eighteenth and early nineteenth centuries to justify dispossession, where did it come from? It is remarkable that even during the ascendancy of *terra nullius* as an historical tool no historian managed to answer this question and it remains unanswered. I will show that while the term *terra nullius* was not used to justify dispossession in Australia, it was produced by the legal tradition that dominated questions of the justice of 'occupation' at the time that Australia was colonised. *Terra nullius* is a product of the history of dispossession and the larger history of European expansion.

Most early and mid twentieth-century sources identify the polar regions debate of the late nineteenth century as the origin of the idea *terra nullius*.[4]

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[4] Camille Piccioni, *Revue générale de droit international public* vol. XVI (1909): 118; James Brown Scott, 'Arctic Exploration and International Law', *The American Journal of International Law* 3, no. 4 (October 1909): 941; Frantz Despagnet, *Cours de droit international public*, 4th edn (Paris: Librarie de la Sociétié du Recueil Sirey 1910, 1st edn 1893), 590–1; Ernest Nys, *Le droit international* vol. 2 (Brussels : M. Weissenbruch, 1912), 80; Ernest Scott, 'Taking Possession of Australia: The Doctrine of *Terra Nullius* (No-Man's Land)', *Journal and Proceedings, Royal Australian Historical Society* vol. XXVI, pt. 1 (1940), 1–19; Philip C. Jessup and Howard J. Taubenfeld, *Controls for Outer Space and the Antarctic Analogy* (New York: Columbia University Press, 1959), see, for example, 18, 34–9, 181, 257–8; Geir Ulfstein, *The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty* (Oslo, 1995). In an article in *The Australian*'s Higher Education Supplement ('Evidence Tailored to Fit an Argument', 15 March 2006) I claimed the origin of the term *terra nullius* was in the polar regions debate (following the sources above) and the earliest reference I could find in that debate was in 1909 by Piccioni. Michael Connor helpfully responded that the 28 August 1899 edition of *The Times* contained a reference to *terra nullius* in the context of the Venezuela Arbitration (see Michael Connor, 'Null Truth to Academic Accusations', *The Australian*, Higher Education Supplement, 5 April 2006; and *The Times Digital Archive*, 28 August 1899). Indeed, an even earlier reference can be found in 1885 in relation to the conflict between Spain and the United States over the Contoy Islands in 1850: Herman Eduard von Holst, *The Constitutional and Political History of the United States*, trans. J. Lalor from the German edition of 1877–92, vol. 4 (Chicago: Callaghan, 1885), 51. Holst claims that 'Barringer, the American ambassador at Madrid, was unquestionably right when he said that Contoy was not, in an international sense, a desert, that is an abandoned island and hence *terra nullius*'. While Barringer's 1850 correspondence reveals, however, the

Following the 'carve-up' of Africa in the 1870s and 1880s, European and North American states turned to the question of the only remaining parts of the globe that were not under sovereignty. These were the poles. After concerted exploration of the polar regions in the first half of the nineteenth century it was not until the 1890s that serious efforts were again made to reach and explore the North and South poles. Expeditions between 1898 and 1917 provoked a prolonged discussion of the poles' legal status (this discussion is now being reignited by the melting of the northern polar ice cap). The legal arguments concerning the North Pole were complicated by the realisation, as late as 1895, that there was no land under the ice. Could it be possible, the jurists wondered, to establish sovereignty over floating ice? Does the law of the sea apply to frozen water?[5]

The arguments found firmer ground when the jurists turned their attention to islands that lay within the Arctic Circle and over which no sovereignty had been established. The most important of these was Spitzbergen, between 76 and 80 degrees latitude north and approximately 800 kilometres north of the northernmost point of Norway. Spitzbergen should have been uninhabitable but it is located at the north-eastern end of the Gulf Stream, which moderates its climate and keeps its southern and western shores free of ice for half the year.

From at least the sixteenth century, European fishermen travelled north into the Arctic seas each summer. But from the seventeenth century the number of visitors to Spitzbergen increased—up to 20000 a year according to some accounts—and many began to establish habitation there. In addition to trawling the surrounding seas for fish and hunting for whales, trade in fur was established on the island. An international community of nomads, including Dutch, English, Norwegians and Russians, came each summer, with the majority leaving each winter (the island had no Inuit inhabitants). Finally, in 1906 permanent habitation was established along with the foundations for a new industry—coal. For the European states, these people formed an anarchic community: that is, they did not live under any formal sovereignty even if they had houses, flourishing commerce, a graveyard, a hotel and a bakery. By the late nineteenth century, polar exploration increased the pressure to resolve this situation and both Norway and Russia made strong claims to the island, although the treaty granting

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use of the natural and Roman law doctrine of the first taker, it does not contain the term *terra nullius*: see, 'Barringer to Pidal', Madrid, 19 September 1850, in *Diplomatic Correspondence of the United States: Inter-American Affairs* vol. XI, 'Spain' (Washington, 1939): 557. (I would like to thank David Armitage for assistance with this reference.) The precise origin of the term could take some more months of research to discover. Sources that point to the polar regions debate as the origin cite diplomatic correspondence between Sweden and Russia over Spitzbergen dating from 1871, see Ulfstein, *The Svalbard Treaty*, 36–7. But while that 1871 correspondence contains a statement of the law of the first taker applied to the island it does not contain the term *terra nullius*, see *ШПИЦБЕРГЕНЪ 1871–1912* [*Diplomatic Correspondence Spitzbergen 1871–1912*] (St Petersburg, 1912), '17/29 Марта 1871 года', 3. What is clear, however, is that many early and mid twentieth-century sources understood that the context of the polar regions debate was important to understanding the meaning of *terra nullius*.

5 For these debates see the *Revue générale de droit international public* from the 1890s to the 1910s.

Norway sovereignty over the archipelago of Svalbard, of which Spitzbergen was the principal island, was not signed until 1925.[6]

This all seems very remote from the dispossession of Australian Aboriginals. But it was in this context that the term *terra nullius* came to prominence. Between 1908 and 1911, the *Revue générale de droit international public* devoted many pages to the issue of sovereignty of the polar regions. In that journal in 1909, while trying to resolve the question of the sovereignty of Spitzbergen, the Italian international jurist Camille Piccioni described the island as *'terra nullius'*. Piccioni declared that

> The issue would have been simpler if Spitzbergen, until now *terra nullius*, could have been attributed to a single state, for reasons of neighbouring or earlier occupation. But this is not the case and several powers can, for different reasons, make their claims to this territory which still has no master.[7]

By this he clearly meant not that the island was uninhabited—he knew well that it was inhabited—but that it was inhabited in such a way that no sovereignty and very little property had been established: that is, it was inhabited sparsely with a low level of exploitation of natural resources.

Piccioni certainly helped popularise the idea of *terra nullius* in international law. Ernest Nys, in the 1904 edition of his *Droit international,* and Franz Despagnet in his 1896 *Essai sur les protectorats,* made no mention of *terra nullius*. But in the 1912 edition of *Droit international,* Nys adopted the term, citing Piccioni, and in 1910, just one year after Piccioni's article was published, Despagnet employed the term in his *Cours de droit international public,* again citing Piccioni. From that point, *terra nullius* was increasingly adopted in treatises on international law, although some authors continued to prefer *territorium nullius* in discussions of occupation and colonisation. By the 1930s the distinction between the terms was becoming blurred.

The question of whether Australia had been *terra nullius* at the time of colonial occupation was first posed in 1939, when Philip C. Jessup, a professor of law at the University of Columbia, wrote to the eminent Australian historian Sir Ernest Scott asking if Australia had been described as *terra nullius* during the period of occupation. Scott's answer was published one year later by the Royal Australian Historical Society, by which time he was dead. But Jessup (1897–1986) still had the majority of his career in front of him.

Surprisingly, while almost always referring to Scott's role in the debate, students of *terra nullius* in Australia have not pursued the link to Jessup. They often mention the fact that Scott's interest in the matter was provoked by a letter from a professor at Columbia, but they do not even mention Jessup by name.[8] Jessup's immediate interest in *terra nullius* was that he was running a seminar on

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[6] For the pre twentieth-century history of Spitzbergen, see René Waultrin, 'La question de la souveraineté des terres arctiques', *Revue générale de droit international public* vol. XV (1908): 78–125.

[7] Camille Piccioni, *Revue générale de droit international public* vol. XVI (1909): 118, my translation.

[8] See, for example: Connor, *Invention of Terra Nullius,* 12.

precisely that issue at Columbia, where he taught from 1925 to 1961. Jessup also held various senior UN posts including positions in the UN General Assembly and UN Security Council. In addition, he served as a judge on the International Court of Justice from 1961 to 1970, leaving five years before the court's use of *terra nullius* in the Western Sahara decision.

Ernest Scott was perceptive in his 1939 speculation that Jessup's interest in *terra nullius* was stimulated by American ambitions in the Antarctic (surely a hint to historians looking at the genealogy of the term).[9] Clearly, the debate over the polar regions had been an important context for the popularisation of the idea of *terra nullius*. Moreover, Jessup proved Scott right in his publication (with Howard J. Taubenfeld), twenty years later, of *Controls for Outer Space and the Antarctic Analogy*. As the title suggests, Jessup and Taubenfeld examined similarities in the legal conflicts over the Antarctic and space and they employed the tools of *'terra nullius'* and *'res nullius'* to assist the comparison.[10] This legal continuity points to the endurance of European expansion, which passed into the new frontier of space at precisely the historical moment that decolonisation was gaining momentum. As European expansion moved to this new frontier it carried its library of political and legal arguments with it. These arguments, and specifically the natural law tradition, that had been used to debate the justice of colonisation were now turned to space exploration. This should hardly come as a surprise because the ideas of the use and exploitation of nature that underpinned the natural law ideas of property were at the heart of the motivation for European expansion.

With the space race heating up in the context of the Cold War, the legal issues were urgent and the rules of effective occupation were re-examined in this new context. Both sides worried about whether it could be possible to claim sovereignty, for example, over the moon simply by sticking a flag into its surface—after all, this had been a ceremony that colonial powers had considered many times to be sufficient to claim sovereignty over various regions of the globe. It is perhaps hardly surprising in this atmosphere that the idea of *terra nullius* resurfaced in Jessup's discussion of outer space. The idea of *terra nullius*, generated by the assumption that property lies in use, could be employed to demonstrate that neither property nor sovereignty could be established by flag-waving ceremonies and other such symbolic gestures. Significantly, Jessup included a lengthy analysis of the Spitzbergen precedent in his analysis. His use of *terra nullius* in the context of the space race was not isolated—the term is employed widely in the literature on the law of space for the same reason that Jessup found it useful: namely, to control claims to property.

Between Ernest Scott and Paul Coe's use of *terra nullius* in 1978, discussions of *res nullius*, *territorium nullius* and *terra nullius* in application to Australian history

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[9] See Sir Ernest Scott, 'Taking Possession of Australia—The Doctrine of *Terra Nullius* (No-Man's Land)', *Journal and Proceedings, Royal Australian Historical Society* vol. XXVI, pt. 1 (1940), 1–19.

[10] Philip C. Jessup and Howard J. Taubenfeld, *Controls for Outer Space*, see, for example, 18, 34–9, 181, 257–8. See also Philip C. Jessup, *The Use of International Law* (Ann Arbor: University of Michigan Law School, 1959), 148–9.

were rare, for the obvious reason that occupation was regarded as just and as a *fait accompli*. But the terms did maintain their place as the focus of examinations of the law of occupation (including space law) in treatises of international law. It was for this reason that the International Court of Justice judges in the Western Sahara advisory opinion employed the term in 1975. They were simply using the standard term in the theory of international law for land contested in terms of its level of exploitation or 'effective occupation'. It would be a strange distortion of history indeed to see that judgement as the source of the 'modern' use of the term.

This is, of course, just half the story of *terra nullius*. Critics such as Ritter, Attwood and Connor have been correct to point out that we should not use *terra nullius* to describe a 'doctrine' of dispossession before the term was invented. But our understanding of the history of the law of colonial occupation would be very superficial if we did not attempt to understand how the idea of *terra nullius* was generated by nineteenth- and pre-nineteenth-century discussions of colonisation. *Terra nullius* was not born adult. It did not emerge spontaneously into the world.

Here historians have made an effort to explain that *terra nullius* was derived from the Roman law doctrine of *res nullius*.[11] But these efforts at historical clarification have just added to the layers of ambiguity and confusion, as there was no Roman law doctrine of *res nullius*. The relevant passage of Roman law is the law of the first taker, or the law *ferae bestiae*—literally, the law of wild beasts—in which the word *nullius*, 'nobody's', was employed. *Ferae bestiae* states that any thing, such as a wild beast, that has not been taken by anybody becomes the property of the first taker. The Roman law *Institutes of Justinian* provided the longest discussion and made the connection between the law of the first taker and natural law:

> Now things become the property of individuals in many ways: for of some things ownership arises by natural law which, as we have said is called the law of nations [*ius gentium*], and of others at civil law. It is more convenient to start with the older law and, obviously, the older law is natural law which the nature of things introduced with humankind itself ... Hence, wild animals, birds and fish, i.e. all animals born on land or in the sea or air, as soon as they are caught by anyone, forthwith fall into his ownership by the law of nations [*ius gentium*]: for what previously belonged to no one is, by natural reason, accorded to its captor [*quod enim ante nullius est id naturali ratione occupanti conceditur*].[12]

The Roman law of the first taker was first used to discuss the legal status of colonised land in the sixteenth century. The theologians of Salamanca, most famously Francesco de Vitoria, used *ferae bestiae* to argue that the Spanish conquests were unjust because the land and property of the vanquished American

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[11] Including both myself and Connor, who prefers to refer to 'the Roman concept *res nullius*'. Connor, *The Invention of Terra Nullius*, 47; Andrew Fitzmaurice, *Humanism and America* (Cambridge: Cambridge University Press, 2003), 140.

[12] J. A. C. Thomas, ed., *The Institutes of Justinian* (Amsterdam: North-Holland Publishing Co., 1975), Bk II, i, 11–12. See also Theodore Mommsen, ed., *The Digest of Justinian*, (Philadelphia: University of Pennsylvania Press, 1985), 487a: 'what presently belongs to no one becomes by natural reason the property of the first taker [*Quod enim nullius est, id ratione naturali occupanti conceditur*]'.

civilisations clearly had not been in a state where they could be appropriated by the first taker. He pointed out that there is an argument that this title—'by right of discovery'—is valid because:

1. All things which are unoccupied or deserted become the property of the occupier by natural law and the law of nations, according to the law *Ferae bestiae* (*Institutions* II, i. 12). Hence it follows that the Spaniards who were the first to discover and occupy these countries, must by right possess them, just as if they had discovered a hitherto uninhabited desert.[13]

But his response to this claim was unequivocal:

But on the other hand, against this third title, we need not argue long; as I proved above (I.1-6), the barbarians possessed true public and private dominion. The law of nations, on the other hand, expressly states that goods which belong to no owner pass to the occupier. Since the goods in question here had an owner, they do not fall under this title.[14]

He added that, therefore, this title 'provides no support for possession of these lands, any more than it would if they had discovered us'.[15]

Following Thomas Aquinas, Vitoria used Aristotelian natural law to argue that all things exist in potential. It is the nature of humans to release and exploit the potential of the physical and moral environment. According to this view, all trees, for example, are potential chairs. Where a people accomplish this exploitation of nature, they establish property and just dominion and can only unjustly be usurped of that property and dominion (for Vitoria this argument was very important for countering, on the one hand, the Protestant heresy that *dominium* was founded on grace and, on the other, the temporal claims of the church). For these scholastic theologians, Roman law was written natural law (or, written reason—*ratio scripta*) and the law of the first taker expressed succinctly the natural law principles that they applied to the question of colonisation.

These principles are foundational for Western cultures; they are not just the intellectual propositions of philosophers. The ideas that ownership of property is based upon use (later also expressed by John Locke) and more broadly that we demonstrate that we are human through the exploitation of nature (or that we are not human if we fail to do so) are fundamental to European history.[16] These ideas are not unique to Greek philosophy and Roman law; similar ideas are found throughout the Bible and through much of modern European thinking. The history of the legal arguments used to justify colonial dispossession follows the natural law heritage back through Vitoria, but it must be kept in mind that this history reflected broader movements in Western cultures.

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[13] Francesco de Vitoria, 'On the American Indians', in *Political Writings*, ed. Anthony Pagden (Cambridge: Cambridge University Press, 1991), 264.

[14] Ibid., 264–5.

[15] Ibid., 265.

[16] This is not to say that rival understandings of property did not flourish. For the idea that property is based not in use but consent, see, for example: Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, translation of the edition of 1688 by C. H. Oldfather and W. A. Oldfather, 2 vols (Oxford: Clarendon Press, 1934), vol. 2, 536; Christian Wolff, *Jus Gentium Methodo Scientificia Pertractatum*, 2 vols, trans. Joseph H. Drake (Oxford: Clarendon Press, 1934), vol. 2, 159.

What is striking about the polemics of the Salamanca school is that they used the law of the first taker to argue *against* the dispossession of conquered peoples, not (as historians would anachronistically have it) to establish a 'doctrine' of dispossession.[17] In the seventeenth century, the English, also seeking to rationalise their colonisation in America, turned to Vitoria and the natural law tradition. The English, however, made a crucial modification to his argument. They inverted it. They appreciated the potential in natural law for describing a people as not having exploited nature and not having established their humanity. According to the English publicists, the North American Indians had failed to turn trees into chairs and the English were therefore the first takers of that land. This argument reached its most celebrated formulation in John Locke's essay 'On property' in his *Two Treatises on Government.*[18] There were, therefore, two traditions of employing natural law in discussions of empire. The first, following Vitoria, was a defence of Indigenous rights; the second used natural law to justify dispossession. Throughout the eighteenth and nineteenth centuries both of these traditions were vibrant, and often both were evident in any one discussion of the problems of empire.

It was not until the eighteenth and nineteenth centuries that the term *res nullius* became reified as a doctrine of the law of the first taker in the law of nations regarding the status of conquered property (including property conquered in wars on the European continent).[19] Georg Friedrich von Martens, a Hanoverian diplomat and professor of law at the University of Göttingen, was the central figure in the late eighteenth- and early nineteenth-century efforts to codify the law of nations. In 1800, in his *Précis du droit des gens* (first written in 1788), Martens declared that: 'In the primitive state of man, nobody has the right of property over the things that surround them: in that sense they [the things] are *res nullius*'.[20] Martens dedicated his treatise to the Hanoverian princes 'de la Grande Bretagne', which was at that very moment launching the colonisation of Australia. Thus while the term *terra nullius* was not being employed at this time, the idea of *res nullius* was central to the discussion of occupation in the most

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[17] For an example of this anachronistic reading of Vitoria, see: Robert A. Williams, *The American Indian in Western Legal Thought* (Oxford: Oxford University Press, 1990); James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993).

[18] On the shift from the negative use of natural law by the School of Salamanca to defend Indigenous rights to Locke's use of natural law to justify colonisation, see: Andrew Fitzmaurice, 'Moral Uncertainty in the Dispossession of American Indians', in *Virginia and the Atlantic World*, ed. Peter Mancal (Chapel Hill: Omohundro Institute for Early American History, 2007).

[19] This tendency to reification is evident in Georg Freidrich von Martens' *Précis du droit des gens modernes de l'Europe* (Göttingen, 1800; first published 1789); and in 1831, for example, in Jean Louis [Johann Ludwig] Klüber's *Droit des gens* (Paris, 1831 reprinted from 1819 edition): 'Un état peut acquérir des choses qui n'appartiennent à personne (*res nullius*) par l'*occupation*'. One of the earliest and most extensive uses of the term *res nullius* is in Immanuel Kant, *Metaphysics of Morals*, first published in 1797. See Kant, *The Metaphysics of Morals*, trans. Mary J. Gregor, Cambridge University Press, 1996, see for example 'The doctrine of right', Part 1, 'Private Right', Chapter 1, Section 6, sub-section 250–1, 'Postulate of practical reason with regard to rights': 'it is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become law, an object of choice would in itself (objectively) have to belong to no one (res nullius) is contrary to rights ...' (I would like to thank Duncan Ivison for this reference.)

[20] Martens, *Précis*, 65.

important codification of international law at the end of the eighteenth century, at the time Australian settlement was being initiated. Importantly, most discussions of *res nullius* in the nineteenth century were employed to argue negatively very much in the spirit of the Salamanca school: that is, *res nullius* was not used to justify dispossession but rather it was employed consistently to argue that colonised lands were not *res nullius* and therefore Indigenous peoples could not arbitrarily be dispossessed of their land and goods.[21]

This opposition was not motivated simply by high-minded or 'humanitarian' generosity to colonised peoples. What concerned the critics of colonial dispossession were the principles of property and rule of law that had been the focus of painful struggles in recent European history, from the Glorious Revolution to the American and French revolutions. While freedom from arbitrary power over property and life had been secured to some degree within Europe, many Europeans feared that their grip on these new-found freedoms was tenuous. They watched as metropolitan governments trampled on the same rights in the colonies—such as the secure possession of property, free from arbitrary imposition—that had been so dearly won in Europe. They feared that these abuses would very soon be repatriated into the European states from which they had been expelled.

In his treatise *L'occupation des territoires sans maître* (Paris, 1889), Charles Salomon sought to reject the proposition that 'sovereignty was a right to property' and on this basis he criticised the dispossession of colonised peoples.[22] He responded that 'This dangerous conception', which was adopted by 'absolute monarchy', 'was completely rejected from the public law of modern states by the French Revolution'.[23] His subsequent treatise, in which he attacked this 'absolutist' pretension in the context of colonial occupation, was thus in his eyes a

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[21] See, for example, Frantz Despagnet, *Cours de droit international public*, 598: 'A territory reigned by a sovereign barbarous even and organised in a rudimentary manner must not be regarded as *res nullius*' (my translation). See also Frantz Despagnet, *Essai sur les protectorats* (Paris: Librarie de la Société du Recueil Général des Lois et des Arrêts, 1896), 243; Gaston Jèze, *Etude théorique et pratique sur l'occupation* (Paris: V. Giard and E. Brière, 1896), 121–4; Ernest Nys, *Le droit international* vol. 2, 79–80; Édouard Engelhardt, 'Étude sur la déclaration de la conférence de Berlin relative aux occupations' *Revue de droit international et de législation comparée* vol. 18, 1886, 577; A. G. Heffter, *Le droit international public de l'Europe* (Paris, 1866), 133 and 141–3.

[22] Charles Salomon, *L'occupation des territoires sans maître* (Paris: A. Giard, 1889), 7.

[23] Salomon, *L'occupation*, 7; my translation. See also Jèze, *Etude théorique et pratique sur l'occupation*, 113, who, having reviewed all the arguments for colonisation, revealed his fears about the arbitrary power of the state over property: 'Some of the arguments brought forth are particularly dangerous. Indeed, for example, the argument drawn from the so-called right of necessity; without talking about the inaccuracy of the claim, that argument is invoked by all troublemakers. Isn't it necessity's authority that the adversaries of the right of property invoke in our country?' (my translation). Earlier in the nineteenth century, similar arguments were made by Benjamin Constant and Gérard de Rayneval. Constant's 1814 essay, 'De l'esprit de conquête', argued at length that conquest abroad subverts freedom at home: see Benjamin Constant, *Œuvres*, ed. A. Roulin (Paris: Bibliothèque de la Pléïade, 1957). Rayneval complained that European colonisers had 'violated all the principles of natural law and the law of nations ... upon which social order was founded in Europe': see Gérard de Rayneval, *Institutions du droit de nature et des gens* (Paris: Leblanc, 1803), 2 vols, vol. 1, 367, 21ff). In his magisterial study, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001), 106–7, Martti Koskenniemi mistakes Jèze and Salomon as humanitarian apologists for colonisation possibly because he does not perceive their concerns about metropolitan liberty.

defence of the principles of the revolution. The idea of *res nullius* offered these writers a legal instrument that could be used to defend the principles established in the modern state-based revolutions but at the same time could be used beyond the boundaries of the state because, as an expression of natural law, *res nullius* had, in the eyes of its adherents, universal application.[24]

We do know, however, that *terra nullius* was sometimes used positively to argue that land could be appropriated. So when was the polemical force of this legal tradition inverted? The answer lies at least partly in what is popularly known as the 'carve-up' of Africa in the late nineteenth century. As European powers each competed to get a piece of Africa for themselves, the German Chancellor, Otto von Bismarck, called a conference of imperial powers in the winter of 1884–85 in Berlin to establish some rules for the division of territories among them. Bismarck and many of his contemporaries feared that colonial competition could bring European states into conflict with each other.

The conference successfully established several principles of behaviour (even if they were not subsequently observed), foremost of which was the rule of 'effective occupation': namely, that sovereignty could not be claimed by flag raising or other such ceremonies but only through the effective exploitation of the land. This was, of course, a formalisation of the natural law principles that had been applied to colonisation since the sixteenth century. The corollary of this principle, recognised by the conference, was that where native peoples had established effective occupation their sovereignty could not simply be usurped (hence the subsequent enthusiasm for 'protectorates').

Between 3 and 8 September 1888, the Institut de Droit International met in Lausanne to distil the legal principles from the Berlin conference into regulations of international law. The institute had been established in 1873 to further the study of international law and it was the first professional association of that discipline.[25] In 1887 the institute had commissioned one of its members, F. de Martitz, a German professor of law at Tübingen, to present a report on the Berlin conference. It is in Martitz's report and the subsequent lengthy debate among members of the institute that there was first a shift from the terminology *'res nullius'* to *'territorium nullius'*. The difference was by no means simply one of semantics.

The first of nine 'articles' in Martitz's 'Projet de déclaration' was that:

> All regions which do not find themselves effectively under the sovereignty or the Protectorate of one of the States which form the community of the law of nations, no matter whether this region is inhabited or not, will be considered as *territorium nullius*.[26]

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[24] There is a widespread notion that nineteenth-century jurists rejected natural law, and its universal understanding of rights, in favour of a nationalistic understanding of rights that was promoted through positivist codifications of law. According to this account universal understandings of rights would only be resurrected after the devastation of World War II and the Holocaust, notably in the 1948 UN Declaration of the Rights of Man (see, for example, Anthony Pagden, 'Human Rights, Natural Rights and Europe's Imperial Legacy', *Political Theory* 31, no. 2 (2003): 171–91). Most nineteenth-century accounts of law, and international law in particular, drew upon natural law and positivism and did not see any opposition between the two.

[25] See Koskeniemmi, *Gentle Civilizer of Nations*.

[26] *Annuaire de l'institut de droit international*, 9e année, 1888, 247, my translation.

'It is an exaggeration', he argued, 'to talk about the sovereignty of savage or half-barbarian peoples'.[27]

At their Lausanne meeting, the members of the institute could not agree on a declaration of principles derived from the Berlin conference, nor could they agree on Martitz's report. But they did agree on one thing: namely, to annul the first article of Martitz's 'Projet'.[28] The opposition to Martitz was led by Édouard Engelhardt who had been the representative of the French government at Berlin. In the minutes to the Lausanne meeting we find that the President of the institute 'put into discussion' 'l'article 1er' of Martitz. Engelhardt immediately responded: 'M. Engelhardt wonders whether it would be possible to establish this rule of *territorium nullius* inhabited or not?'[29] Engelhardt then asked, 'In what conditions would a state be considered as belonging or not to the community of the law of nations? What is the situation of a state which submits to most of the rules of the law of nations, and rejects others?'[30] He challenged the condition of sovereignty itself:

> Other societies are actually outside the community of the law of nations, and remain, however, states worthy of being respected; such was the situation of the States of America at the time of the Spanish conquest. There are even some which are in certain aspects savage peoples, who are absolutely outside the community of the law of nations and yet it would be exorbitant to consider their territory as a *territorium nullius*.[31]

Engelhardt understood that Martitz was trying to shift the debate over occupation to a question of sovereignty, making it more difficult for a people to be free from the possibility of colonisation. While many anti-colonial writers had argued that it is illegal to colonise where any peoples whatsoever inhabited the land, Martitz was arguing that only sovereignty excluded the possibility of occupation. Engelhardt accepted the neologism *territorium nullius* and merely attempted to separate it from the question of sovereignty. Clearly, from their rejection of Martitz's project, a majority of the institute's members agreed with Engelhardt.

Martitz's innovation was not, however, so easily dismissed. He had argued that '*territorium nullius* is not the same thing as *res nullius*'.[32] In the debate over Martitz's 'Article 1', another institute member, M. Fusinato, a supporter of Martitz, explained why *territorium nullius* was different to *res nullius*:

> Mr Fusinato observes that the idea of *territorium nullius* in public law corresponds to the one of *res nullius* in private law. As *res nullius* in private law is not a current object of property, likewise in public law *territorium nullius* is not a current object of sovereignty. And just as the acquisition of *res nullius* is ruled by law, likewise in public law, the acquisition of *territorium nullius* has to be regulated.[33]

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27 Ibid., my translation.
28 *Annuaire* vol. 10, 1889, 201, 'l'article n'est pas admis'.
29 Ibid., 177, my translation.
30 Ibid., 178, my translation.
31 Ibid., 178, my translation.
32 *Annuaire*, 9e année, 1888, 247, my translation.
33 *Annuaire* vol. 10, 1889, 183, my translation.

Here Fusinato revealed that Martitz had attacked the heart of Vitoria's defence of colonised peoples (Vitoria was a constant focus of nineteenth-century jurists' discussions of colonial occupation).[34] It certainly was true that the doctrine of *res nullius*, or the law *ferae bestiae*, as principles of private law, or *droit privé*, seemed inappropriate instruments for dealing with the question of whether a state can colonise another territory, which appears to be an eminently public matter. For Vitoria, however, the restriction of the question of just conquest to an issue of *dominium*, or property, dictated that the test of whether occupation would be legal would be based upon a judgement about individuals. If individuals in the particular territory could be regarded as in possession of private property and to exploit nature, then occupation was inadmissible. As anti-colonial writers had been quick to see, this ruled out the colonisation of virtually all inhabited lands.

By establishing a new and parallel principle in public law, *territorium nullius*, to that of *res nullius* in private law, Martitz shifted the ground to a question of collective behaviour and collective rights. He understood that collective rights are far more difficult to establish than individual rights. The behaviour of an entire culture would have to pass the test for them to be free of occupation. For Martitz, only the exercise of sovereignty would constitute the collective expression that could exclude colonisation. Even the existence of extensive property rights would not be a bar to colonisation if sovereignty was absent. Significantly, the move from *res nullius* to *territorium nullius* was from a negative to what we may call a positive argument.[35] Whereas *res nullius* had been often used to say that particular lands or peoples could not be occupied, *territorium nullius* was clearly intended to be used to declare that certain territories could be subject to occupation, although it too was employed by critics of colonisation. In this way Martitz also attempted to create an argument that would address the anxiety of his contemporaries about the abuses of property in the colonies being repatriated to the metropolis (although Martitz's efforts did not satisfy jurists such as Charles Salomon).[36] While Martitz successfully raised the legal bar for the recognition of sovereignty, he was unable to control the descriptive force of his term. Subsequent discussions of *territorium nullius*, and *terra nullius*, often agreed with Martitz that many colonised peoples did not meet the conditions of sovereignty but they often also

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[34] For the use of Vitoria in discussions of colonial occupation, see, for example: Ernest Nys, *Les origines du droit international* (Brussels: Bohn, 1894), 129, see also 126–9; Ernest Nys, *Etudes de droit international et de droit politique* (Brussels: Alfred Castaigne, 1896), 126–7; Jèze, *Etude théorique et pratique sur l'occupation*, 103; Salomon, *L'occupation*, 44; Frantz Despagnet, *Essai sur les protectorats*, 242; Henry Bonfils, *Manuel de droit international public* 7th edn (Paris: Arthur Rousseau, 1914), 382.

[35] Connor appears to understand that there is a difference between *res nullius* and *terra nullius* on the issue of sovereignty, although he does not explain the reasons for this shift and he is seemingly unaware of the move from the negative to the positive use of the doctrine and its context: Connor, *Invention of Terra Nullius*, 50–1. To explain the difference between *res nullius* and *terra nullius*, Connor cites Lindley who was talking about the difference between *res nullius* and *territorium nullius*.

[36] For Salomon's use of *territorium nullius* to argue against colonial occupation, see Salomon, *L'occupation*, 200.

disagreed, starting with Engelhardt.[37] The scepticism of the Salamanca school was not entirely expunged.

This still leaves us with the matter of how jurists understood *terra nullius* to be different from *territorium nullius*. Both terms are species of the natural law of the first taker. Clearly, in Latin, whereas *'territorium'* carried the sense of 'territory' that was appropriate to Martitz's emphasis upon the level of political sophistication, *'terra'* implied a question of land. These meanings are significant given that one of the terms was coined with the occupation of Africa in mind while the other was believed to be appropriate to polar regions inhabited by European subjects or not inhabited at all. *Terra nullius* was judged to be inappropriate for Africa for the reason that the native peoples were understood to have established extensive property rights in the land. Thus *terra nullius* referred to an absence of property. It hardly needs to be added that it also indicated an absence of sovereignty since it is fairly obvious that where there is such a low level of exploitation of nature that property has not been created, it follows that the far greater degree to which nature must be exploited to create sovereignty is also lacking.[38] The notion of *territorium nullius* conceded the possibility of property existing without sovereignty having been established. It thus could allow colonisers to establish *imperium*, or sovereignty, over territories while acknowledging local property rights. What was at work in this taxonomy was a progressive anthropology (which began to be elaborated in the sixteenth century) in which peoples were placed on a developmental ladder. Their position on that ladder would determine the degree of colonial intervention that could be justified. The differences deserve some serious historical research because they have implications for subsequent uses of both terms in the Australian context as well as in other former colonial states.[39]

One might wonder if the answer to this question is really important given that what was understood by the terms became confused and then fused, and given that *territorium nullius* appears to have slipped out of the vocabulary. But surely the issue to which recent controversy has paid so much attention is precisely how these legal terms came to be misunderstood and misused. Are we not, therefore, under an obligation to persist in the unravelling of that story?

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[37] *Annuaire de l'institut de droit international* vol. 10, 1889, 178. In 1926 M. F. Lindley argued that almost no lands occupied by Europeans had been *territorium nullius* (with the exception of Australia!) and for this reason he went to great lengths to prove that the vast majority had been acquired by treaty. See M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green and Co., 1926), 40–3. Treaty was, of course, yet another instrument of colonial occupation.

[38] Connor does not seem to appreciate that an absence of property implies an absence of sovereignty, see: Michael Connor, 'Null Truth', 28. He fails to understand that originally the difference between *territorium* and *terra nullius* was not that one applied to sovereignty and the other to property but that both referred to an absence of sovereignty while one acknowledged the existence of Indigenous property and the other did not.

[39] Michael Connor has criticised Henry Reynolds for treating *terra nullius* as the same as *res nullius* (Connor, *Invention of Terra Nullius*, 50–1). Yet he insists that there is no difference between *territorium nullius* and *terra nullius* (Connor, 'Null Truth', 28). It is not possible to have it both ways. Either the differences between the species of the law of the first taker are negligible or Connor makes precisely the same fault upon which he bases his case against Reynolds.

The sceptical use of the arguments *ferae bestiae, res nullius* and *territorium nullius* sheds light on the current disputes about *terra nullius*. It is often stated that the Mabo judgement rejected the doctrine of *terra nullius*. In fact, the judgement was consistent with a five-hundred-year tradition of employing natural law—and in this instance, the idea of *terra nullius*—to consider the justice of colonisation. (Whether the common law can draw on natural law is a matter we might refer to Sir William Blackstone, but Mabo was certainly not the first time the common law trespassed that boundary.)[40] The Mabo judges argued that Australia was not *terra nullius* when it was occupied by Europeans. In this sense their arguments (and also those of the Western Sahara Advisory Opinion) were consistent with the negative use of the natural law tradition and its instruments *ferae bestiae, res nullius* and, to a lesser degree, *territorium nullius* and *terra nullius*, to defend the rights of Indigenous peoples. The judges were not rejecting *terra nullius* so much as reviving it for a longstanding critique of colonisation. Similarly, Henry Reynolds' *The Law of the Land*, while not good history to the degree that it is anachronistic (and there is much that was and is of use in the work), is typical of numerous works of legal history that applied these terms to the past anachronistically and it is also typical of the same tradition of the negative use of natural law to defend Indigenous rights. These recent discussions of *terra nullius* added a chapter to a very long tradition of legal scepticism concerning the arbitrary claims of European colonisers.

Natural law arguments were also, of course, used to justify dispossession. *Terra nullius* was anachronistic history but what it described was an approximation of the positive use of the law of the first taker in natural law to justify dispossession. More importantly, *terra nullius* was a species of the law of the first taker that dominated the justification of colonial dispossession from the sixteenth to the twentieth centuries. The cultural disposition that produced *terra nullius*, particularly attitudes to the exploitation of nature and the belief that property is created by use, permeated the entire experience of European expansion. It was for this reason that the legal history that produced *terra nullius* was able to stand for some time as a reasonable account of how Europeans justified colonisation in Australia. *Terra nullius* was not just a description of those justifications (as Henry Reynolds has argued in his own defence) but their product.

What difference does it make, however, that the law of the first taker (including the concept *terra nullius*) was also used, right up to the Mabo judgement, to oppose colonial dispossession? Historians have largely ignored or misunderstood this story of opposition. One of the central questions discussed by historians internationally for the past thirty years is the degree to which Western political institutions, or 'liberalism', were implicated in the expansion of Europe and the consequent miseries of slavery and the dispossession of countless colonised

[40] Blackstone made extensive use of natural law. When, for example, he divided the types of colonies into those gained by occupation, cession and conquest, he observed that 'these rights are founded upon the law of nature, or at least upon that of nations', see William Blackstone, *Commentaries on the Laws of England* 4 vols, 21st edn (London: Stevens and Norton, 1844), vol. 1, 107.

peoples. Overwhelming evidence has been produced, for example, that demonstrates that central figures in the development of Western understandings of liberty, such as John Locke and John Stuart Mill, were deeply involved in the business of empire and, what is more, used that involvement to develop their understanding of freedom.[41] In consequence, there are many within this debate who regard Western political institutions as irredeemable in the face of the challenges posed by decolonisation. How is it, they ask, that the institutions and ideas that were responsible for the dispossession of Aboriginal peoples can now be employed to negotiate their rights?

If, however, we appreciate that there was a Western political tradition that defended the rights of colonised peoples and, moreover, saw the freedom of those peoples as inherently linked to the freedom of the 'coloniser', it becomes possible to think about reconciling Aboriginal rights and Western democracy (which would seem a pragmatic outcome, at the least, given that liberalism does not seem likely to collapse in the near future).[42] It was apposite, for this reason, that Henry Reynolds wrote at such length on anti-colonial thought in the first part of *The Law of the Land*. And it is interesting in this context that Bain Attwood claimed that Reynolds' project was to rescue the rule of law and liberalism (although Attwood perhaps does not look upon that act positively).[43] It is certainly in this context that the Mabo judgement must be understood. The judgement sits within a five-hundred-year tradition of the negative use of the law of the first taker to defend Indigenous rights. Mabo is not good history and it may not be very good common law, but it is clearly continuous with a Western judicial tradition that attempted to rescue liberty (or, in this case, liberal democracy) from the threat posed by the dispossession of colonised peoples.

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41 The best recent analysis of the development of Locke's ideas in the context of his role as secretary to the Lords Proprietor of Carolina is: David Armitage, 'John Locke, Carolina, and the Two Treatises of Government', *Political Theory* 32, no. 5 (October 2004): 602–27. For a recent discussion of Mill in the context of empire, see Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton: Princeton University Press, 2005).

42 This suggestion is taken up in Duncan Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002).

43 Attwood.