NATIVE TITLE AS DISPLACED MEDIATOR

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This article considers how native title is a legal manifestation of settler colonialism that operates as a displaced mediator. Using native title cases from Australia and elsewhere, this article argues that native title displaces Indigenous laws, customs, and practices in constructing native title holders as 'traditional' to mediate their integration into the so-called 'modern' nation. Legal processes construct native title and then retroactively posit that these legal constructions pre-exist the Crown's acquisition of sovereignty. This provides legal support for the Crown's acquisition of sovereignty and Aboriginal and Torres Strait Islander peoples who assert native title claims become subjects who aver and reproduce the myth that the Crown acquired sovereignty over them. Native title displaces more unsettling, decolonising practices but produces the appearance of justice through the production of existential and material benefits for its subjects. Northern Territory v Griffiths (2019) 364 ALR 208 ('Timber Creek') demonstrates this.

I INTRODUCTION

Commentators have asserted that *Northern Territory v Griffiths* (2019) 364 ALR 208 ('*Timber Creek*') is the 'most significant',[1] a 'landmark',[2] or the 'biggest case since Mabo' in Australia.[3] Co-chair of the National Congress of Australia's

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1 William Isdale and Jonathan Fulcher, 'How Will Indigenous People be Compensated for Lost Native Title Rights: The High Court Will Soon Decide', *The Conversation* (online, 4 September 2018) <https://theconversation.com/how-will-indigenous-people-be-compensated-for-lost-native-title-rights-the-high-court-will-soon-decide-102252>.

2 Helen Davidson, 'High Court Native Title Award of $2.53m May Open Floodgates', *The Guardian* (online, 13 March 2019) <https://www.theguardian.com/australia-news/2019/mar/13/northern-territory-ordered-to-pay-253m-to-native-title-holders-in-legal-first>.

3 Felicity James, 'High Court Awards Timber Creek Native Title Holders $2.5m, Partly for "Spiritual Harm"', *ABC News* (online, 13 March 2019) <https://www.abc.net.au/news/2019-03-13/native-title-high-court-land-rights-spiritual-connection/10895934>. See also Richard Abraham and William Isdale,

First Peoples, Jackie Huggins, 'hailed' it as providing 'some comfort' while also noting that 'no amount of money can adequately compensate for cultural loss and its consequences'.[4] *Timber Creek* is a 2019 Australian High Court decision where claimants acting on behalf of the Ngaliwurru and Nungali Peoples argued that the Northern Territory had extinguished their native title rights.[5] The Northern Territory agreed that it had extinguished their rights, but disputed how to value extinguishment. The High Court's decision resolved how to calculate compensation for economic losses associated with loss of native title, the interest associated with that loss, as well as the loss or diminution of connection or 'traditional attachment to land' which it called 'cultural loss'.[6]

Noting 'that the dispossession of Indigenous peoples' land is not only something that happened in the past but is *ongoing*', Duncan Ivison writes, '[i]t was only in 1992 that the Australian High Court recognized Aboriginal "native title" … and only in 2019 that it recognized that compensation might be due for cultural loss as a result of dispossession'.[7] One could read Ivison as praising *Timber Creek*, which recognised that compensation owed due to cultural losses is an exception to ongoing dispossession. If so, then *Timber Creek* is a noteworthy example of how liberal states accommodate Indigenous peoples. Although it is not clear that these are Ivison's views,[8] it is worth questioning whether compensation for cultural loss is an exception to dispossession, a problematic continuation of dispossession, or something more ambiguous.

A reading that views *Timber Creek* as a positive development in how settler states accommodate Indigenous peoples, understands native title in a particular way. This way might uphold native title as 'an example of a Western legal system (late twentieth-century Australian property law, to be more precise) recognising an Indigenous form of land tenure, or relation to country'.[9] Such a general understanding of native title allows for a range of opinions about what it is: native title might involve some minimal recognition of Aboriginal and Torres Strait Islander peoples' own law within a colonial framework.[10] Similarly, native title could be viewed as a more 'generative right'.[11] What these opinions have in

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'Timber Creek: The Most Significant Native Title Decision Since *Mabo*', *MinterEllison* (Web Page, 21 March 2019) <https://www.minterellison.com/articles/timber-creek>.

4 National Congress of Australia's First Peoples, 'National Congress Hails Timber Creek Decision on Native Title' (Media Release, 15 March 2019) <https://web.archive.org/web/20190323060337/https://nationalcongress.com.au/national-congress-hails-timber-creek-decision-on-native-title/>.

5 *Northern Territory v Griffiths* (2019) 364 ALR 208 ('*Timber Creek*').

6 Ibid 255 [154] (Kiefel CJ, Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

7 Duncan Ivison, *Can Liberal States Accommodate Indigenous Peoples?* (Polity Press, 2020) 6 (emphasis in original).

8 Ibid 57–62. See also Duncan Ivison, 'Decolonizing the Rule of Law: *Mabo*'s Case and Postcolonial Constitutionalism' (1997) 17(2) *Oxford Journal of Legal Studies* 253, 259.

9 Ben Golder, 'Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law' (2004) 9(1) *Deakin Law Review* 41, 42.

10 Noel Pearson, 'The Concept of Native Title at Common Law' in Galarrwuy Yunupingu (ed), *Our Land is Our Life: Land Rights – Past, Present Future* (University of Queensland Press, 1997) 154, 159, cited in Golder (n 9) 42. But see Stewart Motha, '*MABO*: Encountering the Epistemic Limit of the Recognition of "Difference"' (1998) 7(1) *Griffith Law Review* 79.

11 Brian Slattery, 'The Metamorphosis of Aboriginal Title' (2006) 85(2) *Canadian Bar Review* 255, 259.

common is that scholars, commentators and claimants view native title as a means for addressing historical injustices and delivering some justice.

In opposition to those views, there are a range of critical views on native title law. It has been argued that native title determinations take place within a colonial framework with asymmetrical power dynamics, or that it is an Orientalist discourse that epistemically erases the 'Indigenous subject'.[12] Strelein and Tran argue that native title's promise 'as a mechanism for achieving a decolonisation of Australian land law and as a potential basis for the recognition of Indigenous peoples as self-governing peoples has been thwarted by overly "legal" processes'.[13] Irene Watson argues that 'the laws of Aboriginal peoples ruwi' is 'digging itself from the rubble of the aftermath and the impact of *Mabo [No 2]*, and the *Native Title* legislation, to excavate its way through an understanding of how unlawfulness continues in a space declared lawful'.[14] Other scholars have argued that it perpetuates, rather than reverses, colonialism.[15] Given these significant critiques from Indigenous and settler scholars alike, how does native title endure?

I agree with the critics that native title is a legal manifestation of settler colonialism, but it endures because it is a displaced mediator.[16] Through an interpretation of *Timber Creek* and native title jurisprudence in Australia and elsewhere, I argue that it endures because, as a displaced mediator, native title invisibilises through displacement and produces enjoyment for its subjects (rights claimants, as well as judges, lawyers, scholars, commentators and others). As a process of displacement, it replaces more unsettling and decolonising approaches with a 'quieter and more pragmatic voice'.[17] As a mediator, courts construct native title bearers as traditional, customary and mythical in order to mediate their inclusion in a so-called modern, rational and reasonable nation. Native title operates

12 Golder (n 9); Motha (n 10) 85–9; Penny Pether, 'Principles of Skeletons? *Mabo* and the Discursive Constitution of the Australian Nation' (1998) 4(1) *Law Text Culture* 115, 117; Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387; J Kēhaulani Kauanui, '"A Structure, Not an Event": Settler Colonialism and Enduring Indigeneity' (2016) 5(1) *Lateral* <https://doi.org/10.25158/L5.1.7>. See also Tyler McCreary and Richard Milligan, 'The Limits of Liberal Recognition: Racial Capitalism, Settler Colonialism, and Environmental Governance in Vancouver and Atlanta' (2018) 53(1) *Antipode* 724.

13 Lisa Strelein and Tran Tran, 'Building Indigenous Governance from Native Title: Moving Away from "Fitting in" to Creating a Decolonized Space' (2013) 18(1) *Review of Constitutional Studies* 19, 21.

14 Irene Watson, 'Buried Alive' (2002) 13(3) *Law and Critique* 253, 257–60.

15 Valerie Kerruish and Jeannine Purdy, 'He "Look" Honest – Big White Thief' (1998) 4(1) *Law Text Culture* 146; Sarah Keenan, 'Moments of Decolonization: Indigenous Australia in the Here and Now' (2014) 29(2) *Canadian Journal of Law & Society* 163, 168–72; Stewart Motha, 'The Failure of "Postcolonial" Sovereignty in Australia' (2005) 22(1) *Australian Feminist Law Journal* 107. See also Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford University Press, 1999) 140.

16 Jodi Dean, 'Zizek Against Democracy' (2005) 1(2) *Law, Culture and the Humanities* 154, 155–8, 162. Dean inherits the phrase from Slavoj Žižek: see Slavoj Žižek, *For They Know Not What They Do: Enjoyment as a Political Factor* (Verso, 2nd ed, 2002) 183–205 ('*For They Know Not What They Do*'); Slavoj Žižek, 'Eastern European Liberalism and Its Discontents' (1992) 57 (Autumn) *New German Critique* 25, 47. Žižek borrows the concept from Frederic Jameson's critique of Max Weber: see Frederic Jameson, 'The Vanishing Mediator: Narrative Structure in Max Weber' (1973) 1 (Winter) *New German Critique* 52.

17 Watson (n 14) 258.

as a displaced mediator because the process of mediation and displacement is, itself, displaced and mediated. To the degree that native title appears to recognise Indigenous laws or relations to land, and might, therefore, seem partially non-colonial or even progressive, that is an effect of the displaced mediator that occurs through legal construction. Courts construct and then displace what they construct by retroactively positing that their legal construction of native title pre-exists or 'survives' the Crown's acquisition of sovereignty.[18] The process does not end with the courts. Commentators use the legal result to support their own legal, social, or political projects and contest other views. That mediatisation or mediation of the legal result demonstrates broader, societal enjoyment in a legal case.

The argument I make is complementary to the argument that Robert Nichols makes in *Theft is Property! Dispossession and Critical Theory*. There, Nichols is responding to those critics who wish to

> catch Indigenous peoples and their allies on the horns of a dilemma: either one claims prior possession of the land in a recognizable propertied form – thus universalising and backdating a general possessive logic as the appropriate normative benchmark – or one disavows possession as such, apparently undercutting the force of a subsequent claim of dispossession.[19]

Taking the 'predicament of dispossession as a real problem', Nichols seeks to diagnose how dispossession occurs and is resisted, and, in so doing, theorise dispossession as a useful critique of 'colonialism, capitalism, and modern property relations in their global context'.[20] Under Nichols' approach, dispossession occurs through a combination of two, interrelated processes. The first, involves the transformation of 'nonproprietary relations into proprietary ones while … systematically transferring control and title of this (newly formed) property'.[21] The second, is that 'those negatively impacted by the process – the dispossessed – are figured as "original owners," but only *retroactively*, that is, refracted backward through the process itself'.[22] For Nichols, then, property within settler state contexts depends on theft as the mechanism and means for its generation or construction as property.[23] I find Nichols' approach convincing and aims appealing.

Like Nichols, my aim here is not to condemn any First Peoples for seeking native title determinations. I believe many First Peoples retain ways of living that are not based upon state law, even if they have been impacted or (partially) interpellated through colonial processes. It is also clear to me that native title claimants engage with settler state legal systems for various reasons, including because they are forced to, or have no other option. In doing so, many raise arguments that show how the legal system remains unjust, flawed, and discriminatory. I gesture to some

18 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 57 (Brennan J) ('*Mabo [No 2]*'); David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18(1) *Sydney Law Review* 5. See also *Calder v Attorney-General of British Columbia* [1973] SCR 313, 383 (Hall J).

19 Robert Nichols, *Theft is Property! Dispossession and Critical Theory* (Duke University Press, 2020) 8.

20 Ibid 9.

21 Ibid 8.

22 Ibid (emphasis in original).

23 Žižek writes, 'there is no "original" law not based upon crime; the institution of law as such is an "illegitimate" usurpation': Žižek, *For They Know Not What They Do* (n 16) 209.

of the moments of resistance that remain visible in the High Court's decision in the discussion of *Timber Creek* below. My overarching purpose in writing this article is to further illustrate, as Moreton-Robinson has pioneered, 'how the possessive logics of patriarchal white sovereignty discursively disavow and dispossess the Indigenous subject of an ontology that exists outside the logic of capital, by always demanding our inclusion within modernity on terms that it defines'.[24] My focus is on settler state law (not on First Laws), the production of whiteness, and how processes of dispossession endure.

Although my approach is similar to Nichols', it adds this: retroactively positing what is legally created provides the appearance that the Crown had already acquired sovereignty over the native title claimants, which creates a linear and progressive narrative structure so that the court and its subjects can assert that they merely inherit the result as they create it. Those who believe that native title is progressive make themselves subjects of this legal discourse, which, through myth, imbues their subject status with a universalised standpoint from which to objectively ascertain the unfolding of history as progress. As *Timber Creek* reveals, the subject status of the High Court Justices is mythically imbued with a universal standpoint from which to objectively ascertain the value of the Claim Group's relation to land and culture. In effect, native title reproduces national myth-making, which 'continues to sustain the force of imperialism'.[25]

More problematically, the judicial construction of native title makes native title claimants subjects of the Crown, who are then, from within the state's law, unable to question or undermine how or when the Crown acquired sovereignty (although they remain capable of questioning the Crown's acquisition of sovereignty from outside the law).[26] The legal processes entangle claimants in reproducing white/colonial national myths of progress, as all who are involved in these processes derive some existential and material benefits from it. When that occurs, settlers can believe that native title does *some* good or corrects *some* injustice (even if they note that native title, paradoxically, remains colonial). Those beliefs are further supported by the benefits deriving from the national myth. When this covert colonial process is produced as a pragmatic, reasonable, and progressive step in the right direction, it displaces more difficult and unsettling decolonising alternatives as unreasonable, impractical or unpragmatic. Although not further discussed here, and as a demonstration of how alternatives appear unreasonable, these alternatives may include: overturning the ability to extinguish or infringe native title, overturning the doctrine of tenure as a basis for the Crown's acquisition of radical title, undermining the basis of property and property-based relations in settler states, giving land back, paying reparations, fracturing 'the skeleton

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24 Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015) 191.

25 Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992) 111.

26 Courts are generally unable to question how courts obtain authority. See, eg, *Johnson v McIntosh*, 21 US (8 Wheat) 543, 580 (Marshall CJ) (1823): 'Conquest gives a title which the Courts of the conqueror cannot deny': at 588. In articulating native title, courts draw Aboriginal and Torres Strait Islander peoples within this myth, and failure to do so would undo the court's authority.

of principle which gives the body of our law its shape',[27] and so on. Most legal subjects probably find these steps unreasonable. I certainly find them unsettling.

On this account, *Timber Creek* is an important case because it helps establish that native title is a form of justice that integrates the claimants into an imperial legal system that transcends national jurisdictions as it facilitates national myth-making. The approach adopted here stands in opposition to linear and progressive views that native title is 'characterised by steps or stages towards attaining a greater understanding of the relationships between Indigenous people, land and Indigenous cultures, and *recognising those relationships at law*'.[28] That view is a progressive one. It also demonstrates how native title perpetuates a form of colonisation: the author's view is supposedly objective (which is supported by their subject status as a High Court Justice) as it upholds inherited colonial structures, subjects First Peoples to those structures, and applauds the continued extinguishment of First Peoples' relation to lands and culture. But the author embraces a myth of progressive or iterative process, which presents native title as becoming more reasonable, just, and fair. The progressive vision produces a sense of enjoyment in native title. So, even if it is widely acknowledged that native title is not perfect (or that it is colonial), legal subjects can enjoy the belief things are getting better or should be getting better.[29]

The purpose in making this intervention is to argue that decolonisation cannot and will not occur,[30] whether through treaties, structural reform, or other processes that embrace pragmatic and iterative approaches, as long as colonial forms remain invisible in plain sight. When colonisation is viewed as a process that involves intentions – as though minds must be tainted with prejudicially racist concepts to be derided – then the legal system will blindly reproduce imperial formations while legal subjects applaud their good intentions. After all, the structures justify their belief in progress. Colonisation will continue in unintentional ways because the nationalist myth that native title produces is one that legal subjects enjoy –

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27 *Mabo [No 2]* (1992) 175 CLR 1, 29 (Brennan J).

28 See Justice Michelle Gordon, 'The Development of Native Title: Opening Our Eyes to Shared History' (2019) 30 *Public Law Review* 314, 316 (emphasis in original); see also Henry Reynolds, 'After *Mabo*, What about Aboriginal Sovereignty?', *Sovereignty Union: First Nations Asserting Sovereignty* (Web Page) <http://nationalunitygovernment.org/content/after-mabo-what-about-aboriginal-sovereignty>.

29 In part, this is why those who critique native title can maintain that it started out with some radical potential but then became worse when legislated as the *Native Title Act 1993* (Cth) ('*NTA*'), which then lead to the subsequent *Wik Peoples v Queensland* (1996) 187 CLR 1 and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ('*Yorta Yorta v Victoria*') cases. See Keenan (n 15); Golder (n 9); Strelein and Tran (n 13). Regarding transitional justice, Park has recently argued that an 'orientation to futurity and the liberal telos' are hurdles to decolonisation: Augustine SJ Park, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice' (2020) 14 *International Journal of Transitional Justice* 260, 262. Short has conclusively argued that commercial lobby groups influenced legislation to ensure that native title perpetuated the status quo: Damien Short, 'The Social Construction of Indigenous "Native Title" Land Rights in Australia' (2007) 55(6) *Current Sociology* 857, 867 ('The Social Construction of Native Title in Australia').

30 Frantz Fanon, *The Wretched of the Earth*, tr Constance Farrington (Grove Press, 1963) 36; Eve Tuck and K Wayne Yang, 'Decolonization Is Not a Metaphor' (2012) 1(1) *Decolonization: Indigeneity, Education & Society* 1.

it settles and pacifies in ways that decolonisation unsettles and disrupts.[31] That is, legal subjects (claimants, but more importantly judges, lawyers, and other believers) receive existential confirmation of their views, which they enjoy as the legal processes produce and legitimate material benefits they receive. Before reading *Timber Creek* as a displaced mediator, it is necessary to outline in more detail how displaced mediators operate.

In the next section, Part II, I describe the concept of a 'displaced mediator'. After explaining how that operates, I argue in Part III that native title law is a displaced mediator. I argue that the High Court in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo [No 2]*') constructs native title and then retroactively posits that it pre-exists the acquisition of Crown sovereignty to make the Crown's acquisition of sovereignty appear legally objective and unassailable. As that section explores, that process is not limited to Australia. As an inherited myth that is tied to colonialism and imperialism, courts of the Crown in many settler states have made holders of native title, alternatively called Aboriginal title or Indian title,[32] into 'traditional' peoples with 'customs and practices'. By retroactively positing that the Crown already acquired sovereignty over those claimants so that courts can assert that the Crown has sovereignty in fact,[33] courts actively construct the Crown and its acquisition of sovereignty over holders of native title, which makes the claimants dependent on a doctrine of feudal tenure and into subjects of the Crown.[34] In Part IV, I explore how native title holders become (partially) modern through the extinguishment of their traditional cultures. *Timber Creek* retroactively finds that historical processes removed or extinguished native title holders' 'traditional customs and practices'. In exchange for reproducing the national myth that the Crown had previously acquired sovereignty over them, they receive compensation for the 'extinguishment' of portions of their 'traditional' culture. The arguments amongst the High Court Justices in *Timber Creek* reveal that the 'reasonable'

31 Tuck and Yang (n 30) 3.

32 Slattery, 'The Metamorphosis of Aboriginal Title' (n 11) 258.

33 See *Mabo [No 2]* (1992) 175 CLR 1, 54–7 (Brennan J), 82 (Deane and Gaudron JJ), 182 (Toohey J); *Western Australia v Commonwealth* (1995) 183 CLR 373, 420–3, 447–9 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Western Australia v Ward* (2002) 213 CLR 1, 91–5 [82]–[96], 163–5 [302]–[307] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Yorta Yorta v Victoria* (2002) 214 CLR 422, 441 [37]–[38], 443–7 [43]–[56], 458 [94]–[96] (Gleeson CJ, Gummow and Hayne JJ). For commentary, see Aileen Moreton-Robinson, 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the *Yorta Yorta* Decision' (2004) 3(2) *Borderlands E-Journal* 1–9 <https://eprints.qut.edu.au/7690/1/7690.pdf>.

34 See Matthew LM Fletcher, 'The Iron Cold of the Marshall Trilogy' (2006) 82(3) *North Dakota Law Review* 627, 651; Samantha Hepburn, 'Disinterested Truth: Legitimation of the Doctrine of Tenure Post-*Mabo*' (2005) 29(1) *Melbourne University Law Review* 1; Samantha Hepburn, 'Feudal Tenure and Native Title: Revising an Enduring Fiction' (2005) 27(1) *Sydney Law Review* 49; John William Tate, 'Pre-*Wi Parata*: Early Native Title Cases in New Zealand' (2003) 11 *Waikato Law Review* 112; Kent McNeil, 'The Source, Nature, and Content of the Crown's Underlying Title to Aboriginal Title Lands' (2018) 96(2) *Canadian Bar Review* 273. In his analysis of the Canadian approach, McNeil agrees with Justice Campbell that a 'doctrinally accurate' explanation is that underlying Crown title 'is simply a basic proposition of English and Canadian property law that applies to all land': at 279, citing *Chippewas of Sarnia v Canada (Attorney General)* [1999] 88 ACWS (3d) 728, 40 RPR (3d) 49, [377]. The criticism here is the movement within a progressive narrative from mythical, traditional, and feudal to modern, rational, and capitalist.

amount of compensation, which appears as a pragmatic and progressive step in the right direction, appears reasonable because it does not threaten the reproduction of that process.

II DISPLACED MEDIATORS

A displaced mediator essentially operates in the following way. Whenever someone is asked to give an account of their origins, they face a paradox. They are being asked to give an account of events they have not and cannot have experienced.[35] To produce an account that appears to avoid this paradox, authors create a narrative from the stories, myths and fictions they inherit. The author provides the appearance that the narrative is reasonable, rational and true by retroactively positing the necessity of it. That is, in retroactively positing the necessity of this narrative, the author creates themselves as a subject-object of their own story. In doing so, the author reproduces mythological and fictive views as a reasonable and rational narrative to which they (as the author) are simply an effect or subject. As a result, the author's subjective and mythological account is displaced, and their displacement is mediated (a process of occluding and concealing) by the structure of the ostensibly rational, reasonable, and factual narrative. Critical purchase arises from pointing out that the author has constructed and then retroactively posited this narrative.[36] It explains how authors perpetuate and reproduce inherited myths as objective and rational facts, and how the narrative constructs the author as having some objective vantage point over their subject, which is their self.[37] This brief and individualised way of thinking about the displaced mediator has broader purchase when tied to progressive narratives used in law and society.[38]

For instance, one might believe in societal progress, or the gradual process of moving from a pre-historical society that is mystical, feudal, and communal to a modern society that is rational, fair and just.[39] Critical purchase arises in pointing out that someone has constructed and then retroactively posited this progressive narrative because, even though they have inherited a mythical account, the

35 See Judith Butler, 'Giving an Account of Oneself' (2001) 31(4) *Diacritics* 22, 26–7.

36 Following Fitzpatrick, as an author I am trapped or entangled within this reason/myth too. However, I am attempting to show that the reasonableness that arises is, itself, an iteration of Enlightenment myth, or what Derrida calls a 'white mythology'. See Fitzpatrick, *The Mythology of Modern Law* (n 25) x–xi, 32–3, citing Jacques Derrida, *Margins of Philosophy*, tr Alan Bass (Harvester Press, 1982) 213. Fitzpatrick's immanent critique is to show that a fundamental contradiction in Enlightenment thought is located in the movement from mystical past to reasoned present, which is, itself, a myth of progress. Showing the myth in the progress narrative of native title is not to cast Aboriginal and Torres Strait Islander peoples as falling prey to an insidious plot. It is to show how whiteness is created, how white mythology is reproduced, and the role of native title in (re)securing those beliefs.

37 As Jameson, Žižek, and others note, the displaced or vanishing mediator has a psychoanalytic component. That matters, here, to the degree that native title involves the creation of a self, or self-actualisation within a colonial discourse.

38 See Jameson (n 16) 82; Fitzpatrick, *The Mythology of Modern Law* (n 25) 101–6; Park (n 29) 262, 264.

39 Cf Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (George Allen & Unwin, 1930) and Jameson (n 16).

author cannot account for their origins without mythical and fictional stories.[40] Fitzpatrick makes this type of critique. Although he does not use the phrase 'displaced mediator', Fitzpatrick employs a genealogical method that he calls negative mythology.[41] With this negative mythology – an immanent critique – he argues that the reasonableness, rationality, and pureness of Occidental modern law is maintained by myth, and its invisibility as myth is mediated through belief in this myth. The notion that law is based on reason and rationality in a way that is separate from, and an overcoming of, myth, is itself a myth stemming from, and replicating mythological origin stories.[42] Those who believe in the myth that progress is reasonable are subject to, not 'the destruction of myth but, rather, its perfection'.[43] According to Fitzpatrick, when this myth is embodied then '[t]he subject is invested with a capacity to know universally, a capacity responsive to universal forms of reality'.[44] Law plays a central role in sustaining this myth.

On Fitzpatrick's account, 'stories of the progression of society' were invented by lawyers to create hierarchies between the advanced civilisations of 'western Europe' and the 'primitive', 'less advanced' Others.[45] Progressive narratives embrace a racialised hierarchy and generate an obligation to bring civilisation to 'others' in the form of colonisation.[46] In Fitzpatrick's genealogy, after colonies have become nations, legality appears emptied of any of its imperial, racialised and civilising content. It has been whitened so that it is transparent; upheld as pure, positive and coherent.[47] When that occurs, it is 'hardly surprising that law becomes

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40 Jameson (n 16) 54–5, 85–7; Žižek, 'Eastern European Liberalism' (n 16) 25, 32; Žižek, *For They Know Not What They Do* (n 16) 204–9. See also Robert A Williams Jr, 'The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence' [1986] (2) *Wisconsin Law Review* 219, 255; Douglas Sanderson, 'The Residue of *Imperium*: Property and Sovereignty on Indigenous Lands' (2018) 68(3) *University of Toronto Law Journal* 319, 319–20; Daniel Lavery, 'No Decorous Veil: The Continuing Reliance on an Enlarged Terra Nullius Notion in *Mabo [No 2]*' (2019) 43(1) *Melbourne University Law Review* 233.

41 See Fitzpatrick, *The Mythology of Modern Law* (n 25); Peter Fitzpatrick, 'Still Not Being Modern: Law and the Insistence of Myth' (2017) 43(2) *Australian Feminist Law Journal* 231, 232; Shane Chalmers, 'Negative Mythology' (2020) 31(1) *Law and Critique* 59.

42 Fitzpatrick, *The Mythology of Modern Law* (n 25) 13–15.

43 Ibid 36.

44 Ibid.

45 Ibid 101–6. Fitzpatrick draws upon Said, as well as Goodrich's account of Haida Nation's attempt to prevent logging in their ancestral lands: ibid 30, citing Edward Said, *Orientalism* (Penguin, 1985); Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld & Nicolson, 1990) 179–184.

46 Fitzpatrick, *The Mythology of Modern Law* (n 25) 107–8. See also Williams (n 40) 255. Williams begins his article with a quote from Nietzsche:

> The 'purpose of law' however, is absolutely the last thing to employ in the history of the origin of law: on the contrary … the cause of the origin of a thing and its eventual utility … lie worlds apart; whatever exists, having somehow come into being, is again and again interpreted to new ends, taken over, transformed, and redirected by some power superior to it …

Williams (n 40) 219, quoting Friedrich Nietzsche, *On the Genealogy of Morals and Ecce Homo*, tr Walter Kaufmann and RJ Hollingdale (Vintage Books, 1969) 77.

47 Ibid 114–15. Fitzpatrick is clearly targeting positivist notions about the rule of law. See also Dylan Lino, 'The Rule of Law and the Rule of Empire: AV Dicey in Imperial Context' (2018) 81(5) *Modern Law Review* 739.

a potent figure of national identity or that it remains capable of representing the purity and integrity of a race which claims to correspond to, encompass or protect the nation'.[48]

Narratives of legal progress are myths that create a national identity and demarcate its Others as non-civilised or not-fully-civilised. However, Others can use the legal system, reproduce the national myth, and become included within it. They can become included in national myth-making by retroactively positing new legal constructs that support the myth, which produces themselves and the authors of the new legal discourse as mere subjects of a rational, factual narrative. As investigated below, the new construct that supports the myth is that the Others are 'traditional'. The legal process fits them within a progressive and civilising narrative, and, in making them the authors, who are simply subjects of this narrative's effects, they receive existential and material benefits in return.[49] In exchange for expending their social energies to support and remake the national myth,[50] they receive value in the form of legal recognition (as traditional). That existential validation enables them to partake in the national myth to the degree that they become participants in (re)producing the myth as 'traditional'. *Timber Creek* shows below that, in some cases, they can receive monetary compensation where that 'tradition' and 'culture' has been extinguished.

What I aim to show in the following sections is that native title law operates as a displaced mediator. It (re)constructs a progressive narrative that locates Aboriginal and Torres Strait Islander peoples who have 'traditional and customary practices' in a modern, rational, progressive narrative. Legal subjects (lawyers, judges, justices) displace the claimants' pre-legal practices when constructing the myth that native title pre-exists the Crown's acquisition of sovereignty, which is retroactively posited due to legal subjects' inability to account for the Crown's origin of power and its acquisition of sovereignty. In effect, native title allows Aboriginal and Torres Strait Islander peoples to participate in (re)producing Australia's national myth and its imperial inheritance.

III NATIVE TITLE: A MODERN CONSTRUCTION OF TRADITIONAL LAWS AND PRACTICES

In 1982, Eddie Mabo and others instituted an action-seeking legal recognition and protection of their traditional land rights over the Murray Islands.[51] To prevent the claim from proceeding, the 1985 Queensland legislature passed an Act to 'retrospectively abolish all such rights and interests as the Murray Islanders may have owned and enjoyed before its enactment'.[52] In response, the petitioners argued

48 Fitzpatrick, *The Mythology of Modern Law* (n 25) 117.

49 Ibid.

50 See Jodi Dean, 'Why Žižek for Political Theory?' (2007) 1(1) *International Journal of Žižek Studies* 18, 24–5. See also Pierre Bourdieu, 'The Forms of Capital' in Nicole Woolsey Biggart (ed), *Readings in Economic Sociology* (Blackwell, 2002) 282–7.

51 *Mabo v Queensland [No 1]* (1988) 166 CLR 186, 199 (Wilson J).

52 Ibid 196 (Mason CJ).

that Queensland could not rely on that Act to defend against their native title claim because it was inconsistent with the *Racial Discrimination Act 1975* (Cth) ('*RDA*'). The High Court upheld the petitioners' argument in *Mabo [No 1]*.[53] Essentially, Queensland's attempt to retroactively abolish or extinguish the petitioners' rights was thwarted by the *RDA*.

Subsequently, in *Mabo [No 2]*, the petitioners argued that they had traditional land rights that could be recognised at common law. Queensland argued that the Crown acquired absolute beneficial ownership over all land when it assumed sovereignty over the Australian colony.[54] Under this nationalist myth, British subjects brought the common law with them when settling Australia, which deemed the territory terra nullius – wasteland that belonged to no one or was inhabited by 'backward peoples' without society, permanent political organisation, or civilisation – in short, without a sovereign or a sufficiently complex legal-political system.[55] In arguing that they continuously inhabited traditional and cultivated lands, the *Mabo [No 2]* petitioners challenged the national fantasy or myth that terra nullius could have been the doctrinal justification for the Crown's acquisition of sovereignty. Faced with factual evidence showing that the 'theory that the indigenous inhabitants of a "settled" colony had no proprietary interest[s]' was false,[56] the High Court overruled the doctrinal justification for the Crown's acquisition of sovereignty. No longer would a standard of 'civilisation' prevent the recognition of indigenous habitation. Instead, '[j]udged by any civilized standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned'.[57]

In making this claim, the High Court 'rewrote [the] colonial stories of "civilisation", and the claims of contemporary conscience necessitated a rewriting of that legal history'.[58] It based the legal history on a history rewritten for legal purposes. According to Attwood, Henry Reynolds wrote a historical account of colonialisation that turned 'the dispossession of Aboriginal people into a legal event', which influenced the High Court through a 'lego-historical narrative'.[59] As Attwood explains, terra nullius had not been an accepted common law concept long before *Mabo [No 2]*, but under Reynolds's 'juridical history', the dispossession of Aboriginal and Torres Strait Islander peoples started in 1788 with the incorrect common law application of terra nullius to the territory that would become Australia.[60] In rewriting the legal history

53 Ibid 218–19 (Brennan, Toohey and Gaudron JJ), 227–8 (Deane J).

54 *Mabo [No 2]* (1992) 175 CLR 1, 30–1 (Brennan J).

55 Ibid 32 (Brennan J). The idea that the Court overturned terra nullius as legal doctrine might itself be fiction. See Ritter (n 18); Andrew Fitzmaurice, 'The Genealogy of *Terra Nullius*' (2007) 38(129) *Australian Historical Studies* 1; Shane Chalmers, 'Terra Nullius: Temporal Legal Pluralism in an Australian Colony' (2020) 29(4) *Social & Legal Studies* 463; Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous Peoples from Australia to Alaska* (Harvard University Press, 2007) ch 1. Legality is a means for continually updating these national myths.

56 *Mabo [No 2]* (1992) 175 CLR 1, 40 (Brennan J); see Banner (n 55) 28–38.

57 *Mabo [No 2]* (1992) 175 CLR 1, 29 (Brennan J).

58 Pether (n 12) 117. See Lavery (n 40) 237, 264–5.

59 Bain Attwood, '*The Law of the Land* or the Law of the Land: History, Law and Narrative in a Settler Society' (2004) 2(1) *History Compass* 1, 7, 14.

60 Ibid 13, citing Henry Reynolds, *The Law of the Land* (Penguin Books, 1987) 172–5.

so that English common law always embraced terra nullius, Reynolds provided the High Court with a redemptive opportunity. If it embraced terra nullius as central to colonialism's legal justification, then it could reject the 'doctrine of terra nullius' as a 'convenient scapegoat to explain why traditional Aboriginal rights to land had never been recognised under the Australian common law' and, hence, reaffirm 'the apparent equity of Australian jurisprudence'.[61] Essentially, rejecting terra nullius would appear to reject colonialism. However, rewriting the legal narrative provided the High Court with the opportunity to legally justify colonialism through the common law.[62]

The High Court held that the Crown had acquired radical title (*imperium*) but not the beneficial title to all land (*dominium*) when it acquired sovereignty.[63] Australia's common law could then recognise native title. It also found that native title claimants can prove its existence if they continue '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 substantially maintained'.[64] If native title claimants continue to observe those customs, then, as Brennan J explains, they have avoided the Scylla but maybe not the Charybdis of 'subsequent extinguishment'.[65]

Brennan J's metaphorical but seemingly secularised use of mythology – namely, Odysseus' navigation of the sea monsters Scylla and Charybdis – demonstrates a collapse of rationality and myth.[66] He asserts that 'when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared'.[67] Additionally, when the Crown acquired sovereignty and radical title, it obtained 'the power to create and to extinguish private rights and interests in land within the Sovereign's territory'.[68] After the Crown acquires sovereignty and it has a clear and plain intention to act, like granting title to non-Indigenous persons, it may have extinguished native title.[69] If not, then the native title claimants have navigated the waters of this epic narrative, like Odysseus. According to Pether, *Mabo [No 2]* is beset with a paradox:

> [T]he common law was rewritten to recognise a law predating it and persisting alongside it, but always subject to subordination and indeed extinguishment by it … [T]he common law defined the incidents of that pre-existing law, which was in effect its creature … Yet the common law at the same time refused to question the sovereign taking of the Australian continent which depended on the same discredited

61 Ritter (n 18) 7, cited in Attwood (n 59) 15 (emphasis in original).

62 Moreton-Robinson (n 24) 67–8.

63 *Mabo [No 2]* (1992) 175 CLR 1, 52–3 (Brennan J).

64 Ibid 59.

65 Ibid 63.

66 See Elizabeth A Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Duke University Press, 2002) 164. See generally Theodor W Adorno and Max Horkheimer, 'Odysseus or Myth and Enlightenment' (1992) 56 *New German Critique* 109.

67 *Mabo [No 2]* (1992) 175 CLR 1, 60 (Brennan J).

68 Ibid 63.

69 Ibid 63–70.

> doctrine – that of terra nullius – which it had subjected to such a revisionary scrutiny in the context of land law.[70]

Similarly, Lavery writes that *Mabo [No 2]* is 'a supreme jurisprudential paradox'. Under it, 'Anglo-Australian constitutional common law holds the enlarged notion of terra nullius to be abhorrent *and* then embraces it as the juridical foundation upon which the present-day territorial sovereignty of the modern Australian nation rests'.[71] For Lavery, this amounts to 'an air of the fantastical in the current story of Anglo-Australian sovereignty'.[72]

These paradoxical features arise in *Mabo [No 2]* because the High Court's Justices, as legal subjects, do not question or undermine the Crown's acquisition of sovereignty.[73] Doing so would either reveal their myth-making, or undermine their power to adjudicate the dispute before them. As superlative legal subjects, High Court Justices cannot fully account for the origin of their power (as individual legal subjects who make decisions, as members that constitute the High Court, the Australian nation state, or the Crown). For instance, in Brennan J's summary of Australian common law in *Mabo [No 2]*, the first enumerated point is that '[t]he Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court'.[74] To avoid giving an account of its origins, the High Court constructs and then retroactively posits the necessity of native title, which enables the Court to declare that the Crown acquired sovereignty over territories in 1788, 1824, or 1829.[75] The Court's Justices make native title a displaced mediator to uphold Crown sovereignty and their role as 'objective' and 'reasonable' legal evaluators. With the aid of litigants, they create a new national myth-narrative. This narrative operates in the following way.

In the first stage, Aboriginal and Torres Strait Islander peoples have their myths, traditional laws, customs and practices that pre-exist the Crown's acquisition of sovereignty. The second stage is the legal recognition of native title content in the form of 'traditional and customary practices' – like the recognition arising in *Mabo [No 2]* – which is the Crown's formal recognition of native title as a sui generis right.[76] As this legal formation (re)constitutes legal jurisdiction in the third stage, it universalises as it rationalises the Crown's assertion that it acquired sovereignty on behalf of both Aboriginal and Torres Strait Islander peoples and

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70 Pether (n 12) 117–18. See also Henry Reynolds, 'Property, Sovereignty and Self-Determination in Australia' in Peter Larmour (ed), *The Governance of Common Property in the Pacific Region* (National Centre for Development Studies, 1997) 123, 124.

71 Lavery (n 40) 265 (emphasis in original).

72 Ibid.

73 Here, I use the term 'sovereignty' to mean *imperium*, as it is deployed the *dominium*/*imperium* distinction. I am not advancing the opinion that 'sovereignty' must mean one thing. See Stephen Allen, 'Book Reviews: P.G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights*' (2014) 14(2) *Human Rights Law Review* 381, 382–3.

74 *Mabo [No 2]* (1992) 175 CLR 1, 69 (Brennan J).

75 Lavery (n 40) 235, citing Elizabeth Evatt, 'The Acquisition of Territory in Australia and New Zealand' in CH Alexandrowicz (ed), *Grotian Society Papers 1968: Studies in the History of the Law of Nations* (Martinus Nijhoff, 1970) 16, 33, 35–6 (referencing the dates when the Crown acquired sovereignty over New South Wales, the Northern Territory, and Western Australia, respectively).

76 *Mabo [No 2]* (1992) 175 CLR 1, 89 (Deane and Gaudron JJ), 133 (Dawson J).

settlers. It establishes holders of native title as dependent on a doctrine of tenure, as subjects of the Crown, and provides compensation when native title has been extinguished.[77] In this way, native title mediates the transition from traditional and mythical society to a rational and modern national society.

A crucial aspect of this new national myth is that native title has an origin in something other than the common law. As Brennan J stated, '[n]ative title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law'.[78] This provides a legal basis for Aboriginal and Torres Strait Islander peoples to become existentially committed to a process that reproduces the national myth. That is because, undoubtedly, Aboriginal and Torres Strait Islander peoples (or as 'Indigenous peoples') have forms of living and governing that pre-exist first contact situations, European 'discovery', or any mention of the Crown. That is different from acknowledging that native title can only arise from assertions that the Crown has already acquired sovereignty, which is what makes those behaviours, performances and rituals into 'traditional practices and customs' to recognise native title. Hence, proving native title requires an evidentiary finding that native title claimants continue to observe traditional laws and customs observed in a society that has 'had a continuous existence and vitality since sovereignty'.[79]

Positing the pre-existence of native title elides as it displaces the fact that the High Court constructed native title in Australia in 1992, and, in exchange, the Crown's acquisition of sovereignty becomes legally unassailable by Aboriginal and Torres Strait Islander peoples.[80] According to Fitzpatrick, what *Mabo [No 2]* 'did, with some marginal mitigation, was to confirm court decisions from the era of conspicuous imperialism upholding the colonists' sovereign claim to territory along with the denial of any entitlement of the Indigenous inhabitants. The decision also affirmed the dominance of the sovereign state over law'.[81] In effect, when courts of the Crown create native title and simultaneously hold that native title pre-exists the acquisition of Crown sovereignty, they reproduce the national myth as a legal necessity and objective fact rather than as a subjectively-held, inherited myth. Those who subjectively believe in and reproduce this legal necessity as objective fact reproduce the national myth. Despite critiques of native title,[82] it endures because legal subjects of all sorts (justices, lawyers, students, commentators, claimants, and others) derive enjoyment and material benefit from

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77 In *Mabo [No 2]* (1992) 175 CLR 1, the High Court held by 4:3 that compensation is not payable before 1975. Not in favour of compensation: at 15–16 (Mason CJ and McHugh J), 63–4 (Brennan J), 159, 164 (Dawson J). In favour of compensation: at 111–12 (Deane and Gaudron JJ), 216 (Toohey J).

78 *Mabo [No 2]* (1992) 175 CLR 1, 59 (Brennan J).

79 *Yorta Yorta v Victoria* (2002) 214 CLR 422, 444; for the Canadian test for determining Aboriginal rights, see *R v Van der Peet* [1996] 2 SCR 507.

80 In Canada, *Calder* [1973] SCR 313 created the possibility of Aboriginal title in 1973, which *R v Sparrow* [1990] 1 SCR 1075 ('*Sparrow*') confirmed in 1990.

81 Fitzpatrick, 'Still Not Being Modern: Law and the Insistence of Myth' (n 41) 234; see also Short, 'The Social Construction of Native Title in Australia' (n 29) 860.

82 See, eg, Marcia Langton, 'The Aboriginal Balancing Act' [2013] (115) *Australian Geographic* 39; Richard Bartlett, 'An Obsession with Traditional Laws and Customs Created Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31(1) *University of Western Australia Law Review*

how native title reproduces national myths. It reproduces civilising hierarchies and colonial myths, but, when retroactively posited as a narrative, native title provides legal subjects with the enjoyable belief that its recognition is progressive. When this myth is reproduced at a national level, it displaces broader appreciation that settler states continuously borrow from each other, and, in doing so, find justifications to sustain the structuring forces of imperialism.[83]

For instance, in Canada, Slattery has generated an influential account of native title.[84] Slattery argues that there are three leading conceptions of Aboriginal title, also known as native title or Indian title. Native title might be a customary right under tribal or Indigenous law, 'a right under English common law', or a '*sui generis* right'.[85] Slattery argues that native title cannot be Indigenous customary law, which is far more variable than native title. For Slattery, it cannot be English common law because translating Indigenous rights into English common law does not capture the uniqueness of native title and is liable to lead to injustices.[86] For Slattery, native title is neither common law nor Indigenous customary law, so it must be 'a sui generis right at common law' stemming from 'a distinctive body of common law that developed from relations between the British Crown and Indigenous American peoples in the early centuries of colonization' that 'was absorbed into the system of colonial law'.[87] Under Slattery's approach, courts correctly assert that native title is 'a distinctive form of title that *presumptively survives* the Crown's acquisition of sovereignty and does not depend on an explicit act of recognition by the Crown'.[88]

On the contrary, the form of native title is not distinct from that of English common law, nor does it exist independent of recognition by the Crown. As *Timber Creek* clarifies below, the High Court explicitly translates cultural practices into a form of native title to be recognisable in English common law for the purposes of valuation. That is to say, following Nichols, that legal processes transform 'nonproprietary relations into proprietary ones while … systematically transferring control and title of this (newly formed) property' to the Crown as the claimants become '"original

35; Lisa Strelein, 'The Vagaries of Native Title: Partial Recognition of Aboriginal Law in the Alice Springs Native Title Case: *Hayes v Northern Territory*' (1999) 4(26) *Indigenous Law Bulletin* 13.

83 Fitzpatrick, *The Mythology of Modern Law* (n 25) 111–12. For a view that common law recognition of native title is a consequence of modernity and, additionally, that it is a positive development, see PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011); cf Allen (n 73) 382.

84 Slattery, 'The Metamorphosis of Aboriginal Title' (n 11) 257. See also Slattery, 'The Generative Structure of Aboriginal Rights' (2007) 38 *Supreme Court Law Review, Second Series* 595. See, eg, Ivison (n 7) 57–9; Kent McNeil, 'Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v. British Columbia*' (2010) 8(1) *Indigenous Law Journal* 7, 10–11; Janna Promislow, 'Treaties in History and Law' (2014) 47(3) *University of British Columbia Law Review* 1085, 1088 n 4; James (Sa'ke'j) Youngblood Henderson, 'Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada' (2010) 14(2) *Australian Indigenous Law Review* 24, 36–7. But see Nicholas Blomley, 'The Ties that Blind: Making Fee Simple in the British Columbia Treaty Process' (2014) 40(2) *Transactions of the Institute of British Geographers* 168, 171.

85 Slattery, 'The Metamorphosis of Aboriginal Title' (n 11) 256–8 (emphasis in original).

86 Ibid 263–9.

87 Ibid 269–70.

88 Ibid 277 (emphasis added).

owners," but only *retroactively*, that is, refracted backward through the process itself'.[89] That does not mean that First Peoples did not have concepts that are like property or like ownership. It means that courts and others engage in acts of translating those ways of being into proprietary relations for legal purposes. Courts create native title through explicit acts of recognition on behalf of the Crown and retroactively posit its existence to explain how the Crown acquired sovereignty over non-British subject-inhabitants.[90] Because legal subjects of the Crown's courts cannot question the origins of the power from which they derive their authority and enjoyment, they retroactively posit the necessity of native title to rationalise mythic narratives that the Crown acquired sovereignty. In Slattery's narrative:

> The small European colonies founded on the eastern shores of America gradually grew in population and influence, and by a complex series of events spread over several centuries (and its successor the Canadian Crown) emerged as the factual sovereign of the territories that now make up Canada. As a result, the international title of Indigenous groups to their territories was transformed into a form of domestic title known variously as *native title*, *Indian title*, and *aboriginal title*.[91]

Slattery claims here that the 'Canadian Crown' 'emerged' as 'factual sovereign' and a result was the transformation of tribes' international 'title' into domestic title. Slattery's narrative fails to address or explain what Douglas Sanderson calls a 'mystery' that remains 'at the heart of Canadian law: by what process did the British Imperial Crown and later the Dominion government come to hold title to the vast lands of present-day Canada and become the sovereign of Canada's Indigenous populations?'[92] Sanderson answers that the 'Supreme Court of Canada's articulation of Aboriginal title has created a unique (or *sui generis*) category of land rights based on the reconciliation of the fact of prior occupation of Indigenous people with the assertion of Crown sovereignty', which elides the Crown's lack of legal justification.[93] Like Lavery in Australia, Sanderson argues that it is a 'fiction' that the Crown perfected sovereignty, which he traces back to the story of biblical creation.[94] In concert with the views of Sanderson and Lavery, the difficulty of giving a true account of origins gives rise to a retroactively posited

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89 Nichols (n 19) 8.

90 For a discussion of recognition in settler state contexts, see Sana Nakata, 'Who Is the Self in Indigenous Self-Determination?' in Laura Rademaker and Tim Rowse (eds), *Indigenous Self-Determination in Australia: Histories and Historiography* (ANU Press, 2020) 335, 341–5.

91 Slattery, 'The Metamorphosis of Aboriginal Title' (n 11) 257–8 (emphasis in original). See also Brian Slattery, 'Aboriginal Sovereignty and Imperial Claims' (1991) 29(4) *Osgoode Hall Law Journal* 681, 702–3; Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66(4) *Canadian Bar Review* 727, 739.

92 Sanderson (n 40) 319. After discussing how courts accept the Crown's claims to have acquired sovereignty without question, Kent McNeil writes: 'In virtually all of Canada, Crown assertions of sovereignty therefore need to be re-evaluated by examining both the legal and the factual basis for the Crown's claims': Kent McNeil, 'Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion' (2001) 33(2) *Ottawa Law Review* 301, 318 ('Extinguishment of Aboriginal Title'). See also Kent McNeil, 'La Relativité de la Souveraineté *De Jure* au Canada: 1600–2018' [The Relativity of De Jure Sovereignty in Canada: 1600–2018] (2018) 49(2) *Ottawa Law Review* 305, 311–13, 320–5 (an analysis of de jure versus de facto sovereignty and the mystery of Canadian acquisition of sovereignty).

93 Sanderson (n 40) 322.

94 Ibid 323. See also Stewart Motha, 'The Sovereign Event in a Nation's Law' (2002) 13 *Law and Critique* 311.

necessity for the (re)construction of a mythic narrative. To ardently believe in the truth of a progressive narrative is to believe that native title is a (partial) solution to colonialism rather than a legal extension of it. Consider how that can work.

For Slattery, the 'Crown gradually extended its effective rule' and 'Aboriginal lands were granted away to private individuals without Indigenous consent, and Indigenous groups found themselves confined to small tracts of lands known as "reserves"'.[95] This narrative supports his assertion that

> the dispossession of Indigenous peoples was contrary to the common law and did not extinguish aboriginal title, in the absence of clear and plain legislation to that effect. However, the scope and practical effects of dispossession were so significant that as time passed the situation became increasingly difficult to reverse without severely affecting the interests of innocent third parties and the public at large.[96]

Given the entrenchment of what Slattery calls 'practical effects of dispossession', the common law has 'adapted to take account of the change in circumstances' which 'gave rise to common law Principles of Reconciliation'.[97] The point, for Slattery, is that the Principles of Reconciliation have transformed native title into a generative right. Under this view, a generative right 'can be partially implemented by the courts but whose full implementation requires the negotiation of modern treaties' to 'bring about the *reconciliation* between **historical** aboriginal rights and **modern** rights held under general Canadian law'.[98]

Viewing native title as a generative right could appear to be a break from colonial oppression or civilising missions, but it also demonstrates how legal subjects use native title as a displaced mediator to 'reconcile' a movement from 'historical aboriginal rights' (traditional, feudal, mythical) to 'modern rights held under general Canadian law' (modern, rational, fair).[99] For Slattery, transformation is predicated on the assertion that the Crown's acquisition of sovereignty is a 'practical effect of dispossession'. Although he may not entirely approve of that (and he may see it as an incontestable fact), if the dispossession of Indigenous peoples was contrary to common law, then common law can be positioned as a redemptive tool for recognition.[100] That requires also believing that the Crown's claim to sovereignty could be against the common law, that colonialism was

95 Slattery, 'The Metamorphosis of Aboriginal Title' (n 11) 261.

96 Ibid.

97 Ibid 262.

98 Ibid 281–2 (italics in original, bold added).

99 Ibid. For critical views on reconciliation see John Borrows, 'Canada's Colonial Constitution' in John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historic Treaties* (University of Toronto Press, 2017) 17, 20–1; Taiaiake Alfred, 'The Failure of Reconciliation' (Speech, University of Quebec in Montreal, 25 April 2014) <https://intercontinentalcry.org/failure-reconciliation/>; Damien Short, 'Reconciliation and the Problem of Internal Colonialism' (2005) 26(3) *Journal of Intercultural Studies* 267. For an overview, see Sophie Rigney, 'The Hopes and Discontents of Indigenous-Settler Reconciliation' (2017) 11(2) *International Journal of Transitional Justice* 359.

100 Cf Taiaiake Alfred, 'For Indigenous Nations to Live, Colonial Mentalities Must Die', *Policy Options* (Blog Post, 13 October 2017) <https://policyoptions.irpp.org/magazines/october-2017/for-indigenous-nations-to-live-colonial-mentalities-must-die/>. Alfred writes that Canadian 'prosperity is derived from the fraudulent taking of Indigenous nations' lands and the marginalization of Indigenous peoples in their own homelands'.

principally a legal matter, and that First Nations were subjects of British common law so that it could apply to them.

While one might agree that Crown sovereignty is today a fact, First Peoples continue to dispute that assumption, just as the Crown continues to trespass on their territories under the assumed theory that its sovereignty underlies their property.[101] The point here, however, is that when dispossession and acquisition of sovereignty have been mythically relegated to the past, Slattery can then advocate for common law recognition of native title. It may encourage tribes to subject themselves to the Crown for their benefit and reconciliation with Canada's national myth-making,[102] as the common law enables the Crown to 'justifiably infringe' Aboriginal title in Canada or 'extinguish' native title in Australia.[103] While Slattery provides a normative account of how native title should work, his account perpetuates without questioning the assumption that Crown sovereignty underlies First Nations property rights, which are, themselves, constructed through national myth-making as 'proprietary rights'.[104]

To support a sui generis approach to native title, which also shows how settler states borrow from each other to support national myths that sustain imperial forces, Slattery references its 'judicial pedigree'.[105] For him, it extends 'back to the celebrated trilogy of *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, decided by the United States Supreme Court in the early

101 See, eg, Nick Estes, *Our History is the Future: Standing Rock Versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance* (Verso, 2019) ch 1; Augusta Davis, 'Unceded Land: The Case for Wet'suwet'en Sovereignty', *Cultural Survival* (Blog Post, 28 February 2020) <https://www.culturalsurvival.org/news/unceded-land-case-wetsuweten-sovereignty>. If sovereignty is 'practically' the ability to take by force or under the threat of force, then we see that the Crown does not acquire sovereignty over Aboriginal and Torres Strait Islander peoples' lands or First Peoples' lands until the state takes their lands, whether legally justified or not.

102 *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, 524 [20].

103 For explanation of extinguishment in Canada, see McNeil, 'Extinguishment of Aboriginal Title' (n 92) 316–17. There are differences between justifiable infringement in Canada and extinguishment in Australia, as Canada's *Canada Act 1982* (UK) c 11, sch B pt 2 s 35 ('*Constitution Act 1982*') protects Aboriginal title against extinguishment, so-called, after 1982. But, as *Sparrow* demonstrated in 1990, whether legislation previously extinguished Aboriginal title by a 'clear and plain intention' and compensation is owed remains a live issue: *Sparrow* [1990] 1 SCR 1075, 1099, 1119. The basis stems from United States law: *United States v Dion*, 476 US 734, (1986) cited in *R v Van Der Peet* [1996] 2 SCR 507, 652 [286] (McLachlin J); *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1113–14 [169]. *Sparrow* [1990] 1 SCR 1075 also says at 1103:

> It is worth realling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.

While this looks like a mere recounting of history, the Supreme Court is retroactively vesting Crown sovereignty in law that extends beyond the Royal Proclamation of 1763 and without any regard for the Treaty of Niagra or the Covenant Chain. See John Borrows, 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government' in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (University of British Columbia Press, 1997) 155, 161–5, 168–9.

104 Nichols (n 19) 8.

105 Slattery, 'The Metamorphosis of Aboriginal Title' (n 11) 271.

nineteenth century'.[106] Slattery's judicial pedigree helps establish his argument that rights recognition and treaty negotiation can help secure tribal self-governance.[107] While that approach may support limited tribal sovereignty, Matthew Fletcher argues that the Marshall trilogy cases 'are the house in which American Indian advocates, leaders, and policymakers rise each morning – and it is a house filled with an iron cold of the deepest hour'.[108] Far from celebrating those cases, Fletcher explains that they introduce the language of Indian Nations' 'feudal dependence' on the United States for their 'protection', as recognised through treaty, which subjects tribes to the United States and a 'plenary power [that] Congress would later take up in force'.[109] More damagingly for accounts of these rights as reasonable and non-mythical, Robert Williams Jr traces the myths of Christendom that justified conquest through the Marshall trilogy and into the present.[110] Citing *Johnson v McIntosh*, 21 US (8 Wheat) 543, (1823), he writes, '[t]he familiar mythic categories of unity and hierarchy central to European legal discourse had become embodied in a totalizing ideology that presupposed the rightful subjugation of Indian Nations, and subsumed their radical difference within the overriding superior sovereignty of their "conqueror," the United States'.[111] Why advocate for this version of the state or use the common law to recreate this nationalist myth?

Slattery is advocating for a more equitable and maybe pragmatic approach that would, hopefully, avoid illegally subsuming First Nations to the Canadian nation. He is asking First Nations to legally subsume themselves to progress the Canadian nation. That would align First Nations with a national myth and integrate them into the nation as dependents on a feudal doctrine of title and a progressive narrative. While the property-based land claims of Indian Tribes in the United States, First Nations in Canada, Māori in New Zealand, and Aboriginal and Torres Strait Islander peoples in Australia differ in their legal significance and processes, the interworkings of the national legal systems sustain imperial formations.[112] Focusing on the legality of any one nation and failing to see that settler states' courts continuously borrow from one another to develop progressive

106 Ibid (citations omitted).

107 For a critique of genealogical pedigrees, see Stephen Young, 'Re-historicising Dissolved Identities: Deskaheh, the League of Nations, and International Legal Discourse on Indigenous Peoples' (2019) 7(3) *London Review of International Law* 377, 388–92.

108 Fletcher (n 34) 628.

109 Ibid 650–1.

110 Williams (n 40) 226–58.

111 Ibid 256.

112 Although New Zealand is not significantly discussed in this article, New Zealand's approach to native title is broadly similar. *R v Symonds* (1847) NZPCC 387 ('*Symonds*') imported the significance of Marshall Trilogy into New Zealand. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) overturned that ruling and established a regime that denied native title for the next 135 years, until a *Symonds*-like approach to native title was reinstated through common law recognition of native title in *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643. Before the Crown recognised native title at common law, which has been growing since *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, New Zealand courts were unwilling to intervene under the 'political trust doctrine', which upholds the relationship of Māori and Pākehā as a 'political relationship': see Karen Feint, 'A Commentary on the Supreme Court Decision of *Proprietors of Wakatū v Attorney-General*' (2017) 25 *Waikato Law Review* 1, 4, 18–19.

narratives, displaces recognition of the imperial times, which perpetuates the force of imperialism as universal progression.[113]

From within Australia, native title is universalised throughout the Crown's sovereign territories in several Acts. First, native title was created in *Mabo [No 2]*, then legislated in the *Native Title Act 1993* (Cth) ('*NTA*'), which was then challenged and upheld.[114] That process, especially as it borrows from settler state and international legalities, universalises the Crown's acquisition of sovereignty and establishes native title holders as depending on the feudal doctrine of tenure of the nation. Dependency on the feudal doctrine of tenure arises in requiring native title claims groups to maintain that native title is theirs (that it belongs to them), that their traditional customs and practices fit into the form of native title and, crucially, that those practices pre-exist the Crown's acquisition of sovereignty. While Aboriginal and Torres Strait Islander peoples' practices, cultures and laws for self-governing continue, those practices only become 'native title' when they are placed in and displaced by the form of native title.[115] So, for instance, inspired by the Marshall trilogy, some native title claimants in Australia have attempted to pursue legal recognition as domestic dependent nations, which the High Court rejected.[116] Despite that outcome, Australian courts have been willing to retroactively construct native title to support the Crown's acquisition of sovereignty.

When Native Title Claim Groups seek determinations that their native title exists (or has been extinguished), courts retroactively read native title into pre-1992 scenarios. They do so to evaluate 'whether the [state's grants of] rights [to others] are inconsistent with the alleged native title rights and interests'.[117] When courts retroactively read native title into pre-1992 scenarios, they construct a narrative which enables courts, lawyers and litigants to adopt the position that they are merely applying the law even though it is the courts (through complex litigation processes) that are taking the post-1992 concept and reading it into pre-1992 histories. They do so when asking, for example, 'did the grant of mineral leases' in 1964 'extinguish those native title rights and interests in relation to the land subject to the mineral leases?'[118] Another example, is when asking, between 1943 and 1945 'did the act of the Commonwealth in … making the Military Orders wholly extinguish all native title rights and interests that then subsisted on the special case land'?[119] When courts find that native title survived those acts and one believes the court is describing history instead of re-constructing and rewriting it

113 See Fitzpatrick, *The Mythology of Modern Law* (n 25) 113–14.

114 See generally *Western Australia v Commonwealth* (1995) 183 CLR 373 ('*Native Title Act Case*').

115 See Nichols (n 19) 8; Short, 'The Social Construction of Native Title in Australia' (n 29); Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, June 1986) vol 1, 79–80 [103]. But see *Yorta Yorta v Victoria* (2002) 214 CLR 422, 444–5 [44] (Gleeson CJ, Gummow and Hayne JJ).

116 *Coe v Commonwealth [No 2]* (1993) 118 ALR 193, 197, 199. Mason CJ denied that Aboriginal peoples of Australia are organised as a 'distinct political society' and, hence, were not domestic dependent nations, which is the reasoning – albeit in different language – that Thompson J employed (in concurrance with Marshall CJ) to establish that the Cherokee Nation was a domestic dependent nation: at 199.

117 *Western Australia v Ward* (2002) 213 CLR 1, 89 [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

118 *Western Australia v Brown* (2014) 253 CLR 507, 514–15 [3] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

119 *Queensland v Congoo* (2015) 256 CLR 239, 251–2 [2] (French CJ and Keane J).

for legal purposes, legal subjects can then embrace the paradoxicality of native title. For instance, one can celebrate that the jurisprudential trend 'reflects a new respect for the holistic nature of First Peoples' relationships with land and waters in Australia' and write a few pages later that '[i]t is difficult to avoid the awkward truth that the Australian native title doctrine still carries and wields the "vestiges of colonising intent"'.[120]

As a displaced mediator, native title reproduces a colonising form without regard for individual intentions. Native Title Claim Groups who adopt retroactive terminology to claim that their native title survives the Crown's acquisition of sovereignty, which is a necessary constraint of native title pleadings, contribute to the national myth and stand to benefit when the court recognises their native title. In return for expending their energies in reproducing the national myth that the Crown acquired sovereignty over them, they are included in the national myth and can enjoy it.[121] To see that, let us turn to *Timber Creek*.

IV *TIMBER CREEK*: COMPENSATION FOR EXTINGUISHING CULTURE

The following analysis is a criticism of the state-based legal system, not a criticism of the Claim Group that pursued native title claims or compensation. The analysis of *Timber Creek* shows that in return for reproducing the national myth that the Crown acquired sovereignty over them, the Claim Group receives existential and material benefits. In exchanging these values, the Claim Group receives the Crown's sanctioned right to perform their customs, practices and laws, but it is through the legal construction of native title that holders of those rights become 'traditional'. Where their land-based practices and rituals no longer exist – where they have been alienated from their culture – they receive compensation.[122] Although that applies to all native title claims, I have several reasons for focusing on *Timber Creek.*

One reason for focusing on *Timber Creek* is to show that it is a product of *Mabo [No 2]* and the *NTA*. *Timber Creek* is similar to other post-*Mabo [No 2]* native title cases. It replicates the progressive narrative and mediates the Claim Group's integration within it as 'traditional', 'mystical' and 'feudal' as legal processes include them in the Australian nation as those (partially) without traditions. By including the Claim Group in this narrative, it then enables the court to value their relations to land according to English land law. This brings us to the second reason for focusing on *Timber Creek*.

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120 Simon Young, 'The Increments of Justice: Exploring the Outer Reach of *Akiba*'s Edge Towards Native Title "Ownership"' (2019) 42(3) *University of New South Wales Law Journal* 825, 827, 828, citing Lisa Strelein, 'The Right to Resources and the Right to Trade' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 44, 44.

121 Dean, 'Why Žižek for Political Theory?' (n 50) 25.

122 In *Mabo [No 2]*, a 4:3 majority held that extinguishment did not require compensation.

A second reason is to highlight what is new about it. At one level, the hierarchy of courts and the subjects of Australia's legal system apply native title law in a new context and to new claimants. Doing so constructs the Ngaliwurru and Nungali Peoples as holders of native title and as legal subjects of the Crown, which legally extends the Crown's assumption of sovereignty. At another level, *Timber Creek* extends the scope of compensable extinguishment to include 'cultural loss'. The High Court Justices do so through a detailed, complex and long doctrinal analysis of private law concepts, including property, equity and personal injury that spans over 145 pages. Through that doctrinal analysis, accultured practices inherited from Imperial Britain are upheld as objective and reasonable. The unasked and, hence, unanswered question in *Timber Creek*, is how Ngaliwurru and Nungali ways of being have become structured according to disciplinary categorisations of 'land' and 'culture' for valuation according to the mythical 'open and free market'. The High Court Justices assume the ability to delineate, control, and extinguish title and culture because native title processes transform 'nonproprietary relations into proprietary ones' as it retroactively treats those who have been newly subsumed to these processes as 'original owners'.[123] In enacting their subjectivity to legal discourse, the Justices mythically imbue their subject status with assumed objectivity, a universalised standpoint, from which to ascertain the value of the particular claims at issue. Where Ngaliwurru and Nungali ways of being and relations are transformed into 'traditions', they obtain native title. Where those 'traditions' have been impacted, the absent or diminished 'culture' becomes a compensable loss. *Timber Creek* is not the creation or recognition of a right to land or culture. It is the creation of a legal means and justification for its extinguishment.

The last reason for focusing on *Timber Creek* is because, as described in the introduction, it is has attracted broad media attention.[124] Applauded as progressive, or condemned as a threat to the economy,[125] mediatisation or mediation of the legal result demonstrates broader, societal enjoyment in this legal case.

Timber Creek is a native title case arising out of the northwestern corner of the Northern Territory. In 1999 and 2000, a Claim Group acting on behalf of the Ngaliwurru and Nungali Peoples initiated native title claims, which established that between 1980 and 1996, the Northern Territory government committed 53 acts that impaired or extinguished their native title rights.[126] Essentially, a court established that previous acts of the Northern Territory had impaired or extinguished the claimants' traditional laws, customs and practices. The *NTA* entitles those who hold native title to compensation on just terms for 'any loss, diminution, impairment or other effect *of the act* on their native title rights and

123 Nichols (n 19) 8.

124 James (n 3); Abraham and Isdale (n 3).

125 Davidson (n 2); Australian Associated Press, 'Court Agrees to Compo for Cultural Losses', *SBS News* (online, 14 March 2019) <https://www.sbs.com.au/news/court-agrees-to-compo-for-cultural-losses>; Mark Ludlow, 'States Face Billion-Dollar Native Title Compensation Bill After Court Ruling', *Australian Financial Review* (online, 13 March 2019) <https://www.afr.com/politics/states-face-billiondollar-native-title-compensation-bill-after-high-court-ruling-20190313-h1cbfl>.

126 *Timber Creek* (2019) 364 ALR 208, 213–14 [6]–[7] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

interests',[127] including for physical/material (economic) impacts or cultural/ spiritual (non-economic) impacts.[128] Therefore, in 2011, the *Timber Creek* Claim Group began pursuing compensation for economic and non-economic impacts as well as interest.[129] On appeal from each party, the High Court's task was answering 'how the objective economic value of the affected native title rights and interests is to be ascertained';[130] how to compute interest; and how to value the 'Claim Group's sense of loss of traditional attachment to the land or connection to country'.[131] The High Court's judgment was unanimous about the result. Kiefel CJ, Bell, Keane, Nettle, and Gordon JJ authored a joint judgment. Gageler J and Edelman J authored separate judgments.

Contrary to Slattery's contention that native title does not involve translation into English common law, it does for compensation. The High Court Justices in *Timber Creek* never question the legitimacy of such a translation. When native title has already displaced the Claim Group's forms of living – that is, when native title is written into their histories – the Justices' task is to translate native title into the equivalent of common law property to determine its value.[132] The Justices began by considering relevant provisions of the *NTA*. The Act defines 'native title rights and interests' as a 'bundle' of 'communal, group or individual' rights and interests in relation to 'land or waters' as 'possessed under … traditional laws' for 'those peoples [who] have a connection with the land or waters' that are 'recognised by the common law of Australia'.[133] In their interpretation of the *NTA*, they also concluded that compensation should be 'measured by reference to, and capped at, the freehold value of the land together with compensation for cultural loss'.[134] Their task is to apply this law, which involves acts of legal construction.

To apply this law and objectively value native title or, rather, to make their subjectively held and internalised views about value appear reasonable, the joint Justices of the plurality (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) stated that

127 Ibid 223 [42], citing *NTA 1993* (Cth) ss 51(1), 227 (emphasis in original).

128 Ibid 223 [44], citing *NTA 1993* (Cth) ss 51(1), 223(1).

129 Ibid 214 [8], 215 [11], 221–2 [36]–[37], citing *NTA 1993* (Cth) s 23J.

130 Ibid 212 [2].

131 Ibid.

132 In Canada, Aboriginal rights are protected by section 35 of *Constitution Act 1982* (UK). *Tsilhqot'in* clarifies that infringement of aboriginal title must be justified under a two-part test after the Crown has consulted with the potentially impacted rights-holders: *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257, 273 [13]. Notably, the Crown can justifiably infringe if it consults and accommodates, 'its actions [are] backed by a compelling and substantial' public purpose, and it acts consistently with its fiduciary duty to Aboriginal groups, which is a high standard that stems from the Crown's acquisition of radical title: at 295 [77]–[88]. For an analysis of what should occur, beyond compensation, in Canada to remedy a justifiable infringement of Aboriginal rights, see Brenda L Gunn, 'More than Money: Using International Law of Reparations to Determine Fair Compensation for Infringements of Aboriginal Title' (2013) 46(2) *University of British Columbia Law Review* 299.

133 *Timber Creek* (2019) 364 ALR 208, 218–19 [22]–[23] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), citing *NTA 1993* (Cth) s 223(1). But see Brendan Edgeworth, 'Extinguishment of Native Title: Recent High Court Decisions' (2016) 8(22) *Indigenous Law Bulletin* 28, 33.

134 *Timber Creek* (2019) 364 ALR 208, 225 [54], referencing *NTA 1993* (Cth) ss 51(1), 51A. Section 51A(1) limits 'total compensation payable under this Division for an act that extinguishes all native title' to the amount 'payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters'.

freehold ownership is the 'most ample estate which can exist in land'.[135] As such, '[l]esser estates in land confer lesser rights in relation to land … and, for that reason, they ordinarily have a lesser economic value than a fee simple interest in land'.[136] The Court then states that '[n]ative title rights and interests are not the same as common law proprietary rights … but the common law's conception of property as comprised of a "bundle of rights" is translatable to native title'.[137] To apply this law in a new context and over new claimants, the joint Justices repurpose the myth that native title does not derive from common law, but uphold it as translatable into common law. Given the apparent translatability, the Claim Group's interests were deemed to be 'usufructuary, ceremonial and non-exclusive'.[138] The reason for this is because the Northern Territory could 'grant additional co-existent rights and interests in and over the land'.[139] Retroactively granting these rights also retroactively justifies the Northern Territory's legitimate authority to grant rights to that land, which, then, provides the basis for legitimating extinguishment as well as decreasing the value of the rights at issue.

Accordingly, the Claim Group argued that translating their rights into lesser sticks of a bundle, and not treating them as a different type of bundle, is discriminatory and, therefore, prohibited by the *RDA*. The High Court disagreed, holding that the *RDA* only requires 'parity of treatment and there is no disparity of treatment if the economic value of native title rights and interests is assessed in accordance with conventional tools of economic valuation' for unique native title rights as directed by statute.[140] Essentially, the translation of native title into common law is not wrongful and lesser sticks in the bundle are worth less than the bundle. Although the *NTA* stipulates that compensation is capped at freehold value, it is only reasonable to reduce the value of native title rights according to freehold when English common law is the objective basis for understanding value and other values are tainted, non-equivalents.

As I read it, the *RDA* claims involve acts of resistance. When the High Court rejected the *RDA* claims, it must provide reasons and admit (albeit in terms of the legal discourse) that they uphold their inherited, acculturated preference for English land law and, perhaps more pointedly, 'English-ness' as the objective standard for evaluating discrimination. Hence, those claims reveal that the entirety of the supposedly equal legal system remains predicated on translating other values into inherited English cultural values. While freehold title is reducible to a metaphorical bundle of sticks, there is nothing that suggests Aboriginal and Torres Strait Islander peoples' ways of being are equally reducible or should be subject to that metaphorical standard. However, when the legal processes retroactively construct the Claim Group as 'traditional' subjects to fit within the

135 *Timber Creek* (2019) 364 ALR 208, 228 [67].

136 Ibid; Wolfe argues that the positive aspect of elimination is how it breaks down 'native title into alienable individual freeholds': Wolfe (n 12) 388.

137 *Timber Creek* (2019) 364 ALR 208, 228 [68].

138 Ibid 229 [69].

139 Ibid.

140 Ibid 231 [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

legal discourse, the progressive narrative imbues the Justices with a mythological universalised standpoint. Their inherited myths are told as a narrative that remakes their acculturated and subjectively-held views, those inherited from English land law, as the standard and objective basis for comparison. As Moreton-Robinson writes, this case is a demonstration of 'how the possessive logics of patriarchal white sovereignty discursively disavow and dispossess the Indigenous subject of an ontology that exists outside the logic of capital, by always demanding our inclusion within modernity on terms that it defines'.[141] That is to say, the High Court upholds English land law as the objective terms of modernity and fits native title holders within it.

To construct the 'objective' value for native title land, the joint Justices believe that one should consider 'what a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to secure the extinguishment of those rights and interests'.[142] As a supposedly objective test, this thought experiment removes any potential idiosyncrasies or particularities of these purchasers, vendors, and lands. The Justices' inherited English land law is made transparent, colourless, or white. Having never existed and bearing no resemblance to the lands or cultures at issue, this myth enables the joint Justices to uphold alienable freehold title as the 'most ample estate which can exist in land'.[143] As a standard for comparison, the joint Justices ignored that for the lands at issue: the only 'buyer' could be the Northern Territory, the Claim Group's rights are inalienable, the Claim Group was unwilling to alienate and sell their land, and there was no open and free market for these rights. However, when this myth is produced as reasonable, then the Claim Group's rights and interests have to be valued at less than 'unencumbered, freely alienable freehold title'.[144] The joint Justices found that the trial judge and Full Court had inappropriately discounted the value of the native title rights, perhaps because they had considered the inalienability of those interests or the '*true character*' of those rights, which were irrelevant.[145] It is hard to see why the 'true character' is irrelevant, and that the 'true character' of native title is related to Ngaliwurru and Nungali Peoples' ways of living when it is constructed through legal process inherited from the imperial legal system. However, in removing its 'true character', the joint Justices (re)construct native title to be more like English land law, and, therefore, decreased the amount from 65% to 50% of freehold value at the time of extinguishment.[146] According to *Timber Creek*, Ngaliwurru and Nungali Peoples' ways of living are, simply, not sufficiently comparable to unencumbered, freely alienable freehold title to be valued as it.

Of course, disagreements about the reasonable and objective method or model for valuation can arise. For example, Gageler J argued for a different method.[147]

141 Moreton-Robinson (n 24) 191.
142 *Timber Creek* (2019) 364 ALR 208, 227 [64], 239 [104].
143 Ibid 228 [67].
144 Ibid 238–9 [100]–[102], citing *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 408–10; *Geita Sebea v Territory of Papua* (1941) 67 CLR 544, 552, 557.
145 *Timber Creek* (2019) 364 ALR 208, 239–40 [105]–[106] (emphasis in original).
146 Ibid 240 [106]–[107].
147 Ibid 274–5 [241]–[243].

As further described below, Edelman J argues for a method of translation that does not divide economic from non-economic damages. Debates amongst the Justices about the proper means of translating native title into English land law is entirely in keeping with their inherited English land law. That is to say when the Claim Group has been retroactively constructed as bearers of native title, which translates their forms of living into the form of title recognisable at law, the reasonable means of valuation is to treat it like any other from of English land. Even if English land law contains no comparable forms of relation and being to the Ngaliwurru and Nungali Peoples, the task is to uphold English land law and structure the Ngaliwurru and Nungali Peoples according to it. When that is done, ensuring that there is an additional award for 'cultural loss' appears progressive. Before addressing those arguments, it is worth looking, briefly, at the second issue the High Court addressed.

The second issue was how much interest was owed for the economic valuation. The Claim Group requested compound interest on various grounds.[148] The joint Justices found that equity allows for simple interest but not compound interest 'in proceedings for specific performance of a contract for the sale of land' which 'has been extended to the compulsory acquisition of land'.[149] Based upon its translation of native title into common law property, it found it could only award simple interest.[150] The Claim Group also argued that compound interest should be awarded because the Northern Territory had a fiduciary-like duty or had unlawfully acquired their land and then retroactively justified it when native title legislation was passed. Here we see another moment of resistance. The Claim Group is pointing out that the Northern Territory's acquisition of their territory was not lawful because *NTA* had not been passed when it took their land. Following from Nichols' argument, the construction of their territory as property depends on theft as the mechanism and means for its generation or construction as property, which is retroactively constructed.[151] Making this argument in the court of law, however, runs against the form of pleading and the logic of the law. The Claim Group had retroactively rewritten their history to include native title to claim native title. When both settler and Aboriginal histories are retroactively written to support and include native title, then the court has no trouble finding that retroactive legislation allows for impairment or extinguishment of those rights.[152] In short, the High Court awarded simple interest.

Where the Claim Group's prior litigation established that their behaviours, performances and rituals fit into the form of native title as 'traditional customs and practices', the real innovation in *Timber Creek* is how it extends the scope of compensable extinguishment to include 'cultural loss'. The last issue the joint Justices evaluated was how to calculate compensation for the 'non-economic

148 Ibid 240–1 [110]–[111] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

149 Ibid 242 [113], 242–4 [116]–[119].

150 Ibid 246–7 [128].

151 Žižek writes, 'there is no "original" law not based upon crime: the institution of law as such is an "illegitimate" usurpation': Žižek, *For They Know Not What They Do* (n 16) 209.

152 *Timber Creek* (2019) 364 ALR 208, 248 [131]. But see Kirsty Gover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(3) *Sydney Law Review* 339.

effect of compensable acts … which is inherent in the thing that has been lost, diminished, impaired or otherwise affected'.[153] The joint Justices found a basis for awarding non-economic damages '[u]nder the general law' which allows 'compensation for the compulsory acquisition of land' including the freehold value as well as 'compensation for severance, injurious affection, disturbance, special value, solatium or other non-economic loss'.[154] The joint Justices treated these non-economic losses as 'solatium', but called them 'cultural losses' because solatium, a personal injury concept, 'distracts attention from the relevant statutory task of assessing just terms for the acquisition of native title rights … which owe their origins and nature to a different belief system'.[155] Rebranding 'non-economic losses' or 'solatium' as 'cultural loss' is an attempt by the joint Justices to maintain the belief that native title 'arise[s] under traditional laws and customs',[156] even though the judgments construct the method for translating the content into 'modern' values. Writing extrajudicially, Justice Gordon noted that the Court's explicit task was to translate the '"spiritual … into the legal" in order to ascertain the right amount of compensation for what had been done'.[157] The Court used native title law to mediate the transformation of 'spiritual' values into 'compensation', which is the spirit value of modernity.

To construct 'culture' as a commodity like 'land', the joint Justices employed a valuation that was similar to the trial judge's two-step process for land. The first was to identify 'the nature and extent of the native title holders' connection or relationship with the land and waters by their laws and customs' and then to '[consider] the effect of the compensable acts on that connection'.[158] Under such an approach, the method for calculating compensation owed for impacts to the Claim Group's traditional laws, customs, and practices is to attend to 'the nature and timing of the compensable acts' through an 'incremental and cumulative' understanding of the consequences from 1975 onward.[159]

The trial judge accepted uncontested evidence from Claim Group members that demonstrated their connection, beliefs and practices, as well as duties and obligations to 'look after country'.[160] In support, the trial judge also extensively referenced anthropologists' reports on the Claim Group's traditional and customary laws and customs.[161] To understand how the Claim Group experienced cultural loss, the joint Justices referenced four events that were 'not the direct result of compensable acts'.[162] They found that the effects 'had to be understood by the bond

153 *Timber Creek* (2019) 364 ALR 208, 255 [154].

154 Ibid 224 [51]. Allowable under *NTA 1993* (Cth) s 51A.

155 Ibid 225 [53].

156 Ibid.

157 Gordon (n 28) 328, citing *Western Australia v Ward* (2002) 213 CLR 1, 64–5 [14].

158 *Timber Creek* (2019) 364 ALR 208, 256 [159].

159 Ibid 257–8 [164]–[166]. But see Lavery (n 40) 264; William Isdale, 'Dr Yunupingu's Claim for Native Title Compensation: The Constitutional Path Not Yet Trodden', *AusPubLaw* (Blog Post, 18 March 2020) <https://auspublaw.org/2020/03/dr-yunupingus-claim-for-native-title-compensation/>.

160 *Timber Creek* (2019) 364 ALR 208, 258 [168] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

161 Ibid 259–60 [169]–[176].

162 Ibid 260–2 [177]–[184].

that existed between a person and the spirituality of country'.[163] Erecting fencing and buildings destroyed significant cultural sites,[164] and the evidence revealed the Claim Group's 'gut-wrenching pain and deep or primary emotions accompanied by anxiety'.[165] Given that dispossession would continue,[166] the trial judge assessed the level of compensation at AUD1.3 million.[167] Neither the Full Court nor the High Court found that the trial judge made an error of law or that the award was manifestly excessive.[168] In essence, the joint Justices believed that the Australian community would find that AUD1.3 million is reasonable.[169] Although the joint Justices appropriately took notice of the Claim Group's pain and suffering, how does it translate into AUD1.3 million so that it is a reasonable sum?

To some degree, Justice Edelman's analysis clarifies how reasonableness arises as well as why AUD1.3 million is 'a conservative award'.[170] For Edelman J, the economic valuation depends on an 'exchange value', or what the Northern Territory would reasonably pay to extinguish native title, while the cultural loss is the value not captured by that value.[171] Putting aside that the Northern Territory did not pay and that Aboriginal peoples could not extinguish their obligations, Edelman J claims that the proper method for determining the exchange value of non-exclusive rights is the reasonable price to extinguish an easement.[172] His Honour agreed that was around 50% of freehold value for this Claim Group.[173] When the economic value is understood as an exchange value, then the value of the cultural loss is an amount the exchange value does not capture.[174] The flaw with the joint Justices' valuation, according to his Honour, is that they treat the harm as accruing from the date of judgment instead of the date of loss, because, even though they call it 'cultural loss', they apply the legal form of solatium. An award for cultural loss is 'compensation for the value of the loss of attachment to country and rights to live on, and to gain spiritual and material sustenance from, the land', which is 'distinct from the subsequent inconvenience and anguish caused by the compulsory manner in which the rights were extinguished', called solatium.[175] Loss of amenity occurs at the moment of the injury and requires it to be calculated from the moment of loss.[176] Solatium or loss amenity are both ways of treating 'cultural loss' as heads of damage associated with personal injury in tort law. Essentially,

163 Ibid 265–6 [197]–[198]; *Northern Territory v Griffiths* (2016) 337 ALR 362, 421 [326].
164 *Timber Creek* (2019) 364 ALR 208, 263–4 [190].
165 Ibid 265 [194].
166 Ibid 263–4 [190].
167 Ibid 268 [208] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
168 Ibid 268 [209]–[210], 273–4 [235]–[237] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
169 Ibid 273–4 [237].
170 Ibid 294 [328].
171 Ibid 280 [271].
172 Ibid 285 [288].
173 Ibid 286–8 [293]–[303].
174 Ibid 288–9 [304].
175 Ibid 290 [312].
176 Ibid 291 [314]–[316], citing *Skelton v Collins* (1966) 115 CLR 94 (awarding loss of amenity despite permanent unconsciousness and without any experience of pain and suffering).

Edelman J is saying the joint Justices have mixed up which heads of damage are most appropriate.

That matters because the joint Justices valued the cultural loss at AUD1.3 million, which could look excessive if it is compared to a freehold value of AUD640,000 in 1994 money. That is what the Commonwealth and the Northern Territory both argued, which is also why, as his Honour explained, that the comparison is inapt.[177] Providing AUD1.3 million at the time of judgment in 2019 means that the relative value at the moment of extinguishment (assuming it occurred on 10 March 1994 – another myth – and using simple interest) is AUD338,381.[178] As slightly more than half of the freehold value in 1994, Edelman J claimed it was 'a conservative award', but it was 'plainly not excessive'.[179]

From within the law, one can argue, like the High Court Justices, that the total award of compensation for the *Timber Creek* Claim Group, AUD2,530,350, is conservative, legally justified or within a 'range of what is reasonable'.[180] But what makes a 'range' reasonable? As subjects of legal discourse, the High Court Justices construct a narrative. Through the legal processes, the Claim Group is integrated into progressive narrative as partially traditional and partially modern. Those who believe this progressive narrative make themselves into subjects of this legal discourse. Even though they (re)construct it and make it new, in retroactively positing it as necessary for their narrative, their subject status is mythically imbued with assumed objectivity. When that is done, their myths are reasonable tools for evaluating and ascertaining value. That does not mean it is beyond controversy.

From outside the dispute, commentators have claimed that *Timber Creek* was too generous and that it will require the government to be liable for billions of dollars, which could affect mining, natural resource development, and agricultural sectors of the economy.[181] If so, then *Timber Creek* reinvests native title with an aura of 'uncertainty', which, as Short argues, previously enabled commercial interests to lobby the government and ensure that native title legislation in 1993 would 'pose no threat to commercial interests and maintain existing inequalities'.[182] On the other hand, some applaud it.[183] The point I make is that *Timber Creek* exceeds the confines of legal discourses in successful ways. Various commentators can claim that *Timber Creek* is reasonable or not. That is to say, mediatisation or mediation of the legal result demonstrates broader, societal enjoyment in this legal case.[184] It is 'enjoyment' in the sense that others engage with it to reconstruct their particular

177 Ibid 293 [321]–[322].

178 Ibid 293 [322]. Edelman J agreed that there was no basis for claiming compound interest 'on' the compensation: ibid 277 [255], 295–303 [335]–[359].

179 Ibid 294 [328].

180 'NLC Welcomes High Court Judgment of Native Title Compensation at Timber Creek', *Northern Land Council* (Media Release, 13 March 2019) <https://www.nlc.org.au/media-publications/nlc-welcomes-high-court-judgment-of-native-title-compensation-at-timber-creek>.

181 Davidson (n 2); Australian Associated Press (n 125); Ludlow (n 125).

182 Short, 'The Social Construction of Native Title in Australia' (n 29) 859–60.

183 James (n 3); Abraham and Isdale (n 3).

184 Jodi Dean, *Blog Theory: Feedback and Capture in the Circuits of Drive* (Polity Press, 2010) 27–9.

views and political projects.[185] It binds them to these national myths through their debate and contestation.

The values constructed through these processes – the legal processes as well as the broader processes – are 'reasonable' because they pose no threat to the national myth or systems of valuational exchange. *Timber Creek* reproduces the national myth and the valuational exchanges as reasonable. By validating the Claim Group's native title claim, the legal processes validate their existence and materially construct them as 'traditional' in return for asserting that the Crown acquired sovereignty over them. When integrated within the progressive narrative, they validate the national myth, and where they continue to hold native title rights, they become dependent on the Crown. Where their cultural practices have been extinguished, the processes of native title transform their erstwhile culture into compensation. Their traditional and mythical beliefs have been replaced by so-called reasonable and modern values – the national myth that the Crown acquired sovereignty. Because the award for cultural losses is provided in addition to economic losses, it could even look progressive. In this way, as Justice Gordon wrote extrajudicially, it is part of the common law and a 'shared history' that 'constitutes one step towards developing a "good Australia"'.[186]

V CONCLUSION

Native title is a process, not a thing, or an object. It is a process that displaces Aboriginal and Torres Strait Islander peoples' laws, customs and practices and mediates their transition into the modern Australian national state, which sustains imperialism. This does not mean that Aboriginal and Torres Strait Islander peoples do not have traditional laws, customs and practices. Nor does it mean that they cannot strategically deploy native title as a means of resistance while maintaining their own, separate ways of being. However, native title materialises that which survives the Crown's acquisition of sovereignty into traditional laws, customs and practices. Courts employ legal concepts and myths they inherit to determine what is sufficiently property-like to construct claimants as holders of native title and then retroactively posit it as pre-existing the Crown's acquisition of title to bind native title claimants to the national myth that the Crown acquired sovereignty sometime in the past, as a historical fact. In this way, native title reconciles Aboriginal and Torres Strait Islander peoples with Australia's national myth-making.

Those who claim native title become legal subjects, whether courts of the Crown acknowledge their rights as existing or extinguished. Those who have native title become 'traditional' in depending on the Crown for legal title. Rather than challenging the Crown's acquisition of sovereignty, an impossible legal claim in municipal courts, they become integrated within the state as legal subjects who help reproduce the national myth. Those who successfully claim that their

185 The 'history wars' are an example. See Moreton-Robinson (n 24) 150, 216 n 50.

186 Gordon (n 28) 329.

native title has been extinguished retroactively aver the Crown's acquisition of sovereignty so that the destruction of custom and practices can be translated into compensation. Native title claimants can also assert and maintain that they have never ceded sovereignty.[187] They are not wrong or misguided to do so. But holders of native title cannot question or undermine the Crown's acquisition of sovereignty in law without undermining their legal claims to native title.

Importantly, viewing native title as a displaced mediator does not prevent everyone from questioning that the Crown acquired sovereignty in settler states or from using legal discourse to do so.[188] One can look at the law and argue that the facts do not fit with the currently accepted legal justification. That type of argument is a historical-empirical argument about legality or a theoretical argument. If someone makes a legal argument that challenges the current national myth about the origins of Crown sovereignty, those claimants will become, as legal subjects, displaced mediators of the national myth by providing a new space for legal contestation.

While many have argued that native title perpetuates colonisation, it endures particularly because it transcends disciplinary and national boundaries. Even if many legal subjects believe that native title has problems, the belief that it can be better and will get better is what sustains the force of imperial formations across settler states. With the belief that First Peoples and settler relations are improved through native title, colonisation will continue because the nationalist myth (re)produced through native title is one that legal subjects enjoy – it settles and pacifies in ways that decolonisation unsettles and disrupts.[189]

187 See Ghillar, Michael Anderson, 'How the Issue of First Nations and Peoples Sovereignty Has Evolved', *Sovereign Union: First Nations Asserting Sovereignty* (Blog Post, 9 April 2015) <http://nationalunitygovernment.org/content/sovereignty-never-ceded>.

188 See Rowan Nicholson, 'Was the Colonisation of Australia an Invasion of Sovereign Territory?' (2019) 20(2) *Melbourne Journal of International Law* 493.

189 Tuck and Yang (n 30) 3.