Claiming the Past:

Historical Understanding in Australian Native Title Jurisprudence

ALEX REILLY AND ANN GENOVESE*

In this paper, we consider the use of history in Indigenous land rights claims in Australia through a critique of the High Court's construction of Native title rights in Yorta Yorta Aborginal Community *v.* Victoria*. The leading joint judgment of Gleeson C.J., Gummow and Hayne JJ. (with whom McHugh and Callinan JJ. agreed on the result) posited the time of the assertion of sovereignty as the key moment in the history of Indigenous and non-Indigenous legal relations, and the test for the proof of Native title focuses on this moment. This paper is intended to be interdisciplinary in perspective and uses analysis from*

---

* Alexander Reilly, LL.B. (University of Adelaide), LL.M. (University of British Columbia), is a Senior Lecturer in the Division of Law at Macquarie University, specializing in legal theory and constitutional law. He is executive editor of the Macquarie Law Journal and on the editorial board of the interdisciplinary journal, Balayi: Culture, Law and Colonialism.

Ann Genovese, LL.B. (Adelaide), Ph.D. in History (University of Technology, Sydney), is a part-time lecturer in the Faculty of Law, UTS, and manages a research project for the Australian National University which is investigating the role of historical expert evidence in Federal Court cases involving Indigenous litigants.

both legal and historical theory. We aim to demonstrate how the courts have adopted a particular understanding of what history is and how it may be used in the resolution of claims. The courts assume that law and history have a shared understanding of the past. Secure in this assumption, the only issues of concern to courts relating to historical evidence are practical issues of the form and presentation of expert reports and testimony, and legal issues of their relevance and reliability. We question the ability of history and law to speak to each other about the past, free from difficult questions of theory and method. We advocate for an alternative role for historians in the claims process as theoretical experts on the nature of the past and its interpretation.

I INTRODUCTION

> The images which we find "caught" in the record like a fly in amber are not those that figure forth an unambiguous and internally consistent social reality, but those that capture as in the still photograph a moment of tension and change, an intermittency between two moments of putative presence. [1]

Native title bridges a gap between the past and the present by recognizing a basis for rights that exists in both periods of time. This has meant that since Indigenous land rights were recognized in Australia in *Mabo* v. *Queensland [No. 2],*[2] "history" has become an imperative in the construction of the jurisprudence for claiming these rights.[3] One consequence of this incursion of history into the legal domain has been vigorous academic debate about how lawyers and judges view and use history as a tool for interpreting law.[4] There has also been much reflection among historians who have been called upon to write expert opinions or appear as expert witnesses on how they have been constrained in their presentation of history by legal conventions and practices.[5] At the same time, debates over historical method among historians themselves have become more vocal and more public in light of competing and discordant historiographies of

1. H. White, "History as Fulfilment" (Keynote Address, Interdisciplinary Scholars Network, Tulane University, 12 November 1999) [unpublished].
2. (1992), 175 C.L.R. 1 (H.C. Aus.) [hereinafter *Mabo*].
3. We use "history" in this paper to refer generally to the body of theory and practice of interpreting the past, which is encompassed in the discipline of history.
4. See *e.g.* D. Ritter & F. Flanagan, "Stunted Growth: The Historiography of Native Title Litigation in the Decade Since *Mabo*" (2003) 10 Public History Rev. 21; A. Reilly, "The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title" (2000) 28 Federal L. Rev. 453; B. Selway, "The Use of History and Other Facts in the Reasoning of the High Court of Australia" (2001) 20:2 University of Tasmania L. Rev. 129.
5. There are two recent collections which provide excellent examples of these reflections: C. Choo & S. Hollbach, eds., *History and Native Title: Studies in Western Australian History,* vol. 23 (Perth: University of Western Australia Press, 2003); M. Paul & G. Gray, eds., *Through A Smoky Mirror: History and Native Title* (Canberra: Aboriginal Studies Press, AIATSIS, 2002).

Australia's colonial past.[6] Another more ethically urgent consequence of the growing reliance on history in Native title cases has been the questions generated among Indigenous parties themselves, not only about how the past can be given a voice, but about whose voice is in fact able to be heard.[7] These often conflicting concerns about the role and impact of history in Native title cases share a common assumption: that history and law are able to speak to each other. This means that that their ideas about the past can be shared, translated or transposed, and that the key issue for case management is a practical one about improving the ways in which historical evidence is gathered and presented. These questions have been asked in the Canadian context of Indigenous land rights.[8] However, the construction of Native title in Australia and the requirements for its proof has provided particular challenges to historians in Indigenous land rights claims.

In 2002, the High Court of Australia decision of *Yorta Yorta Aboriginal Community* v. *Victoria*[9] permanently disrupted the assumption that law and history are able to speak to each other. The decision confirmed that in Australian Native title jurisprudence, history is defined as a finite and measurable entity. It is certain, knowable and interchangeable with a concept of the past. This is an idea that poses a theoretical and methodological impossibility for most historians, and is perplexing for most Indigenous peoples whose idea of themselves and their past are interchangeable. In this paper, we will explore how the decision in *Yorta Yorta*, both at first instance, on appeal to the Full Court of the Federal Court and, finally, on appeal to the High Court, exposes the epistemological conflict between law and history that lies at the heart of the Native title process. We will review the approach to the question of history and the assessment of historical evidence in the *Yorta Yorta* judgments through the lens of both jurisprudence and historiography, and analyze the impact the judgments have on the idea of history itself.

We have structured the paper to reflect our interdisciplinary approach, attempting to integrate aspects from both disciplines into each section and not presenting a traditional case note format. This is important to our belief that a

---

6. The genesis of this debate, which is being staged squarely in the public domain through media and political commentary, can be argued to be a self-published book by Keith Windschuttle, *The Fabrication of Aboriginal History: Van Dieman's Land 1803-1947*, vol. 1 (Sydney: Macleay Press, 2002). The counter position and analysis of Windschuttle is well represented in two recent publications: R. Manne, ed., *Whitewash: On Keith Windschuttle's Fabrication of Australian History* (Melbourne: Black Inc. Agenda, 2003); and S. Macintyre & A. Clark, *The History Wars* (Melbourne: Melbourne University Press, 2003).
7. For example, M. Morgan & J. Muir, "Yorta Yorta: The Community's Perspective on The Treatment of Oral History" in Paul & Gray, *supra* note 5 at 1-9.
8. On the Canadian literature, see *e.g*. P.G. McHugh, "The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past" (1998) 61 Sask. L. Rev. 393; Robin Fisher, "Judging history: Reflections on the Reasons for Judgment in *Delgamuukw* v. *BC*" (1992) 95 B.C. Studies 43; J. Fortune, "Construing *Delgamuukw*: Legal Arguments, Historical Argumentation, and the Philosophy of History" (1993) 51 U.T. Fac. L. Rev. 80; Arthur Ray, "Creating the Image of the Savage in Defence of the Crown: The Ethnohistorian in Court" (1990) 6:2 Native Studies Rev. 13; H. Foster & A. Grove, "Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and Their Employers" (1993) 27 U.B.C. L. Rev. 213.
9. [2002] HCA 58 [hereinafter *Yorta Yorta 3*].

more fluid, and less legally dominant and structured, conversation between law and history as disciplines is essential to improving how historical evidence may be understood by the courts in Native title cases.

The paper has been divided into six sections. After these introductory remarks, section II discusses the role of history and historians in *Mabo*,[10] the first case to recognize the concept of Native title. This section examines how *Mabo* established the jurisprudential framework for the *Native Title Act*,[11] which created the process for claiming Native title that has been used in all subsequent Native title claims. Section III describes the content of the three *Yorta Yorta* decisions, outlining and criticizing the legal tests for the proof of Native title. Sections IV and V engage in specific criticisms of the law's use of history from the perspective of historical theory. Section IV challenges the assumption that facts in the past are fixed and determinable, and therefore capable of providing a secure basis for the determination of rights. Section V draws a distinction between the past and history, a distinction which is lost in the judgments in the cases. This section unravels the methodological and theoretical understandings of history that exist in the law and presents other understandings from historical theory. The final section, section VI, argues that as a result of the *Yorta Yorta* judgments, historians need to reconsider their role in Native title cases. It encourages them to put into the foreground their theoretical ability to interpret the past and, in doing so, to provide a necessary context and reservation to their empirical role as the collators of documents.

II BEFORE *YORTA YORTA*: HOW COLONIAL HISTORY BECAME CENTRAL TO INDIGENOUS LAND RIGHTS IN AUSTRALIA

Indigenous people in Australia have always maintained rights to their traditional lands. The first push to have these rights recognized, however, only occurred in the 1960s when the Yirrkala people made a land rights claim over the Gove Peninsula in the Northern Territory. Yirrkala people claimed that their laws and customs could be recognized and enforced at common law. In the case which ensued in the Federal Court, *Milirrpum* v. *Nabalco Pty Ltd.*, the trial judge, Blackburn J., concluded from the evidence that the Yirrkala had a "subtle and elaborate [relationship to the land] which provided a stable order of society …. If ever a system could be called 'a government of laws, and not men,' it is that shown in the evidence before me."[12] Furthermore, Blackburn J. was prepared to examine Indigenous relationships to their lands in the assessment of their rights under the common law. However, he rejected the claim on the basis that the relationships to land of the Yirrkala lacked the essential elements of a property interest under Australian law. Those elements included the right to alienate the

10. *Supra* note 2.
11. *Native Title Act 1993* (Cth).
12. (1971), 17 F.L.R. 141 (N.T.S.C.) at 267 [hereinafter *Milirrpum*].

land and the right to exclude others from the land.[13] The claimants did not appeal the decision in *Milirrpum*. Instead, there was a government inquiry into Indigenous land rights in the Northern Territory, which resulted in a *Land Rights Act* in the Territory.[14] Elsewhere in Australia, Indigenous communities continued to have no legal rights over their traditional lands, unless such rights had been conferred by state or Commonwealth governments.

It was not until the *Mabo* decision in 1992 that Australia's highest court, the High Court, was called upon to reconsider the decision in *Milirrpum*.[15] *Mabo* occurred when historical accounts of the extent of dispossession of Indigenous peoples from their land since colonization could no longer be ignored as a matter of law or ethics.[16] Although the historical record of Indigenous dispossession might have been the motivation for *Mabo*, rectifying this dispossession played no part in the formal legal response in the judgment. Instead, consistent with its limited power to expound the law and not to make it, the High Court drew upon existing principles in the common law to declare the existence of "native title," a right to land claimable by Indigenous people with a current and continuing physical or spiritual connection to traditional lands. The majority of the Court reaffirmed Blackburn J.'s finding that Indigenous relationships to land could be recognized by the common law. For this recognition, however, the court did not require the relationships to land to have the characteristics of recognized property interests. Instead, the Court held that title to land was *sui generis*. That is, the nature and extent of Native title rights depended on the relationship to land of Indigenous peoples. The practical significance of *Mabo* was that it left open the possibility that to the extent Indigenous communities had survived dispossession from their land, they possessed a title to the land based on survival of their traditional laws and customs.

The Australian Parliament responded to *Mabo* by passing the *Native Title Act,* which established a process for claiming Native title. The definition of Native title in the *Act* adopted the language of the leading judgment in *Mabo*.[17] It is defined in s. 223 of the *Act* "as rights and interests possessed under the traditional laws acknowledged and the traditional laws observed by the Aboriginal peoples."[18] To be claimable, Aboriginal people must have a connection with land or waters under those laws and customs.[19]

As a result of the *Mabo* decision and the subsequent passing of the *Native Title Act*, certain key questions have arisen with regards to the determination of the current nature and extent of Native title rights. For example: What was the significance of the assertion of sovereignty on the present nature and content of

13. *Ibid*. at 235-237.
14. *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
15. *Supra* note 2.
16. For an interpretation of the *Mabo* decision as a response to past injustices, see Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*" (1995) 17 Sydney L. Rev. 5.
17. *Supra* note 2 at 57, per Brennan J.
18. *Supra* note 11 at s. 223(a).
19. *Ibid*. at s. 223(b).

Native title rights?[20] What is required for present rights and interests to be based in "tradition"? Should the inquiry into Native title rights start from the past or from the present, and how does this starting point shape the inquiry? Importantly, although Native title was defined by the court as having existed from the time of the assertion of British sovereignty in 1788 (and later in other Australian colonies), it only became claimable from the time of the declaration of its existence in 1992. As a result, the temporal gap between the inquiry into the claimant's present relationships to land and the inquiry into whether these relationships were traditional in nature is potentially very wide. It is in the interpretation of this gap that history finds its role.

History is used both in support of and in opposition to Native title claims. For claimants, the historical record is essential to establishing that their ancestors were the original occupiers of land under claim, and that their present laws and customs were derived from the laws and customs of those original occupiers. For defendants, the historical record is used to testify to the extent of the encroachment of European lives upon the lives of the ancestors of the claimants.

In the earliest Native title cases, historians were used to create reports outlining historical accounts of Indigenous and non-Indigenous occupation of the claim area from the time of first European settlement.[21] In these and subsequent cases, historians for claimants have been requested in expert reports to research appropriate archives and order relevant material into coherent narratives testifying to the history of Indigenous relationships to land on the claim area since the time of first European contact. Historians for defendants (primarily the state and federal governments but also private mining and pastoral interests) write their own reports, presenting alternative interpretations of the archival material. They emphasize conflicting stories that highlight the extent of disruption to traditional life in the claim area, such as massacres, disease and forced migration. These accounts cast doubt on whether claimants are descended from the original occupiers of the land or whether their current practices are based on Indigenous traditions sourced in the claim area. The courts adjudicate between the competing versions of the past and expound their own history of relations within the claim area in order to determine the extent of Native title rights. The historian's role can therefore fit neatly into the adversarial process. Historians become advocates for versions of events as "revealed" through the documents and trial judges use these versions of events in their own

20. "Sovereignty" refers here to the points in time that the Australian colonies were proclaimed to be under the rule of the British Crown. Sovereignty was claimed upon settlement of the territories, on the basis that they were *terra nullius* (the land of no one). The applicability of this doctrine to the circumstances of Australia was questioned in *Mabo, supra* note 2. However, the Court refused to reconsider the validity of the assertions of sovereignty on the basis that they were "acts of State" that could not be challenged in domestic courts.

21. See for example the first two claims to go to trial in the Federal Court, those of the Yorta Yorta Aboriginal Community (*Yorta Yorta Aboriginal Community* v. *Victoria*, [1998] FCA 1606 [hereinafter *Yorta Yorta*].) and the claim of the Miriuwung-Gajerrong peoples (*Ward* v. *Western Australia* (1998), 159 A.L.R. 483 [hereinafter *Ward*].).

historiographies of the claim area, shaping the past in the service of the needs of the present.

There is another role for historians in the Native title process: as theorists of the relationship between the past and the present. This is a role that does *not* fit neatly with the adversarial process and is not immediately evident from the discussion and use of history in *Mabo*. Historians have particular expertise in thinking through questions about our relationship to the past. The very act of reading a document in order to "reveal" the past necessitates, from the purview of trained historians, a correlative act of interpretation and a theoretical perspective on how that interpretation can be justified. The involvement of historians in Native title jurisprudence has meant that historiographical questions about interpreting, and not just revealing, the past have become increasingly urgent for historians acting within the constraints of the law. To date, however, the questions have been considered most fully outside of the legal process.

Not surprisingly, the theoretical role for historians is marginalized in the legal process of Native title cases. The law is interested in accessing the past for the specific purpose of resolving Native title claims and not in exploring how events in the past might be viewed differently depending on the method and vantage point of the inquiry. This has meant the law's approach to the past has been dependent on the archive and chronologically driven.[22] In sections IV and V, this paper explains more fully how the law's approach to the past is an example of a narrow theoretical framework, and how its approach creates the basis for the epistemological conflict between "the past" and "history" that has characterized the *Yorta Yorta* judgments. It is necessary, however, to first outline how the *Yorta Yorta* decisions constructed the test for claiming Native title and used history in the application of this test.

III THE USE OF HISTORY IN *YORTA YORTA*

> [T]his case is not about righting the wrongs of the past, rather it has a very narrow focus directed to determining whether [N]ative title rights and interests in relation to land enjoyed by the original inhabitants of the area in question have survived to be recognised and enforced under the contemporary law of Australia.[23]

The claim of the Yorta Yorta Aboriginal Community was heard at first instance in the Federal Court by a single judge, went on appeal to the Full Court of the Federal Court (a three judge bench) and was finally heard by the High Court of Australia in its appellate jurisdiction, from which there is no appeal. Together, the three *Yorta Yorta* determinations are an interesting study of the assumptions in the law's understanding of the past that drive its use of history in the Native title claims process. This section examines these assumptions from the point of view of the historian, through the lens of the two main issues in the case. First,

22. See *e.g.* Reilly, *supra* note 4; Ritter & Flanagan, *supra* note 4.
23. *Yorta Yorta 3, supra* note 9 at para. 21, Gleeson C.J., Gummow and Hayne JJ.

what are the legal requirements to establish the existence of Native title rights? Second, how do you go about proving these requirements?

The Yorta Yorta people claimed to be the descendants of the Indigenous peoples living in an area on the border of Victoria and New South Wales that included parts of the Murray and Goulburn rivers and surrounded many large towns. They admitted that they had lost their traditional languages, that they no longer observed the traditional religious practices of their ancestors and that external influences such as Christianity and environmentalism influenced their views of their relationship to land and other matters.[24] However, the community maintained that it owed its existence to pre-existing laws, customs and traditions, and that these traditions were of great importance to the people's identity and, indeed, to their survival as a community. The area is the site of intensive non-Indigenous economic activity including agriculture, grazing and tourism around the river systems. The court proceedings included 500 parties responding to the claim. The claim was widely understood as a test case for the survival of Native title in the more heavily populated areas of Australia.

Decision at First Instance

The decision of the trial judge, Olney J., established that there are a number of distinct avenues of inquiry to make out a Native title claim. He stated: "[F]irst, it is necessary to prove that the members of the claimant group … are descendants of the [I]ndigenous people who occupied (in the relevant sense) the claimed area prior to the assertion of Crown sovereignty."[25] Olney J. held that the claimants had satisfied the court, on a balance of probabilities, that two of their known ancestors were descended from the original inhabitants of the claimed lands. The documentary record provided evidence of their births in the 1830s and the judge was prepared to infer that the ancestors of these ancestors were among the occupiers of the claimed lands at the time of the assertion of sovereignty in 1788.[26]

Second, Olney J. required that the claimants establish the nature and content of the traditional laws acknowledged, and the traditional customs observed, by their ancestors in relation to their traditional land.[27] Olney J. held that the best evidence of the traditional laws and customs associated with the claimed area in the 19th century was to be found in the documentary sources, in particular, in the writings of E.M. Curr, a pastoralist who lived in the claim area from 1841 to 1851.[28] According to Olney J., the oral testimony of the claimants was helpful only to the extent that it confirmed the documentary sources. The judge formed the view that oral testimony is an inherently weaker form of evidence. He found

24. The applicants' supplementary anthropological report prepared by Mr. Hagen (exhibit A67) in *Yorta Yorta*, *supra* note 21.
25. *Ibid*. at para. 4.
26. *Ibid*. at para. 104.
27. *Ibid*. at para. 4.
28. *Ibid*. at para. 106.

that it diminishes in quality over time: "Evidence based upon oral tradition passed down from generation to generation does not gain in strength or credit through embellishment by the recipients of the tradition."[29] He also found that its value is not intrinsic, but depends on how it compares with "evidence derived from historical records and the recorded observations of people who witnessed activities and events about which the members of the claimant group know only what has been passed down to them by their forebears."[30]

Having assessed the quality of evidence in this way, Olney J. concluded that the claimants no longer acknowledged or observed the traditional laws and customs of their ancestors. There were two main bases for this finding. First, the historical documentary record after Curr was silent as to the nature and extent of traditional laws and customs. Instead, it demonstrated "that the land on either side of the Murray had been taken up for pastoral purposes and that there had been both severe dislocation of the [I]ndigenous population and a considerable reduction in its numbers due to disease."[31] Second, Olney J. interpreted a petition for land of 42 Indigenous people from the region to the Governor of NSW in 1881 to be positive evidence that the signatories, on behalf of their communities, had abandoned their *traditional* connection to land. Olney J. then reached his conclusion that Native title had been completely extinguished over the claim area without considering the testimony of the claimants as to the laws and customs that they claim to be traditional in nature. He stated:

> It is clear that by 1881 those through whom the claimant group now seeks to establish [N]ative title were no longer in possession of their tribal lands and had, by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present [N]ative title claim; and the dispossession of the original inhabitants and their descendants has continued through to the present time …. Traditional [N]ative title having expired, the Crown's radical title expanded to a full beneficial title.[32]

Having reached this conclusion, Olney J. considered it "appropriate" to make "some mention" of the "current beliefs and practices of the claimant group."[33] However, these were not relevant to his ultimate conclusion that Native title rights had ceased to exist over 100 years before. Olney J. held that such current practices as protecting sacred sites and managing the land were either not consistent with Curr's observations or that there was no evidence that the practices "were of significance to the original inhabitants."[34] Finally, Olney J. concluded his judgment with what has become a much-quoted passage about

29. *Ibid*. at para. 21.
30. *Ibid*. at para. 22.
31. *Ibid*. at para. 118.
32. *Ibid*. at para. 121.
33. *Ibid*.
34. *Ibid*. at paras. 122-124.

"the tide of history" having "indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs."[35]

Decision of the Full Court of the Federal Court

On appeal, the claimants argued that Olney J. had applied a "frozen in time" approach to the claim. He considered it necessary for the claimants to prove that their laws and customs were the same as those of their ancestors prior to the assertion of European sovereignty, and he only valued evidence that was relevant to establishing the nature and extent of these pre-sovereignty laws and customs.[36] It was argued at the trial and on appeal to the Full Court of the Federal Court that this approach provided insufficient weight to the claimants' evidence of their current relationship with their traditional lands.[37]

Black C.J., Branson and Katz JJ. in the Full Court all agreed that the trial judge had applied too restrictive a test. The whole court defined "tradition" broadly, allowing within the definition room for considerable change over time. Furthermore, Branson and Katz JJ. concluded that "it is probable that on the proper construction of s 223(1) of the *Native Title Act* the precise nature of the rights and interests that constitute a [N]ative title may evolve and change over time."[38] Despite this generous understanding of the potential scope for change in Native title rights and interests, and a broad definition of what is "traditional," Branson and Katz JJ. dismissed the appeal on the ground that it was still open for the trial judge to find, as he did, that on an assessment of the evidence, Native title rights and interests had ceased to exist at the end of the 19th century. History, and the weighting of historical evidence, was, therefore, the key jurisprudential question in their judgment. Our criticism of Branson and Katz JJ. is that they were prepared to leave standing an approach to assessing the historical evidence that was theoretically flawed. They accepted Olney J.'s judgment as an objective assessment of a past containing definite origins which can be ascertained empirically through the historical record. Such an assessment, they held, was "not to be lightly disturbed on appeal."[39] The dissenting judge, Black C.J., engaged with the questions of historical theory that underpinned the trial judge's approach to the evidence. He emphasized the contingent nature of the past. He held that conclusions about the past vary depending on how the evidence is approached and which evidence is given the greatest weight. He allowed the appeal on the basis that the trial judge had privileged documentary over oral evidence, evidence from the past over evidence from the present, and had adopted a narrowly chronological approach to considering the evidence. These

35. *Ibid*. at para. 129.
36. *Ibid*. at para. 4.
37. *Ibid*.
38. *Yorta Yorta Aboriginal Community* v. *Victoria*, [2001] FCA 45 at para. 144, per Branson and Katz JJ. [hereinafter *Yorta Yorta 2*].
39. *Ibid*. at para. 202, per Branson and Katz JJ.

approaches to assessing the evidence, Black C.J. held, led the trial judge into error.[40]

Decision of the High Court

The Yorta Yorta appealed from the Full Court of the Federal Court to the High Court. In the High Court, the leading judgment of Gleeson C.J., Gummow and Hayne JJ. ("the joint judgment"), with whom McHugh and Callinan JJ. agreed in the result, applied a much narrower test of Native title rights to that of the Full Federal Court, and even to that of the trial judge.[41] Furthermore, like Branson and Katz JJ. in the Federal Court, they failed to address the questions of historical theory central to Black C.J.'s reasons for allowing the appeal. The joint judgment posited the assertion of sovereignty as the key moment in the history of Indigenous and non-Indigenous legal relations.[42] Contemporary Indigenous land rights have their origin in traditional laws and customs as they were observed and acknowledged at the time of the assertion of sovereignty. The result of this approach is that no new Native title rights and interests could be created after this time as the transfer of sovereignty had also removed any capacity for Indigenous law to create new rights.[43]

Rights associated with laws and customs came into being at the intersection of two normative systems. That intersection occurred when the common law entered Australia and recognized rights and interests derived from traditional laws and customs. The common law continues to recognize those rights and interests to the extent that they continue to exist. However, although the common law has evolved, as have the traditional laws and customs of Aboriginal communities, Native title rights cannot evolve from the point of the acquisition of sovereignty when the two systems intersected. For the joint judgment, then, the acquisition of sovereignty is simply a point of the transition of legal power. The joint judgment does not consider other interpretations of the impact of the transfer of sovereignty, such as the possibility that there was a new and necessarily transformative relationship between colonial and Indigenous sources of authority at that time. The judgment's conclusion on the impact of the transfer of sovereignty is ahistorical in nature. That is, the decision makes clear that the assertion of British sovereignty had a particular impact as a matter of law, *regardless* of what was happening as a matter of historical fact in the early years of colonization.

Gleeson C.J., Gummow and Hayne JJ. attributed to sovereignty a different impact from that suggested by Branson and Katz JJ. in the Full Court of the Federal Court. For Branson and Katz JJ., Native title rights have their origin at the moment of the assertion of sovereignty, but can still evolve from that time;

---

40. *Ibid.* at para. 75, per Black C.J.
41. Unlike the joint judgment in the High Court, Olney J. does not posit sovereignty as a point after which Native title rights can no longer evolve.
42. *Yorta Yorta 3, supra* note 9 at para. 44.
43. *Ibid*. at para. 43.

for the joint judgment, any evolution of Native title rights "must find their roots in the legal order of the new sovereign power."[44] The joint judgment reached this conclusion because the new sovereign power is not *capable* of recognizing the evolution of rights under the laws and customs of an alternative legal order:

> Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom.[45]

As a matter of legal theory, the joint judgment's view of sovereignty is particularly narrow. Whether or not the new sovereign power gives effect to new laws and customs in the traditional society is a question of the extent of recognition of the old law that the new sovereign makes, and not a question of the sovereign's capacity to recognize rights that are created under the old law.[46] By effectively holding that the sovereign lacked the capacity to recognize a pre-existing legal order, the joint judgment avoids the more interesting and very challenging question of how a plurality of legal systems can co-exist in the same territory.[47]

For our purposes, what is important about the joint judgment's interpretation of the impact of sovereignty is that it creates a fixed point for the recognition of Native title rights and a time from which the nature of those rights can no longer evolve. It constructs the date that the Crown acquired sovereignty in Australia, 26 January 1788, as the high point of the extent of Native title, after which it can only diminish.

In dissent, Gaudron and Kirby JJ. suggested a different construction of Native title. They held that once Native title claimants establish a continuing connection to the land, how traditional laws and customs were observed was a matter for the Indigenous community:

> The question whether a community has ceased to exist is not one that is to be answered solely by reference to external indicia or the observations of those who are not or were not members of that community. The question whether there is or is not continuity is primarily a question of whether, throughout the period in issue, there have been persons who have identified themselves and each other as members of the community in question.[48]

---

44. *Ibid*. at para. 55.
45. *Ibid*. at para. 44.
46. See *e.g.* A.V. Dicey, *Introduction to the Study of the Constitution*, 9th ed. (London: Macmillan, 1952). The sovereign is not limited in what it can recognize as a right or interest in the legal order, or when or how it is derived. *Mabo* establishes common law recognition of rights derived from Indigenous traditional laws and customs. The extent of this recognition is not self-evident as the joint judgment in *Yorta Yorta* make out. It is not enough, therefore, to simply assert the proposition that the sovereign will not give effect to interests created in an alternative normative order.
47. See *e.g.* John Griffith, "What is Legal Pluralism" (1986) 24 *J. of Legal Pluralism and Unofficial Law* 1.
48. *Ibid*. at para. 117.

Under this construction, Gaudron and Kirby JJ. avoided placing emphasis on sovereignty as the joint judgment did and, instead, required an approach to determining Native title rights that focuses on the present day relationships to the land under claim. This construction of the test for the proof of Native title takes the emphasis off the past and the need for the courts to make an assessment of conditions in the past, including the nature of Indigenous relationships to land, in order to validate present rights. This approach does not, consequently, rely on historians in the claims process to provide this validation.

We believe that Gaudron and Kirby JJ.'s interpretation of the test for proof of Native title derived from s. 223 of the *Native Title Act* is a much sounder basis for determining the extent of Native title rights. Unfortunately, Gaudron and Kirby JJ. did not explain why the majority's interpretation of the *Act*, with its emphasis on the point of the assertion of British sovereignty, was unsatisfactory as a matter of historical theory. Such a critique will occupy us for the rest of the paper.

Antiquarian History and the Test for Proof of Native Title

In the High Court, Gleeson C.J., Gummow and Hayne JJ. drew a distinction between traditional laws and customs, which can evolve and still be the foundation of Native title rights, and Native title rights themselves, which are fixed at the moment of sovereignty.[49] By emphasizing the possibility of law and custom evolving, the Court was able to maintain that it did not support a "frozen in time" approach to the elements to be proved. According to the joint judgment, the trial judge would only have imposed a "frozen in time" approach if he had required the claimants,

> to establish that they, and their ancestors, had at all times since sovereignty continuously acknowledged and observed the same traditional laws and customs as had been acknowledged and observed before sovereignty, that they and their ancestors had occupied the claimed land and waters throughout that time in the same way as their ancestors had done so, and that the traditional connection which the claimants alleged they had with the land had been substantially maintained throughout the period since 1788.[50]

And yet, in relation to Native title rights, it is the pre-sovereignty nature and shape of the rights that indicate the fullest extent to which the rights can be claimed in the present. The only concession to change over time is that the rights may diminish in extent and still be partially claimable. Since present Native title rights are only the replication of their pre-sovereignty antecedents, the courts' acknowledgment that the laws and customs underpinning them can evolve seems a hollow concession. This is because the concession is made in a context in which sovereignty has had the impact of uncoupling laws and customs from the

49. *Yorta Yorta 3, supra* note 9 at para. 24, Gleeson C.J., Gummow and Hayne JJ.
50. *Ibid.*

rights from which they were derived. This means that the more laws and customs evolve, the less they conform to a static form of rights and, therefore, the less value they have as proof of Native title rights.

Furthermore, the joint judgment's discussion of proof in *Yorta Yorta* seems to require the very approach it disavows. In commenting on Olney J.'s reliance on the writings of the pastoralist, E.M. Curr, the joint judgment suggests that it is entirely a matter for the trial judge what evidence is favoured in relation to proving the content of traditional laws and customs at the time of the acquisition of European sovereignty, and at the time of Curr's observations in the 1840s and 1850s.[51] This inquiry is completely separate from the inquiry into current observance of laws and customs. According to this, there are three discrete aspects to proof: proof of the existence of traditional laws and customs in the past; proof of observance of traditional laws and customs in the present; and establishing a connection between the two such that the laws and customs can be said to have been substantially maintained across time. This construction of proof suggests that only written evidence can be used to prove the shape of traditional law and custom in the past, as the use of oral testimony would unfairly prejudice the third question of whether there has been a substantial maintenance of law and custom. The underlying assumption is that the past is constituted of discrete periods of time that can be compared and contrasted, the outcome of which determines the existence of Native title.

As was stated above, the approach taken by Branson and Katz JJ. in the Federal Court differed in that they held that Native title rights can *themselves* evolve. Despite this, the moment of sovereignty remained of critical importance to them in the determination of what is considered a "traditional" law or custom.

> We are … unable to accept the submission … that the test of whether a law or custom is traditional is a subjective test. That is, that the crucial question is whether those who currently acknowledge a law or observe a custom regard their practice of so doing as traditional. The adoption of a purely subjective test for the identification of traditional laws and customs would, it seems to us, leave considerable scope for the rewriting, perhaps unintentionally, of history.[52]

They further held that the objective nature of the test is "whether in fact the law or custom has in substance been handed down from generation to generation; that is, whether it can be shown to have its roots in the tradition of the relevant community."[53]

These passages reveal a number of things about the past as Branson and Katz JJ., and the majority of the High Court, understand it: First, that the past is determinate; second, that it is ascertainable from the present; and third, that there is a written history which has captured this past (presumably the written history of "serious historians" to which judges feel empowered to turn for the purposes

51. *Ibid*. at paras. 62-63.
52. *Yorta Yorta 2, supra* note 38 at para. 126, per Branson and Katz JJ.
53. *Ibid*. at para. 127.

of judicial notice.)[54] Of these three propositions, the first two are axiomatic for the law as it relies on the possibility of truth in the past to authorize its judgments. The third proposition reveals a strong faith in the possibility of objectivity in the process of writing. It leaves the way open for bold legal historiography and may explain why Branson and Katz JJ. were reluctant to "disturb" Olney J.'s judgment at first instance.[55]

Regardless of the elements to be proved in a Native title claim, how difficult it is to satisfy the elements depends ultimately on how the courts understand the relationship between the past and the present, and how they use historical sources to mediate this relationship. Even under the interpretation of Native title of the majority of the High Court, it might still be possible to "prove" the existence of Native title rights at sovereignty depending on what is considered "proof" and what it is that has to be proved. From one understanding of the past, it is impossible to access it and, therefore, to prove it. We cannot possibly know if and when something happened. The past, as David Lowenthal famously argued, is a foreign country.[56] We do not live there. We do not know, and can never know, the full range of happenings or, more importantly, what they mean. In fact, the point is that the past only matters because *we* look backwards from the present and ask questions of it: *we* put meaning into the past by looking for signs and causes of things we must deal with and experience now; *we* frame questions that make the past viable in discrete ways; *we* look for causes to explain the contemporary. It is this process of what *we* do that makes the past into an altogether different creature: and that is history.

This truth about our relationship to the past either negates the possibility of proving Native title rights altogether or encourages us to think about proof differently. Also, the existence of different understandings of history, and what this means for "proof" of past events, impacts on what types of connections to the past we choose to emphasize. If a combination of continuous occupation, an assertion of presently practiced traditional law and custom, and inference of a continuity of such practice is sufficient to establish proof of title, then the focus of the test on pre-sovereignty rights and interests may not be overly burdensome to claimants. But if what is required is documentary evidence to establish past observance of traditional laws and customs, then claims in all parts of Australia may face an insurmountable obstacle.

Of the 11 judges in the cumulative *Yorta Yorta* decisions, only Black C.J. attended to the possibility that a view of the past can be affected by the direction from which, and method by which, interpreters approach it. His analysis of Olney J.'s judgment reveals a different understanding of how the past can be understood from the present, and the role of written records and oral histories in this process. Black C.J. noted the limitations of historical assessments, including,

---

54. M.H. Ogilvie, "Case Notes: Evidence – Judicial Notice – Historical Documents and Historical Facts – Indian Treaty Rights" (1986) 64 Can. Bar Rev. 183.
55. *Yorta Yorta 2, supra* note 38 at para. 202, per Branson and Katz JJ.
56. D. Lowenthal, *The Past is a Foreign Country* (Cambridge: Cambridge University Press, 1985).

among other things: the preconceptions of the authors;[57] the limited access authors may have had to local culture and knowledge;[58] the lack of training in what to look for;[59] the skewed perspective contained in "historical snapshots of adventitious content";[60] and the need therefore for a sustained period of analysis for more accurate views.[61] He stated:

> Special attention needs to be given to the essential nature of the subject matter of inquiry. The inquiry, when it is said that [N]ative title expired in colonial times, is not an inquiry about a single historical event concerning which the written record may be a very good guide—such as whether a vessel was lost with all hands—but something entirely more complicated and likely to involve a consideration of events over a lengthy period.[62]

Black C.J. concluded that the combination of these factors meant that "any conclusion about expiry" ought to consider "a very substantial time frame."[63] Implicit in this conclusion is that the time frame ought to include the oral testimony of the claimants in the mix of factors. Black C.J.'s caution about the dangers of relying too heavily on the written historical record is reinforced by what he describes as "the potential richness and strength of orally-based traditions."[64] He concluded that to be soundly based, "a conclusion … that at some point in the past there has ceased to be any real acknowledgment and observance of laws and customs based on tradition … will need to overcome difficulties of a formidable nature."[65] In 10 paragraphs of his judgment in dissent in the Full Federal Court,[66] Black C.J. neatly summarized the limitations that we believe expert historians ought to impress on trial judges in relation to the use of historical evidence in particular claims. He thus opened the door for historians to make the argument to lawyers preparing claims that expertise in understanding the difference between the past and history, and the role of interpretation in doing so, is an essential step for Indigenous groups and their struggle for their land.

In contrast to Black C.J., the other judges accepted the historical record at face value. They accepted a linear approach to history that began with the point of the introduction of British sovereignty and "pasted" chronological moments together to construct a past from the position of the present.[67] They accept that it was open for the trial judge to trace the historical evidence from the past to the

---

57. *Yorta Yorta 2, supra* note 38 at para. 55, per Black C.J.
58. *Ibid*. at para. 58.
59. *Ibid*. at paras. 55 and 58.
60. *Ibid*. at para. 58.
61. *Ibid*. at paras. 59-60.
62. *Ibid*. at para. 60, per Black C.J.
63. *Ibid*. at para. 61.
64. *Ibid*. at para. 55.
65. *Ibid*. at para. 54.
66. *Ibid*. at paras. 51-61.
67. R.G. Collingwood used the term "scissors-and-paste" history to describe this historical method. See generally his book, *The Idea of History* (Oxford; New York: Oxford University Press, 1994) at 257-266.

present and to cease the inquiry at the point at which the judge was satisfied that a traditional Aboriginal community observing and acknowledging traditional laws and customs had ceased to exist.

IV THE ILLUSION OF A DETERMINATE PAST

> "Traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty [which must have] continued substantially uninterrupted …. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the people concerned.[68]

The decision of the majority of the High Court freezes Native title rights at the moment of the acquisition of sovereignty and turns them into relics of a functioning legal system. For the purposes of Native title, it is not the vibrancy of a contemporary Aboriginal legal system that is of importance, but its authenticity. Under this approach, the best that could be done from the time of British sovereignty was to preserve those rights. Underlying this jurisprudence, however, is a central, unifying conceit about the nature of history: that the past can be declared in a finite manner and, because of this, is interchangeable with a notion of history. We will argue in the following sections that this disables a jurisprudential purview of Native title which can accommodate Indigenous experiences and understandings of the past. It also presents an enormous strategic challenge to historians of all persuasions, who share, we will argue, a distinct disciplinary understanding of the difference between "the past" and "history."

In order to explain our argument, it is useful to place the High Court's majority judgment within a historiographical context. By placing emphasis on the nature and extent of Native title rights at the time of the transfer of sovereignty, the joint judgment is promoting what philosopher Friedrich Nietzsche describes as an "antiquarian" view of our relationship with the past. Antiquarians, as exemplified by the 19th century historian von Ranke, viewed their role as eschewing any literary flourish (such as interpretation or unnecessary narrative construction) and, instead, kept a faithful, accurate record of the past, through the use of genealogies, chronologies and close attention to the archive. For the antiquarian, Nietzsche argued, the purpose of analyzing events of the past is to "preserve that which owes its existence to men … lest it be obliterated by time."[69] In this type of historical practice, there is a balance between preserving events in the past and "mummifying" them.[70]

---

68. Majority judgment in *Yorta Yorta 3, supra* note 9 at paras. 86-87, Gleeson C.J., Gummow and Hayne JJ. [emphasis added].
69. H. Arendt, *Between Past and Future: Eight Exercises in Political Thought* (New York: Viking Press, 1968) at 41, referring to Herodotus from *Laws* 755.
70. F. Nietzsche, *Use and Abuse of History*, trans. A. Collins (New York: Liberal Arts Press, 1957) at 20.

In his discussion of genres of historical methodology, Nietzsche compared antiquarian history with "monumental" and "critical" history. Monumental history focuses on key events in the past. These monumental events help define a society and motivate it to action. The danger is that the society valorizes its past and then fails to live up to it. Critical history looks to mistakes in the past in the hope of exorcising them or avoiding them in the future. At its best, critical history encourages a new way of life not saddled by the negative aspects of the past. At its worst, critical history denies the past altogether. As with these other approaches to history, antiquarianism has both positive and negative aspects. At its best, Nietzsche suggests, antiquarian history gives "a soul and inspiration to the fresh life of the present" and, at its worst, it "dries up the spirit into an insatiable curiosity for everything old."[71]

In its approach to the proof of title, discussed in section III, the High Court has adopted the worst of antiquarianism. By freezing Native title rights in their pre-sovereignty form, its test necessarily turns the investigative resources of the court to the conditions of the past. In its reliance on antiquarian history, the joint judgment of Gleeson C.J., Gummow and Hayne JJ. makes a number of assumptions about our relationship to the past that constitute its underlying historical understanding. First, it assumes that it is possible to determine *general conditions* in the past, such as the content of Indigenous laws and customs, and the rights derived from them, and not just the occurrence of particular events, such as the date and time of first settlement. Linked to this assumption is the belief that it is possible to testify to the physical and normative character of rights as they existed in the past through the use of documentary evidence of that period. These assumptions exclude the theory and practice of many contemporary historians who insist that history is reflexive, contextual and non-objective.[72] If the approach taken in *Yorta Yorta* remains unchallenged, the attempt to demonstrate the existence of rights and interests through historical *content* will be impossible, no matter how persuasive historians are in their role as empiricists.

It would be incorrect to suggest that all decisions on Native title share an understanding of how to weight different genres or content of historical evidence.[73] It *is* possible however to suggest that underlying those diverse judgments there is a common assumption, exemplified by *Yorta Yorta*, that the promise of Native title through the operation of the law suffers from the illusion of a determinate past. In other words, there is a distinct metahistory captured in Native title jurisprudence. Metahistory, in this sense, means the propounding of universal explanations of historical processes. For the law, this metahistory is

---

71. *Ibid.*
72. For a straightforward and useful summary and description of contemporary historiographical problems and perspectives see K. Jenkins, *On "What is History?": From Carr and Elton to Rorty and White* (London: Routledge, 1995). See also the discussion in Section V of this paper.
73. For a comparison of the use of historical evidence by Justice Olney in *Yorta Yorta*, *supra* note 21, and Justice Lee in another leading Native title decision, *Ward, supra* note 21, see Reilly, *supra* note 4.

that the past is knowable in its entirety. As a result of this assumption, the role of historical evidence is merely to declare, or expose, the past through sources, as common law reasoning would dictate and as a purist vision of antiquarian historical practice would insist upon. As will be shown in section V, the discipline of History has a distinct metahistory of its own, which may offer a counterpoint to the impact of the High Court's judgment. First, however, it is important to look at how the law's metahistory is exposed in the *Yorta Yorta* decisions. The rest of this section will focus on this point.

At the trial level in *Yorta Yorta*, Olney J. accepted that "history" is a documentary map to the past where the answers lie, awaiting discovery. In his view, the role of courts is not to engage with the past in a "Whigish"[74] enterprise of progress, looking to the past in order to look forward. Instead, courts must view the past statically, through an authoritative archive that renders the past completely knowable in content and conception. To argue forcefully (as historians currently do)[75] that there are alternative interpretations and contexts for specific documents the court is reading, and that understandings of rights are affected by currents of change over time, calls into question the empiricist role of historians within the existing legal process. It becomes impractical, if not counter-productive to the resolution of legal claims. Depending on their perspective, some historians would reject the possibility of determining the general conditions at a period of time in the past altogether. Others who might accept the possibility would only do so with particular qualifications about the kind of conclusions that could be drawn.[76]

The unique foundation of Native title rights—with pre-sovereignty foundations in another normative system—presents a problem of historical inquiry which the law has never before faced. By insisting that the evidentiary test is one situated firmly in 1788, the claims process is immediately alienated from the terms of contemporary Indigenous life outside the courtroom and, since Indigenous claimants will *never* have a competitive documentary archive, they are at a fundamental disadvantage inside the courtroom as well. The problems faced in establishing the general conditions that give rise to Native title rights at the point of sovereignty threaten to undermine the point of claiming the rights in the first place.

The complications are, if anything, even more pronounced when the normative system under which the rights have evolved is based on an oral, rather than a written, tradition. This is partly because of the function of memory which is, at least in non-Indigenous terms, "not to preserve the past but to adapt it so as

---

74. "Whig History" refers to the teleological school of British history writing, exemplified by Lord Macauley, where past events are portrayed as moving society towards a logically more advanced state.
75. For example, Deborah Bird Rose, "Reflections on the Use of Historical Evidence in the *Yorta Yorta* Case" in Paul & Gray, *supra* note 5, 35; Morgan & Muir, *supra* note 7 at 1-9.
76. See generally Peter Burke, ed., *New Perspectives on Historical Writing* (Cambridge: Polity Press, 1991). See also discussion of historical perspectives offered by D. LaCapra, E.H. Carr, Michael Oakeshott and Michel Foucault summarized later in this paper in Section V.

to enrich and manipulate the present."[77] It is also partly a function of culture. Native title is a construction of the common law, relying on recognition of the values in another normative system. To speak of Native title "rights" is immediately to translate Indigenous relationships with land into a language associated with a completely different normative system. To attempt this in the present is fraught with difficulty. To attempt a reconstruction of these "rights" at a point in the past is obviously more so.

In the High Court, the joint judgment assumes that the character of Native title rights can exist outside of a context and time. That is, the qualities of the rights are the same in different eras, despite the change in the physical and normative conditions. As part of its foundation for the discussion of the construction of Native title, the joint judgment held that a society cannot be separated from its laws and remain a functioning society and, conversely, a law that is disassociated from a society within which it can operate is not properly a law.[78] Since Native title rights are based on a system of laws and customs that has had no legal authority since the acquisition of sovereignty, it would seem that, according to the joint judgment, Native title rights can only ever be relics of a previously functioning legal system. As mentioned earlier in the paper, this requires an antiquarian approach to determining the nature of Native title rights. It dictates that only evidence of the original character of Native title rights is of relevance to the inquiry and, given the passage of time since the assertion of European sovereignty, that documentary evidence will be of primary importance to establishing these rights.

More fundamentally, constructing Native title rights in such a way that they are required to exist in the same form outside of the time and context of their creation is ahistorical. At most, a right in the past might be juxtaposed against current rights in order to better understand how they came to be shaped and asserted in the present. But to interpose rights from the past into the present and expect their nature and extent to be unchanged requires a similitude between conditions in the past and the present that gives a false notion of history. Furthermore, it encourages a romantic notion of Aboriginality. The extent of existing Native title rights must be measured against the "authentic" Native who is revealed in the non-Indigenous documentary record.

V THE PAST IS NOT HISTORY

The outcome of the *Yorta Yorta* judgment indicates that "law" ultimately views "history" as an equivalent to the past, whereas the reality of Native title trials demands an assessment of past assumptions of historical fact. It is necessary to counter this misconception. Denied an adequate empiricist role, history must engage with the law hermeneutically. It must claim its position within the tradition of interpretative philosophy, committed to eliciting meaning from

77. Lowenthal, *supra* note 56 at 210.
78. *Yorta Yorta 3, supra* note 9 at paras. 49-50, Gleeson C.J., Gummow and Hayne JJ.

interrelationships that have occurred in the past and eschewing any traditional reliance on a scientific model where concepts like "tradition" itself are acknowledged as constructed according to their own culture, time and place.[79] History and historians must challenge the specific metahistory of Native title jurisprudence currently expressed by the courts and begin to strenuously argue for an alternative that is based on historical principles rather than legal ones.

The nature of a distinct metahistory, as understood by historians, is well summarized by historian Keith Jenkins:

> In translating the past into modern terms and in using knowledge perhaps previously unavailable, the historian discovers both what has been forgotten about the past and pieces together things that never pieced together before. People and special formations can only be seen in retrospect, and documents and other traces are ripped out of their original contexts of purpose and function to illustrate, say, a pattern, which might not be remotely meaningful to any of their authors …."[80]

History therefore needs to expose as flawed the assumption that the past is knowable without question, gloss or interpretation. Historians have been so entwined in the legal processes involved in proving Native title claims, and so distracted by the operation of legal rules and boundaries, that they have forgotten that they themselves are able to lay claim to competing professional and disciplinary traditions and principles.

Of course, the very idea that history has any fundamental, binding principles is anathema to most contemporary historians and theorists. To suggest that there is a "metahistory" may appear to privilege aspects of the very antiquarian approach we criticize. That is, it could suggest a return to a Rankean perspective, with an explicit reliance on traditional archival sources at the expense of oral histories or analysis of documentary absences.[81] Many historians trained in the last 80 years have been influenced by theorists and historians that do not reify the records and thus, by definition, the experiences of those who were able to participate in the construction and collating of those records: political elites, landholders, Europeans and men. For example, writers like E.P. Thompson (with his Marxist perspective), Michel Foucault (with his commitment to anti-teleological genealogy), Joan Wallach Scott (with her investigations into the complexities of feminist history) and Robert Young (with his examination of how traditional historical ideas are constructs of the West) have ensured that

---

79. Hermeneutics as a school of philosophy stems in its modern guise from Martin Heidegger and the most useful contemporary work arguably comes from Paul Ricoeur. See for example: Paul Ricoeur, *The Contribution of French Historiography to the Theory of History* (Oxford: Clarendon, 1980).
80. Jenkins, *supra* note 72 at 16.
81. Leopold Von Ranke was a 19th century German historian who wrote history specifically drawn from official archives. He did not believe in reflecting on the meaning of history, but focused instead on a stark presentation of "the facts" in order to show "how it really was." This approach was very influential until challenged by 20th century historians such as those mentioned in the text above, and was used by positivist historians to argue that history was indeed a science that could be established from "obvious facts."

there is rarely any unquestioning reliance by historians on the documentary record that antiquarians valued above all else.[82]

The point is, however, that as far as the law is concerned, it is the fact that history seems able to encompass all of these different perspectives which makes it appear to lack, and present itself as lacking, specific frameworks as to how to "do," tell and read history. This creates problems, particularly where Indigenous or frontier histories are concerned, as the documentary record (as far as many historians see it) is notoriously biased and unreliable. This ensures that oral history is a very important and valuable resource for historians working with Indigenous peoples. There is, of course, debate amongst historians about how to read and value oral history. The point that most historians who work in Indigenous history make, however, is that oral history need not be accepted uncritically, but it should be taken seriously, provided it is interpreted as arising from a social relationship and is understood in the context within which it is given.[83] The historians approach to oral history is to view it as a history influenced by hermeneutics, by the idea that the act of interpretation is culturally specific. Oral history from the perspective of the law on the other hand, is viewed as being suspect, as it is unable to be verified like a document. In contrast to documentary history, it is viewed as being, as Justice Callinan perceives it in *Yorta Yorta*, "influenced and distorted in transmission through the ages by … fragility of recollection, intentional and unintentional exaggeration, embellishment, wishful thinking, justifiable sense of grievance, embroidery, and self-interest." [84]

Given the law's focus on resolution, it may be impatient with historians' differences in ideology and method, casting the differences as a disciplinary weakness and hence a lack of authority. Yet, despite their diversity, historians do share a metahistorical self-consciousness that the past is not history. Historians, to varying degrees, acknowledge that the past is knowable only through the *interpretation* of historical sources, although what these are and how they are valued is, of course, contested.

As a general proposition, it is fair to say that a new genre of self-conscious historical writing emerged in the 20th century that began to grapple with the problems of the epistemology or the foundations of knowledge underlying the profession of history. This genre of historical writing, despite the diversity of the

---

82. For examples of these historians' work please refer to: E.P. Thompson, *The Making of the English Working Class* (Harmondsworth, UK: Penguin, 1991); Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Pantheon, 1977); Joan W. Scott, *Gender and the Politics of History* (New York: Columbia University Press, 1988); Robert Young, *White Mythologies: Writing History and the West* (London: Routledge, 1990).

83. See for discussion of these issues in the context of Australian Native title cases: Ann Curthoys, "The Proof of Continuity of Native Title: An Historian's Perspective" in Native Titles Research Unit at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Land, Rights, Laws: Issues of Native Title*: *Issues Paper no. 18* (Canberra: Aboriginal Studies Press, AITASIS, 1997); Heather Goodall, "'The Whole Truth and Nothing But ...': Some Intersections of Western Law, Aboriginal History and Community Memory" in Bain Attwood, ed., (1992) 35 Power, Knowledge and Aborigines, a Special Issue of the Journal of Australian Studies 104.

84. *Yorta Yorta 3, supra* note 9 at para. 143, per Callinan J.

authors, seems to return repeatedly to the idea that history and the past are distinct because the role of history is to interpret, that is, to give shape and meaning to a range of sources about the past. This epistemological quest did not begin and end with anti-teleological historians like Michel Foucault, Hayden White or linguists like Dominick LaCapra.[85] In 1961, E.H. Carr famously argued that historians will always get the facts that they want, that the process of archival work and historical practice is necessarily selective and an act of interpretation, and as such the past cannot be known objectively.[86] Similarly, but distinctly, historian Michael Oakeshott argued historians must avoid an inquiry into origins since "it reads the past backwards … suppl[ies] information about 'the cause' or the 'beginning' of an already specified situation [and thus imposes] upon events an arbitrary teleological structure." [87] However, Oakeshott went on to argue that if the historian is interested in the past purely for its own sake, he cannot help but use the terms of the present. That is, the historian does not recall the past, but translates it; the task being to "understand past conduct and happenings in a manner they were never understood at the time."[88] These statements of principle on our relationship to the past should be axiomatic. And yet, as we discuss below, the test for the proof of Native title is built upon rules that are contrary to these principles and historians are then used to bolster decisions that are decidedly ahistorical in conception and conclusion.

VI THE METAHISTORICAL CHALLENGE

The construction of Native title of the majority of the High Court in *Yorta Yorta* means documentary evidence is indispensable to establishing acknowledgement of traditional laws and customs. This preserves several of the roles that historians are already performing in the claims process: finding relevant traces of Indigenous occupation, use and dispossession in and around the claim area; offering expert opinion on the strengths and weaknesses of historical sources; guiding judges in the drawing of inferences from the historical record; and ultimately, drawing conclusions as expert witnesses on whether or not the documentary record assists in establishing or disestablishing the statutory elements of Native title.

Historians could, we believe, play a more constructive role in the claims process by further emphasizing their expertise as theorists of the relationship between the past and the present, as opposed to being used as experts within an empiricist framework that has been handicapped, maybe permanently, by the idea of history employed in the *Yorta Yorta* decisions. Historians need to use

---

85. For example, LaCapra argued that: "All history, moreover, must more or less blindly encounter the problem of a transferational relation to the past whereby the processes at work in the object of study acquire their displaced analogues in the historian's account." D. LaCapra, *History and Criticism* (Ithaca, NY: Cornell University Press, 1985) at 11.
86. E.H. Carr, *What Is History?* (Ringwood, Victoria: Penguin, 1987) at 28-30.
87. M. Oakeshott, *Rationalism in Politics and Other Essays* (London: Methuen, 1962) at 160.
88. *Ibid*. at 164.

their expertise as interpreters of the relationship between the past and the present to unpack the methods and assumptions in the law's understanding of the past and its use of the past to resolve present rights. If historians do not contribute to the claims process in this way, they will continue to become trapped in a process which is underpinned by a historiography that is foreign to them (one that insists the past and history are interchangeable, one that privileges one genre of historical evidence only) and their involvement will serve simply to reinforce the truth (and therefore justice) of a past that the law propounds.

Historians need to be resolute and articulate about their own disciplinary frameworks and traditions. Despite protestations of ideological difference or forgetfulness, historians *do* possess a "metahistory" that contrasts to that practiced by the law. Historians' role as theoretical experts on the nature of the past and its interpretation has already been identified by those working in the field in Australia. For example, Western Australian historian Fiona Skyring argues that it is important for historians used as expert witnesses in the court process to combat the law's skepticism and even denigration of contemporary practices of historical analysis by including in all expert reports a historiographical summary, so law understands better that history has a different disciplinary tradition and development.[89]

It is inevitable of course that there will be arguments between historians about the use and interpretation of evidence in specific cases. It is also important to acknowledge the fact that the law must reach judgment and, in doing so, privilege one version of historical evidence over another. Our point is that if the law is challenged by an alternative metahistory, the courts will be better equipped to manage the extremely difficult empirical assessments the law requires of them and may even find ways to turn away from such definitive assessments. Furthermore, if the courts refrain from delivering the certain outcomes the law demands, the legislature itself might be encouraged to consider other avenues to recognizing Indigenous land claims that reflect the contemporary commitments to land of all those involved in the litigation process. Historians can no doubt aid the law in understanding these commitments through their reflection on, and imposition of meaning onto, documentary traces. But any such historical exercise is not to revisit the past. It is a distinct professional exercise that needs to be acknowledged as such. The challenge for the law is to formulate a test for Native title that, if historical in conception, takes seriously the theoretical underpinnings of history or, if ahistorical in conception, has an adequate alternative ethical and jurisprudential basis.

89. Fiona Skyring, "History Wars: Debates about History in the Native Title Process" in Choo & Hollbach, *supra* note 5 at 78.