Fact, Narrative, and the Judicial Uses of History:

Delgamuukw and Beyond

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This article examines how judges' use of history serves to construct and reinforce particular views of the past, of the legal order, and of the relationship between the two. Through an analysis of Delgamuukw v. British Columbia *and more recent Aboriginal title and rights cases, it traces the process through which judges select facts and turn them into narratives, and then authorize those narratives into new "facts" through the act of judgment. This process of narrative construction is*

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inherently political, and rests on culturally specific assumptions about the nature of time and historical significance. By forcing litigants—particularly Aboriginal litigants—to fit their claims and their history into the predominant narrative, history as wielded by judges represents a powerful force for the creation and preservation of orthodoxy that severely limits the possibilities for dialogue and pluralism in law.

I Introduction

Judges and historians approach the past in similar ways. Both take the raw data of past events and fashion from them narratives that stand for the past, but that work their influence on the present and future. Producing these narratives confers a certain power: through them historians and judges occupy and claim the past, since events are fleeting, but their record endures. The difference, of course, is that judges' narratives are overtly prescriptive rather than descriptive: backed by the coercive force of the state, they abruptly close debate, at least between the parties to the litigation, and at least until overturned on appeal or overruled by future courts.[1] To say that history is written by the winners is a truism, but a misleading one: in both history and law, it is the writer who determines who wins and who loses by setting the questions to be asked, by including and excluding evidence, by defining and assessing significance, in short, by controlling the narrative version of the past that will stand for the fleeting past events.

My argument in what follows is that one of the ways in which this power of the word is exercised and ultimately justified in law is through particular constructions, uses and authorizations of historical narratives by judges. The process of judging involves making sense of evidence by constructing from it coherent narratives of what happened. A judgment in turn bestows on these

1 On judicial narrative construction, see Robert M. Cover, "The Supreme Court, 1982 Term – Foreword: *Nomos* and Narrative" (1983) 97 Harv. L. Rev. 4 at 53 [Cover, "*Nomos* and Narrative"]; Robert M. Cover, "Violence and the Word" (1986) 95 Yale L.J. 1601; Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'" (1990) 11 Cardozo L. Rev. 919, esp. 941-943; Kim Lane Scheppele, "Facing Facts in Legal Interpretation" (1990) 30 Representations 42; Larry Catá Backer, "Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain" (1998) 6 S. Cal. Interdisc. L.J. 611; Gary Edmond, "Science, Law and Narrative: Helping the 'Facts' to Speak for Themselves" (1999) 23 S. Ill. U. L. Rev. 555; William Twining, "Narrative and Generalizations in Argumentation About Questions of Fact" (1999) 40 S. Tex. L. Rev. 351; Anne Moses Stratton, "Courtroom Narrative and Findings of Fact: Reconstructing the Past One (Cinder) Block at a Time" (2004) 22 QLR 923; David Barnard, "Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians" (2006) 16 Temp. Pol. & Civ. Rts. L. Rev. 1; Laura Jeffery, "Historical Narrative and Legal Evidence: Judging Chagossians' High Court Testimonies" (2006) 29 PoLAR: Pol. & Legal Anthropology Rev. 228.

narratives an aura of factual finality that masks their narrative origins. The process, I argue, is built from a series of subtle—though strongly political—transitions from fact to narrative and back again to a kind of fact. Supporting and justifying this movement are particular views of fact, history and significance that together create a powerful justification of outcomes that constrains—though never closes off completely—the possibility of alternative narratives. Far from being the dispassionate survey of evidence that judging is in theory supposed to be, the use of history by judges becomes a powerful force for the construction and preservation of orthodoxy—of a particular view of the past, of the legal order and of the relationship between the two.

My analysis will centre on *Delgamuukw v. British Columbia*,[2] a case that dealt directly with the nature of history—and particularly of oral tradition[3]—in the context of Aboriginal land claims. As many commentators have pointed out,[4] *Delgamuukw* brought up fundamental questions about historical method, about the admissibility and weight of historical evidence and expert testimony

2 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [*Delgamuukw* (S.C.C.)], rev'g in part (1993), 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97 (B.C.C.A.) [*Delgamuukw* (C.A.) cited to D.L.R.], rev'g (1991), 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C.S.C.) [*Delgamuukw* (trial) cited to D.L.R.].

3 Though all three courts in *Delgamuukw*, as well as some of the scholarly commentary, use "oral history" to refer to the stories Aboriginal peoples tell about their past, the term "oral tradition" is more current in the historical literature, and so I have used it here. See Jan Vansina, *Oral Tradition as History* (Madison: University of Wisconsin Press, 1985) at 12-13.

4 Particularly relevant for my purposes are Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992) 30 Alta. L. Rev. 1276; Geoff Sherrott, "The Court's Treatment of the Evidence in *Delgamuukw v. B.C.*" (1992) 56 Sask. L. Rev. 441; Joel R. Fortune, "Construing *Delgamuukw*: Legal Arguments, Historical Argumentation, and the Philosophy of History" (1993) 51 U. Tor. Fac. L. Rev. 80; Michael Asch & Catherine Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*" (1994) 19 Queen's L.J. 503; Brian J. Gover & Mary Locke Macaulay, "'Snow Houses Leave No Ruins': Unique Evidence Issues in Aboriginal and Treaty Rights Cases" (1996) 60 Sask. L. Rev. 47; Patricia Wallace, "Grave-Digging: The Misuse of History in Aboriginal Rights Litigation" (1998) 30 U. Miami Inter-Am. L. Rev. 489; John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall L.J. 537 [Borrows, "Sovereignty's Alchemy"]; Michael Asch, "The Judicial Conceptualization of Culture After *Delgamuukw* and *Van der Peet*" (2000) 5 Rev. Const. Stud. 119; Andie Diane Palmer, "Evidence 'Not in a Form Familiar to Common Law Courts': Assessing Oral Histories in Land Claims Testimony After *Delgamuukw v. B.C.*" (2000) 38 Alta. L. Rev. 1040; John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39 Osgoode Hall L.J. 1 [Borrows, "Listening for a Change"]; Brian Thom, "Aboriginal Rights and Title in Canada After *Delgamuukw*: Part One, Oral Traditions and Anthropological Evidence in the Courtroom" (2001) 14:1 Native Stud. Rev. 1; Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23 Windsor Y.B. Access to Just. 17; Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005); Val Napoleon, "*Delgamuukw*: A Legal Straightjacket for Oral Histories?" (2005) 20:2 Can. J.L. & Soc'y 123; Adele Perry, "The Colonial Archive on Trial: Possession, Dispossession and History in *Delgamuukw v. British Columbia*" in Antoinette Burton, ed., *Archive Stories: Facts, Fictions and the Writing of History* (Durham, NC: Duke University Press, 2005) 325.

and about conflicting conceptions of fact in history and law, questions that are still being worked out.[5] I will focus mainly on the trial decision, where historical narratives were constructed, and the Supreme Court of Canada ruling, where those narratives were challenged and for the most part overturned. My main purpose in what follows, however, is not to add to the already copious commentary on *Delgamuukw* and the shortcomings of the historical narratives in that case. Rather, I will argue that *Delgamuukw* and subsequent cases dealing with Aboriginal title and Aboriginal rights bring into sharper focus the processes of marshalling and interpreting the past that take place in all kinds of proceedings, from family disputes to criminal matters,[6] but that are particularly troublesome in litigation between cultures, where various assumptions informing and shaping historical narratives are not necessarily shared, and are frequently strongly contested. I argue that the way the various judges in the different stages of the *Delgamuukw* litigation use history illustrates a general point about judicial narrative construction, namely that the effect of the inherent politics of making narratives from facts has been to limit the scope—even the possibility—of dialogue and pluralism in law. Whatever an individual judge's sensitivity or lack thereof, the process of judging proceeds by distilling diverse stories into a single, authorized narrative that substitutes one voice for another, often by excluding and silencing divergent viewpoints. Achieving the goals of accommodation, dialogue or pluralism requires, as a first step, understanding this politics of narrative so that its assumptions can be unpacked and challenged.

My argument proceeds in two steps. In Part II, I examine some of the assumptions behind the use of history in constructing legal narratives, assump-

5 The Supreme Court of Canada has had opportunity to grapple with these issues in several post-*Delgamuukw* cases, principally *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513 [*Marshall (No. 2)* cited to S.C.R.]; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, 199 D.L.R. (4th) 385 [*Mitchell* cited to S.C.R.]; *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43, 230 D.L.R. (4th) 1 [*Powley* cited to S.C.R.]; *R. v. Marshall, R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, 255 D.L.R. (4th) 1 [*Marshall and Bernard* cited to S.C.R.]; *R. v. Sappier, R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54, 274 D.L.R. (4th) 75 [*Sappier and Gray* cited to S.C.R.]. Other cases working through the lower courts are likewise engaging similar issues, for example *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 (currently on appeal) and *Sawridge Band v. Canada* (currently before the Federal Court).

6 An interesting example is the English libel action by Holocaust-denier David Irving: *Irving v. Penguin Books*, [2000] E.W.J. No. 1897 (Q.B.D.), leave to appeal refused 2001 EWCA Civ 1197, 2001 WL 825074, where one of the tasks of the judges was to create a judicially accepted narrative of "what happened" in Germany in the 1930s and 1940s. For commentary, see especially Dennise Mulvihill, "*Irving v. Penguin*: Historians on Trial and the Determination of Truth under English Libel Law" Case Comment (2000) 11 Fordham I.P. Media & Ent. L.J. 217; Wendie Ellen Schneider, "Past Imperfect" Case Note on *Irving v. Penguin Books* (2001) 110 Yale L.J. 1531; Richard J. Evans, *Lying About Hitler: History, Holocaust, and the David Irving Trial* (New York: Basic Books, 2001); D.D. Guttenplan, *The Holocaust on Trial: History, Justice and the David Irving Libel Case* (London: Granta Books, 2001); Deborah E. Lipstadt, *History on Trial: My Day in Court with David Irving* (New York: Ecco, 2005).

tions that grow out of the alliance between the still-predominant scientific view of law and a scientific, objectivist view of history. In particular, I explore how two key myths underlying and supporting both the legal and historical orders, the myth of modernity and the myth of origins, serve to marginalize Aboriginal viewpoints within judicially constructed historical narratives. In Part III, I consider some implications of this use of narrative in *Delgamuukw* as well as some more recent cases. My focus is on how the legal process moves from "fact" to narrative and then uses these narratives as the basis for creating new adjudicative "facts" that hide their narrative origins. This process reveals a crucial tension between dialogue and authority, or between voice and silence; how this tension is resolved in individual Aboriginal rights cases is a key factor in the quality of the result achieved.

II Assumptions: History, Law and Interpretation

Various assumptions come into play when historical evidence is used in law. These assumptions help bridge the gap between "fact" (or human experience) and narrative (or the understanding of human experience, as structured by the historian or judge).[7] This is the realm of interpretation and, as I hope to show, it is precisely in the negotiation of this gap between fact and narrative that history can become a coercive tool.

The overarching assumption is that both law and history are scientific disciplines that, in theory, work from "facts" towards "truth."[8] Part of the power of both law and history is the foundational assumption that neither simply makes things up: conclusions must rest on verifiable evidence (facts), evaluated according to established canons of interpretation. The narratives constructed from these facts become authorities to be used for further narrative refinement.[9] In both history and law, however, this view—the product of the 19th-century concern to recast intellectual disciplines on a scientific footing (though its roots go further back)[10]—is problematic on a number of

7 On this transition from fact to narrative in the legal context, see Jerome Bruner, "What Is a Narrative Fact?" (1998) 560 Annals of the American Academy of Political and Social Science 17, as well as the literature cited *supra* note 1.

8 See especially Bruno Latour, "Scientific Objects and Legal Objectivity" in Alain Pottage & Martha Mundy, eds., *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge: Cambridge University Press, 2003) 73.

9 Examples of this instrumentalist view of history abound in legal literature. See, for example, Buckner F. Melton, Jr., "Clio at the Bar: A Guide to Historical Method for Legists and Jurists" (1998) 83 Minn. L. Rev. 377, which provides an objectivist "how-to" guide for practising lawyers. For critiques, see Robert W. Gordon, "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57 at 59-65; Christine Choo, "Historians and Native Title: The Question of Evidence" in Diane Kirkby & Catharine Coleborne, eds., *Law, History, Colonialism: The Reach of Empire* (Manchester: Manchester University Press, 2001) 261.

10 For history, see Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* (Cambridge: Cambridge University Press, 1988). For law, see Geoffrey

levels.[11] Most important for our purposes, linking law and history to science privileges a view of narrative that hides political assumptions behind a veneer of objectivity. A narrative can never be politically neutral since it depends on language: the past is itself a text, which must be read, interpreted and constructed by the historian.[12] There can be no dispassionate rehearsal of facts; if they exist at all, facts are by themselves sterile, even meaningless. Meaning comes from narrative linkages of facts, and there can be no narrative without judgment (or, it must be added, no judgment without narrative, as we shall see).

At the most basic level, this process of narrative structuring draws meaning from what is often called the "master narrative": the big picture of history that provides a conceptual framework for historical interpretation by setting up periodization, isolating points of change, assessing the contributions of different historical actors and positing a structure to history that prevents the past from being the shapeless and bewildering mass of detail it otherwise would be.[13] The master narrative (or better, master narratives, since these narratives are culturally specific) serves the useful—but politically charged—function of articulating the distinction between the past, which is unstructured, and history, which is the past structured through narrative. The tendency (the danger, to historians) is for this narrative to become something to be applied to the data (a "fact" in itself) rather than the other way around.

Along with the assumptions of the scientific nature of law and history and the basically structured nature of past time, two overlapping myths[14] underlie this interpretive process of constructing legal and historical narratives. These

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Samuel, "Can Gaius Really Be Compared to Darwin?" (2000) 49 I.C.L.Q. 297. On the earlier history, see Barbara J. Shapiro, "The Concept 'Fact': Legal Origins and Cultural Diffusion" (1994) 26 Albion 227.

11 Foucault, for example, argues that disciplines like history are power structures which grow out of and perpetuate a particular stance toward knowledge. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan (New York: Vintage Books, 1979), esp. 170-194; Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (New York: Vintage Books, 1994) at 125-165. This process is discussed in Guyora Binder & Robert Weisberg, "Cultural Criticism of Law" (1997) 49 Stan. L. Rev. 1149 at 1160-1161.

12 This point is common to critics as diverse as deconstructionists and New Historicists. See, for example, Jonathan Culler, *On Deconstruction* (London: Routledge, 1983) at 129-131; Christopher Norris, "Law, Deconstruction, and the Resistance to Theory" (1988) 15 J. Law & Soc'y 166, esp. 167; Stephen J. Greenblatt, *Learning to Curse: Essays in Early Modern Culture* (New York: Routledge, 1990) esp. 161-183; Binder & Weisberg, *supra* note 11 at 1165-1167.

13 This idea is particularly associated with the work of Hayden White, for example in his *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Baltimore: Johns Hopkins University Press, 1973) at ix-x, 5-7.

14 We might define "myths" for our purposes here as stories that combine identity with ideology, a definition informed by Jeremy Hawthorn, *A Concise Glossary of Contemporary Literary Theory* (London: Edward Arnold, 1992) *s.v.* "Myth", and particularly the discussion of myth as ideology in the writings of Roland Barthes. On myth and law, see Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).

myths operate in the background to colour judges' assumptions about historical evidence and about their role in interpreting it.[15] There is often a colonialist dimension to these myths—evident in *Delgamuukw*[16]—but they operate outside this context as well. I will call these myths the "myth of modernity" and the "myth of origins." They stand for progress and change respectively, two classic themes of historiography. They thus link the historical and the political in such a way as to render the past (of the parties, of the legal system, of society in general) useful for the present. In the face of evidence that challenges accepted categories—such as the oral tradition in *Delgamuukw*—these myths exert a powerful normative influence on the range of interpretation open to a court.

The Myth of Modernity

The myth of modernity draws on the fundamentally forward momentum of the master narrative of history. In itself, chronology is neutral, but introducing periodization and points of change into the narrative structure of history suggests a teleology, which easily leads to a confusion between temporal and substantive progress. The myth of modernity grows out of this, and serves to turn the neutral temporality of history into a narrative of value judgment whereby the purpose of the past is to produce a particular culminating present. This reflects both Whiggish notions of progress and 19th-century evolutionary theories, and reinforces the idea that history is written by the winners, for the winners. This creates a vicious circle: judgments of historical "importance" or "influence" are informed—implicitly or sometimes explicitly[17]—by their fit with the master narrative, and this in turn strengthens that narrative

15 This is influenced by Gadamer's idea of the horizon—the historical past that is carried forward to limit the infinity of meaning and make interpretation possible. See Hans-Georg Gadamer, *Truth and Method*, trans. by Garrett Barden & John Cumming (New York: Seabury Press, 1975) at 269-272 [Gadamer, *Truth and Method*]; Hans-Georg Gadamer, "Hermeneutics and Historicism" in *ibid*. at 460. Gadamer's ideas are usefully surveyed and applied to legal interpretation in David Couzens Hoy, "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives" (1985) 58 S. Cal. L. Rev. 135.

16 Perry, *supra* note 4; Christie, *supra* note 4. Compare also the discussion of Hawaii in Barnard, *supra* note 1.

17 Particularly notorious examples include Hugh Trevor-Roper, *The Rise of Christian Europe* ([London]: Thames and Hudson, 1965) at 9 ("[We must not] neglect our own history and amuse ourselves with the unrewarding gyrations of barbarous tribes in picturesque but irrelevant corners of the globe: tribes whose chief function in history, in my opinion, is to show to the present an image of the past from which, by history, it has escaped"), cited in Borrows, "Listening for a Change", *supra* note 4 at 7, and J.L. Granatstein, *Who Killed Canadian History?* (Toronto: Harper Perennial, 1999) at 72-73, dismissing social historians who study subjects like "the history of housemaid's knee in Belleville in the 1890s." "Really, who cares?" he also said. "I did say that, and I have been denounced for it ever since. It was an overstatement, to be sure, but it reflected my increasing uneasiness and complete frustration at the way our history is taught."

and so justifies the exclusion or marginalization of groups and stories that do not fit (such as women, minorities and non-Western cultures). History's structure makes it a closed club, with entry controlled by those responsible for that structure.

The assumptions behind the myth of modernity have long been challenged by professional historians: women's history, social history and post-colonial history, to name just three sub-disciplines, challenge the idea of a Western, liberal, white, male-dominated trajectory of history.[18] It would be no exaggeration to say that gender-based or post-colonialist refashionings of history have yet to enter the case law in any significant way. Judges, who are generally not professional historians and for whom history serves a purely instrumental function, tend to use history as background, as a context into which details can be placed to help understand the factual questions of who, when and where. What reflection there is about the role of history in the legal process involves concern over the accuracy of the facts—names, dates, events—rather than the more difficult meta-historical question of how particular understandings of the past can themselves structure that past.

In *Delgamuukw*, British Columbia Chief Justice Allan McEachern's much-maligned trial judgment can be read as an elaboration of the fundamental division between pre-modernity and modernity. This division is built into the very structure of the crucial narrative portion of his judgment ("An Historical Overview"), where he organizes time into the "Pre-Historic Period," the "Proto-Historic Period" and the "Historic Period."[19] The division between pre-history and history corresponds to the onset of modernity, since it is only in McEachern's "Proto-Historic Period" (when "some historical facts are known"[20]) that the tell-tale indicators of modernity—commerce, writing, technology—begin slowly to appear. The Chief Justice's description leaves no doubt that before the onset of the "Historic Period" the inhabitants of British Columbia were anything but modern: "The evidence suggests that the Indians of the territory were, by historical standards, a primitive people without any form of writing, horses, or wheeled wagons."[21]

The entire concept of Aboriginal rights in Canada as constructed by the courts is based on this historical narrative of forward movement from pre-modern to modern. Since claimants must generally trace Aboriginal rights

18 For one example among many, see Judith M. Bennett, *History Matters: Patriarchy and the Challenge of Feminism* (Philadelphia: University of Pennsylvania Press, 2006).

19 *Delgamuukw* (trial), *supra* note 2 at 211-228. Justice Vickers adopts this same periodization in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, leave to appeal to B.C.C.A. granted [*Tsilhqot'in Nation*].

20 *Delgamuukw* (trial), *ibid*. at 220.

21 *Ibid*. at 222 (emphasis added).

back either before the assertion of Crown sovereignty or before "contact"[22]—that is, before "history" in an objectivist sense begins—the very conceptualization of these rights (and by extension of Aboriginal culture) is as vestigially pre-modern, and so *sui generis* or Other. As Justice Wallace remarked at the Court of Appeal in *Delgamuukw*: "A 'modern aboriginal right' is a contradiction in terms."[23] This characterization holds even despite the Supreme Court of Canada's acknowledgment that Aboriginal rights might evolve over time:[24] the determining factor remains connection with pre-contact, pre-modern, traditional practices. Once this crucial link to the other side of the divide is broken, Aboriginal culture ceases to be something distinct, and it assimilates (for legal purposes, at any rate) with the dominant culture. Furthermore, this test renders legally irrelevant any changes or development in Aboriginal societies before contact; history consecrates change, and so until "history" begins, the societies are, for all intents and purposes, homogeneously and statically "traditional." The pre-historic past is simply a goal to be reached, not something to be factored into the analysis in a substantive way. Aboriginal groups are thus faced with an unenviable dilemma: to win their claims, they must deny their modernity, the very thing the legal system privileges in judicial narrative-building. By insisting on maintaining this division between pre-modernity and modernity—and by anchoring Aboriginal rights firmly on the other side of that threshold—law's narrative, with its teleology of development and progress, effectively denies the subjects of these rights entry into history.

The Myth of Origins

The second myth, the myth of origins, works with the myth of modernity to underscore the "Otherness" of experiences that fall outside the master narrative. Like objectivist history, positivist law—and particularly land law—is preoccupied with the quest for origins: of rights, of title, of the legal order more generally. This search for origins is a narrative act,[25] and as such is a fiction, a myth. It represents the choice of one point in preference to any number

22 *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at para. 60 (Lamer C.J.C. for the majority) [*Van der Peet*]: "The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights." This test has been nuanced, as for example in the case of Métis claimants, who by definition have no pre-contact history: *Powley*, *supra* note 5. See generally Thomas Isaac, *Aboriginal Title* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 15-20.

23 *Delgamuukw* (C.A.), *supra* note 2 at 574 (Wallace J.A., concurring).

24 See, e.g., *Sappier and Gray*, *supra* note 5 at para. 23.

25 Cover, "*Nomos* and Narrative", *supra* note 1 at 23-24.

of other possible alternatives in order to break the regress and to ground the law, like the old statutory (though no less mythic for that) definition in England of "time immemorial" as before September 3, 1189.[26] The myth of origins thus creates the elusive fixed point from which to interpret,[27] but in so doing it creates a relevant past while sealing off the rest. This allows the myth of origins to play a powerful normative role: by introducing discontinuity, it creates points of transition and change—sovereignty, for example[28]—that can be used strategically to produce and maintain orthodoxy.[29] Like the myth of modernity, the myth of origins creates an Other by leaving certain things on the far side of the transition. In history, these points of change become one arbiter of "significance"; in law, they are tools in what Robert Cover has called "jurispathology," the killing off of alternative normative orders in favour of the goal of a single, coherent law.[30]

The search for origins is central to the law relating to Aboriginal rights and title, since the success of claims is linked to clearly articulated cut-off dates and the stakes are high. *Delgamuukw* (like more recent cases[31]) was all about the search for origins, which put the claimants at a disadvantage from the start, since origins are a particular preoccupation of Western views of time, history and law.[32] Since Chief Justice McEachern viewed the Pacific Northwest before contact as largely unknown and unknowable (at least in scientific historical terms), he could posit a beginning to history at the point where the documentary record begins, and concentrate his narrative-building efforts on that point. The contrast is striking: after pointing out the limitations of the evidentiary record in the Pre- and Proto-Historical Periods, he devotes almost 100 pages to outlining in excruciatingly exhaustive detail "The Relevant Political History of British Columbia."[33] The difference lies in the nature of the evidence, as we will see below. Pre-history involves problematic oral tradition or contentious archaeological or anthropological theories; history, by contrast, involves the documentary record based in the familiar (to judges) world of

26 The basis of the rule (though not of the phrase "time immemorial" itself) is the *Statute of Westminster, 1275*, 3 Edw. I, c. 39. See generally Peter Goodrich & Yifat Hachamovitch, "Time Out of Mind: An Introduction to the Semiotics of Common Law" in Peter Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto Press, 1991) 159.

27 See Peter Goodrich, "Historical Aspects of Legal Interpretation" (1986) 61 Ind. L.J. 331 at 341. Compare also Gadamer's idea of the horizon of interpretation: Gadamer, *Truth and Method*, *supra* note 15 at 269-271.

28 Borrows, "Sovereignty's Alchemy", *supra* note 4.

29 Goodrich, *supra* note 27 at 343.

30 Cover, "*Nomos* and Narrative", *supra* note 1 at 40-44.

31 For example *Marshall and Bernard*, *supra* note 5; *Powley*, *supra* note 5.

32 See Vansina, *supra* note 3 at 125-133; Lori Ann Roness & Kent McNeil, "Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts" (2000) 39:3 J. of the West 66 at 72-73; Peter Nabokov, *A Forest of Time: American Indian Ways of History* (Cambridge: Cambridge University Press, 2002).

33 *Delgamuukw* (trial), *supra* note 2 at 307-403.

writing, from which the Chief Justice quotes liberally.[34] Limiting himself to "facts," then, allowed him to distinguish between historical actors and Others, and to justify bringing the former into the narrative while excluding the latter.

This divide created by the mythic origins of history really amounts to a distinction between historical (and by extension legal) subjects and objects. Since the Aboriginal inhabitants of the region exist on the other side of the point of historical origin, they factor in the narrative only as the objects of observation by the real historical actors: the Western traders who first made contact and the governors and others who exercised sovereignty in the region. This objectification of Aboriginal culture—the idea that validation requires observation by others, and can never be based on assertion by the Aboriginal groups themselves—is an essential aspect of the treatment of historical fact in Chief Justice McEachern's judgment.

At the Supreme Court of Canada, Chief Justice Lamer was much less rigid in his application of the myth of origins, and was willing at least to admit the possibility of multiple origins.[35] The problem, though, is that the courts must always choose, and so the Western myth of origins—in which time is divided based on verifiable (or at least canonized, which is not the same thing) dividing lines, such as assertion of sovereignty—trumps the Aboriginal narrative of the essential continuity of time. This comes out in Chief Justice Lamer's criteria for the recognition of Aboriginal title:

> In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[36]

Though he recognizes continuity, it is overlain by the narrative of sovereignty, a form of the myth of origins. Then-Justice McLachlin's dissenting judgment in *Van der Peet*, by contrast, hints at a different view of history, which suggests continuity rather than the disjuncture of the myth of origins:

> … Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question. … What must be established is continuity between the modern practice at issue and a traditional law or custom of the native people. Most often, that law or tradi-

34 See for example *ibid*. at 343-403, where there are numerous lengthy quotations from letters, committee reports, legal instruments and the like. See the discussion of this point in Perry, *supra* note 4 at 333-334 and, more generally, Valerie Johnson, "Creating History? Confronting the Myth of Objectivity in the Archive" (2007) 32:117 Archives 128.

35 *Delgamuukw* (S.C.C.), *supra* note 2 at para. 147: "However, as I have explained above, the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy."

36 *Ibid*. at para. 143.

> tion will be traceable to time immemorial; otherwise it would not be an ancestral aboriginal law or custom. But date of contact is not the only moment to consider. What went before and after can be relevant too.[37]

My point in calling attention to these assumptions and myths underlying the use of history is not to tar these judges as "bad historians"—they are not historians at all, of course, and they are writing legal judgments, not histories of the Pacific Northwest. What is important is that history be recognized as a form of narrative—even as a form of myth-making about the world—that affects the judgments that use it. This insight is frequently lost when judges use historical evidence, with potentially drastic results.[38] If we accept that no history, however well intentioned or close to the "facts" it might be, can ever "tell it like it was," we reveal its political dimension. We can then assess the different narratives in play, not against an objective standard of truth, but rather against social and cultural standards of relevance, diversity and inclusion. In looking at things in this way, history can either silence or promote dialogue, depending on how it is deployed.

III Implications: Voice and Silence

The issue of voice is crucial in law and history in similar ways. Both are concerned with who is speaking, what they are saying, what their interest is in saying it, how reliable they are and what the real message being expressed is. Historians and judges alike work by selectively listening to the voices of others, thereby creating a singular new voice in their historical or judicial narratives. Voice implies silence, however, and silence is more than simply the absence of voice, but is itself charged with meaning.[39] The narratives constructed by this selective listening leave behind silences—stories not available, not accepted, not listened to at all. In law this process carries special implications: if voice is the authoritative power of the judge to declare the law and thereby to coerce, silence is the residue of the exercise of that power.

This interplay between voice and silence comes out in a central issue in *Delgamuukw*: the negotiation—by judges in search of "truth"[40]—of the grey area between reality and our constructions of reality. Scientific history supports scientific law by providing an affirmation of the central principles of the law: stability, predictability, verifiability, impartiality. Freed from a rigorous

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37 *Supra* note 22 at para. 247

38 See especially Barnard, *supra* note 1.

39 Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2d ed. (London: Butterworths, 2002) at 109-112.

40 See, for example, *Delgamuukw* (trial), *supra* note 2 at 247; *Delgamuukw* (S.C.C.), *supra* note 2 at para. 86. See generally Robert S. Summers, "Formal Legal Truth and Substantive Truth in Judicial Fact-Finding—Their Justified Divergence in Some Particular Cases" (1999) 18 Law & Phil. 497.

objectivism, however, history also has the potential to undermine these very principles if the inherently contingent nature of its narrativity is recognized. The oral traditions at issue in *Delgamuukw* force the courts to decide how far to go in leaving behind the security of science for the instability of language. This is a question of the tension between authority and dialogue, with authority seeking to impose a single narrative as fact, and dialogue seeking to break this monopoly in favour of pluralism and diversity.

Voice and power thus intersect, the by-product being coerced silence or the denial of the opportunity (or the right) to speak at all.[41] All those written out of or buried in the master narrative reside in a zone of historical silence, and the dynamic of trial and appeal can replicate and authorize that textual disappearance. By establishing "facts," a trial judge moulds a perception of reality into a narrative, which then assumes the authoritative mantle of the law itself, in turn enabling this narrative to function as a kind of fact. In the case of historically excluded groups, like the plaintiffs in *Delgamuukw*, the very creation of this narrative serves at once to exclude and to reinforce the exclusion. This is a two-part process, moving first from fact to narrative, and then from narrative to fact.

From Fact to Narrative

Like historians, judges are confronted with a bewildering array of "facts" from which they must (the language of obligation is crucial here) fashion a coherent narrative based as closely as possible on the evidence available to them.[42] Like an objectivist historian, the judge's goal is not simply a rhetorically persuasive rendering of the past, but, as Chief Justice Lamer put it, "the determination of the historical truth."[43] Truth can come in many forms,[44] however, and the end product depends to a large extent on what the interpreter will accept. For judges, the law of evidence plays a key role in this process.

Judgments on the admissibility and weight of evidence are partly based on the usefulness of the evidence in question for narrative construction—this is implicit in the idea of pertinence. Though in theory the evidence comes first and the judge logically builds a narrative upon it, in practice the assumptions and myths outlined above precede the evidence and allow a judge to make

41 Compare Edward Said's notion of the "power to narrate": "The power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them." Edward Said, *Culture and Imperialism* (New York: Knopf, 1993) at xiii.

42 As Bruno Latour points out, this evidence is largely limited to what the parties submit—to what is contained in the case file. Unlike a research scientist (or a historian), a judge cannot *proprio motu* seek out additional evidence. Latour, *supra* note 8 at 89, 100-101.

43 *Delgamuukw* (S.C.C.), *supra* note 2 at para. 86.

44 See generally Simon Blackburn, *Truth: A Guide* (Oxford: Oxford University Press, 2005).

sense of it.[45] The range of meanings possible for historical evidence, then, comes to be considerably narrowed by its very familiarity: since historical data usually look like "facts," it can be easy for a judge to channel them into that familiar category and to deal with them in an unreflective way.[46]

One illustration of this phenomenon is the doctrine of judicial notice, which considerably lowers the evidentiary burden for particular kinds of historical (and other) material, provided they can be characterized as undisputed "facts."[47] In Quebec, for example, Article 2808 of the *Civil Code of Québec* states that "Judicial notice shall be taken of any fact that is so generally known that it cannot reasonably be questioned." The courts have interpreted this to include, among other things, historical events (not historical interpretations), but the distinction between an event and the record of that event remains unexplored.[48] The majoritarian effects of this are clear, given the construction of the master narrative and the corresponding silences it contains.

Another illustration is the characterization of the testimony of expert witnesses.[49] Judges tend to be most receptive to expert testimony cloaked in the rhetoric of dispassionate conclusions, rather than of potentially controversial interpretations. In Aboriginal rights cases, the historians, ethnographers, anthropologists and other scholars called to testify are held up against the supposedly factual "historical record"—presented as an impartial yardstick of scientific evidence against which interpretations can be measured.[50] The constitution of this record—who establishes it, and what it contains and does

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45 My view of interpretation here is influenced by Gadamer's notion that the context precedes interpretation and conditions the interpreter's experience of the text. See Gadamer, *Truth and Method*, *supra* note 15 at 267-274; Hoy, *supra* note 15 at 147.

46 Critical legal history fights against just this inertia: see Gordon, "Critical Legal Histories", *supra* note 9.

47 See Gover & Macaulay, *supra* note 4 at 78-80; Claire L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994) 26 Ottawa L. Rev. 551; Wayne N. Renke, "*Vriend v. Alberta*: Discrimination, Burdens of Proof, and Judicial Notice" Case Comment (1996) 34 Alta. L. Rev. 925; Danielle Pinard, "La notion traditionnelle de connaissance d'office des faits" (1997) 31 R.J.T. 87. Other doctrines—such as *stare decisis*, *res judicata*, the similar fact rule, and appellate deference to findings of fact—have similar history-making effects.

48 The Supreme Court of Canada has held that in dealing with historical evidence, a judge may take judicial notice of "un fait généralement connu et indiscutablement vrai," [in English, "a fact generally known and indisputably true"], though this offers little help in negotiating the line between "fact" and interpretation. *Gagné v. St-Regis Co. Ltd.*, [1973] S.C.R. 814 at 819 (Pigeon J.).

49 See generally Arthur J. Ray, "Native History on Trial: Confessions of an Expert Witness" (2003) 84 Can. Hist. Rev. 253.

50 See especially the majority judgment of McLachlin C.J.C. in *Marshall and Bernard*, *supra* note 5 at para. 18ff, where the "historical record" (para. 18) and "[t]he historic records" (para. 21) are discussed. The judgments in *Powley*, *supra* note 5 at para. 40 and *Marshall (No. 2)*, *supra* note 5, esp. paras 96, 102, 104 reify "the historical record" in similar ways. See also McEachern C.J.'s discussion of the evidence of expert witnesses Daly, Mills and Brody in *Delgamuukw* (trial), *supra* note 2 at 248-251.

not contain—is invisible in the decisions, as the record itself becomes a fact.[51] Once expert testimony passes this acid test and is admitted, the courts tend to treat it too as unmediated "fact"—quotations drawn from the works of these experts are often presented without footnotes, thus stripping away historical controversy in favour of an artificial unanimity.[52]

Problems arise when courts are forced to confront narratives (that is, structured "facts"), when their preference in dealing with historical evidence is to accept only material that appears to be unmediated by human interpreters. In other words, judges tend to be most receptive to evidence that looks like familiar objectivist history, since this material can easily and transparently be incorporated without explicit reinterpretation into the new judicial narrative being constructed. We see Chief Justice McEachern grappling with this problem when he addresses the reliability of the expert testimony of historians:

> Generally speaking, I accept just about everything they put before me because they were largely collectors of archival, historical documents. In most cases they provided much useful information with minimal editorial comment. *Their marvellous collections largely spoke for themselves*.[53]

Where the historian is a dispassionate scientist, collecting and preserving facts like specimens of insect species, there are no problems. Difficulties—and judicial resistance—arise where evidence comes before the court coloured by non-objectivist concerns.

The main evidentiary issue in *Delgamuukw*—the weight to be given to oral tradition—fell squarely within this dilemma.[54] The problem, of course, is that by according oral evidence virtually no weight, the trial judge set an impossibly high burden on the plaintiffs since that was practically the only evidence of pre-contact life they had. This resistance at trial to oral tradition was due to more than the simple fact that it was not written down and so lacked textual stability. Rather, Aboriginal oral tradition is not simply a linear narrative in the objectivist mode, but presents a foreign-looking (to the judge)

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51 Perry, *supra* note 4.

52 See, e.g., *Mitchell*, *supra* note 5 at paras 43-46 (McLachlin C.J.C. for the majority). Whether it is the court that strips away the footnotes or the expert who fails to provide them is beside the point: in either case complex issues are being given a largely univocal reading. It is an irony of the power of academic disciplines that this historical literature itself frequently synthesizes the very anthropological or archaeological evidence that the courts distinguish from the "historical record." Filtered through the minds of historians and presented as part of historical analysis, this evidence can move away from anthropology or archaeology to become "history."

53 *Delgamuukw* (trial), *supra* note 2 at 251 (emphasis added).

54 Oral tradition was ruled admissible in an earlier procedural stage of the trial: see *Uukw v. R.*, [1987] 6 W.W.R. 155 (B.C.S.C.) (the style of cause here is itself an interesting example of the cultural divide between the Court and the plaintiffs, as the court clerk responsible for identifying the case has apparently mistakenly extracted a Western-style surname from the party's chiefly name, sometimes rendered "Delgam Uukw"). For specifics on the evidence issues, see Gover & Macaulay, *supra* note 4; McLeod, *supra* note 4; Palmer, *supra* note 4; Sherrott, *supra* note 4.

amalgam of history, geography, spirituality, performance and community norms.[55] Its narrativity, in other words, is right on the surface, not buried under the accustomed veneer of scientific detachment. Chief Justice McEachern noted this at one point: "I have great difficulty, as did many witnesses, separating histories and declarations of aboriginal interests from stories."[56] Even leaving aside the etymology of the word "history" (from the Latin *historia*, or "story"), this remark makes clear that for the Chief Justice a demonstrable distinction exists between history and narrative: the former is scientific and so immediately useful to a court of law, while the latter is suspect because of its lack of verifiability.[57] At the Supreme Court of Canada, Chief Justice Lamer pointed out these biases against oral tradition,[58] but translating that appreciation into practice is another matter.[59] Listening to oral traditions is a start, but little changes if they are simply to be mined for whatever "facts" can survive scrutiny against the "historical record."[60] The principle remains that judicial narratives must be based on "facts," not stories, and evidence that looks more like the former than the latter continues to have an advantage.

From Narrative to Fact: Authority and Dialogue

The move from facts to narrative does not end the process, at least not in the law. While a historian's narrative is generally recognized as an interpretation and takes its place in the ongoing process of historical analysis, awaiting refinement and revision, a judge's narrative has a different character. Once an issue is litigated, the judge's decision becomes an authoritative determination of a dispute between parties, a pronouncement on the reality of a past state of affairs, in short, a "fact." This pronouncement is subject to appeal, but

55 See generally Borrows, "Listening for a Change", *supra* note 4, Palmer, *supra* note 4, Napoleon, *supra* note 4 and the literature they cite.

56 *Delgamuukw* (trial), *supra* note 2 at 243.

57 See also *ibid*. at 247-248: "When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiffs' historical evidence is not literally true. … Serious questions arise about many of the matters about which the witnesses have testified and I must assess the totality of the evidence in accordance with legal, not cultural principles. … I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. *It was obvious to me, however, that very often they were recounting matters of faith which have become fact to them. If I do not accept their evidence it will seldom be because I think they are untruthful, but rather because I have a different view of what is fact and what is belief*" (emphasis added).

58 *Delgamuukw* (S.C.C.), *supra* note 2 at para. 101: "In my opinion, the trial judge expected too much of the oral history of the appellants, as expressed in the recollections of aboriginal life of members of the appellant nations. He expected that evidence to provide definitive and precise evidence of pre-contact aboriginal activities on the territory in question. However, as I held in *Van der Peet*, this will be almost an impossible burden to meet. Rather, if oral history cannot conclusively establish pre-sovereignty (after this decision) occupation of land, it may still be relevant to demonstrate that current occupation has its origins prior to sovereignty. This is exactly what the appellants sought to do."

59 Roness & McNeil, *supra* note 32.

60 These difficulties come out in *Mitchell*, *supra* note 5 at paras 41-53, esp. para. 52.

canons of appellate deference to findings and inferences of fact mean that the trial judge's narrative—if not the final result—will stand unless the appellate court can establish a "palpable and overriding error," which means more than simple disagreement over interpretation.[61] Of course, just because a judge says something does not make it so: external reality and juridical reality are two different things. But the authority of the law takes judicial interpretations and transforms them so that they function—within the law—as facts in the further elaboration of judicial narratives.

My point is that in order to maintain authority, the courts—and judges—must rhetorically situate themselves as the arbiters of truth, even in areas where "truth" is lost in the mists of time, or is impossible to ascertain, or is contestable by rational disagreement between interpreters.[62] To be fair, judges are not historians, and the narratives they create serve not to further scholarly understanding of particular problems, but to decide a dispute between two parties. Justice demands timely resolution of disputes, and refusal to adjudicate is not possible.[63] Judges must muddle through as best they can, as Justice Binnie points out in *Marshall (No. 2)*:

> The courts have attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a "cut and paste" version of history …
>
> While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced. Experts, it is argued, are trained to read the various historical records together with the benefit of a protracted study of the period, and an appreciation of the frailties of the various sources. The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can.[64]

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61 See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, 211 D.L.R. (4th) 577 at para. 23 (Iacobucci and Major J.J. for the majority): "We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the *inference-drawing process itself* is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts" (emphasis in original).

62 Compare Goodrich, *supra* note 26 at 353-354.

63 For example, s. 41.2 of the Quebec *Interpretation Act*, R.S.Q. c. I-16, stipulates that "A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law."

64 *Marshall (No. 2)*, *supra* note 5 at paras 36-37 (citations omitted).

In other words, whether historical evidence represents the uncontroversial consensus of historians or a contested interpretation, judgment requires a story about what happened. What Justice Binnie does not mention is that where the story is not obvious the judge must still create one, and objectivist history —which privileges certain facts and certain interpretations—provides a powerful tool for creating certain stories.

This has a steep cost, however: the suppression of dialogue and the silencing of one or more divergent points of view. The adjudicative process moves from dialogue to imposed consensus—from narrative to fact. Though the adversarial nature of litigation in North America[65] presents the appearance of dialogue, true dialogue is impossible because the process is determined by a key power imbalance—that between the parties on one side and the court on the other. While the court is limited by the presentations of the parties and by the integrity of the law more generally,[66] the assumptions and myths outlined above make up the interpretive context of adjudication and tend to work disproportionately in favour of the maintenance of a particular point of view.

Moreover, the quality of the initial dialogue between the parties and the decision-maker determines the quality of this imposed consensus, and true dialogue is difficult or impossible unless each side is speaking the same language. This was clearly not the case in *Delgamuukw*, where the gulf between the two conceptions of history was wide, and it is arguably never the case in litigation involving Aboriginal peoples. The *Delgamuukw* plaintiffs (or their lawyers) seem to have sensed this, and during the course of the long trial began to mould their discourse to that of the forum, by increasingly privileging the scientific evidence that it was obvious the judge preferred. As Chief Justice McEachern rather disingenuously noted, "as the trial progressed I noticed the plaintiffs seemed to place less and less importance on *adaawk* and *kungax*,[67] possibly because they are highly equivocal, or perhaps because the plaintiffs focused more on feasting and scientific evidence."[68] This change of strategy amounted to their being forced to downplay what should have been their strongest evidence: the oral tradition of their people. This placed them in an untenable situation: their only hope for recognition of their rights was to

65 This characterization has been challenged: see Stephan G. Coughlan, "The 'Adversary System': Rhetoric or Reality?" (1993) 8-FALL Can. J.L. & Soc'y 139; Amalia D. Kessler, "Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial" (2005) 90 Cornell L. Rev. 1181.

66 See Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) at 225-275; Gerald J. Postema, "Integrity: Justice in Workclothes" (1997) 82 Iowa L. Rev. 821.

67 McEachern C.J. describes the *adaawk* and *kungax* as follows: "Most if not all Gitksan Houses have oral histories and an 'adaawk' which is a collection of sacred oral reminiscences about their ancestors, their histories and their territories. The Wet'suwet'en Houses do not have a true equivalent of an 'adaawk,' but they each have a 'kungax' which is a spiritual song or songs or dance or performance which ties them to their lands."

68 *Delgamuukw* (trial), *supra* note 2 at 259.

abandon their distinct identity and to merge themselves as far as possible with the dominant narrative, a narrative that was constructed without their input and against their interests.[69]

The Supreme Court recognized this problem and ordered a new trial.[70] Hints of dialogue and pluralism are present in the Supreme Court of Canada's ruling in *Delgamuukw*, particularly in the majority's affirmation that oral histories must be evaluated on their own terms and not just to the extent that they confirm other types of evidence.[71] Clearly, things have come far since the Privy Council's notorious remarks in *Re Southern Rhodesia*: "The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged."[72] Still, the end result arguably remains the same: Aboriginal cultures are judged against the norm of hegemonic Western culture, and to succeed their claims must be couched in the conventions of the dominant discourse.

In the end, objectivist history-as-science prevailed in *Delgamuukw*, and indeed continues to prevail in Canadian courts. The Supreme Court of Canada's decision in *Delgamuukw*, though it did not settle the litigation, did outline some principles to guide the use of oral tradition evidence in future cases. Building on the principles he had set out a year earlier in *Van der Peet*, Chief Justice Lamer demanded a high degree of openness to oral tradition:

> This appeal requires us to apply not only the first principle in *Van der Peet* but the second principle as well, and adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.[73]

Such "coming to terms" requires changes to long-standing traditions of evidence law in order to recognize the unique nature of oral tradition evidence. In a welcome change after Chief Justice McEachern's trial judgment, Chief Justice Lamer strongly hinted at a pluralist understanding of the relationship between Aboriginal and non-Aboriginal evidence about the past:

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69 This is a central lesson of post-colonial studies: see Perry, *supra* note 4; Barnard, *supra* note 1; Miranda Johnson, "Honest Acts and Dangerous Supplements: Indigenous Oral History and Historical Practice in Settler Societies" (2005) 8 Postcolonial Stud. 261; Diane Kirkby & Catharine Coleborne, eds., *Law, History, Colonialism: The Reach of Empire* (Manchester: Manchester University Press, 2001).

70 *Delgamuukw* (S.C.C.), *supra* note 2 at paras 1071-08. To date the case has not been retried.

71 *Delgamuukw* (S.C.C.), *supra* note 2 at para. 98.

72 *Re Southern Rhodesia* (1918), [1919] A.C. 211 at 233 (P.C.)

73 *Delgamuukw* (S.C.C.), *supra* note 2 at para. 84; *Van der Peet*, *supra* note 22.

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and *placed on an equal footing* with the types of historical evidence that courts are familiar with, which largely consists of historical documents.[74]

Still, though the Supreme Court certainly opens the door to oral tradition, that door is open just a crack, and no more. In what I believe is the crucial passage regarding these issues in the judgment, and which occurs immediately before the expressions of openness and pluralism just quoted, the Court in the space of two lines firmly reasserts the authority of the dominant narrative and makes it clear that Aboriginal evidence must be made to fit within it:

> In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure."[75]

The first half of this passage is a pluralist assertion, pointing to dialogue and accommodation. But the "however" makes it clear where the power lies and what the actual rules of the game are. Though the rhetoric is inclusive and indicates that courts must not run roughshod over Aboriginal rights, constitutional structure—and the common law—clearly trump divergent narratives coming from Aboriginal communities.[76] Accommodation thus becomes a process of fitting in, of translating one's claims, one's evidence and one's history into the framework of the predominant narrative.

Aboriginal rights litigation since *Delgamuukw* for the most part bears out this pessimistic reading. In recent decisions the Supreme Court has backed away from the hints of pluralism in *Delgamuukw* and opted instead to reinforce the ordering of foreground and background implicit in the requirement to avoid straining Canada's legal order. Canadian law—like the "historical record"—is treated as a largely immutable and unchallengeable given against which Aboriginal claims are to be measured. For Chief Justice McLachlin, for

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74 *Delgamuukw* (S.C.C.), *ibid.* at para. 87 (emphasis added).

75 *Delgamuukw* (S.C.C.), *supra* note 2 at para. 82 (reference omitted), quoting *Van der Peet*, *supra* note 22 at para. 49. The full passage in *Van der Peet* reads (emphasis added): "In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. … It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35(1) [of the *Constitution Act, 1982*] is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. *Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada*."

76 See Borrows, "Listening for a Change", *supra* note 4 at 27-28.

example, writing for the majority in *R. v. Mitchell*, the laws of evidence are largely self-evident: "While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the 'general principles of common sense.'"[77]

Similarly, in *R. v. Marshall and Bernard*, the Chief Justice describes a process of "translation" of legally unfamiliar Aboriginal concepts into the vernacular of the common law:

> The evidence, oral and documentary, must be evaluated from the aboriginal perspective. What would a certain practice or event have signified in their world and value system? Having evaluated the evidence, the final step is to translate the facts found and thus interpreted into a modern common law right. The right must be accurately delineated in a way that reflects common law traditions, while respecting the aboriginal perspective.[78]

This latter issue was a key point of disagreement for the minority (Justices LeBel and Fish), who argued instead for adaptation of common law principles (in short, for dialogue) rather than the majority's template approach: "The role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The aboriginal perspective shapes the very concept of aboriginal title."[79] This alternative approach suggests that though the Supreme Court has left little room for dialogue in this context, it has not completely shut itself off to the possibility.

This disagreement at the Supreme Court is reflected in recent lower court decisions, where it is clear that some judges are pulling away from the opening to dialogue and accommodation created by *Delgamuukw*, while others are more willing to probe the implications of Chief Justice Lamer's pluralist hints. An example of the former is the 2005 decision of the Federal Court, Trial Division in *Samson Indian Band v. Canada*,[80] which in its interpretation of oral tradition evidence relies on the much criticized decision of the Federal Court of Appeal in *Benoit v. Canada*.[81] In *Samson*, Justice Teitelbaum's stated purpose is to tell it like it was: "I have attempted to present,

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77 *Mitchell*, *supra* note 5 at para. 38, quoting John Sopinka & Sidney N. Lederman, *The Law of Evidence in Civil* Cases (Toronto: Butterworths, 1974).

78 *Marshall and Bernard*, *supra* note 5 at para. 69.

79 *Marshall and Bernard*, *ibid.* at paras 127-131, quotation at para. 130.

80 *Samson Indian Band v. Canada*, 2005 FC 1622, 269 F.T.R. 1 (Teitelbaum J.), aff'd 2006 FCA 415, [2007] 3 F.C. 245, aff'd 2009 SCC 9 (*sub nom. Ermineskin Indian Band and Nation v. Canada*) [*Samson*]. The Supreme Court did not deal in any substantive way with the so-called "General and Historical Phase" of the trial decision.

81 2003 FCA 236, 228 D.L.R. (4th) 1, rev'g 2002 FCT 243, 217 F.T.R. 1, leave to appeal to S.C.C. denied. For criticism, see especially Napoleon, *supra* note 4 at 133-137.

for the most part, an historical chronology, as opposed to drifting into any analytical abstractionism, which is best left to academics, not judges."[82] To do this, he holds Aboriginal witnesses' oral histories up to "the documentary record" and "the larger historical context" and finds them wanting.[83] Justice Teitelbaum does not subject the written accounts of 19th-century white observers to such scrutiny, which he sees as characterized by an "essential objectivity."[84]

More promisingly, the judgment of Justice Vickers of the British Columbia Supreme Court in *Tsilhqot'in Nation*[85] suggests a more nuanced view of both historical evidence and history itself, and not surprisingly it led to a different result than *Delgamuukw*. Justice Vickers stresses that in dealing with oral tradition, "courts must undergo their own process of decolonization," that judges must move beyond "positivisitic or scientific" notions of "objective truth," and that in general they must "set aside some closely held beliefs."[86] This approach—his interpretation of the requirements set by the Supreme Court in *Delgamuukw* and *Mitchell*—led him, for instance, to adopt a more fluid, "social" view of the concept of boundaries, which was crucial to his conclusions on Aboriginal title.[87] Still, despite the sensitive reading of oral tradition evidence, a pessimist might argue that it mattered little in the final result. The way the plaintiffs framed their land claim (as all or nothing) precluded on procedural grounds an award of Aboriginal title to the entirety of the lands claimed, so that in the end the claim failed and the court recommended that the parties proceed to negotiation.[88] This was not, however, a simple repeat of the result in *Delgamuukw* since Justice Vickers held "as a finding of fact in these proceedings" that the plaintiffs had made out a claim to Aboriginal title to large parts of the territory at issue, a finding that provides a foundation from which to negotiate.[89] This is a highly significant development since in the terms of my argument the Tsilhqot'in oral traditions—unlike those in *Delgamuukw*—survived the process of judicial narrative construction to become authorized "facts" in their own right, to be taken into account in any subsequent narrative-building.

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82 *Samson*, *supra* note 80 at para. 5.

83 *Ibid*. at para. 477 ("documentary record") and para. 489 ("larger historical context").

84 *Ibid*., e.g., at para. 504: "Turning to the documentary, or contemporary eyewitness accounts, I find those of Morris and Jackes to be reliable records of the Treaty 6 negotiations. I acknowledge that neither man was a disinterested, or independent, party … However, I have no evidence before me that would either impugn or cast doubt upon the essential objectivity of their respective accounts."

85 *Supra* note 19.

86 *Ibid*., quotations at paras 132, 137, and 133, respectively.

87 *Ibid*. at para. 649.

88 *Ibid*. at para. 129.

89 *Ibid*. at para. 961.

Though the developments in *Tsilhqot'in Nation* are promising, in the face of the monological power of the law, pluralism, which recognizes multiple sites of narrativity, undeniably faces a tenuous existence.[90] This is hardly surprising since to embrace a pluralist reading of evidence such as judges encounter in cases like *Delgamuukw* would go a long way toward undermining the very myths upon which law depends for its authority.[91] Dialogue easily disappears in the initial transition from facts to narrative. Once the evidence has been heard, assessed and translated into an objectivist form congenial to legal science, the voice of the law takes over, creates a new, authorized narrative and "declares" it to be what happened. It is interesting to note that the relief sought by the plaintiffs in *Delgamuukw* was a series of "declarations"—invitations to the court to speak the law, and in so doing to validate a particular reading of history. The plaintiffs asked the court to be a historian and interpret the past; the type of history they got was perhaps unexpected, but hardly surprising.

IV Conclusion: "Judged by Their Own Words"

Words are central to law, as they are to history. Both history and law, by giving meaningful structure to past events, create narratives, and as discursive constructions these narratives always have the power to turn around and structure the reality on which they are based.[92] As long as the stakes are not high, we are content to accept this without much reflection and to work under the assumption that our narratives correspond closely to an external reality. Where an issue becomes contentious, however, the tendency is to cloak it in the rhetoric of objective fact as a counter to the strong feelings that issues like the story of Aboriginal dispossession evoke. The danger in this is that since the narrative-building is hidden and rests on largely unspoken majoritarian assumptions,

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90 Cover, "*Nomos* and Narrative", *supra* note 1 at 11-19. On pluralism see also Martha-Marie Kleinhans & Roderick A. Macdonald, "What Is a Critical Legal Pluralism?" (1997) 12-FALL Can. J.L. & Soc'y 25, esp. 44.

91 Similar issues were in play in the High Court of Australia's landmark decision in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 [*Mabo*], which the Supreme Court of Canada cited with approval in *Delgamuukw* (S.C.C.), *supra* note 2 at para. 153. This is especially evident in Brennan J.'s remark that: "In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency"; *Mabo*, *ibid*. at 29. See Peter H. Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005) at 250-257.

92 This observation draws on both Giddens' structuration theory and Bourdieu's idea of habitus: Anthony Giddens, "Structuration Theory: Past, Present and Future" in Christopher G.A. Bryant & David Jury, eds., *Giddens' Theory of Structuration: A Critical Appreciation* (London: Routledge, 1991) 201 at 204; Pierre Bourdieu, *Outline of a Theory of Practice*, trans. Richard Nice (Cambridge: Cambridge University Press, 1977) esp. 72-95.

what are contestable political decisions appear instead to proceed inevitably from an incontestable factual historical record.[93]

One might argue that since judicial narratives-turned-facts hold only within the confines of a particular litigation—deference to a trial judge's findings of fact applies only to the courts hearing that particular appeal—the effects of judicial narrative-building are limited. But the stories produced and authorized by judgment do more than simply outline who did what, and for this reason their influence transcends particular proceedings. These narratives—and the processes of interpretation by which judges produce them—serve also to validate and to develop the myths we looked at above. Judges' frequent invocation of the respective "traditions" of the common law and of the civil law, for example, serve as shorthand justifications of the powerful role that judge-made and judge-authorized history plays in deciding legal questions.[94] These traditions support our legal order, but they also support a particular reading of the past among many other possible histories.

Though the politics of narrative are particularly evident in Aboriginal rights litigation, they are an inherent part of the process of judgment. Judges act as positivist historians, imposing consensus on disparate and contradictory evidence, by selecting one story in preference to the other possible stories, and ultimately by conferring the mantle of "fact" on the stories they create. We see this for example in family litigation or in sexual assault cases, where each side presents divergent—sometimes widely so—oral histories, out of which the judge constructs *the* history of the parties, which stands in place of the others.[95] From one perspective, the "historical record" in *Delgamuukw* and other cases is simply a more powerful version of the "factual record" upon which any judicial narrative is based, and a positivist invocation of "the record"—whether factual or historical—confers weight, authority and finality on the narratives that rely on it.

From another perspective, however, the politics of judicial narrative-building in Aboriginal rights litigation present much more fundamental (and

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93 Compare for example *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, where the same "factual record" is finessed by the majority and the dissent to create strikingly different histories of Ms. Gosselin's situation and the sufficiency or insufficiency of Quebec welfare programs in the 1980s.

94 A good illustration of the interplay of these traditions is the discussion of the possibility of compensation for *solatium doloris* in *Augustus v. Gosset*, [1996] 3 S.C.R. 268, 138 D.L.R. (4th) 617, esp. paras 26-35. See generally H. Patrick Glenn, "La Cour suprême du Canada et la tradition du droit civil" (2001) 80 Can. Bar Rev. 151.

95 It should be noted that while this process is characteristic of adjudication, other forms of dispute resolution may hold promise for allowing pluralist readings of evidence. Narrative mediation in particular seeks to embrace the plurality of narrative and voice: see especially Sara Cobb, "Empowerment and Mediation: A Narrative Perspective" (1993) 9 Negot. J. 245; Michal Alberstein, "Forms of Mediation and Law: Cultures of Dispute Resolution" (2007) 22 Ohio St. J. on Disp. Resol. 321.

troubling) problems since the master narrative rests on cultural assumptions held by one side only. The hurdle in such cases is strikingly higher—Aboriginal plaintiffs, as outsiders to the master narrative against which their evidence will be evaluated, must challenge the monological tendency of the courts and point out and reframe the political decisions that created and continue to authorize that master narrative. Changing the narrative and the assumptions behind it is difficult, to be sure. It takes time, perseverance and creativity, not to mention money, all in the service of a long-term goal that transcends each individual case. To accept the narrative and adapt to its strictures is to allow the narrow opening created in *Delgamuukw* to close completely.

In *Delgamuukw*, Chief Justice McEachern remarked that in constructing a narrative history of British Columbia for the purposes of the trial, he planned to let the historical actors be "judged by their own words, rather than by the reconstruction of writers."[96] On its face, this remark is a fitting epigraph for objectivist history in the service of positivist law: since in this view words are unmediated evidence, the truth can come out of them self-evidently and without interpretation. The judge thus becomes merely a conduit through which the truth emerges, a collator of the historical record that speaks for itself. On a deeper level, however, the Chief Justice's words ask questions about the nature of language, narrative and interpretation discussed in this article. As I have tried to show, *Delgamuukw* was decided not by letting the facts speak for themselves in an unmediated way, but through complex processes of narrative creation and authorization. Understanding this subtle and often hidden substitution of one voice for another can shed light on the degree of cultural power that our courts actually wield.

96 *Delgamuukw* (trial), *supra* note 2 at 307.