A Decolonizing Medieval Studies?

AUTHOR(S)

Helen Young

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Towards a decolonising medieval studies: Temporality and sovereignty

> The ancient Britons, in the time of Caesar painted their bodies, as the present Cherokees of North America; because it would naturally enough occur to the wild people of every country, that by this practice they might render themselves terrible to their enemies: Nor will this prove that the Cherokees are descended from the ancient Britons.
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> Thomas Percy, *Northern Antiquities: Or, A Description of the Manners, Customs, Religion and Laws of the Ancient Danes, and Other Northern Nations; Including Those of Our Own Saxon Ancestors, With a Translation of the Edda, Or System of Runic Mythology, And Other Pieces* (1770). [1]

Medievalism in the late-eighteenth century served the interests of imperial and colonial projects with global reach, and continues to do so;[2] Indigenous peoples in numerous places and time were and are Othered through medievalist temporalities.[3] The Cherokee in Thomas Percy's comment are, as Martin Nakata has written of Torres Strait Islanders, positioned and understood "as a society from the past rather than one with a past;" Percy, like British missionaries in the Torres Strait a hemisphere away and a century later, used "developments in the civilised world as a benchmark" to render "the 'uncivilised' world … as static."[4] The Cherokee, for Percy, are 'medieval-like' in the wrong time (the medieval is necessarily in the past of modernity) and are thus "wild" because of their supposed failure or inability to progress.[5] This framing is both a product and a reinforcement of entanglements between European colonialism and race, and was broadly applied by Europeans around the globe in the construction and maintenance of racial hierarchies. "Time," as Emma Kowal argues, "is a crucial mechanism through which Indigenous-Western dichotomies are created and

maintained and an enduring trope of difference in the settler-colonial imaginary."[6] Assignations of a teleological temporality – who can be 'medieval' and when – were and remain a critical tool in managing white racial colonial power structures.[7] Medieval studies as an academic field – which I consider here to be a form of the much broader practice of medievalism – is foundationally invested in racialized and racializing white colonialist temporalities because the object of its study is by definition premodern; the Middle Ages were invented to be an Other to European modernity.[8] What, then, can medieval studies offer Indigenous studies? This article seeks answers to that question through an exploration of the imbrications of medievalism and legal recognition of Indigenous sovereignty in the settler colonial nation of Australia, focussing particularly on temporality.

Medieval studies, because of its long and ongoing imbrication with white racism, imperialism and settler colonialism, has a particular ethical obligation to actively contribute to decolonisation by addressing impacts of 'the medieval' on Indigenous lives. A decolonising medieval studies can make a meaningful contribution to the broad project of decolonisation by highlighting ways in which medieval pasts bring colonialist dispositions to decolonising endeavours. Linda Tuhiwai Smith argues that "imperialism and colonialism, notions of Other, and theories of about human nature existed long before the Enlightenment in Western philosophy."[9] The Western "cultural archive" contains many different traditions and ideas that are "reformed and transformed" in particular contexts and reveal "rules of practice" by which the West operates that can be made intelligible through how they have be "perpetrated on indigenous communities."[10] Classical and medieval culture provide models for modern taxonomizing concepts such as race and gender to take up, adapt, and enact through social institutions, including but not only in imperial and colonial contexts.[11] As part of the Western cultural archive, medieval pasts have, are and will impact Indigenous peoples by generating,

justifying and perpetuating "white possessive logics" that reaffirm settler colonial ownership, control, and domination."[12]

The essay focuses on medievalism and *Mabo and Others vs Queensland (2)* (1992) (*Mabo*);[13] that case, heard in the High Court of Australia, was the culmination of a decade-long court battle by the Meriam people, led by Eddie Koiki Mabo, to have their ownership of land on Mer island in Torres Strait legally recognised. It saw the first recognition of native title by the Australian legal system and overturned the legal doctrine of *terra nullius* – no one's land – which was historically used to justify British possession-taking of the land that is now the settler colonial nation Australia. The *Mabo* ruling, however, reinscribed settler colonial sovereignty even as it acknowledged that a key legal principle used to justify it is a fiction. The article is concerned with the temporalities constructed through the cultural archive and its use in and around *Mabo*, not with jurisprudence and the law for its own sake. Following a brief outline of the history of British claiming of sovereignty in Australia, it explores how the medieval colonial history of Britain provide a cultural archive that shaped application of English common law in the service of white patriarchal colonialism. It then examines medievalist temporalities in judgements made in *Mabo* by Justices of the High Court of Australia before returning to the question of what medieval studies and medievalism have to offer Indigenous studies.

When Lieutenant James Cook, captain of *HMS Endeavour*, sailed from Britain for the Pacific in 1768 to observe the passage of Venus he was given secret instructions to "take possession" of lands previously unknown to Europeans he encountered with the "Consent of the Natives" or "if you find the Country uninhabited."[14] The latter gestures to the principle of *terra*

nullius, that is, that 'no-one's land' could be legitimately claimed by the first person to discover and wish to possess it. Cook and his men encountered Indigenous Australians, at times violently, but he did not consider them inhabitants in a meaningful sense and wrote in his journal that they were nomadic and "know nothing of Cultivation."[15] Cook would write in his journal that he claimed possession of the east coast of Australia for the British Crown on 22nd August 1770. Whether that event took place as he described or was a later invention by him to thwart French territorial ambitions has been called into question,[16] but in any case it was taken to be true and the British Empire acted as though it were a legitimate claim by violently invading from 1788. The principle of *terra nullius* was built into colonial law in New South Wales before national federation in 1901, and into Australian law in the twentieth century.[17] *Mabo* overturned the doctrine of *terra nullius* but also recognised and reinscribed settler colonial Australian sovereignty.[18] As Aileen Moreton-Robinson argues that the High Court's ruling was "based on politics and economics rather than the rule of law," and created a precedent through which Indigenous land rights could be extinguished with the result that: "in *Mabo*, the common law ensured the continuance of patriarchal whiteness as a system that protects the properties and privileges of white men" by significantly limiting the parameters through which Australian legal recognition of native title can be achieved.[19] As I write this, the news announces that the Queensland government has extinguished Indigenous title of the Wangan and Jagalingou peoples over a large area of land to allow the major new Adani coal mine to go ahead.[20]

Colonisation and the medievalist cultural archive

The cultural archive of British history enables a Foucauldian genealogy for colonialism and imperialism to be constructed in an Australian context. In the lead up to the High Court's

final ruling in *Mabo*, a 1991 briefing paper for the state parliament of Queensland (the Queensland state government was the defendant in the case), the history of Britain was figured as having made English common law particularly suited to dealing with empire:

> The Europeans and British were already well experienced in colonial enterprise. Britain had been successively invaded by the Romans, Anglo Saxons, the Danes, and in 1066 by the Normans. Each displaced and absorbed their predecessors with varying degrees of violence. However Great Britain has never been invaded since 1066 and in the eighteenth century became a colonizing power itself. Their history produced legal precedents to resolve the complex issues involved in the acquisition and management of an overseas empire.[21]

Britain – and its colony Australia – is constructed here as a power with an intimate, even unique expertise on colonisation, having been both coloniser and colonised. Its peoples have learned so well from their collective experience of being colonised that they became highly successful colonisers, with a legal system to match that success; people, culture, and social institutions are wound together into a colonial Self. This teleological temporal structure resonates with nineteenth-century progressivist concepts of race,[22] and with twenty-first-century discourses in which white Western people are understood to be the inheritors of "cumulative cultural knowledge, acquired over centuries" in "contrast [with] Indigenous people … [who] have not had time to develop the appropriate cultural knowledge."[23] The pivot from the Norman conquest in 1066 to eighteenth-century imperialism draws attention to the Middle Ages as a key period in the successful transition of the British-English from being subject to acquisition and management by foreign powers to acquiring and managing their own empire; at its peak arguably the most successful global imperial endeavour in history. The teleological structure points to the past, through the Middle Ages to the classical era, but also to the future and the High Court's pending ruling in *Mabo* and beyond. The collective

experience of the various peoples of the British Isles are welded in this passage into a single history, a cultural archive as Tuhiwai-Smith puts it, which is expressed in and exercised through the modern social institution of the law. The passage, perhaps unwittingly, points to the reality of the English common law: it is genuinely particularly suited to acquiring and maintaining power, territory and resources because it is designed to do so and has been applied to create precedent. White possessive logics that are structured by "excessive desire to own, control and dominate" underpin the application of English common law,[24] the precedents that are invoked, and the rulings that are made as a result.

The medieval English cultural archive provides models for colonialist possessive logics and for constructions of the colonial Self. The summary of the history of the peoples of the British Isles quoted above resonates strikingly with medieval versions of that same history. The twelfth-century account of Henry of Huntingdon presents five colonial and imperial "plagues" inflicted as God's punishment for sin:

> The Romans subjugated Britain to themselves for a brief time, and ruled splendidly by right of conquest. Next the Picts and Scots made frequent incursions from the northern part of Britain. … when, after a short time, they were repulsed, they gave up their invasion. The Saxons on the other hand … gained possession of what they had taken [by warfare], built on what they had gained, and what they had built they ruled by laws. Likewise, the Normans, suddenly and quickly, subduing the land to themselves, by right of kingship, granted to the conquered their life, liberty and ancient laws.[25]

Conquest and colonisation shaped medieval formations of British and English subjectivities articulated through historiography.[26] In accounts from the ninth century onward the British were typically represented as the first humans in Britain but not as indigenous to that land;

they were rather said to have arrived and settled there from origins in the Middle East (variously Biblical, Trojan, or a combination of the two).[27] The origins of *terra nullius* as an articulated legal principle have been traced to the sixteenth century,[28] but medieval historiography offers a much older model for the practice of refusing to recognise the humanity of the inhabitants of a country. Britain was often said to have been previously occupied by giants whom the British dispossessed: "they drove the giants whom they had discovered into caves in the mountains … They began to cultivate the fields and to build homes." [29] The Saxon arrival in England was also represented as settler colonists. According to Geoffrey of Monmouth most of the British were killed or dispossessed and driven to "living precariously in Wales, in the remote recesses of the woods" by the Saxons and Angles who multiplied,[30] "cultivated the fields and re-built the cities and castles,"[31] and renamed the land England. The Romans and Danes, meanwhile, were constructed as imperial powers that seized power by force and took control of resources without supplanting the existing population.

God's will was invoked to explain the successive conquests and colonisations of Britain in the medieval era: Henry of Huntingdon ascribed the five waves of colonisation and conquest to "divine vengeance" for sin.[32] White patriarchal colonialism in the nineteenth and early twentieth centuries was likewise often framed in religious terms. For example, Richard Howitt, who referred to himself as a "white man" and "English" wrote in 1845:

> No nation can boast such an honest ancestry as we: our colonising is of the blood … We have the right blood in our veins; Roman, Danish, Saxon, and Norman; and nobody will dispute our title to one half of the globe … the aborigines … have reversed God's command to 'increase and multiply.' They are decreasing naturally, and thus have no

> right to the land. Nobody will dispute our title in this particular; *we* are not decreasing.[33]

Possessive logics, as theorised by Moreton-Robinson,[34] shape medieval historiography; it provides a cultural archive of colonialist practices and justifications on which the British empire and modern settler colonial nation-states could and can draw to construct teleological temporalities that justify their violent dispossessions of Indigenous peoples.

Medieval origins of legal principles, particularly although not exclusively, the Catholic 'doctrine of discovery,' were deployed in European colonial and imperial expansion to justify acquisition and manage in ongoing ways the sovereignty, rights and lives of Indigenous peoples around the globe.[35] The application of English common law in Australia meant that native title claims hinged, in part, on medieval practices and medievalist accounts and interpretations of them. Colonial courts in nineteenth-century New South Wales relied heavily on Sir William Blackstone's *Commentaries on the Laws of England* (1765-1770) including by using his "feudal proposition justifying British land colonisation."[36] Blackstone wrote that British sovereignty could be established in colonies "where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have either gained, by conquest, or ceded to us by treaties;"[37] the first of these was used as a legal basis for *terra nullius* in the nineteenth-century courts of the colony of New South Wales. Blackstone formulated a procedure for colonisation: "that the Crown acquires all land in the form of radical (or ultimate) title … [and] stated that this was akin to a feudal tenure, where the Crown held ultimate title but granted lands to the lords for productive use."[38] For Blackstone, universal Crown possession was a feature of the feudal system introduced to England by the Normans

after the conquest as "a mere fiction," a principle that enabled the system of government to function which was accepted in theory by the English then exploited by the Normans.[39] Whatever the truth of Blackstone's highly ideological and historically contextual claims, his account of the Norman Conquest and feudal law in England became part of the British cultural archive and provided a rationalization for claiming sovereignty in the lands now internationally known as Australia.

Medievalism in Mabo

Medieval English practices are a shaping force in Indigenous futures through of settler colonial recognition – and non-recognition – of Indigenous sovereignty through legal precedents. Five judgements were delivered by the Justices of the High Court of Australia in *Mabo*; medievalism is clearly apparent in those of Justice Brennan (with which Chief Justice Mason and Justice McHugh agreed in both outcome and reasoning)[40] and Justices Deane and Gaudron.[41] Their medievalism principally pertains to Crown acquisition of land title following the Norman Conquest of England in 1066 and English conquests in Wales and Ireland. Justices Deane and Gaudron summarise the central point:

> the English common law principles relating to real property developed as the product of concepts shaped by the feudal system of medieval times. The basic tenet was that, consequent upon the Norman Conquest, the Crown was the owner of all land in the kingdom.[42]

Justice Brennan's judgement cited seventeenth-century written precedents in English common law of land tenure rulings against universal Crown possession in the wake of medieval conquests of Wales and Ireland.[43] Justice Brennan's judgement also raises the

situation of Anglo-Saxon landholders and their titles after the Norman Conquest as key issue in common law arguments over the rule of universality of tenure:

> The origin of the rule [of universality of tenure] is to be found in a traditional belief that, at some time after the Norman Conquest, the King either owned beneficially and granted, or otherwise became Paramount Lord of, all the land in the Kingdom.[44]

Justice Brennan offers two possibilities as to how William I may have acquired such rights, both based on nineteenth-century commentaries on medieval legal history,[45] then states: "whatever the fact, it is the fiction of royal grants that underlies the English rule."[46] Justice Brennan quotes Blackstone's *Commentaries*:

> it became a fundamental maxim, and necessary principle (though in reality a mere fiction) of our English tenures, 'that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has, mediately or immediately, been derived as a gift from him'.[47]

Crown possession in Australia exists as exercise of power, that is, it is a matter of fact that has been made into a matter of law through application of a legal precedent justifying assertion of sovereign power. For Blackstone, as Davis argues, feudal law was imposed by the Normans in England on terms that "were de jure, not de facto", that is as a matter of legal principle not a fact of reality (albeit as Blackstone has it the Normans exploited that law to their own advantage).[48] In Australia, the opposite is the case: the fact of reality – claiming of sovereignty and violent possession-taking – justified by legal principle.[49]

Universality of tenure was a convenient fiction apt for colonial purposes; Justice Brennan's judgement explicitly refuses to challenge what it acknowledges to be false:

> it is far too late in the day to contemplate an allodial or other system of land ownership. Land in Australia which has been granted by the Crown is held on a tenure of some kind and the titles acquired under the accepted land law cannot be disturbed.[50]

This acknowledgement of the fictional basis for legally-inscribed reality in Justice Brennan's *Mabo* judgement illustrates in concrete terms the axiom of medievalism that what is thought or said to have happened matters far more in the modern era than what actually happened in the Middle Ages. Medievalist fiction was made a fact of power and possession in settler colonial Australia because it suited the needs of the white settler colony. That process of factualising fiction in the Australian legal record generates a particular form of medievalist temporality by inserting the present into the past at precisely the moment it claims that same present is authorised by the past it creates. Linear time collapses even as its valency is insisted upon. The medieval past is not a mirror, as Kathleen Biddick puts it in her influential articulation of presentism, and nor is this legal medievalism pastist; 'then' and 'now' are not "bounded temporal objects that cannot come into contact."[51] There is something of a neomedievalist simulacrum because the present judgement creates a copy based on an original (precedent) that never existed,[52] at least not in the place and time it was said to have (immediately after the Norman Conquest) even if by the time of *Mabo* judgements the same feudal fiction had already been made fact by being retrospectively inserted into history as legal precedent in other colonial contexts.[53]

Justice Brennan's judgement in *Mabo* reveals a white Western approach to temporality: after two centuries of English systems of land ownership it is "too late in the day" to consider implementing another system, as compared to the tens of thousands of years of Aboriginal law that have been deliberately and violently supplanted. The claim that it is too late for

change ignores the treaties made by settler-colonial states Canada and New Zealand with Indigenous peoples in the preceding two decades.[54] As Tuhiwai Smith states: "what makes ideas 'real' is the system of knowledge, the formations of culture and the relations of power in which there concepts are located."[55] The internal contradictions of temporality and justification detailed in the previous paragraph quite simply do not matter to the overall possessive logic of the judgement itself. Western, teleological time matters and is made real in ways that Indigenous time does and is not; white patriarchal occupation for a relatively short period is made significant in Justice Brennan's judgement because it is understood to have changed possession of the land beyond reversal. Imposition of colonial temporality is an assertion of control over space, of possession. What matters most here is the exercise of power as justified through the social institution of the law, not the passage of time.

Medievalizing Aboriginal Law after Mabo

Indigenous people, law, and culture are often, although not always, excluded from 'the medieval' in white colonialist assignations of temporality as particular discursive strategies are deployed to maintain white patriarchal colonial power and control. In the post-*Mabo* era popular, legal and academic sources have medievalized Aboriginal law through assertions that it is similar in significant ways to Anglo-Saxon law in attempts to make it recognisable to the Australian common law. Aboriginal lawyer and political leader Noel Pearson has argued that "Native title is … the space between the two systems [Aboriginal law and Australian common law], where there is recognition."[56] Comparisons of Aboriginal and Anglo-Saxon law can arguably be read as exemplary of attempts to create such spaces. However, when that comparison is made through reference to a specifically racial and anachronistic concept of identity – the Anglo-Saxon – that is directly linked to a time-period understood as

medieval and therefore inherently premodern, Indigenous peoples, cultures, and social systems are positioned as less developed than settler colonial modernity.

A Screen Australia Digital Learning website based on the documentary *Mabo: the Native Title Revolution*, for example, draws connections between English Common Law and Aboriginal law in its exploration of the case and its significance: "the laws of England originally consisted of local customs, which differed from region to region, much like the customary law Aboriginal Australians."[57] That such a comparison needs to be made is arguably an assertion of white colonial power: Indigenous law must, in such formulations, be legitimised in ways that render it intelligible to colonial mindsets and systems in order to be recognised and treated as law (rather than custom, superstition, tradition etc). Very similar assertions have been made in legal contexts. A 2003 background paper prepared for the Northern Territory Committee of Inquiry into Aboriginal Customary Law outlines "how the assertion of British sovereignty" produced an Australian legal system "that denied any general recognition of Aboriginal law" and presents an argument for "recognition of Aboriginal law as law."[58] The paper includes several paragraphs comparing Aboriginal and Anglo-Saxon law in England from the sixth-century to the 1066 Norman Conquest to suggest that the former can be recognised by the Australian legal system with its common law roots in the English code. The comparison is made in service of an argument that Aboriginal law could be recognised in the Australian settler colonial system. Comparisons like these are generally made with the apparent or stated aim of improving Indigenous self-determination and social outcomes,[59] but considering them through the lens of medievalism illuminates underlying logics of white possession.

Comparisons of Anglo-Saxon and Indigenous law bear some striking similarities to the colonialist temporality evident in the quotation from Percy's *Northern Antiquities* with which this article begins. Percy framed the Cherokee as "wild' because they were medieval in the modern present of the mid-eighteenth-century, rendering them 'out of time' – backward, un-progressive and un-progressed. Comparing Aboriginal law as it is practiced in the modern present of the twenty-first century with Anglo-Saxon law medievalizes Aboriginal people, again placing them outside modernity. José Rabasa, writing of the Mesoamerican context, argues that:

> Classifying indigenous cultures, languages, and institutions as medieval is not a mere exercise in historical taxonomy but an insertion within a teleology. The epistemic violence of the comparison may be saying that, just as medieval society was bound to become modern … indigenous cultures today must give way to modernity.[60]

Assigning premodernity to Aboriginal law positions it – and the people for whom it is current – within a paradigm that locates Indigenous society as always 'behind' Australian modernity, always on the brink of but never achieving 'progress' into it – a progress that can only lead to the erasure of that very indigeneity that is conceived of as inherently premodern. As Kowal argues, even in Western institutions shaped by progressive politics that aim to improve the lives of Indigenous people, "the melding of culture, time and Aboriginal personhood produces both the perpetual ending of indigeneity and the perpetual newness of modernity."[61] The deep structures of colonial thought still frame many attempts to ameliorate the catastrophic effects of colonisation on Indigenous lives. This is not to suggest that there is no potential for productive engagements of medievalisms and Indigenous cultures in Australia. Jenna Mead argues that what she terms "medievalism on Country creates a temporality for balanda [non-Indigenous Australians] that is proximate to, folded alongside, interpellates … with Yolnju [an Indigenous people]" in political ways that envisage futures with deeper

engagements between Indigenous and non-Indigenous Australians.[62] Such temporalities are markedly, profoundly different from those constructed by simple comparisons; they are structured by mutual recognition rather than by settler colonial possessive structures that demand Othered systems, cultures and peoples be made to fit the very system that devalues them.

Conclusion

The patterns of colonialist assertions of power, of selective application of law and construction of justifying teleological temporalities explored in this essay will be painfully familiar to many readers, although these general patterns have not been explored in the medievalisms in and around *Mabo* previously.[63] My principal aim in this article has been to explore what contribution medieval studies and medievalism studies can make to the vast project of decolonization through a case study of medievalism in and around *Mabo*. As Tuhiwai Smith states: "history is important for understanding the present … and reclaiming history is a critical and essential aspect of decolonization."[64] Western historical thinking with its teleological assumptions and temporality, claims of universality, and exclusions of Indigenous (and other) peoples from full participation in the category of 'humanity' both produces and is produced by the anti-modernity of 'the medieval.' Medieval studies and medievalism studies disciplinary knowledge and methodologies can contribute to the decolonisation of history (and History), and thus to the decolonisation of the Western academy and research through a critically-oriented exploration of the cultural archive and how it is used to shape and justify social power relations. Expertise in those fields can help recognise colonial continuations in decolonial endeavours. This type of contribution does not, however, encompass the whole of decolonisation or the goals of Indigenous studies.

Decolonisation, as Tuhiwai Smith argues … is about centring our [Indigenous] concerns and world views and then coming to understand theory and research from our own perspectives and for our own purposes."[65] What role, then can 'the medieval' – in its broad cultural or more specific scholarly formations – play in this project, if any? Mead's "anomalous" instances of "medievalism on Country" with their politically challenging temporality, mutual recognition and orientation towards a more connected future for Indigenous and non-Indigenous Australians offer a pattern of possibility,[66] but medieval studies itself is not evident in them. Beyond deconstructive exploration of the Western cultural archive it is perhaps not immediately easy to see a specific role for the discipline of medieval or medievalism studies. Such a difficulty, I would argue, stems largely from presuppositions that reproduce white racist exclusion of Indigenous peoples from 'the medieval:' that Indigenous people are not already researching in those fields; and that they have and could have no interest in doing so. The possibilities perhaps become clearer with further articulation of the goals of Indigenous Studies (including research and pedagogy). Nakata et al argue that "an imperative of decoloniality and a central task of Indigenous people … is 'decolonial knowledge-making' that re-asserts and draws in concepts and meanings from Indigenous knowledge and systems of thought and experience of the colonial."[67] Decolonisation of medievalist research and its objects of study has potential to open up new spaces and foci for knowledge-making. What is already being done by Indigenous medievalists? What can Indigenous worldviews, knowledges and subject positions do with the material on which our disciplines focus - cultural and social formations and artefacts, the events of history and so on, and the ways they can be reimagined? How would that material, and the knowledge that can be made through it, change if it were not always already principally taxonomised and understood through a system of classification that Others it from both modernity *and*

indigeneity? To what purposes? Without a more sustained and comprehensive process of decolonisation that is not only informed but directed by the insights and imperatives of Indigenous studies, these questions cannot be answered.

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[1] *Northern Antiquities: Or, A Description of the Manners, Customs, Religion and Laws of the Ancient Danes, and Other Northern Nations; Including Those of Our Own Saxon Ancestors, With a Translation of the Edda, Or System of Runic Mythology, And Other Pieces* (London: T. Carnan and Co, 1770), I, vii.

[2] There is a wealth of scholarship on this point. For works specific to the Australian context on which this essay is focussed see, for example, Louise D Arcens, Andrew Lynch, and Stephanie Trigg, "Medievalism, Nationalism, Colonialism: Introduction," *Australian Literary Studies*, 2011, 1–5; Louise D'Arcens, "Inverse Invasions: Medievalism and Colonialism in Rolf Boldrewood's A Sydney-Side Saxon," *Parergon* 22, no. 2 (2005): 159–82.

[3] See, for example, Kathleen Davis, *Periodization and Sovereignty : How Ideas of Feudalism and Secularization Govern the Politics of Time* (Philadelphia: University of Pennsylvania Press, 2008); Adam Miyashiro, ""Our Deeper Past: Race, Settler Colonialism, and Medieval Heritage Politics," *Literature Compass* 16, no. 9–10 (2019): 1–11, https://doi.org/10.1111/lic3.12550.

[4] Martin Nakata, *Disciplining the Savages: Savaging the Disciplines* (Aboriginal Studies Press, 2007), p. 35 <https://doi.org/10.22201/fq.18708404e.2004.3.66178>.

[5] On Percy's race-thinking see Helen Young, "Thomas Percy's Racialization of the European Middle Ages," *Literature Compass* 16, no. 9–10 (2019), https://doi.org/10.1111/lic3.12543.

[6] Emma Kowal, "Time, Indigeneity and White Anti-Racism in Australia," *Australian Journal of Anthropology* 26, no. 1 (2015): 95, https://doi.org/10.1111/taja.12122. In this argument, Kowal draws on Johannes Fabian, *Time and the Other: How Anthropology Makes Its Object* (New York: Columbia University Press, 1983).

[7] On ‘medieval’ as a racializing colonialist and imperialist category see , for example, Davis, *Periodization and Sovereignty : How Ideas of Feudalism and Secularization Govern the Politics of Time*; Carolyn Dinshaw, “Pale Faces: Race, Religion, and Affect in Chaucer’s Texts and Their Readers,” *Studies in the Age of Chaucer* 23, no. 1 (2001): 19–41, https://doi.org/10.1353/sac.2001.0013; Daniel P.S. Goh, “Imperialism and ‘medieval’ Natives: The Malay Image in Anglo-American Travelogues and Colonialism in Malaya and the Philippines,” *International Journal of Cultural Studies* 10, no. 3 (2007): 323–41, https://doi.org/10.1177/1367877907080147; Miyashiro, ““Our Deeper Past: Race, Settler Colonialism, and Medieval Heritage Politics.”

[8] See, for example, Catherine Brown, “In the Middle,” *Journal of Medieval and Early Modern Studies* 30, no. 3 (2000): 547–74.

[9] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 2nd ed. (London and New York: Zed Books, 2012), 94.

[10] Tuhiwai Smith, 95.

[11] Tuhiwai Smith, 97–98. Tuhiwai Smith uses the work of David Goldberg in the section on race and states that “there was no explicit category or space in medieval thought for racial differentiation” 97. See David Goldberg, *Racist Culture, Philosophy and the Politics of Meaning* (Oxford: Blackwell, 1993). Geraldine Heng demonstrates that this is not the case, see *The Invention of Race in the European Middle Ages* (Cambridge: Cambridge University Press, 2018).. The point is not significant to either Tuhiwai Smith’s argument or my own. See also Kofi Campbell, ‘A Clash of Medieval Cultures: Amerindians and Conquisators in the Thought of Wilson Harris’, in *Medievalisms in the Postcolonial World: The Idea of ‘the Middle Ages’ Outside Europe*, ed. by Kathleen Davis and Nadia R. Altschul (Baltimore: Johns Hopkins University Press, 2009), pp. 325–47; Lynn Ramey, ‘Monstrous Alterity in Early Modern Travel Accounts: Lessons from the Ambiguous Medieval Discourse on

Humanities', *L'Esprit Créateur*, 48.1 (2008), 81–95; Ian J. McNiven and Lynette Russell, *Appropriated Pasts: Indigenous Peoples and the Colonial Culture of Archaeology* (Oxford: AltaMira Press, 2005), pp. 35–36.

[12] Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015), xii.

[13] "Mabo v Queensland (No 2) HCA 23; (1992) 175 CLR 1 F.C. 92/014," (1992).

[14] "Secret Instructions to Lieutenant Cook 30 July 1768," Museum of Australian Democracy, 1768, https://www.foundingdocs.gov.au/resources/transcripts/nsw1_doc_1768.pdf.

[15] James Cook, "A Journal of the Proceedings of His Majesty's Bark Endeavour on a Voyage Round the World, by Lieutenant James Cook, Commander, Commencing the 25th of May 1768 - 23 Oct. 1770," State Library of New South Wales, 1770, https://transcripts.sl.nsw.gov.au/page/james-cook-journal-proceedings-his-majestys-bark-endeavour-voyage-round-world-lieutenant-690. For an exploration of the principle of cultivation as possession of land see Raelene Webb, "The Birthplace of Native Title - From Mabo to Akiba," *James Cook University Law Review* 23 (2017): 31–34.

[16] See Margaret Cameron-Ash, *Lying for the Admiralty* (Sydney: Rosenberg Press, 2018), 139–45.

[17] For examples, see Webb, "The Birthplace of Native Title - From Mabo to Akiba," 34–35.

[18] Council for Aboriginal Reconciliation, "Briefing Paper: Terra Nullius and Sovereignty," Documents for Reconciliation, n.d., http://www.austlii.edu.au/au/orgs/car/docrec/policy/brief/terran.htm.

[19] Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty*, 68. On post-Mabo native title decisions by the High Court and legal and politics discourses upholding settler-colonial power see, for example, Ben Wardle and Beth McKenna, "Usurping Indigenous Sovereignty through Everchanging Legal Fictions," *Griffith Law*

Review, 2019, https://doi.org/10.1080/10383441.2019.1682959; Webb, "The Birthplace of Native Title - From Mabo to Akiba."

[20] Ben Doherty, "Queensland Extinguishes Native Title over Indigenous Land to Make Way for Adani Coalmine," *The Guardian*, 2019, https://www.theguardian.com/business/2019/aug/31/queensland-extinguishes-native-title-over-indigenous-land-to-make-way-for-adani-coalmine.

[21] Ruth S Kerr, "Aboriginal Land Rights: A Comparative Assessment" (Brisbane: Queensland Parliamentary Library, 1991), 4.

[22] On white racial medievalism and temporality see Helen Young on Anglo-Saxonism, medievalism and temporality: "Whiteness and Time: The Once, Present, and Future Race," *Studies in Medievalism* 24 (2015): 39–49.

[23] Kowal, "Time, Indigeneity and White Anti-Racism in Australia," 95.

[24] Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty*, 67.

[25] Henry of Huntingdon, *Historia Anglorum*, ed. Diana Greenway (Oxford: Clarendon Press, 1996), 273.

[26] It is beyond the scope of this article to give and in-depth account of the complex colonial relationship of the British and English in medieval historiography which, in any case, does not take any single position. For representative discussion see debates over the post/colonial position of Geoffrey of Monmouth's Historia Regum Brittaniae in, for example, Michael A. Faletra, *Wales and the Medieval Colonial Imagination: The Matters of Britain in the Twelfth Century* (New York: Palgrave Macmillan, 2014); Michelle R. Warren, "Making Contact: Postcolonial Perspectives through Geoffrey of Monmouth's Historia Regum Britannie," *Arthuriana* 8, no. 4 (1998): 115–34, https://doi.org/10.1353/art.1988.0009.

[27] Both versions are given in Nennius, 'Historia Brittonum', *Internet Medieval Sourcebook* (New York, 1998) <https://sourcebooks.fordham.edu/basis/nennius-full.asp> [accessed 25 August 2019]; later chronicles often found ways to combine the two, for example Robert Mannyng of Brunne's 1338 history, *The Story of England*, ed. by Idelle Sullens (Binghampton: Medieval and Renaissance Texts, 1998).

[28] Andrew Fitzmaurice, "The Genealogy of Terra Nullius," *Australian Historical Studies* 38, no. 129 (2007): 1–15, https://doi.org/10.1080/10314610708601228. On the Lockean underpinnings of the concept see Webb, "The Birthplace of Native Title - From Mabo to Akiba."

[29] Geoffrey of Monmouth, *The History of the Kings of Britain*, ed. Lewis Thorpe (London: Penguin, 1966).

[30] Geoffrey of Monmouth, *The History of the Kings of Britain*, ed. and trans. by Lewis Thorpe (London: Penguin, 1966), p. 262.

[31] Geoffrey of Monmouth, 274.

[32] Henry of Huntingdon, *Historia Anglorum*, 15.

[33] Richard Howitt, *Impressions of Australia Felix, during Four Years Residence in That Colony* (London: Longman, Brown, Green, and Longmans, 1845), 276.

[34] Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty*.

[35] Robert A. Williams Jnr., "Columbus's Legacy: Law as an Instrument of Racial Discrimination against Indigenous People's Rights of Self-Determination," *Arizona Journal of International and Comparative Law* 8 (1991): 51–61; Robert A. Jr Williams, "The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought," *Southern California Law Review* 57 (1983): 1–100; Randall Bess, "New Zealand's Treaty of Waitangi and the Doctrine of Discovery: Implications for the Foreshore and Seabed," *Marine Policy* 35, no. 1 (2011): 85–94.

[36] Thalia Anthony, "Blackstone's Commentaries on Colonialism: Australian Judicial Interpretations," in *Blackstone and His Commentaries: Biography, Law, History*, ed. Wilfrid Prest (Oxford and Portland: Hart Publishing, 2009), 129. On Blackstone's medievalist "feudal fiction" and its use in India see Davis, *Periodization and Sovereignty : How Ideas of Feudalism and Secularization Govern the Politics of Time* esp. 62-74.

[37] William Blackstone, *Commentaries on the Laws of England* (Adelaide: University of Adelaide, 2014), bk. 1, https://ebooks.adelaide.edu.au/b/blackstone/william/comment/index.html. I have cited this version, based on the 2nd edition of Blackstone's works, as the most accessible source.

[38] Anthony, "Blackstone's Commentaries on Colonialism: Australian Judicial Interpretations," 130.

[39] Blackstone, qtd in Davis, *Periodization and Sovereignty : How Ideas of Feudalism and Secularization Govern the Politics of Time*, 64.

[40] Mason, CJ and McHugh, J. "Mabo v Queensland (No 2) HCA 23; (1992) 175 CLR 1 F.C. 92/014," para. 1.

[41] Judgements were also given by Justice Toohey, Chief Justice Mason and Justice McHugh, and a dissent by Justice Dawson. Citations are given by the name of the relevant judge and paragraph number within their written judgement. The judgements are collated at "Mabo v Queensland (No 2) HCA 23; (1992) 175 CLR 1 F.C. 92/014."

[42] Deane and Gaudron JJ. "Mabo v Queensland (No 2) HCA 23; (1992) 175 CLR 1 F.C. 92/014," para. 7.

[43] Brennan, J. "Mabo v Queensland (No 2) HCA 23; (1992) 175 CLR 1 F.C. 92/014," para. 52.

[44] Brennan, J. "Mabo v Queensland (No 2) HCA 23; (1992) 175 CLR 1 F.C. 92/014," para. 49.

[45] On this point Justice Brennan cites Kenelm Digby *The History of the Law of Real Property*, 5th edn (Oxford: Clarendon Press, 1897), Matthew Bacon *A New Abridgement of the Law* (London: A. Strahan, 1807), vol. 5, and William Blackstone, *Commentaries on the Law of England*, 17th ed. (London: Richard Taylor, 1830), vol. 2.

[46] Brennan, J. "Mabo v Queensland (No 2) HCA 23; (1992) 175 CLR 1 F.C. 92/014," para. 49.

[47] Brennan, J. "Mabo v Queensland (No 2) HCA 23; (1992) 175 CLR 1 F.C. 92/014," para. 49. The quotation is from Blackstone, vol 2 *Commentaries on the Law of England*, 90.

[48] Davis, *Periodization and Sovereignty : How Ideas of Feudalism and Secularization Govern the Politics of Time*, 64. Whether Blackstone is right about this is irrelevant in practice.

[49] If Cook indeed retrospectively made up his acts on Possession Island and arguments that principles other than *terra nullius* were used to justify British claims to sovereignty in the early colonial years, as discussed above, are correct this statement is thrown into even sharper reality,

[50] Brennan, J."Mabo v Queensland (No 2) HCA 23; (1992) 175 CLR 1 F.C. 92/014," para. 49.

[51] Katherine Biddick, *The Shock of Medievalism* (London, UK: Duke University Press, 1998), 83.

[52] See M. J. Toswell, "The Simulacrum of Neomedievalism," *Studies in Medievalism* 19 (2010): 44–55.

[53] For example as discussed in Davis, *Periodization and Sovereignty : How Ideas of Feudalism and Secularization Govern the Politics of Time*.

[54] Sean Brennan, Brenda Gunn, and Goerge William, "'Sovereignty'' and Its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments,'" *Sydney Law Review* 26, no. 3 (2004),

http://classic.austlii.edu.au/au/journals/SydLawRw/2004/15.html#Heading153. It is important to note here that treaties have not served to protect Indigenous sovereignty in those settler colonial nations (or others), and that treaty language often settler colonial needs. See, for example, Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

[55] Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 102.

[56] Noel Pearson, "The Concept of Native Title at Common Law," *Australian Humanities Review* 5, no. March (1997), http://australianhumanitiesreview.org/1997/03/01/the-concept-of-native-title-at-common-law/.

[57] Trevor Graham, Rob Wellington, and Cristina Pozzan, "The Common Law," Mabo: the Native Title Revolution, 2000, http://www.mabonativetitle.com/tn_12.shtml.

[58] Northern Territory Law Reform Committee, "Background Paper 2: The Recognition of Aboriginal Law as Law" (Darwin, 2003), 1.

[59] For another example, see Justice Judith Kelly, "The Intersection of Aboriginal Customary Law with the NT Criminal Justice System: The Road Not Taken ?," in *NTBA Conference 2014 in Association with the School of Law, CDU*, 2014, 1–25.

[60] José Rabasa, "Decolonizing Mediveal Mexico," in *Medievalisms in the Postcolonial World: The Idea of "the Middle Ages" Outside Europe*, ed. Kathleen Davis and Nadia R. Altschul (Baltimore: Johns Hopkins University Press, 2009), 29.

[61] Kowal, "Time, Indigeneity and White Anti-Racism in Australia," 95.

[62] Jenna Mead, "Medievalism on Country," in *The Global South and Literature*, ed. Russell West-Pavlov (Camrbidge: Cambridge University Press, 2018), 297.

[63] Mead notes the medievalism in the overturning of *terra nullius* in *Mabo* but does not discuss it at length. Mead, 292.

[64] Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 74.

[65] Tuhiwai Smith, 89.

[66] Mead, "Medievalism on Country," 300.

[67] N. Martin Nakata et al., "Decolonial Goals and Pedagogies for Indigenous Studies," *Decolonization: Indigeneity, Education & Society Vol.* 1, no. 1 (2012): 124, https://doi.org/10.1109/IAdCC.2013.6514202.