

## BOOK REVIEW

**THE INVENTION OF TERRA NULLIUS: HISTORICAL AND LEGAL FICTIONS ON  
THE FOUNDATION OF AUSTRALIA**

MICHAEL CONNOR, MACLEAY PRESS, 2005

This book is a wasted opportunity. Michael Connor has some valuable things to say about the doctrine of *terra nullius* and the way it has been used over the past 250 years. His insights can be hard to find, though, because he scatters them throughout hundreds of pages of extremely nasty criticism of previous historians of the subject. To make matters worse, the book emphasises an aspect of the topic on which Connor scarcely disagrees with prior writers (although he believes he disagrees with them very much), while it underplays his original contributions. I fear that as a result those contributions will not be taken seriously by the targets of his attack, who are the people who would benefit most from them. But maybe they are not the book's intended audience.

Connor comes out swinging and never lets up. He charges that academic historians – ‘the History Warlords,’ as he repeatedly calls them – ‘have corrupted the discipline of history with their own politics’ (2). ‘They all share a frozen moral outlook, an obvious sense of superiority over the past, and a careerist mentality’ (41). Connor has no tolerance for ‘their certainties, their snobbery, their hunger for power, their fear of criticism, their elitism’ (41). Their writing ‘came into the world with stale breath. At birth it carried within itself the decay of errors. As it grew it was fed on error enriched pap, falsehood, and political bias’ (79). They are a bunch of ‘latte stained, conformist historians’ (160). The invective goes on and on. The worst of it is reserved for Henry Reynolds, who gets a chapter-length ad hominem attack for sins like advocating Aboriginal land rights while being ‘a child of the middle classes’ and enjoying a ‘comfortable life style’ (26), but Connor finds room to say cruel things about what seems like nearly every professional historian who has written about Aboriginal-settler relations. I don't think I have ever read such a mean-spirited book.

What is all this vitriol about? Connor thinks it is about the status of *terra nullius* during the founding of colonial Australia. As used today, the phrase commonly means land owned by no-one and thus free for the taking. It is often used as a shorthand way of referring to the fact that in the late eighteenth century the British government did not recognize Aboriginal property rights in any of the land in

Australia, and that colonisation accordingly vested ownership of the continent's land in the Crown. But *terra nullius* did not exist in the late eighteenth century, Connor says. It was an invention of the late twentieth century, a concept created by mostly leftist academics and lawyers. 'Over a short time two Latin words, completely absent from our history, became our founding myth' (9).

There is less to this claim than meets the eye. Connor makes it clear that he is *not* arguing that the British government *did* recognize Aboriginal property rights in land. 'In our beginning,' he explains at one point, 'the British government assumed sovereignty over the territory and crown ownership of the land at the same time' (47). He acknowledges that 'the argument that *terra nullius* is an error does not hide or disguise Aboriginal dispossession' (165). Similar passages recur throughout the book. Just like the historians he detests, Connor tells a story in which the colonial government assumed ownership of all the land in Australia and allocated it to white settlers without regard to prior Aboriginal usage.

On the early colonial status of *terra nullius*, it turns out, Connor's sole disagreement with prior historians is over whether the words 'terra nullius' were used at the time to justify or describe what was happening. It's a dispute about labels rather than substance. On the question of labels, I think he's right. Everyone who has written on this subject has read more or less the same sources, and I can't recall seeing 'terra nullius' used in the late eighteenth or early nineteenth centuries to refer to unowned land. As Connor explains, the phrase *terra nullius* came into circulation only much later, and it was originally used to refer to a territory without sovereignty, not land without an owner. There *was* a term in the eighteenth century for property without an owner, but that was *res nullius*, not *terra nullius*. In recent years somehow lawyers and academics began calling it *terra nullius* instead. I don't know why. Connor implies throughout the book that there was some sinister political reason for making the switch, but that can't be right. A claim for Aboriginal land rights doesn't become any easier if you call colonial policy *terra nullius* rather than *res nullius*. *Res* is no longer a familiar word, but *terra* is – we still speak of *terra firma*, *terra incognita*, and so on – so maybe *terra nullius* just sounded better.

Whether we call it *res nullius* or *terra nullius*, colonial officials did not use either phrase to justify the Crown's assumption of property rights in land. As Connor correctly points out, they didn't do much theorizing about land, at least not on paper, and when they did they used ordinary English words like 'discovery' and 'settlement' instead. Again, though, this is a dispute over the labels people used, not a dispute about what happened.

Why should the presence or absence of the words 'terra nullius' make any difference? That the phrase has been used only recently to describe colonial events doesn't change the events themselves, so why castigate historians for using a term the participants in those events did not use? Connor never answers this question explicitly, but some of his comments suggest a possible answer: blaming the dispossession of the Aborigines on *terra nullius* makes it seem the law's fault rather

than the fault of human beings. Invoking *terra nullius* shifts responsibility away from the real culprits. 'Settlement began with military supremacy,' he explains at one point. 'The frank language of the opening years continued into the nineteenth and twentieth century accounts by traditional historians.' It was only in recent decades that '*terra nullius* arrived to misrepresent the past and explain everything' (260). 'The Aborigines were dispossessed not by the law of the land,' he asserts toward the end of the book, 'but by administrative practices which developed as the colony was established and expanded' (322). If he means in these passages that colonial officials were not constrained by the law to take the Aborigines' land, but that they *chose* to take it, I agree with him, and I suspect that most of the historians he attacks would agree too.

This dispute over the origin of the phrase *terra nullius* is thus not nearly substantial enough to motivate a book as angry as this one. Connor's real beef with the historical profession lies elsewhere. He makes this plain in chapters 5 through 7, most of which are not about *terra nullius* at all. He is upset that historians of Australia sympathize with Aborigines more than with whites, and he thinks that as a result they have distorted the writing of Australian history, by making settlers and colonial officials seem more racist and more violent, and Aborigines more peaceful, than they actually were. They overlook all the good things whites did, to emphasise all the bad. 'It is not Cook and discovery that the grandchildren of the old historians are taught,' he asserts, 'but blood, hatred, and lies' (117). In the book's last substantive chapter, Connor diagnoses the root of the problem. All this warped history is in fact 'disguised moral autobiography, and political posturing, by the historians, more than the history of the Aborigines' (298).

Whether or not historians are misrepresenting the past in order to score present-day political points is an important question – too important to bury inside a trumped-up and vinegar-filled argument over *terra nullius*. A book that carefully examined historians' claims about specific incidents in the history of settler-Aborigine contact would be a valuable thing to have, but this book is not it, because Connor is too preoccupied with the insults and too focused on *terra nullius* to spend much time on his real substantive points of disagreement.

Along the way Connor has some valuable things to say specifically about *terra nullius*, but these too get lost in the nastiness. He's right about the fuzziness with which some recent writers use the phrase. Sometimes they mean the absence of property rights in land, sometimes the absence of sovereignty over territory, and sometimes even the absence of cultivation. Calling attention to this range of meanings is a useful contribution. He's right that modern academics and judges sometimes quote selective snippets from sources like Blackstone and Vattel and thus sometimes misunderstand them. He's right that the legal status of land ownership in early New South Wales was murkier than today's arguments make it seem. These are all important points that could have been made much more effectively on their own. In this book they are too easy to overlook.

A wasted opportunity, then – *if* this book was intended as a contribution to our knowledge. But then maybe it wasn't. The proportion of political bluster to substantive history-writing is so high that maybe the bluster was supposed to be the main thing, and the repetition of the magic words *terra nullius* just a clever way to get attention. If so, then I suppose the book should be evaluated by entirely different criteria, somewhere other than this journal.

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