

# Barron Field's *Terra Nullius* Operation

Thomas H. Ford and Justin Clemens

**B**ARRON FIELD, WHO IS TODAY A LARGELY FORGOTTEN FIGURE, WAS FROM 1817 TO 1824 the highest judge in New South Wales. His place in literary history rests on his *First Fruits of Australian Poetry* of 1819, which, as the title announces, was the first book of poetry to be published in this country. But by most accounts Field was a mediocre judge and a worse poet. John McLaren writes of the legal career that 'Field's record as a judge could best be described as mercurial, a reflection of his conservative belief system, a commitment to the culture of English law, and an opportunistic streak in his character.... Field's counsel was not invariably sound or in keeping with the Colonial Office's understanding of the legal proprieties' (144). As for his poetry, even the colonial anthologists were wary of Field's inclusion, although Vivian Smith has more recently been generous enough to judge Field's poem 'The Kangaroo' to be 'an exuberant oddity' (74). Field also appears in a number of historical studies of colonial science and culture, where he tends however to remain a minor and rather ambiguous figure (Bernard Smith; Carter).

Rarely has Field's poetry been read alongside the records of his judicial activities. But this historiographical separation of his legal from his literary projects needs to be revisited in light of Stuart Banner's research on the application of *terra nullius* in Australia—as does our understanding of Field's legal projects. For Banner attributes the introduction of *terra nullius* to Field: specifically,

The first such statement [of the doctrine] appears to have been made in 1819, when a dispute arose between Lachlan Macquarie, the governor of New South Wales, and Barron Field, judge of the New South Wales Supreme Court, over whether the Crown, acting through Macquarie, had the power to impose taxes on the residents of New South Wales, or whether that power was reserved to Parliament, as was the case with taxes imposed on residents of Britain. (112)

According to Banner's chronology, Australian *terra nullius* was coeval with Australian poetry. Both appeared in the same year, 1819, and were in fact even authored by the same hand. Field is then a remarkable figure in the history of Australian literature's intertwinements with colonial genocide: he was the founding father, so to speak, of the poetics of *terra nullius*. This essay is a preliminary step towards a larger critical history of that poetics.<sup>1</sup> It re-opens the question—what was *terra nullius*?—by considering Field's role in its initial articulation and establishment in Australia.

Most Australians today know *terra nullius* as the legal fiction that Australia was uninhabited prior to settlement by the British. Uninhabited, and so unowned and unclaimed—a vacant, non-political, non-sovereign territory. Literally, *terra* means earth, ground or land, and *nullius* means nobody's: *terra nullius* then means nobody's land, the idea being that the British Crown claimed sovereign title over the Australian continent on the basis that no one already owned it, as if Aboriginal people did not exist in 1788. The phrase was first established in public discourse in Australia with this meaning largely thanks to the work of historians through the 1970s and 1980s (Rowley; Frost). The most influential of these was Henry Reynolds, who in his 1987 book *The Law of the Land* identified *terra nullius* as 'the single most important feature of the British expropriation of Aboriginal land... This idea had become accepted legal doctrine in the first generation of settlement and it has played a central role in relations between black and white Australians ever since' (163). The phrase was then disseminated much more widely with this meaning following the Mabo decision by the High Court of Australia in 1992, which was presented as the judicial rejection of *terra nullius*, and with the subsequent passage of the Native Title Act by the Keating government. But as historians have since pointed out—some quite polemically, as part of what became known as 'the history wars', and others in a more nuanced spirit of historiographical revision—using *terra nullius* in this way to refer to the foundational legal doctrine of

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<sup>1</sup> For other recent accounts that have been motivated by Banner to read Field's poetry alongside his legal activities, see Higgins; and Clemens. The single book-length study of Field to date is Solomon, which while providing valuable contextual readings of Field's legal practice fails to discuss either his poetry or his *terra nullius* operation.

Australian colonisation is in fact quite anachronistic.<sup>2</sup> The phrase does not appear anywhere, for instance, in the archive of colonial administration, from the Secret Instructions issued to James Cook in 1768 all the way through to the Commonwealth of Australia Constitution Act passed by the British Parliament in 1900.

The phrase '*terra nullius*' first entered English-language publication and wider usage only towards the end of the nineteenth century.<sup>3</sup> When it appeared, which was at first very infrequently, it operated as a relatively loose concept in discussions of international law. We find it, for example, in an 1866 account of the US American Monroe doctrine, which rejected Russian and British claims that the North American West was '*terra nullius*, that it was still open to discovery and

<sup>2</sup> For *ressentiment*-fuelled polemic, see Connor. For more nuanced revisions, see Ritter; Borch; Attwood; Fitzmaurice; and Banner.

<sup>3</sup> Nor did it appear before this date in any other European language, with a notable and singular exception in the Latin marginalia of John Gower's late fourteenth-century poem *Confessio Amantis*. There it names the earth as the thing which men help the most, but which least needs their help: *terra nullius indiget*, or 'the earth needs nobody.' Men 'help' the earth through agricultural labour. But the earth stands in no need of this help; it is sufficient in itself, self-entire:

The ferste I understonde is this,  
 What thing of al the world it is,  
 Which men most helpe and hath lest nede.  
 Mi liege lord, this wolde I rede:  
 The Erthe it is, which evermo  
 With mannes labour is bego;  
 As wel in wynter as in Maii  
 The mannes hond doth what he mai  
 To helpe it forth and make it riche,  
 And forthi men it delve and dyche  
 And eren it with strengthe of plowh,  
 Wher it hath of himself ynowh,  
 So that his nede is ate leste.  
 For every man and bridd and beste,  
 And flour and gras and rote and rinde,  
 And every thyng be weie of kinde  
 Schal sterve, and Erthe it schal become,  
 As it was out of Erthe nome,  
 It schal to therth torne ayein:  
 And thus I mai be resoun sein  
 That Erthe is the most nedeles,  
 And most men helpe it natheles. (Gower 124)

The passage is contained within an *exemplum contra superbiam*, a moral tale against the sin of pride. Its description of the earth as no-man's land—which Gower glosses with *terra nullius*—is a way of figuring the vanity of all human projects. The earth belongs to no one because everyone belongs to it as a future corpse. But this striking poetic instance was not a source for nineteenth-century legal arguments. When the phrase reappeared at the end of the nineteenth century it had undergone an ironic and total reversal of meaning. For Gower, *terra nullius* names the inability of labour to transform earth into an enduring value. In modernity, *terra nullius* is premised on the opposite belief: that agriculture underpins stable property relations, and so that territories not subject to settled agriculture belong to no one, even the people who have occupied them ancestrally and immemorally.

occupation' ('The Present Aspect', 472). Twenty years later it was used to describe the condition of a deserted or abandoned island. But it also appeared in these decades in discussions of civil cases: to describe an intervening space between two properties but belonging to neither, or to describe the status of a common prior to its enclosure. Only in the twentieth century was it established as a consistent if still relatively obscure concept of international law. Initially, this was largely in the context of the assertion and contestation of sovereign claims to territories in the Polar regions—first Spitzbergen and Greenland in the North, and then Antarctica in the South (Fitzmaurice 2-3). Through the 1920s and 30s, the phrase's range of reference was geographically extended to cover colonial territories that had been acquired by Western powers as if they had been uninhabited. This was the meaning that would then become central to the phrase's critical deployment towards the end of the twentieth century in historiographical, juridical and political projects of decolonisation.

Although a Latin phrase, its classical pedigree is indirect. Its primary verbal source is *res nullius*, a category of Roman law that designates a thing belonging to no one. The classical case concerned the legal status of wild animals. These were fair game: owned by no one, and so belonging to the first taker. In the verbal shift from *res nullius* to *terra nullius*, a concept that had originally concerned individual rights to the acquisition of property was repurposed as one concerning the territorial claims of sovereign states. But even as it effected a new principle of international law around 1900, *terra nullius* also linked the law between nations to the laws within them—linked sovereignty to property—in a series of complex conjunctions of historically diverse terms and concepts. Viewed from the perspective of such disciplines as philology and historical semantics, the identity of a word and a concept always appears as imperfect, for whenever a new word or phrase enacts a novel linguistic fact it also and necessarily mobilises pre-existing verbal and semantic elements. The phrase *terra nullius* may barely be a century old, but its genealogies can be traced much further back to an unstable and shifting eighteenth-century series of cognates, calques and partial synonyms. As a verbal fact, *terra nullius* may be quite new, but what it names is a much older set of colonial concepts and practices.

In the early period of British colonisation of Australia, for example, *res nullius* was already operating in the discourse of international law as the name of the doctrine of first taker in the construction of sovereign state rights to colonial territories. In the late eighteenth century *res nullius* was more commonly employed to contest colonial dispossessions of Indigenous peoples than it was in justification of them (Fitzmaurice; Benton and Straumann). In his *The Metaphysics of Morals* of 1797, for example, Immanuel Kant criticised the term as part of a broader critique of contemporary colonialism that notably included Australia in its denial of legitimacy to European territorial acquisitions. Earlier, when considering the

much more general case of the abstract possession of external objects, Kant had rejected the idea of *res nullius*, of objects that belonged to no one. A *res nullius* would be something that I and others might want to use, but which does not belong to me or to anyone else either. Kant's argument works by showing that this is necessarily an empty set. When we treat this category as being universal—as applying to everyone equally—we can see that it is contradictory, for it determines a class of things as being at once usable and unusable with respect to that supremely Kantian moral category, freedom:

An object of my choice is something that I have the *physical* power to use. If it were nevertheless absolutely not within my *rightful* power to make use of that, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law... then freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting *usable* objects beyond any possibility of being *used*; in other words, it would annihilate them in a practical respect and make them into *res nullius*.—But pure practical reason...can contain no absolute prohibition against using such an object, since this would be a contradiction of outer freedom with itself.  
(41)

In other words: everything useful belongs to someone (and some things potentially to everyone). In the court of pure practical reason, there is no such thing as *res nullius*. Kant's philosophical procedure for demonstrating this derives from his principal technique of ethical argument. *Res nullius* fails the test of the categorical imperative: treat your particular ethical categories and actions as if they applied to everyone. If they are not capable of universalisation, then they are not properly moral categories; if they are, then they have the force of an absolute injunction.

When Kant later turned to the rights of colonial acquisition, his rejection of *res nullius* as a category pertaining to individual rights was extended to include relations between states too:

It can still be asked whether, when neither nature nor chance but just our own will brings us into the neighborhood of a people that holds out no prospect of civil union with it, we should not be authorized to found colonies, by force if need be, in order to establish a civil union with them and bring these human beings (savages) into a rightful condition (as with the American Indians, the Hottentots, and the inhabitants of New Holland)... Should we not be authorized to do this, especially since nature itself (which abhors a vacuum) seems to demand it, and great expanses of land in other parts of the world, which are not splendidly

populated, would have otherwise remained uninhabited by civilized people or, indeed, would have to remain forever uninhabited, so that the end of creation would have been frustrated? But it is easy to see through this veil of injustice (Jesuitism), which would sanction any means to good ends. Such a way of acquiring land is therefore to be repudiated. (53)

Kant introduces *res nullius* only to dismiss it as an incoherent category. It fails the test of universalisation, which is to say, it always harbours a particular claim. Never disinterested, it works ultimately to licence any action whatsoever, any means to a given end. Even in the case of two rival countries separated by a neutral territory—we might think, today, of the demilitarized zone that divides North from South Korea—that empty land is ‘not something *belonging to no one* (*res nullius*), just because it is being used by both to keep them apart’ (53). Used by both, and so belonging to both. For Kant, in international relations as in private law, *res nullius* does not exist. The ends do not justify the means, and the duty of autonomy condemns the doctrine as irremediably unjust.

The colonialist argument Kant paraphrases here only to repudiate as self-serving casuistry—that lands ‘uninhabited by civilized people’ constitute a kind of vacuum, a *nullius* space in global civil society, so that colonial acquisition of them is not only legitimate but also natural and even providential—was a well-established doctrine of the post-Westphalian international order. Such authorities as Hugo Grotius, Samuel Pufendorf, John Locke, Christian Wolff and Emer de Vattel all argued that people have a naturally ordained and divinely sanctioned obligation to cultivate the lands under their control most productively. Those who did not do this could not be said to own the lands they lived on. In his 1622 sermon to the Virginia Company, John Donne declared that:

In the Law of Nature and Nations, A Land never inhabited, by any, or utterly derelicted and immemorially abandoned by the former Inhabitants, becomes theirs that will possese it. So also is it, if the inhabitants doe not in some measure fill the Land, so as the Land may bring foorth her increase for the use of men: for as a man doth not become proprietary of the Sea, because he hath two or three Boats, fishing in it, soo neither does a man become a Lord of a maine Continent, because he hath two or three Cottages in the Skirts thereof. (274)

The equivalence Donne drew between uninhabited and uncultivated lands in his sermon to the colonists was commonplace in the later seventeenth and eighteenth centuries. In his influential synthesis of international law of 1758, *Le Droit des gens*, Vattel drew on what by then was over a century of legal theory to argue that:

The whole earth is destined to feed its inhabitants; but this it would be incapable of doing, if it were uncultivated. Every nation is then obliged by the law of nature to cultivate the land that has fallen to its share... Those nations (such as the ancient Germans, and some modern Tartars), who inhabit fertile countries, but disdain to cultivate their lands, and chuse rather to live by plunder, are wanting to themselves, are injurious to all their neighbours, and deserve to be extirpated as savage and pernicious beasts. There are others, who, to avoid labour, chuse to live only by hunting, and their flocks. This might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its small number of inhabitants. But at present, when the human race is so greatly multiplied, it could not subsist if all nations were disposed to live in that manner. Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have therefore no reason to complain, if other nations, more industrious, and too closely confined, take possession of a part of those lands. (129-30)

As with Donne, Vattel's case in point was the European colonisation of North America. In contrast to the Spanish conquest of independent kingdoms in Mexico and Peru, the North American colonies were for Vattel 'extremely lawful' because 'the people of those extensive tracts rather ranged through than inhabited them' (130).

Vattel did not provide a name for this category of territories that were uncultivated and so treatable as if uninhabited, as there for the taking. But names were available: *res nullius* for one, as we have seen. 'Waste' was another: for John Locke, 'Land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, *wast*' (297). Others included 'desert,' the eighteenth-century meaning of which often ranged seamlessly from 'uncultivated' through 'abandoned' to 'uninhabited.' Such words positioned a particular mode of agricultural practice as the material foundation for the only kind of civil society thought able to express sovereign claims because it was seen as being the only kind of economic structure in which land could be said to be owned. Agriculture, property, civilization and sovereign power came to function as logical equivalents in these accounts, each one implicating the others. Societies that existed outside of this assemblage—that appeared uncultivated, unowned, uncivilized, unsovereign—were waste, desert, there for the taking even when inhabited. They were *terra nullius* in everything but name.

What has been called 'the doctrine of *terra nullius*' can therefore be found everywhere in the eighteenth century (Ritter). It appeared in Enlightenment theories of natural law and in conjectural histories of social development, in books on political economy and on the laws of nations. It can be found in literature too: Richard Waswo has traced its operations in the poetry of Alexander Pope and the novels of Samuel Richardson. And as Waswo has also shown, *terra nullius* considered more narrowly as a specific doctrine of international law drew very significantly on older literary materials, most notably that founding text of Western civilization, Virgil's *Aeneid*. At key points in the logical chain that connected agriculture to the legitimacy of colonial sovereignty, texts in the tradition of international law would often cite lines of verse. Writing to vindicate the first great English colonial expansion of the end at the sixteenth century, for example, the Oxford Professor of Law Alberico Gentili argued that 'the seizure of vacant places is regarded as a law of nature,' because of 'that law of nature which abhors a vacuum' (80-1). And even when the territory to be occupied was not actually uninhabited, Gentili observed that 'a slight loss can be endured' on the part of the original inhabitants in the service of colonial ends, citing by way of justification the final settlement of the Trojans in Latium from Book 12 of the *Aeneid* (81). Such Virgilian lineages suggest that the doctrine of *translatio imperii et studii*—of the transmission of empire and learning—already provided early modernity with something like an anticipatory synonym for *terra nullius*. In the westward march of empire, knowledge and learning were to be introduced into spaces defined as having none. Another keyword increasingly drawn into the future orbit of *terra nullius* through this period was 'culture,' originally from the Latin verb 'to cultivate' (*colo, cultum*). The semantic network of culture increasingly tied the claims of higher learning and aesthetic cultivation—meanings the word was acquiring through the eighteenth century—to the coulter that turns the soil, and to the colony.

But despite the evident presence of such ideas within the ideological matrix of British colonialism, they were nowhere mobilised as legal or administrative instruments in the early years of the establishment of New South Wales. The colony was in part a penal encampment and in part a strategic forward force posture in the Indo-Pacific. It was founded on military supremacy rather than on a philosophical idea, legal fiction or appeal to Virgilian authority. Colonisation commenced without any considered statement addressing the question of its legitimacy. The Act of Parliament that established the colony instituted a criminal court 'with authority to proceed in a more summary way than is used in this realm,' and left its attention to questions of legality and jurisdiction at that.<sup>4</sup> Indeed, given that the colony was to constitute something like a concentration camp—a zone of the civil dead, a state of exception in a generalised regime of

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<sup>4</sup> 22 Geo III, 1787.

rights and laws—such questions may have been thought best left unsettled. As a widely disseminated doctrine and as part of the overarching philosophical and aesthetic superstructures of Western civilization, *terra nullius* certainly preceded British colonisation of Australia. But it does not appear to have been in any way instrumental to that project prior to Barron Field's arrival in New South Wales. Before Field, *terra nullius* in Australia was no more than a set of background assumptions about civilization and culture. Field's intervention was the first to render those assumptions explicit and employ them in the judicial determination of the colony's legal framework. With Field, *terra nullius* became constitutional.

In 1819, the colonial population of New South Wales was around 25,000. Nearly half of that number were convicts; the remainder were split roughly evenly between emancipists (ex-convicts) and free-born colonials, most of whom were still minors. Considerably fewer than one in ten were free settlers. For Field, for whom emancipists were still convicts legally speaking, it was 'a colony in which (it appears) more than ninety-nine persons out of a hundred are convicts' (*HRA* 865). And politically, just as demographically, New South Wales was in effect an archipelago of prison camps. Designed to avoid the administrative pitfalls of the American model, it had represented a new kind of colony for the British in the late eighteenth century. It was the first to be founded without representative institutions, as an autocratic space of summary justice, no trial by jury, and no legislative council (Neal).

But the colony was changing rapidly in 1819. The end of the Napoleonic wars brought a surge in the transportation of convicts. West of the Blue Mountains, north, up the Hunter, south, through the Illawarra, and out across the central plains of Van Dieman's Land, vast new areas were being brought under agricultural exploitation. And although still deeply remote, New South Wales was an increasingly significant node in oceanic networks of commerce and capital. With these developments came scalar shifts in the colony's levels of economic and administrative complexity, along with growing internal agitation for it to be reformed along more politically and economically liberal lines. And these were developments playing out amidst the ongoing bureaucratic rationalisation of imperial administration, with the proliferation after Waterloo of such roles as undersecretarial assistant and commissioner of inquiry. From 1819, Field's stint in New South Wales overlapped with the visit of John Bigge, charged by Lord Bathurst, Secretary of State for War and the Colonies, with evaluating what bureaucrats would now call the colony's fitness for purpose. Bigge's core recommendations were adopted in the New South Wales Act of 1823, which established a Legislative Council and restructured the judiciary, creating the office of Chief Justice of the Supreme Court and giving that office judicial oversight of colonial legislation. In the same moment we find the initial liberalisation of the

press in Australia. Field was the last judge of the old regime, and a key actor in this turning point of Australian legal and political history.

As noted by Banner, the immediate occasion for Field's formal application of what would later become known as *terra nullius* to New South Wales was a jurisdictional dispute about taxation. Prior to Field's arrival, relations had collapsed between Governor Macquarie and Field's predecessor as Judge of the Supreme Court, Jeffery Bent. Field disembarked to a court that had been closed for over two years, and to a backlog of cases that included ones sparked by Bent's refusal to pay the toll on Parramatta Road—an illegal tax, Bent had argued, and yet another instance of what he called, in a letter of November 1815 to Bathurst, 'the arbitrary and military principles of Governor Macquarie's Government' (*HRA* 165). When Macquarie decided to pursue tax defaulters through the court in 1818, Field asked him to hold off prosecuting in two letters of 23 and 24 February 1818, giving his opinion that the Governor lacked the legislative authority to impose taxes. Macquarie forwarded one letter to Bathurst in London, and Field himself sent a copy of the other to the Under Secretary, Henry Goulburn<sup>5</sup>. In December 1818 Bathurst referred the question to the Attorney General, Samuel Shepherd, and the Solicitor General, Robert Gifford. Shepherd and Gifford—the highest legal officers of Britain—confirmed Field's opinion. The Governor had been levying taxes that he was not legally empowered to. In line with Field's recommendations, in 1819 Parliament passed Acts authorising the Governor to levy duties, and retrospectively indemnifying him and his officers for those already levied. As Bathurst commented to Shepherd and Gifford, a legally robust power of taxation was essential if the colony were ever to become self-supporting (*HRA* 326-7). And, taxation mattered politically too, of course. As Field would later tell Bigge: 'I see the shadow of the spirit of American revolt at taxation... it will next demand legislative assembly; and end in declaring itself a nation of free-booters and pirates' (*HRA* 869).

Field's letters directly addressed what had become by 1818 a persistent and troubling uncertainty about the constitutionality of the powers exercised by the Governor in New South Wales (Phillips; Campbell). The problem had first been raised by Jeremy Bentham in his *A Plea for the Constitution*, printed in 1803 although not published until 1812, and which was a further instalment in his long-running pamphlet campaign against New South Wales and in favour of his own panopticon. Neither the Crown nor its vice-regal representative, Bentham argued, could legitimately exercise legislative power in the colony without authority from Parliament. Because such authority had never been given, New South Wales was truly outside the rule of law, a space in which every act of government was

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<sup>5</sup> The letter of the 24th is a somewhat shortened copy of the letter of the 23rd: presumably Macquarie asked Field to provide a condensed version of his reasoning for transmission to London.

unlawful. And the existence of such a space outside of law had implications that reached far beyond the South Pacific: 'If, without authority from Parliament, the King can legislate over Britons and Irishmen in New South Wales, so can he in Great Britain and Ireland' (55). Bentham's radical critique was picked up in Sydney by John Macarthur in 1806, who in the context of urging Governor King to allow distilling in the colony drew King's attention to 'some counsel's opinion of the illegality of all local Regulations,' on the grounds that 'no Order or Regulation given by a Governor could be binding unless sanctioned by an Act of Parliament' (HRA 44). Two years later, Macarthur's legal scepticism about the constitutionality of colonial government would help him mobilise the Rum Rebellion and oust Bligh. When in response to that coup the judicial system of New South Wales was reorganised, with the Supreme Court—first Bent's court, and then subsequently Field's—being established in 1814, this realignment of the colonial legal system with practice in the wider British empire only brought the unsettled nature of the constitutional basis of New South Wales into sharper relief. It was, as we have seen, a flash-point for Bent's assertions of judicial autonomy from vice-regal direction. And by the later 1810s it was also becoming a subject of opposition attention in Parliament, with first the radical member Henry Bennet and then Henry Brougham challenging, in particular, whether taxes could be levied in New South Wales by vice-regal fiat. But when Brougham raised the issue in the House of Commons on 23 March 1819, Under-Secretary Goulburn was prepared—he had Field's legal reasoning, confirmed by Shepherd and Gifford, in hand—and was able to assure the House that although the opinion had been given to him only within the last fortnight, the government would shortly pass measures to authorise colonial taxation appropriately. The underlying issues were now clear, the path to a solution charted.

Field's legal opinion resolved this constitutional uncertainty by reducing it to two fundamental legal principles. The first, which he supported by quoting Blackstone's *Commentaries*, was that 'no subject of England can be constrained to any aids or taxes...but such as are imposed by his own consent, or that of his representatives in parliament' (Blackstone, 94). Or as the Americans said, no taxation without representation. Macquarie's taxes, which were backed by no parliamentary Act, clearly failed to meet this test. The second question, however, was whether this basic liberty of English subjects also applied in New South Wales, which in many respects presented something of a jurisdictional anomaly. What legal framework actually applied in the colony, given its peculiar circumstances? Here Field pointed to a series of cases that had established a distinction in law between territories that had been acquired by conquest and those that had not, citing the Chief Justice the Earl of Mansfield in 1774 who was in turn citing principles laid out in 1722 by the Attorney General Sir Phillip Yorke and the Solicitor General Sir Clement Wearge: namely, that 'if Jamaica was still to be considered as a *conquered island*, the *king* had a *right* to *levy taxes* upon the

inhabitants; but if it was to be considered in the *same light* as the *other colonies*, no tax could be imposed on the inhabitants, but *by an assembly of the island, or by an act of parliament*' (Cowper 211).<sup>6</sup> By the same principle, if New South Wales was a conquered territory, the Governor, acting for the King, had the power to levy taxes; if it was not, all taxation required the legislative basis of an Act of Parliament. And Field supported this latter alternative with a further reference to Adam Smith's *Wealth of Nations*, and with the comment that the claim 'of the Americans (during the War) was that the Colonies could be taxed only by their legislative assemblies, and that all the Crown then contended for and enforced was that the British *legislature* (not the King alone) could also tax them. But here it is the King *alone* (through the Medium of Your Excellency) that imposes duties, which by the British Constitution and law cannot be' (*HRA* 775).

Field drew the conclusion that New South Wales was a territory in which both the fundamental liberties of English subjects and the constitutional constraints on Royal prerogatives still applied. But he left the crucial premise of his legal reasoning—that New South Wales was not conquered—silent and implicit. In London, Shepherd and Gifford helpfully spelled it out:

That the part of New South Wales possessed by His Majesty, not having been acquired by conquest or cession, but taken by him as desert and uninhabited, and subsequently colonized from this country, We apprehend His Majesty by his Royal Prerogative has not the right either by himself or thro' the Medium of his Governor to make laws for the levying of taxes in such Colony. (*HRA* 330)

The crucial *terra nullius* phrase in Shepherd and Gifford is 'desert and uninhabited'. It is this formulation that supplies the place of what remained, in Field's opinion, a weight-bearing but nonetheless silent premise, at once necessary yet unstated. Considered rhetorically, Shepherd and Gifford's phrase is a hendiadys, an 'x and y' verbal structure commonly found in legal discourse, in which a complex idea is expressed through the conjunction of two terms. But as William Empson once noted, 'and' is one of the most ambiguous words in the English language. Is the meaning of 'x and y' arrived at by adding together the meanings of x and y each considered separately? Or does one qualify the other, narrowing its meaning? Is 'desert' something like a synonym for 'uninhabited' for Shepherd and Gifford? Or might it instead mean something closer to 'uncultivated'?

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<sup>6</sup> For the legal and historical backgrounds to these cases from 1722 and 1774, see Cavanagh, who provides a longer colonial itinerary for the construction of the legal precedents and principles applied by Field.

Field's reference to Blackstone suggests we interpret this phrase in light of another passage in Blackstone's *Commentaries* that also handled the distinction between colonies gained by conquest and those that were not:

Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties... there is a difference between these two species of colonies, with respect to the laws by which they are bound. (104)<sup>7</sup>

In the first case, that of 'desart and uncultivated' lands, the laws of England were extended to the new colony. In the latter, the laws of the conquered territory remained as they were unless changed through Royal prerogative—and the King had lawful authority to do this for conquered territories without Parliamentary consent, for such a colony was something akin to his personal possession: his dominion in right of his crown. For Blackstone, the American colonies were principally of this latter sort, gained 'by right of conquest and driving out the natives', which meant that 'the common law of England, as such, has no allowance or authority there' (105). Shepherd and Gifford echoed Blackstone's language, but they did so in order to place New South Wales in the other category—America, from their perspective, being an object-lesson in how not to set up a colony. For them, New South Wales fell within the jurisdiction of the common law of England; subjects there had the fundamental liberties of Englishmen; arbitrary power was restrained by the same constitutional checks and mechanisms as in England; and all on the basis that the colony was originally, in Blackstone's words, 'desart and uncultivated', or in Shepherd and Gifford's, 'desert and uninhabited'. Functionally speaking, the meanings of 'uncultivated' and 'uninhabited' have become convergent here. With reference to New South Wales, each one is substitutable for the other. This was the functional *terra nullius* identity first effected implicitly by Field in Sydney, and then articulated explicitly by his superiors in London: an apparently minor textual revision that would bring taxation in New South Wales within the horizon of lawfulness.

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<sup>7</sup> And here Blackstone cites the 1722 case also referenced by Field in his letters, closing the circuit of authorities invoked by Field and by Shepherd and Gifford. Given how thoroughly Field knew Blackstone's text—he was the author of a best-selling study guide to the *Commentaries*—his citation of the 1722 Yorke and Werge judgement is unquestionably also a reference to this passage in Blackstone. (No doubt it was in Blackstone that he first learned of the 1722 precedent.) Shepherd and Gifford's clear verbal echo of Blackstone ('desert and uninhabited' / 'desart and uncultivated') indicates that they recognised this double reference and followed the path charted by Field's silent citation.

The subsequent legal history of Field's innovation has been traced by David Ritter and Stuart Banner, amongst others. The principle that New South Wales had been settled as uninhabited, rather than conquered, and so was a space of common law was upheld in a series of cases heard by the Supreme Court through the 1830s and 1840s (Ritter 8, n.16). It underpinned, for example, the judgement in *R v Murrell* of 1836, in which the court held that English law extended to Aboriginal people on the paradoxical basis that English common law applied in the colony because it was, until colonisation, uninhabited (Neal 17). And it was similarly crucial to a series of administrative decisions taken by the Colonial Office in London. The path first charted by Field was followed, for instance, by James Stephen in 1822 when determining whether the Governor of New South Wales was authorised to make laws by proclamation—in this particular case, concerning the regulation of servants' wages. Stephen reasoned that laws could only be passed with the consent of Parliament with two exceptions, that of colonies gained either by conquest or cession. New South Wales met neither of these criteria, for it 'was acquired... by the mere occupation of a desert or uninhabited land' (HRA 414). But perhaps even more significant than the widespread administrative and judicial uptake of *terra nullius* was the fact that, from 1819, it informed all Parliamentary legislation dealing with the colony, starting with the Act passed in 1819 that indemnified the Governor and his agents for any past impositions of illegal taxes and duties, an Act that was renewed regularly until it was superseded (and effectively made permanent) with the passage of the New South Wales Act of 1823. From 1819, *terra nullius* was repeatedly used to resolve unsettled questions concerning what legal regime was in effect in New South Wales. And even where it went unmentioned, it carried constitutive force, for it set the parameters of lawfulness and underwrote the meaning of legality in New South Wales. It was, in effect, the foundational sovereign act, determining the nature and validity of all other governmental actions. And as such it was all the more powerful when it did not even require mentioning.

In naming this politico-legal action 'the poetics of *terra nullius*' we hope to call attention to five of its aspects that we see as being central to its field of effects in 1819—and as being central, equally, to the foundational literary event that Field authored in that same year. The first concerns the radical meaning of *poiesis*: of poetics as a making, as the bringing of something new into the world. Historians of *terra nullius* have tracked its emergence and consolidation as a doctrine, seeing it as a sometimes loose and sometimes more formally coherent system of ideas. Field employed *terra nullius* not as a doctrine but as an instrument of law and bureaucratic administration. He made it operational; he used it, putting it into practice to produce a new governmental situation. In this regard, we might do better to view *terra nullius* as belonging not to the empirical domain of truth and falsity, of facts and actualities—for although *terra nullius* was certainly never true that equally never really mattered—but to the alternatives of felicity and infelicity

proposed by J. L. Austin for evaluating the success of performative speech acts. *Terra nullius* was a discursive act of colonial making; it was performative rather than conceptual or descriptive. The question elicited by attempted operations of *terra nullius*, at least with regard to their rhetorical enunciation, was not ‘is it true?’ but ‘does it work?’ And if it worked—if it took—then it would have implemented the conditions by which its effectiveness could then be determined. It would have constituted the legal regime that underwrote its own lawfulness.

The complex temporality described in this pattern of implications is the second aspect we hope to have underlined in telling this story. In the conventional narrative of *terra nullius*, first comes the idea, and then comes the colonisation that proceeds on the basis of that idea. The case of Field suggests this narrative has things precisely backwards. The colonisation of Australia preceded its legal justification; *terra nullius* operated retrospectively, legitimising an already existing state of affairs. For Kant, *res nullius* was an inoperative category because it failed the ethical test of universalisation. But the constitutive retrospectivity of *terra nullius* operationalised the paradox Kant had identified. The failure to be universal, rather than precluding the felicity of the *terra nullius* operation, instead became something like the motor of its recurrent empirical applications. Formally, the logic is impeccable: *Can the governor set taxes? Only if the land was invaded. Was the land invaded? No. Therefore the governor cannot set taxes.* And despite this formal reasoning clearly contravening what is and was known to be the case—the existence and prior occupancy of Aboriginal people, the facts of invasion—the legal fiction nonetheless backdates its own priority in an ecstasy of retroactive legislation. If the formalism contradicts the reality—so much the worse for reality. But this obscure rift between reason and reference would have consequences. Each instance of *terra nullius* precipitated further acts to come, so that the history of *terra nullius* after 1819 is reminiscent of the deconstructive operations of *différance*. It was reiterative: the jurisprudential foundation of the colony kept on having to be officially reasserted, each invocation producing conditions that required the reaffirmation of the backdated nullity said to have come before, the zero condition of the colonial enterprise. The history of *terra nullius* is then not one of a foundational event from which all else followed, but instead presents a long-drawn-out reiterative process of conquest, an attritional slow legal violence that keeps on having to re-secure its own retrospective legitimation.

Third, in 1819 and subsequently, the retrospective action of *terra nullius* was used principally for regularising settler/settler relations. It was primarily a mechanism for adjudicating and resolving disputes between settlers, not those between settlers and Aboriginal people. Field implemented the *terra nullius* operation to decide a question of tax jurisdiction. Contexts for later applications included questions of land ownership, of legislative authority, of the regulation of wages. Only to a very minor and derivative extent was it invoked when relations with

Aboriginal people were at issue. Instead, the *terra nullius* operation worked repeatedly to clarify and rationalise the legal framework within which settlement could progress by linking it to a retrospective assertion of colonial sovereignty. The operation functioned at the interface between the territorial sovereignty of the state, on the one hand, and the structure of property relations between private settlers within that state on the other. Private property in the colony was authorised through *terra nullius* by the legitimacy of colonial sovereignty. And that sovereign legitimacy was authorised, in turn, by an absence of private property relations in the territory that was retrospectively attributed as *terra nullius* to its own foundation. This doubled link positioned *terra nullius* as an important means for renegotiating relationships between settler property and settler sovereignty, between colonial rights and colonial powers. Technically described, the place of Aboriginal people in these renegotiations was that of a vanishing mediator.

The *terra nullius* operation retrospectively legitimated the present through inscribing it as having already happened. But it also displaced that present forwards, into the future perfect of the 'will have been.' In this fourth aspect we wish to stress, the reiterative nature of the *terra nullius* operation was put in service of liberalising projects of colonial development that progressively displaced present conditions with those of a perfected state to come. Australians today tend to see *terra nullius* as a deeply conservative doctrine. Throughout its history, however, it was used for quite contrary ends to affirm the status of Australia as a state in which the arbitrary actions of government were restrained by the fundamental liberties of its citizens. Indeed, as we have seen, *terra nullius* was responsible for the first stirrings of representative democracy on Australian soil.<sup>8</sup> Perhaps it was precisely this future-oriented progressiveness that licensed such an unusually high degree of blindness to actually existing Aboriginal people in the present. For any such Indigenous population had to be discounted twice over, once in a past in which, retrospectively, they were held not to have not existed, and then again in a future in which as a people in any sense separable from other Australian citizens they will entirely have faded away. 'To know history in the colonies,' as Chris Healy has written, was in this sense 'to know the revelation of the past in the future' (20). A future condition—a colony without Indigenous

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<sup>8</sup> Even the Mabo case fits the paradigm in certain respects. As Ritter has noted, the Mabo judgement resolved 'a crisis of legitimacy for the rule of law in Australia' (6). Resolving the crisis in question required a renegotiation between Australia's international sovereign obligations (its commitment to international principles of anti-discrimination) and its internal framework of governance. The outcome of that renegotiation was justified by a narrative of progressive liberalisation. And it was widely seen as a significant reaffirmation of the fundamental commitment in Australia to the rule of law. Nonetheless, in recognizing native title the High Court equally ruled that it had been extinguished across all the main populated regions of Australia. Nor could the Court consider the extent to which its own powers were implicated in the history of Aboriginal dispossession: such questions were deemed unjusticiable. And in this sense, as Gary Foley commented at the time, 'Mabo is the *terra nullius* of these days' (435).

inhabitants—was given legislative force in the present by being inscribed retrospectively as a pre-existing condition.

And finally, we might distinguish this particular kind of blindness—this erasure or necessary absence that was generated through the *terra nullius* operation—from other kinds of non-seeing that were, if still colonial, perhaps less insidious in their constitutive logics and ramifications. As we have argued, although *terra nullius* was certainly available at the time of first settlement, it was nowhere employed instrumentally in the first three decades of New South Wales. We have identified Barron Field as the agent of its initial mobilisation. And we have done so despite the fact that the key *terra nullius* phrase—‘desert and uninhabited’—was penned not by Field but by his superiors in London. Our justification for naming Field as nonetheless responsible is that the matrix of citations he presented in his argument was so tightly constructed as to make visible and even unmistakable what it left carefully unnamed. From 1819, enunciatory absence was no longer equivalent with discursive non-existence. It had, instead, become a mode of enunciation. Not saying something; keeping silent; erasing or effacing it: these were now discursive ways of making it happen. Field was the first to perform the *terra nullius* operation, which he did with absolute exemplarity precisely because he left it to others to perform, having shown exactly what they must do. After Field, *terra nullius* spoke repeatedly in the letter of the law. But he also made it speak, originally, through silence as well as through law and its administration of violence. And that silence—along with the other aspects of Field’s *terra nullius* operation we have focussed on here: its performativity, retrospectivity, nostrocetric settlerism and progressive utopianism—was also crucial to Field’s second foundational discursive event of 1819, his *First Fruits of Australian Poetry*. Here, however, we leave the silences of Field’s poetry for another occasion.

**THOMAS H. FORD** is a Lecturer in English at La Trobe University.

**JUSTIN CLEMENS** is an Associate Professor of English at the University of Melbourne.

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