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BOOK REVIEW

INTRODUCTION

In 1765 the legal theorist William Blackstone advised his contemporaries: 'There is nothing which so generally strikes the imagination and engages the affections of mankind as the right of property, and yet there are very few who give themselves the trouble to consider the origin and foundation of that right.'[1] On the cusp of the twenty-first century, not only legal historians, academic lawyers, jurists and courts but also activists and minority communities have begun to give the origin and foundation of property rights the consideration that they merit. The legal and popular social debate generated by such decisions as *Mabo* (1992) and *Wik* (1996) in Australia and regulatory takings decisions in America articulate competing conceptualisations of property and property rights. These are the subjects of the articles in this volume of *The Australian Journal of Legal History* that were first presented at the *Land and Freedom Conference*, the 19th annual conference of the Australian and New Zealand Law and History Society in July 1999.

Within Australia and America, the two jurisdictions whose property law is considered in this collection of articles, statute law interacts with ideas of property originating in English common law that was imported into these settler societies. That interaction produced 'new' narratives about property. It is this subject—'the stories that the law tells itself about the origins and nature'[2] of property—that links the articles in this volume. Narratives

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1 Blackstone, *Commentaries on the Laws of England* (abridged edition 1890) 115.

2 Dorsett and Godden, 'Tenure and Statute: Re-conceiving the Basis of Land Holding in Australia' see page 2 below.

through which different, competing concepts of property advance specific models of rights emerge from a variety of historical contexts. Changing narratives about 'the family' have been one basis of re-evaluating the competing claims represented by family provision legislation that, in Australia and New Zealand, recognises a testator's 'moral duty' to make adequate provision for family members rather than the legal right of testamentary freedom. Testamentary freedom, as legal scholar Ros Atherton explains, is a right derived from the narrative of private property entrenched but not fixed in Western legal jurisprudence. In tracing the meaning of moral duty in its jurisprudential context, she reveals how ways of thinking about property and property rights altered from the seventeenth to the twentieth century.

In the 1990s, courts within Australia have reread the doctrine of '*terra nullius*' that, in the colonial context, provided one legal narrative about property and rights of sovereignty. As legal historians Shaunnagh Dorsett and Lee Godden explain, this narrative was displaced in the *Mabo (No 2)* decision from the narrative of Australian land law. Rather than producing a radically new conception of property and rights, however, the resulting concept of native title was constructed using the doctrine of tenure, a traditional conceptual and classificatory structure of English land law. The consequences of that story about land law and native title in Australia, particularly in relation to the recognition of indigenous land rights, as Roderic Pitty explains, can be obscured by competing narratives. In his discussion of the application of the law of evidence in the *Yorta Yorta* claim in 1998, Pitty describes the particular narrative about the survival of native title developed in this case. The weight and credibility that the judge gave to one written text, a colonial settler's diary that purported to represent the lives of indigenous people, exceeded that of the accumulated evidence based on oral tradition presented by the indigenous claimants. By focussing on the Federal Court's evaluation of written and oral narratives as historical evidence in the *Yorta Yorta* claim, Pitty exposes a matter of consequence in adjudication of land claims cases. Without the law's respectful and accurate understanding of oral tradition as a medium that records laws and custom and that reveals evidence of their continued observance, indigenous witnesses in a court of law cannot represent their narrative about their lands nor gain recognition of their rights.