Constitutions

Writing Nations, Reading Difference

Judith Pryor

Routledge
Taylor & Francis Group

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Can a nation have an unwritten constitution? While written constitutions both found and define modern nations, Britain is commonly regarded as one of the very few exceptions to this rule. Drawing on a range of theories concerning writing, law and violence (from Robert Cover to Jacques Derrida), *Constitutions* makes a theoretical intervention into conventional constitutional analyses by problematising the notion of a 'written constitution' on which they are based. Situated within the frame of the former British empire, this book deconstructs the conventional opposition between the 'margins' and the 'centre', as well as between the 'written' and 'unwritten', by paying very close, detailed attention to the constitutional texts under consideration. *Constitutions* argues instead that Britain's 'unwritten' constitution and 'immemorial' common law only take on meaning in a relation of difference with the written constitutions of its former colonies. These texts, in turn, draw on this pre-literate origin in order to legitimate themselves. The 'unwritten' constitution of Britain can therefore be located and dislocated in post-colonial written constitutions.

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Birkbeck LAW PRESS

First published 2008
by Birkbeck Law Press
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Birkbeck Law Press
270 Madison Ave, New York, NY 10016

This edition published in the Taylor & Francis e-Library, 2007.

Birkbeck Law Press is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
A catalog record for this book has been requested

ISBN 0-203-94063-6 Master e-book ISBN

ISBN10: 0–415–43192–1 (cased)
ISBN10: 0–415–43193–X (limp)
ISBN10: 0–203–94063–1 (e-book)

ISBN13: 978–0–415–43192–7 (cased)
ISBN13: 978–0–415–43193–4 (limp)
ISBN13: 978–0–203–94063–6 (e-book)

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Acknowledgements

This research would not have been possible without the financial assistance of Cardiff University and the British Council (in the form of an Overseas Research Students Award) from 2001–04. I would also like to thank the New Zealand Federation of Graduate Women for awarding me a generous Postgraduate Fellowship in 2001–02. Participation at academic conferences – including *New Voices in Irish Criticism* (Cork, February 2003), *Whither Theory?/Où va la Théorie?* (Paris, June 2003), *'Betwixt and Between': Place and Translation* (Belfast, April 2005), *Resistances: Critical Legal Conference* (Canterbury, September 2005) – has been invaluable, as was the British Academy's Overseas Conference Grant for the 9th annual conference of the Association for the Study of Law, Culture and the Humanities (Syracuse, New York, March 2006).

My thanks are due to Catherine Belsey, from whom I have been privileged to learn so much. I have had many fruitful discussions with my former colleagues at the Centre for Critical and Cultural Theory, particularly Neil Badmington, Claire Connolly, Laurent Milesi, Martin Kayman, Stephen Knight and Radhika Mohanram. I have benefited from the advice of Terry Threadgold and Peter Hulme, as well as Mark Houlahan, Kathy Troup, Ralph Crane and Anna Green. Thanks to John Robson and the staff of the New Zealand Room at Waikato University Library for their help in researching the 'antipodean' sections of this project. Thank you to the Museum of New Zealand, *Te Papa Tongarewa*, for access to its archival material on the Treaty exhibition, and for permission to reproduce an image of the glass Treaty on the cover of this book.

I would like to thank my friends and family for their support and encouragement. Thanks to my parents, Barry and Joan, as well as to Michael, Kanako, Joshua, Kevin, Esther and Juliet, and to John, for his hospitality in London. My thinking has benefited from discussions with Elaine Brennan, Susan Cahill, Gareth Gordon, Faith Kent, Anne McMonagle, Chris Marlow, Gareth Pierce, Robin Sims, Ailbhe Thunder, Helen Wales and Andy Williams. Special thanks are due to Lindsey Moore, Irene Morra and, especially, Catherine Silverstone, for generously sharing their work, ideas and perceptive reading skills.

Finally, extra-special thanks to Daniel Haines for his continual encouragement and support, perceptive reading skills, and enthusiasm for relocating from Wales to Wellington.

Dr Judith Pryor, January 2007
Wellington, Aotearoa New Zealand

Copyright acknowledgements

Earlier versions of material from Chapters 1, 3, 4, 5 and 6 of this book have appeared as follows:

'Reconciling the Irreconcilable? Reading the *Mabo* decision and the Treaty of Waitangi', 2005, *Social Semiotics* 15:1, pp 81–101, published by Taylor & Francis Ltd (http://www.tandf.co.uk/journals), reprinted by permission of the publisher.

'Shaking The Foundations: Reading, Writing and Difference in Constitutional Texts', 2005, *ACCESS: Critical Perspectives in Communication, Cultural and Policy Studies*, Special Tribute Issue to Jacques Derrida, 24:1–2, pp 21–32, reprinted by permission of the editor.

'Writing the Irish Republic', in *New Voices in Irish Criticism 5*, 2005, Dublin: Four Courts Press, pp 51–8, reprinted by permission of the publisher.

'The Treaty of Waitangi and the Justice of Cultural Translation', ch 12 in Kelly, S and Johnston, D (eds), *Betwixt and Between: Place and Cultural Translation*, 2007, Newcastle upon Tyne: Cambridge Scholars Press, reprinted by permission of the publisher.

'Unwritten Constitutions? British Exceptionalism and New Zealand Equivocation', 2007, *European Journal of English Studies* 11:1, pp 79–92, published by Taylor & Francis Ltd (http://www.tandf.co.uk/journals), reprinted by permission of the publisher.

Chapter 1

Introduction

Next door to the Gothic splendour of Lincoln Cathedral is a pub called 'The Magna Carta', its sign depicting the barons forcing King John to sign the eponymous document at Runnymede in 1215. Across the street, Lincoln Castle houses one of the four 'originals'. Accompanying the dimly, yet mystically, lit 'original copy' is a display about both Magna Carta and constitutions. The exhibition begins by stating that the copy of 'Magna Carta that you will see today was written . . .':

> Before women had the vote (1928)
> Before all men had the vote (1918)
> Before the United States declared independence (1776)
> Before the Glorious Revolution (1688)
> Before King Charles lost his head (1649)
> . . .
> Long before Constitutions were written down.

It then asks the question 'What is a constitution?' and answers by providing a part of the *Oxford English Dictionary* (*OED*) definition: 'A body of fundamental principles according to which a State is governed.' Directly underneath, however, the exhibition proclaims:

> But in Britain there is no written constitution. Our laws have developed through the centuries reflecting the aspirations of each generation. Our constitution has evolved over more than 800 years, refining the rights and freedoms that we now enjoy.[1]

This opening section of the exhibition represents an apparent paradox: Magna Carta is the originator of modern written constitutions, yet Britain itself – the country that produced this important foundational document – has an unwritten constitution.

Described as an 'icon of liberty', Magna Carta is widely thought of as a precursor to modern declarations of independence and constitutions.[2]

Indeed, Lincoln's Magna Carta was displayed in San Francisco in 1976 as part of the Bicentennial celebrations of the US Declaration of Independence, and also during the Australian Bicentenary in 1988. During World War Two, the Lincoln Magna Carta, on a previous tour of the USA, was housed in Fort Knox, along with the US Constitution, for safe keeping.[3] In a bid to further strengthen transatlantic constitutional ties, Lincoln Castle and Cathedral hosted the first 'Magna Carta/USA week' during 10–15 June 2005, to commemorate 790 years since it was signed.[4]

Another exhibition, located in Washington DC at the US National Archives (whose slogan is 'Democracy Starts Here'), also emphasises transatlantic constitutional links. Like the exhibition at Lincoln Castle, the 'Charters of Freedom' exhibition displays the US Declaration of Independence, Constitution and Bill of Rights in a semi-religious atmosphere. Courtesy of the Perot Foundation, it also includes another copy of Magna Carta, one that is thought to have been confirmed by Edward I in 1297.[5] Although the exhibition's juxtaposition of these documents serves to place them in a single tradition of English constitutionalism, historian Pauline Maier notes that 'it's easy to walk past the Magna Carta without noticing it. It seems not like an ancestor but a sideshow to the main attraction at the rotunda's end'.[6] Magna Carta is acknowledged as originary, its influence continuous, while simultaneously being disavowed as emblematic of the tyranny from which the American revolutionaries seceded and by which they established a nation.

The transnational links on display in both of these exhibitions signify, working to construct a linear constitutional tradition and constituting Magna Carta as a point of origin. These constitutional links, however, also open out these documents of national definition to an imperial diaspora. The British constitutional tradition of immemorial common law and liberty worked – and continues to work – in an imperial context as the origin of both the law and constitution. I argue that it is a peculiarly British trait to claim to have an *unwritten* constitution – the claim itself constitutes a statement of national definition – in contrast to those of its 'heirs' on the other side of the Atlantic.

This can be seen in the way Lincoln Castle's exhibition states that it is 790 years since Magna Carta, but that the constitution has evolved over more than 800 years. An *unwritten* constitution is positioned before this foundational document; Magna Carta is perceived as a restatement and clarification of ancient customs, liberties and laws, the origins of which remain obscure. Furthermore, there is no single Magna Carta in which to locate these liberties: Lincoln's document is one of four surviving 'original copies'; another is held at Salisbury Cathedral and the other two can be found at the British Library. The oxymoronic term 'original copy' signals an uncertainty about origins and priority, temporality and history. Which comes first: is it the laws and customs, the people or nation, or the constitutional text? What is the original source of a constitution? Does writing

merely set down and codify ancient laws, or does it actively and performatively define and redefine them? Do constitutions draw on past precedents, or are they statements of the present oriented towards the future? The ambiguous and undecidable temporality of past, present and future is relevant to each of the case studies considered in this book, particularly in relation to the role of historiography in constituting legal and political national narratives.

In *Constitutions: Writing Nations, Reading Difference*, I investigate the performative textual strategies by which nations constitute themselves as collective subjects within their foundational documents. As part of this analysis, I theorise the ways in which 'national' discourse constitutes its own origins in relation to writing. By way of illustration, I examine the 'constitutional texts' of Ireland, Australia, and Aotearoa New Zealand, as well as Britain, in order to assess whether a similarly ambiguous relationship can be traced between these common-law jurisdictions to that charted between the USA and Britain. In each national context, a tension is at work between the 'written' and the 'unwritten', between the 'letter' of the most fundamental laws and their unwritten 'spirit'. A deep ambivalence towards writing is thus, paradoxically, a constitutive characteristic of all constitutions.

It is this ambivalence with which I am concerned. Rather than reproducing a simple binary opposition between the written and the unwritten, I deconstruct these terms in order to show that each term invades the other. This is particularly evident in the final chapter, which examines Britain's 'unwritten' constitution as constitutive of both its national discourse and a sense of 'Britishness'. The somewhat overused term 'deconstruction' will signal that philosopher Jacques Derrida's theories of writing – signifying, in the broadest sense, cultural inscription – are to be put to work in order to theorise constitutional texts. Constitutional or foundational documents are usually written texts, in the everyday sense that they are recorded using the graphic representations of phonetic alphabets. Throughout his work, Derrida challenges the conventional binary opposition between speech and this kind of writing, arguing that speech is always already writing, that is, cultural inscription. All forms of discourse – from declarations of independence to newspaper articles – are therefore inscribed with the prevalent assumptions and values of their particular cultural moment. This book analyses constitutional texts as constitutive of and, more crucially, *produced by* national discourse; although concerned in part with legal documents, it is, therefore, a work of cultural criticism rather than one of legal history or jurisprudence.

Constitutions

The Magna Carta exhibition at Lincoln Castle defines a constitution as a 'body of fundamental principles according to which a State is governed'. This definition is broad and general, allowing for no distinction between written

and unwritten constitutions. The more common-sense definition, derived from such texts as the US Constitution, is a *written* document setting out a system of founding principles according to which a nation state is constituted and governed, and, most particularly, by which its sovereign power is located. This type of constitution is held to be an originary text, embodying various fundamental tenets with which all subsequent legislation must concur. Not all states, however, have a formal document of constitution. As Lincoln Castle's Magna Carta exhibition states, the British constitution is thought to derive from successive concessions in sovereign power and the development of legal precedent.

Throughout this book, however, I understand the word 'constitution' much more broadly. The word 'constitution' signifies in other ways, and it is worth returning to the *OED* to reflect on them. In addition to defining nations, 'constitution' means:

- the action of constituting, making, establishing; the action of decreeing or ordaining,
- the way in which anything is constituted or made up; the arrangement or combination of its parts or elements, as determining its nature and character; make, frame, composition
- and also the physical nature or character of the body in regard to healthiness, strength, vitality . . . nature, character, or condition of mind.[7]

Throughout this book, these alternative meanings for the word 'constitution' will also be put to work in order to theorise constitutional texts. The third part of this definition, concerning the physical well-being of a healthy body, is particularly significant in the discourse of nations. Bodily metaphors are conventionally deployed to represent collectivities. The collective subject of the 'body politic' reflects and reiterates the actual body of the individual human subject. The word 'constitutions', then, comprehends the movement between nature (the nation perceived as a healthy body) and culture (the action of making or decreeing a sovereign nation). This opposition is interrogated throughout the book, the title of which should be understood as a performative pun.

Although some of the documents I examine are not constitutions in the strict legal sense, I hold onto the word 'constitution' because it charts a migration from the nation conceived of as a body moving through the various stages of human development (relying on natural, organic metaphors), to the nation constituted as a body of texts (thought of as self-consciously performative representations). Both modes of the nation are written, although the former sense of the nation as a body politic is naturalised and its textuality effaced. As is evident in Lincoln Castle's Magna Carta exhibition, a tension can be traced between the documentary tradition of foundational documents and 'unwritten', or immemorial, laws and customs.

I also draw attention to the *textuality* of constitutions: hence my preference for the term 'text' rather than 'document'. These are not just constitutional documents in the obvious and narrow sense that the US Constitution is; constitutional *texts* are, rather, constitutive of collective and individual subjectivity. Constitutional texts are performative: they perform an action, rather than only describe an event or make a statement. Philosopher John Austin, who coined the term 'performative', stated:

> The name is derived, of course, from 'perform', the usual verb with the noun 'action': it indicates that the issuing of the utterance is the performing of an action – it is not normally thought of as just saying something.[8]

Austin adds that the utterance is not the *sole* thing necessary for deeming the act to have been performed, 'the [actual] performance of which is also the object of the utterance'.[9] Austin is here, somewhat logocentrically, referring to speech ('utterances'), but writing can also be thought of as a performative action. The act of writing makes it a 'speech act', even though it is not speech: the action of the 'utterance' is writing, not speech. In some cases – for example, those of the Easter Proclamation (1916) and the Treaty of Waitangi (1840) – while it is the written text and signatures that constitute a new subjectivity, spoken performance also plays a crucial role.

Each of the texts discussed in the case studies in this book can also be described as 'foundational'. I have understood this as a synonym for 'constitutional'; it also shares the performative sense of 'establishing and determining', as given in the above definitions of 'constitution', because, in each case, the texts that constitute the nation are positioned as being in some way originary. Literary critic Seamus Deane has usefully defined a foundational text as:

> one that allows or has allowed for a reading of a national literature in such a manner that even chronologically prior texts can be annexed by it into a narrative that will ascribe to them a preparatory role in the ultimate completion of that narrative's plot. It is a text that generates the possibility of such a narrative and lends to that narrative a versatile cultural and political value.[10]

A foundational text, then, has a constitutive effect on national discourse, particularly in the narrative it tells itself about its origins. The textualising of origins in each case takes different forms: in Ireland, for example, the Easter Proclamation is perceived as the foundation of the modern independent Republic, and in Aotearoa New Zealand, the Treaty of Waitangi is viewed as the origin of British government. In a different sense, the much more recent High Court decision in *Mabo v Queensland No 2* (1992) operates in Australia as a newly *re*constituted origin. That is, despite the fact that it is not

historically the 'origin' of modern Australia, rhetoric of beginnings and foundations is used to refer to *Mabo*; it therefore represents a self-conscious attempt at refashioning the narrative of the nation.

The ideas embodied in constitutional texts in the broadest sense – such as declarations of independence, key legal decisions and treaties – found the public institutions and systems, which are constitutive of subjectivity. I discuss both 'written' and 'unwritten' constitutions in this project, as well as the relationships between them. These relationships are reciprocal and mutually constitutive: a written document marks a rupture, or break, from a supposedly unmarked centre, yet it draws on the authority of this 'pre-literate' origin to legitimate itself. Similarly, the wide variety of written texts reified as foundational often take the form of performative speech acts *represented* on paper: that is, declarations, proclamations, decisions and (en)treaties. At the same time, this supposedly unwritten centre is retroactively constituted as both unwritten and a point of origin. A philosophy of writing is, therefore, integral to, and constitutive of, the nation.

Graphic writing separates modern nations from ancient 'unwritten' ones. This opposition is interrogated throughout this book, as I argue that several nations with written foundational texts – including Australia and Aotearoa New Zealand – *depend upon* the idea of the British constitution's immemorial origins in order to legitimate themselves. They then continue to disseminate the value of this supposedly unwritten origin in order to conserve the hegemony of the respective colonial states they found. Similarly, the British constitution's 'immemorial origins', positioned before writing, yet disseminated by it, construct the constitution as 'unwritten' in a relation of difference with the written documents of Britain's former colonies. I locate this cultural inscription of difference not in a pre-literate mythic time, but in nineteenth-century constitutional writings, particularly those of Albert Venn Dicey and Walter Bagehot. This temporal location is also coincident with the high point of British imperialism. Constitutions and the effects (and after-effects) of empire are inextricably linked.

Writing nations

But what is a nation, exactly?

On 11 March 1882, Ernest Renan delivered what was to be an influential lecture at the Sorbonne in Paris, asking just that. Allowing that nations were 'a new feature in history', he traced a genealogy of the historically 'modern' nation from the Roman Empire, through successive waves of Germanic invasions of Gaul, which roughly established the countries of Western Europe as they are currently known.[11] Defining unifying compulsions such as dynasty, primordial ties and language, Renan concluded that '[a] nation is a living soul, a spiritual principle'. Furthermore, this spiritual principle derived from two things – which Renan argued were really one: the possession in common

of a 'rich heritage of memories' and the 'actual consent, the desire to live together, the will to preserve worthily the undivided inheritance which has been handed down'.[12]

Renan's address, given towards the close of the nineteenth century – a century that saw the hegemony of the nation-state grow exponentially – is a key text in the constitution of a Western discourse on the nation. This discourse naturalises the concept of the nation and maps it onto the state as a legal and political entity. Moreover, naturalising the nation renders it difficult to define: its origins are positioned outside the time of writing, so that any attempt to describe what it might be is necessarily uncertain. A nation has been defined, therefore, by a variety of criteria including territory, language and customs in common, the same race or ethnicity, and the same polity. Post-colonial critic Homi K Bhabha has argued persuasively that the 'cultural compulsion' of the nation lies in its 'impossible unity . . . as a symbolic force'.[13]

Etymologically, the word 'nation' derives from the past tense of the Latin verb *nascor*, meaning 'to be born', and the noun *natio*, meaning 'birth, race, nation, class of person'.[14] The root of the word contains a trace of the presumed corporeal and genealogical origins of national communities. Tom Nairn therefore notes that the 'pre-history and evolution of . . . kinship (literal and metaphorical) . . . effectively links *natus* to nation and then, under modernity's impact, to nationalism'.[15] Similarly, 'nation' is also linked to the words 'natural', 'nature' and 'native'. Somewhat paradoxically, then, language – thought of as cultural – constructs the nation as 'natural'. Like race and gender, nationality is perceived to be a collective membership that 'goes without saying', part of an individual's basic identity. This collective membership is deemed to be ahistorical and natural precisely because it is 'an imaginary construction' that constitutes subjectivity.[16] That is, nationality is one of many subject positions that cohere into an individual's apparently unitary identity, an identity that is lived as if it were natural rather than cultural.

As an extension of this naturalising process, the nation has also been mapped onto a coherent racial or ethnic identity. One definition, for example, of the Irish nation, as found in the 1937 Constitution, is Celtic and Catholic, while Australia's Constitution establishes a 'white' Anglo-Saxon nation. Throughout this book, I problematise the idea that state, nation and race fit seamlessly together. By foregrounding the tensions and ambiguities in the foundational texts of modern nations, I seek to foreground alterity and difference, rather than unity and totality. In this way, I set out to denaturalise the conventionally naturalised nation and reveal the constitutive paradox inherent in processes of nation-building. Foundational or constitutional texts are key components of nation-building in the modern period. The term 'nation-building', however, signals a contradiction: if the nation is 'natural', why does it need to be 'built'?

Similarly, I contest the idea that the nation represents a natural community. Rather, national discourse draws on assumed material connections, among them blood ties and territorial links. These apparently natural elements are made to signify in the context of politically and historically specific cultures. The establishment of a nation requires continual reiteration; the story of this reiteration, or reinscription, takes the form of history. This is particularly explicit in the case of modern 'settler' nations, in which hegemonic narratives iteratively maintain ascendancy over counter-narratives. I demonstrate, however, with reference to Britain, that it is also the case in 'old world' nations.

Benedict Anderson has famously defined a nation as 'an imagined political community . . . both inherently limited and sovereign'.[17] That is, no nation is synonymous with humanity or the globe, although its borders may be subject to redefinition: it is finite. Thus, communities as nations can be distinguished by 'the style in which they are imagined'.[18] Cultural representations of the nation demonstrate how a community signifies *as* a nation and how it perpetuates its self-image ideologically. Although some commentators have urged us to 'forget the "nation" ', seeing it as an overdetermined concept with little political value,[19] I argue that it is precisely this elastic – although apparently natural – conceptualisation that renders the nation powerful as a collectively constituted transcendent subject. The idea of 'the nation' archives the seeming contradictions between civic nationalism (that of '*the* people') and ethnic nationalism (that of '*a* people'). Moreover, notwithstanding persuasive critiques of post-colonial nationalism,[20] the nation as a politically transcendent goal has appealed to the political desire for self-determination for stateless groups, including Māori and North American First Nations peoples. The nation is not, therefore, always synonymous with the state.

This book, however, focuses on four modern nation-states: their documents of national constitution are retroactively given legal force by the states they establish. By the nation's inscription in various state apparatuses – from the individual to the family, the school to the law court – it interpellates both its subjects and its 'self' as subject. That is, in the process of constituting national subjects, a national curriculum and national laws, the nation is itself simultaneously constituted from these diverse parts as a unified, transcendent collective subject. Not only, therefore, is the nation 'imagined', 'conceptualised' or a 'spiritual principle', but it also has material effects. This should not be understood as constructing a binary opposition between the ideal nation and the material state. Rather, the nation can be thought of as an 'absent presence', which is not precisely locatable in any one place. National subjects actively, although not necessarily consciously, work to perpetuate and repeat what the nation is at a given moment. The nation haunts the state formation that it helps constitute and which constitutes it. Its effects are imprinted in a variety of cultural discourses, ranging from (but not limited to) the literary

and cinematic, to the legal and political. It is in the latter group of cultural texts that I locate my analysis.

In the course of this book, I outline how the nation – thought of as a collective subject comprehended and constructed in the collective pronoun 'we' – is constituted in a range of what I have broadly termed constitutional texts. As I have suggested, a 'nation', although it is perceived as a unified entity, is rather a locus for differing discourses that are constitutive of subjectivity, both individual and collective. As Bhabha has pointed out, the cultural compulsion towards unity is an impossible one, yet it remains the goal, or *telos*, of the nation. It is also perceived to be its origin. I interrogate the compulsive construction of this unity within documents that are viewed as constitutive of the nations they found. By attention to the modes of address of constitutional texts, I seek to 'activate the differences'[21] and keep in play the ambiguities and contradictions on which a text relies in order to construct meaning. My approach to reading constitutional texts thus attends to what cultural critic Catherine Belsey has described as 'the textuality of the text, its nuances and equivocations, its displacements and evasions, the questions posed there and the anxieties on display about the answers proffered'.[22]

My case studies are not, however, limited to analyses of constitutional documents in isolation. Derrida famously observed, '*il n'y a pas de hors-texte*', which Gayatri Chakravorty Spivak glosses as '*[t]here is nothing outside of the text* [there is no outside-text]'.[23] Read in context, this assertion does not – as it may seem – posit an idealist view of the world in which there is literally no reality outside the text. Rather, Derrida argues that a text has no definitive external guarantee of meaning such as an author, God, or, in the case of constitutional documents, the nation. Reading:

> cannot legitimately transgress the text toward something other than it, toward a referent . . . or toward a signified outside the text whose content could take place, could have taken place outside of language . . . [I]n what one calls the real life of these existences 'of flesh and bone', beyond and behind what one believes can be circumscribed as Rousseau's text, there has never been anything but writing . . . that what opens meaning and language is writing as the disappearance of natural presence.[24]

Not only does a text have no transcendent and true guarantee of meaning, but, by constantly deferring its final 'external' referent, it also continually exceeds its boundaries. As Derrida notes elsewhere, there is:

> a sort of overrun . . . that spoils all these boundaries and divisions and forces us to extend . . . the dominant notion of a 'text' . . . that is henceforth no longer a finished corpus of writing . . . but a differential network, a fabric of traces referring endlessly to something other than itself, to other differential traces.[25]

Texts are not unified or internally consistent. Drawing on this notion of the text as a 'fabric of traces' that 'refers endlessly to something other than itself', I examine how constitutional documents, reified as closed, finite, 'self-evidently' meaningful and foundational, are intertextually related to other types of cultural text. This book focuses its discussions on political philosophy, legal decisions, legal and political commentary, constitutional traditions and historiography, all of which are written documents in the narrow, graphic sense. These texts signify 'inter-discursively', however, in relation to other cultural texts – some of which I briefly touch on – including literature, art, museums, cinema and tourist information. These texts can be thought of as written in the broader, Derridean, sense of cultural inscription.[26] I refer to both senses of 'writing' throughout this book.

Texts also signify in relation to what is usually called 'context': in the case of constitutions, the cultural, historical, philosophical and political milieu in which they were devised. Rather than relying on a static historical backdrop to 'explain' the text in question, I simultaneously analyse the writing of history (or historiography) as constituted by, and in the same moment as, the constitutional text.

I therefore want to hold onto the formulation that opens this section – 'what is a nation?' – rather than examine how constitutional texts construct 'national identities'. The latter formulation presupposes an originary nation with which the subject identifies and through which it establishes its own identity. It is at this *a priori* stage that I interrogate the nation. Rather than the origin of both a collective and an individual identity, based on a hazy conflation of supposed biological, geographical and political ties, the nation is an effect of the variety of cultural texts that constitute it. These texts are given the aura of authenticity by time, particularly the narrativising of time into history, which ascribes a unified and linear meaning to the nation. Moreover, like the 'fabric of differential traces' of a text, a 'nation' is not contained and bounded by the texts that constitute it. It is always more than the sum of its parts.

It should be noted that this is a specifically *Western* narrative of temporality, which, precisely by deploying graphic writing as a technological innovation, is located in, and helps constitute, the time of modernity. Attention to the possibilities for alternate narratives in constitutional texts performs what Bhabha has called the 'contingent moment' of the time lag that challenges narratives of progressive modernity.[27] Bhabha argues for the importance of such a 'disjunctive temporality' to post-colonial criticism, because it 'creates a signifying time for the inscription of cultural incommensurability where differences cannot be sublated or totalized'.[28] This is not to suggest that modernity is 'an incomplete project',[29] or that in the contemporary moment there is a pure indigeneity that transcends colonial structures, but rather that difference can be teased out within the legal and political texts that constitute modern nations, in order to resist the unifying impulse towards the nation.

This has the effect, then, of interrogating totalising discourses on the nation – particularly, as I indicate further below, in nations broadly described as 'settler', in which strong counter-narratives have challenged the ascendancy of colonial discourse.

Reading difference

If a nation is thought of as a unity, how can it be read in order to activate difference?

Activating difference means attending to the modes of address of the nation's constitutive texts, and, as scholars in the field of law-and-literature have agreed, this involves reading cultural texts such as legal documents *as* literature.[30] In the first instance, this means attending to recurrent metaphors, tropes and modes of language. The nation, while perceived as natural, is rather conceptualised in terms of such literary devices as bodily metaphors and religious analogies. These tropes retroactively construct an external origin that guarantees the nation and the way it signifies. More broadly, however, it also means theorising how writing and language constitute and naturalise contemporary institutions and structures, and what is at stake in this process.

In order to achieve this second task, I draw on the reflections on law, justice and writing that recur throughout Derrida's work, particularly in *Of Grammatology* and his essay 'Force of Law'. These works represent the two key axes of this project: first, the ways in which the nation is written (in both senses), and, second, the means by which constitutional texts legitimate and are legitimated within national discourse. Framing key questions of origins, belonging and history, writing – thought of both as codified laws and, more broadly, as cultural inscription – is an important means of shaping and constituting the (colonial) nation as a unified conceptual object. In a post-colonial context, it is also a means of domesticating and defining Indigenous peoples as other and marginalising alternative temporal narratives and discourses of law.

Broadly speaking, then, my theoretical framework is Derridean. The reliance on the work of a so-called master theorist may seem anomalous in a project that also positions itself within a post-colonial framework. This alliance may not, however, be quite as unconventional as it first appears. As Robert Young has observed, all of Derrida's work – including the more recent 'semi-autobiographical' work in *Monolingualism of the Other*[31] – involves a radical interrogation of the foundations and legitimations of Western philosophy, understood as the basis of Western culture.[32] Read from a post-colonial viewpoint, it denaturalises the colonial assumptions of modernity within hegemonic texts. This is evident in the work of post-colonial critics, including Spivak and Bhabha, who have drawn on and extended Derrida's revision of Eurocentric, Western philosophy. It therefore seems timely to deploy this work in a reassessment of hegemonic (post-)colonial

legal and political narratives. Most importantly, however, this book foregrounds strategies of *writing* (in both senses) and relies on a process of active close reading in order to do this. I therefore align myself with cultural work such as Peter Hulme's, which:

> work[s] to identify key locations in a text . . . where the text stutters in its articulation, and which can therefore be used as levers to open out the ideology of colonial discourse, to spread it out . . . in an act of explication.[33]

This should not be understood as attempting to posit the 'truth' of the several documents on which I focus, but rather to foreground their difference without closing down the possibilities for other interpretations.

Scope of the project

I have limited myself to analysing cases taken from Britain's former white dominions. One of my reasons for doing so is to make visible a transnational white diaspora. Additionally, as post-colonial critic Ella Shohat points out, analysing the colonies of the former British empire is not a uniform 'post-colonial' process:

> [t]his problematic formulation collapses very different national–racial formulations – the United States, Australia, and Canada, on the one hand, and Nigeria, Jamaica, and India, on the other – as equally 'post-colonial'.[34]

Analysing the post-colonial state arrangements of Britain's former colonies in Asia and Africa would therefore involve different questions. In addition, I have not explored the constitutional arrangements of Southern Rhodesia (now Zimbabwe) or the Republic of South Africa, because I am concerned with those countries in which the history of the nation is perceived as very much 'settled' within a predominantly 'white' framework.

I have selected Ireland, Aotearoa New Zealand and Australia for analysis in order to consider the establishment and naturalising of current state arrangements as an expression of the nation as part of a white, British diaspora. The focus for this is, therefore, the legal and political constitutions from the former dominions or what can be termed 'settler societies'.[35] While apparently anomalous, the relationship between Protestant and Catholic Ireland in both pre- and post-independence configurations of the nation works within a 'settler' paradigm.[36] In Australia and Aotearoa New Zealand, 'settler' and 'indigenous' still form a conventional binary opposition by which to define the nation and its history. All three countries still operate within a legal and political framework defined by English common law.

Current challenges to existing national narratives precisely aim to 'unsettle' previously settled conceptions of the nation, as well as the motivations for, and forms of, settlement.

Canada provides another fascinating example of not only alternative and plural Indigenous narratives, but also contrary European traditions in the political inheritance of its Francophone population. Now comprehending three separate territories in its federal structure, with the separate national assembly (and proposed secession) of the province of Québec and the establishment of the Inuit territory of Nunavut on 1 April 1999,[37] what constitutes Canada as a unified nation raises different and conflicting questions concerning not only political sovereignty, but also race and empire. Historian John Pocock also makes the point that 'Canada' is a 'special case' among the former white dominions:

> since its European settlement originates in the early seventeenth century and its eastern structure is a product of the French and American wars of the eighteenth. No less a product of the American secession than is the United States, it is situated within the North American history into which streams of British emigration flowed, and to enclose it with other Dominions within 'Commonwealth history' is to tell only part of its story.[38]

Comparative work that draws out the similarities and differences between Canada and other former British dominions has already begun. Ken Coates and Paul McHugh's book, *Living Relationships: Kōkiri Ngātahi: The Treaty of Waitangi in the New Millennium*, compares the Treaty of Waitangi to North American treaties with Indigenous peoples and how the subsequent 'settlement' processes in both Canada and Aotearoa New Zealand aim to redress past wrongs.[39] Kathleen Hazelhurst's collection, *Legal Pluralism: Indigenous Experiences of Justice in Canada, Australia and New Zealand*, draws comparisons between these three countries within the framework of the international Indigenous rights movement.[40] I think, however, the complications and ramifications presented by French imperialism to narratives of colonial encounters between British and Indigenous peoples are difficult to address. In critically rereading constitutional texts in a new way, I have restricted myself to nations in which there is – very generally speaking – one dominant narrative of the (white) nation interrogated by counter-narratives. This should not be understood as constituting only two discrete narratives or as claiming that these two narratives are the only ways to configure the nation. Rather it is about opening up alternative routes within the hegemonic narratives of the nation.

Constitutions, then, takes the form of a series of comparative readings of the constitutional and foundational texts of Ireland, Aotearoa New Zealand, Australia and Britain within a post-colonial framework, specifically situating

these documents as part of a white, British diaspora. Despite the adjective 'white', this diaspora should not solely be understood in racial terms. Rather this term signals that each nation state has been established in a relation with British constitutionalism and common law; these institutional apparatuses systematically privilege a white, male legal subject. The comparative aspect of the book therefore allows for reflection on the similarities between each configuration of the nation and how, thought of as a diaspora, they participate in a transnational discourse on the nation. Comparison also allows for analysis of local and historical particularity and the ways in which supposedly universal configurations of the nation rely on culturally specific ideas to legitimate themselves: the structure of the book is precisely national, in order to emphasise difference, rather than thematic, which tends to collapse difference in preference to similarity.

Comprising four case studies, this book explores new ways of thinking about nations and constitutions. While there are many works on the Easter Proclamation, the Treaty of Waitangi and the *Mabo* decision – both within and without their respective nations – I read them not as closed, legal and historical documents, but as cultural texts. Some work of this kind has already been undertaken, particularly in relation to Ireland. Liam de Paor opens out the text of the Easter Proclamation to show how it is 'intertextually' constructed, while Patrick Hanafin seeks to analyse the Irish Constitution as a cultural document.[41] Taking examples from British imperial expansion, I examine the constitutional documents of Ireland, Aotearoa New Zealand and Australia in the first three case studies. My final chapter, however, represents a 'twist in the tale', as I interrogate the notion that Britain's constitution, by contrast with the others, remains 'unwritten'.

My readings of key constitutional texts open out into different trajectories in each chapter. In Chapter 3, I analyse how The Proclamation of *Poblacht na h Eireann*: The Provisional Government of the Irish Republic to the People of Ireland (1916) – read out during the course of the 1916 Easter Rising – signifies culturally as a foundational text in the Republic of Ireland, while projecting a unity, 'Ireland', that the Republic has yet to attain. I read the Proclamation in relation to both historical representations of the Easter Rising as a foundational event and the textual genealogy of constitutional documents – from the 1919 Declaration of Independence to the 1937 Constitution, including the latter's amendments in light of the 1998 Good Friday Agreement. The Proclamation authorises its signatories to sign in the name of a people that it itself constitutes. It also, however, provides an ambivalent answer to the question of what constitutes the nation, and the people, of Ireland. Using Julia Kristeva's theorisation of the abject, I examine how the nascent nation is characterised as an imagined maternal body, an object of both fear and fascination: this body demands blood sacrifice in order to constitute the subjectivity of a new political entity – the republic. This reference to blood, which Kristeva has described as abject, opens the polemical

text of the Proclamation to a reading of the foundational violence it also engenders, as well as the tensions between differing definitions of what the nation is. Reading the Proclamation in relation to the abject, I argue that Northern Ireland appears in an analogous way to both the Republic and Britain, remaining not quite part of one or the other. In light of British imperial expansion, however, 'Ireland' (understood as both the Republic and Northern Ireland) also functions as abject. It is perceived as both part of Europe and, thus, an 'old world' nation that played a part in colonising the so-called new world, yet also part of the decolonising world, as its nationalist mythologies attest.

In Chapter 4, I examine the Treaty of Waitangi, *Te Tiriti o Waitangi*, as the founding document of Aotearoa New Zealand. Signed in 1840, between Māori chiefs representing some of the tribes of Aotearoa New Zealand and representatives of the British Crown, the Treaty has been read in a contradictory fashion as guaranteeing *both* Māori self-determination *and* British sovereignty. This text both constitutes and contests a unified definition of the nation, prompting a search for transcendent meaning in which the nation could make sense of itself as a just and equitable relationship between two peoples. I examine how the Treaty relies on an opposition between speech and (graphic) writing. Existing in two languages and several versions of each, the Treaty is caught in a problematic of translation that attempts to posit the Treaty's 'true' non-contradictory meaning. Translation not only refers to the movement between the two languages, Māori and English, but also between two incommensurable cultural narratives of origin and law. Attempts to reconcile these narratives have posited a just *telos* for the nation – but these quests for unity, envisaged as partnership, often still have the effect of reinscribing the legitimacy of current state arrangements.

Chapter 5 discusses the 1992 *Mabo* decision as a potential *re*constitution of both the Australian nation and its history. Unlike the Republic of Ireland's Constitution, the Constitution of the Commonwealth of Australia situated Australia firmly within the empire, passing into law in 1901 as an Act of Parliament of the United Kingdom. Constituting Australia within a British framework, this text does not recognise any prior rights of Indigenous Australians to the land and effectively writes them out of the nation it constitutes. Immediately following this, the newly sovereign nation legislated for a racially 'pure' society by introducing a series of Acts that are known collectively as the 'White Australia' policy. The 1992 *Mabo* decision – which set a legal precedent recognising these prior land rights and discrediting the foundational fiction of *terra nullius* (land belonging to no one) – generated a great deal of controversy, which has served to destabilise ideas about what might constitute Australian national identity. The effect of these attempts at reconstitution, and the subsequent controversy surrounding them, is to render both the nation and its history 'uncanny'. This 'uncanny' effect signifies an anxiety regarding origins. The *Mabo* decision attempts to arbitrate between

incommensurable narratives of origin and, in so doing, due to its passage through the High Court, reinscribes the origin of British Australia and the hegemonic structures that support it.

The final chapter focuses on contemporary Britain in its 'post-imperial' moment, examining what it means to constitute Britain as a nation in the aftermath of decolonisation. Unlike most of its former colonies, Britain does not have a formal written constitution or foundational document, instead drawing on 'immemorial' principles of common law and documentary concessions of sovereignty that can be traced back to Magna Carta. This charter, in conjunction with the 'unwritten' rule of law, became a crucial juridical component of the colonising process and, in turn, of the establishment of 'post'-colonial constitutions. This debt is particularly 'self-evident' in the Constitution of the USA, as Lincoln Castle's Magna Carta exhibition and various Anglo-American commemorative events attest.

Using the US documents as reference points, I argue that the British constitution is not only retroactively constituted as 'unwritten', but also haunts subsequent written constitutions. Furthermore, contemporary debates over British and imperial history manifest an anxiety about the nation and where its unity might be located. I argue that Britain's unwritten constitution performatively constitutes an 'unwritten' national identity that can be traced in national discourse. I therefore refer to 'Britain', rather than 'Great Britain' or the 'United Kingdom', throughout this chapter. To hold onto 'Britain', and the adjective 'British', is to chart a shift in its national and imperial significations. Ireland, Australia and Aotearoa New Zealand have all been comprehended under this term, signalling either a racial or a governmental link, or both. Indeed, historians Carl Bridge and Kent Fedorowich argue that, despite the end of the empire, these and other countries still operate within the frame of a 'British world'.[42] Similarly, Pocock has sought throughout his career to expand the notion of 'British' history beyond the confines of what he terms 'the Atlantic archipelago'.[43] The imperial nomination 'British' has had to be re-conceptualised as a national description, yet it cannot map onto the constituent parts of the United Kingdom in a seamless fashion.

Why it matters

Lincoln Castle's Magna Carta has visited the USA and some of Britain's former dominions. It has participated in commemorative celebrations for the foundations of modern nations: the Bicentennial of the US Declaration of Independence and the Australian Bicentenary. Magna Carta's localised and historically specific concessions to aggrieved barons have been hailed as the cornerstones of specifically English liberties and the rule of law. The appropriation of this medieval document through the seventeenth and eighteenth centuries, into the twenty-first, in Britain and around the world, attests to the fact that written documents can resignify in the absence of both original

author and audience. It also attests to the fact that each rereading of such documents reconstitutes both the text and the nation it founds for a contemporary audience. The question of how and why we read thus has *active* consequences for the nations that we, as national subjects, constitute, and by which 'we' are constituted.

Notes

1 I visited the Magna Carta Exhibition at Lincoln Castle on 3 July 2005.
2 R Davis (ed), *Magna Carta: Icon of Liberty*, 1988, Lincoln: Dean and Chapter of Lincoln.
3 Davis, *Magna Carta*, p 10. Pauline Maier recounts the transportation of the US Constitution and Declaration of Independence to Fort Knox in a lively way in the 'Introduction' to her cultural history of the latter document: P Maier, *American Scripture: Making the Declaration of Independence*, 1997, New York: Vintage, p xii.
4 Information concerning Magna Carta/USA week comes from the City of Lincoln Council website, accessed 19 July 2005, available online at http://www.lincoln.gov.uk/ news_det.asp?id=6442&sec_id=468.
5 The 'Charters of Freedom: A New World is at Hand' exhibition can be found on the US National Archives & Records Administration website, accessed 1 August 2005, available online at http://www.archives.gov/national-archives-experience/charters/charters.html. Indeed, the importance of Magna Carta in the USA is such that the American Bar Association established a monument at Runnymede in 1957.
6 Maier, *American Scripture*, p xv.
7 All of the various definitions of the word 'constitution' in this paragraph are drawn from the *Oxford English Dictionary*, accessed 5 September 2002, available online at http://www.oed.com/.
8 J L Austin, *How to Do Things With Words: The William James Lectures Delivered at Harvard in 1955*, 2nd edn, 1975, Cambridge, MA: Harvard University Press, pp 6–7.
9 Austin, *Words*, p 8.
10 S Deane, *Strange Country: Modernity and Nationhood in Irish Writing since 1790*, 1997, Oxford: Clarendon Press, pp 1–2.
11 E Renan, 'What is a Nation?' in *The Poetry of the Celtic Races and Other Studies by Ernest Renan*, W G Hutchinson (trans), 1896, London: Walter Scott, pp 61–83. (pp 62–3). This essay is reproduced in H Bhabha (ed), *Nation and Narration*, 1990, London and New York: Routledge.
12 Renan, 'Nation', p 80.
13 H Bhabha, 'Introduction: Narrating the Nation', in *Nation and Narration*, pp 1–7 (p 1).
14 Definition of 'nation' from the *Oxford English Dictionary Online*. accessed on 9 September 2002, available online at http://www.oed.com.
15 T Nairn, *Faces of Nationalism: Janus Revisited*, 1997, London and New York: Verso, p 13.
16 L Althusser, 'Ideology and Ideological State Apparatuses (Notes Towards an Investigation)', in *Lenin and Philosophy*, B Brewster (trans), 1971, London: New Left Books, pp 122–73 (p 150).
17 B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev'd edn, 1991, London and New York: Verso, p 6.

18 Anderson, *Imagined Communities*, p 6.
19 See for example V A Tishkov, 'Forget the "Nation": Post-Nationalist Understanding of Nationalism', 2000, *Ethnic and Racial Studies*, 23:4 (July), pp 625–50. Tishkov's assertion does have a political aim, particularly in relation to the countries of the former Soviet Union. She urges scholars to 'forget the *nation* to save states, peoples and cultures, even if future scholars may question these definitions as well' (p 647).
20 See, for example, P Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse?*, 1986, Delhi: Oxford University Press.
21 J-F Lyotard, 'Answering the Question: What is Postmodernism?' in *The Postmodern Condition: A Report on Knowledge*, G Bennington and B Massumi (trans), 1984, Manchester: Manchester University Press, pp 71–82. This phrase is elsewhere translated as 'activate the differends'. See Lyotard, 'Answer to the Question: What is the Postmodern?' in J Pefanis and M Thomas (eds and trans), *The Postmodern Explained to Children: Correspondence 1982–1985*, 1992, London: Turnaround, pp 9–25. This has the stronger sense of differences as incommensurable and more directly links to Lyotard's major work, *The Differend: Phrases in Dispute*, G van den Abbeele (trans), 1998, Minneapolis: University of Minnesota Press. In this work, Lyotard argues: 'a differend would be a case of conflict between (at least) two parties, that cannot be resolved for lack of a rule of judgement applicable to both arguments. One side's legitimacy does not imply the other's lack of legitimacy.' (p xi)
22 C Belsey, 'Reading Cultural History', in T Spargo (ed), *Reading the Past: Literature and History*, 2007, Basingstoke and New York: Palgrave, pp 103–17 (p 114).
23 J Derrida, *Of Grammatology*, G C Spivak (trans), rev'd edn, 1997, Baltimore: Johns Hopkins University Press, p 158.
24 Derrida, *Of Grammatology*, pp 158–9.
25 J Derrida, 'Living On: Borderlines', in P Kamuf (ed), *A Derrida Reader*, 1991, New York: Columbia University Press, pp 256–68 (pp 256–7).
26 Derrida's reconfiguration of writing – especially his deconstruction of the opposition between speech and writing within Western thought that privileges the former as closer to truth – recurs throughout his work. See especially, *Of Grammatology; Writing and Difference*, A Bass (trans), 1978, London and New York: Routledge; *'Speech and Phenomena' and Other Essays on Husserl's Theory of Signs*, D B Allison (trans), 1973, Evanston, IL: Northwestern University Press; *Dissemination*, B Johnson (trans), 1981, Chicago: The University of Chicago Press; *Limited Inc*, S Weber and J Mehlman (trans), 1997, Evanston, IL: Northwestern University Press.
27 Bhabha, 'The Postcolonial and the Postmodern: The Question of Agency', in *The Location of Culture*, 1994, London and New York: Routledge, pp 171–97 (p 183).
28 Bhabha, 'Postcolonial', p 177.
29 J Habermas, 'Modernity: An Incomplete Project', in T Docherty (ed), *Postmodernism: A Reader*, 1993, New York: Columbia University Press, pp 98–109.
30 See I Ward, *Law and Literature: Possibilities and Perspectives*, 1995, Cambridge: Cambridge University Press, p 3. Chapter 1, 'Law and Literature: A Continuing Debate', outlines the position taken by various scholars in their analyses of 'law *as* literature' and/or 'law *in* literature'.
31 J Derrida, *Monolingualism of the Other or the Prothesis of Origin*, P Mensah (trans), 1998, Stanford, CA: Stanford University Press.
32 See R Young, *White Mythologies: Writing History and the West*, 1990, London

and New York: Routledge. Young's more recent reader, *Postcolonialism: An Historical Introduction*, 2001, Oxford: Blackwell, includes a chapter on 'post-colonial Derrida', entitled 'Subjectivity and History: Derrida in Algeria' (pp 411–26), in which he apostrophises Derrida thus: 'I knew it all along, for you showed it to me in your writings from the first: whereas other philosophers would write of "philosophy", for you it was always "western philosophy". Whiteness, otherness, margins, decentring: it was obvious to me what you were up to, what possibilities you were striving towards, what presuppositions you were seeking to dislodge.' (p 412)

33 P Hulme, *Colonial Encounters: Europe and the Native Caribbean 1492–1797*, 1986, London and New York: Methuen, p 12.

34 E Shohat, 'Notes on the "Post-Colonial" ', in P Mongia (ed) *Contemporary Post-Colonial Theory: A Reader*, 1996, London and New York: Arnold, pp 321–34 (p 324).

35 D Stasiulis and N Yuval-Davis (eds), *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class*, 1995, London: Sage.

36 Claire Carroll also takes this view in her 'Introduction: The Nation and Postcolonial Theory', in C Carroll and P King (eds), *Ireland and Postcolonial Theory*, 2003, Cork: Cork University Press, pp 1–15: 'Since in the North of Ireland the majority of the population is made up of descendants of settlers, Ireland conforms at least in part to the model of Canada and Australia.' (p 8)

37 The Inuit territory of Nunavut – meaning 'Our Land' in the Inukitut language – was initially proposed by the Inuit Tapirisit of Canada in 1976 and ratified by plebiscite in what is now Nunavut in 1992. See the Nunavut Kavamat/Government of Nunavut/Gouvernement du Nunavut website, accessed 17 May 2004, available online at http://www.gov.nu.ca/.

38 J G A Pocock, 'The Neo-Britains and the Three Empires', in *The Discovery of Islands: Essays in British History*, 2005, Cambridge: Cambridge University Press, pp 181–98 (p 188).

39 K S Coates and P G McHugh, *Living Relationships: Kōkiri Ngātahi – The Treaty of Waitangi in the New Millennium*, 1998, Wellington: Victoria University Press.

40 K M Hazelhurst (ed), *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand*, 1995, Aldershot: Avebury; J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, 1995, Cambridge: Cambridge University Press. See also Stasiulis and Yuval-Davis (eds), *Unsettling Settler Societies*.

41 L De Paor, *On the Easter Proclamation and Other Declarations*, 1997, Dublin: Four Courts Press; P Hanafin, *Constituting Identity: Political Identity Formation and the Constitution in Post-Independence Ireland*, 2001, Aldershot: Ashgate.

42 C Bridge and K Fedorowich, 'Mapping the British World', in C Bridge and K Fedorowich (eds), *The British World: Diaspora, Culture and Identity*, 2003, London: Frank Cass, pp 1–15.

43 See the collected essays, including 'British History: A Plea for a New Subject' in Pocock, *Discovery*.

Chapter 2

Theorising constitutional texts

'We hold these truths to be self-evident' – so proclaims the US Declaration of Independence, at once referring outside itself to an apparently 'unwritten' set of truths concerning right relations in a community and constituting in writing what exactly these truths were. A deployment and disavowal of writing thus occurs simultaneously. Such a contradictory relationship to writing is indicative of the ambivalence that structures the constitutional texts that performatively call nations into being. An apposite place to begin theorising such texts is with the notion of 'self-evidence'. 'Self-evidence' alludes to an empiricism that, as I will explore further in Chapter 6, is a fundamentally *British* philosophical tradition and mode of discourse: it relates very specifically, for example, to the 'unwritten' British constitution.

Broadly, empiricism supposes human nature to be a *tabula rasa*, an unwritten 'blank slate' that is imprinted with the knowledge gathered about the world experienced by the senses. Rather than relying on abstract deduction, empiricism relies on induction in order to constitute who 'we' are: we can only know what we experience and we only experience what is there, rather than what we think or deduce is there. Empiricism is pragmatic and practical, relying on 'common sense' to discern self-evident truths about the world.[1] British diasporic constitutional texts are characterised by empiricist discourse, which deploys bodily metaphors and anthropomorphic language based on the senses – including such verbs as 'seeing', 'feeling', 'thinking' and 'holding' – to naturalise specific instances of graphic writing.[2] Such writings are underwritten by an 'unwritten' human nature. Examining how writing configures and naturalises the 'body politic' in the work of influential empiricist philosophers John Locke and David Hume, as well as that of other significant political theorists and philosophers, we can begin thinking about how constitutional texts might work in the context of a British legal and political diaspora.

How do constitutional texts work?

The subtitle of this book is 'writing nations, reading difference'. In order to 'read difference', or, indeed, read differently, we need to theorise both what

writing and what nations might be, rather than to understand them solely in a 'common-sense' fashion. Might there be tensions and problems with these concepts that open up alternate routes for different reading practices?

Both the Lincoln Castle Magna Carta exhibition and the 'Charters of Freedom' display at the US National Archives in Washington DC recognise, reaffirm and repeat the centrality of foundational, or what I have termed 'constitutional', texts in modern Western culture. Such documents serve to constitute modern nation states, constituting a collective subject by means of graphic writing. Written constitutional documents performatively call new nations into being, defining their origins, boundaries, laws and history.

In his essay 'Declarations of Independence', Jacques Derrida analyses the ways in which the performative text of the US Declaration of Independence has a self-legitimating, constitutive effect upon the nation – and 'the people' – that it founds. Derrida points out that 'the people' (understood not as all of the inhabitants of the continental United States of America but as the white settlers framing themselves within an established English constitutional discourse) – the collective subject that authorised its representatives to sign – did not exist as an entity prior to the appending of signatures to this document. It is the signature that authorises the signer and gives him/her the right to sign, and to do so in the name of others:

> [t]his signer can only authorize him- or herself to sign once he or she has come to the end, if one can say this, of his or her own signature, in a sort of fabulous retroactivity.

Just as there was no signer before the text, so the text 'itself remains the producer and guarantor of its own signature'.[3]

Furthermore, this text and its signatures will continue to signify, in the absence of its signer, as a representation of the founding moment of the nation. As the originary moment is commemorated in the text, it is also separated from that moment, and both requires and creates an archive to preserve the event by which the new entity is established. The text witnesses the event after the fact; the instant of constitution is fleeting and past. Yet, at the same time, it remains always to come, containing a promise of the newly constituted nation in the future. Thus, the signature is haunted from both the past and the future, at once archiving the origin of the nation and heralding a new entity yet to come beyond its name that will assume the unity it promises.

Derrida's brief essay, then, usefully stages the important axes that need to be considered when theorising how constitutional texts work. Writing in constitutional texts acts performatively, as its effect coincides with its inscription. The signature, in particular, functions as a rhetorical trope, metonymically standing in for 'the people'. It also authorises the text and thus has a legitimating effect, providing a point of origin for the establishment of new

laws and government. At the same time as the text acts in the name of 'the people', it constitutes this group as a discrete collective subject. It does so by textualising and representing the unpresentable foundational event. In doing so, the text also functions as a historiographic narrative, and the starting point for other histories. It has an uncertain temporality, both inaugurating future histories and performing its own historiographic gloss on the past. Finally, such texts mark a rupture in imperial configurations, declaring by force a separation from their sovereign power and the establishment of a new nation, yet also, simultaneously, drawing on the laws and constitutional traditions of this sovereign power. In turn, the text establishes a legal diasporic tradition of its own, which would later influence and inform colonial and post-colonial constitutions.

These written texts, like all writing, are therefore much more than *aides-mémoire*. They actively constitute and shape the laws, the history and the subjectivity of a nation. The establishment of a nation as a system of cultural significations by way of a written text means that this text can be rewritten and reinscribed in relation to what the nation is *now*. That is, it can reinscribe, and be reinscribed with, the ways in which the collective subject signifies at a given time.

The need, then, to set down formally in writing either a rupture from, or alliance with, a sovereign power in the form of declarations of independence, treaties, and constitutions signals a break, as the 'family ties' that are held to bind a community together and constitute its common myth of origin are, respectively, erased or reconfigured. These texts in turn help constitute a new body politic and establish a new narrative of origin – or history – for that nation. Similarly, legal decisions and new political arrangements have a constitutive effect. The modern nation-state as collective subject is constituted by texts that write its body and identity into being in a performative manner. Furthermore, such texts establish the ideal underpinnings of the new state, which interpellates the subjectivity of its citizens in such a way that their own identity is dependent on, and defined by, the dominant ideology in which they live. So, for example, the Irish Proclamation of Independence – as discussed in Chapter 3 – and subsequent Constitution continue to define Irishness in reference to the whole island, to the Catholic church and to a Celtic past. Similarly, the adjective 'Australian', established by the 1901 Constitution, continues to exclude Indigenous peoples from the hegemonic narrative of the nation (as I discuss further in Chapter 5).

With Derrida's reading of the US Declaration in mind, the current chapter will explore different, sometimes disjunctive, ways in which these constitutional texts can be theorised. I begin by assessing recurrent tropes in Western political philosophy concerning nations as 'bodies politic' and constitutions as analogous to religious covenants, strengthening the reiterations of body and soul as constitutive of subjectivity. Second, I examine ideas about how subjectivity is constituted, both individually and collectively. In

Western constitutional texts, the individual human subject provides both the model and guarantee for the collective subject of the nation and 'the people'. Third, the discussion of recurrent metaphors and religious analogies will open onto a discussion of writing in general and how it works to constitute subjects. I then consider a specific type of writing, historiography, or the 'writing of history', and examine the ways in which a foundational moment works to legitimate constitutions. Finally, I look at the ways in which legal and political documents work not only to constitute individual nations, but also as legal and political diaspora that exceeds any one discrete nation.

Metaphors

In considering the consequences of the idea that philosophy is a written discourse that 'forgets' or effaces its own textuality, Derrida urges the study of the formal aspects of the philosophical text:

> A task is then prescribed: to study the philosophical text in its formal structure, in its rhetorical organization, in the specificity and diversity of its textual types, in its modes of exposition and production – beyond what were previously called genres – and also in the space of its mises en scène, in a syntax, which would be not only the articulation of its signifieds, its references to Being or to truth, but also the handling of its proceedings, and of everything invested in them. In a word, the task is to consider philosophy also as 'a particular literary genre', drawing upon the reserves of a language, cultivating, forcing, or making deviate a set of tropic resources older than philosophy itself.[4]

With minor modifications, Peter Goodrich adapts this task to the study of legal texts,[5] and it can likewise be deployed in the study of constitutional texts. The first phase of reading difference in constitutional texts is to attend to the ways in which the text is written and organised. On what literary techniques does it rely? What 'extra-textual' guarantees work to legitimate it? How is constitutional status conferred? I begin my analysis by examining two key tropes that inform the discourse of modern constitutionalism: bodies politic and religious covenants.

Bodies politic

The representation of a nation as a 'body politic', using corporeal metaphors, is common to many philosophers, from Plato to Derrida. Superficially, this may seem an anachronistic and linear progression, especially since the idea of 'nation' is relatively recent. Moreover, Plato's *Republic*, along with Aristotle's model of Athenian democracy,[6] are more usually thought of as models for

state arrangements. There is, however, an overlap between the nation, state and body politic, at the level of metaphor and trope. As Derrida has argued throughout his work, the tropes that characterise Western philosophy – particularly the privileging of speech over writing – can be located in works from Plato onwards. These 'pre-modern' origins lend authority to 'modern' reinterpretations that, in turn, retroactively constitute them as philosophical antecedents.

In *Republic*, Plato describes an ideal community in order to outline how a moral individual should act:

> morality might exist on a larger scale in the larger entity . . . we can examine individuals [as well as communities] . . . to see if the larger entity is reflected in the features of the smaller entity.[7]

The members of this community make up the limbs of the body with their guardians as its head, while threats to the order of the community, such as war and lawlessness, are described as disease or illness. The body is envisaged as a unified organism, in which all of the parts work together to provide a harmonious community.

Seventeenth- and eighteenth-century philosophers also noted that the parts of this imagined body were to work together for the benefit of the whole. Echoing Plato, John Locke observed that:

> Government [is] for the benefit of the Governed, and not the sole advantage of the Governors (but only for theirs with the rest, as they make a part of that Politick Body, each of whose parts and Members are taken care of, and directed in its peculiar Functions for the good of the whole, by the Laws of the Society).[8]

Such body imagery was also common to Locke's more immediate precursor, Thomas Hobbes, who famously described the state as a body with the sovereign, more specifically an absolute monarch, as its head, anatomising it thus:

> *Sovereignty* is an artificial soul, as giving life and motion to the whole body; the *magistrates* and other *officers* of judicature and execution, artificial *joints; reward* and *punishment* . . . are the *nerves*, that do the same in the body natural; the *wealth* and *riches* of all the particular members are the *strength; salus populi* (the people's safety) its *business; counsellors*, by whom all things needful for it to know are suggested unto it, are the *memory; equity* and *laws*, an artificial *reason* and *will; concord, health; sedition, sickness*; and *civil war, death*. Lastly, the *pacts* and *covenants* by which the parts of this body politic were at first made, set together, and united, resemble that *fiat*, or the *let us make man*, pronounced by God in the creation.[9]

While the state is naturalised as a body, its workings are marked as artificial. Hobbes is careful to distinguish the artificial creation of men from the natural one of their Creator. The last assertion, however – that the pacts and covenants by which the body politic was first made resemble God's original performative speech act – describes these pre-literate pacts as analogous not only to the creation of God but also to his covenant with his chosen people. The binary opposition created here between natural and artificial maps onto that constructed between speech and writing. The latter is viewed as the artificial representation of the former. This opposition again signals a contradiction between nature and culture. Hobbes constructs his narrative of the creation of the 'commonwealth' out of a state of nature, yet represents its growth as organic and legitimate precisely *because* its functioning is thought to be analogous to that of the human body.

An opposition between the natural and artificial is again demonstrable in the writing of the eighteenth-century philosopher Jean-Jacques Rousseau, who envisaged the nation not as a static, fully formed individual, but rather one that is born, grows old and eventually dies. The individual's biography thus becomes the model of the nation's history. In *The Social Contract*, Rousseau observed:

> The body politic, no less than the body of a man, begins to die as soon as it is born, and bears within itself the causes of its own destruction. Either kind of body may have a constitution of greater or lesser robustness, fitted to preserve it for a longer or shorter time. The constitution of a man is the work of nature; that of the state is the work of artifice.[10]

Although the state or the body politic is represented as artificial, and hence inferior to the natural creation of God, it still depends upon this originary natural metaphor for its authority. Although it is 'self-evidently' a human construct, it can, nonetheless, be justified as the correct model for a community because it can be shown to work in an analogous way to the human body. Rousseau's philosophy again constitutes a familiar binary opposition between nature and culture in which the former term is privileged.

For Hobbes, Locke and Rousseau – key philosophers in the dissemination of ideas on modern collectivities – the origins of the 'body politic' are traced in nature: a nature, moreover, created by God. Simultaneously, by conceiving of the links between members of a community as emanating from the 'general will' or the 'social contract', they draw an analogy with God's covenants with his chosen people. Although covenant traditions are not limited to Christianity, I indicate below why this analogy helps constitute not only a Western tradition of nation building, but also one that is guaranteed by the writings of the Christian tradition. It is by relying on the 'social contract' tradition and drawing on archived religious covenants that modern

constitutional texts construct a messianic and transcendent idea of the nation as a unity – perceived to be lost – that might once again be attained. Such a teleological narrative of the nation finds its echo and guarantee in the Biblical narrative of the expulsion from Eden, as the loss of both paradise and God's grace. Unity and innocence are lost, but are thought to be regained, through Christ's sacrifice, at the Last Judgement.

Religious covenants

By looking back to contracts of religious promise, constitutional texts herald a 'nation-to-come' that is haunted by pre-originary narratives of origin. Indeed, Hobbes noted that the 'seed of religion having been observed by many, some of those that have observed it have been inclined thereby to nourish, dress and form it into laws'.[11] A religious idiom therefore persists, despite the sometimes deliberately secular tone of modern constitutional texts. The 'original' Old Testament covenant provided God's chosen people with a promised land, yet at the same time constituted a drive for both self-protection (from those who were not chosen and were thus external threats) and sacrificial self-destruction (purging oneself of internal others in a necessary sacrifice in order to keep the covenant). Those 'chosen people' were thus marked out, first by circumcision and then by baptism, as adherents to the covenant between God and his people. The idea of a 'chosen people' helped legitimate the imperial British mission to civilise and settle the so-called new world. This narrative might also be appropriated, however, by Indigenous peoples. The settler government in Aotearoa New Zealand, for example, was referred to as 'Pharaoh' by Māori leaders such as Te Kooti and Te Ua Haumene, both of whom strategically aligned themselves with the Jews of the Old Testament. In a similar vein, the Treaty of Waitangi was perceived as – and is still referred to – as a 'covenant'.[12]

The three major covenants made in the Old Testament differ in one crucial way. The first covenant, which God makes with Noah, is a verbal agreement only. The sole sign of this covenant – a rainbow – takes the form of a kind of 'memory aid'. As the contract is not written, it resides in the (living) memory and the spoken promise. The Abrahamic covenant likewise takes the form of a verbal oath, which is this time signed on the body of all males in the form of circumcision. Circumcision becomes a metaphor for the covenant. By contrast, the Mosaic covenant, while still first verbalised, is inscribed on two stone tablets and establishes a system of laws by which the covenant should be upheld.[13] The 'original' covenant is represented and recorded in writing. The writing of laws thus supplements the verbal covenant, and threatens to replace it.

These covenants conventionally form a model for the modern constitutional tradition. The first and 'original' covenant is perceived as 'pre-literate'. Due, however, to violations of this covenant, the law is subsequently

inscribed on stone tablets in order to preserve and apparently stabilise it. All *three* covenants are known, however, only from the written texts that describe them. These written texts represent the making of covenants and giving of laws in the form of narratives, narratives that establish origins and order cultural systems. In his essay 'Nomos and Narrative', Robert Cover observes:

> No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.[14]

Law, as a specific form of writing, is one of the many cultural institutions that constitute individual and collective subjectivity.

Subjectivity

In his study of the bodily metaphors deployed throughout legal practice, *Bodies of Law*, Alan Hyde quotes Michel de Certeau:

> there is no law that is not inscribed on bodies. Every law has a hold on the body . . . every power, including the power of law, is written first of all on the backs of its subjects.[15]

Hyde's study examines the ways in which bodily discourses impact on real bodies, subjecting them to the legal force of the state in the form of search warrants, privacy laws and specific cases. I wish, however, to paraphrase Certeau's statement slightly: every power (including law) is written on, and by, its subjects. Individual subjectivity is constituted by, and in, culture, most particularly by language. Grammatically, a subject is what speaks and says 'I': it is the agent in a sentence, proclaiming its mastery over the verbs and objects that follow it. Individual subjectivity is thus inhabited as apparently unitary and autonomous. This coherence and mastery is also, however, an effect of language. The 'I' coheres disparate subject positions, including those of race, nationality, gender and sexuality. These subject positions are neither coherent, nor equally insistent at a given time; indeed, as I demonstrate throughout this book, some subject positions come into conflict with others. Because of these conflicts, uncertainties and contradictions, a subject can be viewed as differed from itself: it does not add up to one unified and consistent whole. Bodily organisms are inextricably imprinted, or 'written', with the norms of their particular culture, language and law. The subject is thus also subject to the cultural and linguistic norms that prescribe how these are configured at a particular cultural and historical moment; these norms precede the birth of a child and are learned as the child acquires language.[16]

The use of bodily metaphors, in particular to constitute the model of a community, by many political philosophers is not, then, accidental. As Hobbes observed, 'men measure, not only other men, but all other things, by themselves'.[17] Using the body as a metaphor links the collective subject of the 'we' inextricably to the 'I' of the individual subject. The 'I' is not, however, simply randomly subsumed into the 'we'; instead, the 'we' is an entity to which the 'I' is linked by, among other things, language, ethnicity, and customs in common. This 'we' draws on an archived rhetoric of blood ties and genealogical links to bond the community together, establishing a familial discourse on the nation. This discourse simultaneously constitutes that which is familiar, a place where 'we' belong, and also the threatening space of the other. In fact, the family and familial images dominate the 'nation', in both its dissemination and its reproduction over a long period of time. Plato, for example, asserts that a community must regard its country as mother and nurse,[18] while Hobbes views colonisation as a means of procreating the original community.[19] These colonial 'children' in turn constitute an 'original' community. The spread of this metaphorical family is traced as a white, British diasporic process throughout this book, which primarily foregrounds difference in terms of indigeneity and empire.

Psychoanalytic theories of subject formation, which also rely on familial metaphors, can therefore be usefully brought to bear on this analysis. The collective subject, envisaged as a body, is linked to the development of the individual human subject. The nation does not so much parallel the individual's development, as Rousseau observed, but is rather constitutive of its subjectivity, normalising and subjecting the body of the individual to its laws and customs. As Louis Althusser has argued, '*the category of the subject is only constitutive of all ideology insofar as all ideology has the function . . . of "constituting" concrete individuals as subjects*'.[20] This mutual constitution depends on a recognition factor that can be related to psychoanalyst Jacques Lacan's theories of human development.

Lacan proposed that the individual subject first envisages its own body as a unified whole during 'the mirror stage'.[21] A child, seeing its own reflection in a mirror, recognises itself in the discrete and coherent functional entity it finds there. This recognition, however, is simultaneously a misrecognition, as the child identifies with – and strives to attain – an illusory, unified autonomous image: its 'Ideal-I'. The child's desire is therefore for the unity of its specular self. Lacan's theory provides a productive analogy for the development of a nation, which, in a similar manner, fears its own disintegration as it tries and fails to achieve the ideal unity and autonomy it positions as both its origin and its goal.

In a similar discussion, Sigmund Freud, in an essay on 'Infantile Sexuality', described infants as being able to become 'polymorphously perverse' under a seductive influence.[22] In its 'infant state', a nation is similarly polymorphous and can be inscribed and acculturated by the 'seductive influence' of both

historical precedent and the promise of the 'future-to-come'.[23] Likewise, it is inscribed in relation to a transnational discourse on the nation and the previously established precedents of nation building. Ireland's 1916 Proclamation of Independence, for example, draws on the preceding texts of the American and French revolutions, which Liam De Paor has made connections between in his study of the Proclamation.[24] Similarly, Aotearoa New Zealand's Treaty of Waitangi was preceded by the treaties made by colonisers with various Indigenous peoples in North America, and the *Mabo* decision draws on a wide variety of imperial common-law cases to construct a new national narrative.

In the same essay, Freud also makes reference to 'infantile amnesia' as a fundamental component of development. The earliest years of childhood are forgotten and 'we retain nothing in our memory but a few unintelligible and fragmentary recollections'. That which has been forgotten, however, is repressed and leaves traces on our minds that 'have had a determining effect upon the whole of our later development'.[25] The study of constitutional texts suggests that a similar process of 'infantile' amnesia is integral to the process of nation-building. As various ideologies and narratives compete for ascendancy, violent upheavals – such as the Irish civil war of the early 1920s, Australian frontier violence in the nineteenth century and the New Zealand Wars of the 1860s – determine the constitution of the 'new' nation. Once a more stable legal and political framework has been established in the wake of these events, the 'disorders' will be written out of subsequent histories of the nation and, effectively, repressed. The history of the nation, then, as the selective and interpreted record of a collective past, is the story and process by which the collective subject's identification of self becomes inscribed, in much the same way that – according to Freud and Lacan – the individual subject represses its earliest years, before it acquires language and the concept of self-hood.

The psychoanalytic analogy of childhood repression constituting a supposedly healthy adulthood can be related to Derrida's essay, 'Force of Law', in which he discusses the repression of foundational violence. In this essay – to which I return from a variety of angles throughout this book – Derrida reflects on questions of justice, legitimacy and origins in a reading of Walter Benjamin's 'Critique of Violence'. Derrida argues that the two types of violence Benjamin identified – the foundational and the conservative[26] – cannot be kept apart, but are instead caught in an intractable double bind. Each needs the other in order to legitimate the new entity that they call into being. Foundational violence legitimates what it has produced retroactively. In order to contain the threat of further possible 'law-making' irruptions, the revolutionary moment must be domesticated by valorising and commemorating it as a point of national origin. This selective valorisation of force depends on a certain amnesia in relation to its foundations. Derrida notes that 'originary violence is consigned to oblivion'.[27] Oblivion thus constitutes

the originary event as a representation, one that both legitimates the new legal and political entity and validates it as just.

It only masks, however, the violence that constitutes the law. Cover observes that: 'Revolutionary constitutional understandings are commonly staked in blood. In them, the violence of the law takes its most blatant form.'[28] The recuperation of foundational violence has obvious applicability in the case of Ireland, where 'good' state-building nationalism is differentiated from the fanaticism of 'bad' nationalist groups, such as the Irish Republican Army (IRA), which also trace their origins in the Easter Rising. I argue, however, in the case of Australia and Aotearoa New Zealand, that revolution and originary violence can also be understood in legal and political events such as *Mabo* and the Treaty of Waitangi. The legitimation of the state as just is an integral part of nation-building and graphic writing is one of the technologies of modernity that is perceived to disseminate this justice. It is in the constitutional texts of the nation itself that this originary violence can be located. Cover describes these as '[t]he most basic of the texts of jurisdiction', which 'are the apologies for the state itself and for its violence – the ideology of social contract or the rationalization of the welfare state'.[29]

Violence is also constitutive of the subject in its demarcation of boundaries. The subject is constituted by configurations of alterity, or 'otherness', that separate the 'inside' of a community from its 'outside'. Thought of in this way, the analogy between the body and the nation can be extended further. The actual body of any individual subject is a 'leaky vessel' rather than a closed, unified system. The internal organs of the body itself are marked off from the external world by means of a semipermeable membrane that establishes a kind of boundary between 'inside' and 'outside'. Each body has various orifices, too, through which various abject matter can pass. As Julia Kristeva has noted, this matter is simultaneously '[n]ot me. Not that. But not nothing, either. A "something" that I do not recognize as a thing.'[30]

Moreover, the constitution of the subject by a process of abjection is exemplified in the creation of both 'internal' and 'external' others, which helps define the boundaries of that subject. Not only can a body excrete that which is 'internal', it is also open to contamination by that which is 'external': viruses, bacteria and disease. The question of borders and boundaries is crucial to defining the nation-state. Furthermore, the emphasis on redrawing and interrogating boundaries, renegotiating what is 'inside' and what is 'outside', provides a space for the new entity to inhabit. As the collective subject is constituted, so it marks out a place for itself to occupy. It becomes visible by separating itself from the other, as can be seen with the US Declaration of Independence: the new nation became visible by separating itself from a tyrannical government.

The nation metaphorically conceived of as a body must be kept safe from disease and immune to infection from both external and internal threats. The

community thus needs to give its 'self' immunity but also to provide immunity from itself, to create a *com-mon auto-immunity* as Derrida has termed it.[31] In times of crisis, such as war or the breakdown of law, internal 'others' are in the most vulnerable position, subject to providing the *pharmakos*, or scapegoat, for the community. The scapegoat is at once of the community and not of it; it is made abject in order that the community might survive. The community must thus destroy some part of itself and this is at odds with the rubric of self-protection. In the name of suppressing an external threat, or warding off a life-threatening virus, the community inoculates itself by fragmenting itself. This contradictory move in order to provide immunity by means of immunisation represents a 'death-drive that is silently at work in every community'.[32] One way of thinking of this 'death-drive' is as the return of repressed originary violence, which is disseminated by the workings of the state, particularly the law. Cover argues:

> the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion. And from this fact we may come to recognize a special role for the courts. Courts, at least the courts of the state, are characteristically 'jurispathic'.[33]

The dissemination of foundational violence, particular in the 'jurispathic' context of the courts, will have particular significance in Chapter 5, which examines Australia and the *Mabo* decision.

As I demonstrate in each of my chapters, the configuration of 'internal' and 'external' otherness – particularly in relation to race and indigeneity – is not uniform and continually shifts. Each constitutional text defines – and is able potentially to redefine – the relationship between inside and outside, thus constituting the collective subject of the nation and the collective subjectivity of its inhabitants.

Writing

Much political philosophy deals with nations that have been well established in a mythic, pre-literate time, largely concurring that, as well as protection, the important components of nation-building are the establishment of common origins, constructing an other against which a nation can define itself, and the creation of a collective memory in the form of history. The social contract or covenant to which Plato, Hobbes, Locke, Rousseau and others refer is rather an agreement that 'goes without saying', so long established that it does not need to be written down. Philosopher David Hume, for example, argued that

> [the original contract] preceded the use of writing, and all the other

> civilized arts of life. But we trace it plainly in the nature of man, and in the equality, or something approaching equality, which we find in all the individuals of that species.[34]

With the exception of Britain, however, my case studies are drawn from historically modern nations whose current 'national identity' in law was constituted relatively recently, that is, in the last 250 years. Graphic writing thus becomes an important means of textualising the promise of the nation-to-come, giving a material frame to questions of origin, otherness, nation and history. Understood as a *pharmakon*, or supplement, this writing of the collective subject, by codifying its founding principles into a constitutional text, introduces a problematic of textuality to the concept of the nation. The nation, long perceived as a body metaphorically, thus becomes a body of texts.

Derrida discusses the *pharmakon*, a drug that acts as both medicine and poison, in a reading of Plato's *Phaedrus* in 'Plato's Pharmacy'. In the *Phaedrus*, Socrates tells the story of the Egyptian god Theuth who, among other arts, presents the gift of writing to the king of the gods, Thamous. Theuth argues that the gift of writing will make the Egyptians wiser; it will 'increase the intelligence of the people . . . and improve their memories'.[35] In Derrida's reading, the king refuses the value of the gift, implying that 'it will atrophy people's memories'.[36] He speaks, or dictates, and if a scribe then writes his words down this is viewed as a supplementary addition. The written inscription of the king's speech is perceived as secondary because it is more distant from the *logos* as full presence, or site of truth, which is embodied in speech. The phonic aspect of language is therefore privileged over the graphic. Derrida argues, however, that the structure of writing is not secondary to, but inextricable from, that of speech itself, challenging the supposed 'originality' of speech in relation to writing. This has the effect of upsetting the idea of a natural relationship between speech and truth.[37] Derrida's reading of the *pharmakon*, however, itself acts as a supplement or *pharmakon* within the Platonic text. In claiming that it is the plenitude of speech that is closer to truth and that writing is the scourge of both memory and wisdom, the *Phaedrus* effaces its own textuality. That is, although it is only known in the present as a key *written* text of Western philosophy, as a dialogue it appears transparently to present an oral face-to-face encounter. Derrida's reading of Plato's *Phaedrus*, therefore, calls into question the supposed naturalness of speech, arguing that it was always already writing.

Writing is, moreover, constitutive of individual subjectivity. In 'Freud and the Scene of Writing', Derrida asserts, '[w]riting is unthinkable without repression'.[38] Repression constitutes subjects as alienated from their desires and subjects write, relying on what is seen as a supplementary medium, whether graphic writing or oral representation, to express their 'inner thoughts'. A

subject is thus formed outside itself, as a kind of witness to its own inside. As the subject is alienated from its own desires and only ever speaks from the place of the other – the language learned as subjectivity is constituted – that which is most one's own is simultaneously alien. Writing, perceived as a supplement to speech and thought, inscribes this primary alienation:

> [t]he *simple* structure of maintenance and manuscription, like every intuition of an origin, is a myth, a 'fiction' as 'theoretical' as the idea of the primary process. For that idea is contradicted by the theme of primal repression.[39]

That is, what is repressed is the split at the origin of language as subjectivity is constituted. As speaking subjects, we speak and write as if our innermost thoughts can be directly expressed, repressing the fact that the language we inhabit as our own was acquired from the pre-existing culture into which we were born: what we perceive as 'inner thoughts' or internal consciousness is always already writing in the form of cultural inscription. Furthermore, '[i]f there were only perception, pure permeability to breaching, there would be no breaches. We would be written, but nothing would be recorded.'[40] Writing represses itself as a supplement of a supplement. It iterates the fiction of the origin of language, thought or consciousness, of which it is itself the record. In an analogous way, in constituting a collective subject, what is inscribed as a 'natural' origin is rather brought into being by a continual (re)writing of the origin that represses those elements that contradict its perceived centrality.

In Plato's *Phaedrus*, writing is described as a *pharmakon*. In the Platonic text, the negative or 'bad' aspects of this word are brought to bear on Theuth's gift and writing, as Derrida has shown throughout his work, has been consequently 'devalued' by comparison to speech. There is, however, a sense in which writing is thought of as 'good'. Derrida has commented: 'There is therefore a good and a bad writing: the good and natural is the divine inscription in the heart and soul; the perverse and artful is technique, exiled in the exteriority of the body.'[41] Good writing is positioned, like the covenant of God, as prior to language, written internally: 'the good writing has . . . always been *comprehended* . . . first thought within an eternal presence'.[42] This good writing is supposed, therefore, to precede speech and is a form of the eternal author/authority speaking: 'Arche-speech is writing because it is a law. A natural law.'[43] As Goodrich summarises the case:

> it is possible to trace within that contract and its theory of origin and transmission a residual linguistic theology, a contractarian semantics which at one of its roots posits a law prior to language, an order of contract which precedes the agreement of reference that is noted in words, a covenant that is prior to both speech and writing, an absolute

> law. The law continues to haunt the languages of contemporaneity, that contract still holds us.[44]

Turning again to the biblical precedent for the natural law predicated on 'good' writing, we can trace an uncertain temporality. Although, in the Old Testament, God had promised an everlasting covenant, he had deemed it necessary to amend the covenant due to transgressions on the part of those it was meant to protect. In this new covenant, God would 'put [his] laws in their minds/and write them on their hearts'.[45] The new covenant, then, was not to be externally marked on the body but internally inscribed in the consciousness and life-giving organs of the body. This 'natural' covenant – perceived to be written in and on the body as God *directly* speaking to and constituting his people *as* his people – comes *after* the codified Mosaic laws of the Old Testament. The naturalised, 'true' covenant thus depends upon an idea of writing, with which it is retroactively constituted, as truer, better and (somewhat paradoxically) more original. This retroactive temporality is constitutive of configurations of the nation – especially in an imperial context – and the documents that define them. Moreover, 'good' writing can be seen as analogous to the 'spirit' of the law; 'bad' writing, to its letter.

Goodrich comments that law and history were the first instances of graphic writing.[46] Constitutional texts both inaugurate and form part of an archive of legal and historical documents that constitute the nation. National archives – such as that which houses the 'Charters of Freedom' in Washington DC, or Archives New Zealand, which displays the Treaty of Waitangi in a special 'Constitution Room' – select and collect those written traces of the past deemed worthy of national significance. Etymologically linked to *archon* (a superior magistrate who inscribes the 'law of the house'), the archive is the lengthy inscription of the retrospective contents of 'an instant of no duration'.[47] It looks back to the fleeting originary moment, continually (re)iterating it, while simultaneously constituting it as a moment of origin. A national archive, for example, is established in the name of the nation and guaranteed by its foundational moment. The national archive repeats and reinforces this moment, as it also holds the documents that have been annexed into the linear narrative of the nation. The archival material is invested with significance by the national narrative inaugurated in the foundational moment in a continually self-legitimating move.

The archive is both constituted and protected by the *archon*, the guardian of the 'original' text, who supposedly keeps it safe, remaining faithful to its sense. *Archon* derives from the Greek meaning both commencement and commandment; according to Derrida, this dual meaning signals:

> the principle according to nature or history, *there* where things *commence* – physical, historical or ontological principle – but also the principle according to the law, *there* where men and gods *command*.[48]

The use of the word 'there' also signals the relationship of the archive to *place*. This allusion to place is thrown into further relief by expanding the etymological net. The Latin *archivum/archium* and the Greek *arkheion* refer to a domicile, an address: the residence of the superior magistrates, the *archons*, those who command. It is therefore in their house or place that the official documents are 'at home'. These *archons* are not solely the document's guardians: they also have the power to interpret the documents – 'entrusted to such *archons* these documents in effect speak the law'. The text thus occurs in the topo-nomological place, the abyss, which is 'the intersection of the topological and nomological, of the place and the law . . . a scene of domicilation at once visible and invisible'.[49]

Simultaneously, the *archon* interprets the text, therefore rewriting the 'law' governing the original text. Thought of as an archive in this way, constitutional texts constitute, and are constituted by, the 'guardians' who make them speak on their behalf. These guardians can take the form of specialist interpreters, including constitutional lawyers, historians, political commentators and cultural critics. In the context of the nation, however, the 'guardians' of constitutional texts are also more broadly 'the people' who are subject to it. This includes 'the people' envisaged as part of a unified civic nation and 'peoples', Indigenous and settler, who have some investment in claiming, maintaining, refuting or interrogating how the nation is constituted as an 'impossible unity' by these texts.

Historiography

Throughout this book, I interrogate the conventional idea that nations have their foundations in either an original, natural community or a contract 'written' in the body by God. I argue, rather, that modern nations are constituted by the construction of an origin to which the people can trace a line of descent and from which they can exclude others. Nations that trace their origins in written documents also construct a foundational event. A nationalist mythology is, therefore, usually based in an historical event deemed to have a foundational impact. In the case of modern Ireland, for example, this is the Easter Rising of 1916, which is seen as analogous to other revolutionary beginnings, such as the US War of Independence. Originary events do not always have to take the form of violent repudiations of colonial rule, however. In Aotearoa New Zealand, the relatively peaceful signing of the Treaty of Waitangi (recalling such historic signings as that of the US Declaration of Independence) supposedly constituting a partnership between Māori and the British Crown, defines the nation. Similarly, these foundational moments do not always have to come at the conventional beginning of the new national narrative (even if this could be precisely located). In Australia, for example, the 1992 *Mabo* decision marked a reconstitution of the nation's origins and radically challenged what had hitherto been the accepted national narrative of origin.

Constructing a national narrative is an integral part of nation-building as it constitutes the group's common identity. The narrative creates an ordered body upon which both the originary event and subsequent constitutive events can be inscribed. Conventional historiography, which takes the nation as its object, assumes the form of a collective consciousness that presupposes a storage model of memory-history, able to reproduce a faithful narrative of events, untouched by external influences. The assumption of both a collective subject and the accuracy of its memories, however, constructs the past in such a way that they, in turn, constitute this collective subject. The collective subject – the 'nation' – and its memories – the 'history' of that nation – then, mutually constitute each other. In order for a subject to remember, to be conscious of holding some events and impressions in its memory, it must also forget or repress other things, particularly those events that would call the seamless unity of this narrative into question. The stability this amnesia generates comes in the form of legal, political and cultural institutions that disseminate the dominant ideology.

An overt example of historical amnesia occurs in Plato's *Republic*. Plato advocates a method of social engineering that offers an explicit description of the more implicit machinations of the way ideology functions to perpetuate dominant inscriptions of subjectivity. He argues that the establishment of a manufactured founding myth of origin is for the benefit of the republic: it is a 'tall story' or 'noble lie' that bonds the community together as a family. Furthermore, such an active programme of forgetting would then need to erase all memory of what went before. This probably would not be achieved for the immediate generation of the new polity, but would become naturalised for 'the immediately succeeding generations and all the generations to follow'. Telling such a lie would have the positive effect, however, of making people 'care even more for the community and for one another'.[50] In an analogous way, the new legal and political entity would thus become naturalised as a unified subject – 'the' nation – and given a structure to make it 'a non-historical reality' when it is, in fact, 'omni-historical'.[51] Not only is the nation seen to pervade all history, it also continuously makes history, looking back to and rewriting the originary moment to suit its purposes (as will be demonstrated in each case study). As Bhabha has noted, then, the writing of the nation is an ambivalent process: 'history may be half-made because it is in the process of being made.'[52]

Because history is actively made rather than 'found', it is more useful to think of it as 'historiography': literally, 'the writing of history'. This phrase signals an awareness of the ways in which historical narratives are constructed by a process of selection and coherence. It also draws attention to the active role that historiography plays in constituting the nation as a unified object of discourse.

In 'Writings and Histories', Certeau traces the simultaneous development of modern historiography and of medicine. Roughly contemporary with the

increased hegemony of the nation state in the nineteenth century, both medicine and history developed as scientific disciplines, objectifying their subject matter by mapping and classifying it. As Certeau observes:

> Modern medicine and historiography are born almost simultaneously from the rift between a subject that is supposedly literate, and an object that is supposedly written in an unknown language. The latter always remains to be decoded.[53]

Much like the political philosophers discussed earlier, Certeau uses the metaphor of a doctor anatomising a patient to describe the work of the historian. Nineteenth-century developments in medicine allow 'the seen body to be converted into the known body . . . [and] turns the spatial organisation of the body into a semantic organisation of a vocabulary – and vice versa'.[54] The creation of a specialist language and method enabled the constitution of a corpus of specialised professionals who could interpret their object. In this respect, history functions in a similar way not only to medicine, but also to law.

The role of historiography in constituting the nation is an ambivalent one. Broadly speaking, on the one hand, histories that create a sustaining narrative that orders and legitimates a political entity can be called nationalist; on the other, histories that attempt to reconstitute both conventional narratives and the nation they produce can be grouped as revisionist. The establishment of an historical record is coincident with the founding of a collective subject. Historiography provides the originary event – the founding of the nation – with its own *raison d'être*, and constitutes the mode in which the community is imagined, reproducing a recognisably familiar (and familial) narrative. Despite the fact that revisionist historians challenge many of the sacred tenets of national history – as I discuss further especially in my chapters on Ireland and Australia – their work also has the effect of reinscribing and reiterating foundational texts and events.

Philosopher Jean-François Lyotard offers a theory of the 'event' as something that is unpresentable. One can only *bear* witness to an event after the fact – despite the presence of witnesses at the scene – and it can therefore only be represented, not presented.[55] In 'The Sublime and the Avant-Garde', he observes:

> Before asking questions about what it is and about its significance . . . it must 'first' so to speak 'happen' . . . That it happens 'precedes', so to speak, the question pertaining to what happens.[56]

Understanding of – and writings about – any originary event – such as, for example, the Easter Rising, the First Fleet's arrival in Australia, or the signing of the Treaty of Waitangi – comes with the benefit of hindsight or retrospective understanding, which orders a coherent narrative of explanation.

This does not mean that these events did not occur, but rather that we have no access to those events 'as they actually happened', in the formulation of nineteenth-century German historian, Leopold von Ranke.[57] Lyotard is sceptical about the 'nostalgia for presence felt by the human subject', understood as an impulse to totalise the unpresentable.[58] That is, interpretations of an event strive to understand it in its fullness, seeking a return to the originary moment by means of a synthesis of analysis. As the large body of historical writing, 'nationalist', 'revisionist', 'popular' and otherwise can attest, this is, as Lyotard notes, a 'futile will'.[59] Narratives are necessarily selective, connecting together various events and moments in order to constitute a seamless whole. In each case study, I analyse some of these narratives, foregrounding the ways in which their contradictions and exclusions produce an effect of coherence. Such coherent narratives themselves have constitutive effects.

Whether intentionally – in the manner of Plato's 'noble lie' – or not, those who write the history of the nation also write out of it that which might fragment the unity of the whole. Just as the framers of the US Declaration of Independence, the Easter Proclamation or the Treaty of Waitangi constructed a historical narrative that called into being both the nation and the people that constituted it, likewise later commentators, especially around anniversaries, have created collective explanations of the event that evoke a lost unified origin to which they seek to return. This 'nostalgia as history' brings into being what Michel Foucault describes as:

> the indispensable correlative of the founding function of the subject: the guarantee that everything that has eluded him may be restored to him; the certainty that time will disperse nothing without restoring it in a reconstituted unity; the promise that one day the subject – in the form of historical consciousness – will once again be able to appropriate . . . all those things that are kept at a distance by difference, and find in them what might be called his abode.[60]

Rather than challenging Foucault's criticism of the 'age-old collective consciousness', founding documents conventionally serve to enshrine the historical event of their signing and, in turn, guarantee the 'founding function' of the collective subject, providing a marker from which 'the people' can say they originate. These texts, however, as iterative representations rather than presentations of the actual event, continually reconstitute the past with a view to the future, simultaneously reinscribing new narratives of the nation. As a result, they can be read in such a way that differences, ambiguities and contradictions can be highlighted. In this way, this book operates within a broadly post-colonial framework, as it attempts to:

> bear . . . witness to the unequal and uneven forces of cultural representation . . . [and] intervene in those ideological discourses of modernity that

> attempt to give a hegemonic 'normality' to the uneven development and the differential, often disadvantaged, histories of nations, races, communities, peoples.[61]

That is, in unpacking the ways in which a dominant ideology works to naturalise its own constitution and the legal and political structures it establishes, this project opens up the possibilities to challenge the law from within the grounds of that law. It recognises as neither natural nor inevitable the systemic and systematic marginalisation of 'internal' others and of alternative narratives of nation, history and law. This book, then, is not solely concerned with writing nations, but also with how difference, specifically national, racial, ethnic or indigenous difference, might be read in the context of a legal and political diaspora.

Diaspora

Political philosophers have generally referred to a state, or a body politic, or a community, when discussing a collective group of people. With its roots in the early modern period and flourishing in the nineteenth century, the nation is explicitly linked to state formations and the 'nation state' is conceived of as a seamless link between primordial, ethnic, linguistic and cultural ties, on the one hand, and modern legal and political institutions, on the other. The latter are viewed as the expression and assertion of the former's sense of self. Within Europe, the state, previously embodied in the monarch as a sovereign, increasingly came to be defined by the people, represented in a sovereign legislature. The enfranchisement of marginal groups, including both women and the working classes, continued throughout the late nineteenth and twentieth centuries. At the same time, the nation states of Europe constituted their sense of self not only in relation to each other, but also in relation to their developing empires: the nation state at the origin or centre of its empire was defined in opposition to its colonies and annexed territories. The borders of the state, then, become one way of defining the limits or borders of the nation. In the context of the British empire, however, with the advent of colonies of settlement in North America, Southern Africa and the Pacific among others, the borders of the state no longer contained the nation – nor was the state itself confined to its own borders. The nation was reconfigured as empire based on the same assumptions of primordial ties, modernity and morality legitimated by legal and political institutions. The nineteenth-century imperial historian, J R Seeley, commented:

> Greater Britain is a real enlargement of the English State; it carries across the seas not merely the English race, but the authority of the English Government. We call it for want of a better word an Empire.[62]

This empire was not, however, uniform. While the British had had trading interests in West Africa since the sixteenth century and in India since the seventeenth century, the British mandate in Palestine and Iraq only dated from 1920, following Turkey's defeat in the First World War. The empire also operated a racial hierarchy, some of the effects of which I trace in my chapters on Aotearoa New Zealand and Australia, in which Māori and Aboriginals were represented as occupying different stages in the evolutionary model of Western modernity. In relation to constitutional development, however, there was (and continues to be) a sharp distinction between the white 'settler' colonies, subsequently renamed 'dominions' in the early twentieth century, and colonies of exploitation with predominantly non-white populations.

At the 1926 Imperial Conference, dominion status was granted to Canada, the Union of South Africa, the Commonwealth of Australia, New Zealand, the Irish Free State and Newfoundland (now part of Canada). In 1931, the Statute of Westminster enacted the resolutions of the 1926 and 1930 Imperial Conferences, and gave the self-governing dominions control over their own parliaments.[63] These nations were recognised as sovereign nation states in their own right, ready to assume the task of 'responsible government'. India and the rest of the empire, however, were still paternalistically viewed as either incapable of, or insufficiently prepared for, the assumption of self-government. Although now separate from Britain, the former dominions, then, defined their national character and legal and political institutions along British lines.

Consequently, Goldie Osuri and Bobby Banerjee, in their reading of Australia's solidarity with the USA in the wake of 11 September 2001, view the former British dominions as forming a transnational white diaspora. Summarising a talk given by novelist Amitav Ghosh, they assert:

> while non-Anglo ethnic groups in settler countries such as Australia, Canada and the United States are often marked as diasporic, in fact, Anglo groups in settler states such as Australia, Canada, and the United States remain unmarked as diasporic. And, the logic of the marking of non-Anglo groups as diasporic reveals the manner in which colonial settler populations retain their ownership of the nation-state . . . white diasporic loyalties, while unmarked, are also often expressed at the level of the nation-state, in cultural, political, economic, and military alliances.[64]

Osuri and Banerjee view Australian involvement in the USA-led coalition's 'war on terror' as an assertion of transnational nationalism. Historian Stephen Constantine is slightly more wary of using the term 'diaspora' to designate hegemonic colonies of white, British settlement, noting that the term – initially derived from the Jewish diaspora of the Torah/Old Testament

and subsequently applied to any migrant groups who suffer oppression and isolation in an alien environment – signifies a sense of expulsion and exile, and subsequent preservation of a separate cultural identity in a new land.[65] Aligning myself more closely with Osuri and Banerjee, I argue that 'diaspora' – etymologically derived from the Greek for 'dispersion'[66] – *can* be strategically used to describe the legal and political national configurations of the former white colonies of settlement because it draws attention to ongoing transnational loyalties. To use this description is to make visible that which operates in an apparently natural and neutral way, namely, the privileging of white, British conceptions of government in the state apparatuses of the former British dominions.

Within the contexts of Britain and the United States of America respectively, scholars including Paul Gilroy and Ian F Haney López have also interrogated how the legal constitution of the state depends upon a national identity that is racially (un)marked as white.[67] The legal writing of these nations, then, depends upon a racial idea of the nation that is unwritten. 'Whiteness' becomes a legally legitimated text that effaces its own textuality.

'Whiteness' is, however, (re)configured in historically, geographically and culturally specific ways: for example, Irish (both 'native' and immigrant), Italian and Greek immigrants have all been represented as 'black' and 'other' at various points in history.[68] I do not want to suggest that legal and political narratives of 'whiteness' represent a unified, transcultural entity. In each of my case studies, the constraints of the texts under consideration provide the ground for readings of local particularities. Nonetheless, there is value to be gained from this kind of comparative exercise because it denaturalises the perceived links of community with which an unmarked diaspora is constituted and disseminated. Unmarked diasporic loyalties elevate the nation out of the local and particular into the universal, continuing to perpetuate the ideological and naturalising position of the nation, that this is how things have always been and should always be. As Ruth Frankenburg observes, 'whiteness makes itself invisible precisely by asserting its normalcy, its transparency, in contrast with the marking of others on which its transparency depends'.[69] I seek to make dominant (white) configurations of the nation visible, with particular reference to graphic writing deployed as a modern, Western technology in the construction of constitutional texts.

Bhabha has argued that '[t]o study the nation through its narrative address does not merely draw attention to its language and rhetoric; it also attempts to alter the conceptual object itself'.[70] Constitutional texts can be theorised as integral to subject formation, both individual and collective. By relying on a philosophy of writing, whether it is perceived as 'good' or 'bad', such texts both establish and legitimate new legal and political entities. They can, however, be read by attending to the contradictions and ambiguities that

characterise their rhetorical strategies in order to demonstrate how the collective subject is differentially constituted from itself.

Notes

1 Indeed, the pamphlet that, on its publication by Englishman Thomas Paine in 1776, helped incite revolutionary fervour in both the USA and France was entitled *Common Sense*: T Paine, *Common Sense*, 1976, Harmondsworth: Penguin.
2 Cultural critic Antony Easthope usefully traces the development and distinguishing traits of empiricist discourse in *Englishness and National Culture*, 1999, London and New York: Routledge. See especially pp 87–114.
3 J Derrida, 'Declarations of Independence', 1986, *New Political Science*, 15, pp 7–15 (p 10).
4 J Derrida, *Margins of Philosophy*, A Bass (trans), 1982, London: Prentice Hall, p 293.
5 P Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks*, 1990, London: Weidenfeld and Nicholson, p 114.
6 See Aristotle, *The Athenian Constitution*, P J Rhodes (trans), 1984, London: Penguin, and Aristotle, *The Politics*, T A Sinclair (trans), T J Saunders (rev'd), 1981, London: Penguin.
7 Plato, *Republic*, R Wakefield (trans), 1993, Oxford: Oxford University Press, 368e–369a, p 58.
8 J Locke, *Two Treatises of Government*, P Laslett (ed), 1988, Cambridge: Cambridge University Press, p 210.
9 T Hobbes, *Leviathan*, E Curley (ed), 1994, Indianapolis and Cambridge: Hackett, pp 3–4. Original emphasis.
10 J-J Rousseau, *The Social Contract*, M Cranston (trans), 1968, London: Penguin, pp 134–5.
11 Hobbes, *Leviathan*, p 63.
12 Educated at a mission school and active in the Anglican faith, Te Kooti was later imprisoned during the New Zealand wars of the late nineteenth century. In prison, he became an ardent believer in the Old Testament and subsequently founded the Ringatu faith, promising release from bondage and the return of his people's land. See J Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki*, 1995, Auckland: Auckland University Press. Maurice Shadbolt constructs a fictionalised account of Te Kooti's war against the Pākehā in *Season of the Jew*, 1986, London: Hodder and Stoughton.
13 The relevant books of the Old Testament for each covenant are, in order, Genesis 9 (Noah), Genesis 15–17 (Abraham) and Exodus 34 (Moses). These references are taken from the Bible Gateway (New International Version) website, accessed 18 May 2004, available online at http://www.biblegateway.com/.
14 R Cover, 'Nomos and Narrative', in M Minow, M Ryan and A Sarat (eds), *Narrative, Violence and the Law: The Essays of Robert Cover*, 1992, Ann Arbor: University of Michigan Press, pp 95–172, (pp 95–6).
15 M de Certeau, *The Practice of Everyday Life*, pp 139–40, cited in A Hyde, *Bodies of Law*, 1997, Princeton, NJ: Princeton University Press, p 187.
16 An extremely useful introduction to subjectivity can be found in C Belsey, 'Addressing the Subject', *Critical Practice*, 2nd edn, 2002, London and New York: Routledge, pp 52–77.
17 Hobbes, *Leviathan*, p 8.
18 Plato, *Republic*, 414e, p 119.

19 Hobbes, *Leviathan*, p 164.
20 L Althusser, 'Ideology and Ideological State Apparatuses (Notes Towards an Investigation)', in *Lenin and Philosophy*, B Brewster (trans), 1971, London: New Left Books, pp 122–73 (p 159). Italics in original.
21 J Lacan, 'The Mirror Stage', in *Ecrits*, A Sheridan (trans), 1977, London: Tavistock, pp 1–7.
22 S Freud, 'Infantile Sexuality', in *The Penguin Freud Library Volume 7: On Sexuality – Three Essays on the Theory of Sexuality and Other Works*, J Strachey (trans), 1991, London: Penguin, pp 88–126 (p 109).
23 The phrase 'future-to-come' derives from a translation of the French *avenir/à venir*. Derrida uses the neologism '*l'à-venir*', which comprehends both the noun *l'avenir* (the future) and the infinitive of the verb *à venir* (to come), thus indicating that the future is always in the process of becoming. The use of the ordinary noun for future, however, also has this sense of coming, or advent. This usage recurs throughout Derrida's work. See, for example, J Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International*, P Kamuf (trans), 1994, London and New York: Routledge, p xix and translator's note, p 177.
24 L De Paor, *On the Easter Proclamation and Other Declarations*, 1997, Dublin: Four Courts Press.
25 Freud, 'Infantile Sexuality', pp 89–90.
26 Benjamin refers to them as 'lawmaking' and 'law preserving' in his 'The Critique of Violence', E Jephcott (trans), in M Bullock and M W Jennings (eds), *Selected Writings Volume 1 1913–1926*, 1997, London and Cambridge, MA: Belknapp Press of Harvard University, pp 236–52.
27 J Derrida, 'Force of Law: The "Mystical Foundation of Authority" ', in D Cornell, M Rosenfeld and D G Carlson (eds), *Deconstruction and the Possibility of Justice*, 1992, London and New York: Routledge, pp 3–67, (p 47).
28 Cover, 'Violence and the Word', in Minow, *Narrative*, pp 203–38, (p 210).
29 Cover, 'Nomos', p 156.
30 J Kristeva, *Powers of Horror: An Essay on Abjection*, L S Roudiez (trans), 1982, New York: Columbia University Press, p 2.
31 'Community as *com-mon auto-immunity*: no community [is possible] that would not cultivate its own auto-immunity, a principle of sacrificial self-destruction ruining the principle of self-protection': J Derrida, 'Faith and Knowledge: The Two Sources of "Religion" at the Limits of Reason Alone', in J Derrida and G Vattimo (eds), *Religion*, 1998, Cambridge: Polity Press, pp 1–78 (p 51).
32 Ibid.
33 Cover, 'Nomos', p 139.
34 D Hume, 'On the Original Contract', in *Social Contract: Essays by Locke, Hume and Rousseau*, 1971, Oxford: Oxford University Press, pp 145–66 (p 149).
35 Plato, *Phaedrus*, R Wakefield (trans), 2002, Oxford: Oxford University Press, 274e, p 68. The story of Theuth is contained in sections 274c–275e, pp 68–70.
36 Plato, *Phaedrus*, 275a, p 69.
37 J Derrida, 'Plato's Pharmacy', in *Dissemination*, B Johnson (trans), 1981, Chicago: University of Chicago Press, pp 61–171.
38 J Derrida, 'Freud and the Scene of Writing', in *Writing and Difference*, A Bass (trans), 1978, London and New York: Routledge, pp 246–91 (p 285).
39 Derrida, 'Freud', pp 284–5.
40 Derrida, 'Freud', p 285.
41 J Derrida, *Of Grammatology*, G C Spivak (trans), rev'd edn, 1997, Baltimore: John Hopkins University Press, p 17.

42 Derrida, *Of Grammatology*, p 18.
43 Derrida, *Of Grammatology*, p 17.
44 Goodrich, *Languages*, p 8.
45 Hebrews 8:10, Bible Gateway (New International Version) website.
46 Goodrich, *Languages*, p 3.
47 J Derrida, *Archive Fever: A Freudian Impression*, E Prenowitz (trans), 1996, Chicago and London: The University of Chicago Press, p 26.
48 Derrida, *Archive Fever*, pp 1–3. Original emphasis.
49 Derrida, *Archive Fever*, p 3.
50 Plato, *Republic*, 414b–415d, pp 118–20.
51 Althusser, 'Ideology', p 151.
52 H Bhabha, 'Introduction: Narrating the Nation', in H Bhabha (ed), *Nation and Narration*, 1990, London and New York: Routledge, p 3.
53 M de Certeau, 'Writings and Histories', in T Spargo (ed), *Reading the Past: Literature and History*, 2000, Hampshire and New York: Palgrave, pp 156–67 (p 158).
54 Ibid.
55 J-F Lyotard, 'Answering the Question: What is Postmodernism?' in *The Postmodern Condition: A Report on Knowledge*, G Bennington and B Massumi (trans), 1994, Manchester: Manchester University Press, pp 71–82 (p 78). In *The Differend: Phrases in Dispute*, G van den Abbeele (trans), 1988, Minneapolis: University of Minnesota Press, Lyotard expounds the philosophical problematic of bearing witness in relation to the differend of the Nazi Final Solution: '1.You are informed that human beings endowed with language were placed in a situation such that none of them is now able to tell about it. When they do speak about it, their testimony bears only upon a minute part of the situation. How can you know that the situation itself existed? That it is not the fruit of your informant's imagination? Either the situation did not exist as such. Or else it did exist, in which case your informant's testimony is false, either because he or she should have disappeared, or else because he or she should remain silent, or else because, if he or she does speak, he or she can bear witness only to the particular experience he had, it remaining to be established whether this experience was a compenent of the situation in question.' (p 3)
56 J-F Lyotard, 'The Sublime and the Avant-Garde', in *The Inhuman: Reflections on Time*, G Bennington and R Bowlby (trans), 1993, Cambridge: Polity Press, p 89–107 (p 90).
57 Leopold von Ranke's work, *The History of the Latin and Teutonic Nations from 1494 to 1514* – in which the phrase '*wie es eigentlich gewesen*/as it actually happened' appears – was instrumental in the establishment of both 'scientific' or objective history and professional standards for historians (for example, relying on primary sources and constructing a linear narrative). See K Troup and A Green (eds), *The Houses of History: A Critical Reader in Twentieth-Century History and Theory*, 1999, Manchester: Manchester University Press, pp 2–3.
58 Lyotard, 'Answering the Question', p 79.
59 Ibid.
60 M Foucault, *The Archaeology of Knowledge*, A M Sheridan Smith (trans), 1972, London: Routledge, p 12.
61 H Bhabha, 'The Postcolonial and the Postmodern: The Question of Agency', in *The Location of Culture*, 1994, London and New York: Routledge, pp 171–97 (p 171).
62 J R Seeley, *The Expansion of England*, J Gross (ed), 1971, Chicago and London: University of Chicago Press, p 38.

63 The Statute of Westminster 1931, 22 George V, c4 (UK), accessed 17 May 2004, available online at http://www.solon.org/Constitutions/Canada/English/StatuteofWestminster.html.

64 G Osuri and S B Banerjee, 'White Diasporas: Media Representations of September 11 and the Unbearable Whiteness of Being in Australia', 2004, *Social Semiotics* 14:2 (Aug), pp 151–71 (p 152). See also G Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Nation*, 1998, Annandale, NSW: Pluto Press.

65 S Constantine, 'British Emigration to the Empire-Commonwealth since 1880: From Overseas Settlement to Diaspora?' in C Bridge and K Fedorowich (eds), *The British World: Diaspora, Culture and Identity*, 2003, London and Portland, OR: Frank Cass, pp 16–35.

66 Definition of 'diaspora' taken from the *Oxford English Dictionary*, accessed 17 May 2004, available online at http://www.oed.com/.

67 P Gilroy, *'There Ain't No Black in the Union Jack': The Cultural Politics of Race and Nation*, 2nd edn, 2002, London: Routledge; I F Haney López, *White by Law: The Legal Construction of Race*, 1996, New York and London: New York University Press. P Karsten examines the legal cultures of the USA, Canada, Australia and New Zealand in the context of a British diaspora in *Between Law and Custom: 'High' and 'Low' Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia and New Zealand 1600–1900*, 2002, Cambridge: Cambridge University Press.

68 For a discussion of the racialising of Italian and Greek immigrants to Australia, see J Pugliese, 'Race as Category Crisis: Whiteness and the Topical Assignation of Race', 2002, *Social Semiotics*, 12:2, pp 150–69. See N Ignatiev, *How the Irish Became White*, 1995, New York and London: Routledge, for a discussion on the racialising of Irish immigrants to the USA. See also B Walter, *Outsiders Inside: Whiteness, Place and Irish Women*, 2001, London and New York: Routledge. Work in the area of 'whiteness' appears particularly prolific in the USA. See, for example, T W Allen, *The Invention of the White Race: Volume One – Racial Oppression and Social Control*, 1994, London and New York: Verso, and *The Invention of the White Race: Volume Two – The Origin of Racial Oppression in Anglo-America*, 1999, London and New York: Verso; R Frankenburg (ed), *Displacing Whiteness: Essays in Social and Cultural Criticism*, 1997, Durham and London: Duke University Press. By theorising whiteness as part of a constitutional discourse in some of the former dominions of the British empire, I seek to contribute to, and broaden the terms of, this kind of analysis.

69 R Frankenburg, 'Introduction: Local Whitenesses, Localizing Whiteness', in Frankenburg, *Displacing Whiteness*, pp 1–33 (p 6).

70 Bhabha, 'Narration', p 3.

Chapter 3

‘In the name of God and of the dead generations’

Proclaiming the Irish Republic

On 11 June 2004, in response to anxieties arising from non-white immigration,[1] the electorate of the Republic of Ireland voted in a referendum to change Article 9 of the Irish Constitution, which concerns entitlement to Irish citizenship. With approximately 80 per cent electoral support, the 27th Amendment to the Constitution changed Article 9 to read:

> 9.2.1 Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of his or her birth, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless otherwise provided for by law.
>
> 9.2.2 This section shall not apply to persons born before the date of the enactment of this section.[2]

This change to the Constitution allowed the Dáil Éireann to introduce legislative changes limiting citizenship rights by means of the Citizenship and Nationality Act (2004).

Prior to the referendum, the Constitution had effectively allowed citizenship to anyone born on the island of Ireland. In the wake of the 1998 Good Friday Agreement, Article 2 of the Constitution had been altered to state: ‘It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas to be part of the Irish Nation’.[3] While this alteration helped set in motion the peace process in Northern Ireland, as it restated the nationalist wish to ‘reintegrate national territory’, it also raised another set of questions about nationality and citizenship. Effectively, Article 2 guaranteed that anyone born in Ireland could take out Irish citizenship even if they were not ethnically ‘Irish’: Irish citizenship could be granted to anyone who was born in Ireland solely due to territorial criteria, regardless of the nationality or citizenship of their parents.

It was not, however, Article 2 that was to be altered by the 2004 referendum. As a statement quite literally of ‘The Nation’ (the title given to

Articles 1–3 of the Constitution), alteration to this Article might potentially have threatened the peace process. If the above wording introduced in 1998 were to change, or its declaration concerning 'every person born in the island of Ireland' were to be removed, then this might effectively exclude the people of Northern Ireland. Rather, the changes were to be made to Article 9, which is included in 'The State' section of the Constitution, signalling a sense of separation between nationality and citizenship. Irish nationals can be citizens elsewhere and Article 2 also makes reference to the 'special affinity with people of Irish ancestry living abroad who share its culture, identity and heritage'. Irish citizens, on the other hand, are not necessarily Irish nationals. The 27th Amendment to the Constitution, therefore, cut right at the heart of the question of who is, or is not, Irish and what criteria can be used to determine this. Although the wording of the referendum was couched in terms of citizenship rather than nationality, it also implicitly defined the nation in terms of an ethnicity that is both white and 'Irish'.

The referendum thus foregrounded a tension between nationality and citizenship, between 'the Irish people' and 'the people of Ireland', that can also be traced in many of the legal and constitutional texts of modern Ireland. The central ambiguity in these texts primarily refers to relations between nationalists and unionists, Catholics and Protestants, Irish and British. It is a tension that marks a profound undecidability concerning 'what the nation is': an ambiguity that can be traced in Ireland's colonial past.

As a consequence of colonialism, pre- and post-partition Ireland can be characterised as both a 'settler' society and a common-law jurisdiction, in common with Australia and Aotearoa New Zealand. In 1155, Pope Adrian IV's Bull *Laudabiliter* authorised England's Henry II to conquer Ireland, in order to bring reform to the church. From 1170, vassal lords were established in Ireland, who attempted to control the Indigenous chiefs and kings. From 1220, the English common law was imposed in the area ruled by these lords; this was extended throughout the country, finally suppressing native Irish law in the sixteenth century. A more recognisably modern and systematic programme of colonisation by both settlement and subjugation was implemented in the early modern period. With the Act of Union in 1801 – following the failed 1798 rebellion of Theobald Wolfe Tone and the United Irishmen – Ireland officially became part of the United Kingdom of Great Britain and Ireland, and was governed by its parliament and legal system. Protestant landowners and descendants of planted settlers exercised disproportionately hegemonic dominance as a legacy of their colonial forebears. Difference was marked not solely by religion, language and customs but also by race and phenotype. L P Curtis notes that, in the Victorian period, the native Irish Celts were characterised in opposition to the Anglo-Saxon as 'half-human and half-simian'; he asserts furthermore that '[i]t was not uncommon for English observers to compare Irishmen with the "lowliest" of African tribes, the Hottentots, because they seemed to share so many attributes in common'.[4]

Comparative 'whiteness' of skin colour, however, complicates Anglo-Saxon racial hierarchies and has also been the source of contention concerning whether or not Ireland can be considered 'post-colonial'. Joe Cleary points out that it is well established that many prominent nationalists considered it 'outrageous that Ireland should be treated as a colony because to do so was to put an ancient and civilized European people on the same level as non-white colonial subjects in Africa or Asia'.[5] Notwithstanding the racialising of those same 'civilised' people as backward, simian Celts in contrast with Anglo-Saxons, whiteness was something to be striven for, particularly among immigrants to the New World. As Noel Ignatiev points out, positioning Irish people as 'black' continued as they immigrated to the so-called new world from the middle of the nineteenth century.[6] Bronwen Walter similarly notes:

> Outside Ireland, a key aspect of constructions of Irishness is the paradox by which the Irish are represented by dominant Western groups simultaneously as 'other', that is racialised as essentially different in stereotypical ways, and also the 'same' because 'white' people share a similar timeless essence.[7]

Borrowing Catherine M Eagan's formulation of ' "white", if "not quite" ' – a paraphrase of Bhabha's colonial '*subject of difference that is almost the same, but not quite*'[8] – I situate Ireland obliquely within the frame of a white, British diaspora. That is, while its legal and constitutional composition is shaped by British impositions and American models, it simultaneously disavows these antecedents and configures whiteness as pre-colonial, Celtic and Catholic in contradistinction to these primarily Anglo-Saxon, Protestant traditions. In doing so, it constituted a nation implicitly defined by ethnicity – as demonstrated by the anxieties surrounding the 2004 referendum – yet explicitly concerned to build a civic nation for the 'people of Ireland'.

Unlike Australia and Aotearoa New Zealand, Ireland has a pre-colonial relationship to writing and European modernity. Indeed, the Brehon law is one of the most coherent of ancient law systems still extant as a series of written texts. These laws were primarily oral and customary; the legal interpretations of generations of lawyers are thought, however, to have been written down around the seventh century AD. Nationalist Eoin MacNeill observed in 1934 that 'Irish law came into writing not as a record of purely customary usage but as the subject of a learned tradition already ancient'.[9] Positioned, therefore, as both oral *and* written, the Brehon law helped constitute an imperial perception of the Irish as *both* savage and civilised. Graphic writing is a signifier of civilisation but also the measure of England's supposed superiority. This throws into sharp relief the constructed state of the English common law's 'immemorial' origins, highlighting the way in which they were imposed by force in place of existing codes and alternative traditions

of 'immemorial law' (the first two volumes of the Brehon law contain the *Seanchus Mór*, or 'Great Immemorial Custom'). In 1603, James I terminated the authority of Irish law and authorised the uniform introduction of English law into the country. It was also during the seventeenth century that the common law of England was stabilised as 'immemorial', famously in the commentaries of Edward Coke. The common law's ascendancy over rival forms of law in Ireland both consolidated its authority and coherence, and set a precedent for its use as a tool of legitimation in the establishment of other British colonies. Legal historian Paul Brand has argued that the growth of English common law went in tandem with the imposition of the common law in Ireland and that development of the common law should be understood as 'an Anglo-Irish legal system – the legal system not just of England but also of the lordship of Ireland'.[10]

Somewhat ironically, it was the establishment of the Irish Free State in 1922 and its Constitution that ended alternative juridical experiments, such as the reformulation of ancient Irish Brehon law and the establishment of the Dáil courts, in favour of the preservation of English common law, introduced into Ireland from the thirteenth century.[11] In the Dáil Éireann Courts (Winding Up) Act (1923), 'the courts established under the Constitution of the Irish Free State held that the decisions of the Dáil courts were void and of no legal effect'.[12] The 1937 Constitution, the successor of the 1922 Free State Constitution, reiterated the rule of law established in 1922. Ireland's ambiguous post-colonial status can therefore also be related to writing and law.

The tensions and ambiguities between different configurations of the nation, concerning colonial and post-colonial status, and ethnic or civil nationality, which informed the 2004 referendum, can be traced in the constitutional texts of the Republic. I argue, however, that it is in the originary founding moment of the Republic – Easter 1916 – and its Proclamation that these differences can be located. By retroactively constituting Easter 1916 as a point of origin, subsequent constitutional texts have inherited its equivocations and evasions concerning what the nation might be.

What is a nation?

What constitutes the nation or the Irish people has proved – and continues to prove – a troublesome question in both the Republic of Ireland and Northern Ireland. The modern history of Ireland has been marked by conflict, as groups north and south of the border have fought to have their version of *the* national narrative inscribed and legitimated as true. The tensions within and between nations in search of a state define the modern history of 'Ireland', understood as a projected unity comprehending both north and south. Very different narratives of unity competed in the pre-independence period (and continue to shape politics today, particularly in Northern Ireland): Irish

nationalists sought a united, independent Ireland, while Unionists, primarily located in the northern province of Ulster, sought to preserve their allegiance to Britain, which had been enacted by the 1801 Act of Union.

Following the Anglo-Irish agreement of 1921, the irreconcilable political aims of nationalists and unionists constituted a partitioned country. In light of the contesting national visions of Irish nationalists and unionists, Cleary has questioned the universality of Benedict Anderson's definition of the nation, pointing out that he makes 'almost no mention of either loyalist nationalisms within the settler colonies or what might be called minority or sub-nationalist movements within either set of colonies'.[13] Indeed, Cleary has argued that debates over Ireland's political future in the nineteenth and twentieth centuries can be characterised as conflicts between *nations,* rather than between religions or ethnic groups:

> Each of these movements claimed that it represented not a religious or ethnic minority but a second and *separate* 'nation' within the colony whose interests would be negated in any sovereign state ruled over by the majority nationalist movement.[14]

Cleary's insistence that these nations are *separate* is suggestive. The apparently incommensurable political aims of nationalists and unionists are characterised by their desire to keep themselves separate and safe from subjugation by the other, a tendency that political philosophers have long used to characterise nations. Cleary's assertion of two separate nations is borne out by the post-partition constitution of an Irish Free State, which constituted itself as overwhelmingly Catholic, and the Protestant majority statelet of Northern Ireland produced by the Government of Ireland Act of 1920.

Cleary's description of pre-partition Ireland as containing not one, but two nations touches on an ongoing debate within representations of Ireland's history. Early twentieth-century writers, including John Redmond, George Russell (AE) and Alice Stopford Green, maintained that this theory was manufactured by the British government in Ireland in order to keep it divided. While allowing that there were two races, two creeds and two factions in Ireland, Green dismissed the idea of two nations, writing in 1912:

> this new term seems to find favour as a convenient means of adding discredit to the notion of nationality, and thus by indirect means weakening the claim of any and every nation . . . What . . . is the name of that other nation in Ireland?[15]

Green and others have contested the idea that there are two nations, arguing that it draws on colonial rhetoric fostered by British imperialists and that, far from being an international conflict, the problem is rather intranational. Brian Murphy cites the above examples in a challenge to the revisionist

historian Roy Foster's work *Modern Ireland*, which, he claims, 'confer[s] an unmerited legitimacy on the "two nations" theory'.[16] Murphy argues that he does this not by deciding that Ireland is either one nation or two, but by making 'no attempt to address the question'.[17] Foster writes, in relation to the Home Rule crisis, simply that '[t]he question of whether Ireland was one nation or two hung in the air'.[18] Murphy's own position, in stating the case against the two nations theory, is to reconcile the 'two cultures, two creeds, and two traditions that inhabit the island of Ireland' so that they may 'live together in peace'.[19] Much like Australian commentators in the wake of the 1992 *Mabo* decision, discussed in Chapter 5, those who insist on internal difference within *one* nation have a unitary goal: that of a unified and reconciled nation.

By contrast, John Whyte presents a summary of the debate as it took place in writing about Northern Ireland, detailing how various interpretative positions – those of traditional nationalist, traditional unionist, Marxist and internal conflict theorists respectively – determine various definitions of 'what the nation is'. Assessing the traditional nationalist viewpoint, he asserts that '[s]carcely anyone . . . now stands over the one-nation theory'[20] and, later in the text, after outlining each interpretative approach, reasserts that 'virtually no one who has put themselves to the discipline of researching on Northern Ireland still defends the one-nation theory'.[21] Whyte seems to stop short of advocating the 'two nations' approach, although his outline of both unionist and Marxist interpretations indicates some strong support for the idea of 'two nations'.[22] It seems that the question of 'one nation or two', perhaps unsurprisingly, elicits a more divisive approach in the north, supporting the claim that the border 'represents, however arbitrarily, an important spiritual divide'.[23]

Part of the problem of definition is related, among other things, to geography: the Republic of Ireland and Northern Ireland together make up a relatively small island. Although that island has been subjugated by its closest neighbour, the Irish Sea has been perceived as a natural boundary, especially in nationalist discourse.[24] The north-east of Ulster, however, was planted by Scottish and English Protestants, whose descendants contested, first, Home Rule and, then, independence, arguing to preserve instead the 1801 Union with Britain. Irish history provided a precedent for the parties to the Anglo-Irish Treaty of 1921, who prescribed the supposedly temporary solution of partition. This solution traced not a natural marine boundary between Britain and Ireland, but an internal one, comprising, first, the whole and, then, just six of the nine counties of the (supposedly) ancient province of Ulster.[25] Redrawing the map in this way would separate the United Kingdom from the newly established Irish Free State, thus distinguishing two states, at least, if not two nations.

Writing in favour of either theory, or writing that aims to find a position between the two, often elides the question of 'what a nation is' by implicitly

defining it as a racial group (Celtic or Anglo-Saxon), a geopolitical entity (Britain or Ireland), a religious observance (Catholic or Protestant) or a political affiliation (nationalist or unionist). In the constitutional texts I examine, however, a definitional ambiguity remains over 'what a nation is'. I suggest that this is because, as the above summary shows, the question itself continues to trouble the homogenising discourse that constructs the nation.

In a variety of forms, then, the question of the nation has continued to define modern Ireland. More recently, the increasingly prosperous Republic has sought to interrogate its constitutional character inscribed as Celtic, Catholic, rural, and traditional by reconfiguring the nation in terms of gender, sexuality, class and urbanity, political union with Europe and, latterly, post-colonialism. Drawing on some of the questions raised by post-colonial studies, I look at Ireland as my first case study, which begins to map the transnational similarities and local particularities of a white, British diaspora. Ireland was arguably Britain's first colony, given that Northern Ireland, envisaged as part of the imaginary Republic proclaimed in 1916, still remains part of the United Kingdom; Ireland is also arguably Britain's last colony.

Whether or not commentators view Ireland as a colony or former colony depends on their interpretation of historical and political events, especially the partition of the island. Whyte, in his survey of writing on Northern Ireland, notes that:

> [t]here does seem to be an implicit majority view in the literature that, while the 'colony' model illustrates some features of the Northern Ireland problem, the 'ethnic conflict-zone' model is more generally appropriate.
>
> The colonial analogy is perhaps more apposite when applied to the whole of Ireland when under British rule before 1921.[26]

David Lloyd states, therefore, that describing Ireland as a colony has a more overtly political aim:

> [t]o assert that Ireland is and has been a colony is certainly to deny the legitimacy of British government in Northern Ireland and no less to question the state and governmental structures that have been institutionalized in the postcolonial Free State and Republic of Ireland.[27]

Cleary points out, however, that post-colonial studies raise interesting possibilities for Irish studies, rather than only the question of whether or not Ireland can be understood as a colony. Instead, he explores how a post-colonial perspective opens out debates on the nation to more global and complex readings in the context of empire.[28] In line with Cleary, I argue that the recent interest in re-examining the question of the nation from a post-colonial perspective broadens these debates, particularly that concerning

nationalist and revisionist histories, which I examine in more detail below. A post-colonial perspective contextualises Ireland within a global network of capital, law and politics without losing sight of national particularity. As productive analogies and disjunctions have been traced with both India[29] and the United States of America, Ireland can also be located within a racialised British diaspora, albeit in an ambivalent and doubled position. Anti-colonial nationalisms that provided models for Ireland were, in the first instance, primarily those of the white colonies of settlement in North America. The USA, furthermore, constitutes a large part of the Irish diaspora, reconfiguring the Irish nation beyond the borders of the nation state represented by the Republic. Understanding Ireland as part of a white, British diaspora situates it not only within a post-colonial frame, but also in a relation with British constitutionalism and the rule of law, both of which systematically privilege white, male configurations of subjectivity. Feminists have contested this masculine subject enshrined in the 1937 Constitution and, more recently, non-white immigration has thrown the systemic constitution of whiteness into relief, as demonstrated by the 2004 referendum.

Dominant readings of foundational texts such as the 1916 Proclamation and 1937 Constitution serve to legitimate and enshrine this legal subject, as well as to establish a textual genealogy for the nascent nation. The successful establishment of a new state and its attendant institutions confers foundational status on these texts, positing the current state arrangements as the logical post-colonial end of the nationalist struggle. The state-building process demands an answer to the undecidable question: 'What is a nation?' Differing interpretations of how best to answer this question become more urgent in a colonial situation. In order to repudiate colonial rule, the question necessitates an answer that enables the colonised people to develop a unified self-image and a sense of the right to self-determination. Paradoxically, this answer is often one initially posited by the coloniser, who unifies the colonised as other in a relation of difference with the self, as various commentators including Edward Said and Ashis Nandy have argued.[30] Although the unity of this self-image is constructed rather than natural or pre-colonial, the appropriation and valorisation of it remains an important part of the decolonising process. The nation, then, is made to speak on behalf of the people in order to call a new, anti-colonial state into being. As Lloyd has pointed out, however, the legacy of this nationalism is ambiguous: it is at once positioned as modern and state-forming, and also as atavistic.[31] He contends that the simple characterisation of nationalism as negative and violent 'ignores the role of the state in restructuring and producing ethnic and tribal antagonism'; characterising nationalism rather as 'non-modern', Lloyd asserts:

> those accounts of nationalism which are currently hegemonic in the West are locked into a singular narrative of modernity which is able neither to

> do historical justice to the complex articulation of nationalist struggles with other social movements.[32]

In a different way, Partha Chatterjee and Ranajit Guha interrogate the nationalism of post-independence India, arguing that the new Indian ruling class reproduced and reiterated the norms of its colonial predecessors by drawing on European models of national emancipation.[33]

I want to hold on to both Lloyd's ambiguous view of nationalism and Chatterjee and Guha's critique of post-colonial nationalism throughout this chapter, since both arguments make visible the ambivalent position of Ireland within Europe, both as a geographical and conceptual entity, and within post-colonial studies more generally. In the first instance, Ireland is geographically and historically part of Europe, but, in common with countries such as India, it also has a history of subjugation and decolonisation. Lloyd recognises the specific dislocation of the case of Ireland within post-colonial discourse, as it is:

> geographically of Western Europe though marginal to it and historically of the decolonizing world, increasingly assimilated to that Europe, while in part still subject to a dissimulated colonialism . . . [It also] continues to lose up to 30,000 people annually to emigration.[34]

Carol Coulter likewise asserts that it is:

> undeniable that we are part of Europe . . . [but] the analogues of our institutions, our culture and our political life and expectations are to be found more in other former colonies than in the old imperialist power of Western Europe.[35]

Keeping Chatterjee and Guha's observations in play also makes visible the ways in which the Republic of Ireland, despite its initial forays in alternative juridical forms, continues to operate in relation to British legal and political models.

In my reading of the Proclamation and other constitutional texts, I set out to show that not only Northern Ireland, but also the Republic of Ireland still continues to operate within a legal and political framework that has recognisably British antecedents. As is evident from recent increases of non-white immigrants and asylum seekers, this framework privileges an ethnic and racial conception of Irishness that is not only Celtic and Catholic, but also white. I argue, however, that 'whiteness' in the context of constitutional texts can be understood as a legal and political structure that systematically privileges both racially white people and, implicitly, 'Anglo-Saxon' (that is, British) conceptions of rational government.

The problem of definition, of who has the right to say 'who *we* are',

troubles the familial and racial discourse of the nation, interrogating the unity of the 'we' of the natural and adopted family often alluded to in political discourse. Unsurprisingly, then, representation of the family is particularly of interest in discussing post-independence Ireland. In line with feminist interrogations of the conservatively gendered nation established in the 1937 Constitution, I trace how familial relationships – particularly in relation to the mother – are configured and potentially reconfigured in the Proclamation. The question of 'who we are' is particularly significant in the case of post-colonial nation states: it archives a sense of the people as having, on the one hand, a racial and ethnic bond – the Irish people – or, on the other hand, a civic and republican bond – the people of Ireland. In my reading of the Proclamation, I argue that both definitions work in a tense double relation with each other.

In the focal text of this chapter, The Proclamation of *Poblacht na h Eireann*: The Provisional Government of the Irish Republic to the People of Ireland (1916) read out during the course of the Easter Rising, I trace not only the tensions between Protestant and Catholic, unionist and nationalist, but also the contradictions and ambiguities concerning nations and states, ethnic and civic nationalisms, past and future, history and myth. I focus on the Proclamation not only because it is a foundational text of modern Ireland (despite the fact that, like Aotearoa New Zealand's Treaty of Waitangi, it has never been ratified and has little legal status), but also because, in current debates concerning the nation in the Republic, especially in relation to gender, this text has provided a counter-narrative to the more conservative national vision of Eamonn de Valera's 1937 Constitution.

The ambiguity over national definition can be traced within the text of the Proclamation and, subsequently, over how best to narrate the story of the nation, particularly in relation to the originary event, Easter 1916. Easter 1916 – understood as an unpresentable 'event' that can only be represented, in the sense that Lyotard has identified – continues to signify powerfully in the debate over 'what the nation is' and what form its history should take. This is evidenced by the recent 'nationalist–revisionist' debate, which is obsessively concerned with the most appropriate way to tell the story of the nation. One way of tracing what is at stake in this debate is to reread the 'founding' text that effectively called the 'nation-as-republic' into being, examining how it legitimates the new state formation by both founding and conserving the violence of the originary event.

Easter 1916

In his poem 'Easter 1916', W B Yeats identified – and helped constitute – the Easter Rising as the originary event that eventually led to the establishment of the Irish Free State (later the Republic of Ireland). Although the rebellion was considered to be a failure and its leaders executed as traitors, the events

of 1916 set in train a bloody process that saw the eventual establishment of the Irish Free State in 1922. After the execution of the leaders of the rebellion, the mood of nationalist Ireland changed from a desire for Home Rule (effectively, devolution) to the desire for political independence from Great Britain. At its *ard fheis* in 1917, Sinn Féin's Constitution was altered to specify this aim. The results of the 1918 General Election bore out the change in political emphasis when Sinn Féin returned 73 candidates compared to the Home Rule Irish Parliamentary Party's six.[36] The refusal of the new Irish Members of Parliament to take their seats at Westminster, following the proposed introduction of conscription to Ireland, led to the establishment of the first Dáil Éireann in 1919. This Dáil produced a Declaration of Independence that continued the vision of 1916, asserting 'the Irish Republic was proclaimed in Dublin on Easter Monday 1916, by the Irish Republican Army, acting on behalf of the Irish people'.[37]

This first attempt at state building came with the attendant violence of sectarian riots and hunger strikes. If Ulster had not been happy with the idea of Home Rule – and nearly 250,000 Ulster Unionists had signed the 'Solemn League and Covenant' of 1912 vehemently opposing it[38] – then it was even more disturbed by the prospect of government from an Irish nationalist parliament in Dublin. A devolved form of self-government in Northern Ireland still linked to Westminster was established, along with the need to reach some kind of settlement over Ireland's political future. In 1921, an Anglo-Irish Treaty effectively partitioning the island and incorporating an oath of allegiance to the British Crown was seen, by both British and Irish parties, as an intermediary measure on the path to full political independence for the island of Ireland. The Treaty was signed by representatives of both the British and Irish governments, including among the former, David Lloyd George and Winston Churchill, and among the latter, Michael Collins and Arthur Griffith (the former leader of Sinn Féin). Unsurprisingly, the Treaty caused friction between pro- and anti-Treaty factions, which disintegrated into civil war in Ireland. From this violent series of upheavals, underpinned by very different interpretations of the question 'what is a nation', the overwhelmingly Catholic Irish Free State, made up of 26 of the 32 counties of the former Ireland, was established in 1922 and entered the League of Nations in September of the following year.[39]

At the beginning of the twentieth century, the nation 'Ireland', ventriloquised in the 1916 Proclamation and performatively called into being by its authors, was to take the form of a republic. The republican vision of Patrick Pearse *et al* implicitly equated the concept of the nation with an ethnic definition of 'Irishness', while simultaneously addressing itself to all the 'people of Ireland'; this new vision of the nation would be 'the property of the people', although who exactly these people were remained somewhat more ambiguous. Conflict over this republican definition led in 1921 to the establishment in law of a partitioned island constituting the Irish Free State

and Northern Ireland. The functional unity of Ireland, the nation envisaged as a republic, which was drawn from the pre-colonial past, remained still to come beyond its name. The purpose of my discussion of both the originary event of the Easter Rising and the foundational texts of the Republic is to interrogate the conventional image of a unified community located in the Proclamation. In the course of this chapter, I outline the ways in which the dominant conception of the nation is mapped onto, and legitimated by, the new state formation. The retroactive process of legitimation constructs the Easter Rising as an event in the Lyotardian sense and valorises it as a point of national origin. This process similarly positions the Proclamation as inaugurating a genealogy of legitimating texts. Finally, the continual conservation of both event and text in popular, historical and legal discourse in the form of commemorative anniversaries constantly reiterates the dominant national narrative of 'who we are'. These processes serve to legitimate the new state and assure its stability.

Because the vision of belonging to, and originating within, a collective subject – the nation – is constitutive of the individual subject's self-image, it is always perceived as a unity masking the originary split in its conceptualisation. Ireland provides a particularly striking example of how differing attempts to fix a unitary meaning for the nation are motivated by conflicting political and ideological aims. In this case, these differing interpretations eventually proved politically incommensurable.

Foundations

As Cleary has noted, the partition of the island did not, and does not, solve conflicting questions of national definition and national sovereignty; rather, it has the effect of exacerbating them. Furthermore, it was not accomplished without 'extraordinary communal violence'. He continues: 'The violence does not end with the act of partition: violence is not incidental to but constitutive of the new state arrangements thus produced.'[40] In accordance with Derrida's reading of Walter Benjamin in 'Force of Law',[41] I argue that this violence is both foundational, in the sense that Cleary identifies, and, as a consequence, conservative. The dominant position that is founded needs to be constantly reiterated in order to be preserved and conserved. Thus, the violent event that set in motion the process leading to the establishment of Northern Ireland and the Irish Free State is commemorated as a foundational event in the Republic of Ireland, a result of 'good' state-building nationalism. Commemorating the 'glorious rebellion' of Easter 1916 indicates that it is this more unified and romanticised vision of the Irish Republic that the state wishes to preserve as its foundational moment, rather than the more divisive later conflict (such as the signing of the Anglo-Irish Treaty or the civil war of the early 1920s) that, in more practical terms, actually led to the foundation of the Free State. The succeeding Republic continues

to construct a selective memory of its own past, repressing irruptions of violence and alternative definitions of the nation that would trouble this seamless narrative of national identity.

While I refer to the 1919 Declaration of Independence and the 1937 Constitution, I therefore discuss the question of 'what a nation is' in relation to The Proclamation of *Poblacht na h Eireann* (1916). It is this particular text that founded an idea of the 'nation-to-come'; this idea haunts subsequent texts that have attempted to define the Republic along more conservative lines. The nation-as-republic remains rather an imagined Irish community that is still yet to come beyond its name, despite its legal confirmation by the Republic of Ireland Act of 1949. Although it strives for the functional unity promised in the Proclamation, this unified entity remains always in the future-to-come. Despite the impossibility of the unity for which it strives, that it strives for a unified nation enables the Proclamation to be described as foundational. Foundational is not the same as being original: being thought of as a foundational text implies a more active constitutive role in the shaping of narratives than that of a text which may have chronologically preceded it. Thought of as a foundational text, I therefore characterise the 1916 Proclamation as a material frame, which both writes and supports the nation it is calling into being. Moreover, it is the Proclamation, as well as the Rising, that is commemorated as foundational by the state that it helped call into being and legitimate. As part of this commemorative drive, the material remnants of *this* text have been made into both sacred objects worthy of veneration and consumable tourist souvenirs. The text appearing in its original type is reproduced in books and on websites as an historical artefact, while copies of the original proclamation appear on postcards, posters and even tea towels in Irish gift shops.[42]

The question of what is 'foundational', rather than merely 'original', also relates to the question of legitimacy. To properly found a nation, mapped by a state system of laws, the new entity subsequently needs to be preserved and legitimated in order to confer foundational status on a particular event. Foundational texts such as the Easter Proclamation play a crucial role in this process of legitimation, preserving the originary event in both legal and popular discourse, and subsequently forming a textual precedent for the constitutional texts that come after it. Such texts establish the ideal underpinnings of the new state, which interpellates its citizens in such a way that their own subjectivity is dependent on, and defined by, the dominant ideology in which they live.

In 'Force of Law', Derrida reflects on questions of justice and legitimacy in a reading of Walter Benjamin's essay 'Critique of Violence'. Derrida argues that the two types of violence Benjamin identified – the foundational and the conservative, which are both comprehended in the German word *Gewalt*, meaning both force and violence[43] – cannot be kept apart, but are instead caught in an intractable double bind. Each needs the other in order to

legitimate the new entity they call into being. Indeed, just as the signature appended to a declaration of independence authorises its signer to sign retroactively, foundational violence likewise legitimates what it has produced in hindsight. Thus, the violence of Easter week is foundational insofar as it leads to the setting up of the Free State; once the Free State was established and internationally recognised, it retrospectively conferred legitimacy on both the Rising and the Proclamation. The Easter Rising – more particularly, the moment at which the Proclamation was read out, thus legitimating the action – is instituted as a point of origin from which the collective subject can trace its line of descent.

As a result of this process of legitimation, the foundational moment is seen as an irruption into history that sweeps all previous colonial institutions before it, making new laws and institutions. In order to contain the threat of further possible 'law-making' irruptions, however, this revolutionary moment must be domesticated by valorising and commemorating it as a point of national origin. Rather than remaining external to the political entity it brings into being, it is retroactively constituted as foundational by the very state it founds. The 'new entity' distances itself from the foundational violence as, aware of the lawmaking potential of this force, it perceives the threat that non-sanctioned violence might make to its stability. Benjamin, for example, noted that modern law tends to 'divest the individual, at least as a legal subject, of all violence . . . The state, however, fears this violence simply for its lawmaking character'.[44] That is, as the individual is divested of the agency that is valorised in the figures of Pearse *et al*, so this violence is conferred on to the state and recuperated as legitimate force. Because this foundational violence becomes institutional, for example, as a national police force or legal system, the new state still remains aware of the threat simultaneously instituted. Derrida notes that '[l]aw is both threatening and threatened by itself'.[45] Therefore, the 'original' foundational violence is venerated and commemorated, while other violence, such as, in this case, sectarian violence that threatens to overthrow the state it once played a part in creating, is outlawed.

This selective valorisation of force depends on a certain amnesia in relation to its foundations. Derrida notes that the 'originary violence is consigned to oblivion' and, furthermore, that '[t]his amnesic loss of consciousness does not happen by accident. It is the very passage from presence to representation'.[46] In order to preserve its new hegemonic position, the new legal entity must repress the traumatic 'presence' of what brought it into being: the revolutionary instant. It must rely instead on iterative representations in the form of institutionalised force, including the police and the legal system, as well as state-sanctioned commemorations and historical representations of those past events.

These representations do not, however, capture, and therefore stabilise, the fleeting revolutionary moment, which Derrida asserts is:

> an ungraspable revolutionary instant that belongs to no historical, temporal continuum but in which the foundation of a new law nevertheless plays . . . on something from an anterior law that it extends, radicalizes, deforms, metaphorizes or metonymizes . . . But this figure is also a contamination. It effaces or blurs the distinction, pure and simple, between foundation and conservation. It inscribes iterability in originarity, in unicity and singularity.[47]

That is, although this revolutionary moment appears original in the sense that it retroactively founds the institutions that it brings into being, it draws on a pre-existing law and is rather *quasi*-original. While it radically transforms these models, it also repeats them in various other guises – indeed, it must compulsively repeat and commemorate them – calling into question the apparent anomaly of these moments. The textual constitution of the new legal entity further legitimates the originary violence, drawing on internationally recognised precedents to frame a document that establishes a 'new' and independent nation.

When the originary moment of violence is commemorated, it contributes to the preservation and, therefore, legitimation of this violence. This can be traced in the commemoration of the Easter Rising at both 50th and 75th anniversaries. These anniversaries – in 1966 and 1991 – frame the worsening of 'the Troubles' in Northern Ireland. The position taken during these commemorations on the foundational violence of 1916 signals an awareness of what else this originary event may have constituted. Crucially, therefore, commemoration relies on legitimating a particular type of violence – the product of the 'good' nationalism that heroically founded a nation – while distancing itself from any other kind of violence, especially sectarian, that it perceives as a threat to its unity and stability.

Commemorations

Rather than challenging the conventional model of history as the shared memories of a community, acts of commemoration serve to enshrine events and, in turn, guarantee the 'founding function' of the collective subject, providing a marker from which 'the people' can say they originate. These acts, however, being iterative representations rather than presentations of the actual event, continually reconstitute the past with a view to the future. They simultaneously preserve the hegemonic position of the state that they found, as well as constructing and reiterating 'the people' as a unified, collective subject.

Interpretations of history are integral to the commemorative drive with which a nation produces and reproduces a sense of itself. The 1966 anniversary of the Easter Rising produced a collection of documents, edited by revisionist historians Owen Dudley Edwards and Fergus Pyle, entitled *1916:*

The Easter Rising, while in 1991 an essay collection, *Revising the Rising*, meditating on the relationship between nation and history, was specifically produced for the occasion. Linking 1916 to 1776 and the US War of Independence, Edwards and Pyle view texts such as the Declaration of Independence and the Proclamation as 'diplomatic ploy[s]' that take on an iconic status.[48] They thereby implicitly recognise the iterative and conservative function of these icons.

Perhaps in a reaction to the 1966 anniversary volume, which endorsed the revisionist project, 1991's *Revising the Rising* seemed to provide a recuperation of the nationalist tradition of telling the story of the nation in relation to its foundational moment. A closer look at the aims of this project reveals the intimate links between the 'nation' and its 'history', and shows the way in which the latter serves to legitimate the foundational violence of the Rising, while distancing the nation from more recent sectarian violence.

An obsession with dates is a feature of commemoration. According to the editors, the contributors to *Revising the Rising* 'met tough deadlines so that this book might appear in 1991'. In addition, the publishers, Field Day, 'played a Trojan part in producing the book at such short notice'.[49] Presumably, the book would not have the same impact, nor attract the attention of a public caught in a mood of historical reflection, if it were not produced in the anniversary year. This effort to conform to what is an arbitrary marker of significance suggests that, like the framers of the 1916 Proclamation, the editors and contributors to this volume were aware of their investment in constituting the history of the nation, particularly in admonishing that nation not to forget its origins. They seldom interrogate, however, how these origins have been constructed or what else they might have played a part in constituting, namely decades of sectarian violence.

The essays move not only between 1991 and 1916, but also between 1966 and the 50th anniversary celebrations. In the Preface to *Revising the Rising*, the editors frame the collection of essays as a reaction to what they refer to as a 'curiously muted, not to say inhibited' public response to the 75th anniversary, especially by comparison to the more overtly nationalist celebrations of 1966. A conference on '1916 and its Interpretations' was abandoned due to lack of official support and this essay collection grew out of a desire not to let the occasion be marked solely by a 'specialized audience familiar with the infighting of recent historiography', but also by the wider public, for whom these essays were to provide a forum of discussion and debate. The project is thus concerned with what is constructed as both an official and an unofficial malaise about remembering the nation's past. According to the editors, 'there are those of us who feel that, as a reaction, *amnesia* – private or communal – is both unhealthy and dangerous'. The use of the word 'amnesia' here again points to the conceptualisation of a collective subject that must not forget its own past. Although it allows that a consensus would be 'absurd' and that the voices included are 'different and often divergent', the project helps to

constitute a 'people' who, although they may disagree among themselves as individuals, still signify as a collective.[50] The way in which they do this is in a mutually constituting relationship with the concepts of 'nation' and 'history', and a reappraisal of the nationalist tradition, the denigration of which features as a cause for concern for several of the contributors.

In the commemorative year of 1991, the contributors sought to revise not the Rising, but the *commemoration* of it by a nation that would turn its own history into a televised exercise in apathy or pseudoscientific detachment. What seems to be missing is a consideration of what this 'commemoration' might entail. One of the features of the essay collection in general is a distancing of this nationalist tradition from sectarianism, leading D George Boyce to observe that '[t]hese claims were not necessarily invalid, but they revealed how anxious southern Irish scholars were not to let contemporary, violent northern Republicanism capture the 1916 tradition'.[51] Northern Republicanism, as one example of sectarian violence, is separated from the legitimate state-forming violence of Easter week and, hence, its republican vision. This further separates the north from the Republic of Ireland, distancing it from a southern definition of the nation.

Although foundational violence is institutionalised and preserved in the form of state-sanctioned force, its capacity for lawmaking and the threat that this would make to the new entity is repressed. Albeit in different, state-sanctioned guises, this repressive process is also iterative, analogous to Freud's characterisation of the development of an individual's neurosis, in which 'the process of repression is not to be regarded as an event which takes place *once*, the results of which are permanent . . . repression demands a persistent expenditure of force'.[52] Thus, the distancing of the relatively stable, and increasingly prosperous, Republic of Ireland from the troubles to the north can be seen as intimately connected to the process of legitimation and also to the primary motivation for repression, which is 'the avoidance of unpleasure'.[53] The collective subject is not so much amnesiac, as the contributors to *Revising the Rising* would have it, as 'neurotic'. The symptoms of repression – that is, irruptions of violence from which the collective subject distances itself – are visible manifestations of that which it has repressed, namely the foundational violence out of which the new state was born. The state must repress its originary violence in order to found stable institutions in law.

Rather than questioning the assumption of a collective subject, which it supposes is unhealthily and dangerously close to amnesia, commemorative material such as *Revising the Rising* seems to seek a return to a more unified form of commemoration, one that is recognisably nationalist (albeit a modified form of nationalism). This positing of a unified community as the subject of a nationalist history thus risks reproducing the epistemic violence with which the unified object 'Ireland' was constructed as Britain's other. The anterior law 'extended' and 'radicalised' by the revolutionary instant is,

paradoxically, that of the former colonial power and its construction of a coherent Irish other in order to legitimate its own imperialist aims. In appropriating this discursive identity, nationalists, and subsequently the new Irish state, 'propp[ed] up through its organizational assumptions that which it claimed to oppose'.[54] This coherent Irish self, therefore, posited a British 'foreign' other that did not share the same blood ties, thus legitimating the right to self-determination.

Unionists, however, did not recognise themselves in this image of the nation and consequently differentiated themselves from the nationalist vision. Their self-image was drawn from the hegemonic position afforded them by British imperialism and was dependent on remaining part of the United Kingdom. The desire of both groups to fix a unitary meaning of 'what the nation is' not only repudiated the other's contesting vision of the nation, but erased the possibility of any alternative definition. Rather than closing down the meaning of the nation, critically rereading the Proclamation as a performative text draws out the contradictions and ambiguities that constitute such divergent interpretations, offering an alternative account of the 'nation' and its 'history'.

Debates about how best to represent the story of the nation continue to attempt to answer definitively the undecidable question of 'what is a nation'. Historian Hugh Kearney comments that this question raises:

> an issue which is fundamental for all nationalist historians, namely the question how far back in time can we trace national consciousness. As the vast historical literature concerning nationalism illustrates, we are entering an extremely problematic area. What is a nation? What is the criterion of belonging? Language? Religion? Class? Race? How many individuals can be said to be conscious of belonging to a particular nation at any one period?[55]

The question of whether Ireland is one nation or two is not only a symptom of an ongoing debate about 'who the nation is defined by', but also, as Kearney demonstrates, part of a larger debate over the history of that nation and whether it should be 'nationalist' or 'revisionist'. Far from solely being a concern of nationalist historians, historiography plays a constitutive role in constructing the nation as a unified object of analysis. Thus, the writing of both history and the nation is always already politically charged.

Nationalist historian Desmond Fennell, for example, vehemently attacks the 'revisionist' approach, arguing that the historian has a moral responsibility to the health and well-being of the nation. He comments:

> Every nation in its here and now, the people who make up the nation, have needs with respect to their national history. They need for their collective well-being an image of their national past which sustains and

> energises them personally, and which bonds them together by making their inherited nation seem a value worth adhering to and working for.[56]

Fennell explicitly and prescriptively traces a constitutive link between 'history' and the 'nation', recalling Plato's 'noble lie', which would engineer the bonding of the republic. He also, however, naturalises the 'need' of the contemporary nation to have a strong sense of self not only in the 'here and now', but also by a link to the 'dead generations' in the form of 'their inherited nation'. The final line of this quotation, however, signifies ambiguously. This national past is recognised as an 'image' that makes their inherited nation '*seem* a value worth adhering to and working for'. That is, this line implicitly recognises that it is *not* the authentic nation, but rather its constructed, unitary image.

In a similar vein, but with particular regard to historical representations of the Easter Rising, Deane takes issue with the 'revisionist' project, asserting that the Rising 'has been so effectively revised that its seventy-fifth anniversary is a matter of official embarrassment'.[57] He implies that the more detached revisionist interpretations of the Rising have served to undermine not only the nationalist tradition, but also the constituent effect of the Rising itself. Deane specifically takes Foster to task for the way he equates the Rising with irrationalism and the northern crisis. Foster's treatment of Irish history is often singled out, for either praise or criticism, as being the epitome of the revisionist approach. Kevin Whelan, for example, describes it as 'the zenith as well as the obituary of the revisionist project in Ireland'.[58] The irrationalism Deane mentions is, according to Foster, illustrated by the use in the 1916 Proclamation of both poetic and religious rhetoric, which obscures any 'theoretical contradictions' or the 'practicalities of insurrection'.[59] Deane argues that this characterisation of the Rising is symptomatic of the revisionists' desire to undermine the value of unifying concepts:

> Easter 1916 was an action predicated on a version of Irish history that has now been rewritten so that its force may be denied, particularly the force that came from the rebels' conception of themselves as the long culmination of a long, single narrative that had been submerged by deceit and oppression. Revisionism attacks the notion of a single narrative and pretends to supplant it with a plurality of narratives.[60]

Deane's critique seems nostalgic for lost unity: one, moreover, that conforms to a nationalist narrative.

Representations of the 'nation' as a singularity and its 'history' as a linear chronology are mutually constitutive. The 'nationalist–revisionist' debate implicitly recognises this constitutive role. M A G O'Tuathaigh notes that, although the revision of early Irish history has provoked lively debate among scholars, they 'have had nothing like the same seismic impact within the

profession as the controversy surrounding the modern period'.[61] I argue that it is precisely because this modern period covers the originary event that constituted the new nation-as-republic that it provokes such an impact. Debates over how 'properly' – or 'morally', as Fennell puts it – to represent that event are inextricably linked to the foundational question of 'what a nation is' and are thus also constitutive of what that nation is.

History, whether nationalist, revisionist or otherwise, is written retrospectively. Lloyd observes:

> historians narrate history as the history of its own end, in the reconciliation and resolution of contradiction, finding closure predominantly in an orderly civil society and reformed state or occasionally in post-revolutionary socialism. In either case, history is written from the perspective of and with the aim of producing a non-contradictory subject.[62]

The desire to decide on the 'proper' or 'moral' way to narrate the history of the nation aims to constitute a unified collective subject in the form of the present state. Understood as historiography, history in its conventional forms can be seen as the product of European technological modernity. In the case of Ireland, it constitutes the 'post-colonial' history of Ireland within hegemonic structures. The origin of the 'proper' history of modern Ireland can be traced in the Proclamation itself, to which I now turn.

Proclaiming the Irish Republic

While the nation is called into being as a republic, the 1916 Proclamation simultaneously creates a historical *raison d'être* for that nation. The history of the nation, then, as the selective and interpreted record of its collective past, is the story and process by which the collective subject's identification of self becomes inscribed. The 'history' or, rather, historiography, of 1916 does not only come after those events in the form of scholarly interpretation and analysis. By invoking the 'dead generations' and previous failed rebellions, Pearse *et al* also perform a historiographic gloss on Ireland's past that is at once romantic and mythic. The text alludes to a self-conscious awareness that its authors are caught in an historical moment, described as 'this supreme hour'. A ventriloquised, personified Ireland appeals to God and 'the dead generations' in order to 'prove itself worthy of the august destiny to which it is called'. These 'dead generations' include the 'six times during the past three hundred years' in which a series of abortive rebellions had previously taken place.[63] The invocation of a tradition of resistance, in which the 1916 rebels could place themselves, provides both an authorisation of action and a legitimation of *their* particular suitability to act as the natural successors to Tone, Robert Emmet and others. At the same time, this romanticised view of previous glorious failures, to which and for which they will succeed in both senses

of the word, has an eye to the future or the destiny of the nation. Liam De Paor comments that the Proclamation provides a 'mythic definition of Ireland, powerful because it is transcendental, raising its vision above the shameful contingencies of the present, to find a future in the transfigured past'.[64]

The imagined future-to-come of Ireland, after the 'alien government' had been expelled, would look back to the pre-colonial Celtic past, one not marked by capitalism and individualism, but rather characterised by tribal communalism. In doing so, it would 'guarantee . . . religious and civil liberty, equal rights and equal opportunities for all its citizens' and would, furthermore, 'pursue the happiness and prosperity of the whole nation and of all of its parts, cherishing all the children of the nation equally, and oblivious of all the differences carefully fostered by an alien government'. This egalitarian rhetoric – referring intertextually to phrases from the US Declaration of Independence, rather than ancient Irish customs – suggests that the Republic that is called into being in this Proclamation will be founded on more community-oriented principles drawn from the pre-colonial past. It is because the Proclamation provides an elastic vision of a 'glorious future in the transfigured past', without actually outlining what that might be, that the Irish state looks back to this text and venerates it as foundational. This mythic vision of community also pre-dates the partition of the island, therefore providing a more unified, pre-colonial self-image for the collective subject. The Constitution, on the other hand, implicitly legitimated the partition of the island in order to found a workable legal and political framework for the Irish Free State, and reiterated the rule of law established in the 1922 Free State Constitution. Clare Carroll asserts that, in this and other conservative measures (particularly, assigning women a domestic role), the Free State 'imitated colonial institutions more than it lived up to the revolutionary ideals of 1916'.[65]

On Easter Monday, 1916, Pearse read out the Proclamation in front of the General Post Office in Dublin. The document was printed and widely distributed, leading De Paor to comment:

> [t]he purpose of the Rising was to issue the Proclamation with sufficient force and courage to give it meaning. The purpose of the Proclamation was to rouse the nation and make it free and independent.[66]

In the act of reading out this Proclamation, Pearse performatively called the Irish Republic into being. In order to bring the new Republic into existence it was necessary for this text to be read out or *performed*, rather than merely circulated, thus ritually conferring its new national status. Drawing on Austin's theory of performative speech acts, Lyotard has defined a performative utterance as one in which:

> its effect upon the referent coincides with its enunciation . . . That this is so is not subject to discussion or verification on the part of the

> addressee, who is immediately placed within the new context created by the utterance. As for the sender, he must be invested with the authority to make such a statement.[67]

The act of proclaiming the new Republic did not have the immediate effect of constituting a new state formation. It did, however, alter the nation as a conceptual object, constructing it as a collective subject in the form of a republic. The *immediate* addressee of the performative utterance was not, then, the 'alien government', but rather the 'Irishmen and Irishwomen' who would define (and were defined by) the new Republic. The text not only created a newly emancipated nation, 'the Irish Republic', but also entrusted its provisional government to the leaders and actors of the Rising, a government that, again, the text 'hereby constituted'. Retroactively, the new state accepted the authority that the rebels and their Proclamation claimed, and used it to confer legitimacy upon itself.

While the Republic was 'constituted' in this Proclamation, however, it was not until well after the rebels had surrendered and been executed that the Republic, as a legal and political entity, came into being. This occurred much later, on Easter Monday 1949, when the Republic of Ireland Act passed into law, following the repeal of the External Relations Act. Performatively calling a new state into being, then, is not only comprehended in the moment of enunciation, but also traceable though a textual genealogy. In Republican quarters, however, this legal event was a belated recognition of an 'ideal reality that had always existed in theory if not in fact'. The President of Sinn Féin in 1949, Margaret Buckley, at the party's *ard fheis*, asserted that the government could not declare a Republic, because 'the Republic was proclaimed in 1916, established in 1919, and it had never been disestablished'.[68]

Although the Irish Republic was proclaimed in 1916, its legal birth pangs were somewhat more drawn out. The Proclamation was restated and ratified by the Dáil Éireann in 1919, giving it the mandate of the electorate. It was, however, then superseded by the 1921 Articles of Agreement, ratified by the Dáil in 1922, and later still by the Free State Constitution of 1937. De Paor notes that the 1916 Proclamation's '*memory*, if nothing more, was revived when the government in Dublin declared the Irish State to be a Republic and this received international acknowledgement, including British recognition in 1949'.[69] The 'memory' that De Paor invokes here suggests that the Republic that came into being in 1949 did not bear much resemblance to the Republic envisaged in 1916 and that it is only by retaining the same title that the event of 1916 is commemorated in law. This 'memory' also finds a locus in the Proclamation, however, because, in keeping with Deane's definition of a foundational text, it generates the possibility of such a textual genealogy or narrative. Commemorating the foundational Proclamation within the title of the new state also confers legitimacy on that state.

Furthermore, the Republic's legal enactment depended on the constative acknowledgement not only of the international community, but also of Britain, its former coloniser. It was not until 1949 then, that Britain formally accepted the authority of the sender of 1916's performative utterance – or, to put it another way, the law-making character of the violence of Easter week had been successfully contained in the state apparatuses of 1949 and no longer posed a threat to the self-image of the United Kingdom, of which Northern Ireland still remained part. That this happened some 33 years later, when the new state could be said to have a post-colonial 'history', suggests that both the concept of the 'nation' and the 'history' of that nation mutually constitute each other.

Both the 'nation' and its 'history', which, in Ireland, the Easter Rising and the 1916 Proclamation helped constitute, imply that, collectively, the 'people' have a unified idea about what the nation is. They also suggest that the 'history' of how that nation came into being constituted a collective memory of the event. Transforming the collective memory or 'history' of the event into myth not only confers foundational status on both that moment and the new state, but also limits the ways in which the event can be represented. The Proclamation placed the rebels in a linear succession and constituted a continuous narrative of mythic resistance to oppression, referring not only to previous historical rebellions – eliding the different and sometimes contradictory aims of their revolutionary forebears[70] – but also reaching back to more mythic heroes such as Cúchulainn.[71] It also constituted the historico-narrative mode in which the nationalist tradition, in particular, would later refer to the rebels and with which revisionists would later take issue.[72] The Proclamation's nationalist narrative relied heavily on the construction of familial blood ties, constituting a sacrifice that could be made in the name of the nation. It is these naturalised, 'self-evident' blood ties that work to exclude those born in the island of Ireland to non-Irish parents in 2004's referendum.

Blood ties

In the Easter Proclamation, the rebels called for the shedding of nationalist blood, 'pledging our lives and the lives of our comrades-in-arms' in the cause of 'sacrifice . . . for the common good'.[73] It is this blood, both literal and metaphorical, that links the individual subject to the collective subject of the nation. As I have indicated in Chapter 2, 'nation' is etymologically linked to both 'nature' and 'race'. This etymology traces the corporeal and genealogical origins of national communities, traces that are often represented as blood ties firmly linking the 'people' as individual subjects to the collective subject of the 'nation', thus giving a materiality to an imagined community. In my reading of the Proclamation, I draw on Julia Kristeva's theory of the abject in order to characterise the imagined body of the nation as a maternal

body of both fear and fascination, which demands blood sacrifice in order to constitute the subjectivity of a new entity: the republic. More than just a sacrifice made in the manner of the *pharmakos* to preserve the city state of Athens, this one is made in the blood that (racially) links the nation together as a family. A vocabulary of blood and family not only naturalises this particular idea of the nation, but also acts as an apparent guarantee of its legitimacy.

The idea of blood sacrifice had strong resonances in the early part of the twentieth century. Alvin Jackson and Edna Longley have shown that nationalists and unionists alike subscribed to the ideals of blood sacrifice circulating at the time of the First World War; the rebels' apparent bloodthirstiness was symptomatic of the times rather than an aberration.[74] The rebels appropriated the ideals espoused by British war propaganda and turned them to their own ends, calling for sacrifice in the name of the *Irish*, rather than the British, nation. Drawing on this rhetoric of blood sacrifice, which is heavily redolent with Christian imagery, the rebels, particularly Pearse, who called for the 'old heart of the earth' to be 'warmed by the red wine of the battlefields',[75] refer to the planned uprising as something akin to Christ's sacrifice, a link that the Easter date readily offers.

Indeed, it was with this imagery that one of the first revisionists of the Rising, Jesuit priest Father Francis Shaw, took issue, effectively critiquing the use of the idea of blood sacrifice to valorise and legitimate the state. In an essay held back in the anniversary year 1966, not appearing until 1972 (the year of Bloody Sunday in Derry, Northern Ireland), Shaw rejected the link between the rebels as national martyrs and Christ's sacrifice. Shaw argued that this view had been 'carefully fostered and was newly consecrated in the massive State-inspired and State-assisted Commemoration in 1966'.[76] In his view, the rebels, rather than saving the nation, inflicted three wounds on it that damaged the vision of the nation as a unified entity: partition, civil war and the inability to honour those Irishmen who fought in the First World War.[77] Following this argument, the ideal of blood sacrifice, far from uniting the nation, served to split it still further.

The reference to blood, which Kristeva has characterised as abject, opens the text of the Proclamation to a reading in terms of both the horror of the foundational violence it also engenders and the tensions between differing definitions of 'what the nation is'. Blood, as abject matter, is expelled from the inside of the body, transgressing the boundaries between 'inside' and 'outside'; in an analogous way, the area that became the statelet of Northern Ireland was 'sacrificed' in order for the Irish Free State to establish itself as a legal subject. The 'in-between' state of Northern Ireland continues to form part of the self-image of the nation, Ireland – a self not yet realised in the state formation of the Republic of Ireland. The disputed territory of Northern Ireland becomes abject to both Ireland and Britain, as discrete and *separate* nations, in that it is at once of both and yet not fully of either. At the

same time, by its abjection, it constitutes the subjectivity of the collective subject, Ireland, inscribing its own loss in the foundational moment. This abject territory is expelled from the imagined, unitary Ireland, by the Anglo-Irish Treaty of 1921, yet still remains constitutive of its vision of itself as a healthy coherent whole.

In a similar way, the abject blood reassures the individual subject that, although it appears to lack 'its own and clean self',[78] – that is, a self that is proper to it and links it to the maternal body it strives to possess – this self can still be attained because the individual still has recognisable links to the maternal body. In the case of the Republic, the blood of a succession of martyrs works to anchor them to a genealogy of resistance to colonial rule and incorporates them into the imagined body of the nation. Analogies based on blood ties therefore link the people of the Republic to the imaginary community of the nation. The two entities – the 'nation' and the 'republic' – are, however, held apart within the text.

In the Proclamation, the Irish 'republic' at first appears to be used almost interchangeably with the feminised Irish 'nation'. In the first two paragraphs of the text, Ireland is symbolised as a woman: more particularly, as a mother calling her children to arms. Moreover, Mother Ireland is where the 'nation' presently resides, because she has received its tradition from God and the 'dead generations', thereby legitimating her right to 'strike . . . for her freedom'. This maternal image recalls figures such as Sean Bhan Bhocht, Cathleen Ni Houlihan and Róisín Dubh, traditional female representations of the Irish nation, or the Sovereignty, used covertly in poetry and plays to criticise the British occupation of Ireland.[79] Rosalind Clark argues that Yeats's play *Cathleen Ni Houlihan*, often thought to be a revolutionary catalyst, takes these usually aristocratic figures and moulds them into a peasant figure that appeals 'to all Irish patriots'.[80] According to Clark, this more revolutionary figure 'expects the tragic ending. She demands sacrifice and offers nothing in return but the promise that the names of the patriots will never be forgotten.'[81] Reading the play from a more overtly feminist perspective, Susan Cannon Harris argues:

> The fact that Cathleen persuades Michael to choose allegorical fertility over the opportunity for literal procreation . . . indicates that one of the purposes of sacrifice is to rewrite the story of how the Irish subject is produced – to reject the mortal Irish mother in favor of a symbolic one whose body, unlike that of her pedestrian counterpart, is inviolable and who can therefore provide the Irish subject with a clean genealogy and an uncomplicated pedigree.[82]

As the 1937 Constitution makes clear, the gender roles envisaged for the new Republic constitute the nation in a domestic and conservative fashion; Article 41, in particular, locates the role of women as within the home and defines the

family as 'the natural, primary and fundamental unit group of Society'.[83] Read closely, however, the Proclamation is much more ambiguous in its constitution of a national subject, both conventionally describing the nation as a mother and imprinting over it a new, potentially more radical configuration of the nation as an ungendered (although subsequently masculine) republic.

The first lines of the Proclamation describe Mother Ireland and her children as acting 'in the name of God and of the dead generations', the latter phrase recalling such diverse philosophers as Edmund Burke and Karl Marx.[84] This formulation has a legitimating function. An appeal to God and the past guarantees the rightness of this particular action: it is not only sanctioned by the supreme authority, but also by the previous members of one's own family and community. Furthermore, the 'dead generations', from whom Ireland 'receives her old tradition of nationhood', naturalise the family ties of the nation defining them as a natural, racial bond. This maternal, racial definition of the nation, moreover, transcends the borders of the nation state with reference to 'her exiled children in America'. The rest of the text, however, offers a much more ambiguous answer to the question of 'what the nation is', appealing to a new *state*: a republic.

The rebels, along with her children, strike for freedom in the name of Mother Ireland, yet in so doing, they call into being a republic. This republic represents a specific idea of the nation that is meant to be instrumental in forming the institutions of the new state after the expulsion of the 'alien government'. The distillation of the nation into the form of a republic is a necessary step to political independence: it embodies the idea of a new state formation that will govern the people in their name; the Proclamation therefore declares the 'right of the people of Ireland to the ownership of Ireland'. The people have a right to possess the nation in common, internalising an image of community to which they belong and with which they guarantee their right to self-determination. It is thus the nation in the form of an Irish *Republic*, not Mother Ireland, that is proclaimed as a 'Sovereign Independent State', signalling a potential shift to a civic rather than solely an ethnic nation, which will take its place 'in exaltation among the nations'.

The shift in the roles of the nation and the republic in constituting a collective subject can be seen in the usage of pronouns in the text. 'She' and 'her' occur repeatedly throughout the first two paragraphs, where Ireland as the 'mother-nation' rallies her children to the nationalist cause. This invocation of kinship ties – 'children', ancestors and mothers, rather than citizens – signifies a constitutive narrative of the Irish people, the 'Irishmen and Irishwomen' addressed at the beginning of the text, as familial rather than merely political. They share blood ties with each other that the 'foreign' and 'alien' occupiers do not. As the text progresses, however, Ireland as mother-nation becomes an Irish Republic, referred to by the pronoun 'it'. Ireland, as the mother-nation, has nourished her children and now their representatives,

with her sanction, are calling a new kind of nation into being: a republic. This republic, as the etymology suggests, is a 'thing of the people' or, rather, after Cicero, is 'the property of the people'.[85] That is, it not only belongs to them, but is also what is proper to them and is thus a defining characteristic of who they are. Moreover, by appealing to a *republic* as the ideal state form for the Irish nation, Pearse *et al* look not only to the republics of Greece and Rome, but also to the modern republics of France and the USA. In doing so, they align themselves with nations who have not only asserted their claims in arms, but also actively attempted to constitute a *civic* as opposed to strictly ethnic definition of the nation, which would foster the Enlightenment values of equality, fraternity and, above all, liberty. The invocation of a republic also constitutes a rejection of monarchy as an appropriate system of government.

Furthermore, although it draws on a pre-colonial past that it represents as natural and immemorial, this active reconstitution is modern and written. I examine the revolutionary constitutional tradition and its impact on post-imperial Britain in more detail in Chapter 6. Suffice to note here that, by drawing on these revolutionary models, Pearse *et al* sought actively to *construct* a new idea of the nation that was *built* on and extended the natural blood ties of the nation. It is this vision – especially in the sections of the Proclamation inserted by socialist James Connolly guaranteeing 'religious and civil liberty, equal rights and equal opportunities for all its citizens' – to which recent commentators have looked back. Irish feminists, in particular, have invoked the Proclamation as providing a more egalitarian national model than the more traditional, and apparently natural, view of Ireland constructed in the Constitution.

In order both to reassert their identity as a nation and to assert the form in which they choose to express it, the people have 'a right to the ownership of Ireland and to the unfettered control of Irish destinies'. Furthermore, they are entitled to assert these claims in arms. The retroactive legitimating function of the text upon both the Rising and the civil war that followed it, leading to the establishment of a new state, can be traced here. While the mother-nation looks to the past, drawing her strength from tradition, God and ancestors, the new Irish 'child-republic' heralds this new state in the future-to-come, one that promises 'civil and religious liberties', among other pledges. Just as the child must distinguish itself from the mother, so too the child-republic strives to separate itself from the mother-nation, in order to provide the foundations for a state with stable legal and political institutions. The child-republic that the Proclamation calls into being must finally supersede the mother-nation, separating itself from the maternal body, in order to urge *all* of the people of Ireland to rally to this new entity in its closing call to arms:

> In this supreme hour, the Irish nation must, by *its* valour and discipline and by the readiness of *its* children to sacrifice themselves for the

> common good, prove *itself* worthy of the august destiny to which *it* is called. (My emphasis)

Indeed, the notion of the mother-nation becomes other to the new republic as the child-republic strives to separate itself from the figure that has nurtured it, and which has constituted its primary object of desire, in a bid to establish its own, discrete subjectivity. The idea of the republic, which will subsequently shape a new state formation, must repudiate this object, which has hitherto been constitutive of its vision of self, in order to found itself as a subject. The mother-nation is supplanted, becoming an object of fear, a devouring mother who, like Cathleen Ni Houlihan, demands the sacrifice of her children. This can be related to Kristeva's description of fear of the archaic, uncontrollable, generative mother, who 'repels me from the body . . . abjection (of the mother) leads me toward respect for the body of the other, my fellow man'.[86] Read in this way, the Proclamation suggests that the new Irish subject must separate itself from the closed, racial ties of the nation and turn towards the more inclusive, civic ties of the republic.

The difference between mother and child is not absolute, however, as the imaginary unified nation, in the form of a maternal body, remains a site of fascination and horror for the child-republic. The perceived unity of the maternal body is what the child desires, yet, in order for this child-republic to form its own subjective identity, it must separate itself from this body. This separation is not total, however, because it 'does not succeed in differentiating itself as *other* but threatens [its] *own and clean self*'.[87] Although this separation constitutes the child-republic's subjectivity, it also threatens the very self-image it creates by the repudiation of what has brought it into being: the idea of the mother-nation. The child-republic thus depends on an idea of the mother-nation in order to found itself as a collective subject and legitimate a new state. Furthermore, the fear of the mother's generative power ties into the threat of the law-making function of violence: the mother-nation must be domesticated and conserved in the new state formation that is established in the name of the child-republic, so that she does not keep calling her children to violent rebellion in her name.

This originary split, in which the collective subject desires the perceived unity of the mother-nation, yet fears the sacrifice and law-making violence she demands, demonstrates the contradictory impulses that constitute subjectivity. The rebels' call for blood sacrifice, which is both destructive and generative, is analogous, then, to those 'devotees of the abject', who:

> do not cease looking, within what flows from the other's 'innermost being,' for the desirable and terrifying, nourishing and murderous, fascinating and abject inside of the maternal body.[88]

The abject matter of blood thus becomes symbolic of this contradictory drive

towards subjectivity: a subjectivity that is, moreover, constructed within conventionally masculine parameters. Harris observes:

> [t]he conjunction of ritual violence and fertility helps participate in this process of disavowal by projecting corporeality and its attendant suffering onto the female body, leaving the male disembodied and therefore fundamentally unscathed. At the moment of death the martyr's body drops out of the narrative, and its pain is transferred to the female figure whose job it is to turn those death throes into birth pangs.[89]

Literal and metaphorical blood – sacrificial, menstrual, natal, familial and racial – firmly links the rebels and the people of Ireland to the new political entity established in the name of the child-republic, thus conferring legitimacy on the new state. The collective subject of the nation, named as Ireland at the opening of the Proclamation, is, by the end of the text, subsumed by a new entity that takes the form of the 'property of the people' or the republic. This republic does not, however, represent a unified vision of what is proper to the people, instead providing an ambivalent answer to 'who we are'.

Irish Republic or Republic of Ireland?

Tensions in the definition of 'what a nation is' can be traced in the text of the Proclamation. Ireland, in the form of the mother-nation and the 'Irish Republic', are used interchangeably throughout but do not represent the same answer to the question 'what is a nation'. The change in focus here from 'Ireland', as where the nation resides, to the 'Irish Republic', as its state-forming child, signals a transfer in the philosophical underpinnings by which a nation is constituted. There is a similar ambiguity at work in the imagining of the Republic. Is Ireland, as 'the property of the people', to be 'the Republic of Ireland' or an 'Irish Republic'? The text ambiguously uses both appellations to herald a new state; indeed, both are used in the title of the document. The translation of the Irish *Poblacht na h Eireann* [*sic*] as 'Republic of Ireland' is in a tense double movement with the succeeding 'Irish Republic'. Relating the 1916 Proclamation to the French Revolution of 1789, De Paor notes that:

> [t]he new State being proclaimed was not 'the Republic of Ireland' . . . but 'the Irish Republic'. This may seem an over-subtle distinction; but it is one rooted in revolutionary history. 'The French Republic' . . . is sharply distinct . . . from the 'Kingdom of France'. 'France' is the royal estate belonging to the King of France. The French Republic is the State constituted by the French. The very title signified a transfer of power.[90]

The transition marked in the title of the 1916 Proclamation is not quite as sharply marked as De Paor's French example. Both titles refer to the new republic that is to supersede the mother-nation – but there is a subtle, and important, difference between the 'Republic of Ireland' and the 'Irish Republic', suggesting an ambivalence about how to answer the question of 'what the nation is' within this text. The 'Irish Republic' can be said to be that constituted by the Irish people, that is, a people who share a common ethnic and cultural background, which includes the diaspora of 'her exiled children in America', while the 'Republic of Ireland' signifies an attachment to *place*, marked out by the geopolitical borders of the island of Ireland, and comprehends all inhabitants of the island, regardless of creed or ethnicity. Likewise, the 'Irish nation' that takes the form of this republic is one constituted in the name of 'the people' as well as 'in the name of God and of the dead generations'; it draws its ideological force from an ethnic definition of the nation, while simultaneously interrogating its boundaries.

This undecidability can be traced through a genealogy of subsequent constitutional texts. A similarly ambiguous formulation appears in the 1919 Declaration of Independence, when the first Dáil Éireann declared that 'the elected representatives of the Irish people alone have power to make laws binding on the people of Ireland'.[91] One possible reading of this assertion is that the nationalist government, as representatives of the Irish people, would, as the majority in the newly independent state, legislate for the whole island. This was a key fear for Ulster unionists and was eventually borne out by the adoption of the 1937 Constitution. The Constitution differentiates the Irish nation from the inhabitants of the island. In 1937, the self-image of the Irish Free State was predicated on territorial claims to the six counties of Northern Ireland, as Article 3 of the text called for 'the reintegration of national territory'. The recent revision of Article 3 asserts that it is 'the firm will of the Irish nation . . . to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities'. Although this Article was amended in 1999 to read in a less overtly nationalist way, in accordance with the 1998 Good Friday Agreement, it also separates the imagined community of the nation, implicitly defined according to ethnicity, from the inhabitants of the island. These people who, despite their 'diverse identities', are to be adopted into the family of the nation, are not described as 'Irish'. Moreover, while it is 'the entitlement and birthright of every person born in the island . . . to be part of the nation', this nation is firmly characterised elsewhere in the document as rural, domestic, Celtic and, despite the removal of a constitutionally privileged position for the Church in 1973, Catholic.[92]

In a distinction made in common with most political theory, the 1937 Constitution separates 'the Nation' and 'the State' into Articles 1–3 and 4–11 respectively, recognising the distinct, although linked, character of both. The former Articles characterise the style in which the nation was to be distinguished, while the latter established the legal and political institutions

that would embody it. Not only does the Constitution set up the state apparatuses by which the nation would be disseminated, it also enshrines the foundational status of both the Easter Rising and the Proclamation, as it 'gratefully remember[s] the heroic and unremitting struggle to regain the rightful independence of the nation'. Although it asserts a desire for the 'unity of our country [to be] restored', however, with the exception of the 19th Amendment in 1998, which bound the state to adopt the Good Friday Agreement, no other amendments to the Constitution endorse a practical means of unifying the disparate definitions of the nation of Ireland. To date, most of the amendments have been overwhelmingly in response to changes in the inward-looking, parochial, Catholic definition of the nation.[93] The Constitution, then, continues the foundational work of the Proclamation in that, as it continues to write the nation into being, it extends and alters the nation as a conceptual object.

The Preamble to the 1937 Constitution declares 'We, the people of Éire . . . adopt, enact and give to ourselves this Constitution'. As the 2004 Citizenship Referendum demonstrates, however, who these people are is not as self-evident as it may have appeared in 1937. In the course of this chapter, I have sought to show how the Proclamation's call to arms in the name of Ireland provides ambiguous answers if we ask whom it is addressing, rather than look for a fixed, unitary explanation of the text. Read closely, these contradictions can be used intertextually and transnationally to open out the text in order to interrogate subsequent configurations of race, gender and, particularly, racism and ethnocentrism masquerading as nationalism.

Notes

1 The Immigration Control Platform/*An Feachtas um Smacht ar Inimirce*, for example, was specifically set up to oppose what the group perceive as an 'open borders policy'. It singles out Nigerians and Chinese particularly for attention, foregrounding nationality and language rather than race: 'In relation to nationality, language etc. it would be the position of the I. C. P. that labour market immigration should tend as far as possible to be such as would minimize rather than maximise ethnic and racial differences . . . Of particular concern are the entry of immigrants from Northern Ireland (governed by *British* asylum and immigration regulations) and the acquisition of Irish citizenship which, according to the Constitution, is currently granted to anyone born in Ireland.' See Immigration Control Platform/*An Feachtas um Smacht ar Inimirce* website, accessed 25 June 2004, available online at http://www.immigrationcontrol.org/. Paul Cullen interrogates the construction of Irishness as homogeneous, arguing '[t]his state has experienced waves of immigration from different sources since the beginning of time'. These 'waves' have included 'Celts, Vikings, Normans, English, Scottish, Spanish, Huguenots and Jews' as well as small groups in the twentieth century from Hungary, Chile, Vietnam and Bosnia. Cullen thus attempts to reconfigure Irishness, especially as it is constitutionally enshrined: *Refugees and Asylum Seekers in Ireland*, 2000, Cork: Cork University Press, p 4.

2 *The Referendum on Irish Citizenship*, 2004, Dublin: The Referendum Commission/

An Coimisiún Reifrinn, accessed 19 August 2005, available online at http://www.refcom.ie/RefCom/RefComWebSite.nsf/0/C037F0ECB8CEAFC980256EA5005B0572.

3 'The Nation: Article 2'. *Bunreacht na hÉireann*/The Constitution of Ireland, enacted 1 July 1937 and effective from 29 December 1937, accessed 17 June 2002, available online at http://www.taoiseach.gov.ie/attached_files/Pdf files/Constitution of IrelandNov2004.pdf.

4 L P Curtis Jr, *The Anglo-Saxons and the Celts: A Study of Anti-Irish Prejudice in Victorian England*, 1968, Bridgeport, CT: University of Bridgeport Press, p 59. Luke Gibbons is cautious about using these analogies to relate Irish and African-American experience, suggesting that a more productive comparison can be drawn with Native Americans: *Transformations in Irish Culture*, 1996, Cork: Cork University Press, p 150.

5 J Cleary, 'Misplaced Ideas? Colonialism, Location and Dislocation in Irish Studies', in C Connolly (ed), *Theorizing Ireland*, 2003, Basingstoke: Palgrave MacMillan, pp 91–104 (p 96).

6 N Ignatiev, *How the Irish Became White*, 1995, New York and London: Routledge.

7 B Walter, *Outsiders Inside: Whiteness, Place and Irish Women*, 2001, London and New York: Routledge, p 22.

8 C M Eagan, ' "White" if "Not Quite": Irish Whiteness in the Nineteenth-Century Irish-American Novel', 2001, *Eire–Ireland: Journal of Irish Studies* (Spring/Summer), accessed 5 May 2004, available online at http://www.findarticles.com/p/articles/mi_m0FKX/is_2001_Spring-Summer/ai_80532344; H Bhabha, 'Of Mimicry and Man: The Ambivalence of Colonial Discourse', in *Location of Culture*, 1994, London and New York: Routledge, pp 85–92 (p 86). Italics in original.

9 E MacNeill, *Early Irish Laws and Institutions*, 1934, Dublin: Burns, Oates and Washbourne Ltd, p 86.

10 P Brand, *The Making of the Common Law*, 1992, London and Rio Grande: The Hambledon Press, p 462.

11 Kevin Whelan notes that '[t]he Free State ... terminated revolutionary legal experiments such as the Dáil courts [and] closed down the debate over the ending of English common law': 'The Revisionist Debate in Ireland', 2004, *boundary 2*, 31:1, pp 179–205 (p 183). Mary Kotsonouris examines the disestablishment of the Dáil courts in more detail in *Retreat from Revolution: The Dáil Courts, 1920–24*, 1994, Blackrock: Irish Academic Press. Interest in the Brehon laws, which had been suppressed in the seventeenth century in favour of English common law, was reignited in the mid-nineteenth century by the work of John O'Donovan and Eugene O'Curry (undertaken at the behest of the British government). Studies in various forms of early Irish law were also made in the early part of the twentieth century. See, for example, MacNeill, *Early Irish Laws*, and E MacNeill, *Ancient Irish Law: The Law of States or Franchise*, 1923, Dublin: Hodges, Figgis & Co. Henry Sumner Maine noted, in his *Lectures on the Early History of Institutions*, 4th edn, 1885, London: John Murray, that: 'The Ancient Irish Law, the so-called Brehon law, has been for the most part bitterly condemned by the few writers who have noticed it; and, after gradually losing whatever influence it once possessed in the country in which it grew up, in the end it was forcibly suppressed. Yet the very causes which have denied a modern history to the Brehon law have given it a special interest of its own in our day through the arrest of its development.' (pp vii–viii)

12 R Byrne and P McCutcheon (eds), *The Irish Legal System*, 3rd edn, 1996, Dublin: Butterworths Ireland, p 43.

13 J Cleary, *Literature, Partition and the Nation State: Culture and Conflict in Ireland, Israel and Palestine*, 2002, Cambridge: Cambridge University Press, p 17.

14 Cleary, *Literature*, p 30. My emphasis.
15 A S Green in the *Westminster Gazette*, 13 May 1912, cited in B Murphy, 'The Canon of Irish Cultural History: Some Questions Concerning Roy Foster's *Modern Ireland*', in C Brady (ed), *Interpreting Irish History: The Debate on Historical Revisionism 1938–1994*, 1994, Blackrock: Irish Academic Press, pp 222–33 (p 232).
16 Ibid.
17 Murphy, 'Canon', p 230.
18 R F Foster, *Modern Ireland 1660–1988*, London: Penguin, p 466.
19 Murphy, 'Canon', p 233.
20 J Whyte, *Interpreting Northern Ireland*, 1991, Oxford: Clarendon Press, p 141.
21 Whyte, *Interpreting*, p 191.
22 Under his outline of traditional Unionist approaches, Whyte cites M W Heslinga, *The Irish Border as a Cultural Divide* (1952), which views Ulstermen as forming a separate nation, and the British and Irish Communist Organisation (BICO) pamphlets, *The Two Irish Nations* (1971) and *The Economics of Partition* (1972), which argue that 'differential economic development' has produced two nations in Ireland: *Interpreting*, pp 147, 182–3.
23 Heslinga, *Border*, cited in Whyte, *Interpreting*, p 147.
24 The historical accuracy of this 'natural marine boundary' has been queried. Some have argued that before roads and communications made mountains and valleys passable, communications across the Irish sea, between Ulster, Scotland, Wales and the north-west of England would have been much more 'natural'. See, for example, Antony Carty, *Was Ireland Conquered? International Law and the Irish Question*, 1996, London and Chicago: Pluto Press, p 85.
25 Richard Kirkland notes, in ' "In the Midst of All This Dross": Establishing the Grounds of Dissent', in C Connolly (ed), *Theorizing Ireland*, 2003, Basingstoke: Palgrave MacMillan, pp 135–49, that Ulster was rather a Tudor, and hence colonial, construction: 'Northern Ireland, a construct which of course had temporariness needled into its very existence, is displaced by the (ironically) Tudor-established nine-county Ulster.' (p 140)
26 Whyte, *Interpreting*, p 179.
27 D Lloyd, *Ireland After History*, 1999, Cork: Cork University Press in association with Field Day, p 3. In *Was Ireland Conquered? International Law and the Irish Question*, 1996, London and Chicago: Pluto Press, Antony Carty attempts to decide whether or not Ireland was a colony by putting it into the context of international law.
28 Cleary, 'Misplaced Ideas?', p 91. Cleary dates interest in issues of colonialism and post-colonialism in the Irish academy from the late 1980s, and the very recent publication of edited collections interrogating the intersection of post-colonial and Irish studies attests to the relative novelty of this approach to questions of the Irish nation. See for example, C Carroll and P King (eds), *Ireland and Postcolonial Theory*, 2003, Cork: Cork University Press and G Hooper and C Graham (eds), *Irish and Postcolonial Writing: History, Theory, Practice*, 2002, Basingstoke: Palgrave MacMillan. Historian Stephen Howe has produced a monograph locating the various discourses on imperialism, post-coloniality and anti-colonialism within an Irish context in *Ireland and Empire: Colonial Legacies in Irish History and Culture*, 2000, Oxford: Oxford University Press.
29 Comparisons between India and Ireland have been drawn most recently in three essays in Carroll and King's collection, *Ireland and Postcolonial Theory*. See A Ghosh, 'Mutinies: India, Ireland and Imperialism' (pp 122–8), J Lennon, 'Irish Orientalism: An Overview' (pp 129–57) and G Viswanathan, 'Spiritualism,

Internationalism and Decolonization: James Cousins, the "Irish Poet from India" ' (pp 158–76).

30 See E W Said, *Orientalism: Western Conceptions of the Orient*, 1995, London: Penguin, which argues that 'Orientalism' is a constructed discourse with which Europe both managed and produced its other. A Nandy, *The Intimate Enemy: Loss and Recovery of Self Under Colonialism*, 1988, Delhi and Oxford: Oxford University Press, similarly argues that the colonised are constructed as feminine and passive in an oppositional relation with the coloniser.

31 Lloyd, *Ireland After History*, pp 1, 19–20.

32 Lloyd, *Ireland After History*, p 20.

33 P Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse?*, 1986, Delhi: Oxford University Press, and R Guha, 'On Some Aspects of the Historiography of Colonial India', in R Guha (ed), *Subaltern Studies I: Writings on South Asian History and Society*, 1994, Delhi: Oxford University Press, pp 1–8.

34 D Lloyd, *Anomalous States: Irish Writing and the Post-Colonial Moment*, 1993, Dublin: Lilliput, pp 2–3.

35 C Coulter, 'Ireland Between First and Third Worlds', 1990, in Boland, E, *et al, A Dozen LIPS*, 1994, Dublin: Attic Press, pp 93–116 (pp 94–5).

36 Foster, *Modern Ireland*, p 613.

37 Irish Declaration of Independence, 21 January 1919, accessed 6 October 2002, available online at http://www.spirited-ireland.net/articles/declaration-of-independence/.

38 The Solemn League and Covenant (reproduced in M Kenny, *The Road to Freedom: Photographs and Memorabilia from the 1916 Rising and Afterwards*, 1993, Dublin: Country House, p 18) stated: 'we . . . men of Ulster, loyal subjects of His Gracious Majesty King George V . . . do hereby pledge ourselves in solemn Covenant throughout this our time of threatened calamity to stand by one another in defending for ourselves and our children our cherished position of equal citizenship in the United Kingdom and in using all means which may be found necessary to defeat the present conspiracy to set up a Home Rule Parliament in Ireland. And in the event of such a Parliament being forced upon us we further solemnly and mutually pledge ourselves to refuse to recognise its authority.'

39 This brief, and partial, account of the events that followed the Easter Rising is given in order to provide a context for my reading of the 1916 Proclamation as a constitutional text of independent Ireland. It is drawn from a number of sources, including: P Bew, *Ideology and the Irish Question: Ulster Unionism and Irish Nationalism 1912–1916*, 1994, Oxford: Clarendon Press; L De Paor, *On the Easter Proclamation and Other Declarations*, 1997, Dublin: Four Courts Press; Foster, *Modern Ireland*; Kenny, *Road*; D Kiberd, *Inventing Ireland: The Literature of the Modern Nation*, 1995, London: Vintage; J J Lee, *Ireland 1912–1985: Politics and Society*, 1989, Cambridge: Cambridge University Press.

40 Cleary, *Literature*, p 11.

41 J Derrida, 'Force of Law: The "Mystical Foundation of Authority" ', in D Cornell, M Rosenfeld and D G Carlson (eds), *Deconstruction and the Possibility of Justice*, 1992, London and New York: Routledge, pp 3–67.

42 The text is reproduced in several texts on the subject of modern Irish history including De Paor, *Easter*; O D Edwards and F Pyle (eds), *1916: The Easter Rising*, 1968, London: MacGibbon and Kee; Foster, *Modern Ireland* (a transcription rather than a reproduction); Kenny, *Road*.

43 Benjamin refers to them as 'lawmaking' and 'law preserving': 'The Critique of Violence', E Jephcott (trans), in M Bullock and M W Jennings (eds), *Selected*

Writings Volume 1 1913–1926, 1997, London and Cambridge, MA: Belknapp Press of Harvard University, pp 236–52.

44 Benjamin, 'Critique', p 241.
45 Derrida, 'Force', p 41.
46 Derrida, 'Force', p 47.
47 Derrida, 'Force', p 41.
48 Edwards and Pyle, *1916*, p 11.
49 Preface to M Ní Dhonnchadha and T Dorgan (eds), *Revising the Rising*, 1991, Derry: Field Day, p x.
50 Preface to Ní Dhonnchadha and Dorgan (eds), *Revising*, pp ix–x. My emphasis.
51 D G Boyce, '1916, Interpreting the Rising', in D G Boyce and A O'Day (eds), *The Making of Modern Irish History: Revisionism and the Revisionist Controversy*, 1996, London and New York: Routledge, pp 163–87 (p 183).
52 S Freud, 'Repression', in *The Essentials of Psycho-Analysis: The Definitive Collection of Sigmund Freud's Writing*, selected by A Freud, J Strachey (trans), 1986, London: Penguin, pp 523–33 (pp 527–8).
53 Freud, 'Repression', p 530.
54 G Smyth, 'Decolonization and Criticism: Towards a Theory of Irish Critical Discourse', in C Graham and R Kirkland (eds), *Ireland and Cultural Theory: The Mechanics of Authenticity*, 1999, London: MacMillan, pp 29–49 (p 29). Smyth is here summarising, with approval, the work of David Lloyd.
55 H Kearney, 'The Irish and Their History', in Brady (ed), *Interpreting*, pp 246–52 (p 250).
56 D Fennell, 'Against Revisionism', in Brady (ed), *Interpreting*, pp 183–90 (p 187).
57 S Deane, 'Wherever Green is Read', in Ní Dhonnchadha and Dorgan (eds), *Revising*, pp 91–105 (p 91).
58 Whelan, 'Revisionist', p 193.
59 Foster, *Modern Ireland*, p 479.
60 Deane, 'Green', p 100.
61 M A G O'Tuathaigh, 'Irish Historical Revisionism', in Brady (ed), *Interpreting*, pp 306–26 (p 309).
62 Lloyd, *Ireland After History*, p 17.
63 De Paor notes that this probably refers to 'the episodes of 1641, 1689, 1798, 1803, 1848 and 1867'. He goes further, pointing out that Pearse had mentioned in his own writing the failure of the *last* generation to rebel and carry on the genealogy of resistance. De Paor writes, in *Easter*: '[I]t was a long time since 1867 (the abortive Fenian uprising). It was necessary for [Pearse's] schematic myth that there *should* be a rising in each generation; but something had gone wrong in the previous twenty or thirty years.' (pp 69–70) Original emphasis.
64 De Paor, *Easter*, p 70.
65 C Carroll, 'Introduction: The Nation and Postcolonial Theory', in Carroll and King (eds), *Ireland*, pp 1–15 (p 1).
66 De Paor, *Easter*, pp 28–9.
67 J-F Lyotard, *The Postmodern Condition: A Report on Knowledge*, G Bennington and B Massumi (trans), 1984, Manchester: Manchester University Press, p 9.
68 M Buckley, 'A Perpetuation of Partition', *Irish Times*, 22 November 1948, cited in C Morash, ' "Something's Missing": Theatre and the Republic of Ireland Act', in R Ryan (ed), *Writing in the Irish Republic: Literature, Culture, Politics, 1949–1999*, 2000, Basingstoke: Palgrave MacMillan, pp 64–81 (p 65).
69 De Paor, *Easter*, p 7. My emphasis.
70 De Paor describes Pearse's condensation of the previous three hundred years of Irish history as 'very stylized and rhetorical'. He notes different aspects of these

uprisings and calls into question the assertion that 'the Irish people' in them 'asserted their right to national freedom': *Easter*, p 70.

71 Cúchulainn (the Hound of Chulainn) was a legendary heroic figure in the Ulster Cycle gifted with superhuman abilities. See J Gantz (ed and trans), *Early Irish Myths and Sagas*, 1981, London: Penguin. In *Inventing Ireland*, Declan Kiberd notes that he was to provide a 'symbol of masculinity for Celts, who had been written off as feminine by their masters' (pp 25, 196–7). This symbol was constructed, however, in the nineteenth century by Standish O'Grady on the basis of the ancient legendary figure and was intended to serve as a heroic exemplar for the declining Anglo-Irish aristocracy. Instead, Cúchulainn provided an inspirational figure for Pearse, who likewise imagined himself standing against an invading host. Father Shaw, as well as criticising the ideal of blood sacrifice, also queried the use of Cúchulainn as a nationalist figure, arguing that he was fighting for the Uliad (from Ulster) against the men of the other provinces of Ireland: 'The Canon of Irish History: A Challenge', 1972, *Studies: An Irish Quarterly* (Summer), pp 117–53 (p 133). A statue of Cúchulainn can be found in the General Post Office in Dublin commemorating the Rising. Along with the Proclamation, this statue is incorporated into a 1991 commemorative stamp.

72 It was in opposition to nationalist 'hagiography' that revisionists of the 1960s, 70s, and 80s responded. Foster, for example, refers to '[t]he Connolly hagiography', which is unable to account for socialist James Connolly's capitulation to the ideal of nationalist blood sacrifice, implying that canonising the participants of the Rising makes it impossible to analyse events in a more complex way: *Modern Ireland*, p 478.

73 The Proclamation of *Poblacht na h Eireann*: The Provisional Government of Irish Republic to the People of Ireland, accessed 11 June 2002, available online at http://www.taoiseach.gov.ie/index.asp?locID=468&docID=2521. Subsequent references to the Proclamation will be given in the text.

74 A Jackson, 'Unionist History', in Brady (ed), *Interpreting*, pp 253–68. Jackson asserts that '[c]elebrating the loyalist tradition in Ireland also, inevitably, meant celebrating the contribution of Irish soldiers to the British war effort in the years 1914–1918 . . . 1916 came to represent a different sort of "magic number" to different types of Irishman, even if Protestants and Catholics were fighting and dying together on the Western Front. The War, the Somme in particular, dominated Unionist history-writing in the 1920s, when the Irish Free State was being supplied with a revolutionary mythology and hagiography by its scholarly and polemical defenders' (p 257). In 'The Rising, the Somme and Irish Memory', in Ní Dhonnchadha and Dorgan (eds), *Revising*, eds, pp 29–49, E Longley links Pearse's rhetoric to that of Rupert Brooke, especially 'the association of self-sacrifice with a "cleansing" [and] . . . the vision of noble death as redeeming collective shame' (p 40).

75 P Pearse, *Peace and the Gael*, cited in Shaw, 'Canon', p 125.

76 Shaw, 'Canon', p 117.

77 Shaw, 'Canon', p 151.

78 J Kristeva, *Powers of Horror: An Essay in Abjection*, L S Roudiez (trans), 1982, New York: Columbia University Press, p 53.

79 See R Clark, *The Great Queens: Irish Goddesses from the Morrigan to Cathleen Ni Houlihan*, 1991, Gerrards Cross: Colin Smythe. The figure of Cathleen as a nationalist icon has been interrogated by commentators seeking a feminist reconfiguration of the nation. See, for example, A Quinn, 'Cathleen Ni Houlihan Writes Back: Maud Gonne and Irish National Theater', pp 39–59; M E Daly, ' "Oh, Kathleen Ni Houlihan, Your Way's a Thorny Way!": The Condition of Women in

Twentieth-Century Ireland', pp 102–26; C B Shannon, 'The Changing Face of Cathleen Ni Houlihan: Women and Politics in Ireland, 1960–1966', pp 257–74; all in A Bradley and M G Valiulis (eds), *Gender and Sexuality in Modern Ireland*, 1997, Amherst, MA: University of Massachusetts Press.

80 Clark, *Great Queens*, p 175. In his *States of Ireland*, 1972, London: Hutchinson, Conor Cruise O' Brien also makes this equation between Cathleen Ni Houlihan and the personified Ireland of the Proclamation: 'The personification itself was a very old Gaelic literary tradition, but it was undoubtedly Yeats who made it come alive for those who lived in the first decades of the twentieth century.' (p 70) Yeats had even mused, in a later poem, 'Did that play of mine send out/ Certain men the English shot?': 'The Man and the Echo', 1938, in W B Yeats, *Collected Poems of W B Yeats*, 1984, London and Basingstoke: MacMillan, pp 393–5. So persuasive was this mythical Sovereignty figure that one of the leaders of the Irish Republican Brotherhood, Eoin MacNeill, stated at a meeting in February 1916 that '[t]here is no such person as Caitlín Ní Uallacháin, or Róisín Dubh or the Sean-bhean Bhocht, who is calling upon us to serve her': cited in Donal MacCartney, 'Gaelic Ideological Origins of 1916', in Edwards and Pyle (eds), *1916*, pp 41–9 (p 43).

81 Clark, *Great Queens*, p 178.

82 S C Harris, *Gender and Modern Irish Drama*, 2002, Bloomington and Indianapolis: Indiana University Press, p 11.

83 The Constitution defines women's role thus:

> 2.1 In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
> 2.2 The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.
> 3.1 The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

'The Family: Article 41', *Bunreacht na hÉireann*/Constitution of Ireland, pp 159–60.

84 Burke considered that society was 'a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born': *Reflections on the Revolution in France*, L G Mitchell (ed), 1993, Oxford: Oxford University Press, p 96. Marx viewed the construction of history as subject to the constraints of the past: 'Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living.' (*Eighteenth Brumaire of Louis Bonaparte*, K Mapkc (trans), rev'd edn, 1984, Moscow: Progress; London: Lawrence & Wishart, p 10)

85 Cicero, *De Republica*, cited in R Kearney, *Postnationalist Ireland: Politics, Culture, Philosophy*, 1997, London and New York: Routledge, p 40.

86 Kristeva, *Powers*, p 79.

87 Kristeva, *Powers*, p 65

88 Kristeva, *Powers*, p 54.

89 Harris, *Gender*, p 23.

90 De Paor, *Easter*, p 38.

91 Irish Declaration of Independence, 21 January 1919, accessed 6 October 2002,

available online at http://www.spirited-ireland.net/articles/declaration-of-independence/.

92 *Bunreacht na hÉireann*/Constitution of Ireland. Patrick Hanafin analyses the more conservative nation called into being in de Valera's 1937 Constitution in 'Legal Texts as Cultural Documents: Interpreting the Irish Constitution', in R Ryan (ed), *Writing in the Irish Republic*, pp 147–64. See also P Hanafin, *Constituting Identity: Political Identity Formation and the Constitution in Post-Independence Ireland*, 2001, Aldershot: Ashgate, which reads the Constitution in relation to, among other topics, feminist and queer theory.

93 Six (5th, 8th, 12th, 13th, 14th, 15th) of the 20 amendments to the Constitution have been on the issues of divorce, abortion and the position of the Catholic Church. A further five (1st, 3rd, 10th, 11th, 18th) have altered the Republic of Ireland's position in a broader international context, particularly establishing it as, first, a member of the European Economic Community and, then, of the European Union. The 20th amendment has a more regional focus, recognising the role of local government.

Chapter 4

'The Treaty always speaks'

Reading the Treaty of Waitangi/*Te Tiriti O Waitangi*

On 11 December 2004, the New Zealand House of Representatives commissioned a parliamentary committee to review existing constitutional arrangements.[1] The Committee was also to make recommendations to the government concerning appropriate processes for constitutional change. This inquiry was concerned to review, among other issues, 'the place of the Treaty [of Waitangi], its principles and the broader issue of historic claims, the idea of a written constitution and Maori representation in Parliament'.[2] Published in August 2005, the Committee's report located the sources of the constitution and set out a 'timeline' of its development, with 1840 – the year the Treaty was signed – being marked a significant originary point. In the report's 'Overview', Aotearoa New Zealand is positioned, with the United Kingdom, in the group of countries with an 'unwritten' constitution, in which constitutional rules 'are contained in a mixture of statutes, court decisions and practices'.[3] As a consequence of 'the absence of a written and entrenched constitution', there is 'room for much debate whether key values or policy settings are so embedded that they have become "constitutional" ' [*sic*].[4] Furthermore, the constitution is defined as having developed over a period of just over 150 years by a process of 'pragmatic evolution'.[5] Although the Report affirmed that 'New Zealand's constitution is not in crisis',[6] it raised some areas of concern. Chief among these was the constitutional and legal position of the Treaty of Waitangi/*Te Tiriti o Waitangi* (1840), an agreement between Māori and the British Crown concerning the question of sovereignty. The Treaty Tribes Coalition, for example, considered:

> The greatest shortcoming of New Zealand's current constitutional arrangements is their failure to fully recognise the fundamental significance of the Treaty of Waitangi.
>
> . . .
>
> The review should consider *how* – not *whether* – the guarantees enshrined in the Treaty can be given greater legal and constitutional protection.[7]

Taking a more cautious – even 'tepid'[8] – approach, the Committee concluded that 'the important questions for New Zealand at present are those that go to the sources of political legitimacy, including the import of the Treaty of Waitangi'. Among the main topical issues that needed to be addressed was 'the relationship between the constitution and the Treaty of Waitangi including whether it should, or how it might, form superior law'.[9]

On the one hand, then, the Committee's Report defines Aotearoa New Zealand's status as one of the few countries with an 'unwritten', flexible and evolutionary constitution. On the other hand, it repeatedly affirms the centrality of a written document, the Treaty of Waitangi, as being of fundamental importance, citing, for example, the words of the former President of the Court of Appeal, Robin Cooke, that the Treaty is 'simply the most important document in New Zealand's history . . . a foundation document'.[10] Acknowledging the tension between the 'written' and 'unwritten' aspects of the constitution, the committee concludes:

> most of us think it is difficult to identify key constitutional questions that do not touch on the Treaty to a material extent, and that would not have social and political importance. The issues surrounding the constitutional impact of the Treaty are so unclear, contested, and socially significant, that it seems likely that anything but the most minor and technical constitutional change would require deliberate effort to engage with hapū [clan, subtribe] and iwi [tribe] as part of the process of public debate.[11]

The Treaty texts are perceived to inaugurate Aotearoa New Zealand's constitutional tradition by legitimating British sovereignty (in the English text). A written text thus works as a guarantee for the implementation of the unwritten constitution. Although it has never been legally ratified, the Treaty of Waitangi/*Te Tiriti o Waitangi* is commonly held to be the founding document of Aotearoa New Zealand and the source of political legitimacy for current state institutions. The Constitutional Arrangements Committee trace the history of the Treaty's legal status, from the Privy Council's decision in 1941 that the Treaty was only enforceable to the extent that it is incorporated in legislation, to the State-Owned Enterprises Act in 1986, which gave statutory force to the 'principles' of the Treaty.[12] The Treaty is thus recognised in law but the texts themselves are not binding legal documents. Indeed, as historian Alan Ward notes: 'For the terms and principles of the Treaty to have any legal effect, they would need to be explicitly recognised in statutes of Parliament.'[13]

At the same time as such importance is given to the Treaty, Aotearoa New Zealand is – like Britain and unlike the USA, the Republic of Ireland and Australia – perceived to have an 'unwritten' constitution. Its current constitutional arrangements locate sovereignty not in 'the people', but rather in

parliament, albeit one that is nominally representative of 'popular sovereignty'.[14] In the course of this chapter, I situate Aotearoa New Zealand as having *both* a written document, which can be described as constitutional in the performative sense of defining and creating the nation, and an 'unwritten' constitution, which is, in turn, legitimated by the transplantation of the British 'immemorial' constitution and common law. In addition, I examine how the Treaty both constitutes and contests a unified definition of the nation, one that is not easily comprehended in contemporary state arrangements. The state interpellates its citizens, discursively producing them as always already split into the binarised 'Treaty partners' of Māori and Pākehā,[15] eliding other ethnic configurations that do not fall within this division. These binarised groups established divergent Treaty histories as, in the late nineteenth and early twentieth centuries, Pākehā amnesia consigned the Treaty to the past, while Māori continued to struggle for *tino rangatiratanga*, or self-determination, under the Treaty. In 1986, following a more publicly acknowledged cultural resurgence over the preceding two decades, unified and labelled as the 'Māori Renaissance', the Labour government established a new Treaty policy in order to address this central division. A key injunction of this policy was to 'regard the Treaty as always speaking'.[16] The voice constructed in the text operates in the continuous present to remind the peoples of Aotearoa New Zealand of the Treaty's 'true intent and spirit'. This ventriloquising of the text represents a search for transcendent meaning in which the nation could make sense of itself as a just and equitable relationship between two peoples.

In this chapter, I explore how the Treaty of Waitangi has been constituted as Aotearoa New Zealand's founding document. This text has repeatedly been given foundational status rather than, for example, the 1835 Declaration of Independence, which, in British political terms, textually established an independent nation in the name of the United Tribes of New Zealand; the 1852 New Zealand Constitution Act (UK), which established representative government in the colony; or the more recent 1986 Constitution Act, which removed remaining political links with Westminster, set in motion a process of electoral reform and led to the enactment of a Bill of Rights (1990).[17] Because it is the Treaty that is given a foundational designation and legitimating function, I look at how *this* text defines the nation it is seen to constitute.

Examples of its central position abound: the Treaty is the foundation of what is considered to be Aotearoa New Zealand's national day, Waitangi Day, which falls on February 6 and commemorates the signing of the Treaty in 1840. It is also the centrepiece of a long-term exhibition called *Signs of a Nation* at the recently established National Museum of New Zealand/*Te Papa Tongarewa*, which is reproduced on the cover of this book. The Treaty is the focus of an especially devoted 'Constitution Room' that was established in 1990 to house the remnants of the Waitangi document in Māori at Archives

New Zealand/*Te Whare Tohu Tuhituhinga o Aotearoa*. The Constitution Room also contains various extant versions that were signed around the country and other documents broadly determined as constitutional, including the first coat of arms and the Order of Council of 9 September 1907, which changed the country's status from a 'colony' to a 'dominion'. Each of these documents is described as 'a stepping stone in New Zealand's growth from colony to nation'.[18] Variously referred to as the 'Maori Magna Carta',[19] a sacred covenant,[20] a 'simple nullity',[21] a 'travesty',[22] and a 'fraud',[23] what is it about *this* text that constitutes Aotearoa New Zealand as a unified conceptual object? Why, positively or negatively, have the authors of the preceding descriptions felt compelled to address it as central to the self-definition of the nation?

Signing the Treaty

The Treaty differs from the Irish Proclamation in that it was not the repudiation of colonial rule and simultaneous self-proclamation of a new form of government read out in the course of a rebellion. It was, rather, a relatively peaceful agreement between chiefs representing many, but not all, of the *hapū* (clans, subtribes) and *iwi* (tribes) of Aotearoa New Zealand and functionaries of the British Crown.[24] Although it does not explicitly constitute or describe a new nation, in implicitly recognising the sovereignty of two *separate* nations – and, in the case of Māori, constituting the textual recognition of a separate sovereignty that might then be ceded – this document has conventionally come to be seen as the founding document of *one* nation: New Zealand.

In order to trace the process of how the Treaty has come to signify as a founding text, I outline here a brief and partial account of the Treaty-making process by way of context. Following a series of violent incidents in Aotearoa New Zealand between Europeans and Māori, and fearing annexation by the French (a combination of British paranoia and ambition, in addition to the supposed and actual threat of French ships sighted in nearby waters), 13 Northern Māori chiefs petitioned King William IV for protection in the 'King's Letter' of 1831. A British Resident, James Busby, was subsequently appointed by the Colonial Office and sent to New Zealand in 1833 charged with the maintenance of order in the country. In 1835, 34 Northern chiefs signed a Declaration of Independence called *He Wakaputanga o te Rangatiratanga o Nu Tireni*. The chiefs (in conjunction with Busby and missionary, Henry Williams, who later translated the Treaty) asserted the 'Independence of our country, which is hereby constituted and declared to be an Independent State, under the designation of The United Tribes of New Zealand'. This Declaration entreated the king to 'continue to be the parent of their infant State . . . its Protector from all attempts upon its independence'.[25] In addition, this Declaration asserted that:

> all sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity.[26]

This recognition of the sovereignty of the Māori chiefs over the land – in effect, the establishment of 'Nu Tireni' as a sovereign nation – was one of the reasons that a formal treaty of cession was deemed necessary before full-scale colonisation of Aotearoa New Zealand could begin. Margaret Mutu asserts that this Declaration played a crucial role – far greater than hitherto thought in conventional histories – in the signing of the Treaty:

> In the tradition of the Far North of *Aotearoa*/New Zealand, one of the reasons many *rangatira* [leaders, nobles, chiefs] signed *Te Tiriti* was because of its apparent confirmation of *He Wakaputanga o te Rangatiratanga o nga Hapu o Nu Tireni*, that is, the Māori version of the Declaration of Independence, which they had signed several years earlier.[27]

Philanthropic objections by such groups as the Aborigines Protection Society towards British treatment of other native populations are thought to have effected a change in attitude to colonial policy-making. Paul McHugh suggests that attitudes to consensual constitutionalism also contributed. That is, like the pre-literate social contract representing the consent of the governed that was thought to be the foundation of the British constitution, the Treaty was perceived by Britain to be a written expression of consent on the part of the soon-to-be governed:

> The Treaty affirms the Crown's sovereignty over the Māori as resting on the 'freely given' consent of the Māori, and in guaranteeing te tino rangatiratanga and tribal property rights, gives a yardstick for the continued legitimacy of this sovereignty. The Treaty was necessary simply because the previous centuries of British constitutionalism demanded its conclusion. One need go no further than the Waitangi Tribunal's comment that the Treaty 'is the foundation for a developing social contract'.[28]

Paul Moon asserts, by contrast (and in a move that reconciles the contradictions in the various Treaty texts), that Māori *did* assent to 'government' by the British, believing it to be limited to control of the increasing numbers of white settlers in the country, while they would retain their customary rights. He argues, furthermore, that, at the time of signing, this is also what the British Crown intended.[29]

In 1840, Captain William Hobson arrived from Britain with instructions from Lord Normanby, the Secretary of State for the Colonies, to draft an

agreement and carry out the Treaty-making process. He was to obtain 'the free and intelligent consent of the Natives' to the Treaty and deal with them openly.[30] An English text was drafted from Normanby's instructions and this draft was then translated into Māori by the Anglican missionary, Henry Williams. Williams' translation used 'missionary Māori' – that is, oral Māori that had recently been 'translated' into a system of phonetic writing – to render the terms of the Treaty. A separate English text was also drafted. At Waitangi, after speeches to both Māori and Europeans, Hobson read out the English text of the Treaty. He was then followed by Williams, who read out the Māori text. In his recollections of the event, Williams says that he amplified the meaning of the text as he read it out:

> I told all to listen with care, explaining clause by clause to the chiefs, giving them caution not to be in a hurry, but telling them that we, the missionaries, fully approved of the treaty; that it was an act of love towards them on the part of the Queen, who desired to secure to them their property, rights and privileges; that this treaty was as a fortress for them against any foreign power which might desire to take possession of their country.[31]

The Treaty was then debated among an estimated 500 chiefs and various missionaries, settlers and Crown personnel who were present. After lengthy debate, during both the day and night of 5 February, several chiefs signed the Māori document on 6 February 1840. The exact number of chiefs who signed the Treaty on this day is uncertain,[32] but altogether approximately 200 signatures or marks were eventually attached to this document. For the next two months, Hobson and others travelled around the country to treat with other chiefs and to obtain their signatures. With one exception,[33] all of these documents were in Māori. Hobson made a Proclamation of Sovereignty over the whole country on 21 May 1840. While signatures were not obtained from all chiefs in all areas of the country, sovereignty was declared based both on cession by treaty and discovery. Furthermore, the Waitangi signing was seen as the *de facto* Treaty. Treaty historian Claudia Orange argues that later signings were viewed as further ratifying and confirming it.[34]

One nation or two?

The process of building a nation is a homogenising one. That is, the process aims to reconcile, or even elide, difference so that 'the people' can map their selves collectively onto the nation, recognising 'themselves' in its inclusive lexicon. Following the signing of the Treaty at Waitangi, Hobson declared in Māori, '*he iwi tahi tatou* (we are now one people)', a performative formulation that effectively constituted one sovereign nation state: the British colony of New Zealand. This apparently inclusive formulation has been put to use

ideologically; some commentators have pointed to the deliberately amnesic policies of the settler state, which could represent Aotearoa New Zealand to the world as a racially harmonious nation, living equally under a benevolent welfare system.[35] Indeed, part of the Pākehā majority backlash against attempts to assert Māori sovereignty under the Treaty has been the development of a movement called 'One Nation New Zealand', which claims that the only noteworthy aspect of the Treaty is to have 'made us all one people under one flag, one law'.[36] A renewed focus on the Treaty is seen as a 'conspiracy' to create an 'apartheid nation';[37] One Nation argues that 'it is a conspiracy that must be stopped before it destroys our Nation. A nation of New Zealanders of many races and cultures who must share this country as one [*sic*]'.[38]

More recently, the formulation of 'two peoples, one nation' has found currency. Cleve Barlow, for example, asserts that '[t]he Treaty of Waitangi is the founding document of this nation: it signified the bringing together of two peoples – the indigenous Māori tribes and the British Crown – into one nation'.[39] Former Prime Minister of Aotearoa New Zealand, Geoffrey Palmer, affirms the Treaty's foundational status as he simultaneously recognises a cultural division, asserting, 'I believe that the Treaty of Waitangi is the foundation on which our bicultural nation is built'.[40] Similarly, Orange draws a distinction between the status of Māori and Pākehā in the nineteenth century and the ideal nation to which the Treaty looked forward. In describing colonial life immediately following the signing, she writes: 'New Zealand comprised two nations, Maori and Pakeha, many Maori living outside the boundaries of effective government', but she also recognises that the role of the Crown as laid out in the Treaty was to stand between settler and Māori in pursuit of 'the ultimate ideal of one nation'.[41]

Others have argued that Aotearoa New Zealand is not even 'two peoples, one nation', but rather should be viewed as two nations. This reading has been strengthened by the growth of an international Indigenous rights movement – a movement finding a focus in the process of drafting a Declaration of the Rights of Indigenous Peoples (1994), adopted by the United Nations (UN) Human Rights Council on 29 June 2006[42] – that links Māori to other groups, including Australian Aboriginals and Torres Strait Islanders, and North American First Nations peoples.[43] Article 9 of the draft Declaration, which is yet to be ratified by the UN General Assembly, asserts that 'indigenous groups have the right to belong to an indigenous community or nation', as well as a right to self-determination. The assertion of these rights allows for a reconsideration of alternative legal and political configurations. Moana Jackson, for example, writes that it was the imposition of 'English law-making institutions and the paraphernalia of the Victorian nation-state' that led to the 'denial of the existence and validity of Maori law'. In rejecting 'a centuries-old jurisprudence', it denied the very basis of 'iwi-based Maori nationhood'.[44] Likewise, Ranginui Walker conceives of the colonising process as a clash between nations:

> Modern nation-building . . . is a historic process predicated on nation-destroying.
>
> Developed nations, through the process of treaty-making, compromised the territorial and cultural integrity of indigenous nations by the expropriations of their lands and resources.[45]

Historian Michael King came to believe that the differing political aims of Māori and Pākehā would be better served by thinking in terms of two (or more) nations:

> I no longer believe in the inevitability, or even the desirability, of a bicultural nation . . . In recent decades . . . Maori have undertaken a massive shift back to tribal culture and identity. Some, such as Tuhoe, had never abandoned that character, identifying iwi as a 'nation', in the sense that Native American tribes have used that term.[46]

These various definitions of nationhood reveal an undecidability about what a nation is: should it be primarily marked either by a division along racial or cultural lines, or by consolidating a unified polity based on occupation of the same geographical area? The preference in much recent political commentary has been for 'two peoples, one nation' or a 'bicultural nation' that tries to reconcile these two seeming contradictions, while also deferring the 'belonging' of groups who fall outside the central binary opposition of Māori and Pākehā. This preferred description also signals an unease about the homogenising process of nation building: it recognises the difference of 'peoples' (plural) and distinguishes them from the 'nation'. It does, however, posit 'one nation' that these peoples are working towards.

Instead of unifying disparate conceptions of nationhood, I argue that the Treaty – which is conventionally called upon to bear witness to each of these interpretations of nationhood – can be read as performing a time lag, in the sense that Bhabha has described.[47] That is, the *differences* in the Treaty text can be teased out in order to foreground the heterogeneous narratives and cultural configurations that work to produce the text's meaning. To read the Treaty in this way is to call attention to the hegemonic strategies by which a totalised, seamless national narrative is constituted and maintained. The nation, as an ideal site of rational and progressive modernity, aims to homogenise differing conceptions of time, progress and belonging into a single historical narrative. King's autobiographical reflections on growing up in the 1940s and 1950s illustrate a typically homogenising narrative, drawn from a school textbook:

> New Zealand had not existed until European navigators discovered it; English missionaries brought Christianity and civilisation to an 'uncivilised' Maori; the Treaty of Waitangi was 'the fairest treaty ever made

> between Europeans and a native race'; and the 'Maori Wars' were caused by those same natives becoming resentful, sullen and insolent. All this and more the sisters took from *Our Nation's Story*. We never heard a Maori interpretation of this story. It was years before I knew there was one.[48]

Stephen Turner puts this amnesia down to New Zealanders having a 'weak sense of history',[49] while McHugh suggests it is a result of the deferral of history, by which 'real' history – battles such as Gallipoli, for example – is positioned as something that happens elsewhere. By displacing history, 'Pakeha New Zealanders . . . have embraced a theory as well as a historical consciousness of their constitution under the pretence of lacking them'.[50] Jane Kelsey similarly refers to Aotearoa New Zealand's dominant political ideology as 'reflecting a deeply ingrained and selective amnesia'.[51] Orange asserts that the reason for this general lack of information about both Māori and the Treaty was that, from the 1870s onward, the Treaty 'receded from settler consciousness',[52] as the settlement of the colony proceeded apace.

The Treaty increasingly became the 'touchstone' for Māori grievances and further consolidated a unified sense of Māori-ness constructed in opposition to that of the Pākehā settlers. Late nineteenth-century intertribal organisations such as the *Kingitanga, Kotahitanga*, and the *Kohimarama* conferences[53] cemented the centrality of the Treaty within Māoridom, constituting what Orange describes as 'the symbol for a new unity of purpose [which] gave some sense of cohesion to the diversity of tribal, hapu and individual aspirations'. By providing a unifying focus, the Treaty thus created the equivalent of a Māori constitutional tradition.[54] During this period – the late nineteenth and most of the twentieth centuries – the state continued to suppress Māori opposition by the selective representation of history. As I have outlined in Chapter 2, this ideological amnesia plays a key role in constituting the legitimacy of the new state. By analogy with Freud's account of 'infantile amnesia', the state relies on a process of selective memory making in order to a build a sense of nationhood. Those things that have been forgotten have not, however, entirely disappeared: rather, they are repressed, leaving traces that 'have had a determining effect upon the whole of [the subject's] later development'.[55] These traces, represented by renewed focus on the Treaty, trouble the constructed unity of the nation.

Continued reference to the Treaty and its seemingly incommensurable assertions of sovereignty has called homogenising conceptualisations of the nation of Aotearoa New Zealand into question. It also arrests the linear process of constituting a just nation and highlights the fact that not all members of the community share the same temporal narrative. Further to this, challenges to the Treaty have demonstrated that the historical amnesia necessary to constitute a single unified narrative is an ideological product that

has the effect of effacing both 'inter'- and 'intra'-cultural difference. These differences include those between not only Māori and Pākehā, but also other collective configurations, including *hapū* and *iwi*. As a result of these challenges, in recent decades the state has had to address the Treaty more directly and its position towards it has altered as a consequence. While, following its signing, the nascent colonial state may have done its best to forget the Treaty, the contemporary state has retroactively conferred legitimacy on it as a foundational moment. This can be dated from around the time of the establishment of the Waitangi Tribunal in 1975, finding a focus in 1986's constitutional reforms. Indeed, Geoffrey Palmer's 1979 book on the constitution, *Unbridled Power?*, does not have a separate chapter on the Treaty – in contrast to its 2004 revision, *Bridled Power*. In this later edition, Palmer asserts: 'It is clear that the Treaty of Waitangi is an integral part of New Zealand's constitutional arrangements.'[56]

Using the Treaty as a means of legitimation has a twofold effect: in addition to guaranteeing the state's own hegemony with the cession of sovereignty (in the English version) and affirming the supremacy of British-based power structures, it marks the moment in which Māori were annexed into a Western political discourse of sovereignty and subjectivity. By contrast to the change in attitude of the state, many Māori have continued to argue, both within and without the courts and Tribunal, that the Treaty affirms their right to self-determination. These protests pose a challenge to the legitimacy of current state apparatuses. Rather than continuing to dismiss these challenges, especially in light of the international Indigenous rights movement, the state has had to find ways to recuperate them. The contradictory positions occupied by the state and Māori opposition are constituted by the Treaty itself, which exists in two major versions (of which there are multiple variations) and in two languages.

The Treaty poses two different concepts of 'sovereignty', establishing two different collective subjects. This creates a binary opposition between 'Māori' and 'Pākehā' as two discrete subject positions that are racially marked. Furthermore, discussion of the Treaty in terms of fixed racial identities tends to sideline interrogation of the nation as a constructed and unified whole. Rather, the nation is represented as split into a division between Māori and Pākehā that is the central focus of national discourse; as a result, this discourse tends to foreground issues of justice and history. I argue, however, that these contested issues are not inseparable from, or antithetical to, the nation constituted by the Treaty, but rather integral to it. In contemporary Aotearoa New Zealand, the concept of the nation as a unity is seen to rely on the just resolution of historical wrongs and the hope that this can be attained. As shown by the most recent controversy concerning what the Treaty means – in relation to who has possession, or has the right to decide possession, of the foreshore and seabed – this is an ongoing concern.[57]

'Māori' and 'Pākehā'

King has described the process in which both 'Māori' and 'Pākehā' were constituted in an oppositonal relation with one another: the disparate *hapū* and *iwi* of Aotearoa defined themselves against the more recently arrived *pakepakeha* (fair-skinned folk) as *tangata māori* (ordinary people).[58] Historian Anne Salmond, in outlining various disparate accounts from Māori of how the words came to signify, suggests a slightly more subtle reading: 'From the outset . . . Maori people were formulating guesses about the nature of their extraordinary visitors . . . [and] it is unlikely that unanimity was quickly achieved.' She adds:

> All the various surviving Maori accounts of first meetings with Europeans share the supposition, however, that these new arrivals were not 'maori', or ordinary. The newly constituted groups were defined in relation to each other; what are now commonplace ethnic labels in New Zealand ('Maori' and 'Pakeha') at first meant simply 'familiar, everyday', and 'extraordinary' in some way.[59]

By binarising 'Māori' and 'Pākehā', the Treaty helps to constitute a fixed Māori identity that is positioned as being pre-contact and subject to tribal groupings. Apirana Ngata, Member of Parliament for Eastern Māori from 1905 to 1943, noted that consolidation of a Māori identity also marked an entry into a European political framework:

> The Maori did not have any government when the European first came to these islands. There was no unified chiefly authority over man or land, or any one person to decide life or death, one who could be designated a King, a leader . . . The Maori did not have authority or a government which could make laws to govern the whole of the Maori Race.[60]

This is not to say that Māori had no system of government or law, but that it was not intelligible within a European framework and that it was – broadly speaking – tribally, rather than nationally, based. Recent work by Angela Ballara and Manuhuia Barcham has queried this locus of a fixed identity and suggested alternative configurations. Ballara argues that locating Māori identity within the *iwi* is a recent construct, not a timeless and essential feature. Before the nineteenth century, she asserts, *hapū* (clan or subtribe) appeared as an independent political and cultural grouping with loose connections to *iwi*. She goes on to state that, at the end of the eighteenth century, *hapū* began to find it necessary for 'corporate action' to revive the larger tribal associations.[61] Barcham takes Ballara's historicisation of an apparently fixed identity still further. He suggests that attempts to fix a Māori identity based on *iwi* have elided difference by positing an 'authentic' tribal identity that denies

the validity of other forms of association, leading to their exclusion and delegitimation. He argues that 'bodies . . . exist in an ahistorical essentialism wherein reality is collapsed into a timeless present such that what *is* now is the same as what *was*, which in turn is the same as what *will be*'.[62] This has the political effect of establishing *iwi* as the Crown's Treaty partner and the primary association through which Treaty claims are negotiated, effectively marginalising the 'more than 80 per cent of Māori [who] live in urban areas and for many [of whom] *iwi* affiliation no longer plays an important part in their day-to-day lives'.[63]

What Barcham points out is that apparently fixed identities are culturally and ideologically produced. This has the effect of constituting ahistorical, essentialised subject positions and naturalising them as an authentic expression of a true identity. Instead of the opposition between 'New Zealanders' and 'Europeans' of the nineteenth century, which differentiates on the basis of territory, contemporary division of New Zealanders into 'Māori' and 'Pākehā' occurs within the Māori language and is racially marked. In August 2003, however, Associate Māori Affairs Minister, Tariana Turia, supported by academics Ranginui Walker and Waldo Houia, asserted that the use of the word 'Māori' had a marginalising effect. Instead, they advocate the use of *tangata whenua* ('people of the land') because it has less derogatory connotations and makes Maori prior occupation of the land clear.[64] Despite this, 'race' still works as the primary indicator of difference in public discourse, above language, territory and customs, because the geographical distinction loses meaning in light of the succeeding generations of descendants of European – primarily British and Irish – settlers who also claim an autochthonous relationship to the land.[65] Lyndsay Head asserts that the change in the use of definitional labels – from those based on territory to those based on race – occurred within 30 years of the signing of the Treaty and was affected by the role of Māori combatants in the wars of the 1860s. While some Māori fought the encroaching Pākehā, others fought on the side of the settlers. Head notes:

> The language in which many Maori in the early colonial period expressed a sense of their being does not illustrate easy dichotomies. While rebels against the government were known to both sides as the 'side of New Zealand', Maori who did not fight, or fought for the government were variously called neutrals (kupapa), queenites (kuini), government supporters (kawanatanga) – or Europeans (Pakeha). However, one result of war was that the ideas that 'New Zealand' meant Maoridom and not the settler colony or that Maori might think of themselves as Pakeha, were already on their way to their current inconceivability . . . The time when identity did not wholly rest on ethnicity lasted less than thirty years.[66]

Since the late nineteenth century, then, racial difference becomes the most

visible category by which to differentiate New Zealanders; it continues to binarise the two parties to the Treaty and highlights both their difference and the inequality of their relationship. The Treaty plays a key role in defining this difference.

As mentioned above, the constitution of the Treaty as a central and founding document of nationhood has likewise been a relatively recent one. This is not to say that the Treaty was completely forgotten, particularly by its Māori signatories and their descendants, who have looked to the Treaty as a guarantee of *tino rangatiratanga*, or self-determination: rather, the state, following the signing and for more than a century afterwards, no longer needed the Treaty to legitimate itself. The Treaty documents languished in storage for most of the late nineteenth century, to be found in 1911, water-damaged and rat-eaten. As a reaction to the 'Māori Renaissance', the Treaty has more recently been validated by the state in the form of various legislation and the setting up of the Waitangi Tribunal to hear claims based on violations of the Treaty – but not, noticeably, the *ratification* of the Treaty in law. These moves recognise the cracks in the unifying narrative of 'one nation' and, while in some respects they affirm and activate differences, have the effect of recuperating perceived challenges to the state's hegemony.

I contend that the tension between unity (one nation, one people) and difference (two nations, two – or more – peoples) is fostered by the undecidability of the Treaty itself. This text, while positioned as a founding document from which all New Zealanders can trace a shared line of descent, rather binarises Māori and Pākehā into two discrete and separate entities. Rhetoric of 'partnership' further heightens this sense of separation, as it presumes two equal but opposing parties coming together for the common good.

'The Treaty always speaks'

The Treaty was drawn up in order to solve problems of sovereignty and subjectivity, of what belongs to whom, and, more recently, it has carried the weight of the question of who 'we' are as a consequence. Providing a material frame, the Treaty positions the individual subject in relation to the collective subject of the nation. The recognition of both its self and its point of origin, particularly by the state, conserves the foundational moment and ensures the legitimacy of the legal and political institutions it founds. Derrida discusses foundations in 'Force of Law':

> A foundation is a promise . . . And even if a promise is not kept in fact, iterability inscribes the promise as guard in the most irruptive instant of foundation. Thus it inscribes the possibility of repetition at the heart of the originary.[67]

That is, an origin, simultaneously a non-origin, never appears as it *is*, but is

always already a repetition. A foundational moment is thus constituted by its continued conservation. The promise of the nation-to-come, in this instance, relies on the continual (re)iteration of the originary division posited in the Treaty. I trace how this process works in a reading of the Treaty itself. I draw a distinction here in the way in which the Treaty text is addressed to Māori and Pākehā subjects because it racially positions both as separate within the collective address. This divided address is not exclusively marked by language. As Orange suggested above, the 'two people, one nation' model implicitly recognises this process of hierarchical differentiation. The *telos* of the nation is to be represented to itself as one collectivity in which the fact of there being two (or more) peoples will no longer be a source of conflict and division. Furthermore, this *telos* must represent a *just* nation with respect to those peoples who have been disadvantaged as a direct result of the imposition of a colonial state formation.

The Treaty represents the collision between two different cultures; both official language versions of the text conflict with each other at several points. The conventional interpretation of the differences between the versions of the Treaty in Māori and English runs as follows. In what is regarded as *the* English version of the Treaty, Māori leaders ceded 'absolutely and without reservation all the rights and powers of Sovereignty' that they had acquired in the 1835 Declaration. In return, they were guaranteed 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties' and the 'rights of British subjects'. The chiefs were, however, also to 'yield to Her Majesty the exclusive right of pre-emption over such lands'. In effect, although couched in paternalistic terms, the English text paved the way for full-scale migration to, and colonisation of, Aotearoa New Zealand.[68] An English draft was translated into Māori by the missionary Henry Williams, who used concepts from the Bible to translate terms such as 'sovereignty' into Māori. There are two key differences between the Māori text (as written) and the English text. The first is between sovereignty and *kawanatanga*, which can be translated as 'governorship' or 'government'. In the English version, Māori ceded sovereignty to the British Crown; in the Māori version, *kawanatanga* conveys a much weaker sense of authority, and is believed to have been comparable to the authority wielded by Biblical governors such as Pontius Pilate and, possibly, by the Governor of New South Wales in Australia.[69] Furthermore, the root 'kawana' was not a Māori word but, rather, a transliteration of the English word 'governor'; the European concept of sovereignty, therefore, had no cultural precedent in Māoridom.[70] Likewise, in order to reconcile the differences in various Treaty versions, Moon has radically interrogated the conventional idea of sovereignty ceded in the Treaty, arguing that *national* sovereignty was not known among the disparate *hapū* and *iwi* of Aotearoa New Zealand. He asserts that it was rather governorship solely of the European settlers – not Māori – by the British government to which the chiefs assented.[71]

The second point of contention is that Māori were guaranteed *tino rangatiratanga* (chieftainship) in the equivalent Māori clause promising 'full exclusive and undisturbed possession of their Lands and Estates, Forests and Fisheries'. *Tino rangatiratanga* can be translated as 'self-determination' and is a term that is thought to be more indicative of 'sovereignty'; the root word here – *rangatira* – is the Māori word for 'chief' or 'leader'. The English text gives the British Crown a right of pre-emption of these lands, while the Māori version translates this more innocuously as *hokonga* (buying and selling). These different understandings, among others in the text and elsewhere, precipitated the colonial land wars of the later nineteenth century and have been the source of controversy and conflict since the Treaty was signed.

These points are usually raised in conventional textual analyses of the Treaty,[72] which, while recognising the slippages in translation, attempt to posit a true and transparent meaning. Often this quest for a 'true' meaning has led commentators to privilege one language version over another. Historian Keith Sorrenson notes that '[u]ntil recently, most commentators have relied on the English language text of the Treaty'.[73] Ruth Ross, one of the earliest Pākehā academics to write on the Treaty and move away from this commonly held belief, asserted that: 'This much is clear: the drafts, in English or in Maori, were merely drafts; it is the Maori text which was signed at Waitangi on 6 February 1840 . . . by Hobson . . . and a total of 500 New Zealanders, which is the Treaty of Waitangi.'[74] Following on from Ross, some analyses of the Treaty argue that it should be interpreted in line with the legal principle of *contra proferentem*, which would again privilege the Maori text. F M Brookfield, for example, notes:

> It is well established – and this applies generally to treaties between the Crown and aboriginal peoples – that such a treaty is to be interpreted *contra proferentem*, against the Crown as the party who prepared and put the treaty forward . . . [T]he treaty must be liberally construed and doubtful expressions resolved in favour of the indigenous parties.[75]

Conservative or neoliberal writers in more recent years have continued to privilege the English text, because Aotearoa New Zealand operates within a recognisably British legal and political structure, and English is the language that the majority of its inhabitants understand.[76] Although they have different aims, these conflicting claims as to the 'true' version of the Treaty are all attempts to fix its meaning. The multiple text creates the spectre of a 'real' Treaty that various interpretations have claimed for both key versions – but neither of these versions can be said to be the 'real' Treaty with any sense of plenitude. To regard the Treaty as the founding document of a nation is to ask what it means. I wish, however, to pose a different question, that is, what does it mean to ask what the Treaty means, or, rather, *how* does it mean?

To ask what the Treaty means supposes that there is a final 'true' meaning to be ascertained, if only the reader were skilful enough to determine it. This supposition of a 'true' meaning is based on a division between speech and writing, and their relationship to meaning, that a close reading of the Treaty can problematise. In the words of the 1986 Cabinet Treaty Policy, to regard the Treaty as 'always speaking' is to position the voice as the purveyor of its 'true intent and spirit'.[77] This voice is, however, constituted by writing. Furthermore, although the Treaty is a written text, it constructs a personalised relationship between its framers and its addressees. Despite the legalistic phrasing, 'Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland *regarding* with Her Royal Favour the Native Chiefs and Tribes of New Zealand and *anxious* to *protect* their just rights' (my emphasis) constitutes a personalised and hierarchised encounter that is seen to be mediated by writing. This becomes even more stark in the Māori version, which reads: 'Victoria the Queen of England, in *her concern* to *protect* the chiefs and sub-tribes of New Zealand and in *her desire* to preserve their chieftainship [my emphasis].' Thus, writing is seen as a necessary intermediary between what would otherwise be a personal, face-to-face, spoken agreement between the Queen and the 'Native Chiefs'. In addition, it is the written record of the meeting that did take place at Waitangi between Hobson and the chiefs. The form of the text – a treaty – also presupposes this verbal encounter. Indeed, the queen's representative, 'me, William Hobson', who not only ventriloquises the queen, but also takes part in the immediate face-to-face encounter, is 'authorized to treat with the Aborigines of New Zealand' and, furthermore, to 'invite them to concur in the following Articles and Conditions'. Although what is actually required is the chiefs' agreement in the form of a legally binding signature or mark, the language of the Treaty posits an oral encounter similar to a verbal contract. In the equivalent passage in the Māori text, the queen 'presents to the chiefs . . . these laws set out here'. This is not only an indirect translation of the English, but it also does not have the same sense of dialogue or agreement. Rather, it is described as a token or gift – or, at least, an object – that the chiefs can refuse or accept. Again, this presupposes a face-to-face encounter in which to proffer the object in question.

This textual representation of a direct encounter, while making the agreement seem immediate and present to those assembled at Waitangi, rather has the effect of masking the dispersion of political power in a literate culture. That is, while it may have *appeared* that the cession of sovereignty took place once the chiefs appended their signatures following a lengthy debate at a localised point in Aotearoa New Zealand, Māori, by this stage, were already encompassed within another, Eurocentric, political space that deemed the written treaty a necessary tool in the process of legitimating the British exercise of sovereignty over the country.

Reflecting on Western political representation, Derrida asserts:

> the writing of the voice corresponds to a more efficient civil order . . . Corresponding to a better organization of social institutions, it also gives the means of more easily doing without the sovereign presence of the assembled people. It tends to restore natural dispersion. Writing naturalizes culture . . . Political rationality . . . favors writing and dispersion at the same time and in the same movement.[78]

The implications of this 'writing of the voice' can be taken still further in relation to encounters between oral and literate cultures. While an oral culture is perceived to require proximity to the voice in order to convey meaning, a literate culture, which supplements this voice by means of writing, does not need its addressees to be present in order for language to signify. Writing still privileges oral forms, however, in order to perpetuate the presence-to-itself of the spoken word. By appropriating this voice, writing takes on a political force that has the effect of marginalising the spoken voice while simultaneously idealising it. This seems to pose a paradox: if Western culture privileges speech over writing and, indeed, views the latter as a supplementary or even threatening addition, how does it maintain this position when encountering a predominantly oral culture?

In the case of Aotearoa New Zealand and colonisation more generally, I think this encounter has a twofold effect. First, the oral culture *is* valorised in a similar way to speech. In line with a philosophy of the 'noble savage', more primitive or uncivilised cultures are seen as less corrupted by the vices of civilisation. This philosophy is expressed in Montaigne's essay 'Of Cannibals' (1580), written following the discovery of the 'new world' in the Americas. Among other observations, Montaigne notes:

> These nations, then, seem to me barbarous in this sense, that they have been fashioned very little by the human mind, and are still very close to their *original naturalness*. The laws of nature still rule them, very little corrupted by ours.[79]

Furthermore, this closeness to nature is described in terms of an *absence* of corrupt and civilised technologies, including law and writing:

> This is a nation, I should say to Plato, in which there is no sort of traffic, *no knowledge of letters*, no science of numbers, no name for a magistrate or for political superiority, no custom of servitude, no riches or poverty, *no contracts*, no successions, no partitions . . . The very words that signify lying, treachery, dissimulation, avarice, envy, belittling, pardon – unheard of.[80]

Although Montaigne explicitly valorises the 'naturalness' of the cannibals, the privileging of nature *over* civilisation is more obvious in the work of

Jean-Jacques Rousseau. Rousseau speaks of writing, the mark of civilisation, as a dangerous supplement that threatens the naturalness of spoken language.[81] This privileging of nature over culture continues into the twentieth century. Claude Lévi-Strauss, whose work Derrida also discusses in *Of Grammatology*, refers to the 'writing lesson' of the Nambikwara as an example of how an allegedly inauthentic writing both invades and perverts a 'naturally innocent' people:

> The Nambikwara, around whom the 'Writing Lesson' will unfold its scene, among whom evil will insinuate itself with the intrusion of writing come from *without* . . . the Nambikwara, who do not know how to write, are *good*, we are told.[82]

Oral cultures, which are not marked by writing in the usual sense, are positioned as closer to nature. Although the Māori 'laid little claim to this condition of unwarlike innocence' and the Treaty constitutes them as already having embraced 'civilising' processes, J G A Pocock points out that 'noble savage' thinking played, and continues to play, a part in the Treaty process:

> in making claims under the Treaty and explaining how an intimate relation with the land (mana whenua) arose and existed in pre-contact Maori culture, they allege with justice the existence and survival of a view of the world that Pakeha thinking once ascribed to the 'noble savage', and are still inclined to ascribe to 'indigenous' peoples whom Pakeha view as their own antiselves.[83]

Second, however, this idealisation of the primitive and of orality does not correspond with the attribution of political power. Rather, it reads this difference according to its own terms: an oral culture like that of Māori is positioned as 'primitive' or 'natural' in opposition to civilised, although corrupt, Europe. The oral or 'primitive' culture is domesticated within this Western framework and marked as technologically inferior (unable to write) while simultaneously morally superior (closer to nature and truth). At the same time, this oral culture is positioned outside and historically behind the literate culture. It thus resembles an Edenic origin for which the Western literate culture is nostalgic. While Western culture may be nostalgic for a grace perceived as lost – a grace to which oral cultures are seen as much closer – this corresponds with a desire to master and represent this past within presently intelligible cultural terms. It also, paradoxically, positions the more historically advanced literate culture as closer to attaining the final presence of grace by being further removed from its first presence. The technology of writing marks this more advanced 'intermediate' stage. Idealisation of both speech and oral cultures – which occurs within a *written* discourse – thus ideologically masks the means by which power is disseminated within Western culture, that is, by writing.

Writing, seen as a preserve of literate cultures and a mark of civilisation, thus performs a basic ethnocentrism 'which, everywhere and always, had controlled the concept of writing'.[84] This ethnocentrism is naturalised within European culture as an innate superiority predicated on the facility for both reason and writing. According to Rousseau, for example:

> [t]hese three ways of writing correspond almost exactly to three different stages according to which one can consider men gathered into a nation. The depicting of objects is appropriate to a savage people; signs of words and of propositions, to a barbaric people, and the alphabet to civilized peoples.[85]

While Rousseau privileges speech over writing as more natural and true, the ability to express oneself by means of writing – more particularly, phonetic writing – distinguishes a more technologically and historically advanced civilisation. A series of examples such as this leads Derrida to comment that '*logocentrism*: the metaphysics of phonetic writing . . . was fundamentally . . . nothing but the most original and powerful ethnocentrism'.[86] That is, logocentrism privileges Western phonetic alphabets over all other forms of writing, making Western reason the sole criterion of knowledge. Logocentric discourse posits a meaning that is present to itself and which is most present in speech; writing is further distanced from meaning. This presence, however, can be regained through reliance on the supplementary 'medium' of writing, which would transparently reveal meaning. It is thus part of a 'metaphysics of presence' that is constructed within language. The process by which truth is accessed passes from thought to speech and finally, to writing. Derrida, by contrast, argues that speech was always already 'writing', in the sense that neither has access to a transcendent meaning. Both speech and graphic writing are rather part of an ongoing process of cultural inscription.

This logocentrism can be traced in the closing passage of the Treaty. In English, the text closes with the declaration that 'we the Chiefs . . . Having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks'. In the Māori text, this is given as 'we, the Chiefs . . . having *seen the shape of these words* which we accept and agree to record our marks and our names thus' (my emphasis). The chiefs, in the Māori text, are asked to 'record' their signatures or marks rather than merely to 'attach' them as a witness to the agreement. This 'recording' involves a stabilising, and *individualising*, process: the name or mark is that of the chief. This is a crucial step in the process of mapping land within a British system of individual title so that it might be bought and sold as a commodity; this is how the Treaty constitutes land in Article 3.

Disparate translations of the various extant Treaty texts highlight this tension between orality and the written word. The English text uses the phrase

'full spirit and meaning' of the Treaty, which, by its own terms, is *not* fully contained within the written words of the text. This 'full spirit and meaning' exceeds the frame of the document, because the chiefs must be 'made fully to understand its provisions'. The written text alone is not enough to guarantee the cession of sovereignty. Conventional analyses point to the Māori text as being that one that does not guarantee this cession of sovereignty, but the English text also implies that cession is not guaranteed until the meaning of the Treaty is made clear in all its plenitude. By making this a condition of the Treaty's validity, however, the text is caught in a double bind: if the 'full' meaning of the text exceeds its frame, then its 'true' meaning is deferred, because it cannot be contained within the written document. The necessity of obtaining signatures to the document, in order to preserve and stabilise its meaning – in this case, an agreement to a cession of sovereignty – supplements the verbal entreaty or bond; it is offered as proof or 'witness' that this took place. This paradox suggests that the Treaty contradicts its own terms and is thus differed from itself. In order for the written text to be valid, it must be verbally agreed, and in order for the verbal agreement to carry the force of law, it must be witnessed in a signature or mark. The mark must supplement the agreement in order to guarantee it.

The direction in the Māori text that the chiefs must see 'the shape of these words', while alluding to the primarily oral nature of Māori culture at this time, also points to the power of the written word as a stabiliser and guarantor of meaning. It is not necessary to *understand* the words as they are written, but only to *see* the mark they make on the page. These written marks, as the extension and repetition of the agreement, also threaten the (verbal) agreement, because its meaning is constantly deferred, requiring continual interpretations of the 'true' meaning of the text. Derrida notes that, traditionally, 'representation follows a first presence and restores a final presence'.[87] That is, the written text, as well as the signature as written guarantee, refers outside itself to an imagined 'full' and true meaning that is present to itself and which is supposedly more immediate in speech. While writing is seen as being only a representation of this meaning, it can be read as if it were transparent in order to attain a final true meaning. It contains the promise of understanding without containing meaning in itself. The true meaning therefore is endlessly deferred, the written texts rather referring only to themselves and other texts in an endless chain of signification. Moreover, the assumption of a prior and idealised speech that is represented within writing, which is closer to meaning, justifies and legitimates the 'fall' into writing. The direction in the Treaty also suggests that what is at stake for the chiefs is not understanding of the written text, but of the display of power and technological superiority to which they were required to submit.

What this contradictory process of 'entreating' alludes to is that speech is posited as the guarantor of genuine and true meaning, while writing is seen as the witness to, and medium of, a personalised face-to-face encounter. In

practical and historical terms, the verbal debate at Waitangi was necessary to convey the terms of the Treaty and to annex Māori into a Western (specifically, British) discourse of writing that they could 'witness' but not participate in. This textual encounter with an oral culture reveals the contradiction that drives Western colonising processes. On one hand, orality is privileged as being closer to truth, as is a more 'natural' writing (in the Derridean sense), both of which are more apparent in the 'spirit' of the Treaty. On the other hand, however, it is the use of the technical written apparatus of the imperial state, along with an assumption of superiority because of this modernity, that is the means by which power was imposed and exercised. The supplement of writing reveals the limit of language in that it cannot convey a meaning that is fully present to its subjects – whether they share fluency in the same linguistic system or not. Translation, therefore, further complicates the question of meaning in relation to the Treaty.

The Treaty in translation

Problems of translation have been a key feature of any discussion of the Treaty. Neither version of the Treaty in English or Māori exists in just one form that can be called the definitive language version. 'The' English version, for example, is a somewhat misleading label, because there are several texts that might lay claim to this title. Ross notes that:

> In all, Hobson forwarded five English versions to his superiors in Sydney or London . . . A comparison of all five English versions with the Maori text makes it clear that the Maori text was not a translation of any one of these English versions, nor was any of the English versions a translation of the Maori text.[88]

As I have indicated earlier, several Māori written texts also exist. Furthermore, there are various translations of the Māori text back into English in order to convey its difference to an Anglophone audience. Translation raises the question: which is the 'true' text and is it possible to decide? Moreover, does this absolute distinction between different language versions presuppose an 'original' text that would contain the Treaty's 'true' meaning?

Acts of translation rely on principles of both economy and justice; they can therefore be read as analogous to the nation. Exchange features as part of a more general economy of language in the sense of finding the most faithful and economic equivalence in the target language that has the tenor of the 'original'. 'Economy' is etymologically the 'law of the house' and relates to an internal order of language in the sense of being the genius, that is, characteristic method or procedure that is 'proper' to a linguistic system such as English or Māori. Like political economies, however, languages do not exist in isolation from one another and remain open to 'contamination'. A

translation is not only supposed to render what is due to another word in an economic fashion, it must also be a just and equitable rendering. James Boyd White, a commentator in the field of law-and-literature, has argued:

> Translation and justice first meet at the point where we recognize that they are both ways of talking about right relations, and of two kinds simultaneously: relations with languages [and] relations with people.[89]

White also writes that both the terms 'justice' and 'translation' are 'references to the past and a promise for the future'.[90] These quotations set up the twin axes at stake in any discussion of the Treaty. The Treaty both represents that moment of colonial encounter and provides the ground for future negotiations as to what right relations between languages and peoples might mean within this particular national space. As I illustrate, with particular reference to the work of Bruce Biggs, the *justice* of translation in the Treaty has been a source of continual contention.

In his 1959 essay 'On Linguistic Aspects of Translation', the linguist Roman Jakobson identified three kinds of translation:

- *intersemiotic*, in which, for example, verbal signs are re-encoded in non-verbal sign systems
- *interlingual*, or translation 'proper'
- *intralingual*, or paraphrase.[91]

Although these are somewhat logocentric categories, because they rely on absolute distinctions between different uses of language, they serve as a useful framework for considering the variant processes of translation that are simultaneously at work in the Treaty. In the case of the Treaty 'in translation', there are several types of translation that are constantly in play. For ease of discussion, I will break them down into categories:

- 'intersemiotic' translation between Māori as an oral language and as a written one;
- 'interlingual' translation between English and Māori, and between Māori and English, considering the relationship of 'translation' to 'original' within and between language versions;
- 'intralingual' translation of the Treaty into a series of principles.

The first of these, the 'intersemiotic' translation of Māori from an oral to a written language, has been a key concern of recent textual analyses of the Treaty and occurs at the same time as a more readily discernible 'interlingual' translation. The Treaty is perceived as marking the invasion of English concepts into Māori language and culture, metaphorically precipitating the imminent colonisation of the country. While recent commentary on the

Treaty and what it means has preserved the binary opposition between English and Māori language versions, the fact that there is a written version of the Treaty in Māori at all suggests that this might be a misleading distinction. As has been noted, the 'Māori' of the Māori text is viewed as a written 'translation' of an 'oral' language. Biggs comments that the Māori used in the Treaty contains many loan words and words with new senses. He considers the use of transliterated phrases from English – including *kawanatanga* (governorship), *kuini* (queen), *ture* (law – from 'Torah') – as altering the integrity of Māori as a linguistic system. Treaty Māori also contains traditional words that have been used both in new contexts and unusual ways: Biggs discusses the use of *rite* (be alike, resemble), *taonga* (treasures) and *tikanga* (custom, obligations) in his essay. He also asserts that, syntactically, the Māori used in the Treaty does not function according to structures of orality in the way that the (modern) Māori language does: 'Indigenous, wholly oral Māori was marked stylistically by short sentences and little overt marking of subordination, co-ordination, or complementation.'[92] Biggs argues, furthermore, in regard to Williams' efforts to render the long legal phrases used in the English text:

> Long and complex sentences could be constructed in Māori but to use such sentences would have been as inappropriate as using in English the oratical style of Māori, with its subjectless sentences, multiple repetitions, and many vocatives and imperatives.[93]

Biggs here identifies what he perceives as the characteristics of the genius proper to each language and suggests that, although they can be imported into the other language, this is not a 'proper' usage. The Māori text of the Treaty highlights the way in which Māori has been 'translated' through its contact with English in terms of both its form (writing) and its content (loan words and new contexts). The reading of Māori as a written language falls within the bounds of what Jakobson terms 'intersemiotic' translation. The oral language, Māori, was 'translated' into a written language with its own orthography in order to render English loan words like *kawana*. At the same time, it was 'interlingually' transformed by its encounter with English. Even before the Treaty was translated from English into Māori, then, the Māori language as a system of phonetic writing was viewed as a translation of itself. In order to make this kind of reading, however, Biggs relies on a static opposition between orality and literacy. By claiming that indigenous Māori is 'wholly oral', he positions the 'true' language as existing at a pre-contact historical moment and denies both the validity of the written form of the language and its ability to change over time. In so doing, Biggs appears to view the written language with a suspicion similar to that of Rousseau, while at the same time relying on recorded Māori and contemporary spoken Māori to make these claims in a close reading of the written Treaty texts. Suspicion

towards apparent mistranslations of the Treaty – into English *and* into Māori – has been the ground for claims of injustice and inequity between peoples in respect of the Treaty.

In addition to problematising the distinction between 'interlingual' and 'intersemiotic' translation, analysis of the Treaty also raises the question of which text is the 'original' and which is the 'translation'. This question can be asked both in relation to whether the English *or* the Māori text is the 'original', as well as which is the 'original' of *each* language version. These questions presuppose an 'original' that can be reached. The process of interlingual translation relies on finding the most faithful and economic equivalence in the target language that has the tenor of the 'original'. The apparently parasitic 'translation', however, does not exist apart from the 'original'. It supplements the 'original' in the sense of being at once *of* the structure of the (self-)same, yet different. As an addition to a supposedly complete whole, the supplement reveals an apparent lack of completeness in the 'original' and thus extends what it supplements by repeating it. Translations also, however, oppose the 'original' and threaten to take its place. English concepts – such as *kawana* – invade Māori, while the structures of orality invade the written text and the written text alters the oral language. Without recourse to *both* language versions – one cannot stand without the other – there is potential for a lack of justice, a continued inequity between the two peoples that would lead to *in*justice if one version were to be privileged over the other.

'The' supposedly unified text is also caught in a play of differance between the 'original' and the 'translation'. The differance of the text, like the trait that marks the limit of the work of art:

> never appears, never itself, never for a first time. It begins by retrac[t]ing . . . I follow here the logical succession of what I long ago called . . . the *broaching* . . . of the origin: that which opens, with a trace, without initiating anything.[94]

The supplement, 'another name for differance',[95] of the translation calls into question what is constituted by the 'original'. The supplementary translation threatens to subsume the original on which it relies and thus becomes 'the very violence – that it does to itself'. That is, by threatening the 'original', the translation threatens to violate its own *raison d'être*. The relationship of Māori and English versions of the Treaty, then, is not that of 'translation' to 'original', but of 'translation' to 'translation'; the idea of an 'original' represents the full meaning that both translations strive to attain. This 'true' text is the horizon that can be imagined but never reached: it is unpresentable. Although both language versions of the Treaty are held to constitute different texts – that is, that they are *not* direct translations of each other – this relation between 'original' and 'translation' can still be traced. The Māori text is said to be a translation of an 'original' English draft, while the English text is

another 'copy' of this original. That the 'original' draft is thought to be lost and the Māori and English versions conflict with each other only throws this process into sharper relief.[96]

Furthermore, an additional process of translation also takes place: a literal translation of the Māori text into English in order to highlight the discrepancies between it and the 'official' English version. Translation into English provides the condition by which Anglophone readers, including myself, can have access to the Māori text of the Treaty. I have been primarily relying on Kawharu's translation of the Māori Treaty text but there are others; Ngata also 'translated' the official English text into Māori in a similar move. Such translations inescapably transform the texts. Not only do they represent another Treaty text, but also another translation of a translation. Kawharu appends 11 footnotes to his translation in order to render the terms of the Māori text with *justice* into English. Yet these supplementary explanations become a part of the text, revealing the lack of economic equivalence between languages. 'Interlingual' translation thus alludes to an economy of language that is itself illusory. Language is always already 'in' translation, not just in the sense of relying on the kind of 'intralingual' paraphrase Kawharu uses to illuminate the contradictions between the official Māori and English Treaty texts, but also in the sense of being continually in the process of 'interlingual' cross-pollination and 'intersemiotic' inscription. These forms of translation are not as discrete as their appellations imply and are rather all in play in the process of 'writing' the nation of Aotearoa New Zealand in relation to the Treaty.

Treaty translations rely on a conventional opposition between speech and writing: in the first instance, between the primarily oral culture of Māori and the literate culture of the British Crown in 1840. Yet attending to the various kinds of translation at work in Treaty debates suggests that there continues to be a tension at work, concerning what is written and what is not. Each new interpretation or translation of the Treaty relies on an idea either of an 'original' Treaty text – now lost – or, more frequently since the mid-1980s, of the 'original intent and spirit' of the Treaty. Attempts to fashion an originary guarantee for contemporary rereadings of the Treaty can be read as attempts to assert the legitimacy of a particular interpretation.

The apparent lack of an original – or at least a *unified* original – has brought forth a range of 'intralingual' translations of the Treaty, referring to both its spirit and its principles. Around 60 separate Acts of Parliament now make reference to the 'principles of the Treaty', although Parliament has not itself specified what these are. In order to shed some light on what these 'principles' might be, *Te Puni Kōkiri*, the Ministry of Māori Development, has produced a document entitled *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001).[97] The principles of the Treaty have therefore been positively defined by the courts and the Tribunal, and, because of

this, always take place within the law established and retroactively legitimised by the Treaty. In these principles, the cession of sovereignty in the English version, on the one hand, and the retention of *tino rangatiratanga* in the Māori version on the other – the key differences between the Treaty texts – are reconciled and unified as the two core principles of 'partnership' and 'active protection'. The principle of active protection defines the fundamental exchange recorded in the Treaty as 'the cession of sovereignty for the guarantee of tino rangatiratanga', attempting to put into practice the concepts of justice and translation as right relations between peoples.

These principles, in the words of the Cabinet's Treaty Policy of 1986, would be more faithful to the Treaty's 'true intent and spirit'. In deciding the 1992 *Broadcasting* case, Justice McKay both affirmed the shift of focus to the principles of the Treaty and gave them legal force – a legal force that the Treaty text itself, as an independent foundational document, does not have. McKay ruled that:

> It is the principles of the treaty which are to be applied, not the literal words. The English and the Māori texts . . . are not translations the one of the other, and the differences between the texts and shades of meaning are less important than the spirit.[98]

In order to guarantee this shift away from the 'letter' of the irreducibly different Treaty texts, other judges have aligned this focus on the 'spirit' of the Treaty specifically with Māori culture. President Cooke of the Court of Appeal decided in *New Zealand Maori Council v Attorney General* (the 1987 *Lands* case) that:

> The differences between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit. This approach accords with the oral nature of Māori tradition and culture.[99]

And, in an appeal of the *Broadcasting Assets* case to the Privy Council in 1994, Lord Woolf ruled that: the ' "principles" which underlie the treaty have become much more important than the precise terms'.[100]

While these principles define the utilitarian and practical focus of the Treaty claims process, what the translation of the Treaty texts into an apparently unified body of principles does is reinforce conventional suspicions concerning 'the letter of the Treaty', or of writing – a suspicion already noted with reference to Biggs' work. Not all writing is, however, suspect. In *Of Grammatology*, Derrida distinguishes between a good and a bad writing. 'Good writing' is positioned as prior to language and written internally; it constitutes a 'natural law'. This natural law in the form of 'good writing' is related to the idea of spirit, often invoked in commentary on law, constitution and nation, and is particularly resonant in the contemporary context of

Treaty translations. Continued reference to the 'spirit' or 'principles' of the Treaty indicates the precedence of a quasi-religious 'natural' writing that is somehow 'truer' than the more 'artificial' supplementary writing contained in the actual Treaty texts. References to 'the spirit' are at least as indicative of recurrent tropes in law and legal theory as the oral culture of Māori; I explore the 'spirit' of the law further in Chapter 6.

Just foundations

The Māori sheet preserved at Archives New Zealand and centrally represented in the *Signs of a Nation* exhibition, generally understood to be *the* Māori text of the Treaty, poses a paradox. This text represents a translation of an English draft into written 'missionary Māori', a recent construction in 1840, which relied on Biblical concepts and their transliterations. Although some Māori were literate by this stage, the key reason that the text was written down was so that it could subsequently be *read out* to the assembled Māori chiefs, as Williams indicates in his account of events. The debate following this reading is generally asserted to have constituted the text to which Māori assented.[101] The appendage of their signatures or marks was to this Māori text, a fact that is frequently noted in subsequent discussion of the Treaty in order to underline the pre-eminence of this version of the Treaty as true.[102] The paradox, then, is that this version was signed at all. If the debate was the Treaty that Māori understood as being a true representation of the Crown's intentions, then why was it not the English text that they signed, as the one 'true' Treaty, especially as their signatures were to be witness to the 'shape of the words' rather than an indication of understanding them?

There is no definitive answer to this question. What this inconsistency does point to, however, is that to transform one kind of 'writing' – represented as pre-contact oral Māori – into another kind – that of a written text – and to require the signing of that text placed Māori within the context of the British system of law; it was literally to write or inscribe their subjectivity before the law as if they were British subjects. In the English text, this subject status is granted thus: 'Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.' In the Māori version, this is rendered as 'the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England'. It is a mark of how successfully this law has been founded as 'natural' in a relatively short space of time (less than 200 years) that the contestation of the Treaty's claims of sovereignty has taken place *within* a British framework of laws. The Māori King movement, for example, created a Māori 'royal' tradition analogous to that of Britain in order to contest the Crown on its own terms. Similarly, the legal principle of *contra proferentem* is often evoked as the fairest means by which to interpret the Treaty,

because it would favour the Māori version as that of the party which did not draft its terms. These are just two examples of how British legal and political concepts or organisations have invaded the ongoing struggle for *tino rangatiratanga*, which appeals to the terms laid out within the Treaty itself – that of ownership of lands, forests, fisheries and *taonga* (treasures). What this alludes to is the foundational *epistemological* violence instituted by the Treaty.

In Chapter 3, I considered the 1916 Proclamation in light of the foundational, and simultaneously iterative, violence of constituting and legitimating a nation. In the case of Ireland, this process went in tandem with literal violence in the form of the Easter Rising and the civil war. In the case of Aotearoa New Zealand, where the Treaty was signed in a relatively peaceful manner, foundational violence or force was rather epistemological and ontological, as Māori were constituted as subjects within a British legal and political framework. F M Brookfield implicitly recognises the dissimulated violence in the Treaty-making process and subsequent colonisation of the country when he couches his discussion of the Treaty in terms of a revolution. He refers to the Treaty both as 'the 1840 revolution' and as an origin for the imposition of an alien state formation – 'the revolution that began in 1840'. Furthermore, '[t]he Crown's assertion of power over New Zealand is treated as revolutionary in that it took from chiefs who had signed the Treaty of Waitangi more than they ceded and took from the non-signatories (who had ceded nothing)'. He then goes on to consider:

> the colonialist revolution, by which as the *British* Crown, it asserted its power, and also the counter-revolutions of Maori resistance and the (revolutionary) splitting that has resulted in the *New Zealand* Crown as a separate constitutional entity in an independent nation state.[103]

Derrida notes that '[t]here is no contract that does not have violence as both an origin . . . and an outcome'.[104] While both the origin and the outcome in this instance may have been epistemological violence in the form of the imposition of colonial state apparatuses, a more immediate result was the violence of the 1860s Land Wars and the conservative violence that was contained in the maintenance of the imposed political framework; both of these have constituted a deeply riven society divided along racial lines, in contrast to the constitutionally enforced uniformity of post-independence Ireland.

Discussion of the Treaty has taken place most vociferously in the fields of law and history. What this points to is that the nation is not only historiographically constituted as an 'imagined community', but is also subject to legal determination. Indeed, the historic community of the nation is mapped onto a legalistic state formation. In the case of Aotearoa New Zealand, the founding document constitutes a promise of a *justice*-to-come; nationhood is conditional upon this promise of equitable and fair partnership.

In 'Force of Law', Derrida not only discusses the foundational and conservative violence of founding a nation, but also the possibility of justice and its relationship to the law. The foundation of a system of laws that legitimates itself only defers the problem of justice. Justice is positioned outside the law as something to be attained. It therefore exceeds the system that it drives. A system of laws cannot operate without a conception of justice that is then displaced or, as Derrida puts it, 'in the founding of law or in its institution, the same problem of justice will have been posed and violently resolved, that is to say buried, dissimulated, repressed'.[105] If this 'problem of justice' is deferred or repressed, it has not been solved or removed, but rather effaced; it provides the ground from which a system of laws can then authorise its own legitimacy or, rather, it acts in accordance with a principle of justice that it itself constructs. This principle of justice is necessary for the system of law to operate; it must appeal to something outside itself in order to authorise itself. Furthermore, 'law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere as to be unjust or unjustifiable'.[106] Laws therefore become a representation of a justice that is deferred in order to be seen as legitimate.

As such, laws are a form of cultural inscription that constitute subjectivity. An individual subject is positioned as being 'before the law' – both prior to, and in front of, the law; the subject thus operates within a temporality that is both future and past. That is, while the Treaty recasts Māori as having equivalence with 'British subjects', they have already been positioned before the law of the colonising power. Being a subject before the law, in the sense of being prior to it, in this case signifies that Māori are retroactively constituted as subjects over whom this Treaty has jurisdiction: their subjectivity is seen as pre-existing the law laid down in the Treaty and is thus answerable to it. As subjects before the law in the sense of being in front of it, their subjectivity is given legitimacy by the very document that constitutes them as subjects.

Furthermore, this legitimacy must be constantly reiterated. This not only occurs on such occasions as Waitangi Day, but also by recourse to, and reliance on, legal judgments in determining the Treaty's status in law. This is one of the reasons why legal decisions – from that of Chief Justice Prendergast, who declared the Treaty a 'simple nullity' in 1877, through to the recommendations of the Waitangi Tribunal – have had such a decisive impact not only on the cultural status of the Treaty, but also on the very foundation of the law in Aotearoa New Zealand. Derrida asserts:

> [t]o be just, the decision of a judge, for example, must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value, by a reinstituting act of interpretation, as if ultimately nothing previously existed of the law, as if the judge himself invented the law in every case. No exercise of justice as law can be just unless there is a 'fresh judgement'.

This conservation relies on a simultaneous destruction of the law as it is affirmed: 'It must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it.'[107] That is, the law, or in this case, the Treaty, is reread in order to find its true meaning, which nevertheless remains out of reach in the future-to-come. The rereading therefore iterates the centrality and legitimacy of the law – repetition makes it seem more 'natural' and 'right' – yet it can never posit the true meaning of that law. Therefore, '[j]ustice as the experience of absolute alterity is unpresentable, but it is the chance of the event and the condition of history'.[108] An idea of justice is constituted *by* the law – it does not precede it as an origin or source, although it is posited as such – and it is also constituted as a *telos*, to which the process of law aspires. Law thus functions in an analogous way to writing, proceeding from a first presence of justice of which it is the supplementary inscription and aiming for the final presence of justice restored. It therefore exceeds representation and so threatens the system that creates it. Derrida suggests that: 'Perhaps it is for this reason that justice, insofar as it is not only a juridical or political concept, opens up for *l'avenir* the transformation, the recasting or refounding of law and politics.'[109]

State formations not only rely on a concept of the nation, but also one of *justice* in order to legitimate themselves and subsequently to validate their institutions as being just and legitimate. This appeal to justice can, however, have the effect of recasting the law if it is not seen to be just. Thus, the re-emergence of the Treaty of Waitangi in the consciousness of the state signals a partial recasting of the law as becoming 'more' just in light of the Treaty. While establishing and legitimating the state, the Treaty also invokes the principle of justice, which could radically transform it. Because this is a powerful threat to the state's hegemony, it therefore relies not only on the recuperation of the threat but also on the (continued) suppression of any pre-existing law. Foundational violence 'does not recognize existing law in the moment that it founds another'.[110] Thus, the state still fears the foundational violence threatened by Māori protest, including the occupation of Bastion Point[111] and the political threat mounted by Māori religious movements. The threat posed, for example, by the Ratana church in the 1930s was quickly recuperated by its alliance with the Labour party. Likewise, supratribal communities, such as that founded at Parihaka by Te Whiti and Tohu – who, in the late nineteenth century, practised passive resistance as a means of protest against the state – were ruthlessly suppressed.[112] The guarantee of *tino rangatiratanga* promised in the Māori text of the Treaty poses a direct threat to the working of the state. That state therefore sees it as imperative to ensure its own hegemony by allowing concessions based on Treaty rights and valorising the Treaty as a founding document. It has not to date, however, conceded a separate Māori sovereignty, which could potentially establish an opposing new law.

Situating the Treaty as a foundational document, however, positions both Māori and Pākehā in a double bind. For Māori, continuing to valorise the

Treaty as a point of origin signals a continuing, although tacit, assent to the imposition of that framework. This is not to say that Māori did not pre-exist the Treaty, but rather that it constitutes them as 'Māori', a unified sovereign subject within a British legal framework with certain rights as a condition of that. In so doing, while the Treaty can legally be said to guarantee the exercise of *tino rangatiratanga* within that framework, it simultaneously recognises its loss by always already relying on that framework in order to define it. For the Crown, metonymically representing the interests of Pākehā, the law thus constituted also poses a threat to itself: that is, it contains the threat of another separate sovereign subject – one that it both constitutes and reiterates – that might contest, and has contested, the validity of the law from *within* the terms of that law. While tacitly iterating the validity of the state, Māori legal challenges to that state also contain the threat of foundational violence. This threat might be seen to be contained by such conservative legal moves as the institution of Waitangi Day and, more importantly, the establishment of the Waitangi Tribunal, which operates *within* the law *without* having the force of law – that is, the Tribunal makes recommendations to the government but the government is not legally obliged to do what the Tribunal recommends. Any recommendations that are accepted are carried out by the Office of Treaty Settlements, a government department. Pocock notes that the Treaty itself relies on a similar legal sleight of hand in its treatment of Māori:

> [i]t can plausibly be argued that the British actions of 1840 pursued a double and deceptive strategy: on the one hand attributing to Maori enough sovereignty to make them capable of entering into a treaty, on the other denying them – what indeed they did not possess – the sovereignty of a fully formed state, so that the Treaty could subsequently be denied the binding force of law.[113]

Thus, at the moment when a new system of law was constituted as the dominant system of law and, subsequently, defined a new nation in the 1852 Constitution Act, it legally nullified the foundational force of that which constituted it – the Treaty of Waitangi – because it recognised the threat its ratification in law might pose.

Immemorial origins

As I have described in Chapter 2, the origin of 'old world' nations is perceived to precede the use of writing: the social contract or the general will under which the 'true' collectivity of the nation resides is placed outside recorded time and hence outside writing, at the same moment that it is marked *within* writing. The nation, then, is conceived as an ideal form, an imagined community, that exceeds representation; the 'real' nation is always other, always to come. In nations that trace a line of descent from a written document such

as the Treaty of Waitangi, the final signified meaning of the nation – in this instance, in the form of an equitable partnership between two peoples – is similarly deferred: it is contained in the promise of justice-to-come, drawn from a shared past. It also reveals a deferral that is masked by the constitution of 'immemorial' origins. The supposedly unwritten contract is not a 'natural' origin but is always already written.

The deferral of a pre-literate origin works to naturalise the imposition of a colonial state formation. In the case of Aotearoa New Zealand, the state relies on the formulation of an 'immemorial constitution' derived from the British (unwritten) constitution, in order to ensure its 'naturalness'. McHugh observes:

> English institutions had taken root in the New Zealand soil with remarkably little trouble. And this history of the trouble-free transplantation of the English Constitution . . . has since allowed constitutional lawyers to say that there is no 'theory' of the New Zealand constitution, just as it has allowed the popular belief to become current that the country has no 'history' of which to speak.[114]

The 'immemorial constitution' – which I analyse in greater detail in Chapter 6 – guarantees the written text at the same time as being opposed to it. Continued reference to the 'spirit' or 'principles' of the Treaty of Waitingi indicate the precedence of a quasi-religious 'natural' writing, which is somehow 'truer' than the more 'artificial' supplementary writing contained in the text.

That the Treaty is sometimes referred to as a covenant or sacred pact also alludes to this idealisation of an 'extratextual' writing. As I have discussed in Chapter 2, the use of a religious idiom in these secular founding texts derives from the body – the body of believers, literally and figuratively – and the body of Christ. The body is the site at which both the old and the new covenants are written. Marking the body in this way functions as a metaphor for a kind of 'natural' writing that precedes artificial, technical writing. This natural writing is seen as being innate – it is the site of the *logos* as God or consciousness itself – and it is 'immediately united to the voice and to breath'.[115] The metaphor of writing confirms the privilege of the *logos* as a site of truth and founds the 'literal' meaning of writing: that of 'a sign signifying a signifier'.[116] Thus, the 'spirit' of the Treaty is its 'true' meaning and is written into the heart and soul of those who were, and are, party to it. This inscription always already marks the community of Aotearoa New Zealand as being a discrete and separate nation, whatever the 'artifice' of the written Treaty of Waitingi might be made to say. The nation is thus naturalised by the terms of the Treaty because its 'true' meaning is written within the members of that nation and posited as prior to that nation as a first presence. At the same time, the written Treaty, while seen as supplementary and inadequate, marks the

'fall' into writing, seen as a necessary step on the path to regaining the final presence of a just nation.

The Treaty posits a nation that is always already differed from itself – the collective subject of the nation is split into binarised Treaty partners that subsequently become racially marked – and deferred as the nation struggles to attain its image of itself as a just partnership. This struggle for nationhood is troubled by the 'time-lag' of the Treaty, which posits differing temporalities for the process of modernity in which the nation can be understood. It also demonstrates the limit of language, in that the idea of the nation somehow exceeds representation but, at the same time, can only ever be represented and never present to itself. In light of this, the founding moment of Aotearoa New Zealand as a 'modern' nation within an international context can be characterised as an event, in the Lyotardian sense, to which the Treaty of Waitingi 'bears witness'. The event, like the 'true' meaning of the Treaty, is unpresentable; it can only ever be represented. That both event and text are valorised (and demonised) as a point of national origin, suggests that this is not a unified moment. Rather, the representation of the nation displayed by them is that of the historical encounter between two very different cultures; this consequently writes incommensurable difference into the origin of the nation. The consequences of that encounter – to which the Treaty 'bears witness' – mark the inhabitants of the national community and therefore constitute a nation that strives to realise a just and equitable relationship between them.

Notes

1 I use the designation 'Aotearoa New Zealand', combining Māori and Pākehā names, in order to juxtapose two contesting national narratives.

2 A Young, 'Clark Set to Go on Inquiry into Place of Treaty', *New Zealand Herald*, 11 March 2004. accessed 11 March 2004, available online at http://www.nzherald.co.nz/search/story.cfm?storyid=0CAAB984–39E1–11DA–8E1B-A5B353C55561.

3 Constitutional Arrangements Committee, *Report of the Committee of the Inquiry to Review New Zealand's Existing Constitutional Arrangements*, 47th Parliament (Hon P Dunne, chairperson), August 2005, p 7. The Report notes that there are 'few academic treatments' concerning the sources of the constitution and considers the most reliable to be Kenneth Keith's six-page introduction to the *Cabinet Manual* (cited in the *Report*, p 19). Keith identifies the 1986 Constitution Act as the principal source of the constitution with other major sources including: 'the prerogative powers of the Queen; other relevant New Zealand statutes; relevant English and United Kingdom statutes; relevant decisions of the courts; the Treaty of Waitangi; the conventions of the constitution.'

4 *Report*, p 7.

5 Such 'pragmatic evolution' can be read as an implicit statement of national identity, one that demonstrates a utilitarianism drawn from both a pioneer history and a British empiricism: 'by this we mean New Zealander's instinct to fix things when they need fixing, when they can fix them, without necessarily relating them to any grand philosophical scheme.' (*Report*, p 12)

6 *Report*, p 7.
7 *Report*, p 8.
8 Polemically arguing the case for a written constitution, Tim Watkin describes the 2004 Inquiry as 'tepid' and quotes an unnamed legal expert who had described it as 'little better than a "sixth-form essay" ": 'Get It in Writing', 2006, *New Zealand Listener* 204:3456 (5–11 August) accessed 30 November 2006, available online at http://www.listener.co.nz//issue/3456/features/6702/printable/get_it_in_writing.html.
9 *Report*, p 16
10 R Cooke, Introduction, 1990, 12 NZULR 1, 1, cited in *Report*, p 38.
11 *Report*, p 23.
12 *Report*, pp 55, 70–1.
13 A Ward, *An Unsettled History: Treaty Claims in New Zealand Today*, 1999, Wellington: Bridget Williams Books, p 20.
14 See P McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, 1991, Oxford: Oxford University Press, especially pp 12–16, 31–4. In 'The Treaty of Waitangi, The Constitution and the Future', 1998, *British Review of New Zealand Studies*, 18 (Dec), pp 4–19, F M Brookfield asserts: '[T]he New Zealand Parliament is . . . now a free-standing, self-existent sovereign legislature, in a constitution which is basically unwritten.' (p 5)
15 Pākehā is the term generally used to describe New Zealanders of white, European origin, primarily British and Irish. I discuss this term further below. The binary division created between Māori and Pākehā, and the government's recent focus on biculturalism, has tended to obscure the increasing diversity of Aotearoa New Zealand's current ethnic and cultural composition.
16 Cabinet's 1986 Treaty Policy, 24 March 1986, cited in J Kelsey, *A Question of Honour? Labour and the Treaty 1984–1989*, 1990, Wellington and London: Allen & Unwin, p 66.
17 P G McHugh, 'A History of Crown Sovereignty in New Zealand', in A Sharp and P McHugh (eds), *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary*, 2001, Wellington: Bridget Williams Books, pp 189–211 (p 207). The *Report of the Committee of the Inquiry to Review New Zealand's Existing Constitutional Arrangements* describes a more detailed constitutional history of New Zealand that not only comprehends these significant milestones, but also a number of others.
18 Archives New Zealand, *Paths to Nationhood/Ngā Ara Ki Te Whenuatanga*, Wellington: Keeper of the Public Record, Archives New Zealand/*Te Whare Tohu Tuhituhinga o Aotearoa*, accessed December 2001, available online at http://www.archives.govt.nz/exhibitions/permanentexhibitions.php.
19 Reverend Henry Williams, who translated an English draft of the Treaty into Māori, wrote: 'My view of the Treaty of Waitangi is . . . that it was the *Magna Carta* of the aborigines of New Zealand.' (Paihia 12 July 1847, extracted from *The Life of Henry Williams, Archdeacon of Waimate*, 1877, Auckland: Wilson and Horton, accessed 3 January 2002, available online at http://www.waitangi.com/politics/print.html. See also McHugh, *Magna Carta*.)
20 Treaty historian, Claudia Orange, notes, in *The Treaty of Waitangi*, 1987, Wellington: Allen & Unwin, that both Henry Williams and Hone Heke, one of the first chiefs to sign the Treaty, had spoken of the Treaty in terms of a covenant analogy: 'Heke . . . spoke of the treaty as the New Covenant. As Christ was the New Covenant and as the old Mosaic Law was put aside on conversion to Christianity, so the treaty, with its promise of a new relationship between the Crown and the Maori chiefs, could be likened to the New Covenant.' (p 90) Sir James Henare, *kaitiaki* (guardian) of the oral tradition of Ngapuhi history, underlined that the

Treaty 'signed' by the chiefs – many of whom were Ngapuhi – was the debate the previous day: 'Once the chiefs had given their word, the agreement was tapu [sacred]. "The Treaty then was not just a political and legal covenant but a spiritual one." ' (Affidavit of Sir James Clarendon Henare, 1 May 1987, in *New Zealand Maori Council v the Attorney General* (1987), cited in Kelsey, *Honour*, p 9.) The Te Papa exhibition, *Signs of a Nation*, also emphasises the sacred character of the Treaty. The museum describes its presentation thus: '[It] stand[s] in a physically stunning space, underneath a very high wedge-shaped ceiling. The words of the Treaty resonate in giant lettering on the walls of the monumental cathedral-like space on Level 4. The place is sacred, powerful and dignified – a place where the clarity and simplicity of the actual words of the Treaty express the vision of two peoples seeking to coexist peacefully in one country.' (*Te Papa Tongarewa*/ Museum of New Zealand website, 'Signs of a Nation/*Ngā Tohu Kotahitanga*', accessed 3 January 2002, available online at http://www.tepapa.govt.nz/TePapa/English/WhatsOn/LongTermExhibitions/SignsofaNation.htm)

21 The judgment of Chief Justice Prendergast in the case of *Wi Parata v The Bishop of Wellington* (1877), cited in McHugh 'Crown Sovereignty', stated that: 'So far indeed as that instrument purported to cede the sovereignty . . . it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist.' (p 193)

22 Stuart C Scott's two self-published polemics on the Treaty are entitled *The Travesty of Waitangi: Towards Anarchy*, 1995, Dunedin: Campbell Press, and *Travesty After Travesty*, 1996, Christchurch: Certes Press.

23 In his overview of the history of Māori protest regarding the Treaty, Robert Consedine records the catch-cries of the late 1970s and 1980s: 'The Waitangi Action Committee, with Maori and Pakeha support, continued to engage in protests, focusing attention on Waitangi Day, using highly charged slogans such as "The Treaty is a Fraud" and "Cheaty of Waitangi" '. (R Consedine and J Consedine, *Healing our History: The Challenge of the Treaty of Waitangi*, 2001, Auckland: Penguin, p 105.)

24 In *The Discovery of Islands: Essays in British History*, 2005, Cambridge: Cambridge University Press, J G A Pocock notes that in 'New Zealand typography, Maori words are no longer italicized, in order to avoid making Maori seem exotic or inferior'. Following his lead, however, Māori words will be italicised 'in order to ease acceptance of the terms by readers who will find them unfamiliar' (p 5, note 6)

25 Orange, *Treaty*, p 256.

26 'A Declaration of the Independence of New Zealand/*He Wakaputanga o te Rangatiratanga o Nu Tireni*' Appendix 1 in Orange, *Treaty*, pp 255–6.

27 Mutu also draws on Northern oral traditions to refute the conventional paternalistic reading of the Declaration in 'The Humpty Dumpty Principle At Work: The Role of Mistranslation in the British Settlement of Aotearoa, the Declaration of Independence and He Whakaputanga o te Rangatiratanga o nga Hapu o Nu Tireni', in S Fenton (ed), *For Better or Worse: Translation as a Tool for Change in the South Pacific*, 2004, Manchester: St Jerome, pp 11–36 (p 13).

28 McHugh, *Magna Carta*, pp 31–8 (p 35).

29 P Moon, *Te Ara Kī Te Tiriti: The Path to the Treaty of Waitangi*, 2002, Auckland: David Ling Publishing, pp 10, 99.

30 Lord Normanby's Instructions, cited in ch 11, 'The Status and Scope of the Treaty of Waitangi', *Report of the Waitangi Tribunal on the Orakei Claim*, accessed 12 August 2004, available online at http://www.waitangi-tribunal.govt.nz/reports/viewchapter.asp?reportID=49AF06E3-FBCB–45C5–9E97–2C2044B558C2&chapter=71.

31 H Carleton, *The Life of Henry Williams, Archdeacon of Waimate*, J Elliott (ed), 1874–77, Auckland: Upton; repr 1948, Wellington: A H & A W Reed, p 313.
32 Orange gives differing figures of 43, 45 or 52: *Treaty*, p 259.
33 The document signed at Waikato Heads: Orange, *Treaty*, p 69.
34 Orange, *Treaty*, p 60.
35 See, for example, Orange, *Treaty*; M King, *Being Pākehā: An Encounter with New Zealand and the Māori Renaissance*, 1985, Auckland and London: Hodder & Stoughton; Kelsey, *Honour*.
36 H R Baker (ed), *From Treaty to Conspiracy (A Theory)*, 1998, Palmerston North: One Nation New Zealand Inc Press, p 10.
37 *Conspiracy*, p 12.
38 *Conspiracy*, p 37.
39 C Barlow, 'Tiriti o Waitangi (Treaty of Waitangi)', in *Tikanga Whakaaro: Key Concepts in Māori Culture*, 1994, Auckland: Oxford University Press, p 134.
40 Geoffrey Palmer, cited in Kelsey, *Honour*, p 56.
41 Orange, *Treaty*, pp 139–40.
42 The Human Rights Council recommended that the Declaration be adopted by the General Assembly. To date, the General Assembly has not adopted the Declaration due to pressure from the USA, Australia and New Zealand.
43 See K S Coates and P G McHugh, *Living Relationships: Kōkiri Ngātahi – The Treaty of Waitangi in the New Millennium*, 1998, Wellington: Victoria University Press, for more on comparative Indigenous histories.
44 M Jackson, 'Justice and Political Power: Reasserting Maori Legal Processes', in K M Hazelhurst (ed), *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand*, 1995, Aldershot: Avebury, pp 243–63 (p 249).
45 R J Walker, 'The Treaty of Waitangi as the Focus of Maori Protest', in I H Kawharu (ed), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi*, 1989, Auckland: Oxford University Press, pp 263–79 (pp 277–8).
46 M King, *Being Pakeha Now: Reflections and Recollections of a White Native*, 1999, Auckland: Penguin, pp 237–8.
47 See H Bhabha, 'The Postcolonial and the Postmodern: The Question of Agency', in *The Location of Culture*, 1994, London and New York: Routledge, pp 171–97.
48 King, *Being Pakeha*, p 46.
49 S Turner, 'Settlement as Forgetting', in K Neumann, N Thomas and H Ericksen (eds), *Quicksands: Foundational Histories in Australia and Aotearoa New Zealand*, 1999, Sydney: University of New South Wales Press, pp 20–38 (p 21).
50 McHugh, 'Crown Sovereignty', p 198.
51 Kelsey, *Honour*, p 5.
52 Orange, *Treaty*, p 185.
53 *Kingitanga* (King movement): this movement was formally established in 1858. Its main object was (and continues to be) to unite Māori under the *mana* and *tapu* (roughly, prestige and sacredness) of their own King and to complement the role of the British Crown in New Zealand. *Kotahitanga* (Unity movement): this became a nationwide organisation in the 1890s and had its own parliament. Orange regards it as 'the most comprehensive effort to secure the autonomy guaranteed under the Treaty' (*Treaty*, p 276). The movement had two (conflicting) aims: 1) to secure legislative recognition for their parliament, which would operate alongside the existing state; and 2) to achieve full independence. *Kohimarama* conferences: these were held in 1860, 1879, 1880, 1881 and 1889, and were representative gatherings of Māori chiefs, together with some government officials, in order to restate or redefine the Treaty of Waitangi in light of conflicts and challenges that occurred frequently in this time period.

54 Orange, *Treaty*, p 195.

55 S Freud, 'Infantile Sexuality', in *The Penguin Freud Library Volume 7: On Sexuality – Three Essays on the Theory of Sexuality and Other Works*, J Strachey (trans), 1991, London: Penguin, pp 88–126 (p 90).

56 G Palmer and M Palmer, *Bridled Power: New Zealand's Constitution and Government*, 4th edn, 2004, Oxford: Oxford University Press, p 346.

57 A 2003 Court of Appeal decision (*Ngati Apa and Others v Attorney-General* [2003] 3 NZLR 643), departing from conventional understanding of the seabed and foreshore as Crown possessions, opened an avenue for the High Court to declare Māori common law rights still extant (a similar move to the native title rights declared in the *Mabo* decision, as discussed in Chapter 4). The Māori Land Court could then declare land to be customary land under *Te Ture Whenua Māori Act* 1993. Apparently acting in response to fears that Māori would control access to the beach (a fear exacerbated by speeches capitalising on race issues from the then Leader of the Opposition, Don Brash), the government quickly implemented its own policy, which asserted that the foreshore and seabed would remain accessible to 'all New Zealanders'. This pre-emptive move has angered Māori, who believe their rights under the Treaty have been eroded. The Waitangi Tribunal has also found that government policy 'removes the ability of Māori to go the High Court and the Māori Land Court for definition and declaration of their legal rights in the foreshore and seabed'. Furthermore, '[i]n removing the means by which the rights would be declared, it effectively removes the rights themselves': Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, Wai 1071, accessed 18 August 2004, available online at http://www.waitangi-tribunal.govt.nz/reports/view.asp?ReportID=838C5579–36C3–4CE2-A444-E6CFB1D4FA01. See also D Slack, *Bullshit, Backlash and Bleeding Hearts: A Confused Person's Guide to the Great Race Row*, 2004, Auckland: Penguin. This text, written by a law graduate and parliamentary speechwriter, attempts to demystify both the Treaty and the foreshore issue for the 'confused person', specifically those of 'my generation and my parents' generation . . . those who came late to this story' (p 7). Historian Marcia Stenson has also published an accessible guide to the Treaty, aimed primarily at Pākehā, in the context of the foreshore debate: *The Treaty: Every New Zealander's Guide to the Treaty of Waitangi*, 2004, Auckland: Random House NZ.

58 'Maori (from "tangata maori" – ordinary people) denotes the descendants of the country's first Polynesian immigrants. Pakeha – a word whose origins are contentious – denotes non-Maori New Zealanders.' (King, *Being Pakeha*, p 12) See also King, *Being Pakeha Now*, p 10.

59 A Salmond, *Between Worlds: Early Exchanges Between Maori and European 1773–1815*, 1997, Auckland: Viking, p 22. By examining a series of letters debating the origin of the terms in a Māori-language newspaper, *Te Pipiwharauroa*, in the early twentieth century, Salmond traces a lack of consensus among the various correspondents who suggest that the terms originate from a misunderstanding on the part of Captain Cook, a type of flax, an ancient people who had arrived from the sea, from a haka, or a distinction made between the world of ordinary people and the world of *atua* (gods).

60 A Ngata, *The Treaty of Waitangi: An Explanation/Te Tiriti o Waitangi: He Whakamarama*, M R Jones (trans), 1922, Christchurch: published for the Māori Purposes Fund Board, p 4.

61 A Ballara, *Iwi: The Dynamics of Māori Tribal Organisation from c1769 to c1945*, 1998, Wellington: Victoria University Press. Note that the English text of the Treaty refers to tribes, while the Māori text uses *hapū*, which Kawharu translates as 'sub-tribe' and which Ballara glosses as 'clan'.

62 M Barcham, '(De)Constructing the Politics of Indigeneity', in D Ivison, P Patton and W Sanders (eds), *Political Theory and the Rights of Indigenous Peoples*, 2000, Cambridge: Cambridge University Press, pp 137–51 (p 138). Original emphasis.
63 Barcham, 'Politics', p 142.
64 See Anon, ' "Tangata Whenua" a Better Name than "Maori", says Turia', *New Zealand Herald*, 7 August 2003, accessed 8 August 2003, available online at http://www.nzherald.co.nz/search/story.cfm?storyid=AFC6FEAE–39DF–11DA–8E 1B-A5B353C55561 and A Thomson, 'People of the Land Say Maori a Pakeha Name They Dislike', *New Zealand Herald*, 8 August 2003, accessed 7 August 2003, available online at http://www.nzherald.co.nz/search/story.cfm?storyid-=B43A1FE8–39DF–11DA–8E1B-A5B353C55561.
65 Michael King has written of a more spiritual Pākehā relationship to the land that is not couched in terms of capital and private property in his autobiographical works, *Being Pakeha* and *Being Pakeha Now*. Lynda Dyson is somewhat more sceptical of 'Pakeha Whiteness', arguing instead that it is 'an important aspect of a contemporary "primitivist turn" which seeks to avoid the connotations of supremacy "white" has acquired': 'The Construction and Reconstruction of Whiteness in New Zealand', 1996, *British Review of New Zealand Studies*, 9, pp 55–69 (p 63).
66 L Head, 'The Pursuit of Modernity in Maori Society: The Conceptual Bases of Citizenship in the Early Colonial Period', in Sharp and McHugh (eds), *Histories*, pp 97–122 (p 98).
67 J Derrida, 'Force of Law: The "Mystical Foundation of Authority" ', in D Cornell, M Rosenfeld and D G Carlson (eds), *Deconstruction and the Possibility of Justice*, 1992, London and New York: Routledge, pp 3–67 (p 38).
68 These references are taken from the English version of the Treaty of Waitangi held in the New Zealand National Archives. Both English and Māori versions of the Treaty (plus an English translation of the Māori version by I H Kawharu) were accessed 12 December 2001 and are available online at http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text (English version) and at http://www.nzhistory.net.nz/read-the-treaty/maori-text-read-the-treaty (Māori version). All subsequent references to the Treaty will be given in the text.
69 J Laurie, 'Translating the Treaty of Waitangi', 2002, *Journal of the Polynesian Society*, 111:3 (Sept), pp 255–8 (p 255).
70 Appendix in I H Kawharu (ed), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi*, 1989, Auckland: Oxford University Press, p 319.
71 Moon, *Path*, pp 99, 110.
72 See R M Ross, '*Te Tiriti O Waitangi*: Texts and Translations', 1972, *The New Zealand Journal of History*, 6, pp 129–57; Bruce Biggs, 'Humpty Dumpty and the Treaty of Waitangi', in Kawharu (ed), *Waitangi*, pp 300–12; Orange, *Treaty*; Head, 'Modernity', for a selective sample.
73 M P K Sorrenson, 'Towards a Radial Reinterpretation of New Zealand History: The Role of the Waitangi Tribunal', in Kawharu (ed), *Waitangi*, pp 158–78 (p 158).
74 Ross, 'Tiriti', p 133.
75 F M Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, 1999, Auckland: Auckland University Press, p 55.
76 See, for example, Baker (ed), *Conspiracy*, One Nation New Zealand, and W Christie, *New Zealand Education and Treatyism*, 1999, Auckland: Wyverne Press.
77 Cabinet Treaty Policy, cited in Kelsey, *Honour*, p 66.
78 J Derrida, *Of Grammatology*, G C Spivak (trans), rev'd edn, 1997, Baltimore: John Hopkins University Press, p 301.
79 M de Montaigne, 'Of Cannibals', in *The Complete Works of Montaigne: Essays, Travel Journal, Letters*, D M Frame (trans), 1958, London: Hamish Hamilton, pp 150–9 (p 153). My emphasis.

80 Ibid. My emphasis.
81 'Writing, which would seem to crystallize language, is precisely what alters it': 'Essay on the Origin of Languages which Treats of Melody and Musical Imitation', in Rousseau and J G Herder, *Two Essays on the Origin of Language*, J H Moran and A Gode (trans), 1966, Chicago and London: University of Chicago Press, p 21. Although he does not refer to writing specifically as a 'dangerous supplement', Derrida shows that Rousseau thinks the supplement of writing in language within the same structure as other dangerous supplements such as masturbation (as a supplement to sex). See Part II, ch 2, '. . . That Dangerous Supplement . . .', in Derrida, *Of Grammatology*.
82 Derrida, *Of Grammatology*, p 116.
83 J G A Pocock, 'The Treaty Between Histories', in Sharp and McHugh (eds), *Histories*, pp 75–96 (p 85–6).
84 Derrida, *Of Grammatology*, p 3.
85 Rousseau, 'Essay', p 17.
86 Derrida, *Of Grammatology*, p 3.
87 Derrida, *Of Grammatology*, p 296.
88 Ross, 'Tiriti', p 132.
89 J B White, *Justice as Translation: An Essay in Cultural and Legal Criticism*, 1990, Chicago and London: University of Chicago Press, p 233.
90 White, *Justice*, p 231.
91 R Jakobson, 'On Linguistic Aspects of Translation', in *Selected Writings II: Word and Language*, 1971, The Hague and Paris: Mouton, pp 260–6 (p 261).
92 Biggs, 'Humpty Dumpty', p 301.
93 Biggs, 'Humpty Dumpty', p 302.
94 J Derrida, *The Truth in Painting*, G Bennington and I McLeod (trans), 1987, Chicago and London: The University of Chicago Press, p 11.
95 Derrida, *Of Grammatology*, p 150.
96 In a recent article, Ian Wishart has polemically asserted that a copy of the Treaty found in 1989 and known as the 'Littlewood Treaty' is this missing draft, which, he argues, is 'crystal clear' on the issue of sovereignty: that Māori unambiguously ceded sovereignty. Dismissing the Māori text now that the 'missing link' has come to light, Wishart and *Investigate* announce ('Waitangi Treaty Bombshell: The End of the Golden Gravy Train?', 2003, *Investigate*, 4:28 (December), pp 26–36): 'It's over – in a stunning blow to the hopes of some in Maoridom, a draft of the Treaty of Waitangi has emerged from the mists of time – been confirmed as authentic – and . . . it proves the Maori version of the Treaty used by the Government has been mistranslated.' (p 26)
97 Te Puni Kōkiri/Ministry of Māori Development, *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and Waitangi Tribunal*, 2001, Wellington: Te Puni Kōkiri/Ministry of Māori Development.
98 Te Puni Kōkiri, *Tirohanga*, p 74.
99 Te Puni Kōkiri, *Tirohanga*, p 75.
100 Te Puni Kōkiri, *Tirohanga*, p 76.
101 Jane Kelsey, for example, asserts 'it was the tau rangatira the night before, not the actual signing of the treaty, which was significant to Maori': *Honour*, p 9.
102 A brief collective history of Māori signatories can be found in M Simpson, *Ngā Tohu o Te Tiriti: Making a Mark* (a companion to *Nga Whārangi o te Tiriti*, a facsimile of the Treaty of Waitangi, published with the 1990 exhibition *Ngā Kupu Kōrero, The People of the Treaty Speak*), 1990, Wellington: National Library of New Zealand.
103 Brookfield, *Waitangi*, p 12.

104 Derrida, 'Force', p 47.
105 Derrida, 'Force', p 23.
106 Derrida, 'Force', p 5.
107 Derrida, 'Force', p 23.
108 Derrida, 'Force', p 27.
109 Ibid.
110 Derrida, 'Force', p 40.
111 Bastion Point is an area of land north of the city of Auckland. Some of this land was sold in 1840, while some was retained as a reserve for the people of Ngati Whatua. In 1887, more land was taken for military purposes. The remaining land continued to be whittled away until 1977. In January 1977, the Orakei Marae Committee Action Group and young Ngati Whatua activists occupied Bastion Point in protest because the Crown Lands Department wanted to subdivide the land for high-cost housing and Auckland City Council wanted to use it as parkland. The occupation lasted over a year and was ended when, on 25 May 1978, the government sent in the police and army to remove the protesters: 222 protesters were arrested and their temporary meeting house and other buildings demolished. The Bastion Point occupation is one of the most significant protest actions in New Zealand history.
112 For more on the community at Parihaka, see D Scott, *Ask That Mountain: The Story of Parihaka*, 1981, Auckland: Reed/Southern Cross.
113 Pocock, 'Treaty', p 76.
114 McHugh, 'Crown Sovereignty', p 198.
115 Derrida, *Of Grammatology*, p 17.
116 Derrida, *Of Grammatology*, p 15.

Chapter 5

‘Fracturing the skeleton’ of the law

The *Mabo* decision and the reconstitution of Australia

Literally a ‘celebration of the nation’,[1] the Australian Bicentenary of 1988 commemorated the arrival of the First Fleet, commanded by Arthur Phillip, at Botany Bay, New South Wales in 1788. The fleet had comprised 160,000 men, women and children, including both gaolers and convicts, and the British government had charged Phillip with the responsibility of establishing a penal colony there. In tandem with the official celebrations and the arrival of a replica First Fleet from Britain, a large-scale protest – in which 50,000 Indigenous Australians and their supporters walked on a ‘March for Freedom, Hope and Justice’ – publicly highlighted the fact that this originary moment was predicated on invasion and dispossession of the peoples who had previously occupied the land. As a result, the Bicentenary acted as the catalyst for a vigorous constitutional and national debate, which continued throughout Australia in the 1990s, concerning ‘what the nation is’ and when it might be said to begin.

Although the Bicentenary exhorted a ‘celebration of the nation’, Australia as a political entity did not exist in 1788. From 1788, a number of independent British colonies were established at various locations around the continent. It was not until the ratification of the Constitution of the Commonwealth of Australia (1901) that the six existing colonies were federated into one Commonwealth. Furthermore, this Constitution situated Australia firmly within the empire as it passed into law as an Act of Parliament of the United Kingdom. In the process of constituting Australia within a British framework, this text does not recognise any prior land rights of Australian Aboriginals and Torres Strait Islanders and, in effect, writes them out of the nation it constitutes.

Despite its name, this Constitution does not seem to have the foundational status of comparable documents. Commentator Graeme Davison, for example, asserts, ‘Nor could Australians . . . cite a founding document, a national birthright such as the Treaty of Waitangi, much less a Magna Carta, a Declaration of Independence or a Bill of Rights’.[2] This is partly due to the fact that, unusually, the Australian Constitution does not set out a statement of national intent. Historian Stuart MacIntyre states that Australia ‘makes

no declaration of its virtues. No Statue of Liberty welcomes the newcomer, no proclamation of guiding principles is offered'.[3] He subsequently concludes that this is a strength, because the lack of rigid definition enables the nation to go forward and redefine itself. I argue rather that it negatively signifies as an empirical and 'unwritten' statement of nationhood: there is no need to define the nation because it is 'self-evident'. Moreover, at roughly the same time, Australia *did* establish a series of written statements of national intent in immediately legislating for a racially 'pure' and protected nation. The first actions of the new state were to establish what is collectively known as the 'White Australia' policy, excluding both internal others (Aboriginals and Torres Strait Islanders) and external others (specifically, Chinese and Pacific Islanders). I argue, however, that, in the last decades of the twentieth century, Australia was no longer 'at home' in this Constitution: public discourse instead focused on both 'multicultural' and 'Indigenous' configurations. Thus, the High Court decision in *Mabo v Queensland No 2* (1992), in which the foundational fiction of *terra nullius* (land belonging to no one) that had underpinned British colonisation was discredited, radically broke with the 1901 Constitution and forms a new basis for Australian nationhood. An ambivalence concerning 'written' and 'unwritten' constitutions (in the performative sense) of the nation can therefore be traced in recent attempts to *re*write the national narrative.

In the wake of *Mabo*, the questions of what constitutes the nation *now* and of who is party to its inclusive lexicon have been seen as a matter of national urgency, by liberals and conservatives alike. During the 1990s, groups with vastly differing agenda and political aims utilised surprisingly similar imagery to talk about the nation and what it might become in the future, in different ways calling for a 'healed, 'unified' or even 'one' nation. Labor Prime Minister, Paul Keating had used the idea of 'one nation' in 1992 in order to promote a strong and unified nation. His invocation, however, was not overtly to do with race relations, but with the standardising of communications, roads and rail networks between the states. Despite these pragmatic, material aims, Keating's speech revealed a national vision:

> all our efforts should go towards uniting the country, not dividing it. The most successful societies are notable for their unity . . . That is the kind of Australia we seek . . . An Australia which is more truly one nation.[4]

Similarly, in 1995, Jesuit priest Frank Brennan set out his vision of social justice, for the country to work toward 2001 as 'one land, one nation'.[5]

The goal of a unified nation was likewise invoked to promote policies of 'multiculturalism' and 'reconciliation' with Indigenous peoples. In these policies, Australia is perceived as a unity that, despite its recently acknowledged divisions, can be 'healed' by integrating various seemingly incommensurable narratives relating to its colonial past. Initiatives of the Reconciliation

movement, including the 'Journey of Healing' and the Sharing History project, bear witness to this desire for an integrated and healed national narrative.[6] In 1999, the Council for Aboriginal Reconciliation stated: 'Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.'[7]

Ideas of the nation and its well-being were also used to promote a politics of resentment and grievance, as the prominence of Pauline Hanson's One Nation party attests. Hanson, a former Liberal Party candidate who had her nomination withdrawn by the party prior to the 1996 federal election, stood as an independent candidate for Oxley and won her seat. In her maiden speech in the House of Representatives, she appealed to those 'mainstream Australians' who felt that they were adversely affected by the 'reverse racism' used by those who 'promote political correctness'. In April 1997, she founded the 'One Nation' party, whose platform was based on both protectionist economic policies and populist aversions to Asian immigration and state subsidisation of Aboriginal interest groups.[8] In a call for unity, sounding a not entirely dissimilar note to the Reconciliation movement and Keating's vision for a united nation (albeit with a different emphasis), Hanson asserted: 'To survive in peace and harmony, united and strong, we must have one people, one nation, one flag.'[9]

In contrast to Hanson's wish to ignore the legacies of colonial encounter and using similar rhetoric to the Reconciliation movement, MacIntyre asserts that coming to terms with the past is the means by which the nation can heal itself in the future:

> For those who were here first, the modern history of Australia is deeply traumatic and the healing has only begun. For those who came, it is a story of fresh beginnings. A place of exile became a land of choice and a sanctuary for successive waves of new arrivals who have continually reworked it . . . The history of Australia works backwards and forwards to rework our understanding of how we came to be what we are. Its presence is inescapable. To enter into it provides a capacity to determine what we still might be.[10]

This assertion suggests that the nation, 'what we still might be', is one that can be unified and 'healed' in the future-to-come. This process particularly depends on coming to terms with the traumas experienced by Indigenous Australians in the modern period. Further divisions can be traced in the legacy of the former convict colony and the experiences of non-'Anglo-Celtic' immigrants (a hegemonic designation that itself elides a history of dispossession and division). Thus, Australia has been described as 'two nations, or worst of all, two half nations', 'many mobs with many countries', 'three nations encased within the Australian state', a 'divided nation', at the same time as both liberals and conservatives call for 'one nation'.[11] MacIntyre

views the past as an 'inescapable presence', imagining it as a solid bedrock of historical events and facts that will shape the future. This presence is something that can be regained by the 'right' interpretation of history, since to 'enter into it' (the past) will allow 'us' to determine the future.

The nation as a conceptual object thus becomes the site in which differing narratives of origin and otherness compete for legitimacy. As a result of this, 'Australia' is no longer 'at home' with its perceived national and constitutional origins and the nation itself has become an uncanny object of both fear and familiarity. In this chapter, I focus specifically on the relationship between Indigenous and non-Indigenous Australians, because this relationship hinges on the question of origins and thus has major implications for the process of nation-building.

Drawing on debates over what constitutes the nation, I argue that Australia is troubled by anxiety concerning its origins. I discuss 'Australia' as an imagined community within a Western theoretical framework and thus address the question of origins in reference to the 'post-contact' history of Australia. This is not to suggest that the land was not inhabited for at least 40,000 years (and probably more) by Indigenous communities and clans, but, rather, that the *question* of origins – who was there first, to whom the land belonged – takes on urgency post-contact, reaching a crucial turning point in the 1992 *Mabo* decision. That is, it only came to matter who was there first and to whom the land belonged once the invaders had arrived.

As well as its implications for property and race relations law, the High Court decision in *Mabo* represents an alternative account, or rewriting, of the nation's origins. This 'new' narrative, as noted in the judgment of Chief Justice Brennan, has the potential to 'fracture the skeleton' of the law it invokes. *Mabo* marks a reconstitution of the nation, invoking a constitutional tradition – that of the common law and the unwritten British constitution's immemorial origins – which, paradoxically, both threatens and gives authority to existing constitutional arrangements and the perceived unity of the nation constituted as a conceptual object.

Beginnings

Does 'Australia', then, begin in 1788? In fact, the Bicentennial commemoration marks a quasi-origin even within European discourse. The British government's decision to embark on a programme of transportation to this remote land had its roots in the navigational voyages of James Cook and, before him, Luis Vaez de Torrez, Abel Tasman, Willem Vlamingh and William Dampier among others, who named what they saw of the continent 'New Holland'. Following these navigators, Cook travelled under secret instructions from the British Admiralty to take possession of 'a continent or land of great extent' that was thought to exist in the southern part of the globe. Cook was also instructed to:

> observe the Genius, Temper, Disposition and Number of the Natives . . . You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessers.[12]

These instructions represent Britain's earliest expressions of interest in *terra Australis incognita*. Cook was required either to obtain an agreement – the 'consent of the natives' – to take possession of the land, or to record 'Proper Marks and Inscriptions' that would effectively *write* British ownership onto the land. Along with Cook's voyage, these instructions are usually annexed into an Australian narrative of origin beginning with European contact.[13] Historian Paul Carter warns against this retroactively constructed narrative, suggesting that it is part of a desire to see Cook as a 'founding father', and predecessor of Phillip and later nation builders.[14]

Nevertheless, the figure of Captain Cook is important not only in European narratives, but also in post-contact Aboriginal narratives. Stories featuring Cook exist within various communities even where there is no record of the 'historical' Cook having been.[15] Disparate stories come from different parts of the country, from Ulladulla on the south coast of New South Wales to Arnhem Land in the far north. Historian Bain Attwood comments:

> The Captain Cook stories are not, quite evidently, about Captain Cook but concern the relationship between two peoples – the British, who are represented as invaders, and Aborigines, who are represented as indigenes – which Cook is considered to have established because he assumes enormous symbolic importance to Australian histories. But whereas in Australian myths Cook is valorised as the discoverer of this country and the founder of British settlement, in these Aboriginal myths he is the archetypal first white man, an Australian Everyman who invades, colonises the land, and imposes an immoral and unjust law on Aborigines.[16]

Cook thus becomes a figure both of (British) origin and of (British) law and, subsequently, of the origin of that law on the continent. In some areas, the legend has distinctive variations: the first white invader in the Yarralin district of the Northern Territory, for example, is represented as Ned Kelly, the nineteenth-century bushranger who also has 'enormous symbolic importance' in Australian history. In this version of the story, Kelly is seen to arrive prior to Cook. Paddy Wainburranga, of the Rembarranga people from central Arnhem Land, relates their history of Captain Cook in which it is Cook's descendants who pervert his legacy, in *Too Many Captain Cooks*.[17]

In non-Indigenous terms, what Phillip did establish in 1788, as opposed to Cook, was the first encroachment of a long-term British presence on

antipodean soil. Cook had claimed the land as a British possession in 1770 but, in establishing a colony at Sydney Cove, Phillip literally took possession of it. Until Matthew Flinders circumnavigated the coast of New South Wales in 1803 (which, at this time, was the name for the whole of the British colony), it was also not known that Australia was a continent and not an island. In 1829, the whole of the continent was claimed as British territory. In a similar fashion to the USA, what is now represented internationally as 'one nation' began as several distinct colonies established at different times and, mostly, clinging to the outer edges of the continent. From 1788 to 1859, Britain established six Australian colonies: New South Wales; Tasmania (initially known as 'Van Dieman's land'); Victoria; Western Australia; South Australia; and Queensland. The first convicts arrived in 1788 with the First Fleet and transportation did not end until January 1868, when a cargo made up mostly of Irish Fenians landed in Western Australia. The 'convict stain' did not, however, affect all colonies. South Australia, for example, prided itself on its establishment as a colony of free immigrants and was referred to as a province in order to distinguish itself.

The colonies were not, at this stage, connected to each other but, rather, to Britain; each of them had established its own parliament, court and constitution by the middle of the nineteenth century.[18] Colonial governments, believing that the Indigenous peoples of Australia were nomadic because they did not appear to cultivate the land and, thus, have a proprietary relationship with it, viewed the country as 'wasteland'. Warfare with Aboriginals along the frontier, together with punitive expeditions and massacres, ensured the survival of early settlements. The land, which is commonly perceived to have been peacefully settled in one movement, was, rather, expropriated in a piecemeal and violent manner throughout the nineteenth century.

If British colonisation 'began' Australia in 1788, a more 'home-grown' version of Australia originated when the six colonies were federated as a Commonwealth in 1901. Although federation had been in the air since the middle of the nineteenth century, it was only given formal recognition by the Australian Federal Council in 1885 and took a further decade to come to fruition. Federalists advocated common defence and communications between the states, and also the restriction of Chinese immigration. 'Anti-Billites' were more cautious in what they viewed as an unnecessary haste to assert a kind of independence from Britain. Following two constitutional conventions, in which models from Switzerland, Canada and the USA were considered, and several state referenda, which put the document to the electorate, a draft Constitution was submitted to the British Parliament to be passed into law. The Commonwealth of Australia was established in this text as a constitutional monarchy with the monarch's representative – a Governor-General – as the cornerstone of government. The Constitution also established three arms of government – the executive, legislature and the judiciary – thought to form the 'unwritten' basis of the British constitution,

as observed by commentators such as Montesquieu and Tocqueville (discussed further in Chapter 6). The High Court, which, in deciding *Mabo*, was forced into a process of interrogating constitutional origins, was itself established as a national institution by the Constitution. Appeals from the High Court to the Privy Council in Britain ended in 1986 when the Australia Act removed the last remaining provisions with which to do so. Since then, the High Court has been not only the final court of appeal in the land, but also a constitutional court with the power to reinterpret the very text that founded it.

Indigenous Australians – named as 'aborigines' with a lower-case 'a' in the text – only received two brief mentions in the Constitution. The first was as an exception to the power of the federal government to make laws (Section 51: xxvi): the states retained the ability to legislate for Aboriginals within their jurisdiction. With no national responsibility, policies of 'protection' and assimilation loosely based on Social Darwinist ideals were implemented.[19] The second reference was in Section 127: 'In reckoning the numbers of the people of the Commonwealth, or of a state or other part of the Commonwealth, aboriginal natives shall not be counted.' The Indigenous peoples of Australia were thus written out of 'the people' who textually constituted themselves in the Preamble of the Constitution. They were, furthermore, homogenised as 'aborigines', eliding the vast geographical, cultural and linguistic differences between them. The small 'a' indicates a generic usage – which I explore further later in this chapter – rather than a specific proper name for Indigenous Australians. The process of homogenisation has continued until the present day, with only the people indigenous to the Torres Strait Islands differentiated. This is perhaps due to the fact that, unlike mainland Aboriginals, Torres Strait Islanders were not viewed as primarily hunter-gatherers but as seafaring traders and gardeners; this latter practice established a proprietary relationship with the land, which would become important in deciding *Mabo*.

Following the ratification of the Commonwealth of Australia Act (UK) in 1901, a variety of legislation was passed that set up both internally and externally what is known as the 'White Australia' policy. The Immigration Restriction Act (1901), Pacific Islander Labourers Act (1901) and section 15 of the Post and Telegraph Act (1901) effectively excluded 'undesirable' immigrants, principally Chinese and Pacific Islanders, from entering the country or, if they were already there, from remaining. The Immigration Restriction Act called for a dictation test, based on legislation from Natal, South Africa, in 'an [*sic*] European language directed by the [government] officer'.[20] From 1932 until 1966, this test could be administered any number of times during the first five years of an immigrant's residence.[21] The Pacific Islander Labourers Act enabled the federal government, from 1906, to deport large numbers of Pacific Islanders (or *kanakas*), who worked in conditions of virtual slavery in the sugar plantations and pearl-diving industries of

Queensland and northern New South Wales. The Post and Telegraph Act asserted that ships carrying Australian mail should only employ white labour.

By a similar legal sleight of hand, the Commonwealth Franchise Act (1902), which gave women in the Commonwealth the vote, effectively denied the franchise to Aboriginals.[22] Indeed, this was not rescinded on a federal level until 1962, with the amendment of the Commonwealth Electoral Act (1918); the last states to enfranchise Aboriginals were Western Australia in 1962 and Queensland in 1965. The landmark 1967 Referendum, one of only eight successful referenda to change the Constitution, allowed the Commonwealth to legislate for Aboriginals and Torres Strait Islanders and also for both to be counted in the Census. In the referendum, 90.77 per cent of those who voted – the highest 'yes' vote of any referendum – voted for changes in the wording of the Constitution in relation to Aboriginals and Torres Strait Islanders. The Constitution was subsequently amended to remove the words 'other than Aboriginal people in any State' from Section xxvi and all of Section 127. Australians voted to enable the federal government to make laws for Indigenous peoples and override any state legislation that was felt to be discriminatory.[23] These initial documentary exclusions went in tandem with paternalistic state policies of assimilation that saw, among other things, the creation of reserves and the removal of 'half-caste' children from those reserves to state-run institutions. Such less than admirable 'origins' and officially sanctioned policies have drawn comparisons with South Africa. Aboriginal activist, Gary Foley, asserts, '[b]efore 1967 this country had a system of apartheid',[24] while historians Gregory Melleuish and Geoff Stokes argue, '[e]xcept perhaps in South Africa, the ideology of racial superiority was probably more powerfully developed and imposed in Australia than in any comparable settler country'.[25]

While the Commonwealth of Australia may not have set out in its Constitution a proclamation of its guiding principles, the legal establishment of an overtly racist state formation seems to indicate what these might have been. As historian Henry Reynolds notes, '[t]he Commonwealth was custom-made to provide a very neat fit of race, state and nation'.[26] The 'people' referred to in the Preamble would be racially homogeneous, not only ridding themselves of 'undesirable' migrants, but also writing out, and thus constitutionally 'forgetting', the existence of Aboriginals and Torres Strait Islanders. In the process of erasing the existence of Indigenous Australians in the *now* of the national narrative – literally, by breeding them out in some assimilationist policies – the Constitution also forgot the history of dispossession and frontier violence that contributed to the 'settling' of the question of 'what the nation is'. Recent constitutional developments have called the 'neat fit' of race, nation and state into question.

At the close of the twentieth century, with the centenary of federation looming, these beginnings did not seem so admirable or worth celebrating. The 'White Australia' legislation had been effectively revoked by a series of

amendments that prevented the enforcement of the racial aspects of immigration laws in 1973. In addition, the 1975 Racial Discrimination Act had made the use of racial criteria for any official purpose unlawful. Larger numbers of immigrants from places outside Britain and Ireland – particularly post-World War Two, from Greece, Italy, Vietnam, Lebanon, India and Poland – had also broadened the narrowly racially constituted nation.[27] The increasingly visible public presence of the Indigenous rights movement, active in various forms of land rights action since invasion, appeared to culminate in two landmark High Court cases. The first of these is *Mabo* (1992), which decided that Australia had not been *terra nullius* prior to European contact and that Indigenous rights to the land in certain areas of the country were therefore upheld. Four years after *Mabo*, the *Wik* case (1996) decided that native title could be held jointly with pastoral leases.[28] These decisions were seen to inaugurate an era in which the quest for Aboriginal land rights and sovereignty became a movement for the recognition of native title. The quest for native title has met with mixed results: in 2002, the High Court in *Yorta Yorta Aboriginal Community v Victoria* upheld the decision that the Yorta Yorta people had ceased to occupy their lands in Northern Victoria and Southern New South Wales. More recently, however, in September 2006, Justice Wilcox ruled in the Perth Federal Court that the Nyoongar people were the traditional owners of Perth and large parts of south-western West Australia.

Many non-Indigenous Australians felt moved to continue the public reconciliation initiatives begun under Keating's Labor government, setting up 'Sorry' books and marking a national 'Sorry' day in order to express a kind of national penance, in what has also been described as 'a self-evident nation-building project'.[29] This movement became more urgent as Keating's successor, Liberal–National Coalition Prime Minister, John Howard, while personally apologising, resolutely refused to accept contemporary national responsibility for what had occurred in the past. Haydie Gooder and Jane M Jacobs point out that this process, which may have been taken up at a popular level, was rather the latest in 'a series of official approaches (forerunners included segregation, assimilation and self-determination) adopted by Australian bureaucracies in their struggle to manage the consequences of colonial occupation'.[30]

The growing importance of these movements has, not surprisingly, run in tandem with a dissatisfaction with the country's constitutional origins.[31] Unlike the Republic of Ireland or the USA, with which its constitutional composition has much in common, Australia does not have a nationalist mythology founded in violent repudiation of colonial rule. Its foundational violence is rather epistemic: it writes out the presence of Indigenous Australians and forgets the frontier violence with which the nation was established. Nor does Australia have a document like Aotearoa New Zealand's *Treaty of Waitangi*, which might form the basis for dialogue between Indigenous

peoples and settlers. Indeed, a treaty made in 1835 between settler John Batman and Aboriginals in the Melbourne and Geelong area of Victoria for the acquisition of land was annulled by Governor Richard Bourke of New South Wales later that year. This subsequently led to an official Proclamation asserting that Aboriginals did not own land and that Batman's treaty was 'void and of no effect against the rights of the Crown'.[32] This treaty was used as official precedent in the *Gove Land Rights* case (1971),[33] which, in turn, influenced *Mabo*. The call for a treaty, or treaties, with various Aboriginal groups has been part of the movement for constitutional change in Australia.

As well as the conservative backlash that saw the temporary popularity of the One Nation party, there have been growing calls to make Australia define itself by reference to both its increasingly multicultural composition and the long histories of its Indigenous peoples. In addition, the constitutional crisis of the 1970s, in which the Governor-General sacked the incumbent Whitlam government,[34] indicated cracks in the very composition of government. 'The Dismissal' provided a foundation for the republican movement, which, despite endorsement at 1998's constitutional convention, ultimately failed to win a referendum in 1999.

In many different ways, then, contemporary Australia has shown a desire to *re*constitute its national origins. In order to do so, the nation must textually reconstitute itself for the twenty-first century and, in the process, look to the future in the form of a transfigured relationship with the past. Many of these divergent movements, including reconciliation and republicanism, found a focus in the commemorative year of 2001. Brennan asserts, for example: 'It would be better for all Australians . . . if we could go into the next millennium committed to the legitimacy of "one land, one nation".'[35] That 2001, the centenary of federation, should be the focus of these initiatives demonstrates the cultural force of commemoration in constituting history. If 2001 were to represent either a reconciled nation or a republic, rather than the beginning of the 'White Australia' policy, it would then mark a 'better', more desirable origin. In 2001, however, 'it was made clear . . . that Australia had chosen not to open the lens too far at all', continuing, rather, to refuse to engage publicly with the colonial past.[36] Six years on, Australia is neither reconciled nor a republic, illustrating that attempts to reconstitute origins are not simply a matter of the reassignation of dates. Such attempts involve, rather, a reconstitution of the national narrative, a reconstitution that the *Mabo* decision attempts to perform.

'Uncanny' Australia

In radically altering the story of the nation's origins, *Mabo* renders the national narrative, and its constitutional origins, uncanny. As outlined in Chapter 2, the nation has been referred to throughout Western history using metaphors of the body and home. During the debate surrounding federation

and the 1901 Constitution, a number of homely, or *heimlich*, metaphors were used to constitute 'Australia' as a conceptual object. Federation was viewed as a marriage between the states, creating a home for the new nation. Alfred Deakin, one of the architects of federation, invoked images of marriage in 1895 when he likened the union to 'entering the bonds of permanent matrimony'.[37] The Preamble, likewise, refers to an 'indissoluble union' of the people witnessed by God. Cultural historian Helen Irving extends the matrimonial metaphor, calling it not just an 'arranged marriage' (arranged by colonial politicians during the constitutional conventions), but also 'a marriage of consent' (it was put to referendum in all colonies), concluding: 'But the marriage, if not without conflict, has endured. Perhaps like all marriages, it was partly a matter of love, partly of convenience, partly of proximity.'[38]

The self-conscious fashioning of constitutional origins not only rendered *unheimlich* the homely relationship with Britain; in recent decades, Australia has also come to be seen as 'uncanny'. Freud argued that the 'uncanny' is 'that class of the frightening which leads back to what is known of old and long familiar'.[39] Thus, the familiarity of the hegemonic 'white Australia' has, since the end of World War Two, become increasingly fragmented and contested. Indeed, the current Prime Minister, John Howard, ran his campaign against that of the reforming Keating government, promising to make Australia's relationship with the colonial past more 'relaxed and comfortable' for 'ordinary Australians'.[40] For different reasons, liberal white Australians write of an unhomely feeling within their current constitutional arrangements, as the move for reconciliation, 'sorry' days and the republic attests. Keating's speechwriter, historian Don Watson, summed up the liberal desire for a repudiation of these origins by calling for a 'postmodern republic' in which tolerance and diversity would be respected.[41]

The 'uncanny' effect is not solely due to recent events, but can rather be traced in the colonisation and historical amnesia of post-contact Australia.[42] For Freud, the 'uncanny' 'is in reality nothing new or alien, but something which is familiar and old-established in the mind and which has become alienated from it only through the process of repression'.[43] He notes, furthermore, that this repression is contained in the etymology of the word *unheimlich* itself: 'The *unheimlich* is what was once *heimisch*, familiar; the prefix "*un*" . . . is the token of repression.'[44] Repression is linked to the uncanny – indeed, the 'uncanny' feeling is a symptom of repression – as 'we can understand how it is that the objects to which men give most preference, their ideals, proceed from the same perceptions and experiences as the objects which they most abhor'.[45] Seen as belonging to the prehistory of the individual or of the 'race', repression manifests as a series of symptoms in which individuals feel at odds with themselves. As Anna Freud summarises the process, a person experiences 'a dim intimation of pressing impulses at work; a sense of being at odds with oneself; in short, the distress connected with an internal conflictual state'.[46] The experience of repression is that of a 'return

of the repressed' because, in order for it to be manifest, the process cannot have been entirely successful. This does not just take place once, but is an ongoing repetitive process. The uncanniness felt by 'white Australia' can be read as a symptom of the repression of the role played by both Indigenous Australians and non-'Anglo-Celtic' Australians in the narrative of Australian history. It can also be read as an anxiety regarding origins that comes with the repetitive compulsion to (re)inscribe familiar narratives of origin.

Ken Gelder and Jane M Jacobs have used the idea of the 'uncanny' to discuss white Australia's relationship to discourses of the Aboriginal sacred, a relationship that hinges on questions of belonging. The simultaneity of the familiar and the unfamiliar shifts the boundaries between 'us' and 'them', causing the one to seem as if it inhabits the other: 'In this moment of decolonisation, what is "ours" is also potentially, or even always already, "theirs": the one is becoming the other, the familiar is becoming strange.'[47] Thus, the uncanny relationship with 'Australia' becomes literally about 'home' and settlement. The white, settler society is unsettled in its relationship to Indigenous peoples; the unhomely is, in this case, related to home, as the unsettledness generated by the assertion of Aboriginal land rights in *Mabo* and calls for Aboriginal sovereignty are perceived to threaten not only the security of non-Indigenous Australians, but also, literally, their homes, land and other property. Some politicians have even warned that the backyards of the average citizen were at risk.[48] Indeed, Aboriginal leader Wesley Aird asserted, in light of the 2006 Perth decision, that 'no-one's going to lose their backyard'.[49] As *Mabo* is based on conferring property rights on Indigenous Australians, it is also based on making what is homely unhomely. In constituting a collective subject, what is inscribed as a 'natural' origin is rather brought into being by a continual rewriting of the origin that represses those elements that contradict its perceived centrality. In the case of Australia, this repression is seen as only partially successful; in its rewriting of the national narrative, *Mabo* can be represented as a kind of 'return of the repressed'.

This view of *Mabo*, however, masks a further repression: that of the split between 'us' and 'them' that constitutes the collective subject of Australia. By rewriting the common law of Australia to reflect the pre-eminence of the 'new history', *Mabo* represses the involvement of both the law and the discipline of history in constituting both the fiction of *terra nullius* and the erasure of Indigenous Australians from 'Australian' history. *Mabo* is viewed as a reconstitution of the nation by this revision, pushing the origins of Australia further into the past before European contact. In so doing, however, it represses the fact that this 'newly' constituted origin cannot be known outside of the texts that describe it and therefore *depends upon* the imposition of colonial law. Consequently, it is not the recovery of a lost origin or the creation of a new origin, but the reinscription of the same one.

Australia *ab origine*

The *Mabo* judges appeal to the history and common law of Australia and, in so doing, interrogate the very origins of Australia, rendering the national narrative 'uncanny'. As a result, I argue, the decision, which poses the threat of foundational violence, simultaneously challenges and reinscribes the authority of existing structures. Yet the question of when Australia begins continues to resonate. Does 'Australia' as a conceptual object originate with the federation of the Australian colonies in 1901? Certainly, the name comes into currency at this point as a way to mark the collective name of the federated states as the 'Commonwealth of Australia'. 'Australia' is, however, more than just a name: it represents a narrative of the nation that comprehends both origins and otherness. Increasingly, as *Mabo* demonstrates, this narrative has had to reorient the question of both origin and otherness in relation to its Indigenous inhabitants, those who were 'aboriginal' to the land when Europeans landed there. It is therefore important to consider how narratives of history constitute both an origin and the 'aborigine'.

Bob Hodge and Vijay Mishra assert that the etymology of the word 'aborigine' signals the legitimate claims of the Indigenous peoples to the land:

> Australian Aborigines have an exceptionally persuasive claim to the territories in dispute against the claims of the colonising power. This claim can be sustained by appeal to archaeology, which currently recognises evidence of their continuous occupation of Australia for over 40 000 years, but more to the point is the tacit recognition of an absolute legitimacy which is inscribed in the name that the colonisers give to this people: Aborigines, from the latin *ab origine*, 'from the origin'.[50]

Hodge and Mishra thus reveal a certain irony in dispossessing by the doctrine of *terra nullius* those named 'aborigine' by the colonisers. If these peoples exist 'from the origin', how can the land then not belong to anyone? This etymology warrants, however, further examination. The word 'aborigine' or 'aboriginal' comes from the Latin adverbial phrase *ab origine* meaning, as Hodge and Mishra note, 'from the beginning' or 'from the conception (of an idea etc)'. This phrase informs such words as the adjective 'aboriginal' – which the *OED* glosses as both 'first or earliest so far as history or science gives record, primitive, strictly native, indigenous' and '[d]welling in any country before the arrival of later (European) colonists'; the adverb 'aboriginally' – understood as '[f]rom the very beginning; from the origin of a race; in the earliest times or conditions known to history or science'; and the noun 'aboriginality' – defined as 'existence in or possession of a land at the earliest stages of its history'. These words were used to define the first inhabitants of a place, initially referring to Latin and Celtic peoples, as early as 1547 and

were in use by the eighteenth century to refer to the Indigenous inhabitants of the so-called new world. With the addition of a capital 'A', the word 'aboriginal' has come into usage as the proper collective name for the disparate Indigenous peoples of Australia.[51]

These definitions, despite being framed within a Western logocentric discourse, are suggestive in relation to the question of when the nation begins. Those described as the 'aboriginal' inhabitants of Australia (which includes the various language groupings, communities and clans known collectively as 'Australian Aboriginals' and those peoples indigenous to the Torres Strait Islands) by the European navigators and colonisers, were positioned in a temporal narrative that placed them both at the origin (of European 'discovery') and prior to it. At the moment they were annexed into European modernity, they were simultaneously positioned as prior to this origin (and, hence, different) and as existing from the origins of humankind itself (and, hence, the same, only not as advanced), a definition that many anthropologists and other scientists have used as good reason to study them. This resulted from the positioning of Indigenous Australians within a pseudo-evolutionary framework in which they were seen as the earliest examples of humankind. Nationalist historian, Brian Fitzpatrick, for example, stated in 1946: '[The first settlers] found in Australia people of the Old Stone Age, surviving types of the most primitive communities of *homo sapiens*; and unique fantastic animals, belonging to the morning of the world.'[52] Biologist William Baldwin Spencer, using similar imagery, wrote in 1927:

> Australia is the present home and refuge of creatures, often crude and quaint, that elsewhere have passed away and given place to higher forms . . . the Aboriginal show[s] us, at least in broad outline, what every man must have been like before he learned to read and write, domesticate animals, cultivate crops and use a metal tool. It has been possible to study in Australia human beings that still remain on the cultural level of men of the Stone Age.[53]

As in Montaigne's description of the 'noble savage', cited in Chapter 4, the ability to use modern Western technology is seen as the marker of cultural sophistication and, significantly, the ability to read and write heads this list. Aboriginals are thus positioned outside history, that is, outside writing; their only function within the discourse of conventional anthropology is to illuminate the origins of humanity – that is, European modernity – itself.

This ambiguous temporality, which positions Aborigines both at and prior to the origin, can be traced in the etymology of the phrase *ab origine* itself. *Ab origine* is defined as 'from the beginning'; 'from' has a double sense of 'beginning from' ('they' were already there at 'our' beginning in this place) and 'belonging to' ('they' belong to a past that has a beginning which predates 'ours'). This double sense also invokes the question of which beginning

is being positioned as the origin. Is it the beginning of Aboriginals' representation in European histories and travel logs, the beginning of a British colony in 1788, or a beginning that is still further back, in the immemorial origins of the country itself: the ancestral Dreamings in which the world was called into being? The prefix 'ab-' marks a further ambiguity. In this phrase, it is glossed as 'from', yet it also has the sense of 'off' and 'away', and has come into recent compound usage as meaning 'a position away from'. 'Aborigine' can also represent a movement away or off the origin. Thus, 'aborigine' signifies an origin that is simultaneously not an origin. The giving of the name 'aborigine' both marks the beginning of a European temporal narrative and simultaneously disavows it. That is, what this name recognises is that the origin, which it itself marks and constitutes, is also not an origin.

The definition of the noun 'origin' can be read in an equally suggestive way. The *OED* glosses it as:

- The act or fact of arising or springing from something; derivation, rise; beginning of existence in reference to its source or course . . .
- that from which anything arises, springs or is derived, source.

An 'origin' is constituted by that which comes after or derives from it; derivation requires repetition and affirmation. The unitary fixed point of the origin is thus split from itself forming a supplement at the source. Derrida elaborates on this 'broaching of the origin' throughout his work, in which he asserts that an origin or centre only has meaning within a structure:

> structure . . . has always been neutralized or reduced, and this by a process of giving it a center or referring it to a point of presence, a fixed origin. The function of this center was not only to orient, balance, and organize the structure . . . but above all to make sure that the organizing principle of the structure would limit what we might call the *play* of the structure. By orienting and organizing the coherence of the system, the center of a structure permits the play of its elements inside the total form.[54]

The origin is central in the sense of being intrinsic to a structure, but it is also outside it, marking an anterior point from which the structure orients itself. In a historical narrative of origin, for example, the founding moment is central to the creation of the narrative: it could not be created without it. Yet it simultaneously remains 'outside' it, retroactively constituted by the very narrative of events it is perceived to inaugurate. Derrida goes on to argue that 'the origin' is:

> a central presence which has never been itself, has always already been exiled from itself into its own substitute. The substitute does not substitute itself for anything that has somehow existed before it.[55]

Repetition of the substitute that is representation masks the absent presence at the origin. The continual reiteration of a historical event thus constitutes that event, which can never be known in itself. This is not to say that events did not occur in the past, that the First Fleet, for example, did not 'really' arrive in 1788. Rather it is to say that this historical occurrence is marked and is intelligible as an event by subsequent iterative representations of it. The repetition of those representations institutes this moment as a foundational point of origin. This movement is a repetitive representation of the originary event, which supplements the historical events, making them intelligible within current cultural frameworks.

In *Of Grammatology*, Derrida refers to origins specifically in relation to language. Language is not just used as an analogy, however: it is always already the origin of a discourse on the origin. Meaning, understood as the origin of language, is thought to be more fully present in speech, which is, in turn, threatened by the supplementary addition of graphic writing. The supplement calls into question what is constituted by the 'original'; it threatens to subsume the original that it also is and is not, and thus becomes 'the very violence – that it does to itself'. Furthermore:

> [it] is always the supplement of a supplement. One wishes to go back *from the supplement to the source:* one must recognize that there is *a supplement at the source*.[56]

That is, when one looks for origins, or attempts to go back to the beginning, one is, in fact, reinscribing the representations that constitute that origin and thus contributing to the construction of that point as a point of origin. The beginning of a discourse on the origin is not the origin, but, rather, the representation of it as such. The centrality of the phrase/word *ab origine* shows how this supplementary source works. Given to the Indigenous peoples by the first European arrivals, it is a name that is not only a name, but a temporal inscription; significantly, 'Aboriginals' and 'Torres Strait Islanders' identify themselves by their clan or community names. The English name represents an historical point of origin, the moment at which 'aborigines' were annexed into Western historical time (the time of modernity), and yet, those named existed prior to this inscribed 'origin', both revealing its 'lack' (that it was not an origin, but, rather, a point of time marked as one within a specific discourse) and, at the same time, affirming it. Thus, the moment at which this name took on meaning was the origin of a specific temporal discourse, which created a name that contradicted its own claims to originality. That is, the name *represents* Indigenous peoples as an origin (they are 'ab-original') but also *establishes* an origin (of European Australia). The 'aboriginals', however, as the legal fiction of *terra nullius* demonstrates, are not really viewed as an origin for the Europeans nor is the European origin an origin for Aboriginals. This moment of origin, then, constitutes two

incommensurable normative orders and narratives of origin, narratives that *Mabo* appears to reconcile.

Where Australia begins is not, then, a simple matter of historical record. It is the ground for conflicting representations of the nation's narrative in the form of history, leading commentators to speak of foundations in uncertain terms. Attwood, for example, insists that 'in the case of Australia these foundations are shaky, because dispossession was the originating act of the nation'.[57] Historian Bernard Smith, in his 1980 Boyer lecture, drew religious parallels, viewing Australia as suffering from the guilt of 'original sin'.[58] The use of the term 'original sin', referring back to the expulsion from Eden, suggests that 'Australia' is nostalgic for the unity of a 'whole' national narrative, as quotes from MacIntyre and the Reconciliation documents at the start of this chapter attest. The nation desires to pass from the first presence of perceived wholeness to a final healed presence in the future-to-come. Historiography is thus assigned a particular role. With the past as its object – specifically, in this case, past origins of the nation – history is deployed in order to bring about a new future. The practitioners of what has been called the 'black armband' view of history have been instrumental, as the *Mabo* judges point out, in setting processes of reconstituting the national narrative in motion.

'Black armband' history

Historiography – literally, the writing of history, both in the sense of creating a narrative based on past events and inscribing cultural values in the way that narrative is selected and created – maps the body politic. That is, history makes the nation what it *is*; the ontological status of the nation is dependent on this narrative to create a common origin and frame of reference for the collective subject. The question of origins, and writing, engages with the practice of history and its debates. Indeed, *Mabo* has been accused of rewriting history in an attempt to undermine the nation. In the polyvalent text of *Mabo*, the dissenting judgment of Justice Dawson and the majority judgments of Justices Brennan, Toohey, Gaudron, Deane, Mason and McHugh replicate the disputes within the discipline of history itself:

> The debate in the *Murray Islands* case between Justice Dawson and the majority reproduced the academic debate between the 'old' and the 'new' Australian histories. The majority bestowed *legal force* upon the 'new' history, in some cases making direct reference to Reynolds' work.[59]

Prominent oppositional commentators include the editor of conservative literary journal *Quadrant*, Paddy McGuiness, who attacks 'those Aboriginal leaders and white self-flagellators who prefer to tell a story of victimisation and blame', and historian Keith Windschuttle, who warns that revisionist

histories might lead to the 'reorganisation and even the eventual break-up of the Australian nation'.[60] In the view of practitioners of the 'new' history, including Attwood and Reynolds, *Mabo* instead represents a narrative that writes an Aboriginal presence 'from the origin' of European contact back into history or, rather, its conventionally nationalist account. *Mabo* thus acts as a supplement to the origin of both Australian history and the presence of history as a discipline in Australia. For them, this supplement has the effect of 'curing' the amnesia regarding Indigenous peoples, whose existence was written out of the Constitution at federation.

The discipline of history worked to occlude Aboriginal peoples from the temporal narrative of the nation. Attwood neatly summarises its role:

> History, as a discourse which deploys temporality as a marker of difference, has been the means by which Europeans have constructed Aborigines in terms of an absence or lack – they were either of another time or were even timeless, and so were not of our time, that is, modernity.[61]

By means of a process of 'narrative accrual', conventionally nationalist histories created 'a corpus of connected and shared narratives' by which the history of the nation was constituted as a singular linear narrative. In reading, recognising and repeating this narrative, the people of British Australia 'came to realise and be conscious of themselves as Australians'.[62] An example of this historical occlusion can be seen in the work of historian W K Hancock, for example, who began his 1930 book, *Australia*, with a chapter entitled 'The Invasion of Australia'. It is not, however, about Aboriginal dispossession, but about the nineteenth-century land-grabbing of pastoralists who acted as if that land were unoccupied. Indeed, he begins with the assertion that '[m]any nations adventured for the discovery of Australia, but the British peoples have alone possessed her'.[63]

Mabo represented a reorientation of the historical landscape and was envisaged as a supplement to traditional historical narratives. In effect, however, it radically rewrote the history of Australia since invasion. Justice Brennan's judgment argues that the law should be brought into 'conformity with Australian history' (*Mabo* [2:63])[64] while Justices Deane and Gaudron 'acknowledge [their] indebtedness' to the 'researches of the many scholars who have written in the areas into which this judgment has necessarily ventured': *Mabo* [3:78]. Justice Dawson's dissenting judgment also notes the effects of the new history in *Mabo* [4:48] – 'there may not be much to be proud of in this history of events' – adding, however, that:

> it would be wrong to attempt to revise the history or to fail to recognise its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided.

Although Dawson does not subscribe to the view of the majority, his fear for the foundation of the law alludes to the foundational violence thought to be immanent in the new histories.

The discipline of history has also provided an important impetus for the movement of Aboriginal sovereignty, conventionally perceived to culminate in the *Mabo* decision. It is, however, a particular type of history, variously called the 'new' history, 'revisionist history' or 'black armband' history, to which Justices Brennan, Deane and Gaudron refer. Historian Geoffrey Blainey coined the epithet 'black armband' in 1993. He describes its use in the 2001 Boyer lectures:

> there has been a tendency to put on the black armband when discussing Australia's last 200 years. The wearing of the black armband is sometimes justifiable; more often it is worn as a result of a failure to understand the nation's past.[65]

Kerryn Goldsworthy notes that this description of history was borrowed for use in the Howard government's 1996 electoral campaign:

> With breathtaking cynicism, Howard appropriated Blainey's phrase in an attempt to convince an already demoralised electorate that this moderately (and not exclusively) left-wing view of history was chiefly designed to make them feel personally guilty about Aboriginal Australia.

She adds, however, that, in many ways, the 'black armband' is an appropriate description for this type of history, because it 'has absolutely nothing to do with guilt but is, rather, a symbol of the acknowledgement, mourning and remembrance of the dead and is, as such, a fine badge for any historian worthy of the name'.[66]

The 'new history' can be traced back to the work of W E H Stanner. Stanner's contributions to the Boyer lecture series in 1968 refer to the 'great Australian silence' on the matter of the nation's treatment of Indigenous Australians. In these lectures, he critiqued the historical amnesia of both Australian historiography and public discourse, asserting:

> A partial survey is enough to let me make the point that inattention on such a scale cannot possibly be explained by absent-mindedness. It is a structural matter, a view from a window which has been carefully placed to exclude a whole quadrant of the landscape. What may well have begun as a simple forgetting of other possible views turned under habit and over time into something like a cult of forgetfulness practised on a national scale.[67]

What this quotation illustrates is the way in which visual metaphors construct

a relationship of 'them' and 'us' between Aboriginals and 'Australians'. This relationship also constitutes a hierarchy of power. The 'Australian' is one who looks at and 'frames' the Aboriginal. Aboriginal writer Tony Birch also uses the metaphor of 'focussing a lens' and the need for a 'sharp focus' on the past.[68] Although there are nearly 40 years between Stanner and Birch, the visual metaphors used by both writers echo the role of surveyors and, latterly, photographers who, along with historians and anthropologists, have framed Aboriginals and Torres Strait Islanders within Australia's past. The subject surveys that which is framed; the frame allows the subject mastery over that at which s/he looks. Simultaneously, however, the subject is subjected to the limitations of the frame, only able to see what it encapsulates. The collective subject of Australia is similarly positioned by the frame of Australian history, the nationalist version of which has represented Aboriginals as background colour or just out of view, leading Carter to comment that: 'The Aborigines were not physically invisible, but they were culturally so, for they eluded the cause and effect logic that made the workings of history plain to see.'[69] The Constitution functions in a similar way to nationalist history, barely mentioning Aboriginals as it consciously fashions 'the people'. Both the new history and *Mabo* reposition the collective subject and, consequently, the visual metaphors change. Advocates of the new history now talk of conservatives' refusal 'to see what is obvious to everyone else'.[70] Attwood likewise suggests that Aboriginals, who have previously functioned as a 'lack' at the centre, are now a differential visible representation of 'Australian-ness' in a global context.[71]

Among *Mabo*'s references to the 'new history', Justice Toohey cites, in particular, the work of Henry Reynolds, one of its prominent practitioners (*Mabo* [5:18]). Reynolds, whose work includes *The Other Side of the Frontier* (1981) and *The Law of the Land* (first published in 1987 and to which Toohey refers), discredited the myths that Australia was settled peacefully and that Aboriginals and Torres Strait Islanders were passive victims of colonisation, concluding rather that the frontier was in a constant state of warfare. In *Aboriginal Sovereignty*, Reynolds looks back through nineteenth-century documents, including letters and newspapers, to assert that violence was a matter of intense public debate, which was subsequently written out of post-federation history by self-conscious nation builders.[72] In a similar fashion to Aotearoa New Zealand's Michael King, Reynolds recalls the impact of this actively induced amnesia, which came to seem natural in relation to both education and locally oriented history:

> There had been nothing in my education on which to draw, to understand many of the things I was witness to, or things that I heard about from others. I knew little about the history of Aboriginal-European relations, nothing about contact and conflict on the frontier. I had no idea there had been massacres and punitive expeditions. I was ignorant about

> protective and repressive legislation and of the ideology and practice of white racism beyond a highly generalised view that 'we' had treated 'them' rather badly in the past. It was a view that at least had the right orientation but it was ill-informed, sentimental and of little depth.[73]

Drawing on the work of Stanner and, latterly, C D Rowley,[74] the shift to the pre-eminence of the 'new' history has performed a 'paradigm shift' in Australian historiography, located in the late 1960s and early 1970s. The 'new' history raises new questions that fall outside the old paradigm: 'Why do Aborigines die in large numbers . . . Who owns the land . . . Was Australia occupied peacefully or invaded with force?'[75] This paradigm shift broadens the discipline of history itself to include oral history and Aboriginal history and has, since 1992, seen the inclusion of Aboriginal Studies in the school curriculum.

One of the key areas in which the 'new' history has been influential is in changing the vocabulary that defines the events of the past. Most contentious has been the introduction of the word 'invasion' to describe what had previously been termed the 'settlement' of Australia. This shift in acceptable terminology has the effect of rendering the familiar hegemonic narrative of Australian history 'uncanny' and, thus, 'unsettling' what had previously been perceived as settled knowledge. Verity Burgman and Jenny Lee, for example, begin *A People's History of Australia* with the acknowledgement:

> [This history] starts from a recognition that Australian settler society was built on invasion and dispossession . . . Held up against the millennia of Aboriginal experience, the last two hundred years seem but a brief, nasty interlude.[76]

In a similar vein, Deborah Bird Rose asserts: 'Settler societies are brought into being through invasion.'[77] Justices Deane and Gaudron acknowledge in *Mabo* the process by which the language of settlement has changed by referring to the process of 'settlement' in inverted commas (*Mabo* [3 : 2]).

Not everyone has embraced the change in terminology. Reynolds notes a resistance to the term 'invasion':

> Australia still strongly resists the idea that the British invaded the country. The reasons are legal, moral, political; the emotions are powerful as recent controversy has made abundantly clear. The courts have determined that the idea of peaceful settlement is a central – indeed skeletal – feature of the legal system.[78]

This resistance is evident in the uncanniness of the language used to describe what had hitherto been a settled and familiar narrative.

As Daiva Stasiulis and Nira Yuval-Davis note, 'one of the main imperatives

of settler rule . . . has been "to consolidate control over the indigenous population" '.[79] Part of this process is the exclusion of Indigenous people from the national narrative and making this part of a hegemonic narrative that shaped Australians' sense of 'us' as opposed to 'them'. Despite the recent historiographical shifts, I argue that this opposition still shapes the writing of the national narrative. Stanner started his influential lectures with the statement: 'The subject of these lectures will be *ourselves* and the *aborigines* and in particular the new relations which have been growing up between us over the last thirty years [my emphasis].'[80] Despite the more inclusive rhetoric of recent years, there is still a marked linguistic difference between 'us' and 'them'. Keating's 1992 Redfern speech talks about what 'we' did to 'them' and how this should be worked through for the 'good of Australia', confirming the binary opposition but also urging reconciliation between the two groups for the common good. In this speech, however, 'we' and 'us' appear to refer to both 'Anglo-Celtic Australians' and 'Australia' as a collective subject: 'In all these things, they have shaped our knowledge of this continent and of ourselves. They have shaped our identity.'[81]

Similarly, one of the main instruments of the reconciliation movement is called the Council for *Aboriginal* Reconciliation, not, notably, for *Australian* reconciliation. Promoting the aim of a 'reconciled nation', while recognising a split at the heart of the nation, suggests an ambiguity as to how it will create a new narrative. 'To reconcile' means not only 'to bring back into concord', 'to absolve', 'to expiate and atone for', but also 'to bring into a state of acquiescence (with) or submission to a thing'.[82] Reconciliation in this case might equally signify a 'healed' national narrative or Indigenous Australians reconciling themselves to always being in the place of the other, outside the collective 'we'. Furthermore, the rhetoric of reconciliation implies that there was once a 'whole' and healthy nation that is currently in need of healing, a reading of Australian history that again positions the unified nation as solely of white origin.

This narrative of wholeness traces its origins in the federation movement of the late nineteenth century, which left no room for Indigenous Australians. In 1895, Deakin asserted, 'in this country, we are separated only by imaginary lines' and 'we are a people one in blood, race, religion, and aspirations'.[83] The 'we' that was united by blood and race referred only to white, primarily British, settlers and denied the continued presence of Indigenous peoples in defining the nation. The creation of a unified nation spanning the continent, moreover, effectively laid claim to all of the land that would hitherto have been occupied in a piecemeal fashion by settlers and states. Patricia Grimshaw asserts that Aboriginals' dispossession and denial of civil rights has 'remained an indisputably disturbing but still separate story', contributing to what she terms 'the great silence of 2001',[84] an allusion to Stanner's lectures. Heather Goodall concurs, noting that the non-Indigenous population still view the Aboriginal story as 'very separate from their sense of "general" or "Australian" history'.[85]

Despite the perceived confrontational force of vocabulary such as 'invasion', one of the purported reasons for undertaking the 'new' history is to 'heal' the nation. Birch, for example, asserts:

> if we are to begin to remember in Australia in a way that does not so deliberately censor that which does not appeal to the nation's sense of self it will be important to reflect on the comment of historian Thomas Butler that 'memory not only causes pain, it heals'. Healing will not happen without remembrance.[86]

Birch here talks of a remembering of the body politic which would allow for the nation's 'sense of self' to grow and become stronger, even if the process by which it does so is initially painful. Although he recognises more difficulties than the official reconciliation rhetoric allows, the focus here is still on healing, the nation becoming whole again, reconciled to itself in the future-to-come. The aim of healing the nation, however, occurs in the rhetoric of both conservatives and liberals. The former may wish to assimilate Aboriginal stories of dispossession into a comfortable view of the past, but the projects of reconciliation and Sharing History also seem to express a desire to integrate Aboriginal narratives into the main narrative of Australian history, rather than first recognising the incommensurable alterity of Indigenous narratives of origins and laws. Despite its opposition to Hanson-like conservatism, the political desire of liberals to heal the nation, to make the national narrative whole again, invariably involves colonial structures of power. What is represented as being in the process of becoming unified and whole, apparently combining 'multiculturalism' or 'anything goes' pluralism, rather has the effect of reinforcing the hegemony of existing structures. Official policies promoting both reconciliation and multiculturalism work to preserve the status quo while appearing to broaden the nation's composition.

In *Archive Fever*, Derrida states that 'the form and grammar' of questions asked about the concept of archive 'are all turned toward the past', questioning whether such a concept is already at our disposal.[87] *Mabo*, for example, re-examines the common law, in order to ask if there are past precedents with which to reread the law in light of contemporary concerns. The archive, however, 'should *call into question* the coming of the future'.[88] The temporality of the archive looks to the past in order both to interrogate and to determine what will happen in the future. Derrida continues:

> It is a question of the future, the question of the future itself, the question of a response, of a promise and of a responsibility for tomorrow. The archive: if we want to know what that will have meant, we will only know in times to come. Perhaps.

There is, according to Derrida, therefore a 'spectral messianicity' at work in

the concept of the archive as it is tied 'to a very singular experience of the promise'.[89] The 'new' history shifts the focus of Australian history to 'the quadrant of the landscape' previously left out of the frame, asking new questions of the past and of the complicit role of the practice of historiography in constructing that past. Thus, as the new history constructs a counter-narrative, it calls on the past to provide answers and new questions for the future. By so doing, historians 'call into question the coming of that future'. *Mabo* draws on the work of these historians, thus radically reconstituting the archive, orienting it towards a future and raising 'the question of a response, of a promise of responsibility for tomorrow'. What *Mabo* cannot recognise is that this response is not predetermined, because it would not then be a response that is yet to come, but would already be known in the present moment. In this case, the future anterior promised by *Mabo* will only have been known 'in times to come. *Perhaps*': that is, when these future times have themselves become 'the past'. The 'perhaps' signals that this future is not set by the questions and answers determined in the present, thus 'fracturing' the teleological temporal narrative that moves from, first, unity, to healed whole and operates as a 'time lag' in the sense that Bhabha has identified. The reconstitution of the archive – in this case, post-contact Australian history – thus creates the possibility of affecting possible outcomes, although what these effects will be can only be known once the future has already passed.

Rereading *Mabo*

Because the 1992 *Mabo* decision concerns issues of origin and 'aboriginality', I regard it as constituting a legal and political 'event' that relocates the question of origins in relation to the prior occupation of Indigenous peoples. *Mabo* supplements the colonial narrative of origin by adding to its perceived lack (in relation to the way both history and law have represented an aboriginal presence), yet it also threatens this narrative of origin. That is, by recognising the prior claims of Aboriginals and Torres Strait Islanders to the land, it threatens the hegemonic force of colonial law and, hence, its own authority. In rewriting the 'legal fiction' of *terra nullius*, the *Mabo* decision erased the foundation of British claims to possession of the land, displacing it with another narrative of origin. In so doing, it aimed to alter not only the origin, but also the possible futures immanent in a newly reconstituted origin. This has direct implications for the foundation and Constitution of Australia, but I argue that *Mabo* ultimately recuperates the threat that it itself constitutes by reaffirming the force of colonial law.

In 1901, the Constitution wrote the Commonwealth of Federated States of Australia into being in a performative act. Thus, as 'Australia' was constituted as a legal and political entity, so 'Australians' were interpellated by the new state that was called into being. This new state took the form of a *gestalt* in that the conceptual object created – 'Australia' – appeared as a functional

whole that was more than the sum of its parts. This *gestalt* unity also impacted on the Indigenous peoples of Australia, in that what had hitherto been taken from them in a piecemeal fashion by individual settlers and by the states was now the sovereign property of the Crown, as represented by the federal government of Australia. The ambiguous legal status of Aborigines and Torres Strait Islanders – were they British subjects or not? – also seemed to be decided in the Constitution: they were not included in the people of 'Australia' and responsibility for their 'protection' would remain with the states. *Mabo*'s recognition of their prior claims thus had implications not only for property law, but also for the very constitution of 'Australia' in the broadest sense. It fundamentally challenged the justice of the foundational fiction of *terra nullius* and the constitution and composition of the nation; at the same time, it conserved and iterated the foundation of the law that it questioned.

The decision in *Mabo v Queensland No 2*, handed down on 3 June 1992, began 10 years earlier when the plaintiffs, Eddie Mabo, Sam Passi, David Passi, Celuia Mapo Selee and James Rice, began a legal claim for ownership of their lands on the island of Mer (part of the Murray Islands group), situated in the East Torres Strait between Australia and Papua New Guinea. The first *Mabo* decision revoked specific Queensland legislation that extinguished the land rights of the Islanders, judging that it was in conflict with the Commonwealth Racial Discrimination Act 1975. The second decision was undertaken to determine who had ownership of the islands: the Commonwealth, the state of Queensland or the Murray Islanders themselves. The judgment in this decision would not only affect the people of Mer, but also have repercussions for Indigenous land rights throughout Australia. The decision – agreed by six justices with one dissenting – dismantled the legal fiction of *terra nullius*, which had been upheld as recently as 1971 in the *Gove* case.

Arguing that 'it took a century for the *terra nullius* doctrine to be firmly established as the legal explanation of the occupation of Australia', legal historian Bruce Kercher traces the process by which the doctrine of *terra nullius* solidified over the course of the nineteenth century, mentioning cases in which the legitimacy of 'white' law and Aboriginal laws came into conflict.[90] In an 1836 case, *R v Jack Congo Murrell*, the New South Wales Supreme Court rejected the argument that Australia was subject to a plurality of laws, while in 1889, the Privy Council decision in *Cooper v Stuart* asserted that 'there was no land law or tenure existing at the time of annexation to the Crown'. Kercher describes the latter decision as the 'decisive fictional assumption that New South Wales in 1788 was *terra nullius*'.[91]

Reynolds, furthermore, notes that the term *terra nullius* has two uses that are usually conflated:

> It means both a country without a sovereign recognized by European

> authorities and a territory where nobody owns any land at all, where no tenure of any sort existed.[92]

These definitions, comprehended in the gloss 'land *belonging* to no one', indicate that nomadic Aboriginals were not thought to have either a proprietary relationship with the land or a political organisation with systems of law and authority equivalent to those in Europe. It is significant that, in deciding *Mabo*, the High Court recognised the Murray Islanders as having both such a relationship with the land and a law system known as 'Malo's law'. The implications of this localised decision, however, were extended to include all of Australia's Indigenous inhabitants. *Mabo* asserted the right of Indigenous native title, which preceded Cook's Declaration of Possession in 1770 and the establishment of a British colony in New South Wales in 1788. In doing so, the justices acknowledged that the dispossession of Indigenous Australians 'underwrote the development of the nation': *Mabo* [2:82].

Mabo is thus inextricably linked to history, both as a narrative and as a temporal marker. In commentary about *Mabo*, the decision is referred to in at least four ways, which overlap and inform each other. First, it is used to mark the eras of 'pre-' and 'post-'*Mabo*. Aboriginal writer Mudrooroo ironically notes:

> So now, for better or worse, we have moved away from the grand Land Rights struggle. It has become history, and we are in what has been described as a post-*Mabo* period in which we are being given some justice and some rights.[93]

Reynolds likewise refers to the 'old story' and the 'post-*Mabo* story'.[94] This usage constitutes the decision as an event, represented in subsequent writing and case law. It can thus be read as a foundational text, in the sense that Seamus Deane has identified.[95] In the time marked 'post-*Mabo*', all 'pre-*Mabo*' texts become repositioned retroactively in the narrative it constitutes.

It is elsewhere referred to as 'a starting point' for a new relationship between Indigenous and non-Indigenous Australians, which again represents this legal event as a foundational moment. Then Prime Minister Keating spoke of *Mabo* as a new foundation: 'The Court's decision was unquestionably just. It rejected a lie and acknowledged a truth . . . after 200 years, we will at last be building on the truth.' He concluded, furthermore, that '[i]f we do not pass this test of truth, we will be judged now and by history'.[96] Aboriginal lawyer and advocate, Noel Pearson, comments: 'The *Mabo* decision and the national legislation which has subsequently been developed finally recognise the existence of Aboriginal people and so provides a reasonable starting point for further debate and development.'[97] In each sense, *Mabo* is perceived to be judged not only by the High Court, but also, as Keating notes and as the

Mabo judges themselves seem aware, by history, which is positioned as the ultimate arbiter or court of appeal in this dispute.

Furthermore, *Mabo* is referred to as 'a turning point' or 'an historic decision', a kind of alternate route in the national narrative. In *Why Weren't We Told?*, Reynolds recalls Eddie Mabo:

> His name was to be forever linked with one of the most important legal decisions in Australian history, a real turning point after which nothing could ever be the same again.[98]

In this phrase, *Mabo* appears revolutionary, in that it turns everything (law, history, politics, entitlement to property) around. Viewed as an 'historic decision', it is evolutionary, in that its newly acquired foundational status represents how far the nation has grown from its now suspect origins in the Constitution.

Finally, as Reynolds notes, *Mabo* unfolds a 'new story': 'There can be no doubt that the *Mabo* judgment has changed the way the story of Australian colonisation must in future be told.'[99] In this respect, it selects and coheres a 'new' version of events, thus creating a 'new' legal and historical narrative that, in the conceit of the common law, 'rediscovers' what was already there in the ancient customs and laws that found the common law of Australia. This new-old story radically challenges established precedent and establishes a new law, which is inextricably linked to the nation and its well-being. Justices Dean and Gaudron note (*Mabo* [3:56]): 'The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices.' Justice, in the sense of aquedation, must heal the nation, which cannot come into its 'true' self until justice is seen to be done.

The nation as a body politic is invoked in terms of both physical and mental health. Deane and Gaudron refer to the psychic health of the nation; Justice Brennan is concerned that this decision, while correcting injustice, must not fragment the body of the nation (*Mabo* [2:29]):

> In discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England.

Brennan here talks about the 'skeleton of principle' within 'the body of the law', invoking the body imagery of political philosophers. As the body is mapped according to the discourse of biological sciences, so the nation is mapped by the law pertaining to questions of sovereignty, property and

possession. Brennan's phrasing suggests that the High Court recognises the threat that this 'new' narrative might potentially have to the 'old' hegemonic narrative of Australian history. By stating that the court should not 'fracture the skeleton of principle', Brennan effectively recuperates this radical potential by asserting that he does not want to undermine current institutions, including both his own position as a Chief Justice and that of the collective subject, Australia, which in turn constituted the High Court. The majority judgments base their decision on native title cases in the common law. By so doing, *Mabo* creates its own fiction: that the law was really all right all along, it just needed the 'correct' reading. The decision thus does juridical violence – the kind that Robert Cover has described as 'jurispathic' – to both the Constitutional and common law of Australia while, simultaneously, affirming their hegemony.[100]

This rereading of the history of the common law performs what Derrida has termed 'a juridico-symbolic violence' that is at 'the very heart of interpretative reading'.[101] Furthermore:

> A 'successful' revolution . . . will produce *après coup* what it was destined in advance to produce, namely, proper interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretive model in question, that is, the discourse of its self-legitimation.[102]

Each time the law states itself, it must destroy a part of itself in order to refound itself. The restatement of the law in this case both destroys a legal fiction, that of *terra nullius*, and creates a new one in its stead, that of the *preservation* of native title that was not extinguished by British invasion. *Mabo* thus retrospectively rereads the history and the law of Australia, dismantling the previously constructed frame from which the collective subject of the nation oriented itself. It reframes questions of origin and otherness, inoculating itself against possible external threats – those of the international Indigenous and human rights movement, for example – which Brennan acknowledges (*Mabo* [2:29]): 'No case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights . . . which are aspirations of the contemporary Australian legal system.' In this case, the law does violence to itself and its own legal fictions in order to preserve itself: it makes itself violent as it does violence to itself.

Moreover, Justice Toohey notes that legal fictions are 'acknowledged "for some special purpose" ' and that these bring fictional responsibilities (*Mabo* [5:115]): 'If the fiction that all land was originally owned by the Crown is to be applied, it may well be that it cannot operate without also according fictitious grants to the indigenous occupiers.' The court thus recognises its own role in creating and maintaining legal fictions. Rather than restoring

what is perceived to have 'belonged' to Indigenous Australians, it reinforces the fiction that the Crown owned all of the land based on various declarations of sovereignty and, subsequently, on the Constitution. Within this fiction, the Crown has the power to grant native title according to its own law to Aboriginals and Torres Strait Islanders. *Mabo* thus supplements the supplement of *terra nullius* and Crown sovereignty, rather than, as it claims, going back to the 'origin' of how Australia was inhabited before European contact. Derrida notes that the 'supplement of a legal fiction' is needed 'to establish the truth of justice'.[103] While the High Court dismantles one legal fiction in *Mabo*, it must preserve another in order to maintain what it believes the truth of justice *will have been* in the future-to-come.

The desire not to 'fracture the skeleton of principle' in 'the body of law' can also be read another way. The principle that gives the body its 'shape and consistency' is that of the common law, which is given legal force by its derivation from the perceived (British) origin of the law. The common law of Australia constitutes itself as existing from time immemorial in the form of the ancient customs and laws of England transplanted and translated into an Australian context. Brennan (*Mabo* [2:25]) cites an 1847 judgment, which states: 'At the moment of its settlement the colonists brought the common law of England with them.' Deane and Gaudron concur (*Mabo* [3:5]): 'The common law of this country had its origins in, and initially owed its authority to, the common law of England.' The authority of the common law continually needed to be reasserted in order to cement its 'immemorial' status; the High Court was constituted as the interpreter of the common law in the Constitution in order to do this.

Brennan calls Australian law 'an organic development, from the law of England', that is, a natural growth. Despite its recent import, it is made to seem natural by drawing on the authority of the English common law's immemorial origins. Furthermore, this is no longer seen as English law, but is asserted to be 'Australian law'. The decision itself is an assertion of national origin (*Mabo* [2:29]): 'The common law of Australia has been substantially in the hands of this Court. Here rests the ultimate responsibility of declaring the law of the nation.' The common law, however, as Brennan notes at [63], retains its authority by 'jurispathically' destroying a part of itself in order to preserve itself:

> [T]o state the common law in this way involves the overruling of cases which have held the contrary. To maintain the authority of these cases would destroy the equality of all Australians before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land. Moreover, to reject the theory that the Crown

> acquired absolute beneficial ownership of land is to bring the law into conformity with Australian history.

By constituting its origins outside recorded time, that is, outside history, as preceding the use of writing, the common law institutes itself as somehow natural: its justice is seen to be immanent in the law itself. Furthermore, while iterated in various constitutional texts, the question of origins also relies on an idea of immemorial origins of which, arguably, there are at least three conflicting traditions, or normative orders, in Australia. The Constitution and the High Court draw their legal and ideological force from the British constitution, which is positioned outside history.

The various ancestral Dreamings of Aboriginal Australians inscribe Indigenous law on the land, mapping it within that discourse. In deciding *Mabo*, the High Court had to take into account Malo's law of the Murray Islanders, which 'has the authority and force of a religious commandment'.[104] It is the first of these traditions of immemorial origins that has legal force, however, as it has been both 'translated' by phonetic writing – and is, consequently, a mark of modernity – and enforced by means of violent subjugation. The Australian Constitution thus marks the imposition of graphic and phonetic writing as the law over other forms of cultural inscription.

In a similar vein, Brennan asserts that the decision is 'a mixed question of fact and law' and that upholding the idea that the Crown took absolute possession of the land on 'first settlement' would be a view 'contrary to history' (*Mabo* [2:81]). The law is seen to be lagging behind, out of step with the nation, needing to be reread according to history, more particularly, the 'new' history. In addition, this appeal to history effectively exonerates the law from the actual acts of dispossession it acknowledges, as does the federal position of the High Court positioned 'above' the state courts. These acts are seen instead to be the result of government actions (at [82]):

> [I]t is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land.

It becomes necessary to distance the law from the discredited narrative and apportion blame elsewhere, so that the law can maintain its commitment to the justice it must be seen to dispense in this case. Dawson, however, disagrees (*Mabo* [4:110]):

> If traditional land rights . . . are to be afforded to the inhabitants of the Murray Islands, the responsibility, both legal and moral, lies with the legislature and not with the courts.

While apparently at odds with the majority in his insistence that the law must remain outside politics and that it is the government's responsibility to confer land rights, Dawson similarly, and more obviously, recuperates the foundational threat implicit in *Mabo*.

The common law is perceived to be situated outside institutional hierarchies of power. In the 2000 Boyer lectures on the Constitution and rule of law, for example, Justice Murray Gleeson comments that 'judges must be, and must be seen to be, independent of people and institutions whose power may be challenged before them'.[105] The body of the law guarantees the nation and the state that it founds; it is separated in the Constitution from the people, the legislature and the executive, and places itself outside politics and government as determining 'truth' by drawing on the precedent (that is, previous writings) of the common law. This common law is, however, always already written. Far from invoking an immemorial justice, as it claims, *Mabo* draws on cases from other British imperial domains, including colonies in Africa, India, North America and the Pacific. In addition, it rereads Swiss jurist Emer de Vattel's *The Law of Nations* and Blackstone's *Commentaries on the Laws of England*. Rather than being 'self-evident' and true, then, *Mabo* coheres and selects a new legal narrative from previous case law and legal commentaries. In the process of effacing its own textuality, it stretches to hundreds of pages. The reference to 'the skeleton of principle' signals that which internally 'gives shape' to this body, that is, a philosophy or ideology of law predicated on the common law as natural and true and a (colonial) assumption of modernity and sovereignty. The 'body of the law', while positioning itself outside institutional hierarchies of power, is 'given its shape' by an ideological 'skeleton of principle' that is inscribed in these institutions. It is at once outside the state apparatuses, the hegemony of which it questions, and within them, as it reinscribes the hegemonic status of these structures.

Brennan notes, moreover, that '[t]he peace and order of Australian society is built on the legal system . . . it cannot be destroyed' (*Mabo* [2:29]). Thus, *Mabo* reaffirms the 'rule of law' in Australia; the struggle for land rights and sovereignty has now been eclipsed by claims for native title. *Mabo* upheld the authority of the various state apparatuses as it determined that claims for land must go through the courts and must be determined by reference to the precedents that *Mabo* itself established. By affirming the rule of law, *Mabo* opened up a legal space to recuperate challenges to the hegemony of the Australian legal system based on common law and, by extension, the Australian state as the sovereign guarantee of that law. To recognise Aboriginal *sovereignty* as well as land rights, something *Mabo* does not do, would constitute a more profound threat to the rule of law in Australia, which would radically undermine the authority the court relies on in order to make this judgment. That it resolutely does not consider the question of sovereignty is perhaps why Brennan worries about a 'fracture' in the skeleton and not an outright 'break'.

Mabo has been viewed as a revolutionary 'turning point'; I argue, however, that it is 'revolutionary' not only in the sense of turning things upside down, but also, and perhaps more strongly, in the sense of bringing things back to where they were to start. That is, while sanctioning a new narrative of history that displaces the origin of European Australia, *Mabo* also reaffirms the centrality of this origin. It upholds the common law of Australia and thus contributes to the rewriting of the national narrative in order to heal and unify the nation.

Conclusion

Mabo contributes to the uncanniness of modern Australia by reorientating the question of origins and giving the 'black armband' view of history legal force. An uncanny effect 'is often and easily produced when the distinction between imagination and reality is effaced, as when something that we have hitherto regarded as imaginary appears before us in reality, or when a symbol takes over the full functions of the thing it symbolizes'.[106] By discrediting a legal fiction and replacing it with a new legally sanctioned version of history, *Mabo* reimagines the relationships within the community and constitutes an altered conceptual object. It is thus constitutive of a new social 'reality' that, subsequently, led to the Native Title Act 1993, and to the *Wik* decision (1996) and the formation of legal precedent in relation to native title. The national feeling of 'uncanniness' was politicised by liberals, who called for a 'healed' or 'reconciled' nation, and conservatives, who called for the maintenance of 'one nation'.

In legally sanctioning the new history's representation of Australia's past, *Mabo* posed a threat to the very law on which it relied. It is its reinterpretation of history that threatens 'to fracture the skeleton of principle'. Yet, in doing so, *Mabo* represses less desirable narratives of national origin and the law's own complicity in the maintenance of colonial authority. Histories of Australia have both constituted the nation as a conceptual object and contested its 'historical amnesia' in relation to its myths of origin. In rewriting both history and the history of the common law in Australia, *Mabo* also has the potential to *un*make the nation as it remakes it. This potential, however, is not realised, because *Mabo* instead reinscribes the origin of British law as the origin of Australia.

A nation can, therefore, actively engage in the process of reconstituting itself. In the case of Australia, *Mabo*, as well as the republican and reconciliation movements, represents a self-conscious attempt to reorient the nation and its origins. Is it then the 'same' nation? My answer is both 'yes' and 'no'. *Mabo* attempts to write difference into the history of modern Australia by acknowledging the role of the dispossession of its Indigenous inhabitants in forming the nation – but by attempting to reconcile two incommensurable narratives, it has the effect of domesticating the more threatening one (that of

Indigenous land rights) within the dominant narrative of Australian history. It is thus a further iterative representation of the origin (of British Australia), representing it as both the same (we were always *really* like this) and different (we have improved on what we were).

Attempts at reconstitution have been given legal force by the event of *Mabo*, which is feted as a new beginning. As I have argued, these attempts also have the effect of reinscribing the origins and state structures that they also call into question. These state arrangements, like those of Aotearoa New Zealand, can be traced to a continually disseminated idea of the inheritance of the common law and the British constitution's 'immemorial' origins. Put another way, both the modern Australian and New Zealand states – and, more obliquely, the state formations of the Republic of Ireland – are perceived as natural and just *because* they can position an external guarantee of meaning elsewhere, that is, in British constitutional traditions. In my final chapter, I interrogate this external guarantee of meaning and suggest that, rather than being the foundation for 'settler' ascendancy in the former British dominions, the British constitution is retroactively constituted by them as both 'original' and 'unwritten' in order to legitimate themselves.

Notes

1 'Celebration of the Nation' was the name of the advertising campaign and song used to promote the 1988 Bicentenary celebrations. Graeme Turner notes that 'the "Celebration of a Nation" campaign . . . appears to have been designed precisely to deal with the very real possibility that Australians would not spontaneously respond to the Bicentenary celebrations with anything like sufficient enthusiasm'. Furthermore, 'Australians were being *taught* their bicentennial behaviours. "Celebration of a Nation" was not just a method of raising the emotional temperature of the nation in readiness for 1988. It was also a practical demonstration of what was expected of Australians celebrating the bicentennial year.' See G Turner, *Making it National: Nationalism and Australian Popular Culture*, 1994, St Leonard's, NSW: Allen & Unwin, pp 68–9.

2 G Davison, *Australia: The First Postmodern Republic?* Working Papers in Australian Studies, No 103, 1995, London: Sir Robert Menzies Centre for Australian Studies; Institute of Commonwealth Studies, p 3.

3 S MacIntyre, *A Concise History of Australia*, 1999, Cambridge: Cambridge University Press, pp 279–80.

4 P Keating, 'One Nation' speech, 26 February 1992, cited in K Goldsworthy, ' "Ordinary Australians": Discourses of Race and Nation in Contemporary Australian Political Rhetoric', in A Wimmer (ed), *Australian Nationalism Reconsidered: Maintaining a Monocultural Tradition in a Multicultural Society*, 1999, Tübingen: Stauffenberg Verlag, pp 215–22 (p 215).

5 F Brennan, *One Land, One Nation:* Mabo – *Towards 2001*, 1995, St Lucia, Queensland: University of Queensland Press, p xviii.

6 The Bringing Them Home Report (Human Rights and Equal Opportunities Commission (Australia), *Bringing Them Home April 1997: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, Sydney, NSW: Commonwealth of Australia/Sterling Press

Pty Ltd) inquired into the consequences of the forced removal of so-called 'half-caste' Aboriginal and Torres Strait Islander children from their families and placing them in state-run institutions. One of the Report's recommendations was that those responsible, particularly the government and other institutions, apologise to Indigenous Australians; all of its recommendations were 'directed to healing and reconciliation for the benefit of all Australians' (p 4). Various other grass-roots initiatives included the opening of 'Sorry books', in which non-Indigenous Australians could express a personal apology and the movement for a National 'Sorry Day', the first of which was held on 26 May 1998, the anniversary of the findings of the Report (p 241). The 1999 Sorry Day was called 'A Journey of Healing'. The name change was brought about in an attempt 'to make the day a less painful experience for the Stolen Generations. But it was also a name intended to make the event "more palatable" to those settler Australians who . . . felt some resistance towards the idea of apologizing': H Gooder and J M Jacobs, ' "On the Border of the Unsayable": The Apology in Postcolonizing Australia', 2000, *Interventions*, 2:2, pp 229–47 (pp 242–3). One of the Key Issue papers produced for the Council of Aboriginal Reconciliation is *Sharing History: A Sense for All Australians of a Shared Ownership of their History*. The document asserts that '[i]t is only through indigenous Australians that non-indigenous Australians can claim a long-standing relationship with and deeper understanding of Australia's lands and seas, in a way possible to other nations who have occupied their native soil for thousands of years': *Sharing History*, cited in Gooder and Jacobs, ' "On the Border" ', p 236.

7 Council for Aboriginal Reconciliation, *Draft Document for Reconciliation*, 1999, in Gooder and Jacobs, ' "On the Border" ', p 238.

8 R Gibson, I McAllister and T Swenson, 'The Politics of Race and Immigration in Australia: One Nation Voting in the 1998 Election', 2002, *Ethnic and Racial Studies*, 25:5 (Sept), pp 823–44 (p 824). The party gained popularity quickly. In 1998, One Nation won almost a quarter of the votes in the Queensland state elections and almost one in 10 votes in the national elections held shortly afterwards. At the peak of its popularity, One Nation had 12 per cent electoral support, but the party had largely disintegrated by 1999, commanding only about 2.3 per cent support. Pauline Hanson and Derek Ettridge were jailed for electoral fraud in August 2003. The spectre of Hanson, however, still haunted Australian politics, as journalists speculated that, if she won her November appeal, she might be a significant political threat to the government were a double dissolution election to be called in December of that year. Hanson's conviction has since been overturned.

9 P Hanson, 'Maiden Speech to the House of Representatives', 10 September 1996, accessed 28 September 2003, available online at http://www.australianpolitics.com/parties/onenation/96–09–10hanson-first-speech.shtml.

10 MacIntyre, *Concise History*, pp 279–80.

11 In order, these descriptions come from G Blainey, 'Australia: Two Peoples', cited in B Attwood, '*Mabo*, Australia and the End of History' in B Attwood (ed), *In the Age of* Mabo, 1996, St Leonards, NSW: Allen & Unwin, pp 100–16 (p 115); Mudrooroo, *Us Mob: History, Culture, Struggle – An Introduction to Indigenous Australia*, 1995, Sydney: Angus & Robertson, p v; H Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation*, 1996, St Leonards, NSW: Allen & Unwin, p 177; K Gelder and J M Jacobs, *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation*, 1998, Carlton South, Victoria: Melbourne University Press, p 22.

12 Secret Instructions to Lieutenant Cook, 30 July 1768 (UK), p 2, accessed 8 June 2003, available online at http://www.foundingdocs.gov.au/item.asp?dID=34.

13 The Secret Instructions are positioned as a foundational text on the National

Archives of Australia website, 'Documenting a Democracy: Australia's Story', accessed 8 June 2003, available online at http://www.foundingdocs.gov.au/, along with other documents establishing the various colonies and Commonwealth of Australia. This project was curated by the Research Co-ordinator of the National Archives of Australia, Dr Lenore Colthart, and funded by the National Council for the Centenary of Federation, to mark the commemorative year of 2001. Included in the 30 contributing institutions and project teams in Australia and the United Kingdom were a number of noted historians, including Helen Irving and Stuart MacIntyre.

14 P Carter, *The Road to Botany Bay: An Essay in Spatial History*, 1987, London and Boston: Faber and Faber, pp 1–2.

15 R Hunter, 'Aboriginal Histories, Australian Histories' in Attwood (ed), *Age*, pp 1–16 (p 2).

16 Attwood, 'Introduction', in Attwood (ed), *Age*, pp xx–xxi.

17 Hunter, 'Aboriginal', pp 2–3; McDonald, P and Wainburranga, P F (dirs) *Too Many Captain Cooks*, 1988, Canberra, ACT: Ronin Films.

18 After Federation, two further territories were added to Australia. The Australian Capital Territory (ACT) was transferred from New South Wales to the Commonwealth in 1909. Two years later, the Northern Territory of South Australia was also transferred to the Commonwealth.

19 See, for example, A Charlton, 'Conceptualising Aboriginality: Reading A O Neville's *Australia's Coloured Minority*', 2001, *Australian Aboriginal Studies*, 2 (Fall), pp 47–51, in which Charlton critically appraises the policies of A O Neville, the head bureaucrat in charge of Aboriginal Affairs for Western Australia from 1915 to 1949.

20 Immigration Restriction Act 1901, p 1.

21 Joseph Pugliese has shown how, post-World War Two, the Immigration Restriction Act, designed to limit Chinese immigration, was used not only to mark out a 'White Australia', but also to demarcate a specific type of whiteness with which migrants from Greece and Italy were also excluded as racially undesirable: 'Race as Category Crisis: Whiteness and the Topical Assignation of Race', 2002, *Social Semiotics*, 12:2, pp 150–69.

22 The Commonwealth Franchise Act 1902 contained the following clause: 'No aboriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution.' Grimshaw notes that some adult male Aboriginals already had been granted the vote in some states' Constitutions, but this Act and subsequent state legislation effectively denied it to them. While, theoretically, those states that had already legislated for Aboriginal enfranchisement, or should have included them by default based on a property qualification, would have then allowed Aboriginal women the vote as well, Grimshaw points out ('Federation as Turning Point in Australian History', 2002, *Australian Historical Studies*, 118, pp 25–41) that, in practice, this was usually not the case. She asserts: 'Even in the south-eastern colonies where no state government had formally legislated to remove the inclusion of Aboriginal men (and Aboriginal women in the case of South Australia) enshrined in their 1850s constitutions, the 1902 Commonwealth Act in practice removed political rights through subsequent interpretations of the law.' (p 33)

23 See Office of Aboriginal and Torres Strait Islander Affairs, *Voting Rights, Citizenship and the 1967 Referendum: Indigenous Issues*, Fact Sheet 4, 2002, Canberra: OATSIA, Department of Immigration and Multiculturalism and Indigenous Affairs, accessed 13 August 2003, available online at http://www.dh.sa.gov.au/reconciliation/images/voting_rights.pdf.

24 G Foley, 'Teaching Whites a Lesson', in V Burgmann and J Lee (eds), *Staining the Wattle: A People's History of Australia since 1788*, 1988, Ringwood and Fitzroy, Victoria: Penguin/McPhee Gribble, pp 198–207 (p 202).
25 G Melleuish and G Stokes, 'Australian Political Thought', in W Hudson and G Bolton (eds), *Creating Australia: Changing Australian History*, 1997, St Leonards, NSW: Allen & Unwin, p 113.
26 Reynolds, *Aboriginal Sovereignty*, p 176.
27 The Australian Bureau of Statistics reported that, in 2001, more than 160 ancestries were separately identified. The fastest growing, since 1986, have been Indian, Chinese, Vietnamese and Lebanese: Australian Bureau of Statistics website, accessed 8 June 2003, available online at http://www.abs.gov.au/.
28 See H Goodall, 'Cryin' Out for Land Rights', in Burgmann and Lee (eds), *Staining the Wattle*, pp 181–207, for an overview of land rights actions since invasion. The *Wik* decision, which was handed down by the High Court of Australia on 23 December 1996, sought to provide further guidance on some of the questions left unanswered by *Mabo*. It focused on the particular situation of the Wik people of the Cape York peninsula in the far north of Queensland. The High Court found that the holders of such leases had been provided with the right to pasture their cattle and to engage in various other activities but that they had not been granted exclusive possession. They also decided that pastoral and other activity on the land had not necessarily extinguished Indigenous rights and interests: *The Wik Peoples v The State of Queensland and Ors; The Thayorre People v The State of Queensland and Ors* [1996] HCA 40 (23 December 1996), accessed 15 June 2003, available online at http://www.austlii.edu.au/au/cases/cth/HCA/1996/40.html.
29 Gooder and Jacobs, 'On the Border', p 233.
30 Gooder and Jacobs, 'On the Border', p 232.
31 Feminist historians and critics have also taken to task the national mythology, which is not only white, but also, to quote historian Marilyn Lake, 'masculinist'. Lake critiques the conventional interpretation of the constitutional moment of the 1890s, asserting rather that there was a 'contest between men and women at the end of the nineteenth century for the control of the national culture'. Lake's claims set off a series of responses in the pages of *Australian Historical Studies* in which it was first published and has paved the way for feminist rewritings of the story of national origins. This includes the project *Creating a Nation*, which aimed not only to tell the national narrative from women's perspectives, but also to include other marginalised voices such as those of Indigenous and non-British or Irish women, effectively reconstituting the national narrative: M Lake, 'The Politics of Respectability: Identifying the Masculinist Context', 1986, reproduced in S Magarey, S Rowley and S Sheridan (eds), *Debutante Nation: Feminism Contests the 1890s*, 1993, St Leonards, NSW: Allen & Unwin, pp 1–15 (p 2); P Grimshaw, M Lake, A McGrath and M Quartly, *Creating a Nation 1788–1990*, 1994, Ringwood, Victoria: Penguin/McPhee Gribble.
32 Governor Bourke's Proclamation (1835), accessed 28 September 2003, available online at http://www.foundingdocs.gov.au/resources/transcripts/nsw7_doc_1835.pdf.
33 In *Millipirum and Others v Nabalco Pty Ltd and Cth of Australia*, more commonly known as the *Gove Lands Right* case, the Yolngu people of the Gove peninsula in north-east Arnhem Land went to court to prevent mining by aluminium company Nabalco on their land. During the court case, they produced ritual objects that spoke of their right to the land and referred to the oral traditions of their people, none of which were accepted as evidence in the court. The native title argument was also rejected in this case. See Hunter, 'Aboriginal', pp 8–10.

34 Gough Whitlam's Labor government came to power in 1972. In its first month in office, the government withdrew the last troops from Vietnam, established diplomatic relations with China, announced independence for Papua New Guinea and implemented international accords on racism, labour and nuclear weapons. But several scandals rocked the government, including one that involved a government Minister negotiating with an international financier for an unauthorised $4bn loan. This led the Senate, controlled by the Opposition, to block the government's supply bills – which they were constitutionally able to do – unless an election was held. After a deadlock of 27 days, in which the Senate continued to refuse supply and the government refused to call an early election after a motion of confidence was passed by the House of Representatives, Governor-General John Kerr dismissed the government on 11 November 1975. He then invited the Leader of the Opposition, Malcolm Fraser, to form a caretaker government until an election could be held. Fraser won the election with a record majority. Stuart MacIntyre refers to 'the Dismissal' as 'the most serious constitutional crisis in Australian history': *Concise History*, p 234.
35 Brennan, *One Land*, p xv.
36 T Birch, ' "History is Never Bloodless": Getting it Wrong After One Hundred Years of Federation', 2002, *Australian Historical Studies*, 31:118, pp 42–53 (p 42).
37 A Deakin, *Council Debates*, 1895, cited in H Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution*, 1997, Cambridge: Cambridge University Press, p 7.
38 Irving, *Constitute*, p 23.
39 S Freud, 'The "Uncanny"', in *Art and Literature: Jensen's 'Gradiva', Leonardo da Vinci and Other Works – The Penguin Freud Library, Volume 14*, J Strachey (trans), 1985, London: Penguin, pp 335–76 (p 340).
40 Birch, 'History', p 43.
41 Watson's call for a post-modern republic was made during an address to the Australian Republican Movement: 'I'm only just game enough to say it: [Australia] might be the first post-modern republic, and I mean that in the nicest possible way. I mean a republic that exalts the nation less than the way of life. Whose principal value is tolerance rather than conformity, difference rather than uniformity.' (D Watson, 'Birth of a Post-Modern Nation', 24–5 July 1993, cited in Turner, *National*, p 1)
42 This uncanny effect is not just a recent phenomenon. I argue that 'Australia' as an imagined community comprehends an uncanniness with questions of origin even within its 'white' history. Both Russel Ward and Robert Hughes describe the reluctance of white Australians to trace origins in the convict past. In 1958, Ward noted: 'We Australians often display a certain queasiness in recalling our founding fathers. Even to-day many prefer not to remember that for nearly the first half-century of its existence White Australia was, primarily, an extensive gaol.' (*The Australian Legend*, 2nd edn, 1966, Melbourne: Oxford University Press, p 15) Hughes' monumental work on the history of transportation, *The Fatal Shore: A History of the Transportation of Convicts to Australia 1787–1868*, 1987, London: Pan Books/Collins, marks an effort to do away with this historical amnesia. Noting the silence of school textbooks and the rarity of historical works on the subject, Hughes asserts that '[t]his sublimation had a long history; the desire to forget about our felon origins began with the origins themselves', arguing that this 'desire to forget' expressed itself in an intense concern with respectability and the blotting out of the 'convict stain' (pp xi–xii).
43 Freud, ' "Uncanny" ', pp 363–4.
44 Freud, ' "Uncanny" ', p 368.

45 S Freud, 'Repression', in *The Essentials of Psycho-Analysis: The Definitive Collection of Sigmund Freud's Writing*, selected by A Freud, J. Strachey (trans), 1986, London: Penguin, pp 523–33 (p 527).
46 A Freud, 'The Concept of Repression', Introduction to Freud, 'Repression', p 520.
47 Gelder and Jacobs, *Uncanny Australia*, p 23.
48 A Markus, 'Between *Mabo* and a Hard Place: Race and the Contradictions of Conservatism', in Attwood (ed), *Age*, pp 88–99 (p 89). Aboriginal activist, Gary Foley, acknowledges this proprietary fear as he asserts '[y]ou do need to understand that our movement is no threat to your property: to your swimming pools or your flash buildings in town': 'Teaching Whites', p 198.
49 Wesley Aird quoted in 'Aboriginal Groups Deny Australian Landgrab', *The Guardian*, 22 September 2006, accessed 8 January 2007, available online at http://www.guardian.co.uk/australia/story/0,,1879070,00.html.
50 B Hodge and V Mishra, *Dark Side of the Dream: Australian Literature and the Postcolonial Mind*, 1991, North Sydney, NSW: Allen & Unwin, p 25.
51 '*Ab origine*', 'aboriginal', 'aboriginality', 'aboriginally' and 'origin' defined in the *Oxford English Dictionary*, accessed 6 September 2003, available online at http://www.oed.com.
52 B Fitzpatrick, *The Australian People 1788–1945*, 2nd edn, 1951, Carlton, Victoria: Melbourne University Press, p 4. This was first published in 1946.
53 W B Spencer, *The Arunta: The Study of a Stone-Age People*, 1927, cited in Attwood, 'Introduction', p xiii.
54 J Derrida, 'Structure, Sign and Play in the Discourse of the Human Sciences', in *Writing and Difference*, A Bass (trans), 1978, London and New York: Routledge, pp 351–70 (pp 351–2).
55 Derrida, 'Structure', p 353.
56 J Derrida, *Of Grammatology*, G C Spivak (trans), rev'd edn, 1997, Baltimore: Johns Hopkins University Press, p 304. Original emphasis.
57 Attwood, 'Introduction', p xxx.
58 B Smith, *The Spectre of Truganini*, 1981, cited in Attwood, 'Introduction', p xxx.
59 Hunter, 'Aboriginal', p 12. My emphasis.
60 P McGuiness 'Aborigines, Massacres and Stolen Children', 2000, *Quadrant* (Nov), cited in Birch, 'History', p 45; K Windschuttle, 'The Break-up of Australia', 2000, *Quadrant*, cited in H Reynolds, 'From Armband to Blindfold', 2001, *The Australian Review of Books* (March), pp 8–9, 26. Historian Stuart MacIntyre traces the fierce debates concerning the politics of Australian history and their antecedents in S MacIntyre and A Clark, *The History Wars*, 2003, Carlton, Victoria: Melbourne University Press.
61 Attwood, 'Introduction', p viii.
62 B Attwood, '*Mabo*, Australia and the End of History' in Attwood (ed), *Age*, pp.100–116 (p 101).
63 W K Hancock, *Australia*, 1930, London: Ernest Benn Ltd, p 11.
64 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 FC 92/014, accessed 11 June 2003, available online at http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/high_ct/175clr1.html?query=mabo%20v%20queensland%20no%202. All subsequent references will be given in the text, citing judgment and paragraph number.
65 G Blainey, *Boyer Lectures 200: This Land is All Horizons – Australian Fears and Visions (Programme Six – Almost Equal)*, accessed 21 August 2003, available online at http://www.abc.net.au/rn/boyerlectures/stories/2001/1715576.htm. Blainey does qualify this view: 'These terrible things happened. It is not "black armband history" to acknowledge them, as the High Court has done (in the *Mabo* decision)' (Blainey in *Sydney Morning Herald*, 17 November 1993, cited in

N Pearson, '*Mabo* and the Humanities', in D M Schreuder (ed), *The Humanities and a Creative Nation: Jubilee Essays*, 1995, Canberra, ACT: Australian Academy of the Humanities, pp 43–62 (p 51).

66 Goldsworthy, 'Ordinary Australians', p 220. MacIntyre similarly expresses puzzlement as to what the 'black armband' might refer to. He does point out, however, that it was John Howard's appropriation of the term that brought it further into public discourse, because it referred to not only 'the disgraceful story told by the historians', but also to then Prime Minister Keating's 'partisan uses of history': *History Wars*, pp 131–2, 138.

67 W E H Stanner, *After the Dreaming*, 1991, Crows Nest NSW: ABC Enterprises, pp 24–5.

68 Birch, 'History', p 42.

69 Carter, *Botany Bay*, p xx. In *The Road to Botany Bay*, Paul Carter contrasts the histories of Manning Clark and Geoffrey Blainey, describing the former's historical point of view as that of a stage set in which 'History is the playwright' and '[h]e is a spectator like anybody else and, whatever he may think of the performance, he does not question the stage conventions' (p xiv). Blainey, on the other hand, presents a 'sublime' point of view analogous to looking down a telescope: 'Blainey's panoramic figure of speech, like Clark's theatrical description, does not refer to a physical invisibility. Rather, it outlines the selective blindnesses of a cultural discourse: imperial history.' (p xx)

70 Reynolds on K Windschuttle, 'Armband', p 4.

71 Attwood, 'Introduction', p xxiii.

72 See Reynolds, *Aboriginal Sovereignty*.

73 H Reynolds, *Why Weren't We Told? A Personal Search for the Truth About Our History*, 1999, Ringwood, Victoria: Viking/Penguin, pp 3–4.

74 See, for example, C D Rowley, *The Destruction of Aboriginal Society*, 1970, Ringwood, Victoria: Penguin.

75 G T Espák, '*Mabo* and the Paradigm Shift in Australian Historiography', 2000, *The Anachronist*, pp 327–44 (p 327, 337).

76 V Burgmann and J Lee, 'Introduction', in V Burgmann and J Lee (eds), *Constructing a Culture: A People's History of Australia since 1788*, 1988, Ringwood and Fitzroy, Victoria: Penguin/McPhee Gribble, p xv.

77 D B Rose, 'Hard Times: An Australian Study', in K Neumann, N Thomas and H Ericksen (eds), *Quicksands: Foundational Histories in Australia and Aotearoa New Zealand*, 1999, Sydney: The University of New South Wales Press, pp 2–18 (p 6).

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87 J Derrida, *Archive Fever: A Freudian Impression*, E M Prenowitz (trans), 1996, Chicago: University of Chicago Press, p 33.
88 Derrida, *Archive*, pp 33–4. Original emphasis.
89 Derrida, *Archive*, p 36
90 B Kercher, *An Unruly Child: A History of Law in Australia*, 1995, St Leonard's, NSW: Allen & Unwin, p 5.
91 Kercher, *An Unruly Child*, pp 9, 19–20.
92 H Reynolds, *The Law of the Land*, 2nd edn, 1987, Ringwood, Victoria: Penguin, p 12.
93 Mudrooroo, *Us Mob*, p 219.
94 Reynolds, *Aboriginal Sovereignty*, p 8.
95 S Deane, *Strange Country: Modernity and Nationhood in Irish Writing since 1790*, 1997, Oxford: Clarendon Press, pp 1–2.
96 P Keating, Mabo: *An Address to the Nation*, 15 November 1993, accessed 28 September 2003, available online at http://www.keating.org.au/main.cfm.
97 Pearson, '*Mabo*', p 57.
98 Reynolds, *Why*, p 200.
99 Reynolds, *Why*, p 202.
100 R Cover, 'Nomos and Narrative', in M Minow, M Ryan and A Sarat (eds), *Narrative, Violence and the Law: The Essays of Robert Cover*, 1992, Ann Arbor: University of Michigan Press, pp 95–172 (p 138 *passim*).
101 Derrida, 'Force', p 37.
102 Derrida, 'Force', p 36.
103 Derrida, 'Force', p 12.
104 N Sharp, *No Ordinary Judgment:* Mabo, *the Murray Islanders' Land Case*, 1996, Canberra: Aboriginal Studies Press, p 7.
105 M Gleeson, *The Boyer Lectures 2000: The Rule of Law and the Constitution*, accessed 21 August 2003, available online at http://www.abc.net.au/rn/boyers/index/BoyersChronoIdx.htm#2000.
106 Freud, ' "Uncanny" ', p 367.

Chapter 6

Conjuring spectres

Locating the constitution of Britain in its post-imperial moment

Methodologically, this project has, thus far, taken the form of a close reading of constitutional texts, analysing how each constructs an idea of the nation that it simultaneously calls into being. These readings of what have been termed both 'colonial' and 'post-colonial' polities have made reference to a relationship – whether one of repudiation, family or partnership – with Britain, as all of these now more-or-less sovereign nations were once part of the British empire (or, in the case of Ireland, 'Britain-within-the-empire').[1] To avoid thinking in terms of a simple centre–periphery model, I have sought to analyse how these processes of national constitution might have interrogated the constitution of Britain. Therein, however, lies the rub: Britain itself has no comparable constitutional texts that might be read in this way. When making a case in my previous chapters for texts that are perceived as foundational, there was a certain 'self-evidence' about them; they continue to signify in national debates and, more specifically, in debates concerning what constitutes the nation. Moreover, these foundational texts are all *written* documents: reified as much for their rhetoric, 'original' appearance and supposed uniqueness as for their constitutive effects. Feeling some of the frustration of historian Peter Hennessy, who has been searching for the ' "great ghost" of our constitution since the autumn of 1966',[2] I began to think the 'problem' of the British constitution is *where* it might be located, or, indeed, where one might start looking. Although one might refer to such key historical documents as Magna Carta (1215)[3], the Bill of Rights (1689), the Act of Settlement (1701) and, more recently, the Human Rights Act (1998), no single text has captured the national imagination in the way that the Easter Proclamation, the *Mabo* decision and the Treaty of Waitangi have in their respective nations.

The question of location, then, becomes important. I was not only looking for one key text to analyse, but also assuming a more directly performative and constitutive effect on the geography of Britain and the people who both inhabit and claim, however unconsciously, an autochthonous relationship with it. The 'where' of the British constitution is not solely a question of historical documents, but also one of race and ethnicity, of nationhood,

whether it exists and, if so, where it might be located; it is a question then of what *place* is mapped by it and *who* has proprietary rights over it. Furthermore, a problematic of 'looking' and vision is introduced by these attempts to map and define national territory, in both the geographical and philosophical sense. Attempts to locate the British constitution as a material presence suppose an empirical reality that can be readily discerned, particularly by the application of common sense.

The ability to *locate* relies on the senses, more specifically, on sight. I argue, however, that attempts to fix the British constitution as something stable and self-(evidently) present and visible – manifested in either a desire for a written instrument or a nostalgic reference to a more natural unwritten one – are rather effects of language. Visual metaphors construct an idea of the 'mind's eye' with which the nation is mapped as a unity and by means of which the subject has mastery.[4] The double constitution of 'Britain', then, depends on an absent presence: an *idea* of a national unity, which constructs and is constructed by, legal, political and historical events. 'The nation' does not exist prior to its constitution in language; its iteration as a representation gives it an ideological force *by* which a people are identified and *with* which they can identify. Moreover, these representations include visual metaphors that construct an image or set of images in which an individual or collective can *recognise* itself (much like the child of Lacan's mirror stage). This should not be understood, however, as a simple binary opposition of subject and object, since the subject is formed outside itself. The vision of the nation is also a *misrecognition* that enables the subject to identify with a unified image. Bhabha has characterised the nation as an 'image of cultural authority' ambivalent, 'because it is caught, uncertainly, in the act of "composing" its powerful image'.[5] Such ambivalence is characteristic of Britain – especially in light of the continuing uncertainty concerning its national status – more strongly than in any other nation considered in this book.

I therefore characterise the British constitution, in light of Hennessy's suggestive conjuration of a 'great ghost', as *spectral*. Drawing on Derrida's analysis in *Archive Fever*, I suggest that the nation that this ghost archives is 'neither present nor absent, "in the flesh," neither visible nor invisible, a trace always referring to another whose eyes can never be met'. This spectral motif usefully stages the dislocation of place, the body and looking (for) in the concept of 'Britain'. While Derrida asserts, 'thus it is for every concept: always dislocating itself because it is never one with itself'[6] and although the spectral motif works in terms of national constitution generally, I think it is applicable to the British case still more strongly for five reasons:

- the perceived absence of a key written constitutional document (effacing the textual presence of a wide variety of political and legal documents, Acts, cases and commentaries) and the persistence of the notion that Britain's constitution is unwritten;

- the consequent haunting of the British constitution by other constitutional traditions;
- the supranational appellation 'Britain', which applies to (at least) four separate nations and yet is simultaneously thought to represent either one nation or no nation at all;
- the haunting of 'Britain' by England, and the nebulous and negative character of English nationalism in the face of Scottish, Irish and Welsh nationalisms; and
- the effacement of colonisation and empire when discussing Britain's constitutional reforms since World War Two.

The 'spectre effect', then, applies not only to the British constitution and its haunting of the foundational documents that come after it (which haunt it, in turn), but also the very notion of 'Britain' itself.

Where is 'Britain'?

As well as asking what the constitution of Britain might be in a legal and political sense, we should also consider what constitutes the idea of 'Britain' as a corporate entity itself. Studying the constitution pertains directly to the question of the nation; according to Hennessy: 'It . . . has to do with the essence, the quiddity of Britain, as the constitution is bound up with our national identity, our place in the world.'[7] For Hennessy, the constitution and national identity seem seamlessly to map ontological essence and existence, the collective subject's being-in-the-world. Debates over whether Britain should have a written constitution suggest otherwise. A key question implicit in debates about whether the British constitution should be codified is *which* nation is being mapped by this process: is 'Britain' a nation, a union of nations, a country or countries, a people or peoples? In an attempt to answer this question, historian Norman Davies asserts that Britain is not, and never has been, a nation-state in the way that that the Republic of Ireland, France and Germany are. It is, rather:

> essentially a dynastic conglomerate, which could never equalize the functions of its four constituent parts and which, as a result, could never fully harmonize the identities of the national communities within its borders.[8]

I argue that 'Britain' can be thought of as an effect of language, a collection of representations, narratives or cultural significations.[9] Thus, 'Britain' might be thought of as a signifier that, rather than mapping onto an external signified, refers to other signifiers in a relation of difference, including, for example, England, Ireland, Europe, the empire and the Commonwealth. Drawing on and extending Antony Easthope's thesis that the nation is constituted in a certain mode of discourse,[10] I argue that a particular

language – English – and a particular mode of its use – juridical – iterating a particular philosophical discourse – empiricist – constructs a supranational spectre, 'Britain', that somewhat paradoxically grounds *ideas* of tradition, continuity, common sense and the rule of (common) law. In the manner of empiricist discourse, these ideas were (and are), represented as 'real' and 'true', so natural that they exceed both the record of history and codified law, existing outside time in the continuous present of tradition and memory. In this form, Britain's spectral constitution was imposed on nearly one quarter of the world's peoples in the name of liberty, reason and justice. These Enlightenment ideals, indigenised as 'British', then became the foundation for repudiations of colonial rule in the name of national consciousness in the countries of its former empire.[11] This 'revolution' in the dissemination of both 'Britain' and the British constitution can be traced to one of the major upheavals of the twentieth century: World War Two. Although the American colonists constituted themselves as a nation well before this, the reinvented and reinvigorated British empire, which some historians refer to as Britain's 'second empire',[12] did not begin to disintegrate until after the war.[13]

One of the key differences between 'Britain' and the case studies in my other chapters is, then, where the nation might be located. In each of the preceding chapters, I have traced how 'the' nation is a somewhat misleading label because commentators have battled over whether or not there may be one or more (or fewer) nations. In terms of state arrangements, however, all three cases represent separate sovereign nations. 'Britain', however, is slightly different. The uncertain subject positions that it generates can be traced in the 'Welcome to Britain' section of the 10 Downing Street website:

> The United Kingdom is made up of four countries: England, Scotland, Wales and Northern Ireland. Its full name is the United Kingdom of Great Britain and Northern Ireland. Great Britain, however, comprises only England, Scotland and Wales. Great Britain is the largest island of the British Isles. Northern Ireland and the Irish Republic form the second largest island.[14]

The site then goes on to note that the United Kingdom retains some responsibility for defence and international relations for the largely self-governing Isle of Man and Channel Islands. Apart from recent devolutional developments, Scotland has a separate legal system to that of England and Wales, and also produces its own coinage (although it uses the same currency). 'Great Britain' has a perceived external referent – England, Scotland and Wales – but 'Britain' is not locatable anywhere in these configurations. Instead, it functions as a kind of colloquial shorthand for the United Kingdom and its diverse constituent parts; indeed, the website asserts: 'On this site the term "Britain" is used informally to mean the United Kingdom of Great Britain and Northern Ireland.'[15] 'Britain' and 'Great Britain' are not, then,

identical with one another. Although 'Great Britain' and 'the United Kingdom' are seen as locatable, 'Britain' is not quite so easy to place. Although it is a short form of the unwieldy official name of the country, 'Britain' does not quite map on to its geography, constituting a supranational identity that interrogates the boundary between 'inside' and 'outside' in the constitution of its self as a collective subject. This corresponds to the dislocation of the British constitution and the national affiliation 'British', which also do not quite map straightforwardly as an ethnic identity. In an analogous fashion to the child of Lacan's mirror stage, the collective subject (and individual subjects) recognises the functional unity of 'Britain', yet is also alienated from this unity it has yet to attain. 'Britain' therefore becomes a speculation based on a spectacular image in the 'mind's eye'.

This spectral 'Britain' is also a more obviously political construction: modern Britain can be understood as the creation of England, nothwithstanding resistance to this from the other constituent parts of Britain. Krishnan Kumar asserts that the slippage between 'English' and 'British' can be read as a sign of 'England's hegemony over the rest of the British Isles'.[16] This slippage between Britain and England can also be traced in attempts to map the constitution. Walter Bagehot, for example, in *The English Constitution* (1867), slips between appellations, naming both the English and British constitution apparently interchangeably.[17] Blackstone, with additions from his nineteenth-century editor, notes:

> The kingdom of England . . . includes not, by the common law, either Wales, Scotland, or Ireland, or any part of the queen's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries; of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.[18]

The narrative of the growth and spread of the laws of England is thus a narrative of imperial expansion. The colonies and other territories are viewed as mere copies of the original source of law: 'Most of them have probably copied the spirit of their own law from this origin; but then it receives its obligation and authoritative force, from being the law of the country.'[19]

Nineteenth-century historian J R Seeley viewed the imperial system as an enlargement of the English state in the form of government:

> Greater Britain is a real enlargement of the English State; it carries across the seas not merely the English race, but the authority of the English Government. We call it for want of a better word an Empire.[20]

Furthermore, Greater Britain (with the exception of India), he noted, 'is not

properly . . . an Empire at all', but 'a vast English nation'. Although its 'strong natural bonds of race and religion' are dispersed by distance, the technology of the modern age would work to overcome this distance and thereby strengthen the union.[21] Kumar expands on this:

> Here then was one way for the English to see themselves: as the creators of a worldwide system in which they as it were gigantically replicated themselves, carrying with them their language, their culture, their institutions, their industry. Here, on an even broader canvas than Great Britain, was a plane on which to portray themselves in their world-historic role.[22]

This world-historic role went in tandem with the insularity that Seeley deplored; British insularity, however, helped foster the notion of its unique and ancient constitution grounded in the immemorial common law. J G A Pocock asserts:

> The law was immemorial and there had been no legislator. In this respect at least common-law thought was independent of fashionable classical models. Its eyes were turned inward, upon the past of its own nation which it saw as making its own laws, untouched by foreign influences, in a process without a beginning.[23]

The Anglo-British constitution grounded in the common law becomes an assertion of both national identity (English, subsequently, British) and, latterly, international identity (imperial/Greater British). The shifting processes of imperialism are partially masked by appeals to the continuity and antiquity of the common law and the constitution, which preserve and maintain an idea of modern Britain as remaining the same as it always had been. To rename the country, following the Acts of Union, 'Great Britain', while also referring to the English common law as the basis for the Anglo-British constitution, was to construct retroactively a former unity (ancient Britain) that was fragmented by foreign invaders (Romans, Danes, Normans) and which the modern political union would restore. The *English* laws in the *British* constitution thus draw part of their hegemonic authority from the presumption of a shared British past.

England becomes Britain – most particularly in its constitutional framework – as part of imperial expansion. Seeley, for example, notes:

> the modern character of England, as it has come to be since the Middle Ages, may also be most briefly described on the whole by saying that England has been expanding into Greater Britain.[24]

This expansion began even before England itself was a recognisably modern

nation and involved not only an expansion of England, but also a sacrifice of it. Easthope points out that:

> to become an imperial power, a nation must sacrifice part of its national particularity. This is what happened when the idea of 'Britain' became promoted as a more general name to include the other nations subjected by the colonising power of England – something of Englishness had to be given up.[25]

'England' thus functions in the manner of Derrida's community as *com-mon auto-immunity*, as discussed in Chapter 2. That is, it must sacrifice a part of itself in order to preserve itself (and, in this instance, grow and expand); the nation fragments as it unites.

This originary process highlights the way in which 'Britain' was initially constituted with both difference and deferral as its foundation. Rather than characterising the 'natural' growth of the common law as an insular process, Paul Brand argues that the *making* of the common law was not confined to England, but was rather an integral part of the plantation of Ireland and the establishment of the English rule of law there:

> The need to state clearly what the English rule was may, paradoxically, have helped to create a single, fixed rule in England . . . the Common Law was the legal system not just of England but also of the lordship of Ireland, since the process of transmission of English law to Ireland was a significant factor in the creation of the literature of the early common law.[26]

Read in this way, the foundations of 'Britain' can be seen to be constructed in a piecemeal process of imperial conquest and imposition of laws.

A similarly fragmentary process also constructs the supposed absence of English nationalism. Tom Nairn suggests that this 'absence' is rather a myth – and one that is sustained by the lack of a defining nationalist moment in the vein of the French revolution or the originary events discussed in previous chapters:

> nearly all the modern nations have such a myth, the key to their 'nationalism', and the common source of their political upheavals and regeneration. England does not possess one.

Nairn asserts that this is a patrician recuperation of the radical potentials of the seventeenth-century civil wars (which made 'modern times' possible).[27] I think, however, it might also be read as an effect of empire: the idea of absence (of a written constitution, of a foundational nationalist myth) conditions and constitutes the *difference* of England as the origin of both Britain

and its empire. This narrative itself negatively works as a defining nationalist myth. The uncanniness of modern Britain – where it might be said to be located and what it might it look like in the aftermath of European integration and internal devolution – can be traced not only in political developments, but also in the very representation of a unitary national narrative.

What constitutes 'Britain' now?

The plethora of recent popular and academic narrative histories – sometimes a combination of the two as historians including Simon Schama, Niall Ferguson and David Starkey have filmed successful television history series – attests to an early twenty-first-century interest not only in the history of Britain, but also in what constitutes 'Britishness' and what it might mean in a new century in which Britain's industrial empire is no longer the global superpower and in which Britain itself seems to be fracturing from within. In 2002 and 2003, these television histories included Schama's tripartite *A History of Britain* and Ferguson's *Empire: How Britain Made the Modern World*, as well as *The Seven Ages of Britain* and Melvin Bragg's *The Adventure of English*. Popular history books include Norman Davies' monumental study *The Isles* (1999); *1215: the Year of Magna Carta* (2003); *Great Tales from English History* (2003); and even *A Rhyming History of Britain* (2003).[28] This impressionistic survey suggests that histories of Britain are one increasingly visible way of trying to understand – or of trying to hold onto – what might constitute 'Britain' or 'Britishness' in the twenty-first century.

This popular interest can also be located in academic histories that focus on both the construction of Britain – for example, Linda Colley, *Britons: Forging the Nation 1707–1837* (1996) and Kathleen Wilson, *The Island Race* (2003)[29] – and the British Empire – for example, C A Bayly, *Imperial Meridian: the British Empire and the World 1780–1830* (1989) and David Cannadine, *Ornamentalism: How the British Viewed their Empire* (2001).[30] Indeed, in this early twenty-first-century moment, Britain and the empire are viewed as inextricable. P J Cain and A G Hopkins, whose influential 1993 book *British Imperialism* appeared in a 2001 edition, assert:

> The empire has now gone, but its legacy lives on at home and abroad. The dilemmas of the post-colonial era arise at least partly from the weakening of the institutions that helped to shape the nation state and its imperial international order. The history of those institutions therefore has considerable contemporary relevance; conversely the large issues facing nation states in a globalized world can provide fresh inspiration for the study of imperialism and empires. From either standpoint, imperial history, however it is named or re-branded, is a subject that is full of vitality and therefore has a future and not just a past.[31]

It does not seem coincidental that several of these texts reassess the impact of the empire on both Britain and its perceived national identity. In the field of historiography since the late 1980s and early 1990s, there has been an explosion of writing on British imperial history, both popular and critical, coming in tandem with an academic interest in the field of post-colonial studies. Moreover, this interest has also had an impact on the way in which history, and its role in constituting modern Britain, may be represented within the (national) school curriculum.

Ferguson's 2003 television series has catalysed a debate concerning whether imperial history should be taught in schools. *The Guardian* reported that 'academic interest in the imperial past has been steadily growing . . . Books on the empire by Linda Colley and David Cannadine are judged to be at the cutting edge of historical debate'.[32] These authors' works are the tip of an iceberg that also includes the works listed above, as well as the reissue of works such as Jan Morris's *Pax Britannica* trilogy.[33] A number of these works are edited collections, suggesting a new-found attention to representations of Britain's imperial past; some of these include *The Expansion of England* (after Seeley's nineteenth-century work of the same name), *Cultures of Empire, The British World* and the multi-volume *Oxford History of the British Empire*.[34]

The Guardian article cited above was written in response to a 2003 Prince of Wales' summer school during which various specialists had voiced concern that the 'story of the British empire has been airbrushed out of history'. Prince Charles went so far as to claim that this 'left many young people culturally disinherited'.[35] Notwithstanding the conservative motives and investments in this historical narrative, imperial history has been the focus of a renewed interest and debate. The growth of a more reflexive imperial approach has not only transformed leftist histories, but has also been informed by them: Marxist historians, although not necessarily focusing on the workings of empire, have linked the rise of the industrial might of Britain to the maintenance of the largest empire in the world. Nairn, for example, refers to Britain as an 'imperial state':

> From the outset, all these internal conditions were interwoven with, and in reality dependent on, external conditions. As well as England's place in developmental sequence, one must bear in mind its place in the history of overseas exploitation. As Marx indicated in *Capital*, success on this front was bound up with the primitive accumulation of capital in England itself.[36]

Likewise, in the introduction to the third volume of his *Pelican Economic History of Britain*, entitled 'Industry and Empire', Eric Hobsbawm asserts:

> This book is about the history of Britain. However . . . an insular history of Britain (and there have been too many such) is quite inadequate. In the

> first place Britain developed as an essential part of a global economy, and more particularly as the centre of that vast formal or informal 'empire' on which its fortunes have so largely rested. To write about this country without also saying something about the West Indies and India, about Argentina and Australia, is unreal.

This, however, takes the form of a caveat because, while acknowledging that modern Britain's industrial might is constitutive of, and dependent upon, the empire, 'the purpose of such remarks is simply to remind the reader constantly of the inter-relations between Britain and the rest of the world, without which our history can be understood. It is no more'. Any 'external' references would, therefore, be 'marginal'.[37] While setting up the terms by which to think about how 'Britain' has been constituted outside itself, British Marxist historians have tended to disavow their own insight, focusing instead on the constitution of class relations in a mostly national way, touching on imperial connections only tangentially. Moreover, as Easthope has noted, the Marxist critique of 'imagined' or constructed communities, while instructive, is also somewhat nostalgic for the 'real' of face-to-face communities.[38]

Notwithstanding this, historians of the left have weighed into the debate on whether or not imperial history should be taught in schools. In a recent symposium on the topic in *The Guardian*, for example, Hobsbawm contributed the following:

> it depends entirely on how it is being taught. If it is being taught in a Hooray Henry spirit then obviously that is not the way to teach it, but it can't be written out of the picture – not to mention the fact that a very large number of people from the empire are actually living in England.[39]

His view is shared by other historians who have recently published works in the field. Jon Wilson concurs:

> There is a danger that teaching 'the empire' could just become another version of 'our great island story' . . . I would welcome greater teaching of the history of the British Empire, but only in a way which was not just British history, but global.

Who 'we', as a collective, are, then, is something that must be traced in history. This history, as the various historians who have contributed to this debate have noted, must be much less parochial: 'not just British history, but global' (Wilson); 'the empire is an integral part of British history, at least over the past few years' (Hobsbawm); 'Empires have been one of the great organising forces of government in global history. I think it would be challenging to work out ways of teaching it which are appropriate to the society Britain is now' (Linda Colley).

The debate – especially when it extends to pedagogical policy – must be authorised, policed, domesticated, made 'proper' and 'appropriate'; it should not only represent 'who we are', but who we are '*now*' in an authentic and, above all, *recognisable* way. This demand has the effect of disconnecting Britain *now* from its past at the same time as it discusses how best to represent that past: 'we', in the present moment, are not viewed as responsible for the past and are sufficiently distanced from it to study it more 'objectively' or, at least, critically. At the same time, however, the past is inescapably 'ours', for good or ill, and must, therefore, have a constituent effect on the present. The past both describes and inscribes the contingent constitution of a collective subject not universally and for all time, but for *this* moment. This moment, however, is deferred both temporally and spatially. New studies in imperial history should be 'global', 'multinational' 'multifaceted' and 'complex'.

While this inclusiveness is certainly welcome, it deflects the ontological imperative of asking 'who we are now' away from Britain. That is, if revisionist imperial history is to focus on the empire, this will take place in a global context: so, for example, Colley's 2002 book *Captives* focuses on slavery in three areas – the Mediterranean, America and India – while *Britons: Forging the Nation* assesses the impact of Continental and international warfare (in France, the rest of Europe and America) in shaping national identity.[40] Other writers look at the processes at work in the global flow of commodities, peoples and ideas: Richard Drayton invokes motifs of botany and the natural sciences to situate his analysis of empire in *Nature's Government*, while *Imperial Co-Histories* examines discourses of empire and nation in the realm of the press, publishing and communications.[41] *The Seven Ages of Britain* discusses Roman Britain in what might be considered anachronistically post-colonial terms, yet ends its seventh age at the beginning of the agricultural and industrial revolutions, as Britain's own imperial expansion was still gathering pace.[42] So while the focus is on the continuous present, *now*, the history of the British present is displaced into the (remote) past – Roman Britain, the Middle Ages – or other places – India, Ireland, France, and the USA. This displacement threatens to leave 'Britain' to haunt these studies as an absent presence and to leave the status quo intact. Historian Antoinette Burton voices similar concerns:

> Because history-writing is one terrain upon which political battles are fought out, the quest currently being undertaken by historians and literary critics to recast the nation as an imperialized space – a political territory which could not, and still cannot, escape the imprint of empire – is an important political project. It strikes at the heart of Britain's long ideological attachment to the narratives of the Island Story, of splendid isolation, and of European exceptionalism . . . And yet what it potentially leaves intact is the sanctity of the nation itself as the right and proper subject of history. It runs the risk, in other words, of remaking

> Britain (itself a falsely homogeneous whole) as the centripetal origin of empire, rather than insisting on the interdependence, the 'uneven development' . . . of national/imperial formations in any given historical moment.[43]

When 'Britain' is addressed, it is often in an insular fashion: the possible impact of empire is assessed on Britain's internal margins in Scotland, Wales and Ireland; significantly, recent devolution to the non-English parts of the United Kingdom has been called, by historian Stephen Howe, 'internal decolonization'.[44] A gap is still created, albeit a more critical one, between Britain (the subject) and its (former) empire (its object). The empire is thought to be 'British' but Britain does not seem to be part of this empire: it rather *belonged* to Britain as a possession or property. The empire was proper to Britain and Britain was its proprietor, perceived to have, by extension, proprietary rights over how it might be represented and interpreted. The debate concerning the teaching of *imperial* history as part of the *national* curriculum can be seen as symptomatic of the uncanniness of modern Britain, in which the question of 'who we are *now*' suggests that what is proper to the collective subject, Britain, is subject to an ongoing process of reconfiguration. Increased interest in imperial history might also be read as reassuring Britain of its importance and centrality to the constitution of the modern world: who we are now is much the same as who we always have been (only better). Allowing that the question of 'who we are now' is undecidable, there are several possibilities to discuss.

First, how might Britain's constitutional character signify in the constitution of its *existence*, its being-in-the-world? How might this be said to constitute, in turn, an idea of Britain with which individual subjects can identify? Post-World War Two, changes to the political constitution of Britain, including devolution and entry into Europe, have interrogated the unity of the collective subject 'we' that could be collectively identified; this uncertainty is captured in the interrogative 'who'. That is, as a *gestalt* form, Britain is constituted as a functional unity that does not map fully onto other contemporary political and cultural identifications.

What it is it about *this* moment ('now'), moreover, that makes these questions so urgent? Does it imply that, until now, 'who we are' was self-evident and could go without saying – that it was as immemorial and unwritten as the 'ancient constitution' and common law that formed a British rule of law which was exported to all its colonies? Does it imply, indeed, that 'British history' constituted a unified subject – not only as an imagined community but also as a subject of study? In the 1970s, J G A Pocock – a British historian from Aotearoa New Zealand – introduced a 'plea for a new subject' in British history, one that was more properly 'British' rather than merely English with a few added extras. Subsequently, for example, studies of what was formerly known as 'the English Civil War' now tend to be interrogated as 'the war of

the three kingdoms'. This plea might also be seen to inaugurate the type of less parochial, more globally oriented work of Colley, Cannadine and others.[45]

Second, the 'internal decolonisation' or constitutional devolution of the United Kingdom suggests a further fragmentation of 'we', albeit divided into (at least) four, constituting other collective subjectivities. Devolution, however, shores up the nations *within* Britain. Britain is perceived to be a 'we' that both informs and supersedes (or is superseded by) other more localised definitions. Despite its resounding defeat at the polls, calls for further devolution to the English regions, in the manner of the Greater London Authority, suggest the possibility of further divisions and fractures.[46] Furthermore, this 'we' can, in turn, be subsumed by other collective identifications that also constitute modern Britain, including, for example, identification with the European Union (EU), NATO, and the Commonwealth.

The terms 'Britain' and 'British' are, however, still seen to provide a means of collective identification. John Carvel, writing in *The Guardian*, notes:

> Most white people living in Britain do not regard themselves as British and prefer to state their identity as English, Scottish, Welsh or Irish. But a clear majority of people from the ethnic minorities confidently assert their Britishness and do not feel they belong to any other national grouping.[47]

Allowing for the generalities of this statement – which cannot account for those from Northern Ireland who do not identify as Irish,[48] or the contradictory impulses felt by second- and third-generation 'ethnic minorities', or, indeed, immigrants and asylum seekers from outside the former empire, amongst others – 'Britain' and 'Britishness' can provide a means of collective identity that is not necessarily grounded in primordial ties. At the same time, however, it also defines the ethno-national affiliations of Englishness, Irishness, Welshness and Scottishness in a relation of difference.

The equation of these ethno-national ties with race is also a means by which to displace those perceived as racial others. As Paul Gilroy has shown, this has implications for British constitutionalism as well: a black presence interrogates the legal constitution of Britain defined by its rule of law. As a perceived threat, black culture is 'criminalised' and continually positioned as being outside of, and having contempt for, the law. In discussing Enoch Powell's infamous 'rivers of blood' speech of 1968, Gilroy observes:

> The issue is not the volume of black settlement but rather its character and effects, specifically the threat to the legal institutions of the country made concrete by the introduction of new race relations laws.[49]

He adds, furthermore:

> Legality is the pre-eminent symbol of national culture and it is the capacity of black settlement to transform it which alarms Powell rather than the criminal acts which the blacks commit.[50]

Laws in particular – such as the race relations laws to which Gilroy refers – form part of the centrality of the rule of law more generally and this is seen as an integral component of the nation's constitution.

Third, 'who we are now' is a question of language: this is a question posed in the English language (the language of the majority of the inhabitants of Britain) about what constitutes Britain and Britishness. Along with constitutionalism and the rule of law, the spread of the English language as a kind of global *lingua franca* is also the legacy of empire, again positioning England as the effaced origin of 'Britain'.[51] That it is the English language that is the dominant language of modern Britain is testament to empire not only throughout the world, but also within Britain itself. The Chief Executive of the School Curriculum and Assessment Authority asserted, in a 1995 *Guardian* report, the efficacy of teaching '*English* language, *English* history and literary heritage' as the constituents of a '*British* cultural identity'.[52] In addition to its 'unwritten' constitution, Britain can claim ownership of another idiosyncratic difference, one that is constituted within its dominant language. Homi Bhabha quotes Robert Southey's *Letters from England*:

> A remarkable peculiarity is that they (the English) always write the personal pronoun I with a capital letter. May we not consider this Great I as an unintended proof how much an Englishman thinks of his own consequence?[53]

Both Hobbes and Locke, as noted in Chapter 2, envisaged the constitution of the political nation (specifically England rather than Britain) in the shape of a body or material subject. The Anglo-British tradition of writing on the nation and the primordial contract is described and inscribed by the sovereign subject, 'I'. This subject is perceived as the supreme author of its own actions: Britain *had* an empire, it *made* an empire, Britain *was*/*is* the origin of the rule of law and modern constitutions.

It is also, however, subject to those actions: Britain is defined, in a relation of difference with its colonies, as an imperial centre. This can be traced especially in regard to its constitution, which, in contrast with those of its colonies, is 'unwritten'. By reference to this example, Britain's difference can also be seen as a deferral; its supposed 'lack' is constituted outside itself. The perceived absence of, first, a constitution and, second, a unitary nation and territory suggests that both Britain's exceptionalism and its originality are retroactive constructions. Bhabha argues that:

> What is 'English' in these discourses of colonial power cannot be

> represented as a plenitudinous presence; it is determined by its belatedness. As a signifier of authority, the English book acquires its meaning *after* the traumatic scenario of colonial difference, cultural or racial, returns the eye of power to some prior, archaic image or identity.[54]

If we read 'constitution' for 'English book' in this quotation, Bhabha's comments illuminate the uncertain temporality of Britain's spectral constitution. The *meaning* of its 'unwritten' constitution and its position as the origin of the rule of law comes *after* the fact of empire and colonisation; it is, as Bhabha notes, determined by belatedness.

Last, the 'we' of 'who we are now' is perceived to precede the interrogation of 'our' sense of ourselves, our existence (who we *are*) in the present moment. It positions a sense of collectivity outside of the present moment in the past; history authorises and legitimates the constitution of the collective subject. That this 'we' is thought to derive from a shared past signals an ethnic bond (blood ties are archived in this rhetoric) that effectively excludes more recent arrivals, as Gilroy has noted. Moreover, this 'we' haunts the present moment, feeding into the cultural nostalgia for a more unified, historical idea of Britain: the one that was not only 'Great', but part of both a 'United' Kingdom and a global empire. I argue that this collective subject can be traced not only in debates over what constitutes Britain in its post-imperial moment, but also in those that try to establish the character of the British constitution. This constitution is, moreover, haunted by empire in the form of the constitutional tradition of the USA, the 'internal' colonisation of Wales, Scotland and Ireland by England to create a supranational Britain and the decline of Britain's global empire post-World War Two.

Where is the British constitution?

Unlike other modern nations, the United Kingdom does not have a single authoritative document that is called a constitution, as many constitutional commentators have asserted. *Halsbury's Laws of England*, for example, claims that attempts to define the 'basic principles of the constitution of the United Kingdom' are:

> peculiarly difficult because of the absence of a written constitution for the United Kingdom as the sole or supreme source of legal authority for all public action, whether executive, legislative or judicial.[55]

Law textbooks produced for students continue to reproduce the idea of British difference by reiterating that the constitution is 'unwritten'. Ann Lyon's 2003 textbook on British constitutional history, for example, asserts:

> Britain's unique and unwritten constitution is the product of a process of

> evolution over many centuries and, unlike most others, is not wholly or even predominantly the child of an identifiable event or period of time.[56]

Similarly, Blackstone's guide to *Constitutional and Administrative Law* for law students introduces its topic by stating that, in contradistinction to the USA and other polities, 'Britain is different: it is one of the few countries in the world without a written constitution'. It adds, however, that despite this, accepted legal practice, following in the tradition of Dicey, is that:

> Britain does have a constitution, but it can be found elsewhere than a single written document . . . It can be found in Acts of Parliament and cases, but unlike a written constitution, both can be changed and have no special protection. This flexibility and evolution is supposed to be the advantage of the British Constitution.[57]

Constitutional commentator Eric Barendt concurs:

> There is no document in the United Kingdom equivalent, say, to the United States Constitution of 1787 or to the Constitution of the Fifth Republic in France approved in September 1958. Nor, for that matter, is there a set of statutes clearly indicated by their titles as 'Constitutional' or 'Basic laws'. Yet judges, politicians, and commentators in the United Kingdom often refer in general terms to its constitution, and they describe various rules and principles as 'constitutional'.[58]

Legislation viewed as having a more than usually important or fundamental status, such as Magna Carta or, more recently, the 1998 Human Rights Act, can be repealed by parliament in the same manner as can any other law. Barendt also suggests that the distinction between flexible and rigid constitutions (rather than unwritten and written),[59] made by Dicey in *An Introduction to the Study of the Law of the Constitution* is 'now rather unhelpful', because the former group is now quite small, comprising New Zealand and the United Kingdom.[60]

This difference between Britain and almost all other polities has, traditionally, been viewed as – at the least – how things have always been and – at the most – actively desirable. Lord Callaghan, for example, commented in 1991:

> Well, it works, doesn't it? So I think that's the answer, even if it is on the back of an envelope and doesn't have a written constitution with every comma and every semicolon in place. Because sometimes they can make for difficulties that common sense can overcome.[61]

In recent years, the question of whether Britain should have a written constitution or not has come up in debates over government reform, particularly in

light of planned reforms to the judiciary. Lord Woolf, the former Lord Chief Justice of England and Wales,[62] has warned that these reforms will threaten the 'unwritten constitution'; furthermore, the implementation of the Asylum and Immigration Bill, which effectively removes the right of appeal to a higher court from asylum seekers, 'could be the catalyst for a campaign for a written constitution'.[63] This is not a desirable outcome for Woolf, who remains in favour of legal and political agreements to preserve the 'delicate balance of our constitution'.[64] The implementation of a concordat, 'achieved' by Woolf and outlining the shape that the future relationship between the government and the judiciary should take, 'will be the type of consensual constitutional evolution that could, for the time being, postpone the need to resort to the less flexible alternative of a written constitution'.[65]

As well as these generally positive views of the 'unwritten constitution', there have been dissenting voices. In the last two decades, calls for a written constitution have increased. These have come in the face of the current government's constitutional reforms, especially those of the Human Rights Act and the consequent proposed abolition of the Law Lords in favour of a US-style supreme court. A 2004 article by Mary Riddell in *The Observer* entreated, 'Let's Have it in Writing', coupling the government's planned reforms to the 'need for a written constitution', which 'is now imperative'. Acknowledging in the opening sentence that '[c]onstitutional reform is the least sexed-up topic in the public realm', Riddell goes on to assert:

> Britain's uncodified laws do not grab the public's imagination in the same way that health does, or education, or who pushed Jason off the roof in *Footballers' Wives*. Now, suddenly, our sagging constitution matters.[66]

There are several processes at work here. In the colloquial, ironic mode of both journalistic and empiricist discourse, constitutional reform is not thought to be very attention-grabbing or, until 'now', worthy of attention. The use of the colloquial 'sexed-up' hints at what might excite people: the controversial Hutton inquiry and the claims that the government misled the country in making the case for war in Iraq. An opposition is constructed here between 'real' politics and the foundation or stratum that makes it possible (the constitution), which is, nonetheless, fairly intangible. In the following sentence, this free-floating set of laws (plural) is not perceived to be as real as 'issues' or even television dramas. Some event, however, implied by the word 'suddenly', has brought this now 'sagging' set of rules to the public's attention. By turns characterised as free-floating, and so heavy and decrepit it sags under its own weight, the British constitution (singular) is simultaneously defined as 'uncodified laws' (plural). Writing can it seems, heal this unhappy and contradictory state of affairs: Riddell appeals to modernity to replace and stabilise the immemorial tradition of uncodified laws, putting it into both writing and history.

Elsewhere in the article, the British constitution is characterised as 'unique in relying on a "historic" combination of arcane flummery and sloppily drafted nonsense'. Rejecting a conservative appeal to tradition and continuity, Riddell strives for the modernity embodied in the North American and French traditions of written constitutions, which, presumably, carry the seriousness and gravitas that these matters deserve: they provide clarity, order, sense and, presumably, stability, rather than 'nonsense'. The implementation of a written constitution would, then, have a performative effect: '[i]t would . . . reshape the modern state' and constitute a more desirable narrative of who (and where) we are now. Unsurprisingly, the model is supplied by the USA:

> New citizens, offered the core values of a secular, democratic society, would sign up to a clear agreement for reciprocal commitment. The question is who might get to play Thomas Jefferson, a founding father of the American constitution.

There is, however, a qualification and, perhaps, a lapse back into the common-sense position that writing merely records, rather than constitutes, reality:

> Pieces of vellum are obviously not a cure-all. 'We the people', the power brokers of America, are litigious death penalty advocates with a President chosen by fewer than half of them. France may espouse liberty, equality and brotherhood, but the hijab ban for Muslim schoolgirls bears the fusty odour of the *ancien régime*. Good constitutions do not guarantee perfect societies, but bad ones stifle justice and sour national life.

An opposition is constructed here between 'good' and 'bad' constitutions. The first, privileged term does not, however, quite map on to its other; it remains ambiguous as to what the terms 'good' and 'bad' refer to. In this article, Riddell's central proposition is that written constitutions are 'good constitutions', in contrast to the 'unwritten' British constitution, which can be deployed in seemingly undemocratic ways. In the quotation above, however, she acknowledges that the idealistic rhetoric of the US and French 'good' constitutions does not necessarily guarantee a better society than that of Britain; indeed, she seems to imply that they might even be worse because of the discrepancy between 'ideal' and 'real'. Are they 'really', then, the 'bad constitutions' to which she later refers? If not, what are these 'bad constitutions'? It had appeared that Riddell was talking about other written constitutions that were not as successful as those of the USA and France. Yet she advocates a written constitution for Britain in the face of government reforms that are in keeping with the 'unwritten' British constitution's key principle of parliamentary sovereignty. This seems to suggest that the 'bad'

constitution in question might be an 'unwritten' one. Such a 'bad constitution' 'stifles justice', metaphorically envisaged as a person who is being asphyxiated, and 'sours national life'. Relying on metaphors of death and decay, Riddell's words echo the corruptibility that George Dangerfield (see later) had envisaged in the 1930s as the result of a written constitution; she, however, sees this as the outcome of *not* having one.

Making reference to the current government's constitutional reforms, Riddell adds her voice to calls for a written constitution. This political desire is not, however, a new one, as she appears to suggest. The nineteenth-century Chartist movement, for example, sought a written document in the tradition of Magna Carta in order for political concessions to be made to the disenfranchised sectors of the population. The Chartist Convention of 1839 called upon its members to 'defend the laws and constitutional privileges their ancestors bequeathed to them'.[67] Although these exponents of a written constitution looked to English models (perhaps because, at this time, Britain was at the height of its imperial power), more recent advocates, such as Riddell, have looked instead to the USA.

One group that also refers to the tradition of English liberty as defined by Magna Carta is the non-partisan pressure group, Charter 88. Established in 1988, it has continued to call for a written constitution in order to change the British political system; a written constitution would be 'anchored in the ideal of universal citizenship', incorporating a series of reforms that would be enshrined in a bill of rights including, among others, the rights to peaceful assembly, to freedom from discrimination, to privacy and to trial by jury. The group has its own 'Original Charter'; this appellation recalls both Magna Carta and the Chartist movement. Charter 88 is therefore aligned at once with one of the key documents perceived to guarantee English liberties, while simultaneously recognising its elitist implications: an association with the more populist Chartist movement works to obviate this connotation.

The group's Charter calls for 'a new constitutional settlement'. This 'new settlement', however, as well as intertextually alluding to the 1701 Act of Settlement (which limited the monarch's powers and aimed to 'settle' the question of the succession in the decades following the 1688 Glorious Revolution), is, on closer inspection, far from 'new'. Its mode of address is nostalgic, opening with the assertion: 'We have had less freedom than we believed.' The group's aims are '[t]o make real the freedoms we once took for granted'; this would be achieved by curtailing the supremacy of parliament, '[s]ubject[ing] Executive powers and prerogatives, by whomsoever exercised, to the rule of law'. The 'rule of law', legal redress and an independent judiciary are the key components of the new settlement. Furthermore, the language and the demands – for 'a Bill of Rights', the separation of powers, and rights as inalienable possessions – recall the US Constitution (as well as Locke and Montesquieu). 'To make real' is to put into words in the form of a written constitution, yet there is a simultaneous retreat from this into

common sense: '[t]he inscription of laws does not guarantee their realisation' (Riddell's words, quoted above, are a virtual paraphrase of this), signalling a Rousseauesque mistrust of writing similar to that of Lords Callaghan and Woolf. These modern Chartists and other campaigners for a codified constitution seem to desire writing and the stability that it promises as a guarantee of meaning, while remaining suspicious of it and lapsing back into natural metaphors more typical of 'common sense'. This has the effect of reassurance: a new 'modern' constitution would not be so very different from the old 'unwritten' one; in fact, it would be the *same* as this constitution, only more so – what it *would have been* if the 'elective dictatorship' of the House of Commons had not all but destroyed it. The mode of address of Charter 88's charter is therefore not only nostalgic, but also messianic, looking to the future in the shape of a transfigured (and translated) relationship with the past. Once again, this takes place in the continuous 'now' as 'the time has come' for this to take place.[68]

Callaghan and Riddell describe the constitution over a decade apart (during which the House of Lords has been reformed and the Law Lords threatened with abolition) and from different positions: Callaghan is content to maintain the status quo as a triumph of 'common sense' and Riddell urges a written constitution at the expense of flummery and nonsense. Although they advocate different positions regarding a written constitution, they are both operating within the limits of empiricist discourse, displaying a similar mistrust towards writing and lauding common sense. Claims to an unwritten constitution or claims for a written one tend to immediately to qualify their assertions with the caveat of common sense: the 'unwritten' constitution is not *really* unwritten, it is rather uncodified; a written constitution, while desirable, does not *really* guarantee a good government or society. Interestingly, Dicey performs a similar disavowal in his critique of Blackstone:

> The harm wrought is, that unreal language obscures or conceals the true extent of the powers, both of the Queen and of the Government . . . We have all learnt from Blackstone, and writers of the same class, to make such constant use of expressions which we know not to be strictly true to fact, that we cannot say for certain what is the exact relation between the *facts* of constitutional government and the more or less *artificial phraseology* under which they are concealed.[69]

These writers not only invoke common sense, but also construct a binary opposition between the 'real' and its description; this real – perceived to be accessible *through*, and in spite of, writing – takes the form of the fairly intangible qualities of 'power', 'difficulties', a 'good' society. The 'real' seems to haunt these texts, yet its materiality can only be located in those writings, insofar as it can be located at all.

This might also, perhaps, be linked to the proposed model: on the one

hand, to use writing would be to emulate the USA as a site of global power and, on the other, to disavow the US model is to be distanced from it, preserving the idea that Britain is the 'true' (and unwritten) location of the constitution (and distanced from a perceived taint of vulgarity as well). Although the model that is continually invoked as either desirable or to be avoided is that of the USA (or, less often, France), this seems to pose a problem when asking why it is *now* that these concerns seem so pressing, notwithstanding similar sentiments expressed by Burke in response to the French Revolution and political commentary surrounding the 1832 and 1910 Reform Acts. The USA has had a codified constitution since the late eighteenth century and yet, in the face of this (and perhaps because of it), Britain has taken pride in an attachment to a flexible 'unwritten' constitution. What then, is the 'now' that has created an imperative need for a written constitution?

Nevil Johnson suggests that post-war accounts of the constitution, which uncritically stress its flexibility, 'express . . . an unhistorical view of the conditions in which such values come to play a major part in the definition of that very Constitution'.[70] Historicising these apparently timeless and continuous values, Johnson locates them in the work of nineteenth-century constitutional writers. This group would include Stubbs, Bagehot and, most importantly, Dicey; it is notable that *Blackstone's Commentaries* were also revised and reproduced in this period in an odd double-voiced text into which nineteenth-century editorial additions were seamlessly inserted.[71] Johnson refers to the 'builders of the Victorian theory of the Constitution' who gave such a large place to unwritten conventions – which in the words of Ivor Jennings 'provide the flesh which clothes the dry bones of the law'[72] – as a 'result of a belief that it was founded on habits and traditions expressive of the genius of the people which, like the rock of ages, would endure'.[73] So Dicey, for example, claims:

> the very term 'constitutional law,' which is not . . . ever employed by Blackstone, is of comparatively modern origin; and . . . before commenting on the law of the constitution [the English commentator] must make up his mind what is the nature and the extent of English constitutional law.[74]

As Johnson points out, then, to a certain extent the *idea* of the English constitution as something separate from, but dependent on, the rule of (common) law (as most famously defined by Edward Coke, Matthew Hale and Blackstone), was itself constituted relatively recently.[75] The constitution is, thus, to appropriate Bhabha, 'half made as it is in the process of being made'.

Drawing on Johnson's thesis, I would go still further and suggest that this emphasis on convention and, hence, on the 'true' constitution being 'unwritten', was a product not only of the nineteenth century, but also of the imperialism of that age. The appeal to tradition, continuity, stability, order

and, above all, the 'rule of law' (in tandem with the benefits of industrial capitalism) was what legitimated the annexing of territories and peoples around the world in the name of progress and modernity.

This characterisation has not, however, disappeared with the post-war collapse of the British empire. On the contrary, similar sentiments can be found in Lord Woolf's 2004 speech:

> Our ability to manage very well, thank you, without one of those written constitutions which we so generously drafted for our former colonies, was probably also assisted by the fact that, as Dr Robert Stevens points out, with the exception of the 17th century: *traditionally the growth of the English Constitution has been organic, the rate of change glacial*.[76]

Despite Woolf's generally liberal leanings – he was involved in the drafting of the Human Rights Act and has criticised the current government's measures on terrorism – a somewhat conservative, albeit ironic, investment in the value of the 'unwritten' constitution can be traced. The use of irony notwithstanding, Woolf's words illustrate not only a belief in British exceptionalism and the value of an unwritten constitution, but also the imperialist ideology of the benevolent law-giver, dispensing the correct model of the law to 'our former colonies', which had to state explicitly what could go without saying in Britain itself. This tends to suggest that current constitutional debates (understood in the broadest sense) are located within the framework of empire, whether the fact is explicitly acknowledged or not.

Easthope has persuasively argued that traumatic experience is integral to the constitution of the modern collective subject:

> Today, more than one nation carries something on its back it cannot see . . . England still can neither face nor forget the Empire and loss of Empire . . . the English continue to repeat Empire through irony – an irony which recognises its inevitability and at the same time mourns the loss.[77]

This ironic mode, which repetitively performs a nostalgia for empire, insisting on its continued value, can be traced in Woolf's words (and in Johnson's 'rock of ages [that] would endure'). Woolf's comments signify both an embarrassed disavowal of the effects and after-effects of imperial expansion, yet at the same time reinscribe Britain's perceived centrality. The employment of a colloquial phrasing coupled with an almost aggressive assertion of independence ('our ability to manage very well, thank you') preserves a defensive and defiant distance between this collective subject and 'our former colonies', while also acknowledging paternity with the possessive 'our'. Furthermore, the 'generously drafted' written constitutions are looked down upon as inferior and vulgar ('*those* written constitutions').

Although Woolf does not use this exact word, his apparent disdain for vulgarity is interesting: it signifies in this context as common, both in the sense of ordinary and distasteful (the *OED* glosses it as 'having a common and offensively mean character; coarsely commonplace; lacking in refinement or good taste; uncultured'). Yet the word 'vulgar' also signifies as 'of or pertaining to the common people'; 'common' signifies in a similar way and also comprehends 'together', 'general, indiscriminate', 'of merely ordinary or inferior quality'.[78] What Woolf appears to repudiate, then, is not only vulgarity, but also democracy constituted in the name of 'the people'. That these constitutions are seen as 'generously' drafted indicates that it was actually a gift from a parent to a child – more specifically, given the paternalistic tone and the generally masculine discourse of nationhood, as the inheritance of a father to a son, while simultaneously relying on natural, maternal metaphors – that, in their indecent haste to assert a national independence, these ungrateful children have forgotten.

The nationalism of, and constitutional traditions appropriated by, Britain's former colonies affect the former imperial centre in an uncanny fashion: Britain appears to remain the same, or at least, familiar, in terms of its political make-up – unlike post-war France, Germany and Japan. The British constitution is perceived to have remained much the same as it always had been, continuity being an important constituent concept. Yet it also appears as an uncanny object of fear and unfamiliarity: Britain's place in the world has changed and this has had an effect on subjectivity, both collective and individual. The collective subject's image of itself fractures in the post-war period. After the 1931 Statute of Westminster (which created self-governing dominions of its white settler colonies, Canada, South Africa, the Irish Free State, Australia and Aotearoa New Zealand), the rest of the empire – starting with India in 1947 – began to secede, often violently or with violent consequences. The empire was reconfigured with the creation of the Commonwealth as an association of sovereign nations. Moving from the centre of its imperial world to become a single member nation of the Commonwealth, one of Britain's claims to global authority was dislocated. It should be noted, however, that the Commonwealth's governing principles converge with those of the unwritten, British constitution: its current slogan proclaims that it is 'a force for peace, democracy, equality and good governance'. Moreover, unlike the United Nations, which is governed by a charter, the Commonwealth is perceived as an evolutionary organism, not 'constructed from a blueprint'.[79] Britain's relationship to Europe has also changed: in 1972, Britain joined the European Community and, in 1992, further committed itself to the European Union with the ratification of the Treaty of Maastricht. Further proposals for integration with Europe in the form of a monetary union and the adoption of the euro, and, more recently, the proposed adoption of a European Constitution have been met with fears of Britain becoming just one state in a federal superstate and, from some quarters, the voicing of a desire to remain

separate. In tandem with these perceived threats from without, the Labour government has, since 1997, introduced a number of constitutional reforms that have fractured the notion of Britain from within: in addition to the reforms of the judiciary and executive, the most obvious of these has been the devolution of executive and legislative power to Scotland, executive power to Wales and a power-sharing executive in Northern Ireland (this was suspended in October 2002, but, at the time of writing, has been timetabled under the Northern Ireland (St Andrews Agreement) Act 2007 to resume by 8 May 2007). This perceived 'body in pieces' fractures from both within and without, the effect of which is that 'Britain', thought of as a homogeneous, self-present unity, has become difficult to locate.

The constitution of Britain, then, in the sense of both its fundamental laws and government, and its national composition, was – and is – always defined outside itself. This does not, however, constitute a 'centre defined by margins' model, in which the margins mark out the boundaries of the centre in a negative way (where, for example, Britain is all that the empire or the non-British world is not), but, rather, that 'Britain' is itself a relation and one that is continually reconfigured. Its subjectivity is dependent on a relationship that distinguishes between the 'internal' and the 'external'. The model of inside and outside is part of an ongoing process: 'internal' can refer variously to the American colonists who claimed the rights of Englishmen, Māori who were supposedly granted rights equal to British subjects under the Treaty of Waitangi or the constituent nations of the United Kingdom. The first two of these examples are also positioned externally according to geography and ethnicity/culture. The third example refers to those nations that used to be external within Britain itself until the various Acts of Union. Likewise, 'external' might refer to the other sovereign nations of Europe, particularly France (parts of which were formerly 'English'); these, however, become partially 'internal' as Britain joins the European Union.[80] Part of the uncanniness of modern Britain can be traced, therefore, to this movement between 'inside' and 'outside', which unhomes the subject in the place where it belongs, generating uncertain subject positions in regard to the idea of the nation and where it might be located.

Britain's spectral constitution

The various hauntings of Britain – and its uncertain location – have led me to characterise the constitution as spectral. This is not just a fanciful metaphor: references to monsters, ghosts, hauntings and spirits abound in legal and political commentary. As I mentioned at the beginning of this chapter, Hennessy borrows the figure of the 'great ghost' of the constitution from George Dangerfield's 1936 work, *The Strange Death of Liberal England*. In response to the reforms of the House of Lords in 1910, Dangerfield had commented:

> To reform the House of Lords meant to set down in writing a Constitution which for centuries had remained happily unwritten, to conjure a great ghost into the narrow and corruptible flesh of a code.
>
> . . .
>
> For this Constitution . . . was nowhere set forth in an Instrument. It had no visible body. A Magna Carta, an Apology, an Act of Settlement, an Act of Union, had printed themselves across the ribbed sands of English history like the footsteps of an unseen traveller, a mighty ghost. Materialized, this spectral Constitution would have been a very monster, bearing a horrid mixture of features, from Norman French to early Edwardian; a monster flagrantly improvised, illogically permanent; a monster which existed on the principle that every grievance had a remedy, but that no grievance was eternal and no remedy a panacea.
>
> It was this variegated spirit, the genius of English history, which mocked the rather idle labours of those [reformers].[81]

Dangerfield constructs an idea of the *real* British constitution as being beyond mere words, viewing the latter as narrow, corruptible and, hence, monstrous: writing would reduce the constitution to the mere letter of the law rather than invoke its spirit. This spirit is, however, a spectre: it is not totally insubstantial, because it has left 'imprints across the sands of history' in the form of the documents listed. Viewed in this way, the spectral constitution has some vestiges of corporeality.

These two striking metaphors, both of the spectre haunting the reformers at the Lansdowne House conference and of the monstrosity of the written or modern constitution, recall Edmund Burke's reflections on the British constitution in the wake of the French Revolution. Warning against the social chaos of the Revolution in 1789, Burke wrote that 'all these chimeras of a monstrous and portentous policy, must aggravate the confusions from which they have arisen'.[82] Furthermore, France's descent into rule by the army or 'military democracy' was 'a species of political monster, which has always ended up by devouring those who have produced it'.[83] By contrast, the 'firm ground of the British Constitution'[84] was a more perfect expression of what a society should be: '. . . a partnership . . . between those who are living, those who are dead, and those who are to be born.'[85] Furthermore:

> Each contract of each particular state is but a clause in the great primaeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures each in their appointed place.[86]

Dangerfield and Burke both position a more spiritual, less material constitution outside the time of modernity. Crucially, this constitution is viewed as

more natural, in sharp contrast to the monstrous offspring that might be produced by writing. Writing is perceived here in an ambivalent mode: it is both outside time and, hence, desirable and worth preserving – it is 'the great primeval contract' (note, though, the use of the term 'contract') – and yet also something to be feared and secured against – in the threat of 'the narrow and corruptible flesh of a code'. As noted in Chapter 2, Derrida has commented on the 'good writing', which is positioned, like the covenant of God, as prior to language and written internally. In so doing, it constitutes a 'natural law'. This natural law, in the form of 'good writing', is related to the idea of spirit, invoked in terms of law, constitution and nation. Derrida asserts that '[w]hat writing itself, in its nonphonetic moment, betrays, is life. It menaces at once the breath, the spirit, and history as the spirit's relationship with itself'.[87] In relation to the British constitution, the menace of graphic writing can be traced, for example, in *Blackstone's Commentaries*:

> The common law of England has fared like other venerable edifices of antiquity, which rash and inexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently it's [*sic*] symmetry has been destroyed, it's proportions distorted, and it's majestic simplicity exchanged for specious embellishments and fantastic novelties.[88]

Graphic writing, as a representation of a representation, is doubly distanced from the 'natural law' and spirit of the 'immemorial' common law. Able to signify in the absence of both author and addressee, it is perceived as a poison or harbinger of death (or, in the Blackstone quotation above, a destroyer)[89] that, as Dangerfield illustrates, has the potential to corrupt the spirit.

This 'spirit' can be understood in several ways. Aside from the religious connotation, in relation to an individual subject, it can refer to the soul, thought, consciousness or essence. It has also, however, been used to describe the constitution of collective narratives of subjectivity. Thus, it might be understood in the sense of Montesquieu's *Spirit of the Laws*, which attempts to discern what that spirit might be. Montesquieu does not distinguish between civil and political laws and, focusing on the particularities of place, people, and climate, aims to examine all these *relations* of laws, because 'together they form what is called THE SPIRIT OF THE LAWS'. He clarifies this by adding that 'I do not treat laws but the spirit of the laws, and as this spirit consists in the various relations that laws may have with various things, I have had to follow the natural order of laws less than that of these relations'.[90] The *spirit* of the laws is viewed entirely differently to the *natural* law, which is often proposed as the foundation of both constitutions and the common law.

Furthermore, 'spirit' might also be understood as Hegel's 'world spirit'. In Hegel's *Philosophy of History*, the world spirit (*Geist*) moves through history

in order to come into its full realisation as self-presence and the idea that is realised in this process is that of freedom:

> we may affirm that the substance, the essence of Spirit is Freedom. All will readily assent to the doctrine that Spirit, among other properties, is also endowed with Freedom; but philosophy teaches that all the qualities of Spirit exist only through Freedom; that all are but means for attaining Freedom; that all seek and produce this and this alone. It is a result of speculative Philosophy, that Freedom is the sole truth of Spirit . . . Spirit is *self-contained existence* . . . Now this is Freedom, exactly.[91]

Somewhat paradoxically, this spirit has a *substance* rendering it both tangible and intangible; this substance is, however, shown to be another intangible quality: that of freedom. Hegel's *Philosophy of History* outlines the stages of the unfolding of the spirit as it strives for freedom; as for Montesquieu, spirit in this view is seen as the contrary of nature. This process takes the form of 'Universal History', which, again somewhat paradoxically, displays itself as the 'concrete reality' of the spirit. The state also provides a material ground for the spirit because it is 'the shape which the perfect embodiment of Spirit assumes'.[92] The spirit is thus linked to knowledge; it is free 'exactly' when it achieves full consciousness of itself.

Spirit is thought to be intangible, ideal (Hegel), relational (Montesquieu) and, perhaps, divine. It is thus constituted in opposition to the *material*, which it is not. Both Montesquieu and Hegel, however, lapse back into metaphors of substantiality when they discuss how this spirit might work and where it might be located: the former in the relations between laws, people and places; the latter in the processes of history. Law and history, then, provide the material ground for their discussions of the spirit.

Understood in this way, however, the spirit is not identical with the spectre, although it is related to it. Derrida notes:

> It is a differ*a*nce. The specter is not only the carnal apparition of the spirit, its phenomenal body, its fallen and guilty body, it is also the impatient and nostalgic waiting for a redemption, namely, once again, for a spirit . . . The ghost would be the deferred spirit, the promise or calculation of an expiation . . . A transition between the two moments of spirit, the ghost is just passing through.[93]

The spectre is not only *different* to the spirit, because it is a more material presence (although not quite fully present), it is also the spirit *deferred*. It undecidably refers outside itself to the past or future, longing for that which would reanimate it as fully present or, perhaps, annihilate it altogether. Furthermore, an articulation of it:

> plays between the spirit (*Geist*) and the specter (*Gespenst*), between the spirit on the one hand, the ghost or the *revenant* on the other. This articulation often remains inaccessible, eclipsed in its turn in shadow, where it moves about and puts one off the trail. First of all, let us once again underscore that *Geist* can also mean specter, as do the words 'esprit' or 'spirit.' The spirit is also the spirit of spirits.[94]

The spectre, as 'the spirit of spirits', conditions what we can know about the world. It is the animating principle of the material, sensible world and the (more-or-less) material trace of the ideal, intelligible world. Thus:

> [t]wo conclusions . . . (1) the phenomenal form of the world itself is spectral; (2) the phenomenological *ego* . . . is a specter . . . The apparition form, the phenomenal body of the spirit, that is the definition of the specter. The ghost is the phenomenon of the spirit.[95]

Much like Dangerfield's 'imprints', the spectre is a 'paradoxical *incorporation*' of the spirit. Moreover, the spectre 'stems from [the spirit] even as it follows it as its ghostly double'.[96] The spectre conjures up, and stands in for, the spirit as both a representation and reiteration, in this case, of both history and laws, the twin axes that both constitute and legitimate a political constitution.

Derrida's 'specter-effect', therefore, comprehends many of the axes I have outlined above: he discusses the spectre in terms of its relationship of differance to the spirit by tracing its etymological links with 'specular', 'speculative', 'spectrum', 'spectacular' and 'spectatorial'. The spectre is that which haunts the boundaries between life and death, certainty and uncertainty, visible and invisible, past and future, subject and object, ideal and material, interrogating the opposition constructed between them. There are, furthermore, 'several times of the specter. It is a proper characteristic of the specter, if there is any, that no one can be sure if by returning it testifies to a living past or to a living future'.[97] The spectre, in Derrida's example of communism, is:

> Already promised but only promised . . . It is only a specter, seemed to say these allies of old Europe so as to reassure themselves; let's hope that in the future it does not become an actual, effectively present, manifest, non-secret reality.[98]

But the spectre is also a *revenant*, that which comes back both in and from the future: 'At bottom, the specter is the future, it is always to come, it presents itself only as that which could come or come back.'[99] A *revenant* is that which comes back: the use of the (active) suffix '-ant' indicates that this is a process of becoming. The *revenant* is not fully here/present; it haunts the present as a *possible* (not necessarily probable) outcome, rather than inhabits it.

The 'unwritten' character of Britain's constitution, then, like the 'spectre of Communism', haunts from both the past and the future. It is perceived – by Burke, at least – to be transmitted as an eternal contract between the living and the dead from an immemorial past that is positioned outside and before writing, while simultaneously kept in trust for those 'who are to be born'. Equally, the spectre of a *written* constitution that would codify the unwritten constitution also haunts from both the past and the future. Calls for a written constitution are future-oriented, aiming to establish the *telos* of a more just and equitable society with a written document as its foundation. This constitution of the future, however, operates in the future perfect tense: the written document would codify the unwritten constitution, thereby stabilising its meaning and apparently conserving more correctly the ancient constitution grounded not in writing, but in liberty and the rule of law. That this document would, therefore, define and safeguard what *will have been* the British constitution, suggests an uncertain and ambivalent temporality. This conservation, however, should be understood as a reiteration, part of the process of continued cultural inscription as the constitution redefines 'who' and 'what we are *now*'.

The spectre of the US Constitution

If an immemorial, unwritten constitution haunts constitutional debates, a not-so-distant past is also part of the spectral archive of the British constitution – a spectre that has also, it must be acknowledged, haunted this project – that of the constitutional tradition of the United States of America.[100] It is perhaps a testament to the global hegemony of the USA that 'freedom', 'democracy' and 'due process of law' are seen as archetypally *American* values: values that are enshrined and guaranteed by *writing*, in the form of a codified constitution. In his 2003 address to Congress, the British Prime Minister, Tony Blair, performed a typical uncoupling of British constitutional traditions from American values. In constructing an ironic criticism of the British–United States' coalition's motives in the 'war on terror', he claimed:

> There is a myth. That though we love freedom, others don't, that our attachment to freedom is a product of our culture. That freedom, democracy, human rights, the rule of law are American values or Western values.

To this myth, he responded: 'Ours are not Western values. They are the universal values of the human spirit.'[101] In his assertion of British solidarity with the US government's 'war on terror', Blair elides a historical narrative of colonisation, as well as the export and translation of ideas of government, particularly those of 'freedom' and the 'rule of law'. His response, which then transposes these localised values into universal ones, also effaces the historical

and political configurations that have presented these 'values' (even the language here suggests a moral imperative) as timeless (conceived in an eternal 'now' by use of the present tense) and unchanging (they are universal principles that are divined from laws of nature as manifested in the human spirit – and presumably, therefore, authored by God).

This might, however, be read another way: the unmarked position of Britain in this dissemination of 'values' absolves Britain of any responsibility for them; this is instead deflected towards the USA or, more vaguely, to 'the West' or 'universal values'. Blair affirms the USA as the locus of freedom and the rule of law while simultaneously disavowing it: they do not belong to the USA specifically but are, rather, universal. Paradoxically, the claim that 'our' values – the 'our' is ambivalent here: it might signify Britain, the coalition, the West or the whole world – are universal can be read as an assertion of nationalism, albeit one that is masked by US hegemony. Derrida notes:

> Nationalism *par excellence* is . . . not foreign to philosophy . . . It always presents itself as a philosophy, or better, as philosophy *itself* . . . and it claims *a priori* a certain essentialist universalism.[102]

He reiterates: 'Nationalism . . . does not present itself as a retrenchment onto an empirical particularity, but as the assigning to a nation of a universalistic, essentialist representation.'[103] Blair's linguistic performance of the dislocation of the British constitution might, therefore, be read as an assertion of nationalism in the perceived face of both international insecurity (US hegemony, the war on terror, further integration with Europe) and intranational fragmentation (devolution in Scotland and Wales, civil unrest in Northern Ireland, the reform of the House of Lords and judiciary, the possibility of devolved government to the English regions). While in this reading the USA is superficially the originary location of these values, it in fact embodies the continuation and extension of them.

Recourse to the written texts that have helped constitute this notion of American 'originality' can open up the terms in which to think about the location (or dislocation) of the British constitution. The US Constitution of 1789 opens with the Preamble:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[104]

Famously positioned as revolutionaries by the British parliament, the American colonists – with a rallying cry of 'no taxation without representation' – sought to defend and guarantee their rights and liberties as *Englishmen*, and it

is these that they claim in this text. Patriot James Otis, for example, was thanked by the people of Boston for his 'undaunted Exertions in the Common Cause of the Colonies, from the Beginning of the present glorious Struggle for the Rights of the British Constitution'. In citing this example, John Phillip Reid asserts that the American colonists were searching for 'English rights under the British constitution'.[105] Ralph Turner notes that not only the quest for liberty, but also the idea of a codified document that would guarantee it can be traced back to Magna Carta:

> The colonists held Magna Carta to be fundamental law, standing above both King and Parliament and unalterable by statute. Americans' dedication to fundamental law increased in the years after 1688, an age when British political thinkers were discarding it in favour of parliamentary sovereignty. Their commitment to such higher law as Magna Carta fortified their inclination toward written constitutions.[106]

As a result of this, according to Turner: 'Today, Magna Carta seems to enjoy greater prestige in the United States than in the United Kingdom.'[107]

This attachment to ideals of British rights and liberties is still more apparent in the 1776 Declaration of Independence, which textualised the colonists' initial secession:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.[108]

What follows is a long list of the abuses of liberty and justice made by the tyrannical government of King George III. In 'declar[ing] the causes which impel them to the separation', the American colonists believed they were establishing a truer and more perfect government that would be more in line with 'the Laws of Nature and of Nature's God'. Although famously rhetorical in terms of its writing style, the Declaration of Independence constituted an idea of government and nationhood *outside* the text as 'truths' that were 'self-evident', natural and above all, authored by the supreme authority himself. These 'self-evident' truths are, however, a monument to the immemorial nature of the British constitution, which simultaneously (re)-iterate the idea of its being immemorial. Moreover, the US Declaration draws specifically on a British tradition of political philosophy, invoking not only Locke's thesis on government by the consent of the governed, but also his theory of property: these rights are seen as inalienable. They are thus constituted as rights proper to a subject, both belonging to it (as property) and defining it (as proper/correct and as a proprietor).

Moreover, the British constitution was thought by the authors of the US Declaration to be unique; it was believed to be the best because of its tradition of liberty. Blackstone had commented in 1765 that England was '[a] land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution'. This liberty is understood as 'the power of doing whatever the laws permit'.[109] Furthermore:

> The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of it's owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject.[110]

The US Declaration of Independence, then, while drawing authority from God and nature, textualises the 'unsaid' of the British 'unwritten' constitution. Former British Prime Minister, Winston Churchill, for example, asserted to an American audience in 1946:

> we must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence.[111]

It is some measure of the dislocation of the British constitution that its most famous expression should be found in the foundational text of a political entity that seceded from it by force. Some flattery is probably at work here: speaking in front of an American audience, following their successful involvement in bringing World War Two to a close, Churchill positions the American document as the 'most famous'. This is, however, only an 'inheritance': the 'true' greatness lies in its British antecedents and precedents. The way in which the dislocation he unconsciously claims is also performed can be traced in Churchill's words. This dislocation is such that, nearly 60 years later, another British Prime Minister addressing an American audience will miss out the constituent parts of Magna Carta and the English common law, and directly link 'freedom and the rights of man' to 'America'. Specific documents, or locations of the nation, are effaced and rendered universal in this later text.

Furthermore, the very notion (and, moreover, the *persistence* of the notion) of Britain's constitution being 'unwritten' was first constituted by (and in reaction to) the authors of the US Constitution and, subsequently, revolutionary France's 1789 Declaration of the Rights of Man and the Citizen. These two texts – and the documentary traditions they found –

positioned as *written/codified/rigid* constitutional traditions, opposed to Britain's *unwritten/uncodified/flexible* constitution, still form the benchmarks of the study of British constitutional law.[112] This triad of constitutional systems (Britain, France and the USA) occurs in a number of writings (including those of Dicey and Jennings), not least in Alexis de Tocqueville's *Democracy in America*. There, by way of contrast with the US Constitution, he declares:

> In England the Parliament has an acknowledged right to modify the constitution; [*sic*] as, therefore, the constitution may undergo perpetual changes, it does not in reality exist; the Parliament is at once a legislative and a constituent assembly.[113]

Britain is perceived as having either 'no constitution' or an unwritten one by means of comparison with those that do in both the 'new world' (USA) and the 'old' (France). Its difference or exceptionalism is thus doubly (dis)located.

The advantage of the US system is thought to be its separation of powers between the executive, legislature and judiciary. According to the Australian constitutional commentators John Quick and Robert Randolph Garran, the tripartite separation of powers codified in modern constitutional documents is

> also observed in the British system of government, the Constitution of which, although it has not been reduced to the form of a single document or Act of Parliament, is as capable of being gathered from numerous Charters, Bills, Proclamations, Statutes, legal decisions, and official documents, extending from the time of King Alfred down to the reign of Queen Victoria, as the Constitutions of the countries referred to, which have been, in fact, largely, constructed according to the British model.[114]

Quick and Garran here draw on the observations of Montesquieu's *Spirit of the Laws*, which focused attention on the separation of powers in England.[115] They also construct and reiterate a historical narrative of continuity, even though the period they trace (from the time of King Alfred to that of Queen Victoria) saw several major constitutional upheavals. Lord Woolf can be seen as one inheritor of this position as, in his 2004 address regarding the Labour government's constitutional reforms, he stressed the continuity of the constitution, viewing the upheavals of the seventeenth century as a temporary 'exception'.

Another commentator on the US Constitution, James Bryce, observed that Montesquieu:

> had taken the Constitution of England as his model system, and had ascribed its merits to the division of legislative, executive, and judicial functions which he discovered in it, and to the system of checks and balances whereby its equilibrium seemed to be preserved. No general

> principle of politics laid such hold on the constitution-makers and statesmen of America as the dogma that the separation of these three functions is essential to freedom.[116]

Woolf, however, suggests that the British constitution can be defined by 'the *absence* of the separation of powers' and it was this, rather than separation, that in 'times of tension' has enabled the 'good sense and good will on all sides' to 'successfully manage the situation'. Jennings, writing earlier in the twentieth century, was not quite so assertive, arguing rather that Montesquieu's observations were based on theory rather than in the practical workings of the state.[117]

The British constitution, then, insofar as it can be defined at all, seems definitively located from without. Its key characteristics are perceived as the separation of powers, the supremacy of parliament (understood as monarch, lords and commons) and the rule of law, all of which guarantee liberty. *British* commentators have, however, repudiated this as a *ground* of the constitution, arguing instead that this 'theory' does not apply in 'practice'. In Woolf's words can be traced, I think, the preservation of an idea of *difference*: the USA is constituted according to the separation of powers, the British by an absence of this. A mode of empiricist discourse can also be traced here: the separation of powers might be what the constitution is *theoretically* like – that is, how it is theorised in *writing* on the constitution – but in the common-sense world of legal and political practice, this separation is perceived to be absent or, at least, far less clear-cut. Within this discourse, the British constitution is not precisely locatable.

A written constitution?

Commentary on the British constitution – what it is, where it might be located and whether or not it should be changed – is inextricably linked to writing. Graphic, phonetic writing, as a sign of modernity, is what distinguishes modern nation states, such as the USA, Ireland, Australia and even Aotearoa New Zealand, from their predecessors. In this instance, the British constitution is marked out as different; there has been a large investment – traced in commentary from Edmund Burke to Lord Woolf – in the notion that, by contrast with both other 'old world' and 'new world' constitutions, the British one is 'unwritten'. Effacing the textuality of numerous charters, Acts and interpretations, arche-speech in the form of a 'natural' writing not only distinguishes the British constitution, but marks it as the origin and, moreover, a more perfect origin, because it is closer to the 'spirit' of the law. Graphic writing is thus viewed with suspicion because it is perceived to represent only the 'letter' of the law. This suspicion can be traced not only in the words of defenders of the unwritten constitution, but also in those of the advocates for a written one.

A sense of the 'difference' of the British constitution can also be used to think about 'Britishness' and Britain. Difference is constitutive of the British constitution and the constitution of Britain as a collective subject: 'Britain' and its constitution is always something different or other to what is being discussed. It is this exemplary quality that marked Britain out as 'Great', special, the bearer of a mission to 'make the world' (as Ferguson puts it) in its own image. This difference should also be understood as a deferral: a spectre effect. Positioning Britain as both different to, and the origin of, those traditions is a retroactive effect of the processes of empire, understood as empire within and without Britain.

The constitution of Britain in the double sense, then, can be thought as both differed and deferred from itself. The presence of the constitution cannot be located in any one key document, one mythic foundational event or one particular place. I have thus characterised it as *spectral*, haunting the present moment and the constitution of the collective subject within that moment. This differance of the constitution of Britain can also be read as an assertion of national identity: one that *appears* to be absent but is rather disseminated by means of an attachment to exceptionalism and empiricist common sense.

Notes

1 Historian David Cannadine uses a similar formulation to draw attention to the unusual position of Ireland, asserting that '[t]he Act of Union of 1800 brought together Great Britain and Ireland in a new, imperial-cum-metropolitan unity': *Ornamentalism: How the British Saw Their Empire*, 2001, London: Allan Lane, p 15. In both configurations, Ireland occupies an abject position between Britain and the Empire as part of both but not quite part of either. As I have argued in Chapter 2, since 1922, Northern Ireland has come to occupy this abject status between the (decolonised) Republic of Ireland and the imperial 'centre' of Britain.

2 P Hennessy, 'Searching for the "Great Ghost": The Palace, the Premiership, the Cabinet and the Constitution in the Post-War Period', 1995, *Journal of Contemporary History*, 30:2 (Apr), pp 211–31 (p 212). Hennessy takes the figure of the 'great ghost' from G Dangerfield's 1936 work, *The Strange Death of Liberal England*, 1936, London: Constable; repr 1980, New York: G P Putnam's Sons, referring to it more extensively in P Hennessy, *The Hidden Wiring: Unearthing the British Constitution*, 1995, London: Victor Gollancz. Nor are Dangerfield and Hennessy alone in conjuring ghosts when discussing the British Constitution. Vernon Bogdanor opens his collection of essays on British government *Politics and the Constitution: Essays on British Government*, 1996, Aldershot: Dartmouth, with an introduction subtitled 'Exorcising Dicey's Ghost'. In this case, the ghost is not the constitution, but the monumental work *An Introduction to the Study of the Law of the Constitution* by A V Dicey that describes (and defines) it. Bogdanor notes: 'In Britain, where there is no officially sanctioned collection of constitutional rules, constitutional lawyers have generally fallen back on the work of A V Dicey (1835–1922) who has become Britain's substitute for a codified constitution.' (p xi) He continues: 'The debate on electoral reform . . . while seemingly part of an abstract constitutional argument, is in reality a debate about the

distribution of political power . . . That struggle will involve the people as well as the politicians. For Dicey was at least right in this, that on great constitutional issues, the opinion of the nation counts for more than the opinion of Parliament . . . The outcome of the constitutional debate, therefore, is one that will be determined by the people. Only in this way will it be possible to finally to exorcise Dicey's ghost, which has become all the constitution we have left.' (p xix)

3 To some extent, a case may be made that Magna Carta could occupy this foundational space. Historian Ralph Turner notes, in 'The Meaning of Magna Carta since 1215', 2003, *History Today*, 23:9 (Sept), pp 29–35, that Edward I's confirmation of the charters in 1297 set a precedent 'for parliaments to seek reconfirmation of the Charter and clarification of its meaning'. He adds, furthermore, that 'Magna Carta was the first of the statutes; and by the late-fifteenth century, collections of statutes beginning with it were among the earliest books to be printed in England'. *Halsbury's Statute Citator* (accessed 19 March 2004, now at the LexisNexis Butterworths subscriber database, available online at http://www.lexisnexis.com) still includes it as one of the first *dated* statutes (although not in its full text, because it has been effectively repealed by later legislation). It is not, however, the 1215 charter but its confirmation in 1297 by Edward I, which tends to back up Turner's point, suggesting that (re)iteration of this text is what is important rather than its content. It is thus the *spirit* of Magna Carta that persists rather than its letter. Tracing Magna Carta's importance through the centuries, Turner also links it to empire: 'It also generated enormous pride among nineteenth-century Britons, convincing them of their island-kingdom's destiny to be a model for other nations seeking freedom and unity as well as justification for their rule over a colonial empire.' (pp 30–1, 34) In spite of this, however, I argue that a stronger case can be made for British exceptionalism: that the idea of an 'unwritten' constitution has more purchase than that of Magna Carta as a possible foundational and constitutive text. *Halsbury's Laws of England* also makes this case: 'Although the Magna Carta of Edward 1 (25 Edw 1) (1297) and other constitutional documents of the same kind, such as the Petition of Right (1627), and the Bill of Rights, are sometimes regarded as forming a written constitution they are not complete, and are not immune from change by the ordinary process of legislation.'

4 Homi Bhabha uses this formulation to discuss how nations are constructed: 'Nations . . . only fully realize their horizons in the mind's eye.' ('Introduction: Narrating the Nation', in *Nation and Narration*, H Bhabha (ed), 1990, London and New York: Routledge, pp 1–7 (p 1))

5 Bhabha, 'Narrating', p 3.

6 J Derrida, *Archive Fever: A Freudian Impression*, E Prenowitz (trans), 1996, Chicago and London: The University of Chicago Press, p 84.

7 Hennessy, *Hidden Wiring*, p 8.

8 N Davies, *The Isles: A History*, 1999, London: MacMillan, p 870.

9 See, especially, Bhabha, *Nation and Narration*.

10 A Easthope, *Englishness and National Culture*, 1999, London and New York: Routledge, pp 24–32.

11 See, for example, P Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse?*, 1986, Delhi: Oxford University Press. The *Mabo* judges also noted this translation and reappropriation of British models by acknowledging the common law as the foundation of the Australian legal system.

12 1776, or the start of the US War of Independence, generally marks the caesura between the first and second empires. Towards the end of the nineteenth century, imperial historian J R Seeley asserted in his *The Expansion of England: Two*

Courses of Lectures, 1883, London: MacMillan: 'We have had at different times two such Empires. So decided is the drift of our destiny towards the occupation of the New World that after we had created one Empire and lost it, a second grew up almost in our own despite.' (repr J Gross (ed), 1971, Chicago and London: University of Chicago Press, p 16) More recent historians have also observed a similar pattern. David Cannadine notes that '[t]he first British Empire consisted primarily of a western Atlantic dominion extending from Canada, via the thirteen American colonies, to the Caribbean, and reached its peak in the brief years between 1763 and 1776' (*Ornamentalism*, p 11). C A Bayly puts the decline of the second British Empire between 1830 and 1860 in ch 8 of *Imperial Meridian: The British Empire and the World 1800–1830*, 1989, London and New York: Longman, pp 235–47. John Darwin proposes a third British Empire with the creation of the white dominions after the 1931 Statue of Westminster (see 'A Third British Empire? The Dominion Idea in Imperial Politics', J M Brown and W R Louis (eds), *The Oxford History of the British Empire: Volume 4 – The Twentieth Century*, 1999, Oxford and New York: Oxford University Press, pp 64–87).

13 Historian Jack Gallagher argues, however, that the empire was already in decline before the war and the first two years of the war actually marked a recovery: *The Decline, Recovery and Fall of the British Empire: The Ford Lectures and Other Essays*, A Seal (ed), 1982, Cambridge: Cambridge University Press.

14 10 Downing Street website, 'Countries within a Country', accessed 27 October 2003, available online at http://www.pm.gov.uk/output/Page823.asp.

15 Ibid.

16 K Kumar, *The Making of English National Identity*, 2003, Cambridge: Cambridge University Press, p 1. Similarly, Tom Nairn asserts that 'the underlying configuration of the United Kingdom is unique. Its majority nationality enjoys a dominance which has since the Middle Ages been overwhelming rather than contestatory . . . the English have tended to take hegemony over their archipelago for granted': *After Britain: New Labour and the Return of Scotland*, 2000, London: Granta Books, p 39.

17 W Bagehot, *The English Constitution*, new edn, 1872, London: H S King; repr 1997, Brighton and Portland, OR: Sussex Academic Press, p 3.

18 W Blackstone, *Commentaries on the Laws of England: A New Edition Adapted to the Present State of the Law by Robert Malcolm Kerr – Volume 1: Of the Rights of Persons*, 1857, London: John Murray, p 76.

19 Blackstone, *Commentaries*, Kerr (ed), p 97.

20 Seeley, *Expansion*, p 38.

21 Seeley, *Expansion*, p 63.

22 Kumar, *Making*, p 189.

23 J G A Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century – A Reissue with Retrospect*, 1957, repr 1987, Cambridge: Cambridge University Press, p 41.

24 Seeley, *Expansion*, pp 64–5.

25 Easthope, *Englishness*, p 27.

26 P Brand, *The Making of the Common Law*, 1992, London and Rio Grande: The Hambledon Press, p 463

27 T Nairn, *The Break-up of Britain: Crisis and Neo-Nationalism*, 2nd edn, 1981, London: Verso, p 296.

28 The texts that tie in with television histories are: S Schama, *A History of Britain 1: At the Edge of the World? 3000 BC–AD 1603*, 2003, London: BBC Worldwide Ltd; Schama, *A History of Britain 2: The British Wars 1603–1776*, 2003, London: BBC Worldwide Ltd; Schama, *A History of Britain 3: The Fate of Empire 1776–2000*,

2003, London: BBC Worldwide Ltd; N Ferguson, *Empire: How Britain Made the Modern World*, 2003, London: Allen Lane; J Pollard, *The Seven Ages of Britain*, 2003, London: Hodder & Stoughton; and M Bragg, *The Adventure of English: The Biography of a Language*, 2003, London: Hodder & Stoughton. Other popular history texts include: Davies, *The Isles*; D Danziger and J Gillingham, *1215: The Year of Magna Carta*, 2003, London: Hodder & Stoughton General; R Lacey, *Great Tales from English History: Cheddar Man to the Peasants' Revolt*, 2003, London: Little, Brown & Co Ltd; and J Muirden, *A Rhyming History of Britain*, 2003, London: Constable and Robinson.

29 L Colley, *Britons: Forging the Nation 1707–1837*, 1996, London: Vintage (see also L Colley, 'Britishness and Otherness: An Argument', 1992, *Journal of British Studies*, 31, p 309–29, which theorises the establishment of a unified notion of Britishess in relation to otherness – specifically in relation to religion (Protestant), recurrent warfare on the Continent and in America, and by the establishment of an overseas empire); K Wilson, *This Island Race: Englishness, Empire and Gender in the Eighteenth Century*, 2003, London: Routledge (see also K Wilson, *The Sense of the People: Politics, Culture and the People 1715–1785*, 1995, Cambridge: Cambridge University Press).

30 Bayly, *Imperial Meridian*; Cannadine, *Ornamentalism*.

31 P J Cain and A G Hopkins, *British Imperialism 1688–2000*, 2nd edn, 2001, Edinburgh and London: Longman, p 19.

32 N Pyke, 'Schools Ignore It – But is it Time for the Empire to Strike Back?' *The Guardian*, 5 July 2003, accessed 27 October 2003, available online at http://www.guardian.co.uk/uk_news/story/0,3604,991874,00.html.

33 J Morris, Pax Britannica: *The Climax of an Empire*, 1968, repr 1998, London: Faber & Faber; *Heaven's Command: An Imperial Progress*, 1973, repr 1998, London: Faber & Faber; *Farewell the Trumpets: An Imperial Retreat*, 1978, repr 1998, London: Faber & Faber.

34 C Hall (ed), *Cultures of Empire: A Reader – Colonizers in Britain and the Empire in the Nineteenth and Twentieth Centuries*, 2000, Manchester: Manchester University Press; B Schwarz (ed), *The Expansion of England: Race, Ethnicity and Cultural History*, 1996, London and New York: Routledge; C Bridge and K Fedorowich (eds), *The British World: Diaspora, Culture and Identity*, 2003, London and Portland, OR: Frank Cass; P J Marshall (ed), *The Cambridge Illustrated History of the British Empire*, 1996, Cambridge: Cambridge University Press.

35 Pyke, 'Schools'.

36 Nairn, *Break-up*, p 20.

37 E J Hobsbawm, *The Pelican Economic History of Britain: Volume 3 – Industry and Empire: From 1750 to the Present Day*, 1969, London: Penguin, pp 19–20.

38 Easthope, *Englishness*, pp 8–11.

39 Comments from Hobsbawm, Wilson, and Colley in 'Teach It in Full, It Made Us Who We Are', *The Guardian*, 5 July 2003, accessed 27 October 2003, available online at http://education.guardian.co.uk/higher/artsandhumanities/story/0,,993106,00.html.

40 See L Colley, *Captives: Britain, Empire and the World 1600–1850*, 2002, London: Jonathan Cape.

41 R Drayton, *Nature's Government: Science, Imperial Britain and the "Improvement" of the World*, 2000, New Haven and London: Yale University Press; J F Cadell (ed), *National Identities and the British and Colonial Press*, 2003, London: Associated University Presses.

42 Pollard, *Seven Ages*. Pollard wrote and produced this series for Channel 4 but, unlike Schama and Ferguson, did not present it. The Channel Four website

describes the programme as 'starting when Britain first became an island at the close of the last Ice Age and ending at the beginning of the agricultural and industrial revolutions': Channel 4 website, 'Seven Ages of Britain', accessed 19 March 2003, available online at http://www.channel4.com/history/microsites/H/history/n-s/sevenages.html.

43 A Burton, 'Who Needs the Nation? Interrogating "British" History', in Hall (ed), *Cultures of Empire*, pp 137–53 (p 140).

44 S Howe, 'Internal Decolonization? British Politics since Thatcher as Post-Colonial Trauma', 2000, *Twentieth-Century British History*, 14:3, pp 286–304 (p 286).

45 J G A Pocock, 'British History: A Plea for a New Subject', 1974, *Journal of Modern History*, 8, pp 3–21 and 'British History: A Plea for a New Subject – A Reply', 1975, *The Journal of British History*, 47:4 (Dec), pp 626–8. See also J G A Pocock, 'The Limits and Divisions of British History: In Search of the Unknown Subject', 1982, *American Historical Review*, 87:2 (Apr), pp 311–36. Cannadine acknowledges this debt: 'Academically, it is no longer convincing to write the history of England without some awareness of the separate but interlocking histories of Ireland, Scotland and Wales, and without giving thought to the different identities (and histories) implied by the words England, Great Britain, the United Kingdom, the British Isles and the British Empire.' He gives the examples of Conrad Russell's work on the war of the three kingdoms and Colley's work on British national identity in the eighteenth century in support of this assertion: 'British History as a "New Subject" ', in A Grant and K J Stringer (eds), *Uniting the Kingdom? The Making of British History*, 1995, London and New York: Routledge, pp 12–28 (pp 21–4).

46 In a vote on 4 November 2004, the north-east of England emphatically voted 'no' to regional devolution, arguing that the model proposed would be ineffectual: H Mulholland, 'North-East Assembly "No" Vote "Due to Lack of Power" ', *The Guardian*, 5 November 2004, accessed 25 August 2005, available online at http://www.guardian.co.uk/uk_news/story/0,,1344571,00.html.

47 J Carvel, 'Sense of Britishness More Prevalent Among Ethnic Minorities', *The Guardian*, 18 December 2002, accessed 27 October 2003, available online at http://www.guardian.co.uk/print/0,3858,4569488–103639,00.html.

48 See, for example, P Shirlow and M McGovern (eds), *Who Are the People? Unionism, Protestantism and Loyalism in Northern Ireland*, 1997, London and Chicago: Pluto Press.

49 P Gilroy, '*There Ain't No Black in the Union Jack': The Cultural Politics of Race and Nation*, 2nd edn, 2002, London: Routledge, pp 85–6.

50 Gilroy, '*Union Jack*', p 87. See, especially, the chapter entitled, 'Lesser Breeds Without the Law'.

51 Derrida refers to this process as *globalatinization* by which Latin and classical values are disseminated through English, by means of first British and latterly US global hegemony: see J Derrida, *The Other Heading: Reflections on Today's Europe*, P-A Brault and M B Naas (trans), 1992, Bloomington and Indianapolis: Indiana University Press.

52 Chief Executive of the School Curriculum and Assessment Authority, *The Guardian*, 19 July 1995, cited in A Grant and K Stringer, 'Introduction: The Enigma of British History', Grant and Stringer (eds), *Uniting the Kingdom?*, pp 3–11 (p 4). Original emphasis.

53 H K Bhabha, 'Signs Taken For Wonders', in *The Location of Culture*, 1994, London and New York: Routledge, p 102–22 (p 102).

54 Bhabha, 'Signs', p 107.

55 *Halsbury's Laws of England*, 'Constitutional Law and Human Rights, 1.

Introduction: Basic Principles of the Constitution of the United Kingdom'. This is, however, qualified in a footnote: 'It is sometimes said that the United Kingdom has an unwritten constitution. But many of the unconstitutional rules by which the country is governed are individually to be found in written documents such as statutes, law reports and parliamentary standing orders.' (Accessed 19 March 2004, now at the LexisNexis Butterworths subscriber database, available online at http://www.lexisnexis.com.)

56 A Lyon, *Constitutional History of the United Kingdom*, 2003, London: Cavendish, p xxxvii.

57 R Clements and J Kay, *Blackstone's Law Questions and Answers: Constitutional and Administrative Law*, 2nd edn, 2001, London: Blackstone, p 5. See also Bagehot, *English Constitution*; A V Dicey, *Introduction*; and W I Jennings, *The Law and the Constitution*, 3rd edn, 1943, London: University of London Press.

58 E Barendt, *An Introduction to Constitutional Law*, 1998, Oxford: Oxford University Press, p 26.

59 Dicey, however, is a little more subtle than this. As well as distinguishing the peculiarities of the British constitution from others, he asserts that it comprehends *both* the 'written' and the 'unwritten': 'There are laws of the constitution, as, for example, the Bill of Rights, the Act of Settlement, the Habeas Corpus Acts, which are "written law," found in the statute-books. . . . There are other most important laws of the constitution . . . which are "unwritten" laws, that is, not statutory enactments.' (*Introduction*, p 28)

60 Barendt, *Introduction*, p 9. This group should also include Israel. Under the 'Constitution' heading of the 'Government section', the CIA Factbook notes that Israel has 'no formal constitution; some of the functions of a constitution are filled by the Declaration of Establishment (1948), the Basic Laws of the parliament (Knesset) and the Israeli citizenship law': Central Intelligence Agency website, 'Israel', *CIA Factbook*, accessed 19 March 2003, available online at https://www.cia.gov/cia/publications/factbook/geos/is.html. One might speculate that it does not have a written constitution because the state legitimates its presence in Palestine by constituting itself as the direct descendant of the Hebrews, who were given the promised land by God (as outlined in the Torah/Old Testament). To have a written document would uncouple modern Israel from the past and would have to situate the state of Israel's right to exist much more recently, that is, since World War Two. For the state of Israel, then, the nation is perceived already to have been constituted through the covenant with God and it therefore has no need of a codified document. New Zealand, however, did pass a Constitution Act in 1986, as well as possessing a text reified (if not, to date, ratified) as a foundational document in the form of the Treaty of Waitangi, as discussed in Chapter 4. Since the ratification of an enforceable Bill of Rights in 1990, further constitutional change has included the establishment of a Supreme Court in 2003 – which ended appeals to the Privy Council – and a parliamentary inquiry into existing constitutional arrangements. This parallel with British constitutional reforms may owe something to New Zealand's self-representation as a nation in the nineteenth century and first half of the twentieth century as a kind of 'Better Britain'.

61 James Callaghan, interview in P Hennessy and S Coates, *The Back of the Envelope Nation: Hung Parliaments, the Queen and the Constitution*, 1991, Strathclyde Analysis Paper, No 5, p 18.

62 Lord Woolf retired as Lord Chief Justice of England and Wales on 1 October 2005 and has been succeeded by Lord Phillips of Worth Maltravers.

63 H K Woolf, The Lord Chief Justice of England and Wales, 'The Rule of Law and a Change in the Constitution', Squire Centenary Lecture, 3 March 2004,

Cambridge University, accessed 4 March 2004, available online at http://www.dca.gov.uk/judicial/speeches/lcj030304.htm.

64 Woolf, 'Rule', p 3.

65 Woolf, 'Rule', p 7.

66 M Riddell, 'Let's Have it in Writing', *The Observer*, 15 February 2004, p 28. All subsequent references to this article will be incorporated into the text.

67 Chartist Convention 1839 cited in E Evans, 'Englishness and Britishness, c1790–1870' in Grant and Stringer (eds), *Uniting the Kingdom?*, pp 223–43 (p 232). In 'A Memorial for Jeremy Bentham: Memory, Fiction, and Writing the Law', 2004, *Law and Critique* 15:3, pp 207–29, Martin Kayman, with particular reference to the work of Jeremy Bentham, traces a slightly different criticism of unwritten constitutions, in that they potentially place too much power in the hands of judges: 'Bentham pursues a language for law that denounces the unwritten law conceived as a monument to cultural memory as a fiction which, by requiring judicial interpretation, serves an oppressive regime wherein the lawyers are the agents of the ruling class. This language, moreover, will be capable of constructing a solid democratic body in a rational code of written law.' (p 218) While Woolf's fears for a written constitution add substance to Bentham's critique of lawyers, recent calls for a written constitution have been made in the face of planned reforms of the judiciary. In the era of the Human Rights Act, judicial review is seen as a more certain (though less democratic) means of safeguarding traditional liberties. It is this strange marriage of the immemorial authority of the common law and the political desire for a codified constitution that Thomas Poole has termed 'common law constitutionalism': 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism', 2003, *Oxford Journal of Legal Studies*, 23:3, pp 435–54.

68 All quotes refer to Charter 88, 'The Original Charter 88', accessed 14 November 2003, available online at http://www.unlockdemocracy.org.uk/?page_id=551.

69 Dicey, *Introduction*, p 11. My emphasis.

70 N Johnson, *In Search of the Constitution: Reflections on State and Society in Britain*, 1977, London: Methuen, p 32.

71 *Blackstone's Commentaries*, edited by Kerr. This new-old edition includes in the section, 'Of the Countries Subject to the Laws of England', references to territories that were either unknown (for example, New Zealand), not annexed (for example, Australia), or not part of the Union (for example, Ireland) when Blackstone's first *Commentaries* were published in 1765.

72 Jennings, *Law*, p 80.

73 Johnson, *Search*, p 33.

74 Dicey, *Introduction*, p 6.

75 Kayman notes that this immemorial common law was itself 'in large part a retrospective creation of the seventeenth and eighteenth centuries', based largely on the work of these writers: 'Memorial', p 211. He comments further: 'In his pursuit of continuity, Coke had Brutus bringing the law to England from Troy! "Time immemorial" itself in fact had a conventional date (the beginning of the reign of Richard I in 1189), established . . . by statute in 1290.' (p 218)

76 Woolf, 'Rule', p 3. Original emphasis.

77 Easthope, *Englishness*, p 31.

78 Definitions of 'common' and 'vulgar' from the *Oxford English Dictionary Online*, accessed 17 February 2004, available online at http://www.oed.com/.

79 See Commonwealth Secretariat website, 'History of the Commonwealth', accessed 19 March 2004, available online at http://www.thecommonwealth.org/Internal/34493/history/.

80 It should also be noted that over half of modern France – including Normandy, Brittany and Aquitaine – were once English lands, consolidated under the rule of Henry II and his wife, Eleanor of Aquitaine. The Hundred Years' War (1337–1453) between England and France – which saw the eventual loss of these French lands (except for Calais) – was precipitated by attempts to strip the English king, Edward III, of his fiefs south of the Loire river in Aquitaine. Edward resisted and sent raiding parties into France to preserve his lands. In 1338, Edward formally laid claim to the French throne, inciting further conflict. By 1453, the English had been driven out of France; Calais remained an English possession until 1565. The Channel Islands are the last remnants of England's medieval empire in France.
81 Dangerfield earlier asked 'But what was "constitutional" legislation? Nobody knew. It is an axiom of English constitutional theory that no precise difference exists between "constitutional" and "ordinary" legislation': *The Strange Death of Liberal England*, 1936, London: Constable; repr 1980, New York: G P Putnam's Sons, pp 35–6.
82 E Burke, *Reflections on the Revolution in France*, L G Mitchell (ed), 1993, Oxford: Oxford University Press, p 218.
83 Burke, *Reflections*, p 213.
84 Burke, *Reflections*, p 249.
85 Burke, *Reflections*, p 96. As noted in Chapter 3, this partnership foreshadows Marx's *Eighteenth Brumaire of Louis Bonaparte*, in which he describes the tradition of 'all the dead generations weigh[ing] like a nightmare on the brain of the living'. Following immediately on from this often-quoted passage, Marx asserts: '. . . precisely in such periods of revolutionary crisis they anxiously conjure up the spirits of the past to their service.' (*Eighteenth Brumaire of Louis Bonaparte*, K Mapkc (trans), rev'd edn, 1984, Moscow: Progress; London, Lawrence & Wishart, p 10)
86 Burke, *Reflections*, pp 96–7.
87 Derrida, *Of Grammatology*, p 25.
88 W Blackstone, *Commentaries on the Laws of England: Book the First*, 1765–69, Oxford: Clarendon Press; repr 1966, London: Dawsons of Pall Mall, p 10.
89 For more on the signification of writing, see J Derrida, 'Plato's Pharmacy', in *Dissemination*, B Johnson (trans), 1981, Chicago: The University of Chicago Press, pp 61–171, and 'Signature, Event, Context', in *Limited Inc*, S Weber and J Mehlman (trans), 1997, Evanston, IL: Northwestern University Press, pp 1–23.
90 C de Secondat, de Montesquieu, *The Spirit of the Laws*, A Cohler, B Miller and H Stone (eds and trans), 1989, Cambridge: Cambridge University Press, p 9. Capitals in original. Later in the text, he observes: 'Many things govern men: climate, religion, laws, the maxims of the government, examples of past things, mores and manners; a general spirit is formed as a result.' (p 310)
91 G W F Hegel, *The Philosophy of History*, J Sibree (trans), 1991, Buffalo, NY: Prometheus Books, p 17. Original emphasis.
92 Hegel, *History*, pp 16–7.
93 J Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International*, P Kamuf (trans), 1994, New York and London: Routledge, p 136.
94 Derrida, *Specters*, p 125.
95 Derrida, *Specters*, p 135.
96 Derrida, *Specters*, p 126. Original emphasis.
97 Derrida, *Specters*, p 99.
98 Derrida, *Specters*, p 38.
99 Derrida, *Specters*, p 39.

100 The US constitutional tradition might be seen as the inheritance of any number of modern states, both used as a model (as in the case of Australia, which I discuss in Chapter 4) and often imposed by force. This latter can be seen in the construction of Japan's constitution following its defeat in World War Two and the recent attempts to impose constitutional settlements on both Afghanistan and Iraq in the wake of wars in those countries.
101 10 Downing Street website, 'Prime Minister's Speech to the US Congress', 18 July 2003, accessed 1 March 2004, available online at http://www.number–10.gov.uk/output/Page4220.asp.
102 J Derrida, 'The Onto-Theology of National Humanism (Prolegomena to a Hypothesis)', 1992, *Oxford Literary Review*, 14, pp 3–23 (p 17).
103 Derrida, 'Onto-Theology', p 9.
104 The United States Constitution, accessed 29 February 2004, available online at http://www.archives.gov/national-archives-experience/charters/constitution.html.
105 J P Reid, *Constitutional History of the American Constitution: The Authority of Rights I*, 1986, Madison: University of Wisconsin Press, p 9.
106 Turner, 'Meaning', p 35.
107 Turner, 'Meaning', p 34.
108 The Declaration of Independence of the Thirteen Colonies in CONGRESS, July 4, 1776, accessed 29 February 2004, available online at http://www.law.indiana.edu/uslawdocs/declaration.html. Derrida has reflected upon this text in 'Declarations of Independence', 1986, *New Political Science*, 15, pp 7–15.
109 Blackstone, *Commentaries: Book the First*, p 6.
110 Blackstone, *Commentaries: Book the First*, pp 122–3.
111 W Churchill, 'The Sinews of Peace', speech given at Fulton, Missouri, 5 March 1946, in D Cannadine (ed), *Blood, Toil, Tears and Sweat: Winston Churchill's Famous Speeches*, 1989, London: Cassell, pp 295–308 (p 300). This speech is perhaps more famous for the phrase that materialises the spectre of communism: '. . . an iron curtain has descended across the continent.'
112 See, for example, Clements and Kay, *Blackstone's Law*; Dicey, *Introduction*; and Barendt, *Introduction*, p 26. The decision of Lord Birkenhead in *McCawley v R* [1920] AC 691, 74 (PC) distinguishes constitutions as 'controlled' and 'uncontrolled', the United Kingdom falling under the latter category.
113 A de Tocqueville, *Democracy in America*, Volume I, ch 6, H Steele (ed), H Reeve (trans), 1965, London: Oxford University Press, pp 79–80.
114 J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1976, Sydney: Legal Books, p 315.
115 See especially the section 'On the Constitution of England', in Montesquieu, *Spirit*, pp 156–66 in which the liberty of the English is shown to be 'established by their laws'. He adds, later, that 'island people are more inclined to liberty' (p 288).
116 J Bryce, *American Commonwealth: Volume 1*, 1889, London and New York: MacMillan; repr 1995, Indianapolis: Liberty Fund, p 26.
117 See Jennings, *Law*, pp 18–28.

Chapter 7

Conclusion

Rereading constitutional texts

Constitutional texts are performative: they do not merely describe national spaces and communities, but rather bring them into being as legal and political entities. They affirm national sovereignty, interpellate citizens as national subjects and iterate national histories. All of these processes serve continually to reinscribe national identity as natural while, at the same time, constituting exclusions from its collective address. Constitutions also work retroactively to legitimate themselves and the law they establish. Such documents produce spaces in which national identities can be configured; they also, however, simultaneously produce spaces in which such hegemonic identities can be challenged, resisted and potentially reconfigured.

By analysing the narrative address of a variety of constitutional texts – in conjunction with legal, political and historical commentary – I have sought to show that, in the examples discussed in this book, the idea of the nation as a natural, transhistorical unity is constructed in culture, primarily by means of writing. Constitutional texts are *conventionally* positioned as foundational; I have reread them, however, in order to 'activate the differences' and show how such texts constitute an external guarantee of meaning with which they are also legitimated. In the foundational or constitutional texts I have examined, such explicit external guarantees are usually God and nature. I have sought to bring out the implicit textual strategies of legitimation, denaturalising these declared origins by looking at how these texts signify intertextually in relation to other similar texts. They simultaneously draw on the authority of the British constitution, constituted itself as immemorial in a relation of difference with the written documents of its former empire.

Similarly, keeping in play the double sense of 'constitution', I have examined the processes by which each nation retroactively confers legitimacy on what it determines as its foundational moment, continuing to reiterate and commemorate a point of origin from which 'the people' can trace a line of descent. This is not only a legal and political matter: the master narratives that position the originary event in the past and write the collective descent into being also take the form of history – conventionally, national and imperial history. I have sought to show how history, as the selective and interpreted

record of the foundational event (and subsequent events), simultaneously constitutes the nation no less than does the law.

I have located my analysis within the post-colonial frame of a white, British diaspora in order to foreground how the constitutional texts in each of these four case studies participate in a transnational discourse on the nation. In these examples, the 'immemorial origins' of the British constitution serve to legitimate new state formations (both colonial and post-colonial) in preference to Indigenous law and customs. Each nation remains marked by British imperial configurations of law; these configurations, moreover, systematically privilege 'whiteness', thought of here as both a racial and legal framework. Likewise, the national and supranational composition of Britain today itself remains an imperial formation. It is subject to, first, England's 'internal' colonisation of Scotland, Wales and Ireland and, second, constitution as 'Britain' by its empire. What now constitutes a white, British diaspora has its roots – as J R Seeley asserted in the nineteenth century – in the imperial expansion of England and the creation of a 'vast English nation' in terms of government, race and law. While Ireland, Aotearoa New Zealand and Australia have asserted varying degrees of independence from Britain, this legal and racial diaspora still shapes the contemporary state formations of these nations. I therefore consider that the spectral British constitution haunts both contemporary Britain and the state arrangements of its former colonies. Its governmental structures, which incorporate the rule of law as the guarantee of liberty, have haunted the struggles for freedom of both Ireland and the USA, while providing a ground for Indigenous challenges to the state's hegemony in Australia and Aotearoa New Zealand.

Each case study is, of course, different. In addition to the local particularities of history and politics, I have selected examples that treat very different events as originary. Unlike Australia and Aotearoa New Zealand, Ireland violently repudiated British colonial rule in the foundational event of the Easter Rising. The Proclamation read at the beginning of the fighting constituted an independent Ireland that has still yet to come beyond its name, despite its appropriation by nationalists to guarantee the much more conservative national vision enshrined in the 1937 Constitution. Rereading the ambivalences and intertexts of the Proclamation allows for alternative routes in the national narrative to be traced.

Like Britain, Aotearoa New Zealand is perceived to have an 'unwritten constitution'; it does, however, have a foundational text: the Treaty of Waitangi. The signing of this document also constitutes a foundational event, controversially paving the way for the establishment of a British colony. The Treaty – likened to both Magna Carta and a sacred covenant – is firmly positioned in a written tradition that masks the lack of codified constitutional settlement. It also defines the nation as split into Māori and Pākehā with conflicting, incommensurable accounts of what was ceded and what retained.

In Chapter 5, I examined attempts to reconstitute the national narrative of Australia established at federation in the 1901 Constitution. The 1992 *Mabo* decision discredited the foundational fiction of *terra nullius* and sought to alter both the nation and its origins. In so doing, commentators positioned it as a legal and political event after which nothing would be the same. At the same time, it repositioned the conventional origins of modern Australia within the extended period of continuous Indigenous occupation and gave revisionist histories of the national narrative legal force.

Finally, in Chapter 6, in order to interrogate the supposed origin of these modern nation states and their legal and political framework, I have analysed what is at stake in the idea that Britain's constitution is 'unwritten'. I argue that this idea only takes on meaning in a relation of difference with the written constitutional traditions of, first, the USA (and France) and, subsequently, the rest of its colonies. Despite the collapse of the empire, this apparent difference continues to constitute a national narrative of exceptionalism and superiority.

Modern nations are constituted as unified conceptual objects through the construction of origins. Both nation and origins are then given authority and authenticity by the writing of history. Writing, history and the rule of law are all tools of Western technological modernity and, in the context of colonial expansion, also the tools of empire. Thus, the nations established using these tools are positioned within the time of Western modernity, marginalising alternative configurations of law and nation. Not only do constitutional texts retroactively constitute an external origin that then shapes subsequent narratives, they also serve to posit a future *telos* towards which the nation is working. While allowing for *present* conflict and uncertainty, it is the perceived unity of both the past and the future that serves to legitimate contemporary structures and to make them appear natural, logical and inevitable. This unity, past and future, is what I have sought to denaturalise throughout this book.

I have thus put into practice a new approach to analysing the constitutional texts of modern nations. This does not take the form of a strictly historical, legal, political or philosophical analysis; it is, rather, a work of cultural criticism that looks to raise new kinds of questions rather than definitively to answer the old ones. Much valuable cultural work still remains to be done in this area, involving both other countries within the frame of the former British empire – including Canada, the USA, India, and South Africa, to name but a few – and also many other contemporary configurations of nation and empire. In Aotearoa New Zealand, for example, the Treaty of Waitangi is at the centre of current debates between the government and Māori over the use and ownership of the foreshore, as well as the possibility and desirability of a codified constitution. Currently, in Australian politics, white, diasporic alliance with the USA and Britain in the global war on terror has marginalised a national discourse on native title. The closure of the federal government-funded

Aboriginal and Torres Strait Islander Commission (ATSIC) in 2005 has also proved a setback for reconciliation and post-*Mabo* Indigenous rights. For Ireland, membership of the European Union, and the implementation of the Good Friday Agreement under the 'international' auspices of both Britain and the USA has contributed to the opening out of an inward-looking and narrowly constituted nation. In tandem, however, with this openness are the new constitutional moves to restrict Irish citizenship along racial and ethnic lines. Similarly, in Britain, questions of national definition raised by the European Constitution, as well as the altered position of Britain in relation to the USA, have constitutional implications for global politics, particularly in response to the terrorist attacks of 11 September 2001 and, more recently, the attacks on London on 7 July 2005. In the midst of these controversial and uncertain reconfigurations of both national and international politics, it is more important than ever to contest a unitary and universalising narrative of *the* nation and its history.

Lyotard argues that in the nineteenth and twentieth centuries, '[w]e have paid a high enough price for the nostalgia of the whole and the one'. Instead, he advocates the bearing of witness to the unpresentable and the activation of differences.[1] In this instance, such a mode of reading involves a fresh approach to the conceptualisation of both 'nation' and 'history' in relation to the idea of an originary founding moment, resisting the urge to homogenise difference and totalise the narrative of the nation. By attending to difference rather than unity, I have read these documents as 'open' cultural texts, refusing to close down their meaning. This refusal should be understood as both positive and political: the approach to rereading constitutional texts that I have put into practice throughout this book constitutes a 'time-lag' within the progressive, totalising compulsion towards national unity and enables such texts to act as continued sites of potential struggle.

Note

1 J-F Lyotard, 'Answering the Question: What is Postmodernism?', in *The Postmodern Condition: A Report on Knowledge,* G Bennington and B Massumi (trans), 1994, Manchester: Manchester University Press, pp 71–82 (pp 81–2).

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