CHAPTER 5
Similar Societies, Different Solutions:
U.S. Indian Policy in Light of Australian
Policy toward Aboriginal Peoples
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The United States and Australia are similar in many ways. Both are
developed settler societies with high output per capita, large territories,
democratic governments, and a legal system that is derived from the Brit-
ish common law. Both countries also had a substantial native population
that was displaced by European settlement. Yet each country treated the
property rights of native peoples in very different ways, and these differ-
ences have had important implications for the native peoples. In order to
fit the native population into English law and policy, new institutions and
new legal concepts developed in both countries. Colonial authorities and
settlers in Australia created a new legal concept: “terra nullius.” Accord-
ing to this legal principle, land in Australia belonged to no one prior to
the coming of the English settlers in 1788 and all subsequent private title
to land was treated in law as originating with a grant from the English
crown (see Connor 2005). By contrast, British colonial authorities in North
America and later in New Zealand treated native peoples as having “abor-
iginal rights” to land that they occupied before the coming of English
settlers (Lester and Parker 1973, p. 189). In the United States, this came to
mean that Indian title had to be cleared (extinguished) before it could be
owned by anyone else. Later in the United States the federal government
created special laws for “Indian country” and regulations for negotiating
with native peoples. The legal rights of aborigines to land in Australia based
on the fact that they lived there prior to English settlement were belatedly
recognized in 1992 by the High Court of Australia in Mabo v. Queensland,
thereby voiding the concept of terra nullius. Since that time Australians
have struggled to come to terms with past treatment of the Aborigines by
first English and then Australian authorities.
The argument made here is that differences arose (1) because of different initial conditions in Australia and the United States and (2) because of subsequent interactions with native peoples and the settlers. In the United States, English settlers encountered native peoples who farmed land and lived in settled communities. Indian tribes were also a formidable military threat which made them either valuable allies or dangerous foes in the battle between Britain, France, and Spain for control of North America. As a consequence, Indian land claims were treated with respect by colonial governments. In some cases private individuals purchased land from Indians both in colonial times and later, although this practice was not recognized by colonial courts and colonial authorities tried to stop the practice. Indian land was treated as territory controlled by “domestic dependent nations.”

By contrast, aboriginal peoples in Australia were not farmers, and they did not engage in land management as recognized by the British. Further, the initial colony in Australia was a penal colony administered by the British military. Poorly armed aborigines were not a major military threat, and they had no European allies.

As settlers spread out from the east coast of the United States, they continued to encounter organized tribes that impeded settlement. First the British and then the Americans tried to minimize conflict with Indians by recognizing tribal territories and enacting formal treaties with tribes. By the 1850s this evolved into a system of tribally controlled territories “reserved” for Indians—reservations. Once in place this system took on a life of its own. Indians knew what land was theirs, and the federal courts, often pressured by white allies of the Indians, treated these rights seriously. Over time court decisions, laws, and executive actions have created institutions that have proven useful to Indians.

In Australia most settlers remained close to the coast. Interior lands were first settled by sheep herders moving into crown lands, often without permission. Some of these “squatters” who used crown lands (ironically cleared of trees by the land use practices of the aborigines) to establish large sheep farms became quite wealthy. Any land “reserved” for aborigines from crown lands were under the control of the state governments or
owned by private charitable or religious groups, not the aboriginal people who lived there.

Did the fact that Indians had legal rights to land really matter? Or were these merely “trinket treaties,” as some non-U.S. observers claim (Weaver 1996, p. 989; Macintyre 1999, p. 68)? It is clear, in light of later events, that these treaties did matter and were far more than mere formalities. California and Texas, settled by Americans under Mexican laws that did not recognize territorial rights of Indian tribes, provide a “natural experiment” as to what might have happened in the rest of the country had Indian land and treaty rights not existed. The consequences for Indians, especially in California, were tragic.

**NATIVE PEOPLES AND THE FEDERAL GOVERNMENT**

Both the United States and Australia are federal systems, but the relation of native peoples to the federal governments of the two countries is defined differently in their constitutions. In Australia aboriginal peoples are explicitly mentioned in the Constitution twice. The Commonwealth of Australia Constitution Act of 1900 states: “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.” Further, the Commonwealth Constitution gives the federal government the right to make laws for “people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.”

The italicized clauses were dropped in 1967, but it is clear that aboriginals were considered outsiders who were not citizens and whose welfare was left to the states to decide, except in federal territory.

Like the Australian Commonwealth Constitution, the U.S. Constitution (1789) also refers to native peoples twice. The first time is in Article I, in reference to citizenship to determine representation in the House of Representatives:

> Article I, Section 2, Clause 3: Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the
whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. (Emphasis added)

Indians who did not live in tribes were taxed and counted in the census, like other people. But Indians who still lived in tribes (Indians not taxed) are not citizens of the United States, but rather members of tribes. By act of Congress in 1924 all Indians in the United States who had not already become citizens were made citizens of the United States (Prucha 1984, vol. 2, p. 973). The second time Indians are mentioned is in the commerce clause, Article I, Section 8, “The Congress shall have the power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” (emphasis added). Relations with Indian tribes, like those with foreign governments, are reserved for the Congress, not the states, and tribes have a direct relationship with the federal government.

INITIAL CONDITIONS IN NORTH AMERICA AND AUSTRALIA

As already noted, in the Australian legal system all land was originally “terra nullius.” This meant that no private title to land before 1788 was legally recognized and all private title to land was ultimately derived from grants to individuals by the English crown after that date. By contrast, British colonial authorities in North America and in New Zealand treated native peoples as having “aboriginal rights” to land that they occupied before the coming of English settlers (Lester and Parker 1973, p. 189). The British in Australia, however, were not alone in failing to recognize the land rights of hunter-gatherers. The Spanish, for example, recognized that Indians in the Americas had a claim to land they used for farming or pasturage, but generally did not recognize claims to territory used by hunter-gatherers (Royce 1896, p. 541).

Australia was initially settled by the “first fleet” that arrived in Botany Bay in New South Wales, Australia, in 1788. The eleven ships brought soldiers and administrators along with prisoners to establish a penal colony on the presumably thinly populated continent. The military had the task of setting up and operating the penal colony and controlling the
activities of the prisoners. The native peoples they encountered seemed few in number and technologically backward to them. The easiest course of action was to treat the whole continent as owned by the crown and to try to keep settlers off crown lands unless they received permission to settle from the government. There was a large military presence with vastly superior weapons relative to the aborigines and the military is paid to fight. Thus the incentive to keep peace with the native population by signing treaties or buying land was reduced compared to North America or New Zealand. The fact that the aborigines were hunter-gatherers was also important. Stuart Banner argues, “The absence of aboriginal farms was crucial, because the British were heirs to a long tradition of thought associating the development of property rights with a society’s passage through specific stages of civilization” (Banner 2005a, p. 101).

Reformers in the 1830s and 1840s challenged the legal doctrine that native people had no legal claim to the land, but without success. According to Banner (2003b, p. 129), by the 1830s “every landowner in Australia had a vested interest in terra nullius. To overturn the doctrine would be to upset every white person’s title to his or her land.” For example, in 1835 a group of Australians led by John Batman claimed a territory of 200,000 hectares acquired from the Kulin people for goods and the promise of payment of an annual rent. The minister for the colonies dismissed it on the grounds that “such a concession would subvert the foundation upon which all property rights in New South Wales at present rest” (Macintyre 1999, p. 68).

Why didn’t English settlers in North America similarly just take possession of Indian land? It would be logical, given self-interest and the feudal tradition that is the basis of the common law. According to one popular textbook on American Economic History, “In theory, all English land belonged to the king. . . . According to English feudalism, all land ownership was a grant for services from the king” (Hughes and Cain 2003, p. 11).

But in North America this theory ran into obvious contradictions. Indians were already farming the land when English settlers arrived. Natural law philosophers such as John Locke saw farmers as having property rights that needed to be respected. Further, there was also the practical issue that Indians were a serious military threat. The first North American
English colonies were settled by small private ventures authorized by the crown. European weapons in the seventeenth century were crude and not that superior to Indian weapons, which meant that the natives could be a serious military threat. Moreover, Indians quickly learned that there was competition for their support in wars between European powers, just as Indians sought allies against enemy tribes.

Indians were also often willing to sell land. European diseases arrived before English settlement, leading to a massive loss of population that left idle improved land that Indians did not need. Once a system of buying land from Indians was in place, however, Banner argues it was hard to abolish. In the 1680s the imperial government argued that “from the Indians noe title cann be Derived.’ The result was uproar, led by some of the most prominent people in New England. If a purchase from the Indians could not serve as the root of a valid land title, declared a group of Boston merchants, then ‘no Man was owner of a Foot of Land in all the Colony.’ The imperial government had to back down” (Banner 2005a, p. 131).

Banner’s view is not accepted by many other scholars. Juricek (1989), for example, argues instead that these private transactions were tolerated but never really recognized as part of the law. He concludes that “in the official English view Indian land rights were neither sovereign rights nor civil rights, but were mere ‘natural’ rights . . . since Indians did not ‘own’ the land in a sense recognized by English law, no Englishman—not even the king—could ‘buy’ it from them. . . . Indian rights were not transferred to the English but eliminated—hence the later expression, ‘extinguishment of Indian title’” (Juricek 1989, p. xxiv). In either view, however, aboriginal people in North America had a claim to land that British could not ignore.

**The Establishment of “Indian Territory” and Indian Property Rights in British North America**

Another institution that developed in North America, but not in Australia, was formal negotiations with tribal governments. According to Francis Prucha, the leading historian of Indian-white relations,
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The eighteenth-century treaties with the Iroquois, for example, were dramatic documents indicating a shrewdness and eloquence on the part of the Indians that were often a match for the self-interest of the whites. . . . It is in the treaties that one sees best the acceptance by Europeans of the nationhood of the Indian groups that became a fixed principle in the national policy of the United States. (Prucha 1984, vol. 1, p. 17; emphasis added)

The British treated tribes in other colonies in much the same way.

But treaties did not eliminate costly friction on the frontier. “Conferences between the Indians and the Albany Congress in 1754 emphasized the point. . . . ‘We told you a little while ago,’ said one speaker for the Mohawks, ‘that we had an uneasiness on our minds, and we shall now tell you what it is; it is concerning our land’” (Prucha 1984, vol. 1, pp. 17–18). These frictions and many others led to conflict on the frontier.

To reduce the problem of warfare on the frontier, the British government began to take Indian affairs out of the “incompetent” hands of the colonials in 1755 (Prucha 1984, vol. 1, p. 21). The end of the war with France in 1763 was accompanied by a rebellion on the frontier led by Chief Pontiac. After the costly suppression of the rebellion, the imperial government issued the Proclamation of 1763. The proclamation reserved for Indian nations “all the Lands and Territories lying to the Westward of the Sources of the Rivers that fall into the Sea from the West and North West” (cited in Prucha 1984, vol. 1, p. 24).

The Proclamation of 1763 was a direct statement by the king (not just the Privy Council) and affirmed two important principles. The first was that Indians had a claim to territory, not just land that they farmed, based on aboriginal occupancy. Secondly, only the crown had the right to acquire land from the tribes, not colonists or groups of them. It also established the borders of Indian country. The seriousness with which the British and Indians took these agreements is illustrated by the many treaties and laws negotiated by the British. A recent edited collection of laws and treaties comes to 20 volumes (Vaughan 1979–2003).

Why is there no equivalent of the Proclamation of 1763 in Australian history? One reason is that the British had no European rivals in Australia.
This meant that there was no outside power to provide the aborigines with guns and no competition for alliances with native peoples. Nor did the aborigines acquire horses in large numbers, as the plains tribes did with deadly effectiveness. This was critical. Equestrianism was embraced by Indian tribes in the plains after roughly 1780. Indian tribes on the plains acquired horses from the Spanish by raiding and trade, and feral herds began to roam the Great Plains. This totally transformed the balance of power in the western United States (Hamalainen 2004). Horses allowed plains tribes, especially the Lakota, to dominate other tribes and to engage in effective guerrilla warfare against white settlers. Aborigines engaged in pedestrian warfare against mounted settlers were far less effective.

From the point of view of British officials, a greater problem for British authority in Australia would have been to anger British settlers by preventing the profitable expansion of the production of wool. The example of the American Revolution, where the Proclamation of 1763 that stopped settlers from moving west was a major grievance of the colonists against the British crown, would have been clearly in the minds of British authorities. Interactions with the native peoples by Europeans in Australia were dominated by sheep herders pushing into aboriginal territory and establishing vast estates controlled by “squatters.” The colonial government tried to limit settlement, but this was largely unsuccessful (see Weaver 1996; Attard 2006). The wool that these stations produced became the leading export of the Australian economy and the driving force for the economic growth of much of Australia from 1820 to 1850—described as Australia’s “pastoral age” (Jackson 1977, p. 4). Overly aggressive actions to hinder the expansion of the sheep industry onto crown lands could have led to disruptions in output and conflict on the frontier between settlers and the crown.

THE COEVOLUTION OF U.S. INDIAN POLICY AND INDIAN TRIBAL RESPONSES TO EUROPEAN SETTLEMENT

Following the American Revolution, there was temptation in the United States to move toward a system closer to what was evolving in Australia at the same time. Under the Articles of Confederation, states had consider-
able independent authority, and some states treated western tribes as defeated enemies who had lost the war along with their British allies, thereby forfeiting their claim to territory (Perdue and Green 1995, pp. 7–8). Unlike Australia, the states recognized Indian rights to land but argued these rights had been forfeited during the Revolutionary War. This led to warfare along the frontier as settlers pushed into lands occupied by Indians. This policy proved costly and unworkable and led to a return to the British practice of negotiating treaties with tribes to cede their claims to western lands.

After the passage of the Land Ordinance of 1784, much of the fighting was in federally controlled territory, and, as noted above, the U.S. Constitution of 1789 placed relations with Indian tribes in the hands of the federal government. Henry Knox, the first secretary of war after the adoption of the Constitution and the man in charge of President George Washington’s Indian policy,

was convinced that the encroachment of settlers and others onto their (Indian) lands was the primary cause of war on the frontier and that . . . the federal government had a moral obligation to preserve and protect Native Americans from the extinction he believed was otherwise inevitable when “uncivilized” people came into contact with “civilized” ones. Knox’s policy and those that followed have been called “expansion with honor.” (Perdue and Green 1995, p. 10)

THE CREATION OF AN INDIAN FRONTIER
BEFORE 1840

The attempt to pursue a peaceful and honorable solution in dealing with Indians was confronted with the eager desire of many white settlers to acquire Indian land in fertile farming areas. Serious Indian wars continued east of the Mississippi until after the end of the war of 1812 with Great Britain and its aftermath. By 1820 most tribes north of the Ohio River had been defeated and the policy was to move many of these tribes to new territory west of the Mississippi River. Indians who were willing to give up “the hunt” and agree to hold title under state law could remain. The result was an Indian frontier where Indian tribes had the land west of the Mississippi and whites land to the east. Each tribe had it own

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relationship with the federal government and its own territory and there were frequent conflicts between groups of Indians in the west.

In general, proponents of removal argued that moving Indians away from whites was a practical and a humanitarian solution. A humanitarian argument for removal was made by Lewis Cass, the leading scholar of Indian languages of his day. Anthony Wallace concludes that, in Cass's view,

"they" (i.e., the [Indian] men) were ill adapted to sedentary civilized life and languished in indolence and vice when unable any longer to hunt and fight. The only solution was to remove Indians to the forests and plains west of the Mississippi, where they could either choose to return to their former way of life in the untrammelled hunter state or to gradually embrace civilization. (Wallace 1993, p. 48)

Wallace is critical of the factual basis of Cass's views, but he notes, "Many of the smaller [Indian] communities, particularly in the North, were slums in the wilderness." Wallace also points out that other communities in the southeast had made impressive progress as farmers and had established settled communities which those who pushed for the removal of tribes to the west tended to ignore.

Removal was not without its critics in the 1830s. Opposition to removal of the "Five Civilized Tribes" from the southeast was centered in the northeast among opponents of President Andrew Jackson. The most notorious example of forced removal is that of the Cherokee Indians in the southeast. The crisis came to a head in Georgia. Georgia had a unique history. It was one of the original thirteen states and its original territory stretched all the way to the Mississippi River. In 1802 Georgia was the last state to cede its western lands to the federal government. Under the terms of the 1802 agreement with the state of Georgia, the federal government agreed to move Indians from the new boundaries of the state as soon as it could reach agreements with the tribes. Settlement in Georgia was originally confined to the coast and the land along its border with South Carolina. Over time, the Creeks ceded lands in Georgia and moved west.

But the Cherokee Nation successfully put off removal for years in close alliance with members of Congress from the Northeast. The Cherokee invited religious groups in the Northeast to set up schools in their
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territory in return for being allowed to preach the Christian religion. They also established a written constitution, modeled on that of the United States, and had an elected legislature. By 1828 the cause of the Cherokee and other southern tribes was taken up by opponents of Andrew Jackson, who were in the process of coalescing into the new Whig party. Jackson made removal of the tribes from the southeast a key goal of his administration. The vote to authorize removal passed in the House of Representatives by a five-vote margin out of 199 cast (Carlson 2006). When the state of Georgia and President Jackson pressed to move the tribe, the Cherokee appealed to the Supreme Court. They were represented by William Wirt, a former attorney general of the United States. With the president and the state of Georgia both determined to have the Cherokee leave, the Supreme Court was faced with a constitutional crisis. The Court did not block removal, but made two landmark rulings defining the rights of tribes in the cases of the *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832). In the first of these cases Chief Justice Marshall defined Indian tribes as “Domestic Dependent Nations,” and both cases established legal principles relied upon and expanded by lawyers representing Indian tribes ever since.

But even as it authorized removal, Congress clearly recognized that Cherokee and other tribes had a right to their lands in the Southeast and that the tribes had to be compensated for land taken from them. The final treaty with the Cherokees was signed by a minority faction in the tribe that saw removal as inevitable. Once in Oklahoma, the Cherokee and the other “Civilized Tribes” created self-governing republics which existed until the 1890s. Throughout the debate over the removal of tribes to the West, members of Congress took pains to deny that Indian tribes had sovereignty over their territory, but their ownership of the land, especially land that was cultivated, was never in doubt.

Did it matter that Indians had rights to land, given the ability of the federal government to pressure them to move west of the Mississippi River? The answer is yes. This is not a defense of the forced removal of the Cherokees in 1839, but simply an argument that if they were going to be forced to move, it was good to get a legal right to the new territory in return. By contrast, under Australian law at that time, there would have
been no need to do such a quid pro quo with native peoples, because they legally did not own the land they occupied. If the lands became valuable, the land could simply be taken for other purposes and the inhabitants moved elsewhere (see Lester and Parker 1973, p. 190).

The Creation of the Reservation System

The next major institutional development was Indian reservations, an institution that has persisted to this day. The removal policy as it existed in the years after 1820 theoretically created a permanent “Indian frontier.” Indians who lived to the west of that line were to receive goods and be provided with education and protected from the “vices” of white civilization. But the population growth of the United States and the acquisition of vast territory after the Mexican-American War in 1848 made that solution unworkable. Settlers pushed west across the Mississippi River into lands once reserved for Indians. This created pressure to open lands to white settlers while continuing the idea of protecting Indians on lands reserved for their use until they were ready for assimilation.

After 1846 the Office of Indian Affairs began a policy of negotiating with western tribes to establish reservations. After the movement of the Office of Indian Affairs from the War Department to the Department of the Interior in 1849, this movement became more pronounced. Earlier settlements with tribes who had agreed to live in peace with their white neighbors, such as the Iroquois, had resulted in pockets of peaceful Indians owning land under state jurisdiction. These are referred to as reservations as well, but they were not part of a general policy of creating federally recognized reservations.

The reservations were designed to keep the peace between aggressive tribes on the one side and white settlers and peaceful tribes on the other. The treaties creating reservations called for Indians to surrender some of their territory in return for fixed borders and treaty goods and supplies as well as education. Of course much land was opened to white settlement, but substantial amounts remained in Indian hands. The treaties were seen as both practical and humane. For example, the commissioner of Indian affairs in 1856 saw the reservation system as a way to prevent “these poor denizens of the forest [from being] blotted out of existence” (cited in...
Prucha 1984, vol. 1, p. 317). This reflected a view also expressed earlier by Thomas Jefferson that Indians should be helped to become settled agriculturalists. Interestingly, initially reservations were seen as only a temporary solution. Once a tribe had agreed to live on a reservation, the federal government appointed an agent to interact with the tribe and distribute promised food ("rations") and provide education, including education in farming. Many treaties contained clauses calling for the future privatization of the reservations by dividing land among individual members of the tribe (allotment), giving them title (in fee simple) to the land, and ending federal supervision. After the American Civil War (1861–1865), President Grant in 1869 launched a so-called Peace Policy which elaborated this policy. His policy was to push for treaties with western tribes to establish reservation boundaries. On the reservations Indians were to be assisted by agents appointed from members of Protestant religious denominations. If Indians "left the reservation" without permission, they were under the army's authority and could be rounded up and brought back (Prucha 1984, vol. 1, pp. 501–533).

The reservation system was a practical solution forged in the context of the movement of settlement west of the Mississippi River. Many settlers were attempting to pass through the plains on their way to land on the West Coast in what is today Oregon and Washington. But to do so they had to pass through territory controlled by aggressive Plains Indian tribes. After 1780 the horse, first acquired from the Spanish by raiding or trading, and guns, acquired by trade, led to dramatic changes in the West as equestrian tribes such as the Cheyenne and later the Lakota came to rely on hunting buffalo and fighting while mounted. Plains tribes fought with sedentary tribes and each other and formed new alliances. Their mobility made them a formidable military force in the West, even though whites greatly outnumbered Indians (see Prucha 1984, vol. 1, p. 493; Hämäläinen 2004). Confining both warlike and more peaceful tribes to reservations came to be the dominant tool for trying to bring peace to the West.

The tribes themselves gradually recognized boundaries of reservations. Legally, white settlers could only acquire land outside the boundaries of these reservations. Indians in the West at times fought against being
confined to reservations (Utley 2003), but as the title of an important work on the subject says, reservations were an “alternative to extinction” (Trennert 1975; Prucha 1984, vol. 1, p. 317). As the history of California Indians discussed below illustrates, the alternative to reservations could be extinction.

The reservation system was far from perfect, of course. Substantial amounts of land were removed from Indian control over the years and the failure to deliver all the promised goods because of fraud, theft, and outright reneging was a persistent problem. But in the treaty system and on the reservations, Indian tribes developed institutions to negotiate with the federal government and promote their interests. Once created, Indian reservations proved to be a resilient institution that still exists and is important to Indians today. Reservations persist despite the announced intention of federal policy makers from 1887 to 1934 and again from 1946 to 1960 to abolish reservations (see Carlson 1981; Fixico 1986; Prucha 1984, vol. 2). They are governed by elected officials and subject to tribal and federal laws unique to reservations.

In 1871 the practice of having treaties approved only by the Senate was replaced by a system where laws regarding Indians were passed by both houses of Congress. This came about because members of the House of Representatives had objected to being excluded from legislation affecting Indians in their states (Prucha 1984, vol. 1, p. 530). The end of treaties, however, did not mean that Indian tribes no longer could have land added to their reservations. After the 1870s, land from the public domain was transferred to tribes in cases where there was undeveloped land and a tribe lacked sufficient resources to subsist. These transfers were the result of congressional action or executive orders of the president transferring federal land to a tribe. These have been called “treaty substitutes” (Banner 2005b, p. 252). The amount of land transferred was at times extensive.

Indian tribal lands were something of a legal anomaly within the U.S. legal system, but tribal land was still a property right. Indians had the support of reform groups in the Northeast, and that gave them leverage on Congress and the courts. Congress was reluctant to recognize tribes as being sovereign, but at the same time judges and courts tended to be
conservative on issues related to property. Courts did not recognize as legal the taking of Indian land without compensation or some kind of an agreement.\(^3\) Any act that arbitrarily took land from Indians was a threat to property rights in general.\(^4\) Further, there were active and influential supporters of Indian rights in the eastern states trying to influence members of Congress and the courts to support Indian welfare.\(^5\) Some of these groups grew out of the earlier antislavery movement. There were a total of 155 million acres of Indian land under federal supervision in 1881 (Carlson 1981, p. 183). Figure 5.1 shows Indian reservations in 1880.

**DID RESERVATIONS MATTER? CALIFORNIA AS A U.S. VERSION OF "TERRA NULLIUS"**

Suppose, as in Australia, the United States had not recognized tribes as owning land and that all land was open to settlement. What if there were

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no reservations? What might have happened? What difference would it have made? As already noted, some scholars have seen the reservation system as an “alternative to extinction.” California provides a “natural experiment” to see what might have occurred had American settlement occurred without recognizing Indian land rights. As noted earlier, under Spanish and later Mexican law, Indian land was not recognized unless it was tilled or used as pasture.

The comparison to Australia is apt for several reasons. First, the native peoples in California and Australia were not farmers at the time of European contact. Most were hunter-gatherers who had complex patterns of using plants and animals to survive. Second, Indians in California were divided into several language groups and typically lacked a centralized tribal organization. This is similar to the aboriginal groups settlers found in Australia. Third, until 1848 the legal systems in both Australia and Mexican California did not legally recognize aboriginal claims to territory used for a hunter-gatherer economy. Fourth, California and Australia both experienced gold rushes which brought settlers into native controlled lands; and fifth, in both California and Australia settlers moved into areas with weak control by the central government.

California had the highest population density of any Indian culture area in North America north of Mexico (Ubelaker 1988, p. 290), but “the cultural pattern was a complex mosaic of small territories. These cells, which were particularly small in northern California, were filled by about five hundred culturally diverse independent communities speaking nearly fifty languages belonging to at least six families” (Snow 1966, pp. 176–177). Technically the tribes were hunter-gatherers who gathered resources such as acorns from their territory in complex substance systems. “Each village and, in less settled areas, each wandering band managed its own affairs without regard to the others” (Underhill 1971 [1953], p. 255). The description of Indians in California is somewhat similar to the types of economic activity found among the aboriginal peoples of Australia. The Indians in the California cultural area should not be confused with the Northwest Coast Indians farther up the Pacific coast, who harvested salmon and who, by comparison with California Indians, had a relative
surplus of food and a more complex material culture (see Underhill 1971 [1953], chaps. 12 and 13).

The southern half of what is today California was settled relatively late by the Spanish. In part to spread the gospel and in part to defend their territory from the British and the Russians, the Spanish friars entered California to establish a series of missions. Beginning with San Diego in 1769, Franciscan friars led by Father Junipero Serra established missions along the coast, ending in San Francisco Solano, twenty miles north of San Francisco in 1823. Indians near the missions were gathered on mission lands to be Christianized and taught to be farmers, sometimes by force. According to Underhill, “Though they existed in full power for only about sixty years, they (the missions) changed the life of the Indians forever.” When the mission system ended, it proved impossible for Indians to go back to their previous way of life. The missions were secularized in 1834 and the stated Mexican policy was to give land to Mission Indians, but this did not happen. Instead, the Mission Indians became peons working on the land of Mexican landlords (Underhill 1971 [1953], p. 84).

East and north of the modern city of San Francisco, first Spain and then Mexico exerted little control. Tribes outside Mexican control continued to hunt and gather as before. According to Ubelaker, as late as 1850, the Indian population of California was 82,980, down from about 200,000 in 1800. But the end of the Mexican-American War and the discovery of gold proved disastrous for California’s Indians. By the Treaty of Guadalupe Hidalgo, the 1848 treaty that ended the war, Mexico ceded California to the United States.

Gold was discovered in California a few months before that treaty was signed, but the news had not reached the treaty negotiators (Clay and Wright 2005). The discovery of gold in central California led to a rapid influx of miners into California. Mining law in California was in a state of limbo because Mexican law with respect to mining had been suspended in the gold country by U.S. officials. There is a lively literature discussing how a new system of property rights was created in gold country (see Umbrecht 1977; Clay and Wright 2005; Clay, this volume). The fate of Indians
in California, however, is usually not mentioned in these accounts, probably because Indians had already been driven out of the area where gold was being mined. Neither Spain nor Mexico recognized California Indians as controlling any territory, and American settlers did not either. The result was the near annihilation of these small bands as they clashed with the new settlers.

An initial attempt to create Indian reservations in California failed. In 1851 the federal government authorized three commissioners to travel throughout California and negotiate treaties with tribes. The commissioners had an immense task and lacked the language skills to fully communicate with the people with whom they were negotiating. The reservations they proposed are shown in Figure 5.2. These treaties were never ratified by the Senate, in part because of the opposition of California’s senators who did not want territory closed to them and who had little respect for California’s Indians (Prucha 1984, vol. 1, pp. 386–67; Lamar and Truett 1996, p. 98).

Thus Indians in California were left to the mercy of a state government dominated by settlers who often saw Indians as thieves who raided their farms and ranches. The settlers in the 1850s and 1860s organized militia and attacked Indians to stop these raids (Lamar and Pruet 1996, p. 99). According to Prucha (1984, vol. 1, p. 381), “The relations of the States and Indians in California were particularly disastrous, for the attempt of the federal government to protect them through the treaty machinery was abortive, and the Indians themselves were no match for the aggressive and often lawless gold seekers who flooded the region in 1849 and after.” Lamar and Truett (1996, p. 98) conclude that “through the combined effects of disease, starvation, malnutrition and simple homicide, the Indian population plummeted from 150,000 in 1845 to 35,000 in 1860.” Similarly, Thornton (1987, p. 109) concludes that “primarily because of killings, the California Indian population ... decreased almost by two-thirds in a little more than a single decade from 100,000 in 1849 to 35,000 in 1860.”

Ultimately a few reservations were established in the north outside the gold country. Beginning in 1870, Mission Indians were granted small reservations known as rancherias. In general, however, “the California experience was outside the main course of reservation history. Indians
were allowed no clear title to land and . . . presented quite a different situation from examples such as the Sioux reserve in Dakota” (Prucha 1984, vol. 1, p. 392).

The population decline in California was by far the steepest of any Indian group in North America, “even though they [the California Indians] were among the last populations to sustain major disease impact” (Ubelaker 1988, p. 291). There were only 14,825 living members of California tribes in 1900, 7.4 percent of the population at first contact with Europeans. To be clear, this estimate is of the entire population of this cultural group. By 1940, the total estimated population was only 10,000, or less than 3 percent of the population in 1500. By contrast, the population of Plains tribes in 1900 was 52 percent of that of its 1800 level. The Indian population in 1900 in the Southwest was 73.3 percent of its 1800 level and had returned to the 1800 level by 1950 (calculated from Ubelaker 1988, p. 291). This can be seen in Figure 5.3.

**Figure 5.3 North American Indian Population as Percent of 1800 Level: Total and Selected Cultural Groups**

![Graph showing population decline](image)

Texas is an additional example of what happened when there was no recognition of Indian claims to land. American settlers had moved into the Mexican territory and fought a successful war of secession from Mexico in 1836. From that date until its admission as a state in the United States in 1845, Texas waged an aggressive policy of driving the Comanche and Kiowa Indians out of the state. The goal was largely achieved, and except for some small bands, there is very little federally controlled Indian land in the state.

Could California have turned out differently if recognized reservations had been in place before the gold rush? Counterfactual histories are tricky, of course, but suppose gold was not discovered in California in 1848, but ten years later. In that situation perhaps a system of reservations like that proposed in 1851 might already have been in place at the time gold was discovered and settlers flooded into the state. If so, perhaps Indians in California might have fared better. This is not to say that the outcome would have been just by modern standards, but it simply might have been better than what actually occurred.

The other territories in the far west settled under U.S. law, rather than Spanish law, provide evidence of what might have occurred if reservations had been created for Indians in California. An especially interesting example is the history of Indians belonging to the Great Basin cultural group, such as the Indians in Oregon, Utah, and Idaho. These peoples, like those in California, lacked a tradition of centralized authority and lived in small bands. In these states tribes were gathered onto reservations created by treaty, and later, by statutes or executive orders. In some cases tribes who were traditional enemies were placed on the same reservation. But even where groups with little in common were brought together, Indians often proved to be agents of their own destiny and formed new communities based on a fusing of different traditions and acted in their own interests (Underhill 1971 [1953]). These tribes survived and retained their territory into the twentieth century.

CONCLUSION

It seems obvious that, because native peoples in the United States and Australia were there before European settlers arrived, they in some sense
“owned the land.” But Indians and Australian Aborigines had different economic and political systems than British settlers, and in practice it proved difficult to fit native territorial rights within the framework of European legal systems. One reason is that legal systems, like other economic institutions, evolved over time in a way that is path dependent and often inelegant (David 1994). As a result the way that native rights have been treated has often been awkward and inefficient. In each country native rights were treated differently. These differences mattered. At times small differences in institutions can have important consequences for future development. Gavin Wright (2006, pp. 44–45), for example, concludes that the fact that Illinois was closed to slavery by the Northwest Ordinance of 1787 ensured that it became a free state and not a border state like nearby Kentucky, with vast implications for the course of U.S. history.

In the United States institutions evolved that allowed Indians to maintain a degree of autonomy within the federal U.S. structure that Indians value highly. The example of Australia shows that these institutions might have been developed differently. Institutions in the United States were shaped by initial conditions and the history of how Euro-Americans and the Indians responded to each other. Of critical importance was the initial existence of agriculture among American Indians and their formidable strength militarily. Once in place, however, more co-evolution took place, so that the reservation system that emerged in the middle decades of the nineteenth century was shaped by both the federal government and the response of Indian tribes and their allies. Once in place, these institutions—the relationship of Indians to the federal government including the recognition by the courts of Indian property rights and the evolution of tribal leadership among Indians—influenced how Indians interacted with white settlers and the army, even when the Indians did not pose a significant military threat. The fate of Indians in California is used as a natural experiment to show what might have happened if Indians lacked such institutions. Left without legal property rights or reservations, Indians in central California were nearly exterminated during and after the gold rush of 1849.
Although conceived of as a temporary solution, the system of reservations has persisted and become entrenched in the United States. Since 1934 most Indian land in trust status has remained under tribal or federal supervision, and some has been added to Indian control. Roughly 56.2 million acres of Indian land are under federal supervision and there are 326 Indian land areas recognized as reservations. Major reservations as of 1987 are shown in Figure 5.4. Much of this is administered by tribal governments which operate independently of state governments. Indeed, crimes committed on Indian reservations are federal crimes and handled by tribal or federal authorities, not state law enforcement agencies. This is not to say that there are not serious social and economic problems on many reservations. There are. But Indians are committed to maintain these rights. An attempt by Congress to abolish reservations in the late 1940s and 1950s, known as the “termination policy,” was fiercely resisted by Indians and their political allies. Indeed one scholar of Indian ancestry concluded, “In everything it represented, termination threatened the very core of

**Figure 5.4** Indian Reservations in the United States in 1987

American Indian existence—its culture (Fixico 1986, p. 183). President Nixon, in a message to Congress in July 1970, stated that the federal government would never again implement such a unilateral policy. This came to be called “self-determination without termination” (Prucha 1984, vol. 2, p. 112). It was a clear repudiation of the termination policy, and it is hard to imagine another attempt to eliminate tribal governments.

Since 1992 the courts in Australia have recognized that the aboriginal peoples there had a right to the land that they occupied prior to the coming of settlers. Australians have grappled in recent years with how to come to terms with that decision and other aspects of government policies toward aboriginal peoples. I am not suggesting, however, that Australia simply model its policies on those of the United States. An implication of this chapter is that useful institutions suitable to Australia would need to reflect the common history of aborigines and white Australians.

NOTES

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2. Prior to 1924, many individual Indians were granted citizenship when their reservations were allotted (privatized) by special treaties (Carlson 1981).

3. The Supreme Court decision in Lone Wolf v. Hancock (1904) allowed the federal government to divide a reservation into private allotments given to members of the tribe with surplus lands sold to whites. But even then there was no doubt that Indians owned the land—the rationale was that the federal government was acting as a guardian for Indian property (Prucha, 1984, vol. 2, pp. 775-776).

4. This is still true. In 2009 the federal government agreed to pay Indians $1.4 billion for mismanaging Indian lands held in trust (Fahrenholz 2009).

5. Unfortunately, at times these reformers supported well-intentioned policies that in fact harmed Indians. Most notable was the General Allotment Act of 1887 (see Carlson 1981).

6. Thornton’s estimate of the population of the Indian population in 1850 is higher than that of Ubekker (1988, p. 292), who gives an estimate of 82,980.

REFERENCES


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