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Amy Sender

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AUSTRALIA'S EXAMPLE OF TREATMENT TOWARDS NATIVE TITLE: INDIGENOUS PEOPLE'S LAND RIGHTS IN AUSTRALIA AND THE UNITED STATES

I. INTRODUCTION

With the end of the twentieth century quickly approaching, the world's focus has shifted from a capitalist, gain-seeking mentality towards a sympathy and respect for needy and less fortunate humans. Consequently, a global emphasis has been placed on indigenous people¹ and their rights.² Remarkably, 1993 was proclaimed the International Year of the World's Indigenous People by the United Nations,³ and the

1. The U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities has defined indigenous people as:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

José R. Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, vol. 5, para. 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986). See also John Skinner, *Native People, Foreign Laws: A Survey Comparing Aboriginal Title to Property in the United States and Australia*, 19 SUFFOLK TRANSNAT'L L. REV. 235, 235 n.2 (1995). For a further discussion on the definition of indigenous people, see Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 663-64 n.4 (1990).

2. A concern for indigenous people's rights has recently gained a place on the international human rights agenda. See S. James Anaya, *Indigenous Rights Norms In Contemporary International Law*, 8 ARIZ. J. INT'L COMP. L. 1, 4 (1991); Williams, *supra* note 1, at 663-64 n.4 (discussing the trend of the international community, comprised of indigenous and non-indigenous scholars, towards actively exploring the topic of indigenous people's rights in the context of international law).

3. G.A. Res. 45, U.N. GAOR, 45th Sess., 69th plen. mtg. at 1, U.N. Doc. A/Res/45/164 (1991). Professor McSloy observed that the U.N. declared 1993 as the International Year of the World's Indigenous People in anticipation of the expected interest that would be shown in the indigenous peoples current situation after the 1992 anniversary of Columbus' "discovery" of America. See Steven Paul McSloy,

General Assembly marked the 1990s as the International Decade of the World's Indigenous People.⁴ Today, it seems, indigenous people are gaining more influence in the international arena and an increased recognition of their rights is necessary to preserve peace within and between nations.⁵ However, the struggle to reach this level of acceptance has not been easy.

Prior to this trend of recognition, the international arena treated indigenous people solely as "subjects of the exclusive domestic jurisdiction of the settler state regimes that invaded their territories and established hegemony during prior colonial eras."⁶ This perception brought forth a concern for indigenous people's rights, specifically with respect to the land which they claim was once rightfully theirs. Indigenous people worldwide were thrust from their lands by European settlers over the course of centuries.⁷ Land was more to the indigenous people than merely a place to live. It meant even more to them than their home and livelihood.⁸ The respect and attachment that indigenous people maintained with their land was something that no modern day individual could fully comprehend.⁹ "Land ownership was intertwined with the ideal of self-determination of indigenous peoples, along with their ability to choose the extent of their participation in the lives of the na-

Back to the Future: Native American Sovereignty in the 21st Century, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 294 (1993).

4. U.N. GAOR 3d Comm., 51st Sess., 82nd mtg. at 107, U.N. Doc. A/RES/51/78 (1997). See also Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 COLUM. J.L. & SOC. PROBS. 529, 531 (1997).

5. Due to such incidents as the dissolutions of Yugoslavia and the Soviet Union, and the revolt of the Mayan Indians in Chiapas, Mexico, it seems that a focus on indigenous issues is essential in order to preserve international peace. See Steven C. Perkins, *Indigenous Peoples and International Organizations: Issues and Responses*, 23 INT'L J. LEGAL INFO. 217, 218 (1995).

6. Williams, *supra* note 1, at 664.

7. See Skinner, *supra* note 1, at 236. Approximately 300 million people in the world are indigenous. They are represented in such vast lands as New Zealand, Botswana and Norway. See Bravo, *supra* note 4, at 530 n.4.

8. See Gary D. Meyers & John Mugambwa, *The Mabo Decision: Australian Aboriginal Land Rights in Transition*, 23 ENVTL. L. 1203, 1203-04 (1993).

9. See *id.* at 1204. The English language does not do justice to the Aboriginal's sense of their land.

The Aboriginal would speak of 'earth' and use the word in a richly symbolic way to mean his 'shoulder' or his 'side'. I have seen an Aboriginal embrace the earth he walked on. To put our words 'home' and 'land' together into 'homeland' is a little better but not much.

Id.

tions that have grown up around them, their ability to preserve their unique cultural heritage without outside interference, and their ability to choose the lifestyles that they desire."¹⁰ Despite this recognized relationship between indigenous peoples and their land, it was not until the latter part of the twentieth century that efforts were made to recognize these people's land claims and attempts were made towards rectification.

Australia and the United States are two countries with mass populations of indigenous people. They are also countries with abundant natural wealth and resources. Consequently, the imbalance in the allocation of these resources among the indigenous people and the white settlers of these countries has led to significant domestic conflicts. In addition, these two countries provide a particularly useful source of comparison because they were each settled by English colonists.¹¹ Although both Australia and the United States emulated the English common law system of land ownership, they each restructured it for their own purposes.¹² These different outlooks on land ownership starkly contrast one another and provide the root of the debate on treatment towards native title which has ensued.¹³

This Note examines the struggle faced by indigenous people in acquiring their land in Australia and the United States. Section II will provide a historical analysis of how Australia has prevented its Aborigines from retaining their property, as well as the positive strides it has made in the latter part of this century towards remedying the situation. This section will evaluate the significant cases and legislation involving Aboriginal land rights and the impact that both have had on the Aboriginal community. An emphasis will be placed on the 1992 case of *Mabo v. Queensland*,¹⁴ in which the High Court of Australia abandoned the traditional notion of *terra nullius*¹⁵

10. Bravo, *supra* note 4, at 532.

11. See *infra* Sections II.A, III.A.

12. Compare *infra* Sections II.A, III.A.

13. The term "native title" describes the interests and rights of the indigenous people in their land, whether communal or individual, possessed under their traditional customs and laws. See *Mabo v. Queensland* (1992) 107 A.L.R. 1, 41 (Austl.).

14. *Id.*

15. *Terra nullius* is a Latin word which is translated as "uninhabited land." Melissa Manwaring, Recent Development, 34 HARV. INT'L L.J. 177, 177 n.2 (1993).

and acknowledged the Aborigines' rights to their homeland.¹⁶

Section III will be an analysis of the significant cases and legislation that have developed with respect to the Native Americans of the United States. Distinct to this section will be a discussion of the early treatment of Native Americans as independent nations and a historical tour of how this ideology has taken a drastic change for the worse. In this analysis, specific attention will be paid to the early nineteenth century cases adjudged by Chief Justice John Marshall, as well as the major cases and legislative battles that have ensued in the past two centuries. This section will end with a look at the future of Native American land rights and provide suggestions for improvements.

Section IV will be a comparison of Australia and the United States. Having such similar beginnings and prominent roles in today's society, Australia and the United States provide excellent sources for a comparison of native title treatment. Within this context, this Note will evaluate the legal and non-legal remedies that each country has attempted to use and extract from each worthy examples that can serve other nations in need of redress. This Note will specifically address the comparisons of each country's treatment upon colonization and the effects that the accessibility to the courts has had on each nation.

Section V of this Note will propose that although both countries still need major improvements, Australia has gained better strides in this arena within the last decade, has less of a firm history, and a greater willingness to be flexible. Therefore, Australia sets the finest example of treatment towards native title, and the rest of the world should follow her lead.

Terra nullius has been used as an international law doctrine to essentially extinguish the title of the original inhabitants based on the principle that such inhabitants were not of a sufficient level of civilization to "own" the land effectively. See Bravo, *supra* note 4, at 549 n.110. Simply put, it is defined as territory "practically unoccupied." See *Mabo*, 107 A.L.R. at 4.

16. See *Mabo*, 107 A.L.R. at 2.

II. ABORIGINE'S STRUGGLE IN AUSTRALIA

A. History

Long before Captain James Cook claimed Australia as a territory of England in 1788,¹⁷ the Aborigines were living on the land and using it as both their livelihood and a source of identity.¹⁸ Yet, from the late eighteenth century on, England consistently dominated and deprived the Aboriginal communities of their rights. Unlike its practices with other colonized areas, England did not sign any treaties with the Aborigines or provide them any compensation for their losses.¹⁹ Instead, the implementation of English law in Australia in 1828, coupled with the doctrine of *terra nullius*, left the Aborigines dispossessed of their land.²⁰ An example of this is seen in the adoption of the Pacific Islanders Protection Acts,²¹ which ended the slave trade and gave the English court jurisdiction over its people in the Western Pacific Islands.²² Similarly, in 1879 Queen Victoria officially annexed the Murray Islands to Australia.²³ All the while, the British government completely ignored the rights of the Meriam people inhabiting the Murray Islands and disregarded the international law detailing how to acquire sovereignty.²⁴ Nonetheless, England was found to have acquired sovereignty through the doctrine of *terra nullius* because it was viewed that no other owners existed.²⁵ England was legally able to do this because the doctrine of *terra nullius* had been expanded to include ownership of land already inhabited so long as the original inhabitants were so

17. See Bravo, *supra* note 4, at 549.

18. See Meyers & Mugambwa, *supra* note 8, at 1204.

19. See Bravo, *supra* note 4, at 550. For a comparison of England's treatment upon colonization, see *infra* Section III.A.

20. See Bravo, *supra* note 4, at 550. The concept of *terra nullius* was so ingrained in the settler's psyche that when Australia adopted its own Constitution in 1900, the only references to Aborigines were to forbid the Parliament from making any laws with respect to them, AUSTL. CONST. ch. I, pt. V, § 51 (xxvi) (altered 1967), and to deny their inclusion in Australia's census, *id.* ch. VII, § 127 (repealed 1967). See also *Mabo*, 107 A.L.R. at 80.

21. Pacific Islanders Protection Act, 1872, 35 & 36 Vict., ch. 19 (Eng).

22. *Id.*; Pacific Islanders Protection Act, 1875, 38 & 39 Vict., ch. 51 (Eng).

23. See *Mabo*, 107 A.L.R. at 1, 10.

24. International law recognizes three ways of acquiring sovereignty: conquest, cession, and occupation of territory that is *terra nullius*. See *id.* at 21.

25. See *id.* at 27.

"primitive" that they did not have any of their own ascertainable laws and no other actual claims to the land were known.²⁶

In addition to extinguishing the Aborigine's title to their land, European colonization practically destroyed the Aboriginal culture.²⁷ Prior to colonization, it is estimated that 300,000 Aborigines, speaking 600 dialects, inhabited Australia.²⁸ By the beginning of the twentieth century, it is believed that seventy-five percent of the population was killed by either infectious diseases brought into the country by settlers or by violent attacks instigated by settlers.²⁹ As the Aboriginal population diminished, the Aborigines were forced into reservations, which were located in desolate areas secluded from the European society.³⁰

B. Significant Early Challenges

Given the tumultuous relationship between the Aborigines and English settlers, Aborigines brought many suits against the Commonwealth government to try to regain their rights to the land. Unfortunately for the Aborigines, these suits were consistently unsuccessful.

The first challenge to the doctrine of *terra nullius* was made in the 1970s, nearly 200 years after the Aborigines were deprived of their land. This case, entitled *Milirrpum v. Nabalco Pty. Ltd.*³¹ (or the "Gove" case), was brought by the Yirrkala Aborigines of the Gove Peninsula, which is located in the Northern Territory of Australia. In their suit, the Yirrkalas people applied to the Supreme Court of the Northern Territory for an injunction to stop bauxite mining taking place on their land, as well as judicial recognition of their right to the land and compensatory damages.³² In line with their unwillingness to recognize Aboriginal land rights, the Court rejected all the Aborigines' claims.³³ Justice Blackburn opined that Australia

26. See *id.*

27. See Bravo, *supra* note 4, at 550.

28. See *id.*

29. See *id.* at 551.

30. See *id.*

31. (1971) 17 F.L.R. 141 (Austl.).

32. See *id.* at 141-42, 144.

33. See *id.* at 293.

did not recognize communal native title, that the Yirrkalas people did not sufficiently show that they had a continual connection to the land since 1788, and that their relationship to the territory did not create a right of property.³⁴ This case holds historical significance, however, because it held that Aboriginal rights could exist, but they must be created by statute.³⁵

The "Gove" case was also significant because it gave impetus to the movement towards recognizing Aboriginal land rights and resulted in the passage of the Aboriginal Land Rights (Northern Territory) Act³⁶ in 1976 (Land Rights Act). The Land Rights Act gave an Aborigine statutory title to land once he proved that he had owned that land. However, it was limited in its application because a claim had to be filed under the Act by June 5, 1997,³⁷ and the Act was only applicable to land within the Northern Territory of Australia.³⁸ Subsequent to the adoption of the Land Rights Act, Aboriginal reserve lands within the Northern Territory were put into land trusts,³⁹ where the Commonwealth government continued to exercise a significant amount of control.⁴⁰ The land transferred to such trusts constituted approximately eighteen percent of the Northern Territory.⁴¹

Another important case brought by the Aborigines under a similar challenge to their land was *Coe v. Commonwealth of Australia*.⁴² In 1979, Coe, an Aborigine, instigated a sweeping challenge on behalf of all indigenous Australians against the Australian and British government, seeking injunctive relief preventing anyone from using land that the Aborigines were

34. *See id.*

35. *See Skinner, supra* note 1, at 242.

36. Aboriginal Land Rights (Northern Territory) Act, 1976, ch. 119 (Austl.).

37. Bravo, *supra* note 4, at 552.

38. *See* Aboriginal Land Rights Act, § 4. The Act only applies to the Northern Territory because, although it has some aspects of self-government, the Northern Territory is still not a state. Therefore, the Commonwealth can pass general legislation for it. *See* Bravo, *supra* note 4, at 552 n.135.

39. *See* Bravo, *supra* note 4, at 553.

40. *See* Matthew C. Miller, Comment, *An Australian Nunavut? A Comparison of Inuit and Aboriginal Rights Movements in Canada and Australia*, 12 EMORY INT'L L. REV. 1175, 1195 (1998).

41. *See* Bravo, *supra* note 4, at 552-53.

42. (1979) 24 A.L.R. 118 (Austl.).

currently using.⁴³ The *Coe* case was dismissed on procedural grounds, denying plaintiff leave to amend the complaint.⁴⁴ Nonetheless, it is still a monumental case because it showed the Court that there may well be a legitimate question as to whether the Aborigines had an actual interest in the land before colonization.⁴⁵ Most notably, Justice Murphy, in his dissent, reasoned that Coe's allegation that New South Wales was conquered rather than settled was justifiable.⁴⁶ He suggested that it was possible that the Aborigines had occupied the land at the time the settlers claimed it as *terra nullius*, and, therefore, Coe should be afforded the opportunity to explore this claim.⁴⁷ Thus, although the High Court dismissed *Coe*, the case suggested that if another case was brought on narrower grounds, the Aborigines could possibly have a successful claim for native title.⁴⁸ The dissent in *Coe* provided a guideline to be followed in future cases.

C. *Mabo v. Queensland*⁴⁹

Arguably the most momentous case to come before the Australian courts⁵⁰ was brought in 1982 by the Meriam people of the Murray Islands.⁵¹ The plaintiffs in *Mabo* sought a

43. See *id.* at 120, 123. See also Manwaring, *supra* note 15, at 180-81.

44. See *Coe*, 24 A.L.R. at 120, 123. See also Manwaring, *supra* note 15, at 81.

45. See Manwaring, *supra* note 15, at 181.

46. *Id.*

47. See *Coe*, 24 A.L.R. at 137-38 (Murphy, J., dissenting).

48. *Id.* at 137.

49. (1992) 107 A.L.R. 1. (Austl.).

50. *Mabo* was an especially significant case because it was the first major case to break away from looking to English courts for precedent. Because the ultimate court of appeal for Australia is the Privy Council in London, Australia has traditionally looked to English courts rather than looking to the United States or Commonwealth courts. Here, however, the High Court drew upon cases from both the United States and Canada to support conclusions which would otherwise have been contrary to Australian law. See Peter Butt, *The Mabo Case and its Aftermath: Indigenous Land Title in Australia*, in PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 495, 496 (G.E. van Maanen & A.J. van Walt eds., 1996).

51. Eddie Mabo and four others brought a claim on behalf of the Meriam people, inhabitants of the Murray Islands, which form part of the State of Queensland, Australia, and lie in the Torres Strait between Australia and Papua New Guinea. See Dianne Otto, *A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia*, 21 SYRACUSE J. INT'L L. & COM. 65, 66 n.2 (1995). The people of the Murray Islands are Melanesian, see *Mabo*, 107 A.L.R. at 8, and different from mainland Aborigines in their cultural and social history. See Gerald

declaration that "the Meriam people [were] entitled to the Murray Islands ... that the Murray Islands [were] not and never [had] been 'Crown Lands' ... and ... that the State of Queensland [was] not entitled to extinguish the title of the Meriam people."⁵² After ten years of litigation, the High Court made a historic decision by reversing the decision in *Milirrpum* and overruling the notion of *terra nullius*.⁵³

The main issues presented in *Mabo* were whether the annexation of the Murray Islands had vested absolute beneficial ownership and/or sovereignty of the islands in the Crown; and, second, whether native title to the Murray Islands, if it had ever existed, had been extinguished by actions that occurred after the annexation.⁵⁴ Thus, the plaintiffs argued that the interest that their ancestors enjoyed in the land before annexation survived "acquisition by the British Crown and became a dimension of the Common law," or "native title."⁵⁵ On the other hand, the defendant, the State of Queensland, argued that even assuming that common law native title existed, it was extinguished by annexation.⁵⁶

In a 6-1 decision, the High Court of Australia ruled that native title to land is in fact recognized in Australia. In accepting the concept of common law native title, the Court essentially overruled Justice Blackburn's decision in *Milirrpum*.⁵⁷ Significantly, the *Mabo* decision applies to the entire country, and not just to the Meriam Islands.⁵⁸ Justice Brennan, writing for

P. McGinley, *Indigenous Peoples' Rights: Mabo and Others v. State of Queensland—The Australian High Court Addresses 200 Years of Oppression*, 21 DENV. J. INT'L L. & POL'Y 311, 315-16 (1993).

52. See *Mabo*, 107 A.L.R. at 55.

53. See *id.* at 56.

54. See Manwaring, *supra* note 15, at 182.

55. See *Mabo*, 107 A.L.R. at 137.

56. See *Mabo*, 107 A.L.R. at 92 (Dawson, J., dissenting). There are four ways to extinguish native title: surrender, abandonment, death, and executive or legislative action. See *id.* at 83 (Deane and Gaudron, JJ., concurring). For a further discussion of extinguishment of native title, see Meyers & Mugambwa, *supra* note 8, at 1223-28.

57. See *Mabo*, A.L.R. at 77.

58. Justice Brennan writes:

[T]he validity of the propositions in the defendant's chain of argument cannot be determined by reference to circumstances unique to the Murray Islands; they are advanced as general propositions of law applicable to all settled colonies. Nor can the circumstances which might be thought to differentiate the Murray Islands from other parts of Australia be invoked

Chief Justices Mason and McHugh,⁵⁹ acknowledged that the concept of *terra nullius* was racially discriminatory and contradictory to current international law.⁶⁰ Native title remained as long as the group occupying the land continued in its customs and traditional connection with the land.⁶¹ The Court rejected Justice Blackburn's notion that property includes the right to use or enjoy the land, the right to exclude others, and the right to alienate, which the Aborigines in *Milirrpum* did not satisfy.⁶² On the contrary, Justice Brennan reasoned that "[t]he ownership of land within a territory in the exclusive occupation of a people must be vested in that people," provided that they have asserted effectively that no one else has the right to use or occupy the land in question.⁶³ In essence, the majority rejected the European based concept of property rights and found that common law native title existed for the Meriam people.⁶⁴ Thus, the plaintiffs successfully proved that their rights to the Murray Islands survived annexation and that their claim of title was not extinguished.⁶⁵

Justices Deane and Gaudron wrote a separate opinion, agreeing with Justice Brennan, except on the issue of compensation.⁶⁶ Although the plaintiffs only sought declaratory relief, Justices Deane and Gaudron felt that compensatory damages could be recovered only in situations where the common law native title was wrongfully extinguished and that the proceedings for such recovery were instituted within the applicable statute of limitations period.⁶⁷ Because native title is a legal right, it follows that the government should be required to pay for the damages that accrued by its actions.⁶⁸

of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land.

Mabo, 107 A.L.R. at 15-16.

59. See *id.* at 2.

60. See *id.* at 41 (Brennan, J., concurring).

61. See *id.* at 43-44.

62. See *Milirrpum*, 17 F.L.R. at 198; Skinner, *supra* note 1, at 242.

63. See *Mabo*, 107 A.L.R. at 36 (Brennan, J., concurring).

64. See *id.* at 56 (Brennan, J., concurring); *id.* at 90 (Deane & Gaudron, JJ., concurring); *id.* at 169 (Toohey, J., concurring).

65. See *id.* at 169.

66. See Manwaring, *supra* note 15, at 187.

67. See *Mabo*, 107 A.L.R. at 85 (Deane & Gaudron, JJ., concurring).

68. See *id.*

for the damages that accrued by its actions.⁶⁸

Justice Toohey also wrote a separate opinion. Although he reasoned that the Aborigine's rights were protected under common law, he questioned the notion that native title was an inalienable right.⁶⁹ In addition, he determined that in order for the Crown to extinguish native title, it must do so by clear and plain legislation.⁷⁰

Justice Dawson was the lone dissenter in this historic decision. He focused on the intentions of the settlers to occupy the land, rather than on the rights of the indigenous people.⁷¹ Not surprisingly, the only aspect of the majority decision that he agreed with was that compensation was not necessary when extinguishing native title.⁷²

D. Aftermath of Mabo

The *Mabo* case represents a landmark for the judicial treatment of Aborigines. Prior to *Mabo*, the issue of indigenous people's land rights was addressed only in moral, ethical and political terms.⁷³ This was the first judicial challenge to meet significant success. The *Mabo* decision could now be used as binding precedent for future Aboriginal land claims.

Although it was monumental, the decision was somewhat vague and left the Aborigines uncertain as to their specific entitlements.⁷⁴ The Meriam people were ideal plaintiffs for a successful native title suit because they were biological descendants of the original inhabitants of the Murray Islands and

68. *See id.*

69. *See id.* at 136-70 (Toohey, J., concurring).

70. *See id.*

71. *See id.* at 91-136 (Dawson, J., dissenting).

72. *See id.*

73. *See* Manwaring, *supra* note 15, at 187-88.

74. G.P.J. McGinley observed:

The result of *Mabo* was that Aboriginal claimants who wanted to establish native title would have to show that they were an identifiable community or group that had a traditional occupancy or connection with the land and that they had maintained that connection since annexation. Not clear was to what extent the claimants had to demonstrate that they had continued their original customs and traditions on the land. Once the nature of the native title was determined, the court would protect this native interest by prohibiting activities that were inconsistent with the Aboriginal traditional way of life.

G.P.J. McGinley, *Natural Resource Companies and Aboriginal Title to Land: The Australian Experience—Mabo and its Aftermath*, 28 INT'L LAW. 695, 703 (1994).

maintained their customs and traditions.⁷⁵ Other Aboriginal groups would face difficult obstacles to establish their claims of native title.⁷⁶

In response to *Mabo*, the Australian government passed the Native Title Act of 1993.⁷⁷ The Act validated all prior acts where native title was under the sole ownership of non-natives.⁷⁸ Simply stated, it had the effect of extinguishing all native title over privately owned lands. Claimants were entitled to compensation if their title was extinguished after the enactment of the Commonwealth's Racial Discrimination Act of 1975,⁷⁹ as long as they could demonstrate their connection with the land at the time of annexation.⁸⁰ The Act applied to every Australian state as of January 1, 1994.⁸¹ A significant aspect of the Act was a provision which enabled the Aborigines to negotiate with the mining companies who wished to renew their leases. However, the ultimate decision regarding mining disputes was sent to an arbitral body and not left to the Aborigines.⁸² The Act also established the National Native Title

75. See Manwaring, *supra* note 15, at 188-89. Other elements in favor of the Meriam people's claim were that they lived in community villages, and the total land they occupied was relatively small, encompassing only nine square kilometers. *Id.* See also Butt, *supra* note 50, at 496. Moreover, because the Meriam people handed down the land they occupied from generation to generation and gardening was the prime source of their survival, they had a strong claim that they maintained a long-standing cultivation of the land. See Manwaring, *supra* note 15, at 188. In view of these facts, the Meriam people lived a very different lifestyle from the nomadic Aborigines on the Australian mainland. See Butt, *supra* note 50, at 496.

76. See Manwaring, *supra* note 15, at 188-89.

77. Native Title Act, 1993, ch. 110 (Austl.).

78. See *id.* §§ 14, 19.

79. Racial Discrimination Act, 1975, ch. 52 (Austl.). The Racial Discrimination Act of 1975 was implemented to prevent bi-partisan racial discrimination in Australia. Section 9 of the Act prohibits any "person to do any act involving a distinction, exclusion, restriction or preference based on race . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom . . ." *Id.* § 9(1). Unfortunately, it has not proven effective in ending racial discrimination. See Miller, *supra* note 40, at 1195.

80. The Native Title Act uses the word "connection" but does not specify whether the connection must be physical or whether it may be spiritual. Whatever the court interprets this to mean will be recognized within the meaning of the Act. See Butt, *supra* note 50, at 505.

81. See Native Title Act, § 15(1)(b)(ii). See also Bravo, *supra* note 4, at 553-54.

82. See generally Native Title Act, §§ 26-42.

Tribunal, a mediating body, which would process and hear native title claims and fund programs to assist disputes over native title.⁸³ Claims heard by the Tribunal are not binding and provisions are made for the claims to be heard in federal court. As a result of *Mabo* and the Native Title Act of 1993, over 300 native title claims were filed with the Tribunal by 1997.⁸⁴

Although the Native Title Act was comprehensive, it failed to thoroughly address the issue of whether the Crown's act of permitting pastoral leases⁸⁵ was included in the category of "past acts" to which native title was extinguished. This issue was subsequently raised in the 1996 case of *Wik Peoples v. Queensland*.⁸⁶ In this case, the Wik and Thayorre people instituted an action contending that their title to the western side of north Queensland's Cape York was not extinguished by the grant of pastoral leases.⁸⁷ The High Court, in a 4-3 decision, ruled in favor of the Aborigines and held that the pastoral leases did not extinguish their native title.⁸⁸ In its decision, Justice Toohey noted that "inconsistency . . . renders the native title rights unenforceable at law and, in that sense, extinguished. If the two can co-exist, no question of implicit extinguishment arises."⁸⁹ In essence, the *Wik* case stands for the proposition that Aborigines can claim title to land subject to pastoral leases. However, Justice Toohey was clear in defining

83. See *id.* §§ 107-110.

84. See Bravo, *supra* note 4, at 554. These claims, however, are more significant on paper than in practice. In order to bring a successful claim, the Aborigines must prove that their rights and interests were effected and that they have maintained a connection with the land. See Native Title Act, § 223(1). This presents a problem for a substantial portion of Aborigines because they were forced to relocate and were displaced from their land in the process. As a result, only two percent of Australia's population qualify to bring native title claims. See Gilda C. Rodriguez, Note, *Wik Peoples v. State of Queensland: A Restrained Expansion of Aboriginal Land Rights*, 23 N.C. J. INT'L L. & COM. REG. 711, 727 (1998).

85. Pastoral leases are leases granted by the government to non-natives who wish to raise and herd cattle on large areas of land. This practice was prevalent in the Australian "outback," where tens of thousands of Aborigines lived. Today, it is estimated that forty-two percent of the Australian mainland is subject to pastoral leases. See Peter H. Russell, *High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence*, 61 SASK. L. REV. 247, 267 (1998).

86. (1996) 141 A.L.R. 129 (Austl.).

87. See *id.* at 136.

88. See *id.* at 132.

89. *Id.* at 184.

this victory by limiting the potential claims to pastoral lease cases where the rights of the grantee's of the pastoral leases were being balanced. In cases where inconsistent uses of the land arose between the Aborigine and the grantee of the pastoral lease, the rights would be afforded to the grantee.⁹⁰ Furthermore, even where an Aborigine was successful in his native title claim, he was not provided the same rights as an original owner of a freehold estate.⁹¹ A successful claimant was only entitled to limited use of the land, namely for such things as hunting, gathering and fishing. His rights and interest in the land were severely limited and nontransferable.⁹²

The Act also left many Australian states unsatisfied. In 1994, Western Australia, the largest state in Australia, brought a case before the High Court alleging that the Native Title Act was beyond the power of the Commonwealth and should be held unconstitutional.⁹³ It alleged that the Australian Constitution did not provide the Commonwealth with the authority to legislate land matters.⁹⁴ The High Court disagreed and ruled that the Native Title Act was constitutional, finding a general power within the "races power" section of the Australian Constitution.⁹⁵ The Court interpreted the Native Title Act as a special law which conferred this benefit.⁹⁶ Western Australia was successful, however, in proving that one specific section of the Act was unconstitutional.⁹⁷

90. *See id.* at 185.

91. *See* Rodriguez, *supra* note 84, at 728.

92. *See id.*

93. *Western Australia v. Commonwealth* (1995) 128 A.L.R. 1, 3 (Austl.).

94. *Id.* at 10.

95. *See id.* at 43-44. The "races power" section grants the Commonwealth authority to make laws regarding "[t]he people of any race for whom it is deemed necessary to make special laws." AUSTL. CONST. ch. I, pt. V, § 51 (xxvi).

96. *See Western Australia*, 128 A.L.R. at 43-44.

97. *See* Native Title Act, 1993, ch. 110, §12. Section 12 reads: "Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth." *Id.* It was held invalid for attempting to convey legislative power upon the judicial branch of the government. *See Western Australia*, 128 A.L.R. at 62-65. However, the invalidity of this section did not affect the validity of any other provisions of the Act. *See id.* at 65.

III. NATIVE AMERICAN DEPRIVATION IN THE UNITED STATES

A. *Native American Recognition Upon Colonization*

Like the Aborigines of Australia, the Native American Indians⁹⁸ of the United States have struggled to gain recognition to the land they claim is rightfully theirs. It is estimated that when Columbus "discovered" America in 1492, 900,000 to 1,000,000 Native Americans inhabited the lands that subsequently became the United States.⁹⁹ From the time of the American Revolution through 1900, the United States acquired over two billion acres of land which was previously occupied by Native Americans throughout the continent.¹⁰⁰ Because the United States is a world power, it acts as a role model for the rest of the world.¹⁰¹ Similarly, treatment of the indigenous people of the United States is particularly crucial because "[I]ndigenous Nations of North America are leaders in the effort to ensure that Indigenous Peoples are represented in international-forums."¹⁰²

Interestingly, acceptance of Native American land ownership has not always been a contentious issue. As early as the sixteenth century, Francisco de Vitoria asserted that the American Indians were the true owners of their land and had complete control over its public and private matters.¹⁰³ Furthermore, early American settlers viewed the Native American

98. The tribes of the United States have certain unique characteristics. First, the tribal nations are the only indigenous people in the United States. Second, the term "tribal status" reflects the notion of collective or group rights, as opposed to the European based trend of individualism. Third, Indians are allowed to expatriate, i.e., withdraw from their tribes and live apart from their nation. See DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 19 (1997).

99. See Bravo, *supra* note 4, at 543 n.65.

100. See *id.* at 548.

101. During her role as a U.S. representative on the Human Rights Commission, the Honorable Ada Deer observed that what was "[m]ost striking about the struggles of indigenous peoples worldwide [was] that the United States is consistently viewed as a role model in establishing and maintaining a legal framework for recognizing and working with tribes." Honorable Ada Deer, *Tribal Sovereignty in the Twenty-First Century*, 10 ST. THOMAS L. REV. 17, 22-23 (1997). Judge Deer stated that "[i]ndigenous peoples in other countries look to the United States for inspiration and leadership in their quest to attain similar recognition and respect." *Id.* at 23.

102. Robert H. Berry III, Note, *Indigenous Nations and International Trade*, 24 BROOK. J. INT'L L. 239, 256 (1998).

103. See Anaya, *supra* note 2, at 2.

territories as independent nations. U.S. legislative and judicial jurisprudence is replete with examples of early recognition of Native American sovereignty. For example, Indians are only referenced in the U.S. Constitution three times. They are specifically mentioned in the Commerce Clause,¹⁰⁴ wherefore Congress is explicitly granted the power to deal with Indian related matters. The only other instances in which they are mentioned is to omit them from the census if they fail to pay taxes.¹⁰⁵ It is clear that Native Americans were not part of the body politic of the United States so they were not addressed in any constitutional provisions. Instead, the Native American tribes were viewed as foreign nations at the inception of our Constitution.

Further indication of the international status of Indian tribes as viewed by the Framers is seen in the longstanding history of treaty making with the Indians.¹⁰⁶ Even before the signing of the Constitution, the United States had made numerous treaties with the Indians. In fact, the first treaty between the United States and the Indians, entitled the United States—Delaware Nation Treaty,¹⁰⁷ dates all the way back to 1778. Reinforcing the sovereign status of the Indians, this treaty proposed that Delaware Nation delegates become members of the Continental Congress.¹⁰⁸ Another example of Native American sovereignty is found in the Northwest Ordinance of 1787¹⁰⁹ which proclaimed that “[t]he utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be

104. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [to] regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.”).

105. U.S. CONST. art. I, § 2, cl. 3; *Id.* amend. XIV § 2.

106. A treaty is defined as an international agreement between sovereign political entities. *See generally* OPPENHEIM'S INTERNATIONAL LAW § 11 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992). The Supreme Court consistently held for two centuries that treaties entered into with the Indians were on the same level as treaties entered into with other foreign nations. In other words, treaties were viewed as the supreme law of the land. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (interpreting U.S. CONST. art. VI).

107. Articles of Agreement and Confederation, Sept. 17, 1778, U.S.—Delaware Nation, 7 Stat. 13.

108. *Id.* art. VI.

109. Northwest Ordinance of July 13, 1787 (adopted as amended at ch. 8, 1 Stat. 50 (1789)).

invaded or disturbed, unless in just and lawful wars authorised by Congress."¹¹⁰ Lastly, the Treaty with the Sioux Indians, signed in 1868, captured the spirit of this ideology by proclaiming that "no white person or persons shall be permitted to settle upon or occupy any portion of the same [unceded Indian territory]; or without the consent of the Indians . . . to pass through the same."¹¹¹

*B. The Marshall Trilogy*¹¹²

Notwithstanding this history of Native American recognition, as the United States grew in strength and power, its acceptance of Native American property rights dramatically diminished.¹¹³ Legislation and case law began to reflect this new perspective of domination over the tribes.¹¹⁴ By 1871, the United States had acquired control of ninety-nine percent of Native American land.¹¹⁵ Today, Native Americans only own 56.6 million acres of land in the entire United States.¹¹⁶

Chief Justice Marshall, although somewhat sympathetic to the Native Americans for his time period, was a major implementer of judicial policy and treatment towards Native American title. The first case in the Marshall trilogy, *Johnson v. M'Intosh*,¹¹⁷ marked a significant change in the treatment of Native Americans. In *Johnson*, Justice Marshall applied the

110. *Id.*

111. Treaty with the Sioux Indians, Apr. 29, 1868, U.S.—Sioux, XVI, 15 Stat. 635, 640.

112. The term "Marshall trilogy" refers to the three consecutively decided cases on this subject: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). See Russell, *supra* note 85, at 248-54.

113. Other factors that have been attributed to this vast change were the decrease in the Indian population and its military capabilities. See Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 431 (1998). Moreover, "[s]ubstantial growth in the nineteenth-century non-Indian population, supplemented by the influx of many landless European immigrants, required the states and private land syndicates to shift from an Indian 'trading' to an Indian 'raiding' strategy as the more efficient means of acquiring Indian lands." *Id.* at 455.

114. See generally, *A History of Indian Jurisdiction*, 2 AM. INDIAN J. 2 (1976).

115. See Bravo, *supra* note 4, at 546 n.88.

116. See DAVID H. GETCHES ET. AL, *FEDERAL INDIAN LAW* 20 (3d ed. 1993).

117. 21 U.S. (8 Wheat.) 543 (1823). This case involved a dispute over land purchased by land speculators from the Indians in what is now Illinois. See *id.* See also Russell, *supra* note 85, at 249.

European doctrine of discovery¹¹⁸ to determine the rights of the indigenous people against the occupiers of the land. He concluded that the land spectators did not have a right to the land because the Native Americans were still entitled to the use and occupancy of the property.¹¹⁹ However, he recognized that the rights of the Native Americans were significantly diminished because they were forced to associate with England, a country that consistently asserted her discovery rights. This case set forth the principle that the Indians could only sell their land to the Crown or the United States and established a precedent for the federal government to justify stripping away Native American rights to their land.¹²⁰ Further, it created a landlord-tenant relationship between the federal government and the Indians tribes, where the government was the tyrannical landlord possessing complete power over the lives of the Indians.¹²¹

The next major case in the Marshall trilogy was *Cherokee Nation v. Georgia*,¹²² wherein the Cherokee tribe sought an injunction against the state of Georgia to stop them from enforcing state laws upon Cherokee land.¹²³ Although Marshall expressed sympathy for the Cherokee people, he ultimately concluded that they lacked status to bring suit in a U.S. court.¹²⁴ In this case, Marshall discussed the unique relationship between the Indians and the United States, rendering the status of Indians as "domestic dependent nations," analogous to "that of a ward to his guardian."¹²⁵ He remarked that the

118. See *Johnson*, 21 U.S. (8 Wheat.) at 572-74. Simply stated, the European doctrine of discovery means that if the European explorers "discovered" the contested area, that European nation had exclusive rights and control over the land and the people occupying it. *Id.* See Williams, *supra* note 1, at 672. For a general discussion of this doctrine, see ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

119. See *Johnson*, 21 U.S. (8 Wheat.) at 574. This reasoning was a reflection of the seminal international scholar Francisco de Vitoria. See Anaya, *supra* note 2, at 2; Bravo, *supra* note 4, at 544-45.

120. See *Johnson*, 21 U.S. (8 Wheat.) at 574.

121. See WILKINS, *supra* note 98, at 31.

122. 30 U.S. (5 Pet.) 1 (1831).

123. *Id.*

124. *Id.* at 18.

125. *Id.* at 17. In his notorious dicta, Chief Justice Marshall stated:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it

framers did not specify Indians as people who were entitled to bring suit and, alternatively, the Indians should appeal to the tomahawk.¹²⁶

Only one year later, Marshall afforded some protection to the Cherokees in *Worcester v. Georgia*.¹²⁷ In this case, he evaluated the history of treatment towards Native Americans and their independence, concluding that the Native American's rights in the treaty with the United States entitled them to protection.¹²⁸ As a result, the Court struck down the Georgian law which attempted to destroy the Cherokee's political community and possession of their land.¹²⁹ Remarkably, this case recognized Indian sovereignty and established that legal consent was required to extinguish native title of the Indians.¹³⁰ During this time period, this case was the most progressive and comprehensive judicial statement regarding the status of Native Americans and their property rights.¹³¹ Unfortunately, this decision looked promising in theory, but remained virtually unenforced against Georgia.¹³²

may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.

Id.

126. *Id.* at 18.

127. 31 U.S. (6 Pet.) 515 (1832).

128. *See id.* at 556.

This treaty [between the United States and the Cherokee Nation], thus explicitly recognizing the national character of the Cherokees, and their right of self government; thus guarantying [sic] their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force.

Id.

129. *See id.* at 520.

130. *See* JILL NORGAN, *THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS* 146 (1996) (discussing the significance of the *Worcester* opinion and its failure to accomplish its goals).

131. *See id.* at 142.

132. *See* Russell, *supra* note 85, at 251-52. Chief Justice Marshall's opinions were met with political adversity. President Andrew Jackson, a proponent of westward expansion, allegedly said, "John Marshall has made his decision: now let him enforce it!" HORACE GREELEY, *THE AMERICAN CONFLICT* 106 (1846). Consequently, the *Worcester* decision was not enforced, and the Cherokee Indians were forced off their lands and marched across the Mississippi river in what is now known as the

C. Early Legislative Battles for Native American Native Title

As shown by the significant case law above, challenging title to land through the judicial system presented considerable obstacles for Native Americans. Likewise, the barriers presented to the Native Americans through legislative reform left much to be desired. Indian treaties had long legitimized the process of taking Native American land with a promise of future land or monetary compensation. However, as time progressed, the Indians were pushed further west without compensation, and transactions were no longer made at arms-length.¹³³ The time period between President Thomas Jefferson and Andrew Jackson marked a national policy of removal of the Indians through separation against their will.¹³⁴ As early as 1790, Congress enacted the first of what would later be the Indian Trade and Intercourse Act,¹³⁵ in which Congress promulgated authority and forbade unauthorized trade with Indians.¹³⁶ This Act, however, was met with great adversity by private land owners and states rights advocates, making its enforcement problematic.¹³⁷

The late nineteenth century marked pivotal Congressional involvement in Native American affairs. The time period from 1845-1887 is coined the "reservation era,"¹³⁸ because the strategy during this era was to force Indians, usually against their will, out of their settled areas and onto confined reservations.¹³⁹ In 1871, Congress ended treaty making with the Indians.¹⁴⁰ Although this was a significant development, this

"Trail of Tears." See *McSloy*, *supra* note 3, at 239.

133. See *Cross*, *supra* note 113, at 441-45.

134. See *Ralph W. Johnson*, *Indian Tribes and the Legal System*, 72 WASH. L. REV. 1021; 1022 (1997).

135. An Act to regulate trade and intercourse with the Indian tribes, 33 Stat. 137 (1790) (repealed in 1793).

136. A later version of this statute defined Indian country as:

That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian Country.

Indian Trade and Intercourse Act, ch. 161, 4 Stat. 729 (1834).

137. See *Cross*, *supra* note 113, at 449.

138. See *Johnson*, *supra* note 134, at 1023.

139. See *id.*

140. See Act of Mar. 3, 1871, ch. 120, 16 Stat. 544 (codified as amended at 25

Act only prohibited treaties executed after 1871.¹⁴¹ Consequently, all prior treaties were still in effect.¹⁴² This meant that the 371 formal treaties entered into between the United States and the Native Americans between 1778 and 1871 were still recognized.¹⁴³ More importantly, by ending treaty making authority, the House of Representatives achieved its goal of helping control Indian policy making for the future.¹⁴⁴ The problem with this Act, however, was that Congress did not abrogate the existing treaties, thus leaving the Indians in a quasi-sovereign status.¹⁴⁵ As a result, the Act had the effect of thwarting the trust relationship between the United States and the Indians and opened the doors for Congress to consistently ignore the interests of Native Americans.¹⁴⁶

In a continuation of its policy of involvement in Native American affairs, Congress enacted the General Allotment Act,¹⁴⁷ which broke up the land held communally by Native Americans into small homesteads of land, which were designated to individual tribal members for farming and ranching.¹⁴⁸ Lastly, Congress set up a program which distributed

U.S.C. § 71 (1994)). The Act reads "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." *Id.* at 566. See also Cross, *supra* note 113, at 443-44; Susan Lope, Note and Comment, *Indian Giver: The Illusion of Effective Legal Redress for Native American Land Claims*, 23 SW. U. L. REV. 331, 336 (1994).

141. See Act of Mar. 3, 1871, ch. 20, 16 Stat. 544 (1871) (codified as amended at 25 U.S.C. § 71 (1994)). See also Cross, *supra* note 113, at 443-44.

142. See Cross, *supra* note 113, at 443-44.

143. See Ward Churchill, *Implications of Treaty Relationships Between the United States and Various American Indian Nations*, in NATIVE AMERICANS AND THE LAW: CONTEMPORARY AND HISTORICAL PERSPECTIVES ON AMERICAN INDIAN RIGHTS, FREEDOM, AND SOVEREIGNTY: NATIVE AMERICAN SOVEREIGNTY 81 (John R. Wunder ed., 1996).

144. Historically, the President controlled treaty making with the Indians. However, tension grew between the House of Representatives and the Senate because the Senate had the power to ratify these treaties. The House's only job was to expend the monies agreed to be apportioned by the President and Senate. This Act was the House's way of becoming part of Indian policy making. See Cross, *supra* note 113, at 460-61. By changing the balance of power from "negotiating" to "legislating" treaties, any previously required consensus was stripped away from the Indians. This imbalance was enhanced by the fact that the Indians were not citizens and lacked any control over the legislation passed regarding them. See McSloy, *supra* note 3, at 244.

145. See Cross, *supra* note 113, at 461.

146. See Lope, *supra* note 140, at 336-37.

147. General Allotment Act, ch. 119, 24 Stat. 388 (1887).

148. The General Allotment Act sought to disband the Native Americans by

the excess land from the General Allotment Act to the non-Indian settlers.¹⁴⁹ It is estimated that dispersing the land to individuals under this method reduced the land held by Indians from 138 million acres in 1887 to 48 million acres in 1934.¹⁵⁰

D. *Twentieth Century Obstacles*

Little progress for Native American protection was apparent from the statutory and judicial jurisprudence of the early twentieth century. America's notion of manifest destiny¹⁵¹ was in full force and sensitivity towards this subject was at a lull. The Kiowa and Comanche tribes, for example, were coerced through false promises of land and monetary compensation into signing an agreement with the government to give up their land.¹⁵² A tribal member named Lone Wolf brought a federal suit alleging that the allotting of the reservation was a taking of their land and in violation of Article 12 of the Treaty of Medicine Lodge Creek.¹⁵³ The lower courts determined that

149. See Cross, *supra* note 113, at 461.

150. See Johnson, *supra* note 134, at 1024-25. In June 1996, a class action suit was brought by over 300,000 Native Americans alleging that the federal government had mishandled the allocation of funds from the 1887 General Allotment Act. See John Gibeaut, *Another Broken Trust*, A.B.A. J., Sept. 1999, at 40. The case sought a retrospective accounting of the trust funds and an order requiring the government to improve the system. Cobell v. Babbitt, 30 F. Supp.2d 24 (D.D.C. 1998). Judge Lamberth, the judge presiding over the case, has valued the claim at \$4 million. See Gibeaut, *supra*, at 42. The three years prior to the June 1999 trial date were filled with delays and lack of due diligence by the Department of Justice, which resulted in a February 1999 contempt order requiring the federal government to pay all of plaintiff's reasonable attorneys' fees. See Cobell v. Babbitt, 37 F. Supp.2d 6 (D.D.C. 1999). These fees were determined to total \$624,643.50. See Cobell v. Babbitt, No. Civ. 96-1285, 1999 WL 607188 at *21 (D.D.C. Aug. 10, 1999). The first phase of this bifurcated trial ended in late July 1999 and sought a court-appointed special master with a separate power from the seemingly flawed Indian Affairs Bureau. See Gibeaut, *supra*, at 43. Judge Lamberth is expected to rule on this phase by Labor Day 1999. See *id.* The second phase, which is expected to occur in the fall or winter of 1999, seeks a reconciliation of the Native American's trust accounts and could potentially cost the Interior Department \$8 billion, the equivalent of an entire years budget. See *id.*

151. Manifest destiny was the nineteenth century ideology of the United States to expand boundaries westward beyond the Pacific Ocean. The term was often used to justify the relocating of Native Americans. See WILKINS, *supra* note 98, at 372-73.

152. See Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

153. *Id.* Article 12 of the Treaty of Medicine Lodge Creek required that Kiowa and Comanche land would not be taken without the consent of at least three-

taking of their land and in violation of Article 12 of the Treaty of Medicine Lodge Creek.¹⁵³ The lower courts determined that because Congress had the authority to allot the land, Congress, and not the courts, should address this problem.¹⁵⁴ The Supreme Court, under the auspices of Justice White, ruled against Lone Wolf's request for injunctive relief. This case, significantly, applied the standard of good faith, which instructed that the courts will "presume that Congress acted in perfect good faith in the dealings with the Indians."¹⁵⁵ This standard, now used as precedent, is a major obstacle for Native Americans to overcome merely to be heard by a judicial tribunal.

The mid-twentieth century brought slight encouragement to a somewhat bleak situation. In 1924, all Native Americans became federally recognized U.S. citizens.¹⁵⁶ By the 1930s, the American West had expanded to its capacity and it was clear that Native Americans were not going to get the land that they were falsely promised in various treaties. In 1934, along with the era of the New Deal, Congress exercised its intention to improve the conditions of the Native Americans. Through the Indian Reorganization Act (IRA) of 1934,¹⁵⁷ Congress took the first steps in dealing with the disarray it had caused through the lack of sufficient land and funds from the General Allotment Act.¹⁵⁸ The goal of these reforms was to "promote the new federal policy of tribal economic development and political self-determination."¹⁵⁹

This goal of tribal revitalization is exemplified by the temporary victories of the Native Americans in *United States v. Shoshone Tribe*¹⁶⁰ and *United States v. Creek Nation*.¹⁶¹ In

153. *Id.* Article 12 of the Treaty of Medicine Lodge Creek required that Kiowa and Comanche land would not be taken without the consent of at least three-fourths of the adult males in the tribe. Treaty with the Kiowa and Comanche Tribes of Indians (Treaty of Medicine Lodge Creek), Oct. 21, 1867, art. 12, 15 Stat. 581, 585.

154. See Cross, *supra* note 113, at 464.

155. *Lone Wolf*, 187 U.S. at 568.

156. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253.

157. Indian Reorganization Act, 25 U.S.C. § 461 (1934).

158. See *id.* See also Lawrence B. Landman, Article, *International Protection for American Indian Land Rights?*, 5 B.U. INT'L L.J. 59, 71 (1987).

159. Cross, *supra* note 113, at 467.

160. 304 U.S. 111 (1938).

161. 295 U.S. 103 (1935).

the *Shoshone Tribe* case, the Shoshone tribe challenged the government's action of settling a new tribe on the Shoshone territory because they had signed a treaty in 1868 which made their reservation part of the United States but gave them the exclusive use of their land for hunting and gathering.¹⁶² The Court, remarkably, responded that the government needed to compensate the Shoshone's for this taking.¹⁶³ Similarly, in *Creek Nation*, the Supreme Court affirmed the notion that the guardian relationship between the U.S. government and the Indians implies that Congress does in fact have duties towards the Indians.¹⁶⁴ Both of these decisions gave hope to Native Americans for possible recognition in the future. It has even been thought that *Shoshone Tribe* overruled *Lone Wolf*.¹⁶⁵ Unfortunately, this spirit was quickly thwarted by the Great Depression and the subsequent world war. Later rulings of the Court and continuous failures to procure progressive legislation are evidence of yet another shift from "self-determination" back to "termination."¹⁶⁶

In 1942, Felix S. Cohen published his *Handbook of Federal Indian Law*, which served as a guide for anyone working with Indian law issues.¹⁶⁷ Most significantly, the efforts undertaken in connection with this book proved that Indian law was alive and well in the twentieth century.¹⁶⁸ In 1946, the Indian Claims Commission (ICC) was created to evaluate the Native American claims against the U.S. government.¹⁶⁹ Under the ICC, Indians were entitled to compensation for their land if they satisfied two conditions. First, they had to prove that

162. See *Shoshone Tribe*, 304 U.S. at 113-14.

163. See *id.* at 118.

164. See *Creek Nation*, 295 U.S. at 109-10.

165. See Cross, *supra* note 113, at 468.

166. See Johnson, *supra* note 134, at 1025-26.

167. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1942). See also Johnson, *supra* note 134, at 1036.

168. Cohen's book has survived many revisions. Its 1982 version, which condones self-determination and self-sufficiency, is widely used and cited today. See Johnson, *supra* note 134, at 1037.

169. Indian Claims Commission Act, Pub. L. No. 79-726, 60 Stat. 1049 (1946) (codified as amended at 25 U.S.C. §§ 70 to 70v-3 (1978)). Once the ICC was created, the Supreme Court was quick to push Indian title claims before it to the Commission, deeming this issue a political question which was non-justiciable. See Cross, *supra* note 113, at 472-73. A perfect example of this shift in responsibility is seen in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), discussed *infra* text accompanying notes 174-77.

Congress had affirmatively acted in the past to recognize their use and occupancy of the land. This was shown through treaties, statutes, or conduct. Second, the Indians had to show that Congress did not act within the standard of good faith set forth in *Lone Wolf*.¹⁷⁰ Unfortunately, the ICC was terminated in 1978, leaving the remaining cases to be heard by the Court of Claims.¹⁷¹ This transfer caused major problems for the Native American claimants because claims that were compensable under the ICC were no longer compensable under the jurisdiction of the Court of Claims.¹⁷² In addition, unlike title recognized in treaties and other agreements, native title was not compensable under the takings clause of the Fifth Amendment.¹⁷³

In 1955, the Tee-Hit-Ton Indians of Alaska brought suit against the U.S. government to recover compensation for the taking of timber from their land.¹⁷⁴ The Tee-Hit-Tons alleged that, unlike the Indians on the continent, they had a well-defined and complex property rights and ownership system which should be recognized.¹⁷⁵ The Court observed this system and determined that it was in fact a communal system like all the other tribes, and therefore could not be compensated.¹⁷⁶ In rejecting their claim for compensation, the Supreme Court reaffirmed that Native American's rights to native title were not constitutionally protected property rights and could be extinguished.¹⁷⁷

The 1980 decision in *United States v. Sioux Nation of Indians*¹⁷⁸ furthered the government's control over Indian

170. See *Lone Wolf*, 187 U.S. at 568.

171. The ICC was terminated by 25 U.S.C. § 70v (1978). Many factors can be attributed to the failure of the ICC. Some examples are: 1) Only Indian tribes and not individuals were entitled to bring claims before the ICC; 2) Claims were only allowed to be heard if they arose before August 13, 1946; 3) Indians were not entitled to interest from the time of the taking of their lands and their property was appraised at the time of the taking rather than at the time of adjudication; and, 4) Remedies from the ICC were limited to damages. See Cross, *supra* note 113, at 474-76.

172. 25 U.S.C. § 70v (1978). For a further discussion of the establishment of the Court of Claims, see Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

173. See Cross, *supra* note 113, at 476 n.341.

174. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

175. See *id.* at 287-88.

176. See *id.*

177. See *id.* at 290.

178. 448 U.S. 371 (1980).

property.¹⁷⁹ In this case, the Supreme Court analyzed the good faith test and rejected it for a more difficult standard of "good faith effort" test.¹⁸⁰ Now, the focus is not on the economic losses and hardships suffered by the Native Americans, but whether the government was legitimate in its exercise of plenary power over the Indian land.¹⁸¹ In applying this test, the reviewing judge must evaluate the relevant legislative history along with the surrounding circumstances to determine whether Congress made a good faith effort in giving the Indians the full value of their lands.¹⁸² This is a difficult test to apply. In fact, Professor Raymond Cross stated that "[a]bsent an objective valuation standard, there is simply no reliable reference point for the court's evaluation of claimed congressional good faith."¹⁸³ Thus, this is seemingly an arduous test, and the federal government has successfully immunized itself from all compensation which is not clearly an unfair taking.

E. The Future of Native American Land Rights

The future success of Native Americans with respect to their land remains unclear. While there are many factors contributing to this ambiguity, the most significant, in the opinion of this author, is the lack of willingness to compromise between Native Americans and the federal government. Native Americans currently exist as independent cultures with their own customs, traditions, language, religion, and government.¹⁸⁴ As a result of their desire to preserve their own cul-

179. *Id.*

180. *See id.* at 407-17.

181. *See Cross, supra* note 113, at 438. Under Federal Indian Policy, the term "plenary power" has three distinct meanings: a) exclusive—Congress has the sole authority through the Commerce Clause to regulate affairs with the Indian tribes; b) preemptive—Congressional action precludes state governments from acting in matters related to the Indians; c) unlimited or absolute—judicial opinions have vested in Congress what seems to be boundless authority over the Indians, including their lands and resources. *See WILKINS, supra* note 98, at 373-74.

182. *See Sioux Nation*, 448 U.S. at 416-17.

183. *See Cross, supra* note 113, at 497.

184. *See Lope, supra* note 140, at 352. According to Vine Deloria, this is the result of "[t]he modern Indian movement for national recognition [which] has its roots in the tireless resistance of generations of unknown Indians who have refused to melt into homogeneity of American life and accept American citizenship." *Id.* (citing VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* 20 (1974)).

ture and identity, hostility between Native Americans and the rest of the country will likely continue. Unless a change in philosophy or a compromise between Native Americans and the federal government occurs, the possibility of increased protection of Native Americans in today's society is highly unlikely.

At the same time, it is difficult to comprehend why American citizens have been so unwilling to accept Native Americans as their own distinct culture. Because it is the opinion of this author that the United States is typically one of the most progressive countries in the world, it seems ironic that the laws dictating Indian affairs from the 1800s are still cited as precedent today. Interestingly, the Supreme Court's decision in *Lone Wolf* was decided at the exact same time as its famous "separate but equal" decision in *Plessy v. Ferguson*.¹⁸⁵ But fifty years later, *Plessy* was overruled by *Brown v. Board of Education*.¹⁸⁶ Nonetheless, the unenforced decision of *Lone Wolf*, and the deeply flawed interpretations of other Native American related opinions, remains the law controlling Native American affairs even today.

Another factor which significantly affects the future of Native Americans is the composition of the current Supreme Court. Recently, the Supreme Court has shown a lack of interest in cases involving Native Americans.¹⁸⁷ Now that Justices Marshall, Brennan and Blackmun have left the Court, the status of Native American progression and protection is disputable. In fact, Chief Justice Rehnquist and Justice Stevens are the only justices who have shown any serious interest in this arena.¹⁸⁸ Whether the current Supreme Court justices are

185. 163 U.S. 537 (1896).

186. 347 U.S. 483 (1954). Another example of the U.S. legislature revisiting outdated concepts of legislation affecting racial minorities is seen in the amending of the Constitutional provisions regarding African Americans. At the inception of the Constitution, African Americans were counted as only three-fifths of a vote. U.S. CONST. art. I, § 2. After the Civil War, the status of African Americans changed and the Fourteenth Amendment struck down the three-fifths status. U.S. CONST. amend. XIV, § 2. Compare Native American provisions excluding them from the body politic as "Indians not taxed," which remain unchanged. U.S. CONST. art. I, § 2, amend. XIV, § 2. See *McSloy*, *supra* note 3, at 221.

187. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1631 (1996).

188. See *id.*

willing to provide these protections plays a crucial role in the future status of this issue.

Furthermore, a problem arises in the fact that current federal Indian law embraces two contradictory doctrines.¹⁸⁹ This inconsistency is blamed on the vague language in judicial opinions concerning such crucial concepts as foreign nation status, ward-guardian relationships, and federal authority over Native American affairs.¹⁹⁰ One trend, following the reasoning of *Cherokee Nation* and *Worcester*, recognizes tribal sovereignty and considers tribes domestic, dependent nations.¹⁹¹ These jurists continually interpret ambiguous treaty language in favor of the Native Americans and place the burden of proof and the standard of good faith on the federal government.¹⁹² The other trend of jurisprudence reflects the legitimacy of congressional plenary power over the Native Americans and their status as "wards."¹⁹³ This concept has been expanded so greatly that Congress today seems to have absolute power over Indian affairs.

Fortunately, the situation is not completely bleak, as recent political influences have provided some significant progress. During the 1990s, the Clinton administration put forth a remarkable record regarding achievements on behalf of the Native Americans.¹⁹⁴ During the early terms of his Presidency, Clinton signed the Religious Freedom Restoration Act (RFRA),¹⁹⁵ met with tribal leaders, and signed memorandum commemorating the meeting which has been used in subsequent reports.¹⁹⁶ Further examples include the signing of an executive order which promoted access to sacred sites on federal lands,¹⁹⁷ and federal assistance to tribal colleges.¹⁹⁸

189. See NORGREN, *supra* note 130, at 151-52 (discussing the flaws of twentieth century federal Indian law).

190. *Id.* at 151.

191. *Id.*

192. *Id.*

193. *Id.* at 152.

194. See Deer, *supra* note 101, at 21-22.

195. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

196. President Clinton met with tribal leaders on April 29, 1994. See Deer, *supra* note 101, at 21-22 n.32.

197. Exec. Order No. 13007, 3 C.F.R. 196 (1996).

198. Exec. Order No. 13021, 3 C.F.R. 221 (1996). Continuing in his pledge to better the situation for the Native Americans, President Clinton recently visited

Although the future status of the Native Americans is unclear, one thing that is clear is that a change is urgently needed. Many suggestions have been provided as solutions to this problem. One author proposed that the only solution is to reinstate the treaty status of the Native Americans by repealing the Act of 1877, and returning to the ideology that Native American territories are independent foreign nations whose controversies with the United States should be dealt with in an international arena.¹⁹⁹ Another suggested that a modern Indian takings doctrine should be implemented to mitigate the government's incentive to take Indian land through congressional plenary power.²⁰⁰ The Indians, he argued, should not become equal bargainers with the federal government. Rather, they should be provided heightened scrutiny in the protection of what little land they still own.²⁰¹ This hypothetical takings doctrine would ideally require the federal government to provide just compensation for any further takings of Indian land through appropriate awards, replacements, or compensation for lost resources.²⁰²

Whether one of the academic solutions proffered in this Note is adopted, or another alternative is accepted, the fact remains that something must be done. The history of the Native Americans has been so tumultuous that it has been analogized to a "long sine wave that gradually diminishes, a historical oscillation between recognition of Indian sovereignty and virulent assimilationist policies, with the highs and lows flattening out as time progresses."²⁰³ It is clear that the struggle between the principles of sovereignty and plenary

the Oglala Lakota Sioux reservation in South Dakota. See Peter T. Kilborn, *Clinton, Amid the Squalor on a Reservation, Again Pledges Help*, N.Y. TIMES, July 8, 1999, at A16. When President Clinton spoke to the tribal members about their living condition, he afforded them respect by labeling the meeting a "nation to nation" visit. *Id.* This was the first time a President had visited an Indian reservation since Franklin D. Roosevelt in 1936. *Id.*

199. See Lope, *supra* note 140, at 333. Similarly, McSloy suggests we go "back to the future" where Native American sovereignty was more prevalent than it is today. He agrees that Native American sovereignty should be based solely upon an "international, treaty-oriented system of diplomacy," which recognizes the inherent sovereign status of Indian nations. See McSloy, *supra* note 3, at 225.

200. See Cross, *supra* note 113, at 432.

201. *Id.*

202. *Id.*

203. McSloy, *supra* note 3, at 250.

power must come to some semblance of a compromise for any progress to be successful. Despite the federal governments attempts to extinguish Native American culture, the Native Americans have consistently proven their endurance and determination to gain recognition and protection of their land. This is a problem that has and will not vanish, and in due time the U.S. government must recognize these people's fundamental rights.

IV. A COMPARISON OF AUSTRALIA AND THE UNITED STATES

A. *Lessons To Be Learned*

As shown above, both Australia and the United States have struggled to accommodate their indigenous populations. Yet, the reactions of both countries to their indigenous people are clearly at a variance to one another. Most importantly, their later attempts to compensate their indigenous populations provide practical examples and lessons for developing countries.²⁰⁴ One lesson that both countries can provide is a startling example of the urgency of proper treatment towards indigenous populations and the dangers that ensue as a result of improper treatment.²⁰⁵ Each country has had positive and negative results and an analysis of these experiences can show a country facing similar obstacles what they should and should not do.

B. *Treatment Upon Colonization*

The first major comparison that is worth noting between the United States and Australia is their treatment by England upon colonization. Like its customary practices with all its conquests, England attempted to afford protection to the Native Americans of the United States through consensual treaties. No such treaties or attempts at appeasement were ever offered to the Australian Aborigines.²⁰⁶ Instead, England justified its domination of the Aborigines by categorizing them as backwards people.

Secondly, a stark contrast can be seen in each country's

204. See Bravo, *supra* note 4, at 555.

205. *Id.* at 573.

206. See *supra* Section II.A.

views towards its indigenous people upon colonization. While the Aborigines were uncivilized and barbaric to the Europeans, the Indians were considered independent nations with their own culture and even their own Constitutions.²⁰⁷ Psychologically speaking, the Native Americans faced a more difficult struggle because they were afforded protections that were quickly taken away. "When it was no longer convenient for the United States to deal with [the Native Americans] as independent 'foreign' nations, their status was changed solely because of their existence within the United States borders, in hopes of assimilating them into western culture."²⁰⁸ Being that their status is so attenuated today, it seems ironic that the Native Americans were treated with greater respect and sovereignty by Columbus and the early settlers than they have been the past two centuries. The Aborigines, in contrast, have been faced with an upward battle towards acceptance and respect. These paradoxical views towards both indigenous populations has had a considerable impact on the treatment that each country has subsequently provided.

C. Access To The Courts

Another major difference concerning indigenous people's land rights in the United States and Australia is the use and accessibility of the court systems.²⁰⁹ In short, the American courts have been entangled in Native American issues since the inception of the judicial system. In contrast, it was not until the latter part of this century that the Australian High Court played a role in the determination of Aboriginal land rights. It is questionable, however, whether the early role of the American courts has had a negative or positive effect on the status of the Native Americans. It is this author's contention that this judicial interference has primarily had a detrimental effect.

Unlike the United States, the early history of Australia did not provide any John Marshall-like proponents to rally for the rights of the Aborigines.²¹⁰ Rather, the Australian court

207. *See supra* Section III.A.

208. Lope, *supra* note 140, at 350.

209. *See Russell, supra* note 85, at 254.

210. *Id.*

system reflected the practice of "material dispossession and political subjugation . . . but without the camouflage of friendly high court decisions."²¹¹ The Aborigine's main source of land rights were their own systems of law and politics and the little protection they were provided by the common-law courts.²¹² The doctrine of *terra nullius* and the perspective that the Aborigines were backwards and uncivilized people were embedded in these early practices. In fact, it wasn't until the 1970s, in the *Milirrpum* case, that the Aborigines were afforded even the slightest protection.²¹³ Consequently, it is an uncontested fact that the biggest changes in Australia have come about within the last decade.²¹⁴ Upon examination of recent statistics regarding land claims, it is estimated that Australian Aborigines today have potential claims to seventy-nine percent of Australia's land.²¹⁵ A mere ten years ago, their ownership claims were only fourteen percent.²¹⁶ In hindsight, it seems that Australia's lack of a forum for vindication of rights until much later made her more flexible and open to the vast changes that have developed in the latter part of this century.²¹⁷

In contrast, the U.S. courts have a long history of deep involvement in Native American affairs.²¹⁸ Yet, Professor Peter H. Russell suggests that the Indians' reliance on the "white man's courts" to adjudicate their rights "blunt[ed] the capacity of America's Indigenous peoples for more autonomous forms of political action and prevent[ed] Aboriginal issues from becoming as prominent on [the United States'] political agenda as they now are in Australia, Canada and New Zealand."²¹⁹ Sim-

211. *Id.*

212. *See id.*

213. *Milirrpum*, 17 F.L.R. at 13. For a discussion of this case, see *supra* Section II.B.

214. While justifying the importance of the *Mabo* case, Justices Deane and Gaudron epitomized this radical change in perspective when they stated:

The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.

Mabo, 107 A.L.R. at 82.

215. *See* Rodriguez, *supra* note 84, at 711.

216. *Id.*

217. *See* Russell, *supra* note 85, at 254. *See also infra* Section V.

218. *See* Russell, *supra* note 85, at 254.

219. *Id.*

ilarly, it is this author's contention that the early judicial involvement in Native American affairs, specifically with respect to their land, served as a hindrance and not a benefit. From a psychological perspective, it is more difficult to have status and rights taken away than face an upward struggle to gain them from the outset. It is unfortunate that the Native Americans, in a sense, "used up" their advantages so early on in American history while the rest of the world continues to reap the benefits of the United States' mistakes. This scenario reflects a disheartening ideology that the past is irrelevant and it only matters what has been done to rectify the present situation. If this is the belief among the Native Americans, the current response of the federal government can only be interpreted as callous and unsympathetic.

V. CONCLUSION

Although both Australia and the United States still have significant strides to make in truly accommodating their indigenous populations, Australia seems to provide a better example of treatment towards native title in the latter part of the twentieth century. However, no discredit should be given to the efforts made by the United States. Rather, the U.S. example is one of the major reasons that Australia has even been afforded an opportunity to progress in this area.

Australia has at its advantage the benefit of being a younger and perhaps a more easily influenced country. Simply stated, now that she has made the giant leap towards change, she has the flexibility to change more than any other country, particularly the United States. In deciding *Mabo*, the High Court expressed it best when it observed that Australia's legal treatment towards its indigenous people "should neither be nor be seen to be frozen in an age of racial discrimination"²²⁰ and should be in accord with international human rights. Knowing full well the political and legal repercussions, not many countries are willing to make such a drastic change. Australia has taken the lessons of her mother country, England, as well as the United States, and learned from them. Although Australia has a significant history of her own, it is not nearly as lengthy or complex as the rest of the world, making it easier for her to

220. *Mabo*, 107 A.L.R. at 28.

admonish it entirely and begin anew. Ideally, "Australia can use *Mabo* to make a clean break with the past and learn from the successes and failures of countries sharing a significant cultural and legal bond."²²¹

Australia owes a lot of credit to the experiences of the United States. As seen in this Note, without the early history of the Native Americans and their connections to the land, Australia would not have had the foundation to base her revolutionary *Mabo* decision upon. Arguably, it took a long time for Australia to begin to make changes in this area, but this too can be used to her advantage. Modern times bring with them radical theories and technology to implement ideas. The fact that these changes have only come about within the past ten years, coupled with the knowledge of the lessons of the past, leaves the door open for insurmountable flexibility in treatment of native title in the years to come. If Australia continues along this path of protection and acceptance with the rest of the world following her example, the opportunities that may be provided for indigenous people in the new millennium will be endless.

Amy Sender

221. Meyers & Mugambwa, *supra* note 8, at 1240.