“Indians in [American history] textbooks either do nothing or they resist.” In their colonial and nineteenth century manifestations, they are either “obstacles to white settlement” or “victims of oppression.” “As victims or obstacles, Indians have no textbook existence apart from their resistance.” In short, the texts reflect our “deep-seated tendency to see whites and Indians as possessing two distinct species of historical experience” rather than a mutual history of continuous interaction and influences.

Axtell (1987, p.981)

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1 I thank participants at the XIV International Economic History Congress, Helsinki, Finland, 25 August 2006 and the Social Science History Association Meeting November 2007 for comments on an earlier draft of this paper. I also thank Barbara Wilkinson, Lauren Rule, Steven Kohlhagen, Claude Chauvigne, and Matt Gregg for helpful comments. I also thank my family for putting up with me while I wrote the paper.
What can we learn from a comparison of the legal status of native peoples in two settler societies, Australia and the United States? Since both countries were once British colonies and share a common language and legal system, one might expect to find similar institutions in both countries. Indeed, had the American colonies not won their independence from Britain, the prisoners in the “First Fleet” might have been sent to North America, not Australia, in 1788. In both countries the process of European settlement was accompanied by a sharp decline in the native population due to war, disease, and displacement. Yet there are important differences between the two countries that have real positive consequences for Indians in the U.S. relative to Aborigines in Australia.

In the US, Indian tribes have a direct legal relationship to the federal government embedded in the U.S. Constitution that has evolved into one which gives tribes important legal rights and a degree of independence from state laws. This emerged from the history of treaty making in North America that began under the British in the 1600’s and continued after Independence. Some tribes also have legal claims to territory (reservations) that originated in the 18th and 19th centuries. The legal autonomy of reservations and the legal claim to territory is highly valued by Indians in the United States. In Australia, by contrast, the entire continent was treated as belonging to no one before the British arrived in 1788. It is only in the last twenty years that the High Court in Australia has recognized that the aboriginal population “owned” the land prior to the coming of the British. What this legal recognition of aboriginal rights means in practice is still being worked out.
For the U.S., this is the story of the evolution of two sets of parallel institutions: one created by the federal government to negotiate with Indians and another created by Indian tribes to negotiate with government agents. I argue that these institutions matter for Indians in the United States. Such institutions did not emerge in Australia. Do these differences really matter? After all, in both countries the aboriginal populations were displaced, weren’t they? Some scholars have dismissed treaties as rationalizations to paper over the taking of Indian land by force. In the extreme, I found references to “trinket treaties in the American West,” by scholars studying Australia that suggest that these had little meaning. (See Macintyre, p. 68, Weaver, p. 989) I argue here that even though the transactions were not always voluntary, it is incorrect to dismiss the importance of the treaty system and later, “treaty substitutes.” Although sometimes signed under duress, treaties are important. In other words, treaties are better than nothing.

In the first part of my paper I discuss how Indian tribes in North America came to be recognized as owning the land. The historical situation was very different in Australia and I will discuss why the same thing did not occur there. In the second part of my paper, I look at what difference this made in practice in history, using California as a natural experiment. In this I take advantage of the fact that the Spanish and Mexican legal system that existed in California before 1848 did not recognize tribal rights to uncultivated land, leaving tribes in California with no recognized title at the time of annexation by the U.S. in 1848, just prior to the California Gold Rush the next year.

**Differences in the Legal Status of Indians and Aborigines**
By the 1850’s, there were important differences between Australia and the U.S. in how the native population was treated in terms of property rights and citizenship rights. The biggest difference was in aboriginal rights to land. Until the High Court of Australia ruling in Mabo v. Queensland in 1992, the British and later Australian law treated all land in Australia before 1788 as “Terra Nullius,” -- it belonged to no one. By right of settlement and conquest the British crown came to “own” the entire continent. After that date, any settler who wished to own land had to acquire the title from the British crown. Some land was later “reserved” for Aboriginal people in Australia by state governments for humanitarian purposes. Often these territories were administered by religious organizations in a very paternalistic manner. That land, however, did not belong to the Aboriginal peoples who lived there.

In the United States a settler also had to acquire land from the federal government. The difference is that the federal government first had to “extinguish” prior Indian title to the land. How tribes came to be recognized as owning land is complicated, but there was no doubt that in modern U.S. law the land originally belonged to Indians by aboriginal title.²

Another important difference is the relationship of native peoples to the federal governments of the two countries. This shows up clearly in the constitutions of the two countries. In Australia, Aboriginal peoples show up in the constitution two times. The Commonwealth of Australia Constitution Act 1900 passed by the English parliament states that: “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 bolded clauses were dropped in 1967, but it was 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 United States 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)\(^3\)

In the U.S. Constitution, Indians who do not live in tribes are simply citizens like any other. Indians who still live in tribes (Indians not taxed) are not citizens of the United States, but members of tribes. 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; . . .” Relations with Indian tribes, like those with foreign governments, are reserved for the Congress, not the states.\(^4\) Thus tribes have a direct relationship with the

\(^3\) Over time many individual Indians were granted citizenship when their reservations were allotted (privatized) by special treaties. The General Allotment (Dawes Act) of 1887 called for the granting of citizenship when an Indian received title to part of his tribe’s reservation. Finally in 1924, Congress made all Indians citizens of the United States (Prucha, p.973). Indians living on federally supervised reservations, however, still could not vote in some states as late as 1948.

\(^4\) The Articles of Confederation, which preceded the U.S. Constitution, was somewhat closer to the Australian model. The ninth article stated that:

The United States in Congress assembled have the sole and exclusive right and power of regulating the trade and
federal government, even when a reservation is within a state. This is very different from Australia where the states have jurisdiction within their boundaries.

**Institutions as “Awkward Contrivances”**

It seems like a simple, straightforward problem. Obviously the native peoples were here first and in some sense “owned the land.” As a matter of fairness, their rights to the land and as individuals should be respected. The hard question is how to do this within the framework of existing laws. In practice this leaves many questions to be answered and the solutions in law seem convoluted. What is a tribe? In fact in Australia the term “tribe” is no longer used. In its place, groups sharing a language and culture are called a “people.” If there are legally recognized tribes, as in North America, what is the relationship of a tribe to the government? What does it mean to say that the native peoples owned the land? Given different economic systems, who, exactly, owned the land? How can it be transferred?

All these questions this has proven difficult and far from obvious to work out. Why? The reason is that law is a fundamental institution that is very “path dependent.”

According to Paul David:

. . . In place of the invisible appendage celebrated by Adam Smith, the Panda’s thumb metaphor offers institutional economics the paradigm of a **serviceable but inelegant resultant** of a path-dependent process of evolutionary improvisation, a structure whose obvious functional limitations stem from its remote accidental origins. (David 1994, p. 217) (Emphasis added)

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5 Panda’s are true bears and do not have an opposable thumb. In order to pick up bamboo, the panda has evolved a raised bit of bone in its paw in order to do this. See Gould (1980).
In the case of English settlement in both countries, this meant that contact with native peoples and English settlers had to be defined in terms of existing institutions. James Axtell correctly points out that there is a tendency in historical and policy literatures to consider natives a “problem” that well meaning individuals in the dominant community needed to “solve,” or to view the native peoples as resisting these efforts. But he argues that in fact there is a “… a mutual history of continuous interaction and influences.” (Axtell (1987), p. 981) This is very clear in discussing the history of Indian and white relationships over land in the North American colonies as well as the history of relationships between Aborigines and English settlers in Australia.

**Why was Australia ‘Terra Nullius’ and North America not?**

In the British colonies in North America and in New Zealand it was recognized that the native peoples were in some sense there first and had rights under English law. Yet in Australia these rights were not recognized. The British in Australia were not alone in not legally recognizing the title of hunter-gatherers to the land. The Spanish recognized the rights of Indians to the land they needed for their subsistence by farming or ranching but generally did not recognize claims to lands used by hunter-gatherers.

As soon as British landed in Australia to establish a penal colony, the British military set about the task of setting up and operating a colony for prisoners and organizing their activities. The native peoples they encountered seemed few in number and technologically backwards. 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)
The simplest solution for the English at Botany Bay in Australia was to treat the land as vacant and to simply appropriate the land for the crown as needed. British colonial authorities were concerned with maintaining control over a convict population and later a free population. All land was seen as being owned by the crown and the policy issue was how to control the rush of settlers and their animals on to the crown lands. There was no recognition that the native people had originally owned the land that British settlers now occupied. Reformers in the 1830’s and 1840’s challenged this unfair characterization. Once established, this was a difficult precedent to alter. According to Banner, “In short, 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. The result would be chaos—no one would be sure of who owned what.” (Banner, (2005b), p.129).

The British did not recognize the right of settlers to buy land from aborigines in any circumstances. Thus when in 1835 a group of Australians lead by John Batman claimed a territory of 200,000 hectares 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.”(Cited in Macintyre, p. 68)  

It appears that this 1835 “treaty” was really an attempt to get around crown ownership of unclaimed land, not a true attempt to negotiate with native peoples.

**Why wasn’t North America treated as Terra Nullius?**

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6 Macintyre goes on to compare this sale to “. . .the ‘trinket treaties’ arranged in the American West.” The term ‘trinket treaty’ is not typically used by American historians of Indian-white relations and I argue in what follows that treaties with Indians in the American West were important to Indians and their descendents, even when coerced.
Why didn’t the English settlers in North America automatically recognize Indians as owning the land? It would seem obviously strange not to do so. It would, however, not have been consistent with the feudal tradition that is the basis of European law.

According to one popular textbook on American Economic History,

In theory, all English land belonged to the king. He was the sole and absolute owner. Only he, as the Lord Paramount, was beholden to no one save God for his property rights. He was the "donor," and without his authority, there were no land ownership rights for his subjects. According to English feudalism, all land ownership was a grant for services from the king. (Hughes and Cain (2003), p. 11)

In North America, English settlers entered into territory where Indians were clearly farming the land. Banner argues that in many cases there were Indians who were willing to sell these lands to the English. But why not just take the land?

Apart from the obvious moral issues, there was the practical issue that Indians were a serious military threat. North American colonies were settled by small private ventures authorized by the crown. It made sense to minimize outright warfare with the native peoples. European weapons in the 17th century were still crude and not that clearly superior to Indian weapons. Further Indians quickly learned that there was competition for their alliances. France and to a lesser extent Spain would have been happy to aid Indians in opposing the English colonies.

Once a system of buying land from Indians was in place, Banner argues it was hard to get rid of it within the English legal system. According to Banner,

In the 1680s, when the imperial government briefly reorganized the administration of the New England colonies, the government announced its intention to invalidate all land titles based on "pretended Purchases from Indians," on the theory that "from the Indians noe title cann be Derived." The result was an 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)

Thus in time in America existing land owners had to insist that Indians had rights to land.

Banner’s view is not the only one, however. By contrast, Juricek (1989), for example, argues that private transactions were never really part of the law:

In the official English view Indian land rights were neither sovereign rights nor civil rights, but were mere “natural” rights. Since all civil rights were supposed to derive from sovereign authority, it followed that all civil titles to land in the English colonies had to derive directly or indirectly from the King. 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. An Indian land cession was therefore not a legal conveyance but a surrender of an inconvenient competing title to the king or his representative. Indian rights were not transferred to the English but eliminated – hence the later expression, “extinguishment of Indian title.” Once Indian rights to a tract had been given up, legal titles to the same land based on royal grants could take place. (Juricek (1989) p. xxiv)

The title that was being extinguished was that of the tribe, not of an individual Indian. This view would ultimately prevail in Britain in the middle of the 18th century and would carry forward into the U.S. constitution.

**The Evolution of the Treaty System in British North America**

Another major difference between North America and Australia was the formal negotiations with tribal governments. Indians in North America had competing European powers—France, Spain and Britain, vying for their support. Each European country wanted to in extend and defending their claims to territory in North America and Indians could be either valuable allies or formidable opponents.

The sale of Indian land to settlers continued along the frontier for many years, as did the lending of money from merchants to Indians using land as collateral. Conflicts over land on the frontier could prove dangerous. The colonists needed to reach
agreement with Indian tribes to gain their allegiance in confrontations with the French and Spanish.

According Francis Prucha (1984), the leading historian of Indian-White relations

The English colonists adapted their proceedings to the deliberate and highly metaphorical patterns of the Indians. 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, although the colonial treaties for the most part were in the form of reports of the speeches and negotiations as well as articles of agreement (all sealed with the presentation of strings and belts of wampum or other gifts), rather than in the cold legal contract form in which United States treaties were cast. (Prucha 1984, vI, p. 17) (Emphasis added)

These treaty negotiations were adapted to Indian customs and Indians in turn learned to work within this new framework.

But treaties did not eliminate costly friction on the frontier. Again according to Prucha,

The treaties did not solve the problem of the steady pressure of white settlers on the Indian hunting grounds, and it is difficult to explain the slowness with which the imperial government came to realize the danger of these white encroachments. Continuing to rely on presents in order to keep the Indians attached to the English cause, officials only gradually awakened to the realization that the way to keep the Indians happy would be to remove the causes of their resentment and discontent.

Conferences between the Indians and the Albany Congress in 1754 emphasized the point, for the Indians made known their resentment in unmistakable terms. "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." Again and again in the course of the conferences, Indians complained of the steady encroachment of whites onto their lands through purchases that the Indians refused to acknowledge or without any semblance of title at all." No matter how great the presents made to the tribes, gifts could not cover over the fundamental reasons for Indian hostility to the English. (Prucha (1984), vI p. 17-18)
Trade between Indians and whites created another source of friction. The Indians could and did feel cheated by colonial traders. Guns and alcohol were problematic trade goods. These goods were a dangerous mix on the frontier and could easily lead to violence and warfare.

The imperial government began to take Indian affairs out of the “incompetent” hands of the colonials in 1755. (Prucha (1984), v.1 p, 21) The Proclamation of 1763 took even more control from the hands of colonists. The Proclamation was issued by George III on October 7, 1763 after the end of the French and Indian War (The Seven Years War). The date of issuing proclamation was moved due to Pontiac’s Rebellion by Indians in what is today Ohio and Michigan in response to encroachments by white settlers into Indian lands. The British did this to assure Indians in the west that they “need no longer fear a steady and ruthless expulsion from their hunting grounds . . . “ (Prucha (1984), v. 1, p. 24) The Proclamation forbade the settlement of colonists west of the crest of the Appalachian Mountains and formally 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, I, p. 24)

The Proclamation of 1763 put into U.S. and Canadian legal traditions two important principles. Indians had a claim to the land and that those claims were made by tribes, not individual Indians. Further only the crown had the right to acquire land form the tribes, not individuals or colonial governments. In the US, this authority ultimately passed to the federal government after independence. It also introduced the concept of special laws for Indian country.
Figure 1

The Proclamation of 1763

Map 6-1
Land Claims

The colonial appetite for new land was huge, as colonial land claims demonstrated. The Royal Proclamation of 1763 was designed to stop westward movement.

Why is there no equivalent of the Proclamation of 1763 in Australian history?

One reason is that the British had no European rival in Australia. Secondly, interactions with the native peoples by Europeans in Australia seem to have largely controlled by pastoralists pushing into aboriginal territory. There was no clear boundary and the crown was already having trouble controlling “squatters.” Local settlers had little incentive to recognize aboriginal rights and it would have simply been an added burden for the crown.

According to Attard:

The process of colonial growth began with two related developments. First, in 1820, Macquarie responded to land pressure in the districts immediately surrounding Sydney by relaxing restrictions on settlement. Soon the outward movement of herdsmen seeking new pastures became uncontrollable…Millennia of fire-stick management to assist hunter-gathering had created inland grasslands in the southeast that were ideally suited to the production of fine wool. The colonial government tried to limit settlement, but this was largely unsuccessful (see Attard (2007), Weaver (1996). The wool that these stations produced became the leading export of the Australian economy and the driving force in the expansion of population and output. Jackson (1977) describes the era from 1820 to 1850 as Australia’s “pastoral age.” Aboriginal peoples were displaced by this activity and resisted in some cases. But compared to Indians in North America they faced numerous disadvantages. They lacked access to European allies to provide them with assistance, they never adapted fire arms, and they had a decentralized social structure that made it hard to organize large scale resistance. They also never adapted the use of the horse, which made Indians of the plains such an imposing military force in the second half of the nineteenth century in North America. In some cases, the remaining bands ended up working for the stations in return for food and other goods. The imperial government called for humane treatment of the native population, but conflicts on the frontier were
hard to prevent. Like California, gold was discovered in Australia in the 1840’s. These discoveries also lead to an influx of miners into new territory lead to further disruption of the aboriginal population.

**Treaty Making in the United States After Independence**

The attempt by the British authorities to control the spread of settlers into the west after 1763 was, of course, one of the grievances of the colonists in the American Revolution. Indian tribes on the frontier recognized that the British were more inclined to protect their interests than the Americans and as a result many tribes sided with the British.

But why did the new United States continue British practice of negotiating treaties with tribes and recognizing their territory? Why not move closer to the Australian practice and simply refuses to recognize the rights of Indians to land that they did not actually occupy by farming? In fact this was roughly what occurred after the American Revolution, but it did not work.

After the Treaty of Paris in 1783, which recognized American independence, some states treated western tribes as defeated enemies who had thereby forfeited their claims to land. (See Perdue and Green (1995), p. 7-8) 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.

By 1789, most of the original states had already ceded their lands to federal control and the Constitution followed the British imperial practice of treating tribes as having sovereign
powers to negotiate with the federal government. Indians living in the existing states were subject to state supervision and were treated as citizens (taxed Indians).

According to Perdue and Green, Henry Knox, the first Secretary of War and the man in charge of 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 only way to bring peace to the frontier was to exert legislative controls over aggressive United States citizens. Furthermore, Knox thought 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 also fully concurred with the general American view that as the population of the United States grew, Indians must surrender their lands to accommodate the increased numbers. These views added up to a policy aptly described by one historian as "expansion with honor," the central premise of which was that United States Indian policy should make expansion possible without detriment to the Indians. (Perdue and Green (1995): 10)

A key part of this policy was enacted into law with the passage of the first Trade and Intercourse Act in 1790. The Act gave the federal government control over trade with Indians by licensing traders and established special laws for Indian country. In particular, the act sought to control the trade of guns and alcohol, which could easily lead to violence on the frontier. The federal government also set up trading posts to try to manage trade with Indians. Not surprisingly, much trade occurred outside federal control.

Thus, like the British before them, the new federal government had a problem with Indians and wished to minimize the cost of warfare. The British imperial model of treaties and recognizing tribal sovereignty was a readily available way to minimize these costs. Further, this is system of treaties and negotiation was familiar to eastern tribes and tribes had adapted to this system. The new United States had a voluminous history of laws and treaties to look to for precedent. A recent edited collection, *Early American*
Indian Documents: Treaties and Laws, 1607-1789 comes to 20 volumes (Vaughan (ed.) (1979-2003)).

Why the difference with Australia? As stated earlier, it would have been very difficult to limit settlement in the interior of Australia and there was no little to gain. Further in Australia the British had had the chance to learn from their experience in North America. After all attempts to limit settlement in North America with the Proclamation of 1763 was significant source of resentment and animosity toward the crown. Why would the British want to create this sort of resentment among colonial settlers by trying to limit the expansion of the valuable wool industry?

Who Represented the Indians?

There were important institutional adjustments on the Indian side as well. If the American government wanted to relate to Indians by negotiating with a tribe, with who would the federal government negotiate? As already noted, the negotiations with the Iroquois were elaborate and the tribal leaders proved themselves to be skillful negotiators with the English as well as the French. They also were shrewd in their dealings with defeated tribes that they absorbed into their confederation. Tribal leaders, like any other leaders of a political organization, could favor their own welfare over that of the group. During the removal from Indians from the southeast, for example, tribal leaders received favorable land deals (see, for example, Young (1961)). Thus tribes had to evolve ways to select and monitor their leaders.

The policy of the United States after 1790 was to move tribes to less desired lands in the west where, it was argued, they would be safe from corrupting influences of white civilization and have time to make needed adjustments to assimilate. This was
sometimes voluntary and sometimes coerced. But in either case the federal government had to negotiate with some representatives of the tribes.

Had this process evolved can be illustrated by two southeastern Tribes, the Creeks and Cherokee. Unlike the northern tribes, which were patrilineal, the southern tribes were matrilineal, which meant that the children of white traders and Indian women were fully recognized as members of the tribe. Children of these unions played an influential role in tribal society and became a bridge between the two cultures. Some of these mixed bloods became planters and slaveholders on the American model.

One of these tribes, the Creeks, maintained a stable confederation of towns balanced between the competing European powers throughout much of the eighteenth century. The defeat of the French in 1763 left them without an important potential ally and the confederation weakened. Some towns allied themselves with the British in the War of 1812 and were defeated in 1814. A real possibility of war along the southern frontier existed as long as Spain controlled Florida, which it did until 1819. After 1814, the Creeks were badly divided over how to deal with the expanding Americans. In 1825, for example, Chief William McIntosh of the Creeks signed the Treaty of Indian Springs which ceded a large tract of Creek land to the federal government without permission of the tribal council, who then ordered his execution (Prucha (1984), vI, p. 220-1). Clearly treaties were seen as serious endeavors by the Creeks.

The most famous of the southeastern tribes were the Cherokee. They were also the tribe which forced the Supreme Court in the United States to deal most directly with Indian nations in two land mark cases. During the American Revolution the Cherokee in western North Carolina and Georgia had initially sided with the colonists, but they soon
grew tired of the undisciplined behavior of the colonists and switched sides to support the British government. Colonial forces reacted fiercely and inflicted heavy losses on the Cherokee and destroyed towns and fields. The tribe was forced to sign the treaty of Fort Hopewell ceding lands in the east. Fighting continued after the revolution, with some bands resisting until 1791, when the Treaty of Fort Hopewell ended the fighting. After that defeat, the Cherokee nation went through a period of peaceful relations with the new United States and developed new forms of governance. Some mixed blooded Indians became slaveholders and planters. More traditional Cherokee settled on small farms.

Sequoyah, a full-blooded Cherokee, brought about another major change when he invented a syllabary for the Cherokee language that allowed many Cherokee to become literate in their own language. A tribal newspaper, the Cherokee Phoenix, was published in both English and Cherokee beginning in the late 1820’s. The Cherokee adopted a constitution modeled on the U.S. Constitution and it was this tribal government that defied the state of Georgia by refusing to move west in 1830.

When the Cherokee declared that they had sovereignty in the middle of Georgia, one of the original states that existed before the Constitution, several constitutional questions were raised. This outraged the state legislature of Georgia.

In the Cherokee and their American allies in the northeast who were the political opponents of President Andrew Jackson (members of the just emerging Whig Party) took their case the Supreme Court which grappled with the competing claims of sovereignty in two famous cases, Cherokee Nation versus Georgia (1831) and Worcester v. Georgia (1832). The Cherokee were represented by a former attorney general of the United States. The Supreme Court was sympathetic to the Cherokee in these cases, but it tread
carefully since both the state of Georgia and the president of the United States favored removal.

It was clear that the state of Georgia was determined to extend its control over the Cherokee lands in its territory and that the President Jackson was on their side. Faced with the inevitable, a minority faction of the Cherokee signed a treaty with the federal government giving up land in Georgia for new land in Oklahoma. Those who signed, the treaty party, moved west voluntarily. The bulk of the tribe refused to move and waited until federal troops were involved in rounding up the tribe for the move west in 1837. This resulted in the “Trail of Tears,” where the tribe was forced west in a badly managed and disorderly trip. Once in Oklahoma, the split between those who signed the treaty, the Treaty Party, and those who followed Chief John Ross who opposed signing the treaty continued. Two of the leaders of the Treaty Party were later assassinated.

What good did it do to have the Supreme Court rule in these cases? After all, the tribe had to move west. Quit a lot, actually. The Cherokee and the other Five Civilized Tribes did receive a recognized right to much of what is today the eastern half of the State of Oklahoma. There they continued as self-governing republics for another sixty years. The rights of the tribe to its land were recognized in law and held some of the same protections as other property holders. To be sure the federal government later arranged for the land to be divided among tribal members and merged the territory of Cherokee and the other “Civilized” tribes into the State of Oklahoma, but the principle that the tribe owned the land was never in doubt.
Figure 2
Indian Land Cessions 1820-9

Figure 3
Indian Removal 1830-39
Figure 4

Indian Frontier as the Result of Removal

Source: Tyler (1973), p. 60
An Alternative to Extinction: The Creation of Reservations.

Before the 1850s, the policy of the federal government was to move Indian tribes in the east to lands west of the Mississippi River. The goal was to protect Indians from the worst aspects of white civilization as well as opening more valuable land in the east to white settlement. This process was sometimes voluntary and sometimes coerced.

Once in the west, the federal government appointed an agent to interact with the tribe and distribute promised goods to the tribe. Often the federal government was required by treaty to provide “rations” and education, including education in farming. Tribes again had a legal right to these lands which were in many cases quite substantial. In the 1850s it became apparent that the lands west of the Mississippi were valuable for farming and this policy was not viable. The solution was to negotiate a series of treaties, ratified by the Senate, which created Indian reservations with defined boundaries. White settlers could acquire land outside the boundaries of these reservations.

The reservation system was far from perfect, of course. Substantial amounts of land were removed from Indian control over the years. (See Carlson 1981) Failure to provide all the promised good due to fraud was a persistent problem. In 1870 the treaty system was ended, as an anomaly. Under the treaty system, agreements with Indians were only approved by the Senate. But members of the House of Representatives wanted to participate in important legislation affecting their constituents and the system was changed (Prucha (1984), v.II, p. 530). It was not changed because treaties were unimportant and an equivalent way of transferring land to Indian control through laws and executive orders of the president. These have been referred to as “treaty substitutes.” (Banner (2005b), p. 252) Indians had rights to land that were taken seriously by the
Supreme Court and Congress. By applying the same legal principles to Indian land as any other property, any act that arbitrarily took land from Indians was a threat to property rights in general. Further there were active supporters of Indian rights in the eastern states willing to use their power in Congress and the courts to support Indian welfare. At times, as I have argued elsewhere, these reformers supported well-intentioned policies that would have negative consequences for Indians. (See Carlson (1981) None-the-less, the rights of Indians to land and their legal rights as tribes are imbedded in the legal system and these rights remained in many cases. Over time lawyers for tribes, some of whom themselves are Indians, have used these principles to expand the legal rights of tribes relative to the federal government and the states.

**California: A U.S. version of “Terra Nullius”?**

Suppose the U.S. had not recognized tribes as owning land and had not created reservations. What difference would it make? I argue that it did make an important difference on the margin— one that Indians in the United States have fought hard in the courts and through political action to maintain. California provides a useful “natural experiment” to consider how things might have been different if Indian rights were not recognized.

Suppose that as in Australia, the federal government in the U.S. had not recognized Indian rights to land and did not create legally recognized reservations? California is a natural experiment to see what might have occurred in such a setting. The comparison is apt for several reasons. 1) The native peoples in both California and Australia were not farmers at the time of European contact. Indians in California were divided into several language groups and lacked a centralized tribal organization. This is
similar to the aboriginal groups settlers found in Australia. 2) Up 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. 3) California and Australia both experienced gold rushes which brought settlers into native controlled lands. And, 4) In both California and Australia setters moved into an areas with weak control by the central government.

Up until 1848 California was a northern province of Mexico, a country that did not recognize the rights of Indians to lands that they occupied as hunter-gatherers.

Spain, and later Mexico, had a legal system that evolved from feudal roots, like Britain, where all land came from the king. According to an essay by Cyrus Thomas, included in the authoritative survey of Indian lands and land cession prepared by Royce in 1896-7, He finds that decrees of the crown from earlier eras of Spanish settlement in the Americas called for fair treatment of Indian peoples. But he concludes “It appears, however, that the Spanish government never accepted the idea that the Indians had a possessory right to the whole territory, but only to so much as they actually occupied, or that was necessary for their use.” (p. 541) “...no claim by the natives to unoccupied lands or uninhabited territory appears to have been recognized. Such territory was designated "waste lands," and formed part of the royal domain.” (p. 539)

Elsewhere in the Mexican southwest, the government made peace treaties with nomadic tribes to limit raiding, but these treaties did not recognize a tribe as owning territory.

When California was annexed to the United States in 1848, Indians had no legal rights to that were recognized by Mexican authorities. The
consequences for the Indian population were disastrous. At the time of first contact with Europeans, California had a large native population that spoke a number of different languages. Although relatively numerous,

Yet all of these societies [in California] were still technically hunter-gatherers. One reason for this situation was the extraordinary richness of the environment, perhaps coupled with the inappropriateness of available plant domesticates under regional conditions. 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 (1996), pp.176-7)

Only in the very far south, near what is today Arizona, were there agricultural peoples. Politically as well, different groups were divided. According to Underhill,

The lack of formal organization is striking. Here [California], as almost ever where west of the Rockies, there were no nations, no confederacies. The word "tribe" is loosely used for groups of people simply because they spoke the same dialect and did not fight among themselves. Each village and, in less settled areas, each wandering band managed its own affairs without regard to the others. (Underhill (1971), p. 255)

This description of Indians in California is similar to the complex kinship relationships and types of economic activity found among the aborigines of Australia. California was settled relatively late by the Spanish and was on the fringe of Spanish America. By the 18th century Spain was faced potential competition from the territorial claims of two other European Empires on the west coast of North America: Britain and Russia. In part to spread the gospel and in part to defend their territory, the Spanish entered into southern California with a series of missions. Beginning with San Diego in 1769, Franciscan friars lead by Father Serra established missions along the coast, ending with San Francisco in 1825. Indians near the missions were gathered on mission lands to be Christianized and taught to be farmers. This had a big impact on Indian in the southern half of the state.
Though they existed in full power for only about sixty years, they changed the life of the Indians forever. The Franciscans were devoted missionaries, vowed to poverty and service. Their solution for the Indians was to gather them in villages around a mission which should consist of church, school, and shops. Here they would be taught Christianity and civilized trades and at last would live like white people. This might have worked with an agricultural people, used to living in one place, and perhaps such people could have appreciated the oranges and grapes which the fathers planted in California. Wanderers grew sick with the unusual confinement and the heavy clothing, though many accepted it because their own lands were being overrun. The worst tragedy came when Mexico, which then included California, gained her independence and ceased to support the missions. (Underhill (1971), p. 279)

When Missions were secularized in 1834, the stated Mexican policy was to assign half of the Mission lands to Indians, but this did not happen. The mission Indians became peons working on the land of Mexican landlords. They did tend, however, to cluster in small communities on the larger estates (p. 84).

North and east of San Francisco, first Spain and then Mexico exerted little control. According to Spicer, “The Spaniards and Mexicans did not penetrate deeply into the interior valleys and mountains where the greater part of the large population of Indians lived.” As late as 1850, the Indian population of California was 89,000, down from about 200,000 in 1800. (see Table 1)

This was the state of affairs when California was annexed by the United States from Mexico at the end of the Mexican American War in 1848. California was ceded to the United States by the Treaty of Guadeloupe Hidalgo in that year. Gold had been discovered in California a few months earlier, 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 potential miners from the eastern U.S. and other countries, many of whom did not stay very long which lead to a very fluid situation on the frontier. Mining law in both the U.S. and
California was in a state of limbo since Mexican law with respect to mining had been suspended in the gold country by U.S. officials. Further, Article X of the Treaty of Guadalupe Hidalgo, recognizing Mexican law about property rights, was stricken from the Treaty at the insistence of the U.S. Senate.

The lack of a system of property rights created an untenable situation in California. According to Clay and Wright (2005), “For some months, gold mining went forward under truly wide-open conditions, subject to no regulation of any kind. This state of affairs could not last, however. Increased population in the mines, particularly after mid-1849, created a demand for some type of allocation system.”

There is a lively literature discussing how a new system property rights were created in this environment. (See Umbeck (1977), and Clay and Wright (2005). As far as I can tell, the fate of Indians in California, however, is usually not mentioned in these accounts. I assume this omission is due to the fact that Indian property rights were not considered by the participants and Indians had already largely been driven out of the area where gold was being mined.

Indians in northern California were badly disrupted by the influx of whites into gold country. Indian bands raided ranches and farms in California to steal cattle and food, in part because these settlements disrupted the native food gathering cycle. In response, local and state officials organized groups to attack the bands and drive them off. For example, according to according to Lamar and Truett (1996):

Governor Burnett authorized the sheriff of El Dorado County to call up 200 men as a volunteer militia to punish Miwoks who had harassed emigrants on the Salt Lake to California trail, and had stolen and butchered their cattle. Over 300 men enlisted and engaged Indians in a series of skirmishes that cost the new state an exorbitant amount of money. A year later in the southern district, a
local group organized to fight the Mariposa War, a military expedition that eventually gained the approval of the California legislature. Subsequent militia campaigns launched against California Indians were numerous, some twenty occurring during the Civil War period alone. Instead of solving the problem of Indian livestock theft, however, these expeditions often pushed Native peoples far from their traditional subsistence bases, increasing their dependence on raiding for survival. Anglo-American Californians responded with new invasions, leading to a deadly cycle of violence between Indians and their new neighbors. (p. 99)

The problem was in part, the decentralized nature of decision making. Lamar and Truett (1996) conclude that “. . . the California story, even more than that of Arizona, was one of divided counsel Washington, with no one consistent policy emerging. It might even be argued that a California Indian policy was the victim of too much Anglo-American democracy!” (Lamar and Truett (1996), pp 100-1) I think that Lamar and Truett have it right. Indians in California were under too local and state authority unconstrained by federal legal protections and federal courts. This is broadly similar to conditions in Australia as settlers pushed into aboriginal lands. Raids to punish aboriginal peoples for real or imagined offenses were under local control, not a unified policy. Further, the lands were empty crown lands that legally did not belong to aboriginals.

There was a brief unsuccessful attempt to incorporate Indians in California into the U.S. reservation system. In 1851, the federal government authorized three commissioners to travel throughout California and negotiate treaties with California tribes ceding land to the federal government and creating reservations. These commissioners had an immense task and lacked the language skills to fully communicate with the people that they were dealing with. The land cessions and reservations they proposed are shown in figure 5. These treaties were never ratified by Senate. This was in part due to the opposition of Californians who did not want

But since the treaties were never ratified, Indians in central California never received a reservation. According to Underhill,

This part of California, too far north for most of the Spaniards, was left almost undisturbed until the gold rush of 1849. Suddenly, then, the Indians were overwhelmed and pushed aside. … As their land was overrun, they, like the Paiute, ended up taking to working for the whites. Since their money requirements were small, they could manage something of their old seasonal arrangements, working in the summer and congregating in the winter, in hamlets or in small hunting or fishing parties. (Underhill, (1971), p. 285)

This sounds like the situation of aborigines in Australia, many of whom ended up working on the sheep stations in the interior of Australia.

In the southern part of the state, the so called Mission Indians in southern California were ultimately granted small reservations called Rancherias by executive order of the President assigning them land from the public domain beginning in 1870. A key agent of this reform movement was Helen Hunt Jackson, an author and critic who was on the of the “friends of the Indian,” who wrote an influential and critical study of Indian policy in the US, A Century of Dishonor (1880), and the more famous fictional account of the Mission Indians, Ramona. Further north, outside of gold country, reservations were created in Hoopa Valley and Round Valley created in 1864 (Royce (1896), p. 830). See figure 6.

7 Some of the Rancherias turned out to be very in very favorable locations. The Agua Caliente band, for example, owned what became the city of Palm Springs.
Figure 5
Proposed Indian Reservations in the Unratified Treaties of 1851

Shaded area represents white settlement of 2 persons per square mile.

**Source:** Prucha (1990) p. 38
The sad story of Indians in California is captured in Table 1 showing estimates of the Indian population prepared by Ubelaker (1996). The Indian population of California declined faster and to a far lower level than any other group. There were only 14,825 Indians in California in 1900 only 7.4% of the Indian population in 1800. This is by far the largest decline in population of any Indian population. By contrast the population of plains tribes in 1900 was 52% of that of 1800. The Indian population in 1900 in the Southwest was 73.3% of that of 1800.

I am arguing that California might have turned out differently if the U.S. policy of establishing defined reservations had been in place before the Gold Rush. How could this have occurred? Counterfactual histories are tricky, of course, but suppose gold was not discovered in California in 1847, but ten years later in 1857. Or suppose that California were annexed by the U.S. in 1836 when Texas first won its independence from Mexico, rather than 1848. In either of those two counterfactuals, a system of reservations like that proposed in 1851 might already have been in place at the time gold was discovered. If either of these had happened, perhaps Indians in California might have fared better. This is not to say that such an outcome would have been just by modern standards, but I suggest that it simply might have better than what actually occurred.

The other territories acquired in 1848 provide a kind of test case. Figure 7 shows reservations that existed in the far west in 1880. After annexation by the United States there was an attempt to form reservations in the territory acquired by force from Mexico and by treaty from Great Britain.
Figure 7

Indian Populations as a Percent of the 1800 Level

Source: See Table 2
Figure 8

Indian Reservations in 1880

Source: Prucha, p. 38.
Table 1

Indian Population of North America By Cultural Groups

<table>
<thead>
<tr>
<th>Year</th>
<th>1500</th>
<th>1600</th>
<th>1700</th>
<th>1800</th>
<th>1850</th>
<th>1900</th>
<th>1925</th>
<th>1950</th>
<th>1965</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>221,000</td>
<td>221,000</td>
<td>221,000</td>
<td>200,000</td>
<td>82,980</td>
<td>148,25</td>
<td>11,005</td>
<td>10,542</td>
<td>13,341</td>
</tr>
<tr>
<td>Northwest</td>
<td>175,330</td>
<td>175,330</td>
<td>175,000</td>
<td>98,333</td>
<td>50,338</td>
<td>29,785</td>
<td>25,906</td>
<td>33,311</td>
<td>40,337</td>
</tr>
<tr>
<td>Coast</td>
<td>175,330</td>
<td>175,330</td>
<td>175,000</td>
<td>98,333</td>
<td>50,338</td>
<td>29,785</td>
<td>25,906</td>
<td>33,311</td>
<td>40,337</td>
</tr>
<tr>
<td>Plateau</td>
<td>77,950</td>
<td>77,950</td>
<td>77,950</td>
<td>70,000</td>
<td>46,300</td>
<td>18,720</td>
<td>18,649</td>
<td>25,045</td>
<td>30,245</td>
</tr>
<tr>
<td>Southwest</td>
<td>454,200</td>
<td>420,000</td>
<td>276,260</td>
<td>215,950</td>
<td>176,740</td>
<td>158,283</td>
<td>180,010</td>
<td>214,845</td>
<td>263,400</td>
</tr>
<tr>
<td>Total</td>
<td>1,894,280</td>
<td>1,801,080</td>
<td>1,404,745</td>
<td>1,051,688</td>
<td>770,981</td>
<td>536,562</td>
<td>606,032</td>
<td>799,959</td>
<td>994,267</td>
</tr>
</tbody>
</table>

Source: Ubelaker (1988)

Table 2

Indian Population as Percentage of the level in 1500

<table>
<thead>
<tr>
<th>Year</th>
<th>1500</th>
<th>1600</th>
<th>1700</th>
<th>1800</th>
<th>1850</th>
<th>1900</th>
<th>1925</th>
<th>1950</th>
<th>1965</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>100.00%</td>
<td>100.00%</td>
<td>100.00%</td>
<td>90.50%</td>
<td>37.55%</td>
<td>6.71%</td>
<td>4.98%</td>
<td>4.77%</td>
<td>6.04%</td>
</tr>
<tr>
<td>Northwest</td>
<td>100.00%</td>
<td>100.00%</td>
<td>99.81%</td>
<td>56.08%</td>
<td>28.71%</td>
<td>16.99%</td>
<td>14.78%</td>
<td>19.00%</td>
<td>23.01%</td>
</tr>
<tr>
<td>Coast</td>
<td>100.00%</td>
<td>100.00%</td>
<td>99.81%</td>
<td>56.08%</td>
<td>28.71%</td>
<td>16.99%</td>
<td>14.78%</td>
<td>19.00%</td>
<td>23.01%</td>
</tr>
<tr>
<td>Plateau</td>
<td>100.00%</td>
<td>100.00%</td>
<td>100.00%</td>
<td>89.80%</td>
<td>59.40%</td>
<td>24.02%</td>
<td>23.92%</td>
<td>32.13%</td>
<td>38.80%</td>
</tr>
<tr>
<td>Total</td>
<td>100.00%</td>
<td>95.08%</td>
<td>74.16%</td>
<td>55.52%</td>
<td>40.70%</td>
<td>28.33%</td>
<td>31.99%</td>
<td>42.23%</td>
<td>52.49%</td>
</tr>
</tbody>
</table>

Source: Ubelaker (1988)
The Formation of Reservations in the West after 1848

An interesting test case is provided by the Indians in the Great Basin and Oregon. These peoples, like those in California, lacked a tradition of centralized authority.

The Plateau had no clans and or moieties. Descent was counted on both sides, an arrangement that curs often when women are equal producers with men. The choosing of chiefs was an informal affair, depending on their achievement. . . . Such a chief was father, adviser, and judge rattier than autocrat. Men who led war and hunting parties were simply volunteers. Only when opposition to the whites made dictatorship necessary was this informality changed. (Underhill (1971), p. 255)

Indians in these states, especially after the Civil War, were gathered onto reservations created by treaty, and after Congress ended formal treaty making in 1870, by statutes and executive orders of the president. The system was not ideal. Some groups were gathered on reservations with other groups with whom they had little in common. Some engaged in tragic armed rebellion. But on these reservations tribes has a degree of political sovereignty and they were promised food, education and agricultural supplies. As noted in Table 1, the population decline among Indians in the Plateau was much less severe than in California.

Once established the some opportunity for self-determination existed. Further Indians did better on a reservation system than is sometimes realized. At times bands with little in common were placed on the same reservation. (See Underhill (1971) But even where groups with little in common were brought together, Indians often proved to be agents of their own destiny and form new communities based on a fusing of traditions and act in their own interests. In the 1950s, when the federal government “terminated” the Klamath reservation in Oregon and the Menominee Reservation in Wisconsin,

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8 Captain Jack and the Modoc War.
Indians saw this as a violation of their rights and tried to have the reservation recreated. The Menominee Reservation was ultimately restored to its status as a federal reservation. (Prucha (1984), v. II, pp. 1135-8)

In Arizona and New Mexico the United States government was negotiating with more cohesive Indian groups. Some Indians in the southwest had been farming long before the coming of Europeans. The states of Arizona and New Mexico were in the far northern frontier of Spanish Mexico. Spanish and, later, Mexican control of groups such as the Pueblo, Zuni and Pima was a times tenuous. Since some of these tribes had complex irrigation system that required centralized direction these agricultural tribes already had a political structure could adapt to the American treaty system. But both these agricultural tribes and Spanish faced a challenge from the tribes to their north.

To their north and east, tribes such as the Kiowa-Apache and Navajo raided the agricultural tribes such as the Pueblos, hunter gatherers like the Ute, and the Spanish for goods and slaves. The Spanish dealt with these tribes by building forts (presidios) and negotiating peace arrangements. While never conquered by the Spanish, these tribes adapted significant technologies and practices such as using horses and guns for fighting (in later years, American traders were quite willing to sell Indians guns superior to those of the Mexican army) and herding sheep, weaving wool, and making silver ornaments and jewelry from the Spanish.

After the annexation by the United States, the U.S. army had a difficult time subduing these tribes and confining them to reservations. But superior numbers and fire power made the U.S. army ultimately successful. An interesting example is the Navajo. Before 1848, the Navajo raided both their Indian neighbors and the Spanish. During the
Civil War, federal troops on the overall command of General James Carleton pushed for the pacification of the Navajo. They were ruthlessly defeated by an armed force lead by Kit Carson. In 1864 the bulk of the defeated tribe was forced to leave their homes and walk to a reservation in eastern New Mexico, the Bosque Redondo reservation, far from their original territory. (Prucha (1984), v.II, p. 452-454) In 1868, the Navajo agreed to end their warfare against the U.S. and their neighbors and return to an executive order reservation in northern Arizona and New Mexico. They adapted a successful grazing economy and their population and the area of their reservation has grown rapidly since. Some Apaches continued to fight a guerilla war but by 1880 there was little effective opposition to further white settlement. According to Lamar and Truett (1996):” . . . the Anglo-American conquest of Native peoples in Arizona was achieved largely by military campaigns, reservations, and rations — a vast, government-run "outdoor commissary" according to one observer…” (p. 98)

Despite the harsh beginnings, however, the reservation system that was established in this relatively sparsely settled area allowed for the recovery of the Indian population and a growth in the amount of land in the reservations there through executive order. As noted in Table 1 the Indian population of the Southwest is greater in 1970 than in 1800.

Conclusion

The long run result of these policies has been a system that gives Indian tribes a direct relationship with the federal government through a variety of tribal governments, each of which has a different territory. This is an important vehicle for economic and cultural development.
I do not want to leave the impression that the federal government simply left Indians to their own devices on reservations. The administration would be heavy handed and paternalistic. In the late nineteenth an early twentieth century, Indian children were at times required to leave their families to attend boarding schools where their native languages were suppressed and attempts were made to assimilate them into white culture. In the late nineteenth century, Indians in the plains who literally ‘left the reservation’ were subject to arrest by the army. As I have discussed at length elsewhere, Indian reservations in the years from 1887 to 1934 were at subject to a kind of enforce privatization that lead to the sale of part of the reserves to outsiders (Carlson, 1981). After the Lone Wolf decision of 1903, the sale of so called surplus land could be done without the consent of the tribe. Such a paternalistic policies and attitudes by government officials toward Indians will sound familiar to students of the history of aboriginal policy in Australia (See, for Armitage (1995) and McGrath (1995)). But I contend that the fact that Indian tribes were the recognized owners of the land with a direct legal relationship to the federal government left Indians with rights and institutions had important implications for Indians in the twentieth century and into the present.

Australia had a very different history and this has implications for policy alternatives. When an Australian historian tried to imagine how "Model Aboriginal State” might have come to be in Australia he placed it in the 1920’s. As an exercise in “counterfactual history, Tim Rouse imagines the creation of a model aboriginal state in the Northern Territory in Australia. At that time there were very few whites in the territory and unlike elsewhere in Australia, many of the native people continued traditional hunting and gathering.
Rouse imagines a situation where the government of Australia might have chosen to administer the Northern Territories as a separate territory modeled on League of Nations Mandate colony in the 1920’s. In his scenario, educated aboriginal people would have been chosen by the federal government in Canberra to administer the territory. Since they came from somewhere else, these representatives would have had to prove to the people living there that they really were like them. He imagines that such a government would have administered paternalistic government programs not very different than those which were actually employed. In his scenario the experiment ended with the outbreak of World War II.

By contrast, in the United States in 1934 the federal government instituted a reform program suggested by John Collier and passed by the Congress to create tribal governments with model constitutions to administer Indian reservations lands. This was a part of the early days of the Roosevelt administration known as the New Deal and was part of a wave of emergency legislation passed to address the Great Depression. Like other New Deal legislation, the crisis provoked by the prolonged fall in output and employment allowed for the passage of reforms that had been proposed in the 1920’s.

Among other things, the Indian Reorganization Act ended the privatization of tribal lands (allotment) and called for elections to draw up tribal constitutions among tribes which accepted the law. Many of these constitutions were very similar and written by eager young attorneys for the BIA. Like the Australian counter factual just discussed, there was an element of “top down” decision making. The law effectively froze the amount of Indian land under federal supervision at fifty five million acres of tribal and individual land.
Over time this experiment in self-government has became a fixed reality in Indian country. Tribal governments, despite their faults, are highly valued by Indian peoples. Federal, state, and local officials in communities next to reservations came to negotiate with these tribal governments. Indeed some legal entity was needed if Indians were to act as a group. Some important tribes, in particular the Navajo, rejected setting up a government under the Wheeler-Howard Act. But even in this case a tribal government was needed to negotiate leases with the federal government and one was created by the agents. Over time this government has become a fixture on the reservation that would be hard to eliminate.

In the years from 1946 to 1960, Congress attempted to end the separate status of Indians by abolishing (terminating) tribal governments and treating Indians as citizens like any other. This has since been seen as a major assault on Indian ethnic identity. One scholar of Indian ancestry concluded that “In everything it represented, termination threatened the very core of American Indian existence—its culture.” (Fixico (1986), p. 183) President Nixon pledged in the 1960’s that the federal government would never implement such a unilateral policy again. Any changes would require the consent of Indian tribes. It was a clear repudiation of the termination policy and it is hard to imagine another attempt to eliminate tribal governments.9

I am not suggesting that Australia model its policies on the US. The thrust of this paper is that useful institutions suitable to Australia need to reflect the common history of aborigines and white Australians. I do, however, want to emphasize that the history of

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9 The only high ranking government official in recent years to suggest that tribal governments were a major problem was James Watt, secretary of the Interior in the Regan administration 1982-4, and he was roundly criticized for this position. He was later indicted on corruption charges while in office.
these interactions in the U.S. has left a legacy of tribal institutions that should be appreciated as the result of a path dependent process that was not inevitable. At times tribal governments have been criticized by Indians and others and with good reason. Some tribes have political divisions that make collective action difficult. See, for example, Libecap and Johnson (1980), for a discussion of the problems of the Navajo in dealing with over-grazing in the 1930’s. Tribes can also exercise their sovereignty in a way that discourages investment (see Haddock (2006). But although imperfect, Indian tribal governments and the reservation system are a useful institution for Indians and the federal government that would be hard to replace. Hence the title: “Two Cheers for Indian Reservations.”

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Figure 10
American Indian Cultural Areas

Source: Prucha (1990), p. 4.