AUSTRALIAN AND UNITED STATES LAW OF ABORIGINAL LAND RIGHTS: A COMPARATIVE PERSPECTIVE

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INTRODUCTION: THE RELEVANCE OF THE AUSTRALIAN EXPERIENCE

This article compares and contrasts Aboriginal claims to the occupation and use of land throughout the Australia with United States Indian law. This is a rapidly evolving area of aboriginal jurisprudence of the High Court of the Commonwealth of Australia. Australian Aborigines had no pre-settlement land titles until the Labor government enacted land title legislation in the 1970s. This legislation, and the profound value shift that it represented, ultimately led to the Commonwealth High Court's *Mabo* decision which reversed two hundred years of precedent and recognized the existence of native land titles in Australia.[1] Why should United States environmental and natural resources lawyers be interested in the Australian High Court's aboriginal jurisprudence other than for academic reasons? The fundamental idea of United States Indian jurisprudence, that the federal government should treat aboriginal peoples as quasi-sovereign entities, has had a powerful influence on countries such as Australia and South Africa, which came to this idea late in the twentieth century. As a matter of legal

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1. Mabo v. Queensland, 175 C.L.R. 1 (1992).

process, modern Australian aboriginal jurisprudence is based on the United States' Supreme Court Indian jurisprudence. Therefore, the Australian cases are an interesting example of the convergence of different legal systems resulting from similar ideas taking root in areas of the world that face similar problems.

This article offers two reasons why the Australian experience is relevant to both Indian and environmental law in the United States. The first is a practical one. For example, United States and multi-national mineral companies operate in Australia, and the country's rich mineral resources often sit beneath lands where potential aboriginal usufructuary or possessory claims exist.[2] Lawyers must understand the basis of these claims to be able to formulate the pro-active accommodation plans that are being negotiated in Australia. The second reason is that American Indian law can be enriched by the Australian High Court's aboriginal rights jurisprudence.

The Australian High Court has explicitly based its jurisprudence on the need to preserve a remnant culture's identity by confirming the right of aboriginal peoples to use lands with which they have long maintained a spiritual or use connection. In contrast, American Indian law increasingly refuses to recognize the legitimacy of cultural preservation and attachment to a historic land base, especially when Indian Tribes assert "off reservation" the right to use non-reservation land or to make "traditional" resource uses.[3] This experience can be useful to the evolution of United States Indian law because it places a non-western culture at center, rather than at the margins, of the law.

Claims to traditional practices have generally not been classified as an "environmental" issue. However, cultural practices claims implicate environmental protection issues for two reasons. First, the essential difference between an aboriginal people and a non-aboriginal people is that the former remain land-based.[4] For non-aboriginal peoples, religion and civic identity are abstractions that are not tied to a geographic location. For aboriginal peoples, identity is bound up in a historic relationship with a land. Thus, culture practice claims involve the use of land[5] and any use of

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2. SAMUEL C. WIEL, 1 WATER RIGHTS IN THE WESTERN UNITED STATES 14–25 (3ed. 1911). A usufruct is a civil law term which connotes a qualified as opposed to an absolute property right to make use of a resource.

3. The leading example is Lyng v. Northwest Cemetery Protective Association, 485 U.S. 439 (1988).

4. AUGIE FLERAS & JEAN LOENARD ELIOT, THE NATIONS WITHIN: ABORIGINAL-STATE RELATIONSHIPS IN CANADA, THE UNITED STATES, AND NEW ZEALAND 2 (1992).

5. *Id.*

land can have environmental implications.[6] Second, environmentalists have historically imagined a landscape devoid of humans.[7] The object has been to protect pre-human environments from human degradation. This attitude is changing and modern theories of ecosystem management and bio-regional planning, based on non-equilibrium ecology, accept humans as a powerful influence of landscape form and change over time.[8] Thus, dynamic actors such as aboriginal or Indian peoples must be part of any ecosystem management strategy.

I. AUSTRALIA AND AMERICA: SHARED AND SEPARATE HISTORIES

A. Some Historical and Geographic Similarities and Differences

Australia and the United States have much in common. They are both former British penal colonies that have evolved into federal states.[9] Each has had to settle a large land mass that differs significantly in climate and topography from Great Britain and northern and central Europe. Both countries define themselves by British political and cultural values even as they have evolved or are evolving into multi-ethnic societies. Further, each country has had to confront the survival of a pre-settlement aboriginal population that has never been fully culturally, socially, economically or legally integrated into the dominant culture. In each country, law plays a significant role in the maintenance of a distinct cultural identity and society. United State's Indians have always enjoyed the protection, albeit incomplete, of the law while in Australia, the use of law to benefit aborigines dates only from the 1970s.[10]

Significant differences exist between the two countries. For instance, Australia enjoys Mediterranean and tropical climates, and occupies that land mass that precluded intensive settlement outside of coastal regions.[11] In contrast, the interior of the United States varies much more widely than

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6. *See* ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS AND NATIONAL PARKS (1998) for a recent history of conflicts and cooperation between Indians and national park managers since the creation of the national park system.

7. SIMON SCHAMA, LANDSCAPE AND MEMORY 12–13 (1995).

8. *See Symposium on Ecology and the Law*, 69 CHICAGO-KENT L. REV. 847 (1994).

9. ROBERT HUGHES, THE FATAL SHORE 41–42 (1987).

10. 5 GEOFFREY BOLTON, THE OXFORD HISTORY OF AUSTRALIA: THE MIDDLE WAY 1942–1995 235- 236 (1996).

11. *See* Helen Stacy & A. Dan Tarlock, *The Law and Policy of Drought Response in Australia and the United States of America: A Comparative Perspective*, 4 AUSTRALIAN J. NAT. RESOURCES L. & POL'Y 1 (1997).

Australia, and we have succeeded in distributing our population throughout the country's land mass.[12] Australia's population continues to hug the benign climate of the coast in the six capital cities and the northern Queensland coast. The great mass of the continent is used for grazing, mineral extraction or environmental reserves. Title to a large percent of the country remains in the Crown.

Equally significant differences exist between the two countries' treatment of their aboriginal populations. The American story is much more complex than the Australian story because the north American Indians were comparatively more appreciated by the European settlers. Indians are central, if often tragic players, in the American story. The British and the United States had to confront the reality of their existence in relatively settled and sophisticated societies and to develop policies to mediate between the Indians and the settlers, who invaded their homelands.[13] The French settlements in Quebec gave Indian Tribes strategic importance in Great Britain and France's rivalry for the North American Empire.[14]

Australian aborigines were marginal players from the start of the settlement of Australia. In contrast to the United States, Australian aboriginal peoples were easily subdued by the British and were quickly pushed to the margins of Australian society until well after World War II.[15] Australia developed as an English society and took its cultural ques from the mother country until after World War II. This resulted in aboriginal people and their culture, being ignored by the dominant Australian culture. Only in this century have anthropologists painted a picture of aboriginal people as groups with creation myths and a long tradition of using inter-generational wisdom to survive.

The geographic position of the two peoples is also different. The long history of United States federal Indian policy has resulted either in the location of Indians on well defined reservations, large and small, or in the disbursement of Indians throughout the general society.[16] Some major Indian land claims, such as Sioux claim to the Black Hills of South Dakota, remain unresolved, and there are unresolved claims in the eastern United

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12. *Id.*

13. The literature on Indians and Indian policy is vast. Among the best treatments are BRIAN DIPPIE, THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY (1982), and FRANCIS PRUCHA, THE GREAT FATHER (1984).

14. 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 18 (1984).

15. Bolton, *supra* note 11 at 191.

16. Slightly over 50 percent of all Indians live in urban areas. The rest remain on reservations or reside in rural areas. David Rich Lewis, *Native Americans: The Original Rural Westerners, in* THE RURAL WEST SINCE WORLD WAR II 12, 13 (R. Douglas Hurt ed., 1998).

States. However, most Indian land claims have been settled.[17] Indians can claim off-reservation hunting and fishing rights and assert the right of access to non-reservation sacred sites. Conversely, Australia has used the reserve system much less than the United States so remnant aboriginal peoples, who have continued to roam or settle in traditional areas are in a position to assert both possessory and use claims to large amounts of land.

B. Different but Converging Legal Positions

At the end of the twentieth century, United States Indian policy is not a central political issue in American politics. For example, the Clinton Administration has offered supportive words but very little else to Indian tribes.[18] In contrast, Aboriginal policy is a central political issue in Australia. Australian aborigines are at the center of the country's political stage because they have the leverage to disrupt the existing distribution of Crown grazing and mineral entitlements. The Whitlam Labor government elected in 1972, drew on decades of research and rising social conscience in the country to enact federal laws recognizing aboriginal civil and property rights.[19] This period coincided with the approaching bi-centennial of the arrival of the First Fleet in Sydney Harbor. It was a time of an intense interest in the development of a national identity that emphasized the influence of the Australian landscape and colonial experience and differentiated Australia from the British.

Aboriginal culture underwent a radical, positive reevaluation. This evaluation is supported by recent environmental scholarship that casts a harsh light on much of the efforts to settle the Australian interior as a new Britain.[20] One of the leading Australian proponents of the this view has written about the British model, "[a]lthough they appear foolish in hindsight, they were in reality only terribly maladapted.[21] Aborigines are better land managers that the most enlightened European conservation thinking; aboriginal beliefs "embody hundreds of generations of

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17. The Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1628 (1998) was the last major federal act settling Indian claims.

18. For example, the Clinton Administration has been strongly criticized by tribes and others for failing to fund the federal share of Indian water rights settlements. REPORT OF THE WESTERN WATER POLICY ADVISORY REVIEW COMMISSION, WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY 3–46 (1998).

19. Bolton, *supra* note 11, at 191.

20. *E.g.*, WILLIAM J. LINES, TAMING THE GREAT SOUTH LAND: A HISTORY OF THE CONQUEST OF NATURE IN AUSTRALIA (1991).

21. TIMOTHY FRIDTJOP FLANNERY, THE FUTURE EATERS; AN ENVIRONMENTAL HISTORY OF THE AUSTRALIAN LANDS AND PEOPLE 355 (1994).

accumulated wisdom regarding the environment and how best to utilize it without destroying it."[22]

Furthermore, Australian Aboriginal peoples are going through a more intense experience. Initially, the Australian experience seems of little direct relevance to the United States, although federal Indian law has been the model for the recognition of Aboriginal rights. The relations between the European settlers and the two groups of indigenous peoples was different. In America, the British treated many groups of Indians as nations, in part to enlist their support against the French.[23] As a result, Indian Tribes have always had a constitutional status which has survived the 19th century efforts to exterminate or assimilate them.[24] In contrast, the British declared Australia terra nullius when it was settled as a convict colony in 1788.[25] Aborigines were treated as inferior people, and the British could find no noble savage or evidence of civilization in the nomadic culture of the Aborigines. Aborigines groups had no protected status in colonial or Commonwealth Australian law.

1. United States Indian Law

United States Indian law is based on the principle that Tribes are quasi-sovereign entities.[26] Tribes enjoy a high degree of formal sovereignty because of the reservation policy which we have followed since the 1830s. Cruel as it has been, the practice of confining tribes to specific land areas has given Indians a land base which is the foundation of the recognition of their sovereignty. This sovereignty is subject to the plenary control of the federal government, but Tribes do have considerable autonomy against the states. For example, recent cases have upheld the power of tribes to adopt high water quality standards which must be maintained by upstream, off-reservation dischargers.[27]

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22. *Id.* at 284.

23. *See* Prucha, *supra* note 15 at 18.

24. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY (1987). The legacy is bitterly criticized and contested. E.g., DAVID WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT (1997).

25. Mabo v. Queensland, 175 C.L.R. 1 (1992).

26. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

27. In Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), Isleta Pueblo, located on Rio Grande River downstream from Albuquerque, designed the portion of the River flowing through its boundaries as "Primary Contact Ceremonial" for member immersion and ingestion. EPA approved the designation and allowed the Tribe to assert extra territorial jurisdiction over the upstream city and the Tenth Circuit upheld EPA's power to approve the designation under *Chevron* and federal Indian law. Accord: Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998).

Tribes are also victims of the general withdrawal of the federal presence from American life and of a hostile Supreme Court which continues to erode Tribal prerogatives.[28] Initially, Indian tribes gained a measure of constitutional protection as "domestic dependent nations" because they resembled the western idea of a nation-state.[29] Indian resource claims, land, water and minerals, have been defined in common law or western terms. Indians were given land titles and water rights so that they could evolve into civilized, Christian pastoralists. Claims that fell outside western notions, such as the use of land for scared purposes, have been given less recognition. Further, tribal power to regulate off-reservation use to protect reservation interests has been diminished by the Supreme Court.[30] Judicial hostility to Indian cultural claims is exemplified in *Lyng v. Northwest Cemetery Protective Association*.[31] In a five to three decision, with one abstention, the Supreme Court held that neither the First Amendment nor the Indian Freedom of Religion Act prevented the Forest Service from paving an area in a national forest that was used for tribal religious ceremonies. Justice O'Connor rejected the claim in part because it could be characterized as an extravagant servitude: "No disrespect for these practices is implied when one notes that such beliefs could easily require de facto ownership of some rather spacious tracts of public property."[32]

Lyng's refusal to recognize the legitimacy of Indian religious practices illustrates the difficulty that the United States faces in having defining the role of Indians in contemporary America. Contrary to 19th century expectations, Indians neither became extinct nor completely assimilated

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28. DAVID WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT (1997).

29. Cherokee Nation v. Georgia, 30 U.S.(5 Pet.) 1 (1831).

30. The contraction of the power of tribes to regulate non-Indians on reservations illustrates the current Supreme Court's hostility to Indian sovereignty. Tribes may regulate nonmembers who enter into consensual relationships with the Tribe or exercise inherent jurisdiction when conduct outside the reservation "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544 (1981). This is a problem because of the Allotment Act of 1887 which reduced the size of many reservations. The Supreme Court addressed Tribal jurisdiction over mixed reservations in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). The Yakima reservation was divided into closed and open sections and the Court applied *Montana* to hold that the Tribe could exercise jurisdiction over nonIndians on the closed but not open part of the reservation because activities on the former posed a threat to the cultural and spiritual values of the Tribe and thus to its welfare. The standard for extra-territorial standard is not clear. *Montana* required only "some direct effect" on tribal sovereignty; *Brendale* required that the conduct "must be demonstrably serious and must imperil" tribal sovereign interests. A subsequent case, South Dakota v. Borland, 508 U.S. 679 (1993) appears to revert to the Montana test. *See* Judith V. Royster, *Oil and Water in Indian Country*, 37 NAT. RES. J. 457,460-461 (1997).

31. 485 U.S. 439 (1988).

32. 485 U.S. at 453.

into the dominant culture.[33] Tribes have survived on the marginal reservations and are now trying to chart their destiny in the face of a federal Indian policy that is increasingly incoherent, and a Supreme Court Indian jurisprudence that is increasingly hostile toward Tribal sovereignty. As "domestic dependent nations," Indian Tribes remain subject to plenary federal control. They are sovereign against the states, but not the federal government. Federal authority is subject to a trust responsibility, but the federal government increasingly discharges its trust responsibility by decreasing federal funding for Indians and encouraging Tribes to use their quasi-sovereignty to become financially independent. However, Tribal efforts to assert themselves culturally and financially are often met with intense opposition from states and neighboring communities. Indian law has become a much contested battleground on which the Indians must fight with only European weapons.

2. The Australian Aboriginal Experience Prior to the 1970s

The most salient point about Australia's recognition of aboriginal rights is that it came late in the twentieth century. The country had the legacy of the United States and Canadian experience and was forced, to a much greater degree than the United States, to confront the aborigines on their own terms rather than as potential objects of civilization and Christian salvation.

In contrast, Australia viewed its aboriginal peoples, when it finally began to use the law to redress the injustices of the past, through the lens of anthropology, which stressed their distinct culture, rather than through Enlightenment and religious conceptions. The Australian High Court has made an attempt to tailor a law of entitlements based on their perception of aboriginal culture.

Australian aboriginal peoples started from a legally inferior position compared to American Indian Tribes. Aboriginal peoples had no legal basis to make land claims against the Crown because no Australian jurisprudence, following British colonial precedents, taught that land titles or claims pre-dated British settlement in 1788. As late as 1979, the High Court ruled that Australia was devoid of "civilized" peoples or settlements prior to 1788.[34] Aboriginal peoples never had the benefit of being mythologized as noble savages. Prior to the High Court's decision in Mabo v. Queensland, it was orthodox learning that Australia was terra nullius

33. BRIAN DIPPIE, THE VANISHING AMERICAN (1982).
34. Coe v. Commonwealth, 53 A.L.J.R. 403 (1979).

when the Sydney penal colony was established in 1788.[35] All land titles in Australia were radical; they derived solely from the Crown. In short, Aborigines had no legal existence, and any occupation of the soil was at the sufferance of the Crown. After federation in 1901, both the federal government, the six state governments and the two territories, the Northern Territory and the tiny Australian Capital Territory which surrounds Canberra, became a source of land titles.[36] Australia began to reassess its aboriginal policies after World War II as part of a larger reassessment of its history.[37] The Whitlam Labor government enacted laws recognizing aboriginal claims in the mid-1970s, and this eventually led to the present jurisprudence. Aboriginal law remains a mix of federal and state legislative enactments and judicial decisions.

II. THE HIGH COURT'S ABORIGINAL JURISPRUDENCE

The status of the Aborigines changed dramatically in the 1970s when the Whitlam government reversed the Country's traditional refusal to grant them rights. This recognition culminated in the Australian High Court's 1992 decision in *Mabo v. Queensland*.[38] In *Mabo*, the High Court of Australia reversed two hundred years of legal history and held that Aborigines might possess land claims that were not extinguished by British, colonial, federal and state governments. *Mabo* was an ideal case to recognize aboriginal rights because it involved a small island in the Murray islands, a chain of islands in the Torres Strait located off of the northern coast of Queensland. The traditional aboriginal culture was still relatively coherent and the Meriam peoples had limited contact with white Australians. The precise issue was whether the state of Queensland could extinguish Native title.

Drawing on the post World War II jurisprudence of the International Court of Justice, the High Court concluded that the *terra nullius* rationale for the settlement of Australia only established Great Britain's (and its successor the Commonwealth of Australia) claim to the continent as against

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35. The history of this idea is detailed in Justice Brennan's opinion in Mabo v. Queensland, 175 C.L.R. 1 (1992).

36. Unallocated land in Australia in either Crown or Commonwealth land. Crown land is controlled by the states subject to Commonwealth power. For example, a state may not extinguish native title in a manner inconsistent with the Commonwealth Racial Discrimination Act. *See* Mabo v. Queensland, 166 C.L.R. 186 (1988).

37. For an excellent example of new Australian history see WILLIAM J. LINES, TAMING THE GREAT SOUTH LAND: A HISTORY OF CONQUEST OF NATURE IN AUSTRALIA (1991).

38. 175 C.L.R. 1 (1992).

other nations. Settlement and effective occupation did not, as colonial and commonwealth courts had consistently held, create radical [exclusive] Crown title, unencumbered by native claims. Justice Brennan elevated the country's new found respect for aboriginal culture into law:

> To maintain the authority of . . . [prior] cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterizing the indigenous inhabitants of the Australian territories as people too low in scale of social organization to be acknowledged as possessing rights and interests in land.[39]

Mabo is Australia's *Brown v. Board of Education* because it the High Court used law to make the country confront a history of injustice to a minority. The decision has triggered extensive commentary about its impact and jurisprudential basis.[40] This paper does not enter the jurisprudential debate, but rather examines the way in which the Mabo and subsequent decision have defined aboriginal claims.

Subsequent High Court decisions have expanded aboriginal land claims, but they have also put them at the risk of legislative curtailment. Aboriginal peoples, therefore, enjoy a much weaker legal position compared to Indian Tribes in the United States. Tribal reservation land cannot be taken without just compensation. The source of federal power over aboriginal peoples in Section 51(xxvi) of the 1902 Commonwealth Constitution.[41] This article, the race power, authorizes the federal Parliament to make laws for "[t]he people of any race for whom it is deemed necessary to make special laws." As of mid-1998, the High Court had not directly ruled on the authority of the Commonwealth Parliament to use the race power to extinguish or modify aboriginal titles. A 1998 case suggests that the Commonwealth Parliament has such power. An aboriginal in South Australia claimed that Hindmarsh Island, an area slated for development, was a significant aboriginal area and that the development was inconsistent with the federal Aboriginal and Torres Strait Islander Heritage Protection Act of 1984. In response, the Commonwealth Parliament passed an act to permit the development. A majority of the High Court reasoned that since the race power was a plenary grant of authority to

39. Mabo v. Queensland, 175 C.L.R.1 at 41-42 (1992).
40. *E.g.*, MABO: A JUDICIAL REVOLUTION (M.A. Stephenson & Suri Ratnapala, ed. 1993).
41. 1 CONSTITUTIONS OF THE WORLD, Australia (Gisbert H. Flanz ed., 1998).

Parliament, it could be amended.[42] Only one judge dissented and advanced the argument that the Constitution does not permit the use of the race power to discriminate against the enjoyment of aboriginal rights.

A. What Can Aborigines Claim?

The answer to this question, in common law terms, is a customary usufructuary right. *Mabo* did not recognize fee simple aboriginal title and the High Court did not, as it could not without stepping completely outside the judicial box, create a system of aboriginal reserves. In *Mabo*, the High Court rejected the principal of aboriginal sovereignty and thus aborigines remain subject to Australian federal and state law. Instead *Mabo* holds that an identifiable aboriginal clans or groups that follow traditional cultural practices must establish a right to use land if they can prove that "their traditional connection with the land has been substantially maintained."[43] It is additionally instructive to contrast the approach of the High court with Justice O'Connor's majority opinion *Lyng v. Northwest Indian Cemetery Protective Association*. As previously discussed, Justice O'Connor characterized the use claim as "de facto beneficial ownership," but Australian jurisprudence shows that a much less intrusive solution, a usufructuary right, is possible.

This right is also recognized by statute. For example, recent New South Wales legislation recognizes a right to hunt and gather non-threatened species for ceremonial and subsistence purposes in national parks.[44] The definition of aboriginal title as a traditional communal connection to the land, is incorporated into Section 223(1) of the federal Native Title Act of 1993. The connection may be spiritual and shared.[45] Once a clan or group abandons traditional laws and practices, as many aborigines, were forced to do to survive white contact, the land connection cannot be revived.[46] The title is a group or communal title and aboriginal communities or sub-groups

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42. Kartinyeri v. Commonwealth, 152 A.L.R. 540 (1998). Australian High Court jurisprudence has been influenced by the United States' Supreme Court's willingness to imply rights to protect minorities. However, in the High Court's jurisprudence still reflects the more positive constitutional tradition of Great Britain. *Kartinyeri's* refusal to find that the power to legislate with respect to race contains an implied limitation is consistent with Western Australia v. Commonwealth, 183 C.L.R. 373 (1995) which construed the power as a political one.

43. 175 C.L.R. at 51.

44. National Parks and Wildlife Amendment (Aboriginal Ownership) § 71.

45. Australian commentators place great weight on Justice William O. Douglas' opinion in United States, As Guardian of the Hualpai Indians of Arizona v. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941) which holds that the United States may sue to protect aboriginal claims based on time immemorial usage.

46. Mabo v. Queensland, 175 C.L.R. 1, 110 (1992).

and individuals may seek appropriate legal and equitable remedies to protect the decreed use. Thus, aboriginal title claims may be claimed by smaller units, down to the individual, compared to the United States where most Indian rights can only be exercised by enrolled members of tribes that are recognized by Congress and the Bureau of Indian Affairs.[47]

The High Court's approach to aboriginal claims places much more reliance on the testimony of anthropologists and aborigines compared to United States Indian jurisprudence. Aboriginal title in Australia is more open-ended than in the United States because the claimed rights are usufructuary. In 1996, the High Court held that a grant of a state pastoral lease does not per se extinguish aboriginal claims.[48] State courts have held that prior use of the land pursuant to a Crown mineral lease does not preclude the recognition of aboriginal rights.[49] The prior use or occupation of the land, however, must be more than nominal.[50] United States Indian law also recognizes the enjoyment of substantial usufructuary rights, but the source of the right is different. Indian tribes may claim off reservation hunting and fishing rights, but these rights must be recognized in a prior treaty or other agreement between the United States government and the Tribe. Australian aboriginal rights may be initially claimed provided that the group, clan, or individual can meet the *Mabo* and relevant statutory connection standard. The rights can be claimed for a variety of spiritual and subsistence uses because custom is the basis of *Mabo* rights.

Mabo rights are subject to a number of major limitations. First, *Wik Peoples v. Queensland*[51] held that prior Crown grants and prior non-aboriginal land uses pursuant to the grants does not extinguish land title. But, the High Court limited its holding. If the pastoralist or mineral lessee can prove that the prior non-aboriginal uses are inconsistent with the usufructuary rights claimed by a group of aborigines, the prior use will prevail. In practice, this limitation is not as restrictive as it might appear. Given the vastness of many Crown leases and the limited uses claimed by the aborigines, accommodation is often possible. Second, spiritual and

47. Indians are United States citizens and subject to the same rights and duties as all citizens. Enrolled tribal members may be entitled to additional special rights such as the right to hunt and fish in ways not permitted to non-Indians, United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), although the geographical and legal boundaries of these rights are contested by state governments and non-Indians.

48. Wik Peoples v. Queensland, 187 CLR 1 (1996).

49. Minister for the Administration of Crown Lands Act v. New South Wales Aboriginal Land Council, 31 N.S.W.R. 106 (1996).

50. Daruk Local Aboriginal Council v. Minister Administering Crown Lands Act, 30 N.S.W.R. 140 (1993).

51. 187 C.L.R. 1 (1996).

subsistence connections must be proved. Hearsay evidence may be admitted to establish this claim, but the validity of the practice can, and is, be contested. Third, these rights will probably be limited to historic subsistence practices. Further, precedents from Canada and New Zealand have refused to recognize fishing rights that are not grounded in pre-contact culture.[52]

CONCLUSION

Australia's recent efforts to incorporate aboriginal title into land rights regime is based on a more enlightened view of the pre-settlement cultures than is American Indian law. The United States model of Indians as domestic dependent nations has shielded Indians from extinction and has become a model for other nations. However, the international law-based model is European to the core. American Indian law seeks to define separate spheres of tribal and state autonomy, but it gives little weight to Native American cultural practices that conflict with national or state laws. Australia approaches aboriginal rights from a twentieth century perspective and thus offers an alternative and more useful model for this country.

American Indians have been seen through the legal lens of the western liberal tradition. Europeans and Americans have had hard time seeing them outside this lens, even after centuries of interaction and assimilation. Because Australia did not fully confront its legacy of oppression of aboriginal peoples until late in this century, the High Court of Australia, and the Commonwealth and state legislatures, have been forced to face more explicit cross-cultural problems of the role of aboriginal peoples in land management. Although Native Americans are often portrayed, by tribal members and non-Indian intellectuals, as natural stewards of the land, this is vast over-simplification. Native American claims to cultural autonomy often conflict with environmental and natural resources management laws.[53] Accommodation is very difficult for United States courts. Accommodation is also difficult in Australia, but the courts and legislatures have been forced to face the issue more directly and thus there are insights for the United States. However, each country must adapt another country's law to its unique cultural and historical context.

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52. R. v. Van Der Peet, 2 R.C.S. 507 (1996); Ngai Tahu Maori Trust Board v. Director General of Conservation, 3 N.Z.L.R. 553 (1995).

53. *E.g.*, United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987) (Holding that there is no Indian religion exemption from the Endangered Species Act).